

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/1. GENERAL INTRODUCTION/1. Scope of title.

## **FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)**

### **1. GENERAL INTRODUCTION**

#### **1. Scope of title.**

This title seeks to draw together the main areas of law relating to the provision of financial services. The main objective is to explain those activities which are subject to regulation by the Financial Services Authority<sup>1</sup> under the powers conferred upon it by the Financial Services and Markets Act 2000<sup>2</sup>. Insurance broking and mortgage lending are also subject to regulation within this framework but these are dealt with separately elsewhere in this work<sup>3</sup>.

The title has three main strands of coverage. The first and most extensive strand<sup>4</sup> covers financial services regulation generally under the Financial Services and Markets Act 2000 and subordinate legislation under that statute<sup>5</sup>. Anti-money laundering<sup>6</sup> and financial markets and insolvency<sup>7</sup> are also part of this strand. It does not include banking<sup>8</sup>, guarantee and indemnity<sup>9</sup>, money<sup>10</sup>, bills of exchange and other negotiable instruments<sup>11</sup> and bills of sale<sup>12</sup>, which form the second strand of the title. Mutual societies (that is, building societies<sup>13</sup> and friendly societies<sup>14</sup>) and industrial and provident societies and credit unions<sup>15</sup> form the title's third strand.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 As to the Financial Services and Markets Act 2000 generally see PARA 2. However in the individual areas other legislation is also of great importance.

3 See **INSURANCE** and **MORTGAGE** vol 77 (2010) PARA 101 et seq respectively. See also PARA 2.

4 See PARA 5 et seq.

5 As to the legislation generally see PARA 2.

6 See the Money Laundering Regulations 2007, SI 2007/2157; and PARA 539 et seq.

7 See the Companies Act 1989 Pt VII (ss 154-191); and PARA 509 et seq.

8 See PARA 791 et seq.

9 See PARA 1013 et seq.

10 See PARA 1276 et seq.

11 See PARA 1400 et seq.

12 See PARA 1620 et seq.

13 See PARA 1856 et seq.

14 See PARA 2081 et seq.

15 See PARA 2394 et seq.

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## 2. The legislation.

Financial services generally are regulated by the Financial Services and Markets Act 2000<sup>1</sup>, with much of the detailed provision contained in secondary legislation made under that Act. The Financial Services and Markets Act 2000 replaced the Financial Services Act 1986, and shares the same fundamental principles. It does, however, introduce some new elements.

The Financial Services and Markets Act 2000 contains a general prohibition, which prohibits a person from carrying on a regulated activity<sup>2</sup> in the United Kingdom<sup>3</sup> unless he is either an authorised person<sup>4</sup> or an exempt person<sup>5</sup>. The Financial Services and Markets Act 2000 provides for the Financial Services Authority<sup>6</sup> to be the sole regulatory authority for the financial services industry, with powers of authorisation<sup>7</sup>, supervision<sup>8</sup> and enforcement<sup>9</sup>. It creates a tribunal, known as the Financial Services and Markets Tribunal, to hear references from certain decisions of the Financial Services Authority<sup>10</sup>. The former prohibitions on investment advertisements and unsolicited calls are replaced with a new and broader scheme to control financial promotion<sup>11</sup>. In addition to powers of investigation and enforcement<sup>12</sup>, there are powers to impose penalties for market abuse<sup>13</sup> which supplement the provisions relating to insider dealing<sup>14</sup>. The Act also makes provision for consumer protection<sup>15</sup>, and provides for there to be a single compensation scheme<sup>16</sup> and a single ombudsman<sup>17</sup>.

This title is concerned with the regulation of the financial services industry, in particular by the Authority<sup>18</sup>. However provisions relating to shares and securities<sup>19</sup>, mortgages<sup>20</sup>, consumer credit<sup>21</sup>, insurance<sup>22</sup>, trusts<sup>23</sup>, and criminal offences such as fraud<sup>24</sup>, are dealt with elsewhere in this work.

1 The Financial Services and Markets Act 2000 was passed (ie received the Royal Assent) on 14 June 2000. As to the commencement of the Act see s 431. As to the extent of the Act see s 430.

2 As to regulated activities see PARA 84 et seq.

3 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 Sch 2 para 5(a). Neither the Isle of Man nor the Channel Islands are within the United Kingdom. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 3.

4 As to authorised persons see the Financial Services and Markets Act 2000 s 31; and PARA 314. The most usual way for a person to obtain authorisation is to apply for permission to carry on one or more regulated activities: see Pt IV (ss 40-55); and PARA 348 et seq. There are certain threshold conditions that must be met: see s 41 and Sch 6; and PARA 351.

5 See the Financial Services and Markets Act 2000 s 19; and PARA 80. As to exempt persons see PARA 330 et seq.

6 As to the Financial Services Authority see PARAS 4, 6 et seq.

7 See PARA 314 et seq.

8 See PARA 348 et seq.

- 9 See PARA 437 et seq.
- 10 As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 11 See the Financial Services and Markets Act 2000 ss 21, 25; and PARA 225 et seq.
- 12 See eg the Financial Services and Markets Act 2000 Pt XI (ss 165-177); and PARA 447 et seq. There are a number of statutory safeguards for those subjected to investigation or to the enforcement process, such as a limited privilege against self-incrimination: see s 174; and PARA 452.
- 13 See the Financial Services and Markets Act 2000 Pt VIII (ss 118-131A); and PARA 437 et seq.
- 14 As to insider dealing see the Criminal Justice Act 1993 Pt V (ss 52-64); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.
- 15 See eg PARAS 8-9, 21.
- 16 See PARA 583 et seq.
- 17 See PARA 575 et seq.
- 18 See also PARA 1. Note that there is also specific legislation for individual topic areas: eg banking (see PARA 791 et seq), building societies (see PARA 1856 et seq) and friendly societies (see PARA 2081 et seq).
- 19 See **COMPANIES**.
- 20 See **MORTGAGE** vol 77 (2010) PARA 101 et seq.
- 21 See **CONSUMER CREDIT**.
- 22 See **INSURANCE**.
- 23 See **TRUSTS**.
- 24 As to criminal offences generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**. As to fraud see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 309 et seq.

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### 3. The Treasury and the Secretary of State.

The Treasury<sup>1</sup> is the government department responsible for managing the national economy, and its functions include the regulation of the financial services industry<sup>2</sup>. It is the Treasury that specifies the kinds of activities that are regulated activities for the purposes of the Financial Services and Markets Act 2000<sup>3</sup>, and the Treasury appoints the chairman and other members of the governing body of the Financial Services Authority<sup>4</sup>.

The Secretary of State<sup>5</sup> also has certain powers under the Financial Services and Markets Act 2000<sup>6</sup>.

A Tripartite Memorandum originally concluded in 1997/1998<sup>7</sup> deals with the division of certain financial market responsibilities between the Treasury, the Authority and the Bank of England<sup>8</sup>. It does not, of course, override the terms of the applicable legislation.

1 As to the Treasury see further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the transfer of functions relating to financial services regulation from the Department of Trade and Industry to the Treasury see the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315 (amended by SI 2002/2840). As to the nationalising powers of the Treasury under the Banking (Special Provisions) Act 2008 see PARA 791.

3 See the Financial Services and Markets Act 2000 s 22; and PARA 84. As to regulated activities see PARA 84 et seq.

4 As to the Financial Services Authority see PARAS 4, 6 et seq. As to the appointment of the chairman and other members of the governing body see PARA 13 et seq.

5 The one of Her Majesty's principal Secretaries of State: see the Interpretation Act 1978 Sch 1. The office of Secretary of State is a unified office, and in law each Secretary of State is generally capable of performing the functions of all or any of them: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

6 Eg in relation to the institution of proceedings for offences under the Financial Services and Markets Act 2000 s 401: see PARA 572.

7 See also PARA 807.

8 As to the Bank of England see PARA 793 et seq.

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#### **4. The Financial Services Authority.**

In 1997 it was decided that the regulation of banking and investment services should be the responsibility of a single body. The Securities and Investments Board was replaced by the Financial Services Authority<sup>1</sup>, and in 1998 responsibility for banking supervision was transferred from the Bank of England<sup>2</sup> to the Financial Services Authority<sup>3</sup>. The Financial Services and Markets Act 2000 provides for the abolition of other former regulatory bodies, such as the Building Societies Commission, the Friendly Societies Commission and the Registry of Friendly Societies and the transfer to the Authority of functions conferred by legislation relating to industrial and provident societies and credit unions<sup>4</sup>.

The Financial Services Authority is now the single regulator for the financial services industry<sup>5</sup>, responsible for the regulation of banks<sup>6</sup>, building societies<sup>7</sup>, friendly societies<sup>8</sup>, industrial and provident societies and credit unions<sup>9</sup> and insurance companies<sup>10</sup>, and it is also responsible for the regulation of Lloyd's of London<sup>11</sup>. The Authority is the competent authority for official listing<sup>12</sup>. The Authority has various powers, including powers aimed at combating market abuse<sup>13</sup>, powers to recognise and supervise investment exchanges and clearing houses<sup>14</sup>, powers in relation to competition scrutiny<sup>15</sup>, powers to regulate open-ended investment companies<sup>16</sup>, and powers to oversee the ombudsman scheme<sup>17</sup> and the compensation scheme<sup>18</sup>. It has rule-making powers and powers to give guidance<sup>19</sup>; for the most part the rules and guidance are contained in the Financial Services Authority's Handbook of Rules and Guidance<sup>20</sup>.

1 See the Financial Services Authority Press Release dated 28 October 1997. As to the Financial Services Authority see further PARA 6 et seq.

2 As to the Bank of England see PARA 74; and PARA 793 et seq.

3 See the Bank of England Act 1998; and PARA 793 et seq. The Bank of England does however retain various important functions: see PARA 793 et seq.



4 See the Financial Services and Markets Act 2000 ss 334-336, 338; and PARA 758 et seq. As to building societies see PARA 1856 et seq; as to friendly societies see PARA 2081 et seq; and as to industrial and provident societies and credit unions see PARA 2394 et seq.

5 Although the Financial Services Authority has sole overall responsibility for the supervision of financial services, certain other bodies have a subsidiary responsibility: eg the Bank of England (see PARAS 74, 793 et seq), the recognised clearing houses and investment exchanges (see PARAS 76, 684 et seq), the London Stock Exchange (see PARA 75), the Panel on Takeovers and Mergers (see PARA 439; and **COMPANIES** vol 15 (2009) PARA 1480), Lloyd's (which retains various responsibilities in regard to the insurance market: see PARA 77; and **INSURANCE**), and the designated professional bodies (which are responsible for the regulation of financial services activities by their members: see PARA 749 et seq). Overseas regulatory authorities may have a role in enforcement: see PARA 79.

Where criminal offences may have been committed a number of different bodies may be involved as well as or instead of the Financial Services Authority, including the Department for Business, Enterprise and Regulatory Reform (eg in relation to insider dealing: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**), the Serious Fraud Office (in cases of criminal fraud: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1089 et seq), the Crown Prosecution Service (where other criminal offences are involved) and the National Criminal Intelligence Service (in relation to money laundering: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**). As to the Serious Fraud Office see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1089 et seq; as to the Crown Prosecution Service see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1079 et seq; and as to the National Criminal Intelligence Service see **POLICE** vol 36(1) (2007 Reissue) PARA 430 et seq.

6 As to banking generally see PARA 791 et seq.

7 As to building societies generally see PARA 1856 et seq.

8 As to friendly societies generally see PARA 2081 et seq.

9 As to industrial and provident societies and credit unions generally see PARA 2394 et seq.

10 As to insurance generally see **INSURANCE**.

11 See PARAS 77, 741 et seq.

12 See PARA 385 et seq.

13 See PARA 437 et seq.

14 See PARA 684 et seq.

15 See eg PARAS 38 et seq, 730 et seq.

16 See PARA 621 et seq.

17 See PARA 575 et seq.

18 See PARA 583 et seq.

19 See PARA 21 et seq.

20 See PARA 22.

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## 2. FINANCIAL SERVICES REGULATION

### (1) INTRODUCTION

#### 5. The regulatory bodies.

As already indicated<sup>1</sup>, the Financial Services Authority<sup>2</sup> is the main regulator under the legislative framework established by the Financial Services and Markets Act 2000. The Financial Services and Markets Tribunal<sup>3</sup> plays a very important role in the settling of disputes and other matters. Reference should also be made to relevant regulatory bodies such as the Bank of England<sup>4</sup>, the London Stock Exchange<sup>5</sup>, other exchanges and clearing houses<sup>6</sup>, Lloyd's<sup>7</sup>, the Panel of Takeovers and Mergers<sup>8</sup> and EEA and overseas authorities<sup>9</sup>.

1 See PARA 4.

2 See PARAS 4, 6 et seq.

3 See PARA 43 et seq.

4 See PARA 74.

5 See PARA 75.

6 See PARA 76.

7 See PARA 77.

8 See PARA 78.

9 See PARA 79.

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## **(2) THE REGULATOR AND THE TRIBUNAL**

### **(i) The Financial Services Authority**

#### **A. GENERAL FUNCTIONS**

##### **6. The Financial Services Authority and its general functions and duties.**

The Financial Services Authority is an independent non-governmental body and has the functions conferred on it by or under the Financial Services and Markets Act 2000<sup>1</sup>.

The Authority's general functions are:

- 1 (1) its function of making rules under the Financial Services and Markets Act 2000 (considered as a whole)<sup>2</sup>;
- 2 (2) its function of preparing and issuing codes under the Act (considered as a whole)<sup>3</sup>;
- 3 (3) its functions in relation to the giving of general guidance<sup>4</sup> (considered as a whole)<sup>5</sup>; and
- 4 (4) its function of determining the general policy and principles by reference to which it performs particular functions<sup>6</sup>.

In discharging its general functions the Authority must, so far as is reasonably possible, act in a way which is compatible with the regulatory objectives<sup>7</sup> of market confidence, public awareness, the protection of consumers and the reduction of financial crime<sup>8</sup>, and which the Authority considers most appropriate for the purpose of meeting those objectives<sup>9</sup>. In discharging its general functions the Authority must also have regard to:

- 5 (a) the need to use its resources in the most efficient and economic way<sup>10</sup>;
- 6 (b) the responsibilities of those who manage the affairs of authorised persons<sup>11</sup>;
- 7 (c) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction<sup>12</sup>;
- 8 (d) the desirability of facilitating innovation in connection with regulated activities<sup>13</sup>;
- 9 (e) the international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom<sup>14</sup>;
- 10 (f) the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions<sup>15</sup>;
- 11 (g) the desirability of facilitating competition between those who are subject to any form of regulation by the Authority<sup>16</sup>.

The Authority must, in managing its affairs, have regard to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to it<sup>17</sup>.

Neither the Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions<sup>18</sup>.

For the purposes of the Financial Services and Markets Act 2000 anything done by an accredited financial investigator within the meaning of the Proceeds of Crime Act 2002<sup>19</sup> who is a member of the staff of the Authority or a person appointed by the Authority under the 2000 Act<sup>20</sup> to conduct an investigation, must be treated as done in the exercise or discharge of a function of the Authority<sup>21</sup>.

1 Financial Services and Markets Act 2000 s 1(1). The Authority is a body corporate (see s 1(1)) and exists as a company limited by guarantee. As to the constitution of the Authority see PARA 13 et seq. The Authority continues to be exempt from the requirements of the Companies Act 1985 relating to the use of 'Limited' as part of its name: Financial Services and Markets Act 2000 Sch 1 para 14. As to the requirements of the companies legislation relating to company names see **COMPANIES** vol 14 (2009) PARA 200 et seq. If the Secretary of State is satisfied that any action taken by the Authority makes it inappropriate for the exemption given by the Financial Services and Markets Act 2000 Sch 1 para 14 to continue he may, after consulting the Treasury, give a direction removing it: Sch 1 para 15. As to the Secretary of State see PARA 3. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

The Authority also has functions under the Regulated Covered Bonds Regulations 2008, SI 2008/346, in particular Pt 2 (reg 6). The Regulations provide a new legislative framework for covered bonds in the United Kingdom. They implement the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities) art 22(4); the Third Non-Life Insurance Directive (ie EC Council Directive 92/49 (OJ L228, 11.8.92, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, and amending EC Directives 73/239 and 88/357) art 22(4); and the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 24(4). The relevant requirements of the above three directives are in the same terms. The Regulated Covered Bonds Regulations 2008, SI 2008/346 also implement the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) Annex 6 para 68. A 'covered bond' is a class of corporate bond, issued by credit institutions and backed by certain assets, normally mortgages or public sector loans (see the Regulated Covered Bonds Regulations 2008, SI 2008/346, reg 1). Interest and repayments of principal are payable out of ring-fenced assets ('an asset pool') backing the bond (see reg 3). Covered bonds that comply with the above directives' requirements benefit from higher

prudential investment limits under the UCITS Directive and lower risk weights under the Banking Consolidation Directive. The Regulated Covered Bonds Regulations 2008, SI 2008/346, establish a new regime supervised by the Financial Services Authority and take account of United Kingdom practice in relation to covered bonds. In the United Kingdom, covered bonds are issued by credit institutions. The issuer lends the sums derived from the bonds to a separate legal entity owned by another person (the 'owner') (see reg 4). The owner uses the sums to purchase property which it holds in an asset pool. The owner agrees to guarantee the issuer's obligations to the covered bond holders. The loan is repaid once the bond holders' claims to the principal and accrued interest have been met. Part 1 (regs 1-5) contains definitions. Part 2 (reg 6) sets out the functions of the Authority and provides for it to have regard to certain considerations, including the need to preserve investor confidence in regulated covered bonds in the United Kingdom. Part 3 (regs 7-14) requires the Authority to maintain a register of issuers and a register of regulated covered bonds and sets out the registration process. Part 4 (regs 15-20) imposes requirements on issuers. Part 5 (regs 21-26) imposes requirements on owners (in particular, that the issuer and the owner must make arrangements for the maintenance and administration of the asset pool so that the claims of bond holders and other specified parties may be met). Part 6 (regs 27-29) establishes that regulated covered bond holders and other specified persons must be paid in priority to all other creditors, after the payment of expenses of the receivership or winding up etc; and provides for certain expenses incurred by a receiver or liquidator to rank above the payment of all other expenses. Part 7 (regs 30-38) has the enforcement powers of the Authority and the courts. Part 8 (regs 39-40) confers functions on the Financial Services and Markets Act Tribunal (as to which see PARA 43 et seq). Part 9 (regs 41-46) and the Schedule contain provision for notification of the European Commission, guidance to be issued by the Authority and various modifications of primary and secondary legislation (see also PARAS 16, 447, 448). As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 Financial Services and Markets Act 2000 s 2(4)(a). This does not apply to Part VI rules: see Sch 7 para 2(a); and PARA 385. As to the meaning of 'Part VI rules' see PARA 385. The power to issue statements of principle and codes of practice is to be treated for the purposes of s 2(4)(a) as part of the Authority's rule-making functions: s 64(11)(b). As to statements of principle and codes of practice see PARA 372. See also heads (2) and (4) in the text. As to the Authority's Handbook of Rules and Guidance generally see PARA 22.

3 Financial Services and Markets Act 2000 s 2(4)(b).

4 As to the meaning of 'general guidance' see PARA 35 note 1; definition applied by the Financial Services and Markets Act 2000 s 2(5).

5 Financial Services and Markets Act 2000 s 2(4)(c). This does not apply to general guidance given in relation to Pt VI (ss 72-103): see Sch 7 para 2(b); and PARA 385.

6 Financial Services and Markets Act 2000 s 2(4)(d). This does not apply to functions under Pt VI: see Sch 7 para 2(c); and PARA 385.

7 Financial Services and Markets Act 2000 s 2(1)(a).

8 Financial Services and Markets Act 2000 s 2(2)(a)-(d). See further PARA 8.

9 Financial Services and Markets Act 2000 s 2(1)(b).

10 Financial Services and Markets Act 2000 s 2(3)(a).

11 Financial Services and Markets Act 2000 s 2(3)(b). As to authorised persons see PARA 314.

12 Financial Services and Markets Act 2000 s 2(3)(c).

13 Financial Services and Markets Act 2000 s 2(3)(d). As to regulated activities see PARA 84 et seq.

14 Financial Services and Markets Act 2000 s 2(3)(e).

15 Financial Services and Markets Act 2000 s 2(3)(f).

16 Financial Services and Markets Act 2000 s 2(3)(g).

17 Financial Services and Markets Act 2000 s 7.

18 Financial Services and Markets Act 2000 Sch 1 para 19(1). As to the meaning of 'functions' in relation to the Authority see PARA 14 note 6. As to the application of a predecessor provision (in the Banking Act 1979) see *Three Rivers District Council v Bank of England* [2006] EWHC 816 (Comm), [2006] All ER (D) 175 (Apr).

The Financial Services and Markets Act 2000 Sch 1 para 19(1) does not apply (1) if the act or omission is shown to have been in bad faith; or (2) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of the Human Rights Act 1998 s 6(1) (see

**CONSTITUTIONAL LAW AND HUMAN RIGHTS**): Financial Services and Markets Act 2000 Sch 1 para 19(3). As to acts in bad faith see *Melton Medes Ltd v Securities and Investments Board* [1995] Ch 137, [1995] 3 All ER 880 (decided under previous legislation).

For modifications to the Financial Services and Markets Act 2000 Sch 1 para 19 when the Authority is exercising functions under Pt VI as the competent authority see s 72(2), Sch 7 para 8. See further PARA 385.

19 As to accredited financial investigators under the Proceeds of Crime Act 2002 see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq.

20 le appointed under the Financial Services and Markets Act 2000 s 97 (see PARA 434), s 167 or s 168 (see PARA 449).

21 Financial Services and Markets Act 2000 Sch 1 para 19A (added by the Proceeds of Crime Act 2002 s 456, Sch 11 paras 1, 38).

## UPDATE

### 6 The Financial Services Authority and its general functions and duties

NOTE 1--SI 2008/346 amended: SI 2008/1714. Financial Services and Markets Act 2000 Sch 1 para 14 amended: SI 2009/1941. Directive 85/611 replaced with effect from 1 July 2011: European Parliament and EC Council Directive 2009/65 (OJ L302, 17.11.2009, p 32).

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### 7. Monitoring and enforcement.

The Financial Services Authority must maintain arrangements designed to enable it to determine whether persons on whom requirements are imposed by or under the Financial Services and Markets Act 2000, or by any directly applicable Community regulation made under the Markets in Financial Instruments Directive<sup>1</sup>, are complying with them<sup>2</sup>. Those arrangements may provide for functions to be performed on behalf of the Authority by any body or person who, in its opinion, is competent to perform them<sup>3</sup>. The Authority must also maintain arrangements for enforcing the provisions of, or made under, the Financial Services and Markets Act 2000 or of any directly applicable Community regulation made under the Markets in Financial Instruments Directive<sup>4</sup>.

1 le European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

2 Financial Services and Markets Act 2000 Sch 1 para 6(1) (amended by SI 2007/126). See also the Financial Services Authority's Handbook of Rules and Guidance, Supervision Manual (SUP) and Enforcement Manual (ENF). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 Sch 1 para 6(2). Schedule 1 para 6(2) does not affect the Authority's duty under Sch 1 para 6(1): Sch 1 para 6(4).

4 Financial Services and Markets Act 2000 Sch 1 para 6(3) (amended by SI 2007/126).

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## **8. The regulatory objectives.**

The regulatory objectives are market confidence, public awareness, the protection of consumers and the reduction of financial crime<sup>1</sup>.

The market confidence objective is defined as the objective of maintaining confidence in the financial system<sup>2</sup>.

The public awareness objective is defined as the objective of promoting public understanding of the financial system<sup>3</sup>. In particular this objective includes:

- 12 (1) promoting awareness of the benefits and risks associated with different kinds of investment or other financial dealing<sup>4</sup>; and
- 13 (2) the provision of appropriate information and advice<sup>5</sup>.

The protection of consumers objective is defined as the objective of securing the appropriate degree of protection for consumers<sup>6</sup>. In considering what degree of protection may be appropriate, the Financial Services Authority must have regard to:

- 14 (a) the differing degrees of risk involved in different kinds of investment or other transaction<sup>7</sup>;
- 15 (b) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity<sup>8</sup>;
- 16 (c) the needs that consumers may have for advice and accurate information<sup>9</sup>; and
- 17 (d) the general principle that consumers should take responsibility for their decisions<sup>10</sup>.

The reduction of financial crime objective is defined as the objective of reducing the extent to which it is possible for a business carried on by a regulated person<sup>11</sup>, or in contravention of the general prohibition<sup>12</sup>, to be used for a purpose connected with financial crime<sup>13</sup>. In considering that objective the Authority must, in particular, have regard to the desirability of:

- 18 (i) regulated persons being aware of the risk of their businesses being used in connection with the commission of financial crime<sup>14</sup>;
- 19 (ii) regulated persons taking appropriate measures (in relation to their administration and employment practices, the conduct of transactions by them and otherwise) to prevent financial crime, facilitate its detection and monitor its incidence<sup>15</sup>;
- 20 (iii) regulated persons devoting adequate resources to the matters mentioned in head (ii) above<sup>16</sup>.

1 Financial Services and Markets Act 2000 s 2(2). These four objectives are the rationale for the Financial Services Authority's actions: see the Authority's Handbook of Rules and Guidance, Enforcement Manual. As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 3(1). For the purposes of ss 3, 4, 'financial system' means the financial system operating in the United Kingdom and includes: (1) financial markets and exchanges; (2)

regulated activities; and (3) other activities connected with financial markets and exchanges: ss 3(2), 4(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to regulated activities see PARA 84 et seq.

3 Financial Services and Markets Act 2000 s 4(1).

4 Financial Services and Markets Act 2000 s 4(2)(a).

5 Financial Services and Markets Act 2000 s 4(2)(b).

6 Financial Services and Markets Act 2000 s 5(1). For these purposes, 'consumers' means persons: (1) who are consumers for the purposes of s 138 (see PARA 21 note 5); or (2) who, in relation to regulated activities carried on otherwise than by authorised persons, would be consumers for those purposes if the activities were carried on by authorised persons: s 5(3). As to authorised persons see PARA 314. As to the extension of the definition to include those who before the commencement of the Act used the services provided by regulated persons in carrying on relevant activities see the Financial Services and Markets Act 2000 (Consequential and Transitional Provisions) (Miscellaneous) Order 2001, SI 2001/1821, art 3. As to the extension of the definition to include those who before 2 July 2002 used the services provided by a credit union and those who are certain related persons see the Financial Services and Markets Act 2000 (Consequential Amendments and Transitional Provisions) (Credit Unions) Order 2002, SI 2002/1501, art 4. As to credit unions generally see PARA 2402.

7 Financial Services and Markets Act 2000 s 5(2)(a).

8 Financial Services and Markets Act 2000 s 5(2)(b).

9 Financial Services and Markets Act 2000 s 5(2)(c).

10 Financial Services and Markets Act 2000 s 5(2)(d).

11 'Regulated person' means an authorised person, a recognised investment exchange or a recognised clearing house: Financial Services and Markets Act 2000 s 6(5). As to the meanings of 'recognised investment exchange' and 'recognised clearing house' see PARA 684.

12 As to the meaning of 'general prohibition' see PARA 80.

13 Financial Services and Markets Act 2000 s 6(1). 'Financial crime' includes any offence involving: (1) fraud or dishonesty; (2) misconduct in, or misuse of information relating to, a financial market; or (3) handling the proceeds of crime: s 6(3). 'Offence' includes an act or omission which would be an offence if it had taken place in the United Kingdom: s 6(4). As to insider dealing see further; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 331.

14 Financial Services and Markets Act 2000 s 6(2)(a).

15 Financial Services and Markets Act 2000 s 6(2)(b).

16 Financial Services and Markets Act 2000 s 6(2)(c).

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## **9. Arrangements for consulting practitioners and consumers.**

The Financial Services Authority must make and maintain effective arrangements for consulting practitioners and consumers on the extent to which its general policies and practices are consistent with its general duties<sup>1</sup>.

The arrangements must include the establishment and maintenance of a panel of persons (known as the 'Practitioner Panel') to represent the interests of practitioners<sup>2</sup>. The Authority must appoint one of the members of the Practitioner Panel to be its chairman<sup>3</sup>. The Treasury's approval is required for the appointment or dismissal of the chairman<sup>4</sup>. The Authority must

appoint to the Practitioner Panel such individuals who are authorised persons<sup>5</sup>, persons representing authorised persons<sup>6</sup>, persons representing recognised investment exchanges<sup>7</sup> and persons representing recognised clearing houses<sup>8</sup>, as it considers appropriate<sup>9</sup>. The Authority must have regard to any representations made to it by the Practitioner Panel<sup>10</sup>.

The arrangements must include the establishment and maintenance of a panel of persons (to be known as the 'Consumer Panel') to represent the interests of consumers<sup>11</sup>. The Authority must appoint one of the members of the Consumer Panel to be its chairman<sup>12</sup>. The Treasury's approval is required for the appointment or dismissal of the chairman<sup>13</sup>. The Authority must appoint to the Consumer Panel such consumers, or persons representing the interests of consumers, as it considers appropriate<sup>14</sup>. The Authority must secure that the membership of the Consumer Panel is such as to give a fair degree of representation to those who are using, or are or may be contemplating using, services otherwise than in connection with businesses carried on by them<sup>15</sup>. The Authority must have regard to any representations made to it by the Consumer Panel<sup>16</sup>.

The Authority must consider any representation made, in accordance with arrangements of the Authority, by the Practitioner Panel or by the Consumer Panel<sup>17</sup>. If the Authority disagrees with a view expressed, or proposal made, in the representation, it must give a statement in writing of its reasons for disagreeing<sup>18</sup>.

1 Financial Services and Markets Act 2000 s 8. As to the general duties of the Authority see s 2; and PARA 6. As to the Authority's Handbook generally see PARA 22.

The Financial Services and Markets Act 2000 s 8 does not apply when the Authority is exercising functions under Pt VI (ss 72-103) (see PARA 385 et seq) as the competent authority: s 72(2), Sch 7 para 3.

2 Financial Services and Markets Act 2000 s 9(1).

3 Financial Services and Markets Act 2000 s 9(2).

4 Financial Services and Markets Act 2000 s 9(3). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 Financial Services and Markets Act 2000 s 9(5)(a). As to authorised persons see PARA 314.

6 Financial Services and Markets Act 2000 s 9(5)(b).

7 Financial Services and Markets Act 2000 s 9(5)(c). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

8 Financial Services and Markets Act 2000 s 9(5)(d). As to the meaning of 'recognised clearing house' see PARA 684 note 6.

9 Financial Services and Markets Act 2000 s 9(5).

10 Financial Services and Markets Act 2000 s 9(4).

11 Financial Services and Markets Act 2000 s 10(1). For these purposes, 'consumers' means persons, other than authorised persons: (1) who are consumers for the purposes of s 138 (see PARA 21 note 5); or (2) who, in relation to regulated activities carried on otherwise than by authorised persons, would be consumers for those purposes if the activities were carried on by authorised persons: s 10(7). As to regulated activities see PARA 84 et seq. As to the extension of the definition to include those who before the commencement of the Act used the services provided by regulated persons in carrying on relevant activities see the Financial Services and Markets Act 2000 (Consequential and Transitional Provisions) (Miscellaneous) Order 2001, SI 2001/1821, art 3. As to the extension of the definition to include those who before 2 July 2002 used the services provided by a credit union and those who are certain related persons see the Financial Services and Markets Act 2000 (Consequential Amendments and Transitional Provisions) (Credit Unions) Order 2002, SI 2002/1501, art 4. As to credit unions generally see PARA 2402.

12 Financial Services and Markets Act 2000 s 10(2).

13 Financial Services and Markets Act 2000 s 10(3).



14 Financial Services and Markets Act 2000 s 10(4).

15 Financial Services and Markets Act 2000 s 10(5). The Secretary of State may direct the Authority to appoint as a member of the Consumer Panel a person specified by the Secretary of State who (1) is a non-executive member of the National Consumer Council; and (2) is nominated for these purposes by the National Consumer Council after consultation with the Authority: Financial Services and Markets Act 2000 s 10(5A) (s 10(5A)-(5C) added by the Consumers, Estate Agents and Redress Act 2007 s 39). Only one person may, at any time, be a member of the Consumer Panel appointed in accordance with a direction under the Financial Services and Markets Act 2000 s 10(5A); but that does not prevent the Authority appointing as a member of the Consumer Panel any person who is also a member of the National Consumer Council: s 10(5B) (as so added). A person appointed in accordance with a direction under s 10(5A) ceases to be a member of the Panel on ceasing to be a non-executive member of the National Consumer Council: s 10(5C) (as so added). As to the Secretary of State see PARA 3.

16 Financial Services and Markets Act 2000 s 10(6).

17 Financial Services and Markets Act 2000 s 11(1), (2).

18 Financial Services and Markets Act 2000 s 11(3).

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## **10. Reviews by the Treasury.**

The Treasury<sup>1</sup> may appoint an independent<sup>2</sup> person to conduct a review of the economy, efficiency and effectiveness with which the Financial Services Authority has used its resources in discharging its functions<sup>3</sup>. A review may be limited by the Treasury to such functions of the Authority (however described) as the Treasury may specify in appointing the person to conduct it<sup>4</sup>. A review is not to be concerned with the merits of the Authority's general policy or principles in pursuing regulatory objectives<sup>5</sup> or in exercising functions under Part VI of the Financial Services and Markets Act 2000<sup>6</sup>.

On completion of a review, the person conducting it must make a written report to the Treasury setting out the result of the review, and making such recommendations (if any) as he considers appropriate<sup>7</sup>. A copy of the report must be laid before each House of Parliament, and published in such manner as the Treasury considers appropriate<sup>8</sup>. Any expenses reasonably incurred in the conduct of a review are to be met by the Treasury out of money provided by Parliament<sup>9</sup>.

A person conducting a review has a right of access at any reasonable time to all such documents<sup>10</sup> as he may reasonably require for purposes of the review, and may require any person holding or accountable for any such document to provide such information and explanation as are reasonably necessary for that purpose<sup>11</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 'Independent' means appearing to the Treasury to be independent of the Financial Services Authority: Financial Services and Markets Act 2000 s 12(7).

3 Financial Services and Markets Act 2000 s 12(1).

4 Financial Services and Markets Act 2000 s 12(2).

5 As to the regulatory objectives see PARAS 6, 8.

6 Financial Services and Markets Act 2000 s 12(3). As to Pt VI (ss 72-103) see PARA 385 et seq.

7 Financial Services and Markets Act 2000 s 12(4).

8 Financial Services and Markets Act 2000 s 12(5).

9 Financial Services and Markets Act 2000 s 12(6).

10 'Documents' includes information recorded in any form and, in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form, or in a form from which it can readily be produced in visible and legible form: Financial Services and Markets Act 2000 s 417(1) (definition amended by the Criminal Justice and Police Act 2001 s 70, Sch 2 Pt 2 para 16(1), (2)(f)).

11 Financial Services and Markets Act 2000 s 13(1). Section 13(1) applies only to documents in the custody or under the control of the Authority: s 13(2). An obligation imposed on a person as a result of the exercise of powers conferred by s 13(1) is enforceable by injunction: s 13(3). As to injunctions see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

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## 11. Inquiries.

The provisions described below in relation to inquiries<sup>1</sup> apply in two cases<sup>2</sup>.

The first case is where it appears to the Treasury<sup>3</sup> that:

- 21 (1) events<sup>4</sup> have occurred in relation to a collective investment scheme<sup>5</sup>, or a person who is, or was at the time of the events, carrying on a regulated activity<sup>6</sup> (whether or not as an authorised person<sup>7</sup>), which posed or could have posed a grave risk to the financial system<sup>8</sup> or caused or risked causing significant damage to the interests of consumers<sup>9</sup>; and
- 22 (2) those events might not have occurred, or the risk or damage might have been reduced, but for a serious failure in the system established by the Financial Services and Markets Act 2000, or by any previous statutory provision, for the regulation of such schemes or of such persons and their activities, or the operation of that system<sup>10</sup>.

The second case is where it appears to the Treasury that:

- 23 (a) events have occurred in relation to listed securities<sup>11</sup> or an issuer of listed securities which caused or could have caused significant damage to holders of listed securities<sup>12</sup>; and
- 24 (b) those events might not have occurred but for a serious failure in the regulatory system established by Part VI of the Financial Services and Markets Act 2000 or by any previous statutory provision concerned with the official listing of securities or in the operation of that system<sup>13</sup>.

If the Treasury considers that it is in the public interest that there should be an independent inquiry into the events and the circumstances surrounding them, it may arrange for an inquiry to be held<sup>14</sup>.

If the Treasury decides to arrange for such an inquiry to be held, it may appoint such person as it considers appropriate to hold the inquiry<sup>15</sup>. The Treasury may, by a direction to the appointed person, control:

- 25 (i) the scope of the inquiry<sup>16</sup>;
- 26 (ii) the period during which the inquiry is to be held<sup>17</sup>;
- 27 (iii) the conduct of the inquiry<sup>18</sup>; and
- 28 (iv) the making of reports<sup>19</sup>.

The person appointed to hold an inquiry may obtain such information from such persons and in such manner as he thinks fit, make such inquiries as he thinks fit, and determine the procedure to be followed in connection with the inquiry<sup>20</sup>. The appointed person may require any person who, in his opinion, is able to provide any information, or produce any document<sup>21</sup>, which is relevant to the inquiry to provide any such information or produce any such document<sup>22</sup>. For the purposes of an inquiry, the appointed person has the same powers as the High Court in respect of the attendance and examination of witnesses (including the examination of witnesses abroad) and in respect of the production of documents<sup>23</sup>.

On completion of an inquiry<sup>24</sup>, the person holding the inquiry must make a written report to the Treasury setting out the result of the inquiry, and making such recommendations (if any) as he considers appropriate<sup>25</sup>. The Treasury may publish the whole, or any part, of the report and may do so in such manner as it considers appropriate<sup>26</sup>.

If the Treasury proposes to publish a report but considers that it contains material:

- 29 (A) which relates to the affairs of a particular person whose interests would, in the opinion of the Treasury, be seriously prejudiced by publication of the material<sup>27</sup>;  
or
- 30 (B) the disclosure of which would be incompatible with an international obligation of the United Kingdom<sup>28</sup>,

the Treasury must ensure that the material is removed before publication<sup>29</sup>.

The Treasury must lay before each House of Parliament a copy of any report or part of a report so published<sup>30</sup>.

If a person ('A') fails to comply with a requirement imposed on him by a person holding an inquiry, or otherwise obstructs such an inquiry, the person holding the inquiry may certify the matter to the High Court<sup>31</sup> which may inquire into the matter<sup>32</sup>. If, after hearing any witnesses who may be produced against or on behalf of A, and any statement made by or on behalf of A, the court is satisfied that A would have been in contempt of court if the inquiry had been proceedings before the court, it may deal with him as if he were in contempt<sup>33</sup>.

1    le the Financial Services and Markets Act 2000 s 14: see the text and notes 2-14.

2    Financial Services and Markets Act 2000 s 14(1).

3    As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4    'Event' does not include any event occurring before 1 December 2001 (but no such limitation applies to the reference in the Financial Services and Markets Act 2000 s 14(4) (see the text and note 14) to surrounding circumstances): s 14(5A) (added by the Inquiries Act 2005 s 46(1), (4)).

5    As to the meaning of 'collective investment scheme' see PARA 603.

6    As to regulated activities see PARA 84 et seq.

7 As to authorised persons see PARA 314.

8 As to the meaning of 'financial system' see PARA 8 note 2; definition applied by the Financial Services and Markets Act 2000 s 14(6).

9 Financial Services and Markets Act 2000 s 14(2)(a). For these purposes, 'consumers' means persons: (1) who are consumers for the purposes of s 138 (see PARA 21 note 5); or (2) who, in relation to regulated activities carried on otherwise than by authorised persons, would be consumers for those purposes if the activities were carried on by authorised persons: s 14(5). As to the extension of the definition to include those who before the commencement of the Act used the services provided by regulated persons in carrying on relevant activities see the Financial Services and Markets Act 2000 (Consequential and Transitional Provisions) (Miscellaneous) Order 2001, SI 2001/1821, art 3. As to the extension of the definition to include those who before 2 July 2002 used the services provided by a credit union and those who are certain related persons see the Financial Services and Markets Act 2000 (Consequential Amendments and Transitional Provisions) (Credit Unions) Order 2002, SI 2002/1501, art 4. As to credit unions generally see PARA 2402.

10 Financial Services and Markets Act 2000 s 14(2)(b) (amended by the Inquiries Act 2005 s 46(1), (2)).

11 'Listed securities' means anything which has been admitted to the official list under the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (see PARA 385 et seq): s 14(7). As to the official list see PARA 387.

12 Financial Services and Markets Act 2000 s 14(3)(a).

13 Financial Services and Markets Act 2000 s 14(3)(b) (amended by the Inquiries Act 2005 s 46(1), (3)).

14 Financial Services and Markets Act 2000 s 14(4). Any expenses reasonably incurred in holding an inquiry are to be met by the Treasury out of money provided by Parliament: s 17(6).

15 Financial Services and Markets Act 2000 s 15(1).

16 Financial Services and Markets Act 2000 s 15(2)(a).

17 Financial Services and Markets Act 2000 s 15(2)(b).

18 Financial Services and Markets Act 2000 s 15(2)(c).

19 Financial Services and Markets Act 2000 s 15(2)(d). A direction may, in particular: (1) confine the inquiry to particular matters; (2) extend the inquiry to additional matters; (3) require the appointed person to discontinue the inquiry or to take only such steps as are specified in the direction; (4) require the appointed person to make such interim reports as are so specified: s 15(3).

20 Financial Services and Markets Act 2000 s 16(1).

21 As to the meaning of 'documents' see PARA 10 note 10.

22 Financial Services and Markets Act 2000 s 16(2).

23 Financial Services and Markets Act 2000 s 16(4).

24 Financial Services and Markets Act 2000 s 16(3).

25 Financial Services and Markets Act 2000 s 17(1).

26 Financial Services and Markets Act 2000 s 17(2).

27 Financial Services and Markets Act 2000 s 17(3)(a).

28 Financial Services and Markets Act 2000 s 17(3)(b). As to the meaning of 'United Kingdom' see PARA 2 note 3.

29 Financial Services and Markets Act 2000 s 17(4).

30 Financial Services and Markets Act 2000 s 17(5).

31 Financial Services and Markets Act 2000 s 18(1).

32 Financial Services and Markets Act 2000 s 18(2).

33 Financial Services and Markets Act 2000 s 18(3). As to contempt of court see generally **CONTEMPT OF COURT**.

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## **12. Penalties under the Financial Services and Markets Act 2000.**

In determining its policy with respect to the amounts of penalties to be imposed by it under the Financial Services and Markets Act 2000, the Financial Services Authority must take no account of the expenses which it incurs, or expects to incur, in discharging its functions<sup>1</sup>.

The Authority must prepare and operate a scheme for ensuring that the amounts paid to the Authority by way of penalties imposed under the Financial Services and Markets Act 2000 are applied for the benefit of authorised persons<sup>2</sup>. The scheme may, in particular, make different provision with respect to different classes of authorised person<sup>3</sup>. Up to date details of the scheme must be set out in a document (referred to as the 'scheme details')<sup>4</sup>. The scheme details must be published by the Authority in the way appearing to it to be best calculated to bring them to the attention of the public<sup>5</sup>.

Before making the scheme, the Authority must publish a draft of the proposed scheme in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>6</sup>. The draft must be accompanied by notice that representations about the proposals may be made to the Authority within a specified time<sup>7</sup>. If the Authority makes the proposed scheme, it must publish an account, in general terms, of the representations made to it<sup>8</sup> and its response to them<sup>9</sup>. If the scheme differs from the draft<sup>10</sup> in a way which is, in the opinion of the Authority, significant the Authority must<sup>11</sup> publish details of the difference<sup>12</sup>.

The Authority must, without delay, give the Treasury a copy of any scheme details published by it<sup>13</sup>. The Authority may charge a reasonable fee for providing a person with a copy of a draft<sup>14</sup> or scheme details<sup>15</sup>.

1 Financial Services and Markets Act 2000 Sch 1 para 16(1). As to the meaning of 'functions' in relation to the Authority see PARA 14 note 6. For modifications to Sch 1 para 16 when the Authority is exercising functions under Pt VI (ss 72-103) as the competent authority see s 72(2), Sch 7 para 6. See further PARA 385.

2 Financial Services and Markets Act 2000 Sch 1 para 16(2). As to authorised persons see PARA 314.

3 Financial Services and Markets Act 2000 Sch 1 para 16(3).

4 Financial Services and Markets Act 2000 Sch 1 para 16(4).

5 Financial Services and Markets Act 2000 Sch 1 para 16(5).

6 Financial Services and Markets Act 2000 Sch 1 para 16(6). Schedule 1 para 16(6)-(10), (12)(a) also applies to a proposal to alter or replace the complaints scheme: Sch 1 para 16(13). As to the complaints scheme see PARAS 36, 37.

7 Financial Services and Markets Act 2000 Sch 1 para 16(7). Before making the scheme, the Authority must have regard to any representations made to it in accordance with Sch 1 para 16(7): Sch 1 para 16(8).

8 Financial Services and Markets Act 2000 Sch 1 para 16(9)(a).

9 Financial Services and Markets Act 2000 Sch 1 para 16(9)(b).

10 le the draft published under the Financial Services and Markets Act 2000 Sch 1 para 16(6): see the text to note 6.

11 le in addition to complying with the Financial Services and Markets Act 2000 Sch 1 para 16(9).

12 Financial Services and Markets Act 2000 Sch 1 para 16(10).

13 Financial Services and Markets Act 2000 Sch 1 para 16(11).

14 Financial Services and Markets Act 2000 Sch 1 para 16(12)(a).

15 Financial Services and Markets Act 2000 Sch 1 para 16(12)(b).

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## ***B. CONSTITUTION***

### **13. Constitution of the Financial Services Authority.**

The constitution of the Financial Services Authority must provide for the Authority to have a chairman<sup>1</sup> and a governing body<sup>2</sup>. The governing body must include the chairman<sup>3</sup>. The chairman and other members of the governing body must be appointed, and be liable to removal from office, by the Treasury<sup>4</sup>.

The validity of any act of the Authority is not affected by a vacancy in the office of chairman<sup>5</sup> or by a defect in the appointment of a person as a member of the governing body or as chairman<sup>6</sup>.

1 Financial Services and Markets Act 2000 Sch 1 para 2(1)(a). The Authority must comply with the requirements as to its constitution set out in Sch 1: s 1(2). Schedule 1 also makes provision about the status of the Authority (see PARA 20) and the exercise of certain of its functions: s 1(3).

2 Financial Services and Markets Act 2000 Sch 1 para 2(1)(b).

3 Financial Services and Markets Act 2000 Sch 1 para 2(2).

4 Financial Services and Markets Act 2000 Sch 1 para 2(3).

5 Financial Services and Markets Act 2000 Sch 1 para 2(4)(a).

6 Financial Services and Markets Act 2000 Sch 1 para 2(4)(b).

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### **14. Non-executive members of the governing body.**

The Financial Services Authority must secure:

- 31 (1) that the majority of the members of its governing body are non-executive members<sup>1</sup>; and
- 32 (2) that a committee of its governing body, consisting solely of the non-executive members, is set up and maintained for the purposes of discharging the functions conferred on the committee<sup>2</sup>.

The members of this non-executive committee<sup>3</sup> are to be appointed by the Authority<sup>4</sup>. The non-executive committee is to have a chairman appointed by the Treasury from among its members<sup>5</sup>.

The non-executive functions listed below are functions<sup>6</sup> of the Authority but must be discharged by the non-executive committee<sup>7</sup>. The non-executive functions are:

- 33 (a) keeping under review the question whether the Authority is, in discharging its functions in accordance with decisions of its governing body, using its resources in the most efficient and economic way<sup>8</sup>;
- 34 (b) keeping under review the question whether the Authority's internal financial controls secure the proper conduct of its financial affairs<sup>9</sup>; and
- 35 (c) determining the remuneration of the chairman of the Authority's governing body, and the executive members of that body<sup>10</sup>.

The committee must prepare a report on the discharge of its functions for inclusion in the Authority's annual report to the Treasury<sup>11</sup>. The committee's report must relate to the same period as that covered by the Authority's report<sup>12</sup>.

1 Financial Services and Markets Act 2000 Sch 1 para 3(1)(a).

2 Financial Services and Markets Act 2000 Sch 1 para 3(1)(b). The functions referred to in the text are those conferred on the committee by Sch 1.

3 Financial Services and Markets Act 2000 Sch 1 para 1(1).

4 Financial Services and Markets Act 2000 Sch 1 para 3(2).

5 Financial Services and Markets Act 2000 Sch 1 para 3(3).

6 For the Financial Services and Markets Act 2000 Sch 1, 'functions', in relation to the Authority, means functions conferred on the Authority by or under any provision of the Act: s 1, Sch 1 para 1(1).

7 Financial Services and Markets Act 2000 Sch 1 para 4(2).

8 Financial Services and Markets Act 2000 Sch 1 para 4(3)(a).

9 Financial Services and Markets Act 2000 Sch 1 para 4(3)(b). The function mentioned in Sch 1 para 4(3)(b) (see head (b) in the text) and those mentioned in Sch 1 para 4(3)(c) (see head (c) in the text) may be discharged on behalf of the committee by a sub-committee: Sch 1 para 4(4).

Any sub-committee of the committee must have as its chairman the chairman of the committee but may include persons other than members of the committee: Sch 1 para 4(5).

As to arrangements for discharging functions of the Authority see PARA 15.

10 Financial Services and Markets Act 2000 Sch 1 para 4(3)(c). See note 9.

11 Financial Services and Markets Act 2000 Sch 1 para 4(6). As to the Authority's annual report under Sch 1 para 10 see PARA 18.

12 Financial Services and Markets Act 2000 Sch 1 para 4(7).

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### **15. Arrangements made by the Financial Services Authority for discharging its functions.**

The Financial Services Authority may make arrangements for any of its functions<sup>1</sup> to be discharged by a committee, sub-committee, officer or member of staff of the Authority<sup>2</sup>.

However, in exercising its legislative functions<sup>3</sup>, the Authority must act through its governing body<sup>4</sup>. The Authority's legislative functions are:

- 36 (1) making rules<sup>5</sup>;
- 37 (2) issuing codes<sup>6</sup>;
- 38 (3) issuing statements<sup>7</sup>;
- 39 (4) giving directions<sup>8</sup>;
- 40 (5) issuing general guidance<sup>9</sup> or guidance on outsourcing by investment firms and credit institutions<sup>10</sup>.

1 As to the meaning of 'functions' in relation to the Authority see PARA 14 note 6.

2 Financial Services and Markets Act 2000 Sch 1 para 5(1). Schedule 1 para 5(1) does not apply to the non-executive functions: Sch 1 para 5(3). As to the non-executive functions see PARA 14. As to the distribution of functions as seen by the Treasury, the Authority and the Bank of England see the Memorandum of Understanding between them; and see PARA 807.

3 See under the Financial Services and Markets Act 2000 Sch 1 para 1(2)(a)-(d): see the text to notes 4-8.

4 Financial Services and Markets Act 2000 Sch 1 para 5(2)(a) (Sch 1 para 5(2) substituted by SI 2007/1973). The legislative function mentioned in the Financial Services and Markets Act 2000 Sch 1 para 1(2)(e) (see the text to note 9) may not be discharged by an officer or member of staff of the Authority: Sch 1 para 5(2)(b) (as so substituted).

For modifications to Sch 1 paras 1(2), 5 when the Authority is exercising functions under Pt VI as the competent authority see s 72(2), Sch 7 para 5. See further PARA 385.

5 Financial Services and Markets Act 2000 Sch 1 para 1(2)(a).

6 Financial Services and Markets Act 2000 Sch 1 para 1(2)(b). As to the power to issue codes see s 64 (see PARA 372) and s 119 (see PARA 439).

7 Financial Services and Markets Act 2000 Sch 1 para 1(2)(c). As to the power to issue statements see s 64 (see PARA 372), s 69 (see PARA 375), s 124 (see PARA 441) and s 210 (see PARA 467).

8 Financial Services and Markets Act 2000 Sch 1 para 1(2)(d). As to the power to issue directions see s 316 (see PARA 743), s 318 (see PARA 745) and s 328 (see PARA 752).

9 As to the meaning of 'general guidance' see PARA 35 note 1.

10 Financial Services and Markets Act 2000 Sch 1 para 1(2)(e) (amended by SI 2006/2975). As to guidance on outsourcing by investment firms and credit institutions under the Financial Services and Markets Act 2000 s 158A see PARA 35.



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## 16. Fees.

The Financial Services Authority may make rules providing for the payment to it of such fees, in connection with the discharge of any of its functions<sup>1</sup> under or as a result of the Financial Services and Markets Act 2000, as it considers will (taking account of its expected income from fees and charges provided for by any other provision of the Financial Services and Markets Act 2000) enable it<sup>2</sup> to:

- 41 (1) meet expenses incurred in carrying out its functions or for any incidental purpose<sup>3</sup>;
- 42 (2) repay the principal of, and pay any interest on, any money which it has borrowed and which has been used for the purpose of meeting expenses incurred in relation to its assumption of functions under the Financial Services and Markets Act 2000 or the Bank of England Act 1998<sup>4</sup>; and
- 43 (3) maintain adequate reserves<sup>5</sup>.

In fixing the amount of any fee which is to be payable to the Authority, no account is to be taken of any sums which the Authority receives, or expects to receive, by way of penalties imposed by it under the Financial Services and Markets Act 2000<sup>6</sup>. Any fee which is owed to the Authority under any provision made by or under the Financial Services and Markets Act 2000 may be recovered as a debt due to the Authority<sup>7</sup>.

1 As to the meaning of 'functions' in relation to the Financial Services Authority see PARA 14 note 6.

2 Financial Services and Markets Act 2000 Sch 1 para 17(1). See also the Authority's Handbook of Rules and Guidance, which has schedules of fees and other payments in each sourcebook or manual. As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 Sch 1 para 17(1)(a).

4 Financial Services and Markets Act 2000 Sch 1 para 17(1)(b). Schedule 1 para 17(1)(b) applies whether expenses were incurred before or after the coming into force of the Financial Services and Markets Act 2000 or the Bank of England Act 1998: Financial Services and Markets Act 2000 Sch 1 para 17(3). As to the Authority's functions under the Bank of England Act 1998 see PARA 792 et seq.

Schedule 1 para 17 is to apply for the purposes of the Regulated Covered Bonds Regulations 2008, SI 2008/346, as it applies for the purposes of the Financial Services and Markets Act 2000, but with the following modifications: (1) Sch 1 para 17(1)(b), (c) is omitted; (2) for the reference in Sch 1 para 17(2) to 'penalties imposed by it under the Financial Services and Markets Act 2000' there is substituted a reference to 'penalties imposed by it under the Regulated Covered Bonds Regulations 2008, SI 2008/346'; and (3) the Financial Services and Markets Act 2000 Sch 1 para 17(3) is omitted: see the Regulated Covered Bonds Regulations 2008, SI 2008/346, Schedule para 5. As to the Regulated Covered Bonds Regulations 2008, SI 2008/346, generally see PARA 6 note 1.

5 Financial Services and Markets Act 2000 Sch 1 para 17(1)(c). See note 4.

6 Financial Services and Markets Act 2000 Sch 1 para 17(2). See note 4.

7 Financial Services and Markets Act 2000 Sch 1 para 17(4). The power conferred by Sch 1 para 17 may not be used to require: (1) a fee to be paid in respect of the discharge of any of the Authority's functions under Sch 3 para 13, 14, 19 or 20 (see PARAS 315, 323-324); or (2) a fee to be paid by any person whose application for approval under s 59 (see PARA 367) has been granted: Sch 1 para 18.

For modifications to Sch 1 para 17 when the Authority is exercising functions under Pt VI (ss 72-103) as the competent authority see s 72(2), Sch 7 para 7. See further PARA 385.

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## 17. Records.

The Financial Services Authority must maintain satisfactory arrangements for recording decisions made in the exercise of its functions<sup>1</sup> and for the safe-keeping of those records which it considers ought to be preserved<sup>2</sup>.

1 Financial Services and Markets Act 2000 Sch 1 para 9(a). As to the meaning of 'functions' in relation to the Authority see PARA 14 note 6. See also the Authority's Handbook of Rules and Guidance, which has a summary of record-keeping requirements in each sourcebook or manual. As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 Sch 1 para 9(b).

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## 18. Annual report.

At least once a year the Financial Services Authority must make a report to the Treasury<sup>1</sup> on:

- 44 (1) the discharge of its functions<sup>2</sup>;
- 45 (2) the extent to which, in its opinion, the regulatory objectives<sup>3</sup> have been met<sup>4</sup>;
- 46 (3) its consideration of matters relating to the discharge of its general functions<sup>5</sup>;
- and
- 47 (4) such other matters as the Treasury may from time to time direct<sup>6</sup>.

This report must be accompanied by the report prepared by the non-executive committee<sup>7</sup> and such other reports or information, prepared by such persons, as the Treasury may from time to time direct<sup>8</sup>.

The Treasury must lay before Parliament a copy of each such report received by it<sup>9</sup>.

The Treasury may require the Authority to comply with any provisions of the Companies Act 2006 about accounts and its audit which would not otherwise apply to it<sup>10</sup>, or direct that any such provision of the Companies Act 2006 is to apply to the Authority with such modifications as are specified in the direction<sup>11</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 Financial Services and Markets Act 2000 Sch 1 para 10(1)(a). As to the meaning of 'functions' in relation to the Authority see PARA 14 note 6.

3 As to the regulatory objectives see PARAS 6, 8.

- 4 Financial Services and Markets Act 2000 Sch 1 para 10(1)(b).
- 5 Financial Services and Markets Act 2000 Sch 1 para 10(1)(c). As to the matters relating to the discharge of the Authority's general functions see s 2(3); and PARA 6.
- 6 Financial Services and Markets Act 2000 Sch 1 para 10(1)(d).
- 7 Financial Services and Markets Act 2000 Sch 1 para 10(2)(a). The non-executive committee's report is prepared under Sch 1 para 4(6): see PARA 14. As to the non-executive committee see PARA 14.
- 8 Financial Services and Markets Act 2000 Sch 1 para 10(2)(b).
- 9 Financial Services and Markets Act 2000 Sch 1 para 10(3).
- 10 Financial Services and Markets Act 2000 Sch 1 para 10(4)(a) (amended by SI 2008/948). As to such provisions about accounts and audit see **COMPANIES**. Compliance with any requirement imposed under the Financial Services and Markets Act 2000 Sch 1 para 10(4)(a) or Sch 1 para 10(4)(b) is enforceable by injunction: Sch 1 para 10(5). Proceedings under Sch 1 para 10(5) may be brought only by the Treasury: Sch 1 para 10(6). As to injunctions see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.
- 11 Financial Services and Markets Act 2000 Sch 1 para 10(4)(b). See note 10.

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## **19. Annual public meeting.**

Not later than three months after making its annual report<sup>1</sup>, the Financial Services Authority must hold a public meeting for the purposes of enabling that report to be considered<sup>2</sup>.

The Authority must organise the annual meeting so as to allow:

- 48 (1) a general discussion of the contents of the report which is being considered<sup>3</sup>; and
- 49 (2) a reasonable opportunity for those attending the meeting to put questions to the Authority about the way in which it discharged, or failed to discharge, its functions<sup>4</sup> during the period to which the report relates<sup>5</sup>.

Otherwise the annual meeting is to be organised and conducted in such a way as the Authority considers appropriate<sup>6</sup>.

The Authority must give reasonable notice of its annual meeting<sup>7</sup>. That notice must:

- 50 (a) give details of the time and place at which the meeting is to be held<sup>8</sup>;
- 51 (b) set out the proposed agenda for the meeting<sup>9</sup>;
- 52 (c) indicate the proposed duration of the meeting<sup>10</sup>;
- 53 (d) give details of the Authority's arrangements for enabling persons to attend<sup>11</sup>; and
- 54 (e) be published by the Authority in the way appearing to it to be most suitable for bringing the notice to the attention of the public<sup>12</sup>.

If the Authority proposes to alter any of the arrangements which have been included in the notice it must give reasonable notice of the alteration<sup>13</sup> and publish that notice in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>14</sup>.

Not later than one month after its annual meeting, the Authority must publish a report of the proceedings of the meeting<sup>15</sup>.

1 le under the Financial Services and Markets Act 2000 Sch 1 para 10: see PARA 18.

2 Financial Services and Markets Act 2000 Sch 1 para 11(1).

3 Financial Services and Markets Act 2000 Sch 1 para 11(2)(a).

4 As to the meaning of 'functions' in relation to the Authority see PARA 14 note 6. As to the matters to which the Authority must have regard in discharging its general functions see the Financial Services and Markets Act 2000 s 2(3); and PARA 6.

5 Financial Services and Markets Act 2000 Sch 1 para 11(2)(b).

6 Financial Services and Markets Act 2000 Sch 1 para 11(3).

7 Financial Services and Markets Act 2000 Sch 1 para 11(4).

8 Financial Services and Markets Act 2000 Sch 1 para 11(5)(a).

9 Financial Services and Markets Act 2000 Sch 1 para 11(5)(b).

10 Financial Services and Markets Act 2000 Sch 1 para 11(5)(c).

11 Financial Services and Markets Act 2000 Sch 1 para 11(5)(d).

12 Financial Services and Markets Act 2000 Sch 1 para 11(5)(e).

13 Financial Services and Markets Act 2000 Sch 1 para 11(6)(a).

14 Financial Services and Markets Act 2000 Sch 1 para 11(6)(b).

15 Financial Services and Markets Act 2000 Sch 1 para 12.

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## **20. Status of the Financial Services Authority and disqualification of its members from the House of Commons.**

In relation to any of its functions<sup>1</sup> the Financial Services Authority is not to be regarded as acting on behalf of the Crown<sup>2</sup>, and its members, officers and staff are not to be regarded as Crown servants<sup>3</sup>.

A member of the governing body of the Financial Services Authority<sup>4</sup> is disqualified for membership of the House of Commons<sup>5</sup>.

1 As to the meaning of 'functions' in relation to the Financial Services Authority see PARA 14 note 6. As to the general functions of the Financial Services Authority see PARA 6.

2 Financial Services and Markets Act 2000 Sch 1 para 13(a).

3 Financial Services and Markets Act 2000 Sch 1 para 13(b).

4 As to the governing body of the Financial Services Authority see PARA 13.

5 See the House of Commons Disqualification Act 1975 s 1, Sch 1 Pt III (amended by the Financial Services and Markets Act 2000 s 1, Sch 1 para 20); and **PARLIAMENT** vol 78 (2010) PARA 908.

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## **(ii) Rules and Guidance by the Financial Services Authority**

### **A. IN GENERAL**

#### **21. General rule-making power.**

The Financial Services Authority<sup>1</sup> may make such rules applying to authorised persons<sup>2</sup>:

- 55 (1) with respect to the carrying on by them of regulated activities<sup>3</sup>; or
- 56 (2) with respect to the carrying on by them of activities which are not regulated activities<sup>4</sup>,

as appear to it to be necessary or expedient for the purpose of protecting the interests of consumers<sup>5</sup>. The Authority may also make such rules applying to authorised persons who are investments firms or credit institutions, with respect to the provision by them of a relevant ancillary service, as appear to the Authority to be necessary or expedient for the purpose of protecting the interests of consumers<sup>6</sup>. Such rules<sup>7</sup> are referred to in the Financial Services and Markets Act 2000 as the Authority's 'general rules'<sup>8</sup>. The Authority's power to make general rules is not limited by any other power which it has to make regulating provisions<sup>9</sup>.

The Authority's general rules may make provision applying to authorised persons even though there is no relationship between the authorised persons to whom the rules will apply and the persons whose interests will be protected by the rules<sup>10</sup>.

General rules may contain requirements which take into account, in the case of an authorised person who is a member of a group<sup>11</sup>, any activity of another member of the group<sup>12</sup>.

General rules may not:

- 57 (a) make provision prohibiting an EEA firm<sup>13</sup> from carrying on, or holding itself out as carrying on, any activity which it has permission<sup>14</sup> to carry on in the United Kingdom<sup>15</sup>;
- 58 (b) make provision, as respects an EEA firm, about any matter responsibility for which is, under any of the Single Market Directives<sup>16</sup>, reserved to the firm's home state regulator<sup>17</sup>.

General rules<sup>18</sup> may require a relevant authorised person<sup>19</sup> to pay interest in specified<sup>20</sup> circumstances in respect of claims made for compensation<sup>21</sup>.

- 1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq. As to the Authority's Handbook generally see PARA 22.
- 2 As to authorised persons see PARA 314.
- 3 Financial Services and Markets Act 2000 s 138(1)(a).
- 4 Financial Services and Markets Act 2000 s 138(1)(b).
- 5 Financial Services and Markets Act 2000 s 138(1). 'Consumers' means persons:
  - 1 (1) who use, have used, or are or may be contemplating using, any of the services provided by: (a) authorised persons in carrying on regulated activities (s 138(7)(a)(i)); (b) authorised persons who are investment firms or credit institutions in providing a relevant ancillary service (s 138(7)(a)(ia) (added by SI 2006/2975)); or (c) persons acting as appointed representatives (see PARA 346) (Financial Services and Markets Act 2000 s 138(7)(a)(ii));
  - 2 (2) who have rights or interests which are derived from, or are otherwise attributable to, the use of any such services by other persons (s 138(7)(b)); or
  - 3 (3) who have rights or interests which may be adversely affected by the use of any such services by persons acting on their behalf or in a fiduciary capacity in relation to them (s 138(7)(c)).

In the Financial Services and Markets Act 2000 'investment firm' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.1: Financial Services and Markets Act 2000 s 424A(1) (s 424A added by SI 2006/2975). The Financial Services and Markets Act 2000 s 424A(1) is subject to s 424A(3)-(5): s 424A(2) (as so added). References in the Financial Services and Markets Act 2000 to an 'investment firm' include references to a person who would be an investment firm (within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.1) if, in the case of a body corporate, his registered office or, if he has no registered office, his head office; and, in the case of a person other than a body corporate, his head office, were in an EEA state: Financial Services and Markets Act 2000 s 424A(3) (s 424A as so added; s 424A(3) substituted by SI 2007/126). However the Financial Services and Markets Act 2000 s 424A(3) does not apply if the person in question is one to whom the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) would not apply by virtue of art 2: Financial Services and Markets Act 2000 s 424A(4) (as so added). References in the Financial Services and Markets Act 2000 to an 'investment firm' do not include references to (i) a person to whom the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) does not apply by virtue of art 2; or (ii) a person whose home member state (within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.20) is an EEA state and to whom, by reason of the fact that the state has given effect to art 3, that directive does not apply by virtue of that article: Financial Services and Markets Act 2000 s 424A(5) (as so added). As to the meaning of 'EEA state' see PARA 315 note 1.

'Credit institution' means: (A) a credit institution authorised under the Banking Consolidation Directive (ie European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of credit institutions); or (B) an institution which would satisfy the requirements for authorisation as a credit institution under the Banking Consolidation Directive (ie European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)) if it had its registered office (or if it does not have a registered office, its head office) in an EEA state: Financial Services and Markets Act 2000 s 138(1B) (s 138(1A)-(1C) added by SI 2006/2975). 'Relevant ancillary service' means any service of a kind mentioned in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) Annex 1 Section B the provision of which does not involve the carrying on of a regulated activity: Financial Services and Markets Act 2000 s 138(1C) (as so added).

If an authorised person is carrying on a regulated activity in his capacity as a trustee, the persons who are, have been or may be beneficiaries of the trust are to be treated as persons who use, have used or are or may be contemplating using services provided by the authorised person in his carrying on of that activity: s 138(8).

For the purposes of s 138(7), a person who deals with an authorised person in the course of the authorised person's carrying on of a regulated activity is to be treated as using services provided by the authorised person in carrying on those activities: s 138(9). As to regulated activities see PARA 84 et seq. As to the Regulated Covered Bonds Regulations 2008, SI 2008/346, see PARA 6.

- 6 Financial Services and Markets Act 2000 s 138(1A) (as added: see note 5). As to the meanings of 'investment firm', 'credit institution' and 'relevant ancillary service' see note 5.
- 7 The rules under the Financial Services and Markets Act 2000 s 138.

- 8 Financial Services and Markets Act 2000 ss 138(2), 417(1).
- 9 Financial Services and Markets Act 2000 s 138(3). As to the meaning of 'regulating provisions' see PARA 38 note 2.
- 10 Financial Services and Markets Act 2000 s 138(4).
- 11 As to the meaning of 'group' see PARA 351 note 37.
- 12 Financial Services and Markets Act 2000 s 138(5).
- 13 As to the meaning of 'EEA firm' see PARA 315 note 1.
- 14 The permission conferred by the Financial Services and Markets Act 2000 Sch 3 Pt II: see PARA 315 et seq.
- 15 Financial Services and Markets Act 2000 s 138(6)(a). As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 16 As to the meaning of 'Single Market Directives' see PARA 86 note 6.
- 17 Financial Services and Markets Act 2000 s 138(6)(b). As to the meaning of 'home state regulator' see PARA 315 note 1.
- 18 The rules made by the Authority under the Financial Services and Markets Act 2000 s 138.
- 19 'Relevant authorised person' means an authorised person with a Part IV permission: (1) to effect or carry out relevant contracts of insurance; or (2) to manage the underwriting capacity of a Lloyd's syndicate as a managing agent, the members of which effect or carry out relevant contracts of insurance underwritten at Lloyd's, where 'relevant contract of insurance' means a contract of insurance against damage arising out of or in connection with the use of motor vehicles on land (other than carrier's liability): Financial Services and Markets Act 2000 (Fourth Motor Insurance Directive) Regulations 2002, SI 2002/2706, reg 2(2)(a). As to the meaning of 'Part IV permission' see PARA 348.
- 20 'Specified' means specified in the rules: Financial Services and Markets Act 2000 (Fourth Motor Insurance Directive) Regulations 2002, SI 2002/2706, reg 2(2)(b).
- 21 Financial Services and Markets Act 2000 (Fourth Motor Insurance Directive) Regulations 2002, SI 2002/2706, reg 2(1).

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## **22. Handbook of Rules and Guidance.**

The Financial Services and Markets Act 2000<sup>1</sup> gives to the Financial Services Authority<sup>2</sup> a number of rule-making powers and powers to give guidance. The Act requires the Authority to exercise its rule-making powers in writing. It describes the document by which the rules are made as a 'rule-making instrument' and imposes a number of requirements, including a requirement to publish it<sup>3</sup>. For the most part the rules are contained in the Authority's Handbook of Rules and Guidance<sup>4</sup>. The Handbook is available on the Internet, on CD-ROM and on paper. In the latter two forms it is intended to provide a continuously updated consolidation of the contents of the instruments by which the provisions in the Handbook are made, and all instruments by which provisions in the Handbook are made or amended are published in full on the Authority's website.

The Handbook consists of sourcebooks (providing sources of the Authority's requirements and guidance) and manuals (containing processes to be followed), each divided into chapters<sup>5</sup>. Each

chapter is divided into sections and each section into paragraphs of provisions with an icon indicating the paragraph's regulatory status. The different types of provisions and icons include the following:

- 59 (1) rules ('R'), including general rules<sup>6</sup>, specialised rules<sup>7</sup>, listing rules<sup>8</sup> and rules made under other powers and the Principles for Business;
- 60 (2) directions and requirements ('D') under various powers conferred by the Financial Services and Markets Act 2000<sup>9</sup>;
- 61 (3) Statements of Principle ('P') for approved persons<sup>10</sup>;
- 62 (4) descriptions of behaviour<sup>11</sup> ('C') which, in the Authority's opinion, do not amount to market abuse;
- 63 (5) evidential provisions<sup>12</sup> ('E');
- 64 (6) guidance<sup>13</sup> ('G') relating to the operation of the Financial Services and Markets Act 2000, the rules in the Handbook and other matters; and
- 65 (7) non-Authority legislative material relating to the UK ('UK') and the EU ('EU').

1   Ie in the Financial Services and Markets Act 2000 Pt X Ch I (ss 138-156), Ch II (ss 157-158A): see PARAS 21, 25 et seq.

2   As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

3   See PARA 24.

4   There are general references to the Authority's Handbook of Rules and Guidance throughout this title.

5   The sourcebooks and manuals are arranged into groups according to their subject matter. Each sourcebook or manual has an appropriate reference code. They may have one or more appendices and, similarly, the chapters may have annexes to them with material supplementing the contents of the chapter. Reference should be made to the Authority's website or to the Handbook itself for more detailed information. At the date at which this volume states the law, the Authority's website address is [www.fsa.gov.uk](http://www.fsa.gov.uk).

6   Ie under the Financial Services and Markets Act 2000 s 138: see PARA 21.

7   Ie under the Financial Services and Markets Act 2000 ss 140-147: see PARAS 26-31.

8   Ie under the Financial Services and Markets Act 2000 s 73A: see PARA 385.

9   Eg under the Financial Services and Markets Act 2000 s 51(3) (form and content of applications for Part IV permission): see PARA 348.

10   Ie under the Financial Services and Markets Act 2000 s 64: see PARA 372.

11   Ie under the Financial Services and Markets Act 2000 s 119(2)(b): see PARA 439.

12   Ie under the Financial Services and Markets Act 2000 s 149: see PARA 32. 'E' is also used for paragraphs that make up the Code of Practice for Approved Persons made under s 64 (see PARA 372) and for certain paragraphs in the Code of Market Conduct made under s 119 (see PARA 439).

13   Ie under the Financial Services and Markets Act 2000 s 157: see PARA 34. 'G' is also used for the Authority's statement of the procedure for giving statutory notices under s 395 (see PARA 777), the Authority's statements of policies on penalties as required by the Financial Services and Markets Act 2000 and the conduct of interviews to which a direction under s 169(7) (see PARA 450) has been given or the Authority is considering giving. 'G' is also used to indicate the arrangements made by the Authority under Sch 1 para 7 (see PARAS 16, 36) for the investigation of complaints arising in connection with its exercise or non-exercise of its non-legislative functions and to indicate background information which is not guidance under the Financial Services and Markets Act 2000.



AND THE TRIBUNAL/(ii) Rules and Guidance by the Financial Services Authority/A. IN GENERAL/23. Modification or waiver of certain rules.

### **23. Modification or waiver of certain rules.**

The Financial Services Authority<sup>1</sup> may, on the application or with the consent of a person who is subject to rules<sup>2</sup> made by the Authority, direct that all or any of the rules<sup>3</sup> are not to apply to that person<sup>4</sup> or are to apply to him with such modifications as may be specified in the direction<sup>5</sup>.

An application must be made in such manner as the Authority may direct<sup>6</sup>.

The Authority may not give a direction unless it is satisfied that:

- 66 (1) compliance by the person with the rules, or with the rules as unmodified, would be unduly burdensome or would not achieve the purpose for which the rules were made<sup>7</sup>; and
- 67 (2) the direction would not result in undue risk to persons whose interests the rules are intended to protect<sup>8</sup>.

A direction may be given subject to conditions<sup>9</sup>.

Unless it is satisfied that it is inappropriate or unnecessary to do so, a direction must be published by the Authority in such a way as it thinks most suitable for bringing the direction to the attention of those likely to be affected by it<sup>10</sup> and others who may be likely to make an application for a similar direction<sup>11</sup>. In deciding whether it is so satisfied, the Authority must:

- 68 (a) take into account whether the direction relates to a rule contravention of which is actionable<sup>12</sup>;
- 69 (b) consider whether its publication would prejudice, to an unreasonable degree, the commercial interests of the person concerned or any other member of his immediate group<sup>13</sup>; and
- 70 (c) consider whether its publication would be contrary to an international obligation of the United Kingdom<sup>14</sup>.

For the purposes of heads (b) and (c) above, the Authority must consider whether it would be possible to publish the direction without either of the consequences mentioned in those heads by publishing it without disclosing the identity of the person concerned<sup>15</sup>.

The Authority may revoke a direction<sup>16</sup> or vary it on the application, or with the consent, of the authorised person to whom it relates<sup>17</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq. See also the Authority's Handbook of Rules and Guidance, Supervision Manual (SUP) Ch 8. As to the Handbook generally see PARA 22.

2 'Rule' means a rule made by the Authority under the Financial Services and Markets Act 2000: s 417(1).

3 Ie other than rules made under the Financial Services and Markets Act 2000 s 247 (trust scheme rules) (see PARA 614) or s 248 (scheme particulars rules) (see PARA 615).

4 Financial Services and Markets Act 2000 s 148(2)(a) (s 148(2) substituted by SI 2007/1973).

5 Financial Services and Markets Act 2000 s 148(2)(b) (as substituted: see note 4). 'Direction' means a direction under s 148(2): s 148(10).

6 Financial Services and Markets Act 2000 s 148(3).

- 7 Financial Services and Markets Act 2000 s 148(4)(a) (amended by SI 2007/1973).
- 8 Financial Services and Markets Act 2000 s 148(4)(b).
- 9 Financial Services and Markets Act 2000 s 148(5).
- 10 Financial Services and Markets Act 2000 s 148(6)(a).
- 11 Financial Services and Markets Act 2000 s 148(6)(b).
- 12 Financial Services and Markets Act 2000 s 148(7)(a). As to actions see s 150; and PARA 33.
- 13 Financial Services and Markets Act 2000 s 148(7)(b) (amended by SI 2007/1973). 'Immediate group', in relation to a person ('A'), means: (1) A himself; (2) a parent undertaking of A; (3) a subsidiary undertaking of A; (4) a subsidiary undertaking of a parent undertaking of A; (5) a parent undertaking of a subsidiary undertaking of A: s 148(11) (amended by SI 2007/1973). As to the meaning of 'group' see PARA 351 note 37. As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 351 note 32. As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 14 Financial Services and Markets Act 2000 s 148(7)(c).
- 15 Financial Services and Markets Act 2000 s 148(8) (amended by SI 2007/1973).
- 16 Financial Services and Markets Act 2000 s 148(9)(a).
- 17 Financial Services and Markets Act 2000 s 148(9)(b).

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## **24. Rule-making instruments.**

If the Financial Services Authority<sup>1</sup> makes any rules, it must give a copy to the Treasury<sup>2</sup> without delay<sup>3</sup>. If the Authority alters or revokes any rules, it must give written notice to the Treasury without delay<sup>4</sup> and such notice must include details of the alteration<sup>5</sup>.

Any power conferred on the Authority to make rules is exercisable in writing<sup>6</sup>. A rule-making instrument must specify the provision under which the rules are made<sup>7</sup>. A rule-making instrument must be published by the Authority in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>8</sup>. The Authority may charge a reasonable fee for providing a person with a copy of a rule-making instrument<sup>9</sup>. A person is not to be taken to have contravened any rule made by the Authority if he shows that at the time of the alleged contravention the rule-making instrument concerned had not been made available as described above<sup>10</sup>.

The production of a printed copy of a rule-making instrument purporting to be made by the Authority on which is indorsed a certificate signed by a member of the Authority's staff authorised by it for that purpose<sup>11</sup>, and which contains the required statements<sup>12</sup>, is evidence of the facts stated in the certificate<sup>13</sup>. A certificate purporting to be signed is to be taken to have been properly signed unless the contrary is shown<sup>14</sup>. A person who wishes in any legal proceedings to rely on a rule-making instrument may require the Authority to indorse a copy of the instrument with a certificate<sup>15</sup>.

If the Authority proposes to make any rules, it must publish a draft of the proposed rules in the way appearing to it to be best calculated to bring them to the attention of the public<sup>16</sup>. The draft must be accompanied by:

- 71 (1) a cost benefit analysis<sup>17</sup>;
- 72 (2) an explanation of the purpose of the proposed rules<sup>18</sup>;
- 73 (3) an explanation of the Authority's reasons for believing that making the proposed rules is compatible with its general duties<sup>19</sup>; and
- 74 (4) notice that representations about the proposals may be made to the Authority within a specified time<sup>20</sup>.

In the case of a proposal to make rules under certain provisions<sup>21</sup>, the draft must also be accompanied by details of the expected expenditure by reference to which the proposal is made<sup>22</sup>. Before making the proposed rules, the Authority must have regard to any representations made to it in accordance with head (4) above<sup>23</sup>.

If the Authority makes the proposed rules, it must publish an account, in general terms, of the representations made to it<sup>24</sup> and its response to them<sup>25</sup>.

If the rules differ from the draft<sup>26</sup> in a way which is, in the opinion of the Authority, significant, the Authority must<sup>27</sup> publish details of the difference<sup>28</sup> and those details must be accompanied by a cost benefit analysis<sup>29</sup>.

Rules made by the Authority may make different provision for different cases and may, in particular, make different provision in respect of different descriptions of authorised person<sup>30</sup>, activity or investment<sup>31</sup>. Rules may contain such incidental, supplemental, consequential and transitional provision as the Authority considers appropriate<sup>32</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

2 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Financial Services and Markets Act 2000 s 152(1). As to the Authority's Handbook of Rules and Guidance generally see PARA 22.

4 Financial Services and Markets Act 2000 s 152(2).

5 Financial Services and Markets Act 2000 s 152(3).

6 Financial Services and Markets Act 2000 s 153(1). When the Authority is exercising functions under Pt VI (ss 72-103) (see PARA 385) as the competent authority, s 153 does not apply: s 72(2), Sch 7 para 4(1).

7 Financial Services and Markets Act 2000 s 153(2). To the extent to which a rule-making instrument does not comply with s 153(2), it is void: s 153(3). See note 6.

8 Financial Services and Markets Act 2000 s 153(4). See note 6.

9 Financial Services and Markets Act 2000 s 153(5). See note 6.

10 Financial Services and Markets Act 2000 s 153(6). See note 6.

11 Financial Services and Markets Act 2000 s 154(1)(a). When the Authority is exercising functions under Pt VI as the competent authority, s 154 does not apply: s 72(2), Sch 7 para 4(1).

12 Financial Services and Markets Act 2000 s 154(1)(b). The required statements are: (1) that the instrument was made by the Authority; (2) that the copy is a true copy of the instrument; and (3) that on a specified date the instrument was made available to the public in accordance with s 153(4): s 154(2). See note 11.

13 Financial Services and Markets Act 2000 s 154(1). See note 11.

14 Financial Services and Markets Act 2000 s 154(3). See note 11.

15 Financial Services and Markets Act 2000 s 154(4). See note 11.

16 Financial Services and Markets Act 2000 s 155(1). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 155(1): s 155(12). Section 155(1)-(6) does not apply if the Authority considers that the delay involved in complying with it would be prejudicial to the interests of consumers: s 155(7).

For modifications to s 155 when the Authority is exercising functions under Pt VI as the competent authority see s 72(2), Sch 7 para 4(2). See further PARA 385.

17 Financial Services and Markets Act 2000 s 155(2)(a). See note 16. 'Cost benefit analysis' means an estimate of the costs together with an analysis of the benefits that will arise (1) if the proposed rules are made; or (2) if s 155(6) (see the text and notes 28-29) applies, from the rules that have been made: s 155(10).

Section 155(2)(a) does not require a cost benefit analysis to be carried out in relation to rules made under s 136(2) (see PARA 68), s 213(1) (see PARA 584), s 234 (see PARA 575) or Sch 1 para 17 (see PARA 16): s 155(9).

Section 155(2)(a) does not apply if the Authority considers: (a) that, making the appropriate comparison, there will be no increase in costs; or (b) that, making that comparison, there will be an increase in costs but the increase will be of minimal significance: s 155(8). 'Appropriate comparison' means: (i) in relation to head (1) in the text, a comparison between the overall position if the rules are made and the overall position if they are not made; (ii) in relation to head (ii) in the text, a comparison between the overall position after the making of the rules and the overall position before they were made: s 155(11).

18 Financial Services and Markets Act 2000 s 155(2)(b). See note 16.

19 Financial Services and Markets Act 2000 s 155(2)(c). See note 16. As to the general duties of the Authority see s 2; and PARA 6.

20 Financial Services and Markets Act 2000 s 155(2)(d). See note 16.

21 Ie under the Financial Services and Markets Act 2000 s 136(2) (see PARA 68), s 213(1) (see PARA 584), s 234 (see PARA 575) or Sch 1 para 17 (see PARA 16): s 155(9).

22 Financial Services and Markets Act 2000 s 155(3). See note 16.

23 Financial Services and Markets Act 2000 s 155(4). See note 16.

24 Financial Services and Markets Act 2000 s 155(5)(a). The representations referred to in the text are those made in accordance with head (4) in the text. See note 16.

25 Financial Services and Markets Act 2000 s 155(5)(b). See note 16.

26 Ie the draft published under the Financial Services and Markets Act 2000 s 155(1): see the text and note 16.

27 Ie in addition to complying with the Financial Services and Markets Act 2000 s 155(5).

28 Financial Services and Markets Act 2000 s 155(6)(a). See note 16.

29 Financial Services and Markets Act 2000 s 155(6)(b). See note 16.

Section 155(6)(b) does not require a cost benefit analysis to be carried out in relation to rules made under s 136(2) (see PARA 68), s 213(1) (see PARA 584), s 234 (see PARA 575) or Sch 1 para 17 (see PARA 16): s 155(9).

Section 155(6)(b) does not apply if the Authority considers: (1) that, making the appropriate comparison, there will be no increase in costs; or (2) that, making that comparison, there will be an increase in costs but the increase will be of minimal significance: s 155(8).

30 As to authorised persons see PARA 314.

31 Financial Services and Markets Act 2000 s 156(1). When the Authority is exercising functions under Pt VI as the competent authority (see PARA 385), s 156 does not apply: Sch 7 para 4(1).

32 Financial Services and Markets Act 2000 s 156(2). See note 31.

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## ***B. RULES FOR PARTICULAR PURPOSES***

### **25. Rules relating to clients' money etc.**

General rules<sup>1</sup> relating to the handling of clients' money (that is, money held by an authorised person<sup>2</sup> in specified<sup>3</sup> circumstances) may:

- 75 (1) make provision which results in clients' money being held on trust in accordance with the rules<sup>4</sup>;
- 76 (2) treat two or more accounts as a single account for specified purposes (which may include the distribution of money held in the accounts)<sup>5</sup>;
- 77 (3) authorise the retention by the authorised person of interest accruing on clients' money<sup>6</sup>; and
- 78 (4) make provision as to the distribution of such interest which is not to be retained by him<sup>7</sup>.

An institution with which an account is kept in pursuance of rules relating to the handling of clients' money does not incur any liability as constructive trustee<sup>8</sup> if money is wrongfully paid from the account, unless the institution permits the payment:

- 79 (a) with knowledge that it is wrongful<sup>9</sup>; or
- 80 (b) having deliberately failed to make inquiries in circumstances in which a reasonable and honest person would have done so<sup>10</sup>.

General rules may confer rights on persons to rescind agreements with, or withdraw offers to, authorised persons within a specified period<sup>11</sup> and may make provision, in respect of authorised persons and persons exercising those rights, for the restitution of property and the making or recovery of payments where those rights are exercised<sup>12</sup>.

1 Financial Services and Markets Act 2000 s 139(5). As to the general rules see PARA 21.

2 As to authorised persons see PARA 314.

3 'Specified' means specified in the rules: Financial Services and Markets Act 2000 s 139(6).

4 Financial Services and Markets Act 2000 s 139(1)(a). See also the Financial Services Authority's Handbook of Rules and Guidance, Business Standards, Client Assets (CASS). As to the Handbook generally see PARA 22.

5 Financial Services and Markets Act 2000 s 139(1)(b).

6 Financial Services and Markets Act 2000 s 139(1)(c).

7 Financial Services and Markets Act 2000 s 139(1)(d).

8 As to constructive trusts see **TRUSTS** vol 48 (2007 Reissue) PARA 625.

9 Financial Services and Markets Act 2000 s 139(2)(a).

10 Financial Services and Markets Act 2000 s 139(2)(b).

- 11 Financial Services and Markets Act 2000 s 139(4)(a).
- 12 Financial Services and Markets Act 2000 s 139(4)(b).

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## **26. Restriction on managers of authorised unit trust schemes.**

The Financial Services Authority<sup>1</sup> may make rules prohibiting an authorised person<sup>2</sup> who has permission to act as (1) the manager of an authorised unit trust scheme<sup>3</sup>; or (2) the management company of an authorised UCITS open-ended investment company<sup>4</sup>, from carrying on a specified activity<sup>5</sup>. Such rules may specify an activity which is not a regulated activity<sup>6</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

2 As to authorised persons see PARA 314.

3 Financial Services and Markets Act 2000 s 140(1)(a) (s 140(1) substituted by SI 2003/2066). As to the meanings of 'unit trust scheme' and 'authorised unit trust scheme' see PARA 603.

4 Financial Services and Markets Act 2000 s 140(1)(b) (as substituted: see note 3). For these purposes, 'authorised UCITS open-ended investment company' means an authorised open-ended investment company to which the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.1985, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities) applies; and 'management company' has the meaning given by art 1a(2): Financial Services and Markets Act 2000 s 140(3) (added by SI 2003/2066).

5 Financial Services and Markets Act 2000 s 140(1) (as substituted: see note 3).

6 Financial Services and Markets Act 2000 s 140(2). As to regulated activities see PARA 84 et seq.

### **UPDATE**

## **26 Restriction on managers of authorised unit trust schemes**

NOTE 4--Directive 85/611 replaced: see PARA 6.

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## **27. Insurance business rules and regulations.**

The Financial Services Authority<sup>1</sup> may make rules prohibiting an authorised person<sup>2</sup> who has permission to effect or carry out contracts of insurance<sup>3</sup> from carrying on a specified activity<sup>4</sup>. Such rules may specify an activity which is not a regulated activity<sup>5</sup>.

The Authority may make rules in relation to contracts entered into by an authorised person in the course of carrying on business which consists of the effecting or carrying out of contracts of long-term insurance<sup>6</sup>. Such rules may, in particular:

- 81 (1) restrict the descriptions of property or indices of the value of property by reference to which the benefits under such contracts may be determined<sup>7</sup>;
- 82 (2) make provision, in the interests of the protection of policyholders<sup>8</sup>, for the substitution of one description of property, or index of value, by reference to which the benefits under a contract are to be determined for another such description of property or index<sup>9</sup>.

Rules made as described above<sup>10</sup> are referred to in the Financial Services and Markets Act 2000 as insurance business rules<sup>11</sup>.

The Treasury<sup>12</sup> may make regulations for the purpose of preventing a person who is not an authorised person but who is a parent undertaking<sup>13</sup> of an authorised person who has permission to effect or carry out contracts of insurance<sup>14</sup>, and falls within a prescribed class<sup>15</sup>, from doing anything to lessen the effectiveness of asset identification rules<sup>16</sup>. Such regulations may, in particular, include provision:

- 83 (a) prohibiting the payment of dividends<sup>17</sup>;
- 84 (b) prohibiting the creation of charges<sup>18</sup>;
- 85 (c) making charges created in contravention of the regulations void<sup>19</sup>.

The Treasury may by regulations provide that, in prescribed circumstances, charges created in contravention of asset identification rules are void<sup>20</sup>.

A person who contravenes the regulations is guilty of an offence<sup>21</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

2 As to authorised persons see PARA 314.

3 As to the meaning of 'contracts of insurance' see PARA 351 note 13.

4 Financial Services and Markets Act 2000 s 141(1).

5 Financial Services and Markets Act 2000 s 141(2). As to regulated activities see PARA 84 et seq. See also the Authority's Handbook of Rules and Guidance, Interim Prudential Sourcebook for Insurers (IPRU(INS)). As to the Handbook generally see PARA 22.

6 Financial Services and Markets Act 2000 s 141(3). As to the meaning of 'contracts of long-term insurance' see PARA 595 note 12.

7 Financial Services and Markets Act 2000 s 141(4)(a).

8 As to the meaning of 'policyholder' see PARA 591 note 15.

9 Financial Services and Markets Act 2000 s 141(4)(b).

10 le made under the Financial Services and Markets Act 2000 s 141.

11 Financial Services and Markets Act 2000 s 141(5).

12 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

13 As to the meaning of 'parent undertaking' see PARA 351 note 32.

14 Financial Services and Markets Act 2000 s 142(1)(a).

15 Financial Services and Markets Act 2000 s 142(1)(b). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1).

16 Financial Services and Markets Act 2000 s 142(1). 'Asset identification rules' means rules made by the Authority which require an authorised person who has permission to effect or carry out contracts of insurance to identify assets which belong to him and which are maintained in respect of a particular aspect of his business: s 142(2).

17 Financial Services and Markets Act 2000 s 142(3)(a).

18 Financial Services and Markets Act 2000 s 142(3)(b). 'Charges' includes mortgages: s 142(6).

19 Financial Services and Markets Act 2000 s 142(3)(c).

20 Financial Services and Markets Act 2000 s 142(4).

21 Financial Services and Markets Act 2000 s 142(5). Such a person is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 142(5). 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144.

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## **28. Price stabilising rules.**

The Financial Services Authority<sup>1</sup> may make price stabilising rules, that is rules as to the circumstances and manner in which<sup>2</sup>, the conditions subject to which<sup>3</sup>, and the time when or the period during which<sup>4</sup>, action may be taken for the purpose of stabilising the price of investments of specified kinds<sup>5</sup>.

Price stabilising rules are to be made so as to apply only to authorised persons<sup>6</sup> and they may make different provision in relation to different kinds of investment<sup>7</sup>.

The Authority may make rules which<sup>8</sup> treat a person who acts or engages in conduct:

86 (1) for the purpose of stabilising the price of investments<sup>9</sup>; and

87 (2) in conformity with such provisions corresponding to price stabilising rules and made by a body or authority outside the United Kingdom<sup>10</sup> as may be specified in the rules under this provision<sup>11</sup>,

as acting, or engaging in that conduct, for that purpose and in conformity with price stabilising rules<sup>12</sup>.

The Treasury<sup>13</sup> may by order impose limitations on the power to make price stabilising rules<sup>14</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.



- 2 Financial Services and Markets Act 2000 s 144(1)(a). See also the Authority's Handbook of Rules and Guidance, Business Standards, Market Conduct (MAR). As to the Handbook generally see PARA 22.
- 3 Financial Services and Markets Act 2000 s 144(1)(b).
- 4 Financial Services and Markets Act 2000 s 144(1)(c).
- 5 Financial Services and Markets Act 2000 s 144(1).
- 6 Financial Services and Markets Act 2000 s 144(2)(a). As to authorised persons see PARA 314.
- 7 Financial Services and Markets Act 2000 s 144(2)(b).
- 8 le for the purposes of the Financial Services and Markets Act 2000 s 397(5)(b): see PARA 568.
- 9 Financial Services and Markets Act 2000 s 144(3)(a).
- 10 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 11 Financial Services and Markets Act 2000 s 144(3)(b).
- 12 Financial Services and Markets Act 2000 s 144(3). If provisions specified in rules made under s 144(3) are altered, the rules continue to apply to those provisions as altered, but only if before the alteration the Authority has notified the body or authority concerned (and has not withdrawn its notification) that it is satisfied with its consultation procedures: s 144(6). 'Consultation procedures' means procedures designed to provide an opportunity for persons likely to be affected by alterations to those provisions to make representations about proposed alterations to any of those provisions: s 144(7) (substituted by the Companies Act 2006 s 964(1), (3)).
- 13 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 14 Financial Services and Markets Act 2000 s 144(4). Such an order may, in particular:
- 4 (1) specify the kinds of investment in relation to which price stabilising rules may make provision (s 144(5)(a));
  - 5 (2) specify the kinds of investment in relation to which rules made under s 144(3) may make provision (s 144(5)(b));
  - 6 (3) provide for price stabilising rules to make provision for action to be taken for the purpose of stabilising the price of investments only in such circumstances as the order may specify (s 144(5)(c));
  - 7 (4) provide for price stabilising rules to make provision for action to be taken for that purpose only at such times or during such periods as the order may specify (s 144(5)(d)).
- No order is to be made under s 144(4) unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(1)(a).

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## **29. Financial promotion rules.**

The Financial Services Authority<sup>1</sup> may make rules applying to authorised persons<sup>2</sup> about the communication by them, or their approval of the communication by others, of invitations or inducements to engage in investment activity<sup>3</sup> or to participate in a collective investment scheme<sup>4</sup>. Such rules<sup>5</sup> may, in particular, make provision about the form and content of

communications<sup>6</sup>. The Treasury<sup>7</sup> may by order impose limitations on the power to make such financial promotion rules<sup>8</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq. See also the Authority's Handbook of Rules and Guidance, Business Standards, Conduct of Business Sourcebook (COBS). As to the Handbook generally see PARA 22.

2 As to authorised persons see PARA 314.

3 Financial Services and Markets Act 2000 s 145(1)(a). As to the meaning of 'engage in investment activity' see PARA 225; definition applied by s 145(4).

Section 145(1) applies only to communications which:

8 (1) if made by a person other than an authorised person, without the approval of an authorised person, would contravene s 21(1) (the restriction on financial promotion) (see PARA 225) (s 145(3)(a));

9 (2) may be made by an authorised person without contravening s 238(1) (restriction on promotion of a collective investment scheme) (see PARA 605) (s 145(3)(b)).

However s 145(3) does not prevent the Authority from making rules under s 145(1) in relation to a communication that would not contravene s 21(1) if made by a person other than an authorised person, without the approval of an authorised person, if the conditions set out in s 145(3B) are satisfied: s 145(3A) (s 145(3A), (3B) added by SI 2006/2975). Those conditions are:

10 (a) that the communication would not contravene the Financial Services and Markets Act 2000 s 21(1) because it is a communication to which that provision does not apply as a result of an order under s 21(5) (see PARA 225) (s 145(3B)(a) (as so added));

11 (b) that the Authority considers that any of the requirements of (i) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 19(1)-(8); or (ii) any implementing measure made under art 19(10), apply to the communication (Financial Services and Markets Act 2000 s 145(3B)(b) (as so added)); and

12 (c) that the Authority considers that the rules are necessary to secure that the communication satisfies such of the requirements mentioned in head (b) as the Authority considers apply to the communication (s 145(3B)(c) (as so added)).

4 Financial Services and Markets Act 2000 s 145(1)(b). See note 3. As to the meaning of 'collective investment scheme' see PARA 603.

5 ie under the Financial Services and Markets Act 2000 s 145.

6 Financial Services and Markets Act 2000 s 145(2).

7 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Financial Services and Markets Act 2000 s 145(5).

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### 30. Money laundering rules.

The Financial Services Authority<sup>1</sup> may make rules in relation to the prevention and detection of money laundering<sup>2</sup> in connection with the carrying on of regulated activities<sup>3</sup> by authorised persons<sup>4</sup>.

At the time of writing, the Authority only imposes high level requirements for institutions to put in place appropriate risk-based procedures to counteract money laundering<sup>5</sup>. However, institutions are of course required to comply with other, statutory requirements relating to money laundering<sup>6</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

2 As to money laundering see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 789 et seq.

3 As to regulated activities see PARA 84 et seq.

4 Financial Services and Markets Act 2000 s 146. As to authorised persons see PARA 314.

5 See the Authority's Handbook of Rules and Guidance, High Level Standards, Senior Management Arrangements, Systems and Controls (SYSC) 3.2. As to the Handbook generally see PARA 22.

6 See in particular the Proceeds of Crime Act 2002; **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq; the Money Laundering Regulations 2007, SI 2007/2157; and PARA 539 et seq.

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### **31. Control of information rules.**

The Financial Services Authority<sup>1</sup> may make rules about the disclosure and use of information held by an authorised person ('A')<sup>2</sup>. These are known as 'control of information rules' and they may:

- 88 (1) require the withholding of information which A would otherwise have to disclose to a person ('B') for or with whom A does business in the course of carrying on any regulated or other activity<sup>3</sup>;
- 89 (2) specify circumstances in which A may withhold information which he would otherwise have to disclose to B<sup>4</sup>;
- 90 (3) require A not to use for the benefit of B information A holds which A would otherwise have to use in that way<sup>5</sup>;
- 91 (4) specify circumstances in which A may decide not to use for the benefit of B information A holds which A would otherwise have to use in that way<sup>6</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

2 Financial Services and Markets Act 2000 s 147(1). As to authorised persons see PARA 314. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 147(2)(a). As to regulated activities see PARA 84 et seq.

4 Financial Services and Markets Act 2000 s 147(2)(b).

- 5 Financial Services and Markets Act 2000 s 147(2)(c).
- 6 Financial Services and Markets Act 2000 s 147(2)(d).

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### **C. CONTRAVENTION OF RULES**

#### **32. Evidential rules.**

If a particular rule<sup>1</sup> so provides, contravention of the rule does not give rise to any of the consequences provided for by other provisions of the Financial Services and Markets Act 2000<sup>2</sup>. A rule which so provides must also provide:

- 92 (1) that contravention may be relied on as tending to establish contravention of such other rule as may be specified<sup>3</sup>; or
- 93 (2) that compliance may be relied on as tending to establish compliance with such other rule as may be specified<sup>4</sup>.

1 As to the meaning of 'rule' see PARA 23 note 2.

2 Financial Services and Markets Act 2000 s 149(1). A rule may include such provision only if the Financial Services Authority considers that it is appropriate for it also to include the provision required by s 149(2) (see the text and notes 3-4): s 149(3). As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

When the Authority is exercising functions under the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (see PARA 385) as the competent authority, s 149 does not apply: s 72(2), Sch 7 para 4(1).

3 Financial Services and Markets Act 2000 s 149(2)(a). See note 2.

4 Financial Services and Markets Act 2000 s 149(2)(b). See note 2.

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#### **33. Actions for damages, and limits on effect of contravention.**

A contravention by an authorised person<sup>1</sup> of a rule<sup>2</sup> is generally actionable at the suit of a private person<sup>3</sup> who suffers loss as a result of the contravention, subject to the defences and other incidents applying to claims for breach of statutory duty<sup>4</sup>.

In prescribed cases, a contravention of a rule which would be actionable at the suit of a private person is actionable at the suit of a person who is not a private person, subject to the defences and other incidents applying to claims for breach of statutory duty<sup>5</sup>.

A person is not guilty of an offence by reason of a contravention of a rule made by the Financial Services Authority<sup>6</sup>. No such contravention makes any transaction void or unenforceable<sup>7</sup>.

1 As to authorised persons see PARA 314.

2 For the purposes of the Financial Services and Markets Act 2000 s 150(1), (3), 'rule' does not include Part VI rules or a rule requiring an authorised person to have or maintain financial resources: s 150(4) (amended by SI 2005/381). If rules so provide, the Financial Services and Markets Act 2000 s 150(1) does not apply to contravention of a specified provision of those rules: s 150(2). As to the meaning of 'Part VI rules' see PARA 385.

3 'Private person' has such meaning as may be prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 150(5).

'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

The Treasury has prescribed that 'private person' means:

- 13 (1) any individual, unless he suffers the loss in question in the course of carrying on: (a) any regulated activity; or (b) any activity which would be a regulated activity apart from any exclusion made by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72 (overseas persons) or art 72A (information society services) (Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 3(1)(a) (amended by SI 2002/1775); and
- 14 (2) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind (Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 3(1)(b)),

but it does not include a government, a local authority (in the United Kingdom or elsewhere) or an international organisation (regs 3(1), 6(1)).

For the purposes of head (1), an individual who suffers loss in the course of effecting or carrying out contracts of insurance (within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10 (see PARA 100)) written at Lloyd's is not to be taken to suffer loss in the course of carrying on a regulated activity: Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 3(2).

For these purposes, 'government' means: (i) the government of the United Kingdom; (ii) the Scottish Administration; (iii) the Executive Committee of the Northern Ireland Assembly; (iv) the National Assembly for Wales; or (v) the government of any country or territory outside the United Kingdom: reg 2. 'Local authority', in relation to the United Kingdom, means: (A) in England and Wales, a local authority within the meaning of the Local Government Act 1972, the Greater London Authority, the Common Council of the City of London or the Council of the Isles of Scilly; (B) in Scotland, a local authority within the meaning of the Local Government (Scotland) Act 1973; and (C) in Northern Ireland, a district council within the meaning of the Local Government Act (Northern Ireland) 1972: Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 2. 'International organisation' means any international organisation the members of which include the United Kingdom or any other state: reg 2. As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Financial Services and Markets Act 2000 s 150(1). Claims in respect of contravention of certain provisions may be excepted from s 150(1): see s 150(2); and note 2.

5 Financial Services and Markets Act 2000 s 150(3). The Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, prescribed that contravention of a rule is actionable at the suit of a person who is not a private person in a case where any of the following conditions is satisfied (reg 6(2)). The conditions are that:

- 15 (1) the rule that has been contravened prohibits an authorised person from seeking to make provision excluding or restricting any duty or liability (reg 6(3)(a));
- 16 (2) the rule that has been contravened is directed at ensuring that transactions in any security or contractually based investment (within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: see PARA 112 note 4) are not effected with the benefit of unpublished information that, if made public, would be likely to affect the price of that security or investment (Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 6(3)(b));

- 17 (3) the claim would be brought at the suit of a person (who is not a private person) acting in a fiduciary or representative capacity on behalf of a private person and any remedy would be exclusively for the benefit of that private person and could not be effected through a claim brought otherwise than at the suit of the fiduciary or representative (reg 6(3)(c));
- 18 (4) the rule that has been contravened requires a relevant authorised person to respond to a claim for compensation within a specified time limit, or to pay interest in specified circumstances in respect of any such claim (reg 6(3)(d) (added by SI 2002/2706)).

'Relevant authorised person' means an authorised person with a Part IV permission to effect or to carry out relevant contracts of insurance (reg 6(4)(a)(i) (reg 6(4) substituted by SI 2002/2706)) or to manage the underwriting capacity of a Lloyd's syndicate as a managing agent, the members of which effect or carry out relevant contracts of insurance underwritten at Lloyd's (Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 6(4)(a)(ii) (as so substituted)), where 'relevant contract of insurance' means a contract of insurance against damage arising out of or in connection with the use of motor vehicles on land (other than carrier's liability) (reg 6(4)(a) (as so substituted)). As to the meaning of 'Part IV permission' see PARA 348. 'Specified' means specified in rules: reg 6(4)(c) (as so substituted). As to the meaning of 'rule' see note 2; definition applied by reg 6(4)(b) (as so substituted).

6 Financial Services and Markets Act 2000 s 151(1). As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

7 Financial Services and Markets Act 2000 s 151(2).

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## ***D. GUIDANCE***

### **34. Guidance by the Financial Services Authority.**

The Financial Services Authority<sup>1</sup> may give guidance consisting of such information and advice as it considers appropriate:

- 94 (1) with respect to the operation of the Financial Services and Markets Act 2000 and of any rules<sup>2</sup> made under it<sup>3</sup>;
- 95 (2) with respect to any matters relating to functions of the Authority<sup>4</sup>;
- 96 (3) for the purpose of meeting the regulatory objectives<sup>5</sup>;
- 97 (4) with respect to any other matters about which it appears to the Authority to be desirable to give information or advice<sup>6</sup>.

The Authority may give financial or other assistance to persons giving information or advice of a kind which the Authority could give under these provisions<sup>7</sup>. If the Authority proposes to give guidance to regulated persons generally, or to a class of regulated person, in relation to rules to which those persons are subject, the statutory provisions relating to consultation<sup>8</sup> apply to the proposed guidance as they apply to proposed rules, unless the Authority considers that the delay in complying with them would be prejudicial to the interests of consumers<sup>9</sup>.

The Authority may publish its guidance<sup>10</sup> and offer copies of its published guidance for sale at a reasonable price<sup>11</sup>. If it gives guidance in response to a request made by any person, it may make a reasonable charge for that guidance<sup>12</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

- 2 As to the meaning of 'rule' see PARA 23 note 2.
- 3 Financial Services and Markets Act 2000 s 157(1)(a). As to the Authority's Handbook of Rules and Guidance generally see PARA 22.
- 4 Financial Services and Markets Act 2000 s 157(1)(b).
- 5 Financial Services and Markets Act 2000 s 157(1)(c). As to the regulatory objectives see PARAS 6, 8.
- 6 Financial Services and Markets Act 2000 s 157(1)(d). In the Financial Services and Markets Act 2000 Pt X Ch II (ss 157-158A) (except in s 158A (as added: see PARA 35)), references to guidance given by the Authority include references to any recommendation made by the Authority to persons generally, to regulated persons generally, or to any class of regulated person: s 157(5) (amended by SI 2006/2975). 'Regulated person' means: (1) any authorised person; (2) any person who is otherwise subject to rules made by the Authority: Financial Services and Markets Act 2000 s 157(6). As to authorised persons see PARA 314.
- 7 Financial Services and Markets Act 2000 s 157(2).
- 8 In the Financial Services and Markets Act 2000 s 155(1), (2)(d), (4): see PARA 24.
- 9 Financial Services and Markets Act 2000 s 157(3) (amended by SI 2007/1973).
- 10 Financial Services and Markets Act 2000 s 157(4)(a).
- 11 Financial Services and Markets Act 2000 s 157(4)(b).
- 12 Financial Services and Markets Act 2000 s 157(4)(c).

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### **35. Notification to the Treasury of guidance.**

On giving any general guidance<sup>1</sup>, the Financial Services Authority<sup>2</sup> must give the Treasury<sup>3</sup> a copy of the guidance without delay<sup>4</sup>. If the Authority alters any of its general guidance, it must similarly give written notice (including details of the alteration<sup>5</sup>) to the Treasury without delay<sup>6</sup>. The Authority must give written notice to the Treasury without delay if it revokes any of its general guidance<sup>7</sup>.

Without prejudice to the generality of the provision on guidance<sup>8</sup>, the Authority must also give guidance in the terms required by the provision on the publication of a statement of policy on outsourcing of investment services by investment firms and credit institutions<sup>9</sup>. Certain consultation provisions about proposed rules<sup>10</sup> apply to such guidance<sup>11</sup> as they apply to proposed rules<sup>12</sup>. The Authority must publish such guidance<sup>13</sup> and may offer copies of the published guidance for sale at a reasonable price<sup>14</sup>. The above provisions applying to general guidance<sup>15</sup> apply to this guidance as they do to general guidance<sup>16</sup>.

1 'General guidance' means guidance given by the Financial Services Authority under the Financial Services and Markets Act 2000 s 157 (see PARA 34) which is: (1) given to persons generally, to regulated persons generally, or to a class of regulated person; (2) intended to have continuing effect; and (3) given in writing or other legible form: s 158(5). As to the meaning of 'regulated person' see PARA 34 note 6; definition applied by s 158(6). As to references to guidance given by the Authority see PARA 34 note 6.

2 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

- 3 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 4 Financial Services and Markets Act 2000 s 158(1).
- 5 Financial Services and Markets Act 2000 s 158(3).
- 6 Financial Services and Markets Act 2000 s 158(2).
- 7 Financial Services and Markets Act 2000 s 158(4).
- 8 Ie the Financial Services and Markets Act 2000 s 157: see PARA 34.
- 9 Financial Services and Markets Act 2000 s 158A(1) (s 158A added by SI 2006/2975). The reference is to European Commission Directive 2006/73 (OJ L241, 2.9.2006, p 26) implementing European Parliament and EC Council Directive 2004/39 as regards organisational requirements and operating conditions for investment firms and defined terms for the purpose of that Directive, art 15(3). As to the meaning of 'investment firm' see PARA 21 note 5.
- 10 Ie the Financial Services and Markets Act 2000 s 155(1), (2)(b), (d), (4), (5), (6)(a), (7): see PARA 24.
- 11 Ie the guidance that the Authority is required to give under the Financial Services and Markets Act 2000 s 158A.
- 12 Financial Services and Markets Act 2000 s 158A(2) (as added: see note 9).
- 13 Financial Services and Markets Act 2000 s 158A(3) (as added: see note 9).
- 14 Financial Services and Markets Act 2000 s 158A(4) (as added: see note 9).
- 15 Ie the Financial Services and Markets Act 2000 s 158(1)-(4): see the text and notes 1-7.
- 16 Financial Services and Markets Act 2000 s 158A(5) (as added: see note 9).

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### **(iii) Scrutiny of the Financial Services Authority**

#### **A. INVESTIGATION OF COMPLAINTS**

##### **36. Arrangements for the investigation of complaints.**

The Financial Services Authority must make arrangements for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of its functions<sup>1</sup> (other than its legislative functions)<sup>2</sup>. These arrangements are referred to as the 'complaints scheme'. The complaints scheme must be designed so that, as far as reasonably practicable, complaints are investigated quickly<sup>3</sup>.

The Authority must also appoint an independent person (referred to as the 'investigator') to be responsible for the conduct of investigations in accordance with the complaints scheme<sup>4</sup>. The terms and conditions on which the investigator is appointed must be such as, in the opinion of the Authority, are reasonably designed to secure that he will be free at all times to act independently of the Authority<sup>5</sup>, and that complaints will be investigated under the complaints scheme without favouring the Authority<sup>6</sup>. The Treasury's<sup>7</sup> approval is required for the appointment or dismissal of the investigator<sup>8</sup>.



Before making the complaints scheme, the Authority must publish a draft of the proposed scheme in the way appearing to the Authority best calculated to bring it to the attention of the public<sup>9</sup>. The draft must be accompanied by notice that representations about it may be made to the Authority within a specified time<sup>10</sup>. Before making the proposed complaints scheme, the Authority must have regard to any representations so made to it<sup>11</sup>.

If the Authority makes the proposed complaints scheme, it must publish an account, in general terms, of the representations made to it<sup>12</sup> and its response to them<sup>13</sup>. If the complaints scheme differs from the draft<sup>14</sup> in a way which is, in the opinion of the Authority, significant the Authority must<sup>15</sup> publish details of the difference<sup>16</sup>.

The Authority must publish up-to-date details of the complaints scheme<sup>17</sup>. Those details must be published in the way appearing to the Authority to be best calculated to bring them to the attention of the public<sup>18</sup>. The Authority must, without delay, give the Treasury a copy of any details published by it under these provisions<sup>19</sup>.

1 As to the meaning of 'functions' in relation to the Authority see PARA 14 note 6. As to the general functions of the Authority see PARA 6.

2 Financial Services and Markets Act 2000 Sch 1 para 7(1)(a). As to the meaning of 'legislative functions' see PARA 15. See also the Authority's Handbook of Rules and Guidance, Redress, Complaints against the FSA (COAF). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 Sch 1 para 7(2).

4 Financial Services and Markets Act 2000 Sch 1 para 7(1)(b).

5 Financial Services and Markets Act 2000 Sch 1 para 7(4)(a).

6 Financial Services and Markets Act 2000 Sch 1 para 7(4)(b).

7 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Financial Services and Markets Act 2000 Sch 1 para 7(3).

9 Financial Services and Markets Act 2000 Sch 1 para 7(5). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under Sch 1 para 7(5): Sch 1 para 7(13)(a). The provisions of Sch 1 para 7(5), (13)(a) also apply to a proposal to alter or replace the complaints scheme: Sch 1 para 7(14).

10 Financial Services and Markets Act 2000 Sch 1 para 7(6). Schedule 1 para 7(6) also applies to a proposal to alter or replace the complaints scheme: Sch 1 para 7(14).

11 Financial Services and Markets Act 2000 Sch 1 para 7(7). Schedule 1 para 7(7) also applies to a proposal to alter or replace the complaints scheme: Sch 1 para 7(14).

12 Financial Services and Markets Act 2000 Sch 1 para 7(8)(a). The representations referred to in the text are those made in accordance with Sch 1 para 7(6): see the text to note 10. Schedule 1 para 7(8) also applies to a proposal to alter or replace the complaints scheme: Sch 1 para 7(14).

13 Financial Services and Markets Act 2000 Sch 1 para 7(8)(b). Schedule 1 para 7(8) also applies to a proposal to alter or replace the complaints scheme: Sch 1 para 7(14).

14 Is the draft published under the Financial Services and Markets Act 2000 Sch 1 para 7(5): see the text to note 9.

15 Is in addition to complying with the Financial Services and Markets Act 2000 Sch 1 para 7(8): see the text and notes 12-13.

16 Financial Services and Markets Act 2000 Sch 1 para 7(9). Schedule 1 para 7(9) also applies to a proposal to alter or replace the complaints scheme: Sch 1 para 7(14).

17 Financial Services and Markets Act 2000 Sch 1 para 7(10). The details published must include, in particular, details of: (1) the provision made under Sch 1 para 8(5) (see PARA 37); and (2) the powers which the

investigator has to investigate a complaint: Sch 1 para 7(10). The Authority may charge a reasonable fee for providing a person with a copy of details published under Sch 1 para 7(10): Sch 1 para 7(13)(b).

18 Financial Services and Markets Act 2000 Sch 1 para 7(11).

19 Financial Services and Markets Act 2000 Sch 1 para 7(12).

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### **37. Investigation of complaints.**

The Financial Services Authority is not obliged to investigate a complaint in accordance with the complaints scheme<sup>1</sup> which it reasonably considers would be more appropriately dealt with in another way (for example by referring the matter to the Financial Services and Markets Tribunal<sup>2</sup> or by the institution of other legal proceedings)<sup>3</sup>.

The complaints scheme must provide for reference to the investigator of any complaint which the Authority is investigating<sup>4</sup> and for him to:

- 98 (1) have the means to conduct a full investigation of the complaint<sup>5</sup>;
- 99 (2) report on the result of his investigation to the Authority and the complainant<sup>6</sup>;  
and
- 100 (3) be able to publish his report (or any part of it) if he considers that it (or the part) ought to be brought to the attention of the public<sup>7</sup>.

The investigator may appoint a person to conduct the investigation on his behalf but subject to his direction<sup>8</sup>.

If the Authority has decided not to investigate a complaint, it must notify the investigator<sup>9</sup>. If the investigator considers that a complaint of which he has been notified ought to be investigated, he may proceed as if the complaint had been referred to him under the complaints scheme<sup>10</sup>.

The complaints scheme must confer on the investigator the power to recommend, if he thinks it appropriate, that the Authority: (a) makes a compensatory payment to the complainant<sup>11</sup>; (b) remedies the matter complained of<sup>12</sup>; or (c) takes both of those steps<sup>13</sup>.

The complaints scheme must require the Authority, in a case where the investigator has reported that a complaint is well founded<sup>14</sup>, or has criticised the Authority in his report<sup>15</sup>, to inform the investigator and the complainant of the steps which it proposes to take in response to the report<sup>16</sup>. The investigator may require the Authority to publish the whole or a specified part of the response<sup>17</sup>.

Neither the investigator<sup>18</sup> nor a person appointed to conduct an investigation on his behalf<sup>19</sup> is liable in damages for anything done or omitted in the discharge, or purported discharge, of his functions in relation to the investigation of a complaint<sup>20</sup>.

1 As to the complaints scheme see PARA 36.

2 As to the Financial Services and Markets Tribunal see PARA 43 et seq.

3 Financial Services and Markets Act 2000 Sch 1 para 8(1). See also the Authority's Handbook of Rules and Guidance, Redress, Complaints against the FSA (COAF). As to the Handbook generally see PARA 22.

4 Financial Services and Markets Act 2000 Sch 1 para 8(2)(a). Schedule 1 para 8(2) is not to be taken as preventing the Authority from making arrangements for the initial investigation of a complaint to be conducted by the Authority: Sch 1 para 8(10).

5 Financial Services and Markets Act 2000 Sch 1 para 8(2)(b)(i). See note 4.

6 Financial Services and Markets Act 2000 Sch 1 para 8(2)(b)(ii). See note 4.

7 Financial Services and Markets Act 2000 Sch 1 para 8(2)(b)(iii). See note 4.

8 Financial Services and Markets Act 2000 Sch 1 para 8(8). Neither an officer nor an employee of the Authority may be appointed under Sch 1 para 8(8): Sch 1 para 8(9).

9 Financial Services and Markets Act 2000 Sch 1 para 8(3).

10 Financial Services and Markets Act 2000 Sch 1 para 8(4).

11 Financial Services and Markets Act 2000 Sch 1 para 8(5)(a).

12 Financial Services and Markets Act 2000 Sch 1 para 8(5)(b).

13 Financial Services and Markets Act 2000 Sch 1 para 8(5).

14 Financial Services and Markets Act 2000 Sch 1 para 8(6)(a).

15 Financial Services and Markets Act 2000 Sch 1 para 8(6)(b).

16 Financial Services and Markets Act 2000 Sch 1 para 8(6).

17 Financial Services and Markets Act 2000 Sch 1 para 8(7).

18 Ie appointed under the Financial Services and Markets Act 2000 Sch 1 para 7: see PARA 36.

19 Ie under the Financial Services and Markets Act 2000 Sch 1 para 8(8): see the text to note 8.

20 Financial Services and Markets Act 2000 Sch 1 para 19(2). Schedule 1 para 19(2) does not apply: (1) if the act or omission is shown to have been in bad faith; or (2) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of the Human Rights Act 1998 s 6(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): Financial Services and Markets Act 2000 Sch 1 para 19(3). As to acts in bad faith see *Melton Medes Ltd v Securities and Investments Board* [1995] Ch 137, [1995] 3 All ER 880 (decided under previous legislation).

For modifications to the Financial Services and Markets Act 2000 Sch 1 para 19 when the Authority is exercising functions under Pt VI (ss 72-103) as the competent authority see s 72(2), Sch 7 para 8. See further PARA 385.

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## **B. COMPETITION SCRUTINY**

### **38. Reports.**

The Office of Fair Trading<sup>1</sup> must keep the regulating provisions<sup>2</sup> and the Financial Services Authority's practices<sup>3</sup> under review<sup>4</sup>.

If at any time the Office of Fair Trading considers that a regulating provision or practice has a significantly adverse effect on competition<sup>5</sup>, or two or more regulating provisions or practices taken together, or a particular combination of regulating provisions and practices, have such an effect, it must make a report to that effect<sup>6</sup>. Such a report must include details of the adverse effect on competition<sup>7</sup>. If the Office of Fair Trading makes such a report it must:

- 101 (1) send a copy of the report to the Treasury<sup>8</sup>, the Competition Commission<sup>9</sup> and the Financial Services Authority<sup>10</sup>; and
- 102 (2) publish the report in the way appearing to it to be best calculated to bring the report to the attention of the public<sup>11</sup>.

If at any time the Office of Fair Trading considers that a regulating provision or practice does not have a significantly adverse effect on competition<sup>12</sup>, or two or more regulating provisions or practices taken together, or a particular combination of regulating provisions and practices, do not have any such effect<sup>13</sup>, it may make a report to that effect<sup>14</sup>. If the Office of Fair Trading makes such a report: (a) it must send a copy of the report to the Treasury, the Competition Commission and the Financial Services Authority<sup>15</sup>; and (b) it may publish the report<sup>16</sup>.

Before publishing a report the Office of Fair Trading must, so far as practicable, exclude any matter which relates to the private affairs of a particular individual the publication of which, in its opinion, would or might seriously and prejudicially affect that individual's interests<sup>17</sup>. It must also, so far as practicable, exclude any matter which relates to the affairs of a particular body the publication of which, in its opinion, would or might seriously and prejudicially affect its interests<sup>18</sup>.

For the purposes of the law of defamation, absolute privilege attaches to any such report of the Office of Fair Trading<sup>19</sup>.

1 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

2 'Regulating provisions' means: any (1) any rules; (2) any general guidance as defined by the Financial Services and Markets Act 2000 s 158(5) (see PARA 35 note 1) or guidance under s 158A (see PARA 35); (3) any statement issued by the Financial Services Authority under s 64 (see PARA 372); (4) any code issued by the Authority under s 64 (see PARA 372) or s 119 (see PARA 439): ss 159(1), 417(1) (definition in s 159(1) amended by SI 2006/2975). As to the meaning of 'rule' see PARA 23 note 2.

3 For these purposes, 'practices', in relation to the Financial Services Authority, means practices adopted by the Authority in the exercise of functions under the Financial Services and Markets Act 2000: s 159(1). As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

4 Financial Services and Markets Act 2000 s 160(1) (s 160(1)-(3), (5)-(10) amended by the Enterprise Act 2002 Sch 25 para 40(3)).

5 For these purposes, regulating provisions or practices have a significantly adverse effect on competition if: (1) they have, or are intended or likely to have, that effect; or (2) the effect that they have, or are intended or likely to have, is to require or encourage behaviour which has, or is intended or likely to have, a significantly adverse effect on competition: Financial Services and Markets Act 2000 s 159(2). If regulating provisions or practices have, or are intended or likely to have, the effect of requiring or encouraging exploitation of the strength of a market position, they are to be taken, for the purposes of Pt X Ch III (ss 159-164), to have an adverse effect on competition: s 159(3). In determining under Pt X Ch III whether any of the regulating provisions have, or are likely to have, a particular effect, it may be assumed that the persons to whom the provisions concerned are addressed will act in accordance with them: s 159(4).

6 Financial Services and Markets Act 2000 s 160(2) (as amended: see note 4).

7 Financial Services and Markets Act 2000 s 160(4).

8 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

9 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARA 9 et seq.

- 10 Financial Services and Markets Act 2000 s 160(5)(a) (as amended: see note 4).
- 11 Financial Services and Markets Act 2000 s 160(5)(b) (as amended: see note 4).
- 12 Financial Services and Markets Act 2000 s 160(3)(a) (as amended: see note 4).
- 13 Financial Services and Markets Act 2000 s 160(3)(b) (as amended: see note 4).
- 14 Financial Services and Markets Act 2000 s 160(3) (as amended: see note 4).
- 15 Financial Services and Markets Act 2000 s 160(6)(a) (as amended: see note 4).
- 16 Financial Services and Markets Act 2000 s 160(6)(b) (as amended: see note 4).
- 17 Financial Services and Markets Act 2000 s 160(7) (as amended: see note 4). Section 160(7), (8) does not apply in relation to copies of a report which the Director is required to send under head (1) or head (a) in the text: s 160(9) (as so amended).
- 18 Financial Services and Markets Act 2000 s 160(8) (as amended: see note 4). See note 17.
- 19 Financial Services and Markets Act 2000 s 160(10) (as amended: see note 4).

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### **39. Power to request information.**

For the purpose of investigating any matter with a view to its consideration<sup>1</sup>, the Office of Fair Trading<sup>2</sup> may exercise the following powers<sup>3</sup>.

The Office of Fair Trading may by notice in writing require any person to produce to it or to a person appointed by it for the purpose, at a time and place specified in the notice, any document<sup>4</sup> which is specified or described in the notice<sup>5</sup> and which is a document in that person's custody or under his control<sup>6</sup>.

The Office of Fair Trading may by notice in writing require any person carrying on any business to provide it with such information as may be specified or described in the notice<sup>7</sup>, and specify the time within which, and the manner and form in which, any such information is to be provided<sup>8</sup>.

If a person (the 'defaulter') refuses, or otherwise fails, to comply with such a notice, the Office of Fair Trading may certify that fact in writing to the High Court<sup>9</sup> and the court may inquire into the case<sup>10</sup>. If, after hearing any witness who may be produced against or on behalf of the defaulter and any statement which may be offered in defence, the court is satisfied that the defaulter did not have a reasonable excuse for refusing or otherwise failing to comply with the notice, the court may deal with the defaulter as if he were in contempt<sup>11</sup>.

1    le under the Financial Services and Markets Act 2000 s 160: see PARA 38.

2    As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

3    Financial Services and Markets Act 2000 s 161(1) (s 161(1)-(3), (5) amended by the Enterprise Act 2002 Sch 24 paras 2-6).

4    As to the meaning of 'document' see PARA 10 note 10.

- 5 Financial Services and Markets Act 2000 s 161(2)(a) (as amended: see note 3). A requirement may be imposed under s 161(2) or s 161(3)(a) only in respect of information or documents which relate to any matter relevant to the investigation: s 161(4).
- 6 Financial Services and Markets Act 2000 s 161(2)(b) (as amended: see note 3). See note 5.
- 7 Financial Services and Markets Act 2000 s 161(3)(a) (as amended: see note 3). See note 5.
- 8 Financial Services and Markets Act 2000 s 161(3)(b) (as amended: see note 3).
- 9 Financial Services and Markets Act 2000 s 161(7).
- 10 Financial Services and Markets Act 2000 s 161(5) (as amended: see note 3).
- 11 Financial Services and Markets Act 2000 s 161(6).

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#### **40. Consideration by Competition Commission.**

If the Office of Fair Trading<sup>1</sup> makes a report<sup>2</sup>, or asks the Competition Commission<sup>3</sup> to consider a report that it has made<sup>4</sup>, the Commission must investigate the matter<sup>5</sup>. The Commission must then make its own report on the matter unless it considers that, as a result of a change of circumstances, no useful purpose would be served by a report<sup>6</sup>. If the Commission decides<sup>7</sup> not to make a report, it must make a statement setting out the change of circumstances which resulted in that decision<sup>8</sup>.

The Commission's report must state the Commission's conclusion as to whether:

- 103 (1) the regulating provision or practice which is the subject of the report has a significantly adverse effect on competition<sup>9</sup>; or
- 104 (2) the regulating provisions or practices, or combination of regulating provisions and practices, which are the subject of the report have such an effect<sup>10</sup>.

A report stating the Commission's conclusion that there is a significantly adverse effect on competition must also:

- 105 (a) state whether the Commission considers that that effect is justified<sup>11</sup>; and
- 106 (b) if it states that the Commission considers that it is not justified, state its conclusion as to what action, if any, ought to be taken by the Financial Services Authority<sup>12</sup>.

Whenever the Commission is considering, for these purposes<sup>13</sup>, whether a particular adverse effect on competition is justified<sup>14</sup>, the Commission must ensure, so far as that is reasonably possible, that the conclusion it reaches is compatible with the functions conferred, and obligations imposed, on the Authority by or under the Financial Services and Markets Act 2000<sup>15</sup>.

A report must contain such an account of the Commission's reasons for its conclusions as is expedient, in the opinion of the Commission, for facilitating proper understanding of them<sup>16</sup>. If

the Commission makes a report it must send a copy to the Treasury, the Authority and the Office of Fair Trading<sup>17</sup>.

For the purpose of assisting the Commission in carrying out an investigation only<sup>18</sup>, the Treasury<sup>19</sup> may give to the Commission any information in its possession which relates to matters falling within the scope of the investigation<sup>20</sup> and may give other assistance in relation to any such matters<sup>21</sup>. In carrying out such an investigation, the Commission must have regard to any such information given to it<sup>22</sup>.

In considering any matter arising from a report made by the Office of Fair Trading<sup>23</sup>, the Commission must have regard to any representations made to it in connection with the matter by any person appearing to the Commission to have a substantial interest in the matter<sup>24</sup> and any cost benefit analysis prepared by the Authority (at any time) in connection with the regulatory provision or practice, or any of the regulatory provisions or practices, which are the subject of the report<sup>25</sup>.

A number of statutory provisions apply for the purposes of any investigation by the Commission under the provisions described above<sup>26</sup> as they apply for references under Part 3 of the Enterprise Act 2002<sup>27</sup>. There is also an appropriate modification to the Competition Act 1998 and further provision about reports by the Commission<sup>28</sup>.

If the Commission makes a report as described above<sup>29</sup>, it must publish it in such a way as appears to it to be best calculated to bring it to the attention of the public<sup>30</sup>. Before publishing the report the Commission must, so far as practicable, exclude any matter which relates to the private affairs of a particular individual the publication of which, in the opinion of the Commission, would or might seriously and prejudicially affect his interests<sup>31</sup>. Before publishing the report the Commission must, so far as practicable, also exclude any matter which relates to the affairs of a particular body the publication of which, in the opinion of the Commission, would or might seriously and prejudicially affect its interests<sup>32</sup>.

1 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

2 Financial Services and Markets Act 2000 s 162(1)(a) (s 162(1), (10) amended by the Enterprise Act 2002 Sch 25 para 40(1), (5)). The report referred to in the text is one made under the Financial Services and Markets Act 2000 s 160(2): see PARA 38.

3 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARA 9 et seq.

4 Financial Services and Markets Act 2000 s 162(1)(b) (as amended: see note 2). The report referred to in the text is one made under s 160(3): see PARA 38.

5 Financial Services and Markets Act 2000 s 162(1).

6 Financial Services and Markets Act 2000 s 162(2).

7 Ie in accordance with the Financial Services and Markets Act 2000 s 162(2).

8 Financial Services and Markets Act 2000 s 162(3).

9 Financial Services and Markets Act 2000 s 162(4)(a). As to the meaning of 'regulating provisions' see PARA 38 note 2. As to the meaning of 'practices' see PARA 38 note 3. As to regulating provisions or practices having a significantly adverse effect on competition see PARA 38 note 5.

10 Financial Services and Markets Act 2000 s 162(4)(b).

11 Financial Services and Markets Act 2000 s 162(5)(a).

12 Financial Services and Markets Act 2000 s 162(5)(b). As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

13 Ie for the purposes of the Financial Services and Markets Act 2000 s 162.

- 14 Financial Services and Markets Act 2000 s 162(6).
- 15 Financial Services and Markets Act 2000 s 162(7).
- 16 Financial Services and Markets Act 2000 s 162(8).
- 17 Financial Services and Markets Act 2000 s 162(10) (as amended: see note 2).
- 18 Financial Services and Markets Act 2000 s 162, Sch 14 para 1(1).
- 19 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 20 Financial Services and Markets Act 2000 Sch 14 para 1(2)(a).
- 21 Financial Services and Markets Act 2000 Sch 14 para 1(2)(b).
- 22 Financial Services and Markets Act 2000 Sch 14 para 1(3).
- 23 Ie under the Financial Services and Markets Act 2000 s 160: see PARA 38.
- 24 Financial Services and Markets Act 2000 Sch 14 para 2(a) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 40(1), (20)(a)).
- 25 Financial Services and Markets Act 2000 Sch 14 para 2(b).
- 26 Ie under the Financial Services and Markets Act 2000 s 162.
- 27 See the Financial Services and Markets Act 2000 Sch 14 para 2A(1) (Sch 14 paras 2A-2C added by the Enterprise Act 2002 Sch 25 para 40(1), (20)(b)). The reference is to the Enterprise Act Pt 3 (ss 22-130): see generally **COMPETITION** vol 18 (2009) PARA 1 et seq. The provisions are as follows (with the modifications set out in the Financial Services and Markets Act 2000 Sch 14 para 2A(2), (3)):
  - 19 (1) the Enterprise Act 2002 s 109 (attendance of witnesses and production of documents etc) (see **COMPETITION** vol 18 (2009) PARA 259) (Financial Services and Markets Act 2000 Sch 14 para 2A(1)(a) (as so added));
  - 20 (2) the Enterprise Act 2002 s 110 (enforcement of powers under s 109: general) (see **COMPETITION** vol 18 (2009) PARA 260) (Financial Services and Markets Act 2000 Sch 14 para 2A(1)(b) (as so added));
  - 21 (3) the Enterprise Act 2002 s 111 (penalties) (see **COMPETITION** vol 18 (2009) PARA 260) (Financial Services and Markets Act 2000 Sch 14 para 2A(1)(c) (as so added));
  - 22 (4) the Enterprise Act 2002 s 112 (penalties: main procedural requirements) (see **COMPETITION** vol 18 (2009) PARA 261) (Financial Services and Markets Act 2000 Sch 14 para 2A(1)(d) (as so added));
  - 23 (5) the Enterprise Act 2002 s 113 (payments and interest by instalments) (see **COMPETITION** vol 18 (2009) PARAS 261, 262) (Financial Services and Markets Act 2000 Sch 14 para 2A(1)(e) (as so added));
  - 24 (6) the Enterprise Act 2002 s 114 (appeals in relation to penalties) (see **COMPETITION** vol 18 (2009) PARA 263) (Financial Services and Markets Act 2000 Sch 14 para 2A(1)(f) (as so added));
  - 25 (7) the Enterprise Act 2002 s 115 (recovery of penalties) (see **COMPETITION** vol 18 (2009) PARA 264) (Financial Services and Markets Act 2000 Sch 14 para 2A(1)(g) (as so added)); and
  - 26 (8) the Enterprise Act 2002 s 116 (statement of policy) (see **COMPETITION** vol 18 (2009) PARA 265) (Financial Services and Markets Act 2000 Sch 14 para 2A(1)(h) (as so added)).

The Enterprise Act 2002 s 110 (see head (2)), in its application by virtue of the Financial Services and Markets Act 2000 Sch 14 para 2A(1), has effect as if the Enterprise Act 2002 s 110(2) were omitted; and in s 110(9) the words from 'or section' to 's 65(3))' were omitted: Financial Services and Markets Act 2000 Sch 14 para 2A(2) (as so added). The Enterprise Act 2002 s 111(5)(b) (see head (3)), in its application by virtue of the Financial Services and Markets Act 2000 Sch 14 para 2A(1), has effect as if for the Enterprise Act 2002 s 111(5)(b)(ii) there were substituted '(ii) if earlier, the day on which the report of the Commission on the investigation concerned is made or, if the Commission decides not to make a report, the day on which the Commission



makes the statement required by the Financial Services and Markets Act 2000 s 162(3).': Sch 14 para 2A(3) (as so added).

The Enterprise Act 2002 s 117 (false or misleading information) (see **COMPETITION** vol 18 (2009) PARAS 266, 317) applies in relation to functions of the Commission in connection with an investigation under the Financial Services and Markets Act 2000 s 162 as it applies in relation to its functions under the Enterprise Act 2002 Pt 3 but as if, in s 117(1)(a), (2), the words 'the OFT, OFCOM,' and 'or the Secretary of State' were omitted: Financial Services and Markets Act 2000 Sch 14 para 2A(4) (as so added; amended by the Communications Act 2003 s 389(1), Sch 16 para 5). Provisions of the Enterprise Act 2002 Pt 3 which have effect for the purposes of ss 109-117 (including, in particular, provisions relating to offences and the making of orders), for the purposes of the application of those provisions by virtue of the Financial Services and Markets Act 2000 Sch 14 para 2A(1) or (4), have effect in relation to those provisions as applied by virtue of Sch 14 para 2A(1) or (4): Sch 14 para 2A(5) (as so added). Accordingly, corresponding provisions of the Financial Services and Markets Act 2000 do not have effect in relation to those provisions as applied by virtue of Sch 14 para 2A(1) or (4): Sch 14 para 2A(6) (as so added).

28 See the Financial Services and Markets Act 2000 Sch 14 paras 2B, 2C (as added: see note 27).

For the purposes of its application in relation to the function of the Commission of deciding in accordance with s 162(2) not to make a report (see the text to note 6), the Competition Act 1998 Sch 7 para 15(7) (power of the Chairman to act on his own while a group is being constituted) (see **COMPETITION** vol 18 (2009) PARA 11) has effect as if, after Sch 7 para 15(7)(a), there were inserted: '; or (aa) in the case of an investigation under the Financial Services and Markets Act 2000 s 162, decide not to make a report in accordance with s 162(2) (decision not to make a report where no useful purpose would be served).': Sch 14 para 2B (as so added).

For the purposes of s 163 (see PARA 41), a conclusion contained in a report of the Commission is to be disregarded if the conclusion is not that of at least two-thirds of the members of the group constituted in connection with the investigation concerned in pursuance of the Competition Act 1998 Sch 7 para 15 (see **COMPETITION** vol 18 (2009) PARA 11): Financial Services and Markets Act 2000 Sch 14 para 2C(1) (as so added). If a member of a group so constituted disagrees with any conclusions contained in a report made under s 162 as the conclusions of the Commission, the report must, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing: Sch 14 para 2C(2) (as so added). For the purposes of the law relating to defamation, absolute privilege attaches to any report made by the Commission under s 162: Sch 14 para 2C(3) (as so added).

29 Ie under the Financial Services and Markets Act 2000 s 162.

30 Financial Services and Markets Act 2000 Sch 14 para 4(1).

31 Financial Services and Markets Act 2000 Sch 14 para 4(2). Sch 14 para 4(2), (3) does not apply in relation to copies of a report which the Commission is required to send under s 162(10): Sch 14 para 4(4).

32 Financial Services and Markets Act 2000 Sch 14 para 4(3). See note 31.

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#### **41. Role of the Treasury.**

If the Competition Commission<sup>1</sup> makes a report<sup>2</sup> which states its conclusion that there is a significantly adverse effect on competition<sup>3</sup> then the following provisions apply<sup>4</sup>.

If the Commission's conclusion, as stated in the report, is that the adverse effect on competition is not justified, the Treasury<sup>5</sup> must give a direction to the Financial Services Authority<sup>6</sup> requiring it to take such action as may be specified in the direction<sup>7</sup>. In considering the action to be specified in a direction<sup>8</sup>, the Treasury must have regard to any conclusion of the Commission included<sup>9</sup> in the report<sup>10</sup>.

If:

- 107 (1) the Commission's conclusion, as stated in its report, is that the adverse effect on competition is justified<sup>11</sup>; but
- 108 (2) the Treasury considers that the exceptional circumstances of the case require it to act<sup>12</sup>,

the Treasury may give a direction to the Authority requiring it to take such action as the Treasury considers to be necessary in the light of the exceptional circumstances of the case<sup>13</sup> and as may be specified in the direction<sup>14</sup>.

However, the Authority may not be required as a result of these provisions<sup>15</sup> to take any action that it would not have power to take in the absence of such a direction<sup>16</sup>, or that would otherwise be incompatible with any of the functions conferred, or obligations imposed, on it by or under the Financial Services and Markets Act 2000<sup>17</sup>.

The Treasury must do what it considers appropriate to allow the Authority, and any other person appearing to the Treasury to be affected, an opportunity to make representations<sup>18</sup>, and the Treasury must have regard to any such representations<sup>19</sup>.

If the Treasury gives such a direction it must make a statement giving details of the direction, and (in certain cases<sup>20</sup>) its reasons for giving it<sup>21</sup>. The Treasury must publish any such statement in the way appearing to it best calculated to bring it to the attention of the public<sup>22</sup>, and must lay a copy of it before Parliament<sup>23</sup>.

1 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARA 9 et seq.

2 le under the Financial Services and Markets Act 2000 s 162(2): see PARA 40.

3 Financial Services and Markets Act 2000 s 163(1). As to the consequences of regulating provisions or practices having an adverse effect on competition see PARA 40.

4 See the Financial Services and Markets Act 2000 s 163, and the text and notes 7-23.

As to s 163 in connection with an investigation in pursuance of the Competition Act 1998 Sch 7 para 15 see PARA 35.

5 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

6 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

7 Financial Services and Markets Act 2000 s 163(2). However, s 163(2) does not apply if the Treasury considers: (1) that, as a result of action taken by the Authority in response to the Commission's report, it is unnecessary for it to give a direction; or (2) that the exceptional circumstances of the case make it inappropriate or unnecessary for it to do so: s 163(3). If, in reliance on head (1) or head (2), the Treasury declines to act under s 163(2), it must make a statement to that effect, giving its reasons: s 163(10).

8 le under the Financial Services and Markets Act 2000 s 163(2).

9 le included because of the Financial Services and Markets Act 2000 s 162(5)(b) (see PARA 40 head (b)).

10 Financial Services and Markets Act 2000 s 163(4).

11 Financial Services and Markets Act 2000 s 163(5)(a).

12 Financial Services and Markets Act 2000 s 163(5)(b).

13 Financial Services and Markets Act 2000 s 163(6)(a).

14 Financial Services and Markets Act 2000 s 163(6)(b).

15 le as a result of the Financial Services and Markets Act 2000 s 163.

16 Financial Services and Markets Act 2000 s 163(7)(a).

17 Financial Services and Markets Act 2000 s 163(7)(b).

18 Financial Services and Markets Act 2000 s 163(9)(a). Section 163(9) applies if the Treasury is considering: (1) whether s 163(2) (see the text to note 7) applies and, if so, what action is to be specified in a direction under s 163(2); or (2) whether to give a direction under s 163(6) (see the text and notes 13-14): s 163(8).

19 Financial Services and Markets Act 2000 s 163(9)(b). See note 18.

20 Ie if the direction is given under the Financial Services and Markets Act 2000 s 163(6).

21 Financial Services and Markets Act 2000 s 163(11).

22 Financial Services and Markets Act 2000 s 163(12)(a).

23 Financial Services and Markets Act 2000 s 163(12)(b).

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## 42. The Competition Act 1998.

The prohibition on the restriction of competition affecting trade in the United Kingdom imposed by the Competition Act 1998 (referred to as the 'Chapter I prohibition'<sup>1</sup>) does not apply to an agreement the parties to which consist of or include:

109 (1) an authorised person<sup>2</sup>; or

110 (2) a person who is otherwise subject to the Financial Services Authority's<sup>3</sup> regulating provisions<sup>4</sup>,

to the extent to which the agreement consists of provisions the inclusion of which in the agreement is encouraged by any of the Authority's regulating provisions<sup>5</sup>, nor does it apply to the practices of an authorised person or a person who is otherwise subject to the regulating provisions to the extent to which the practices are encouraged by any of the Authority's regulating provisions<sup>6</sup>.

The prohibition on the abuse of a dominant position affecting trade in the United Kingdom imposed by the Competition Act 1998 (referred to as the 'Chapter II prohibition'<sup>7</sup>) does not apply to conduct of:

111 (a) an authorised person<sup>8</sup>; or

112 (b) a person who is otherwise subject to the Authority's regulating provisions<sup>9</sup>,

to the extent to which the conduct is encouraged by any of the Authority's regulating provisions<sup>10</sup>.

1 'Chapter I prohibition' means the prohibition imposed by the Competition Act 1998 s 2(1) (see **COMPETITION** vol 18 (2009) PARA 116 et seq): Financial Services and Markets Act 2000 s 164(4). As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 Financial Services and Markets Act 2000 s 164(1)(a). As to authorised persons see PARA 314.

- 3 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.
- 4 Financial Services and Markets Act 2000 s 164(1)(b). As to the meaning of 'regulating provisions' see PARA 38 note 2.
- 5 Financial Services and Markets Act 2000 s 164(1).
- 6 Financial Services and Markets Act 2000 s 164(2).
- 7 'Chapter II prohibition' means the prohibition imposed by the Competition Act 1998 s 18(1) (see **COMPETITION** vol 18 (2009) PARA 125 et seq); Financial Services and Markets Act 2000 s 164(5).
- 8 Financial Services and Markets Act 2000 s 164(3)(a).
- 9 Financial Services and Markets Act 2000 s 164(3)(b).
- 10 Financial Services and Markets Act 2000 s 164(3).

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## **(iv) The Financial Services and Markets Tribunal**

### **A. CONSTITUTION**

#### **43. Constitution of the Financial Services and Markets Tribunal.**

The Financial Services and Markets Tribunal was established under the Financial Services and Markets Act 2000<sup>1</sup> and has the functions conferred on it by or under that Act<sup>2</sup>.

The Lord Chancellor<sup>3</sup> must appoint a panel of persons for the purposes of serving as chairmen of the Tribunal<sup>4</sup>. A person is qualified for membership of the panel of chairmen if he satisfies certain conditions<sup>5</sup>.

The Lord Chancellor must appoint one of the members of the panel of chairmen<sup>6</sup> to be the President of the Financial Services and Markets Tribunal and to preside over the discharge of the Tribunal's functions<sup>7</sup>. The Lord Chancellor may appoint one of the members of the panel of chairmen to be Deputy President<sup>8</sup>. The Deputy President has such functions in relation to the Tribunal as the President may assign to him<sup>9</sup>. The Lord Chancellor may not appoint a person to be the President or Deputy President unless that person satisfies certain conditions<sup>10</sup>.

If the President (or Deputy President) ceases to be a member of the panel of chairmen, he also ceases to be the President (or Deputy President)<sup>11</sup>. The functions of the President may, if he is absent or is otherwise unable to act, be discharged by the Deputy President<sup>12</sup>, or, if there is no Deputy President or he too is absent or otherwise unable to act, by a person appointed for that purpose from the panel of chairmen by the Lord Chancellor<sup>13</sup>.

The Lord Chancellor must also appoint a lay panel, that is a panel of persons who appear to him to be qualified by experience or otherwise to deal with matters of the kind that may be referred to the Tribunal<sup>14</sup>.

Each member of the panel of chairmen and the lay panel is to hold and vacate office in accordance with the terms of his appointment<sup>15</sup>. The Lord Chancellor may remove a member of either panel (including the President) on the ground of incapacity or misbehaviour<sup>16</sup>. A member

of either panel may at any time resign office by notice in writing to the Lord Chancellor<sup>17</sup> and is eligible for re-appointment if he ceases to hold office<sup>18</sup>.

The Lord Chancellor may pay to any person, in respect of his service as a member of the Tribunal (including service as the President or Deputy President)<sup>19</sup>, or as a person appointed as an expert<sup>20</sup>, such remuneration and allowances as he may determine<sup>21</sup>.

The Lord Chancellor may appoint such staff for the Tribunal as he may determine<sup>22</sup>. One such member is to be appointed Secretary to the Tribunal<sup>23</sup>. Any functions of the Secretary may be performed by an Assistant Secretary or by some other member of the Tribunal staff authorised by the Secretary<sup>24</sup>. The remuneration of the Tribunal's staff is to be defrayed by the Lord Chancellor<sup>25</sup>.

Such expenses of the Tribunal as the Lord Chancellor may determine are to be defrayed by the Lord Chancellor<sup>26</sup>.

1 Financial Services and Markets Act 2000 s 132(1).

2 Financial Services and Markets Act 2000 s 132(2).

3 As to the Lord Chancellor see **CONSTITUTIONAL AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq.

4 Financial Services and Markets Act 2000 s 132, Sch 13 para 3(1). The Chairman is the person from time to time acting as chairman of the Tribunal in respect of a reference: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 2(1).

Any matter (other than the determination of a reference or the setting aside of a decision on a reference) required or authorised by the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, to be done by the Tribunal may be done by the Chairman: r 29.

Any document purporting to be a document duly executed or issued by the Chairman on behalf of the Tribunal is, unless proved to the contrary, deemed to be a document so executed or issued: r 30(1).

5 The conditions are that:

27 (1) he has a seven year general qualification within the meaning of the Courts and Legal Services Act 1990 s 71) (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 742) (Financial Services and Markets Act 2000 Sch 13 para 3(2)(a));

28 (2) he is an advocate or solicitor in Scotland of at least seven years' standing (Sch 13 para 3(2)(b)); or

29 (3) he is a member of the Bar of Northern Ireland of at least seven years' standing or a solicitor of the Supreme Court of Northern Ireland of at least seven years' standing (Sch 13 para 3(2)(c)).

As from a day or days to be appointed, head (1) above is replaced by a new provision referring to satisfying the judicial-appointment eligibility condition on a five-year basis, the figure in head (2) above is replaced by 'five', the figure in head (3) above is replaced by 'five' and the reference is changed to a solicitor of the Court of Judicature of Northern Ireland: Sch 13 para 3(2) (prospectively amended by the Tribunals, Courts and Enforcement Act 2007 Sch 10 Pt 1 para 34(1), (3)(b) and the Constitutional Reform Act 2005 Sch 11 Pt 3 para 5). At the date at which this volume states the law no such day or days had been appointed.

The panel of chairmen must include at least one member who is a person of the kind mentioned in the Financial Services and Markets Act 2000 Sch 13 para 3(2)(b): Sch 13 para 3(3).

6 The panel established under the Financial Services and Markets Act 2000 Sch 13 para 3(1): see the text to note 4.

7 Financial Services and Markets Act 2000 Sch 13 para 2(1), (2).

8 Financial Services and Markets Act 2000 Sch 13 para 2(3).

9 Financial Services and Markets Act 2000 Sch 13 para 2(4).

10 The Lord Chancellor may not appoint a person to be the President or Deputy President unless that person:

- 30 (1) has a ten year general qualification within the meaning of the Courts and Legal Services Act 1990 s 71 (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 742) (Financial Services and Markets Act 2000 Sch 13 para 2(5)(a));
- 31 (2) is an advocate or solicitor in Scotland of at least ten years' standing (Sch 13 para 2(5)(b)); or
- 32 (3) is a member of the Bar of Northern Ireland of at least ten years' standing or a solicitor of the Supreme Court of Northern Ireland of at least ten years' standing (Sch 13 para 2(5)(c)).

As from a day or days to be appointed, head (1) above is replaced by a new provision referring to satisfying the judicial-appointment eligibility condition on a seven-year basis, the figure in head (2) above is replaced by 'seven', the figure in head (3) above is replaced by 'seven' and the reference is changed to a solicitor of the Court of Judicature of Northern Ireland: Sch 13 para 2(5) (prospectively amended by the Tribunals, Courts and Enforcement Act 2007 Sch 10 Pt 1 para 34(1), (2)(b) and the Constitutional Reform Act 2005 Sch 4 Pt 1 para 286(1), (2)). At the date at which this volume states the law no such day or days had been appointed.

- 11 Financial Services and Markets Act 2000 Sch 13 para 2(6).
- 12 Financial Services and Markets Act 2000 Sch 13 para 2(7)(a).
- 13 Financial Services and Markets Act 2000 Sch 13 para 2(7)(b).

The Lord Chancellor may appoint a person under Sch 13 para 2(7)(b) only after consulting the following: (1) the Lord Chief Justice of England and Wales; (2) the Lord President of the Court of Session; (3) the Lord Chief Justice of Northern Ireland: Sch 13 para 2(8) (Sch 13 para 2(8)-(11) added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 286(1), (2)). The Lord Chief Justice of England and Wales may nominate a judicial office holder (as defined in s 109(4)) to exercise his functions under the Financial Services and Markets Act 2000 Sch 13 para 2: Sch 13 para 2(9) (as so added). The Lord President of the Court of Session may nominate a judge of the Court of Session who is a member of the First or Second Division of the Inner House of that Court to exercise his under Sch 13 para 2: Sch 13 para 2(10) (as so added). The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his functions under Sch 13 para 2: (a) the holder of one of the offices listed in the Justice (Northern Ireland) Act 2002 Sch 1; (b) a Lord Justice of Appeal (as defined in s 88): Financial Services and Markets Act 2000 Sch 13 para 2(11) (as so added). As to the Lord Chief Justice of England and Wales see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 301 et seq; **COURTS**.

- 14 Financial Services and Markets Act 2000 Sch 13 para 3(1), (4).
- 15 Financial Services and Markets Act 2000 Sch 13 para 4(1).
- 16 Financial Services and Markets Act 2000 Sch 13 para 4(2).

The Lord Chancellor may remove a person under Sch 13 para 4(2) only with the concurrence of the appropriate senior judge: Sch 13 para 4(2A) (Sch 13 para 4(2A), (2B) added by the Constitutional Reform Act 2005 Sch 4 Pt 1 para 286(1), (3)). The appropriate senior judge is the Lord Chief Justice of England and Wales, unless (1) the person to be removed exercises functions wholly or mainly in Scotland, in which case it is the Lord President of the Court of Session; or (2) the person to be removed exercises functions wholly or mainly in Northern Ireland, in which case it is the Lord Chief Justice of Northern Ireland: Sch 13 para 4(2B) (as so added).

- 17 Financial Services and Markets Act 2000 Sch 13 para 4(3)(a).
- 18 Financial Services and Markets Act 2000 Sch 13 para 4(3)(b).
- 19 Financial Services and Markets Act 2000 Sch 13 para 5(a).
- 20 Financial Services and Markets Act 2000 Sch 13 para 5(b). As to the appointment of an expert see Sch 13 para 7(4); and PARA 44.
- 21 Financial Services and Markets Act 2000 Sch 13 para 5.
- 22 Financial Services and Markets Act 2000 Sch 13 para 6(1).
- 23 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 2(1). Any document purporting to be a document duly executed or issued by the Secretary on behalf of the Tribunal is, unless proved to the contrary, deemed to be a document so executed or issued: r 30(1).
- 24 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 26(1).

25 Financial Services and Markets Act 2000 Sch 13 para 6(2).

26 Financial Services and Markets Act 2000 Sch 13 para 6(3).

## UPDATE

### 43 Constitution of the Financial Services and Markets Tribunal

NOTES 5, 10--Tribunals, Courts and Enforcement Act 2007 Sch 10 para 34 in force 21 July 2008: SI 2008/1653.

NOTE 5--Constitutional Reform Act 2005 Sch 11 para 5 in force on 1 October 2009: SI 2009/1604.

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### 44. Standing arrangements.

On a reference to the Financial Services and Markets Tribunal<sup>1</sup>, the persons to act as members of the Tribunal for the purposes of the reference are to be selected from the panel of chairmen<sup>2</sup> or the lay panel<sup>3</sup> in accordance with arrangements made by the President (referred to as 'standing arrangements')<sup>4</sup>. The standing arrangements must provide for at least one member to be selected from the panel of chairmen<sup>5</sup>.

If, while a reference is being dealt with, a person serving as member of the Tribunal in respect of the reference becomes unable to act, the reference may be dealt with by:

- 113 (1) the other members selected in respect of that reference<sup>6</sup>; or
- 114 (2) if it is being dealt with by a single member, such other member of the panel of chairmen as may be selected in accordance with the standing arrangements for the purposes of the reference<sup>7</sup>.

If it appears to the Tribunal that a matter before it involves a question of fact of special difficulty, it may appoint one or more experts to provide assistance<sup>8</sup>.

1 As to the establishment of the Financial Services and Markets Tribunal see PARA 43.

2 As to the panel of chairmen see PARA 43.

3 As to the lay panel see PARA 43.

4 Financial Services and Markets Act 2000 Sch 13 para 7(1). As to the President see PARA 43.

5 Financial Services and Markets Act 2000 Sch 13 para 7(2).

6 Financial Services and Markets Act 2000 Sch 13 para 7(3)(a).

7 Financial Services and Markets Act 2000 Sch 13 para 7(3)(b).

8 Financial Services and Markets Act 2000 Sch 13 para 7(4).

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## ***B. TRIBUNAL PROCEDURE AND PROCEEDINGS***

### **45. Rules for the conduct of proceedings.**

The Lord Chancellor may by rules make such provision as appears to him to be necessary or expedient in respect of the conduct of proceedings before the Tribunal<sup>1</sup>. Provision is also made by the Financial Services and Markets Act 2000<sup>2</sup> as respects the conduct of proceedings before the Tribunal but this does not limit the Lord Chancellor's powers to make such rules<sup>3</sup>.

Rules made by the Lord Chancellor<sup>4</sup> may, in particular, include provision:

- 115 (1) as to the manner in which references are to be instituted<sup>5</sup>;
- 116 (2) for the holding of hearings in private in such circumstances as may be specified in the rules<sup>6</sup>;
- 117 (3) as to the persons who may appear on behalf of the parties<sup>7</sup>;
- 118 (4) for a member of the panel of chairmen<sup>8</sup> to hear and determine interlocutory matters arising on a reference<sup>9</sup>;
- 119 (5) for the suspension of decisions of the Financial Services Authority<sup>10</sup> which have taken effect<sup>11</sup>;
- 120 (6) as to the withdrawal of references<sup>12</sup>;
- 121 (7) as to the registration, publication and proof of decisions and orders<sup>13</sup>.

Subject to the provisions of the Financial Services and Markets Act 2000 and the rules made by the Lord Chancellor<sup>14</sup>, the Tribunal may regulate its own procedure<sup>15</sup>.

1 Financial Services and Markets Act 2000 s 132(3). The Lord Chancellor's power to make rules under s 132 is exercisable by statutory instrument: s 428(2). In exercise of this power the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, have been made: see PARA 47 et seq. As to the Lord Chancellor see **CONSTITUTIONAL AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq.

2 Ie under the Financial Services and Markets Act 2000 s 132(4), Sch 13: see PARA 56.

3 Financial Services and Markets Act 2000 s 132(4).

4 Ie rules made by the Lord Chancellor under the Financial Services and Markets Act 2000 s 132: Sch 13 para 1.

5 Financial Services and Markets Act 2000 Sch 13 para 9(a). See PARA 47.

6 Financial Services and Markets Act 2000 Sch 13 para 9(b). See PARA 61.

7 Financial Services and Markets Act 2000 Sch 13 para 9(c). See PARA 62.

8 As to the panel of chairmen see PARA 43.

9 Financial Services and Markets Act 2000 Sch 13 para 9(d). See PARA 57.

10 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

11 Financial Services and Markets Act 2000 Sch 13 para 9(e).



- 12 Financial Services and Markets Act 2000 Sch 13 para 9(f). See PARA 58.
- 13 Financial Services and Markets Act 2000 Sch 13 para 9(g). See PARA 64.
- 14 The Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.
- 15 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 26(2).

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#### **46. Timing and determination of references.**

A reference to the Financial Services and Markets Tribunal<sup>1</sup> under the Financial Services and Markets Act 2000 must be made before the end of:

- 122 (1) the period of 28 days beginning with the date on which the decision notice or supervisory notice<sup>2</sup> in question is given<sup>3</sup>; or
- 123 (2) such other period as may be specified in rules<sup>4</sup>.

Subject to the rules, the Tribunal may allow a reference to be made after the end of that period<sup>5</sup>.

For the purpose of dealing with references, or any matter preliminary or incidental to a reference, the Financial Services and Markets Tribunal must sit at such times and in such place or places as the Lord Chancellor may, after consulting the President of the Tribunal, direct<sup>6</sup>.

On a reference the Tribunal may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the Financial Services Authority<sup>7</sup> at the material time<sup>8</sup>. On a reference the Tribunal must determine what (if any) is the appropriate action for the Authority to take in relation to the matter referred to it<sup>9</sup>. On determining a reference, the Tribunal must remit the matter to the Authority with such directions<sup>10</sup> (if any) as the Tribunal considers appropriate for giving effect to its determination<sup>11</sup>.

In determining a reference made as a result of a decision notice, the Tribunal may not direct the Authority to take action which the Authority would not<sup>12</sup> have had power to take when giving the decision notice<sup>13</sup>. In determining a reference made as a result of a supervisory notice, the Tribunal may not direct the Authority to take action which would have otherwise required the giving of a decision notice<sup>14</sup>.

The Authority must not take the action specified in a decision notice:

- 124 (a) during the period within which the matter to which the decision notice relates may be referred to the Financial Services and Markets Tribunal<sup>15</sup>; and
- 125 (b) if the matter is so referred, until the reference, and any appeal<sup>16</sup> against the Tribunal's determination, has been finally disposed of<sup>17</sup>.

The Authority must act in accordance with the determination of, and any direction given by, the Tribunal<sup>18</sup>.

The Tribunal may, on determining a reference, make recommendations as to the Authority's regulating provisions<sup>19</sup> or its procedures<sup>20</sup>.

The President of the Tribunal may give directions as to the practice and procedure to be followed by the Tribunal in relation to references to it<sup>21</sup>.

- 1 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.
- 2 As to the meaning of 'supervisory notice' see PARA 773; definition applied by the Financial Services and Markets Act 2000 s 133(12). As to decision notices see PARA 770.
- 3 Financial Services and Markets Act 2000 s 133(1)(a).
- 4 Financial Services and Markets Act 2000 s 133(1)(b). As to the rules made under s 132 see the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.
- 5 Financial Services and Markets Act 2000 s 133(2).
- 6 Financial Services and Markets Act 2000 s 132(4), Sch 13 para 8 (amended by the Constitutional Reform Act 2005 s 15(1), Sch 4 Pt 1 para 286(1), (4)). As to the President see PARA 43
- 7 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.
- 8 Financial Services and Markets Act 2000 s 133(3).
- 9 Financial Services and Markets Act 2000 s 133(4).
- 10 As to directions by the Tribunal see PARAS 52-53.
- 11 Financial Services and Markets Act 2000 s 133(5).
- 12 Ie as a result of the Financial Services and Markets Act 2000 s 388(2): see PARA 770.
- 13 Financial Services and Markets Act 2000 s 133(6).
- 14 Financial Services and Markets Act 2000 s 133(7).
- 15 Financial Services and Markets Act 2000 s 133(9)(a).
- 16 As to appeals see PARA 69 et seq.
- 17 Financial Services and Markets Act 2000 s 133(9)(b).
- 18 Financial Services and Markets Act 2000 s 133(10).
- 19 As to the meaning of 'regulating provisions' see PARA 38 note 2.
- 20 Financial Services and Markets Act 2000 s 133(8).
- 21 Financial Services and Markets Act 2000 Sch 13 para 10.

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#### **47. Making a reference.**

A reference<sup>1</sup> must be made by way of a written notice (the 'reference notice') signed by or on behalf of the applicant and filed by the applicant<sup>2</sup>. Usually a reference must be made before the

end of the period of 28 days beginning with the date on which a decision notice<sup>3</sup> or supervisory notice<sup>4</sup> is given<sup>5</sup>.

The reference notice must state:

- 126 (1) the name and address<sup>6</sup> of the applicant<sup>7</sup>;
- 127 (2) the name and address of the applicant's representative (if any)<sup>8</sup>;
- 128 (3) if no representative is named under head (2) above, the applicant's address for service in the United Kingdom<sup>9</sup> (if different from the address notified under head (1) above)<sup>10</sup>;
- 129 (4) that the notice is a reference notice<sup>11</sup>; and
- 130 (5) the issues concerning the Authority notice<sup>12</sup> that the applicant wishes the Financial Services and Markets Tribunal to consider<sup>13</sup>.

The applicant must file with the reference notice a copy of any Authority notice to which the reference relates<sup>14</sup>. The applicant may include with the reference notice an application for directions, such as a direction extending any time limit for making a reference, a direction<sup>15</sup> in regard to suspension of the action by the Financial Services Authority or a direction<sup>16</sup> that the register must include no particulars about the reference<sup>17</sup>.

At the same time as he files the reference notice, the applicant must send a copy of that notice (and of any such application for directions) to the Authority<sup>18</sup>.

Wherever an application for directions is made the Secretary to the Financial Services and Markets Tribunal<sup>19</sup> must refer the application for directions to the Tribunal for determination and he must take no further action in relation to the reference notice until the application for directions has been determined<sup>20</sup>. Subject to this<sup>21</sup> and to any directions given by the Tribunal, upon receiving a reference notice the Secretary must:

- 131 (a) enter particulars of the reference in the register<sup>22</sup>; and
- 132 (b) inform the parties in writing of:
  - 1. (i) the fact that the reference has been received<sup>23</sup>;
  - 2. (ii) the date when the Tribunal received the notice<sup>24</sup>; and
  - 3. (iii) the Tribunal's decision on any application made for directions (and include a copy of any direction given)<sup>25</sup>.

When sending the parties this information the Secretary must specify the date on which he is sending it<sup>26</sup>.

Where, after the filing of a reference notice, the Authority gives the applicant any notice<sup>27</sup> in relation to the referred action, the Authority must without delay file a copy of that notice<sup>28</sup>.

1 'Reference' means a reference to the Financial Services and Markets Tribunal under or by virtue of the Financial Services and Markets Act 2000 or any other enactment (including an enactment comprised in subordinate legislation within the meaning of the Interpretation Act 1978): Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 2(1). As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

2 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(1). 'Applicant' means a person who refers a case to the Tribunal and, if there is more than one such person, each such person: r 2(1). 'File' means send to the Tribunal: r 2(1).

3 As to decision notices see PARA 770.

4 As to supervisory notices see PARA 773.

- 5 See the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(2). Rule 4(2) further provides that in any case not covered by the Financial Services and Markets Act 2000 s 133(1)(a) (see PARA 46 head (1)), the period specified for the purposes of s 133(1)(b) (period specified for making a reference) (see PARA 46) is the period of 28 days beginning with the date on which the Authority notice is given.
- 6 For these purposes, 'address', where the applicant is a corporation, means the address of the applicant's registered or principal office: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(4).
- 7 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(3)(a).
- 8 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(3)(b).
- 9 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 10 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(3)(c).
- 11 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(3)(d).
- 12 'Authority notice' means the decision notice, supervisory notice or other notice relating to the referred action that was given to the applicant by the Financial Services Authority: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 2(1). 'Referred action' means the act (or proposed act) on the part of the Authority that gave rise to the reference: r 2(1). As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.
- 13 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(3)(e).
- 14 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(5). If the reference was made under the Financial Services and Markets Act 2000 s 393(11) (reference to the Tribunal by a third party who alleges that he was not given a copy of a decision notice) (see PARA 775), the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(5) does not apply: r 15(3). For these purposes, 'Authority notice' means the decision notice which the applicant alleges was not copied to him; and 'referred action' means the action set out in the Authority notice: r 15(2).
- 15 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(e): see PARA 53 head (5).
- 16 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(p): see PARA 53 head (15).
- 17 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(6).
- 18 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(7).
- 19 As to the Secretary see PARA 43.
- 20 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(8).
- 21 Ie the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(8): see the text to note 20.
- 22 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(9)(a). 'Register' means the register of references and decisions kept in connection with the Tribunal's functions and which is open to the inspection of any person without charge at all reasonable hours: r 2(1). A document purporting to be certified by the Secretary to be a true copy of any entry of a decision in the register is, unless proved to the contrary, sufficient evidence of the entry and of the matters referred to in it: r 30(2).
- 23 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(9)(b)(i).
- 24 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(9)(b)(ii).
- 25 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(9)(b)(iii). As to directions see PARA 52.
- 26 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(9).
- 27 Ie a notice under the Financial Services and Markets Act 2000.
- 28 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 11.

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#### **48. Statement of case by the Financial Services Authority.**

The Financial Services Authority<sup>1</sup> must file a written statement (a 'statement of case') in support of the referred action<sup>2</sup> so that it is received by the Financial Services and Markets Tribunal<sup>3</sup> no later than 28 days after the day on which the Authority received the information sent<sup>4</sup> by the Secretary to the Tribunal<sup>5</sup>.

The statement of case must:

- 133 (1) specify the statutory provisions providing for the referred action<sup>6</sup>;
- 134 (2) specify the reasons for the referred action<sup>7</sup>;
- 135 (3) set out all the matters and facts upon which the Authority relies to support the referred action<sup>8</sup>; and
- 136 (4) specify the date on which the statement of case is filed<sup>9</sup>.

The statement of case must be accompanied by a list of:

- 137 (a) the documents<sup>10</sup> on which the Authority relies in support of the referred action<sup>11</sup>; and
- 138 (b) the further material<sup>12</sup> which in the opinion of the Authority might undermine the decision to take that action<sup>13</sup>.

At the same time as it files the statement of case, the Authority must send to the applicant<sup>14</sup> a copy of the statement of case and of the list under heads (a) and (b) above<sup>15</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

2 As to the meaning of 'referred action' see PARA 47 note 12.

3 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

4 In accordance with the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(9)(b): see PARA 47 heads (b)(i)-(b)(iii).

5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(1). As to the Secretary to the Tribunal see PARA 43.

6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(2)(a). The duties of the Authority to set out information under r 5(2) or to list material under r 5(3) apply only to information, material or documents which relate to the matters referred to the Tribunal in accordance with the Financial Services and Markets Act 2000 s 393(9) (reference to the Tribunal by a third party to whom a decision notice was copied) or (as the case may be) s 393(11) (reference to the Tribunal by a third party who alleges that he was not given a copy of a decision notice) (see PARA 775): Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 15(4). If the reference was made under the Financial Services and Markets Act 2000 s 393(9), 'Authority notice' means the decision notice which was copied to the applicant by the Authority; if the reference was made under s 393(11), 'Authority notice' means the decision notice which the applicant alleges was not copied to him; and in both cases 'referred action' means the action set out in the Authority notice: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 15(2).

7 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(2)(b). See note 6.

8 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(2)(c). See note 6.

9 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(2)(d). As to the meaning of 'file' see PARA 47 note 2. See note 6.

10 'Documents' includes information recorded in any form and, in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 2(1).

11 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(3)(a). For the exception to r 5(3) see r 8; and PARA 51. See note 6.

12 'Further material' means documents which:

33 (1) were considered by the Authority in reaching or maintaining the decision to give an Authority notice; or

34 (2) were obtained by the Authority in connection with the matter to which that notice relates (whether they were obtained before or after giving the notice) but which were not considered by it in reaching or maintaining that decision,

but does not include documents on which the Authority relies in support of the referred action: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 2(1). As to the meaning of 'Authority notice' see PARA 47 note 12.

13 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(3)(b). For the exception to r 5(3) see r 8; and PARA 51. See note 6.

14 As to the meaning of 'applicant' see PARA 47 note 2.

15 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(4).

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#### **49. Applicant's reply.**

The applicant<sup>1</sup> must file a written reply so that it is received by the Financial Services and Markets Tribunal<sup>2</sup> no later than 28 days after:

139 (1) the date on which the applicant received a copy of the statement of case<sup>3</sup>; or

140 (2) if the Financial Services Authority<sup>4</sup> amends its statement of case, the date on which the applicant received a copy of the amended statement of case<sup>5</sup>.

The reply must:

141 (a) state the grounds on which the applicant relies in the reference<sup>6</sup>;

142 (b) identify all matters contained in the statement of case which are disputed by the applicant<sup>7</sup>;

143 (c) state the applicant's reasons for disputing them<sup>8</sup>; and

144 (d) specify the date on which it is filed<sup>9</sup>.

The reply must be accompanied by a list of all the documents<sup>10</sup> on which the applicant relies in support of his case<sup>11</sup>. At the same time as he files the reply, the applicant must send to the Authority a copy of the reply and of the list of documents<sup>12</sup>.

- 1 As to the meaning of 'applicant' see PARA 47 note 2.
- 2 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.
- 3 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 6(1)(a). As to the meaning of 'statement of case' see PARA 48.
- 4 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.
- 5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 6(1)(b).
- 6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 6(2)(a). As to the meaning of 'reference' see PARA 47 note 1.
- 7 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 6(2)(b).
- 8 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 6(2)(c).
- 9 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 6(2)(d). As to the meaning of 'file' see PARA 47 note 2.
- 10 As to the meaning of 'documents' see PARA 48 note 10.
- 11 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 6(3).
- 12 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 6(4).

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## **50. Secondary disclosure by the Financial Services Authority.**

Following the filing of the applicant's reply<sup>1</sup>, if there is any further material which might be reasonably expected to assist the applicant's case as disclosed by the applicant's reply and which is not mentioned in the list<sup>2</sup> accompanying the statement of case provided, the Financial Services Authority<sup>3</sup> must file a list of such further material<sup>4</sup>.

Any such list required to be filed must be filed so that it is received no later than 14 days after the day on which the Authority received the applicant's reply<sup>5</sup>. At the same time as it files such list the Authority must send a copy to the applicant<sup>6</sup>.

- 1 As to the applicant's reply see PARA 49. As to the meaning of 'applicant' see PARA 47 note 2.
- 2 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(3); see PARA 48.
- 3 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.
- 4 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 7(1). As to the meaning of 'further material' see PARA 48 note 12. For the exception to disclosure see r 8; and PARA 51. The duty of the Authority under r 7(1) applies only to material which relates to the matters referred to the Tribunal in accordance with the Financial Services and Markets Act 2000 s 393(9) (reference to the Tribunal by a third party to whom a decision notice was given) or (as the case may be) s 393(11) (reference to the Tribunal by a third party who alleges that

he was not given a copy of a decision notice) (see PARA 775): Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 15(4). If the reference was made under the Financial Services and Markets Act 2000 s 393(9), 'Authority notice' means the decision notice which was copied to the applicant by the Authority; if the reference was made under s 393(11), 'Authority notice' means the decision notice which the applicant alleges was not copied to him; and in both cases 'referred action' means the action set out in the Authority notice: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 15(2).

5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 7(2).

6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 7(3).

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## **51. Exceptions to disclosure.**

Any list of documents or further material required to be filed with a statement of case by the Financial Services Authority<sup>1</sup> or required as secondary disclosure<sup>2</sup> need not include any document<sup>3</sup> that relates to a case involving a person other than the applicant<sup>4</sup> which was taken into account by the Authority in the applicant's case only for the purposes of comparison with other cases<sup>5</sup>.

Any such list or a list accompanying the applicant's reply<sup>6</sup> need not include any document that is material the disclosure of which for the purposes of or in connection with any legal proceedings is prohibited by the Regulation of Investigatory Powers Act 2000<sup>7</sup>.

A party<sup>8</sup> may apply to the Financial Services and Markets Tribunal<sup>9</sup> (without giving notice to the other party) for a direction<sup>10</sup> authorising that party not to include in the relevant list<sup>11</sup> a document on the ground that disclosure of the document:

145 (1) would not be in the public interest<sup>12</sup>; or

146 (2) would not be fair, having regard to:

3

4. (a) the likely significance of the document to the applicant in relation to the matter referred to the Tribunal<sup>13</sup>; and

5. (b) the potential prejudice to the commercial interests of a person other than the applicant which would be caused by disclosure of the document<sup>14</sup>.

4

Any of the lists mentioned above<sup>15</sup> need not include any document in respect of which such an application has been or is being made<sup>16</sup>. For the purpose of deciding an application by a party<sup>17</sup>, the Tribunal may require that the document be produced to the Tribunal together with a statement of the reasons why its inclusion in the list would:

147 (i) in the case of an application under head (1) above, not be in the public interest<sup>18</sup>; or

148 (ii) in the case of an application under head (2) above, not be fair<sup>19</sup>;

and may invite the other party to make representations<sup>20</sup>.



If the Tribunal refuses an application<sup>21</sup> for a direction authorising a party not to include a document in a list, it must direct that party to revise the list so as to include the document<sup>22</sup>, and to file<sup>23</sup> a copy of that list as revised and send a copy to the other party<sup>24</sup>.

A party who has filed such a list<sup>25</sup> must, upon the request of the other party, provide that other party with a copy of any document specified in the list or make any such document available to that party for inspection or copying<sup>26</sup>.

- 1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.
- 2 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(3) (see PARA 48) and r 7(1) (see PARA 50).
- 3 As to the meaning of 'documents' see PARA 48 note 10.
- 4 As to the meaning of 'applicant' see PARA 47 note 2.
- 5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(1).
- 6 Ie a list under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 6(3): see PARA 49.
- 7 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(2). As to the prohibition mentioned in the text see the Regulation of Investigatory Powers Act 2000 s 17; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 519.
- 8 'Party' means the applicant or the Authority (or, if there is more than one applicant, any of the applicants or the Authority), and 'other party' is construed accordingly: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 2(1).
- 9 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.
- 10 As to directions see PARA 52.
- 11 Ie a list under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(1), r 6(3) or r 7(1): see PARAS 48-50.
- 12 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(4)(a).
- 13 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(4)(b)(i).
- 14 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(4)(b)(ii).
- 15 Ie a list under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(1), r 6(3) or r 7(1): see PARAS 48-50.
- 16 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(3).
- 17 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(4).
- 18 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(5)(a)(i).
- 19 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(5)(a)(ii).
- 20 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(5)(b). 'Representations' means written representations or (with the consent of the Tribunal, or at its request) oral representations: r 2(1).
- 21 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(4).
- 22 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(6)(a).
- 23 As to the meaning of 'file' see PARA 47 note 2.
- 24 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(6)(b).
- 25 Ie a list under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(1), r 6(3) or r 7(1): see PARAS 48-50.

26 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(7). This does not apply to any document that is a protected item: r 8(8). As to the meaning of 'protected item' see PARA 784; definition applied by r 2(1).

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## **52. Power to give directions.**

The Financial Services and Markets Tribunal<sup>1</sup> may at any time give directions<sup>2</sup> to enable the parties<sup>3</sup> to prepare for the hearing of the reference<sup>4</sup>, to assist the Tribunal to determine the issues and generally to ensure the just, expeditious and economical determination of the reference<sup>5</sup>.

The President of the Tribunal<sup>6</sup> may give directions as to the practice and procedure to be followed by the Tribunal in relation to references to it<sup>7</sup>.

The Tribunal may give directions on the application of any party or of all the parties or of its own initiative and, where it gives a direction of its own initiative, it may (but need not) give prior notice to the parties of its intention to do so<sup>8</sup>. Any application for directions must include the reasons for making that application<sup>9</sup>.

Except where it is made during the pre-hearing review<sup>10</sup> or during the hearing of the reference, an application for directions must be filed<sup>11</sup> and, unless the application is accompanied by the written consent of all the parties or an application without notice is permitted<sup>12</sup>, the party making the application must at the same time send a copy to the other party<sup>13</sup>.

If any party objects to the directions applied for, the Tribunal must consider the objection and, if it considers it necessary for the determination of the application, must give the parties an opportunity to make representations<sup>14</sup>.

Directions may be given orally or in writing and, unless the Tribunal decides otherwise in any particular case, notice of any written direction (or refusal to give a direction) must be given to the parties<sup>15</sup>. Directions containing a requirement may specify a time limit for complying with the requirement and must include a statement of the possible consequences of a party's failure to comply with the requirement<sup>16</sup>.

A person to whom a direction is given<sup>17</sup> may apply to the Tribunal showing good cause why it should be varied or set aside, but the Tribunal must not grant such an application without first notifying any person who applied for the direction and giving that party an opportunity to make representations<sup>18</sup>.

If the Chairman of the Financial Services and Markets Tribunal<sup>19</sup> directs that it is appropriate to hold a pre-hearing review<sup>20</sup>, the Secretary to the Tribunal<sup>21</sup> must give the parties not less than 14 days' notice of the time and place of the pre-hearing review<sup>22</sup>. At the pre-hearing review, which must be held before the Chairman, he must give all directions appearing necessary or desirable for securing the just, expeditious and economical conduct of the reference<sup>23</sup>. The Chairman must also endeavour to secure that the parties make all admissions and agreements as they ought reasonably to have made in relation to the proceedings<sup>24</sup>.

1 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

2 'Direction' includes any direction, summons or order given or made by the Tribunal: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 2(1).

3 As to the meaning of 'party' see PARA 51 note 8.

4 As to the meaning of 'reference' see PARA 47 note 1.

5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(1).

6 As to the President of the Tribunal see PARA 43.

7 Financial Services and Markets Act 2000 s 132(4), Sch 13 para 10. As to references see PARAS 46-47.

8 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(2).

9 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(3).

10 'Pre-hearing review' means a review of the reference that may be held at any time before the hearing of the reference: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(12).

11 As to the meaning of 'file' see PARA 47 note 2.

12 If permitted by the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.

13 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(4).

14 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(5). As to the meaning of 'representations' see PARA 51 note 20.

15 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(6).

16 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(7).

17 If under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.

18 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(8).

19 As to the Chairman see PARA 43.

20 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(8).

21 As to the Secretary see PARA 43.

22 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(9), (10).

23 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(9), (11)(a).

24 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 9(9), (11)(b).

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### **53. Particular types of direction.**

Directions<sup>1</sup> given by the Financial Services and Markets Tribunal<sup>2</sup> may:

- 149 (1) fix the time and place of the hearing of the reference<sup>3</sup> and alter any time and place so fixed<sup>4</sup>;

- 150 (2) provide for an oral hearing, upon such notice as the Tribunal may determine, in connection with any matter arising under the reference<sup>5</sup>;
- 151 (3) adjourn any oral hearing<sup>6</sup>;
- 152 (4) extend any time limit for making a reference<sup>7</sup>, or vary (whether by extending or shortening) any other time limit for anything to be done<sup>8</sup>;
- 153 (5) suspend the effect of an Authority notice<sup>9</sup> (or prevent it taking effect) until the reference has been finally disposed of, or until any appeal against the Tribunal's determination of the reference has been finally disposed of, or both<sup>10</sup>;
- 154 (6) permit or require any party to provide further information or supplementary statements<sup>11</sup> or to amend a response document<sup>12</sup> or a supplementary statement<sup>13</sup>;
- 155 (7) require any party to file any document:
- 5
6. (a) that is in the custody or under the control of that party<sup>14</sup>;
7. (b) that the Tribunal considers is or may be relevant to the determination of the reference<sup>15</sup>; and
8. (c) that has neither been exempted from disclosure<sup>16</sup> nor been made available<sup>17</sup>,
- 6
- 156 and may also require that any such document so directed for filing must be copied to the other party or else be made available to that other party for inspection and copying<sup>18</sup>;
- 157 (8) require any party to provide a statement of relevant issues and facts, identifying those which are, and those which are not, agreed by the other party<sup>19</sup>;
- 158 (9) require any party to file<sup>20</sup> documents for any hearing<sup>21</sup> or to agree with the other party the documents to be filed<sup>22</sup>;
- 159 (10) require any party to file:
- 7
9. (a) a list of the witnesses whom the party wishes to call to give evidence at the hearing of the reference<sup>23</sup>; and
10. (b) statements of the evidence which those witnesses intend to give, if called<sup>24</sup>;
- 8
- 160 (11) make provision as to any expert witnesses to be called including the number of such witnesses and the evidence to be given by them<sup>25</sup>;
- 161 (12) provide for the appointment of any expert<sup>26</sup> and for that expert to send the parties copies of any report that he produces<sup>27</sup>;
- 162 (13) provide for the manner in which any evidence may be given<sup>28</sup>;
- 163 (14) provide for the use of languages in addition to English, including provision:
- 9
11. (a) as to the venue of any hearing<sup>29</sup> so as to ensure the availability of simultaneous translation facilities<sup>30</sup>; and
12. (b) for the translation of any document<sup>31</sup>;
- 10
- 164 (15) require that the register include no particulars about the reference<sup>32</sup>; and
- 165 (16) where two or more reference notices<sup>33</sup> have been filed:
- 11
13. (a) in respect of the same matter<sup>34</sup>;
14. (b) in respect of separate interests in the same subject in dispute<sup>35</sup>; or
15. (c) which involve the same issues<sup>36</sup>,
- 12
- 166 provide that the references or any particular issue or matter raised in the references be consolidated or heard together<sup>37</sup>.

In the case of an application for a direction under head (4) above<sup>38</sup> extending any time limit, the Tribunal may direct that the time limit be extended (whether or not it has already expired) if it

is satisfied that to do so would be in the interests of justice but, in the case of an application for a direction extending any time limit for making a reference, the Tribunal must not determine the application without:

- 167 (i) considering whether the Authority notice was such as to notify the applicant properly and effectively of the referred action<sup>39</sup>; and
- 168 (ii) considering whether the existence of the right to make the reference and the time limit had been notified to the applicant, whether in the Authority notice or otherwise<sup>40</sup>.

A time limit so extended<sup>41</sup> may from time to time be further extended by directions of the Tribunal (whether or not that or any subsequent such time limit has already expired) made upon an application under head (4) above<sup>42</sup>, but no such direction may be given unless the Tribunal is satisfied that the further extension would be in the interests of justice<sup>43</sup>. Where a party files a response document or list later than any time limit imposed or extended<sup>44</sup> but without applying for a direction under head (4) above<sup>45</sup> extending the time limit, that party must be treated as applying for such a direction; but no such direction may be given unless the Tribunal is satisfied that such an extension would be in the interests of justice<sup>46</sup>. If a response document or list is not filed in accordance with the time limit imposed (or extended) in this way<sup>47</sup>, the Tribunal may of its own initiative direct that the document or list be filed by a specified date<sup>48</sup>.

Where an application for a direction is made under head (5) above<sup>49</sup> suspending the effect of an Authority notice, the Tribunal may give the direction only if it is satisfied that to do so would not prejudice the interests of any persons (whether consumers, investors or otherwise) intended to be protected by the Authority notice<sup>50</sup> or the smooth operation or integrity of any market intended to be protected by that notice<sup>51</sup>.

If the Tribunal gives a direction under head (6) above<sup>52</sup> permitting or requiring a party to provide a supplementary statement or to amend a response document or supplementary statement, the direction may require that party to file any such statement or amendment and send a copy to the other party<sup>53</sup>.

The Tribunal must not give a direction under head (7) or head (9) above<sup>54</sup> in relation to the disclosure of any document to the extent that the Tribunal is satisfied that:

- 169 (A) it is a protected item or would be included in an exemption<sup>55</sup>; or
- 170 (B) it should not be disclosed on one of the grounds specified<sup>56</sup>;

and, for the purpose of determining whether such a direction should be given in respect of any such document, the Tribunal may require that the document be produced to the Tribunal<sup>57</sup>, hear the application in the absence of any party<sup>58</sup>, and invite any party to make representations<sup>59</sup>.

In the case of an application for a direction under head (15) above<sup>60</sup> that the register<sup>61</sup> should include no particulars about the reference, the Tribunal may give the direction if it is satisfied that this is necessary, having regard to the interests of morals, public order, national security or the protection of the private lives of the parties<sup>62</sup> or to any unfairness to the applicant or prejudice to the interests of consumers that might result from the register including particulars about the reference<sup>63</sup>.

1 As to the power to give directions see PARA 52.

2 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

3 As to the meaning of 'reference' see PARA 47 note 1.

- 4 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(a).
- 5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(b).
- 6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(c).
- 7 le under the Financial Services and Markets Act 2000 or the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.
- 8 le under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(d).
- 9 As to the meaning of 'Authority notice' see PARA 47 note 12.
- 10 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(e).
- 11 'Supplementary statement' means a statement that is supplementary to a response document and filed in accordance with a direction given under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(f): r 2(1).
- 12 'Response document' means, in relation to the Financial Services Authority, its statement of case and, in relation to the applicant, his reply: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 2(1). As to the Authority's statement of case see PARA 48. As to the applicant's reply see PARA 49.
- 13 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(f).
- 14 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(g)(i).
- 15 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(g)(ii).
- 16 le by direction given pursuant to the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(4): see PARA 51.
- 17 le pursuant to the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(7): see PARA 51.
- 18 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(g).
- 19 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(h).
- 20 As to the meaning of 'file' see PARA 47 note 2.
- 21 le under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.
- 22 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(j).
- 23 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(k)(i).
- 24 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(k)(ii).
- 25 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(l).
- 26 le under the Financial Services and Markets Act 2000 Sch 13 para 7(4): see PARA 44.
- 27 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(m).
- 28 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(n).
- 29 le under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.
- 30 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(o)(i).
- 31 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(o)(ii).
- 32 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(p).
- 33 'Reference notice' means a notice under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(1) (see PARA 47): r 2(1).

- 34 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(q)(i).
- 35 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(q)(ii).
- 36 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(q)(iii).
- 37 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(q).
- 38 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(d).
- 39 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(2)(a). As to the meaning of 'referred action' see PARA 47 note 12.
- 40 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(2)(b).
- 41 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(2).
- 42 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(d).
- 43 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(3).
- 44 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.
- 45 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(d).
- 46 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(4).
- 47 Ie by or under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.
- 48 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(5).
- 49 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(e).
- 50 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(6)(a).
- 51 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(6)(b).
- 52 Ie the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(f).
- 53 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(7).
- 54 Ie the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(g) or r 10(1)(j).
- 55 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(8)(a). The exemption referred to in the text is an exemption under r 8(1) or r 8(2): see PARA 51. As to the meaning of 'protected item' see PARA 51 note 26. See also PARA 784.
- 56 Ie specified in the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 8(4): see PARA 51.
- 57 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(8)(i).
- 58 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(8)(ii).
- 59 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(8)(iii).
- 60 Ie the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(1)(p).
- 61 As to the meaning of 'register' see PARA 47 note 22.
- 62 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(9)(a).
- 63 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(9)(b).

5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(2) THE REGULATOR AND THE TRIBUNAL/(iv) The Financial Services and Markets Tribunal/B. TRIBUNAL PROCEDURE AND PROCEEDINGS/54. Miscellaneous powers of the Financial Services and Markets Tribunal.

#### **54. Miscellaneous powers of the Financial Services and Markets Tribunal.**

Without limiting any other powers conferred on it by the Financial Services and Markets Act 2000 or the Financial Services and Markets Tribunal Rules 2001<sup>1</sup>, the Financial Services and Markets Tribunal<sup>2</sup> may, if it thinks fit:

- 171 (1) order any response document<sup>3</sup>, supplementary statement<sup>4</sup> or written representation to be struck out at any stage of the proceedings on the ground that it is scandalous, frivolous or vexatious<sup>5</sup>; or
- 172 (2) order any reference<sup>6</sup> to be struck out for want of prosecution<sup>7</sup>.

Before making any order under heads (1) and (2) above, the Tribunal must give notice to the party<sup>8</sup> against whom it is proposed that the order should be made, giving it an opportunity to make representations<sup>9</sup> against the making of the order<sup>10</sup>.

- 1    le the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.
- 2    As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.
- 3    As to the meaning of 'response document' see PARA 53 note 12.
- 4    As to the meaning of 'supplementary statement' see PARA 53 note 11.
- 5    Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 26(3)(a).
- 6    As to the meaning of 'reference' see PARA 47 note 1.
- 7    Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 26(3)(b).
- 8    As to the meaning of 'party' see PARA 51 note 8.
- 9    As to the meaning of 'representations' see PARA 51 note 20.
- 10   Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 26(4).

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#### **55. Failure to comply with direction etc.**

Where a party<sup>1</sup> has, without reasonable excuse, failed to comply:

- 173 (1) with a direction<sup>2</sup> given under the Financial Services and Markets Tribunal Rules 2001<sup>3</sup>; or
- 174 (2) with a provision of the Financial Services and Markets Tribunal Rules 2001<sup>4</sup>,



the Financial Services and Markets Tribunal<sup>5</sup> may take any one or more of the following steps in respect of that party:

- 175 (a) make a costs order<sup>6</sup> against that party<sup>7</sup>;
- 176 (b) where that party is the applicant<sup>8</sup>, dismiss the whole or part of the reference<sup>9</sup> (or, if there is more than one applicant, that applicant's reference)<sup>10</sup>;
- 177 (c) where that party is the Financial Services Authority<sup>11</sup>, strike out the whole or part of the statement of case<sup>12</sup> and, where appropriate, direct that the Authority be debarred from contesting the reference altogether<sup>13</sup>.

The Tribunal must not take any of these steps in respect of a party unless it has given that party notice, giving it an opportunity to make representations<sup>14</sup> against the taking of any such steps<sup>15</sup>.

Any irregularity resulting from failure to comply with any provision of the Financial Services and Markets Tribunal Rules 2001 or of any direction of the Tribunal before the Tribunal has reached its decision does not of itself render the proceedings void<sup>16</sup>. Where any such irregularity comes to the attention of the Tribunal, the Tribunal may, and must if it considers that any person may have been prejudiced by the irregularity, give such directions as it thinks just to cure or waive the irregularity<sup>17</sup>.

Clerical mistakes in any document<sup>18</sup> recording a direction or decision of the Chairman<sup>19</sup> or the Tribunal, or errors arising in such a document from an accidental slip or omission, may be corrected by a certificate signed by the Chairman<sup>20</sup>.

1 As to the meaning of 'party' see PARA 51 note 8.

2 As to directions see PARA 52.

3 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 27(1)(a).

4 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 27(1)(b).

5 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

6 See under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 21: see PARA 65.

7 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 27(1)(i).

8 As to the meaning of 'applicant' see PARA 47 note 2.

9 As to the meaning of 'reference' see PARA 47 note 1.

10 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 27(1)(ii).

11 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

12 'Statement of case' means a statement filed by the Authority under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(1) (see PARA 48): r 2(1).

13 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 27(1)(iii).

14 As to the meaning of 'representations' see PARA 51 note 20.

15 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 27(2).

16 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 28(1).

17 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 28(2).

18 As to the meaning of 'documents' see PARA 48 note 10.

19 As to the Chairman see PARA 43.

20 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 28(3).

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## **56. Evidence and summoning of witnesses.**

The Financial Services and Markets Tribunal<sup>1</sup> may by summons require any person to attend, at such time and place as is specified in the summons, to give evidence or to produce any document<sup>2</sup> in his custody or under his control which the Tribunal considers it necessary to examine<sup>3</sup>.

The Tribunal may take evidence on oath and for that purpose administer oaths<sup>4</sup>, or it may, instead of administering an oath, require the person examined to make and subscribe a declaration of the truth of the matters in respect of which he is examined<sup>5</sup>.

The Tribunal may by summons require any person to:

- 178 (1) attend, at such time and place as is specified in the summons, to give evidence as a witness<sup>6</sup>;
- 179 (2) file<sup>7</sup>, within the time specified in the summons, any document<sup>8</sup> in his custody or under his control which the Tribunal considers it necessary to examine<sup>9</sup>; or
- 180 (3) both attend and file in accordance with heads (1) and (2) above<sup>10</sup>.

No person may be required to file a document to the extent that the Tribunal is satisfied that:

- 181 (a) it is a protected item<sup>11</sup> or would be included in an exemption<sup>12</sup>; or
- 182 (b) it should not be disclosed on the ground that disclosure would not be in the public interest, or would not be fair, having regard to the likely significance of the document to the applicant in relation to the matter referred to the Tribunal and the potential prejudice to the commercial interests of a person other than the applicant which would be caused by disclosure<sup>13</sup>.

For the purpose of satisfying itself in respect of any such document, the Tribunal may require that the document be produced to the Tribunal<sup>14</sup>, conduct any hearing in the absence of any party<sup>15</sup>, and invite any party to make representations<sup>16</sup>.

A witness summons must be sent so as to be received by the person to whom it is addressed not less than seven days before the time specified in the summons<sup>17</sup>. Every summons under heads (1), (2) and (3) above<sup>18</sup> must contain a statement warning of the penalty for refusal or failure to attend or give evidence<sup>19</sup>.

No person is required, in obedience under heads (1), (2) and (3) above<sup>20</sup>, to travel more than 16 kilometres from his place of residence unless the necessary expenses of his attendance are paid or tendered to him in advance; and when the summons is issued at the request of a party<sup>21</sup>, those expenses must be paid by that party<sup>22</sup>.

The Tribunal may, upon the application of the person to whom the witness summons is addressed, direct that the witness summons be set aside or varied<sup>23</sup>.

A person who without reasonable excuse refuses or fails to attend following the issue of a summons by the Tribunal<sup>24</sup>, or to give evidence is guilty of an offence<sup>25</sup>. A person who without a reasonable excuse alters, suppresses, conceals or destroys, or refuses to produce a document which he may be required to produce for the purposes of proceedings before the Tribunal, is also guilty of an offence<sup>26</sup>.

1 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

2 As to the meaning of 'document' see PARA 10 note 10.

3 Financial Services and Markets Act 2000 s 132(4), Sch 13 para 11(1).

4 Financial Services and Markets Act 2000 Sch 13 para 11(2)(a).

5 Financial Services and Markets Act 2000 Sch 13 para 11(2)(b).

6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(1)(a).

7 As to the meaning of 'file' see PARA 47 note 2.

8 As to the meaning of 'documents' see PARA 48 note 10.

9 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(1)(b).

10 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(1)(c).

11 As to the meaning of 'protected item' see PARA 51 note 26. See also PARA 784.

12 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(2)(a). As to the exemption provided by r 8(1) or r 8(2) see PARA 51.

13 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, rr 8(4), 12(2)(b).

14 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(2)(i).

15 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(2)(ii).

16 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(2)(iii).

17 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(3).

18 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(1).

19 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(4). As to the penalty see the text and notes 24-26.

20 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(1).

21 As to the meaning of 'party' see PARA 51 note 8.

22 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(5).

23 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 12(6).

24 Financial Services and Markets Act 2000 Sch 13 para 11(3)(a)(i). A person guilty of an offence under Sch 13 para 11(3)(a) is liable on summary conviction to a fine not exceeding the statutory maximum: Sch 13 para 11(4). The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. 'Prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1); see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141.

25 Financial Services and Markets Act 2000 Sch 13 para 11(3)(a)(ii). See note 24.

26 Financial Services and Markets Act 2000 Sch 13 para 11(3)(b). A person guilty of an offence under Sch 13 para 11(3)(b) is liable, on summary conviction, to a fine not exceeding the statutory maximum, and is liable, on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both: Sch 13 para 11(5).

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## **57. Preliminary hearing.**

The Financial Services and Markets Tribunal<sup>1</sup> may direct that any question of fact or law which appears to be in issue in relation to the reference<sup>2</sup> be determined at a preliminary hearing<sup>3</sup>. If, in the opinion of the Tribunal, the determination of that question substantially disposes of the reference, the Tribunal may treat the preliminary hearing as the hearing of the reference and may make such order by way of disposing of the reference as it thinks fit<sup>4</sup>.

If the parties<sup>5</sup> so agree in writing, the Tribunal may determine the question without an oral hearing, but, in any such case, the Tribunal may not at the same time dispose of the reference unless the parties have agreed in writing that it may do so<sup>6</sup>.

1 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

2 As to the meaning of 'reference' see PARA 47 note 1.

3 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 13(1).

4 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 13(2).

5 As to the meaning of 'party' see PARA 51 note 8.

6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 13(3).

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## **58. Withdrawal of reference and unopposed references.**

The applicant<sup>1</sup> may withdraw the reference<sup>2</sup>:

183 (1) at any time before the hearing of the reference, without permission, by filing a notice to that effect<sup>3</sup>; or

184 (2) at the hearing of the reference, with the Financial Services and Markets Tribunal's<sup>4</sup> permission<sup>5</sup>,

and the Tribunal may determine any reference that is so withdrawn<sup>6</sup>.

The Financial Services Authority<sup>7</sup> may state that it does not oppose the reference or that it is withdrawing its opposition to it:

- 185 (a) at any time before the hearing of the reference, without permission, by filing a notice to that effect<sup>8</sup>; or
- 186 (b) at the hearing of the reference, with the Tribunal's permission<sup>9</sup>.

In any case where:

- 187 (i) the Authority makes a statement within head (a) above<sup>10</sup>;
- 188 (ii) the Authority does not file a statement of case within the time limit imposed<sup>11</sup> (or any extended time limit)<sup>12</sup>; or
- 189 (iii) the applicant does not file a reply within any time limit imposed<sup>13</sup> (or any extended time limit)<sup>14</sup>,

the Tribunal may (subject to its power to give a direction<sup>15</sup>) determine the reference without an oral hearing<sup>16</sup>, but it must not dismiss a reference without notifying the applicant that it is minded to do so and giving him an opportunity to make representations<sup>17</sup>.

When determining proceedings as described above<sup>18</sup>, the Tribunal may make a costs order<sup>19</sup>.

1 As to the meaning of 'applicant' see PARA 47 note 2.

2 As to the meaning of 'reference' see PARA 47 note 1.

3 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(1)(a).

4 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(1)(b).

6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(1).

7 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

8 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(2)(a).

9 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(2)(b).

10 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(3)(a).

11 Ie imposed by the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 5(1): see PARA 48.

12 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(3)(b). As to the extension of time limits under r 10(1)(d) see PARA 53 head (4).

13 Ie imposed by the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 6(1): see PARA 49 heads (1) and (2).

14 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(3)(c). As to the extension of time limits under r 10(1)(d) see PARA 53 head (4).

15 Ie pursuant to the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 10(5): see PARA 53.

16 Ie in accordance with the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 16: see PARA 60.

17 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(3). As to the meaning of 'representations' see PARA 51 note 20.

18 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(1) or r 14(3).

19 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 14(4). As to making a costs order under r 21 see PARA 65.

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## **59. References by third parties.**

The Financial Services and Markets Tribunal Rules 2001<sup>1</sup> apply, with modifications, in the case of any reference<sup>2</sup> made by an applicant<sup>3</sup> under the provisions relating to third party rights<sup>4</sup>.

1 The Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.

2 As to the meaning of 'reference' see PARA 47 note 1.

3 For meaning of 'applicant' see PARA 47 note 2.

4 See the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 15; and PARAS 47, 48, 50. As to the provisions relating to third party rights see the Financial Services and Markets Act 2000 s 393; and PARA 775.

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## **60. Determination without oral hearing.**

The Financial Services and Markets Tribunal<sup>1</sup> may determine a reference<sup>2</sup>, or any particular issue, without an oral hearing in certain situations<sup>3</sup>. Where a reference or an issue is determined without an oral hearing, the Tribunal must consider whether there are circumstances making it undesirable to make a public pronouncement of the whole or part of its decision and may in consequence take any steps, including any one or more of the steps specified in heads (1) to (3) below, but any such step must be taken with a view to ensuring the minimum restriction on public pronouncement that is consistent with the need for the restriction<sup>4</sup>. The steps which the Tribunal may take are: (1) anonymising the decision<sup>5</sup>; (2) editing the text of the decision<sup>6</sup>; (3) declining to publish the whole or part of the decision<sup>7</sup>.

Before reaching such a decision<sup>8</sup>, the Tribunal must invite the parties<sup>9</sup> to make representations<sup>10</sup> on the matter<sup>11</sup>.

1 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

2 As to the meaning of 'reference' see PARA 47 note 1.

3 The Tribunal may determine a reference, or any particular issue, without an oral hearing if:

- 35 (1) the parties agree in writing (Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 16(1)(a));
- 36 (2) the issue concerns an application for directions (r 16(1)(b)); or
- 37 (3) the provisions of r 14(3) apply (see PARA 58) (r 16(1)(c)).

As to decisions of the Tribunal generally see PARA 64.

- 4 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 16(2).
- 5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 16(3)(a).
- 6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 16(3)(b).
- 7 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 16(3)(c).
- 8 le under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 16(2).
- 9 As to the meaning of 'party' see PARA 51 note 8.
- 10 As to the meaning of 'representations' see PARA 51 note 20.
- 11 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 16(4).

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## 61. Hearings in public.

All hearings<sup>1</sup> must generally be in public<sup>2</sup>. However, the Financial Services and Markets Tribunal<sup>3</sup> may direct that all or part of a hearing must be in private:

- 190 (1) upon the application of all the parties<sup>4</sup>; or
- 191 (2) upon the application of any party, if the Tribunal is satisfied that a hearing in private is necessary, having regard to:
- 13
- 16. (a) the interests of morals, public order, national security or the protection of the private lives of the parties<sup>5</sup>; or
- 17. (b) any unfairness to the applicant or prejudice to the interests of consumers that might result from a hearing in public<sup>6</sup>,
- 14

if, in either case, the Tribunal is satisfied that a hearing in private would not prejudice the interests of justice<sup>7</sup>. Before determining an application under head (2) above<sup>8</sup>, the Tribunal must give the other party an opportunity to make representations<sup>9</sup>. Before giving a direction under heads (1) and (2) above<sup>10</sup> that the entire hearing should be in private, the Tribunal must consider whether only part of the hearing should be heard in private<sup>11</sup>.

The following persons are entitled to attend any hearing of the Tribunal whether or not it is in private:

- 192 (i) the parties and their representatives<sup>12</sup>;

- 193 (ii) the President of the Financial Services and Markets Tribunal or any member of the panel of chairmen or of the lay panel notwithstanding that they are not members of the Tribunal for the purpose of the reference to which the hearing relates<sup>13</sup>;
- 194 (iii) the Secretary to the Financial Services and Markets Tribunal<sup>14</sup> and any member of the Tribunal's staff<sup>15</sup>; and
- 195 (iv) a member of the Administrative Justice and Tribunals Council<sup>16</sup>.

The Tribunal may permit any other person to attend a hearing which is held in private<sup>17</sup>. The Tribunal may exclude from the whole or part of a hearing any person whose conduct, in the opinion of the Tribunal, has disrupted or is likely to disrupt the hearing<sup>18</sup>.

Where all or part of a hearing is held or is to be held in private, the Tribunal may direct that information about the whole or part of the proceedings before the Tribunal (including information that might help to identify any person) must not be made public, and such a direction may provide for the information (if any) that is to be entered in the register<sup>19</sup> or removed from it<sup>20</sup>. Subject to any such direction<sup>21</sup>, the Secretary must provide for the public inspection at the Tribunal's offices of a daily list of all hearings which are to be held together with information about the time and place fixed for the hearings<sup>22</sup>.

1 For these purposes, 'hearing' means any hearing under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, but does not include any determination under r 16(1) or the hearing of any application made to the Tribunal without notice to the other party: r 17(1).

2 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(2).

3 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

4 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(3)(a). As to the meaning of 'party' see PARA 51 note 8.

5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(3)(b)(i).

6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(3)(b)(ii).

7 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(3). See also the decision in *Eurolife Assurance Co Ltd v Financial Services Authority* (23 May 2002, unreported), Financial Services and Markets Tribunal. Although the hearing was held by the Tribunal on 23 May 2002, the decision was not released for publication until 26 July 2002.

8 *Ie* under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(3)(b).

9 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(4). As to the meaning of 'representations' see PARA 51 note 20.

10 *Ie* under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(3).

11 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(5).

12 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(6)(a).

13 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(6)(b). The persons mentioned in r 17(6)(b) are entitled to attend the deliberations of the Tribunal but must take no part in those deliberations: r 17(8). As to the panel of chairmen and the lay panel see PARA 43.

14 As to the Secretary see PARA 43.

15 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(6)(c).

16 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(6)(d). The person mentioned in r 17(6)(d) is entitled to attend the deliberations of the Tribunal but must take no part in those deliberations: r 17(8). In regard to r 17(6)(d) note that the Administrative Justice and Tribunals Council replaces the Council on



Tribunals and the Scottish Committee of the Council on Tribunals which are abolished: see the Tribunals, Courts and Enforcement Act 2007 ss 44, 45, Sch 7.

- 17 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(7).
- 18 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(9).
- 19 As to the meaning of 'register' see PARA 47 note 22.
- 20 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(11).
- 21 le under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(11).
- 22 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 17(10).

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## **62. Representation at hearings.**

The parties<sup>1</sup> may appear at the hearing<sup>2</sup> (with assistance from any person if desired), and may be represented by any person, whether or not that person is legally qualified<sup>3</sup>. However, if in any particular case the Financial Services and Markets Tribunal<sup>4</sup> is satisfied that there are good and sufficient reasons for doing so, it may refuse to permit a person to assist or represent a party at the hearing<sup>5</sup>.

- 1 As to the meaning of 'party' see PARA 51 note 8.
- 2 For these purposes, 'hearing' means any hearing under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476: r 18(3).
- 3 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 18(1).
- 4 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.
- 5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 18(2).

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## **63. Conduct of hearings.**

The Financial Services and Markets Tribunal<sup>1</sup> must conduct all hearings<sup>2</sup> in such manner as it considers most suitable to the clarification of the issues before it and generally to the just, expeditious and economical determination of the proceedings<sup>3</sup>.

Subject to any directions by the Tribunal, the parties are entitled:

- 196 (1) to give evidence (and, with the consent of the Tribunal, to bring expert evidence)<sup>4</sup>;
- 197 (2) to call witnesses<sup>5</sup>;
- 198 (3) to question any witnesses<sup>6</sup>; and
- 199 (4) to address the Tribunal on the evidence, and generally on the subject matter of the reference<sup>7</sup>.

Evidence may be admitted by the Tribunal whether or not it would be admissible in a court of law and whether or not it was available to the Financial Services Authority<sup>8</sup> when taking the referred action<sup>9</sup>.

If a party<sup>10</sup> fails to attend or be represented at any hearing of which it has been duly notified, the Tribunal may, if it is satisfied that there is no good and sufficient reason for the absence:

- 200 (a) in the case of the hearing of the reference, hear and determine the reference in the party's absence<sup>11</sup>; or
- 201 (b) in the case of any other hearing, give any direction, determine any issue or adjourn the hearing<sup>12</sup>.

1 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

2 Ie under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.

3 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 19(1).

4 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 19(2)(a).

5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 19(2)(b).

6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 19(2)(c).

7 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 19(2)(d).

8 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

9 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 19(3). As to the meaning of 'referred action' see PARA 47 note 12.

10 As to the meaning of 'party' see PARA 51 note 8.

11 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 19(4)(a).

12 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 19(4)(b).

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#### **64. Decisions of the Financial Services and Markets Tribunal.**

A decision of the Financial Services and Markets Tribunal<sup>1</sup> may be taken by a majority<sup>2</sup>. The decision must state whether it was unanimous or taken by a majority<sup>3</sup> and must be recorded in a document which contains a statement of the reasons for the decision<sup>4</sup> and is signed and dated by the member of the panel of chairmen<sup>5</sup> dealing with the reference<sup>6</sup>.

The Tribunal must inform each party of its decision<sup>7</sup>, and as soon as reasonably practicable send to each party and, if different, to any authorised person<sup>8</sup> concerned a copy of the document mentioned above<sup>9</sup>. The Tribunal must send the Treasury a copy of its decision<sup>10</sup>.

The Tribunal must make arrangements for the public pronouncement of its decisions, whether by giving its decisions orally in open court or by publishing its decisions in writing<sup>11</sup>. However, where the whole or any part of any hearing<sup>12</sup> was in private, the Tribunal must consider whether, having regard to the reason for the hearing or any part of it being in private<sup>13</sup> and to the outcome of the hearing<sup>14</sup>, it would be undesirable to make a public pronouncement of the whole or part of its decision and may in consequence take any steps, including one or more of the steps listed in heads (1) to (3) below, but any such step must be taken with a view to ensuring the minimum restriction on public pronouncement that is consistent with the need for the restriction<sup>15</sup>. The steps which the Tribunal may take are: (1) anonymising the decision<sup>16</sup>; (2) editing the text of the decision<sup>17</sup>; (3) declining to publish the whole or part of the decision<sup>18</sup>.

The Secretary to the Financial Services and Markets Tribunal<sup>19</sup> must as soon as may be practicable enter every decision (and the reasons for the decision) in the register<sup>20</sup>.

Every notification of a decision determining a reference<sup>21</sup> which is sent to the parties<sup>22</sup> must be accompanied by a notification of any provision of the Financial Services and Markets Act 2000 relating to appeals from the Tribunal and of the time within which and the place at which such appeal or application for permission to appeal may be made<sup>23</sup>.

1 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

2 Financial Services and Markets Act 2000 s 132(4), Sch 13 para 12(1).

3 Financial Services and Markets Act 2000 Sch 13 para 12(2)(a).

4 Financial Services and Markets Act 2000 Sch 13 para 12(2)(b)(i).

5 As to the panel of chairmen see PARA 43.

6 Financial Services and Markets Act 2000 Sch 13 para 12(2)(b)(ii).

7 Financial Services and Markets Act 2000 Sch 13 para 12(3)(a).

8 As to authorised persons see PARA 314.

9 Financial Services and Markets Act 2000 Sch 13 para 12(3)(b).

10 Financial Services and Markets Act 2000 Sch 13 para 12(4).

11 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 20(1). This rule is subject to r 20(2) and r 16(2): see PARA 60.

12 I.e. under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.

13 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 20(2)(a).

14 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 20(2)(b).

15 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 20(2). Before reaching a decision under r 20(2), the Tribunal must invite the parties to make representations on the matter: r 20(4). As to the meaning of 'representations' see PARA 51 note 20.

16 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 20(3)(a).

17 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 20(3)(b).

18 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 20(3)(c).

19 As to the Secretary to the Financial Services and Markets Tribunal see PARA 43.

20 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 20(5). However, this duty is subject to any steps taken under r 20(2) and r 16(2) (see PARA 60) and to any direction given under r 17(11) (see PARA 61). As to the meaning of 'register' see PARA 47 note 22.

21 As to the meaning of 'reference' see PARA 47 note 1.

22 As to the meaning of 'party' see PARA 51 note 8.

23 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 20(6). As to appeals see PARA 69 et seq.

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## 65. Costs.

If the Financial Services and Markets Tribunal<sup>1</sup> considers that a party to any proceedings on a reference has acted vexatiously, frivolously or unreasonably, it may order that party to pay to another party to the proceedings the whole or part of the costs or expenses incurred by the other party in connection with the proceedings<sup>2</sup>.

If, in any proceedings on a reference, the Tribunal considers that a decision of the Financial Services Authority<sup>3</sup> which is the subject of the reference was unreasonable, it may order the Authority to pay to another party to the proceedings the whole or part of the costs or expenses incurred by the other party in connection with the proceedings<sup>4</sup>.

The Tribunal must not make a costs order<sup>5</sup> without first giving the paying party<sup>6</sup> an opportunity to make representations<sup>7</sup> against the making of the order<sup>8</sup>.

Where the Tribunal makes a cost order, it may order:

- 202 (1) that an amount fixed by the Tribunal must be paid to the receiving party<sup>9</sup> by way of costs or (as the case may be) expenses<sup>10</sup>; or
- 203 (2) that the costs must be assessed or (as the case may be) expenses must be taxed, on such basis as it may specify, by a costs official<sup>11</sup>.

An order of the Tribunal may be enforced as if it were an order of a county court<sup>12</sup>.

1 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

2 Financial Services and Markets Act 2000 s 132(4), Sch 13 para 13(1).

3 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

4 Financial Services and Markets Act 2000 Sch 13 para 13(2). As to a ruling by the Tribunal where costs were awarded against the Authority on the basis that it acted unreasonably see *Davidson and Tatham v Financial Services Authority* (7 September 2006, unreported), Financial Services and Markets Tribunal.

5 'Costs order' means an order under the Financial Services and Markets Act 2000 Sch 13 para 13 (see the text and notes 1-4) that a party pay the whole or part of the costs or expenses incurred by another party: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 21(1). As to the meaning of 'party' see PARA 51 note 8.

6 'Paying party' means the party against whom the Tribunal makes, or (as the case may be) considers making a costs order: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 21(1).

7 As to the meaning of 'representations' see PARA 51 note 20.

8 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 21(2).

9 'Receiving party' means the party in whose favour the Tribunal makes, or (as the case may be) considers making a costs order: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 21(1).

10 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 21(3)(a).

11 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 21(3)(b)(i). Costs are assessed and expenses are taxed, in Scotland, by the Auditor of the Court of Session (r 21(3)(b)(ii)) and, in Northern Ireland, by the Taxing Master of the Supreme Court of Northern Ireland (r 21(3)(b)(iii)).

12 Financial Services and Markets Act 2000 s 133(11).

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## **66. Sending notices.**

Any notice<sup>1</sup> required to be sent<sup>2</sup> under the Financial Services and Markets Tribunal Rules 2001<sup>3</sup> may be sent:

- 204 (1) by a postal service which seeks to deliver documents or other things by post no later than the next working day in all or in the majority of cases<sup>4</sup>;
- 205 (2) by fax or other means of electronic communication<sup>5</sup>; or
- 206 (3) by personal delivery<sup>6</sup>.

A notice must be sent:

- 207 (a) in the case of a notice directed to the Financial Services and Markets Tribunal<sup>7</sup>, to the Tribunal's office<sup>8</sup>;
- 208 (b) in the case of a notice directed to the applicant<sup>9</sup>, to his representative<sup>10</sup> or (in any case where there is no representative) to the applicant<sup>11</sup>, at the appropriate address notified to the Tribunal<sup>12</sup>;
- 209 (c) in the case of a notice directed to the Financial Services Authority<sup>13</sup>, to the Authority's head office<sup>14</sup>; or
- 210 (d) otherwise, to the recipient's<sup>15</sup> registered office or last known address<sup>16</sup>.

A notice that is sent is deemed, unless the contrary is proved, to have been received, where it was sent by post, on the second day after it was sent<sup>17</sup> and, in any other case, on the day it was sent<sup>18</sup>. However, where a notice is sent by post to the Tribunal, it is deemed to have been received on the day it was actually received by the Tribunal<sup>19</sup>. No notice is deemed to have been received if it is not received in legible form (or, in the case of a document received in electronic form, if the recipient is not readily able to elicit the information in legible form)<sup>20</sup>.

Where:

- 211 (i) a recipient cannot be found<sup>21</sup>;

- 212 (ii) a recipient has died and has no known personal representative<sup>22</sup>;
- 213 (iii) a recipient has no address for service in the United Kingdom<sup>23</sup>; or
- 214 (iv) for any other reason service on a recipient cannot be readily effected<sup>24</sup>,

the Chairman of the Financial Services and Markets Tribunal<sup>25</sup> may dispense with service on the recipient or may make an order for alternative service on such other person or in such other form (whether by advertisement in a newspaper or otherwise) as the Chairman may think fit<sup>26</sup>.

Where the time prescribed<sup>27</sup> for doing any act expires on a Saturday, Sunday, Christmas Day, Good Friday or bank holiday<sup>28</sup>, the act is in time if done on the next following working day<sup>29</sup>.

1 For these purposes, 'notice' includes any notice or other thing required or authorised by the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, to be sent or delivered to, or served on, any person: r 31(1).

2 'Send' to a person includes deliver or give to, or serve on, that person: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(1).

3 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(1).

4 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(2)(a).

5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(2)(b).

6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(2)(c).

7 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

8 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(3)(a).

9 As to the meaning of 'applicant' see PARA 47 note 2.

10 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(3)(b)(i).

11 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(3)(b)(ii).

12 In accordance with the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 4(3): see PARA 47.

13 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

14 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(3)(c).

15 'Recipient' means a person to or on whom any notice is required or authorised to be sent for the purposes of the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476: r 31(1).

16 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(3)(d).

17 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(4)(a).

18 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(4)(b).

19 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(5).

20 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(6).

21 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(8)(a).

22 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(8)(b).

23 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(8)(c). As to the meaning of 'United Kingdom' see PARA 2 note 3.

24 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(8)(d).

25 As to the Chairman see PARA 43.

26 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(9).

27 le prescribed by the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.

28 For these purposes, 'bank holiday' means a day that is specified in, or appointed under, the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321): Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(10).

29 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 31(7).

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### ***C. LEGAL ASSISTANCE BEFORE THE TRIBUNAL***

#### **67. Legal assistance scheme.**

The Lord Chancellor may by regulations establish a scheme governing the provision of legal assistance in connection with proceedings before the Financial Services and Markets Tribunal<sup>1</sup>. If the Lord Chancellor establishes a scheme, it must provide that a person is eligible for assistance only if he is an individual who has referred a matter to the Tribunal<sup>2</sup> and he fulfils such other criteria (if any) as may be prescribed<sup>3</sup>.

The legal assistance scheme may, in particular, make provision as to:

- 215 (1) the kinds of legal assistance that may be provided<sup>4</sup>;
- 216 (2) the persons by whom legal assistance may be provided<sup>5</sup>;
- 217 (3) the manner in which applications for legal assistance are to be made<sup>6</sup>;
- 218 (4) the criteria on which eligibility for legal assistance is to be determined<sup>7</sup>;
- 219 (5) the persons or bodies by whom applications are to be determined<sup>8</sup>;
- 220 (6) appeals against refusals of applications<sup>9</sup>;
- 221 (7) the revocation or variation of decisions<sup>10</sup>;
- 222 (8) its administration and the enforcement of its provisions<sup>11</sup>.

Legal assistance under the legal assistance scheme may be provided subject to conditions or restrictions, including conditions as to the making of contributions by the person to whom it is provided<sup>12</sup>.

1 Financial Services and Markets Act 2000 s 134(1). For the purposes of Pt IX (ss 132-137), 'legal assistance scheme' means any scheme in force under s 134(1): s 134(4). As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq. As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

Any power to make an order which is conferred on a Minister of the Crown by the Financial Services and Markets Act 2000 and any power to make regulations which is conferred by the Act is exercisable by statutory instrument: s 428(1). Any statutory instrument made under the Act may: (1) contain such incidental, supplemental, consequential and transitional provision as the person making it considers appropriate; and (2) make different provisions for different cases: s 428(3). Provision is made with respect to the Parliamentary control of statutory instruments: see s 429. Generally, any statutory instrument made under the Financial Services and Markets Act 2000 is subject to annulment in pursuance of a resolution of either House of Parliament: s 429(8). 'Minister of the Crown' has the same meaning as in the Ministers of the Crown Act 1975

(see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 363): Financial Services and Markets Act 2000 s 417(1).

In exercise of the power under s 134(1), the Lord Chancellor has made the Financial Services and Markets Tribunal (Legal Assistance) Regulations 2001, SI 2001/3632; and the Financial Services and Markets Tribunal (Legal Assistance Scheme - Costs) Regulations 2001, SI 2001/3633.

The Financial Services and Markets Tribunal (Legal Assistance) Regulations 2001, SI 2001/3632, govern the provision of legal assistance in respect of matters which are referred to the Financial Services and Markets Tribunal by individuals against whom the Financial Services Authority has decided to take action in respect of alleged market abuse. The Lord Chancellor must fund such legal assistance as the Tribunal directs regarding a relevant reference: reg 3(1). A relevant reference is a reference which the Tribunal is to determine in relation to an individual who: (a) has received a decision notice from the Authority; (b) has referred the matter to the Tribunal under the Financial Services and Markets Act 2000 s 127(4) (see PARA 442); and (c) fulfils the criteria set out in the Financial Services and Markets Tribunal (Legal Assistance) Regulations 2001, SI 2001/3632, reg 8: reg 3(2). In addition to provisions on citation, commencement and interpretation (regs 1, 2), the Financial Services and Markets Tribunal (Legal Assistance) Regulations 2001, SI 2001/3632, provide for the manner in which applications for legal assistance are to be made (reg 4); the supply of relevant information to the Tribunal, the issue of a legal assistance order where the application is granted, and what happens where such an application is refused (regs 5-7); the circumstances in which an individual may receive legal assistance, including his financial eligibility, and the interests of justice test (regs 8-10); the assessment of the individual's financial resources, including the calculation of his disposable income and disposable capital (regs 11-34); the determination of any contribution payable (regs 35, 36); the assignment and change of representatives (regs 37-40); the withdrawal of legal assistance and duty to report abuse (regs 41, 42); and the constitution of the Tribunal (reg 43).

The Financial Services and Markets Tribunal (Legal Assistance Scheme - Costs) Regulations 2001, SI 2001/3633, make provision for the remuneration of work done under a legal assistance order in respect of cases which are before the Tribunal. In addition to provisions on citation, commencement and extent, interpretation and determination of costs by the appropriate officer (regs 1-3) there are specific provisions dealing with: disbursements (regs 4-7); interim payments and staged payments in long cases (regs 8, 9); hardship payments (reg 10); how claims are to be made, determined and paid (regs 11-18); the re-determination of costs by an appropriate officer, appeals from the appropriate officer to a Costs Judge and appeals from the Costs Judge to the High Court (or Auditor of the Court of Session and Court of Session in Scotland) (regs 19-22); time limits (reg 23); and details of the rates in respect of solicitors' and advocates' fees which are to be paid (Schs 1, 2).

2 Financial Services and Markets Act 2000 s 134(2)(a), (3). Matters are referred under s 127(4) by way of decision notice (market abuse): see PARA 442.

3 Financial Services and Markets Act 2000 s 134(2)(b). The criteria are prescribed under s 135(1)(d): see head (4) in the text.

4 Financial Services and Markets Act 2000 s 135(1)(a). See also note 1.

5 Financial Services and Markets Act 2000 s 135(1)(b). See also note 1.

6 Financial Services and Markets Act 2000 s 135(1)(c). See also note 1.

7 Financial Services and Markets Act 2000 s 135(1)(d). As to the criteria see the Financial Services and Markets Tribunal (Legal Assistance) Regulations 2001, SI 2001/3632, reg 8. See also note 1.

8 Financial Services and Markets Act 2000 s 135(1)(e). See also note 1.

9 Financial Services and Markets Act 2000 s 135(1)(f). See also note 1.

10 Financial Services and Markets Act 2000 s 135(1)(g). See also note 1.

11 Financial Services and Markets Act 2000 s 135(1)(h). See also note 1.

12 Financial Services and Markets Act 2000 s 135(2).

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## 68. Funding of legal assistance scheme.

The Financial Services Authority<sup>1</sup> must pay to the Lord Chancellor such sums at such times as he may from time to time determine in respect of the anticipated or actual cost of legal assistance provided in connection with proceedings before the Financial Services and Markets Tribunal<sup>2</sup> under the legal assistance scheme<sup>3</sup>. In order to enable it to pay any such sum which it is obliged to pay<sup>4</sup>, the Authority must make rules requiring the payment to it by authorised persons<sup>5</sup> or any class of authorised person of specified<sup>6</sup> amounts or amounts calculated in a specified way<sup>7</sup>. Sums received by the Lord Chancellor<sup>8</sup> must be paid into the Consolidated Fund<sup>9</sup>.

The Lord Chancellor must, out of money provided by Parliament, fund the cost of legal assistance provided in connection with proceedings before the Tribunal under the legal assistance scheme<sup>10</sup>.

If, as respects a period determined by the Lord Chancellor, the amount paid to him<sup>11</sup> as respects that period exceeds the amount he has expended in that period<sup>12</sup> the Lord Chancellor must:

- 223 (1) repay, out of money provided by Parliament, the excess to the Authority<sup>13</sup>; or
- 224 (2) take the excess into account on the next occasion on which he makes a determination<sup>14</sup>.

The Authority must make provision for any sum repaid to it under head (1) above:

- 225 (a) to be distributed among the authorised persons on whom a levy was imposed in the period in question<sup>15</sup> or among such of those persons as it may determine<sup>16</sup>;
- 226 (b) to be applied in order to reduce any amounts which those persons, or such of them as it may determine, are or will be liable to pay to the Authority<sup>17</sup>; or
- 227 (c) to be partly so distributed and partly so applied<sup>18</sup>.

1 As to the constitution and general functions of the Financial Services Authority see PARA 6 et seq.

2 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

3 Financial Services and Markets Act 2000 s 136(1). As to the legal assistance scheme see PARA 67. As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq.

4 Ie under the Financial Services and Markets Act 2000 s 136(1).

5 As to authorised persons see PARA 314.

6 'Specified' means specified in the rules: Financial Services and Markets Act 2000 s 136(9).

7 Financial Services and Markets Act 2000 s 136(2).

8 Ie under the Financial Services and Markets Act 2000 s 136(1).

9 Financial Services and Markets Act 2000 s 136(3). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

10 Financial Services and Markets Act 2000 s 136(4).

11 Ie under the Financial Services and Markets Act 2000 s 136(1).

12 Ie under the Financial Services and Markets Act 2000 s 136(4).

13 Financial Services and Markets Act 2000 s 136(6)(a).

- 14 Financial Services and Markets Act 2000 s 136(6)(b).
- 15 Financial Services and Markets Act 2000 s 136(7)(a)(i).
- 16 Financial Services and Markets Act 2000 s 136(7)(a)(ii).
- 17 Financial Services and Markets Act 2000 s 136(7)(b).
- 18 Financial Services and Markets Act 2000 s 136(7)(c). If the Authority considers that it is not practicable to deal with any part of a sum repaid to it under s 136(6)(a) (see head (1) in the text) in accordance with provision made by it as a result of s 136(7), it may, with the consent of the Lord Chancellor, apply or dispose of that part of that sum in such manner as it considers appropriate: s 136(8).

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## ***D. APPEALS***

### **69. Appeals generally.**

A party to a reference to the Financial Services and Markets Tribunal<sup>1</sup> may with permission<sup>2</sup> appeal to the Court of Appeal on a point of law arising from a decision of the Tribunal disposing of the reference<sup>3</sup>.

If, on an appeal<sup>4</sup>, the court considers that the decision of the Tribunal was wrong in law, it may remit the matter to the Tribunal for rehearing and determination by it<sup>5</sup>, or the court may itself make a determination<sup>6</sup>.

An appeal may not be brought from a decision of the Court of Appeal<sup>7</sup> except with the leave of the Court of Appeal<sup>8</sup>; or the House of Lords<sup>9</sup>.

Rules<sup>10</sup> may make provision for regulating or prescribing any matters incidental to or consequential on an appeal under the provisions described above<sup>11</sup>.

1 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

2 'Permission' means permission given by the Tribunal or by the Court of Appeal: Financial Services and Markets Act 2000 s 137(2). As to decisions relating to permission to appeal see PARA 70.

3 Financial Services and Markets Act 2000 s 137(1).

4 Ie under the Financial Services and Markets Act 2000 s 137(1).

5 Financial Services and Markets Act 2000 s 137(3)(a). As to references remitted for hearing see PARA 72.

6 Financial Services and Markets Act 2000 s 137(3)(b).

7 Ie under the Financial Services and Markets Act 2000 s 137(3).

8 Financial Services and Markets Act 2000 s 137(4)(a).

9 Financial Services and Markets Act 2000 s 137(4)(b). As from a day to be appointed, this provision is replaced by one referring to the Supreme Court: s 137(4)(b) (prospectively substituted by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1 para 70(a)). At the date at which this volume states the law no such day had been appointed.

<sup>10</sup> The rules made by the Lord Chancellor under the Financial Services and Markets Act 2000 s 132: see PARA 45.

<sup>11</sup> Financial Services and Markets Act 2000 s 137(6). In exercise of this power the Lord Chancellor has made the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476. As to the provision made in respect of appeals see rr 23-25; and PARAS 70-72.

## **UPDATE**

### **69 Appeals generally**

NOTE 9--Appointed day is 1 October 2009: SI 2009/1604.

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### **70. Application for permission to appeal.**

An application<sup>1</sup> to the Financial Services and Markets Tribunal<sup>2</sup> for permission to appeal<sup>3</sup> may be made orally at the hearing after the decision is announced by the Tribunal<sup>4</sup> or by way of written application filed<sup>5</sup> not later than 14 days after the decision is sent to the party<sup>6</sup> making the application<sup>7</sup>.

When an application is made by way of written application<sup>8</sup>, it must be signed by the appellant<sup>9</sup> and must state the name and address of the appellant and any representative of the appellant<sup>10</sup>, identify the decision of the Tribunal to which the application relates<sup>11</sup>, and state the grounds on which the appellant intends to rely in the appeal<sup>12</sup>.

<sup>1</sup> An application under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 23 may include an application for a direction under r 10(1)(e) (suspension of Authority's action) (see PARA 53 head (5)): r 23(4).

<sup>2</sup> As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

<sup>3</sup> For the purposes of the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, Pt IV (rr 23-25), 'appeal' means appeal (or an appeal) under the Financial Services and Markets Act 2000 s 137(1) to the Court of Appeal from a decision of the Tribunal disposing of a reference: Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 23(1).

<sup>4</sup> Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 23(2)(a).

<sup>5</sup> As to the meaning of 'file' see PARA 47 note 2.

<sup>6</sup> As to the meaning of 'party' see PARA 51 note 8.

<sup>7</sup> Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 23(2)(b).

<sup>8</sup> The under the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 23(2)(b).

<sup>9</sup> For the purposes of the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, Pt IV (rr 23-25), 'appellant' means a party applying for permission to appeal: r 23(1).

<sup>10</sup> Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 23(3)(a).

<sup>11</sup> Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 23(3)(b).

12 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 23(3)(c).

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## **71. Decision as to permission to appeal.**

An application to the Financial Services and Markets Tribunal<sup>1</sup> for permission to appeal<sup>2</sup> may be decided by the Chairman<sup>3</sup>, on consideration of the application<sup>4</sup>. Unless the decision is made immediately following an oral application or the Chairman considers that special circumstances render a hearing desirable, the application for permission to appeal must be decided without an oral hearing<sup>5</sup>.

The decision of the Tribunal on an application for permission to appeal, together with the reasons for its decision, must be recorded in writing<sup>6</sup>. Unless the decision is given immediately following an oral application, the Secretary to the Financial Services and Markets Tribunal<sup>7</sup> must notify the appellant<sup>8</sup> and each of the other parties<sup>9</sup> of the decision and the reasons for the decision<sup>10</sup>.

Where the Tribunal refuses the application, it must issue a direction<sup>11</sup> that the appellant, if he wishes to seek permission from the Court of Appeal to appeal, must do so within 14 days of the Tribunal's refusal<sup>12</sup>.

1 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

2 As to the meaning of 'appeal' see PARA 70 note 3.

3 As to the Chairman see PARA 43.

4 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 24(1).

5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 24(2).

6 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 24(3).

7 As to the Secretary see PARA 43.

8 As to the meaning of 'appellant' see PARA 70 note 9.

9 As to the meaning of 'party' see PARA 51 note 8.

10 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 24(4).

11 As to directions see PARA 52.

12 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 24(5).

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## 72. Reference remitted for rehearing.

Where the Court of Appeal remits a reference<sup>1</sup> to the Financial Services and Markets Tribunal<sup>2</sup> for rehearing and determination<sup>3</sup>, the Financial Services and Markets Tribunal Rules 2001<sup>4</sup>, so far as relevant, apply to the rehearing as they did to the original hearing of the reference<sup>5</sup>.

The Tribunal must, within 28 days of such remittal, give directions<sup>6</sup> in relation to the rehearing<sup>7</sup>.

1 As to the meaning of 'reference' see PARA 47 note 1.

2 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.

3 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 25(1).

4 ie the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476.

5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 25(2).

6 As to directions see PARA 52.

7 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 25(3).

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## 73. Review of the Tribunal's decision.

If, on the application of a party<sup>1</sup> or of its own initiative, the Financial Services and Markets Tribunal<sup>2</sup> is satisfied that:

228 (1) its decision determining a reference<sup>3</sup> was wrongly made as a result of an error on the part of the Tribunal staff<sup>4</sup>; or

229 (2) new evidence has become available since the conclusion of the hearing to which that decision relates, the existence of which could not have been reasonably known of or foreseen<sup>5</sup>,

the Tribunal may review and, by certificate signed by the Chairman<sup>6</sup>, set aside the relevant decision<sup>7</sup>. An application may either be made immediately following the decision at the hearing of the reference or must be filed<sup>8</sup> (stating the grounds in full) not later than 14 days after the date on which notification of the decision was sent to the parties<sup>9</sup>. Where the Tribunal proposes to review its decision of its own initiative, it must notify the parties of that proposal not later than 14 days after the date on which the decision was sent to the parties<sup>10</sup>.

The parties must have an opportunity to make representations<sup>11</sup> on any application or proposal for review and the review must be determined either by the same members of the Tribunal who decided the case or by a differently constituted Tribunal appointed by the President<sup>12</sup>.

If, after the decision has been reviewed, the decision is set aside, the Tribunal must substitute such decision as it thinks fit or order a rehearing before either the same or a differently constituted Tribunal<sup>13</sup>.

The certificate of the Chairman as to the setting aside of the Tribunal's decision must be sent to the Secretary to the Financial Services and Markets Tribunal<sup>14</sup> who must immediately make such correction as may be necessary in the register<sup>15</sup> and must send a copy of the entry so corrected to each party<sup>16</sup>.

- 1 As to the meaning of 'party' see PARA 51 note 8.
- 2 As to the establishment and constitution of the Financial Services and Markets Tribunal see PARAS 43-44.
- 3 As to the meaning of 'reference' see PARA 47 note 1.
- 4 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 22(1)(a).
- 5 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 22(1)(b).
- 6 As to the Chairman see PARA 43.
- 7 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 22(1).
- 8 As to the meaning of 'file' see PARA 47 note 2.
- 9 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 22(2).
- 10 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 22(3).
- 11 As to the meaning of 'representations' see PARA 51 note 20.
- 12 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 22(4).
- 13 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 22(5).
- 14 As to the Secretary see PARA 43.
- 15 As to the meaning of 'register' see PARA 47 note 22.
- 16 Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, r 22(6).

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### **(3) OTHER REGULATORY BODIES**

#### **74. The Bank of England.**

Since the transfer of banking regulation<sup>1</sup> from the Bank of England<sup>2</sup> to the Financial Services Authority<sup>3</sup>, the Bank's functions in relation to the regulation of financial services have been reduced but it continues to play a significant role in the management of the economy.

The Bank's functions include maintaining the stability of the financial system and ensuring its effectiveness, and maintaining the integrity and value of the currency<sup>4</sup>. The Bank sets interest rates for sterling, issues bank notes and acts as banker to the commercial banks and to the government. The Bank of England also acts as 'lender of last resort' to banks which are solvent but encounter liquidity problems<sup>5</sup>.

1 See the Bank of England Act 1998; and PARA 793 et seq.

2 As to the Bank of England see PARA 793 et seq.

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 See in particular PARA 807.

5 See PARA 807. This role achieved public prominence as a result of the Northern Rock plc crisis in 2007/2008. As to the nationalising powers of the Treasury under the Banking (Special Provisions) Act 2008 (under which Northern Rock plc was ultimately nationalised in 2008) see PARA 791.

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## 75. The London Stock Exchange.

The London Stock Exchange can trace its history back to the eighteenth century and became a regulated exchange in 1801. It is now incorporated under the name London Stock Exchange plc, having previously been an unincorporated company; and the functions formerly carried out by the Council of the Stock Exchange are now vested in the Board of the Stock Exchange<sup>1</sup>. The London Stock Exchange is a recognised investment exchange and thus comes within the statutory provisions on recognised investment exchanges and clearing houses<sup>2</sup>. The Exchange is no longer responsible for listing securities, since this function has been transferred to the Financial Services Authority<sup>3</sup>; and the settlement service is now provided by CRESTCo<sup>4</sup> rather than the Exchange. The Exchange retains functions such as managing the Exchange's affairs and property, and its own rules still cover matters that relate to membership of the Exchange for those who use its facilities and markets<sup>5</sup>. The Exchange has a number of markets<sup>6</sup>. Trading facilities are open to all those who have been accepted for listing by the Financial Services Authority<sup>7</sup> and those companies which had obtained listing before the Authority took over that role.

1 As to the objects, powers and duties of the Stock Exchange see the Rules of the London Stock Exchange. See also note 5.

2 See PARA 684 et seq. As a recognised investment exchange the London Stock Exchange is an exempt person, and thus complies with the Financial Services and Markets Act 2000 s 19: see PARA 80.

As to the transfer of shares in companies in England and Wales see the Companies Act 1985 s 182(1) (prospectively repealed); and **COMPANIES** vol 15 (2009) PARA 1042, 1055 (as to replacement provisions see the Companies Act 2006 ss 541, 544). As to securities as negotiable instruments see s 779 (formerly the Companies Act 1985 s 188); and **COMPANIES** vol 14 (2009) PARA 382. As to paperless trading and the transfer of securities without a written instrument see the Uncertificated Securities Regulations 2001, SI 2001/3755; and **COMPANIES** vol 14 (2009) PARA 421 et seq.

3 See the Official Listing of Securities (Change of Competent Authority) Regulations 2000, SI 2000/968 (spent on the repeal of the Financial Services Act 1986). See also the Financial Services and Markets Act 2000 s 72(1); and PARA 385. As to official listing see PARA 385 et seq. As to the Financial Services Authority see PARAS 4, 6 et seq.

4 See PARA 76.

5 See the Rules of the London Stock Exchange. At the date at which this volume states the law, the most recent version of the rules is that revised and effective from 22 October 2007 in preparation for the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) from 1 November 2007. At that date there is also a General Rulebook Review in operation.

6 Eg the Alternative Investment Market (AIM), which is the main market for unlisted securities in the United Kingdom; TechMark, an international market for innovative technology companies; and the Professional Securities Market (PSM), which enables companies to raise capital through the use of specialist securities (such as debt, convertibles and depositary receipts) to professional or institutional investors. Other markets include the Specialist Fund Market and Real Estate Investment Trusts (REITs). There is also EDX London which handles derivatives.

7 See PARA 385 et seq.

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## **76. Other exchanges and clearing houses.**

In addition to the London Stock Exchange<sup>1</sup>, there are several other recognised investment exchanges<sup>2</sup>, which are organised markets for the trading of investments such as equities and derivatives. These exchanges include: the London International Financial Futures and Options Exchange ('LIFFE') (acquired by Euronext in 2002 and also known as Euronext.liffe); the London Metal Exchange; the International Petroleum Exchange of London (known since 2005 as ICE Futures); the OM London Exchange; and the Virt-x Exchange.

Recognised clearing houses include the London Clearing House which provides clearing services for the derivatives exchanges and for over the counter transactions, and CRESTCo which operates a real time settlement system for securities<sup>3</sup>.

1 As to the London Stock Exchange see PARA 75.

2 As to recognised investment exchanges see PARA 684 et seq.

3 As to recognised clearing houses see PARA 684 et seq.

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## **77. Lloyd's.**

Lloyd's is a society, incorporated by statute, which provides the facilities for the Lloyd's insurance underwriting market to carry on business<sup>1</sup>. The members of Lloyd's, whether individual 'Names' or corporate members, generally form syndicates managed by managing agents. The members of the syndicates are fully liable for their respective shares of the accepted risk: any loss they suffer as a result of contracts of insurance written at Lloyd's does not give rise to a right of action against any person<sup>2</sup>. Members of Lloyd's do not deal directly with the public as business is usually transacted through a broker.

Lloyd's is regulated by the Financial Services Authority<sup>3</sup>. For the purposes of the Financial Services and Markets Act 2000, the underwriting capacity of a Lloyd's syndicate and syndicate membership are specified investments<sup>4</sup>; advising a person to become or cease to be a member of a Lloyd's syndicate, managing the underwriting capacity of a Lloyd's syndicate as a



managing agent, and arranging deals in contracts of insurance written at Lloyd's are specified activities<sup>5</sup>; and Lloyd's is an authorised person<sup>6</sup>, with authority to carry out its market activities<sup>7</sup>. However, although supervised by the Financial Services Authority, the Council of Lloyd's retains the capacity to make byelaws regulating the market and has responsibility for its functioning<sup>8</sup>.

1 As to Lloyd's generally see **INSURANCE**.

2 As to the circumstances in which a contravention of certain provisions of the Financial Services and Markets Act 2000 is actionable by any private person or by certain other persons who suffered loss as a result see the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256; and PARAS 33, 83, 376. For the purposes of the definition of 'private person', an individual suffering loss in the course of effecting or carrying out contracts of insurance written at Lloyd's is not to be taken to suffer loss in the course of carrying on a regulated activity: see reg 3; and PARA 33. As to regulated activities see PARA 84 et seq.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. As to the regulation of Lloyd's see PARA 741 et seq. In particular, the Authority may make a direction applying certain provisions of the Financial Services and Markets Act 2000 to members of Lloyd's (see ss 316, 317; and PARA 743), and may give directions to the Council of Lloyd's, to the Society, or to both (see s 318; and PARA 745).

4 As to specified investments see PARA 224.

5 As to specified activities see PARA 88 et seq. As to advising about investments see PARA 174. As to managing investments see PARA 152. As to arranging deals see PARA 139.

6 See the Financial Services and Markets Act 2000 s 315(1); and PARA 744.

7 See the Financial Services and Markets Act 2000 s 315(2); and PARA 744.

8 See the Lloyd's Act 1982; and **INSURANCE** vol 25 (2003 Reissue) PARA 24. The Authority must keep itself informed about the way in which the Council of Lloyd's supervises and regulates the Lloyd's market and the way in which regulated activities are being carried out: see the Financial Services and Markets Act 2000 s 314; and PARA 742.

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## **78. The Panel on Takeovers and Mergers.**

The Panel on Takeovers and Mergers is the body responsible for the City Code on Takeovers and Mergers, which is a code issued for the purpose of ensuring good business practice in the conduct of takeovers and mergers<sup>1</sup>. This code may be endorsed by the Financial Services Authority<sup>2</sup>.

1 As to the Panel on Takeovers and Mergers and the City Code on Takeovers and Mergers see **COMPANIES** vol 14 (2009) PARA 1480 et seq.

2 See PARA 439. As to the Financial Services Authority see PARAS 4, 6 et seq.

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## **79. EEA and overseas authorities.**

Overseas regulatory authorities may have a role in enforcement, particularly where the matter relates to an EEA firm<sup>1</sup> which is exercising its passport rights in the United Kingdom<sup>2</sup>, or where a Treaty firm<sup>3</sup> is exercising Treaty rights<sup>4</sup>. They also have a role in the recognition of collective investment schemes constituted in other EEA states<sup>5</sup>.

Overseas authorities will, of course, be involved where the Financial Services Authority<sup>6</sup> is exercising its powers in support of an overseas regulator<sup>7</sup>.

1 As to the meaning of 'EEA firm' see PARA 315 note 1.

2 See PARA 315 et seq. As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 As to the meaning of 'Treaty firm' see PARA 319 note 1.

4 See PARA 319 et seq.

5 See PARA 672. As to the meaning of 'EEA state' see PARA 315 note 1. As to collective investment schemes generally see PARA 603 et seq.

6 As to the Financial Services Authority see PARAS 4, 6 et seq.

7 See PARAS 356 et seq, 457.

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## **(4) REGULATED ACTIVITIES**

### **(i) The General Prohibition and the Requirement for Permission**

#### **80. The general prohibition.**

No person may carry on a regulated activity<sup>1</sup> in the United Kingdom<sup>2</sup>, or purport to do so, unless he is an authorised person<sup>3</sup> or an exempt person<sup>4</sup>. This prohibition is referred to in the Financial Services and Markets Act 2000 as the 'general prohibition'<sup>5</sup>.

A person who contravenes the general prohibition is guilty of an authorisation offence<sup>6</sup>.

In proceedings for an authorisation offence it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence<sup>7</sup>.

A person who is neither an authorised person nor, in relation to the regulated activity in question, an exempt person is guilty of an offence<sup>8</sup> if he:

- 230 (1) describes himself (in whatever terms) as an authorised person<sup>9</sup>;
- 231 (2) describes himself (in whatever terms) as an exempt person in relation to the regulated activity<sup>10</sup>; or
- 232 (3) behaves, or otherwise holds himself out, in a manner which indicates (or which is reasonably likely to be understood as indicating) that he is an authorised person or an exempt person in relation to the regulated activity<sup>11</sup>.

In proceedings for such an offence it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence<sup>12</sup>.

- 1 As to regulated activities, including the 'by way of business' test, see PARA 84.
- 2 As to the meaning of 'carrying on a regulated activity in the United Kingdom' see PARA 86.
- 3 Financial Services and Markets Act 2000 s 19(1)(a). As to authorised persons see PARA 314.
- 4 Financial Services and Markets Act 2000 s 19(1)(b). 'Exempt person', in relation to a regulated activity, means a person who is exempt from the general prohibition in relation to that activity as a result of an exemption order made under s 38(1) (see PARA 330) or as a result of s 39(1) (see PARA 346) or s 285(2) or s 285(3) (see PARA 684): s 417(1).
- 5 Financial Services and Markets Act 2000 ss 19(2), 417(1).
- 6 Financial Services and Markets Act 2000 s 23(1), (2). A person guilty of such an offence is liable: (1) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both (s 23(1)(a)); (2) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both (s 23(1)(b)). As to the statutory maximum see PARA 56 note 24.
- 7 Financial Services and Markets Act 2000 s 23(3).
- 8 A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both: Financial Services and Markets Act 2000 s 24(3). However, where the conduct constituting the offence involved or included the public display of any material, the maximum fine for the offence is level 5 on the standard scale multiplied by the number of days for which the display continued: s 24(4). As to the standard scale see PARA 27 note 21.
- 9 Financial Services and Markets Act 2000 s 24(1)(a).
- 10 Financial Services and Markets Act 2000 s 24(1)(b).
- 11 Financial Services and Markets Act 2000 s 24(1)(c).
- 12 Financial Services and Markets Act 2000 s 24(2).

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## **81. Enforceability of agreements made by and through unauthorised persons.**

An agreement<sup>1</sup> made by a person in the course of carrying on a regulated activity<sup>2</sup> in contravention of the general prohibition<sup>3</sup> is unenforceable against the other party<sup>4</sup>.

The other party is entitled to recover:

- 233 (1) any money or other property<sup>5</sup> paid or transferred by him under the agreement<sup>6</sup>; and
- 234 (2) compensation for any loss sustained by him as a result of having parted with it<sup>7</sup>.

An agreement<sup>8</sup> made by an authorised person<sup>9</sup> (the 'provider'):

- 235 (a) in the course of carrying on a regulated activity, not in contravention of the general prohibition<sup>10</sup>; but
- 236 (b) in consequence of something said or done by another person (the 'third party') in the course of a regulated activity carried on by the third party in contravention of the general prohibition<sup>11</sup>,

is unenforceable against the other party<sup>12</sup>.

The other party is entitled to recover:

- 237 (i) any money or other property<sup>13</sup> paid or transferred by him under the agreement<sup>14</sup>; and
- 238 (ii) compensation for any loss sustained by him as a result of having parted with it<sup>15</sup>.

The commission of an authorisation offence<sup>16</sup> does not make the agreement concerned illegal or invalid to any greater extent than is provided by the provisions above<sup>17</sup>.

1    le an agreement:

- 38    (1)    made after 1 December 2001 (ie the date on which the Financial Services and Markets Act 2000 s 26 came into force: see the Financial Services and Markets Act 2000 (Commencement No 7) Order 2001, SI 2001/3538) (Financial Services and Markets Act 2000 s 26(3)(a)); and
- 39    (2)    the making or performance of which constitutes, or is part of, the regulated activity in question (s 26(3)(b)).

As to regulated activities see PARA 84 et seq.

2    See note 1. The Financial Services and Markets Act 2000 s 26 does not apply if the regulated activity is accepting deposits: s 26(4). As to accepting deposits see PARA 89.

3    As to the general prohibition see PARA 80.

4    Financial Services and Markets Act 2000 s 26(1).

5    If property transferred under the agreement has passed to a third party, a reference in the Financial Services and Markets Act 2000 s 26, s 27 or s 28 to that property is to be read as a reference to its value at the time of its transfer under the agreement: s 28(8).

6    Financial Services and Markets Act 2000 s 26(2)(a).

7    Financial Services and Markets Act 2000 s 26(2)(b).

8    le an agreement:

- 40    (1)    made after 1 December 2001 (ie the date on which the Financial Services and Markets Act 2000 s 27 came into force: see the Financial Services and Markets Act 2000 (Commencement No 7) Order 2001, SI 2001/3538) (Financial Services and Markets Act 2000 s 27(3)(a)); and
- 41    (2)    the making or performance of which constitutes, or is part of, the regulated activity in question carried on by the provider (s 27(3)(b)).

9    As to authorised persons see PARA 314.

10   Financial Services and Markets Act 2000 s 27(1)(a).

11   Financial Services and Markets Act 2000 s 27(1)(b).

12   Financial Services and Markets Act 2000 s 27(1). Section s 27 does not apply if the regulated activity is accepting deposits: s 27(4).

13   See note 5.

- 14 Financial Services and Markets Act 2000 s 27(2)(a). See note 12.
- 15 Financial Services and Markets Act 2000 s 27(2)(b). See note 12.
- 16 As to the meaning of 'authorisation offence' see PARA 80 note 6.
- 17 Financial Services and Markets Act 2000 s 28(9). The provisions referred to are s 26 or s 27.

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## **82. Unenforceable agreements and accepting deposits in breach of the general prohibition.**

Where an agreement is enforceable<sup>1</sup>, the amount of compensation recoverable is the amount agreed by the parties<sup>2</sup> or, on the application of either party, the amount determined by the court<sup>3</sup>.

If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow the agreement to be enforced<sup>4</sup> or money and property<sup>5</sup> paid or transferred under the agreement to be retained<sup>6</sup>.

In considering whether to allow the agreement to be enforced or (as the case may be) the money or property<sup>7</sup> paid or transferred under the agreement to be retained the court must have regard to certain issues<sup>8</sup>. If the case arises as a result of an agreement made by an unauthorised person<sup>9</sup>, the court must have regard to the issue of whether the person carrying on the regulated activity<sup>10</sup> concerned reasonably believed that he was not contravening the general prohibition<sup>11</sup> by making the agreement<sup>12</sup>. If the case arises as a result of an agreement made through an unauthorised person<sup>13</sup>, the court must have regard to the issue of whether the provider knew that the third party was (in carrying on the regulated activity) contravening the general prohibition<sup>14</sup>.

If the person against whom the agreement is unenforceable elects not to perform the agreement<sup>15</sup> or, as a result of these provisions<sup>16</sup>, recovers money paid or other property<sup>17</sup> transferred by him under the agreement<sup>18</sup>, he must repay any money and return any other property received by him under the agreement<sup>19</sup>.

Where an agreement<sup>20</sup> is made between a person (the 'depositor') and another person (the 'deposit-taker') in the course of the carrying on by the deposit-taker of accepting deposits in contravention of the general prohibition<sup>21</sup> then, if the depositor is not entitled under the agreement to recover without delay any money deposited by him, he may apply to the court for an order directing the deposit-taker to return the money to him<sup>22</sup>. The court need not make such an order if it is satisfied that it would not be just and equitable for the money deposited to be returned, having regard to the issue of whether the deposit-taker reasonably believed that he was not contravening the general prohibition by making the agreement<sup>23</sup>.

1    le where the agreement is unenforceable because of the Financial Services and Markets Act 2000 s 26 or s 27 (see PARA 81): s 28(1).

2    Financial Services and Markets Act 2000 s 28(2)(a).

3    Financial Services and Markets Act 2000 s 28(2)(b).

- 4 Financial Services and Markets Act 2000 s 28(3)(a).
- 5 If property transferred under the agreement has passed to a third party, a reference in the Financial Services and Markets Act 2000 s 26, s 27 or s 28 to that property is to be read as a reference to its value at the time of its transfer under the agreement: s 28(8).
- 6 Financial Services and Markets Act 2000 s 28(3)(b).
- 7 See note 5.
- 8 Financial Services and Markets Act 2000 s 28(4).
- 9 Ie a case arising as a result of the Financial Services and Markets Act 2000 s 26: see PARA 81.
- 10 As to regulated activities see PARA 84 et seq.
- 11 As to the general prohibition see PARA 80.
- 12 Financial Services and Markets Act 2000 s 28(4)(a), (5).
- 13 Ie a case arising as a result of the Financial Services and Markets Act 2000 s 27: see PARA 81.
- 14 Financial Services and Markets Act 2000 s 28(4)(b), (6).
- 15 Financial Services and Markets Act 2000 s 28(7)(a).
- 16 Ie as a result of the Financial Services and Markets Act 2000 s 28.
- 17 See note 5.
- 18 Financial Services and Markets Act 2000 s 28(7)(b).
- 19 Financial Services and Markets Act 2000 s 28(7).
- 20 Ie an agreement:
  - 42 (1) made after 1 December 2001 (ie the date on which the Financial Services and Markets Act 2000 s 29 came into force: see the Financial Services and Markets Act (Commencement No 7) Order 2001, SI 2001/3538) (Financial Services and Markets Act 2000 s 29(5)(a)); and
  - 43 (2) the making or performance of which constitutes, or is part of, accepting deposits (s 29(5)(b)).
- 21 Financial Services and Markets Act 2000 s 29(1).
- 22 Financial Services and Markets Act 2000 s 29(2).
- 23 Financial Services and Markets Act 2000 s 29(3), (4).

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### **83. Requirement for permission.**

If an authorised person<sup>1</sup> carries on a regulated activity<sup>2</sup> in the United Kingdom<sup>3</sup>, or purports to do so, otherwise than in accordance with permission given to him by the Financial Services Authority<sup>4</sup> under Part IV of the Financial Services and Markets Act 2000<sup>5</sup>, or permission resulting from any other provision of the Financial Services and Markets Act 2000<sup>6</sup>, he is to be taken to

have contravened a requirement imposed on him by the Authority under the Financial Services and Markets Act 2000<sup>7</sup>.

The contravention does not make a person guilty of an offence<sup>8</sup>, nor does it make any transaction void or unenforceable<sup>9</sup>. Contravention does not give rise to any right of action for breach of statutory duty<sup>10</sup> although in prescribed<sup>11</sup> cases the contravention is actionable at the suit of a person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty<sup>12</sup>. The prescribed cases are those where the following conditions are satisfied<sup>13</sup>:

- 239 (1) the action would be brought at the suit of:
- 15
18. (a) a private person<sup>14</sup>; or
19. (b) a person acting in a fiduciary or representative capacity on behalf of a private person and any remedy would be exclusively for the benefit of that private person and could not be effected through an action brought otherwise than at the suit of the fiduciary or representative<sup>15</sup>;
- 16
- 240 (2) the contravention is not of a financial resources requirement under Part IV of the Financial Services and Markets Act 2000<sup>16</sup>.

1 As to authorised persons see PARA 314.

2 As to regulated activities see PARA 84 et seq.

3 As to the meaning of 'carrying on a regulated activity in the United Kingdom' see PARA 86.

4 As to the Financial Services Authority see PARAS 4, 6 et seq.

5 Financial Services and Markets Act 2000 s 20(1)(a). As to Pt IV (ss 40-55) see PARA 348 et seq.

6 Financial Services and Markets Act 2000 s 20(1)(b).

7 Financial Services and Markets Act 2000 s 20(1).

8 Financial Services and Markets Act 2000 s 20(2)(a).

9 Financial Services and Markets Act 2000 s 20(2)(b).

10 Financial Services and Markets Act 2000 s 20(2)(c). Section 20(2)(c) is subject to s 20(3): see the text to note 12.

11 'Prescribed' means prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 417(1). See the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256; and the text and notes 13-16. As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

12 Financial Services and Markets Act 2000 s 20(3).

13 See the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 4(1).

14 Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 4(2)(a)(i). For these purposes, 'private person' means

44 (1) any individual, unless he suffers the loss in question in the course of carrying on: (a) any regulated activity (reg 3(1)(a)(i)); or (b) any activity which would be a regulated activity apart from any exclusion made in regard to overseas persons or information society services (reg 3(1)(a)(ii) (amended by SI 2002/1775)); and

45 (2) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind (Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 3(1)(b)),

but does not include a government, a local authority (in the United Kingdom or elsewhere) or an international organisation (reg 3(1)). As to the meanings of 'government', 'local authority' and 'international organisation' see PARA 33 note 3. As to the meaning of 'United Kingdom' see PARA 2 note 3.

In regard to head (1) above, an individual who suffers loss in the course of effecting or carrying out contracts of insurance (within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10 (see PARA 100)) written at Lloyd's is not to be taken to suffer loss in the course of carrying on a regulated activity: Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 3(2).

15 Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 4(2)(a) (ii).

16 Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 4(2)(b). As to the financial resources requirements under the Financial Services and Markets Act 2000 Pt IV see PARA 351.

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## **(ii) Regulated Activities**

### **A. IN GENERAL**

#### **84. Classes of activity and categories of investment.**

An activity is a regulated activity for the purposes of the Financial Services and Markets Act 2000 if it is an activity of a specified<sup>1</sup> kind which is carried on by way of business and:

- 241 (1) relates to an investment<sup>2</sup> of a specified kind<sup>3</sup>; or
- 242 (2) in the case of an activity of a kind which is also specified for these purposes, is carried on in relation to property of any kind<sup>4</sup>.

An order<sup>5</sup> may:

- 243 (a) provide for exemptions<sup>6</sup>;
- 244 (b) confer powers on the Treasury or the Financial Services Authority<sup>7</sup>;
- 245 (c) authorise the making of regulations or other instruments by the Treasury for purposes of, or connected with, any relevant provision<sup>8</sup>;
- 246 (d) authorise the making of rules or other instruments by the Authority for purposes of, or connected with, any relevant provision<sup>9</sup>;
- 247 (e) make provision in respect of any information or document which, in the opinion of the Treasury or the Authority, is relevant for purposes of, or connected with, any relevant provision<sup>10</sup>;
- 248 (f) make such consequential, transitional or supplemental provision as the Treasury considers appropriate for purposes of, or connected with, any relevant provision<sup>11</sup>.

1 'Specified' means specified in an order made by the Treasury: Financial Services and Markets Act 2000 s 22(5). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the specified kinds of investments see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544; and PARA 88 et seq. As to orders under the Financial Services and Markets



Act 2000 generally see PARA 67 note 1. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

2 'Investment' includes any asset, right or interest: Financial Services and Markets Act 2000 s 22(4). See also PARA 85.

3 Financial Services and Markets Act 2000 s 22(1)(a).

4 Financial Services and Markets Act 2000 s 22(1)(b).

Supplementary provision is made by Sch 2, but nothing in Sch 2 limits the powers conferred by s 22(1): s 22(3).

The following provisions apply to the first order made under s 22(1): s 22(2), Sch 2 para 26(1). They also apply to any subsequent order made under s 22(1) which contains a statement by the Treasury that, in its opinion, the effect (or one of the effects) of the proposed order would be that an activity which is not a regulated activity would become a regulated activity: Sch 2 para 26(2). An order to which Sch 2 para 26 applies must be laid before Parliament after being made; and ceases to have effect at the end of the relevant period unless before the end of that period the order is approved by a resolution of each House of Parliament (but without that affecting anything done under the order or the power to make a new order): Sch 2 para 26(3). 'Relevant period' means a period of 28 days beginning with the day on which the order is made: Sch 2 para 26(4). In calculating the relevant period no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days: Sch 2 para 26(5). Statutory instruments made under Sch 2 para 26 are excepted from the general provision that statutory instruments are subject to annulment in pursuance of a resolution of either House of Parliament (see PARA 67 note 1): see s 429(8).

The matters with respect to which provision may be made under s 22(1) in respect of activities include, in particular, those described in general terms in Sch 2 Pt I: Sch 2 para 1 (but see PARA 88 et seq). The general range of activities is as follows:

- 46 (1) buying, selling, subscribing for or underwriting investments or offering or agreeing to do so, either as a principal or as an agent (Sch 2 para 2(1)) (in the case of an investment which is a contract of insurance, that includes carrying out the contract: Sch 2 para 2(2));
- 47 (2) making, or offering or agreeing to make:
  - 1. (a) arrangements with a view to another person buying, selling, subscribing for or underwriting a particular investment (Sch 2 para 3(a));  
1
  - 2. (b) arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments (Sch 2 para 3(b));  
2
- 48 (3) accepting deposits (Sch 2 para 4);
- 49 (4) safeguarding and administering assets belonging to another which consist of or include investments or offering or agreeing to do so (Sch 2 para 5(1)), and arranging for the safeguarding and administration of assets belonging to another, or offering or agreeing to do so (Sch 2 para 5(2));
- 50 (5) managing, or offering or agreeing to manage, assets belonging to another person where:
  - 3. (a) the assets consist of or include investments (Sch 2 para 6(a)); or  
3
  - 4. (b) the arrangements for their management are such that the assets may consist of or include investments at the discretion of the person managing or offering or agreeing to manage them (Sch 2 para 6(b));  
4
- 51 (6) giving or offering or agreeing to give advice to persons:
  - 5. (a) on buying, selling, subscribing for or underwriting an investment (Sch 2 para 7(a)); or  
5
  - 6. (b) exercising any right conferred by an investment to acquire, dispose of, underwrite or convert an investment (Sch 2 para 7(b));  
6
- 52 (7) establishing, operating or winding up a collective investment scheme, including acting as:
  - 7. (a) trustee of a unit trust scheme (Sch 2 para 8(a));

- 7
8. (b) depositary of a collective investment scheme other than a unit trust scheme (Sch 2 para 8(b)); or  
8
9. (c) sole director of a body incorporated by virtue of regulations under s 262 (see PARA 621) (Sch 2 para 8(c));  
9
- 53 (8) sending on behalf of another person instructions relating to an investment by means of a computer-based system which enables investments to be transferred without a written instrument (Sch 2 para 9(1)), offering or agreeing to send such instructions by such means on behalf of another person (Sch 2 para 9(2)), causing such instructions to be sent by such means on behalf of another person (Sch 2 para 9(3)), offering or agreeing to cause such instructions to be sent by such means on behalf of another person (Sch 2 para 9(4)).

In head (1) above 'buying' includes acquiring for valuable consideration: Sch 2 para 27(1). In head (1) above 'selling' includes disposing for valuable consideration: Sch 2 para 27(1). In Sch 2 para 27(1) 'disposing' includes (i) in the case of an investment consisting of rights under a contract, surrendering, assigning or converting those rights (Sch 2 para 27(2)(a)(i)) or assuming the corresponding liabilities under the contract (Sch 2 para 27(2)(a)(ii)); (ii) in the case of an investment consisting of rights under other arrangements, assuming the corresponding liabilities under the contract or arrangements (Sch 2 para 27(2)(b)); (iii) in the case of any other investment, issuing or creating the investment or granting the rights or interests of which it consists (Sch 2 para 27(2)(c)).

In head (2) above 'offering' includes inviting to treat: Sch 2 para 27(1). As to the meanings of 'collective investment scheme' and 'unit trust scheme' (see head (7) above) see PARA 603. In head (8) above references to an instrument include references to any record (whether or not in the form of a document): Sch 2 para 27(3). As to the meaning of 'documents' see PARA 10 note 10.

See also the Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095 (amended by SI 2007/108), which implement European Parliament and EC Council Directive 2002/65 (OJ L271, 9.10.2002, p 16) concerning the distance marketing of consumer financial services. The matters covered in the Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095, include scope (see regs 3-5); financial services marketed by an intermediary (see reg 6); information required prior to the conclusion of the contract (see reg 7); written and additional information (see reg 8); right to cancel (see reg 9); cancellation period (see reg 10); exceptions to the right to cancel (see reg 11); automatic cancellation of an attached distance contract (see reg 12); payment for services provided before cancellation (see reg 13); payment by card (see reg 14); unsolicited services (see reg 15); prevention of contracting-out (see reg 16); enforcement authorities (see reg 17); consideration of complaints (see reg 18); injunctions to secure compliance with Regulations (see reg 19); notification of undertakings and orders to the Office of Fair Trading (see reg 20); publications, information and advice (see reg 21); offences (see reg 22); and functions of the Financial Services Authority (see reg 23). See also **CONTRACT; SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 393, 452, 453, 673; and **COMPETITION** vol 18 (2009) PARA 1 et seq.

5 le under the Financial Services and Markets Act 2000 s 22(1). See also note 1.

6 Financial Services and Markets Act 2000 Sch 2 para 25(1)(a). As to orders under Sch 2 para 25 see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 (see PARA 88 et seq); and the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529 (see PARA 225 et seq).

7 Financial Services and Markets Act 2000 Sch 2 para 25(1)(b). As to the Financial Services Authority see PARAS 4, 6 et seq.

8 Financial Services and Markets Act 2000 Sch 2 para 25(1)(c). 'Relevant provision' means any provision of the Financial Services and Markets Act 2000 s 22 or Sch 2 or any provision made under s 22 or Sch 2: Sch 2 para 25(3).

9 Financial Services and Markets Act 2000 Sch 2 para 25(1)(d).

10 Financial Services and Markets Act 2000 Sch 2 para 25(1)(e).

11 Financial Services and Markets Act 2000 Sch 2 para 25(1)(f). Provision made as a result of Sch 2 para 25(1)(f) may amend any primary or subordinate legislation, including any provision of, or made under, the Financial Services and Markets Act 2000: Sch 2 para 25(2).

## UPDATE

### 84 Classes of activity and categories of investment

NOTE 4--Also, head (9) any of the activities of a reclaim fund: Financial Services and Markets Act 2000 Sch 2 para 9A(1) (Sch 2 para 9A added by Dormant Bank and Building Society Accounts Act 2008 Sch 2 para 1). 'Reclaim fund' has the meaning given by Dormant Bank and Building Society Accounts Act 2008 s 5(1) (see PARA 590A): Financial Services and Markets Act 2000 Sch 2 para 9A(2). SI 2004/2095 further amended: SI 2008/1277, SI 2009/209.

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## **85. Investments generally.**

The general range of investments which may be specified as regulated activities<sup>1</sup> include the following<sup>2</sup>:

- 249 (1) shares or stock in the share capital of a company<sup>3</sup>;
- 250 (2) any of the following:
  - 17
  - 20. (a) debentures<sup>4</sup>;
  - 21. (b) debenture stock<sup>5</sup>;
  - 22. (c) loan stock<sup>6</sup>;
  - 23. (d) bonds<sup>7</sup>;
  - 24. (e) certificates of deposit<sup>8</sup>;
  - 25. (f) any other instruments<sup>9</sup> creating or acknowledging a present or future indebtedness<sup>10</sup>;
  - 18
  - 251 (3) loan stock, bonds and other instruments:
  - 19
    - 26. (a) creating or acknowledging indebtedness<sup>11</sup>; and
    - 27. (b) issued by or on behalf of a government, local authority or public authority<sup>12</sup>;
  - 20
  - 252 (4) warrants or other instruments entitling the holder to subscribe for any investment<sup>13</sup>;
  - 253 (5) certificates or other instruments which confer contractual or property<sup>14</sup> rights:
    - 21
    - 28. (a) in respect of any investment held by someone other than the person on whom the rights are conferred by the certificate or other instrument<sup>15</sup>; and
    - 29. (b) the transfer of which may be effected without requiring the consent of that person<sup>16</sup>;
    - 22
    - 254 (6) shares in or securities of an open-ended investment company<sup>17</sup>, and any right to participate in a collective investment scheme<sup>18</sup>;
    - 255 (7) options to acquire or dispose of property<sup>19</sup>;
    - 256 (8) rights under a contract for the sale of a commodity or property of any other description under which delivery is to be made at a future date<sup>20</sup>;
    - 257 (9) rights under:
      - 23

- 30. (a) a contract for differences<sup>21</sup>; or
- 31. (b) any other contract the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the value or price of property of any description<sup>22</sup>, or an index or other factor designated for that purpose in the contract<sup>23</sup>;
- 24
- 258 (10) rights under a contract of insurance<sup>24</sup>;
- 259 (11) the underwriting capacity of a Lloyd's syndicate<sup>25</sup>, and a person's membership (or prospective membership) of a Lloyd's syndicate<sup>26</sup>;
- 260 (12) rights under any contract under which a sum of money (whether or not denominated in a currency) is paid on terms under which it will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it<sup>27</sup>;
- 261 (13) rights under any contract under which:
- 25
- 32. (a) one person provides another with credit<sup>28</sup>; and
- 33. (b) the obligation of the borrower to repay is secured on land<sup>29</sup>;
- 26
- 262 (14) rights under any arrangement for the provision of finance under which the person providing the finance either:
- 27
- 34. (a) acquires a major interest in land from the person to whom the finance is provided<sup>30</sup>; or
- 35. (b) disposes of a major interest in land to that person, as part of the arrangement<sup>31</sup>;
- 28
- 263 (15) any right or interest in anything which is an investment<sup>32</sup>.

1 le for which provision may be made under the Financial Services and Markets Act 2000 s 22(1): see PARA 84.

2 Financial Services and Markets Act 2000 Sch 2 para 10. The matters are described in general terms in Sch 2 Pt II: see heads (1)-(15) in the text.

3 Financial Services and Markets Act 2000 Sch 2 para 11(1). 'Company' includes: (1) any body corporate (wherever incorporated) (Sch 2 para 11(2)(a)); and (2) any unincorporated body constituted under the law of a country or territory outside the United Kingdom (Sch 2 para 11(2)(b)), other than an open-ended investment company (Sch 2 para 11(2)). As to the meaning of 'body corporate' see PARA 86 note 11. As to the meaning of 'open-ended investment company' see PARA 603. As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Financial Services and Markets Act 2000 Sch 2 para 12(a).

5 Financial Services and Markets Act 2000 Sch 2 para 12(b).

6 Financial Services and Markets Act 2000 Sch 2 para 12(c).

7 Financial Services and Markets Act 2000 Sch 2 para 12(d).

8 Financial Services and Markets Act 2000 Sch 2 para 12(e).

9 As to the meaning of 'instruments' see PARA 84 note 4.

10 Financial Services and Markets Act 2000 Sch 2 para 12(f).

11 Financial Services and Markets Act 2000 Sch 2 para 13(1)(a).

12 Financial Services and Markets Act 2000 Sch 2 para 13(1)(b). 'Government, local authority or public authority' means: (1) the government of the United Kingdom, of Northern Ireland, or of any country or territory outside the United Kingdom (Sch 2 para 13(2)(a)); (2) a local authority in the United Kingdom or elsewhere (Sch

2 para 13(2)(b)); (3) any international organisation the members of which include the United Kingdom or another member state (Sch 2 para 13(2)(c)).

13 Financial Services and Markets Act 2000 Sch 2 para 14(1). It is immaterial whether the investment is in existence or identifiable: Sch 2 para 14(2).

14 For these purposes, 'property' includes currency of the United Kingdom or any other country or territory: Financial Services and Markets Act 2000 Sch 2 para 27(1).

15 Financial Services and Markets Act 2000 Sch 2 para 15(a).

16 Financial Services and Markets Act 2000 Sch 2 para 15(b).

17 Financial Services and Markets Act 2000 Sch 2 para 16(1).

18 Financial Services and Markets Act 2000 Sch 2 para 16(2). As to the meaning of 'collective investment scheme' see PARA 603.

19 Financial Services and Markets Act 2000 Sch 2 para 17.

20 Financial Services and Markets Act 2000 Sch 2 para 18.

21 Financial Services and Markets Act 2000 Sch 2 para 19(a).

22 Financial Services and Markets Act 2000 Sch 2 para 19(b)(i).

23 Financial Services and Markets Act 2000 Sch 2 para 19(b)(ii).

24 Financial Services and Markets Act 2000 Sch 2 para 20. This includes rights under contracts falling within the Friendly Societies Act 1992 Sch 2 head C (see PARA 2096): Financial Services and Markets Act 2000 Sch 2 para 20.

25 Financial Services and Markets Act 2000 Sch 2 para 21(1).

26 Financial Services and Markets Act 2000 Sch 2 para 21(2). As to Lloyd's generally see **INSURANCE**.

27 Financial Services and Markets Act 2000 Sch 2 para 22.

28 Financial Services and Markets Act 2000 Sch 2 para 23(1)(a). 'Credit' includes any cash loan or other financial accommodation: Sch 2 para 23(2). 'Cash' includes money in any form: Sch 2 para 23(3).

29 Financial Services and Markets Act 2000 Sch 2 para 23(1)(b).

30 Financial Services and Markets Act 2000 Sch 2 para 23A(1)(a) (Sch 2 para 23A added by the Regulation of Financial Services (Land Transactions) Act 2005 s 1). References to a 'major interest' in land are to an estate in fee simple absolute, or a term of years absolute, whether subsisting at law or in equity: Financial Services and Markets Act 2000 Sch 2 para 23A(2) (as so added). It is immaterial whether either party acquires or, as the case may be, disposes of the interest in land directly, or indirectly: Sch 2 para 23A(3) (as so added).

31 Financial Services and Markets Act 2000 Sch 2 para 23A(1)(b) (as added: see note 30). See note 30.

32 Financial Services and Markets Act 2000 Sch 2 para 24. The reference to any right or interest in the text is a reference to any right or interest in anything which is an investment as a result of any other provision made under s 22(1) (see PARA 84): see Sch 2 para 24.

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## ***B. CARRYING ON REGULATED ACTIVITIES***

## 86. Carrying on regulated activities in the United Kingdom.

In the five cases described below<sup>1</sup>, a person who is carrying on a regulated activity<sup>2</sup>, but would not otherwise be regarded as carrying it on in the United Kingdom<sup>3</sup>, is, for the purposes of the Financial Services and Markets Act 2000, to be regarded as carrying it on in the United Kingdom<sup>4</sup>.

The first case is where:

- 264 (1) his registered office (or if he does not have a registered office his head office) is in the United Kingdom<sup>5</sup>;
- 265 (2) he is entitled to exercise rights under a Single Market Directive<sup>6</sup> as a UK firm<sup>7</sup>; and
- 266 (3) he is carrying on in another EEA state<sup>8</sup> a regulated activity to which that Directive applies<sup>9</sup>.

The second case is where:

- 267 (a) his registered office (or if he does not have a registered office his head office) is in the United Kingdom<sup>10</sup>;
- 268 (b) he is the manager<sup>11</sup> of a scheme which is entitled to enjoy the rights conferred by an instrument which is a relevant Community instrument<sup>12</sup>; and
- 269 (c) persons in another EEA state are invited to become participants in the scheme<sup>13</sup>.

The third case is where:

- 270 (i) his registered office (or if he does not have a registered office his head office) is in the United Kingdom<sup>14</sup>;
- 271 (ii) the day-to-day management of the carrying on of the regulated activity is the responsibility of his registered office (or head office)<sup>15</sup>, or another establishment maintained by him in the United Kingdom<sup>16</sup>.

The fourth case is where:

- 272 (A) his head office is not in the United Kingdom<sup>17</sup>; but
- 273 (B) the activity is carried on from an establishment maintained by him in the United Kingdom<sup>18</sup>.

The fifth case is any other case where the activity consists of the provision of an information society service to a person or persons in one or more EEA states<sup>19</sup> and is carried on from an establishment in the United Kingdom<sup>20</sup>.

For the purposes of all five cases<sup>21</sup> it is irrelevant where the person with whom the activity is carried on is situated<sup>22</sup>.

1 le described in the Financial Services and Markets Act 2000 s 418: see the text and notes 2-22.

2 Financial Services and Markets Act 2000 s 418(1)(a). As to regulated activities see PARA 84 et seq.

3 Financial Services and Markets Act 2000 s 418(1)(b).

4 Financial Services and Markets Act 2000 s 418(1) (amended by SI 2002/1775). As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 Financial Services and Markets Act 2000 s 418(2)(a).

6 'The Single Market Directives' means: (1) the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions); (2) the Insurance Directives; (3) the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83); (4) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments); (5) the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation); and (6) the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities): Financial Services and Markets Act 2000 Sch 3 paras 1, 2, 3A, 4A-4C (amended and added by SI 2000/2952; SI 2003/1473; SI 2003/2066; SI 2006/2975; SI 2006/3221; SI 2007/126; SI 2007/3253).

'The Insurance Directives' means: (a) the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance); (b) the Second Non-Life Insurance Directive (ie EC Council Directive 88/357 (OJ L172, 4.7.88, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, and laying down provisions to facilitate the effective exercise of freedom to provide services and amending EC Directive 73/239); (c) the Third Non-Life Insurance Directive (ie EC Council Directive 92/49 (OJ L228, 11.8.92, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, and amending EC Directives 73/239 and 88/357); and (d) the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance): see the Financial Services and Markets Act 2000 Sch 3 para 3 (amended by SI 2004/3379).

As to the Regulated Covered Bonds Regulations 2008, SI 2008/346, which implement some of the provisions of the UCITS Directive, the Third Non-Life Insurance Directive, the Life Assurance Consolidation Directive and the Banking Consolidation Directive, see PARA 6 note 1. See also PARAS 16, 447, 448.

7 Financial Services and Markets Act 2000 s 418(2)(b). As to the meaning of 'UK firm' see PARA 323 note 4.

8 As to the meaning of 'EEA state' see PARA 315 note 1.

9 Financial Services and Markets Act 2000 s 418(2)(c).

10 Financial Services and Markets Act 2000 s 418(3)(a).

11 In the Financial Services and Markets Act 2000, except in relation to a unit trust scheme or a registered friendly society, 'manager' means an employee who: (1) under the immediate authority of his employer is responsible, either alone or jointly with one or more other persons, for the conduct of his employer's business; or (2) under the immediate authority of his employer or of a person who is a manager by virtue of head (1) above exercises managerial functions or is responsible for maintaining accounts or other records of his employer: s 423(1). As to the meaning of 'unit trust scheme' see PARA 603. As to the meaning of 'registered friendly society' see PARA 351 note 17. If the employer is not an individual, references in s 423(1) to the authority of the employer are references to the authority: (a) in the case of a body corporate, of the directors; (b) in the case of a partnership, of the partners; and (c) in the case of an unincorporated association, of its officers or the members of its governing body: s 423(2). 'Body corporate' includes a body corporate constituted under the law of a country or territory outside the United Kingdom: s 417(1). 'Director', in relation to a body corporate, includes a person occupying in relation to it the position of a director (by whatever name called); and a person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of that body are accustomed to act: s 417(1). 'Partnership' includes a partnership constituted under the law of a country or territory outside the United Kingdom: s 417(1). 'Manager', in relation to a body corporate, means a person (other than an employee of the body) who is appointed by the body to manage any part of its business and includes an employee of the body corporate (other than the chief executive) who, under the immediate authority of a director or chief executive of the body corporate, exercises managerial functions or is responsible for maintaining accounts or other records of the body corporate: s 423(3). 'Chief executive': (i) in relation to a body corporate whose principal place of business is within the United Kingdom, means an employee of that body who, alone or jointly with one or more others, is responsible under the immediate authority of the directors, for the conduct of the whole of the business of that body; and (ii) in relation to a body corporate whose principal place of business is outside the United Kingdom, means the person who, alone or jointly with one or more others, is responsible for the conduct of its business within the United Kingdom: s 417(1).

12 Financial Services and Markets Act 2000 s 418(3)(b). The reference to a relevant Community instrument is a reference to a relevant Community instrument for the purposes of s 264: see PARA 672.

- 13 Financial Services and Markets Act 2000 s 418(3)(c).
- 14 Financial Services and Markets Act 2000 s 418(4)(a).
- 15 Financial Services and Markets Act 2000 s 418(4)(b)(i).
- 16 Financial Services and Markets Act 2000 s 418(4)(b)(ii).
- 17 Financial Services and Markets Act 2000 s 418(5)(a).
- 18 Financial Services and Markets Act 2000 s 418(5)(b).
- 19 Financial Services and Markets Act 2000 s 418(5A)(a) (s 418(5A) added by SI 2002/1775).
- 20 Financial Services and Markets Act 2000 s 418(5A)(b) (as added: see note 19).
- 21 le for the purposes of the Financial Services and Markets Act 2000 s 418(2)-(5A).
- 22 Financial Services and Markets Act 2000 s 418(6) (amended by SI 2002/1775).

## **UPDATE**

### **86 Carrying on regulated activities in the United Kingdom**

NOTE 6--Directive 85/611 replaced: see PARA 6.

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### **87. Carrying on regulated activities by way of business.**

The Treasury<sup>1</sup> may by order make provision:

- 274 (1) as to the circumstances in which a person who would otherwise not be regarded as carrying on a regulated activity<sup>2</sup> by way of business is to be regarded as doing so<sup>3</sup>;
- 275 (2) as to the circumstances in which a person who would otherwise be regarded as carrying on a regulated activity by way of business is to be regarded as not doing so<sup>4</sup>.

An order<sup>5</sup> may be made so as to apply:

- 276 (a) generally in relation to all regulated activities<sup>6</sup>;
- 277 (b) in relation to a specified category of regulated activity<sup>7</sup>; or
- 278 (c) in relation to a particular regulated activity<sup>8</sup>.

Such an order may be made so as to apply for the purposes of all provisions of or made under the Financial Services and Markets Act 2000<sup>9</sup>, for a specified group of such provisions<sup>10</sup>, or for a specified provision<sup>11</sup>.



No such order is to be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House<sup>12</sup>.

Nothing above is to be read as affecting the scope for an order to make different provisions for different cases or contain certain appropriate incidental and other matters<sup>13</sup>.

- 1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 2 As to regulated activities see PARA 84 et seq.
- 3 Financial Services and Markets Act 2000 s 419(1)(a).
- 4 Financial Services and Markets Act 2000 s 419(1)(b). See the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177 (amended by SI 2003/1475; SI 2003/1476; SI 2005/922; SI 2006/1969; SI 2006/3384), which makes provision as to the circumstances in which a person is, or is not, to be regarded as carrying on a regulated activity by way of business in accordance with the Financial Services and Markets Act 2000 s 22(1) (see PARA 84).
- 5 Ie an order under the Financial Services and Markets Act 2000 s 419(1). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, specifically makes provision for persons to accept deposits, or carry on certain kinds of dealing and investment activity, without being regarded as doing so by way of business. In addition, the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, specifies that a person who manages the assets of an occupational pension scheme will normally be regarded as doing so by way of business unless certain circumstances apply: see PARA 152. There are also similar provisions in regard to regulated mortgage contracts (see PARA 203 et seq), regulated home reversion plans (see PARA 209 et seq) and home purchase plans (see PARA 215 et seq).
- 6 Financial Services and Markets Act 2000 s 419(2)(a).
- 7 Financial Services and Markets Act 2000 s 419(2)(b).
- 8 Financial Services and Markets Act 2000 s 419(2)(c).
- 9 Financial Services and Markets Act 2000 s 419(3)(a), (4).
- 10 Financial Services and Markets Act 2000 s 419(3)(b).
- 11 Financial Services and Markets Act 2000 s 419(3)(c).
- 12 Financial Services and Markets Act 2000 s 429(1)(a).
- 13 Ie nothing in the Financial Services and Markets Act 2000 s 419 is to be read as affecting the provisions of s 428(3) (regulations and orders: see PARA 67 note 1): s 419(5).

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## ***C. SPECIFIED ACTIVITIES AND EXCLUSIONS***

### **(A) INTRODUCTION**

#### **88. Activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.**

Any activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001<sup>1</sup>, which is carried on by way of business, and relates to an investment of a kind specified by that Order<sup>2</sup> and applicable to that activity, is a regulated activity for the purposes of the Financial Services and Markets Act 2000<sup>3</sup>. Each provision specifying a kind of activity is subject to the exclusions applicable to that provision (and accordingly any reference in the Order to an activity of the kind specified by a particular provision is to be read subject to any such exclusions)<sup>4</sup>. However, where an investment firm<sup>5</sup> or credit institution<sup>6</sup> provides or performs investment services and activities<sup>7</sup> on a professional basis<sup>8</sup>, and in doing so would be treated as carrying on an activity of a kind specified by the Order but for one of certain exclusions<sup>9</sup>, that exclusion is to be disregarded (and accordingly the investment firm or credit institution is to be treated as carrying on an activity of the kind specified by the provision in question)<sup>10</sup>. In addition where a person<sup>11</sup>, for remuneration, takes up or pursues insurance mediation<sup>12</sup> or reinsurance mediation<sup>13</sup> in relation to a risk or commitment located in an EEA state<sup>14</sup>; and in doing so would be treated as carrying on an activity of a kind specified by a provision of the Order but for one of certain exclusions<sup>15</sup>, that exclusion is to be disregarded (and accordingly that person is to be treated as carrying on an activity of the kind specified by the provision in question)<sup>16</sup>. The exemptions which would otherwise be available in these cases are overridden in order to ensure that the scope of the United Kingdom<sup>17</sup> rules is consistent with the provisions of the corresponding Single Market Directives<sup>18</sup>.

1 The specified activities are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F): see PARAS 89 et seq.

2 The specified investments are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt III (arts 73-89): see PARA 224.

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(1). As to regulated activities under the Financial Services and Markets Act 2000 see s 22; and PARA 84. The kinds of activity specified by art 51 (see PARA 171) and art 52 (see PARA 187) are also specified for the purposes of the Financial Services and Markets Act 2000 s 22(1)(b) (see PARA 84) (and accordingly any activity of one of those kinds, when carried on by way of business, is a regulated activity when carried on in relation to property of any kind): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(2). 'Property' includes currency of the United Kingdom or any other country or territory: art 3(1). As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(3).

5 For these purposes, 'investment firm' means a person whose regular occupation or business is the provision of investment services and activities on a professional basis but does not include (1) a person to whom the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1) on markets in financial instruments) does not apply by virtue of art 2 (the text of which is set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 3 (substituted by SI 2006/3384)) (see heads (i)-(xiv) below); (2) a person whose home member state is an EEA state other than the United Kingdom and to whom, by reason of the fact that the state has given effect to the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) art 3, that directive does not apply by virtue of that article; (3) a person who does not have a home member state and to whom (if he had his registered office in an EEA state, or, being a person other than a body corporate or a body corporate not having a registered office, if he had his head office in an EEA state) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) would not apply by virtue of art 2: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3 (definition added by SI 2006/3384).

'Investment services and activities' means (a) any service provided to third parties listed in the Markets in Financial Services Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section A (the text of which is set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 2 Pt III (substituted by SI 2006/3384)) (see heads (A)-(G) below) read with European Commission Directive 2006/73 (OJ L241, 2.9.2006, p 26) art 52 (the text of which is set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 2 Pt IV (substituted by SI 2006/3384)) (see further below); or (b) any activity listed in the Markets in Financial Services Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section A, relating to any financial instrument: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3 (definition added by SI 2006/3384).

'Home member state', in relation to an investment firm, has the meaning given by the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) art 4.1.20, and in relation to a credit institution, has the meaning given by the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) art 4.7: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3 (definition added by SI 2006/3384).

'Financial instrument' means any instrument listed in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex 1 Section C (the text of which is set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 2 Pt I (substituted by SI 2006/3384)) (see below) read with EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch VI (the text of which is set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 2 Pt II (substituted by SI 2006/3384)) (see below): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3 (definition added by SI 2006/3384).

As to the meaning of 'EEA state' see PARA 315 note 1.

The Markets in Financial Services Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) does not apply to the following undertakings (see art 2.1 set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 3 (substituted by SI 2006/3384)):

- 54 (i) insurance undertakings as defined in the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 1 or EC Council Directive 79/267 (OJ L63, 13.3.79, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance art 1 or undertakings carrying on the reinsurance and retrocession activities referred to in EC Council Directive 64/225 (OJ P56, 4.4.64, p 878) on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession;
- 55 (ii) persons who provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
- 56 (iii) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which does not exclude the provision of that service;
- 57 (iv) persons who do not provide any investment services or activities other than dealing on own account unless they are market makers or deal on own account outside a regulated market or an MTF (Multilateral Trading Facility) on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them;
- 58 (v) persons who provide investment services consisting exclusively in the administration of employee-participation schemes;
- 59 (vi) persons who provide investment services which only involve both administration of employee-participation schemes and the provision of investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;
- 60 (vii) the members of the European System of Central Banks and other national bodies performing similar functions and other public bodies charged with or intervening in the management of the public debt;
- 61 (viii) collective investment undertakings and pension funds whether coordinated at Community level or not and the depositaries and managers of such undertakings;
- 62 (ix) persons dealing on own account in financial instruments, or providing investment services in commodity derivatives or derivative contracts included in the Markets in Financial Services Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I, Section C10 to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of the Markets in Financial Services Directive or banking services under European Parliament and EC Council Directive 2000/12 (OJ L126, 26.5.2000, p 1) on the taking up and pursuit of the business of credit institutions;
- 63 (x) persons providing investment advice in the course of providing another professional activity not covered by this directive (ie the Markets in Financial Services Directive (ie European

Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) provided that the provision of such advice is not specifically remunerated;

- 64 (xi) persons whose main business consists of dealing on own account in commodities and/or commodity derivatives. This exception does not apply where the persons that deal on own account in commodities and/or commodity derivatives are part of a group the main business of which is the provision of other investment services within the meaning of this directive or banking services under European Parliament and EC Council Directive 2000/12 (OJ L126, 26.5.2000, p 1);
- 65 (xii) firms which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets;
- 66 (xiii) associations set up by Danish and Finnish pensions funds with the sole aim of managing the assets of pension funds that are members of those associations;
- 67 (xiv) 'agenti di cambio' whose activities and functions are governed by Article 201 of Italian Legislative Decree No 58 of 24 February 1998.

The rights conferred by the Markets in Financial Services Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) do not extend to the provision of services as counterparty in transactions carried out by public bodies dealing with public debt or by members of the European System of Central Banks performing their tasks as provided for by the Treaty and the Statute of the European System of Central Banks and of the European Central Bank or performing equivalent functions under national provisions: art 2.2. In order to take account of developments on financial markets, and to ensure the uniform application of this directive, the Commission, acting in accordance with the procedure referred to in art 64(2), may, in respect of exemptions (c), (i) and (k) (see heads (iii), (ix), (xi) above) define the criteria for determining when an activity is to be considered as ancillary to the main business on a group level as well as for determining when an activity is provided in an incidental manner: art 2.3.

The services provided to third parties listed in the Markets in Financial Services Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section A (the text of which is set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 2 Pt III (substituted by SI 2006/3384)) (see above) are as follows: (A) reception and transmission of orders in relation to one or more financial instruments; (B) execution of orders on behalf of clients; (C) dealing on own account; (D) portfolio management; (E) investment advice; (F) underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis; (G) placing of financial instruments without a firm commitment basis; (H) operation of Multilateral Trading Facilities.

European Commission Directive 2006/73 (OJ L241, 2.9.2006, p 26) art 52 (the text of which is set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 2 Pt IV (substituted by SI 2006/3384)) (see above) is as follows: 'For the purposes of the definition of 'investment advice' in the Markets in Financial Instruments Directive [ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)] art 4(1)(4), a personal recommendation is a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor. That recommendation must be presented as suitable for that person, or must be based on a consideration of the circumstances of that person, and must constitute a recommendation to take one of the following sets of steps: (aa) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument; (bb) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument. A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.'

The Markets in Financial Services Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex 1 Section C (as reproduced in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 2 Pt I (substituted by SI 2006/3384)) (relevant to the definition of 'financial instrument': see above) is as follows:

- 1. Transferable securities;
- 2. Money-market instruments;
- 3. Units in collective investment undertakings;
- 4. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;

5. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event);

6. Options, futures, swaps, and any other derivative contracts relating to commodities that can be physically settled provided that they are traded on a regulated market and/or an MTF;

7. Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;

8. Derivative instruments for the transfer of credit risk;

9. Financial contracts for differences;

10. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls.'

EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch VI (as reproduced in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 2 Pt II (substituted by SI 2006/3384)) (relevant to the definition of 'financial instrument': see above) is as follows:

'Derivative Financial Instruments: Article 38: Characteristics of other derivative financial instruments

1. For the purposes of Section C(7) of Annex I to Directive 2004/39/EC, a contract which is not a spot contract within the meaning of paragraph 2 of this Article and which is not covered by paragraph 4 shall be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes if it satisfies the following conditions:

68 (a) it meets one of the following sets of criteria:

10. (i) it is traded on a third country trading facility that performs a similar function to a regulated market or an MTF;

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11. (ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF or such a third country trading facility;

11

12. (iii) it is expressly stated to be equivalent to a contract traded on a regulated market, MTF or such a third country trading facility;

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69 (b) it is cleared by a clearing house or other entity carrying out the same functions as a central counterparty, or there are arrangements for the payment or provision of margin in relation to the contract;

70 (c) it is standardised so that, in particular, the price, the lot, the delivery date or other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

2. A spot contract for the purposes of paragraph 1 means a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods:

71 (a) two trading days;

72 (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

However, a contract is not a spot contract if, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period mentioned in the first subparagraph.

3. For the purposes of Section C(10) of Annex I to Directive 2004/39/EC, a derivative contract relating to an underlying referred to in that Section or in Article 39 shall be considered to have the characteristics of other derivative financial instruments if one of the following conditions is satisfied:

- 73 (a) that contract is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event;
- 74 (b) that contract is traded on a regulated market or an MTF;
- 75 (c) the conditions laid down in paragraph 1 are satisfied in relation to that contract.

4. A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to Directive 2004/39/EC, and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, if it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network, and it is necessary to keep in balance the supplies and uses of energy at a given time.

#### Article 39: Derivatives Within Section C(10) of Annex I to Directive 2004/39/EC

In addition to derivative contracts of a kind referred to in Section C(10) of Annex I to Directive 2004/39/EC, a derivative contract relating to any of the following shall fall within that Section if it meets the criteria set out in that Section and in Article 38(3):

- 76 (a) telecommunications bandwidth;
- 77 (b) commodity storage capacity;
- 78 (c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means;
- 79 (d) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources;
- 80 (e) a geological, environmental or other physical variable;
- 81 (f) any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred;
- 82 (g) an index or measure related to the price or value of, or volume of transactions in any asset, right, service or obligation.'

6 'Credit institution' means (1) a credit institution authorised under the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) other than an institution to which art 2.1 (the text of which is set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 3 (substituted by SI 2006/3384)) (see note 5) applies; or (2) an institution which would satisfy the requirements for authorisation as a credit institution under the Banking Consolidation Directive (other than an institution to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1) art 2.1 would apply) if it had its registered office (or if it does not have a registered office, its head office) in an EEA state: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3 (definition added by SI 2006/3384).

7 As to the meaning of 'investment services and activities' see note 5.

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(4)(a) (art 4(4) substituted by SI 2006/ 3384).

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(4)(b) (as substituted: see note 8). The exclusions are in any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 15 (see PARA 113), art 16 (see PARA 114), art 19 (see PARA 118), art 22 (see PARA 127), art 23 (see PARA 128), art 29 (see PARA 139), art 38 (see PARA 153), art 67 (see PARAS 129, 141, 164, 178), art 68 (see PARAS 120, 130, 142, 155, 165, 179), art 69 (see PARAS 121, 131, 143, 156, 166, 196, 180), art 70 (see PARAS 122, 132, 144, 181) and art 72E (see PARAS 138, 151, 159, 170, 173, 186).

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(4) (as substituted: see note 8).

11 Ie other than a person specified by the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation) art 1.2 which is set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 4 Pt I (added by SI 2003/1476) which refers to the Directive not applying to persons providing mediation services for insurance contracts if all the following conditions are met:

- 83 (1) the insurance contract only requires knowledge of the insurance cover that is provided;
- 84 (2) the insurance contract is not a life assurance contract;
- 85 (3) the insurance contract does not cover any liability risks;
- 86 (4) the principal professional activity of the person is other than insurance mediation;
- 87 (5) the insurance is complementary to the product or service supplied by any provider, where such insurance covers: (a) the risk of breakdown, loss of or damage to goods supplied by that provider; or (b) damage to or loss of baggage and other risks linked to the travel booked with that provider, even if the insurance covers life assurance or liability risks, provided that the cover is ancillary to the main cover for the risks linked to that travel;
- 88 (6) the amount of the annual premium does not exceed 500 euros and the total duration of the insurance contract, including any renewals, does not exceed five years.

12 'Insurance mediation' has the meaning given by the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3)) art 2.3 (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(5) (definition added by SI 2003/1476)), the text of which is set out in Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 4 Pt II (added by SI 2003/1476) as follows: 'Insurance mediation' means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim. These activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation. The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing an insurance contract, the management of claims of an insurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims shall also not be considered as insurance mediation.'

13 'Reinsurance mediation' has the meaning given by the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3)) art 2.4 (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(5) (definition added by SI 2003/1476)), the text of which is set out in Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 4 Pt III (added by SI 2003/1476) as follows: 'Reinsurance mediation' means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of reinsurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim. These activities when undertaken by a reinsurance undertaking or an employee of a reinsurance undertaking who is acting under the responsibility of the reinsurance undertaking are not considered as reinsurance mediation. The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing a reinsurance contract, the management of claims of a reinsurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims shall also not be considered as reinsurance mediation.'

14 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(4A)(a) (art 4(4A) added by SI 2003/1476).

15 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(4A)(b) (as added: see note 14). The exclusions are in any of art 30 (see PARA 139), art 66 (see PARAS 119, 140, 154, 106, 163, 195, 177, 206, 212, 218) and art 67 (see PARAS 129, 141, 107, 164, 178-179).

16 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 4(4A) (as added: see note 14).

17 As to the meaning of 'United Kingdom' see PARA 2 note 3.

18 As to the meaning of 'Single Market Directives' see PARA 86 note 6.

## UPDATE

### **88 Activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001**

NOTE 3--The kinds of activity specified by SI 2001/544 art 63N (PARA 220B) are also specified for the purposes of 2000 Act s 22(1)(b): SI 2001/544 art 4(2) (amended by SI 2009/1389).

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## (B) ACCEPTING DEPOSITS

### 89. Accepting deposits.

Accepting deposits<sup>1</sup> is a specified kind of activity<sup>2</sup> if: (1) money received by way of deposit is lent to others<sup>3</sup>; or (2) any other activity of the person accepting the deposit is financed wholly, or to a material extent, out of the capital of or interest on money received by way of deposit<sup>4</sup>.

A person who carries on the activity of accepting deposits is not to be regarded as doing so by way of business<sup>5</sup> if: (a) he does not hold himself out as accepting deposits on a day to day basis<sup>6</sup>; and (b) any deposits which he accepts are accepted only on particular occasions, whether or not involving the issue of any securities<sup>7</sup>.

Certain deposits are specifically excluded<sup>8</sup>. There are exclusions for sums paid by certain persons<sup>9</sup>, sums paid by solicitors<sup>10</sup>, sums paid by certain authorised persons<sup>11</sup>, sums received in consideration for the issue of debt securities<sup>12</sup> and sums received in exchange for electronic money<sup>13</sup>. There is also an exclusion for any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>14</sup>.

1 For these purposes, 'deposit' means a sum of money, other than one excluded by any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 6-9A (see PARA 90 et seq), paid on terms:

- 89 (1) under which it will be repaid, with or without interest or premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it (art 5(2)(a) (art 5(2) amended by SI 2002/682)); and
- 90 (2) which are not referable to the provision of property (other than currency) or services or the giving of security (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5(2)(b) (as so amended)).

As to the meaning of 'property' see PARA 88 note 3. 'Security' means (except where the context otherwise requires) any investment of the kind specified by any of arts 76-82 (see PARA 224) or, so far as relevant to any such investment, art 89 (see PARA 224): art 3(1). For the purposes of art 5(2), money is paid on terms which are referable to the provision of property or services or the giving of security if, and only if:

- 91 (a) it is paid by way of advance or part payment under a contract for the sale, hire or other provision of property or services, and is repayable only in the event that the property or services is or are not in fact sold, hired or otherwise provided (art 5(3)(a));
- 92 (b) it is paid by way of security for the performance of a contract or by way of security in respect of loss which may result from the non-performance of a contract (art 5(3)(b)); or
- 93 (c) without prejudice to head (b) above, it is paid by way of security for the delivery up or return of any property, whether in a particular state of repair or otherwise (art 5(3)(c)).

2 Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind



specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5(1)(a).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5(1)(b).

5 le in accordance with the Financial Services and Markets Act 2000 s 22(1) (see PARA 84) and s 419 (see PARA 87).

6 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, reg 2(1)(a).

7 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, reg 2(1)(b). In determining for the purposes of reg 2(1)(b) whether deposits are accepted only on particular occasions, regard is to be had to the frequency of those occasions and to any characteristics distinguishing them from each other: reg 2(2). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419.

8 See note 1.

9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 6; and PARA 90.

10 See the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 7; and PARA 91.

11 See the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 8; and PARA 92.

12 See the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 9; and PARA 93.

13 See the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 9A; and PARA 94.

14 See the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 9AA, 72A; and PARA 95.

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## **90. Exclusion for sums paid by certain persons.**

A sum is not a deposit<sup>1</sup> if it is:

279 (1) paid by any of the following persons:

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36. (a) the Bank of England, the central bank of an EEA state other than the United Kingdom, or the European Central Bank<sup>2</sup>;

37. (b) an authorised person who has permission to accept deposits, or to effect or carry out contracts of insurance<sup>3</sup>;

38. (c) a qualifying EEA firm<sup>4</sup>;

39. (d) the National Savings Bank<sup>5</sup>;

40. (e) a municipal bank<sup>6</sup>;

41. (f) Keesler Federal Credit Union<sup>7</sup>;

- 42. (g) a body of persons certified as a school bank by the National Savings Bank or by an authorised person who has permission to accept deposits<sup>8</sup>;
- 43. (h) a local authority<sup>9</sup>;
- 44. (i) any body which by virtue of any enactment has power to issue a precept to a local authority in England and Wales or a requisition to a local authority in Scotland, or to the expenses of which, by virtue of any enactment<sup>10</sup>, a local authority in the United Kingdom is or can be required to contribute<sup>11</sup>;
- 45. (j) the European Community, the European Atomic Energy Community or the European Coal and Steel Community<sup>12</sup>;
- 46. (k) the European Investment Bank<sup>13</sup>;
- 47. (l) the International Bank for Reconstruction and Development<sup>14</sup>;
- 48. (m) the International Finance Corporation<sup>15</sup>;
- 49. (n) the International Monetary Fund<sup>16</sup>;
- 50. (o) the African Development Bank<sup>17</sup>;
- 51. (p) the Asian Development Bank<sup>18</sup>;
- 52. (q) the Caribbean Development Bank<sup>19</sup>;
- 53. (r) the Inter-American Development Bank<sup>20</sup>;
- 54. (s) the European Bank for Reconstruction and Development<sup>21</sup>;
- 55. (t) the Council of Europe Development Fund<sup>22</sup>;

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- 280 (2) paid by a person other than one mentioned in head (1) above in the course of carrying on a business consisting wholly or to a significant extent of lending money<sup>23</sup>;
- 281 (3) paid by one company to another at a time when both are members of the same group or when the same individual is a majority shareholder controller<sup>24</sup> of both of them<sup>25</sup>; or
- 282 (4) paid by a person who, at the time when it is paid, is a close relative<sup>26</sup> of the person receiving it or who is, or is a close relative of, a director or manager of that person or who is, or is a close relative of, a controller of that person<sup>27</sup>.

1 le for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5: see PARA 89. As to the meaning of 'deposit' see PARA 89 note 1.

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(i). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the Bank of England see PARA 793 et seq. As to the European Central Bank see PARA 807.

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(ii). 'Contract of insurance' means any contract of insurance which is a contract of long-term insurance or a contract of general insurance, and includes:

- 94 (1) fidelity bonds, performance bonds, administration bonds, bail bonds, customs bonds or similar contracts of guarantee, where these are:
- 13. (a) effected or carried out by a person not carrying on a banking business;  
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- 14. (b) not effected merely incidentally to some other business carried on by the person effecting them;  
and  
14
- 15. (c) effected in return for the payment of one or more premiums;  
15
- 95 (2) tontines;
- 96 (3) capital redemption contracts or pension fund management contracts, where these are effected or carried out by a person who does not carry on a banking business, and otherwise carries on a regulated activity of the kind specified by art 10(1) or art 10(2) (see PARA 100);
- 97 (4) contracts to pay annuities on human life;

- 98 (5) contracts of a kind referred to in EC Council Directive 79/267 (OJ L63, 13.3.79, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance, art 1(2)(e) (collective insurance etc); and
- 99 (6) contracts of a kind referred to in EC Council Directive 79/267 (OJ L63, 13.3.79, p 1) art 1(3) (social insurance),

but does not include a funeral plan contract (or a contract which would be a funeral plan contract but for the exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60 (see PARA 200)): art 3(1).

'Contract of long-term insurance' means any of the following (as set out in Sch 1 Pt II (amended by SI 2005/2114)) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1)):

- 100 (i) contracts of insurance on human life or contracts to pay annuities on human life, but excluding (in each case) contracts within head (iii) below;
- 101 (ii) contracts of insurance to provide a sum on marriage or the formation of a civil partnership or on the birth of a child, being contracts expressed to be in effect for a period of more than one year;
- 102 (iii) contracts of insurance on human life or contracts to pay annuities on human life where the benefits are wholly or partly to be determined by references to the value of, or the income from, property of any description (whether or not specified in the contracts) or by reference to fluctuations in, or in an index of, the value of property of any description (whether or not so specified);
- 103 (iv) contracts of insurance providing specified benefits against risks of persons becoming incapacitated in consequence of sustaining injury as a result of an accident or of an accident of a specified class or of sickness or infirmity, being contracts that are expressed to be in effect for a period of not less than five years, or until the normal retirement age for the persons concerned, or without limit of time, and either are not expressed to be terminable by the insurer, or are expressed to be so terminable only in special circumstances mentioned in the contract;
- 104 (v) tontines;
- 105 (vi) capital redemption contracts, where effected or carried out by a person who does not carry on a banking business, and otherwise carries on a regulated activity of the kind specified by art 10(1) or art 10(2) (see PARA 100);
- 106 (vii) pension fund management contracts, and pension fund management contracts which are combined with contracts of insurance covering either conservation of capital or payment of a minimum interest, where effected or carried out by a person who does not carry on a banking business, and otherwise carries on a regulated activity of the kind specified by art 10(1) or art 10(2);
- 107 (viii) contracts of a kind referred to in EC Council Directive 79/267 (OJ L63, 13.3.79, p 1) art 1(2)(e);
- 108 (ix) Contracts of a kind referred to in EC Council Directive 79/267 (OJ L63, 13.3.79, p 1) art 1(3).

'Contract of general insurance' means any of the following (as set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 Pt I) (art 3(1)):

- 109 (A) contracts of insurance providing fixed pecuniary benefits or benefits in the nature of indemnity (or a combination of both) against risks of the person insured or, in the case of a contract made by virtue of the Local Government Act 1972 s 140, 140A or 140B (see **INSURANCE; LOCAL GOVERNMENT** vol 69 (2009) PARA 224) (or, in Scotland, the Local Government (Scotland) Act 1973 s 86(1)), a person for whose benefit the contract is made:
- 16. (aa) sustaining injury as the result of an accident or of an accident of a specified class; or  
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- 17. (bb) dying as a result of an accident or of an accident of a specified class; or  
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- 18. (cc) becoming incapacitated in consequence of disease or of disease of a specified class,  
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- 110 including contracts relating to industrial injury and occupational disease but excluding contracts falling within head (B) above or head (iv) above;
- 111 (B) contracts of insurance providing fixed pecuniary benefits or benefits in the nature of indemnity (or a combination of both) against risks of loss to the persons insured attributable to sickness or infirmity but excluding contracts falling within head (iv) above;
- 112 (C) contracts of insurance against loss of or damage to vehicles used on land, including motor vehicles but excluding railway rolling stock;
- 113 (D) contracts of insurance against loss of or damage to railway rolling stock;
- 114 (E) contracts of insurance upon aircraft or upon the machinery, tackle, furniture or equipment of aircraft;
- 115 (F) contracts of insurance upon vessels used on the sea or on inland water, or upon the machinery, tackle, furniture or equipment of such vessels;
- 116 (G) contracts of insurance against loss of or damage to merchandise, baggage and all other goods in transit, irrespective of the form of transport;
- 117 (H) contracts of insurance against loss of or damage to property (other than property to which heads (C)-(G) above relate) due to fire, explosion, storm, natural forces other than storm, nuclear energy or land subsidence;
- 118 (I) contracts of insurance against loss of or damage to property (other than property to which heads (C)-(G) above relate) due to hail or frost or any other event (such as theft) other than those mentioned in head (H) above;
- 119 (J) contracts of insurance against damage arising out of or in connection with the use of motor vehicles on land, including third-party risks and carrier's liability;
- 120 (K) contracts of insurance against damage arising out of or in connection with the use of aircraft, including third-party risks and carrier's liability;
- 121 (L) contracts of insurance against damage arising out of or in connection with the use of vessels on the sea or on inland water, including third party risks and carrier's liability;
- 122 (M) contracts of insurance against risks of the persons insured incurring liabilities to third parties, the risks in question not being risks to which heads (J), (K) or (L) above relate;
- 123 (N) contracts of insurance against risks of loss to the persons insured arising from the insolvency of debtors of theirs or from the failure (otherwise than through insolvency) of debtors of theirs to pay their debts when due;
- 124 (O) contracts of insurance against the risks of loss to the persons insured arising from their having to perform contracts of guarantee entered into by them, fidelity bonds, performance bonds, administration bonds, bail bonds or customs bonds or similar contracts of guarantee, where these are:
- 19. (aa) effected or carried out by a person not carrying on a banking business;  
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- 20. (bb) not effected merely incidentally to some other business carried on by the person effecting them;  
and  
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- 21. (cc) effected in return for the payment of one or more premiums;  
21
- 125 (P) contracts of insurance against any of the following risks, namely:
- 22. (aa) risks of loss to the persons insured attributable to interruptions of the carrying on of business carried on by them or to reduction of the scope of business so carried on;  
22
- 23. (bb) risks of loss to the persons insured attributable to their incurring unforeseen expense (other than loss such as is covered by contracts falling within head (R) below);  
23

24. (cc) risks which do not fall within heads (P)(aa) or (P)(bb) above and which are not of a kind such that contracts of insurance against them fall within any other provision of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1;  
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126 (Q) contracts of insurance against risks of loss to the persons insured attributable to their incurring legal expenses (including costs of litigation);

127 (R) contracts of insurance providing either or both of the following benefits, namely:

25. (aa) assistance (whether in cash or in kind) for persons who get into difficulties while travelling, while away from home or while away from their permanent residence; or  
25

26. (bb) assistance (whether in cash or in kind) for persons who get into difficulties otherwise than as mentioned in head (R)(aa) above.  
26

'Pension fund management contract' means a contract to manage the investments of pension funds (other than funds solely for the benefit of the officers or employees of the person effecting or carrying out the contract and their dependants or, in the case of a company, partly for the benefit of officers and employees and their dependants of its subsidiary or holding company or a subsidiary of its holding company); and for the purposes of this definition, 'subsidiary' and 'holding company' are to be construed in accordance with the Companies Act 1985 s 736 (prospectively repealed) (**COMPANIES**) (as to replacement provisions see the Companies Act 2006 s 1159) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 4: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1). 'Annuities on human life' does not include superannuation allowances and annuities payable out of any fund applicable solely to the relief and maintenance of persons engaged, or who have been engaged, in any particular profession, trade or employment, or of the dependants of such persons: art 3(1). As to the meaning of 'funeral plan contract' see art 59; and PARA 200 note 1.

For the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, a contract of insurance is to be treated as falling within Sch 1 Pt II (see heads (i)-(ix) above), notwithstanding the fact that it contains related and subsidiary provisions such that it might also be regarded as falling within Sch 1 Pt I (see heads (A)-(R) above), if its principal object is that of a contract falling within Sch 1 Pt II (see heads (i)-(ix) above) and it is effected or carried out by an authorised person who has permission to effect or carry out contracts falling within head (i) above: see art 3(3).

As to insurance generally see **INSURANCE**.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(iii). A qualifying EEA firm is one which falls within the Financial Services and Markets Act 2000 Sch 3 para 5(b), (c) or (d) (see PARA 315 note 1) (other than one falling within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 3(1), 6(1)(a)(ii)): art 6(1)(a)(iii).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(iv). As to the National Savings Bank see PARA 810 et seq.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(v). A municipal bank is a company which was, immediately before the coming into force of art 6 exempt from the prohibition in the Banking Act 1987 by virtue of the Banking Act 1987 Sch 2 para 4 (now repealed) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 798): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(v).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(vi).

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(vii).

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(viii). 'Local authority' means: (1) in England and Wales, a local authority within the meaning of the Local Government Act 1972 (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 23), the Greater London Authority, the Common Council of the City of London or the Council of the Isles of Scilly; (2) in Scotland, a local authority within the meaning of the Local Government (Scotland) Act 1973; (3) in Northern Ireland, a district council within the meaning of the Local Government Act (Northern Ireland) 1972: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1).

10 For these purposes, 'enactment' includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(ix).

- 11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(ix).
- 12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(x).
- 13 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(xi).
- 14 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(xii).
- 15 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(xiii).  
As to the International Finance Corporation see PARA 1391.
- 16 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(xiv).  
As to the International Monetary Fund see PARA 1391.
- 17 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(xv).
- 18 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(xvi).
- 19 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(xvii).
- 20 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(xviii).
- 21 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(xix).
- 22 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(a)(xx)  
(substituted by SI 2002/1310).
- 23 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(b).
- 24 For these purposes, an individual is a majority shareholder controller of a company if he is a controller of the company by virtue of the Financial Services and Markets Act 2000 s 422(2)(a), (c), (e) or (g) (see PARA 591 note 16), and if in his case the greatest percentage of those referred to in those provisions is 50 or more:  
Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(2).
- 25 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(c).
- 26 'Close relative' in relation to a person means: (1) his spouse or civil partner; (2) his children and step-children, his parents and step-parents, his brothers and sisters and his step-brothers and step-sisters; and the spouse or civil partner of any such person: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1) (definition amended by SI 2005/2114).
- 27 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 6(1)(d). In the application of art 6(1)(d) to a sum paid by a partnership, art 6(1)(d) is to have effect as if, for the reference to the person paying the sum, there were substituted a reference to each of the partners: art 6(3).

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## **91. Exclusion for sums received by solicitors etc.**

A sum is not a deposit<sup>1</sup> if it is received by a practising solicitor<sup>2</sup> acting in the course of his profession<sup>3</sup>.

<sup>1</sup> Ie for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5: see PARA 89. As to the meaning of 'deposit' see PARA 89 note 1.

<sup>2</sup> For these purposes, 'practising solicitor' means:

- 128 (1) a solicitor who is qualified to act as such under the Solicitors Act 1974 s 1 (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 635 et seq), the Solicitors (Northern Ireland) Order 1976, SI 1976/582 (NI 12), art 4 or the Solicitors (Scotland) Act 1980 s 4 (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 7(2)(a));
- 129 (2) a recognised body (ie a body corporate recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 687 et seq), the Incorporated Law Society of Northern Ireland under the Solicitors (Northern Ireland) Order 1976, SI 1976/582 (NI 12), art 26A or the Council of the Law Society of Scotland under the Solicitors (Scotland) Act 1980 s 34) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 7(2)(b), (3)(a));
- 130 (3) a registered foreign lawyer (ie under the Courts and Legal Services Act 1990 s 89 (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 628) or, in Scotland, the Solicitors (Scotland) Act 1980 s 65) in the course of providing professional services as a member of a multi-national partnership (ie under the Courts and Legal Services Act 1990 s 89 (see **LEGAL PROFESSIONS** vol 65 (2008) PARAS 724-726) but, in Scotland, a 'multi-national practice' under the Solicitors (Scotland) Act 1980 s 60A) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 7(2)(c), (3)(b), (c));
- 131 (4) a registered European lawyer (ie under the European Communities (Lawyer's Practice) Regulations 2000, SI 2000/1119, reg 2(1) or the European Communities (Lawyer's Practice) (Scotland) Regulations 2000, SI 2000/121, art 2(1)) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 7(2)(d), (3)(d)); or
- 132 (5) a partner of a registered European lawyer who is providing professional services in accordance with rules made under the Solicitors Act 1974 s 31 (see **LEGAL PROFESSIONS** vol 66 (2009) PARA 828 et seq); regulations made under the Solicitors (Northern Ireland) Order 1976, SI 1976/582 (NI 12), art 26; or rules made under the Solicitors (Scotland) Act 1980 s 34 (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 7(2)(e)).
- 3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 7(1).

## UPDATE

### 91 Exclusion for sums received by solicitors etc

NOTE 2--Head (2). SI 2001/544 art 7(3)(a) amended: SI 2009/500.

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### 92. Exclusion for sums received by persons authorised to deal, etc.

A sum is not a deposit<sup>1</sup> if it is received by a person who is an authorised person with permission to carry on an activity of the kind specified in heads (1) to (6) below<sup>2</sup>, or an exempt person in relation to any such activity<sup>3</sup>, in the course of, or for the purpose of, carrying on that activity (or any activity which would be such an activity but for any exclusion made) with or on behalf of the person by or on behalf of whom the sum is paid<sup>4</sup>. The specified activities referred to above are:

- 283 (1) dealing in investments as principal<sup>5</sup>;
- 284 (2) dealing in investments as agent<sup>6</sup>;
- 285 (3) arranging deals in investments<sup>7</sup>;
- 286 (4) managing investments<sup>8</sup>;

- 287 (5) establishing, operating or winding up a collective investment scheme, etc<sup>9</sup>;  
 288 (6) establishing, operating or winding up a stakeholder pension scheme<sup>10</sup>.

1. See for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5: see PARA 89. As to the meaning of 'deposit' see PARA 89 note 1.

2. Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 8(a). See notes 5-10.

3. Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 8(b).

4. Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 8 (amended by SI 2001/3544).

5. See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14; and PARA 112.

6. See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21; and PARA 126.

7. See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25; and PARA 139.

8. See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37; and PARA 152.

9. See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51; and PARA 171.

10. See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52; and PARA 187.

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### **93. Exclusion for sums received in consideration for the issue of debt securities.**

A sum is not a deposit<sup>1</sup> if it is received by a person as consideration for the issue by him of debt securities<sup>2</sup>. However, this exclusion does not apply to the receipt by a person of a sum as consideration for the issue by him of commercial paper<sup>3</sup> unless:

- 289 (1) the commercial paper is issued to persons whose ordinary activities involve them in acquiring, holding, managing or disposing of investments (as principal or agent) for the purposes of their businesses<sup>4</sup>, or who it is reasonable to expect will acquire, hold, manage or dispose of investments (as principal or agent) for the purposes of their businesses<sup>5</sup>; and  
 290 (2) the redemption value of the commercial paper is not less than £100,000 (or an amount of equivalent value denominated wholly or partly in a currency other than sterling), and no part of the commercial paper may be transferred unless the redemption value of that part is not less than £100,000 (or such an equivalent amount)<sup>6</sup>.

1. See for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5: see PARA 89. As to the meaning of 'deposit' see PARA 89 note 1.



2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9(1). Debt securities are any investment of the kind specified by art 77 or art 78 (see PARA 224): see art 9(1). As to the meaning of 'security' see PARA 89 note 1.

3 For these purposes, 'commercial paper' means an investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 77 (see PARA 224) or art 78 (see PARA 224) having a maturity of less than one year from the date of issue: art 9(3) (substituted by SI 2002/682).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9(2)(a)(i).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9(2)(a)(ii).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9(2)(b).

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#### **94. Exclusion for sums received in exchange for electronic money.**

A sum is not a deposit<sup>1</sup> if it is immediately exchanged for electronic money<sup>2</sup>.

1 Ie for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5: see PARA 89. As to the meaning of 'deposit' see PARA 89 note 1.

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9A (added by SI 2002/682). 'Electronic money' means monetary value, as represented by a claim on the issuer, which is: (1) stored on an electronic device; (2) issued on receipt of funds; and (3) accepted as a means of payment by persons other than the issuer: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1) (definition added by SI 2002/682).

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#### **95. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). The exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) does not apply to the activity of effecting or carrying out a contract of insurance as principal, where:

- 133 (1) the activity is carried on by an undertaking which has received official authorisation in accordance with the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 4 (Financial

Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(a) (art 72A as so added; art 72A(2)(a) amended by SI 2005/2114)); and

- 134 (2) the insurance falls within the scope of any of the Insurance Directives (art 72A(2)(b) (as so added)).

As to the meaning of 'contract of insurance' see PARA 90 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'Insurance Directives' see PARA 86 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9AA (added by SI 2002/1776). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

## UPDATE

### 95 Exclusion for information society services

NOTE 2--See also SI 2001/544 art 9AB (added by SI 2009/209), which provides an exclusion for funds received for payment services. As to payment services see PARA 1399.

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## (C) ISSUING ELECTRONIC MONEY

### 96. Issuing electronic money.

Issuing electronic money<sup>1</sup> is a specified kind of activity<sup>2</sup>. Certain instances of issuing electronic money are, however, excluded<sup>3</sup>.

1 As to the meaning of 'electronic money' see PARA 94 note 2.

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9B (added by SI 2002/682). The reference to a specified kind of activity is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 See PARA 97 et seq.

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## 97. Exclusion for persons certified as small issuers etc.

Not every instance of issuing electronic money<sup>1</sup> is a specified activity<sup>2</sup>. The issuing of electronic money by a person to whom the Financial Services Authority<sup>3</sup> has given a certificate (provided it has not been revoked)<sup>4</sup> is specifically excluded<sup>5</sup>.

An application for a certificate may be made by a body corporate, or a partnership (other than a credit institution) which has its head office in the United Kingdom<sup>6</sup>.

The Authority must, on the application of 'A', give A a certificate if it appears to the Authority that one of the three situations described below applies<sup>7</sup>.

The first situation is if:

- 291 (1) A does not issue electronic money except on terms that the electronic device on which the monetary value is stored is subject to a maximum storage amount of not more than 150 euros<sup>8</sup>; and
- 292 (2) A's total liabilities with respect to the issuing of electronic money do not (or will not) usually exceed 5 million euros and do not (or will not) ever exceed 6 million euros<sup>9</sup>.

The second situation is if:

- 293 (a) the condition in head (1) above is met<sup>10</sup>;
- 294 (b) A's total liabilities with respect to the issuing of electronic money do not (or will not) exceed 10 million euros<sup>11</sup>; and
- 295 (c) electronic money issued by A is accepted as a means of payment only by: (i) subsidiaries of A which perform operational or other ancillary functions related to electronic money issued or distributed by A<sup>12</sup>; or (ii) other members of the same group as A (other than subsidiaries of A)<sup>13</sup>.

The third situation is if:

- 296 (A) the conditions in heads (1) and (b) above are met<sup>14</sup>; and
- 297 (B) electronic money issued by A is accepted as a means of payment, in the course of business, by not more than one hundred persons where those persons accept such electronic money only at locations<sup>15</sup> within the same premises or limited local area<sup>16</sup>, or those persons have a close financial or business relationship with A<sup>17</sup> such as a common marketing or distribution scheme<sup>18</sup>.

A number of provisions of the Financial Services and Markets Act 2000<sup>19</sup> apply to applications to the Authority for such certificates (and the determination of such applications) as they apply to other applications<sup>20</sup> (and their determination)<sup>21</sup>. An application for such a certificate must include the address of a place in the United Kingdom for the service of notices or other documents<sup>22</sup>. It must be made in such manner as the Authority may direct and contain or be accompanied by such information as the Authority may reasonably require as well as such further information it may require at any time between the receipt and the determination of the application that it reasonably considers necessary to enable it to determine the application<sup>23</sup>. There may be different directions given and different requirements imposed in relation to different applications or categories of application<sup>24</sup> and the information may be required to be provided in such form or verified in such a way as the Authority may direct<sup>25</sup>. An application must be determined by the Authority before the end of the period of six months beginning with the date on which it received the completed application<sup>26</sup>. The Authority may determine an

incomplete application if it considers it appropriate to do so; and it must in any event determine such an application within 12 months beginning with the date on which it received the application<sup>27</sup>. The applicant may withdraw his application, by giving the Authority written notice, at any time before the Authority determines it<sup>28</sup>. If the Authority grants an application for, or for variation of, a certificate, it must give the applicant written notice<sup>29</sup>. Such notice must state the date from which the certificate, or the variation, has effect<sup>30</sup>. If the Authority proposes to refuse an application, it must give the applicant a warning notice and if it decides to refuse an application it must give the applicant a written notice<sup>31</sup>. An applicant aggrieved by the determination of an application may refer the matter to the Financial Services and Markets Tribunal<sup>32</sup>.

The Authority may make rules<sup>33</sup> applying to authorised persons with permission to carry on the issue of electronic money<sup>34</sup>, prohibiting the issue of electronic money having a monetary value greater than the funds received<sup>35</sup>.

A person who is not a certified person<sup>36</sup> is to be treated as guilty of an offence<sup>37</sup> if he describes himself (in whatever terms) as a certified person<sup>38</sup> or if he behaves, or otherwise holds himself out, in a manner which indicates (or which is reasonably likely to be understood as indicating) that he is a certified person<sup>39</sup>.

1 As to the meaning of 'electronic money' see PARA 94 note 2.

2 I.e. an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(1) (art 9C added by SI 2002/682).

5 I.e. excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9B: see PARA 96.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(2) (as added: see note 4). A 'credit institution' is as defined in the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) art 4(1)(a): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(2) (art 9C as so added; art 9C(2) amended by SI 2006/3221). As to the meaning of 'United Kingdom' see PARA 2 note 3.

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(3) (as added: see note 4).

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(4)(a) (as added: see note 4). References to amounts in euros include references to equivalent amounts in sterling: art 9C(9) (as so added).

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(4)(b) (as added: see note 4).

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(5)(a) (as added: see note 4).

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(5)(b) (as added: see note 4).

12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(5)(c)(i) (as added: see note 4).

13 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(5)(c)(ii) (as added: see note 4).

14 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(6)(a) (as added: see note 4).

15 For these purposes, locations are to be treated as situated within the same premises or limited local area if they are situated within:

135 (1) a shopping centre, airport, railway station, bus station, or campus of a university, polytechnic, college, school or similar educational establishment (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(7)(a) (as added: see note 4)); or

136 (2) an area which does not exceed four square kilometres (art 9C(7)(b) (as so added));

but heads (1) and (2) above are illustrative only and are not to be treated as limiting the scope of art 9C(6)(b)(i) (art 9C(7) (as so added)).

16 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(6)(b)(i) (as added: see note 4).

17 For the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(6)(b)(ii), persons are not to be treated as having a close financial or business relationship with A merely because they participate in arrangements for the acceptance of electronic money issued by A: art 9C(8) (as added: see note 4).

18 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(6)(b)(ii) (as added: see note 4).

19 In the Financial Services and Markets Act 2000 s 51(1)(b), (3)-(6) (see PARA 349), s 52 (except s 52(6), (8), (9)(a), (b)) (see PARA 350), s 55(1) (see PARA 361): see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D.

20 In under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.

21 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D (added by SI 2002/682).

22 Financial Services and Markets Act 2000 s 51(1)(b) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(a) (as added: see note 21)).

23 Financial Services and Markets Act 2000 s 51(3), (4) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(a) (as added: see note 21)).

24 Financial Services and Markets Act 2000 s 51(5) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(a) (as added: see note 21)).

25 Financial Services and Markets Act 2000 s 51(6) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(a) (as added: see note 21)).

26 Financial Services and Markets Act 2000 s 52(1) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(b) (as added: see note 21)).

27 Financial Services and Markets Act 2000 s 52(2) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(b) (as added: see note 21)).

28 Financial Services and Markets Act 2000 s 52(3) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(b) (as added: see note 21)).

29 Financial Services and Markets Act 2000 s 52(4) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(b) (as added: see note 21)).

30 Financial Services and Markets Act 2000 s 52(5) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(b) (as added: see note 21)).

31 Financial Services and Markets Act 2000 s 52(7), (9)(c) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(b) (as added: see note 21)). As to warning notices generally see PARA 769. As to decision notices generally see PARA 770.

32 Financial Services and Markets Act 2000 s 55(1) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9D(c) (as added: see note 21)). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

33 The Financial Services and Markets Act 2000 s 148 (modification or waiver of rules) (see PARA 23) applies in relation to rules made under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9H(1): art 9H(2) (art 9H added by SI 2002/682).

34 Ie the activity specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9B: see PARA 96.

35 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9H(1) (as added: see note 33).

36 Ie under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C.

37 Ie under the Financial Services and Markets Act 2000 s 24 (false claims to be authorised or exempt): see PARA 80.

38 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9I(a) (art 9I added by SI 2002/682).

39 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9I(b) (as added: see note 38).

## **UPDATE**

### **97 Exclusion for persons certified as small issuers etc**

TEXT AND NOTES--Funds received for payment services are not to be treated as electronic money for the purposes of SI 2001/544: see SI 2001/544 art 9L (added by SI 2009/209). As to payment services see PARA 1399.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(4) REGULATED ACTIVITIES/(ii) Regulated Activities/C. SPECIFIED ACTIVITIES AND EXCLUSIONS/ (C) Issuing Electronic Money/98. Revocation of certificates.

### **98. Revocation of certificates.**

The Financial Services Authority<sup>1</sup> may revoke<sup>2</sup> a certificate given to a person ('A')<sup>3</sup> if:

298 (1) it appears to the Authority that A does not meet the relevant conditions<sup>4</sup> or has failed to meet the relevant conditions at any time since the certificate was given<sup>5</sup>; or

299 (2) the person to whom the certificate was given has contravened any rule or requirement (by the Authority to provide information about activities relating to the issue of electronic money) to which he is subject<sup>6</sup>.

A certified person ('B') may apply to the Authority<sup>7</sup> for his certificate to be revoked, and the Authority must then revoke the certificate and give B written notice that it has done so<sup>8</sup>.

If:

- 300 (a) B has made an application<sup>9</sup> for permission to carry on the regulated activity of issuing electronic money (or for variation of an existing permission so as to add a regulated activity of that kind)<sup>10</sup>; and
- 301 (b) on making an application for revocation of his certificate<sup>11</sup>, he requests that the revocation be conditional on the granting of his application for permission<sup>12</sup>,

the revocation of B's certificate is to be conditional on the granting of such application for permission<sup>13</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 The Financial Services and Markets Act 2000 s 54 (see PARA 357) and s 55(2) (see PARA 361) apply to the revocation of a certificate under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9E(1) as they apply to the cancellation of a Part IV permission on the Authority's own initiative, as if references in those sections to an authorised person were references to a certified person: art 9E(3) (art 9E added by SI 2002/682). As to the meaning of 'Part IV permission' see PARA 348. As to the Authority's own-initiative power and its cancellation see PARAS 355, 357.

3 Ie a certificate under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C: see PARA 97.

4 A meets the relevant conditions at any time if, at that time, any of the situations for the giving of a certificate set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C(4), (5) or (6) (see PARA 97) applies: art 9E(2) (as added: see note 2).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9E(1)(a) (as added: see note 2).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9E(1)(b) (as added: see note 2). As to these rules or requirements see art 9G; and PARA 99. As to the meaning of 'electronic money' see PARA 94 note 2.

7 Such an application must be made in such manner as the Authority may direct: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9F(2) (art 9F added by SI 2002/682).

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9F(1) (as added: see note 7).

9 Ie an application under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) for permission to carry on a regulated activity of the kind specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9B: see PARA 96.

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9F(3)(a) (as added: see note 7).

11 Ie under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9F(1).

12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9F(3)(b) (as added: see note 7). Such an application is made under the Financial Services and Markets Act 2000 Pt IV.

13 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9F(3) (as added: see note 7).

## 99. Rules for obtaining information from certified persons etc.

The Financial Services Authority<sup>1</sup> may make rules requiring certified persons<sup>2</sup> to provide information to the Authority about their activities so far as relating to the issuing of electronic money<sup>3</sup>, including the amount of their liabilities with respect to the issuing of electronic money<sup>4</sup>.

The Authority may, by notice in writing given to a certified person, require him to provide specified<sup>5</sup> information or information of a specified description<sup>6</sup> or require him to produce specified documents or documents of a specified description<sup>7</sup>. This only applies to information or documents reasonably required for the purposes of determining whether the certified person meets, or has met, the relevant conditions<sup>8</sup>.

Such information or documents must be provided or produced before the end of such reasonable period as may be specified and at such place as may be specified<sup>9</sup>. The Authority may require any information provided to be provided in such form as it may reasonably require<sup>10</sup>. The Authority may require any information provided, whether in a document or otherwise, to be verified in such manner, or any document produced to be authenticated in such manner, as it may reasonably require<sup>11</sup>.

The Authority may, by notice in writing given to one of the following persons, require him to provide the Authority with a report on any matter about which the Authority has required or could require the provision of information or production of documents<sup>12</sup>. Such persons are: (1) a certified person ('A')<sup>13</sup>; (2) any other member of A's group<sup>14</sup>; (3) a partnership<sup>15</sup> of which A is a member<sup>16</sup>; or (4) a person who has at any relevant time been a person falling within head (1), head (2) or head (3) above, who is, or was at the relevant time, carrying on a business<sup>17</sup>.

The Authority may require the report to be in such form as may be specified in the notice<sup>18</sup>. The person appointed to make such a report must be a person: (a) nominated or approved by the Authority; and (b) appearing to the Authority to have the skills necessary to make a report on the matter concerned<sup>19</sup>. It is the duty of any person who is providing (or who at any time has provided) services to a person falling within heads (1) to (4) above in relation to a matter on which a report is required to give a person appointed to provide such a report all such assistance as the appointed person may reasonably require<sup>20</sup>.

The Authority may appoint one or more competent persons to conduct an investigation on its behalf if it appears to the Authority that there are circumstances suggesting that a certified person may not meet, or may not have met, the relevant conditions<sup>21</sup>.

If the Authority or an investigator<sup>22</sup> has power<sup>23</sup> to require a person to produce a document but it appears that the document is in the possession of a third person, that power may be exercised in relation to the third person<sup>24</sup>. If a document is produced in response to a requirement<sup>25</sup>, the person to whom it is produced may take copies or extracts from the document, or require the person producing the document, or any relevant person<sup>26</sup>, to provide an explanation of the document<sup>27</sup>. If a person who is required to produce a document fails to do so, the Authority or an investigator may require him to state, to the best of his knowledge and belief, where the document is<sup>28</sup>. A lawyer may be required to furnish the name and address of his client<sup>29</sup>. No person may be required to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless<sup>30</sup>:

- 302 (i) he is the person under investigation or a member of that person's group<sup>31</sup>;
- 303 (ii) the person to whom the obligation of confidence is owed is the person under investigation or a member of that person's group<sup>32</sup>;
- 304 (iii) the person to whom the obligation of confidence is owed consents to the disclosure or production<sup>33</sup>; or
- 305 (iv) the imposing on him of a requirement with respect to such information or document has been specifically authorised by the investigating authority<sup>34</sup>.



If a person claims a lien on a document, its production does not affect the lien<sup>35</sup>.

A justice of the peace<sup>36</sup> may issue a warrant if satisfied on information on oath given by or on behalf of the Secretary of State<sup>37</sup>, the Authority or an investigator<sup>38</sup> that there are reasonable grounds for believing that the first, second or third set of conditions set out below is satisfied<sup>39</sup>.

The first set of conditions is that a person on whom an information requirement<sup>40</sup> has been imposed has failed (wholly or in part) to comply with it<sup>41</sup> and that on the premises specified in the warrant there are documents which have been required; or there is information which has been required<sup>42</sup>.

The second set of conditions is that the premises specified in the warrant are premises of a certified person or an appointed representative<sup>43</sup>, that there are on the premises documents or information in relation to which an information requirement could be imposed<sup>44</sup>, and that if such a requirement were to be imposed it would not be complied with, or the documents or information to which it related would be removed, tampered with or destroyed<sup>45</sup>.

The third set of conditions is that an offence<sup>46</sup> for which the maximum sentence on conviction on indictment is two years or more has been (or is being) committed by any person<sup>47</sup>, that there are on the premises specified in the warrant documents or information relevant to whether that offence has been (or is being) committed<sup>48</sup>, that an information requirement could be imposed in relation to those documents or information<sup>49</sup>, and that if such a requirement were to be imposed it would not be complied with, or the documents or information to which it related would be removed, tampered with or destroyed<sup>50</sup>.

A warrant authorises a constable<sup>51</sup>:

- 306 (A) to enter the premises specified in the warrant<sup>52</sup>;
- 307 (B) to search the premises and take possession of any documents or information appearing to be documents or information of a kind in respect of which a warrant was issued (the 'relevant kind') or to take, in relation to any such documents or information, any other steps which may appear to be necessary for preserving them or preventing interference with them<sup>53</sup>;
- 308 (C) to take copies of, or extracts from, any documents or information appearing to be of the relevant kind<sup>54</sup>;
- 309 (D) to require any person on the premises to provide an explanation of any document or information appearing to be of the relevant kind or to state where it may be found<sup>55</sup>; and
- 310 (E) to use such force as may be reasonably necessary<sup>56</sup>.

Any document of which possession is taken may be retained for a period of three months, or if within that period proceedings to which the document is relevant are commenced against any person for any criminal offence, until the conclusion of those proceedings<sup>57</sup>.

Any person who intentionally obstructs the exercise of any rights conferred by a warrant is guilty of an offence<sup>58</sup>. If a person other than the investigator (the 'defaulter') fails to comply with a requirement imposed on him under Part XI of the Financial Services and Markets Act 2000<sup>59</sup>, the person imposing the requirement may certify that fact in writing to the High Court<sup>60</sup>. If the court is satisfied that the defaulter failed without reasonable excuse to comply with the requirement, it may deal with the defaulter (and in the case of a body corporate<sup>61</sup>, any director or officer<sup>62</sup>) as if he were in contempt<sup>63</sup>.

A person who knows or suspects that an investigation is being or is likely to be conducted under Part XI is guilty of an offence if he falsifies, conceals, destroys or otherwise disposes of a document which he knows or suspects is or would be relevant to such an investigation or he causes or permits the falsification, concealment, destruction or disposal of such a document,

unless he shows that he had no intention of concealing facts disclosed by the documents from the investigator<sup>64</sup>.

A person who, in purported compliance with a requirement imposed on him under Part XI, provides information which he knows to be false or misleading in a material particular or recklessly provides information which is false or misleading in a material particular, is guilty of an offence<sup>65</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 The Financial Services and Markets Act 2000 s 148 (modification or waiver of rules) (see PARA 23) and s 150 (actions for damages) (see PARA 33) apply in relation to rules made under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(1) as if references in the Financial Services and Markets Act 2000 s 148 and s 150(1) to an authorised person were references to a certified person: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(2), (3) (art 9G added by SI 2002/682). A certified person is someone given a certificate under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C: see PARA 97.

3 As to the issuing of electronic money see PARA 96. As to the meaning of 'electronic money' see PARA 94 note 2.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(1) (as added: see note 2).

5 As specified in the notice mentioned in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(4): art 9G(10)(a) (as added: see note 2).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(4)(a) (as added: see note 2).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(4)(b) (as added: see note 2).

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(5) (as added: see note 2). A certified person meets the relevant conditions at any time if, at that time, any of the situations for the giving of a certificate set out in art 9C(4), (5) or (6) applies (see PARA 97): art 9G(10)(b) (as so added).

9 Financial Services and Markets Act 2000 s 165(2) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(6) (as added: see note 2)).

10 Financial Services and Markets Act 2000 s 165(5) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(6) (as added: see note 2)).

11 Financial Services and Markets Act 2000 s 165(6) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(6) (as added: see note 2)).

12 Financial Services and Markets Act 2000 s 166(1) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(7) (as added: see note 2)). As to the meaning of 'document' see PARA 10 note 10.

13 Financial Services and Markets Act 2000 s 166(2)(a) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(7) (as added: see note 2)).

14 Financial Services and Markets Act 2000 s 166(2)(b) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(7) (as added: see note 2)). As to the meaning of 'group' see PARA 351 note 37.

15 As to the meaning of 'partnership' see PARA 86 note 11.

16 Financial Services and Markets Act 2000 s 166(2)(c) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(7) (as added: see note 2)).

17 Financial Services and Markets Act 2000 s 166(2)(d) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(7) (as added: see note 2)).

18 Financial Services and Markets Act 2000 s 166(3) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(7) (as added: see note 2)).

19 Financial Services and Markets Act 2000 s 166(4) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(7) (as added: see note 2)).

20 Financial Services and Markets Act 2000 s 166(5) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(7) (as added: see note 2)). The obligation imposed by the Financial Services and Markets Act 2000 s 166(5) is enforceable, on the application of the Authority, by an injunction: s 166(6) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(7) (as so added)). As to injunctions see **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

21 Financial Services and Markets Act 2000 s 168(4) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(8) (as added: see note 2)). As to meeting the relevant conditions see note 8.

22 'Investigator' means a person appointed under the Financial Services and Markets Act 2000 s 167 or s 168(5): s 175(8) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

23 Ie under the Financial Services and Markets Act 2000 Pt XI (ss 165-177): see PARA 447 et seq.

24 Financial Services and Markets Act 2000 s 175(1) (modified by Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

25 Ie a requirement under the Financial Services and Markets Act 2000 Pt XI.

26 'Relevant person', in relation to a person who is required to produce a document, means a person who: (1) has been or is or is proposed to be a director of that person; (2) has been or is an auditor of that person; (3) has been or is an actuary, accountant or lawyer appointed or instructed by that person; or (4) has been or is an employee of that person: Financial Services and Markets Act 2000 s 175(7). As to the meaning of 'director' see PARA 86 note 11. As to the meaning of 'controller' see PARA 591 note 16.

27 Financial Services and Markets Act 2000 s 175(2) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

28 Financial Services and Markets Act 2000 s 175(3) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

29 Financial Services and Markets Act 2000 s 175(4) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

30 Financial Services and Markets Act 2000 s 175(5) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

31 Financial Services and Markets Act 2000 s 175(5)(a) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

32 Financial Services and Markets Act 2000 s 175(5)(b) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

33 Financial Services and Markets Act 2000 s 175(5)(c) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

34 Financial Services and Markets Act 2000 s 175(5)(d) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

35 Financial Services and Markets Act 2000 s 175(6) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

36 As to justices of the peace see generally **MAGISTRATES**.

37 As to the Secretary of State see PARA 3.

38 'Investigator' means a person appointed under the Financial Services and Markets Act 2000 s 167, s 168(3) or s 168(5): s 176(10).

39 Financial Services and Markets Act 2000 s 176(1) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)). In England and Wales, the Police and Criminal Evidence Act 1984 ss 15(5)-(8), 16 (execution of search warrants and safeguards) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 880 et seq) apply to warrants issued under the Financial Services and Markets Act 2000 s 176: s 176(6) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as so added)). In Northern Ireland, the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (NI 12), arts 17(5)-(8), 18 apply to warrants issued under the Financial Services and Markets Act 2000 s 176: s 176(7) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as so added)).

40 'Information requirement' means a requirement imposed (1) by the Authority under the Financial Services and Markets Act 2000 s 87C (see PARA 401), s 87J (see PARA 405), s 165 or s 175; or (2) by an investigator under s 171, 172, 173 or s 175: s 176(11) (amended by SI 2005/1433) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

41 Financial Services and Markets Act 2000 s 176(2)(a) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

42 Financial Services and Markets Act 2000 s 176(2)(b) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

43 Financial Services and Markets Act 2000 s 176(3)(a) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)). As to the meaning of 'appointed representative' see PARA 346.

44 Financial Services and Markets Act 2000 s 176(3)(b) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

45 Financial Services and Markets Act 2000 s 176(3)(c) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

46 Is an offence mentioned in the Financial Services and Markets Act 2000 s 168.

47 Financial Services and Markets Act 2000 s 176(4)(a) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

48 Financial Services and Markets Act 2000 s 176(4)(b) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

49 Financial Services and Markets Act 2000 s 176(4)(c) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

50 Financial Services and Markets Act 2000 s 176(4)(d) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

51 As to the office of constable see **POLICE** vol 36(1) (2007 Reissue) PARA 101 et seq.

52 Financial Services and Markets Act 2000 s 176(5)(a) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

53 Financial Services and Markets Act 2000 s 176(5)(b) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

54 Financial Services and Markets Act 2000 s 176(5)(c) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

55 Financial Services and Markets Act 2000 s 176(5)(d) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

56 Financial Services and Markets Act 2000 s 176(5)(e) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

57 Financial Services and Markets Act 2000 s 176(8) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

58 Financial Services and Markets Act 2000 s 177(6) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not

exceeding level 5 on the standard scale, or both: see the Financial Services and Markets Act 2000 s 177(6) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as so added)). As to the standard scale see PARA 27 note 21. As from a day to be appointed, the reference to three months is changed to one to 51 weeks: Financial Services and Markets Act 2000 s 177(6) (prospectively amended by the Criminal Justice Act 2003 Sch 26 para 54(1), (2)). At the date at which this volume states the law no such day had been appointed.

59 In the Financial Services and Markets Act 2000 Pt XI.

60 Financial Services and Markets Act 2000 s 177(1), (7) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

61 As to the meaning of 'body corporate' see PARA 86 note 11.

62 'Officer', in relation to a limited liability partnership, means a member of the limited liability partnership: Financial Services and Markets Act 2000 s 177(2) (definition added by SI 2001/1090) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

63 Financial Services and Markets Act 2000 s 177(2) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)).

64 Financial Services and Markets Act 2000 s 177(3) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)). A person guilty of an offence under the Financial Services and Markets Act 2000 s 177(3) or s 177(4) is liable: (1) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both: s 177(5) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as so added)). As to the statutory maximum see PARA 56 note 24.

65 Financial Services and Markets Act 2000 s 177(4) (modified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9G(9) (as added: see note 2)). See note 64.

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## (D) EFFECTING AND CARRYING OUT CONTRACTS OF INSURANCE

### **100. Effecting and carrying out contracts of insurance.**

Effecting a contract of insurance<sup>1</sup> and carrying out a contract of insurance as principal are each a specified kind of activity<sup>2</sup>. There are specific exclusions for Community co-insurers<sup>3</sup>, for breakdown insurance<sup>4</sup> and for the provision of an information society service from another EEA state<sup>5</sup>.

1 As to the meaning of 'contract of insurance' see PARA 90 note 3.

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 10(1), (2). The reference to a specified kind of activity is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 11; and PARA 101.

4 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12; and PARA 102.

5 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12A; and PARA 124.

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### **101. Exclusion for Community co-insurers.**

Not every instance of effecting a contract of insurance or carrying out a contract of insurance as principal is a specified activity<sup>1</sup>. The effecting or carrying out of a contract of insurance<sup>2</sup> by an EEA firm<sup>3</sup> other than through a branch in the United Kingdom<sup>4</sup>, and pursuant to a Community co-insurance operation<sup>5</sup> in which the firm is participating otherwise than as the leading insurer<sup>6</sup> is specifically excluded<sup>7</sup>.

1 Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 As to the meaning of 'contract of insurance' see PARA 90 note 3.

3 Is a firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(d) (see PARA 315 note 1): see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 11(1).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 11(1)(a). As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 For these purposes, 'Community co-insurance operation' and 'leading insurer' have the same meaning as in EC Council Directive 78/473 (OJ L151, 7.6.78, p 25) on the co-ordination of laws, regulations and administrative provisions relating to Community co-insurance: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 11(2).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 11(1)(b). See note 5.

7 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10(1), (2) (see PARA 100): see art 11(1).

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### **102. Exclusion for breakdown insurance.**

Not every instance of effecting a contract of insurance or carrying out a contract of insurance as principal is a specified activity<sup>1</sup>. Specifically excluded<sup>2</sup> is the effecting or carrying out, by a person who does not otherwise carry on such an activity, of a contract of insurance which is a

contract under which the benefits provided by that person (the 'provider') are exclusively or primarily benefits in kind in the event of accident to or breakdown<sup>3</sup> of a vehicle<sup>4</sup>, and which contains the following terms<sup>5</sup>:

- 311 (1) the assistance takes either or both of the forms mentioned in heads (a) and (b) below<sup>6</sup>;
- 312 (2) the assistance is not available outside the United Kingdom and the Republic of Ireland except where it is provided without the payment of additional premium by a person in the country concerned with whom the provider has entered into a reciprocal agreement<sup>7</sup>; and
- 313 (3) assistance provided in the case of an accident or breakdown occurring in the United Kingdom or the Republic of Ireland is, in most circumstances, provided by the provider's servants<sup>8</sup>.

The forms of assistance are:

- 314 (a) repairs to the relevant vehicle at the place where the accident or breakdown has occurred; this assistance may also include the delivery of parts, fuel, oil, water or keys to the relevant vehicle<sup>9</sup>;
  - 315 (b) removal of the relevant vehicle to the nearest or most appropriate place at which repairs may be carried out, or to:
- 31
- 56. (i) the home, point of departure or original destination within the United Kingdom of the driver and passengers, provided the accident or breakdown occurred within the United Kingdom<sup>10</sup>;
  - 57. (ii) the home, point of departure or original destination within the Republic of Ireland of the driver and passengers, provided the accident or breakdown occurred within the Republic of Ireland or within Northern Ireland<sup>11</sup>;
  - 58. (iii) the home, point of departure or original destination within Northern Ireland of the driver and passengers, provided the accident or breakdown occurred within the Republic of Ireland<sup>12</sup>;
- 32
- 316 and this form of assistance may include the conveyance of the driver or passengers of the relevant vehicle, with the vehicle, or (where the vehicle is to be conveyed only to the nearest or most appropriate place at which repairs may be carried out) separately, to the nearest location from which they may continue their journey by other means<sup>13</sup>.

1    le an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2    le excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10(1), (2) (see PARA 100): see art 12(1). As to the meaning of 'contract of insurance' see PARA 90 note 3.

3    For these purposes, 'breakdown' means an event: (1) which causes the driver of the relevant vehicle to be unable to start a journey in the vehicle or involuntarily to bring the vehicle to a halt on a journey because of some malfunction of the vehicle or failure of it to function; and (2) after which the journey cannot reasonably be commenced or continued in the relevant vehicle: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(5). 'Relevant vehicle' means the vehicle (including a trailer or caravan) in respect of which the assistance is required: art 12(5). 'Assistance' means the benefits to be provided under a contract of the kind mentioned in art 12(1): art 12(5).

4    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(1)(a). A contract does not fail to meet the condition in art 12(1)(a) solely because the provider may reimburse the

person entitled to the assistance for all or part of any sums paid by him in respect of assistance either because he failed to identify himself as a person entitled to the assistance or because he was unable to get in touch with the provider in order to claim the assistance: art 12(4).

- 5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(1)(b).
- 6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(2)(a).
- 7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(2)(b). As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(2)(c).
- 9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(3)(a).
- 10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(3)(b)(i).
- 11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(3)(b)(ii).
- 12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(3)(b)(iii).
- 13 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12(3).

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### **103. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). The exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) does not apply to the activity of effecting or carrying out a contract of insurance as principal, where:

- 137 (1) the activity is carried on by an undertaking which has received official authorisation in accordance with the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 4 (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(a) (art 72A as so added; art 72A(2)(a) amended by SI 2004/3379)); and
- 138 (2) the insurance falls within the scope of any of the Insurance Directives (art 72A(2)(b) (as so added)).

As to the meaning of 'contract of insurance' see PARA 90 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'Insurance Directives' see PARA 86 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12A (added by SI 2002/1776). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.



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## (E) ASSISTING IN THE ADMINISTRATION AND PERFORMANCE OF A CONTRACT OF INSURANCE

### **104. Assisting in the administration and performance of a contract of insurance.**

Assisting in the administration and performance of a contract of insurance<sup>1</sup> is a specified activity<sup>2</sup>.

This is subject to exclusions for claims management on behalf of an insurer<sup>3</sup>, trustees, nominees and personal representatives<sup>4</sup>, activities carried on in the course of a profession or non-investment business<sup>5</sup>, information society services<sup>6</sup>, activities carried on by a provider of relevant goods or services<sup>7</sup>, provisions of information about contracts of insurance on an incidental basis<sup>8</sup> and large risks contracts where the risk is situated outside the EEA<sup>9</sup>.

1 As to the meaning of 'contract of insurance' see PARA 90 note 3.

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A (added by SI 2003/1476). The reference is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39B; and PARA 105.

4 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39C, 66; and PARA 106.

5 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39C, 67; and PARA 107.

6 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39C, 72A; and PARA 108.

7 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39C, 72B; and PARA 109.

8 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39C, 72C; and PARA 110.

9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39C, 72D; and PARA 111.

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### 105. Exclusion for claims management on behalf of an insurer, etc.

A person does not carry on the specified activity<sup>1</sup> of assisting in the administration and performance of a contract of insurance<sup>2</sup> if he acts in the course of carrying on the activity of (1) expert appraisal; (2) loss adjusting on behalf of a relevant insurer<sup>3</sup>; or (3) managing claims on behalf of a relevant insurer, and that activity is carried on in the course of carrying on any profession or business<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37 (see PARA 152): see art 39B(1) (as added: see note 3).

3 For these purposes, 'relevant insurer' means: (1) a person who has Part IV permission (see PARA 348) to carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10 (see PARA 100); (2) a person to whom the general prohibition does not apply by virtue of the Financial Services and Markets Act 2000 s 316(1)(a) (members of the Society of Lloyd's) (see PARA 743); (3) an EEA firm falling within Sch 3 para 5(d) (insurance undertaking) (see PARA 315 note 1 head (4)); or (4) a relevant reinsurer: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39B(2)(a) (art 39B added by SI 2003/1476). 'Relevant reinsurer' means a person whose main business consists of accepting risks ceded by: (a) a person falling within heads (1), (2) or (3) above of the definition of 'relevant insurer'; (b) an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(da) (reinsurance undertaking) (see PARA 315 note 1); or (c) a person who is established outside the United Kingdom who carries on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10 (see PARA 100) by way of business: art 39B(2)(b) (as so added; amended by SI 2007/3254). As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39B(1) (as added: see note 3).

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### 106. Exclusion for trustees, nominees and personal representatives.

There is excluded from the specified activity<sup>1</sup> of assisting in the administration and performance of a contract of insurance<sup>2</sup> any activity carried on by a person acting as trustee or personal representative unless he holds himself out as providing a service comprising such an activity<sup>3</sup>. These provisions<sup>4</sup> do not apply if the person carrying on the activity is remunerated for what he does in addition to any remuneration he receives as trustee or personal representative, and for these purposes a person is not to be regarded as receiving additional remuneration merely because his remuneration is calculated by reference to time spent<sup>5</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A (see PARA 104): see art 66(3A) (as added: see note 3).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(3A) (art 66 added by SI 2003/1476). The activity is of the kind specified by Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A: see PARA 104. Article 39A is subject to art 4(4A) (see PARA 88): art 39A(8) (added by SI 2006/3384).

4 le the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(3A).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(7) (amended by SI 2003/1476).

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### **107. Exclusion for activities carried on in the course of a profession or non-investment business.**

There is excluded from the specified activity<sup>1</sup> of assisting in the administration and performance of a contract of insurance<sup>2</sup> any activity which:

317 (1) is carried on in the course of carrying on any profession or business which does not otherwise consist of the carrying on of regulated activities in the United Kingdom<sup>3</sup>; and

318 (2) may reasonably be regarded as a necessary part of other services provided in the course of that profession or business<sup>4</sup>.

However, this exclusion does not apply if the activity in question is remunerated separately from the other services<sup>5</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 le excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A (see PARA 104): see art 67(1) (amended by SI 2003/1476).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(1)(a) (amended by SI 2001/3544). As to the meaning of 'United Kingdom' see PARA 2 note 3. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67 is subject to art 4(4), (4A) (see PARA 88): art 67(3) (added by SI 2006/3384).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(1)(b).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(2).

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ACTIVITIES/(ii) Regulated Activities/C. SPECIFIED ACTIVITIES AND EXCLUSIONS/(E) Assisting in the Administration and Performance of a Contract of Insurance/108. Exclusion for information society services.

### **108. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). The exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) does not apply to the activity of effecting or carrying out a contract of insurance as principal, where:

- 139 (1) the activity is carried on by an undertaking which has received official authorisation in accordance with the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 4 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(a) (art 72A as so added; art 72A(2)(a) amended by SI 2004/3379)); and
- 140 (2) the insurance falls within the scope of any of the Insurance Directives (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(b) (as so added)).

As to the meaning of 'contract of insurance' see PARA 90 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'Insurance Directives' see PARA 86 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39C (added by SI 2003/1476). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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### **109. Exclusion for activities carried on by a provider of relevant goods or services.**

There is excluded from the specified activity<sup>1</sup> of assisting in the administration and performance of a contract of insurance<sup>2</sup> any activity carried on by a provider<sup>3</sup> where the contract of insurance in question is a connected contract of insurance<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 le excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A (see PARA 104): see art 72B(4) (as added: see note 4). As to the meaning of 'contract of insurance' see PARA 90 note 3.

3 As to the meaning of 'provider' see note 4.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B(4) (art 72B added by SI 2003/1476).

'Connected contract of insurance' means a contract of insurance which:

- 141 (1) is not a contract of long-term insurance;
- 142 (2) has a total duration (or would have a total duration were any right to renew conferred by the contract exercised) of five years or less;
- 143 (3) has an annual premium (or, where the premium is paid otherwise than by way of annual premium, the equivalent of an annual premium) of 500 euros or less, or the equivalent amount in sterling or other currency;
- 144 (4) covers the risk of (a) breakdown, loss of, or damage to, non-motor goods supplied by the provider; or (b) damage to, or loss of, baggage and other risks linked to the travel booked with the provider ('travel risks');
- 145 (5) does not cover any liability risks (except, in the case of a contract which covers travel risks, where that cover is ancillary to the main cover provided by the contract);
- 146 (6) is complementary to the non-motor goods being supplied or service being provided by the provider; and
- 147 (7) is of such a nature that the only information that a person requires in order to carry on an activity of the kind specified by art 21, art 25 (see PARA 139), art 39A (see PARA 104) or art 53 (see PARA 174) in relation to it is the cover provided by the contract: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B(1) (art 72B added by SI 2003/1476).

As to the meaning of 'contract of long-term insurance' see PARA 90 note 3. 'Non-motor goods' means goods which are not mechanically propelled road vehicles: art 72B(1) (as so added). 'Provider' means a person who supplies non-motor goods or provides services related to travel in the course of carrying on a profession or business which does not otherwise consist of the carrying on of regulated activities: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B(1) (as so added).

As from 30 June 2008 and 1 January 2009 (see further below) head (4)(b) above is replaced by the following: 'damage to, or loss of, baggage and other risks linked to the travel booked with the provider ('travel risks') in circumstances where (i) the travel booked with the provider relates to attendance at an event organised or managed by that provider and the party seeking insurance is not an individual (acting in his private capacity) or a small business; or (ii) the travel booked with the provider is only the hire of an aircraft, vehicle or vessel which does not provide sleeping accommodation': Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B(1) (as so added; amended by SI 2007/3510). As from the same dates, there is added to the definition of 'provider' the following words: 'For these purposes, the transfer of possession of an aircraft, vehicle or vessel under an agreement for hire which is not a hire-purchase agreement within the meaning of the Consumer Credit Act 1974 s 189(1) (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 95), or any other agreement which contemplates that the property in those goods will also pass at some time in the future, is the provision of a service related to travel, not a supply of goods.': Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B(1) (as so added; definition amended by SI 2007/3510). Also from the same dates, the following definitions of 'small business' and 'turnover' are added: "'small business' means (A) subject to head (B) below a sole trader, body corporate, partnership or an unincorporated association which had a turnover in the last financial year of less than £1,000,000; (B) where the business concerned is a member of a group within the meaning of the Companies Act 2006 s 474(1) (see **COMPANIES**), reference to its turnover means the combined turnover of the group; and 'turnover' means the amounts derived from the provision of goods and services falling within the business's ordinary activities, after deduction of trade discounts, value added tax and any other taxes based on the amounts so derived': see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B(1) (as so added; definitions added by SI 2007/3510).

The above amendments come into force (aa) for the purposes of enabling applications to be made, pursuant to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B (as so amended), for a Part IV permission (see PARA 348), or a variation of a Part IV permission, in relation to activities of the kind specified by art 21 (see PARA 126), art 25(1), (2) (see PARA 139), art 39A (see PARA 104), art 53 (see PARA 174) or, so far as relevant to any such activity, art 64 (see PARA 221), or the Authority's approval under the

Financial Services and Markets Act 2000 s 59 (see PARA 367) in relation to any of those activities, on 30 June 2008; (bb) for all other purposes, on 1 January 2009: Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2007, SI 2007/3510, art 1(2). As to transitional provisions see arts 3-9.

For the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B, a contract of insurance which covers travel risks is not to be treated as a contract of long-term insurance, notwithstanding the fact that it contains related and subsidiary provisions such that it might be regarded as a contract of long-term insurance, if the cover to which those provisions relate is ancillary to the main cover provided by the contract: art 72B(6) (as so added).

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### **110. Provision of information on an incidental basis.**

There is excluded from the specified activity<sup>1</sup> of assisting in the administration and performance of a contract of insurance<sup>2</sup> any activity which meets the following conditions<sup>3</sup>:

- 319 (1) that the activity consists of the provision of information to the policyholder or potential policyholder<sup>4</sup>;
- 320 (2) that the activity is carried on by a person in the course of carrying on a profession or business which does not otherwise consist of the carrying on of regulated activities<sup>5</sup> and
- 321 (3) that the activity may reasonably be regarded as being incidental to that profession or business<sup>6</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A (see PARA 104): see art 72C(3) (as added: see note 3).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(3) (art 72C added by SI 2003/1476).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(a) (as added: see note 3).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(b) (as added: see note 3). As to regulated activities generally see PARA 84 et seq.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(c) (as added: see note 3).

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## 111. Exclusion for large risks contracts where risk situated outside the EEA.

There is excluded from the specified activity<sup>1</sup> of assisting in the administration and performance of a contract of insurance<sup>2</sup> any activity which is carried on in relation to a large risks contract of insurance<sup>3</sup>, to the extent that the risk of commitment covered by the contract is not situated in an EEA state<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A (see PARA 104): see art 72D(1) (as added: see note 4).

3 'Large risks contract of insurance' is a contract of insurance the principal object of which is to cover (1) risks falling within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 Pt I para 4 (railway rolling stock) (see PARA 90 note 3 head (d)), Sch 1 Pt I para 5 (aircraft) (see PARA 90 note 3 head (e)), Sch 1 Pt I para 6 (ships) (see PARA 90 note 3 head (f)), Sch 1 Pt I para 7 (goods in transit) (see PARA 90 note 3 head (g)), Sch 1 Pt I para 11 (aircraft liability) (see PARA 90 note 3 head (k)) or Sch 1 Pt I para 12 (liability of ships) (see PARA 90 note 3 head (l)); (2) risks falling within Sch 1 Pt I para 14 (credit) (see PARA 90 note 3 head (j)) or Sch 1 Pt I 15 (suretyship) (see PARA 90 note 3 head (o)) provided that the risks relate to a business carried on by the policyholder; or (3) risks falling within Sch 1 Pt I para 3 (land vehicles) (see PARA 90 note 3 head (c)), Sch 1 Pt I para 8 (fire and natural forces) (see PARA 90 note 3 head (h)), Sch 1 Pt I para 9 (damage to property) (see PARA 90 note 3 head (i)), Sch 1 Pt I para 10 (motor vehicle liability) (see PARA 90 note 3 head (j)), Sch 1 Pt I para 13 (general liability) (see PARA 90 note 3 head (m)) or Sch 1 Pt I para 16 (miscellaneous financial loss) (see PARA 90 note 3 head (p)) provided that the risks relate to a business carried on by the policyholder and that the condition specified in art 72D(3) (see below) is met in relation to that business: art 72D(2) (art 72D added by SI 2003/1476).

The condition referred to above is that at least two of the three following criteria were met in the most recent financial year for which information is available: (a) the balance sheet total of the business (within the meaning of the Companies Act 2006 ss 382(5), 465(5) (formerly the Companies Act 1985 s 247(5)) (see **COMPANIES**) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 255(5)) exceeded 6.2 million euros; (b) the net turnover (within the meaning given to 'turnover' by the Companies Act 2006 s 474 (formerly the Companies Act 1985 s 262(1)) (see **COMPANIES**) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 270(1)) exceeded 12.8 million euros; (c) the number of employees (within the meaning given by the Companies Act 2006 ss 382(6), 465(6) (formerly the Companies Act 1985 s 247(6)) (see **COMPANIES**) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 255(6)) exceeded 250, and for a financial year which is a company's financial year but not in fact a year, the net turnover of the policyholder is proportionately adjusted: see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72D(3) (as so added). For the purposes of art 72D(3), where the policyholder is a member of a group for which consolidated accounts (within the meaning of the Seventh Company Law Directive (ie EEC Council Directive 83/39 (OJ L193, 18.7.83, p 1) based on Article 54(3)(g) of the Treaty on consolidated accounts)) are drawn up, the question whether the condition specified by that paragraph is met is to be determined by reference to those accounts: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72D(4) (as so added).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72D(1) (as added: see note 3).

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## (F) DEALING IN INVESTMENTS

*(a) Dealing as Principal***112. Dealing in investments as principal.**

Buying<sup>1</sup>, selling<sup>2</sup>, subscribing for or underwriting securities<sup>3</sup> or contractually based investments<sup>4</sup> as principal is a specified kind of activity<sup>5</sup>. There are specified exclusions for absence of holding out etc<sup>6</sup>, dealing in contractually based investments<sup>7</sup>, acceptance of instruments creating or acknowledging indebtedness<sup>8</sup>, issue by a company of its own shares<sup>9</sup>, dealing by a company in its own shares<sup>10</sup>, risk management<sup>11</sup>, trustees etc<sup>12</sup>, sale of goods and supply of services<sup>13</sup>, groups and joint enterprises<sup>14</sup>, sale of a body corporate<sup>15</sup>, employee share schemes<sup>16</sup>, overseas persons<sup>17</sup> and information society services<sup>18</sup>.

A person is not to be regarded as carrying on by way of business<sup>19</sup> a relevant investment business activity (including dealing in investments as principal)<sup>20</sup>, unless he carries on the business of engaging in one or more such activities<sup>21</sup>.

1 'Buying' includes acquiring for valuable consideration: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1).

2 'Selling', in relation to any investment, includes disposing of the investment for valuable consideration, and for these purposes 'disposing' includes: (1) in the case of an investment consisting of rights under a contract, surrendering, assigning or converting those rights, or assuming the corresponding liabilities under the contract; (2) in the case of an investment consisting of rights under other arrangements, assuming the corresponding liabilities under the arrangements; and (3) in the case of any other investment, issuing or creating the investment or granting the rights or interests of which it consists: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1).

3 As to the meaning of 'security' see PARA 89 note 1.

4 I.e. other than investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 87 or art 89 (see PARA 224), so far as relevant to art 87: see art 14(1) (as renumbered: see note 5). 'Contractually based investment' means: (1) rights under a qualifying contract of insurance; (2) any investment of the kind specified by any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 83, art 84, art 85 and art 87 (see PARA 224); or (3) any investment of the kind specified by art 89 so far as relevant to an investment falling within head (1) or (2) above: art 3(1). 'Qualifying contract of insurance' means a contract of long-term insurance which is not: (a) a reinsurance contract; nor (b) a contract in respect of which the following conditions are met:

- 148 (i) the benefits under the contract are payable only on death or in respect of incapacity due to injury, sickness or infirmity;
- 149 (ii) the contract has no surrender value, or the consideration consists of a single premium and the surrender value does not exceed that premium; and
- 150 (iii) the contract makes no provision for its conversion or extension in a manner which would result in it ceasing to comply with any of the conditions in heads (i), (ii) above: art 3(1) (definition amended by SI 2007/1339).

As to the meaning of 'contract of long-term insurance' see PARA 90 note 3.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14(1) (renumbered as such by SI 2006/3384). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14(1) does not apply to a kind of activity to which art 25D (see PARA 139) applies: art 14(2) (added by SI 2006/3384). The reference to a specified kind of activity is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

6 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 15; and PARA 113.



- 7 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 16; and PARA 114.
- 8 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 17; and PARA 115.
- 9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 18; and PARA 116.
- 10 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 18A; and PARA 117.
- 11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 19; and PARA 118.
- 12 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 20, 66; and PARA 119.
- 13 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 20, 68; and PARA 120.
- 14 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 20, 69; and PARA 121.
- 15 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 20, 70; and PARA 122.
- 16 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 20, 71; and PARA 123.
- 17 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 20, 72; and PARA 124.
- 18 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 20, 72A; and PARA 125.
- 19 See the Financial Services and Markets Act 2000 s 22 (see PARA 84) and s 419 (see PARA 87).
- 20 The reference is to an activity to which the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) applies, namely an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 14 (dealing in investments as principal); art 21 (dealing in investments as agent) (see PARA 126); art 25 (arranging deals in investments) (see PARA 139), except in so far as that activity relates to an investment of the kind specified by art 86 (Lloyd's syndicate capacity and syndicate membership), or art 89 (rights and interests) (see PARA 224) so far as relevant to art 86; art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments) (see PARA 152); art 40 (safeguarding and administering investments) (see PARA 160); art 45 (sending dematerialised instructions) (see PARA 190); art 51 (establishing etc a collective investment scheme) (see PARA 171); art 52 (establishing etc a pension scheme) (see PARA 187); art 53 (advising on investments) (see PARA 174); and art 64 (agreeing) (see PARA 221), so far as relevant to any of the articles mentioned above: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) (amended by SI 2003/1476; SI 2006/1969; SI 2006/3384). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) does not apply to any insurance mediation activity: see art 3(2) (as so amended). A person is not to be regarded as carrying on by way of business any insurance mediation activity unless he takes up or pursues that activity for remuneration: art 3(4) (art 3(4), (5) added by SI 2003/1476). For these purposes, 'insurance mediation activity' means any activity of the kind specified by Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126), art 25(1) or (2) (see PARA 139), art 39A (see PARA 104) or art 53 (see PARA 174), or, so far as relevant to any of those articles, art 64 (see PARA 221), which is carried on in relation to a contract of insurance: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(5) (as so added). As to the meaning of 'contract of insurance' see PARA 90 note 3; definition applied by art 1(2)(b) (amended by SI 2003/1476). A person is also not to be regarded as carrying on by way of business activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans) (see PARA 139), art 53A (advising on regulated mortgage contracts), art 53B (advising on regulated home reversion plans), art 53C (advising on regulated home purchase plans) (see PARA 174) or art 64 (agreeing) (see PARA 221) as far as relevant to the articles mentioned above, unless he

carried on the business of engaging in those activities: see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 3A, 3B, 3C; and PARA 139.

21 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) is without prejudice to art 4 in regard to occupational pension schemes (see PARA 152): art 3(3) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419: see note 19.

## UPDATE

### 112 Dealing in investments as principal

NOTE 20--A person is also not to be regarded as carrying on by way of business activities specified by SI 2001/544 art 25E (arranging regulated sale and rent back agreements) (PARA 139), art 53D (advising on regulated sale and rent back agreements) (PARA 174) or art 64 (agreeing) as far as relevant to either of the articles mentioned above, unless he carried on the business of engaging in those activities: see SI 2001/1177 art 3D; and PARA 139.

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### 113. Exclusion for absence of holding out etc.

A person ('A') does not deal in investments as principal<sup>1</sup> by entering into a transaction<sup>2</sup> which relates to a security<sup>3</sup> or is the assignment of a qualifying contract<sup>4</sup> of insurance (or an investment of a specified kind<sup>5</sup>, so far as relevant to such a contract), unless:

- 322 (1) A holds himself out as willing, as principal, to buy<sup>6</sup>, sell<sup>7</sup> or subscribe for investments of the kind to which the transaction relates at prices determined by him generally and continuously rather than in respect of each particular transaction<sup>8</sup>;
- 323 (2) A holds himself out as engaging in the business of buying investments of the kind to which the transaction relates, with a view to selling them<sup>9</sup>;
- 324 (3) A holds himself out as engaging in the business of underwriting investments of the kind to which the transaction relates<sup>10</sup>; or
- 325 (4) A regularly solicits members of the public with the purpose of inducing them, as principals or agents, to enter into transactions constituting dealing in investments as principal<sup>11</sup>, and the transaction is entered into as a result of his having solicited members of the public<sup>12</sup> in that manner<sup>13</sup>.

This exclusion from dealing in investments as principal does not apply where A enters into the transaction as bare trustee for another person and is acting on that other person's instructions<sup>14</sup>.

1 He does not carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 15(1).

- 2 For the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, a transaction is entered into through a person if he enters into it as agent or arranges, in a manner constituting the carrying on of an activity of the kind specified by arts 25(1), 25A(1), 25B(1), 25C(1) (see PARA 139), for it to be entered into by another person as agent or principal: art 3(2) (amended by SI 2006/2383).
- 3 As to the meaning of 'security' see PARA 89 note 1.
- 4 As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4.
- 5 Is an investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 89 (see PARA 224): see art 15(1).
- 6 As to the meaning of 'buying' see PARA 112 note 1.
- 7 As to the meaning of 'selling' see PARA 112 note 2.
- 8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 15(1)(a). Article 15 is subject to art 4(4) (see PARA 88): art 15(4) (added by SI 2006/3384).
- 9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 15(1)(b).
- 10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 15(1)(c).
- 11 Is constituting activities of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14: see PARA 112.
- 12 For these purposes, 'members of the public' means any persons other than:
- 151 (1) authorised persons or persons who are exempt persons in relation to activities of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112) (art 15(2)(a));
  - 152 (2) members of the same group as A (art 15(2)(b));
  - 153 (3) persons who are or who propose to become participators with A in a joint enterprise (art 15(2)(c));
  - 154 (4) any person who is solicited by A with a view to the acquisition by A of 20% or more of the voting shares in a body corporate (art 15(2)(d));
  - 155 (5) if A (either alone or with members of the same group as himself) holds more than 20% of the voting shares in a body corporate, any person who is solicited by A with a view (a) to the acquisition by A of further shares in the body corporate (art 15(2)(e)(i)); or (b) the disposal by A of shares in the body corporate to the person solicited or to a member of the same group as the person solicited (art 15(2)(e)(ii));
  - 156 (6) any person who is solicited by A with a view to the disposal by A of shares in a body corporate to the person solicited or to a member of the same group as that person (art 15(2)(f)(i)), and either alone or with members of the same group holds 20% or more of the voting shares in the body corporate (art 15(2)(f)(ii));
  - 157 (7) any person whose head office is outside the United Kingdom, who is solicited by an approach made or directed to him at a place outside the United Kingdom and whose ordinary business involves him in carrying on activities of the kind specified by any of art 14 (dealing in investments as principal) (see PARA 112), art 21 (dealing in investments as agent) (see PARA 126), art 25 (arranging deals in investments) (see PARA 139), art 37 (managing investments) (see PARA 152), art 40 (safeguarding and administering investments) (see PARA 160), art 45 (sending dematerialised instructions) (see PARA 190), art 51 (establishing etc a collective investment scheme) (see PARA 171), art 52 (establishing etc a stakeholder pension scheme) (see PARA 187) and art 53 (advising on investments) (see PARA 174) or (so far as relevant to any of those articles) art 64 (agreeing to carry on specified kinds of activity) (see PARA 221), or would do so apart from any exclusion from any of those articles made by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (art 15(2)(g)).

'Joint enterprise' means an enterprise into which two or more persons (the 'participators') enter for commercial purposes related to a business or businesses (other than the business of engaging in a regulated activity) carried on by them; and, where a participator is a member of a group, each other member of the group is also to be regarded as a participator in the enterprise: art 3(1).

'Voting shares', in relation to a body corporate, means shares carrying voting rights attributable to share capital which are exercisable in all circumstances at any general meeting of that body corporate: art 3(1).

As to the meaning of 'United Kingdom' see PARA 2 note 3.

13 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 15(1)(d).

14 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 15(3). However, the exclusion in art 66(1) (see PARA 119) applies if the conditions set out there are met: see art 15(3).

## UPDATE

### 113 Exclusion for absence of holding out etc

NOTE 2--A transaction is also entered into through a person for these purposes if he arranges for it to be entered into by another person as agent or principal in a manner constituting the carrying on of an activity of the kind specified by SI 2001/544 art 25E(1) (PARA 139): SI 2001/544 art 3(2) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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### 114. Exclusion for dealing in contractually based investments.

A person who is not an authorised person does not deal in investments as principal<sup>1</sup> by entering into a transaction<sup>2</sup> relating to a contractually based investment<sup>3</sup>:

326 (1) with or through an authorised person, or an exempt person acting in the course of a business comprising a regulated activity in relation to which he is exempt<sup>4</sup>; or

327 (2) through an office outside the United Kingdom maintained by a party to the transaction, and with or through a person whose head office is situated outside the United Kingdom and whose ordinary business involves him in carrying on certain specified activities<sup>5</sup>.

1 He does not carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 16.

2 As to entering into a transaction see PARA 113 note 2.

3 As to the meaning of 'contractually based investment' see PARA 112 note 4.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 16(1)(a) (renumbered as such by SI 2006/3384). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 16 is subject to art 4(4) (see PARA 88): art 16(2) (added by SI 2006/3384).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 16(1)(b) (as renumbered: see note 4). The activities are activities of the kind specified by any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (dealing in investments as principal) (see PARA 112), art 21 (dealing in investments as agent) (see PARA 126), art 25 (arranging deals in investments) (see PARA 139), art 37 (managing investments) (see PARA 152), art 40 (safeguarding and administering

investments) (see PARA 160), art 45 (sending dematerialised instructions) (see PARA 190), art 51 (establishing etc a collective investment scheme) (see PARA 171), art 52 (establishing etc a stakeholder pension scheme) (see PARA 187) and art 53 (advising on investments) (see PARA 174) or, so far as relevant to any of those articles, art 64 (agreeing to carry on specified kinds of activity) (see PARA 221) (or would do so apart from any exclusion from any of those articles made by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544).

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### **115. Exclusion for acceptance of instruments creating or acknowledging indebtedness.**

A person does not deal in investments as principal<sup>1</sup> by accepting an instrument<sup>2</sup> creating or acknowledging indebtedness in respect of any loan, credit, guarantee or other similar financial accommodation or assurance which he has made, granted or provided<sup>3</sup>.

1 He does not carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 17(1).

2 The reference to a person accepting an instrument includes a reference to a person becoming a party to an instrument otherwise than as a debtor or a surety: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 17(2). 'Instrument' includes any record whether or not in the form of a document: art 3(1).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 17(1).

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### **116. Exclusion for issue by a company of its own shares etc.**

There is excluded from the specified activity of dealing in investments as principal<sup>1</sup> the issue by a company<sup>2</sup> of its own shares<sup>3</sup> or share warrants<sup>4</sup>, and the issue by any person of his own debentures<sup>5</sup> or debenture warrants<sup>6</sup>.

1 He is excluded from an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 18(1).

2 For these purposes, 'company' means any body corporate other than an open-ended investment company: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 18(2)(a).

3 'Shares' and 'debentures' include any investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 76 or art 77 (see PARA 224): art 18(2)(b).

4 'Share warrants' and 'debenture warrants' mean any investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 79 (see PARA 224) which relates to shares in the company concerned or, as the case may be, debentures issued by the person concerned: art 18(2)(c) (amended by SI 2001/3544).

5 See note 3.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 18(1). See note 4.

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### **117. Exclusion for dealing by a company in its own shares etc.**

A company does not deal in investments as principal<sup>1</sup> by purchasing its own shares where the Companies Act 1985<sup>2</sup> applies to the shares purchased<sup>3</sup>. A company also does not deal in investments as principal by dealing in its own shares held as treasury shares<sup>4</sup>, in accordance with the Companies Act 1985<sup>5</sup>.

1 It does not carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 18A(1).

2 It is the Companies Act 1985 s 162A (prospectively repealed) (see **COMPANIES**) (as to replacement provisions see the Companies Act 2006 s 724).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 18A(1) (art 18A added by SI 2003/2822).

4 'Shares held as treasury shares' has the same meaning as in the Companies Act 1985 (see **COMPANIES** vol 15 (2009) PARA 1251) (as to replacement provisions see the Companies Act 2006): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 18A(3) (as added: see note 3).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 18A(2) (as added: see note 3). The reference is to the Companies Act 1985 s 162D (prospectively repealed) (see **COMPANIES**) (as to replacement provisions see the Companies Act 2006 ss 727, 729).

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### **118. Exclusion for risk management.**

A person ('B') does not deal in investments as principal<sup>1</sup> by entering as principal into a transaction<sup>2</sup> with another person ('C') if:

- 328 (1) the transaction relates to certain specified investments<sup>3</sup>;
- 329 (2) neither B nor C is an individual<sup>4</sup>;

- 330 (3) the sole or main purpose for which B enters into the transaction (either by itself or in combination with other such transactions) is that of limiting the extent to which a relevant business<sup>5</sup> will be affected by any identifiable risk arising otherwise than as a result of the carrying on of a regulated activity<sup>6</sup>; and
- 331 (4) the relevant business consists mainly of activities other than: (a) regulated activities<sup>7</sup>, or (b) activities which would be regulated activities but for a statutory exclusion<sup>8</sup>.

1     Ie he does not carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 19(1).

2     As to entering into a transaction see PARA 113 note 2.

3     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 19(1)(a). The investments in question are of the kind specified by any of art 83 (options), art 84 (futures) and art 85 (contracts for differences etc) (or art 89 so far as relevant to any of those articles) (see PARA 224). Article 19 is subject to art 4(4) (see PARA 88): art 19(3) (added by SI 2006/3384).

4     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 19(1)(b).

5     For these purposes, 'relevant business' means a business carried on by B, a member of the same group as B, or where B and another person are, or propose to become, participators in a joint enterprise, that other person: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 19(2). As to the meaning of 'joint enterprise' see PARA 113 note 12.

6     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 19(1)(c).

7     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 19(1)(d)(i).

8     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 19(1)(d)(ii). The statutory exclusions referred to in the text are those contained in Pt II (arts 4-72F).

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### **119. Exclusion for trustees, nominees and personal representatives.**

A person ('X') does not carry on the specified activity<sup>1</sup> of dealing in investments as principal<sup>2</sup> where he enters into a transaction<sup>3</sup> as bare trustee or, in Scotland, as nominee for another person ('Y'), and X is acting on Y's instructions<sup>4</sup> and X does not hold himself out as providing a service of buying<sup>5</sup> and selling<sup>6</sup> securities<sup>7</sup> or contractually based investments<sup>8</sup>.

1     A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2     Ie an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 66(1).

3     As to entering into a transaction see PARA 113 note 2.

4     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(1)(a). Article 66 is subject to art 4(4A) (see PARA 88): art 66(8) (added by SI 2006/3384).

5 As to the meaning of 'buying' see PARA 112 note 1.

6 As to the meaning of 'selling' see PARA 112 note 2.

7 As to the meaning of 'security' see PARA 89 note 1.

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(1)(b). As to the meaning of 'contractually based investment' see PARA 112 note 4.

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## **120. Exclusion for activities carried on in connection with the sale of goods or supply of services by a supplier to a customer.**

There is excluded from the specified activity<sup>1</sup> of dealing in investments as principal<sup>2</sup> any transaction entered into<sup>3</sup> by a supplier<sup>4</sup> with a customer<sup>5</sup>, if the transaction is entered into for the purposes of, or in connection with, the sale of goods or supply of services, or a related sale or supply<sup>6</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 68(2).

3 As to entering into a transaction see PARA 113 note 2.

4 'Supplier' means a person whose main business is to sell goods or supply services and not to carry on any activities of the kind specified by any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), art 25 (see PARA 139), art 37 (see PARA 152), art 39A (see PARA 104), art 40 (see PARA 160), art 45 (see PARA 190), art 51 (see PARA 171), art 52 (see PARA 187) and art 53 (see PARA 174) and, where the supplier is a member of a group, also means any other member of that group: art 68(1) (definition amended by SI 2003/1476). As to the meaning of 'selling' see PARA 112 note 2. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68 is subject to art 4(4) (see PARA 88): art 68(12) (added by SI 2006/3384).

5 'Customer' means a person, other than an individual, to whom a supplier sells goods or supplies services, or agrees to do so, and, where the customer is a member of a group, also means any other member of that group: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(1).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(2). 'Related sale or supply' means a sale of goods or supply of services to the customer otherwise than by the supplier, but for or in connection with the same purpose as the sale or supply mentioned in art 68(1): art 68(1). Article 68(2) does not apply in the case of a transaction for the sale or purchase of a contract of insurance, an investment of the kind specified by art 81 (see PARA 224), or an investment of the kind specified by art 89 (see PARA 224) so far as relevant to such a contract or such an investment: art 68(9) (amended by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3.



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### **121. Exclusion for groups and joint enterprises.**

There is excluded from the specified activity<sup>1</sup> of dealing in investments as principal<sup>2</sup> any transaction into which a person enters<sup>3</sup> as principal with another person if that other person is also acting as principal and they are members of the same group<sup>4</sup>, or they are, or propose to become, participators in a joint enterprise<sup>5</sup> and the transaction is entered into for the purposes of, or in connection with, that enterprise<sup>6</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 69(1).

3 As to entering into a transaction see PARA 113 note 2.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(1)(a). Article 69 is subject to art 4(4) (see PARA 88): art 69(13) (added by SI 2006/3384).

5 As to the meaning of 'joint enterprise' see PARA 113 note 12.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(1)(b).

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### **122. Exclusion for activities carried on in connection with the sale of a body corporate.**

A person does not carry on the specified activity<sup>1</sup> of dealing in investments as principal<sup>2</sup> by entering as principal into a transaction<sup>3</sup> if:

- 332 (1) the transaction is one to acquire or dispose of shares in a body corporate other than an open-ended investment company<sup>4</sup>, or is entered into for the purposes of such an acquisition or disposal<sup>5</sup>; and
- 333 (2) either the conditions set out in heads (a) to (c) below are met<sup>6</sup>, or those conditions are not met, but the object of the transaction may nevertheless reasonably be regarded as being the acquisition of day to day control of the affairs of the body corporate<sup>7</sup>.

The conditions mentioned above are that:

- 334 (a) the shares consist of or include 50 per cent or more of the voting shares<sup>8</sup> in the body corporate<sup>9</sup>; or
- 335 (b) the shares, together with any already held by the person acquiring them, consist of or include at least that percentage of such shares<sup>10</sup>; and
- 336 (c) in either case, the acquisition or disposal is between parties each of whom is a body corporate, a partnership, a single individual or a group of connected individuals<sup>11</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 le of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 70(1).

3 As to entering into a transaction see PARA 113 note 2.

4 As to open-ended investment companies see PARA 621 et seq.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(a). Article 70 is subject to art 4(4) (see PARA 88): art 70(8) (added by SI 2006/3384).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(b)(i).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(b)(ii).

8 As to the meaning of 'voting shares' see PARA 113 note 12.

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(a).

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(b).

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(c). For these purposes, 'a group of connected individuals' means:

158 (1) in relation to a party disposing of shares in a body corporate, a single group of persons each of whom is:

27. (a) a director or manager of the body corporate (art 70(3)(a)(i));  
27

28. (b) a close relative of any such director or manager (art 70(3)(a)(ii));  
28

29. (c) a person acting as trustee for any person falling within head (1)(a) or head (1)(b) above (art 70(3)(a)(iii)); and  
29

159 (2) in relation to a party acquiring shares in a body corporate, a single group of persons each of whom is:

30. (a) a person who is or is to be a director or manager of the body corporate (art 70(3)(b)(i));  
30

31. (b) a close relative of any such person (art 70(3)(b)(ii)); or  
31

32. (c) a person acting as trustee for any person falling within head (2)(a) or head (2)(b) above (art 70(3)(b)(iii)).  
32

As to the meaning of 'close relative' see PARA 90 note 26.

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### **123. Exclusion for activities carried on in connection with employee share schemes.**

A person ('C'), a member of the same group as C or a relevant trustee<sup>1</sup> does not carry on an activity<sup>2</sup> of dealing in investments as principal<sup>3</sup> by entering as principal into a transaction<sup>4</sup> the purpose of which is to enable or facilitate:

- 337 (1) transactions in shares in, or debentures issued by C between, or for the benefit of<sup>5</sup>:
- 33
  - 59. (a) the bona fide employees or former employees of C or of another member of the same group as C<sup>6</sup>; and
  - 60. (b) the wives, husbands, widows, widowers, civil partners, surviving civil partners, or children or step-children under the age of 18 of such employees or former employees<sup>7</sup>; or
- 34
  - 338 (2) the holding of such shares or debentures by, or for the benefit of, such persons<sup>8</sup>.

1 'Relevant trustee' means a person who, in pursuance of the arrangements made for the purpose of entering as principal into a transaction the purpose of which is to enable or facilitate the matters mentioned in heads (1) and (2) in the text, holds, as trustee, shares in or debentures issued by C: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(6)(b). 'Shares' and 'debentures' include:

- 160 (1) any investment of the kind specified by art 76 or art 77 (see PARA 224) (art 71(6)(a)(i));
- 161 (2) any investment of the kind specified by art 79 or art 80 (see PARA 224) so far as relevant to arts 76, 77 (art 71(6)(a)(ii)); and
- 162 (3) any investment of the kind specified by art 89 (see PARA 224) so far as relevant to investments of the kind mentioned in art 71(6)(a)(i) or (ii) (art 71(6)(a)(iii)).

2 Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Is of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112): see art 71(1).

4 As to entering into a transaction see PARA 113 note 2.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(1)(a).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(2)(a).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(2)(b) (amended by SI 2005/2114).

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(1)(b).

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## **124. Exclusion for overseas persons.**

An overseas person<sup>1</sup> does not carry on the activities<sup>2</sup> of dealing in investments as principal or operating a multilateral trading facility<sup>3</sup> by:

- 339 (1) entering into a transaction<sup>4</sup> as principal with or through an authorised person<sup>5</sup>, or an exempt person<sup>6</sup> acting in the course of a business comprising a regulated activity<sup>7</sup> in relation to which he is exempt<sup>8</sup>; or
- 340 (2) entering into a transaction as principal with a person in the United Kingdom, if the transaction is the result of a legitimate approach<sup>9</sup>.

1 'Overseas person' means a person who:

- 163 (1) carries on activities of the kind specified by any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), art 25 (see PARA 139), art 25A, art 25B, art 25C, art 25D (see PARA 139), art 37 (see PARA 152), art 39A (see PARA 104), art 40 (see PARA 160), art 45 (see PARA 190), art 51 (see PARA 171), art 52 (see PARA 187) and art 53, art 53A, art 53B, art 53C (see PARA 174) art 61 (see PARA 203), art 63B and art 63F (see PARA 209) or, so far as relevant to any of those articles, art 64 (see PARA 221) (or activities of a kind which would be so specified but for the exclusion in art 72); but
- 164 (2) does not carry on any such activities, or offer to do so, from a permanent place of business maintained by him in the United Kingdom: art 3(1) (definition amended by SI 2003/1475; SI 2003/1476; SI 2006/2383; SI 2006/3384). As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Is of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112) or art 25D (see PARA 139): see art 72(1) (amended by SI 2006/3384). See note 8.

4 As to entering into a transaction see PARA 113 note 2.

5 As to authorised persons see PARA 314.

6 As to exempt persons see PARA 330.

7 As to regulated activities see PARA 80.

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(1)(a). Article 72(1) does not apply where the overseas person is an investment firm or credit institution who is providing or performing investment services and activities on a professional basis, and whose home member state is the United Kingdom: art 72(8) (added by SI 2006/3384). As to the meanings of 'investment firm', 'investment services and activities' and 'home member state' see PARA 88 note 5. As to the meaning of 'credit institution' see PARA 88 note 6.

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(1)(b). 'Legitimate approach' means:

- 165 (1) an approach made to the overseas person which has not been solicited by him in any way, or has been solicited by him in a way which does not contravene the Financial Services and

Markets Act 2000 s 21 (see PARA 225) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(7)(a)); or

- 166 (2) an approach made by or on behalf of the overseas person in a way which does not contravene the Financial Services and Markets Act 2000 s 21 (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(7)(b)).

## UPDATE

### 124 Exclusion for overseas persons

NOTE 1--Activities of the kind specified in SI 2001/544 art 25E (PARA 139), art 53D (PARA 174), and art 63J (PARA 220A) are included in the list of activities in head (1): SI 2001/544 art 3(1) (definition amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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### 125. Exclusion for information society services.

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

<sup>1</sup> Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). The exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) does not apply to the activity of effecting or carrying out a contract of insurance as principal, where:

- 167 (1) the activity is carried on by an undertaking which has received official authorisation in accordance with the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 4 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(a) (art 72A as so added; art 72A(2)(a) amended by SI 2004/3379)); and
- 168 (2) the insurance falls within the scope of any of the Insurance Directives (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(b) (as so added)).

As to the meaning of 'contract of insurance' see PARA 90 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'the Insurance Directives' see PARA 86 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

<sup>2</sup> See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 20 (amended by SI 2002/1776). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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### *(b) Dealing as Agent*

#### **126. Dealing in investments as agent.**

Buying<sup>1</sup>, selling<sup>2</sup>, subscribing for or underwriting securities<sup>3</sup> or relevant investments<sup>4</sup> as agent is a specified kind of activity<sup>5</sup>. There are specified exclusions for deals with or through authorised persons<sup>6</sup>, risk management<sup>7</sup>, activities carried on in the course of a profession or non-investment business<sup>8</sup>, sale of goods and supply of services<sup>9</sup>, groups and joint enterprises<sup>10</sup>, sale of a body corporate<sup>11</sup>, employee share schemes<sup>12</sup>, overseas persons<sup>13</sup>, information society services<sup>14</sup>, activities carried on by a provider of relevant goods and services<sup>15</sup>, large risks contracts where risk situated outside the EEA<sup>16</sup> and business Angel-led Enterprise Capital Funds<sup>17</sup>.

A person is not to be regarded as carrying on by way of business<sup>18</sup> a relevant investment business activity (including dealing in investments as agent)<sup>19</sup>, unless he carries on the business of engaging in one or more such activities<sup>20</sup>.

1 As to the meaning of 'buying' see PARA 112 note 1.

2 As to the meaning of 'selling' see PARA 112 note 2.

3 As to the meaning of 'security' see PARA 89 note 1.

4 I.e. other than investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 87 or art 89 (see PARA 224) so far as relevant to that article: see art 21(1). 'Relevant investment' means (1) rights under a qualifying contract of insurance; (2) rights under any contract of insurance; (3) any investment of the kind specified by arts 83, 84, 85 and 87 (see PARA 224); or (4) any investment of the kind specified by art 89 (see PARA 224) so far as relevant to an investment falling within heads (1) or (3) above: art 3(1) (definition added by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21(1) (amended by SI 2003/1476; renumbered by SI 2006/3384). The reference to a specified kind of activity is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21(1) does not apply to a kind of activity to which art 25D (see PARA 139) applies: art 21(2) (added by SI 2006/3384).

6 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 22; and PARA 127.

7 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 23; and PARA 128.

8 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 24, 67; and PARA 129.

9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 24, 68; and PARA 130.

10 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 24, 69; and PARA 131.

11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 24, 70; and PARA 132.

12 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 24, 71; and PARA 133.

13 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 24, 72; and PARA 134.

14 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 24, 72A; and PARA 135.

15 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 24, 72B; and PARA 136.

16 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 24, 72D; and PARA 137.

17 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 72E, 72F; and PARA 138.

18 See the Financial Services and Markets Act 2000 s 22 (see PARA 84) and s 419 (see PARA 87).

19 The reference is to an activity to which the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) applies, namely an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 14 (dealing in investments as principal) (see PARA 112); art 21 (dealing in investments as agent) (see PARA 126); art 25 (arranging deals in investments) (see PARA 139), except in so far as that activity relates to an investment of the kind specified by art 86 (Lloyd's syndicate capacity and syndicate membership), or art 89 (rights and interests) (see PARA 224) so far as relevant to art 86; art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments) (see PARA 152); art 40 (safeguarding and administering investments) (see PARA 160); art 45 (sending dematerialised instructions) (see PARA 190); art 51 (establishing etc a collective investment scheme) (see PARA 171); art 52 (establishing etc a pension scheme) (see PARA 187); art 53 (advising on investments) (see PARA 174); and art 64 (agreeing) (see PARA 221), so far as relevant to any of the articles mentioned above: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) (amended by SI 2003/1476; SI 2006/1969; SI 2006/3384). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) does not apply to any insurance mediation activity: see art 3(2) (as so amended). A person is not to be regarded as carrying on by way of business any insurance mediation activity unless he takes up or pursues that activity for remuneration: art 3(4) (art 3(4), (5) added by SI 2003/1476). As to the meaning of 'insurance mediation activity' see PARA 112 note 20. A person is also not to be regarded as carrying on by way of business activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans) (see PARA 139), art 53A (advising on regulated mortgage contracts), art 53B (advising on regulated home reversion plans), art 53C (advising on regulated home purchase plans) (see PARA 174) or art 64 (agreeing) (see PARA 221) as far as relevant to the articles mentioned above, unless he carried on the business of engaging in those activities: see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 3A, 3B, 3C; and PARA 139.

20 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) is without prejudice to art 4 in regard to occupational pension schemes (see PARA 152): art 3(3) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419: see note 18.

## UPDATE

### 126 Dealing in investments as agent

NOTE 19--A person is also not to be regarded as carrying on by way of business activities specified by SI 2001/544 art 25E (arranging regulated sale and rent back

agreements) (PARA 139), art 53D (advising on regulated sale and rent back agreements) (PARA 174) or art 64 (agreeing) as far as relevant to either of the articles mentioned above, unless he carried on the business of engaging in those activities: see SI 2001/1177 art 3D; and PARA 139.

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### **127. Exclusion for deals with or through authorised persons.**

A person who is not an authorised person<sup>1</sup> does not deal in investments as agent<sup>2</sup> by entering into a transaction<sup>3</sup> as agent for another person (the 'client') with or through an authorised person if:

- 341 (1) the transaction is entered into on advice given to the client by an authorised person<sup>4</sup>; or
- 342 (2) it is clear, in all the circumstances, that the client, in his capacity as an investor, is not seeking and has not sought advice from the agent as to the merits of the client's entering into the transaction (or, if the client has sought such advice, the agent has declined to give it but has recommended that the client seek such advice from an authorised person)<sup>5</sup>.

However, this exclusion does not apply if the transaction relates to a contract of insurance<sup>6</sup> or if the agent receives from any person other than the client any pecuniary reward or other advantage, for which he does not account to the client, arising out of his entering into the transaction<sup>7</sup>.

1 As to authorised persons see PARA 314.

2 If he does not carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126): see art 22(1).

3 As to entering into a transaction see PARA 113 note 2.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 22(1)(a). Article 22 is subject to art 4(4) (see PARA 88): art 22(3) (added by SI 2006/3384).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 22(1)(b).

6 As to the meaning of 'contract of insurance' see PARA 90 note 3.

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 22(2) (substituted by SI 2003/1476).

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## 128. Exclusion for risk management.

A person ('B') does not deal in investments as agent<sup>1</sup> by entering as agent for a relevant person<sup>2</sup> into a transaction<sup>3</sup> with another person ('C') if:

- 343 (1) the transaction relates to certain specified investments<sup>4</sup>;
- 344 (2) neither B nor C is an individual<sup>5</sup>;
- 345 (3) the sole or main purpose for which B enters into the transaction (either by itself or in combination with other such transactions) is that of limiting the extent to which a relevant business<sup>6</sup> will be affected by any identifiable risk arising otherwise than as a result of the carrying on of a regulated activity<sup>7</sup>; and
- 346 (4) the relevant business consists mainly of activities other than regulated activities<sup>8</sup> or activities which would be regulated activities but for a specific statutory exclusion<sup>9</sup>.

1 He does not carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126): see art 23(1).

2 For these purposes, 'relevant person' means (1) a member of the same group as B; or (2) where B and another person are, or propose to become, participators in a joint enterprise, that other person: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 23(2). As to the meaning of 'joint enterprise' see PARA 113 note 12.

3 As to entering into a transaction see PARA 113 note 2.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 23(1)(a). The investments in question are of the kind specified by any of art 83 (options), art 84 (futures) and art 85 (contracts for differences etc) (or art 89 so far as relevant to any of those articles) (see PARA 224). Article 23 is subject to art 4(4) (see PARA 88): art 23(3) (added by SI 2006/3384).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 23(1)(b).

6 For these purposes, 'relevant business' means a business carried on by a relevant person (see note 2): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 23(2).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 23(1)(c).

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 23(1)(d)(i).

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 23(1)(d)(ii). The exclusions are contained in Pt II (arts 4-72F).

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## 129. Exclusion for activities carried on in the course of a profession or non-investment business.

There is excluded from the specified activity<sup>1</sup> of dealing in investments as agent<sup>2</sup> any activity which:

- 347 (1) is carried on in the course of carrying on any profession or business which does not otherwise consist of the carrying on of regulated activities in the United Kingdom<sup>3</sup>; and
- 348 (2) may reasonably be regarded as a necessary part of other services provided in the course of that profession or business<sup>4</sup>.

However this exclusion does not apply if the activity in question is remunerated separately from the other services<sup>5</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126): see art 67(1).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(1)(a) (amended by SI 2001/3544). As to the meaning of 'United Kingdom' see PARA 2 note 3. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 23 is subject to art 4(4), (4A) (see PARA 88): art 67(3) (added by SI 2006/3384).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(1)(b).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(2).

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### **130. Exclusion for activities carried on in connection with the sale of goods or supply of services by a supplier to a customer.**

There is excluded from the specified activity<sup>1</sup> of dealing in investments as agent<sup>2</sup> any transaction entered into by a supplier as agent for a customer<sup>3</sup>, if the transaction is entered into for the purposes of, or in connection with, the sale of goods or supply of services, or a related sale or supply, and provided that:

- 349 (1) where the investment to which the transaction relates is a security<sup>4</sup>, the supplier does not hold himself out (other than to the customer) as engaging in the business of buying<sup>5</sup> securities of the kind to which the transaction relates with a view to selling them, and does not regularly solicit members of the public<sup>6</sup> for the purpose of inducing them (as principals or agents) to buy, sell, subscribe for or underwrite securities<sup>7</sup>;

- 350 (2) where the investment to which the transaction relates is a contractually based investment<sup>8</sup>, the supplier enters into the transaction:

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61. (a) with or through an authorised person, or an exempt person acting in the course of a business comprising a regulated activity in relation to which he is exempt<sup>9</sup>; or

62. (b) through an office outside the United Kingdom maintained by a party to the transaction, and with or through a person whose head office is situated outside the United Kingdom and whose ordinary business involves him in carrying on certain specified activities<sup>10</sup>, or would do so apart from any exclusion<sup>11</sup>.

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1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126): see art 68(3).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(3) (amended by SI 2001/3544). As to the meanings of 'supplier' and 'customer' see PARA 120 notes 4, 5. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(3) does not apply in the case of a transaction for the sale or purchase of a contract of insurance, an investment of the kind specified by art 81 (see PARA 224), or an investment of the kind specified by art 89 (see PARA 224) so far as relevant to such a contract or such an investment: art 68(9) (amended by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68 is subject to art 4(4) (see PARA 88): art 68(12) (added by SI 2006/3384).

4 As to the meaning of 'security' see PARA 89 note 1.

5 As to the meaning of 'buying' see PARA 112 note 1.

6 As to the meaning of 'members of the public' see PARA 113 note 12, references to 'A' being read as references to the supplier; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(4).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(3)(a). See note 3.

8 As to the meaning of 'contractually based investment' see PARA 112 note 4.

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(3)(b)(i). As to authorised persons see PARA 314. As to exempt persons see PARA 330. See note 3.

10 Is activities of the kind specified by any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), art 25 (see PARA 139), art 37 (see PARA 152), art 40 (see PARA 160), art 45 (see PARA 190), art 51 (see PARA 171), art 52 (see PARA 187) and art 53 (see PARA 174) or, so far as relevant to any of those articles, art 64 (see PARA 221).

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(3)(b)(ii). The exclusion is from any of the articles referred to in note 10. See note 3.

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### **131. Exclusion for groups and joint enterprises.**

There is excluded from the specified activity<sup>1</sup> of dealing in investments as agent<sup>2</sup> any transaction into which a person enters as agent for another person if that other person is acting as principal, and they are members of the same group<sup>3</sup>, or they are, or propose to become,

participators in a joint enterprise<sup>4</sup> and the transaction is entered into for the purposes of, or in connection with, that enterprise<sup>5</sup>, provided that:

- 351 (1) where the investment to which the transaction relates is a security<sup>6</sup>, the agent does not hold himself out (other than to members of the same group or persons who are or propose to become participators with him in a joint enterprise) as engaging in the business of buying<sup>7</sup> securities of the kind to which the transaction relates with a view to selling<sup>8</sup> them, and does not regularly solicit members of the public<sup>9</sup> for the purpose of inducing them (as principals or agents) to buy, sell, subscribe for or underwrite securities<sup>10</sup>; or
- 352 (2) where the investment to which the transaction relates is a contractually based investment<sup>11</sup>, the agent enters into the transaction:
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63. (a) with or through an authorised person, or an exempt person acting in the course of a business comprising a regulated activity in relation to which he is exempt<sup>12</sup>; or
64. (b) through an office outside the United Kingdom<sup>13</sup> maintained by a party to the transaction, and with or through a person whose head office is situated outside the United Kingdom and whose ordinary business involves him in carrying on certain specified activities<sup>14</sup> or would do so apart from any exclusion<sup>15</sup>.
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1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126): see art 69(2).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(1)(a), (2). Article 69 is subject to art 4(4) (see PARA 88): art 69(13) (added by SI 2006/3384). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(2) does not apply to a transaction for the sale or purchase of a contract of insurance: art 69(10) (added by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3.

4 As to the meaning of 'joint enterprise' see PARA 113 note 12.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(1)(b), (2). See note 3.

6 As to the meaning of 'security' see PARA 89 note 1.

7 As to the meaning of 'buying' see PARA 112 note 1.

8 As to the meaning of 'selling' see PARA 112 note 2.

9 As to the meaning of 'members of the public' see PARA 113 note 12, references to 'A' being read as references to the agent; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(3).

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(2)(a). See note 3.

11 As to the meaning of 'contractually based investment' see PARA 112 note 4.

12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(2)(b)(i). See note 3.

13 As to the meaning of 'United Kingdom' see PARA 2 note 3.

14 le of the kind specified by any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), art 25 (see PARA 139), art 37 (see PARA 152), art 40 (see PARA 160), art 45 (see PARA 190), art 51 (see PARA 171), art 52 (see PARA 187) and art 53 (see PARA 174) or, so far as relevant to any of those articles, art 64 (see PARA 221).

15 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(2)(b)(ii). The exclusion is from any of the articles referred to in note 14. See note 3.

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### **132. Exclusion for activities carried on in connection with the sale of a body corporate.**

A person does not carry on the specified activity<sup>1</sup> of dealing in investments as agent<sup>2</sup> by entering as principal into a transaction<sup>3</sup> if:

- 353 (1) the transaction is one to acquire or dispose of shares in a body corporate other than an open-ended investment company<sup>4</sup>, or is entered into for the purposes of such an acquisition or disposal<sup>5</sup>; and
- 354 (2) either the conditions set out in heads (a) to (c) below are met<sup>6</sup> or those conditions are not met, but the object of the transaction may nevertheless reasonably be regarded as being the acquisition of day to day control of the affairs of the body corporate<sup>7</sup>.

The conditions mentioned above are that:

- 355 (a) the shares consist of or include 50 per cent or more of the voting shares<sup>8</sup> in the body corporate<sup>9</sup>; or
- 356 (b) the shares, together with any already held by the person acquiring them, consist of or include at least that percentage of such shares<sup>10</sup>; and
- 357 (c) in either case, the acquisition or disposal is between parties each of whom is a body corporate, a partnership, a single individual or a group of connected individuals<sup>11</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 le of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126): see art 70(4).

3 As to entering into a transaction see PARA 113 note 2.

4 As to open-ended investment companies see PARA 621 et seq.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(a), (4). Article 70 is subject to art 4(4) (see PARA 88): art 70(8) (added by SI 2006/3384). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(4) does not apply to a transaction for the sale or purchase of a contract of insurance: art 70(7) (added by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(b)(i), (4). See note 5.

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(b)(ii), (4). See note 5.

8 As to the meaning of 'voting shares' see PARA 113 note 12.

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(a), (4). See note 5.

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(b), (4). See note 5.

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(c), (4). As to the meaning of 'a group of connected individuals' see PARA 122 note 11. As to the meaning of 'close relative' see PARA 90 note 26. See note 5.

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### **133. Exclusion for activities carried on in connection with employee share schemes.**

A person ('C'), a member of the same group as C or a relevant trustee<sup>1</sup> does not carry on an activity<sup>2</sup> of dealing in investments as agent<sup>3</sup> by entering as principal into a transaction<sup>4</sup> the purpose of which is to enable or facilitate:

- 358 (1) transactions in shares in, or debentures issued by C between, or for the benefit of<sup>5</sup>:
- 39
- 65. (a) the bona fide employees or former employees of C or of another member of the same group as C<sup>6</sup>; and
- 66. (b) the wives, husbands, widows, widowers, or children or step-children under the age of eighteen of such employees or former employees<sup>7</sup>; or
- 40
- 359 (2) the holding of such shares or debentures by, or for the benefit of, such persons<sup>8</sup>.

1 As to the meaning of 'relevant trustee' see PARA 123 note 1. As to the meanings of 'shares' and 'debentures' see PARA 123 note 1.

2 Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Is of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126): see art 71(3).

4 As to entering into a transaction see PARA 113 note 2.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(1)(a), (3).

- 6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(2)(a), (3).
- 7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(2)(b), (3).
- 8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(1)(b), (3).

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### **134. Exclusion for overseas persons.**

An overseas person<sup>1</sup> does not carry on an activity<sup>2</sup> of dealing in investments as agent or operating a multilateral trading facility<sup>3</sup> by:

- 360 (1) entering into a transaction<sup>4</sup> as agent for any person with or through an authorised person<sup>5</sup> or an exempt person<sup>6</sup> acting in the course of a business comprising a regulated activity<sup>7</sup> in relation to which he is exempt<sup>8</sup>; or
- 361 (2) entering into a transaction with another party ('X') as agent for any person ('Y'), other than with or through an authorised person or such an exempt person, unless either X or Y is in the United Kingdom<sup>9</sup>, and the transaction is the result of an approach (other than a legitimate approach<sup>10</sup>) made by or on behalf of, or to, whichever of X or Y is in the United Kingdom<sup>11</sup>.

1 As to the meaning of 'overseas person' see PARA 124 note 1.

2 Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Is of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126) or art 25D (see PARA 139): see art 72(2) (amended by SI 2006/3384). See note 8.

4 As to entering into a transaction see PARA 113 note 2.

5 As to authorised persons see PARA 314.

6 As to exempt persons see PARA 330.

7 As to regulated activities see PARA 84 et seq.

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(2)(a). Article 72(2) does not apply where the overseas person is an investment firm or credit institution (1) who is providing or performing investment services and activities on a professional basis; and (2) whose home member state is the United Kingdom: art 72(8) (added by SI 2006/3384). As to the meanings of 'investment firm', 'investment services and activities' and 'home member state' see PARA 88 note 5. As to the meaning of 'credit institution' see PARA 88 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(2)(b)(i). See note 8.

10 As to the meaning of 'legitimate approach' see PARA 124 note 9.

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(2)(b)(ii). See note 8.

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### **135. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). The exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) does not apply to the activity of effecting or carrying out a contract of insurance as principal, where:

- 169 (1) the activity is carried on by an undertaking which has received official authorisation in accordance with the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 4 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(a) (art 72A as so added; art 72A(2)(a) amended by SI 2004/3379)); and
- 170 (2) the insurance falls within the scope of any of the Insurance Directives (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(b) (as so added)).

As to the meaning of 'contract of insurance' see PARA 90 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'Insurance Directives' see PARA 86 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 24 (amended by SI 2003/1476). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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### **136. Exclusion for activities carried on by a provider of relevant goods or services.**

There is excluded from the specified activity<sup>1</sup> of dealing in investments as agent<sup>2</sup> any transaction for the sale or purchase of a connected contract of insurance<sup>3</sup> into which a provider<sup>4</sup> enters as agent<sup>5</sup>.



1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126): see art 72B(2) (as added: see note 5).

3 As to the meaning of 'connected contract of insurance' see PARA 109 note 4.

4 As to the meaning of 'provider' see PARA 109 note 4.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B(2) (art 72B added by 2003/1476).

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### **137. Exclusion for large risks contracts where risk situated outside the EEA.**

There is excluded from the specified activity<sup>1</sup> of dealing in investments as agent<sup>2</sup> any activity which is carried on in relation to a large risks contract of insurance<sup>3</sup>, to the extent that the risk of commitment covered by the contract is not situated in an EEA state<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126): see art 72D(1) (as added: see note 4).

3 As to the meaning of 'large risks contract of insurance' see PARA 111 note 3.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72D(1) (art 72D added by SI 2003/1476).

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### **138. Exclusion for Business Angel-led Enterprise Capital Funds.**

A specified type of body corporate<sup>1</sup> does not carry on the specified activity<sup>2</sup> of dealing in investments as agent<sup>3</sup> by entering as agent into a transaction on behalf of the participants of a Business Angel-led Enterprise Capital Fund<sup>4</sup>.

1 The type of body corporate specified is a limited company (1) which operates a Business Angel-led Enterprise Capital Fund; and (2) the members of which are participants in the Business Angel-led Enterprise Capital Fund operated by that limited company and between them have invested at least 50% of the total investment in that Business Angel-led Enterprise Capital Fund excluding any investment made by the Secretary of State: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E(7) (arts 72E, 72F added by SI 2005/1518). For the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E(7), 'a limited company' means a body corporate with limited liability which is a company or firm formed in accordance with the law of an EEA state and having its registered office, central administration or principal place of business within the territory of an EEA state: art 72E(8) (as so added). As to the Secretary of State see PARA 3. As to the meaning of 'Business Angel-led Enterprise Capital Fund' see note 4.

2 Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Is of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126): see art 72E(1) (as added: see note 1).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E(1) (as added: see note 1). Nothing in art 72E has the effect of excluding a body corporate from the application of the Money Laundering Regulations 2007, SI 2007/2157 (see PARA 539 et seq), in so far as those Regulations would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(9) (as so added; amended by SI 2007/2157). Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Financial Services and Markets Act 2000 s 397 (misleading statements and practices) (see PARA 568), in so far as that section would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(10) (as so added). Article 72E is subject to art 4(4) (see PARA 88): art 72E(11) (added by SI 2006/3384).

'Business Angel-led Enterprise Capital Fund' means a collective investment scheme which:

- 171 (1) is established for the purpose of enabling participants to participate in or receive profits or income arising from the acquisition, holding, management or disposal of investments falling within one or more of (a) the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 76 (see PARA 224), being shares in an unlisted company; (b) art 77 (see PARA 224), being instruments creating or acknowledging indebtedness in respect of an unlisted company; and (c) art 79 (see PARA 224), being warrants or other instruments entitling the holder to subscribe for shares in an unlisted company;
- 172 (2) has only the following as its participants: (a) the Secretary of State; (b) a body corporate of a type specified in art 72E(7) (see note 1); and (c) one or more persons each of whom at the time they became a participant was (i) a sophisticated investor; (ii) a high net worth individual; (iii) a high net worth company; (iv) a high net worth unincorporated association; (v) a trustee of a high value trust; or (vi) a self-certified sophisticated investor;
- 173 (3) is prevented, by the arrangements by which it is established, from (a) acquiring investments, other than those falling within heads (1)(a)-(c) above; and (b) acquiring investments falling within heads (1)(a)-(c) above in an unlisted company, where the aggregated cost of those investments exceeds £2 million, unless that acquisition is necessary to prevent or reduce the dilution of an existing share-holding in that unlisted company: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72F(1) (as added: see note 1).

'Unlisted company' has the meaning given by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, SI 2001/1335, art 3 (revoked: see now the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 3) (see PARA 295): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72F(1) (as so added).

'Sophisticated investor' means an individual who is a 'certified sophisticated investor' within the meaning of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, SI 2001/1335, art 50(1) (revoked: see now the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50(1)) (see PARA 297), and has signed a statement in the following terms: 'I declare that I am a certified sophisticated investor within the meaning of article 50(1) of the Financial Services and Markets Act 2000 (Financial Promotion) Order [2005] and that I understand that any Business Angel-led Enterprise Capital Fund (within the meaning of article 72F of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001), in which I participate, or any person who operates that Business Angel-led Enterprise Capital Fund, in which I

participate, will not be authorised under the Financial Services and Markets Act 2000 (and so will not have to satisfy the threshold conditions set out in Part I of Schedule 6 to that Act and will not be subject to Financial Services Authority rules such as those on holding client money). I understand that this means that redress through the Financial Services Authority, the Financial Ombudsman Scheme or the Financial Services Compensation Scheme will not be available. I also understand the risks associated in investing in a Business Angel-led Enterprise Capital Fund and am aware that it is open to me to seek advice from someone who is authorised under the Financial Services and Markets Act 2000 and who specialises in advising on this kind of investment': Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72F(1) (as so added).

'High net worth individual' means an individual who is a 'certified high net worth individual' within the meaning of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, SI 2001/1335, art 48(2) (revoked: see now the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(2)) (certified high net worth individuals) (see PARA 295), and has signed a statement in the following terms: 'I declare that I am a certified high net worth individual within the meaning of article 48(2) of the Financial Services and Markets Act 2000 (Financial Promotion) Order [2005] and that I understand that any Business Angel-led Enterprise Capital Fund (within the meaning of article 72F of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001), in which I participate, or any person who operates that Business Angel-led Enterprise Capital Fund, in which I participate, will not be authorised under the Financial Services and Markets Act 2000 (and so will not have to satisfy the threshold conditions set out in Part I of Schedule 6 to that Act and will not be subject to Financial Services Authority rules such as those on holding client money). I understand that this means that redress through the Financial Services Authority, the Financial Ombudsman Scheme or the Financial Services Compensation Scheme will not be available. I also understand the risks associated in investing in a Business Angel-led Enterprise Capital Fund and am aware that it is open to me to seek advice from someone who is authorised under the Financial Services and Markets Act 2000 and who specialises in advising on this kind of investment': Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72F(1) (as so added).

'High net worth company' means a body corporate which falls within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, SI 2001/1335, art 49(2)(a) (revoked: see now Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(2)(a)) (high net worth companies, unincorporated associations etc) (see PARA 296), and has executed a document (in a manner which binds the company) in the following terms: 'This company is a high net worth company and falls within article 49(2)(a) of the Financial Services and Markets Act 2000 (Financial Promotion) Order [2005]. We understand that any Business Angel-led Enterprise Capital Fund (within the meaning of article 72F of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001), in which this company participates, or any person who operates that Business Angel-led Enterprise Capital Fund, in which this company participates, will not be authorised under the Financial Services and Markets Act 2000 (and so will not have to satisfy the threshold conditions set out in Part I of Schedule 6 to that Act and will not be subject to Financial Services Authority rules such as those on holding client money). We understand that this means that redress through the Financial Services Authority, the Financial Ombudsman Scheme or the Financial Services Compensation Scheme will not be available. We also understand the risks associated in investing in a Business Angel-led Enterprise Capital Fund and are aware that it is open to us to seek advice from someone who is authorised under the Financial Services and Markets Act 2000 and who specialises in advising on this kind of investment': Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72F(1) (as so added; definition amended by SI 2006/2383).

'High net worth unincorporated association' means an unincorporated association which falls within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, SI 2001/1335, art 49(2)(b) (revoked: see now Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(2)(b)) (see PARA 296), and on behalf of which an officer of that association or a member of its governing body has signed a statement in the following terms: 'This unincorporated association is a high net worth unincorporated association and falls within article 49(2)(b) of the Financial Services and Markets Act 2000 (Financial Promotion) Order [2005]. I understand that any Business Angel-led Enterprise Capital Fund (within the meaning of article 72F of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001), in which this association participates, or any person who operates that Business Angel-led Enterprise Capital Fund, in which this association participates, will not be authorised under the Financial Services and Markets Act 2000 (and so will not have to satisfy the threshold conditions set out in Part I of Schedule 6 to that Act and will not be subject to Financial Services Authority rules such as those on holding client money). I understand that this means that redress through the Financial Services Authority, the Financial Ombudsman Scheme or the Financial Services Compensation Scheme will not be available. I also understand the risks associated in investing in a Business Angel-led Enterprise Capital Fund and am aware that it is open to the association to seek advice from someone who is authorised under the Financial Services and Markets Act 2000 and who specialises in advising on this kind of investment': Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72F(1) (as so added).

'High value trust' means a trust where the aggregate value of the cash and investments which form a part of the trust's assets (before deducting the amount of its liabilities) is £10 million or more; on behalf of which a trustee has signed a statement in the following terms: 'This trust is a high value trust. I understand that any Business Angel-led Enterprise Capital Fund (within the meaning of article 72F of the Financial Services and

Markets Act 2000 (Regulated Activities) Order 2001), in which this trust participates, or any person who operates that Business Angel-led Enterprise Capital Fund, in which this trust participates, will not be authorised under the Financial Services and Markets Act 2000 (and so will not have to satisfy the threshold conditions set out in Part I of Schedule 6 to that Act and will not be subject to Financial Services Authority rules such as those on holding client money). I understand that this means that redress through the Financial Services Authority, the Financial Ombudsman Scheme or the Financial Services Compensation Scheme will not be available. I also understand the risks associated in investing in a Business Angel-led Enterprise Capital Fund and am aware that it is open to the trust to seek advice from someone who is authorised under the Financial Services and Markets Act 2000 and who specialises in advising on this kind of investment': Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72F(1) (as so added).

'Self-certified sophisticated investor' means an individual who is a 'self-certified sophisticated investor' within the meaning of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, SI 2001/1335, art 50A (revoked: see now Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A) (see PARA 297), and has signed a statement in the following terms: 'I declare that I am a self-certified sophisticated investor within the meaning of article 50A of the Financial Services and Markets Act 2000 (Financial Promotion) Order [2005] and that I understand that any Business Angel-led Enterprise Capital Fund (within the meaning of article 72F of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001), in which I participate, or any person who operates that Business Angel-led Enterprise Capital Fund, in which I participate, will not be authorised under the Financial Services and Markets Act 2000 (and so will not have to satisfy the threshold conditions set out in Part I of Schedule 6 to that Act and will not be subject to Financial Services Authority rules such as those on holding client money). I understand that this means that redress through the Financial Services Authority, the Financial Ombudsman Scheme or the Financial Services Compensation Scheme will not be available. I also understand the risks associated in investing in a Business Angel-led Enterprise Capital Fund and am aware that it is open to me to seek advice from someone who is authorised under the Financial Services and Markets Act 2000 and who specialises in advising on this kind of investment': Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72F(1) (as so added).

References in arts 72E, 72F to a participant in a Business Angel-led Enterprise Capital Fund, doing things on behalf of such a participant and property belonging to such a participant are, respectively, references to that participant in that capacity, to doing things on behalf of that participant in that capacity or to the property of that participant held in that capacity: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72F(2) (as so added).

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### *(c) Arranging Deals, etc*

#### **139. Arranging deals in investments, regulated mortgage contracts, etc.**

Making arrangements for another person (whether as principal or agent) to buy<sup>1</sup>, sell<sup>2</sup>, subscribe for or underwrite a particular investment which is a security<sup>3</sup>, a relevant investment<sup>4</sup> or a specified investment<sup>5</sup>, is a specified kind of activity<sup>6</sup>. Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting such investments (whether as principal or agent) is also a specified kind of activity<sup>7</sup>.

Making arrangements for another person to enter into a regulated mortgage contract<sup>8</sup> as borrower<sup>9</sup>, or for another person to vary the terms of a regulated mortgage contract entered into by him as borrower<sup>10</sup>, in such a way as to vary his obligations under that contract, is a specified kind of activity<sup>11</sup>. Making arrangements with a view to a person who participates in the arrangements entering into a regulated mortgage contract as borrower is also a specified kind of activity<sup>12</sup>.

Making arrangements for another person to enter into a regulated home reversion plan<sup>13</sup> as reversion seller<sup>14</sup> or as plan provider<sup>15</sup>, or for another person to vary the terms of a regulated home reversion plan, entered into on or after 6 April 2007 by him as reversion seller or as plan provider, in such a way as to vary his obligations under that plan, is a specified kind of activity<sup>16</sup>. Making arrangements with a view to a person who participates in the arrangements entering into a regulated home reversion plan as reversion seller or as plan provider is also a specified kind of activity<sup>17</sup>.

Making arrangements for another person to enter into a regulated home purchase plan<sup>18</sup> as home purchaser<sup>19</sup>, or for another person to vary the terms of a regulated home purchase plan, entered into on or after 6 April 2007 by him as home purchaser, in such a way as to vary his obligations under that plan, is a specified kind of activity<sup>20</sup>. Making arrangements with a view to a person who participates in the arrangements entering into a regulated home purchase plan as home purchaser is also a specified kind of activity<sup>21</sup>.

The operation of a multilateral trading facility<sup>22</sup> on which MiFID instruments<sup>23</sup> are traded is also a specified kind of activity<sup>24</sup>.

A person is not to be regarded as carrying on by way of business<sup>25</sup> a relevant investment business activity (including arranging deals in investments, arranging regulated mortgage contracts, arranging regulated home reversion plans, arranging regulated home purchase plans and operating a multilateral trading facility)<sup>26</sup>, unless he carries on the business of engaging in one or more such activities<sup>27</sup>.

The following are excluded from qualifying as the activity of arranging deals in investments<sup>28</sup>:

- 362 (1) any arrangements for a transaction into which the person making the arrangements enters or is to enter as principal or as agent for some other person<sup>29</sup>, or any arrangements which a person makes with a view to transactions into which he enters or is to enter as principal or as agent for some other person<sup>30</sup>;
- 363 (2) arrangements made by a money-lender<sup>31</sup> under which either: (a) a relevant authorised person<sup>32</sup> or a person acting on his behalf will introduce to the money-lender persons with whom the relevant authorised person has entered, or proposes to enter, into a relevant transaction, or will advise such persons to approach the money-lender, with a view to the money-lender lending money on the security of any contract effected pursuant to a relevant transaction<sup>33</sup>; or (b) a relevant authorised person gives an assurance to the money-lender as to the amount which, on the security of any contract effected pursuant to a relevant transaction, will or may be received by the money-lender should the money-lender lend money to a person introduced to him pursuant to the arrangements<sup>34</sup>;
- 364 (3) arrangements under which a person accepts or is to accept, whether as principal or agent, an instrument<sup>35</sup> creating or acknowledging indebtedness in respect of any loan, credit, guarantee or other similar financial accommodation or assurance which is, or is to be, made, granted or provided by that person or his principal<sup>36</sup>;
- 365 (4) arrangements having as their sole purpose the provision of finance to enable a person to buy, sell, subscribe for or underwrite investments<sup>37</sup>;
- 366 (5) arrangements made by a company<sup>38</sup> for the purposes of issuing its own shares<sup>39</sup> or share warrants<sup>40</sup>, and arrangements made by any person for the purposes of issuing his own debentures<sup>41</sup> or debenture warrants<sup>42</sup>;
- 367 (6) any arrangements made for the purposes of carrying out the functions of a body or association which is approved under this provision as an international securities self-regulating organisation, whether the arrangements are made by the organisation itself or by a person acting on its behalf<sup>43</sup>.

The following are excluded from qualifying as the activities of arranging deals in investments, regulated mortgage contracts, regulated home reversion plans and regulated home purchase plans<sup>44</sup>:

- 368 (i) arrangements which do not or would not bring about the transaction to which the arrangements relate<sup>45</sup>;
- 369 (ii) arrangements under which a person merely provides means by which one party to a transaction (or potential transaction) is able to communicate with other parties<sup>46</sup>;
- 370 (iii) arrangements made by a person ('A') who is not an authorised person for or with a view to a transaction which is or is to be entered into by a person ('the client') with or through an authorised person if: the transaction is or is to be entered into on advice to the client by an authorised person<sup>47</sup>; or it is clear, in all the circumstances, that the client, in his capacity as an investor, borrower, reversion seller, plan provider or (as the case may be) home purchaser, is not seeking and has not sought advice from A as to the merits of the client's entering into the transaction (or, if the client has sought such advice, A has declined to give it but has recommended that the client seek such advice from an authorised person)<sup>48</sup>;
- 371 (iv) arrangements under which persons ('clients') will be introduced to another person<sup>49</sup>, where the person to whom introductions are to be made is an authorised person<sup>50</sup>, an exempt person acting in the course of a business comprising a regulated activity in relation to which he is exempt<sup>51</sup>, or a person who is not unlawfully carrying on regulated activities in the United Kingdom and whose ordinary business involves him in engaging in certain activities<sup>52</sup>; the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate<sup>53</sup>; and the arrangements are made with a view to a person entering into a transaction which does not relate to a contract of insurance<sup>54</sup>.

The following are excluded from qualifying as the activities of arranging regulated mortgage contracts, regulated home reversion plans and regulated home purchase plans<sup>55</sup>:

- 372 (A) any arrangements for a contract or plan into which the person making the arrangements enters or is to enter or for a variation of a contract or plan to which that person is (or is to become) a party<sup>56</sup>; and any arrangements which a person makes with a view to contracts or plans into which he enters or is to enter<sup>57</sup>;
- 373 (B) certain arrangements made in the course of administration by an authorised person<sup>58</sup>; and
- 374 (C) certain arrangements under which a client is introduced to an authorised person, an appointed representative or an overseas person<sup>59</sup>.

There are also other separate exclusions from the above specified activities<sup>60</sup> which relate to trustees<sup>61</sup>, a profession or non-investment business<sup>62</sup>, sale of goods and supply of services<sup>63</sup>, groups and joint enterprises<sup>64</sup>, sale of a body corporate<sup>65</sup>, employee share schemes<sup>66</sup>, overseas persons<sup>67</sup>, information society services<sup>68</sup>, activities carried on by a provider of relevant goods or services<sup>69</sup>, provision of information on an incidental basis<sup>70</sup>, large risks contracts where risk is situated outside the EEA<sup>71</sup> and Business Angel-led Enterprise Capital Funds<sup>72</sup>.

1 As to the meaning of 'buying' see PARA 112 note 1.

2 As to the meaning of 'selling' see PARA 112 note 2.

3 As to the meaning of 'security' see PARA 89 note 1.

4 As to the meaning of 'relevant investment' see PARA 126 note 4.

5 Is an investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 86 or art 89 (see PARA 224) so far as relevant to that article: see art 25(1)(c).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1), (2) does not apply to a kind of activity to which art 25D (see the text and notes 22-24) applies: art 25(3) (added by SI 2006/3384). As to whether a limited liability partnership's activities in regard to 'boiler rooms' were possible regulated activities in contravention of the general prohibition but within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25 or the exception in art 26 see *Re Inertia Partnership LLP* [2007] EWHC 539 (Ch), [2007] 1 BCLC 739, [2007] All ER (D) 316 (Feb).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(2). See note 6.

8 As to the meaning of 'regulated mortgage contract' see PARA 203 note 1.

9 As to the meaning of 'borrower' see PARA 203 note 1; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A(3) (art 25A added by SI 2003/1475).

10 Is after the coming into force of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61 (31 October 2004): see PARA 203.

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A(1) (as added: see note 9).

12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A(2) (as added: see note 9).

13 As to the meaning of 'regulated home reversion plan' see PARA 209 note 1.

14 As to the meaning of 'reversion seller' see PARA 209 note 1.

15 As to the meaning of 'plan provider' see PARA 209 note 1.

16 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25B(1) (art 25B added by SI 2006/2383).

17 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25B(2) (as added: see note 16).

18 As to the meaning of 'regulated home purchase plan' see PARA 215 note 1.

19 As to the meaning of 'home purchaser' see PARA 215 note 1.

20 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25C(1) (art 25C added by SI 2006/2383).

21 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25C(2) (as added: see note 20).

22 'Multilateral trading facility' means (1) a multilateral trading facility (within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1) on markets in financial instruments) art 4.1.15) operated by an investment firm, a credit institution or a market operator; or (2) a facility which (a) is operated by an investment firm, a credit institution or market operator which does not have a home member state; and (b) if its operator had a home member state, would be a multilateral trading facility within the meaning of art 4.1.15: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1) (definition added by SI 2006/3384). As to the meanings of 'investment firm', 'credit institution' and 'home member state' see PARA 88 notes 5, 6. 'Market operator' means a market operator within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) art 4.1.13, or a person who would be a market operator if he had his registered office, or if he does not have a registered office his head office, in an EEA state, but does not include (i) a person to whom the Markets in Financial Instruments Directive does not apply by virtue of art 2 (see PARA 88); (ii) a person who does not have a home member state to whom (if he had his registered office, or if he does not have a registered office his head office, in an EEA state) the Markets in

Financial Instruments Directive would not apply by virtue of art 2: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1) (definition added by SI 2006/3384).

23 For these purposes, 'MiFID instrument' means any investment (1) of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 76, 77, 78, 79, 80, 81, 83, 84 or 85 (see par 224); or (2) of the kind specified by art 89 (see PARA 224) so far as relevant to an investment falling within head (1) above, that is a financial instrument: art 25D(2) (art 25D added by SI 2006/3384).

24 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25D(1) (as added: see note 23).

25 See the Financial Services and Markets Act 2000 s 22 (see PARA 84) and s 419 (see PARA 87).

26 The reference is to an activity to which the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) applies, namely an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 14 (dealing in investments as principal); art 21 (dealing in investments as agent) (see PARA 126); art 25 (arranging deals in investments), except in so far as that activity relates to an investment of the kind specified by art 86 (Lloyd's syndicate capacity and syndicate membership), or art 89 (rights and interests) (see PARA 224) so far as relevant to art 86; art 25D (operating a multilateral trading facility); art 37 (managing investments) (see PARA 152); art 40 (safeguarding and administering investments) (see PARA 160); art 45 (sending dematerialised instructions) (see PARA 190); art 51 (establishing etc a collective investment scheme) (see PARA 171); art 52 (establishing etc a pension scheme) (see PARA 187); art 53 (advising on investments) (see PARA 174); and art 64 (agreeing) (see PARA 221), so far as relevant to any of the articles mentioned above: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) (amended by SI 2003/1476; SI 2006/1969; SI 2006/3384). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) does not apply to any insurance mediation activity: see art 3(2) (as so amended). A person is not to be regarded as carrying on by way of business any insurance mediation activity unless he takes up or pursues that activity for remuneration: art 3(4) (art 3(4), (5) added by SI 2003/1476). As to the meaning of 'insurance mediation activity' see PARA 112 note 20. A person is also not to be regarded as carrying on by way of business activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans), art 53A (advising on regulated mortgage contracts), art 53B (advising on regulated home reversion plans), art 53C (advising on regulated home purchase plans) (see PARA 174) or art 64 (agreeing) (see PARA 221) as far as relevant to the articles mentioned above, unless he carried on the business of engaging in those activities: see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 3A, 3B, 3C (added by SI 2003/1475; SI 2006/2383).

27 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) is without prejudice to art 4 in regard to occupational pension schemes (see PARA 152): art 3(3) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419: see note 25.

28 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25.

29 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 28(1). The exclusion is from art 25(1). As to entering into a transaction see PARA 113 note 2. The exclusions in art 28(1), (2) do not apply to arrangements made for or with a view to a transaction which relates to a contract of insurance, unless the person making the arrangements either is the only policyholder, or as a result of the transaction, would become the only policyholder: art 28(3) (added by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3.

30 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 28(2). The exclusion is from art 25(2).

31 For these purposes, 'money-lender' means a person who is: (1) a money-lending company within the meaning of the Companies Act 2006 s 209 (formerly the Companies Act 1985 s 338) (see **COMPANIES** vol 15 (2009) PARA 574); (2) a body corporate incorporated under the law of, or of any part of, the United Kingdom relating to building societies (see PARA 1856 et seq); or (3) a person whose ordinary business includes the making of loans or the giving of guarantees in connection with loans: see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 30(2).



32 For these purposes, 'relevant authorised person' means an authorised person who has permission to effect contracts of insurance or to sell investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 89 (see PARA 224), so far as relevant to such contracts: art 30(2) (definition amended by SI 2003/1476).

33 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 30(1)(a) (substituted by SI 2001/3544). The exclusion is from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1), (2). In art 30(1) 'relevant transaction' means the effecting of a contract of insurance or the sale of an investment of the kind specified by art 89 (see PARA 224), so far as relevant to such contracts: art 30(2) (definition amended by SI 2003/1476).

34 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 30(1)(b).

35 The reference in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 31(1) to a person accepting an instrument includes a reference to a person becoming a party to an instrument otherwise than as a debtor or a surety: art 31(2). As to the meaning of 'instrument' see PARA 115 note 2.

36 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 31(1). The exclusion is from art 25(1), (2).

37 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 32. The exclusion is from art 25(2).

38 As to the meaning of 'company' see PARA 116 note 2; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 34(2).

39 As to the meaning of 'shares' see PARA 116 note 3; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 34(2).

40 As to the meaning of 'share warrants' see PARA 116 note 4; definition applied by Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 34(2).

41 As to the meaning of 'debentures' see PARA 116 note 3; definition applied by Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 34(2).

42 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 34(1). The exclusion is from art 25(1), (2). It should be noted that a company is not, by reason of issuing its own shares or share warrants, and a person is not, by reason of issuing his own debentures or debenture warrants, to be treated as selling them: art 34(1). As to the meaning of 'debenture warrants' see PARA 116 note 4; definition applied by art 34(2).

43 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 35(1). The exclusion is from art 25(1), (2). The Treasury may approve as an international securities self-regulating organisation any body corporate or unincorporated association with respect to which the conditions mentioned in heads (1)-(6) below appear to it to be met if, having regard to such matters affecting international trade, overseas earnings and the balance of payments or otherwise as they consider relevant, it appears to them that to do so would be desirable and not result in any undue risk to investors: art 35(2). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. The conditions are that:

174 (1) the body or association does not have its head office in the United Kingdom (art 35(3)(a));

175 (2) the body or association is not eligible for recognition under the Financial Services and Markets Act 2000 s 287 or s 288 (applications by investment exchanges and clearing houses) (see PARAS 706-707) on the ground that (whether or not it has applied, and whether or not it would be eligible on other grounds) it is unable to satisfy the requirements of one or both of s 292(3)(a) and s 292(3)(b) (requirements for overseas investment exchanges and overseas clearing houses) (see PARA 710) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 35(3)(b));

176 (3) the body or association is able and willing to co-operate with the Financial Services Authority by the sharing of information and in other ways (art 35(3)(c));

177 (4) adequate arrangements exist for co-operation between the Authority and those responsible for the supervision of the body or association in the country or territory in which its head office is situated (art 35(3)(d));

178 (5) the body or association has a membership composed of persons falling within any of the following categories, that is to say, authorised persons, exempt persons, and persons whose head offices are outside the United Kingdom and whose ordinary business involves them in engaging in activities specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (or which would be apart from any exclusion made by Pt II (arts 4-72F)) (art 35(3)(e)); and

179 (6) the body or association facilitates and regulates the activity of its members in the conduct of international securities business (art 35(3)(f)).

As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the Financial Services Authority see PARAS 4, 6 et seq. 'International securities business' means the business of buying, selling, subscribing for or underwriting investments (or agreeing to do so), either as principal or agent, where: (a) the investments are securities or relevant investments and are of a kind which, by their nature, and the manner in which the business is conducted, may be expected normally to be bought or dealt in by persons sufficiently expert to understand the risks involved; and (b) either the transaction is international or each of the parties may be expected to be indifferent to the location of the other, and for the purposes of this definition, it is irrelevant that the investments may ultimately be bought otherwise than in the course of such business by persons not so expert: art 35(4) (amended by SI 2003/1476). As to the meaning of 'security' see PARA 89 note 1.

Any such approval is to be given by notice in writing, and the Treasury may by a further notice in writing withdraw any such approval if for any reason it appears to it that it is not appropriate to it to continue in force: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 35(5).

44 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25, 25A, 25B, 25C.

45 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 26 (amended by SI 2006/2383). The exclusion is from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25(1), 25A(1), 25B(1), 25C(1). See also note 6.

46 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 27 (amended by SI 2006/2383). The exclusion is from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25(2), 25A(2), 25B(2), 25C(2).

47 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 29(1)(a) (art 29(1) amended by SI 2006/2383). The exclusion is from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25(1), 25A(1), (2), 25B(1), (2), 25C(1), (2). The exclusion in art 29(1) does not apply if the transaction relates, or would relate, to a contract of insurance, or A receives from any person other than the client any pecuniary reward or other advantage, for which he does not account to the client, arising out of his making the arrangements: art 29(2) (substituted by SI 2003/1476). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 29 is subject to art 4(4) (see PARA 88): art 29(3) (added by SI 2006/3384).

48 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 29(1)(b) (amended by SI 2006/2383). See note 40.

49 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 33(a) (art 33 amended by SI 2006/2383). The exclusion is from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25(2), 25A(2), 25B(2), 25C(2).

50 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 33(b)(i). As to authorised persons see PARA 314.

51 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 33(b)(ii). As to exempt persons see PARA 80.

52 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 33(b)(iii) (amended by SI 2003/1475; SI 2003/1476; SI 2006/2383). The reference in the text is a reference to ordinary business involving him in engaging in an activity of the kind specified by any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (dealing in investments as principal) (see PARA 112), art 21 (dealing in investments as agent) (see PARA 126), art 25 (arranging deals in investments), art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans), art 37 (managing investments) (see PARA 152), art 39A (assisting in administration and performance of a contract of insurance) (see PARA 104), art 40 (safeguarding and administering investments) (see PARA 160), art 45 (sending dematerialised instructions) (see PARA 190), art 51 (establishing etc a collective investment scheme) (see PARA 171), art 52 (establishing etc a stakeholder pension scheme) (see PARA 187), art 53 (advising on investments) (see PARA 174), art 53A (advising on regulated mortgage contracts) (see PARA 174), art 53B (advising on regulated home reversion plans) (see PARA 174), art

53C (advising on regulated home purchase plans) (see PARA 174) (or, so far as relevant to any of those articles, art 64 (agreeing to carry on specified kinds of activity) (see PARA 221)), or which would do so apart from any exclusion from any of those articles made by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: see art 33(b)(iii) (as so amended).

53 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 33(c).

54 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 33(d) (added by SI 2003/1476).

55 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25A, 25B, 25C.

56 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 28A(1) (art 28A added by SI 2003/1475; and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 28A(1) amended by SI 2006/2383). The exclusion is from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25A(1), 25B(1), 25C(1).

57 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 28A(2) (as added (see note 49); amended by SI 2006/2383).

58 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 29A (art 29A originally added by SI 2003/1475; and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 29A(1) renumbered as such and art 29A(2), (3) added by SI 2006/2383).

A person who is not an authorised person ('A') does not carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A(1)(b) (see the text and note 10) as a result of (1) anything done by an authorised person ('B') in relation to a regulated mortgage contract which B is administering pursuant to an arrangement of the kind mentioned in art 62(a) (see PARA 204); or (2) anything A does in connection with the administration of a regulated mortgage contract in circumstances falling within art 62(b) (see PARA 204): art 29A(1) (as so renumbered). A person who is not an authorised person ('A') does not carry on an activity of the kind specified by art 25B(1)(b) (see the text and note 16) as a result of (a) anything done by an authorised person ('B') in relation to a regulated home reversion plan which B is administering pursuant to an arrangement of the kind mentioned in art 63C(a) (see PARA 210); or (b) anything A does in connection with the administration of a regulated home reversion plan in circumstances falling within art 63C(b) (see PARA 210): art 29A(2) (as so added). A person who is not an authorised person ('A') does not carry on an activity of the kind specified by art 25C(1)(b) (see the text and note 20) as a result of (i) anything done by an authorised person ('B') in relation to a regulated home purchase plan which B is administering pursuant to an arrangement of the kind mentioned in art 63G(a) (see PARA 216); or (ii) anything A does in connection with the administration of a regulated home purchase plan in circumstances falling within art 63G(b) (see PARA 216): art 29A(3) (as so added).

59 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 33A (art 33A added by SI 2003/1475; and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 33A(1A), (1B) added and art 33A(4) substituted by SI 2006/2383).

There are excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A(2) (see the text and note 12) arrangements where (1) they are arrangements under which a client is introduced to a person ('N') who is an authorised person who has permission to carry on a regulated activity of the kind specified by any of art 25A, art 53A (see PARA 174) and art 61(1) (see PARA 203); an appointed representative who may carry on a regulated activity of the kind specified by either of art 25A and art 53A without contravening the general prohibition (see PARA 80), or an overseas person who carries on activities specified by any of arts 25A, 53A and 61(1); and (2) the conditions mentioned in art 33A(2) (see below) are satisfied: art 33A(1) (as so added). There are excluded from art 25B(2) (see the text and note 17) arrangements where (a) they are arrangements under which a client is introduced to a person ('N') who is an authorised person who has permission to carry on a regulated activity of the kind specified by any of art 25B, art 53B (see PARA 174) and art 63B(1) (see PARA 209), an appointed representative who may carry on a regulated activity of the kind specified by either of art 25B and art 53B without contravening the general prohibition, or an overseas person who carries on activities specified by any of arts 25B, 53B and 63B(1); and (b) the conditions mentioned in art 33A(2) (see below) are satisfied: art 33A(1A) (as so added). There are excluded from art 25C(2) (see the text and note 21) arrangements where (i) they are arrangements under which a client is introduced to a person ('N') who is an authorised person who has permission to carry on a regulated activity of the kind specified by any of art 25C, art 53C (see PARA 174) and art 63F(1) (see PARA 215), an appointed representative who may carry on a regulated activity of the kind specified by either of arts 25C and 53C without contravening the general prohibition, or an overseas person who carries on activities specified by any of arts 25C, 53C and 63F(1); and (ii) the conditions mentioned in art 33A(2) are satisfied: art 33(1A) (as so added).

The conditions referred to above are: (A) that the person making the introduction ('P') does not receive any money, other than money payable to P on his own account, paid by the client for or in connection with any transaction which the client enters into with or through N as a result of the introduction; and (B) that before making the introduction P discloses to the client such of the information mentioned in art 33A(3) (see below) as applies to P: art 33A(2) (as so added). That information is: that P is a member of the same group as N; details of any payment which P will receive from N, by way of fee or commission, for introducing the client to N; an indication of any other reward or advantage received or to be received by P that arises out of his introducing clients to N: art 33A(3) (as so added).

'Client' means: (aa) for the purposes of art 33A(1), a borrower within the meaning given by art 61(3)(a)(i) (see PARA 203), or a person who is or may be contemplating entering into a regulated mortgage contract as such a borrower; (bb) for the purposes of art 33A(1A), a reversion seller, a plan provider or a person who is or may be contemplating entering into a regulated home reversion plan as a reversion seller or as a plan provider; (cc) for the purposes of art 33A(1B), a home purchaser or a person who is or may be contemplating entering into a regulated home purchase plan as a home purchaser: art 33A(4) (as so substituted).

60 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25, 25A, 25B, 25C, 25D. Note that the exclusions to art 25 are in arts 66, 67, 68, 69, 70, 71, 72, 72A, 72B, 72C, 72D, 72E; the exclusions to arts 25A, 25B, 25C are in arts 66, 67, 72, 72A; and the exclusion to art 25D is in art 72. See art 36 (amended by SI 2003/1475; SI 2003/1476; SI 2006/2383; SI 2006/3384).

61 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 66; and PARA 140.

62 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 67; and PARA 141.

63 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 68; and PARA 142.

64 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 69; and PARA 143.

65 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 70; and PARA 144.

66 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 71; and PARA 145.

67 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 72; and PARA 146.

68 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 72A; and PARA 147.

69 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 72B; and PARA 148.

70 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 72C; and PARA 149.

71 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 36, 72D; and PARA 150.

72 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 72E, 72F; and PARA 151.

## UPDATE

### 139 Arranging deals in investments, regulated mortgage contracts, etc

TEXT AND NOTES 1-24--Making arrangements (1) for another person to enter into a regulated sale and rent back agreement as an agreement seller or as an agreement provider; or (2) for another person to vary the terms of a regulated sale and rent back agreement, entered into on or after 1 July 2009 by him as agreement seller or agreement provider, in such a way as to vary his obligations under that agreement, is

a specified kind of activity: SI 2001/544 art 25E(1)(a), (b) (art 25E added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). For the meaning of 'regulated sale and rent back agreement', 'agreement seller', and 'agreement provider' see PARA 220A. Making arrangements with a view to a person who participates in the arrangements entering into a regulated sale and rent back agreement as agreement seller or agreement provider is also a specified activity: SI 2001/544 art 25E(2). For transitional provisions see Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2009, SI 2009/1342, arts 32-34, Schedule.

NOTE 26--A person is not to be regarded as carrying on by way of business an activity specified by SI 2001/544 art 25E (see TEXT AND NOTES 1-24), art 53D (see PARA 174), or art 64 so far as relevant to either art 25E or art 53D, unless he carries on the business of engaging in that activity: SI 2001/1177 art 3D (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

NOTE 45--The exclusion is also from SI 2001/544 art 25E(1) (see TEXT AND NOTES 1-24): SI 2001/544 art 26 (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

NOTE 46--The exclusion is also from SI 2001/544 art 25E(2) (see TEXT AND NOTES 1-24): SI 2001/544 art 27 (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

TEXT AND NOTES 47, 48--The exclusion is also from SI 2001/544 art 25E(1), (2) (see TEXT AND NOTES 1-24): SI 2001/544 art 29(1) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). Head (iii) now also applies to arrangements made by A if it is clear, in all the circumstances, that the client, in his capacity as an agreement provider, is not seeking and has not sought advice from A as to the merits of the client's entering into the transaction (or, if the client has sought such advice, A has declined to give it but has recommended that the client seek such advice from an authorised person): SI 2001/544 art 29(1)(b).

TEXT AND NOTES 49-52--The exclusion is also from SI 2001/544 art 25E(2) (see TEXT AND NOTES 1-24): SI 2001/544 art 33 (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). The reference in the text is also a reference to ordinary business involving a person in engaging in an activity of the kind specified by SI 2001/544 art 25E (arranging regulated sale and rent back agreements), art 53D (advising on regulated sale and rent back agreements): SI 2001/544 art 33(b)(iii).

TEXT AND NOTES 55-59--Heads (A)-(C) are also excluded from qualifying as the activities of arranging regulated sale and rent back agreements under SI 2001/544 art 25E (see TEXT AND NOTES 1-24): SI 2001/544 arts 28A, 29A, 33A (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). Head (A) now also refers to arrangements for such agreements; the exclusion under art 28A(1) is also from SI 2001/544 art 25E(1); and the exclusion under art 28A(2) is also from SI 2001/544 art 25E(2): SI 2001/544 art 28A(1), (2). In relation to head (B), a person who is not an authorised person ('A') does not carry on an activity of the kind specified by art 25E(1)(b) as a result of (1) anything done by an authorised person ('B') in relation to a regulated sale and rent back agreement which B is administering pursuant to an arrangement of the kind mentioned in SI 2001/544 art 63K(a) (PARA 220A); or (2) anything A does in connection with the administration of a regulated sale and rent back agreement in circumstances falling within SI 2001/544 art 63K(a): SI 2001/544 art 29A(4) (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). In relation to head

(c), there are excluded from SI 2001/544 art 25E(2) arrangements where (1) they are arrangements under which a client is introduced to a person ('N') who is (a) an authorised person who has permission to carry on a regulated activity of the kind specified by any of SI 2001/544 arts 25E, 53D and 63J(1) (PARA 220A); (b) an appointed representative who may carry on a regulated activity of the kind specified by either SI 2001/544 art 25E or art 53D without contravening the general prohibition; or (c) an overseas person who carries on activities specified by any of SI 2001/544 arts 25E, 53D, 63J(1); and (2) the conditions mentioned in SI 2001/544 art 33A(2) are satisfied: SI 2001/544 art 33A(1C) (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). For these purposes, 'client' means an agreement provider, an agreement seller or a person who is or may be contemplating entering into a regulated sale and rent back agreement as an agreement provider or agreement seller: SI 2001/544 art 33A(4)(d) (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

NOTE 60--SI 2001/544 art 36 further amended: SI 2009/1342 (with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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#### **140. Exclusion for trustees, nominees and personal representatives.**

There are excluded from the specified activities<sup>1</sup> of arranging deals in investments, arranging regulated mortgage contracts, arranging regulated home reversion plans and arranging regulated home purchase plans<sup>2</sup> arrangements made by a person acting as trustee or personal representative for, or with a view to, a transaction which is or is to be entered into: (1) by that person and a fellow trustee or personal representative (acting in their capacity as such)<sup>3</sup>; or (2) by a beneficiary under the trust, will or intestacy<sup>4</sup>. These provisions<sup>5</sup> do not apply if the person carrying on the activity is remunerated for what he does in addition to any remuneration he receives as trustee or personal representative, and for these purposes a person is not to be regarded as receiving additional remuneration merely because his remuneration is calculated by reference to time spent<sup>6</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Ie from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25(1), (2), 25A(1), (2), 25B(1), (2), 25C(1), (2) (see PARA 139): see art 66(2) (amended by SI 2006/3384).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(2)(a). Article 66 is subject to art 4(4) (see PARA 88): art 66(8) (added by SI 2006/3384).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(2)(b).

5 Ie the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(2).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(7).

**UPDATE****140 Exclusion for trustees, nominees and personal representatives**

TEXT AND NOTES 1-4--Such arrangements are also excluded from the specified activity of arranging regulated sale and rent back agreements (ie from SI 2001/544 art 25E(1), (2) (PARA 139)): SI 2001/544 art 66(2) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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**141. Exclusion for activities carried on in the course of a profession or non-investment business.**

There is excluded from the specified activities<sup>1</sup> of arranging deals in investments, arranging regulated mortgage contracts, arranging regulated home reversion plans and arranging regulated home purchase plans<sup>2</sup> any activity which:

- 375 (1) is carried on in the course of carrying on any profession or business which does not otherwise consist of the carrying on of regulated activities in the United Kingdom<sup>3</sup>; and
- 376 (2) may reasonably be regarded as a necessary part of other services provided in the course of that profession or business<sup>4</sup>.

However, this exclusion does not apply if the activity in question is remunerated separately from the other services<sup>5</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Ie excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25(1), (2), 25A, 25B, 25C (see PARA 139): see art 67(1) (amended by SI 2003/1475; SI 2006/2383).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(1)(a) (amended by SI 2001/3544). As to the meaning of 'United Kingdom' see PARA 2 note 3. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67 is subject to art 4(4), (4A) (see PARA 88): art 67(3) (added by SI 2006/3384).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(1)(b).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(2).

**UPDATE**

### **141 Exclusion for activities carried on in the course of a profession or non-investment business**

TEXT AND NOTES 1-4--Such activity is also excluded from the specified activity of arranging regulated sale and rent back agreements (ie from SI 2001/544 art 25E (PARA 139)): SI 2001/544 art 67(1) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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### **142. Exclusion for activities carried on in connection with the sale of goods or supply of services by a supplier to a customer.**

There is excluded from each specified activity<sup>1</sup> in regard to arranging deals in investments<sup>2</sup> arrangements made by a supplier for, or with a view to, a transaction which is or is to be entered into by a customer for the purposes of, or in connection with, the sale of goods or supply of services, or a related sale or supply<sup>3</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 ie excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1), (2) (see PARA 139): see art 68(5).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(5). Article 68(5) does not apply in the case of a transaction for the sale or purchase of a contract of insurance, an investment of the kind specified by art 81 (see PARA 224), or an investment of the kind specified by art 89 (see PARA 224) so far as relevant to such a contract or such an investment: art 68(9) (amended by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68 is subject to art 4(4) (see PARA 88): art 68(12) (added by SI 2006/3384).

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### **143. Exclusion for groups and joint enterprises.**

There are excluded from each specified activity<sup>1</sup> of arranging deals in investments<sup>2</sup> arrangements made by a person if:



- 377 (1) he is a member of a group and the arrangements in question are for, or with a view to, a transaction which is or is to be entered into, as principal, by another member of the same group<sup>3</sup>; or
- 378 (2) he is or proposes to become a participator in a joint enterprise<sup>4</sup>, and the arrangements in question are for, or with a view to, a transaction which is or is to be entered into, as principal, by another person who is or proposes to become a participator in that enterprise, for the purposes of, or in connection with, that enterprise<sup>5</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 He excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1), (2) (see PARA 139): see art 69(4).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(4)(a). Article 69(4) does not apply to arrangements for, or with a view to, a transaction for the sale or purchase of a contract of insurance: art 69(11) (added by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69 is subject to art 4(4) (see PARA 88): art 68(13) (added by SI 2006/3384).

4 As to the meaning of 'joint enterprise' see PARA 113 note 12.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(4)(b).

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#### **144. Exclusion for activities carried on in connection with the sale of a body corporate.**

There is an exclusion from each specified activity<sup>1</sup> in regard to arranging deals in investments<sup>2</sup> by entering as principal into a transaction<sup>3</sup> if:

- 379 (1) the transaction is one to acquire or dispose of shares in a body corporate other than an open-ended investment company<sup>4</sup>, or is entered into for the purposes of such an acquisition or disposal<sup>5</sup>; and
- 380 (2) either the conditions set out in heads (a) to (c) below are met<sup>6</sup> or those conditions are not met, but the object of the transaction may nevertheless reasonably be regarded as being the acquisition of day to day control of the affairs of the body corporate<sup>7</sup>.

The conditions mentioned above are that:

- 381 (a) the shares consist of or include 50 per cent or more of the voting shares<sup>8</sup> in the body corporate<sup>9</sup>; or
- 382 (b) the shares, together with any already held by the person acquiring them, consist of or include at least that percentage of such shares<sup>10</sup>; and

383 (c) in either case, the acquisition or disposal is between parties each of whom is a body corporate, a partnership, a single individual or a group of connected individuals<sup>11</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Ie making arrangements for another person (whether as principal or agent) to buy, sell or subscribe for or underwrite particular investments or making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting such investments, ie activities of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1), (2) (see PARA 139): see art 70(5).

3 As to entering into a transaction see PARA 113 note 2.

4 As to open-ended investment companies see PARA 621 et seq.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(a), (5). Article 70(5) does not apply in the case of a transaction for the sale or purchase of a contract of insurance: art 70(7) (added by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70 is subject to art 4(4) (see PARA 88): art 70(8) (added by SI 2006/3384).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(b)(i), (5).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(b)(ii), (5).

8 As to the meaning of 'voting shares' see PARA 113 note 12.

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(a), (5).

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(b), (5).

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(c). As to the meaning of 'a group of connected individuals' see PARA 122 note 11. As to the meaning of 'close relative' see PARA 90 note 26.

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#### **145. Exclusion for activities carried on in connection with employee share schemes.**

There are excluded from each specified activity<sup>1</sup> in regard to arranging deals in investments<sup>2</sup> arrangements made by a person ('C'), a member of the same group as C or a relevant trustee<sup>3</sup> if the arrangements in question are for, or with a view to, entering as principal into a transaction<sup>4</sup> the purpose of which is to enable or facilitate:

384 (1) transactions in shares in, or debentures issued by C between, or for the benefit of<sup>5</sup>:

67. (a) the bona fide employees or former employees of C or of another member of the same group as C<sup>6</sup>; and
68. (b) the wives, husbands, widows, widowers, civil partners, surviving civil partners, or children or step-children under the age of eighteen of such employees or former employees<sup>7</sup>;
- 42
- 385 (2) or the holding of such shares or debentures by, or for the benefit of, such persons<sup>8</sup>.

1 A 'specific activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 le of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1), (2) (see PARA 139): see art 71(4).

3 As to the meaning of 'relevant trustee' see PARA 123 note 1. As to the meanings of 'shares' and debentures' see PARA 123 note 1.

4 As to entering into a transaction see PARA 113 note 2.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(1)(a), (4).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(2)(a), (4).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(2)(b), (4) (art 71(2)(b) amended by SI 2005/2114).

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(1)(b), (4).

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#### **146. Exclusion for overseas persons.**

There are excluded from the specified activities<sup>1</sup> of making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite certain particular investments or operating a multilateral trading facility<sup>2</sup> arrangements made by an overseas person<sup>3</sup> with an authorised person<sup>4</sup>, or an exempt person<sup>5</sup> acting in the course of a business comprising a regulated activity<sup>6</sup> in relation to which he is exempt<sup>7</sup>. There are excluded from the specified activities of making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting such investments or operating a multilateral trading facility<sup>8</sup> arrangements made by an overseas person with a view to transactions which are, as respects transactions in the United Kingdom<sup>9</sup>, confined to transactions entered into by authorised persons as principal or agent<sup>10</sup>; and transactions entered into by exempt persons, as principal or agent, in the course of business comprising regulated activities in relation to which they are exempt<sup>11</sup>. There is also an exclusion relating to the specified activity of operating a multilateral trading facility that applies to the specified activity of dealing in investments as principal<sup>12</sup>.

An overseas person does not carry on the specified activities of arranging regulated mortgage contracts, arranging regulated home reversion plans or arranging regulated home purchase

plans<sup>13</sup> if each person who may be contemplating entering into the relevant type of agreement<sup>14</sup> in the relevant capacity<sup>15</sup> is non-resident<sup>16</sup>. There are excluded from these activities<sup>17</sup> arrangements made by an overseas person to vary the terms of a qualifying agreement<sup>18</sup>. There are also excluded from these activities<sup>19</sup> arrangements made by an overseas person which are made solely with a view to non-resident persons who participate in those arrangements entering, in the relevant capacity, into the relevant type of agreement<sup>20</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1) (see PARA 139) or art 25D (see PARA 139): see art 72(3) (as amended: see note 7).

3 As to the meaning of 'overseas person' see PARA 124 note 1.

4 As to authorised persons see PARA 314.

5 As to exempt persons see PARA 330.

6 As to regulated activities see PARA 80.

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(3) (amended by SI 2006/3384). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001, 544, art 72(1)-(5) does not apply where the overseas person is an investment firm or credit institution who is providing or performing investment services and activities on a professional basis, and whose home member state is the United Kingdom: art 72(8) (added by SI 2006/3384). As to the meanings of 'investment firm', 'investment services and activities' and 'home member state' see PARA 88 note 5. As to the meaning of 'credit institution' see PARA 88 note 6.

8 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(2) (see PARA 139) or art 25D (see PARA 139): see art 72(4) (amended by SI 2006/3384). See note 7.

9 As to the meaning of 'United Kingdom' see PARA 2 note 3.

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(4)(a). See note 7.

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(4)(b). See note 7.

12 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(1), (2); and PARA 123. See note 7.

13 Is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25A(1)(a), 25B(1)(a), 25C(1)(a): see PARA 139.

14 'Relevant type of agreement' means: (1) in relation to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 25A (see PARA 139), a regulated mortgage contract; (2) in relation to art 25B (see PARA 139), a regulated home reversion plan; (3) in relation to art 25C (see PARA 139), a regulated home purchase plan: art 72(5F)(d) (art 72(5A)-(5F) added by SI 2003/1475 and substituted by SI 2006/2383). As to the meaning of 'regulated mortgage contract' see PARA 203 note 1. As to the meaning of 'regulated home reversion plan' see PARA 209 note 1. As to the meaning of 'regulated home purchase plan' see PARA 215 note 1.

15 'Relevant capacity' means: (1) in the case of a regulated mortgage contract, as borrower; (2) in the case of a regulated home reversion plan, as reversion seller or plan provider; (3) in the case of a regulated home purchase plan, as home purchaser: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 72(5F)(c) (as added and substituted: see note 14). As to the meaning of 'reversion seller' see PARA 209 note 1. As to the meaning of 'plan provider' see PARA 209 note 1. As to the meaning of 'home purchaser' see PARA 215 note 1.

16 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 72(5A) (as added and substituted: see note 14). 'Non-resident' means not normally resident in the United Kingdom: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 72(5F)(a) (as so added and substituted).

17     le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, arts 25A(1)(b), 25B(1)(b), 25C(1)(b): see PARA 139.

18     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 72(5B) (as added and substituted: see note 14). 'Qualifying agreement' means: (1) in relation to arts 25A, 61 (as to art 61 see PARA 203), a regulated mortgage contract where the borrower (or each borrower) is non-resident when he enters into it; (2) in relation to arts 25B, 63B (as to art 63B see PARA 209), a regulated home reversion plan where the reversion seller (or each reversion seller) is non-resident when he enters into it; (3) in relation to arts 25C, 63F (as to art 63F see PARA 215), a regulated home purchase plan where the home purchaser (or each home purchaser) is non-resident when he enters into it: art 72(5F)(b) (as so added and substituted).

19     le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, arts 25A(2), 25B(2), 25C(2): see PARA 139.

20     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 72(5C) (as added and substituted: see note 14).

## UPDATE

### 146 Exclusion for overseas persons

TEXT AND NOTES--Such arrangements are also excluded from the specified activity of arranging regulated sale and rent back agreements (ie from SI 2001/544 art 25E(1)(a), (b), (2) (PARA 139)): SI 2001/544 art 72(5A)-(5C) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). 'Qualifying agreement' means, in relation to SI 2001/544 arts 25E, 63J (PARA 220A), a regulated sale and rent back agreement where the agreement seller (or each agreement seller) is non-resident when the agreement seller enters into it; 'relevant capacity' means, in the case of a regulated sale and rent back agreement, as agreement seller or agreement provider; and 'relevant type of agreement' means, in relation to art 25E, a regulated sale and rent back agreement: SI 2001/544 art 72(5F) (b), (c), (d) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). For the meaning of 'regulated sale and rent back agreement', 'agreement seller', and 'agreement provider' see PARA 220A.

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### 147. Exclusion for information society services.

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). The exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) does not apply to the activity of effecting or carrying out a contract of insurance as principal, where:

180     (1) the activity is carried on by an undertaking which has received official authorisation in accordance with the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 4 or the First

Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(a) (art 72A as so added; art 72A(2)(a) amended by SI 2004/3379)); and

- 181 (2) the insurance falls within the scope of any of the Insurance Directives (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(b) (as so added)).

As to the meaning of 'contract of insurance' see PARA 90 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'Insurance Directives' see PARA 86 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 36 (amended by SI 2003/1476; SI 2006/2383). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

## UPDATE

### 147 Exclusion for information society services

NOTE 2--SI 2001/544 art 36 further amended: SI 2009/1342 (with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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### 148. Exclusion for activities carried on in regard to certain insurance.

There is excluded from the specified activity<sup>1</sup> of arranging deals in investments<sup>2</sup> any arrangements made by a provider<sup>3</sup> for, or with a view to, a transaction for the sale or purchase of a connected contract of insurance<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1), (2) (see PARA 139): see art 72B(3) (as added: see note 4).

3 As to the meaning of 'provider' see PARA 109 note 4.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B(3) (art 72B added by SI 2003/1476). As to the meaning of 'connected contract of insurance' see PARA 109 note 4.

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#### **149. Exclusion for provision of information on an incidental basis.**

There is excluded from the specified activity<sup>1</sup> of arranging deals in investments<sup>2</sup> the making of arrangements for, or with a view to, a transaction for the sale or purchase of a contract of insurance<sup>3</sup> or any rights or interests in certain investments<sup>4</sup>, so far as relevant to such a contract, where that activity meets the following conditions<sup>5</sup>:

- 386 (1) that the activity consists of the provision of information to the policyholder or potential policyholder<sup>6</sup>;
- 387 (2) that the activity is carried on by a person in the course of carrying on a profession or business which does not otherwise consist of the carrying on of regulated activities<sup>7</sup>; and
- 388 (3) that the activity may reasonably be regarded as being incidental to that profession or business<sup>8</sup>.

<sup>1</sup> A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

<sup>2</sup> I.e. excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1), (2) (see PARA 139): see art 72C(1) (as added: see note 5).

<sup>3</sup> As to the meaning of 'contract of insurance' see PARA 90 note 3.

<sup>4</sup> I.e. an investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 89: see PARA 224.

<sup>5</sup> Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(1) (art 72C added by SI 2003/1476).

<sup>6</sup> Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(a) (as added: see note 5).

<sup>7</sup> Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(b) (as added: see note 5). As to regulated activities generally see PARA 84 et seq.

<sup>8</sup> Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(c) (as added: see note 5).

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#### **150. Exclusion for large risks contracts where risk situated outside the EEA.**

There is excluded from the specified activity<sup>1</sup> of arranging deals in investments<sup>2</sup> any activity which is carried on in relation to a large risks contract of insurance<sup>3</sup>, to the extent that the risk of commitment covered by the contract is not situated in an EEA state<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1), (2) (see PARA 139): see art 72D(1) (as added: see note 4).

3 As to the meaning of 'large risks contract of insurance' see PARA 111 note 3.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72D(1) (art 72D added by SI 2003/1476).

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### **151. Exclusion for Business Angel-led Enterprise Capital Funds.**

There is excluded from the specified activity<sup>1</sup> of arranging deals in investments<sup>2</sup> arrangements made by a specified type of body corporate<sup>3</sup> for or with a view to a transaction which is or is to be entered into by or on behalf of the participants of a Business Angel-led Enterprise Capital Fund<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1), (2) (see PARA 139): see art 72E(2) (as added: see note 4).

3 As to the specified type of body corporate see PARA 138 note 1.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E(2) (art 72E added by SI 2005/1518). As to the meaning of 'Business Angel-led Enterprise Capital Fund' see PARA 138 note 4. Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Money Laundering Regulations 2007, SI 2007/2157 (see PARA 539 et seq), in so far as those Regulations would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(9) (as so added; amended by SI 2007/2157). Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Financial Services and Markets Act 2000 s 397 (misleading statements and practices) (see PARA 568), in so far as that section would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(10) (as so added). Article 72E is subject to art 4(4) (see PARA 88): art 72E(11) (added by SI 2006/3384).

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## (G) MANAGING INVESTMENTS

### 152. Managing investments.

Managing assets belonging to another person, in circumstances involving the exercise of discretion, is a specified kind of activity<sup>1</sup> if:

- 389 (1) the assets consist of or include any investment which is a security<sup>2</sup> or a contractually based investment<sup>3</sup>; or
- 390 (2) the arrangements for their management are such that the assets may consist of or include such investments, and either the assets have at any time since 29 April 1988 done so, or the arrangements have at any time (whether before or after that date) been held out as arrangements under which the assets would do so<sup>4</sup>.

A person is not to be regarded as carrying on by way of business<sup>5</sup> a relevant investment business activity (including managing investments)<sup>6</sup>, unless he carries on the business of engaging in one or more such activities<sup>7</sup>.

This is subject to exclusions for attorneys<sup>8</sup>, trustees, nominees and personal representatives<sup>9</sup>, sale of goods and supply of services<sup>10</sup>, groups and joint enterprises<sup>11</sup>, information society services<sup>12</sup>, provision of information on an incidental basis<sup>13</sup> and Business Angel-led Enterprise Capital Funds<sup>14</sup>.

A person who carries on the activity of managing investments<sup>15</sup>, where the assets in question are held for the purposes of an occupational pension scheme<sup>16</sup>, is to be regarded as carrying on that activity by way of business<sup>17</sup>, except where:

- 391 (a) he is a trustee of a relevant scheme<sup>18</sup> who is a beneficiary or potential beneficiary under the scheme<sup>19</sup> or any other trustee of a relevant scheme who takes no day to day decisions relating to the management of any relevant assets<sup>20</sup>; or
- 392 (b) all day to day decisions in the carrying on of that activity (other than certain excepted decisions)<sup>21</sup>, so far as relating to relevant assets, are taken on his behalf by:

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- 69. (i) an authorised person<sup>22</sup> who has permission to carry on managing investments<sup>23</sup>;

- 70. (ii) a person who is an exempt person<sup>24</sup> in relation to activities of that kind<sup>25</sup>; or

- 71. (iii) an overseas person<sup>26</sup>.

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1. Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2. As to the meaning of 'security' see PARA 89 note 1.

3. Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37(a). As to the meaning of 'contractually based investment' see PARA 112 note 4.

4. Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37(b).

5 See the Financial Services and Markets Act 2000 s 22 (see PARA 84) and s 419 (see PARA 87).

6 The reference is to an activity to which the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) applies, namely an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 14 (dealing in investments as principal) (see PARA 112); art 21 (dealing in investments as agent) (see PARA 126); art 25 (arranging deals in investments) (see PARA 139), except in so far as that activity relates to an investment of the kind specified by art 86 (Lloyd's syndicate capacity and syndicate membership), or art 89 (rights and interests) (see PARA 224) so far as relevant to art 86; art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments); art 40 (safeguarding and administering investments) (see PARA 160); art 45 (sending dematerialised instructions) (see PARA 190); art 51 (establishing etc a collective investment scheme) (see PARA 171); art 52 (establishing etc a pension scheme) (see PARA 187); art 53 (advising on investments) (see PARA 174); and art 64 (agreeing) (see PARA 221), so far as relevant to any of the articles mentioned above: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) (amended by SI 2003/1476; SI 2006/1969; SI 2006/3384). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) does not apply to any insurance mediation activity: see art 3(2) (as so amended). A person is not to be regarded as carrying on by way of business any insurance mediation activity unless he takes up or pursues that activity for remuneration: art 3(4) (art 3(4), (5) added by SI 2003/1476). As to the meaning of 'insurance mediation activity' see PARA 112 note 20. A person is also not to be regarded as carrying on by way of business activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans) (see PARA 139), art 53A (advising on regulated mortgage contracts), art 53B (advising on regulated home reversion plans), art 53C (advising on regulated home purchase plans) (see PARA 174) or art 64 (agreeing) (see PARA 221) as far as relevant to the articles mentioned above, unless he carried on the business of engaging in those activities: see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 3A, 3B, 3C; and PARA 139.

7 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) is without prejudice to art 4 in regard to occupational pension schemes (see PARA 152): art 3(3) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419: see note 5.

8 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 38; and PARA 153.

9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39, 66; and PARA 154.

10 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39, 68; and PARA 155.

11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39, 69; and PARA 156.

12 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39, 72A; and PARA 157.

13 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 39, 72C; and PARA 158.

14 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E; and PARA 159.

15 Is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37.

16 For these purposes, 'occupational pension scheme' has the meaning given by the Pension Schemes Act 1993 s 1 with head (b) of the definition omitted (see **SOCIAL SECURITY AND PENSIONS**): Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(3) (definition substituted by SI 2006/1969).

17 See note 5.

18 For these purposes, 'relevant scheme' means any occupational pension scheme of a kind falling within the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(4) (see heads (1)-(4) below) or art 4(5) (see heads (a)-(d) below): art 4(3).

A scheme falls within art 4(4) if:

- 182 (1) it is constituted under an irrevocable trust (art 4(4)(a));
- 183 (2) it has no more than 12 relevant members (art 4(4)(b));
- 184 (3) all relevant members, other than any relevant member who is unfit to act, or is incapable of acting, as trustee of the scheme, are trustees of it (art 4(4)(c)); and
- 185 (4) all day to day decisions relating to the management of the assets of the scheme which are relevant assets are required to be taken by all, or a majority of, relevant members who are trustees of the scheme or by a person of a kind falling within head (b)(i) or (b)(ii) in the text acting alone or jointly with all, or a majority of, such relevant members (art 4(4)(d) (amended by SI 2005/922)).

For these purposes, a person is a relevant member of a scheme if he is an employee or former employee by or in respect of whom contributions to the scheme are being or have been made and to or in respect of whom benefits are or may become payable under the scheme: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(4).

'Relevant assets' means assets of the scheme in question which are securities or contractually based investments: art 4(3). As to the meaning of 'security' see PARA 89 note 1; and as to the meaning of 'contractually based investment' see PARA 112 note 4; both definitions applied by the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 1(2)(b).

A scheme falls within art 4(5) if:

- 186 (a) it has no more than 50 members (art 4(5)(a));
- 187 (b) the contributions made by or in respect of each member of the scheme are used in the acquisition of a contract of insurance on the life of that member or in the acquisition of a contract to pay an annuity on that life (art 4(5)(b));
- 188 (c) the only decision of a kind described in head (b) in the text which may be taken in relation to the scheme is the selection of such contracts (art 4(5)(c)); and
- 189 (d) each member is given the opportunity to select the contract which the contributions made by or in respect of him will be used to acquire (art 4(5)(d)).

19 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(1)(a), (2)(a).

20 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(1)(a), (2)(b) (art 4(2)(b) amended by SI 2005/922).

21 A decision is an excepted decision if:

- 190 (1) it is a decision by the trustees of an occupational pension scheme to buy, sell or subscribe for units in a collective investment scheme, shares or debentures of a body corporate (or warrants relating to such shares or debentures) issued by a body corporate having as its purpose the investment of its funds with the aim of spreading investment risk and giving its members the benefit of the results of the management of those funds by or on behalf of that body, or rights under (or rights to or interests in) any contract of insurance (Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(6)(a) (amended by SI 2005/922));
- 191 (2) the decision is taken after advice has been obtained and considered from:

- 33. (a) an authorised person who has permission to carry on activities of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (see PARA 171) in relation to the decision in question (Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(6)(b), (7)(a) (art 4(6)(b) amended and art 4(7) substituted by SI 2005/922));

34. (b) a person who is an exempt person in relation to such activities (Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(6)(b), (7) (b) (as so amended and substituted));  
34
35. (c) a person exempt from the general prohibition by virtue of the Financial Services and Markets Act 2000 s 327 (see PARA 751) (Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(6)(b), (7)(c) (as so amended and substituted)); or  
35
36. (d) an overseas person (art 4(6)(b), (7)(d) (as so amended and substituted)).  
36

As to the meaning of 'contract of insurance' see PARA 90 note 3; definition applied by art 1(2)(b) (amended by SI 2003/1476). 'Units in a collective investment scheme' means any investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 81 (units in a collective investment scheme) (see PARA 224); Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 1(2)(d). 'Shares' and 'debentures' mean any investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 76 (shares etc) (see PARA 224) or art 77 (instruments creating or acknowledging indebtedness) (see PARA 224); Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 1(2)(c). 'Warrants' means any investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 79 (instruments giving entitlements to investments) (see PARA 224); Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 1(2)(e). As to the meaning of 'overseas person' see PARA 124 note 1; definition applied by art 1(2)(b).

22 As to authorised persons see PARA 314.

23 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(1)(b)(i).

24 As to exempt persons see PARA 330 et seq.

25 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(1)(b)(ii).

26 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4(1)(b)(iii).

## UPDATE

### 152 Managing investments

NOTE 6--A person is also not to be regarded as carrying on by way of business activities specified by SI 2001/544 art 25E (arranging regulated sale and rent back agreements) (PARA 139), art 53D (advising on regulated sale and rent back agreements) (PARA 174) or art 64 (agreeing) as far as relevant to either of the articles mentioned above, unless he carried on the business of engaging in those activities: see SI 2001/1177 art 3D; and PARA 139.

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### 153. Exclusion for attorneys.

A person does not carry on the specified activity of managing investments<sup>1</sup> if he is a person appointed to manage the assets in question under a power of attorney<sup>2</sup>; and all routine or day-to-day decisions<sup>3</sup> are taken on behalf of that person by: (1) an authorised person with permission to carry on such activities<sup>4</sup>; (2) a person who is an exempt person in relation to activities of that kind<sup>5</sup>; or (3) an overseas person<sup>6</sup>.

1     le of the kind of activity specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37 (see PARA 152): see art 38(1) (as renumbered and amended: see note 2).

2     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 38(1)(a) (art 38(1) renumbered as such and amended by SI 2006/3384). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 38 is subject to art 4(4) (see PARA 88): see art 38(1) (as so renumbered and amended).

3     le so far as relating to investments of a kind mentioned in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37(a): see PARA 152.

4     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 38(1)(b)(i) (as renumbered (see note 2); amended by SI 2001/3544). They are activities of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37: see PARA 152.

5     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 38(1)(b)(ii) (as renumbered: see note 2).

6     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 38(1)(b)(iii) (as renumbered (see note 2); amended by SI 2001/3544). As to the meaning of 'overseas person' see PARA 124 note 1.

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#### **154. Exclusion for trustees, nominees and personal representatives.**

There is excluded from the specified activity<sup>1</sup> of managing investments<sup>2</sup> any activity carried on by a person acting as trustee or personal representative, unless: (1) he holds himself out as providing a service comprising such an activity<sup>3</sup>; or (2) the assets in question are held for the purposes of an occupational pension scheme<sup>4</sup>, and he is to be treated<sup>5</sup> as carrying on that activity by way of business<sup>6</sup>. These provisions<sup>7</sup> do not apply if the person carrying on the activity is remunerated for what he does in addition to any remuneration he receives as trustee or personal representative, and for these purposes a person is not to be regarded as receiving additional remuneration merely because his remuneration is calculated by reference to time spent<sup>8</sup>.

1     A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2     le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37 (see PARA 152): see art 66(3).

3     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(3)(a). The activity is of the kind specified by art 37: see PARA 152. Article 66 is subject to art 4(4A) (see PARA 88): art 66(8) (added by SI 2006/3384).

4 'Occupational pension scheme' has the meaning given by the Pension Schemes Act 1993 s 1 with head (b) of the definition omitted (see **SOCIAL SECURITY AND PENSIONS**): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1) (definition substituted by SI 2006/1969).

5 le by virtue of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 4: see PARA 152.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(3)(b).

7 le the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(3).

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(7).

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### **155. Exclusion for activities carried on in connection with the sale of goods or supply of services by a supplier to a customer.**

There is excluded from the specified activity<sup>1</sup> of managing investments<sup>2</sup> any activity carried on by a supplier where the assets in question are those of a customer<sup>3</sup> and are managed for the purposes of, or in connection with, the sale of goods or supply of services, or a related sale or supply<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 le excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37 (see PARA 152): see art 68(6).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(6)(a). Article 68(6) does not apply where the assets managed consist of qualifying contracts of insurance, investments of the kind specified by art 81 (see PARA 224), or investments of the kind specified by art 89 (see PARA 224) so far as relevant to such contracts or such investments: art 68(10). As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4. Article 68 is subject to art 4(4) (see PARA 88): art 68(12) (added by SI 2006/3384).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(6)(b). See note 3. See generally PARA 120.

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### **156. Exclusion for groups and joint enterprises.**

There is excluded from the specified activity<sup>1</sup> of managing investments<sup>2</sup> any activity carried on by a person if: (1) he is a member of a group and the assets in question belong to another member of the same group<sup>3</sup>; or (2) he is or proposes to become a participator in a joint enterprise with the person to whom the assets belong, and the assets are managed for the purposes of, or in connection with, that enterprise<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37 (see PARA 152): see art 69(5).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(5)(a). Article 69 is subject to art 4(4) (see PARA 88): art 69(13) (added by SI 2006/3384).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(5)(b).

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### **157. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39 (amended by SI 2003/1476). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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### **158. Exclusion for provision of information on an incidental basis.**

There is excluded from the specified activity<sup>1</sup> of managing investments<sup>2</sup> any activity where the assets in question are rights under a contract of insurance<sup>3</sup> or certain investments<sup>4</sup>, so far as relevant to such a contract, where that activity meets the following conditions<sup>5</sup>:

- 393 (1) that the activity consists of the provision of information to the policyholder or potential policyholder<sup>6</sup>;
- 394 (2) that the activity is carried on by a person in the course of carrying on a profession or business which does not otherwise consist of the carrying on of regulated activities<sup>7</sup> and
- 395 (3) that the activity may reasonably be regarded as being incidental to that profession or business<sup>8</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Ie excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37 (see PARA 152): see art 72C(2) (as added: see note 5).

3 As to the meaning of 'contract of insurance' see PARA 90 note 3.

4 Ie an investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 89: see PARA 224.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(2) (art 72C added by SI 2003/1476).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(a) (as added: see note 5).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(b) (as added: see note 5). As to regulated activities generally see PARA 84 et seq.

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(c) (as added: see note 5).

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### **159. Exclusion for Business Angel-led Enterprise Capital Funds.**

There is excluded from the specified activity<sup>1</sup> of managing investments<sup>2</sup> any activity carried on by a specified type of body corporate<sup>3</sup> which consists in the managing of assets belonging to the participants of a Business Angel-led Enterprise Capital Fund<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Ie excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37 (see PARA 152): see art 72E(3) (as added: see note 4).

3 As to the specified type of body corporate see PARA 138 note 1.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E(3) (art 72E added by SI 2005/1518). As to the meaning of 'Business Angel-led Enterprise Capital Fund' see PARA 138



note 4. Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Money Laundering Regulations 2007, SI 2007/2157 (see PARA 539 et seq), in so far as those Regulations would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(9) (as so added; amended by SI 2007/2157). Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Financial Services and Markets Act 2000 s 397 (misleading statements and practices) (see PARA 568), in so far as that section would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(10) (as so added). Article 72E is subject to art 4(4) (see PARA 88): art 72E(11) (added by SI 2006/3384).

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## (H) SAFEGUARDING AND ADMINISTERING INVESTMENTS

### **160. Safeguarding and administering investments.**

The activity consisting of both the safeguarding of assets belonging to another, and the administration of those assets, or arranging for one or more other persons to carry on that activity, is a specified kind of activity<sup>1</sup> if the following condition is met<sup>2</sup>. The condition is that:

- 396 (1) the assets consist of or include any investment which is a security<sup>3</sup> or a contractually based investment<sup>4</sup>; or
- 397 (2) the arrangements for their safeguarding and administration are such that the assets may consist of or include such investments, and either the assets have at any time since 1 June 1997 done so, or the arrangements have at any time (whether before or after that date) been held out as ones under which such investments would be safeguarded and administered<sup>5</sup>.

For these purposes, it is immaterial that title to the assets safeguarded and administered is held in uncertificated form<sup>6</sup> and it is immaterial that the assets safeguarded and administered may be transferred to another person, subject to a commitment by the person safeguarding and administering them, or arranging for their safeguarding and administration, that they will be replaced by equivalent assets at some future date or when so requested by the person to whom they belong<sup>7</sup>.

A person is not to be regarded as carrying on by way of business<sup>8</sup> a relevant investment business activity (including safeguarding and administering investments)<sup>9</sup>, unless he carries on the business of engaging in one or more such activities<sup>10</sup>.

Certain activities and arrangements are specifically excluded and therefore do not constitute specified kinds of activities: they are acceptance of responsibility by a third party<sup>11</sup>, introduction to qualifying custodians<sup>12</sup>, trustees, nominees and personal representatives<sup>13</sup>, profession or non-investment business<sup>14</sup>, sale of goods and supply of services<sup>15</sup>, groups and joint enterprises<sup>16</sup>, employee share schemes<sup>17</sup>, information society services<sup>18</sup>, provision of information on an incidental basis<sup>19</sup> and Business Angel-led Enterprise Capital Funds<sup>20</sup>.

<sup>1</sup> ie an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind

specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40(1). The following activities do not constitute the administration of assets for the purposes of art 40: (1) providing information as to the number of units or the value of any assets safeguarded; (2) converting currency; and (3) receiving documents relating to an investment solely for the purpose of onward transmission to, from or at the direction of the person to whom the investment belongs: art 43.

3 As to the meaning of 'security' see PARA 89 note 1.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40(2)(a). As to the meaning of 'contractually based investment' see PARA 112 note 4.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40(2)(b).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40(3)(a).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40(3)(b).

8 See the Financial Services and Markets Act 2000 s 22 (see PARA 84) and s 419 (see PARA 87).

9 The reference is to an activity to which the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) applies, namely an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 14 (dealing in investments as principal) (see PARA 112); art 21 (dealing in investments as agent) (see PARA 126); art 25 (arranging deals in investments) (see PARA 139), except in so far as that activity relates to an investment of the kind specified by art 86 (Lloyd's syndicate capacity and syndicate membership), or art 89 (rights and interests) (see PARA 224) so far as relevant to art 86; art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments) (see PARA 152); art 40 (safeguarding and administering investments) (see PARA 160); art 45 (sending dematerialised instructions) (see PARA 190); art 51 (establishing etc a collective investment scheme) (see PARA 171); art 52 (establishing etc a pension scheme) (see PARA 187); art 53 (advising on investments) (see PARA 174); and art 64 (agreeing) (see PARA 221), so far as relevant to any of the articles mentioned above: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) (amended by SI 2003/1476; SI 2006/1969; SI 2006/3384). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) does not apply to any insurance mediation activity: see art 3(2) (as so amended). A person is not to be regarded as carrying on by way of business any insurance mediation activity unless he takes up or pursues that activity for remuneration: art 3(4) (art 3(4), (5) added by SI 2003/1476). As to the meaning of 'insurance mediation activity' see PARA 112 note 20. A person is also not to be regarded as carrying on by way of business activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans) (see PARA 139), art 53A (advising on regulated mortgage contracts), art 53B (advising on regulated home reversion plans), art 53C (advising on regulated home purchase plans) (see PARA 174) or art 64 (agreeing) (see PARA 221) as far as relevant to the articles mentioned above, unless he carried on the business of engaging in those activities: see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 3A, 3B, 3C; and PARA 139.

10 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) is without prejudice to art 4 in regard to occupational pension schemes (see PARA 152): art 3(3) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419: see note 8.

11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 41; and PARA 161.

12 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 42; and PARA 162.

13 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 44, 66; and PARA 163.

14 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 44, 67; and PARA 164.

15 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 44, 68; and PARA 165.

16 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 44, 69; and PARA 166.

17 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 44, 71; and PARA 167.

18 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 44, 72A; and PARA 168.

19 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 44, 72C; and PARA 169.

20 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E; and PARA 170.

## **UPDATE**

### **160 Safeguarding and administering investments**

NOTE 9--A person is also not to be regarded as carrying on by way of business activities specified by SI 2001/544 art 25E (arranging regulated sale and rent back agreements) (PARA 139), art 53D (advising on regulated sale and rent back agreements) (PARA 174) or art 64 (agreeing) as far as relevant to either of the articles mentioned above, unless he carried on the business of engaging in those activities: see SI 2001/1177 art 3D; and PARA 139.

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### **161. Exclusion for acceptance of responsibility by a third party.**

Although safeguarding and administering investments is a specified activity<sup>1</sup>, there is an exclusion<sup>2</sup> for any activities which a person carries on pursuant to arrangements which:

- 398 (1) are ones under which a qualifying custodian<sup>3</sup> undertakes to the person to whom the assets belong a responsibility in respect of the assets which is no less onerous than the qualifying custodian would have if the qualifying custodian were safeguarding and administering the assets<sup>4</sup>; and
- 399 (2) are operated by the qualifying custodian in the course of carrying on in the United Kingdom<sup>5</sup> an activity consisting of both the safeguarding of assets belonging to another and the administration of those assets or arranging for one or more other persons to carry on that activity<sup>6</sup>.

1 Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2     le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160): see art 41(1).

3     For these purposes, 'qualifying custodian' means a person who is an authorised person who has permission to carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160); or an exempt person acting in the course of a business comprising a regulated activity in relation to which he is exempt: art 41(2).

4     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 41(1)(a).

5     As to the meaning of 'United Kingdom' see PARA 2 note 3.

6     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 41(1)(b). As to the safeguarding and administering of investments see art 40; and PARA 160.

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## **162. Exclusion for introduction to qualifying custodians.**

Although safeguarding and administering investments is a specified activity<sup>1</sup>, there is a specific exclusion<sup>2</sup> for any arrangements pursuant to which introductions are made by a person ('P') to a qualifying custodian<sup>3</sup> with a view to the qualifying custodian providing in the United Kingdom<sup>4</sup> a service comprising an activity consisting of the safeguarding and administering of assets as described above, where the qualifying person (or other person who is to safeguard and administer the assets in question) is not connected with P<sup>5</sup>.

1     le an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2     le the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160): see art 42(1).

3     As to the meaning of 'qualifying custodian' see PARA 161 note 3; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 42(2)(a).

4     As to the meaning of 'United Kingdom' see PARA 2 note 3.

5     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 42(1). For the purposes of art 42(1) a person is connected with P if either he is a member of the same group as P, or P is remunerated by him: art 42(2)(b).

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## **163. Exclusion for trustees, nominees and personal representatives.**

There is excluded from the specified activity<sup>1</sup> of safeguarding and administering investments<sup>2</sup> any activity carried on by a person acting as trustee or personal representative, unless he holds himself out as providing a service comprising such an activity<sup>3</sup>. These provisions<sup>4</sup> do not apply if the person carrying on the activity is remunerated for what he does in addition to any remuneration he receives as trustee or personal representative, and for these purposes a person is not to be regarded as receiving additional remuneration merely because his remuneration is calculated by reference to time spent<sup>5</sup>.

Also excluded<sup>6</sup> is any activity carried on by a person acting as trustee which consists of arranging for one or more other persons to safeguard and administer trust assets where (1) that other person is a qualifying custodian<sup>7</sup>; or (2) that safeguarding and administration is also arranged by a qualifying custodian<sup>8</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Ie from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160): see art 66(4).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(4). Article 66 is subject to art 4(4A) (see PARA 88): art 66(8) (added by SI 2006/3384).

4 Ie the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(4).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(7).

6 See note 2.

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(4A)(a) (art 66(4A) added by SI 2005/593). As to the meaning of 'qualifying custodian' see PARA 161 note 3; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(4A) (as so added).

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(4A)(b) (as added: see note 7).

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#### **164. Exclusion for activities carried on in the course of a profession or non-investment business.**

There is excluded from the specified activity<sup>1</sup> of safeguarding and administering investments<sup>2</sup> any activity which:

- 400 (1) is carried on in the course of carrying on any profession or business which does not otherwise consist of the carrying on of regulated activities in the United Kingdom<sup>3</sup>; and

401 (2) may reasonably be regarded as a necessary part of other services provided in the course of that profession or business<sup>4</sup>.

However, this exclusion does not apply if the activity in question is remunerated separately from the other services<sup>5</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160): see art 67(1).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(1)(a) (amended by SI 2001/3544). As to the meaning of 'United Kingdom' see PARA 2 note 3. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67 is subject to art 4(4), (4A) (see PARA 88): art 67(3) (added by SI 2006/3384).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(1)(b).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(2).

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### **165. Exclusion for activities carried on in connection with the sale of goods or supply of services by a supplier to a customer.**

There is excluded from the specified activity<sup>1</sup> of safeguarding and administering investments<sup>2</sup> any activity carried on by a supplier where the assets in question are or are to be safeguarded and administered for the purposes of, or in connection with, the sale of goods or supply of services, or a related sale or supply<sup>3</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160): see art 68(7).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(7). Article 68 is subject to art 4(4) (see PARA 88): art 68(12) (added by SI 2006/3384). See generally also PARA 120.

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## 166. Exclusion for groups and joint enterprises.

There is excluded from the specified activity<sup>1</sup> of safeguarding and administering investments<sup>2</sup> any activity carried on by a person if: (1) he is a member of a group and the assets in question belong to another member of the same group<sup>3</sup>; or (2) he is or proposes to become a participator in a joint enterprise, and the assets in question belong to another person who is or proposes to become a participator in that joint enterprise<sup>4</sup>, and are, or are to be, safeguarded and administered for the purposes of, or in connection with, that enterprise<sup>5</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160): see art 69(6).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(6)(a). Article 69 is subject to art 4(4) (see PARA 88): art 69(13) (added by SI 2006/3384).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(6)(b)(i).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(6)(b)(ii).

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## 167. Exclusion for activities carried on in connection with employee share schemes.

There is excluded from the specified activity<sup>1</sup> of safeguarding and administering investments<sup>2</sup> any activity if the assets in question are, or are to be, safeguarded and administered by a person ('C'), a member of the same group as C or a relevant trustee<sup>3</sup> for the purpose of enabling or facilitating the following kinds of transactions:

402 (1) transactions in shares in, or debentures issued by C between, or for the benefit of<sup>4</sup>:

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72. (a) the bona fide employees or former employees of C or of another member of the same group as C<sup>5</sup>; and

73. (b) the wives, husbands, widows, widowers, civil partners, surviving civil partners, or children or step-children under the age of 18 of such employees or former employees<sup>6</sup>; or

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403 (2) the holding of such shares or debentures by, or for the benefit of, such persons<sup>7</sup>.

1 A 'specific activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an

investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160): see art 71(5).

3 As to the meaning of 'relevant trustee' see PARA 123 note 1. As to the meanings of 'shares' and 'debentures' see PARA 123 note 1.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(1)(a), (5).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(2)(a), (5).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(2)(b), (5) (art 71(2)(b) amended by SI 2005/2114).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(1)(b), (5).

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### **168. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 44 (amended by SI 2003/1476). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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### **169. Exclusion for provision of information on an incidental basis.**

There is excluded from the specified activity<sup>1</sup> of safeguarding and administering investments<sup>2</sup> any activity where the assets in question are rights under a contract of insurance<sup>3</sup> or certain investments<sup>4</sup>, so far as relevant to such a contract, where that activity meets the following conditions<sup>5</sup>:



- 404 (1) that the activity consists of the provision of information to the policyholder or potential policyholder<sup>6</sup>;
- 405 (2) that the activity is carried on by a person in the course of carrying on a profession or business which does not otherwise consist of the carrying on of regulated activities<sup>7</sup>; and
- 406 (3) that the activity may reasonably be regarded as being incidental to that profession or business<sup>8</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Ie excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160): see art 72C(2) (as added: see note 5).

3 As to the meaning of 'contract of insurance' see PARA 90 note 3.

4 Ie an investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 89: see PARA 224.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(2) (art 72C added by SI 2003/1476).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(a) (as added: see note 5).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(b) (as added: see note 5). As to regulated activities generally see PARA 84 et seq.

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72C(4)(c) (as added: see note 5).

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## **170. Exclusion for Business Angel-led Enterprise Capital Funds.**

There is excluded from the specified activity<sup>1</sup> of safeguarding and administering investments<sup>2</sup> any activity carried on by a specified type of body corporate<sup>3</sup> in respect of assets belonging to the participants of a Business Angel-led Enterprise Capital Fund<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Ie excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160): see art 72E(4) (as added: see note 4).

3 As to the specified type of body corporate see PARA 138 note 1.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E(4) (art 72E added by SI 2005/1518). As to the meaning of 'Business Angel-led Enterprise Capital Fund' see PARA 138

note 4. Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Money Laundering Regulations 2007, SI 2007/2157 (see PARA 539 et seq), in so far as those Regulations would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(9) (as so added; amended by SI 2007/2157). Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Financial Services and Markets Act 2000 s 397 (misleading statements and practices) (see PARA 568), in so far as that section would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(10) (as so added). Article 72E is subject to art 4(4) (see PARA 88): art 72E(11) (added by SI 2006/3384).

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## (I) COLLECTIVE INVESTMENT SCHEMES

### **171. Establishing etc a collective investment scheme.**

The following are specified kinds of activity<sup>1</sup>:

- 407 (1) establishing, operating or winding up a collective investment scheme<sup>2</sup>;
- 408 (2) acting as trustee<sup>3</sup> of an authorised unit trust scheme<sup>4</sup>;
- 409 (3) acting as the depositary<sup>5</sup> or sole director of an open-ended investment company<sup>6</sup>.

A person is not to be regarded as carrying on by way of business<sup>7</sup> a relevant investment business activity (including establishing etc a collective investment scheme)<sup>8</sup>, unless he carries on the business of engaging in one or more such activities<sup>9</sup>.

There is an exclusion for any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>10</sup> and also an exclusion in regard to Business Angel-led Enterprise Capital Funds<sup>11</sup>.

1    Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51(1)(a). As to collective investment schemes generally see PARA 603 et seq.

3    As to the meaning of 'trustee' see PARA 606 note 16; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51(2).

4    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51(1)(b). As to the meaning of 'authorised unit trust scheme' see PARA 603; definition applied by art 51(2).

5    As to the meaning of 'depositary' see PARA 606 note 18; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51(2).

6    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51(1)(c).

7    See the Financial Services and Markets Act 2000 s 22 (see PARA 84) and s 419 (see PARA 87).

8 The reference is to an activity to which the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) applies, namely an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 14 (dealing in investments as principal) (see PARA 112); art 21 (dealing in investments as agent) (see PARA 126); art 25 (arranging deals in investments) (see PARA 139), except in so far as that activity relates to an investment of the kind specified by art 86 (Lloyd's syndicate capacity and syndicate membership), or art 89 (rights and interests) (see PARA 224) so far as relevant to art 86; art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments) (see PARA 152); art 40 (safeguarding and administering investments) (see PARA 160); art 45 (sending dematerialised instructions) (see PARA 190); art 51 (establishing etc a collective investment scheme); art 52 (establishing etc a pension scheme) (see PARA 187); art 53 (advising on investments) (see PARA 174); and art 64 (agreeing) (see PARA 221), so far as relevant to any of the articles mentioned above: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) (amended by SI 2003/1476; SI 2006/1969; SI 2006/3384). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) does not apply to any insurance mediation activity: see art 3(2) (as so amended). A person is not to be regarded as carrying on by way of business any insurance mediation activity unless he takes up or pursues that activity for remuneration: art 3(4) (art 3(4), (5) added by SI 2003/1476). As to the meaning of 'insurance mediation activity' see PARA 112 note 20. A person is also not to be regarded as carrying on by way of business activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans) (see PARA 139), art 53A (advising on regulated mortgage contracts), art 53B (advising on regulated home reversion plans), art 53C (advising on regulated home purchase plans) (see PARA 174) or art 64 (agreeing) (see PARA 221) as far as relevant to the articles mentioned above, unless he carried on the business of engaging in those activities: see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 3A, 3B, 3C; and PARA 139.

9 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) is without prejudice to art 4 in regard to occupational pension schemes (see PARA 152): art 3(3) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419: see note 7.

10 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51A (added by SI 2002/1776); the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A; and PARA 172.

11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E; and PARA 173.

## **UPDATE**

### **171 Establishing etc a collective investment scheme**

NOTE 8--A person is also not to be regarded as carrying on by way of business activities specified by SI 2001/544 art 25E (arranging regulated sale and rent back agreements) (PARA 139), art 53D (advising on regulated sale and rent back agreements) (PARA 174) or art 64 (agreeing) as far as relevant to either of the articles mentioned above, unless he carried on the business of engaging in those activities: see SI 2001/1177 art 3D; and PARA 139.

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### **172. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51A (added by SI 2002/1776). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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### **173. Exclusion for Business Angel-led Enterprise Capital Funds.**

A specified type of body corporate<sup>1</sup> does not carry on the specified activity<sup>2</sup> of establishing, operating and winding up a collective investment scheme<sup>3</sup> where it carries on the activity of establishing, operating or winding up a Business Angel-led Enterprise Capital Fund<sup>4</sup>.

1 As to the specified type of body corporate see PARA 138 note 1.

2 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 I.e. the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51(1)(a) (see PARA 171): see art 72E(5) (as added: see note 4).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E(5) (art 72E added by SI 2005/1518). As to the meaning of 'Business Angel-led Enterprise Capital Fund' see PARA 138 note 4. Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Money Laundering Regulations 2007, SI 2007/2157 (see PARA 539 et seq), in so far as those Regulations would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(9) (as so added; amended by SI 2007/2157). Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Financial Services and Markets Act 2000 s 397 (misleading statements and practices) (see PARA 568), in so far as that section would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(10) (as so added). Article 72E is subject to art 4(4) (see PARA 88): art 72E(11) (added by SI 2006/3384).

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## (J) ADVISING ON INVESTMENTS

### 174. Advising on investments.

Advising a person is a specified kind of activity<sup>1</sup> if the advice is:

- 410 (1) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor<sup>2</sup>; and
- 411 (2) advice on the merits of his doing any of the following (whether as principal or agent): buying<sup>3</sup>, selling<sup>4</sup>, subscribing for or underwriting a particular investment which is a security<sup>5</sup> or a relevant investment<sup>6</sup>, or exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment<sup>7</sup>.

Advising a person is a specified kind of activity if the advice is: (a) given to the person in his capacity as a borrower or potential borrower<sup>8</sup>; and (b) advice on the merits of his doing any of the following: entering into a particular regulated mortgage contract<sup>9</sup>, or varying the terms of a regulated mortgage contract entered into by him after 31 October 2004<sup>10</sup> in such a way as to vary his obligations under that contract<sup>11</sup>.

Advising a person is a specified kind of activity if the advice is: (i) given to the person in his capacity as a reversion seller or potential reversion seller<sup>12</sup>, or a plan provider or potential plan provider<sup>13</sup>; and (ii) advice on the merits of his doing either of the following: entering into a particular regulated home reversion plan<sup>14</sup>, or varying the terms of a regulated home reversion plan, entered into on or after 6 April 2007 by him, in such a way as to vary his obligations under that plan<sup>15</sup>.

Advising a person is a specified kind of activity if the advice is: (A) given to the person in his capacity as a home purchaser or potential home purchaser<sup>16</sup>; and (B) advice on the merits of his doing either of the following: entering into a particular regulated home purchase plan<sup>17</sup> or varying the terms of a regulated home purchase plan, entered into on or after 6 April 2007 by him, in such a way as to vary his obligations under that plan<sup>18</sup>.

A person is not to be regarded as carrying on by way of business<sup>19</sup> a relevant investment business activity (including advising on investments, advising on regulated mortgage contracts, advising on regulated home reversion plans and advising on regulated home purchase plans)<sup>20</sup>, unless he carries on the business of engaging in one or more such activities<sup>21</sup>.

There are exclusions from the above specified activities<sup>22</sup> for advice-giving in newspapers etc<sup>23</sup>, advice given in the course of administration by an authorised person<sup>24</sup>, trustees, nominees and personal representatives<sup>25</sup>, a profession or non-investment business<sup>26</sup>, sale of goods and supply of services<sup>27</sup>, groups and joint enterprises<sup>28</sup>, sale of a body corporate<sup>29</sup>, overseas persons<sup>30</sup>, information society services<sup>31</sup>, activities carried on by a provider of relevant goods or services<sup>32</sup>, large risks contracts where the risk is situated outside the EEA<sup>33</sup> and Business Angel-led Enterprise Capital Funds<sup>34</sup>.

1    Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53(a).

3    As to the meaning of 'buying' see PARA 112 note 1.

4    As to the meaning of 'selling' see PARA 112 note 2.

- 5 As to the meaning of 'security' see PARA 89 note 1.
- 6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53(b)(i) (amended by SI 2003/1476). As to the meaning of 'relevant investment' see PARA 126 note 4.
- 7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53(b)(ii).
- 8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A(1)(a) (art 53A added by SI 2003/1475). As to the meaning of 'borrower' see PARA 203 note 1; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A(2) (as so added).
- 9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A(1)(b)(i) (as added: see note 8). As to the meaning of 'regulated mortgage contract' see PARA 203 note 1.
- 10 The day on which the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61 (see PARA 203) came into force.
- 11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A(1)(b)(ii) (as added: see note 8).
- 12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B(a)(i) (art 53B added by SI 2006/2383). As to the meaning of 'reversion seller' see PARA 209 note 1.
- 13 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B(a)(ii) (as added: see note 12). As to the meaning of 'plan provider' see PARA 209 note 1.
- 14 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B(b)(i) (as added: see note 12). As to the meaning of 'regulated home reversion plan' see PARA 209 note 1.
- 15 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B(b)(ii) (as added: see note 12).
- 16 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53C(a) (art 53C added by SI 2006/2383). As to the meaning of 'home purchaser' see PARA 215 note 1.
- 17 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53C(b)(i) (as added: see note 16). As to the meaning of 'regulated home purchase plan' see PARA 215 note 1.
- 18 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53C(b)(ii) (as added: see note 16).
- 19 See the Financial Services and Markets Act 2000 s 22 (see PARA 84) and s 419 (see PARA 87).
- 20 The reference is to an activity to which the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) applies, namely an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 14 (dealing in investments as principal) (see PARA 112); art 21 (dealing in investments as agent) (see PARA 126); art 25 (arranging deals in investments) (see PARA 139), except in so far as that activity relates to an investment of the kind specified by art 86 (Lloyd's syndicate capacity and syndicate membership), or art 89 (rights and interests) (see PARA 224) so far as relevant to art 86; art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments) (see PARA 152); art 40 (safeguarding and administering investments) (see PARA 160); art 45 (sending dematerialised instructions) (see PARA 190); art 51 (establishing etc a collective investment scheme) (see PARA 171); art 52 (establishing etc a pension scheme); art 53 (advising on investments); and art 64 (agreeing) (see PARA 221), so far as relevant to any of the articles mentioned above: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) (amended by SI 2003/1476; SI 2006/1969; SI 2006/3384). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) does not apply to any insurance mediation activity: see art 3(2) (as so amended). A person is not to be regarded as carrying on by way of business any insurance mediation activity unless he takes up or pursues that activity for remuneration: art 3(4) (art 3(4), (5) added by SI 2003/1476). As to the meaning of 'insurance mediation activity' see PARA 112 note 20. A person is also not to be regarded as carrying on by way of business activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans) (see PARA 139), art 53A (advising on regulated mortgage contracts), art 53B (advising on regulated home reversion plans), art 53C (advising on regulated home purchase plans) or art 64 (agreeing) (see PARA 221) as far as relevant to the articles mentioned above, unless he carried on the business of engaging in those activities: see the Financial

Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 3A, 3B, 3C; and PARA 139.

21 See the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) is without prejudice to art 4 in regard to occupational pension schemes (see PARA 152): art 3(3) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419: see note 19.

22 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 53, 53A, 53B, 53C. Note that the exclusions to art 53 are in arts 66, 67, 68, 69, 70, 72, 72A, 72B, 72D, 72E; and that the exclusions to arts 53A, 53B, 53C are in arts 66, 67, 72A. See art 55 (amended by SI 2002/1776, SI 2003/1475; SI 2003/1476; SI 2006/2383).

23 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54; and PARA 175.

24 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54A; and PARA 176.

25 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 55, 66; and PARA 177.

26 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 55, 67; and PARA 178.

27 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 55, 68; and PARA 179.

28 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 55, 69; and PARA 180.

29 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 55, 70; and PARA 181.

30 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 55, 72; and PARA 182.

31 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 55, 72A; and PARA 183.

32 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 55, 72B; and PARA 184.

33 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 55, 72D; and PARA 185.

34 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E; and PARA 186.

## **UPDATE**

### **174 Advising on investments**

TEXT AND NOTES 1-18--Advising a person is a specified kind of activity if the advice (1) is given to the person in his capacity as (a) an agreement seller or potential agreement seller; or (b) an agreement provider or potential agreement provider; and (2) is advice on the merits of his doing either of the following: entering into a particular regulated sale and rent back agreement or varying the terms of a regulated sale and rent back agreement entered into on or after 1 July 2009 by him as agreement seller or agreement provider, in such a way so as to vary his obligations under that agreement: SI 2001/544 art 53D (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). For the meaning of

'agreement seller', 'agreement provider', and 'regulated sale and rent back agreement' see PARA 220A. For transitional provisions see Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2009, SI 2009/1342, arts 32-34, Schedule.

NOTE 22--SI 2001/544 art 55 further amended: SI 2009/1342 (with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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### **175. Exclusion for advice given in newspapers etc.**

There is an exclusion from the specified activities<sup>1</sup> of advising on investments, advising on regulated mortgage contracts, advising on regulated home reversion plans and advising on regulated home purchase plans<sup>2</sup> the giving of advice in writing or other legible form if the advice is contained in a newspaper, journal, magazine, or other periodical publication, or is given by way of a service comprising regularly updated news or information, if the principal purpose of the publication or service, taken as a whole and including any advertisements or other promotional material contained in it, is neither: (1) that of giving advice on the matters referred to above<sup>3</sup>; nor (2) that of leading or enabling persons to buy, sell, subscribe for or underwrite securities<sup>4</sup> or contractually based investments<sup>5</sup> or (as the case may be) to enter as borrower into regulated mortgage contracts<sup>6</sup> or vary the terms of regulated mortgage contracts entered into by them as borrower, to enter as reversion seller<sup>7</sup> or plan provider<sup>8</sup> into regulated home reversion plans<sup>9</sup> or vary the terms of regulated home reversion plans entered into by them as reversion seller or plan provider, to enter as home purchaser<sup>10</sup> into regulated home purchase plans<sup>11</sup> or vary the terms of regulated home purchase plans entered into by them as home purchaser<sup>12</sup>.

There is also an exclusion for the giving of advice in any service consisting of the broadcast or transmission of television or radio programmes, if the principal purpose of the service, taken as a whole and including any advertisements or other promotional material contained in it, is neither of those mentioned in heads (1) and (2) above<sup>13</sup>. The Financial Services Authority<sup>14</sup> may, on the application of the proprietor of any such publication or service<sup>15</sup>, certify that it is of the nature so described, and may revoke any such certificate if it considers that it is no longer justified<sup>16</sup>. A certificate so given and not revoked is conclusive evidence of the matters certified<sup>17</sup>.

1    Ie an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2    Ie excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 53, 53A, 53B, 53C: see PARA 174.

3    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(1)(a) (amended by SI 2006/2383). The reference is to the giving of advice of a kind mentioned in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 53, 53A, 53B, 53C, as the case may be: see PARA 174.

4    As to the meaning of 'security' see PARA 89 note 1.



- 5 As to the meaning of 'contractually based investments' see PARA 112 note 1.
- 6 As to the meaning of 'regulated mortgage contract' see PARA 203 note 1.
- 7 As to the meaning of 'reversion seller' see PARA 209 note 1.
- 8 As to the meaning of 'plan provider' see PARA 209 note 1.
- 9 As to the meaning of 'regulated home reversion plan' see PARA 209 note 1.
- 10 As to the meaning of 'home purchaser' see PARA 215 note 1.
- 11 As to the meaning of 'regulated home purchase plan' see PARA 215 note 1.
- 12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(1)(b) (substituted by SI 2003/1475 and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(1)(b) amended by SI 2006/2383).
- 13 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(2) (amended by SI 2006/2383).
- 14 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 15 Is any publication or service mentioned in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(1) or (2).
- 16 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(3).
- 17 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(4).

## **UPDATE**

### **175 Exclusion for advice given in newspapers etc**

NOTES 2, 3--The exclusion also applies to the activity of advising on regulated sale and rent back agreements specified under, and the reference is also to the giving of advice of a kind mentioned in, SI 2001/544 art 53D (PARA 174): SI 2001/544 art 54(1) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

TEXT AND NOTES 4-13--There are also exclusions if the principal purpose of the publication or service is not that of leading and enabling persons to enter as agreement seller or agreement provider into regulated sale and rent back agreements, or vary the terms of regulated sale and rent back agreements entered into by them as agreement seller or agreement provider: SI 2001/544 art 54(1)(b), (2) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). For the meaning of 'regulated sale and rent back agreement', 'agreement seller', and 'agreement provider' see PARA 220A.

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### **176. Exclusion for advice given in the course of administration by authorised person.**

A person who is not an authorised person<sup>1</sup> ('A') does not carry on the specified activity<sup>2</sup> of advising on regulated mortgage contracts<sup>3</sup> by reason of (1) anything done by an authorised person ('B') in relation to a regulated mortgage contract<sup>4</sup> which B is administering pursuant to certain arrangements<sup>5</sup>; or (2) anything A does in connection with the administration of a regulated mortgage contract in certain circumstances<sup>6</sup>.

A person who is not an authorised person ('A') does not carry on the specified activity of advising on regulated home reversion plans<sup>7</sup> by reason of (a) anything done by an authorised person ('B') in relation to a regulated home reversion plan<sup>8</sup> which B is administering pursuant to certain arrangements<sup>9</sup>; or (b) anything A does in connection with the administration of a regulated home reversion plan in certain circumstances<sup>10</sup>.

A person who is not an authorised person ('A') does not carry on the specified activity of advising on regulated home purchase plans<sup>11</sup> by reason of (i) anything done by an authorised person ('B') in relation to a regulated home purchase plan<sup>12</sup> which B is administering pursuant to certain arrangements<sup>13</sup>; or (ii) anything A does in connection with the administration of a regulated home purchase plan in certain circumstances<sup>14</sup>.

1 As to authorised persons see PARA 314 et seq.

2 I.e. an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 I.e. an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A (see PARA 174): see art 54A(1) (as added: see note 5).

4 As to the meaning of 'regulated mortgage contract' see PARA 203 note 1.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54A(1)(a) (art 54A(1) added by SI 2003/1475 and renumbered as such by SI 2006/2383). The arrangements are of the kind mentioned in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 62(a): see PARA 204.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54A(1)(b) (as added: see note 5). The circumstances are those falling within art 62(b): see PARA 204.

7 I.e. an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B (see PARA 174): see art 54A(2) (as added: see note 9).

8 As to the meaning of 'regulated home reversion plan' see PARA 209 note 1.

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54A(2)(a) (arts 54A(2), (3) added by SI 2006/2383). The arrangements are of the kind mentioned in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63C(a): see PARA 210.

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54A(2)(b) (as added: see note 9). The circumstances are those falling within art 63C(b): see PARA 210.

11 I.e. an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53C (see PARA 174): see art 54A(3) (as added: see note 9).

12 As to the meaning of 'regulated home purchase plan' see PARA 215 note 1.

13 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54A(3)(a) (as added: see note 9). The arrangements are of the kind specified in art 63G(a): see PARA 216.

14 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54A(3)(b) (as added: see note 9). The circumstances are those falling within art 63G(b): see PARA 216.

## UPDATE

## **176 Exclusion for advice given in the course of administration by authorised person**

TEXT AND NOTES--A person who is not an authorised person ('A') does not carry on an activity of the kind specified by SI 2001/544 art 53D (PARA 174) by reason of (1) anything done by an authorised person ('B') in relation to a regulated sale and rent back agreement which B is administering pursuant to arrangements of the kind mentioned in SI 2001/544 art 63K(a) (PARA 220A); or (2) anything A does in connection with the administration of a regulated sale and rent back agreement in circumstances falling within SI 2001/544 art 63K(b): SI 2001/544 art 54A(4) (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). For the meaning of 'regulated sale and rent back agreement', 'agreement seller', and 'agreement provider' see PARA 220A.

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## **177. Exclusion for trustees, nominees and personal representatives.**

There is excluded from the specified activities<sup>1</sup> of advising on investments, advising on regulated mortgage contracts, advising on regulated home reversion plans and advising on regulated home purchase plans<sup>2</sup> the giving of advice by a person acting as trustee or personal representative where he gives the advice to:

- 412 (1) a fellow trustee or personal representative for the purposes of the trust or the estate<sup>3</sup>; or
- 413 (2) a beneficiary under the trust, will or intestacy concerning his interest in the trust fund or estate<sup>4</sup>.

These provisions<sup>5</sup> do not apply if the person carrying on the activity is remunerated for what he does in addition to any remuneration he receives as trustee or personal representative, and for these purposes a person is not to be regarded as receiving additional remuneration merely because his remuneration is calculated by reference to time spent<sup>6</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Ie from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 53, 53A, 53B, 53C (see PARA 174): see art 66(6) (as amended: see note 3). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66 is subject to art 4(4A) (see PARA 88): art 66(8) (added by SI 2006/3384)

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(6)(a) (art 66(6) amended by SI 2006/2383).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(6)(b).

5 Ie the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(6).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(7).

## UPDATE

### 177 Exclusion for trustees, nominees and personal representatives

TEXT AND NOTES 1-4--Such advice is also excluded from the specified activity of advising on regulated sale and rent back agreements (ie from SI 2001/544 art 53D (PARA 174)): SI 2001/544 art 66(6) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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### 178. Exclusion for activities carried on in the course of a profession or non-investment business.

There is excluded from the specified activities<sup>1</sup> of advising on investments, advising on regulated mortgage contracts, advising on regulated home reversion plans and advising on regulated home purchase plans<sup>2</sup> any activity which:

- 414 (1) is carried on in the course of carrying on any profession or business which does not otherwise consist of the carrying on of regulated activities in the United Kingdom<sup>3</sup>; and
- 415 (2) may reasonably be regarded as a necessary part of other services provided in the course of that profession or business<sup>4</sup>.

However, this exclusion does not apply if the activity in question is remunerated separately from the other services<sup>5</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 53, 53A, 53B, 53C (see PARA 174): see art 67(1) (as amended: see note 3).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(1)(a) (art 67(1) amended by SI 2006/2383). As to the meaning of 'United Kingdom' see PARA 2 note 3. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67 is subject to art 4(4), (4A) (see PARA 88): art 67(3) (added by SI 2006/3384).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(1)(b).

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67(2).

## UPDATE

## **178 Exclusion for activities carried on in the course of a profession or non-investment business**

TEXT AND NOTES 1-4--Such activity is also excluded from the specified activity of advising on regulated sale and rent back agreements (ie from SI 2001/544 art 53D (PARA 174)): SI 2001/544 art 67(1) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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## **179. Activities carried on in connection with the sale of goods or supply of services by a supplier to a customer.**

There is excluded from the specified activity<sup>1</sup> of advising on investments<sup>2</sup> the giving of advice by a supplier to a customer for the purposes of, or in connection with, the sale of goods or supply of services, or a related sale or supply, or to a person with whom the customer proposes to enter into a transaction for the purposes of, or in connection with, such a sale or supply or related sale or supply<sup>3</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (see PARA 174): see art 68(8).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 68(8). Article 68(8) does not apply in the case of advice in relation to an investment which is a contract of insurance, is of the kind specified by art 81 (see PARA 224), or is of the kind specified by art 89 (see PARA 224) so far as relevant to such a contract or such an investment: art 68(11). Art 68 is subject to art 4(4) (see PARA 88): art 68(12) (added by SI 2006/3384).

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## **180. Exclusion for groups and joint enterprises.**

There is excluded from the specified activity<sup>1</sup> of advising on investments<sup>2</sup> the giving of advice by a person if he is a member of a group and gives the advice in question to another member of the same group<sup>3</sup> or if he is, or proposes to become, a participator in a joint enterprise and the advice in question is given to another person who is, or proposes to become, a participator in that enterprise for the purposes of, or in connection with, that enterprise<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 le excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (see PARA 174): see art 69(9).

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(9)(a). Art 69 is subject to art 4(4) (see PARA 88): art 69(13) (added by SI 2006/3384).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(9)(b).

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### **181. Exclusion for activities carried on in connection with the sale of a body corporate.**

There is an exclusion from the specified activity<sup>1</sup> of advising on investments<sup>2</sup> by entering as principal into a transaction<sup>3</sup> if:

- 416 (1) the transaction is one to acquire or dispose of shares in a body corporate other than an open-ended investment company<sup>4</sup>, or is entered into for the purposes of such an acquisition or disposal<sup>5</sup>; and
- 417 (2) either the conditions set out in heads (a) to (c) below are met<sup>6</sup>, or those conditions are not met, but the object of the transaction may nevertheless reasonably be regarded as being the acquisition of day to day control of the affairs of the body corporate<sup>7</sup>.

The conditions mentioned above are that:

- 418 (a) the shares consist of or include 50 per cent or more of the voting shares<sup>8</sup> in the body corporate<sup>9</sup>; or
- 419 (b) the shares, together with any already held by the person acquiring them, consist of or include at least that percentage of such shares<sup>10</sup>; and
- 420 (c) in either case, the acquisition or disposal is between parties each of whom is a body corporate, a partnership, a single individual or a group of connected individuals<sup>11</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 le of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (see PARA 174): see art 70(6).

3 As to entering into a transaction see PARA 113 note 2.

- 4 As to open-ended investment companies see PARA 621 et seq.
- 5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(a), (6). Article 70(6) does not apply in the case of a transaction for the sale or purchase of a contract of insurance: art 70(7) (added by SI 2003/1476). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70 is subject to art 4(4) (see PARA 88): art 70(8) (added by SI 2006/3384).
- 6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(b)(i), (6).
- 7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(1)(b)(ii), (6).
- 8 As to the meaning of 'voting shares' see PARA 113 note 12.
- 9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(a), (6).
- 10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(b), (6).
- 11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 70(2)(c), (6). As to the meaning of 'a group of connected individuals' see PARA 122 note 11. As to the meaning of 'close relative' see PARA 90 note 26.

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## **182. Exclusion for overseas persons.**

There is excluded from the specified activity<sup>1</sup> of advising on investments<sup>2</sup> the giving of advice by an overseas person<sup>3</sup> as a result of a legitimate approach<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (see PARA 174): see art 72(5).

3 As to the meaning of 'overseas person' see PARA 124 note 1.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(5). As to the meaning of 'legitimate approach' see PARA 124 note 10.

Article 72(5) does not apply where the overseas person is an investment firm or credit institution who is providing or performing investment services and activities on a professional basis, and whose home member state is the United Kingdom: art 72(8) (added by SI 2006/3384). As to the meanings of 'investment firm', 'investment services and activities' and 'home member state' see PARA 88 note 5. As to the meaning of 'credit institution' see PARA 88 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

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### **183. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 55 (amended by SI 2003/1476). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

### **UPDATE**

### **183 Exclusion for information society services**

NOTE 2--SI 2001/544 art 55 further amended: SI 2009/1342 (with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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### **184. Exclusion for activities carried on by a provider of relevant goods or services.**

There is excluded from the specified activity<sup>1</sup> of advising on investments<sup>2</sup> the giving of advice by a provider<sup>3</sup> in relation to a transaction for the sale or purchase of a connected contract of insurance<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (see PARA 174): see art 72B(4) (as added: see note 4).

3 As to the meaning of 'provider' see PARA 109 note 4.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72B(5) (art 72B added by SI 2003/1476). As to the meaning of 'connected contract of insurance' see PARA 109 note 4.

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### **185. Exclusion for large risks contracts where risk situated outside the EEA.**

There is excluded from the specified activity<sup>1</sup> of advising on investments<sup>2</sup> any activity which is carried on in relation to a large risks contract of insurance<sup>3</sup>, to the extent that the risk of commitment covered by the contract is not situated in an EEA state<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (see PARA 174): see art 72D(1) (as added: see note 4).

3 As to the meaning of 'large risks contract of insurance' see PARA 111 note 3.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72D(1) (art 72D added by SI 2003/1476).

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### **186. Exclusion for Business Angel-led Enterprise Capital Funds.**

A specified type of body corporate<sup>1</sup> does not carry on the specified activity<sup>2</sup> of advising on investments<sup>3</sup> where it is advising the participants in a Business Angel-led Enterprise Capital Fund on investments to be made by or on behalf of the participants of that Business Angel-led Enterprise Capital Fund<sup>4</sup>.

1 As to the specified type of body corporate see PARA 138 note 1.

2 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (see PARA 171): see art 72E(6) (as added: see note 4).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E(6) (art 72E added by SI 2005/1518). As to the meaning of 'Business Angel-led Enterprise Capital Fund' see PARA 138 note 4. Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Money Laundering Regulations 2007, SI 2007/2157 (see PARA 539 et seq), in so far as those Regulations would have applied to it but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E: art 72E(9) (as so added; amended by SI 2007/2157). Nothing in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72E has the effect of excluding a body corporate from the application of the Financial Services and Markets Act 2000 s 397 (misleading statements and practices) (see PARA 568), in so far as that section would have applied to it but for the Financial Services and Markets Act 2000 (Regulated

Activities) Order 2001, SI 2001/544, art 72E: art 72E(10) (as so added). Article 72E is subject to art 4(4) (see PARA 88): art 72E(11) (added by SI 2006/3384).

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## (K) STAKEHOLDER AND PERSONAL PENSION SCHEMES

### **187. Establishing etc a stakeholder and a personal pension scheme.**

Establishing, operating or winding up a stakeholder pension scheme<sup>1</sup> and establishing, operating or winding up a personal pension scheme<sup>2</sup> are both specified kinds of activity<sup>3</sup>.

A person is not to be regarded as carrying on by way of business<sup>4</sup> a relevant investment business activity (including establishing etc a pension scheme)<sup>5</sup>, unless he carries on the business of engaging in one or more such activities<sup>6</sup>.

There is an exclusion for any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>7</sup>.

1 As to the meaning of 'stakeholder pension scheme' see the Welfare Reform and Pensions Act 1999 s 1 (see **SOCIAL SECURITY AND PENSIONS**) in relation to Great Britain and the meaning given by the Welfare Reform and Pensions (Northern Ireland) Order 1999, SI 1999/3147 (NI 11); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1) (definition amended by SI 2005/593).

2 'Personal pension scheme' means a scheme or arrangement which is not an occupational pension scheme or a stakeholder pension scheme and which is comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people (1) on retirement; (2) on having reached a particular age; or (3) on termination of service in an employment: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1) (definition added by SI 2006/1969). As to the meaning of 'occupational pension scheme' see PARA 154 note 4.

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52(a), (b) (art 52 substituted by SI 2006/1969). The reference is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88. As to the provision of advice on stakeholder products see PARA 188.

4 See the Financial Services and Markets Act 2000 s 22 (see PARA 84) and s 419 (see PARA 87).

5 The reference is to an activity to which the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) applies, namely an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 14 (dealing in investments as principal) (see PARA 112); art 21 (dealing in investments as agent) (see PARA 126); art 25 (arranging deals in investments) (see PARA 139), except in so far as that activity relates to an investment of the kind specified by art 86 (Lloyd's syndicate capacity and syndicate membership), or art 89 (rights and interests) (see PARA 224) so far as relevant to art 86; art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments) (see PARA 152); art 40 (safeguarding and administering investments) (see PARA 160); art 45 (sending dematerialised instructions) (see PARA 190); art 51 (establishing etc a collective investment scheme) (see PARA 171); art 52 (establishing etc a pension scheme); art 53 (advising on investments) (see PARA 174); and art 64 (agreeing) (see PARA 221), so far as relevant to any of the articles mentioned above: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) (amended by SI 2003/1476; SI 2006/1969; SI 2006/3384). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) does not apply to any insurance mediation activity: see art

3(2) (as so amended). A person is not to be regarded as carrying on by way of business any insurance mediation activity unless he takes up or pursues that activity for remuneration: art 3(4) (art 3(4), (5) added by SI 2003/1476). As to the meaning of 'insurance mediation activity' see PARA 112 note 20. A person is also not to be regarded as carrying on by way of business activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans) (see PARA 139), art 53A (advising on regulated mortgage contracts), art 53B (advising on regulated home reversion plans), art 53C (advising on regulated home purchase plans) (see PARA 174) or art 64 (agreeing) (see PARA 221) as far as relevant to the articles mentioned above, unless he carried on the business of engaging in those activities: see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 3A, 3B, 3C; and PARA 139.

6 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) is without prejudice to art 4 in regard to occupational pension schemes (see PARA 152): art 3(3) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419: see note 4.

7 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52A (added by SI 2002/1776); the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A; and PARA 189.

## UPDATE

### 187 Establishing etc a stakeholder and a personal pension scheme

NOTE 5--A person is also not to be regarded as carrying on by way of business activities specified by SI 2001/544 art 25E (arranging regulated sale and rent back agreements) (PARA 139), art 53D (advising on regulated sale and rent back agreements) (PARA 174) or art 64 (agreeing) as far as relevant to either of the articles mentioned above, unless he carried on the business of engaging in those activities: see SI 2001/1177 art 3D; and PARA 139.

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### 188. Exclusion for providing basic advice on stakeholder products.

Providing basic advice<sup>1</sup> to a retail consumer<sup>2</sup> on a stakeholder product<sup>3</sup> is a specified kind of activity<sup>4</sup>.

1 A person provides basic advice when (1) he asks a retail consumer (see note 2) questions to enable him to assess whether a stakeholder product (see note 3) is appropriate for that consumer; (2) relying on the information provided by the retail consumer, he assesses that a stakeholder product is appropriate for the retail consumer and (a) describes that product to that consumer; or (b) gives a recommendation of that product to that consumer; and (3) the retail consumer has indicated to the person that he has understood the description and the recommendation in head (b) above: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52B(2) (art 52B added by SI 2004/2737).

2 'Retail consumer' means any person who is advised by a person on the merits of opening or buying a stakeholder product (see note 3) in the course of a business carried on by him: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52B(3) (as added: see note 1).

3 'Stakeholder product' means (1) an account which qualifies as a stakeholder child trust fund within the meaning given by the Child Trust Funds Regulations 2004, SI 2004/1450 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 565); (2) rights under a stakeholder pension scheme (see **SOCIAL SECURITY AND PENSIONS**) which is subject to lifestyle, which is the process, applied from a date at least five years before the member's retirement date or in the case of a member who joins the scheme less than five years before his retirement date, immediately after he becomes a member and continuing until the member's retirement date, by which an investment strategy is adopted by the trustees or manager which aims to minimise the variation or potential variation in the value of the member's rights caused by market conditions from time to time; and (3) an investment of a kind specified in regulations made by the Treasury: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52B(3) (as added (see note 1); amended by SI 2005/593). The following kinds of investment have been so specified: (a) certain deposit accounts (Financial Services and Markets Act 2000 (Stakeholder Products) Regulations 2004, SI 2004/2738, reg 4 (amended by SI 2005/594)); (b) units in certain collective investment schemes (Financial Services and Markets Act 2000 (Stakeholder Products) Regulations 2004, SI 2004/2738, reg 5); and (c) rights under certain linked long-term contracts (reg 6). As to the requirements applicable to units in collective investment schemes and rights in a linked long-term fund, the additional requirements to be satisfied where the returns under a linked long-term contract are smoothed and for the charge cap applicable to stakeholder collective investment schemes and linked long-term fund see regs 7-9 (reg 7 amended by SI 2005/594). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52B(1) (as added: see note 1). The reference is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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### **189. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). The exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) does not apply to the activity of effecting or carrying out a contract of insurance as principal, where:

- 192 (1) the activity is carried on by an undertaking which has received official authorisation in accordance with the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 4 (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(a) (art 72A as so added; art 72A(2)(a) amended by SI 2005/2114)); and
- 193 (2) the insurance falls within the scope of any of the Insurance Directives (art 72A(2)(b) (as so added)).

As to the meaning of 'contract of insurance' see PARA 90 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'Insurance Directives' see PARA 86 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52A (added by SI 2002/1776). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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## (L) SENDING DEMATERIALISED INSTRUCTIONS

### **190. Sending dematerialised instructions.**

Sending, on behalf of another person, dematerialised instructions<sup>1</sup> relating to a security<sup>2</sup> or a contractually based investment<sup>3</sup> is a specified kind of activity<sup>4</sup>, where those instructions are sent on behalf of another person by means of a relevant system in respect of which there is an approved operator<sup>5</sup>. Causing dematerialised instructions relating to a security or a contractually based investment to be sent on behalf of another person by means of such a system is also a specified kind of activity where the person causing them to be sent is a system-participant<sup>6</sup>.

A person is not to be regarded as carrying on by way of business<sup>7</sup> a relevant investment business activity (including sending dematerialised instructions)<sup>8</sup>, unless he carries on the business of engaging in one or more such activities<sup>9</sup>.

Certain activities and arrangements are specifically excluded and therefore do not constitute specified kinds of activities: they are instructions on behalf of participating issuers<sup>10</sup>, instructions on behalf of settlement banks<sup>11</sup>, instructions in connection with takeover offers<sup>12</sup>, instructions in the course of providing a network<sup>13</sup>, trustees, nominees and personal representatives<sup>14</sup>, groups and joint enterprises<sup>15</sup> and information society services<sup>16</sup>.

1 As to the meaning of 'dematerialised instructions' see the Uncertified Securities Regulations 2001, SI 2001/3755, reg 3 (see **COMPANIES** vol 14 (2009) PARA 421); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45(3) (amended by SI 2002/682).

2 As to the meaning of 'security' see PARA 89 note 1.

3 As to the meaning of 'contractually based investment' see PARA 112 note 4.

4 I.e. an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45(1) (amended by SI 2002/682). As to the meaning of 'operator' see the Uncertified Securities Regulations 2001, SI 2001/3755, reg 3 (see **COMPANIES** vol 14 (2009) PARA 421); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45(3) (as amended: see note 1).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45(2) (amended by SI 2001/3544; SI 2002/682). As to the meaning of 'system-participant' see the Uncertified Securities Regulations 2001, SI 2001/3755, reg 3; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45(3) (as so amended).

7 See the Financial Services and Markets Act 2000 s 22 (see PARA 84) and s 419 (see PARA 87).

8 The reference is to an activity to which the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) applies, namely an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 14 (dealing in investments as principal) (see PARA 112); art 21 (dealing in investments as agent) (see PARA 126); art 25 (arranging deals in investments) (see PARA 139), except in so far

as that activity relates to an investment of the kind specified by art 86 (Lloyd's syndicate capacity and syndicate membership), or art 89 (rights and interests) (see PARA 224) so far as relevant to art 86; art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments) (see PARA 152); art 40 (safeguarding and administering investments) (see PARA 160); art 45 (sending dematerialised instructions); art 51 (establishing etc a collective investment scheme) (see PARA 171); art 52 (establishing etc a pension scheme) (see PARA 187); art 53 (advising on investments) (see PARA 174); and art 64 (agreeing) (see PARA 221), so far as relevant to any of the articles mentioned above: Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) (amended by SI 2003/1476; SI 2006/1969; SI 2006/3384). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) does not apply to any insurance mediation activity: see art 3(2) (as so amended). A person is not to be regarded as carrying on by way of business any insurance mediation activity unless he takes up or pursues that activity for remuneration: art 3(4) (art 3(4), (5) added by SI 2003/1476). As to the meaning of 'insurance mediation activity' see PARA 112 note 20. A person is also not to be regarded as carrying on by way of business activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans) (see PARA 139), art 53A (advising on regulated mortgage contracts), art 53B (advising on regulated home reversion plans), art 53C (advising on regulated home purchase plans) (see PARA 174) or art 64 (agreeing) (see PARA 221) as far as relevant to the articles mentioned above, unless he carried on the business of engaging in those activities: see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 3A, 3B, 3C; and PARA 139.

9 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) is without prejudice to art 4 in regard to occupational pension schemes (see PARA 152): art 3(3) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419: see note 7.

10 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 46; and PARA 191.

11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 47; and PARA 192.

12 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 48; and PARA 193.

13 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 49; and PARA 194.

14 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 50, 66; and PARA 195.

15 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 50, 69; and PARA 196.

16 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 50, 72A; and PARA 197.

## **UPDATE**

### **190 Sending dematerialised instructions**

NOTE 8--A person is also not to be regarded as carrying on by way of business activities specified by SI 2001/544 art 25E (arranging regulated sale and rent back agreements) (PARA 139), art 53D (advising on regulated sale and rent back agreements) (PARA 174) or art 64 (agreeing) as far as relevant to either of the articles mentioned above, unless he carried on the business of engaging in those activities: see SI 2001/1177 art 3D; and PARA 139.

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### **191. Exclusion for instructions on behalf of participating issuers.**

There is excluded from the specified activity<sup>1</sup> of sending dematerialised instructions<sup>2</sup> the act of sending, or causing to be sent, a dematerialised instruction where the person on whose behalf the instruction is sent or caused to be sent is a participating issuer<sup>3</sup>.

1    Ie an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2    Ie from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45 (see PARA 190): see art 46.

3    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 46 (amended by SI 2002/682). As to the meaning of 'participating issuer' see the Uncertified Securities Regulations 2001, SI 2001/3755, reg 3 (see **COMPANIES** vol 14 (2009) PARA 421 et seq); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45(3) (amended by SI 2002/682).

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### **192. Exclusion for instructions on behalf of settlement banks.**

There is also excluded from the specified activity<sup>1</sup> of sending dematerialised instructions<sup>2</sup> the act of sending, or causing to be sent, a dematerialised instruction where the person on whose behalf the instruction is sent or caused to be sent is a settlement bank<sup>3</sup> in its capacity as such<sup>4</sup>.

1    Ie an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2    Ie from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45 (see PARA 190): see art 47.

3    As to the meaning of 'settlement bank' see the Uncertified Securities Regulations 2001, SI 2001/3755, reg 3 (see **COMPANIES** vol 14 (2009) PARA 428); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45(3) (amended by SI 2002/682).

4    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 47.

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### **193. Exclusion for instructions in connection with takeover offers.**

Another exclusion from the specified activity<sup>1</sup> of sending dematerialised instructions<sup>2</sup> is the act of sending, or causing to be sent, a dematerialised instruction where the person on whose behalf the instruction is sent or caused to be sent is an offeror<sup>3</sup> making a takeover offer<sup>4</sup>.

1     le an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2     le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45 (see PARA 190): see art 48(1).

3     In Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 48 'offeror' means, in the case of a takeover offer made by two or more persons jointly, the joint offers or any of them: art 48(2)(a). 'Takeover offer' means:

194   (1)   an offer to acquire shares (which in art 48(2)(b)(i) has the same meaning as in the Companies Act 2006 s 974 (see **COMPANIES** vol 15 (2009) PARA 1511) in a body corporate incorporated in the United Kingdom which is a takeover offer within the meaning of Pt 28 Ch 3 (ss 974-991) of that Act (or would be such an offer if Pt 28 Ch 3 of that Act applied in relation to any body corporate) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 48(2)(b)(i) (amended by SI 2007/1093));

195   (2)   an offer to acquire all or substantially all the shares, or all the shares of a particular class, in a body corporate incorporated outside the United Kingdom (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 48(2)(b)(ii)); or

196   (3)   an offer made to all the holders of shares, or shares of a particular class, in a body corporate to acquire a specified proportion of those shares (art 48(2)(b)(iii));

but in determining whether an offer falls within head (2) above there are to be disregarded any shares which the offeror or any associate of his (within the meaning of the Companies Act 2006 s 988 (see **COMPANIES** vol 15 (2009) PARA 1512) holds or has contracted to acquire; and in determining whether an offer falls within head (3) above the offeror, any such associate and any person whose shares the offeror or any such associate has contracted to acquire is not to be regarded as a holder of shares (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 48(2)(b) (amended by SI 2007/1093)). As to the meaning of 'United Kingdom' see PARA 2 note 3.

4     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 48(1).

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### **194. Exclusion for instructions in the course of providing a network.**

Excluded from the specified activity<sup>1</sup> of sending dematerialised instructions<sup>2</sup> is the act of sending, or causing to be sent, a dematerialised instruction as a necessary part of providing a



network, the purpose of which is to carry dematerialised instructions which are at all times properly authenticated<sup>3</sup>.

1     Ie an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2     Ie from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45 (see PARA 190): see art 49.

3     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 49 (amended by SI 2002/682). As to the meaning of 'properly authenticated' see the Uncertified Securities Regulations 2001, SI 2001/3755, reg 3 (see **COMPANIES** vol 14 (2009) PARA 421 et seq); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45(3) (amended by SI 2002/682).

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### **195. Exclusion for trustees, nominees and personal representatives.**

A person does not, by sending or causing to be sent a dematerialised instruction<sup>1</sup>, carry on the specified activity<sup>2</sup> of sending dematerialised instructions<sup>3</sup> if the instruction relates to an investment which that person holds as trustee or personal representative<sup>4</sup>.

1     Ie within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45: see PARA 190.

2     A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3     Ie an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45 (see PARA 190): see art 66(5).

4     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(5). Article 66 is subject to art 4(4A) (see PARA 88): art 66(8) (added by SI 2006/3384).

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### **196. Exclusion for groups and joint enterprises.**

A person who is a member of a group does not carry on the specified activity<sup>1</sup> of sending dematerialised instructions<sup>2</sup> where he sends a dematerialised instruction, or causes one to be

sent, on behalf of another member of the same group, if the investment to which the instruction relates is one in respect of which a member of the same group is registered as holder in the appropriate register of securities<sup>3</sup>, or will be so registered as a result of the instruction<sup>4</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45 (see PARA 190): see art 69(7). As to the meaning of 'dematerialised instruction' see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3 (see **COMPANIES** vol 14 (2009) PARA 421); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(8) (amended by SI 2002/682).

3 As to the meaning of 'register of securities' see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3; definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(8) (as amended: see note 2).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 69(7). Article 69 is subject to art 4(4) (see PARA 88): art 69(13) (added by SI 2006/3384).

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## **197. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 50 (amended by SI 2002/1776). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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(M) LLOYD'S

## 198. Various activities at Lloyd's.

The carrying on of each one of a number of activities at Lloyd's is a specified kind of activity<sup>1</sup>. Advising a person to become, or continue or cease to be, a member of a particular Lloyd's syndicate<sup>2</sup> is a specified kind of activity<sup>3</sup>. So are managing the underwriting capacity of a Lloyd's syndicate as a managing agent<sup>4</sup> at Lloyd's<sup>5</sup> and the arranging, by the society incorporated by the Lloyd's Act 1871 by the name of Lloyd's, of deals in contracts of insurance written at Lloyd's<sup>6</sup>.

For each of the above specified activities there is an exclusion in regard to information society services<sup>7</sup>.

1     Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2     'Syndicate' means one or more persons, to whom a particular syndicate number has been assigned by or under the authority of the Council of Lloyd's, carrying out or effecting contracts of insurance written at Lloyd's: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1). As to the meaning of 'contract of insurance' see PARA 90 note 3. As to Lloyd's generally see **INSURANCE**.

3     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 56.

4     'Managing agent' means a person who is permitted by the Council of Lloyd's in the conduct of his business as an underwriting agent to perform for a member of Lloyd's one or more of the following functions: (1) underwriting contracts of insurance at Lloyd's; (2) reinsuring such contracts in whole or in part; (3) paying claims on such contracts: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1).

5     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 57.

6     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 58.

7     The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 56, 57 and 58 are subject to the exclusion in art 72A (information society services) (see PARA 199): see art 58A (added by SI 2002/1776).

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## 199. Exclusion for information society services.

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). The exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) does not apply to the activity of effecting or carrying out a contract of insurance as principal, where:

197 (1) the activity is carried on by an undertaking which has received official authorisation in accordance with the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 4 (Financial

Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(a) (art 72A as so added; art 72A(2)(a) amended by SI 2005/2114)); and

- 198 (2) the insurance falls within the scope of any of the Insurance Directives (art 72A(2)(b) (as so added)).

As to the meaning of 'contract of insurance' see PARA 90 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'Insurance Directives' see PARA 86 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 58A (added by SI 2002/1776). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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## (N) FUNERAL PLAN CONTRACTS

### 200. Funeral plan contracts.

Entering as provider into a funeral plan contract<sup>1</sup> is a specified kind of activity<sup>2</sup>. Certain contracts are specifically excluded<sup>3</sup> and therefore do not constitute specified activities. These exclusions are plans covered by insurance and trust arrangements<sup>4</sup> and any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>5</sup>.

1 A 'funeral plan contract' is a contract (other than one excluded by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60) under which:

199 (1) a person (the 'customer') makes one or more payments to another person (the 'provider') (art 59(2)(a)); and

200 (2) the provider undertakes to provide, or secure that another person provides, a funeral in the United Kingdom for the customer (or some other person who is living at the date when the contract is entered into) on his death (art 59(2)(b)),

unless, at the time of entering into the contract, the customer and the provider intend or expect the funeral to occur within one month (art 59(2)). As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 59(1). The reference is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 59.

4 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60; and PARA 201.

5 The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 59 is subject to the exclusion in art 72A (information society services) (see PARA 202): art 60A (added by SI 2002/1776).

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## **201. Exclusion for plans covered by insurance or trust arrangements.**

There is an exclusion<sup>1</sup> from the specified activity<sup>2</sup> of entering as provider into a funeral plan contract in regard to any contract under which:

- 421 (1) the provider undertakes to secure that sums paid by the customer under the contract will be applied towards a contract of whole life insurance on the life of the customer (or other person for whom the funeral is to be provided), effected and carried out by an authorised person who has permission to effect and carry out such contracts of insurance, for the purpose of providing the funeral<sup>3</sup>; or
  - 422 (2) the provider undertakes to secure that sums paid by the customer under the contract will be held on trust for the purpose of providing the funeral, and that the following requirements are or will be met with respect to the trust:
- 47
- 74. (a) the trust must be established by a written instrument<sup>4</sup>;
  - 75. (b) more than half of the trustees must be unconnected<sup>5</sup> with the provider<sup>6</sup>;
  - 76. (c) the trustees must appoint, or have appointed, an independent fund manager who is an authorised person who has permission to carry on a specified kind of activity<sup>7</sup>, and who is a person who is unconnected<sup>8</sup> with the provider, to manage the assets of the trust<sup>9</sup>;
  - 77. (d) annual accounts must be prepared, and audited by a person who is eligible for appointment as a statutory auditor<sup>10</sup>, with respect to the assets and liabilities of the trust<sup>11</sup>; and
  - 78. (e) the assets and liabilities of the trust must, at least once every three years, be determined, calculated and verified by an actuary who is a Fellow of the Institute of Actuaries or of the Faculty of Actuaries<sup>12</sup>.
- 48

1 le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 59 (see PARA 200): see art 60(1).

2 le an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60(1)(a).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60(1)(b)(i). As to the meaning of 'instrument' see PARA 115 note 2.

5 For the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60(1)(b)(ii), (iii), a person is unconnected with the provider if he is a person other than: (1) the provider; (2) a member of the same group as the provider; (3) a director, other officer or employee of the provider, or of any member of the same group as the provider; (4) a partner of the provider; (5) a close relative

of a person falling within head (1), head (3) or head (4) above; or (6) an agent of any person falling within heads (1)-(5) above: art 60(2). As to meaning of 'close relative' see PARA 90 note 26.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60(1)(b)(ii).

7 Is an activity of the kind specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37: see PARA 152.

8 See note 5.

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60(1)(b)(iii).

10 Is under the Companies Act 2006 Pt 42 (ss 1209-1264) (see **COMPANIES**): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60(1)(b)(iv) (amended by SI 2008/948).

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60(1)(b)(iv) (as amended: see note 10).

12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60(1)(b)(v).

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## **202. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). The exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) does not apply to the activity of effecting or carrying out a contract of insurance as principal, where:

201 (1) the activity is carried on by an undertaking which has received official authorisation in accordance with the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 4 (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(2)(a) (art 72A as so added; art 72A(2)(a) amended by SI 2005/2114)); and

202 (2) the insurance falls within the scope of any of the Insurance Directives (art 72A(2)(b) (as so added)).

As to the meaning of 'contract of insurance' see PARA 90 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'Insurance Directives' see PARA 86 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 60A (added by SI 2002/1776). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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## (O) REGULATED MORTGAGE CONTRACTS

### 203. Entering into and administering regulated mortgage contracts.

Entering into a regulated mortgage contract<sup>1</sup> as lender is a specified kind of activity<sup>2</sup>. Administering<sup>3</sup> a regulated mortgage contract is also a specified kind of activity<sup>4</sup>.

Certain contracts are specifically excluded<sup>5</sup> from administering a regulated mortgage contract and therefore do not constitute that specified activity. They are arranging administration by an authorised person<sup>6</sup> and administration pursuant to agreement with an authorised person<sup>7</sup>.

There are also exclusions<sup>8</sup> from both the above specified activities in regard to trustees, nominees and personal representatives<sup>9</sup>, overseas persons<sup>10</sup> and information society services<sup>11</sup>.

1 A contract is a 'regulated mortgage contract' if, at the time it is entered into, the following conditions are met:

- 203 (1) the contract is one under which a person (the 'lender') provides credit to an individual or to trustees (the 'borrower') (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 3(1), 61(3)(a)(i) (art 61(3)(a) substituted by SI 2001/3544));
- 204 (2) the contract provides for the obligation of the borrower to repay to be secured by a first legal mortgage on land (other than timeshare accommodation) in the United Kingdom (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 3(1), 61(3)(a)(ii) (art 61(3)(a) as so substituted));
- 205 (3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling by the borrower or (in the case of credit provided to trustees) by an individual who is a beneficiary of the trust, or by a related person (arts 3(1), 61(3)(a)(iii) (art 61(3)(a) as so substituted));

but such a contract is not a regulated mortgage contract if it is a regulated home purchase plan (see PARA 215): arts 3(1), 61(3)(a) (art 61(3)(a) as so substituted; amended by SI 2006/2383).

'Credit' includes a cash loan, and any other form of financial accommodation: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(3)(c). A 'first legal mortgage' means a legal mortgage ranking in priority ahead of all other mortgages (if any) affecting the land in question, where 'mortgage' includes charge and (in Scotland) a heritable security: art 61(4)(a) (art 61(4) amended by SI 2001/3544). The area of any land which comprises a building or other structure containing two or more storeys is to be taken to be the aggregate of the floor areas of each of those storeys: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(4)(b) (as so amended). 'Timeshare accommodation' has the meaning given by the Timeshare Act 1992 s 1 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 867 et seq): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(4)(d) (as so amended). 'Related person', in relation to the borrower or (in the case of credit provided to trustees) a beneficiary of the trust, means: (a) that person's spouse or civil partner; (b) a person (whether or not of the opposite sex) whose relationship with that person has the characteristics of the relationship between husband and wife; or (c) that person's parent, brother, sister, child, grandparent or grandchild: art 61(4)(c)(iii) (art 61(4) as so amended; art 61(4)(c) amended by SI 2005/2114).

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(1). The reference is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 'Administering' a regulated mortgage contract means either or both of:

- 206 (1) notifying the borrower of changes in interest rates or payments due under the contract, or of other matters of which the contract requires him to be notified (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(3)(b)(i)); and

207 (2) taking any necessary steps for the purposes of collecting or recovering payments due under the contract from the borrower (art 61(3)(b)(ii));

but a person is not to be treated as administering a regulated mortgage contract merely because he has, or exercises, a right to take action for the purposes of enforcing the contract (or to require that such action is or is not taken) (art 61(3)(b)).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(2) (amended by SI 2001/3544). It is a specified kind of activity where the contract was entered into by way of business after the coming into force of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61.

5 le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(2).

6 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 62; and PARA 204.

7 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63; and PARA 205.

8 le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61. See art 63A (added by SI 2002/1776; and substituted by SI 2003/1475).

9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 63A, 66; and PARA 206.

10 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 63A, 72; and PARA 207.

11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 63A, 72A; and PARA 208.

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#### **204. Exclusion for arranging administration by authorised person.**

There is an exclusion<sup>1</sup> from the specified activity<sup>2</sup> of administering<sup>3</sup> a regulated mortgage contract<sup>4</sup> for a person who is not an authorised person<sup>5</sup> in relation to a regulated mortgage contract where he:

423 (1) arranges for another person, being an authorised person with permission to carry on an activity of that kind, to administer the contract<sup>6</sup>; or

424 (2) administers the contract himself during a period of not more than one month beginning with the day on which any such arrangement comes to an end<sup>7</sup>.

1 le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(2).

2 le an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 As to the meaning of 'administering' see PARA 203 note 3.



- 4 As to the meaning of 'regulated mortgage contract' see PARA 203 note 1.
- 5 As to authorised persons see PARA 314.
- 6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 62(a).
- 7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 62(b).

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### **205. Exclusion for administration pursuant to agreement with authorised person.**

There is an exclusion<sup>1</sup> from the specified activity<sup>2</sup> of administering<sup>3</sup> a regulated mortgage contract<sup>4</sup> for a person who is not an authorised person<sup>5</sup> where he administers the contract pursuant to an agreement with an authorised person who has permission to carry on the activity<sup>6</sup>.

1 Excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(2).

2 Is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 As to the meaning of 'administering' see PARA 203 note 3.

4 As to the meaning of 'regulated mortgage contract' see PARA 203 note 1.

5 As to authorised persons see PARA 314.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63.

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### **206. Exclusion for beneficiary under trust, will or intestacy.**

There is excluded from the specified activities<sup>1</sup> of entering into a regulated mortgage contract as lender or administering a regulated mortgage contract<sup>2</sup> where the borrower under the regulated mortgage contract<sup>3</sup> in question is a beneficiary under the trust, will or intestacy<sup>4</sup>.

These provisions<sup>5</sup> do not apply if the person carrying on the activity is remunerated for what he does in addition to any remuneration he receives as trustee or personal representative, and for

these purposes a person is not to be regarded as receiving additional remuneration merely because his remuneration is calculated by reference to time spent<sup>6</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Ie from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(1) or (2) (see PARA 203): see art 66(6A) (as added: see note 3). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66 is subject to art 4(4A) (see PARA 88): art 66(8) (added by SI 2006/3384).

3 As to the meaning of 'regulated mortgage contract' see PARA 203 note 1.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(6A) (added by SI 2003/1475).

5 Ie the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(6A).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(7) (amended by SI 2006/2383).

## UPDATE

### 206 Exclusion for beneficiary under trust, will or intestacy

TEXT AND NOTES 1-4--Text should read as follows: 'There is an exclusion from the specified activities of entering into a regulated mortgage contract as lender or administering a regulated mortgage contract for a person acting as trustee or personal representative where the borrower under the regulated mortgage contract in question is a beneficiary under the trust, will or intestacy.'

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### 207. Exclusion for overseas persons.

An overseas person<sup>1</sup> does not carry on the specified activity<sup>2</sup> of entering into a regulated mortgage contract as lender<sup>3</sup> by entering into a qualifying agreement<sup>4</sup>. An overseas person also does not carry on the specified activity of administering a regulated mortgage contract<sup>5</sup> where he administers a qualifying agreement<sup>6</sup>.

1 As to the meaning of 'overseas person' see PARA 124 note 1.

2 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Ie an activity of the kind specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(1) (see PARA 203): see art 72(5D) (as added and substituted: see note 4).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(5D) (arts 72(5D), (5E) added by SI 2003/1475; and substituted by SI 2006/2383). As to the meaning of 'qualifying agreement' see PARA 146 note 18.

5 Is an activity of the kind specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(2) (see PARA 203): see art 72(5E) (as added and substituted: see note 4).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(5E) (as added: see note 4).

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## **208. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63A (added by SI 2002/1776). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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## **(P) REGULATED HOME REVERSION PLANS**

### **209. Entering into and administering regulated home reversion plans.**

Entering into a regulated home reversion plan<sup>1</sup> as plan provider is a specified kind of activity<sup>2</sup>. Administering<sup>3</sup> a regulated home reversion plan is also a specified kind of activity<sup>4</sup>.

Certain contracts are specifically excluded<sup>5</sup> from administering a regulated home reversion plan and therefore do not constitute that specified activity. They are arranging administration by an authorised person<sup>6</sup> and administration pursuant to agreement with an authorised person<sup>7</sup>.

There are also exclusions<sup>8</sup> from both the above specified activities in regard to trustees, nominees and personal representatives<sup>9</sup>, overseas persons<sup>10</sup> and information society services<sup>11</sup>.

1 A 'regulated home reversion plan' is an arrangement comprised in one or more instruments or agreements, in relation to which the following conditions are met at the time it is entered into:

- 208 (1) the arrangement is one under which a person (the 'plan provider') buys all or part of a qualifying interest in land (other than timeshare accommodation) in the United Kingdom from an individual or trustees (the 'reversion seller') (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 3(1), 63B(3)(a)(i) (art 63B added by SI 2006/2383));
- 209 (2) the reversion seller (if he is an individual) or an individual who is a beneficiary of the trust (if the reversion seller is a trustee), or a related person, is entitled under the arrangement to occupy at least 40% of the land in question as or in connection with a dwelling, and intends to do so (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 3(1), 63B(3)(a)(ii) (art 63B as so added)); and
- 210 (3) the arrangement specifies one or more qualifying termination events, on the occurrence of which that entitlement will end (arts 3(1), 63B(3)(a)(iii) (art 63B as so added)).

For the purposes of art 63B(3)(a)(ii) (see head (2) above), the area of any land which comprises a building or other structure containing two or more storeys is to be taken to be the aggregate of the floor areas of each of those storeys: art 63B(5) (as so added).

The reference to a 'qualifying interest' in land in relation to land in England or Wales, is to an estate in fee simple absolute or a term of years absolute, whether subsisting at law or in equity; and in relation to land in Northern Ireland, it is to any freehold estate or any leasehold estate, whether subsisting at law or in equity: art 63B(4)(a) (as so added). 'Timeshare accommodation' has the meaning given by the Timeshare Act 1992 s 1 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 867 et seq): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(4)(b) (as so added). 'Related person' in relation to the reversion seller or, where the reversion seller is a trustee, a beneficiary of the trust, means (a) that person's spouse or civil partner; (b) a person (whether or not of the opposite sex) whose relationship with that person has the characteristics of the relationship between husband and wife; or (c) that person's parent, brother, sister, child, grandparent or grandchild: art 63B(4)(c) (as so added). 'Qualifying termination event', in relation to a person's entitlement to occupy land, means: (i) the person becomes a resident of a care home; (ii) the person dies; (iii) the end of a specified period of at least 20 years beginning with the day on which the reversion seller entered into the arrangement: art 63B(4)(d) (as so added). For these purposes, 'care home' in relation to England and Wales, has the meaning given by the Care Standards Act 2000 s 3 (see **SOCIAL SECURITY AND PENSIONS**); and in relation to Northern Ireland, means a residential care home within the meaning of the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003, SI 2003/431 (NI 9), art 10 or a nursing home within the meaning of art 11: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(6) (as so added). See also note 2.

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(1) (as added: see note 1). The reference is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

In the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, references to entering into a regulated home reversion plan as plan provider include acquiring any obligations or rights (including his interest in land) of the plan provider, under such a plan; but in relation to a person who acquires any such obligations or rights, an activity is a specified kind of activity for the purposes of art 25B(1)(b) (see PARA 139) and art 53B(b)(ii) (see PARA 174) and art 63B(2) (see the text to note 4) only if the plan was entered into by the plan provider (rather than the obligations or rights acquired) on or after 6 April 2007: see art 63B(7) (as so added). Accordingly, references in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, to a plan provider, other than in art 63B(7), include a person who acquires any such obligations or rights: art 63B(8) (as so added). See note 1.

3 'Administering' a regulated home reversion plan means any of (1) notifying the reversion seller of changes in payments due under the plan, or of other matters of which the plan requires him to be notified; (2) taking any necessary steps for the purposes of making payments to the reversion seller under the plan; and (3) taking any necessary steps for the purposes of collecting or recovering payments due under the plan from the reversion seller, but a person is not to be treated as administering a regulated home reversion plan merely because he has, or exercises, a right to take action for the purposes of enforcing the plan (or to require that such action is or is not taken): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(3)(b) (as added: see note 1).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(2) (as added: see note 1). It is a specified kind of activity where the plan was entered into on or after 6 April 2007. See note 2.

5 le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(2).

6 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63C; and PARA 210.

7 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63D; and PARA 211.

8 le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B. See art 63E (added by SI 2006/2383).

9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 63E, 66; and PARA 212.

10 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 63E, 72; and PARA 213.

11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 63E, 72A; and PARA 214.

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## **210. Exclusion for arranging administration by authorised person.**

There is an exclusion<sup>1</sup> from the specified activity<sup>2</sup> of administering<sup>3</sup> a regulated home reversion plan<sup>4</sup> for a person who is not an authorised person<sup>5</sup> in relation to a regulated home reversion plan where he:

- 425 (1) arranges for another person, being an authorised person with permission to carry on an activity of that kind, to administer the plan<sup>6</sup>; or
- 426 (2) administers the plan himself during a period of not more than one month beginning with the day on which any such arrangement comes to an end<sup>7</sup>.

1 le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(2).

2 le an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 As to the meaning of 'administering' see PARA 209 note 3.

4 As to the meaning of 'regulated home reversion plan' see PARA 209 note 1.

5 As to authorised persons see PARA 314.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63C(a) (art 63C added by SI 2006/2383).

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63C(b) (as added: see note 6).

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## **211. Exclusion for administration pursuant to agreement with authorised person.**

There is an exclusion<sup>1</sup> from the specified activity<sup>2</sup> of administering<sup>3</sup> a regulated home reversion plan<sup>4</sup> for a person who is not an authorised person<sup>5</sup> where he administers the plan pursuant to an agreement with an authorised person who has permission to carry on the activity<sup>6</sup>.

1 Excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(2).

2 Means an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 As to the meaning of 'administering' see PARA 209 note 3.

4 As to the meaning of 'regulated home reversion plan' see PARA 209 note 1.

5 As to authorised persons see PARA 314.

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63D (added by SI 2006/2383).

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## **212. Exclusion for beneficiary under trust, will or intestacy.**

There is excluded from the specified activities<sup>1</sup> of entering into a regulated home reversion plan as plan provider or administering a regulated home reversion plan<sup>2</sup> where the reversion seller under the plan<sup>3</sup> in question is a beneficiary under the trust, will or intestacy<sup>4</sup>.

These provisions<sup>5</sup> do not apply if the person carrying on the activity is remunerated for what he does in addition to any remuneration he receives as trustee or personal representative, and for these purposes a person is not to be regarded as receiving additional remuneration merely because his remuneration is calculated by reference to time spent<sup>6</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(1) or (2) (see PARA 209): see art 66(6B) (as added: see note 3). The Financial Services and Markets Act 2000

(Regulated Activities) Order 2001, SI 2001/544, art 66 is subject to art 4(4A) (see PARA 88): art 66(8) (added by SI 2006/3384)

3 As to the meanings of 'regulated home reversion plan' and 'reversion seller' see PARA 209 note 1.

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(6B) (added by SI 2006/2383).

5 le the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(6B).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(7) (amended by SI 2006/2383).

## UPDATE

### 212 Exclusion for beneficiary under trust, will or intestacy

TEXT AND NOTES 1-4--Text should read as follows: 'There is an exclusion from the specified activities of entering into a regulated home reversion plan as plan provider or administering a regulated home reversion plan for a person acting as trustee or personal representative where the reversion seller under the plan in question is a beneficiary under the trust, will or intestacy.'

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### 213. Exclusion for overseas persons.

An overseas person<sup>1</sup> does not carry on the specified activity<sup>2</sup> of entering into a regulated home reversion plan as plan provider<sup>3</sup> by entering into a qualifying agreement<sup>4</sup>. An overseas person also does not carry on the specified activity of administering a regulated home reversion plan<sup>5</sup> where he administers a qualifying agreement<sup>6</sup>.

1 As to the meaning of 'overseas person' see PARA 124 note 1.

2 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 le an activity of the kind specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(1) (see PARA 209): see art 72(5D) (as added and substituted: see note 4).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(5D) (arts 72(5D), (5E) added by SI 2003/1475; and substituted by SI 2006/2383). As to the meaning of 'qualifying agreement' see PARA 146 note 18.

5 le an activity of the kind specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(2) (see PARA 209): see art 72(5E) (as added and substituted: see note 4).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(5E) (as added: see note 4).

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## **214. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63E (added by SI 2006/2383). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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## **(Q) REGULATED HOME PURCHASE PLANS**

### **215. Entering into and administering regulated home purchase plans.**

Entering into a regulated home purchase plan<sup>1</sup> as home purchase provider is a specified kind of activity<sup>2</sup>. Administering<sup>3</sup> a regulated home purchase plan is also a specified kind of activity<sup>4</sup>.

Certain contracts are specifically excluded<sup>5</sup> from administering a regulated home purchase plan and therefore do not constitute that specified activity. They are arranging administration by an authorised person<sup>6</sup> and administration pursuant to agreement with an authorised person<sup>7</sup>.

There are also exclusions<sup>8</sup> from both the above specified activities in regard to trustees, nominees and personal representatives<sup>9</sup>, overseas persons<sup>10</sup> and information society services<sup>11</sup>.

1 'Regulated home purchase plan' is an arrangement comprised in one or more instruments or agreements, in relation to which the following conditions are met at the time it is entered into:

- 211 (1) the arrangement is one under which a person (the 'home purchase provider') buys a qualifying interest or an undivided share of a qualifying interest in land (other than timeshare accommodation) in the United Kingdom (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 3(1), 63F(3)(a)(i) (definition in art 3(1); and art 63F added by SI 2006/2383));
- 212 (2) where an undivided share of a qualifying interest in land is bought, the interest is held on trust for the home purchase provider and the individual or trustees mentioned in head (3) below



as beneficial tenants in common (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 3(1), 63F(3)(a)(ii) (as so added));

213 (3) the arrangement provides for the obligation of an individual or trustees (the 'home purchaser') to buy the interest bought by the home purchase provider over the course of or at the end of a specified period (arts 3(1), 63F(3)(a)(iii) (as so added)); and

214 (4) the home purchaser (if he is an individual) or an individual who is a beneficiary of the trust (if the home purchaser is a trustee), or a related person, is entitled under the arrangement to occupy at least 40% of the land in question as or in connection with a dwelling during that period, and intends to do so (arts 3(1), 63F(3)(a)(iv) (as so added)).

As to the meaning of 'instrument' see PARA 115 note 2. As to the meaning of 'United Kingdom' see PARA 2 note 3. Article 63B(4)(a)-(c) (see PARA 209 note 1) applies for the purposes of art 63F(3)(a) (see heads (1)-(4) above) with references to the 'reversion seller' being read as references to the 'home purchaser': art 63F(4) (as so added). Article 63B(5) (see PARA 209 note 1) applies for the purposes of art 63F(3)(a)(iv) (see head (4) above) with the reference to 'art 63B(3)(a)(ii)' being read as a reference to 'art 63F(3)(a)(iv)': art 63F(5) (as so added).

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(1) (as added: see note 1). The reference is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 'Administering' a regulated home purchase plan means either or both of (1) notifying the home purchaser of changes in payments due under the plan, or of other matters of which the plan requires him to be notified; and (2) taking any necessary steps for the purposes of collecting or recovering payments due under the plan from the home purchaser; but a person is not to be treated as administering a regulated home purchase plan merely because he has, or exercises, a right to take action for the purposes of enforcing the plan or to require that such action is or is not taken: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(3)(b) (as added: see note 1).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(2) (as added: see note 1). It is a specified kind of activity where the plan was entered into on or after 6 April 2007.

5 le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(2).

6 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63G; and PARA 216.

7 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63H; and PARA 217.

8 le from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F. See art 63I (added by SI 2006/2383).

9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 63I, 66; and PARA 218.

10 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 63I, 72; and PARA 219.

11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 63I, 72A; and PARA 220.

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## **216. Exclusion for arranging administration by authorised person.**

There is an exclusion<sup>1</sup> from the specified activity<sup>2</sup> of administering<sup>3</sup> a regulated home purchase plan<sup>4</sup> for a person who is not an authorised person<sup>5</sup> in relation to a regulated home purchase plan where he:

- 427 (1) arranges for another person, being an authorised person with permission to carry on an activity of that kind, to administer the plan<sup>6</sup>; or
- 428 (2) administers the plan himself during a period of not more than one month beginning with the day on which any such arrangement comes to an end<sup>7</sup>.

1    Ie from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(2).

2    Ie an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3    As to the meaning of 'administering' see PARA 215 note 3.

4    As to the meaning of 'regulated home purchase plan' see PARA 215 note 1.

5    As to authorised persons see PARA 314.

6    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63G(a) (art 63C added by SI 2006/2383).

7    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63G(b) (as added: see note 6).

## **UPDATE**

### **216 Exclusion for arranging administration by authorised person**

NOTE 6--For 'art 63C added by' read 'art 63G added by'.

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### **217. Exclusion for administration pursuant to agreement with authorised person.**

There is an exclusion<sup>1</sup> from the specified activity<sup>2</sup> of administering<sup>3</sup> a regulated home purchase plan<sup>4</sup> for a person who is not an authorised person<sup>5</sup> where he administers the plan pursuant to an agreement with an authorised person who has permission to carry on the activity<sup>6</sup>.

1    Ie from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(2).

2    Ie an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

- 3 As to the meaning of 'administering' see PARA 215 note 3.
- 4 As to the meaning of 'regulated home purchase plan' see PARA 215 note 1.
- 5 As to authorised persons see PARA 314.
- 6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63H (added by SI 2006/2383).

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## **218. Exclusion for beneficiary under trust, will or intestacy.**

There is excluded from the specified activities<sup>1</sup> of entering into a regulated home purchase plan as home purchase provider or administering a regulated home purchase plan<sup>2</sup> where the home purchaser under the plan<sup>3</sup> in question is a beneficiary under the trust, will or intestacy<sup>4</sup>.

These provisions<sup>5</sup> do not apply if the person carrying on the activity is remunerated for what he does in addition to any remuneration he receives as trustee or personal representative, and for these purposes a person is not to be regarded as receiving additional remuneration merely because his remuneration is calculated by reference to time spent<sup>6</sup>.

- 1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.
- 2 Ie from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(1) or (2) (see PARA 215): see art 66(6C) (as added: see note 3). The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66 is subject to art 4(4A) (see PARA 88): art 66(8) (added by SI 2006/3384).
- 3 As to the meanings of 'regulated home purchase plan' and 'home purchaser' see PARA 215 note 1.
- 4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(6C) (added by SI 2006/2383).
- 5 Ie the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(6C).
- 6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 66(7) (amended by SI 2006/2383).

## **UPDATE**

## **218 Exclusion for beneficiary under trust, will or intestacy**

TEXT AND NOTES 1-4--Text should read as follows: 'There is an exclusion from the specified activities of entering into a regulated home purchase plan as home purchase provider or administering a regulated home purchase plan for a person acting as a trustee or personal representative where the home purchaser under the plan in question is a beneficiary under the trust, will or intestacy.'

There is also an exclusion from the specified activities of entering into and administering regulated sale and rent back agreements (ie from SI 2001/544 art 63J(1), (2) (PARA 220A)) for a person acting as a trustee or personal representative where the agreement seller under the agreement in question is a beneficiary under the trust, will or intestacy: SI 2002/544 art 66(6D) (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

TEXT AND NOTES 5, 6--SI 2002/544 art 66(6D) (see TEXT AND NOTES 1-4) is also disapplied in these circumstances: SI 2002/544 art 66(7) (amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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## **219. Exclusion for overseas persons.**

An overseas person<sup>1</sup> does not carry on the specified activity<sup>2</sup> of entering into a regulated home purchase plan as home purchase provider<sup>3</sup> by entering into a qualifying agreement<sup>4</sup>. An overseas person also does not carry on the specified activity of administering a regulated home purchase plan<sup>5</sup> where he administers a qualifying agreement<sup>6</sup>.

1 As to the meaning of 'overseas person' see PARA 124 note 1.

2 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 Ie an activity of the kind specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(1) (see PARA 215): see art 72(5D) (as added and substituted: see note 4).

4 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(5D) (arts 72(5D), (5E) added by SI 2003/1475; and substituted by SI 2006/2383). As to the meaning of 'qualifying agreement' see PARA 146 note 18.

5 Ie an activity of the kind specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(2) (see PARA 215): see art 72(5E) (as added and substituted: see note 4).

6 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(5E) (as added: see note 4).

## **UPDATE**

### **219 Exclusion for overseas persons**

TEXT AND NOTES--The exclusion also applies to the specified activities of entering into and administering regulated sale and rent back agreements (ie activities of a kind specified in SI 2001/544 art 63J(1), (2) (PARA 220A)): SI 2002/544 art 72(5D), (5E) (amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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## **220. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63I (added by SI 2006/2383). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

### **UPDATE**

## **220 Exclusion for information society services**

TEXT AND NOTES--There is a new regulated activity of entering into and administering regulated sale and rent back agreements and exclusions apply in relation to arranging administration by an authorised person and administration pursuant to an agreement with an authorised person: see PARA 220A.

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## **220A. Regulated sale and rent back agreements.**

Entering into a regulated sale and rent back agreement as an agreement provider is a specified kind of activity: SI 2001/544 art 63J(1) (arts 63J-63M added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). A 'regulated sale and rent back agreement' is an arrangement comprised in one or more instruments or agreements, in relation to which the following conditions are met at the time it is entered into: (1) the arrangement is one under which a person (the 'agreement provider') buys all or part of the qualifying interest in land (other than timeshare accommodation) in the United Kingdom from an individual or trustees (the 'agreement seller'); and (2) the agreement seller (if the agreement seller is an individual) or an individual who is the beneficiary of the trust (if the agreement seller is a trustee), or a related person, is entitled under the arrangement to occupy at least 40 per cent of the land in question as or in connection with a dwelling, and intends to do so; but such an arrangement is not a regulated sale and rent back agreement if it is a

regulated home reversion plan (see PARA 209): SI 2001/544 art 63J(3)(a). Administering a regulated sale and rent back agreement is also a specified kind of activity when the agreement was entered into on or after 1 July 2009: SI 2001/544 art 63J(2). 'Administering' a regulated sale and rent back agreement means any of: (a) notifying the agreement seller of changes in payments due under the agreement, or of other matters of which the agreement requires the agreement seller to be notified; (b) taking any necessary steps for the purpose of making payments to the agreement seller under the agreement; and (c) taking any necessary steps for the purposes of collecting or recovering payments due under the agreement from the agreement seller, but a person is not treated as administering a regulated sale and rent back agreement because he has, or exercises, a right to take action for the purposes of enforcing the agreement (or to require that such action is or is not taken): SI 2001/544 art 63J(3)(b). The reference to a 'qualifying interest' in land is to an estate in fee simple absolute or a term of years absolute, whether subsisting at law or in equity; 'timeshare accommodation' has the meaning given by the Timeshare Act 1992 s 1 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 868 NOTE 3); and 'related person' in relation to the agreement seller or, where the agreement seller is a trustee, a beneficiary of the trust, means (i) his spouse or civil partner; (ii) a person (whether or not of the opposite sex) whose relationship with him has the characteristic of the relationship between husband and wife; and (iii) his parent, brother, sister, child, grandparent or grandchild: SI 2001/544 art 63J(4). For the purposes of head (2), the area of any land which comprises a building or other structure containing two or more storeys is to be taken to be the aggregate of the floor areas of each of those storeys: SI 2001/544 art 63J(5). References to entering into a regulated sale and rent back agreement as agreement provider include acquiring any obligations or rights of the agreement provider, including the agreement provider's interest in land or interests under one or more of the instruments or agreements referred to in heads (1), (2), but in relation to a person who acquires any such obligations or rights, an activity is a specified kind of activity for the purposes of SI 2001/544 art 25E(1)(b) (PARA 139), art 53D(b)(ii) (PARA 174), and art 63J(2) only if the agreement was entered into by the agreement provider (rather than the obligations or rights acquired) on or after 1 July 2009: SI 2001/544 art 63J(6). References to an agreement provider, other than in the foregoing provision, include a person who acquires any such obligations or rights: SI 2001/544 art 63J(7).

A person who is not an authorised person does not carry on an activity of the kind specified by SI 2001/544 art 63J(2) in relation to a regulated sale and rent back agreement where that person (A) arranges for another person, being an authorised person with permission to carry on an activity of that kind, to administer the agreement; or (B) administers the agreement during a period of not more than one month beginning with the day on which any such arrangement comes to an end: SI 2001/544 art 63K(a), (b). A person who is not an authorised person does not carry on an activity of the kind specified by SI 2001/544 art 63J(2) in relation to a regulated sale and rent back agreement where that person administers the agreement pursuant to an agreement with an authorised person who has permission to carry on activity of that kind: SI 2001/544 art 63L. The specified activities of entering into and administering regulated sale and rent back agreements are also subject to the exclusions in SI 2001/544 arts 66, 72, 72A: SI 2001/544 art 63M.

For transitional provisions see Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2009, SI 2009/1342, arts 32-34, Schedule.

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## **220B. Dormant account funds.**

The meeting of repayment claims by a reclaim fund and the management of dormant account funds (including the investment of such funds) by a reclaim fund are specified kinds of activity: SI 2001/544 art 63N(1)(a), (b) (art 63N added by SI 2009/1389). 'Account', 'balance', 'dormant' and 'reclaim fund' have the same meaning as in Dormant Bank and Building Society Accounts Act 2008, Pt I (ss 1-15) (PARA 590A); 'dormant account funds' and 'repayment claims' have the same meaning as in Dormant Bank and Building Society Accounts Act 2008 s 5; and 'management of dormant account funds' means the acceptance of a transfer from a bank or building society of the balance of a dormant account, or a proportion of such a balance, and the management of those funds in such a way as to enable the reclaim fund to meet whatever repayment claims it is prudent to anticipate: SI 2001/544 art 63N(2).

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## **(R) AGREEING TO CARRY ON ACTIVITIES**

### **221. Agreeing to carry on specified kinds of activity.**

Agreeing to carry on any of the following activities<sup>1</sup> itself constitutes a specified activity<sup>2</sup>:

- 429 (1) dealing in investments as principal<sup>3</sup>;
- 430 (2) dealing in investments as agent<sup>4</sup>;
- 431 (3) arranging deals in investments, arranging regulated mortgage contracts, arranging regulated home reversion plans, arranging regulated home purchase plans<sup>5</sup>;
- 432 (4) managing investments<sup>6</sup>;
- 433 (5) assisting in the administration and performance of a contract of insurance<sup>7</sup>;
- 434 (6) safeguarding and administering investments<sup>8</sup>;
- 435 (7) sending dematerialised instructions<sup>9</sup>;
- 436 (8) providing basic advice on stakeholder products<sup>10</sup>;
- 437 (9) advising on investments, advising on regulated mortgage contracts, advising on regulated home reversion plans, advising on regulated home purchase plans<sup>11</sup>;
- 438 (10) various Lloyd's activities<sup>12</sup>;
- 439 (11) entering as provider into a funeral plan contract<sup>13</sup>;
- 440 (12) entering into and administering regulated mortgage contracts<sup>14</sup>;
- 441 (13) entering into and administering regulated home reversion plans<sup>15</sup>;
- 442 (14) entering into and administering regulated home purchase plans<sup>16</sup>.

A person is not to be regarded as carrying on by way of business (including agreeing)<sup>17</sup> a relevant investment business activity<sup>18</sup>, unless he carries on the business of engaging in one or more such activities<sup>19</sup>.

There are exclusions<sup>20</sup> in regard to overseas persons<sup>21</sup> and information society services<sup>22</sup>.

1 le in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F) other than art 5 (accepting deposits) (see PARA 89), art 9B (issuing electronic money) (see PARA 96), art 10 (effecting and carrying out contracts of insurance) (see PARA 100), art 25D (operating a multilateral trading facility) (see PARA 139), art 51 (establishing etc a collective investment scheme) (see PARA 171) or art 52 (establishing etc a pension scheme (see PARA 187): see art 64 (as amended: see note 2).

2 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 64 (amended by SI 2002/682; and SI 2006/3384). The reference is to an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

3 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14; and PARA 112.

4 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21; and PARA 126.

5 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 25, 25A, 25B, 25C; and PARA 139.

6 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37; and PARA 152.

7 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A; and PARA 104.

8 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40; and PARA 160.

9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45; and PARA 190.

10 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52B; and PARA 188.

11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 53, 53A, 53B, 53C; and PARA 174.

12 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 56-58; and PARA 198.

13 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 59; and PARA 200.

14 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61; and PARA 203.

15 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B; and PARA 209.

16 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F; and PARA 215.

17 See the Financial Services and Markets Act 2000 s 22 (see PARA 84) and s 419 (see PARA 87).

18 The reference is to an activity to which the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) applies, namely an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 14 (dealing in investments as principal) (see PARA 112); art 21 (dealing in investments as agent) (see PARA 126); art 25 (arranging deals in investments) (see PARA 139), except in so far as that activity relates to an investment of the kind specified by art 86 (Lloyd's syndicate capacity and syndicate membership), or art 89 (rights and interests) (see PARA 224) so far as relevant to art 86; art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments) (see PARA 152); art 40 (safeguarding and administering investments) (see PARA 160); art 45 (sending dematerialised instructions) (see PARA 190); art 51 (establishing etc a collective investment scheme) (see PARA 171); art 52 (establishing etc a pension scheme) (see PARA 187); art 53 (advising on investments) (see PARA 174); and art 64 (agreeing), so far as relevant to any of the articles mentioned above: Financial Services and Markets Act 2000 (Carrying on



Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) (amended by SI 2003/1476; SI 2006/1969; SI 2006/3384). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(2) does not apply to any insurance mediation activity: see art 3(2) (as so amended). A person is not to be regarded as carrying on by way of business any insurance mediation activity unless he takes up or pursues that activity for remuneration: art 3(4) (art 3(4), (5) added by SI 2003/1476). As to the meaning of 'insurance mediation activity' see PARA 112 note 20. A person is also not to be regarded as carrying on by way of business activities specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts), art 25B (arranging regulated home reversion plans), art 25C (arranging regulated home purchase plans) (see PARA 139), art 53A (advising on regulated mortgage contracts), art 53B (advising on regulated home reversion plans), art 53C (advising on regulated home purchase plans) (see PARA 174) or art 64 (agreeing) as far as relevant to the articles mentioned above, unless he carried on the business of engaging in those activities: see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, arts 3A, 3B, 3C; and PARA 139.

19 Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, art 3(1) is without prejudice to art 4 in regard to occupational pension schemes (see PARA 152): art 3(3) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, SI 2001/1177, is made under the Financial Services and Markets Act 2000 s 419: see note 17.

20 le from Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 64. See art 65 (substituted by SI 2002/1776).

21 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 65, 72; and PARA 222.

22 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 65, 72A; and PARA 223.

## UPDATE

### 221 Agreeing to carry on specified kinds of activity

NOTES 1, 2--Activity of a kind specified in SI 2001/544 art 63N (dormant account funds) (PARA 220B) is also excepted: SI 2009/544 art 64 (amended by SI 2009/1389).

NOTES 3-16--In head (3), also arranging regulated sale and rent back agreements (see SI 2001/544 art 25E; and PARA 139); in head (9), also advising on regulated sale and rent back agreements (see SI 2001/544 art 53D; and PARA 174); and also head (15) entering into and administering regulated sale and rent back agreements (see SI 2001/544 art 63J; and PARA 220A).

NOTE 18--A person is also not to be regarded as carrying on by way of business activities specified by SI 2001/544 art 25E (arranging regulated sale and rent back agreements) (PARA 139), art 53D (advising on regulated sale and rent back agreements) (PARA 174) or art 64 (agreeing) as far as relevant to either of the articles mentioned above, unless he carried on the business of engaging in those activities: see SI 2001/1177 art 3D; and PARA 139.

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### 222. Exclusion for overseas persons.

There is excluded from the specified activity<sup>1</sup> of agreeing to carry on specified kinds of activity<sup>2</sup> any agreement made by an overseas person<sup>3</sup> to carry on the activities of arranging deals in investments<sup>4</sup>, managing investments<sup>5</sup>, assisting in the administration and performance of a contract of insurance<sup>6</sup>, safeguarding and administering investments<sup>7</sup> or sending dematerialised instructions<sup>8</sup> if the agreement is the result of a legitimate approach<sup>9</sup>.

1 A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

2 Is excluded from the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 64 (see PARA 221): see art 72(6) (as amended: see note 9).

3 As to the meaning of 'overseas person' see PARA 124 note 1.

4 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25(1) or (2); and PARA 139.

5 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37; and PARA 152.

6 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A; and PARA 104.

7 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40; and PARA 160.

8 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45; and PARA 190.

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72(6) (amended by SI 2003/1476). As to the meaning of 'legitimate approach' see PARA 124 note 10.

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## **223. Exclusion for information society services.**

Any activity consisting of the provision of an information society service from an EEA state other than the United Kingdom<sup>1</sup> is not categorised as a specified activity<sup>2</sup>.

1 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72A(1) (art 72A added by SI 2002/1776). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 65 (substituted by SI 2002/1776). The reference is to a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F). A 'specified activity' is an activity of a kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, which is carried on by way of business, and relates to an investment of a kind specified by that Order and applicable to that activity, and is therefore a regulated activity for the purposes of the Financial Services and Markets Act 2000 s 22: see PARAS 84, 88.

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## ***D. SPECIFIED INVESTMENTS***

### **224. Specified kinds of investment.**

The following kinds of investment are specified investments<sup>1</sup>:

- 443 (1) a deposit<sup>2</sup>;
- 444 (2) electronic money<sup>3</sup>;
- 445 (3) rights under a contract of insurance<sup>4</sup>;
- 446 (4) shares or stock in the share capital of any body corporate (wherever incorporated), and any unincorporated body constituted under the law of a country or territory outside the United Kingdom<sup>5</sup>;
- 447 (5) certain (a) debentures; (b) debenture stock; (c) loan stock; (d) bonds; (e) certificates of deposit; and (f) other instruments creating or acknowledging indebtedness<sup>6</sup>;
- 448 (6) loan stock, bonds and other instruments creating or acknowledging indebtedness, issued by or on behalf of any of the following: (a) the government of the United Kingdom; (b) the Scottish Administration; (c) the Executive Committee of the Northern Ireland Assembly; (d) the National Assembly for Wales; (e) the government of any country or territory outside the United Kingdom; (f) a local authority in the United Kingdom or elsewhere; or (g) a body the members of which comprise states including the United Kingdom or another EEA state, or bodies whose members comprise states including the United Kingdom or another EEA state<sup>7</sup>;
- 449 (7) warrants and other instruments entitling the holder to subscribe for shares or stock, certain instruments creating or acknowledging indebtedness or government and public securities<sup>8</sup>;
- 450 (8) certificates or other instruments which confer contractual or property rights (other than rights consisting of options) (a) in respect of any shares or stock, certain instruments creating or acknowledging indebtedness, government and public securities and instruments giving entitlements to investments, being an investment held by a person other than the person on whom the rights are conferred by the certificate or instrument; and (b) the transfer of which may be effected without the consent of that person<sup>9</sup>;
- 451 (9) units in a collective investment scheme<sup>10</sup>;
- 452 (10) rights under a stakeholder pension scheme and rights under a personal pension scheme<sup>11</sup>;
- 453 (11) options to acquire or dispose of: (a) a security or contractually based investment; (b) currency of the United Kingdom or any other country or territory; (c) palladium, platinum, gold or silver; (d) an option to acquire or dispose of such an investment; (e) an option to acquire or dispose of an option to which certain provisions of the Markets in Financial Instruments Directive apply<sup>12</sup>, and certain other options to which heads (11)(a) to (e) above do not apply<sup>13</sup>;
- 454 (12) rights under a contract for the sale of a commodity or property of any other description under which delivery is to be made at a future date and at a price agreed on when the contract is made<sup>14</sup>, and certain other futures and forwards<sup>15</sup>;

- 455 (13) rights under: (a) a contract for differences; or (b) any other contract the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the value or price of property of any description or an index or other factor designated for that purpose in the contract<sup>16</sup>, and certain derivative instruments for the transfer of credit risk<sup>17</sup>;
- 456 (14) the underwriting capacity of a Lloyd's syndicate<sup>18</sup>;
- 457 (15) a person's membership (or prospective membership) of a Lloyd's syndicate<sup>19</sup>;
- 458 (16) rights under a funeral plan contract<sup>20</sup>;
- 459 (17) rights under a regulated mortgage contract<sup>21</sup>;
- 460 (18) rights under a regulated home reversion plan<sup>22</sup>;
- 461 (19) rights under a regulated home purchase plan<sup>23</sup>;
- 462 (20) any right to or interest in anything which is specified in heads (1) to (16) above<sup>24</sup>.

1   le they are specified investments for the purposes of the Financial Services and Markets Act 2000 s 22 (see PARA 84): see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 73.

2   Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 74. As to the meaning of 'deposit' see PARA 89 note 1.

3   Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 74A (added by SI 2002/682). As to the meaning of 'electronic money' see PARA 94 note 2.

4   Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 75. As to the meaning of 'contract of insurance' see PARA 90 note 3.

5   Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 76(1)(a), (b). This includes any shares of a class defined as deferred shares for the purposes of the Building Societies Act 1986 s 119 (see PARA 1906) and any transferable shares in a body incorporated under the law of, or any part of, the United Kingdom relating to industrial and provident societies or credit unions, or in a body constituted under the law of another EEA state for the purposes equivalent to those of such a body: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 76(2). However it does not include shares or stock in the share capital of (1) an open-ended investment company; (2) a building society incorporated under the law of, or any part of, the United Kingdom; (3) a body incorporated under the law of, or any part of, the United Kingdom relating to industrial and provident societies or credit unions: art 76(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to industrial and provident societies see further PARA 2394 et seq. As to the old definition of 'shares' (apparently extending to stock) see *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279 at 288.

6   Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 77(1)(a)-(f). This only applies to such instruments as do not fall within art 78(1) (see head (6) in the text): art 77(1). If and to the extent that they would otherwise fall within head (5) in the text, the following are excluded: (1) an instrument acknowledging or creating indebtedness for, or for money borrowed to defray, the consideration payable under a contract for the supply of goods or services; (2) a cheque or other bill of exchange, a banker's draft or a letter of credit (but not a bill of exchange accepted by a banker); (3) a banknote, a statement showing a balance on a current, deposit or savings account, a lease or other disposition of property, or a heritable security; and (4) a contract of insurance: art 77(2). Note that an instrument excluded from art 78(1) (see head (6) in the text) by art 78(2)(b) (see note 7 head (b)) is not thereby to be taken to fall within art 77(1): art 77(3). As to the meaning of 'instrument' see PARA 115 note 2. As to the definition of 'debentures' see *Levy v Abercorris Slate and Slab Co* (1887) 37 ChD 260, [1886-90] All ER Rep 509. As to the validity of a charge when particulars were delivered to the registrar although the charge was not registered see *Slavenburg's Bank NV v International Natural Resources Ltd* [1980] 1 All ER 955, [1980] 1 WLR 1076.

7   Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 78(1)(a)-(g). This does not include: (1) so far as applicable, the instruments mentioned in note 6 heads (1)-(4); and (2) any instrument creating or acknowledging indebtedness in respect of: (a) money received by the Director of Savings as deposits or otherwise in connection with the business of the National Savings Bank; or (b) money raised under the National Loans Act 1968 under the auspices of the Director of Savings or treated as so raised by virtue of the National Debt Act 1972 s 11(3) (see PARA 1367): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 78(2).

Note that an instrument excluded from art 78(1) by art 78(2)(b) (see head (b) above) is not thereby to be taken to fall within art 77(1) (see head (5) in the text): art 77(3). As to the National Assembly for Wales see **CONSTITUTIONAL LAW AND HUMAN RIGHTS.**

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 79(1). It is immaterial whether the investment to which the entitlement relates is in existence or identifiable: art 79(2). Note that an investment of the kind specified by head (7) in the text is not to be regarded as falling within art 83 (see head (11) in the text), art 84 (see head (12) in the text) or art 85 (see head (13) in the text): art 79(3).

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 80(1)(a), (b). This does not include any certificate or other instrument which confers rights in respect of two or more investments issued by different persons, or in respect of two or more different investments of the kind specified by art 78 (see head (6) in the text) and issued by the same person: art 80(2). As to the meaning of 'property' see PARA 88 note 3.

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 81. As to the meaning of 'collective investment scheme' see PARA 603.

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 82 (substituted by SI 2006/1969). As to the meaning of 'stakeholder pension scheme' see PARA 187 note 1. As to the meaning of 'personal pension scheme' see PARA 187 note 2.

12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 83(1)(a)-(e) (art 83(1) renumbered as such and amended by SI 2006/3384). As to the meaning of 'security' see PARA 89 note 1. As to the meaning of 'contractually based investment' see PARA 112 note 4. The reference to the Markets in Financial Instruments Directive is a reference to European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1) on markets in financial instruments. In regard to the restriction on the application of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 83(1)(e) see also note 13.

13 The other options referred to are:

- 215 (1) options (a) to which the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 83(1)(a)-(e) (see heads (11)(a)-(e) in the text) does not apply; (b) which relate to commodities; (c) which may be settled physically; and (d) either to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 5 or 6 (see PARA 88 note 5) applies, or which in accordance with EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) art 38 (see PARA 88 note 5) are to be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes, and to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 7 (see PARA 88 note 5) applies (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 83(2)(a)-(d) (art 83(2)-(5) added by SI 2006/3384));
- 216 (2) options (a) to which the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 83(1)(a)-(e) (see heads (11)(a)-(e) in the text) does not apply; (b) which may be settled physically; and (c) to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 10 (see PARA 88 note 5) (read with EC Commission Regulation 1287/2006) applies (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 83(3)(a)-(c) (as so added)).

Article 83(1)(e), (2), (3) only applies to options in relation to which (i) an investment firm or credit institution is providing or performing investment services and activities on a professional basis; (ii) a management company is providing, in accordance with the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities) art 5(3), the investment service specified in Section A para 4 or 5, or the ancillary service specified in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex 1 Section B para 1; or (iii) a market operator is providing the investment service specified in Annex 1 Section A para 8: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 83(4) (as so added). Expressions used in art 83(1)(e), (2), (3) and in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) have the same meaning as in that directive: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 83(5) (as so added). As to the meaning of 'investment firm' see PARA 88 note 5. As to the meaning of 'credit institution' see PARA 88 note 6. As to the meaning of 'investment services and activities' see PARA 88 note 5. As to the meaning of 'market operator' see PARA 139 note 22. 'Management company' has the meaning given by the UCITS Directive (ie EEC Council Directive 85/611 (OJ

L375, 31.12.85, p 3)) art 1a.2: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1) (definition added by SI 2006/3384).

14 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84(1). This does not include rights under any contract which is made for commercial and not investment purposes: art 84(2). A contract is to be regarded as made for investment purposes if it is made or traded on a recognised investment exchange, or is made otherwise than on a recognised investment exchange but is expressed to be as traded on such an exchange or on the same terms as those on which an equivalent contract would be made on such an exchange: art 84(3). A contract not falling within art 84(3) is to be regarded as made for commercial purposes if under the terms of the contract delivery is to be made within seven days, unless it can be shown that there existed an understanding that (notwithstanding the express terms of the contract) delivery would not be made within seven days: art 84(4).

The following are indications that a contract not falling within art 84(3) or art 84(4) is made for commercial purposes and the absence of them is an indication that it is made for investment purposes: (1) one or more of the parties is a producer of the commodity or other property, or uses it in his business; (2) the seller delivers or intends to deliver the property or the purchaser takes or intends to take delivery of it: art 84(5).

It is an indication that a contract is made for commercial purposes that the prices, the lot, the delivery date or other terms are determined by the parties for the purposes of the particular contract and not by reference (or not solely by reference) to regularly published prices, to standard lots or delivery dates or to standard terms: art 84(6).

The following are indications that a contract is made for investment purposes: (a) it is expressed to be as traded on an investment exchange; (b) performance of the contract is ensured by an investment exchange or a clearing house; (c) there are arrangements for the payment or provision of margin: art 84(7).

For these purposes, a price is to be taken to be agreed on when a contract is made: (i) notwithstanding that it is left to be determined by reference to the price at which a contract is to be entered into on a market or exchange or could be entered into at a time and place specified in the contract; or (ii) in a case where the contract is expressed to be by reference to a standard lot and quality, notwithstanding that provision is made for a variation in the price to take account of any variation in quantity or quality on delivery: art 84(8).

15 The other futures and forwards are:

- 217 (1) futures (a) to which the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84(1) (see head (12) in the text) does not apply; (b) which relate to commodities; (c) which may be settled physically; and (d) to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 5 or 6 (see PARA 88 note 5) applies (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84(1A)(a)-(d) (art 84(1A)-(1E) added by SI 2006/3384));
- 218 (2) futures and forwards (a) to which the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84(1) (see head (12) in the text) does not apply; (b) which relate to commodities; (c) which may be settled physically; (d) which in accordance with EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) art 38 (see PARA 88 note 5) are to be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes; and (e) to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 7 (see PARA 88 note 5) applies (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84(1B)(a)-(e) (as so added));
- 219 (3) futures (a) to which art 84(1) (see head (12) in the text) does not apply; (b) which may be settled physically; and (c) to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 10 (see PARA 88 note 5) (read with EC Commission Regulation 1287/2006) applies (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84(1C)(a)-(c) (as so added)).

Article 84(1A), (1B), (1C) only applies to futures or forwards in relation to which (i) an investment firm or credit institution is providing or performing investment services and activities on a professional basis; (ii) a management company is providing, in accordance with the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3)) art 5(3), the investment service specified in Section A para 4 or 5, or the ancillary service specified in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section B para 1 (see PARA 88 note 5); or (iii) a market operator is providing the investment service specified in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section A para 8 (see PARA 88 note 5): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84(1D) (as so added). Expressions used in art 84(1A)-(1C) and in the Markets in Financial Instruments Directive (ie

European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) have the same meaning as in that directive: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84(1E) (as so added).

16 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 85(1)(a), (b). This does not include:

- 220 (1) rights under a contract if the parties intend that the profit is to be secured or the loss is to be avoided by one or more of the parties taking delivery of any property to which the contract relates (art 85(2)(a));
- 221 (2) rights under a contract under which money is received by way of deposit on terms that any interest or other return to be paid on the sum deposited will be calculated by reference to fluctuations in an index or other factor (art 85(2)(b));
- 222 (3) rights under any contract under which: (a) money is received by the Director of Savings as deposits or otherwise in connection with the business of the National Savings Bank; or (b) money is raised under the National Loans Act 1968 under the auspices of the Director of Savings or treated as so raised by virtue of the National Debt Act 1972 s 11(3) (see PARA 1367) (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 85(2)(c));
- 223 (4) rights under a qualifying contract of insurance (art 85(2)(d)).

As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4. As to the definition of 'contracts for differences' see *City Index Ltd v Leslie* [1992] QB 98, [1991] 3 All ER 180, CA.

17 The derivative instruments for the transfer of credit risk (1) to which neither the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 83 (see head (11) in the text) nor art 85(1) (see heads (13)(a), (b) in the text) applies; and (2) to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 8 (see PARA 88 note 5) applies: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 85(3) (art 85(3)-(5) added by SI 2006/3384). 'Derivative instruments for the transfer of credit risk' has the same meaning as in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 85(5) (as so added).

The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 85(3) only applies to derivatives in relation to which (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis; (b) a management company is providing, in accordance with UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3)) art 5(3), the investment service specified in Section A para 4 or 5, or the ancillary service specified in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section B para 1 (see PARA 88 note 5); or (c) a market operator is providing the investment service specified in Annex I Section A para 8 (see PARA 88 note 5): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 85(4) (as so added).

18 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 86(1). As to the meaning of 'syndicate' see PARA 198 note 2.

19 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 86(2).

20 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 87. As to the meaning of 'funeral plan contract' see PARA 200 note 1.

21 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 88. As to the meaning of 'regulated mortgage contract' see PARA 203 note 1.

22 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 88A (added by SI 2006/2383). As to the meaning of 'regulated home reversion plan' see PARA 209 note 1.

23 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 88B (added by SI 2006/2383). As to the meaning of 'regulated home purchase plan' see PARA 215 note 1.

24 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 89(1) (amended by SI 2006/2383). This specifically excludes the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 88, 88A, 88B (see heads (17)-(19) in the text). In addition this does not include interests under the trusts of an occupational pension scheme: art 89(2). Nor does it include rights to or interests in a contract of insurance of the kind referred to in art 60(1)(a) (see PARA 201) or interests under a trust of the kind mentioned in art 60(1)(b) (see PARA 201): art 89(3). Nor does it include anything which is

specified by any other provision of Pt III (arts 73-89): art 89(4). As to the meaning of 'occupational pension scheme' see PARA 152 note 14.

## **UPDATE**

### **224 Specified kinds of investment**

TEXT AND NOTES--Also, head (19A) rights under a regulated sale and rent back agreement (see para 220A): SI 2001/544 art 88C (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

NOTES 13, 15, 17--Directive 85/611 replaced: see PARA 6.

NOTE 24--SI 2001/544 art 88C (see head (19A) in TEXT AND NOTES) is also specifically excluded: SI 2001/544 art 89(1) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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### **(iii) Financial Promotion**

#### **A. IN GENERAL**

#### **225. Restriction on financial promotion.**

A person must not, in the course of business<sup>1</sup>, communicate<sup>2</sup> an invitation or inducement to engage in investment activity<sup>3</sup>. 'Engaging in investment activity' means: (1) entering or offering to enter into an agreement the making or performance of which by either party constitutes a controlled activity<sup>4</sup>; or (2) exercising any rights conferred by a controlled investment to acquire, dispose of, underwrite or convert a controlled investment<sup>5</sup>. An activity is a controlled activity if: (a) it is an activity of a specified kind or one which falls within a specified class of activity<sup>6</sup>; and (b) it relates to an investment of a specified kind, or to one which falls within a specified class of investment<sup>7</sup>. 'Specified' means specified in an order made by the Treasury<sup>8</sup>. An investment is a controlled investment if it is an investment of a specified kind or one which falls within a specified class of investment<sup>9</sup>.

However, this restriction does not apply if:

- 463 (i) the person making the communication is an authorised person<sup>10</sup>; or
- 464 (ii) the content of the communication is approved<sup>11</sup> by an authorised person<sup>12</sup>.

In the case of a communication originating outside the United Kingdom<sup>13</sup>, the restriction<sup>14</sup> applies only if the communication is capable of having an effect in the United Kingdom<sup>15</sup>. The Treasury may by order specify circumstances (which may include compliance with financial promotion rules<sup>16</sup>) in which the restriction<sup>17</sup> does not apply<sup>18</sup>.

A person who contravenes the financial promotion prohibition<sup>19</sup> is guilty of an offence<sup>20</sup>.

In proceedings for this offence it is a defence for the accused to show: (A) that he believed on reasonable grounds that the content of the communication was prepared, or approved<sup>21</sup>, by an



authorised person<sup>22</sup>; or (b) that he took all reasonable precautions and exercised all due diligence to avoid committing the offence<sup>23</sup>.

1 The Treasury may by order specify circumstances in which a person is to be regarded for the purposes of the Financial Services and Markets Act 2000 s 21(1) as: (1) acting in the course of business; (2) not acting in the course of business: s 21(4). 'Specified' means specified in an order made by the Treasury: s 21(15). In exercise of the power under s 21, the Treasury has made the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529 (see PARA 227 et seq) replacing the earlier Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, SI 2001/1335. As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 'Communicate' includes causing a communication to be made: Financial Services and Markets Act 2000 s 21(13).

3 Financial Services and Markets Act 2000 s 21(1). See also the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 5.

4 Financial Services and Markets Act 2000 s 21(8)(a). See also the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(2).

5 Financial Services and Markets Act 2000 s 21(8)(b). See also the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(2).

6 Financial Services and Markets Act 2000 s 21(9)(a). Schedule 2 (in regard to specified activities and investments) (see PARAS 84, 85), except Sch 2 para 26, applies for the purposes of s 21(9) and s 21(10) with references to s 22 (see PARA 84) being read as references to each of those provisions: s 21(11). Nothing in Sch 2, as applied by s 21(11), limits the powers conferred by s 21(9) or s 21(10): s 21(12).

7 Financial Services and Markets Act 2000 s 21(9)(b). 'Investment' includes any asset, right or interest: s 21(14). See note 6. As to controlled activities see PARA 227 et seq.

8 Financial Services and Markets Act 2000 s 21(15). See note 1.

9 Financial Services and Markets Act 2000 s 21(10). See note 6. As to controlled investments see PARA 241.

10 Financial Services and Markets Act 2000 s 21(2)(a). As to authorised persons see PARA 314 et seq.

11 Ie for the purposes of the Financial Services and Markets Act 2000 s 21.

12 Financial Services and Markets Act 2000 s 21(2)(b).

13 As to the meaning of 'United Kingdom' see PARA 2 note 3.

14 Ie the Financial Services and Markets Act 2000 s 21(1).

15 Financial Services and Markets Act 2000 s 21(3). The Treasury may by order repeal s 21(3): s 21(7).

16 'Financial promotion rules' means rules made under the Financial Services and Markets Act 2000 s 145 (see PARA 29): s 417(1). See also the Financial Services Authority's Handbook of Rules and Guidance, Business Standards, Conduct of Business Sourcebook (COBS). As to the Handbook generally see PARA 22.

17 Ie the Financial Services and Markets Act 2000 s 21(1).

18 Financial Services and Markets Act 2000 s 21(5). An order under s 21(5) may, in particular, provide that s 21(1) does not apply in relation to communications:

224 (1) of a specified description (s 21(6)(a));

225 (2) originating in a specified country or territory outside the United Kingdom (s 21(6)(b));

226 (3) originating in a country or territory which falls within a specified description of country or territory outside the United Kingdom (s 21(6)(c)); or

227 (4) originating outside the United Kingdom (s 21(6)(d)).

An order to which, if it is made, s 429(4) (see below) will apply is not to be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(3). Section 429(4) applies to an order under s 21 if: (a) it is the first order to be made, or to contain provisions made, under s 21(4); (b) it varies an order made under s 21(4) so as to make s 21(1) apply in circumstances in which it did not previously apply; (c) it is the first order to be made, or to contain provisions made, under s 21(5); (d) it varies a previous order made under s 21(5) so as to make s 21(1) apply in circumstances in which it did not, as a result of that previous order, apply; (e) it is the first order to be made, or to contain provisions made, under s 21(9) or (10); (f) it adds one or more activities to those that are controlled activities for the purposes of s 21; or (g) it adds one or more investments to those which are controlled investments for the purposes of s 21: s 429(4).

As to the order that has been made see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529; note 1; and PARA 227 et seq.

19    le the Financial Services and Markets Act 2000 s 21(1).

20    Financial Services and Markets Act 2000 s 25(1). Such a person is liable: (1) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both: s 25(1). As to the statutory maximum see PARA 56 note 24.

21    le for the purposes of the Financial Services and Markets Act 2000 s 21.

22    Financial Services and Markets Act 2000 s 25(2)(a).

23    Financial Services and Markets Act 2000 s 25(2)(b).

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## **226. Enforceability of agreements resulting from unlawful communications.**

If in consequence of an unlawful communication<sup>1</sup> a person enters as a customer into a controlled agreement<sup>2</sup>, it is unenforceable against him and he is entitled to recover:

- 465 (1)    any money or other property paid or transferred by him under the agreement<sup>3</sup>; and
- 466 (2)    compensation for any loss sustained by him as a result of having parted with it<sup>4</sup>.

If in consequence of an unlawful communication a person exercises any rights conferred by a controlled investment<sup>5</sup>, no obligation to which he is subject as a result of exercising them is enforceable against him and he is entitled to recover: (a) any money or other property paid or transferred by him under the obligation<sup>6</sup>; and (b) compensation for any loss sustained by him as a result of having parted with it<sup>7</sup>.

However, the court may allow: (i) the agreement or obligation to be enforced<sup>8</sup>; or (ii) money or property paid or transferred under the agreement or obligation to be retained<sup>9</sup>, if it is satisfied that it is just and equitable in the circumstances of the case<sup>10</sup>. In considering whether to allow the agreement or obligation to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained<sup>11</sup>:

- 467 (A)    if the applicant<sup>12</sup> made the unlawful communication, the court must consider whether he reasonably believed that he was not making such a communication<sup>13</sup>;

468 (B) if the applicant did not make the unlawful communication, the court must consider whether he knew that the agreement was entered into in consequence of such a communication<sup>14</sup>.

1 For these purposes, 'unlawful communication' means a communication in relation to which there has been a contravention of the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): s 30(1). Any reference to making a communication includes causing a communication to be made: s 30(9).

2 For these purposes, 'controlled agreement' means an agreement the making or performance of which by either party constitutes a controlled activity for the purposes of s 21(1) (see PARA 225): s 30(1).

3 Financial Services and Markets Act 2000 s 30(2)(a). If any property required to be returned has passed to a third party, references to that property are to be read as references to its value at the time of its receipt by the person required to return it: s 30(13).

4 Financial Services and Markets Act 2000 s 30(2)(b). See further note 7.

5 As to the meaning of 'controlled investment' see PARA 225; definition applied by the Financial Services and Markets Act 2000 s 30(1).

6 Financial Services and Markets Act 2000 s 30(3)(a).

7 Financial Services and Markets Act 2000 s 30(3)(b). The amount of compensation recoverable as a result of s 30(2) or s 30(3) is: (1) the amount agreed between the parties; or (2) on the application of either party, the amount determined by the court: s 30(10). If a person elects not to perform an agreement or an obligation which (by virtue of s 30(2) or s 30(3)) is unenforceable against him, he must repay any money and return any other property received by him under the agreement: s 30(11). If (by virtue of s 30(2) or s 30(3)) a person recovers money paid or property transferred by him under an agreement or obligation, he must repay any money and return any other property received by him as a result of exercising the rights in question: s 30(12).

8 Financial Services and Markets Act 2000 s 30(4)(a).

9 Financial Services and Markets Act 2000 s 30(4)(b).

10 Financial Services and Markets Act 2000 s 30(4).

11 See the Financial Services and Markets Act 2000 s 30(5).

12 'Applicant' means the person seeking to enforce the agreement or obligation or retain the money or property paid or transferred: Financial Services and Markets Act 2000 s 30(8).

13 See the Financial Services and Markets Act 2000 s 30(6).

14 See the Financial Services and Markets Act 2000 s 30(7).

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## **B. CONTROLLED ACTIVITIES**

### **227. Accepting deposits.**

Accepting deposits<sup>1</sup> is a controlled activity<sup>2</sup> if:

469 (1) money received by way of deposit is lent to others; or

470 (2) any other activity of the person accepting the deposit is financed wholly, or to a material extent, out of the capital of or interest on money received by way of deposit,

and the person accepting the deposit holds himself out as accepting deposits on a day to day basis<sup>3</sup>.

1 'Deposit' means a sum of money which is a deposit for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5 (see PARA 89): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1).

2 le for the purposes of the Financial Services and Markets Act 2000 s 21(9) (see PARA 225): see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 4(1).

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 4(1), Sch 1 para 1.

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## **228. Effecting and carrying out contracts of insurance.**

Both effecting and carrying out a contract of insurance<sup>1</sup> as principal are controlled activities<sup>2</sup>, although there is an exclusion<sup>3</sup> in regard to the effecting or carrying out of a contract of breakdown insurance<sup>4</sup> by a person who does not otherwise effect or carry out contracts of insurance<sup>5</sup>.

1 As to the meaning of 'contract of insurance' see PARA 90 note 3; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 4, Sch 1 para 28.

2 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1), Sch 1 para 2(1), (2). As to the meaning of 'controlled activity' see PARA 225.

3 le an exclusion from the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 2(1) or (2).

4 le the effecting or carrying out of a contract of insurance of the kind described in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 12: see PARA 102.

5 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 2(3).

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## **229. Dealing in securities and contractually based investments.**

Buying<sup>1</sup>, selling<sup>2</sup>, subscribing for or underwriting securities<sup>3</sup> or contractually based investments<sup>4</sup> as principal or agent is a controlled activity<sup>5</sup>. A person does not carry on such an activity by accepting an instrument<sup>6</sup> creating or acknowledging indebtedness in respect of any loan, credit, guarantee or other similar financial accommodation or assurance which he has made, granted or provided<sup>7</sup>.

1 'Buying' includes acquiring for valuable consideration: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28.

2 'Selling', in relation to any investment, includes disposing of the investment for valuable consideration, and for these purposes 'disposing' includes:

228 (1) in the case of an investment consisting of rights under a contract:

37. (a) surrendering, assigning or converting those rights; or  
37

38. (b) assuming the corresponding liabilities under the contract;  
38

229 (2) in the case of an investment consisting of rights under other arrangements, assuming the corresponding liabilities under the arrangements; and

230 (3) in the case of any other investment, issuing or creating the investment or granting the rights or interests of which it consists: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28.

3 'Security' means a controlled investment falling within any of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 paras 14-20 (see PARA 241) or, so far as relevant to any such investment, Sch 1 para 27 (see PARA 241): Sch 1 para 28.

4 In other than investments of the kind specified by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 25 (funeral plan contracts) (see PARA 241), or Sch 1 para 27 (rights to or interests in investments) (see PARA 241) so far as relevant to Sch 1 para 25: see Sch 1 para 3(1). 'Contractually based investment' means:

231 (1) rights under a qualifying contract of insurance;

232 (2) any investment of the kind specified by any of Sch 1 para 21 (options) (see PARA 241), Sch 1 para 22 (futures) (see PARA 241), Sch 1 para 23 (contracts for differences) (see PARA 241) and Sch 1 para 25 (funeral plan contracts) (see PARA 241);

233 (3) any investment of the kind specified by Sch 1 para 27 (rights to or interests in investments) (see PARA 241) so far as relevant to an investment falling within head (1) or head (2) above: Sch 1 para 28.

As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4; definition applied by art 2(1).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1), Sch 1 para 3(1). As to the meaning of 'controlled activity' see PARA 225.

6 This reference to a person accepting an instrument includes a reference to a person becoming a party to an instrument otherwise than as a debtor or a surety: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 3(3). 'Instrument' includes any record whether or not in the form of a document: art 2(1).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 3(2).

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### 230. Arranging deals in investments.

Making arrangements for another person (whether as principal or agent) to buy<sup>1</sup>, sell<sup>2</sup>, subscribe for or underwrite a particular investment which is: (1) a security<sup>3</sup>; (2) a contractually based investment<sup>4</sup>; (3) the underwriting capacity of a Lloyd's syndicate, or a person's membership (or prospective membership) of a Lloyd's syndicate; or (4) a right to or interest in investments in head (3) above<sup>5</sup>, is a controlled activity<sup>6</sup>.

Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within heads (1), (2), (3) or (4) above (whether as principal or agent) is also a controlled activity<sup>7</sup>. However, a person does not carry on such an activity merely by providing means by which one party to a transaction (or potential transaction) is able to communicate<sup>8</sup> with other such parties<sup>9</sup>.

1 As to the meaning of 'buying' see PARA 229 note 1.

2 As to the meaning of 'selling' see PARA 229 note 2.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 4(1) (a). As to the meaning of 'security' see PARA 229 note 3.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 4(1) (b). As to the meaning of 'contractually based investment' see PARA 229 note 4.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 4(1) (c). The investments referred to in heads (3) and (4) in the text are those specified by Sch 1 para 24 (see PARA 241), and by Sch 1 para 27 (see PARA 241) so far as relevant to Sch 1 para 24.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1), Sch 1 para 4(1). As to the meaning of 'controlled activity' see PARA 225.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 4(2).

8 As to the meaning of 'communicate' see PARA 242. As to the meaning of 'engaging in investment activity' see PARA 225.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 4(3).

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### 231. Operating a multilateral trading facility.

Operating a multilateral trading facility<sup>1</sup> on which MiFD instruments<sup>2</sup> are traded is a controlled activity<sup>3</sup>.

1 As to the meaning of 'multilateral trading facility' see PARA 139 note 22; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28.

2 As to the meaning of 'MiFD instrument' see PARA 139 note 23; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1), Sch 1 para 4A. As to the meaning of 'controlled activity' see PARA 225.

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### **232. Managing investments.**

Managing assets belonging to another person, in circumstances involving the exercise of discretion, is a controlled activity<sup>1</sup> if:

- 471 (1) the assets consist of or include any investment which is a security<sup>2</sup> or a contractually based investment<sup>3</sup>; or
- 472 (2) the arrangements for their management are such that the assets may consist of or include such investments, and either the assets have at any time since 29 April 1988 done so, or the arrangements have at any time (whether before or after that date) been held out as arrangements under which the assets would do so<sup>4</sup>.

1 As to the meaning of 'controlled activity' see PARA 225.

2 As to the meaning of 'security' see PARA 229 note 3.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 5(a). As to the meaning of 'contractually based investment' see PARA 229 note 4.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 5(b).

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### **233. Safeguarding and administering investments.**

The activity consisting of both:

- 473 (1) the safeguarding of assets belonging to another<sup>1</sup>; and
- 474 (2) the administration of those assets<sup>2</sup>,

or arranging for one or more other persons to carry on that activity, is a controlled activity<sup>3</sup> if either the condition in head (a) or head (b) below is met<sup>4</sup>:

- 475 (a) the assets consist of or include any investment which is a security<sup>5</sup> or a contractually based investment<sup>6</sup>; or
- 476 (b) the arrangements for their safeguarding and administration are such that the assets may consist of or include investments of the kind mentioned in head (a) above and either the assets have at any time since 1 June 1997 done so, or the

arrangements have at any time (whether before or after that date) been held out as ones under which such investments would be safeguarded and administered<sup>7</sup>.

For these purposes: (i) it is immaterial that title to the assets safeguarded and administered is held in uncertificated form<sup>8</sup>; and (ii) it is immaterial that the assets safeguarded and administered may be transferred to another person, subject to a commitment by the person safeguarding and administering them, or arranging for their safeguarding and administration, that they will be replaced by equivalent assets at some future date or when so requested by the person to whom they belong<sup>9</sup>.

1 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 6(1) (a).

2 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 6(1) (b). For the purposes of Sch 1 para 6, the following activities do not constitute the administration of assets:

234 (1) providing information as to the number of units or the value of any assets safeguarded (Sch 1 para 6(4)(a));

235 (2) converting currency (Sch 1 para 6(4)(b));

236 (3) receiving documents relating to an investment solely for the purpose of onward transmission to, from or at the direction of the person to whom the investment belongs (Sch 1 para 6(4)(c)).

As to the meaning of 'units', in a collective investment scheme, see PARA 603; definition applied by art 2(1).

3 As to the meaning of 'controlled activity' see PARA 225.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 6(1).

5 As to the meaning of 'security' see PARA 229 note 3.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 6(2) (a). As to the meaning of 'contractually based investment' see PARA 229 note 4.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 6(2) (b).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 6(3) (a).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 6(3) (b).

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## 234. Advising on investments.

Advising a person is a controlled activity<sup>1</sup> if the advice is:

- 477 (1) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor<sup>2</sup>; and



- 478 (2) advice on the merits of his doing any of the following (whether as principal or agent):
- 49
79. (a) buying<sup>3</sup>, selling<sup>4</sup>, subscribing for or underwriting a particular investment which is a security<sup>5</sup> or a contractually based investment<sup>6</sup>; or
80. (b) exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment<sup>7</sup>.
- 50

1 As to the meaning of 'controlled activity' see PARA 225.

2 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1), Sch 1 para 7(a).

3 As to the meaning of 'buying' see PARA 229 note 1.

4 As to the meaning of 'selling' see PARA 229 note 2.

5 As to the meaning of 'security' see PARA 229 note 3.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 7(b) (i). As to the meaning of 'contractually based investment' see PARA 229 note 4.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 7(b) (ii).

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### **235. Advising on syndicate participation at Lloyd's.**

Advising a person to become, to continue, or to cease to be, a member of a particular Lloyd's syndicate<sup>1</sup> is a controlled activity<sup>2</sup>.

1 As to the meaning of 'syndicate' see PARA 198 note 2; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28. As to Lloyd's see PARA 77; and **INSURANCE**.

2 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1), Sch 1 para 8. As to the meaning of 'controlled activity' see PARA 225.

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### **236. Providing funeral plan contracts.**

Entering as provider into a qualifying funeral plan contract is a controlled activity<sup>1</sup>. A 'qualifying funeral plan contract' is a contract under which:

- 479 (1) a person (the 'customer') makes one or more payments to another person (the 'provider')<sup>2</sup>;
- 480 (2) the provider undertakes to provide, or to secure that another person provides, a funeral in the United Kingdom<sup>3</sup> for the customer (or some other person who is living at the date when the contract is entered into) on his death<sup>4</sup>; and
- 481 (3) the provider is a person who carries on the regulated activity of entering as a provider into a funeral plan<sup>5</sup>.

1 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), Sch 1 para 9(1). As to the meaning of 'controlled activity' see PARA 225.

2 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 paras 9(2) (a), 28.

3 As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 paras 9(2) (b), 28.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 paras 9(2) (c), 28. The regulated activity referred to is one specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 59: see PARA 200.

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### **237. Providing, arranging and advising on qualifying credit.**

Providing qualifying credit<sup>1</sup> is a controlled activity<sup>2</sup>.

Making arrangements (1) for another person to enter as borrower into an agreement for the provision of qualifying credit<sup>3</sup>; or (2) for a borrower under a regulated mortgage contract<sup>4</sup>, entered into after 31 October 2004<sup>5</sup>, to vary the terms of that contract in such a way as to vary his obligations under that contract<sup>6</sup>, is a controlled activity<sup>7</sup>.

Advising a person is a controlled activity if the advice is (a) given to the person in his capacity as a borrower<sup>8</sup> or potential borrower<sup>9</sup>; and (b) advice on the merits of his doing any of the following: (i) entering into an agreement for the provision of qualifying credit<sup>10</sup>, or (ii) varying the terms of a regulated mortgage contract<sup>11</sup> entered into by him after 31 October 2004<sup>12</sup> in such a way as to vary his obligations under that contract<sup>13</sup>.

1 'Qualifying credit' is a credit provided pursuant to an agreement under which: (1) the lender is a person who carries on the regulated activity of entering into a regulated mortgage contract (ie the regulated activity specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61: see PARA 203); and (2) the obligation of the borrower to repay is secured (in whole or in part) on land: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1), Sch 1 para 10(2). 'Credit' includes a cash loan and any other form of financial accommodation: Sch 1 para 10(3).

2 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1), Sch 1 para 10(1). As to the meaning of 'controlled activity' see PARA 225.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10A(a).

4 le within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(3): see PARA 203 note 1.

5 le after the coming into force of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10A(b).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10A.

8 As to the meaning of 'borrower' see PARA 203 note 1; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10B(2).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10B(1)(a).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10B(1)(b)(i).

11 As to the meaning of 'borrower' see PARA 203 note 1; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10B(2).

12 le after the coming into force of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61.

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10B(1)(b)(ii).

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### **238. Providing, arranging and advising on a regulated home reversion plan.**

Entering into a regulated home reversion plan<sup>1</sup> as plan provider<sup>2</sup> is a controlled activity<sup>3</sup>.

Making arrangements (1) for another person to enter as reversion seller<sup>4</sup> or plan provider into a regulated home reversion plan<sup>5</sup>; or (2) for a reversion seller or a plan provider under a regulated home reversion plan, entered into on or after 6 April 2007 by him, to vary the terms of that plan in such a way as to vary his obligations under that plan<sup>6</sup>, is a controlled activity<sup>7</sup>.

Advising a person is a controlled activity if the advice is (a) given to the person in his capacity as reversion seller, potential reversion seller, plan provider or potential plan provider<sup>8</sup>; and (b) advice on the merits of his doing either of the following: (i) entering into a regulated home reversion plan<sup>9</sup>; or (ii) varying the terms of a regulated home reversion plan, entered into on or after 6 April 2007 by him, in such a way as to vary his obligations under that plan<sup>10</sup>.

1 As to the meanings of 'regulated home reversion plan' and 'reversion seller' see PARA 209 note 1; definitions applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28 (definitions added by SI 2006/2383).

2 As to the meaning of 'plan provider' see PARA 209 note 1; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28 (definition added by SI 2006/2383).

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10C (Sch 1 paras 10C-10E added by SI 2006/2383). As to the meaning of 'controlled activity' see PARA 225.

4 See note 1.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10D(a) (as added: see note 3).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10D(b) (as added: see note 3).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10D (as added: see note 3).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10E(a) (as added: see note 3).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10E(b)(i) (as added: see note 3).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10E(b)(ii) (as added: see note 3).

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### **239. Providing, arranging and advising on a regulated home purchase plan.**

Entering into a regulated home purchase plan<sup>1</sup> as home purchase provider<sup>2</sup> is a controlled activity<sup>3</sup>.

Making arrangements (1) for another person to enter as home purchaser<sup>4</sup> into a regulated home purchase plan<sup>5</sup>; or (2) for a home purchaser under a regulated home purchase plan, entered into on or after 6 April 2007 by him, to vary the terms of that plan in such a way as to vary his obligations under that plan<sup>6</sup>, is a controlled activity<sup>7</sup>.

Advising a person is a controlled activity if the advice is (a) given to the person in his capacity as home purchaser or potential home purchaser<sup>8</sup>; and (b) advice on the merits of his doing either of the following: (i) entering into a regulated home purchase plan<sup>9</sup>, or (ii) varying the terms of a regulated home purchase plan, entered into on or after 6 April 2007 by him, in such a way as to vary his obligations under that plan<sup>10</sup>.

1 As to the meanings of 'regulated home purchase plan', 'home purchase provider' and 'home purchaser' see PARA 215 note 1; definitions applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28 (definitions added by SI 2006/2383).

2 See note 1.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10F (Sch 1 paras 10F-10H added by SI 2006/2383). As to the meaning of 'controlled activity' see PARA 225.

4 See note 1.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10G(a) (as added: see note 3).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10G(b) (as added: see note 3).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10G (as added: see note 3).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10H(a) (as added: see note 3).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10H(b)(i) (as added: see note 3).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10H(b)(ii) (as added: see note 3).

## UPDATE

### **239 Providing, arranging and advising on a regulated home purchase plan**

TEXT AND NOTES--Providing, arranging and advising on a regulated sale and rent back agreement are also controlled activities: see PARA 239A.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(4) REGULATED ACTIVITIES/(iii) Financial Promotion/B. CONTROLLED ACTIVITIES/239A. Providing, arranging and advising on a regulated sale and rent back agreement.

### **239A. Providing, arranging and advising on a regulated sale and rent back agreement.**

Entering into a regulated sale and rent back agreement as agreement provider is a controlled activity: SI 2005/1529 Sch 1 para 10I (paras 10I-10K added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). 'Agreement provider' has the meaning given by SI 2001/544 art 63J(3), read with art 63J(6); and 'regulated sale and rent back agreement' has the meaning given by art 63J(3) (PARA 220A): SI 2005/1529 Sch 1 para 28 (definitions added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). Making arrangements (1) for another person to enter as agreement seller or agreement provider into a regulated sale and rent back agreement; or (2) for an agreement seller or an agreement provider under a regulated sale and rent back agreement, entered into on or after 1 July 2009, to vary the terms of that plan in such a way as to vary the obligations of the agreement seller or the agreement provider under that plan, is a controlled activity: SI 2005/1529 Sch 1 para 10J(a), (b). 'Agreement seller' has the meaning given by art 63J(3): SI 2005/1529 Sch 1 para 28 (definition added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). Advising a person is a controlled activity if the advice is (a) given to the person in his capacity as agreement seller, potential agreement seller, agreement provider or potential agreement provider; and (b) advice on the merits of his doing either of the following: (i) entering into a regulated sale and rent back agreement; or (ii) varying the terms of a regulated sale and rent back agreement, entered into on or after 1 July 2009 by him, in such a way as to vary his obligations under that agreement: SI 2005/1529 Sch 1 para 10K(a), (b)(i), (ii).

In head (2) above, it is submitted that the word 'agreement' should be substituted for the word 'plan' in both places where it appears.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(4) REGULATED ACTIVITIES/(iii) Financial Promotion/B. CONTROLLED ACTIVITIES/240. Agreeing to carry on specified kinds of activity.

#### **240. Agreeing to carry on specified kinds of activity.**

Agreeing to carry on the following kinds of controlled activity is a controlled activity<sup>1</sup>:

- 482 (1) dealing in securities and contractually based investments<sup>2</sup>;
- 483 (2) arranging deals in investments<sup>3</sup>;
- 484 (3) managing investments<sup>4</sup>;
- 485 (4) safeguarding and administering investments<sup>5</sup>;
- 486 (5) advising on investments<sup>6</sup>;
- 487 (6) advising on syndicate participation at Lloyd's<sup>7</sup>;
- 488 (7) providing funeral plan contracts<sup>8</sup>;
- 489 (8) providing qualifying credit<sup>9</sup>;
- 490 (9) arranging qualifying credit, etc<sup>10</sup>;
- 491 (10) advising on qualifying credit, etc<sup>11</sup>.

1 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1), Sch 1 para 11 (amended by SI 2006/3384). Note that the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 11 does not include accepting deposits (Sch 1 para 1) (see PARA 227), effecting and carrying out contracts of insurance (Sch 1 para 2) (see PARA 228) or operating a multilateral trading facility (Sch 1 para 4A) (see PARA 231). As to the meaning of 'controlled activity' see PARA 225.

2 I.e. falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 3: see PARA 229.

3 I.e. falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 4: see PARA 230.

4 I.e. falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 5: see PARA 232.

5 I.e. falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 6: see PARA 233.

6 I.e. falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 7: see PARA 234.

7 I.e. falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 8: see PARA 235. As to Lloyd's see PARA 77; and **INSURANCE**.

8 I.e. falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 9: see PARA 236.

9 I.e. falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10: see PARA 237.

10 I.e. falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10A: see PARA 238.

11 le falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10B: see PARA 238.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(4) REGULATED ACTIVITIES/(iii) Financial Promotion/C. CONTROLLED INVESTMENTS/241. Kinds of controlled investments.

## **C. CONTROLLED INVESTMENTS**

### **241. Kinds of controlled investments.**

The following kinds of investment are controlled investments<sup>1</sup>:

- 492 (1) a deposit<sup>2</sup>;
- 493 (2) rights under a contract of insurance<sup>3</sup>;
- 494 (3) shares or stock in the share capital of: (a) any body corporate (wherever incorporated); (b) any unincorporated body constituted under the law of a country or territory outside the United Kingdom<sup>4</sup>;
- 495 (4) certain (a) debentures; (b) debenture stock; (c) loan stock; (d) bonds; (e) certificates of deposit; (f) other instruments creating or acknowledging indebtedness<sup>5</sup>;
- 496 (5) loan stock, bonds and other instruments creating or acknowledging indebtedness and issued by or on behalf of a government, local authority (whether in the United Kingdom or elsewhere) or international organisation<sup>6</sup>;
- 497 (6) warrants and other instruments entitling the holder to subscribe for any investment falling with head (3), (4) or (5) above<sup>7</sup>;
- 498 (7) certificates or other instruments which confer contractual or property rights (other than rights consisting of an investment of the kind specified in head (10) below) in respect of any investment of the kind specified by any of heads (3) to (6) above being investments held by a person other than the person on whom the rights are conferred by the certificate or investment, and the transfer of which may be effected without the consent of that person<sup>8</sup>;
- 499 (8) units in a collective investment scheme<sup>9</sup>;
- 500 (9) rights under a stakeholder pension scheme and rights under a personal pension scheme<sup>10</sup>;
- 501 (10) options to acquire or dispose of: (a) a security or contractually based investment; (b) currency of the United Kingdom or of any other country or territory; (c) palladium, platinum, gold or silver; (d) an option to acquire or dispose of such an option; (e) an option to acquire or dispose of an option to which certain provisions of the Markets in Financial Instruments Directive apply<sup>11</sup>, and certain other options to which heads (a) to (e) above do not apply<sup>12</sup>;
- 502 (11) rights under a contract for the sale of a commodity or property of any other description under which delivery is to be made at a future date and at a price agreed on when the contract is made<sup>13</sup>, and certain other futures and forwards<sup>14</sup>;
- 503 (12) rights under: (a) a contract for differences; or (b) any other contract the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the value or price of property of any description, or an index or other factor designated for that purpose in the contract<sup>15</sup>, and certain derivative instruments for the transfer of credit risk<sup>16</sup>;
- 504 (13) the underwriting capacity of a Lloyd's syndicate<sup>17</sup>;

- 505 (14) a person's membership (or prospective membership) of a Lloyd's syndicate<sup>18</sup>;
- 506 (15) rights under a qualifying funeral plan contract<sup>19</sup>;
- 507 (16) rights under an agreement for qualifying credit<sup>20</sup>;
- 508 (17) rights under a regulated home reversion plan<sup>21</sup>;
- 509 (18) rights under a regulated home purchase plan<sup>22</sup>;
- 510 (19) any right to or interest in anything which is specified in heads (1) to (15) above<sup>23</sup>.

1 le for the purposes of the Financial Services and Markets Act 2000 s 21(10) (see PARA 225): see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 4(2), Sch 1 Pt II (paras 12-27).

2 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 12. As to the meaning of 'deposit' see PARA 227 note 1.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 13. As to the meaning of 'contract of insurance' see PARA 90 note 3; definition applied by Sch 1 para 28.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 14(1). This includes any shares of a class defined as deferred shares for the purposes of the Building Societies Act 1986 s 119 (see PARA 1906) and any transferable shares in a body incorporated under the law of, or any part of, the United Kingdom relating to industrial and provident societies or credit unions or in a body constituted under the law of another EEA state for purposes equivalent to those of such a body: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 14(2)(a), (b). It does not include shares or stock in the share capital of: (1) an open-ended investment company; (2) a building society incorporated under the law of, or any part of, the United Kingdom; (3) any body incorporated under the law of, or any part of, the United Kingdom relating to industrial and provident societies or credit unions; (4) any body constituted under the law of an EEA state for purposes equivalent to those of a body falling within head (2) or head (3) above: Sch 1 para 14(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to open-ended investment companies see PARA 621 et seq. As to industrial and provident societies and credit unions see further PARA 2394 et seq.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 15(1) (a)-(f). This only applies to such instruments as do not fall within Sch 1 para 16 (see head (5) in the text): Sch 1 para 15(1). However, if and to the extent that they would otherwise fall within head (4) in the text, there are excluded: (1) any instrument acknowledging or creating indebtedness for, or for money borrowed to defray, the consideration payable under a contract for the supply of goods or services; (2) a cheque or other bill of exchange, a banker's draft or a letter of credit (but not a bill of exchange accepted by a banker); (3) a banknote, a statement showing a balance on a current, deposit or saving account, a lease or other disposition of property, or a heritable security; and (4) a contract of insurance: Sch 1 para 15(2). Note that an instrument excluded from Sch 1 para 16(1) (see head (5) in the text) by Sch 1 para (2)(b) is not thereby to be taken to fall within Sch 1 para 15(1): Sch 1 para 15(3). As to the meaning of 'instrument' see PARA 229 note 6.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 16(1) (a)-(b). This does not include:

237 (1) so far as applicable, the instruments mentioned in Sch 1 para 15(2)(a)-(d) (see note 5 heads (1)-(4)) (Sch 1 para 16(2)(a)); and

238 (2) any instrument creating or acknowledging indebtedness in respect of: (a) money received by the Director of Savings as deposits or otherwise in connection with the business of the National Savings Bank (see PARA 810 et seq); or (b) money raised under the National Loans Act 1968 under the auspices of the Director of Savings or treated as so raised by virtue of the National Debt Act 1972 s 11(3) (see PARA 1367) (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 16(2)(b)).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 17(1). It is immaterial whether the investment to which the entitlement relates is in existence or identifiable: Sch 1 para 17(2). Note that an investment falling within head (6) in the text is not to be regarded as falling within Sch 1 para 21, 22 or 23 (see heads (10)-(12) in the text): Sch 1 para 17(3).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 18(1) (a), (b). This does not include any instrument which confers rights in respect of two or more investments issued by different persons, or in respect of two or more different investments of the kind specified by Sch 1 para 16



(see head (5) in the text) and issued by the same person: Sch 1 para 18(2). 'Property' includes currency of the United Kingdom or any other country or territory: Sch 1 para 28.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 19. As to the meaning of 'units', in a collective investment scheme, see PARA 603; definition applied by art 2(1).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 20(1), (2) (Sch 1 para 20 substituted by SI 2006/1969). As to the meanings of 'stakeholder pension scheme' and 'personal pension scheme' see PARA 312; definitions applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 20(3) (as so substituted).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 21(1)(a)-(e) (Sch 1 para 21(1) renumbered as such and amended by SI 2006/3384). As to the meaning of 'security' see PARA 229 note 3. As to the meaning of 'contractually based investment' see PARA 229 note 4. The reference to the Markets in Financial Instruments Directive is a reference to European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1) on markets in financial instruments. In regard to the restriction on the application of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 21(1)(e) see also note 12.

12 The other options referred to are:

- 239 (1) options (a) to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 21(a)-(e) (see heads (10)(a)-(e) in the text) does not apply; (b) which relate to commodities; (c) which may be settled physically; and (d) either to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 5 or 6 (see PARA 88 note 5) applies, or which in accordance with EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) art 38 (see PARA 88 note 5) are to be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes, and to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 7 (see PARA 88 note 5) applies (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 21(2)(a)-(d) (Sch 1 para 21(2)-(5) added by SI 2006/3384));
- 240 (2) options (a) to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 21(1)(a)-(e) (see heads (10)(a)-(e) in the text) does not apply; (b) which may be settled physically; and (c) to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 10 (see PARA 88 note 5) (read with EC Commission Regulation 1287/2006) applies (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 21(3)(a)-(c) (as so added)).

Schedule 1 para 21(1)(e), (2), (3) only applies to options in relation to which (i) an investment firm or credit institution is providing or performing investment services and activities on a professional basis; (ii) a management company is providing, in accordance with the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities) art 5(3), the investment service specified in Section A para 4 or 5, or the ancillary service specified in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex 1 Section B para 1; or (iii) a market operator is providing the investment service specified in Annex 1 Section A para 8: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 21(4) (as so added). Expressions used in Sch 1 para 21(1)(e), (2), (3) and in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) have the same meaning as in that directive: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 21(5) (as so added). As to the meanings of 'investment firm', 'credit institution' and 'investment services and activities' see PARA 88 notes 5, 6; definitions applied by Sch 1 para 28 (definitions added by SI 2006/2383). As to the meaning of 'market operator' see PARA 139 note 22; and as to the meaning of 'management company' see PARA 224 note 12; definitions applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28 (definitions as so added).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 22(1). This does not include rights under any contract which is made for commercial and not investment purposes: Sch 1 para 22(2). For the purposes of Sch 1 para 22(2), in considering whether a contract is to be regarded as made for investment purposes or for commercial purposes, the indicators set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84 must be applied in the same way as they are applied for the purposes of art 84 (see PARA 224): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 22(3).

14 The other futures and forwards are:

- 241 (1) futures (a) to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 22(1) (see head (11) in the text) does not apply; (b) which relate to commodities; (c) which may be settled physically; and (d) to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 5 or 6 (see PARA 88 note 5) applies (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 22(1A)(a)-(d) (Sch 1 para 22(1A)-(1E) added by SI 2006/3384));
- 242 (2) futures and forwards (a) to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 22(1) (see head (11) in the text) does not apply; (b) which relate to commodities; (c) which may be settled physically; (d) which in accordance with EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) art 38 (see PARA 88 note 5) are to be considered as having the characteristics of other derivative financial instruments and not being for commercial purposes; and (e) to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 7 (see PARA 88 note 5) applies (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 22(1B)(a)-(e) (as so added));
- 243 (3) futures (a) to which Sch 1 para 22(1) (see head (11) in the text) does not apply; (b) which may be settled physically; and (c) to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 10 (see PARA 88 note 5) (read with EC Commission Regulation 1287/2006) applies (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 22(1C)(a)-(c) (as so added)).

Article 84(1A), (1B), (1C) only applies to futures or forwards in relation to which (i) an investment firm or credit institution is providing or performing investment services and activities on a professional basis; (ii) a management company is providing, in accordance with the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3)) art 5(3), the investment service specified in Section A para 4 or 5, or the ancillary service specified in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section B para 1 (see PARA 88 note 5); or (iii) a market operator is providing the investment service specified in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section A para 8 (see PARA 88 note 5); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 22(1D) (as so added). Expressions used in Sch 1 para 22(1A)-(1C) and in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) have the same meaning as in that directive: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 22(1E) (as so added).

15 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 23(1). This does not include:

- 244 (1) rights under a contract if the parties intend that the profit is to be secured or the loss is to be avoided by one or more of the parties taking delivery of any property to which the contract relates (Sch 1 para 23(2)(a));
- 245 (2) rights under a contract under which money is received by way of deposit on terms that any interest or other return to be paid on the sum deposited will be calculated by reference to fluctuations in an index or other factor (Sch 1 para 23(2)(b));
- 246 (3) rights under any contract under which: (a) money is received by the Director of Savings as deposits or otherwise in connection with the business of the National Savings Bank (see PARA 810 et seq); or (b) money is raised under the National Loans Act 1968 under the auspices of the Director of Savings or treated as so raised by virtue of the National Debt Act 1972 s 11(3) (see PARA 1367) (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 23(2)(c));
- 247 (4) rights under a qualifying contract of insurance (Sch 1 para 23(2)(d)).

As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4; definition applied by art 2(1).

16 Ie derivative instruments for the transfer of credit risk (1) to which neither the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 21(1) (see head (10) in the text) nor Sch 1 para 23(1) (see heads (12)(a), (b) in the text) applies; and (2) to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) Annex I Section C para 8 (see PARA 88 note 5) applies: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 23(3) (Sch 1 para 23(3)-(5) added by SI 2006/3384).

'Derivative instruments for the transfer of credit risk' has the same meaning as in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 23(5) (as so added).

The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 23(3) only applies to derivatives in relation to which (a) an investment firm or credit institution is providing or performing investment services and activities on a professional basis; (b) a management company is providing, in accordance with UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3)) art 5(3), the investment service specified in Section A para 4 or 5, or the ancillary service specified in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) Annex I Section B para 1 (see PARA 88 note 5); or (c) a market operator is providing the investment service specified in Annex I Section A para 8 (see PARA 88 note 5): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 23(4) (as so added).

17 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 24(1). As to the meaning of 'syndicate' see PARA 198 note 2; definition applied by Sch 1 para 28. As to Lloyd's see PARA 77; and **INSURANCE**.

18 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 24(2).

19 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 25. As to the meaning of 'qualifying funeral plan contract' see PARA 236; definition applied by Sch 1 paras 9, 28.

20 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 26. As to the meaning of 'qualifying credit' see PARA 237 note 1; definition applied by Sch 1 paras 10, 28.

21 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 26A (added by SI 2006/2383). As to the meaning of 'regulated home reversion plan' see PARA 209 note 1; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28 (definition added by SI 2006/2383).

22 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 26B (added by SI 2006/2383). As to the meaning of 'regulated home purchase plan' see PARA 215 note 1; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28 (definition added by SI 2006/2383).

23 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 27(1) (amended by SI 2006/2383). The reference is to any provision of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 Pt II other than para 26, 26A or 26B. This also does not apply to interests under the trusts of an occupational pension scheme (Sch 1 para 27(2)), to any right or interest acquired as a result of entering into a funeral plan contract (Sch 1 para 27(2A)) or to anything which falls within any other provision of Sch 1 Pt II (see heads (1)-(19) in the text) (Sch 1 para 27(3)). 'Occupational pension scheme' has the meaning given by the Pension Schemes Act 1993 s 1, but with para (b) of the definition omitted (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 741): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 28 (definition substituted by SI 2006/1969). 'Funeral plan contract' means a contract under which: (1) a person (the 'customer') makes one or more payments to another person (the 'provider'); and (2) the provider undertakes to provide, or to secure that another person provides, a funeral in the United Kingdom for the customer (or some other person who is living at the date when the contract is entered into) on his death: Sch 1 paras 9(2), 27(2A).

## UPDATE

### 241 Kinds of controlled investments

TEXT AND NOTES--Also, head (18A) rights under a regulated sale and rent back agreement (see PARA 220A): SI 2005/1529 Sch 1 para 26C (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

NOTES 12, 14, 16--Directive 85/611 replaced: see PARA 6.

NOTE 23--SI 2005/1529 Sch 1 para 26C (see head (18A) in TEXT AND NOTES) is also specifically excluded: SI 2005/1529 Sch 1 para 27(1) (further amended by SI

2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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## ***D. EXEMPT COMMUNICATIONS***

### **(A) INTRODUCTION**

#### **242. Meaning of 'communications'.**

The restriction on financial promotion requires that a person must not, in the course of business, communicate an invitation or inducement to engage in investment activity unless that person is an authorised person or the content of the communication is approved by an authorised person<sup>1</sup>. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005<sup>2</sup> defines what constitutes a communication for these purposes.

The word 'communicate' itself includes causing a communication to be made or directed<sup>3</sup>. Any reference to a communication is a reference to the communication, in the course of business, of an invitation or inducement to engage in investment activity<sup>4</sup>. Any reference to a communication being made to another person is a reference to a communication being addressed, whether verbally or in legible form, to a particular person or persons (for example where it is contained in a telephone call or letter)<sup>5</sup>. Any reference to a communication being directed at persons is a reference to a communication being addressed to persons generally (for example where it is contained in a television broadcast or website)<sup>6</sup>.

Communications are classified either as 'real time' or 'non-real time'. A 'real time communication' is any communication made in the course of a personal visit, telephone conversation or other interactive dialogue<sup>7</sup>. Any other communication is referred to as a 'non-real time communication'<sup>8</sup>. Non-real time communications include communications made by letter or e-mail or contained in a publication<sup>9</sup>. The following factors are treated as indications that a communication is a non-real time communication<sup>10</sup>: (1) the communication is made to or directed at more than one recipient in identical terms (save for details of the recipient's identity)<sup>11</sup>; (2) the communication is made or directed by way of a system which in the normal course constitutes or creates a record of the communication which is available to the recipient to refer to at a later time<sup>12</sup>; (3) the communication is made or directed by way of a system which in the normal course does not enable or require the recipient to respond immediately to it<sup>13</sup>.

Real time communications may be solicited or unsolicited. A real time communication is solicited where it is made in the course of a personal visit, telephone call or other interactive dialogue if that call, visit or dialogue was initiated by the recipient of the communication or if it takes place in response to an express request from the recipient of the communication<sup>14</sup>. For these purposes, a person is not to be treated as expressly requesting a call, visit or dialogue simply because: (a) he omits to indicate that he does not wish to receive any or any further visits or calls or to engage in any or any further dialogue<sup>15</sup>; or (b) he agrees to standard terms that state that such visits, calls or dialogue will take place, unless he has signified clearly that, in addition to agreeing to the terms, he is willing for them to take place<sup>16</sup>. A communication is solicited only if it is clear from all the circumstances when the call, visit or dialogue is initiated

or requested that during the course of the visit, call or dialogue communications will be made concerning the kind of controlled activities or investments to which the communications in fact made relate<sup>17</sup>. In any other case the communication is unsolicited<sup>18</sup>.

Where a real time communication is solicited by a recipient ('R'), it is treated as having also been solicited by any other person to whom it is made at the same time as it is made to R if that other recipient is a close relative of R, or if that other recipient is expected to engage in any investment activity jointly with R<sup>19</sup>. A 'recipient' of a communication is the person to whom the communication is made or, in the case of a non-real time communication which is directed at persons generally, any person who reads or hears the communication<sup>20</sup>.

1 See the Financial Services and Markets Act 2000 s 21(1), (2); and PARA 225. As to the meaning of 'engaging in investment activity' see PARA 225.

2 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 6(d).

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 6(a).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 6(b).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 6(c).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 7(1).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 7(2).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 7(3). 'Publication' means: (1) a newspaper, journal, magazine or other periodical publication; (2) a website or similar system for the electronic display of information; (3) any programme forming part of a service consisting of the broadcast or transmission of television or radio programmes; (4) any teletext service, ie a service consisting of television transmissions consisting of a succession of visual displays (with or without accompanying sound) capable of being selected and held for separate viewing or other use: art 2(1).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 7(4).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 7(5)(a).

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 7(5)(b).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 7(5)(c).

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 8(1). It is immaterial whether the express request was made before or after 1 July 2005 (ie the date on which art 8 came into force): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 8(3)(c).

15 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 8(3)(a)(i).

16 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 8(3)(a)(ii).

17 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 8(3)(b).

18 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 8(2).

19 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 8(4). 'Close relative' in relation to a person means: (1) his spouse or civil partner; (2) his children and step-children, his parents and step-parents, his brothers and sisters and his step-brothers and step-sisters; and (3) the spouse or civil partner of any person within head (2): art 2(1) (definition amended by SI 2005/3392).

20 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 6(e).

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### **243. Communications exempt from the restriction on financial promotion.**

Not all communications are subject to the restriction on financial promotion<sup>1</sup>. Exemptions are conferred on communications in certain circumstances. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005<sup>2</sup> sets out those exemptions, some of which apply to communications relating to all kinds of controlled activity<sup>3</sup> whilst others apply only to communications relating to certain controlled activities<sup>4</sup>.

1 As to the restriction on financial promotion see PARA 225.

2 Ie the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529.

3 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt IV (arts 12-20B); and PARA 247 et seq. As to controlled activities see PARA 227 et seq.

4 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt V (arts 21-26) (deposits and insurance) (see PARA 259 et seq); and Pt VI (arts 27-74) (certain controlled activities) (see PARA 264 et seq).

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### **244. Combination of different exemptions.**

In respect of a communication<sup>1</sup> relating to: (1) a controlled activity<sup>2</sup> carried on in relation to a qualifying contract of insurance<sup>3</sup>; or (2) other specified controlled activities<sup>4</sup>, a person may rely on the application of one or more of the exemptions in Parts IV and VI of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005<sup>5</sup>.

A person may also rely on the application of one or more of the exemptions in Parts IV and V of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 in respect of a communication relating to the activity of accepting deposits<sup>6</sup> and in respect of a communication relating to a relevant insurance activity<sup>7</sup>; and, where a communication relates to any such activity and also an activity mentioned in head (1) or (2) above, a person may rely on one or more of the exemptions in Parts IV and V in respect of the former activity and on one or more of the exemptions in Parts V and VI in respect of the latter activity<sup>8</sup>.

1 As to the meaning of 'communication' see PARA 242.

2 Ie a controlled activity falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 2: see PARA 228. As to the meaning of 'controlled activity' see PARA 225.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 11(1)(a). As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4; definition applied by art 2(1).

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 11(1)(b). These are activities falling within any of Sch 1 paras 3-11: see PARA 229 et seq.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 11(1). As to Pt IV (arts 12-20B) see PARA 247 et seq. As to Pt VI (arts 27-74) see PARA 264 et seq.

6 I.e. the activity falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 1: see PARA 227. As to the meaning of 'deposit' see PARA 227 note 1.

7 As to the meaning of 'relevant insurance activity' see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 21; and PARA 261 note 3.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 11(2).

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## **245. Communications inviting or inducing person to enter into qualifying contract of insurance.**

Nothing in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005<sup>1</sup> exempts from the application of the financial promotion restriction<sup>2</sup> a communication<sup>3</sup> which invites or induces a person to enter into a qualifying contract of insurance<sup>4</sup> with a person who is not:

- 511 (1) an authorised person<sup>5</sup>;
- 512 (2) an exempt person who is exempt in relation to effecting or carrying out contracts of insurance of the class<sup>6</sup> to which the communication relates<sup>7</sup>;
- 513 (3) a company which has its head office in an EEA state other than the United Kingdom and which is entitled under the law of that state to carry on there insurance business of the class to which the communication relates<sup>8</sup>;
- 514 (4) a company which has a branch or agency in an EEA state other than the United Kingdom and is entitled under the law of that state to carry on there insurance business of the class to which the communication relates<sup>9</sup>;
- 515 (5) a company authorised to carry on insurance business of the class to which the communication relates in any of the following countries or territories: (a) the Bailiwick of Guernsey<sup>10</sup>; (b) the Isle of Man<sup>11</sup>; (c) the Commonwealth of Pennsylvania<sup>12</sup>; (d) the State of Iowa<sup>13</sup>; (e) the Bailiwick of Jersey<sup>14</sup>.

1 I.e. the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529.

2 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

3 As to the meaning of 'communication' see PARA 242.

4 As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 10(1)(a). As to authorised persons see PARA 314 et seq.

6 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 10, references to a class of insurance are references to the class of insurance contract described in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 (see PARA 90) into which the effecting and carrying out of the contract to which the communication relates would fall: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 10(2).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 10(1)(b).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 10(1)(c).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 10(1)(d).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 10(1)(e), Sch 2 para 1.

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 10(1)(e), Sch 2 para 2.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 10(1)(e), Sch 2 para 3.

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 10(1)(e), Sch 2 para 4.

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 10(1)(e), Sch 2 para 5.

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#### **246. Degree of prominence to be given to required indications.**

Where a communication<sup>1</sup> must, if it is to fall within any provision of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005<sup>2</sup>, be accompanied by an indication of any matter, the indication must be presented to the recipient<sup>3</sup>:

516 (1) in a way that can be easily understood<sup>4</sup>; and

517 (2) in such manner as, depending on the means by which the communication is made or directed, is best calculated to bring the matter in question to the attention of the recipient and to allow him to consider it<sup>5</sup>.

1 As to the meaning of 'communication' see PARA 242.

2 Ie the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529.

3 As to the meaning of 'recipient' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 9(a).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 9(b).

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ACTIVITIES/(iii) Financial Promotion/D. EXEMPT COMMUNICATIONS/(B) All Controlled Activities/247. Communications to overseas recipients.

## (B) ALL CONTROLLED ACTIVITIES

### **247. Communications to overseas recipients.**

The restriction on financial promotion<sup>1</sup> does not apply to any communication<sup>2</sup>:

- 518 (1) which is made (whether from inside or outside the United Kingdom) to a person<sup>3</sup> who receives the communication outside the United Kingdom<sup>4</sup>; or
- 519 (2) which is directed (whether from inside or outside the United Kingdom) only at persons<sup>5</sup> outside the United Kingdom<sup>6</sup>.

However, this exemption does not apply to an outgoing electronic commerce communication<sup>7</sup>, nor does it apply to an unsolicited real time communication<sup>8</sup> unless: (a) it is made from a place outside the United Kingdom<sup>9</sup>; and (b) it is made for the purposes of a business which is carried on outside the United Kingdom and which is not carried on in the United Kingdom<sup>10</sup>.

For the purposes of head (b) above:

- 520 (i) if the conditions set out in heads (A), (B), (C) and (D) below are met, a communication directed from a place inside the United Kingdom is to be regarded as directed only at persons outside the United Kingdom<sup>11</sup>;
- 521 (ii) if the conditions set out in heads (C) and (D) below are met, a communication directed from a place outside the United Kingdom is to be regarded as directed only at persons outside the United Kingdom<sup>12</sup>;
- 522 (iii) in any other case where one or more of the conditions in heads (A) to (E) below are met, that fact is to be taken into account in determining whether or not a communication is to be regarded as directed only at persons outside the United Kingdom (but a communication may still be regarded as directed only at persons outside the United Kingdom even if none of the conditions in heads (A) to (E) below is met)<sup>13</sup>.

The conditions are that:

- 523 (A) the communication is accompanied by an indication that it is directed only at persons outside the United Kingdom<sup>14</sup>;
- 524 (B) the communication is accompanied by an indication that it must not be acted upon by persons in the United Kingdom<sup>15</sup>;
- 525 (C) the communication is not referred to in, or directly accessible from, any other communication which is made to a person or directed at persons in the United Kingdom by the person directing the communication<sup>16</sup>;
- 526 (D) there are in place proper systems and procedures to prevent recipients in the United Kingdom (other than those to whom the communication might otherwise lawfully have been made by the person directing it or a member of the same group) engaging in the investment activity to which the communication relates with the person directing the communication, a close relative of his or a member of the same group<sup>17</sup>;
- 527 (E) the communication is included in a website, newspaper, journal, magazine or periodical publication which is principally accessed in or intended for a market outside the United Kingdom<sup>18</sup>, or is included in a radio or television broadcast or teletext service transmitted principally for reception outside the United Kingdom<sup>19</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'communication' see PARA 242.

3 As to a communication being made to another person see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(1)(a). As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 As to a communication being directed at persons see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(1)(b). For these purposes, a communication may be treated as directed only at persons outside the United Kingdom even if:

248 (1) it is also directed, for the purposes of art 19(1)(b), at investment professionals falling within art 19(5) (but disregarding art 19(6) (see PARA 255) for this purpose) (art 12(5)(a));

249 (2) it is also directed, for the purposes of art 49(1)(b), at high net worth persons to whom art 49 applies (but disregarding art 49(2)(e) (see PARA 296) for this purpose) and it relates to a controlled activity to which art 49 applies (art 12(5)(b));

250 (3) it is a communication to which art 31 applies (see PARA 270) (art 12(5)(c)).

Where a communication falls within art 12(5)(a) or (b):

251 (a) the condition in art 12(4)(a) (see head (A) in the text) is to be construed as requiring an indication that the communication is directed only at persons outside the United Kingdom or persons having professional experience in matters relating to investments or high net worth persons (as the case may be) (art 12(6)(a));

252 (b) the condition in art 12(4)(b) (see head (B) in the text) is to be construed as requiring an indication that the communication must not be acted upon by persons in the United Kingdom except by persons who have professional experience in matters relating to investments or who are not high net worth persons (as the case may be) (art 12(6)(b));

253 (c) the condition in art 12(4)(c) (see head (C) in the text) will not apply where the other communication referred to is made to a person or directed at a person in the United Kingdom to whom art 12(5) applies (see heads (1), (2), (3) above) (art 12(6)(c)).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(7). 'Outgoing electronic commerce communication' means an electronic commerce communication made from an establishment in the United Kingdom to a person in an EEA state other than the United Kingdom: art 6(h). As to the meaning of 'electronic commerce communication' see PARA 254 note 9.

8 As to the meaning of 'unsolicited real time communication' see PARA 242.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(2)(a).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(2)(b).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(3)(a). See also note 6.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(3)(b). See also note 6.

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(3)(c). See also note 6.

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(4)(a).

15 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(4)(b).

- 16 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(4)(c).
- 17 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(4)(d).
- 18 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(4)(e)(i).
- 19 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 12(4)(e)(ii).

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#### **248. Communications from customers and potential customers.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> made by or on behalf of a person (referred to as the 'customer') to one other person<sup>3</sup> (referred to as the 'supplier'):

- 528 (1) in order to obtain information about a controlled investment<sup>4</sup> available from or a controlled service<sup>5</sup> provided by the supplier<sup>6</sup>; or
- 529 (2) in order that the customer can acquire a controlled investment from that supplier or be supplied with a controlled service by that supplier<sup>7</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'communication' see PARA 242.

3 As to a communication being made to another person see PARA 242.

4 As to controlled investments see PARA 241.

5 For the purposes of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 13(1), a controlled service is a service the provision of which constitutes engaging in a controlled activity by the supplier: art 13(2). As to controlled activities see PARA 227 et seq.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 13(1)(a).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 13(1)(b).

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#### **249. Follow up non-real time communications and solicited real time communications.**

Where a person makes or directs a communication<sup>1</sup> (the 'first communication') which is exempt from the financial promotion restriction<sup>2</sup> because<sup>3</sup> it is accompanied by certain indications or contains certain information, then the financial promotion restriction does not apply to any subsequent communication which complies with the following requirements<sup>4</sup>. The requirements are that the subsequent communication:

- 530 (1) is a non-real time communication<sup>5</sup> or a solicited real time communication<sup>6</sup>;
- 531 (2) is made by the same person who made the first communication<sup>7</sup>;
- 532 (3) is made to a recipient<sup>8</sup> of the first communication<sup>9</sup>;
- 533 (4) relates to the same controlled activity<sup>10</sup> and the same controlled investment<sup>11</sup> as the first communication<sup>12</sup>; and
- 534 (5) is made within 12 months of the recipient receiving the first communication<sup>13</sup>.

These provisions<sup>14</sup> only apply in the case of a person who makes or directs a communication on behalf of another where the first communication is made by that other person<sup>15</sup>. Where a person makes or directs a communication on behalf of another person in reliance on this exemption<sup>16</sup> the person on whose behalf the communication was made or directed remains responsible for the content of that communication<sup>17</sup>.

1 As to the meaning of 'communication' see PARA 242.

2 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

3 ie in compliance with the requirements of another provision of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 14(1).

5 As to the meaning of 'non-real time communication' see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 14(2)(a). As to the meaning of 'solicited real time communication' see PARA 242.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 14(2)(b).

8 As to the meaning of 'recipient' see PARA 242.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 14(2)(c).

10 As to controlled activities see PARA 227 et seq.

11 As to controlled investments see PARA 241.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 14(2)(d).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 14(2)(e). A communication made or directed before 1 July 2005 (ie the date on which art 14 came into force: see art 1(2)) is to be treated as a first communication falling within art 14(1) if it would have fallen within art 14(1) had it been made or directed after that date: art 14(5).

14 ie the provisions of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 14.

15 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 14(3).

16 ie the exemption contained in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 14.

17 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 14(4).

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## 250. Introductions.

If the requirements listed in heads (a) to (c) below are met, the financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is made with a view to or for the purposes of introducing the recipient<sup>3</sup> to:

- 535 (1) an authorised person who carries on the controlled activity<sup>4</sup> to which the communication relates<sup>5</sup>; or
- 536 (2) an exempt person where the communication relates to a controlled activity which is also a regulated activity in relation to which he is an exempt person<sup>6</sup>.

The requirements are that:

- 537 (a) the maker of the communication ('A') is not a close relative<sup>7</sup> of, nor a member of the same group as, the person to whom the introduction is, or is to be, made<sup>8</sup>;
- 538 (b) A does not receive from any person other than the recipient any pecuniary reward or other advantage arising out of his making the introduction<sup>9</sup>; and
- 539 (c) it is clear in all the circumstances that the recipient, in his capacity as an investor, is not seeking and has not sought advice from A as to the merits of the recipient engaging in investment activity<sup>10</sup> (or, if the client has sought such advice, A has declined to give it, but has recommended that the recipient seek such advice from an authorised person)<sup>11</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'recipient' see PARA 242.

4 As to controlled activities see PARA 227 et seq.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 15(1)(a).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 15(1)(b). As to exempt persons see PARA 330.

7 As to the meaning of 'close relative' see PARA 242 note 19.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 15(2)(a).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 15(2)(b).

10 As to persons engaging in investment activity see PARA 225.

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 15(2)(c).

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## **251. Exempt persons.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 540 (1) is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;
- 541 (2) is made or directed by an exempt person<sup>5</sup>; and
- 542 (3) is for the purposes of that exempt person's business of carrying on a controlled activity<sup>6</sup> which is also a regulated activity in relation to which he is an exempt person<sup>7</sup>,

nor does it apply to any unsolicited real time communication<sup>8</sup> made by a person ('AR') who is an appointed representative<sup>9</sup> where:

- 543 (a) the communication is made by AR in carrying on the business: (i) for which his principal ('P') has accepted responsibility<sup>10</sup>; and (ii) in relation to which AR is exempt from the general prohibition<sup>11</sup>; and
- 544 (b) the communication is one which, if it were made by P, would comply with any financial promotion rules made by the Financial Services Authority<sup>12</sup> which are relevant to a communication of that kind<sup>13</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 16(1)(a). As to the meaning of 'solicited real time communication' see PARA 242.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 16(1)(b). As to exempt persons see PARA 330.

6 As to controlled activities see PARA 227.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 16(1)(c). As to regulated activities see PARA 84 et seq.

8 As to the meaning of 'unsolicited real time communication' see PARA 242.

9 Ie within the meaning of the Financial Services and Markets Act 2000 s 39(2): see PARA 346.

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 16(2)(a)(i). The reference in the text to acceptance of responsibility is a reference to such acceptance for the purposes of the Financial Services and Markets Act 2000 s 39: see PARA 346.

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 16(2)(a)(ii). As to the general prohibition on carrying out a regulated activity in the United Kingdom see PARA 80.

12 le under the Financial Services and Markets Act 2000 s 145: see PARA 29. As to the Financial Services Authority see PARAS 4, 6 et seq.

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 16(2)(b).

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## **252. Generic promotions.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

545 (1) does not identify (directly or indirectly) a person who provides the controlled investment<sup>3</sup> to which the communication relates<sup>4</sup>; and

546 (2) does not identify (directly or indirectly) any person as a person who carries on a controlled activity<sup>5</sup> in relation to that investment<sup>6</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'communication' see PARA 242.

3 As to controlled investments see PARA 241.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 17(a).

5 As to controlled activities see PARA 227 et seq.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 17(b).

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## **253. Communications caused to be made or directed by unauthorised persons.**

If one of the conditions below is met, the financial promotion restriction<sup>1</sup> does not apply to a communication<sup>2</sup> caused to be made or directed by an unauthorised person which is made or directed by an authorised person<sup>3</sup>.

The conditions are that (1) the authorised person prepared the content of the communication<sup>4</sup>; or (2) it is a real time communication<sup>5</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 17A(1). As to authorised persons see PARA 314 et seq.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 17A(2)(a).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 17A(2)(b). As to the meaning of 'real time communication' see PARA 242.

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## 254. Mere conduits.

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is made or directed by a person who acts as a mere conduit for it<sup>3</sup>. A person acts as a mere conduit for a communication if:

547 (1) he communicates<sup>4</sup> it in the course of a business carried on by him, the principal purpose of which is transmitting or receiving material provided to him by others<sup>5</sup>;

548 (2) the content of the communication is wholly devised by another person<sup>6</sup>; and

549 (3) the nature of the service provided by him in relation to the communication is such that he does not select, modify or otherwise exercise control over its content<sup>7</sup> prior to its transmission or receipt<sup>8</sup>.

Electronic commerce communications are not generally exempt from the restriction on financial promotion<sup>9</sup>. The financial promotion restriction does not apply to an electronic commerce communication where<sup>10</sup>:

550 (a) the making of the communication constitutes the provision of an information society service of a certain kind (namely, 'mere conduit', 'caching' and 'hosting')<sup>11</sup>; and

551 (b) the relevant conditions<sup>12</sup>, to the extent that they are applicable at the time of, or prior to, the making of the communication, are or have been met at that time<sup>13</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 18(1).

4 As to the meaning of 'communicate' see PARA 242.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 18(2)(a).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 18(2)(b).



7 For the purposes of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 18(2)(c), a person does not select, modify or otherwise exercise control over the content of a communication merely by removing or having the power to remove material:

254 (1) which is, or is alleged to be, illegal, defamatory or in breach of copyright (art 18(3)(a));

255 (2) in response to a request to a body which is empowered by or under any enactment to make such a request (art 18(3)(b)); or

256 (3) when otherwise required to do so by law (art 18(3)(c)).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 18(2)(c).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 18(4). 'Electronic commerce communication' means a communication the making of which constitutes the provision of an information society service: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 6(f).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 18A.

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 18A(a). The information society services referred to in the text are those of a kind falling within EC Council Directive 2000/31 (OJ L178, 17.7.2000, p 1) on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, art 12(1), art 13(1), or art 14(1).

12 le the conditions mentioned in EC Council Directive 2000/31 (OJ L178, 17.7.2000, p 1) arts 12(1), 13(1), 14(1).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 18A(b).

## UPDATE

### 254 Mere conduits

NOTE 11--See further Coroners and Justice Act 2009 s 143 (implementation of E-Commerce and Services directives: penalties).

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### 255. Investment professionals.

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which: (1) is made only to recipients<sup>3</sup> whom the person making the communication believes on reasonable grounds to be investment professionals<sup>4</sup>; or (2) may reasonably be regarded as directed only at such recipients<sup>5</sup>.

If:

552 (a) the communication is accompanied by an indication that it is directed at persons having professional experience in matters relating to investments and that any investment or investment activity to which it relates is available only to such persons or will be engaged in only with such persons<sup>6</sup>;

- 553 (b) the communication is accompanied by an indication that persons who do not have professional experience in matters relating to investments should not rely on it<sup>7</sup>;
- 554 (c) there are in place proper systems and procedures to prevent recipients other than investment professionals engaging in the investment activity to which the communication relates with the person directing the communication, a close relative<sup>8</sup> of his or a member of the same group<sup>9</sup>,

then the communication is to be regarded as directed only at investment professionals<sup>10</sup>. In any other case in which one or more of the conditions set out in heads (a) to (c) above are met, that fact is to be taken into account in determining whether the communication is directed only at investment professionals (but a communication may still be regarded as so directed even if none of the conditions in heads (a) to (c) above is met)<sup>11</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'recipient' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 19(1)(a). 'Investment professionals' means:

257 (1) an authorised person (art 19(5)(a));

258 (2) an exempt person where the communication relates to a controlled activity which is a regulated activity in relation to which the person is exempt (art 19(5)(b));

259 (3) any other person:

39. (a) whose ordinary activities involve him in carrying on the controlled activity to which the communication relates for the purpose of a business carried on by him (art 19(5)(c)(i)); or  
39

40. (b) who it is reasonable to expect will carry on such activity for the purposes of a business carried on by him (art 19(5)(c)(ii));  
40

260 (4) a government, a local authority (whether in the United Kingdom or elsewhere) or an international organisation (art 19(5)(d));

261 (5) a person ('A') who is a director, officer or employee of a person ('B') falling within any of heads (1)-(4) above where the communication is made to A in that capacity and where A's responsibilities when acting in that capacity involve him in the carrying on by B of controlled activities (art 19(5)(e)).

As to controlled activities see PARA 227 et seq. As to the meaning of 'government' see PARA 241. 'International organisation' means any body the members of which comprise states including the United Kingdom or another EEA state or bodies whose members comprise states including the United Kingdom or another EEA state: art 2(1). As to authorised persons see PARA 314 et seq. As to regulated activities generally see PARA 84. As to investment generally see PARA 85. As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 19(1)(b). For these purposes, a communication may be treated as made only to or directed only at investment professionals even if it is also made to or directed at other persons to whom it may lawfully be communicated: art 19(6). As to communication being made to another person see PARA 242; and as to communication being directed at persons see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 19(4)(a).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 19(4)(b).

- 8 As to the meaning of 'close relative' see PARA 242 note 19.
- 9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 19(4)(c).
- 10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 19(2).
- 11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 19(3).

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## **256. Communications by journalists.**

The financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> if:

- 555 (1) the content of the communication<sup>3</sup> is devised by a person acting in the capacity of a journalist<sup>4</sup>;
- 556 (2) the communication is contained in a qualifying publication<sup>5</sup>; and
- 557 (3) in the case of a communication requiring disclosure<sup>6</sup>, one of the conditions below is met<sup>7</sup>:
- 51
81. (a) the communication is accompanied by an indication explaining the nature of the author's<sup>8</sup> financial interest or that of a member of his family<sup>9</sup> (as the case may be)<sup>10</sup>;
82. (b) the authors are subject to proper systems and procedures which prevent the publication of communications requiring disclosure without the explanation referred to in head (a) above<sup>11</sup>; or
83. (c) the qualifying publication in which the communication appears falls within the remit of the Code of Practice issued by the Press Complaints Commission<sup>12</sup>, or the OFCOM Broadcasting Code<sup>13</sup>, or the Producers' Guidelines issued by the British Broadcasting Corporation<sup>14</sup>.
- 52

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'non-real time communication' see PARA 242.

3 As to the meaning of 'communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(1)(a).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(1)(b). A 'qualifying publication' is a publication or service of the kind mentioned in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(1) or art 54(2) and which is of the nature described in art 54 (see PARA 175); and for the purposes of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20, a certificate given under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(3) and not revoked is conclusive evidence of the matters certified: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(5)(b).

6 A communication requires disclosure if:

- 262 (1) an author of the communication or a member of his family is likely to obtain a financial benefit or avoid a financial loss if people act in accordance with the invitation or inducement contained in the communication (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(3)(a));
- 263 (2) the communication relates to a controlled investment of a kind falling within art 20(4) (see heads (a)-(d) below) (art 20(3)(b)); and
- 264 (3) the communication identifies directly a person who issues or provides the controlled investment to which the communication relates (art 20(3)(c)).

A 'controlled investment' falls within art 20(4) if it is:

- 265 (a) an investment falling within Sch 1 para 14 (shares or stock in share capital) (see PARA 241) (art 20(4)(a));
- 266 (b) an investment falling within Sch 1 para 21 (options) (see PARA 241) to acquire or dispose of an investment falling within head (a) above (art 20(4)(b));
- 267 (c) an investment falling within Sch 1 para 22 (futures) (see PARA 241), being rights under a contract for the sale of an investment falling within head (a) above (art 20(4)(c)); or
- 268 (d) an investment falling within Sch 1 para 23 (contracts for differences) (see PARA 241), being rights under a contract relating to, or to fluctuations in, the value or price of an investment falling within head (a) above (art 20(4)(d)).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(1)(c).

8 For the purposes of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20, the 'author' of the communication is the person who devises the content of the communication and the person who is responsible for deciding to include the communication in the qualifying publication: art 20(5)(a)). As to the meaning of 'qualifying publication' see note 5.

9 The members of a person's family are his spouse or civil partner and any children of his under the age of 18 years: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(5)(c) (amended by SI 2005/3392).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(2)(a).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(2)(b).

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(2)(c)(i). See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 449.

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(2)(c)(ii).

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(2)(c)(iii).

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## **257. Promotion broadcast by company director.**

The financial promotion restriction<sup>1</sup> does not apply to a communication<sup>2</sup> which is communicated as part of a qualifying service<sup>3</sup> by a person ('D') who is a director or employee of an undertaking ('U') where:

- 558 (1) the communication invites or induces the recipient to acquire:  
53  
84. (a) a controlled investment of a particular kind<sup>4</sup> which is issued by U (or by an undertaking in the same group as U)<sup>5</sup>; or  
85. (b) a controlled investment issued or provided by an authorised person in the same group as U<sup>6</sup>;  
54  
559 (2) the communication:  
55  
86. (a) comprises words which are spoken by D and not broadcast, transmitted or displayed in writing<sup>7</sup>; or  
87. (b) is displayed in writing only because it forms part of an interactive dialogue to which D is a party and in the course of which D is expected to respond immediately to questions put by a recipient of the communication<sup>8</sup>;  
56  
560 (3) the communication is not part of an organised marketing campaign<sup>9</sup>; and  
561 (4) the communication is accompanied by an indication that D is a director or employee (as the case may be) of U<sup>10</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'communication' see PARA 242.

3 'Qualifying service' means a service: (1) which is broadcast or transmitted in the form of television or radio programmes; or (2) displayed on a website (or similar system for the electronic display of information) comprising regularly updated news and information, provided that the principal purpose of the service, taken as a whole and including any advertisements and other promotional material contained in it, is neither of the purposes described in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(1)(a) or art 54(1)(b) (see PARA 175); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20A(2). For these purposes, a certificate given under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 54(3) (see PARA 175) and not revoked is conclusive evidence of the matters certified: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20A(3).

4 ie a controlled investment of a kind falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20(4) (see PARA 256).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20A(1)(a)(i).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20A(1)(a)(ii).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20A(1)(b)(i).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20A(1)(b)(ii).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20A(1)(c).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20A(1)(d).

## 258. Incoming electronic commerce communications.

The financial promotion restriction<sup>1</sup> does not apply to an incoming electronic communication<sup>2</sup>. However, this does not include:

- 562 (1) a communication which constitutes an advertisement by the operator of a UCITS Directive scheme<sup>3</sup> of units in that scheme<sup>4</sup>;
- 563 (2) a communication consisting of an invitation or inducement to enter into a contract of insurance, where:
- 57
- 88. (a) the communication is made by an undertaking which has received official authorisation<sup>5</sup>;
- 89. (b) the insurance falls within the scope of any of the Insurance Directives<sup>6</sup>; or
- 58
- 564 (3) an unsolicited communication made by electronic mail<sup>7</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20B(1). 'Incoming electronic commerce communication' means an electronic commerce communication made from an establishment in an EEA state other than the United Kingdom: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 6(g). As to the meaning of 'electronic commerce communication' see PARA 254 note 9. As to the meaning of 'communication' see PARA 242. As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 'UCITS Directive scheme' means an undertaking for collective investment in transferable securities which is subject to the UCITS Directive (ie EC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities), and which has been authorised in accordance with art 4: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20B(3).

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20B(2)(a).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20B(2)(b)(i). The official authorisation referred to in the text is authorisation in accordance with the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 4 or the First Non-life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20B(2)(b)(ii). As to the meaning of 'Insurance Directives' see PARA 86 note 6.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 20B(2)(b)(iii). For the purposes of art 20B, a communication by electronic mail is to be regarded as unsolicited, unless it is made in response to an express request from the recipient of the communication: art 20B(4). As to the meaning of 'recipient' see PARA 242.

### UPDATE

## 258 Incoming electronic commerce communications

NOTE 3--Directive 85/611 replaced: see PARA 6.

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## (C) DEPOSITS

### 259. Non-real time communications.

If the following requirements are met, the financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> which relates to the controlled activity of accepting deposits<sup>3</sup>. The requirements are that the communication<sup>4</sup> is accompanied by an indication:

- 565 (1) of the full name<sup>5</sup> of the person with whom the investment which is the subject of the communication is to be made (the 'deposit-taker')<sup>6</sup>;
- 566 (2) of the country or territory in which a deposit-taker that is a body corporate is incorporated (described as such)<sup>7</sup>;
- 567 (3) if different, of the country or territory in which the deposit-taker's principal place of business is situated (described as such)<sup>8</sup>;
- 568 (4) whether or not the deposit-taker is regulated in respect of his deposit-taking business<sup>9</sup>;
- 569 (5) if the deposit-taker is so regulated, of the name of the regulator in the deposit-taker's principal place of business or, if there is more than one such regulator, the prudential regulator<sup>10</sup>;
- 570 (6) whether any transaction to which the communication relates would, if entered into by the recipient<sup>11</sup> and the deposit-taker, fall within the jurisdiction of any dispute resolution scheme or deposit guarantee scheme and, if so, identifying each such scheme<sup>12</sup>; and
- 571 (7) the necessary capital information<sup>13</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'non-real time communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 22(1). As to the activity of accepting deposits see Sch 1 para 1; and PARA 227.

4 As to the meaning of 'communication' see PARA 242.

5 'Full name', in relation to a person, means the name under which that person carries on business and, if different, that person's corporate name: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 22(3).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 22(2)(a). As to the meaning of 'deposit' see PARA 227 note 1.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 22(2)(b).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 22(2)(c).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 22(2)(d).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 22(2)(e).

11 As to the meaning of 'recipient' see PARA 242.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 22(2)(f).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 22(2)(g). 'Necessary capital information' means: (1) in relation to a deposit-taker which is a body corporate, either the amount of its paid up capital and reserves, described as such, or a statement that the amount of its paid up capital and reserves exceeds a particular amount (stating it); (2) in relation to a deposit-taker which is not a body corporate, either the amount of the total assets less liabilities (described as such) or a statement that the amount of its total assets exceeds a particular amount (stating it) and that its total liabilities do not exceed a particular amount (stating it): art 22(3). 'Liabilities' includes provisions where such provisions have not been deducted from the value of the assets: art 22(3).

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## **260. Real time communications.**

The financial promotion restriction<sup>1</sup> does not apply to any real time communication<sup>2</sup> (whether solicited or unsolicited<sup>3</sup>) which relates to an activity of accepting deposits<sup>4</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'real time communication' see PARA 242.

3 As to the meaning of 'solicited or unsolicited real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 23. As to the activity of accepting deposits see Sch 1 para 1; and PARA 227. As to the meaning of 'deposit' see PARA 227 note 1.

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## **(D) RELEVANT INSURANCE ACTIVITY**

### **261. Non-real time communications.**

If the following requirements are met, the financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> which relates to a relevant insurance activity<sup>3</sup>. The requirements are that the communication<sup>4</sup> is accompanied by an indication:

- 572 (1) of the full name<sup>5</sup> of the person with whom the investment which is the subject of the communication is to be made (the 'insurer')<sup>6</sup>;
- 573 (2) of the country or territory in which the insurer is incorporated (described as such)<sup>7</sup>;



- 574 (3) if different, of the country or territory in which the insurer's principal place of business is situated (described as such)<sup>8</sup>;
- 575 (4) whether or not the insurer is regulated in respect of its insurance business<sup>9</sup>;
- 576 (5) if the insurer is so regulated, of the name of the regulator of the insurer in its principal place of business or, if there is more than one such regulator, the name of the prudential regulator<sup>10</sup>; and
- 577 (6) whether any transaction to which the communication relates would, if entered into by the recipient<sup>11</sup> and the insurer, fall within the jurisdiction of any dispute resolution scheme or compensation scheme and, if so, identifying each such scheme<sup>12</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'non-real time communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 24(1). For the purposes of Pt V (arts 21-26), a 'relevant insurance activity' means a controlled activity falling within Sch 1 para 2 (ie effecting and carrying out contracts of insurance: see PARA 228) carried on in relation to an investment falling within Sch 1 para 13 (ie rights under a contract of insurance: see PARA 241) where that investment is not a qualifying contract of insurance: art 21. As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4; definition applied by art 2(1).

4 As to the meaning of 'communication' see PARA 242.

5 'Full name', in relation to a person, means the name under which that person carries on business and, if different, that person's corporate name: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 24(3).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 24(2)(a).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 24(2)(b).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 24(2)(c).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 24(2)(d).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 24(2)(e).

11 As to the meaning of 'recipient' see PARA 242.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 24(2)(f).

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## **262. Non-real time communications relating to reinsurance and large risks.**

The financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> which relates to a relevant insurance activity<sup>3</sup> and concerns only a contract of reinsurance<sup>4</sup> or a contract that covers large risks<sup>5</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'non-real time communication' see PARA 242.

3 As to the meaning of 'relevant insurance activity' see PARA 261 note 3.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 25(1)(a).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 25(1)(b). 'Large risks' means:

269 (1) risks falling within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 para 4 (railway rolling stock), Sch 1 para 5 (aircraft), Sch 1 para 6 (ships), Sch 1 para 7 (goods in transit), Sch 1 para 11 (aircraft liability) or Sch 1 para 12 (liability of ships) (see PARA 90) (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 25(2)(a));

270 (2) risks falling within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 para 14 (credit) or Sch 1 para 15 (suretyship) (see PARA 90) provided that the risks relate to a business carried on by the recipient (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 25(2)(b));

271 (3) risks falling within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 para 3 (land vehicles), Sch 1 para 8 (fire and natural forces), Sch 1 para 9 (damage to property), Sch 1 para 10 (motor vehicle liability), Sch 1 para 13 (general liability) or Sch 1 para 16 (miscellaneous financial loss) (see PARA 90) provided that the risks relate to a business carried on by the recipient and that the condition specified in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 25(3) (see below) is met in relation to that business (art 25(2)(c)).

As to the meaning of 'recipient' see PARA 242.

The condition referred to in head (3) above is that at least two of the three following criteria were exceeded in the most recent financial year for which information is available prior to the making of the communication:

272 (a) the balance sheet total of the business (within the meaning of the Companies Act 2006 ss 382(5), 465(5) (formerly the Companies Act 1985 s 247(5) (see **COMPANIES** vol 15 (2009) PARAS 694-695) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 255(5)) was 6.2 million euros (see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 25(3)(a));

273 (b) the net turnover (within the meaning given by the Companies Act 2006 s 474(1) (formerly the Companies Act 1985 s 262(1) (see **COMPANIES** vol 15 (2009) PARA 715) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 270(1)) was 12.8 million euros (see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 25(3)(b));

274 (c) the number of employees (within the meaning given by the Companies Act 2006 ss 382(6), 465(6) (formerly the Companies Act 1985 s 247(6)) (see **COMPANIES** vol 15 (2009) PARAS 694-695) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 255(6)) was 250 (Financial Services and Markets Act 2000 (see the Financial Promotion) Order 2005, SI 2005/1529, art 25(3)(c)),

and for a financial year which is a company's financial year but not in fact a year, the net turnover of the recipient must be proportionately adjusted: art 25(3). As to the meaning of 'communication' see PARA 242.

For the purposes of art 25(3), where the recipient is a member of a group for which consolidated accounts (within the meaning of EC Council Directive 83/349 (OJ L193, 18.7.83, p 1) based on the Article 54(3)(g) of the Treaty on consolidated accounts (the 'Seventh Company Law Directive')) are drawn up, the question whether the condition met in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, is met is to be determined by reference to those accounts: art 25(4).

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### **263. Real time communication.**

The financial promotion restriction<sup>1</sup> does not apply to any real time communication<sup>2</sup> (whether solicited or unsolicited<sup>3</sup>) which relates to a relevant insurance activity<sup>4</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meaning of 'real time communication' see PARA 242.

3 As to the meaning of 'solicited or unsolicited real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 26. As to the meaning of 'relevant insurance activity' see PARA 261 note 3.

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## **(E) CERTAIN CONTROLLED ACTIVITIES**

### *(a) Application of Exemptions*

### **264. Exemption of communications relating to certain controlled activities.**

Certain communications are exempt from the restriction on financial promotion<sup>1</sup>. Part VI of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005<sup>2</sup> exempts communications which relate to:

- 578 (1) the controlled activity<sup>3</sup> of effecting and carrying out a contract of insurance<sup>4</sup> carried on in relation to a qualifying contract of insurance<sup>5</sup>;
- 579 (2) the controlled activities of:
- 59
- 90. (a) dealing in securities and contractually based investments<sup>6</sup>;
- 91. (b) arranging deals in investments<sup>7</sup>;
- 92. (c) operating a multilateral trading facility<sup>8</sup>;
- 93. (d) managing investments<sup>9</sup>;
- 94. (e) safeguarding and administering investments<sup>10</sup>;
- 95. (f) advising on investments<sup>11</sup>;
- 96. (g) advising on syndicate participation at Lloyd's<sup>12</sup>;
- 97. (h) providing funeral plan contracts<sup>13</sup>;
- 98. (i) providing, arranging and advising on qualifying credit<sup>14</sup>;
- 99. (j) providing, arranging and advising on a regulated home reversion plan<sup>15</sup>;
- 100. (k) providing, arranging and advising on a regulated home purchase plan<sup>16</sup>;

101. (l) agreeing to carry on any of the activities in heads (a) to (i) above with the exception of head (c) above<sup>17</sup>.  
60

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5. As to the meaning of 'communication' see PARA 242.

2 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73).

3 As to the meaning of 'controlled activity' see PARA 225.

4 In falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 2: see PARA 228.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(a). As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4; definition applied by art 2(1).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 para 3; and PARA 229.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 para 4; and PARA 230.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 para 4A; and PARA 231.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 para 5; and PARA 232.

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 para 6; and PARA 233.

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 para 7; and PARA 234.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 para 8; and PARA 235.

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 para 9; and PARA 236.

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 paras 10, 10A, 10B; and PARA 237.

15 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 paras 10C, 10D, 10E; and PARA 238.

16 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 paras 10F, 10G, 10H; and PARA 239.

17 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 27(b); and see Sch 1 para 11; and PARA 240.

## UPDATE

### 264 Exemption of communications relating to certain controlled activities

TEXT AND NOTES--Also, head (ka) providing, arranging and advising on a regulated sale and rent back agreement: see SI 2005/1529 art 27(b); and Sch 1 paras 10I, 10J, 10K (PARA 239A).

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*(b) Non-real Time and Real Time Communications*

**265. One off non-real time communications and solicited real time communications.**

The financial promotion restriction<sup>1</sup> does not apply to a one off communication<sup>2</sup> which is either a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>. If all the conditions set out in heads (1) to (3) below are met in relation to a communication it is to be regarded as a one off communication<sup>5</sup>. In any other case in which one or more of those conditions are met, that fact is to be taken into account in determining whether the communication is a one off communication (but a communication may still be regarded as a one off communication even if none of the following conditions is met)<sup>6</sup>. The conditions are that:

- 580 (1) the communication is made only to one recipient<sup>7</sup> or only to one group of recipients in the expectation that they would engage in any investment activity jointly<sup>8</sup>;
- 581 (2) the identity of the product or service to which the communication relates has been determined having regard to the particular circumstances of the recipient<sup>9</sup>;
- 582 (3) the communication is not part of an organised marketing campaign<sup>10</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28(1). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28(2).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28(2).

7 As to the meaning of 'recipient' see PARA 242.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28(3)(a).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28(3)(b).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28(3)(c).

5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(4) REGULATED ACTIVITIES/(iii) Financial Promotion/D. EXEMPT COMMUNICATIONS/(E) Certain Controlled Activities/(b) Non-real Time and Real Time Communications/266. One off unsolicited real time communications.

## **266. One off unsolicited real time communications.**

The financial promotion restriction<sup>1</sup> does not apply to an unsolicited real time communication<sup>2</sup> if the conditions set out in heads (1) to (3) below are met<sup>3</sup>.

The conditions are that:

- 583 (1) the communication is a one off communication<sup>4</sup>;
- 584 (2) the communicator believes on reasonable grounds that the recipient understands the risks associated with engaging in the investment activity to which the communication relates<sup>5</sup>;
- 585 (3) at the time that the communication is made, the communicator believes on reasonable grounds that the recipient<sup>6</sup> would expect to be contacted by him in relation to the investment activity to which the communication relates<sup>7</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242. As to the meaning of 'unsolicited real time communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28A(1).

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28A(2)(a). Note that art 28(2), (3) (see PARA 265) applies in determining whether a communication is a one off communication for the purposes of art 28A as it applies for the purposes of art 28 (see PARA 265): art 28A(3).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28A(2)(b).

6 As to the meaning of 'recipient' see PARA 242.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28A(2)(c).

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## **267. Real time communications: introductions.**

If the requirements set out in heads (i) and (ii) below<sup>1</sup> are met, the financial promotion restriction<sup>2</sup> does not apply to any real time communication<sup>3</sup> which:

- 586 (1) relates to the controlled activities of providing, arranging and advising on qualifying credit, a regulated home reversion plan or a regulated purchase plan<sup>4</sup>; and
- 587 (2) is made for the purpose of, or with a view to, introducing the recipient<sup>5</sup> to a person ('N') who is (a) an authorised person<sup>6</sup> who carries on the controlled activity to which the communication relates<sup>7</sup>; (b) an appointed representative<sup>8</sup>, where the controlled activity to which the communication relates is also a regulated activity<sup>9</sup> in respect of which he is exempt from the general prohibition<sup>10</sup>; or (c) an overseas person<sup>11</sup> who carries on the controlled activity to which the communication relates<sup>12</sup>.

The requirements referred to above are that the maker of the communication ('M'):

- 588 (i) does not receive any money, other than money payable to M on his own account, paid by the recipient for or in connection with any transaction which the recipient enters into with or through N as a result of the introduction<sup>13</sup>; and
- 589 (ii) before making the introduction, discloses to the recipient such of the information mentioned below as applies to M<sup>14</sup>:

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102. (A) that M is a member of the same group as N<sup>15</sup>;
103. (B) details of any payment which M will receive from N, by way of fee or commission, for introducing the recipient to N<sup>16</sup>;
104. (C) an indication of any other reward or advantage received or to be received by M that arises out of his making introductions to N<sup>17</sup>.

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1. The requirements of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28B(2).

2. In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

3. As to the meaning of 'real time communication' see PARA 242.

4. Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28B(1)(a) (amended by SI 2006/2383). The reference is to a controlled activity falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10, 10A, 10B, 10C, 10D, 10E, 10F, 10G or 10H (see PARAS 237, 238, 239).

5. As to the meaning of 'recipient' see PARA 242.

6. As to authorised persons see PARA 314.

7. Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28B(1)(b)(i).

8. As to appointed representatives see PARA 346.

9. As to regulated activities see PARA 84 et seq.

10. Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28B(1)(b)(ii). As to the meaning of the 'general prohibition' see PARA 80.

11. For these purposes, 'overseas person' means a person who carries on controlled activities which fall within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10, 10A or 10B (see PARA 237), but who does not carry on any such activity, or offer to do so, from a permanent place of business maintained by him in the United Kingdom: art 28B(4). As to the meaning of 'United Kingdom' see PARA 2 note 3.

- 12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28B(1)(b) (iii).
- 13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28B(2)(a).
- 14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28B(2)(b).
- 15 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28B(3)(a).
- 16 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28B(3)(b).
- 17 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 28B(3)(c).

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### *(c) Communications under Other Legislation*

#### **UPDATE**

#### **267 Real time communications: introductions**

TEXT AND NOTE 4--The restriction also does not apply to any real time communication which relates to the controlled activities of providing, arranging and advising on a regulated sale and rent back agreement (ie controlled activities falling within SI 2005/1529 arts 10I, 10J, 10K (PARA 239A)): SI 2005/1529 art 28B(1)(a) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

#### **268. Communications required or authorised by enactments.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is required or authorised by or under any enactment other than the Financial Services and Markets Act 2000<sup>3</sup>. However, this does not apply to a communication relating to the controlled activities of providing, arranging or advising on qualifying credit or agreeing to carry on that controlled activity<sup>4</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 29(1).

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 29(2). The controlled activities referred to are those within Sch 1 para 10, 10A or 10B (see PARA 237) or within Sch 1 para 11 (see PARA 240) in so far as it relates to those activities.



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#### *(d) Communications by Overseas Communicators*

### **269. Overseas communicators: solicited real time communications.**

The financial promotion restriction<sup>1</sup> does not apply to any solicited real time communication<sup>2</sup> which is made by an overseas communicator<sup>3</sup> from outside the United Kingdom in the course of or for the purposes of his carrying on the business of engaging in relevant investment activities outside the United Kingdom<sup>4</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242. As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264.

3 'Overseas communicator' means a person who carries on relevant investment activities outside the United Kingdom but who does not carry on any such activity from a permanent place of business maintained by him in the United Kingdom: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 30(2). 'Relevant investment activities' means controlled activities which fall within Sch 1 paras 3-7 or paras 10-10B (see PARAS 229-234, 237) or, so far as relevant to any of Sch 1 paras 3-7, 10-10B, Sch 1 para 11 (see PARA 240): arts 2(1), 30(2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 30(1).

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### **270. Overseas communicators: non-real time communications to previously overseas customers.**

The financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> which is communicated<sup>3</sup> by an overseas communicator<sup>4</sup> from outside the United Kingdom to a previously overseas customer<sup>5</sup> of his<sup>6</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'non-real time communication' see PARA 242.

3 As to the meaning of 'communicate' see PARA 242.

4 As to the meaning of 'overseas communicator' see PARA 269 note 3.

5 'Previously overseas customer' means a person with whom the overseas communicator has done business within the period of 12 months ending with the day on which the communication was received (the 'earlier business') and where:

275 (1) at the time that the earlier business was done, the customer was neither resident in the United Kingdom nor had a place of business there (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 31(2)(a)); or

276 (2) at the time the earlier business was done, the overseas communicator had on a former occasion done business with the customer, being business of the same description as the business to which the communication relates, and on that former occasion the customer was neither resident in the United Kingdom nor had a place of business there (art 31(2)(b)).

As to the meaning of 'communication' see PARA 242. For the purposes of art 31, an overseas communicator has done business with a customer if, in the course of carrying on his relevant investment activities outside the United Kingdom, he has:

277 (a) effected a transaction, or arranged for a transaction to be effected, with the customer (art 31(3)(a));

278 (b) provided, outside the United Kingdom, a service to the customer as described in Sch 1 para 6 (see PARA 233) (whether or not Sch 1 para 6 was in force at the time the business was done) (art 31(3)(b)); or

279 (c) given, outside the United Kingdom, any advice to the customer as described in Sch 1 para 7 (see PARA 234) (whether or not Sch 1 para 7 was in force at the time the business was done) (art 31(3)(c)).

As to the meaning of 'relevant investment activities' see PARA 269 note 3. As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 31(1).

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## **271. Overseas communicators: unsolicited real time communications to previously overseas customers.**

If the following two requirements are met, the financial promotion restriction<sup>1</sup> does not apply to an unsolicited real time communication<sup>2</sup> which is made by an overseas communicator<sup>3</sup> from outside the United Kingdom<sup>4</sup> to a previously overseas customer<sup>5</sup> of his<sup>6</sup>. The first requirement is that the terms on which previous transactions and services had been effected or provided by the overseas communicator to the previously overseas customer were such that the customer would reasonably expect, at the time that the unsolicited real time communication is made, to be contacted by the overseas communicator in relation to the investment activity to which the communication<sup>7</sup> relates<sup>8</sup>. The second requirement is that the previously overseas customer has been informed by the overseas communicator on an earlier occasion<sup>9</sup>:

- 590 (1) that the protections conferred by or under the Financial Services and Markets Act 2000 will not apply to any unsolicited real time communication which is made by the overseas communicator and which relates to that investment activity<sup>10</sup>;
- 591 (2) that the protections conferred by or under that Act may not apply to any investment activity that may be engaged in as a result of the communication<sup>11</sup>; and
- 592 (3) whether any transaction between them resulting from the communication would fall within the jurisdiction of any dispute resolution scheme or compensation scheme or, if there is no such scheme, of that fact<sup>12</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'unsolicited real time communication' see PARA 242.

3 As to the meaning of 'overseas communicator' see PARA 269 note 3.

4 As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 As to the meaning of 'previously overseas customer' see PARA 270 note 5.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 32(1).

7 As to the meaning of 'communication' see PARA 242.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 32(2).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 32(3).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 32(3)(a).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 32(3)(b).

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 32(3)(c).

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## **272. Overseas communicators: unsolicited real time communications to knowledgeable customers.**

If the following three requirements are met, the financial promotion restriction<sup>1</sup> does not apply to an unsolicited real time communication<sup>2</sup> which is made by an overseas communicator<sup>3</sup> from outside the United Kingdom in the course of his carrying on relevant investment activities<sup>4</sup> outside the United Kingdom<sup>5</sup>. The first requirement is that the overseas communicator believes on reasonable grounds that the recipient<sup>6</sup> is sufficiently knowledgeable to understand the risks associated with engaging in the investment activity to which the communication<sup>7</sup> relates<sup>8</sup>. The second requirement is that, in relation to any particular investment activity, the recipient has been informed by the overseas communicator on an earlier occasion:

- 593 (1) that the protections conferred by or under the Financial Services and Markets Act 2000 will not apply to any unsolicited real time communication which is made by him and which relates to that activity<sup>9</sup>;
- 594 (2) that the protections conferred by or under that Act may not apply to any investment activity that may be engaged in as a result of the communication<sup>10</sup>; and
- 595 (3) whether any transaction between them resulting from the communication would fall within the jurisdiction of any dispute resolution scheme or compensation scheme or, if there is no such scheme, of that fact<sup>11</sup>.

The third requirement is that the recipient, after being given a proper opportunity to consider the information given to him in accordance with the second requirement, has clearly signified that he understands the warnings referred to in heads (1) and (2) above and that he accepts that he will not benefit from the protections referred to<sup>12</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'unsolicited real time communication' see PARA 242.

3 As to the meaning of 'overseas communicator' see PARA 269 note 3.

4 As to the meaning of 'relevant investment activities' see PARA 269 note 3.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 33(1). As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 As to the meaning of 'recipient' see PARA 242.

7 As to the meaning of 'communication' see PARA 242.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 33(2).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 33(3)(a).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 33(3)(b).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 33(3)(c).

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 33(4).

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*(e) Communications by Governments, Central Banks, etc*

## **273. Governments, central banks etc.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup> and which is communicated<sup>5</sup> by and relates only to controlled investments<sup>6</sup> issued by:

**.1**

- 105. (1) any government<sup>7</sup>;
- 106. (2) any local authority (in the United Kingdom or elsewhere)<sup>8</sup>;
- 107. (3) any international organisation<sup>9</sup>;
- 108. (4) the Bank of England<sup>10</sup>;
- 109. (5) the European Central Bank<sup>11</sup>;
- 110. (6) the central bank of any country or territory outside the United Kingdom<sup>12</sup>.

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1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 34(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 As to the meaning of 'communicate' see PARA 242.

6 As to controlled investments see PARA 241.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 34(b)(i). As to the meaning of 'government' see PARA 241.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 34(b)(ii). As to areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 34(b)(iii).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 34(b)(iv). As to the Bank of England see PARA 74; and PARA 793 et seq.

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 34(b)(v). As to the European Central Bank see PARA 807. See also **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 304.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 34(b)(vi). As to the meaning of 'United Kingdom' see PARA 2 note 3.

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*(f) Communications by Industrial and Provident Societies*

**274. Industrial and provident societies.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 596 (1) is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;
- 597 (2) is communicated<sup>5</sup> by an industrial and provident society<sup>6</sup>; and
- 598 (3) relates only to the specified investment in regard to certain instruments acknowledging or creating indebtedness<sup>7</sup> which is issued by the society in question<sup>8</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 35(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 As to the meaning of 'communicate' see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 35(b).

7 ie falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 15 (see PARA 241): see art 35(c).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 35(c).

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### *(g) Communications by Other EEA Nationals*

#### **275. Nationals of EEA states other than the United Kingdom.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 599 (1) is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;
- 600 (2) is communicated<sup>5</sup> by a national of an EEA state other than the United Kingdom in the course of any controlled activity<sup>6</sup> lawfully carried on by him in that state<sup>7</sup>; and
- 601 (3) conforms with any rules made by the Financial Services Authority<sup>8</sup> which are relevant to a communication of that kind<sup>9</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

- 2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.
- 3 As to the meaning of 'non-real time communication' see PARA 242.
- 4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 36(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.
- 5 As to the meaning of 'communicate' see PARA 242.
- 6 As to controlled activities see PARA 227 et seq.
- 7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 36(b). As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 8 The rules under the Financial Services and Markets Act 2000 s 145 (financial promotion rules) (see PARA 29): see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 36(c). As to the Financial Services Authority see PARAS 4, 6 et seq.
- 9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 36(c).

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### *(h) Communications by Financial Markets*

#### **276. Financial markets.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup>:

- 602 (1) which is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;
- 603 (2) which is communicated<sup>5</sup> by a relevant market<sup>6</sup>; and
- 604 (3) to which one of the following conditions apply<sup>7</sup>.

The first condition applies to a communication if it relates only to facilities provided by the market<sup>8</sup> and it does not identify (directly or indirectly):

- 605 (a) any particular investment issued by or available from an identified person as one that may be traded or dealt in on the market<sup>9</sup>; or
- 606 (b) any particular person as a person through whom transactions on the market may be effected<sup>10</sup>.

The second condition applies to a communication if it relates only to the particular investments of options, futures and forwards and rights under certain contracts for differences and other contracts<sup>11</sup>, and if it identifies the investment as one that may be traded or dealt in on the market<sup>12</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and

Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 37(1)(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 As to the meaning of 'communicate' see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 37(1)(b). 'Relevant market' means a market which meets the criteria specified in Sch 3 Pt I (see heads (1)-(2) below) or is specified in, or is established under the rules of an exchange specified in, Sch 3 Pt II, III or IV (see below): art 37(4).

The criteria which the market must meet are:

280 (1) the head office of the market must be situated in an EEA state; and

281 (2) the market must be subject to requirements in the EEA state in which its head office is situated as to: (a) the manner in which it operates; (b) the means by which access may be had to the facilities it provides; (c) the conditions to be satisfied before an investment may be traded or dealt in by means of its facilities; (d) the reporting and publication of transactions effected by means of its facilities.

The investment exchanges operating relevant EEA markets are: Aktietorget I Norden (Sweden); Amsterdam Options Exchange (Netherlands); Athens Stock Exchange (Greece); Athens Derivative Exchange (Greece); Barcelona Stock Exchange (Spain); Bavarian Stock Exchange (Germany); Belgian Secondary Market for Treasury Certificates (Belgium); Berlin-Bremen Stock Exchange (Germany); Bilbao Stock Exchange (Spain); Böag Borsen AG (Germany); Bratislava Stock Exchange (Slovakia); Bucharest Stock Exchange (Romania); Budapest Stock Exchange (Hungary); Bulgaria Stock Exchange (Bulgaria); Copenhagen Stock Exchange (Denmark); Cyprus Stock Exchange (Cyprus); Danish Authorised Market Place (Denmark); Dusseldorf Stock Market (Germany); EDX (UK); Eurex Deutschland (Germany); Euronext Amsterdam (Netherlands); Euronext Brussels (Belgium); Euronext Lisbon (Portugal); Euronext Paris (France); Frankfurt Stock Exchange (Germany); Helsinki Stock Exchange and Securities and Derivatives Exchange (Finland); Irish Stock Exchange (Ireland); Italian and Foreign Government Bonds Market (Italy); Italian Stock Exchange (Italy); Ljubljana Stock Exchange (Slovenia); London International Financial Futures and Options Exchange (UK); London Stock Exchange (UK); Luxembourg Stock Exchange (Luxembourg); Madrid Stock Exchange (Spain); Malta Stock Exchange (Malta); Market for Public Debt (Spain); MEFF Renta Variable Futures Options Exchange (Spain); MEFF Renta Fija Equity Futures Exchange (Spain); MTS Italy (Italy); MTS Poland (Poland); MTS Portugal (Portugal); National Stock Exchange of Lithuania (Lithuania); Nordic Growth Market (Sweden); PLUS (UK); Prague Stock Exchange (Czech Republic); Riga Stock Exchange (Latvia); Sharemark (UK); Stockholm Stock Exchange (Sweden); Stuttgart Stock Exchange (Germany); Tallinn Stock Exchange (Estonia); Valencia Stock Exchange (Spain); Vienna Stock Exchange (Austria); Virt-x (UK); Warsaw Stock Exchange (Poland): Sch 3 Pt II (substituted by SI 2007/1083).

The non-EEA investment exchanges operating relevant markets are: America Stock Exchange; Australian Stock Exchange; Basler Effektenbourse; Boston Stock Exchange; Bourse de Genève; Buenos Aires Stock Exchange; Canadian Venture Exchange; Chicago Board Options Exchange; Chicago Stock Exchange; Effektenborsenverein Zurich; Fukuoka Stock Exchange; Hiroshima Stock Exchange; Iceland Stock Exchange; Johannesburg Stock Exchange; Korean Stock Exchange; Kuala Lumpur Stock Exchange; Kyoto Stock Exchange; Midwest Stock Exchange; Montreal Stock Exchange; Nagoya Stock Exchange; NASDAQ; National Stock Exchange; New York Stock Exchange; New Zealand Stock Exchange Limited; Niigata Stock Exchange; Osaka Stock Exchange; Oslo Stock Exchange; Pacific Stock Exchange; Philadelphia Stock Exchange; Sapporo Stock Exchange; Singapore Stock Exchange; Stock Exchange of Hong Kong Limited; Stock Exchange of Thailand; Tokyo Stock Exchange; Toronto Stock Exchange: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 3 Pt III.

The other relevant markets are: American Commodity Exchange; Australian Financial Futures Market; Chicago Board of Trade; Chicago Mercantile Exchange; Chicago Rice and Cotton Exchange; Commodity Exchange Inc.; Eurex US; Eurex Zurich; International Securities Market Association; International Petroleum Exchange; Kansas City Board of Trade; London Metal Exchange; Minneapolis Grain Exchange; New York Board of Trade; New York Futures Exchange; New York Mercantile Exchange; New Zealand Futures Exchange; Pacific Commodity Exchange; Philadelphia Board of Trade; Singapore International Monetary Exchange; Sydney Futures Exchange; Toronto Futures Exchange: Sch 3 Pt IV.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 37(1)(c).



- 8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 37(2)(a).
- 9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 37(2)(b)(i).
- 10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 37(2)(b)(ii).
- 11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 37(3)(a).  
The investments in question are those falling within Sch 1 para 21, Sch 1 para 22 or Sch 1 para 23: see PARA 241.
- 12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 37(3)(b).

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*(i) Communications in regard to Promotions, Information Dissemination, Prospectuses*

**277. Persons in the business of placing promotional material.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is made to a person whose business it is to place, or arrange for the placing of, promotional material provided that it is communicated<sup>3</sup> so that he can place or arrange for placing it<sup>4</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'communicate' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 38.

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**278. Persons in the business of disseminating information.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is made only to recipients<sup>3</sup> whom the person making the communication believes on reasonable grounds to be persons falling within heads (1) to (3) below<sup>4</sup>:

- 607 (1) a person who receives the communication in the course of a business which involves the dissemination through a publication<sup>5</sup> of information concerning controlled activities<sup>6</sup>; or
- 608 (2) a person whilst acting in the capacity of director, officer or employee of a person falling within head (1) above being a person whose responsibilities when acting in that capacity involve him in the business referred to in that head<sup>7</sup>; or
- 609 (3) any person to whom the communication may otherwise lawfully be made<sup>8</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'recipient' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 47(1).

5 As to the meaning of 'publication' see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 47(2)(a). As to controlled activities see PARA 227 et seq.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 47(2)(b).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 47(2)(c).

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## **279. Persons placing promotional material in particular publications.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> received by a person who receives the publication<sup>3</sup> in which the communication is contained because he has himself placed an advertisement in that publication<sup>4</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'publication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 57.

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## **280. Promotions required or permitted by market rules.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 610 (1) is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;
- 611 (2) relates to certain specified investments<sup>5</sup> and which is permitted to be traded or dealt in on a relevant market<sup>6</sup>; and
- 612 (3) is required or permitted to be communicated<sup>7</sup> by:
  - 64 111. (a) the rules of the relevant market<sup>8</sup>;
  - 112. (b) a body which regulates the market<sup>9</sup>; or
  - 113. (c) a body which regulates offers or issues of investments to be traded on such a market<sup>10</sup>.
- 65

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 67(1)(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 I.e. an investment which falls within any of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 14 (shares or stock in the share capital of any body corporate or unincorporated body) (see PARA 241), Sch 1 para 15 (instruments creating or acknowledging indebtedness) (see PARA 241), Sch 1 para 16 (government and public securities) (see PARA 241), Sch 1 para 17 (instruments giving entitlements to investments) (see PARA 241) and Sch 1 para 18 (certificates representing certain securities) (see PARA 241).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 67(1)(b). 'Relevant market' means (1) a market which meets the criteria specified in Sch 3 Pt I (see PARA 276); or (2) is specified in, or established under the rules of an exchange specified in, Sch 3 Pt II or III (see PARA 276): art 67(2).

7 As to the meaning of 'communicate' see PARA 242.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 67(1)(c)(i).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 67(1)(c)(ii).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 67(1)(c)(iii).

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## **281. Promotions in connection with admission to certain EEA markets.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup>:

- 613 (1) which is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;
- 614 (2) which a relevant EEA market<sup>5</sup> requires to be communicated<sup>6</sup> before an investment can be admitted to trading on that market<sup>7</sup>;
- 615 (3) which, if it were included in a prospectus issued in accordance with prospectus rules made under Part VI of the Financial Services and Markets Act 2000<sup>8</sup>, would be required to be communicated by those rules<sup>9</sup>; and
- 616 (4) which is not accompanied by any information other than information which is required or permitted to be published by the rules of that market<sup>10</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 68(1)(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 'Relevant EEA market' means any market on which investments can be traded or dealt in and which (1) meets the criteria specified in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 3 Pt I (see PARA 276); or (2) is specified in, or established under the rules of an exchange specified in, Sch 3 Pt II (see PARA 276): art 68(2).

6 As to the meaning of 'communicate' see PARA 242.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 68(1)(b).

8 I.e. prospectus rules made under the Financial Services and Markets Act 2000 Pt VI (ss 72-103): see PARA 385 et seq. In the application of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 68(1) to outgoing electronic commerce communications, the reference to rules includes a reference to corresponding provisions in the law of an EEA state other than the United Kingdom: art 8A(1)(b). As to the meaning of 'outgoing electronic commerce communication' see PARA 247 note 7. As to the meaning of 'United Kingdom' see PARA 2 note 3.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 68(1)(c).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 68(1)(d).

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ACTIVITIES/(iii) Financial Promotion/D. EXEMPT COMMUNICATIONS/(E) Certain Controlled Activities/(i) Communications in regard to Promotions, Information Dissemination, Prospectuses/282. Promotions of securities already admitted to certain markets.

## **282. Promotions of securities already admitted to certain markets.**

If the requirements set out in heads (a) to (c) below are met, the financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 617 (1) is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;
- 618 (2) is communicated<sup>5</sup> by a body corporate ('A'), other than an open-ended investment company<sup>6</sup>; and
- 619 (3) relates only to relevant investments<sup>7</sup> issued, or to be issued, by A or by another body corporate in the same group<sup>8</sup>,

if relevant investments issued by A or by any such body corporate are permitted to be traded on a relevant market<sup>9</sup>.

The requirements referred to above are that the communication:

- 620 (a) is not, and is not accompanied by, an invitation to engage in investment activity<sup>10</sup>;
- 621 (b) is not, and is not accompanied by, an inducement relating to an investment other than one issued, or to be issued, by A (or another body corporate in the same group)<sup>11</sup>;
- 622 (c) is not, and is not accompanied by, an inducement relating to a relevant investment which refers to (i) the price at which relevant investments have been bought or sold in the past<sup>12</sup>; or (ii) the yield on such investments<sup>13</sup>, unless the inducement also contains an indication that past performance cannot be relied on as a guide to future performance<sup>14</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 69(2)(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 As to the meaning of 'communicate' see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 69(2)(b).

7 'Relevant investment' means: (1) any investment falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 14 (shares or stock in the share capital of any body corporate or unincorporated body) (see PARA 241) or Sch 1 para 15 (instruments creating or acknowledging indebtedness) (see PARA 241); or (2) falling within Sch 1 para 17 (instruments giving entitlements to investments) (see PARA 241) or Sch 1 para 18 (certificates representing certain securities) (see PARA 241) so far as relating to any investment mentioned in head (1) above: art 69(1).

For the purposes of art 69, an investment falling within Sch 1 para 17 or para 18 is treated as issued by the person ('P') who issued the investment in respect of which the investment confers rights if it is issued by (a) an undertaking in the same group as P; or (b) a person acting on behalf of, or pursuant to, arrangements made with P: art 69(4).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 69(2)(c).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 69(2). 'Relevant market' means any market on which investments can be traded and which meets the criteria specified in Sch 3 Pt I (see PARA 276) or is specified in, or established under the rules of an exchange specified in, Sch 3 Pt II or III (see PARA 276): art 69(1).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 69(3)(a). As to the meaning of 'engaging in investment activity' in art 69(3)(a) see PARA 225; definition applied by art 69(5); and for the purposes of art 69(3)(c)(ii) (see head (c)(ii) in the text), a reference, in relation to an investment, to earnings, dividend or nominal rate of interest payable is not to be taken to be a reference to the yield on the investment: see art 69(5).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 69(3)(b).

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 69(3)(c)(i).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 69(3)(c)(ii). See note 10.

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 69(3)(c).

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### **283. Promotions included in listing particulars etc.**

The financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> which is included in:

- 623 (1) listing particulars<sup>3</sup>;
- 624 (2) supplementary listing particulars<sup>4</sup>;
- 625 (3) a prospectus<sup>5</sup> or supplementary prospectus approved (a) by the competent authority<sup>6</sup> in accordance with Part VI of the Financial Services and Markets Act 2000<sup>7</sup>; or (b) by the competent authority of an EEA state other than the United Kingdom<sup>8</sup> provided that certain requirements of the Act<sup>9</sup> have been met<sup>10</sup>, or part of such prospectus or supplementary prospectus<sup>11</sup>; or
- 626 (4) any other document required or permitted to be published by listing rules<sup>12</sup> or prospectus rules<sup>13</sup> under Part VI of the Financial Services and Markets Act 2000 (except an advertisement within the meaning of the Prospectus Directive)<sup>14</sup>.

The financial promotion restriction also does not apply to any non-real time communication:

- 627 (i) comprising the final terms of an offer or the final offer price or amount of securities which will be offered to the public<sup>15</sup>; and
- 628 (ii) complying with certain provisions of the Prospectus Directive<sup>16</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

- 2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'non-real time communication' see PARA 242.
- 3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 70(1)(a). As to the meaning of 'listing particulars' see PARA 391 note 4; definition applied by art 70(2).
- 4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 70(1)(b).
- 5 As to prospectuses (including supplementary prospectuses) see PARA 395 et seq.
- 6 As to the competent authority see PARA 385.
- 7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 70(1)(c)(i) (art 70(1)(c) substituted by SI 2007/2615). The reference is to the Financial Services and Markets Act 2000 Pt VI (ss 72-103): see PARA 385 et seq.
- 8 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 9 I.e. the requirements of the Financial Services and Markets Act 2000 s 87H: see PARA 404.
- 10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 70(1)(c)(ii) (as substituted: see note 7).
- 11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 70(1)(c) (as substituted: see note 7).
- 12 As to the meaning of 'listing rules' see PARA 385 note 18; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 70(2).
- 13 As to the meaning of 'prospectus rules' see PARA 385 note 18; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 70(2).
- 14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 70(1)(d). The reference is to European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading.
- 15 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 70(1A)(a) (art 70(1A) added by SI 2007/2615).
- 16 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 70(1A)(b) (as added: see note 15). The reference is to European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) arts 5(4), 8(1), 14(2).

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## **284. Material relating to prospectus for public offer of unlisted securities.**

The financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> relating to a prospectus or supplementary prospectus<sup>3</sup> where the only reason for considering it to be an invitation or inducement is that it does one or more of the following:

- 629 (1) it states the name and address of the person by whom the transferable securities<sup>4</sup> to which the prospectus or supplementary prospectus relates are to be offered<sup>5</sup>;

- 630 (2) it gives other details for contacting that person<sup>6</sup>;  
 631 (3) it states the nature and the nominal value of the transferable securities to which the prospectus or supplementary prospectus relates, the number offered and the price at which they are offered<sup>7</sup>;  
 632 (4) it states that a prospectus or supplementary prospectus is or will be available (and, if it is not yet available, when it is expected to be)<sup>8</sup>;  
 633 (5) it gives instructions for obtaining a copy of the prospectus or supplementary prospectus<sup>9</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'non-real time communication' see PARA 242.

3 References to a prospectus or supplementary prospectus are references to a prospectus or supplementary prospectus which is published in accordance with the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (see PARA 385 et seq): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 71(2)(b).

In the application of art 71 to outgoing electronic commerce communications, the reference to legislation includes a reference to corresponding provisions in the law of an EEA state other than the United Kingdom: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 8A(1)(b). As to the meaning of 'outgoing electronic commerce communication' see PARA 247 note 7. As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 As to the meaning of 'transferable securities' see PARA 385 note 18; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 71(2)(a).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 71(1)(a).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 71(1)(b).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 71(1)(c).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 71(1)(d).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 71(1)(e).

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### *(j) Communications in regard to Joint Enterprises and Collective Investment Schemes*

#### **285. Joint enterprises.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is communicated<sup>3</sup> by a participator<sup>4</sup> in a joint enterprise<sup>5</sup> to another participator in the same joint enterprise in connection with or for the purposes of that enterprise<sup>6</sup>.



- 1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.
- 2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.
- 3 As to the meaning of 'communicate' see PARA 242.
- 4 'Participator' includes potential participator: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 39(3).
- 5 'Joint enterprise' means an enterprise into which two or more persons (the 'participators') enter for commercial purposes related to a business or businesses (other than the business of engaging in a controlled activity) carried on by them; and, where a participator is a member of a group, each other member of the group is also to be regarded as a participator in the enterprise: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 39(2). As to controlled activities see PARA 227 et seq.
- 6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 39(1).

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## **286. Participants in certain recognised collective investment schemes.**

The financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> or solicited real time communication<sup>3</sup> which is made:

- 634 (1) by a person who is the operator of a scheme recognised under specified provisions of the Financial Services and Markets Act 2000<sup>4</sup>; and
- 635 (2) to persons in the United Kingdom<sup>5</sup> who are participants in any such recognised scheme operated by the person making the communication<sup>6</sup>,

and which relates only to such recognised schemes as are operated by that person or to units<sup>7</sup> in such schemes<sup>8</sup>.

- 1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.
- 2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'non-real time communication' see PARA 242.
- 3 As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.
- 4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 40(a). The provisions are the Financial Services and Markets Act 2000 s 270 (see PARA 675) or s 272 (see PARA 676).
- 5 As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 40(b). As to the meaning of 'communication' see PARA 242.

7 As to the meaning of 'units', in a collective investment scheme, see PARA 603; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 40.

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### *(k) Communications in regard to Bearer Instruments*

#### **287. Bearer instruments: promotions required or permitted by market rules.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 636 (1) is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;
- 637 (2) is communicated<sup>5</sup> by a body corporate ('A') that is not an open-ended investment company<sup>6</sup>;
- 638 (3) is made to or may reasonably be regarded as directed at persons<sup>7</sup> entitled to bearer instruments<sup>8</sup> issued by A, a parent undertaking of A or a subsidiary undertaking of A<sup>9</sup>; and
- 639 (4) is required or permitted by the rules of a relevant market<sup>10</sup> to be communicated to holders of instruments of a class which consists of or includes the bearer instruments in question<sup>11</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 41(1)(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 As to the meaning of 'communicate' see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 41(1)(b). As to open-ended investment companies see PARA 621 et seq.

7 As to a communication being made to another person and as to a communication being directed at another person see PARA 242.

8 'Bearer instrument' means any of the following investments title to which is capable of being transferred by delivery:

282 (1) any investment falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 14 (certain shares or stock in the share capital

or bodies corporate and unincorporated bodies) (see PARA 241) or Sch 1 para 15 (instruments creating or acknowledging indebtedness) (see PARA 241) (art 41(2)(a));

- 283 (2) any investment falling within Sch 1 para 17 (instruments giving entitlements to investments) (see PARA 241) or Sch 1 para 18 (certificates representing certain securities) (see PARA 241) which confers rights in respect of an investment falling within Sch 1 para 14 or 15 (art 41(2)(b)).

For the purpose of art 41, a bearer instrument falling within Sch 1 para 17 or 18 is treated as issued by the person ('P') who issued the investment in respect of which the bearer instrument confers rights if it is issued by an undertaking in the same group as P; or a person acting on behalf of, or pursuant to arrangements made with, P: art 41(3).

- 9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 41(1)(c).

10 'Relevant market', in relation to instruments of any particular class, means any market on which instruments of that class can be traded or dealt in and which meets the criteria specified in the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 3 Pt I (see PARA 276 note 6) or is specified in, or established under the rules of an exchange specified in, Sch 3 Pt II or III (see PARA 276 note 6): art 41(4).

- 11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 41(1)(d).

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## **288. Bearer instruments: promotions to existing holders.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 640 (1) is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;  
 641 (2) is communicated<sup>5</sup> by a body corporate ('A') that is not an open-ended investment company<sup>6</sup>;  
 642 (3) is made to or may reasonably be regarded as directed at persons<sup>7</sup> entitled to bearer instruments<sup>8</sup> issued by A, a parent undertaking of A or a subsidiary undertaking of A<sup>9</sup>;  
 643 (4) relates only to instruments of a class which consists of or includes either the bearer instruments to which the communication relates or instruments in respect of which those bearer instruments confer rights<sup>10</sup>; and  
 644 (5) is capable of being accepted or acted on only by persons who are entitled to instruments (whether or not bearer instruments) issued by A, a parent undertaking of A or a subsidiary undertaking of A<sup>11</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 42(1)(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 As to the meaning of 'communicate' see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 42(1)(b). As to open-ended investment companies see PARA 621 et seq.

7 As to a communication being made to another person and as to a communication being directed at another person see PARA 242.

8 As to the meaning of 'bearer instrument' see PARA 287 note 8; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 42(2). For the purposes of art 42, an instrument falling within Sch 1 para 17 (instruments giving entitlements to investments) (see PARA 241) or Sch 1 para 18 (certificates representing certain securities) (see PARA 241) is treated as issued by the person ('P') who issued the investment in respect of which the bearer instrument confers rights if it is issued by an undertaking in the same group as P, or a person acting on behalf of, or pursuant to arrangements made with, P: art 42(3). As to the meaning of 'instrument' see PARA 229 note 6.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 42(1)(c).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 42(1)(d).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 42(1)(e).

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### *(I) Communications in regard to Certain Members and Creditors*

#### **289. Members and creditors of certain bodies corporate.**

The financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> or solicited real time communication<sup>3</sup> which:

645 (1) is communicated<sup>4</sup> by a body corporate ('A') that is not an open-ended investment company<sup>5</sup>;

646 (2) relates only to a relevant investment<sup>6</sup> which is issued or to be issued by A, or by an undertaking ('U') in the same group as A that is not an open-ended investment company<sup>7</sup>; and

647 (3) is communicated to persons<sup>8</sup> whom the person making the communication believes on reasonable grounds to be<sup>9</sup>:

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114. (a) a creditor or member of A or of U<sup>10</sup>;

115. (b) a person who is entitled to a relevant investment which is issued by A or by U<sup>11</sup>;

116. (c) a person who is entitled, whether conditionally or unconditionally, to become a member of A or U but who has not yet done so<sup>12</sup>;

117. (d) a person who is entitled, whether conditionally or unconditionally, to have transferred to him title to a relevant investment which is issued by A or U but has not yet acquired title to the investment<sup>13</sup>.

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1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'non-real time communication' see PARA 242.

3 As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

4 As to the meaning of 'communicate' see PARA 242.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 43(1)(a). As to open-ended investment companies see PARA 621 et seq.

6 'Relevant investment' means:

284 (1) an investment falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 14 (shares or stock in the share capital of any body corporate and unincorporated bodies) (see PARA 241) or Sch 1 para 15 (instruments creating or acknowledging indebtedness) (see PARA 241) (art 43(3)(a));

285 (2) an investment falling within Sch 1 para 17 (instruments giving entitlements to investments) (see PARA 241) or Sch 1 para 18 (certificates representing certain securities) (see PARA 241) so far as relating to any investments within head (1) above (art 43(3)(b)).

For the purposes of art 43, an investment falling within Sch 1 para 17 or 18 is treated as issued by the person ('P') who issued the investment in respect of which the instrument confers rights if it is issued by an undertaking in the same group as P, or a person acting on behalf of, or pursuant to arrangements made with, P: art 43(4).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 43(1).

8 As to a communication being made to another person see PARA 242.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 43(1)(b).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 43(2)(a).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 43(2)(b).

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 43(2)(c).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 43(2)(d).

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## **290. Members and creditors of open-ended investment companies.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

648 (1) is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;

649 (2) is communicated<sup>5</sup> by, or on behalf of a body corporate ('A') that is an open-ended investment company<sup>6</sup>;

650 (3) is communicated to persons whom the person making or directing the communication<sup>7</sup> believes on reasonable grounds to be<sup>8</sup>:

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- 118. (a) a creditor or member of A<sup>9</sup>;
- 119. (b) a person who is entitled to specified investments<sup>10</sup> which are issued by A<sup>11</sup>;
- 120. (c) a person who is entitled, whether conditionally or unconditionally, to become a member of A but who has not yet done so<sup>12</sup>;
- 121. (d) a person who is entitled, whether conditionally or unconditionally, to have transferred to him title to such investments<sup>13</sup> which are issued by A but has not yet acquired title to the investments<sup>14</sup>; and

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651 (4) relates only to specified investments<sup>15</sup> which are issued or to be issued by A<sup>16</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 44(1)(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 As to the meaning of 'communicate' see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 44(1)(b). As to open-ended investment companies see PARA 621 et seq.

7 As to a communication being made to another person and as to a communication being directed at another person see PARA 242.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 44(1)(c).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 44(2)(a).

10 I.e. an investment falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 15 (instruments creating or acknowledging indebtedness) (see PARA 241), Sch 1 para 17 (instruments giving entitlements to investments) (see PARA 241) or Sch 1 para 19 (units in a collective investment scheme) (see PARA 241).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 44(2)(b).

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 44(2)(c).

13 See note 10.

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 44(2)(d).

15 See note 10.

16 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 44(1)(d). For the purposes of art 44, an investment falling within Sch 1 para 17 (instruments giving entitlements to investments) (see PARA 241) is treated as issued by the person ('P') who issued the investment in respect of which the instrument confers rights if it is issued by an undertaking in the same group as P, or a person acting on behalf of, or pursuant to arrangements made with, P: art 44(3). As to the meaning of 'instrument' see PARA 229 note 6.

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*(m) Communications in regard to Companies*

**291. Group companies.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> made by one body corporate in a group to another body corporate in the same group<sup>3</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 45.

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**292. Qualifying credit to bodies corporate.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which relates to the controlled activities of providing, arranging or advising on qualifying credit or agreeing to carry on such activities<sup>3</sup> if the communication is made to or directed at bodies corporate only<sup>4</sup> or is accompanied by an indication that the qualifying credit<sup>5</sup> to which it relates is only available to bodies corporate<sup>6</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 Ie the controlled activity falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 10, 10A or 10B (see PARA 237) (or within Sch 1 para 11 (see PARA 240) so far as it relates to that activity).

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 46(a).

5 As to the meaning of 'qualifying credit' see PARA 237.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 46(b).

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### **293. Common interest group of a company.**

If the first requirement described below and either the second or the third requirement described below are met, the financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 652 (1) is a non-real time communication<sup>3</sup> or a solicited real time communication<sup>4</sup>;
- 653 (2) is made only to persons who are members of a common interest group<sup>5</sup> of a company, or may reasonably be regarded as directed only at such persons<sup>6</sup>; and
- 654 (3) relates to specified investments<sup>7</sup> which are issued by that company<sup>8</sup>.

The first requirement is that the communication is accompanied by an indication:

- 655 (a) that the directors of the company (or its promoters named in the communication) have taken all reasonable care to ensure that every statement of fact or opinion included in the communication is true and not misleading given the form and context in which it appears<sup>9</sup>;
- 656 (b) that the directors of the company (or its promoters named in the communication) have not limited their liability with respect to the communication<sup>10</sup>; and
- 657 (c) that any person who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question<sup>11</sup>.

The second requirement is that the communication is accompanied by an indication:

- 658 (i) that the directors of the company (or its promoters named in the communication) have taken all reasonable care to ensure that any person belonging to the common interest group (and his professional advisers) can have access, at all reasonable times, to all the information that he or they would reasonably require, and reasonably expect to find, for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the company and of the rights attaching to the investments in question<sup>12</sup>; and
- 659 (ii) describing the means by which such information can be accessed<sup>13</sup>.

The third requirement is that the communication is accompanied by an indication that any person considering subscribing for the investments in question should regard any subscription as made primarily to assist the furtherance of the company's objectives (other than any purely financial objectives) and only secondarily, if at all, as an investment<sup>14</sup>.



1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'non-real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 52(2)(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

5 'Common interest group', in relation to a company, means an identified group of persons who at the time the communication is made might reasonably be regarded as having an existing and common interest with each other and that company in the affairs of the company and what is done with the proceeds arising from any investment to which the communication relates: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 52(1). Persons are not to be regarded as having such an interest if the only reason why they would be so regarded is that:

286 (1) they will have such an interest if they become members or creditors of the company (art 52(8)(a));

287 (2) they all carry on a particular trade or profession (art 52(8)(b)); or

288 (3) they are persons with whom the company has an existing business relationship, whether by being its clients, customers, contractors, suppliers or otherwise (art 52(8)(c)).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 52(2)(b). For these purposes:

289 (1) if all the conditions set out in art 52(7)(a)-(c) (see heads (a)-(c) below) are met, the communication is to be regarded as directed at persons who are members of the common interest group (art 52(6)(a));

290 (2) in any other case in which one or more of those conditions are met, that fact must be taken into account in determining whether the communication is directed at persons who are members of the common interest group (but a communication may still be regarded as directed only at such persons even if none of the conditions in art 52(7) is met) (art 52(6)(b)).

The conditions are that:

291 (a) the communication is accompanied by an indication that it is directed at persons who are members of the common interest group and that any investment or activity to which it relates is available only to such persons (art 52(7)(a));

292 (b) the communication is accompanied by an indication that it must not be acted upon by persons who are not members of the common interest group (art 52(7)(b));

293 (c) there are in place proper systems and procedures to prevent recipients other than members of the common interest group engaging in the investment activity to which the communication relates with the person directing the communication, a close relative of his or a member of the same group (art 52(7)(c)).

As to the meaning of 'recipient' see PARA 242. As to a person engaging in investment activity see PARA 242. As to the meaning of 'close relative' see PARA 242 note 19.

7 Investments falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 14 (shares or stock in the share capital of any body corporate or unincorporated body) (see PARA 241) or Sch 1 para 15 (instruments creating or acknowledging indebtedness) (see PARA 241).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 52(2)(c).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 52(3)(a).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 52(3)(b).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 52(3)(c). In the application of art 52(3)(c) to outgoing electronic commerce communications, the reference to an authorised person includes a reference to a person who is entitled, under the law of an EEA state other than the United Kingdom, to carry on regulated activities in that state: art 8A(1)(a). As to the meaning of 'outgoing electronic commerce communication' see PARA 247 note 7. As to authorised persons see PARA 314 et seq. As to the meaning of 'United Kingdom' see PARA 2 note 3. As to regulated activities see PARA 84.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 52(4)(a).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 52(4)(b).

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 52(5).

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#### **294. Annual accounts and directors' report.**

If the following four requirements are met, the financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> by a body corporate (other than an open-ended investment company) which:

- 660 (1) consists of, or is accompanied by, the whole or any part of the annual accounts<sup>3</sup> of a body corporate (other than an open-ended investment company)<sup>4</sup>; or
- 661 (2) is accompanied by any report which is prepared and approved by the directors of such a body corporate under the Companies Act 2006<sup>5</sup>, the corresponding Northern Ireland enactment<sup>6</sup> or the law of an EEA state other than the United Kingdom which corresponds to those provisions<sup>7</sup>.

The first requirement is that the communication:

- 662 (a) does not contain any invitation to persons to underwrite, subscribe for, or otherwise acquire or dispose of, a controlled investment<sup>8</sup>; and
- 663 (b) does not advise persons to engage in any of the activities within head (a) above<sup>9</sup>.

The second requirement is that the communication does not contain any invitation to persons to:

- 664 (i) effect any transaction with the body corporate (or with any named person) in the course of that body's (or person's) carrying on of any of certain specified activities<sup>10</sup>; or
- 665 (ii) make use of any services provided by that body corporate (or by any named person) in the course of carrying on such activity<sup>11</sup>.

The third requirement is that the communication does not contain any inducement relating to an investment other than one issued by the body corporate (or another body corporate in the same group) which falls within certain specified controlled investments<sup>12</sup>.

The fourth requirement is that the communication does not contain any reference to:

- 666 (A) the price at which investments issued by the body corporate have in the past been bought or sold<sup>13</sup>; or  
 667 (B) the yield on such investments<sup>14</sup>,

unless it is also accompanied by an indication that past performance cannot be relied on as a guide to future performance<sup>15</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 'Annual accounts' means:

- 294 (1) accounts produced by virtue of the Companies Act 2006 Pt 15 (ss 380-474) (formerly the Companies Act 1985 Pt VII (ss 221-262A)) (see **COMPANIES**) (or of the Companies Act 2006 Pt 15 as applied by virtue of any other enactment) (see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(7)(a));
- 295 (2) accounts produced by virtue of the corresponding Northern Ireland enactment (or of that enactment as applied by virtue of any other enactment) (art 59(7)(b));
- 296 (3) a summary financial statement prepared under the Companies Act 2006 ss 426-429, 434, 435 (formerly the Companies Act 1985 s 251) (see **COMPANIES**) (see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(7)(c));
- 297 (4) accounts delivered to the registrar under the Companies Act 1985 Pt XXIII Ch II (ss 699A-703R) (prospectively repealed) (see **COMPANIES**) (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(7)(d));
- 298 (5) accounts which are produced or published by virtue of the law of an EEA state other than the United Kingdom and which correspond to accounts within any of heads (1)-(4) above (art 59(7)(e)).

As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(1)(a). As to open-ended investment companies see PARA 621 et seq.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(1)(b)(i). The reference in the text is a reference to the Companies Act 2006 ss 415-419, 433, 436, 444-447 (formerly the Companies Act 1985 ss 234, 234A): see **COMPANIES**.

6 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(1)(b)(ii).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(1)(b)(iii).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(2)(a). As to controlled investments see PARA 241.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(2)(b).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(3)(a). The activities referred to in the text are activities falling within any of Sch 1 paras 3-11: see PARAS 229-240.

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(3)(b).

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(4). The specified controlled investments are those falling within Sch 1 para 14 (shares or stock in the share capital of

any body corporate or unincorporated body) (see PARA 241) or Sch 1 para 15 (instruments creating or acknowledging indebtedness) (see PARA 241) (art 59(4)(a)); or Sch 1 para 17 (instruments giving entitlements to investments) (see PARA 241) or Sch 1 para 18 (certificates representing certain securities) (PARA 241), so far as relating to any investments within art 59(4)(a) (art 59(4)(b)).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(5)(a).

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(5)(b). For the purposes of art 59(5)(b), a reference, in relation to an investment, to earnings, dividend or nominal rate of interest payable is not to be taken to be a reference to the yield on the investment: art 59(6).

15 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 59(5).

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*(n) Communications to High Net Worth and Sophisticated Individuals, etc*

## **295. Certified high net worth individuals.**

If the requirements relating to the giving of a warning<sup>1</sup> and also those set out in heads (i) to (iii) below<sup>2</sup> are met, the financial promotion restriction<sup>3</sup> does not apply to any communication<sup>4</sup> which:

- 668 (1) is a non-real time communication<sup>5</sup> or a solicited real time communication<sup>6</sup>;
- 669 (2) is made to an individual whom the person making the communication believes on reasonable grounds to be a certified high net worth individual<sup>7</sup>; and
- 670 (3) relates only to one or more of the following investments<sup>8</sup>:
- 70
- 122. (a) stock or shares in an unlisted company<sup>9</sup>;
- 123. (b) an instrument acknowledging the indebtedness of an unlisted company<sup>10</sup>;
- 124. (c) investments conferring entitlement or rights with respect to investments falling within heads (a) or (b) above<sup>11</sup>;
- 125. (d) an investment comprising units in a collective investment scheme being a scheme which invests wholly or predominantly in investments falling within heads (a) or (b) above<sup>12</sup>;
- 126. (e) options to acquire or dispose of an investment falling within heads (a), (b) or (c) above<sup>13</sup>;
- 127. (f) rights under a contract for the sale of an investment falling within heads (a), (b) or (c) above<sup>14</sup>;
- 128. (g) a contract relating to, or to fluctuations in the value or price of, an investment falling within heads (a), (b) or (c) above<sup>15</sup>,
- 71
- 671 provided in each case that it is an investment under the terms of which the investor cannot incur a liability or obligation to pay or contribute more than he commits by way of investment<sup>16</sup>.

The requirements referred to above are that the communication is accompanied by the giving of a warning<sup>17</sup> and also by an indication:

- 672 (i) that it is exempt from the general restriction<sup>18</sup> on the communication of invitations or inducements to engage in investment activity on the grounds that it is made to a certified high net worth individual<sup>19</sup>;
- 673 (ii) of the requirements that must be met for a person to qualify as a certified high net worth individual<sup>20</sup>;
- 674 (iii) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question<sup>21</sup>.

1 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(4); and the text and note 17.

2 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(7).

3 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

4 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

5 As to the meaning of 'non-real time communication' see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(1)(a). As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(1)(b). 'Certified high net worth individual' means any individual who has signed, within the period of 12 months ending with the day on which the communication is made, a statement complying with Sch 5 Pt I (see below): art 48(2).

The validity of a statement signed for the purposes of art 48(2) is not affected by a defect in the form or wording of the statement, provided that the defect does not alter the statement's meaning and that the words shown in bold type in Sch 5 Pt I (see below) are so shown in the statement: art 48(3).

The statement to be signed for the purposes of art 48(2) must be in the following form and contain the following content (see Sch 5 Pt I):

*'Statement for Certified High Net Worth Individual'*

I declare that I am a certified high net worth individual for the purposes of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005.

I understand that this means:

- 299 (a) I can receive financial promotions that may not have been approved by a person authorised by the Financial Services Authority;
- 300 (b) the content of such financial promotions may not conform to rules issued by the Financial Services Authority;
- 301 **(c) by signing this statement I may lose significant rights;**
- 302 (d) I may have no right to complain to either of the following:
41. (i) the Financial Services Authority; or  
41
42. (ii) the Financial Ombudsman Scheme;  
42
- 303 (e) I may have no right to seek compensation from the Financial Services Compensation Scheme.

I am a certified high net worth individual because **at least one of the following applies:**

- 304 (a) I had, during the financial year immediately preceding the date below, an annual income to the value of £100,000 or more;
- 305 (b) I held, throughout the financial year immediately preceding the date below, net assets to the value of £250,000 or more. Net assets for these purposes do not include:
43. (i) the property which is my primary residence or any loan secured on that residence;  
43
44. (ii) any rights of mine under a qualifying contract of insurance within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001; or  
44
45. (iii) any benefits (in the form of pensions or otherwise) which are payable on the termination of my service or on my death or retirement and to which I am (or my dependants are), or may be, entitled.  
45

**I accept that I can lose my property and other assets from making investment decisions based on financial promotions.**

I am aware that it is open to me to seek advice from someone who specialises in advising on investments.

Signature

Date'.

As to the Financial Services Authority see PARAS 4, 6 et seq. As the Financial Ombudsman Scheme see PARA 575 et seq. As to the Financial Services Compensation Scheme see PARA 583 et seq. As to authorised persons see PARA 314 et seq. As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(1)(d). The investments referred to in the text are those falling within art 48(8).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(8)(a). The investment referred to in the text is one falling within Sch 1 para 14: see PARA 241.

An 'unlisted company' means a body corporate the shares in which are not:

- 306 (1) listed or quoted on an investment exchange whether in the United Kingdom or elsewhere (art 3(1)(a));
- 307 (2) shares in respect of which information is, with the agreement or approval of any officer of the company, published for the purpose of facilitating deals in the shares indicating prices at which persons have dealt or are willing to deal in them other than persons who, at the time the information is published, are existing members of a relevant class (art 3(1)(b));
- 308 (3) subject to a marketing arrangement which accords to the company the facilities referred to in the Companies Act 1985 s 163(2)(b) (prospectively repealed) (see **COMPANIES**) (as to replacement provisions see the Companies Act 2006 s 693(3)) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 173(2)(b) (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 3(1)(c)).

For the purposes of the application of art 3 in respect of outgoing electronic commerce communications any reference in the Companies Act 1985 s 163(2)(b) (prospectively repealed) (as to replacement provisions see the Companies Act 2006 s 693(3)) (or the equivalent provision in the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6)) (see head (3) above) to a company includes a reference to a company registered under the law of an EEA state other than the United Kingdom (see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 3(1)(c)) and any reference to an investment exchange (see art 3(1)(a)) includes a reference to an investment exchange which is recognised as an investment exchange under the law of an EEA state other than the United Kingdom: art 8A(3). As to the meaning of 'outgoing electronic commerce communication' see PARA 247 note 7; and as to the meaning of 'United Kingdom' see PARA 2 note 3.

For the purpose of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 3(1)(b) (see head (2) above), a person is to be regarded as a member of a relevant class if he was, at the relevant time:

- 309 (a) an existing member or debenture holder of the company (art 3(2)(a));
- 310 (b) an existing employee of the company (art 3(2)(b));

- 311 (c) a close relative of such a member or employee (art 3(2)(c)); or
- 312 (d) a trustee (acting in his capacity as such) of a trust, the principal beneficiary of which is a person within any of heads (a), (b) and (c) above (art 3(2)(d)).

As to the meaning of 'close relative' see PARA 242 note 19.

References to shares in and debentures of an unlisted company are references:

- 313 (i) in the case of a body corporate which is a company within the meaning of the Companies Act 1985 (see **COMPANIES** vol 14 (2009) PARA 1), to shares and debentures within the meaning of that Act (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 3(3)(a));
- 314 (ii) in the case of a body corporate which is a company within the meaning of the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), to shares and debentures within the meaning of that Order (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 3(3)(b));
- 315 (iii) in the case of any other body corporate, to investments falling within Sch 1 para 14 (shares or stock in the share capital of any body corporate or unincorporated body) (see PARA 241) or Sch 1 para 15 (instruments creating or acknowledging indebtedness) (see PARA 241) (art 3(3)(c)).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(8)(b). The investment referred to in the text is one falling within Sch 1 para 15: see PARA 241. As to the meaning of 'instrument' see PARA 229 note 6.

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(8)(c). The investment referred to in the text is one falling within Sch 1 para 17 or Sch 1 para 18: see PARA 241.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(8)(d). As to the meaning of 'units', in a collective investment scheme, see PARA 603; definition applied by art 2(1).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(8)(e). The investment referred to in the text is one falling within Sch 1 para 21: see PARA 241.

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(8)(f). The investment referred to in the text is one falling within Sch 1 para 22: see PARA 241.

15 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(8)(g). The investment referred to in the text is one falling within Sch 1 para 23: see PARA 241.

16 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(8).

17 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(4), (5), (6).

The requirements of art 48(4) are that either the communication is accompanied by the giving of a warning in accordance with art 48(5), (6) or where, because of the nature of the communication, this is not reasonably practicable:

- 316 (1) a warning in accordance with art 48(5) is given to the recipient orally at the beginning of the communication together with an indication that he will receive the warning in legible form and that, before receipt of that warning, he should consider carefully any decision to engage in investment activity to which the communication relates (art 48(4)(a)); and
- 317 (2) a warning in accordance with art 48(5) and 48(6)(d)-(h) (see heads (d)-(h) below) is sent to the recipient of the communication within two business days of the day on which the communication is made (art 48(4)(b)).

As to the meaning of 'recipient' see PARA 242. 'Business day' means any day except a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom: art 48(9). As to the meaning of 'United Kingdom' see PARA 2 note 3.

The warning must be in the following terms: 'The content of this promotion has not been approved by an authorised person within the meaning of the Financial Services and Markets Act 2000. Reliance on this promotion for the purpose of engaging in any investment activity may expose an individual to a significant risk of losing all of the property or other assets invested': Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(5). However where a warning is sent pursuant to art 48(4)(b) (see

head (2) above), for the words 'this promotion' in both places where they occur there must be substituted wording which clearly identifies the promotion which is the subject of the warning: art 48(5).

The warning must:

- 318 (a) be given at the beginning of the communication (art 48(6)(a));
- 319 (b) precede any other written or pictorial matter (art 48(6)(b));
- 320 (c) be in a font size consistent with the text forming the remainder of the communication (art 48(6)(c));
- 321 (d) be indelible (art 48(6)(d));
- 322 (e) be legible (art 48(6)(e));
- 323 (f) be printed in black, bold type (art 48(6)(f));
- 324 (g) be surrounded by a black border which does not interfere with the text of the warning (art 48(6)(g)); and
- 325 (h) not be hidden, obscured or interrupted by any other written or pictorial matter (art 48(6)(h)).

18 See the Financial Services and Markets Act 2000 s 21; and PARA 225.

19 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(7)(a).

20 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(7)(b).

21 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(7)(c). In the application of art 48(7)(c) to outgoing electronic commerce communications, the reference to an authorised person includes a reference to a person who is entitled, under the law of an EEA state other than the United Kingdom, to carry on regulated activities in that state: art 8A(1)(a).

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## **296. High net worth companies, unincorporated associations etc.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 675 (1) is made only to recipients<sup>3</sup> whom the person making the communication believes on reasonable grounds to be persons falling within heads (a) to (e) below<sup>4</sup>;  
or
- 676 (2) may reasonably be regarded as directed only at persons<sup>5</sup> falling within heads (a) to (e) below<sup>6</sup>.

The persons in question are:

- 677 (a) any body corporate which has, or which is a member of the same group as an undertaking which has, a called-up share capital<sup>7</sup> or net assets<sup>8</sup> of not less than:  
72
- 129. (i) if the body corporate has more than 20 members, or is a subsidiary undertaking of an undertaking which has more than 20 members, £500,000<sup>9</sup>;



130. (ii) otherwise, £5 million<sup>10</sup>;  
73  
678 (b) any unincorporated association or partnership which has net assets of not less than £5 million<sup>11</sup>;  
679 (c) the trustee of a high value trust<sup>12</sup>;  
680 (d) any person ('A') whilst acting in the capacity of director, officer or employee of a person ('B') falling within any of heads (a) to (c) above where A's responsibilities, when acting in that capacity, involve him in B's engaging in investment activity<sup>13</sup>;  
681 (e) any person to whom the communication may otherwise lawfully be made<sup>14</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'recipient' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(1)(a).

5 As to communications being directed at persons see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(1)(b). For these purposes:

- 326 (1) if all the conditions set out in art 49(4)(a)-(c) (see heads (a)-(c) below) are met, the communication is to be regarded as directed at persons to whom art 49(2) applies (art 49(3)(a));  
327 (2) in any other case in which one or more of those conditions are met, that fact is to be taken into account in determining whether the communication is directed at persons to whom art 49(2) applies (but a communication may still be regarded as so directed even if none of the conditions in art 49(4) is met) (art 49(3)(b)).

The conditions are that:

- 328 (a) the communication includes an indication of the description of persons to whom it is directed and an indication of the fact that the controlled investment or controlled activity to which it relates is available only to such persons (art 49(4)(a));  
329 (b) the communication includes an indication that persons of any other description should not act upon it (art 49(4)(b));  
330 (c) there are in place proper systems and procedures to prevent recipients other than persons to whom art 49(2) applies engaging in the investment activity to which the communication relates with the person directing the communication, a close relative of his or a member of the same group (art 49(4)(c)).

As to controlled investments see PARA 241. As to controlled activities see PARA 227 et seq. As to the meaning of 'close relative' see PARA 242 note 19.

7 'Called-up share capital' has the meaning given in the Companies Act 1985 (see **COMPANIES** vol 15 (2009) PARA 1048) (as to replacement provisions see the Companies Act 2006) or in the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(5).

For the purposes of the application of art 49 to outgoing electronic commerce communications, any reference in the Companies Acts or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6) (see above), to a body corporate or company includes a reference to a body corporate or company registered under the law of an EEA state other than the United Kingdom: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 8A(2). As to the meaning of 'outgoing electronic commerce communication' see PARA 247 note 7. As to the meaning of 'United Kingdom' see PARA 2 note 3.

8 'Net assets' has the meaning given by the Companies Act 2006 s 831 (formerly the Companies Act 1985 s 264)(see **COMPANIES**) or the equivalent provision of the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6): see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(7). See note 7.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(2)(a)(i). In the application of art 49 to outgoing electronic commerce communications, any reference to an amount in pounds sterling includes a reference to an equivalent amount in another currency: art 8A(1)(c).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(2)(a)(ii). See note 9.

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(2)(b). See note 9.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(2)(c). 'High value trust' means a trust where the aggregate value of the cash and investments which form part of the trust's assets (before deducting the amount of its liabilities) is £10 million or more, or has been £10 million or more at any time during the year immediately preceding the date on which the communication in question was first made or directed: art 49(6)(b). See note 9.

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(2)(d). As to a person engaging in investment activity see PARA 225.

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 49(2)(e).

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## **297. Sophisticated investors.**

If the following requirements are met, the financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 682 (1) is made to a certified sophisticated investor<sup>3</sup>;
- 683 (2) does not invite or induce the recipient<sup>4</sup> to engage in investment activity<sup>5</sup> with the person who has signed the certificate<sup>6</sup>; and
- 684 (3) relates only to a description of investment in respect of which that investor is certified<sup>7</sup>.

The requirements are that the communication is accompanied by an indication:

- 685 (a) that it is exempt from the general restriction<sup>8</sup> on the communication of invitations or inducements to engage in investment activity on the ground that it is made to a certified sophisticated investor<sup>9</sup>;
- 686 (b) of the requirements that must be met for a person to qualify as a certified sophisticated investor<sup>10</sup>;
- 687 (c) that the content of the communication has not been approved by an authorised person and that such approval is, unless this exemption or any other exemption applies, required<sup>11</sup>;
- 688 (d) that reliance on the communication for the purpose of engaging in any investment activity may expose the individual to a significant risk of losing all of the property invested or of incurring additional liability<sup>12</sup>;

689 (e) that any person who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question<sup>13</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50(2)(a). 'Certified sophisticated investor', in relation to any description of investment, means a person:

331 (1) who has a current certificate in writing or other legible form signed by an authorised person to the effect that he is sufficiently knowledgeable to understand the risks associated with that description of investment (art 50(1)(a)); and

332 (2) who has signed, within the period of 12 months ending with the day on which the communication is made, a statement in the following terms: 'I make this statement so that I am able to receive promotions which are exempt from the restrictions on financial promotion in the Financial Services and Markets Act 2000. The exemption relates to certified sophisticated investors and I declare that I qualify as such in relation to investments of the following kind [list them]. I accept that the contents of promotions and other material that I receive may not have been approved by an authorised person and that their content may not therefore be subject to controls which would apply if the promotion were made or approved by an authorised person. I am aware that it is open to me to seek advice from someone who specialises in advising on this kind of investment' (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50(1)(b)).

For the purposes of art 50(1)(a) (see head (1) above), a certificate is current if it is signed and dated not more than three years before the date on which the communication is made: art 50(4). In the application of art 50(1)(a) to outgoing electronic commerce communications, the reference to an authorised person includes a reference to a person who is entitled, under the law of an EEA state other than the United Kingdom, to carry on regulated activities in that state: art 8A(1)(a). As to the meaning of 'outgoing electronic commerce communication' see PARA 247 note 7. As to the meaning of 'United Kingdom' see PARA 2 note 3.

The validity of a statement signed in accordance with art 50(1)(b) (see head (2) above) is not affected by a defect in the wording of the statement, provided that the defect does not alter the statement's meaning: art 50(1A).

As to self-certified sophisticated investors see PARA 298.

4 As to the meaning of 'recipient' see PARA 242.

5 As to a person engaging in investment activity see PARA 225.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50(2)(b).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50(2)(c).

8 See the Financial Services and Markets Act 2000 s 21; and PARA 225.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50(3)(a).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50(3)(b). That qualification is required by the Financial Services and Markets Act 2000 s 21: see PARA 225.

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50(3)(c).

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50(3)(d).

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50(3)(e). In the application of art 50(3)(e) to outgoing electronic commerce communications, the reference to an authorised person includes a reference to a person who is entitled, under the law of an EEA state other than the United Kingdom, to carry on regulated activities in that state: art 8A(1)(a).

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## **298. Self-certified sophisticated investors.**

If the requirements relating to the giving of a warning<sup>1</sup> and also those set out in heads (i) to (iii) below<sup>2</sup> are met, the financial promotion restriction<sup>3</sup> does not apply to any communication<sup>4</sup> which:

- 690 (1) is made to an individual whom the person making the communication believes on reasonable grounds to be a self-certified sophisticated investor<sup>5</sup>; and  
 691 (2) relates only to one or more of the following investments<sup>6</sup>:
- 74
- 131. (a) stock or shares in an unlisted company<sup>7</sup>;
  - 132. (b) an instrument acknowledging the indebtedness of an unlisted company<sup>8</sup>;
  - 133. (c) investments conferring entitlement or rights with respect to investments falling within heads (a) or (b) above<sup>9</sup>;
  - 134. (d) an investment comprising units in a collective investment scheme being a scheme which invests wholly or predominantly in investments falling within heads (a) or (b) above<sup>10</sup>;
  - 135. (e) options to acquire or dispose of an investment falling within heads (a), (b) or (c) above<sup>11</sup>;
  - 136. (f) rights under a contract for the sale of an investment falling within heads (a), (b) or (c) above<sup>12</sup>;
  - 137. (g) a contract relating to, or to fluctuations in the value or price of, an investment falling within heads (a), (b) or (c) above<sup>13</sup>,
- 75
- 692 provided in each case that it is an investment under the terms of which the investor cannot incur a liability or obligation to pay or contribute more than he commits by way of investment<sup>14</sup>.

The requirements referred to above are that the communication is accompanied by the giving of a warning<sup>15</sup> and also by an indication:

- 693 (i) that it is exempt from the general restriction<sup>16</sup> on the communication of invitations or inducements to engage in investment activity on the grounds that it is made to a self-certified sophisticated investor<sup>17</sup>;
- 694 (ii) of the requirements that must be met for a person to qualify as a self-certified sophisticated investor<sup>18</sup>;
- 695 (iii) that any individual who is in any doubt about the investment to which the communication relates should consult an authorised person specialising in advising on investments of the kind in question<sup>19</sup>.

1 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(4); and the text and note 15.

2 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(7).

3 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

4 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 48(1)(b). 'Self-certified sophisticated investor' means any individual who has signed, within the period of 12 months ending with the day on which the communication is made, a statement complying with Sch 5 Pt II (see below): art 50A(1).

The validity of a statement signed for the purposes of art 50A(1) is not affected by a defect in the form or wording of the statement, provided that the defect does not alter the statement's meaning and that the words shown in bold type in Sch 5 Pt I (see below) are so shown in the statement: art 50A(2).

The statement to be signed for the purposes of art 50A(1) must be in the following form and contain the following content (see Sch 5 Pt II):

*'Statement for Self-certified Sophisticated Investor'*

I declare that I am a self-certified sophisticated investor for the purposes of the Financial Services and Markets Act (Financial Promotion) Order 2005.

I understand that this means:

- 333 (a) I can receive financial promotions that may not have been approved by a person authorised by the Financial Services Authority;
- 334 (b) the content of such financial promotions may not conform to rules issued by the Financial Services Authority;
- 335 **(c) by signing this statement I may lose significant rights;**
- 336 (d) I may have no right to complain to either of the following:
  - 46. (i) the Financial Services Authority; or  
46
  - 47. (ii) the Financial Ombudsman Scheme;  
47
- 337 (e) I may have no right to seek compensation from the Financial Services Compensation Scheme.

I am a self-certified sophisticated investor because **at least one of the following applies:**

- 338 (a) I am a member of a network or syndicate of business angels and have been so for at least the last six months prior to the date below;
- 339 (b) I have made more than one investment in an unlisted company in the two years prior to the date below;
- 340 (c) I am working, or have worked in the two years prior to the date below, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises;
- 341 (d) I am currently, or have been in the two years prior to the date below, a director of a company with an annual turnover of at least £1 million.

**I accept that I can lose my property and other assets from making investment decisions based on financial promotions.**

I am aware that it is open to me to seek advice from someone who specialises in advising on investments.

Signature

Date.'

As to the Financial Services Authority see PARAS 4, 6 et seq. As the Financial Ombudsman Scheme see PARA 575 et seq. As to the Financial Services Compensation Scheme see PARA 583 et seq. As to authorised persons see PARA 314 et seq.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(1)(d). The investments referred to in the text are those falling within art 50A(8).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(8)(a). The investment referred to in the text is one falling within Sch 1 para 14: see PARA 241. As to the meaning of 'unlisted company' see PARA 295 note 9.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(8)(b). The investment referred to in the text is one falling within Sch 1 para 15: see PARA 241. As to the meaning of 'instrument' see PARA 229 note 6.

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(8)(c). The investment referred to in the text is one falling within Sch 1 para 17 or Sch 1 para 18: see PARA 241.

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(8)(d). As to the meaning of 'units', in a collective investment scheme, see PARA 603; definition applied by art 2(1).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(8)(e). The investment referred to in the text is one falling within Sch 1 para 21: see PARA 241.

12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(8)(f). The investment referred to in the text is one falling within Sch 1 para 22: see PARA 241.

13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(8)(g). The investment referred to in the text is one falling within Sch 1 para 23: see PARA 241.

14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(8).

15 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(4), (5), (6).

The requirements of art 50A(4) are that either the communication is accompanied by the giving of a warning in accordance with art 50A(5), (6) or where, because of the nature of the communication, this is not reasonably practicable:

342 (1) a warning in accordance with art 50A(5) is given to the recipient orally at the beginning of the communication together with an indication that he will receive the warning in legible form and that, before receipt of that warning, he should consider carefully any decision to engage in investment activity to which the communication relates (art 50A(4)(a)); and

343 (2) a warning in accordance with art 50A(5) and 50A(6)(d)-(h) (see heads (d)-(h) below) is sent to the recipient of the communication within two business days of the day on which the communication is made (art 50A(4)(b)).

As to the meaning of 'recipient' see PARA 242. 'Business day' means any day except a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom: art 50A(9). As to the meaning of 'United Kingdom' see PARA 2 note 3.

The warning must be in the following terms: 'The content of this promotion has not been approved by an authorised person within the meaning of the Financial Services and Markets Act 2000. Reliance on this promotion for the purpose of engaging in any investment activity may expose an individual to a significant risk of losing all of the property or other assets invested': Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(5). However where a warning is sent pursuant to art 50A(4)(b) (see head (2) above), for the words 'this promotion' in both places where they occur there must be substituted wording which clearly identifies the promotion which is the subject of the warning: art 50A(5).

The warning must:

344 (a) be given at the beginning of the communication (art 50A(6)(a));

345 (b) precede any other written or pictorial matter (art 50A(6)(b));

346 (c) be in a font size consistent with the text forming the remainder of the communication (art 50A(6)(c));

347 (d) be indelible (art 50A(6)(d));

- 348 (e) be legible (art 50A(6)(e));
  - 349 (f) be printed in black, bold type (art 50A(6)(f));
  - 350 (g) be surrounded by a black border which does not interfere with the text of the warning (art 50A(6)(g)); and
  - 351 (h) not be hidden, obscured or interrupted by any other written or pictorial matter (art 50A(6)(h)).
- 16 See the Financial Services and Markets Act 2000 s 21; and PARA 225.
  - 17 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(7)(a).
  - 18 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(7)(b).
  - 19 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 50A(7)(c).

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## **299. Associations of high net worth or sophisticated investors.**

The financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> or solicited real time communication<sup>3</sup> which:

- 696 (1) is made to an association, or to a member of an association, the membership of which the person making the communication believes on reasonable grounds comprises wholly or predominantly persons who are: (a) certified high net worth individuals<sup>4</sup>; (b) high net worth persons<sup>5</sup>; (c) certified or self-sophisticated investors<sup>6</sup>; and
- 697 (2) relates only to an investment under the terms of which a person cannot incur a liability or obligation to pay or contribute more than he commits by way of investment<sup>7</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 51(a)(i). As to certified high net worth individuals see PARA 295.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 51(a)(ii). As to high net worth persons see PARA 296.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 51(a)(iii). As to certified sophisticated investors see PARA 297. As to self-certified sophisticated investors see PARA 298.

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 51(b).

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*(o) Communications relating to Trusts, etc*

**300. Settlers, trustees and personal representatives.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is made between:

- 698 (1) a person when acting as a settlor or grantor of a trust, a trustee or a personal representative; and
- 699 (2) a trustee of the trust, a fellow trustee or a fellow personal representative (as the case may be),

if the communication is made for the purposes of the trust or estate<sup>3</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 53. See **TRUSTS** vol 48 (2007 Reissue) PARA 601 et seq.

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**301. Beneficiaries of trust, will or intestacy.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is made:

- 700 (1) between a person when acting as a settlor or grantor of a trust, trustee or personal representative and a beneficiary under the trust, will or intestacy; or
- 701 (2) between a beneficiary under a trust, will or intestacy and another beneficiary under the same trust, will or intestacy,



if the communication relates to the management or distribution of that trust fund or estate<sup>3</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 54.

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### *(p) Communications by Members of Professions*

#### **302. Communications by members of professions.**

The financial promotion restriction<sup>1</sup> does not apply to a real time communication<sup>2</sup> (whether solicited or unsolicited)<sup>3</sup> which:

702 (1) is made by a person ('P') who carries on a regulated activity to which the general prohibition does not apply<sup>4</sup>; and

703 (2) is made to a recipient<sup>5</sup> who has, prior to the communication being made, engaged P to provide professional services<sup>6</sup>,

where the controlled activity<sup>7</sup> to which the communication relates is an excluded activity<sup>8</sup> which would be undertaken by P for the purposes of, and incidental to, the provision by him of professional services to or at the request of the recipient<sup>9</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'real time communication' see PARA 242.

3 As to the meanings of 'solicited real time communication' and 'unsolicited real time communication' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 55(1)(a). The non-application of the general prohibition is by virtue of the Financial Services and Markets Act 2000 s 327: see PARA 751.

5 As to the meaning of 'recipient' see PARA 242.

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 55(1)(b). As to the meaning of 'professional services' see PARA 751 note 11; definition applied by art 55(2).

7 As to controlled activities see PARA 227 et seq.

8 An 'excluded activity' is an activity to which the general prohibition would apply but for the application of the Financial Services and Markets Act 2000 s 327 (see PARA 751) or the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 67 (see PARA 129): see the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 55(3).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 55(1). See also PARA 303 head (1).

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### **303. Non-real time communications by members of professions.**

The financial promotion restriction<sup>1</sup> does not apply to a non-real time communication<sup>2</sup> which:

- 704 (1) is made by a person ('P') who carries on Part XX activities<sup>3</sup>; and
- 705 (2) is limited to what is required or permitted as described below<sup>4</sup>.

The limitations are that the communication must consist of a strictly worded statement<sup>5</sup>, and may in addition set out the Part XX activities which P is able to offer to his clients, provided it is clear that these are the investment services to which that statement relates<sup>6</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242. As to the meaning of 'non-real time communication' see PARA 242.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 55A(1)(a). 'Part XX activities' means the regulated activities to which the general prohibition (ie in the Financial Services and Markets Act 2000 s 19 (see PARA 80)) does not apply when they are carried on by P by virtue of s 327 (see PARA 751): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 55A(5). See also PARA 302 head (1).

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 55A(1)(b).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 55A(2). The communication must be in the following terms: 'This [firm/company] is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of [relevant designated professional body]. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide': Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 55A(2). The validity of a communication made in accordance with art 55A(2) is not affected by a defect in the wording of it provided that the defect does not alter the communication's meaning: art 55A(4).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 55A(3).

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*(q) Communications in regard to Parliamentary Reports*

**304. Remedy following report by the Parliamentary Commissioner for Administration.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> made or directed by a person for the purpose of enabling any injustice, stated by the Parliamentary Commissioner for Administration in a report under the Parliamentary Commissioner Act 1967<sup>3</sup> to have occurred, to be remedied with respect to the recipient<sup>4</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 In a report under the Parliamentary Commissioner Act 1967 s 10. As to the Parliamentary Commissioner for Administration see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 41 et seq.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 56. As to the meaning of 'recipient' see PARA 242.

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*(r) Certain Communications by Management Companies*

**305. Acquisition of interest in premises run by management companies.**

The financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> or solicited real time communication<sup>3</sup> if it relates to a specified investment<sup>4</sup> which is issued, or to be issued, by a management company<sup>5</sup>, and is to be acquired by any person in connection with the acquisition of an interest in the premises in question<sup>6</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'non-real time communication' see PARA 242.

3 As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

4 Is an investment falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 14 (shares or stock in the share capital of any body corporate or any unincorporated body): see PARA 241.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 58(2)(a). 'Management company' means a company established for the purpose of (1) managing the common parts or fabric of premises used for residential or business purposes; or (2) supplying services to such premises: art 58(1).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 58(2)(b).

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### *(s) Communications in regard to Employee Share Schemes*

#### **306. Participation in employee share schemes.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> by a person ('C'), a member of the same group as C or a relevant trustee<sup>3</sup> where the communication is for the purposes of an employee share scheme and relates to any of certain specified investments<sup>4</sup> issued by C<sup>5</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 'Relevant trustee' means a person who, in pursuance of an actual or proposed employee share scheme, holds as trustee or will hold as trustee investments issued by C: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 60(3). 'Employee share scheme', in relation to any investments issued by C, means arrangements made or to be made by C or by a person in the same group as C to enable or facilitate:

352 (1) transactions in the investments specified in art 60(1)(a) or (b) (see note 4 heads (1), (2)) between or for the benefit of:

48. (a) the bona fide employees or former employees of C or of another member of the same group as C (art 60(2)(a)(i));

48

49. (b) the wives, husbands, widows, widowers, civil partners, surviving civil partners or children or step-children under the age of 18 of such employees or former employees (art 60(2)(a)(ii) (amended by SI 2005/3392)); or

49

353 (2) the holding of those investments by, or for the benefit of, such persons (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 60(2)(b)).

4 le (1) investments falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 14 (shares or stock in the share capital of any body corporate or unincorporated body) (see PARA 241) or Sch 1 para 15 (instruments creating or acknowledging indebtedness) (see PARA 241) (art 60(1)(a)); (2) investments falling within Sch 1 para 17 (instruments giving entitlements to investments) (see PARA 241) or Sch 1 para 18 (certificates representing certain securities) (see PARA 241) so far as relating to any investments within head (1) above (art 60(1)(b)); or (3) investments falling within Sch 1 para 21 (options) (see PARA 241) or Sch 1 para 27 (rights or interests in other investments) (see PARA 241) so far as relating to any investments within head (1) or head (2) above (art 60(1)(c)).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 60(1).

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### *(t) Communications in regard to Goods and Services*

#### **307. Sale of goods and supply of services.**

The financial promotion restriction<sup>1</sup> does not apply to any non-real time communication<sup>2</sup> or any solicited real time communication<sup>3</sup> made by a supplier<sup>4</sup> to a customer<sup>5</sup> of his for the purposes of, or in connection with, the sale of goods or supply of services or a related sale or supply<sup>6</sup>. However, this exemption does not apply if the communication relates to a qualifying contract of insurance<sup>7</sup> or units<sup>8</sup> in a collective investment scheme<sup>9</sup>, or relates to any rights to or interests in such contract or such units<sup>10</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'non-real time communication' see PARA 242.

3 As to the meanings of 'solicited real time communication' and 'real time communication' see PARA 242.

4 'Supplier' means a person whose main business is to sell goods or supply services and not to carry on controlled activities falling within any of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 paras 3-7 (see PARAS 229-234) and, where the supplier is a member of a group, also means any other member of that group: art 61(1). As to the sale of goods and the supply of services generally see **SALE OF GOODS AND SUPPLY OF SERVICES**.

5 'Customer' means a person, other than an individual, to whom a supplier sells goods or supplies services, or agrees to do so, and, where the customer is a member of a group, also means any other member of that group: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 61(1).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 61(2). 'A related sale or supply' means a sale of goods or supply of services to the customer otherwise than by the supplier, but for or in connection with the same purpose as the sale or supply mentioned in art 61(1) (see notes 4-5): art 61(1).

7 As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1).

8 As to the meaning of 'units', in a collective investment scheme, see PARA 603; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 61(3)(a).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 61(3)(b). The investments referred to in the text are those falling within Sch 1 para 27 (see PARA 241) so far as relating to investments within art 61(3)(a).

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### *(u) Communications in regard to Corporate Sales, Takeovers*

#### **308. Sale of body corporate.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> by, or on behalf of, a body corporate, a partnership, a single individual or a group of connected individuals<sup>3</sup> which relates to a qualifying transaction<sup>4</sup>. A transaction is a qualifying transaction if:

706 (1) it is a transaction to acquire or dispose of shares in a body corporate other than an open-ended investment company, or is entered into for the purposes of such an acquisition or disposal<sup>5</sup>; and either

707 (2) the following conditions are met<sup>6</sup>:

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138. (a) the shares consist of or include 50 per cent or more of the voting shares<sup>7</sup> in the body corporate<sup>8</sup>; or

139. (b) the shares, together with any already held by the person acquiring them, consist of or include at least that percentage of such shares<sup>9</sup>; and

140. (c) in either case, the acquisition or disposal is, or is to be, between parties each of whom is a body corporate, a partnership, a single individual or a group of connected individuals<sup>10</sup>; or

77

708 (3) those conditions are not met, but the object of the transaction may nevertheless reasonably be regarded as being the acquisition of day to day control of the affairs of the body corporate<sup>11</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 'A group of connected individuals' means:

354 (1) in relation to a party disposing of shares in a body corporate, a single group of persons each of whom is:

50. (a) a director or manager of the body corporate (Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 62(4)(a)(i));  
50

51. (b) a close relative of any such director or manager (art 62(4)(a)(ii)); or  
51

52. (c) a person acting as trustee for any person falling within head (a) or (b) above (art 62(4)(a)(iii)); and  
52

355 (2) in relation to a party acquiring shares in a body corporate, a single group of persons each of whom is:

53. (a) a person who is or is to be a director or manager of the body corporate (art 62(4)(b)(i));  
53

54. (b) a close relative of any such person (art 62(4)(b)(ii)); or  
54

55. (c) a person acting as trustee for any person falling within head (a) or (b) above (art 62(4)(b)(iii)).  
55

As to the meaning of 'close relative' see PARA 242 note 19.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 62(1).

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 62(2)(a).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 62(2)(b)(i).

7 'Voting shares', in relation to a body corporate, means shares carrying voting rights attributable to share capital which are exercisable in all circumstances at any general meeting of that body corporate: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 62(5).

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 62(3)(a).

9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 62(3)(b).

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 62(3)(c).

11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 62(2)(b)(ii).

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### **309. Takeovers of relevant unlisted companies.**

If the following two requirements are met, the financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is communicated<sup>3</sup> in connection with a takeover offer for a relevant unlisted company<sup>4</sup>.

The first requirement is that the communication is accompanied by specified material<sup>5</sup>, namely:

709 (1) an indication of the identity of the offeror and, if the offer is being made on behalf of another person, the identity of that person<sup>6</sup>;

- 710 (2) an indication of the fact that the terms of the offer are recommended by all directors of the company other than (if that is the case) any director who is the offeror or a director of the offeror<sup>7</sup>;
- 711 (3) an indication to the effect that any person who is in any doubt about the invitation or inducement should consult a person authorised under the Financial Services and Markets Act 2000<sup>8</sup>;
- 712 (4) an indication that, except in so far as the offer may be totally withdrawn and all persons released from any obligation incurred under it, the offer is open for acceptance by every recipient for the period of at least 21 days beginning with the day after the day on which the invitation or inducement in question was first communicated to recipients of the offer<sup>9</sup>;
- 713 (5) an indication of the date on which the invitation or inducement was first communicated to the recipients of the offer<sup>10</sup>;
- 714 (6) an indication that the acquisition of the shares or debentures to which the offer relates is not conditional upon the recipients approving or consenting to any payment or other benefit being made or given to any director or former director of the company in connection with, or as compensation or consideration for:
- 78
141. (a) his ceasing to be a director<sup>11</sup>;
142. (b) his ceasing to hold any office held in conjunction with any directorship<sup>12</sup>; or
143. (c) in the case of a former director, his ceasing to hold any office which he held in conjunction with his former directorship and which he continued to hold after ceasing to be a director<sup>13</sup>;
- 79
- 715 (7) an indication of the place where additional material may be inspected<sup>14</sup>;
- 716 (8) the audited accounts of the company in respect of the latest accounting reference period for which the period for laying and delivering accounts has passed<sup>15</sup> or, if accounts in respect of a later accounting reference period have been delivered, as shown in those accounts and not the earlier accounts<sup>16</sup>;
- 717 (9) advice to the directors of the company on the financial implications of the offer which is given by a competent person who is independent of and who has no substantial financial interest in the company or the offeror, being advice which gives the opinion of that person in relation to the offer<sup>17</sup>;
- 718 (10) an indication by the directors of the company, acting as a board, of the following matters:
- 80
144. (a) whether or not there has been any material change in the financial position or prospects of the company since the end of the latest accounting reference period in respect of which audited accounts have been delivered to the relevant registrar of companies under the relevant legislation<sup>18</sup>;
145. (b) if there has been any such change, the particulars of it<sup>19</sup>;
146. (c) any interests, in percentage terms, which any of them have in the shares in or debentures of the company and which are required to be entered in the register kept by the company<sup>20</sup>;
147. (d) any interests, in percentage terms, which any of them have in the shares in or debentures of any offeror which is a body corporate and which, if the director were a director of the offeror, would, in the case of a company within the meaning of the Companies Acts or the Companies (Northern Ireland) Order 1986<sup>21</sup>, be required to be entered in the register kept by the offeror<sup>22</sup> and, in any other case, be required to be so entered if the offeror were such a company<sup>23</sup>;
- 81
- 719 (11) an indication of any material interest which any director has in any contract entered into by the offeror and in any contract entered into by any member of any group of which the offeror is a member<sup>24</sup>;



- 720 (12) an indication as to whether or not each director intends to accept the offer in respect of his own beneficial holdings in the company<sup>25</sup>;
- 721 (13) in the case of an offeror which is a body corporate and the shares in or debentures of which are to be the consideration or any part of the consideration for the offer, an indication by the directors of the offeror that the information concerning the offeror and those shares or debentures contained in the document is correct<sup>26</sup>;
- 722 (14) if the offeror is making the offer on behalf of another person:
- 82
148. (a) an indication by the offeror as to whether or not he has taken any steps to ascertain whether that person will be in a position to implement the offer<sup>27</sup>;
149. (b) if he has taken any such steps, an indication by him as to what those steps are<sup>28</sup>; and
150. (c) the offeror's opinion as to whether that person will be in a position to implement the offer<sup>29</sup>;
- 83
- 723 (15) an indication that each of the following: (a) each of the directors of the company; (b) the offeror; and (c) if the offeror is a body corporate, each of the directors of the offeror, is responsible for the required information related to the offer and the accompanying information in so far as it relates to themselves or their respective bodies corporate and that, to the best of their knowledge and belief (having taken all reasonable care to ensure that such is the case) the information is in accordance with the facts and that no material fact has been omitted<sup>30</sup>;
- 724 (16) the particulars of: (a) all shares in or debentures of the company; and (b) all investments relating to instruments giving entitlements to investments<sup>31</sup>, units in a collective investment scheme<sup>32</sup> or options<sup>33</sup> so far as relating to shares in or debentures of the company, which are held by or on behalf of the offeror or each offeror, if there is more than one, or if none are so held an appropriate negative statement<sup>34</sup>;
- 725 (17) an indication as to whether or not the offer is conditional upon acceptance in respect of a minimum number of shares or debentures being received and, if the offer is so conditional, what the minimum number is<sup>35</sup>;
- 726 (18) where the offer is conditional upon acceptances, an indication of the date which is the latest date on which it can become unconditional<sup>36</sup>;
- 727 (19) if the offer is, or has become, unconditional an indication of the fact that it will remain open until further notice and that at least 14 days' notice will be given before it is closed<sup>37</sup>;
- 728 (20) an indication as to whether or not, if circumstances arise in which an offeror is able compulsorily to acquire shares of any dissenting minority<sup>38</sup>, that offeror intends to acquire those shares<sup>39</sup>;
- 729 (21) if shares or debentures are to be acquired for cash, an indication of the period within which the payment will be made<sup>40</sup>;
- 730 (22) subject to the proviso mentioned below<sup>41</sup>, if the consideration or any part of the consideration for the shares or debentures to be acquired is shares in or debentures of an offeror: (a) an indication of the nature and particulars of the offeror's business, its financial and trading prospects and its place of incorporation<sup>42</sup>; and (b) the following information, in respect of any offeror which is a body corporate and in respect of the company, for the period of five years immediately preceding the date on which the invitation or information in question was first communicated to recipients of the offer: turnover, profit on ordinary activities before and after tax, extraordinary items, profits and loss and the rate per cent of any dividends paid, adjusted as appropriate to take account of relevant changes over the period and the total amount absorbed thereby<sup>43</sup>; although in the case of a body corporate which was incorporated during the period of five years immediately preceding the date on which the invitation or information in question

was first communicated to recipients of the offer or which has, at any time during that period been exempt from the audit of accounts provisions of the Companies Acts or their Northern Ireland equivalent<sup>44</sup>, the information described in heads (a) and (b) above with respect to that body corporate need be included only in relation to the period since its incorporation or since it last ceased to be exempt from the obligation to appoint auditors, as the case may be<sup>45</sup>;

- 731 (23) particulars of the first dividend in which any such shares or debentures will participate and of the rights attaching to them (including in the case of debentures, rights as to interest) and of any restrictions on their transfer<sup>46</sup>;
- 732 (24) an indication of the effect of the acceptance on the capital and income position of the holder of the shares in or debentures of the company<sup>47</sup>;
- 733 (25) particulars of all material contracts (not being contracts which were entered into in the ordinary course of business) which were entered into by each of the company and the offeror during the period of two years immediately preceding the date on which the invitation or information in question was first communicated to recipients of the offer<sup>48</sup>;
- 734 (26) particulars of the terms on which shares in or debentures of the company acquired in pursuance of the offer will be transferred and any restrictions on their transfer<sup>49</sup>;
- 735 (27) an indication as to whether or not it is proposed, in connection with the offer, that any payment or other benefit be made or given to any director or former director of the company in connection with, or as compensation or consideration for: (a) his ceasing to be a director; (b) his ceasing to hold any office held in conjunction with any directorship; or (c) in the case of a former director, his ceasing to hold any office which he held in conjunction with his former directorship and which he continued to hold after ceasing to be a director, and, if such payments or benefits are proposed, details of each one<sup>50</sup>;
- 736 (28) an indication as to whether or not there exists any agreement or arrangement between: (a) the offeror or any person with whom the offeror has an agreement<sup>51</sup>; and (b) any director or shareholder of the company or any person who has been such a director or shareholder, at any time during the period of 12 months immediately preceding the date on which the invitation or inducement in question was first communicated to recipients of the offer, being an agreement or arrangement which is connected with or dependent on the offer and, if there is any such agreement or arrangement particulars of it<sup>52</sup>;
- 737 (29) an indication whether or not the offeror has reason to believe that there has been any material change in the financial position or prospects of the company since the end of the accounting reference period to which the accounts referred to in head (8) above<sup>53</sup> relate, and if the offeror has reason to believe that there has been such a change, the particulars of it<sup>54</sup>;
- 738 (30) an indication as to whether or not there is any agreement or arrangement whereby any shares or debentures acquired by the offeror in pursuance of the offer will or may be transferred to any other person, together with the names of the parties to any such agreement or arrangement and particulars of all shares and debentures in the company held by such persons<sup>55</sup>;
- 739 (31) particulars of any dealings: (a) in the shares in or debentures of the company; and (b) if the offeror is a body corporate, in the shares in or debentures of the offeror, which took place during the period of 12 months immediately preceding the date on which the invitation or inducement in question was first communicated to recipients of the offer and which were entered into by every person who was a director of either the company or the offeror during that period, and, if there have been no such dealings, an indication to that effect<sup>56</sup>;
- 740 (32) in a case in which the offeror is a body corporate which is required to deliver accounts<sup>57</sup>, particulars of the assets and liabilities as shown in its audited accounts in respect of the latest accounting reference period for which the period for laying

and delivering accounts under the relevant legislation has passed or, if accounts in respect of a later accounting reference period have been delivered under the relevant legislation, as shown in those accounts and not the earlier accounts<sup>58</sup>;

- 741 (33) where valuations of assets are given in connection with the offer, the basis on which the valuation was made and the names and addresses of the persons who valued them and particulars of any relevant qualifications<sup>59</sup>;
- 742 (34) if any profit forecast is given in connection with the offer, an indication of the assumptions on which the forecast is based<sup>60</sup>.

The second requirement is that certain additional material<sup>61</sup> is available at a place in the United Kingdom<sup>62</sup> at all times during normal office hours for inspection free of charge<sup>63</sup>. The additional material is as follows:

- 743 (i) the memorandum and articles of association of the company<sup>64</sup>;
- 744 (ii) if the offeror is a body corporate, the memorandum and articles of association of the offeror or, if there is no such memorandum and articles, any instrument<sup>65</sup> constituting or defining the constitution of the offeror and, in either case, if the relevant document is not written in English, a certified translation in English<sup>66</sup>;
- 745 (iii) in the case of a company that does not fall within head (v) below:
- 84 151. (A) the audited accounts of the company in respect of the last two accounting reference periods for which the laying and delivering of accounts<sup>67</sup> has passed<sup>68</sup>; and
152. (B) if accounts have been delivered to the relevant registrar of companies, in respect of a later accounting reference period, a copy of those accounts<sup>69</sup>;
- 85 746 (iv) in the case of an offeror which is required to deliver accounts to the registrar of companies and which does not fall within head (v) below:
- 86 153. (A) the audited accounts of the offeror in respect of the last two accounting reference periods for which the laying and delivering of accounts<sup>70</sup> has passed<sup>71</sup>; and
154. (B) if accounts have been delivered to the relevant registrar of companies in respect of a later accounting reference period, a copy of those accounts<sup>72</sup>;
- 87 747 (v) in the case of a company or an offeror: (A) which was incorporated during the period of three years immediately preceding the date on which the invitation or inducement in question was first communicated to recipients of the offer; or (B) which has, at any time during that period, been exempt from the audit of accounts provisions of the Companies Acts or their Northern Ireland equivalent<sup>73</sup>, the information described in whichever is relevant of head (iii) or (iv) above<sup>74</sup> with respect to that body corporate need be included only in relation to the period since its incorporation or since it last ceased to be exempt from the obligation to appoint auditors, as the case may be<sup>75</sup>;
- 748 (vi) all existing contracts of service entered into for a period of more than one year between the company and any of its directors and, if the offeror is a body corporate, between the offeror and any of its directors<sup>76</sup>;
- 749 (vii) any report, letter, valuation or other document any part of which is exhibited or referred to in the information required to be made available relating to the offer or as accompanying material<sup>77</sup>;
- 750 (viii) if the offer document contains any statement purporting to have been made by an expert, that expert's written consent to the inclusion of that statement<sup>78</sup>;
- 751 (ix) all material contracts (if any) of the company and of the offeror (not, in either case, being contracts which were entered into in the ordinary course of business) which were entered into during the period of two years immediately preceding the

date on which the invitation or inducement in question was first communicated to recipients of the offer<sup>79</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'communicate' see PARA 242.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 64(1). In arts 63, 64, 65 (see PARA 310) and art 66 (see PARA 311), a 'relevant unlisted company', in relation to a takeover offer, means a company which is an unlisted company at the time that the offer is made and which has been an unlisted company throughout the period of ten years immediately preceding the date of the offer: art 63(1). As to the meaning of 'unlisted company' see PARA 295 note 9.

In arts 63-66 references to a takeover offer for a relevant unlisted company are references to an offer which meets the requirements of Sch 4 Pt I and which is an offer:

- 356 (1) for all the shares in, or all the shares comprised in the equity or non-equity share capital of, a relevant unlisted company (other than any shares already held by or on behalf of the person making the offer) (art 63(2)(a)); or
- 357 (2) for all the debentures of such a company (other than any debentures already held by or on behalf of the person making the offer) (art 63(2)(b)).

Shares in or debentures of an unlisted company are to be regarded as being held by or on behalf of the person making the offer if the person who holds them, or on whose behalf they are held, has agreed that an offer should not be made in respect of them: art 63(3).

The terms of the offer must be recommended by all the directors of the company other than any director who: (a) is the person by whom, or on whose behalf, an offer is made ('offeror'); or (b) a director of the offeror: Sch 4 para 1(a), (b).

In relation to an offer for debentures or for non-equity share capital where, at the date of the offer, shares carrying 50% or less of the voting rights attributable to the equity share capital are held by or on behalf of the offeror, the offer must include or be accompanied by an offer made by the offeror for the rest of the shares comprised in the equity share capital: Sch 4 para 2(1), (2).

In relation to an offer for shares comprised in the equity share capital where, at the date of the offer, shares which carry 50% or less of the categories of voting rights described in Sch 4 para 3(3) are held by or on behalf of the offeror, it must be a condition of the offer that sufficient shares will be acquired or agreed to be acquired by the offeror pursuant to or during the offer so as to result in shares carrying more than 50% of one or both categories of relevant voting rights being held by him or on his behalf: Sch 4 para 3(1), (2). The categories of voting rights are voting rights exercisable in general meetings of the company and voting rights attributable to the equity share capital: Sch 4 para 3(3).

The offer must be open for acceptance by every recipient for the period of at least 21 days beginning with the day after the day on which the invitation or inducement in question was first communicated to recipients of the offer: Sch 4 para 4(1). However, this does not apply if the offer is totally withdrawn and all persons released from any obligation incurred under it: Sch 4 para 4(2). As to the meaning of 'recipient' see PARA 242.

The acquisition of the shares or debentures to which the offer relates must not be conditional upon the recipients approving or consenting to any payment or other benefit being made or given to any director or former director of the company in connection with, or as compensation or consideration for:

- 358 (i) his ceasing to be a director (Sch 4 para 5(a));
- 359 (ii) his ceasing to hold any office held in conjunction with any directorship (Sch 4 para 5(b)); or
- 360 (iii) in the case of a former director, his ceasing to hold any office which he held in conjunction with his former directorship and which he continued to hold after ceasing to be a director (Sch 4 para 5(c)).

The consideration for the shares or debentures must be cash, or in the case of an offeror which is a body corporate other than an open-ended investment company, either cash or shares in, or debentures of, the body corporate or any combination of such cash, shares or debentures: Sch 4 para 6.

- 5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 64(2). The material referred to in the text is that listed in Sch 4 Pt II (see heads (1)-(34) in the text).
- 6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 7.
- 7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 8.
- 8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 9. As to authorised persons see PARA 314 et seq.
- 9 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 10.
- 10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 11.
- 11 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 12(a).
- 12 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 12(b).
- 13 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 12(c).
- 14 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 13. The additional material referred to in the text is that listed in Sch 4 Pt III (see heads (i)-(ix) in the text).
- 15 Ie under the Companies Act 1985 (see **COMPANIES** vol 15 (2009) PARA 708 et seq) (as to replacement provisions see also the Companies Act 2006) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6).
- 16 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 14.
- 17 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 15.
- 18 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 16(a).
- 19 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 16(b).
- 20 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 16(c). The register referred to is one kept by the company under the Companies Act 2006 ss 808, 809 (formerly the Companies Act 1985 s 325) (see **COMPANIES**) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 333.
- 21 Ie the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6).
- 22 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 16(d)(i). The register referred to in the text is one under the Companies Act 2006 ss 808, 809 (formerly the Companies Act 1985 s 325) (see **COMPANIES**) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 333.
- 23 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 16(d)(ii).
- 24 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 17.
- 25 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 18.
- 26 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 19.
- 27 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 20(a).

- 28 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 20(b).
- 29 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 20(c).
- 30 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 21. The information related to the offer is required under Sch 4 Pt I (see note 4). The accompanying information is required by Sch 4 Pt II (see note 5).
- 31 Ie investments falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 17: see **PARA 241**.
- 32 Ie investments falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 19: see **PARA 241**.
- 33 Ie investments falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 21: see **PARA 241**.
- 34 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 22.
- 35 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 23.
- 36 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 24.
- 37 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 25.
- 38 Ie under the Companies Act 2006 Pt 28 Ch 3 (ss 974-991): see **COMPANIES** vol 15 (2009) **PARA 1511-1520**).
- 39 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 26 (amended by SI 2007/1093).
- 40 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 27.
- 41 Ie subject to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 28(2).
- 42 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 28(1)(a).
- 43 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 28(1)(b).
- 44 Ie exempt from the provisions of the Companies Act 1985 Pt VII (ss 221-262) (prospectively repealed) by virtue of s 249A or s 249AA (both prospectively repealed) (see **COMPANIES**) (as to replacement provisions see the Companies Act 2006 ss 477, 480, 481, 1169) or exempt from the provisions of the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Pt VIII by virtue of art 257A or art 257AA.
- 45 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 28(2).
- 46 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 29.
- 47 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 30.
- 48 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 31.
- 49 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 32.
- 50 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 33.
- 51 Ie an agreement of the kind described in the Companies Act 2006 ss 824, 988 (formerly the Companies Act 1985 s 204) (see **COMPANIES**) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 216.
- 52 See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 34.

- 53    le the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 14.
- 54    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 35.
- 55    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 36.
- 56    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 37.
- 57    le under the Companies Act 1985 (see **COMPANIES** vol 15 (2009) PARA 708 et seq) (as to replacement provisions see also the Companies Act 2006) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6).
- 58    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 38.
- 59    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 39.
- 60    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 40.
- 61    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 64(3). The additional material referred to in the text is that listed in Sch 4 Pt III (see heads (i)-(ix) in the text).
- 62    As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 63    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 64(3).
- 64    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 41.
- 65    As to the meaning of 'instrument' see PARA 229 note 6.
- 66    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 42.
- 67    le under the Companies Act 1985 (see **COMPANIES** vol 15 (2009) PARA 708 et seq) (as to replacement provisions see also the Companies Act 2006) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6).
- 68    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 43(a).
- 69    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 43(b).
- 70    le under the Companies Act 1985 (see **COMPANIES** vol 15 (2009) PARA 708 et seq) (as to replacement provisions see also the Companies Act 2006) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6).
- 71    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 44(a).
- 72    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 44(b).
- 73    le exempt from the provisions of the Companies Act 1985 Pt VII (ss 221-262A) (repealed) by virtue of s 249A or s 249AA (repealed) (see now the Companies Act 2006 ss 477, 480, 481, 1169) (see **COMPANIES**) or exempt from the provisions of the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Pt VIII by virtue of art 257A or art 257AA.
- 74    le the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529.
- 75    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 45.
- 76    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 46.
- 77    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 47. The information relating to the offer is required by Sch 4 Pt I (see note 4) and the accompanying material is required by Sch 4 Pt II (see heads (1)-(34) in the text).
- 78    Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 48.

79 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 4 para 49.

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### **310. Takeovers of relevant unlisted companies: warrants etc.**

The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which:

- 752 (1) is communicated<sup>3</sup> at the same time as, or after, a takeover offer for a relevant unlisted company<sup>4</sup> is made<sup>5</sup>; and
- 753 (2) relates to the specified investments of warrants and other instruments entitling the holder to subscribe for any of certain other investments and certificates or other instruments conferring certain contractual and property rights<sup>6</sup> so far as relating to the shares in or debentures of the unlisted company<sup>7</sup> which are the subject of the offer<sup>8</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'communicate' see PARA 242.

4 As to the meaning of 'relevant unlisted company', and as to references to a takeover offer for a relevant unlisted company, see PARA 309 note 4. As to the meaning of 'unlisted company' see PARA 295 note 9.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 65(a).

6 I.e. investments falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 17 (see note 241) or Sch 1 para 18 (see PARA 241).

7 As to shares in or debentures of an unlisted company see PARA 309 note 4.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 65(b).

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### **311. Takeovers of relevant unlisted companies: application forms.**



The financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> made in connection with a takeover offer for a relevant unlisted company<sup>3</sup> which is a form of application for:

- 754 (1) shares in or debentures of the unlisted company<sup>4</sup>; or
- 755 (2) certain specified investments of warrants and other instruments entitling the holder to subscribe for any of certain other investments and certificates or other instruments conferring certain contractual and property rights<sup>5</sup> so far as relating to the shares in or debentures of the company which are the subject of the offer<sup>6</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264. As to the meaning of 'communication' see PARA 242.

3 As to the meaning of 'relevant unlisted company', and as to references to a takeover offer for a relevant unlisted company, see PARA 309 note 4. As to the meaning of 'unlisted company' see PARA 295 note 9.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 66(a). As to shares in or debentures of an unlisted company see PARA 309 note 4.

5 I.e. investments falling within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 17 (see note 241) or Sch 1 para 18 (see PARA 241).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 66(b).

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### *(v) Communications in regard to Pension Products*

#### **312. Pension products offered by employers.**

If the requirements set out in heads (1) to (4) below are met, the financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is made by an employer to an employee in relation to a group personal pension scheme<sup>3</sup> or a stakeholder pension scheme<sup>4</sup>.

The requirements referred to above are that:

- 756 (1) the employer will make a contribution to the group personal pension scheme or stakeholder pension scheme to which the communication relates in the event of the employee becoming a member of the scheme and the communication contains a statement informing the employee of this<sup>5</sup>;
- 757 (2) the employer has not received, and will not receive, any direct financial benefit from the scheme<sup>6</sup>;
- 758 (3) the employer notifies the employee in writing prior to the employee becoming a member of the scheme of the amount of the contribution that the employer will make to the scheme in respect of that employee<sup>7</sup>; and

759 (4) in the case of a non-real time communication<sup>8</sup>, the communication contains, or is accompanied by, a statement informing the employee of his right to seek advice from an authorised person<sup>9</sup> or an appointed representative<sup>10</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225); Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264.

3 'Group personal pension scheme' means arrangements administered on a group basis under a personal pension scheme and which are available to employees of the same employer or of employers within a group: Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 72(4). 'Personal pension scheme' means a scheme or arrangement which is not an occupational pension scheme or a stakeholder pension scheme and which is comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people: (1) on retirement; (2) on having reached a particular age; or (3) on termination of service in an employment: art 72(4) (definition substituted by SI 2006/1969). As to the meaning of 'stakeholder pension scheme' see the Welfare Reform and Pensions Act 1999 s 1 (see **SOCIAL SECURITY AND PENSIONS**); definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 72(4). As to the meaning of 'instrument' see PARA 229 note 6.

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 72(1). See also note 3.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 72(2)(a).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 72(2)(b). For the purposes of art 72(2)(b) 'direct financial benefit' includes: (1) any commission paid to the employer by the provider of the scheme; and (2) any reduction in the amount of the premium payable by the employer in respect of any insurance policy issued to the employer by the provider of the scheme: art 72(3).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 72(2)(c).

8 As to the meaning of 'non-real time communication' see PARA 242.

9 As to authorised persons see PARA 314 et seq.

10 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 72(2)(d). As to appointed representatives see PARA 346.

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### *(w) Communications by Advice Centres*

#### **313. Advice centres.**

If the requirements of heads (1) to (5) below are met, the financial promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup> which is made by a person in the course of carrying out his duties as an adviser for, or employee of, an advice centre<sup>3</sup>.

The requirements referred to above are that the communication relates to:

- 760 (1) qualifying credit<sup>4</sup>;
- 761 (2) rights under, or rights to or interests in rights under, qualifying contracts of insurance<sup>5</sup>;
- 762 (3) a child trust fund<sup>6</sup>;
- 763 (4) a regulated home reversion plan<sup>7</sup>; or
- 764 (5) a regulated home purchase plan<sup>8</sup>.

1 In the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, any reference to the financial promotion restriction is a reference to the restriction in the Financial Services and Markets Act 2000 s 21(1) (see PARA 225): Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, arts 2(1), 5.

2 As to the communications to which the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Pt VI (arts 27-73) applies see PARA 264.

3 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 73(1). 'Advice centre' means a body which: (1) gives advice which is free and in respect of which the centre does not receive any fee, commission or other reward; (2) provides debt advice as its principal financial services activity; and (3) in the case of a body which is not part of a local authority, holds adequate professional indemnity insurance or a guarantee providing comparable cover: art 73(3). 'Adequate professional indemnity insurance', in relation to an advice centre, means insurance providing cover that is adequate having regard to: (a) the claims record of the centre; (b) the financial resources of the centre; and (c) the right of clients of the centre to be compensated for loss arising from the negligent provision of financial advice: art 73(3). As to the meaning of 'local authority' see PARA 332 note 13; definition applied by art 73(3).

4 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 73(2)(a). As to the meaning of 'qualifying credit' see PARA 237 note 1.

5 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 73(2)(b) (amended by SI 2006/2383). As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4; definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 2(1).

6 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 73(2)(c). As to the meaning of 'child trust fund' see the Child Trust Funds Act 2004 s 1(2) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 564); definition applied by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 73(3).

7 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 73(2)(d) (art 73(2)(d), (e) added by SI 2006/2383). As to regulated home reversion plans see PARA 238.

8 Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, art 73(2)(e) (as added: see note 7). As to regulated home purchase plans see PARA 239.

## UPDATE

### 313 Advice centres

TEXT AND NOTES--Also, head (6) a regulated sale and rent back agreement (PARA 239): SI 2005/1529 art 73(2)(f) (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(i) Authorisation/A. IN GENERAL/314. Authorised persons.

## **(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES**

### **(i) Authorisation**

#### **A. IN GENERAL**

##### **314. Authorised persons.**

No person may carry on a regulated activity in the United Kingdom<sup>1</sup>, or purport to do so, unless he is an authorised person or an exempt person. This is referred to as the 'general prohibition'<sup>2</sup>. The following persons are authorised for the purposes of the Financial Services and Markets Act 2000:

- 765 (1) a person who has a Part IV permission<sup>3</sup> to carry on one or more regulated activities<sup>4</sup>;
- 766 (2) an EEA firm<sup>5</sup> qualifying for authorisation<sup>6</sup>;
- 767 (3) a Treaty firm qualifying for authorisation<sup>7</sup>;
- 768 (4) a person who is otherwise authorised by a provision of, or a provision made under, the Financial Services and Markets Act 2000<sup>8</sup>.

If a firm<sup>9</sup> is authorised, it is authorised to carry on the regulated activities concerned in the name of the firm<sup>10</sup> and its authorisation is not affected by any change in its membership<sup>11</sup>.

If an authorised firm is dissolved, its authorisation continues to have effect in relation to any individual or firm which succeeds to the business of the dissolved firm<sup>12</sup>.

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Financial Services and Markets Act 2000 s 19; and PARA 80. As to exempt persons see PARA 330. Note that the general prohibition does not apply to designated professional bodies carrying on exempt regulated activities under Pt XX (ss 325-333): see PARA 749 et seq. Such bodies are thus neither authorised nor exempt as such.

3 As to the meaning of 'Part IV permission' see PARA 348.

4 Financial Services and Markets Act 2000 s 31(1)(a). As to regulated activities see PARA 84 et seq.

5 As to the meaning of 'EEA firm' see PARA 315 note 1.

6 Financial Services and Markets Act 2000 s 31(1)(b). EEA firms are authorised under Sch 3: see PARA 315.

7 Financial Services and Markets Act 2000 s 31(1)(c). Treaty firms are authorised under Sch 4: see PARA 319.

8 Financial Services and Markets Act 2000 s 31(1)(d). 'Authorised person' means a person who is authorised for the purposes of the Financial Services and Markets Act 2000: ss 31(2), 417(1).

9 'Firm' means: (1) a partnership; or (2) an unincorporated association of persons: Financial Services and Markets Act 2000 s 32(4). 'Partnership' does not include a partnership which is constituted under the law of any place outside the United Kingdom and is a body corporate: s 32(5). As to partnerships generally see **PARTNERSHIP**. As to the meaning of 'body corporate' see PARA 86 note 11.

10 Financial Services and Markets Act 2000 s 32(1)(a).

11 Financial Services and Markets Act 2000 s 32(1)(b).

12 Financial Services and Markets Act 2000 s 32(2) (amended by SI 2007/1973). For the purposes of the Financial Services and Markets Act 2000 s 32, a firm is to be regarded as succeeding to the business of another individual or firm only if: (1) the members of the resulting firm are substantially the same as those of the former

firm; and (2) succession is to the whole or substantially the whole of the business of the former firm: s 32(3) (amended by SI 2007/1973).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(i) Authorisation/B. EXERCISE OF PASSPORT RIGHTS BY EEA FIRMS/315. Qualifying for authorisation.

## ***B. EXERCISE OF PASSPORT RIGHTS BY EEA FIRMS***

### **315. Qualifying for authorisation.**

Once an EEA firm<sup>1</sup> which is seeking to establish a branch in the United Kingdom<sup>2</sup> in exercise of an EEA right<sup>3</sup> satisfies the establishment conditions set out in heads (1) to (4) and heads (a) to (d) below, it qualifies for authorisation<sup>4</sup>; and once an EEA firm which is seeking to provide services in the United Kingdom in exercise of an EEA right satisfies the service conditions set out in heads (i) to (v) below, it qualifies for authorisation<sup>5</sup>. Note that there are special provisions about the use of a tied agent<sup>6</sup>.

If the firm is an EEA firm other than a reinsurance undertaking or an insurance intermediary<sup>7</sup>, the establishment conditions are that<sup>8</sup>:

- 769 (1) the Financial Services Authority<sup>9</sup> has received notice (a 'consent notice') from the firm's home state regulator<sup>10</sup> that it has given the firm consent to establish a branch in the United Kingdom<sup>11</sup>;
- 770 (2) the consent notice is given in accordance with the relevant Single Market Directive<sup>12</sup>, identifies the activities to which consent relates<sup>13</sup> and includes such other information as may be prescribed<sup>14</sup>;
- 771 (3) in the case of an investment firm<sup>15</sup>, the Authority has given the firm notice for the purposes of this provision or two months have elapsed beginning with the date when the home state regulator gave the consent notice<sup>16</sup>; and
- 772 (4) in the case of a credit institution, a financial institution, an undertaking pursuing the activity of direct insurance or a management company<sup>17</sup>, the firm has been informed of the applicable provisions<sup>18</sup> or two months have elapsed beginning with the date when the Authority received the consent notice<sup>19</sup>.

If the EEA firm is an insurance intermediary<sup>20</sup>, the establishment conditions are that:

- 773 (a) the firm has given its home state regulator notice of its intention to establish a branch in the United Kingdom<sup>21</sup>;
- 774 (b) the Authority has received notice (a 'regulator's notice') from the firm's home state regulator that the firm intends to establish a branch in the United Kingdom<sup>22</sup>;
- 775 (c) the firm's home state regulator has informed the firm that the regulator's notice has been sent to the Authority<sup>23</sup>; and
- 776 (d) one month has elapsed beginning with the date on which the firm's home state regulator informed the firm that the regulator's notice has been sent to the Authority<sup>24</sup>.

If the Authority has received a consent notice, it must prepare for the firm's supervision<sup>25</sup>, except in the case of an investment firm<sup>26</sup>, notify the firm of the applicable provisions (if any)<sup>27</sup>

and, if the firm is an undertaking pursuing the activity of direct insurance<sup>28</sup>, notify its home state regulator of the applicable provisions (if any)<sup>29</sup>.

The service conditions are that:

- 777 (i) the firm has given its home state regulator notice of its intention to provide services in the United Kingdom (a 'notice of intention')<sup>30</sup>;
- 778 (ii) if the firm is an investment firm, an undertaking pursuing the activity of direct insurance, an insurance intermediary or a management company<sup>31</sup>, the Authority has received notice (a 'regulator's notice') from the firm's home state regulator containing such information as may be prescribed<sup>32</sup>;
- 779 (iii) if the firm is a credit institution<sup>33</sup>, and is seeking to provide services in exercise of the right under the Markets in Financial Instruments Directive<sup>34</sup>, the Authority has received notice (a 'regulator's notice') from the firm's home state regulator stating that the firm intends to exercise that right in the United Kingdom<sup>35</sup>;
- 780 (iv) if the firm is an undertaking pursuing the activity of direct insurance or a management company or an insurance intermediary<sup>36</sup>, its home state regulator has informed it that the regulator's notice has been sent to the Authority<sup>37</sup>; and
- 781 (v) if the firm is an insurance intermediary<sup>38</sup>, one month has elapsed beginning with the date on which the firm's home state regulator informed the firm that the regulator's notice has been sent to the Authority<sup>39</sup>.

If the Authority has received a regulator's notice or, where none is required<sup>40</sup>, has been informed of the firm's intention to provide services in the United Kingdom, it must (unless the firm is an insurance intermediary)<sup>41</sup> prepare for the firm's supervision<sup>42</sup> and notify the firm of the applicable provisions<sup>43</sup> (if any)<sup>44</sup>.

On qualifying for authorisation<sup>45</sup>, a firm has, in respect of each permitted activity which is a regulated activity<sup>46</sup>, permission to carry it on through its United Kingdom branch (if it satisfies the establishment conditions) or by providing services in the United Kingdom (if it satisfies the service conditions)<sup>47</sup>. The permission is to be treated as being on terms equivalent to those appearing from the consent notice, regulator's notice or notice of intention<sup>48</sup>.

If (A) a management company<sup>49</sup> qualifies for authorisation<sup>50</sup>; but (B) the Authority determines that the way in which the firm intends to invite persons in the United Kingdom to become participants in any collective investment scheme<sup>51</sup> which that firm manages does not comply with the law in force in the United Kingdom<sup>52</sup>, the Authority may give a notice to the firm and the firm's home state regulator of the Authority's determination under head (B) above<sup>53</sup>. Heads (A) and (B) above do not give a firm to which the Authority has given (and not withdrawn) such a notice<sup>54</sup> permission to carry on through the firm's United Kingdom branch the regulated activity of dealing in<sup>55</sup> units<sup>56</sup> in the collective investment schemes which the firm manages<sup>57</sup>. Any such notice<sup>58</sup> must be given before the end of the period of two months beginning with the day on which the Authority received the consent notice<sup>59</sup>.

1 'EEA firm' means any of the following if the firm does not have its relevant office in the United Kingdom (see note 2):

- 361 (1) an investment firm (as defined in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.1) which is authorised (within the meaning of art 5) by its home state regulator (Financial Services and Markets Act 2000 Sch 3 para 5(a) (amended by SI 2007/126));
- 362 (2) a credit institution (as defined in Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) art 4.1) which is authorised (within the meaning of art 4.2) by its home state

regulator (Financial Services and Markets Act 2000 Sch 3 para 5(b) (Sch 3 para 5(b), (c) substituted by SI 2006/3221));

- 363 (3) a financial institution (as defined in the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)) art 4.5) which is a subsidiary of the kind mentioned in art 24 and which fulfils the conditions in that article (Financial Services and Markets Act 2000 Sch 3 para 5(c) (as so substituted));
- 364 (4) an undertaking pursuing the activity of direct insurance (within the meaning of the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 2 or First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 1) which has received authorisation under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 4 or the First Non-life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 6 from its home state regulator (Financial Services and Markets Act 2000 Sch 3 para 5(d) (amended by SI 2003/2066; SI 2004/3379));
- 365 (5) an undertaking pursuing the activity of reinsurance (within the meaning of the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83) art 2.1(a)) which has received authorisation under (or is deemed to be authorised in accordance with) the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1)) art 3 from its home state regulator (Financial Services and Markets Act 2000 Sch 3 para 5(da) (added by SI 2007/3253));
- 366 (6) an insurance intermediary (as defined in the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation) art 2.5), or a reinsurance intermediary (as defined in art 2.6) which is registered with its home state regulator under art 3 (Financial Services and Markets Act 2000 Sch 3 para 5(e) (added by SI 2003/1473)); or
- 367 (7) a management company (as defined in the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities) art 1a.2) which is authorised (within the meaning of art 5) by its home state regulator (Financial Services and Markets Act 2000 Sch 3 para 5(f) (added by SI 2003/2066)).

For these purposes, 'relevant office' means (a) in relation to a firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(e) (see head (5) above) which has a registered office, its registered office; (b) in relation to any other firm, its head office: Sch 3 para 5A (added by SI 2003/1473). 'Home state regulator' means the competent authority (within the meaning of the relevant Single Market Directive) of an EEA state (other than the United Kingdom) in relation to the EEA firm concerned: Financial Services and Markets Act 2000 Sch 3 para 9. As to the meaning of 'Single Market Directives' see PARA 86 note 6. 'EEA state' has the meaning given by the Interpretation Act 1978 Sc 1: Financial Services and Markets Act 2000 Sch 3 para 8 (substituted by SI 2007/108).

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 'EEA right' means the entitlement of a person to establish a branch, or provide services, in an EEA state other than that in which he has relevant office: (1) in accordance with the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) (the 'EC Treaty') as applied in the EEA; and (2) subject to the conditions of the relevant Single Market Directive : Financial Services and Markets Act 2000 Sch 3 para 7 (amended by SI 2003/1473). For these purposes, 'relevant office' means (a) in relation to a person who has a registered office and whose entitlement is subject to the conditions of the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation), his registered office; (b) in relation to any other person, his head office: Financial Services and Markets Act 2000 Sch 3 para 7A (added by SI 2003/1473).

4 Financial Services and Markets Act 2000 Sch 3 para 12(1).

An EEA firm which falls within Sch 3 para 5(da) (see note 1 head (5)) which establishes a branch in the United Kingdom, or provides services in the United Kingdom, in exercise of an EEA right qualifies for authorisation: Sch 3 para 12(5) (Sch 3 para 12(5), (6) added by SI 2007/3253). The Financial Services and Markets Act 2000 Sch 3 para 12(1), (2) (see the text to note 5) does not apply to an EEA firm falling within Sch 3 para 5(da): Sch 3 para 12(6) (as so added). See note 47.

Where an EEA firm is not qualified for authorisation under Sch 3 para 12, then: (1) the provisions of s 26 (agreements made by unauthorised persons) (see PARA 81) do not apply to an agreement entered into by the firm (Sch 3 para 16(1), (2)); (2) the provisions of s 27 (agreements made through unauthorised persons) (see PARA 81) do not apply to an agreement in relation to which the firm is a third party for the purposes of s 27 (Sch 3 para 16(3)); and (3) the provisions of s 29 (accepting deposits in breach of general prohibition) (see PARA 82) do not apply to an agreement in relation to which the firm is the deposit-taker (Sch 3 para 16(4)).

5 Financial Services and Markets Act 2000 Sch 3 para 12(2). See note 4.

6 If an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(a) (see note 1 head (1)) is seeking to use a tied agent established in the United Kingdom in connection with the exercise of an EEA right deriving from the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)), the Financial Services and Markets Act 2000 Sch 3 Pt II applies as if the firm were seeking to establish a branch in the United Kingdom: Financial Services and Markets Act 2000 Sch 3 para 12(3) (Sch 3 para 12(3), (4) added by SI 2007/126). 'Tied agent' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) art 4.1.25: Financial Services and Markets Act 2000 Sch 3 para 11A (added by SI 2007/126). However if (1) an EEA firm already qualifies for authorisation by virtue of the Financial Services and Markets Act 2000 Sch 3 para 12(1) (see the text to note 4); and (2) the EEA right which it is exercising derives from the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)), the Financial Services and Markets Act 2000 Sch 3 para 12(3) does not require the firm to satisfy the establishment conditions in respect of its use of the tied agent in question: Sch 3 para 12(4) (as so added).

7 Ie if the EEA firm falls within the Financial Services and Markets Act 2000 Sch 3 para 5(a), (b), (c), (d) or (f): see note 1 heads (1), (2), (3), (4), (7). See also note 4.

8 Financial Services and Markets Act 2000 Sch 3 para 13(1) (amended by SI 2003/1473; SI 2003/2066).

9 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP). As to the Handbook generally see PARA 22.

10 As to the meaning of 'home state regulator' see note 1.

11 Financial Services and Markets Act 2000 Sch 3 para 13(1)(a).

12 Financial Services and Markets Act 2000 Sch 3 para 13(1)(b)(i).

13 Financial Services and Markets Act 2000 Sch 3 para 13(1)(b)(ii).

14 Financial Services and Markets Act 2000 Sch 3 para 13(1)(b)(iii). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). The regulations may modify any provision of the Financial Services and Markets Act 2000 which is an applicable provision (see note 18) in its application to an EEA firm qualifying for authorisation: Sch 3 para 17(a). In exercise of this power the Treasury has made the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

The Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, prescribe that the following information must be included in the consent notice: reg 2(1).

In the case of an investment firm, the prescribed information is a statement that the firm is an investment firm (reg 2(2)(a)); the requisite details of the branch (reg 2(2)(b)); details of the accredited compensation scheme of which the firm is a member in accordance with European Parliament and EC Council Directive 97/9 (OJ L84, 26.3.97, p 22) on investor-compensation schemes (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(2)(c) (reg 2(2)(c) substituted and reg 2(2)(d) added by SI 2006/3385)); and a statement of whether the firm intends to use a tied agent established in the United Kingdom (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(2)(d) (as so added)). 'Investment firm' means an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(a) (see note 1 head (1)): Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2). 'Requisite details', in relation to a branch, means particulars of the programme of operations carried on, or to be carried on, from the branch, including a description of the particular EEA activities to be carried on, and of the structural organisation of the branch; the address in the EEA state in which the branch is, or is to be, established from which information about the business may be obtained; and the names of the managers of the business: reg 1(2). 'EEA activities', in relation to an EEA firm, means activities which the firm is seeking to carry on in the United Kingdom in exercise of an EEA right; and, in relation to a UK firm, means activities which the firm is seeking to carry on in another EEA state in exercise of an EEA right: reg 1(2). As to the meaning of 'UK firm' see PARA 323 note 4.



In the case of a management company, the prescribed information is (1) a statement that the firm is a management company (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(2A)(a) (reg 2(2A) added by SI 2003/2066)); (2) the requisite details of the branch (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(2A)(b)); and (3) details of any compensation scheme which is intended to protect the branch's investors (reg 2(2A)(b) (as so added)). A 'management company' is an EEA firm falling within the 2000 Act Sch 3 para 5(f) (see note 1 head (6)): Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2) (definition added by SI 2003/2066).

In the case of a credit institution, the information prescribed for inclusion in a consent notice is:

- 368 (a) a statement that the firm is a credit institution (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(3)(a));
- 369 (b) the requisite details of the branch (reg 2(3)(b));
- 370 (c) the amount of the firm's own funds (reg 2(3)(c)); and
- 371 (d) except where the firm is an electronic money institution, the sum of the capital requirements under the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)) art 75 (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(3)(d) (amended by SI 2002/765; SI 2006/3221)).

'Credit institution' means an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(b) (see note 1 head (2)): Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2). 'Own funds' has the meaning as defined in the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)) Title V, Chapter 2, Section 1: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(3)(c). 'Electronic money institution' means an electronic money institution as defined in EC Council Directive 2000/46 (OJ L275, 27.10.2000, p 36) on the taking up, pursuit of and prudential supervision of the business of electronic money institutions: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2) (definition added by SI 2002/765).

In the case of a financial institution, the prescribed information is:

- 372 (i) a statement that:
  - 56. (A) the firm is a financial institution (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(4)(a)(i));  
56
  - 57. (B) the firm is a subsidiary undertaking of a credit institution (other than an electronic money institution) which is authorised in the EEA state in question and which holds at least 90% of the voting rights in the firm (reg 2(4)(a)(ii));  
57
  - 58. (C) the firm carries on in that EEA state the EEA activities in question (reg 2(4)(a)(iii));  
58
  - 59. (D) the memorandum and articles of association, or other constituent instrument, of the firm permit it to carry on those activities (reg 2(4)(a)(iv));  
59
  - 60. (E) the consolidated supervision of the firm's parent undertaking (or, if more than one, any one of them) effectively includes supervision of the firm (reg 2(4)(a)(v));  
60
  - 61. (F) the firm's parent undertaking has guaranteed or, if more than one, they have jointly and severally guaranteed, the firm's obligations, with the consent of the home state regulator (reg 2(4)(a)(vi));  
61
  - 62. (G) the firm's business is being conducted in a prudent manner (reg 2(4)(a)(vii));  
62
- 373 (ii) the requisite details of the branch (reg 2(4)(b));
- 374 (iii) the amount of the firm's own funds (reg 2(4)(c)); and

- 375 (iv) the sum of the capital requirements under the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)) art 75 of the firm's parent undertaking (reg 2(4)(d) (substituted by SI 2006/3221)).

'Financial institution' means an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(c) (see note 1 head (3)): Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2). For the purposes of reg 2(4)(a)(ii) (see head (i)(b) above), any two or more credit institutions which are authorised in that EEA state and hold voting rights in the firm are to be treated as a single credit institution, and as being parent undertakings of the firm: reg 2(4)(a)(ii).

In the case of an insurance firm, the information prescribed for inclusion in a consent notice is:

- 376 (aa) a scheme of operations prepared in accordance with such requirements as may be imposed by the firm's home state regulator, setting out (amongst other things) the types of business to be carried on and the structural organisation of the branch (reg 2(5)(a));
- 377 (bb) the name of the firm's authorised agent (reg 2(5)(b));
- 378 (cc) the address in the United Kingdom from which information about the business may be obtained, and a statement that this is the address for service on the firm's authorised agent (reg 2(5)(c));
- 379 (dd) in the case of a firm which intends to cover relevant motor vehicle risks, a declaration by the firm that it has become a member of the Motor Insurers' Bureau (reg 2(5)(d)); and
- 380 (ee) a statement by the firm's home state regulator attesting that the firm has the minimum margin of solvency calculated in accordance with the appropriate provisions (reg 2(5)(e)).

'Insurance firm' means an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(d) (see note 1 head (4)): Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2). 'Authorised agent' means, in relation to an EEA firm or UK firm, an agent or employee of the firm who has authority to bind the firm in its relations with third parties, and to represent the firm in its relations with the Authority or the host state regulator (as the case may be) and with the courts in the United Kingdom or the EEA state concerned (as the case may be): reg 1(2). The Motor Insurers' Bureau is a company limited by guarantee and was incorporated under the Companies Act 1929 on 14 June 1946 (see further **INSURANCE**): Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(5)(d). The minimum margin of solvency is calculated in accordance with such of the following as are appropriate, namely the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) arts 16, 17, and the First Life Insurance Directive (ie EC Council Directive 79/267 (OJ L63, 13.3.79, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance art 1 or undertakings carrying on the reinsurance and retrocession activities referred to in EC Council Directive 64/225 (OJ P56, 4.4.64, p 878) on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession)) arts 18-20: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(5)(e).

15 Ie in the case of a firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(a): see note 1 head (1).

16 Financial Services and Markets Act 2000 Sch 3 para 13(1)(ba) (added by SI 2007/126).

17 Ie in the case of a firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(b), (c), (d) or (f): see note 1 heads (2), (3), (4), (6).

18 For these purposes, 'applicable provisions' means the host state rules with which the firm is required to comply when carrying on a permitted activity through a branch in the United Kingdom: Financial Services and Markets Act 2000 Sch 3 para 13(4). For these purposes, 'host state rules' means rules: (1) made in accordance with the relevant Single Market Directive; and (2) which are the responsibility of the United Kingdom (both as to implementation and as to supervision of compliance) in accordance with that Directive: Financial Services and Markets Act 2000 Sch 3 para 13(4). 'Permitted activity' means an activity identified in the consent notice or regulator's notice, as the case may be: Sch 3 para 13(4) (definition amended by SI 2003/1473).

19 Financial Services and Markets Act 2000 Sch 3 para 13(1)(c).

20 Ie if the firm falls within the Financial Services and Markets Act 2000 Sch 3 para 5(e): see note 1 head (5).

21 Financial Services and Markets Act 2000 Sch 3 para 13(1A)(a) (Sch 3 para 13(1A) added by SI 2003/1473).

22 Financial Services and Markets Act 2000 Sch 3 para 13(1A)(b) (as added: see note 21).

23 Financial Services and Markets Act 2000 Sch 3 para 13(1A)(c) (as added: see note 21).

24 Financial Services and Markets Act 2000 Sch 3 para 13(1A)(d) (as added: see note 21).

25 Financial Services and Markets Act 2000 Sch 3 para 13(2)(a).

26 Ie except if the firm falls within the Financial Services and Markets Act 2000 Sch 3 para 5(a): see note 1 head (1).

27 Financial Services and Markets Act 2000 Sch 3 para 13(2)(b) (amended by SI 2007/126). A notice under the Financial Services and Markets Act 2000 Sch 3 para 13(2)(b) or (c) must be given before the end of the period of two months beginning with the day on which the Authority received the consent notice: Sch 3 para 13(3).

28 Ie if the firm falls within the Financial Services and Markets Act 2000 Sch 3 para 5(d): see note 1 head (4).

29 Financial Services and Markets Act 2000 Sch 3 para 13(2)(c). See note 27.

30 Financial Services and Markets Act 2000 Sch 3 para 14(1)(a).

31 Ie if the firm falls within the Financial Services and Markets Act 2000 Sch 3 para 5(a), (d), (e) or (f): see note 1 heads (1), (4), (5), (6).

32 Financial Services and Markets Act 2000 Sch 3 para 14(1)(b). The following information is prescribed for inclusion in a regulator's notice given to the Authority by a firm's home state regulator: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3(1).

In the case of an investment firm (see note 14), the information prescribed for inclusion in the regulator's notice is: (1) a statement that the firm is an investment firm (reg 3(2)(a) (reg 3(2) amended by SI 2006/3385)); (2) particulars of the programme of operations to be carried on in the United Kingdom, including a description of the particular EEA activities to be carried on (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3(2)(b)); and (3) a statement of whether the firm intends to use a tied agent to provide services in the United Kingdom (reg 3(2)(c) (added by SI 2006/3385)). However, in the case of an investment firm exercising the right under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) art 31.5, the prescribed information is a statement that the firm is an investment firm, and a statement that the firm intends to exercise that right in the United Kingdom: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3(2ZA)(a), (b) (added by SI 2006/3385).

In the case of a management company (see note 14), the prescribed information is (a) a statement that the firm is a management company (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3(2A)(a) (reg 3(2A) added by SI 2003/2066)); (b) particulars of the programme of operations to be carried on in the United Kingdom including a description of the particular EEA activities to be carried on (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3(2A)(b) (as so added)); and (c) details of any compensation scheme which is intended to protect investors (reg 3(2A)(c) (as so added)).

In the case of an insurance firm (see note 14), the prescribed information is:

- 381 (i) a statement of the classes of business which the firm is authorised to carry on (reg 3(3)(a));
- 382 (ii) the name and address of the firm (reg 3(3)(b));
- 383 (iii) the nature of the risks or commitments which the firm proposes to cover in the United Kingdom (reg 3(3)(c));
- 384 (iv) in the case of a firm which intends to cover relevant motor vehicle risks: (A) the name and address of the claims representative (reg 3(3)(d)(i)); and (B) a declaration by the firm that it has become a member of the Motor Insurers' Bureau (reg 3(3)(d)(ii)); and
- 385 (v) a statement by the firm's home state regulator attesting that the firm has the minimum margin of solvency (reg 3(3)(e)).

For the purposes of head (i) above, 'authorised' means authorised in accordance with the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 6 or the First Life Insurance Directive (ie EC Council Directive 79/267 (OJ L63, 13.3.79, p 1)) art 6: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3(3)(a). For the purposes of head (iv) above, 'relevant motor vehicle risks' means risks of damage arising out of or in connection with the use of motor vehicles on land, including third party risks (but excluding carrier's liability): reg 1(2). For the purposes of head

(iv)(A) above, 'claims representative', in relation to a UK firm and an EEA state, means a person who has been designated as the firm's representative in that EEA state, and has authority: (aa) to act on behalf of the firm and to represent, or to instruct others to represent, the firm in relation to any matters giving rise to claims made against policies issued by the firm, to the extent that they cover motor vehicles risks situated in the EEA state; (bb) to pay sums in settlement of such claims (but not to settle such claims); and (cc) to accept service on behalf of the firm of proceedings in respect of such claims: reg 1(2). For the purposes of head (v) above, the minimum margin of solvency is calculated in accordance with such of the following as are appropriate, namely the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) arts 16, 17, and the First Life Insurance Directive (ie EC Council Directive 79/267 (OJ L63, 13.3.79, p 1)) arts 18-20: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3(3)(e).

In the case of an insurance intermediary, the prescribed information is that the firm intends to carry on insurance mediation or reinsurance mediation (in each case, within the meaning of the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation)) by providing services in the United Kingdom: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3(4) (added by SI 2003/1473). 'Insurance intermediary' means an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(e) (see note 1 head (5)): Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2) (definition amended by SI 2003/1473).

33    Ie if the firm falls within the Financial Services and Markets Act 2000 Sch 3 para 5(b): see head 1 note (2).

34    Ie the right under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) art 31.5.

35    Financial Services and Markets Act 2000 Sch 3 para 14(1)(ba) (added by SI 2007/126).

36    Ie if the firm falls within the Financial Services and Markets Act 2000 Sch 3 para 5(d) or (e): see note 1 heads (4), (5).

37    Financial Services and Markets Act 2000 Sch 3 para 14(1)(c) (amended by SI 2003/1473).

38    Ie if the firm falls within the Financial Services and Markets Act 2000 Sch 3 para 5(e): see note 1 head (5).

39    Financial Services and Markets Act 2000 Sch 3 para 14(1)(d) (added by SI 2003/1473).

40    Ie required by the Financial Services and Markets Act 2000 Sch 3 para 14(1).

41    Ie the firm falls within the Financial Services and Markets Act 2000 Sch 3 para 5(e): see note 1 head (5).

42    Financial Services and Markets Act 2000 Sch 3 para 14(2)(a) (Sch 3 para 14(2) amended by SI 2003/1473).

43    See note 18.

44    Financial Services and Markets Act 2000 Sch 3 para 14(2)(b). Schedule 3 para 14(2)(b) does not apply in the case of an investment firm (ie a firm falling with Sch 3 para 5(a)): Sch 3 para 14(2A) (added by SI 2007/126). A notice under the Financial Services and Markets Act 2000 Sch 3 para 14(2)(b) must be given before the end of the period of two months beginning on the day on which the Authority received the regulator's notice, or was informed of the firm's intention: Sch 3 para 14(3).

45    Ie as a result of the Financial Services and Markets Act 2000 Sch 3 para 12(1), (2) or (3): see the text and notes 4-6.

46    As to regulated activities see PARA 84 et seq.

47    Financial Services and Markets Act 2000 Sch 3 para 15(1) (amended by SI 2007/3253). The Financial Services and Markets Act 2000 Sch 3 para 15(1) is to be read subject to Sch 3 para 15A(3): Sch 3 para 15(1A) (added by SI 2003/2066).

A firm which qualifies for authorisation as a result of the Financial Services and Markets Act 2000 Sch 3 para 12(5) (see note 4) has, in respect of each permitted activity which is a regulated activity, permission to carry it on through its United Kingdom branch or by providing services in the United Kingdom: Sch 3 para 15(5) (Sch 3 para 15(5)-(7) added by SI 2007/3253). The permission is to be treated as being on terms equivalent to those appearing in the authorisation granted to the firm under the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83) art 3 by its home state regulator (its 'home authorisation'): Financial Services and Markets Act 2000 Sch 3 para 15(6) (as so added). For the purposes of

Sch 3 para 15(5), 'permitted activity' means an activity which the firm is permitted to carry on under its home authorisation: Sch 3 para 15(7) (as so added).

48 Financial Services and Markets Act 2000 Sch 3 para 15(2). The Consumer Credit Act 1974 ss 21, 39(1) (business requiring a licence under that Act: see **CONSUMER CREDIT**) do not apply in relation to the carrying on of a permitted activity which is Consumer Credit Act business by a firm which qualifies for authorisation as a result of the Financial Services and Markets Act 2000 Sch 3 para 12, unless the Office of Fair Trading has exercised the power conferred on it by s 203 (see PARA 464) in relation to the firm: Sch 3 para 15(3) (amended by the Enterprise Act 2002 Sch 25 para 40(1), (19)(a); and the Consumer Credit Act 2006 s 33(9)). As to the meaning of 'Consumer Credit Act business' see PARA 464 note 2; definition applied by the Financial Services and Markets Act 2000 Sch 3 para 15(4). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

49 Ie a firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(f): see note 1 head (6).

50 Financial Services and Markets Act 2000 Sch 3 para 15A(1)(a) (Sch 3 para 15A added by SI 2003/2066). The qualification is as a result of the Financial Services and Markets Act 2000 Sch 3 para 12(1) (establishment conditions satisfied): see the text and notes 1-4.

51 As to collective investment schemes see PARA 603 et seq.

52 Financial Services and Markets Act 2000 Sch 3 para 15A(1)(b) (as added: see note 50).

53 Financial Services and Markets Act 2000 Sch 3 para 15A(2) (as added: see note 50). Sections 264(4) and 265(1), (2), (4) (see PARA 672) apply to a notice given under Sch 3 para 15A(2) as they apply to a notice given by the Authority under s 264(2) (see PARA 672): Sch 3 para 15A(5) (as so added). If a decision notice is given to the firm under s 265(4) (see PARA 672), by virtue of Sch 3 para 15A(5), the firm may refer the matter to the Financial Services and Markets Tribunal: Sch 3 para 15A(6) (as so added). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

54 Ie a notice under the Financial Services and Markets Act 2000 Sch 3 para 15A(2).

55 The reference to 'dealing in' units in a collective investment scheme must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision and Sch 2 (see PARA 84 et seq): Sch 3 para 15A(7)(b) (as added: see note 50). As to the meaning of 'units' see PARA 603; definition applied by Sch 3 para 15A(7)(a) (as so added).

56 See note 55.

57 Financial Services and Markets Act 2000 Sch 3 para 15A(3) (as added: see note 50).

58 Ie any notice given under the Financial Services and Markets Act 2000 Sch 3 para 15A(2).

59 Financial Services and Markets Act 2000 Sch 3 para 15A(4) (as added: see note 50).

## UPDATE

### 315 Qualifying for authorisation

NOTE 1--Directive 85/611 replaced: see PARA 6.

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### 316. Changes in regard to management companies, credit and financial institutions, and investment firms.

A management company, credit institution or financial institution<sup>1</sup> which has established a branch in the United Kingdom<sup>2</sup> in exercise of an EEA right<sup>3</sup> must not make a change in the requisite details<sup>4</sup> of the branch, unless the relevant requirements<sup>5</sup> have been complied with<sup>6</sup>. Where the relevant requirements have been complied with, the firm's permission is to be treated as varied accordingly<sup>7</sup>. The Financial Services Authority must, as soon as practicable after receiving a notice from a management company, credit institution or financial institution<sup>8</sup>, inform the firm of any consequential changes in the applicable provisions<sup>9</sup>.

An investment firm<sup>10</sup> which has established a branch in the United Kingdom in exercise of an EEA right must not make a change in the requisite details of the branch, use (for the first time) any tied agent established in the United Kingdom, or cease to use tied agents established in the United Kingdom, unless the relevant requirements<sup>11</sup> have been complied with<sup>12</sup>. Where those requirements have been complied with, the firm's permission is to be treated as varied accordingly<sup>13</sup>.

A management company which is providing services in the United Kingdom in exercise of an EEA right must not make a change in any of the particulars of the programme of operations to be carried on in the United Kingdom<sup>14</sup>, unless the relevant requirements<sup>15</sup> have been complied with<sup>16</sup>. Where the relevant requirements have been complied with, the firm's permission is to be treated as varied accordingly<sup>17</sup>. The Authority must, as soon as practicable after receiving a notice from an investment firm<sup>18</sup>, inform the firm of any consequential changes in the applicable provisions<sup>19</sup>.

An investment firm which is providing services in the United Kingdom in exercise of an EEA right must not make a change in any of the programme of operations to be carried on in the United Kingdom<sup>20</sup>, use (for the first time) any tied agent to provide services in the United Kingdom, or cease to use tied agents to provide services in the United Kingdom, unless the relevant requirements<sup>21</sup> have been complied with<sup>22</sup>. Where those requirements have been complied with, the firm's permission is to be treated as varied accordingly<sup>23</sup>.

1 As to the meanings of 'management company', 'credit institution' and 'financial institution' see PARA 315 note 14.

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 As to the meaning of 'EEA right' see PARA 315 note 3.

4 As to the meaning of 'requisite details' see PARA 315 note 14.

5 For the purposes of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 4, the relevant requirements are that:

386 (1) the firm has given a notice to the Financial Services Authority and to its home state regulator stating the details of the proposed change (reg 4(3), (4)(a));

387 (2) the Authority has received from the home state regulator a notice stating those details (reg 4(3), (4)(b)); and

388 (3) either the Authority has informed the firm that it may make the change, or the period of one month beginning with the day on which the firm gave the Authority the notice mentioned in head (1) above has elapsed (reg 4(3), (4)(c)).

If the change is occasioned by circumstances beyond the firm's control the relevant requirements are that the firm has as soon as practicable (whether before or after the change) given a notice to the Authority and to its home state regulator, stating the details of the change: reg 4(3), (5). As to the meaning of 'home state regulator' see PARA 315 note 1.

As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

6 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 4(1) (amended by SI 2003/2066; SI 2006/3385). See also the Financial Services and Markets Act 2000 Sch 3 para

17(b), which provides that regulations may make provision as to any change (or proposed change) of a prescribed kind relating to an EEA firm or to an activity that it carries on in the United Kingdom and as to the procedure to be followed in relation to such cases. As to the meaning of 'EEA firm' see PARA 315 note 1.

7 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 4(2).

8 le under the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 4.

9 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 4(6). As to the meaning of 'applicable provisions' see PARA 315 note 18; definition applied by reg 5(4).

10 As to the meaning of 'investment firm' see PARA 315 note 14.

11 The requirements are that:

389 (1) the firm has given a notice to its home state regulator stating the details of the proposed change (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 4A(3)(a) (reg 4A added by SI 2006/3385)); and

390 (2) the period of one month beginning with the day on which the firm gave the notice has elapsed (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 4A(3)(b) (as so added)).

12 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 4A(1) (as added: see note 11). Regulation 4A(1) does not apply to a change occasioned by circumstances beyond the firm's control: reg 4A(4) (as so added).

13 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 4A(2) (as added: see note 11).

14 le the matters referred to in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3A(2)(b): see PARA 315 note 32.

15 For the purposes of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 5, the relevant requirements are that:

391 (1) the firm has given a notice to the Authority and to its home state regulator stating the details of the proposed change (reg 5(3)(a)); or

392 (2) if the change is occasioned by circumstances beyond the firm's control, it has as soon as practicable (whether before or after the change) given to the Authority and to its home state regulator a notice stating the details of the change (reg 5(3)(b)).

16 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 5(1A) (added by SI 2003/2066).

17 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 5(2).

18 le under the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 5.

19 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 5(4).

20 le the matters referred to in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3(2)(b): see PARA 315 note 32.

21 The requirements are that:

393 (1) the firm has given a notice to its home state regulator stating the details of the proposed change (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 5A(3)(a) (reg 5A added by SI 2006/3385)); and

394 (2) the period of one month beginning with the day on which the firm gave the notice has elapsed (reg 5A(3)(b) (as so added)).

22 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 5A(1) (as added: see note 21). Regulation 5A(1) does not apply to a change occasioned by circumstances beyond the firm's control: reg 5A(4) (as so added).

23 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 5A(2) (as added: see note 21).

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### **317. Changes in regard to insurance firms.**

An insurance firm<sup>1</sup> which has established a branch in the United Kingdom<sup>2</sup> in exercise of an EEA right<sup>3</sup> must not make a change in any of certain details of the firm's scheme of operations, the name of its authorised agent and the address in the United Kingdom from which information may be obtained<sup>4</sup> with respect to the branch, unless the relevant requirements<sup>5</sup> have been complied with<sup>6</sup>. Where the relevant requirements have been complied with, the firm's permission is to be treated as varied accordingly<sup>7</sup>.

An insurance firm which is providing services in the United Kingdom in exercise of an EEA right must not make a change in the name and address of the firm, the nature of its proposed risks and commitments in the United Kingdom or certain details in regard to any relevant motor vehicle risks<sup>8</sup>, unless the relevant requirements<sup>9</sup> have been complied with<sup>10</sup>. Where the relevant requirements have been complied with, the firm's permission is to be treated as varied accordingly<sup>11</sup>.

1 As to the meaning of 'insurance firm' see PARA 315 note 14.

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 As to the meaning of 'EEA right' see PARA 315 note 3.

4 I.e. the details referred to in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 2(5)(a)-(c): see PARA 315 note 14.

5 For the purposes of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 6, the relevant requirements are that:

395 (1) the firm has given a notice to the Financial Services Authority and to its home state regulator stating the details of the proposed change (reg 6(3), (4)(a));

396 (2) the Authority has received from the home state regulator a notice stating that it has approved the proposed change (reg 6(3), (4)(b));

397 (3) the period of one month beginning with the day on which the firm gave the Authority the notice mentioned in head (1) above has elapsed (reg 6(3), (4)(c)); and

398 (4) either: (a) a further period of one month has elapsed (reg 6(3), (4)(d)(i)); or (b) the Authority has informed the home state regulator of any consequential changes in the applicable provisions (reg 6(3), (4)(d)(ii)).

If the change is occasioned by circumstances beyond the firm's control, the relevant requirements are that the firm has as soon as practicable (whether before or after the change) given a notice to the Authority and to its home state regulator, stating the details of the change: reg 6(3), (5). As to the meaning of 'applicable provisions' see PARA 315 note 18; definition applied by reg 6(6)(b).



The Financial Services Authority must, as soon as practicable, acknowledge receipt of the documents sent under reg 6(4) or reg 6(5) (see reg 6(6)(a)) and, in the case of a notice under reg 6(5) inform the firm's home state regulator of any consequential changes in the applicable provisions (see reg 6(6)(b)).

As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP). As to the Handbook generally see PARA 22.

6 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 6(1). See also the Financial Services and Markets Act 2000 Sch 3 para 17(b), which provides that regulations may make provision as to any change (or proposed change) of a prescribed kind relating to an EEA firm or to an activity that it carries on in the United Kingdom and as to the procedure to be followed in relation to such cases. As to the meaning of 'EEA firm' see PARA 315 note 1.

7 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 6(2).

8 In any of the matters referred to in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 3(3)(b), (c) or (d): see PARA 315 note 32.

9 For the purposes of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 7, the relevant requirements are that:

399 (1) the firm has given a notice to its home state regulator stating the details of the proposed change (reg 7(3), (4)(a)); and

400 (2) the home state regulator has passed to the Authority the information contained in that notice (reg 7(3), (4)(b)).

If the change is occasioned by circumstances beyond the firm's control, the relevant requirements are that the firm has as soon as practicable (whether before or after the change) given to its home state regulator a notice stating the details of the change: reg 7(3), (5).

10 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 7(1).

11 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 7(2).

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### **318. Ceasing to be qualified for authorisation.**

An EEA firm<sup>1</sup> ceases to qualify for authorisation<sup>2</sup> if it ceases to be an EEA firm as a result of: (1) having its EEA authorisation<sup>3</sup> withdrawn<sup>4</sup>; or (2) ceasing to have an EEA right<sup>5</sup> in circumstances in which EEA authorisation is not required<sup>6</sup>.

At the request of an EEA firm, the Financial Services Authority<sup>7</sup> may give a direction cancelling its authorisation<sup>8</sup>. If an EEA firm has a Part IV permission<sup>9</sup>, it does not cease to be an authorised person merely because it ceases to qualify for authorisation<sup>10</sup>.

The Authority may, on an application by a financial institution<sup>11</sup> which is qualified for authorisation<sup>12</sup>, direct that the firm's qualification for authorisation<sup>13</sup> is cancelled from such date as may be specified in the direction<sup>14</sup>. The Authority must not give such a direction unless the firm has given notice to its home state regulator<sup>15</sup> and the Authority has agreed with the home state regulator that the direction should be given<sup>16</sup>. The Authority must, as soon as practicable, send a copy of the direction to the firm and to the firm's home state regulator<sup>17</sup>.

1 As to the meaning of 'EEA firm' see PARA 315 note 1.

- 2    Ie under the Financial Services and Markets Act 2000 s 31, Sch 3 Pt II: see PARA 315.
- 3    'EEA authorisation' means (1) in relation to an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(e) (see PARA 315 note 1), registration with its home state regulator under the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation) art 3; (2) in relation to any other EEA firm, authorisation granted to an EEA firm by its home state regulator for the purpose of the relevant Single Market Directive: Financial Services and Markets Act 2000 Sch 3 para 6 (substituted by SI 2003/1473). As to the meaning of 'home state regulator' see PARA 315 note 1. As to the meaning of 'Single Market Directives' see PARA 86 note 6.
- 4    Financial Services and Markets Act 2000 s 34(1)(a).
- 5    As to the meaning of 'EEA right' see PARA 315 note 3.
- 6    Financial Services and Markets Act 2000 s 34(1)(b).
- 7    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP). As to the Handbook generally see PARA 22.
- 8    Financial Services and Markets Act 2000 s 34(2). The authorisation referred to in the text is authorisation under Sch 3 Pt II: see PARA 315. Where an EEA firm which is qualified for authorisation under Sch 3 has ceased, or is to cease to carry on regulated activities in the United Kingdom and gives notice of that fact to the Authority, the notice is to be treated as a request for cancellation of the firm's qualification for authorisation under Sch 3 (and hence as a request under s 34(2)): see Sch 3 para 17(c); and the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 8. As to regulated activities see PARA 84 et seq.
- 9    As to the meaning of 'Part IV permission' see PARA 348.
- 10   Financial Services and Markets Act 2000 s 34(3). The authorisation referred to in the text is authorisation under Sch 3 Pt II: see PARA 315.
- 11   As to the meaning of 'financial institution' see PARA 315 note 14.
- 12   Ie under the Financial Services and Markets Act 2000 Sch 3.
- 13   Ie under the Financial Services and Markets Act 2000 Sch 3.
- 14   Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 9(1). The date specified in such a direction must not be earlier than the date requested in the application but, subject to that, is to be such date as may be agreed between the Authority and the firm's home state regulator: reg 9(3). A firm in respect of which such a direction has been given may (ie notwithstanding the Financial Services and Markets Act 2000 s 40(3) (see PARA 348)) apply for permission under s 40 (see PARA 348), to take effect not earlier than the date referred to in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 9(1): reg 9(5). Regulation 9 is made in exercise of the power in the Financial Services and Markets Act 2000 Sch 3 para 18, namely that regulations may provide that in prescribed circumstances an EEA firm may, on following the prescribed procedure, have its qualification for authorisation under Sch 3 cancelled and seek to become an authorised person by applying for a Part IV permission.
- 15   Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 9(2) (a).
- 16   Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 9(2) (b).
- 17   Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 9(4).

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## **C. TREATY FIRMS**

### **319. Qualifying for authorisation.**

Once a Treaty firm<sup>1</sup> which is seeking to carry on a regulated activity<sup>2</sup> satisfies the conditions set out in heads (1) to (3) below, it qualifies for authorisation<sup>3</sup>. The conditions are that:

- 782 (1) the firm has received home state authorisation (that is authorisation under the law of its home state) to carry on the regulated activity in question (the 'permitted activity')<sup>4</sup>;
- 783 (2) the relevant provisions of the law of the firm's home state: (a) afford equivalent protection<sup>5</sup>; or (b) satisfy the conditions laid down by a Community instrument for the co-ordination or approximation of laws, regulations or administrative provisions of member states relating to the carrying on of that activity<sup>6</sup>; and
- 784 (3) the firm has no EEA right<sup>7</sup> to carry on that activity in the manner in which it is seeking to carry it on<sup>8</sup>.

On qualifying for authorisation<sup>9</sup>, a Treaty firm has permission to carry on each permitted activity through its United Kingdom branch or by providing services in the United Kingdom<sup>10</sup>. The permission is to be treated as being on terms equivalent to those to which the firm's home state authorisation is subject<sup>11</sup>. If, on qualifying for authorisation, a firm has a Part IV permission<sup>12</sup> which includes permission to carry on a permitted activity, the Authority must give a direction cancelling the permission so far as it relates to that activity<sup>13</sup>.

A Treaty firm which qualifies for authorisation<sup>14</sup>, but is not carrying on in the United Kingdom the regulated activity, or any of the regulated activities, which it has permission to carry on there<sup>15</sup>, must at least seven days before it begins to carry on such a regulated activity, give the Authority written notice of its intention to do so<sup>16</sup>. A person who does not comply with this requirement<sup>17</sup> is guilty of an offence<sup>18</sup>. In proceedings against a person for such an offence it is a defence for him to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence<sup>19</sup>. A person is guilty of an offence if in, or in connection with, a notice given by him<sup>20</sup> he provides information which he knows to be false or misleading in a material particular<sup>21</sup> or he recklessly provides information which is false or misleading in a material particular<sup>22</sup>.

1 'Treaty firm' means a person: (1) whose head office is situated in an EEA state (its 'home state') other than the United Kingdom; and (2) which is recognised under the law of that state as its national: Financial Services and Markets Act 2000 s 425(2)(b), Sch 4 para 1. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 As to regulated activities see PARA 84 et seq.

3 Financial Services and Markets Act 2000 Sch 4 para 2. As to authorisation see PARA 314. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH) Ch 5. As to the Handbook generally see PARA 22.

4 Financial Services and Markets Act 2000 Sch 4 para 3(1)(a). A firm is not to be regarded as having home state authorisation unless its home state regulator has so informed the Financial Services Authority in writing: Sch 4 para 3(2). 'Home state regulator', in relation to a Treaty firm, means the competent authority of the firm's home state for the purpose of its home state authorisation: s 425(2)(c), Sch 4 para 1. In the Financial Services and Markets Act 2000 'home state authorisation' has the meaning given in Sch 4: s 425(2)(a) (see head (1) in the text). As to the Financial Services Authority see PARAS 4, 6 et seq.

A certificate issued by the Treasury that the provisions of the law of a particular EEA state afford equivalent protection in relation to the activities specified in the certificate is conclusive evidence of that fact: Sch 4 para

3(4). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 Financial Services and Markets Act 2000 Sch 4 para 3(1)(b)(i). Provisions afford equivalent protection if, in relation to the firm's carrying on of the permitted activity, they afford consumers protection which is at least equivalent to that afforded by or under the Financial Services and Markets Act 2000 in relation to that activity: Sch 4 para 3(3). 'Consumers' means persons who are consumers for the purposes of s 138 (see PARA 21): Sch 4 para 1.

6 Financial Services and Markets Act 2000 Sch 4 para 3(1)(b)(ii).

7 As to the meaning of 'EEA right' see PARA 315 note 3.

8 Financial Services and Markets Act 2000 Sch 4 para 3(1)(c).

9 Ie under the Financial Services and Markets Act 2000 Sch 4.

10 Financial Services and Markets Act 2000 Sch 4 para 4(1).

11 Financial Services and Markets Act 2000 Sch 4 para 4(2).

12 As to the meaning of 'Part IV permission' see PARA 348.

13 Financial Services and Markets Act 2000 Sch 4 para 4(3). The Authority need not give a direction under Sch 4 para 4(3) if it considers that there are good reasons for not doing so: Sch 4 para 4(4).

14 Financial Services and Markets Act 2000 Sch 4 para 5(1)(a).

15 Financial Services and Markets Act 2000 Sch 4 para 5(1)(b).

16 Financial Services and Markets Act 2000 Sch 4 para 5(2). If a Treaty firm to which Sch 4 para 5(2) applies has given notice under that provision, it need not give such a notice if it again becomes a firm to which Sch 4 para 5(2) applies: Sch 4 para 5(3). Section 51(1), (3), (6) (applications for Part IV permission) (see PARA 349) applies to a notice under Sch 4 para 5(2) as it applies to an application for a Part IV permission: Sch 4 para 5(4).

17 Ie a person who contravenes the Financial Services and Markets Act 2000 Sch 4 para 5(2): see the text to note 16.

18 Financial Services and Markets Act 2000 Sch 4 para 6(1). A person guilty of an offence under Sch 4 para 6 is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to a fine: Sch 4 para 6(4). As to the statutory maximum see PARA 56 note 24.

19 Financial Services and Markets Act 2000 Sch 4 para 6(2).

20 Ie under the Financial Services and Markets Act 2000 Sch 4 para 5(2).

21 Financial Services and Markets Act 2000 Sch 4 para 6(3)(a). See note 18.

22 Financial Services and Markets Act 2000 Sch 4 para 6(3)(b). See note 18.

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### **320. Ceasing to be qualified for authorisation.**

A Treaty firm<sup>1</sup> ceases to qualify for authorisation<sup>2</sup> if its home state authorisation<sup>3</sup> is withdrawn<sup>4</sup>.

At the request of a Treaty firm, the Financial Services Authority<sup>5</sup> may give a direction cancelling its authorisation<sup>6</sup>. If a Treaty firm has a Part IV permission<sup>7</sup>, it does not cease to be an authorised person<sup>8</sup> merely because it ceases to qualify for authorisation<sup>9</sup>.

- 1 As to the meaning of 'Treaty firm' see PARA 319 note 1.
- 2 le under the Financial Services and Markets Act 2000 s 31(1)(c), Sch 4: see PARA 319.
- 3 As to the meaning of 'home state authorisation' see PARA 273 head (1).
- 4 Financial Services and Markets Act 2000 s 35(1).
- 5 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.
- 6 Financial Services and Markets Act 2000 s 35(2). As to authorisation see PARA 314.
- 7 As to the meaning of 'Part IV permission' see PARA 348.
- 8 As to authorised persons see PARA 314.
- 9 Financial Services and Markets Act 2000 s 35(3).

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## **D. PERSONS CONCERNED IN COLLECTIVE INVESTMENT SCHEMES**

### **321. Qualifying for authorisation.**

A person who for the time being is an operator, trustee or depositary of a recognised collective investment scheme is an authorised person<sup>1</sup> and has permission to carry on, so far as it is a regulated activity<sup>2</sup>: (1) any activity, appropriate to the capacity in which he acts in relation to the scheme<sup>3</sup>; (2) any activity in connection with, or for the purposes of, the scheme<sup>4</sup>.

An authorised open-ended investment company is an authorised person<sup>5</sup> and has permission to carry on, so far as it is a regulated activity: (a) the operation of the scheme<sup>6</sup>; (b) any activity in connection with, or for the purposes of, the operation of the scheme<sup>7</sup>.

1 Financial Services and Markets Act 2000 s 36, Sch 5 para 1(1). As to the meanings of 'operator' and 'trustee' see PARA 606 note 16; as to the meaning of 'depositary' see PARA 606 note 18; and as to the meaning of 'collective investment scheme' see PARA 603. 'Recognised' means recognised by virtue of s 264 (see PARA 672): Sch 5 para 1(2).

2 As to regulated activities see PARA 84 et seq.

3 Financial Services and Markets Act 2000 Sch 5 para 2(1)(a). The scheme referred to in the text is of the kind described in Sch 2 para 8 (see PARA 84). See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

As to cases involving collective schemes see, for example, *Russell-Cooke Trust Co v Elliott* [2001] All ER (D) 197 (Jul); *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch), [2003] 2 All ER 478.

4 Financial Services and Markets Act 2000 Sch 5 para 2(1)(b).

5 Financial Services and Markets Act 2000 Sch 5 para 1(3). As to the meaning of 'authorised open-ended investment company' see PARA 603. As to authorised persons see PARA 314.

A body incorporated by virtue of regulations made under the Open-Ended Investment Companies Act (Northern Ireland) 2002 s 1 in respect of which an authorisation order is in force, and to which the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities) applies, is also an authorised person: Financial Services and Markets Act 2000 Sch 5 para 1(4) (Sch 5 para 1(4), (5) added by SI 2003/2066). For these purposes 'authorisation order' means an order made under (or having effect as made under) any provision of those regulations which is made by virtue of the Open-Ended Investment Companies Act (Northern Ireland) 2002 s 1(2)(1): see the Financial Services and Markets Act 2000 Sch 5 para 1(5) (as so added).

6 Financial Services and Markets Act 2000 Sch 5 para 2(2)(a) (Sch 5 para 2 amended by SI 2003/2066).

7 Financial Services and Markets Act 2000 Sch 5 para 2(2)(b).

## UPDATE

### 321 Qualifying for authorisation

NOTE 5--Directive 85/611 replaced: see PARA 6.

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### 322. Ceasing to be qualified for authorisation.

At the request of a person who is for the time being an operator, trustee or depositary of a recognised collective investment scheme<sup>1</sup>, the Financial Services Authority<sup>2</sup> may give a direction cancelling his authorisation as such a person<sup>3</sup>.

If such a person has a Part IV permission<sup>4</sup>, he does not cease to be an authorised person<sup>5</sup> merely because he ceases to be a person so authorised<sup>6</sup>.

1 I.e. a person authorised as a result of the Financial Services and Markets Act 2000 Sch 5 para 1(1): see PARA 321 note 1.

2 As to the Financial Services Authority see PARAS 4, 6 et seq.

3 Financial Services and Markets Act 2000 s 36(1). See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

4 As to the meaning of 'Part IV permission' see PARA 348.

5 As to authorised persons see PARA 314.

6 Financial Services and Markets Act 2000 s 36(2).

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## ***E. EXERCISE OF EEA RIGHTS BY UK FIRMS***

### **323. Exercise of right to establish a branch.**

Provision is made<sup>1</sup> in relation to the exercise outside the United Kingdom<sup>2</sup> of EEA rights<sup>3</sup> by UK firms<sup>4</sup>. A UK firm may not exercise an EEA right to establish a branch unless the following conditions are satisfied<sup>5</sup>:

- 785 (1) the firm has given the Financial Services Authority<sup>6</sup>, in the specified<sup>7</sup> way, a notice of intention (that is, a notice of its intention to establish a branch and which: (a) identifies the activities which it seeks to carry on through the branch<sup>8</sup>; and (b) includes such other information as may be specified)<sup>9</sup>;
- 786 (2) the Authority has given notice (a 'consent notice') to the host state regulator<sup>10</sup>;
- 787 (3) (a) if the EEA right in question derives from the Insurance Mediation Directive<sup>11</sup>, that one month has elapsed beginning with the date on which the firm received notice<sup>12</sup> that the Authority has given a consent notice<sup>13</sup>; (b) in any other case, that either (i) the host state regulator has notified the firm (or, where the EEA right in question derives from any of the Insurance Directives<sup>14</sup>, the Authority) of the applicable provisions<sup>15</sup>; or (ii) two months have elapsed beginning with the date on which the Authority gave the consent notice<sup>16</sup>.

If the firm's EEA right derives from the Banking Consolidation Directive<sup>17</sup>, the UCITS Directive<sup>18</sup> or, in the case of a credit institution authorised under the Banking Consolidation Directive, the Markets in Financial Instruments Directive<sup>19</sup> and the first condition (see head (1) above) is satisfied, the Authority must give a consent notice to the host state regulator unless it has reason to doubt the adequacy of the firm's resources or its administrative structure<sup>20</sup>.

If the firm's EEA right derives from any of the Insurance Directives and the first condition (see head (1) above) is satisfied, the Authority must give a consent notice unless it has reason to doubt the adequacy of the firm's resources or its administrative structure<sup>21</sup>, or to question the reputation, qualifications or experience of the directors<sup>22</sup> or managers<sup>23</sup> of the firm or the person proposed as the branch's authorised agent for the purposes of the Insurance Directives<sup>24</sup>, in relation to the business to be conducted through the proposed branch<sup>25</sup>. If the firm's EEA right derives from the Insurance Mediation Directive, the first condition (see head (1) above) is satisfied and the second condition (see head (2) above) applies, the Authority must give a consent notice, and must do so within one month beginning with the date on which it received the firm's notice of intention<sup>26</sup>. If the firm is a UK investment firm and the first condition (see head (1) above) is satisfied, the Authority must give a consent notice to the host state regulator within three months beginning with the date on which it received the firm's notice of intention unless the Authority has reason to doubt the adequacy of the firm's resources or its administrative structure<sup>27</sup>.

If the Authority proposes to refuse to give a consent notice it must give the firm concerned a warning notice<sup>28</sup>. If the Authority gives a consent notice it must give written notice that it has done so to the firm concerned<sup>29</sup>. If the Authority decides to refuse to give a consent notice it must, within the relevant period<sup>30</sup>, give the person who gave that notice a decision notice to that effect<sup>31</sup>, and that person may refer the matter to the Financial Services and Markets Tribunal<sup>32</sup>.

If the firm's EEA right derives from any of the Insurance Directives and the host state regulator has notified it of the applicable provisions, the Authority must inform the firm of those provisions<sup>33</sup>.

Rules may specify the procedure to be followed by the Authority in exercising its functions as described above<sup>34</sup>.

If a UK firm which is not an authorised person<sup>35</sup> contravenes the prohibition in regard to establishing a branch<sup>36</sup> it is guilty of an offence<sup>37</sup>.

The Authority must include in its public record<sup>38</sup> in relation to any UK firm whose EEA right derives from the Insurance Mediation Directive information as to each EEA state in which the UK firm, in accordance with such a right has established a branch<sup>39</sup>.

If a UK investment firm is seeking to use a tied agent<sup>40</sup> established in an EEA state (other than the United Kingdom) in connection with the exercise of an EEA right deriving from the Markets in Financial Instruments Directive, the provisions of Schedule 3 to the Financial Services and Markets Act 2000 on establishment<sup>41</sup> apply as if the firm were seeking to establish a branch in that state<sup>42</sup>.

1    Ie by the Financial Services and Markets Act 2000 s 37, Sch 3 Pt III (paras 19-25).

2    As to the meaning of 'United Kingdom' see PARA 2 note 3.

3    As to the meaning of 'EEA right' see PARA 315 note 3.

4    Financial Services and Markets Act 2000 s 37. 'UK firm' means a person whose relevant office is in the UK and who has an EEA right to carry on activity in an EEA state other than the United Kingdom: Sch 3 para 10 (amended by SI 2003/1473). For these purposes, 'relevant office' means (1) in relation to firm whose EEA right derives from the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation) and which has a registered office, its registered office; (2) in relation to any other firm, its head office: Financial Services and Markets Act 2000 Sch 3 para 10A (added by SI 2003/1473). As to the meaning of 'EEA state' see PARA 315 note 1. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP). As to the Handbook generally see PARA 22.

5    Financial Services and Markets Act 2000 Sch 3 para 19(1) (amended by SI 2003/1473; SI 2007/3253). This is subject to the Financial Services and Markets Act 2000 Sch 3 para 19(5ZA), (5A) (as to Sch 3 para 19(5A) see note 10).

Schedule 3 para 19 does not apply to a UK firm having an EEA right which is subject to the conditions of the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83): Financial Services and Markets Act 2000 Sch 3 para 19(5ZA) (added by SI 2007/3253).

6    As to the Financial Services Authority see PARAS 4, 6 et seq.

7    'Specified' means specified in rules: Financial Services and Markets Act 2000 Sch 3 para 19(15). 'Rule' means a rule made by the Authority under the Financial Services and Markets Act 2000: s 417(1).

8    Financial Services and Markets Act 2000 Sch 3 para 19(2)(a). Subject to Sch 3 para 19(5B), the activities identified in a notice of intention may include activities which are not regulated activities: Sch 3 para 19(3) (amended by SI 2007/126). As to regulated activities see PARA 84 et seq.

If the firm is a UK investment firm, a notice of intention may not include ancillary services unless such services are to be provided in connection with the carrying on of one or more investment services and activities: Financial Services and Markets Act 2000 Sch 3 para 19(5B) (Sch 3 par 19(5B), (5C) added by SI 2007/126). 'UK investment firm' means a UK firm (1) which is an investment firm; and (2) whose EEA right derives from the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1) on markets in financial instruments): Financial Services and Markets Act 2000 Sch 3 para 10B (added by SI 2007/126). As to the meaning of 'investment firm' see PARA 21 note 5. 'Ancillary services' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p1)) art 4.1.3: Financial Services and Markets Act 2000 Sch 3 para 19(5C) (as so added).

Where the activities identified in the notice include any activity which is not a regulated activity and that activity is one which the UK firm in question is able to carry on in the EEA state in question without contravening any provision of the law of the United Kingdom (or any part of it), the UK firm is to be treated, for the purposes of the exercise of its EEA right, as being authorised to carry on that activity: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 19(1) (renumbered as such by SI



2007/3253). Where the activities of a UK firm which pursues the activity of reinsurance (within the meaning of the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83) art 2.1(a)) includes any activity which is not a regulated activity and that activity is one which the UK firm in question is able to carry on in the EEA state in question without contravening any provision of the law of the United Kingdom (or any part of the United Kingdom), the UK firm is to be treated, for the purpose of the exercise of its EEA right, as being authorised to carry on that activity: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, art 19(2) (added by SI 2007/3253). The Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 19 is in exercise of the power in the Financial Services and Market Act 2000 Sch 3 para 22(1), namely that regulations may make such provision as the Treasury considers appropriate in relation to a UK firm's exercise of EEA rights, and may in particular provide for the application (with or without modification) of any provision of, or made under, the Financial Services and Markets Act 2000. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

9 Financial Services and Markets Act 2000 Sch 3 para 19(2)(b).

10 Financial Services and Markets Act 2000 Sch 3 para 19(4). 'Host state regulator' means the competent authority (within the meaning of the relevant Single Market Directive) of an EEA state (other than the United Kingdom) in relation to a UK firm's exercise of EEA rights there: Sch 3 para 11. As to the meaning of 'Single Market Directives' see PARA 86 note 6.

If (1) the EEA right in question derives from the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation); and (2) the EEA state in which the firm intends to establish a branch has not notified the Commission, in accordance with the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3)) art 6(2), of its wish to be informed of the intention of any UK firm to establish a branch in its territory, the second and third conditions (ie the Financial Services and Markets Act 2000 Sch 3 para 19(4), (5): see heads (2), (3) in the text) do not apply (and so the firm may establish the branch to which its notice of intention relates as soon as the first condition (ie Sch 3 para 19(2): see head (1) in the text) is satisfied): Sch 3 para 19(5A) (added by SI 2003/1473).

11 Ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3).

12 Ie in accordance with the Financial Services and Markets Act 2000 Sch 3 para 19(11): see the text and note 29.

13 Financial Services and Markets Act 2000 Sch 3 para 19(5)(a) (Sch 3 para 19(5) substituted by SI 2003/1473). See note 10.

14 As to the meaning of 'Insurance Directives' see PARA 86 note 6.

15 Financial Services and Markets Act 2000 Sch 3 para 19(5)(b)(i) (as substituted: see note 13). See note 10. For these purposes, 'applicable provisions' means the host state rules with which the firm will be required to comply when conducting business through the proposed branch in the EEA state concerned: Sch 3 para 19(13). 'Host state rules' means rules: (1) made in accordance with the relevant Single Market Directive; and (2) which are the responsibility of the EEA state concerned (both as to implementation and as to supervision of compliance) in accordance with that Directive: Sch 3 para 19(14).

16 Financial Services and Markets Act 2000 Sch 3 para 19(5)(b)(ii) (as added: see note 13). See note 10.

17 Ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions.

18 Ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

19 Ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

20 Financial Services and Markets Act 2000 Sch 3 para 19(6) (amended by SI 2003/2066; SI 2007/126).

21 Financial Services and Markets Act 2000 Sch 3 para 19(7)(a).

22 As to the meaning of 'director' see PARA 86 note 11.

23 As to the meaning of 'manager' see PARA 86 note 11.

24 Financial Services and Markets Act 2000 Sch 3 para 19(7)(b).

25 Financial Services and Markets Act 2000 Sch 3 para 19(7).

26 Financial Services and Markets Act 2000 Sch 3 para 19(7A) (added by SI 2003/1473).

27 Financial Services and Markets Act 2000 Sch 3 para 19(7B) (added by SI 2007/126).

28 Financial Services and Markets Act 2000 Sch 3 para 19(8).

29 Financial Services and Markets Act 2000 Sch 3 para 19(11).

30 For these purposes, 'relevant period' means (1) if the firm's EEA right derives from the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities), two months beginning with the date on which the Authority received the notice of intention; (2) in any other case, three months beginning with that date: Financial Services and Markets Act 2000 Sch 3 para 19(12A) (added by SI 2003/2066).

31 Financial Services and Markets Act 2000 Sch 3 para 19(12)(a).

32 Financial Services and Markets Act 2000 Sch 3 para 19(12)(b). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

33 Financial Services and Markets Act 2000 Sch 3 para 19(9).

34 Financial Services and Markets Act 2000 Sch 3 para 19(10).

35 As to authorised persons see PARA 314.

36 Ie the prohibition imposed by the Financial Services and Markets Act 2000 Sch 3 para 19(1) (see the text to note 5): Sch 3 para 21(1)(a).

37 Financial Services and Markets Act 2000 Sch 3 para 21(1). In proceedings for such an offence it is a defence for the firm to show that it took all reasonable precautions and exercised all due diligence to avoid committing the offence: Sch 3 para 21(3). A firm guilty of such an offence is liable, on summary conviction, to a fine not exceeding the statutory maximum, or on conviction on indictment, to a fine: Sch 3 para 21(2). As to the statutory maximum see PARA 56 note 24.

38 Ie the record that the Authority maintains under the Financial Services and Markets Act 2000 s 347: see PARA 475.

39 Financial Services and Markets Act 2000 Sch 3 para 25(a) (Sch 3 para 25 added by SI 2003/1473).

40 As to the meaning of 'tied agent' see PARA 315 note 6.

41 Ie the Financial Services and Markets Act 2000 Sch 3 Pt III.

42 Financial Services and Markets Act 2000 Sch 3 para 20A(1) (Sch 3 para 20A added by SI 2007/126). However if (1) a UK investment firm has already established a branch in an EEA state other than the United Kingdom in accordance with the Financial Services and Markets Act 2000 Sch 3 para 19 (see the text and notes 1-34); and (2) the EEA right which it is exercising derives from the Markets in Financial Instruments Directive, Sch 3 para 19 does not apply in respect of its use of the tied agent in question: Financial Services and Markets Act 2000 Sch 3 para 20A(2) (as so added).

## **UPDATE**

### **323 Exercise of right to establish a branch**

NOTES 18, 30--Directive 85/611 replaced: see PARA 6.

EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(i) Authorisation/E. EXERCISE OF EEA RIGHTS BY UK FIRMS/324. Exercise of right to provide services.

### **324. Exercise of right to provide services.**

A UK firm<sup>1</sup> may not exercise an EEA right<sup>2</sup> to provide services unless the firm has given the Financial Services Authority<sup>3</sup>, in the specified<sup>4</sup> way, notice of its intention to provide services (a 'notice of intention') which: (1) identifies the activities which it seeks to carry out by way of provision of services<sup>5</sup>; and (2) includes such other information as may be specified<sup>6</sup>. The activities identified in a notice of intention may include activities which are not regulated activities<sup>7</sup>.

If the firm's EEA right derives from the Banking Consolidation Directive<sup>8</sup>, the Markets in Financial Instruments Directive<sup>9</sup> or the UCITS Directive<sup>10</sup>, the Authority must, within one month of receiving a notice of intention, send a copy of it to the host state regulator<sup>11</sup> with such other information as may be specified<sup>12</sup>.

If the firm's EEA right derives from any of the Insurance Directives<sup>13</sup>, the Authority must, within one month of receiving the notice of intention, give notice in specified terms (a 'consent notice') to the host state regulator<sup>14</sup> or give written notice to the firm of its refusal to give a consent notice<sup>15</sup> and its reasons for that refusal<sup>16</sup>.

If the firm's EEA right derives from the Insurance Mediation Directive<sup>17</sup> and the EEA state in which the firm intends to provide services has notified the European Commission, in accordance with that directive<sup>18</sup>, of its wish to be informed of the intention of any UK firm to provide services in its territory (a) the Authority must, within one month of receiving the notice of intention, send a copy of it to the host state regulator<sup>19</sup>; (b) the Authority, when it sends the copy in accordance with head (a) above, must give written notice to the firm concerned that it has done so<sup>20</sup>; and (c) the firm concerned must not provide the services to which its notice of intention relates until one month, beginning with the date on which it receives the notice under head (b) above has elapsed<sup>21</sup>.

When the Authority sends the copy of the notice of intention<sup>22</sup> or gives a consent notice<sup>23</sup>, it must give written notice to the firm concerned<sup>24</sup>. If the firm's EEA right derives from any of the Insurance Directives or from the Markets in Financial Instruments Directive, it must not provide the services to which its notice of intention relates until it has received written notice<sup>25</sup>.

If the firm's EEA right derives from the Markets in Financial Instruments Directive, the Authority must comply as soon as reasonably practicable with a request for information under that directive<sup>26</sup> from the host state regulator<sup>27</sup>.

Rules may specify the procedure to be followed by the Authority in these circumstances<sup>28</sup>.

If a UK firm which is not an authorised person<sup>29</sup> contravenes the prohibition in regard to providing services<sup>30</sup> it is guilty of an offence<sup>31</sup>.

The Authority must include in its public record<sup>32</sup> in relation to any UK firm whose EEA right derives from the Insurance Mediation Directive information as to each EEA state in which the UK firm, in accordance with such a right is providing services<sup>33</sup>.

1 As to the meaning of 'UK firm' see PARA 323 note 4.

2 As to the meaning of 'EEA right' see PARA 315 note 3.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP) Ch 13. As to the Handbook generally see PARA 22.

4 'Specified' means specified in rules: Financial Services and Markets Act 2000 Sch 3 para 20(6). 'Rule' means a rule made by the Authority under the Financial Services and Markets Act 2000: s 417(1).

5 Financial Services and Markets Act 2000 Sch 3 para 20(1)(a) (Sch 3 para 20(1) amended by SI 2007/3253).

The Financial Services and Markets Act 2000 Sch 3 para 20 does not apply to a UK firm having an EEA right which is subject to the conditions of the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83): Financial Services and Markets Act 2000 Sch 3 para 20(4D) (added by SI 2007/3253).

6 Financial Services and Markets Act 2000 Sch 3 para 20(1)(b).

7 Financial Services and Markets Act 2000 Sch 3 para 20(2) (amended by SI 2007/126). As to regulated activities see PARA 84 et seq. The Financial Services and Markets Act 2000 Sch 3 para 20(2) is subject to Sch 3 para 20(2A). If the firm is a UK investment firm, a notice of intention may not include ancillary services unless such services are to be provided in connection with the carrying on of one or more investment services and activities: Sch 3 para 19(2A) (Sch 3 para 19(2A), (2B) added by SI 2007/126). As to the meaning of 'UK investment firm' see PARA 323 note 8. For these purposes, 'ancillary services' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.3: Financial Services and Markets Act 2000 Sch 3 para 19(2B) (as so added).

Where the activities identified in the notice include any activity which is not a regulated activity and that activity is one which the UK firm in question is able to carry on in the EEA state in question without contravening any provision of the law of the United Kingdom (or any part of it), the UK firm is to be treated, for the purposes of the exercise of its EEA right, as being authorised to carry on that activity: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 19. This is in exercise of the power in the Financial Services and Market Act 2000 Sch 3 para 22(1), namely that regulations may make such provision as the Treasury considers appropriate in relation to a UK firm's exercise of EEA rights, and may in particular provide for the application (with or without modification) of any provision of, or made under, the Financial Services and Markets Act 2000. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions.

9 Ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

10 Ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

11 As to the meaning of 'host state regulator' see PARA 323 note 10.

12 Financial Services and Markets Act 2000 Sch 3 para 20(3) (amended by SI 2003/2066; SI 2007/126).

13 As to the meaning of 'Insurance Directives' see PARA 86 note 6.

14 Financial Services and Markets Act 2000 Sch 3 para 20(3A)(a) (Sch 3 para 20(3A) added by SI 2001/1376). See note 7.

15 Financial Services and Markets Act 2000 Sch 3 para 20(3A)(b)(i) (as added: see note 12). See note 7.

16 Financial Services and Markets Act 2000 Sch 3 para 20(3A)(b)(ii) (as added: see note 12). If the firm is given notice under Sch 3 para 20(3A)(b), it may refer the matter to the Financial Services and Market Tribunal: Sch 3 para 20(4A) (added by SI 2001/1376). As to the Financial Services and Markets Tribunal see PARA 43 et seq. See note 7.

17 Ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation.

18 Ie in accordance with European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) art 6(2).

19 Financial Services and Markets Act 2000 Sch 3 para 20(3B)(a) (Sch 3 para 20(3B) added by SI 2003/1473).

20 Financial Services and Markets Act 2000 Sch 3 para 20(3B)(b) (as added: see note 19).

- 21 Financial Services and Markets Act 2000 Sch 3 para 20(3B)(c) (as added: see note 19).
- 22 Ie under the Financial Services and Markets Act 2000 Sch 3 para 20(3): see the text and notes 8-12. See note 7.
- 23 Ie under the Financial Services and Markets Act 2000 Sch 3 para 20(3A): see the text and notes 13-16.
- 24 Financial Services and Markets Act 2000 Sch 3 para 20(4) (amended by SI 2001/1376). See note 7.
- 25 Financial Services and Markets Act 2000 Sch 3 para 20(4B) (added by SI 2001/1376; and amended by SI 2007/126). The written notice is under the Financial Services and Markets Act 2000 Sch 3 para 20(4): see the text and notes 22-24. See note 7.
- 26 Ie under European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) art 31.6, second subparagraph.
- 27 Financial Services and Markets Act 2000 Sch 3 para 20(4BA) (added by SI 2007/126).
- 28 Financial Services and Markets Act 2000 Sch 3 para 20(4C) (added by SI 2001/1376). See note 7.
- 29 As to authorised persons see PARA 314.
- 30 Ie the prohibition imposed by the Financial Services and Markets Act 2000 Sch 3 para 20(1) (see the text to notes 1-6), Sch 3 para 20(3B)(c) (see head (c) in the text) or Sch 3 para 20(4B) (see the text and note 25): Sch 3 para 21(1)(b) (amended by SI 2003/1473). See note 7.
- 31 Financial Services and Markets Act 2000 Sch 3 para 21(1) (as amended: see note 30). In proceedings for such an offence, it is a defence for the firm to show that it took all reasonable precautions and exercised all due diligence to avoid committing the offence: Sch 3 para 21(3). A firm guilty of such an offence is liable on summary conviction to a fine not exceeding the statutory maximum or on conviction on indictment to a fine: Sch 3 para 21(2). As to the statutory maximum see PARA 56 note 24.
- 32 Ie the record that the Authority maintains under the Financial Services and Markets Act 2000 s 347: see PARA 475.
- 33 Financial Services and Markets Act 2000 Sch 3 para 25(b) (Sch 3 para 25 added by SI 2003/1473).

## **UPDATE**

### **324 Exercise of right to provide services**

NOTE 10--Directive 85/611 replaced: see PARA 6.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(i) Authorisation/E. EXERCISE OF EEA RIGHTS BY UK FIRMS/325. Management companies, credit and financial institutions, UK investment firms: changes to branch details.

### **325. Management companies, credit and financial institutions, UK investment firms: changes to branch details.**

A UK firm<sup>1</sup> which has exercised an EEA right<sup>2</sup>, deriving from the UCITS Directive<sup>3</sup> or the Banking Consolidation Directive<sup>4</sup>, to establish a branch must not make a change in the requisite details<sup>5</sup> of the branch unless the following requirements<sup>6</sup> have been complied with<sup>7</sup>:

- 788 (1) the firm has given a notice to the Financial Services Authority<sup>8</sup> and to the host state regulator<sup>9</sup> stating the details of the proposed change<sup>10</sup>;

- 789 (2) the Authority has given the host state regulator a notice<sup>11</sup>; and  
 790 (3) either the host state regulator has informed the firm that it may make the change, or the period of one month beginning with the day on which the firm gave the host state regulator the notice mentioned in head (1) above<sup>12</sup> has elapsed<sup>13</sup>.

Alternatively (if the change is occasioned by circumstances beyond the firm's control) the requirements are that the firm has as soon as practicable (whether before or after the change) given a notice to the Authority and to the host state regulator, stating the details of the change<sup>14</sup>.

A UK investment firm<sup>15</sup> which has exercised an EEA right deriving from the Markets in Financial Instruments Directive<sup>16</sup> to establish a branch must not (a) make a change in the requisite details of the branch<sup>17</sup>; (b) use, for the first time, any tied agent<sup>18</sup> established in the EEA state in which the branch is established<sup>19</sup>; or (c) cease to use tied agents established in the EEA state in which the branch is established<sup>20</sup>, unless the following requirements have been complied with<sup>21</sup>:

- 791 (i) the firm has given a notice to the Authority stating the details of the proposed change<sup>22</sup>; and  
 792 (ii) the period of one month beginning with the day on which the firm gave the notice has elapsed<sup>23</sup>.

The Authority must, as soon as reasonably practicable after receiving such a notice, inform the host state regulator of the proposed change<sup>24</sup>.

If a UK firm which is not an authorised person<sup>25</sup> contravenes the above prohibitions<sup>26</sup> it is guilty of an offence<sup>27</sup>.

The Authority must, within the period of one month beginning with the day on which it received the notice referred to in head (1) above<sup>28</sup>, either consent to the change or refuse to consent to the change<sup>29</sup>. If the Authority consents to the change, it must give a notice to the host state regulator informing it of the details of the proposed change<sup>30</sup> and inform the firm that it has given that notice, stating the date on which it did so<sup>31</sup>. If the Authority refuses to consent to the change the firm may refer the matter to the Financial Services and Markets Tribunal<sup>32</sup> and the Authority must give notice to the firm of the refusal, stating the reasons for it, and giving an indication of the firm's right to refer the matter to the Tribunal, and the procedure on such a reference<sup>33</sup>. The Authority may not refuse to consent to the change unless, having regard to the change and to the EEA activities<sup>34</sup> which the firm is seeking to carry on, it doubts the adequacy of the administrative structure or the financial situation of the firm; and in reaching a determination as to the adequacy of the administrative structure, the Authority may have regard to the adequacy of management, systems and controls and the presence of relevant skills needed for the EEA activities to be carried on<sup>35</sup>.

1 As to the meaning of 'UK firm' see PARA 323 note 4.

2 As to the meaning of 'EEA right' see PARA 315 note 3.

3 I.e EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

4 I.e EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions.

5 As to the meaning of 'requisite details' see PARA 315 note 14.

6 I.e the requirements of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(2).

7 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(1) (amended by SI 2006/3385). The Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, regs 11, 11A are in exercise of the Financial Services and Markets Act 2000 Sch 3 para 22(2)(a), namely that regulations may make provision as to any change (or proposed change) of a prescribed kind relating to a UK firm or to an activity that it carries on and as to the procedure to be followed in relation to such cases.

Where a provision of the kind mentioned in Sch 3 para 22(2) requires the Financial Services Authority's consent to a change (or proposed change): (1) consent may be refused only on prescribed grounds; and (2) if the Authority decides to refuse consent, the firm concerned may refer the matter to the Financial Services and Markets Tribunal: Sch 3 para 22(3). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the Financial Services and Markets Tribunal see PARA 43 et seq.

Where a UK firm has a Part IV permission and is exercising an EEA right to carry on any Consumer Credit Act business in an EEA state other than the United Kingdom the Authority may exercise its power under s 45 (see PARA 355) in respect of the firm if the Office of Fair Trading has informed the Authority that (a) the firm; (b) any of the firm's employees, agents or associates (whether past or present); or (c) if the firm is a body corporate, a controller of the firm or an associate of such a controller, has done any of the things specified in the Consumer Credit Act 1974 s 25(2A)(a)-(e) (see **CONSUMER CREDIT**): Financial Services and Markets Act 2000 Sch 3 para 23(1), (2) (Sch 3 para 23(2) amended by the Environment Act 2002 Sch 25 para 40(1), (19)(b); and the Financial Services and Markets Act 2000 Sch 3 para 23(1), (2) amended by the Consumer Credit Act 2006 s 33(10), (11)). The Authority may also exercise its power under the Financial Services and Markets Act 2000 s 45 (see PARA 355) in respect of the firm if the Office of Fair Trading has informed the Authority that it has concerns about any of the following: (i) the firm's skills, knowledge and experience in relation to Consumer Credit Act businesses; (ii) such skills, knowledge and experience of other persons who are participating in any Consumer Credit Act business being carried on by the firm; (iii) practices and procedures that the firm is implementing in connection with any such business: Financial Services and Markets Act 2000 Sch 3 para 23(2A) (added by the Consumer Credit Act 2006 s 33(12)). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq. As to the meaning of 'Part IV permission' see PARA 348. As to the meaning of 'Consumer Credit Act business' see PARA 464 note 2; definition applied by the Financial Services and Markets Act 2000 Sch 3 para 23(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meanings of 'associate' and 'controller' see PARA 591 note 16; definitions applied by Sch 3 para 23(3). As to the meaning of 'body corporate' see PARA 86 note 11.

Where a UK firm is not required to have a Part IV permission in relation to the business which it is carrying on and is exercising the right conferred by the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) art 24 to carry on that business in an EEA state other than the United Kingdom then, if requested to do so by the host state regulator in the EEA state in which the UK firm's business is being carried on, the Authority may impose any requirement in relation to the firm which it could impose if: (A) the firm had a Part IV permission in relation to the business which it is carrying on; and (B) the Authority was entitled to exercise its power under Pt IV to vary that permission: Financial Services and Markets Act 2000 Sch 3 para 24(1), (2) (Sch 3 para 24(1)(b) amended by SI 2000/2952; SI 2006/3221). As to the meaning of 'EEA state' see PARA 315 note 1.

As to the information to be included in the public record see the Financial Services and Markets Act 2000 Sch 3 para 25(a); and PARA 323.

8 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP) Ch 13. As to the Handbook generally see PARA 22.

9 As to the meaning of 'host state regulator' see PARA 323 note 10.

10 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(2) (a). See note 7.

11 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(2) (b). The notice referred to in the text is the notice under reg 11(5)(a): see the text to note 30. See note 7.

12 Ie in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(2)(a).

13 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(2) (c). See note 7.

14 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(1), (3). See note 7.

15 'UK investment firm' means a UK firm (1) which is an investment firm (within the meaning of the Financial Services and Markets Act 2000 s 424A (see PARA 21 note 5); (2) whose EEA right derives from the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments): Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2) (definition amended by SI 2007/763).

16 ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

17 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11A(1)(a) (reg 11A added by SI 2006/3385). See note 7.

18 'Tied agent' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.25: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2).

19 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11A(1)(b) (as added: see note 17). See note 7.

20 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11A(1)(c) (as added: see note 17). See note 7.

21 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11A(1) (as added: see note 17). Regulation 11A(1) does not apply to a change occasioned by circumstances beyond the firm's control: reg 11A(4) (as so added). See note 7.

22 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11A(2)(a) (as added: see note 17). See note 7.

23 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11A(2)(b) (as added: see note 17). See note 7.

24 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11A(3) (as added: see note 17). See note 7.

25 As to authorised persons see PARA 314.

26 ie under the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, regs 11(1), 11A(1).

27 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 18(1) (amended by SI 2006/3385). Such an offence is punishable: (1) on summary conviction, by a fine not exceeding the statutory maximum; or (2) on conviction on indictment, by a fine: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 18(1) (as so amended). In proceedings for such an offence, it is a defence for the firm to show that it took all reasonable precautions and exercised all due diligence to avoid committing the offence: reg 18(2). As to the statutory maximum see PARA 56 note 24.

Regulation 18 is in exercise of the Financial Services and Markets Act 2000 Sch 3 para 22(2)(b), namely that regulations may make provision with respect of the consequences of the UK firm's failure to comply with a provision of the regulations. See note 7.

28 ie in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(2)(a).

29 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(4). See note 7.

30 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(5) (a). See note 7.

31 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(5) (b). See note 7.

32 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(6) (a). As to the Financial Services and Markets Tribunal see PARA 43 et seq. See note 7.

33 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(6) (b). See note 7.



34 As to the meaning of 'EEA activities' see PARA 315 note 14.

35 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 11(7). See note 7.

## UPDATE

### **325 Management companies, credit and financial institutions, UK investment firms: changes to branch details**

NOTE 3--Directive 85/611 replaced: see PARA 6.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(i) Authorisation/E. EXERCISE OF EEA RIGHTS BY UK FIRMS/326. Management companies, UK investment firms: changes to services.

### **326. Management companies, UK investment firms: changes to services.**

A UK firm<sup>1</sup> which is providing services in exercise of an EEA right<sup>2</sup>, deriving from the UCITS Directive<sup>3</sup>, must not make a change in the programme of operations, or the EEA activities<sup>4</sup>, to be carried on in exercise of that right, unless the relevant requirements have been complied with<sup>5</sup>. The 'relevant requirements' are that: (1) the firm has given a notice to the Financial Services Authority<sup>6</sup> and to the host state regulator<sup>7</sup> stating the details of the proposed change<sup>8</sup>; or (2) if the change is occasioned by circumstances beyond the firm's control, it has as soon as practicable (whether before or after the change) given a notice to the Authority and to the host state regulator, stating the details of the change<sup>9</sup>.

A UK investment firm<sup>10</sup> which is providing services in a particular EEA state in exercise of an EEA right deriving from the Markets in Financial Instruments Directive<sup>11</sup> must not (a) make a change in the programme of operations, or the EEA activities, to be carried on in exercise of that right<sup>12</sup>; (b) use, for the first time, any tied agent<sup>13</sup> to provide services in the territory of that state<sup>14</sup>; or (c) cease to use tied agents to provide services in the territory of that state<sup>15</sup>, unless the following requirements have been complied with<sup>16</sup>:

793 (i) the firm has given a notice to the Authority stating the details of the proposed change<sup>17</sup>; and

794 (ii) the period of one month beginning with the day on which the firm gave the notice has elapsed<sup>18</sup>.

The Authority must, as soon as reasonably practicable after receiving such a notice, inform the host state regulator of the proposed change<sup>19</sup>.

If a UK firm which is not an authorised person<sup>20</sup> contravenes the above prohibitions<sup>21</sup> it is guilty of an offence<sup>22</sup>.

1 As to the meaning of 'UK firm' see PARA 323 note 4.

2 As to the meaning of 'EEA right' see PARA 315 note 3.

3 le EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

4 As to the meaning of 'EEA activities' see PARA 315 note 14.

5 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 12(1) (amended by SI 2003/2066; SI 2006/3385). The Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, regs 12, 12A are in exercise of the Financial Services and Markets Act 2000 Sch 3 para 22(2)(a), namely that regulations may make provision as to any change (or proposed change) of a prescribed kind relating to a UK firm or to an activity that it carries on and as to the procedure to be followed in relation to such cases.

Where a provision of the kind mentioned in Sch 3 para 22(2) requires the Financial Services Authority's consent to a change (or proposed change): (1) consent may be refused only on prescribed grounds; and (2) if the Authority decides to refuse consent, the firm concerned may refer the matter to the Financial Services and Markets Tribunal: Sch 3 para 22(3). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the Financial Services and Markets Tribunal see PARA 43 et seq.

Where a UK firm has a Part IV permission and is exercising an EEA right to carry on any Consumer Credit Act business in an EEA state other than the United Kingdom the Authority may exercise its power under s 45 (see PARA 355) in respect of the firm if the Office of Fair Trading has informed the Authority that (a) the firm; (b) any of the firm's employees, agents or associates (whether past or present); or (c) if the firm is a body corporate, a controller of the firm or an associate of such a controller, has done any of the things specified in the Consumer Credit Act 1974 s 25(2A)(a)-(e) (see **CONSUMER CREDIT**): Financial Services and Markets Act 2000 Sch 3 para 23(1), (2) (Sch 3 para 23(2) amended by the Environment Act 2002 Sch 25 para 40(1), (19)(b); and the Financial Services and Markets Act 2000 Sch 3 para 23(1), (2) amended by the Consumer Credit Act 2006 s 33(10), (11)). The Authority may also exercise its power under the Financial Services and Markets Act 2000 s 45 (see PARA 355) in respect of the firm if the Office of Fair Trading has informed the Authority that it has concerns about any of the following: (i) the firm's skills, knowledge and experience in relation to Consumer Credit Act businesses; (ii) such skills, knowledge and experience of other persons who are participating in any Consumer Credit Act business being carried on by the firm; (iii) practices and procedures that the firm is implementing in connection with any such business: Financial Services and Markets Act 2000 Sch 3 para 23(2A) (added by the Consumer Credit Act 2006 s 33(12)). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq. As to the meaning of 'Part IV permission' see PARA 348. As to the meaning of 'Consumer Credit Act business' see PARA 464 note 2; definition applied by the Financial Services and Markets Act 2000 Sch 3 para 23(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meanings of 'associate' and 'controller' see PARA 591 note 16; definitions applied by Sch 3 para 23(3). As to the meaning of 'body corporate' see PARA 86 note 11.

Where a UK firm is not required to have a Part IV permission in relation to the business which it is carrying on and is exercising the right conferred by the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) art 24 to carry on that business in an EEA state other than the United Kingdom then, if requested to do so by the host state regulator in the EEA state in which the UK firm's business is being carried on, the Authority may impose any requirement in relation to the firm which it could impose if: (A) the firm had a Part IV permission in relation to the business which it is carrying on; and (B) the Authority was entitled to exercise its power under Pt IV to vary that permission: Financial Services and Markets Act 2000 Sch 3 para 24(1), (2) (Sch 3 para 24(1)(b) amended by SI 2000/2952; SI 2006/3221). As to the meaning of 'EEA state' see PARA 315 note 1.

As to the information to be included in the public record see the Financial Services and Markets Act 2000 Sch 3 para 25(b); and PARA 323.

6 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP) Ch 13. As to the Handbook generally see PARA 22.

7 As to the meaning of 'host state regulator' see PARA 323 note 10.

8 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 12(2) (a). See note 5.

9 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 12(2) (b). See note 5.

10 As to the meaning of 'UK investment firm' see PARA 325 note 15.

11 le European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

12 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 12A(1)(a) (reg 12A added by SI 2006/3385). See note 5.

13 As to the meaning of 'tied agent' see PARA 325 note 18.

14 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 12A(1)(b) (as added: see note 12). See note 5.

15 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 12A(1)(c) (as added: see note 12). See note 5.

16 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 12A(1) (as added: see note 12). Regulation 12A(1) does not apply to a change occasioned by circumstances beyond the firm's control: reg 12A(4) (as so added). See note 5.

17 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 12A(2)(a) (as added: see note 12). See note 5.

18 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 12A(2)(b) (as added: see note 12). See note 5.

19 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 12A(3) (as added: see note 12). See note 5.

20 As to authorised persons see PARA 314.

21 Ie under the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, regs 12(1), 12A(1).

22 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 18(1) (amended by SI 2006/3385). Such an offence is punishable: (1) on summary conviction, by a fine not exceeding the statutory maximum; or (2) on conviction on indictment, by a fine: reg 18(1) (as so amended). In proceedings for such an offence, it is a defence for the firm to show that it took all reasonable precautions and exercised all due diligence to avoid committing the offence: reg 18(2). As to the statutory maximum see PARA 56 note 24.

Regulation 18 is in exercise of the Financial Services and Markets Act 2000 Sch 3 para 22(2)(b), namely that regulations may make provision with respect of the consequences of the UK firm's failure to comply with a provision of the regulations. See note 5.

## UPDATE

### 326 Management companies, UK investment firms: changes to services

NOTE 3--Directive 85/611 replaced: see PARA 6.

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### 327. UK insurance firms: changes to relevant EEA details of branches.

A UK firm<sup>1</sup> which has exercised an EEA right<sup>2</sup>, deriving from any of the Insurance Directives<sup>3</sup>, to establish a branch must not make a change in the relevant EEA details<sup>4</sup>, unless certain requirements<sup>5</sup> have been complied with<sup>6</sup>. The relevant EEA details, with respect to a branch, are:

- 795 (1) the address of the branch<sup>7</sup>;
- 796 (2) the name of the UK firm's<sup>8</sup> authorised agent<sup>9</sup> and, in the case of a member of Lloyd's, confirmation that the authorised agent has power to accept service of proceedings on behalf of Lloyd's<sup>10</sup>;
- 797 (3) the classes or parts of classes of business carried on, or to be carried on, and the nature of the risks or commitments covered, or to be covered, in the EEA state<sup>11</sup> concerned<sup>12</sup>;
- 798 (4) details of the structural organisation of the branch<sup>13</sup>;
- 799 (5) the guiding principles as to reinsurance of business carried on, or to be carried on, in the EEA state concerned, including the firm's maximum retention per risk or event after all reinsurance ceded<sup>14</sup>;
- 800 (6) estimates of:
  - 88 155. (a) the costs of installing administrative services and the organisation for securing business in the EEA state concerned<sup>15</sup>;
  - 156. (b) the resources available to cover those costs<sup>16</sup>; and
  - 157. (c) if contracts of insurance providing assistance for travellers or other persons<sup>17</sup> are, or are to be, effected or carried out, the resources available for providing assistance<sup>18</sup>;
- 89 801 (7) for each of the first three years following the establishment of the branch:
  - 90 158. (a) estimates of the firm's margin of solvency and the margin of solvency required, and the method of calculation<sup>19</sup>;
  - 159. (b) if the firm carries on, or intends to carry on, business comprising the effecting or carrying out of contracts of long-term insurance<sup>20</sup>, certain details<sup>21</sup> as respects the business carried on, or to be carried on, in the EEA state concerned<sup>22</sup>; and
  - 160. (c) if the firm carries on, or intends to carry on, business comprising the effecting or carrying out of contracts of general insurance<sup>23</sup>, certain details<sup>24</sup> as respects the business carried on, or to be carried on, in the EEA state concerned<sup>25</sup>;
- 91 802 (8) if the insurer covers, or intends to cover, relevant motor vehicle risks<sup>26</sup>, details of the firm's membership of the national bureau<sup>27</sup> and the national guarantee fund<sup>28</sup> in the EEA state concerned<sup>29</sup>; and
- 803 (9) if the firm covers, or intends to cover, health insurance risks<sup>30</sup>, the technical bases used, or to be used, for calculating premiums in respect of such risks<sup>31</sup>.

If a UK firm which is not an authorised person<sup>32</sup> contravenes the above prohibitions<sup>33</sup> it is guilty of an offence<sup>34</sup>.

A UK firm which has exercised an EEA right, deriving from any of the Insurance Directives, to establish a branch must not make a change in any of the relevant EEA details described above unless:

- 804 (i) the firm has given a notice to the Financial Services Authority<sup>35</sup> and to the host state regulator<sup>36</sup> stating the details of the proposed change<sup>37</sup>;
- 805 (ii) the Authority has given the host state regulator a notice<sup>38</sup>;
- 806 (iii) the period of one month beginning with the day on which the firm gave the Authority the notice mentioned in head (i) above<sup>39</sup> has elapsed<sup>40</sup>; and
- 807 (iv) either a further period of one month has elapsed<sup>41</sup> or the Authority has informed the firm of any consequential changes in the applicable provisions<sup>42</sup> of which the Authority has been notified by the host state regulator<sup>43</sup>.

Alternatively (if the change is occasioned by circumstances beyond the firm's control) the requirements are that the firm has as soon as practicable (whether before or after the change) given a notice to the Authority and to the host state regulator, stating the details of the change<sup>44</sup>.

The Authority must, within one month of receiving the notice referred to in head (i) above<sup>45</sup>, either consent to the change or refuse to consent to the change<sup>46</sup>. If the Authority consents to the change, it must give a notice to the host state regulator informing it of the details of the proposed change<sup>47</sup> and inform the firm that it has given that notice, stating the date on which it did so<sup>48</sup>. If the Authority refuses to consent to the change the firm may refer the matter to the Financial Services and Markets Tribunal<sup>49</sup> and the Authority must give notice to the firm of the refusal, stating the reasons for it, and giving an indication of the firm's right to refer the matter to the Tribunal, and the procedure on such a reference<sup>50</sup>. The Authority may not refuse to consent to the change unless, having regard to the change, the Authority has reason: (A) to doubt the adequacy of the firm's administrative structure or financial situation<sup>51</sup>; or (B) to question the reputation, qualifications or experience of the directors or managers of the firm or the authorised agent<sup>52</sup>, in relation to the business conducted, or to be conducted, through the branch<sup>53</sup>.

1 As to the meaning of 'UK firm' see PARA 323 note 4.

2 As to the meaning of 'EEA right' see PARA 315 note 3.

3 As to the meaning of 'Insurance Directives' see PARA 86 note 6.

4 See heads (1)-(9) in the text.

5 As to the requirements of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(2).

6 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(1). Regulation 13 is made in exercise of the Financial Services and Markets Act 2000 s 37, Sch 3 para 22(2)(a), which provides that regulations may make provision as to any change (or proposed change) of a prescribed kind relating to a UK firm or to an activity that it carries on and as to the procedure to be followed in relation to such cases.

Where a provision of the kind mentioned in Sch 3 para 22(2) requires the Financial Services Authority's consent to a change (or proposed change): (1) consent may be refused only on prescribed grounds; and (2) if the Authority decides to refuse consent, the firm concerned may refer the matter to the Financial Services and Markets Tribunal: Sch 3 para 22(3). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Financial Services and Markets Tribunal see PARA 43 et seq. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP) Ch 13. As to the Handbook generally see PARA 22.

Where a UK firm has a Part IV permission and is exercising an EEA right to carry on any Consumer Credit Act business in an EEA state other than the United Kingdom the Authority may exercise its power under s 45 (see PARA 355) in respect of the firm if the Office of Fair Trading has informed the Authority that (a) the firm; (b) any of the firm's employees, agents or associates (whether past or present); or (c) if the firm is a body corporate, a controller of the firm or an associate of such a controller, has done any of the things specified in the Consumer Credit Act 1974 s 25(2)(a)-(e) (see **CONSUMER CREDIT**): Financial Services and Markets Act 2000 Sch 3 para 23(1), (2) (Sch 3 para 23(2) amended by the Environment Act 2002 Sch 25 para 40(1), (19)(b); and the Financial Services and Markets Act 2000 Sch 3 para 23(1), (2) amended by the Consumer Credit Act 2006 s 33(10), (11)). The Authority may also exercise its power under the Financial Services and Markets Act 2000 s 45 (see PARA 355) in respect of the firm if the Office of Fair Trading has informed the Authority that it has concerns about any of the following: (i) the firm's skills, knowledge and experience in relation to Consumer Credit Act businesses; (ii) such skills, knowledge and experience of other persons who are participating in any Consumer Credit Act business being carried on by the firm; (iii) practices and procedures that the firm is implementing in connection with any such business: Financial Services and Markets Act 2000 Sch 3 para 23(2A) (added by the Consumer Credit Act 2006 s 33(12)). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq. As to the meaning of 'Part IV permission' see PARA 348. As to the meaning of 'Consumer Credit Act business' see PARA 464 note 2; definition applied by the Financial Services and Markets Act 2000 Sch 3 para 23(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meanings of 'associate' and

'controller' see PARA 591 note 16; definitions applied by Sch 3 para 23(3). As to the meaning of 'body corporate' see PARA 86 note 11.

Where a UK firm is not required to have a Part IV permission in relation to the business which it is carrying on and is exercising the right conferred by the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) art 24 to carry on that business in an EEA state other than the United Kingdom then, if requested to do so by the host state regulator in the EEA state in which the UK firm's business is being carried on, the Authority may impose any requirement in relation to the firm which it could impose if: (A) the firm had a Part IV permission in relation to the business which it is carrying on; and (B) the Authority was entitled to exercise its power under Pt IV to vary that permission: Financial Services and Markets Act 2000 Sch 3 para 24(1), (2) (Sch 3 para 24(1)(b) amended by SI 2000/2952; SI 2006/3221). As to the meaning of 'EEA state' see PARA 315 note 1.

As to the information to be included in the public record see the Financial Services and Markets Act 2000 Sch 3 para 25(a); and PARA 323.

7 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1) (a).

8 As to the meaning of 'UK firm' see PARA 323 note 4.

9 As to the meaning of 'authorised agent' see PARA 315 note 14.

10 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1) (b).

11 As to the meaning of 'EEA state' see PARA 315 note 1.

12 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1) (c).

13 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1) (d).

14 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1) (e).

15 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1) (f)(i).

16 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1) (f)(ii).

17 I.e. contracts of a kind falling within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 para 18: see PARA 90.

18 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1) (f)(iii).

19 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1) (g)(i).

20 As to the meaning of 'contract of long-term insurance' see PARA 90 note 3; definition applied by the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2).

21 The details in question are:

401 (1) the following information, on both optimistic and pessimistic bases, for each type of contract or treaty: (a) the number of contracts or treaties expected to be issued (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(2) (a)(i)); (b) the total premium income, both gross and net of reinsurance ceded (reg 14(2)(a)(ii)); and (c) the total sums assured or the total amounts payable each year by way of annuity (reg 14(2)(a)(iii));

402 (2) detailed estimates, on both optimistic and pessimistic bases, of income and expenditure in respect of direct business, reinsurance acceptances and reinsurance cessions (reg 14(2)(b)); and

403 (3) estimates relating to the financial resources intended to cover underwriting liabilities (reg 14(2)(c)).

22 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1)(g)(ii).

23 As to the meaning of 'contract of general insurance' see PARA 90 note 3; definition applied by the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2).

24 The details in question are:

404 (1) estimates relating to expenses of management (other than costs of installation), and in particular those relating to current expenses and commissions (Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(3)(a));

405 (2) estimates relating to premiums or contributions (both gross and net of all reinsurance ceded) and to claims (after all reinsurance recoveries) (reg 14(3)(b)); and

406 (3) estimates relating to the financial resources to cover underwriting liabilities (reg 14(3)(c)).

25 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1)(g)(iii).

26 As to the meaning of 'relevant motor vehicle risks' see PARA 315 note 32.

27 'National bureau', in relation to an EEA state, means a professional organisation: (1) which has been constituted in that EEA state in accordance with Recommendation No 5 adopted on 25 January 1949 by the Road Transport Sub-committee of the Inland Transport Committee of the United Nations Economic Commission for Europe; and (2) which groups together undertakings which in that EEA state are authorised to conduct the business of motor vehicle liability insurance: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2).

28 'National guarantee fund', in relation to an EEA state, means a body: (1) which has been set up or authorised in that EEA state in accordance with EC Council Directive 84/5 (OJ L8, 11.1.84, p 17) on the approximation of laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles, art 1(4); and (2) which provides compensation for damage to property or personal injuries caused by unidentified vehicles or vehicles for which the insurance obligation provided for in EC Council Directive 84/5 (OJ L8, 11.1.84, p 17) art 1(1) has not been satisfied: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2).

29 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1)(h).

30 'Health insurance risks', in relation to an EEA state, means risks of a kind mentioned in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 para 2 (sickness) (see PARA 90), where: (1) contracts of insurance covering those risks serve as a partial or complete alternative to the health cover provided by the statutory social security system in that EEA state; and (2) the law of that EEA state requires such contracts to be operated on a technical basis similar to life assurance in accordance with all the conditions listed in the Third Non-Life Insurance Directive (ie EC Council Directive 92/49 (OJ L228, 11.8.92, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, and amending EC Directives 73/239 and 88/357) art 54(2), first sub-paragraph: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 1(2).

31 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 14(1)(i).

32 As to authorised persons see PARA 314.

33 Ie under the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, regs 13(1), 14(1).

34 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 18(1). Such an offence is punishable: (1) on summary conviction, by a fine not exceeding the statutory maximum; or (2) on conviction on indictment, by a fine: reg 18(1). In proceedings for such an offence, it is a defence for the firm to show that it took all reasonable precautions and exercised all due diligence to avoid committing the offence: reg 18(2). As to the statutory maximum see PARA 56 note 24.

Regulation 18 is in exercise of the Financial Services and Markets Act 2000 Sch 3 para 22(2)(b), namely that regulations may make provision with respect of the consequences of the UK firm's failure to comply with a provision of the regulations. See note 6.

- 35 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 36 As to the meaning of 'host state regulator' see PARA 323 note 10.
- 37 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(2) (a). See note 6.
- 38 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(2) (b). The notice referred to in the text is that under reg 13(5)(a): see the text and note 47. See note 6.
- 39 Ie in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(2)(a).
- 40 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(2) (c). See note 6.
- 41 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(2) (d)(i). See note 6.
- 42 Ie within the meaning of the Financial Services and Markets Act 2000 Sch 3 para 19: see PARA 323 note 14.
- 43 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(2) (d)(ii). See note 6.
- 44 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(1), (3). See note 6.
- 45 Ie in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(2)(a).
- 46 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(4). See note 6.
- 47 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(5) (a). See note 6.
- 48 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(5) (b). See note 6.
- 49 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(6) (a). As to the Financial Services and Markets Tribunal see PARA 43 et seq. See note 6.
- 50 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(6) (b). See note 6.
- 51 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(7) (a). See note 6.
- 52 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(7) (b). See note 6.
- 53 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13(7). See note 6.

## UPDATE

### 327 UK insurance firms: changes to relevant EEA details of branches

NOTE 28--Directive 84/5 replaced: European Parliament and EC Council Directive 2009/103 (OJ L263, 7.10.2009, p 11).



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### **328. UK insurance firms: changes to relevant UK details of branches.**

A UK firm<sup>1</sup> which has exercised an EEA right<sup>2</sup>, deriving from any of the Insurance Directives<sup>3</sup>, to establish a branch must not make a change in any of the information which the UK firm was required to provide to the Financial Services Authority<sup>4</sup> in its notice of intention to establish a branch<sup>5</sup> with respect to the branch, unless: (1) the firm has given a notice to the Authority stating the details of the proposed change at least one month before the change is effected<sup>6</sup>; or (2) if the change is occasioned by circumstances beyond the firm's control, the firm has as soon as practicable (whether before or after the change) given a notice to the Authority stating the details of the change<sup>7</sup>.

If a UK firm which is not an authorised person<sup>8</sup> contravenes the above prohibitions<sup>9</sup> it is guilty of an offence<sup>10</sup>.

1 As to the meaning of 'UK firm' see PARA 323 note 4.

2 As to the meaning of 'EEA right' see PARA 315 note 3.

3 As to the meaning of 'Insurance Directives' see PARA 86 note 6.

4 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP) Ch 13. As to the Handbook generally see PARA 22.

5 I.e. a change in any of the information which the UK firm was required to provide to the Authority by or under the Financial Services and Markets Act 2000 Sch 3 para 19(2) (see PARA 323), other than a change in the relevant EEA details referred to in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 13 (see PARA 327): reg 15(2).

6 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 15(1) (a). Regulation 15 is in exercise of the Financial Services and Markets Act 2000 s 37, Sch 3 para 22(2)(a), namely that regulations may make provision as to any change (or proposed change) of a prescribed kind relating to a UK firm or to an activity that it carries on and as to the procedure to be followed in relation to such cases.

Where a provision of the kind mentioned in Sch 3 para 22(2) requires the Authority's consent to a change (or proposed change) (1) consent may be refused only on prescribed grounds; and (2) if the Authority decides to refuse consent, the firm concerned may refer the matter to the Financial Services and Markets Tribunal: Sch 3 para 22(3). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the Financial Services and Markets Tribunal see PARA 43 et seq.

Where a UK firm has a Part IV permission and is exercising an EEA right to carry on any Consumer Credit Act business in an EEA state other than the United Kingdom the Authority may exercise its power under s 45 (see PARA 355) in respect of the firm if the Office of Fair Trading has informed the Authority that (a) the firm; (b) any of the firm's employees, agents or associates (whether past or present); or (c) if the firm is a body corporate, a controller of the firm or an associate of such a controller, has done any of the things specified in the Consumer Credit Act 1974 s 25(2)(a)-(e) (see **CONSUMER CREDIT**): Financial Services and Markets Act 2000 Sch 3 para 23(1), (2) (Sch 3 para 23(2) amended by the Environment Act 2002 Sch 25 para 40(1), (19)(b); and the Financial Services and Markets Act 2000 Sch 3 para 23(1), (2) amended by the Consumer Credit Act 2006 s 33(10), (11)). The Authority may also exercise its power under the Financial Services and Markets Act 2000 s 45 (see PARA 355) in respect of the firm if the Office of Fair Trading has informed the Authority that it has concerns about any of the following: (i) the firm's skills, knowledge and experience in relation to Consumer Credit Act businesses; (ii) such skills, knowledge and experience of other persons who are participating in any Consumer Credit Act business being carried on by the firm; (iii) practices and procedures that the firm is implementing in connection with any such business: Financial Services and Markets Act 2000 Sch 3 para 23(2A) (added by the Consumer Credit Act 2006 s 33(12)). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et

seq. As to the meaning of 'Part IV permission' see PARA 348. As to the meaning of 'Consumer Credit Act business' see PARA 464 note 2; definition applied by the Financial Services and Markets Act 2000 Sch 3 para 23(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meanings of 'associate' and 'controller' see PARA 591 note 16; definitions applied by Sch 3 para 23(3). As to the meaning of 'body corporate' see PARA 86 note 11.

Where a UK firm is not required to have a Part IV permission in relation to the business which it is carrying on and is exercising the right conferred by the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) art 24 to carry on that business in an EEA state other than the United Kingdom then, if requested to do so by the host state regulator in the EEA state in which the UK firm's business is being carried on, the Authority may impose any requirement in relation to the firm which it could impose if: (A) the firm had a Part IV permission in relation to the business which it is carrying on; and (B) the Authority was entitled to exercise its power under Pt IV to vary that permission: Financial Services and Markets Act 2000 Sch 3 para 24(1), (2) (Sch 3 para 24(1)(b) amended by SI 2000/2952; SI 2006/3221). As to the meaning of 'EEA state' see PARA 315 note 1.

As to the information to be included in the public record see the Financial Services and Markets Act 2000 Sch 3 para 25(a); and PARA 323.

7 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 15(1) (b). See note 6.

8 As to authorised persons see PARA 314.

9 Ie under the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 15(1).

10 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 18(1). Such an offence is punishable: (1) on summary conviction, by a fine not exceeding the statutory maximum; or (2) on conviction on indictment, by a fine: reg 18(1). In proceedings for such an offence, it is a defence for the firm to show that it took all reasonable precautions and exercised all due diligence to avoid committing the offence: reg 18(2). As to the statutory maximum see PARA 56 note 24.

Regulation 18 is made in exercise of the Financial Services and Markets Act 2000 Sch 3 para 22(2)(b), which provides that regulations may make provision with respect of the consequences of the UK firm's failure to comply with a provision of the regulations. See note 6.

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### **329. UK insurance firms: changes to services.**

A UK firm<sup>1</sup> which is providing services in exercise of an EEA right<sup>2</sup>, deriving from any of the Insurance Directives<sup>3</sup>, must not make a change in the relevant details<sup>4</sup>, unless certain requirements<sup>5</sup> have been complied with<sup>6</sup>. The relevant details are:

- 808 (1) the EEA state in which the EEA activities<sup>7</sup> are carried on, or are to be carried on<sup>8</sup>;
- 809 (2) the nature of the risks or commitments covered, or to be covered, in the EEA state concerned<sup>9</sup>;
- 810 (3) if the firm covers, or intends to cover, relevant motor vehicle risks<sup>10</sup>: (a) the name and address of the claims representative<sup>11</sup>; and (b) details of the firm's membership of the national bureau<sup>12</sup> and the national guarantee fund<sup>13</sup> in the EEA state concerned<sup>14</sup>; and
- 811 (4) if the insurer covers, or intends to cover, health insurance risks<sup>15</sup>, the technical bases used, or to be used, for calculating premiums in respect of such risks<sup>16</sup>.

If a UK firm which is not an authorised person<sup>17</sup> contravenes the above prohibition<sup>18</sup> it is guilty of an offence<sup>19</sup>.

The firm must not make a change in any of the relevant details described above unless: (i) the firm has given a notice to the Financial Services Authority<sup>20</sup> stating the details of the proposed change<sup>21</sup>; and (ii) the Authority has given the host state regulator<sup>22</sup> a notice<sup>23</sup>.

Alternatively (if the change is occasioned by circumstances beyond the firm's control) the requirements are that the firm has as soon as practicable (whether before or after the change) given a notice to the Authority stating the details of the change<sup>24</sup>.

The Authority must, within one month of receiving a notice under head (i) above<sup>25</sup>, either consent to the change or refuse to consent to the change<sup>26</sup>. If the Authority consents to the change, it must give a notice to the host state regulator informing it of the details of the proposed change<sup>27</sup> and inform the firm that it has given that notice, stating the date on which it did so<sup>28</sup>. If the Authority refuses to consent to the change the firm may refer the matter to the Financial Services and Markets Tribunal<sup>29</sup> and the Authority must give notice to the firm of the refusal, stating the reasons for it, and giving an indication of the firm's right to refer the matter to the Tribunal, and the procedure on such a reference<sup>30</sup>.

1 As to the meaning of 'UK firm' see PARA 323 note 4.

2 As to the meaning of 'EEA right' see PARA 315 note 3.

3 As to the meaning of 'Insurance Directives' see PARA 86 note 6.

4 See heads (1)-(4) in the text.

5 See the requirements in the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(3); reg 16(2).

6 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(1). Regulation 16 is made in exercise of the Financial Services and Markets Act 2000 s 37, Sch 3 para 22(2)(a), which provides that regulations may make provision as to any change (or proposed change) of a prescribed kind relating to a UK firm or to an activity that it carries on and as to the procedure to be followed in relation to such cases.

Where a provision of the kind mentioned in Sch 3 para 22(2) requires the Financial Services Authority's consent to a change (or proposed change): (1) consent may be refused only on prescribed grounds; and (2) if the Authority decides to refuse consent, the firm concerned may refer the matter to the Financial Services and Markets Tribunal: Sch 3 para 22(3). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

Where a UK firm has a Part IV permission and is exercising an EEA right to carry on any Consumer Credit Act business in an EEA state other than the United Kingdom the Authority may exercise its power under s 45 (see PARA 355) in respect of the firm if the Office of Fair Trading has informed the Authority that (a) the firm; (b) any of the firm's employees, agents or associates (whether past or present); or (c) if the firm is a body corporate, a controller of the firm or an associate of such a controller, has done any of the things specified in the Consumer Credit Act 1974 s 25(2)(a)-(e) (see **CONSUMER CREDIT**): Financial Services and Markets Act 2000 Sch 3 para 23(1), (2) (Sch 3 para 23(2) amended by the Environment Act 2002 Sch 25 para 40(1), (19)(b); and the Financial Services and Markets Act 2000 Sch 3 para 23(1), (2) amended by the Consumer Credit Act 2006 s 33(10), (11)). The Authority may also exercise its power under the Financial Services and Markets Act 2000 s 45 (see PARA 355) in respect of the firm if the Office of Fair Trading has informed the Authority that it has concerns about any of the following: (i) the firm's skills, knowledge and experience in relation to Consumer Credit Act businesses; (ii) such skills, knowledge and experience of other persons who are participating in any Consumer Credit Act business being carried on by the firm; (iii) practices and procedures that the firm is implementing in connection with any such business: Financial Services and Markets Act 2000 Sch 3 para 23(2A) (added by the Consumer Credit Act 2006 s 33(12)). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq. As to the meaning of 'Part IV permission' see PARA 348. As to the meaning of 'Consumer Credit Act business' see PARA 464 note 2; definition applied by the Financial Services and Markets Act 2000 Sch 3 para 23(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meanings of 'associate' and

'controller' see PARA 591 note 16; definitions applied by Sch 3 para 23(3). As to the meaning of 'body corporate' see PARA 86 note 11.

Where a UK firm is not required to have a Part IV permission in relation to the business which it is carrying on and is exercising the right conferred by the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) art 24 to carry on that business in an EEA state other than the United Kingdom then, if requested to do so by the host state regulator in the EEA state in which the UK firm's business is being carried on, the Authority may impose any requirement in relation to the firm which it could impose if: (A) the firm had a Part IV permission in relation to the business which it is carrying on; and (B) the Authority was entitled to exercise its power under Pt IV to vary that permission: Financial Services and Markets Act 2000 Sch 3 para 24(1), (2) (Sch 3 para 24(1)(b) amended by SI 2000/2952; SI 2006/3221). As to the meaning of 'EEA state' see PARA 315 note 1.

As to the information to be included in the public record see the Financial Services and Markets Act 2000 Sch 3 para 25(b); and PARA 323.

7 As to the meaning of 'EEA activities' see PARA 315 note 14.

8 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 17(a).

9 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 17(b).

10 As to the meaning of 'relevant motor vehicle risks' see PARA 315 note 32.

11 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 17(c) (i). As to the meaning of 'claims representative' see PARA 315 note 32.

12 As to the meaning of 'national bureau' see PARA 327 note 27.

13 As to the meaning of 'national guarantee fund' see PARA 327 note 28.

14 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 17(c) (ii).

15 As to the meaning of 'health insurance risks' see PARA 327 note 30.

16 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 17(d).

17 As to authorised persons see PARA 314.

18 Ie under the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(1).

19 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 18(1). Such an offence is punishable: (1) on summary conviction, by a fine not exceeding the statutory maximum; or (2) on conviction on indictment, by a fine: reg 18(1). In proceedings for such an offence, it is a defence for the firm to show that it took all reasonable precautions and exercised all due diligence to avoid committing the offence: reg 18(2). As to the statutory maximum see PARA 56 note 24.

Regulation 18 is in exercise of the Financial Services and Markets Act 2000 Sch 3 para 22(2)(b), namely that regulations may make provision with respect of the consequences of the UK firm's failure to comply with a provision of the regulations. See note 6.

20 As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Financial Services and Markets Tribunal see PARA 43 et seq. See also the Authority's Handbook of Rules and Guidance, Authorisation Manual (AUTH), Regulatory Processes, Supervision Manual (SUP) Ch 13. As to the Handbook generally see PARA 22.

21 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(3) (a). See note 6.

22 As to the meaning of 'host state regulator' see PARA 323 note 10.

23 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(3) (b). The notice is under reg 16(6)(a): see the text to note 27. See note 6.

24 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(2), (4). See also notes 5, 6.

25 See the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(3)(a).

26 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(5). See note 6.

27 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(6)(a). See note 6.

28 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(6)(b). See note 6.

29 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(7)(a). As to the Financial Services and Markets Tribunal see PARA 43 et seq. See note 6.

30 Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 16(7)(b). See note 6.

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## **(ii) Exemption**

### **A. PERSONS EXEMPTED BY EXEMPTION ORDERS**

#### **330. Power of the Treasury to make exemption orders.**

No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is an authorised person or an exempt person. This is referred to as the 'general prohibition'<sup>1</sup>. The Treasury may by order provide for specified<sup>2</sup> persons<sup>3</sup>, or persons falling within a specified class<sup>4</sup>, to be exempt from the general prohibition<sup>5</sup>. However, a person cannot be an exempt person<sup>6</sup> as a result of an exemption order if he has a Part IV permission<sup>7</sup>.

An exemption order may provide for an exemption to have effect:

- 812 (1) in respect of all regulated activities<sup>8</sup>;
- 813 (2) in respect of one or more specified regulated activities<sup>9</sup>;
- 814 (3) only in specified circumstances<sup>10</sup>;
- 815 (4) only in relation to specified functions<sup>11</sup>;
- 816 (5) subject to conditions<sup>12</sup>.

1 See the Financial Services and Markets Act 2000 s 19; and PARA 80. As to authorised persons see PARA 314.

2 'Specified' means specified by the exemption order: Financial Services and Markets Act 2000 s 38(4). In exercise of the power under s 38 the Treasury has made the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201: see PARA 331 et seq. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Financial Services and Markets Act 2000 s 38(1)(a).

4 Financial Services and Markets Act 2000 s 38(1)(b).

5 Financial Services and Markets Act 2000 s 38(1). If the order is the first order to be made, or to contain provisions made, under s 38 or if it contains provisions restricting or removing an exemption provided by an earlier order made under s 38 then the order must not be made unless a draft of it has been laid before

Parliament and approved by a resolution of each House: s 429(3), (5). See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

- 6 As to the meaning of 'exempt person' see PARA 80 note 4.
- 7 Financial Services and Markets Act 2000 s 38(2). As to the meaning of 'Part IV permission' see PARA 348.
- 8 Financial Services and Markets Act 2000 s 38(3)(a). As to regulated activities see PARA 84 et seq.
- 9 Financial Services and Markets Act 2000 s 38(3)(b).
- 10 Financial Services and Markets Act 2000 s 38(3)(c).
- 11 Financial Services and Markets Act 2000 s 38(3)(d).
- 12 Financial Services and Markets Act 2000 s 38(3).

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### **331. Persons exempt in respect of non-insurance business.**

Each of the persons listed below<sup>1</sup> is exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>2</sup> in respect of any regulated activity<sup>3</sup> other than the activity of effecting and carrying out contracts of insurance<sup>4</sup>:

- 817 (1) the Bank of England<sup>5</sup>;
- 818 (2) the central bank of an EEA state<sup>6</sup> other than the United Kingdom<sup>7</sup>;
- 819 (3) the European Central Bank<sup>8</sup>;
- 820 (4) the European Community<sup>9</sup>;
- 821 (5) the European Atomic Energy Community<sup>10</sup>;
- 822 (6) the European Coal and Steel Community<sup>11</sup>;
- 823 (7) the European Investment Bank<sup>12</sup>;
- 824 (8) the International Bank for Reconstruction and Development<sup>13</sup>;
- 825 (9) the International Finance Corporation<sup>14</sup>;
- 826 (10) the International Monetary Fund<sup>15</sup>;
- 827 (11) the African Development Bank<sup>16</sup>;
- 828 (12) the Asian Development Bank<sup>17</sup>;
- 829 (13) the Caribbean Development Bank<sup>18</sup>;
- 830 (14) the Inter-American Development Bank<sup>19</sup>;
- 831 (15) the European Bank for Reconstruction and Development<sup>20</sup>;
- 832 (16) the Bank for International Settlements<sup>21</sup>.

1 Is listed in the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 3, Schedule Pt I. The order is made under the Financial Services and Markets Act 2000 s 38: see PARA 330.

2 As to the general prohibition see PARA 80.

3 As to regulated activities see PARA 84 et seq.

4 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 3. Effecting and carrying out contracts of insurance are specified kinds of activity under the Financial Services and Markets Act

2000 (Regulated Activities) Order 2001, SI 2001/544, art 10(1): see PARA 100. As to the meaning of 'contract of insurance' see PARA 90 note 3.

5 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 1. See PARA 793 et seq.

6 As to the meaning of 'EEA state' see PARA 315 note 1.

7 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 2. As to the meaning of 'United Kingdom' see PARA 2 note 3.

8 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 3. See **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 304.

9 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 4.

10 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 5.

11 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 6.

12 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 7.

13 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 8. See PARA 1391.

14 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 9. See PARAS 1391, 1392.

15 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 10. See PARA 1391.

16 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 11. See PARAS 1391, 1392.

17 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 12. See PARAS 1391, 1392.

18 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 13. See PARAS 1391, 1392.

19 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 14. See PARAS 1391, 1392.

20 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 15. See PARA 1393.

21 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 15A (added by SI 2003/47). See PARA 1391.

## **UPDATE**

### **331 Persons exempt in respect of non-insurance business**

TEXT AND NOTES--Also, head (17) Bank of England Asset Purchase Facility Fund Ltd: SI 2001/1201 Schedule para 15B (added by SI 2009/118).

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### 332. Persons exempt in respect of accepting deposits.

Subject to the limitations, if any, expressed in relation to him, each of the persons listed below<sup>1</sup> is exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>2</sup> in respect of the regulated activity<sup>3</sup> of accepting deposits<sup>4</sup>:

- 833 (1) a municipal bank<sup>5</sup>;
- 834 (2) Keesler Federal Credit Union, in so far as it accepts deposits from members<sup>6</sup>, or dependants<sup>7</sup> of members, of a visiting force<sup>8</sup> of the United States of America, or from members, or dependants of members, of a civilian component<sup>9</sup> of such a force<sup>10</sup>;
- 835 (3) a body of persons certified as a school bank by the National Savings Bank or by an authorised person<sup>11</sup> who has permission to accept deposits<sup>12</sup>;
- 836 (4) a local authority<sup>13</sup>;
- 837 (5) any body which by virtue of any enactment<sup>14</sup> has power to issue a precept to a local authority in England or Wales or a requisition to a local authority in Scotland, or to the expenses of which, by virtue of any enactment, a local authority in the United Kingdom<sup>15</sup> is or can be required to contribute<sup>16</sup>;
- 838 (6) the Council of Europe Development Bank<sup>17</sup>;
- 839 (7) a charity<sup>18</sup>, in so far as it accepts deposits: (a) from another charity<sup>19</sup>; or (b) in respect of which no interest or premium is payable<sup>20</sup>;
- 840 (8) the National Children's Charities Fund in so far as it accepts deposits in respect of which no interest or premium is payable<sup>21</sup> and the total value of the deposits made by any one person does not exceed £10,000<sup>22</sup>;
- 841 (9) an industrial and provident society<sup>23</sup>, in so far as it accepts deposits in the form of withdrawable share capital<sup>24</sup>;
- 842 (10) a credit union<sup>25</sup>;
- 843 (11) the Student Loans Company Limited, in so far as it accepts deposits from the Secretary of State or the Scottish Ministers in connection with, or for the purposes of, enabling eligible students<sup>26</sup> to receive loans<sup>27</sup>.

1 He listed in the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 4, Schedule Pt II. The order is made under the Financial Services and Markets Act 2000 s 38: see PARA 330.

2 As to the general prohibition see PARA 80.

3 As to regulated activities see PARA 84 et seq.

4 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 4. Accepting deposits is a specified kind of activity (subject to various qualifications) under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5(1): see PARA 89. As to the meaning of 'deposit' see PARA 89 note 1.

5 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 16. A municipal bank is a company which was, immediately before 1 December 2001, exempted from the prohibition in the Banking Act 1987 s 3 (now repealed) by virtue of s 4(1), and Sch 2 para 4: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 16; Financial Services and Markets Act 2000 (Commencement No 7) Order 2001, SI 2001/3538, art 2(1).

6 As to the meaning of 'member' see the Visiting Forces Act 1952 s 12; definition applied by the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 17(2).

7 As to the meaning of 'dependant' see the Visiting Forces Act 1952 s 12; definition applied by the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 17(2).

8 As to the meaning of 'visiting force' see the Visiting Forces Act 1952 s 12; definition applied by the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 17(2).



- 9 As to the meaning of 'member of a civilian component' see the Visiting Forces Act 1952 s 12; definition applied by the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 17(2).
- 10 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 17(1).
- 11 As to authorised persons see PARA 314.
- 12 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 18.
- 13 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 19. 'Local authority' means: (1) in England and Wales, a local authority within the meaning of the Local Government Act 1972, the Greater London Authority, the Common Council of the City of London or the Council of the Isles of Scilly; (2) in Scotland, a local authority within the meaning of the Local Government (Scotland) Act 1973; and (3) in Northern Ireland, a district council within the meaning of the Local Government Act (Northern Ireland) 1972: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 2. As to areas and authorities in England and Wales see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.
- 14 For these purposes, 'enactment' includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 20(2).
- 15 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 16 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 20(1). As to the issuing of precepts see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 524 et seq.
- 17 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 21 (substituted by SI 2002/1310).
- 18 'Charity' in relation to Scotland, means a body entered in the Scottish Charity Register, and otherwise, has the meaning given by the Charities Act 1993 s 96(1) (see **CHARITIES** vol 8 (2010) PARA 1 et seq) or by the Charities Act (Northern Ireland) 1964 s 35: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 2 (definition amended by SI 2006/242).
- 19 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 22(a).
- 20 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 22(b).
- 21 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 23(a).
- 22 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 23(b).
- 23 'Industrial and provident society' has the meaning given by the Financial Services and Markets Act 2000 s 417(1) but does not include a credit union within the meaning of the Credit Unions Act 1979 or the Credit Unions (Northern Ireland) Order 1985, SI 1985/1205 (NI 12): Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 2. As to credit unions see PARA 2394 et seq.
- 24 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 24.
- 25 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 24A (added by SI 2001/3623). This is a credit union within the meaning of the Credit Unions (Northern Ireland) Order 1985, SI 1985/1205 (NI 12).
- 26 For these purposes, 'eligible student' means: (1) any person who is an eligible student pursuant to regulations made under the Teaching and Higher Education Act 1998, Pt II (ss 22-31) (see **EDUCATION** vol 15(2) (2006 Reissue) PARA 1046 et seq) (Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 25(2)(a)); (2) any person to whom, or in respect of whom, loans may be paid under the Education (Scotland) Act 1980 s 73(f) (Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 25(2)(b)); (3) any person who is an eligible student pursuant to regulations made under the Education (Student Support) (Northern Ireland) Order 1998, SI 1998/1760 (NI 14), art 3 (Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 25(2)(c)); or (4) any person who is in receipt of or who is eligible to receive a loan of the kind mentioned in the Teaching and Higher Education Act 1998 (Commencement No 2 and Transitional Provisions) Order 1998, SI 1998/2004, or the Education (Student Support) (Northern Ireland) Order 1998 (Commencement and Transitional Provisions) Order (Northern Ireland) 1998 art 3(1) (Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 25(2)(d)).

27 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 25(1).

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### **333. Persons exempt in respect of particular investment business activities.**

Subject to the limitation, if any, expressed in relation to him, each of the persons listed in heads (a) to (o) below<sup>1</sup> is exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>2</sup> in respect of any of the following regulated activities<sup>3</sup>: (1) dealing in investments as principal<sup>4</sup>; (2) dealing in investments as agent<sup>5</sup>; (3) arranging deals in investments<sup>6</sup>; (4) operating a multilateral trading facility<sup>7</sup>; (5) managing investments<sup>8</sup>; (6) assisting in the administration and performance of a contract of insurance<sup>9</sup>; (7) safeguarding and administering investments<sup>10</sup>; (8) sending dematerialised instructions<sup>11</sup>; (9) establishing, operating or winding up a collective investment scheme etc<sup>12</sup>; (10) establishing etc a pension scheme<sup>13</sup>; (11) advising on investments<sup>14</sup>; and (12) agreeing to carry on regulated activities relevant to such activities<sup>15</sup>. The persons exempt from the general prohibition in respect of those activities are:

- 844 (a) the National Debt Commissioners<sup>16</sup>;
- 845 (b) Partnerships UK<sup>17</sup>;
- 846 (c) the International Development Association<sup>18</sup>;
- 847 (d) the English Tourist Board<sup>19</sup>;
- 848 (e) VisitScotland<sup>20</sup>;
- 849 (f) the Northern Ireland Tourist Board<sup>21</sup>;
- 850 (g) Scottish Enterprise<sup>22</sup>;
- 851 (h) Invest Northern Ireland<sup>23</sup>;
- 852 (i) the Multilateral Investment Guarantee Agency<sup>24</sup>;
- 853 (j) the Board of the Pension Protection Fund<sup>25</sup>;
- 854 (k) Capital for Enterprise Limited, in so far as in carrying on any regulated activity it provides services only to the Crown<sup>26</sup>;
- 855 (l) a person acting as an official receiver<sup>27</sup>;
- 856 (m) an Operator<sup>28</sup>, in so far he carries on: (i) any regulated activity for the purposes of the performance of his functions as an Operator<sup>29</sup>; or (ii) any other regulated activity for the purposes of operating a computer-based system and procedures which enable title to investments to be evidenced and transferred without a written instrument<sup>30</sup>, or facilitate matters supplementary or incidental to enabling titles to be so evidenced<sup>31</sup>, other than a regulated activity in respect of which a recognised clearing house is exempt from the general prohibition<sup>32</sup>;
- 857 (n) a person acting as a judicial factor<sup>33</sup>;
- 858 (o) a person acting as an insolvency practitioner<sup>34</sup>.

1 He listed in the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 5(1), Schedule Pt III. The order is made under the Financial Services and Markets Act 2000 s 38: see PARA 330.

2 As to the general prohibition see PARA 80.

3 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 5(1) (amended by SI 2003/1675; SI 2006/1969; SI 2007/125).

- 4 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14; and PARA 112.
- 5 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21; and PARA 126.
- 6 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25; and PARA 139.
- 7 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25D; and PARA 139.
- 8 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37; and PARA 152.
- 9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A; and PARA 104.
- 10 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40; and PARA 160.
- 11 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45; and PARA 190.
- 12 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51; and PARA 171.
- 13 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52; and PARA 187.
- 14 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53; and PARA 174.
- 15 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 64; and PARA 221.
- 16 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 26.
- 17 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 27 (substituted by SI 2003/1675).
- 18 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 28.
- 19 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 29.
- 20 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 31 (substituted by virtue of the Tourist Boards (Scotland) Act 2006 Sch 2 Pt 2 para 10).
- 21 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 32.
- 22 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 33.
- 23 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 33A (added by SI 2007/1821).
- 24 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 34.
- 25 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 34A (added by SI 2005/592).
- 26 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 34B (added by SI 2008/682).
- 27 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 35. The reference is to an official receiver within the meaning of the Insolvency Act 1986 s 399 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 503 et seq) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 2.

28     le an Operator approved as such by the Treasury under the Uncertificated Securities Regulations 1995, SI 1995/3272 (see now the Uncertificated Securities Regulations 2001, SI 2001/3755): Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 37(2). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

29     Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 37(1)(a) (Schedule para 37(1) substituted by SI 2001/3623). The functions referred to in the text are his functions under the Uncertificated Securities Regulations 1995, SI 1995/3272 (see now the Uncertificated Securities Regulations 2001, SI 2001/3755): see **COMPANIES** vol 14 (2009) PARA 335 et seq.

30     Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 37(1)(b) (i) (as substituted: see note 29).

31     Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 37(1)(b) (ii) (as substituted: see note 29).

32     Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 37(1) (as substituted: see note 29). The reference in the text is to a recognised clearing house exempt by virtue of the Financial Services and Markets Act 2000 s 285(3): see PARA 684.

33     Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 38.

34     Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 39 (amended by SI 2001/3623). The reference is to an insolvency practitioner within the meaning of the Insolvency Act 1986 s 388 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1344 et seq) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19) art 3.

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### **334. Persons exempt in respect of other particular activities.**

Subject to any statutory limitation, each of the following<sup>1</sup> is exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>2</sup> in respect of certain regulated activities<sup>3</sup>, or in respect of agreeing to carry on such specified kinds of activity<sup>4</sup>:

- 859 (1)     enterprise schemes<sup>5</sup>;
- 860 (2)     employee share schemes in electricity shares<sup>6</sup>;
- 861 (3)     gas industry<sup>7</sup>;
- 862 (4)     trade unions and employers' associations<sup>8</sup>;
- 863 (5)     charities<sup>9</sup>;
- 864 (6)     schemes established under the Trustee Investments Act 1961<sup>10</sup>;
- 865 (7)     former members of Lloyd's<sup>11</sup>;
- 866 (8)     local authorities<sup>12</sup>;
- 867 (9)     social housing<sup>13</sup>;
- 868 (10)    electricity industry<sup>14</sup>;
- 869 (11)    freight forwarders and storage firms<sup>15</sup>;
- 870 (12)    policyholder advocates<sup>16</sup>.

1     le listed in the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 5(2), Schedule Pt IV: see PARA 335 et seq. The order is made under the Financial Services and Markets Act 2000 s 38: see PARA 330.

- 2 As to the general prohibition see PARA 80.
- 3 As to regulated activities see PARA 84 et seq.
- 4 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 5(2). In respect of agreeing to carry on specified kinds of activity see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 64; and PARA 221.
- 5 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 40; and PARA 335.
- 6 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41; and PARA 336.
- 7 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 42; and PARA 337.
- 8 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 43; and PARA 338.
- 9 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 44; and PARA 339.
- 10 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 45; and PARA 340.
- 11 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 46; and PARA 341.
- 12 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 47; and PARA 342.
- 13 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 48; and PARA 342.
- 14 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49; and PARA 343.
- 15 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 50; and PARA 344.
- 16 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 51; and PARA 345.

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### **335. Enterprise schemes exempt in respect of arranging deals in investments.**

Any body corporate which has as its principal object (or one of its principal objects): (1) the promotion or encouragement of industrial or commercial activity or enterprise in the United Kingdom<sup>1</sup> or in any particular area of it<sup>2</sup>; or (2) the dissemination of information concerning persons engaged in such activity or enterprise or requiring capital to become so engaged<sup>3</sup>, is exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>4</sup> in respect of the specified regulated activity<sup>5</sup> of arranging deals in investments<sup>6</sup> so long as it does not carry on that activity for, or with the prospect of, direct or indirect pecuniary gain<sup>7</sup>.

The above provision<sup>8</sup> does not apply where an investment firm<sup>9</sup> or credit institution<sup>10</sup>: (a) provides or performs investment services and activities on a professional basis<sup>11</sup>, and (b) in doing so it would otherwise<sup>12</sup> be treated as carrying on a specified activity<sup>13</sup> in breach of the general prohibition<sup>14</sup>.

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 5(2), Schedule para 40(1)(a).

3 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 40(1)(b).

4 As to the general prohibition see PARA 80.

5 As to regulated activities see PARA 84 et seq.

6 Ie any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25: see PARA 139.

7 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 40(1). For the purposes of the Schedule para 40, such sums as may reasonably be regarded as necessary to meet the costs of carrying on the activity do not constitute a pecuniary gain: Schedule para 40(2).

8 Ie the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 40.

9 As to the meaning of 'investment firm' see PARA 88 note 5; definition applied by the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, reg 2 (definition added by SI 2007/125).

10 As to the meaning of 'credit institution' see PARA 88 note 6; definition applied by the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, reg 2 (definition added by SI 2007/125).

11 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 40(3)(a) (Schedule para 40(3) added by SI 2007/125).

12 Ie but for the operation of the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 40(1): see notes 1-7.

13 Ie an activity specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II (arts 4-72F): see PARA 88 et seq.

14 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 40(3)(b) (as added (see note 11); amended by SI 2007/1821).

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### **336. Employee share schemes in electricity industry shares.**

Each of the persons listed below<sup>1</sup> is exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>2</sup> in respect of the specified regulated activities<sup>3</sup> of dealing in investments as principal or agent or arranging deals in investments<sup>4</sup> which he carries on for the purpose of enabling or facilitating transactions in electricity industry shares or debentures<sup>5</sup> between or for the benefit of any qualifying person<sup>6</sup>; or for the purpose of the holding of electricity industry shares or debentures by or for the benefit of any qualifying person<sup>7</sup>:

- 871 (1) The National Grid Holding plc<sup>8</sup> (or any body corporate in the same group)<sup>9</sup>;  
 872 (2) Electricity Association Limited<sup>10</sup> (or any body corporate in the same group)<sup>11</sup>;  
 873 (3) any company listed in the Electricity Act 1989 (Nominated Companies)  
 (England and Wales) Order 1990<sup>12</sup>; and  
 874 (4) a person holding shares in or debentures of a body corporate as trustee in  
 pursuance of arrangements made for either of the purposes mentioned above<sup>13</sup> by  
 the Secretary of State<sup>14</sup>, by any of the bodies mentioned in heads (1) and (2)  
 above<sup>15</sup> or by an electricity successor company<sup>16</sup> or by some or all of them<sup>17</sup>.

1 le the persons listed in the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, art 5(2), Schedule para 41(2): see heads (1)-(4) in the text.

2 As to the general prohibition see PARA 80.

3 As to regulated activities see PARA 84 et seq.

4 le any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126) or art 25 (see PARA 139).

5 'Electricity industry shares or debentures' means:

407 (1) any investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 76 or art 77 (shares or instruments creating or acknowledging indebtedness) (see PARA 224) in or of an electricity successor company (Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(3)(a)(i));

408 (2) any investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 79 or art 80 (instruments giving entitlement to investments and certificates representing certain securities) (see PARA 224), so far as relevant to the investments mentioned in head (1) above (Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(3)(a)(ii)); and

409 (3) any investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 89 (rights to or interests in investments) (see PARA 224) so far as relevant to the investments mentioned in heads (1) and (2) above (Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(3)(a)(iii)).

References to an electricity successor company include any body corporate that is in the same group, and 'electricity successor company' means a body corporate which is a successor company for the purposes of the Electricity Act 1989 Pt II (ss 65-95) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1034): Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(3)(b).

6 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(1)(a). 'Qualifying person' means: (1) the bona fide employees or former employees of The National Grid Holding plc, Electricity Association Limited or any other body corporate in the same group as either of them; and (2) the wives, husbands, widows, widowers, civil partners, surviving civil partners, or children (including, in Northern Ireland, adopted children) or step-children under the age of 18 of such employees or former employees: Schedule para 41(3)(b) (amended by SI 2005/2114).

'Former employees' of a person (the 'employer') include any person who has never been employed by the employer so long as he occupied a position in relation to some other person of such a kind that it may reasonably be assumed that he would have been a former employee of the employer had the reorganisation of the electricity industry under the Electricity Act 1989 Pt II (ss 65-95) been effected before he ceased to occupy the relevant position: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule, para 41(3)(d).

7 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(1)(b).

8 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(2)(a).

9 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(2)(c).

10 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(2)(b).

11 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(2)(c).

12 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(2)(d). The companies are listed in the Electricity Act 1989 (Nominated Companies) (England and Wales) Order 1990, SI 1990/224, Sch 1.

13 Ie in the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(1)(a) or (b): see the text to notes 6, 7.

14 As to the Secretary of State see PARA 3.

15 Ie the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(2)(a)-(c).

16 See note 5.

17 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 41(2)(e).

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### **337. Gas industry.**

Transco plc is exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>1</sup> in respect of the specified regulated activities of dealing in investments as principal or agent, arranging deals in investments or operating a multilateral trading facility<sup>2</sup> which it carries on: (1) in its capacity as a gas transporter under the Transco Licence<sup>3</sup>; and (2) for the purposes of enabling or facilitating<sup>4</sup> gas shippers<sup>5</sup> to buy or sell a specified investment of futures or contracts for differences etc<sup>6</sup>.

ENMO Ltd is exempt from the general prohibition in respect of the specified regulated activities of dealing in investments as principal or agent, arranging deals in investments or operating a multilateral trading facility<sup>7</sup> which it carries on: (a) in its capacity as the operator of the balancing market<sup>8</sup>; and (b) for the purpose of enabling or facilitating Transco plc and relevant gas shippers<sup>9</sup>, for the purpose of participating in the balancing market, to buy or sell specified investments of futures or contracts for differences etc<sup>10</sup>.

Transco plc and relevant gas shippers are exempt from the general prohibition in respect of any specified regulated activity of dealing in investments as principal or agent<sup>11</sup> in so far as that activity relates to a specified investment of futures or contracts for differences etc<sup>12</sup> and is carried on for the purpose of participating in the balancing market<sup>13</sup>.

1 As to the general prohibition see PARA 80.

2 Ie any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), art 25 (see PARA 139) or art 25D (see PARA 139). As to regulated activities see PARA 84 et seq.

3 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 42(1)(a) (Schedule para 42(1) amended by SI 2007/125). 'Transco Licence' means the licence treated as granted to Transco plc as a gas transporter under the Gas Act 1986 s 7 (**FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 805); Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 42(4)(d).

4 In the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 42 the reference to enabling or facilitating includes acting pursuant to rules governing the operation of the



balancing market which apply in the event of one of the participants appearing to be unable, or likely to become unable, to meet his obligations in respect of one or more contracts entered into through the balancing market: Schedule para 42(4)(e). 'Balancing market' means the market to regulate the delivery and off-take of gas in Transco plc's pipeline system for the purpose of balancing the volume of gas in that system: Schedule para 42(4)(a).

5 'Gas shipper' has the same meaning as in the Gas Act 1986 Pt I (ss 4AA-48) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 807); Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 42(4)(b).

6 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 42(1)(b). The investment in question is an investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84 (see PARA 224) or art 85 (see PARA 224).

7 Is any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), art 25 (see PARA 139) or art 25D (see PARA 139).

8 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 42(2)(a) (Schedule para 42(2) amended by SI 2007/125).

9 'Relevant gas shippers' means gas shippers who have entered into a subscription agreement with ENMO Ltd for the purpose of participating in the balancing market: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 42(4)(b).

10 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 42(2)(b). The investments in question are of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84 (see PARA 224) or art 85 (see PARA 224).

11 Is any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), or art 21 (see PARA 126).

12 Is an investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 84 (see PARA 224) or art 85 (see PARA 224).

13 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 42(3).

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### **338. Trade unions and employers' associations.**

A trade union<sup>1</sup> or employers' association<sup>2</sup> is exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>3</sup> in respect of any specified regulated activity<sup>4</sup> of effecting and carrying out contracts of insurance<sup>5</sup> which it carries on in order to provide provident benefits or strike benefits for its members<sup>6</sup>.

1 As to the meanings of 'trade union' and 'employers' association' see the Trade Union and Labour Relations (Consolidation) Act 1992 ss 1, 122(1) (see **EMPLOYMENT** vol 40 (2009) PARAS 846, 1028) or, in Northern Ireland, the Industrial Relations (Northern Ireland) Order 1992, SI 1992/807 (NI 5), arts 3(1), 4(1); definitions applied by the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 43(2).

2 See note 1.

3 As to the general prohibition see PARA 80.

4 As to regulated activities see PARA 84 et seq.

5     le any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10: see PARA 100. As to the meaning of 'contract of insurance' see PARA 90 note 3.

6     Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 43(1).

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### **339. Charities.**

A charity is exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>1</sup> in respect of any specified regulated activity<sup>2</sup> of establishing, operating or winding up a collective investment scheme or acting as a trustee of an authorised unit trust or acting as a depositary or sole director of an open-ended investment company<sup>3</sup> which it carries on in relation to a fund established under charities legislation<sup>4</sup>. A charity is also exempt from the general prohibition in respect of any such specified regulated activity<sup>5</sup> which it carries on in relation to a pooling scheme fund<sup>6</sup> established under charities legislation<sup>7</sup>.

1     As to the general prohibition see PARA 80.

2     As to regulated activities see PARA 84 et seq.

3     le any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51: see PARA 171.

4     Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 44(1). The charities legislation in question is the Charities Act 1960 s 22A (now repealed), the Charities Act 1993 s 25 (see **CHARITIES** vol 8 (2010) PARA 420), or the Charities Act (Northern Ireland) 1964 s 25.

5     le any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51: see PARA 171.

6     'Pooling scheme fund' means a fund established by a common investment scheme the trusts of which provide that property is not to be transferred to the fund except by or on behalf of a charity, the charity trustees (within the meaning of the Charities Act 1993 s 97(1) (see **CHARITIES** vol 8 (2010) PARA 1) of which are the trustees appointed to manage the fund: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 44(3).

7     Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 44(2). The charities legislation in question is the Charities Act 1960 s 22 (now repealed) or the Charities Act 1993 s 24 (**CHARITIES** vol 8 (2010) PARA 419).

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### **340. Schemes established under the Trustee Investments Act 1961.**

A person acting in his capacity as manager or operator of a fund established under the Trustee Investments Act 1961<sup>1</sup> is exempt from the general prohibition from carrying on regulating activities in the United Kingdom<sup>2</sup> in respect of any specified regulated activity<sup>3</sup> of establishing, operating or winding up a collective investment scheme or acting as a trustee of an authorised unit trust or acting as a depository or sole director of an open-ended investment company<sup>4</sup> which he carries on in relation to that fund<sup>5</sup>.

- 1    Ie the Trustee Investments Act 1961 s 11 (see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 516).
- 2    As to the general prohibition see PARA 80.
- 3    As to regulated activities see PARA 84 et seq.
- 4    Ie any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 51: see PARA 171.
- 5    Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 45.

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### **341. Former members of Lloyd's.**

Any person who ceased to be an underwriting member<sup>1</sup> of Lloyd's before 24 December 1996 is exempt from the general prohibition from carrying on regulating activities in the United Kingdom<sup>2</sup> in respect of any specified regulated activity<sup>3</sup> of carrying out contracts of insurance<sup>4</sup> which relates to contracts of insurance that he has underwritten at Lloyd's<sup>5</sup>.

- 1    Ie within the meaning of the Lloyd's Act 1982: see **INSURANCE**.
- 2    As to the general prohibition see PARA 80.
- 3    As to regulated activities see PARA 84 et seq.
- 4    Ie any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10(2): see PARA 100. As to the meaning of 'contract of insurance' see PARA 90 note 3.
- 5    Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 46.

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### **342. Local authorities and social housing bodies.**

A local authority<sup>1</sup> and a relevant housing authority<sup>2</sup> are each exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>3</sup> in respect of any of the following specified regulated activities<sup>4</sup>:

- 875 (1) dealing in investments as agent, arranging deals in investments, assisting in the administration and performance of a contract of insurance or advising on investments which relate to a non-qualifying contract of insurance<sup>5</sup>;
- 876 (2) arranging, advising on, entering into or administering a regulated mortgage contract<sup>6</sup>;
- 877 (3) arranging, advising on, entering into or administering a regulated home reversion plan<sup>7</sup>; or
- 878 (4) arranging, advising on, entering into or administering a regulated home purchase plan<sup>8</sup>.

1 As to the meaning of 'local authority' see PARA 332 note 13.

2 'Relevant housing authority' means any of the following:

- 410 (1) a registered social landlord within the meaning of the Housing Act 1996 Pt I (ss 1-64) (see **HOUSING** vol 22 (2006 Reissue) PARA 66 et seq) (Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 48(2)(a) (Schedule para 48 substituted by SI 2003/1675));
- 411 (2) a registered social landlord within the meaning of the Housing (Scotland) Act 1981 (Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 48(2)(b) (as so substituted));
- 412 (3) the Housing Corporation (Schedule para 48(2)(c) (as so substituted));
- 413 (4) Scottish Homes (Schedule para 48(2)(d) (as so substituted));
- 414 (5) the body established under the Housing (Northern Ireland) Order 1981, SI 1981/156 (NI 3), art 9 known as the Northern Ireland Housing Executive (Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 48(2)(e) (as so substituted));
- 415 (6) Communities Scotland (Schedule para 48(2)(f) (added by SI 2005/592)).

3 As to the general prohibition see PARA 80.

4 As to regulated activities see PARA 84 et seq.

5 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule paras 47(a), 48(1)(a) (Schedule paras 47, 48 substituted by SI 2003/1675 and the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule paras 47(a), 48(1)(a) amended by SI 2006/2383). The reference is to any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126), art 25(1) or (2) (see PARA 139), art 39A (see PARA 104) or art 53 (see PARA 174).

6 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule paras 47(b), 48(1)(b) (as substituted (see note 5)). The reference is to any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (see PARA 139), art 53A (see PARA 174) or art 61 (see PARA 203).

7 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule paras 47(c), 48(1)(c) (Schedule paras 47(c), (d), 48(1)(c), (d) added by SI 2006/2383). The reference is to any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25B (see PARA 139), art 53B (see PARA 174) or art 63B (see PARA 209).

8 See the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule paras 47(d), 48(1)(d) (as added: see note 7). The reference is to any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25C (see PARA 139), art 53C (see PARA 174) or art 63F (see PARA 215).

## UPDATE

### 342 Local authorities and social housing bodies

TEXT AND NOTES--Also, head (5) arranging, advising on, entering into or administering regulated sale and rent back agreements (the reference is to any regulated activity of the kind specified by SI 2001/544 art 25E (PARA 139), art 53D (PARA 174) or art 63J (PARA 220A): SI 2001/1201 Schedule paras 47(e), 48(1)(e) (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

NOTE 2--SI 2001/1201 Schedule para 48(2) amended: SI 2008/2831.

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### 343. Electricity industry.

NGC<sup>1</sup> is exempt from the general prohibition<sup>2</sup> in respect of any specified regulated activity<sup>3</sup> of dealing in investments as principal or agent, arranging deals in investments, operating a multilateral trading facility or advising on investments<sup>4</sup> which it carries on in the course of: (1) its participation in the Balancing and Settlement Arrangements<sup>5</sup> as operator of the electricity transmission system in Great Britain under the Transmission Licence<sup>6</sup>; or (2) the acquisition by it of Balancing Services<sup>7</sup> in accordance with the Electricity Act 1989<sup>8</sup> and the Transmission Licence<sup>9</sup>.

ELEXON Clear Limited is exempt from the general prohibition in respect of any specified regulated activity of dealing in investments as principal or agent, arranging deals in investments or operating a multilateral trading facility<sup>10</sup> which it carries on in the course of its participation in the Balancing and Settlement Arrangements as clearer for the purposes of (among other things) receiving from and paying to BSC Parties trading and reconciliation charges arising under the Balancing and Settlement Arrangements<sup>11</sup>.

Each BSC Party is exempt from the general prohibition in respect of any specified regulated activity of dealing in investments as principal or agent, arranging deals in investments, operating a multilateral trading facility or advising on investments<sup>12</sup> which it carries on in the course of: (a) its participation in the Balancing and Settlement Arrangements<sup>13</sup>; or (b) the provision by it (or, in the case of the specified regulated activity of dealing in investments as agent<sup>14</sup>, its principal) of Balancing Services to NGC<sup>15</sup>.

ELEXON Limited is exempt from the general prohibition in respect of any specified regulated activity of arranging deals in investments or operating a multilateral trading facility<sup>16</sup> which it carries on in the course of its participation in the Balancing and Settlement Arrangements as administrator<sup>17</sup>.

Each BSC Agent<sup>18</sup> and each Volume Notification Agent<sup>19</sup> is exempt from the general prohibition in respect of any specified regulated activity of arranging deals in investments or operating a multilateral trading facility<sup>20</sup> which it carries on in that capacity<sup>21</sup>.

1 'NGC' means National Grid Company plc: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(7) (Schedule para 49 added by SI 2001/3623; definition amended by SI 2005/592).

2 As to the general prohibition see PARA 80.

3 As to regulated activities see PARA 84 et seq.

4 Ie any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), art 25 (see PARA 139), art 25D (see PARA 139) or art 53 (see PARA 174).

5 'Balancing and Settlement Arrangements' means: (1) the Balancing Mechanism; and (2) arrangements: (a) for the determination and allocation to BSC Parties of the quantities of electricity that have been delivered to and taken off the electricity transmission system and any distribution system in Great Britain; and (b) which set, and provide for the determination and financial settlement of, BSC Parties' obligations arising by reference to the quantities referred to in head (a) above, including the difference between such quantities (after taking account of accepted bids and offers in the Balancing Mechanism) and the quantities of electricity contracted for sale and purchase between BSC Parties: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(7) (as added (see note 1); definition amended by SI 2005/592). As to the meaning of 'Great Britain' see PARA 2 note 3.

'Balancing Mechanism' means the arrangements pursuant to which BSC Parties may make, and NGC may accept, offers or bids to increase or decrease the quantities of electricity to be delivered to or taken off the electricity transmission system or any distribution system in Great Britain at any time or during any period so as to assist NGC in operating and balancing the electricity transmission system, and arrangements for the settlement of financial obligations arising from the acceptance of such offers and bids: Schedule para 49(7) (as so added; definition amended by SI 2005/592). 'BSC Parties' means those persons (other than NGC, ELEXON Limited and ELEXON Clear Limited) who have signed or acceded to (in accordance with the terms of the BSC Framework Agreement), and not withdrawn from, the BSC Framework Agreement: Schedule para 49(7) (as so added).

'BSC Framework Agreement' means the agreement of that title in the form approved by the Secretary of State for the purpose of conditions of the Transmission Licence and which is dated 14 August 2000; and 'conditions' for the purposes of this definition means conditions determined by the Secretary of State under powers granted by the Energy Act 2004 s 137(1) and incorporated into existing electricity transmission licences by a scheme made by the Secretary of State pursuant to s 138 of, and Sch 17 to, that Act: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(7) (definitions added by SI 2005/592). 'The Transmission Licence' means the licence to participate in the transmission of electricity in Great Britain granted, or treated as granted, to NGC under the Electricity Act 1989 s 6(1)(b) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1065): Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(7) (as so added; definition amended by SI 2005/592).

6 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(1)(a) (as added (see note 1); amended by SI 2005/592; SI 2007/125).

7 'Balancing Services' means: (1) offers and bids made in the Balancing Mechanism; (2) Ancillary Services; and (3) other services available to NGC which assist it in operating the electricity transmission system in accordance with the Electricity Act 1989 and the Transmission Licence (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1065 et seq): Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(7) (as added: see note 1).

'Ancillary Services' means services which generators and suppliers of electricity and those making transfers of electricity across an Interconnector are required (as a condition of their connection to the transmission system in Great Britain), or have agreed, to make available to NGC for the purpose of securing the stability of the electricity transmission or any distribution system in Great Britain or any system linked to it by an Interconnector: Schedule para 49(7) (as so added; definition amended by SI 2005/592). 'Interconnector' means the electric lines and electrical plant and meters used solely for the transfer of electricity to or from the electricity transmission system in Great Britain into or out of England and Wales: Schedule para 49(7) (as so added; definition amended by SI 2005/592).

8 See generally **FUEL AND ENERGY**.

9 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(1)(b) (as added: see note 1).

10 Ie any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), and art 25 (see PARA 139) or art 25D (see PARA 139).

11 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(2) (as added (see note 1); amended by SI 2007/125).

12    le any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), art 25 (see PARA 139), art 25D (see PARA 139) or art 53 (see PARA 174).

13    Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(3)(a) (as added (see note 1); art 49(3) amended by SI 2007/125).

14    le an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21: see PARA 126.

15    Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(3)(b) (as added: see note 1).

16    le any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25 (see PARA 139) or art 25D (see PARA 139).

17    Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(4) (as added: see note 1).

18    'BSC Agents' means the persons for the time being engaged by or on behalf of ELEXON Limited for the purpose of providing services to all BSC Parties, NGC, ELEXON Limited and ELEXON Clear Limited in connection with the operation of the Balancing and Settlement Arrangements: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(7) (as added: see note 1).

19    'Volume Notification Agents' means the persons for the time being appointed and authorised under and in accordance with the Balancing and Settlement Arrangements on behalf of BSC Parties to notify to the BSC Agent designated for that purpose pursuant to the Balancing and Settlement Arrangements quantities of electricity contracted for the sale and purchase between those BSC Parties to be taken into account for the purposes of the Balancing and Settlement Arrangements: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(7) (as added: see note 1).

20    le any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25 (see PARA 139) or art 25D (see PARA 139).

21    Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 49(5) (as added (see note 1); amended by SI 2007/127).

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### **344. Freight forwarders and storage firms.**

A freight forwarder<sup>1</sup> or storage firm<sup>2</sup> is exempt from the general prohibition<sup>3</sup> in respect of any specified regulated activity<sup>4</sup> of dealing in investments as agent, arranging deals in investments, assisting in the administration and performance of a contract of insurance or advising on investments<sup>5</sup> in the following circumstances<sup>6</sup>:

879 (1)    where a freight forwarder ('F') (a) holds a policy of insurance which insures F in respect of loss of or damage to goods which F transports or of which F arranges the transportation<sup>7</sup>; and (b) makes available to a customer rights under that policy to enable the customer<sup>8</sup> to claim directly against the insurer in respect of loss or damage to those goods<sup>9</sup>; or

880 (2)    where a storage firm ('S') (a) holds a policy of insurance which insures S in respect of loss of or damage to goods which S stores or for which S arranges storage<sup>10</sup>; and (b) makes available to a customer rights under that policy to enable

the customer to claim directly against the insurer in respect of loss or damage to those goods<sup>11</sup>.

- 1 'Freight forwarder' means a person whose principal business is arranging or carrying out the transportation of goods: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 50(3)(a) (Schedule para 50 added by SI 2007/1821).
- 2 'Storage firm' means a person whose principal business is storing goods or arranging storage for goods: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 50(3)(b) (as added: see note 1).
- 3 As to the general prohibition see PARA 80.
- 4 As to regulated activities see PARA 84 et seq.
- 5 Is any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126), art 25 (see PARA 139), art 39A (see PARA 104) or art 53 (see PARA 174).
- 6 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 50(1) (as added: see note 1). The circumstances are those referred to in the Schedule para 50(2).
- 7 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 50(2)(a)(i) (as added: see note 1).
- 8 'Customer' means a person who is not an individual who uses the service of a freight forwarder or storage firm: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 50(3)(c) (as added: see note 1).
- 9 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 50(2)(a)(ii) (as added: see note 1).
- 10 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 50(2)(b)(i) (as added: see note 1).
- 11 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 50(2)(b)(ii) (as added: see note 1).

## UPDATE

### 344 Freight forwarders and storage firms

NOTE 8--Words 'who is not an individual' omitted: SI 2001/1201 Schedule para 50(3)(c) (amended by SI 2009/264).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(ii) Exemption/A. PERSONS EXEMPTED BY EXEMPTION ORDERS/345. Policyholder advocates.

### 345. Policyholder advocates.

A person acting as a policyholder advocate<sup>1</sup> is exempt from the general prohibition<sup>2</sup> in respect of any specified regulated activity<sup>3</sup> of arranging deals in investments or advising on investments<sup>4</sup> in so far as he carries on these activities in connection with, or for the purposes of, his role as policyholder advocate<sup>5</sup>.



1 'Policyholder advocate' means a person who is: (1) appointed by an insurer ('I') to represent the interests of policyholders in negotiations with I about I's proposals to redefine the rights and interests in any surplus assets arising in I's with-profits fund; and (2) approved or nominated by the Financial Services Authority to carry out that role: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 51(2) (Schedule para 51 added by SI 2007/1821). For these purposes, 'with-profits fund' means a long-term insurance fund in which policyholders are eligible to participate in surplus assets of the fund: Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 51(3) (as so added). As to the Financial Services Authority see PARAS 4, 6 et seq.

2 As to the general prohibition see PARA 80.

3 As to regulated activities see PARA 84 et seq.

4 Ie any regulated activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25 (see PARA 139) or art 53 (see PARA 174).

5 Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule para 51(1) (as added: see note 1).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(ii) Exemption/B. EXEMPTION OF APPOINTED REPRESENTATIVES/346. Exemption from general prohibition.

## ***B. EXEMPTION OF APPOINTED REPRESENTATIVES***

### **346. Exemption from general prohibition.**

If a person (other than an authorised person<sup>1</sup>):

- 881 (1) is a party to a contract with an authorised person ('his principal') which: (a) permits or requires him to carry on business of a prescribed description<sup>2</sup>; and (b) complies with such requirements as may be prescribed<sup>3</sup>; and
- 882 (2) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing<sup>4</sup>,

he is exempt from the general prohibition from carrying on regulated activities in the United Kingdom<sup>5</sup> in relation to any regulated activity<sup>6</sup> comprised in the carrying on of that business for which his principal has accepted responsibility<sup>7</sup>. Such a person is an 'appointed representative'<sup>8</sup>.

However a person is not exempt<sup>9</sup> (a) if his principal is an investment firm<sup>10</sup> or a credit institution<sup>11</sup>; and (b) so far as the business for which his principal has accepted responsibility is investment services business<sup>12</sup>, unless he is entered on the applicable register<sup>13</sup>.

The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility<sup>14</sup>.

In determining whether an authorised person has complied with a provision contained in or made under the Financial Services and Markets Act 2000, or with a provision contained in any directly applicable Community regulation made under the Markets in Financial Instruments Directive<sup>15</sup>, anything which a relevant person<sup>16</sup> has done or omitted as respects business for which the authorised person has accepted responsibility is to be treated as having been done or omitted by the authorised person<sup>17</sup>.

1 As to authorised persons see PARA 314.

2 Financial Services and Markets Act 2000 s 39(1)(a)(i). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. In exercise of its power the Treasury has made the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217: see the text and note 3.

Any business which comprises:

- 416 (1) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (dealing in investments as agent) (see PARA 126), where the transaction relates to a contract of insurance which is not a qualifying contract of insurance or a contract of long-term care insurance (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(aa) (added by SI 2003/1476; and amended by SI 2004/453));
- 417 (2) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25 (arranging deals in investments) (see PARA 139), where the arrangements are for or with a view to transactions relating to securities or relevant investments (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(a) (reg 2(1) renumbered by SI 2001/2508)); and the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(a) amended by SI 2003/1476; SI 2004/453));
- 418 (3) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (arranging regulated mortgage contracts) (see PARA 139) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(ab) (added by SI 2003/1475));
- 419 (4) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25B (arranging regulated home reversion plans) (see PARA 139) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(aba) (reg 2(1)(aba), (abb) added by SI 2006/2383));
- 420 (5) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25C (arranging regulated home purchase plans) (see PARA 139) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(abb) (as so added));
- 421 (6) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A (assisting in the administration and performance of a contract of insurance) (see PARA 104) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(ac) (added by SI 2003/1476; and amended by SI 2004/453));
- 422 (7) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (safeguarding and administering investments) (see PARA 160), where the activity consists of arranging for one or more other persons to safeguard and administer assets (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(b) (as so renumbered));
- 423 (8) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 52B (providing basic advice on stakeholder products) (see PARA 188) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(ba) (added by SI 2004/2737));
- 424 (9) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (advising on investments) (see PARA 174) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(c) (as so renumbered; amended by SI 2003/1475));
- 425 (10) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A (advising on regulated mortgage contracts) (see PARA 174) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(ca) (added by SI 2003/1475; and amended by SI 2006/2383));

- 426 (11) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B (advising on regulated home reversion plans) (see PARA 174) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(cb) (reg 2(1)(cb), (cc) added by SI 2006/2383));
- 427 (12) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53C (advising on regulated home purchase plans) (see PARA 174) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(cc) (as so added)); or
- 428 (13) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 64 (agreeing to carry on activities) (see PARA 221), so far as relevant to an activity falling within heads (1)-(7), (9)-(12) above (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(d) (as so renumbered; amended by SI 2003/1476; SI 2006/2383)),

is prescribed for the purposes of the Financial Services and Markets Act 2000 s 39(1)(a)(i) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)).

'Contract of long-term care insurance' means a contract of insurance in respect of which the following conditions are met: (a) the purpose (or one of the purposes) of the policy is to protect the policyholder against the risk of becoming unable to live independently without assistance in consequence of a deterioration of mental or physical health, injury, sickness or other infirmity; (b) benefits under the contract are payable in respect of services, accommodation or goods, which are (or which is) necessary or desirable due to a deterioration of mental or physical health, injury, sickness or other infirmity; (c) the contract is expressed to be in effect until the death of the policyholder (except that the contract may give the policyholder the option to surrender the policy); and (d) the benefits under the contract are capable of being paid throughout the life of the policyholder: reg 1(2) (definition added by SI 2004/453). As to the meaning of 'security' see PARA 89 note 1; definition applied by the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 1(2). As to the meaning of 'contract of insurance' see PARA 90 note 3; definition applied by reg 1(2) (definition added by SI 2003/1476). As to the meaning of 'qualifying contract of insurance' see PARA 112 note 4; definition applied by the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 1(2) (definition added by SI 2003/1476). As to the meaning of 'relevant investments' see PARA 126 note 4; definition applied by the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 1(2) (definition added by SI 2003/1476). In head (13) above the reference is to the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1)(aa), (a), (ab), (ac), (aba), (abb), (b), (c), (ca), (cb), (cc). See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP) Ch 12. As to the Handbook generally see PARA 22. As to the Financial Services Authority see PARAS 4, 6 et seq.

In its application to a contract with a principal who is an EEA investment firm or an EEA credit institution, the list in the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1) (see above) is treated as including in addition (i) the activity of placing financial instruments; and (ii) the activity of providing advice to clients or potential clients in relation to the placing of financial instruments: reg 2(1A) (reg 2(1A), (1B) added by SI 2006/3414). For these purposes, 'clients' and 'financial instruments' have the meanings given in, respectively, the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4 paras 1.10 and 1.17: Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 2(1B) (as so added). 'Principal', in relation to a contract, means the party who is an authorised person (as to which see PARA 314), 'representative' means the other party: reg 1(2). 'EEA credit institution' means a credit institution under the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) which has its relevant office in an EEA state other than the United Kingdom: Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 1(2) (definition added by SI 2006/3414). As to the meaning of 'United Kingdom' see PARA 2 note 3. 'EEA investment firm' means an investment firm as defined in the Financial Services and Markets Act 2000 s 424A (see PARA 21) which has its relevant office in an EEA state other than the United Kingdom: Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 1(2) (definition added by SI 2006/3414).

3 Financial Services and Markets Act 2000 s 39(1)(a)(ii). The prescribed requirements are in the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217: see note 2.

Except where reg 3(1A) applies to a contract between a principal and a representative, it is a prescribed requirement for the purposes of the Financial Services and Markets Act 2000 s 39(1)(a)(ii) that such a contract must (unless it prohibits the representative from representing other counterparties) contain a provision enabling the principal to: (1) impose such a prohibition; or (2) impose restrictions as to the other counterparties which the representative may represent, or as to the types of investment in relation to which the representative may represent other counterparties: reg 3(1) (amended by SI 2006/3414). The Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(1A) applies where the principal is

an EEA investment firm or an EEA credit institution: reg 3(1A) (added by SI 2006/3414). 'Other counterparties' means persons other than the principal: Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 1(2).

For the purposes of reg 3(1) a representative is to be treated as representing other counterparties where he:

- 429 (a) enters into investment transactions as agent (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126) for other counterparties (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(2)(aa) (added by SI 2003/1476));
- 430 (b) makes arrangements (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25 (see PARA 139)) for persons to enter (or with a view to persons entering) into investment transactions with other counterparties (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(2)(a) (amended by SI 2003/1476));
- 431 (c) assists in the administration and performance of a contract of insurance (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A (see PARA 104)) for other counterparties (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(2)(ab) (added by SI 2003/1476));
- 432 (d) arranges (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 40 (see PARA 160)) for other counterparties to safeguard and administer assets (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(2)(b)); or
- 433 (e) gives advice (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (see PARA 174)) on the merits of entering into investment transactions with other counterparties (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(2)(c)).

'Investment transaction' means a transaction to buy, sell, subscribe for or underwrite an investment which is a security or a relevant investment: reg 3(2) (amended by SI 2003/1476). As to the meanings of 'buy' and 'sell' see PARA 112 notes 1, 2; definitions applied by the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 1(2).

A representative is also to be treated as representing other counterparties for the purposes of reg 3(1) where he:

- 434 (i) makes arrangements (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25A (see PARA 139)) for persons to enter (or with a view to persons entering) as borrowers into regulated mortgage contracts with other counterparties, or for a person to vary a regulated mortgage contract entered into by a person as borrower after the coming into force of art 61 (see PARA 203) with other counterparties (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(3)(a) (reg 3(3) added by SI 2003/1475)); or
- 435 (ii) gives advice (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A (see PARA 174)) on the merits of persons entering as borrowers into regulated mortgage contracts with other counterparties, or persons varying regulated mortgage contracts entered into by them as borrower after the coming into force of art 61 (see PARA 203) with other counterparties (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(3)(b) (as so added)).

As to the meanings of 'borrower' and 'regulated mortgage contract' see PARA 203 note 1; definitions applied by reg 1(2) (definitions added by SI 2003/1475).

A representative is also to be treated as representing other counterparties for the purposes of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(1) where he:

- 436 (A) makes arrangements (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25B (see PARA 139)) for a person to enter (or with a view to a person entering) as reversion seller or plan provider into a regulated home reversion plan with other counterparties, or for a person to vary a regulated home reversion plan entered into on or after 6 April 2007 by him as reversion seller or plan provider with other counterparties (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(3A)(a) (reg 3(3A), (3B) added by SI 2006/2383)); or
- 437 (B) gives advice (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B (see PARA 174)) on the merits of a person entering as reversion seller or plan provider into a regulated home reversion plan with other counterparties, or a person varying a regulated home reversion plan entered into on or after 6 April 2007 by him as reversion seller or plan provider with other counterparties (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(3A)(b) (as so added)).

As to the meanings of 'plan provider', 'regulated home reversion plan' and 'reversion seller' see PARA 209 note 1; definitions applied by art 1(2) (definitions added by SI 2006/2383).

A representative is also to be treated as representing other counterparties for the purposes of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(1) where he:

- 438 (aa) makes arrangements (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 25C (see PARA 139)) for a person to enter (or with a view to a person entering) as home purchaser into a regulated home purchase plan with other counterparties, or for a person to vary a regulated home purchase plan entered into on or after 6 April 2007 by a person as home purchaser with other counterparties (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(3B)(a) (as so added)); or
- 439 (bb) gives advice (in circumstances constituting the carrying on of an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53C (see PARA 174)) on the merits of a person entering as home purchaser into a regulated home purchase plan with other counterparties, or a person varying a regulated home purchase plan entered into on or after 6 April 2007 by him as home purchaser with other counterparties (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, SI 2001/544, reg 3(3B)(b) (as so added)).

As to the meanings of 'home purchaser', 'regulated home purchase plan' and 'reversion seller' see PARA 215 note 1; definitions applied by art 1(2) (definitions added by SI 2006/2383).

Where the contract between the principal and the representative permits or requires the representative to carry on business which includes an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (see PARA 126), art 25 (see PARA 139), art 39A (see PARA 104) or art 53 (see PARA 174) or an activity of the kind specified by art 64 (see PARA 221), so far as relevant to any of those articles, and which relates to a contract of insurance (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(4) (reg 3(4), (5) added by SI 2003/1476)), it is also a prescribed requirement for the purposes of the Financial Services and Markets Act 2000 s 39(1)(a)(ii) that the contract between the principal and the representative contain a provision providing that the representative is not permitted or required to carry on business, so far as it comprises an activity of the kind specified by the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(4) (see above), unless he is included in the record maintained by the Authority under the Financial Services and Markets Act 2000 s 347 (see PARA 475) by virtue of Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93 (recorded insurance intermediaries) (see PARA 476) (Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(5) (as so added)). See also note 13.

4 Financial Services and Markets Act 2000 s 39(1)(b).

5 As to the general prohibition see PARA 80.

6 As to regulated activities see PARA 84 et seq.

7 Financial Services and Markets Act 2000 s 39(1). As to the legal relationship between principal and agent generally see **AGENCY**.

8 Financial Services and Markets Act 2000 ss 39(2), 417(1).

9     Ie as a result of the Financial Services and Markets Act 2000 s 39(1).

10    As to the meaning of 'investment firm' see PARA 21 note 5.

11    Financial Services and Markets Act 2000 s 39(1A)(a) (s 39(1A), (1B) added by SI 2007/126). For these purposes, 'credit institution' means: (1) a credit institution authorised under the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions); or (2) an institution which would satisfy the requirements for authorisation as a credit institution under that Directive if it had its relevant office in an EEA state; and 'relevant office' means (a) in relation to a body corporate, its registered office or, if it has no registered office, its head office; and (b) in relation to a person other than a body corporate, the person's head office: Financial Services and Markets Act 2000 s 39(8) (s 39(7), (8) added by SI 2007/126). As to the meaning of 'body corporate' see PARA 86 note 11. See also note 13.

12    Financial Services and Markets Act 2000 s 39(1A)(b) (as added: see note 11). See note 13. A person carries on 'investment services business' if (1) the business includes providing services or carrying on activities of the kind mentioned in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.25; and (2) as a result of providing such services or carrying on such activities he is a tied agent or would be if he were established in an EEA state: Financial Services and Markets Act 2000 s 39(7) (as added: see note 11).

13    Financial Services and Markets Act 2000 s 39(1A) (as added: see note 11). The 'applicable register' is (1) in the case of a person established in an EEA state (other than the United Kingdom) which permits investment firms authorised by the competent authority of that state to appoint tied agents, the register of tied agents maintained in that state pursuant to the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 23; (2) in the case of a person established in an EEA state which does not permit investment firms authorised as mentioned in head (1) above to appoint tied agents (a) if his principal has his relevant office in the United Kingdom, the record maintained by the Authority by virtue of s 347(1)(ha) (see PARA 475); and (b) if his principal is established in an EEA state (other than the United Kingdom) which permits investment firms authorised by the competent authority of the State to appoint tied agents, the register of tied agents maintained by that state pursuant to the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 23; and (c) in any other case, the record maintained by the Authority by virtue of the Financial Services and Markets Act 2000 s 347(1)(ha) (see PARA 475): s 39(1B) (as added: see note 11). As to the meaning of 'EEA state' see PARA 315 note 1. 'Competent authority' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.22: Financial Services and Markets Act 2000 s 39(8) (as added: see note 11).

In the case of a representative to whom s 39(1A) applies, it is a prescribed requirement for the purposes of s 39(1)(a)(ii) (see the text and note 3), except where s 39(1A) applies, that the contract between the principal and the representative must contain a provision that the representative is only permitted to provide the services and carry on the activities referred to in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.25 while he is entered on the applicable register: Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(6) (added by SI 2006/3414). The Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, SI 2001/1217, reg 3(6) does not apply in relation to a contract made on or before 31 October 2007: reg 4 (added by SI 2007/763).

14    Financial Services and Markets Act 2000 s 39(3).

15    Ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

16    'Relevant person' means a person who at the material time is or was an appointed representative by virtue of being a party to a contract with the authorised person: Financial Services and Markets Act 2000 s 39(5).

17    Financial Services and Markets Act 2000 s 39(4) (amended by SI 2007/126). Nothing in the Financial Services and Markets Act 2000 s 39(4) is to cause the knowledge or intentions of an appointed representative to be attributed to his principal for the purpose of determining whether the principal has committed an offence, unless in all the circumstances it is reasonable for them to be attributed to him: s 39(6).

EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(ii) Exemption/C. CERTAIN TIED AGENTS OUTSIDE THE UNITED KINGDOM/347. Tied agents operating outside the United Kingdom.

### ***C. CERTAIN TIED AGENTS OUTSIDE THE UNITED KINGDOM***

#### **347. Tied agents operating outside the United Kingdom.**

The provisions set out below<sup>1</sup> apply to an authorised person<sup>2</sup> whose relevant office<sup>3</sup> is in the United Kingdom<sup>4</sup> if (1) he is a party to a contract with a person (other than an authorised person) who is established in the United Kingdom, or in an EEA state<sup>5</sup> which does not permit investment firms<sup>6</sup> authorised by the competent authority<sup>7</sup> of the state to appoint tied agents<sup>8</sup>; and (2) the contract is a relevant contract<sup>9</sup>.

An authorised person<sup>10</sup> who:

- 883 (a) enters into or continues to perform a relevant contract with an agent which does not comply with the applicable requirements<sup>11</sup>;
- 884 (b) enters into or continues to perform a relevant contract without accepting or having accepted responsibility in writing for the agent's activities in carrying on investment services business<sup>12</sup>;
- 885 (c) enters into a relevant contract with an agent who is not entered on the record maintained by the Financial Services Authority<sup>13</sup>; or
- 886 (d) continues to perform a relevant contract with an agent when he knows or ought to know that the agent is not entered on that record<sup>14</sup>,

is to be taken for the purposes of the Financial Services and Markets Act 2000 to have contravened a requirement imposed on him by or under that Act<sup>15</sup>.

1    Ie the Financial Services and Markets Act 2000 s 39A.

2    As to authorised persons see PARA 314.

3    For these purposes, 'relevant office' means (1) in relation to a body corporate, its registered office or, if it has no registered office, its head office; and (2) in relation to a person other than a body corporate, the person's head office: Financial Services and Markets Act 2000 s 39A(9) (s 39A added by SI 2007/126). As to the meaning of 'body corporate' see PARA 86 note 11.

4    As to the meaning of 'United Kingdom' see PARA 2 note 3.

5    As to the meaning of 'EEA state' see PARA 315 note 1.

6    As to the meaning of 'investment firm' see PARA 21 note 5.

7    For these purposes, 'competent authority' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.22: Financial Services and Markets Act 2000 s 39A(9) (as added: see note 3).

8    Financial Services and Markets Act 2000 s 39A(1)(a) (as added: see note 3).

9    Financial Services and Markets Act 2000 s 39A(1)(b) (as added: see note 3).

A contract is a 'relevant contract' if it satisfies Conditions A to C: Financial Services and Markets Act 2000 s 39A(2) (as so added). Condition A is that the contract permits or requires the person mentioned in s 39A(1)(a) (see head (1) in the text) (the 'agent') to carry on investment services business: s 39A(3) (as so added). Condition B is that either (1) it is a condition of the contract that such business may only be carried on by the agent in an EEA state other than the United Kingdom; or (2) in a case not falling within head (1) above, the Financial Services Authority is satisfied that no such business is, or is likely to be, carried on by the agent in the United Kingdom: s 39A(4) (as so added). Condition C is that the business is of a description that, if carried on in

the United Kingdom, would be prescribed for the purposes of s 39(1)(a)(i) (see PARA 346): s 39A(5) (as so added). As to the Financial Services Authority see PARAS 4, 6 et seq.

A person carries on 'investment services business' if (a) his business includes providing services or carrying on activities of the kind mentioned in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.25; and (b) as a result of providing such services or carrying on such activities he is a tied agent: Financial Services and Markets Act 2000 s 39A(8) (as so added).

10 le an authorised person to whom the Financial Services and Markets Act 2000 s 39A applies.

11 Financial Services and Markets Act 2000 s 39A(6)(a) (as added: see note 3). The 'applicable requirements' are the requirements prescribed for the purposes of the Financial Services and Markets Act 2000 s 39(1)(a)(ii) (see PARA 346) which have effect in the case of a person to whom s 39(1A) (see PARA 346) applies: s 39A(7) (as so added).

12 Financial Services and Markets Act 2000 s 39A(6)(b) (as added: see note 3).

13 Financial Services and Markets Act 2000 s 39A(6)(c) (as added: see note 3). The reference is to the record maintained by the Authority under s 347(1)(ha): see PARA 475.

14 Financial Services and Markets Act 2000 s 39A(6)(d) (as added: see note 3).

15 Financial Services and Markets Act 2000 s 39A(6) (as added: see note 3).

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### **(iii) Permission to Carry on Regulated Activities**

#### **A. APPLICATION FOR PERMISSION**

##### **348. Who may apply for permission.**

An application for permission to carry on one or more regulated activities<sup>1</sup> may be made to the Financial Services Authority<sup>2</sup> by: (1) an individual<sup>3</sup>; (2) a body corporate<sup>4</sup>; (3) a partnership<sup>5</sup>; or (4) an unincorporated association<sup>6</sup>. A permission given by the Authority under Part IV of the Financial Services and Markets Act 2000 or having effect as if so given is referred to in the Act as a 'Part IV permission'<sup>7</sup>.

An authorised person<sup>8</sup> may not apply for permission<sup>9</sup> if he has a permission given to him by the Authority under Part IV of the Financial Services and Markets Act 2000<sup>10</sup>, or having effect as if so given, which is in force<sup>11</sup>. An EEA firm<sup>12</sup> may not apply for permission to carry on a regulated activity which it is, or would be, entitled to carry on in exercise of an EEA right<sup>13</sup>, whether through a United Kingdom<sup>14</sup> branch or by providing services in the United Kingdom<sup>15</sup>.

1 As to regulated activities see PARA 84 et seq.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 40(1)(a).

4 Financial Services and Markets Act 2000 s 40(1)(b). As to the meaning of 'body corporate' see PARA 86 note 11.

5 Financial Services and Markets Act 2000 s 40(1)(c). As to the meaning of 'partnership' see PARA 86 note 11.



- 6 Financial Services and Markets Act 2000 s 40(1)(d).
- 7 Financial Services and Markets Act 2000 ss 40(4), 417(1).
- 8 As to authorised persons see PARA 314.
- 9 Ie under the Financial Services and Markets Act 2000 s 40.
- 10 Ie the Financial Services and Markets Act 2000 Pt IV (ss 40-55).
- 11 Financial Services and Markets Act 2000 s 40(2).
- 12 As to the meaning of 'EEA firm' see PARA 315 note 1.
- 13 As to the meaning of 'EEA right' see PARA 315 note 3.
- 14 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 15 Financial Services and Markets Act 2000 s 40(3).

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### **349. Procedure for making applications.**

An application for a Part IV permission<sup>1</sup> must:

- 887 (1) contain a statement of the regulated activity<sup>2</sup> or regulated activities which the applicant proposes to carry on and for which he wishes to have permission<sup>3</sup>; and
- 888 (2) give the address of a place in the United Kingdom<sup>4</sup> for service on the applicant of any notice or other document<sup>5</sup> which is required or authorised to be served on him under the Financial Services and Markets Act 2000<sup>6</sup>.

An application for the variation of a Part IV permission must contain a statement of the desired variation<sup>7</sup> and a statement of the regulated activity or regulated activities which the applicant proposes to carry on if his permission is varied<sup>8</sup>.

Any application under Part IV of the Financial Services and Markets Act 2000<sup>9</sup> must be made in such manner as the Financial Services Authority<sup>10</sup> may direct<sup>11</sup> and must contain, or be accompanied by, such other information as the Authority may reasonably require<sup>12</sup>.

At any time after receiving an application and before determining it, the Authority may require the applicant to provide it with such further information as it reasonably considers necessary to enable it to determine the application<sup>13</sup>. Different directions may be given, and different requirements imposed, in relation to different applications or categories of application<sup>14</sup>. The Authority may require an applicant to provide information which he is required to provide<sup>15</sup> in such form, or to verify it in such a way, as the Authority may direct<sup>16</sup>.

1 As to the meaning of 'Part IV permission' see PARA 348.

2 As to regulated activities see PARA 84 et seq.

- 3 Financial Services and Markets Act 2000 s 51(1)(a).
- 4 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 5 As to the meaning of 'document' see PARA 10 note 10.
- 6 Financial Services and Markets Act 2000 s 51(1)(b).
- 7 Financial Services and Markets Act 2000 s 51(2)(a).
- 8 Financial Services and Markets Act 2000 s 51(2)(b).
- 9 Ie the Financial Services and Markets Act 2000 Pt IV (ss 40-55).
- 10 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.
- 11 Financial Services and Markets Act 2000 s 51(3)(a).
- 12 Financial Services and Markets Act 2000 s 51(3)(b).
- 13 Financial Services and Markets Act 2000 s 51(4).
- 14 Financial Services and Markets Act 2000 s 51(5).
- 15 Ie under the Financial Services and Markets Act 2000 s 51.
- 16 Financial Services and Markets Act 2000 s 51(6).

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### **350. Procedure for determining applications.**

An application under Part IV of the Financial Services and Markets Act 2000<sup>1</sup> must be determined by the Financial Services Authority<sup>2</sup> before the end of the period of six months beginning with the date on which it received the completed application<sup>3</sup>. The Authority may determine an incomplete application if it considers it appropriate to do so, and it must in any event determine such an application within 12 months beginning with the date on which it received the application<sup>4</sup>. The applicant may withdraw his application, by giving the Authority written notice, at any time before the Authority determines it<sup>5</sup>.

If the Authority grants an application for, or for variation of, a Part IV permission<sup>6</sup>, it must give the applicant written notice<sup>7</sup>. The notice must state the date from which the permission, or the variation, has effect<sup>8</sup>. If the Authority proposes to give a Part IV permission but to exercise its power to incorporate limitations in the description of the regulated activity<sup>9</sup> or its power to specify a narrower or wider description of the activity than that to which the application relates<sup>10</sup> or its power to include other requirements as it considers appropriate<sup>11</sup>, then it must give the applicant a warning notice<sup>12</sup>. The same applies where it proposes to vary a Part IV permission and to exercise any of those powers<sup>13</sup>.

If the Authority proposes to refuse an application made under Part IV of the Financial Services and Markets Act 2000, it must give the applicant a warning notice<sup>14</sup> unless it appears to the Authority that: (1) the applicant is an EEA firm<sup>15</sup>; and (2) the application is made with a view to carrying on a regulated activity<sup>16</sup> in a manner in which the applicant is, or would be, entitled to

carry on that activity in the exercise of an EEA right<sup>17</sup> whether through a United Kingdom<sup>18</sup> branch or by providing services in the United Kingdom<sup>19</sup>.

If the Authority decides to give a Part IV permission but to exercise its power to incorporate limitations in the description of the regulated activity<sup>20</sup> or its power to specify a narrower or wider description of the activity than that to which the application relates<sup>21</sup> or its power to include other requirements as it considers appropriate<sup>22</sup>, then it must give the applicant a decision notice<sup>23</sup>. The same applies where it proposes to vary a Part IV permission and to exercise any of those powers or to refuse an application for permission<sup>24</sup>.

1    le Financial Services and Markets Act 2000 Pt IV (ss 40-55).

2    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

3    Financial Services and Markets Act 2000 s 52(1).

4    Financial Services and Markets Act 2000 s 52(2).

5    Financial Services and Markets Act 2000 s 52(3).

6    As to the meaning of 'Part IV permission' see PARA 348.

7    Financial Services and Markets Act 2000 s 52(4).

8    Financial Services and Markets Act 2000 s 52(5).

9    See the Financial Services and Markets Act 2000 s 42(7)(a); and PARA 352.

10   See the Financial Services and Markets Act 2000 s 42(7)(b); and PARA 352.

11   See the Financial Services and Markets Act 2000 s 43(1); and PARA 353.

12   Financial Services and Markets Act 2000 s 52(6). As to warning notices generally see PARA 769.

13   Financial Services and Markets Act 2000 s 52(6).

14   Financial Services and Markets Act 2000 s 52(7).

15   Financial Services and Markets Act 2000 s 52(8)(a). As to the meaning of 'EEA firm' see PARA 315 note 1.

16   As to regulated activities see PARA 84 et seq.

17   As to the meaning of 'EEA right' see PARA 315 note 3.

18   As to the meaning of 'United Kingdom' see PARA 2 note 3.

19   Financial Services and Markets Act 2000 s 52(8)(b).

20   See the Financial Services and Markets Act 2000 s 42(7)(a); and PARA 352.

21   See the Financial Services and Markets Act 2000 s 42(7)(b); and PARA 352.

22   See the Financial Services and Markets Act 2000 s 43(1); and PARA 353.

23   Financial Services and Markets Act 2000 s 52(9). As to decision notices generally see PARA 770.

24   Financial Services and Markets Act 2000 s 52(9).

EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(iii) Permission to Carry on Regulated Activities/A. APPLICATION FOR PERMISSION/351. The threshold conditions.

### **351. The threshold conditions.**

In giving or varying permission, or imposing or varying any requirement, under Part IV of the Financial Services and Markets Act 2000<sup>1</sup> the Financial Services Authority<sup>2</sup> must ensure that the person concerned will satisfy, and continue to satisfy, the threshold conditions in relation to all of the regulated activities<sup>3</sup> for which he has or will have permission<sup>4</sup>. The threshold conditions concern: (1) legal status<sup>5</sup>; (2) location of offices and appointment of claims representatives<sup>6</sup>; (3) close links<sup>7</sup>; (4) adequate resources<sup>8</sup>; and (5) suitability<sup>9</sup>. There are possible additional specified conditions for certain persons<sup>10</sup> and provisions on how the threshold conditions apply to those with EEA passport rights<sup>11</sup> and treaty rights<sup>12</sup>.

The legal status threshold conditions are as follows. If the regulated activity concerned is the effecting or carrying out of contracts of insurance<sup>13</sup>, the authorised person<sup>14</sup> must be a body corporate<sup>15</sup> (other than a limited liability partnership<sup>16</sup>), a registered friendly society<sup>17</sup> or a member of Lloyd's<sup>18</sup>. If the person concerned appears to the Authority to be seeking to carry on, or to be carrying on, a regulated activity constituting accepting deposits or issuing electronic money<sup>19</sup>, it must be<sup>20</sup> a body corporate<sup>21</sup> or a partnership<sup>22</sup>.

The threshold conditions relating to the location of offices are as follows. If the person concerned is a body corporate constituted under the law of any part of the United Kingdom<sup>23</sup> its head office<sup>24</sup>, and if it has a registered office, that office<sup>25</sup>, must be in the United Kingdom<sup>26</sup>. If the person concerned has its head office in the United Kingdom but is not a body corporate, it must carry on business in the United Kingdom<sup>27</sup>. If it appears to the Authority that the regulated activity that the person concerned is carrying on, or is seeking to carry on, is the effecting or carrying out of contracts of insurance<sup>28</sup>, and contracts of insurance against damage arising out of or in connection with the use of motor vehicles on land (other than carrier's liability) are being, or will be, effected or carried out by the person concerned<sup>29</sup>, that person must have a claims representative<sup>30</sup> in each EEA state other than the United Kingdom<sup>31</sup>.

The close links threshold condition is as follows. If the person concerned ('A') has close links with another person ('CL')<sup>32</sup>, the Authority must be satisfied:

- 889 (a) that those links are not likely to prevent the Authority's effective supervision of A<sup>33</sup>; and
- 890 (b) if it appears to the Authority that CL is subject to the laws, regulations or administrative provisions of a territory which is not an EEA state (the 'foreign provisions')<sup>34</sup>, that neither the foreign provisions, nor any deficiency in their enforcement, would prevent the Authority's effective supervision of A<sup>35</sup>.

The threshold condition relating to adequacy of resources is as follows. The resources of the person concerned must, in the opinion of the Authority, be adequate in relation to the regulated activities that he seeks to carry on, or carries on<sup>36</sup>. In reaching that opinion, the Authority may take into account the person's membership of a group<sup>37</sup> and any effect which that membership may have<sup>38</sup> and may have regard to the provision he makes and, if he is a member of a group, which other members of the group make in respect of liabilities (including contingent and future liabilities)<sup>39</sup> and the means by which he manages and, if he is a member of a group, which other members of the group manage the incidence of risk in connection with his business<sup>40</sup>.

The threshold condition on suitability requires that the person concerned must satisfy the Authority that he is a fit and proper person having regard to all the circumstances, including his

connection with any person<sup>41</sup>, the nature of any regulated activity that he carries on or seeks to carry on<sup>42</sup> and the need to ensure that his affairs are conducted soundly and prudently<sup>43</sup>.

In relation to an EEA firm<sup>44</sup> qualifying for authorisation<sup>45</sup>, the threshold conditions on legal status, close links, adequate resources and suitability<sup>46</sup> apply, so far as relevant, to an application for permission under Part IV of the Financial Services and Markets Act 2000<sup>47</sup> and to the exercise of the Authority's own-initiative power<sup>48</sup> in relation to a Part IV permission<sup>49</sup>. In relation to a person who qualifies for authorisation as a treaty firm<sup>50</sup>, the threshold conditions on legal status, close links, adequate resources and suitability<sup>51</sup> apply, so far as relevant, to an application for an additional permission<sup>52</sup>, and to the exercise of the Authority's own-initiative power<sup>53</sup> in relation to additional permission<sup>54</sup>.

Where a person has his head office outside the EEA<sup>55</sup> and appears to the Authority to be seeking to carry on a regulated activity relating to insurance business<sup>56</sup>, he must, for the purposes of such provisions of the Financial Services and Markets Act 2000 as may be specified in an order made by the Treasury<sup>57</sup>, satisfy specified additional conditions<sup>58</sup>. Those additional conditions are as follows:

- 891 (i) the person must have a representative who is resident in the United Kingdom and who has authority to bind it in its relations with third parties and to represent it in its relations with the Authority and the courts in the United Kingdom<sup>59</sup>;
- 892 (ii) if the person concerned is not a Swiss general insurance company: (A) it must be a body corporate entitled under the law of the place where its head office is situated to effect and carry out contracts of insurance<sup>60</sup>; (B) it must have in the United Kingdom<sup>61</sup> assets of such value as may be specified in the rules<sup>62</sup>; (C) unless the regulated activity in question relates solely to reinsurance, it must have made a deposit (of money or securities, as may be specified) of such an amount and with such a person as may be specified in the rules<sup>63</sup>, and on such terms and subject to such other provisions as may be specified in the rules<sup>64</sup>.

The Treasury may by order vary or remove any of the threshold conditions set out above<sup>65</sup> or may add to those conditions<sup>66</sup>.

1    I.e the Financial Services and Markets Act 2000 Pt IV (ss 40-55).

2    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, High Level Standards, Threshold Conditions (COND); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

3    As to regulated activities see PARA 84 et seq.

4    Financial Services and Markets Act 2000 s 41(2). 'Threshold conditions', in relation to a regulated activity, means the conditions set out in Sch 6: s 41(1). As to regulated activities see PARA 84 et seq. However, the duty imposed by s 41(2) does not prevent the Authority, having due regard to that duty, from taking such steps as it considers are necessary, in relation to a particular authorised person, in order to secure its regulatory objective of the protection of consumers: s 41(3). As to the regulatory objectives see PARA 8.

5    See the Financial Services and Markets Act 2000 Sch 6 para 1.

6    See the Financial Services and Markets Act 2000 Sch 6 paras 2, 2A.

7    See the Financial Services and Markets Act 2000 Sch 6 para 3.

8    See the Financial Services and Markets Act 2000 Sch 6 para 4.

9    See the Financial Services and Markets Act 2000 Sch 6 para 5.

10   See the Financial Services and Markets Act 2000 Sch 6 paras 8, 9.

- 11 See the Financial Services and Markets Act 2000 Sch 6 para 6. EEA passport rights are under Sch 3: see PARA 315 et seq.
- 12 See the Financial Services and Markets Act 2000 Sch 6 para 7. Treaty rights are under Sch 4: see PARA 319.
- 13 In the Financial Services and Markets Act 2000 references to contracts of insurance are to be read with s 22, Sch 2 (see PARA 84 et seq): s 424(1)(a). The law applicable to a contract of insurance, the effecting of which constitutes the carrying on of a regulated activity, is to be determined, if it is of a prescribed description, in accordance with regulations made by the Treasury: s 424(3). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). In exercise of this power the Treasury has made the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635 (amended by SI 2001/3542) (see **CONFLICT OF LAWS**); and the Financial Services and Markets Act 2000 (Motor Insurance) Regulations 2007, SI 2007/2403. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.
- 14 As to authorised persons see PARA 314.
- 15 As to the meaning of 'body corporate' see PARA 86 note 11.
- 16 As to limited liability partnerships see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.
- 17 'Registered friendly society' means a society which is: (1) a friendly society within the meaning of the Friendly Societies Act 1974 s 7(1)(a) (see PARA 2096); and (2) registered within the meaning of the Friendly Societies Act 1974: Financial Services and Markets Act 2000 s 417(1).
- 18 Financial Services and Markets Act 2000 Sch 6 para 1(1) (amended by SI 2001/2507). As to Lloyd's generally see **INSURANCE**.
- 19 As to accepting deposits see PARA 89. As to issuing electronic money see PARA 96.
- 20 Financial Services and Markets Act 2000 Sch 6 para 1(2) (amended by SI 2002/682).
- 21 Financial Services and Markets Act 2000 Sch 6 para 1(2)(a).
- 22 Financial Services and Markets Act 2000 Sch 6 para 1(2)(b). As to the meaning of 'partnership' see PARA 86 note 11.
- 23 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 24 Financial Services and Markets Act 2000 Sch 6 para 2(1)(a). See note 26.
- 25 Financial Services and Markets Act 2000 Sch 6 para 2(1)(b). See note 26.
- 26 Financial Services and Markets Act 2000 Sch 6 para 2(1) (amended by SI 2003/682; SI 2007/126). The Financial Services and Markets Act 2000 Sch 6 para 2(1) is subject to Sch 6 para 2(2A), (3). If (1) the regulated activity concerned is any of the investment services and activities; and (2) the person concerned is a body corporate with no registered office, Sch 6 para 2(2B) applies in place of Sch 6 para 2(1): Sch 6 para 2(2A) (Sch 6 para 2(2A), (2B) added by SI 2007/126). If the person concerned has its head office in the United Kingdom, it must carry on business in the United Kingdom: Sch 6 para 2(2B) (as so added).
- Schedule 6 para 2(1) also does not apply if the regulated activity concerned is an insurance mediation activity: Sch 6 para 2(3) (Sch 6 para 2(3)-(6) added by SI 2003/1476). 'Insurance mediation activity' means any of the following activities: (a) dealing in rights under a contract of insurance as agent; (b) arranging deals in rights under a contract of insurance; (c) assisting in the administration and performance of a contract of insurance; (d) advising on buying or selling rights under a contract of insurance; (e) agreeing to do any of the activities specified in heads (a)-(d) above: Financial Services and Markets Act 2000 Sch 6 para 2(5) (as so added). Sch 6 para 2(5) must be read with s 22, any relevant order under that provision and Sch 2 (see PARA 84 et seq): Sch 6 para 2(6) (as so added). If the regulated activity concerned is an insurance mediation activity, the person concerned (i) if it is a body corporate constituted under the law of any part of the United Kingdom, must have its registered office, or if it has no registered office, its head office, in the United Kingdom; (ii) if a natural person, is to be treated for the purposes of Sch 6 para 2(2) (see the text to note 27), as having his head office in the United Kingdom if his residence is situated there: Sch 6 para 2(4) (as so added). As to certain applicants who have applied for an interim permission or interim approval under Pt IV see the Financial Services and Markets Act 2000 (Transitional Provisions) (General Insurance Intermediaries) Order 2004, SI 2004/3351.
- 27 Financial Services and Markets Act 2000 Sch 6 para 2(2). See also note 26.

28 Financial Services and Markets Act 2000 Sch 6 para 2A(1)(a) (Sch 6 para 2A added by SI 2002/2707).

29 Financial Services and Markets Act 2000 Sch 6 para 2A(1)(b) (as added: see note 27). For these purposes contracts of reinsurance are to be disregarded: Sch 6 para 2A(2) (as so added). As to the meaning of 'reinsurance' see PARA 591 note 8.

30 A claims representative is a person with responsibility for handling and settling claims arising from accidents of the kind mentioned in the Fourth Motor Insurance Directive (ie EC Council Directive 2000/26 (OJ L181, 20.7.2000, p 65) on the approximation of the laws of the member states relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239 and 88/357) art 1(2): Financial Services and Markets Act 2000 Sch 6 para 2A(3) (as added: see note 28).

31 Financial Services and Markets Act 2000 Sch 6 para 2A(1) (as added: see note 28).

32 A has close links with CL if:

440 (1) CL is a parent undertaking of A (Financial Services and Markets Act 2000 Sch 6 para 3(2)(a));

441 (2) CL is a subsidiary undertaking of A (Sch 6 para 3(2)(b));

442 (3) CL is a parent undertaking of a subsidiary undertaking of A (Sch 6 para 3(2)(c));

443 (4) CL is a subsidiary undertaking of a parent undertaking of A (Sch 6 para 3(2)(d));

444 (5) CL owns or controls 20% or more of the voting rights or capital of A (Sch 6 para 3(2)(e)); or

445 (6) A owns or controls 20% or more of the voting rights or capital of CL (Sch 6 para 3(2)(f)).

'Subsidiary undertaking' includes all the instances mentioned in the Seventh Company Law Directive (ie EC Council Directive 83/349 (OJ L193, 18.7.83, p 1) based on the Article 54(3)(g) of the Treaty on consolidated accounts) art 1(1), (2) in which an entity may be a subsidiary of an undertaking: Financial Services and Markets Act 2000 Sch 6 para 3(3).

In the Financial Services and Markets Act 2000, except in relation to an incorporated friendly society, 'parent undertaking' and 'subsidiary undertaking' have the same meaning as in the Companies Acts (see the Companies Act 2006 s 1162, Sch 7; and **COMPANIES** vol 14 (2009) PARAS 26, 27): Financial Services and Markets Act 2000 s 420(1) (amended by SI 2008/948). 'Incorporated friendly society' means a society incorporated under the Friendly Societies Act 1992: Financial Services and Markets Act 2000 s 417(1). However, 'parent undertaking' also includes an individual who would be a parent undertaking for the purposes of those provisions if he were taken to be an undertaking (and 'subsidiary undertaking' is to be read accordingly) (s 420(2)(a)); 'subsidiary undertaking' also includes, in relation to a body incorporated in or formed under the law of an EEA state other than the United Kingdom, an undertaking which is a subsidiary undertaking within the meaning of any rule of law in force in that state for purposes connected with implementation of EC Council Directive 83/349 (OJ L193, 18.7.83, p 1) (and 'parent undertaking' is to be read accordingly) (Financial Services and Markets Act 2000 s 420(2)(b)). In the Financial Services and Markets Act 2000 'subsidiary undertaking', in relation to an incorporated friendly society, means a body corporate of which the society has control within the meaning of the Friendly Societies Act 1992 s 13(9)(a) or s 13(9)(aa) (see PARA 2134) (and 'parent undertaking' is to be read accordingly): Financial Services and Markets Act 2000 s 420(3).

33 Financial Services and Markets Act 2000 Sch 6 para 3(1)(a).

34 As to the meaning of 'EEA state' see PARA 315 note 1.

35 Financial Services and Markets Act 2000 Sch 6 para 3(1)(b).

36 Financial Services and Markets Act 2000 Sch 6 para 4(1). The threshold conditions set out in Sch 6 paras 4, 5 (adequate resources; suitability) are removed in relation to a Swiss general insurance company: Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, art 3(3) (substituted by SI 2005/680). 'Swiss general insurance company' means a person: (1) whose head office is in Switzerland; (2) who is authorised by the supervisory authority in Switzerland as mentioned in the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life insurance, signed at Luxembourg on 10 October 1989, art 7.1; (3) who is seeking to carry on, or is carrying on, from a branch in the United Kingdom, a regulated activity consisting of the effecting or carrying out of contracts of insurance of a kind which is subject to that Agreement: Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, art 1(2). 'Supervisory authority' means an authority responsible for supervising carrying on insurance business: art 1(2).

37 'Group', in relation to a person ('A'), means A and any person who is: (1) a parent undertaking of A; (2) a subsidiary undertaking of A; (3) a subsidiary undertaking of a parent undertaking of A; (4) a parent undertaking of a subsidiary undertaking of A; (5) an undertaking in which A or an undertaking mentioned in heads (1), (2), (3) or (4) above has a participating interest; (6) if A or an undertaking mentioned in heads (1) or (4) above is a building society, an associated undertaking of the society; or (7) if A or an undertaking mentioned in heads (1) or (4) above is an incorporated friendly society, a body corporate of which the society has joint control (within the meaning of the Friendly Societies Act 1992 s 13(9)(c) or s 13(9)(cc) (see PARA 2134)): Financial Services and Markets Act 2000 s 421(1). 'Participating interest' has the meaning in s 421A: s 421(2) (s 421(2) amended and s 421A added by SI 2008/948). In the Financial Services and Markets Act 2000 s 421 a 'participating interest' means an interest held by an undertaking in the shares of another undertaking which it holds on a long-term basis for the purpose of securing a contribution to its activities by the exercise of control or influence arising from or related to that interest: s 421A(1) (as so added). A holding of 20% or more of the shares of an undertaking is presumed to be a participating interest unless the contrary is shown: s 421A(2) (as so added). The reference in s 421A(1) to an interest in shares includes: (a) an interest which is convertible into an interest in shares, and (b) an option to acquire shares or any such interest; and an interest or option falls within head (a) or (b) above notwithstanding that the shares to which it relates are, until the conversion or the exercise of the option, unissued: s 421A(3) (as so added). For the purposes of s 421A an interest held on behalf of an undertaking is to be treated as held by it: s 421A(4) (as so added). In s 421A 'undertaking' has the same meaning as in the Companies Acts (see the Companies Act 2006 s 1161(1); and **COMPANIES** vol 14 (2009) PARAS 26, 27): Financial Services and Markets Act 2000 s 421A(5) (as so added). 'Associated undertaking' has the meaning given in the Building Societies Act 1986 s 119(1) (see PARA 1916): Financial Services and Markets Act 2000 s 421(3).

38 Financial Services and Markets Act 2000 Sch 6 para 4(2)(a). See note 36.

39 Financial Services and Markets Act 2000 Sch 6 para 4(2)(b)(i). See note 36.

40 Financial Services and Markets Act 2000 Sch 6 para 4(2)(b)(ii). See note 36.

41 Financial Services and Markets Act 2000 Sch 6 para 5(a). See note 36.

42 Financial Services and Markets Act 2000 Sch 6 para 5(b). See note 36.

43 Financial Services and Markets Act 2000 Sch 6 para 5(c). See note 36.

44 As to the meaning of 'EEA firm' see PARA 315 note 1.

45 Ie under the Financial Services and Markets Act 2000 Sch 3: see PARA 315.

46 Ie the threshold conditions set out in the Financial Services and Markets Act 2000 Sch 6 paras 1, 3-5.

47 Financial Services and Markets Act 2000 Sch 6 para 6(a).

48 Ie under the Financial Services and Markets Act 2000 s 45: see PARA 355.

49 Financial Services and Markets Act 2000 Sch 6 para 6(b). As to the meaning of 'Part IV permission' see PARA 348.

50 Ie under the Financial Services and Markets Act 2000 Sch 4: see PARA 319.

51 Ie the threshold conditions set out in the Financial Services and Markets Act 2000 Sch 6 paras 1, 3-5.

52 Financial Services and Markets Act 2000 Sch 6 para 7(a).

53 Ie under the Financial Services and Markets Act 2000 s 45: see PARA 355.

54 Financial Services and Markets Act 2000 Sch 6 para 7(b).

55 Financial Services and Markets Act 2000 Sch 6 para 8(2)(a).

56 Financial Services and Markets Act 2000 Sch 6 para 8(2)(b).

57 'Specified' means specified in, or in accordance with, an order made by the Treasury: Financial Services and Markets Act 2000 Sch 6 para 8(3). In exercise of the power the Treasury has made the Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507 (see also notes 13, 36, 65, 66). As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

58 Financial Services and Markets Act 2000 Sch 6 para 8(1).



59 Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, art 3(1)(a).

60 Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, art 3(1)(b)(i).

61 Where the person concerned is seeking to carry on an activity relating to insurance business in one or more other EEA states (as well as in the United Kingdom), and the Authority and the supervisory authority in the other EEA state or states concerned so agree: (1) the reference in Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, art 3(1)(b)(ii) to the United Kingdom is to be read as a reference to the United Kingdom and the other EEA state or states concerned; and (2) the reference in art 3(1)(b)(iii) to such a person as may be specified is to be read as a reference to such a person as may be agreed between the Authority and the other supervisory authority or authorities concerned: art 3(2)(a), (b).

62 Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, art 3(1)(b)(ii), (4).

63 See note 61.

64 Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, art 3(1)(b)(iii), (4).

65 Financial Services and Markets Act 2000 Sch 6 para 9(a). The conditions are those set out in Sch 6 Pts I and II (Sch 6 paras 1-7). The Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, amends the Financial Services and Markets Act 2000 Sch 6 para 1(1) (see note 18), and provides that the conditions set out in Sch 6 paras 4, 5 do not apply to Swiss general insurance companies (see note 36).

66 Financial Services and Markets Act 2000 Sch 6 para 9(b). A Swiss general insurance company must, for the purposes of s 41 and Sch 6, satisfy the following additional conditions:

- 446 (1) the value of the assets of the business carried on by it in the United Kingdom must not fall below the amount of the liabilities of that business, that value and amount being determined in such manner as may be specified in rules (Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, reg 4(1)(a), (2) (reg 4 added by SI 2005/680));
- 447 (2) such assets must be maintained in such places as may be specified in rules and must be of such a nature as may be specified as being appropriate in relation to the currency in which the liabilities of the company are or may be required to be met (Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, reg 4(1)(b), (2) (as so added)); and
- 448 (3) when applying to the Authority for permission to carry on a regulated activity it must submit to the Authority a statement from the supervisory authorities in Switzerland (a) stating the classes of insurance business which the company is authorised to carry on in Switzerland; (b) specifying the risks covered there; (c) declaring that the company is constituted in Switzerland in a form permitted by the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life insurance, signed at Luxembourg on 10 October 1989, Annex 3; (d) confirming that the company limits its business activities to insurance and to operations directly arising therefrom to the exclusion of all other commercial business; and (e) declaring that the company has the required solvency margin or minimum guarantee fund (Financial Services and Markets Act 2000 (Variation of Threshold Conditions) Order 2001, SI 2001/2507, reg 4(1)(c) (as so added)).

## UPDATE

### 351 The threshold conditions

NOTE 13--SI 2001/2635 is limited to contracts of insurance entered into before 17 December 2009: see reg 3 (amended by SI 2009/3075).

NOTE 30--Directive 2000/26 replaced: European Parliament and EC Council Directive 2009/103 (OJ L263, 7.10.2009, p 11).

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## **B. GRANT OF PERMISSION**

### **352. Giving permission.**

The Financial Services Authority<sup>1</sup> may give permission for the applicant<sup>2</sup> to carry on the regulated activity<sup>3</sup> or activities to which his application relates or such of them as may be specified in the permission<sup>4</sup>.

If the applicant in relation to a particular regulated activity is exempt from the general prohibition as a result of the provisions relating to appointed representatives or of an exemption order<sup>5</sup>, but has applied for permission in relation to another regulated activity<sup>6</sup>, the application is to be treated as relating to all the regulated activities which, if permission is given, he will carry on<sup>7</sup>. If the applicant in relation to a particular regulated activity is exempt from the general prohibition as a result of the provisions relating to exemptions for recognised investment exchanges and clearing houses<sup>8</sup>, but has applied for permission in relation to another regulated activity<sup>9</sup>, the application is to be treated as relating only to that other regulated activity<sup>10</sup>. If the applicant is a person to whom, in relation to a particular regulated activity, the general prohibition does not apply<sup>11</sup>, but who has applied for permission in relation to another regulated activity<sup>12</sup>, the application is to be treated as relating only to that other regulated activity<sup>13</sup>.

If it gives permission, the Authority must specify the permitted regulated activity or activities, described in such manner as the Authority considers appropriate<sup>14</sup>. The Authority may:

- 893 (1) incorporate in the description of a regulated activity such limitations (for example as to circumstances in which the activity may, or may not, be carried on) as it considers appropriate<sup>15</sup>;
- 894 (2) specify a narrower or wider description of regulated activity than that to which the application relates<sup>16</sup>;
- 895 (3) give permission for the carrying on of a regulated activity which is not included among those to which the application relates<sup>17</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 'Applicant' means an applicant for permission under the Financial Services and Markets Act 2000 s 40 (see PARA 348): s 42(1).

3 As to regulated activities see PARA 84 et seq.

4 Financial Services and Markets Act 2000 s 42(2).

5 Financial Services and Markets Act 2000 s 42(3)(a). The exemption referred to in the text is an exemption resulting from s 39(1) (see PARA 346) or an order made under s 38(1) (see PARA 330). As to the general prohibition see PARA 80.

6 Financial Services and Markets Act 2000 s 42(3)(b).

7 Financial Services and Markets Act 2000 s 42(3).

8 Financial Services and Markets Act 2000 s 42(4)(a). The exemption referred to in the text is an exemption resulting from s 285(2) or s 285(3): see PARA 684.

9 Financial Services and Markets Act 2000 s 42(4)(b).

10 Financial Services and Markets Act 2000 s 42(4).

11 Financial Services and Markets Act 2000 s 42(5)(a). This applies where the general prohibition does not apply as a result of Pt XIX (ss 314-324): see PARA 741 et seq.

12 Financial Services and Markets Act 2000 s 42(5)(b).

13 Financial Services and Markets Act 2000 s 42(5).

14 Financial Services and Markets Act 2000 s 42(6).

15 Financial Services and Markets Act 2000 s 42(7)(a).

16 Financial Services and Markets Act 2000 s 42(7)(b).

17 Financial Services and Markets Act 2000 s 42(7)(c).

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### **353. Imposition of requirements.**

A Part IV permission<sup>1</sup> may include such requirements as the Financial Services Authority<sup>2</sup> considers appropriate<sup>3</sup>. A requirement may, in particular, be imposed so as to require the person concerned to take specified action<sup>4</sup>, or so as to require him to refrain from taking specified action<sup>5</sup>. A requirement may extend to activities which are not regulated activities<sup>6</sup>. A requirement may be imposed by reference to the person's relationship with his group<sup>7</sup>, or other members of his group<sup>8</sup>.

Any requirement imposed by the Authority expires at the end of such period as the Authority may specify in the permission<sup>9</sup>.

1 As to the meaning of 'Part IV permission' see PARA 348.

2 As to the Financial Services Authority see PARAS 4, 6 et seq.

3 Financial Services and Markets Act 2000 s 43(1). When giving a person a Part IV permission the Authority may impose an assets requirement: see PARA 359.

4 Financial Services and Markets Act 2000 s 43(2)(a).

5 Financial Services and Markets Act 2000 s 43(2)(b).

6 Financial Services and Markets Act 2000 s 43(3).

7 Financial Services and Markets Act 2000 s 43(4)(a). As to the meaning of 'group' see PARA 351 note 37.

8 Financial Services and Markets Act 2000 s 43(4)(b).

9 Financial Services and Markets Act 2000 s 43(5). However s 43(5) does not affect the Authority's powers under s 44 (variation and cancellation of permission at request of authorised person) (see PARA 354) or s 45 (variation and cancellation of permission on the Authority's own initiative) (see PARA 355): s 43(6).

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### ***C. VARIATION, REFUSAL AND CANCELLATION OF PERMISSION***

#### **354. Variation, refusal or cancellation at request of authorised person.**

The Financial Services Authority<sup>1</sup> may, on the application of an authorised person<sup>2</sup> with a Part IV permission<sup>3</sup>, vary the permission by:

- 896 (1) adding a regulated activity<sup>4</sup> to those for which it gives permission<sup>5</sup>;
- 897 (2) removing a regulated activity from those for which it gives permission<sup>6</sup>;
- 898 (3) varying the description of a regulated activity for which it gives permission<sup>7</sup>;
- 899 (4) cancelling a requirement previously imposed by the Authority<sup>8</sup>; or
- 900 (5) varying a requirement<sup>9</sup>.

The Authority's power to vary a Part IV permission extends to including any provision in the permission as varied that could be included if a fresh permission were being given in response to an application<sup>10</sup>.

The Authority may, on the application of an authorised person with a Part IV permission, cancel the permission<sup>11</sup>. The Authority may refuse an application<sup>12</sup> if it appears to it that the interests of consumers, or potential consumers, would be adversely affected if the application were to be granted<sup>13</sup>; and that it is desirable in the interests of consumers, or potential consumers, for the application to be refused<sup>14</sup>. If, as a result of a variation of a Part IV permission, there are no longer any regulated activities for which the authorised person concerned has permission, the Authority must, once it is satisfied that it is no longer necessary to keep the permission in force, cancel it<sup>15</sup>.

If an authorised person's Part IV permission is cancelled<sup>16</sup>, and as a result, there is no regulated activity for which he has permission<sup>17</sup>, the Authority must give a direction withdrawing that person's status as an authorised person<sup>18</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 As to authorised persons see PARA 314.

3 As to the meaning of 'Part IV permission' see PARA 348.

4 As to regulated activities see PARA 84 et seq.

5 Financial Services and Markets Act 2000 s 44(1)(a).

6 Financial Services and Markets Act 2000 s 44(1)(b).

7 Financial Services and Markets Act 2000 s 44(1)(c).

8 Financial Services and Markets Act 2000 s 44(1)(d). As to the imposition of requirements under s 43 see PARA 353.

- 9 Financial Services and Markets Act 2000 s 44(1)(e).
- 10 Financial Services and Markets Act 2000 s 44(5). As to applications under s 40 see PARA 348.
- 11 Financial Services and Markets Act 2000 s 44(2).
- 12 le under the Financial Services and Markets Act 2000 s 44.
- 13 Financial Services and Markets Act 2000 s 44(3)(a).
- 14 Financial Services and Markets Act 2000 s 44(3)(b).
- 15 Financial Services and Markets Act 2000 s 44(4).
- 16 Financial Services and Markets Act 2000 s 33(1)(a). See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
- 17 Financial Services and Markets Act 2000 s 33(1)(b).
- 18 Financial Services and Markets Act 2000 s 33(2).

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### **355. Variation or cancellation on the Financial Services Authority's own initiative.**

The Financial Services Authority<sup>1</sup> may exercise its power to vary or cancel a Part IV permission<sup>2</sup> in relation to an authorised person<sup>3</sup> if it appears to it that:

- 901 (1) he is failing, or is likely to fail, to satisfy the threshold conditions<sup>4</sup>;
- 902 (2) he has failed, during a period of at least 12 months, to carry on a regulated activity<sup>5</sup> for which he has a Part IV permission<sup>6</sup>; or
- 903 (3) it is desirable to exercise that power in order to protect the interests of consumers or potential consumers<sup>7</sup>.

Without prejudice to the generality of the above<sup>8</sup>, the Authority may, in relation to an authorised person who is an investment firm<sup>9</sup>, exercise its power<sup>10</sup> to cancel the Part IV permission of the firm if it appears to it that:

- 904 (a) the firm has failed, during a period of at least six months, to carry on a regulated activity which is an investment service or activity<sup>11</sup> for which it has a Part IV permission<sup>12</sup>;
- 905 (b) the firm obtained the Part IV permission by making a false statement or by other irregular means<sup>13</sup>;
- 906 (c) the firm no longer satisfies the requirements for authorisation pursuant to the Markets in Financial Instruments Directive or pursuant to or contained in any related Community legislation<sup>14</sup>, in relation to a regulated activity which is an investment service or activity for which it has a Part IV permission<sup>15</sup>; or
- 907 (d) the firm has seriously and systematically infringed the operating conditions pursuant to the Markets in Financial Instruments Directive or pursuant to or

contained in any related Community legislation<sup>16</sup> in relation to a regulated activity which is an investment service or activity for which it has a Part IV permission<sup>17</sup>.

This power<sup>18</sup> is referred to as the Authority's own-initiative power<sup>19</sup>. If, as a result of a variation of a Part IV permission, there are no longer any regulated activities for which the authorised person concerned has permission, the Authority must, once it is satisfied that it is no longer necessary to keep the permission in force, cancel it<sup>20</sup>. The Authority's power to vary a Part IV permission extends to including any provision in the permission as varied that could be included if a fresh permission were being given in response to an application<sup>21</sup>.

If the Authority is considering whether, and if so how, to exercise its own-initiative power in relation to an additional Part IV permission<sup>22</sup>, it must take into account:

- 908 (i) the home state authorisation<sup>23</sup> of the authorised person concerned<sup>24</sup>;
- 909 (ii) any relevant Directive<sup>25</sup>; and
- 910 (iii) relevant provisions of the EC Treaty<sup>26</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 Ie under the Financial Services and Markets Act 2000 s 45. The Authority's power is the power to vary a Part IV permission in any of the ways mentioned in s 44(1) (see PARA 354) or to cancel it: s 45(2). As to the meaning of 'Part IV permission' see PARA 348.

3 As to authorised persons see PARA 314.

4 Financial Services and Markets Act 2000 s 45(1)(a). As to the threshold conditions see PARA 351. As to the Financial Services and Markets Tribunal see PARA 43 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

5 As to regulated activities see PARA 84 et seq.

6 Financial Services and Markets Act 2000 s 45(1)(b).

7 Financial Services and Markets Act 2000 s 45(1)(c).

8 Ie the Financial Services and Markets Act 2000 s 45(1), (2).

9 As to the meaning of 'investment firm' see PARA 21 note 5.

10 Ie under the Financial Services and Markets Act 2000 s 45.

11 For the purposes of the Financial Services and Markets Act 2000 s 45(2A) a regulated activity is an investment service or activity if it falls within the definition of 'investment services and activities' in s 417(1): s 45(2B) (s 45(2A), (2B) added by SI 2007/126). 'Investment services and activities' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.2, read with EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) implementing Directive 2004/39 as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments for trading and defined terms for the purposes of that Directive, Ch VI, and EC Commission Directive 2006/73 (OJ L241, 2.9.2006, p 26) as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, art 52: Financial Services and Markets Act 2000 s 417(1) (definition added by SI 2007/126).

12 Financial Services and Markets Act 2000 s 45(2A)(a) (as added: see note 11).

13 Financial Services and Markets Act 2000 s 45(2A)(b) (as added: see note 11).

14 Ie pursuant to the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) Title II Ch I, or pursuant to or contained in any Community legislation made under that chapter.

15 Financial Services and Markets Act 2000 s 45(2A)(c) (as added: see note 11).

16 le pursuant to the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) Title II Ch II, or pursuant to or contained in any Community legislation made under that chapter.

17 Financial Services and Markets Act 2000 s 45(2A)(d) (as added: see note 11).

18 le the power under the Financial Services and Markets Act 2000 s 45.

19 Financial Services and Markets Act 2000 s 45(5).

20 Financial Services and Markets Act 2000 s 45(3).

21 Financial Services and Markets Act 2000 s 45(4). The response is to an application under s 40: see PARA 348.

22 'Additional Part IV permission' means a Part IV permission which is in force in relation to an EEA firm, a Treaty firm or a person authorised as a result of the Financial Services and Markets Act 2000 Sch 5 para 1(1) (see PARA 321); s 50(1). As to the meaning of 'EEA firm' see PARA 315 note 1. As to the meaning of 'Treaty firm' see PARA 319 note 1.

23 As to the meaning of 'home state authorisation' see PARA 319 note 4.

24 Financial Services and Markets Act 2000 s 50(2)(a).

25 Financial Services and Markets Act 2000 s 50(2)(b).

26 Financial Services and Markets Act 2000 s 50(2)(c). The reference to the EC Treaty is to the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179).

## UPDATE

### **355 Variation or cancellation on the Financial Services Authority's own initiative**

TEXT AND NOTE 7--Financial Services and Markets Act 2000 s 45(1)(c) amended: Banking Act 2009 s 248.

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### **356. Exercise of the Financial Services Authority's own-initiative power in support of overseas regulator.**

The Financial Services Authority's<sup>1</sup> own-initiative power<sup>2</sup> may be exercised in respect of an authorised person<sup>3</sup> at the request of, or for the purpose of assisting, a regulator who is outside the United Kingdom<sup>4</sup> and who is of a prescribed kind<sup>5</sup>.

If a request to the Authority for the exercise of its own-initiative power has been made by a regulator who is: (1) outside the United Kingdom<sup>6</sup>; (2) of a prescribed kind<sup>7</sup>; and (3) acting in pursuance of provisions of a prescribed kind<sup>8</sup>, the Authority must, in deciding whether or not to exercise that power in response to the request, consider whether it is necessary to do so in order to comply with a Community obligation<sup>9</sup>.

In deciding in any case in which the Authority does not consider that the exercise of its own-initiative power is necessary in order to comply with a Community obligation, it may take into account in particular:

- 911 (a) whether in the country or territory of the regulator concerned, corresponding assistance would be given to a United Kingdom regulatory authority<sup>10</sup>;
- 912 (b) whether the case concerns the breach of a law, or other requirement, which has no close parallel in the United Kingdom or involves the assertion of a jurisdiction not recognised by the United Kingdom<sup>11</sup>;
- 913 (c) the seriousness of the case and its importance to persons in the United Kingdom<sup>12</sup>;
- 914 (d) whether it is otherwise appropriate in the public interest to give the assistance sought<sup>13</sup>.

The Authority may decide not to exercise its own-initiative power, in response to a request<sup>14</sup>, unless the regulator concerned undertakes to make such contribution towards the cost of its exercise as the Authority considers appropriate<sup>15</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 I.e. under the Financial Services and Markets Act 2000 s 45: see PARA 355.

3 As to authorised persons see PARA 314.

4 Financial Services and Markets Act 2000 s 47(1)(a). The Financial Services and Markets Act 2000 s 47(1) applies whether or not the Authority has powers which are exercisable in relation to the authorised person by virtue of any provision of Pt XIII (ss 193-204) (see PARA 456 et seq): s 47(2). As to the meaning of 'United Kingdom' see PARA 2 note 3. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

5 Financial Services and Markets Act 2000 s 47(1)(b). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). In exercise of the power under s 47(1), (3) (and also ss 417(1), 428(3)) (see notes 7-8) the Treasury has made the Financial Services and Markets Act 2000 (Own-initiative Power) (Overseas Regulators) Regulations 2001, SI 2001/2639, which prescribe the following kinds of regulator, namely a regulator who exercises:

449 (1) a function corresponding to any function of the Authority under the Financial Services and Markets Act 2000 (Financial Services and Markets Act 2000 (Own-initiative Power) (Overseas Regulators) Regulations 2001, SI 2001/2639, reg 2(1), (2)(a));

450 (2) a function corresponding to any function exercised by the competent authority under the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (official listing) (see PARA 385 et seq) (Financial Services and Markets Act 2000 (Own-initiative Power) (Overseas Regulators) Regulations 2001, SI 2001/2639, reg 2(1), (2)(b));

451 (3) a function corresponding to any function exercised by the Secretary of State under the Companies Act 1985 (see **COMPANIES**) (as to replacement provisions see also the Companies Act 2006) (Financial Services and Markets Act 2000 (Own-initiative Power) (Overseas Regulators) Regulations 2001, SI 2001/2639, reg 2(1), (2)(c)); or

452 (4) a function in connection with:

63. (a) the investigation of conduct of the kind prohibited by the Criminal Justice Act 1993 Pt V (ss 52-64) (insider dealing) (see PARA 574A et seq) (Financial Services and Markets Act 2000 (Own-initiative Power) (Overseas Regulators) Regulations 2001, SI 2001/2639, reg 2(1), (2)(d)(i)); or  
63

64. (b) the enforcement of rules (whether or not having the force of law) relating to such conduct (reg 2(1), (2)(d)(ii)).  
64

As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.



6 Financial Services and Markets Act 2000 s 47(3)(a).

7 Financial Services and Markets Act 2000 s 47(3)(b). The following kinds of regulator are prescribed for the purposes of s 47(3)(b): (1) any host state regulator (within the meaning of Sch 3) (see PARA 323 note 10) (Financial Services and Markets Act 2000 (Own-initiative Power) (Overseas Regulators) Regulations 2001, SI 2001/2639, reg 3(2)(a)); and (2) the supervisory authority in Switzerland (within the meaning of the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance, signed at Luxembourg on 10 October 1989) (Financial Services and Markets Act 2000 (Own-initiative Power) (Overseas Regulators) Regulations 2001, SI 2001/2639, reg 3(2)(b)).

8 Financial Services and Markets Act 2000 s 47(3)(c). The following provisions are prescribed for the purposes of s 47(3)(c):

453 (1) in the case of a regulator to whom the Financial Services and Markets Act 2000 (Own-initiative Power) (Overseas Regulators) Regulations 2001, SI 2001/2639, reg 3(2)(a) (see note 7) applies: (a) any provision of Community legislation (reg 3(3)(a)(i)); and (b) any rule of law in force in an EEA state for purposes connected with the implementation of any such provision (reg 3(3)(a)(ii));

454 (2) in the case of a regulator to whom reg 3(2)(b) (see note 7) applies: (a) any provision of the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance, signed at Luxembourg on 10 October 1989 (reg 3(3)(b)(i)); and (b) any rule of law in force in Switzerland for purposes connected with the implementation of any such provision (reg 3(3)(b)(ii)).

9 Financial Services and Markets Act 2000 s 47(3).

10 Financial Services and Markets Act 2000 s 47(4)(a).

11 Financial Services and Markets Act 2000 s 47(4)(b).

12 Financial Services and Markets Act 2000 s 47(4)(c).

13 Financial Services and Markets Act 2000 s 47(4)(d).

14 'Request' means a request of a kind mentioned in the Financial Services and Markets Act 2000 s 47(1) (see the text to notes 1-5): s 47(7).

15 Financial Services and Markets Act 2000 s 47(5). Section 47(5) does not apply if the Authority decides that it is necessary for it to exercise its own-initiative power in order to comply with a Community obligation: s 47(6).

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### **357. Procedure for the exercise of the Financial Services Authority's own-initiative power.**

Where the Financial Services Authority<sup>1</sup> exercises its own-initiative power<sup>2</sup> to vary an authorised person's<sup>3</sup> Part IV permission<sup>4</sup>, such variation takes effect:

915 (1) immediately, if a notice<sup>5</sup> states that that is the case<sup>6</sup>;

916 (2) on such date as may be specified in the notice<sup>7</sup>; or

917 (3) if no date is specified in the notice, when the matter to which the notice relates is no longer open to review<sup>8</sup>.

A variation may be expressed to take effect immediately (or on a specified date) only if the Authority, having regard to the ground on which it is exercising its own-initiative power, reasonably considers that it is necessary for the variation to take effect immediately (or on that date)<sup>9</sup>.

If the Authority proposes to vary the Part IV permission, or varies it with immediate effect, it must give the authorised person written notice<sup>10</sup>. The notice must:

- 918 (a) give details of the variation<sup>11</sup>;
- 919 (b) state the Authority's reasons for the variation and for its determination as to when the variation takes effect<sup>12</sup>;
- 920 (c) inform the authorised person that he may make representations to the Authority within such period as may be specified in the notice (whether or not he has referred the matter to the Financial Services and Markets Tribunal)<sup>13</sup>;
- 921 (d) inform him of when the variation takes effect<sup>14</sup>; and
- 922 (e) inform him of his right to refer the matter to the Tribunal<sup>15</sup>.

If, having considered any representations made by the authorised person, the Authority decides to vary the permission in the way proposed<sup>16</sup>, or, if the permission has been varied, it decides not to rescind the variation<sup>17</sup>, it must give him written notice<sup>18</sup>. If, having considered any representations made by the authorised person, the Authority decides not to vary the permission in the way proposed<sup>19</sup>, or decides to vary the permission in a different way<sup>20</sup>, or decides to rescind a variation which has effect<sup>21</sup>, it must give him written notice<sup>22</sup>.

If the Authority proposes to cancel<sup>23</sup> an authorised person's Part IV permission otherwise than at his request, it must give him a warning notice<sup>24</sup>. If the Authority decides to cancel an authorised person's Part IV permission otherwise than at his request, it must give him a decision notice<sup>25</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the Authority's own-initiative power see PARA 355.

3 As to authorised persons see PARA 314.

4 Financial Services and Markets Act 2000 s 53(1). As to the meaning of 'Part IV permission' see PARA 348.

5 I.e. the notice given under the Financial Services and Markets Act 2000 s 53(4): see the text and note 10.

6 Financial Services and Markets Act 2000 s 53(2)(a).

7 Financial Services and Markets Act 2000 s 53(2)(b).

8 Financial Services and Markets Act 2000 s 53(2)(c). For the purposes of s 53(2)(c), whether a matter is open to review is to be determined in accordance with s 391(8) (see PARA 774): s 53(12).

9 Financial Services and Markets Act 2000 s 53(3).

10 Financial Services and Markets Act 2000 s 53(4).

11 Financial Services and Markets Act 2000 s 53(5)(a).

12 Financial Services and Markets Act 2000 s 53(5)(b).

13 Financial Services and Markets Act 2000 s 53(5)(c). The Authority may extend the period allowed under the notice for making representations: s 53(6). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

14 Financial Services and Markets Act 2000 s 53(5)(d).

- 15 Financial Services and Markets Act 2000 s 53(5)(e). If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference: s 53(11).
- 16 Financial Services and Markets Act 2000 s 53(7)(a).
- 17 Financial Services and Markets Act 2000 s 53(7)(b).
- 18 Financial Services and Markets Act 2000 s 53(7). A notice given under s 53(7) must inform the authorised person of his right to refer the matter to the Tribunal: s 53(9). See note 15.
- 19 Financial Services and Markets Act 2000 s 53(8)(a).
- 20 Financial Services and Markets Act 2000 s 53(8)(b). A notice to vary the permission in a different way under s 53(8)(b) must: (1) give details of the variation; (2) state the Authority's reasons for the variation and for its determination as to when a variation takes effect; (3) inform the authorised person that he may make representations to the Authority within such period as may be specified in the notice (whether or not he has referred the matter to the Tribunal); (4) inform him of when the variation takes effect; and (5) inform him of his right to refer the matter to the Tribunal: s 53(5), (10).
- 21 Financial Services and Markets Act 2000 s 53(8)(c).
- 22 Financial Services and Markets Act 2000 s 53(8).
- 23 See PARA 355.
- 24 Financial Services and Markets Act 2000 s 54(1). As to warning notices generally see PARA 769.
- 25 Financial Services and Markets Act 2000 s 54(2). As to decision notices generally see PARA 770.

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### **358. Variation of permission on acquisition of control.**

If it appears to the Financial Services Authority<sup>1</sup> that a person has acquired control<sup>2</sup> over a UK authorised person<sup>3</sup> who has a Part IV permission<sup>4</sup> but there are no grounds for exercising its own-initiative power<sup>5</sup>, then if it appears to the Authority that the likely effect of the acquisition of control on the authorised person, or on any of its activities, is uncertain the Authority may vary the authorised person's permission by imposing a requirement<sup>6</sup> or by varying a requirement included in the authorised person's permission<sup>7</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 Any reference to a person having acquired control is to be read in accordance with the Financial Services and Markets Act 2000 Pt XII (ss 178-192) (see PARA 377 et seq): s 46(3).

3 In the Financial Services and Markets Act 2000 Pt XII (ss 178-192), 'UK authorised person' means an authorised person who: (1) is a body incorporated in, or an unincorporated association formed under the law of, any part of the United Kingdom; and (2) is not a person authorised as a result of s 36, Sch 5 para 1 (see PARAS 321, 322): ss 178(4), 417(1).

4 Financial Services and Markets Act 2000 s 46(1)(a). As to the meaning of 'Part IV permission' see PARA 348.

5 Financial Services and Markets Act 2000 s 46(1)(b). As to the Authority's own-initiative power see PARA 355.

6 Financial Services and Markets Act 2000 s 46(2)(a). As to the imposition of requirements under s 43 see PARA 353.

7 Financial Services and Markets Act 2000 s 46(2)(b).

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### **359. Prohibitions and restrictions which may be imposed by the Financial Services Authority.**

An 'assets requirement' is a requirement<sup>1</sup>: (1) prohibiting the disposal of, or other dealing with, any of A's<sup>2</sup> assets (whether in the United Kingdom<sup>3</sup> or elsewhere) or restricting such disposals or dealings<sup>4</sup>; or (2) that all or any of A's assets, or all or any assets belonging to consumers but held by A or to his order, must be transferred to and held by a trustee approved by the Authority<sup>5</sup>. If the Financial Services Authority<sup>6</sup>, on giving a person a Part IV permission<sup>7</sup>, imposes an assets requirement on him<sup>8</sup> or varies an authorised person's<sup>9</sup> Part IV permission so as to alter an assets requirement imposed on him or impose such a requirement on him<sup>10</sup> then the following provision is made.

If the Authority imposes a requirement of the kind referred to in head (1) above<sup>11</sup>, and gives notice of the requirement to any institution with whom A keeps an account<sup>12</sup>, the notice has the following effects<sup>13</sup>. The institution does not act in breach of any contract with A if, having been instructed by A (or on his behalf) to transfer any sum or otherwise make any payment out of A's account, it refuses to do so in the reasonably held belief that complying with the instruction would be incompatible with the requirement<sup>14</sup>. If the institution complies with such an instruction, it is liable to pay to the Authority an amount equal to the amount transferred from, or otherwise paid out of, A's account in contravention of the requirement<sup>15</sup>.

If the Authority imposes a requirement of the kind referred to in head (2) above, no assets held by a person as trustee in accordance with the requirement may, while the requirement is in force, be released or dealt with except with the consent of the Authority<sup>16</sup>. If, while a requirement of the kind referred to in head (2) above is in force, A creates a charge<sup>17</sup> over any assets of his held in accordance with the requirement, the charge is (to the extent that it confers security over the assets) void against the liquidator and any of A's creditors<sup>18</sup>.

Assets held by a person as trustee ('T') are to be taken to be held by T in accordance with a requirement referred to in head (2) above only if: (a) A has given T written notice that those assets are to be held by T in accordance with the requirement<sup>19</sup>; or (b) they are assets into which assets to which head (a) above applies have been transposed by T on the instructions of A<sup>20</sup>.

1 le under the Financial Services and Markets Act 2000 s 43: see PARA 353.

2 A person on whom an assets requirement is imposed is referred to in the Financial Services and Markets Act 2000 s 48 as 'A': s 48(2).

3 As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Financial Services and Markets Act 2000 s 48(3)(a).

5 Financial Services and Markets Act 2000 s 48(3)(b).

- 6 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 7 As to the meaning of 'Part IV permission' see PARA 348.
- 8 Financial Services and Markets Act 2000 s 48(1)(a).
- 9 As to authorised persons see PARA 314.
- 10 Financial Services and Markets Act 2000 s 48(1)(b).
- 11 Financial Services and Markets Act 2000 s 48(4)(a).
- 12 Financial Services and Markets Act 2000 s 48(4)(b).
- 13 Financial Services and Markets Act 2000 s 48(4).
- 14 Financial Services and Markets Act 2000 s 48(5)(a).
- 15 Financial Services and Markets Act 2000 s 48(5)(b).
- 16 Financial Services and Markets Act 2000 s 48(6). A person who contravenes s 48(6) is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 48(9). As to the standard scale see PARA 27 note 21.  
Section 48(6), (8) does not affect any equitable interest or remedy in favour of a person who is a beneficiary of a trust as a result of a requirement of the kind mentioned in s 48(3)(b) (see head (2) in the text): s 48(11).
- 17 'Charge' includes a mortgage: Financial Services and Markets Act 2000 s 48(10).
- 18 Financial Services and Markets Act 2000 s 48(7).
- 19 Financial Services and Markets Act 2000 s 48(8)(a). See note 16.
- 20 Financial Services and Markets Act 2000 s 48(8)(b). See note 16.

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### **360. Persons connected with the applicant.**

In considering an application for a Part IV permission<sup>1</sup>, or whether to vary or cancel a Part IV permission<sup>2</sup>, the Financial Services Authority<sup>3</sup> may have regard to any person appearing to it to be, or likely to be, in a relationship with the applicant or person given permission which is relevant<sup>4</sup>.

Before (1) giving permission in response to an application made by a person who is connected with an EEA firm other than an EEA firm which is an insurance or reinsurance intermediary<sup>5</sup>; or (2) varying any permission given by the Authority to such a person, where the effect of the variation is to grant permission for the purposes of a Single Market Directive<sup>6</sup> other than the one for the purposes of which the existing permission was granted<sup>7</sup>, the Authority must consult the firm's home state regulator<sup>8</sup>. A person ('A') is connected with an EEA firm if A is a subsidiary undertaking<sup>9</sup> of the firm<sup>10</sup> or if A is a subsidiary undertaking of a parent undertaking<sup>11</sup> of the firm<sup>12</sup>.

- 1 Financial Services and Markets Act 2000 s 49(1)(a). As to the meaning of 'Part IV permission' see PARA 348.
- 2 Financial Services and Markets Act 2000 s 49(1)(b).
- 3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
- 4 Financial Services and Markets Act 2000 s 49(1).
- 5 Financial Services and Markets Act 2000 s 49(2)(a) (amended by SI 2003/1476). The reference to an EEA firm other than one that is an insurance or reinsurance intermediary is a reference to an EEA firm other than one falling within the Financial Services and Markets Act 2000 Sch 3 para 5(e): see PARA 315. As to the meaning of 'EEA firm' see PARA 315 note 1. See note 8.
- 6 As to the meaning of 'Single Market Directives' see PARA 86 note 6.
- 7 Financial Services and Markets Act 2000 s 49(2)(b) (substituted by SI 2007/1973). See note 8.
- 8 Financial Services and Markets Act 2000 s 49(2). As to the meaning of 'home state regulator' in relation to an EEA firm see PARA 315 note 1.  
  
However s 49(2) does not apply to the extent that the permission relates to: (1) an insurance mediation activity (within the meaning of Sch 6 para 2(5): see PARA 351 note 26); or (2) a regulated activity involving a regulated mortgage contract, a regulated home reversion plan or a regulated home purchase plan (see PARAS 203, 209, 215): s 49(2A) (added by SI 2001/544; and amended by SI 2006/2383).
- 9 As to the meaning of 'subsidiary undertaking' see PARA 351 note 32.
- 10 Financial Services and Markets Act 2000 s 49(3)(a).
- 11 As to the meaning of 'parent undertaking' see PARA 351 note 32.
- 12 Financial Services and Markets Act 2000 s 49(3)(b).

## **UPDATE**

### **360 Persons connected with the applicant**

NOTE 8--2000 Act s 49(2) also does not apply to the extent that the permission relates to a regulated sale and rent back agreement (PARA 220A): Financial Services and Markets Act 2000 s 49(2A) (further amended by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes). 'Regulated mortgage contract', 'regulated home reversion plan', 'regulated home purchase plan' and 'regulated sale and rent back agreement' must be construed in accordance with Financial Services and Markets Act 2000 s 22, any relevant order under s 22, and Financial Services and Markets Act 2000 Sch 2: Financial Services and Markets Act 2000 s 49(4) (added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

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## ***D. REFERENCES TO THE FINANCIAL SERVICES AND MARKETS TRIBUNAL***

### **361. References to the Financial Services and Markets Tribunal.**

An applicant who is aggrieved by the determination of an application made under Part IV of the Financial Services and Markets Act 2000<sup>1</sup> may refer the matter to the Financial Services and Markets Tribunal<sup>2</sup>.

An authorised person<sup>3</sup> who is aggrieved by the exercise of the Financial Services Authority's<sup>4</sup> own-initiative power<sup>5</sup> may also refer the matter to the Tribunal<sup>6</sup>.

1    le the Financial Services and Markets Act 2000 Pt IV (ss 40-55).

2    Financial Services and Markets Act 2000 s 55(1). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

3    As to authorised persons see PARA 314.

4    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

5    As to the Authority's own-initiative power see PARA 355.

6    Financial Services and Markets Act 2000 s 55(2).

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## ***E. AUTHORISED PERSON OPERATING A MONEY SERVICE BUSINESS***

### **362. Requirement to inform the Financial Services Authority.**

The Money Laundering Regulations 2007<sup>1</sup> require an authorised person whose supervisory authority is the Financial Services Authority, before acting as a money service business or a trust or company service provider or within 28 days of so doing, to inform the Authority that he intends, or has begun, to act as such, and also to inform the Authority immediately he ceases to act as such<sup>2</sup>.

1    See the Money Laundering Regulations 2007, SI 2007/2157; and generally PARA 539 et seq.

2    See the Money Laundering Regulations 2007, SI 2007/2157, reg 31; and PARA 556.

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## **(iv) Conduct of Business**

### **363. Conduct of business.**

Once authorised<sup>1</sup> and permitted to carry on regulated activities<sup>2</sup>, there must also in regard to conduct of business be compliance with the Financial Services Authority's Handbook of Rules and Guidance<sup>3</sup>.

The relevant sourcebook of the Handbook<sup>4</sup> has been reissued in light of the Markets in Financial Instruments Directive<sup>5</sup> and applies to a firm with respect to the following activities carried on from an establishment maintained by it, or its appointed representative, in the United Kingdom: (1) accepting deposits; (2) designated investment business; (3) long-term insurance business in relation to life policies; and activities connected with them<sup>6</sup>. While for full details reference should be made to the Handbook in general and the above sourcebook in particular, highlighted briefly below are relevant matters of importance.

Client classification is of fundamental significance as there are different levels of regulatory protection according to whether a person is a client, a retail client, a professional client or an eligible counterparty<sup>7</sup>, with retail clients enjoying the highest level of protection as it is assumed that they have no specialist investment knowledge.

Another significant matter is price transparency and the Directive has requirements implemented in the Handbook that certain reasonable pricing information be made public and continue to be made public both before and after shares are admitted to trading<sup>8</sup>.

There are also important rules as to best execution. These require (subject to specific client instructions) that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order<sup>9</sup>.

The last subject to be highlighted is conflicts of interest. Generally investment firms must take all reasonable steps to identify conflicts of interest between themselves, including their managers, employees and tied agents, or any person directly or indirectly linked to them by control and their clients or between one client and another that arise in the course of providing any investment and ancillary services, or combinations of such services<sup>10</sup>.

1 As to authorisation see PARA 314 et seq.

2 As to permission to carry on regulated activities see PARA 348 et seq.

3 A detailed consideration of the Handbook is beyond the scope of this work although general cross-references to relevant parts of the Handbook are provided. As to the Handbook generally see PARA 22. As to the Financial Services Authority see PARAS 4, 6 et seq.

4 See the Authority's Handbook of Rules and Guidance, Business Standards; Conduct of Business Sourcebook (COBS).

5 Ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

6 See the Handbook of Rules and Guidance, Business Standards; Conduct of Business Sourcebook (COBS) 1, Annex.

7 See the Handbook of Rules and Guidance, Business Standards; Conduct of Business Sourcebook (COBS) 3.2-3.8; and European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) arts 4, 24, 28, Annex II. As to client money in this context see the Handbook of Rules and Guidance, Business Standards, Client Assets (CASS) 7.2.



8 See in particular European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) arts 44, 45.

9 See the Handbook of Rules and Guidance, Business Standards; Conduct of Business Sourcebook (COBS) 11.2; and European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) art 21.

10 See European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) art 18; and see also Handbook of Rules and Guidance, High Level Standards, Senior Management Arrangements, Systems and Controls (SYSC) 10.

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## **(v) Performance**

### **A. PROHIBITION ORDERS**

#### **364. Power of the Financial Services Authority to make prohibition orders.**

If it appears to the Financial Services Authority<sup>1</sup> that an individual is not a fit and proper person to perform functions in relation to a regulated activity<sup>2</sup> carried on by an authorised person<sup>3</sup>, the Authority may make an order (a 'prohibition order') prohibiting the individual from performing a specified<sup>4</sup> function, any function falling within a specified description or any function<sup>5</sup>.

A prohibition order may relate to: (1) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities<sup>6</sup>; (2) authorised persons generally or any person within a specified class of authorised person<sup>7</sup>.

An individual who performs or agrees to perform a function in breach of a prohibition order is guilty of an offence<sup>8</sup>.

An authorised person must take reasonable care to ensure that no function of his, in relation to the carrying on of a regulated activity, is performed by a person who is prohibited from performing that function by a prohibition order<sup>9</sup>. The Authority may, on the application of the individual named in a prohibition order, vary or revoke it<sup>10</sup>.

The provisions described above apply to the performance of functions in relation to a regulated activity carried on by: (a) a person who is an exempt person<sup>11</sup> in relation to that activity<sup>12</sup>; and (b) a person to whom<sup>13</sup> the general prohibition<sup>14</sup> does not apply in relation to that activity<sup>15</sup>, as they apply to the performance of functions in relation to a regulated activity carried on by an authorised person<sup>16</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 As to regulated activities see PARA 84 et seq.

3 Financial Services and Markets Act 2000 s 56(1). As to authorised persons see PARA 314. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22. As to approval of the use of disciplinary powers under s 56 where penalties under s 66 (see PARA 374) are inadequate in view of the seriousness of the charges made against the claimants see *R (on the application of Davis) v Financial Services Authority* [2003] EWCA Civ 1128, [2003] 4 All ER 1196, [2004] All ER (Comm) 88.

4 'Specified' means specified in the prohibition order: Financial Services and Markets Act 2000 s 56(9).

- 5 Financial Services and Markets Act 2000 s 56(2).
- 6 Financial Services and Markets Act 2000 s 56(3)(a).
- 7 Financial Services and Markets Act 2000 s 56(3)(b).
- 8 Financial Services and Markets Act 2000 s 56(4). Such a person is liable on summary conviction to a fine not exceeding level 5 on the standard scale. As to the standard scale see PARA 27 note 21. In proceedings for an offence under s 56(4) it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence: s 56(5).
- 9 Financial Services and Markets Act 2000 s 56(6). Contravention of this provision is actionable at the suit of a private person: see s 71; and PARA 376.
- 10 Financial Services and Markets Act 2000 s 56(7). See PARA 366.
- 11 As to the meaning of 'exempt person' see PARA 80 note 4.
- 12 Financial Services and Markets Act 2000 s 56(8)(a).
- 13 Ie as a result of the Financial Services and Markets Act 2000 Pt XX (ss 325-333): see PARA 750 et seq.
- 14 As to the general prohibition see PARA 80.
- 15 Financial Services and Markets Act 2000 s 56(8)(b).
- 16 Financial Services and Markets Act 2000 s 56(8).

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### **365. Procedure for making prohibition orders.**

If the Financial Services Authority<sup>1</sup> proposes to make a prohibition order<sup>2</sup> it must give the individual concerned a warning notice<sup>3</sup>. The warning notice must set out the terms of the prohibition<sup>4</sup>.

If the Authority decides to make a prohibition order it must give the individual concerned a decision notice<sup>5</sup>. The decision notice must: (1) name the individual to whom the prohibition order applies<sup>6</sup>; (2) set out the terms of the order<sup>7</sup>; and (3) be given to the individual named in the order<sup>8</sup>.

A person against whom a decision to make a prohibition order is made may refer the matter to the Financial Services and Markets Tribunal<sup>9</sup>.

- 1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
- 2 As to prohibition orders generally see PARA 364.
- 3 Financial Services and Markets Act 2000 s 57(1). As to warning notices generally see PARA 769.
- 4 Financial Services and Markets Act 2000 s 57(2).
- 5 Financial Services and Markets Act 2000 s 57(3). As to decision notices generally see PARA 770.

- 6 Financial Services and Markets Act 2000 s 57(4)(a).
- 7 Financial Services and Markets Act 2000 s 57(4)(b).
- 8 Financial Services and Markets Act 2000 s 57(4)(c).
- 9 Financial Services and Markets Act 2000 s 57(5). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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### **366. Applications to vary or revoke prohibition orders.**

The Financial Services Authority<sup>1</sup> may, on the application of the individual named in a prohibition order, vary or revoke it<sup>2</sup>. Where such an application is made the Authority must respond as follows<sup>3</sup>.

If the Authority decides to grant the application, it must give the applicant written notice of its decision<sup>4</sup>. If the Authority proposes to refuse the application, it must give the applicant a warning notice<sup>5</sup>. If the Authority decides to refuse the application, it must give the applicant a decision notice<sup>6</sup>.

If the Authority gives the applicant a decision notice, he may refer the matter to the Financial Services and Markets Tribunal<sup>7</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 56(7).

3 Financial Services and Markets Act 2000 s 58(1).

4 Financial Services and Markets Act 2000 s 58(2).

5 Financial Services and Markets Act 2000 s 58(3). As to warning notices generally see PARA 769.

6 Financial Services and Markets Act 2000 s 58(4). As to decision notices generally see PARA 770.

7 Financial Services and Markets Act 2000 s 58(5). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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## **B. APPROVAL**

### 367. Approval for particular arrangements.

An authorised person<sup>1</sup> ('A') must take reasonable care to ensure that no person performs a controlled function<sup>2</sup> under an arrangement<sup>3</sup> entered into by A in relation to the carrying on by A of a regulated activity, unless the Financial Services Authority approves the performance by that person of the controlled function to which the arrangement relates<sup>4</sup>.

Similarly, A must take reasonable care to ensure that no person performs a controlled function under an arrangement entered into by a contractor of A in relation to the carrying on by A of a regulated activity, unless the Authority approves the performance by that person of the controlled function to which the arrangement relates<sup>5</sup>.

1 As to authorised persons see PARA 314.

2 'Controlled function' means a function of a description specified in rules: Financial Services and Markets Act 2000 s 59(3). As to the meaning of 'rule' see PARA 23 note 2. A 'controlled function' will usually have a particular significance in the context of the firm's regulated activities. A list of controlled functions is contained in the Financial Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 10. As to the Handbook generally see PARA 22.

The Authority may specify a description of function under s 59(3) only if, in relation to the carrying on of a regulated activity by an authorised person, it is satisfied that the first, second or third condition is met: s 59(4). The first condition is that the function is likely to enable the person responsible for its performance to exercise a significant influence on the conduct of the authorised person's affairs, so far as relating to the regulated activity: s 59(5). In determining whether the first condition is met, the Authority may take into account the likely consequences of a failure to discharge that function properly: s 59(9). The second condition is that the function will involve the person performing it in dealing with customers of the authorised person in a manner substantially connected with the carrying on of the regulated activity: s 59(6). 'Customer', in relation to an authorised person, means a person who is using, or who is or may be contemplating using, any of the services provided by the authorised person: s 59(11). The third condition is that the function will involve the person performing it in dealing with property of customers of the authorised person in a manner substantially connected with the carrying on of the regulated activity: s 59(7).

As to the Financial Services Authority see PARAS 4, 6 et seq. As to regulated activities see PARA 84 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP) Ch 10.

3 'Arrangement' means any kind of arrangement for the performance of a function of A which is entered into by A or any contractor of his with another person; and includes, in particular, that other person's appointment to an office, his becoming a partner or his employment (whether under a contract of service or otherwise): Financial Services and Markets Act 2000 s 59(10).

4 Financial Services and Markets Act 2000 s 59(1). Neither s 59(1) nor s 59(2) applies to an arrangement which allows a person to perform a function if the question of whether he is a fit and proper person to perform the function is reserved under any of the Single Market Directives to an authority in a country or territory outside the United Kingdom: Financial Services and Markets Act 2000 s 59(8). As to the meaning of 'Single Market Directives' see PARA 86 note 6. As to the meaning of 'United Kingdom' see PARA 2 note 3. Contravention of s 59(1) or s 59(2) is actionable at the suit of a private person: see s 71; and PARA 376.

5 Financial Services and Markets Act 2000 s 59(2). See note 4.

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### 368. Applications for approval.

An application for the Financial Services Authority's<sup>1</sup> approval<sup>2</sup> may be made by the authorised person concerned<sup>3</sup>. The application must be made in such manner as the Authority may direct<sup>4</sup> and must contain, or be accompanied by, such information as the Authority may reasonably require<sup>5</sup>.

At any time after receiving the application and before determining it, the Authority may require the applicant to provide it with such further information as it reasonably considers necessary to enable it to determine the application<sup>6</sup>. The Authority may require an applicant to present information which he is required to give<sup>7</sup> in such form, or to verify it in such a way, as the Authority may direct<sup>8</sup>. Different directions may be given, and different requirements imposed, in relation to different applications or categories of application<sup>9</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, High Level Standards (Fit and Proper test for Approved Persons (FIT)); Regulatory Processes, Authorisation Manual (AUTH), Supervision Manual (SUP) Ch 10. As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 59: see PARA 367.

3 Financial Services and Markets Act 2000 s 60(1). The 'authorised person concerned' includes a person who has applied for permission under Pt IV (ss 40-55) (see PARA 348 et seq) and will be the authorised person concerned if permission is given: s 60(6).

The 'authorised person concerned' also includes (1) an EEA firm with respect to which the Authority has received a consent notice or a regulator's notice under Sch 3 para 13 (see PARA 315) or a regulator's notice under Sch 3 para 14 (see PARA 315), and which will be the authorised person concerned if it qualifies for authorisation under Sch 3; and (2) an EEA firm which falls within Sch 3 para 5(da) (reinsurance undertaking) (see PARA 315 note 1) which establishes a branch in the United Kingdom: Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001, SI 2001/2511, reg 10 (amended by SI 2003/1473; SI 2007/3253). As to the meaning of 'EEA firm' see PARA 315 note 1.

4 Financial Services and Markets Act 2000 s 60(2)(a).

5 Financial Services and Markets Act 2000 s 60(2)(b).

6 Financial Services and Markets Act 2000 s 60(3).

7 Ie under the Financial Services and Markets Act 2000 s 60.

8 Financial Services and Markets Act 2000 s 60(4).

9 Financial Services and Markets Act 2000 s 60(5).

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### **369. Determination of approval applications.**

The Financial Services Authority<sup>1</sup> may grant an application for approval<sup>2</sup> only if it is satisfied that the person in respect of whom the application is made (the 'candidate') is a fit and proper person to perform the function to which the application relates<sup>3</sup>. In deciding that question, the Authority may have regard (among other things) to whether the candidate, or any person who may perform a function on his behalf: (1) has obtained a qualification<sup>4</sup>; (2) has undergone, or is undergoing, training<sup>5</sup>; or (3) possesses a level of competence<sup>6</sup>, required by general rules<sup>7</sup> in relation to persons performing functions of the kind to which the application relates<sup>8</sup>.

The Authority must, before the end of the period of consideration (that is the period of three months beginning with the date on which it receives an application<sup>9</sup>), determine whether to grant the application<sup>10</sup>, or to give a warning notice<sup>11</sup>.

If the Authority imposes a requirement to provide further information<sup>12</sup>, the period for consideration stops running on the day on which the requirement is imposed but starts running again: (a) on the day on which the required information is received by the Authority<sup>13</sup>; or (b) if the information is not provided on a single day, on the last of the days on which it is received by the Authority<sup>14</sup>.

A person who makes an application for approval<sup>15</sup> may withdraw his application by giving written notice to the Authority at any time before the Authority determines it, but only with the consent of the candidate<sup>16</sup> and the person by whom the candidate is to be retained to perform the function concerned, if not the applicant<sup>17</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

2 Ie made under the Financial Services and Markets Act 2000 s 60: see PARA 368.

3 Financial Services and Markets Act 2000 s 61(1).

4 Financial Services and Markets Act 2000 s 61(2)(a).

5 Financial Services and Markets Act 2000 s 61(2)(b).

6 Financial Services and Markets Act 2000 s 61(2)(c).

7 As to general rules see PARA 21.

8 Financial Services and Markets Act 2000 s 61(2).

9 Ie made under the Financial Services and Markets Act 2000 s 60: see PARA 368.

10 Financial Services and Markets Act 2000 s 61(3)(a).

11 Financial Services and Markets Act 2000 s 61(3)(b). As to the giving of warning notices under s 62(2) see PARA 370.

12 Ie under the Financial Services and Markets Act 2000 s 60(3): see PARA 368.

13 Financial Services and Markets Act 2000 s 61(4)(a).

14 Financial Services and Markets Act 2000 s 61(4)(b).

15 Ie under the Financial Services and Markets Act 2000 s 60: see PARA 368.

16 Financial Services and Markets Act 2000 s 61(5)(a).

17 Financial Services and Markets Act 2000 s 61(5)(b).

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### **370. Procedure for approval applications.**

If the Financial Services Authority<sup>1</sup> decides to grant an application for approval<sup>2</sup>, it must give written notice of its decision to each of the interested parties<sup>3</sup>. If the Authority proposes to refuse an application, it must give a warning notice to each of the interested parties<sup>4</sup>. If the Authority decides to refuse an application, it must give a decision notice to each of the interested parties<sup>5</sup>. If the Authority decides to refuse an application, each of the interested parties may refer the matter to the Financial Services and Markets Tribunal<sup>6</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

2 I.e. an application made under the Financial Services and Markets Act 2000 s 60: see PARA 368.

3 Financial Services and Markets Act 2000 s 62(1). The 'interested parties', in relation to an application, are: (1) the applicant; (2) the person in respect of whom the application is made ('A'); and (3) the person by whom A's services are to be retained, if not the applicant: s 62(5).

4 Financial Services and Markets Act 2000 s 62(2). As to warning notices generally see PARA 769.

5 Financial Services and Markets Act 2000 s 62(3). As to decision notices generally see PARA 770.

6 Financial Services and Markets Act 2000 s 62(4). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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### **371. Withdrawal of approval.**

The Financial Services Authority<sup>1</sup> may withdraw an approval<sup>2</sup> if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates<sup>3</sup>. When considering whether to withdraw its approval, the Authority may take into account any matter which it could take into account if it were considering an application for approval<sup>4</sup> in respect of the performance of the function to which the approval relates<sup>5</sup>. If the Authority proposes to withdraw its approval, it must give each of the interested parties<sup>6</sup> a warning notice<sup>7</sup>. If the Authority decides to withdraw its approval, it must give each of the interested parties a decision notice<sup>8</sup>. If the Authority decides to withdraw its approval, each of the interested parties may refer the matter to the Financial Services and Markets Tribunal<sup>9</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 I.e. given under the Financial Services and Markets Act 2000 s 59: see PARA 367.

3 Financial Services and Markets Act 2000 s 63(1).

4 I.e. made under the Financial Services and Markets Act 2000 s 60: see PARA 368.

5 Financial Services and Markets Act 2000 s 63(2).

6 The 'interested parties', in relation to an approval, are: (1) the person on whose application it was given ('A'); (2) the person in respect of whom it was given ('B'); and (3) the person by whom B's services are retained, if not A: Financial Services and Markets Act 2000 s 63(6).

7 Financial Services and Markets Act 2000 s 63(3). As to warning notices generally see PARA 769.

8 Financial Services and Markets Act 2000 s 63(4). As to decision notices generally see PARA 770.

9 Financial Services and Markets Act 2000 s 63(5). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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## ***C. CONDUCT***

### **372. Statements of principle and codes of practice.**

The Financial Services Authority<sup>1</sup> may issue statements of principle with respect to the conduct expected of approved persons<sup>2</sup>. If the Authority issues a statement of principle<sup>3</sup>, it must also issue a code of practice for the purpose of helping to determine whether or not a person's conduct complies with the statement of principle<sup>4</sup>. Such a code may specify:

- 923 (1) descriptions of conduct which, in the opinion of the Authority, comply with a statement of principle<sup>5</sup>;
- 924 (2) descriptions of conduct which, in the opinion of the Authority, do not comply with a statement of principle<sup>6</sup>;
- 925 (3) factors which, in the opinion of the Authority, are to be taken into account in determining whether or not a person's conduct complies with a statement of principle<sup>7</sup>.

The Authority may at any time alter or replace a statement or code which has been issued<sup>8</sup>. If a statement or code is altered or replaced, the altered or replacement statement or code must be issued by the Authority<sup>9</sup>. A statement or code must be published by the Authority in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>10</sup>. A code published<sup>11</sup> and in force at the time when any particular conduct takes place may be relied on so far as it tends to establish whether or not that conduct complies with a statement of principle<sup>12</sup>.

Failure to comply with a statement of principle does not of itself give rise to any right of action by persons affected or affect the validity of any transaction<sup>13</sup>. A person is not to be taken to have failed to comply with a statement of principle if he shows that, at the time of the alleged failure, it or its associated code of practice had not been published<sup>14</sup>.

The Authority must, without delay, give the Treasury a copy of any statement or code which it publishes<sup>15</sup>. The power to issue statements of principle and codes of practice includes power to make different provision in relation to persons, cases or circumstances of different descriptions<sup>16</sup>. The Authority may charge a reasonable fee for providing a person with a copy of a statement or code<sup>17</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, High Level Standards, Statements of Principle and Code of Practice for Approved Persons (APER); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.



2 Financial Services and Markets Act 2000 s 64(1). 'Approved person' means a person in relation to whom the Authority has given its approval under s 59 (see PARA 367); s 64(13).

3 Ie under the Financial Services and Markets Act 2000 s 64(1).

4 Financial Services and Markets Act 2000 s 64(2).

5 Financial Services and Markets Act 2000 s 64(3)(a).

6 Financial Services and Markets Act 2000 s 64(3)(b).

7 Financial Services and Markets Act 2000 s 64(3)(c).

8 Financial Services and Markets Act 2000 s 64(4).

9 Financial Services and Markets Act 2000 s 64(5).

10 Financial Services and Markets Act 2000 s 64(6).

11 Ie under the Financial Services and Markets Act 2000 s 64.

12 Financial Services and Markets Act 2000 s 64(7).

13 Financial Services and Markets Act 2000 s 64(8).

14 Financial Services and Markets Act 2000 s 64(9).

15 Financial Services and Markets Act 2000 s 64(10).

16 Financial Services and Markets Act 2000 s 64(11)(a).

17 Financial Services and Markets Act 2000 s 64(12).

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### **373. Procedure for statements and codes.**

Before issuing a statement or code<sup>1</sup>, the Financial Services Authority<sup>2</sup> must publish a draft of it in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>3</sup>. The draft must be accompanied by a cost benefit analysis<sup>4</sup> and notice that representations about the proposal may be made to the Authority within a specified time<sup>5</sup>.

Before issuing the proposed statement or code, the Authority must have regard to any representations made to it<sup>6</sup>. If the Authority issues the proposed statement or code it must publish an account, in general terms, of the representations made to it<sup>7</sup> and its response to them<sup>8</sup>.

If the statement or code differs from the draft in a way which is, in the opinion of the Authority, significant, the Authority must<sup>9</sup> publish details of the difference<sup>10</sup> and those details must be accompanied by a cost benefit analysis<sup>11</sup>.

Note that a cost benefit analysis is not required if the Authority considers that, making the appropriate comparison<sup>12</sup>, there will be no increase in costs<sup>13</sup> or that, making that comparison, there will be an increase in costs but the increase will be of minimal significance<sup>14</sup>.

1 Ie under the Financial Services and Markets Act 2000 s 64: see PARA 321.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, High Level Standards, Statements of Principle and Code of Practice for Approved Persons (APER). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 65(1). The Authority may charge a reasonable fee for providing a copy of a draft published under s 65(1): s 65(9). Section 65(1)-(6) does not apply if the Authority considers that the delay involved in complying with it would prejudice the interests of consumers: s 65(7). A statement or code must state that it is issued under s 64 (see PARA 372): s 65(8). Section 65 also applies to a proposal to alter or replace a statement or code: s 65(10).

4 Financial Services and Markets Act 2000 s 65(2)(a). 'Cost benefit analysis' means an estimate of the costs together with an analysis of the benefits that will arise if the proposed statement or code is issued; or from the statement or code that has been issued where it differs significantly from the published draft: s 65(11). See note 3.

5 Financial Services and Markets Act 2000 s 65(2)(b). See note 3.

6 Financial Services and Markets Act 2000 s 65(3). See note 3.

7 Financial Services and Markets Act 2000 s 65(4)(a). See note 3.

8 Financial Services and Markets Act 2000 s 65(4)(b). See note 3.

9 ie in addition to complying with the Financial Services and Markets Act 2000 s 65(4).

10 Financial Services and Markets Act 2000 s 65(5)(a). See note 3.

11 Financial Services and Markets Act 2000 s 65(5)(b). See note 3.

12 'Appropriate comparison' means: (1) in relation to the cost benefit analysis accompanying the draft statement or code, a comparison between the overall position if the statement or code is issued and the overall position if it is not issued; (2) in relation to the cost benefit analysis accompanying the published details of the difference between the statement (or code) and the draft, a comparison between the overall position after the issuing of the statement or code and the overall position before it was issued: Financial Services and Markets Act 2000 s 65(12).

13 Financial Services and Markets Act 2000 s 65(6)(a). See note 3.

14 Financial Services and Markets Act 2000 s 65(6)(b). See note 3.

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### **374. Disciplinary powers of the Financial Services Authority.**

The Financial Services Authority<sup>1</sup> may take action against a person<sup>2</sup> if it appears to the Authority that he is guilty of misconduct<sup>3</sup> and the Authority is satisfied that it is appropriate in all the circumstances to take action against him<sup>4</sup>. A person is guilty of misconduct if, while an approved person<sup>5</sup>:

926 (1) he has failed to comply with a statement of principle<sup>6</sup>; or

927 (2) he has been knowingly concerned in a contravention by the relevant authorised person<sup>7</sup> of a requirement imposed on that authorised person by or under the Financial Services and Markets Act 2000 or by any directly applicable Community regulation made under the Markets in Financial Instruments Directive<sup>8</sup>.

If the Authority is entitled to take action against a person, it may impose a penalty on him of such amount as it considers appropriate<sup>9</sup>, or publish a statement of his misconduct<sup>10</sup>. The Authority may not take action after the end of the period of two years beginning with the first day on which the Authority knew of the misconduct, unless proceedings in respect of it against the person concerned were begun before the end of that period<sup>11</sup>.

If the Authority proposes to take action against a person<sup>12</sup>, it must give him a warning notice<sup>13</sup>. A warning notice about a proposal to impose a penalty must state the amount of the penalty<sup>14</sup>. A warning notice about a proposal to publish a statement must set out the terms of the statement<sup>15</sup>.

If the Authority decides to take action against a person<sup>16</sup>, it must give him a decision notice<sup>17</sup>. A decision notice about the imposition of a penalty must state the amount of the penalty<sup>18</sup>. A decision notice about the publication of a statement must set out the terms of the statement<sup>19</sup>. If the Authority decides to take action against a person, he may refer the matter to the Financial Services and Markets Tribunal<sup>20</sup>.

After a statement of misconduct<sup>21</sup> is published, the Authority must send a copy of it to the person concerned and to any person to whom a copy of the decision notice was given<sup>22</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 66.

3 Financial Services and Markets Act 2000 s 66(1)(a).

4 Financial Services and Markets Act 2000 s 66(1)(b). As to approval of the use of disciplinary powers under s 56 (see PARA 364) where penalties under s 66 were inadequate in view of the seriousness of the charges made against the claimants see *R (on the application of Davis) v Financial Services Authority* [2003] EWCA Civ 1128, [2003] 4 All ER 1196, [2004] All ER (Comm) 88.

5 As to the meaning of 'approved person' see PARA 372 note 2; definition applied by the Financial Services and Markets Act 2000 s 66(6).

6 Financial Services and Markets Act 2000 s 66(2)(a). The statement of principle is issued under s 64: see PARA 372.

7 'Relevant authorised person', in relation to an approved person, means the person on whose application approval under the Financial Services and Markets Act 2000 s 59 (see PARA 367) was given: s 66(7).

8 Financial Services and Markets Act 2000 s 66(2)(b) (amended by SI 2007/126). The reference is to the European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments. As to 'knowingly concerned' (as used in the previous legislation, the Financial Services Act 1986 ss 6, 61) see *Securities and Investments Board v Scandex Capital Management A/S* [1998] 1 All ER 514, [1998] 1 WLR 712, CA; *Securities and Investments Board v Pantell SA (No 2)* [1993] Ch 256, [1993] 1 All ER 134, CA (both the SIB cases were about firms that were not authorised); and *R v Shivpuri* [1987] AC 1, [1986] 2 All ER 334, HL.

9 Financial Services and Markets Act 2000 s 66(3)(a).

10 Financial Services and Markets Act 2000 s 66(3)(b).

11 Financial Services and Markets Act 2000 s 66(4). For these purposes, the Authority is to be treated as knowing of misconduct if it has information from which the misconduct can reasonably be inferred: s 66(5)(a). Proceedings against a person in respect of misconduct are to be treated as begun when a warning notice is given to him under s 67(1) (see the text and note 13): s 66(5)(b).

12 Ie under the Financial Services and Markets Act 2000 s 66.

13 Financial Services and Markets Act 2000 s 67(1). As to warning notices generally see PARA 769.

14 Financial Services and Markets Act 2000 s 67(2).

- 15 Financial Services and Markets Act 2000 s 67(3).
- 16 le under the Financial Services and Markets Act 2000 s 66.
- 17 Financial Services and Markets Act 2000 s 67(4). As to decision notices generally see PARA 770.
- 18 Financial Services and Markets Act 2000 s 67(5).
- 19 Financial Services and Markets Act 2000 s 67(6).
- 20 Financial Services and Markets Act 2000 s 67(7). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 21 le under the Financial Services and Markets Act 2000 s 66: see the text and note 10.
- 22 Financial Services and Markets Act 2000 s 68.

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### **375. Statements of policy.**

The Financial Services Authority<sup>1</sup> must prepare and issue a statement of its policy with respect to the imposition and the amount of penalties in respect of misconduct<sup>2</sup>. The Authority's policy in determining what the amount of a penalty should be must include having regard to:

- 928 (1) the seriousness of the misconduct in question in relation to the nature of the principle or requirement concerned<sup>3</sup>;
- 929 (2) the extent to which that misconduct was deliberate or reckless<sup>4</sup>; and
- 930 (3) whether the person on whom the penalty is to be imposed is an individual<sup>5</sup>.

The Authority may at any time alter or replace a statement of policy so issued<sup>6</sup>. If a statement is altered or replaced, the Authority must issue the altered or replacement statement<sup>7</sup>.

The Authority must, without delay, give the Treasury a copy of any statement which it publishes<sup>8</sup>. A statement issued must be published by the Authority in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>9</sup>. The Authority may charge a reasonable fee for providing a person with a copy of the statement<sup>10</sup>.

In exercising, or deciding whether to exercise, its power to take action<sup>11</sup> in the case of any particular misconduct, the Authority must have regard to any statement of policy published and in force at the time when the misconduct in question occurred<sup>12</sup>.

Before issuing a statement, the Authority must publish a draft of the proposed statement in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>13</sup>. The draft must be accompanied by notice that representations about the proposal may be made to the Authority within a specified time<sup>14</sup>. Before issuing the proposed statement, the Authority must have regard to any such representations made to it<sup>15</sup>. If the Authority issues the proposed statement it must publish an account, in general terms, of the representations made to it<sup>16</sup> and its response to them<sup>17</sup>. If the statement differs from the draft in a way which is, in the opinion of the Authority, significant, the Authority must<sup>18</sup> publish details of the difference<sup>19</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 69(1)(a), (b). The penalties in question are those imposed under s 66: see PARA 374.

3 Financial Services and Markets Act 2000 s 69(2)(a).

4 Financial Services and Markets Act 2000 s 69(2)(b).

5 Financial Services and Markets Act 2000 s 69(2)(c).

6 Financial Services and Markets Act 2000 s 69(3).

7 Financial Services and Markets Act 2000 s 69(4).

8 Financial Services and Markets Act 2000 s 69(5). The publication is under s 69.

9 Financial Services and Markets Act 2000 s 69(6).

10 Financial Services and Markets Act 2000 s 69(7).

11 Its power under the Financial Services and Markets Act 2000 s 66: see PARA 374.

12 Financial Services and Markets Act 2000 s 69(8).

13 Financial Services and Markets Act 2000 s 70(1). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 70(1): s 70(6). Section 70 also applies to a proposal to alter or replace a statement: s 70(7).

14 Financial Services and Markets Act 2000 s 70(2). See note 13.

15 Financial Services and Markets Act 2000 s 70(3). See note 13.

16 Financial Services and Markets Act 2000 s 70(4)(a). See note 13.

17 Financial Services and Markets Act 2000 s 70(4)(b). See note 13.

18 Its in addition to complying with the Financial Services and Markets Act 2000 s 70(4).

19 Financial Services and Markets Act 2000 s 70(5). See note 13.

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## ***D. ACTIONS FOR BREACH OF STATUTORY DUTY***

### **376. Breach of duty.**

A contravention of certain provisions relating to the performance of regulated activities<sup>1</sup> is actionable at the suit of a private person<sup>2</sup> who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty<sup>3</sup>.

In prescribed cases, a contravention of that kind which would be actionable at the suit of a private person is actionable at the suit of a person who is not a private person, subject to the defences and other incidents applying to actions for breach of statutory duty<sup>4</sup>.

1 le the Financial Services and Markets Act 2000 s 56(6) (see PARA 364) or s 59(1) or s 59(2) (see PARA 367). As to regulated activities see PARA 84 et seq.

2 'Private person' has such meaning as may be prescribed: Financial Services and Markets Act 2000 s 71(3). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1).

In exercise of this power the Treasury has made the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, which define 'private person' as:

455 (1) any individual, unless he suffers the loss in question in the course of carrying on: (a) any regulated activity (reg 3(1)(a)(i)); or (b) any activity which would be a regulated activity apart from any exclusion made by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 72 (overseas persons) (see PARAS 124, 134, 146, 182, 207, 213, 219, 222) or art 72A (information society services) (see PARAS 95, 103, 108, 125, 135, 147, 157, 168, 172, 183, 189, 197, 201, 202, 208, 214, 220, 223) (Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 3(1)(a)(ii) (amended by SI 2002/1775)); and

456 (2) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind (Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 3(1)(b)),

but it does not include a government, a local authority (in the United Kingdom or elsewhere) or an international organisation (regs 3(1), 5(1)).

In regard to head (1) above, an individual who suffers loss in the course of effecting or carrying out contracts of insurance (within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10 (see PARA 100)) written at Lloyd's is not to be taken to suffer loss in the course of carrying on a regulated activity: Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 3(2). As to the meanings of 'government', 'local authority' and 'international organisation' see PARA 33 note 3. As to the meaning of 'United Kingdom' see PARA 2 note 3.

As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Financial Services and Markets Act 2000 s 71(1).

4 Financial Services and Markets Act 2000 s 71(2). A case where the following condition is satisfied is prescribed for the purposes of s 71(2) (and so in such a case the contravention of s 56(6) (see PARA 364) or s 59(1) or s 59(2) (see PARA 367) is actionable at the suit of a person who is not a private person): Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 5(2). The condition is that the action would be brought at the suit of a person (who is not a private person) acting in a fiduciary or representative capacity on behalf of a private person and any remedy would be exclusively for the benefit of that private person and could not be effected through an action brought otherwise than at the suit of the fiduciary or representative: reg 5(3).

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## **(vi) Control over Authorised Persons**

### **A. NOTICE OF CONTROL**

#### **377. Notice of control.**

If a step which a person proposes to take would result in his acquiring control over a UK authorised person<sup>1</sup>, an additional kind of control over a UK authorised person, or an increase in a relevant kind of control which he already has over a UK authorised person, he must notify the Financial Services Authority<sup>2</sup> of his proposal<sup>3</sup>. A person who is under such a duty to notify the

Authority<sup>4</sup> must also give notice to the Authority on acquiring, or increasing, the control in question<sup>5</sup>. A person who, without himself taking any such step, acquires any such control or additional or increased control must notify the Authority before the end of the period of 14 days beginning with the day on which he first becomes aware that he has acquired it<sup>6</sup>. The Treasury<sup>7</sup> may by order provide for exemptions from the obligation to notify the Authority<sup>8</sup>.

A notice of control<sup>9</sup> must: (1) be given to the Authority in writing; and (2) include such information and be accompanied by such documents<sup>10</sup> as the Authority may reasonably require<sup>11</sup>. The Authority may require the person giving a notice of control to provide such additional information or documents as it reasonably considers necessary in order to enable it to determine what action it is to take in response to the notice<sup>12</sup>. Different requirements may be imposed in different circumstances<sup>13</sup>.

If a step which a controller<sup>14</sup> of a UK authorised person proposes to take would result in his ceasing to have control of a relevant kind over the authorised person, or reducing a relevant kind of control over that person, he must notify the Authority of his proposal<sup>15</sup>. A controller of a UK authorised person who, without himself taking any such step, ceases to have that control or reduces that control must notify the Authority before the end of the period of 14 days beginning with the day on which he first becomes aware that he has ceased to have the control in question or that he has reduced that control<sup>16</sup>. The notice must be given to the Authority in writing and must include details of the extent of the control (if any) which the person concerned will retain (or still retains) over the authorised person concerned<sup>17</sup>. The Treasury may by order provide for exemptions from the obligation to notify the Authority<sup>18</sup>.

A person who fails to comply with the duty to notify the Authority imposed on him by the provisions described above<sup>19</sup> is guilty of an offence<sup>20</sup>. If a person who has given a notice of control to the Authority carries out the proposal to which the notice relates, he is guilty of an offence if: (a) the period of three months beginning with the date on which the Authority received the notice is still running; and (b) the Authority has not responded to the notice by either giving its approval or giving him a warning notice<sup>21</sup>.

1 As to the meaning of 'UK authorised person' see PARA 358 note 3. As to authorised persons see PARA 314.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 11. As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 178(1). A notice under s 178(1), (2) is referred to in Pt XII (ss 178-192) as a 'notice of control': s 178(5).

4 It is a duty imposed by the Financial Services and Markets Act 2000 s 178(1): see the text to notes 1-3.

5 Financial Services and Markets Act 2000 s 178(3).

6 Financial Services and Markets Act 2000 s 178(2). See note 3.

7 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Financial Services and Markets Act 2000 s 192(a). As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

In any case where a person (the 'acquirer') proposes to take, in relation to a relevant friendly society, such a step as is mentioned in s 178(1) (see the text to notes 1-3), or acquires control, an additional kind of control or an increase in a relevant kind of control (in each case, within the meaning of Pt XII) over a relevant friendly society without himself taking any such step, the acquirer is exempt from any obligation imposed by s 178 to notify the Authority of his proposal or acquisition: Financial Services and Markets Act 2000 (Controllers) (Exemption) Order 2001, SI 2001/2638, art 2(1). 'Relevant friendly society' means any UK authorised person who is a friendly society to which neither the Friendly Societies Act 1992 s 37(2) nor s 37(3) (see PARA 2112) applies: Financial Services and Markets Act 2000 (Controllers) (Exemption) Order 2001, SI 2001/2638, art 2(3). 'Acquirer' means the acquirer, any of the acquirer's associates, or the acquirer and any of his associates: art 2(3). As to the meaning of 'associate' see PARA 591 note 16; definition applied by art 1(2).

In any case where a person (the 'acquirer'): (1) proposes to take a step which would result in his (a) acquiring control over an authorised building society in the case mentioned in the Financial Services and Markets Act 2000 s 179(2)(a) (holding of 10% or more of the shares) (see PARA 378); or (b) acquiring an additional kind of control over such a society of the kind mentioned in s 179(4)(a) (holding of shares) (see PARA 378); or (2) without himself taking any such step, has acquired such control or such an additional kind of control over such a society, the acquirer is exempt from any obligation imposed by s 178 to notify the Authority of his proposal or his acquisition unless the proposed step would result in the acquirer holding, or the acquirer holds, a holding of 10% or more of the capital of that authorised building society: Financial Services and Markets Act 2000 (Controllers) (Exemption) (No 2) Order 2001, SI 2001/3338, art 2(1), (2). 'Authorised building society' means a building society (within the meaning of the Building Societies Act 1986 (see PARA 1856)) which is a UK authorised person for the purposes of the Financial Services and Markets Act 2000 Pt XII: Financial Services and Markets Act 2000 (Controllers) (Exemption) (No 2) Order 2001, SI 2001/3338, art 1(2). 'Capital', in relation to an authorised building society, consists of the following: (i) any shares of a class defined as deferred shares for the purposes of the Building Societies Act 1986 s 119 (see PARA 1906) which have been issued by that society; and (ii) the general reserves of that society: Financial Services and Markets Act 2000 (Controllers) (Exemption) (No 2) Order 2001, SI 2001/3338, art 1(2).

In any case where a controller of an authorised building society: (A) proposes to take a step which would result in his acquiring an increase of his control over that society in the circumstances mentioned in the Financial Services and Markets Act 2000 s 180(1)(a) (increase in percentage of shares) (see PARA 378); or (b) has acquired increased control over that society in those circumstances without himself taking any such step, the controller is exempt from any obligation imposed by s 178 to notify the Authority of his proposal or his acquisition unless the proposed step would result in the controller increasing, or the controller has increased, his holding of the capital of that authorised building society by any of the steps mentioned in s 180(2) (see PARA 379): Financial Services and Markets Act 2000 (Controllers) (Exemption) (No 2) Order 2001, SI 2001/3338, art 2(4), (5). For these purposes, 'controller' means the controller, any of the controller's associates, or the controller and any of his associates: art 2(6).

9 See note 3.

10 As to the meaning of 'document' see PARA 10 note 10.

11 Financial Services and Markets Act 2000 s 182(1).

12 Financial Services and Markets Act 2000 s 182(2).

13 Financial Services and Markets Act 2000 s 182(3).

14 As to the meaning of 'controller' see PARA 591 note 16.

15 Financial Services and Markets Act 2000 s 190(1). A person who is under the duty to notify the Authority imposed by s 190(1) must also give a notice to the Authority: (1) on ceasing to have the control in question; or (2) on reducing that control: s 190(3). As to when a controller of a UK authorised person reduces his control see PARA 380.

16 Financial Services and Markets Act 2000 s 190(2).

17 Financial Services and Markets Act 2000 s 190(4).

18 Financial Services and Markets Act 2000 s 192(a).

In any case where a controller of a relevant friendly society proposes to take, in relation to that relevant friendly society, such a step as is mentioned in s 190(1) (see the text and note 15), or ceases to have or reduces a relevant kind of control (within the meaning of Pt XII) over that relevant friendly society without himself taking any such step, the controller is exempt from any obligation imposed by s 190 to notify the Authority: Financial Services and Markets Act 2000 (Controllers) (Exemption) Order 2001, SI 2001/2638, art 2(2).

In any case where a controller of an authorised building society: (1) proposes to take a step which would result in his ceasing to have control of the kind mentioned in the Financial Services and Markets Act 2000 s 179(4)(a) (holding of shares) (see PARA 378 head (a)) over that society; or (2) has ceased to have such control without himself taking any such step, the controller is exempt from any obligation imposed by s 190 to notify the Authority of his proposal or that cessation unless the proposed step would result in the controller ceasing, or the controller has ceased, to hold 10% or more of the capital of that authorised building society: Financial Services and Markets Act 2000 (Controllers) (Exemption) (No 2) Order 2001, SI 2001/3338 art 3(1), (2). In any case where a controller of an authorised building society: (a) proposes to take a step which would result in his reducing his control over that society in the circumstances mentioned in the Financial Services and Markets Act 2000 s 181(1)(a) (decrease in percentage of shares) (see PARA 380 head (1)); or (b) has reduced his control in those circumstances without himself taking any such step, the controller is exempt from any obligation imposed by s 190 to notify the Authority of his proposal or that reduction unless the proposed step would result in the



controller reducing, or the controller has reduced, his holding of the capital of that authorised building society by any of the steps mentioned in s 181(2) (see PARA 380): Financial Services and Markets Act 2000 (Controllers) (Exemption) (No 2) Order 2001, SI 2001/3338, art 3(3), (4). For these purposes, 'controller' means the controller, any of the controller's associates, or the controller and any of his associates: art 3(5).

19 le the duty imposed by the Financial Services and Markets Act 2000 ss 178(1), (2), 190(1), (2).

20 Financial Services and Markets Act 2000 s 191(1), (2). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 191(6). As to the standard scale see PARA 27 note 21. It is a defence for a person charged with an offence of failing to comply with the duty to notify imposed on him by s 178(1) or s 190(1) to show that he had, at the time of the alleged offence, no knowledge of the act or circumstances by virtue of which the duty to notify the Authority arose: s 191(9). If a person who was under a duty to notify the Authority imposed by s 178(1) or s 190(1), but who had no knowledge of the act or circumstances by virtue of which that duty arose, subsequently becomes aware of that act or those circumstances, he must notify the Authority before the end of the period of 14 days beginning with the day on which he first became so aware: s 191(10). A person who fails to comply with the duty to notify the Authority imposed by s 191(10) is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 191(11).

21 Financial Services and Markets Act 2000 s 191(3). A warning notice is given under s 183(3) (see PARA 381) or s 185(3) (see PARA 382). As to warning notices generally see PARA 769. A person guilty of an offence under s 191(3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 191(6).

## UPDATE

### 377 Notice of control

TEXT AND NOTES 1-6, 9-13--2000 Act ss 178, 182 replaced: Financial Services and Markets Act 2000 ss 178-180 (substituted by SI 2009/534).

NOTES 8, 18--Financial Services and Markets Act 2000 s 192(a) amended: SI 2009/534. SI 2001/2638, SI 2001/3338 replaced: Financial Services and Markets Act 2000 (Controllers) (Exemption) Order 2009, SI 2009/774.

TEXT AND NOTES 14-17--2000 Act s 190 replaced: Financial Services and Markets Act 2000 ss 191D, 191E (substituted by SI 2009/534).

TEXT AND NOTES 19-21--2000 Act s 191 replaced: Financial Services and Markets Act 2000 s 191F (substituted by SI 2009/534).

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## **B. VARYING CONTROL**

### **378. Acquiring control.**

For the purposes of the provisions relating to control over authorised persons<sup>1</sup>, a person (the 'acquirer') acquires control over a UK authorised person<sup>2</sup> ('A') on first falling within any of the cases mentioned below<sup>3</sup>. Those cases are where the acquirer<sup>4</sup>:

931 (1) holds 10 per cent or more of the shares<sup>5</sup> in A<sup>6</sup>;

932 (2) is able to exercise significant influence over the management of A by virtue of his shareholding in A<sup>7</sup>;

- 933 (3) holds 10 per cent or more of the shares in a parent undertaking<sup>8</sup> ('P') of A<sup>9</sup>;
- 934 (4) is able to exercise significant influence over the management of P by virtue of his shareholding in P<sup>10</sup>;
- 935 (5) is entitled to exercise, or control the exercise of, 10 per cent or more of the voting power<sup>11</sup> in A<sup>12</sup>;
- 936 (6) is able to exercise significant influence over the management of A by virtue of his voting power in A<sup>13</sup>;
- 937 (7) is entitled to exercise, or control the exercise of, 10 per cent or more of the voting power in P<sup>14</sup>; or
- 938 (8) is able to exercise significant influence over the management of P by virtue of his voting power in P<sup>15</sup>.

For the purposes of the provisions relating to control over authorised persons<sup>16</sup>, each of the following is to be regarded as a kind of control<sup>17</sup>:

- 939 (a) control arising as a result of the holding of shares in A<sup>18</sup>;
- 940 (b) control arising as a result of the holding of shares in P<sup>19</sup>;
- 941 (c) control arising as a result of the entitlement to exercise, or control the exercise of, voting power in A<sup>20</sup>;
- 942 (d) control arising as a result of the entitlement to exercise, or control the exercise of, voting power in P<sup>21</sup>.

The Treasury<sup>22</sup> may by order amend the provisions described above by varying, or removing, any of the cases in which a person is treated as having control over a UK authorised person or by adding a case<sup>23</sup>.

1 le the Financial Services and Markets Act 2000 Pt XII (ss 178-192).

2 As to the meaning of 'UK authorised person' see PARA 358 note 3.

3 Financial Services and Markets Act 2000 s 179(1). See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 11. As to the Handbook generally see PARA 22.

4 Financial Services and Markets Act 2000 s 179(2). For the purposes of s 179(2), 'acquirer' means the acquirer, any of the acquirer's associates, or the acquirer and any of his associates: s 179(3). As to the meaning of 'associate' see PARA 591 note 16; definition applied by s 179(5).

5 As to the meaning of 'shares' see PARA 591 note 16; definition applied by the Financial Services and Markets Act 2000 s 179(5).

6 Financial Services and Markets Act 2000 s 179(2)(a).

7 Financial Services and Markets Act 2000 s 179(2)(b).

8 As to the meaning of 'parent undertaking' see PARA 351 note 32.

9 Financial Services and Markets Act 2000 s 179(2)(c).

10 Financial Services and Markets Act 2000 s 179(2)(d).

11 As to the meaning of 'voting power' see PARA 591 note 16; definition applied by the Financial Services and Markets Act 2000 s 179(5).

12 Financial Services and Markets Act 2000 s 179(2)(e).

13 Financial Services and Markets Act 2000 s 179(2)(f).

14 Financial Services and Markets Act 2000 s 179(2)(g).

- 15 Financial Services and Markets Act 2000 s 179(2)(h).  
 16 In the Financial Services and Markets Act 2000 Pt XII.  
 17 Financial Services and Markets Act 2000 s 179(4).  
 18 Financial Services and Markets Act 2000 s 179(4)(a).  
 19 Financial Services and Markets Act 2000 s 179(4)(b).  
 20 Financial Services and Markets Act 2000 s 179(4)(c).  
 21 Financial Services and Markets Act 2000 s 179(4)(d).  
 22 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.  
 23 Financial Services and Markets Act 2000 s 192(b). No order is to be made under s 192(b) unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(1)(a). At the date at which this volume states the law no such order had been made. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

## UPDATE

### 378-380 Acquiring control ... Reducing control

Financial Services and Markets Act 2000 ss 179-181 now ss 181-184 (substituted by SI 2009/534).

### 378 Acquiring control

TEXT AND NOTE 23--For 'having control' read 'acquiring control': Financial Services and Markets Act 2000 s 192(b) (amended by SI 2009/534).

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### 379. Increasing control.

For the purposes of the provisions relating to control over authorised persons<sup>1</sup>, a controller<sup>2</sup> of a person ('A') who is a UK authorised person<sup>3</sup> increases his control over A if<sup>4</sup>:

- 943 (1) the percentage of shares<sup>5</sup> held by the controller in A increases by any of the steps described below<sup>6</sup>;  
 944 (2) the percentage of shares held by the controller in a parent undertaking<sup>7</sup> ('P') of A increases by any of the steps described below<sup>8</sup>;  
 945 (3) the percentage of voting power<sup>9</sup> which the controller is entitled to exercise, or control the exercise of, in A increases by any of the steps described below<sup>10</sup>;  
 946 (4) the percentage of voting power which the controller is entitled to exercise, or control the exercise of, in P increases by any of the steps described below<sup>11</sup>; or  
 947 (5) the controller becomes a parent undertaking of A<sup>12</sup>.

The steps mentioned above are:

- 948 (a) from below 10 per cent to 10 per cent or more but less than 20 per cent<sup>13</sup>;
- 949 (b) from below 20 per cent to 20 per cent or more but less than 33 per cent<sup>14</sup>;
- 950 (c) from below 33 per cent to 33 per cent or more but less than 50 per cent<sup>15</sup>;
- 951 (d) from below 50 per cent to 50 per cent or more<sup>16</sup>.

The Treasury<sup>17</sup> may by order amend the provisions described above by varying, or removing, any of the cases in which a person is treated as increasing control over a UK authorised person or by adding a case<sup>18</sup>.

1 The Financial Services and Markets Act 2000 Pt XII (ss 178-192).

2 For the purposes of heads (1)-(4) in the text, 'controller' means: (1) the controller; (2) any of the controller's associates; or (3) the controller and any of his associates: Financial Services and Markets Act 2000 s 180(3). As to the meaning of 'controller' generally see PARA 591 note 16. As to the meaning of 'associate' see PARA 591 note 16; definition applied by s 179(5). In the rest of Pt XII, 'acquiring control' or 'having control' includes: (a) acquiring or having an additional kind of control; or (b) acquiring an increase in a relevant kind of control, or having increased control of a relevant kind: s 180(4). As to kinds of control see PARA 378.

3 As to the meaning of 'UK authorised person' see PARA 358 note 3.

4 Financial Services and Markets Act 2000 s 180(1). See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 11. As to the Handbook generally see PARA 22.

5 As to the meaning of 'shares' see PARA 591 note 16; definition applied by the Financial Services and Markets Act 2000 s 179(5).

6 Financial Services and Markets Act 2000 s 180(1)(a).

7 As to the meaning of 'parent undertaking' see PARA 351 note 32.

8 Financial Services and Markets Act 2000 s 180(1)(b).

9 As to the meaning of 'voting power' see PARA 591 note 16; definition applied by the Financial Services and Markets Act 2000 s 179(5).

10 Financial Services and Markets Act 2000 s 180(1)(c).

11 Financial Services and Markets Act 2000 s 180(1)(d).

12 Financial Services and Markets Act 2000 s 180(1)(e).

13 Financial Services and Markets Act 2000 s 180(2)(a).

14 Financial Services and Markets Act 2000 s 180(2)(b).

15 Financial Services and Markets Act 2000 s 180(2)(c).

16 Financial Services and Markets Act 2000 s 180(2)(d).

17 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

18 Financial Services and Markets Act 2000 s 192(c). At the date at which this volume states the law no such order had been made. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

## UPDATE

### 378-380 Acquiring control ... Reducing control

Financial Services and Markets Act 2000 ss 179-181 now ss 181-184 (substituted by SI 2009/534).

### 379 Increasing control

NOTE 18--Financial Services and Markets Act 2000 s 192(c) amended: SI 2009/534.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(vi) Control over Authorised Persons/B. VARYING CONTROL/380. Reducing control.

### 380. Reducing control.

For the purposes of the provisions relating to control over authorised persons<sup>1</sup>, a controller<sup>2</sup> of a person ('A') who is a UK authorised person<sup>3</sup> reduces his control over A, if<sup>4</sup>:

- 952 (1) the percentage of shares<sup>5</sup> held by the controller in A decreases by any of the steps described below<sup>6</sup>;
- 953 (2) the percentage of shares held by the controller in a parent undertaking<sup>7</sup> ('P') of A decreases by any of the steps described below<sup>8</sup>;
- 954 (3) the percentage of voting power<sup>9</sup> which the controller is entitled to exercise, or control the exercise of, in A decreases by any of the steps described below<sup>10</sup>;
- 955 (4) the percentage of voting power which the controller is entitled to exercise, or control the exercise of, in P decreases by any of the steps described below<sup>11</sup>; or
- 956 (5) the controller ceases to be a parent undertaking of A<sup>12</sup>,

unless the controller ceases to have the kind of control concerned over A as a result<sup>13</sup>.

The steps mentioned above are:

- 957 (a) from 50 per cent or more to 33 per cent or more but less than 50 per cent<sup>14</sup>;
- 958 (b) from 33 per cent or more to 20 per cent or more but less than 33 per cent<sup>15</sup>;
- 959 (c) from 20 per cent or more to 10 per cent or more but less than 20 per cent<sup>16</sup>;
- 960 (d) from 10 per cent or more to less than 10 per cent<sup>17</sup>.

The Treasury<sup>18</sup> may by order amend the provisions described above by varying, or removing, any of the cases in which a person is treated as reducing his control over a UK authorised person or by adding a case<sup>19</sup>.

1 le the Financial Services and Markets Act 2000 Pt XII (ss 178-192).

2 For the purposes of heads (1)-(4) in the text, 'controller' means: (1) the controller; (2) any of the controller's associates; or (3) the controller and any of his associates: Financial Services and Markets Act 2000 s 181(3). As to the meaning of 'controller' generally see PARA 591 note 16. As to the meaning of 'associate' see PARA 591 note 16; definition applied by s 179(5).

3 As to the meaning of 'UK authorised person' see PARA 358 note 3.

4 Financial Services and Markets Act 2000 s 181(1). See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 11. As to the Handbook generally see PARA 22.

5 As to the meaning of 'shares' see PARA 591 note 16; definition applied by the Financial Services and Markets Act 2000 s 179(5).

6 Financial Services and Markets Act 2000 s 181(1)(a).

7 As to the meaning of 'parent undertaking' see PARA 351 note 32.

8 Financial Services and Markets Act 2000 s 181(1)(b).

9 As to the meaning of 'voting power' see PARA 591 note 16; definition applied by the Financial Services and Markets Act 2000 s 179(5).

10 Financial Services and Markets Act 2000 s 181(1)(c).

11 Financial Services and Markets Act 2000 s 181(1)(d).

12 Financial Services and Markets Act 2000 s 181(1)(e).

13 Financial Services and Markets Act 2000 s 181(1).

14 Financial Services and Markets Act 2000 s 181(2)(a).

15 Financial Services and Markets Act 2000 s 181(2)(b).

16 Financial Services and Markets Act 2000 s 181(2)(c).

17 Financial Services and Markets Act 2000 s 181(2)(d).

18 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

19 Financial Services and Markets Act 2000 s 192(d). At the date at which this volume states the law no such order had been made. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

## **UPDATE**

### **378-380 Acquiring control ... Reducing control**

Financial Services and Markets Act 2000 ss 179-181 now ss 181-184 (substituted by SI 2009/534).

### **380 Reducing control**

TEXT AND NOTE 19--For 'reducing his control' read 'reducing or ceasing to have control': Financial Services and Markets Act 2000 s 192(d) (amended by SI 2009/534).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(vi) Control over Authorised Persons/B. VARYING CONTROL/381. Duty of the Financial Services Authority in relation to notice of control.

### **381. Duty of the Financial Services Authority in relation to notice of control.**

The Financial Services Authority<sup>1</sup> must, before the end of the period of three months beginning with the date on which it receives a notice of control<sup>2</sup> (the 'period for consideration'), determine

whether: (1) to approve of the person concerned having the control<sup>3</sup> to which the notice relates; or (2) to serve a warning notice<sup>4</sup>. Before doing so, the Authority must comply with such requirements as to consultation with competent authorities outside the United Kingdom<sup>5</sup> as may be prescribed<sup>6</sup>. If the Authority proposes to give the person concerned a notice of objection<sup>7</sup>, it must give him a warning notice<sup>8</sup>.

On considering a notice of control, the Authority may give a decision notice<sup>9</sup> to the person acquiring control<sup>10</sup> (the 'acquirer') unless it is satisfied that the approval requirements are met<sup>11</sup>. The approval requirements are that: (a) the acquirer is a fit and proper person to have the control over the authorised person<sup>12</sup> that he has or would have if he acquired the control in question; and (b) the interests of consumers<sup>13</sup> would not be threatened by the acquirer's control or by his acquiring that control<sup>14</sup>. In deciding whether the approval requirements are met, the Authority must have regard, in relation to the control that the acquirer has over the authorised person concerned ('A'), or will have over A if the proposal to which the notice of control relates is carried into effect, to its duty to consider the threshold conditions<sup>15</sup> in relation to each regulated activity<sup>16</sup> carried on by A<sup>17</sup>. If the Authority gives a notice but considers that the approval requirements would be met if the person to whom the notice is given were to take, or refrain from taking, a particular step, the notice must identify that step<sup>18</sup>. A person to whom a notice is given may refer the matter to the Financial Services and Markets Tribunal<sup>19</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 11. As to the Handbook generally see PARA 22.

2 As to the meaning of 'notice of control' see PARA 377 note 3.

3 As to the meaning of 'having control' see PARA 379 note 2.

4 Financial Services and Markets Act 2000 s 183(1). The warning notice is served under s 183(3) (see the text to note 8) or s 185(3) (see PARA 382). As to warning notices see PARA 769.

5 As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Financial Services and Markets Act 2000 s 183(2). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

Regulations have been made prescribing that:

457 (1) where (a) a person (the 'acquirer') proposes to acquire or has acquired control, an additional kind of control or an increase in a relevant kind of control over a UK authorised person in circumstances falling within s 178(1) or s 178(2) (see PARA 377); (b) that UK authorised person is an investment firm; (c) the acquirer is (i) an EEA investment firm; (ii) an EEA credit institution; (iii) an EEA insurance undertaking; or (iv) the parent undertaking of an EEA firm specified by head (1)(b)(i), (ii) or (iii) above; and (d) as a result of the acquisition or proposed acquisition, the acquirer is or would become a parent undertaking of the UK authorised person;

458 (2) where (a) a person (the 'acquirer') proposes to acquire or has acquired control, an additional kind of control or an increase in a relevant kind of control over a UK authorised person in circumstances falling within s 178(1) or s 178(2) (see PARA 377); (b) that UK authorised person has permission to accept deposits (within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (see PARA 89)); (c) the acquirer is (i) an EEA investment firm; (ii) an EEA credit institution; (iii) an EEA insurance undertaking; or (iv) the parent undertaking of an EEA firm of a kind specified by head (2)(b)(i), (ii) or (iii) above; and (d) as a result of the acquisition or proposed acquisition, the acquirer is or would become a parent undertaking of the UK authorised person;

459 (3) where (a) a person (the 'acquirer') proposes to acquire or has acquired control, an additional kind of control or an increase in a relevant kind of control over a United Kingdom authorised person in circumstances falling within the Financial Services and Markets Act 2000 s 178(1) or (2) (see PARA 377); (b) that United Kingdom authorised person has permission to operate a collective investment scheme; (c) the acquirer is (i) an EEA investment firm; (ii) an EEA credit institution; (iii) an EEA insurance undertaking; (iv) an EEA management company; or (v)

the parent undertaking of an EEA firm of a kind specified by head (3)(b)(i), (ii), (iii) or (iv) above; and (d) as a result of the acquisition or proposed acquisition, the acquirer is or would become a parent undertaking of the UK authorised person; or

- 460 (4) where (a) a person (the 'acquirer') proposes to acquire or has acquired control, an additional kind of control or an increase in a relevant kind of control over a UK authorised person in circumstances falling within s 178(1) or (2) (see PARA 377); (b) that UK authorised person has permission to effect or carry on contracts of insurance (within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (see PARA 90 note 3)); (c) the acquirer is (i) an EEA investment firm; (ii) an EEA credit institution; (iii) an EEA insurance undertaking; (iv) an EEA reinsurance undertaking; or (v) the parent undertaking of an EEA firm of a kind specified by head (4)(b)(i), (ii), (iii) or (iv) above; and (d) as a result of the acquisition or proposed acquisition, the acquirer is or would become a parent undertaking of the UK authorised person,

the Authority must, as the case may be, consult the home state regulator of any EEA firm that is mentioned in head (1)(c), (2)(c), (3)(c) or (4)(c) above: Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001, SI 2001/2509, regs 3, 5, 6 (amended by SI 2003/2066; SI 2004/1862; SI 2007/3255). This requirement must be complied with by the Authority before determining whether to approve the change of control or to give a warning notice under the Financial Services and Markets Act 2000 s 183(3) or s 185(3) (see PARA 382); see the Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001, SI 2001/2509, reg 3. 'EEA credit institution' means an EEA firm falling within the Financial Services and Markets Act 2000 s 31(1)(b), Sch 3 para 5(b) (see PARA 315 note 1); 'EEA insurance firm' means an EEA firm falling within Sch 3 para 5(d) (see PARA 315 note 1); 'EEA investment firm' means an EEA firm falling within Sch 3 para 5(a) (see PARA 315 note 1); 'EEA management company' means an EEA firm falling within Sch 3 para 5(f) (see PARA 315 note 1); and 'EEA reinsurance undertaking' means an EEA firm falling within Sch 3 para 5(da) (see PARA 315 note 1): Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001, SI 2001/2509, reg 2 (definitions amended by SI 2003/2066; SI 2004/1862; SI 2007/3255). As to the meaning of 'home state regulator' see PARA 315 note 1. As to the meaning of 'investment firm' see PARA 21 note 5. As to the meaning of 'UK authorised person' see PARA 358 note 3; definition applied by the Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001, SI 2001/2509, reg 2.

7 le under the Financial Services and Markets Act 2000 s 186(1): see the text and notes 9-11.

8 Financial Services and Markets Act 2000 s 183(3). A person to whom the Authority has given a warning notice under s 183(3) is guilty of an offence if he carries out the proposal to which the notice relates before the Authority has decided whether to give him a notice of objection: s 191(4). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 191(6). As to the standard scale see PARA 27 note 21. A person to whom a notice of objection has been given is guilty of an offence if he acquires the control to which the notice applies at a time when the notice is still in force: s 191(5). A person guilty of an offence under s 191(5) is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; and (2) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both: s 191(7). A person guilty of an offence under s 191(5) is also liable on summary conviction to a fine not exceeding one-tenth of the statutory maximum for each day on which the offence has continued: s 191(8). As to the statutory maximum see PARA 56 note 24.

9 As to decision notices see PARA 770.

10 As to the meaning of 'acquiring control' see PARA 379 note 2.

11 Financial Services and Markets Act 2000 s 186(1).

12 As to authorised persons see PARA 314.

13 'Consumers' means persons who are consumers for the purposes of the Financial Services and Markets Act 2000 s 138 (see PARA 21 note 5): s 186(6).

14 Financial Services and Markets Act 2000 s 186(2).

15 le its duty under the Financial Services and Markets Act 2000 s 41: see PARA 351.

16 As to regulated activities see PARA 84 et seq.

17 Financial Services and Markets Act 2000 s 186(3).

18 Financial Services and Markets Act 2000 s 186(4).



19 Financial Services and Markets Act 2000 s 186(5). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

## UPDATE

### 381 Duty of the Financial Services Authority in relation to notice of control

TEXT AND NOTES--2000 Act ss 183, 186 replaced: Financial Services and Markets Act 2000 ss 185, 186, 188-190 (substituted by SI 2009/534).

NOTE 8--2000 Act s 191 replaced: Financial Services and Markets Act 2000 s 191F (substituted by SI 2009/534).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(vi) Control over Authorised Persons/B. VARYING CONTROL/382. Approval of acquisition of control.

### 382. Approval of acquisition of control.

If the Financial Services Authority<sup>1</sup> decides to approve of the person concerned having the control<sup>2</sup> to which the notice of control relates, it must notify that person of its approval in writing without delay<sup>3</sup>. The Authority's approval remains effective only if the person to whom it relates acquires the control<sup>4</sup> in question: (1) before the end of such period as may be specified in the notice; or (2) if no period is specified, before the end of the period of one year beginning with the date: (a) of the notice of approval; (b) on which the Authority is treated as having given approval<sup>5</sup>; or (c) of a decision on a reference to the Financial Services and Markets Tribunal<sup>6</sup> which results in the person concerned receiving approval<sup>7</sup>.

The Authority's approval<sup>8</sup> may be given unconditionally or subject to such conditions as the Authority considers appropriate<sup>9</sup>. In imposing any conditions, the Authority must have regard to its duty with respect to the threshold conditions<sup>10</sup>. If the Authority proposes to impose conditions on a person it must give him a warning notice<sup>11</sup>, and if the Authority decides to impose conditions on a person it must give him a decision notice<sup>12</sup>. A person who is subject to a condition may apply to the Authority for the condition to be varied or cancelled<sup>13</sup>. The Authority may, on its own initiative, cancel a condition<sup>14</sup>. If the Authority has given its approval to a person subject to a condition, that person may refer to the Tribunal: (i) the imposition of the condition; or (ii) the Authority's decision to refuse an application to vary or cancel the condition<sup>15</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 11. As to the Handbook generally see PARA 22.

2 As to the meaning of 'having control' see PARA 379 note 2.

3 Financial Services and Markets Act 2000 s 184(1). As to the meaning of 'notice of control' see PARA 377 note 3. If the Authority fails to comply with s 183(1) (see PARA 381), it is to be treated as having given its approval and notified the person concerned at the end of the three month period fixed by s 183(1): s 184(2).

4 As to the meaning of 'acquiring control' see PARA 379 note 2.

5 Ie under the Financial Services and Markets Act 2000 s 184(2): see note 3.

6 As to the Financial Services and Markets Tribunal see PARA 43 et seq.

- 7 Financial Services and Markets Act 2000 s 184(3).
- 8 le under the Financial Services and Markets Act 2000 s 184: see the text and notes 1-7.
- 9 Financial Services and Markets Act 2000 s 185(1).
- 10 Financial Services and Markets Act 2000 s 185(2). The duty referred to in the text is the Authority's duty under s 41: see PARA 351.
- 11 Financial Services and Markets Act 2000 s 185(3). As to warning notices see PARA 769.
- 12 Financial Services and Markets Act 2000 s 185(4). As to decision notices see PARA 770.
- 13 Financial Services and Markets Act 2000 s 185(5).
- 14 Financial Services and Markets Act 2000 s 185(6).
- 15 Financial Services and Markets Act 2000 s 185(7).

## UPDATE

### 382 Approval of acquisition of control

TEXT AND NOTES--2000 Act ss 184, 185 replaced: Financial Services and Markets Act 2000 ss 187, 191 (substituted by SI 2009/534).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(vi) Control over Authorised Persons/B. VARYING CONTROL/383. Objection to existing control.

### 383. Objection to existing control.

If the Financial Services Authority<sup>1</sup> is not satisfied that the approval requirements<sup>2</sup> are met, it may give a decision notice<sup>3</sup> to a person if he has failed to comply with a duty to notify the Authority<sup>4</sup>. The Authority may also give a decision notice to a person who is a controller of a UK authorised person<sup>5</sup> if the Authority becomes aware of matters as a result of which it is satisfied that: (1) the approval requirements are not met with respect to the controller; or (2) a condition<sup>6</sup> required that person to do (or refrain from doing) a particular thing and the condition has been breached as a result of his failing to do (or doing) that thing<sup>7</sup>. A person to whom a notice is given may refer the matter to the Financial Services and Markets Tribunal<sup>8</sup>.

If the Authority proposes to give a notice of objection<sup>9</sup> to a person<sup>10</sup>, it must give him a warning notice<sup>11</sup>. Before doing so, the Authority must comply with such requirements as to consultation with competent authorities outside the United Kingdom<sup>12</sup> as may be prescribed<sup>13</sup>. The Authority may require the person concerned to provide such additional information or documents<sup>14</sup> as it considers reasonable<sup>15</sup>. Different requirements may be imposed in different circumstances<sup>16</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 11. As to the Handbook generally see PARA 22.

2 'Approval requirements' has the same meaning as in the Financial Services and Markets Act 2000 s 186 (see PARA 381): s 187(5).

3 le under the Financial Services and Markets Act 2000 s 187. As to decision notices see PARA 770.

4 Financial Services and Markets Act 2000 s 187(1). The duty to notify the Authority is imposed by s 178: see PARA 377. If the failure relates to s 178(1) or s 178(2) (see PARA 377), the Authority may (instead of giving a notice under s 187(1)) approve the acquisition of the control in question by the person concerned as if he had given it a notice of control: s 187(2). As to the meaning of 'notice of control' see PARA 377 note 3.

5 As to the meaning of 'controller' see PARA 591 note 16. As to the meaning of 'UK authorised person' see PARA 358 note 3.

6 Is a condition imposed by the Financial Services and Markets Act 2000 s 185: see PARA 382.

7 Financial Services and Markets Act 2000 s 187(3).

8 Financial Services and Markets Act 2000 s 187(4). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

9 For the purposes of the Financial Services and Markets Act 2000 Pt XII (ss 178-192), 'notice of objection' means a notice under s 186 (see PARA 381) or s 187 (see the text to notes 1-8): s 187(6).

10 Is under the Financial Services and Markets Act 2000 s 187: see the text to notes 1-8.

11 Financial Services and Markets Act 2000 s 188(1). As to warning notices see PARA 769. If the Authority decides to give a warning notice under s 188, it must do so before the end of the period of three months beginning: (1) in the case of a notice to be given under s 187(1) (see the text to notes 1-4), with the date on which it became aware of the failure to comply with the duty in question; (2) in the case of a notice to be given under s 187(3) (see the text to notes 5-7), with the date on which it became aware of the matters in question: s 188(3).

12 As to the meaning of 'United Kingdom' see PARA 2 note 3.

13 Financial Services and Markets Act 2000 s 188(2). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

Regulations have been made prescribing that:

- 461 (1) where (a) a person (the 'acquirer') proposes to acquire or has acquired control, an additional kind of control or an increase in a relevant kind of control over a UK authorised person in circumstances falling within s 178(1) or s 178(2) (see PARA 377); (b) that UK authorised person is an investment firm; (c) the acquirer is (i) an EEA investment firm; (ii) an EEA credit institution; (iii) an EEA insurance undertaking; or (iv) the parent undertaking of an EEA firm specified by head (1)(b)(i), (ii) or (iii) above; and (d) as a result of the acquisition or proposed acquisition, the acquirer is or would become a parent undertaking of the UK authorised person;
- 462 (2) where (a) a person (the 'acquirer') proposes to acquire or has acquired control, an additional kind of control or an increase in a relevant kind of control over a UK authorised person in circumstances falling within s 178(1) or s 178(2) (see PARA 377); (b) that UK authorised person has permission to accept deposits (within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (see PARA 89)); (c) the acquirer is (i) an EEA investment firm; (ii) an EEA credit institution; (iii) an EEA insurance undertaking; or (iv) the parent undertaking of an EEA firm of a kind specified by head (2)(b)(i), (ii) or (iii) above; and (d) as a result of the acquisition or proposed acquisition, the acquirer is or would become a parent undertaking of the UK authorised person;
- 463 (3) where (a) a person (the 'acquirer') proposes to acquire or has acquired control, an additional kind of control or an increase in a relevant kind of control over a United Kingdom authorised person in circumstances falling within the Financial Services and Markets Act 2000 s 178(1) or (2) (see PARA 377); (b) that United Kingdom authorised person has permission to operate a collective investment scheme; (c) the acquirer is (i) an EEA investment firm; (ii) an EEA credit institution; (iii) an EEA insurance undertaking; (iv) an EEA management company; or (v) the parent undertaking of an EEA firm of a kind specified by head (3)(b)(i), (ii), (iii) or (iv) above; and (d) as a result of the acquisition or proposed acquisition, the acquirer is or would become a parent undertaking of the UK authorised person; or
- 464 (4) where (a) a person (the 'acquirer') proposes to acquire or has acquired control, an additional kind of control or an increase in a relevant kind of control over a UK authorised person in circumstances falling within s 178(1) or (2) (see PARA 377); (b) that UK authorised person has permission to effect or carry on contracts of insurance (within the meaning of the Financial

Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (see PARA 90 note 3)); (c) the acquirer is (i) an EEA investment firm; (ii) an EEA credit institution; (iii) an EEA insurance undertaking; (iv) an EEA reinsurance undertaking; or (v) the parent undertaking of an EEA firm of a kind specified by head (4)(b)(i), (ii), (iii) or (iv) above; and (d) as a result of the acquisition or proposed acquisition, the acquirer is or would become a parent undertaking of the UK authorised person; and

- 465 (5) where the Authority proposes to give a notice of objection under the Financial Services and Markets Act 2000 s 187(1) (see the text and note 4),

the Authority must consult the home state regulator of each EEA investment firm or each EEA credit institution mentioned above, as the case may be: Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001, SI 2001/2509, regs 4, 5, 6 (amended by SI 2003/2066; SI 2004/1862; SI 2007/3255). This requirement must be complied with by the Authority before it gives a warning notice under the Financial Services and Markets Act 2000 s 188(1): see the Financial Services and Markets Act 2000 (Consultation with Competent Authorities) Regulations 2001, SI 2001/2509, reg 4. As to the meanings of 'EEA credit institution', 'EEA insurance undertaking', 'EEA investment firm', 'EEA management company' and 'EEA reinsurance undertaking' see PARA 381 note 6. As to the meaning of 'home state regulator' see PARA 315 note 1. As to the meaning of 'investment firm' see PARA 21 note 5.

14 As to the meaning of 'document' see PARA 10 note 10.

15 Financial Services and Markets Act 2000 s 188(4).

16 Financial Services and Markets Act 2000 s 188(5).

## UPDATE

### 383 Objection to existing control

TEXT AND NOTES--2000 Act ss 187, 188 replaced: Financial Services and Markets Act 2000 s 191A (substituted by SI 2009/534).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(5) AUTHORISATION, EXEMPTION, ETC IN RELATION TO REGULATED ACTIVITIES/(vi) Control over Authorised Persons/C. OFFENCES/384. Improperly acquired shares.

## C. OFFENCES

### 384. Improperly acquired shares.

The powers described below<sup>1</sup> are exercisable if a person has acquired, or has continued to hold, any shares<sup>2</sup> in contravention of a notice of objection<sup>3</sup> or a condition imposed on the Financial Services Authority's<sup>4</sup> approval<sup>5</sup>.

The Authority may by notice in writing served on the person concerned (a 'restriction notice') direct that any such shares which are specified in the notice are, until further notice, to be subject to one or more of the following restrictions<sup>6</sup>:

- 961 (1) a transfer of (or agreement to transfer) those shares, or in the case of unissued shares any transfer of (or agreement to transfer) the right to be issued with them, is void<sup>7</sup>;
- 962 (2) no voting rights are to be exercisable in respect of the shares<sup>8</sup>;
- 963 (3) no further shares are to be issued in right of them or in pursuance of any offer made to their holder<sup>9</sup>;

964 (4) except in a liquidation, no payment is to be made of any sums due from the body corporate<sup>10</sup> on the shares, whether in respect of capital or otherwise<sup>11</sup>.

The High Court may, on the application of the Authority, order the sale of any improperly acquired shares<sup>12</sup> and, if they are for the time being subject to any restriction<sup>13</sup>, it may order that they are to cease to be subject to that restriction<sup>14</sup>. If shares are sold in pursuance of an order, the proceeds of sale, less the costs of the sale, must be paid into court for the benefit of the persons beneficially interested in them; and any such person may apply to the court for the whole or part of the proceeds to be paid to him<sup>15</sup>.

A copy of the restriction notice must be served on: (a) the authorised person to whose shares it relates; and (b) if it relates to shares held by an associate of that authorised person, on that associate<sup>16</sup>.

1     Ie the powers set out in the Financial Services and Markets Act 2000 s 189: see the text and notes 2-16.

2     As to the meaning of 'shares' see PARA 591 note 16.

3     As to the meaning of 'notice of objection' see PARA 383 note 9.

4     As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 11. As to the Handbook generally see PARA 22.

5     Financial Services and Markets Act 2000 s 189(1). As to conditions attached to approval see PARA 382.

6     Financial Services and Markets Act 2000 s 189(2).

7     Financial Services and Markets Act 2000 s 189(2)(a).

8     Financial Services and Markets Act 2000 s 189(2)(b).

9     Financial Services and Markets Act 2000 s 189(2)(c).

10    As to the meaning of 'body corporate' see PARA 86 note 11.

11    Financial Services and Markets Act 2000 s 189(2)(d).

12    Ie any shares to which the Financial Services and Markets Act 2000 s 189 applies: s 189(3). Section 189 applies:

466   (1)   in the case of an acquirer falling within s 178(1) (see PARA 377), to all the shares: (a) in the authorised person which the acquirer has acquired; (b) which are held by him or an associate of his; and (c) which were not so held immediately before he became a person with control over the authorised person (s 189(7)(a));

467   (2)   in the case of an acquirer falling within s 178(2) (see PARA 377), to all the shares held by him or an associate of his at the time when he first became aware that he had acquired control over the authorised person (s 189(7)(b)); and

468   (3)   to all the shares in an undertaking ('C'): (a) which are held by the acquirer or an associate of his; and (b) which were not so held before he became a person with control in relation to the authorised person, where C is the undertaking in which shares were acquired by the acquirer (or an associate of his) and, as a result, he became a person with control in relation to that authorised person (s 189(7)(c)).

As to authorised persons see PARA 314. As to the meaning of 'associate' see PARA 591 note 16. As to the meaning of 'acquiring control' see PARA 379 note 2.

13    Ie under the Financial Services and Markets Act 2000 s 189(2): see the text to notes 5-10.

14    Financial Services and Markets Act 2000 s 189(3), (9). No order may be made under s 189(3): (1) until the end of the period within which a reference may be made to the Financial Services and Markets Tribunal in respect of the notice of objection; and (2) if a reference is made, until the matter has been determined or the reference withdrawn: s 189(4). As to the Financial Services and Markets Tribunal see PARA 43 et seq. If an order

has been made under s 189(3), the court may, on the application of the Authority, make such further order relating to the sale or transfer of the shares as it thinks fit: s 189(5).

15 Financial Services and Markets Act 2000 s 189(6).

16 Financial Services and Markets Act 2000 s 189(8).

## **UPDATE**

### **384 Improperly acquired shares**

TEXT AND NOTES--2000 Act s 189 replaced: Financial Services and Markets Act 2000 ss 191B, 191C (substituted by SI 2009/534).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(6) OFFICIAL LISTING/(i) Introduction/385. The competent authority.

## **(6) OFFICIAL LISTING**

### **(i) Introduction**

#### **385. The competent authority.**

Since 18 June 2001<sup>1</sup>, the functions conferred on the competent authority<sup>2</sup> by the statutory provisions relating to official listing<sup>3</sup> have been exercisable by the Financial Services Authority<sup>4</sup>.

The competent authority's general functions are, in relation to official listing<sup>5</sup>: (1) its function of making rules<sup>6</sup>; (2) its functions in relation to the giving of general guidance<sup>7</sup>; (3) its function of determining the general policy and principles by reference to which it performs particular functions<sup>8</sup>.

In discharging its general functions, the competent authority must have regard to:

- 965 (a) the need to use its resources in the most efficient and economic way<sup>9</sup>;
- 966 (b) the principle that a burden or restriction which is imposed on a person should be proportionate to the benefits, considered in general terms, which are expected to arise from the imposition of that burden or restriction<sup>10</sup>;
- 967 (c) the desirability of facilitating innovation in respect of listed securities<sup>11</sup>, and in respect of financial instruments<sup>12</sup> which have otherwise been admitted to trading on a regulated market<sup>13</sup> or for which a request for admission to trading on such a market has been made<sup>14</sup>;
- 968 (d) the international character of capital markets and the desirability of maintaining the competitive position of the United Kingdom<sup>15</sup>;
- 969 (e) the need to minimise the adverse effects on competition of anything done in the discharge of those functions<sup>16</sup>;
- 970 (f) the desirability of facilitating competition in relation to listed securities and in relation to financial instruments which have otherwise been admitted to trading on a regulated market or for which a request for admission to trading on such a market has been made<sup>17</sup>.

The competent authority may make rules ('Part VI rules') for the purposes of Part VI of the Financial Services and Markets Act 2000<sup>18</sup>.

In the case of infringement of a provision of prospectus rules or any other provision made in accordance with the Prospectus Directive<sup>19</sup> or of a provision of transparency rules or any other provision made in accordance with the Transparency Obligations Directive<sup>20</sup>, in relation to an issuer<sup>21</sup> whose home state<sup>22</sup> is a member state other than the United Kingdom<sup>23</sup>, the competent authority may act in such a case only in respect of the infringement of a provision required by the relevant directive<sup>24</sup>.

If the authority finds that there has been such an infringement, it must give a notice to that effect to the competent authority of the person's home state requesting it (i) to take all appropriate measures for the purpose of ensuring that the person remedies the situation that has given rise to the notice<sup>25</sup>; and (ii) to inform the authority of the measures it proposes to take or has taken or the reasons for not taking such measures<sup>26</sup>. The authority may not act further unless satisfied (A) that the competent authority of the person's home state has failed or refused to take measures for the purpose mentioned in head (i) above<sup>27</sup>; or (B) that the measures taken by that authority have proved inadequate for that purpose<sup>28</sup>. If the authority is so satisfied, it must, after informing the competent authority of the person's home state, take all appropriate measures to protect investors<sup>29</sup>. In such a case the authority must inform the Commission of the measures at the earliest opportunity<sup>30</sup>.

Neither the competent authority nor any person who is, or is acting as, a member, officer or member of staff of the competent authority is liable in damages for anything done or omitted in the discharge, or purported discharge, of the authority's functions<sup>31</sup>.

1     I.e. the date on which the Financial Services and Markets Act 2000 s 72 came into force: see the Financial Services and Markets Act 2000 (Commencement No 3) Order 2001, SI 2001/1820.

2     In relation to any function conferred on the competent authority by the Financial Services and Markets Act 2000 Pt VI (ss 72-103), any reference in Pt VI to the competent authority is to be read as a reference to the person by whom that function is for the time being exercisable (see the text and note 4): s 103(2) (s 103 substituted by SI 2005/1433).

Provision is made allowing some or all of the functions conferred on the competent authority to be transferred by the Treasury so as to be exercisable by another person: see the Financial Services and Markets Act 2000 s 72(3); and PARA 386. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3     I.e. the provisions of the Financial Services and Markets Act 2000 Pt VI.

4     Financial Services and Markets Act 2000 s 72(1). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

The Financial Services and Markets Act 2000 applies in relation to the Financial Services Authority when it is exercising functions under Pt VI as the competent authority subject to the following modifications: s 72(2), Sch 7 para 1. In relation to the Financial Services Authority's general functions (see PARA 6), s 2(4)(a) does not apply to Part VI rules; s 2(4)(c) does not apply to general guidance given in relation to Pt VI; and s 2(4)(d) does not apply to functions under Pt VI: Sch 7 para 2 (amended by SI 2005/381). As to Part VI rules see also PARA 387. In relation to the general duty to consult, the Financial Services and Markets Act 2000 s 8 (see PARA 9) does not apply: Sch 7 para 3. In relation to rules, s 149 (see PARA 32) and ss 153, 154, 156 (see PARA 24) do not apply; and s 155 (consultation) (see PARA 24) has effect as if the reference in s 155(2)(c) to the general duties of the Financial Services Authority under s 2 were a reference to its duty under s 73 and as if s 99 (see PARA 436) were included in the provisions referred to in s 155(9): Sch 7 para 4. In relation to statements of policy Sch 1 para 5 (see PARA 15) has effect as if the requirement to act through the Financial Services Authority's governing body applied also to the exercise of its functions of publishing statements under s 93 (see PARA 430); and Sch 1 para 1 has effect as if s 93 were included in the provisions referred to in Sch 1 para 1(2)(d) (see PARA 14): Sch 7 para 5(1), (2). In relation to penalties, Sch 1 para 16 (see PARA 12) does not apply in relation to penalties under Pt VI (for which separate provision is made by s 100: see PARA 431): Sch 7 para 6. In relation to fees, Sch 1 para 17 (see PARA 16) does not apply in relation to fees payable under Pt VI (for which separate provision is made by s 99: see PARA 436): Sch 7 para 7. In relation to exemption from liability in damages, Sch 1 para 19 (see PARA 37)

is modified so as not to refer to the liability of the Financial Services Authority or its staff (provision being made in relation to the liability of the competent authority by s 102): Sch 7 para 8.

5     le functions under the Financial Services and Markets Act 2000 Pt VI.

6     Financial Services and Markets Act 2000 s 73(2)(a).

7     Financial Services and Markets Act 2000 s 73(2)(b).

8     Financial Services and Markets Act 2000 s 73(2)(c).

9     Financial Services and Markets Act 2000 s 73(1)(a).

10    Financial Services and Markets Act 2000 s 73(1)(b).

11    As to the meaning of 'listed securities' see PARA 11 note 11.

12    'Financial instrument' has the meaning given by European Parliament and EC Council Directive 2003/6 (OJ L96, 12.4.2003, p 16) on insider dealing and market manipulation art 1.3: Financial Services and Markets Act 2000 s 102A(4) (s 102A added by SI 2005/1433).

13    'Regulated market' has the meaning given in European Council Directive 93/22 (OJ L141, 11.6.93, p 27) on investment services in the securities field art 1.13: Financial Services and Markets Act 2000 s 103(1) (s 103 as substituted: see note 2). As from a date to be appointed, the reference is changed to European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments art 4.1(14): Financial Services and Markets Act 2000 s 103(1) (definition prospectively amended by the Companies Act 2006 Sch 15 Pt 1 paras 1, 10(1), (3)). At the date at which this volume states the law no such day had been appointed.

14    Financial Services and Markets Act 2000 s 73(1)(c) (substituted by SI 2005/381). To the extent that those general functions are functions under or relating to transparency rules, the Financial Services and Markets Act 2000 s 73(1)(c), (f) has effect as if the references to a regulated market were references to a market: s 73(1A) (added by the Companies Act 2006 Sch 15 Pt 1 paras 1, 2). As to the meaning of 'transparency rules' see PARA 415 note 2. As to transparency rules generally see PARA 415.

15    Financial Services and Markets Act 2000 s 73(1)(d). As to the meaning of 'United Kingdom' see PARA 2 note 3.

16    Financial Services and Markets Act 2000 s 73(1)(e).

17    Financial Services and Markets Act 2000 s 73(1)(f) (substituted by SI 2005/381). See note 14.

18    Financial Services and Markets Act 2000 s 73A(1) (s 73A added by SI 2005/381), Financial Services and Markets Act 2000 s 103(1) (as substituted: see note 2).

Provisions of Part VI rules expressed to relate to the official list are referred to in Pt VI as 'listing rules': s 73A(2) (as so added), s 103(1) (as so substituted). Provisions of Part VI rules expressed to relate to disclosure of information in respect of financial instruments which have been admitted to trading on a regulated market or for which a request for admission to trading on such a market has been made, are referred to in Pt VI as 'disclosure rules': s 73A(3) (as so added), s 103(1) (as so substituted). As to disclosure rules see PARA 390. As to the official list see PARA 387. Provisions of Part VI rules expressed to relate to transferable securities are referred to in Pt VI as 'prospectus rules': s 73A(4) (s 73A(4), (5) added by SI 2005/1433), Financial Services and Markets Act 2000 s 103(1) (as so substituted). 'Transferable securities' means anything which is a transferable security for the purposes of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments), other than money-market instruments for the purposes of that Directive which have a maturity of less than 12 months: Financial Services and Markets Act 2000 s 102A(3) (s 102A as added (see note 12); s 102A(3) amended by the Companies Act 2006 Sch 15 Pt 1 paras 1, 10(1), (3)). In relation to prospectus rules, the purposes of the Financial Services and Markets Act 2000 Pt VI include the purposes of the Prospectus Directive (ie European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading): Financial Services and Markets Act 2000 s 73A(5) (as so added). Transparency rules (see PARA 415 et seq) and corporate governance rules (see PARA 425) are not listing rules, disclosure rules or prospectus rules, but are Part VI rules: s 73A(6) (added by the Companies Act 2006 Sch 15 Pt 1 paras 1, 3).

19    Financial Services and Markets Act 2000 s 100A(1)(a) (s 100A added by the Companies Act 2006 s 1271). The reference is to European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64).



20 Financial Services and Markets Act 2000 s 100A(1)(b) (as added: see note 19). The reference to the Transparency Obligations Directive is a reference to European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

21 'Issuer' (1) in relation to an offer of transferable securities to the public or admission of transferable securities to trading on a regulated market for which an approved prospectus is required as a result of the Financial Services and Markets Act 2000 s 85 (see PARA 397), means a legal person who issues or proposes to issue the transferable securities in question; (2) in relation to transparency rules, means a legal person whose securities are admitted to trading on a regulated market or whose voting shares are admitted to trading on a UK market other than a regulated market, and in the case of depository receipts representing securities, the issuer is the issuer of the securities represented; (3) in relation to anything else which is or may be admitted to the official list, has such meaning as may be prescribed by the Treasury; and (4) in any other case, means a person who issues financial instruments: s 102A(6) (s 102A as substituted (see note 12); s 102A(6) amended by the Companies Act 2006 Sch 15 Pt 1 paras 1, 10(1), (4)). At the date at which this volume states the law there have been no orders under head (3) above. 'Securities' means (except in the Financial Services and Markets Act 2000 s 74(2) (see PARA 387) and the expression 'transferable securities' (see note 18)) anything which has been, or may be, admitted to the official list: s 102A(2) (as so substituted). For the purposes of Pt VI there is an 'offer of transferable securities to the public' if there is a communication to any person which presents sufficient information on the transferable securities to be offered and the terms on which they are offered, to enable an investor to decide to buy or subscribe for the securities in question: s 102B(1) (s 102B added by SI 2005/1433). For the purposes of the Financial Services and Markets Act 2000 Pt VI, to the extent that an offer of transferable securities is made to a person in the United Kingdom it is an offer of transferable securities to the public in the United Kingdom: s 102B(2) (as so added). The communication may be made in any form, and by any means: s 102B(3) (as so added). Section 102B(1) includes the placing of securities through a financial intermediary: s 102B(4) (as so added). Section 102B(1) does not include a communication in connection with trading on (a) a regulated market; (b) a multilateral trading facility; or (c) a market prescribed by an order under s 130A(2) (see PARA 437): s 102B(5) (as so added). 'Multilateral trading facility' means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments in accordance with non-discretionary rules so as to result in a contract: s 102B(6) (as so added; amended by SI 2007/126). As to the meaning of 'investment firm' see PARA 21 note 5. 'Market operator' means a person who manages or operates the business of a regulated market: s 103(1) (as substituted: see note 2).

22 In the Financial Services and Markets Act 2000 Pt VI, in relation to an issuer of transferable securities, the 'home state' is the EEA state which is the 'home member state' for the purposes of the Prospectus Directive (ie European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64)) (which is to be determined in accordance with art 2.1(m)): Financial Services and Markets Act 2000 s 102C (added by SI 2005/1433).

23 Financial Services and Markets Act 2000 s 100A (as added: see note 19).

24 Financial Services and Markets Act 2000 s 100A(2) (as added: see note 19). Any reference to an applicable provision or applicable transparency obligation must be read accordingly: see s 100A(2) (as so added). See also PARA 422 et seq.

25 Financial Services and Markets Act 2000 s 100A(3)(a) (as added: see note 19).

26 Financial Services and Markets Act 2000 s 100A(3)(b) (as added: see note 19).

27 Financial Services and Markets Act 2000 s 100A(4)(a) (as added: see note 19). See note 28.

28 Financial Services and Markets Act 2000 s 100A(4)(b) (as added: see note 19). This does not affect exercise of the powers under s 87K(2), 87L(2) or (3) or s 89L(2) or (3) (powers to protect market) (see PARAS 422, 424): s 100A(4) (as so added).

29 Financial Services and Markets Act 2000 s 100A(5) (as added: see note 19).

30 Financial Services and Markets Act 2000 s 100A(6) (as added: see note 19).

31 Financial Services and Markets Act 2000 s 102(1). This provision does not apply: (1) if the act or omission is shown to have been in bad faith; or (2) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of the Human Rights Act 1998 s 6(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): Financial Services and Markets Act 2000 s 102(2).

## UPDATE

### 385 The competent authority

NOTE 12--This definition does not apply for the purposes of the Financial Services and Markets Act 2000 s 89F (see PARA 415): s 102A(4) (amended by SI 2008/3053).

NOTE 13--Day appointed is 1 October 2008: SI 2008/1886.

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### **386. Transfer of functions in relation to official listing.**

The Treasury<sup>1</sup> may by order provide for any function conferred on the competent authority<sup>2</sup> which is exercisable for the time being by a particular person to be transferred so as to be exercisable by another person<sup>3</sup>. A transfer order may be made only if: (1) the person from whom the relevant functions are to be transferred has agreed in writing that the order should be made; (2) the Treasury is satisfied that the manner in which, or efficiency with which, the functions are discharged would be significantly improved if they were transferred to the transferee; or (3) the Treasury is satisfied that it is otherwise in the public interest that the order should be made<sup>4</sup>.

A transfer order does not affect anything previously done by any person<sup>5</sup> in the exercise of functions which are transferred by the order to another person<sup>6</sup>.

If the Treasury has made a transfer order it may, by a separate order, make any provision of a kind that could have been included in the transfer order<sup>7</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the competent authority and its functions see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 72(3), Sch 8 para 1(1). No order is to be made under Sch 8 para 1 unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(1)(b). At the date at which this volume states the law no such order had been made. As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

4 Financial Services and Markets Act 2000 Sch 8 para 1(2).

5 Such a person is referred to in the Financial Services and Markets Act 2000 Sch 8 para 2 as the 'previous authority'.

6 Financial Services and Markets Act 2000 Sch 8 para 2(1). The person to whom functions are transferred is referred to in Sch 8 para 2 as the 'new authority'. An order under Sch 8 may, in particular, include provision:

469 (1) modifying or excluding any provision of Pt VI (ss 72-103), Pt IX (ss 132-137) (see PARA 43 et seq) or Pt XXVI (ss 387-396) (see PARA 769 et seq) in its application to any such functions (Sch 8 para 2(2)(a));

470 (2) for reviews similar to that made, in relation to the Financial Services Authority, by s 12 (see PARA 10) (Sch 8 para 2(2)(b));

471 (3) imposing on the new authority requirements similar to those imposed, in relation to the Financial Services Authority, by ss 152, 155 (see PARA 24) and s 354 (see PARA 489) (Sch 8 para 2(2)(c));

- 472 (4) as to the giving of guidance by the new authority (Sch 8 para 2(2)(d));
- 473 (5) for the delegation by the new authority of the exercise of functions under Pt VI and as to the consequences of delegation (Sch 8 para 2(2)(e));
- 474 (6) for the transfer of any property, rights or liabilities relating to any such functions from the previous authority to the new authority (Sch 8 para 2(2)(f));
- 475 (7) for the carrying on and completion by the new authority of anything in the process of being done by the previous authority when the order takes effect (Sch 8 para 2(2)(g));
- 476 (8) for the substitution of the new authority for the previous authority in any instrument, contract or legal proceedings (Sch 8 para 2(2)(h));
- 477 (9) for the transfer of persons employed by the previous authority to the new authority and as to the terms on which they are to transfer (Sch 8 para 2(2)(i));
- 478 (10) making such amendments to any primary or subordinate legislation (including any provision of, or made under, the Financial Services and Markets Act 2000) as the Treasury considers appropriate in consequence of the transfer of functions effected by the order (Sch 8 para 2(2)(j)).

Nothing in Sch 8 para 2 is to be taken as restricting the powers conferred by s 428 (regulations and orders: see PARA 67 note 1): Sch 8 para 2(3).

7 Financial Services and Markets Act 2000 Sch 8 para 3.

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## **(ii) Listing**

### **387. The official list.**

The competent authority<sup>1</sup> must maintain the official list<sup>2</sup>. The competent authority may admit to the official list such securities<sup>3</sup> and other things as it considers appropriate<sup>4</sup>. However, nothing may be admitted to the official list except in accordance with Part VI of the Financial Services and Markets Act 2000, and the Treasury<sup>5</sup> may by order provide that anything which falls within a description or category specified in the order may not be admitted to the official list<sup>6</sup>.

Part VI rules<sup>7</sup> may make different provision for different cases<sup>8</sup>. Part VI rules may authorise the competent authority to dispense with or modify the application of the rules in particular cases and by reference to any circumstances<sup>9</sup>. Part VI rules must be made by an instrument in writing<sup>10</sup>. Immediately after an instrument containing Part VI rules is made, it must be printed and made available to the public with or without payment<sup>11</sup>. The production of a printed copy of an instrument purporting to be made by the competent authority on which is indorsed a certificate signed by an officer of the authority authorised by it for that purpose and stating: (1) that the instrument was made by the authority; (2) that the copy is a true copy of the instrument; and (3) that on a specified date the instrument was made available to the public<sup>12</sup>, is evidence of the facts stated in the certificate<sup>13</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 74(1). 'Official list' means the list maintained by the competent authority as that list has effect for the time being: s 103(1) (s 103 substituted by SI 2005/1433). 'Listing' means being included in the official list in accordance with the Financial Services and Markets Act 2000 Pt VI (ss 72-103): ss 74(5), 103(1) (as so substituted).

3 As to the meaning of 'securities' see PARA 385 note 21.

4 Financial Services and Markets Act 2000 s 74(2).

5 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

6 Financial Services and Markets Act 2000 s 74(3). At the date at which this volume states the law no such order had been made. As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

7 As to the meaning of 'Part VI rules' see PARA 385.

8 Financial Services and Markets Act 2000 s 101(1) (s 101(1)-(5) amended by SI 2005/381).

9 Financial Services and Markets Act 2000 s 101(2) (as amended: see note 8).

10 Financial Services and Markets Act 2000 s 101(3) (as amended: see note 8).

11 Financial Services and Markets Act 2000 s 101(4) (as amended: see note 8). A person is not to be taken to have contravened any Part VI rule if he shows that at the time of the alleged contravention the instrument containing the rule had not been made available as required by s 101(4): s 101(5) (as so amended).

12 Ie as required by the Financial Services and Markets Act 2000 s 101(4): see the text and note 11.

13 Financial Services and Markets Act 2000 s 101(6). A certificate purporting to be signed as mentioned in s 101(6) is to be treated as having been properly signed unless the contrary is shown: s 101(7). A person who wishes in any legal proceedings to rely on a rule-making instrument may require the Financial Services Authority to indorse a copy of the instrument with a certificate of the kind mentioned in s 101(6): s 101(8). As to the meaning of 'rule-making instrument' see PARA 24.

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### **388. Applications for listing.**

Admission to the official list<sup>1</sup> may be granted only on an application made to the competent authority<sup>2</sup> in such manner as may be required by listing rules<sup>3</sup>. No application for listing<sup>4</sup> may be entertained by the competent authority unless it is made by, or with the consent of, the issuer<sup>5</sup> of the securities<sup>6</sup> concerned<sup>7</sup>. Nor may any application for listing be entertained by the competent authority in respect of securities which are to be issued by a body of a prescribed kind<sup>8</sup>. The competent authority may not grant an application for listing unless it is satisfied that: (1) the requirements of listing rules (so far as they apply to the application); and (2) any other requirements imposed by the authority in relation to the application, are complied with<sup>9</sup>.

An application for listing may be refused if, for a reason relating to the issuer, the competent authority considers that granting it would be detrimental to the interests of investors<sup>10</sup>. An application for listing securities which are already officially listed in another EEA state may be refused if the issuer has failed to comply with any obligations to which he is subject as a result of that listing<sup>11</sup>.

The competent authority must notify the applicant of its decision on an application for listing: (a) before the end of the period of six months beginning with the date on which the application

is received<sup>12</sup>; or (b) if within that period the authority has required the applicant to provide further information in connection with the application, before the end of the period of six months beginning with the date on which that information is provided<sup>13</sup>. If the competent authority fails to comply with this requirement, it is to be taken to have decided to refuse the application<sup>14</sup>.

If the competent authority decides to grant an application for listing, it must give the applicant written notice<sup>15</sup>. If the competent authority proposes to refuse an application for listing, it must give the applicant a warning notice<sup>16</sup>. If the competent authority decides to refuse an application for listing, it must give the applicant a decision notice<sup>17</sup>. If the competent authority decides to refuse an application for listing, the applicant may refer the matter to the Financial Services and Markets Tribunal<sup>18</sup>.

If securities are admitted to the official list, their admission may not be called in question on the ground that any requirement or condition for their admission has not been complied with<sup>19</sup>.

1 As to the meaning of 'official list' see PARA 387 note 2.

2 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 75(1). As to the meaning of 'listing rules' see PARA 385 note 18.

4 As to the meaning of 'listing' see PARA 387 note 2.

5 As to the meaning of 'issuer' see PARA 385 note 21.

6 As to the meaning of 'securities' see PARA 326 note 21.

7 Financial Services and Markets Act 2000 s 75(2).

8 Financial Services and Markets Act 2000 s 75(3). For the purposes of s 75(3), the following kinds of body have been prescribed: (1) where the securities are securities within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (see PARA 89 note 1), a private company within the meaning of the Companies Act 1985 s 1(3) (repealed) (as to replacement provisions see the Companies Act 2006 s 4) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 12(3); (2) an old public company within the meaning of the Companies Consolidation (Consequential Provisions) Act 1985 s 1 (see **COMPANIES** vol 14 (2009) PARA 183) or the Companies Consolidation (Consequential Provisions) (Northern Ireland) Order 1986, SI 1986/1035 (NI 9), art 3: Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 3 (amended by SI 2001/3439).

9 Financial Services and Markets Act 2000 s 75(4).

10 Financial Services and Markets Act 2000 s 75(5).

11 Financial Services and Markets Act 2000 s 75(6).

12 Financial Services and Markets Act 2000 s 76(1)(a).

13 Financial Services and Markets Act 2000 s 76(1)(b).

14 Financial Services and Markets Act 2000 s 76(2).

15 Financial Services and Markets Act 2000 s 76(3).

16 Financial Services and Markets Act 2000 s 76(4). As to warning notices see PARA 769.

17 Financial Services and Markets Act 2000 s 76(5). As to decision notices see PARA 770.

18 Financial Services and Markets Act 2000 s 76(6). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

19 Financial Services and Markets Act 2000 s 76(7).

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### **389. Discontinuance and suspension of listing.**

The competent authority<sup>1</sup> may, in accordance with listing rules<sup>2</sup>, discontinue the listing<sup>3</sup> of any securities<sup>4</sup> if satisfied that there are special circumstances which preclude normal regular dealings in them<sup>5</sup>. The competent authority may, in accordance with listing rules, suspend the listing of any securities<sup>6</sup>. If the competent authority discontinues or suspends the listing of any securities, on its own initiative, the issuer may refer the matter to the Financial Services and Markets Tribunal<sup>7</sup>.

A discontinuance<sup>8</sup> or suspension<sup>9</sup> by the competent authority on its own initiative takes effect: (1) immediately, if the notice mentioned below<sup>10</sup> states that that is the case; (2) in any other case, on such date as may be specified in that notice<sup>11</sup>. If on its own initiative the competent authority proposes to discontinue or suspend the listing of securities, or discontinues or suspends the listing of securities with immediate effect, it must give the issuer of the securities written notice<sup>12</sup>. The notice must:

- 971 (a) give details of the discontinuance or suspension<sup>13</sup>;
- 972 (b) state the competent authority's reasons for the discontinuance or suspension and for choosing the date on which it took effect or takes effect<sup>14</sup>;
- 973 (c) inform the issuer of the securities that he may make representations to the competent authority within such period as may be specified in the notice (whether or not he has referred the matter to the Tribunal)<sup>15</sup>;
- 974 (d) inform him of the date on which the discontinuance or suspension took effect or will take effect<sup>16</sup>; and
- 975 (e) inform him of his right to refer the matter to the Tribunal<sup>17</sup>.

If, having considered any representations made by the issuer of the securities, the competent authority decides to discontinue or suspend the listing of the securities or, where the discontinuance or suspension has taken effect, it decides not to cancel it, the competent authority must give the issuer of the securities written notice<sup>18</sup>. If the competent authority decides not to discontinue or suspend the listing of the securities, or if it decides, where the discontinuance or suspension has taken effect, to cancel it, the competent authority must give the issuer of the securities written notice<sup>19</sup>. The effect of cancelling a discontinuance is that the securities concerned are to be readmitted, without more, to the official list<sup>20</sup>. If the competent authority has suspended the listing of securities on its own initiative and proposes to refuse an application by the issuer of the securities for the cancellation of the suspension, it must give him a warning notice<sup>21</sup>. The competent authority must, having considered any representations made in response to the warning notice: if it decides to refuse the application, give the issuer of the securities a decision notice<sup>22</sup>; and if it grants the application, give him written notice of its decision<sup>23</sup>. If the competent authority decides to refuse an application for the cancellation of the suspension of listed securities, the applicant may refer the matter to the Tribunal<sup>24</sup>.

A discontinuance<sup>25</sup> or suspension<sup>26</sup> by the competent authority on the application of the issuer of the securities takes effect: (i) immediately, if the notice mentioned below<sup>27</sup> states that this is the case; (ii) in any other case, on such date as may be specified in that notice<sup>28</sup>. If the competent authority discontinues or suspends the listing of securities on the application of the issuer of the securities it must give him written notice<sup>29</sup>. The notice must:

- 976 (A) give details of the discontinuance or suspension<sup>30</sup>;
- 977 (B) inform the issuer of the securities of the date on which the discontinuance or suspension took effect or will take effect<sup>31</sup>; and
- 978 (C) inform the issuer of his right to apply for the cancellation of the suspension<sup>32</sup>.

If the competent authority proposes to refuse an application by the issuer of the securities for the discontinuance or suspension of the listing of the securities, it must give him a warning notice<sup>33</sup>. The competent authority must, having considered any representations made in response to the warning notice, if it decides to refuse the application, give the issuer of the securities a decision notice<sup>34</sup>. If the competent authority decides to refuse an application by the issuer of the securities for the discontinuance or suspension of the listing of the securities, the issuer may refer the matter to the Tribunal<sup>35</sup>. If the competent authority has suspended the listing of securities on the application of the issuer of the securities and proposes to refuse an application by the issuer for the cancellation of the suspension, it must give him a warning notice<sup>36</sup>. The competent authority must, having considered any representations made in response to the warning notice: if it decides to refuse the application for the cancellation of the suspension, give the issuer of the securities a decision notice; and if it grants the application, give him written notice of its decision<sup>37</sup>. If the competent authority decides to refuse an application for the cancellation of the suspension of listed securities, the applicant may refer the matter to the Tribunal<sup>38</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

2 As to the meaning of 'listing rules' see PARA 385 note 18.

3 As to the meaning of 'listing' see PARA 387 note 2.

4 As to the meaning of 'securities' see PARA 326 note 21. The Financial Services and Markets Act 2000 s 77 applies to securities whenever they were admitted to the official list: s 77(4). As to the meaning of 'official list' see PARA 387 note 2.

5 Financial Services and Markets Act 2000 s 77(1). The competent authority may discontinue under s 77(1) or suspend under s 77(2) the listing of any securities on its own initiative or on the application of the issuer of those securities: s 77(2A) (added by SI 2007/1983). As to the meaning of 'issuer' see PARA 385 note 21.

6 Financial Services and Markets Act 2000 s 77(2). If securities are suspended under s 77(2) they are to be treated, for the purposes of ss 96, 99 (see PARAS 433, 436), as still being listed: s 77(3). See also note 5.

7 Financial Services and Markets Act 2000 s 77(5) (amended by SI 2007/1973). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

8 'Discontinuance' means a discontinuance of listing under the Financial Services and Markets Act 2000 s 77(1) (see the text and notes 1-5): s 78(13).

9 'Suspension' means a suspension of listing under the Financial Services and Markets Act 2000 s 77(2) (see the text to note 6): s 78(14).

10 I.e. the notice under the Financial Services and Markets Act 2000 s 78(2): see the text to note 12.

11 Financial Services and Markets Act 2000 s 78(1) (amended by SI 2007/1973).

12 Financial Services and Markets Act 2000 s 78(2) (amended by SI 2007/1973).

13 Financial Services and Markets Act 2000 s 78(3)(a).

14 Financial Services and Markets Act 2000 s 78(3)(b).

- 15 Financial Services and Markets Act 2000 s 78(3)(c). The competent authority may extend the period within which representations may be made to it: s 78(4).
- 16 Financial Services and Markets Act 2000 s 78(3)(d).
- 17 Financial Services and Markets Act 2000 s 78(3)(e).
- 18 Financial Services and Markets Act 2000 s 78(5). A notice given under s 78(5) must inform the issuer of the securities of his right to refer the matter to the Tribunal: s 78(6). If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference: s 78(7).
- 19 Financial Services and Markets Act 2000 s 78(8).
- 20 Financial Services and Markets Act 2000 s 78(9).
- 21 Financial Services and Markets Act 2000 s 78(10). As to warning notices see PARA 769.
- 22 As to decision notices see PARA 770.
- 23 Financial Services and Markets Act 2000 s 78(11).
- 24 Financial Services and Markets Act 2000 s 78(12).
- 25 'Discontinuance' means a discontinuance of listing under the Financial Services and Markets Act 2000 s 77(1) (see the text and notes 1-5): s 78A(10) (s 78A added by SI 2007/1973).
- 26 'Suspension' means a suspension of listing under the Financial Services and Markets Act 2000 s 77(2) (see the text to note 6): s 78A(11) (as added: see note 25).
- 27 Ie the notice under the Financial Services and Markets Act 2000 s 78A(2): see the text to note 29.
- 28 Financial Services and Markets Act 2000 s 78A(1) (as added: see note 25).
- 29 Financial Services and Markets Act 2000 s 78A(2) (as added: see note 25).
- 30 Financial Services and Markets Act 2000 s 78A(3)(a) (as added: see note 25).
- 31 Financial Services and Markets Act 2000 s 78A(3)(b) (as added: see note 25).
- 32 Financial Services and Markets Act 2000 s 78A(3)(c) (as added: see note 25).
- 33 Financial Services and Markets Act 2000 s 78A(4) (as added: see note 25).
- 34 Financial Services and Markets Act 2000 s 78A(5) (as added: see note 25).
- 35 Financial Services and Markets Act 2000 s 78A(6) (as added: see note 25).
- 36 Financial Services and Markets Act 2000 s 78A(7) (as added: see note 25).
- 37 Financial Services and Markets Act 2000 s 78A(8) (as added: see note 25).
- 38 Financial Services and Markets Act 2000 s 78A(9) (as added: see note 25).

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### **390. Disclosure rules.**

Disclosure rules<sup>1</sup> must include provision specifying the disclosure of information requirements to be complied with by:



- 979 (1) issuers<sup>2</sup> who have requested or approved admission of their financial instruments<sup>3</sup> to trading on a regulated market<sup>4</sup> in the United Kingdom<sup>5</sup>;  
 980 (2) persons acting on behalf of or for the account of such issuers<sup>6</sup>;  
 981 (3) persons discharging managerial responsibilities within an issuer<sup>7</sup> (a) who is registered in the United Kingdom and who has requested or approved admission of its shares to trading on a regulated market<sup>8</sup>; or (b) who is not registered in the United Kingdom or any other EEA state but who has requested or approved admission of its shares to trading on a regulated market and who is required in accordance with the Prospectus Directive<sup>9</sup> to file annual information in relation to the shares in the United Kingdom<sup>10</sup>;  
 982 (4) persons connected<sup>11</sup> to such persons discharging managerial responsibilities<sup>12</sup>.

The rules must in particular:

- 983 (a) require an issuer to publish specified inside information<sup>13</sup>;  
 984 (b) require an issuer to publish any significant change concerning information it has already published in accordance with head (a) above<sup>14</sup>;  
 985 (c) allow an issuer to delay the publication of inside information in specified circumstances<sup>15</sup>;  
 986 (d) require an issuer (or a person acting on his behalf or for his account) who discloses inside information to a third party to publish that information without delay in specified circumstances<sup>16</sup>;  
 987 (e) require an issuer (or person acting on his behalf or for his account) to draw up a list of those persons working for him who have access to inside information relating directly or indirectly to that issuer<sup>17</sup>; and  
 988 (f) require persons discharging managerial responsibilities within an issuer falling within heads (3)(a) or (b) above, and persons connected to such persons discharging managerial responsibilities, to disclose transactions conducted on their own account in shares of the issuer, or derivatives or any other financial instrument relating to those shares<sup>18</sup>.

Disclosure rules may make also provision with respect to the action that may be taken by the competent authority in respect of non-compliance<sup>19</sup>.

The competent authority may, in accordance with disclosure rules, suspend trading in a financial instrument<sup>20</sup>. If it does so, the issuer of that financial instrument may refer the matter to the Financial Services and Markets Tribunal<sup>21</sup>.

1 As to the meaning of 'disclosure rules' see PARA 385 note 18.

2 As to the meaning of 'issuer' see PARA 385 note 21.

3 As to the meaning of 'financial instrument' see PARA 385 note 12.

4 As to the meaning of 'regulated market' see PARA 385 note 13.

5 Financial Services and Markets Act 2000 s 96A(1)(a) (ss 96A-96C added by SI 2005/381). As to the meaning of 'United Kingdom' see PARA 2 note 3. These provisions were inserted to implement the provisions of the Market Abuse Directive (ie European Parliament and EC Council Directive 2003/6 (OJ L96, 12.4.2003, p 16) on insider dealing and market manipulation).

6 Financial Services and Markets Act 2000 s 96A(1)(b) (as added: see note 5).

7 For the purposes of the Financial Services and Markets Act 2000 Pt VI (ss 72-103) relating to disclosure rules, a 'person discharging managerial responsibilities within an issuer' means (1) a director of an issuer falling within head (3)(a) or (b) in the text; or (2) a senior executive of such an issuer who has regular access to inside information relating, directly or indirectly, to the issuer, and has power to make managerial decisions affecting

the future development and business prospects of the issuer: s 96B(1) (as added (see note 5); and amended by the Companies Act 2006 Sch 15 Pt 1 paras 1, 7(b)). As to the meaning of 'inside information' see PARA 438; definition applied by the Financial Services and Markets Act 2000 s 103(1) (s 103 substituted by SI 2005/1433).

8 Financial Services and Markets Act 2000 s 96A(1)(c)(i) (as added: see note 5).

9 le in accordance with the European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading, art 10.

10 Financial Services and Markets Act 2000 s 96A(1)(c)(ii) (as added: see note 5).

11 A person 'connected' with a person discharging managerial responsibilities within an issuer means: (1) a 'connected person' within the meaning of the Companies Act 2006 ss 252-255 (formerly the Companies Act 1985 s 346) (see **COMPANIES** vol 14 (2009) PARAS 481, 482) (reading those provisions as if any reference to a director of a company were a reference to a person discharging managerial responsibilities within an issuer); (2) a relative of a person discharging managerial responsibilities within an issuer, who, on the date of the transaction in question, has shared the same household as that person for at least 12 months; (3) a body corporate in which (a) a person discharging managerial responsibilities within an issuer, or (b) any person connected with him by virtue of head (1) or (2) above, is a director or a senior executive who has the power to make management decisions affecting the future development and business prospects of that body corporate: see the Financial Services and Markets Act 2000 s 96B(2) (as added: see note 5).

12 Financial Services and Markets Act 2000 s 96A(1)(d) (as added: see note 5).

13 Financial Services and Markets Act 2000 s 96A(2)(a) (as added: see note 5).

14 Financial Services and Markets Act 2000 s 96A(2)(b) (as added: see note 5).

15 Financial Services and Markets Act 2000 s 96A(2)(c) (as added: see note 5). See note 11.

16 Financial Services and Markets Act 2000 s 96A(2)(d) (as added: see note 5).

17 Financial Services and Markets Act 2000 s 96A(2)(e) (as added: see note 5).

18 Financial Services and Markets Act 2000 s 96A(2)(f) (as added: see note 5).

19 Financial Services and Markets Act 2000 s 96A(3) (as added: see note 5).

20 Financial Services and Markets Act 2000 s 96C(1) (as added: see note 5).

21 Financial Services and Markets Act 2000 s 96C(2) (as added: see note 5). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

The provisions relating to suspension of listing of securities in s 78 (see PARA 389) apply to the suspension of trading in a financial instrument and references to listing and securities are to be read as references to trading and financial instruments for the purposes of s 96C: s 96C(3) (as so added).

## UPDATE

### 390 Disclosure rules

NOTE 11--The Financial Services and Markets Act 2000 Sch 11B (added by SI 2009/2461) (connected persons) has effect for the purposes of the provisions of the Financial Services and Markets Act 2000 Pt VI relating to disclosure rules: 96B(2) (substituted by SI 2009/2461).

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### (iii) Listing Particulars

### 391. Listing particulars and other documents.

Listing rules<sup>1</sup> may provide that securities<sup>2</sup> of a kind specified in the rules may not be admitted to the official list<sup>3</sup> unless: (1) listing particulars<sup>4</sup> have been submitted to, and approved by, the competent authority<sup>5</sup> and published; or (2) in such cases as may be specified by listing rules, such document (other than listing particulars or a prospectus of a kind required by listing rules) as may be so specified has been published<sup>6</sup>.

For the purposes of Part VI of the Financial Services and Markets Act 2000<sup>7</sup>, the persons responsible for listing particulars are to be determined in accordance with regulations made by the Treasury<sup>8</sup>. The persons responsible for listing particulars (including supplementary listing particulars) are<sup>9</sup>:

- 989 (a) the issuer of the securities to which the particulars relate<sup>10</sup>;
- 990 (b) where the issuer is a body corporate, each person who is a director of that body at the time when the particulars are submitted to the competent authority<sup>11</sup>;
- 991 (c) where the issuer is a body corporate, each person who has authorised himself to be named, and is named, in the particulars as a director or as having agreed to become a director of that body either immediately or at a future time<sup>12</sup>;
- 992 (d) each person who accepts, and is stated in the particulars as accepting, responsibility for the particulars<sup>13</sup>;
- 993 (e) each person not falling within heads (a) to (d) above who has authorised the contents of the particulars<sup>14</sup>.

Special provision is made in relation to securities issued in connection with takeovers and mergers<sup>15</sup>, successor companies under legislation relating to electricity<sup>16</sup>, and specialist securities<sup>17</sup>.

1 As to the meaning of 'listing rules' see PARA 385 note 18.

2 As to the meaning of 'securities' see PARA 385 note 21.

3 As to the meaning of 'official list' see PARA 387 note 2.

4 'Listing particulars' means a document in such form and containing such information as may be specified in listing rules: Financial Services and Markets Act 2000 ss 79(2), 103(1) (s 103 substituted by SI 2005/1433). As to the meaning of 'documents' see PARA 10 note 10.

5 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6-37 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

6 Financial Services and Markets Act 2000 s 79(1) (amended by SI 2005/1433). Listing rules made under the Financial Services and Markets Act 2000 s 79(1) may not specify securities of a kind for which an approved prospectus is required as a result of the Financial Services and Markets Act 2000 s 85 (see PARA 397): s 79(3A) (added by SI 2005/1433). Nothing in the Financial Services and Markets Act 2000 s 79 affects the competent authority's general power to make listing rules: s 79(4).

7 Ie the Financial Services and Markets Act 2000 Pt VI (ss 72-103).

8 Financial Services and Markets Act 2000 s 79(3). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the regulations made see the Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956; and the text and notes 9-17. As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

9 Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 6(1). This is expressed to be subject to regs 7-10 (see the text and notes 15-17). As to supplementary listing particulars see PARA 393. Nothing in reg 6 is to be construed as making a person responsible for any particulars

by reason of giving advice as to their contents in a professional capacity: reg 6(4). Where by virtue of reg 6 the issuer of any shares pays or is liable to pay compensation under the Financial Services and Markets Act 2000 s 90 (see PARA 427) for loss suffered in respect of shares for which a person has subscribed, no account is to be taken of that liability or payment in determining any question as to the amount paid on subscription for those shares or as to the amount paid up or deemed to be paid up on them: Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 6(5). As to the meaning of 'issuer' see PARA 385 note 21.

10 Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 6(1)(a).

11 Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 6(1)(b). As to bodies corporate see generally **COMPANIES; CORPORATIONS**. A person is not to be treated as responsible for any particulars by virtue of reg 6(1)(b) if they are published without his knowledge or consent and on becoming aware of their publication he forthwith gives reasonable public notice that they were published without his knowledge or consent: reg 6(2).

12 Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 6(1)(c).

13 Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 6(1)(d). When accepting responsibility for particulars under reg 6(1)(d) or authorising their contents under reg 6(1)(e) (see head (e) in the text), a person may state that he does so only in relation to specified parts of the particulars, or only in specified respects; and in such a case he is responsible under reg 6(1)(d) or reg 6(1)(e) only to the extent specified, and only if the material in question is included in (or substantially in) the form and context to which he has agreed: reg 6(3).

14 Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 6(1)(e). See note 13.

15 Where: (1) listing particulars relate to securities which are to be issued in connection with (a) an offer by the issuer (or by a wholly-owned subsidiary of the issuer) for securities issued by another person ('A'); (b) an agreement for the acquisition by the issuer (or by a wholly-owned subsidiary of the issuer) of securities issued by another person ('A'); or (c) any arrangement whereby the whole of the undertaking of another person ('A') is to become the undertaking of the issuer (or of a wholly-owned subsidiary of the issuer, or of a body corporate which will become such a subsidiary by virtue of the arrangement); and (2) each of the specified persons is responsible by virtue of the Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 6(1)(d) for any part (the 'relevant part') of the particulars relating to A or to the securities or undertaking to which the offer, agreement or arrangement relates, no person is to be treated as responsible for the relevant part of the particulars under reg 6(1)(a), (b) or (c) (see heads (a)-(c) in the text) but without prejudice to his being responsible under reg 6(1)(d) (see head (d) in the text): reg 7(1), (3). In head (2) above, the 'specified persons' are A; and where A is a body corporate, each person who is a director of A at the time when the particulars are submitted to the competent authority, and each other person who has authorised himself to be named, and is named, in the particulars as a director of A: reg 7(2). For these purposes, 'listing particulars' includes supplementary listing particulars; and 'wholly-owned subsidiary' is to be construed in accordance with the Companies Act 1985 s 736 (prospectively repealed) (see **COMPANIES** vol 14 (2009) PARA 25) (as to replacement provisions see the Companies Act 2006 s 1159) (and, in relation to an issuer which is not a body corporate, means a body corporate which would be a wholly-owned subsidiary of the issuer within the meaning of that provision if the issuer were a body corporate): Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 7(4).

16 Where: (1) the same document contains listing particulars (including supplementary listing particulars) relating to the securities of two or more successor companies within the meaning of the Electricity Act 1989 Pt II (ss 65-95) (see **FUEL AND ENERGY** vol 19(2) (2008 Reissue) para 1034), or two or more successor companies within the meaning of the Electricity (Northern Ireland) Order 1992, SI 1992/231 (NI 1), Pt III (arts 68-91); and (2) the responsibility of any person for any information included in the document (the 'relevant information') is stated in the document to be confined to its inclusion as part of the particulars relating to the securities of any one of those companies, that person is not to be treated as responsible, by virtue of the Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 6 (see the text and notes 9-14), for the relevant information in so far as it is stated in the document to form part of the particulars relating to the securities of any other of those companies: reg 8.

17 Where listing particulars (including supplementary listing particulars) relate to securities of a kind specified by listing rules for the purposes of the Financial Services and Markets Act 2000 s 82(1)(c) (see PARA 394), other than securities which are to be issued in the circumstances mentioned in the Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001, SI 2001/2956, reg 7(1)(a) (see note 15 head (1)), no person is to be treated as responsible for the particulars under reg 6(1)(a), (b) or (c) (see heads (a)-(c)

in the text) although this is without prejudice to his being responsible under reg 6(1)(d) (see head (d) in the text): reg 9.

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### **392. General duty of disclosure in listing particulars.**

Listing particulars<sup>1</sup> submitted to the competent authority<sup>2</sup> must contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer<sup>3</sup> of the securities<sup>4</sup>, and of the rights attaching to the securities<sup>5</sup>. This requirement applies only to information: (1) within the knowledge of any person responsible for the listing particulars<sup>6</sup>; or (2) which it would be reasonable for him to obtain by making inquiries<sup>7</sup>.

In determining what information is required to be included in listing particulars, regard must be had (in particular) to: (a) the nature of the securities and their issuer<sup>8</sup>; (b) the nature of the persons likely to consider acquiring them<sup>9</sup>; (c) the fact that certain matters may reasonably be expected to be within the knowledge of professional advisers of a kind which persons likely to acquire the securities may reasonably be expected to consult<sup>10</sup>; and (d) any information available to investors or their professional advisers as a result of requirements imposed on the issuer of the securities by a recognised investment exchange<sup>11</sup>, by listing rules<sup>12</sup>, or by or under any other enactment<sup>13</sup>.

The information specified above is required in addition to any information required by listing rules, or the competent authority, as a condition of the admission of the securities to the official list<sup>14</sup>.

1 As to the meaning of 'listing particulars' see PARA 391 note 4.

2 Ie under the Financial Services and Markets Act 2000 s 79: see PARA 391. As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

3 As to the meaning of 'issuer' see PARA 385 note 21.

4 As to the meaning of 'securities' see PARA 385 note 21.

5 Financial Services and Markets Act 2000 s 80(1). As to prospectuses see PARA 395 et seq.

6 As to the person responsible for listing particulars see PARA 391.

7 Financial Services and Markets Act 2000 s 80(3).

8 Financial Services and Markets Act 2000 s 80(4)(a).

9 Financial Services and Markets Act 2000 s 80(4)(b).

10 Financial Services and Markets Act 2000 s 80(4)(c).

11 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

12 As to the meaning of 'listing rules' see PARA 326 note 18.

13 Financial Services and Markets Act 2000 s 80(4)(d).

14 Financial Services and Markets Act 2000 s 80(2). As to the meaning of 'official list' see PARA 387 note 2.

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### **393. Supplementary listing particulars.**

If at any time after the preparation of listing particulars<sup>1</sup> which have been submitted to the competent authority<sup>2</sup> and before the commencement of dealings in the securities<sup>3</sup> concerned following their admission to the official list<sup>4</sup> there is a significant<sup>5</sup> change affecting any matter contained in the particulars<sup>6</sup>, or a significant new matter arises<sup>7</sup>, the issuer<sup>8</sup> must, in accordance with listing rules, submit supplementary listing particulars of the change or new matter to the competent authority for its approval and, if they are approved, publish them<sup>9</sup>. If the issuer of the securities is not aware of the change or new matter in question, he is not under a duty to comply with this requirement unless he is notified of the change or new matter by a person responsible for the listing particulars<sup>10</sup>. It is the duty of any person responsible for those particulars who is aware of such a change or new matter to give notice of it to the issuer<sup>11</sup>.

1 As to the meaning of 'listing particulars' see PARA 391 note 4.

2 Ie under the Financial Services and Markets Act 2000 s 79: see PARA 391. As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

3 As to the meaning of 'securities' see PARA 385 note 21.

4 As to the meaning of 'official list' see PARA 387 note 2.

5 'Significant' means significant for the purpose of making an informed assessment of the kind mentioned in the Financial Services and Markets Act 2000 s 80(1) (see PARA 392): s 81(2).

6 Ie particulars the inclusion of which was required by the Financial Services and Markets Act 2000 s 80 (see PARA 392), listing rules or the competent authority: s 81(1)(a). As to the meaning of 'listing rules' see PARA 385 note 18.

7 Ie a new matter the inclusion of information in respect of which would have been so required if it had arisen when the particulars were prepared: Financial Services and Markets Act 2000 s 81(1)(b).

8 As to the meaning of 'issuer' see PARA 385 note 21.

9 Financial Services and Markets Act 2000 s 81(1). As to prospectuses see PARA 395 et seq.

Section 81(1) applies also as respects matters contained in any supplementary listing particulars previously published under s 81 in respect of the securities in question: s 81(5).

10 Financial Services and Markets Act 2000 s 81(3). As to the person responsible for listing particulars see PARA 391.

11 Financial Services and Markets Act 2000 s 81(4).

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### **394. Exemptions from disclosure.**

The competent authority<sup>1</sup> may authorise the omission from listing particulars<sup>2</sup> of any information, the inclusion of which would otherwise be required<sup>3</sup>, on the ground: (1) that its disclosure would be contrary to the public interest; (2) that its disclosure would be seriously detrimental to the issuer<sup>4</sup>; or (3) in the case of securities<sup>5</sup> of a kind specified in listing rules<sup>6</sup>, that its disclosure is unnecessary for persons of the kind who may be expected normally to buy or deal in securities of that kind<sup>7</sup>. However, no authority may be granted under head (2) above in respect of essential information<sup>8</sup>, and no authority granted under head (2) above extends to any such information<sup>9</sup>. The Secretary of State<sup>10</sup> or the Treasury<sup>11</sup> may issue a certificate to the effect that the disclosure of any information (including information that would otherwise have to be included in listing particulars for which they are themselves responsible) would be contrary to the public interest<sup>12</sup>. The competent authority is entitled to act on any such certificate in exercising its powers under head (1) above<sup>13</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

2 As to the meaning of 'listing particulars' see PARA 391 note 4. For these purposes, 'listing particulars' includes supplementary listing particulars: Financial Services and Markets Act 2000 s 82(7). As to supplementary listing particulars see PARA 393.

3 As required by the Financial Services and Markets Act 2000 s 80 (see PARA 392) or s 81 (see PARA 393).

4 As to the meaning of 'issuer' see PARA 385 note 21.

5 As to the meaning of 'securities' see PARA 385 note 21.

6 As to the meaning of 'listing rules' see PARA 385 note 18.

7 Financial Services and Markets Act 2000 s 82(1). Section 82 does not affect any powers of the competent authority under listing rules made as a result of s 101(2) (see PARA 386); s 82(5).

8 'Essential information' means information which a person considering acquiring securities of the kind in question would be likely to need in order not to be misled about any facts which it is essential for him to know in order to make an informed assessment: Financial Services and Markets Act 2000 s 82(6). See note 7.

9 Financial Services and Markets Act 2000 s 82(2). See note 7.

10 As to the Secretary of State see PARA 3.

11 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

12 Financial Services and Markets Act 2000 s 82(3). See note 7.

13 Financial Services and Markets Act 2000 s 82(4). See note 7.

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## (iv) Prospectuses

### **A. TRANSFERABLE SECURITIES: PUBLIC OFFERS AND ADMISSION TO TRADING**

#### **395. Transferable securities.**

Transferable securities for the purposes of the provisions of the Financial Services and Markets Act 2000 relating to public offers and admission to trading<sup>1</sup> are:

- 994 (1) units<sup>2</sup> in an open-ended collective investment scheme<sup>3</sup>;
- 995 (2) non-equity transferable securities<sup>4</sup> issued by (a) the government of an EEA state; (b) a local or regional authority of an EEA state; (c) a public international body of which an EEA state is a member; (d) the European Central Bank; (e) the central bank of an EEA state<sup>5</sup>;
- 996 (3) shares in the share capital of the central bank of an EEA state<sup>6</sup>;
- 997 (4) transferable securities unconditionally and irrevocably guaranteed by the government, or a local or regional authority, of an EEA state<sup>7</sup>;
- 998 (5) non-equity transferable securities, issued in a continuous or repeated manner by a credit institution, which (a) are not subordinated, convertible or exchangeable; (b) do not give a right to subscribe to or acquire other types of securities and are not linked to a derivative instrument; (c) materialise reception of repayable deposits; and (d) are covered<sup>8</sup> by a deposit guarantee<sup>9</sup>;
- 999 (6) non-fungible shares of capital (a) the main purpose of which is to provide the holder with a right to occupy any immovable property; and (b) which cannot be sold without that right being given up<sup>10</sup>;
- 1000 (7) transferable securities issued by a specified body<sup>11</sup> if, and only if, the proceeds of the offer of the transferable securities to the public will be used solely for the purposes of the issuer's objectives<sup>12</sup>;
- 1001 (8) non-equity transferable securities, issued in a continuous or repeated manner by a credit institution<sup>13</sup>, which satisfy specified conditions<sup>14</sup>;
- 1002 (9) transferable securities included in an offer where the total consideration of the offer is less than 2,500,000 euros (or an equivalent amount)<sup>15</sup>.

1    I.e. the Financial Services and Markets Act 2000 ss 84-87. See also PARA 385 note 18.

2    I.e. within the meaning in the Financial Services and Markets Act 2000 s 237(2): see PARA 603.

3    Financial Services and Markets Act 2000 Sch 11A para 1 (Sch 11A added by SI 2005/1433). As to open-ended collective investment schemes see PARA 603 et seq.

4    'Non-equity transferable securities' means all transferable securities that are not equity securities; and for this purpose 'equity securities' has the meaning given in European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading art 2.1(b): Financial Services and Markets Act 2000 s 102A(5) (s 102A added by SI 2005/1433).

5    Financial Services and Markets Act 2000 Sch 11A para 2 (as added: see note 3). As to the European Central Bank and central banks of EEA states generally see PARA 1398.

6    Financial Services and Markets Act 2000 Sch 11A para 3 (as added: see note 3).

7    Financial Services and Markets Act 2000 Sch 11A para 4 (as added: see note 3).

8    I.e. under European Parliament and EC Council Directive 94/19 (OJ L135, 31.5.94, p 5) on deposit-guarantee schemes.



9 Financial Services and Markets Act 2000 Sch 11A para 5(1), (2) (as added: see note 3).

10 Financial Services and Markets Act 2000 Sch 11A para 6 (as added: see note 3).

11 The bodies are (1) a charity within the meaning of the Charities Act 1993 s 96(1) (see **CHARITIES** vol 8 (2010 Reissue) PARA 1) or the Charities Act (Northern Ireland) 1964 s 35; (2) a body entered in the Scottish Charity Register; (3) a housing association within the meaning of the Housing Act 1985 s 5(1) (see **HOUSING** vol 22 (2006 Reissue) PARA 11), the Housing Associations Act 1985 s 1 (see **HOUSING** vol 22 (2006 Reissue) PARA 11) or the Housing (Northern Ireland) Order 1992, SI 1992/1725, art 3; (4) an industrial and provident society registered in accordance with the Industrial and Provident Societies Act 1965 s 1(2)(b) (see PARA 2402) or the Industrial and Provident Societies Act (Northern Ireland) 1969 s 1(2)(b); (5) a non-profit making association or body recognised by an EEA state with objectives similar to those of a body falling within any of heads (1)-(4) above: Financial Services and Markets Act 2000 Sch 11A para 7(2) (as added (see note 3); amended by SI 2006/242).

12 Financial Services and Markets Act 2000 Sch 11A para 7(1) (as added: see note 3).

13 'Credit institution' in this context means a credit institution as defined in European Parliament and EC Council Directive 2006/48 relating to the taking up and pursuit of the business of credit institutions, art 4(1)(a): Financial Services and Markets Act 2000 Sch 11A para 8(6) (as added (see note 3); amended by SI 2006/3221).

14 Financial Services and Markets Act 2000 Sch 11A para 8(1) (as added: see note 3). The conditions are (1) that the total consideration of the offer is less than 50m euros (or an equivalent amount); and (2) those mentioned in head (5)(a) and (b) in the text: Sch 11A para 8(2) (as so added). In determining whether head (1) is satisfied in relation to an offer ('offer A'), offer A is to be taken together with any other offer of transferable securities of the same class made by the same person which was open at any time within the period of 12 months ending with the date on which offer A is first made; and had previously satisfied head (1): Sch 11A para 8(3) (as so added).

For these purposes, an amount (in relation to an amount denominated in euros) is an 'equivalent amount' if it is an amount of equal value denominated wholly or partly in another currency or unit of account: Sch 11A para 8(4) (as so added). The equivalent is to be calculated at the latest practicable date before (but in any event not more than three working days before) the date on which the offer is first made: Sch 11A para 8(5) (as so added).

15 Financial Services and Markets Act 2000 Sch 11A para 9(1) (as added: see note 3). Schedule 11A para 8(3)-(5) (see note 14) applies for these purposes but with the references in Sch 11A para 8(3) to head (1) being read as references to Sch 11A para 9(1): Sch 11A para 9(2) (as so added).

## UPDATE

### 395 Transferable securities

NOTE 8--Directive 94/19 amended: European Parliament and EC Council Directive 2005/1 (OJ L79, 24.3.2005, p 9); European Parliament and EC Council Directive 2009/14 (OJ L68, 13.3.2009, p 3).

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### 396. Matters which may be dealt with by prospectus rules.

Prospectus rules<sup>1</sup> may make provision as to:

- 1003 (1) the required form and content of a prospectus (including a summary)<sup>2</sup>;
- 1004 (2) the cases in which a summary need not be included in a prospectus<sup>3</sup>;
- 1005 (3) the languages which may be used in a prospectus (including a summary)<sup>4</sup>;

- 1006 (4) the determination of the persons responsible for a prospectus<sup>5</sup>;
- 1007 (5) the manner in which applications to the competent authority<sup>6</sup> for the approval of a prospectus are to be made<sup>7</sup>.

Prospectus rules may also make provision as to:

- 1008 (a) the period of validity of a prospectus<sup>8</sup>;
- 1009 (b) the disclosure of the maximum price or of the criteria or conditions according to which the final offer price is to be determined, if that information is not contained in a prospectus<sup>9</sup>;
- 1010 (c) the disclosure of the amount of the transferable securities<sup>10</sup> which are to be offered to the public or of the criteria or conditions according to which that amount is to be determined, if that information is not contained in a prospectus<sup>11</sup>;
- 1011 (d) the required form and content of other summary documents (including the languages which may be used in such a document)<sup>12</sup>;
- 1012 (e) the ways in which a prospectus that has been approved by the competent authority may be made available to the public<sup>13</sup>;
- 1013 (f) the disclosure, publication or other communication of such information as the competent authority may reasonably stipulate<sup>14</sup>;
- 1014 (g) the principles to be observed in relation to advertisements in connection with an offer of transferable securities to the public or admission of transferable securities to trading on a regulated market<sup>15</sup> and the enforcement of those principles<sup>16</sup>;
- 1015 (h) the suspension of trading in transferable securities where continued trading would be detrimental to the interests of investors<sup>17</sup>;
- 1016 (i) elections to have a prospectus<sup>18</sup>.

Prospectus rules may also make provision as to access to the register of investors<sup>19</sup>, and the supply of information from that register<sup>20</sup>. Prospectus rules may make provision for the purpose of dealing with matters arising out of or related to any provision of the Prospectus Directive<sup>21</sup>.

In relation to cases where the home state<sup>22</sup> in relation to an issuer<sup>23</sup> of transferable securities is an EEA state other than the United Kingdom<sup>24</sup>, prospectus rules may make provision for the recognition of elections<sup>25</sup>. In relation to a document relating to transferable securities issued by an issuer incorporated in a non-EEA state and drawn up in accordance with the law of that state, prospectus rules may make provision as to the approval of that document as a prospectus<sup>26</sup>.

Nothing in the provisions above affects the competent authority's general power to make prospectus rules<sup>27</sup>.

1 As to the meaning of 'prospectus rules' see PARA 385 note 18.

2 Financial Services and Markets Act 2000 s 84(1)(a) (s 84 substituted by SI 2005/1433).

3 Financial Services and Markets Act 2000 s 84(1)(b) (as substituted: see note 2).

4 Financial Services and Markets Act 2000 s 84(1)(c) (as substituted: see note 2).

5 Financial Services and Markets Act 2000 s 84(1)(d) (as substituted: see note 2).

6 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

7 Financial Services and Markets Act 2000 s 84(1)(e) (as substituted: see note 2).

- 8 Financial Services and Markets Act 2000 s 84(2)(a) (as substituted: see note 2).
- 9 Financial Services and Markets Act 2000 s 84(2)(b) (as substituted: see note 2).
- 10 As to transferable securities see PARA 395.
- 11 Financial Services and Markets Act 2000 s 84(2)(c) (as substituted: see note 2).
- 12 Financial Services and Markets Act 2000 s 84(2)(d) (as substituted: see note 2).
- 13 Financial Services and Markets Act 2000 s 84(2)(e) (as substituted: see note 2).
- 14 Financial Services and Markets Act 2000 s 84(2)(f) (as substituted: see note 2).
- 15 As to the meaning of 'regulated market' see PARA 385 note 13.
- 16 Financial Services and Markets Act 2000 s 84(2)(g) (as substituted: see note 2).
- 17 Financial Services and Markets Act 2000 s 84(2)(h) (as substituted: see note 2).
- 18 Financial Services and Markets Act 2000 s 84(2)(i) (as substituted: see note 2). The reference is to an election under s 87 (see PARA 398) or under European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading, art 2.1(m)(iii) as applied for the purposes of the Financial Services and Markets Act 2000 Pt VI (ss 72-103) by s 102C (see PARA 385 note 22).
- 19 Is maintained under the Financial Services and Markets Act 2000 s 87R: see PARA 414.
- 20 Financial Services and Markets Act 2000 s 84(3) (as substituted: see note 2).
- 21 Financial Services and Markets Act 2000 s 84(4) (as substituted: see note 2). The reference is to European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64).
- 22 As to the meaning of 'home state' see PARA 385 note 22.
- 23 As to the meaning of 'issuer' see PARA 385 note 21.
- 24 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 25 Financial Services and Markets Act 2000 s 84(5) (as substituted: see note 2). The reference is to elections made in relation to such securities under the law of that state in accordance with European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) art 1.3 or art 2.1(m)(iii).
- 26 Financial Services and Markets Act 2000 s 84(6) (as substituted: see note 2).
- 27 Financial Services and Markets Act 2000 s 84(7) (as substituted: see note 2).

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### **397. Prohibition of dealing etc in transferable securities without approved prospectus.**

It is unlawful for transferable securities<sup>1</sup> other than (1) certain listed securities<sup>2</sup>, (2) such other transferable securities as may be specified in prospectus rules<sup>3</sup>, to be offered to the public in the United Kingdom<sup>4</sup> unless an approved prospectus<sup>5</sup> has been made available to the public before the offer is made<sup>6</sup>;

It is also unlawful to request the admission of transferable securities other than (a) certain listed securities<sup>7</sup>, (b) such other transferable securities as may be specified in prospectus rules<sup>8</sup>, to trading on a regulated market<sup>9</sup> situated or operating in the United Kingdom unless an approved prospectus has been made available to the public before the request is made<sup>10</sup>.

A person who contravenes the provisions above is guilty of an offence and liable to a penalty<sup>11</sup>.

A person does not contravene those provisions if:

- 1017 (i) the offer is made to or directed at qualified investors<sup>12</sup> only<sup>13</sup>;
- 1018 (ii) the offer is made to or directed at fewer than 100 persons, other than qualified investors, per EEA state<sup>14</sup>;
- 1019 (iii) the minimum consideration which may be paid by any person for transferable securities acquired by him pursuant to the offer is at least 50,000 euros (or an equivalent amount)<sup>15</sup>;
- 1020 (iv) the transferable securities being offered are denominated in amounts of at least 50,000 euros (or equivalent amounts)<sup>16</sup>; or
- 1021 (v) the total consideration for the transferable securities being offered cannot exceed 100,000 euros (or an equivalent amount)<sup>17</sup>.

Where a person who is not a qualified investor (the 'client') has engaged a qualified investor<sup>18</sup> to act as his agent, and the terms on which the qualified investor is engaged enable him to make decisions concerning the acceptance of offers of transferable securities on the client's behalf without reference to the client, an offer made to or directed at the qualified investor is not to be regarded<sup>19</sup> as also having been made to or directed at the client<sup>20</sup>.

1 As to transferable securities see PARA 395.

2 I.e. those listed in the Financial Services and Markets Act 2000 Sch 11A (see PARA 395): see s 85(5)(a) (ss 85, 86 substituted by SI 2005/1433).

3 Financial Services and Markets Act 2000 s 85(5)(b) (as substituted: see note 2). As to the meaning of 'prospectus rules' see PARA 385 note 18.

4 As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 'Approved prospectus' means, in relation to transferable securities to which the Financial Services and Markets Act 2000 s 85 applies, a prospectus approved by the competent authority of the home state in relation to the issuer of the securities: s 85(7) (as substituted: see note 2). As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

6 Financial Services and Markets Act 2000 s 85(1) (as substituted: see note 2).

7 I.e. those listed in the Financial Services and Markets Act 2000 Sch 11A Pt 1 (paras 7-9) (see PARA 395): see s 85(6)(a) (as substituted: see note 2).

8 Financial Services and Markets Act 2000 s 85(6)(b) (as substituted: see note 2).

9 As to the meaning of 'regulated market' see PARA 385 note 13.

10 Financial Services and Markets Act 2000 s 85(2) (as substituted: see note 2).

11 Financial Services and Markets Act 2000 s 85(3) (as substituted: see note 2). Such a person is liable on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both: see s 85(3) (as so substituted). As to the statutory maximum see PARA 56 note 24.

A contravention is actionable, at the suit of a person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty: s 85(4) (as so substituted).

12 'Qualified investor' means (1) an entity falling within European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public

or admitted to trading, art 2.1(e)(i), (ii) or (iii); (2) an investor registered on the register maintained by the competent authority under the Financial Services and Markets Act 2000 s 87R (see PARA 414); (3) an investor authorised by an EEA state other than the United Kingdom to be considered as a qualified investor for the purposes of European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64): Financial Services and Markets Act 2000 s 85(7) (as substituted: see note 2).

13 Financial Services and Markets Act 2000 s 86(1)(a) (as substituted: see note 2).

14 Financial Services and Markets Act 2000 s 86(1)(b) (as substituted: see note 2). For these purposes, the making of an offer of transferable securities to (1) trustees of a trust; (2) members of a partnership in their capacity as such; or (3) two or more persons jointly, is to be treated as the making of an offer to a single person: s 86(3) (as so substituted).

15 Financial Services and Markets Act 2000 s 86(1)(c) (as substituted: see note 2). For the purposes of s 86, an amount (in relation to an amount denominated in euros) is an 'equivalent amount' if it is an amount of equal value denominated wholly or partly in another currency or unit of account: s 86(5) (as so substituted).

16 Financial Services and Markets Act 2000 s 86(1)(d) (as substituted: see note 2).

17 Financial Services and Markets Act 2000 s 86(1)(e) (as substituted: see note 2). In determining whether head (v) in the text is satisfied in relation to an offer ('offer A'), offer A is to be taken together with any other offer of transferable securities of the same class made by the same person which was open at any time within the period of 12 months ending with the date on which offer A is first made, and had previously satisfied head (v): s 86(4) (as so substituted).

18 le falling within European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) art 2.1(e)(i).

19 le for the purposes of heads (i)-(iv) in the text.

20 Financial Services and Markets Act 2000 s 86(2) (as substituted: see note 2).

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### **398. Election to have prospectus.**

A person who proposes:

- 1022 (1) to issue certain transferable securities<sup>1</sup>;
- 1023 (2) to offer to the public such transferable securities<sup>2</sup>; or
- 1024 (3) to request the admission to a regulated market<sup>3</sup> of such transferable securities<sup>4</sup>,

may elect, in accordance with prospectus rules<sup>5</sup>, to have a prospectus in relation to the securities<sup>6</sup>.

If a person makes such an election, the provisions of Part VI of the Financial Services and Markets Act 2000<sup>7</sup> and of prospectus rules apply in relation to those transferable securities as if, in relation to an offer of the securities to the public or the admission of the securities to trading on a regulated market, they were transferable securities for which an approved prospectus would be required<sup>8</sup>.

Listing rules<sup>9</sup> do not apply to securities which are the subject of an election<sup>10</sup>.

- 1 Financial Services and Markets Act 2000 s 87(1)(a) (s 87 substituted by SI 2005/1433). The reference is to transferable securities falling within Sch 11A para 2, 4, 8 or 9 (see PARA 395) where the United Kingdom is the home state in relation to the issuer of the securities: s 87(4) (s 87 as so substituted). As to the meaning of 'home state' see PARA 385 note 22. As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 2 Financial Services and Markets Act 2000 s 87(1)(b) (as substituted: see note 1).
- 3 As to the meaning of 'regulated market' see PARA 385 note 13.
- 4 Financial Services and Markets Act 2000 s 87(1)(c) (as substituted: see note 1).
- 5 As to the meaning of 'prospectus rules' see PARA 385 note 18.
- 6 Financial Services and Markets Act 2000 s 87(1) (s 87 as substituted: see note 1).
- 7 I.e. the Financial Services and Markets Act 2000 Pt VI (ss 72-103).
- 8 Financial Services and Markets Act 2000 s 87(2) (as substituted: see note 1). As to the prohibition of dealing in transferable securities without an approved prospectus see s 85; and PARA 397.
- 9 I.e. under the Financial Services and Markets Act 2000 s 79: see PARA 391.
- 10 Financial Services and Markets Act 2000 s 87(3) (as substituted: see note 1).

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## ***B. APPROVAL OF PROSPECTUS***

### **399. Criteria for approval of prospectus by competent authority.**

The competent authority<sup>1</sup> may not approve a prospectus<sup>2</sup> unless it is satisfied that:

- 1025 (1) the United Kingdom<sup>3</sup> is the home state<sup>4</sup> in relation to the issuer<sup>5</sup> of the transferable securities<sup>6</sup> to which it relates<sup>7</sup>;
- 1026 (2) the prospectus contains the necessary information<sup>8</sup>; and
- 1027 (3) all of the other requirements imposed by or in accordance with Part VI of the Financial Services and Markets Act 2000<sup>9</sup> or the Prospectus Directive<sup>10</sup> have been complied with (so far as those requirements apply to a prospectus for the transferable securities in question)<sup>11</sup>.

The necessary information is the information necessary to enable investors to make an informed assessment of:

- 1028 (a) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the transferable securities and of any guarantor<sup>12</sup>; and
- 1029 (b) the rights attaching to the transferable securities<sup>13</sup>.

The necessary information must be presented in a form which is comprehensible and easy to analyse<sup>14</sup> and must be prepared having regard to the particular nature of the transferable securities and their issuer<sup>15</sup>.

The prospectus must include a summary (unless the transferable securities in question are ones in relation to which prospectus rules provide that a summary is not required)<sup>16</sup>. The summary must, briefly and in non-technical language, convey the essential characteristics of, and risks associated with, the issuer, any guarantor and the transferable securities to which the prospectus relates<sup>17</sup>. Where the prospectus for which approval is sought does not include the final offer price or the amount of transferable securities to be offered to the public, the applicant must inform the competent authority in writing of that information as soon as that element is finalised<sup>18</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

2 'Prospectus' (except in the Financial Services and Markets Act 2000 s 87(5) (see the text and note 16)) includes a supplementary prospectus: s 87A(8) (s 87A added by SI 2005/1433). As to supplementary prospectuses see PARA 403.

3 As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 As to the meaning of 'home state' see PARA 385 note 22.

5 As to the meaning of 'issuer' see PARA 385 note 21.

6 As to transferable securities see PARA 395.

7 Financial Services and Markets Act 2000 s 87(1)(a) (as added: see note 2).

8 Financial Services and Markets Act 2000 s 87(1)(b) (as added: see note 2).

9 In the Financial Services and Markets Act 2000 Pt VI (ss 72-103).

10 European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading.

11 Financial Services and Markets Act 2000 s 87(1)(c) (as added: see note 2).

12 Financial Services and Markets Act 2000 s 87(2)(a) (as added: see note 2).

13 Financial Services and Markets Act 2000 s 87(2)(b) (as added: see note 2).

14 Financial Services and Markets Act 2000 s 87(3) (as added: see note 2).

15 Financial Services and Markets Act 2000 s 87(4) (as added: see note 2).

16 Financial Services and Markets Act 2000 s 87(5) (as added: see note 2).

17 Financial Services and Markets Act 2000 s 87(6) (as added: see note 2).

18 Financial Services and Markets Act 2000 s 87(7) (as added: see note 2).

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#### **400. Exemptions from disclosure.**

The competent authority<sup>1</sup> may authorise the omission from a prospectus<sup>2</sup> of any information, the inclusion of which would otherwise be required, on the ground (1) that its disclosure would

be contrary to the public interest<sup>3</sup>; (2) that its disclosure would be seriously detrimental to the issuer<sup>4</sup>, provided that the omission would be unlikely to mislead the public with regard to any facts or circumstances which are essential for an informed assessment<sup>5</sup>; or (3) that the information is only of minor importance for a specific offer to the public or admission to trading on a regulated market<sup>6</sup> and unlikely to influence an informed assessment<sup>7</sup>.

The Secretary of State<sup>8</sup> or the Treasury<sup>9</sup> may issue a certificate to the effect that the disclosure of any information would be contrary to the public interest<sup>10</sup>. The competent authority is entitled to act on any such certificate in exercising its powers under head (1) above<sup>11</sup>.

The provisions above do not affect any powers of the competent authority under prospectus rules<sup>12</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

2 'Prospectus' includes a supplementary prospectus: Financial Services and Markets Act 2000 s 87B(5) (s 87B added by SI 2005/1433). As to supplementary prospectuses see PARA 403.

3 Financial Services and Markets Act 2000 s 87B(1)(a) (as added: see note 2).

4 As to the meaning of 'issuer' see PARA 385 note 21.

5 Financial Services and Markets Act 2000 s 87B(1)(b) (as added: see note 2). The informed assessment referred to is of the kind mentioned in s 87A(2): see PARA 399.

6 As to the meaning of 'regulated market' see PARA 385 note 13.

7 Financial Services and Markets Act 2000 s 87B(1)(c) (as added: see note 2).

8 As to the Secretary of State see PARA 3.

9 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

10 Financial Services and Markets Act 2000 s 87B(2) (as added: see note 2).

11 Financial Services and Markets Act 2000 s 87B(3) (as added: see note 2).

12 Financial Services and Markets Act 2000 s 87B(4) (as added: see note 2). As to the meaning of 'prospectus rules' see PARA 385 note 18.

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#### **401. Applications for approval.**

The competent authority<sup>1</sup> must notify the applicant of its decision on an application for approval of a prospectus before the end of the period for consideration<sup>2</sup>. It may by notice<sup>3</sup> in writing require a person who has applied for approval of a prospectus to provide specified documents or documents of a specified description<sup>4</sup>; or specified information or information of a specified description<sup>5</sup>.

The competent authority must notify the applicant of its decision on an application for approval of a supplementary prospectus before the end of the period of seven working days beginning with the date on which the application is received<sup>6</sup>.



If the competent authority (1) approves a prospectus<sup>7</sup>; (2) proposes to refuse to approve a prospectus<sup>8</sup>; (3) decides to refuse to approve a prospectus<sup>9</sup>, it must give the applicant written notice<sup>10</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 87C(1) (ss 87C, 87D added by SI 2005/1433). The competent authority's failure to comply with the Financial Services and Markets Act 2000 s 87C(1) or (9) (see note 6) does not constitute approval of the application in question: s 87C(10) (as so added).

The period for consideration (1) begins with the first working day after the date on which the application is received; but (2) if the competent authority gives a notice under s 87C(4), is to be treated as beginning with the first working day after the date on which the notice is complied with: s 87C(2) (as so added). The period for consideration is (a) except in the case of a new issuer, ten working days; or (b) in that case, 20 working days: s 87C(3) (as so substituted). 'New issuer' means an issuer of transferable securities which does not have transferable securities admitted to trading on any regulated market, and has not previously offered transferable securities to the public: s 87C(11) (as so added). As to the meaning of 'regulated market' see PARA 385 note 13.

3 No notice may be given after the end of the period, beginning with the first working day after the date on which the application is received, of except in the case of a new issuer, ten working days; or in that case, 20 working days: Financial Services and Markets Act 2000 s 87C(5) (as added: see note 2).

4 Financial Services and Markets Act 2000 s 87C(4)(a) (as added: see note 2). Section 87C(4) applies only to information and documents reasonably required in connection with the exercise by the competent authority of its functions in relation to the application: s 87C(6) (as so added).

The competent authority may require any information provided under s 87C to be provided in such form as it may reasonably require: s 87C(7) (as so added). It may require any information provided, whether in a document or otherwise, to be verified in such manner, or any document produced to be authenticated in such manner, as it may reasonably require: s 87C(8) (as so added).

5 Financial Services and Markets Act 2000 s 87C(4)(b) (as added: see note 2). See note 4.

6 Financial Services and Markets Act 2000 s 87C(9) (as added: see note 2). See also s 87C(10); and note 2. Section 87C(4), (6)-(8) (see the text and note 4) applies to an application under s 87C(9) as it applies to an application for approval of a prospectus: s 87C(9) (as so added).

7 Financial Services and Markets Act 2000 s 87D(1) (as added: see note 2). In s 87D 'prospectus' includes a supplementary prospectus: s 87D(7) (as so added). As to supplementary prospectuses see PARA 403.

8 Financial Services and Markets Act 2000 s 87D(2) (as added: see note 2). The notice must state the competent authority's reasons for the proposed refusal: s 87D(3) (as so added).

9 Financial Services and Markets Act 2000 s 87D(4) (as added: see note 2). The notice of a decision must give the competent authority's reasons for refusing the application; and inform the applicant of his right to refer the matter to the Financial Services and Markets Tribunal: s 87D(5) (as so added). If the competent authority refuses to approve a prospectus, the applicant may refer the matter to the Tribunal: s 87D(6) (as so added). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

10 See the Financial Services and Markets Act 2000 s 87D(1), (2), (4) (as added: see note 2).

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#### **402. Transfer of application for approval.**

The competent authority<sup>1</sup> may transfer an application for the approval of a prospectus or a supplementary prospectus to the competent authority of another EEA state (the 'transferee authority')<sup>2</sup>. Before doing so, the competent authority must obtain the agreement of the transferee authority<sup>3</sup>. The competent authority must inform the applicant of the transfer within three working days beginning with the first working day after the date of the transfer<sup>4</sup>. On making such a transfer, the competent authority ceases to have functions under Part VI of the Financial Services and Markets Act 2000<sup>5</sup> in relation to the application transferred<sup>6</sup>.

Where the competent authority agrees to the transfer to it of an application for the approval of a prospectus made to the competent authority of another EEA state, the United Kingdom is to be treated<sup>7</sup> as the home state in relation to the issuer of the transferable securities to which the prospectus relates<sup>8</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 87E(1) (ss 87E, 87F added by SI 2005/1433).

3 Financial Services and Markets Act 2000 s 87E(2) (as added see note 2).

4 Financial Services and Markets Act 2000 s 87E(3) (as added: see note 2).

5 I.e. the Financial Services and Markets Act 2000 Pt VI (ss 72-103).

6 Financial Services and Markets Act 2000 s 87E(4) (as added: see note 2).

7 I.e. for the purposes of the Financial Services and Markets Act 2000 Pt VI.

8 Financial Services and Markets Act 2000 s 87F(1)(a) (as added: see note 2). Part VI then applies to the application as if it had been made to the competent authority but s 87C (see PARA 401) applies as if the date of the transfer were the date on which the application was received by the competent authority: s 87F(1)(b), (2) (as so added).

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## ***C. SUPPLEMENTARY PROSPECTUS***

### **403. Where supplementary prospectus to be submitted.**

If, during the relevant period, there arises or is noted a significant<sup>1</sup> new factor, material mistake or inaccuracy relating to the information included in a prospectus approved by the competent authority<sup>2</sup>, the person on whose application the prospectus was approved must, in accordance with prospectus rules<sup>3</sup>, submit a supplementary prospectus containing details of the new factor, mistake or inaccuracy to the competent authority for its approval<sup>4</sup>. The relevant period begins when the prospectus is approved and ends with the closure of the offer of the transferable securities<sup>5</sup> to which the prospectus relates; or when trading in those securities on a regulated market<sup>6</sup> begins<sup>7</sup>.

Any person responsible for the prospectus who is aware of any new factor, mistake or inaccuracy which may require the submission of a supplementary prospectus in accordance with the provision above must give notice of it to the issuer<sup>8</sup> of the transferable securities to

which the prospectus relates, and to the person on whose application the prospectus was approved<sup>9</sup>. A supplementary prospectus must provide sufficient information to correct any mistake or inaccuracy which gave rise to the need for it<sup>10</sup>.

1 'Significant' means significant for the purposes of making an informed assessment of the kind mentioned in the Financial Services and Markets Act 2000 s 87A(2) (see PARA 399): s 87G(4) (s 87G added SI 2005/1433). This applies also to information contained in any supplementary prospectus published under s 87G: s 87G(7) (as so added).

2 Financial Services and Markets Act 2000 s 87G(1) (as added: see note 1). As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

3 As to the meaning of 'prospectus rules' see PARA 385 note 18.

4 Financial Services and Markets Act 2000 s 87G(2) (as added: see note 1).

5 As to transferable securities see PARA 395.

6 As to the meaning of 'regulated market' see PARA 385 note 13.

7 Financial Services and Markets Act 2000 s 87G(3) (as added: see note 1).

8 As to the meaning of 'issuer' see PARA 385 note 21.

9 Financial Services and Markets Act 2000 s 87G(5) (as added: see note 1).

10 Financial Services and Markets Act 2000 s 87G(6) (as added: see note 1).

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## ***D. PASSPORTING***

### **404. Passporting.**

A prospectus<sup>1</sup> approved by the competent authority<sup>2</sup> of an EEA state other than the United Kingdom<sup>3</sup> is not an approved prospectus<sup>4</sup> unless that authority has provided the competent authority with (1) a certificate of approval<sup>5</sup>; (2) a copy of the prospectus as approved<sup>6</sup>; and (3) if requested by the competent authority, a translation of the summary of the prospectus<sup>7</sup>. A document is not a certificate of approval unless it states that the prospectus has been drawn up in accordance with the Prospectus Directive<sup>8</sup>, and has been approved, in accordance with that directive, by the competent authority providing the certificate<sup>9</sup>. A document is not a certificate of approval unless it states whether (and, if so, why) the competent authority providing it authorised, in accordance with the Prospectus Directive, the omission from the prospectus of information which would otherwise have been required to be included<sup>10</sup>.

The competent authority must, if requested to do so, supply the competent authority of a specified EEA state with (a) a certificate of approval<sup>11</sup>; (b) a copy of the specified prospectus (as approved by the competent authority)<sup>12</sup>; and (c) a translation of the summary of the specified prospectus (if the request states that one has been requested by the other competent authority)<sup>13</sup>. Only the following may make a request under these provisions: (i) the issuer of the transferable securities<sup>9</sup> to which the specified prospectus relates<sup>14</sup>; (ii) a person who wishes to offer the transferable securities to which the specified prospectus relates to the public in an

EEA state other than (or as well as) the United Kingdom<sup>15</sup>; (iii) a person requesting the admission of the transferable securities to which the specified prospectus relates to a regulated market<sup>16</sup> situated or operating in an EEA state other than (or as well as) the United Kingdom<sup>17</sup>.

A certificate of approval must state that the prospectus has been drawn up in accordance with Part VI of the Financial Services and Markets Act 2000<sup>18</sup> and the Prospectus Directive, and has been approved, in accordance with those provisions, by the competent authority<sup>19</sup>. A certificate of approval must state whether (and, if so, why) the competent authority authorised<sup>20</sup> the omission from the prospectus of information which would otherwise have been required to be included<sup>21</sup>. The competent authority must comply with a request<sup>22</sup> if the prospectus has been approved before the request is made, within three working days beginning with the date of the request; or if the request is submitted with an application for the approval of the prospectus, on the first working day after the date on which it approves the prospectus<sup>23</sup>.

1 'Prospectus' includes a supplementary prospectus: Financial Services and Markets Act 2000 ss 87H(4), 87I(6) (ss 87H, 87I added by SI 2005/1433).

2 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

3 As to the meaning of 'United Kingdom' see PARA 2 note 3. The exercise of EEA rights is known as 'passporting'. As to the meaning of 'EEA right' see PARA 315 note 3.

4 Ie for the purposes of the Financial Services and Markets Act 2000 s 85: see PARA 397.

5 Financial Services and Markets Act 2000 s 87H(1)(a) (as added: see note 1).

6 Financial Services and Markets Act 2000 s 87H(1)(b) (as added: see note 1).

7 Financial Services and Markets Act 2000 s 87H(1)(c) (as added: see note 1). The reference is to European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading.

8 Financial Services and Markets Act 2000 s 87H(2) (as added: see note 1).

9 Financial Services and Markets Act 2000 s 87H(3) (as added: see note 1).

10 Financial Services and Markets Act 2000 s 87I(1)(a) (as added: see note 1).

11 Financial Services and Markets Act 2000 s 87I(1)(b) (as added: see note 1).

12 Financial Services and Markets Act 2000 s 87I(1)(c) (as added: see note 1).

13 As to transferable securities see PARA 395. As to the meaning of 'issuer' see PARA 385 note 21.

14 Financial Services and Markets Act 2000 s 87I(2)(a) (as added: see note 1).

15 Financial Services and Markets Act 2000 s 87I(2)(b) (as added: see note 1).

16 As to the meaning of 'regulated market' see PARA 385 note 13.

17 Financial Services and Markets Act 2000 s 87I(2)(c) (as added: see note 1).

18 Ie the Financial Services and Markets Act 2000 Pt VI (ss 72-103).

19 Financial Services and Markets Act 2000 s 87I(3) (as added: see note 1).

20 Ie in accordance with the Financial Services and Markets Act 2000 s 87B: see PARA 400.

21 Financial Services and Markets Act 2000 s 87I(4) (as added: see note 1).

22 Ie under the Financial Services and Markets Act 2000 s 87I.

23 Financial Services and Markets Act 2000 s 87I(5) (as added: see note 1).

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## ***E. TRANSFERABLE SECURITIES: POWERS OF COMPETENT AUTHORITY***

### **405. Requirements imposed as condition of approval.**

As a condition of approving a prospectus<sup>1</sup>, the competent authority<sup>2</sup> may by notice in writing:

- 1030 (1) require the inclusion in the prospectus of such supplementary information necessary for investor protection as the competent authority may specify<sup>3</sup>;
- 1031 (2) require a person controlling, or controlled by, the applicant to provide specified<sup>4</sup> information or documents<sup>5</sup>;
- 1032 (3) require an auditor or manager of the applicant to provide specified information or documents<sup>6</sup>;
- 1033 (4) require a financial intermediary commissioned to assist either in carrying out the offer to the public of the transferable securities<sup>7</sup> to which the prospectus relates or in requesting their admission to trading on a regulated market<sup>8</sup>, to provide specified information or documents<sup>9</sup>.

1 'Prospectus' includes a supplementary prospectus: Financial Services and Markets Act 2000 s 87J(3) (s 87J added by SI 2005/1433).

2 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 87J(1)(a) (as added: see note 1).

4 I.e. specified in the notice: see the Financial Services and Markets Act 2000 s 87(2) (as added: see note 1).

5 Financial Services and Markets Act 2000 s 87J(1)(b) (as added: see note 1).

6 Financial Services and Markets Act 2000 s 87J(1)(c) (as added: see note 1).

7 As to transferable securities see PARA 395.

8 As to the meaning of 'regulated market' see PARA 385 note 13.

9 Financial Services and Markets Act 2000 s 87J(1)(d) (as added: see note 1).

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### **406. Suspension or prohibition of offer to the public.**

Where a person (the 'offeror') has made an offer of transferable securities<sup>1</sup> to the public<sup>2</sup> in the United Kingdom (the 'offer')<sup>3</sup>,

- 1034 (1) if the competent authority<sup>4</sup> has reasonable grounds for suspecting that an applicable provision<sup>5</sup> has been infringed, it may (a) require the offeror to suspend the offer for a period not exceeding ten working days<sup>6</sup>; (b) require a person not to advertise the offer, or to take such steps as the authority may specify to suspend any existing advertisement of the offer, for a period not exceeding ten working days<sup>7</sup>;
- 1035 (2) if the competent authority has reasonable grounds for suspecting that it is likely that an applicable provision will be infringed, it may require the offeror to withdraw the offer<sup>8</sup>;
- 1036 (3) if the competent authority finds that an applicable provision has been infringed, it may require the offeror to withdraw the offer<sup>9</sup>.

If the competent authority proposes to exercise the powers above in relation to a person, or exercises any of those powers in relation to a person with immediate effect, it must give that person written notice<sup>10</sup>.

1 As to transferable securities see PARA 395.

2 As to the meaning of 'offer of transferable securities to the public' see PARA 385 note 21.

3 Financial Services and Markets Act 2000 s 87K(1) (ss 87K, 87N, 87O added by SI 2005/1433).

4 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

5 'Applicable provision' means (1) a provision of the Financial Services and Markets Act 2000 Pt VI (ss 72-103); (2) a provision contained in prospectus rules; (3) any other provision made in accordance with the Prospectus Directive (ie European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading), applicable in relation to the offer: Financial Services and Markets Act 2000 s 87K(5) (as added: see note 3). As to the meaning of 'prospectus rules' see PARA 385 note 18.

6 Financial Services and Markets Act 2000 s 87K(2)(a) (as added: see note 3). A requirement under s 87K or 87L (see PARA 407) takes effect (1) immediately, if the notice under s 87O(2) (see the text and note 10) states that that is the case; (2) in any other case, on such date as may be specified in that notice: s 87O(1) (as added: see note 3).

7 Financial Services and Markets Act 2000 s 87K(2)(b) (as added: see note 3). See note 6.

8 Financial Services and Markets Act 2000 s 87K(3) (as added: see note 3). See note 6.

9 Financial Services and Markets Act 2000 s 87K(4) (as added: see note 3). See note 6.

10 Financial Services and Markets Act 2000 s 87O(2) (as added: see note 3).

The notice must (1) give details of the competent authority's action or proposed action; (2) state its reasons for taking the action in question and choosing the date on which it took effect or takes effect; (3) inform the recipient that he may make representations to the competent authority within such period as may be specified by the notice (whether or not he has referred the matter to the Financial Services and Markets Tribunal); (4) inform him of the date on which the action took effect or takes effect; and (5) inform him of his right to refer the matter to the Tribunal: s 87O(3) (as so added). A person to whom a notice is given under s 87O may refer the matter to the Tribunal: s 87N(2) (as added: see note 3). The competent authority may extend the period within which representations may be made to it: s 87O(4) (as so added). If, having considered any representations made to it, the competent authority decides to maintain, vary or revoke its earlier decision, it must give written notice to that effect to the person mentioned in s 87O(2): s 87O(5) (as so added). Such a notice must inform that person, where relevant, of his right to refer the matter to the Tribunal: s 87O(6) (as so added). If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference: s 87O(7) (as so added). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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#### **407. Suspension or prohibition of admission to trading on a regulated market.**

Where a person has requested the admission of transferable securities<sup>1</sup> to trading on a regulated market<sup>2</sup> situated or operating in the United Kingdom<sup>3</sup>:

- 1037 (1) if the competent authority<sup>4</sup> has reasonable grounds for suspecting that an applicable provision<sup>5</sup> has been infringed and the securities have not yet been admitted to trading on the regulated market in question, it may (a) require the person requesting admission to suspend the request for a period not exceeding ten working days<sup>6</sup>; (b) require a person not to advertise the securities to which it relates, or to take such steps as the authority may specify to suspend any existing advertisement in connection with those securities, for a period not exceeding ten working days<sup>7</sup>;
- 1038 (2) if the competent authority has reasonable grounds for suspecting that an applicable provision has been infringed and the securities have been admitted to trading on the regulated market in question, it may (a) require the market operator<sup>8</sup> to suspend trading in the securities for a period not exceeding ten working days<sup>9</sup>; (b) require a person not to advertise the securities, or to take such steps as the authority may specify to suspend any existing advertisement in connection with those securities, for a period not exceeding ten working days<sup>10</sup>;
- 1039 (3) if the competent authority finds that an applicable provision has been infringed, it may require the market operator to prohibit trading in the securities on the regulated market in question<sup>11</sup>.

If the competent authority proposes to exercise the powers above in relation to a person, or exercises any of those powers in relation to a person with immediate effect, it must give that person written notice<sup>12</sup>.

1 As to transferable securities see PARA 395.

2 As to the meaning of 'regulated market' see PARA 385 note 13.

3 Financial Services and Markets Act 2000 s 87L(1) (ss 87L, 87O added by SI 2005/1433). As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

5 'Applicable provision' means (1) a provision of the Financial Services and Markets Act 2000 Pt VI (ss 72-103); (2) a provision contained in prospectus rules; (3) any other provision made in accordance with the Prospectus Directive (ie European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading), applicable in relation to the admission of the transferable securities to trading on the regulated market in question: Financial Services and Markets Act 2000 s 87L(5) (as added: see note 3). As to the meaning of 'prospectus rules' see PARA 385 note 18.

6 Financial Services and Markets Act 2000 s 87L(2)(a) (as added: see note 3). As to the time at which a requirement takes effect see PARA 414 note 6.

7 Financial Services and Markets Act 2000 s 87L(2)(b) (as added: see note 3). See note 6.

8 As to the meaning of 'market operator' see PARA 385 note 21.

9 Financial Services and Markets Act 2000 s 87L(3)(a) (as added: see note 3). See note 6.

10 Financial Services and Markets Act 2000 s 87L(3)(b) (as added: see note 3). See note 6.

11 Financial Services and Markets Act 2000 s 87L(4) (as added: see note 3). See note 6.

12 Financial Services and Markets Act 2000 s 87O(2) (as added: see note 3). As to the procedure see further PARA 406 the text and note 10.

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#### **408. Public censure of issuer.**

If the competent authority<sup>1</sup> finds that (1) an issuer of transferable securities<sup>2</sup>; (2) a person offering transferable securities to the public<sup>3</sup>; or (3) a person requesting the admission of transferable securities to trading on a regulated market<sup>4</sup>, is failing or has failed to comply with his obligations under an applicable provision<sup>5</sup>, it may publish a statement to that effect<sup>6</sup>. If the competent authority proposes to publish a statement, it must give the person a warning notice setting out the terms of the proposed statement<sup>7</sup>. If, after considering any representations made in response to the warning notice, the competent authority decides to make the proposed statement, it must give the person a decision notice setting out the terms of the statement<sup>8</sup>.

A person to whom a decision notice is given under the provisions above may refer the matter to the Financial Services and Markets Tribunal<sup>9</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 87M(1)(a) (ss 87M, 87N added by SI 2005/1433). As to transferable securities see PARA 395. As to the meaning of 'issuer' see PARA 385 note 21.

3 Financial Services and Markets Act 2000 s 87M(1)(b) (as added: see note 2).

4 Financial Services and Markets Act 2000 s 87M(1)(c) (as added: see note 2). As to the meaning of 'regulated market' see PARA 385 note 13.

5 'Applicable provision' means (1) a provision of the Financial Services and Markets Act 2000 Pt VI (ss 72-103); (2) a provision contained in prospectus rules; (3) any other provision made in accordance with the Prospectus Directive (ie European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading), applicable to a prospectus in relation to the transferable securities in question: Financial Services and Markets Act 2000 s 87M(4) (as added: see note 2). 'Prospectus' includes a supplementary prospectus: s 87M(5) (as so added). As to supplementary prospectuses see PARA 403. As to the meaning of 'prospectus rules' see PARA 385 note 18.

6 Financial Services and Markets Act 2000 s 87M(1) (as added: see note 2).



7 Financial Services and Markets Act 2000 s 87M(2) (as added: see note 2). As to warning notices see PARA 769.

8 Financial Services and Markets Act 2000 s 87M(3) (as added: see note 2). As to decision notices see PARA 770.

9 Financial Services and Markets Act 2000 s 87N(2) (as added: see note 2). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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#### **409. Exercise of powers at request of competent authority of another EEA state.**

If (1) the competent authority<sup>1</sup> of an EEA state other than the United Kingdom<sup>2</sup> has approved a prospectus<sup>3</sup>; (2) the transferable securities<sup>4</sup> to which the prospectus relates have been offered to the public in the United Kingdom or their admission to trading on a regulated market<sup>5</sup> has been requested<sup>6</sup>; and (3) that competent authority makes a request that the competent authority assist it in the performance of its functions under the law of that state in connection with the Prospectus Directive<sup>7</sup>:

- 1040 (a) for the purpose of complying with the request mentioned in head (3) above, the powers<sup>8</sup> to suspend or prohibit an offer to the public or admission to trading on a regulated market may be exercised as if the prospectus were one which had been approved by the competent authority<sup>9</sup>;
- 1041 (b) the right<sup>10</sup> to refer matters to the Financial Services and Markets Tribunal<sup>11</sup> does not apply to an exercise of those powers as a result<sup>12</sup>;
- 1042 (c) the procedure relating to the exercise of the powers of suspension or prohibition mentioned in head (a) above applies in part<sup>13</sup> to such an exercise of those powers<sup>14</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 Financial Services and Markets Act 2000 s 87P(1)(a) (s 87P added by SI 2005/1433).

4 As to transferable securities see PARA 395.

5 As to the meaning of 'regulated market' see PARA 385 note 13.

6 Financial Services and Markets Act 2000 s 87P(1)(b) (as added: see note 3).

7 Financial Services and Markets Act 2000 s 87P(1)(c) (as added: see note 3). The reference is to European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading.

8 I.e. conferred by the Financial Services and Markets Act 2000 ss 87K, 87L: see PARAS 406-407.

9 Financial Services and Markets Act 2000 s 87P(2) (as added: see note 3).

10 I.e. under the Financial Services and Markets Act 2000 s 87N: see PARAS 406, 408.

- 11 As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 12 Financial Services and Markets Act 2000 s 87P(3) (as added: see note 3).
- 13 Ie the Financial Services and Markets Act 2000 s 87(1), (2), (3)(a)-(d), (4), (5), (8): see PARA 398.
- 14 Financial Services and Markets Act 2000 s 87P(4) (as added: see note 3).

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## ***F. SUSPENSION AND REMOVAL OF FINANCIAL INSTRUMENTS FROM TRADING***

### **410. Financial Services Authority's power to require suspension or removal of financial instruments from trading.**

The Financial Services Authority<sup>1</sup> may, for the purpose of protecting (1) the interests of investors; or (2) the orderly functioning of the financial markets, require an institution<sup>2</sup> to suspend or remove a financial instrument<sup>3</sup> from trading<sup>4</sup>.

If the Authority exercises the above power<sup>5</sup>, the institution concerned or, if any, the issuer<sup>6</sup> of the financial instrument concerned may refer the matter to the Financial Services and Markets Tribunal<sup>7</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 'Institution' means: (1) a recognised investment exchange, other than an overseas investment exchange (within the meaning of the Financial Services and Markets Act 2000 Pt XVIII (ss 285-313)) (see PARAS 684 note 1, 709 note 12); (2) an investment firm (see PARA 21 note 5); (3) a credit institution authorised under the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions), when carrying on investment services and activities (see PARA 355 note 11); or (4) an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its registered office (or if it does not have a registered office, its head office) in an EEA state, but does not include an EEA firm qualifying for authorisation under the Financial Services and Markets Act 2000 Sch 3 (see PARA 315): s 313D (ss 313A, 313D added by SI 2007/126).

3 'Financial instrument' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.17: Financial Services and Markets Act 2000 s 313D (as added: see note 2).

4 Financial Services and Markets Act 2000 s 313A(1) (as added: see note 2). For these purposes 'trading' includes trading otherwise than on a regulated market or a multilateral trading facility: s 313A(3) (as so added). 'Regulated market' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.14: Financial Services and Markets Act 2000 s 313D (as so added). 'Multilateral trading facility' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.15: Financial Services and Markets Act 2000 s 313D (as so added).

5 Ie the power conferred by the Financial Services and Markets Act 2000 s 313A(1).

6 'Issuer', in relation to a financial instrument, means the person who issued the instrument: Financial Services and Markets Act 2000 s 313D (as added: see note 2).

7 Financial Services and Markets Act 2000 s 313A(2) (as added: see note 2). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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#### **411. Procedure for suspension or removal of financial instruments from trading.**

A requirement imposed on an institution<sup>1</sup> under the provision on suspension or removal from trading<sup>2</sup> (a 'relevant requirement') takes effect immediately, if the notice referred to below<sup>3</sup> states that this is the case; in any other case, on such date as may be specified in the notice<sup>4</sup>.

If the Financial Services Authority<sup>5</sup> proposes to impose a relevant requirement on an institution, or imposes such a requirement with immediate effect, it must give written notice to (1) the institution; and (2) if any, the issuer<sup>6</sup> of the financial instrument<sup>7</sup> in question<sup>8</sup>.

The notice must: (a) give details of the relevant requirement<sup>9</sup>; (b) state the Authority's reasons for imposing the requirement and choosing the date on which it took effect or takes effect<sup>10</sup>; (c) inform the recipient that he may make representations to the Authority within such period as may be specified by the notice (whether or not he has referred the matter to the Financial Services and Markets Tribunal)<sup>11</sup>; (d) inform him of the date on which the requirement took effect or takes effect<sup>12</sup>; and (e) inform him of his right to refer the matter to the Tribunal and give an indication of the procedure on such a reference<sup>13</sup>.

The Authority may extend the period within which representations may be made to it<sup>14</sup>. If, having considered any representations made to it by the institution or any issuer, the Authority decides to impose the relevant requirement proposed, or if it has been imposed, not to revoke it, it must give the institution and any issuer written notice<sup>15</sup>. If, having considered any representations made to it by the institution or any issuer, the Authority decides not to impose the relevant requirement proposed, or to revoke a requirement which has been imposed, it must give the institution and any issuer written notice<sup>16</sup>.

Where the Authority has imposed a relevant requirement on an institution, and the institution or any issuer of the financial instrument in question has applied for the revocation of the requirement<sup>17</sup>:

1043 (i) if the Authority decides to grant the application, it must give the institution and any issuer written notice of its decision<sup>18</sup>;

1044 (ii) if the Authority proposes to refuse the application, it must give the institution and any issuer a warning notice<sup>19</sup>.

If, having considered any representations made in response to the warning notice, the Authority decides to refuse the application, it must give the institution and any issuer a decision notice<sup>20</sup>.

1 As to the meaning of 'institution' see PARA 410 note 2.

2 Ie the Financial Services and Markets Act 2000 s 313A: see PARA 410.

3 Ie the notice under the Financial Services and Markets Act 2000 s 313B(2).

4 Financial Services and Markets Act 2000 s 313B(1) (s 313B added by SI 2007/126).

- 5 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 6 As to the meaning of 'issuer' see PARA 410 note 6.
- 7 As to the meaning of 'financial instrument' see PARA 410 note 3.
- 8 Financial Services and Markets Act 2000 s 313B(2) (as added: see note 4).
- 9 Financial Services and Markets Act 2000 s 313B(3)(a) (as added: see note 4).
- 10 Financial Services and Markets Act 2000 s 313B(3)(b) (as added: see note 4).
- 11 Financial Services and Markets Act 2000 s 313B(3)(c) (as added: see note 4). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 12 Financial Services and Markets Act 2000 s 313B(3)(d) (as added: see note 4).
- 13 Financial Services and Markets Act 2000 s 313B(3)(e) (as added: see note 4).
- 14 Financial Services and Markets Act 2000 s 313B(4) (as added: see note 4).
- 15 Financial Services and Markets Act 2000 s 313B(5) (as added: see note 4). A notice given under s 313B(5) must inform the recipient of his right to refer the matter to the Tribunal: s 313B(7) (as so added).
- 16 Financial Services and Markets Act 2000 s 313B(6) (as added: see note 4).
- 17 Financial Services and Markets Act 2000 s 313B(8) (as added: see note 4).
- 18 Financial Services and Markets Act 2000 s 313B(9) (as added: see note 4).
- 19 Financial Services and Markets Act 2000 s 313B(10) (as added: see note 4). As to warning notices see PARA 769.
- 20 Financial Services and Markets Act 2000 s 313B(11) (as added: see note 4). As to decision notices see PARA 770. If the Authority gives a decision notice under s 313B(11), the recipient may refer the matter to the Tribunal: s 313B(12) (as so added).

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#### **412. Notification in regard to suspension or removal of financial instruments from trading.**

If the Financial Services Authority<sup>1</sup> exercises its power of suspension or removal<sup>2</sup> in relation to a financial instrument<sup>3</sup> traded on a regulated market<sup>4</sup>, it must as soon as reasonably practicable (1) publish its decision in such manner as it considers appropriate<sup>5</sup>; and (2) inform the competent authorities<sup>6</sup> of all other EEA states<sup>7</sup> of its decision<sup>8</sup>.

If the Authority receives notice from a recognised investment exchange<sup>9</sup> that the exchange has suspended or removed a financial instrument from trading on a regulated market operated by it, the Authority must inform the competent authorities of all other EEA states of the action taken by the exchange<sup>10</sup>.

If the Authority receives notice from the competent authority of another EEA state that that authority<sup>11</sup> has required the suspension of a financial instrument from trading<sup>12</sup>, the Authority must (a) require each recognised investment exchange to suspend the instrument from trading

on any regulated market operated by the exchange<sup>13</sup>; and (b) require each institution<sup>14</sup> operating a multilateral trading facility<sup>15</sup> to suspend the instrument from trading on that facility<sup>16</sup>, unless such a step would be likely to cause significant damage to the interests of investors or the orderly functioning of the financial markets<sup>17</sup>.

If the Authority receives notice from the competent authority of another EEA state that that authority<sup>18</sup> has required the removal of a financial instrument from trading<sup>19</sup>, the Authority must (i) require each recognised investment exchange to remove the instrument from trading on any regulated market operated by the exchange<sup>20</sup>; and (ii) require each institution operating a multilateral trading facility to remove the instrument from trading on that facility<sup>21</sup>, unless such a step would be likely to cause significant damage to the interests of investors or the orderly functioning of the financial markets<sup>22</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 I.e. the power under the Financial Services and Markets Act 2000 s 313A(1): see PARA 410.

3 As to the meaning of 'financial instrument' see PARA 410 note 3.

4 As to the meaning of 'regulated market' see PARA 410 note 4.

5 Financial Services and Markets Act 2000 s 313C(1)(a) (s 313C added by SI 2007/126).

6 'Competent authority' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.22: Financial Services and Markets Act 2000 s 313C(6) (as added: see note 5).

7 As to the meaning of 'EEA state' see PARA 315 note 1.

8 Financial Services and Markets Act 2000 s 313C(1)(b) (as added: see note 5).

9 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

10 Financial Services and Markets Act 2000 s 313C(2) (as added: see note 5).

11 I.e. pursuant to the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 41.2.

12 Financial Services and Markets Act 2000 s 313C(3)(a) (as added: see note 5).

13 Financial Services and Markets Act 2000 s 313C(4)(a) (as added: see note 5).

14 As to the meaning of 'institution' see PARA 410 note 2.

15 As to the meaning of 'multilateral trading facility' see PARA 410 note 4.

16 Financial Services and Markets Act 2000 s 313C(4)(b) (as added: see note 5).

17 Financial Services and Markets Act 2000 s 313C(4) (as added: see note 5).

18 See note 11.

19 Financial Services and Markets Act 2000 s 313C(3)(b) (as added: see note 5).

20 Financial Services and Markets Act 2000 s 313C(5)(a) (as added: see note 5).

21 Financial Services and Markets Act 2000 s 313C(5)(b) (as added: see note 5).

22 Financial Services and Markets Act 2000 s 313C(5) (as added: see note 5).

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## ***G. RIGHTS OF INVESTORS; REGISTER OF INVESTORS***

### **413. Rights of investors.**

Where a person agrees to buy or subscribe for transferable securities<sup>1</sup> in circumstances where the final offer price or the amount of transferable securities to be offered to the public is not included in the prospectus, he may withdraw his acceptance before the end of the withdrawal period<sup>2</sup>. This does not apply if the prospectus contains (1) in the case of the amount of transferable securities to be offered to the public, the criteria or conditions (or both) according to which that element will be determined<sup>3</sup>; or (2) in the case of price, the criteria or conditions (or both) according to which that element will be determined or the maximum price<sup>4</sup>. The withdrawal period begins with the investor's acceptance; and ends at the end of the second working day after the date on which the competent authority is informed<sup>5</sup> of the information<sup>6</sup>.

Where a supplementary prospectus has been published and, prior to the publication, a person agreed to buy or subscribe for transferable securities to which it relates, he may withdraw his acceptance before the end of the period of two working days beginning with the first working day after the date on which the supplementary prospectus was published<sup>7</sup>.

1 As to transferable securities see PARA 395.

2 Financial Services and Markets Act 2000 s 87Q(1) (s 87Q added by SI 2005/1433).

3 Financial Services and Markets Act 2000 s 89Q(3)(a) (as added: see note 2).

4 Financial Services and Markets Act 2000 s 89Q(3)(b) (as added: see note 2).

5 In accordance with the Financial Services and Markets Act 2000 s 87A(7): see PARA 399.

6 Financial Services and Markets Act 2000 s 89Q(2) (as added: see note 2).

7 Financial Services and Markets Act 2000 s 89Q(4) (as added: see note 2). As to supplementary prospectuses see PARA 403.

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### **414. Registered investors.**

The competent authority<sup>1</sup> must establish and maintain<sup>2</sup> a register of investors for certain purposes<sup>3</sup>. An individual may not be entered in the register unless he is resident in the United Kingdom<sup>4</sup>, and he meets certain criteria<sup>5</sup>. A company may not be entered in the register unless it falls within the meaning of 'small and medium-sized enterprises' in the Prospectus Directive<sup>6</sup>, and its registered office is in the United Kingdom<sup>7</sup>. A person who does not fall within the provisions above may not be entered in the register<sup>8</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Prospectus Rules (PR). As to the Handbook generally see PARA 22.

2 In accordance with the Financial Services and Markets Act 2000 s 87R and prospectus rules. As to the meaning of 'prospectus rules' see PARA 385 note 18.

3 Financial Services and Markets Act 2000 s 87R(1) (s 87R added by SI 2005/1433). The register is for the purposes of the Financial Services and Markets Act 2000 s 86: see PARA 397.

4 As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 Financial Services and Markets Act 2000 s 87R(2) (as added: see note 3). He must meet at least two of the criteria mentioned in European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading, art 2.2: Financial Services and Markets Act 2000 s 87R(2) (as so added).

6 In European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) art 2.1.

7 Financial Services and Markets Act 2000 s 87R(3) (as added: see note 3).

8 Financial Services and Markets Act 2000 s 87R(4) (as added: see note 3).

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## **(v) Transparency Obligations**

### **A. IN GENERAL**

#### **415. Transparency rules generally.**

The competent authority<sup>1</sup> may make rules for the purposes of the Transparency Obligations Directive<sup>2</sup>. The rules may include provision for dealing with any matters arising out of or related to any provision of the Directive<sup>3</sup>.

The competent authority may also make rules (1) for the purpose of ensuring that voteholder information<sup>4</sup> in respect of voting shares<sup>5</sup> traded on a UK market<sup>6</sup> other than a regulated market<sup>7</sup> is made public or notified to the competent authority<sup>8</sup>; (2) providing for persons who hold comparable instruments<sup>9</sup> in respect of voting shares to be treated, in the circumstances specified in the rules, as holding some or all of the voting rights in respect of those shares<sup>10</sup>.

Such rules<sup>11</sup> may, in particular, make provision:

- 1045 (a) specifying how the proportion of (i) the total voting rights in respect of shares in an issuer<sup>12</sup>, or (ii) the total voting rights in respect of a particular class of shares in an issuer, held by a person is to be determined<sup>13</sup>;
- 1046 (b) specifying the circumstances in which, for the purposes of any determination of the voting rights held by a person ('P') in respect of voting shares in an issuer, any voting rights held, or treated<sup>14</sup> as held, by another person in respect of voting shares in the issuer are to be regarded as held by P<sup>15</sup>;
- 1047 (c) specifying the nature of the information which must be included in any notification<sup>16</sup>;
- 1048 (d) about the form of any notification<sup>17</sup>;
- 1049 (e) requiring any notification to be given within a specified period<sup>18</sup>;

- 1050 (f) specifying the manner in which any information is to be made public and the period within which it must be made public<sup>19</sup>;
- 1051 (g) specifying circumstances in which any of the requirements imposed by such rules does not apply<sup>20</sup>.

Transparency rules may impose the same obligations on a person who has applied for the admission of transferable securities<sup>21</sup> to trading on a regulated market without the issuer's consent as they impose on an issuer of transferable securities<sup>22</sup>. Transparency rules that require a person to make information public may include provision authorising the competent authority to make the information public in the event that the person fails to do so<sup>23</sup>. The competent authority may make public any information notified to the authority in accordance with transparency rules<sup>24</sup>. Transparency rules may make provision by reference to any provision of any rules made by the Panel on Takeovers and Mergers<sup>25</sup> under Part 28 of the Companies Act 2006<sup>26</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Disclosure Rules and Transparency Rules (DTR). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 89A(1) (ss 89A, 89B, 89F, 89G added by the Companies Act 2006 s 1266(1)). Rules under the Financial Services and Markets Act 2000 s 89A are referred to as 'transparency rules': s 89A(5) (as so added), s 103(1) (s 103 substituted by SI 2005/1433; definition added by the Companies Act 2006 s 1265). The reference to the Transparency Obligations Directive is a reference to European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. Nothing in the Financial Services and Markets Act 2000 ss 89A-89G (see also PARAS 416-419) affects the generality of the power to make rules under s 89A: s 89A(6) (as so added). Sections 89A-89G are without prejudice to any other power conferred by Pt VI (ss 72-103) to make Part VI rules: s 89G(5) (as so added). As to the meaning of 'Part VI rules' see PARA 385.

3 Financial Services and Markets Act 2000 s 89A(2) (as added: see note 2).

4 'Voteholder information' in respect of voting shares means information relating to the proportion of voting rights held by a person in respect of the shares: Financial Services and Markets Act 2000 s 89B(3) (as added: see note 2), s 103(1) (s 103 as substituted (see note 2); definition added by the Companies Act 2006 s 1265).

5 'Voting shares' means shares of an issuer to which voting rights are attached: Financial Services and Markets Act 2000 s 89F(4) (as added: see note 2). See also note 10.

6 'UK market' means a market that is situated or operating in the United Kingdom: s 89F(4) (as added: see note 2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

7 As to the meaning of 'regulated market' see PARA 385 note 13.

8 Financial Services and Markets Act 2000 s 89A(3)(a) (as added: see note 2).

9 See note 10 head (3).

10 Financial Services and Markets Act 2000 s 89A(3)(b) (as added: see note 2). For the purposes of ss 89A-89G (see also PARAS 416-419):

479 (1) the voting rights in respect of any voting shares are the voting rights attached to those shares (s 89F(1)(a) (as so added));

480 (2) a person is to be regarded as holding the voting rights in respect of the shares (a) if, by virtue of those shares, he is a shareholder within the meaning of European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) art 2.1(e); (b) if, and to the extent that, he is entitled to acquire, dispose of or exercise those voting rights in one or more of the cases mentioned in art 10(a)-(h); (c) if he holds, directly or indirectly, a financial instrument which results in an entitlement to acquire the shares and is an Article 13 instrument (Financial Services and Markets Act 2000 s 89F(1)(b) (as so added)); and



- 481 (3) a person holds a 'comparable instrument' in respect of voting shares if he holds, directly or indirectly, a financial instrument in relation to the shares which has similar economic effects to an Article 13 instrument (whether or not the financial instrument results in an entitlement to acquire the shares) (s 89F(1)(c) (as so added)).

As to the meaning of 'financial instrument' see PARA 385 note 12. 'Article 13 instrument' means a financial instrument of a type determined by the European Commission under European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) art 13.2: Financial Services and Markets Act 2000 s 89F(4) (as so added).

Transparency rules under s 89A(3)(b) may make different provision for different descriptions of comparable instrument: s 89F(2) (as so added). For the purposes of ss 89A-89G two or more persons may, at the same time, each be regarded as holding the same voting rights: s 89F(3) (as so added).

11 The rules under the Financial Services and Markets Act 2000 s 89A.

12 Financial Services and Markets Act 2000 s 89A(4)(a)(i) (as added: see note 2). As to the meaning of 'issuer' see PARA 385 note 21.

13 Financial Services and Markets Act 2000 s 89A(4)(a)(ii) (as added: see note 2).

14 The by virtue of the Financial Services and Markets Act 2000 s 89A(3)(b): see head (2) in the text.

15 Financial Services and Markets Act 2000 s 89A(4)(b) (as added: see note 2).

16 Financial Services and Markets Act 2000 s 89A(4)(c) (as added: see note 2).

17 Financial Services and Markets Act 2000 s 89A(4)(d) (as added: see note 2).

18 Financial Services and Markets Act 2000 s 89A(4)(e) (as added: see note 2).

19 Financial Services and Markets Act 2000 s 89A(4)(f) (as added: see note 2).

20 Financial Services and Markets Act 2000 s 89A(4)(g) (as added: see note 2).

21 As to transferable securities see PARA 395

22 Financial Services and Markets Act 2000 s 89G(1) (as added: see note 2).

23 Financial Services and Markets Act 2000 s 89G(2) (as added: see note 2).

24 Financial Services and Markets Act 2000 s 89G(3) (as added: see note 2).

25 As to the Panel on Takeovers and Mergers see PARA 78.

26 Financial Services and Markets Act 2000 s 89G(2) (as added: see note 2). The reference is to the Companies Act 2006 Pt 28 (ss 942-992): see **COMPANIES** vol 15 (2009) PARA 1480 et seq.

## UPDATE

### 415 Transparency rules generally

NOTE 10--'Financial instrument' in this context has the meaning given in European Parliament and EC Council Directive 2004/39 (on markets in financial instruments) art 4.1(17): Financial Services and Markets Act 2000 s 89F(4) (definition added by SI 2008/3053).

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#### 416. Provision of voteholder information.

Transparency rules<sup>1</sup> may make provision for voteholder information<sup>2</sup> in respect of voting shares<sup>3</sup> to be notified, in circumstances specified in the rules to the issuer<sup>4</sup> or to the public, or to both<sup>5</sup>. Transparency rules may also make provision for voteholder information notified to the issuer to be notified at the same time to the competent authority<sup>6</sup>.

Transparency rules may require notification of voteholder information relating to a person (1) initially, not later than such date as may be specified in the rules for the purposes of the transitional provisions of the Transparency Obligations Directive<sup>7</sup>; and (2) subsequently, in accordance with the following provisions<sup>8</sup>.

Transparency rules under head (2) above may require notification of voteholder information relating to a person only where there is a notifiable change<sup>9</sup> in the proportion of (a) the total voting rights in respect of shares in the issuer<sup>10</sup>; or (b) the total voting rights in respect of a particular class of share in the issuer<sup>11</sup>, held by the person<sup>12</sup>.

1 As to the meaning of 'transparency rules' see PARA 415 note 2. As to transparency rules generally see PARA 415.

2 As to the meaning of 'voteholder information' see PARA 415 note 4.

3 As to the meaning of 'voting shares' see PARA 415 note 5.

4 As to the meaning of 'issuer' see PARA 385 note 21.

5 Financial Services and Markets Act 2000 s 89B(1) (s 89B added by the Companies Act 2006 s 1266(1)).

6 Financial Services and Markets Act 2000 s 89B(2) (as added: see note 5). As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Disclosure Rules and Transparency Rules (DTR). As to the Handbook generally see PARA 22.

7 Financial Services and Markets Act 2000 s 89B(4)(a) (as added: see note 5). The reference is to European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, art 30.2 first indent.

8 Financial Services and Markets Act 2000 s 89B(4)(b) (as added: see note 5). The reference is to s 89B(5)-(7): see the text and notes 9-12.

9 For these purposes, there is a 'notifiable change' in the proportion of voting rights held by a person when the proportion changes (1) from being a proportion less than a designated proportion to a proportion equal to or greater than that designated proportion; (2) from being a proportion equal to a designated proportion to a proportion greater or less than that designated proportion; or (3) from being a proportion greater than a designated proportion to a proportion equal to or less than that designated proportion: Financial Services and Markets Act 2000 s 89B(6) (as added: see note 5). In s 89B(6) 'designated' means designated by the rules: s 89B(7) (as so added).

10 Financial Services and Markets Act 2000 s 89B(5)(a) (as added: see note 5).

11 Financial Services and Markets Act 2000 s 89B(5)(b) (as added: see note 5).

12 Financial Services and Markets Act 2000 s 89B(5) (as added: see note 5).

LISTING/(v) Transparency Obligations/A. IN GENERAL/417. Provision of information by issuers of transferable securities.

#### **417. Provision of information by issuers of transferable securities.**

Transparency rules<sup>1</sup> may make provision requiring the issuer<sup>2</sup> of transferable securities<sup>3</sup>, in circumstances specified in the rules (1) to make public information to which this provision applies<sup>4</sup>; or (2) to notify to the competent authority<sup>5</sup> information to which this provision applies<sup>6</sup>, or to do both<sup>7</sup>.

In the case of every issuer, this provision applies to:

- 1052 (a) information on annual financial reports required by the Transparency Obligations Directive<sup>8</sup>;
- 1053 (b) information relating to the rights attached to the transferable securities, including information about the terms and conditions of those securities which could indirectly affect those rights<sup>9</sup>; and
- 1054 (c) information about new loan issues and about any guarantee or security in connection with any such issue<sup>10</sup>.

In the case of an issuer of debt securities<sup>11</sup>, this provision also applies to information on half-yearly financial reports required by the Transparency Obligations Directive<sup>12</sup>.

In the case of an issuer of shares, this provision also applies to:

- 1055 (i) information on half-yearly financial reports required by the Directive<sup>13</sup>;
- 1056 (ii) information on interim management statements required by the Directive<sup>14</sup>;
- 1057 (iii) voteholder information (A) notified to the issuer<sup>15</sup>; or (B) relating to the proportion of voting rights<sup>16</sup> held by the issuer in respect of shares in the issuer<sup>17</sup>;
- 1058 (iv) information relating to the issuer's capital<sup>18</sup>; and
- 1059 (v) information relating to the total number of voting rights in respect of shares or shares of a particular class<sup>19</sup>.

1 As to the meaning of 'transparency rules' see PARA 415 note 2. As to transparency rules generally see PARA 415.

2 As to the meaning of 'issuer' see PARA 385 note 21.

3 As to transferable securities see PARA 395.

4 Financial Services and Markets Act 2000 s 89C(1)(a) (s 89C added by the Companies Act 2006 s 1266(1)). The reference is to the Financial Services and Markets Act 2000 s 89C.

5 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Disclosure Rules and Transparency Rules (DTR). As to the Handbook generally see PARA 22.

6 Financial Services and Markets Act 2000 s 89C(1)(b) (as added: see note 4).

7 Financial Services and Markets Act 2000 s 89C(1) (as added: see note 4).

8 Financial Services and Markets Act 2000 s 89C(2)(a) (as added: see note 4). The reference is to information required by European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, art 4.

9 Financial Services and Markets Act 2000 s 89C(2)(b) (as added: see note 4).

10 Financial Services and Markets Act 2000 s 89C(2)(c) (as added: see note 4).

- 11 'Debt securities' has the meaning given in European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) art 2.1(b): Financial Services and Markets Act 2000 s 102A(3A) (added by the Companies Act 2006 Sch 15 Pt 1 paras 1, 10(1), (2)).
- 12 Financial Services and Markets Act 2000 s 89C(3) (as added: see note 4). The reference is to information required by European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) art 5.
- 13 Financial Services and Markets Act 2000 s 89C(4)(a) (as added: see note 4). See note 12.
- 14 Financial Services and Markets Act 2000 s 89C(4)(b) (as added: see note 4). The reference is to information required by European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) art 6.
- 15 Financial Services and Markets Act 2000 s 89C(4)(c)(i) (as added: see note 4).
- 16 As to voting rights generally see PARA 415 note 10.
- 17 Financial Services and Markets Act 2000 s 89C(4)(c)(ii) (as added: see note 4).
- 18 Financial Services and Markets Act 2000 s 89C(4)(d) (as added: see note 4).
- 19 Financial Services and Markets Act 2000 s 89C(4)(e) (as added: see note 4).

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#### **418. Notification of voting rights held by issuer.**

Transparency rules<sup>1</sup> may require notification of voteholder information<sup>2</sup> relating to the proportion of voting rights<sup>3</sup> held by an issuer<sup>4</sup> in respect of voting shares<sup>5</sup> in the issuer (1) initially, not later than such date as may be specified in the rules for the purposes of the transitional provisions of the Transparency Obligations Directive<sup>6</sup>; and (2) subsequently, in accordance with the following provisions<sup>7</sup>.

Transparency rules under head (2) above may require notification of voteholder information relating to the proportion of voting rights held by an issuer in respect of voting shares in the issuer only where there is a notifiable change<sup>8</sup> in the proportion of (a) the total voting rights in respect of shares in the issuer<sup>9</sup>; or (b) the total voting rights in respect of a particular class of share in the issuer<sup>10</sup>, held by the issuer<sup>11</sup>.

- 1 As to the meaning of 'transparency rules' see PARA 415 note 2. As to transparency rules generally see PARA 415. See also the Financial Services Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Disclosure Rules and Transparency Rules (DTR). As to the Authority see PARAS 4, 6 et seq. As to the Handbook generally see PARA 22.
- 2 As to the meaning of 'voteholder information' see PARA 415 note 4.
- 3 As to voting rights generally see PARA 415 note 10.
- 4 As to the meaning of 'issuer' see PARA 385 note 21.
- 5 As to the meaning of 'voting shares' see PARA 415 note 5.
- 6 Financial Services and Markets Act 2000 s 89D(1)(a) (s 89D added by the Companies Act 2006 s 1266(1)). The reference is to European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating

to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, art 30.2 second indent.

7 Financial Services and Markets Act 2000 s 89D(1)(a) (as added: see note 6). The reference is to s 89D(2)-(4): see the text and notes 8-11.

8 For these purposes there is a 'notifiable change' in the proportion of voting rights held by a person when the proportion changes (1) from being a proportion less than a designated proportion to a proportion equal to or greater than that designated proportion; (2) from being a proportion equal to a designated proportion to a proportion greater or less than that designated proportion; or (3) from being a proportion greater than a designated proportion to a proportion equal to or less than that designated proportion: Financial Services and Markets Act 2000 s 89D(3) (as added: see note 6). In s 89D(3) 'designated' means designated by the rules: s 89D(4) (as so added).

9 Financial Services and Markets Act 2000 s 89D(2)(a) (as added: see note 6).

10 Financial Services and Markets Act 2000 s 89D(2)(b) (as added: see note 6).

11 Financial Services and Markets Act 2000 s 89D(2) (as added: see note 6).

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#### **419. Notification of proposed amendment of issuer's constitution.**

Transparency rules<sup>1</sup> may make provision requiring an issuer<sup>2</sup> of transferable securities<sup>3</sup> that are admitted to trading on a regulated market<sup>4</sup> to notify a proposed amendment to its constitution (1) to the competent authority<sup>5</sup>; and (2) to the market on which the issuer's securities are admitted<sup>6</sup>, at times and in circumstances specified in the rules<sup>7</sup>.

1 As to the meaning of 'transparency rules' see PARA 415 note 2. As to transparency rules generally see PARA 415. See also the Financial Services Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Disclosure Rules and Transparency Rules (DTR). As to the Authority see PARAS 4, 6 et seq. As to the Handbook generally see PARA 22.

2 As to the meaning of 'issuer' see PARA 385 note 21.

3 As to transferable securities see PARA 395.

4 As to the meaning of 'regulated market' see PARA 385 note 13.

5 Financial Services and Markets Act 2000 s 89E(a) (s 89E added by the Companies Act 2006 s 1266(1)). As to the meaning of 'competent authority' see PARA 385 note 2.

6 Financial Services and Markets Act 2000 s 89E(b) (as added: see note 5).

7 Financial Services and Markets Act 2000 s 89E (as added: see note 5).

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## ***B. POWER OF COMPETENT AUTHORITY TO CALL FOR INFORMATION***

### **420. Power to call for information.**

The competent authority<sup>1</sup> may by notice in writing given to a person to whom this provision applies<sup>2</sup> require him (1) to provide specified<sup>3</sup> information or information of a specified description<sup>4</sup>; or (2) to produce specified documents or documents of a specified description<sup>5</sup>.

This provision<sup>6</sup> applies to:

- 1060 (1) an issuer<sup>7</sup> in respect of whom transparency rules<sup>8</sup> have effect<sup>9</sup>;
- 1061 (2) a voteholder<sup>10</sup>;
- 1062 (3) an auditor of an issuer<sup>11</sup>, or a voteholder<sup>12</sup>;
- 1063 (4) a person who controls<sup>13</sup> a voteholder<sup>14</sup>;
- 1064 (5) a person controlled by a voteholder<sup>15</sup>;
- 1065 (6) a director or other similar officer of an issuer<sup>16</sup>;
- 1066 (7) a director or other similar officer of a voteholder or, where the affairs of a voteholder are managed by its members, a member of the voteholder<sup>17</sup>.

This provision<sup>18</sup> applies only to information and documents reasonably required in connection with the exercise by the competent authority of functions conferred on it by or under the provisions on transparency rules<sup>19</sup>.

Information or documents required under this provision must be provided or produced (a) before the end of such reasonable period as may be specified<sup>20</sup>; and (b) at such place as may be specified<sup>21</sup>. If a person claims a lien on a document, its production under this provision does not affect the lien<sup>22</sup>.

The competent authority may require an issuer to make public any information provided to the authority<sup>23</sup>. If the issuer fails to comply with this requirement, the competent authority may, after seeking representations from the issuer, make the information public<sup>24</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Disclosure Rules and Transparency Rules (DTR). As to the Handbook generally see PARA 22.

2 I.e. a person to whom the Financial Services and Markets Act 2000 s 89H applies: see s 89H(1) (ss 89H, 89J added by the Companies Act 2006 s 1267). See also heads (1)-(7) in the text.

3 For the purposes of the Financial Services and Markets Act 2000 ss 89H, 89J 'specified' means specified in the notice: s 89J(3) (as added: see note 2).

4 Financial Services and Markets Act 2000 s 89H(1)(a) (as added: see note 2).

5 Financial Services and Markets Act 2000 s 89H(1)(b) (as added: see note 2).

6 I.e. the Financial Services and Markets Act 2000 s 89H.

7 As to the meaning of 'issuer' see PARA 385 note 21.

8 As to the meaning of 'transparency rules' see PARA 415 note 2. As to transparency rules generally see PARA 415.

9 Financial Services and Markets Act 2000 s 89H(2)(a) (as added: see note 2).

10 Financial Services and Markets Act 2000 s 89H(2)(b) (as added: see note 2). For the purposes of ss 89H, 89J 'voteholder' means a person who (1) holds voting rights in respect of any voting shares for the purposes of ss 89A-89G (transparency rules) (see PARAS 415-421); or (2) is treated as holding such rights by virtue of rules under s 89A(3)(b) (see PARA 415 head (2)): s 89J(3) (as so added).

- 11    le an issuer to whom the Financial Services and Markets Act 2000 s 89H applies.
- 12    Financial Services and Markets Act 2000 s 89H(2)(c) (as added: see note 2).
- 13    For the purposes of the Financial Services and Markets Act 2000 ss 89H, 89I 'control' and 'controlled' have the meaning set out in s 89J(4): s 89J(3) (as added: see note 2). For these purposes a person ('A') controls another person ('B') if (1) A holds a majority of the voting rights in B; (2) A is a member of B and has the right to appoint or remove a majority of the members of the board of directors (or, if there is no such board, the equivalent management body) of B; (3) A is a member of B and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in B; or (4) A has the right to exercise, or actually exercises, dominant influence or control over B: s 89J(4) (as so added). For the purposes of head (2): (a) any rights of a person controlled by A; and (b) any rights of a person acting on behalf of A or a person controlled by A, are treated as held by A: s 89J(5) (as so added).
- 14    Financial Services and Markets Act 2000 s 89H(2)(d) (as added: see note 2).
- 15    Financial Services and Markets Act 2000 s 89H(2)(e) (as added: see note 2).
- 16    Financial Services and Markets Act 2000 s 89H(2)(f) (as added: see note 2). The reference is to an issuer to whom s 89H applies.
- 17    Financial Services and Markets Act 2000 s 89H(2)(g) (as added: see note 2).
- 18    le the Financial Services and Markets Act 2000 s 89H.
- 19    Financial Services and Markets Act 2000 s 89H(3) (as added: see note 2). The reference is to ss 89A-89G: see PARAS 415-421.
- 20    Financial Services and Markets Act 2000 s 89H(4)(a) (as added: see note 2).
- 21    Financial Services and Markets Act 2000 s 89H(4)(b) (as added: see note 2).
- 22    Financial Services and Markets Act 2000 s 89H(5) (as added: see note 2). As to lien generally see **LIEN**.
- 23    Financial Services and Markets Act 2000 s 89J(1) (as added: see note 2). Such information is provided under s 89H: see the text and notes 1-22.
- 24    Financial Services and Markets Act 2000 s 89J(2) (as added: see note 2).

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#### **421. Requirements in connection with call for information.**

The competent authority<sup>1</sup> may require any information<sup>2</sup> to be provided in such form as it may reasonably require<sup>3</sup>.

The competent authority may require (1) any information provided, whether in a document or otherwise, to be verified in such manner as it may reasonably require<sup>4</sup>; (2) any document produced to be authenticated in such manner as it may reasonably require<sup>5</sup>.

If a document is produced in response to a requirement imposed under a power to call for information<sup>6</sup>, the competent authority may (a) take copies of or extracts from the document<sup>7</sup>; or (b) require the person producing the document, or any relevant person<sup>8</sup>, to provide an explanation of the document<sup>9</sup>.

If a person who is required<sup>10</sup> to produce a document fails to do so, the competent authority may require him to state, to the best of his knowledge and belief, where the document is<sup>11</sup>.

- 1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Disclosure Rules and Transparency Rules (DTR). As to the Handbook generally see PARA 22.
- 2 le any information provided by the Financial Services and Markets Act 2000 s 89H: see PARA 420.
- 3 Financial Services and Markets Act 2000 s 89I(1) (s 89I added by the Companies Act 2006 s 1267).
- 4 Financial Services and Markets Act 2000 s 89I(2)(a) (as added: see note 3).
- 5 Financial Services and Markets Act 2000 s 89I(2)(b) (as added: see note 3).
- 6 le under the Financial Services and Markets Act 2000 s 89H: see PARA 420.
- 7 Financial Services and Markets Act 2000 s 89I(3)(a) (as added: see note 3).
- 8 For these purposes, 'relevant person', in relation to a person who is required to produce a document, means a person who: (1) has been or is a director or controller of that person; (2) has been or is an auditor of that person; (3) has been or is an actuary, accountant or lawyer appointed or instructed by that person; or (4) has been or is an employee of that person: Financial Services and Markets Act 2000 s 89I(4) (as added: see note 3). As to the meaning of 'control' see PARA 420 note 13. As to directors and auditors generally see **COMPANIES**.
- 9 Financial Services and Markets Act 2000 s 89I(3)(b) (as added: see note 3).
- 10 le required under the Financial Services and Markets Act 2000 s 89H: see PARA 420.
- 11 Financial Services and Markets Act 2000 s 89I(5) (as added: see note 3).

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### ***C. POWERS EXERCISABLE WHERE INFRINGEMENT OF TRANSPARENCY OBLIGATION***

#### **422. Public censure of issuer.**

If the competent authority<sup>1</sup> finds that an issuer<sup>2</sup> of securities<sup>3</sup> admitted to trading on a regulated market<sup>4</sup> is failing or has failed to comply with an applicable transparency obligation<sup>5</sup>, it may publish a statement to that effect<sup>6</sup>.

If the competent authority proposes to publish a statement, it must give the issuer a warning notice setting out the terms of the proposed statement<sup>7</sup>. If, after considering any representations made in response to the warning notice, the competent authority decides to make the proposed statement, it must give the issuer a decision notice setting out the terms of the statement<sup>8</sup>. Such a notice<sup>9</sup> must inform the issuer of his right<sup>10</sup> to refer the matter to the Financial Services and Markets Tribunal<sup>11</sup> and give an indication of the procedure on such a reference<sup>12</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Disclosure Rules and Transparency Rules (DTR). As to the Handbook generally see PARA 22.



2 As to the meaning of 'issuer' see PARA 385 note 21.

3 As to the meaning of 'securities' see PARA 385 note 21.

4 As to the meaning of 'regulated market' see PARA 385 note 13.

5 For these purposes, 'transparency obligation' means an obligation under (1) a provision of transparency rules; or (2) any other provision made in accordance with European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market: Financial Services and Markets Act 2000 s 89K(5) (s 89K added by the Companies Act 2006 s 1268). As to the meaning of 'transparency rules' see PARA 415 note 2. As to transparency rules generally see PARA 415.

In relation to an issuer whose home state is a member state other than the United Kingdom, any reference to an applicable transparency obligation must be read subject to s 100A(2) (see PARA 385): Financial Services and Markets Act 2000 s 89K(6) (as so added). As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Financial Services and Markets Act 2000 s 89K(1) (as added: see note 5).

7 Financial Services and Markets Act 2000 s 89K(2) (as added: see note 5). As to warning notices see PARA 769.

8 Financial Services and Markets Act 2000 s 89K(3) (as added: see note 5). As to decision notices see PARA 770.

9 Ie a notice under the Financial Services and Markets Act 2000 s 89K.

10 Ie under the Financial Services and Markets Act 2000 s 89N: see PARA 424.

11 As to the Financial Services and Markets Tribunal see PARA 43 et seq.

12 Financial Services and Markets Act 2000 s 89K(4) (as added: see note 5).

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### **423. Power to suspend or prohibit trading of securities.**

The following provision<sup>1</sup> applies to securities<sup>2</sup> admitted to trading on a regulated market<sup>3</sup>. If the competent authority<sup>4</sup> has reasonable grounds for suspecting that an applicable transparency obligation<sup>5</sup> has been infringed by an issuer<sup>6</sup>, it may:

- 1067 (1) suspend trading in the securities for a period not exceeding ten days<sup>7</sup>;
- 1068 (2) prohibit trading in the securities<sup>8</sup>; or
- 1069 (3) make a request to the operator of the market on which the issuer's securities are traded to suspend trading in the securities for a period not exceeding ten days<sup>9</sup>, or to prohibit trading in the securities<sup>10</sup>.

If the competent authority has reasonable grounds for suspecting that a provision required by the Transparency Obligations Directive<sup>11</sup> has been infringed by a voteholder of an issuer, it may (a) prohibit trading in the securities<sup>12</sup>; or (b) make a request to the operator of the market on which the issuer's securities are traded to prohibit trading in the securities<sup>13</sup>. If the competent authority finds that an applicable transparency obligation has been infringed, it may require the market operator to prohibit trading in the securities<sup>14</sup>.

A requirement under the above provision<sup>15</sup> takes effect (i) immediately, if the notice under heads (A) and (B) below<sup>16</sup> states that that is the case<sup>17</sup>; (ii) in any other case, on such date as may be specified in the notice<sup>18</sup>.

If the competent authority (A) proposes to exercise the above powers<sup>19</sup> in relation to a person<sup>20</sup>; or (B) exercises any of those powers in relation to a person with immediate effect<sup>21</sup>, it must give that person written notice<sup>22</sup>.

The competent authority may extend the period within which representations<sup>23</sup> may be made to it<sup>24</sup>. If, having considered any representations made to it, the competent authority decides to maintain, vary or revoke its earlier decision, it must give written notice to that effect to the person mentioned in heads (A) and (B) above<sup>25</sup>.

1    Ie the Financial Services and Markets Act 2000 s 89L: see the text to notes 2-25.

2    As to the meaning of 'securities' see PARA 385 note 21.

3    Financial Services and Markets Act 2000 s 89L(1) (ss 89L, 89L added by the Companies Act 2006 s 1268). As to the meaning of 'regulated market' see PARA 385 note 13.

4    As to competent authority see PARA 385.

5    For these purposes, 'transparency obligation' means an obligation under (1) a provision contained in transparency rules; or (2) any other provision made in accordance with the Transparency Obligations Directive (ie European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market): Financial Services and Markets Act 2000 s 89L(5) (as added: see note 2). As to the meaning of 'transparency rules' see PARA 415 note 2. As to transparency rules generally see PARA 415.

In relation to an issuer whose home state is a member state other than the United Kingdom, any reference to an applicable transparency obligation must be read subject to s 100A(2) (see PARA 385): Financial Services and Markets Act 2000 s 89L(6) (as so added). As to the meaning of 'United Kingdom' see PARA 2 note 3.

6    As to the meaning of 'issuer' see PARA 385 note 21.

7    Financial Services and Markets Act 2000 s 89L(2)(a) (as added: see note 2).

8    Financial Services and Markets Act 2000 s 89L(2)(b) (as added: see note 2).

9    Financial Services and Markets Act 2000 s 89L(2)(c)(i) (as added: see note 2).

10   Financial Services and Markets Act 2000 s 89L(2)(c)(ii) (as added: see note 2).

11   Ie European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38).

12   Financial Services and Markets Act 2000 s 89L(3)(a) (as added: see note 2).

13   Financial Services and Markets Act 2000 s 89L(3)(b) (as added: see note 2).

14   Financial Services and Markets Act 2000 s 89L(4) (as added: see note 2).

15   Ie under the Financial Services and Markets Act 2000 s 89L.

16   Ie under the Financial Services and Markets Act 2000 s 89M(2).

17   Financial Services and Markets Act 2000 s 89M(1)(a) (as added: see note 2).

18   Financial Services and Markets Act 2000 s 89M(1)(b) (as added: see note 2).

19   Ie the powers in the Financial Services and Markets Act 2000 s 89L.

20   Financial Services and Markets Act 2000 s 89M(2)(a) (as added: see note 2).

21   Financial Services and Markets Act 2000 s 89M(2)(b) (as added: see note 2).

- 22 Financial Services and Markets Act 2000 s 89M(2) (as added: see note 2). Such notice must:
- 482 (1) give details of the competent authority's action or proposed action (s 89M(3)(a) (as so added));
  - 483 (2) state the competent authority's reasons for taking the action in question and choosing the date on which it took effect or takes effect (s 89M(3)(b) (as so added));
  - 484 (3) inform the recipient that he may make representations to the competent authority within such period as may be specified by the notice (whether or not he had referred the matter to the Financial Services and Markets Tribunal) (s 89M(3)(c) (as so added));
  - 485 (4) inform him of the date on which the action took effect or takes effect (s 89M(3)(d) (as so added));
  - 486 (5) inform him of his right to refer the matter to the Tribunal (see s 89N; and PARA 424) and give an indication of the procedure on such a reference (s 89M(3)(e) (as so added)).

As to the Financial Services and Markets Tribunal see PARA 43 et seq.

23 Such representations are referred to in the notice: see note 22.

24 Financial Services and Markets Act 2000 s 89L(4) (as added: see note 2).

25 Financial Services and Markets Act 2000 s 89L(5) (as added: see note 2). The reference is to the person mentioned in s 89M(2).

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#### **424. Right to refer matters to Financial Services Tribunal.**

A person (1) to whom a decision notice is given under the provision on public censure<sup>1</sup>; or (2) to whom a notice is given under the provision dealing with the procedure in connection with suspension or prohibition of trading<sup>2</sup>, may refer the matter to the Financial Services and Markets Tribunal<sup>3</sup>.

1 Financial Services and Markets Act 2000 s 89N(a) (s 89N added by the Companies Act 2006 s 1268). The reference is to a decision notice given under the Financial Services and Markets Act 2000 s 89K: see PARA 422.

2 Financial Services and Markets Act 2000 s 89N(b) (as added: see note 1). The reference is to a notice given under s 89M: see PARA 423.

3 Financial Services and Markets Act 2000 s 89N (as added: see note 1). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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#### **(vi) Corporate Governance**

##### **425. Corporate governance rules.**

The competent authority<sup>1</sup> may make rules ('corporate governance rules'):

- 1070 (1) for the purpose of implementing, enabling the implementation of or dealing with matters arising out of or related to, any Community obligation relating to the corporate governance<sup>2</sup> of issuers<sup>3</sup> who have requested or approved admission of their securities<sup>4</sup> to trading on a regulated market<sup>5</sup>;
- 1071 (2) about corporate governance in relation to such issuers for the purpose of implementing, or dealing with matters arising out of or related to, any Community obligation<sup>6</sup>.

The burdens and restrictions imposed by such rules<sup>7</sup> on foreign-traded issuers<sup>8</sup> must not be greater than the burdens and restrictions imposed on UK-traded issuers<sup>9</sup> by (a) such rules<sup>10</sup>; and (b) listing rules<sup>11</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq.

2 'Corporate governance', in relation to an issuer, includes: (1) the nature, constitution or functions of the organs of the issuer; (2) the manner in which organs of the issuer conduct themselves; (3) the requirements imposed on organs of the issuer; (4) the relationship between the different organs of the issuer; (5) the relationship between the organs of the issuer and the members of the issuer or holders of the issuer's securities: Financial Services and Markets Act 2000 s 89O(3) (s 89O added by the Companies Act 2006 s 1269). As to the meaning of 'issuer' see PARA 385 note 21. As to the meaning of 'securities' see PARA 385 note 21.

3 See note 2.

4 See note 2.

5 Financial Services and Markets Act 2000 s 89O(1)(a) (as added: see note 2). As to the meaning of 'regulated market' see PARA 385 note 13. Section 89O is without prejudice to any other power conferred by Pt VI (ss 72-103) to make Part VI rules: s 89O(5) (as so added). As to the meaning of 'Part VI rules' see PARA 385. See also the Financial Services Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.

6 Financial Services and Markets Act 2000 s 89O(1)(b) (as added: see note 2).

7 Ie rules under the Financial Services and Markets Act 2000 s 89O.

8 'Foreign-traded issuer' means an issuer who has requested or approved admission of the issuer's securities to trading on a regulated market situated or operating outside the United Kingdom: Financial Services and Markets Act 2000 s 89O(4) (as added: see note 2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

9 'UK-traded issuer' means an issuer who has requested or approved admission of the issuer's securities to trading on a regulated market situated or operating in the United Kingdom: Financial Services and Markets Act 2000 s 89O(4) (as added: see note 2).

10 Financial Services and Markets Act 2000 s 89O(3)(a) (as added: see note 2). The reference is to rules under s 89O.

11 Financial Services and Markets Act 2000 s 89O(3)(b) (as added: see note 2). As to the meaning of 'listing rules' see PARA 385 note 18.

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## **(vii) Other Listing Matters**

## 426. Sponsors.

Listing rules<sup>1</sup> may require a person to make arrangements with a sponsor<sup>2</sup> for the performance by the sponsor of such services in relation to him as may be specified in the rules<sup>3</sup>. Listing rules<sup>4</sup> may: (1) provide for the competent authority to maintain a list of sponsors<sup>5</sup>; (2) specify services which must be performed by a sponsor<sup>6</sup>; (3) impose requirements on a sponsor in relation to the provision of services or specified services<sup>7</sup>; (4) specify the circumstances in which a person is qualified for being approved as a sponsor<sup>8</sup>. If the competent authority proposes to refuse a person's application for approval as a sponsor, or to cancel a person's approval as a sponsor otherwise than at his request, it must give him a warning notice<sup>9</sup>. If, after considering any representations made in response to the warning notice, the competent authority decides to grant the application for approval, or not to cancel the approval, it must give the person concerned, and any person to whom a copy of the warning notice was given, written notice of its decision<sup>10</sup>. If, after considering any representations made in response to the warning notice, the competent authority decides to refuse to grant the application for approval, or to cancel the approval, it must give the person concerned a decision notice<sup>11</sup>. A person to whom a decision notice is given<sup>12</sup> may refer the matter to the Financial Services and Markets Tribunal<sup>13</sup>.

Listing rules may make provision for the competent authority, if it considers that a sponsor has contravened a requirement imposed on him<sup>14</sup>, to publish a statement to that effect<sup>15</sup>. If the competent authority proposes to publish a statement it must give the sponsor a warning notice setting out the terms of the proposed statement<sup>16</sup>. If, after considering any representations made in response to the warning notice, the competent authority decides to make the proposed statement, it must give the sponsor a decision notice setting out the terms of the statement<sup>17</sup>. A sponsor to whom a decision notice is given<sup>18</sup> may refer the matter to the Financial Services and Markets Tribunal<sup>19</sup>.

1 As to the meaning of 'listing rules' see PARA 385 note 18.

2 'Sponsor' means a person approved by the competent authority for the purposes of the rules: Financial Services and Markets Act 2000 s 88(2). As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 88(1).

4 Ie made by virtue of the Financial Services and Markets Act 2000 s 88(1).

5 Financial Services and Markets Act 2000 s 88(2)(a).

6 Financial Services and Markets Act 2000 s 88(2)(b).

7 Financial Services and Markets Act 2000 s 88(2)(c).

8 Financial Services and Markets Act 2000 s 88(2)(d).

9 Financial Services and Markets Act 2000 s 88(4) (amended by SI 2007/1973). As to warning notices see PARA 769.

10 Financial Services and Markets Act 2000 s 88(5).

11 Financial Services and Markets Act 2000 s 88(6). As to decision notices see PARA 770.

12 Ie under the Financial Services and Markets Act 2000 s 88.

13 Financial Services and Markets Act 2000 s 88(7). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

14 le imposed by rules made as a result of the Financial Services and Markets Act 2000 s 88(3)(c): see head (3) in the text.

15 Financial Services and Markets Act 2000 s 89(1).

16 Financial Services and Markets Act 2000 s 89(2).

17 Financial Services and Markets Act 2000 s 89(3).

18 le under the Financial Services and Markets Act 2000 s 89.

19 Financial Services and Markets Act 2000 s 89(4).

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#### **427. Compensation for false and misleading statements etc.**

Any person responsible for listing particulars<sup>1</sup> is liable to pay compensation to a person who has: (1) acquired securities<sup>2</sup> to which the particulars apply<sup>3</sup>; and (2) suffered loss in respect of them as a result of any untrue or misleading statement in the particulars or as a result of the omission from the particulars of any matter required to be included<sup>4</sup>. If listing particulars are required to include information about the absence of a particular matter, the omission from the particulars of that information is to be treated as a statement in the listing particulars that there is no such matter<sup>5</sup>. Any person who fails to comply with the provision relating to supplementary listing particulars<sup>6</sup> is liable to pay compensation to any person who has: (a) acquired securities of the kind in question<sup>7</sup>; and (b) suffered loss in respect of them as a result of the failure<sup>8</sup>. No person will, by reason of being a promoter of a company or otherwise, incur any liability for failing to disclose information which he would not be required to disclose in listing particulars in respect of a company's securities: (i) if he were responsible for those particulars<sup>9</sup>; or (ii) if he is responsible for them, which he is entitled to omit<sup>10</sup>.

The provisions described above do not affect any liability which may otherwise be incurred<sup>11</sup>. These provisions apply with modifications in relation to a prospectus<sup>12</sup>.

The issuer<sup>13</sup> of certain securities<sup>14</sup> is liable to pay compensation to a person who has (A) acquired<sup>15</sup> such securities issued by it<sup>16</sup>; and (B) suffered loss<sup>17</sup> in respect of them as a result of any untrue or misleading statement in certain publications<sup>18</sup>, or the omission from any such publication of any matter required to be included in it<sup>19</sup>. The issuer is so liable only if a person discharging managerial responsibilities<sup>20</sup> within the issuer in relation to the publication (aa) knew the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading<sup>21</sup>; or (bb) knew the omission to be dishonest concealment of a material fact<sup>22</sup>. These provisions<sup>23</sup> do not affect certain powers in regard to restitution<sup>24</sup>, liability for a civil penalty and liability for a criminal offence<sup>25</sup>. The Treasury<sup>26</sup> may by regulations make provision about the liability of issuers of securities traded on a regulated market, and other persons, in respect of information published to holders of securities, to the market or to the public generally<sup>27</sup>.

1 As to listing particulars see PARA 391 et seq. As to the persons responsible for listing particulars see PARA 391. For the purposes of the Financial Services and Markets Act 2000 s 90(1), 'listing particulars' includes supplementary listing particulars: s 90(10). As to supplementary listing particulars see PARA 393. See also the Financial Services Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

2 As to the meaning of 'securities' see PARA 385 note 21. References in the Financial Services and Markets Act 2000 s 90 to the acquisition by a person of securities include references to his contracting to acquire them or any interest in them: s 90(7).

3 Financial Services and Markets Act 2000 s 90(1)(a). Section 90(1) is subject to exemptions provided by Sch 10 (see PARA 428): s 90(2).

4 Financial Services and Markets Act 2000 s 90(1)(b). Matters are required to be included by s 80 or s 81: see PARAS 392, 393. See note 3.

5 Financial Services and Markets Act 2000 s 90(3).

6 Ie the Financial Services and Markets Act 2000 s 81: see PARA 393.

7 Financial Services and Markets Act 2000 s 90(4)(a). Section 90(4) is subject to exemptions provided by Sch 10 (see PARA 428): s 90(5).

8 Financial Services and Markets Act 2000 s 90(4)(b). See note 7.

9 Financial Services and Markets Act 2000 s 90(8)(a). The reference in s 90(8) to a person incurring liability includes a reference to any other person being entitled as against that person to be granted any civil remedy or to rescind or repudiate an agreement: s 90(9).

10 Financial Services and Markets Act 2000 s 90(8)(b). Particulars may be omitted by virtue of s 82: see PARA 394. See note 9.

11 Financial Services and Markets Act 2000 s 90(6).

12 See the Financial Services and Markets Act 2000 s 90(11) (s 90(11), (12) added by SI 2005/1433). As to prospectuses see PARA 395 et seq. In relation to a prospectus, the references in the Financial Services and Markets Act 2000 s 90 or in Sch 10 (see PARA 428) to listing particulars are to a prospectus, the references to supplementary listing particulars are to a supplementary prospectus (see PARA 403) and the references to securities are to transferable securities (see PARA 395); and in relation to a prospectus, the references to s 80 or s 81 are to s 87A (see PARA 399) or s 87G (see PARA 403): see s 90(11)(a), (b), (c) (as so added).

A person is not to be subject to civil liability solely on the basis of a summary (including any translation of it) in a prospectus unless the summary is misleading, inaccurate or inconsistent when read with the rest of the prospectus: s 90(12) (as so added).

13 As to the meaning of 'issuer' see PARA 385 note 21.

14 The securities to which the Financial Services and Markets Act 2000 s 90A applies are: (1) securities that are traded on a regulated market situated or operating in the United Kingdom; and (2) securities that (a) are traded on a regulated market situated or operating outside the United Kingdom; and (b) are issued by an issuer for which the United Kingdom is the home member state within the meaning of the Transparency Obligations Directive (ie European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market) art 2.1(i): Financial Services and Markets Act 2000 s 90A(2) (ss 90A, 90B added by the Companies Act 2006 s 1270). As to the meaning of 'regulated market' see PARA 385 note 13. As to the meaning of 'United Kingdom' see PARA 2 note 3.

15 For these purposes, references in the Financial Services and Markets Act 2000 s 90A to the acquisition by a person of securities include his contracting to acquire them or any interest in them: s 90A(9)(b) (as added: see note 14).

16 Financial Services and Markets Act 2000 s 90A(3)(a) (as added: see note 14).

17 A loss is not regarded as suffered as a result of the statement or omission in the publication unless the person suffering it acquired the relevant securities (1) in reliance on the information in the publication; and (2) at a time when, and in circumstances in which, it was reasonable for him to rely on that information: Financial Services and Markets Act 2000 s 90A(5) (as added: see note 14). Except as mentioned in s 90A(8) (see the text and notes 23-25), (a) the issuer is not subject to any other liability than that provided for by s 90A in respect of loss suffered as a result of reliance by any person on an untrue or misleading statement in a publication to which this section applies, or the omission from any such publication of any matter required to be included in it; and (b) a person other than the issuer is not subject to any liability, other than to the issuer, in respect of any such loss: s 90A(6) (as so added). Any reference in s 90A(6) to a person being subject to a liability includes a reference to another person being entitled as against him to be granted any civil remedy or to rescind or repudiate an agreement: s 90A(7) (as so added).

18 The publications to which the Financial Services and Markets Act 2000 s 90A applies are: (1) any reports and statements published in response to a requirement imposed by a provision implementing the Transparency Obligations Directive (ie European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38)) art 4, 5 or 6; and (2) any preliminary statement made in advance of a report or statement to be published in response to a requirement imposed by a provision implementing art 4, to the extent that it contains information that it is intended (a) will appear in the report or statement; and (b) will be presented in the report or statement in substantially the same form as that in which it is presented in the preliminary statement: Financial Services and Markets Act 2000 s 90A(1) (as added: see note 14).

19 Financial Services and Markets Act 2000 s 90A(3)(b) (as added: see note 14).

20 For these purposes, the following are persons 'discharging managerial responsibilities' in relation to a publication: (1) any director of the issuer (or person occupying the position of director, by whatever name called); (2) in the case of an issuer whose affairs are managed by its members, any member of the issuer; (3) in the case of an issuer that has no persons within heads (1) or (2) above, any senior executive of the issuer having responsibilities in relation to the publication: Financial Services and Markets Act 2000 s 90A(9)(a) (as added: see note 14).

21 Financial Services and Markets Act 2000 s 90A(4)(a) (as added: see note 14).

22 Financial Services and Markets Act 2000 s 90A(4)(b) (as added: see note 14).

23 In the Financial Services and Markets Act 2000 s 90A.

24 In the powers conferred by the Financial Services and Markets Act 2000 s 382 (power of court to make restitution order) (see PARA 472) and s 384 (power of Financial Services Authority to require restitution) (see PARA 474).

25 Financial Services and Markets Act 2000 s 90A(8) (as added: see note 14).

26 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

27 Financial Services and Markets Act 2000 s 90B(1) (as added: see note 14). Such regulations may amend any primary or subordinate legislation, including any provision of, or made under, the Financial Services and Markets Act 2000: s 90B(2) (as so added). No regulations are to be made under s 90B unless a draft of the regulations has been laid before Parliament and approved by a resolution of each House: s 429(2) (amended by the Companies Act 2006 Sch 15 Pt 1 paras 1, 12). At the date at which this volume states the law no such regulations had been made.

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#### **428. Exemptions.**

A person does not incur any liability<sup>1</sup> for loss caused by a statement<sup>2</sup> if he satisfies the court that, at the time when the listing particulars were submitted to the competent authority<sup>3</sup>, he reasonably believed (having made such inquiries, if any, as were reasonable) that the statement was true and not misleading, or the matter whose omission caused the loss was properly omitted, and that one or more of the following conditions are satisfied<sup>4</sup>. The conditions are that: (1) he continued in his belief until the time when the securities<sup>5</sup> in question were acquired<sup>6</sup>; (2) they were acquired before it was reasonably practicable to bring a correction to the attention of persons likely to acquire them<sup>7</sup>; (3) before the securities were acquired, he had taken all such steps as it was reasonable for him to have taken to secure that a correction was brought to the attention of those persons<sup>8</sup>; (4) he continued in his belief until after the commencement of dealings in the securities following their admission to the official list<sup>9</sup> and they were acquired after such a lapse of time that he ought in the circumstances to be reasonably excused<sup>10</sup>.



A person does not incur any liability<sup>11</sup> for loss in respect of any securities caused by a statement<sup>12</sup> which purports to be made by an expert if he satisfies the court that, at the time when the listing particulars were submitted to the competent authority, he reasonably believed that the other person<sup>13</sup> was competent to make or authorise the statement, and had consented to its inclusion in the form and context in which it was included, and that one or more of the following conditions are satisfied<sup>14</sup>. The conditions are that: (a) he continued in his belief until the time when the securities were acquired<sup>15</sup>; (b) they were acquired before it was reasonably practicable to bring the fact that the expert was not competent, or had not consented, to the attention of persons likely to acquire the securities in question<sup>16</sup>; (c) before the securities were acquired he had taken all such steps as it was reasonable for him to have taken to secure that that fact was brought to the attention of those persons<sup>17</sup>; (d) he continued in his belief until after the commencement of dealings in the securities following their admission to the official list and they were acquired after such a lapse of time that he ought in the circumstances to be reasonably excused<sup>18</sup>.

A person does not incur liability<sup>19</sup> for loss caused by a statement<sup>20</sup> by an expert if he satisfies the court that, before the securities in question were acquired, a correction had been published in a manner calculated to bring it to the attention of persons likely to acquire the securities, or that he took all such steps as it was reasonable for him to take to secure such publication and reasonably believed that it had taken place before the securities were acquired<sup>21</sup>.

A person does not incur liability<sup>22</sup> for loss caused by a statement<sup>23</sup> by an expert if he satisfies the court that before the securities in question were acquired, the fact that the expert was not competent or had not consented had been published in a manner calculated to bring it to the attention of persons likely to acquire the securities, or that he took all such steps as it was reasonable for him to take to secure such publication and reasonably believed that it had taken place before the securities were acquired<sup>24</sup>.

A person does not incur any liability<sup>25</sup> for loss resulting from a statement made by an official person which is included in the listing particulars, or a statement contained in a public official document which is included in the listing particulars, if he satisfies the court that the statement is accurately and fairly reproduced<sup>26</sup>.

A person does not incur any liability to pay compensation<sup>27</sup> if he satisfies the court that the person suffering the loss acquired the securities in question with knowledge: (i) that the statement was false or misleading<sup>28</sup>; (ii) of the omitted matter<sup>29</sup>; or (iii) of the change or new matter, as the case may be<sup>30</sup>.

A person does not incur any liability to pay compensation for failing to comply with the provisions relating to supplementary listing particulars<sup>31</sup> if he satisfies the court that he reasonably believed that the change or new matter in question was not such as to call for supplementary listing particulars<sup>32</sup>.

1    le under the Financial Services and Markets Act 2000 s 90(1): see PARA 427.

2    For these purposes, 'statement' means: (1) any untrue or misleading statement in listing particulars; or (2) the omission from listing particulars of any matter required to be included by the Financial Services and Markets Act 2000 s 80 or s 81 (see PARAS 392, 393): s 90(2), (5), Sch 10 para 1(1). As to listing particulars see PARA 391 et seq. For the purposes of Sch 10, 'listing particulars' includes supplementary listing particulars: s 90(10). As to supplementary listing particulars see PARA 393.

3    As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

4    Financial Services and Markets Act 2000 Sch 10 para 1(2).

5    As to the meaning of 'securities' see PARA 385 note 21.

6    Financial Services and Markets Act 2000 Sch 10 para 1(3)(a).

- 7 Financial Services and Markets Act 2000 Sch 10 para 1(3)(b).
- 8 Financial Services and Markets Act 2000 Sch 10 para 1(3)(c).
- 9 As to the meaning of 'official list' see PARA 387 note 2.
- 10 Financial Services and Markets Act 2000 Sch 10 para 1(3)(d).
- 11 *Ie* under the Financial Services and Markets Act 2000 s 90(1): see PARA 427.
- 12 For these purposes, 'statement' means a statement included in listing particulars which: (1) purports to be made by, or on the authority of, another person as an expert; and (2) is stated to be included in the listing particulars with that other person's consent: Financial Services and Markets Act 2000 Sch 10 para 2(1). 'Expert' includes any engineer, valuer, accountant or other person whose profession, qualifications or experience give authority to a statement made by him: Sch 10 para 8.
- 13 *Ie* the person referred to in note 12.
- 14 Financial Services and Markets Act 2000 Sch 10 para 2(2).
- 15 Financial Services and Markets Act 2000 Sch 10 para 2(3)(a).
- 16 Financial Services and Markets Act 2000 Sch 10 para 2(3)(b).
- 17 Financial Services and Markets Act 2000 Sch 10 para 2(3)(c).
- 18 Financial Services and Markets Act 2000 Sch 10 para 2(3)(d).
- 19 *Ie* under the Financial Services and Markets Act 2000 s 90(1): see PARA 427.
- 20 As to the meaning of 'statement' see note 2; definition applied by the Financial Services and Markets Act 2000 Sch 10 para 3(1).
- 21 Financial Services and Markets Act 2000 Sch 10 para 3(2). Nothing in Sch 10 para 3 is to be taken as affecting Sch 10 para 1 (see the text and notes 1-10): Sch 10 para 3(3).
- 22 *Ie* under the Financial Services and Markets Act 2000 s 90(1): see PARA 427.
- 23 As to the meaning of 'statement' see note 12; definition applied by the Financial Services and Markets Act 2000 Sch 10 para 4(1).
- 24 Financial Services and Markets Act 2000 Sch 10 para 4(2). Nothing in Sch 10 para 4 is to be taken as affecting Sch 10 para 2 (see the text and notes 11-18): Sch 10 para 4(3).
- 25 *Ie* under the Financial Services and Markets Act 2000 s 90(1): see PARA 427.
- 26 Financial Services and Markets Act 2000 Sch 10 para 5.
- 27 *Ie* under the Financial Services and Markets Act 2000 s 90(1), (4): see PARA 427.
- 28 Financial Services and Markets Act 2000 Sch 10 para 6(a).
- 29 Financial Services and Markets Act 2000 Sch 10 para 6(b).
- 30 Financial Services and Markets Act 2000 Sch 10 para 6(c).
- 31 *Ie* under the Financial Services and Markets Act 2000 s 90(4): see PARA 427.
- 32 Financial Services and Markets Act 2000 Sch 10 para 7.

#### 429. Penalties for breach of Part VI rules.

If the competent authority<sup>1</sup> considers that an issuer<sup>2</sup> of listed securities<sup>3</sup>, or an applicant for listing<sup>4</sup>, has contravened any provision of listing rules<sup>5</sup>, it may impose on him a penalty of such amount as it considers appropriate<sup>6</sup>.

If the competent authority considers that (1) an issuer who has requested or approved the admission of a financial instrument<sup>7</sup> to trading on a regulated market<sup>8</sup>; (2) a person discharging managerial responsibilities within such an issuer<sup>9</sup>; or (3) a person connected with such a person discharging managerial responsibilities<sup>10</sup>, has contravened any provision of disclosure rules<sup>11</sup>, it may impose on him a penalty of such amount as it considers appropriate<sup>12</sup>.

If the competent authority considers that (a) an issuer of transferable securities<sup>13</sup>; (b) a person offering transferable securities to the public<sup>14</sup> or requesting their admission to trading on a regulated market<sup>15</sup>; (c) an applicant for the approval of a prospectus in relation to transferable securities<sup>16</sup>; (d) a person on whom a requirement has been imposed under the provisions on suspension or prohibition of an offer to the public or admission to trading on a regulated market<sup>17</sup>; or (e) any other person to whom a provision of the Prospectus Directive<sup>18</sup> applies<sup>19</sup>, has contravened a provision of Part VI of the Financial Services and Markets Act 2000 or of prospectus rules<sup>20</sup>, or a provision otherwise made in accordance with the Prospectus Directive or a requirement imposed on him under such a provision, it may impose on him a penalty of such amount as it considers appropriate<sup>21</sup>.

If the competent authority considers (i) that a person has contravened a provision of transparency rules<sup>22</sup> or a provision otherwise made in accordance with the Transparency Obligations Directive<sup>23</sup>, or a provision of corporate governance rules<sup>24</sup>; or (ii) that a person on whom a requirement has been imposed under the provision on the power to suspend or prohibit trading of securities in case of infringement of applicable transparency obligation<sup>25</sup>, has contravened that requirement<sup>26</sup>, it may impose on the person a penalty of such amount as it considers appropriate<sup>27</sup>.

If, in the case of contravention by a person referred to in the above provisions<sup>28</sup> ('P'), the competent authority considers that another person who was at the material time a director<sup>29</sup> of P was knowingly concerned in the contravention, it may impose on him a penalty of such amount as it considers appropriate<sup>30</sup>. A penalty under these provisions is payable to the competent authority<sup>31</sup>. If the competent authority is entitled to impose a penalty on a person in respect of a particular matter it may, instead of imposing a penalty on him in respect of that matter, publish a statement censuring him<sup>32</sup>. Nothing in these provisions<sup>33</sup> prevents the competent authority from taking any other steps which it has power to take under Part VI of the Financial Services and Markets Act 2000<sup>34</sup>. The competent authority may not take action against a person after the end of the period of two years beginning with the first day on which it knew of the contravention unless proceedings against that person, in respect of the contravention, were begun before the end of that period<sup>35</sup>.

If the competent authority proposes to take action against a person<sup>36</sup>, it must give him a warning notice<sup>37</sup>. A warning notice about a proposal to impose a penalty must state the amount of the proposed penalty<sup>38</sup>. A warning notice about a proposal to publish a statement must set out the terms of the proposed statement<sup>39</sup>.

If the competent authority decides to take action against a person<sup>40</sup> it must give him a decision notice<sup>41</sup>. A decision notice about the imposition of a penalty must state the amount of the penalty<sup>42</sup>. A decision notice about the publication of a statement must set out the terms of the statement<sup>43</sup>. If the competent authority decides to take action against a person<sup>44</sup>, he may refer the matter to the Financial Services and Markets Tribunal<sup>45</sup>.

- 1 As to the competent authority see PARA 385. If, as a result of an order under the Financial Services and Markets Act 2000 Sch 8 (see PARA 386), different functions conferred on the competent authority by Pt VI (ss 72-103) are exercisable by different persons, the powers conferred by s 91 are exercisable by such person as may be determined in accordance with the provisions of the order: s 103(3). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.
- 2 As to the meaning of 'issuer' see PARA 385 note 21.
- 3 As to the meaning of 'securities' see PARA 385 note 18.
- 4 As to the meaning of 'listing' see PARA 387 note 2.
- 5 As to the meaning of 'listing rules' see PARA 385 note 18.
- 6 Financial Services and Markets Act 2000 s 91(1) (s 91(1), (2) substituted by SI 2005/381; the Financial Services and Markets Act 2000 s 91(1) further substituted by the Companies Act 2006 Sch 15 Pt 1 paras 1, 6(1), (2)).
- 7 As to the meaning of 'financial instrument' see PARA 385 note 12.
- 8 Financial Services and Markets Act 2000 s 91(1ZA)(a) (s 91(1ZA) added by the Companies Act 2006 Sch 15 Pt 1 paras 1, 6(1), (2)). As to the meaning of 'regulated market' see PARA 385 note 13.
- 9 Financial Services and Markets Act 2000 s 91(1ZA)(b) (as added: see note 8).
- 10 Financial Services and Markets Act 2000 s 91(1ZA)(c) (as added: see note 8).
- 11 As to the meaning of 'disclosure rules' see PARA 385 note 18.
- 12 Financial Services and Markets Act 2000 s 91(1ZA) (as added: see note 8).
- 13 Financial Services and Markets Act 2000 s 91(1A)(a) (s 91(1A) added by SI 2005/1433). As to transferable securities see PARA 395.
- 14 As to the meaning of 'offer of transferable securities to the public' see PARA 385 note 21.
- 15 Financial Services and Markets Act 2000 s 91(1A)(b) (as added: see note 13).
- 16 Financial Services and Markets Act 2000 s 91(1A)(c) (as added: see note 13).
- 17 Financial Services and Markets Act 2000 s 91(1A)(d) (as added: see note 13). The reference is to s 87K (see PARA 406) or s 87L (see PARA 408).
- 18 Ie European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading.
- 19 Financial Services and Markets Act 2000 s 91(1A)(e) (as added: see note 13).
- 20 As to the meaning of 'prospectus rules' see PARA 385 note 18.
- 21 Financial Services and Markets Act 2000 s 91(1A) (as added: see note 13).
- 22 As to the meaning of 'transparency rules' see PARA 415 note 2. As to transparency rules generally see PARA 415.
- 23 Ie European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.
- 24 Financial Services and Markets Act 2000 s 91(1B)(a) (s 91(1B) added by the Companies Act Sch 15 Pt 1 paras 1, 6(1), (3)). As to corporate governance rules see PARA 425.
- 25 Ie the Financial Services and Markets Act 2000 s 89L: see PARA 424.
- 26 Financial Services and Markets Act 2000 s 91(1B)(b) (as added: see note 24).
- 27 Financial Services and Markets Act 2000 s 91(1B) (as added: see note 24).

28    le in the Financial Services and Markets Act 2000 s 91(1), (1ZA)(a), (1A) or (1B): see the text and notes 1-8, 13-27.

29    As to the meaning of 'director' see PARA 86 note 11.

30    Financial Services and Markets Act 2000 s 91(2) (as substituted (see note 6); and amended by SI 2005/143 and the Companies Act 2006 Sch 15 Pt 1 para 6(1), (4)).

31    Financial Services and Markets Act 2000 s 91(5).

32    Financial Services and Markets Act 2000 s 91(3).

33    le the Financial Services and Markets Act 2000 s 91.

34    Financial Services and Markets Act 2000 s 91(4).

35    Financial Services and Markets Act 2000 s 91(6). For the purposes of s 91(6), the competent authority is to be treated as knowing of a contravention if it has information from which the contravention can reasonably be inferred; and proceedings against a person in respect of a contravention are to be treated as begun when a warning notice is given to him under s 92 (see the text and notes 36-45): s 91(7).

36    le under the Financial Services and Markets Act 2000 s 91: see the text and notes 1-35.

37    Financial Services and Markets Act 2000 s 92(1). As to warning notices see PARA 769.

38    Financial Services and Markets Act 2000 s 92(2).

39    Financial Services and Markets Act 2000 s 92(3).

40    le under the Financial Services and Markets Act 2000 s 91: see the text and notes 1-35.

41    Financial Services and Markets Act 2000 s 92(4). As to decision notices see PARA 770.

42    Financial Services and Markets Act 2000 s 92(5).

43    Financial Services and Markets Act 2000 s 92(6).

44    le under the Financial Services and Markets Act 2000 s 91: see the text and notes 1-35.

45    Financial Services and Markets Act 2000 s 92(7). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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#### **430. Statement of policy relating to penalties.**

The competent authority<sup>1</sup> must prepare and issue a statement of its policy with respect to the imposition of penalties<sup>2</sup> and the amount of penalties<sup>3</sup>. The competent authority's policy in determining what the amount of a penalty should be must include having regard to: (1) the seriousness of the contravention in question in relation to the nature of the requirement contravened<sup>4</sup>; (2) the extent to which that contravention was deliberate or reckless<sup>5</sup>; and (3) whether the person on whom the penalty is to be imposed is an individual<sup>6</sup>. The competent authority may at any time alter or replace its policy statement<sup>7</sup>. If its policy statement is altered or replaced, the competent authority must issue the altered or replacement statement<sup>8</sup>.

In exercising, or deciding whether to exercise, its power with respect to penalties<sup>9</sup> in the case of any particular contravention, the competent authority must have regard to any policy statement published<sup>10</sup> and in force at the time when the contravention in question occurred<sup>11</sup>.

The competent authority must publish a policy statement in the way appearing to the competent authority to be best calculated to bring it to the attention of the public<sup>12</sup>. The competent authority may charge a reasonable fee for providing a person with a copy of the statement<sup>13</sup>. The competent authority must, without delay, give the Treasury<sup>14</sup> a copy of any policy statement which it publishes<sup>15</sup>.

Before issuing a policy statement, the competent authority must publish a draft of the proposed statement in the way appearing to the competent authority to be best calculated to bring it to the attention of the public<sup>16</sup>. The draft must be accompanied by notice that representations about the proposal may be made to the competent authority within a specified time<sup>17</sup>. If the competent authority issues the proposed statement it must publish an account, in general terms, of the representations made to it and its response to them<sup>18</sup>. If the statement differs from the draft in a way which is, in the opinion of the competent authority, significant, the competent authority must publish details of the difference<sup>19</sup>. These requirements also apply to a proposal to alter or replace a statement<sup>20</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 91: see PARA 429.

3 Financial Services and Markets Act 2000 s 93(1).

4 Financial Services and Markets Act 2000 s 93(2)(a).

5 Financial Services and Markets Act 2000 s 93(2)(b).

6 Financial Services and Markets Act 2000 s 93(2)(c).

7 Financial Services and Markets Act 2000 s 93(3).

8 Financial Services and Markets Act 2000 s 93(4).

9 Ie under the Financial Services and Markets Act 2000 s 91: see PARA 429.

10 Ie published under the Financial Services and Markets Act 2000 s 93.

11 Financial Services and Markets Act 2000 s 93(5).

12 Financial Services and Markets Act 2000 s 93(6).

13 Financial Services and Markets Act 2000 s 93(7).

14 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

15 Financial Services and Markets Act 2000 s 93(8).

16 Financial Services and Markets Act 2000 s 94(1). The competent authority may charge a reasonable fee for providing a person with a copy of a draft published under s 94(1): s 94(6).

17 Financial Services and Markets Act 2000 s 94(2). Before issuing the proposed statement, the competent authority must have regard to any representations made to it in accordance with s 94(2): s 94(3).

18 Financial Services and Markets Act 2000 s 94(4).

19 Financial Services and Markets Act 2000 s 94(5). This requirement is in addition to complying with s 94(4): see the text to note 16.

20 Financial Services and Markets Act 2000 s 94(7).

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### **431. Penalty scheme.**

In determining its policy with respect to the amount of penalties to be imposed by it under Part VI of the Financial Services and Markets Act 2000<sup>1</sup>, the competent authority<sup>2</sup> must take no account of the expenses which it incurs, or expects to incur, in discharging its functions under that Part<sup>3</sup>.

The competent authority must prepare and operate a scheme for ensuring that the amounts paid to it by way of penalties imposed under Part VI of the Financial Services and Markets Act 2000 are applied for the benefit of issuers<sup>4</sup> of securities<sup>5</sup> admitted to the official list<sup>6</sup>, and issuers who have requested or approved the admission of financial instruments<sup>7</sup> to trading on a regulated market<sup>8</sup>. The scheme may, in particular, make different provision with respect to different classes of issuer<sup>9</sup>. Up to date details of the scheme must be set out in a document (the 'scheme details')<sup>10</sup>. The scheme details must be published by the competent authority in the way appearing to it to be best calculated to bring them to the attention of the public<sup>11</sup>. The competent authority must, without delay, give the Treasury<sup>12</sup> a copy of any scheme details published by it<sup>13</sup>.

Before making the scheme, the competent authority must publish a draft of the proposed scheme in the way appearing to it to be best calculated to bring it to the attention of the public<sup>14</sup>. The draft must be accompanied by notice that representations about the proposals may be made to the competent authority within a specified time<sup>15</sup>. If the competent authority makes the proposed scheme, it must publish an account, in general terms, of the representations made to it and its response to them<sup>16</sup>. If the scheme differs from the draft in a way which is, in the opinion of the competent authority, significant, the competent authority must publish details of the difference<sup>17</sup>.

The competent authority may charge a reasonable fee for providing a person with a copy of a draft or the scheme details<sup>18</sup>.

1    Ie the Financial Services and Markets Act 2000 Pt VI (ss 72-103).

2    As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

3    Financial Services and Markets Act 2000 s 100(1).

4    As to the meaning of 'issuer' see PARA 385 note 21.

5    As to the meaning of 'securities' see PARA 385 note 21.

6    As to the meaning of 'official list' see PARA 387 note 2.

7    As to the meaning of 'financial instrument' see PARA 385 note 12.

8    Financial Services and Markets Act 2000 s 100(2) (amended by SI 2005/381). As to the meaning of 'regulated market' see PARA 385 note 13.

9    Financial Services and Markets Act 2000 s 100(3).

- 10 Financial Services and Markets Act 2000 s 100(4).
- 11 Financial Services and Markets Act 2000 s 100(5).
- 12 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 13 Financial Services and Markets Act 2000 s 100(11).
- 14 Financial Services and Markets Act 2000 s 100(6). Section 100(6)-(10), (12) applies also to a proposal to alter or replace the scheme: s 100(13).
- 15 Financial Services and Markets Act 2000 s 100(7). Before making the scheme, the competent authority must have regard to any representations made to it under s 100(7): s 100(8). See note 14.
- 16 Financial Services and Markets Act 2000 s 100(9). See note 14.
- 17 Financial Services and Markets Act 2000 s 100(10). This requirement is in addition to complying with s 100(9): see the text to note 16. See note 14.
- 18 Financial Services and Markets Act 2000 s 100(12). See note 14.

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### 432. Competition.

The Treasury<sup>1</sup> may by order provide for regulating provisions<sup>2</sup>, and the practices of the competent authority in exercising its functions under Part VI of the Financial Services and Markets Act 2000 ('practices'), to be kept under review<sup>3</sup>. Such provision must require the person responsible for keeping regulating provisions and practices under review to consider: (1) whether any regulating provision or practice has a significantly adverse effect on competition<sup>4</sup>; or (2) whether two or more regulating provisions or practices taken together have, or a particular combination of regulating provisions and practices has, such an effect<sup>5</sup>.

Regulating provisions or practices have a significantly adverse effect on competition if: (a) they have, or are intended or likely to have, that effect<sup>6</sup>; or (b) the effect that they have, or are intended or likely to have, is to require or encourage behaviour which has, or is intended or likely to have, a significantly adverse effect on competition<sup>7</sup>. If regulating provisions or practices have, or are intended or likely to have, the effect of requiring or encouraging exploitation of the strength of a market position they are to be taken to have, or be intended or be likely to have, an adverse effect on competition<sup>8</sup>. In determining whether any of the regulating provisions or practices have, or are intended or likely to have, a particular effect, it may be assumed that the persons to whom the provisions concerned are addressed will act in accordance with them<sup>9</sup>.

<sup>1</sup> As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

<sup>2</sup> 'Regulating provisions' means: (1) Part VI rules; (2) general guidance given by the competent authority in connection with its functions under the Financial Services and Markets Act 2000 Pt VI (ss 72-103): s 95(9) (amended by SI 2005/381). As to the meaning of 'Part VI rules' see PARA 385. As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.



3 Financial Services and Markets Act 2000 s 95(1). An order under s 95 may include provision corresponding to that made by any provision of Pt X Ch III (ss 159-164) (competition scrutiny) (see PARA 38 et seq): s 95(3). Section 95(3) is not to be read as in any way restricting the power conferred by s 95(1): s 95(4). At the date at which this volume states the law no order has been made under s 95. As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

4 Financial Services and Markets Act 2000 s 95(2)(a).

5 Financial Services and Markets Act 2000 s 95(2)(b).

6 Financial Services and Markets Act 2000 s 95(6)(a).

7 Financial Services and Markets Act 2000 s 95(6)(b).

8 Financial Services and Markets Act 2000 s 95(5), (7).

9 Financial Services and Markets Act 2000 s 95(5), (8).

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### **433. Obligations of issuers of listed securities.**

Listing rules<sup>1</sup> may: (1) specify requirements to be complied with by issuers<sup>2</sup> of listed securities<sup>3</sup>; and (2) make provision with respect to the action that may be taken by the competent authority<sup>4</sup> in the event of non-compliance<sup>5</sup>. If the rules require an issuer to publish information, they may include provision authorising the competent authority to publish it in the event of his failure to do so<sup>6</sup>. The provisions described above apply whenever the listed securities were admitted to the official list<sup>7</sup>.

1 As to the meaning of 'listing rules' see PARA 385 note 18.

2 As to the meaning of 'issuer' see PARA 385 note 21.

3 Financial Services and Markets Act 2000 s 96(1)(a). As to the meaning of 'securities' see PARA 385 note 21.

4 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22.

5 Financial Services and Markets Act 2000 s 96(1)(b).

6 Financial Services and Markets Act 2000 s 96(2).

7 Financial Services and Markets Act 2000 s 96(3). As to the meaning of 'official list' see PARA 387 note 2.

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### **434. Appointment of persons to carry out investigations.**

The competent authority<sup>1</sup> may appoint one or more competent persons to conduct an investigation on its behalf<sup>2</sup> if it appears to the competent authority that there are circumstances suggesting that: (1) there may have been a contravention of a provision of Part VI of the Financial Services and Markets Act 2000<sup>3</sup> or of Part VI rules<sup>4</sup>, or a provision otherwise made in accordance with the Prospectus Directive<sup>5</sup> or the Transparency Obligations Directive<sup>6</sup>; (2) a person who was at the material time a director<sup>7</sup> of certain persons mentioned in the provisions on penalties for breach of Part VI rules<sup>8</sup> has been knowingly concerned in a contravention by that person of a provision of Part VI of the Financial Services and Markets Act 2000 or of Part VI rules, or a provision otherwise made in accordance with the Prospectus Directive or the Transparency Obligations Directive<sup>9</sup>; (3) there may have been a contravention of the statutory provisions relating to registration of listing particulars, publication of prospectuses, supplementary prospectuses or advertisements in connection with listing applications<sup>10</sup>.

1 As to the competent authority see PARA 385. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR). As to the Handbook generally see PARA 22. See note 2.

2 Financial Services and Markets Act 2000 s 97(2). Part XI (ss 165-177) (see PARA 447 et seq) applies to an investigation under s 97(2) as if: (1) the investigator were appointed under s 167(1) (see PARA 449); (2) references to the investigating authority in relation to him were to the competent authority; (3) references to the offences mentioned in s 168 (see PARA 449) were to those mentioned in the text and note 10; (4) references to an authorised person were references to the person under investigation: s 97(3).

As to the power of the Secretary of State to appoint a body to keep under review periodic accounts and reports produced by issuers of listed securities, see the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14; and PARA 435.

3 Ie the Financial Services and Markets Act 2000 Pt VI (ss 72-103).

4 As to the meaning of 'Part VI rules' see PARA 385.

5 Ie European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectus to be published when securities are offered to the public or admitted to trading.

6 Financial Services and Markets Act 2000 s 97(1)(a) (s 97(1)(a), (b) substituted by the Companies Act 2006 Sch 15 Pt 1 paras 1, 8). The reference to the Transparency Obligations Directive is a reference to European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

7 As to the meaning of 'director' see PARA 86 note 11.

8 Ie the Financial Services and Markets Act 2000 s 91(1), (1ZA)(a), (1A) or (1B): see PARA 429.

9 Financial Services and Markets Act 2000 s 97(1)(b) (as substituted: see note 6).

10 Financial Services and Markets Act 2000 s 97(1)(d) (amended by SI 2005/1433). The statutory provisions referred to mentioned in the text are s 83 (now repealed), s 85 (see PARA 397), s 87G (see PARA 403) or s 98 (now repealed).

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#### **435. Supervision of periodic accounts and reports of issuers of listed securities.**

The Secretary of State<sup>1</sup> may make an order appointing a body (the 'prescribed body') to keep under review periodic accounts and reports<sup>2</sup> that are produced by issuers of transferable securities<sup>3</sup> and are required to comply with any accounting requirements imposed by Part VI rules<sup>4</sup>, and, if the prescribed body thinks fit, to inform the Financial Services Authority<sup>5</sup> of any conclusions reached by the body in relation to any such accounts or report<sup>6</sup>.

A body may be appointed if it is a body corporate or an unincorporated association<sup>7</sup> which appears to the Secretary of State to have an interest in, and to have satisfactory procedures directed to, monitoring compliance by issuers of transferable securities with accounting requirements imposed by Part VI rules in relation to periodic accounts and reports produced by such issuers; and otherwise to be a fit and proper body to be appointed<sup>8</sup>. However where the order is to contain any requirements or other provisions<sup>9</sup> relating to the exercise of functions by the prescribed body, the Secretary of State may not appoint a body unless, in addition, it appears to him that the body would, if appointed, exercise its functions as a prescribed body in accordance with any such requirements or provisions<sup>10</sup>.

A body may be appointed either generally or in respect of any of the following, namely (1) any particular class or classes of issuers; (2) any particular class or classes of periodic accounts or reports, and different bodies may be appointed in respect of different classes within either or both of heads (1) and (2)<sup>11</sup>.

Where a body is so appointed, but the Financial Services Authority requests the body to exercise its functions in relation to any particular issuer of transferable securities in relation to whom those functions would not otherwise be exercisable, the body is to exercise those functions in relation to that issuer as well<sup>12</sup>.

Where an appointment is revoked, the revoking order may make such provision as the Secretary of State thinks fit with respect to pending proceedings<sup>13</sup>.

1 As to the Secretary of State see PARA 3.

2 'Periodic' accounts and reports means accounts and reports which are required by Part VI rules to be produced periodically: Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(12) (definition amended by the Companies Act 2006 Sch 15 Pt 2 paras 13, 14(1), (5)(c)). As to the meaning of 'Part VI rules' see note 4.

3 'Issuer', in relation to transferable securities, has the meaning given by the Financial Services and Markets Act 2000 s 102A(6)(b) (see PARA 385 note 21); and 'transferable securities' has the meaning given by s 102A(3) (see PARA 385 note 18): Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(12) (definitions substituted by the Companies Act 2006 Sch 15 Pt 2 paras 13, 14(1), (5)(b), (d)).

4 'Part VI rules' has the meaning given by the Financial Services and Markets Act 2000 s 103(1) (see PARA 385): Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(12) (definition substituted by the Companies Act 2006 Sch 15 Pt 2 paras 13, 14(1), (5)(a)).

5 As to the Financial Services Authority see PARAS 4, 6 et seq.

6 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(1), (2) (s 14(2) amended by the Companies Act 2006 Sch 15 Pt 2 paras 13, 14(1), (2)(a)). The power to make an order under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14 is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 14(11). As to the prescribed body, see the Supervision of Accounts and Reports (Prescribed Body) Order 2007, SI 2007/2583.

7 If the prescribed body is an unincorporated association, any relevant proceedings may be brought by or against that body in the name of any body corporate whose constitution provides for the establishment of the body; 'relevant proceedings' means proceedings brought in or in connection with the exercise of any function by the body as a prescribed body: Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(9).

8 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(3) (amended by the Companies Act 2006 Sch 15 Pt 2 paras 13, 14(1), (3)(b)).

9 The provisions specified in the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(8) which provides that an order under s 14 may contain such requirements or other provisions relating to the exercise of functions by the prescribed body as appear to the Secretary of State to be appropriate.

10 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(4).

11 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(5). In relation to the appointment of a body in respect of any such class or classes, s 14(2), (3) is to be read as referring to issuers, or (as the case may be) to periodic accounts or reports, of the class or classes concerned: s 14(6).

12 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(7).

13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14(10). As to the application of the Companies Act 2006 ss 459-462, 1126, 1130 (see **COMPANIES** vol 15 (2009) PARAS 903, 904, 1624, 1627) to prescribed bodies and their functions under the Companies (Audit, Investigations and Community Enterprise) Act 2004 s 14, see s 15.

## UPDATE

### **435 Supervision of periodic accounts and reports of issuers of listed securities**

NOTE 6--SI 2007/2583 replaced by Companies (Defective Accounts and Directors' Reports) (Authorised Person) and Supervision of Accounts and Reports (Prescribed Body) Order 2008, SI 2008/623, regs 3, 4.

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### **436. Fees.**

Listing rules<sup>1</sup> may require the payment of fees to the competent authority<sup>2</sup> in respect of: (1) applications for listing<sup>3</sup>; (2) the continued inclusion of securities<sup>4</sup> in the official list<sup>5</sup>; (3) applications for approval as a sponsor<sup>6</sup>; and (4) continued inclusion of sponsors in the list of sponsors<sup>7</sup>. In exercising its powers<sup>8</sup> the competent authority may set such fees as it considers will (taking account of the income it expects as the competent authority) enable it: (a) to meet expenses incurred in carrying out its functions under Part VI of the Financial Services and Markets Act 2000<sup>9</sup> or for any incidental purpose<sup>10</sup>; (b) to maintain adequate reserves<sup>11</sup>; and (c) in the case of the Financial Services Authority<sup>12</sup>, to repay the principal of, and pay any interest on, any money which it has borrowed and which has been used for the purpose of meeting expenses incurred in relation to its assumption of functions<sup>13</sup>.

Disclosure rules<sup>14</sup> may require the payment of fees to the competent authority in respect of the continued admission of financial instruments<sup>15</sup> to trading on a regulated market<sup>16</sup>. Prospectus rules<sup>17</sup> may require the payment of fees to the competent authority in respect of (i) applications for approval of a prospectus or a supplementary prospectus<sup>18</sup>; (ii) applications for inclusion in the register of investors<sup>19</sup>; (iii) the continued inclusion of investors in that register<sup>20</sup>; (iv) access to that register<sup>21</sup>. Transparency rules<sup>22</sup> may require the payment of fees to the competent authority in respect of the continued admission of financial instruments to trading on a regulated market<sup>23</sup>.

In fixing the amount of any fee which is to be payable to the competent authority, no account is to be taken of any sums which it receives, or expects to receive, by way of penalties imposed by it under Part VI of the Financial Services and Markets Act 2000<sup>24</sup>.

Any fee which is owed to the competent authority under any provision made by or under Part VI of the Financial Services and Markets Act 2000 may be recovered as a debt due to it<sup>25</sup>.

- 1 As to the meaning of 'listing rules' see PARA 385 note 18.
- 2 As to the competent authority see PARA 385. See also the Financial Services Authority's Handbook of Rules and Guidance, Listing, Prospectus and Disclosure, Listing Rules (LR); High Level Standards, Fees Manual (FEES). As to the Handbook generally see PARA 22.
- 3 Financial Services and Markets Act 2000 s 99(1)(a). As to the meaning of 'listing' see PARA 387 note 2.
- 4 As to the meaning of 'securities' see PARA 385 note 21.
- 5 Financial Services and Markets Act 2000 s 99(1)(b). As to the meaning of 'official list' see PARA 387 note 2.
- 6 Financial Services and Markets Act 2000 s 99(1)(c). The reference is to applications under s 88: see PARA 426.
- 7 Financial Services and Markets Act 2000 s 99(1)(d).
- 8 Ie under the Financial Services and Markets Act 2000 s 99(1).
- 9 Ie the Financial Services and Markets Act 2000 Pt VI (ss 72-103).
- 10 Financial Services and Markets Act 2000 s 99(2)(a).
- 11 Financial Services and Markets Act 2000 s 99(2)(b).
- 12 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 13 Financial Services and Markets Act 2000 s 99(2)(c). The reference in the text is to the assumption of functions from the London Stock Exchange in relation to the official list and the assumption of functions under Pt VI. Section 99(2)(c) applies whether expenses were incurred before or after the coming into force of Pt VI: s 99(4). As to the London Stock Exchange see PARA 75.
- 14 As to the meaning of 'disclosure rules' see PARA 385 note 18.
- 15 As to the meaning of 'financial instrument' see PARA 385 note 12.
- 16 Financial Services and Markets Act 2000 s 99(1A) (added by SI 2005/381). As to the meaning of 'regulated market' see PARA 385 note 13.
- 17 As to the meaning of 'disclosure rules' see PARA 385 note 18.
- 18 Financial Services and Markets Act 2000 s 99(1B)(a) (s 99(1B) added by SI 2005/1433). As to prospectuses see PARA 395 et seq. As to supplementary prospectuses see PARA 403.
- 19 Financial Services and Markets Act 2000 s 99(1B)(b) (as added: see note 18). As to the register of investors see PARAS 413-414.
- 20 Financial Services and Markets Act 2000 s 99(1B)(c) (as added: see note 18).
- 21 Financial Services and Markets Act 2000 s 99(1B)(d) (as added: see note 18).
- 22 As to the meaning of 'transparency rules' see PARA 415 note 2.
- 23 Financial Services and Markets Act 2000 s 99(1C) (added by the Companies Act 2006 Sch 15 Pt 1 paras 1, 9).
- 24 Financial Services and Markets Act 2000 s 99(3). As to penalties see PARA 429 et seq.
- 25 Financial Services and Markets Act 2000 s 99(5).

5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(i) Penalties for Market Abuse/437. Market abuse.

## **(7) ENFORCEMENT**

### **(i) Penalties for Market Abuse**

#### **437. Market abuse.**

For the purposes of the Financial Services and Markets Act 2000, market abuse is behaviour<sup>1</sup> (whether by one person alone or by two or more persons jointly or in concert) which (1) occurs in relation to (a) qualifying investments<sup>2</sup> admitted to trading on a prescribed market<sup>3</sup>; (b) qualifying investments in respect of which a request for admission to trading on such a market has been made<sup>4</sup>; or (c) in the case of the first or second type of behaviour<sup>5</sup>, investments which are related investments<sup>6</sup> in relation to such qualifying investments<sup>7</sup>; and (2) falls within any one or more of the types of behaviour set out below<sup>8</sup>.

The first type of behaviour is where an insider<sup>9</sup> deals, or attempts to deal<sup>10</sup>, in a qualifying investment or related investment on the basis of inside information<sup>11</sup> relating to the investment in question<sup>12</sup>. The second is where an insider discloses inside information to another person otherwise than in the proper course of the exercise of his employment, profession or duties<sup>13</sup>.

The third is where the behaviour (not falling within the first or second type of behaviour)<sup>14</sup> is based on information which is not generally available to those using the market but which, if available to a regular user<sup>15</sup> of the market, would be, or would be likely to be, regarded by him as relevant when deciding the terms on which transactions in qualifying investments should be effected, and is likely to be regarded by a regular user of the market as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market<sup>16</sup>.

The fourth is where the behaviour consists of effecting transactions or orders to trade (otherwise than for legitimate reasons and in conformity with accepted market practices<sup>17</sup> on the relevant market) which give, or are likely to give, a false or misleading impression as to the supply of, or demand for, or as to the price of, one or more qualifying investments, or secure the price of one or more such investments at an abnormal or artificial level<sup>18</sup>.

The fifth is where the behaviour consists of effecting transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance<sup>19</sup>. The sixth is where the behaviour consists of the dissemination of information by any means which gives, or is likely to give, a false or misleading impression as to a qualifying investment by a person who knew or could reasonably be expected to have known that the information was false or misleading<sup>20</sup>.

The seventh is where the behaviour (not falling within the fourth, fifth or sixth type of behaviour)<sup>21</sup> is likely to give a regular user of the market a false or misleading impression as to the supply of, demand for or price or value of, qualifying investments, or would be, or would be likely to be, regarded by a regular user of the market as behaviour that would distort, or would be likely to distort, the market in such an investment, and the behaviour is likely to be regarded by a regular user of the market as a failure on the part of the person concerned to observe the standard of behaviour reasonably expected of a person in his position in relation to the market<sup>22</sup>.

Behaviour is to be taken into account for the purposes of Part VIII of the Financial Services and Markets Act 2000<sup>23</sup> only if it occurs in the United Kingdom<sup>24</sup>, or in relation to qualifying investments which are admitted to trading on a prescribed market situated in, or operating in, the United Kingdom, qualifying investments for which a request for admission to trading on such a prescribed market has been made, or in the case of the first and second types of

behaviour<sup>25</sup>, investments which are related investments in relation to such qualifying investments<sup>26</sup>.

Behaviour does not amount to market abuse for the purposes of the Financial Services and Markets Act 2000 if (i) it conforms with a rule which includes a provision to the effect that behaviour conforming with the rule does not amount to market abuse<sup>27</sup>; (ii) it conforms with the relevant provisions of EC legislation relating to exemptions for buy-back programmes and stabilisation of financial instruments<sup>28</sup>; or (iii) it is done by a person acting on behalf of a public authority in pursuit of monetary policies or policies with respect to exchange rates or the management of public debt or foreign exchange reserves<sup>29</sup>. Any reference in the Financial Services and Markets Act 2000 to a person engaged in market abuse is to a person engaged in market abuse either alone or with one or more persons<sup>30</sup>.

1 'Behaviour' includes action or inaction: Financial Services and Markets Act 2000 s 130A(3) (s 130A added by SI 2005/381). See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 'Investment' is to be read with the Financial Services and Markets Act 2000 s 22 and Sch 2 (see PARAS 84-85): s 130A(3) (as added: see note 1).

3 Financial Services and Markets Act 2000 s 118(1)(a)(i) (s 118 substituted by SI 2005/381).

The Treasury may by order prescribe (whether by name or by description): (1) the markets which are prescribed markets for the purposes of specified provisions of the Financial Services and Markets Act 2000 Pt VIII (ss 118-131A); and (2) the investments which are qualifying investments in relation to the prescribed markets: s 130A(1) (as added: see note 1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). An order may prescribe different investments or descriptions of investment in relation to different markets or descriptions of market: s 130A(2) (as so added). As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

There are prescribed, as markets to which the 2000 Act s 118(2), (3), (5)-(7) applies (1) all markets which are established under the rules of a UK recognised investment exchange; (2) the market known as OFEX; (3) all other markets which are regulated markets: Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001, SI 2001/996, art 4(1) (art 4 substituted by SI 2005/381). 'Regulated market' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.14: Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001, SI 2001/996, art 3 (definition added by SI 2005/381; and amended by SI 2007/126). There are prescribed, as markets to which the Financial Services and Markets Act 2000 s 118(4), (8) applies, (a) all markets which are established under the rules of a UK recognised investment exchange; (b) the market known as OFEX: Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001, SI 2001/996, art 4(2) (as so substituted). There are prescribed, as qualifying investments in relation to the markets prescribed by art 4, all financial instruments within the meaning given in European Parliament and EC Council Directive 2003/6 (OJ L96, 12.4.2003, p 16) on insider dealing and market manipulation (market abuse) art 1(3): Financial Services and Markets Act 2000 (Prescribed Markets and Qualifying Investments) Order 2001, SI 2001/996, art 5 (as so substituted).

4 Financial Services and Markets Act 2000 s 118(1)(a)(ii) (as substituted: see note 3).

5 Ie in the case of behaviour under the Financial Services and Markets Act 2000 s 118(2), (3).

6 'Related investment' in relation to a qualifying investment, means an investment whose price or value depends on the price or value of the qualifying investment: Financial Services and Markets Act 2000 s 130A(3) (as added: see note 1).

7 Financial Services and Markets Act 2000 s 118(1)(a)(iii) (as substituted: see note 3).

8 Financial Services and Markets Act 2000 s 118(1)(b) (as substituted: see note 3). The reference is to s 118(2)-(8). Section 118(4), (8) and the definition of 'regular user' (see note 15) in s 130A(3) cease to have effect on 30 June 2008 and s 118(1)(b) is then to be read as no longer referring to those provisions (ie the reference would be to s 118(2), (3), (5)-(7)): see s 118(9) (as so substituted).

9 As to insiders and inside information see PARA 438.

10 'Dealing', in relation to an investment, means acquiring or disposing of the investment whether as principal or agent or directly or indirectly, and includes agreeing to acquire or dispose of the investment, and entering into and bringing to an end a contract creating it: Financial Services and Markets Act 2000 s 130A(3) (as added: see note 1).

11 See note 9.

12 Financial Services and Markets Act 2000 s 118(2) (as substituted: see note 3). See note 3.

13 Financial Services and Markets Act 2000 s 118(3) (as substituted: see note 3). See note 3.

14 Ie not falling within the Financial Services and Markets Act 2000 s 118(2) or (3).

15 'Regular user', in relation to a particular market, means a reasonable person who regularly deals on that market in investments of the kind in question: Financial Services and Markets Act 2000 s 130A(3) (as added: see note 1). See s 118(9); and note 8.

16 Financial Services and Markets Act 2000 s 118(4) (as substituted: see note 3). See s 118(9); and note 8. See also notes 3, 26.

17 'Accepted market practices' means practices that are reasonably expected in the financial market or markets in question and are accepted by the Financial Services Authority or, in the case of a market situated in another EEA state, the competent authority of that EEA state within the meaning of European Parliament and EC Council Directive 2003/6 (OJ L96, 12.4.2003, p 16) on insider dealing and market manipulation (market abuse): 2000 Act s 130A(3) (as added: see note 1). As to the Financial Services Authority see PARAS 4, 6 et seq.

18 Financial Services and Markets Act 2000 s 118(5) (as substituted: see note 3). See note 3.

19 Financial Services and Markets Act 2000 s 118(6) (as substituted: see note 3). See note 3.

20 Financial Services and Markets Act 2000 s 118(7) (as substituted: see note 3). See note 3.

For the purposes of s 118(7), the dissemination of information by a person acting in the capacity of a journalist is to be assessed taking into account the codes governing his profession unless he derives, directly or indirectly, any advantage or profits from the dissemination of the information: s 118A(4) (s 118A added by SI 2005/381).

21 Ie not falling within the Financial Services and Markets Act 2000 s 118(5), (6) or (7).

22 Financial Services and Markets Act 2000 s 118(8) (as substituted: see note 3). See s 118(9); and note 8. See also note 26.

23 Ie the Financial Services and Markets Act 2000 Pt VIII (ss 118-131A).

24 As to the meaning of 'United Kingdom' see PARA 2 note 3.

25 Ie in the case of the Financial Services and Markets Act 2000 s 118(2), (3).

26 Financial Services and Markets Act 2000 s 118A(1) (as added: see note 20).

For the purposes of s 118A(1), as it applies in relation to s 118(4) and (8) (ie the third and seventh types of behaviour), a prescribed market accessible electronically in the United Kingdom is to be treated as operating in the United Kingdom: s 118A(2) (as so added). For the purposes of s 118(4) and (8), the behaviour that is to be regarded as occurring in relation to qualifying investments includes behaviour which occurs in relation to anything that is the subject matter, or whose price or value is expressed by reference to the price or value of the qualifying investments, or occurs in relation to investments (whether or not they are qualifying investments) whose subject matter is the qualifying investments: s 118A(3) (as so added). Section 118A(2), (3) ceases to have effect on 30 June 2008: s 118A(6) (as so added).

27 Financial Services and Markets Act 2000 s 118A(5)(a) (as added: see note 20).

28 Financial Services and Markets Act 2000 s 118A(5)(b) (as added: see note 20). The reference is to EC Commission Regulation 2273/2003 (OJ L336, 23.12.2003, p 33) implementing European Parliament and EC Council Directive 2003/6 as regards exemptions for buy-back programmes and stabilisation of financial instruments.

29 Financial Services and Markets Act 2000 s 118A(5)(c) (as added: see note 20).

30 Financial Services and Markets Act 2000 s 130A(4) (as added: see note 3).



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NOTE 3--SI 2001/996 art 5 amended: SI 2008/3053.

NOTES 8, 26--Provisions cited now cease to have effect on 31 December 2011: Financial Services and Markets Act 2000 ss 118(9), 118A(6) (amended by SI 2009/3128).

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**438. Insiders and inside information.**

For the purposes of Part VIII of the Financial Services and Markets Act 2000<sup>1</sup>, an 'insider' is any person who has 'inside information' (1) as a result of his membership of an administrative, management or supervisory body of an issuer of qualifying investments<sup>2</sup>; (2) as a result of his holding in the capital of an issuer of qualifying investments<sup>3</sup>; (3) as a result of having access to the information through the exercise of his employment, profession or duties<sup>4</sup>; (4) as a result of his criminal activities<sup>5</sup>; or (5) which he has obtained by other means and which he knows, or could reasonably be expected to know, is inside information<sup>6</sup>.

In relation to qualifying investments, or related investments<sup>7</sup>, which are not commodity derivatives, inside information is information of a precise nature<sup>8</sup> which (a) is not generally available<sup>9</sup>; (b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments<sup>10</sup>; and (c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments<sup>11</sup>. In relation to qualifying investments or related investments which are commodity derivatives, inside information is information of a precise nature which (i) is not generally available<sup>12</sup>; (ii) relates, directly or indirectly, to one or more such derivatives<sup>13</sup>; and (iii) users of markets on which the derivatives are traded would expect to receive in accordance with any accepted market practices<sup>14</sup> on those markets<sup>15</sup>.

In relation to a person charged with the execution of orders concerning any qualifying investments or related investments, inside information includes information conveyed by a client and related to the client's pending orders which (A) is of a precise nature<sup>16</sup>; (B) is not generally available<sup>17</sup>; (C) relates, directly or indirectly, to one or more issuers of qualifying investments or to one or more qualifying investments<sup>18</sup>; and (D) would, if generally available, be likely to have a significant effect on the price of those qualifying investments or the price of related investments<sup>19</sup>.

1 le the Financial Services and Markets Act 2000 Pt 8 (ss 118-131A).

2 Financial Services and Markets Act 2000 s 118B(a) (ss 118B, 118C added by SI 2005/381).

3 Financial Services and Markets Act 2000 s 118B(b) (as added: see note 2).

4 Financial Services and Markets Act 2000 s 118B(c) (as added: see note 2).

5 Financial Services and Markets Act 2000 s 118B(d) (as added: see note 2).

6 Financial Services and Markets Act 2000 s 118B(e) (as added: see note 2).

7 As to the meaning of 'related investment' see PARA 437 note 6. As to qualifying investments see also PARA 437.

8 Information is precise if it (1) indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur; and (2) is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments: Financial Services and Markets Act 2000 s 118C(5) (as added: see note 2).

9 Financial Services and Markets Act 2000 s 118C(1), (2)(a) (as added: see note 2).

10 Financial Services and Markets Act 2000 s 118C(1), (2)(b) (as added: see note 2).

11 Financial Services and Markets Act 2000 s 118C(1), (2)(c) (as added: see note 2). Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions: s 118C(6) (as so added).

12 Financial Services and Markets Act 2000 s 118C(1), (3)(a) (as added: see note 2).

13 Financial Services and Markets Act 2000 s 118C(1), (3)(b) (as added: see note 2).

14 As to the meaning of 'accepted market practices' see PARA 437 note 17.

15 Financial Services and Markets Act 2000 s 118C(1), (3)(c) (as added: see note 2). For the purposes of s 118C(2)(c), users of markets on which investments in commodity derivatives are traded are to be treated as expecting to receive information relating directly or indirectly to one or more such derivatives in accordance with any accepted market practices, which is (1) routinely made available to the users of those markets; or (2) required to be disclosed in accordance with any statutory provision, market rules, or contracts or customs on the relevant underlying commodity market or commodity derivatives market: s 118C(7) (as so added).

Information which can be obtained by research or analysis conducted by, or on behalf of, users of a market is to be regarded, for the purposes of Pt VIII, as being generally available to them: s 118C(8) (as so added).

16 Financial Services and Markets Act 2000 s 118C(1), (4)(a) (as added: see note 2).

17 Financial Services and Markets Act 2000 s 118C(1), (4)(b) (as added: see note 2).

18 Financial Services and Markets Act 2000 s 118C(1), (4)(c) (as added: see note 2).

19 Financial Services and Markets Act 2000 s 118C(1), (4)(d) (as added: see note 2).

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#### **439. The code.**

The Financial Services Authority<sup>1</sup> must prepare and issue a code containing such provisions as the Authority considers will give appropriate guidance to those determining whether or not behaviour amounts to market abuse<sup>2</sup>. The code may among other things specify<sup>3</sup>:

1072 (1) descriptions of behaviour that, in the opinion of the Authority, amount to market abuse<sup>4</sup>;

1073 (2) descriptions of behaviour that, in the opinion of the Authority, do not amount to market abuse<sup>5</sup>;

1074 (3) factors that, in the opinion of the Authority, are to be taken into account in determining whether or not behaviour amounts to market abuse<sup>6</sup>.

1075 (4) descriptions of behaviour that are accepted market practices<sup>7</sup> in relation to one or more specified markets<sup>8</sup>;

1076 (5) descriptions of behaviour that are not accepted market practices in relation to one or more specified markets<sup>9</sup>.

The code may make different provision in relation to persons, cases or circumstances of different descriptions<sup>10</sup>. The Authority may at any time alter or replace the code<sup>11</sup>. If the code is altered or replaced, the altered or replacement code must be issued by the Authority<sup>12</sup>.

A code issued under these provisions must be published by the Authority in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>13</sup>. The Authority must, without delay, give the Treasury<sup>14</sup> a copy of any code published<sup>15</sup>. The Authority may charge a reasonable fee for providing a person with a copy of the code<sup>16</sup>.

The Authority may include in a code issued by it<sup>17</sup> (the 'Authority's code') provision to the effect that in its opinion behaviour conforming with the City Code on Takeovers and Mergers<sup>18</sup>: (a) does not amount to market abuse; (b) does not amount to market abuse in specified<sup>19</sup> circumstances; or (c) does not amount to market abuse if engaged in by a specified description of person<sup>20</sup>. The Treasury's approval is required before any such provision may be included in the Authority's code<sup>21</sup>.

Before issuing a code<sup>22</sup>, the Authority must publish a draft of the proposed code in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>23</sup>. The draft must be accompanied by: (i) a cost benefit analysis<sup>24</sup>; and (ii) notice that representations about the proposal may be made to the Authority within a specified time<sup>25</sup>. Before issuing the proposed code, the Authority must have regard to any representations made to it in accordance with head (ii) above<sup>26</sup>. If the Authority issues the proposed code it must publish an account, in general terms, of the representations made to it and its response to them<sup>27</sup>. If the code differs from the draft in a way which is, in the opinion of the Authority, significant: (A) the Authority must publish details of the difference<sup>28</sup>; and (B) those details must be accompanied by a cost benefit analysis<sup>29</sup>. These provisions<sup>30</sup> also apply to a proposal to alter or replace a code<sup>31</sup>.

If a person behaves in a way which is described in the code in force<sup>32</sup> at the time of the behaviour as behaviour that, in the Authority's opinion, does not amount to market abuse that behaviour of his is to be taken, for the purposes of the Financial Services and Markets Act 2000, as not amounting to market abuse<sup>33</sup>; and the code in force<sup>34</sup> at the time when particular behaviour occurs may be relied on so far as it indicates whether or not that behaviour should be taken to amount to market abuse<sup>35</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 Financial Services and Markets Act 2000 s 119(1). As to the meaning of 'market abuse' see PARA 437. See also the Financial Services Authority's Handbook of Rules and Guidance, Business Standards Section, Business Standards, Market Conduct (MAR) Ch 1 (Code of Market Conduct). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 119(2).

4 Financial Services and Markets Act 2000 s 119(2)(a).

5 Financial Services and Markets Act 2000 s 119(2)(b).

6 Financial Services and Markets Act 2000 s 119(2)(c).

7 As to the meaning of 'accepted market practices' see PARA 437 note 17. In determining, for the purposes of the Financial Services and Markets Act 2000 s 119(2)(d), (e) (see heads (4), (5) in the text) or otherwise, what are and what are not accepted market practices, the Authority must have regard to the factors and procedures laid down in EC Commission Directive 2004/72 (OJ L162, 30.4.2004, p 70) implementing European Parliament and EC Council Directive 2003/6, arts 2, 3: Financial Services and Markets Act 2000 s 119(2A) (s 119(2)(d), (e), (2A) added by SI 2005/381).

8 Financial Services and Markets Act 2000 s 119(2)(d) (as added: see note 7).

- 9 Financial Services and Markets Act 2000 s 119(2)(e) (as added: see note 7).
- 10 Financial Services and Markets Act 2000 s 119(3).
- 11 Financial Services and Markets Act 2000 s 119(4).
- 12 Financial Services and Markets Act 2000 s 119(5).
- 13 Financial Services and Markets Act 2000 s 119(6).
- 14 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 15 Financial Services and Markets Act 2000 s 119(7).
- 16 Financial Services and Markets Act 2000 s 119(8).
- 17 Ie under the Financial Services and Markets Act 2000 s 119: see the text to notes 1-16.
- 18 Ie the City Code on Takeovers and Mergers (the 'City Code') issued by the Panel on Takeovers and Mergers (see PARA 78; and **COMPANIES** vol 15 (2009) PARA 1501 et seq) as it has effect at the time when the behaviour occurs: Financial Services and Markets Act 2000 s 120(4).
- 19 'Specified' means specified in the Authority's code: Financial Services and Markets Act 2000 s 120(5).
- 20 Financial Services and Markets Act 2000 s 120(1). If the Authority's code includes provision of a kind authorised by s 120(1), the Authority must keep itself informed of the way in which the Panel on Takeovers and Mergers interprets and administers the relevant provisions of the City Code: s 120(3).
- 21 Financial Services and Markets Act 2000 s 120(2).
- 22 Ie under the Financial Services and Markets Act 2000 s 119: see the text to notes 1-16. Section 121(1)-(5) (see the text to notes 23-29) does not apply if the Authority considers that there is an urgent need to publish the code: s 121(6).
- 23 Financial Services and Markets Act 2000 s 121(1). See note 22. The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 121(1): s 121(8).
- 24 Financial Services and Markets Act 2000 s 121(2)(a). See note 22. 'Cost benefit analysis' means an estimate of the costs together with an analysis of the benefits that will arise: (1) if the proposed code is issued; or (2) if s 121(5)(b) (see head (B) in the text) applies, from the code that has been issued: s 121(10). Neither head (i) nor head (B) in the text applies if the Authority considers that, making the appropriate comparison, there will be no increase in costs or that, making that comparison, there will be an increase in costs but the increase will be of minimal significance: s 121(7). 'Appropriate comparison' means: (a) in relation to head (i) in the text, a comparison between the overall position if the code is issued and the overall position if it is not issued; (b) in relation to head (B) in the text, a comparison between the overall position after the issuing of the code and the overall position before it was issued: s 121(11).
- 25 Financial Services and Markets Act 2000 s 121(2)(b). See note 22.
- 26 Financial Services and Markets Act 2000 s 121(3). See note 22.
- 27 Financial Services and Markets Act 2000 s 121(4). See note 22.
- 28 Financial Services and Markets Act 2000 s 121(5)(a). This obligation is in addition to complying with s 121(4): see the text to note 27. See note 22.
- 29 Financial Services and Markets Act 2000 s 121(5)(b). See notes 22, 24.
- 30 Ie the Financial Services and Markets Act 2000 s 121: see the text and notes 22-29.
- 31 Financial Services and Markets Act 2000 s 121(9).
- 32 Ie under the Financial Services and Markets Act 2000 s 119: see the text to notes 1-16.
- 33 Financial Services and Markets Act 2000 s 122(1).
- 34 Ie under the Financial Services and Markets Act 2000 s 119: see the text to notes 1-16.

35 Financial Services and Markets Act 2000 s 122(2).

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#### **440. Power to impose penalties.**

If the Financial Services Authority<sup>1</sup> is satisfied that a person ('A'): (1) is or has engaged in market abuse<sup>2</sup>; or (2) by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by A, would amount to market abuse, it may impose on him a penalty of such amount as it considers appropriate<sup>3</sup>. However, the Authority may not impose a penalty on a person if, having considered any representations made to it in response to a warning notice<sup>4</sup>, there are reasonable grounds for it to be satisfied that he believed, on reasonable grounds, that his behaviour did not fall within head (1) or head (2) above, or he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within head (1) or head (2) above<sup>5</sup>. If the Authority is entitled to impose a penalty on a person it may, instead of imposing a penalty on him, publish a statement to the effect that he has engaged in market abuse<sup>6</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the meanings of 'market abuse' and 'engaged in market abuse' see PARA 437.

3 Financial Services and Markets Act 2000 s 123(1).

4 As to warning notices see PARA 769.

5 Financial Services and Markets Act 2000 s 123(2).

6 Financial Services and Markets Act 2000 s 123(3).

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#### **441. Statement of policy.**

The Financial Services Authority<sup>1</sup> must prepare and issue a statement of its policy with respect to the imposition of penalties<sup>2</sup> and the amount of those penalties<sup>3</sup>. The Authority's policy in determining what the amount of a penalty should be must include having regard to<sup>4</sup>:

- 1077 (1) whether the behaviour in respect of which the penalty is to be imposed had an adverse effect on the market in question and, if it did, how serious that effect was<sup>5</sup>;
- 1078 (2) the extent to which that behaviour was deliberate or reckless<sup>6</sup>; and
- 1079 (3) whether the person on whom the penalty is to be imposed is an individual<sup>7</sup>.

A statement of policy must include an indication of the circumstances in which the Authority is to be expected to regard a person as: (a) having a reasonable belief that his behaviour did not amount to market abuse<sup>8</sup>; or (b) having taken reasonable precautions and exercised due diligence to avoid engaging in market abuse<sup>9</sup>.

The Authority may at any time alter or replace a statement of policy<sup>10</sup>. If a statement is altered or replaced, the Authority must issue the altered or replacement statement<sup>11</sup>.

In exercising, or deciding whether to exercise, its power to impose penalties<sup>12</sup> in the case of any particular behaviour, the Authority must have regard to any statement published and in force at the time when the behaviour concerned occurred<sup>13</sup>. A statement must be published by the Authority in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>14</sup>. The Authority may charge a reasonable fee for providing a person with a copy of a published statement<sup>15</sup>. The Authority must, without delay, give the Treasury<sup>16</sup> a copy of any published statement<sup>17</sup>.

Before issuing a statement of policy<sup>18</sup>, the Authority must publish a draft of the proposed statement in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>19</sup>. The draft must be accompanied by notice that representations about the proposal may be made to the Authority within a specified time<sup>20</sup>. Before issuing the proposed statement, the Authority must have regard to any representations made to it<sup>21</sup>. If the Authority issues the proposed statement it must publish an account, in general terms, of the representations made to it<sup>22</sup> and its response to them<sup>23</sup>. If the statement differs from the draft<sup>24</sup> in a way which is, in the opinion of the Authority, significant, the Authority must publish details of the difference<sup>25</sup>. These provisions<sup>26</sup> also apply to a proposal to alter or replace a statement<sup>27</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 123: see PARA 440.

3 Financial Services and Markets Act 2000 s 124(1).

4 Financial Services and Markets Act 2000 s 124(2).

5 Financial Services and Markets Act 2000 s 124(2)(a).

6 Financial Services and Markets Act 2000 s 124(2)(b).

7 Financial Services and Markets Act 2000 s 124(2)(c).

8 As to the meaning of 'market abuse' see PARA 437.

9 Financial Services and Markets Act 2000 s 124(3). As to the meaning of 'engaged in market abuse' see PARA 437.

10 Financial Services and Markets Act 2000 s 124(4).

11 Financial Services and Markets Act 2000 s 124(5).

12 Ie under the Financial Services and Markets Act 2000 s 123: see PARA 440.

13 Financial Services and Markets Act 2000 s 124(6).

14 Financial Services and Markets Act 2000 s 124(7).

15 Financial Services and Markets Act 2000 s 124(8).

16 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

- 17 Financial Services and Markets Act 2000 s 124(9).
- 18 le under the Financial Services and Markets Act 2000 s 124: see the text to notes 1-17.
- 19 Financial Services and Markets Act 2000 s 125(1). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 125(1): s 125(6).
- 20 Financial Services and Markets Act 2000 s 125(2).
- 21 Financial Services and Markets Act 2000 s 125(3).
- 22 le in accordance with the Financial Services and Markets Act 2000 s 125(2): see the text to note 20.
- 23 Financial Services and Markets Act 2000 s 125(4).
- 24 le the draft published under the Financial Services and Markets Act 2000 s 125(1): see the text to notes 18-19.
- 25 Financial Services and Markets Act 2000 s 125(5). This requirement is in addition to complying with s 125(4): see the text to notes 22-23.
- 26 le the Financial Services and Markets Act 2000 s 125: see the text and notes 18-24.
- 27 Financial Services and Markets Act 2000 s 125(7).

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#### **442. Procedure.**

If the Financial Services Authority<sup>1</sup> proposes to take action against a person<sup>2</sup>, it must give him a warning notice<sup>3</sup>. A warning notice about a proposal to impose a penalty must state the amount of the proposed penalty<sup>4</sup>. A warning notice about a proposal to publish a statement must set out the terms of the proposed statement<sup>5</sup>.

If the Authority decides to take action against a person<sup>6</sup>, it must give him a decision notice<sup>7</sup>. A decision notice about the imposition of a penalty must state the amount of the penalty<sup>8</sup>. A decision notice about the publication of a statement must set out the terms of the statement<sup>9</sup>.

If the Authority decides to take action against a person<sup>10</sup>, that person may refer the matter to the Financial Services and Markets Tribunal<sup>11</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 le under the Financial Services and Markets Act 2000 s 123: see PARA 440.

3 Financial Services and Markets Act 2000 s 126(1). As to warning notices see PARA 769.

4 Financial Services and Markets Act 2000 s 126(2).

5 Financial Services and Markets Act 2000 s 126(3).

6 le under the Financial Services and Markets Act 2000 s 123: see PARA 440.

7 Financial Services and Markets Act 2000 s 127(1). As to decision notices see PARA 770.

8 Financial Services and Markets Act 2000 s 127(2).

9 Financial Services and Markets Act 2000 s 127(3).

10 le under the Financial Services and Markets Act 2000 s 123: see PARA 440.

11 Financial Services and Markets Act 2000 s 127(4). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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#### **443. Suspension of investigations.**

If the Financial Services Authority<sup>1</sup> considers it desirable or expedient because of the exercise or possible exercise of a power relating to market abuse<sup>2</sup>, it may direct a recognised investment exchange<sup>3</sup> or recognised clearing house<sup>4</sup>: (1) to terminate, suspend or limit the scope of any inquiry which the exchange or clearing house is conducting under its rules; or (2) not to conduct an inquiry which the exchange or clearing house proposes to conduct under its rules<sup>5</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the meaning of 'market abuse' see PARA 437. The Authority's powers relating to market abuse are its powers: (1) to impose penalties under the Financial Services and Markets Act 2000 s 123 (see PARA 440); or (2) to appoint a person to conduct an investigation under s 168 in a case falling within s 168(2)(d) (see PARA 449): s 128(3).

3 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

4 As to the meaning of 'recognised clearing house' see PARA 684 note 6.

5 Financial Services and Markets Act 2000 s 128(1). A direction under s 128(1) must be given to the exchange or clearing house concerned by notice in writing, and is enforceable, on the application of the Authority, by injunction: s 128(2).

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#### **444. Power of the court to impose penalties in cases of market abuse.**

The Financial Services Authority<sup>1</sup> may on an application to the court for an injunction or a restitution order<sup>2</sup> request the court to consider whether the circumstances are such that a penalty should be imposed on the person to whom the application relates<sup>3</sup>. The court may, if it considers it appropriate, make an order requiring the person concerned to pay to the Authority a penalty of such amount as it considers appropriate<sup>4</sup>.



1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 381 or s 383: see PARAS 471, 473. As to the power of the Authority to itself require restitution see s 384; and PARA 474.

3 Financial Services and Markets Act 2000 s 129(1).

4 Financial Services and Markets Act 2000 s 129(2).

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#### 445. Guidance.

The Treasury<sup>1</sup> may from time to time issue written guidance for the purpose of helping relevant authorities<sup>2</sup> to determine the action to be taken in cases where behaviour occurs which is behaviour: (1) with respect to which the power to impose penalties in cases of market abuse<sup>3</sup> appears to be exercisable; and (2) which appears to involve the commission of an offence relating to misleading statements or insider dealing<sup>4</sup>. The Treasury must obtain the consent of the Attorney General and the Secretary of State before issuing any such guidance<sup>5</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 'Relevant authorities': (1) in relation to England and Wales, means the Secretary of State, the Financial Services Authority, the Director of the Serious Fraud Office and the Director of Public Prosecutions; (2) in relation to Northern Ireland, means the Secretary of State, the Financial Services Authority, the Director of the Serious Fraud Office and the Director of Public Prosecutions for Northern Ireland: Financial Services and Markets Act 2000 s 130(3). As to the Secretary of State see PARA 3 ante. As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Director of the Serious Fraud Office see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1067, 1089 et seq. As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq.

3 Ie the power in the Financial Services and Markets Act 2000 s 123: see PARA 440.

4 Financial Services and Markets Act 2000 s 130(1). The offences referred to in the text are an offence under s 397 (misleading statements and practices) (see PARA 568) or under the Criminal Justice Act 1993 Pt V (ss 52-64) (insider dealing) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 574A et seq).

5 Financial Services and Markets Act 2000 s 130(2). As to the Attorney General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 529.

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#### 446. Effect on transactions.

The imposition of a penalty under Part VIII of the Financial Services and Markets Act 2000<sup>1</sup> does not make any transaction void or unenforceable<sup>2</sup>.

1 The Financial Services and Markets Act 2000 Pt VIII (ss 118-131A): see PARA 437 et seq.

2 Financial Services and Markets Act 2000 s 131.

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## **(ii) Information Gathering and Investigations**

### **A. IN GENERAL**

#### **447. The Financial Services Authority's power to require information.**

The Financial Services Authority<sup>1</sup> may, by notice in writing given to an authorised person<sup>2</sup>, require him to provide specified<sup>3</sup> information or information of a specified description or to produce specified documents<sup>4</sup> or documents of a specified description<sup>5</sup>. The information or documents must be provided or produced before the end of such reasonable period as may be specified and at such place as may be specified<sup>6</sup>. An officer<sup>7</sup> who has written authorisation from the Authority to do so may require an authorised person without delay to provide the officer with specified<sup>8</sup> information or information of a specified description or to produce to him specified documents or documents of a specified description<sup>9</sup>. These provisions<sup>10</sup> apply only to information and documents reasonably required in connection with the exercise by the Authority of functions conferred on it by or under the Financial Services and Markets Act 2000<sup>11</sup>. The Authority may require any information provided under these provisions to be provided in such form as it may reasonably require<sup>12</sup>. The Authority may require any information provided, whether in a document or otherwise, to be verified in such manner, or any document produced to be authenticated in such manner, as it may reasonably require<sup>13</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 'Authorised person' includes a person who was at any time an authorised person but who has ceased to be an authorised person: Financial Services and Markets Act 2000 s 165(8). As to authorised persons see PARA 314.

3 For the purposes of the Financial Services and Markets Act 2000 s 165(1), (2) (see the text to notes 5-6) 'specified' means specified in the notice: s 165(10)(a).

4 As to the meaning of 'document' see PARA 10 note 10.

5 Financial Services and Markets Act 2000 s 165(1). The powers conferred by s 165(1), (3) (see the text to notes 7-9) may also be exercised to impose requirements on: (1) a person who is connected with an authorised person; (2) an operator, trustee or depositary of a scheme recognised under s 270 or s 272 (see PARAS 675-676) who is not an authorised person; (3) a recognised investment exchange or recognised clearing house: s 165(7). As to the meaning of 'recognised investment exchange' see PARA 684 note 1; and as to the meaning of 'recognised clearing house' see PARA 684 note 6.

For the purposes of s 165, a person is connected with an authorised person ('A') if he is or has at any relevant time been: (a) a member of A's group; (b) a controller of A; (c) any other member of a partnership of which A is a member; or (d) in relation to A, a person mentioned in Sch 15 Pt I (see heads (i)-(vi) below): s 165(11). As to

the meaning of 'group' see PARA 351 note 37. As to the meaning of 'controller' see PARA 591 note 16. As to the meaning of 'partnership' see PARA 86 note 11.

The persons mentioned in Sch 15 Pt I are as follows:

- 487 (i) if the authorised person ('BC') is a body corporate, a person who is or has been: (A) an officer or manager of BC or of a parent undertaking of BC; (B) an employee of BC; (C) an agent of BC or of a parent undertaking of BC (Sch 15 para 1);
- 488 (ii) if the authorised person ('PP') is a partnership, a person who is or has been a member, manager, employee or agent of PP (Sch 15 para 2);
- 489 (iii) if the authorised person ('UA') is an unincorporated association of persons which is neither a partnership nor an unincorporated friendly society, a person who is or has been an officer, manager, employee or agent of UA (Sch 15 para 3);
- 490 (iv) if the authorised person ('FS') is a friendly society, a person who is or has been an officer, manager or employee of FS (and, in relation to FS, 'officer' and 'manager' have the same meaning as in the Friendly Societies Act 1992 s 119(1) (see PARA 2115)) (Financial Services and Markets Act 2000 Sch 15 para 4);
- 491 (v) if the authorised person ('BS') is a building society, a person who is or has been an officer or employee of BS (and, in relation to BS, 'officer' has the same meaning as it has in the Building Societies Act 1986 s 119(1) (see PARA 1944)) (Financial Services and Markets Act 2000 Sch 15 para 5);
- 492 (vi) if the authorised person ('IP') is an individual, a person who is or has been an employee or agent of IP (Sch 15 para 6).

As to the meaning of 'body corporate' see PARA 86 note 11. As to the meaning of 'parent undertaking' see PARA 351 note 32. As to the meaning of 'friendly society' see PARA 591 note 13.

For the purposes of ss 171, 172 (see PARA 451), if the person under investigation is not an authorised person the references in Sch 15 Pt I to an authorised person are to be taken to be references to the person under investigation: Sch 15 para 7.

As to the restriction on the production, disclosure or inspection of protected items see PARA 784.

Section 165 is to apply for the purposes of the Regulated Covered Bonds Regulations 2008, SI 2008/346, as it applies for the purposes of the Financial Services and Markets Act 2000 but with the modification that for references to 'an authorised person' there is substituted references to 'a person to whom the Regulated Covered Bonds Regulations 2008, SI 2008/346 apply': Schedule para 3. As to the Regulated Covered Bonds Regulations 2008, SI 2008/346, generally see PARA 6 note 1.

6 Financial Services and Markets Act 2000 s 165(2).

7 'Officer' means an officer of the Authority and includes a member of the Authority's staff or an agent of the Authority: Financial Services and Markets Act 2000 s 165(9).

8 For the purposes of the Financial Services and Markets Act 2000 s 165(3) 'specified' means specified in the authorisation: s 165(10)(b).

9 Financial Services and Markets Act 2000 s 165(3). See further note 5.

10 In the Financial Services and Markets Act 2000 s 165.

11 Financial Services and Markets Act 2000 s 165(4).

12 Financial Services and Markets Act 2000 s 165(5).

13 Financial Services and Markets Act 2000 s 165(6).

## UPDATE

### 447 The Financial Services Authority's power to require information

TEXT AND NOTES--The Financial Services Authority has a duty to collect information that it thinks is or may be relevant to the stability of individual financial institutions or one or

more aspects of the financial systems of the United Kingdom: Banking Act 2009 s 150(1). The Authority may perform its function under s 150(1) by the exercise of the power in the Financial Services and Markets Act 2000 s 165 or in any other way: Banking Act 2009 s 150(2).

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#### **448. Reports by skilled persons.**

The Financial Services Authority<sup>1</sup> may, by notice in writing given to one of the following persons<sup>2</sup>, require him to provide the Authority with a report on any matter about which the Authority has required or could require the provision of information or production of documents<sup>3</sup>. This provision applies to:

- 1080 (1) an authorised person<sup>4</sup> ('A')<sup>5</sup>;
- 1081 (2) any other member of A's group<sup>6</sup>;
- 1082 (3) a partnership<sup>7</sup> of which A is a member<sup>8</sup>; or
- 1083 (4) a person who has at any relevant time been a person falling within head (1), head (2) or head (3) above, who is, or was at the relevant time, carrying on a business<sup>9</sup>.

The Authority may require the report to be in such form as may be specified in the notice<sup>10</sup>.

The person appointed to make a report<sup>11</sup> must be a person: (a) nominated or approved by the Authority; and (b) appearing to the Authority to have the skills necessary to make a report on the matter concerned<sup>12</sup>. It is the duty of any person who is providing (or who at any time has provided) services to a person falling within heads (1) to (4) above, in relation to a matter on which a report is required, to give a person appointed to provide such a report all such assistance as the appointed person may reasonably require<sup>13</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 5. As to the Handbook generally see PARA 22.

2 I.e. a person to whom the Financial Services and Markets Act 2000 s 166(2) applies: see the text and notes 4-9.

3 Financial Services and Markets Act 2000 s 166(1). The Authority may make such requirements under s 165: see PARA 447. As to the meaning of 'document' see PARA 10 note 10.

4 As to authorised persons see PARA 314.

5 Financial Services and Markets Act 2000 s 166(2)(a). See note 3.

Section 166 is to apply for the purposes of the Regulated Covered Bonds Regulations 2008, SI 2008/346, as it applies for the purposes of the Financial Services and Markets Act 2000 but with the modification that for the reference in s 166(2)(a) to 'an authorised person' there is substituted a reference to 'a person to whom the Regulated Covered Bond Regulations 2008, SI 2008/346 apply': Schedule para 4. As to the Regulated Covered Bonds Regulations 2008, SI 2008/346, generally see PARA 6 note 1.

6 Financial Services and Markets Act 2000 s 166(2)(b). As to the meaning of 'group' see PARA 351 note 37.

7 As to the meaning of 'partnership' see PARA 86 note 11.

- 8 Financial Services and Markets Act 2000 s 166(2)(c).
- 9 Financial Services and Markets Act 2000 s 166(2)(d).
- 10 Financial Services and Markets Act 2000 s 166(3).
- 11 Is a report required by the Financial Services and Markets Act 2000 s 166(1): see the text to notes 1-3.
- 12 Financial Services and Markets Act 2000 s 166(4).
- 13 Financial Services and Markets Act 2000 s 166(5). The obligation imposed by s 166(5) is enforceable, on the application of the Authority, by an injunction: s 166(6). As to injunctions see **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

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#### **449. Appointment of investigators.**

If it appears to the Financial Services Authority<sup>1</sup> or the Secretary of State<sup>2</sup> (the 'investigating authority') that there is good reason for doing so, the investigating authority may appoint one or more competent persons to conduct an investigation on its behalf into<sup>3</sup>:

- 1084 (1) the nature, conduct or state of the business<sup>4</sup> of a recognised investment exchange<sup>5</sup> or an authorised person<sup>6</sup> or of an appointed representative<sup>7</sup>;
- 1085 (2) a particular aspect of that business<sup>8</sup>; or
- 1086 (3) the ownership or control of a recognised investment exchange or an authorised person<sup>9</sup>.

If a person appointed thinks it necessary for the purposes of his investigation, he may also investigate the business of a person who is or has at any relevant time been: (a) a member of the group<sup>10</sup> of which the person under investigation ('A') is part; or (b) a partnership<sup>11</sup> of which A is a member<sup>12</sup>. The power to appoint persons to carry out investigations<sup>13</sup> may be exercised in relation to a former authorised person (or appointed representative) but only in relation to: (i) business carried on at any time when he was an authorised person (or appointed representative); or (ii) the ownership or control of a former authorised person at any time when he was an authorised person<sup>14</sup>.

In certain circumstances the investigating authority<sup>15</sup> may appoint one or more competent persons to conduct an investigation on its behalf<sup>16</sup>. Similarly, although under different circumstances, the Financial Services Authority may appoint one or more competent persons to conduct an investigation on its behalf<sup>17</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the Secretary of State see PARA 3.

3 Financial Services and Markets Act 2000 s 167(1).

4 'Business' includes any part of a business even if it does not consist of carrying on regulated activities: Financial Services and Markets Act 2000 s 167(5). As to regulated activities see PARA 84 et seq.

5 References in the Financial Services and Markets Act 2000 s 167(1) to a recognised investment exchange do not include references to an overseas investment exchange (as defined by s 313(1) (see PARA 711 note 9)): s 167(6) (added by SI 2007/126). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

6 As to authorised persons see PARA 314.

7 Financial Services and Markets Act 2000 s 167(1)(a) (s 167(1)(a), (c) amended by SI 2007/126). As to the meaning of 'appointed representative' see PARA 346.

8 Financial Services and Markets Act 2000 s 167(1)(b).

9 Financial Services and Markets Act 2000 s 167(1)(c) (as amended: see note 7).

10 As to the meaning of 'group' see PARA 351 note 37.

11 As to the meaning of 'partnership' see PARA 86 note 11.

12 Financial Services and Markets Act 2000 s 167(2). If a person appointed under s 167(1) decides to investigate the business of any person under s 167(2) he must give that person written notice of his decision: s 167(3).

13 Is the power conferred by the Financial Services and Markets Act 2000 s 167.

14 Financial Services and Markets Act 2000 s 167(4). An investigator conducting an investigation under s 167 may require the person who is the subject of the investigation (the 'person under investigation') or any person connected with the person under investigation: (1) to attend before the investigator at a specified time and place and answer questions; or (2) otherwise to provide such information as the investigator may require: s 171(1), (5). For these purposes, 'specified' means specified in a notice in writing: s 171(6). For these purposes, a person is connected with the person under investigation ('A') if he is or has at any relevant time been: (a) a member of A's group; (b) a controller of A; (c) a partnership of which A is a member; or (d) in relation to A, a person mentioned in s 171(4), Sch 15 Pt I (see PARA 447 note 5) or Pt II (see below): s 171(4). As to the meaning of 'group' see PARA 351 note 37. As to the meaning of 'controller' see PARA 591 note 16. As to the meaning of 'partnership' see PARA 86 note 11. The persons mentioned in Sch 15 Pt II are: a person who is, or at the relevant time was, the partner, manager, employee, agent, appointed representative, banker, auditor, actuary or solicitor of: (i) the person under investigation ('A'); (ii) a parent undertaking of A; (iii) a subsidiary undertaking of A; (iv) a subsidiary undertaking of a parent undertaking of A; or (v) a parent undertaking of a subsidiary undertaking of A: Sch 15 para 8. As to the meaning of 'manager' see PARA 86 note 11. As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 351 note 32.

An investigator may also require any person to produce at a specified time and place any specified documents or documents of a specified description: s 171(2). As to the meaning of 'document' see PARA 10 note 10.

A requirement under s 171(1), (2) may be imposed only so far as the investigator concerned reasonably considers the question, provision of information or production of the document to be relevant to the purposes of the investigation: s 171(3).

Where the investigation relates to a recognised investment exchange, an investigator has the additional powers conferred by ss 172 and 173 (and for this purpose references in those provisions to an investigator are to be read accordingly): s 171(3A) (s 171(3A), (7) added by SI 2007/126). The reference in the Financial Services and Markets Act 2000 s 171(3A) to a recognised investment exchange does not include a reference to an overseas investment exchange (as defined by s 313(1) (see PARA 711 note 9)): s 171(7) (as so added).

15 'Investigating authority' means the Authority or the Secretary of State: Financial Services and Markets Act 2000 s 168(6).

16 Financial Services and Markets Act 2000 s 168(3). Section 168(3) applies if it appears to an investigating authority that there are circumstances suggesting that: (1) a person may have contravened any regulation made under s 142 (insurance business) (see PARA 27); or (2) a person may be guilty of an offence under s 177 (see PARA 455), s 191 (see PARAS 377, 381), s 346 (see PARA 768), s 398(1) (see PARA 569) or under s 31(1)(c), Sch 4 (see PARAS 314, 319): s 168(1). Section 168(3) also applies if it appears to an investigating authority that there are circumstances suggesting that: (a) an offence under s 24(1) (false claims) (see PARA 80) or s 397 (misleading statements or practices) (see PARA 568) or under the Criminal Justice Act 1993 Pt V (ss 52-64) (insider dealing) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 574A et seq) may have been committed; (b) there may have been a breach of the general prohibition; (c) there may have been a contravention of the Financial Services and Markets Act 2000 s 21 (see PARA 225) or s 238 (see PARAS 605-606); or (d) market abuse may have taken place: s 168(2). As to the general prohibition see PARA 80. As to the meaning of 'market abuse' see PARA 437.

An investigator appointed as a result of s 168(1) or s 168(4) (see note 17) has the powers conferred by s 171 (see note 14): s 172(1), (4). An investigator may also require a person who is neither the person under

investigation nor a person connected with the person under investigation to attend before the investigator at a specified time and place and answer questions, or otherwise to provide such information as the investigator may require for the purposes of the investigation: s 172(2). For these purposes, 'specified' means specified in a notice in writing: s 172(5). A requirement may only be imposed under s 172(2) if the investigator is satisfied that the requirement is necessary or expedient for the purposes of the investigation: s 172(3).

If an investigator appointed under s 168(3) (as a result of s 168(2)) considers that any person ('A') is or may be able to give information which is or may be relevant to the investigation then the investigator may require A to attend before him at a specified time and place and answer questions, or otherwise to provide such information as he may require for the purposes of the investigation: s 173(1), (2), (5). The investigator may also require A to produce at a specified time and place any specified documents or documents of a specified description which appear to the investigator to relate to any matter relevant to the investigation: s 173(3). The investigator may also otherwise require A to give him all assistance in connection with the investigation which A is reasonably able to give: s 173(4).

17 Financial Services and Markets Act 2000 s 168(5). Section 168(5) applies if it appears to the Authority that there are circumstances suggesting that:

- 493 (1) a person may have contravened s 20 (see PARA 83) (s 168(4)(a));
- 494 (2) a person may be guilty of an offence under prescribed regulations relating to money laundering (s 168(4)(b));
- 495 (3) an authorised person may have contravened a rule made by the Authority (s 168(4)(c));
- 496 (4) an individual may not be a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised or exempt person (s 168(4)(d));
- 497 (5) an individual may have performed or agreed to perform a function in breach of a prohibition order (s 168(4)(e));
- 498 (6) an authorised or exempt person may have failed to comply with s 56(6) (see PARA 364) (s 168(4)(f));
- 499 (7) an authorised person may have failed to comply with s 59(1), (2) (see PARA 367) (s 168(4)(g));
- 500 (8) a person in relation to whom the Authority has given its approval under s 59 (see PARA 367) may not be a fit and proper person to perform the function to which that approval relates (s 168(4)(h));
- 501 (9) a person may be guilty of misconduct for the purposes of s 66 (see PARA 374) (s 168(4)(i)); or
- 502 (10) a person may have contravened any provision made by or under the Financial Services and Markets Act 2000 for the purpose of implementing the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) or by any directly applicable Community regulation made under that directive (Financial Services and Markets Act 2000 s 168(4)(j) (added by SI 2007/126)).

As to the meaning of 'rule' see PARA 23 note 2. As to the meaning of 'exempt person' see PARA 80 note 4. As to prohibition orders see PARA 364. 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). The regulations prescribed for the purposes of head (2) above are the Money Laundering Regulations 2007, SI 2007/2157: see PARA 539 et seq. See also the Transfer of Funds (Information on the Payer) Regulations 2007, SI 2007/3298. The latter regulations implement in part the Wire Transfers Regulation (ie European Parliament and EC Council Regulation 1781/2006 (OJ L345, 8.12.2006, p 1) on information on the payer accompanying transfers of funds) the purpose of which is to update European legislation to bring it into line with Special Recommendation VII of the international standards on combating money laundering and terrorist financing set out by the Financial Action Task Force (see PARA 550 note 6). The 2007 Regulations are needed to implement the Wire Transfers Regulation art 15 in regard to rules on penalties applicable to infringements of the Regulation, and to provide supervisors with powers effectively to monitor payment institutions' compliance with the Regulation. The 2007 Regulations' supervision and enforcement provisions mirror those of the Money Laundering Regulations 2007, SI 2007/2157, and provide for both civil and criminal penalties for non-compliance with the main requirements of the Wire Transfers Regulation. The Transfer of Funds (Information on the Payer) Regulations 2007, SI 2007/3298, cover supervision (see regs 3-5), power to require information and attendance (see reg 7); entry, inspection without a warrant etc (see reg 8); entry under warrant (see reg 9); failure to comply with information requirement (see reg 10); power to impose civil penalties (see reg 11); review procedure (see reg 12); appeals (see reg 13); criminal offences (see regs 14-16); recovery of charges

and penalties (see reg 17); and transfers between the United Kingdom and the Channel Islands and the Isle of Man (see reg 18).

As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** (Reissue) PARA 512 et seq.

As to the powers of a person appointed under s 168(4) see note 16.

## **UPDATE**

### **449 Appointment of investigators**

NOTE 17--SI 2009/3298 amended: SI 2009/1912.

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### **450. Assistance to overseas regulators.**

At the request of an overseas regulator<sup>1</sup>, the Financial Services Authority<sup>2</sup> may: (1) exercise the power to require information<sup>3</sup>; or (2) appoint one or more competent persons to investigate any matter<sup>4</sup>. If the request has been made by a competent authority<sup>5</sup> in pursuance of any European Community obligation the Authority must, in deciding whether or not to exercise its investigative power<sup>6</sup>, consider whether its exercise is necessary to comply with any such obligation<sup>7</sup>. In deciding whether or not to exercise its investigative power, the Authority may take into account in particular<sup>8</sup>:

- 1087 (a) whether in the country or territory of the overseas regulator concerned, corresponding assistance would be given to a United Kingdom regulatory authority<sup>9</sup>;
- 1088 (b) whether the case concerns the breach of a law, or other requirement, which has no close parallel in the United Kingdom or involves the assertion of a jurisdiction not recognised by the United Kingdom<sup>10</sup>;
- 1089 (c) the seriousness of the case and its importance to persons in the United Kingdom<sup>11</sup>;
- 1090 (d) whether it is otherwise appropriate in the public interest to give the assistance sought<sup>12</sup>.

The Authority may decide that it will not exercise its investigative powers unless the overseas regulator undertakes to make such contribution towards the cost of its exercise as the Authority considers appropriate<sup>13</sup>.

If the Authority has appointed an investigator in response to a request from an overseas regulator, it may direct the investigator to permit a representative of that regulator to attend, and take part in, any interview conducted for the purposes of the investigation<sup>14</sup>.

1 As to the meaning of 'overseas regulator' see PARA 457 note 4; definition applied by the Financial Services and Markets Act 2000 s 169(13).



2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

3 le the power conferred by the Financial Services and Markets Act 2000 s 165: see PARA 447.

4 Financial Services and Markets Act 2000 s 169(1). An investigator has the same powers as an investigator appointed under s 168(3) (as a result of s 168(1)) (see PARA 449): s 169(2). 'Investigator' means a person appointed under head (2) in the text: s 169(15).

5 As to the competent authority see PARA 385.

6 'Investigative power' means one of the powers mentioned in the Financial Services and Markets Act 2000 s 169(1) (see the text to notes 1-4): s 169(14).

7 Financial Services and Markets Act 2000 s 169(3).

8 Financial Services and Markets Act 2000 s 169(4). Section 169(4), (5) does not apply if the Authority considers that the exercise of its investigative powers is necessary to comply with a Community obligation: s 169(6).

9 Financial Services and Markets Act 2000 s 169(4)(a). As to the meaning of 'United Kingdom' see PARA 2 note 3.

10 Financial Services and Markets Act 2000 s 169(4)(b).

11 Financial Services and Markets Act 2000 s 169(4)(c).

12 Financial Services and Markets Act 2000 s 169(4)(d).

13 Financial Services and Markets Act 2000 s 169(5). See note 8.

14 Financial Services and Markets Act 2000 s 169(7). A direction under s 169(7) is not to be given unless the Authority is satisfied that any information obtained by an overseas regulator as a result of the interview will be subject to safeguards equivalent to those contained in Pt XXIII (ss 347-354) (see PARA 475 et seq): s 169(8). The Authority must prepare a statement of its policy with respect to the conduct of interviews in relation to which a direction under s 169(7) has been given: s 169(9). The statement requires the approval of the Treasury: s 169(10). If the Treasury approves the statement, the Authority must publish it: s 169(11). No direction may be given under s 169(7) before the statement has been published: s 169(12). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

## UPDATE

### 450 Assistance to overseas regulators

NOTES--For judicial discussion of the exercise of the Authority's power under the Financial Services and Markets Act 2000 s 169 see *The Financial Services Authority v Amro International and Goodman Jones LLP (interested party)* [2010] EWCA Civ 123, [2010] All ER (D) 260 (Feb).

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## **B. CONDUCT OF INVESTIGATIONS**

### **451. Conduct of investigations.**

The following provisions<sup>1</sup> apply if an investigating authority<sup>2</sup> appoints one or more competent persons ('investigators')<sup>3</sup> to conduct an investigation on its behalf<sup>4</sup>.

The investigating authority must give written notice of the appointment of an investigator to the person under investigation<sup>5</sup>. The notice<sup>6</sup> must specify the provisions under which, and as a result of which, the investigator was appointed, and state the reason for his appointment<sup>7</sup>.

Nothing prevents the investigating authority from appointing a person who is a member of its staff as an investigator<sup>8</sup>. An investigator must make a report of his investigation to the investigating authority<sup>9</sup>. The investigating authority may, by a direction to an investigator, control: (1) the scope of the investigation; (2) the period during which the investigation is to be conducted; (3) the conduct of the investigation; and (4) the reporting of the investigation<sup>10</sup>. A direction may in particular: (a) confine the investigation to particular matters; (b) extend the investigation to additional matters; (c) require the investigator to discontinue the investigation or to take only such steps as are specified in the direction; (d) require the investigator to make such interim reports as are so specified<sup>11</sup>. If there is a change in the scope or conduct of the investigation and, in the opinion of the investigating authority, the person subject to investigation is likely to be significantly prejudiced by not being made aware of it, that person must be given written notice of the change<sup>12</sup>.

1    Ie the provisions of the Financial Services and Markets Act 2000 s 170.

2    'Investigating authority', in relation to an investigator, means: (1) the Financial Services Authority, if the Authority appointed him; (2) the Secretary of State, if the Secretary of State appointed him: Financial Services and Markets Act 2000 s 170(10). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Secretary of State see PARA 3. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

3    Ie under the Financial Services and Markets Act 2000 s 167 or s 168(3), (5): see PARA 449.

4    Financial Services and Markets Act 2000 s 170(1). As to the powers of investigators see PARA 449.

In addition to the statutory requirements relating to the conduct of investigations, there are obligations in public law, such as the duty to act fairly (see *Re Pergamon Press Ltd* [1971] Ch 388, [1970] 3 All ER 535, CA). Note that, although all the requirements of natural justice do not apply to investigations (see *Herring v Templeman* [1973] 3 All ER 569, 72 LGR 162, CA; *Moran v Lloyd's* [1981] 1 Lloyd's Rep 423, [1981] Com LR 46, CA), the investigator must not act irrationally (ie in the sense of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, [1947] 2 All ER 680, CA: see **JUDICIAL REVIEW** vol 61 (2010) PARA 617). As to natural justice and the duty to act fairly see **JUDICIAL REVIEW** vol 61 (2010) PARA 629 et seq. As to the requirement that the Authority should act proportionately and consistently in exercising its enforcement powers see the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). Consideration must also be given to the right to privacy under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8(1): see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 110, 150.

5    Financial Services and Markets Act 2000 s 170(2). Section 170(2), (9) does not apply if: (1) the investigator is appointed as a result of s 168(1) or s 168(4) (see PARA 449) and the investigating authority believes that the notice required by s 170(2) or s 170(9) would be likely to result in the investigation being frustrated; or (2) the investigator is appointed as a result of s 168(2) (see PARA 449): s 170(3).

6    Ie the notice under the Financial Services and Markets Act 2000 s 170(2): see the text to note 5.

7    Financial Services and Markets Act 2000 s 170(4).

8    Financial Services and Markets Act 2000 s 170(5).

9    Financial Services and Markets Act 2000 s 170(6).

10   Financial Services and Markets Act 2000 s 170(7).

11   Financial Services and Markets Act 2000 s 170(8).

12   Financial Services and Markets Act 2000 s 170(9). See further note 5.

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#### **452. Admissibility of statements made to investigators.**

A statement made to an investigator<sup>1</sup> by a person in compliance with an information requirement<sup>2</sup> is admissible in evidence in any proceedings, so long as it also complies with any requirements governing the admissibility of evidence in the circumstances in question<sup>3</sup>. However, in criminal proceedings in which that person is charged with certain offences<sup>4</sup> or in proceedings in relation to action to be taken against that person in connection with market abuse<sup>5</sup> no evidence relating to the statement may be adduced, and no question relating to it may be asked, by or on behalf of the prosecution or (as the case may be) the Financial Services Authority<sup>6</sup>, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person<sup>7</sup>.

1 'Investigator' means a person appointed under the Financial Services and Markets Act 2000 s 167, s 168(3) or s 168(5) (see PARA 449): s 174(4).

2 'Information requirement' means a requirement imposed by an investigator under the Financial Services and Markets Act 2000 s 171, s 172, s 173 or s 175 (see PARAS 449, 453): s 174(5).

3 Financial Services and Markets Act 2000 s 174(1).

4 Financial Services and Markets Act 2000 s 174(2) applies to any offence other than one: (1) under s 177(4) (see PARA 455) or s 398 (see PARA 569); (2) under the Perjury Act 1911 s 5 (false statements made otherwise than on oath) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 717); (3) under the Criminal Law (Consolidation) (Scotland) Act 1995 s 44(2) (false statements made otherwise than on oath); or (4) under the Perjury (Northern Ireland) Order 1979, SI 1979/1714 (NI 19), art 10: Financial Services and Markets Act 2000 s 174(3).

5 Ie under the Financial Services and Markets Act 2000 s 123: see PARA 440.

6 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

7 Financial Services and Markets Act 2000 s 174(2).

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#### **453. Information and documents.**

If the Financial Services Authority<sup>1</sup> or an investigator<sup>2</sup> has power<sup>3</sup> to require a person to produce a document<sup>4</sup> but it appears that the document is in the possession of a third person, that power may be exercised in relation to the third person<sup>5</sup>. If a document is produced in response to a requirement<sup>6</sup>, the person to whom it is produced may: (1) take copies or extracts from the

document; or (2) require the person producing the document, or any relevant person<sup>7</sup>, to provide an explanation of the document<sup>8</sup>. If a person who is required<sup>9</sup> to produce a document fails to do so, the Authority or an investigator may require him to state, to the best of his knowledge and belief, where the document is<sup>10</sup>. A lawyer may be required<sup>11</sup> to furnish the name and address of his client<sup>12</sup>. No person may be required<sup>13</sup> to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless<sup>14</sup>:

- 1091 (a) he is the person under investigation or a member of that person's group<sup>15</sup>;
- 1092 (b) the person to whom the obligation of confidence is owed is the person under investigation or a member of that person's group<sup>16</sup>;
- 1093 (c) the person to whom the obligation of confidence is owed consents to the disclosure or production<sup>17</sup>; or
- 1094 (d) the imposing on him of a requirement with respect to such information or document has been specifically authorised by the investigating authority<sup>18</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 'Investigator' means a person appointed under the Financial Services and Markets Act 2000 s 167, s 168(3) or s 168(5) (see PARA 449): s 175(8).

3 Ie under the Financial Services and Markets Act 2000 Pt XI (ss 165-177).

4 As to the meaning of 'document' see PARA 10 note 10.

5 Financial Services and Markets Act 2000 s 175(1). If a person claims a lien on a document, its production under Pt XI does not affect the lien: s 175(6).

6 Ie a requirement under the Financial Services and Markets Act 2000 Pt XI.

7 'Relevant person', in relation to a person who is required to produce a document, means a person who: (1) has been or is or is proposed to be a director or controller of that person; (2) has been or is an auditor of that person; (3) has been or is an actuary, accountant or lawyer appointed or instructed by that person; or (4) has been or is an employee of that person: Financial Services and Markets Act 2000 s 175(7). As to the meaning of 'director' see PARA 86 note 11. As to the meaning of 'controller' see PARA 591 note 16.

8 Financial Services and Markets Act 2000 s 175(2).

9 Ie under the Financial Services and Markets Act 2000 Pt XI.

10 Financial Services and Markets Act 2000 s 175(3).

11 Ie under the Financial Services and Markets Act 2000 Pt XI.

12 Financial Services and Markets Act 2000 s 175(4).

13 Ie under the Financial Services and Markets Act 2000 Pt XI.

14 Financial Services and Markets Act 2000 s 175(5).

15 Financial Services and Markets Act 2000 s 175(5)(a). As to the meaning of 'group' see PARA 351 note 37.

16 Financial Services and Markets Act 2000 s 175(5)(b).

17 Financial Services and Markets Act 2000 s 175(5)(c).

18 Financial Services and Markets Act 2000 s 175(5)(d).

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#### **454. Entry of premises under warrant.**

A justice of the peace<sup>1</sup> may issue a warrant if satisfied on information on oath given by or on behalf of the Secretary of State<sup>2</sup>, the Financial Services Authority<sup>3</sup> or an investigator<sup>4</sup> that there are reasonable grounds for believing that the first, second or third set of conditions set out below is satisfied<sup>5</sup>.

The first set of conditions is:

- 1095 (1) that a person on whom an information requirement<sup>6</sup> has been imposed has failed (wholly or in part) to comply with it<sup>7</sup>; and
- 1096 (2) that on the premises specified in the warrant there are documents<sup>8</sup> which have been required, or on those premises there is information which has been required<sup>9</sup>.

The second set of conditions is:

- 1097 (a) that the premises specified in the warrant are premises of an authorised person<sup>10</sup> or an appointed representative<sup>11</sup>;
- 1098 (b) that there are on the premises documents or information in relation to which an information requirement could be imposed<sup>12</sup>; and
- 1099 (c) that if such a requirement were to be imposed it would not be complied with, or the documents or information to which it related would be removed, tampered with or destroyed<sup>13</sup>.

The third set of conditions is:

- 1100 (i) that an offence<sup>14</sup> for which the maximum sentence on conviction on indictment is two years or more has been (or is being) committed by any person<sup>15</sup>;
- 1101 (ii) that there are on the premises specified in the warrant documents or information relevant to whether that offence has been (or is being) committed<sup>16</sup>;
- 1102 (iii) that an information requirement could be imposed in relation to those documents or information<sup>17</sup>; and
- 1103 (iv) that if such a requirement were to be imposed it would not be complied with, or the documents or information to which it related would be removed, tampered with or destroyed<sup>18</sup>.

A warrant<sup>19</sup> authorises a constable<sup>20</sup>:

- 1104 (A) to enter the premises specified in the warrant<sup>21</sup>;
- 1105 (B) to search the premises and take possession of any documents or information appearing to be documents or information of a kind in respect of which a warrant was issued (the 'relevant kind') or to take, in relation to any such documents or information, any other steps which may appear to be necessary for preserving them or preventing interference with them<sup>22</sup>;
- 1106 (C) to take copies of, or extracts from, any documents or information appearing to be of the relevant kind<sup>23</sup>;

- 1107 (D) to require any person on the premises to provide an explanation of any document or information appearing to be of the relevant kind or to state where it may be found<sup>24</sup>; and
- 1108 (E) to use such force as may be reasonably necessary<sup>25</sup>.

Any document of which possession is taken may be retained for a period of three months or, if within that period proceedings to which the document is relevant are commenced against any person for any criminal offence, until the conclusion of those proceedings<sup>26</sup>.

Any person who intentionally obstructs the exercise of any rights conferred by a warrant is guilty of an offence<sup>27</sup>.

1 As to justices of the peace see generally **MAGISTRATES**.

2 As to the Secretary of State see PARA 3.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

4 'Investigator' means a person appointed under the Financial Services and Markets Act 2000 s 167, s 168(3) or s 168(5) (see PARA 449): s 176(10).

5 Financial Services and Markets Act 2000 s 176(1). In England and Wales, the Police and Criminal Evidence Act 1984 ss 15(5)-(8), 16 (execution of search warrants and safeguards) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 880 et seq) apply to warrants issued under the Financial Services and Markets Act 2000 s 176: s 176(6). In Northern Ireland, the Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341 (NI 12), arts 17(5)-(8), 18 apply to warrants issued under the Financial Services and Markets Act 2000 s 176: s 176(7).

6 'Information requirement' means a requirement imposed: (1) by the Authority under the Financial Services and Markets Act 2000 s 87C (see PARA 401), s 87J (see PARA 405), s 165 (see PARA 447) or s 175 (see PARA 453); or (2) by an investigator under s 171, s 172, s 173 or s 175 (see PARAS 449, 453): s 176(11) (amended by SI 2005/1433).

7 Financial Services and Markets Act 2000 s 176(2)(a).

8 As to the meaning of 'document' see PARA 10 note 10.

9 Financial Services and Markets Act 2000 s 176(2)(b).

10 As to authorised persons see PARA 314.

11 Financial Services and Markets Act 2000 s 176(3)(a). As to the meaning of 'appointed representative' see PARA 346.

12 Financial Services and Markets Act 2000 s 176(3)(b).

13 Financial Services and Markets Act 2000 s 176(3)(c).

14 Ie an offence mentioned in the Financial Services and Markets Act 2000 s 168: see PARA 449.

15 Financial Services and Markets Act 2000 s 176(4)(a).

16 Financial Services and Markets Act 2000 s 176(4)(b).

17 Financial Services and Markets Act 2000 s 176(4)(c).

18 Financial Services and Markets Act 2000 s 176(4)(d).

19 Ie a warrant under the Financial Services and Markets Act 2000 s 176.

20 Financial Services and Markets Act 2000 s 176(5). As to the office of constable see **POLICE** vol 36(1) (2007 Reissue) PARA 101 et seq.

- 21 Financial Services and Markets Act 2000 s 176(5)(a).
- 22 Financial Services and Markets Act 2000 s 176(5)(b).
- 23 Financial Services and Markets Act 2000 s 176(5)(c).
- 24 Financial Services and Markets Act 2000 s 176(5)(d).
- 25 Financial Services and Markets Act 2000 s 176(5)(e).
- 26 Financial Services and Markets Act 2000 s 176(8).
- 27 Financial Services and Markets Act 2000 s 177(6). Such a person is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale, or both: see s 177(6). As to the standard scale see PARA 27 note 21. As from a day to be appointed, the reference to 'three months' is replaced by one to '51 weeks': s 177(6) (prospectively amended by the Criminal Justice Act 2003 Schedule Pt 2). At the date at which this volume states the law no such day had been appointed.

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#### 455. Offences.

If a person other than the investigator (the 'defaulter') fails to comply with a requirement imposed on him under Part XI of the Financial Services and Markets Act 2000<sup>1</sup>, the person imposing the requirement may certify that fact in writing to the High Court<sup>2</sup>. If the court is satisfied that the defaulter failed without reasonable excuse to comply with the requirement, it may deal with the defaulter (and in the case of a body corporate<sup>3</sup>, any director<sup>4</sup> or officer<sup>5</sup>) as if he were in contempt<sup>6</sup>.

A person who knows or suspects that an investigation is being or is likely to be conducted under Part XI of the Financial Services and Markets Act 2000 is guilty of an offence if: (1) he falsifies, conceals, destroys or otherwise disposes of a document<sup>7</sup> which he knows or suspects is or would be relevant to such an investigation; or (2) he causes or permits the falsification, concealment, destruction or disposal of such a document, unless he shows that he had no intention of concealing facts disclosed by the documents from the investigator<sup>8</sup>.

A person who, in purported compliance with a requirement imposed on him under Part XI of the Financial Services and Markets Act 2000: (a) provides information which he knows to be false or misleading in a material particular; or (b) recklessly provides information which is false or misleading in a material particular, is guilty of an offence<sup>9</sup>.

1 Ie the Financial Services and Markets Act 2000 Pt XI (ss 165-177).

2 Financial Services and Markets Act 2000 s 177(1), (7).

3 As to the meaning of 'body corporate' see PARA 86 note 11.

4 As to the meaning of 'director' see PARA 86 note 11.

5 'Officer', in relation to a limited liability partnership, means a member of the limited liability partnership: Financial Services and Markets Act 2000 s 177(2) (definition added by SI 2001/1090). As to limited liability partnerships see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

6 Financial Services and Markets Act 2000 s 177(2).

7 As to the meaning of 'document' see PARA 10 note 10.

8 Financial Services and Markets Act 2000 s 177(3). A person guilty of an offence under s 177(3) or s 177(4) (see the text to note 9) is liable: (1) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both: s 177(5). As to the statutory maximum see PARA 56 note 24.

9 Financial Services and Markets Act 2000 s 177(4). See note 8.

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### **(iii) Power of Intervention in relation to Incoming Firms**

#### **A. POWER TO IMPOSE REQUIREMENTS**

##### **456. General grounds for interference.**

The Financial Services Authority<sup>1</sup> may exercise its power of intervention in respect of an incoming firm<sup>2</sup> if it appears to it that<sup>3</sup>:

- 1109 (1) the firm has contravened, or is likely to contravene, a requirement which is imposed on it by or under the Financial Services and Markets Act 2000 (in a case where the Authority is responsible for enforcing compliance in the United Kingdom)<sup>4</sup>;
- 1110 (2) the firm has, in purported compliance with any requirement imposed by or under the Financial Services and Markets Act 2000, knowingly or recklessly given the Authority information which is false or misleading in a material particular<sup>5</sup>; or
- 1111 (3) it is desirable to exercise the power in order to protect the interests of actual or potential customers<sup>6</sup>.

The Authority may exercise its power of intervention in respect of an incoming EEA firm<sup>7</sup> which is exercising an EEA right<sup>8</sup> to carry on any Consumer Credit Act business<sup>9</sup> in the United Kingdom, if the Office of Fair Trading<sup>10</sup> has informed the Authority that: (a) the firm; (b) any of the firm's employees, agents or associates<sup>11</sup> (whether past or present); or (c) if the firm is a body corporate<sup>12</sup>, a controller<sup>13</sup> of the firm or an associate of such a controller, has done any of the things prohibited for a person seeking a standard licence under the Consumer Credit Act 1974<sup>14</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 If the Authority is entitled to exercise its power of intervention in respect of an incoming firm under the Financial Services and Markets Act 2000 Pt XIII (ss 193-204), it may impose any requirement in relation to the firm which it could impose if: (1) the firm's permission was a Part IV permission; and (2) the Authority was entitled to exercise its power under Pt IV (ss 40-55) (see PARA 348 et seq) to vary that permission: s 196. For the purposes of Pt XIII, 'power of intervention' means the power conferred on the Authority by s 196: s 193(1). 'Incoming firm' means: (a) an EEA firm which is exercising, or has exercised, its right to carry on a regulated activity in the United Kingdom in accordance with s 31(1)(b), Sch 3 (see PARAS 314 et seq, 323 et seq); or (b) a Treaty firm which is exercising, or has exercised, its right to carry on a regulated activity in the United Kingdom



in accordance with s 31(1)(c), Sch 4 (see PARAS 314, 319): s 193(1). As to the meaning of 'Part IV permission' see PARA 348. As to the meaning of 'EEA firm' see PARA 315 note 1. As to regulated activities see PARA 84 et seq. As to the meaning of 'Treaty firm' see PARA 319 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3. In relation to an incoming firm which is an EEA firm, expressions used in Pt XIII and in Sch 3 have the same meaning in Pt XIII as they have in Sch 3: s 193(2).

If the Authority, in exercising its power of intervention, imposes on an incoming firm a requirement of a kind mentioned in s 48(3) (assets requirement) (see PARA 359), the requirement has the same effect in relation to the firm as it would have in relation to an authorised person if it had been imposed on the authorised person by the Authority acting under s 45 (see PARA 355): s 201. As to authorised persons see PARA 314.

3 Financial Services and Markets Act 2000 s 194(1).

4 Financial Services and Markets Act 2000 s 194(1)(a).

5 Financial Services and Markets Act 2000 s 194(1)(b).

6 Financial Services and Markets Act 2000 s 194(1)(c).

7 Is a firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(a) or (b): see PARA 315 note 1.

8 As to the meaning of 'EEA right' see PARA 315 note 3.

9 As to the meaning of 'Consumer Credit Act business' see PARA 464 note 2; definition applied by the Financial Services and Markets Act 2000 s 194(4).

10 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

11 As to the meaning of 'associate' see PARA 464 note 3; definition applied by the Financial Services and Markets Act 2000 s 194(4).

12 As to the meaning of 'body corporate' see PARA 86 note 11.

13 As to the meaning of 'controller' see PARA 591 note 16; definition applied by the Financial Services and Markets Act 2000 s 194(4).

14 Financial Services and Markets Act 2000 s 194(2), (3) (s 194(3) amended by the Enterprise Act 2002 Sch 25 para 40(1), (6); and the Consumer Credit Act 2006 s 71(2)). The reference in the text is to any of the things specified in the Consumer Credit Act 1974 s 25(2A)(a)-(e): see **CONSUMER CREDIT**.

## UPDATE

### 456 General grounds for interference

NOTE 14--Financial Services and Markets Act 2000 s 194(3) further amended: Consumer Credit Act 2006 s 33(7).

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### 457. Intervention in support of overseas regulator.

The Financial Services Authority<sup>1</sup> may exercise its power of intervention<sup>2</sup> in respect of an incoming firm<sup>3</sup> at the request of, or for the purpose of assisting, an overseas regulator<sup>4</sup>. If: (1) a request to the Authority for the exercise of its power of intervention has been made by a home state regulator in pursuance of a Community obligation; or (2) a home state regulator has

notified the Authority that an EEA firm's<sup>5</sup> EEA authorisation<sup>6</sup> has been withdrawn, the Authority must, in deciding whether or not to exercise its power of intervention, consider whether exercising it is necessary in order to comply with a European Community obligation<sup>7</sup>. In deciding in any case in which the Authority does not consider that the exercise of its power of intervention is necessary in order to comply with a Community obligation, it may take into account in particular<sup>8</sup>:

- 1112 (a) whether in the country or territory of the overseas regulator concerned, corresponding assistance would be given to a United Kingdom regulatory authority<sup>9</sup>;
- 1113 (b) whether the case concerns the breach of a law, or other requirement, which has no close parallel in the United Kingdom or involves the assertion of a jurisdiction not recognised by the United Kingdom<sup>10</sup>;
- 1114 (c) the seriousness of the case and its importance to persons in the United Kingdom<sup>11</sup>;
- 1115 (d) whether it is otherwise appropriate in the public interest to give the assistance sought<sup>12</sup>.

The Authority may decide not to exercise its power of intervention, in response to a request, unless the regulator concerned undertakes to make such contribution to the cost of its exercise as the Authority considers appropriate<sup>13</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the meaning of 'power of intervention' see PARA 456 note 2.

3 As to the meaning of 'incoming firm' see PARA 456 note 2.

4 Financial Services and Markets Act 2000 s 195(1). Section 195(1) applies whether or not the Authority's power of intervention is also exercisable as a result of s 194 (see PARA 456): s 195(2).

'Overseas regulator' means an authority in a country or territory outside the United Kingdom: (1) which is a home state regulator; or (2) which exercises any function of a kind mentioned in s 195(4): s 195(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meaning of 'home state regulator' see PARA 315 note 1. The functions mentioned in s 195(4) are:

- 503 (a) a function corresponding to any function of the Authority under the Financial Services and Markets Act 2000 (s 195(4)(a));
- 504 (b) a function corresponding to any function exercised by the competent authority under Pt VI (ss 72-103) (see PARA 385 et seq) (s 195(4)(b) (amended by SI 2005/1433));
- 505 (c) a function corresponding to any function exercised by the Secretary of State under the Companies Acts (as defined in the Companies Act 2006 s 2) (see **COMPANIES** vol 14 (2009) PARA 16) (Financial Services and Markets Act 2000 s 195(4)(c) (amended by SI 2007/2194));
- 506 (d) a function in connection with: (i) the investigation of conduct of the kind prohibited by the Criminal Justice Act 1993 Pt V (ss 52-64) (insider dealing) (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 574A et seq); or (ii) the enforcement of rules (whether or not having the force of law) relating to such conduct (Financial Services and Markets Act 2000 s 195(4)(d));
- 507 (e) a function prescribed by regulations made for the purposes of s 195(4) which, in the opinion of the Treasury, relates to companies or financial services (s 195(4)(e)).

As to the Secretary of State see PARA 3. 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). At the date at which this volume states the law no regulations had been made for the purposes of s 195(4). As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

- 5 As to the meaning of 'EEA firm' see PARA 315 note 1.
- 6 As to the meaning of 'EEA authorisation' see PARA 318 note 3.
- 7 Financial Services and Markets Act 2000 s 195(5).
- 8 Financial Services and Markets Act 2000 s 195(6).
- 9 Financial Services and Markets Act 2000 s 195(6)(a).
- 10 Financial Services and Markets Act 2000 s 195(6)(b). As to the recognition of jurisdiction see **CONFLICT OF LAWS**.
- 11 Financial Services and Markets Act 2000 s 195(6)(c).
- 12 Financial Services and Markets Act 2000 s 195(6)(d).
- 13 Financial Services and Markets Act 2000 s 195(7). Section 195(7) does not apply if the Authority decides that it is necessary for it to exercise its power of intervention in order to comply with a Community obligation: s 195(8).

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#### **458. Exercising the power of intervention.**

A requirement imposed by the Financial Services Authority<sup>1</sup> under its power of intervention<sup>2</sup> takes effect: (1) immediately, if the notice given<sup>3</sup> states that that is the case; (2) on such date as may be specified in the notice; or (3) if no date is specified in the notice, when the matter to which it relates is no longer open to review<sup>4</sup>. A requirement may be expressed to take effect immediately (or on a specified date) only if the Authority, having regard to the ground on which it is exercising its power of intervention, considers that it is necessary for the requirement to take effect immediately (or on that date)<sup>5</sup>.

If the Authority proposes to impose a requirement on an incoming firm<sup>6</sup>, or imposes such a requirement with immediate effect, it must give the firm written notice<sup>7</sup>. The notice must:

- 1116 (a) give details of the requirement<sup>8</sup>;
- 1117 (b) inform the firm of when the requirement takes effect<sup>9</sup>;
- 1118 (c) state the Authority's reasons for imposing the requirement and for its determination as to when the requirement takes effect<sup>10</sup>;
- 1119 (d) inform the firm that it may make representations to the Authority within such period as may be specified in the notice (whether or not it has referred the matter to the Financial Services and Markets Tribunal)<sup>11</sup>; and
- 1120 (e) inform it of its right to refer the matter to the Tribunal<sup>12</sup>.

If, having considered any representations made by the firm, the Authority decides to impose the requirement proposed, or, if it has been imposed, not to rescind the requirement, it must give it written notice<sup>13</sup>. If, having considered any representations made by the firm, the Authority decides: (i) not to impose the requirement proposed; (ii) to impose a different requirement from that proposed; or (iii) to rescind a requirement which has effect, it must give the firm written notice<sup>14</sup>.

- 1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
- 2 Ie under the Financial Services and Markets Act 2000 s 196: see PARA 456.
- 3 Ie the notice given under the Financial Services and Markets Act 2000 s 197(3): see the text to note 7.
- 4 Financial Services and Markets Act 2000 s 197(1).
- 5 Financial Services and Markets Act 2000 s 197(2).
- 6 As to the meaning of 'incoming firm' see PARA 456 note 2.
- 7 Financial Services and Markets Act 2000 s 197(3).
- 8 Financial Services and Markets Act 2000 s 197(4)(a).
- 9 Financial Services and Markets Act 2000 s 197(4)(b).
- 10 Financial Services and Markets Act 2000 s 197(4)(c).
- 11 Financial Services and Markets Act 2000 s 197(4)(d). As to the Financial Services and Markets Tribunal see PARA 43 et seq. The Authority may extend the period allowed under the notice for making representations: s 197(5).
- 12 Financial Services and Markets Act 2000 s 197(4)(e). If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference: s 197(10).
- 13 Financial Services and Markets Act 2000 s 197(6). A notice given under s 197(6) must inform the firm of its right to refer the matter to the Tribunal: s 197(8). See further note 12.
- 14 Financial Services and Markets Act 2000 s 197(7). A notice under head (ii) in the text must comply with s 197(4) (see the text to notes 8-12): s 197(9).

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#### **459. Injunctions in respect of certain overseas insurance companies.**

If the Financial Services Authority<sup>1</sup> has received a request made in respect of an incoming EEA firm<sup>2</sup>, the High Court may, on an application made to it by the Authority with respect to the firm, grant an injunction restraining the firm disposing of or otherwise dealing with any of its assets<sup>3</sup>. If the court grants an injunction, it may by subsequent orders make provision for such incidental, consequential and supplementary matters as it considers necessary to enable the Authority to perform any of its functions under the Financial Services and Markets Act 2000<sup>4</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie in accordance with: (1) First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 20.5; (2) the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 37.5; or (3) the Reinsurance Directive (ie European Parliament and EC Council

Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83) art 42.4. As to the meaning of 'EEA firm' see PARA 315 note 1. As to incoming EEA firms see PARAS 456 note 2, 460.

3 Financial Services and Markets Act 2000 s 198(1), (2), (4) (s 198(1) amended by SI 2004/3379; SI 2007/3253).

4 Financial Services and Markets Act 2000 s 198(3).

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#### **460. Additional procedure for EEA firms in certain cases.**

If it appears to the Financial Services Authority<sup>1</sup> that its power of intervention<sup>2</sup> is exercisable in relation to an EEA firm exercising EEA rights<sup>3</sup> in the United Kingdom<sup>4</sup> (an 'incoming EEA firm'<sup>5</sup>) in respect of the contravention of a relevant requirement<sup>6</sup>, the Authority must, in writing, require the firm to remedy the situation<sup>7</sup>. If the firm fails to comply with this requirement within a reasonable time, the Authority must give a notice to that effect to the firm's home state regulator requesting it: (1) to take all appropriate measures for the purpose of ensuring that the firm remedies the situation which has given rise to the notice; and (2) to inform the Authority of the measures it proposes to take or has taken or the reasons for not taking such measures<sup>8</sup>. The Authority may not exercise its power of intervention before informing the firm's home state regulator<sup>9</sup> and unless satisfied that the firm's home state regulator has failed or refused to take measures for the purpose mentioned in head (1) above, or that the measures taken by the home state regulator have proved inadequate for that purpose<sup>10</sup>. In cases of urgency, the Authority need not comply with these provisions<sup>11</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the meaning of 'power of intervention' see PARA 456 note 2.

3 As to the meaning of 'EEA firm' see PARA 315 note 1. As to the meaning of 'EEA right' see PARA 315 note 3.

4 As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 See PARA 456 note 2.

6 A requirement is relevant if: (1) it is imposed by the Authority under the Financial Services and Markets Act 2000; and (2) as respects its contravention, the Single Market Directive in question provides that a procedure of the kind set out in the Financial Services and Markets Act 2000 s 199(3)-(8) (see the text and notes 7-11) (so far as relevant in the firm's case) is to apply: s 199(2) (amended by SI 2007/126; SI 2007/3253). As to the meaning of 'Single Market Directives' see PARA 86 note 6.

7 Financial Services and Markets Act 2000 s 199(1), (3). See also note 11.

If the firm falls within Sch 3 para 5(da) (a reinsurance undertaking) (see PARA 315 note 1), the Authority must at the same time as it gives notice to the firm under s 199(3) refer its findings to the firm's home state regulator: s 199(3A) (s 199(3A), (3B), (9) added by SI 2007/3253). The Financial Services and Markets Act 2000 s 199(4)-(8) (see the text and notes 9-11) applies to an incoming EEA firm other than a firm falling within Sch 3 para 5(da): s 199(3B) (as so added). As to the meaning of 'home state regulator' see PARA 315 note 1.

In the case of a firm falling within Sch 3 para 5(da), the Authority may not exercise its power of intervention before informing the firm's home state regulator and unless satisfied (1) that the firm's home state regulator

has failed or refused to take all appropriate measures for the purpose of ensuring that the firm remedies the situation which gave rise to the notice under s 199(3); or (2) that the measures taken by the home state regulator have proved inadequate for that purpose: s 199(9) (as so added).

8 Financial Services and Markets Act 2000 s 199(4). See also note 11.

9 See note 7.

10 Financial Services and Markets Act 2000 s 199(5) (amended by SI 2007/3253). This is expressed to apply except as mentioned in the Financial Services and Markets Act 2000 s 199(6) (see the text and note 11).

11 If the Authority decides that it should exercise its power of intervention in respect of the incoming EEA firm as a matter of urgency in order to protect the interests of consumers, it may exercise that power: (1) before complying with the Financial Services and Markets Act 2000 s 199(3), (4) (see the text to notes 1-9); or (2) where it has complied with those provisions, before it is satisfied as mentioned in s 199(5) (see the text to note 10): s 199(6). In such a case the Authority must at the earliest opportunity inform the firm's home state regulator and the European Commission: s 199(7). If: (a) the Authority has (by virtue of s 199(6)) exercised its power of intervention before complying with s 199(3), (4) or before it is satisfied as mentioned in s 199(5); and (b) the Commission decides under any of the Single Market Directives (other than the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments)) that the Authority must rescind or vary any requirement imposed in the exercise of its power of intervention, the Authority must, in accordance with the decision, rescind or vary the requirement: s 199(8) (amended by SI 2007/126).

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#### **461. Rescission and variation of requirements.**

The Financial Services Authority<sup>1</sup> may rescind or vary a requirement imposed in exercise of its power of intervention<sup>2</sup> on its own initiative or on the application of the person subject to the requirement<sup>3</sup>. The power of the Authority on its own initiative to rescind a requirement is exercisable by written notice given by the Authority to the person concerned, which takes effect on the date specified in the notice<sup>4</sup>. If the Authority proposes to refuse an application for the variation or rescission of a requirement, it must give the applicant a warning notice<sup>5</sup>. If the Authority decides to refuse an application for the variation or rescission of a requirement: (1) the Authority must give the applicant a decision notice<sup>6</sup>; and (2) that person may refer the matter to the Financial Services and Markets Tribunal<sup>7</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the meaning of 'power of intervention' see PARA 456 note 2.

3 Financial Services and Markets Act 2000 s 200(1). Section 197 (procedure on exercise of power of intervention) (see PARA 458) applies to the exercise of the power of the Authority on its own initiative to vary a requirement as it applies to the imposition of a requirement: s 200(3).

4 Financial Services and Markets Act 2000 s 200(2).

5 Financial Services and Markets Act 2000 s 200(4). As to warning notices see PARA 769.

6 Financial Services and Markets Act 2000 s 200(5)(a). As to decision notices see PARA 770.

7 Financial Services and Markets Act 2000 s 200(5)(b). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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#### **462. Contravention of a requirement imposed by the Financial Services Authority.**

Contravention of a requirement imposed by the Financial Services Authority<sup>1</sup> under Part XIII of the Financial Services and Markets Act 2000<sup>2</sup> does not: (1) make a person guilty of an offence; (2) make any transaction void or unenforceable; or (3) give rise to any right of action for breach of statutory duty<sup>3</sup>, although in prescribed cases<sup>4</sup> the contravention is actionable at the suit of a person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty<sup>5</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 Ie the Financial Services and Markets Act 2000 Pt XIII (ss 193-204).

3 Financial Services and Markets Act 2000 s 202(1). As to breach of statutory duty see **TORT** vol 45(2) (Reissue) PARA 395 et seq. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

4 'Prescribed' means prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 417(1). The cases prescribed are those where the following conditions are satisfied: (1) the action would be brought at the suit of: (a) a private person; or (b) a person acting in a fiduciary or representative capacity on behalf of a private person and any remedy would be exclusively for the benefit of that private person and could not be effected through an action brought otherwise than at the suit of the fiduciary or representative; and (2) the contravention is not of a Part XIII financial resources requirement: Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 7(1), (2). 'Part XIII financial resources requirement' means a requirement imposed on an incoming firm (within the meaning of the Financial Services and Markets Act 2000 s 193(1) (see PARA 456 note 2)) by the Authority under Pt XIII to have or maintain financial resources: Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 2. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 Financial Services and Markets Act 2000 s 202(2).

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#### **463. Contravention by EEA firm of certain directive requirements.**

If a relevant EEA firm<sup>1</sup> has a branch in the United Kingdom<sup>2</sup>, and the Financial Services Authority<sup>3</sup> ascertains that the firm has contravened, or is contravening, a relevant requirement relating to the Markets in Financial Instruments Directive<sup>4</sup>, the Authority must give the firm written notice which (1) requires the firm to put an end to the contravention<sup>5</sup>; (2) states that the Authority's power of intervention will become exercisable in relation to the firm if the firm continues the contravention<sup>6</sup>; and (3) indicates any requirements that the Authority proposes to

impose on the firm in exercise of its power of intervention in the event of the power becoming exercisable<sup>7</sup>.

The Authority may exercise its power of intervention in respect of the firm if: (a) a reasonable time has expired since the giving of such notice<sup>8</sup>; (b) the firm has failed to put an end to the contravention within that time<sup>9</sup>; and (c) the Authority has informed the firm's home state regulator<sup>10</sup> of its intention to exercise its power of intervention in respect of the firm<sup>11</sup>.

If the Authority has clear and demonstrable grounds for believing that a relevant EEA firm<sup>12</sup> has contravened, or is contravening, a further relevant requirement relating to the Markets in Financial Instruments Directive<sup>13</sup>, the Authority must notify the firm's home state regulator of the situation<sup>14</sup>. Such a notice must (i) request that the home state regulator take all appropriate measures for the purpose of ensuring that the firm puts an end to the contravention<sup>15</sup>; (ii) state that the Authority's power of intervention is likely to become exercisable in relation to the firm if the firm continues the contravention<sup>16</sup>; and (iii) indicate any requirements that the Authority proposes to impose on the firm in exercise of its power of intervention in the event of the power becoming exercisable<sup>17</sup>.

The Authority may exercise its power of intervention in respect of the firm if a reasonable time has expired since the giving of the notice<sup>18</sup>; and conditions A to C below are satisfied<sup>19</sup>.

Condition A is that (A) the firm's home state regulator has failed or refused to take measures for the purpose mentioned in head (i) above<sup>20</sup>; or (B) any measures taken by the home state regulator have proved inadequate for that purpose<sup>21</sup>. Condition B is that the firm is acting in a manner which is clearly prejudicial to the interests of investors in the United Kingdom or the orderly functioning of the markets<sup>22</sup>. Condition C is that the Authority has informed the firm's home state regulator of its intention to exercise its power of intervention in respect of the firm<sup>23</sup>.

1 'Relevant EEA firm' means an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(a) or (b) (see PARA 315 note 1) which is exercising in the United Kingdom an EEA right deriving from the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments); Financial Services and Markets Act 2000 s 194A(1) (s 194A added by SI 2007/126). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meaning of 'EEA right' see PARA 315 note 3.

2 Financial Services and Markets Act 2000 s 194A(1)(a) (as added: see note 1).

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 Financial Services and Markets Act 2000 s 194A(1)(b) (as added: see note 1). The reference is to a requirement falling within the Financial Services and Markets Act 2000 s 194A(3) (in a case to which the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 62.2 applies). A requirement falls within the Financial Services and Markets Act 2000 s 194A(3) if it is imposed on the firm: (1) by any provision of or made under the Financial Services and Markets Act 2000 which implements the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)); or (2) by any directly applicable Community regulation made under that directive: Financial Services and Markets Act 2000 s 194A(3) (as added: see note 1).

5 Financial Services and Markets Act 2000 s 194A(4)(a) (as added: see note 1).

6 Financial Services and Markets Act 2000 s 194A(4)(b) (as added: see note 1).

7 Financial Services and Markets Act 2000 s 194A(4)(c) (as added: see note 1).

8 Financial Services and Markets Act 2000 s 194A(5)(a) (as added: see note 1). Section 194A(5) applies whether or not the Authority's power of intervention is also exercisable as a result of s 194 (see PARA 456): s 194A(6) (as so added).

If the Authority exercises its power of intervention in respect of a relevant EEA firm by virtue of s 194A(5), it must at the earliest opportunity inform the firm's home state regulator and the European Commission of (1) the fact that the Authority has exercised that power in respect of the firm; and (2) any requirements it has imposed on the firm in exercise of the power: s 194A(7) (as so added). See note 10.



- 9 Financial Services and Markets Act 2000 s 194A(5)(b) (as added: see note 1). See note 8.
- 10 As to the meaning of 'home state regulator' see PARA 315 note 1.
- 11 Financial Services and Markets Act 2000 s 194A(5)(c) (as added: see note 1). See note 8.
- 12 As to the meaning of 'relevant EEA firm' see note 1; definition applied by the Financial Services and Markets Act 2000 s 195A(11) (s 195A added by SI 2007/126).
- 13 Financial Services and Markets Act 2000 s 195A(1) (as added: see note 12). The reference is to a requirement falling within s 195A(2) (in a case to which Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 62.1 or art 62.3 applies). A requirement falls within the Financial Services and Markets Act 2000 s 195A(2) if it is imposed on the firm (1) by or under any provision adopted in the firm's home state for the purpose of implementing the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)); or (2) by any directly applicable Community regulation made under that directive: Financial Services and Markets Act 2000 s 195A(2) (as so added). 'Home state', in relation to a relevant EEA firm, means (a) in the case of a firm which is a body corporate, the EEA state in which the firm has its registered office or, if it has no registered office, its head office; and (b) in any other case, the EEA state in which the firm has its head office: s 195A(11) (as so added). As to the meaning of 'body corporate' see PARA 86 note 11. As to the meaning of 'EEA state' see PARA 315 note 3.
- 14 Financial Services and Markets Act 2000 s 195A(3) (as added: see note 12). The reference is to the situation mentioned in s 195A(1).
- 15 Financial Services and Markets Act 2000 s 195A(4)(a) (as added: see note 12).
- 16 Financial Services and Markets Act 2000 s 195A(4)(b) (as added: see note 12).
- 17 Financial Services and Markets Act 2000 s 195A(4)(c) (as added: see note 12).
- 18 Ie the notice under the Financial Services and Markets Act 2000 s 195A(3).
- 19 Financial Services and Markets Act 2000 s 195A(5) (as added: see note 12). Section 195A(5) applies whether or not the Authority's power of intervention is also exercisable as a result of s 194 (see PARA 456) or s 195 (see PARA 457): s 195A(7) (as so added). If the Authority exercises its power of intervention in respect of a relevant EEA firm by virtue of s 195A(5), it must at the earliest opportunity inform the European Commission of (1) the fact that the Authority has exercised that power in respect of the firm; and (2) any requirements it has imposed on the firm in exercise of the power: s 195A(10) (as so added).
- 20 Financial Services and Markets Act 2000 s 195A(6)(a) (as added: see note 12).
- 21 Financial Services and Markets Act 2000 s 195A(6)(b) (as added: see note 12).
- 22 Financial Services and Markets Act 2000 s 195A(7) (as added: see note 12).
- 23 Financial Services and Markets Act 2000 s 195A(8) (as added: see note 12).

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## ***B. CONSUMER CREDIT PROHIBITIONS AND RESTRICTIONS***

### **464. Prohibitions and restrictions.**

If it appears to the Office of Fair Trading<sup>1</sup> that a consumer credit EEA firm<sup>2</sup> or any of its employees, agents or associates<sup>3</sup> (whether past or present) or, if the firm is a body corporate<sup>4</sup>, any controller<sup>5</sup> of the firm or an associate of any such controller, is, or is likely to be doing any

of the things specified in the Consumer Credit Act 1974<sup>6</sup>, it may by written notice given to the firm impose on the firm a consumer credit prohibition<sup>7</sup>. If it appears to the Office of Fair trading that a restriction<sup>8</sup> on an EEA consumer credit firm has not been complied with, it may by written notice given to the firm impose a consumer credit prohibition<sup>9</sup>.

A consumer credit prohibition may be absolute or may be imposed: (1) for such period; (2) until the occurrence of such event; or (3) until such conditions are complied with, as may be specified in the notice<sup>10</sup>. Any period, event or condition so specified may be varied by the Office of Fair Trading on the application of the firm concerned<sup>11</sup>. A consumer credit prohibition may be withdrawn by written notice served by the Office of Fair Trading on the firm concerned, and any such notice takes effect on such date as is specified in the notice<sup>12</sup>. A firm contravening a prohibition is guilty of an offence<sup>13</sup>.

If it appears to the Office of Fair Trading that the situation as respects a consumer credit EEA firm is such that its power to impose a consumer credit prohibition<sup>14</sup> is exercisable, the Office of Fair Trading may, instead of imposing a prohibition, impose such restriction<sup>15</sup> as appears to it desirable<sup>16</sup>. A restriction may be withdrawn, or may be varied with the agreement of the firm concerned, by written notice served by the Office of Fair Trading on the firm, and any such notice takes effect on such date as is specified in the notice<sup>17</sup>. A firm contravening a restriction is guilty of an offence<sup>18</sup>.

If the Office of Fair Trading proposes, in relation to a firm, to impose a prohibition<sup>19</sup>, to impose a restriction<sup>20</sup>, or to vary a restriction otherwise than with the agreement of the firm, the Office of Fair Trading must by notice inform the firm of its proposal, stating its reasons, and invite the firm to submit representations<sup>21</sup>. If it imposes the prohibition or restriction or varies the restriction, the Office of Fair Trading may give directions authorising the firm to carry into effect agreements made before the coming into force of the prohibition, restriction or variation<sup>22</sup>. A prohibition, restriction or variation is not to come into force before the end of the appeal period<sup>23</sup>. If the Office of Fair Trading imposes a prohibition or restriction or varies a restriction, it must serve a copy of the prohibition, restriction or variation on the Financial Services Authority<sup>24</sup> and on the firm's home state regulator<sup>25</sup>.

If the Office of Fair Trading proposes to refuse an application made by a firm for the revocation of a prohibition or restriction, it must by notice inform the firm of the proposed refusal, stating its reasons, and invite the firm to submit representations<sup>26</sup>.

If an invitation is made to submit representations<sup>27</sup>, the Office of Fair Trading must invite the firm, within 21 days after the notice containing the invitation is given to it or such longer period as the Office of Fair Trading may allow, to submit its representations in writing to it, and to give notice to it, if the firm thinks fit, that it wishes to make representations orally<sup>28</sup>. If such notice is given, the Office of Fair Trading must arrange for the oral representations to be heard<sup>29</sup>.

The Office of Fair Trading must give the firm notice of its determination<sup>30</sup>.

1 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

2 'Consumer credit EEA firm' means an EEA firm falling within any of the provisions of the Financial Services and Markets Act 2000 s 31(1)(b), Sch 3 para 5(a)-(c) (see PARA 315 note 1) whose EEA authorisation covers any Consumer Credit Act business: Financial Services and Markets Act 2000 s 203(10). As to the meaning of 'EEA firm' see PARA 315 note 1. As to the meaning of 'EEA authorisation' see PARA 318 note 3. 'Consumer Credit Act business' means consumer credit business, consumer hire business or ancillary credit business: Financial Services and Markets Act 2000 s 203(10). 'Consumer credit business', 'consumer hire business' and 'ancillary credit business' have the same meanings as in the Consumer Credit Act 1974 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 81, 82, 271): Financial Services and Markets Act 2000 s 203(10).

3 'Associate' has the same meaning as in the Consumer Credit Act 1974 s 25(2A) (see **CONSUMER CREDIT**): Financial Services and Markets Act 2000 s 203(10) (definition amended by the Consumer Credit Act 2006 s 33(8)).

4 As to the meaning of 'body corporate' see para 86 note 11.

5 'Controller' has the meaning given by the Consumer Credit Act 1974 s 189(1) (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 92): Financial Services and Markets Act 2000 s 203(10).

6 le specified in the Consumer Credit Act 1974 s 25A(2)(a)-(e): see **CONSUMER CREDIT**.

7 Financial Services and Markets Act 2000 s 203(1), (4) (s 203(1), (2), (6), (7) amended by the Enterprise Act 2002 Sch 25 para 40(1), (7); and the Financial Services and Markets Act 2000 s 203(4) amended by the Consumer Credit Act 2006 ss 33(7)).

'Consumer credit prohibition' means a prohibition on carrying on, or purporting to carry on, in the United Kingdom any Consumer Credit Act business which consists of or includes carrying on one or more listed activities: Financial Services and Markets Act 2000 s 203(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. 'Listed activity' means an activity listed in Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) Annex 1 or the Investment Services Directive (ie EEC Council Directive 93/22 (OJ L141, 11.6.93, p 27) on investment services in the securities field) Annex: Financial Services and Markets Act 2000 s 203(10) (amended by SI 2000/2952). See note 19.

8 le a restriction imposed under the Financial Services and Markets Act 2000 s 204: see the text and notes 15-18. See note 19.

9 Financial Services and Markets Act 2000d s 203(2) (as amended: see note 7).

10 Financial Services and Markets Act 2000 s 203(5).

11 Financial Services and Markets Act 2000 s 203(6) (as amended: see note 7).

12 Financial Services and Markets Act 2000 s 203(7) (as amended: see note 7).

13 Financial Services and Markets Act 2000 s 203(9). Such a firm is liable (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to a fine: s 203(9). As to the statutory maximum see PARA 56 note 24.

14 le the powers conferred by the Financial Services and Markets Act 2000 s 203(1): see the text and notes 1-7.

15 'Restriction' means a direction that a consumer credit EEA firm may not carry on in the United Kingdom, otherwise than in accordance with such condition or conditions as may be specified in the direction, any Consumer Credit Act business which: (1) consists of or includes carrying on any listed activity; and (2) is specified in the direction: Financial Services and Markets Act 2000 s 204(1). See note 19.

16 Financial Services and Markets Act 2000 s 204(2) (s 204(2), (3) amended by the Enterprise Act 2002 Sch 25 para 40(1), (8)).

17 Financial Services and Markets Act 2000 s 204(3) (as amended: see note 16).

18 Financial Services and Markets Act 2000 s 204(4). Such a firm is liable, on summary conviction, to a fine not exceeding the statutory maximum or, on conviction on indictment, to a fine: s 204(4).

19 'Prohibition' means a consumer credit prohibition under the Financial Services and Markets Act 2000 s 203 (see the text and notes 1-13): Sch 16 para 1. Schedule 16 (see the text to notes 19-30) has effect as respects consumer credit prohibitions and restrictions under s 204: s 203(8).

20 'Restriction' means a restriction under the Financial Services and Markets Act 2000 s 204 (see the text and notes 15-18): Sch 16 para 1. See note 19.

21 Financial Services and Markets Act 2000 Sch 16 para 2(1), (2) (Sch 16 paras 2(1)-(3), (5), 3, 4 amended by the Enterprise Act 2002 Sch 25 para 40(1), (21)). Representations are submitted in accordance with the Financial Services and Markets Act 2000 Sch 16 para 4: see the text and notes 27-30.

22 Financial Services and Markets Act 2000 Sch 16 para 2(3) (as amended: see note 21).

23 Financial Services and Markets Act 2000 Sch 16 para 2(4). 'Appeal period' has the same meaning as in the Consumer Credit Act 1974 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 121): Financial Services and Markets Act 2000 Sch 16 para 1.

24 As to the Financial Services Authority see PARAS 4, 6 et seq.

25 Financial Services and Markets Act 2000 Sch 16 para 2(5) (as amended: see note 21). As to the meaning of 'home state regulator' see PARA 315 note 1.

26 Financial Services and Markets Act 2000 Sch 16 para 3(1), (2) (as amended: see note 21). Representations are submitted in accordance with Sch 16 para 4: see the text and notes 27-30.

27 Ie under the Financial Services and Markets Act 2000 Sch 16 para 4.

28 Financial Services and Markets Act 2000 Sch 16 para 4(1) (as amended: see note 21).

29 Financial Services and Markets Act 2000 Sch 16 para 4(2) (as amended: see note 21).

30 Financial Services and Markets Act 2000 Sch 16 para 4(3) (as amended: see note 21). The Consumer Credit Act 1974 s 41 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 135) has effect so that the firm concerned may appeal to the Secretary of State against the imposition of a prohibition or restriction or the variation of a restriction, and against the refusal of an application for the revocation of a prohibition or restriction: see the Financial Services and Markets Act 2000 Sch 16 para 5. As to the Secretary of State see PARA 3.

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## **(iv) Disciplinary Measures**

### **465. Public censure.**

If the Financial Services Authority<sup>1</sup> considers that an authorised person<sup>2</sup> has contravened a requirement imposed on him by or under the Financial Services and Markets Act 2000, or by any directly applicable Community regulation made under the Markets in Financial Instruments Directive<sup>3</sup>, the Authority may publish a statement to that effect<sup>4</sup>. After such a statement is published, the Authority must send a copy of it to the authorised person and to certain third parties<sup>5</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to authorised persons see PARA 314.

3 Ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

4 Financial Services and Markets Act 2000 s 205 (amended by SI 2007/126).

5 Financial Services and Markets Act 2000 s 209. A copy of the statement must be sent to third parties on whom a copy of a decision notice was given under s 393(4): see PARA 775.

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### **466. Financial penalties.**

If the Financial Services Authority<sup>1</sup> considers that an authorised person<sup>2</sup> has contravened a requirement imposed on him by or under the Financial Services and Markets Act 2000, or by any directly applicable Community regulation made under the Markets in Financial Instruments Directive<sup>3</sup>, it may impose on him a penalty, in respect of the contravention, of such amount as it considers appropriate<sup>4</sup>. The Authority may not in respect of any contravention both require a person to pay a penalty under these provisions and withdraw his authorisation<sup>5</sup>. A penalty under these provisions is payable to the Authority<sup>6</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to authorised persons see PARA 314.

3 The European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

4 Financial Services and Markets Act 2000 s 206(1) (amended by SI 2007/126).

5 Financial Services and Markets Act 2000 s 206(2). As to the withdrawal of authorisation see s 33; and PARA 354.

6 Financial Services and Markets Act 2000 s 206(3).

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#### **467. Statements of policy.**

The Financial Services Authority<sup>1</sup> must prepare and issue a statement of its policy with respect to the imposition of penalties in relation to disciplinary measures<sup>2</sup> and the amount of such penalties<sup>3</sup>. The Authority's policy in determining what the amount of a penalty should be must include having regard to<sup>4</sup>:

1121 (1) the seriousness of the contravention in question in relation to the nature of the requirement contravened<sup>5</sup>;

1122 (2) the extent to which that contravention was deliberate or reckless<sup>6</sup>; and

1123 (3) whether the person on whom the penalty is to be imposed is an individual<sup>7</sup>.

In exercising, or deciding whether to exercise, its power to impose a penalty<sup>8</sup> in the case of any particular contravention, the Authority must have regard to any policy statement published and in force at the time when the contravention in question occurred<sup>9</sup>. The Authority may at any time alter or replace a policy statement<sup>10</sup>. If a policy statement is altered or replaced, the Authority must issue the altered or replacement statement<sup>11</sup>. A policy statement must be published by the Authority in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>12</sup>. The Authority must, without delay, give the Treasury<sup>13</sup> a copy of any policy statement which it publishes<sup>14</sup>. The Authority may charge a reasonable fee for providing a person with a copy of the statement<sup>15</sup>.

Before issuing a policy statement<sup>16</sup>, the Authority must publish a draft of the proposed statement in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>17</sup>. The draft must be accompanied by notice that representations about

the proposal may be made to the Authority within a specified time<sup>18</sup>. Before issuing the proposed statement, the Authority must have regard to any such representations made to it<sup>19</sup>. If the Authority issues the proposed statement it must publish an account, in general terms, of the representations made to it and its response to them<sup>20</sup>. If the statement differs from the draft in a way which is, in the opinion of the Authority, significant, the Authority must publish details of the difference<sup>21</sup>. This procedure<sup>22</sup> also applies to a proposal to alter or replace a statement<sup>23</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie penalties under the Financial Services and Markets Act 2000 Pt XIV (ss 205-211).

3 Financial Services and Markets Act 2000 s 210(1).

4 Financial Services and Markets Act 2000 s 210(2).

5 Financial Services and Markets Act 2000 s 210(2)(a).

6 Financial Services and Markets Act 2000 s 210(2)(b).

7 Financial Services and Markets Act 2000 s 210(2)(c).

8 Ie under the Financial Services and Markets Act 2000 s 206: see PARA 466.

9 Financial Services and Markets Act 2000 s 210(7).

10 Financial Services and Markets Act 2000 s 210(3).

11 Financial Services and Markets Act 2000 s 210(4).

12 Financial Services and Markets Act 2000 s 210(6).

13 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

14 Financial Services and Markets Act 2000 s 210(5).

15 Financial Services and Markets Act 2000 s 210(8).

16 Ie under the Financial Services and Markets Act 2000 s 210: see the text to notes 1-15.

17 Financial Services and Markets Act 2000 s 211(1). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 211(1): s 211(6).

18 Financial Services and Markets Act 2000 s 211(2).

19 Financial Services and Markets Act 2000 s 211(3).

20 Financial Services and Markets Act 2000 s 211(4).

21 Financial Services and Markets Act 2000 s 211(5). This obligation is in addition to complying with s 211(4): see the text to note 20.

22 Ie the procedure set out in the Financial Services and Markets Act 2000 s 211.

23 Financial Services and Markets Act 2000 s 211(7).

5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(iv) Disciplinary Measures/468. Proposal to take disciplinary measures.

#### **468. Proposal to take disciplinary measures.**

If the Financial Services Authority<sup>1</sup> proposes: (1) to publish a statement in respect of an authorised person<sup>2</sup>; or (2) to impose a penalty on an authorised person<sup>3</sup>, it must give the authorised person a warning notice<sup>4</sup>. A warning notice about a proposal to publish a statement must set out the terms of the statement<sup>5</sup>. A warning notice about a proposal to impose a penalty must state the amount of the penalty<sup>6</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 205: see PARA 465. As to authorised persons see PARA 314.

3 Ie under the Financial Services and Markets Act 2000 s 206: see PARA 466.

4 Financial Services and Markets Act 2000 s 207(1). As to warning notices see PARA 769.

5 Financial Services and Markets Act 2000 s 207(2).

6 Financial Services and Markets Act 2000 s 207(3).

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#### **469. Decision notices.**

If the Financial Services Authority<sup>1</sup> decides: (1) to publish a statement<sup>2</sup> (whether or not in the terms proposed<sup>3</sup>); or (2) to impose a penalty<sup>4</sup> (whether or not of the amount proposed), it must without delay give the authorised person<sup>5</sup> concerned a decision notice<sup>6</sup>. In the case of a statement, the decision notice must set out the terms of the statement<sup>7</sup>. In the case of a penalty, the decision notice must state the amount of the penalty<sup>8</sup>. If the Authority decides to: (a) publish a statement in respect of an authorised person<sup>9</sup>; or (b) impose a penalty on an authorised person<sup>10</sup>, the authorised person may refer the matter to the Financial Services and Markets Tribunal<sup>11</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 205: see PARA 465.

3 As to proposals see PARA 468.

4 Ie under the Financial Services and Markets Act 2000 s 206: see PARA 466.

5 As to authorised persons see PARA 314.

6 Financial Services and Markets Act 2000 s 208(1). As to decision notices see PARA 770.

7 Financial Services and Markets Act 2000 s 208(2).

8 Financial Services and Markets Act 2000 s 208(3).

9 Ie under the Financial Services and Markets Act 2000 s 205: see PARA 465.

10 Ie under the Financial Services and Markets Act 2000 s 206: see PARA 466.

11 Financial Services and Markets Act 2000 s 208(4). As to the Financial Services and Markets Tribunal see PARA 43 et seq. See *Legal & General Assurance Society Ltd v Financial Services Authority* [2005] All ER (D) 154 (Jan).

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## **(v) Injunctions and Restitution**

### **A. INJUNCTIONS**

#### **470. Applications for injunctions.**

If, on the application of the Financial Services Authority<sup>1</sup> or the Secretary of State<sup>2</sup>, the High Court is satisfied: (1) that there is a reasonable likelihood that any person will contravene a relevant requirement<sup>3</sup>; or (2) that any person has contravened a relevant requirement and that there is a reasonable likelihood that the contravention will continue or be repeated, the court may make an order restraining the contravention<sup>4</sup>. If, on the application of the Authority or the Secretary of State, the High Court is satisfied: (a) that any person has contravened a relevant requirement; and (b) that there are steps which could be taken for remedying the contravention, the court may make an order requiring that person, and any other person who appears to have been knowingly concerned in the contravention, to take such steps as the court may direct to remedy it<sup>5</sup>. If, on the application of the Authority or the Secretary of State, the High Court is satisfied that any person may have: (i) contravened a relevant requirement; or (ii) been knowingly concerned in the contravention of such a requirement, it may make an order restraining him from disposing of, or otherwise dealing with, any assets of his which it is satisfied he is reasonably likely to dispose of or otherwise deal with<sup>6</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the Secretary of State see PARA 3.

3 'Relevant requirement': (1) in relation to an application by the Authority, means a requirement: (a) which is imposed by or under the Financial Services and Markets Act 2000 or by any directly applicable Community regulation made under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments); or (b) which is imposed by or under any other Act and whose contravention constitutes an offence which the Authority has power to prosecute under the Financial Services and Markets Act 2000; (2) in relation to an application by the Secretary of State, means a requirement which is imposed by or under the Financial Services and Markets Act 2000 and whose contravention constitutes an offence which the Secretary of State has power to prosecute under the Financial Services and Markets Act 2000: s 380(6) (amended by SI 2007/126).

4 Financial Services and Markets Act 2000 s 380(1), (4).



5 Financial Services and Markets Act 2000 s 380(2). For the purposes of s 380(2), references to remedying a contravention include references to mitigating its effect: s 380(4), (5). See *Financial Services Authority v Martin* [2005] EWCA Civ 1422, [2006] 2 BCLC 193 (defendant obliged to rescind).

6 Financial Services and Markets Act 2000 s 380(3), (4).

## UPDATE

### 470 Applications for injunctions

NOTE 5--Although a defendant's lack of means is no reason not to make a remedial order, the practicality of enforcement is a relevant factor: see *Financial Services Authority v Shepherd* [2009] EWHC 1167 (Ch), [2009] All ER (D) 15 (Jun).

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#### 471. Injunctions in cases of market abuse.

If, on the application of the Financial Services Authority<sup>1</sup>, the High Court is satisfied: (1) that there is a reasonable likelihood that any person will engage in market abuse<sup>2</sup>; or (2) that any person is or has engaged in market abuse and that there is a reasonable likelihood that the market abuse will continue or be repeated, the court may make an order restraining the market abuse<sup>3</sup>. If, on the application of the Authority, the High Court is satisfied: (a) that any person is or has engaged in market abuse; and (b) that there are steps which could be taken for remedying the market abuse, the court may make an order requiring him to take such steps as the court may direct to remedy it<sup>4</sup>. If, on the application of the Authority, the High Court is satisfied that any person: (i) may be engaged in market abuse; or (ii) may have been engaged in market abuse, the court may make an order restraining the person concerned from disposing of, or otherwise dealing with, any assets of his which it is satisfied that he is reasonably likely to dispose of, or otherwise deal with<sup>5</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the meanings of 'market abuse' and 'engaged in market abuse' see PARA 437. As to penalties for market abuse see PARA 437 et seq.

3 Financial Services and Markets Act 2000 s 381(1), (5).

4 Financial Services and Markets Act 2000 s 381(2), (5). For the purposes of s 381(2), references to remedying any market abuse include references to mitigating its effect: s 381(6).

5 Financial Services and Markets Act 2000 s 381(3), (4), (5).

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## **B. RESTITUTION ORDERS**

### **472. Restitution orders.**

The High Court may, on the application of the Financial Services Authority<sup>1</sup> or the Secretary of State<sup>2</sup>, make a restitution order<sup>3</sup> if it is satisfied that a person has contravened a relevant requirement<sup>4</sup>, or been knowingly concerned in the contravention of such a requirement<sup>5</sup>, and: (1) that profits have accrued to him as a result of the contravention<sup>6</sup>; or (2) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention<sup>7</sup>. The court may order the person concerned to pay to the Authority such sum as appears to the court to be just having regard: (a) in a case within head (1) above, to the profits appearing to the court to have accrued; (b) in a case within head (2) above, to the extent of the loss or other adverse effect; (c) in a case within both of those heads, to the profits appearing to the court to have accrued and to the extent of the loss or other adverse effect<sup>8</sup>. Any amount paid to the Authority in pursuance of such an order must be paid by it to such qualifying person<sup>9</sup> or distributed by it among such qualifying persons as the court may direct<sup>10</sup>. Nothing in these provisions affects the right of any person other than the Authority or the Secretary of State to bring proceedings in respect of the matters to which these provisions apply<sup>11</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the Secretary of State see PARA 3.

3 I.e. an order under the Financial Services and Markets Act 2000 s 382(2): see the text to note 8.

4 'Relevant requirement': (1) in relation to an application by the Authority, means a requirement: (a) which is imposed by or under the Financial Services and Markets Act 2000 or by any directly applicable Community regulation made under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments); or (b) which is imposed by or under any other Act and whose contravention constitutes an offence which the Authority has power to prosecute under the Financial Services and Markets Act 2000; (2) in relation to an application by the Secretary of State, means a requirement which is imposed by or under the Financial Services and Markets Act 2000 and whose contravention constitutes an offence which the Secretary of State has power to prosecute under the Financial Services and Markets Act 2000: s 382(9) (amended by SI 2007/126).

5 Financial Services and Markets Act 2000 s 382(1), (6). On an application under s 382(1), the court may require the person concerned to supply it with such accounts or other information as it may require for any one or more of the following purposes: (1) establishing whether any and, if so, what profits have accrued to him as mentioned in s 382(1)(a) (see head (1) in the text); (2) establishing whether any person or persons have suffered any loss or adverse effect as mentioned in s 382(1)(b) (see head (2) in the text) and, if so, the extent of that loss or adverse effect; and (3) determining how any amounts are to be paid or distributed under s 382(3) (see the text to note 10): s 382(4). The court may require any accounts or other information supplied under s 382(4) to be verified in such manner as it may direct: s 382(5).

6 Financial Services and Markets Act 2000 s 382(1)(a).

7 Financial Services and Markets Act 2000 s 382(1)(b).

8 Financial Services and Markets Act 2000 s 382(2).

9 'Qualifying person' means a person appearing to the court to be someone: (1) to whom the profits mentioned in the Financial Services and Markets Act 2000 s 382(1)(a) (see head (1) in the text) are attributable; or (2) who has suffered the loss or adverse effect mentioned in s 382(1)(b) (see head (2) in the text): s 382(8).

10 Financial Services and Markets Act 2000 s 382(3).

11 Financial Services and Markets Act 2000 s 382(7).

### **UPDATE**

## 472 Restitution orders

NOTE 8--Although a defendant's lack of means is no reason not to make a restitution order, the practicality of enforcement is a relevant factor: see *Financial Services Authority v Shepherd* [2009] EWHC 1167 (Ch), [2009] All ER (D) 15 (Jun).

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### 473. Restitution orders in cases of market abuse.

The High Court may, on the application of the Financial Services Authority<sup>1</sup>, make a restitution order<sup>2</sup> if it is satisfied that a person (the 'person concerned'): (1) has engaged in market abuse<sup>3</sup>; or (2) by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by the person concerned, would amount to market abuse, and the following condition<sup>4</sup> is fulfilled<sup>5</sup>, namely that: (a) profits have accrued to the person concerned as a result; or (b) one or more persons have suffered loss or been otherwise adversely affected as a result<sup>6</sup>. The court may not make an order<sup>7</sup> if it is satisfied that: (i) the person concerned believed, on reasonable grounds, that his behaviour did not fall within head (1) or head (2) above; or (ii) he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within head (1) or head (2) above<sup>8</sup>.

The court may order the person concerned to pay to the Authority such sum as appears to the court to be just having regard: (A) in a case within head (a) above, to the profits appearing to the court to have accrued; (B) in a case within head (b) above, to the extent of the loss or other adverse effect; (c) in a case within both of those heads, to the profits appearing to the court to have accrued and to the extent of the loss or other adverse effect<sup>9</sup>. Any amount paid to the Authority in pursuance of such an order must be paid by it to such qualifying person<sup>10</sup> or distributed by it among such qualifying persons as the court may direct<sup>11</sup>.

Nothing in these provisions affects the right of any person other than the Authority to bring proceedings in respect of the matters to which these provisions apply<sup>12</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 383(4): see the text to note 9.

3 As to the meanings of 'market abuse' and 'engaged in market abuse' see PARA 437. As to penalties for market abuse see PARA 437 et seq.

4 Ie the condition mentioned in the Financial Services and Markets Act 2000 s 383(2): see the text to note 6.

5 Financial Services and Markets Act 2000 s 383(1), (8). On an application under s 383(1), the court may require the person concerned to supply it with such accounts or other information as it may require for any one or more of the following purposes: (1) establishing whether any and, if so, what profits have accrued to him as mentioned in head (a) in the text; (2) establishing whether any person or persons have suffered any loss or adverse effect as mentioned in head (b) in the text and, if so, the extent of that loss or adverse effect; and (3) determining how any amounts are to be paid or distributed under s 383(5) (see the text to note 12): s 383(6).

The court may require any accounts or other information supplied under s 383(6) to be verified in such manner as it may direct: s 383(7).

6 Financial Services and Markets Act 2000 s 383(2).

7 lie under the Financial Services and Markets Act 2000 s 383(4): see the text to note 9.

8 Financial Services and Markets Act 2000 s 383(3).

9 Financial Services and Markets Act 2000 s 383(4).

10 'Qualifying person' means a person appearing to the court to be someone: (1) to whom the profits mentioned in head (a) in the text are attributable; or (2) who has suffered the loss or adverse effect mentioned in head (b) in the text: Financial Services and Markets Act 2000 s 383(10).

11 Financial Services and Markets Act 2000 s 383(5).

12 Financial Services and Markets Act 2000 s 383(9).

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### ***C. FINANCIAL SERVICES AUTHORITY'S POWER TO REQUIRE RESTITUTION***

#### **474. Power of Financial Services Authority to require restitution.**

The Financial Services Authority<sup>1</sup> has a power to require restitution<sup>2</sup> which it may exercise if it is satisfied that an authorised person<sup>3</sup> (the 'person concerned') has contravened a relevant requirement<sup>4</sup>, or been knowingly concerned in the contravention of such a requirement, and: (1) that profits have accrued to him as a result of the contravention; or (2) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention<sup>5</sup>. The Authority may also exercise the power to require restitution<sup>6</sup> if it is satisfied that a person (the 'person concerned'): (a) has engaged in market abuse<sup>7</sup>; or (b) by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by the person concerned, would amount to market abuse, and (i) that profits have accrued to the person concerned as a result of the market abuse; or (ii) that one or more persons have suffered loss or been otherwise adversely affected as a result of the market abuse<sup>8</sup>. However, the Authority may not exercise the power<sup>9</sup> if, having considered any representations made to it in response to a warning notice, there are reasonable grounds for it to be satisfied that the person concerned believed, on reasonable grounds, that his behaviour did not fall within head (a) or head (b) above, or he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within head (a) or head (b) above<sup>10</sup>.

The Authority's power to require restitution is a power to require the person concerned, in accordance with such arrangements as the Authority considers appropriate, to pay to the appropriate person<sup>11</sup> or distribute among the appropriate persons such amount as appears to the Authority to be just having regard: (A) in a case within head (1) or head (i) above, to the profits appearing to the Authority to have accrued; (B) in a case within head (2) or head (ii) above, to the extent of the loss or other adverse effect; (c) in a case within heads (1) and (2) or heads (i) and (ii) above, to the profits appearing to the Authority to have accrued and to the extent of the loss or other adverse effect<sup>12</sup>.

If the Authority proposes to exercise the power to require restitution<sup>13</sup> in relation to a person, it must give him a warning notice<sup>14</sup>. The warning notice must specify the amount which the Authority proposes to require the person concerned to pay or distribute<sup>15</sup>.

If the Authority decides to exercise the power to require restitution, it must give a decision notice<sup>16</sup> to the person in relation to whom the power is exercised<sup>17</sup>. The decision notice must state the amount that he is to pay or distribute, identify the person or persons to whom that amount is to be paid or among whom that amount is to be distributed, and state the arrangements in accordance with which the payment or distribution is to be made<sup>18</sup>. If the Authority decides to exercise the power to require restitution, the person in relation to whom it is exercised may refer the matter to the Financial Services and Markets Tribunal<sup>19</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie the power under the Financial Services and Markets Act 2000 s 384(5): see the text to notes 11-12.

3 As to authorised persons see PARA 314.

4 'Relevant requirement' means: (1) a requirement imposed by or under the Financial Services and Markets Act 2000 or by any directly applicable Community regulation made under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments); and (2) a requirement which is imposed by or under any other Act and whose contravention constitutes an offence which the Authority has power to prosecute under the Financial Services and Markets Act 2000: s 384(7) (amended by SI 2007/126).

5 Financial Services and Markets Act 2000 s 384(1).

6 Ie the power under the Financial Services and Markets Act 2000 s 384(5): see the text and notes 11-12.

7 As to the meanings of 'market abuse' and 'engaged in market abuse' see PARA 437. As to penalties for market abuse see PARA 437 et seq. As to restitution orders in cases of market abuse see PARA 473.

8 Financial Services and Markets Act 2000 s 384(2), (3).

9 Ie as a result of the Financial Services and Markets Act 2000 s 384(2): see the text to notes 6-8.

10 Financial Services and Markets Act 2000 s 384(4). As to the duty to give a warning notice see the text and note 14.

11 'Appropriate person' means a person appearing to the Authority to be someone: (1) to whom the profits mentioned in head (1) or head (i) in the text are attributable; or (2) who has suffered the loss or adverse effect mentioned in head (2) or head (ii) in the text: Financial Services and Markets Act 2000 s 384(6).

12 Financial Services and Markets Act 2000 s 384(5).

13 Ie the power under the Financial Services and Markets Act 2000 s 384(5): see the text to notes 11-12.

14 Financial Services and Markets Act 2000 s 385(1). As to warning notices see PARA 769.

15 Financial Services and Markets Act 2000 s 385(2).

16 As to decision notices see PARA 770.

17 Financial Services and Markets Act 2000 s 386(1).

18 Financial Services and Markets Act 2000 s 386(2).

19 Financial Services and Markets Act 2000 s 386(3). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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## **(vi) Public Record and Disclosure of Information**

### **A. PUBLIC RECORD**

#### **475. The public record.**

The Financial Services Authority<sup>1</sup> must maintain a record of every<sup>2</sup>:

- 1124 (1) person who appears to the Authority to be an authorised person<sup>3</sup>;
- 1125 (2) authorised unit trust scheme<sup>4</sup>;
- 1126 (3) authorised open-ended investment company<sup>5</sup>;
- 1127 (4) recognised scheme<sup>6</sup>;
- 1128 (5) recognised investment exchange<sup>7</sup>;
- 1129 (6) recognised clearing house<sup>8</sup>;
- 1130 (7) individual to whom a prohibition order<sup>9</sup> relates<sup>10</sup>;
- 1131 (8) approved person<sup>11</sup>;
- 1132 (9) person to whom the provision on appointed representatives and tied agents applies<sup>12</sup>;
- 1133 (10) person falling within such other class (if any) as the Authority may determine<sup>13</sup>; and
- 1134 (11) certified person in regard to the issue of electronic money<sup>14</sup>.

The record must include such information as the Authority considers appropriate and at least the following information<sup>15</sup>:

- 1135 (a) in the case of a person appearing to the Authority to be an authorised person: (i) information as to the services which he holds himself out as able to provide; and (ii) any address of which the Authority is aware at which a notice or other document<sup>16</sup> may be served on him<sup>17</sup>;
- 1136 (b) in the case of an authorised unit trust scheme, the name and address of the manager and trustee<sup>18</sup> of the scheme<sup>19</sup>;
- 1137 (c) in the case of an authorised open-ended investment company, the name and address of: (i) the company; (ii) if it has only one director<sup>20</sup>, the director; and (iii) its depositary<sup>21</sup> (if any)<sup>22</sup>;
- 1138 (d) in the case of a recognised scheme, the name and address of: (i) the operator<sup>23</sup> of the scheme; and (ii) any representative of the operator in the United Kingdom<sup>24</sup>;
- 1139 (e) in the case of a recognised investment exchange or recognised clearing house, the name and address of the exchange or clearing house<sup>25</sup>;
- 1140 (f) in the case of an individual to whom a prohibition order relates: (i) his name; and (ii) details of the effect of the order<sup>26</sup>;
- 1141 (g) in the case of a person who is an approved person: (i) his name; (ii) the name of the relevant authorised person<sup>27</sup>; (iii) if the approved person is performing a controlled function<sup>28</sup> under an arrangement<sup>29</sup> with a contractor of the relevant authorised person, the name of the contractor<sup>30</sup>.

The Authority must make the record available for inspection by members of the public in a legible form at such times and in such place or places as the Authority may determine; and on

payment of the fee (if any) fixed by the Authority it must provide to any person who asks for it a certified copy of the record, or any part of it, in a form (either written or electronic) in which it is legible to the person asking for it<sup>31</sup>. The Authority may publish the record, or any part of it; and it may exploit commercially the information contained in the record, or any part of that information<sup>32</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 347(1). If it appears to the Authority that a person in respect of whom there is an entry in the record as a result of one of the heads of s 347(1) (see heads (1)-(10) in the text) has ceased to be a person to whom that head applies, the Authority may remove the entry from the record: s 347(3). But if the Authority decides not to remove the entry, it must: (1) make a note to that effect in the record; and (2) state why it considers that the person has ceased to be a person to whom that head applies: s 347(4).

3 Financial Services and Markets Act 2000 s 347(1)(a). As to authorised persons see PARA 314.

4 Financial Services and Markets Act 2000 s 347(1)(b). As to the meaning of 'authorised unit trust scheme' see PARA 603; definition applied by s 347(7).

5 Financial Services and Markets Act 2000 s 347(1)(c). As to the meaning of 'authorised open-ended investment company' see PARA 603; definition applied by s 347(7).

6 Financial Services and Markets Act 2000 s 347(1)(d). As to the meaning of 'recognised scheme' see PARA 603; definition applied by s 347(7).

7 Financial Services and Markets Act 2000 s 347(1)(e). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

8 Financial Services and Markets Act 2000 s 347(1)(f). As to the meaning of 'recognised clearing house' see PARA 684 note 6.

9 As to prohibition orders see PARA 364.

10 Financial Services and Markets Act 2000 s 347(1)(g).

11 Financial Services and Markets Act 2000 s 347(1)(h). 'Approved person' means a person in relation to whom the Authority has given its approval under s 59 (see PARA 367); s 347(8).

12 Financial Services and Markets Act 2000 s 347(1)(ha) (added by SI 2007/126). The reference is to every person to whom the Financial Services and Markets Act 2000 s 347(2A) applies.

Section 347(2A) applies to:

508 (1) an appointed representative to whom s 39(1A) (see PARA 346) applies for whom the applicable register (as defined by s 39(1B) (see PARA 346)) is the record maintained by virtue of s 347(1)(ha) (s 347(2A)(a) (s 347(2A) added by SI 2007/126));

509 (2) a person mentioned in s 39A(1)(a) (see PARA 347) if (a) the contract with an authorised person to which he is party complies with the applicable requirements (as defined by s 39A(7) (see PARA 347)); and (b) the authorised person has accepted responsibility in writing for the person's activities in carrying on investment services business (as defined by s 39A(8) (see PARA 347)) (s 347(2A)(b) (as so added)); and

510 (3) any person not falling within heads (1) or (2) above in respect of whom the Authority considers that a record must be maintained for the purpose of securing compliance with the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 23.3 (registration of tied agents) (Financial Services and Markets Act 2000 s 347(2A)(c) (as so added)).

13 Financial Services and Markets Act 2000 s 347(1)(i).

- 14 The record maintained by the Authority under the Financial Services and Markets Act 2000 s 347 must include every certified person under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9C (see PARA 97): art 9K (added by SI 2002/682).
- 15 Financial Services and Markets Act 2000 s 347(2).
- 16 As to the meaning of 'document' see PARA 10 note 10.
- 17 Financial Services and Markets Act 2000 s 347(2)(a).
- 18 As to the meaning of 'trustee' see PARA 606 note 16.
- 19 Financial Services and Markets Act 2000 s 347(2)(b).
- 20 As to the meaning of 'director' see PARA 86 note 11.
- 21 As to the meaning of 'depository' see PARA 606 note 18.
- 22 Financial Services and Markets Act 2000 s 347(2)(c).
- 23 As to the meaning of 'operator' see PARA 606 note 16.
- 24 Financial Services and Markets Act 2000 s 347(2)(d). As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 25 Financial Services and Markets Act 2000 s 347(2)(e).
- 26 Financial Services and Markets Act 2000 s 347(2)(f).
- 27 As to the meaning of 'relevant authorised person' see PARA 374 note 7; definition applied by the Financial Services and Markets Act 2000 s 347(9).
- 28 As to the meaning of 'controlled function' see PARA 367 note 2; definition applied by the Financial Services and Markets Act 2000 s 347(8).
- 29 As to the meaning of 'arrangement' see PARA 367 note 3; definition applied by the Financial Services and Markets Act 2000 s 347(8).
- 30 Financial Services and Markets Act 2000 s 347(2)(g).
- 31 Financial Services and Markets Act 2000 s 347(5).
- 32 Financial Services and Markets Act 2000 s 347(6).

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## ***B. RECORD OF UNAUTHORISED PERSONS CARRYING ON INSURANCE MEDIATION ACTIVITIES***

### **476. Duty to maintain record of unauthorised persons carrying on insurance mediation activities.**

The Financial Services Authority<sup>1</sup> must include in the record<sup>2</sup> every person who:



- 1142 (1) as a result of information obtained by virtue of its rules or by virtue of a direction given, or requirement imposed, under the procedure for applications under Part IV of the Financial Services and Markets Act 2000<sup>3</sup>, appears to the Authority to be, or has entered into a contract by virtue of which he will be, an appointed representative<sup>4</sup> who carries on any insurance mediation activity<sup>5</sup>; or
- 1143 (2) as a result of information obtained<sup>6</sup>, appears to the Authority to be a relevant member<sup>7</sup> of a designated professional body<sup>8</sup> who carries on, or is proposing to carry on, any insurance mediation activity<sup>9</sup>; and the general prohibition<sup>10</sup> does not (or will not) apply to the carrying on of those activities by virtue of the exemption from the general prohibition<sup>11</sup>.

The record must include:

- 1144 (a) in the case of any recorded insurance intermediary<sup>12</sup>, its address<sup>13</sup>; and
- 1145 (b) in the case of a recorded insurance intermediary which is not an individual, the name of the individuals who are responsible for the management of the business carried on by the intermediary, so far as it relates to insurance mediation activities<sup>14</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 'Record' means the record maintained by the Authority under the Financial Services and Markets Act 2000 s 347 (public record of authorised persons etc) (see PARA 475): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 92 (arts 92, 93 added by SI 2003/1476).

3 I.e. under the Financial Services and Markets Act 2000 s 51(3): see PARA 349. The reference is to Part IV (ss 40-55).

4 As to appointed representatives see PARA 346.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93(1)(a), (2) (as added: see note 2). Article 91(1) is subject to arts 95, 96: see PARA 478. 'Insurance mediation activity' means any regulated activity of the kind specified by art 21 (see PARA 126), art 25(1) or (2) (see PARA 139), art 39A (see PARA 104) or art 53 (see PARA 174), or, so far as relevant to any of those articles, art 64 (see PARA 221), which is carried on in relation to a contract of insurance: art 92 (as so added). As to the meaning of 'contract of insurance' see PARA 90 note 3.

6 I.e. by virtue of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 94: see PARA 477.

7 'Relevant member', in relation to a designated professional body, means a member (within the meaning of the Financial Services and Markets Act 2000 s 325(2): see PARA 750 note 3) of the profession in relation to which that designated professional body is established, or a person who is controlled or managed by one or more such members: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 92 (as added: see note 2). 'Designated professional body' means a body which is for the time being designated by the Treasury under the Financial Services and Markets Act 2000 s 326 (designation of professional bodies) (see PARA 749): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 92 (as so added). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 See note 7.

9 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93(1)(b), (3) (a) (as added: see note 2).

10 As to the general prohibition see PARA 80.

11 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93(1)(b), (3) (b) (as added: see note 2). The reference to the exemption from the general prohibition is a reference to the Financial Services and Markets Act 2000 s 327: see PARA 751.

12 'Recorded insurance intermediary' means a person who is included in the record by virtue of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93(1): arts 92, 93(4) (as added: see note 2).

13 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93(5)(a) (as added: see note 2).

14 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93(5)(b) (as added: see note 2).

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#### **477. Members of designated professional bodies.**

A designated professional body<sup>1</sup> must, by notice in writing, inform the Financial Services Authority<sup>2</sup> of (1) the name; (2) the address; and (3) in the case of a relevant member<sup>3</sup> which is not an individual, the name of the individuals who are responsible for the management of the business carried on by the member, so far as it relates to insurance mediation activities<sup>4</sup>, of any relevant member who, in accordance with the rules of that body, carries on, or proposes to carry on any insurance mediation activity but does not have, and does not propose to apply for, Part IV permission<sup>5</sup> on the basis that the general prohibition<sup>6</sup> does not (or will not) apply to the carrying on of that activity<sup>7</sup>.

A designated professional body must also, by notice in writing, inform the Authority of any change in relation to the matters specified in heads (1) to (3) above<sup>8</sup>. A designated professional body must inform the Authority when a relevant member<sup>9</sup> ceases, for whatever reason, to carry on insurance mediation activities<sup>10</sup>.

The Authority may give directions to a designated professional body as to the manner in which the above information<sup>11</sup> must be provided<sup>12</sup>.

1 As to the meaning of 'designated professional body' see PARA 476 note 7.

2 As to the Financial Services Authority see PARAS 4, 6 et seq.

3 As to the meaning of 'relevant member' see PARA 476 note 7.

4 As to the meaning of 'insurance mediation activity' see PARA 476 note 5.

5 As to the meaning of 'Part IV permission' see PARA 348.

6 As to the general prohibition see PARA 80.

7 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 94(1), (2) (art 94 added by SI 2003/1476). The non-application would be by virtue of the Financial Services and Markets Act 2000 s 327: see PARA 751.

8 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 94(3) (as added: see note 7).

9 I.e. a relevant member to whom the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 94(2) applies.

10 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 94(4) (as added: see note 7).

11 I.e. the information referred to in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 94(1), (3), (4).

12 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 94(5) (as added: see note 7).

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#### **478. Exclusion from the record.**

If it appears to the Financial Services Authority<sup>1</sup> that an appointed representative<sup>2</sup> ('AR') is not a fit and proper person to carry on insurance mediation activities<sup>3</sup>, it may decide not to include him in the record<sup>4</sup> or, if that person is already included in the record, to remove him from the record<sup>5</sup>.

Where the Authority proposes to make such a determination<sup>6</sup>, it must give AR a warning notice<sup>7</sup>. If the Authority makes such a determination, it must give AR a decision notice<sup>8</sup>. If the Authority gives AR such a decision notice<sup>9</sup>, AR may refer the matter to the Financial Services and Markets Tribunal<sup>10</sup>.

The Authority may, on the application of AR, revoke a determination<sup>11</sup>. If the Authority decides to grant the application, it must give AR written notice of its decision<sup>12</sup>. If the Authority proposes to refuse the application, it must give AR a warning notice<sup>13</sup>. If the Authority decides to refuse the application, it must give AR a decision notice<sup>14</sup>. If the Authority gives AR such a decision notice<sup>15</sup>, AR may refer the matter to the Tribunal<sup>16</sup>.

If a person who appears to the Authority to be member of a designated professional body<sup>17</sup> falls within head (1) or head (2) below, the Authority must not include him in the record or, if that person is already included in the record, must remove him from the record<sup>18</sup>. These exclusions are as follows:

- 1146 (1) where, by virtue of a direction given by the Authority<sup>19</sup>, the exemption from the general prohibition<sup>20</sup> does not apply in relation to the carrying on by him of any insurance mediation activity<sup>21</sup>;
- 1147 (2) where the Authority has made an order<sup>22</sup> disapplying the exemption from the general prohibition<sup>23</sup> in relation to the carrying on by him of any insurance mediation activity<sup>24</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 I.e. a person who falls within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93(2): see PARA 476.

3 As to the meaning of 'insurance mediation activity' see PARA 476 note 5.

4 As to the meaning of 'record' see PARA 476 note 2.

5 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(1) (arts 95, 96 added by SI 2003/1476).

6     le a determination under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/ 544, art 95(1).

7     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(2) (as added: see note 5). As to warning notices see PARA 769.

The Financial Services and Markets Act 2000 ss 393, 394 (third party rights and access to Authority material) (see PARAS 775, 776) apply to a warning notice given in accordance with the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(2) or (7) and to a decision notice given in accordance with art 95(3) or (8): art 95(10) (as so added).

8     Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(3) (as added: see note 5). As to decision notices see PARA 770. See also note 7.

9     le under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(3).

10    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(4) (as added: see note 5). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

11    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(5) (as added: see note 5).

12    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(6) (as added: see note 5).

13    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(7) (as added: see note 5). See also note 7.

14    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(8) (as added: see note 5). See also note 7.

15    le under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(8).

16    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 95(9) (as added: see note 5).

17    le a person who falls within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93(3): see PARA 476.

18    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 96(1) (as added: see note 5).

19    le a direction under the Financial Services and Markets Act 2000 s 328(1): see PARA 752.

20    le the Financial Services and Markets Act 2000 s 327(1): see PARA 751.

21    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 96(2) (as added: see note 5).

22    le an order under the Financial Services and Markets Act 2000 s 329(2): see PARA 753.

23    le the Financial Services and Markets Act 2000 s 327(1): see PARA 751.

24    Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 96(3) (as added: see note 5).

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## ***C. RESTRICTIONS ON DISCLOSURE OF INFORMATION***

### **(A) DISCLOSURE OF CONFIDENTIAL INFORMATION**

#### **479. Restrictions on disclosure of confidential information.**

Confidential information<sup>1</sup> must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of: (1) the person from whom the primary recipient obtained the information; and (2) if different, the person to whom it relates<sup>2</sup>.

This restriction<sup>3</sup> does not prevent a disclosure of confidential information which is made for the purpose of facilitating the carrying out of a public function<sup>4</sup>, and permitted by regulations made by the Treasury under these provisions<sup>5</sup>. The regulations may, in particular, make provision permitting the disclosure of confidential information or of confidential information of a prescribed kind<sup>6</sup>:

- 1148 (a) by prescribed recipients<sup>7</sup>, or recipients of a prescribed description, to any person for the purpose of enabling or assisting the recipient to discharge prescribed public functions<sup>8</sup>;
- 1149 (b) by prescribed recipients, or recipients of a prescribed description, to prescribed persons, or persons of prescribed descriptions, for the purpose of enabling or assisting those persons to discharge prescribed public functions<sup>9</sup>;
- 1150 (c) by the Authority to the Treasury or the Secretary of State for any purpose<sup>10</sup>;
- 1151 (d) by any recipient if the disclosure is with a view to or in connection with prescribed proceedings<sup>11</sup>.

The regulations may also include provision: (i) making any permission to disclose confidential information subject to conditions (which may relate to the obtaining of consents or any other matter); (ii) restricting the uses to which confidential information disclosed under the regulations may be put<sup>12</sup>.

The restriction<sup>13</sup> also does not apply to the disclosure by a recipient<sup>14</sup> of confidential information disclosed to it by the Authority in reliance on the above exception<sup>15</sup>; nor to the disclosure of such information by a person obtaining it directly or indirectly from such a recipient<sup>16</sup>.

A disclosure which satisfies the three following conditions is not to be taken to breach any restriction on the disclosure of information (however imposed)<sup>17</sup>. The first condition is that the information or other matter causes the person making the disclosure (the discloser) to know or suspect, or gives him reasonable grounds for knowing or suspecting, that another person has engaged in market abuse<sup>18</sup>. The second condition is that the information or other matter disclosed came to the discloser in the course of his trade, profession, business or employment<sup>19</sup>. The third condition is that the disclosure is made to the Authority or to a nominated officer as soon as is practicable after the information or other matter comes to the discloser<sup>20</sup>.

A person who discloses information in contravention of the provisions described above is guilty of an offence<sup>21</sup>. In proceedings for an offence it is a defence for the accused to prove: (A) that he did not know and had no reason to suspect that the information was confidential information; (B) that he took all reasonable precautions and exercised all due diligence to avoid committing the offence<sup>22</sup>.

The provisions on disclosure of confidential information by the Financial Services Authority and others<sup>23</sup> do not apply to competition information<sup>24</sup>.

1 'Confidential information' means information which: (1) relates to the business or other affairs of any person; (2) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Financial Services Authority, the competent authority for the purposes of the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (see PARA 385 et seq) or the Secretary of State under any provision made by or under the Financial Services and Markets Act 2000; and (3) is not prevented from being confidential information by s 348(4) (see below): s 348(2). As to the Secretary of State see PARA 3. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

Each of the following is a primary recipient: (a) the Authority; (b) any person exercising functions conferred by Pt VI on the competent authority (see PARA 385 et seq); (c) the Secretary of State; (d) a person appointed to make a report under s 166 (see PARA 448); (e) any person who is or has been employed by a person mentioned in heads (a)-(c) above; (f) any auditor or expert instructed by a person mentioned in those heads: s 348(5). 'Expert' includes: (i) a competent person appointed by the competent authority under s 97 (see PARA 434); (ii) a competent person appointed by the Authority or the Secretary of State to conduct an investigation under Pt XI (ss 165-177) (see PARA 447); (iii) any body or person appointed under Sch 1 para 6 (see PARA 7) to perform a function on behalf of the Authority: s 348(6).

It is immaterial for the purposes of s 348(2) whether or not the information was received: (A) by virtue of a requirement to provide it imposed by or under the Financial Services and Markets Act 2000; (B) for other purposes as well as purposes mentioned in s 348(2): s 348(3).

Information is not confidential information if: (aa) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by s 348; or (bb) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person: s 348(4).

2 Financial Services and Markets Act 2000 s 348(1). As to disclosure see also *Melton Medes Ltd v Securities and Investments Board* [1995] Ch 137, [1995] 3 All ER 880 (decided under previous legislation). A person could not be said to obtain information for the purposes of the Financial Services and Markets Act 2000 s 348 if he already had or knew the information: see *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd* [2007] EWCA Civ 197, [2007] 2 All ER 791. As to the restriction on the production, disclosure or inspection of protected items see PARA 784.

3 Ie the restriction set out in the Financial Services and Markets Act 2000 s 348: see the text and notes 1-2.

4 'Public functions' includes: (1) functions conferred by or in accordance with any provision contained in any enactment or subordinate legislation; (2) functions conferred by or in accordance with any provision contained in the Community Treaties or any Community instrument; (3) similar functions conferred on persons by or under provisions having effect as part of the law of a country or territory outside the United Kingdom; (4) functions exercisable in relation to prescribed disciplinary proceedings: Financial Services and Markets Act 2000 s 349(5). 'Enactment' includes an Act of the Scottish Parliament and Northern Ireland legislation: s 349(6). 'Subordinate legislation' has the meaning given in the Interpretation Act 1978 (see **STATUTES** vol 44(1) (Reissue) PARA 1381) and also includes an instrument made under an Act of the Scottish Parliament or under Northern Ireland legislation: Financial Services and Markets Act 2000 s 349(7). As to the meaning of 'United Kingdom' see PARA 2 note 3. 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). The following disciplinary proceedings are prescribed for the purposes of the Financial Services and Markets Act 2000 s 349(5)(d): (1) disciplinary proceedings relating to the exercise by a barrister, solicitor, auditor, accountant, valuer or actuary of his professional duties; (2) disciplinary proceedings relating to the discharge of his duties by an officer or servant of: the Crown, the Authority, the body known as the Panel on Takeovers and Mergers (see PARA 78), the Charity Commissioners for England and Wales (see **CHARITIES** vol 8 (2010) PARA 538 et seq), the Office of Fair Trading (see **COMPETITION** vol 18 (2009) PARA 6 et seq), the Competition Commission (see **COMPETITION** vol 18 (2009) PARA 9 et seq), the Insolvency Practitioners Tribunal in relation to its functions under the Insolvency Act 1986 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 60 et seq), the Occupational Pensions Board in relation to its functions under the Social Security Act 1973 and the Social Security Acts 1975 to 1986 (see **SOCIAL SECURITY AND PENSIONS**), the organs of the Society of Lloyd's being organs constituted by or under the Lloyd's Act 1982 in relation to their functions under the Lloyd's Acts 1871-1982 and the byelaws made thereunder of the Society of Lloyd's (see PARA 741 et seq), the National Lottery Commission in relation to its functions under the National Lottery etc Act 1993 (see **LICENSING AND GAMBLING** vol 68 (2008) PARA 687 et seq): Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, Sch 3 (amended by virtue of the Enterprise Act 2002 s 2). As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 Financial Services and Markets Act 2000 s 349(1). See the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188; and PARAS 480-486. A person is guilty of an offence if, in contravention of any provision of regulations made under the Financial Services and Markets

Act 2000 s 349, he uses information which has been disclosed to him in accordance with the regulations: s 352(3). A person guilty of an offence under s 352(3) is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale, or both: s 352(5). As to the standard scale see PARA 27 note 21. As from a day to be appointed, the reference to three months is replaced by a reference to 51 weeks: s 352(5) (prospectively amended by the Criminal Justice Act 2003 Sch 26 para 54(1), (3)). At the date at which this volume states the law no such day had been appointed.

6 Financial Services and Markets Act 2000 s 349(2).

7 In relation to confidential information, each of the following is a 'recipient': (1) a primary recipient; (2) a person obtaining the information directly or indirectly from a primary recipient: Financial Services and Markets Act 2000 s 349(4).

8 Financial Services and Markets Act 2000 s 349(2)(a).

9 Financial Services and Markets Act 2000 s 349(2)(b).

10 Financial Services and Markets Act 2000 s 349(2)(c).

11 Financial Services and Markets Act 2000 s 349(2)(d).

12 Financial Services and Markets Act 2000 s 349(3).

13 Ie the Financial Services and Markets Act 2000 s 348.

14 Ie by a recipient to which the Financial Services and Markets Act 2000 s 349(3B) applies. Section 349(3B) applies to (1) the Panel on Takeovers and Mergers (see PARA 78); (2) an authority designated as a supervisory authority for the purposes of the Takeovers Directive (ie European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids) art 4.1; (3) any other person or body that exercises public functions, under legislation in an EEA state other than the United Kingdom, that are similar to the Authority's functions or those of the Panel on Takeovers and Mergers: Financial Services and Markets Act 2000 s 349(3B) (s 349(3A), (3B) added by the Companies Act 2006 s 964(1), (4)). As to the meaning of 'EEA state' see PARA 315 note 1.

15 Ie in reliance on the Financial Services and Markets Act 2000 s 349(1): see the text to note 5.

16 Financial Services and Markets Act 2000 s 349(3A) (as added: see note 14). The reference is to a recipient to which s 349(3B) applies: see note 14.

17 Financial Services and Markets Act 2000 s 131A(1) (s 131A added by SI 2005/381).

18 Financial Services and Markets Act 2000 s 131A(2) (as added: see note 17). As to the meaning of 'market abuse' see PARA 437.

19 Financial Services and Markets Act 2000 s 131A(3) (as added: see note 17). For these purposes, references to a person's employer include any body, association or organisation (including a voluntary organisation) in connection with whose activities the person exercises a function (whether or not for gain or reward) and references to employment must be construed accordingly: s 131A(4) (as so added).

20 Financial Services and Markets Act 2000 s 131A(4) (as added: see note 17). A disclosure to a nominated officer is a disclosure which is made to a person nominated by the discloser's employer to receive disclosures under s 131A, and is made in the course of the discloser's employment and in accordance with the procedure established by the employer for the purpose: s 131A(3) (as so added).

21 Financial Services and Markets Act 2000 s 352(1). A person guilty of an offence under s 352(1) is liable: (1) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum, or both; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both: s 352(2). As to the statutory maximum see PARA 56 note 24.

22 Financial Services and Markets Act 2000 s 352(6).

23 Ie the Financial Services and Markets Act 2000 s 348: see the text to notes 1-22.

24 Financial Services and Markets Act 2000 s 351(4). 'Competition information' means information which: (1) relates to the affairs of a particular individual or body; (2) is not otherwise in the public domain; and (3) was obtained under or by virtue of a competition provision: Financial Services and Markets Act 2000 s 351(5). 'Competition provision' means any provision of: (a) an order made under s 95 (see PARA 432); (b) Pt X Ch III (ss 159-164) (see PARA 38 et seq); or (c) Pt XVIII Ch II (ss 302-310) (see PARA 730 et seq): s 351(6).

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NOTE 2--As to disclosure see *Financial Services Authority v Information Comr* [2009] EWHC 1548 (Admin), [2010] 1 BCLC 53, [2009] Bus LR 1287.

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**480. Disclosure by and to the Financial Services Authority, the Secretary of State and the Treasury.**

A disclosure of confidential information<sup>1</sup> is permitted when it is made to any person<sup>2</sup>:

- 1152 (1) by the Financial Services Authority<sup>3</sup> or an Authority worker<sup>4</sup> for the purpose of enabling or assisting the person making the disclosure to discharge any public functions of the Authority or (if different) of the Authority worker<sup>5</sup>;
- 1153 (2) by the Secretary of State<sup>6</sup> or a Secretary of State worker<sup>7</sup> for the purpose of enabling or assisting the person making the disclosure to discharge any public functions of the Secretary of State or (if different) of the Secretary of State worker<sup>8</sup>;
- 1154 (3) by the Treasury<sup>9</sup> for the purpose of enabling or assisting the Treasury to discharge any of its public functions<sup>10</sup>.

A disclosure of confidential information is permitted when it is made by any primary recipient<sup>11</sup>, or person obtaining the information directly or indirectly from a primary recipient, to the Authority, the Secretary of State or the Treasury for the purpose of enabling or assisting the Authority, the Secretary of State or the Treasury (as the case may be) to discharge any of its or his public functions<sup>12</sup>.

1 As to the meaning of 'confidential information' see PARA 479 note 1.

2 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 3(1). Regulation 3(1), (2) does not permit disclosure in contravention of any of the directive restrictions: reg 3(3). 'Directive restrictions' means the restrictions imposed on the disclosure of information by the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) arts 54, 58, the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) Title V Ch 1 Section 2, the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) arts 16, 17; the Third Non-Life Insurance Directive (ie EC Council Directive 92/49 (OJ L228, 11.8.92, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, and amending EC Directives 73/239 and 88/357) art 16, the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83) arts 24-30, the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities) art 50, and the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation) art 9: Financial Services and Markets Act 2000



(Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 2 (definition amended by SI 2003/1473, SI 2004/3379; SI 2006/3221; SI 2006/3413; SI 2007/3255). For transitional provisions see the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, regs 13-15 (reg 15 amended by SI 2001/3624; SI 2003/2066).

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

4 'Authority worker' means: (1) a person who is or has been employed by the Authority; or (2) an auditor or expert instructed by the Authority: Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 2.

5 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 3(1)(a). As to public functions see PARA 479 note 4.

6 As to the Secretary of State see PARA 3.

7 'Secretary of State worker' means: (1) a person who is or has been employed by the Secretary of State; or (2) an auditor or expert instructed by the Secretary of State: Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 2.

8 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 3(1)(b).

9 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

10 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 3(1)(c).

11 As to the primary recipient see PARA 479 note 1.

12 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 3(2). See note 2. If a recognised self-regulating organisation discloses any information to the Authority for the purpose of enabling or assisting the Authority to discharge functions corresponding to functions of the organisation, the disclosure is not to be taken as a contravention of any duty to which the organisation is subject: reg 16.

## UPDATE

### **480 Disclosure by and to the Financial Services Authority, the Secretary of State and the Treasury**

NOTE 2--Directive 85/611 replaced: see PARA 6.

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### **481. Disclosure for the purposes of criminal proceedings and investigations.**

A primary recipient<sup>1</sup> of confidential information<sup>2</sup>, or a person obtaining such information directly or indirectly from a primary recipient, is permitted to disclose such information to any person<sup>3</sup>:

- 1155 (1) for the purposes of any criminal investigation<sup>4</sup> whatever which is being or may be carried out, whether in the United Kingdom<sup>5</sup> or elsewhere<sup>6</sup>;  
 1156 (2) for the purposes of any criminal proceedings whatever which have been or may be initiated, whether in the United Kingdom or elsewhere<sup>7</sup>;  
 1157 (3) for the purposes of any proceedings under Part 2, 3 or 4 of the Proceeds of Crime Act 2002<sup>8</sup> which have been, or may be initiated<sup>9</sup>; or  
 1158 (4) for the purpose of initiating or bringing to an end any such investigation or proceedings, or of facilitating a determination of whether it or they should be initiated or brought to an end<sup>10</sup>.

1 As to the primary recipient see PARA 479 note 1.

2 As to the meaning of 'confidential information' see PARA 479 note 1.

3 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 4. For transitional provisions see regs 13-15 (reg 15 amended by SI 2001/3624; SI 2003/2066).

4 'Criminal investigation' means an investigation of any crime, including an investigation of any alleged or suspected crime and an investigation of whether a crime has been committed: Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 2. See generally **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

5 As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 4(a).

7 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 4(b).

8 In the Proceeds of Crime Act 2002 Pt 2 (ss 6-91), Pt 3 (ss 92-155), Pt 4 (ss 156-239): see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq.

9 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 4(ba) (added by SI 2003/2174).

10 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 4(c).

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#### **482. Disclosure for the purposes of certain other proceedings.**

A primary recipient<sup>1</sup> of confidential information<sup>2</sup>, or a person obtaining such information directly or indirectly from a primary recipient, is permitted to disclose such information to<sup>3</sup>:

- 1159 (1) the Financial Services Authority<sup>4</sup>, the Secretary of State<sup>5</sup> and the Department of Enterprise, Trade and Investment in Northern Ireland for the purpose of initiating certain proceedings<sup>6</sup>, or of facilitating a determination of whether they should be initiated<sup>7</sup>; or

- 1160 (2) any person for the purposes of those proceedings<sup>8</sup> and which have been initiated, or for the purpose of bringing to an end such proceedings, or of facilitating a determination of whether they should be brought to an end<sup>9</sup>.

The Authority, the Secretary of State and the Department of Enterprise, Trade and Investment in Northern Ireland (or a person who is employed by the Authority or the Secretary of State) is permitted to disclose confidential information to any person for a purpose mentioned in head (1) above<sup>10</sup>.

These provisions do not permit the disclosure of information with a view to the institution of, or in connection with, insolvency proceedings<sup>11</sup> to the extent that<sup>12</sup>:

- 1161 (a) the information relates to an authorised person, former authorised person or former regulated person ('A')<sup>13</sup>;
- 1162 (b) the information also relates to another person ('B') who, to the knowledge of the primary recipient (or person obtaining confidential information directly or indirectly from him), is or has been involved in an attempt to rescue A, or A's business, from insolvency or impending insolvency<sup>14</sup>; and
- 1163 (c) B is not a director, controller or manager of A<sup>15</sup>.

1 As to the primary recipient see PARA 479 note 1.

2 As to the meaning of 'confidential information' see PARA 479 note 1.

3 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(1). Regulation 5 does not permit disclosure in contravention of any of the Directive restrictions: reg 5(5). As to the meaning of 'Directive restrictions' see PARA 480 note 2. For transitional provisions see regs 13-15 (reg 15 amended by SI 2001/3624; SI 2003/2066).

4 As to the Financial Services Authority see PARAS 4, 6 et seq.

5 As to the Secretary of State see PARA 3.

6 The proceedings to which the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5 applies are:

- 511 (1) civil proceedings arising under or by virtue of the Financial Services and Markets Act 2000, an enactment referred to in s 338 (see PARA 762), the Banking Act 1979, the Friendly Societies Act 1974, the Insurance Companies Act 1982, the Financial Services Act 1986, the Building Societies Act 1986, the Banking Act 1987 or the Friendly Societies Act 1992 (Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(6)(a));
- 512 (2) proceedings before the Financial Services and Markets Tribunal (see PARA 43 et seq) (reg 5(6)(b));
- 513 (3) any other civil proceedings to which the Authority is, or is proposed to be, a party (reg 5(6)(c));
- 514 (4) proceedings under the Company Directors Disqualification Act 1986 s 7 or s 8 or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 10 or art 11 in respect of a director or former director of an authorised person, former authorised person or former regulated person (Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(6)(d)); or
- 515 (5) proceedings under the Insolvency Act 1986 Pts I-VI (ss 1-246) or Pts IX-X (ss 264-379), the Bankruptcy (Scotland) Act 1985 or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pts II-VII (arts 14-208), Pt IX (arts 238-342) or Pt X (arts 343-345) in respect of an authorised person, former authorised person or former regulated person (Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(6)(e)).

As to authorised persons see PARA 314.

7 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(1)(a), (3).

8 See note 6.

9 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(1)(b).

10 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(2), (3).

11 In the proceedings of the kind referred to in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(6)(e): see note 6 head (5).

12 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(4).

13 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(4)(a).

14 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(4)(b).

15 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 5(4)(c).

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#### **483. Disclosure in pursuance of a European Community obligation.**

A primary recipient<sup>1</sup> of confidential information<sup>2</sup>, or a person receiving such information directly or indirectly from a primary recipient, is permitted to disclose such information in pursuance of a European Community obligation<sup>3</sup>.

1 As to the primary recipient see PARA 479 note 1.

2 As to the meaning of 'confidential information' see PARA 479 note 1.

3 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 6.

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#### **484. Restrictions on the use of confidential information.**

Where confidential information<sup>1</sup> is disclosed<sup>2</sup> to a person other than the Financial Services Authority<sup>3</sup>, the Secretary of State<sup>4</sup>, the Treasury<sup>5</sup> or the Bank of England<sup>6</sup>, and the disclosure is made subject to any conditions as to the use to which the information may be put, the person to whom the information has been disclosed may not use the information in breach of any such condition, without the consent of the person who disclosed it to him<sup>7</sup>.

1 As to the meaning of 'confidential information' see PARA 479 note 1.

2 le under the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

4 As to the Secretary of State see PARA 3.

5 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

6 As to the Bank of England see PARA 74; and PARA 793 et seq.

7 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 7.

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#### **485. Disclosure of Single Market Directive information and certain Markets in Financial Instruments Directive information.**

The Financial Services Authority<sup>1</sup> or an Authority worker<sup>2</sup> is permitted to disclose Single Market Directive information<sup>3</sup> and certain Markets in Financial Instruments Directive information<sup>4</sup> to a specified person<sup>5</sup> for the purpose of enabling or assisting that person to discharge certain functions<sup>6</sup>.

This provision does not permit disclosure to a dependent territory regulatory authority or a non-EEA regulatory authority<sup>7</sup> unless the disclosure is provided for by a co-operation agreement<sup>8</sup>.

This provision also does not permit disclosure to certain specified persons<sup>9</sup>:

1164 (1) of information obtained from an EEA competent authority, unless that authority has given its express consent to the disclosure<sup>10</sup>; or

1165 (2) of information obtained in the course of an on-the-spot verification<sup>11</sup> unless the EEA competent authority of the state in which the on-the-spot verification was carried out has given its express consent to the disclosure<sup>12</sup>.

This provision also does not permit disclosure of Markets in Financial Instruments Directive information to a specified person<sup>13</sup> other than certain persons<sup>14</sup> where that information:

- 1166 (a) was obtained from an EEA competent authority under the Markets in Financial Instruments Directive<sup>15</sup> or an overseas regulatory authority under a cooperation agreement referred to in that directive<sup>16</sup>; and
- 1167 (b) that authority indicated at the time of communication that such information must not be disclosed<sup>17</sup>,

unless that authority has given its express consent to the disclosure<sup>18</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the meaning of 'Authority worker' see PARA 480 note 4.

3 'Single Market Directive information' means confidential information received by the Authority in the course of discharging its functions as the competent authority under any of the Single Market Directives (except for the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) or the Conglomerates Directive (ie European Parliament and EC Council Directive 2002/87 (OJ L35, 11.2.2003, p 1) on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending EEC Council Directives 73/239, 79/267, 92/49, 92/96, 93/6, 93/22, and European Parliament and EC Council Directives 98/78 and 2000/12): Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 2 (definition amended by SI 2004/1862; SI 2006/3413). As to the meaning of 'confidential information' see PARA 479 note 1. As to the meaning of 'Single Market Directives' see PARA 86 note 6.

4 Ie Markets in Financial Instruments Directive information, where that information has been received from (1) an overseas regulatory authority under a cooperation agreement referred to in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 63; or (2) an EEA competent authority under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 58.1: see the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 8(b) (reg 8 added by SI 2006/3413). 'Markets in Financial Instruments Directive information' means confidential information received by the Authority in the course of discharging its functions as an EEA competent authority under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)): Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 2 (definition added by SI 2006/3413). 'EEA competent authority' means a competent authority of an EEA state other than the United Kingdom for the purposes of any of the Single Market Directives: Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 2 (definition amended by SI 2003/2066; SI 2006/3413).

5 Ie a person specified in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, Sch 1 Pt 1 col 1 (Sch 1 Pt 1 amended by SI 2001/3437; SI 2001/3624; SI 2003/2174; SI 2003/2817; SI 2005/3071; SI 2006/3413). Such a person is permitted to disclose Single Market Directive information and certain Markets in Financial Instruments Directive information for the purpose of enabling or assisting him to discharge any of the functions listed for such a person in Sch 1: see reg 10.

6 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, regs 8, 9(1) (reg 8 as substituted (see note 4); reg 9(1) amended by SI 2006/3413). The specified functions are those listed for such a person in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, Sch 1 Pt 1 col 2 (Sch 1 Pt 1 as amended: see note 5).

7 Ie a person specified in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, Sch 1 Pt 3 col 1. 'Dependent territory regulatory authority' means an overseas regulatory authority which exercises its functions in, and in relation to, a dependent territory; and 'dependent territory' means the Channel Islands, the Isle of Man and any territory outside the British Islands for whose external relations the United Kingdom is responsible: reg 2. As to the meaning of 'United Kingdom' see PARA 2 note 3. 'Overseas regulatory authority' means: (1) an authority in a country or territory outside the United Kingdom which exercises any function of a kind mentioned in the Financial Services and Markets Act 2000 s 195(4) (see PARA 457); or (2) an overseas investment exchange or overseas clearing house: Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 2. As to overseas investment exchanges and overseas clearing houses see PARA 710.

'Non-EEA regulatory authority' means an overseas regulatory authority other than an EEA regulatory authority or a dependent territory regulatory authority: reg 2. 'EEA regulatory authority' means an EEA competent authority or an overseas regulatory authority which exercises its functions in, and in relation to, an EEA state other than the United Kingdom: reg 2.

8 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(2). The co-operation agreement is one of the kind referred to in: (1) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 63; (2) the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) art 46; (3) the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 16.3; (4) the Third Non-Life Insurance Directive (ie EC Council Directive 92/49 (OJ L228, 11.8.92, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, and amending EC Directives 73/239 and 88/357) art 16.3; (5) the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities) art 50.4; or (6) the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83) art 26: Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(2)(a)-(f) (amended by SI 2004/3379; SI 2006/3221; SI 2006/3413; SI 2007/3255). The references to the provisions mentioned in heads (1), (4) and (5) are to those provisions as replaced by European Parliament and EC Council Directive 2000/64 (OJ L290, 17.11.2000, p 27): Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(2A) (added by SI 2003/693; and amended by SI 2004/3379).

9 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(3). The persons referred to in the text are those specified in Sch 1 Pt 4 col 1 (Sch 1 Pt 4 amended by SI 2001/3624).

10 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(3)(a).

11 Ie an on-the-spot verification of the kind referred to in: (1) the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)) art 43; (2) the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 11; (3) the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 14; or (4) the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1)) art 16: Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(3)(b) (amended by SI 2004/3379; SI 2006/3221; SI 2006/3413; SI 2007/3255).

12 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(3)(b).

13 Ie persons specified in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, Sch 1 col 1 (as amended: see notes 5, 9).

14 Ie other than a person listed in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(3B). Such persons are: (1) the Bank of England; (2) the European Central Bank; (3) the central bank of any country or territory outside the United Kingdom; or (4) a body (other than a central bank) in a country or territory outside the United Kingdom having (a) functions as a monetary authority; or (b) responsibility for overseeing payment systems: reg 9(3B) (reg 9(3A), (3B) added by SI 2006/3413). As to the Bank of England see PARA 74; and PARA 793 et seq. As to the European Central Bank and central banks see PARA 807.

15 Ie under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 58.1.

16 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(3A)(a) (as added: see note 14). The last reference is to the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 63.

17 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(3A)(b) (as added: see note 14).

18 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 9(3A) (as added: see note 14).

## UPDATE

## **485 Disclosure of Single Market Directive information and certain Markets in Financial Instruments Directive information**

NOTE 8--Directive 85/611 replaced: see PARA 6.

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## **486. Disclosure of confidential information other than certain Directive information.**

A primary recipient<sup>1</sup> of confidential information<sup>2</sup> other than Single Market Directive information<sup>3</sup> and certain Markets in Financial Instruments Directive information<sup>4</sup>, or a person obtaining such information directly or indirectly from a primary recipient, is permitted to disclose such information to<sup>5</sup>:

- 1168 (1) certain specified persons<sup>6</sup> for the purpose of enabling or assisting those persons to discharge any function<sup>7</sup>; or
- 1169 (2) a disciplinary proceedings authority<sup>8</sup> for the purposes of any prescribed disciplinary proceedings which have been or may be initiated, or for the purpose of initiating or bringing to an end any such proceedings, or of facilitating a determination of whether they should be initiated or brought to an end<sup>9</sup>.

1 As to the primary recipient see PARA 479 note 1.

2 As to the meaning of 'confidential information' see PARA 479 note 1.

3 As to the meaning of 'Single Market Directive information' see PARA 485 note 3.

4 Ie Markets in Financial Instruments Directive information, where that information has been received from (1) an overseas regulatory authority under a cooperation agreement referred to of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 63; or (2) an EEA competent authority under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 58.1, unless that authority has given its express consent for disclosure: see the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 11 (amended by SI 2003/2066; SI 2006/3413). As to the meaning of Markets in Financial Instruments Directive information see PARA 485 note 4. As to the meanings of 'overseas regulatory authority' and 'EEA competent authority' see PARA 485 note 7.

5 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 12(1).

6 Ie persons specified in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 12, Sch 1 col 1, Sch 2 col 1. A person specified in Sch 1 col 1 or Sch 2 col 1 is permitted to disclose confidential information other than Single Market Directive information and certain Markets in Financial Instruments Directive information (see note 4) to any person for the purpose of enabling or assisting the person making the disclosure to discharge any function listed for such a person in Sch 1 col 2 or Sch 2 col 2: reg 12(2).

7 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 12(1)(a). The functions referred to are those listed for such a person in Sch 1 col 2 or Sch 2 col 2.



8 'Disciplinary proceedings authority' means a person responsible for initiating prescribed disciplinary proceedings or determining the outcome of such proceedings: Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 2. 'Prescribed disciplinary proceedings' means the disciplinary proceedings prescribed in Sch 3: reg 2.

The National Lottery Commission may disclose confidential information other than Single Market Directive information and certain Markets in Financial Instruments Directive information (see note 4) to the National Audit Office for the purpose of enabling or assisting the Comptroller and Auditor General to carry out an examination under the National Audit Act 1983 Pt II (ss 6-9) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 717 et seq) in relation to the Commission: Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 12A (added by SI 2001/3624). As to the National Audit Office see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 720 et seq; and as to the Comptroller and the Auditor General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 724 et seq.

The Financial Services Authority may disclose confidential information other than Single Market Directive information and certain Markets in Financial Instruments Directive information (see note 4) for the purpose of publishing that information in accordance with the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002, SI 2002/1775, reg 10(8): Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 12B (added by SI 2002/1775). As to the Financial Services Authority see PARAS 4, 6 et seq.

A primary recipient of confidential information other than Single Market Directive information and certain Markets in Financial Instruments Directive information (see note 4), or a person obtaining such information directly or indirectly from a primary recipient is permitted to disclose such information to any person for the purposes of any proceedings under the Proceeds of Crime Act 2002 (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq) which have been or may be initiated: Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 12C (added by SI 2003/2174).

9 Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001, SI 2001/2188, reg 12(1)(b). A disciplinary proceedings authority is permitted to disclose confidential information other than Single Market Directive information and certain Markets in Financial Instruments Directive information (see note 4) to any person for any of the purposes mentioned in reg 12(1)(b): reg 12(3).

## UPDATE

### **486 Disclosure of confidential information other than certain Directive information**

NOTES 6, 7--SI 2001/2188 Sch 2 amended: SI 2009/2877.

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## (B) DISCLOSURE BY HM REVENUE AND CUSTOMS

### **487. Disclosure of information by Her Majesty's Revenue and Customs.**

No obligation as to secrecy imposed by statute or otherwise prevents the disclosure of Revenue information<sup>1</sup> to the Financial Services Authority<sup>2</sup> or the Secretary of State<sup>3</sup>, if the disclosure is made for the purpose of assisting in the investigation of a matter<sup>4</sup> or with a view to the appointment of an investigator<sup>5</sup>. A disclosure may only be made<sup>6</sup> by or under the authority of the Commissioners for Her Majesty's Revenue and Customs<sup>7</sup>.

Information obtained<sup>8</sup> may not be used except<sup>9</sup>:

- 1170 (1) for the purpose of deciding whether to appoint an investigator<sup>10</sup>;
- 1171 (2) in the conduct of an investigation<sup>11</sup>;
- 1172 (3) in criminal proceedings brought against a person under the Financial Services and Markets Act 2000 or the Criminal Justice Act 1993 as a result of an investigation<sup>12</sup>;
- 1173 (4) for the purpose of taking action under the Financial Services and Markets Act 2000 against a person as a result of an investigation<sup>13</sup>;
- 1174 (5) in proceedings before the Financial Services and Markets Tribunal<sup>14</sup> as a result of action taken as mentioned in head (4) above<sup>15</sup>.

Information obtained<sup>16</sup> may not be disclosed except: (a) by or under the authority of the Commissioners for Revenue and Customs; (b) in proceedings mentioned in head (3) or head (5) above or with a view to their institution<sup>17</sup>.

1 'Revenue information' means information held by a person which it would be an offence under the Finance Act 1989 s 182 (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1834) for him to disclose: Financial Services and Markets Act 2000 s 350(7). The provisions of s 348 (see PARA 479) do not apply to Revenue information: s 350(3).

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

3 As to the Secretary of State see PARA 3.

4 Ie under the Financial Services and Markets Act 2000 s 168: see PARA 449.

5 Financial Services and Markets Act 2000 s 350(1). As to the appointment of an investigator see s 168; and PARA 449.

6 Ie under the Financial Services and Markets Act 2000 s 350(1): see the text to notes 1-5.

7 Financial Services and Markets Act 2000 s 350(2). As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.

8 Ie as a result of the Financial Services and Markets Act 2000 s 350(1): see the text to notes 1-5.

9 Financial Services and Markets Act 2000 s 350(4). A person is guilty of an offence if, in contravention of s 350(4), he uses information which has been disclosed to him in accordance with s 350: s 352(4). A person guilty of an offence under s 352(4) is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale, or both: s 352(5). As to the standard scale see PARA 27 note 21. As from a day to be appointed, the reference to three months is replaced by a reference to 51 weeks: s 352(5) (prospectively amended by the Criminal Justice Act 2003 Sch 26 para 54(1), (3)). At the date at which this volume states the law no such day had been appointed.

10 Financial Services and Markets Act 2000 s 350(4)(a).

11 Financial Services and Markets Act 2000 s 350(4)(b). As to investigations see PARA 449.

12 Financial Services and Markets Act 2000 s 350(4)(c).

13 Financial Services and Markets Act 2000 s 350(4)(d).

14 As to the Financial Services and Markets Tribunal see PARA 43 et seq.

15 Financial Services and Markets Act 2000 s 350(4)(e).

16 Ie as a result of the Financial Services and Markets Act 2000 s 350(1): see the text to notes 1-5.

17 Financial Services and Markets Act 2000 s 350(5). Section 350(5) does not prevent the disclosure of information obtained as a result of s 350(1) to a person to whom it could have been disclosed under s 350(1): s

350(6). A person who discloses information in contravention of s 350(5) is guilty of an offence: s 352(1). A person guilty of an offence under s 352(1) is liable: (1) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum, or both; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both: s 352(2). As to the statutory maximum see PARA 56 note 24. In proceedings for an offence under s 352 it is a defence for the accused to prove: (a) that he did not know and had no reason to suspect that the information had been disclosed in accordance with s 350; (b) that he took all reasonable precautions and exercised all due diligence to avoid committing the offence: s 352(6).

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## (C) DISCLOSURE PERMITTED BY THE TREASURY

### **488. Removal of other restrictions on disclosure.**

The Treasury<sup>1</sup> may make regulations permitting the disclosure of any information, or of information of a prescribed<sup>2</sup> kind: (1) by prescribed persons for the purpose of assisting or enabling them to discharge prescribed functions under the Financial Services and Markets Act 2000 or any rules or regulations made under it; (2) by prescribed persons, or persons of a prescribed description, to the Financial Services Authority<sup>3</sup> for the purpose of assisting or enabling the Authority to discharge prescribed functions; (3) by the scheme operator to the Office of Fair Trading<sup>4</sup> for the purpose of assisting or enabling that Office to discharge prescribed functions under the Consumer Credit Act 1974<sup>5</sup>. Such regulations may not make any provision in relation to the disclosure of confidential information<sup>6</sup> by primary recipients<sup>7</sup> or by any person obtaining confidential information directly or indirectly from a primary recipient<sup>8</sup>. If a person discloses any information as permitted by the regulations, the disclosure is not to be taken as a contravention of any duty to which he is subject<sup>9</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1).

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

5 Financial Services and Markets Act 2000 s 353(1) (amended by the Consumer Credit Act 2006 s 61(9)). As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

In relation to: (1) information received by Schedule persons or scheme persons for the purposes of, or in the discharge of, any functions conferred on them by or under the Financial Services and Markets Act 2000; (2) other information received by Schedule persons if the information is, or would have been relevant to the performance of those functions; or (3) the opinions of Schedule persons or scheme persons in relation to such information, Schedule persons and scheme persons are permitted to disclose that information: (a) for the purpose of enabling or assisting them to discharge their functions under the Financial Services and Markets Act 2000, or any rules or regulations made under that Act; or (b) to the Authority, for the purpose of enabling or assisting the Authority to discharge any of its public functions: Financial Services and Markets Act 2000 (Disclosure of Information by Prescribed Persons) Regulations 2001, SI 2001/1857, reg 3(1), (3). 'Schedule person' means a person who is performing or has performed any of the following functions: (i) the verification of information in a manner required by the Authority pursuant to the Financial Services and Markets Act 2000 s 165(6)(a) (see PARA 447); (ii) the authentication of a document in a manner required by the Authority pursuant to s 165(6)(b) (see PARA 447); (iii) the making of a report under s 166 (see PARA 448); (iv) the conduct of an

investigation under s 113(2) (see PARA 598); (v) the conduct of an investigation under s 167, s 168(3), s 168(5) (see PARA 449) or s 169(1)(b) (see PARA 450); (vi) the conduct of an investigation under s 284 (see PARA 683); (vii) the conduct of an investigation under s 376(10) (see PARA 505); (viii) the conduct of an investigation pursuant to regulations made under s 262 (see PARA 621): Financial Services and Markets Act 2000 (Disclosure of Information by Prescribed Persons) Regulations 2001, SI 2001/1857, reg 2, Schedule (amended by SI 2005/272). 'Scheme person' means the scheme manager, the scheme operator, or a member of the panel of ombudsmen appointed by the scheme operator pursuant to the Financial Services and Markets Act 2000 Sch 17 para 4 (see PARA 575): Financial Services and Markets Act 2000 (Disclosure of Information by Prescribed Persons) Regulations 2001, SI 2001/1857, reg 2.

Schedule persons are permitted to disclose information in accordance with reg 3(1)(b) (see head (b) above) only if the disclosure is made in good faith, and the person disclosing the information reasonably believes that the information is relevant to the discharge of a public function by the Authority: reg 3(2).

Regulation 3 does not apply to confidential information within the meaning of the Financial Services and Markets Act 2000 s 348(2) (see PARA 479 note 1): Financial Services and Markets Act 2000 (Disclosure of Information by Prescribed Persons) Regulations 2001, SI 2001/1857, reg 3(4).

6 As to the meaning of 'confidential information' see PARA 479 note 1.

7 As to the meaning of 'primary recipients' see PARA 479 note 1.

8 Financial Services and Markets Act 2000 s 353(2).

9 Financial Services and Markets Act 2000 s 353(3).

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## (D) SHARING INFORMATION

### **489. Co-operation.**

The Financial Services Authority<sup>1</sup> must take such steps as it considers appropriate to co-operate with other persons (whether in the United Kingdom<sup>2</sup> or elsewhere) who have functions: (1) similar to those of the Authority; or (2) in relation to the prevention or detection of financial crime<sup>3</sup>.

The Authority must take such steps as it considers appropriate to co-operate with (a) the Panel on Takeovers and Mergers<sup>4</sup>; (b) an authority designated as a supervisory authority for the purposes of the Takeovers Directive<sup>5</sup>; (c) any other person or body that exercises functions of a public nature, under legislation in any country or territory outside the United Kingdom, that appear to the Authority to be similar to the functions of the Panel on Takeovers and Mergers<sup>6</sup>.

Co-operation may include the sharing of information which the Authority is not prevented from disclosing<sup>7</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 Financial Services and Markets Act 2000 s 354(1). As to the meaning of 'financial crime' see PARA 8 note 13; definition applied by s 354(3).

4 As to the Panel on Takeovers and Mergers see PARA 78; and **COMPANIES** vol 15 (2009) PARA 1501 et seq.

5     le the Takeovers Directive (ie European Parliament and EC Council Directive 2004/25 (OJ L142, 30.4.2004, p 12) on takeover bids) art 4.1.

6     Financial Services and Markets Act 2000 s 354(1A) (added by the Companies Act 2006 s 964(1), (5)).

7     Financial Services and Markets Act 2000 s 354(2).

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## **(vii) Insolvency**

### **A. VOLUNTARY ARRANGEMENTS**

#### **490. Voluntary arrangements.**

Where a voluntary arrangement has effect<sup>1</sup> in respect of a company or insolvent partnership which is an authorised person<sup>2</sup>, the Financial Services Authority<sup>3</sup> may apply to the court<sup>4</sup>. If a person other than the Authority makes an application to the court in relation to the company or insolvent partnership<sup>5</sup>, the Authority is entitled to be heard at any hearing relating to the application<sup>6</sup>.

The Authority is entitled to be heard on an application by an individual who is an authorised person<sup>7</sup>. If such an order is made on the application of such a person then:

1175 (1) a person appointed for the purpose by the Authority is entitled to attend any meeting of creditors of the debtor<sup>8</sup>;

1176 (2) notice of the result of a meeting so summoned is to be given to the Authority by the chairman of the meeting<sup>9</sup>;

1177 (3) the Authority may apply to the court to challenge the meeting's decision<sup>10</sup>.

1     le under the Insolvency Act 1986 Pt I (ss 1-7B): see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 71 et seq.

2     As to authorised persons see PARA 314.

3     As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

4     Financial Services and Markets Act 2000 s 356(1) (substituted by the Insolvency Act 2000 s 15(3)(a)). The application is made under the Insolvency Act 1986 s 6 or s 7: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 132 et seq. 'Court' means: (1) the court having jurisdiction for the purposes of the Bankruptcy (Scotland) Act 1985 or the Insolvency Act 1986; or (2) in Northern Ireland, the High Court: Financial Services and Markets Act 2000 s 355(1). Where a voluntary arrangement has been approved under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt II (arts 14-20) in respect of a company or insolvent partnership which is an authorised person, the Authority may apply to the court under art 19 or art 20: Financial Services and Markets Act 2000 s 356(2) (substituted by the Insolvency Act 2000 s 15(3)(b)).

5     le under any of the provisions mentioned in the Financial Services and Markets Act 2000 s 356(1), (2): see note 4.

6     Financial Services and Markets Act 2000 s 356(3) (amended by the Insolvency Act 2000 s 15(3)(c)).

7 Financial Services and Markets Act 2000 s 357(1). The text refers to an individual who is an authorised person under the Insolvency Act 1986 s 253 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 81-84) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 227).

8 Financial Services and Markets Act 2000 s 357(2), (3). Creditors are summoned under the Insolvency Act 1986 s 257 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 97) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 231).

9 Financial Services and Markets Act 2000 s 357(2), (4).

10 Financial Services and Markets Act 2000 s 357(2), (5). The Authority may apply to the court under: (1) the Insolvency Act 1986 s 262 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 118-120) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 236); or (2) the Insolvency Act 1986 s 263 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 108) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 237). If a person other than the Authority makes an application to the court under any provision mentioned in the Financial Services and Markets Act 2000 s 357(5), the Authority is entitled to be heard at any hearing relating to the application: s 357(6).

## UPDATE

### 490 Voluntary arrangements

NOTE 4--Definition of 'court' modified: SI 2009/317.

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## ***B. ADMINISTRATION ORDERS***

### **491. Administration orders.**

The Financial Services Authority<sup>1</sup> may make an administration application<sup>2</sup> in relation to a company<sup>3</sup> or insolvent partnership which: (1) is, or has been, an authorised person<sup>4</sup>; (2) is, or has been, an appointed representative<sup>5</sup>; or (3) is carrying on, or has carried on, a regulated activity<sup>6</sup> in contravention of the general prohibition<sup>7</sup>.

In relation to an administration application made (or a petition presented) by the Authority by virtue of this provision<sup>8</sup>, any of the following is treated<sup>9</sup> as unable to pay its debts:

- 1178 (a) a company or partnership in default on an obligation to pay a sum due and payable under an agreement<sup>10</sup>; and
- 1179 (b) an authorised deposit taker<sup>11</sup> in default on an obligation to pay a sum due and payable in respect of a relevant deposit<sup>12</sup>.

1 As to the Financial Services Authority see PARAS 4, 6. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie under the Insolvency Act 1986 Sch B1 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1).

3 'Company' means a company: (1) in respect of which an administrator may be appointed under the Insolvency Act 1986 Sch B1 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq) applies; or (2) in respect of which an administrator may be appointed under the Insolvency (Northern

Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1: Financial Services and Markets Act 2000 s 359(4) (s 359 substituted by the Enterprise Act 2002 Sch 17 paras 53, 55; definition amended by SI 2005/1455).

4 As to authorised persons see PARA 314.

5 As to the meaning of 'appointed representative' see PARA 346.

6 As to regulated activities see PARA 84 et seq.

7 Financial Services and Markets Act 2000 s 359(1) (as substituted (see note 3); amended by SI 2005/1455). As to the general prohibition see PARA 80.

8 Financial Services and Markets Act 2000 s 359(2) (as substituted: see note 3). The reference is to s 359.

9 le for the purposes of the Insolvency Act 1986 Sch B1 para 11(a) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1 para 12(a)).

10 Financial Services and Markets Act 2000 s 359(3)(a) (as substituted: see note 3). 'Agreement' means an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the company or partnership: Financial Services and Markets Act 2000 s 359(4) (as so substituted).

11 'Authorised deposit taker' means a person with a Part IV permission to accept deposits (but not a person who has a Part IV permission to accept deposits only for the purpose of carrying on another regulated activity in accordance with that permission): Financial Services and Markets Act 2000 s 359(4) (as substituted: see note 3). As to the meaning of 'Part IV permission' see PARA 348. As to the regulated activity of accepting deposits see PARA 89 et seq.

The definition of 'authorised deposit taker' is construed in accordance with s 22, any relevant order under that provision (see PARA 84), and Sch 2 (see PARA 84 et seq): s 359(5) (as so substituted).

12 Financial Services and Markets Act 2000 s 359(3)(b) (as substituted: see note 3). 'Relevant deposit' is construed, ignoring any restriction on the meaning of deposit arising from the identity of the person making the deposit, in accordance with s 22, any relevant order under that provision (see PARA 84), and Sch 2 (see PARA 84 et seq): s 359(4) (as so substituted).

## UPDATE

### 491 Administration orders

TEXT AND NOTES 9-12--Also, head (c) an authorised reclaim fund in default on an obligation to pay a sum payable as a result of a claim made by virtue of Dormant Bank and Building Society Accounts Act 2008 s 1(2)(b) or s 2(2)(b) (see PARA 590A): Financial Services and Markets Act 2000 s 359(3)(c) (added by Dormant Bank and Building Society Accounts Act 2008 Sch 2 para 6(2)). 'Authorised reclaim fund' means a reclaim fund within the meaning given by Dormant Bank and Building Society Accounts Act 2008 s 5(1) (see PARA 590A) that is authorised for the purposes of the 2000 Act: Financial Services and Markets Act 2000 s 359(4) (definition added by Dormant Bank and Building Society Accounts Act 2008 Sch 2 para 6(3)).

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### 492. Insurers.

The Treasury<sup>1</sup> may by order provide that such statutory provisions relating to insolvency<sup>2</sup> as may be specified<sup>3</sup> are to apply in relation to insurers<sup>4</sup> with such modifications as may be specified<sup>5</sup>. Such an order may provide that such provisions of Part XXIV of the Financial

Services and Markets Act 2000<sup>6</sup> as may be specified are to apply in relation to the administration of insurers in accordance with the order with such modifications as may be specified<sup>7</sup>. Such an order requires the consent of the Secretary of State<sup>8</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 The provisions of the Insolvency Act 1986 Pt II (s 8) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt III (arts 21-39)).

3 The specified in the order: Financial Services and Markets Act 2000 s 360(3).

4 'Insurer' has such meaning as may be specified in an order made by the Treasury: Financial Services and Markets Act 2000 s 355(2). 'Insurer' means any person who is carrying on a regulated activity of the kind specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10(1) or art 10(2) (effecting and carrying out contracts of insurance) (see PARA 100) but who is not: (1) exempt from the general prohibition in respect of that regulated activity; (2) a friendly society; or (3) a person who effects or carries out contracts of insurance all of which fall within Sch 1 Pt I paras 14-18 (see PARA 90) in the course of, or for the purposes of, a banking business: Financial Services and Markets Act 2000 (Insolvency) (Definition of 'Insurer') Order 2001, SI 2001/2634, art 2 (amended by SI 2002/1242). As to the general prohibition see PARA 80. As to regulated activities see PARA 84 et seq. As to friendly societies generally see PARA 2081 et seq.

5 Financial Services and Markets Act 2000 s 360(1). See the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002, SI 2002/1242 (amended by SI 2003/2134). As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

See Case C-28/03 *Epikouriko Kefalaio v Ipourgios Anaptixis* [2006] All ER (EC) 112, [2004] 3 CMLR 1253, ECJ (Community law does not preclude priority being given to claims other than insurance claims when an insurance company goes into liquidation).

6 The Financial Services and Markets Act 2000 Pt XXIV (ss 355-379).

7 Financial Services and Markets Act 2000 s 360(2).

8 Financial Services and Markets Act 2000 s 360(2). As to the Secretary of State see PARA 3.

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### **493. Administrator's duty to report to Financial Services Authority.**

Where a company or partnership is in administration<sup>1</sup>, if the administrator thinks that the company or partnership is carrying on, or has carried on, a regulated activity<sup>2</sup> in contravention of the general prohibition<sup>3</sup>, he must report to the Financial Services Authority<sup>4</sup> without delay<sup>5</sup>.

1 Financial Services and Markets Act 2000 s 361(1) (s 361 substituted by the Enterprise Act 2002 Sch 17 paras 53, 56). The reference is to being in administration within the meaning of the Insolvency Act 1986 Sch B1 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1).

2 As to regulated activities see PARA 84 et seq.

3 As to the general prohibition see PARA 80.



4 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

5 Financial Services and Markets Act 2000 s 361(2) (as substituted: see note 1). Section 361(2) does not apply where the administration arises out of an administration order made on an application made or petition presented by the Authority: s 361(3) (as so substituted). See PARA 494.

## UPDATE

### 493 Administrator's duty to report to Financial Services Authority

TEXT AND NOTES--Financial Services and Markets Act 2000 s 361 modified: SI 2009/317.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(vii) Insolvency/B. ADMINISTRATION ORDERS/494. The Financial Services Authority's powers to participate in proceedings.

### 494. The Financial Services Authority's powers to participate in proceedings.

If a person other than the Financial Services Authority<sup>1</sup> makes an administration application<sup>2</sup> in relation to a company or partnership which: (1) is, or has been, an authorised person<sup>3</sup>; (2) is, or has been, an appointed representative<sup>4</sup>; or (3) is carrying on, or has carried on, a regulated activity<sup>5</sup> in contravention of the general prohibition<sup>6</sup>, then the Authority is entitled to be heard at the hearing of the administration application and at any other hearing of the court in relation to the company or partnership<sup>7</sup>. This provision<sup>8</sup> also applies in relation to (a) the appointment<sup>9</sup> of an administrator of a company of a kind described in heads (1) to (3) above; or (b) the filing with the court of a copy of notice of intention to appoint an administrator under any of those heads<sup>10</sup>.

Any notice or other document<sup>11</sup> required to be sent to a creditor of the company or partnership must also be sent to the Authority<sup>12</sup>. The Authority may apply to the court under the provisions on challenges to the administrator's conduct of the company<sup>13</sup>. A person appointed for the purpose by the Authority is entitled: (i) to attend any meeting of creditors of the company or partnership summoned under any enactment; (ii) to attend any meeting of a committee<sup>14</sup>; and (iii) to make representations as to any matter for decision at such a meeting<sup>15</sup>. If, during the course of the administration of a company, a compromise or arrangement is proposed between the company and its creditors, or any class of them, the Authority may apply to the court for an order<sup>16</sup>.

In relation to a company of a kind described in heads (1) to (3) above<sup>17</sup>, an administrator of the company may not be appointed<sup>18</sup> without the consent of the Authority<sup>19</sup>. Such consent (A) must be in writing; and (B) must be filed with the court along with the notice of intention to appoint<sup>20</sup>. In a case where no notice of intention to appoint is required head (B) above would not apply, but consent<sup>21</sup> must accompany the notice of appointment filed<sup>22</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Ie under the Insolvency Act 1986 Sch B1 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 212 et seq) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1).

3 As to authorised persons see PARA 314.

4 As to the meaning of 'appointed representative' see PARA 346.

5 As to regulated activities see PARA 84 et seq.

6 Financial Services and Markets Act 2000 s 362(1) (amended by the Enterprise Act 2002 Sch 17 paras 53, 57(a); and SI 2005/1455). As to the general prohibition see PARA 80.

7 Financial Services and Markets Act 2000 s 362(2) (amended by the Enterprise Act 2002 Sch 17 paras 53, 57(c); and SI 2005/1455). This provision applies to any other hearing under the Insolvency Act 1986 Pt II (s 8) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 146 et seq) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt III (arts 21-39)).

8 Ie the Financial Services and Markets Act 2000 s 362.

9 Ie under Insolvency Act 1986 Sch B1 para 14 or para 22 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 228, 236) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1 para 15 or para 23).

10 Financial Services and Markets Act 2000 s 362(1A) (added by the Enterprise Act 2002 Sch 17 paras 53, 57(b); and amended by SI 2005/1455).

11 As to the meaning of 'document' see PARA 10 note 10.

12 Financial Services and Markets Act 2000 s 362(3).

13 Financial Services and Markets Act 2000 s 362(4) (substituted by the Enterprise Act 2002 Sch 17 paras 53, 57(d); and amended by SI 2005/1455). The Authority may apply under the Insolvency Act 1986 Sch B1 para 74 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 361) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1 para 75): see the Financial Services and Markets Act 2000 s 362(4) (as so substituted and amended).

In respect of an application under s 362(4), (1) the Insolvency Act 1986 Sch B1 para 74(1)(a) and (b) has effect as if for the words 'harm the interests of the applicant (whether alone or in common with some or all other members or creditors)' there were substituted the words 'harm the interests of some or all members or creditors'; and (2) the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1 para 75(1)(a) and (b) has effect as if for the words 'harm the interests of the applicant (whether alone or in common with some or all other members or creditors)' there were substituted the words 'harm the interests of some or all members or creditors': Financial Services and Markets Act 2000 s 362(4A) (added by the Enterprise Act Sch 17 paras 53, 57(d); and amended by SI 2005/1455).

14 Ie a committee established under the Insolvency Act 1986 Sch B1 para 57 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 279, 298, 305) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1 para 58).

15 Financial Services and Markets Act 2000 s 362(5) (amended by the Enterprise Act 2002 Sch 17 paras 53, 57(e); and SI 2005/1455).

16 Financial Services and Markets Act 2000 s 362(6) (amended by SI 2008/948). The Authority may apply under the Companies Act 2006 s 896 or s 899: see **COMPANIES** vol 15 (2009) PARAS 1426, 1430, 1431, 1433.

17 Financial Services and Markets Act 2000 s 362A(1) (s 326A added by the Enterprise Act 2002 Sch 17 paras 53, 58).

18 Ie under the Insolvency Act 1986 Sch B1 para 22 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 236) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1 para 23).

19 Financial Services and Markets Act 2000 s 362A(2) (as added (see note 17); amended by SI 2005/1455).

20 Financial Services and Markets Act 2000 s 362A(3) (as added (see note 17); amended by SI 2005/1455). This would be under the Insolvency Act 1986 Sch B1 para 27 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 238) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1 para 28).

21 Ie under the Financial Services and Markets Act 2000 s 362A(2).

22 Financial Services and Markets Act 2000 s 362A(4) (as added (see note 17); amended by SI 2005/1455). Such filing would be under the Insolvency Act 1986 Sch B1 para 29 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 241) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1 para 30).

## **UPDATE**

### **494 The Financial Services Authority's powers to participate in proceedings**

TEXT AND NOTES 1-16--Financial Services and Markets Act 2000 s 362 modified: SI 2009/317.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(vii) Insolvency/C. RECEIVERSHIP/495. Receivership.

## **C. RECEIVERSHIP**

### **495. Receivership.**

If a receiver has been appointed in relation to a company which: (1) is, or has been, an authorised person<sup>1</sup>; (2) is, or has been, an appointed representative<sup>2</sup>; or (3) is carrying on, or has carried on, a regulated activity<sup>3</sup> in contravention of the general prohibition<sup>4</sup>, then<sup>5</sup>:

- 1180 (a) the Financial Services Authority<sup>6</sup> is entitled to be heard on an application<sup>7</sup>;
- 1181 (b) the Authority is entitled to make an application for enforcement of the duty to make returns<sup>8</sup>;
- 1182 (c) a report<sup>9</sup> must be sent by the person making it to the Authority<sup>10</sup>;
- 1183 (d) a person appointed for the purpose by the Authority is entitled: (i) to attend any meeting of creditors of the company summoned under any enactment; (ii) to attend any meeting of a committee<sup>11</sup>; and (iii) to make representations as to any matter for decision at such a meeting<sup>12</sup>.

If a receiver has been appointed in relation to a company, and it appears to the receiver that the company is carrying on, or has carried on, a regulated activity in contravention of the general prohibition, the receiver must report the matter to the Authority without delay<sup>13</sup>.

1 As to authorised persons see PARA 314.

2 As to the meaning of 'appointed representative' see PARA 346.

3 As to regulated activities see PARA 84 et seq.

4 As to the general prohibition see PARA 80.

5 Financial Services and Markets Act 2000 s 363(1).

6 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

7 Financial Services and Markets Act 2000 s 363(2). The application is one made under the Insolvency Act 1986 s 35 or s 63 (see **COMPANIES** vol 15 (2009) PARA 1351) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 45).

8 Financial Services and Markets Act 2000 s 363(3). The application may be made under the Insolvency Act 1986 s 41(1)(a) or s 69(1)(a) (see **COMPANIES** vol 15 (2009) PARA 1353) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 51(1)(a)).

9 le a report under the Insolvency Act 1986 s 48(1) or s 67(1) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 409) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 58(1)).

10 Financial Services and Markets Act 2000 s 363(4).

11 le a committee established under the Insolvency Act 1986 s 49 or s 68 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 415) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 59).

12 Financial Services and Markets Act 2000 s 363(5).

13 Financial Services and Markets Act 2000 s 364.

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## ***D. VOLUNTARY WINDING UP***

### **496. Voluntary winding up.**

Where a company: (1) is being wound up voluntarily; (2) is an authorised person<sup>1</sup>; and (3) is not an insurer<sup>2</sup> effecting or carrying out contracts of long-term insurance<sup>3</sup>, the Financial Services Authority<sup>4</sup> may apply to the court<sup>5</sup> for a determination<sup>6</sup> in respect of the company<sup>7</sup>. The Authority is entitled to be heard at any hearing of the court in relation to the voluntary winding up of the company<sup>8</sup>. Any notice or other document<sup>9</sup> required to be sent to a creditor of the company must also be sent to the Authority<sup>10</sup>. A person appointed for the purpose by the Authority is entitled: (a) to attend any meeting of creditors of the company summoned under any enactment; (b) to attend any meeting of a committee<sup>11</sup>; and (c) to make representations as to any matter for decision at such a meeting<sup>12</sup>. The voluntary winding up of the company does not bar the right of the Authority to have it wound up by the court<sup>13</sup>. If, during the course of the winding up of the company, a compromise or arrangement is proposed between the company and its creditors, or any class of them, the Authority may apply to the court for an order<sup>14</sup>.

An insurer effecting or carrying out contracts of long-term insurance may not be wound up voluntarily without the consent of the Authority<sup>15</sup>. If notice of a general meeting of such an insurer is given, specifying the intention to propose a resolution for voluntary winding up of the insurer, a director<sup>16</sup> of the insurer must notify the Authority as soon as practicable after he becomes aware of it<sup>17</sup>. A copy of a winding-up resolution<sup>18</sup> forwarded to the registrar of companies<sup>19</sup> must be accompanied by a certificate issued by the Authority stating that it consents to the voluntary winding up of the insurer<sup>20</sup>.

1 As to authorised persons see PARA 314.

2 As to the meaning of 'insurer' see PARA 492 note 4.

- 3 Financial Services and Markets Act 2000 s 365(1). As to the meaning of 'contracts of long-term insurance' see PARA 595 note 12.
- 4 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
- 5 As to the meaning of 'court' see PARA 490 note 4.
- 6 le under the Insolvency Act 1986 s 112 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1012) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 98).
- 7 Financial Services and Markets Act 2000 s 365(2).
- 8 Financial Services and Markets Act 2000 s 365(3).
- 9 As to the meaning of 'document' see PARA 10 note 10.
- 10 Financial Services and Markets Act 2000 s 365(4).
- 11 le a committee established under the Insolvency Act 1986 s 101 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 994) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 87).
- 12 Financial Services and Markets Act 2000 s 365(5).
- 13 Financial Services and Markets Act 2000 s 365(6).
- 14 Financial Services and Markets Act 2000 s 365(7) (amended by SI 2008/948). The Authority may apply under the Companies Act 2006 s 896 or s 899: see **COMPANIES** vol 15 (2009) PARAS 1426, 1430, 1431, 1433.
- 15 Financial Services and Markets Act 2000 s 366(1).
- 16 As to the meaning of 'director' see PARA 86 note 11.
- 17 Financial Services and Markets Act 2000 s 366(2). A person who fails to comply with s 366(2) is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 366(3). As to the standard scale see PARA 27 note 21.
- 18 A winding up resolution may not be passed (1) as a written resolution (in accordance with the Companies Act 2006 Pt 18 Ch 2 (ss 677-683) (see **COMPANIES** vol 15 (2009) PARA 1223 et seq)); or (2) at a meeting called in accordance with s 307(4) to (6) or s 337(2) (agreement of members to calling of meeting at short notice) (see **COMPANIES** vol 14 (2009) PARA 632): Financial Services and Markets Act 2000 s 366(4) (substituted by SI 2007/2194).
- 19 le in accordance with the Companies Act 2006 s 30: see **COMPANIES** vol 14 (2009) PARA 231. As to the registrar of companies see **COMPANIES** vol 14 (2009) PARA 131 et seq.
- 20 Financial Services and Markets Act 2000 s 366(5) (amended by SI 2007/2194). If the Financial Services and Markets Act 2000 s 366(5) is complied with, the voluntary winding up is to be treated as having commenced at the time the resolution was passed: s 366(6). If s 366(5) is not complied with, the resolution has no effect: s 366(7).

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## ***E. WINDING UP BY THE COURT***

### **497. Winding-up petitions.**

The Financial Services Authority<sup>1</sup> may present a petition to the court<sup>2</sup> for the winding up of a body<sup>3</sup> which<sup>4</sup>: (1) is, or has been, an authorised person<sup>5</sup>; (2) is, or has been, an appointed representative<sup>6</sup>; or (3) is carrying on, or has carried on, a regulated activity<sup>7</sup> in contravention of the general prohibition<sup>8</sup>. On such a petition, the court may wind up the body if: (a) the body is unable to pay its debts<sup>9</sup>; or (b) the court is of the opinion that it is just and equitable that it should be wound up<sup>10</sup>. If a body is in default on an obligation to pay a sum due and payable under an agreement<sup>11</sup>, it is to be treated for the purpose of head (a) above as unable to pay its debts<sup>12</sup>. If a petition is presented<sup>13</sup> for the winding up of a partnership on the ground mentioned in head (b) above, the court has jurisdiction as if the partnership were an unregistered company<sup>14</sup>.

The Authority may not present a petition to the court<sup>15</sup> for the winding up of: (i) an EEA firm<sup>16</sup> which qualifies for authorisation<sup>17</sup>; or (ii) a Treaty firm<sup>18</sup> which qualifies for authorisation<sup>19</sup>, unless it has been asked to do so by the home state regulator<sup>20</sup> of the firm concerned<sup>21</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the meaning of 'court' see PARA 490 note 4.

3 'Body' means a body of persons: (1) over which the court has jurisdiction under any provision of, or made under, the Insolvency Act 1986 (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19)); but (2) which is not a building society, a friendly society or an industrial and provident society: Financial Services and Markets Act 2000 s 355(1). As to friendly societies see PARA 2081 et seq. As to industrial and provident societies see PARA 2394 et seq. For the purposes of s 367(1), 'body' includes any partnership: s 367(2). As to the meaning of 'partnership' see PARA 86 note 11. As to partnership generally see **PARTNERSHIP**.

4 Financial Services and Markets Act 2000 s 367(1).

5 Financial Services and Markets Act 2000 s 367(1)(a). As to authorised persons see PARA 314.

6 Financial Services and Markets Act 2000 s 367(1)(b). As to the meaning of 'appointed representative' see PARA 346.

7 As to regulated activities see PARA 84 et seq.

8 Financial Services and Markets Act 2000 s 367(1)(c). As to the general prohibition see PARA 80.

As to a petition brought by the Authority under s 367(1)(c) and a discussion of its link to petitions by the Secretary of State under the Insolvency Act 1986 s 124A (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 446) and the exercise of both jurisdictions with a view to protecting the public interest see *Re Inertia Partnership* [2007] EWHC 539 (Ch), [2007] 1 BCLC 739, [2007] All ER (D) 316 (Feb).

9 Ie within the meaning of the Insolvency Act 1986 s 123 or s 221 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 446; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1148 et seq) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 103 or art 185).

10 Financial Services and Markets Act 2000 s 367(3).

11 'Agreement' means an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the body concerned: Financial Services and Markets Act 2000 s 367(5).

12 Financial Services and Markets Act 2000 s 367(4).

13 Ie under the Financial Services and Markets Act 2000 s 367(1): see the text and notes 1-8.

14 Financial Services and Markets Act 2000 s 367(6), (7). 'Unregistered company' has the meaning given by the Insolvency Act 1986 s 220 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1147) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 184): see the Financial Services and Markets Act 2000 s 367(7).

15 Ie under the Financial Services and Markets Act 2000 s 367: see the text and notes 1-15.

16 As to the meaning of 'EEA firm' see PARA 315 note 1.

- 17    le under the Financial Services and Markets Act 2000 Sch 3: see PARA 315 et seq.
- 18    As to the meaning of 'Treaty firm' see PARA 319 note 1.
- 19    le under the Financial Services and Markets Act 2000 Sch 4: see PARA 319.
- 20    As to the meaning of 'home state regulator' in relation to an EEA firm see PARA 315 note 1. As to the meaning of 'home state regulator' in relation to a Treaty firm see PARA 319 note 5.
- 21    Financial Services and Markets Act 2000 s 368.

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#### **498. Service of petition on the Financial Services Authority in relation to insurers.**

If a person other than the Financial Services Authority<sup>1</sup> presents a petition for the winding up of an authorised person<sup>2</sup> with permission to effect or carry out contracts of insurance<sup>3</sup>, the petitioner must serve a copy of the petition on the Authority<sup>4</sup>. If a person other than the Authority applies to have a provisional liquidator appointed<sup>5</sup> in respect of an authorised person with permission to effect or carry out contracts of insurance, the applicant must serve a copy of the application on the Authority<sup>6</sup>.

- 1    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.
- 2    As to authorised persons see PARA 314.
- 3    As to the meaning of 'contracts of insurance' see PARA 351 note 13.
- 4    Financial Services and Markets Act 2000 s 369(1).
- 5    le under the Insolvency Act 1986 s 135 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 491) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 115).
- 6    Financial Services and Markets Act 2000 s 369(2).

#### **UPDATE**

#### **498 Service of petition on the Financial Services Authority in relation to insurers**

TEXT AND NOTES--See also Financial Services and Markets Act 2000 s 369A (added by Dormant Bank and Building Society Accounts Act 2008 Sch 2 para 7), which makes provision for the service of petitions in relation to reclaim funds (see PARA 590A).

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Insolvency/E. WINDING UP BY THE COURT/499. Liquidator's duty to report to Financial Services Authority.

#### **499. Liquidator's duty to report to Financial Services Authority.**

If (1) a company is being wound up voluntarily or a body<sup>1</sup> is being wound up on a petition presented by a person other than the Financial Services Authority<sup>2</sup>; and (2) it appears to the liquidator that the company or body is carrying on, or has carried on, a regulated activity<sup>3</sup> in contravention of the general prohibition<sup>4</sup>, the liquidator must report the matter to the Authority without delay<sup>5</sup>.

1 As to the meaning of 'body' see PARA 497 note 3.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

3 As to regulated activities see PARA 84 et seq.

4 As to the general prohibition see PARA 80.

5 Financial Services and Markets Act 2000 s 370.

#### **UPDATE**

#### **499 Liquidator's duty to report to Financial Services Authority**

TEXT AND NOTES--Financial Services and Markets Act 2000 s 370 modified: SI 2009/317.

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#### **500. Financial Services Authority's powers to participate in proceedings.**

If a person other than the Financial Services Authority<sup>1</sup> presents a petition for the winding up of a body<sup>2</sup> which: (1) is, or has been, an authorised person<sup>3</sup>; (2) is, or has been, an appointed representative<sup>4</sup>; or (3) is carrying on, or has carried on, a regulated activity<sup>5</sup> in contravention of the general prohibition<sup>6</sup>, then the Authority is entitled to be heard at the hearing of the petition and at any other hearing of the court<sup>7</sup> in relation to the body<sup>8</sup>. Any notice or other document<sup>9</sup> required to be sent to a creditor of the body must also be sent to the Authority<sup>10</sup>. A person appointed for the purpose by the Authority is entitled: (a) to attend any meeting of creditors of the body; (b) to attend any meeting of a committee<sup>11</sup>; and (c) to make representations as to any matter for decision at such a meeting<sup>12</sup>. If, during the course of the winding up of a company, a compromise or arrangement is proposed between the company and its creditors, or any class of them, the Authority may apply to the court for an order<sup>13</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.



- 2 As to the meaning of 'body' see PARA 497 note 3.
- 3 As to authorised persons see PARA 314.
- 4 As to the meaning of 'appointed representative' see PARA 346.
- 5 As to regulated activities see PARA 84 et seq.
- 6 As to the general prohibition see PARA 80.
- 7 As to the meaning of 'court' see PARA 490 note 4.
- 8 Financial Services and Markets Act 2000 s 371(1), (2). This provision applies to hearings under or by virtue of the Insolvency Act 1986 Pt IV (ss 73-219) or Pt V (ss 220-229) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt V (arts 60-183) or Pt VI (arts 184-193)).
- 9 As to the meaning of 'document' see PARA 10 note 10.
- 10 Financial Services and Markets Act 2000 s 371(3).
- 11 Is a committee established: (1) for the purposes of the Insolvency Act 1986 Pt IV or Pt V under s 101 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 994) or under s 141 or s 142 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 517; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 629); or (2) for the purposes of the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt V or Pt VI: Financial Services and Markets Act 2000 s 371(4)(a), (b).
- 12 Financial Services and Markets Act 2000 s 371(4).
- 13 Financial Services and Markets Act 2000 s 371(5) (amended by SI 2008/948). The Authority may apply to the court under the Companies Act 2006 s 896 or s 899: see **COMPANIES** vol 15 (2009) PARAS 1426, 1430, 1431, 1433.

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## **F. BANKRUPTCY**

### **501. Petitions.**

The Financial Services Authority<sup>1</sup> may present a petition to the court<sup>2</sup> for a bankruptcy order to be made against an individual<sup>3</sup>. Such a petition may be presented only on the ground that: (1) the individual appears to be unable to pay a regulated activity debt; or (2) the individual appears to have no reasonable prospect of being able to pay a regulated activity debt<sup>4</sup>. An individual appears to be unable to pay a regulated activity debt if he is in default on an obligation to pay a sum due and payable under an agreement<sup>5</sup>. An individual appears to have no reasonable prospect of being able to pay a regulated activity debt if: (a) the Authority has served on him a demand requiring him to establish to the satisfaction of the Authority that there is a reasonable prospect that he will be able to pay a sum payable under an agreement when it falls due<sup>6</sup>; (b) at least three weeks have elapsed since the demand was served; and (c) the demand has been neither complied with nor set aside in accordance with rules<sup>7</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the meaning of 'court' see PARA 490 note 4.

3 Financial Services and Markets Act 2000 s 372(1). The petition is made under the Insolvency Act 1986 s 264 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 124) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 238). 'Individual' means an individual: (1) who is, or has been, an authorised person; or (2) who is carrying on, or has carried on, a regulated activity in contravention of the general prohibition: Financial Services and Markets Act 2000 s 372(7). As to authorised persons see PARA 314. As to regulated activities see PARA 84 et seq. As to the general prohibition see PARA 80.

4 Financial Services and Markets Act 2000 s 372(2).

5 Financial Services and Markets Act 2000 s 372(3). 'Agreement' means an agreement the making or performance of which constitutes or is part of a regulated activity carried on by the individual concerned: s 372(8).

6 A demand made under head (a) in the text is to be treated for the purposes of the Insolvency Act 1986 (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19)) as if it were a statutory demand under the Insolvency Act 1986 s 268 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 127) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 242): Financial Services and Markets Act 2000 s 372(5).

7 Financial Services and Markets Act 2000 s 372(4). For these purposes, 'rules' means: (1) in England and Wales, rules made under the Insolvency Act 1986 s 412 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 753); (2) in Northern Ireland, rules made under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 359: Financial Services and Markets Act 2000 s 372(9).

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## **502. Insolvency practitioner's duty to report to the Financial Services Authority.**

If (1) a bankruptcy order<sup>1</sup> is in force in relation to an individual by virtue of a petition presented by a person other than the Financial Services Authority<sup>2</sup>; and (2) it appears to the insolvency practitioner that the individual is carrying on, or has carried on, a regulated activity<sup>3</sup> in contravention of the general prohibition<sup>4</sup>, the insolvency practitioner must report the matter to the Authority without delay<sup>5</sup>.

1 'Bankruptcy order' means a bankruptcy order under the Insolvency Act 1986 Pt IX (ss 264-371) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 124 et seq) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt IX (arts 238-342)): Financial Services and Markets Act 2000 s 373(2).

2 Financial Services and Markets Act 2000 s 373(1)(a). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

3 As to regulated activities see PARA 84 et seq.

4 Financial Services and Markets Act 2000 s 373(1)(b). As to the general prohibition see PARA 80.

5 Financial Services and Markets Act 2000 s 373(1).

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Insolvency/F. BANKRUPTCY/503. The Financial Services Authority's powers to participate in proceedings.

### **503. The Financial Services Authority's powers to participate in proceedings.**

If a person other than the Financial Services Authority<sup>1</sup> presents a petition to the court<sup>2</sup> for a bankruptcy order to be made against an individual<sup>3</sup>, the Authority is entitled to be heard: (1) at the hearing of the petition; and (2) at any other hearing in relation to the individual or entity<sup>4</sup>. A copy of the insolvency practitioner's report<sup>5</sup> must also be sent to the Authority<sup>6</sup>. A person appointed for the purpose by the Authority is entitled: (a) to attend any meeting of creditors of the individual or entity; (b) to attend any meeting of a committee<sup>7</sup>; and (c) to make representations as to any matter for decision at such a meeting<sup>8</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to the meaning of 'court' see PARA 490 note 4.

3 I.e. under the Insolvency Act 1986 s 264 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 124) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 238). 'Individual' means an individual who: (1) is, or has been, an authorised person; or (2) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition: Financial Services and Markets Act 2000 s 374(5). As to authorised persons see PARA 314. As to regulated activities see PARA 84 et seq. As to the general prohibition see PARA 80.

4 Financial Services and Markets Act 2000 s 374(1), (2). This provision applies to any other hearing under: (1) the Insolvency Act 1986 Pt IX (ss 264-371) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 124 et seq); or (2) the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Pt IX (arts 238-342). 'Entity' means an entity which: (a) is, or has been, an authorised person; or (b) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition: Financial Services and Markets Act 2000 s 374(6).

5 I.e. the report prepared under the Insolvency Act 1986 s 274 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 202) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 248).

6 Financial Services and Markets Act 2000 s 374(3).

7 I.e. any committee established under the Insolvency Act 1986 s 301 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 328) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 274).

8 Financial Services and Markets Act 2000 s 374(4).

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## **G. DEBT AVOIDANCE**

### **504. Provisions against debt avoidance.**

Where a transaction has been entered into at an undervalue<sup>1</sup>, the Financial Services Authority<sup>2</sup> may apply for an order<sup>3</sup> in relation to a debtor if<sup>4</sup>: (1) at the time the transaction at an undervalue was entered into, the debtor was carrying on a regulated activity<sup>5</sup> (whether or not

in contravention of the general prohibition)<sup>6</sup>; and (2) a victim of the transaction is or was party to an agreement entered into with the debtor, the making or performance of which constituted or was part of a regulated activity carried on by the debtor<sup>7</sup>.

1 As to transactions at an undervalue see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 654.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

3 I.e. an order under the Insolvency Act 1986 s 423 (restoring the position to what it would have been if the transaction had not been entered into, and protecting the interests of persons who are victims of the transaction) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 367).

4 Financial Services and Markets Act 2000 s 375(1). Expressions which are given a meaning in the Insolvency Act 1986 Pt XVI (ss 423-425) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 664-667) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), arts 367, 368 or 369) have the same meaning when used in the Financial Services and Markets Act 2000 s 375: s 375(3).

5 As to regulated activities see PARA 84 et seq.

6 Financial Services and Markets Act 2000 s 375(1)(a). As to the general prohibition see PARA 80.

7 Financial Services and Markets Act 2000 s 375(1)(b). An application made under s 375 is to be treated as made on behalf of every victim of the transaction to whom s 375(1)(b) (see head (2) in the text) applies: s 375(2).

## UPDATE

### 504 Provisions against debt avoidance

TEXT AND NOTES--Financial Services and Markets Act 2000 s 375 modified: SI 2009/317.

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## H. INSURERS

### 505. Continuation of contracts of long-term insurance where the insurer is in liquidation.

In relation to the winding up of an insurer<sup>1</sup> which effects or carries out contracts of long-term insurance<sup>2</sup>, unless the court<sup>3</sup> otherwise orders, the liquidator must carry on the insurer's business so far as it consists of carrying out the insurer's contracts of long-term insurance with a view to its being transferred as a going concern to a person who may lawfully carry out those contracts<sup>4</sup>. In carrying on the business, the liquidator: (1) may agree to the variation of any contracts of insurance<sup>5</sup> in existence when the winding up order is made; but (2) must not effect any new contracts of insurance<sup>6</sup>. If the liquidator is satisfied that the interests of the creditors in respect of liabilities of the insurer attributable to contracts of long-term insurance effected by it require the appointment of a special manager, he may apply to the court<sup>7</sup>. On such an application, the court may appoint a special manager to act during such time as the court may

direct<sup>8</sup>. The special manager has such powers, including any of the powers of a receiver or manager, as the court may direct<sup>9</sup>. If the court thinks fit, it may reduce the value of one or more of the contracts of long-term insurance effected by the insurer<sup>10</sup>. Any reduction is to be on such terms and subject to such conditions (if any) as the court thinks fit<sup>11</sup>. The court may, on the application of an official<sup>12</sup>, appoint an independent actuary to investigate the insurer's business so far as it consists of carrying out its contracts of long-term insurance and to report to the official: (a) on the desirability or otherwise of that part of the insurer's business being continued; and (b) on any reduction in the contracts of long-term insurance effected by the insurer that may be necessary for successful continuation of that part of the insurer's business<sup>13</sup>. The liquidator may make an application in the name of the insurer and on its behalf<sup>14</sup> without obtaining the permission that would otherwise be required<sup>15</sup>.

1 As to the meaning of 'insurer' see PARA 492 note 4.

2 Financial Services and Markets Act 2000 s 376(1). As to the meaning of 'contracts of long-term insurance' see PARA 595 note 12.

3 As to the meaning of 'court' see PARA 490 note 4.

4 Financial Services and Markets Act 2000 s 376(2).

5 As to the meaning of 'contracts of insurance' see PARA 351 note 13.

6 Financial Services and Markets Act 2000 s 376(3).

7 Financial Services and Markets Act 2000 s 376(4).

8 Financial Services and Markets Act 2000 s 376(5). The Insolvency Act 1986 s 177(5) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 500-501) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 151(5)) applies to a special manager appointed under the Financial Services and Markets Act 2000 s 376(5) as it applies to a special manager appointed under the Insolvency Act 1986 s 177 (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 151): Financial Services and Markets Act 2000 s 376(7).

9 Financial Services and Markets Act 2000 s 376(6).

10 Financial Services and Markets Act 2000 s 376(8).

11 Financial Services and Markets Act 2000 s 376(9).

12 'Official' means: (1) the liquidator; (2) a special manager appointed under the Financial Services and Markets Act 2000 s 376(5); or (3) the Financial Services Authority: s 376(11). As to the Financial Services Authority see PARAS 4, 6 et seq.

13 Financial Services and Markets Act 2000 s 376(10).

14 Ie under the Financial Services and Markets Act 2000 Pt VII (ss 104-117): see PARA 590 et seq.

15 Financial Services and Markets Act 2000 s 376(12). Permission would otherwise be required by the Insolvency Act 1986 s 167, Sch 4 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 577 et seq) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 142, Sch 2).

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## 506. Reducing the value of contracts instead of winding up.

In relation to an insurer<sup>1</sup> which has been proved to be unable to pay its debts, the court<sup>2</sup>, if it thinks fit, may reduce the value of one or more of the insurer's contracts instead of making a winding up order<sup>3</sup>. Any reduction is to be on such terms and subject to such conditions (if any) as the court thinks fit<sup>4</sup>.

1 As to the meaning of 'insurer' see PARA 492 note 4.

2 As to the meaning of 'court' see PARA 490 note 4.

3 Financial Services and Markets Act 2000 s 377(1), (2).

4 Financial Services and Markets Act 2000 s 377(3).

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### **507. Treatment of assets on winding up.**

The Treasury<sup>1</sup> may by regulations provide for the treatment of the assets of an insurer<sup>2</sup> on its winding up<sup>3</sup>. The regulations may, in particular, provide for: (1) assets representing a particular part of the insurer's business to be available only for meeting liabilities attributable to that part of the insurer's business<sup>4</sup>; (2) separate general meetings of the creditors to be held in respect of liabilities attributable to a particular part of the insurer's business<sup>5</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the meaning of 'insurer' see PARA 492 note 4.

3 Financial Services and Markets Act 2000 s 378(1). As to the regulations made see the Insurers (Reorganisation and Winding Up) Regulations 2004, SI 2004/353 (amended by SI 2004/546; SI 2005/1998; SI 2007/108; SI 2007/851). See also **COMPANY AND PARTNERSHIP INSOLVENCY**. As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

4 Financial Services and Markets Act 2000 s 378(2)(a).

5 Financial Services and Markets Act 2000 s 378(2)(b).

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### **508. Winding-up rules.**

Winding-up rules<sup>1</sup> may include provision: (1) for determining the amount of the liabilities of an insurer<sup>2</sup> to policyholders<sup>3</sup> of any class or description for the purpose of proof in a winding up<sup>4</sup>; and (2) generally for carrying into effect the provisions of the Financial Services and Markets Act 2000 relating to insolvency<sup>5</sup> with respect to the winding up of insurers<sup>6</sup>. Winding-up rules may, in particular, make provision for all or any of the following matters<sup>7</sup>:

- 1184 (a) the identification of assets and liabilities<sup>8</sup>;
- 1185 (b) the apportionment, between assets of different classes or descriptions, of:  
(i) the costs, charges and expenses of the winding up; and (ii) any debts of the insurer of a specified<sup>9</sup> class or description<sup>10</sup>;
- 1186 (c) the determination of the amount of liabilities of a specified description<sup>11</sup>;
- 1187 (d) the application of assets for meeting liabilities of a specified description<sup>12</sup>;
- 1188 (e) the application of assets representing any excess of a specified description<sup>13</sup>.

1 'Winding-up rules' means rules made under the Insolvency Act 1986 s 411 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1041) (or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 359); Financial Services and Markets Act 2000 s 379(4). As to rules made under the Insolvency Act 1986 s 411 and the Financial Services and Markets Act 2000 s 379, see the Insurers (Winding Up) Rules 2001, SI 2001/3635 (amended by SI 2003/1102; SI 2004/353).

2 As to the meaning of 'insurer' see PARA 492 note 4.

3 As to the meaning of 'policyholder' see PARA 591 note 15.

4 Financial Services and Markets Act 2000 s 379(1)(a).

5 In the Financial Services and Markets Act 2000 Pt XXIV (ss 355-379).

6 Financial Services and Markets Act 2000 s 379(1)(b).

7 Financial Services and Markets Act 2000 s 379(2). Nothing in s 379 affects the power to make winding-up rules under the Insolvency Act 1986 or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19): Financial Services and Markets Act 2000 s 379(5).

8 Financial Services and Markets Act 2000 s 379(2)(a).

9 'Specified' means specified in winding-up rules: Financial Services and Markets Act 2000 s 379(3). See note 1.

10 Financial Services and Markets Act 2000 s 379(2)(b).

11 Financial Services and Markets Act 2000 s 379(2)(c).

12 Financial Services and Markets Act 2000 s 379(2)(d).

13 Financial Services and Markets Act 2000 s 379(2)(e).

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## ***I. FINANCIAL MARKETS AND INSOLVENCY***

### **509. Introduction.**

Part VII of the Companies Act 1989<sup>1</sup> has effect for the purposes of safeguarding the operation of certain financial markets by provisions with respect to:

- 1189 (1) the insolvency, winding up or default of a person party<sup>2</sup> to transactions in the market<sup>3</sup>;

- 1190 (2) the effectiveness or enforcement of certain charges<sup>4</sup> given to secure obligations in connection with such transactions<sup>5</sup>; and  
 1191 (3) rights and remedies in relation to certain property provided as cover for margin<sup>6</sup> in relation to such transactions or subject to such a charge<sup>7</sup>.

The Secretary of State<sup>8</sup> may by regulations make such further provision as appears to him necessary or expedient for the purposes of Part VII of the Companies Act 1989<sup>9</sup>. Provision may, in particular, be made (a) for integrating the provisions of Part VII<sup>10</sup> with the general law of insolvency<sup>11</sup>; and (b) for adapting the provisions of Part VII in their application to overseas<sup>12</sup> investment exchanges and clearing houses<sup>13</sup>. Such regulations may add to, amend or repeal any of the provisions of Part VII or provide that those provisions have effect subject to such additions, exceptions or adaptations as are specified in the regulations<sup>14</sup>.

Regulations under Part VII of the Companies Act 1989 may make different provision for different cases and may contain such incidental, transitional and other supplementary provisions as appear to the Secretary of State to be necessary or expedient<sup>15</sup>. Regulations must be made by statutory instrument which are subject to annulment in pursuance of a resolution of either House of Parliament<sup>16</sup>.

Provision has been made as to the application of Part VII of the Act in relation to system charges<sup>17</sup>.

1    Ie the Companies Act 1989 Pt VII (ss 154-191) (see PARA 510 et seq): see s 154.

2    Where a person enters into market contracts in more than one capacity, the provisions of the Companies Act 1989 Pt VII apply (subject as follows) as if the contracts entered into in each different capacity were entered into by different persons: s 187(1). As to the meaning of 'market contract' see PARA 510. References in Pt VII to a market contract to which a person is a party include (subject as follows, and unless the context otherwise requires) contracts to which he is party as agent: s 187(2). The Secretary of State may by regulations (1) modify or exclude the operation of s 187(1), (2) (s 187(3)(a)); and (2) make provision as to the circumstances in which a person is to be regarded for the purposes of those provisions as acting in different capacities (s 187(3)(b)). The functions of the Secretary of State were transferred to the Treasury by the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315: see art 2(1)(c). See the Financial Markets and Insolvency Regulations 1991, SI 1991/880 (amended by SI 1992/716), made under (inter alia) the Companies Act 1989 s 187(3). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3    Ie the Companies Act 1989 ss 155-172 (see PARAS 510 et seq): see s 154(a).

4    'Charge' means any form of security, including a mortgage: Companies Act 1989 s 190(1).

5    Ie the Companies Act 1989 ss 173-176 (see PARAS 527-530): see s 154(b).

6    In the Companies Act 1989 Pt VII the expressions 'margin' and 'cover for margin' have the same meaning: s 190(3).

7    Ie the Companies Act 1989 ss 177-181 (see PARAS 531-535): see s 154(c).

8    The functions of the Secretary of State are to be exercised jointly with the Treasury: see the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, art 4, Sch 2, para 7. See also PARA 3.

9    Companies Act 1989 s 185(1). See the Financial Markets and Insolvency Regulations 1991, SI 1991/880; the Financial Markets and Insolvency Regulations 1996, SI 1996/1469 (see note 17); the Financial Markets and Insolvency Regulations 1998, SI 1998/1748, made under (inter alia) the Companies Act 1989 ss 185, 186.

10   References in the Companies Act 1989 s 185 to the provisions of Part VII include any provision made under the Financial Services and Markets Act 2000 s 301 (see PARA 720): Companies Act 1989 s 185(4) (added by SI 2001/3649).

11   As to references to the 'law of insolvency' see PARA 512 note 2.

12   As to the meaning of 'overseas' see PARA 510 note 4.



13 Companies Act 1989 s 185(2).

14 Companies Act 1989 s 185(3).

15 Companies Act 1989 s 186(1). See also note 8.

16 Companies Act 1989 s 186(2).

17 See the Financial Markets and Insolvency Regulations 1996, SI 1996/1469 (amended by SI 2001/3755; SI 2003/2096; SI 2004/2312).

## UPDATE

### 509 Introduction

NOTE 2--SI 1991/880 further amended: SI 2009/853.

NOTE 7--Companies Act 1989 s 154(c) amended: SI 2009/853.

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### 510. Market contracts.

Part VII of the Companies Act 1989<sup>1</sup> applies to the following descriptions of contract connected with a recognised investment exchange or recognised clearing house<sup>2</sup>. The contracts are referred to in Part VII as 'market contracts'<sup>3</sup>. Subject to an exception<sup>4</sup>, in relation to a recognised investment exchange Part VII applies to:

- 1192 (1) contracts entered into by a member or designated non-member<sup>5</sup> of the exchange with a person other than the exchange which are either:
- 92
161. (a) contracts made on the exchange or on an exchange to whose undertaking the exchange has succeeded whether by amalgamation, merger or otherwise<sup>6</sup>; or
162. (b) contracts in the making of which the member or designated non-member was subject to the rules of the exchange or of an exchange to whose undertaking the exchange has succeeded whether by amalgamation, merger or otherwise<sup>7</sup>; and
- 93
- 1193 (2) contracts entered into by the exchange with its members for the purpose of enabling the rights and liabilities of that member under transactions in investments to be settled<sup>8</sup>.

In relation to a recognised clearing house, Part VII applies to contracts entered into by the clearing house with a member of the clearing house for the purpose of enabling the rights and liabilities of that member under transactions in investments to be settled<sup>9</sup>. The Secretary of State<sup>10</sup> may by regulations make further provision as to the contracts to be treated as 'market contracts', for the purposes of Part VII, in relation to a recognised investment exchange or recognised clearing house<sup>11</sup>.

1 In the Companies Act 1989 Pt VII (ss 154-191) (see PARAS 509, 511 et seq): see s 155(1).

2 Companies Act 1989 s 155(1). As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 684, definitions applied by virtue of s 190(1) (amended by SI 2001/3649).

3 Companies Act 1989 s 155(1).

4 The Companies Act 1989 Pt VII does not apply to contracts falling within s 155(2)(a) (see the text and notes 5-7) where the exchange in question is a recognised overseas investment exchange: s 155(2A) (added by SI 1991/880). 'Overseas', in relation to an investment exchange or clearing house, means having its head office outside the United Kingdom: Companies Act 1989 s 190(1). As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 'Designated non-member' means a person in respect of whom action may be taken under the default rules of the exchange but who is not a member of the exchange: Companies Act 1989 s 155(2) (substituted SI 1991/880). In the Companies Act 1989 Pt VII 'default rules' means rules of a recognised investment exchange or recognised clearing house which provide for the taking of action in the event of a person appearing to be unable, or likely to become unable, to meet his obligations in respect of one or more market contracts connected with the exchange or clearing house: s 188(1). If an exchange or clearing house takes action under its default rules in respect of a person, all subsequent proceedings under its rules for the purposes of or in connection with the settlement of market contracts to which the defaulter is a party must be treated as done under its default rules: s 188(4). In Pt VII 'default proceedings' means proceedings taken by a recognised investment exchange or recognised clearing house under its default rules: s 188(3). References in Pt VII to a 'defaulter' are to a person in respect of whom action has been taken by a recognised investment exchange or recognised clearing house under its default rules, whether by declaring him to be a defaulter or otherwise; and references in Pt VII to 'default' must be construed accordingly: s 188(2). References in Pt VII to settlement in relation to a market contract are to the discharge of the rights and liabilities of the parties to the contract, whether by performance, compromise or otherwise: s 190(2).

6 Companies Act 1989 s 155(2)(a)(i) (s 155(2) as substituted (see note 5); and s 155(2)(a) amended by SI 1998/1748).

7 Companies Act 1989 s 155(2)(a)(ii) (as substituted and amended: see notes 5, 6).

8 Companies Act 1989 s 155(2)(b) (s 155(2) as substituted (see note 5); and s 155(2)(b) further substituted by SI 1998/1748).

9 Companies Act 1989 s 155(3) (substituted by SI 1998/1748).

10 The functions of the Secretary of State were transferred to the Treasury by the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315: see art 2(1)(c). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

11 Companies Act 1989 s 155(4). The regulations may add to, amend or repeal the provisions of s 155(2), and s 155(3): s 155(5). See the Financial Markets and Insolvency Regulations 1991, SI 1991/880; and PARA 509 note 2.

## UPDATE

### 510 Market contracts

NOTE 5--In the definition of 'default rules', 'person' includes another recognised investment exchange or recognised clearing house: Companies Act 1989 s 188(1) (amended by SI 2009/853).

TEXT AND NOTE 8--Head (2) amended; head (3) added as follows: (2) contracts entered into by the exchange, in its capacity as such, with a member of the exchange or with a recognised clearing house or with another recognised investment exchange for the purpose of enabling the rights and liabilities of that member or clearing house or other investment exchange under a transaction to be settled (Companies Act 1989 s 155(b) (substituted by SI 2009/853)); and (3) contracts entered into by the exchange with a member of the exchange or with a recognised clearing house or with another recognised investment exchange for the purpose of providing central counterparty clearing services to that member or clearing house or other investment exchange (Companies Act 1989 s 155(c) (added by SI 2009/853)).

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### **511. Change in default rules.**

A recognised UK investment exchange<sup>1</sup> or recognised UK clearing house<sup>2</sup> must give the Financial Services Authority<sup>3</sup> at least 14 days' notice of any proposal to amend, revoke or add to its default rules<sup>4</sup>; and the Authority may within 14 days from receipt of the notice direct the exchange or clearing house not to proceed with the proposal, in whole or in part<sup>5</sup>. Such a direction may be varied or revoked<sup>6</sup>. Any amendment or revocation of, or addition to, the default rules of an exchange or clearing house in breach of a direction under this provision is ineffective<sup>7</sup>.

1 'UK', in relation to an investment exchange or clearing house, means having its head office in the United Kingdom: Companies Act 1989 s 190(1). As to meaning of 'United Kingdom' see PARA 2 note 3.

2 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 As to the meaning of 'default rules' see PARA 510 note 5.

5 Companies Act 1989 ss 157(1), 190(1) (amended by SI 2001/3640).

6 Companies Act 1989 s 157(2).

7 Companies Act 1989 s 157(3).

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### **512. Modifications of the law of insolvency.**

Subject to specified provisions<sup>1</sup>, the general law of insolvency<sup>2</sup> has effect in relation to market contracts<sup>3</sup>, and action taken under the rules of a recognised investment exchange or recognised clearing house<sup>4</sup> with respect to such contracts<sup>5</sup>. So far as those provisions relate to insolvency proceedings in respect of a person other than a defaulter<sup>6</sup>, they apply in relation to:

- 1194 (1) proceedings in respect of a member or designated non-member<sup>7</sup> of a recognised investment exchange or a member of a recognised clearing house; and
- 1195 (2) proceedings in respect of a party<sup>8</sup> to a market contract begun<sup>9</sup> after a recognised investment exchange or recognised clearing house has taken action under its default rules<sup>10</sup> in relation to a person party to the contract as principal,

but not in relation to any other insolvency proceedings, notwithstanding that rights or liabilities arising from market contracts fall to be dealt with in the proceedings<sup>11</sup>.

- 1 le subject to the provisions of the Companies Act 1989 ss 159-165 (see PARAS 513-519): see s 158(1).
- 2 References in the Companies Act 1989 Part VII (ss 154-191) to the law of insolvency include references to every provision made by or under the Insolvency Act 1986; and in relation to a building society references to insolvency law or to any provision of the Insolvency Act 1986 are to that law or provision as modified by the Building Societies Act 1986: Companies Act 1989 s 190(6). As to the Building Societies Act 1986 generally see PARA 1856 et seq.
- 3 As to the meaning of 'market contract' see PARA 510.
- 4 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.
- 5 Companies Act 1989 s 158(1). The Secretary of State may make further provision by regulations modifying the law of insolvency in relation to the matters mentioned in s 158(1): s 158(4). The functions of the Secretary of State are to be exercised jointly with the Treasury: see the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, art 4, Sch 2 para 7. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. The regulations may add to, amend or repeal the provisions mentioned in the Companies Act 1989 s 158(1), and any other provision of Pt VII as it applies for the purposes of those provisions, or provide that those provisions have effect subject to such additions, exceptions or adaptations as are specified in the regulations: s 158(5). See the Financial Markets and Insolvency Regulations 1991, SI 1991/880; and PARA 509 note 2.
- 6 As to the meaning of 'defaulter' see PARA 510 note 5.
- 7 As to the meaning of 'designated non-member' see PARA 510 note 5.
- 8 As to parties to market contracts see PARA 509 note 2.
- 9 The reference in the Companies Act 1989 s 158(2)(b) (see head (2) in the text) to the beginning of insolvency proceedings is to (1) the presentation of a bankruptcy petition or a petition for sequestration of a person's estate (s 158(3)(a)); or (2) the application for an administration order or the presentation of a winding-up petition or the passing of a resolution for voluntary winding up (s 158(3)(b) (substituted by the Enterprise Act 2002 s 248(3), Sch 17 paras 43, 44(a))); or (3) the appointment of an administrative receiver (Companies Act 1989 s 158(3)(c)). See generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**. In s 158(3)(b) the reference to an application for an administration order must be taken to include a reference to:
  - 516 (a) in a case where an administrator is appointed under the Insolvency Act 1986 Sch B1 para 14 or 22 (appointment by floating charge holder, company or directors) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 228 et seq, 236 et seq) following filing with the court of a copy of a notice of intention to appoint under Sch B1 para 14 or 22, the filing of the copy of the notice (Companies Act 1989 s 158(3A)(a) (s 158(3A) added by the Enterprise Act 2002 s 248(3), Sch 17 paras 43, 44(a))); and
  - 517 (b) in a case where an administrator is appointed under either of the Insolvency Act 1986 Sch B1 para 14 or 22 without a copy of a notice of intention to appoint having been filed with the court, the appointment of the administrator (Companies Act 1989 s 158(3A)(b) (as so added)).
- 10 As to the meaning of 'default rules' see PARA 510 note 5.
- 11 Companies Act 1989 s 158(2).

## UPDATE

### 512 Modifications of the law of insolvency

TEXT AND NOTE 11--Head (1) now proceedings in respect of a recognised investment exchange or a member or designated non-member of a recognised investment exchange, and proceedings in respect of a recognised clearing house or a member of a recognised clearing house: Companies Act 1989 s 158(2) (amended by SI 2009/853).

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**513. Proceedings of exchange or clearing house take precedence over insolvency procedures.**

None of the following must be regarded as to any extent invalid at law on the ground of inconsistency with the law relating to the distribution of the assets of a person on bankruptcy, winding up or sequestration<sup>1</sup>, or in the administration of an insolvent estate:

- 1196 (1) a market contract<sup>2</sup>;
- 1197 (2) the default rules<sup>3</sup> of a recognised investment exchange or recognised clearing house<sup>4</sup>;
- 1198 (3) the rules of a recognised investment exchange or recognised clearing house as to the settlement<sup>5</sup> of market contracts not dealt with under its default rules<sup>6</sup>.

The powers of a relevant office-holder<sup>7</sup> in his capacity as such, and the powers of the court under the Insolvency Act 1986 must not be exercised in such a way as to prevent or interfere with:

- 1199 (a) the settlement in accordance with the rules of a recognised investment exchange or recognised clearing house of a market contract not dealt with under its default rules<sup>8</sup>; or
- 1200 (b) any action taken under the default rules of such an exchange or clearing house<sup>9</sup>.

A debt or other liability arising out of a market contract which is the subject of default proceedings<sup>10</sup> may not be proved in a winding up or bankruptcy until the completion of the default proceedings<sup>11</sup>. A debt or other liability which by virtue of this provision may not be proved or claimed cannot be taken into account for the purposes of any set-off until the completion of the default proceedings<sup>12</sup>. However, prior to the completion of default proceedings:

- 1201 (i) where it appears to the chairman of the meeting of creditors that a sum will be certified<sup>13</sup> to be payable, the above provision cannot prevent any proof or claim including or consisting of an estimate of that sum which has been lodged from being admitted for the purpose only of determining the entitlement of a creditor to vote at a meeting of creditors<sup>14</sup>; and
- 1202 (ii) a creditor whose claim or proof has been lodged and admitted for the purpose of determining the entitlement of a creditor to vote at a meeting of creditors and which has not been subsequently wholly withdrawn, disallowed or rejected, is eligible as a creditor to be a member of a liquidation committee or, in bankruptcy proceedings in England and Wales, a creditors' committee<sup>15</sup>.

<sup>1</sup> As to the meaning of 'sequestration' see PARA 512 note 9. See also generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

- 2 Companies Act 1989 s 159(1)(a). As to the meaning of 'market contract' see PARA 510.
- 3 As to the meaning of 'default rules' see PARA 510 note 5.
- 4 Companies Act 1989 s 159(1)(b). As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.
- 5 As to 'settlement' in relation to a market contract see PARA 510 note 5.
- 6 Companies Act 1989 s 159(1)(c).
- 7 The following are relevant office-holders for the purposes of the Companies Act 1989 Pt VII (ss 154-191) (see PARAS 509-512, 514 et seq):

- 518 (1) the official receiver (s 189(1)(a));
- 519 (2) any person acting in relation to a company as its liquidator, provisional liquidator, administrator or administrative receiver (s 189(1)(b));
- 520 (3) any person acting in relation to an individual as his trustee in bankruptcy or interim receiver of his property (s 189(1)(c));
- 521 (4) any person acting as administrator of an insolvent estate of a deceased person (s 189(1)(d)).

In s 189(1)(b) 'company' means any company, society, association, partnership or other body which may be wound up under the Insolvency Act 1986: Companies Act 1989 s 189(2). 'Administrative receiver' has the meaning given by the Insolvency Act 1986 s 251 (see **COMPANIES** vol 15 (2009) PARA 1337): Companies Act 1989 s 190(1).

- 8 Companies Act 1989 s 159(2)(a).
- 9 Companies Act 1989 s 159(2)(b). This does not prevent a relevant office-holder from afterwards seeking to recover any amount under s 163(4) (see PARA 517) or 164(4) (see PARA 518) or prevent the court from afterwards making any such order or decree as is mentioned in s 165(1) (see PARA 519) (but subject to s 165(3), (4)): s 159(2). Nothing in the following provisions of Pt VII may be construed as affecting the generality of the above provisions: s 159(3).
- 10 As to the meaning of 'default proceedings' see PARA 510 note 5.
- 11 Companies Act 1989 s 159(4). For the purposes of s 159(4), (4A) the default proceedings must be taken to be completed in relation to a person when a report is made under s 162 (see PARA 516) stating the sum (if any) certified to be due to or from him: s 159(5) (amended by SI 1991/880).
- 12 Companies Act 1989 s 159(4).
- 13 le under the Companies Act 1989 s 162(1): see PARA 516.
- 14 Companies Act 1989 s 159(4A)(a) (s 159(4A) added by SI 1991/880).
- 15 Companies Act 1989 s 159(4A)(b) (as added: see note 14).

## UPDATE

### **513 Proceedings of exchange or clearing house take precedence over insolvency procedures**

TEXT AND NOTES 1-6--Companies Act 1989 s 159(1) amended so as to also apply to the administration of a company or other body: SI 2009/853.

TEXT AND NOTES 11-15--Companies Act 1989 s 159(4), (4A)(b) amended so as to also apply to the administration of a company or other body: SI 2009/853.

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#### **514. Duty to give assistance for purposes of default proceedings.**

It is the duty of any person who has or had control of any assets of a defaulter<sup>1</sup>, and any person who has or had control of any documents<sup>2</sup> of or relating to a defaulter, to give a recognised investment exchange or recognised clearing house<sup>3</sup> such assistance as it may reasonably require for the purposes of its default proceedings<sup>4</sup>. This applies notwithstanding any duty of that person under the enactments relating to insolvency<sup>5</sup>. A person must not under this provision be required to provide any information or produce any document which he would be entitled to refuse to provide or produce on grounds of legal professional privilege in proceedings in the High Court<sup>6</sup>. Where original documents are supplied in pursuance of this provision, the exchange or clearing house must return them forthwith after the completion of the relevant default proceedings, and must in the meantime allow reasonable access to them to the person by whom they were supplied and to any person who would be entitled to have access to them if they were still in the control of the person by whom they were supplied<sup>7</sup>. The expenses of a relevant office-holder<sup>8</sup> in giving assistance under this provision are recoverable as part of the expenses incurred by him in the discharge of his duties; and he cannot be required under this provision to take any action which involves expenses which cannot be so recovered, unless the exchange or clearing house undertakes to meet them<sup>9</sup>. There must be treated as expenses of his such reasonable sums as he may determine in respect of time spent in giving the assistance, and for the purpose of determining the priority in which his expenses are payable out of the assets, sums in respect of time spent must be treated as his remuneration and other sums must be treated as his disbursements<sup>10</sup>. The Secretary of State<sup>11</sup> may by regulations make further provision as to the duties of persons to give assistance to a recognised investment exchange or recognised clearing house for the purposes of its default proceedings, and the duties of the exchange or clearing house with respect to information supplied to it<sup>12</sup>.

1 As to the meaning of 'defaulter' see PARA 510 note 5.

2 In the Companies Act 1989 s 160 'document' includes information recorded in any form: s 160(6).

3 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

4 Companies Act 1989 s 160(1). As to the meaning of 'default proceedings' see PARA 510 note 5.

5 Companies Act 1989 s 160(1).

6 Companies Act 1989 s 160(2).

7 Companies Act 1989 s 160(3).

8 As to the meaning of 'relevant office-holder' see PARA 513 note 7.

9 Companies Act 1989 s 160(4).

10 Companies Act 1989 s 160(4) (amended by SI 1991/880).

11 The functions of the Secretary of State are to be exercised jointly with the Treasury: see the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, art 4, Sch 2 para 7. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

12 Companies Act 1989 s 160(5). The regulations may add to, amend or repeal the provisions of s 160(1)-(4): s 160(5). See the Financial Markets and Insolvency Regulations 1991, SI 1991/880; and PARA 509 note 2.

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### **515. Supplementary provisions as to default proceedings.**

If the court is satisfied on an application by a relevant office-holder<sup>1</sup> that a party<sup>2</sup> to a market contract with a defaulter<sup>3</sup> intends to dissipate or apply his assets so as to prevent the office-holder recovering such sums as may become due upon the completion of the default proceedings<sup>4</sup>, the court may grant such interlocutory relief as it thinks fit<sup>5</sup>. A liquidator or trustee of a defaulter cannot (1) declare or pay any dividend to the creditors; or (2) return any capital to contributories, unless he has retained what he reasonably considers to be an adequate reserve in respect of any claims arising as a result of the default proceedings of the exchange or clearing house concerned<sup>6</sup>. The court may on an application by a relevant office-holder make such order as it thinks fit altering or dispensing from compliance with such of the duties of his office as are affected by the fact that default proceedings are pending or could be taken, or have been or could have been taken<sup>7</sup>.

1 As to the meaning of 'relevant office-holder' see PARA 513 note 7. As to the meaning of 'court' see the Financial Markets and Insolvency Regulations 1991, SI 1991/880, reg 19(1), (3).

2 As to 'party' in relation to a market contract see PARA 509 note 2. As to the meaning of 'market contract' see PARA 510.

3 As to the meaning of 'defaulter' see PARA 510 note 5.

4 As to the meaning of 'default proceedings' see PARA 510 note 5.

5 Companies Act 1989 s 161(1).

6 Companies Act 1989 s 161(2).

7 Companies Act 1989 s 161(3). Nothing in the Insolvency Act 1986 s 126, s 128, s 130 or s 285 or Sch B1 para 42 or 43 (including Sch B1 para 43(6) as applied by Sch B1 para 44) (which restrict the taking of certain legal proceedings and other steps) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 218; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 224, 231, 239, 263; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 883, 887 et seq, 893), can affect any action taken by an exchange or clearing house for the purpose of its default proceedings: Companies Act 1989 s 161(4) (amended by the Enterprise Act 2002 s 248(3), Sch 17 paras 43, 45).

### **UPDATE**

### **515 Supplementary provisions as to default proceedings**

TEXT AND NOTE 6--Companies Act 1989 s 161(2) amended so as to also apply to the administrator of a defaulter: SI 2009/853.

NOTE 7--For 'Sch B1 para 42 or 43 (including Sch B1 para 43(6) as applied by Sch B1 para 44)' read 'Sch B1 para 40, 41, 42 or 43 (including Sch B1 paras 40-43 as applied by Sch B1 para 44)': Companies Act 1989 s 161(4) (amended by SI 2009/853).



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### **516. Duty to report on completion of default proceedings.**

Subject to the following provision a recognised investment exchange or recognised clearing house<sup>1</sup> must, on the completion of proceedings under its default rules<sup>2</sup>, report to the Financial Services Authority<sup>3</sup> on its proceedings stating in respect of each creditor or debtor the sum certified by them to be payable from or to the defaulter<sup>4</sup> or, as the case may be, the fact that no sum is payable<sup>5</sup>. A recognised overseas<sup>6</sup> investment exchange or recognised overseas clearing house must not be subject to the obligation under the above provision unless it has been notified by the Authority that a report is required for the purpose of insolvency proceedings in any part of the United Kingdom<sup>7</sup>. The exchange or clearing house may make a single report or may make reports from time to time as proceedings are completed with respect to the transactions affecting particular persons<sup>8</sup>. The exchange or clearing house must supply a copy of every report under this provision to the defaulter and to any relevant office-holder<sup>9</sup> acting in relation to him or his estate<sup>10</sup>. When a report under this provision is received by the Authority, it must publish notice of that fact in such manner as it thinks appropriate for bringing the report to the attention of creditors and debtors of the defaulter<sup>11</sup>. An exchange or clearing house must make available for inspection by a creditor or debtor of the defaulter so much of any report by it under this provision as relates to the sum (if any) certified to be due to or from him or the method by which that sum was determined<sup>12</sup>. Any such person may require the exchange or clearing house, on payment of such reasonable fee as the exchange or clearing house may determine, to provide him with a copy of any part of a report which he is entitled to inspect<sup>13</sup>.

1 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

2 As to the meaning of 'default rules' see PARA 510 note 5.

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 As to the meaning of 'defaulter' see PARA 510 note 5.

5 Companies Act 1989 s 162(1) (amended by SI 1991/880; and SI 2001/3649); Companies Act 1989 s 190(1) (amended by SI 2001/3649).

6 As to the meaning of 'overseas' see PARA 510 note 4.

7 Companies Act 1989 s 162(1A) (added by SI 1991/880); Companies Act 1989 s 190(1) (amended by SI 2001/3649).

8 Companies Act 1989 s 162(2).

9 As to the meaning of 'relevant office-holder' see PARA 513 note 7.

10 Companies Act 1989 s 162(3).

11 Companies Act 1989 s 162(4) (amended by SI 2001/3649).

12 Companies Act 1989 s 162(5).

13 Companies Act 1989 s 162(6).

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### **517. Net sum payable on completion of default proceedings.**

The following provisions apply with respect to the net sum certified by a recognised investment exchange or recognised clearing house<sup>1</sup>, upon proceedings under its default rules<sup>2</sup> being duly completed in accordance with Part VII of the Companies Act 1989<sup>3</sup>, to be payable by or to a defaulter<sup>4</sup>. If, in England and Wales, a bankruptcy or winding-up order has been made, or a resolution for voluntary winding up has been passed, the debt:

1203 (1) is provable in the bankruptcy or winding up or, as the case may be, is payable to the relevant office-holder<sup>5</sup>; and

1204 (2) must be taken into account, where appropriate, under the Insolvency Act 1986<sup>6</sup> or the corresponding provision applicable in the case of winding up,

in the same way as a debt due before the commencement of the bankruptcy, the date on which the body corporate goes into liquidation<sup>7</sup> or, in the case of a partnership, the date of the winding-up order<sup>8</sup>. However, where (or to the extent that) a sum is taken into account by virtue of the above provision which arises from a contract entered into at a time when the creditor had notice:

1205 (a) that a bankruptcy petition was pending; or

1206 (b) that a meeting of creditors had been summoned under the Insolvency Act 1986<sup>9</sup> or that a winding-up petition was pending,

the value of any profit to him arising from the sum being so taken into account (or being so taken into account to that extent) is recoverable from him by the relevant office-holder unless the court directs otherwise<sup>10</sup>. The above provision does not apply in relation to a sum arising from a contract effected under the default rules of a recognised investment exchange or recognised clearing house<sup>11</sup>. Any sum so recoverable ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential debts<sup>12</sup>.

1 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

2 As to the meaning of 'default rules' see PARA 510 note 5.

3 I.e. the Companies Act 1989 Pt VII (ss 154-191): see s 163(1).

4 Companies Act 1989 s 163(1). As to the meaning of 'defaulter' see PARA 510 note 5.

5 As to the meaning of 'relevant office-holder' see PARA 513 note 7. As to bankruptcy and winding up generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

6 I.e. the Insolvency Act 1986 s 323 (mutual dealings and set-off) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 547, 549): see the Companies Act 1989 s 163(2)(b).

7 le within the meaning of the Insolvency Act 1986 s 247 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 9): see the Companies Act 1989 s 163(2).

8 Companies Act 1989 s 163(2).

9 le the Insolvency Act 1986 s 98 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 945 et seq): see the Companies Act 1989 s 163(4)(b). As to bankruptcy and winding up generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

10 Companies Act 1989 s 163(4). See also para 513 note 9. As to the meaning of 'court' see the Financial Markets and Insolvency Regulations 1991, SI 1991/880, reg 19(1), (3). The provisions of the Companies Act 1989 s 163(4)-(6) are disapplied in relation to a designated settlement system: see PARA 525.

11 Companies Act 1989 s 163(5). See also note 10.

12 Companies Act 1989 s 163(6). See also note 10.

## UPDATE

### 517 Net sum payable on completion of default proceedings

TEXT AND NOTES 5-8--Companies Act 1989 s 163(2) amended so as to also apply to administration orders: SI 2009/853. A reference to the making of an administration order includes a reference to the appointment of an administrator under the Insolvency Act 1986 Schedule B1 para 14 or 22: Companies Act 1989 s 163(3A) (added by SI 2009/853).

TEXT AND NOTE 10--Add head (c) that an application for an administration order was pending or that any person had given notice of intention to appoint an administrator: Companies Act 1989 s 163(4) (amended by SI 2009/853).

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### 518. Disclaimer of property, rescission of contracts, etc.

The power to disclaim onerous property and the court's power to order the rescission of contracts, etc granted by certain specified provisions of the Insolvency Act 1986<sup>1</sup> do not apply in relation to:

- 1207 (1) a market contract<sup>2</sup>; or
- 1208 (2) a contract effected by the exchange or clearing house for the purpose of realising property provided as margin<sup>3</sup> in relation to market contracts<sup>4</sup>.

The provisions of the Insolvency Act 1986 relating to the avoidance of property dispositions effected after the commencement of winding up or the presentation of a bankruptcy petition<sup>5</sup> do not apply to:

- 1209 (a) a market contract, or any disposition of property in pursuance of such a contract<sup>6</sup>;
- 1210 (b) the provision of margin in relation to market contracts<sup>7</sup>;

- 1211 (c) a contract effected by the exchange or clearing house for the purpose of realising property provided as margin in relation to a market contract, or any disposition of property in pursuance of such a contract<sup>8</sup>; or
- 1212 (d) any disposition of property in accordance with the rules of the exchange or clearing house as to the application of property provided as margin<sup>9</sup>.

However, where:

- 1213 (i) a market contract is entered into by a person who has notice<sup>10</sup> that a petition has been presented for the winding up or bankruptcy of the estate of the other party to the contract; or
- 1214 (ii) margin in relation to a market contract is accepted by a person who has notice that such a petition has been presented in relation to the person by whom or on whose behalf the margin is provided,

the value of any profit to him arising from the contract or, as the case may be, the amount or value of the margin is recoverable from him by the relevant office-holder<sup>11</sup> unless the court directs otherwise<sup>12</sup>. Head (i) above does not apply where the person entering into the contract is a recognised investment exchange or recognised clearing house<sup>13</sup> acting in accordance with its rules, or where the contract is effected under the default rules<sup>14</sup> of such an exchange or clearing house; but head (ii) above applies in relation to the provision of margin in relation to such a contract<sup>15</sup>.

1     le the Insolvency Act 1986 s 178 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 866 et seq), s 186 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 875), s 315 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 472 et seq), and s 345 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 677): see the Companies Act 1989 s 164(1). As to the meaning of 'court' see the Financial Markets and Insolvency Regulations 1991, SI 1991/880, reg 19(1), (3).

2     Companies Act 1989 s 164(1)(a). As to the meaning of 'market contract' see PARA 510.

3     As to the meaning of 'margin' see PARA 509 note 6.

4     Companies Act 1989 s 164(1)(b).

5     le the Insolvency Act 1986 s 127 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 700), s 284 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217): see the Companies Act 1989 s 164(3). See further PARA 529 note 1.

6     Companies Act 1989 s 164(3)(a).

7     Companies Act 1989 s 164(3)(b).

8     Companies Act 1989 s 164(3)(c).

9     Companies Act 1989 s 164(3)(d).

10    For the purposes of the Companies Act 1989 Pt VII (ss 154-191) a person is to be taken to have notice of a matter if he deliberately failed to make inquiries as to that matter in circumstances in which a reasonable and honest person would have done so: s 190(5). This does not apply for the purposes of a provision requiring 'actual notice'.

11    As to the meaning of 'relevant office-holder' see PARA 513 note 7.

12    Companies Act 1989 s 164(4). Any sum recoverable by virtue of s 164(4) ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential debts: s 164(6). See also PARA 513 note 9; and PARA 529 note 1. The provisions of s 164(4)-(6) are disapplied in relation to a designated settlement system: see PARA 525. As to bankruptcy and winding up generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

13 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

14 As to the meaning of 'default rules' see PARA 510 note 5.

15 Companies Act 1989 s 164(5). See also note 12.

## UPDATE

### 518 Disclaimer of property, rescission of contracts, etc

TEXT AND NOTE 4--Head (2) amended so as to also disapply the specified provisions in relation to default fund contribution: Companies Act 1989 s 164(1) (amended by SI 2009/853). As to the meaning of 'default fund contribution' see Companies Act 1989 s 188(3A) (added by SI 2009/853).

TEXT AND NOTES 6-9--Heads (c) and (d) amended so as to include default fund contribution: Companies Act 1989 s 164(3)(c), (d) (amended by SI 2009/853). Add head (ba) the provision of default fund contribution to the exchange or clearing house: Companies Act 1989 s 164(3)(ba) (added by SI 2009/853).

TEXT AND NOTES 12-15--Companies Act 1989 s 164(4), (5) amended in relation to default fund contribution: SI 2009/853.

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### 519. Adjustment of prior transactions.

The following provision applies to (1) a market contract<sup>1</sup> to which a recognised investment exchange or recognised clearing house<sup>2</sup> is a party<sup>3</sup> or which is entered into under its default rules<sup>4</sup>; and (2) a disposition of property in pursuance of such a market contract<sup>5</sup>. No order must be made in relation to a transaction to which this provision applies under certain specified provisions of the Insolvency Act 1986<sup>6</sup>. Where margin<sup>7</sup> is provided in relation to a market contract and (by virtue of head (1) above or otherwise) no such order or decree as is mentioned in the above provision has been, or could be, made in relation to that contract, this provision applies to (a) the provision of the margin<sup>8</sup>; (b) any contract effected by the exchange or clearing house in question for the purpose of realising the property provided as margin<sup>9</sup>; and (c) any disposition of property in accordance with the rules of the exchange or clearing house as to the application of property provided as margin<sup>10</sup>.

1 As to the meaning of 'market contract' see PARA 510.

2 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

3 As to 'party' in relation to a market contract see PARA 509 note 2.

4 Companies Act 1989 s 165(3)(a). As to the meaning of 'default rules' see PARA 510 note 5.

5 Companies Act 1989 s 165(3)(b).

6 I.e. the Insolvency Act 1986 s 238 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 844-845) or s 339 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 654-655)

(transactions at an under-value) (Companies Act 1989 s 165(1)(a)); the Insolvency Act 1986 s 239 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 846 et seq) or s 340 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 656 et seq) (preferences) (Companies Act 1989 s 165(1)(b)); or the Insolvency Act 1986 s 423 (transactions defrauding creditors) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 854) (Companies Act 1989 s 165(1)(c)). See also PARA 513 note 9.

7 As to the meaning of 'margin' see PARA 509 note 6.

8 Companies Act 1989 s 165(4)(a).

9 Companies Act 1989 s 165(4)(b).

10 Companies Act 1989 s 165(4)(c).

## UPDATE

### 519 Adjustment of prior transactions

TEXT AND NOTES 1-6--The provision also applies to (1) the provision of default fund contribution to a recognised investment exchange or recognised clearing house; (2) any contract effected by a recognised investment exchange or recognised clearing house for the purpose of realising the property provided as default fund contribution; and (3) any disposition of property in accordance with the rules of the recognised investment exchange or recognised clearing house as to the application of property provided as default fund contribution: Companies Act 1989 s 165(5) (added by SI 2009/853). As to the meaning of 'default fund contribution' see PARA 518.

TEXT AND NOTE 10--In head (c) after the words 'the exchange or clearing house' add 'in question': Companies Act 1989 s 165(4) (amended by SI 2009/853).

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### 520. Powers of Secretary of State to give directions.

The powers conferred by the following provision are exercisable in relation to a recognised UK<sup>1</sup> investment exchange or recognised UK clearing house<sup>2</sup>. Where in any case an exchange or clearing house has not taken action under its default rules<sup>3</sup> (1) if it appears to the Financial Services Authority<sup>4</sup> that it could take action, the Authority may direct it to do so<sup>5</sup>; and (2) if it appears to the Authority that it is proposing to take or may take action, the Authority may direct it not to do so<sup>6</sup>. Before giving such a direction the Authority must consult the exchange or clearing house in question; and it cannot give a direction unless it is satisfied, in the light of that consultation:

1215 (a) in the case of a direction to take action, that failure to take action would involve undue risk to investors or other participants in the market<sup>7</sup>; or

1216 (b) in the case of a direction not to take action, that the taking of action would be premature or otherwise undesirable in the interests of investors or other participants in the market<sup>8</sup>.

A direction must specify the grounds on which it is given<sup>9</sup>. A direction not to take action may be expressed to have effect until the giving of a further direction (which may be a direction to take action or simply revoking the earlier direction)<sup>10</sup>. No direction must be given not to take action if, in relation to the person in question:

- 1217 (i) a bankruptcy order or an award of sequestration<sup>11</sup> of his estate has been made, or an interim receiver has been appointed; or
- 1218 (ii) a winding up order has been made, a resolution for voluntary winding up has been passed or an administrator, administrative receiver<sup>12</sup> or provisional liquidator has been appointed,

and any previous direction not to take action must cease to have effect on the making or passing of any such order, award or appointment<sup>13</sup>. Where an exchange or clearing house has taken or been directed to take action under its default rules, the Authority may direct it to do or not to do such things (being things which it has power to do under its default rules) as are specified in the direction<sup>14</sup>. The Authority cannot give such a direction unless it is satisfied that the direction will not impede or frustrate the proper and efficient conduct of the default proceedings<sup>15</sup>. A direction under this provision is enforceable, on the application of the Authority, by injunction; and where an exchange or clearing house has not complied with a direction, the court may make such order as it thinks fit for restoring the position to what it would have been if the direction had been complied with<sup>16</sup>.

1 As to the meaning of 'UK' in this context see PARA 511 note 1.

2 Companies Act 1989 s 166(1). As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

3 As to the meaning of 'default rules' see PARA 510 note 5.

4 As to the Financial Services Authority see PARAS 4, 6 et seq.

5 Companies Act 1989 ss 166(2)(a), 190(1) (amended by SI 2001/3649). See also PARA 521 note 14.

6 Companies Act 1989 s 166(2)(b) (amended by SI 2001/3649).

7 Companies Act 1989 s 166(3)(a) (amended by SI 2001/3649).

8 Companies Act 1989 s 166(3)(b) (amended by SI 2001/3649).

9 Companies Act 1989 s 166(4).

10 Companies Act 1989 s 166(5).

11 As to the meaning of 'sequestration' see PARA 512 note 9. As to bankruptcy and winding up generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

12 'Administrative receiver' has the meaning given by the Insolvency Act 1986 s 251 (see **COMPANIES** vol 15 (2009) PARA 1337); Companies Act 1989 s 190(1).

13 Companies Act 1989 s 166(6).

14 Companies Act 1989 s 166(7) (amended by SI 2001/3649).

15 Companies Act 1989 s 166(7) (amended by SI 2001/3649). As to the meaning of 'default proceedings' see PARA 510 note 5.

16 Companies Act 1989 s 166(8) (amended by SI 2001/3649). The functions of the Secretary of State were transferred to the Treasury, by the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315: see art 2(1)(c). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

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## **521. Application to determine whether default proceedings to be taken.**

Where there has been made or passed in relation to a member or designated non-member<sup>1</sup> of a recognised investment exchange or a member of a recognised clearing house<sup>2</sup>:

- 1219 (1) a bankruptcy order or an award of sequestration<sup>3</sup> of his estate, or an order appointing an interim receiver of his property; or
- 1220 (2) an administration<sup>4</sup> or winding up order, a resolution for voluntary winding up or an order appointing a provisional liquidator,

and the exchange or clearing house has not taken action under its default rules<sup>5</sup> in consequence of the order, award or resolution or the matters giving rise to it, a relevant office-holder<sup>6</sup> appointed by, or in consequence of or in connection with, the order, award or resolution may apply to the Financial Services Authority<sup>7</sup>. The application must specify the exchange or clearing house concerned and the grounds on which it is made<sup>8</sup>. On receipt of the application the Authority must notify the exchange or clearing house, and unless within three business days<sup>9</sup> after the day on which the notice is received the exchange or clearing house (a) takes action under its default rules; or (b) notifies the Authority that it proposes to do so forthwith, then, subject as follows, certain specified provisions of the Companies Act 1989<sup>10</sup> do not apply in relation to market contracts<sup>11</sup> to which the member or designated non-member in question is a party<sup>12</sup> or to anything done by the exchange or clearing house for the purposes of, or in connection with, the settlement<sup>13</sup> of any such contract<sup>14</sup>. If the exchange or clearing house notifies the Authority that it proposes to take action under its default rules forthwith, it must do so; and that duty is enforceable, on the application of the Authority, by injunction<sup>15</sup>.

1 As to the meaning of 'designated non-member' see PARA 510 note 5.

2 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

3 As to the meaning of 'sequestration' see PARA 512 note 9. As to bankruptcy and winding up generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

4 In the Companies Act 1989 s 167(1) a reference to an administration order is to be taken to include a reference to the appointment of an administrator under (1) the Insolvency Act 1986 Sch B1 para 14 (appointment by holder of qualifying floating charge) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 228 et seq) (Companies Act 1989 s 167(1A)(a) (s 167(1A) added by the Enterprise Act 2002 s 248(3), Sch 17 paras 43, 46)); or (2) the Insolvency Act 1986 Sch B1 para 22 (appointment by company or directors) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 236 et seq) (Companies Act 1989 s 167(1A)(b) (as so added)).

5 As to the meaning of 'default rules' see PARA 510 note 5.

6 As to the meaning of 'relevant office-holder' see PARA 513 note 7.

7 Companies Act 1989 ss 167(1), 190(1) (amended by SI 2001/3649). As to the Financial Services Authority see PARAS 4, 6 et seq.

8 Companies Act 1989 s 167(2).



9 For this purpose 'business day' means any day which is not a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday in any part of the United Kingdom under the Banking and Financial Dealings Act 1971: Companies Act 1989 s 167(3). As to the meaning of 'United Kingdom' see PARA 2 note 3.

10 In the Companies Act 1989 ss 158-165: see s 167(3).

11 As to the meaning of 'market contract' see PARA 510.

12 As to 'party' in relation to a market contract see PARA 509 note 2.

13 As to 'settlement' in relation to a market contract see PARA 510 note 5.

14 Companies Act 1989 s 167(3) (amended by SI 2001/3649). The provisions of the Companies Act 1989 ss 158-165 are not disapplied if before the end of the period mentioned in s 167(3) the Authority gives the exchange or clearing house a direction under s 166(2)(a) (direction to take action under default rules) (see PARA 520): s 167(4) (amended by SI 2001/3649). No such direction may be given after the end of that period: Companies Act 1989 s 167(4).

15 Companies Act 1989 s 167(5) (amended by SI 2001/3649).

## UPDATE

### 521 Application to determine whether default proceedings to be taken

TEXT AND NOTES 1-7--Companies Act 1989 s 167(1) substituted; s 167(1A), (1B) added: SI 2009/853. The provisions of s 167 apply where a relevant insolvency event has occurred in the case of (1) a recognised investment exchange or a member or designated non-member of a recognised investment exchange; or (2) a recognised clearing house or a member of a recognised clearing house (s 167(1)). A 'relevant insolvency event' occurs where (a) a bankruptcy order is made; (b) an award of sequestration is made; (c) an order appointing an interim receiver is made; (d) an administration or winding up order is made; (e) an administrator is appointed under to the Insolvency Act 1986 Sch B1 para 14 or 22; (f) a resolution for voluntary winding up is passed, or (g) an order appointing a provisional liquidator is made (s 167(1A)). Where in relation to a person in default a recognised investment exchange or a recognised clearing house ('the responsible exchange or clearing house') has power under its default rules to take action in consequence of the relevant insolvency event or the matters giving rise to it, but has not done so, a relevant office-holder appointed in connection with or in consequence of the relevant insolvency event may apply to the Financial Services Authority (s 167(1B)). 'The person in default' means the investment exchange, member, designated non-member or clearing house in whose case a relevant insolvency event has occurred (s 167(1)).

TEXT AND NOTES 8-15--For the words 'exchange or clearing house concerned' substitute 'the responsible exchange or clearing house' (see TEXT AND NOTES 1-7): Companies Act s 167(2)-(5) (amended by SI 2009/853). For the words 'member or designated non-member in question' substitute 'the responsible exchange or clearing house' (see TEXT AND NOTES 1-7): Companies Act 1989 s 167(3) (amended by SI 2009/853).

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### 522. Supplementary provisions.

Certain specified provisions of the Financial Services and Markets Act 2000<sup>1</sup> apply in relation to a failure by a recognised investment exchange or recognised clearing house<sup>2</sup> to comply with an obligation under Part VII of the Companies Act 1989<sup>3</sup> as to a failure to comply with an obligation under the Financial Services and Markets Act 2000<sup>4</sup>. Where the recognition of an investment exchange or clearing house is revoked under the Financial Services and Markets Act 2000<sup>5</sup>, the appropriate authority<sup>6</sup> may, before or after the revocation order, give such directions as it thinks fit with respect to the continued application of the provisions of Part VII of the Companies Act 1989, with such exceptions, additions and adaptations as may be specified in the direction, in relation to cases where a relevant event of any description specified in the directions occurred before the revocation order takes effect<sup>7</sup>. Regulations under the Financial Services and Markets Act 2000<sup>8</sup> (service of notices) may make provision in relation to a notice, direction or other document required or authorised by or under Part VII of the Companies Act 1989 to be given to or served on any person other than the Treasury or the Financial Services Authority<sup>9</sup>.

1    Ie the Financial Services and Markets Act 2000 ss 296, 297: see PARAS 714, 715.

2    As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

3    Ie the Companies Act 1989 Pt VII (ss 154-191): see PARAS 509-521, 523 et seq.

4    Companies Act 1989 s 169(2) (amended by SI 2001/3649).

5    See PARA 715 et seq.

6    'Appropriate authority' means (1) in the case of an overseas investment exchange or clearing house, the Treasury (Companies Act 1989 s 169(3A)(a) (s 169(3A) added by SI 2001/3649)); and (2) in the case of a UK investment exchange or clearing house, the Financial Services Authority (Companies Act 1989 s 169(3A)(b) (as so added)). As to the meaning of 'overseas' see PARA 510 note 4. As to the meaning of 'UK' in this context see PARA 511 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the Financial Services Authority see PARAS 4, 6 et seq.

7    Companies Act 1989 s 169(3) (amended by SI 2001/3649).

8    Ie under the Financial Services and Markets Act 2000 s 414: see PARA 785.

9    Companies Act 1989 s 169(5) (amended by SI 2001/3649).

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### **523. Certain overseas exchanges and clearing houses.**

The Secretary of State<sup>1</sup> and the Treasury may by regulations provide that Part VII of the Companies Act 1989<sup>2</sup> applies in relation to contracts connected with an overseas<sup>3</sup> investment exchange or clearing house which is approved by the Treasury in accordance with such procedures as may be specified in the regulations, as satisfying such requirements as may be so specified, as it applies in relation to contracts connected with a recognised investment exchange or clearing house<sup>4</sup>. The Treasury must not approve an overseas investment exchange or clearing house unless satisfied:

- 1221 (1) that the rules and practices of the body, together with the law of the country in which the body's head office is situated, provide adequate procedures for dealing with the default<sup>5</sup> of persons party<sup>6</sup> to contracts connected with the body<sup>7</sup>; and
- 1222 (2) that it is otherwise appropriate to approve the body<sup>8</sup>.

The regulations may apply in relation to the approval of a body under this provision such of the provisions of the Financial Services and Markets Act 2000 as the Secretary of State considers appropriate<sup>9</sup>. The Secretary of State may make regulations which, in relation to a body which is so approved:

- 1223 (a) apply such of the provisions of the Financial Services and Markets Act 2000 as the Secretary of State considers appropriate; and
- 1224 (b) provide that the provisions of Part VII of the Companies Act 1989 apply with such exceptions, additions and adaptations as appear to the Secretary of State to be necessary or expedient;

and different provision may be made with respect to different bodies or descriptions of body<sup>10</sup>.

Where the regulations apply any provisions of the Financial Services and Markets Act 2000, they may provide that those provisions apply with such exceptions, additions and adaptations as appear to the Secretary of State to be necessary or expedient<sup>11</sup>.

The above provisions may be applied to further descriptions of property in certain circumstances<sup>12</sup>.

1 The functions of the Secretary of State, exercised under the Companies Act 1989 s 170(1) (as amended: see note 4), were transferred to the Treasury, by the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315: see art 2(1)(c). The remainder are to be exercised jointly with the Treasury: see art 4, Sch 2, para 7. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 In the Companies Act 1989 Pt VII (ss 154-191): see PARAS 509-522, 524 et seq.

3 As to the meaning of 'overseas' see PARA 510 note 4.

4 Companies Act 1989 s 170(1) (amended by SI 2001/3649). As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

The Companies Act 1989 s 170 is in force only so far as is necessary for the making of regulations. At the date at which this volume states the law no such regulations had been made.

5 The reference in the Companies Act 1989 s 170(2)(a) to default is to a person being unable to meet his obligations: s 170(3).

6 As to 'party' in relation to a market contract see PARA 509 note 2. As to the meaning of 'market contract' see PARA 510.

7 Companies Act 1989 s 170(2)(a) (s 170(2)(a), (b), (4)-(6) amended by SI 2001/3649).

8 Companies Act 1989 s 170(2)(b) (as amended: see note 7).

9 Companies Act 1989 s 170(4) (as amended: see note 7).

10 Companies Act 1989 s 170(5) (as amended: see note 7).

11 Companies Act 1989 s 170(6) (as amended: see note 7).

12 See PARA 535.

## UPDATE

## 523 Certain overseas exchanges and clearing houses

TEXT AND NOTES 1-4--Companies Act 1989 s 170(1) substituted: SI 2009/853. The Secretary of State and the Treasury may by regulations provide that the Companies Act 1989 Pt VII applies in relation to contracts connected with an overseas investment exchange or overseas clearing house which is not a recognised investment exchange or recognised clearing house, but is approved by the Treasury in accordance with such requirements as may be so specified, as it applies in relation to contracts connected with a recognised investment exchange or recognised clearing house: s 170(1).

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## 524. Settlement arrangements provided by the Bank of England.

The Secretary of State<sup>1</sup> may by regulations provide that Part VII of the Companies Act 1989<sup>2</sup> applies to contracts of any specified description in relation to which settlement<sup>3</sup> arrangements are provided by the Bank of England<sup>4</sup>, as it applies to contracts connected with a recognised investment exchange or recognised clearing house<sup>5</sup>. Regulations under this provision may provide that the provisions of Part VII of the Companies Act 1989 apply with such exceptions, additions and adaptations as appear to the Secretary of State to be necessary or expedient<sup>6</sup>. Before making any regulations under this provision, the Secretary of State and the Treasury must consult the Bank of England<sup>7</sup>.

The above provisions may be applied to further descriptions of property in certain circumstances<sup>8</sup>.

1 The functions of the Secretary of State are to be exercised jointly with the Treasury: see the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, art 4, Sch 2, para 7. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 Ie the Companies Act 1989 Pt VII (ss 154-191): see PARAS 509-523, 527 et seq.

3 As to 'settlement' in relation to a market contract see PARA 510 note 5. As to the meaning of 'market contract' see PARA 510.

4 As to the Bank of England see PARA 793 et seq.

5 Companies Act 1989 s 172(1). As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

The Companies Act 1989 s 172 is in force only so far as is necessary for the making of regulations. At the date at which this volume states the law no such regulations had been made.

6 Companies Act 1989 s 172(2).

7 Companies Act 1989 s 172(3) (amended by SI 1992/1315).

8 See PARA 535.

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## **525. Settlement finality in payment and securities settlement systems.**

Provision is made by regulations implementing certain European legislation<sup>1</sup> on settlement finality and payment systems<sup>2</sup>. The protection afforded by the regulations applies to systems which have been designated by means of a designation order made by the Bank of England or the Financial Services Authority<sup>3</sup>.

Modifications are made to the law of insolvency in so far as it applies to transfer orders effected through a designated system and to collateral security provided in connection with participation in a designated system<sup>4</sup>. In particular, provision is made to the effect that proceedings of a designated system take precedence over general insolvency proceedings<sup>5</sup>. The modifications to the law of insolvency cease to apply to a transfer order which is entered into a designated system after insolvency, unless the transfer order is carried out on the same day as the insolvency and the relevant persons do not have notice of the insolvency at the time of settlement<sup>6</sup>. Certain provisions of the Companies Act 1989<sup>7</sup> are disapplied to a market contract which is also a transfer order effected through a designated system, and a market charge which is also a collateral security charge<sup>8</sup>.

Where a court makes an insolvency order against a participant in a designated system, it must notify both the relevant designated system and the relevant designating authority that such an order has been made<sup>9</sup>.

The law governing the rights of a person as a holder of collateral security when their entitlement is recorded in a register, account or centralised deposit system is specified as the law of the EEA state (or part of the EEA state) where the register, account or centralised deposit system is located<sup>10</sup>. Any other rights or obligations arising from, or in connection with, participation in a system designated under the European Directive are to be governed by the law governing the system<sup>11</sup>. Further provision is made in relation to insolvency proceedings in other jurisdictions<sup>12</sup>, and systems designated in other EEA states or Gibraltar<sup>13</sup>.

1    Ie EC Council and Parliament Directive 98/26 (OJ L166, 19.5.98, p 45) on settlement finality in payment and securities settlement systems.

2    See the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979 (amended by SI 2000/2952; SI 2001/3929; SI 2002/765; SI 2002/1555; SI 2003/2096).

3    As to applications for designation see the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 3. As to the grant or refusal of designation orders see reg 4. Certain requirements must be met for designation to be granted: see reg 4(1), Schedule (amended by SI 2006/50). Certain of those requirements are deemed to have been met by recognised investment exchanges or recognised clearing houses: see reg 6 (amended by SI 2002/1555). As to revocation of designation see the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 7 (amended by SI 2002/1555). As to the Financial Services Authority see PARAS 4, 6 et seq.

Fees may be charged both on application for a designation order, and for the continued designation of a designated system: see the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 5. See also reg 8 (certain undertakings to be treated as institutions), reg 9 (indirect participants in a system treated as participants), reg 10 (amended by SI 2002/1555) (provision of information by designated systems), the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 11 (exemption of designating authority and employees thereof from liability in damages), reg 12 (publication of information and advice by designating authority).

4    See the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, regs 13-19 (amended by SI 2003/2096; SI 2006/50; SI 2007/832).

- 5 See the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 14 (amended by SI 2003/2096; SI 2006/50; SI 2007/832).
- 6 See the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 20.
- 7 See the Companies Act 1989 ss 163(4)-(6), 164(4)-(6), 175(5), (6) (see PARAS 517, 518, 529).
- 8 Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 21 (amended by SI 2006/50).
- 9 See the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 22.
- 10 See the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 23.
- 11 See the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 24 (amended by SI 2006/50).
- 12 See the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 25 (amended by SI 2001/3929; SI 2006/50; SI 2007/1655).
- 13 See the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, SI 1999/2979, reg 26 (amended by SI 2006/50).

## **UPDATE**

### **525 Settlement finality in payment and securities settlement systems**

NOTE 1--Directive 98/26 amended: European Parliament and EC Council Directive 2009/44 (OJ L146, 10.6.2009, p 37).

NOTE 3--SI 1999/2979 reg 6 further amended: SI 2009/1972.

NOTES 4, 5--SI 1999/2979 regs 14-16, 19 amended: SI 2009/1972.

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### **526. Financial collateral arrangements.**

Certain formalities which apply to the creation of guarantees and security do not apply to financial collateral arrangements<sup>1</sup>.

In addition if a security financial collateral arrangement<sup>2</sup> provides for the collateral-taker to use and dispose of any financial collateral provided under the arrangement, as if it were the owner of it, the collateral-taker may do so in accordance with the terms of the arrangement<sup>3</sup>.

If a collateral-taker exercises such a right of use, it is obliged to replace the original financial collateral by transferring equivalent financial collateral on or before the due date for the performance of the relevant financial obligations covered by the arrangement or, if the arrangement so provides, it may set off the value of the equivalent financial collateral against or apply it in discharge of the relevant financial obligations in accordance with the terms of the arrangement<sup>4</sup>. The equivalent financial collateral which is transferred in discharge of an obligation as so described<sup>5</sup>, is subject to the same terms of the security financial collateral arrangement as the original financial collateral was subject to and is treated as having been

provided under the security financial collateral arrangement at the same time as the original financial collateral was first provided<sup>6</sup>.

If a collateral-taker has an outstanding obligation to replace the original financial collateral with equivalent financial collateral when an enforcement event<sup>7</sup> occurs, that obligation may be the subject of a close-out netting provision<sup>8</sup>.

Where a legal or equitable mortgage is the security interest created or arising under a security financial collateral arrangement on terms that include a power for the collateral-taker to appropriate the collateral, the collateral-taker may exercise that power in accordance with the terms of the security financial collateral arrangement, without any order for foreclosure from the courts<sup>9</sup>.

Where a collateral-taker exercises a power contained in a security financial collateral arrangement to appropriate the financial collateral the collateral-taker must value the financial collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner<sup>10</sup>.

Where a collateral-taker exercises such a power and the value of the financial collateral appropriated differs from the amount of the relevant financial obligations, then as the case may be, either (1) the collateral-taker must account to the collateral-provider for the amount by which the value of the financial collateral exceeds the relevant financial obligations<sup>11</sup>; or (2) the collateral-provider will remain liable to the collateral-taker for any amount whereby the value of the financial collateral is less than the relevant financial obligations<sup>12</sup>.

1 See the Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 4. 'Financial collateral arrangement' means a title transfer financial collateral arrangement or a security financial collateral arrangement, whether or not these are covered by a master agreement or general terms and conditions: reg 3.

'Title transfer financial collateral arrangement' means an agreement or arrangement, including a repurchase agreement, evidenced in writing, where (1) the purpose of the agreement or arrangement is to secure or otherwise cover the relevant financial obligations owed to the collateral-taker; (2) the collateral-provider transfers legal and beneficial ownership in financial collateral to a collateral-taker on terms that when the relevant financial obligations are discharged the collateral-taker must transfer legal and beneficial ownership of equivalent financial collateral to the collateral-provider; and (3) the collateral-provider and the collateral-taker are both non-natural persons: reg 3. 'Relevant financial obligations' means the obligations which are secured or otherwise covered by a financial collateral arrangement, and such obligations may consist of or include present or future, actual or contingent or prospective obligations (including such obligations arising under a master agreement or similar arrangement; obligations owed to the collateral-taker by a person other than the collateral-provider; obligations of a specified class or kind arising from time to time: reg 3. 'Security financial collateral arrangement' means an agreement or arrangement, evidenced in writing, where: (a) the purpose of the agreement or arrangement is to secure the relevant financial obligations owed to the collateral-taker; (b) the collateral-provider creates or there arises a security interest in financial collateral to secure those obligations; (c) the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; any right of the collateral-provider to substitute equivalent financial collateral or withdraw excess financial collateral does not prevent the financial collateral being in the possession or under the control of the collateral-taker; and (d) the collateral-provider and the collateral-taker are both non-natural persons: Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 3.

'Security interest' means any legal or equitable interest or any right in security, other than a title transfer financial collateral arrangement, created or otherwise arising by way of security including (i) a pledge; (ii) a mortgage; (iii) a fixed charge; (iv) a charge created as a floating charge where the financial collateral charged is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; any right of the collateral-provider to substitute equivalent financial collateral or withdraw excess financial collateral does not prevent the financial collateral being in the possession or under the control of the collateral-taker; or (v) a lien: reg 3.

'Financial collateral' means either cash or financial instruments: reg 3. 'Cash' means money in any currency, credited to an account, or a similar claim for repayment of money and includes money market deposits and sums due or payable to, or received between the parties in connection with the operation of a financial collateral arrangement or a close-out netting provision: reg 3.

'Financial instruments' means (A) shares in companies and other securities equivalent to shares in companies; (B) bonds and other forms of instruments giving rise to or acknowledging indebtedness if these are tradeable on

the capital market; and (c) any other securities which are normally dealt in and which give the right to acquire any such shares, bonds, instruments or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment); and includes units of a collective investment scheme within the meaning of the Financial Services and Markets Act 2000 (see PARA 603), eligible debt securities within the meaning of the Uncertificated Securities Regulations 2001, SI 2001/3755 (see **COMPANIES** vol 14 (2009) PARA 421 et seq), money market instruments, claims relating to or rights in or in respect of any of the financial instruments included in this definition and any rights, privileges or benefits attached to or arising from any such financial instruments: Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 3.

'Close-out netting provision' means a term of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, or any legislative provision under which on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise (aa) the obligations of the parties are accelerated to become immediately due and expressed as an obligation to pay an amount representing the original obligation's estimated current value or replacement cost, or are terminated and replaced by an obligation to pay such an amount; or (bb) an account is taken of what is due from each party to the other in respect of such obligations and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party: reg 3.

'Equivalent financial collateral' means firstly in relation to cash, a payment of the same amount and in the same currency; and secondly in relation to financial instruments, financial instruments of the same issuer or debtor, forming part of the same issue or class and of the same nominal amount, currency and description or, where the financial collateral arrangement provides for the transfer of other assets following the occurrence of any event relating to or affecting any financial instruments provided as financial collateral, those other assets; and the expression includes the original financial collateral provided under the arrangement: reg 3.

'Non-natural person' means any corporate body, unincorporated firm, partnership or body with legal personality except an individual, including any such entity constituted under the law of a country or territory outside the United Kingdom or any such entity constituted under international law: reg 3. As to the meaning of 'United Kingdom' see PARA 2 note 3.

In particular the following provisions are rendered inapplicable: the Statute of Frauds (1677) s 4 (which prohibits an action on a guarantee unless in writing and signed by the defendant) (see PARA 1052); the Law of Property Act 1925 s 53(1)(c) (requiring a disposition of an equitable interest to be in writing and signed) (see PARA 1622); the Companies Act 1985 s 395 (prospectively repealed) (providing that certain charges are void unless registered) (see **COMPANIES** vol 15 (2009) PARA 1296 et seq) (as to replacement provisions see the Companies Act 2006 ss 860(1), 861(5), 870(1), 874); and the Industrial and Provident Societies Act 1967 s 4 (requiring late filing of certain information) (see PARA 2454): see the Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 4(1)-(2), (4)-(5).

2 As to the meaning of 'security financial collateral arrangement see note 1.

3 Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 16(1).

4 Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 16(2).

5 Ie in the Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 16(2).

6 Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 16(3).

7 'Enforcement event' means an event of default, or any similar event as agreed between the parties, on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the collateral-taker is entitled to realise or appropriate financial collateral or a close-out netting provision comes into effect: Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 3.

8 Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 16(4).

9 Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 17.

10 Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 18(1).

11 Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 18(2)(a).

12 Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 18(2)(b).

## UPDATE

### 526 Financial collateral arrangements



TEXT AND NOTES--As from a day to be appointed, the Treasury may make regulations about financial collateral arrangements: Banking Act 2009 s 255(1). 'Financial collateral arrangements' are arrangements under which financial collateral is used as security in respect of a loan or other liability; and for that purpose (1) collateral may be in cash, securities or any other form; (2) use as security may involve transfer of the collateral or the creation or transfer of any kind of right, interest or charge (fixed or floating) in respect of it; and (3) in particular, use as security can include use under arrangements of a kind described commercially as 'title transfer financial collateral arrangements': Banking Act 2009 s 255(2). The regulations may make any provision that the Treasury thinks necessary or desirable for the purpose of, or in connection with, implementation of the European Parliament and EC Council Directive 2002/47 (but are not restricted to provision required in connection with Directive 2002/47), and may make any provision that the Treasury thinks necessary or desirable for the purpose of enabling financial collateral arrangements, irrespective of whether they have an international element, to be commercially useful and effective: Banking Act 2009 s 255(3). The regulations may do anything done or purported to be done by SI 2003/3226: Banking Act 2009 s 255(5)(a). See further the Banking Act 2009 s 256.

NOTE 3--The application of the Law of Property Act 1925 s 53(1)(c) to dispositions of units in unit trust schemes is modified so as to make transfers of such units possible by electronic communication: see Unit Trusts (Electronic Communications) Order 2009, SI 2009/555.

NOTE 9--See *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2009] UKPC 19, [2009] 3 All ER 849 (commercial practicalities require that there should be an overt act evincing the intention to exercise a power of appropriation, communicated to the collateral-provider).

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## 527. Market charges.

In Part VII of the Companies Act 1989<sup>1</sup> 'market charge' means a charge<sup>2</sup>, whether fixed or floating, granted:

- 1225 (1) in favour of a recognised investment exchange<sup>3</sup>, for the purpose of securing debts or liabilities arising in connection with the settlement<sup>4</sup> of market contracts<sup>5</sup>;
- 1226 (2) in favour of The Stock Exchange<sup>6</sup>, for the purpose of securing debts or liabilities arising in connection with short term certificates<sup>7</sup>;
- 1227 (3) in favour of a recognised clearing house<sup>8</sup>, for the purpose of securing debts or liabilities arising in connection with their ensuring the performance of market contracts<sup>9</sup>; or
- 1228 (4) in favour of a person who agrees to make payments as a result of the transfer<sup>10</sup> or allotment of specified securities<sup>11</sup> made through the medium of a computer-based system established by the Bank of England and The Stock Exchange, for the purpose of securing debts or liabilities of the transferee or allottee arising in connection therewith<sup>12</sup>.

Where a charge is granted partly for purposes specified in head (1), (2), (3) or (4) above and partly for other purposes, it is a 'market charge' so far as it has effect for the specified purposes<sup>13</sup>. The Secretary of State<sup>14</sup> may by regulations make further provision as to the charges granted in favour of any such person as is mentioned in head (1), (2) or (3) above which are to be treated as 'market charges' for the purposes of Part VII; and the regulations may add to, amend or repeal the above provisions<sup>15</sup>. The regulations may provide that a charge must or must not be treated as a market charge if or to the extent that it secures obligations of a specified description, is a charge over property of a specified description or contains provisions of a specified description<sup>16</sup>. Before making such regulations in relation to charges granted in favour of a person within head (3) above the Secretary of State and the Treasury must consult the Bank of England<sup>17</sup>.

1    Ie the Companies Act 1989 Pt VII (ss 154-191): see PARAS 509-524, 528 et seq.

2    As to the meaning of 'charge' see PARA 509 note 4.

3    As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

4    As to 'settlement' in relation to a market contract see PARA 510 note 5. As to the meaning of 'market contract' see PARA 510.

5    Companies Act 1989 s 173(1)(a).

6    'The Stock Exchange' means the London Stock Exchange Limited: Companies Act 1989 s 190(1) (definition substituted by SI 2001/3649). See also PARA 75.

7    Companies Act 1989 s 173(1)(aa) (added by SI 1991/880). 'Short term certificate' means an instrument issued by The Stock Exchange undertaking to procure the transfer of property of a value and description specified in the instrument to or to the order of the person to whom the instrument is issued or his endorsee or to a person acting on behalf of either of them and also undertaking to make appropriate payments in cash, in the event that the obligation to procure the transfer of property cannot be discharged in whole or in part: Companies Act 1989 s 173(3) (amended by SI 1991/880).

8    See note 3.

9    Companies Act 1989 s 173(1)(b).

10   'Transfer', in relation to any such securities or right, means a transfer of the beneficial interest: Companies Act 1989 s 173(3) (amended by SI 1991/880).

11   'Specified securities' means securities for the time being specified in the list in the Stock Transfer Act 1982 Sch 1 (see **COMPANIES** vol 14 (2009) PARA 430), and includes any right to such securities: Companies Act 1989 s 173(3) (amended by SI 1991/880).

12   Companies Act 1989 s 173(1)(c) (amended by SI 1991/880). As to the Bank of England see PARA 793 et seq.

13   Companies Act 1989 s 173(2) (amended by SI 1991/880).

14   The functions of the Secretary of State are to be exercised jointly with the Treasury: see the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, art 4, Sch 2, para 7. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

15   Companies Act 1989 s 173(4). See the Financial Markets and Insolvency Regulations 1991, SI 1991/880, regs 7, 8, 10-13 (regs 7, 12 amended by SI 1999/1209).

16   Companies Act 1989 s 173(5); and see note 15.

17   Companies Act 1989 s 173(6) (amended by SI 1992/1315).

## UPDATE

### 527 Market charges

NOTE 15--SI 1991/880 reg 7 further amended; regs 10, 11 amended: SI 2009/853.

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## **528. Modifications of the law of insolvency.**

The general law of insolvency<sup>1</sup> has effect in relation to market charges<sup>2</sup> and action taken in enforcing them<sup>3</sup>. The Secretary of State<sup>4</sup> may by regulations make further provision modifying the law of insolvency in relation to the matters mentioned above<sup>5</sup>. The regulations may add to, amend or repeal the provisions mentioned above, and any other provision of Part VII of the Companies Act 1989<sup>6</sup> as it applies for the purposes of those provisions, or provide that those provisions have effect with such exceptions, additions or adaptations as are specified in the regulations<sup>7</sup>. The regulations may make different provision for cases defined by reference to the nature of the charge, the nature of the property subject to it, the circumstances, nature or extent of the obligations secured by it or any other relevant factor<sup>8</sup>.

1 As to references to the law of insolvency see PARA 512 note 2.

2 As to the meaning of 'market charge' see PARA 527. As to the meaning of 'charge' see PARA 509 note 4.

3 In subject to the provisions of the Companies Act 1989 s 175 (see PARA 529): see s 174(1).

4 The functions of the Secretary of State are to be exercised jointly with the Treasury: see the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, art 4, Sch 2, para 7. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 Companies Act 1989 s 174(2). See the Financial Markets and Insolvency Regulations 1991, SI 1991/880, regs 7, 14, 15 (amended by SI 1999/1209; SI 2003/2096).

6 In the Companies Act 1989 Pt VII (ss 154-191): see PARAS 509 et seq, 529 et seq.

7 Companies Act 1989 s 174(3).

8 Companies Act 1989 s 174(4). Before making regulations under this provision in relation to charges granted in favour of a person within s 173(1)(c) (see PARA 527), the Secretary of State and the Treasury must consult the Bank of England: s 174(5) (amended by SI 1992/1315).

## **UPDATE**

## **528 Modifications of the law of insolvency**

NOTE 5--SI 1991/880 reg 7 further amended: SI 2009/853.

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## 529. Administration orders, etc.

Certain specified provisions of the Insolvency Act 1986 do not apply in relation to a market charge<sup>1</sup>. However, where a market charge falls to be enforced after the occurrence of an event to which the following provision applies, and there exists another charge over some or all of the same property ranking in priority to or *pari passu* with the market charge, on the application of any person interested the court may order that there must be taken after enforcement of the market charge such steps as the court may direct for the purpose of ensuring that the chargee under the other charge is not prejudiced by the enforcement of the market charge<sup>2</sup>. This provision applies to (1) making an administration application<sup>3</sup>; (2) appointing an administrator<sup>4</sup>; (3) filing with the court a copy of notice of intention to appoint an administrator<sup>5</sup>.

1 In the Insolvency Act 1986 s 43 (power of administrative receiver to dispose of charged property) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 398), Sch B1 para 41(2) (receiver to vacate office at request of administrator) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 262), Sch B1 para 43(2), (3) (restriction on enforcement of security or repossession of goods) (including that provision as applied by Sch B1 para 44 (interim moratorium)) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 231, 239, 263), Sch B1 paras 70, 71, 72 (power of administrator to deal with charged or hire-purchase property) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 357 et seq): see the Companies Act 1989 s 175(1), (1A), (3) (s 175(1), (1A) substituted and added by the Enterprise Act 2002, s 248(3), Sch 17 paras 43, 47(1), (2)). Certain further provisions of the Insolvency Act 1986 (ie s 127, s 284 (avoidance of property dispositions effected after commencement of winding up or presentation of bankruptcy petition) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 700 et seq)) do not apply to a disposition of property as a result of which the property becomes subject to a market charge or any transaction pursuant to which that disposition is made: Companies Act 1989 s 175(4). However, if a person (other than the chargee under the market charge) who is party to a disposition mentioned in s 175(4) has notice at the time of the disposition that a petition has been presented for the winding up or bankruptcy or sequestration of the estate of the party making the disposition, the value of any profit to him arising from the disposition is recoverable from him by the relevant office-holder unless the court directs otherwise: s 175(5). As to the meaning of 'sequestration' see PARA 512 note 9. As to bankruptcy and winding up generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**; **COMPANY AND PARTNERSHIP INSOLVENCY**. As to the meaning of 'relevant office-holder' see PARA 513 note 7. Any sum recoverable by virtue of s 175(5) ranks for priority, in the event of the insolvency of the person from whom it is due, immediately before preferential debts: s 175(6). In a case falling within both s 175(4) (as a disposition of property as a result of which the property becomes subject to a market charge) and s 164(3) (see PARA 518) (as the provision of margin in relation to a market contract), s 164(4) (see PARA 518) applies with respect to the recovery of the amount or value of the margin and s 175(5) does not apply: s 175(7). As to the meaning of 'court' see the Financial Markets and Insolvency Regulations 1991, SI 1991/880, reg 19(1), (3).

The provisions of the Companies Act 1989 s 175(5), (6) are disapplied in relation to a designated settlement system: see PARA 525.

2 Companies Act 1989 s 175(2) (amended by SI 1991/880; and the Enterprise Act 2002 Sch 17 paras 43, 47(1), (2)).

3 In the Insolvency Act 1986 Sch B1 para 12 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 221): see the Companies Act 1989 s 175(2A)(a) (s 175(2A) added by the Enterprise Act 2002 Sch 17 paras 43, 47(1), (2)). As to the meaning of 'court' in the text and notes 2, 4-5 see the Financial Markets and Insolvency Regulations 1991, SI 1991/880, reg 19(2) (amended by SI 2003/2096).

4 In the Insolvency Act 1986 Sch B1 para 14 or 22 (appointment by floating charge holder, company or directors) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 228 et seq, 236 et seq): see the Companies Act 1989 s 175(2A)(b) (as added: see note 3).

5 In the Insolvency Act 1986 Sch B1 para 14 or 22 (appointment by floating charge holder, company or directors) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 228 et seq, 236 et seq): see the Companies Act 1989 s 175(2A)(c) (as added: see note 3).

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### **530. Power to make provision about certain other charges.**

The Secretary of State<sup>1</sup> may by regulations provide that the general law of insolvency<sup>2</sup> has effect in relation to charges<sup>3</sup> of such descriptions as may be specified in the regulations, and action taken in enforcing them, subject to such provisions as may be specified in the regulations<sup>4</sup>. The regulations may specify any description of charge granted in favour of:

- 1229 (1) an approved body<sup>5</sup>;
- 1230 (2) a person included in the list maintained by the Financial Services Authority for certain specified purposes of the Financial Services and Markets Act 2000<sup>6</sup>;
- 1231 (3) the Bank of England<sup>7</sup>;
- 1232 (4) a person who has permission under Part 4 of the Financial Services and Markets Act 2000<sup>8</sup> to carry on a relevant regulated activity<sup>9</sup>; or
- 1233 (5) an international securities self-regulating organisation approved for the purposes of an order made under the Financial Services and Markets Act 2000<sup>10</sup>,

for the purpose of securing debts or liabilities arising in connection with or as a result of the settlement<sup>11</sup> of contracts or the transfer of assets, rights or interests on a financial market<sup>12</sup>. The regulations may specify any description of charge granted for that purpose in favour of any other person in connection with exchange facilities or clearing services provided by a recognised investment exchange or recognised clearing house<sup>13</sup> or by any such body, person, authority or organisation as is mentioned in the above provision<sup>14</sup>. Where a charge is granted partly for the purpose specified above<sup>15</sup> and partly for other purposes, the power conferred by this provision is exercisable in relation to the charge so far as it has effect for that purpose<sup>16</sup>. The regulations may make the same or similar provision in relation to the charges to which they apply as is made in relation to market charges<sup>17</sup>, or apply specified provisions<sup>18</sup> with such exceptions, additions or adaptations as are specified in the regulations<sup>19</sup>. Before making such regulations relating to a description of charges defined by reference to their being granted in favour of a person included in the list maintained by the Authority<sup>20</sup>, or in connection with exchange facilities or clearing services provided by a person included in that list, the Secretary of State and the Treasury must consult the Authority and the Bank of England<sup>21</sup>. Before making such regulations relating to a description of charges defined by reference to their being granted in favour of the Bank of England, or in connection with settlement arrangements provided by the Bank, the Secretary of State and the Treasury must consult the Bank<sup>22</sup>. Regulations under this section may provide that they apply or do not apply to a charge if or to the extent that it secures obligations of a specified description, is a charge over property of a specified description or contains provisions of a specified description<sup>23</sup>.

The above provisions may be applied to further descriptions of property in certain circumstances<sup>24</sup>.

1 The functions of the Secretary of State are to be exercised jointly with the Treasury: see the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, art 4, Sch 2, para 7. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to references to the law of insolvency see PARA 512 note 2.

3 As to the meaning of 'charge' see PARA 509 note 4.

4 Companies Act 1989 s 176(1). At the date at which this volume states the law no such regulations had been made.

5     Ie under the Companies Act 1989 s 170 (certain overseas exchanges and clearing houses) (see PARA 523): see s 176(2)(a).

6     Ie for the purposes of the Financial Services and Markets Act 2000 s 301 (certain money market institutions) (see PARA 720): see the Companies Act 1989 s 176(2)(b) (amended by the Bank of England Act 1998 s 23(1), Sch 5 para 48(2); and SI 2001/3649). As to the Financial Services Authority see PARAS 4, 6 et seq.

7     See the Companies Act 1989 s 176(2)(c). As to the Bank of England see PARA 793 et seq.

8     Ie the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see the Companies Act 1989 s 176(2)(d) (substituted by SI 2001/3649).

9     For the purposes of the Companies Act 1989 s 176(2)(d), 'relevant regulated activity' means:

522     (1)   dealing in investments as principal or as agent (s 176(8)(a) (s 176(8)(a), (b), (c)-(f) added by SI 2001/3649));

523     (2)   arranging deals in investments (Companies Act 1989 s 176(8)(b) (as so added));

524     (3)   operating a multilateral trading facility (s 176(8)(ba) (added SI 2006/3384));

525     (4)   managing investments (Companies Act 1989 s 176(8)(c) (as so added));

526     (5)   safeguarding and administering investments (s 176(8)(d) (as so added));

527     (6)   sending dematerialised instructions (s 176(8)(e) (as so added)); or

528     (7)   establishing etc a collective investment scheme (s 176(8)(f) (as so added)).

Section 176(8) must be read with: (a) the Financial Services and Markets Act 2000 s 22 (see PARA 84); (b) any relevant order under s 22; and (c) Sch 2 (see PARAS 84, 85): Companies Act 1989 s 176(9) (added by SI 2001/3649).

10    Ie the Financial Services and Markets Act 2000 s 22 (see PARA 84): see the Companies Act 1989 s 176(2)(e) (substituted by SI 2001/3649).

11    As to 'settlement' in relation to a market contract see PARA 510 note 5. As to the meaning of 'market contract' see PARA 510.

12    Companies Act 1989 s 176(2).

13    As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

14    Companies Act 1989 s 176(3).

15    Ie in the Companies Act 1989 s 176(2).

16    Companies Act 1989 s 176(4).

17    Ie by or under the Companies Act 1989 s 174 (see PARA 528), s 175 (see PARA 529): see s 176(5)(a). As to the meaning of 'market charge' see PARA 527.

18    Ie the Companies Act 1989 s 174 (see PARA 528), s 175 (see PARA 529): see s 176(5)(b).

19    Companies Act 1989 s 176(5)(b).

20    Ie for the purposes of the Financial Services and Markets Act 2000 s 301: see PARA 720.

21    Companies Act 1989 s 176(6) (substituted by the Bank of England Act 1998 s 23(1), Sch 5 para 48(3); and amended by SI 2001/3649).

22    Companies Act 1989 s 176(6A) (added by the Bank of England Act 1998 Sch 5 para 48(3)).

23    Companies Act 1989 s 176(7).

24    See PARA 535.

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### **531. Application of margin not affected by certain other interests.**

The following provisions have effect with respect to the application by a recognised investment exchange or recognised clearing house<sup>1</sup> of property (other than land) held by the exchange or clearing house as margin<sup>2</sup> in relation to a market contract<sup>3</sup>. So far as necessary to enable the property to be applied in accordance with the rules of the exchange or clearing house, it may be so applied notwithstanding any prior equitable interest or right, or any right or remedy arising from a breach of fiduciary duty, unless the exchange or clearing house had notice of the interest, right or breach of duty at the time the property was provided as margin<sup>4</sup>. No right or remedy arising subsequently to the property being provided as margin may be enforced so as to prevent or interfere with the application of the property by the exchange or clearing house in accordance with its rules<sup>5</sup>. Where an exchange or clearing house has power by virtue of the above provisions to apply property notwithstanding an interest, right or remedy, a person to whom the exchange or clearing house disposes of the property in accordance with its rules takes free from that interest, right or remedy<sup>6</sup>.

The above provisions may be applied to further descriptions of property in certain circumstances<sup>7</sup>.

1 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

2 As to the meaning of 'margin' see PARA 509 note 6.

3 Companies Act 1989 s 177(1). As to the meaning of 'market contract' see PARA 510.

4 Companies Act 1989 s 177(2).

5 Companies Act 1989 s 177(3).

6 Companies Act 1989 s 177(4).

7 See PARA 535.

### **UPDATE**

### **531 Application of margin not affected by certain other interests**

TEXT AND NOTES 1-5--Companies Act 1989 s 177(1)-(3) amended so as to also apply the provisions with respect to the application of property in relation to default fund contribution: SI 2009/853. As to the meaning of 'default fund contribution' see PARA 518.

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Insolvency/I. FINANCIAL MARKETS AND INSOLVENCY/532. Priority of floating market charge over subsequent charges.

### **532. Priority of floating market charge over subsequent charges.**

The Secretary of State<sup>1</sup> may by regulations provide that a market charge<sup>2</sup> which is a floating charge has priority over a charge subsequently created or arising, including a fixed charge<sup>3</sup>. The regulations may make different provision for cases defined, as regards the market charge or the subsequent charge, by reference to the description of charge, its terms, the circumstances in which it is created or arises, the nature of the charge, the person in favour of whom it is granted or arises or any other relevant factor<sup>4</sup>.

The above provisions may be applied to further descriptions of property in certain circumstances<sup>5</sup>.

1 The functions of the Secretary of State were transferred to the Treasury, by the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, art 2(1)(c). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the meaning of 'market charge' see PARA 527. As to the meaning of 'charge' see PARA 509 note 4.

3 Companies Act 1989 s 178(1). Section 178 is in force only so far as is necessary for the making of regulations. At the date at which this volume states the law no such regulations had been made.

4 Companies Act 1989 s 178(2).

5 See PARA 535.

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### **533. Priority of market charge over unpaid vendor's lien.**

Where property subject to an unpaid vendor's lien<sup>1</sup> becomes subject to a market charge<sup>2</sup>, the charge has priority over the lien unless the chargee had actual notice<sup>3</sup> of the lien at the time the property became subject to the charge<sup>4</sup>.

The above provisions may be applied to further descriptions of property in certain circumstances<sup>5</sup>.

1 As to the unpaid vendor's lien see **LIEN** vol 68 (2008) PARA 859 et seq.

2 As to the meaning of 'market charge' see PARA 527. As to the meaning of 'charge' see PARA 509 note 4.

3 As to notice see PARA 518 note 10.

4 Companies Act 1989 s 179.

5 See PARA 535.



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### 534. Proceedings against market property by unsecured creditors.

Where property (other than land) is held by a recognised investment exchange or recognised clearing house<sup>1</sup> as margin<sup>2</sup> in relation to market contracts<sup>3</sup> or is subject to a market charge<sup>4</sup>, no execution or other legal process for the enforcement of a judgment or order may be commenced or continued, and no distress may be levied, against the property by a person not seeking to enforce any interest in or security over the property, except with the consent of<sup>5</sup>:

- 1234 (1) in the case of property provided as cover for margin, the investment exchange or clearing house in question<sup>6</sup>; or
- 1235 (2) in the case of property subject to a market charge, the person in whose favour the charge was granted<sup>7</sup>.

Where consent is given the proceedings may be commenced or continued notwithstanding any provision of the Insolvency Act 1986<sup>8</sup>. Where by virtue of this provision a person would not be entitled to enforce a judgment or order against any property, any injunction or other remedy granted with a view to facilitating the enforcement of any such judgment or order cannot extend to that property<sup>9</sup>.

The above provisions may be applied to further descriptions of property in certain circumstances<sup>10</sup>.

1 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

2 As to the meaning of 'margin' see PARA 509 note 6.

3 As to the meaning of 'market contract' see PARA 510.

4 As to the meaning of 'market charge' see PARA 527. As to the meaning of 'charge' see PARA 509 note 4.

5 Companies Act 1989 s 180(1). As to distress and execution and enforcement see generally **DISTRESS; EXECUTION**.

As from a day to be appointed, s 180(1) is amended by the addition, after the reference to no distress being levied, of a reference to no power to use the procedure in the Tribunals, Courts and Enforcement Act 2007 Sch 12 (taking control of goods) being exercised: Companies Act 1989 s 180(1) (prospectively amended by the Tribunals, Courts and Enforcement Act 2007 s 62(3), Sch 13 para 91). At the date at which this volume states the law no such day had been appointed.

6 Companies Act 1989 s 180(1)(a).

7 Companies Act 1989 s 180(1)(b).

8 Companies Act 1989 s 180(2). As to the Insolvency Act 1986 see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**.

9 Companies Act 1989 s 180(3).

10 See PARA 535.

### UPDATE

### **534 Proceedings against market property by unsecured creditors**

TEXT AND NOTES 1-7--After the words 'as margin in relation to market contracts' add 'or as default fund contribution'; in head (1) after the words 'for margin' add 'or as default fund contribution': Companies Act 1989 s 180(1) (amended by SI 2009/853). As to the meaning of 'default fund contribution' see PARA 518.

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### **535. Power to apply provisions to other cases.**

A power to which this provision applies<sup>1</sup> includes the power to apply certain specified provisions of the Companies Act 1989<sup>2</sup> to any description of property provided as cover for margin<sup>3</sup> in relation to contracts in relation to which the power is exercised or, as the case may be, property subject to charges<sup>4</sup> in relation to which the power is exercised<sup>5</sup>.

1 The Companies Act 1989 s 181(1) applies to the powers of the Secretary of State and the Treasury to act jointly under (1) s 170 (see PARA 523), s 172 (see PARA 524) and s 176 (see PARA 530); and (2) the Financial Services and Markets Act 2000 s 301 (supervision of certain contracts) (see PARA 720): Companies Act 1989 s 180(3) (added by SI 2001/3649). The functions of the Secretary of State are to be exercised jointly with the Treasury: see the Transfer of Functions (Financial Services) Order 1992, SI 1992/1315, art 4, Sch 2, para 7. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 I.e. the Companies Act 1989 ss 177-180: see PARAS 531-534.

3 As to 'cover for margin' see PARA 509 note 6.

4 As to the meaning of 'charge' see PARA 509 note 4.

5 Companies Act 1989 s 181(1) (amended by SI 2001/3649). The regulations may provide that the Companies Act 1989 ss 177-180 (see PARAS 531-534) apply with such exceptions, additions and adaptations as may be specified in the regulations: s 181(2). At the date at which this volume states the law no such regulations had been made.

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### **536. Powers of court in relation to certain proceedings begun before commencement.**

The powers conferred by this provision are exercisable by the court where insolvency proceedings<sup>1</sup> in respect of (1) a member of a recognised investment exchange or a recognised clearing house<sup>2</sup>; or (2) a person by whom a market charge<sup>3</sup> has been granted, are begun<sup>4</sup> on or after 22 December 1988 and before the commencement of this provision<sup>5</sup>. That person is referred to in this provision as the 'relevant person'<sup>6</sup>. This provision applies in relation to the

administration of the insolvent estate of a deceased person as it applies in relation to insolvency proceedings<sup>7</sup>. In such a case references to the beginning of the proceedings must be construed as references to the death of the relevant person<sup>8</sup>.

The court may on an application made, within three months after the commencement of this provision, by (a) a recognised investment exchange or recognised clearing house; or (b) a person in whose favour a market charge has been granted, make such order as it thinks fit for achieving, except so far as assets of the relevant person have been distributed before the making of the application, the same result as if certain specified provisions<sup>9</sup> had come into force on 22 December 1988<sup>10</sup>. The court may in particular:

- 1236 (i) require the relevant person or a relevant office-holder<sup>11</sup>;
- 94 163. (A) to return property provided as cover for margin<sup>12</sup> or which was subject to a market charge, or to pay to the applicant or any other person the proceeds of realisation of such property<sup>13</sup>; or
164. (B) to pay to the applicant or any other person such amount as the court estimates would have been payable to that person if the relevant provisions had come into force on 22 December 1988 and market contracts had been settled<sup>14</sup> in accordance with the rules of the recognised investment exchange or recognised clearing house, or a proportion of that amount if the property of the relevant person or relevant office-holder is not sufficient to meet the amount in full<sup>15</sup>;
- 95 1237 (ii) provide that contracts, rules and dispositions must be treated as not having been void<sup>16</sup>;
- 1238 (iii) modify the functions of a relevant office-holder, or the duties of the applicant or any other person, in relation to the insolvency proceedings, or indemnify any such person in respect of acts or omissions which would have been proper if the relevant provisions had been in force<sup>17</sup>;
- 1239 (iv) provide that conduct which constituted an offence be treated as not having done so<sup>18</sup>;
- 1240 (v) dismiss proceedings which could not have been brought if the relevant provisions had come into force on 22 December 1988, and reverse the effect of any order of a court which could not, or would not, have been made if those provisions had come into force on that date<sup>19</sup>.

An order under this provision cannot be made against a relevant office-holder if the effect would be that his remuneration, costs and expenses could not be met<sup>20</sup>.

1 For the purposes of the Companies Act 1989 s 182 'insolvency proceedings' means proceedings under the Insolvency Act 1986 Pt II (s 8), Pt IV (ss 73-219), Pt V (ss 220-229) or Pt IX (ss 264-371) (administration, winding up and bankruptcy) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**); and references in the Companies Act 1989 s 182 to the beginning of such proceedings are to: (1) the presentation of a petition on which an administration order, winding-up order, bankruptcy order or award of sequestration is made; or (2) the passing of a resolution for voluntary winding up: s 182(2).

As to the meaning of 'sequestration' see PARA 512 note 9. As to bankruptcy and winding up generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**. As to the meaning of 'court' see the Financial Markets and Insolvency Regulations 1991, SI 1991/880, reg 19(1), (3).

2 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

3 As to the meaning of 'market charge' see PARA 527. As to the meaning of 'charge' see PARA 509 note 4.

4 See note 1.

5 Companies Act 1989 s 182(1).

- 6 Companies Act 1989 s 182(1).
- 7 Companies Act 1989 s 182(3).
- 8 Companies Act 1989 s 182(3).
- 9 In the Companies Act 1989 Sch 22 (repealed): see s 182(4). Those provisions (the 'relevant provisions') reproduced the effect of certain provisions of Part VII (ss 154-191) as they appeared in the Bill for the Act as introduced into the House of Lords and published on that date: see s 182(5).
- 10 Companies Act 1989 s 182(4).
- 11 As to the meaning of 'relevant office-holder' see PARA 513 note 7.
- 12 As to 'cover for margin' see PARA 509 note 6.
- 13 Companies Act 1989 s 182(6)(a)(i).
- 14 As to 'settlement' in relation to a market contract see PARA 510 note 5.
- 15 Companies Act 1989 s 182(6)(a)(ii).
- 16 Companies Act 1989 s 182(6)(b).
- 17 Companies Act 1989 s 182(6)(c).
- 18 Companies Act 1989 s 182(6)(d).
- 19 Companies Act 1989 s 182(6)(e).
- 20 Companies Act 1989 s 182(7).

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### **537. Insolvency proceedings in other jurisdictions.**

The references to insolvency law in the Insolvency Act 1986<sup>1</sup> include, in relation to a part of the United Kingdom<sup>2</sup>, the provisions made by or under Part VII of the Companies Act 1989<sup>3</sup> and, in relation to a relevant country or territory<sup>4</sup>, so much of the law of that country or territory as corresponds to any provisions made by or under Part VII<sup>5</sup>. A court must not, in pursuance of the Insolvency Act 1986<sup>6</sup> or any other enactment or rule of law, recognise or give effect to:

- 1241 (1) any order of a court exercising jurisdiction in relation to insolvency law<sup>7</sup> in a country or territory outside the United Kingdom; or
- 1242 (2) any act of a person appointed in such a country or territory to discharge any functions under insolvency law,

in so far as the making of the order or the doing of the act would be prohibited in the case of a court in the United Kingdom or a relevant office-holder<sup>8</sup> by provisions made by or under Part VII<sup>9</sup>.

<sup>1</sup> In the Insolvency Act 1986 s 426 (co-operation with courts exercising insolvency jurisdiction in other jurisdictions): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 728.

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 In the Companies Act 1989 Pt VII (ss 154-191).

4 In within the meaning of the Insolvency Act 1986 s 426.

5 Companies Act 1989 s 183(1).

6 In the Insolvency Act 1986 s 426.

7 As to the 'law of insolvency' see PARA 512 note 2.

8 As to the meaning of 'relevant office-holder' see PARA 513 note 7.

9 Companies Act 1989 s 183(2). Section 183(2) does not affect the recognition or enforcement of a judgment required to be recognised or enforced under or by virtue of the Civil Jurisdiction and Judgments Act 1982 or EC Council Regulation 44/2001 of 22 December 2000 (OJ L12, 16.01.2001, p 1) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (amended by EC Commission Regulation 1496/2002 (OJ L225, 22.8.2002, p 13); and EC Commission Regulation 2245/2004 (OJ L381, 28.12.2004, p 11; OJ L183M, 5.7.2006, p 458)) (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65), as applied by the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 299 16.11.2005, p 62): see the Companies Act 1989 s 183(3) (amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 5, Sch 3 para 21; and SI 2007/1655).

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### **538. Indemnity for certain acts, etc.**

Where a relevant office-holder<sup>1</sup> takes any action in relation to property of a defaulter<sup>2</sup> which is liable to be dealt with in accordance with the default rules<sup>3</sup> of a recognised investment exchange or recognised clearing house<sup>4</sup>, and believes and has reasonable grounds for believing that he is entitled to take that action, he is not liable to any person in respect of any loss or damage resulting from his action except in so far as the loss or damage is caused by the office-holder's own negligence<sup>5</sup>. Any failure by a recognised investment exchange or recognised clearing house to comply with its own rules in respect of any matter cannot prevent that matter being treated for the purposes of Part VII of the Companies Act 1989<sup>6</sup> as done in accordance with those rules so long as the failure does not substantially affect the rights of any person entitled to require compliance with the rules<sup>7</sup>. No recognised investment exchange or recognised clearing house, nor any officer or servant or member of the governing body of a recognised investment exchange or recognised clearing house, is to be liable in damages for anything done or omitted in the discharge or purported discharge of any functions to which this provision applies<sup>8</sup> unless the act or omission is shown to have been in bad faith<sup>9</sup>. No person to whom the exercise of any function of a recognised investment exchange or recognised clearing house is delegated under its default rules, nor any officer or servant of such a person, is to be liable in damages for anything done or omitted in the discharge or purported discharge of those functions unless the act or omission is shown to have been in bad faith<sup>10</sup>.

1 As to the meaning of 'relevant office-holder' see PARA 513 note 7.

2 As to the meaning of 'defaulter' see PARA 510 note 5.

3 As to the meaning of 'default rules' see PARA 510 note 5.

4 As to the meanings of 'recognised clearing house' and 'recognised investment exchange' see PARA 510 note 2.

5 Companies Act 1989 s 184(1).

6 In the Companies Act 1989 Pt VII (ss 154-191): see PARA 509 et seq.

7 Companies Act 1989 s 184(2).

8 The functions to which the Companies Act 1989 s 184(3) applies are the functions of the exchange or clearing house so far as relating to, or to matters arising out of (1) its default rules; or (2) any obligations to which it is subject by virtue of Pt VII: s 184(4).

9 Companies Act 1989 s 184(3).

10 Companies Act 1989 s 184(5) (amended by SI 2001/3649).

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## **(viii) Anti Money Laundering**

### **A. IN GENERAL**

#### **539. The Money Laundering Regulations 2007.**

The Money Laundering Regulations 2007<sup>1</sup> have been made in order to prevent the use of the financial system for the purposes of money laundering and terrorist financing<sup>2</sup>. Relevant persons<sup>3</sup> must, when undertaking certain activities in the course of business, apply customer due diligence measures<sup>4</sup> where they establish a business relationship, carry out an occasional transaction, suspect money laundering or terrorist finance or doubt the accuracy of customer identification information<sup>5</sup>. Relevant persons also have to undertake ongoing monitoring of their business relationships<sup>6</sup>. There is a general rule on the timing of the verification of the customer's identity subject to certain exceptions<sup>7</sup>. The regulations have specific measures on record-keeping, procedures and training<sup>8</sup>; and also provisions on supervision and registration<sup>9</sup>. There are enforcement powers for certain supervisors, including powers to obtain information and enter and inspect premises<sup>10</sup>. There is also provision for the recovery of penalties and charges through the court, and the imposition of an obligation on certain public authorities to report suspicions of money laundering or terrorist financing<sup>11</sup>.

1 See the Money Laundering Regulations 2007, SI 2007/2157. The Regulations revoke and replace earlier regulations (the Money Laundering Regulations 2003, SI 2003/3075) (see the Money Laundering Regulations 2007, SI 2007/2157, reg 1(3)) and implement in part European Parliament and EC Council Directive 2005/60 (OJ L309, 25.11.2005, p 15) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. The Money Laundering Regulations 2007, SI 2007/2157, came into force on 15 December 2007: see reg 1(1). The Regulations are prescribed for the purposes of the Financial Services and Markets Act 2000 s 168(4)(b) (appointment of persons to carry out investigations in particular cases) (see PARA 449) and s 402(1)(b) (power of the Financial Services Authority to institute proceedings for certain other offences) (see PARA 573): Money Laundering Regulations 2007, SI 2007/2157, reg 1(2).

The Financial Services Authority has as one of its objectives the reduction of financial crime (see the Financial Services and Markets Act 2000 s 2(2); and PARA 8) and it may make its own rules as to the prevention and detection of money laundering: see s 146; and PARA 30. As to statutory provisions penalising those assisting in the retention of the proceeds of drug trafficking or criminal conduct and requiring banks and their employees to report to the police suspicions or beliefs of money laundering see the Proceeds of Crime Act 2002 Pt 7 (ss 327-

340); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 789 et seq. As to legislation enacted to prevent the retention or control of terrorist property, including money, see the Terrorism Act 2000; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 390 et seq.

2 'Money laundering' means an act which falls within the Proceeds of Crime Act 2002 s 340(11) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 789); Money Laundering Regulations 2007, SI 2007/2157, reg 2(1). 'Terrorist financing' means an offence under (1) the Terrorism Act 2000 s 15 (fund-raising), s 16 (use and possession), s 17 (funding arrangements), s 18 (money laundering) or s 63 (terrorist finance: jurisdiction) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 390 et seq); (2) the Anti-Terrorism, Crime and Security Act 2001 Sch 3 para 7(2) or (3) (freezing orders) (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 549); (3) the Terrorism (United Nations Measures) Order 2006, SI 2006/2657, art 7, 8 or 10 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**); or (4) the Al-Qaida and Taliban (United Nations Measures) Order 2006, SI 2006/2952, art 7, 8 or 10 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**); Money Laundering Regulations 2007, SI 2007/2157, reg 2(1).

As to the action to be taken where an investigation into money laundering (under the Proceeds of Crime Act 2002 Pt 7 (ss 326-340)) creates conflicts between the public interest in combating crime and the entitlement of a private body to obtain redress from the courts see *Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 All ER (Comm) 1023; *Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit* [2003] EWHC 703 (Comm), [2003] 4 All ER 1225, [2003] 1 All ER (Comm) 900; *Tayeb v HSBC Bank plc* [2004] EWHC 1529, [2004] 4 All ER 1024, [2004] 2 All ER (Comm) 880; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 789 et seq.

3 'Relevant person' means a person to whom in accordance with the Money Laundering Regulations 2007, SI 2007/2157, regs 3, 4 (see PARA 540), the Regulations apply: reg 2(1).

4 See the Money Laundering Regulations 2007, SI 2007/2157, reg 5 et seq; and PARA 542.

5 See the Money Laundering Regulations 2007, SI 2007/2157, reg 7; and PARA 542.

6 See the Money Laundering Regulations 2007, SI 2007/2157, reg 8; and PARA 543.

7 See the Money Laundering Regulations 2007, SI 2007/2157, reg 9; and PARA 543.

8 See the Money Laundering Regulations 2007, SI 2007/2157, Pt 3 (regs 19-21); and PARAS 551, 552.

9 See the Money Laundering Regulations 2007, SI 2007/2157, Pt 4 (regs 22-35); and PARA 553 et seq.

10 See generally the Money Laundering Regulations 2007, SI 2007/2157, Pt 5 (regs 36-47); and PARA 559 et seq. See also PARA 541.

11 See the Money Laundering Regulations 2007, SI 2007/2157, Pt 6 (regs 48-51); and PARAS 544, 554-555, 557, 563.

## UPDATE

### 539 The Money Laundering Regulations 2007

NOTE 2--In the definition of 'terrorist financing', add head (5) the Terrorism (United Nations Measures) Order 2009, SI 2009/1747, art 10, 11, 12, 13, 14 or 16: SI 2007/2157 reg 2(1) (amended by SI 2009/1912). SI 2006/2952 replaced: Terrorism (United Nations Measures) Order 2009, SI 2009/1747.

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### 540. Application of the Money Laundering Regulations 2007.

The Money Laundering Regulations 2007<sup>1</sup> apply to the following persons acting in the course of business carried on by them in the United Kingdom<sup>2</sup> ('relevant persons'):

- 1243 (1) credit institutions<sup>3</sup>;
- 1244 (2) financial institutions<sup>4</sup>;
- 1245 (3) auditors<sup>5</sup>, insolvency practitioners<sup>6</sup>, external accountants<sup>7</sup> and tax advisers<sup>8</sup>;
- 1246 (4) independent legal professionals<sup>9</sup>;
- 1247 (5) trust or company service providers<sup>10</sup>;
- 1248 (6) estate agents<sup>11</sup>;
- 1249 (7) high value dealers<sup>12</sup>;
- 1250 (8) casinos<sup>13</sup>.

The Money Laundering Regulations 2007 do not apply to the following persons when carrying out any of the following activities:

- 1251 (a) a society registered under the Industrial and Provident Societies Act 1965, when it issues withdrawable share capital within the limit set<sup>14</sup> by that Act, or accepts deposits from the public within the limit so set<sup>15</sup>;
- 1252 (b) a person who is (or falls within a class of persons) specified in any of certain provisions<sup>16</sup> when carrying out any activity in respect of which he is exempt under the Financial Services and Markets Act 2000<sup>17</sup>;
- 1253 (c) a person who was an exempted person for the purposes of the relevant provision of the Financial Services Act 1986<sup>18</sup> immediately before its repeal, when exercising the functions there specified<sup>19</sup>;
- 1254 (e) a person whose main activity is that of a high value dealer, when he engages in financial activity on an occasional or very limited basis<sup>20</sup>; or
- 1255 (f) a person, when he prepares a home information pack or a document or information for inclusion in a home information pack<sup>21</sup>.

The Regulations do not apply to a person who falls within the application provisions<sup>22</sup> solely as a result of his engaging in financial activity on an occasional or very limited basis<sup>23</sup>. The provisions of the Regulations on customer due diligence<sup>24</sup>, record-keeping, procedures and training<sup>25</sup>, supervision and registration<sup>26</sup> and enforcement<sup>27</sup> do not apply to: (i) the Auditor General for Scotland<sup>28</sup>; (ii) the Auditor General for Wales<sup>29</sup>; (iii) the Bank of England<sup>30</sup>; (iv) the Comptroller and Auditor General<sup>31</sup>; (v) the Comptroller and Auditor General for Northern Ireland<sup>32</sup>; (vi) the Official Solicitor to the Supreme Court, when acting as trustee in his official capacity<sup>33</sup>; (vii) the Treasury Solicitor<sup>34</sup>.

1 The Money Laundering Regulations 2007, SI 2007/2157. Regulation 3 is subject to reg 4.

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 Money Laundering Regulations 2007, SI 2007/2157, reg 3(1)(a). 'Credit institution' means: (1) a credit institution as defined in European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions art 4(1)(a); or (2) a branch (within the meaning of art 4(3)) located in an EEA state of an institution falling within head (1) (or an equivalent institution whose head office is located in a non-EEA state) wherever its head office is located, when it accepts deposits or other repayable funds from the public or grants credits for its own account (within the meaning of the directive); Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 3(2).

4 Money Laundering Regulations 2007, SI 2007/2157, reg 3(1)(b). 'Financial institution' means: (1) an undertaking, including a money service business, when it carries out one or more of the activities listed in European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) Annex 1 points 2-12, 14 (see the Money Laundering Regulations 2007, SI 2007/2157, Sch 1), other than (a) a credit institution; (b) an undertaking whose only listed activity is trading for own account in one or more of the products listed in



European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) Annex 1 point 7 where the undertaking does not have a customer, and, for this purpose, 'customer' means a third party which is not a member of the same group as the undertaking; (2) an insurance company duly authorised in accordance with the European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance, when it carries out activities covered by that Directive; (3) a person whose regular occupation or business is the provision to other persons of an investment service or the performance of an investment activity on a professional basis, when providing or performing investment services or activities (within the meaning of European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments), other than a person falling within art 2; (4) a collective investment undertaking, when marketing or otherwise offering its units or shares; (5) an insurance intermediary as defined in European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation, art 2(5), with the exception of a tied insurance intermediary as mentioned in art 2(7), when it acts in respect of contracts of long-term insurance within the meaning given by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1), Sch 1 Pt II (see PARA 90); (6) a branch located in an EEA state of a person referred to in heads (1)-(5) (or an equivalent person whose head office is located in a non-EEA state), wherever its head office is located, when carrying out any activity mentioned in heads (1)-(5); (7) the National Savings Bank (see PARA 810 et seq); (8) the Director of Savings, when money is raised under the auspices of the Director under the National Loans Act 1968 (see PARA 1325 et seq); Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 3(3). 'Money service business' means an undertaking which by way of business operates a currency exchange office, transmits money (or any representations of monetary value) by any means or cashes cheques which are made payable to customers: reg 2(1).

European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) Annex 1 points 2-12, 14 are as follows: point 2: lending including, inter alia: consumer credit, mortgage credit, factoring, with or without recourse, financing of commercial transactions (including forfeiting); point 3: financial leasing; point 4: money transmission services; point 5: issuing and administering means of payment (eg credit cards, travellers' cheques and bankers' drafts); point 6: guarantees and commitments; point 7: trading for own account or for account of customers in: (a) money market instruments (cheques, bills, certificates of deposit, etc); (b) foreign exchange; (c) financial futures and options; (d) exchange and interest-rate instruments; or (e) transferable securities; point 8: participation in securities issues and the provision of services related to such issues; point 9: advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings; point 10: money broking; point 11: portfolio management and advice; point 12: safekeeping and administration of securities; point 14: safe custody services: see the Money Laundering Regulations 2007, SI 2007/2157, Sch 1.

5 'Auditor', except in the Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(c), (d) (see PARA 549), means any firm or individual who is a statutory auditor within the meaning of the Companies Act 2006 Pt 42 (ss 1209-1264) (statutory auditors) (see **COMPANIES** vol 15 (2009) PARA 957 et seq), when carrying out statutory audit work within the meaning of s 1210: Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 3(4). Before the entry into force of the Companies Act 2006 Pt 42 the reference to (1) a person who is a statutory auditor is treated as a reference to a person who is eligible for appointment as a company auditor under the Companies Act 1989 s 25 (repealed) (eligibility for appointment) (see **COMPANIES** vol 15 (2009) PARA 969) or the Companies (Northern Ireland) Order 1990, SI 1990 No 593 (NI 5), art 28; and (2) the carrying out of statutory audit work is treated as a reference to the provision of audit services: Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 3(5). 'Firm' means any entity, whether or not a legal person, that is not an individual and includes a body corporate and a partnership or other unincorporated association: reg 2(1).

6 'Insolvency practitioner', except in the Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(c), (d) (see PARA 549), means any person who acts as an insolvency practitioner within the meaning of the Insolvency Act 1986 s 388 (meaning of 'act as insolvency practitioner') (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 43; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 8) or the Insolvency (Northern Ireland) Order 1989, SI 1989 No 2405 ((NI 19), art 3: Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 3(6).

7 'External accountant' means a firm or sole practitioner who by way of business provides accountancy services to other persons, when providing such services: Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 3(7).

8 Money Laundering Regulations 2007, SI 2007/2157, reg 3(1)(c). 'Tax adviser', except in reg 11(3) (see PARA 545), means a firm or sole practitioner who by way of business provides advice about the tax affairs of other persons, when providing such services: regs 2(1), 3(8).

9 Money Laundering Regulations 2007, SI 2007/2157, reg 3(1)(d). 'Independent legal professional' means a firm or sole practitioner who by way of business provides legal or notarial services to other persons, when participating in financial or real property transactions concerning: (1) the buying and selling of real property or business entities; (2) the managing of client money, securities or other assets; (3) the opening or management of bank, savings or securities accounts; (4) the organisation of contributions necessary for the creation, operation or management of companies; or (5) the creation, operation or management of trusts, companies or

similar structures, and, for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction: regs 2(1), 3(9).

10 Money Laundering Regulations 2007, SI 2007/2157, reg 3(1)(e). 'Trust or company service provider' means a firm or sole practitioner who by way of business provides any of the following services to other persons: (1) forming companies or other legal persons; (2) acting, or arranging for another person to act as a director or secretary of a company, as a partner of a partnership, or in a similar position in relation to other legal persons; (3) providing a registered office, business address, correspondence or administrative address or other related services for a company, partnership or any other legal person or arrangement; (4) acting, or arranging for another person to act, as a trustee of an express trust or similar legal arrangement, or a nominee shareholder for a person other than a company whose securities are listed on a regulated market, when providing such services: regs 2(1), 3(10).

11 Money Laundering Regulations 2007, SI 2007/2157, reg 3(1)(f). 'Estate agent' means (1) a firm; or (2) sole practitioner, who, or whose employees, carry out estate agency work (within the meaning given by Estate Agents Act 1979 s 1 (estate agency work) (see **AGENCY** vol 1 (2008) PARA 240), when in the course of carrying out such work): Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 3(11).

12 Money Laundering Regulations 2007, SI 2007/2157, reg 3(1)(g). 'High value dealer' means a firm or sole trader who by way of business trades in goods (including an auctioneer dealing in goods), when he receives, in respect of any transaction, a payment or payments in cash of at least 15,000 euros in total, whether the transaction is executed in a single operation or in several operations which appear to be linked: regs 2(1), 3(12). 'Cash' means notes, coins or travellers' cheques in any currency: reg 2(1). In the Money Laundering Regulations 2007, SI 2007/2157, references to amounts in euros include references to equivalent amounts in another currency: reg 2(2).

13 Money Laundering Regulations 2007, SI 2007/2157, reg 3(1)(h). 'Casino' means the holder of a casino operating licence and, for this purpose, a 'casino operating licence' has the meaning given by of the Gambling Act 2005 s 65(2) (nature of licence) (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 349): Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 3(13).

14 Ie set by the Industrial and Provident Societies Act 1965 s 6: see PARA 2447.

15 Money Laundering Regulations 2007, SI 2007/2157, reg 4(1)(a). The time limit for accepting deposits from the public is under the Industrial and Provident Societies Act 1965 s 7(3): see PARA 2406. As to a similar provision in regard to the Industrial and Provident Societies Act (Northern Ireland) 1969 see the Money Laundering Regulations 2007, SI 2007/2157, reg 4(1)(b).

16 Ie the Financial Services and Markets Act 2000 (Exemption) Order 2001, SI 2001/1201, Schedule paras 2-23, 25-38, 40-49: see PARA 331 et seq.

17 Money Laundering Regulations 2007, SI 2007/2157, reg 4(1)(c). As to exemption orders generally see PARA 330.

18 Ie the Financial Services Act 1986 s 45 (repealed) (miscellaneous exemptions): see PARA 355.

19 Money Laundering Regulations 2007, SI 2007/2157, reg 4(1)(d).

20 Money Laundering Regulations 2007, SI 2007/2157, reg 4(1)(e). For the purposes of reg 4(1)(e), (2), a person is to be considered as engaging in financial activity on an occasional or very limited basis if all the following conditions are fulfilled: (1) the person's total annual turnover in respect of the financial activity does not exceed £64,000; (2) the financial activity is limited in relation to any customer to no more than one transaction exceeding 1,000 euros, whether the transaction is carried out in a single operation, or a series of operations which appear to be linked; (3) the financial activity does not exceed 5% of the person's total annual turnover; (4) the financial activity is ancillary and directly related to the person's main activity; (5) the financial activity is not the transmission or remittance of money (or any representation of monetary value) by any means; (6) the person's main activity is not that of a person falling within reg 3(1)(a)-(f) or (h) (see heads (1)-(6), (8) in the text); (7) the financial activity is provided only to customers of the person's main activity and is not offered to the public: Sch 2 para 1.

21 Money Laundering Regulations 2007, SI 2007/2157, reg 4(1)(f). 'Home information pack' has the same meaning as in the Housing Act 2004 Pt 5 (ss 148-178) (home information packs) (see **HOUSING; SALE OF LAND**): Money Laundering Regulations 2007, SI 2007/2157, reg 4(4).

22 Ie the Money Laundering Regulations 2007, SI 2007/2157, reg 3.

23 Money Laundering Regulations 2007, SI 2007/2157, reg 4(2). The reference to engaging in financial activity on an occasional or very limited basis is as set out in Sch 2 para 1: see note 20.

- 24    le the Money Laundering Regulations 2007, SI 2007/2157, Pt 2 (regs 5-18): see PARA 542 et seq.
- 25    le the Money Laundering Regulations 2007, SI 2007/2157, Pt 3 (regs 19-21): see PARAS 551-552.
- 26    le the Money Laundering Regulations 2007, SI 2007/2157, Pt 4 (regs 22-30): see PARA 553 et seq.
- 27    le the Money Laundering Regulations 2007, SI 2007/2157, Pt 5 (regs 36-47): see PARA 559 et seq.
- 28    Money Laundering Regulations 2007, SI 2007/2157, reg 4(3)(a).
- 29    Money Laundering Regulations 2007, SI 2007/2157, reg 4(3)(b). As to the Auditor General for Wales see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.
- 30    Money Laundering Regulations 2007, SI 2007/2157, reg 4(3)(c). As to the Bank of England see PARA 793 et seq.
- 31    Money Laundering Regulations 2007, SI 2007/2157, reg 4(3)(d). As to the Comptroller and Auditor General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 724 et seq.
- 32    Money Laundering Regulations 2007, SI 2007/2157, reg 4(3)(e).
- 33    Money Laundering Regulations 2007, SI 2007/2157, reg 4(3)(f). As to the Official Solicitor to the Supreme Court see **COURTS** vol 10 (Reissue) PARA 667. As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales by the Constitutional Reform Act 2005 s 59(1) (not yet in force): see **COURTS**. At the date at which this volume states the law no such day had been appointed.
- 34    Money Laundering Regulations 2007, SI 2007/2157, reg 4(3)(g). As to the Treasury Solicitor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 541.

## UPDATE

### 540 Application of the Money Laundering Regulations 2007

NOTE 4--European Parliament and EC Council Directive 2006/48 Annex 1 points 4, 5 are now as follows: point 4: payment services as defined in European Parliament and EC Council Directive 2007/64 art 4(3); point 5: issuing and administering other means of payment (including travellers' cheques and bankers' drafts) in so far as this activity is not covered by point 4: SI 2007/2157 Sch 1 (amended by SI 2009/209). As to payment services see PARA 1399.

NOTE 33--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(viii) Anti Money Laundering/A. IN GENERAL/541. Money laundering offences under the Proceeds of Crime Act 2002.

### 541. Money laundering offences under the Proceeds of Crime Act 2002.

In addition to the provisions of the Money Laundering Regulations 2007<sup>1</sup>, there are offences on money laundering under Part 7 of the Proceeds of Crime Act 2002<sup>2</sup>. These are covered elsewhere in this work<sup>3</sup>.

1    le the Money Laundering Regulations 2007, SI 2007/2157. See generally PARA 539.

2    le the Proceeds of Crime Act 2002 Pt 7 (ss 326-340).

3 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 789 et seq.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(viii) Anti Money Laundering/B. CUSTOMER DUE DILIGENCE/542. Due diligence, simplified due diligence.

## ***B. CUSTOMER DUE DILIGENCE***

### **542. Due diligence, simplified due diligence.**

A relevant person<sup>1</sup> must apply customer due diligence measures<sup>2</sup> when he (1) establishes a business relationship<sup>3</sup>; (2) carries out an occasional transaction<sup>4</sup>; (3) suspects money laundering or terrorist financing<sup>5</sup>; (4) doubts the veracity or adequacy of documents, data or information previously obtained for the purposes of identification or verification<sup>6</sup>. A relevant person must also apply customer due diligence measures at other appropriate times to existing customers on a risk-sensitive basis<sup>7</sup>.

A relevant person who is appointed by the issuer of certain specified instruments or securities<sup>8</sup> as trustee of an issue of such instruments or securities, or whose customer is a trustee of an issue of such instruments or securities, is not required to apply the relevant customer due diligence measure<sup>9</sup> in respect of the holders of such instruments or securities<sup>10</sup>.

A relevant person is not required to apply customer due diligence measures in the circumstances mentioned in head (1), (2) or (4) above where he has reasonable grounds for believing that the customer, transaction or product related to such transaction, falls within any of the following<sup>11</sup>:

- 1256 (a) the customer is (i) a credit or financial institution which is subject to the requirements of the Money Laundering Directive<sup>12</sup>; or (ii) a credit or financial institution<sup>13</sup> (or equivalent institution) which is situated in a non-EEA state which imposes requirements equivalent to those laid down in the Money Laundering Directive; and is supervised for compliance with those requirements<sup>14</sup>;
- 1257 (b) the customer is a company whose securities are listed on a regulated market subject to specified disclosure obligations<sup>15</sup>;
- 1258 (c) the customer is an independent legal professional<sup>16</sup> and the product is an account into which monies are pooled, provided that (i) where the pooled account is held in a non-EEA state that state imposes requirements to combat money laundering and terrorist financing which are consistent with international standards, and the independent legal professional is supervised in that state for compliance with those requirements<sup>17</sup>; and (ii) information on the identity of the persons on whose behalf monies are held in the pooled account is available, on request, to the institution which acts as a depository institution for the account<sup>18</sup>;
- 1259 (d) the customer is a public authority in the United Kingdom<sup>19</sup>;
- 1260 (e) the customer is a public authority which fulfils all of certain specified conditions<sup>20</sup>;
- 1261 (f) the product is (i) a life insurance contract where the annual premium is no more than 1,000 euros or where a single premium of no more than 2,500 euros is paid<sup>21</sup>; (ii) an insurance contract for the purposes of a pension scheme where the contract contains no surrender clause and cannot be used as collateral<sup>22</sup>; (iii) a pension, superannuation or similar scheme which provides retirement benefits to

- employees, where contributions are made by an employer or by way of deduction from an employee's wages and the scheme rules do not permit the assignment of a member's interest under the scheme (other than certain assignments)<sup>23</sup>; or (iv) electronic money<sup>24</sup> where if the device cannot be recharged, the maximum amount stored in the device is no more than 150 euros, or if the device can be recharged, a limit of 2,500 euros is imposed on the total amount transacted in a calendar year, except when an amount of 1,000 euros or more is redeemed in the same calendar year by the bearer<sup>25</sup>;
- 1262 (g) the product and any transaction related to such product fulfil all of certain specified conditions<sup>26</sup>;
- 1263 (h) the product is a child trust fund<sup>27</sup>.

1 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540. The Money Laundering Regulations 2007, SI 2007/2157, reg 7 is subject to reg 9 (see PARA 543), reg 10 (see PARA 544), reg 12 (see the text to notes 8-10), reg 13 (see the text to notes 11-27), reg 14 (see PARA 546), reg 16(4) (see PARA 548), reg 17 (see PARA 549): see reg 7(1).

2 'Customer due diligence measures' means: (1) identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source; (2) identifying, where there is a beneficial owner who is not the customer, the beneficial owner and taking adequate measures, on a risk-sensitive basis, to verify his identity so that the relevant person is satisfied that he knows who the beneficial owner is, including, in the case of a legal person, trust or similar legal arrangement, measures to understand the ownership and control structure of the person, trust or arrangement; and (3) obtaining information on the purpose and intended nature of the business relationship: Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 5. 'Business relationship' means a business, professional or commercial relationship between a relevant person and a customer, which is expected by the relevant person, at the time when contact is established, to have an element of duration: reg 2(1).

In the case of a body corporate, 'beneficial owner' means any individual who: as respects any body other than a company whose securities are listed on a regulated market, ultimately owns or controls (whether through direct or indirect ownership or control, including through bearer share holdings) more than 25% of the shares or voting rights in the body; or as respects any body corporate, otherwise exercises control over the management of the body: reg 6(1). 'Regulated market' within the EEA, has the meaning given by European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) art 4(1) point 14; and outside the EEA, means a regulated financial market which subjects companies whose securities are admitted to trading to disclosure obligations which are contained in international standards and are equivalent to the specified disclosure obligations: Money Laundering Regulations 2007, SI 2007/2157; reg 2(1). 'Specified disclosure obligations' means disclosure requirements consistent with European Parliament and EC Council Directive 2003/6 (OJ L96, 12.4.2003, p 20) on insider dealing and market manipulation, art 6(1)-(4); European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 69) on the prospectuses to be published when securities are offered to the public or admitted to trading, arts 3, 5, 7, 8, 10, 14, 16; European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 43) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, arts 4-6, 14, 16-19, 30; or Community legislation made under the provisions previously mentioned: Money Laundering Regulations 2007, SI 2007/2157, reg 2(1).

In the case of a partnership (other than a limited liability partnership (ie within the meaning of the Limited Liability Partnerships Act 2000: see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq), 'beneficial owner' means any individual who ultimately is entitled to or controls (whether the entitlement or control is direct or indirect) more than a 25% share of the capital or profits of the partnership or more than 25% of the voting rights in the partnership; or otherwise exercises control over the management of the partnership: regs 2(1), 6(2), (10).

In the case of a trust, 'beneficial owner' means any individual who is entitled to a specified interest in at least 25% of the capital of the trust property; as respects any trust other than one which is set up or operates entirely for the benefit of the said individuals, the class of persons in whose main interest the trust is set up or operates; any individual who has control over the trust: regs 2(1), 6(3). For the purposes of reg 6(3), 'specified interest' means a vested interest which is in possession or in remainder or reversion (or, in Scotland, in fee); and defeasible or indefeasible; 'control' means a power (whether exercisable alone, jointly with another person or with the consent of another person) under the trust instrument or by law to (a) dispose of, advance, lend, invest, pay or apply trust property; (b) vary the trust; (c) add or remove a person as a beneficiary or to or from a class of beneficiaries; (d) appoint or remove trustees; (e) direct, withhold consent to or veto the exercise of a power such as is mentioned in head (a), (b), (c) or (d): reg 6(4).

Also for the purposes of reg 6(3), (i) where an individual is the beneficial owner of a body corporate which is entitled to a specified interest in the capital of the trust property or which has control over the trust, the individual is to be regarded as entitled to the interest or having control over the trust; and (ii) an individual does

not have control solely as a result of his consent being required in accordance with the Trustee Act 1925 s 32(1) proviso (c) (power of advancement) (see **TRUSTS** vol 48 (2007 Reissue) PARA 1050); any discretion delegated to him under the Pensions Act 1995 s 34 (power of investment and delegation) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 803); the power to give a direction conferred on him by the Trusts of Land and Appointment of Trustees Act 1996 s 19(2) (appointment and retirement of trustee at instance of beneficiaries) (see **TRUSTS** vol 48 (2007 Reissue) PARAS 845, 897); or the power exercisable collectively at common law to vary or extinguish a trust where the beneficiaries under the trust are of full age and capacity and (taken together) absolutely entitled to the property subject to the trust: Money Laundering Regulations 2007, SI 2007/2157, reg 6(5).

In the case of a legal entity or legal arrangement which does not fall within reg 6(1), (2) or (3), 'beneficial owner' means (A) where the individuals who benefit from the entity or arrangement have been determined, any individual who benefits from at least 25% of the property of the entity or arrangement; (B) where the individuals who benefit from the entity or arrangement have yet to be determined, the class of persons in whose main interest the entity or arrangement is set up or operates; (C) any individual who exercises control over at least 25% of the property of the entity or arrangement: regs 2(1), 6(6). For the purposes of reg 6(6), where an individual is the beneficial owner of a body corporate which benefits from or exercises control over the property of the entity or arrangement, the individual is to be regarded as benefiting from or exercising control over the property of the entity or arrangement: reg 6(7).

In the case of an estate of a deceased person in the course of administration, 'beneficial owner' means in England and Wales and Northern Ireland, the executor, original or by representation, or administrator for the time being of a deceased person (see generally **EXECUTORS AND ADMINISTRATORS**): regs 2(1), 6(8). In any other case, 'beneficial owner' means the individual who ultimately owns or controls the customer or on whose behalf a transaction is being conducted: regs 2(1), 6(9).

Throughout reg 6, 'arrangement', 'entity' and 'trust' mean an arrangement, entity or trust which administers and distributes funds: reg 6(10).

3 Money Laundering Regulations 2007, SI 2007/2157, reg 7(1)(a). See note 1. As to identification and verification see also PARA 543.

4 Money Laundering Regulations 2007, SI 2007/2157, reg 7(1)(b). See note 1. As to identification and verification see also PARA 543. 'Occasional transaction' means a transaction (carried out other than as part of a business relationship) amounting to 15,000 euros or more, whether the transaction is carried out in a single operation or several operations which appear to be linked: reg 2(1).

5 Money Laundering Regulations 2007, SI 2007/2157, reg 7(1)(c). See note 1. As to the meanings of 'money laundering' and 'terrorist financing' see PARA 539 note 2.

6 Money Laundering Regulations 2007, SI 2007/2157, reg 7(1)(d). See note 1. As to identification and verification see also PARA 543.

7 Money Laundering Regulations 2007, SI 2007/2157, reg 7(2). This is subject to reg 16(4): see note 1 and PARA 548.

A relevant person must (1) determine the extent of customer due diligence measures on a risk-sensitive basis depending on the type of customer, business relationship, product or transaction; and (2) be able to demonstrate to his supervisory authority that the extent of the measures is appropriate in view of the risks of money laundering and terrorist financing: reg 7(3). See also PARA 543. 'Supervisory authority' in relation to any relevant person means the supervisory authority specified for such a person by reg 23 (see PARA 553): reg 2(1). Head (2) does not apply to the National Savings Bank (see PARA 810 et seq) or the Director of Savings (see PARA 1325 et seq): reg 7(5). See further PARA 553.

Where (a) a relevant person is required to apply customer due diligence measures in the case of a trust, legal entity (other than a body corporate) or a legal arrangement (other than a trust); and (b) the class of persons in whose main interest the trust, entity or arrangement is set up or operates is identified as a beneficial owner, the relevant person is not required to identify all the members of the class: reg 7(4).

8 The specified instruments and securities are: (1) instruments which fall within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 77 (see PARA 224); and (2) securities which fall within art 78 (see PARA 224): Money Laundering Regulations 2007, SI 2007/2157, reg 12(2).

9 Is the customer due diligence measure referred to in the Money Laundering Regulations 2007, SI 2007/2157, reg 5(b): see note 2 head (2).

10 Money Laundering Regulations 2007, SI 2007/2157, reg 12(1).

11 Money Laundering Regulations 2007, SI 2007/2157, reg 13(1).

12 Money Laundering Regulations 2007, SI 2007/2157, reg 13(2)(a). The reference is to European Parliament and EC Council Directive 2005/60 (OJ L309, 25.11.2005, p 15) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

13 As to the meanings of 'credit institution' and 'financial institution' see PARA 540 notes 3, 4.

14 Money Laundering Regulations 2007, SI 2007/2157, reg 13(2)(b).

15 Money Laundering Regulations 2007, SI 2007/2157, reg 13(3).

16 As to the meaning of 'independent legal professional' see PARA 540 note 9.

17 Money Laundering Regulations 2007, SI 2007/2157, reg 13(4)(a).

18 Money Laundering Regulations 2007, SI 2007/2157, reg 13(4)(b).

19 Money Laundering Regulations 2007, SI 2007/2157, reg 13(5). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to obligations on public authorities see PARA 554.

20 Money Laundering Regulations 2007, SI 2007/2157, reg 13(6). The conditions are: (1) the authority has been entrusted with public functions pursuant to the Treaty on the European Union, the Treaties on the European Communities or Community secondary legislation; (2) the authority's identity is publicly available, transparent and certain; (3) the activities of the authority and its accounting practices are transparent; (4) either the authority is accountable to a Community institution or to the authorities of an EEA state, or otherwise appropriate check and balance procedures exist ensuring control of the authority's activity: Sch 2 para 2.

21 Money Laundering Regulations 2007, SI 2007/2157, reg 13(7)(a). See generally **INSURANCE**.

22 Money Laundering Regulations 2007, SI 2007/2157, reg 13(7)(b). See generally **SOCIAL SECURITY AND PENSIONS**.

23 Money Laundering Regulations 2007, SI 2007/2157, reg 13(7)(c). The assignments referred to are those permitted by the Welfare Reform and Pensions Act 1999 s 44 (disapplication of restrictions on alienation) (see **SOCIAL SECURITY AND PENSIONS**) or by the Pensions Act 1995 s 91(5)(a) (inalienability of occupational pension) (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 865): see the Money Laundering Regulations 2007, SI 2007/2157, reg 13(7)(c).

24 Ie within the meaning of European Parliament and EC Council Directive 2000/46 (OJ L275, 27.10.2000, p 39) on the taking up, pursuit and prudential supervision of the business of electronic money institutions, art 1(3) (b): see the Money Laundering Regulations 2007, SI 2007/2157, reg 13(7)(d).

25 Money Laundering Regulations 2007, SI 2007/2157, reg 13(7)(d). The reference to bearer is to that term within the meaning of European Parliament and EC Council Directive 2000/46 (OJ L275, 27.10.2000, p 39) art 3: see the Money Laundering Regulations 2007, SI 2007/2157, reg 13(7)(d). In the Money Laundering Regulations 2007, SI 2007/2157, references to amounts in euros include references to equivalent amounts in another currency: reg 2(2).

26 Money Laundering Regulations 2007, SI 2007/2157, reg 13(8). The conditions are: (1) the product has a written contractual base; (2) any related transaction is carried out through an account of the customer with a credit institution which is subject to European Parliament and EC Council Directive 2005/60 (OJ L309, 25.11.2005, p 15) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing or with a credit institution situated in a non-EEA state which imposes requirements equivalent to those laid down in that directive; (3) the product or related transaction is not anonymous and its nature is such that it allows for the timely application of customer due diligence measures where there is a suspicion of money laundering or terrorist financing; (4) the product is within the following maximum threshold: (a) in the case of insurance policies or savings products of a similar nature, the annual premium is no more than 1,000 euros or there is a single premium of no more than 2,500 euros; (b) in the case of products which are related to the financing of physical assets where the legal and beneficial title of the assets is not transferred to the customer until the termination of the contractual relationship (whether the transaction is carried out in a single operation or in several operations which appear to be linked), the annual payments do not exceed 15,000 euros; (c) in all other cases, the maximum threshold is 15,000 euros; (5) the benefits of the product or related transaction cannot be realised for the benefit of third parties, except in the case of death, disablement, survival to a predetermined advanced age, or similar events; (6) in the case of products or related transactions allowing for the investment of funds in financial assets or claims, including insurance or other kinds of contingent claims: (a) the benefits of the product or related transaction are only realisable in the long term; (b) the product or related transaction cannot be used as collateral; and (c) during the contractual relationship, no accelerated payments are made, surrender clauses used or early termination takes place: Sch 2 para 3.

27 Money Laundering Regulations 2007, SI 2007/2157, reg 13(9). The reference is to a child trust fund within the meaning given by the Child Trust Funds Act 2004 s 1(2): see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 564.

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### **543. Ongoing monitoring, verification.**

A relevant person<sup>1</sup> must conduct ongoing monitoring<sup>2</sup> of a business relationship<sup>3</sup>.

In respect of the duty<sup>4</sup> to apply the customer due diligence measures relating to identification and verification<sup>5</sup>, a relevant person must verify the identity of the customer (and any beneficial owner<sup>6</sup>) before the establishment of a business relationship or the carrying out of an occasional transaction<sup>7</sup>.

Such verification may be completed during the establishment of a business relationship if (1) this is necessary not to interrupt the normal conduct of business<sup>8</sup>; and (2) there is little risk of money laundering or terrorist financing<sup>9</sup> occurring<sup>10</sup>, provided that the verification is completed as soon as practicable after contact is first established<sup>11</sup>.

The verification of the identity of the beneficiary under a life insurance policy may take place after the business relationship has been established provided that it takes place at or before the time of payout or at or before the time the beneficiary exercises a right vested under the policy<sup>12</sup>.

The verification of the identity of a bank account holder may take place after the bank account has been opened provided that there are adequate safeguards in place to ensure that (a) the account is not closed<sup>13</sup>; and (b) transactions are not carried out by or on behalf of the account holder (including any payment from the account to the account holder)<sup>14</sup>, before verification has been completed<sup>15</sup>.

1 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

2 'Ongoing monitoring' of a business relationship means: (1) scrutiny of transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with the relevant person's knowledge of the customer, his business and risk profile; and (2) keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up-to-date: Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 8(2). As to the meaning of 'business relationship' see PARA 542 note 2. As to the meaning of 'customer due diligence measures' see PARA 542 note 2.

3 Money Laundering Regulations 2007, SI 2007/2157, reg 8(1). Regulation 7(3) (see PARA 542 note 7) applies to the duty to conduct ongoing monitoring under reg 8(1) as it applies to customer due diligence measures: reg 8(3). See also note 2.

4 I.e. the duty under the Money Laundering Regulations 2007, SI 2007/2157, 7(1)(a), (b): see PARA 542 heads (1), (2).

5 Money Laundering Regulations 2007, SI 2007/2157, reg 9(1). The reference is to the customer due diligence measures referred to in reg 5(a), (b): see PARA 542 note 2 heads (1), (2).

6 As to the meaning of 'beneficial owner' see PARA 542 note 2.

7 Money Laundering Regulations 2007, SI 2007/2157, reg 9(2). Regulation 9(2) is subject to reg 9(3)-(5) and to reg 10 (see PARA 544). As to the meaning of 'occasional transaction' see PARA 542 note 4.



- 8 Money Laundering Regulations 2007, SI 2007/2157, reg 9(3)(a).
- 9 As to the meanings of 'money laundering' and 'terrorist financing' see PARA 539 note 2.
- 10 Money Laundering Regulations 2007, SI 2007/2157, reg 9(3)(b).
- 11 Money Laundering Regulations 2007, SI 2007/2157, reg 9(3).
- 12 Money Laundering Regulations 2007, SI 2007/2157, reg 9(4). As to life insurance see generally **INSURANCE**.
- 13 Money Laundering Regulations 2007, SI 2007/2157, reg 9(5)(a). As to banks see generally PARA 791 et seq.
- 14 Money Laundering Regulations 2007, SI 2007/2157, reg 9(5)(b).
- 15 Money Laundering Regulations 2007, SI 2007/2157, reg 9(5).

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#### **544. Casinos.**

A casino<sup>1</sup> must establish and verify the identity<sup>2</sup> of:

- 1264 (1) all customers to whom the casino makes facilities for gaming<sup>3</sup> available (a) before entry to any premises<sup>4</sup> where such facilities are provided<sup>5</sup>; or (b) where the facilities are for remote gaming<sup>6</sup>, before access is given to such facilities<sup>7</sup>; or
- 1265 (2) if the specified conditions<sup>8</sup> are met, all customers who, in the course of any period of 24 hours (a) purchase from, or exchange with, the casino chips with a total value of 2,000 euros or more<sup>9</sup>; (b) pay the casino 2,000 euros or more for the use of gaming machines<sup>10</sup>; or (c) pay to, or stake with, the casino 2,000 euros or more in connection with facilities for remote gaming<sup>11</sup>.

1 As to the meaning of 'casino' see PARA 540 note 13.

2 As to verification see also PARA 543.

3 'Gaming' has the meaning given by the Gambling Act 2005 s 6(1) (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 310): Money Laundering Regulations 2007, SI 2007/2157, reg 10(3).

4 'Premises' means premises subject to (1) a casino premises licence within the meaning of the Gambling Act 2005 s 150(1)(a) (nature of licence) (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 311); or (2) a converted casino premises licence within the meaning of the Gambling Act 2005 (Commencement No 6 and Transitional Provisions) Order 2006, SI 2006/3272 (C 119), Sch 4 Pt 7 para 65: Money Laundering Regulations 2007, SI 2007/2157, reg 10(3).

5 Money Laundering Regulations 2007, SI 2007/2157, reg 10(1)(a)(i).

6 'Remote gaming' means gaming provided pursuant to a remote operating licence: Money Laundering Regulations 2007, SI 2007/2157, reg 10(3). 'Remote operating licence' has the meaning given by the Gambling Act 2005 s 67 (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 351): Money Laundering Regulations 2007, SI 2007/2157, reg 10(3).

7 Money Laundering Regulations 2007, SI 2007/2157, reg 10(1)(a)(ii) (amended by SI 2007/3299).

8 The specified conditions are: (1) the casino verifies the identity of each customer before or immediately after such purchase, exchange, payment or stake takes place; and (2) the Gambling Commission is satisfied that the casino has appropriate procedures in place to monitor and record (a) the total value of chips purchased from or exchanged with the casino; (b) the total money paid for the use of gaming machines; or (c) the total money paid or staked in connection with facilities for remote gaming, by each customer: Money Laundering Regulations 2007, SI 2007/2157, reg 10(2). 'Stake' has the meaning given by the Gambling Act 2005 s 353(1) and 'gaming machine' has the meaning given by s 235 (see **LICENSING AND GAMBLING** vol 68 (2008) PARA 547): Money Laundering Regulations 2007, SI 2007/2157, reg 10(3). As to the Gambling Commission see **LICENSING AND GAMBLING** vol 67 (2008) PARA 4.

9 Money Laundering Regulations 2007, SI 2007/2157, reg 10(b)(i). In the Money Laundering Regulations 2007, SI 2007/2157, references to amounts in euros include references to equivalent amounts in another currency: reg 2(2).

10 Money Laundering Regulations 2007, SI 2007/2157, reg 10(b)(ii).

11 Money Laundering Regulations 2007, SI 2007/2157, reg 10(b)(iii).

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#### **545. Ceasing transactions.**

Where, in relation to any customer, a relevant person<sup>1</sup> is unable to apply customer due diligence measures<sup>2</sup> in accordance with the customer due diligence provisions of the Money Laundering Regulations 2007<sup>3</sup>:

1266 (1) he must not carry out a transaction with or for the customer through a bank account<sup>4</sup>;

1267 (2) he must not establish a business relationship<sup>5</sup> or carry out an occasional transaction<sup>6</sup> with the customer<sup>7</sup>;

1268 (3) he must terminate any existing business relationship with the customer<sup>8</sup>;

1269 (4) he must consider whether he is required to make a disclosure by the Proceeds of Crime Act 2002 or the Terrorism Act 2000<sup>9</sup>.

1 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

2 As to the meaning of 'customer due diligence measures' see PARA 542 note 2.

3 Ie the Money Laundering Regulations 2007, SI 2007/2157, Pt 2 (regs 5-18): see also PARAS 542 et seq, 546 et seq.

4 Money Laundering Regulations 2007, SI 2007/2157, reg 11(1)(a).

Regulation 11(1) does not apply where a lawyer or other professional adviser is in the course of ascertaining the legal position for his client or performing his task of defending or representing that client in, or concerning, legal proceedings, including advice on the institution or avoidance of proceedings: reg 11(2). For these purposes, 'other professional adviser' means an auditor, accountant or tax adviser who is a member of a professional body which is established for any such persons and which makes provision for: (1) testing the competence of those seeking admission to membership of such a body as a condition for such admission; and (2) imposing and maintaining professional and ethical standards for its members, as well as imposing sanctions for non-compliance with those standards: reg 11(3). As to the meaning of 'auditor' see PARA 540 note 5.

5 As to the meaning of 'business relationship' see PARA 542 note 2.

6 As to the meaning of 'occasional transaction' see PARA 542 note 4.

7 Money Laundering Regulations 2007, SI 2007/2157, reg 11(1)(b). See note 4.

8 Money Laundering Regulations 2007, SI 2007/2157, reg 11(1)(c). See note 4.

9 Money Laundering Regulations 2007, SI 2007/2157, reg 11(1)(d). See note 4. The reference is to the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 789 et seq) or the Terrorism Act 2000 Pt III (ss 14-23) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 390 et seq). See also *Tayeb v HSBC Bank plc* [2004] EWHC 1529 (Comm), [2004] 4 All ER 1024, [2004] 2 All ER (Comm) 880; *Squirrell Ltd v National Westminster Bank plc* [2005] EWHC 664 (Ch), [2005] 2 All ER 784, [2005] 1 All ER (Comm) 749; *K Ltd v National Westminster Bank plc* [2006] EWCA Civ 1039, [2006] 4 All ER 907, [2006] 2 All ER (Comm) 655; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

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#### **546. Enhanced due diligence, ongoing monitoring.**

A relevant person<sup>1</sup> must apply on a risk-sensitive basis enhanced customer due diligence measures<sup>2</sup> and enhanced ongoing monitoring<sup>3</sup> in accordance with the provisions below<sup>4</sup>; and in any other situation which by its nature can present a higher risk of money laundering or terrorist financing<sup>5</sup>.

Where the customer has not been physically present for identification purposes, a relevant person must take specific and adequate measures to compensate for the higher risk, for example, by applying one or more of the following measures:

- 1270 (1) ensuring that the customer's identity is established by additional documents, data or information<sup>6</sup>;
- 1271 (2) supplementary measures to verify or certify the documents supplied, or requiring confirmatory certification by a credit or financial institution<sup>7</sup> which is subject to the Money Laundering Directive<sup>8</sup>;
- 1272 (3) ensuring that the first payment is carried out through an account opened in the customer's name with a credit institution<sup>9</sup>.

A credit institution (the 'correspondent') which has or proposes to have a correspondent banking relationship with a respondent institution (the 'respondent') from a non-EEA state must:

- 1273 (a) gather sufficient information about the respondent to understand fully the nature of its business<sup>10</sup>;
- 1274 (b) determine from publicly-available information the reputation of the respondent and the quality of its supervision<sup>11</sup>;
- 1275 (c) assess the respondent's anti-money laundering and anti-terrorist financing controls<sup>12</sup>;
- 1276 (d) obtain approval from senior management before establishing a new correspondent banking relationship<sup>13</sup>;
- 1277 (e) document the respective responsibilities of the respondent and correspondent<sup>14</sup>; and
- 1278 (f) be satisfied that, in respect of those of the respondent's customers who have direct access to accounts of the correspondent, the respondent has verified the identity of, and conducts ongoing monitoring in respect of, such customers<sup>15</sup>;

and is able to provide to the correspondent, upon request, the documents, data or information obtained when applying customer due diligence measures and ongoing monitoring<sup>16</sup>.

A relevant person who proposes to have a business relationship<sup>17</sup> or carry out an occasional transaction<sup>18</sup> with a politically exposed person<sup>19</sup> must:

- 1279 (i) have approval from senior management for establishing the business relationship with that person<sup>20</sup>;
- 1280 (ii) take adequate measures to establish the source of wealth and source of funds which are involved in the proposed business relationship or occasional transaction<sup>21</sup>; and
- 1281 (iii) where the business relationship is entered into, conduct enhanced ongoing monitoring of the relationship<sup>22</sup>.

1 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

2 As to the meaning of 'customer due diligence measures' see PARA 542 note 2.

3 As to the meaning of 'ongoing monitoring' see PARA 543 note 2.

4 Money Laundering Regulations 2007, SI 2007/2157, reg 14(1)(a). The reference is to reg 14(2)-(4): see the text to notes 6-22.

5 Money Laundering Regulations 2007, SI 2007/2157, reg 14(1)(b). As to the meanings of 'money laundering' and 'terrorist financing' see PARA 539 note 2.

6 Money Laundering Regulations 2007, SI 2007/2157, reg 14(2)(a).

7 As to the meanings of 'credit institution' and 'financial institution' see PARA 540 notes 3, 4.

8 Money Laundering Regulations 2007, SI 2007/2157, reg 14(2)(b). The reference is to European Parliament and EC Council Directive 2005/60 (OJ L309, 25.11.2005, p 15) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

9 Money Laundering Regulations 2007, SI 2007/2157, reg 14(2)(c).

10 Money Laundering Regulations 2007, SI 2007/2157, reg 14(3)(a).

11 Money Laundering Regulations 2007, SI 2007/2157, reg 14(3)(b).

12 Money Laundering Regulations 2007, SI 2007/2157, reg 14(3)(c).

13 Money Laundering Regulations 2007, SI 2007/2157, reg 14(3)(d).

14 Money Laundering Regulations 2007, SI 2007/2157, reg 14(3)(e).

15 Money Laundering Regulations 2007, SI 2007/2157, reg 14(3)(f)(i). As to verification see PARA 543.

16 Money Laundering Regulations 2007, SI 2007/2157, reg 14(3)(f)(ii).

17 As to the meaning of 'business relationship' see PARA 542 note 2.

18 As to the meaning of 'occasional transaction' see PARA 542 note 4.

19 For these purposes, 'politically exposed person' means a person who is:

529 (1) an individual who is or has, at any time in the preceding year, been entrusted with a prominent public function by (a) a state other than the United Kingdom; (b) a Community institution; or (c) an international body, including a person who falls in any of the following categories (such categories not including middle-ranking or more junior officials): (i) heads of state, heads of government, ministers and deputy or assistant ministers; (ii) members of parliaments; (iii) members of supreme courts, of constitutional courts or of other high-level

judicial bodies whose decisions are not generally subject to further appeal, other than in exceptional circumstances; (iv) members of courts of auditors or of the boards of central banks; (v) ambassadors, chargés d'affaires and high-ranking officers in the armed forces; and (vi) members of the administrative, management or supervisory bodies of state-owned enterprises (Money Laundering Regulations 2007, SI 2007/2157, reg 14(5)(a), Sch 2 para 4(1)(a), (b));

- 530 (2) an immediate family member of a person referred to in head (1) above, including a person who falls in any of the following categories: (a) a spouse; (b) a partner (which means a person who is considered by his national law as equivalent to a spouse); (c) children and their spouses or partners; and (d) parents (reg 14(5)(b), Sch 2 para 4(1)(c), (2));
- 531 (3) a known close associate of a person referred to in head (1) above, including a person who falls in either of the following categories: (a) any individual who is known to have joint beneficial ownership of a legal entity or legal arrangement, or any other close business relations, with a person referred to in head (1); and (b) any individual who has sole beneficial ownership of a legal entity or legal arrangement which is known to have been set up for the benefit of a person referred to in head (1) (reg 14(5)(c), Sch 2 para 4(1)(d)).

For the purpose of deciding whether a person is a known close associate of a person referred to in head (1) above (see head (3) above), a relevant person need only have regard to information which is in his possession or is publicly known: reg 14(6). As to the meaning of 'United Kingdom' see PARA 2 note 3.

20 Money Laundering Regulations 2007, SI 2007/2157, reg 14(4)(a).

21 Money Laundering Regulations 2007, SI 2007/2157, reg 14(4)(b).

22 Money Laundering Regulations 2007, SI 2007/2157, reg 14(4)(c).

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#### **547. Branches and subsidiaries.**

A credit or financial institution<sup>1</sup> must require its branches and subsidiary undertakings<sup>2</sup> which are located in a non-EEA state to apply, to the extent permitted by the law of that state, measures at least equivalent to those set out in the Money Laundering Regulations 2007<sup>3</sup> with regard to customer due diligence measures<sup>4</sup>, ongoing monitoring<sup>5</sup> and record-keeping<sup>6</sup>.

Where the law of a non-EEA state does not permit the application of such equivalent measures by the branch or subsidiary undertaking located in that state, the credit or financial institution must: (1) inform its supervisory authority<sup>7</sup> accordingly<sup>8</sup>; and (2) take additional measures to handle effectively the risk of money laundering and terrorist financing<sup>9</sup>.

<sup>1</sup> As to the meanings of 'credit institution' and 'financial institution' see PARA 540 notes 3, 4.

<sup>2</sup> For these purposes, 'subsidiary undertaking' (1) except in relation to an incorporated friendly society, has the meaning given by the Companies Act 2006 s 1162 (parent and subsidiary undertakings) (see **COMPANIES** vol 14 (2009) PARA 26) and, in relation to a body corporate in or formed under the law of an EEA state other than the United Kingdom, includes an undertaking which is a subsidiary undertaking within the meaning of any rule of law in force in that state for purposes connected with implementation of the EC Seventh Company Law Directive 83/349 (OJ L193, 18.7.83, p 1) on consolidated accounts; (2) in relation to an incorporated friendly society, means a body corporate of which the society has control within the meaning of the Friendly Societies Act 1992 s 13(9)(a) or (aa) (control of subsidiaries and other bodies corporate) (see PARA 2134): Money Laundering Regulations 2007, SI 2007/2157, reg 15(3)(a). Before the entry into force of the Companies Act 2006 s 1162 the reference to that provision in head (1) above is treated as a reference to the Companies Act 1985 s 258 (repealed) (parent and subsidiary undertakings) (see **COMPANIES** vol 14 (2009) PARA 26): Money Laundering Regulations 2007, SI 2007/2157, reg 15(3)(b). As to the meaning of 'United Kingdom' see PARA 2 note 3.

- 3 le the Money Laundering Regulations 2007, SI 2007/2157.
- 4 As to the meaning of 'customer due diligence measures' see PARA 542 note 2.
- 5 As to the meaning of 'ongoing monitoring' see PARA 543 note 2.
- 6 Money Laundering Regulations 2007, SI 2007/2157, reg 15(1). As to record-keeping see PARA 551.
- 7 As to the meaning of 'supervisory authority' see PARA 542 note 7. See also PARA 553.
- 8 Money Laundering Regulations 2007, SI 2007/2157, reg 15(2)(a).
- 9 Money Laundering Regulations 2007, SI 2007/2157, reg 15(2)(b). As to the meanings of 'money laundering' and 'terrorist financing' see PARA 539 note 2.

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#### **548. Shell banks, anonymous accounts, etc.**

A credit institution<sup>1</sup> must not enter into, or continue, a correspondent banking relationship with a shell bank<sup>2</sup>. A credit institution must take appropriate measures to ensure that it does not enter into, or continue, a corresponding banking relationship with a bank which is known to permit its accounts to be used by a shell bank<sup>3</sup>. A credit or financial institution<sup>4</sup> carrying on business in the United Kingdom<sup>5</sup> must not set up an anonymous account or an anonymous passbook for any new or existing customer<sup>6</sup>.

As soon as reasonably practicable on or after 15 December 2007 all credit and financial institutions carrying on business in the United Kingdom must apply customer due diligence measures<sup>7</sup> to, and conduct ongoing monitoring<sup>8</sup> of, all anonymous accounts and passbooks in existence on that date and in any event before such accounts or passbooks are used<sup>9</sup>.

- 1 As to the meaning of 'credit institution' see PARA 540 note 3.
- 2 Money Laundering Regulations 2007, SI 2007/2157, reg 16(1). A 'shell bank' means a credit institution, or an institution engaged in equivalent activities, incorporated in a jurisdiction in which it has no physical presence involving meaningful decision-making and management, and which is not part of a financial conglomerate or third-country financial conglomerate: reg 16(5). For these purposes, 'financial conglomerate' and 'third-country financial conglomerate' have the meanings given by the Financial Conglomerates and Other Financial Groups Regulations 2004, SI 2004/1862, regs 1(2), 7(1) (see PARAS 381, 383): Money Laundering Regulations 2007, SI 2007/2157, reg 16(6).
- 3 Money Laundering Regulations 2007, SI 2007/2157, reg 16(2).
- 4 As to the meaning 'financial institution' see PARA 540 note 4.
- 5 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 6 Money Laundering Regulations 2007, SI 2007/2157, reg 16(3).
- 7 As to the meaning of 'customer due diligence measures' see PARA 542 note 2.
- 8 As to the meaning of 'ongoing monitoring' see PARA 543 note 2.
- 9 Money Laundering Regulations 2007, SI 2007/2157, reg 16(4).

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#### **549. Reliance on certain persons.**

A relevant person<sup>1</sup> may rely on a person who falls within the list below<sup>2</sup> (or who the relevant person has reasonable grounds to believe falls within that list) to apply any customer due diligence measures<sup>3</sup> provided that the other person consents to being relied on<sup>4</sup>; and notwithstanding the relevant person's reliance on the other person, the relevant person remains liable for any failure to apply such measures<sup>5</sup>.

The persons referred to above are:

- 1282 (1) a credit or financial institution<sup>6</sup> which is an authorised person<sup>7</sup>;
- 1283 (2) a relevant person who is (a) an auditor<sup>8</sup>, insolvency practitioner<sup>9</sup>, external accountant<sup>10</sup>, tax adviser<sup>11</sup> or independent legal professional<sup>12</sup>; and (b) supervised for the purposes of the Money Laundering Regulations 2007<sup>13</sup> by one of certain specified professional bodies<sup>14</sup>;
- 1284 (3) a person who carries on business in another EEA state who is (a) a credit or financial institution, auditor, insolvency practitioner, external accountant, tax adviser or independent legal professional<sup>15</sup>; (b) subject to mandatory professional registration recognised by law<sup>16</sup>; and (c) supervised for compliance with the requirements laid down in the Money Laundering Directive<sup>17</sup>; or
- 1285 (4) a person who carries on business in a non-EEA state who is (a) a credit or financial institution (or equivalent institution), auditor, insolvency practitioner, external accountant, tax adviser or independent legal professional<sup>18</sup>; (b) subject to mandatory professional registration recognised by law<sup>19</sup>; (c) subject to requirements equivalent to those laid down in the Money Laundering Directive<sup>20</sup>; and (d) supervised for compliance with those requirements in a manner equivalent to the Money Laundering Directive<sup>21</sup>.

Nothing in the above provisions<sup>22</sup> prevents a relevant person applying customer due diligence measures by means of an outsourcing service provider or agent provided that the relevant person remains liable for any failure to apply such measures<sup>23</sup>.

1 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

2 lie within the Money Laundering Regulations 2007, SI 2007/2157, reg 17(2): see heads (1)-(4) in the text.

3 As to the meaning of 'customer due diligence measures' see PARA 542 note 2.

4 Money Laundering Regulations 2007, SI 2007/2157, reg 17(1)(a).

5 Money Laundering Regulations 2007, SI 2007/2157, reg 17(1)(b).

6 As to the meanings of 'credit institution' and 'financial institution' see PARA 540 notes 3, 4. In the Money Laundering Regulations 2007, SI 2007/2157, reg 17 'financial institution' excludes money service businesses: reg 17(5). As to the meaning of 'money service business' see PARA 540 note 4.

7 Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(a). 'Authorised person' means a person who is authorised for the purposes of the Financial Services and Markets Act 2000 (see PARA 314): Money Laundering Regulations 2007, SI 2007/2157, reg 2(1).

- 8 As to the meaning of 'auditor' see PARA 540 note 5.
- 9 As to the meaning of 'insolvency practitioner' see PARA 540 note 6.
- 10 As to the meaning of 'external accountant' see PARA 540 note 7.
- 11 As to the meaning of 'tax adviser' see PARA 540 note 8.
- 12 Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(b)(i). As to the meaning of 'independent legal professional' see PARA 540 note 9.
- 13 In the Money Laundering Regulations 2007, SI 2007/2157.
- 14 Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(b)(ii). The professional bodies referred to are: the Association of Chartered Certified Accountants; the Council for Licensed Conveyancers (see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1319 et seq); the Faculty of Advocates; the General Council of the Bar (see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1042 et seq); the General Council of the Bar of Northern Ireland; the Institute of Chartered Accountants in England and Wales; the Institute of Chartered Accountants in Ireland; the Institute of Chartered Accountants of Scotland; the Law Society (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 603 et seq); the Law Society of Scotland; and the Law Society of Northern Ireland: see Sch 3 Pt 1.
- 15 Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(c)(i). For the purposes of reg 17(2)(c)(i), (d) (i) 'auditor' and 'insolvency practitioner' include a person situated in another EEA state or a non-EEA state who provides services equivalent to the services provided by an auditor or insolvency practitioner: reg 17(3). See also notes 8, 9.
- 16 Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(c)(ii).
- 17 Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(c)(iii). The reference is to European Parliament and EC Council Directive 2005/60 (OJ L309, 25.11.2005, p 15) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, and in accordance with Ch V s 2.
- 18 Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(d)(i). See note 15.
- 19 Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(d)(ii).
- 20 Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(d)(iii).
- 21 Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(d)(iv). The reference is to European Parliament and EC Council Directive 2005/60 (OJ L309, 25.11.2005, p 15) Ch V s 2: see note 17.
- 22 In the Money Laundering Regulations 2007, SI 2007/2157, reg 17.
- 23 Money Laundering Regulations 2007, SI 2007/2157, reg 17(4).

## UPDATE

### 549 Reliance on certain persons

NOTE 6--In SI 2007/2157 reg 17 'financial institution' also excludes any authorised payment institution, EEA authorised payment institution, or small payment institution (within the meaning of the Payment Services Regulations 2009, SI 2009/209) which provides payment services mainly falling within SI 2009/209 Sch 1 para 1(f): SI 2007/2157 reg 17(5) (substituted by SI 2009/209). As to payment services see PARA 1399.



ENFORCEMENT/(viii) Anti Money Laundering/B. CUSTOMER DUE DILIGENCE/550. Directions by the Treasury.

### **550. Directions by the Treasury.**

The Treasury<sup>1</sup> may direct any relevant person<sup>2</sup> (1) not to enter into a business relationship<sup>3</sup>; (2) not to carry out an occasional transaction<sup>4</sup>; or (3) not to proceed any further with a business relationship or occasional transaction<sup>5</sup>, with a person who is situated or incorporated in a non-EEA state to which the Financial Action Task Force<sup>6</sup> has decided to apply counter-measures<sup>7</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

3 Money Laundering Regulations 2007, SI 2007/2157, reg 18(a). As to the meaning of 'business relationship' see PARA 542 note 2.

4 Money Laundering Regulations 2007, SI 2007/2157, reg 18(b). As to the meaning of 'occasional transaction' see PARA 542 note 4.

5 Money Laundering Regulations 2007, SI 2007/2157, reg 18(c).

6 The Financial Action Task Force (FATF) is an intergovernmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. At the date at which this volume states the law, the FATF has a website at [www.fatf-gafi.org](http://www.fatf-gafi.org).

7 Money Laundering Regulations 2007, SI 2007/2157, reg 18.

### **UPDATE**

### **550 Directions by the Treasury**

TEXT AND NOTES--The Treasury also has power to make a direction relating to terrorist financing and money laundering: Counter-Terrorism Act 2008 Sch 7 (see PARA 550A).

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### **550A. Power of the Treasury to make a direction relating to terrorist financing and money laundering.**

The Treasury may give a direction<sup>1</sup> if one or more of the following conditions is met in relation to a country<sup>2</sup>: (1) the Financial Action Task Force has advised that measures should be taken in relation to the country because of the risk of terrorist financing or money laundering activities being carried on in the country, by the government of the country, or by persons resident or incorporated in the country<sup>3</sup>; (2) the Treasury reasonably believes that there is a risk that terrorist financing or money laundering activities are being carried on in the country, by the government of the country, or by persons resident or incorporated in the country, and that this poses a significant risk to the national interests of the United Kingdom<sup>4</sup>; (3) the Treasury reasonably believes that the development or production of nuclear, radiological, biological or

chemical weapons in the country, or the doing in the country of anything that facilitates the development or production of any such weapons, poses a significant risk to the national interests of the United Kingdom<sup>5</sup>.

A direction may be given to a particular person operating in the financial sector<sup>6</sup>, any description of persons operating in that sector, or all persons operating in that sector<sup>7</sup>. A direction may impose requirements in relation to transactions or business relationships with a person carrying on business in the country, the government of the country, a person resident or incorporated in the country<sup>8</sup>. Such requirements may relate to customer due diligence<sup>9</sup>, ongoing monitoring<sup>10</sup>, systematic reporting<sup>11</sup>, or limiting or ceasing business<sup>12</sup>.

Officers of the enforcement authorities<sup>13</sup> are given powers to (a) require the provision of information or the production of documents<sup>14</sup>; (b) without a warrant to enter and inspect business premises, observe business activities, inspect documents found on business premises and require an explanation of any document<sup>15</sup>; (c) with a warrant to enter and search premises, take possession of documents, require an explanation of any document and to use such force as may reasonably be necessary<sup>16</sup>. However, these powers are not exercisable in relation to information or documents in respect of which a claim to legal professional privilege could be maintained in legal proceedings<sup>17</sup>. It is an offence to fail to comply with a requirement imposed by a direction<sup>18</sup>, and the enforcement authorities may impose a civil penalty on a person failing to comply with a requirement imposed by a direction<sup>19</sup>.

On an application to set aside a direction, the High Court must apply the principles applicable on an application for judicial review<sup>20</sup>.

The Attorney General may appoint a person as a special advocate to represent the interests of a party to financial restrictions proceedings<sup>21</sup> in any of those proceedings from which the party, and any legal representative of the party, is excluded<sup>22</sup>.

1 See the Counter-Terrorism Act 2008 Sch 7. See the Financial Restrictions (Iran) Order 2009, SI 2009/2725. As to procedural provisions see Sch 7 paras 14-16. The Treasury must make annual reports to Parliament on its exercise of its powers under Sch 7: Sch 7 para 38.

2 Counter-Terrorism Act 2008 Sch 7 para 1(1). The power to give such a direction is not exercisable in relation to an EEA state: Sch 7 para 1(5).

3 Counter-Terrorism Act 2008 Sch 7 paras 1(2), 2.

4 Counter-Terrorism Act 2008 Sch 7 paras 1(3), 2.

5 Counter-Terrorism Act 2008 Sch 7 paras 1(4), 2.

6 Subject to the exceptions in the Counter-Terrorism Act 2008 Sch 7 para 6, a person operating in the financial sector is to a credit or financial institution that is a United Kingdom person, or is acting in the course of a business carried on by it in the United Kingdom: see Sch 7 paras 4-8. 'United Kingdom person' means a United Kingdom national or a body incorporated or constituted under the law of any part of the United Kingdom: see Sch 7 para 44.

7 See the Counter-Terrorism Act 2008 Sch 7 para 3. Schedule 7 applies to the Crown: see Sch 7 para 43. The Financial Services Authority, the Office of Fair Trading and the Commissioners for Her Majesty's Revenue and Customs have duties to monitor persons operating in the financial sector for the purpose of securing compliance with the requirements of any directions Sch 7: see Sch 7 para 39.

8 See the Counter-Terrorism Act 2008 Sch 7 para 9.

9 See the Counter-Terrorism Act 2008 Sch 7 para 10.

10 See the Counter-Terrorism Act 2008 Sch 7 para 11.

11 See the Counter-Terrorism Act 2008 Sch 7 para 12.

12 See the Counter-Terrorism Act 2008 Sch 7 paras 13, 17.

13 In the Financial Services Authority, the Commissioners for Her Majesty's Revenue and Customs, and the Office of Fair Trading: Counter-Terrorism Act 2008 Sch 7 para 18(1). An officer of a local weights and measures authority may exercise these powers pursuant to arrangements made with the Office of Fair Trading by or on behalf of the relevant local weights and measures authority: see Sch 7 para 24.

14 See the Counter-Terrorism Act 2008 Sch 7 para 19. As to the power of the High Court or a county court to enforce Sch 7 para 19, see Sch 7 para 23.

15 See the Counter-Terrorism Act 2008 Sch 7 para 20.

16 See the Counter-Terrorism Act 2008 Sch 7 para 21.

17 See the Counter-Terrorism Act 2008 Sch 7 para 22.

18 See the Counter-Terrorism Act 2008 Sch 7 para 30(1). As to offences generally see Sch 7 paras 30-37, 40.

19 See the Counter-Terrorism Act 2008 Sch 7 paras 25-27, 40 (Sch 7 para 26 amended, Sch 7 paras 26A-26F added by SI 2009/777). Provision is made by the Counter-Terrorism Act 2008 Sch 7 paras 28 and 29 about appeals against and the payment and recovery of civil penalties (Sch 7 para 28 amended by SI 2009/777).

20 Counter-Terrorism Act 2008 s 63(1)-(3). As to the setting aside of decisions of the Treasury under Sch 7, see s 63; and CPR Pt 79 (added by SI 2008/3085; see **CIVIL PROCEDURE** vol 12 (2009) PARA 1534).

21 In proceedings in the High Court on an application under the Counter-Terrorism Act 2008 s 63 or on a claim arising from any matter to which such an application relates: s 65. Such proceedings are allocated to the Queen's Bench Division: Senior Courts Act 1981 Sch 1 para 2 (amended by the Counter-Terrorism Act 2008 s 70).

22 Counter-Terrorism Act 2008 s 68(1)(a), (3)(a). A special advocate may also represent the interests of a party on proceedings on an appeal, or further appeal: s 68(1)(b). A person so appointed is not responsible to the party to the proceedings whose interests the person is appointed to represent: s 68(2). A person may be appointed as a special advocate only if the person has a general legal qualification for the purposes of the Courts and Legal Services Act 1990 s 71 (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 742); Counter-Terrorism Act 2008 s 68(4)(a).

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## ***C. RECORD-KEEPING, PROCEDURES AND TRAINING***

### **551. Record-keeping.**

A relevant person<sup>1</sup> must keep the records specified in heads (1) and (2) below<sup>2</sup> for at least the period specified in heads (a) and (b) below<sup>3</sup>.

The records referred to above are: (1) a copy of, or the references to, the evidence of the customer's identity which has been obtained<sup>4</sup>; and (2) the supporting records (consisting of the original documents or copies) in respect of a business relationship<sup>5</sup> or occasional transaction<sup>6</sup> which is the subject of customer due diligence measures<sup>7</sup> or ongoing monitoring<sup>8</sup>. The period referred to above is five years beginning (a) in the case of the records specified in head (1) above, on the date on which the occasional transaction is completed or the business relationship ends<sup>9</sup>; or (b) in the case of the records specified in head (2) above, where the records relate to a particular transaction, on the date on which the transaction is completed; for all other records, on the date on which the business relationship ends<sup>10</sup>.

A relevant person who is relied on by another person must keep the records specified in head (1) above for five years beginning on the date on which he is relied on<sup>11</sup> in relation to any business relationship or occasional transaction<sup>12</sup>.

A person who is a credit or financial institution which is an authorised person or is a member of one of certain specified professions<sup>13</sup> who is relied on by a relevant person must, if requested by the person relying on him within the period referred to above<sup>14</sup> (i) as soon as reasonably practicable make available to the person who is relying on him any information about the customer (and any beneficial owner<sup>15</sup>) which he obtained when applying customer due diligence measures<sup>16</sup>; and (ii) as soon as reasonably practicable forward to the person who is relying on him copies of any identification and verification<sup>17</sup> data and other relevant documents on the identity of the customer (and any beneficial owner) which he obtained when applying those measures<sup>18</sup>.

A relevant person who relies on certain persons carrying on business in another EEA state or in a non-EEA state<sup>19</sup> (a 'third party') to apply customer due diligence measures must take steps to ensure that the third party will, if requested by the relevant person within the period referred to above<sup>20</sup> (A) as soon as reasonably practicable make available to him any information about the customer (and any beneficial owner) which the third party obtained when applying customer due diligence measures<sup>21</sup>; and (B) as soon as reasonably practicable forward to him copies of any identification and verification data and other relevant documents on the identity of the customer (and any beneficial owner) which the third party obtained when applying those measures<sup>22</sup>.

1 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

2 I.e. specified in the Money Laundering Regulations 2007, SI 2007/2157, reg 19(2).

3 Money Laundering Regulations 2007, SI 2007/2157, reg 19(1). The reference is to the period specified in reg 19(3): see reg 19(1). Regulation 19(1) is subject to reg 19(4).

4 Money Laundering Regulations 2007, SI 2007/2157, reg 19(2)(a). Such evidence is obtained pursuant to reg 7 (see PARA 542), reg 8 (see PARA 543), reg 10 (see PARA 544), reg 14 (see PARA 546) or reg 16(4) (see PARA 548): see reg 19(2)(a).

5 As to the meaning of 'business relationship' see PARA 542 note 2.

6 As to the meaning of 'occasional transaction' see PARA 542 note 4.

7 As to the meaning of 'customer due diligence measures' see PARA 542 note 2.

8 Money Laundering Regulations 2007, SI 2007/2157, reg 19(2)(b). As to the meaning of 'ongoing monitoring' see PARA 543 note 2.

9 Money Laundering Regulations 2007, SI 2007/2157, reg 19(3)(a).

10 Money Laundering Regulations 2007, SI 2007/2157, reg 19(3)(b).

11 I.e. for the purposes of the Money Laundering Regulations 2007, SI 2007/2157, reg 7 (see PARA 542), reg 10 (see PARA 544), reg 14 (see PARA 546) or reg 16(4) (see PARA 548): see reg 19(4).

12 Money Laundering Regulations 2007, SI 2007/2157, reg 19(4). See also note 3. For the purposes of reg 19, a person relies on another person where he does so in accordance with reg 17(1) (see PARA 549): reg 19(8).

13 I.e. a person referred to in the Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(a), (b) (see PARA 549): see reg 19(5).

14 I.e. referred to in the Money Laundering Regulations 2007, SI 2007/2157, reg 19(4): see reg 19(5).

15 As to the meaning of 'beneficial owner' see PARA 542 note 2.

16 Money Laundering Regulations 2007, SI 2007/2157, reg 19(5)(a). Regulation 19(5), (6) does not apply where a relevant person applies customer due diligence measures by means of an outsourcing service provider or agent: reg 19(7).

17 As to identification and verification see PARA 543.

18 Money Laundering Regulations 2007, SI 2007/2157, reg 19(5)(b). See note 16.

19 Is a person referred to in the Money Laundering Regulations 2007, SI 2007/2157, reg 17(2)(c), (d) (see PARA 549): see reg 19(6).

20 Is referred to in the Money Laundering Regulations 2007, SI 2007/2157, reg 19(4): see reg 19(6).

21 Money Laundering Regulations 2007, SI 2007/2157, reg 19(6)(a). See note 16.

22 Money Laundering Regulations 2007, SI 2007/2157, reg 19(6)(b). See note 16.

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## **552. Policies and procedures to be established, training.**

A relevant person<sup>1</sup> must establish and maintain appropriate and risk-sensitive policies and procedures<sup>2</sup> relating to: (1) customer due diligence measures<sup>3</sup> and ongoing monitoring<sup>4</sup>; (2) reporting<sup>5</sup>; (3) record-keeping<sup>6</sup>; (4) internal control<sup>7</sup>; (5) risk assessment and management<sup>8</sup>; (6) the monitoring and management of compliance with, and the internal communication of, such policies and procedures<sup>9</sup>, in order to prevent activities related to money laundering and terrorist financing<sup>10</sup>.

A credit or financial institution<sup>11</sup> must establish and maintain systems which enable it to respond fully and rapidly to inquiries from accredited financial investigators under the Proceeds of Crime Act 2002<sup>12</sup>, persons acting on behalf of the Scottish Ministers in their capacity as an enforcement authority under that Act, officers of Revenue and Customs or constables as to whether it maintains, or has maintained during the previous five years, a business relationship<sup>13</sup> with any person, and the nature of that relationship<sup>14</sup>. A credit or financial institution must communicate where relevant the policies and procedures which it establishes and maintains<sup>15</sup> to its branches and subsidiary undertakings<sup>16</sup> which are located outside the United Kingdom<sup>17</sup>.

A relevant person must take appropriate measures so that all relevant employees of his are (a) made aware of the law relating to money laundering and terrorist financing<sup>18</sup>; and (b) regularly given training in how to recognise and deal with transactions and other activities which may be related to money laundering or terrorist financing<sup>19</sup>.

1 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

2 The policies and procedures referred to include policies and procedures:

532 (1) which provide for the identification and scrutiny of (a) complex or unusually large transactions; (b) unusual patterns of transactions which have no apparent economic or visible lawful purpose; and (c) any other activity which the relevant person regards as particularly likely by its nature to be related to money laundering or terrorist financing (Money Laundering Regulations 2007, SI 2007/2157, reg 20(2)(a));

- 533 (2) which specify the taking of additional measures, where appropriate, to prevent the use for money laundering or terrorist financing of products and transactions which might favour anonymity (reg 20(2)(b));
- 534 (3) to determine whether a customer is a politically exposed person (reg 20(2)(c));
- 535 (4) under which (a) an individual in the relevant person's organisation is a nominated officer under the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 789 et seq) and the Terrorism Act 2000 Pt III (ss 14-23) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 390 et seq); (b) anyone in the organisation to whom information or other matter comes in the course of the business as a result of which he knows or suspects or has reasonable grounds for knowing or suspecting that a person is engaged in money laundering or terrorist financing is required to comply with the Proceeds of Crime Act 2002 Pt 7 or, as the case may be, the Terrorism Act 2000 Pt III; and (c) where a disclosure is made to the nominated officer, he must consider it in the light of any relevant information which is available to the relevant person and determine whether it gives rise to knowledge or suspicion or reasonable grounds for knowledge or suspicion that a person is engaged in money laundering or terrorist financing (Money Laundering Regulations 2007, SI 2007/2157, reg 20(2)(d)). Regulation 20(2)(d) does not apply where the relevant person is an individual who neither employs nor acts in association with any other person: reg 20(3).

As to the meanings of 'money laundering' and 'terrorist financing' see PARA 539 note 2. As to the meaning of 'politically exposed person' see PARA 549 note 19; definition applied by reg 20(6). As to the Proceeds of Crime Act 2002 Pt 7 see also *Tayeb v HSBC Bank plc* [2004] EWHC 1529 (Comm), [2004] 4 All ER 1024, [2004] 2 All ER (Comm) 880; *Squirrell Ltd v National Westminster Bank plc* [2005] EWHC 664 (Ch), [2005] 2 All ER 784, [2005] 1 All ER (Comm) 749; *K Ltd v National Westminster Bank plc* [2006] EWCA Civ 1039, [2006] 4 All ER 907, [2006] 2 All ER (Comm) 655; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

3 As to the meaning of 'customer due diligence measures' see PARA 542 note 2.

4 Money Laundering Regulations 2007, SI 2007/2157, reg 20(1)(a). As to the meaning of 'ongoing monitoring' see PARA 543 note 2.

5 Money Laundering Regulations 2007, SI 2007/2157, reg 20(1)(b).

6 Money Laundering Regulations 2007, SI 2007/2157, reg 20(1)(c). As to record-keeping see PARA 551.

7 Money Laundering Regulations 2007, SI 2007/2157, reg 20(1)(d).

8 Money Laundering Regulations 2007, SI 2007/2157, reg 20(1)(e).

9 Money Laundering Regulations 2007, SI 2007/2157, reg 20(1)(f).

10 Money Laundering Regulations 2007, SI 2007/2157, reg 20(1).

11 As to the meanings of 'credit institution' and 'financial institution' see PARA 540 notes 3, 4.

12 The financial investigators accredited under the Proceeds of Crime Act 2002 s 3 (accreditation and training): see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq. See also *Tayeb v HSBC Bank plc* [2004] EWHC 1529 (Comm), [2004] 4 All ER 1024, [2004] 2 All ER (Comm) 880; *Squirrell Ltd v National Westminster Bank plc* [2005] EWHC 664 (Ch), [2005] 2 All ER 784, [2005] 1 All ER (Comm) 749; *K Ltd v National Westminster Bank plc* [2006] EWCA Civ 1039, [2006] 4 All ER 907, [2006] 2 All ER (Comm) 655; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

13 As to the meaning of 'business relationship' see PARA 542 note 2.

14 Money Laundering Regulations 2007, SI 2007/2157, reg 20(4). As to officers of Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 901. As to the office of constable generally see **POLICE** vol 36(1) (2007 Reissue) PARA 101 et seq.

15 In accordance with the Money Laundering Regulations 2007, SI 2007/2157, reg 20.

16 As to the meaning of 'subsidiary undertaking' see PARA 547 note 2; definition applied by the Money Laundering Regulations 2007, SI 2007/2157, reg 20(6). As to branches and subsidiary undertakings see generally PARA 547.

17 Money Laundering Regulations 2007, SI 2007/2157, reg 20(7). As to the meaning of 'United Kingdom' see PARA 2 note 3.

- 18 Money Laundering Regulations 2007, SI 2007/2157, reg 21(a).
- 19 Money Laundering Regulations 2007, SI 2007/2157, reg 21(b).

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## ***D. SUPERVISION AND REGISTRATION***

### **553. Supervisory authorities.**

The following bodies are supervisory authorities<sup>1</sup>:

- 1286 (1) the Financial Services Authority<sup>2</sup> is the supervisory authority for: (a) credit and financial institutions<sup>3</sup> which are authorised persons<sup>4</sup>; (b) trust or company service providers<sup>5</sup> which are authorised persons<sup>6</sup>; (c) Annex I financial institutions<sup>7</sup>;
- 1287 (2) the Office for Fair Trading is the supervisory authority for: (a) consumer credit financial institutions<sup>8</sup>; (b) estate agents<sup>9</sup>;
- 1288 (3) each of certain specified professional bodies<sup>10</sup> is the supervisory authority for relevant persons<sup>11</sup> who are regulated by it<sup>12</sup>;
- 1289 (4) the Commissioners for Her Majesty's Revenue and Customs<sup>13</sup> are the supervisory authority for: (a) high value dealers<sup>14</sup>; (b) money service businesses which are not supervised by the Authority<sup>15</sup>; (c) trust or company service providers which are not supervised by the Authority or one of the specified bodies referred to in head (3) above<sup>16</sup>; (d) auditors<sup>17</sup>, external accountants<sup>18</sup> and tax advisers<sup>19</sup> who are not supervised by one of the specified bodies referred to in head (3) above<sup>20</sup>;
- 1290 (5) the Gambling Commission<sup>21</sup> is the supervisory authority for casinos<sup>22</sup>;
- 1291 (6) the Department of Enterprise, Trade and Investment in Northern Ireland is the supervisory authority for: (a) credit unions in Northern Ireland<sup>23</sup>; (b) insolvency practitioners authorised by it<sup>24</sup>;
- 1292 (7) the Secretary of State<sup>25</sup> is the supervisory authority for insolvency practitioners authorised by him under the Insolvency Act 1986<sup>26</sup>.

Where under the above provisions<sup>27</sup> there is more than one supervisory authority for a relevant person, the supervisory authorities may agree that one of them will act as the supervisory authority for that person<sup>28</sup>. Where such an agreement has been made, the authority which has agreed to act as the supervisory authority must notify the relevant person or publish the agreement in such manner as it considers appropriate<sup>29</sup>. Where no such agreement has been made, the supervisory authorities for a relevant person must cooperate in the performance of their functions under the Money Laundering Regulations 2007<sup>30</sup>.

A supervisory authority must effectively monitor the relevant persons for whom it is the supervisory authority and take necessary measures for the purpose of securing compliance by such persons with the requirements of the Money Laundering Regulations 2007<sup>31</sup>. A supervisory authority which, in the course of carrying out any of its functions under the Regulations, knows or suspects that a person is or has engaged in money laundering or terrorist financing must promptly inform the Serious Organised Crime Agency<sup>32</sup>. The functions of the Financial Services Authority under the Regulations is treated for the purposes of the Financial Services and Markets Act 2000<sup>33</sup> as functions conferred on the Authority under that Act<sup>34</sup>.

- 1 As to the meaning of 'supervisory authority' see PARA 542 note 7.
- 2 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 3 As to the meanings of 'credit institution' and 'financial institution' see PARA 540 notes 3, 4.
- 4 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(a)(i). Regulation 23(1) is subject to reg 23(2). As to the meaning of 'authorised person' see PARA 549 note 7.
- 5 As to the meaning of 'trust or company service provider' see PARA 540 note 10.
- 6 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(a)(ii). See note 4.
- 7 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(a)(ii). See note 4. 'Annex I financial institution' means any undertaking which falls within reg 3(3)(a) (see PARA 539 note 4 head (1)) other than: (1) a consumer credit financial institution; (2) a money service business; or (3) an authorised person; and 'consumer credit financial institution' means any undertaking which falls within reg 3(3)(a) and which requires, under the Consumer Credit Act 1974 s 21 (businesses needing a licence) (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 121), a licence to carry on a consumer credit business, other than: (a) a person covered by a group licence issued by the Office of Fair Trading under s 22 (standard and group licences) (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 122); (b) a money service business; or (c) an authorised person: Money Laundering Regulations 2007, SI 2007/2157, regs 2(1), 22(1). For these purposes, 'consumer credit business' has the meaning given by the Consumer Credit Act 1974 s 189(1) (definitions) (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 81) and, on the entry into force of the Consumer Credit Act 2006 s 23(a) (definitions of 'consumer credit business' and 'consumer hire business') (see **CONSUMER CREDIT**), has the meaning given by the Consumer Credit Act 1974 s 189(1) as amended by the Consumer Credit Act 2006 s 23(a): Money Laundering Regulations 2007, SI 2007/2157, reg 22(2). As to the meaning of 'money service business' see PARA 540 note 4. As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.
- 8 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(b)(i). See note 4.
- 9 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(b)(ii). See note 4. As to the meaning of 'estate agent' see PARA 540 note 11.
- 10 The professional bodies referred to are as follows: the Association of Chartered Certified Accountants; the Council for Licensed Conveyancers (see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1319 et seq); the Faculty of Advocates; the General Council of the Bar (see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1042 et seq); the General Council of the Bar of Northern Ireland; the Institute of Chartered Accountants in England and Wales; the Institute of Chartered Accountants in Ireland; the Institute of Chartered Accountants of Scotland; the Law Society (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 603 et seq); the Law Society of Scotland; the Law Society of Northern Ireland; the Association of Accounting Technicians; the Association of International Accountants; the Association of Taxation Technicians; the Chartered Institute of Management Accountants; the Chartered Institute of Public Finance and Accountancy; the Chartered Institute of Taxation; the Faculty Office of the Archbishop of Canterbury; the Insolvency Practitioners Association; the Institute of Certified Bookkeepers; the Institute of Financial Accountants; and the International Association of Book-keepers: see the Money Laundering Regulations 2007, SI 2007/2157, Sch 3 (amended by SI 2007/3299).
- 11 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.
- 12 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(c). See note 4.
- 13 As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.
- 14 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(d)(i). See note 4. As to the meaning of 'high value dealer' see PARA 540 note 12.
- 15 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(d)(ii). See note 4.
- 16 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(d)(iii). See note 4.
- 17 As to the meaning of 'auditor' see PARA 540 note 5.
- 18 As to the meaning of 'external accountant' see PARA 540 note 7.
- 19 As to the meaning of 'tax adviser' see PARA 540 note 8.



- 20 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(d)(iv). See note 4.
- 21 As to the Gambling Commission see **LICENSING AND GAMBLING** vol 67 (2008) PARA 4.
- 22 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(e). See note 4. As to the meaning of 'casino' see PARA 540 note 13. See also PARA 544.
- 23 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(f)(i). See note 4. As to credit unions generally see PARAS 2395, 2402.
- 24 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(f)(ii). See note 4. Such authorisation is under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 351.
- 25 As to the Secretary of State see PARA 3.
- 26 Money Laundering Regulations 2007, SI 2007/2157, reg 23(1)(g). See note 4. Such authorisation is under the Insolvency Act 1986 s 393 (grant, refusal and withdrawal of authorisation): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 50; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 16.
- 27 Ie under the Money Laundering Regulations 2007, SI 2007/2157, reg 23(1).
- 28 Money Laundering Regulations 2007, SI 2007/2157, reg 23(2).
- 29 Money Laundering Regulations 2007, SI 2007/2157, reg 23(3).
- 30 Money Laundering Regulations 2007, SI 2007/2157, reg 23(4). The reference is to the Money Laundering Regulations 2007, SI 2007/2157.
- 31 Money Laundering Regulations 2007, SI 2007/2157, reg 24(1).
- 32 Money Laundering Regulations 2007, SI 2007/2157, reg 24(2). Such a disclosure is not to be taken to breach any restriction, however imposed, on the disclosure of information: reg 24(3). As to the Serious Organised Crime Agency see **POLICE** vol 36(1) (2007 Reissue) PARA 430 et seq.
- 33 Ie for the purposes of the Financial Services and Markets Act 2000 Sch 1 Pts 1, 2, 4: see PARAS 6, 13 et seq.
- 34 Money Laundering Regulations 2007, SI 2007/2157, reg 24(4).

## UPDATE

### 553 Supervisory authorities

NOTE 7--A bill payment service provider and a telecommunication, digital and IT payment service provider are also excluded from the definition of 'Annex I financial institution': SI 2007/2157 reg 22(1) (amended by SI 2009/209). 'Bill payment service provider' means an undertaking which provides a payment service enabling the payment of utility and other household bills; and 'telecommunication, digital and IT payment service provider' means an undertaking which provides payment services falling within SI 2009/209 Sch 1 para 1(g): SI 2007/2157 reg 2(1) (definitions added by SI 2009/209). As to payment services see PARA 1399.

TEXT AND NOTES 13-20--The Commissioners for Her Majesty's Revenue and Customs are also the supervisory authority for (e) bill payment service providers which are not supervised by the Authority; (f) telecommunication, digital and IT payment service providers which are not supervised by the Authority: SI 2007/2157 reg 23(1)(d)(v), (vi) (added by SI 2009/209). For the meaning of 'bill payment service provider' and 'telecommunication, digital and IT payment service provider' see NOTE 7.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(viii) Anti Money Laundering/D. SUPERVISION AND REGISTRATION/554. Obligations on public authorities.

#### **554. Obligations on public authorities.**

The following bodies and persons must, if they know or suspect or have reasonable grounds for knowing or suspecting that a person is or has engaged in money laundering or terrorist financing<sup>1</sup>, as soon as reasonably practicable inform the Serious Organised Crime Agency<sup>2</sup>:

- 1293 (1) the Auditor General for Scotland<sup>3</sup>;
- 1294 (2) the Auditor General for Wales<sup>4</sup>;
- 1295 (3) the Financial Services Authority<sup>5</sup>;
- 1296 (4) the Bank of England<sup>6</sup>;
- 1297 (5) the Comptroller and Auditor General<sup>7</sup>;
- 1298 (6) the Comptroller and Auditor General for Northern Ireland<sup>8</sup>;
- 1299 (7) the Gambling Commission<sup>9</sup>;
- 1300 (8) the Office of Fair Trading<sup>10</sup>;
- 1301 (9) the Official Solicitor to the Supreme Court<sup>11</sup>;
- 1302 (10) the Pensions Regulator<sup>12</sup>;
- 1303 (11) the Public Trustee<sup>13</sup>;
- 1304 (12) the Secretary of State<sup>14</sup>, in the exercise of his functions under enactments relating to companies and insolvency<sup>15</sup>;
- 1305 (13) the Treasury<sup>16</sup>, in the exercise of its functions under the Financial Services and Markets Act 2000<sup>17</sup>;
- 1306 (14) the Treasury Solicitor<sup>18</sup>;
- 1307 (15) a designated professional body for the purposes of the Financial Services and Markets Act 2000<sup>19</sup>;
- 1308 (16) a person or inspector appointed under the Friendly Societies Act 1992<sup>20</sup>;
- 1309 (17) an inspector appointed under the Industrial and Provident Societies Act 1965<sup>21</sup> or the Credit Unions Act 1979<sup>22</sup>;
- 1310 (18) an inspector appointed under the Companies Act 1985<sup>23</sup> or under its Northern Ireland equivalent<sup>24</sup>;
- 1311 (19) a person or inspector appointed under the Building Societies Act 1986<sup>25</sup>;
- 1312 (20) a person appointed under the Financial Services and Markets Act 2000 to conduct certain investigations<sup>26</sup>; and
- 1313 (21) a person authorised to require the production of documents under the Companies Act 1985<sup>27</sup>, its Northern Ireland equivalent<sup>28</sup> or the Companies Act 1989<sup>29</sup>.

A disclosure made under the above provisions<sup>30</sup> is not to be taken to breach any restriction on the disclosure of information however imposed<sup>31</sup>.

1 As to the meanings of 'money laundering' and 'terrorist financing' see PARA 539 note 2.

2 As to the Serious Organised Crime Agency see **POLICE** vol 36(1) (2007 Reissue) PARA 430 et seq.

3 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(a).

4 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(b). As to the Auditor General for Wales see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

- 5 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(c). As to the Financial Services Authority see **PARAS** 4, 6 et seq.
- 6 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(d). As to the Bank of England see **PARA** 793 et seq.
- 7 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(e). As to the Comptroller and Auditor General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) **PARA** 724 et seq.
- 8 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(f).
- 9 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(g). As to the Gambling Commission see **LICENSING AND GAMBLING** vol 67 (2008) **PARA** 4.
- 10 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(h). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) **PARA** 6 et seq.
- 11 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(i). As from a day to be appointed, the Supreme Court of England and Wales is renamed the Senior Courts of England and Wales by the Constitutional Reform Act 2005 s 59(1) (not yet in force): see **COURTS**. At the date at which this volume states the law no such day had been appointed.
- 12 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(j). As to the Pensions Regulator see **SOCIAL SECURITY AND PENSIONS**.
- 13 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(k). As to the Public Trustee see **TRUSTS** vol 48 (2007 Reissue) **PARA** 766 et seq.
- 14 As to the Secretary of State see **PARA** 3.
- 15 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(l). As to enactments relating to companies and insolvency see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANIES; COMPANY AND PARTNERSHIP INSOLVENCY**.
- 16 As to the Treasury see **PARA** 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) **PARA** 512 et seq.
- 17 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(m). See also **PARA** 84 et seq.
- 18 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(n). As to the Treasury Solicitor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) **PARA** 541.
- 19 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(o). The reference is to a designated professional body for the purposes of the Financial Services and Markets Act 2000 Pt XX (ss 325-333) (provision of financial services by members of the professions): see **PARA** 749 et seq.
- 20 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(p). Such appointments are under the Friendly Societies Act 1992 s 65 (investigations on behalf of Authority) (see **PARA** 2319) or s 66 (inspections and special meetings) (see **PARA** 2320).
- 21 He appointed under the Industrial and Provident Societies Act 1965 s 49 (appointment of inspectors): see **PARA** 2530.
- 22 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(q). The reference is to an appointment under the Credit Unions Act 1979 s 18 (power to appoint inspector): see **PARA** 2530.
- 23 He appointed under the Companies Act 1985 s 431 (investigation of a company on its own application) (see **COMPANIES** vol 15 (2009) **PARA** 1541), s 432 (other company investigations) (see **COMPANIES** vol 15 (2009) **PARA** 1542), s 442 (power to investigate company ownership) (see **COMPANIES** vol 15 (2009) **PARA** 1545) or s 446 (investigation of share dealing) (now repealed).
- 24 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(r). The reference is to an appointment under the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), arts 424, 425, 435 or 439.
- 25 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(s). The reference is to an appointment under the Building Societies Act 1986 s 55 (investigations on behalf of Authority) (see **PARA** 2057) or s 56 (inspections and special meetings) (see **PARA** 2058).

26 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(t). The reference is to an appointment under the Financial Services and Markets Act 2000 s 167 (appointment of persons to carry out investigations) (see PARA 449), s 168(3) or (5) (appointment of persons to carry out investigations in particular cases) (see PARA 449), s 169(1)(b) (investigations to support overseas regulator) (see PARA 450 head (2)) or s 284 (power to investigate affairs of a scheme) (see PARA 683), or under regulations made under s 262(2)(k) (open-ended investment companies) (see PARA 621) to conduct an investigation.

27 Ie authorised under the Companies Act 1985 s 447 (Secretary of State's power to require production of documents); see **COMPANIES** vol 15 (2009) PARA 1558.

28 Ie authorised under the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 440.

29 Money Laundering Regulations 2007, SI 2007/2157, reg 49(1)(t). The reference is to authorisation under the Companies Act 1989 s 84 (exercise of powers by officer): see **COMPANIES** vol 15 (2009) PARA 1570.

30 Ie made under the Money Laundering Regulations 2007, SI 2007/2157, reg 29(1).

31 Money Laundering Regulations 2007, SI 2007/2157, reg 49(2).

## UPDATE

### 554 Obligations on public authorities

TEXT AND NOTES--The Commissioners for Her Majesty's Revenue and Customs may disclose to the Financial Services Authority information held in connection with their functions under SI 2007/2157 if the disclosure is made for the purpose of enabling or assisting the Authority to discharge any of its functions under the Payment Services Regulations 2009, SI 2009/209: see SI 2007/2157 reg 49A (added by SI 2009/209).

NOTE 11--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(viii) Anti Money Laundering/D. SUPERVISION AND REGISTRATION/555. Registration of high value dealers, money service businesses and trust or company service providers.

### 555. Registration of high value dealers, money service businesses and trust or company service providers.

The Commissioners for Her Majesty's Revenue and Customs<sup>1</sup> must maintain registers of high value dealers<sup>2</sup>; money service businesses<sup>3</sup> for which they are the supervisory authority<sup>4</sup>; and trust or company service providers<sup>5</sup> for which they are the supervisory authority<sup>6</sup>. The Commissioners may keep the registers in any form they think fit<sup>7</sup>. They may also publish or make available for public inspection all or part of a register maintained in accordance with these provisions<sup>8</sup>.

A person in respect of whom the Commissioners are required to maintain such a register<sup>9</sup> must not act as a high value dealer, money service business or trust or company service provider, unless he is included in the register<sup>10</sup>.

An applicant for registration in such a register must make an application in such manner and provide such information as the Commissioners may specify<sup>11</sup>. The information which the Commissioners may specify includes: (1) the applicant's name and (if different) the name of the business<sup>12</sup>; (2) the nature of the business<sup>13</sup>; (3) the name of the nominated officer (if any)<sup>14</sup>; (4) in relation to a money service business or trust or company service provider, the name of

any person who effectively directs or will direct the business and any beneficial owner<sup>15</sup> of the business and information needed by the Commissioners to decide whether they must refuse the application<sup>16</sup>.

At any time after receiving an application and before determining it, the Commissioners may require the applicant to provide, within 21 days beginning with the date of being requested to do so, such further information as they reasonably consider necessary to enable them to determine the application<sup>17</sup>. There are also provisions as to material change affecting the information and where the information contains significant inaccuracy<sup>18</sup>. Any information to be provided to the Commissioners<sup>19</sup> must be in such form or verified in such manner as they may specify<sup>20</sup>.

The Commissioners must refuse to register an applicant as a money service business or trust or company service provider if they are satisfied that (a) the applicant<sup>21</sup>; (b) a person who effectively directs, or will effectively direct, the business or service provider<sup>22</sup>; (c) a beneficial owner of the business or service provider<sup>23</sup>; or (d) the nominated officer of the business or service provider<sup>24</sup>, is not a fit and proper person<sup>25</sup>.

The Commissioners may refuse to register an applicant for registration in a register<sup>26</sup> only if (i) any requirement relating to applications<sup>27</sup> has not been complied with<sup>28</sup>; (ii) it appears to the Commissioners that any information provided<sup>29</sup> is false or misleading in a material particular<sup>30</sup>; or (iii) the applicant has failed to pay a relevant charge<sup>31</sup>. The Commissioners must within 45 days beginning either with the date on which they receive the application or, where applicable, with the date on which they receive any further required information<sup>32</sup>, give the applicant notice of their decision to register the applicant<sup>33</sup>; or of their decision not to register the applicant, the reasons for their decision, the right to require a review<sup>34</sup> and the right to appeal<sup>35</sup>. The Commissioners must, as soon as practicable after deciding to register a person, include him in the relevant register<sup>36</sup>.

The Commissioners must cancel the registration of a money service business or trust or company service provider in a register<sup>37</sup> if, at any time after registration, they are satisfied that he or any person mentioned in head (b), (c) or (d) above is not a fit and proper person<sup>38</sup>. The Commissioners may also cancel a person's registration in such a register if, at any time after registration, it appears to them that they would have had grounds to refuse registration under heads (i) to (iii) above<sup>39</sup>.

Where the Commissioners decide to cancel a person's registration they must give him notice of (A) their decision and<sup>40</sup> the date from which the cancellation takes effect<sup>41</sup>; (B) the reasons for their decision<sup>42</sup>; (C) the right to require a review<sup>43</sup>; and (D) the right to appeal<sup>44</sup>. If the Commissioners consider that the interests of the public require the cancellation of a person's registration to have immediate effect<sup>45</sup>, and they include a statement to that effect and the reasons for it in the above notice<sup>46</sup>, the cancellation takes effect when the notice is given to the person<sup>47</sup>.

1 As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.

2 Money Laundering Regulations 2007, SI 2007/2157, reg 25(1)(a). As to the meaning of 'high value dealer' see PARA 540 note 12.

3 As to the meaning of 'money service business' see PARA 540 note 4.

4 Money Laundering Regulations 2007, SI 2007/2157, reg 25(1)(b). As to the meaning of 'supervisory authority' see PARA 542 note 7. See also PARA 553.

5 As to the meaning of 'trust or company service provider' see PARA 540 note 10.

6 Money Laundering Regulations 2007, SI 2007/2157, reg 25(1)(c).

7 Money Laundering Regulations 2007, SI 2007/2157, reg 25(2).

8 Money Laundering Regulations 2007, SI 2007/2157, reg 25(3). The reference is to reg 25.

9 le under the Money Laundering Regulations 2007, SI 2007/2157, reg 25.

10 Money Laundering Regulations 2007, SI 2007/2157, reg 26(1). Regulation 26(1) and reg 29 (see the text and notes 26-36) are subject to the transitional provisions set out in reg 50: reg 26(2).

Regulation 26 does not apply to an existing money service business, an existing trust or company service provider or an existing high value dealer until (1) where it has applied in accordance with reg 27 (see the text to notes 11-18) before the specified date for registration in a register maintained under reg 25(1) (a 'new register') (a) the date it is included in a new register following the determination of its application by the Commissioners; or (b) where the Commissioners give it notice under reg 29(2)(b) (see the text to note 35) of their decision not to register it, the date on which the Commissioners state that the decision takes effect or, where a statement is included in accordance with reg 50(3)(b) (see head (ii) below), the time at which the Commissioners give it such notice; (2) in any other case, the specified date: reg 50(1). 'Existing money service business' and an 'existing high value dealer' mean a money service business or a high value dealer which, immediately before 15 December 2007, was included in a register maintained under the Money Laundering Regulations 2003, SI 2003/3075, reg 10 (revoked); and 'existing trust or company service provider' means a trust or company service provider carrying on business in the United Kingdom immediately before 15 December 2007: Money Laundering Regulations 2007, SI 2007/2157, reg 50(5). The 'specified date' is: in the case of an existing money service business, 1 February 2008; in the case of an existing trust or company service provider, 1 April 2008; in the case of an existing high value dealer, the first anniversary which falls on or after 1 January 2008 of the date of its registration in a register maintained under the Money Laundering Regulations 2003, SI 2003/3075, reg 10 (revoked): Money Laundering Regulations 2007, SI 2007/2157, reg 50(2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

In the case of an application for registration in a new register made before the specified date by an existing money service business, an existing trust or company service provider or an existing high value dealer, the Commissioners must include in a notice given to it under reg 29(2)(b) (see the text to note 35) (i) the date on which their decision is to take effect; or (ii) if the Commissioners consider that the interests of the public require their decision to have immediate effect, a statement to that effect and the reasons for it: reg 50(3).

In the case of an application for registration in a new register made before the specified date by an existing money services business or an existing trust or company service provider, the Commissioners must give it a notice under reg 29(2) (see the text and notes 32-35) by (A) in the case of an existing money service business, 1 June 2008; (B) in the case of an existing trust or company service provider, 1 July 2008; or (C) where applicable, 45 days beginning with the date on which they receive any further information required under reg 27(3) (see the text to note 17): reg 50(4).

11 Money Laundering Regulations 2007, SI 2007/2157, reg 27(1).

12 Money Laundering Regulations 2007, SI 2007/2157, reg 27(2)(a).

13 Money Laundering Regulations 2007, SI 2007/2157, reg 27(2)(b).

14 Money Laundering Regulations 2007, SI 2007/2157, reg 27(2)(c). 'Nominated officer' means a person who is nominated to receive disclosures under the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (money laundering) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 789 et seq) or Terrorism Act 2000 Pt III (ss 14-23) (terrorist property) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 390 et seq): Money Laundering Regulations 2007, SI 2007/2157, reg 2(1).

15 As to the meaning of 'beneficial owner' see PARA 542 note 2.

16 Money Laundering Regulations 2007, SI 2007/2157, reg 27(2)(d). Such refusal is pursuant to reg 28: see the text and notes 21-26.

17 Money Laundering Regulations 2007, SI 2007/2157, reg 27(3).

18 See the Money Laundering Regulations 2007, SI 2007/2157, reg 27(4), (5). If at any time after the applicant has provided the Commissioners with any information under reg 27(1) or (3), (1) there is a material change affecting any matter contained in that information; or (2) it becomes apparent to that person that the information contains a significant inaccuracy, he must provide the Commissioners with details of the change or, as the case may be, a correction of the inaccuracy within 30 days beginning with the date of the occurrence of the change (or the discovery of the inaccuracy) or within such later time as may be agreed with the Commissioners: reg 27(4). The obligation in reg 27(4) applies also to material changes or significant inaccuracies affecting any matter contained in any supplementary information provided pursuant to that provision: reg 27(5).

- 19 le under the Money Laundering Regulations 2007, SI 2007/2157, reg 27.
- 20 Money Laundering Regulations 2007, SI 2007/2157, reg 27(6).
- 21 Money Laundering Regulations 2007, SI 2007/2157, reg 28(1)(a).
- 22 Money Laundering Regulations 2007, SI 2007/2157, reg 28(1)(b).
- 23 Money Laundering Regulations 2007, SI 2007/2157, reg 28(1)(c).
- 24 Money Laundering Regulations 2007, SI 2007/2157, reg 28(1)(d).
- 25 Money Laundering Regulations 2007, SI 2007/2157, reg 28(1). For these purposes, a person is not a fit and proper person if:
  - 536 (1) he has been convicted of (a) an offence under the Terrorism Act 2000 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 390 et seq); (b) an offence under the Anti-Terrorism, Crime and Security Act 2001 Sch 3 para 7(2) or (3) (offences) (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 549); (c) an offence under the Terrorism Act 2006 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 425 et seq); (d) an offence under the Proceeds of Crime Act 2002 Pt 7 (ss 327-340) (money laundering) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 789), or listed in Sch 2 (lifestyle offences: England and Wales) (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq), Sch 4 (lifestyle offences: Scotland) or Sch 5 (lifestyle offences: Northern Ireland); (e) an offence under the Fraud Act 2006 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**) or, in Scotland, the common law offence of fraud; (f) an offence under the Value Added Tax Act 1994 s 72(1), (3) or (8) (offences) (see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 316 et seq); or (g) the common law offence of cheating the public revenue (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 322) (Money Laundering Regulations 2007, SI 2007/2157, reg 28(2)(a));
  - 537 (2) he has been adjudged bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged (see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**) (reg 28(2)(b));
  - 538 (3) he is subject to a disqualification order under the Company Directors Disqualification Act 1986 (see **COMPANIES** vol 15 (2009) PARA 1578 et seq) (Money Laundering Regulations 2007, SI 2007/2157, reg 28(2)(c));
  - 539 (4) he is or has been subject to a confiscation order under the Proceeds of Crime Act 2002 (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 390 et seq) (Money Laundering Regulations 2007, SI 2007/2157, reg 28(2)(d));
  - 540 (5) he has consistently failed to comply with the requirements of the Money Laundering Regulations 2007, SI 2007/2157, the Money Laundering Regulations 2003, SI 2003/3075 (revoked) or the Money Laundering Regulations 2001, SI 2001/3641 (revoked) (Money Laundering Regulations 2007, SI 2007/2157, reg 28(2)(e));
  - 541 (6) he has consistently failed to comply with the requirements of European Parliament and EC Council Regulation 1781/2006 (OJ L345, 8.12.2006, p 1) on information on the payer accompanying the transfer of funds (Money Laundering Regulations 2007, SI 2007/2157, reg 28(2)(f));
  - 542 (7) he has effectively directed a business which falls within head (5) or (6) (reg 28(2)(g));
  - 543 (8) he is otherwise not a fit and proper person with regard to the risk of money laundering or terrorist financing (reg 28(2)(h)).

For the above purposes, a conviction for an offence listed in head (1) is to be disregarded if it is spent for the purposes of the Rehabilitation of Offenders Act 1974 (see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 660 et seq): Money Laundering Regulations 2007, SI 2007/2157, reg 28(3). As to the meanings of 'money laundering' and 'terrorist financing' see PARA 539 note 2.

- 26 le a register maintained under the Money Laundering Regulations 2007, SI 2007/2157, reg 25.
- 27 le any requirement of, or imposed under, the Money Laundering Regulations 2007, SI 2007/2157, reg 27.

- 28 Money Laundering Regulations 2007, SI 2007/2157, reg 29(1)(a). Regulation 29 is subject to reg 28. As to transitional provisions for reg 29 see note 10.
- 29 Ie pursuant to the Money Laundering Regulations 2007, SI 2007/2157, reg 27.
- 30 Money Laundering Regulations 2007, SI 2007/2157, reg 29(1)(b). See note 28.
- 31 Money Laundering Regulations 2007, SI 2007/2157, reg 29(1)(c). See note 28. The reference is to a charge under reg 35(1): see PARA 558.
- 32 Ie further information required under the Money Laundering Regulations 2007, SI 2007/2157, reg 27(3): see the text to note 17.
- 33 Money Laundering Regulations 2007, SI 2007/2157, reg 29(2)(a).
- 34 Ie under the Money Laundering Regulations 2007, SI 2007/2157, reg 43: see PARA 564.
- 35 Money Laundering Regulations 2007, SI 2007/2157, reg 29(2)(b). The reference is the right to appeal under reg 44(1)(a): see PARA 564.
- 36 Money Laundering Regulations 2007, SI 2007/2157, reg 29(3).
- 37 Ie a register maintained under the Money Laundering Regulations 2007, SI 2007/2157, reg 25(1).
- 38 Money Laundering Regulations 2007, SI 2007/2157, reg 30(1). The reference is to a fit and proper person within the meaning of reg 28(2): see note 25.
- 39 Money Laundering Regulations 2007, SI 2007/2157, reg 30(2).
- 40 Ie subject to the Money Laundering Regulations 2007, SI 2007/2157, reg 30(4): see the text to notes 45-47.
- 41 Money Laundering Regulations 2007, SI 2007/2157, reg 30(3)(a).
- 42 Money Laundering Regulations 2007, SI 2007/2157, reg 30(3)(b).
- 43 Money Laundering Regulations 2007, SI 2007/2157, reg 30(3)(c). The reference is to a review under reg 43: see PARA 564.
- 44 Money Laundering Regulations 2007, SI 2007/2157, reg 30(3)(d). The reference is to the right to appeal under reg 44(1)(a): see PARA 564.
- 45 Money Laundering Regulations 2007, SI 2007/2157, reg 30(4)(a).
- 46 Money Laundering Regulations 2007, SI 2007/2157, reg 30(4)(b). The reference is to a notice under reg 30(3): see heads (A)-(C) in the text.
- 47 Money Laundering Regulations 2007, SI 2007/2157, reg 30(4).

## UPDATE

### **555 Registration of high value dealers, money service businesses and trust or company service providers**

TEXT AND NOTES 1-6--The Commissioners for Her Majesty's Revenue and Customs must also maintain registers of bill payment service providers for which they are the supervisory authority; and telecommunication, digital and IT payment service providers for which they are the supervisory authority: SI 2007/2157 reg 25(1)(d), (e) (added by SI 2009/209). For the meaning of 'bill payment service provider' and 'telecommunication, digital and IT payment service provider' see PARA 553.

TEXT AND NOTES 9, 10--Such a person must also not act as a bill payment service provider or a telecommunication, digital and IT payment service provider, unless he is included in the register: SI 2007/2157 reg 26(1) (amended by SI 2009/209). For the



meaning of 'bill payment service provider' and 'telecommunication, digital and IT payment service provider' see PARA 553. The provision excluding the application of reg 26 is extended to an existing bill payment service provider or an existing telecommunication, digital and IT payment service provider: SI 2007/2157 reg 50(1) (amended by SI 2009/209). 'Existing bill payment service provider' and 'existing telecommunication, digital and IT payment service provider' mean a bill payment service provider or a telecommunication, digital and IT payment service provider carrying on business in the United Kingdom immediately before 1 November 2009: SI 2007/2157 reg 50(5) (definition added by SI 2009/209). The 'specified date' is, in the case of an existing bill payment service provider or an existing telecommunication, digital and IT payment service provider, 1 March 2010: SI 2007/2157 reg 50(2) (amended by SI 2009/209). The provision setting out what the Commissioners must include in a notice under reg 29(2)(b) is extended to an existing bill payment service provider or an existing telecommunication, digital and IT payment service provider: SI 2007/2157 reg 50(3) (amended by SI 2009/209).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(viii) Anti Money Laundering/D. SUPERVISION AND REGISTRATION/556. Requirement on authorised person to inform the Financial Services Authority.

#### **556. Requirement on authorised person to inform the Financial Services Authority.**

An authorised person<sup>1</sup> whose supervisory authority<sup>2</sup> is the Financial Services Authority<sup>3</sup> must, before acting as a money service business<sup>4</sup> or a trust or company service provider<sup>5</sup> or within 28 days of so doing, inform the Authority that he intends, or has begun, to act as such<sup>6</sup>.

Where an authorised person whose supervisory authority is the Authority ceases to act as a money service business or a trust or company service provider, he must immediately inform the Authority<sup>7</sup>.

Any requirement imposed by this provision<sup>8</sup> is to be treated as if it were a requirement imposed by or under the Financial Services and Markets Act 2000<sup>9</sup>. Any information to be provided to the Authority under this provision must be in such form or verified in such manner as it may specify<sup>10</sup>.

1 As to the meaning of 'authorised person' see PARA 549 note 7.

2 As to the meaning of 'supervisory authority' see PARA 542 note 7. See also PARA 553.

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 As to the meaning of 'money service business' see PARA 540 note 4.

5 As to the meaning of 'trust or company service provider' see PARA 540 note 6.

6 Money Laundering Regulations 2007, SI 2007/2157, reg 31(1). Regulation 31(1) does not apply to an authorised person who (1) immediately before 15 December 2007 was acting as a money service business or a trust or company service provider and continues to act as such after that date; and (2) before 15 January 2008 informs the Authority that he is or was acting as such: reg 31(2).

7 Money Laundering Regulations 2007, SI 2007/2157, reg 31(3).

8 Ie by the Money Laundering Regulations 2007, SI 2007/2157, reg 31.

9 Money Laundering Regulations 2007, SI 2007/2157, reg 31(4).

10 Money Laundering Regulations 2007, SI 2007/2157, reg 31(5).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(viii) Anti Money Laundering/D. SUPERVISION AND REGISTRATION/557. Registration of Annex I financial institutions, estate agents, etc.

### **557. Registration of Annex I financial institutions, estate agents, etc.**

The supervisory authorities<sup>1</sup> mentioned below<sup>2</sup> may, in order to fulfil their duties<sup>3</sup>, maintain a register<sup>4</sup>.

The Financial Services Authority<sup>5</sup> may maintain a register of Annex I financial institutions<sup>6</sup>. The Office of Fair Trading<sup>7</sup> may maintain registers of consumer credit financial institutions<sup>8</sup>; and estate agents<sup>9</sup>. The Commissioners for Her Majesty's Revenue and Customs<sup>10</sup> may maintain registers of auditors<sup>11</sup>; external accountants<sup>12</sup>; and tax advisers<sup>13</sup>, who are not supervised by the Secretary of State<sup>14</sup>, the Department of Enterprise, Trade and Investment in Northern Ireland or any of certain specified professional bodies<sup>15</sup>.

Where a supervisory authority decides to maintain such a register<sup>16</sup>, it must take reasonable steps to bring its decision to the attention of those relevant persons<sup>17</sup> in respect of whom the register is to be established<sup>18</sup>. A supervisory authority may keep such a register in any form it thinks fit<sup>19</sup>. A supervisory authority may also publish or make available to public inspection all or part of such a register<sup>20</sup>.

Where a supervisory authority decides to maintain a register<sup>21</sup> in respect of any description of relevant persons and establishes a register for that purpose, a relevant person of that description may not carry on the business or profession in question for a period of more than six months beginning on the date on which the supervisory authority establishes the register unless he is included in the register<sup>22</sup>.

Provisions on the application provisions for registers of high value dealers, money service businesses and company service providers<sup>23</sup> apply to the registers referred to above<sup>24</sup> but with some minor modifications<sup>25</sup>.

The Authority and the Office of Fair Trading may refuse to register an applicant for registration in a register<sup>26</sup> where: (1) any requirement any requirement relating to applications<sup>27</sup> has not been complied with<sup>28</sup>; (2) it appears to the Authority or the Office of Fair Trading, as the case may be, that any information provided<sup>29</sup> is false or misleading in a material particular<sup>30</sup>; or (3) the applicant has failed to pay a relevant charge imposed by the Authority or the Office of Fair Trading, as the case may be<sup>31</sup>.

The Authority or the Office of Fair Trading, as the case may be, must, within 45 days beginning either with the date on which it receives an application or, where applicable, with the date on which it receives any further information<sup>32</sup>, give the applicant notice of its decision to register the applicant<sup>33</sup>; or that it is minded not to register the applicant, the reasons for being minded not to register him and the right to make representations to it within a specified period (which may not be less than 28 days)<sup>34</sup>. The Authority or the Office of Fair Trading, as the case may be, must then decide, within a reasonable period, whether to register the applicant and it must give the applicant notice of its decision to register the applicant<sup>35</sup>; or of its decision not to register the applicant, the reasons for its decision and the right to appeal<sup>36</sup>. The Authority or the Office of Fair Trading, as the case may be, must, as soon as reasonably practicable after deciding to register a person, include him in the relevant register<sup>37</sup>.

The Authority or the Office of Fair Trading may cancel a person's registration in a register<sup>38</sup> if, at any time after registration, it appears to them that they would have had grounds to refuse registration under heads (1) to (3) above<sup>39</sup>. Where the Authority or the Office of Fair Trading proposes to cancel a person's registration, it must give him notice of (a) its proposal to cancel his registration<sup>40</sup>; (b) the reasons for the proposed cancellation<sup>41</sup>; and (c) the right to make representations to it within a specified period (which may not be less than 28 days)<sup>42</sup>. The Authority or the Office of Fair Trading, as the case may be, must then decide, within a reasonable period, whether to cancel the person's registration and it must give him notice of its decision not to cancel his registration<sup>43</sup>; or of its decision to cancel his registration and<sup>44</sup> the date from which cancellation takes effect, the reasons for its decision and the right to appeal<sup>45</sup>.

If the Authority or the Office of Fair Trading, as the case may be (i) considers that the interests of the public require the cancellation of a person's registration to have immediate effect<sup>46</sup>; and (ii) includes a statement to that effect and the reasons for it in the notice given<sup>47</sup>, the cancellation takes effect when the notice is given to the person<sup>48</sup>.

1 As to the meaning of 'supervisory authority' see PARA 542 note 7. See also PARA 553.

2 I.e. mentioned in the Money Laundering Regulations 2007, SI 2007/2157, reg 32(2), (3), (4): see the text to notes 5-15.

3 I.e. duties under the Money Laundering Regulations 2007, SI 2007/2157, reg 24: see PARA 553.

4 Money Laundering Regulations 2007, SI 2007/2157, reg 32(1). The reference is to a register under reg 32.

5 As to the Financial Services Authority see PARAS 4, 6 et seq.

6 Money Laundering Regulations 2007, SI 2007/2157, reg 32(2). As to the meaning of 'Annex I financial institution' see PARA 553 note 7.

7 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

8 Money Laundering Regulations 2007, SI 2007/2157, reg 32(3)(a). As to the meaning of 'consumer credit financial institution' see PARA 553 note 7.

9 Money Laundering Regulations 2007, SI 2007/2157, reg 32(3)(b). As to the meaning of 'estate agent' see PARA 540 note 11.

10 As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.

11 Money Laundering Regulations 2007, SI 2007/2157, reg 32(4)(a). As to the meaning of 'auditor' see PARA 540 note 5.

12 Money Laundering Regulations 2007, SI 2007/2157, reg 32(4)(b). As to the meaning of 'external accountant' see PARA 540 note 7.

13 Money Laundering Regulations 2007, SI 2007/2157, reg 32(4)(c). As to the meaning of 'tax adviser' see PARA 540 note 8.

14 As to the Secretary of State see PARA 3.

15 Money Laundering Regulations 2007, SI 2007/2157, reg 32(4). The professional bodies are those listed in Sch 3 (amended by SI 2007/3299): see PARA 553 note 10.

16 I.e. a register under the Money Laundering Regulations 2007, SI 2007/2157, reg 32.

17 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

18 Money Laundering Regulations 2007, SI 2007/2157, reg 32(5).

19 Money Laundering Regulations 2007, SI 2007/2157, reg 32(6).

20 Money Laundering Regulations 2007, SI 2007/2157, reg 32(7).

- 21    le a register under the Money Laundering Regulations 2007, SI 2007/2157, reg 32.
- 22    Money Laundering Regulations 2007, SI 2007/2157, reg 33.
- 23    See the Money Laundering Regulations 2007, SI 2007/2157, regs 27, 29; and PARA 555.
- 24    le to registers under the Money Laundering Regulations 2007, SI 2007/2157, reg 32.
- 25    See the Money Laundering Regulations 2007, SI 2007/2157, reg 34(1), (2). Regulations 27, 29 (with the omission of the words 'Subject to regulation 28' in reg 29(1)) and reg 30(2), (3) and (4) (see PARA 555) apply to registration in a register maintained by the Commissioners under reg 32 as they apply to registration in a register maintained under reg 25 (see PARA 555): reg 34(1). Regulation 27 (see PARA 555) applies to registration in a register maintained by the Authority or the Office of Fair Trading under reg 32 as it applies to registration in a register maintained under reg 25 (see PARA 555) and, for this purpose, references to the Commissioners are to be treated as references to the Authority or the Office of Fair Trading, as the case may be: reg 34(2).
- 26    le a register maintained under the Money Laundering Regulations 2007, SI 2007/2157, reg 32.
- 27    le any requirement of, or imposed under, the Money Laundering Regulations 2007, SI 2007/2157, reg 27: see PARA 555. See note 28.
- 28    Money Laundering Regulations 2007, SI 2007/2157, reg 34(3)(a). In reg 34(3), (4), references to reg 27 (see PARA 555) are to be treated as references to that provision as applied by reg 34(2) (see note 25): reg 34(11).
- 29    le provided pursuant to the Money Laundering Regulations 2007, SI 2007/2157, reg 27: see PARA 555.
- 30    Money Laundering Regulations 2007, SI 2007/2157, reg 34(3)(b). See note 28.
- 31    Money Laundering Regulations 2007, SI 2007/2157, reg 34(3)(c). The reference is to a charge under reg 35(1): see PARA 558. See note 28.
- 32    le further information required under the Money Laundering Regulations 2007, SI 2007/2157, reg 27(3): see PARA 555. See note 28.
- 33    Money Laundering Regulations 2007, SI 2007/2157, reg 34(4)(a). See note 28.
- 34    Money Laundering Regulations 2007, SI 2007/2157, reg 34(4)(b).
- 35    Money Laundering Regulations 2007, SI 2007/2157, reg 34(5)(a).
- 36    Money Laundering Regulations 2007, SI 2007/2157, reg 34(5)(b). The reference is to the right to appeal under reg 44(1)(b): see PARA 564.
- 37    Money Laundering Regulations 2007, SI 2007/2157, reg 34(6).
- 38    le in a register maintained by them under the Money Laundering Regulations 2007, SI 2007/2157, reg 32.
- 39    Money Laundering Regulations 2007, SI 2007/2157, reg 34(7).
- 40    Money Laundering Regulations 2007, SI 2007/2157, reg 34(8)(a).
- 41    Money Laundering Regulations 2007, SI 2007/2157, reg 34(8)(b).
- 42    Money Laundering Regulations 2007, SI 2007/2157, reg 34(8)(c).
- 43    Money Laundering Regulations 2007, SI 2007/2157, reg 34(9)(a).
- 44    le subject to the Money Laundering Regulations 2007, SI 2007/2157, reg 34(10): see heads (i), (ii) in the text.
- 45    Money Laundering Regulations 2007, SI 2007/2157, reg 34(9)(b). The reference is to the right to appeal under reg 44(1)(b): see PARA 564.
- 46    Money Laundering Regulations 2007, SI 2007/2157, reg 34(10)(a).

47 Money Laundering Regulations 2007, SI 2007/2157, reg 34(10)(b). The reference is to the notice given under reg 34(9)(b): see the text and note 45.

48 Money Laundering Regulations 2007, SI 2007/2157, reg 34(10).

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### **558. Costs of supervision.**

The Financial Services Authority<sup>1</sup>, the Office of Fair Trading<sup>2</sup> and the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup> may impose charges (1) on applicants for registration<sup>4</sup>; (2) on relevant persons<sup>5</sup> supervised by them<sup>6</sup>.

Such charges<sup>7</sup> must not exceed such amount as the Authority, the Office of Fair Trading or the Commissioners (as the case may be) consider will enable them to meet any expenses<sup>8</sup> reasonably incurred by them in carrying out their functions under the Money Laundering Regulations 2007<sup>9</sup> or for any incidental purpose<sup>10</sup>. Without prejudice to the generality of the above provision<sup>11</sup>, a charge may be levied in respect of each of the premises at which a person carries on (or proposes to carry on) business<sup>12</sup>.

The Authority must apply amounts paid to it by way of penalties<sup>13</sup> towards expenses incurred in carrying out its functions under the Regulations or for any incidental purpose<sup>14</sup>.

1 As to the Financial Services Authority see PARA 4, 6 et seq.

2 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

3 As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.

4 Money Laundering Regulations 2007, SI 2007/2157, reg 35(1)(a).

Any charge imposed on a person by a supervisory authority under reg 35(1) is a debt due from that person to the authority, and is recoverable accordingly: reg 48. As to the meaning of 'supervisory authority' see PARA 542 note 7. See also PARA 553.

5 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

6 Money Laundering Regulations 2007, SI 2007/2157, reg 35(1)(b). See note 4.

7 I.e. charges levied under the Money Laundering Regulations 2007, SI 2007/2157, reg 35(1).

8 For these purposes, 'expenses' in relation to the Office of Fair Trading includes expenses incurred by a local weights and measures authority or the Department of Enterprise, Trade and Investment in Northern Ireland pursuant to arrangements made for the purposes of the Money Laundering Regulations 2007, SI 2007/2157, with the Office of Fair Trading by or on behalf of the authority or the Department: reg 35(5).

9 I.e. the Money Laundering Regulations 2007, SI 2007/2157.

10 Money Laundering Regulations 2007, SI 2007/2157, reg 35(2).

11 I.e. the Money Laundering Regulations 2007, SI 2007/2157, reg 35(2).

12 Money Laundering Regulations 2007, SI 2007/2157, reg 35(3).

13 I.e. imposed under the Money Laundering Regulations 2007, SI 2007/2157, reg 42: see PARA 563.

14 Money Laundering Regulations 2007, SI 2007/2157, reg 35(4).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(7) ENFORCEMENT/(viii) Anti Money Laundering/E. ENFORCEMENT/(A) Powers of Authorities/559. Power to require information and attendance.

## **E. ENFORCEMENT**

### **(A) POWERS OF AUTHORITIES**

#### **559. Power to require information and attendance.**

An officer<sup>1</sup> may, by notice to a relevant person<sup>2</sup> or to a person connected with a relevant person<sup>3</sup>, require the relevant person or the connected person, as the case may be (1) to provide such information as may be specified in the notice<sup>4</sup>; (2) to produce such recorded information<sup>5</sup> as may be so specified<sup>6</sup>; or (3) to attend before an officer at a time and place specified in the notice and answer questions<sup>7</sup>.

An officer may exercise the powers<sup>8</sup> only if the information sought to be obtained as a result is reasonably required in connection with the exercise by the designated authority<sup>9</sup> for whom he acts of its functions under the Money Laundering Regulations 2007<sup>10</sup>. In relation to information recorded otherwise than in legible form, the power to require production of it includes a power to require the production of a copy of it in legible form or in a form from which it can readily be produced in visible and legible form<sup>11</sup>. The production of a document does not affect any lien which a person has on the document<sup>12</sup>.

A person may not be required<sup>13</sup> to provide or produce information or to answer questions which he would be entitled to refuse to provide, produce or answer on grounds of legal professional privilege<sup>14</sup> in proceedings in the High Court, except that a lawyer may be required to provide the name and address of his client<sup>15</sup>.

If, on an application made by (a) a designated authority<sup>16</sup>; or (b) a local weights and measures authority or the Department of Enterprise, Trade and Investment in Northern Ireland pursuant to arrangements made with the Office of Fair Trading by or on behalf of the authority; or by the Department<sup>17</sup>, it appears to the court<sup>18</sup> that a person (the 'information defaulter') has failed to do something that he was required to do<sup>19</sup>, the court may make a order<sup>20</sup>. Such an order may require the information defaulter (i) to do the thing that he failed to do within such period as may be specified in the order<sup>21</sup>; (ii) otherwise to take such steps to remedy the consequences of the failure as may be so specified<sup>22</sup>.

If the information defaulter is a body corporate, a partnership or an unincorporated body of persons which is not a partnership, the order may require any officer of the body corporate, partnership or body, who is (wholly or partly) responsible for the failure to meet such costs of the application as are specified in the order<sup>23</sup>.

1 'Officer', except in the Money Laundering Regulations 2007, SI 2007/2157, reg 40(3) (see the text to note 23), reg 41 (see PARA 562) and reg 47 (see PARA 564) means (1) an officer of the Financial Services Authority, including a member of the Authority's staff or an agent of the Authority; (2) an officer of Revenue and Customs; (3) an officer of the Office of Fair Trading; (4) a relevant officer; or (5) an officer of the Department of Enterprise, Trade and Investment in Northern Ireland acting for the purposes of its functions under the Regulations in relation to credit unions in Northern Ireland; and 'relevant officer' means: (a) in Great Britain, an officer of a local weights and measures authority; (b) in Northern Ireland, an officer of the Department for

Enterprise, Trade and Investment in Northern Ireland acting pursuant to arrangements made with the Office of Fair Trading for the purposes of the Regulations: reg 36. As to the Financial Services Authority see PARAS 4, 6 et seq. As to officers of Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 901. As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq. As to credit unions generally see PARAS 2395, 2402. As to the meaning of 'Great Britain' see PARA 2 note 3. As to local weights and measures authorities see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 20 et seq.

2 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

3 For these purposes, a person is connected with a relevant person if he is, or has at any time been, in relation to the relevant person, a person listed in the Money Laundering Regulations 2007, SI 2007/2157, Sch 4: reg 37(2). The persons are as follows:

- 544 (1) if the relevant person is a body corporate ('BC'), a person who is or has been (a) an officer or manager of BC or of a parent undertaking of BC; (b) an employee of BC; (c) an agent of BC or of a parent undertaking of BC (Sch 4 para 1);
- 545 (2) if the relevant person is a partnership, a person who is or has been a member, manager, employee or agent of the partnership (Sch 4 para 2);
- 546 (3) if the relevant person is an unincorporated association of persons which is not a partnership, a person who is or has been an officer, manager, employee or agent of the association (Sch 4 para 3);
- 547 (4) if the relevant person is an individual, a person who is or has been an employee or agent of that individual (Sch 4 para 4).

See generally **CLUBS; COMPANIES; CORPORATIONS; PARTNERSHIP**.

4 Money Laundering Regulations 2007, SI 2007/2157, reg 37(1)(a). Where an officer requires information to be provided or produced pursuant to reg 37(1)(a) or (b) (see heads (1) or (2) in the text) (1) the notice must set out the reasons why the officer requires the information to be provided or produced; and (2) such information must be provided or produced before the end of such reasonable period as may be specified in the notice, and at such place as may be so specified: reg 37(4).

As to the action (in the context of earlier Money Laundering Regulations) to be taken where an investigation into money laundering creates conflicts between the public interest in combating crime and the entitlement of a private body to obtain redress from the courts see *Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 3 All ER 58, [2005] 2 All ER 784; *Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit* [2003] EWHC 703 (Comm), [2003] 4 All ER 1225, [2003] 1 All ER (Comm) 900. See also *Tayeb v HSBC Bank plc* [2004] EWHC 1529 (Comm), [2004] 4 All ER 1024, [2004] 2 All ER (Comm) 880; *Squirrel Ltd v National Westminster Bank plc* [2005] EWHC 664 (Ch), [2005] 2 All ER 784, [2005] 1 All ER (Comm) 749; *K Ltd v National Westminster Bank plc* [2006] EWCA Civ 1039, [2006] 4 All ER 907, [2006] 2 All ER (Comm) 655.

5 'Recorded information' includes information recorded in any form and any document of any nature: Money Laundering Regulations 2007, SI 2007/2157, reg 36.

6 Money Laundering Regulations 2007, SI 2007/2157, reg 37(1)(b). See note 4.

7 Money Laundering Regulations 2007, SI 2007/2157, reg 37(1)(c). See note 4.

Subject to reg 37(9), (10), a statement made by a person in compliance with a requirement imposed on him under reg 37(1)(c) is admissible in evidence in any proceedings, so long as it also complies with any requirements governing the admissibility of evidence in the circumstances in question: reg 37(8). In criminal proceedings in which a person is charged with an offence to which this provision applies (1) no evidence relating to the statement may be adduced; and (2) no question relating to it may be asked, by or on behalf of the prosecution unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person: reg 37(9). Regulation 37(9) applies to any offence other than one under (a) the Perjury Act 1911 s 5 (false statements without oath) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 717); (b) the Criminal Law (Consolidation) (Scotland) Act 1995 s 44(2) (false statements and declarations); or (c) the Perjury (Northern Ireland) Order 1979, SI 1979/1714 (NI 19), art 10 (false unsworn statements): Money Laundering Regulations 2007, SI 2007/2157, reg 37(10).

8 le the powers under the Money Laundering Regulations 2007, SI 2007/2157, reg 37.

9 'Designated authority' means (1) the Financial Services Authority; (2) the Commissioners for Her Majesty's Revenue and Customs; (3) the Office of Fair Trading; and (4) in relation to credit unions in Northern Ireland, the Department of Enterprise, Trade and Investment in Northern Ireland: Money Laundering Regulations 2007, SI

2007/2157, reg 36. As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.

10 Money Laundering Regulations 2007, SI 2007/2157, reg 37(3). The reference is to the Money Laundering Regulations 2007, SI 2007/2157.

11 Money Laundering Regulations 2007, SI 2007/2157, reg 37(5).

12 Money Laundering Regulations 2007, SI 2007/2157, reg 37(6).

13 Ie under the Money Laundering Regulations 2007, SI 2007/2157, reg 37.

14 As to legal professional privilege see **LEGAL PROFESSIONS** vol 66 (2009) PARAS 1032, 1146.

15 Money Laundering Regulations 2007, SI 2007/2157, reg 37(7). See also note 7. As to the application of reg 37(7) to Scotland see reg 37(11) (amended by SI 2007/3299) but generally Scottish matters are beyond the scope of this work.

16 Money Laundering Regulations 2007, SI 2007/2157, reg 40(1)(a).

17 Money Laundering Regulations 2007, SI 2007/2157, reg 40(1)(b).

18 For these purposes, 'court' means in England and Wales and Northern Ireland, the High Court or the county court: Money Laundering Regulations 2007, SI 2007/2157, reg 40(4)(a). As to Scotland see reg 40(4)(b) (amended by SI 2007/3299); and note 15.

19 Ie under the Money Laundering Regulations 2007, SI 2007/2157, reg 37(1): see heads (1)-(3) in the text.

20 Money Laundering Regulations 2007, SI 2007/2157, reg 40(1). The reference is to an order under reg 40.

21 Money Laundering Regulations 2007, SI 2007/2157, reg 40(2)(a).

22 Money Laundering Regulations 2007, SI 2007/2157, reg 40(2)(b).

23 Money Laundering Regulations 2007, SI 2007/2157, reg 40(3).

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## **560. Entry, inspection without a warrant.**

Where an officer<sup>1</sup> has reasonable cause to believe that any premises<sup>2</sup> are being used by a relevant person<sup>3</sup> in connection with his business or professional activities, he may on producing evidence of his authority at any reasonable time (1) enter the premises<sup>4</sup>; (2) inspect the premises<sup>5</sup>; (3) observe the carrying on of business or professional activities by the relevant person<sup>6</sup>; (4) inspect any recorded information<sup>7</sup> found on the premises<sup>8</sup>; (5) require any person on the premises to provide an explanation of any recorded information or to state where it may be found<sup>9</sup>; (6) in the case of a money service business<sup>10</sup> or a high value dealer<sup>11</sup>, inspect any cash found on the premises<sup>12</sup>. An officer may take copies of, or make extracts from, any recorded information found under the above provisions<sup>13</sup>.

Heads (4) and (5) above and the provision on taking copies<sup>14</sup> do not apply to recorded information which the relevant person would be entitled to refuse to disclose on grounds of legal professional privilege<sup>15</sup> in proceedings in the High Court, except that a lawyer may be required to provide the name and address of his client<sup>16</sup>.



An officer may exercise the above powers<sup>17</sup> only if the information sought to be obtained as a result is reasonably required in connection with the exercise by the designated authority<sup>18</sup> for whom he acts of its functions under the Money Laundering Regulations 2007<sup>19</sup>.

- 1 As to the meaning of 'officer' see PARA 559 note 1.
- 2 For these purposes, 'premises' means any premises other than premises used only as a dwelling: Money Laundering Regulations 2007, SI 2007/2157, reg 38(5).
- 3 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.
- 4 Money Laundering Regulations 2007, SI 2007/2157, reg 38(1)(a).
- 5 Money Laundering Regulations 2007, SI 2007/2157, reg 38(1)(b).
- 6 Money Laundering Regulations 2007, SI 2007/2157, reg 38(1)(c).
- 7 As to the meaning of 'recorded information' see PARA 559 note 5.
- 8 Money Laundering Regulations 2007, SI 2007/2157, reg 38(1)(d).
- 9 Money Laundering Regulations 2007, SI 2007/2157, reg 38(1)(e).
- 10 As to the meaning of 'money service business' see PARA 540 note 4.
- 11 As to the meaning of 'high value dealer' see PARA 540 note 12.
- 12 Money Laundering Regulations 2007, SI 2007/2157, reg 38(1)(f).
- 13 Money Laundering Regulations 2007, SI 2007/2157, reg 38(2). The reference is to reg 38(1).
- 14 I.e. the Money Laundering Regulations 2007, SI 2007/2157, reg 38(1)(d), (e), (2).
- 15 As to legal professional privilege see **LEGAL PROFESSIONS** vol 66 (2009) PARAS 1032, 1146.
- 16 Money Laundering Regulations 2007, SI 2007/2157, reg 38(3). For this latter purpose in regard to Scotland, reg 37(11) applies to reg 38(3) as it applies to reg 37(7) (see PARA 559 note 15): see reg 38(3). Generally Scottish matters are beyond the scope of this work.
- 17 I.e. powers under the Money Laundering Regulations 2007, SI 2007/2157, reg 38.
- 18 As to the meaning of 'designated authority' see PARA 559 note 9.
- 19 Money Laundering Regulations 2007, SI 2007/2157, reg 38(4). The reference is to the Money Laundering Regulations 2007, SI 2007/2157.

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### **561. Entry of premises under warrant.**

A justice<sup>1</sup> may issue a warrant<sup>2</sup> if satisfied on information on oath given by an officer<sup>3</sup> that there are reasonable grounds for believing that the first<sup>4</sup>, second<sup>5</sup> or third set of conditions<sup>6</sup> is satisfied<sup>7</sup>.

A justice may issue a warrant<sup>8</sup> if satisfied on information on oath given by an officer that there are reasonable grounds for suspecting that (1) an offence under the Money Laundering

Regulations 2007<sup>9</sup> has been, is being or is about to be committed by a relevant person<sup>10</sup>; and (2) there is on the premises specified in the warrant recorded information relevant to whether that offence has been, or is being or is about to be committed<sup>11</sup>.

A warrant issued under the above provisions<sup>12</sup> must authorise an officer<sup>13</sup> (a) to enter the premises specified in the warrant<sup>14</sup>; (b) to search the premises and take possession of any recorded information or anything appearing to be recorded information specified in the warrant or to take, in relation to any such recorded information, any other steps which may appear to be necessary for preserving it or preventing interference with it<sup>15</sup>; (c) to take copies of, or extracts from, any recorded information specified in the warrant<sup>16</sup>; (d) to require any person on the premises to provide an explanation of any recorded information appearing to be of the kind specified in the warrant or to state where it may be found<sup>17</sup>; (e) to use such force as may reasonably be necessary<sup>18</sup>.

1 In the Money Laundering Regulations 2007, SI 2007/2157, reg 39(1), (5), (7), 'justice' means: (1) in relation to England and Wales, a justice of the peace; (2) in relation to Northern Ireland, a lay magistrate: reg 39(8)(a), (c). As to Scotland see reg 39(8)(b) but generally Scottish matters are beyond the scope of this work.

2 Ie a warrant under the Money Laundering Regulations 2007, SI 2007/2157, reg 39(1).

3 As to the meaning of 'officer' see PARA 559 note 1.

4 The first set of conditions is: (1) that there is on the premises specified in the warrant recorded information in relation to which a requirement could be imposed under the Money Laundering Regulations 2007, SI 2007/2157, reg 37(1)(b) (see PARA 559); and (2) that if such a requirement were to be imposed (a) it would not be complied with; or (b) the recorded information to which it relates would be removed, tampered with or destroyed: reg 39(2). As to the meaning of 'recorded information' see PARA 559 note 5.

5 The second set of conditions is: (1) that a person on whom a requirement has been imposed under the Money Laundering Regulations 2007, SI 2007/2157, reg 37(1)(b) (see PARA 559) has failed (wholly or in part) to comply with it; and (2) that there is on the premises specified in the warrant recorded information which has been required to be produced: reg 39(3).

6 The third set of conditions is: (1) that an officer has been obstructed in the exercise of a power under the Money Laundering Regulations 2007, SI 2007/2157, reg 38 (see PARA 560); and (2) that there is on the premises specified in the warrant recorded information or cash which could be inspected under reg 38(1)(d) or (f) (see PARA 560): reg 39(4).

7 Money Laundering Regulations 2007, SI 2007/2157, reg 39(1). As to application to Scotland and references in reg 39(1), (5), (7) see reg 39(9) (amended by SI 2007/3299); and note 1.

8 Ie under the Money Laundering Regulations 2007, SI 2007/2157, reg 39(5).

9 Ie the Money Laundering Regulations 2007, SI 2007/2157.

10 Money Laundering Regulations 2007, SI 2007/2157, reg 39(5)(a). As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540. See note 7.

11 Money Laundering Regulations 2007, SI 2007/2157, reg 39(5)(b). See note 7.

12 Ie under the Money Laundering Regulations 2007, SI 2007/2157, reg 39.

13 Where a warrant is issued by a justice under the Money Laundering Regulations 2007, SI 2007/2157, reg 39(1) or (5) on the basis of information on oath given by an officer of the Financial Services Authority, for 'an officer' in reg 39(6) there is substituted 'a constable': reg 39(7) (amended by SI 2007/3299). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the office of constable generally see **POLICE** vol 36(1) (2007 Reissue) PARA 101 et seq.

14 Money Laundering Regulations 2007, SI 2007/2157, reg 39(6)(a).

15 Money Laundering Regulations 2007, SI 2007/2157, reg 39(6)(b).

16 Money Laundering Regulations 2007, SI 2007/2157, reg 39(6)(c).

17 Money Laundering Regulations 2007, SI 2007/2157, reg 39(6)(d).

18 Money Laundering Regulations 2007, SI 2007/2157, reg 39(6)(e).

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## 562. Powers of certain officers.

A relevant officer<sup>1</sup> may only exercise powers relating to requiring information, attendance, entry and inspection<sup>2</sup> pursuant to arrangements made with the Office of Fair Trading<sup>3</sup> (1) by or on behalf of the local weights and measures authority<sup>4</sup> of which he is an officer ('his authority')<sup>5</sup>; or (2) by the Department of Enterprise, Trade and Investment in Northern Ireland<sup>6</sup>.

Anything done or omitted to be done by, or in relation to, a relevant officer in the exercise or purported exercise of a relevant power<sup>7</sup> is treated for all purposes as having been done or omitted to be done by, or in relation to, an officer of the Office of Fair Trading<sup>8</sup>.

A relevant officer must not disclose to any person other than the Office of Fair Trading and his authority or, as the case may be, the Department of Enterprise, Trade and Investment in Northern Ireland information obtained by him in the exercise of such powers unless (a) he has the approval of the Office of Fair Trading to do so<sup>9</sup>; or (b) he is under a duty to make the disclosure<sup>10</sup>.

1 As to the meaning of 'relevant officer' see PARA 559 note 1.

2 Ie powers under the Money Laundering Regulations 2007, SI 2007/2157, regs 37-39: see PARAS 559-561.

3 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

4 As to local weights and measures authorities see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 20 et seq.

5 Money Laundering Regulations 2007, SI 2007/2157, reg 41(1)(a).

6 Money Laundering Regulations 2007, SI 2007/2157, reg 41(1)(b).

7 Ie a power in the Money Laundering Regulations 2007, SI 2007/2157, Pt 5 (regs 36-47).

8 Money Laundering Regulations 2007, SI 2007/2157, reg 41(2). Regulation 41(2) does not apply for the purposes of any criminal proceedings brought against the relevant officer, his authority, the Department of Enterprise, Trade and Investment in Northern Ireland or the Office of Fair Trading, in respect of anything done or omitted to be done by the officer: reg 41(3).

9 Money Laundering Regulations 2007, SI 2007/2157, reg 41(4)(a).

10 Money Laundering Regulations 2007, SI 2007/2157, reg 41(4)(b).

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## (B) CIVIL PENALTIES, REVIEW AND APPEALS

### 563. Power to impose civil penalties.

A designated authority<sup>1</sup> may impose a penalty of such amount as it considers appropriate<sup>2</sup> on a relevant person<sup>3</sup> who fails to comply with any requirement in certain provisions of the Money Laundering Regulations 2007<sup>4</sup> or with a direction where the Financial Action Task Force is applying counter-measures<sup>5</sup>. Such a penalty is payable to the designated authority which imposes it<sup>6</sup>.

The designated authority must not impose such a penalty on a person<sup>7</sup> where there are reasonable grounds for it to be satisfied that the person took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with<sup>8</sup>.

In deciding whether a person has failed to comply with a requirement of the Regulations, the designated authority must consider whether he followed any relevant guidance which was at the time (1) issued by a supervisory authority or any other appropriate body<sup>9</sup>; (2) approved by the Treasury<sup>10</sup>; and (3) published in a manner approved by the Treasury as suitable in its opinion to bring the guidance to the attention of persons likely to be affected by it<sup>11</sup>.

Where the Commissioners for Her Majesty's Revenue and Customs<sup>12</sup> decide to impose a penalty<sup>13</sup>, they must give the person notice of (a) their decision to impose the penalty and its amount<sup>14</sup>; (b) the reasons for imposing the penalty<sup>15</sup>; (c) the right to a review<sup>16</sup>; and (d) the right to appeal<sup>17</sup>.

Where the Financial Services Authority<sup>18</sup>, the Office of Fair Trading<sup>19</sup> or the Department of Enterprise, Trade and Investment in Northern Ireland proposes to impose a penalty<sup>20</sup>, it must give the person notice of (i) its proposal to impose the penalty and the proposed amount<sup>21</sup>; (ii) the reasons for imposing the penalty<sup>22</sup>; and (iii) the right to make representations to it within a specified period (which may not be less than 28 days)<sup>23</sup>. The Authority, the Office of Fair Trading or the Department of Enterprise, Trade and Investment in Northern Ireland, as the case may be, must then decide, within a reasonable period, whether to impose a penalty<sup>24</sup> and it must give the person notice of (A) its decision not to impose a penalty<sup>25</sup>; or (B) its decision to impose a penalty and the amount, the reasons for its decision and the right to appeal<sup>26</sup>.

1 As to the meaning of 'designated authority' see PARA 559 note 9.

2 For this purpose, 'appropriate' means effective, proportionate and dissuasive: see the Money Laundering Regulations 2007, SI 2007/2157, reg 42(1).

3 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.

4 I.e. any requirement in the Money Laundering Regulations 2007, SI 2007/2157, reg 7(1), (2) or (3) (see PARA 542), reg 8(1) or (3) (see PARA 543), reg 9(2) (see PARA 543), reg 10(1) (see PARA 544), reg 11(1) (see PARA 545), reg 14(1) (see PARA 546), reg 15(1) or (2) (see PARA 547), reg 16(1), (2), (3) or (4) (see PARA 548), reg 19(1), (4), (5) or (6) (see PARA 551), reg 20(1), (4) or (5) (see PARA 552), reg 21 (see PARA 552), reg 26 (see PARA 555), reg 27(4) (see PARA 555) or reg 33 (see PARA 557): see reg 42(1).

5 Money Laundering Regulations 2007, SI 2007/2157, reg 42(1). The direction referred to is made under reg 18: see PARA 550.

Any penalty imposed on a person by a supervisory authority under reg 42(1) is a debt due from that person to the authority, and is recoverable accordingly: reg 48. As to the meaning of 'supervisory authority' see PARA 542 note 7. See also PARA 553.

6 Money Laundering Regulations 2007, SI 2007/2157, reg 42(8).

7 I.e. under the Money Laundering Regulations 2007, SI 2007/2157, reg 42(1).

- 8 Money Laundering Regulations 2007, SI 2007/2157, reg 42(2).
- 9 Money Laundering Regulations 2007, SI 2007/2157, reg 42(3)(a). For these purposes, 'appropriate body' means any body which regulates or is representative of any trade, profession, business or employment carried on by the person: reg 42(4) (amended by SI 2007/3299).
- 10 Money Laundering Regulations 2007, SI 2007/2157, reg 42(3)(b). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 11 Money Laundering Regulations 2007, SI 2007/2157, reg 42(3)(c).
- 12 As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.
- 13 Ie under the Money Laundering Regulations 2007, SI 2007/2157, reg 42.
- 14 Money Laundering Regulations 2007, SI 2007/2157, reg 42(5)(a).
- 15 Money Laundering Regulations 2007, SI 2007/2157, reg 42(5)(b).
- 16 Money Laundering Regulations 2007, SI 2007/2157, reg 42(5)(c). The reference is to a review under reg 43: see PARA 564.
- 17 Money Laundering Regulations 2007, SI 2007/2157, reg 42(5)(d). The reference is to the right to appeal under reg 44(1)(a): see PARA 564.
- 18 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 19 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.
- 20 Ie under the Money Laundering Regulations 2007, SI 2007/2157, reg 42.
- 21 Money Laundering Regulations 2007, SI 2007/2157, reg 42(6)(a).
- 22 Money Laundering Regulations 2007, SI 2007/2157, reg 42(6)(b).
- 23 Money Laundering Regulations 2007, SI 2007/2157, reg 42(6)(c).
- 24 Ie under the Money Laundering Regulations 2007, SI 2007/2157, reg 42.
- 25 Money Laundering Regulations 2007, SI 2007/2157, reg 42(7)(a).
- 26 Money Laundering Regulations 2007, SI 2007/2157, reg 42(7)(b). The reference is the right to appeal under reg 44(1)(a): see PARA 564.

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#### **564. Review and appeals.**

Any person who is the subject of a decision<sup>1</sup> by the Commissioners for Her Majesty's Revenue and Customs<sup>2</sup> may by notice to the Commissioners require them to review that decision<sup>3</sup>. The Commissioners need not review any decision unless the notice requiring the review is given within 45 days beginning with the date on which they first gave notice of the decision to the person requiring the review<sup>4</sup>.

Where the Commissioners are required<sup>5</sup> to review any decision they must either (1) confirm the decision<sup>6</sup>; or (2) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they consider appropriate<sup>7</sup>. Where the

Commissioners do not, within 45 days beginning with the date on which the review was required by a person, give notice to that person of their determination of the review, they are to be taken for the purposes of the Money Laundering Regulations 2007<sup>8</sup> to have confirmed the decision<sup>9</sup>.

A person may appeal from a decision by (a) the Commissioners on a review<sup>10</sup>; and (b) the Financial Services Authority<sup>11</sup>, the Office of Fair Trading<sup>12</sup> or the Department of Enterprise, Trade and Investment in Northern Ireland in regard to non-registration or cancellation of registration or the imposition or non-imposition of a penalty<sup>13</sup>.

An appeal from a decision (i) by the Commissioners is to a VAT and duties tribunal<sup>14</sup>; (ii) by the Authority is to the Financial Services and Markets Tribunal<sup>15</sup>; (iii) by the Office of Fair Trading is to the Consumer Credit Appeals Tribunal<sup>16</sup>; and (iv) by the Department of Enterprise, Trade and Investment in Northern Ireland is to the High Court<sup>17</sup>.

1    le a decision made under (1) the Money Laundering Regulations 2007, SI 2007/2157, reg 29, to refuse to register an applicant (see PARA 555); (2) reg 30, to cancel the registration of a registered person (see PARA 555); and (3) reg 42, to impose a penalty (see PARA 563): reg 43(1).

2    As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.

3    Money Laundering Regulations 2007, SI 2007/2157, reg 43(2).

4    Money Laundering Regulations 2007, SI 2007/2157, reg 43(3).

5    le under the Money Laundering Regulations 2007, SI 2007/2157, reg 43.

6    Money Laundering Regulations 2007, SI 2007/2157, reg 43(4)(a).

7    Money Laundering Regulations 2007, SI 2007/2157, reg 43(4)(b).

8    le the Money Laundering Regulations 2007, SI 2007/2157.

9    Money Laundering Regulations 2007, SI 2007/2157, reg 43(5).

10   Money Laundering Regulations 2007, SI 2007/2157, reg 44(1)(a). The review is under reg 43: see the text to notes 1-9.

11   As to the Financial Services Authority see PARAS 4, 6 et seq.

12   As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

13   Money Laundering Regulations 2007, SI 2007/2157, reg 44(1)(b). The reference is to provisions under reg 34 (see PARA 557) or reg 42 (see PARA 563).

14   Money Laundering Regulations 2007, SI 2007/2157, reg 44(2)(a). As to VAT and duties tribunals see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 343 et seq.

A VAT and duties tribunal hearing an appeal under reg 44(2) has the power to (1) quash or vary any decision of the supervisory authority, including the power to reduce any penalty to such amount (including nil) as it thinks proper; and (2) substitute its own decision for any decision quashed on appeal: reg 44(6). As to the meaning of 'supervisory authority' see PARA 542 note 7. See also PARA 553.

The provisions of the Value Added Tax Act 1994 Pt V (ss 82-87) (appeals) (see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 346 et seq), subject to the modifications set out in the Money Laundering Regulations 2007, SI 2007/2157, Sch 5 para 1, apply in respect of appeals to a VAT and duties tribunal made under reg 44 as they apply in respect of appeals made to such a tribunal under the Value Added Tax Act 1994 s 83 (appeals) (see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 346): Money Laundering Regulations 2007, SI 2007/2157, reg 44(3).

The Value Added Tax Act 1994 Pt V (appeals) is modified as follows: (a) s 84 (see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 347) is omitted; and (b) in s 87(1)(a), (2)(a), (3)(a) (see **VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 369) the words ', or is recoverable as, VAT' are omitted: Money Laundering Regulations 2007, SI 2007/2157, reg 44(8), Sch 5 para 1.

15 Money Laundering Regulations 2007, SI 2007/2157, reg 44(2)(b). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

The provisions of the Financial Services and Markets Act 2000 Pt IX (ss 132-137) (hearings and appeals) (see PARAS 43-46, 65, 67-69), subject to the modifications set out in the Money Laundering Regulations 2007, SI 2007/2157, Sch 5 para 2, apply in respect of appeals to the Financial Services and Markets Tribunal made under reg 44 as they apply in respect of references made to that Tribunal under the Financial Services and Markets Act 2000: Money Laundering Regulations 2007, SI 2007/2157, reg 44(4).

The Financial Services and Markets Act 2000 Pt IX (hearings and appeals) is modified as follows: (1) in the application of s 133 (see PARAS 46, 65) and Sch 13 (see PARAS 43-46, 56, 64, 65) to any appeal commenced before the coming into force of the Consumer Credit Act 2006 s 55 (see **CONSUMER CREDIT**; and also note 16), for all the references to 'the Authority', there is substituted 'the Authority or the Office of Fair Trading (as the case may be)'; (2) in the Financial Services and Markets Act 2000 s 133(1)(a) (see PARA 46) for the words 'decision notice or supervisory notice in question' there are substituted the words 'notice under the Money Laundering Regulations 2007, SI 2007/2157, reg 34(5) or (9) or reg 42(7)'; (3) the Financial Services and Markets Act 2000 s 133(6), (7), (8), (12) (see PARA 46) is omitted; and (4) in s 133(9) (see PARA 46) for the words 'decision notice' in both places where they occur there are substituted the words 'notice under the Money Laundering Regulations 2007, SI 2007/2157, reg 34(5) or (9) or reg 42(7)': Sch 5 para 2.

In the application of the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476 (see PARA 47 et seq) to any appeal commenced before the coming into force of the Consumer Credit Act 2006 s 55, for all the references to 'the Authority' there is substituted 'the Authority or the Office of Fair Trading (as the case may be)': Money Laundering Regulations 2007, SI 2007/2157, Sch 5 para 3.

16 Money Laundering Regulations 2007, SI 2007/2157, reg 44(2)(c). As to the Consumer Credit Appeals Tribunal see **CONSUMER CREDIT**.

The Consumer Credit Act 1974 s 40A (the Consumer Credit Appeals Tribunal), s 41 (appeals to the Secretary of State) and s 41A (appeals from the Consumer Credit Appeals Tribunal) (see **CONSUMER CREDIT**) apply in respect of appeals to the Consumer Credit Appeal Tribunal made under the Money Laundering Regulations 2007, SI 2007/2157, reg 44 as they apply in respect of appeals made to that Tribunal under the Consumer Credit Act 1974 s 41: Money Laundering Regulations 2007, SI 2007/2157, reg 44(5).

Notwithstanding reg 44(2)(c), until the coming into force of the Consumer Credit Act 2006 s 55 (the Consumer Credit Appeals Tribunal) (ie 1 December 2007 for certain purposes, and 6 April 2008 for remaining purposes) (s 55 adds the Consumer Credit Act 1974 s 40A), an appeal from a decision by the Office of Fair Trading is to the Financial Services and Markets Tribunal and, for these purposes, the coming into force of that provision does not affect (1) the hearing and determination by the Financial Service and Markets Tribunal of an appeal commenced before the coming into force of that provision (the 'original appeal'); or (2) any appeal against the decision of the Financial Services and Markets Tribunal with respect to the original appeal: Money Laundering Regulations 2007, SI 2007/2157, reg 44(7).

17 Money Laundering Regulations 2007, SI 2007/2157, reg 44(2)(d). As to the High Court generally see **COURTS**.

## UPDATE

### 564 Review and appeals

TEXT AND NOTE 16--For 'Consumer Credit Appeals Tribunal' read 'First-tier Tribunal': SI 2007/2157 reg 44(2)(c) (amended by SI 2009/1835). SI 2007/2157 reg 44(5) revoked: SI 2009/1835.

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## (C) CRIMINAL OFFENCES

## 565. Offences.

A person who fails to comply with any requirement in certain provisions of the Money Laundering Regulations 2007<sup>1</sup> or with a direction where the Financial Action Task Force is applying counter-measures<sup>2</sup>, is guilty of an offence and liable on conviction to a fine, imprisonment or both<sup>3</sup>.

In deciding whether a person has committed such an offence<sup>4</sup>, the court must consider whether he followed any relevant guidance which was at the time (1) issued by a supervisory authority<sup>5</sup> or any other appropriate body<sup>6</sup>; (2) approved by the Treasury<sup>7</sup>; and (3) published in a manner approved by the Treasury as suitable in its opinion to bring the guidance to the attention of persons likely to be affected by it<sup>8</sup>.

A person is not guilty of such an offence if he took all reasonable steps and exercised all due diligence to avoid committing the offence<sup>9</sup>. Where a person is convicted of such an offence, he is not also liable to a civil penalty<sup>10</sup>.

If an offence as described above<sup>11</sup> which is committed by a body corporate is shown (a) to have been committed with the consent or the connivance of an officer<sup>12</sup> of the body corporate<sup>13</sup>; or (b) to be attributable to any neglect on his part<sup>14</sup>, the officer as well as the body corporate is guilty of an offence and liable to be proceeded against and punished accordingly<sup>15</sup>.

If such an offence committed by a partnership is shown (i) to have been committed with the consent or the connivance of a partner<sup>16</sup>; or (ii) to be attributable to any neglect on his part<sup>17</sup>, the partner as well as the partnership is guilty of an offence and liable to be proceeded against and punished accordingly<sup>18</sup>.

If such an offence committed by an unincorporated association (other than a partnership) is shown (A) to have been committed with the consent or the connivance of an officer of the association<sup>19</sup>; or (B) to be attributable to any neglect on his part<sup>20</sup>, that officer as well as the association is guilty of an offence and liable to be proceeded against and punished accordingly<sup>21</sup>.

Proceedings for an offence alleged to have been committed by a partnership or an unincorporated association must be brought in the name of the partnership or association (and not in that of its members)<sup>22</sup>. A fine imposed on the partnership or association on its conviction of an offence is to be paid out of the funds of the partnership or association<sup>23</sup>. Rules of court relating to the service of documents are to have effect as if the partnership or association were a body corporate<sup>24</sup>. In proceedings for an offence brought against the partnership or association a number of other legislative provisions apply<sup>25</sup>.

1     I.e. any requirement in the Money Laundering Regulations 2007, SI 2007/2157, reg 7(1), (2) or (3) (see PARA 542), reg 8(1) or (3) (see PARA 543), reg 9(2) (see PARA 543), reg 10(1) (see PARA 544), reg 11(1)(a) (see PARA 545), reg 14(1) (see PARA 546), reg 15(1) or (2) (see PARA 547), reg 16(1), (2), (3) or (4) (see PARA 548), reg 19(1), (4), (5) or (6) (see PARA 551), reg 20(1), (4) or (5) (see PARA 552), reg 21 (see PARA 552), reg 26 (see PARA 555), reg 27(4) (see PARA 555) or reg 33 (see PARA 557): see reg 45(1).

2     I.e. a direction by the Treasury made under the Money Laundering Regulations 2007, SI 2007/2157, reg 18 (see PARA 550): see reg 45(1).

3     Money Laundering Regulations 2007, SI 2007/2157, reg 45(1). Such a person is liable (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both: see reg 45(1). As to the statutory maximum see PARA 56 note 24.

4     I.e. an offence under the Money Laundering Regulations 2007, SI 2007/2157, reg 45(1).

5     As to the meaning of 'supervisory authority' see PARA 542 note 7. See also PARA 553.



- 6 Money Laundering Regulations 2007, SI 2007/2157, reg 45(2)(a). For these purposes, 'appropriate body' means any body which regulates or is representative of any trade, profession, business or employment carried on by the alleged offender: reg 45(3).
- 7 Money Laundering Regulations 2007, SI 2007/2157, reg 45(2)(b). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 8 Money Laundering Regulations 2007, SI 2007/2157, reg 45(2)(c).
- 9 Money Laundering Regulations 2007, SI 2007/2157, reg 45(4).
- 10 Money Laundering Regulations 2007, SI 2007/2157, reg 45(5). The reference is to a penalty under reg 42: see PARA 563.
- 11 Is an offence under the Money Laundering Regulations 2007, SI 2007/2157, reg 45.
- 12 'Officer' (1) in relation to a body corporate, means a director, manager, secretary, chief executive, member of the committee of management, or a person purporting to act in such a capacity; and (2) in relation to an unincorporated association, means any officer of the association or any member of its governing body, or a person purporting to act in such capacity: Money Laundering Regulations 2007, SI 2007/2157, reg 47(9). See generally **CLUBS; COMPANIES; CORPORATIONS**.
- 13 Money Laundering Regulations 2007, SI 2007/2157, reg 47(1)(a). If the affairs of a body corporate are managed by its members, reg 47(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body: reg 47(4).
- 14 Money Laundering Regulations 2007, SI 2007/2157, reg 47(1)(b). See note 13.
- 15 Money Laundering Regulations 2007, SI 2007/2157, reg 47(1). See note 13.
- 16 Money Laundering Regulations 2007, SI 2007/2157, reg 47(2)(a). 'Partner' includes a person purporting to act as a partner: reg 47(9). See generally **PARTNERSHIP**.
- 17 Money Laundering Regulations 2007, SI 2007/2157, reg 47(2)(b).
- 18 Money Laundering Regulations 2007, SI 2007/2157, reg 47(2).
- 19 Money Laundering Regulations 2007, SI 2007/2157, reg 47(3)(a). See generally **CLUBS**.
- 20 Money Laundering Regulations 2007, SI 2007/2157, reg 47(3)(b).
- 21 Money Laundering Regulations 2007, SI 2007/2157, reg 47(3).
- 22 Money Laundering Regulations 2007, SI 2007/2157, reg 47(5).
- 23 Money Laundering Regulations 2007, SI 2007/2157, reg 47(6).
- 24 Money Laundering Regulations 2007, SI 2007/2157, reg 47(7). As to service of documents generally see CPR Pt 6.
- 25 See the Money Laundering Regulations 2007, SI 2007/2157, reg 47(8). The Criminal Justice Act 1925 s 33 (procedure on charge of offence against corporation) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1161, 1260) and the Magistrates' Courts Act 1980 Sch 3 (corporations) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1161; **MAGISTRATES** vol 29(2) (Reissue) PARA 666) apply as they do in relation to a body corporate: Money Laundering Regulations 2007, SI 2007/2157, reg 47(8)(a). The Criminal Justice (Northern Ireland) Act 1945 s 18 (procedure on charge) and the Magistrates' Courts (Northern Ireland) Order 1981, SI 1981/1675 (NI 26), Sch 4 (corporations) apply as they do in relation to a body corporate: Money Laundering Regulations 2007, SI 2007/2157, reg 47(8)(c). As to Scotland see reg 47(8)(b) but generally Scottish matters are beyond the scope of this work.

## UPDATE

### 565 Offences

NOTE 24--CPR Pt 6 substituted: SI 2008/2178.

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## 566. Prosecution of offences.

Proceedings for an offence under the Money Laundering Regulations 2007<sup>1</sup> may be instituted by: (1) the Director of Revenue and Customs Prosecutions<sup>2</sup> or by order of the Commissioners for Her Majesty's Revenue and Customs<sup>3</sup>; (2) the Office of Fair Trading<sup>4</sup>; (3) a local weights and measures authority<sup>5</sup>; (4) the Department of Enterprise, Trade and Investment in Northern Ireland<sup>6</sup>; (5) the Director of Public Prosecutions<sup>7</sup>; or (6) the Director of Public Prosecutions for Northern Ireland<sup>8</sup>.

Proceedings for such an offence may be instituted only against a relevant person<sup>9</sup> or, where such a person is a body corporate, a partnership or an unincorporated association, against any person who is liable to be proceeded against<sup>10</sup>.

Where proceedings are instituted<sup>11</sup> by order of the Commissioners, the proceedings must be brought in the name of an officer of Revenue and Customs<sup>12</sup>.

Where a local weights and measures authority in England or Wales proposes to institute proceedings for such an offence<sup>13</sup> it must give the Office of Fair Trading notice of the intended proceedings, together with a summary of the facts on which the charges are to be founded<sup>14</sup>. A local weights and measures authority must also notify the Office of Fair Trading of the outcome of the proceedings after they are finally determined<sup>15</sup>. Such an authority must also, whenever the Office of Fair Trading requires, report in such form and with such particulars as it requires on the exercise of its functions under the Money Laundering Regulations 2007<sup>16</sup>.

Where the Commissioners investigate, or propose to investigate, any matter with a view to determining (a) whether there are grounds for believing that an offence<sup>17</sup> has been committed by any person<sup>18</sup>; or (b) whether such a person should be prosecuted for such an offence<sup>19</sup>, that matter is to be treated as an assigned matter within the meaning of the Customs and Excise Management Act 1979<sup>20</sup>.

1     le an offence under the Money Laundering Regulations 2007, SI 2007/2157, reg 45: see PARA 565.

2     As to the Director of Revenue and Customs Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1068; **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 1192.

3     Money Laundering Regulations 2007, SI 2007/2157, reg 46(1)(a). As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq.

Regulation 46(1), (3)-(6) does not extend to Scotland: reg 46(8). However generally Scottish matters are beyond the scope of this work.

4     Money Laundering Regulations 2007, SI 2007/2157, reg 46(1)(b). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

5     Money Laundering Regulations 2007, SI 2007/2157, reg 46(1)(c). As to local weights and measures authorities see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 20 et seq.

6     Money Laundering Regulations 2007, SI 2007/2157, reg 46(1)(d).

7     Money Laundering Regulations 2007, SI 2007/2157, reg 46(1)(e). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1066, 1080.

- 8 Money Laundering Regulations 2007, SI 2007/2157, reg 46(1)(f).
- 9 As to the meaning of 'relevant person' see PARA 539 note 3. See also PARA 540.
- 10 Money Laundering Regulations 2007, SI 2007/2157, reg 46(2). The reference is to any person liable to be proceeded against under reg 47: see PARA 565.
- 11 Ie under the Money Laundering Regulations 2007, SI 2007/2157, reg 47(1).
- 12 Money Laundering Regulations 2007, SI 2007/2157, reg 46(3). As to officers of Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 901.
- 13 Ie an offence under the Money Laundering Regulations 2007, SI 2007/2157, reg 45: see PARA 565.
- 14 Money Laundering Regulations 2007, SI 2007/2157, reg 46(4).
- 15 Money Laundering Regulations 2007, SI 2007/2157, reg 46(5).
- 16 Money Laundering Regulations 2007, SI 2007/2157, reg 46(6). The reference is to the Money Laundering Regulations 2007, SI 2007/2157.
- 17 Ie an offence under the Money Laundering Regulations 2007, SI 2007/2157, reg 45: see PARA 565.
- 18 Money Laundering Regulations 2007, SI 2007/2157, reg 46(7)(a).
- 19 Money Laundering Regulations 2007, SI 2007/2157, reg 46(7)(b). As to the application of reg 46(7)(b) to Scotland see reg 46(9) (added by SI 2007/3299); and see note 3.
- 20 Money Laundering Regulations 2007, SI 2007/2157, reg 46(7). The reference is to an assigned matter within the meaning of the Customs and Excise Management Act 1979 s 1(1) (definition as substituted) (see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 904): see the Money Laundering Regulations 2007, SI 2007/2157, reg 46(7).

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## **(ix) Offences**

### **567. In general.**

Certain provisions of the Financial Services and Markets Act 2000 relating to offences have a more general application. These provisions include those relating to the institution of proceedings<sup>1</sup>, the making of misleading statements<sup>2</sup>, and offences by bodies corporate and partnerships<sup>3</sup>. Specific offences are dealt with elsewhere in this title.

1 See PARAS 572-574.

2 See PARAS 568-570.

3 See PARA 571.

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## 568. Misleading statements and practices.

A person who: (1) makes a statement, promise or forecast which he knows to be misleading, false or deceptive in a material particular<sup>1</sup>; (2) dishonestly conceals any material facts whether in connection with a statement, promise or forecast made by him or otherwise<sup>2</sup>; or (3) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive in a material particular<sup>3</sup>, is guilty of an offence if he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not the person to whom the statement, promise or forecast is made) to enter or offer to enter into, or to refrain from entering or offering to enter into, a relevant agreement<sup>4</sup>, or to exercise, or refrain from exercising, any rights conferred by a relevant investment<sup>5</sup>.

Any person who does any act or engages in any course of conduct which creates a false or misleading impression as to the market in or the price or value of any relevant investments is guilty of an offence if he does so for the purpose of creating that impression and of thereby inducing another person to acquire, dispose of, subscribe for or underwrite those investments or to refrain from doing so or to exercise, or refrain from exercising, any rights conferred by those investments<sup>6</sup>.

A person guilty of an offence under these provisions<sup>7</sup> is liable to imprisonment or a fine or both<sup>8</sup>.

1 Financial Services and Markets Act 2000 s 397(1)(a).

2 Financial Services and Markets Act 2000 s 397(1)(b).

3 Financial Services and Markets Act 2000 s 397(1)(c).

4 'Relevant agreement' means an agreement: (1) the entering into or performance of which by either party constitutes an activity of a specified kind or one which falls within a specified class of activity; and (2) which relates to a relevant investment: Financial Services and Markets Act 2000 s 397(9). 'Specified' means specified in an order made by the Treasury: s 397(14). As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1. 'Relevant investment' means an investment of a specified kind or one which falls within a prescribed class of investment: s 397(10). 'Investment' includes any asset, right or interest: s 397(13). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

The following kinds of activity are specified for the purposes of s 397(9)(a) (see head (1) above): (a) a controlled activity; (b) an activity which falls within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 9 (providing funeral plan contracts) (see PARA 236), or agreeing to carry on such an activity (see PARA 240); (c) an activity which falls within Sch 1 para 10 (providing qualifying credit) (see PARA 237), or agreeing to carry on such an activity (see PARA 240); (d) an activity which falls within Sch 1 para 10A (arranging qualifying credit) (see PARA 237), or agreeing to carry on such an activity (see PARA 240); (e) an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 45 (sending dematerialised instructions) (see PARA 190), art 51 (establishing etc a collective investment scheme) (see PARA 171), art 52 (establishing etc a stakeholder pension scheme) (see PARA 187) or art 57 (managing the underwriting capacity of a Lloyd's syndicate) (see PARA 198); (f) (so far as not already specified by head (a) above) art 14 (dealing in investments as principal) (see PARA 112), art 21 (dealing in investments as agent) (see PARA 126), art 25(1) or (2) (arranging deals in investments) (see PARA 139), art 39A (assisting in the administration and performance of a contract of insurance) (see PARA 104), art 53 (advising on investments) (see PARA 174), or so far as relevant to any of those articles, art 64 (agreeing) (see PARA 221), so far as it relates to a contract of insurance: Financial Services and Markets Act 2000 (Misleading Statements and Practices) Order 2001, SI 2001/3645, art 3 (amended by SI 2003/1474; SI 2003/1476). 'Controlled activity' means an activity which falls within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 Pt I other than an activity which falls within Sch 1 para 9, 10, 10A or 10B (see PARAS 236, 237) or Sch 1 para 11 (see PARA 240) so far as relating to Sch 1 para 9, 10, 10A or 10B: Financial Services and Markets Act 2000 (Misleading Statements and Practices) Order 2001, SI 2001/3645, art 2 (definition amended by SI 2003/1474). As to the meaning of 'contract of insurance' see PARA 90 note 3, definition applied by the Financial Services and Markets Act 2000 (Misleading Statements and Practices) Order 2001, SI 2001/3645, art 2 (definition added by SI 2003/1476).

The following kinds of investment are specified for the purposes of the Financial Services and Markets Act 2000 s 397(10): (i) a controlled investment; (ii) an investment which falls within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 para 25 (funeral plan contracts) (see PARA 241); (iii) an investment which falls within Sch 1 para 26 (agreements for qualifying credit) (see PARA 241); Financial Services and Markets Act 2000 (Misleading Statements and Practices) Order 2001, SI 2001/3645, art 4. 'Controlled investment' means an investment which falls within the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005, SI 2005/1529, Sch 1 Pt II other than an investment which falls within Sch 1 para 25 or 26 (see PARA 241); Financial Services and Markets Act 2000 (Misleading Statements and Practices) Order 2001, SI 2001/3645, art 2.

The provisions of the Financial Services and Markets Act 2000 Sch 2 (see PARAS 84-85) (except Sch 2 paras 25, 26) apply for the purposes of s 397(9) and s 397(10) with references to s 22 (see PARA 84) being read as references to s 397(9) and s 397(10): s 397(11). Nothing in the Financial Services and Markets Act 2000 Sch 2, as applied by s 397(11), limits the power conferred by s 397(9) or s 397(10): s 397(12).

5 Financial Services and Markets Act 2000 s 397(1), (2). In proceedings for an offence under s 397(2) brought against a person to whom s 397(1) applies as a result of s 397(1)(a) (see head (1) in the text), it is a defence for him to show that the statement, promise or forecast was made in conformity with price stabilising rules, control of information rules or the relevant provisions of EC Commission Regulation 2273/2003 (OJ L336, 23.12.2003, p 33) implementing European Parliament and EC Council Directive 2003/6 as regards exemptions for buy-back programmes and stabilisation of financial instruments: Financial Services and Markets Act 2000 s 397(4) (amended by SI 2005/381). As to the meaning of 'price stabilising rules' see PARA 28. As to the meaning of 'control of information rules' see PARA 31.

The provisions of the Financial Services and Markets Act 2000 s 397(1), (2) do not apply unless: (1) the statement, promise or forecast is made in or from, or the facts are concealed in or from, the United Kingdom or arrangements are made in or from the United Kingdom for the statement, promise or forecast to be made or the facts to be concealed; (2) the person on whom the inducement is intended to or may have effect is in the United Kingdom; or (3) the agreement is or would be entered into or the rights are or would be exercised in the United Kingdom: s 397(6). As to the meaning of 'United Kingdom' see PARA 2 note 3. Section 397 preserves the effect of the decision in *Secretary of State for Trade v Markus* [1976] AC 35, [1975] 1 All ER 958, HL (which applied the Prevention of Fraud (Investments) Act 1958 s 13(1) (now repealed) to acts abroad producing results in the United Kingdom).

6 Financial Services and Markets Act 2000 s 397(3). In proceedings brought against any person for an offence under s 397(3), it is a defence for him to show: (1) that he reasonably believed that his act or conduct would not create an impression that was false or misleading as to the matters mentioned in s 397(3); (2) that he acted or engaged in the conduct: (a) for the purpose of stabilising the price of investments; and (b) in conformity with price stabilising rules; (3) that he acted or engaged in the conduct in conformity with control of information rules; or (4) that he acted or engaged in the conduct in conformity with the relevant provisions of EC Commission Regulation 2273/2003 (OJ L336, 23.12.2003, p 33) implementing European Parliament and EC Council Directive 2003/6 as regards exemptions for buy-back programmes and stabilisation of financial instruments: Financial Services and Markets Act 2000 s 397(5) (amended by SI 2005/381).

The Financial Services and Markets Act 2000 s 397(3) does not apply unless: (i) the act is done, or the course of conduct is engaged in, in the United Kingdom; or (ii) the false or misleading impression is created there: s 397(7).

7 lie under the Financial Services and Markets Act 2000 s 397.

8 Financial Services and Markets Act 2000 s 397(8). Such a person is liable: (1) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both; (2) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine, or both: see s 397(8). As to the statutory maximum see PARA 56 note 24.

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## **569. Misleading the Financial Services Authority.**

A person who, in purported compliance with any requirement imposed by or under the Financial Services and Markets Act 2000, knowingly or recklessly gives the Financial Services

Authority<sup>1</sup> information which is false or misleading in a material particular is guilty of an offence<sup>2</sup>. A person guilty of an offence under these provisions is liable to a fine<sup>3</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 Financial Services and Markets Act 2000 s 398(1). Section 398(1) applies only to a requirement in relation to which no other provision of the Financial Services and Markets Act 2000 creates an offence in connection with the giving of information: s 398(2).

3 Financial Services and Markets Act 2000 s 398(3). Such a person is liable (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to a fine: see s 398(3). As to the statutory maximum see PARA 56 note 24.

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### **570. Misleading the Office of Fair Trading.**

The statutory provision in the Competition Act 1998 relating to offences connected with the provision of false or misleading information<sup>1</sup> applies in relation to any function of the Office of Fair Trading<sup>2</sup> under the Financial Services and Markets Act 2000 as if it were a function under Part I of the Competition Act 1998<sup>3</sup>.

1 In the Competition Act 1998 s 44: see **COMPETITION** vol 18 (2009) PARA 141.

2 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

3 Financial Services and Markets Act 2000 s 399 (amended by the Enterprise Act 2002 Sch 25 para 40(1), (16)(a)). As to the Competition Act 1998 Pt I (ss 1-60) see **COMPETITION** vol 18 (2009) PARA 115 et seq.

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### **571. Offences by bodies corporate and partnerships.**

If an offence under the Financial Services and Markets Act 2000 committed by a body corporate<sup>1</sup> is shown to have been committed with the consent or connivance of an officer<sup>2</sup>, or to be attributable to any neglect on his part, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly<sup>3</sup>.

If an offence under the Financial Services and Markets Act 2000 committed by a partnership<sup>4</sup> is shown to have been committed with the consent or connivance of a partner<sup>5</sup>, or to be attributable to any neglect on his part, the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly<sup>6</sup>.

If an offence under the Financial Services and Markets Act 2000 committed by an unincorporated association (other than a partnership) is shown to have been committed with the consent or connivance of an officer of the association or a member of its governing body, or

to be attributable to any neglect on the part of such an officer or member, that officer or member as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly<sup>7</sup>.

Regulations may provide for the application of any of the provisions described above, with such modifications as the Treasury<sup>8</sup> considers appropriate, to a body corporate or unincorporated association formed or recognised under the law of a territory outside the United Kingdom<sup>9</sup>.

1 As to the meaning of 'body corporate' see PARA 86 note 11.

2 'Officer', in relation to a body corporate, means: (1) a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity; and (2) an individual who is a controller of the body: Financial Services and Markets Act 2000 s 400(5). As to the meanings of 'director' and 'manager' see PARA 86 note 11. As to the meaning of 'controller' see PARA 591 note 16.

3 Financial Services and Markets Act 2000 s 400(1). If the affairs of a body corporate are managed by its members, s 400(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body: s 400(2).

4 As to the meaning of 'partnership' see PARA 86 note 11.

5 For the purposes of the Financial Services and Markets Act 2000 s 400(3), 'partner' includes a person purporting to act as a partner: s 400(4).

6 Financial Services and Markets Act 2000 s 400(3).

7 Financial Services and Markets Act 2000 s 400(6).

8 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

9 Financial Services and Markets Act 2000 s 400(7). As to the meaning of 'United Kingdom' see PARA 2 note 3. At the date at which this volume states the law no regulations had been made under s 400(7). As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

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## **572. Institution of proceedings for offences.**

Proceedings for an offence<sup>1</sup> may be instituted in England and Wales only: (1) by the Financial Services Authority<sup>2</sup> or the Secretary of State<sup>3</sup>; or (2) by or with the consent of the Director of Public Prosecutions<sup>4</sup>. Proceedings for an offence may be instituted in Northern Ireland only: (a) by the Financial Services Authority or the Secretary of State; or (b) by or with the consent of the Director of Public Prosecutions for Northern Ireland<sup>5</sup>. In exercising its power to institute proceedings for an offence, the Financial Services Authority must comply with any conditions or restrictions imposed in writing by the Treasury<sup>6</sup>.

1 'Offence' means an offence under the Financial Services and Markets Act 2000 or subordinate legislation made under that Act: s 401(1).

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

3 As to the Secretary of State see PARA 3.

4 Financial Services and Markets Act 2000 s 401(2). As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq.

Proceedings for an offence under s 203 (see PARA 464) may also be instituted by the Office of Fair Trading: s 401(4) (amended by the Enterprise Act 2002 Sch 25 para 40(1), (17)). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

5 Financial Services and Markets Act 2000 s 401(3).

6 Financial Services and Markets Act 2000 s 401(5). Conditions or restrictions may be imposed under s 401(5) in relation to: (1) proceedings generally; or (2) such proceedings, or categories of proceedings, as the Treasury may direct: s 401(6). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

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### **573. Power of the Financial Services Authority to institute proceedings for insider dealing and money laundering offences.**

The Financial Services Authority<sup>1</sup> may institute proceedings for an offence under: (1) Part V of the Criminal Justice Act 1993, which relates to insider dealing<sup>2</sup>; or (2) prescribed<sup>3</sup> regulations relating to money laundering<sup>4</sup>. In exercising its power to institute proceedings for any such offence, the Authority must comply with any conditions or restrictions imposed in writing by the Treasury<sup>5</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 In the Criminal Justice Act 1993 Pt V (ss 52-64).

3 'Prescribed' means prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 417(1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. See note 4.

4 Financial Services and Markets Act 2000 s 402(1). The Money Laundering Regulations 2007, SI 2007/2157 (see PARA 539 et seq) have been prescribed for the purposes of the Financial Services and Markets Act 2000 s 402(1). See also the Transfer of Funds (Information on the Payer) Regulations 2007, SI 2007/3298; and PARA 449.

5 Financial Services and Markets Act 2000 s 402(2). Conditions or restrictions may be imposed under s 402(2) in relation to: (1) proceedings generally; or (2) such proceedings, or categories of proceedings, as the Treasury may direct: s 402(3).

## **UPDATE**

### **573 Power of the Financial Services Authority to institute proceedings for insider dealing and money laundering offences**

TEXT AND NOTES--For insider dealing in general, defences, disclosure of information and investigation and prosecution powers see PARA 574A.



NOTE 4--SI 2009/3298 amended: SI 2009/1912. The requirement for the Secretary of State or the Director of Public Prosecutions to give consent to a prosecution under the Criminal Justice Act 1993 Pt V (ss 52-64) does not apply to a prosecution instituted by the Financial Services Authority pursuant to the Financial Services and Markets Act 2000 s 402(1): *R (on the application of Uberoi) v City of Westminster Magistrates' Court* [2009] EWHC 3191 (Admin), [2009] 1 WLR 1905, DC. See also *R v Rollins*; *R v McInerney* [2009] EWCA Crim 1941, [2010] 1 All ER 1183.

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#### **574. Jurisdiction and procedure in respect of offences.**

A fine imposed on an unincorporated association on its conviction of an offence<sup>1</sup> is to be paid out of the funds of the association<sup>2</sup>. Proceedings for an offence alleged to have been committed by an unincorporated association must be brought in the name of the association (and not in that of any of its members)<sup>3</sup>. Rules of court relating to the service of documents<sup>4</sup> are to have effect as if the association were a body corporate<sup>5</sup>. Summary proceedings for an offence may be taken: (1) against a body corporate or unincorporated association at any place at which it has a place of business; (2) against an individual at any place where he is for the time being<sup>6</sup>.

1 'Offence' means an offence under the Financial Services and Markets Act 2000: s 403(7).

2 Financial Services and Markets Act 2000 s 403(1).

3 Financial Services and Markets Act 2000 s 403(2).

4 As to the meaning of 'document' see PARA 10 note 10.

5 Financial Services and Markets Act 2000 s 403(3). As to the meaning of 'body corporate' see PARA 86 note 11.

6 Financial Services and Markets Act 2000 s 403(5). Section 403(5) does not affect any jurisdiction exercisable apart from s 403: s 403(6).

In proceedings for an offence brought against an unincorporated association: (1) the Criminal Justice Act 1925 s 33 and the Magistrates' Courts Act 1980 Sch 3 (procedure) (see **MAGISTRATES** vol 29(2) (Reissue) PARA 666) apply as they do in relation to a body corporate; (2) the Criminal Justice (Northern Ireland) Act 1945 s 18 and the Magistrates' Courts (Northern Ireland) Order 1981, SI 1981/1675 (NI 26), Sch 4 (procedure) apply as they do in relation to a body corporate: Financial Services and Markets Act 2000 s 403(4).

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#### **574A. The offence of insider dealing.**

An individual who has information as an insider is guilty of insider dealing if in the specified circumstances<sup>1</sup> he deals in securities<sup>2</sup> that are price-affected securities<sup>3</sup> in relation to the information<sup>4</sup>.

An individual who has information as an insider is also guilty of insider dealing if:

- 1314 (1) he encourages another person to deal in securities that are, whether or not that other knows it, price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the specified circumstances<sup>5</sup>; or
- 1315 (2) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person<sup>6</sup>.

The circumstances specified are that the acquisition or disposal in question occurs on a regulated market<sup>7</sup> or that the person dealing relies on a professional intermediary<sup>8</sup> or is himself acting as a professional intermediary<sup>9</sup>.

The provisions described above do not apply to anything done by an individual acting on behalf of a public sector body<sup>10</sup> in pursuit of monetary policies or policies with respect to exchange rates or the management of public debt or foreign exchange reserves<sup>11</sup>; and no contract is void or unenforceable by reason only of these provisions<sup>12</sup>.

A person has information as an insider if and only if it is, and he knows that it is, inside information and he has it, and knows that he has it, from an inside source<sup>13</sup>. A person has information from an inside source if and only if:

- 1316 (a) he has it through being a director, employee or shareholder of an issuer<sup>14</sup> of securities or having access to the information by virtue of his employment, office or profession; or
- 1317 (b) the direct or indirect source of his information is a person within head (a) above<sup>15</sup>.

1 le the circumstances mentioned in the Criminal Justice Act 1993 s 52(3): see the TEXT to NOTES 7-9.

2 For these purposes, a person deals in securities if: (1) he acquires or disposes of the securities, whether as principal or agent; or (2) he procures, directly or indirectly, an acquisition or disposal of the securities by any other person: Criminal Justice Act 1993 s 55(1). A person procures an acquisition or disposal of a security if the security is acquired or disposed of by a person who is his agent, his nominee or a person who is acting at his direction, in relation to the acquisition or disposal: s 55(4). Section 55(4) is not, however, exhaustive as to the circumstances in which one person may be regarded as procuring an acquisition or disposal of securities by another: s 55(5). 'Acquire', in relation to a security, includes agreeing to acquire the security and entering into a contract which creates the security (s 55(2)); and 'dispose', in relation to a security, includes agreeing to dispose of the security and bringing to an end a contract which created the security (s 55(3)). For the meaning of 'security' see PARA 574D.

3 For these purposes, securities are 'price-affected securities' in relation to inside information, and inside information is 'price-sensitive information' in relation to securities, if and only if the information would, if made public, be likely to have a significant effect on the price of the securities: Criminal Justice Act 1993 s 56(2). 'Price' includes value: s 56(3). For the meaning of 'inside information' see PARA 574B. For the meaning of 'made public' see PARA 574C.

4 See Criminal Justice Act 1993 s 52(1). Section 52 is subject to s 53 (see PARA 574H): s 52(4). As to the territorial scope of an offence under s 52(1) see PARA 574G; and as to defences see PARA 574H et seq. In accordance with EC Council Directive 89/592 arts 1 and 2, where the main shareholders and members of the board of directors of a company agree to effect between themselves stock market transactions in transferable securities to support the price of the company's shares artificially, they are not taking advantage of inside information if they are in possession of the same information on an equal footing: Case C-391/04 *Ipourgos Ikonimikon v Georgakis* [2007] All ER (EC) 1106, ECJ.

5 Criminal Justice Act 1993 s 52(2)(a). As to the specified circumstances see the TEXT to NOTES 7-9.

6 Criminal Justice Act 1993 s 52(2)(b). As to the territorial scope of an offence under s 52(2) see PARA 574G; and as to defences see PARA 574H et seq. See Case C-384/02 *Criminal proceedings against Grongaard* [2006] 1 CMLR 785, ECJ.

7 For these purposes, 'regulated market' means any market, however operated, which, by an order made by the Treasury, is identified, whether by name or by reference to criteria prescribed by the order, as a regulated market for the purposes of Criminal Justice Act 1993 Pt V (ss 52-64): s 60(1). In exercise of the power so conferred the Treasury has made the Insider Dealing (Securities and Regulated Markets) Order 1994, SI 1994/187, art 9 (as amended) which came into force on 1 March 1994 (see art 1). The regulated markets for the purposes of the Criminal Justice Act 1993 Pt V are any market which is established under the rules of one of the following investment exchanges: Amsterdam Stock Exchange; Antwerp Stock Exchange; Athens Stock Exchange; Barcelona Stock Exchange; Bavarian Stock Exchange; Berlin Stock Exchange; Bilbao Stock Exchange; Bologna Stock Exchange; Bremen Stock Exchange; Brussels Stock Exchange; Copenhagen Stock Exchange; the exchange known as COREDEALMTS; Dusseldorf Stock Exchange; the exchange known as EASDAQ; Florence Stock Exchange; Frankfurt Stock Exchange; Genoa Stock Exchange; Hamburg Stock Exchange; Hanover Stock Exchange; Helsinki Stock Exchange; Iceland Stock Exchange; the Irish Stock Exchange Ltd; Lisbon Stock Exchange; LIFFE Administration & Management; the London Stock Exchange Ltd; Luxembourg Stock Exchange; Lyon Stock Exchange; Madrid Stock Exchange; Milan Stock Exchange; Naples Stock Exchange; the exchange known as NASDAQ; the exchange known as Nouveau Marche; OMLX, the London Securities and Derivatives Exchange Ltd; Oporto Stock Exchange; Oslo Stock Exchange; Palermo Stock Exchange; Paris Stock Exchange; Rome Stock Exchange; Stockholm Stock Exchange; Stuttgart Stock Exchange; the exchange known as SWX Swiss Exchange; Trieste Stock Exchange; Turin Stock Exchange; Valencia Stock Exchange; Venice Stock Exchange; Vienna Stock Exchange; virt-x Exchange Ltd; Insider Dealing (Securities and Regulated Markets) Order 1994, SI 1994/187, art 9(a), Schedule (amended by SI 1996/1561; SI 2000/1923; SI 2002/1874). The market known as OFEX is also a regulated market: Insider Dealing (Securities and Regulated Markets) Order 1994, SI 1994/187, art 9(b) (added by SI 2000/1923; amended by SI 2002/1874).

Any power under the Criminal Justice Act 1993 Pt V to make an order is exercisable by statutory instrument (s 64(1)); but no such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament (s 64(2)). Any such order may make different provision for different cases and may contain such incidental, supplemental and transitional provisions as the Treasury considers expedient: s 64(3). As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

8 For the meaning of 'professional intermediary' see PARA 574E.

9 Criminal Justice Act 1993 s 52(3).

10 For these purposes, 'public sector body' means: (1) the government of the United Kingdom, of Northern Ireland or any country or territory outside the United Kingdom; (2) a local authority in the United Kingdom or elsewhere; (3) any international organisation the members of which include the United Kingdom or another member state; (4) the Bank of England; or (5) the central bank of any sovereign state: Criminal Justice Act 1993 s 60(3)(b). For the meaning of 'United Kingdom' see PARA 2 NOTE 3.

11 Criminal Justice Act 1993 s 63(1).

12 See Criminal Justice Act 1993 s 63(2). Cf *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897 (which considered the equivalent provision in the Company Securities (Insider Dealing) Act 1985 (ie s 8(3) (repealed)), which provided that the transaction was not void or voidable by reason only of the contravention of the statutory provisions; the court found that despite s 8(3) (repealed) the transaction was unenforceable). The wording now contained in the Criminal Justice Act 1993 s 63(2) rules out the approach in *Chase Manhattan Equities Ltd v Goodman*.

13 Criminal Justice Act 1993 s 57(1).

14 For these purposes, an 'issuer', in relation to any securities, means any company, public sector body or individual by which or by whom the securities have been or are to be issued: Criminal Justice Act 1993 s 60(2). 'Company' means any body, whether or not incorporated and wherever incorporated or constituted, which is not a public sector body: s 60(3)(a). Information is to be treated as relating to an issuer of securities which is a company not only where it is about the company but also where it may affect the company's business prospects: s 60(4).

15 Criminal Justice Act 1993 s 57(2).

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## **574B. Meaning of 'inside information'.**

'Inside information' means<sup>1</sup> information which:

- 1318 (1) relates to particular securities<sup>2</sup> or to a particular issuer<sup>3</sup> of securities or to particular issuers of securities and not to securities generally or to issuers of securities generally;
- 1319 (2) is specific or precise;
- 1320 (3) has not been made public<sup>4</sup>; and
- 1321 (4) if it were made public, would be likely to have a significant effect on the price of any securities<sup>5</sup>.

1 le for the purposes of the Criminal Justice Act 1993 ss 56, 57: see PARA 574A.

2 For the meaning of 'security' see PARA 574D.

3 For the meaning of 'issuer' see PARA 574A NOTE 14.

4 For the meaning of 'made public' see PARA 574C.

5 Criminal Justice Act 1993 s 56(1).

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#### **574C. Meaning of 'made public'.**

'Made public', in relation to information, is to be construed in accordance with the provisions described below<sup>1</sup>; but these provisions are not exhaustive as to the meaning of that expression<sup>2</sup>. Information is made public if:

- 1322 (1) it is published in accordance with the rules of a regulated market<sup>3</sup> for the purpose of informing investors and their professional advisers;
- 1323 (2) it is contained in records which, by virtue of any enactment, are open to inspection by the public;
- 1324 (3) it can be readily acquired by those likely to deal in any securities<sup>4</sup> to which the information relates or of an issuer to which the information relates; or
- 1325 (4) it is derived from information which has been made public<sup>5</sup>.

Information may be treated as made public, even though:

- 1326 (a) it can be acquired only by persons exercising diligence or expertise;
- 1327 (b) it is communicated to a section of the public and not to the public at large;
- 1328 (c) it can be acquired only by observation;
- 1329 (d) it is communicated only on payment of a fee; or
- 1330 (e) it is published only outside the United Kingdom<sup>6</sup>.

1 le the Criminal Justice Act 1993 s 58(2), (3) (see the TEXT AND NOTES 3-6).

2 Criminal Justice Act 1993 s 58(1).

- 3 For the meaning of 'regulated market' see PARA 574A NOTE 7.
- 4 As to the meaning of 'deal in securities' see PARA 574A NOTE 2.
- 5 Criminal Justice Act 1993 s 58(2).
- 6 Criminal Justice Act 1993 s 58(3). For the meaning of 'United Kingdom' see PARA 2 NOTE 3.

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#### **574D. Meaning of 'security'.**

'Security' means<sup>1</sup> a security which falls within any of the following heads:

- 1331 (1) shares and stock in the share capital of a company<sup>2</sup> ('shares')<sup>3</sup>;
- 1332 (2) any instrument creating or acknowledging indebtedness which is issued by a company or public sector body<sup>4</sup>, including, in particular, debentures, debenture stock, loan stock, bonds and certificates of deposit ('debt securities')<sup>5</sup>;
- 1333 (3) any right, whether conferred by warrant or otherwise, to subscribe for shares or debt securities ('warrants')<sup>6</sup>;
- 1334 (4) the rights under any depositary receipt<sup>7</sup>;
- 1335 (5) any option to acquire<sup>8</sup> or dispose<sup>9</sup> of any security falling within any of heads (1) to (4) above or head (6) or (7) below<sup>10</sup>;
- 1336 (6) rights under a contract for the acquisition or disposal of relevant securities<sup>11</sup> under which delivery is to be made at a future date and at a price agreed<sup>12</sup> when the contract is made<sup>13</sup>;
- 1337 (7) rights under a contract which does not provide for the delivery of securities but whose purpose or pretended purpose is to secure a profit or avoid a loss by reference to fluctuations in a share index or other similar factor connected with relevant securities<sup>14</sup>, the price of particular relevant securities or the interest rate offered on money placed on deposit<sup>15</sup>,

and which satisfies any conditions applying to it under an order made by the Treasury for these purposes<sup>16</sup>.

The Treasury may by order amend the provisions described above<sup>17</sup>.

- 1 le for the purposes of the Criminal Justice Act 1993 Pt V (ss 52-64).
- 2 For the meaning of 'company' see PARA 574A NOTE 14.
- 3 Criminal Justice Act 1993 s 54(1)(a), Sch 2 para 1.
- 4 For the meaning of 'public sector body' see PARA 574A NOTE 10.
- 5 Criminal Justice Act 1993 Sch 2 para 2.
- 6 Criminal Justice Act 1993 Sch 2 para 3.
- 7 Criminal Justice Act 1993 Sch 2 para 4(1). 'Depositary receipt' means a certificate or other record, whether or not in the form of a document, which is issued by or on behalf of a person who holds any relevant securities of a particular issuer, and which acknowledges that another person is entitled to rights in relation to the

relevant securities or relevant securities of the same kind: Sch 2 para 4(2). 'Relevant securities' means shares, debt securities and warrants: Sch 2 para 4(3). For the meaning of 'issuer' see PARA 574A NOTE 14.

8 As to the meaning of 'acquire' in relation to a security see PARA 574A NOTE 2.

9 As to the meaning of 'dispose' in relation to a security see PARA 574A NOTE 2.

10 See the Criminal Justice Act 1993 Sch 2 para 5.

11 For these purposes, 'relevant securities' means any security falling within any of Criminal Justice Act 1993 Sch 2 paras 1-5, 7 (see heads (1)-(5), (7) in the TEXT): Sch 2 para 6(2)(b).

12 For these purposes, the references to a future date and to a price agreed when the contract is made include references to a date and a price determined in accordance with terms of the contract: Criminal Justice Act 1993 Sch 2 para 6(2)(a).

13 Criminal Justice Act 1993 Sch 2 para 6(1).

14 For these purposes, 'relevant securities' means any security falling within any of Criminal Justice Act 1993 Sch 2 paras 1-6 (see heads (1)-(6) in the TEXT): Sch 2 para 7(2).

15 Criminal Justice Act 1993 Sch 2 para 7(1).

16 See Criminal Justice Act 1993 s 54(1)(a), (b). In the provisions of Pt V other than Sch 2, any reference to a security is to a security to which Pt V applies: s 54(1).

The Treasury has specified the following conditions:

- 548 (1) in relation to any security which falls within any of Sch 2 paras 1-7 (see heads (1)-(7) in the TEXT), the following condition applies, ie that it is officially listed in a state within the European Economic Area or that it is admitted to dealing on, or has its price quoted on or under the rules of, a regulated market (Insider Dealing (Securities and Regulated Markets) Order 1994, SI 1994/187, arts 3, 4);
- 549 (2) in relation to a warrant, the following alternative condition applies, ie that the right under it is a right to subscribe for any share or debt security of the same class as a share or debt security which satisfies the condition in art 4 (see head (1)) (arts 3, 5);
- 550 (3) in relation to a depositary receipt, the following alternative condition applies, ie that the rights under it are in respect of any share or debt security which satisfies the condition in art 4 (see head (1)) (arts 3, 6);
- 551 (4) in relation to an option or future, the following alternative condition applies, ie that the option or rights under the future are in respect of: (a) any share or debt security which satisfies the condition in art 4 (see head (1)); or (b) any depositary receipt which satisfies the condition in art 4 (see head (1)) or art 6 (see head (3)) (arts 3, 7);
- 552 (5) in relation to a contract for differences, the following alternative condition applies, ie that the purpose or pretended purpose of the contract is to secure a profit or avoid a loss by reference to fluctuations in: (a) the price of any shares or debt securities which satisfy the condition in art 4 (see head (1)); or (b) an index of the price of such shares or debt securities (arts 3, 8).

For the meaning of 'regulated market' see PARA 574A NOTE 7. For these purposes, a 'state within the European Economic Area' means a state which is a member of the European Communities and the Republics of Austria, Finland and Iceland, the Kingdoms of Norway and Sweden and the Principality of Liechtenstein: art 2. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

17 Criminal Justice Act 1993 s 54(2).

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## **574E. Meaning of 'professional intermediary'.**

A 'professional intermediary' is a person:

- 1338 (1) who carries on a business consisting of a specified activity<sup>1</sup> and who holds himself out to the public or any section of the public, including a section of the public constituted by persons such as himself, as willing to engage in any such business; or
- 1339 (2) who is employed by a person falling within head (1) above to carry out any such activity<sup>2</sup>.

The activities specified are:

- 1340 (a) acquiring<sup>3</sup> or disposing<sup>4</sup> of securities<sup>5</sup>, whether as principal or agent; or
- 1341 (b) acting as an intermediary between persons taking part in any dealing in securities<sup>6</sup>.

A person is not, however, to be treated as carrying on a business consisting of a specified activity<sup>7</sup> if the activity in question is merely incidental to some other activity<sup>8</sup> or merely because he occasionally conducts one of those activities<sup>9</sup>.

A person dealing in securities relies on a professional intermediary<sup>10</sup> if and only if a person who is acting as a professional intermediary carries out a specified activity<sup>11</sup> in relation to that dealing<sup>12</sup>.

- 1    Ie an activity mentioned in the Criminal Justice Act 1993 s 59(2): see heads (a) and (b) in the TEXT.
- 2    Criminal Justice Act 1993 s 59(1).
- 3    As to the meaning of 'acquire' in relation to a security see PARA 574A NOTE 2.
- 4    As to the meaning of 'dispose' in relation to a security see PARA 574A NOTE 2.
- 5    For the meaning of 'security' see PARA 574D.
- 6    Criminal Justice Act 1993 s 59(2). As to the meaning of 'deal in securities' see PARA 574A NOTE 2.
- 7    Ie an activity mentioned in Criminal Justice Act 1993 s 59(2): see heads (a) and (b) in the TEXT.
- 8    Ie some other activity not falling within Criminal Justice Act 1993 s 59(2).
- 9    Criminal Justice Act 1993 s 59(3).
- 10   Ie for the purposes of Criminal Justice Act 1993 s 52: see PARA 574A.
- 11   Ie an activity mentioned in Criminal Justice Act 1993 s 59(2): see heads (a) and (b) in the TEXT.
- 12   Criminal Justice Act 1993 s 59(4).

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## **574F. Penalties.**

An individual guilty of insider dealing<sup>1</sup> is liable on conviction on indictment to imprisonment for a term not exceeding seven years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or to both<sup>2</sup>.

An individual convicted of insider dealing may also be disqualified from being a company director where the insider dealing offence has some relevant factual connection with the management of a company<sup>3</sup>.

In relation to behaviour which constitutes market abuse<sup>4</sup>, the Financial Services Authority<sup>5</sup> has power to impose certain penalties<sup>6</sup>.

1 As to the offence of insider dealing see PARA 574A. As to the territorial scope of insider dealing see PARA 574G. As to prosecutions for insider dealing and summary proceedings for insider dealing see PARA 574N. As to defences see PARA 574H et seq.

2 See the Criminal Justice Act 1993 s 61(1). As to the statutory maximum see PARA 56 NOTE 24. As to considerations to take into account when identifying the appropriate sentence see *R v McQuoid* [2009] All ER (D) 100 (Jun), CA.

3 *R v Goodman* [1992] BCC 625, CA (company chairman who used knowledge of the company's financial position to carry out insider dealing convicted under the Company Securities (Insider Dealing) Act 1985 (repealed) and also disqualified for ten years under the Company Directors Disqualification Act 1986 s 2 (as amended) (disqualification where person convicted of indictable offence in connection with (inter alia) the promotion, formation, management or liquidation of a company)).

4 As to market abuse generally see PARA 437 et seq.

5 As to the Financial Services Authority see PARAS 4, 6 et seq.

6 See the Financial Services and Markets Act 2000 s 123; PARA 574P; and PARA 440.

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### **574G. Territorial scope of insider dealing.**

An individual who has information as an insider<sup>1</sup> is not guilty of an offence by dealing in specified circumstances in securities that are price-affected securities in relation to the information<sup>2</sup> unless:

1342 (1) he was within the United Kingdom at the time when he is alleged to have done any act constituting or forming part of the alleged dealing;

1343 (2) the regulated market<sup>3</sup> on which the dealing is alleged to have occurred is one which, by an order of the Treasury, is identified, whether by name or by reference to criteria prescribed by the order, as being regulated in the United Kingdom<sup>4</sup>; or

1344 (3) the professional intermediary<sup>5</sup> was within the United Kingdom at the time when he is alleged to have done anything by means of which the offence is alleged to have been committed<sup>6</sup>.



Nor is an individual who has information as an insider guilty of an offence by encouraging another person to deal in price-affected securities or disclosing the information to another person<sup>7</sup> unless:

- 1345 (a) he was within the United Kingdom at the time when he is alleged to have disclosed the information or encouraged the dealing; or
- 1346 (b) the alleged recipient of the information or encouragement was within the United Kingdom at the time when he is alleged to have received the information or encouragement<sup>8</sup>.

1 As to having information as an insider see PARA 574A.

2 Ie an offence under the Criminal Justice Act 1993 s 52(1): see PARA 574A. As to the meaning of 'deal in securities' see PARA 574A NOTE 2; and as to the meaning of 'price-affected securities' see PARA 574A NOTE 3.

3 For the meaning of 'regulated market' see PARA 574A NOTE 7.

4 The regulated markets which are regulated in the United Kingdom for the purpose of the Criminal Justice Act 1993 Pt V (ss 52-64) are any market which is established under the rules of:

- 553 (1) the London Stock Exchange Ltd;
- 554 (2) LIFFE Administration & Management;
- 555 (3) OMLX, the London Securities and Derivatives Exchange Ltd;
- 556 (4) virt-x Exchange Ltd; and
- 557 (5) the exchange known as COREDEALMTS,

together with the market known as OFEX: Insider Dealing (Securities and Regulated Markets) Order 1994, SI 1994/187, art 10 (amended by SI 1996/1561; SI 2000/1923; SI 2002/1874). For the meaning of 'United Kingdom' see PARA 2 NOTE 3. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

5 For the meaning of 'professional intermediary' see PARA 574F.

6 Criminal Justice Act 1993 s 62(1).

7 Ie an offence under Criminal Justice Act 1993 s 52(2): see PARA 574A.

8 Criminal Justice Act 1993 s 62(2).

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#### **574H. General defences.**

An individual is not guilty of insider dealing<sup>1</sup> by virtue of dealing in securities<sup>2</sup> if he shows:

- 1347 (1) that he did not at the time expect the dealing to result in a profit<sup>3</sup> attributable to the fact that the information in question was price-sensitive information<sup>4</sup> in relation to the securities; or
- 1348 (2) that at the time he believed on reasonable grounds that the information had been disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information; or

1349 (3) that he would have done what he did even if he had not had the information<sup>5</sup>.

An individual is not guilty of insider dealing by virtue of encouraging another person to deal in securities<sup>6</sup> if he shows:

1350 (a) that he did not at the time expect the dealing to result in a profit attributable to the fact that the information in question was price-sensitive information in relation to the securities; or

1351 (b) that at the time he believed on reasonable grounds that the information had been or would be disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information; or

1352 (c) that he would have done what he did even if he had not had the information<sup>7</sup>.

An individual is not guilty of insider dealing by virtue of a disclosure of information<sup>8</sup> if he shows:

1353 (i) that he did not at the time expect any person, because of the disclosure, to deal in securities in the specified circumstances<sup>9</sup>; or

1354 (ii) that, although he had such an expectation at the time, he did not expect the dealing to result in a profit attributable to the fact that the information was price-sensitive information in relation to the securities<sup>10</sup>.

Special defences<sup>11</sup> apply in the case of market makers, market information and price stabilisation<sup>12</sup>.

1 As to the offence of insider dealing see PARA 574A; as to the territorial scope of the offence see PARA 574G; and as to the penalties see PARA 574F.

2 Ie an offence under the Criminal Justice Act 1993 s 52(1): see PARA 574A. As to the meaning of 'deal in securities' see PARA 574A NOTE 2; and for the meaning of 'security' see PARA 574D.

3 For these purposes, references to a profit include references to the avoidance of a loss: Criminal Justice Act 1993 s 53(6).

4 For the meaning of 'price-sensitive information' see PARA 574A NOTE 3.

5 Criminal Justice Act 1993 s 53(1). See *R v Cross* [1991] BCLC 125 (burden of proof was on the accused to show that he fell within the equivalent defence under the Company Securities (Insider Dealing) Act 1985).

6 Ie an offence under the Criminal Justice Act 1993 s 52(2)(a): see PARA 574A.

7 Criminal Justice Act 1993 s 53(2).

8 Ie an offence under Criminal Justice Act 1993 s 52(2)(b): see PARA 574A.

9 Ie the circumstances mentioned in Criminal Justice Act 1993 s 52(3): see PARA 574A.

10 Criminal Justice Act 1993 s 53(3).

11 Ie the special defences in Criminal Justice Act 1993 s 53(4), Sch 1 (as amended): see PARAS 574I-574K. As to the power of the Treasury to make orders amending Sch 1 (as amended) see s 53(5). As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517.

12 Criminal Justice Act 1993 s 53(4).

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#### **574I. Market makers.**

An individual is not guilty of insider dealing<sup>1</sup> by virtue of dealing in securities<sup>2</sup> or encouraging another person to deal if he shows that he acted in good faith in the course of his business as a market maker or his employment in the business of a market maker<sup>3</sup>.

A market maker is a person who:

1355 (1) holds himself out at all normal times in compliance with the rules of a regulated market<sup>4</sup> or an approved organisation<sup>5</sup> as willing to acquire or dispose<sup>6</sup> of securities; and

1356 (2) is recognised as doing so under those rules<sup>7</sup>.

1 As to the offence of insider dealing see PARA 574A ; as to the territorial scope of the offence see PARA 574G; and as to the penalties see PARA 574F.

2 For the meaning of 'deal in securities' see PARA 574A NOTE 2; and for the meaning of 'security' see PARA 574D.

3 Criminal Justice Act 1993 s 53(4), Sch 1 para 1(1).

4 For the meaning of 'regulated market' see PARA 574A NOTE 7.

5 For these purposes, 'approved organisation' means an international securities self-regulating organisation approved by the Treasury under any relevant order under the Financial Services and Markets Act 2000 s 22 (see PARA 84); Criminal Justice Act 1993 Sch 1 para 1(3) (amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 341).

6 As to the meanings of 'acquire' and 'dispose' in relation to a security see PARA 574A NOTE 2.

7 Criminal Justice Act 1993 Sch 1 para 1(2).

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#### **574J. Market information.**

An individual is not guilty of insider dealing<sup>1</sup> by virtue of dealing in securities<sup>2</sup> or encouraging another person to deal if he shows that the information which he had as an insider<sup>3</sup> was market information and it was reasonable for an individual in his position to have acted as he did despite having that information as an insider at the time<sup>4</sup>. In determining whether it is reasonable for an individual to do any act despite having market information at the time, there must, in particular, be taken into account the content of the information, the circumstances in which he first had the information and in what capacity and the capacity in which he now acts<sup>5</sup>.

An individual is not guilty of insider dealing by virtue of dealing in securities or encouraging another person to deal if he shows:

- 1357 (1) that he acted in connection with an acquisition<sup>6</sup> or disposal<sup>7</sup> which was under consideration or the subject of negotiation, or in the course of a series of such acquisitions or disposals and with a view to facilitating the accomplishment of the acquisition or disposal or the series of acquisitions or disposals; and
- 1358 (2) that the information which he had as an insider was market information arising directly out of his involvement in the acquisition or disposal or series of acquisitions or disposals<sup>8</sup>.

For these purposes, 'market information' is information consisting of one or more of the following facts:

- 1359 (a) that securities of a particular kind have been or are to be acquired or disposed of, or that their acquisition or disposal is under consideration or the subject of negotiation;
- 1360 (b) that securities of a particular kind have not been or are not to be acquired or disposed of;
- 1361 (c) the number of securities acquired or disposed of or to be acquired or disposed of or whose acquisition or disposal is under consideration or the subject of negotiation;
- 1362 (d) the price, or range of prices, at which securities have been or are to be acquired or disposed of or the price, or range of prices, at which securities whose acquisition or disposal is under consideration or the subject of negotiation may be acquired or disposed of;
- 1363 (e) the identity of the persons involved or likely to be involved in any capacity in an acquisition or disposal<sup>9</sup>.

1 As to the offence of insider dealing see PARA 574A; as to the territorial scope of the offence see PARA 574G; and as to the penalties see PARA 574F.

2 For the meaning of 'deal in securities' see PARA 574A NOTE 2; and for the meaning of 'security' see PARA 574D.

3 As to having information as an insider see PARA 574A.

4 Criminal Justice Act 1993 s 53(4), Sch 1 para 2(1).

5 Criminal Justice Act 1993 Sch 1 para 2(2).

6 As to the meaning of 'acquire' see PARA 574A NOTE 2.

7 As to the meaning of 'dispose' see PARA 574A NOTE 2.

8 Criminal Justice Act 1993 Sch 1 para 3.

9 Criminal Justice Act 1993 Sch 1 para 4.

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#### **574K. Price stabilisation.**

An individual is not guilty of insider dealing<sup>1</sup> by virtue of dealing in securities<sup>2</sup> or encouraging another person to deal if he shows that he acted in conformity with the price stabilisation rules

or with the relevant provisions of EC Commission Regulation 2273/2003 implementing EC Directive 2003/6 of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments<sup>3</sup>.

1 As to the offence of insider dealing see PARA 574A; as to the territorial scope of the offence see PARA 574G; and as to the penalties see PARA 574F.

2 For the meaning of 'deal in securities' see PARA 574A NOTE 2; and for the meaning of 'security' see PARA 574D.

3 Criminal Justice Act 1993 s 53(4), Sch 1 para 5(1) (amended by the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2005, SI 2005/381). For these purposes, 'price stabilisation rules' means rules made under the Financial Services and Markets Act 2000 s 144(1) (see PARA 28); Criminal Justice Act 1993 Sch 1 para 5(2) (substituted by Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 341).

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#### **574L. Investigations into insider dealing.**

If it appears to an investigating authority<sup>1</sup> that there are circumstances suggesting that an offence relating to insider dealing<sup>2</sup> may have been committed, that authority may appoint one or more competent persons to conduct an investigation on its behalf<sup>3</sup>. If a person so appointed ('the investigator') considers that any person is or may be able to give information relevant to the investigation, the investigator may require such person to attend before him and answer questions, or otherwise to provide information, provide documents or give such assistance in connection with the investigation as that person is reasonably able to give<sup>4</sup>.

1 'Investigating authority' means the Financial Services Authority or the Secretary of State: Financial Services and Markets Act 2000 s 168(6). As to the Financial Services Authority see PARA 574N; and PARAS 4, 6 et seq. As to the Secretary of State see PARA 3.

2 Is an offence under the Criminal Justice Act 1993 Pt V (ss 52-64): see PARA 574A.

3 See the Financial Services and Markets Act 2000 s 168(2)(a), (3). As to the appointment by the investigating authority of persons to carry out general investigations see s 167; and PARA 449. As to the conduct of investigations under Pt XI (ss 165-177) (as amended) generally see ss 170-176; and PARAS 451-454.

4 See Criminal Justice Act 1993 s 173; and PARA 449.

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#### **574M. Failure to co-operate with investigation into insider dealing.**

Provision is made for failure to comply with a requirement imposed by the Financial Services and Markets Act 2000 relating to information gathering and investigations<sup>1</sup>, including failure to comply with requirements relating to investigations into insider dealing<sup>2</sup>.

1 lie under the Financial Services and Markets Act 2000 Pt XI (ss 165-177) (as amended) (see PARAS 447-455).

2 See Financial Services and Markets Act 2000 s 177 (as amended); and PARA 455. Section 177 (as amended) includes provision for:

558 (1) holding those failing to comply with such requirements in contempt of court (s 177(1), (2) (amended by the Limited Liability Partnerships Regulations 2001, SI 2001/1090, reg 9(1), Sch 5 para 21)); and

559 (2) creating offences relating to:

65. (a) the falsification, concealment, destruction or disposal of a document relevant to an investigation under the Financial Services and Markets Act 2000 Pt XI (as amended) (s 177(3)); and  
65

66. (b) providing information under Pt XI (as amended) (whether recklessly or otherwise) which is false or misleading (s 177(4)).  
66

As to investigations into insider dealing see PARA 574L; and PARA 449. As to the penalties to which persons found guilty of offences under head (2) are liable see s 177(5); and PARA 455. As to contempt of court see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 402 et seq.

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## **574N. Prosecutions.**

The Criminal Justice Act 1993 provides that proceedings for the offence of insider dealing<sup>1</sup> may not be instituted in England and Wales except by or with the consent of the Secretary of State or the Director of Public Prosecutions<sup>2</sup>. Under the Financial Services and Markets Act 2000, the Financial Services Authority<sup>3</sup> may institute proceedings for the offence of insider dealing<sup>4</sup>; but in exercising such power the Authority must comply with any conditions or restrictions imposed in writing by the Treasury<sup>5</sup>. Both the Department of Trade and Industry<sup>6</sup> and the Serious Fraud Office<sup>7</sup> may also be involved in prosecutions for such an offence.

The Financial Services Authority has further powers, including the power to impose penalties, in relation to behaviour which constitutes market abuse<sup>8</sup>.

1 lie an offence under the Criminal Justice Act 1993 Pt V (ss 52-64): see PARA 574A et seq. As to penalties for insider dealing see PARA 574F.

2 Criminal Justice Act 1993 s 61(2). As to the Secretary of State see PARA 3. As to the Director of Public Prosecutions see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1066, 1079 et seq. Summary proceedings for an offence of insider dealing may be brought against an individual at any place at which the individual is for the time being: Criminal Justice Act 1993 s 61A(1) (s 61A(1), (2), (5) added by SI 2009/1941). An information relating to an offence of insider dealing that is triable by a magistrates' court in England and Wales may be so tried if it is laid (1) at any time within three years after the commission of the offence; and (2) within twelve months after the date on which evidence sufficient in the opinion of the Director of Public Prosecutions or the Secretary of State to justify the proceedings comes to that person's knowledge: Criminal Justice Act 1993 s 61A(2). For the purposes of s 61A, a certificate of the Director of Public Prosecutions, the Lord Advocate, the Director of Public Prosecutions for Northern Ireland or the Secretary of State as to the date on which such evidence as is referred to in s 61A(2) came to that person's notice is conclusive evidence: Criminal Justice Act 1993 s 61A(5).

3 As to the Financial Services Authority see PARAS 4, 6-42.

4 See the Financial Services and Markets Act 2000 s 402(1)(a).

5 See the Financial Services and Markets Act 2000s 402(2); and PARA 573. Such conditions or restrictions may be imposed in relation to: (1) proceedings generally; or (2) such proceedings or categories of proceedings as the Treasury may direct: s 402(3). As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 512-517. As to the institution of proceedings under the Financial Services and Markets Act 2000 generally see s 401 (as amended); and PARA 572.

6 As to the Department of Trade and Industry see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 505-508; **TRADE AND INDUSTRY** vol 97 (2010) PARA 802.

7 As to the Serious Fraud Office see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1089 et seq.

8 See the Financial Services and Markets Act 2000 s 123; and PARA 440. As to market abuse generally see PARA 437 et seq. The Treasury may issue guidance for the purpose of helping relevant authorities determine the action to be taken in cases where powers relating to market abuse appear to be exercisable and where the offence of insider dealing also appears to be involved: see s 130; and PARA 445.

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## **(8) OMBUDSMAN AND COMPENSATION SCHEMES**

### **(i) The Ombudsman Scheme**

#### **575. The ombudsman scheme and scheme operator.**

Part XVI of the Financial Services and Markets Act 2000<sup>1</sup> provides for a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person<sup>2</sup>. The scheme is administered by a body corporate<sup>3</sup> (the 'scheme operator')<sup>4</sup>, established by the Financial Services Authority<sup>5</sup> to exercise the functions conferred on the scheme operator by or under the Financial Services and Markets Act 2000<sup>6</sup>. The Authority must take such steps as are necessary to ensure that the scheme operator is, at all times, capable of exercising those functions<sup>7</sup>. The scheme is to be operated under a name chosen by the scheme operator but is referred to in the Financial Services and Markets Act 2000 as the 'ombudsman scheme'<sup>8</sup>.

The constitution of the scheme operator must provide for it to have a chairman and a board (which must include the chairman) whose members are the scheme operator's directors<sup>9</sup>. The chairman and other members of the board must be persons appointed, and liable to removal from office, by the Authority (acting, in the case of the chairman, with the approval of the Treasury)<sup>10</sup>. However, the terms of their appointment (and in particular those governing removal from office) must be such as to secure their independence from the Authority in the operation of the scheme<sup>11</sup>. Certain functions<sup>12</sup> may be exercised only by the board<sup>13</sup>.

The scheme operator must appoint and maintain a panel<sup>14</sup> of persons, appearing to it to have appropriate qualifications and experience, to act as ombudsmen<sup>15</sup> for the purposes of the scheme<sup>16</sup>. A person's appointment to the panel is to be on such terms (including terms as to the duration and termination of his appointment and as to remuneration) as the scheme operator considers consistent with the independence of the person appointed, and otherwise appropriate<sup>17</sup>. The scheme operator must appoint one member of the panel to act as Chief Ombudsman<sup>18</sup>, who is to be appointed on such terms (including terms as to the duration and termination of his appointment) as the scheme operator considers appropriate<sup>19</sup>.

The scheme operator is not to be regarded as exercising functions on behalf of the Crown<sup>20</sup> and the scheme operator's board members, officers and staff are not to be regarded as Crown servants<sup>21</sup>. Appointment as Chief Ombudsman or to the panel or as a deputy ombudsman does not confer the status of Crown servant<sup>22</sup>.

At least once a year the scheme operator and the Chief Ombudsman must make a report to the Authority on the discharge of their functions<sup>23</sup>. Each report must distinguish between functions in relation to the scheme's compulsory jurisdiction, functions in relation to its consumer credit jurisdiction and functions in relation to its voluntary jurisdiction<sup>24</sup>. Each report must also comply with any requirements specified in rules made by the Authority<sup>25</sup>. The scheme operator must publish each report in the way it considers appropriate<sup>26</sup>.

The scheme operator may publish guidance consisting of such information and advice as it considers appropriate and may charge for it or distribute it free of charge<sup>27</sup>.

The scheme operator must, before the start of each of its financial years, adopt an annual budget which has been approved by the Authority<sup>28</sup>. The scheme operator may, with the approval of the Authority, vary the budget for a financial year at any time after its adoption<sup>29</sup>. The annual budget must include an indication of the distribution of resources deployed in the operation of the scheme, and the amounts of income of the scheme operator arising or expected to arise from the operation of the scheme, distinguishing between the scheme's compulsory, consumer credit and voluntary jurisdiction<sup>30</sup>.

1    le the Financial Services and Markets Act 2000 Pt XVI (ss 225-234A).

2    Financial Services and Markets Act 2000 s 225(1).

3    As to the meaning of 'body corporate' see PARA 86 note 11.

4    Financial Services and Markets Act 2000 ss 225(2), 417(1).

5    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Redress, Dispute Resolution: Complaints (DISP) Ch 5. As to the Handbook generally see PARA 22.

6    Financial Services and Markets Act 2000 s 225(4), Sch 17 para 2(1). For the purpose of funding the establishment of the ombudsman scheme (whenever any relevant expense is incurred), and its operation in relation to the compulsory jurisdiction, the Financial Services Authority may make rules requiring the payment to it or to the scheme operator, by authorised persons or any class of authorised person of specified amounts (or amounts calculated in a specified way): s 234(1). 'Specified' means specified in the rules: s 234(2). As to the meaning of 'rule' see PARA 23 note 2. As to the compulsory jurisdiction see PARA 576. As to authorised persons see PARA 314 et seq.

For the purpose of funding (1) the establishment of the ombudsman scheme so far as it relates to the consumer credit jurisdiction (whenever any relevant expense is incurred); and (2) its operation in relation to the consumer credit jurisdiction, the scheme operator may from time to time with the approval of the Authority determine a sum which is to be raised by way of contributions under s 234A: s 234A(1) (s 234A added by the Consumer Credit Act 2006 s 60). A sum determined under the Financial Services and Markets Act 2000 s 234A(1) may include a component to cover the costs of the collection of contributions to that sum ('collection costs') under s 234A: s 234A(2) (as so added). As to the consumer credit jurisdiction see PARA 577.

The scheme operator must notify the Office of Fair Trading of every determination under s 234A(1): s 234A(3) (as so added). The Office of Fair Trading must give general notice of every determination so notified: s 234A(4) (as so added). The Office of Fair Trading may by general notice impose requirements on licensees to whom s 234A applies, or persons who make applications to which s 234A applies, to pay contributions to the Office of Fair Trading for the purpose of raising sums determined under s 234A(1): s 234A(5) (as so added). The amount of the contribution payable by a person under such a requirement must be the amount specified in or determined under the general notice; and must be paid before the end of the period or at the time so specified or determined: s 234A(6) (as so added). A general notice under s 234A(5) may (a) impose requirements only on descriptions of licensees or applicants specified in the notice; (b) provide for exceptions from any requirement imposed on a description of licensees or applicants; (c) impose different requirements on different descriptions of licensees or applicants; (d) make provision for refunds in specified circumstances: s 234A(7) (as so added).

Contributions received by the Office of Fair Trading must be paid to the scheme operator: s 234A(8) (as so added). As soon as practicable after the end of (i) each financial year of the scheme operator; or (ii) if the Office



of Fair Trading and the scheme operator agree that this head is to apply instead of head (i) above for the time being, each period agreed by them, the scheme operator must pay to the Office an amount representing the extent to which collection costs are covered in accordance with s 234A(2) by the total amount of the contributions paid by the Office of Fair Trading to it during the year or (as the case may be) the agreed period: s 234A(9) (as so added).

Amounts received by the Office of Fair Trading from the scheme operator are to be retained by it for the purpose of meeting its costs: s 234A(10) (as so added). The Secretary of State may by order provide that the functions of the Office of Fair Trading under s 235A are for the time being to be carried out by the scheme operator: s 234A(11) (as so added). An order under s 235A(11) may provide that while the order is in force s 235A has effect subject to such modifications as may be set out in the order: s 234A(12) (as so added). The licensees to whom s 235A applies are licensees under standard licences which cover to any extent the carrying on of a type of business specified in an order under s 226A(2)(e) (see PARA 577): s 234A(13) (as so added). The applications to which this section applies are applications for (A) standard licences covering to any extent the carrying on of a business of such a type; (B) the renewal of standard licences on terms covering to any extent the carrying on of a business of such a type: s 234A(14) (as so added). Expressions used in the Consumer Credit Act 1974 (see **CONSUMER CREDIT**) have the same meaning in the Financial Services and Markets Act 2000 s 235A as they have in the Consumer Credit Act 1974: Financial Services and Markets Act 2000 s 234A(15) (as so added). As to the Secretary of State see PARA 3. As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq. At the date at which this volume states the law no order had been made under s 234A.

7 Financial Services and Markets Act 2000 Sch 17 para 2(2).

8 Financial Services and Markets Act 2000 ss 225(3), 417(1). The name so chosen is 'Financial Ombudsman Service' (FOS).

As to the application of the ombudsman scheme to complaints relating to acts or omissions in the course of consumer credit and associated businesses see s 226A; and PARA 577. See also the Financial Services and Markets Act 2000 (Transitional Provisions) (Complaints Relating to General Insurance and Mortgages) Order 2004, SI 2004/454 (amended by SI 2004/1609).

9 Financial Services and Markets Act 2000 Sch 17 para 3(1). As to the meaning of 'director' see PARA 86 note 11. The validity of any act of the scheme operator is unaffected by a vacancy in the office of chairman or by a defect in the appointment of a person as chairman or as a member of the board: Sch 17 para 3(5).

10 Financial Services and Markets Act 2000 Sch 17 para 3(2). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA et seq.

11 Financial Services and Markets Act 2000 Sch 17 para 3(3).

12 Ie the function of making voluntary jurisdiction rules under the Financial Services and Markets Act 2000 s 227 (see PARA 578), the function of making consumer credit rules, the function of making determinations under s 234A(1) (see note 6) and the functions conferred by Sch 17 para 4, 5, 7, 9 or 14 (see the text and notes 15-19, 23-26, 28-30; and PARA 576).

13 Financial Services and Markets Act 2000 Sch 17 para 3(4) (amended by the Consumer Credit Act 2006 s 61(10)(a)).

14 Ie the panel established under the Financial Services and Markets Act 2000 Sch 17 para 4: Sch 17 para 1.

15 For the purposes of the Financial Services and Markets Act 2000 Sch 17, 'ombudsman' means a person who is a member of the panel: Sch 17 para 1.

16 Financial Services and Markets Act 2000 Sch 17 para 4(1).

17 Financial Services and Markets Act 2000 Sch 17 para 4(2).

18 Financial Services and Markets Act 2000 Sch 17 para 5(1).

19 Financial Services and Markets Act 2000 Sch 17 para 5(2).

20 Financial Services and Markets Act 2000 Sch 17 para 6(1).

21 Financial Services and Markets Act 2000 Sch 17 para 6(2).

22 Financial Services and Markets Act 2000 Sch 17 para 6(3).

23 Financial Services and Markets Act 2000 Sch 17 para 7(1).

24 Financial Services and Markets Act 2000 Sch 17 para 7(2) (amended by the Consumer Credit Act 2006 s 61(10)(b)). As to the compulsory jurisdiction see PARA 576. As to the consumer credit jurisdiction see PARA 577. As to the voluntary jurisdiction see PARA 578.

25 Financial Services and Markets Act 2000 Sch 17 para 7(3).

26 Financial Services and Markets Act 2000 Sch 17 para 7(4).

27 Financial Services and Markets Act 2000 Sch 17 para 8.

28 Financial Services and Markets Act 2000 Sch 17 para 9(1).

29 Financial Services and Markets Act 2000 Sch 17 para 9(2).

30 Financial Services and Markets Act 2000 Sch 17 para 9(3) (amended by the Consumer Credit Act 2006 s 61(10)(c)). The Financial Services and Markets Act 2000 Sch 17 para 9(3) did not apply to the scheme operator's first budget: see the Financial Services and Markets Act 2000 (Consequential and Transitional Provisions) Order 2001, SI 2001/1821.

## UPDATE

### 575 The ombudsman scheme and scheme operator

NOTE 6--For the purpose of funding the establishment of the ombudsman scheme and its operation in relation to the compulsory jurisdiction, the Financial Services Authority may also make rules imposing the requirements mentioned on any payment service provider within the meaning of the Payment Services Regulations 2009, SI 2009/209 (PARA 1399): Financial Services and Markets Act 2000 s 234(1) (amended by SI 2009/209). The scheme under which a fee is payable by a company subject to an investigation by the ombudsman is not unlawful notwithstanding the fact that the ombudsman is entitled to dismiss a complaint without a detailed investigation: *Financial Services Ombudsman v Heather Moor & Edgecomb Ltd* [2008] EWCA Civ 643, [2009] 1 All ER 328.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(8) OMBUDSMAN AND COMPENSATION SCHEMES/(i) The Ombudsman Scheme/576. Compulsory jurisdiction.

### 576. Compulsory jurisdiction.

A complaint which relates to an act or omission of a person (the 'respondent') in carrying on an activity to which compulsory jurisdiction rules<sup>1</sup> apply is to be dealt with under the ombudsman scheme<sup>2</sup> if the following conditions are satisfied<sup>3</sup>: (1) the complainant is eligible and wishes to have the complaint dealt with under the scheme; (2) the respondent was an authorised person<sup>4</sup> at the time of the act or omission to which the complaint relates; and (3) the act or omission to which the complaint relates occurred at a time when compulsory jurisdiction rules were in force in relation to the activity in question<sup>5</sup>. A complainant is eligible, in relation to the compulsory jurisdiction of the ombudsman scheme, if he falls within a class of person specified in the rules as eligible<sup>6</sup>. The rules may include provision for persons other than individuals to be eligible, but may not provide for authorised persons to be eligible except in specified circumstances or in relation to complaints of a specified kind<sup>7</sup>.

The jurisdiction of the scheme which results from the provisions described above is referred to in the Financial Services and Markets Act 2000 as the 'compulsory jurisdiction'<sup>8</sup>.

The Financial Services Authority must make rules providing that a complaint is not to be entertained unless the complainant has referred it under the ombudsman scheme before the applicable time limit (determined in accordance with the rules) has expired<sup>9</sup>. The rules may provide that an ombudsman<sup>10</sup> may extend that time limit in specified circumstances<sup>11</sup>. The Authority may make rules providing that a complaint is not to be entertained (except in specified circumstances) if the complainant has not previously communicated its substance to the respondent and given him a reasonable opportunity to deal with it<sup>12</sup>. The Authority may make rules requiring an authorised person who may become subject to the compulsory jurisdiction as a respondent to establish such procedures as the Authority considers appropriate for the resolution of complaints which may be referred to the scheme and arise out of activity to which the Authority's powers<sup>13</sup> do not apply<sup>14</sup>.

The scheme operator<sup>15</sup> must make rules (known as 'scheme rules'), which are to set out the procedure for reference of complaints and for their investigation, consideration and determination by an ombudsman<sup>16</sup>. Scheme rules may, among other things:

- 1364 (a) specify matters which are to be taken into account in determining whether an act or omission was fair and reasonable<sup>17</sup>;
- 1365 (b) provide that a complaint may, in specified circumstances, be dismissed without consideration of its merits<sup>18</sup>;
- 1366 (c) provide for the reference of a complaint, in specified circumstances and with the consent of the complainant, to another body with a view to its being determined by that body instead of by an ombudsman<sup>19</sup>;
- 1367 (d) make provision as to the evidence which may be required or admitted, the extent to which it should be oral or written, and the consequences of a person's failure to produce any information or document<sup>20</sup> which he has been required<sup>21</sup> to produce<sup>22</sup>;
- 1368 (e) allow an ombudsman to fix time limits for any aspect of the proceedings and to extend a time limit<sup>23</sup>;
- 1369 (f) provide for certain things in relation to the reference, investigation or consideration (but not determination) of a complaint to be done by a member of the scheme operator's staff instead of by an ombudsman<sup>24</sup>;
- 1370 (g) make different provision in relation to different kinds of complaint<sup>25</sup>.

If the scheme operator proposes to make any scheme rules it must publish a draft of the proposed rules in the way appearing to it to be best calculated to bring them to the attention of persons appearing to it to be likely to be affected<sup>26</sup>. The draft must be accompanied by a statement that representations about the proposals may be made to the scheme operator within a time specified in the statement<sup>27</sup>. The consent of the Authority is required before any scheme rules may be made<sup>28</sup>.

Scheme rules may require a respondent to pay to the scheme operator such fees as may be specified in the rules<sup>29</sup>.

A money award, including interest, which has been registered in accordance with scheme rules, if a county court so orders, may be recovered by execution issued from the county court (or otherwise) as if it were payable under an order of that court<sup>30</sup>.

No person is liable in damages for anything done or omitted in the discharge, or purported discharge, of any functions under the Financial Services and Markets Act 2000 in relation to the compulsory jurisdiction or to the consumer jurisdiction<sup>31</sup>.

For the purposes of the law relating to defamation, proceedings in relation to a complaint which is subject to the compulsory jurisdiction or to the consumer credit jurisdiction are to be treated as if they were proceedings before a court<sup>32</sup>.

- 1 'Compulsory jurisdiction rules' means rules: (1) made by the Financial Services Authority for the purposes of the Financial Services and Markets Act 2000 s 226; and (2) specifying the activities to which they apply: s 226(3). As to the meaning of 'rule' see PARA 23 note 2. Only activities which are regulated activities, or which could be made regulated activities by an order under s 22 (classes of activity and categories of investment) (see PARA 84), may be specified: s 226(4). As to regulated activities see PARA 84 et seq. Activities may be specified by reference to specified categories (however described): s 226(5). As to the Financial Services Authority see PARAS 4, 6 et seq.
- 2 As to the ombudsman scheme see PARA 575.
- 3 Financial Services and Markets Act 2000 s 226(1). See also the Authority's Handbook of Rules and Guidance, Redress, Dispute Resolution: Complaints (DISP) Ch 2. As to the Handbook generally see PARA 22.
- 4 As to authorised persons see PARA 314.
- 5 Financial Services and Markets Act 2000 s 226(2).
- 6 Financial Services and Markets Act 2000 s 226(6).
- 7 Financial Services and Markets Act 2000 s 226(7).
- 8 Financial Services and Markets Act 2000 s 226(8).
- 9 Financial Services and Markets Act 2000 s 225(4), Sch 17 paras 12, 13(1).
- 10 As to the ombudsman see PARA 575.
- 11 Financial Services and Markets Act 2000 Sch 17 para 13(2).
- 12 Financial Services and Markets Act 2000 Sch 17 para 13(3).
- 13 Ie under the Financial Services and Markets Act 2000 Pt X (ss 138-164) (rule-making powers): see PARA 21 et seq.
- 14 Financial Services and Markets Act 2000 Sch 17 para 13(4).
- 15 As to the scheme operator see PARA 575.
- 16 Financial Services and Markets Act 2000 Sch 17 para 14(1).
- 17 Financial Services and Markets Act 2000 Sch 17 para 14(2)(a).
- 18 Financial Services and Markets Act 2000 Sch 17 para 14(2)(b). The circumstances specified under head (b) in the text may include the following: (1) the ombudsman considers the complaint frivolous or vexatious; (2) legal proceedings have been brought concerning the subject-matter of the complaint and the ombudsman considers that the complaint is best dealt with in those proceedings; or (3) the ombudsman is satisfied that there are other compelling reasons why it is inappropriate for the complaint to be dealt with under the ombudsman scheme: Sch 17 para 14(3).
- 19 Financial Services and Markets Act 2000 Sch 17 para 14(2)(c).
- 20 As to the meaning of 'document' see PARA 10 note 10.
- 21 Ie under the Financial Services and Markets Act 2000 s 231 (see PARA 582) or otherwise.
- 22 Financial Services and Markets Act 2000 Sch 17 para 14(2)(d).
- 23 Financial Services and Markets Act 2000 Sch 17 para 14(2)(e).
- 24 Financial Services and Markets Act 2000 Sch 17 para 14(2)(f).
- 25 Financial Services and Markets Act 2000 Sch 17 para 14(2)(g).
- 26 Financial Services and Markets Act 2000 Sch 17 para 14(4).
- 27 Financial Services and Markets Act 2000 Sch 17 para 14(5). Before making the proposed scheme rules, the scheme operator must have regard to any representations made to it under Sch 17 para 14(5): Sch 17 para 14(6).

28 Financial Services and Markets Act 2000 Sch 17 para 14(7).

29 Financial Services and Markets Act 2000 Sch 17 para 15(1). The rules may, among other things: (1) provide for the scheme operator to reduce or waive a fee in a particular case; (2) set different fees for different stages of the proceedings on a complaint; (3) provide for fees to be refunded in specified circumstances; (4) make different provision for different kinds of complaint: Sch 17 para 15(2).

30 Financial Services and Markets Act 2000 Sch 17 para 16. As from a day to be appointed, the reference to execution issued from the county court is replaced by a reference to the County Courts Act 1984 s 85: Financial Services and Markets Act 2000 Sch 17 para 16 (prospectively amended by the Tribunals, Courts and Enforcement Act 2007 Sch 13 para 134). At the date at which this volume states the law no such day had been appointed.

Such an order may be enforced in Northern Ireland as a money judgment under the Judgments Enforcement (Northern Ireland) Order 1981, SI 1981/226 (NI 6): see the Financial Services and Markets Act 2000 Sch 17 para 16. As to execution generally see **CIVIL PROCEDURE** vol 12 (2009) PARA 1265 et seq.

31 Financial Services and Markets Act 2000 Sch 17 para 10(1) (amended by the Consumer Credit Act 2006 s 61(10)(d)). As to the consumer credit jurisdiction see PARA 577. The Financial Services and Markets Act 2000 Sch 17 para 10(1) does not apply: (1) if the act or omission is shown to have been in bad faith; or (2) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of the Human Rights Act 1998 s 6(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): Financial Services and Markets Act 2000 Sch 17 para 10(2).

32 Financial Services and Markets Act 2000 Sch 17 para 11 (amended by the Consumer Credit Act 2006 s 61(10)(d)).

## UPDATE

### 576 Compulsory jurisdiction

TEXT AND NOTE 5--Head (2). Such a complaint is also to be dealt with under the ombudsman scheme if the respondent was a payment services provider within the meaning of the Payment Services Regulations 2009, SI 2009/209 (PARA 1399) at the time of the act or omission to which the complaint relates: Financial Services and Markets Act 2000 s 226(2) (amended by SI 2009/209).

TEXT AND NOTE 14--The Authority may also make rules imposing such requirements on a payment service provider within the meaning of the Payment Services Regulations 2009, SI 2009/209 (PARA 1399) who may become subject to the compulsory jurisdiction as a respondent: Financial Services and Markets Act 2000 Sch 17 para 13(4) (amended by SI 2009/209).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(8) OMBUDSMAN AND COMPENSATION SCHEMES/(i) The Ombudsman Scheme/577. Consumer credit jurisdiction.

### 577. Consumer credit jurisdiction.

A complaint which relates to an act or omission of a person (the 'respondent') is to be dealt with under the ombudsman scheme<sup>1</sup> if the following conditions are satisfied<sup>2</sup>: (1) the complainant is eligible and wishes to have the complaint dealt with under the scheme<sup>3</sup>; (2) the complaint falls within a description specified in consumer credit rules<sup>4</sup>; (3) at the time of the act or omission the respondent was the licensee under a standard licence or was authorised to carry on an activity by virtue of the rules regarding the winding-up of a standard licensee's business<sup>5</sup>; (4) the act or omission occurred in the course of a business being carried on by the

respondent which was of a specified type<sup>6</sup>; (5) at the time of the act or omission that type of business was specified in an order made by the Secretary of State<sup>7</sup>; and (6) the complaint cannot be dealt with under the compulsory jurisdiction<sup>8</sup>. The types of business referred to in head (4) above are (a) a consumer credit business<sup>9</sup>; (b) a consumer hire business<sup>10</sup>; (c) a business so far as it comprises or relates to credit brokerage<sup>11</sup>; (d) a business so far as it comprises or relates to debt-adjusting<sup>12</sup>; (e) a business so far as it comprises or relates to debt-counselling<sup>13</sup>; (f) a business so far as it comprises or relates to debt-collecting<sup>14</sup>; (g) a business so far as it comprises or relates to debt administration<sup>15</sup>; (h) a business so far as it comprises or relates to the provision of credit information services<sup>16</sup>; and (i) a business so far as it comprises or relates to the operation of a credit reference agency<sup>17</sup>. A complainant is eligible if he is either an individual or a surety in relation to a security provided to the respondent in connection with the business mentioned in head (4), and he falls within a class of person specified in consumer credit rules<sup>18</sup>. The jurisdiction of the scheme which results from the above provisions is referred to as the 'consumer credit jurisdiction'<sup>19</sup>.

Consumer credit rules (i) must provide that a complaint is not to be entertained unless the complainant has referred it under the ombudsman scheme before the applicable time limit (determined in accordance with the rules) has expired<sup>20</sup>; (ii) may provide that an ombudsman may extend that time limit in specified circumstances<sup>21</sup>; (iii) may provide that a complaint is not to be entertained (except in specified circumstances) if the complainant has not previously communicated its substance to the respondent and given him a reasonable opportunity to deal with it<sup>22</sup>; and (iv) may make provision about the procedure for the reference of complaints and for their investigation, consideration and determination by an ombudsman<sup>23</sup>.

Consumer credit rules may require persons who are licensed by a standard licence to carry on to any extent a business of a type specified in an order under head (5) above to establish such procedures as the scheme operator considers appropriate for the resolution of complaints which may be referred to the scheme<sup>24</sup>. Consumer credit rules may require a respondent to pay to the scheme operator such fees as may be specified in the rules<sup>25</sup>. A money award, including interest, which has been registered in accordance with consumer credit rules may, if a county court so orders, be recovered by execution issued from the county court (or otherwise) as if it were payable under an order of that court<sup>26</sup>.

If the scheme operator makes any consumer credit rules, it must give a copy of them to the Financial Services Authority without delay<sup>27</sup>, and if the operator revokes any such rules, it must give written notice to the Authority without delay<sup>28</sup>. The power to make such rules is exercisable in writing<sup>29</sup>. Immediately after the making of such rules, the scheme operator must arrange for them to be printed and made available to the public<sup>30</sup>. The scheme operator may charge a reasonable fee for providing a person with a copy of any such rules<sup>31</sup>.

The production of a printed copy of consumer credit rules purporting to be made by the scheme operator on which there is endorsed a certificate signed by a member of the scheme operator's staff authorised by the scheme operator for that purpose, and which contains the required statements, is evidence of the facts stated in the certificate<sup>32</sup>. The required statements are that the rules were made by the scheme operator, that the copy is a true copy of the rules, and that, on a specified date, the rules were made available to the public<sup>33</sup>. A certificate purporting to be signed as so mentioned is to be taken to have been duly signed unless the contrary is shown<sup>34</sup>.

If the scheme operator proposes to make consumer credit rules, it must publish a draft of the proposed rules in the way appearing to it to be best calculated to bring the draft to the attention of the public<sup>35</sup>. The draft must be accompanied by an explanation of the proposed rules and a statement that representations about the proposals may be made to the scheme operator within a specified time<sup>36</sup>. Before making any consumer credit rules, the scheme operator must have regard to any such representations made to it<sup>37</sup>. If consumer credit rules made by the scheme operator differ from the draft in a way which the scheme operator considers significant, the scheme operator must publish a statement of the difference<sup>38</sup>.

1 As to the ombudsman scheme see PARA 575.

2 Financial Services and Markets Act 2000 s 226A(1) (s 226A added by the Consumer Credit Act 2006 s 59(1)).

3 Financial Services and Markets Act 2000 s 226A(2)(a) (as added: see note 2).

4 Financial Services and Markets Act 2000 s 226A(2)(b) (as added: see note 2). 'Consumer credit rules' means rules made by the scheme operator with the approval of the Financial Services Authority for the purposes of the consumer credit jurisdiction: Financial Services and Markets Act 2000 s 226A(7) (as so added). As to the scheme operator see PARA 575. Consumer credit rules under the Financial Services and Markets Act 2000 s 226A may make different provision for different cases: s 226A(8) (as so added).

5 Financial Services and Markets Act 2000 s 226A(2)(c) (as added: see note 2). Such authorisation is under the Consumer Credit Act 1974 s 34A: see **CONSUMER CREDIT**.

6 Financial Services and Markets Act 2000 s 226A(2)(d) (as added: see note 2).

7 Financial Services and Markets Act 2000 s 226A(2)(e) (as added: see note 2). As to the Secretary of State see PARA 3. The approval of the Treasury is required for an order under s 226A(2)(e): s 226A(5) (as so added). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Financial Services and Markets Act 2000 s 226A(2)(f) (as added: see note 2). As to the compulsory jurisdiction see PARA 576.

9 Financial Services and Markets Act 2000 s 226A(3)(a) (as added: see note 2).

10 Financial Services and Markets Act 2000 s 226A(3)(b) (as added: see note 2).

11 Financial Services and Markets Act 2000 s 226A(3)(c) (as added: see note 2).

12 Financial Services and Markets Act 2000 s 226A(3)(d) (as added: see note 2).

13 Financial Services and Markets Act 2000 s 226A(3)(e) (as added: see note 2).

14 Financial Services and Markets Act 2000 s 226A(3)(f) (as added: see note 2).

15 Financial Services and Markets Act 2000 s 226A(3)(g) (as added: see note 2).

16 Financial Services and Markets Act 2000 s 226A(3)(h) (as added: see note 2).

17 Financial Services and Markets Act 2000 s 226A(3)(i) (as added: see note 2).

18 Financial Services and Markets Act 2000 s 226A(4) (as added: see note 2).

19 Financial Services and Markets Act 2000 s 226A(6) (as added: see note 2).

20 Financial Services and Markets Act 2000 Sch 17 para 16B(1)(a) (Sch 17 Pt IIIA (paras 16A-16G) added by the Consumer Credit Act 2006 Sch 2). The Financial Services and Markets Act 2000 Sch 17 para 14(2), (3) (see PARA 576) applies in relation to consumer credit rules under Sch 17 para 16B(1) as it applies in relation to scheme rules under Sch 17 para 14: Sch 17 para 16B(2) (as so added).

21 Financial Services and Markets Act 2000 Sch 17 para 16B(1)(b) (as added: see note 20). See note 20.

22 Financial Services and Markets Act 2000 Sch 17 para 16B(1)(c) (as added: see note 20). See note 20.

23 Financial Services and Markets Act 2000 Sch 17 para 16B(1)(d) (as added: see note 20). See note 20.

24 Financial Services and Markets Act 2000 Sch 17 para 16B(3), (6) (as added: see note 20). Such rules may make different provision in relation to persons of different descriptions or to complaints of different descriptions (Sch 17 para 16B(4) (as so added)), and may authorise the scheme operator to dispense with or modify the application of such rules in particular cases where the scheme operator considers it appropriate to do so and is satisfied that the specified conditions (if any) are met (Sch 17 para 16B(5) (as so added)).

- 25 Financial Services and Markets Act 2000 Sch 17 para 16C(1) (as added: see note 20). Schedule 17 para 15(2) (see PARA 576) applies in relation to consumer credit rules under Sch 17 para 16C as it applies in relation to scheme rules under Sch 17 para 15: Sch 17 para 16C(2) (as so added).
- 26 Financial Services and Markets Act 2000 Sch 17 para 16D(a) (as added: see note 20).
- 27 Financial Services and Markets Act 2000 Sch 17 para 16E(1) (as added: see note 20). As to the Financial Services Authority see PARAS 4, 6 et seq.
- 28 Financial Services and Markets Act 2000 Sch 17 para 16E(2) (as added: see note 20).
- 29 Financial Services and Markets Act 2000 Sch 17 para 16E(3) (as added: see note 20).
- 30 Financial Services and Markets Act 2000 Sch 17 para 16E(4) (as added: see note 20).
- 31 Financial Services and Markets Act 2000 Sch 17 para 16E(5) (as added: see note 20).
- 32 Financial Services and Markets Act 2000 Sch 17 para 16F(1) (as added: see note 20).
- 33 Financial Services and Markets Act 2000 Sch 17 para 16F(2) (as added: see note 20). The reference is to being made available to the public in accordance with Sch 17 para 16E(4).
- 34 Financial Services and Markets Act 2000 Sch 17 para 16F(3) (as added: see note 20).
- 35 Financial Services and Markets Act 2000 Sch 17 para 16G(1) (as added: see note 20).
- 36 Financial Services and Markets Act 2000 Sch 17 para 16G(2) (as added: see note 20).
- 37 Financial Services and Markets Act 2000 Sch 17 para 16G(3) (as added: see note 20).
- 38 Financial Services and Markets Act 2000 Sch 17 para 16G(4) (as added: see note 20).

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### **578. Voluntary jurisdiction.**

A complaint which relates to an act or omission of a person (the 'respondent') in carrying on an activity to which voluntary jurisdiction rules<sup>1</sup> apply is to be dealt with under the ombudsman scheme<sup>2</sup> if the following conditions are satisfied<sup>3</sup>: (1) the complainant is eligible and wishes to have the complaint dealt with under the scheme<sup>4</sup>; (2) at the time of the act or omission to which the complaint relates, the respondent was participating in the scheme<sup>5</sup>; (3) at the time when the complaint is referred under the scheme, the respondent has not withdrawn from the scheme in accordance with its provisions<sup>6</sup>; (4) the act or omission to which the complaint relates occurred at a time when voluntary jurisdiction rules were in force in relation to the activity in question<sup>7</sup>; and (5) the complaint cannot be dealt with under the compulsory jurisdiction<sup>8</sup>. A complainant is eligible, in relation to the voluntary jurisdiction of the ombudsman scheme, if he falls within a class of person specified in the rules as eligible<sup>9</sup>. The rules may include provision for persons other than individuals to be eligible<sup>10</sup>. A person qualifies for participation in the ombudsman scheme if he falls within a class of person specified in the rules in relation to the activity in question<sup>11</sup>. Provision may be made in the rules for persons other than authorised persons<sup>12</sup> to participate in the ombudsman scheme<sup>13</sup>. The rules may make different provision in relation to complaints arising from different activities<sup>14</sup>.

The jurisdiction of the scheme which results from the provisions described above is referred to in the Financial Services and Markets Act 2000 as the 'voluntary jurisdiction'<sup>15</sup>.



Complaints are to be dealt with and determined under the voluntary jurisdiction on standard terms fixed by the scheme operator with the approval of the Financial Services Authority<sup>16</sup>. Different standard terms may be fixed with respect to different matters or in relation to different cases<sup>17</sup>. The standard terms may, in particular: (a) require the making of payments to the scheme operator by participants in the scheme of such amounts, and at such times, as may be determined by the scheme operator<sup>18</sup>; (b) make provision as to the award of costs on the determination of a complaint<sup>19</sup>. The scheme operator may not vary any of the standard terms or add or remove terms without the approval of the Authority<sup>20</sup>. The standard terms may include provision to the effect that (unless acting in bad faith) none of the following is to be liable in damages for anything done or omitted in the discharge or purported discharge of functions in connection with the voluntary jurisdiction: (i) the scheme operator<sup>21</sup>; (ii) any member of its governing body<sup>22</sup> (iii) any member of its staff<sup>23</sup>; (iv) any person acting as an ombudsman<sup>24</sup> for the purposes of the scheme<sup>25</sup>.

The scheme operator may make arrangements with a relevant body<sup>26</sup>: (A) for the exercise by that body of any part of the voluntary jurisdiction of the ombudsman scheme on behalf of the scheme<sup>27</sup>; or (B) for the exercise by the scheme of any function of that body as if it were part of the voluntary jurisdiction of the scheme<sup>28</sup>. Such arrangements require the approval of the Authority<sup>29</sup>.

If the scheme operator makes voluntary jurisdiction rules, it must give a copy to the Authority without delay<sup>30</sup>; and if the scheme operator revokes any such rules, it must give written notice to the Authority without delay<sup>31</sup>. The power to make voluntary jurisdiction rules is exercisable in writing<sup>32</sup>. Immediately after making voluntary jurisdiction rules, the scheme operator must arrange for them to be printed and made available to the public<sup>33</sup>. The scheme operator may charge a reasonable fee for providing a person with a copy of any voluntary jurisdiction rules<sup>34</sup>.

The production of a printed copy of voluntary jurisdiction rules purporting to be made by the scheme operator on which is indorsed a certificate signed by a member of the scheme operator's staff authorised by the scheme operator for that purpose, and which contains the required statements<sup>35</sup>, is evidence of the facts stated in the certificate<sup>36</sup>.

If the scheme operator proposes to make voluntary jurisdiction rules, it must publish a draft of the proposed rules in the way appearing to it to be best calculated to bring them to the attention of the public<sup>37</sup>. The draft must be accompanied by an explanation of the proposed rules and a statement that representations about the proposals may be made to the scheme operator within a specified time<sup>38</sup>. If voluntary jurisdiction rules made by the scheme operator differ from the draft in a way which the scheme operator considers significant, the scheme operator must publish a statement of the difference<sup>39</sup>.

1 'Voluntary jurisdiction rules' means rules: (1) made by the scheme operator for the purposes of the Financial Services and Markets Act 2000 s 227; and (2) specifying the activities to which they apply: s 227(3). As to the scheme operator see PARA 575. The only activities which may be specified in the rules are activities which are, or could be, specified in compulsory jurisdiction rules: s 227(4). As to the compulsory jurisdiction rules see PARA 576. Activities may be specified by reference to specified categories (however described): s 227(5). The rules require the Financial Services Authority's approval: s 227(6). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Redress, Dispute Resolution: Complaints (DISP) Ch 2. As to the Handbook generally see PARA 22.

2 As to the ombudsman scheme see PARA 575.

3 Financial Services and Markets Act 2000 s 227(1).

4 Financial Services and Markets Act 2000 s 227(2)(a).

5 Financial Services and Markets Act 2000 s 227(2)(b). See note 8.

6 Financial Services and Markets Act 2000 s 227(2)(c).

7 Financial Services and Markets Act 2000 s 227(2)(d). See note 8.

8 Financial Services and Markets Act 2000 s 227(2)(e). As to the compulsory jurisdiction see PARA 576.

In such circumstances as may be specified in voluntary jurisdiction rules, a complaint (1) which relates to an act or omission occurring at a time before the rules came into force; and (2) which could have been dealt with under a scheme which has to any extent been replaced by the voluntary jurisdiction, is to be dealt with under the ombudsman scheme even though head (2) or head (4) in the text would otherwise prevent that: s 227(13). In such circumstances as may be specified in voluntary jurisdiction rules, a complaint is to be dealt with under the ombudsman scheme even though head (2) or head (4) in the text would otherwise prevent that, and the complaint is not brought within the scheme as a result of s 227(13), but only if the respondent has agreed that complaints of that kind were to be dealt with under the scheme: s 227(14).

9 Financial Services and Markets Act 2000 s 227(7).

10 Financial Services and Markets Act 2000 s 227(8).

11 Financial Services and Markets Act 2000 s 227(9).

12 As to authorised persons see PARA 314.

13 Financial Services and Markets Act 2000 s 227(10).

14 Financial Services and Markets Act 2000 s 227(11).

15 Financial Services and Markets Act 2000 s 227(12).

16 Financial Services and Markets Act 2000 Sch 17 paras 17, 18(1).

17 Financial Services and Markets Act 2000 Sch 17 para 18(2).

18 Financial Services and Markets Act 2000 Sch 17 para 18(3)(a).

19 Financial Services and Markets Act 2000 Sch 17 para 18(3)(b).

20 Financial Services and Markets Act 2000 Sch 17 para 18(4).

21 Financial Services and Markets Act 2000 Sch 17 para 18(5)(a).

22 Financial Services and Markets Act 2000 Sch 17 para 18(5)(b).

23 Financial Services and Markets Act 2000 Sch 17 para 18(5)(c).

24 As to the ombudsman see PARA 575.

25 Financial Services and Markets Act 2000 Sch 17 para 18(5)(d).

26 A 'relevant body' is one which the scheme operator is satisfied: (1) is responsible for the operation of a broadly comparable scheme (whether or not established by statute) for the resolution of disputes; and (2) in the case of arrangements under head (A) in the text, will exercise the jurisdiction in question in a way compatible with the requirements imposed by or under the Financial Services and Markets Act 2000 in relation to complaints of the kind concerned: Sch 17 para 19(2).

27 Financial Services and Markets Act 2000 Sch 17 para 19(1)(a).

28 Financial Services and Markets Act 2000 Sch 17 para 19(1)(b).

29 Financial Services and Markets Act 2000 Sch 17 para 19(3).

30 Financial Services and Markets Act 2000 Sch 17 para 20(1).

31 Financial Services and Markets Act 2000 Sch 17 para 20(2).

32 Financial Services and Markets Act 2000 Sch 17 para 20(3).

33 Financial Services and Markets Act 2000 Sch 17 para 20(4).

34 Financial Services and Markets Act 2000 Sch 17 para 20(5).

35 The required statements are: (1) that the rules were made by the scheme operator; (2) that the copy is a true copy of the rules; and (3) that on a specified date the rules were made available to the public in accordance with the Financial Services and Markets Act 2000 Sch 17 para 20(4) (see the text to note 33): Sch 17 para 21(2).

36 Financial Services and Markets Act 2000 Sch 17 para 21(1). A certificate purporting to be signed as mentioned in Sch 17 para 21(1) is to be taken to have been duly signed unless the contrary is shown: Sch 17 para 21(3).

37 Financial Services and Markets Act 2000 Sch 17 para 22(1).

38 Financial Services and Markets Act 2000 Sch 17 para 22(2). Before making any voluntary jurisdiction rules, the scheme operator must have regard to any representations made to it: Sch 17 para 22(3).

39 Financial Services and Markets Act 2000 Sch 17 para 22(4).

## UPDATE

### 578 Voluntary jurisdiction

TEXT AND NOTE 8--Financial Services and Markets Act 2000 s 227(2)(e) amended:  
Consumer Credit Act 2006 s 61(2).

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### 579. Determination under the compulsory jurisdiction.

In relation to the compulsory jurisdiction<sup>1</sup> only<sup>2</sup>, a complaint is to be determined by reference to what is, in the opinion of the ombudsman<sup>3</sup>, fair and reasonable in all the circumstances of the case<sup>4</sup>. When the ombudsman has determined a complaint he must give a written statement of his determination to the respondent and to the complainant<sup>5</sup>. The statement must: (1) give the ombudsman's reasons for his determination<sup>6</sup>; (2) be signed by him<sup>7</sup>; and (3) require the complainant to notify him in writing, before a date specified in the statement, whether he accepts or rejects the determination<sup>8</sup>. If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final<sup>9</sup>. If, by the specified date, the complainant has not notified the ombudsman of his acceptance or rejection of the determination he is to be treated as having rejected it<sup>10</sup>. The ombudsman must notify the respondent of the outcome<sup>11</sup>. A copy of the determination on which appears a certificate signed by an ombudsman is evidence that the determination was made under the scheme<sup>12</sup>. Such a certificate purporting to be signed by an ombudsman is to be taken to have been duly signed unless the contrary is shown<sup>13</sup>.

1 As to the compulsory jurisdiction see PARA 576. See also the Financial Services Authority's Handbook of Rules and Guidance, Redress, Dispute Resolution: Complaints (DISP) Ch 3. As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 228(1).

3 As to the ombudsman see PARA 575.

4 Financial Services and Markets Act 2000 s 228(2).

- 5 Financial Services and Markets Act 2000 s 228(3).
- 6 Financial Services and Markets Act 2000 s 228(4)(a).
- 7 Financial Services and Markets Act 2000 s 228(4)(b).
- 8 Financial Services and Markets Act 2000 s 228(4)(c).
- 9 Financial Services and Markets Act 2000 s 228(5).
- 10 Financial Services and Markets Act 2000 s 228(6).
- 11 Financial Services and Markets Act 2000 s 228(7).
- 12 Financial Services and Markets Act 2000 s 228(8).
- 13 Financial Services and Markets Act 2000 s 228(9).

## UPDATE

### 579 Determination under the compulsory jurisdiction

TEXT AND NOTE 2--Financial Services and Markets Act 2000 s 228(1) amended: Consumer Credit Act 2006 s 61(3).

NOTE 4--It is not appropriate for the ombudsman to rely on his own knowledge in the context of rare or complex financial products: *R (on the application of Williams) v Financial Ombudsman Service* [2008] All ER (D) 35 (Jul).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(8) OMBUDSMAN AND COMPENSATION SCHEMES/(i) The Ombudsman Scheme/580. Awards under the compulsory jurisdiction and consumer credit jurisdiction.

### 580. Awards under the compulsory jurisdiction and consumer credit jurisdiction.

In relation to the compulsory jurisdiction<sup>1</sup> and the consumer credit jurisdiction<sup>2</sup> only<sup>3</sup>, if a complaint which has been dealt with under the scheme<sup>4</sup> is determined in favour of the complainant, the determination may include: (1) a money award (that is, an award against the respondent of such amount as the ombudsman<sup>5</sup> considers fair compensation for loss or damage<sup>6</sup> suffered by the complainant)<sup>7</sup>; (2) a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken)<sup>8</sup>. A money award may compensate for financial loss, or any other loss, or any damage, of a specified<sup>9</sup> kind<sup>10</sup>. A money award may not exceed the monetary limit<sup>11</sup>, but the ombudsman may, if he considers that fair compensation requires payment of a larger amount, recommend that the respondent pay the complainant the balance<sup>12</sup>. A money award may provide for the amount payable under the award to bear interest at a rate and as from a date specified in the award, and is enforceable by the complainant<sup>13</sup>.

1 As to the compulsory jurisdiction see PARA 576. See also the Financial Services Authority's Handbook of Rules and Guidance, Redress, Dispute Resolution: Complaints (DISP) Ch 3. As to the Handbook generally see PARA 22.

2 As to the consumer credit jurisdiction see PARA 577.

3 Financial Services and Markets Act 2000 s 229(1) (amended by the Consumer Credit Act 2006 s 61(3)).

4 As to the scheme see PARA 575.

5 As to the ombudsman see PARA 575.

6 The loss or damage of a kind falling within the Financial Services and Markets Act 2000 s 229(3): see the text to notes 9-10.

7 Financial Services and Markets Act 2000 s 229(2)(a).

8 Financial Services and Markets Act 2000 s 229(2)(b). Compliance with a direction under s 229(2)(b) is enforceable by an injunction: s 229(9). Only the complainant may bring proceedings for an injunction: s 229(10). As to injunctions see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

As to whether a direction is challengeable only by judicial review and the extent of the ombudsman's powers see *Bunney v Burns Anderson plc*; *Cahill v Timothy James & Partners Ltd* [2007] EWHC 1240 (Ch), [2007] 4 All ER 246.

9 The specified in compulsory jurisdiction rules, or consumer credit rules: Financial Services and Markets Act 2000 s 229(11) (s 229(11) substituted and s 229(12) added by the Consumer Credit Act 2006 s 61(7)). Consumer credit rules under the Financial Services and Markets Act 2000 s 229 may make different provision for different cases: s 229(12) (as so added). As to the compulsory jurisdiction rules see PARA 576. As to the consumer credit rules see PARA 577.

10 Financial Services and Markets Act 2000 s 229(3). The Financial Services Authority may specify for the purposes of the compulsory jurisdiction the maximum amount which may be regarded as fair compensation for a particular kind of loss or damage specified under s 229(3)(b): s 229(4) (amended by the Consumer Credit Act 2006 s 61(4)). The scheme operator may specify for the purposes of the consumer credit jurisdiction the maximum amount which may be regarded as fair compensation for a particular kind of loss or damage specified under the Financial Services and Markets Act 2000 s 229(3)(b): s 229(4A) (added by the Consumer Credit Act 2006 s 61(5)). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the scheme operator see PARA 575.

11 The monetary limit is such amount as may be specified: Financial Services and Markets Act 2000 s 229(6). Different amounts may be specified in relation to different kinds of complaint: s 229(7).

12 Financial Services and Markets Act 2000 s 229(5).

13 Financial Services and Markets Act 2000 s 229(8) (amended by the Consumer Credit Act 2006 s 61(6)). The award is enforceable in accordance with the Financial Services and Markets Act 2000 Sch 17 Pt III (paras 12-16) (see PARA 576) or (as the case may be) Sch 17 Pt IIIA (paras 16A-16G) (see PARA 577).

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## 581. Costs.

The scheme operator<sup>1</sup> may by rules provide for an ombudsman<sup>2</sup> to have power, on determining a complaint under the compulsory jurisdiction<sup>3</sup> or the consumer credit jurisdiction<sup>4</sup> to award costs in accordance with the provisions of the rules<sup>5</sup>. These rules are known as 'costs rules'. Costs rules require the approval of the Financial Services Authority<sup>6</sup>. Costs rules may not provide for the making of an award against the complainant in respect of the respondent's costs<sup>7</sup>. However, they may provide for the making of an award against the complainant in favour of the scheme operator, for the purpose of providing a contribution to resources deployed in dealing with the complaint, if in the opinion of the ombudsman: (1) the complainant's conduct was improper or unreasonable<sup>8</sup>; or (2) the complainant was responsible for an unreasonable delay<sup>9</sup>. Costs rules may authorise an ombudsman making an award in

accordance with the rules to order that the amount payable under the award bears interest at a rate and as from a date specified in the order<sup>10</sup>. An amount due under an award made in favour of the scheme operator is recoverable as a debt due to the scheme operator<sup>11</sup>. Any other award made against the respondent is to be treated as a money award and may be recovered by execution<sup>12</sup>.

1 As to the scheme operator see PARA 575. See also the Financial Services Authority's Handbook of Rules and Guidance, Redress, Dispute Resolution: Complaints (DISP). As to the Handbook generally see PARA 22.

2 As to the ombudsman see PARA 575.

3 As to the compulsory jurisdiction see PARA 576.

4 As to the consumer credit jurisdiction see PARA 577.

5 Financial Services and Markets Act 2000 s 230(1) (amended by the Consumer Credit Act 2006 s 61(8)(a)).

6 Financial Services and Markets Act 2000 s 230(2). As to the Financial Services Authority see PARAS 4, 6 et seq.

7 Financial Services and Markets Act 2000 s 230(3).

8 Financial Services and Markets Act 2000 s 230(4)(a).

9 Financial Services and Markets Act 2000 s 230(4)(b).

10 Financial Services and Markets Act 2000 s 230(5).

11 Financial Services and Markets Act 2000 s 230(6).

12 Financial Services and Markets Act 2000 s 230(7) (amended by the Consumer Credit Act 2006 s 61(8)(b)). The award is enforceable in accordance with the Financial Services and Markets Act 2000 Sch 17 para 16 (see PARA 576) or (as the case may be) Sch 17 para 16D (see PARA 577). As to execution generally see **CIVIL PROCEDURE** vol 12 (2009) PARA 1265 et seq.

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## **582. Information.**

An ombudsman<sup>1</sup> may, by notice in writing given to a party to a complaint, require that party: (1) to provide specified<sup>2</sup> information or information of a specified description<sup>3</sup>; or (2) to produce specified documents<sup>4</sup> or documents of a specified description<sup>5</sup>. The information or documents must be provided or produced before the end of such reasonable period as may be specified and, in the case of information, in such manner or form as may be specified<sup>6</sup>. If a document is produced in response to such a requirement, the ombudsman may take copies or extracts from the document, or require the person producing the document to provide an explanation of the document<sup>7</sup>. If a person who is required to produce a document fails to do so, the ombudsman may require him to state, to the best of his knowledge and belief, where the document is<sup>8</sup>. If a person claims a lien on a document, its production<sup>9</sup> does not affect the lien<sup>10</sup>.

If a person (the 'defaulter') fails to comply with a requirement to provide information or documents<sup>11</sup>, the ombudsman may certify that fact in writing to the High Court and the court may inquire into the case<sup>12</sup>. If the court is satisfied that the defaulter failed without reasonable excuse to comply with the requirement, it may deal with the defaulter (and, in the case of a body corporate<sup>13</sup>, any director<sup>14</sup> or officer<sup>15</sup>) as if he were in contempt<sup>16</sup>.

- 1 As to the ombudsman see PARA 575. See also the Financial Services Authority's Handbook of Rules and Guidance, Redress, Dispute Resolution: Complaints (DISP). As to the Handbook generally see PARA 22.
- 2 le specified in the notice given under the Financial Services and Markets Act 2000 231(1): s 231(7).
- 3 Financial Services and Markets Act 2000 s 231(1)(a). The provisions of s 231 apply only to information and documents the production of which the ombudsman considers necessary for the determination of the complaint: s 231(3).
- 4 As to the meaning of 'document' see PARA 10 note 10.
- 5 Financial Services and Markets Act 2000 s 231(1)(b). See note 3.
- 6 Financial Services and Markets Act 2000 s 231(2).
- 7 Financial Services and Markets Act 2000 s 231(4).
- 8 Financial Services and Markets Act 2000 s 231(5).
- 9 le under the Financial Services and Markets Act 2000 Pt XVI (ss 225-234A).
- 10 Financial Services and Markets Act 2000 s 231(6). As to liens see generally **LIEN**.
- 11 le a requirement imposed under the Financial Services and Markets Act 2000 s 231: see the text and notes 1-10.
- 12 Financial Services and Markets Act 2000 s 232(1), (3).
- 13 As to the meaning of 'body corporate' see PARA 86 note 11.
- 14 As to the meaning of 'director' see PARA 86 note 11.
- 15 'Officer', in relation to a limited liability partnership, means a member of the limited liability partnership: Financial Services and Markets Act 2000 s 232(2) (amended by SI 2001/1090). As to limited liability partnerships see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.
- 16 Financial Services and Markets Act 2000 s 232(2). As to contempt of court see generally **CONTEMPT OF COURT**.

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## **(ii) The Financial Services Compensation Scheme**

### **583. The scheme manager.**

The Financial Services Authority<sup>1</sup> has established a body corporate<sup>2</sup> (the 'scheme manager') to exercise the functions conferred on the scheme manager by or under Part XV of the Financial Services and Markets Act 2000<sup>3</sup>. The Authority must take such steps as are necessary to ensure that the scheme manager is, at all times, capable of exercising those functions<sup>4</sup>. The constitution of the scheme manager must provide for it to have a chairman and a board (which must include the chairman) whose members are the scheme manager's directors<sup>5</sup>. The chairman and other members of the board must be persons appointed, and liable to removal from office, by the Authority (acting, in the case of the chairman, with the approval of the Treasury)<sup>6</sup>. However, the terms of their appointment (and in particular those governing removal

from office) must be such as to secure their independence from the Authority in the operation of the compensation scheme<sup>7</sup>. The scheme manager is not to be regarded as exercising functions on behalf of the Crown<sup>8</sup> and the scheme manager's board members, officers and staff are not to be regarded as Crown servants<sup>9</sup>.

At least once a year, the scheme manager must make a report to the Authority on the discharge of its functions<sup>10</sup>. The report must: (1) include a statement setting out the value of each of the funds established by the compensation scheme<sup>11</sup>; and (2) comply with any requirements specified in rules<sup>12</sup> made by the Authority<sup>13</sup>. The scheme manager must publish each report in the way it considers appropriate<sup>14</sup>.

Neither the scheme manager nor any person who is, or who is acting as, its board member, officer or member of staff is liable in damages for anything done or omitted in the discharge, or purported discharge, of the scheme manager's functions<sup>15</sup>.

The amount which the scheme manager may recover, from the sums levied under the scheme, as management expenses<sup>16</sup> attributable to a particular period may not exceed such amount as may be fixed by the scheme as the limit applicable to that period<sup>17</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Redress, Compensation (COMP) Ch 2. As to the Handbook generally see PARA 22.

2 As to the meaning of 'body corporate' see PARA 86 note 11.

3 Financial Services and Markets Act 2000 ss 212(1), 417(1). The text refers to Pt XV (ss 212-224). As to the scheme see PARA 584.

4 Financial Services and Markets Act 2000 s 212(2).

5 Financial Services and Markets Act 2000 s 212(3).

6 Financial Services and Markets Act 2000 s 212(4). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

7 Financial Services and Markets Act 2000 s 212(5). As to the compensation scheme see PARA 584.

8 Financial Services and Markets Act 2000 s 212(6).

9 Financial Services and Markets Act 2000 s 212(7).

10 Financial Services and Markets Act 2000 s 218(1).

11 Financial Services and Markets Act 2000 s 218(2)(a).

12 As to the meaning of 'rule' see PARA 23 note 2.

13 Financial Services and Markets Act 2000 s 218(2)(b).

14 Financial Services and Markets Act 2000 s 218(3).

15 Financial Services and Markets Act 2000 s 222(1). Section 222(1) does not apply: (1) if the act or omission is shown to have been in bad faith; or (2) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of the Human Rights Act 1998 s 6(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): Financial Services and Markets Act 2000 s 222(2).

16 'Management expenses' means expenses incurred, or expected to be incurred, by the scheme manager in connection with its functions under the Financial Services and Markets Act 2000 other than those incurred: (1) in paying compensation; (2) as a result of any provision of the scheme made by virtue of s 216(3), (4) (continuity of long-term insurance policies) (see PARA 587) or s 217(1), (6) (insurers in financial difficulties) (see PARA 588): s 223(3).

17 Financial Services and Markets Act 2000 s 223(1). In calculating the amount of any levy to be imposed by the scheme manager, no amount may be included to reflect management expenses unless the limit mentioned in s 223(1) has been fixed by the scheme: s 223(2).



**UPDATE****583 The scheme manager**

TEXT AND NOTES--The scheme manager may arrange for any of its functions to be discharged on its behalf by another person (a 'scheme agent'): Financial Services and Markets Act 2000 s 221A(1) (s 221A added by the Banking Act 2009 s 179(1)). Before entering into arrangements the scheme manager must be satisfied that the scheme agent is competent to discharge the function and has been given sufficient directions to enable the agent to take any decisions required in the course of exercising the function in accordance with policy determined by the scheme manager: Financial Services and Markets Act 2000 s 221A(2). Arrangements may include provision for payments to be made by the scheme manager to the scheme agent, which payments are management expenses of the scheme manager: Financial Services and Markets Act 2000 s 221A(3).

A reference in the Financial Services and Markets Act 2000 Pt XV to functions of the scheme manager includes a reference to functions conferred by or under the Banking Act 2009: Financial Services and Markets Act 2000 s 224A (added by the Banking Act 2009 s 180).

TEXT AND NOTE 10--Financial Services and Markets Act 2000 s 218(1) amended: Banking Act 2009 s 170(3)(a) (not yet in force).

TEXT AND NOTES 12, 13--Financial Services and Markets Act 2000 s 218(2)(b) amended: Banking Act 2009 s 170(3)(b) (not yet in force).

TEXT AND NOTE 15--Financial Services and Markets Act 2000 s 222(1) amended: Banking Act 2009 s 179(2).

TEXT AND NOTES 16, 17--As to provision enabling the Financial Services Compensation Scheme to invest the levies collected to build up contingency funds in the National Loans Fund and providing for that investment to be treated as money borrowed by the Treasury see the Financial Services and Markets Act 2000 s 223A (added by the Banking Act 2009 s 172 (not yet in force)). As to provision empowering the Treasury to make loans from the National Loans Fund to the Financial Services Compensation Scheme and to make regulations about the amount that can be borrowed and the collection of levies to secure its repayment see the Financial Services and Markets Act 2000 s 223B (added by the Banking Act 2009 s 173)). Payments made by the scheme manager in error, apart from those made in bad faith, may be provided for in setting a levy by virtue of the 2000 Act s 213, 214A, 214B or 223B: Financial Services and Markets Act 2000 s 223C (added by the Banking Act 2009 s 177).

NOTE 16--Also, head (3) under the 2000 Act s 214B (see PARA 585 TEXT AND NOTES): Financial Services and Markets Act 2000 s 223(3) (amended by the Banking Act 2009 s 171(2)).

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**584. The compensation scheme.**

The Financial Services Authority<sup>1</sup> must by rules<sup>2</sup> establish a scheme for compensating persons in cases where relevant persons<sup>3</sup> are unable, or are likely to be unable, to satisfy claims against them<sup>4</sup>. The rules are known as the Financial Services Compensation Scheme<sup>5</sup>.

The compensation scheme must, in particular, provide for the scheme manager<sup>6</sup>: (1) to assess and pay compensation, in accordance with the scheme, to claimants in respect of claims made in connection with regulated activities<sup>7</sup> carried on (whether or not with permission) by relevant persons<sup>8</sup>; and (2) to have power to impose levies on authorised persons, or any class of authorised person, for the purpose of meeting its expenses (including, in particular, expenses incurred, or expected to be incurred, in paying compensation, borrowing or insuring risks)<sup>9</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 As to the meaning of 'rule' see PARA 23 note 2.

3 For the purposes of the Financial Services and Markets Act 2000 Pt XV (ss 212-224) (except in s 219, s 220 or s 224: see PARA 589), 'relevant person' means a person who was: (1) an authorised person at the time the act or omission giving rise to the claim against him took place; or (2) an appointed representative at that time: s 213(9). As to authorised persons see PARA 314. As to the meaning of 'appointed representative' see PARA 346. However, a person who, at that time: (a) qualified for authorisation under s 31(1)(b), Sch 3 (EEA passport rights) (see PARAS 314-318, 323-329); and (b) fell within a prescribed category, is not to be regarded as a relevant person in relation to any activities for which he had permission as a result of any provision of, or made under, Sch 3 unless he had elected to participate in the scheme in relation to those activities at that time: s 213(10). As to elections to participate see PARA 585. 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). For the purposes of s 213(10), the following categories are prescribed: (i) any investment firm; (ii) any credit institution; (iii) any insurance intermediary; and (iv) any relevant management company: Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001, SI 2001/1783, reg 2 (amended by SI 2003/1476; SI 2003/2066). 'Investment firm' has the meaning given by European Parliament and EC Council Directive 97/9 (OJ L84, 26.3.97, p 22) on investor-compensation schemes, art 1.1; and 'credit institution' has the meaning given by the Banking Consolidation Directive (ie European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions) art 4.1: Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001, SI 2001/1783, reg 1(2) (definition of 'credit institution' amended by SI 2006/3221). 'Insurance intermediary' means an insurance intermediary, within the meaning of the Insurance Mediation Directive (ie European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p3) on insurance mediation) art 2(5) or a reinsurance intermediary within the meaning of art 2(6); and 'relevant management company' means an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(f) (see PARA 315 note 1) which is authorised by its home state regulator to provide services of the kind specified by the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities) art 5.3(a) (management of portfolios of investments), and which is providing those services in the United Kingdom: Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001, SI 2001/1783, reg 1(2) (definitions added by SI 2003/1476; SI 2003/2066). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Financial Services and Markets Act 2000 s 213(1). The provisions of ss 214-217 (see PARAS 585-588) make further provision about the scheme but are not to be taken as limiting the power conferred on the Authority by s 213(1): s 213(7). See *R v Investors Compensation Scheme Ltd, ex p Bowden* [1996] AC 261, [1995] 3 All ER 605, HL; *Deposit Protection Board v Dalia* [1994] 2 AC 367, [1994] 2 All ER 577, HL (cases relating to previous similar schemes under the Financial Services Act 1986). An insured company which claims the costs of defending an action brought against it is entitled to claim an indemnity from the Financial Services Compensation Scheme where the insurer has become insolvent: *R (on the application of Geologistics Ltd) v Financial Services Compensation Scheme* [2003] EWCA Civ 1905, [2004] 3 All ER 39, [2004] 1 All ER (Comm) 943.

5 Financial Services and Markets Act 2000 s 213(2).

6 As to the scheme manager see PARA 583.

7 As to regulated activities see PARA 84 et seq.

8 Financial Services and Markets Act 2000 s 213(3)(a). See note 9.

9 Financial Services and Markets Act 2000 s 213(3)(b). In making any provision of the scheme by virtue of s 213(3)(b), the Authority must take account of the desirability of ensuring that the amount of the levies imposed on a particular class of authorised person reflects, so far as practicable, the amount of the claims made, or likely to be made, in respect of that class of person: s 213(5).

The compensation scheme may provide for the scheme manager to have power to impose levies on authorised persons, or any class of authorised person, for the purpose of recovering the cost (whenever incurred) of establishing the scheme: s 213(4). An amount payable to the scheme manager as a result of any provision of the scheme made by virtue of s 213(3)(b) or s 213(4) may be recovered as a debt due to the scheme manager: s 213(6).

## UPDATE

### 584 The compensation scheme

NOTE 3--Directive 85/611 replaced: see PARA 6.

NOTE 4--Financial Services and Markets Act 2000 s 213(7) amended: Banking Act 2009 s 170(2) (not yet in force).

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### 585. Provision made by the compensation scheme.

The compensation scheme<sup>1</sup> may, in particular, make provision:

- 1371 (1) as to the circumstances in which a relevant person<sup>2</sup> is to be taken (for the purposes of the scheme) to be unable, or likely to be unable, to satisfy claims made against him<sup>3</sup>;
- 1372 (2) for the establishment of different funds for meeting different kinds of claim<sup>4</sup>;
- 1373 (3) for the imposition of different levies in different cases<sup>5</sup>;
- 1374 (4) limiting the levy payable by a person in respect of a specified<sup>6</sup> period<sup>7</sup>;
- 1375 (5) for repayment of the whole or part of a levy in specified circumstances<sup>8</sup>;
- 1376 (6) for a claim to be entertained only if it is made by a specified kind of claimant<sup>9</sup>;
- 1377 (7) for a claim to be entertained only if it falls within a specified kind of claim<sup>10</sup>;
- 1378 (8) as to the procedure to be followed in making a claim<sup>11</sup>;
- 1379 (9) for the making of interim payments before a claim is finally determined<sup>12</sup>;
- 1380 (10) limiting the amount payable on a claim to a specified maximum amount or a maximum amount calculated in a specified manner<sup>13</sup>;
- 1381 (11) for payment to be made, in specified circumstances, to a person other than the claimant<sup>14</sup>.

Different provision may be made with respect to different kinds of claim<sup>15</sup>. The scheme may provide for the determination and regulation of matters relating to the scheme by the scheme manager<sup>16</sup>. The scheme, or particular provisions of the scheme, may be made so as to apply only in relation to: (a) activities carried on<sup>17</sup>; (b) claimants<sup>18</sup>; (c) matters arising<sup>19</sup>; or (d) events occurring<sup>20</sup>, in specified territories, areas or localities<sup>21</sup>.

The scheme may provide for a person who qualifies for authorisation<sup>22</sup>, and falls within a prescribed category<sup>23</sup>, to elect to participate in the scheme in relation to some or all of the activities for which he has permission<sup>24</sup>.

The scheme may provide for the scheme manager to have power in specified circumstances, but only if the scheme manager is satisfied that the claimant is entitled to receive a payment in respect of his claim under a scheme which is comparable to the compensation scheme, or as the result of a guarantee given by a government or other authority, to make a full payment of compensation to the claimant and recover the whole or part of the amount of that payment from the other scheme or under that guarantee<sup>25</sup>.

The compensation scheme<sup>26</sup> is not to provide for the compensation of persons in respect of claims made in connection with the issuing of electronic money<sup>27</sup>.

1 As to the compensation scheme see PARA 584. See also the Financial Services Authority's Handbook of Rules and Guidance, Redress, Compensation (COMP). As to the Handbook generally see PARA 22.

2 As to the meaning of 'relevant person' see PARA 584 note 3.

3 Financial Services and Markets Act 2000 s 214(1)(a).

4 Financial Services and Markets Act 2000 s 214(1)(b).

5 Financial Services and Markets Act 2000 s 214(1)(c).

6 Ie specified in the scheme: see the Financial Services and Markets Act 2000 s 213(8).

7 Financial Services and Markets Act 2000 s 214(1)(d).

8 Financial Services and Markets Act 2000 s 214(1)(e).

9 Financial Services and Markets Act 2000 s 214(1)(f).

10 Financial Services and Markets Act 2000 s 214(1)(g).

11 Financial Services and Markets Act 2000 s 214(1)(h).

12 Financial Services and Markets Act 2000 s 214(1)(i).

13 Financial Services and Markets Act 2000 s 214(1)(j).

14 Financial Services and Markets Act 2000 s 214(1)(k).

15 Financial Services and Markets Act 2000 s 214(2).

16 Financial Services and Markets Act 2000 s 214(3). As to the scheme manager see PARA 583.

17 Financial Services and Markets Act 2000 s 214(4)(a).

18 Financial Services and Markets Act 2000 s 214(4)(b).

19 Financial Services and Markets Act 2000 s 214(4)(c).

20 Financial Services and Markets Act 2000 s 214(4)(d).

21 Financial Services and Markets Act 2000 s 214(4).

22 Ie under the Financial Services and Markets Act 2000 Sch 3 (EEA passport rights): see PARAS 314-318, 323-329.

23 'Prescribed' means prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 417(1). For the purposes of s 214(5), the following categories are prescribed: (1) any investment firm or relevant management company which has established a branch in the United Kingdom in exercise of an EEA right and is a member of a home state investor-compensation scheme which meets the condition that the scope or level (including percentage) of the protection afforded to investors by the Financial Services Compensation

Scheme exceeds that afforded by the home state investor-compensation scheme; (2) any credit institution which has established a branch in the United Kingdom in exercise of an EEA right and is a member of a home state deposit-guarantee scheme which meets the condition that the scope or level (including percentage) of the protection afforded to depositors by the Financial Services Compensation Scheme exceeds that afforded by the home state deposit-guarantee scheme; and (3) any insurance intermediary which is not an investment firm or credit institution: Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001, SI 2001/1783, reg 3 (amended by SI 2003/1476; SI 2003/2066). As to the meanings of 'investment firm', 'relevant management company', 'credit institution' and 'insurance intermediary' see PARA 584 note 3. As the meaning of 'United Kingdom' see PARA 2 note 3. 'Home state investor-compensation scheme' means: (a) in relation to a credit institution which is exempted by the EEA state in which that institution has its head office from the obligation to belong to an investor-compensation scheme by virtue of European Parliament and EC Council Directive 97/9 (OJ L84, 26.3.97, p 22) on investor-compensation schemes, art 2.1 (participation in a system that protects the credit institution), that system; and (b) in all other cases, the investor-compensation scheme officially recognised by that EEA state for the purposes of art 2.1: Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001, SI 2001/1783, reg 1(2). 'Home state deposit-guarantee scheme' means: (i) in relation to a credit institution which is exempted by the EEA state in which that institution has its head office from the obligation to belong to a deposit-guarantee scheme by virtue of belonging to a system which protects the credit institution as mentioned in European Parliament and EC Council Directive 94/19 (OJ L135, 31.5.94, p 5) on deposit-guarantee schemes, art 3, that system; and (ii) in all other cases, the deposit-guarantee scheme officially recognised by that EEA state for the purposes of art 3.1: Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001, SI 2001/1783, reg 1(2). As to the meaning of 'EEA state' see PARA 315 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

24 Financial Services and Markets Act 2000 s 214(5). A person has permission as a result of any provision of, or made under, Sch 3: see PARAS 314-318, 323-329.

25 Financial Services and Markets Act 2000 s 214(6).

26 Ie the scheme established under the Financial Services and Markets Act 2000 Pt XV (ss 212-224).

27 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 9J (added by SI 2002/682). The issuing of electronic money is a specified activity under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: see PARA 88. As to issuing electronic money see PARA 96 et seq.

## UPDATE

### 585 Provision made by the compensation scheme

TEXT AND NOTES--The Treasury may make regulations permitting the scheme manager to impose levies under the Financial Services and Markets Act 2000 s 213 for the purpose of maintaining contingency funds from which possible expenses may be paid: Financial Services and Markets Act 2000 s 214A (added by the Banking Act 2009 s 170(1) (not yet in force)). Where (1) a stabilisation power under the Banking Act 2009 Pt 1 (ss 1-89) (see PARA 791) has been exercised in respect of a bank, building society or credit union; and (2) the Treasury thinks that the bank, building society or credit union was, or, but for the exercise of the stabilisation power, would have become, unable to satisfy claims against it, the Treasury may require the scheme manager to make payments in connection with the exercise of the stabilisation power, and payments are to be treated as expenditure under the scheme for all purposes (including levies, contingency funds and borrowing): Financial Services and Markets Act 2000 s 214B(1), (2) (s 214B added by the Banking Act 2009 s 171(1)). The Treasury must make regulations (a) specifying what expenses the scheme manager may be required to incur for that purpose; (b) providing for independent verification of the nature and amount of expenses incurred in connection with the exercise of the stabilisation power (which may include provision about appointment and payment of an auditor); and (c) providing for the method by which amounts to be paid are to be determined: Financial Services and Markets Act 2000 s 214B(3). See further s 214B(4)-(9). See the Financial Services and Markets Act 2000 (Contribution to Costs of Special Resolution Regime) Regulations 2009, SI 2009/807.

NOTE 3--A reference in any enactment or instrument to a claim or claimant under the 2000 Act Pt XV includes a reference to a deemed claim or claimant in accordance with s 214(1A) (see NOTE 11): Financial Services and Markets Act 2000 s 214(1B) (added by the Banking Act 2009 s 174(1)).

NOTE 11--Rules by virtue of the 2000 Act s 214(1)(h) may, in particular, allow the scheme manager to treat persons who are or may be entitled to claim under the scheme as if they had done so: Financial Services and Markets Act 2000 s 214(1A) (added by the Banking Act 2009 s 174(1)).

NOTE 13--Rules by virtue of the 2000 Act s 214(1)(j) may, in particular, allow, or be subject to rules which allow, the scheme manager to settle a class of claim by payment of sums fixed without reference to, or by modification of, the normal rules for calculation of maximum entitlement for individual claims: Financial Services and Markets Act 2000 s 214(1C) (added by the Banking Act 2009 s 174(1)).

NOTE 23--Head (i). Directive 94/19 amended: European Parliament and EC Council Directive 2005/1 (OJ L79, 24.3.2005, p 9); European Parliament and EC Council Directive 2009/14 (OJ L68, 13.3.2009, p 3).

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## **586. Rights in relevant person's insolvency.**

The compensation scheme<sup>1</sup> may, in particular, make provision: (1) as to the effect of a payment of compensation under the scheme in relation to rights or obligations arising out of the claim against a relevant person<sup>2</sup> in respect of which the payment was made<sup>3</sup>; (2) for conferring on the scheme manager<sup>4</sup> a right of recovery against that person<sup>5</sup>. Such a right of recovery conferred by the scheme does not, in the event of the relevant person's insolvency, exceed such right (if any) as the claimant would have had in that event<sup>6</sup>. If a person other than the scheme manager makes an administration application<sup>7</sup> in relation to a company or partnership<sup>8</sup> which is a relevant person, the scheme manager has the same rights as are conferred on the Financial Services Authority<sup>9</sup>. If a person other than the scheme manager presents a petition for the winding up of a body which is a relevant person, the scheme manager has the same rights to participate in the proceedings as are conferred on the Authority<sup>10</sup>. If a person other than the scheme manager presents a bankruptcy petition<sup>11</sup> to the court in relation to an individual who, or an entity which, is a relevant person, the scheme manager has the same rights to participate in the proceedings as are conferred on the Authority<sup>12</sup>. Insolvency rules<sup>13</sup> may be made for the purpose of integrating any procedure for which provision is made by the compensation scheme<sup>14</sup> into the general procedure on the administration of a company or partnership or on a winding-up or bankruptcy<sup>15</sup>.

<sup>1</sup> As to the compensation scheme see PARA 584. See also the Financial Services Authority's Handbook of Rules and Guidance, Redress, Compensation (COMP). As to the Handbook generally see PARA 22.

<sup>2</sup> As to the meaning of 'relevant person' see PARA 584 note 3.

<sup>3</sup> Financial Services and Markets Act 2000 s 215(1)(a).

<sup>4</sup> As to the scheme manager see PARA 583.

5 Financial Services and Markets Act 2000 s 215(1)(b).

6 Financial Services and Markets Act 2000 s 215(2).

7 le under the Insolvency Act 1986 Sch B1 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1. In the Financial Services and Markets Act 2000 the reference to making an administration application includes a reference to (1) appointing an administrator under the Insolvency Act 1986 Sch B1 para 14 or para 22 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 145 et seq) or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), Sch B1 para 15 or para 23; or filing with the court a copy of notice of intention to appoint an administrator under any of those provisions: Financial Services and Markets Act 2000 s 215(3A) (added by the Enterprise Act 2002 Sch 17 paras 53, 54(1), (3); and amended by SI 2005/1455).

8 As to the meaning of 'partnership' see PARA 86 note 11.

9 Financial Services and Markets Act 2000 s 215(3) (amended by the Enterprise Act 2002 Sch 17 paras 53, 54(1), (2); and SI 2005/1455).

Rights to participate in proceedings are conferred on the Financial Services Authority by the Financial Services and Markets Act 2000 s 362: see PARA 494. As to the Financial Services Authority see PARAS 4, 6 et seq.

10 Financial Services and Markets Act 2000 s 215(4). The Authority has power to participate in proceedings under s 371: see PARA 500.

11 'Bankruptcy petition' means a petition to the court under the Insolvency Act 1986 s 264 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1267) or under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 238 for a bankruptcy order to be made against an individual: Financial Services and Markets Act 2000 s 215(7), (9). As to the meaning of 'court' see PARA 490 note 4; definition applied by s 215(9).

12 Financial Services and Markets Act 2000 s 215(5). The Authority has power to participate in proceedings under s 374: see PARA 503.

13 'Insolvency rules' are: (1) for England and Wales, rules made under the Insolvency Act 1986 ss 411, 412 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 753; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1041); and (2) for Northern Ireland, rules made under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 359 and the Judicature (Northern Ireland) Act 1978 s 55: Financial Services and Markets Act 2000 s 215(8).

14 le as a result of the Financial Services and Markets Act 2000s 215(1): see the text and notes 1-5.

15 Financial Services and Markets Act 2000 s 215(6).

## UPDATE

### 586 Rights in insolvency

TEXT AND NOTES 1-5--Financial Services and Markets Act 2000 s 215(1) substituted: Banking Act 2009 s 175(2).

TEXT AND NOTE 6--Financial Services and Markets Act 2000 s 215(2) amended: Banking Act 2009 s 175(3).

TEXT AND NOTES 7-10--Financial Services and Markets Act 2000 s 215(3), (4) modified: SI 2009/317.

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## 587. Insurance.

The compensation scheme<sup>1</sup> may, in particular, include provision requiring the scheme manager<sup>2</sup> to make arrangements for securing continuity of insurance for policyholders<sup>3</sup>, or policyholders of a specified<sup>4</sup> class, of relevant long-term insurers<sup>5</sup>. The scheme may provide for the scheme manager to take such measures as appear to him to be appropriate: (1) for securing or facilitating the transfer of a relevant long-term insurer's business so far as it consists of the carrying out of contracts of long-term insurance, or of any part of that business, to another authorised person<sup>6</sup>; (2) for securing the issue by another authorised person to the policyholders concerned of policies in substitution for their existing policies<sup>7</sup>. The scheme may also provide for the scheme manager to make payments to the policyholders concerned: (a) during any period while he is seeking to make arrangements for continuity of insurance<sup>8</sup>; (b) if it appears to him that it is not reasonably practicable to make such arrangements<sup>9</sup>. The scheme<sup>10</sup> may include power to impose levies for the purpose of meeting expenses of the scheme manager incurred in taking measures<sup>11</sup> or in making payments as mentioned above<sup>12</sup>.

1 As to the compensation scheme see PARA 584. See also the Financial Services Authority's Handbook of Rules and Guidance, Redress, Compensation (COMP) Ch 3. As to the Handbook generally see PARA 22.

2 As to the scheme manager see PARA 583.

3 As to the meaning of 'policyholder' see PARA 591 note 15.

4 I.e. specified in the scheme: see the Financial Services and Markets Act 2000 s 213(8).

5 Financial Services and Markets Act 2000 s 216(1). 'Relevant long-term insurers' means relevant persons who: (1) have permission to effect or carry out contracts of long-term insurance; and (2) are unable, or likely to be unable, to satisfy claims made against them: s 216(2). As to the meaning of 'relevant person' see PARA 584 note 3. As to the meaning of 'contracts of long-term insurance' see PARA 595 note 12.

6 Financial Services and Markets Act 2000 s 216(3)(a). As to authorised persons see PARA 314.

7 Financial Services and Markets Act 2000 s 216(3)(b).

8 Financial Services and Markets Act 2000 s 216(4)(a). The reference is to arrangements under s 216(1): see the text and notes 1-5.

9 Financial Services and Markets Act 2000 s 216(4)(b).

10 I.e. in a provision made by virtue of the Financial Services and Markets Act 2000 s 213(3)(b): see PARA 584 head (2).

11 I.e. as a result of any provision of the scheme made by virtue of the Financial Services and Markets Act 2000 s 216(3): see the text to notes 6-7.

12 Financial Services and Markets Act 2000 s 216(5). The reference is to payments made as a result of any provision of the scheme made by virtue of s 216(4): see the text to notes 8-9.

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## 588. Insurers in financial difficulties.



The compensation scheme<sup>1</sup> may, in particular, include provision for the scheme manager<sup>2</sup> to have power to take measures for safeguarding policyholders<sup>3</sup>, or policyholders of a specified<sup>4</sup> class, of relevant insurers<sup>5</sup>. The measures may include such measures as the scheme manager considers appropriate for: (1) securing or facilitating the transfer of a relevant insurer's business so far as it consists of the carrying out of contracts of insurance, or of any part of that business, to another authorised person<sup>6</sup>; (2) giving assistance to the relevant insurer to enable it to continue to effect or carry out contracts of insurance<sup>7</sup>.

The scheme may provide:

- 1382 (a) that if measures of a kind mentioned in head (1) above are to be taken, they should be on terms appearing to the scheme manager to be appropriate, including terms reducing, or deferring payment of, any of the things to which any of those who are eligible policyholders<sup>8</sup> in relation to the relevant insurer are entitled in their capacity as such<sup>9</sup>;
- 1383 (b) that if measures of a kind mentioned in head (2) above are to be taken, they should be conditional on the reduction of, or the deferment of the payment of, the things to which any of those who are eligible policyholders in relation to the relevant insurer are entitled in their capacity as such<sup>10</sup>;
- 1384 (c) for ensuring that measures of a kind mentioned in head (2) above do not benefit to any material extent persons who were members of a relevant insurer when it began to be in financial difficulties<sup>11</sup> or who had any responsibility for, or who may have profited from, the circumstances giving rise to its financial difficulties, except in specified circumstances<sup>12</sup>;
- 1385 (d) for requiring the scheme manager to be satisfied that any measures he proposes to take are likely to cost less than it would cost to pay compensation under the scheme if the relevant insurer became unable, or likely to be unable, to satisfy claims made against him<sup>13</sup>.

The scheme may provide for the Financial Services Authority<sup>14</sup> to have power: (i) to give such assistance to the scheme manager as it considers appropriate for assisting the scheme manager to determine what measures are practicable or desirable in the case of a particular relevant insurer<sup>15</sup>; (ii) to impose constraints on the taking of measures by the scheme manager in the case of a particular relevant insurer<sup>16</sup>; (iii) to require the scheme manager to provide it with information about any particular measures which the scheme manager is proposing to take<sup>17</sup>.

The scheme may include provision for the scheme manager to have power to make interim payments in respect of eligible policyholders of a relevant insurer and to indemnify any person making payments to eligible policyholders of a relevant insurer<sup>18</sup>.

A provision of the scheme<sup>19</sup> may include power to impose levies for the purpose of meeting expenses of the scheme manager incurred in taking the above measures<sup>20</sup>, and making the above payments or giving the above indemnities<sup>21</sup>.

1 As to the compensation scheme see PARA 584. See also the Financial Services Authority's Handbook of Rules and Guidance, Redress, Compensation (COMP). As to the Handbook generally see PARA 22.

2 As to the scheme manager see PARA 583.

3 As to the meaning of 'policyholder' see PARA 591 note 15.

4 I.e. specified in the scheme: see the Financial Services and Markets Act 2000 s 213(8).

5 Financial Services and Markets Act 2000 s 217(1). 'Relevant insurers' means relevant persons who: (1) have permission to effect or carry out contracts of insurance; and (2) are in financial difficulties: s 217(2). As to

the meaning of 'relevant person' see PARA 584 note 3. As to the meaning of 'contracts of insurance' see PARA 351 note 13.

6 Financial Services and Markets Act 2000 s 217(3)(a). As to authorised persons see PARA 314.

7 Financial Services and Markets Act 2000 s 217(3)(b).

8 'Eligible policyholders' has such meaning as may be specified in the scheme: Financial Services and Markets Act 2000 ss 213(8), 217(8).

9 Financial Services and Markets Act 2000 s 217(4)(a).

10 Financial Services and Markets Act 2000 s 217(4)(b).

11 'Financial difficulties' has such meaning as may be specified in the scheme: Financial Services and Markets Act 2000 ss 213(8), 217(8).

12 Financial Services and Markets Act 2000 s 217(4)(c).

13 Financial Services and Markets Act 2000 s 217(4)(d).

14 As to the Financial Services Authority see PARAS 4, 6 et seq.

15 Financial Services and Markets Act 2000 s 217(5)(a).

16 Financial Services and Markets Act 2000 s 217(5)(b).

17 Financial Services and Markets Act 2000 s 217(5)(c).

18 Financial Services and Markets Act 2000 s 217(6).

19 le made under the Financial Services and Markets Act 2000 s 213(3)(b): see PARA 584 head (2).

20 le as a result of any provision of the scheme made by virtue of the Financial Services and Markets Act 2000 s 217(1): see the text and notes 1-5.

21 Financial Services and Markets Act 2000 s 217(7). The reference is to payments and indemnities as a result of any provision made by virtue of s 217(6): see the text to note 18.

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## **589. Information and documents.**

The scheme manager<sup>1</sup> may, by notice in writing given to the relevant person<sup>2</sup> in respect of whom a claim is made under the scheme or to a person otherwise involved<sup>3</sup>, require that person to provide specified<sup>4</sup> information or information of a specified description or to produce specified documents<sup>5</sup> or documents of a specified description<sup>6</sup>. The information or documents must be provided or produced before the end of such reasonable period as may be specified and, in the case of information, in such manner or form as may be specified<sup>7</sup>. This power applies only to information and documents the provision or production of which the scheme manager considers to be necessary for the fair determination of the claim, or to be necessary (or likely to be necessary) for the fair determination of other claims made (or which it expects may be made) in respect of the relevant person concerned<sup>8</sup>.

If a document is produced in response to a requirement imposed under these provisions, the scheme manager may take copies or extracts from the document or require the person

producing the document to provide an explanation of the document<sup>9</sup>. If a person who is required to produce a document fails to do so, the scheme manager may require the person to state, to the best of his knowledge and belief, where the document is<sup>10</sup>. If a person claims a lien on a document, its production<sup>11</sup> does not affect the lien<sup>12</sup>.

For the purpose of assisting the scheme manager to discharge its functions in relation to a claim made in respect of an insolvent relevant person<sup>13</sup>, the administrative receiver, administrator, liquidator or trustee in bankruptcy<sup>14</sup> of an insolvent relevant person must permit a person authorised by the scheme manager to inspect relevant documents<sup>15</sup>. A person inspecting such a document may take copies of, or extracts from, the document<sup>16</sup>.

If a person (the 'defaulter') fails to comply with a requirement<sup>17</sup>, or fails to permit documents to be inspected<sup>18</sup>, the scheme manager may certify that fact in writing to the High Court and the court may inquire into the case<sup>19</sup>. If the court is satisfied that the defaulter failed without reasonable excuse to comply with the requirement (or to permit the documents to be inspected), it may deal with the defaulter (and, in the case of a body corporate<sup>20</sup>, any director or officer<sup>21</sup>) as if he were in contempt<sup>22</sup>.

If, as a result of the insolvency or bankruptcy of a relevant person<sup>23</sup>, any documents have come into the possession of the Official Receiver, the Official Receiver for Northern Ireland or the Accountant in Bankruptcy, he must permit any person authorised by the scheme manager to inspect the documents for the purpose of establishing: (1) the identity of persons to whom the scheme manager may be liable to make a payment in accordance with the compensation scheme<sup>24</sup>; or (2) the amount of any payment which the scheme manager may be liable to make<sup>25</sup>. A person inspecting a document may take copies or extracts from the document<sup>26</sup>.

1 As to the scheme manager see PARA 583. See also the Financial Services Authority's Handbook of Rules and Guidance, Redress, Compensation (COMP). As to the Handbook generally see PARA 22.

2 For these purposes, 'relevant person' has the same meaning as in the Financial Services and Markets Act 2000 s 224 (see note 23): s 219(8).

3 A person is involved in a claim made under the scheme if he was knowingly involved in the act or omission giving rise to the claim: Financial Services and Markets Act 2000 s 219(10).

4 As specified in the notice given under the Financial Services and Markets Act 2000 s 219(1): s 219(9).

5 As to the meaning of 'document' see PARA 10 note 10.

6 Financial Services and Markets Act 2000 s 219(1). If the relevant person is insolvent, no requirement may be imposed under s 219 on a person to whom s 220 (see the text to notes 13-16) or s 224 (see the text and notes 23-26) applies: s 219(6).

7 Financial Services and Markets Act 2000 s 219(2).

8 Financial Services and Markets Act 2000 s 219(3).

9 Financial Services and Markets Act 2000 s 219(4).

10 Financial Services and Markets Act 2000 s 219(5).

11 As under the Financial Services and Markets Act 2000 Pt XV (ss 212-224).

12 Financial Services and Markets Act 2000 s 219(7). As to liens see **LIEN**.

13 For these purposes, 'relevant person' has the same meaning as in Financial Services and Markets Act 2000 s 224 (see note 23): s 220(5).

14 The Financial Services and Markets Act 2000 s 220 does not apply to a liquidator, administrator or trustee in bankruptcy who is: (1) the Official Receiver (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 31 et seq); (2) the Official Receiver for Northern Ireland; or (3) the Accountant in Bankruptcy: s 220(4).

- 15 Financial Services and Markets Act 2000 s 220(1), (3). As to insolvency see PARA 490 et seq.
- 16 Financial Services and Markets Act 2000 s 220(2).
- 17 Ie imposed under the Financial Services and Markets Act 2000 s 219: see the text and notes 1-12.
- 18 Ie under the Financial Services and Markets Act 2000 s 220: see the text and notes 13-16.
- 19 Financial Services and Markets Act 2000 s 221(1), (3).
- 20 As to the meaning of 'body corporate' see PARA 86 note 11.
- 21 'Officer', in relation to a limited liability partnership, means a member of the limited liability partnership: Financial Services and Markets Act 2000 s 221(2) (amended by SI 2001/1090). As to limited liability partnerships see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.
- 22 Financial Services and Markets Act 2000 s 221(2). As to contempt of court see generally **CONTEMPT OF COURT**.
- 23 'Relevant person' means a person who was: (1) an authorised person at the time the act or omission which may give rise to the liability mentioned in head (1) in the text took place; or (2) an appointed representative at that time: Financial Services and Markets Act 2000 s 224(3). As to authorised persons see PARA 314. As to the meaning of 'appointed representative' see PARA 346. However, a person who, at that time: (a) qualified for authorisation under s 31(1)(b), Sch 3 (EEA passport rights) (see PARAS 314-318, 323-329); and (b) fell within a prescribed category, is not to be regarded as a relevant person for the purposes of s 224 in relation to any activities for which he had permission as a result of any provision of, or made under, Sch 3 unless he had elected to participate in the scheme in relation to those activities at that time: s 224(4). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1).
- For the purposes of s 224(4), the following categories are prescribed: (i) any investment firm; (ii) any credit institution; (iii) any insurance intermediary; and (iv) any relevant management company: Financial Services and Markets Act 2000 (Compensation Scheme: Electing Participants) Regulations 2001, SI 2001/1783, reg 4 (amended by SI 2003/1476; SI 2003/2066). As to the meanings of 'investment firm', 'credit institution', 'insurance intermediary' and 'relevant management company' see PARA 584 note 3. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to elections to participate see PARA 585.
- 24 Financial Services and Markets Act 2000 s 224(1)(a).
- 25 Financial Services and Markets Act 2000 s 224(1)(b).
- 26 Financial Services and Markets Act 2000 s 224(2).

## UPDATE

### 589 Information and documents

TEXT AND NOTES--The Financial Services Authority may make rules enabling it to require authorised persons to provide information, which may then be made available to the scheme manager by the Authority: Financial Services and Markets Act 2000 s 218A(1) (s 218A added by the Banking Act 2009 s 176(1)). See further the Financial Services and Markets Act 2000 s 218A(2)-(5).

TEXT AND NOTES 1-6--Financial Services and Markets Act 2000 s 219(1) amended, s 219(1A), (1B) added: Banking Act 2009 s 176(2)-(4).

NOTES 2, 3--Financial Services and Markets Act 2000 s 219(8), (10) omitted: Banking Act 2009 s 176(2), (8), (9).

NOTE 6--Financial Services and Markets Act 2000 s 219(6) amended: Banking Act 2009 s 176(2), (7).

TEXT AND NOTE 8--Financial Services and Markets Act 2000 s 219(3) amended, s 219(3A) added: Banking Act 2009 s 176(2), (5), (6).

NOTE 14--After 'liquidator' read ', bank liquidator, building society liquidator': Financial Services and Markets Act 2000 s 220(3) (amended by the Banking Act 2009 s 123(3); and SI 2009/805).

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## **(9) SPECIALIST AREAS**

### **(i) Control of Business Transfers**

#### **590. Control of business transfers.**

The Financial Services and Markets Act 2000 provides that no insurance business transfer scheme<sup>1</sup> or banking business transfer scheme<sup>2</sup> is to have effect unless an order sanctioning the scheme<sup>3</sup> has been made in relation to it<sup>4</sup>. At the date at which this volume states the law, this provision had been brought into force in relation to insurance business transfer schemes only<sup>5</sup>.

1 As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

2 As to banking business transfer schemes see PARA 592.

3 Ie under the Financial Services and Markets Act 2000 s 111(1): see PARA 594.

4 Financial Services and Markets Act 2000 s 104. Section 104 has been brought into force for the purpose of insurance business transfer schemes only: Financial Services and Markets Act 2000 (Commencement No 7) Order 2001, SI 2001/3538, art 2(1), (2).

The Treasury may by regulations: (1) provide for prescribed provisions of the Financial Services and Markets Act 2000 Pt VII (ss 104-117) to have effect in relation to prescribed cases with such modifications as may be prescribed; (2) make such amendments to any of those statutory provisions as it considers appropriate for the more effective operation of that or any other provision relating to the control of business transfers: s 117. 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). The Financial Services and Markets Act 2000 (Motor Insurance) Regulations 2007, SI 2007/2403, have been made under the Financial Services and Markets Act 2000 s 117 which, among other things, amended Sch 12 para 6 (see PARA 595). As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 See note 4.

## **UPDATE**

### **590 Control of business transfers**

TEXT AND NOTES--As to the transfer of money from dormant bank and building society accounts for use for social and environmental purposes see Dormant Bank and Building Society Accounts Act 2008 Pt 1 (ss 1-15); and PARA 590A. As to the distribution of such money for use for social and environmental purposes see Dormant Bank and Building Society Accounts Act 2008 Pt 2 (ss 16-27); and **LICENSING AND GAMBLING** vol 68 (2008) PARA 731A.

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#### **590A. Dormant bank and building society accounts.**

Where a bank or building society transfers to an authorised reclaim fund the balance of a dormant account that a person ('the customer') holds with it, and the reclaim fund consents to the transfer, after the transfer the customer no longer has any right against the bank or building society to payment of the balance, but he has against the reclaim fund whatever right to payment of the balance he would have against the bank or building society if the transfer had not happened: Dormant Bank and Building Society Accounts Act 2008 s 1(1), (2). The reference to an account that a person holds is to be read as including an account held by a deceased individual immediately before his death and in such a case, a reference to the customer is to be read as a reference to the person to whom the right to payment of the balance has passed: Dormant Bank and Building Society Accounts Act 2008 s 1(3).

A 'reclaim fund' is a company the objects of which are restricted by its articles of association to the following: (1) the meeting of repayment claims; (2) the management of dormant account funds in such a way as to enable the company to meet whatever repayment claims it is prudent to anticipate; (3) the transfer of money to the bodies specified in the Dormant Bank and Building Society Accounts Act 2008 s 16(1), subject to the need for the company (a) to have access at any given time to enough money to meet whatever repayment claims it is prudent to anticipate; (b) to comply with any requirement with regard to its financial resources that is imposed on it by or under any enactment, and (c) to defray its expenses; and (4) objects that are incidental or conducive to, or otherwise connected with, any of the above (including in particular the prudent investment of dormant account funds): Dormant Bank and Building Society Accounts Act 2008 s 5(1). 'Company' has the meaning given by the Companies Act 2006 s 1(1) (see **COMPANIES** vol 14 (2009) PARA 1); 'dormant account funds' means money paid to a reclaim fund by banks and by building societies in respect of dormant accounts; and 'repayment claims' means claims made by virtue of the 2008 Act s 1(2)(b) or 2(2)(b): Dormant Bank and Building Society Accounts Act 2008 s 5(6). As to further provisions regarding the articles of association of reclaim funds see Dormant Bank and Building Society Accounts Act 2008 s 5(2)-(5), Sch 1.

'Bank' means an authorised deposit-taker that has its head office, or one or more branches, in the United Kingdom, but a bank does not include a building society, a person who is specified, or is within a class of persons specified, by an order under the Financial Services and Markets Act 2000 s 38 (see PARA 330), a credit union or a friendly society: see Dormant Bank and Building Society Accounts Act 2008 s 7. The balance of a person's account at any particular time is the amount owing to the person in respect of the account at that time, after the appropriate adjustments have been made for such things as interest due and fees and charges payable: see Dormant Bank and Building Society Accounts Act 2008 s 8. 'Account' means an account that has at all times consisted only of money provided by the bank or building society as part of its activity of accepting deposits: Dormant Bank and Building Society Accounts Act 2008 s 9(1), (2). In relation to a building society, 'account' includes an account representing shares in the society, other than (i) preferential shares; or (ii) deferred shares within the meaning given in the Building Societies Act 1986 s 119(1) (see PARA 1906): Dormant Bank and Building Society Accounts Act 2008 s 9(3). An account is 'dormant' at a particular time if the account has been open throughout the period of 15 years ending at that time, but during that

period no transactions have been carried out in relation to the account by or on the instructions of the holder of the account: see Dormant Bank and Building Society Accounts Act 2008 s 10.

An alternative scheme is established for smaller institutions which meet the assets-limit condition, involving the transfer of balances to charities with a proportion to an authorised reclaim fund: see Dormant Bank and Building Society Accounts Act 2008 s 2. A bank or a building society meets the assets-limit condition if the aggregate of the amounts shown in its balance sheet as assets on the last day of the latest financial year for which it has prepared accounts is less than £7,000m: see Dormant Bank and Building Society Accounts Act 2008 s 3. Where the directors of a company that is a bank are required by the Companies Act 2006 s 415(1) (see **COMPANIES** vol 15 (2009) PARA 816) to prepare a report for a particular financial year and in that year the company made transfers in relation to which the 2008 Act s 2 applied, the report must identify each of the charities concerned and specify the amount transferred to each of them: Dormant Bank and Building Society Accounts Act 2008 s 13.

Provision is also made for the preservation of the customer's rights on the insolvency of a bank or building society (Dormant Bank and Building Society Accounts Act 2008 s 11), the disclosure of information to an authorised reclaim fund to enable it to deal with claims (s 12), and review by the Treasury of the operation of the 2008 Act Pt 1 (ss 1-15) (s 14).

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### **591. Insurance business transfer schemes.**

A scheme is an insurance business transfer scheme if it: (1) satisfies one of the conditions described below<sup>1</sup>; (2) results in the business transferred being carried on from an establishment<sup>2</sup> of the transferee in an EEA state<sup>3</sup>; and (3) is not an excluded scheme<sup>4</sup>. The conditions are that:

- 1386 (a) the whole or part of the business carried on in one or more member states by a UK authorised person<sup>5</sup> who has permission to effect or carry out contracts of insurance<sup>6</sup> (the 'authorised person concerned') is to be transferred to another body (the 'transferee')<sup>7</sup>;
- 1387 (b) the whole or part of the business, so far as it consists of reinsurance<sup>8</sup>, carried on in the United Kingdom through an establishment there by an EEA firm which is an insurance undertaking qualifying for authorisation<sup>9</sup> (the 'authorised person concerned') is to be transferred to another body (the 'transferee')<sup>10</sup>;
- 1388 (c) the whole or part of the business carried on in the United Kingdom by an authorised person who is neither a UK authorised person nor an EEA firm but who has permission to effect or carry out contracts of insurance (the 'authorised person concerned') is to be transferred to another body (the 'transferee')<sup>11</sup>.

A scheme is an excluded scheme for these purposes if it falls within any of the following cases:

- 1389 (i) Case 1 is where the authorised person concerned is a friendly society<sup>12</sup>;
- 1390 (ii) Case 2 is where: (A) the authorised person concerned is a UK authorised person; (B) the authorised person is not a reinsurance undertaking<sup>13</sup>; (C) the business to be transferred under the scheme is business which consists of the effecting or carrying out of contracts of reinsurance in one or more EEA states other

than the United Kingdom; and (D) the scheme has been approved by a court in an EEA state other than the United Kingdom or by the host state regulator<sup>14</sup>;

1391 (iii) Case 3 is where: (A) the authorised person concerned is a UK authorised person; (B) the business to be transferred under the scheme is carried on in one or more countries or territories (none of which is an EEA state) and does not include policies of insurance against risks arising in an EEA state; and (C) the scheme has been approved by a court in a country or territory other than an EEA state or by the authority responsible for the supervision of that business in a country or territory in which it is carried on;

1392 (iv) Case 4 is where (A) the business to be transferred under the scheme is the whole of the business of the authorised person concerned; (B) all the policyholders<sup>15</sup> are controllers<sup>16</sup> of the firm or of firms within the same group<sup>17</sup> as the firm which is the transferee; and (C) all of the policyholders who will be affected by the transfer have consented to it;

1393 (v) Case 5 is where (A) the business of the authorised person concerned consists solely of the effecting or carrying out of contracts of reinsurance; (B) the business to be transferred is the whole or part of that business; (C) the scheme does not fall within Case 4; (D) all of the policyholders who will be affected by the transfer have consented to it; and (E) a certificate has been obtained<sup>18</sup> in relation to the proposed transfer<sup>19</sup>.

1   Ie the conditions set out in the Financial Services and Markets Act 2000 s 105(2): see the text and notes 4-10.

The expression 'scheme' has a broad meaning and includes any arrangement the predominant purpose of which is to transfer an insurance business transfer: see *Re the Standard Life Assurance Company* [2007] SCLR 581.

2   'Establishment' means, in relation to a person, his head office or a branch of his: Financial Services and Markets Act 2000 s 105(9).

3   As to the meaning of 'EEA state' see PARA 315 note 1.

4   Financial Services and Markets Act 2000 s 105(1). As to excluded schemes see the text and notes 12-19. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

5   'UK authorised person' means a body which is an authorised person and which: (1) is incorporated in the United Kingdom; or (2) is an unincorporated association formed under the law of any part of the United Kingdom: Financial Services and Markets Act 2000 s 105(8). As to authorised persons see PARA 314. As to the meaning of 'United Kingdom' see PARA 2 note 3.

6   As to the meaning of 'contracts of insurance' see PARA 351 note 13.

7   Financial Services and Markets Act 2000 s 105(2)(a).

8   In the Financial Services and Markets Act 2000, references to 'reinsurance' are to be read with s 22 and Sch 2 (see PARA 84 et seq): s 424(1)(b).

9   Ie an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(d) (see PARA 315 note 1) and qualifying for authorisation under Sch 3 (see PARA 314 et seq).

10   Financial Services and Markets Act 2000 s 105(2)(b) (amended by SI 2007/3253).

11   Financial Services and Markets Act 2000 s 105(2)(c).

12   'Friendly society' means an incorporated or registered friendly society: Financial Services and Markets Act 2000 s 417(1).

13   Ie a reinsurance undertaking within the meaning of the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83) art 2.1(c).



14 As to the meaning of 'host state regulator' see PARA 323 note 10.

15 For the purposes of the Financial Services and Markets Act 2000, 'policyholder', in relation to a contract of insurance, has such meaning as the Treasury may by order specify: s 424(2). The Treasury has ordered that, for the purposes of the Financial Services and Markets Act 2000 s 424(2), 'policyholder' means the person who for the time being is the legal holder of the policy, and includes any person to whom, under the policy, a sum is due, a periodic payment is payable or any other benefit is to be provided or to whom such a sum, payment or benefit is contingently due, payable or to be provided: Financial Services and Markets Act 2000 (Meaning of 'Policy' and 'Policyholder') Order 2001, SI 2001/2362, art 3. As to the meaning of 'policy' see PARA 595 note 13. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

16 In the Financial Services and Markets Act 2000 (except Pt XVIII Ch IA (ss 301A-301G): see PARA 725 et seq), 'controller', in relation to an undertaking ('A'), means a person who falls within any of the following cases, namely where the person: (1) holds 10% or more of the shares in A; (2) is able to exercise significant influence over the management of A by virtue of his shareholding in A; (3) holds 10% or more of the shares in a parent undertaking ('P') of A; (4) is able to exercise significant influence over the management of P by virtue of his shareholding in P; (5) is entitled to exercise, or control the exercise of, 10% or more of the voting power in A; (6) is able to exercise significant influence over the management of A by virtue of his voting power in A; (7) is entitled to exercise, or control the exercise of, 10% or more of the voting power in P; or (8) is able to exercise significant influence over the management of P by virtue of his voting power in P: s 422(1), (2) (s 422(1) amended by SI 2007/126). For the purposes of the Financial Services and Markets Act 2000 s 422(2), the 'person' means: (a) the person; (b) any of the person's associates; or (c) the person and any of his associates: s 422(3). 'Associate', in relation to a person ('H') holding shares in an undertaking ('C') or entitled to exercise or control the exercise of voting power in relation to another undertaking ('D'), means: (i) the spouse or civil partner of H; (ii) a child or stepchild of H (if under 18); (iii) the trustee of any settlement under which H has a life interest in possession; (iv) an undertaking of which H is a director; (v) a person who is an employee or partner of H; (vi) if H is an undertaking: (A) a director of H; (B) a subsidiary undertaking of H; (C) a director or employee of such a subsidiary undertaking; and (vii) if H has with any other person an agreement or arrangement with respect to the acquisition, holding or disposal of shares or other interests in C or D or under which they undertake to act together in exercising their voting power in relation to C or D, that other person: s 422(4) (amended by the Civil Partnership Act 2004 Sch 27 para 165). As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 351 note 32. For the purposes of head (iii) above, 'settlement' includes any disposition or arrangement under which property is held on trust (or subject to a comparable obligation): Financial Services and Markets Act 2000 s 422(5). 'Shares', in relation to an undertaking with a share capital, means allotted shares; in relation to an undertaking with capital but no share capital, means rights to share in the capital of the undertaking; in relation to an undertaking without capital, means interests conferring any right to share in the profits, or liability to contribute to the losses, of the undertaking; or giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of a winding up: s 422(6). 'Voting power', in relation to an undertaking which does not have general meetings at which matters are decided by the exercise of voting rights, means the right under the constitution of the undertaking to direct the overall policy of the undertaking or alter the terms of its constitution: s 422(7). The Treasury may by order amend s 422 by varying, or removing, any of the cases in which a person is treated as being a controller of a person or by adding a case: s 192(e). No order is to be made under s 192(e) unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(1)(a).

17 As to the meaning of 'group' see PARA 351 note 37.

18 In the Financial Services and Markets Act 2000 Sch 12 para 2: see PARA 595.

19 Financial Services and Markets Act 2000 s 105(3) (amended by SI 2007/3253). The parties to a scheme which falls within Case 2, 3, 4 or 5 may apply to the court for an order sanctioning the scheme as if it were an insurance business transfer scheme: s 105(4) (amended by SI 2007/3253).

If the scheme involves a compromise or arrangement falling within the Companies Act 2006 Pt 27 (ss 902-941) (mergers and divisions of public companies), the provisions of Pt 27 (and Pt 26 (ss 895-901)) (see **COMPANIES** vol 15 (2009) PARA 1425 et seq) apply accordingly but this does not affect the operation of the Financial Services and Markets Act 2000 Pt VII (ss 104-117) in relation to the scheme: s 105(5) (substituted by SI 2008/948).

## UPDATE

### 591 Insurance business transfer schemes

NOTE 16--'Controller' is now defined in Financial Services and Markets Act 2000 ss 422, 422A (substituted for s 422 by SI 2009/534).

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## **592. Banking business transfer schemes.**

A scheme is a banking business transfer scheme if it: (1) satisfies one of the conditions described below<sup>1</sup>; (2) is one under which the whole or part of the business to be transferred includes the accepting of deposits; and (3) is not an excluded scheme<sup>2</sup>. The conditions are that:

- 1394 (a) the whole or part of the business carried on by a UK authorised person<sup>3</sup> who has permission to accept deposits (the 'authorised person concerned') is to be transferred to another body (the 'transferee')<sup>4</sup>;
- 1395 (b) the whole or part of the business carried on in the United Kingdom by an authorised person who is not a UK authorised person but who has permission to accept deposits (the 'authorised person concerned') is to be transferred to another body which will carry it on in the United Kingdom (the 'transferee')<sup>5</sup>.

A scheme is an excluded scheme for these purposes if: (i) the authorised person concerned is a building society<sup>6</sup> or a credit union<sup>7</sup>; or (ii) the scheme is a compromise or arrangement to which the statutory provisions relating to mergers and divisions of public companies<sup>8</sup> applies<sup>9</sup>.

1    le the conditions set out in the Financial Services and Markets Act 2000 s 106(2): see the text and notes 3-5.

2    Financial Services and Markets Act 2000 s 106(1). As to excluded schemes see the text and notes 6-9.

3    As to the meaning of 'UK authorised person' see PARA 591 note 5; definition applied by the Financial Services and Markets Act 2000 s 106(5).

4    Financial Services and Markets Act 2000 s 106(2)(a). For the purposes of s 106(2)(a) (see head (a) in the text), it is immaterial whether or not the business to be transferred is carried on in the United Kingdom: s 106(4). As to the meaning of 'United Kingdom' see PARA 2 note 3.

5    Financial Services and Markets Act 2000 s 106(2)(b).

6    'Building society' has the meaning given in the Building Societies Act 1986 (see PARA 1856): Financial Services and Markets Act 2000 s 106(6).

7    'Credit union' means a credit union within the meaning of: (1) the Credit Unions Act 1979 (see PARA 2402); (2) the Credit Unions (Northern Ireland) Order 1985, SI 1985/1205 (NI 12): Financial Services and Markets Act 2000 s 106(7).

8    le the Companies Act 2006 Pt 27 (ss 902-941): see **COMPANIES** vol 15 (2009) PARA 1449 et seq.

9    Financial Services and Markets Act 2000 s 106(3) (amended by SI 2008/948).

## **UPDATE**

### **592 Banking business transfer schemes**

TEXT AND NOTES--See also Financial Services and Markets Act 2000 s 106A (added by Dormant Bank and Building Society Accounts Act 2008 Sch 2 para 2), which makes

provision for reclaim fund business transfer schemes. A scheme is a reclaim fund business transfer scheme if, under the scheme, the whole or part of the business carried on by a reclaim fund is to be transferred to one or more other reclaim funds: Financial Services and Markets Act 2000 s 106A(1). 'Reclaim fund' has the meaning given by Dormant Bank and Building Society Accounts Act 2008 s 5(1) (see PARA 590A): Financial Services and Markets Act 2000 s 106A(2).

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### **593. Application for an order sanctioning a business transfer scheme.**

An application may be made to the High Court for an order sanctioning an insurance business transfer scheme<sup>1</sup> or a banking business transfer scheme<sup>2</sup>. An application may be made by: (1) the authorised person<sup>3</sup> concerned; (2) the transferee; or (3) both<sup>4</sup>. The application must be made: (a) if the authorised person concerned and the transferee are registered or have their head offices in the same jurisdiction, to the court in that jurisdiction; (b) if the authorised person concerned and the transferee are registered or have their head offices in different jurisdictions, to the court in either jurisdiction; (c) if the transferee is not registered in the United Kingdom<sup>5</sup> and does not have his head office there, to the court which has jurisdiction in relation to the authorised person concerned<sup>6</sup>.

The Treasury<sup>7</sup> may by regulations impose requirements on applicants under the provisions described above<sup>8</sup>, and the court may not determine an application<sup>9</sup> if the applicant has failed to comply with prescribed<sup>10</sup> requirements<sup>11</sup>. The regulations may, in particular, include provision: (i) as to the persons to whom, and periods within which, notice of an application must be given; (ii) enabling the court to waive a requirement of the regulations in prescribed circumstances<sup>12</sup>.

On an application<sup>13</sup>, the following are also entitled to be heard: (A) the Financial Services Authority; and (B) any person (including an employee of the authorised person concerned or of the transferee) who alleges that he would be adversely affected by the carrying out of the scheme<sup>14</sup>.

1 As to insurance business transfer schemes see PARA 591. An application under the Financial Services and Markets Act 2000 s 107 in respect of an insurance business transfer scheme must be accompanied by a report on the terms of the scheme (a 'scheme report'): s 109(1). A scheme report may be made only by a person: (1) appearing to the Financial Services Authority to have the skills necessary to enable him to make a proper report; and (2) nominated or approved for the purpose by the Authority: s 109(2). A scheme report must be made in a form approved by the Authority: s 109(3). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 107(1), (4). As to banking business transfer schemes see PARA 592. An objector to such an application, which generally involves a change in the legal rights of members and/or creditors of the applicant, has no right to his costs, the right order being no order as to costs: *Re Alliance Assurance Co Ltd; Re British Engine Insurance Ltd* [2006] EWHC 2947 (Ch), [2006] All ER (D) 196 (Oct).

3 As to authorised persons see PARA 314.

4 Financial Services and Markets Act 2000 s 107(2).

5 As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Financial Services and Markets Act 2000 s 107(3).

7 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Financial Services and Markets Act 2000 s 108(1). As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

An applicant under s 107 (see the text and notes 1-6) for an order sanctioning an insurance business transfer scheme (the 'scheme') must comply with the following requirements (Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 3(1)):

- 560 (1) a notice stating that the application has been made must be: (a) published (i) in the London, Edinburgh and Belfast Gazettes; (ii) in two national newspapers in the United Kingdom; and (iii) where, as regards any policy (other than a contract of reinsurance) included in the proposed transfer, an EEA state other than the United Kingdom is the state of the commitment or the state in which the risk is situated, in two national newspapers in that EEA state; and (iv) where, as regards any policy included in the proposed transfer which evidences a contract of reinsurance, an EEA state other than the United Kingdom is the state in which the establishment of the policyholder to which the policy relates is situated at the date when the contract was entered into, in one business newspaper which is published or circulated in that EEA State; and (b) sent to every policyholder of the parties (reg 3(2) (amended by SI 2007/3255));
- 561 (2) the notices mentioned in head (1) above must be approved by the Authority prior to publication (or, as the case may be, being sent), and must contain the address from which the documents mentioned in head (3) below may be obtained (Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 3(3));
- 562 (3) a copy of the report and a statement setting out the terms of the scheme and containing a summary of the report must be given free of charge to any person who requests them (reg 3(4));
- 563 (4) a copy of the application, the report and the statement mentioned in head (3) above must be given free of charge to the Authority (reg 3(5));
- 564 (5) in the case of any such scheme as is mentioned in the Financial Services and Markets Act 2000 s 105(5) (see PARA 591), copies of the documents listed in the Companies Act 2006 ss 910(1), 911(3), 925(1), 926(3) (formerly the Companies Act 1985 Sch 15B para 6(1)) (see **COMPANIES** vol 15 (2009) PARAS 1459, 1460, 1472, 1473) or in the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Sch 15B para 6(1) (application of provisions about compromises and arrangements to mergers and divisions of public companies) must be given to the Authority by the beginning of the period referred to in the Companies Act 2006 ss 908, 909, 911, 912, 923-927 (formerly the Companies Act 1985 Sch 15B para 3(e)) (see **COMPANIES** vol 15 (2009) PARAS 1457 et seq, 1470-1474) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Sch 15B para 3(e) (see the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 3(6)).

'State of the commitment' and 'state in which the risk is situated' have the meanings given by the Financial Services and Markets Act 2000 Sch 12 para 6 (see PARA 595): Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 1(2). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'reinsurance' see PARA 591 note 8.

An applicant under the Financial Services and Markets Act 2000 s 107 for an order sanctioning a banking business transfer scheme (the 'scheme') must comply with the following requirements (Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 5(1)):

- 565 (A) a notice stating that the application has been made must be published in the London, Edinburgh and Belfast Gazettes, and in two national newspapers in the United Kingdom (reg 5(2));
- 566 (B) the notice mentioned in head (A) above must be approved by the Authority prior to its publication, and must contain the address from which the statement mentioned in head (C) below may be obtained (reg 5(3));
- 567 (C) a statement setting out the terms of the scheme must be given free of charge to any person who requests it (reg 5(4));

568 (D) copies of the application and the statement mentioned in head (iii) above must be given free of charge to the Authority (reg 5(5)).

9 le under the Financial Services and Markets Act 2000 s 107: see the text and notes 1-6.

10 'Prescribed' means prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 417(1). See notes 8, 11.

11 Financial Services and Markets Act 2000 s 108(2). The court may not determine an application under s 107 (see the text and notes 1-6) for an order sanctioning an insurance business transfer scheme: (1) where the applicant has failed to comply with the requirements in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 3(2), (3), (6) (see note 8); and (2) until a period of not less than 21 days has elapsed since the Authority was given the documents mentioned in reg 3(5) (see note 8): reg 4(1). The court may not determine an application under the Financial Services and Markets Act 2000 s 107 for an order sanctioning a banking business transfer scheme: (a) where the applicant has failed to comply with the requirements in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 5(2), (3) (see note 8); and (b) until a period of not less than 21 days has elapsed since the Authority was given the documents mentioned in reg 5(5) (see note 8): reg 6(1).

12 Financial Services and Markets Act 2000 s 108(3). Certain of the requirements as to publication in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, regs 3, 5 (see note 8) may be waived by the court in such circumstances and subject to such conditions as the court considers appropriate: see regs 4(2), 6(2) (reg 4(2) amended by SI 2007/3255). However the requirement in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625, reg 3(2)(a)(iv) (see note 8 head (1)(a)(iv)) must be waived where an applicant demonstrates that he has notified all policyholders of contracts of reinsurance: reg 4(3) (added by SI 2007/3255).

13 le under the Financial Services and Markets Act 2000 s 107: see the text and notes 1-6.

14 Financial Services and Markets Act 2000 s 110.

## UPDATE

### 593 Application for an order sanctioning a business transfer scheme

NOTES 1, 12--On an application for the sanction of an insurance business transfer scheme, it is not necessary for the claim form to be accompanied by a scheme report, so long as the report is available to the court and policyholders well before the court sanctions the scheme; it follows that where the report will be so available, the court has jurisdiction to make a waiver under SI 2001/3625 reg 4(2): *Re Names at Lloyd's represented by Equitas Ltd; Re Speyford Ltd* [2008] EWHC 2960 (Ch), [2009] Bus LR 509, [2008] All ER (D) 54 (Dec).

TEXT AND NOTE 2--An application may also be made to the High Court for an order sanctioning a reclaim fund business transfer scheme (see PARA 592): Financial Services and Markets Act 2000 s 107(1) (amended by Dormant Bank and Building Society Accounts Act 2008 Sch 2 para 3).

NOTES 8, 11--The requirements in SI 2001/3625 regs 5, 6 also apply to a reclaim fund business transfer scheme (see PARA 592): SI 2001/3625 regs 5(1), 6(1) (amended by SI 2009/1390).

NOTE 8--Also, head (1)(c) sent (i) to every reinsurer of the authorised person concerned (within the meaning of the Financial Services and Markets Act 2000 s 105(2)) (see PARA 591) any of whose contracts of reinsurance (in whole or part) are to be transferred by the scheme; or (ii) in a case where such a contract has been placed with or through a person authorised to act on behalf of the reinsurer, then to that person; or (iii) in a case where such a contract has been placed with more than one reinsurer, then to the person or persons authorised to act on behalf of those reinsurers or groups of reinsurers: SI 2001/3625 reg 3(2) (amended by SI 2008/1467).

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#### **594. Conditions to be met before business transfer schemes are sanctioned.**

The following conditions must be satisfied before the court may make an order<sup>1</sup> sanctioning an insurance business transfer scheme<sup>2</sup> or a banking business transfer scheme<sup>3</sup>. The court must be satisfied that: (1) the appropriate certificates have been obtained<sup>4</sup>; (2) the transferee has the authorisation required (if any) to enable the business, or part, which is to be transferred to be carried on in the place to which it is to be transferred (or will have it before the scheme takes effect)<sup>5</sup>. The court must consider that, in all the circumstances of the case, it is appropriate to sanction the scheme<sup>6</sup>.

1    le an order under the Financial Services and Markets Act 2000 s 111.

2    As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

3    Financial Services and Markets Act 2000 s 111(1). As to banking business transfer schemes see PARA 592.

4    Financial Services and Markets Act 2000 s 111(2)(a). Certificates are obtained in accordance with Sch 12 Pts I, II: see PARAS 595-596.

5    Financial Services and Markets Act 2000 s 111(2)(b).

6    Financial Services and Markets Act 2000 s 111(3). A scheme can be sanctioned even though it varies the contractual rights of customers or policyholders: see *Re the Standard Life Assurance Company* [2007] SCLR 581.

#### **UPDATE**

#### **594 Conditions to be met before business transfer schemes are sanctioned**

TEXT AND NOTE 3--The conditions must also be satisfied before the court may make an order sanctioning a reclaim fund business transfer scheme (see PARA 592): Financial Services and Markets Act 2000 s 111(1) (amended by Dormant Bank and Building Society Accounts Act 2008 Sch 2 para 4(2)).

NOTE 4--In the case of a reclaim fund business transfer scheme, the appropriate certificate is obtained in accordance with Financial Services and Markets Act 2000 Sch 12, Pt 2A: s 111(2)(aa) (added by Dormant Bank and Building Society Accounts Act 2008 Sch 2 para 4(3)).

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## 595. Certificates for insurance business transfer schemes.

The appropriate certificates which must be obtained<sup>1</sup> before the court sanctions an insurance business transfer scheme<sup>2</sup> are:

- 1396 (1) a certificate as to margin of solvency<sup>3</sup> (that is to say, the excess of the value of the assets of the transferee over the amount of its liabilities<sup>4</sup>), given by the relevant authority<sup>5</sup>, or in a case where there is no relevant authority, by the Financial Services Authority<sup>6</sup>;
- 1397 (2) if the authorised person concerned is a UK authorised person<sup>7</sup> which has received authorisation<sup>8</sup> from the Authority, and the establishment from which the business is to be transferred under the proposed insurance business transfer scheme is in an EEA state other than the United Kingdom<sup>9</sup>, a certificate as to consent<sup>10</sup>;
- 1398 (3) if (a) the authorised person concerned has received authorisation<sup>11</sup> from the Authority; (b) the proposed transfer relates to business which consists of the effecting or carrying out of contracts of long-term insurance<sup>12</sup>; and (c) as regards any policy<sup>13</sup> which is included in the proposed transfer and which evidences a contract of insurance<sup>14</sup> (other than reinsurance<sup>15</sup>), an EEA state other than the United Kingdom is the state of the commitment<sup>16</sup>, a certificate as to long-term business<sup>17</sup>;
- 1399 (4) if (a) the authorised person concerned has received authorisation<sup>18</sup> from the Authority; (b) the business to which the proposed insurance business transfer scheme relates is business which consists of the effecting or carrying out of contracts of general insurance<sup>19</sup>; and (c) as regards any policy which is included in the proposed transfer and which evidences a contract of insurance (other than reinsurance), the risk is situated in an EEA state<sup>20</sup> other than the United Kingdom, a certificate as to general business<sup>21</sup>;
- 1400 (5) if (a) the authorised person concerned has received authorisation<sup>22</sup> from the Authority; and (b) the proposed transfer is to a branch or agency, in an EEA state other than the United Kingdom, authorised under the same provision<sup>23</sup>, certificates as to legality and as to consent<sup>24</sup>.

1    Ie for the purposes of the Financial Services and Markets Act 2000 s 111(2): see PARA 594.

2    As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

3    Financial Services and Markets Act 2000 Sch 12 paras 1(1)(a), 2.

4    Financial Services and Markets Act 2000 Sch 12 para 2(5).

5    A certificate given under the Financial Services and Markets Act 2000 Sch 12 para 1(a) by the relevant authority is one certifying that, taking the proposed transfer into account: (1) the transferee possesses, or will possess before the scheme takes effect, the necessary margin of solvency; or (2) there is no necessary margin of solvency applicable to the transferee: Sch 12 para 2(2). 'Relevant authority' means: (a) if the transferee is an EEA firm falling within Sch 3 para 5(d) or (da) (see PARA 315 note 1), its home state regulator; (b) if the transferee is a non-EEA branch, the competent authorities of the EEA state in which the transferee is situated or, where appropriate, the competent authorities of an EEA state which supervise the state of solvency of the entire business of the transferee's agencies and branches within the EEA in accordance with the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 26 or the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 56; (c) if the transferee is a Swiss general insurer, the authority responsible in Switzerland for supervising persons who effect or carry out contracts of insurance; (d) if the transferee is an authorised person not falling within head

(a), (b) or (c) above, the Financial Services Authority: Sch 12 para 2(6) (amended by SI 2007/3253). As to the meanings of 'EEA firm', 'EEA state' and 'home state regulator' see PARA 315 note 1. As to authorised persons see PARA 314. As to the Financial Services Authority see PARAS 4, 6 et seq. 'Competent authorities' has the same meaning as in the Insurance Directives: Financial Services and Markets Act 2000 Sch 12 para 2(7A) (added by SI 2007/3253). As to the meaning of 'Insurance Directives' see PARA 86 note 6. 'Non-EEA branch means' a branch or agency which has received authorisation under the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 23 or the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 51: Financial Services and Markets Act 2000 Sch 12 para 2(9) (added by SI 2007/3253). 'Swiss general insurer' means a body whose head office is in Switzerland, which has permission to carry on regulated activities consisting of the effecting and carrying out of contracts of general insurance, and whose permission is not restricted to the effecting or carrying out of contracts of reinsurance: Financial Services and Markets Act 2000 Sch 12 para 2(8). As to regulated activities see PARA 84 et seq. For the purposes of Sch 12 para 2(6), any reference to a transferee of a particular description includes a reference to a transferee who will be of that description if the proposed scheme takes effect: Sch 12 para 2(7). 'Necessary margin of solvency' means the margin of solvency required in relation to the transferee, taking the proposed transfer into account, under the law which it is the responsibility of the relevant authority to apply: Sch 12 para 2(4).

6 Financial Services and Markets Act 2000 Sch 12 para 2(1). A certificate given by the Financial Services Authority is one certifying that the Authority has received from the authority which it considers to be the authority responsible for supervising persons who effect or carry out contracts of insurance in the place to which the business is to be transferred that, taking the proposed transfer into account: (1) the transferee possesses or will possess before the scheme takes effect the margin of solvency required under the law applicable in that place; or (2) there is no such margin of solvency applicable to the transferee: Sch 12 para 2(3).

7 As to the meaning of 'UK authorised person' see PARA 358 note 3.

8 Ie under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 4 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 6.

9 As to the meaning of 'United Kingdom' see PARA 2 note 3.

10 Financial Services and Markets Act 2000 Sch 12 paras 1(1)(b), (2), 3 (Sch 12 para 1(2) amended by SI 2004/3379). A certificate as to consent is one given by the Authority and certifying that the host state regulator has been notified of the proposed scheme and that: (1) that regulator has responded to the notification; or (2) it has not responded but the period of three months beginning with the notification has elapsed: Financial Services and Markets Act 2000 Sch 12 para 3. As to the meaning of 'host state regulator' see PARA 323 note 10.

11 Ie under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 4 or art 51.

12 For the purposes of the Financial Services and Markets Act 2000, references to 'contracts of long-term insurance' are to be read with s 22 and Sch 2 (see PARA 84 et seq): s 424(1)(c).

13 For the purposes of the Financial Services and Markets Act 2000, 'policy', in relation to a contract of insurance, has such meaning as the Treasury may by order specify: s 424(2). The Treasury has ordered that, for the purposes of the Financial Services and Markets Act 2000 s 424(2), 'policy' means, as the context requires, a contract of insurance, including one under which an existing liability has already accrued, or any instrument evidencing such a contract: Financial Services and Markets Act 2000 (Meaning of 'Policy' and 'Policyholder') Order 2001, SI 2001/2362, art 2. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

14 As to the meaning of 'contracts of insurance' see PARA 351 note 13.

15 As to references to 'contracts of reinsurance' see PARA 591 note 8.

16 'State of the commitment', in relation to a commitment entered into at any date, means: (1) if the policyholder is an individual, the state in which he had his habitual residence at that date; (2) if the policyholder is not an individual, the state in which the establishment of the policyholder to which the commitment relates was situated at that date: Financial Services and Markets Act 2000 Sch 12 para 6(1). As to the meaning of 'policyholder' see PARA 591 note 15. 'Commitment' means a commitment represented by contracts of insurance of a prescribed class: Sch 12 para 6(2). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). See the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, SI 2001/3625; and PARA 593. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1.



17 Financial Services and Markets Act 2000 Sch 12 paras 1(1)(c), (3), 4 (Sch 12 para 1(3) amended by SI 2004/3379; SI 2007/3253). A certificate as to long-term business is one given by the Authority and certifying that the authority responsible for supervising persons who effect or carry out contracts of insurance in the state of the commitment has been notified of the proposed scheme and that: (1) that authority has consented to the proposed scheme; or (2) the period of three months beginning with the notification has elapsed and that authority has not refused its consent: Financial Services and Markets Act 2000 Sch 12 para 4.

18 Ie under the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 6 or art 23.

19 For the purposes of the Financial Services and Markets Act 2000, references to 'contracts of general insurance' are to be read with s 22 and Sch 2 (see PARA 84 et seq): s 424(1)(d).

20 References to the EEA state in which a risk is situated are: (1) if the insurance relates to a building or to a building and its contents (so far as the contents are covered by the same policy), to the EEA state in which the building is situated; (2) if the insurance relates to a vehicle of any type, to the EEA state of registration; (3) in the case of policies of a duration of four months or less covering travel or holiday risks (whatever the class concerned), to the EEA state in which the policyholder took out the policy; (4) in a case not covered by heads (1)-(3) above: (a) if the policyholder is an individual, to the EEA state in which he has his habitual residence at the date when the contract is entered into; and (b) otherwise, to the EEA state in which the establishment of the policyholder to which the policy relates is situated at that date: Financial Services and Markets Act 2000 Sch 12 para 6(3). If the insurance relates to a vehicle dispatched from one EEA state to another, in respect of the period of 30 days beginning with the day on which the purchaser accepts delivery a reference to the EEA state in which a risk is situated is a reference to the state of destination (and not, as provided by head (2) above, to the state of registration): Sch 12 para 6(4) (added by SI 2007/2403).

21 Financial Services and Markets Act 2000 Sch 12 paras 1(1)(d), (4), 5 (Sch 12 para 1(4) amended by SI 2007/3253). A certificate as to general business is one given by the Authority and certifying that the authority responsible for supervising persons who effect or carry out contracts of insurance in the EEA state in which the risk is situated has been notified of the proposed scheme and that: (1) that authority has consented to the proposed scheme; or (2) the period of three months beginning with the notification has elapsed and that authority has not refused its consent: Financial Services and Markets Act 2000 Sch 12 para 5.

22 Ie under the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 23 or the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 51.

23 Ie under the same article of the relevant directive: see note 22.

24 Financial Services and Markets Act 2000 Sch 12 paras 1(1)(e), (5), 5A (added by SI 2007/3253). The relevant certificates are to be given, in the case of the certificate as to consent, by the Authority; and, in the case of the certificate as to legality, by the relevant authority: Financial Services and Markets Act 2000 Sch 12 para 5A(1) (as so added). A certificate as to consent is one certifying that the relevant authority has been notified of the proposed scheme and that (1) the relevant authority has consented to the proposed scheme; or (2) the period of three months beginning with the notification has elapsed and that relevant authority has not refused its consent: Sch 12 para 5A(2) (as so added). A certificate as to legality is one certifying that the law of the EEA state in which the transferee is set up permits such a transfer: Sch 12 para 5A(3) (as so added). For these purposes, 'relevant authority' means the competent authorities (within the meaning of the Insurance Directives) of the EEA state in which the transferee is set up: Sch 12 para 5A(4) (as so added).

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## **596. Certificates for banking business transfer schemes.**

The appropriate certificates which must be obtained<sup>1</sup> before the court sanctions a banking business transfer scheme<sup>2</sup> are: (1) a certificate as to financial resources<sup>3</sup>; and (2) if the authorised person<sup>4</sup> concerned or the transferee is an EEA firm<sup>5</sup>, a certificate as to consent of the home state regulator<sup>6</sup>.

- 1 le for the purposes of the Financial Services and Markets Act 2000 s 111(2): see PARA 594.
- 2 As to banking business transfer schemes see PARA 592.
- 3 Financial Services and Markets Act 2000 Sch 12 paras 7(1)(a), 8. A certificate as to financial resources is one given by the relevant authority and certifying that, taking the proposed transfer into account, the transferee possesses, or will possess before the scheme takes effect, adequate financial resources: Sch 12 para 8(1). 'Relevant authority' means: (1) if the transferee is a person with a Part IV permission (see PARA 348) or with permission under Sch 4 (see PARAS 314, 319), the Financial Services Authority; (2) if the transferee is an EEA firm falling within Sch 3 para 5(b) (see PARA 315 note 1), its home state regulator; (3) if the transferee does not fall within head (1) or head (2) above, the authority responsible for the supervision of the transferee's business in the place in which the transferee has its head office: Sch 12 para 8(2). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the meaning of 'EEA firm' see PARA 315 note 1. As to the meaning of 'home state regulator' see PARA 315 note 1. For the purposes of Sch 12 para 8(2), any reference to a transferee of a particular description of person includes a reference to a transferee who will be of that description if the proposed banking business transfer scheme takes effect: Sch 12 para 8(3).
- 4 As to authorised persons see PARA 314.
- 5 le falling within the Financial Services and Markets Act 2000 Sch 3 para 5(b): see PARA 315 note 1.
- 6 Financial Services and Markets Act 2000 Sch 12 paras 7(1), (2), 9. A certificate as to consent of the home state regulator is one given by the Authority and certifying that the home state regulator of the authorised person concerned or of the transferee has been notified of the proposed scheme and that: (1) the home state regulator has responded to the notification; or (2) the period of three months beginning with the notification has elapsed: Sch 12 para 9.

## UPDATE

### 596 Certificates for banking business transfer schemes

TEXT AND NOTES--The appropriate certificate in relation to a reclaim fund business transfer scheme (see PARA 592) is a certificate given by the Financial Services Authority certifying that, taking the proposed transfer into account, the transferee possesses, or will possess before the scheme takes effect, adequate financial resources: Financial Services and Markets Act 2000 Sch 12 para 9A (added by Dormant Bank and Building Society Accounts Act 2008 Sch 2 para 5).

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### 597. Effect of order sanctioning business transfer scheme.

If the court makes an order<sup>1</sup>, it may by that or any subsequent order make such provision (if any) as it thinks fit<sup>2</sup>:

- 1401 (1) for the transfer to the transferee of the whole or any part of the undertaking concerned and of any property<sup>3</sup> or liabilities<sup>4</sup> of the authorised person<sup>5</sup> concerned<sup>6</sup>;
- 1402 (2) for the allotment or appropriation by the transferee of any shares<sup>7</sup>, debentures<sup>8</sup>, policies or other similar interests in the transferee which under the scheme are to be allotted or appropriated to or for any other person<sup>9</sup>;

- 1403 (3) for the continuation by (or against) the transferee of any pending legal proceedings by (or against) the authorised person concerned<sup>10</sup>;
- 1404 (4) with respect to such incidental, consequential and supplementary matters as are, in its opinion, necessary to secure that the scheme is fully and effectively carried out<sup>11</sup>.

If an order<sup>12</sup> makes provision for the transfer of property or liabilities, the property is transferred to and vests in, and the liabilities are transferred to and become liabilities of, the transferee as a result of the order<sup>13</sup>. However, if any property or liability included in the order is governed by the law of any country or territory outside the United Kingdom<sup>14</sup>, the order may require the authorised person concerned, if the transferee so requires, to take all necessary steps for securing that the transfer to the transferee of the property or liability is fully effective under the law of that country or territory<sup>15</sup>. Property transferred<sup>16</sup> may, if the court so directs, vest in the transferee free from any charge<sup>17</sup> which is (as a result of the scheme) to cease to have effect<sup>18</sup>. An order<sup>19</sup> which makes provision for the transfer of property is to be treated as an instrument of transfer<sup>20</sup>.

If the court makes an order<sup>21</sup> in relation to an insurance business transfer scheme<sup>22</sup>, it may by that or any subsequent order make such provision (if any) as it thinks fit: (a) for dealing with the interests of any person who, within such time and in such manner as the court may direct, objects to the scheme; (b) for the dissolution, without winding up, of the authorised person concerned; (c) for the reduction, on such terms and subject to such conditions (if any) as it thinks fit, of the benefits payable under any description of policy<sup>23</sup>, or policies generally, entered into by the authorised person concerned and transferred as a result of the scheme<sup>24</sup>. If, in the case of an insurance business transfer scheme, the authorised person concerned is not an EEA firm<sup>25</sup>, it is, for certain purposes<sup>26</sup>, immaterial that the law applicable to any of the contracts of insurance<sup>27</sup> included in the transfer is the law of an EEA state<sup>28</sup> other than the United Kingdom<sup>29</sup>.

The transferee must, if an insurance or banking business transfer scheme<sup>30</sup> is sanctioned by the court, deposit two office copies of the order with the Financial Services Authority<sup>31</sup> within ten days of the making of the order<sup>32</sup>.

1    Ie under the Financial Services and Markets Act 2000 s 111(1): see PARA 594.

2    Financial Services and Markets Act 2000 s 112(1). See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

3    'Property' includes property, rights and powers of any description: Financial Services and Markets Act 2000 s 112(12). It appears that the benefit of contracts may be transferred by the order, notwithstanding contractual restrictions on assignment: see *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538; [2006] 1 WLR 1704, [2006] 2 BCLC 599 (a decision on 'transfer of engagements' under the Industrial and Provident Societies Act 1965 s 51(1): see PARAS 2560, 2562).

4    'Liabilities' includes duties: Financial Services and Markets Act 2000 s 112(13).

5    As to authorised persons see PARA 314.

6    Financial Services and Markets Act 2000 s 112(1)(a). An order under s 112(1)(a) may: (1) transfer property or liabilities whether or not the authorised person concerned otherwise has the capacity to effect the transfer in question; (2) make provision in relation to property which was held by the authorised person concerned as trustee; (3) make provision as to future or contingent rights or liabilities of the authorised person concerned, including provision as to the construction of instruments (including wills) under which such rights or liabilities may arise; (4) make provision as to the consequences of the transfer in relation to any occupational pension scheme (within the meaning of the Finance Act 2004 s 150(5) (see **SOCIAL SECURITY AND PENSIONS**)) operated by or on behalf of the authorised person concerned: Financial Services and Markets Act 2000 s 112(2) (amended by SI 2006/745). See *WASA International (UK) Insurance Co v WASA International Insurance Co Ltd (a Swedish Company)* [2002] EWHC 2698 (Ch), [2003] 1 All ER (Comm) 696 (where it was held that rights could be

transferred by virtue of the Financial Services and Markets Act 2000 s 112(1)(a) whether or not the company was capable of effecting assignment of those rights at common law).

7 'Shares' and 'debentures' have the same meaning as in the Companies Acts (see the Companies Act 2006 ss 540, 738; and **COMPANIES** vol 15 (2009) PARAS 1042, 1299); Financial Services and Markets Act 2000 s 112(14) (amended by SI 2008/948).

8 See note 7.

9 Financial Services and Markets Act 2000 s 112(1)(b).

10 Financial Services and Markets Act 2000 s 112(1)(c).

11 Financial Services and Markets Act 2000 s 112(1)(d).

12 Ie an order under the Financial Services and Markets Act 2000 s 112(1): see the text and notes 1-11.

13 Financial Services and Markets Act 2000 s 112(3).

14 As to the meaning of 'United Kingdom' see PARA 2 note 3.

15 Financial Services and Markets Act 2000 s 112(4).

16 Ie as the result of an order under the Financial Services and Markets Act 2000 s 112(1): see the text and notes 1-11.

17 'Charge' includes a mortgage: Financial Services and Markets Act 2000 s 112(15).

18 Financial Services and Markets Act 2000 s 112(5).

19 Ie under the Financial Services and Markets Act 2000 s 112(1): see the text and notes 1-11.

20 Financial Services and Markets Act 2000 s 112(6) (amended by SI 2008/948). The order is to be treated as an instrument of transfer for the purposes of the Companies Act 2006 s 770(1) (registration of transfer of shares or debentures) (see **COMPANIES** vol 15 (2009) PARAS 399, 414); Financial Services and Markets Act 2000 s 112(6) (as so amended).

21 Ie under the Financial Services and Markets Act 2000 s 111(1): see PARA 594.

22 As to insurance business transfer schemes see PARA 591.

23 As to the meaning of 'policy' see PARA 595 note 13.

24 Financial Services and Markets Act 2000 s 112(8).

25 As to the meaning of 'EEA firm' see PARA 315 note 1.

26 Ie for the purposes of the Financial Services and Markets Act 2000 s 112(1)(a), (c) or (d) (see heads (1), (3), (4) in the text; and notes 6, 10-11) or s 112(2), (3) or (4) (see the text and notes 6, 12-15).

27 As to the meaning of 'contracts of insurance' see PARA 351 note 13.

28 As to the meaning of 'EEA state' see PARA 315 note 1.

29 Financial Services and Markets Act 2000 s 112(9).

30 As to banking business transfer schemes see PARA 592.

31 As to the Financial Services Authority see PARAS 4, 6 et seq.

32 Financial Services and Markets Act 2000 s 112(10). The Authority may extend that period: s 112(11). For the purposes of any provision of the Financial Services and Markets Act 2000 (other than a provision of Pt VI (ss 72-103) (see PARA 385 et seq)) authorising or requiring a person to do anything within a specified number of days, no account is to be taken of any day which is a public holiday in any part of the United Kingdom: s 417(3) (amended by SI 2005/1433). As to public holidays see **TIME** vol 97 (2010) PARA 320 et seq.

## UPDATE

## **597 Effect of order sanctioning business transfer scheme**

NOTE 6--The power under head (1) is to be taken to include the power to transfer property or liabilities which would not otherwise be capable of being transferred or assigned: see Financial Services and Markets Act 2000 s 112(2A)-(2C) (added by SI 2008/1468). Certain rights arising as a result of something done or likely to be done by or under the Financial Services and Markets Act 2000 s 112 Pt 7 (ss 104-117) will only be enforceable after the order under s 112(1) has been made and the court has made provision to that effect in that order: s 112A (added by SI 2008/1468).

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## **598. Appointment of an actuary in relation to the reduction of benefits.**

If an order<sup>1</sup> has been made sanctioning an insurance business transfer scheme<sup>2</sup> or a banking business transfer scheme<sup>3</sup>, the court making the order may, on the application of the Financial Services Authority<sup>4</sup>, appoint an independent actuary: (1) to investigate the business transferred under the scheme; and (2) to report to the Authority on any reduction in the benefits payable under policies entered into by the authorised person<sup>5</sup> concerned that, in the opinion of the actuary, ought to be made<sup>6</sup>.

1    le under the Financial Services and Markets Act 2000 s 111(1): see PARA 594.

2    As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

3    As to banking business transfer schemes see PARA 592.

4    As to the Financial Services Authority see PARAS 4, 6 et seq.

5    As to authorised persons see PARA 314.

6    Financial Services and Markets Act 2000 s 113(1), (2).

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## **599. Rights of certain policyholders in insurance business transfer scheme.**

The provisions described below<sup>1</sup> apply in relation to an insurance business transfer scheme<sup>2</sup> if: (1) the authorised person<sup>3</sup> concerned is an authorised person other than an EEA firm<sup>4</sup> qualifying for authorisation<sup>5</sup>; (2) the court has made an order<sup>6</sup> sanctioning the scheme; and (3) an EEA state<sup>7</sup> other than the United Kingdom<sup>8</sup> is, as regards any policy<sup>9</sup> included in the transfer which

evidences a contract of insurance (other than a contract of reinsurance)<sup>10</sup>, the state of the commitment<sup>11</sup> or the EEA state in which the risk is situated<sup>12</sup> (the 'EEA state concerned')<sup>13</sup>.

The court must direct that notice of the making of the order, or the execution of any instrument, giving effect to the transfer must be published by the transferee in the EEA state concerned<sup>14</sup>. Such a notice must specify such period as the court may direct as the period during which the policyholder<sup>15</sup> may exercise any right which he has to cancel the policy<sup>16</sup>. The order or instrument<sup>17</sup> does not bind the policyholder if: (a) the notice required is not published; or (b) the policyholder cancels the policy during the period specified in the notice<sup>18</sup>. The law of the EEA state concerned governs: (i) whether the policyholder has a right to cancel the policy; and (ii) the conditions, if any, subject to which any such right may be exercised<sup>19</sup>.

1    Ie the Financial Services and Markets Act 2000 s 114.

2    As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

3    As to authorised persons see PARA 314.

4    As to the meaning of 'EEA firm' see PARA 315 note 1.

5    Ie under the Financial Services and Markets Act 2000 Sch 3: see PARA 315.

6    Ie under the Financial Services and Markets Act 2000 s 111: see PARA 594.

7    As to the meaning of 'EEA state' see PARA 315 note 1.

8    As to the meaning of 'United Kingdom' see PARA 2 note 3.

9    As to the meaning of 'policy' see PARA 595 note 13.

10   As to the meaning of 'contracts of insurance' see PARA 351 note 13. As to references to 'contracts of reinsurance' see PARA 591 note 8. As to notice of transfer of reinsurance contracts see PARA 600.

11   As to the meanings of 'state of the commitment' and 'commitment' see PARA 595 note 16; definitions applied by the Financial Services and Markets Act 2000 s 114(6).

12   As to references to the EEA state in which the risk is situated see PARA 595 note 20; definition applied by the Financial Services and Markets Act 2000 s 114(6).

13   Financial Services and Markets Act 2000 s 114(1) (amended by SI 2007/3253).

14   Financial Services and Markets Act 2000 s 114(2).

15   As to the meaning of 'policyholder' see PARA 591 note 15.

16   Financial Services and Markets Act 2000 s 114(3).

17   Ie the order or instrument mentioned in the Financial Services and Markets Act 2000 s 114(2): see the text to note 14.

18   Financial Services and Markets Act 2000 s 114(4).

19   Financial Services and Markets Act 2000 s 114(5).

## 600. Notice of transfer of reinsurance contracts.

The provisions described below<sup>1</sup> apply in relation to an insurance business transfer scheme<sup>2</sup> if: (1) the authorised person<sup>3</sup> concerned is an authorised person other than an EEA firm<sup>4</sup> qualifying for authorisation<sup>5</sup>; (2) the court has made an order<sup>6</sup> in relation to the scheme; and (3) an EEA state<sup>7</sup> other than the United Kingdom<sup>8</sup> is, as regards any policy<sup>9</sup> included in the transfer which evidences a contract of reinsurance<sup>10</sup>, the state in which the establishment of the policyholder to which the policy relates is situated at the date when the contract was entered into (the 'EEA state concerned')<sup>11</sup>.

The court may direct that notice of the making of the order, or the execution of any instrument, giving effect to the transfer must be published by the transferee in the EEA state concerned<sup>12</sup>.

1    Ie the Financial Services and Markets Act 2000 s 114A.

2    As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP). As to the Handbook generally see PARA 22.

3    As to authorised persons see PARA 314.

4    As to the meaning of 'EEA firm' see PARA 315 note 1.

5    Ie under the Financial Services and Markets Act 2000 Sch 3: see PARA 315.

6    Ie under the Financial Services and Markets Act 2000 s 111: see PARA 594.

7    As to the meaning of 'EEA state' see PARA 315 note 1.

8    As to the meaning of 'United Kingdom' see PARA 2 note 3.

9    As to the meaning of 'policy' see PARA 595 note 13.

10   As to references to 'contracts of reinsurance' see PARA 591 note 8.

11   Financial Services and Markets Act 2000 s 114A(1) (s 114A added by SI 2007/3253).

12   Financial Services and Markets Act 2000 s 114A(2) (as added: see note 11).

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## 601. Insurance business transfers outside the United Kingdom.

Provision is made with respect to certificates which the Financial Services Authority<sup>1</sup> may issue in relation to insurance business transfers<sup>2</sup> taking place outside the United Kingdom<sup>3</sup>.

The provisions described below<sup>4</sup> apply to a proposal to execute under provisions corresponding to Part VII of the Financial Services and Markets Act 2000<sup>5</sup> in a country or territory other than the United Kingdom an instrument transferring all the rights and obligations of the transferor under general or long-term insurance policies<sup>6</sup>, or under such descriptions of such policies as may be specified in the instrument, to the transferee if any of the following conditions<sup>7</sup> is met in relation to it<sup>8</sup>. The conditions are:

- 1405 (1) the transferor is an EEA firm<sup>9</sup> and the transferee is an authorised person<sup>10</sup> whose margin of solvency<sup>11</sup> is supervised by the Authority<sup>12</sup>;
- 1406 (2) the transferor is a company authorised in an EEA state<sup>13</sup> other than the United Kingdom<sup>14</sup> and the transferee is a UK authorised person<sup>15</sup> which has received authorisation<sup>16</sup>;
- 1407 (3) the transferor is a Swiss general insurer<sup>17</sup> and the transferee is a UK authorised person which has received authorisation<sup>18</sup>.

In relation to such a proposed transfer, the Authority may, if it is satisfied that the transferee possesses the necessary margin of solvency<sup>19</sup>, issue a certificate to that effect<sup>20</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 As to insurance business transfer schemes see PARA 591. See also the Financial Services Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Ch 18. As to the Handbook generally see PARA 22.

3 See the Financial Services and Markets Act 2000 s 115, Sch 12 Pt III. As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Ie the Financial Services and Markets Act 2000 Sch 12 para 10.

5 Ie the Financial Services and Markets Act 2000 ss 104-117 (control of business transfers).

6 'General policy' means a policy evidencing a contract which, if it had been effected by the transferee, would have constituted the carrying on of a regulated activity consisting of the effecting of contracts of general insurance: Financial Services and Markets Act 2000 Sch 12 para 10(8). As to the meaning of 'policy' see PARA 595 note 13. As to regulated activities see PARA 84 et seq. As to the meaning of 'contracts of general insurance' see PARA 595 note 19. 'Long-term policy' means a policy evidencing a contract which, if it had been effected by the transferee, would have constituted the carrying on of a regulated activity consisting of the effecting of contracts of long-term insurance: Sch 12 para 10(9). As to the meaning of 'contracts of long-term insurance' see PARA 595 note 12.

7 Ie the conditions set out in the Financial Services and Markets Act 2000 Sch 12 para 10(2), (3) or (4): see the text and notes 9-18.

8 Financial Services and Markets Act 2000 Sch 12 para 10(1).

9 Ie falling within the Financial Services and Markets Act 2000 Sch 3 para 5(d) or Sch 3 para 5(da): see PARA 315 note 1. As to the meaning of 'EEA firm' see PARA 315 note 1.

10 As to authorised persons see PARA 314.

11 As to the margin of solvency see PARA 595.

12 Financial Services and Markets Act 2000 Sch 12 para 10(2) (amended by SI 2007/3253).

13 As to the meaning of 'EEA state' see PARA 315 note 1.

14 Ie under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 51 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 23: see PARA 86 note 6.

15 As to the meaning of 'UK authorised person' see PARA 358 note 3.

16 Financial Services and Markets Act 2000 Sch 12 para 10(3) (amended by SI 2004/3379). Authorisation is given under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 4 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 6: see PARA 86 note 6.

17 As to the meaning of 'Swiss general insurer' see PARA 595 note 5; definition applied by the Financial Services and Markets Act 2000 Sch 12 para 10(7).



18 Financial Services and Markets Act 2000 Sch 12 para 10(4) (amended by SI 2004/3379). Authorisation is given under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 4 or the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 6: see PARA 86 note 6.

19 'Necessary margin of solvency' means the margin of solvency which the transferee, taking the proposed transfer into account, is required by the Authority to maintain: Financial Services and Markets Act 2000 Sch 12 para 10(6).

20 Financial Services and Markets Act 2000 Sch 12 para 10(5).

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## **602. Effect of insurance business transfers authorised in other EEA states.**

The provisions described below<sup>1</sup> apply if, as a result of an authorised transfer<sup>2</sup>, an EEA firm<sup>3</sup> transfers to another body all its rights and obligations under any UK policies<sup>4</sup> and if, as a result of an authorised transfer<sup>5</sup>, a company authorised in an EEA state other than the United Kingdom<sup>6</sup> transfers to another body all its rights and obligations under any UK policies<sup>7</sup>.

If appropriate notice<sup>8</sup> of the execution of an instrument giving effect to the transfer is published, the instrument has the effect in law: (1) of transferring to the transferee all the transferor's rights and obligations under the UK policies to which the instrument applies; and (2) if the instrument so provides, of securing the continuation by or against the transferee of any legal proceedings by or against the transferor which relate to those rights and obligations<sup>9</sup>.

1 ie the Financial Services and Markets Act 2000 s 116.

2 For these purposes, 'authorised transfer' means a transfer authorised in the home state of the EEA firm in accordance with: (1) the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance) art 14; (2) the Third Non-Life Insurance Directive (ie EC Council Directive 92/49 (OJ L228, 11.8.92, p 1) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, and amending EC Directives 73/239 and 88/357) art 12; or (3) the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83) art 18: Financial Services and Markets Act 2000 s 116(5)(a) (amended by SI 2004/3379; SI 2007/3253). As to the meaning of 'EEA firm' see PARA 315 note 1.

3 ie falling within the Financial Services and Markets Act 2000 Sch 3 para 5(d) or Sch 3 para 5(da): see PARA 315 note 1.

4 Financial Services and Markets Act 2000 s 116(1) (amended by SI 2007/3253). 'UK policy' means (1) in the case of an authorised transfer within the meaning of the Financial Services and Markets Act 2000 s 116(5)(a)(i) or (ii) (see note 2 heads (1), (2)) or s 116(5)(b)(i) or (ii) (see note 5 heads (1), (2)), a policy evidencing a contract of insurance (other than a contract of reinsurance) for which the applicable law is the law of a part of the United Kingdom; (2) in the case of an authorised transfer within the meaning of s 116(5)(a)(iii) (see note 2 head (3)) or s 116(5)(b)(iii) (see note 5 head (3)), a policy evidencing a contract of reinsurance to which the applicable law is the law of a part of the United Kingdom: s 116(6) (substituted by SI 2007/3253). As to the meaning of 'policy' see PARA 595 note 13. As to the meaning of 'contracts of insurance' see PARA 351 note 13. As to the meaning of 'contract of reinsurance' see PARA 591 note 8. As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 For these purposes, 'authorised transfer' means a transfer authorised in an EEA state other than the United Kingdom in accordance with: (1) the Life Assurance Consolidation Directive (ie European Parliament and EC

Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 53; (2) the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 28a; or (3) the provisions in the law of that EEA state which provide for the authorisation of transfers of all or part of a portfolio of contracts of an undertaking authorised to carry out reinsurance activities in its territory (as mentioned in the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1)) art 49): Financial Services and Markets Act 2000 s 116(5)(b) (amended by SI 2004/3379; SI 2007/3253). As to the meaning of 'EEA state' see PARA 315 note 1.

6    le (1) an undertaking authorised in an EEA state other than the United Kingdom under the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1)) art 51; (2) an undertaking authorised in an EEA state other than the United Kingdom under the First Non-Life Insurance Directive (ie EC Council Directive 73/239 (OJ L228, 16.8.73, p 3)) art 23; (3) an undertaking, whose head office is not within the EEA, authorised under the law of an EEA state other than the United Kingdom to carry out reinsurance activities in its territory (as mentioned in the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1)) art 49).

7    Financial Services and Markets Act 2000 s 116(2) (substituted by SI 2007/3253).

8    'Appropriate notice' means: (1) if the UK policy evidences a contract of insurance in relation to which an EEA state other than the United Kingdom is the state of the commitment, notice given in accordance with the law of that state; (2) if the UK policy evidences a contract of insurance where the risk is situated in an EEA state other than the United Kingdom, notice given in accordance with the law of that EEA state; (3) in any other case, notice given in accordance with the applicable law: Financial Services and Markets Act 2000 s 116(7). As to the meanings of 'state of the commitment' and 'commitment', and as to references to the EEA state in which the risk is situated, see PARA 595 notes 17, 21; definitions applied by s 116(8).

9    Financial Services and Markets Act 2000 s 116(3). No agreement or consent is required before s 116(3) has the effects mentioned: s 116(4).

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## **(ii) Collective Investment Schemes**

### **A. INTRODUCTION**

#### **603. Definitions.**

'Collective investment scheme' means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income<sup>1</sup>. The arrangements must be such that the persons who are to participate ('participants') do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions<sup>2</sup>. The arrangements must also have either or both of the following characteristics: (1) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; (2) the property is managed as a whole by or on behalf of the operator of the scheme<sup>3</sup>. If arrangements provide for such pooling as is mentioned in head (1) above in relation to separate parts of the property, the arrangements are not to be regarded as constituting a single collective investment scheme unless the participants are entitled to exchange rights in one part for rights in another<sup>4</sup>. The Treasury may by order provide that arrangements do not amount to a collective investment scheme in specified circumstances or if the arrangements fall within a specified category of arrangement<sup>5</sup>.

'Open-ended investment company' means a collective investment scheme which satisfies both the property condition and the investment condition<sup>6</sup>. The property condition is that the property belongs beneficially to, and is managed by or on behalf of, a body corporate<sup>7</sup> ('BC') having as its purpose the investment of its funds with the aim of spreading investment risk and giving its members the benefit of the results of the management of those funds by or on behalf of that body<sup>8</sup>. The investment condition is that, in relation to BC, a reasonable investor would, if he were to participate in the scheme: (a) expect that he would be able to realise, within a period appearing to him to be reasonable, his investment in the scheme (represented, at any given time, by the value of shares in, or securities of, BC held by him as a participant in the scheme); and (b) be satisfied that his investment would be realised on a basis calculated wholly or mainly by reference to the value of property in respect of which the scheme makes arrangements<sup>9</sup>. The Treasury may by order amend the definition of an open-ended investment company<sup>10</sup>.

'Authorised open-ended investment company' means a body incorporated by virtue of regulations<sup>11</sup> in respect of which an authorisation order is in force under any provision made in such regulations<sup>12</sup>.

'Unit trust scheme' means a collective investment scheme under which the property is held on trust for the participants<sup>13</sup>. 'Units' means the rights or interests (however described) of the participants in a collective investment scheme<sup>14</sup>. 'Authorised unit trust scheme' means a unit trust scheme which is authorised for the purposes of the Financial Services and Markets Act 2000 by an authorisation order<sup>15</sup>.

'Recognised scheme' means a scheme recognised as a scheme constituted in another EEA state<sup>16</sup>, a scheme authorised in a designated country or territory<sup>17</sup> or an individually recognised overseas scheme<sup>18</sup>.

1 Financial Services and Markets Act 2000 ss 235(1), 417(1). See also the Financial Services Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Handbook generally see PARA 22.

A membership fee paid to a firm running a betting scheme can be 'property of any description' for these purposes even though those amounts were not in fact invested: see *Financial Services Authority v Fradley* [2005] EWCA Civ 1183, [2006] 2 BCLC 616.

2 Financial Services and Markets Act 2000 s 235(2). See *Financial Services Authority v Fradley* [2005] EWCA Civ 1183, [2006] 2 BCLC 616. For cases involving joint investments in real estate which were held to be collective investment schemes see *Russell-Cooke Trust Co v Elliott* [2001] All ER (D) 197 (Jul); *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch), [2003] 2 All ER 478.

3 Financial Services and Markets Act 2000 s 235(3). See *Financial Services Authority v Fradley* [2005] EWCA Civ 1183, [2006] 2 BCLC 616.

4 Financial Services and Markets Act 2000 s 235(4).

5 Financial Services and Markets Act 2000 s 235(5). As to the order that has been made see the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062; and PARA 604. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

6 Financial Services and Markets Act 2000 ss 236(1), 417(1).

7 As to the meaning of 'body corporate' see PARA 86 note 11.

8 Financial Services and Markets Act 2000 s 236(2).

9 Financial Services and Markets Act 2000 s 236(3). In determining whether the investment condition is satisfied, no account is to be taken of any actual or potential redemption or repurchase of shares or securities under: (1) the Companies Act 1985 Pt V Ch VII (ss 159-181) (prospectively repealed) (see **COMPANIES** vol 15 (2009) PARA 1229 et seq) (as to replacement provisions see the Companies Act 2006 Pt 18 Ch 3-6 (ss 684-736)); (2) the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Pt VI Ch VII (arts 169-191); (3) corresponding provisions in force in another EEA state; or (4) provisions in force in a country or territory other

than an EEA state which the Treasury has, by order, designated as corresponding provisions: Financial Services and Markets Act 2000 s 236(4). At the date at which this volume states the law no such order had been made. As to the meaning of 'EEA state' see PARA 315 note 1.

10 Financial Services and Markets Act 2000 s 236(5). No order is to be made under s 236(5) unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(1)(a).

11 Ie under the Financial Services and Markets Act 2000 s 262: see PARA 621.

12 Financial Services and Markets Act 2000 ss 237(3), 417(1).

13 Financial Services and Markets Act 2000 ss 237(1), 417(1).

14 Financial Services and Markets Act 2000 s 237(2).

15 Financial Services and Markets Act 2000 s 237(3). An authorisation order is made under s 243: see PARA 608.

16 Ie under the Financial Services and Markets Act 2000 s 264: see PARA 672.

17 Ie under the Financial Services and Markets Act 2000 s 270: see PARA 675.

18 Financial Services and Markets Act 2000 s 237(3). Such a scheme is recognised under s 272: see PARA 676.

## UPDATE

### 603 Definitions

NOTE 9--Financial Services and Markets Act 2000 s 236(4) amended: SI 2009/1941.

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### 604. Arrangements not amounting to a collective investment scheme.

The following arrangements do not amount to a collective investment scheme<sup>1</sup>:

- 1408 (1) individual investment management arrangements<sup>2</sup>;
- 1409 (2) enterprise initiative schemes<sup>3</sup>;
- 1410 (3) pure deposit based schemes<sup>4</sup>;
- 1411 (4) schemes not operated by way of business<sup>5</sup>;
- 1412 (5) debt issues<sup>6</sup>;
- 1413 (6) common accounts<sup>7</sup>;
- 1414 (7) certain funds relating to leasehold property<sup>8</sup>;
- 1415 (8) certain employee share schemes<sup>9</sup>;
- 1416 (9) schemes entered into for commercial purposes related to existing business<sup>10</sup>;
- 1417 (10) group schemes<sup>11</sup>;
- 1418 (11) franchise arrangements<sup>12</sup>;
- 1419 (12) trading schemes<sup>13</sup>;
- 1420 (13) timeshare schemes<sup>14</sup>;
- 1421 (14) other schemes relating to use or enjoyment of property<sup>15</sup>;
- 1422 (15) schemes involving the issue of certificates representing investments<sup>16</sup>;

- 1423 (16) clearing services<sup>17</sup>;
- 1424 (17) contracts of insurance<sup>18</sup>;
- 1425 (18) funeral plan contracts<sup>19</sup>;
- 1426 (19) individual pension accounts<sup>20</sup>;
- 1427 (20) occupational and personal pension schemes<sup>21</sup>;
- 1428 (21) bodies corporate etc<sup>22</sup>.

1 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 3. As to the meaning of 'collective investment scheme' see PARA 603.

2 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 1. Arrangements do not amount to a collective investment scheme if:

- 569 (1) the property to which the arrangements relate (other than cash awaiting investment) consists of investments of one or more of the following kinds: (a) an investment of the kind specified by any of the provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, arts 76-80 (see PARA 224); (b) an investment of the kind specified by art 81 (units in a collective investment scheme) (see PARA 224) so far as relating to authorised unit trust schemes, recognised schemes or shares in an open-ended investment company; or (c) a contract of long term insurance (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 1(a));
- 570 (2) each participant is entitled to a part of that property and to withdraw that part at any time (Schedule para 1(b)); and
- 571 (3) the arrangements do not have the characteristics mentioned in the Financial Services and Markets Act 2000 s 235(3)(a) (see PARA 603 head (1)) and have those mentioned in s 235(3)(b) (see PARA 603 head (2)) only because the parts of the property to which different participants are entitled are not bought and sold separately except where a person becomes or ceases to be a participant (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 1(c)).

As to the meanings of 'authorised unit trust scheme' and 'recognised scheme' see PARA 603; both definitions applied by art 2. As to the meaning of 'contract of long term insurance' see PARA 90 note 3; definition applied by art 2.

3 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 2. Arrangements do not amount to a collective investment scheme if:

- 572 (1) the property to which the arrangements relate (other than cash awaiting investment) consists of shares (Schedule para 2(1)(a));
- 573 (2) the arrangements constitute a complying fund (Schedule para 2(1)(b));
- 574 (3) each participant is entitled to a part of the property to which the arrangements relate and:
  - 67. (a) to the extent that the property to which he is entitled comprises relevant shares of a class which are admitted to official listing in an EEA state or to dealings on a recognised investment exchange, he is entitled to withdraw it at any time after the end of the period of five years beginning with the date on which the shares in question were issued;
    - 67
  - 68. (b) to the extent that the property to which he is entitled comprises other relevant shares, he is entitled to withdraw it at any time after the end of the period of seven years beginning with the date on which the shares in question were issued;
    - 68
  - 69. (c) to the extent that the property to which he is entitled comprises shares other than relevant shares, he is entitled to withdraw it at any time after the end of the period of six months beginning with the date on which the shares in question ceased to be relevant shares; and
    - 69
  - 70. (d) to the extent that the property comprises cash which the operator has agreed (conditionally or unconditionally) to apply in subscribing for shares,
    - 70
- 575 he is entitled to withdraw it at any time (Schedule para 2(1)(c)); and

- 576 (4) the arrangements would meet the conditions described in Schedule para 1(c) (see note 2 head (3)) were it not for the fact that the operator is entitled to exercise all or any of the rights conferred by shares included in the property to which the arrangements relate (Schedule para 2(1)(d)).

'Shares' means investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 76 (see PARA 224) and shares are to be regarded as relevant shares if and so long as they are shares in respect of which neither: (i) a claim for relief made in accordance with the Income and Corporation Taxes Act 1988 s 306 (repealed with respect to 2007-08 and subsequent income tax years) (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1149) has been disallowed; nor (ii) an assessment has been made pursuant to s 307 (repealed with respect to 2007-08 and subsequent income tax years) (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1150) withdrawing or refusing relief by reason of the body corporate in which the shares are held having ceased to be a body corporate which is a qualifying company for the purposes of that Act: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 2(2)(a). 'Complying fund' means arrangements which provide that: (A) the operator will, so far as is practicable, make investments each of which, subject to each participant's individual circumstances, qualify for relief by virtue of the Income and Corporation Taxes Act 1988 Pt VII Ch III (ss 289-312) (repealed with respect to 2007-08 and subsequent income tax years) (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1137 et seq); and (B) the minimum contribution to the arrangements which each participant must make is not less than £2,000: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 2(2)(b).

4 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 3. Arrangements do not amount to a collective investment scheme if the whole amount of each participant's contribution is a deposit which is accepted by an authorised person with permission to carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5 (accepting deposits) (see PARA 89) or a person who is an exempt person in relation to such an activity: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 3.

5 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 4. Arrangements do not amount to a collective investment scheme if they are operated otherwise than by way of business: Schedule para 4.

6 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5. Arrangements do not amount to a collective investment scheme if they are arrangements under which the rights or interests of participants are, except as provided in Schedule para 5(2) (see below), represented by investments of one, and only one, of the following descriptions:

- 577 (1) investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 77 (instruments creating or acknowledging indebtedness) (see PARA 224) which are:

71. (a) issued by a single body corporate other than an open-ended investment company; or  
71

72. (b) issued by a single issuer who is not a body corporate and which are guaranteed by the government of the United Kingdom, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly, the National Assembly for Wales or the government of any country or territory outside the United Kingdom,  
72

578 and which are not convertible into or exchangeable for investments of any other description (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(1)(a));

579 (2) investments falling within head (1)(a) or head (1)(b) above (the 'former investments') which are convertible into or exchangeable for investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 76 (see PARA 224) (the 'latter investments') provided that the latter investments are issued by the same person who issued the former investments or are issued by a single other issuer (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(1)(b));

580 (3) investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 78 (government and public securities) (see PARA 224) which are issued by a single issuer (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(1)(c)); or

- 581 (4) investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 79 (instruments giving entitlement to investments) (see PARA 224) which are issued otherwise than by an open-ended investment company and which confer rights in respect of investments, issued by the same issuer, of the kind specified by art 76 or within any of heads (1)-(3) above (Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(1)(d)).

As to the meaning of 'United Kingdom' see PARA 2 note 3. Arrangements which would otherwise not amount to a collective investment scheme by virtue of the provisions of heads (1)-(4) above are not to be regarded as amounting to such a scheme by reason only that one or more of the participants (the 'counterparty') is a person: (i) whose ordinary business involves him in carrying on activities of the kind specified by any of the provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (dealing in investments as principal) (see PARA 112), art 21 (dealing in investments as agent) (see PARA 126), art 25 (arranging deals in investments) (see PARA 139), art 25D (operating a multilateral trading facility) (see PARA 139); art 37 (managing investments) (see PARA 152), art 40 (safeguarding and administering investments) (see PARA 160), art 45 (sending dematerialised instructions) (see PARA 190), art 51 (establishing etc a collective investment scheme) (see PARA 171), art 52 (establishing etc a stakeholder pension scheme) (see PARA 187) and art 53 (advising on investments) (see PARA 174) or, so far as relevant to any of those articles, art 64 (agreeing to carry on specified kinds of activities) (see PARA 221), or would do so apart from any exclusion from any of those articles made by that order; and (ii) whose rights or interests in the arrangements are or include rights or interests under a swap arrangement: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(2) (amended by SI 2006/3384). 'Swap arrangement' means an arrangement the purpose of which is to facilitate the making of payments to participants whether in a particular amount or currency or at a particular time or rate of interest or all or any combination of those things, being an arrangement under which the counterparty: (A) is entitled to receive amounts, whether representing principal or interest, payable in respect of any property subject to the arrangements or sums determined by reference to such amounts; and (B) makes payments, whether or not of the same amount or in the same currency as the amounts or sums referred to in head (A) above, which are calculated in accordance with an agreed formula by reference to those amounts or sums: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 5(3).

7 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 6. Arrangements do not amount to a collective investment scheme if: (1) they are arrangements under which the rights or interests of participants are rights to or interests in money held in a common account; and (2) that money is held in the account on the understanding that an amount representing the contribution of each participant is to be applied: (a) in making payments to him; (b) in satisfaction of sums owed by him; or (c) in the acquisition of property for him or the provision of services to him: Schedule para 6.

8 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 7 (substituted by SI 2007/800). Arrangements do not amount to a collective investment scheme if the rights or interests of the participants are rights or interests (1) in a fund which is a trust fund within the meaning of the Landlord and Tenant Act 1987 s 42(1) (see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 352) or which would be such a fund if the landlord were not an exempt landlord within the meaning of s 58(1) (see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 354); or (2) in money held in a designated account by the scheme administrator under a tenancy deposit scheme within the meaning of the Housing Act 2004 s 212(2) (see **HOUSING**): Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 7 (as so substituted).

9 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 8. Arrangements do not amount to a collective investment scheme if they are operated by a person ('A'), a member of the same group as A, or a relevant trustee for the purpose of enabling or facilitating: (1) transactions in shares in, or debentures issued by, A between, or for the benefit of, any of the persons mentioned in Schedule para 8(2); or (2) the holding of such shares or debentures by, or for the benefit of, any such persons: Schedule para 8(1). The persons referred to in Schedule para 8(1) are: (a) the bona fide employees or former employees of A or of another member of the same group; or (b) the wives, husbands, widows, widowers, civil partners, surviving civil partners, or children or step-children under the age of 18 of such employees or former employees: Schedule para 8(2) (amended by SI 2005/2114). 'Shares' and 'debentures' have the meaning given by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 71(6)(a) (see PARA 123); and 'relevant trustee' means a person who, in pursuance of the arrangements, holds shares in or debentures issued by A: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 8(3).

10 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 9 (amended by SI 2001/3650; SI 2006/3384). Arrangements do not amount to a collective investment scheme if each of the participants: (1) carries on a business other than the business of engaging in any regulated activity of the kind specified by any of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 (see PARA 112), art 21 (see PARA 126), art 25 (see PARA 139), art 25D (see PARA 139), art 37 (see PARA 152), art 40 (see PARA 160), art 45 (see PARA 190), arts 51-53 (see PARAS 171,

174, 187) or, so far as relevant to any of those articles, art 64 (see PARA 221); and (2) enters into the arrangements for commercial purposes related to that business: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 9(1) (as so amended). Schedule para 9(1) does not apply where the person will carry on the business in question by virtue of being a participant in the arrangements: Schedule para 9(2).

11 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 10. Arrangements do not amount to a collective investment scheme if each of the participants is a body corporate in the same group as the operator: Schedule para 10. As to the meaning of the 'operator' see PARA 606 note 16; definition applied by art 2.

12 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 11. Franchise arrangements do not amount to a collective investment scheme: Schedule para 11. 'Franchise arrangements' means arrangements under which a person earns profits or income by exploiting a right conferred by the arrangements to use a trade mark or design or other intellectual property or the goodwill attached to it: art 2.

13 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 12. Arrangements do not amount to a collective investment scheme if: (1) the purpose of the arrangements is that participants should receive, by way of reward, payments or other benefits in respect of the introduction by any person of other persons who become participants; (2) the arrangements are such that the payments or other benefits referred to in head (1) above are to be wholly or mainly funded out of the contributions of other participants; and (3) the only reason why the arrangements have either or both of the characteristics mentioned in the Financial Services and Markets Act 2000 s 235(3) (see PARA 603 heads (1), (2)) is because, pending their being used to fund those payments or other benefits, contributions of participants are managed as a whole by or on behalf of the operator of the scheme: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 12.

14 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 13. Arrangements do not amount to a collective investment scheme if the rights or interests of the participants are timeshare rights: Schedule para 13. 'Timeshare rights' has the meaning given by the Timeshare Act 1992 s 1 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 868): Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 2.

15 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 14. Arrangements do not amount to a collective investment scheme if: (1) the predominant purpose of the arrangements is to enable the participants to share in the use or enjoyment of property or to make its use or enjoyment available gratuitously to others; and (2) the property to which the arrangements relate does not consist of the currency of any country or territory and does not consist of or include any investment of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt III (arts 73-89) (see PARA 224) or which would be of such a kind apart from any exclusion made by Pt III: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 14.

16 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 15. Arrangements do not amount to a collective investment scheme if the rights or interests of the participants are investments of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 80 (certificates representing certain securities) (see PARA 224): Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 15.

17 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 16. Arrangements do not amount to a collective investment scheme if their purpose is the provision of clearing services and they are operated by an authorised person, a recognised clearing house or a recognised investment exchange: Schedule para 16.

18 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 17. A contract of insurance does not amount to a collective investment scheme: Schedule para 17. As to the meaning of 'contract of insurance' see PARA 90 note 3; definition applied by art 2.

19 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 18 (substituted by SI 2001/3650). Arrangements do not amount to a collective investment scheme if they consist of, or are made pursuant to: (1) a funeral plan contract; or (2) a contract which would be a funeral plan contract but for the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 59(2) proviso, or the exclusion in art 60 (see PARA 201): Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 18 (as so substituted). As to the meaning of 'funeral plan contract' see PARA 200 note 1; definition applied by art 2.



20 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 19. An individual pension account does not amount to a collective investment scheme: Schedule para 19. 'Individual pension account' has the meaning given by the Personal Pension Schemes (Restriction on Discretion to Approve) (Permitted Investments) Regulations 2001, SI 2001/117, reg 4 (see **SOCIAL SECURITY AND PENSIONS**); definition applied by the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 2.

21 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 20. An occupational pension scheme does not amount to a collective investment scheme: Schedule para 20(1). A personal pension scheme does not amount to a collective investment scheme: Schedule para 20(2). Schedule para 20(2) does not extend to a personal pension unit trust which is constituted as a feeder fund or comprises feeder funds: Schedule para 20(3). 'Occupational pension scheme' has the meaning given by the Pension Schemes Act 1993 s 1 but with para (b) of the definition omitted (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARAS 710, 741); Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 2 (definition substituted by SI 2006/1969). 'Personal pension scheme' means a scheme or arrangement which is not an occupational pension scheme and which is comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people (1) on retirement; (2) on having reached a particular age; or (3) on termination of service in an employment: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 2 (definition substituted by SI 2006/1969). 'Personal pension unit trust' means a personal pension scheme which is an authorised unit trust scheme of a kind mentioned in the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, Sch 1 Pt I (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 886); Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, art 2. 'Feeder fund' means an authorised unit trust scheme the sole object of which is investment in units of a single authorised unit trust scheme or shares in a single open-ended investment company: art 2.

22 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 21 (substituted by SI 2001/3650). No body incorporated under the law of, or any part of, the United Kingdom relating to building societies or industrial and provident societies or registered under any such law relating to friendly societies, and no other body corporate other than an open-ended investment company, amounts to a collective investment scheme: Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, SI 2001/1062, Schedule para 21(1) (as so substituted). This does not apply to any body incorporated as a limited liability partnership: Schedule para 21(2) (as so substituted). As to building societies see PARA 1856 et seq; as to industrial and provident societies see PARA 2394 et seq; as to friendly societies see PARA 2081 et seq; and as to limited liability partnerships see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

## UPDATE

### 604 Arrangements not amounting to a collective investment scheme

NOTE 10--SI 2001/1062 Schedule para 9 substituted by SI 2008/1641; and amended by SI 2008/1813.

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## **B. RESTRICTION ON PROMOTION**

### **605. Main restriction.**

An authorised person<sup>1</sup> must not communicate<sup>2</sup> an invitation or inducement to participate<sup>3</sup> in a collective investment scheme<sup>4</sup>.

<sup>1</sup> As to authorised persons see PARA 314.

2 'Communicate' includes causing a communication to be made: Financial Services and Markets Act 2000 s 238(9).

3 'Participate', in relation to a collective investment scheme, means become a participant (within the meaning given by the Financial Services and Markets Act 2000 s 235(2) (see PARA 603)) in the scheme: s 238(11). As to the meaning of 'collective investment scheme' see PARA 603.

4 Financial Services and Markets Act 2000 s 238(1). This provision is subject to ss 238(3)-(8), 239 (see PARA 606): s 238(2). An unauthorised person cannot communicate such an invitation or inducement by virtue of s 21: see PARA 225.

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## 606. Qualifications to main restriction.

The main restriction on promotion<sup>1</sup> is subject to the provisions described below<sup>2</sup>.

The main restriction applies in the case of a communication<sup>3</sup> originating outside the United Kingdom<sup>4</sup> only if the communication is capable of having an effect in the United Kingdom<sup>5</sup>. It does not apply in relation to: (1) an authorised unit trust scheme<sup>6</sup>; (2) a scheme constituted by an authorised open-ended investment company<sup>7</sup>; or (3) a recognised scheme<sup>8</sup>, nor does it apply to anything done in accordance with rules<sup>9</sup> made by the Financial Services Authority<sup>10</sup> for the purpose of exempting<sup>11</sup> the promotion otherwise than to the general public<sup>12</sup> of schemes of specified descriptions<sup>13</sup>.

The Treasury may by order specify circumstances in which the main restriction does not apply<sup>14</sup>. Such an order may, in particular, provide that the main restriction does not apply in relation to communications: (a) of a specified description; (b) originating in a specified country or territory outside the United Kingdom; (c) originating in a country or territory which falls within a specified description of country or territory outside the United Kingdom; or (d) originating outside the United Kingdom<sup>15</sup>.

The Treasury may by regulations make provision for exempting single property schemes<sup>16</sup> from the main restriction<sup>17</sup>. If such regulations are made, the Authority may make rules imposing duties or liabilities on the operator and (if any) the trustee or depositary<sup>18</sup> of a scheme exempted by the regulations<sup>19</sup>.

An authorised person may not approve<sup>20</sup> the content of a communication relating to a collective investment scheme if he would be prohibited<sup>21</sup> from effecting the communication himself or from causing it to be communicated<sup>22</sup>.

1 As to the main restriction see PARA 605.

2 Financial Services and Markets Act 2000 s 238(2).

3 As to the meaning of 'communicate' see PARA 605 note 2.

4 As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 Financial Services and Markets Act 2000 s 238(3). The Treasury may by order repeal s 238(3): s 238(8). At the date at which this volume states the law no such order had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

If an authorised person contravenes a requirement imposed on him by s 238, then s 150 (action for damages) (see PARA 33) applies to the contravention as it applies to a contravention mentioned in s 150: s 241.

6 As to the meaning of 'authorised unit trust scheme' see PARA 603.

7 As to the meaning of 'authorised open-ended investment company' see PARA 603.

8 Financial Services and Markets Act 2000 s 238(4). See note 5. As to the meaning of 'recognised scheme' see PARA 603.

9 As to the meaning of 'rule' see PARA 23 note 2.

10 As to the Financial Services Authority see PARAS 4, 6 et seq.

11 Ie from the Financial Services and Markets Act 2000 s 238(1): see PARA 605.

12 'Promotion otherwise than to the general public' includes promotion in a way designed to reduce, so far as possible, the risk of participation by persons for whom participation would be unsuitable: Financial Services and Markets Act 2000 s 238(10). As to the meaning of 'participate' see PARA 603.

13 Financial Services and Markets Act 2000 s 238(5). See note 5.

14 Financial Services and Markets Act 2000 s 238(6). As to the order that has been made see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060; and PARA 607. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

15 Financial Services and Markets Act 2000 s 238(7). See note 14.

16 For these purposes, a single property scheme is a scheme which has the characteristics mentioned below and satisfies such other requirements as are prescribed by the regulations conferring the exemption: Financial Services and Markets Act 2000 s 239(2). The characteristics are: (1) that the property subject to the scheme (apart from cash or other assets held for management purposes) consists of: (a) a single building (or a single building with ancillary buildings) managed by or on behalf of the operator of the scheme; or (b) a group of adjacent or contiguous buildings managed by him or on his behalf as a single enterprise, with or without ancillary land and with or without furniture, fittings or other contents of the building or buildings in question; and (2) that the units of the participants in the scheme are either dealt in on a recognised investment exchange or offered on terms such that any agreement for their acquisition is conditional on their admission to dealings on such an exchange: s 239(3). 'Operator', in relation to a unit trust scheme with a separate trustee, means the manager; and, in relation to an open-ended investment company, means that company: s 237(2). 'Trustee', in relation to a unit trust scheme, means the person holding the property in question on trust for the participants: s 237(2). As to the meanings of 'units', 'unit trust scheme' and 'open-ended investment company' see PARA 603. As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

17 Financial Services and Markets Act 2000 s 239(1). At the date at which this volume states the law no such regulations had been made.

18 'Depository', in relation to: (1) a collective investment scheme which is constituted by a body incorporated by virtue of regulations under the Financial Services and Markets Act 2000 s 262 (see PARA 621); or (2) any other collective investment scheme which is not a unit trust scheme, means any person to whom the property subject to the scheme is entrusted for safekeeping: s 237(2).

19 Financial Services and Markets Act 2000 s 239(4). The rules may include, to such extent as the Authority thinks appropriate, provision for purposes corresponding to those for which provision can be made under s 248 (see PARA 615) in relation to authorised unit trust schemes: s 239(5).

20 Ie for the purposes of the Financial Services and Markets Act 2000 s 21: see PARA 225.

21 Ie by the Financial Services and Markets Act 2000 s 238(1): see PARA 605.

22 Financial Services and Markets Act 2000 s 240(1). For the purposes of determining in any case whether there has been a contravention of s 21(1) (see PARA 225), an approval given in contravention of s 240(1) is to be regarded as not having been given: s 240(2). If an authorised person contravenes a requirement imposed on him by s 240, then s 150 (action for damages) (see PARA 33) applies to the contravention as it applies to a contravention mentioned in s 150: s 241.

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### 607. Exemptions from restriction.

The scheme promotion restriction<sup>1</sup> does not apply to any communication<sup>2</sup>: (1) which is made (whether from inside or outside the United Kingdom) to a person who receives the communication outside the United Kingdom; or (2) which is directed (whether from inside or outside the United Kingdom) only at persons outside the United Kingdom<sup>3</sup>. This exemption does not apply to an unsolicited real time communication unless it is made from a place outside the United Kingdom, and it relates to an overseas scheme<sup>4</sup>.

The scheme promotion restriction does not apply to any solicited real time communication<sup>5</sup> which is made from outside the United Kingdom and which relates to units in an overseas scheme<sup>6</sup>.

The scheme promotion restriction does not apply to a non-real time or unsolicited real time communication which is made from outside the United Kingdom by an authorised person to a previously overseas customer<sup>7</sup> of his, and which relates to units in an overseas scheme<sup>8</sup>.

The scheme promotion restriction does not apply to an incoming electronic commerce communication<sup>9</sup>.

The following are also exempted from the scheme promotion restriction:

- 1429 (a) follow up non-real time communications and solicited real time communications<sup>10</sup>;
- 1430 (b) introductions<sup>11</sup>;
- 1431 (c) generic promotions<sup>12</sup>;
- 1432 (d) communications made only to investment professionals<sup>13</sup>;
- 1433 (e) one off non-real time communications and solicited real time communications<sup>14</sup>;
- 1434 (f) one off unsolicited real time communications<sup>15</sup>;
- 1435 (g) communications required or authorised by enactments other than the Financial Services and Markets Act 2000<sup>16</sup>;
- 1436 (h) communications to persons in the business of placing promotional material<sup>17</sup>;
- 1437 (i) communications to existing participants in an unregulated scheme<sup>18</sup>;
- 1438 (j) communications made by one body corporate in a group to another body corporate in the same group<sup>19</sup>;
- 1439 (k) communications to persons in the business of disseminating information<sup>20</sup>;
- 1440 (l) communications to certified high net worth individuals<sup>21</sup>;
- 1441 (m) communications to high net worth companies, unincorporated associations or partnerships or trustees of high value trusts<sup>22</sup>;
- 1442 (n) communications to certified sophisticated investors<sup>23</sup>;
- 1443 (o) non-real time communications or solicited real time communications to associations of high net worth or sophisticated investors<sup>24</sup>;
- 1444 (p) communications to settlors, trustees and personal representatives if the communication is made for the purposes of the trust or estate<sup>25</sup>;
- 1445 (q) communications to beneficiaries of trusts, wills or intestacy if the communication relates to the management or distribution of the trust fund or estate<sup>26</sup>;

- 1446 (r) communications made or directed by a person for the purpose of enabling any injustice<sup>27</sup> to be remedied<sup>28</sup>;
- 1447 (s) any communication received by a person who receives the publication in which the communication is contained because he has himself placed an advertisement in that publication<sup>29</sup>;
- 1448 (t) a scheme constituted by an authorised Northern Ireland open-ended investment company<sup>30</sup>;
- 1449 (u) any communication which is made by an EEA management company<sup>31</sup>.

Nothing in the provisions relating to exemptions from the scheme promotion restriction<sup>32</sup> is to be construed as preventing a person from relying on more than one exemption in respect of the same communication<sup>33</sup>.

1 'Scheme promotion restriction' means the restriction imposed by the Financial Services and Markets Act 2000 s 238(1) (see PARA 605): Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 2(2).

2 For the purposes of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060: (1) any reference to a communication is a reference to the communication, by an authorised person in the course of business, of an invitation or inducement to participate in an unregulated scheme; (2) any reference to a communication being made to another person is a reference to a communication being addressed, whether verbally or in legible form, to a particular person or persons (eg where it is contained in a telephone call or letter); (3) any reference to a communication being directed at persons is a reference to a communication being addressed to persons generally (eg where it is contained in a television broadcast or website); (4) 'communicate' includes causing a communication to be made; (5) a 'recipient' of a communication is a person to whom the communication is made or, in the case of a non-real time communication which is directed at persons generally, any person who reads or hears the communication; (6) 'electronic commerce communication' means a communication the making of which constitutes the provision of an information society service; (7) 'incoming electronic commerce communication' means an electronic commerce communication made from an establishment in an EEA state other than the United Kingdom; (8) 'outgoing electronic commerce communication' means an electronic commerce communication made from an establishment in the United Kingdom to a person in an EEA state other than the United Kingdom: art 3 (amended by SI 2002/2157). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meaning of 'EEA state' see PARA 315 note 1. As to outgoing electronic commerce communications see also the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 5A (added by SI 2002/2157).

References to a 'real time communication' are references to any communication made in the course of a personal visit, telephone conversation or other interactive dialogue: Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 4(1). A 'non-real time communication' is a communication not falling within art 4(1): art 4(2). Non-real time communications include communications made by letter or e-mail or contained in a publication: art 4(3). 'Publication' means: (a) a newspaper, journal, magazine or other periodical publication; (b) a website or similar system for the electronic display of information; (c) any programme forming part of a service consisting of the broadcast or transmission of television or radio programmes; and (d) any teletext service, that is to say a service consisting of television transmissions consisting of a succession of visual displays (with or without accompanying sound) capable of being selected and held for separate viewing or other use: art 2(1) (definition amended by SI 2002/1310). The following factors are to be treated as indications that a communication is a non-real time communication: (i) the communication is made to or directed at more than one recipient in identical terms (save for details of the recipient's identity); (ii) the communication is made or directed by way of a system which in the normal course constitutes or creates a record of the communication which is available to the recipient to refer to at a later time; (iii) the communication is made or directed by way of a system which in the normal course does not enable or require the recipient to respond immediately to it: Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 4(4), (5).

3 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 8(1) (amended by SI 2002/2157). The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 8(1) does not apply to an outgoing electronic commerce communication: art 8(7) (added by SI 2002/2157).

For the purposes of head (1) in the text: (1) if the conditions set out in heads (a), (b), (c) and (d) below are met, a communication directed from a place inside the United Kingdom is to be regarded as directed only at persons outside the United Kingdom; (2) if the conditions set out in heads (c) and (d) below are met, a communication directed from a place outside the United Kingdom is to be regarded as directed only at persons outside the

United Kingdom; (3) in any other case where one or more of the conditions in heads (a)-(e) below are met, that fact must be taken into account in determining whether the communication is to be regarded as directed only at persons outside the United Kingdom (but a communication may still be regarded as directed only at persons outside the United Kingdom even if none of the conditions in heads (a)-(e) below is met): Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 8(3). The conditions are that: (a) the communication is accompanied by an indication that it is directed only at persons outside the United Kingdom; (b) the communication is accompanied by an indication that it must not be acted upon by persons in the United Kingdom; (c) the communication is not referred to in, or directly accessible from, any other communication which is made to a person or directed at persons in the United Kingdom by or on behalf of the same person; (d) there are in place proper systems and procedures to prevent recipients in the United Kingdom (other than those to whom the communication might otherwise lawfully have been made or directed) acquiring from the person directing the communication, a close relative of his or a company in the same group, units in the scheme to which the communication relates; (e) the communication is included in: (i) a website, newspaper, journal, magazine or periodical publication which is principally accessed in or intended for a market outside the United Kingdom; (ii) a radio or television broadcast or teletext service transmitted principally for reception outside the United Kingdom: art 8(4). As to the meaning of 'units' see PARA 603; definition applied by art 2(1). A communication may be treated as directed only at persons outside the United Kingdom even if it is also directed at investment professionals or at high net worth persons: see art 8(5). Where a communication falls within art 8(5), the condition in head (a) above is to be construed as requiring an indication that the communication is directed only at persons outside the United Kingdom or persons having professional experience in matters relating to investments or high net worth persons (as the case may be); the condition in head (b) above is to be construed as requiring an indication that the communication must not be acted upon by persons in the United Kingdom or by persons who do not have professional experience in matters relating to investments or who are not high net worth persons (as the case may be): art 8(6). 'Close relative', in relation to a person, means: (A) his spouse or civil partner; (B) his children and step-children, his parents and step-parents, his brothers and sisters and his step-brothers and step-sisters; and (C) the spouse or civil partner of any person within head (B) above: art 2(1) (definition amended by SI 2005/2114). As to the degree of prominence to be given to the required indications see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 6.

4 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 8(2). 'Overseas scheme' means an unregulated scheme which is operated and managed in a country or territory outside the United Kingdom: art 2(1). 'Unregulated scheme' means a collective investment scheme which is not an authorised unit trust scheme nor a scheme constituted by an authorised open-ended investment company nor a recognised scheme for the purposes of the Financial Services and Markets Act 2000 Pt XVII (ss 235-284) (see PARA 603): Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 2(1).

5 A real time communication is solicited where it is made in the course of a personal visit, telephone call or other interactive dialogue if that call, visit or dialogue: (1) was initiated by the recipient of the communication; or (2) takes place in response to an express request from the recipient of the communication: Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 5(1). A real time communication is unsolicited where it is made otherwise than as described in art 5(1): art 5(2). A person is not to be treated as expressly requesting a call, visit or dialogue: (a) because he omits to indicate that he does not wish to receive any or any further visits or calls or to engage in any or any further dialogue; (b) because he agrees to standard terms that state that such visits, calls or dialogue will take place, unless he has signified clearly that, in addition to agreeing to the terms, he is willing for them to take place: art 5(3)(a). A communication is solicited only if it is clear from all the circumstances when the call, visit or dialogue is initiated or requested that during the course of the visit, call or dialogue communications will be made concerning the kind of activities or investments to which the communications in fact made relate: art 5(3)(b). It is immaterial whether the express request is made before or after the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060 came into force (ie 1 December 2001): art 5(3)(c). Where a real time communication is solicited by a recipient ('R'), it is treated as having also been solicited by any other person to whom it is made at the same time as it is made to R if that other recipient is a close relative of R, or expected to participate in the unregulated scheme jointly with R: art 5(4).

6 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 9.

7 'Previously overseas customer' means a person with whom the authorised person has done business within the period of 12 months ending with the day on which the communication was made (the 'earlier business'), where: (1) at the time that the earlier business was done, the customer was neither resident in the United Kingdom nor had a place of business there; or (2) at the time the earlier business was done, the authorised person had on a former occasion done business with the customer, being business of the same description as the business to which the communication relates, and on that former occasion the customer was neither resident in the United Kingdom nor had a place of business there: Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 10(2). An authorised

person has done business with a customer if, in the course of his overseas business, he has: (a) effected a transaction, or arranged for a transaction to be effected, with the customer in respect of units in an overseas scheme; or (b) given, outside the United Kingdom, any advice on the merits of the customer buying or selling units in an overseas scheme: art 10(3).

8 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 10(1).

9 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 10A(1) (art 10A added by SI 2002/2157). This provision does not apply to certain advertisements or unsolicited communications made by electronic mail: see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 10A(2)-(4) (as so added; art 10A(3) amended by SI 2003/2067).

10 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 11.

11 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 12.

12 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 13.

13 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 14.

14 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 15.

15 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 15A (added by SI 2001/2633).

16 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 16.

17 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 17.

18 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 18.

19 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 19.

20 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 20.

21 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 21 (substituted by SI 2005/270). As to statements for certified high net worth individuals see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, Schedule Pt I (Schedule added by SI 2005/270).

22 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 22 (amended by SI 2002/1310).

23 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 23 (amended by SI 2005/270). As to self-certified sophisticated investors see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 23A (added by SI 2005/270; and amended by SI 2005/1532). As to statements for self-certified sophisticated investors see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, Schedule Pt II (as added: see note 21).

24 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 24 (amended by SI 2005/1532).

25 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 25.

26 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 26.

27 Is any injustice stated to have occurred by the Parliamentary Commissioner for Administration in a report under the Parliamentary Commissioner Act 1967 s 10: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 44. As to the Parliamentary Commissioner for Administration see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 41 et seq.

28 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 27.

29 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 28.

30 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 29 (added by SI 2003/2067).

31 See the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 30 (added by SI 2003/2067). The reference is to an EEA firm falling within the Financial Services and Markets Act 2000 Sch 3 para 5(f) and qualifying for authorisation under Sch 3 para 12 unless a notice under Sch 3 para 15A(2) has been given and not withdrawn: see PARA 315.

32 Is the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060.

33 Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, SI 2001/1060, art 7.

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## ***C. AUTHORISED UNIT TRUSTS***

### **(A) AUTHORISATION**

#### **608. Applications for authorisation.**

Any application for an order declaring a unit trust scheme<sup>1</sup> to be an authorised unit trust scheme<sup>2</sup> must be made to the Financial Services Authority<sup>3</sup> by the manager and trustee<sup>4</sup>, or proposed manager and trustee, of the scheme<sup>5</sup>. The manager and trustee (or proposed manager and trustee) must be different persons<sup>6</sup>. The application must be made in such manner as the Authority may direct, and must contain or be accompanied by such information as the Authority may reasonably require for the purpose of determining the application<sup>7</sup>. At any time after receiving an application and before determining it, the Authority may require the applicants to provide it with such further information as it reasonably considers necessary to enable it to determine the application<sup>8</sup>. Different directions may be given, and different requirements imposed, in relation to different applications<sup>9</sup>. The Authority may require applicants to present information which they are required to give in such form, or to verify it in such a way, as the Authority may direct<sup>10</sup>.

If, on an application<sup>11</sup> in respect of a unit trust scheme, the Authority: (1) is satisfied that the scheme complies with the following requirements<sup>12</sup>; (2) is satisfied that the scheme complies with the requirements of the trust scheme rules<sup>13</sup>; and (3) has been provided with a copy of the trust deed and a certificate signed by a solicitor to the effect that it complies with such of the



requirements mentioned in head (1) or head (2) above as relate to its contents, the Authority may make an order declaring the scheme to be an authorised unit trust scheme<sup>14</sup>. If the Authority makes such an order, it must give written notice of the order to the applicant<sup>15</sup>. The requirements are:

- 1450 (a) the manager and the trustee must be persons who are independent of each other<sup>16</sup>;
- 1451 (b) the manager and the trustee must each be a body corporate<sup>17</sup> incorporated in the United Kingdom<sup>18</sup> or another EEA state<sup>19</sup> and must have a place of business in the United Kingdom, and the affairs of each must be administered in the country in which it is incorporated<sup>20</sup>;
- 1452 (c) the manager and the trustee must each be an authorised person<sup>21</sup> and the manager must have permission to act as manager and the trustee must have permission to act as trustee<sup>22</sup>;
- 1453 (d) the name of the scheme must not be undesirable or misleading<sup>23</sup>;
- 1454 (e) the purposes of the scheme must be reasonably capable of being successfully carried into effect<sup>24</sup>;
- 1455 (f) the participants<sup>25</sup> must be entitled to have their units<sup>26</sup> redeemed in accordance with the scheme at a price: (i) related to the net value of the property to which the units relate; and (ii) determined in accordance with the scheme<sup>27</sup>.

An application<sup>28</sup> must be determined by the Authority before the end of the period of six months beginning with the date on which it receives the completed application<sup>29</sup>. The Authority may determine an incomplete application if it considers it appropriate to do so; and it must in any event determine such an application within 12 months beginning with the date on which it first receives the application<sup>30</sup>. The applicant may withdraw his application, by giving the Authority written notice, at any time before the Authority determines it<sup>31</sup>.

1 As to the meaning of 'unit trust scheme' see PARA 603.

2 As to the meaning of 'authorised unit trust scheme' see PARA 603.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

4 As to the meaning of 'trustee' see PARA 606 note 16.

5 Financial Services and Markets Act 2000 s 242(1).

6 Financial Services and Markets Act 2000 s 242(2).

7 Financial Services and Markets Act 2000 s 242(3).

8 Financial Services and Markets Act 2000 s 242(4).

9 Financial Services and Markets Act 2000 s 242(5).

10 Financial Services and Markets Act 2000 s 242(6).

11 Ie under the Financial Services and Markets Act 2000 s 242: see the text to notes 1-10.

12 Ie set out in the Financial Services and Markets Act 2000 s 243: see heads (a)-(f) in the text.

13 As to the trust scheme rules see PARA 614.

14 Financial Services and Markets Act 2000 s 243(1). For the purposes of Pt XVII Ch III (ss 242-261), 'authorisation order' means an order under s 243(1): s 243(3).

15 Financial Services and Markets Act 2000 s 243(2).

- 16 Financial Services and Markets Act 2000 s 243(4).
- 17 As to the meaning of 'body corporate' see PARA 86 note 11.
- 18 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 19 As to the meaning of 'EEA state' see PARA 315 note 1.
- 20 Financial Services and Markets Act 2000 s 243(5). If the manager is incorporated in another EEA state, the scheme must not be one which satisfies the requirements prescribed for the purposes of s 264 (see PARA 672): s 243(6). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 21 As to authorised persons see PARA 314.
- 22 Financial Services and Markets Act 2000 s 243(7).
- 23 Financial Services and Markets Act 2000 s 243(8).
- 24 Financial Services and Markets Act 2000 s 243(9).
- 25 As to the meaning of 'participants' see PARA 603.
- 26 As to the meaning of 'units' see PARA 603.
- 27 Financial Services and Markets Act 2000 s 243(10). However, a scheme is to be treated as complying with s 243(10) if it requires the manager to ensure that a participant is able to sell his units on an investment exchange at a price not significantly different from that mentioned in s 243(10): s 243(11). As to investment exchanges see PARA 684 et seq.
- 28 le under the Financial Services and Markets Act 2000 s 242: see the text to notes 1-10.
- 29 Financial Services and Markets Act 2000 s 244(1).
- 30 Financial Services and Markets Act 2000 s 244(2).
- 31 Financial Services and Markets Act 2000 s 244(3).

## **UPDATE**

### **608 Applications for authorisation**

TEXT AND NOTES--As to the transfer of units in a unit trust scheme by electronic communication, see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 526.

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### **609. Refusal of applications.**

If the Financial Services Authority<sup>1</sup> proposes to refuse an application<sup>2</sup>, it must give each of the applicants a warning notice<sup>3</sup>. If the Authority decides to refuse the application: (1) it must give each of the applicants a decision notice<sup>4</sup>; and (2) either applicant may refer the matter to the Financial Services and Markets Tribunal<sup>5</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Financial Services Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 Ie an application made under the Financial Services and Markets Act 2000 s 242: see PARA 608.

3 Financial Services and Markets Act 2000 s 245(1). As to warning notices see PARA 769.

4 Financial Services and Markets Act 2000 s 245(2)(a). As to decision notices see PARA 770.

5 Financial Services and Markets Act 2000 s 245(2)(b). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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## **610. Certificates.**

If the manager or trustee<sup>1</sup> of a unit trust scheme<sup>2</sup> which complies with the conditions necessary for it to enjoy the rights conferred by any relevant Community instrument so requests, the Financial Services Authority<sup>3</sup> may issue a certificate to the effect that the scheme complies with those conditions<sup>4</sup>. Such a certificate may be issued on the making of an authorisation order<sup>5</sup> in respect of the scheme or at any subsequent time<sup>6</sup>.

1 As to the meaning of 'trustee' see PARA 606 note 16.

2 As to the meaning of 'unit trust scheme' see PARA 603.

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 Financial Services and Markets Act 2000 s 246(1).

5 As to the meaning of 'authorisation order' see PARA 608 note 14.

6 Financial Services and Markets Act 2000 s 246(2).

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## **611. Exclusion clauses.**

Any provision of the trust deed of an authorised unit trust scheme<sup>1</sup> is void in so far as it would have the effect of exempting the manager or trustee<sup>2</sup> from liability for any failure to exercise due care and diligence in the discharge of his functions in respect of the scheme<sup>3</sup>.

1 As to the meaning of 'authorised unit trust scheme' see PARA 603.

2 As to the meaning of 'trustee' see PARA 606 note 16.

3 Financial Services and Markets Act 2000 s 253.

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## **612. Alterations of schemes and changes of manager or trustee.**

The manager of an authorised unit trust scheme<sup>1</sup> must give written notice to the Financial Services Authority<sup>2</sup> of any proposal to alter the scheme or to replace its trustee<sup>3</sup>. Any notice given in respect of a proposal to alter the scheme involving a change in the trust deed must be accompanied by a certificate signed by a solicitor to the effect that the change will not affect the compliance of the deed with the trust scheme rules<sup>4</sup>. The trustee of an authorised unit trust scheme must give written notice to the Authority of any proposal to replace the manager of the scheme<sup>5</sup>.

Effect is not to be given to any proposal of which notice has been given<sup>6</sup> unless: (1) the Authority, by written notice, has given its approval to the proposal; or (2) one month, beginning with the date on which the notice was given, has expired without the manager or trustee having received from the Authority a warning notice<sup>7</sup> in respect of the proposal<sup>8</sup>. The Authority must not approve a proposal to replace the manager or the trustee of an authorised unit trust scheme unless it is satisfied that, if the proposed replacement is made, the scheme will continue to comply with the statutory requirements<sup>9</sup>.

If the Authority proposes to refuse approval of a proposal to replace the trustee or manager of an authorised unit trust scheme, it must give a warning notice to the person by whom notice of the proposal was given<sup>10</sup>. If the Authority proposes to refuse approval of a proposal to alter an authorised unit trust scheme, it must give separate warning notices to the manager and the trustee of the scheme<sup>11</sup>. To be valid the warning notice must be received by that person before the end of one month beginning with the date on which notice of the proposal was given<sup>12</sup>. If, having given a warning notice to a person, the Authority decides to refuse approval: (a) it must give him a decision notice; and (b) he may refer the matter to the Financial Services and Markets Tribunal<sup>13</sup>.

1 As to the meaning of 'authorised unit trust scheme' see PARA 603.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Financial Services Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 251(1). As to the meaning of 'trustee' see PARA 606 note 16.

4 Financial Services and Markets Act 2000 s 251(2). As to the meaning of 'trust scheme rules' see PARA 614.

5 Financial Services and Markets Act 2000 s 251(3).

6 Ie under the Financial Services and Markets Act 2000 s 251(1) (see the text to notes 1-3) or s 251(3) (see the text to note 5).

7 Ie under the Financial Services and Markets Act 2000 s 252: see the text to notes 10-13. As to warning notices see PARA 769.

8 Financial Services and Markets Act 2000 s 251(4).

9 Financial Services and Markets Act 2000 s 251(5). The statutory requirements referred to in the text are the requirements of s 243(4)-(7): see PARA 608.

10 Financial Services and Markets Act 2000 s 252(1). Notice is given under s 251(1) (see the text to notes 1-3) or s 251(3) (see the text to note 5).

11 Financial Services and Markets Act 2000 s 252(2).

12 Financial Services and Markets Act 2000 s 252(3).

13 Financial Services and Markets Act 2000 s 252(4). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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### **613. Revocation of authorisation.**

An authorisation order<sup>1</sup> may be revoked by an order made by the Financial Services Authority<sup>2</sup> if it appears to the Authority that<sup>3</sup>:

- 1456 (1) one or more of the requirements for the making of the order are no longer satisfied<sup>4</sup>;
- 1457 (2) the manager or trustee<sup>5</sup> of the scheme concerned has contravened a requirement imposed on him by or under the Financial Services and Markets Act 2000<sup>6</sup>;
- 1458 (3) the manager or trustee of the scheme has, in purported compliance with any such requirement, knowingly or recklessly given the Authority information which is false or misleading in a material particular<sup>7</sup>;
- 1459 (4) no regulated activity<sup>8</sup> is being carried on in relation to the scheme and the period of that inactivity began at least 12 months earlier<sup>9</sup>; or
- 1460 (5) none of heads (1) to (4) above applies, but it is desirable to revoke the authorisation order in order to protect the interests of participants<sup>10</sup> or potential participants in the scheme<sup>11</sup>.

If the Authority proposes to make an order<sup>12</sup> revoking an authorisation order (a 'revoking order'), it must give separate warning notices<sup>13</sup> to the manager and the trustee of the scheme<sup>14</sup>. If the Authority decides to make a revoking order, it must without delay give each of them a decision notice<sup>15</sup>; and either of them may refer the matter to the Financial Services and Markets Tribunal<sup>16</sup>.

An authorisation order may be revoked by an order made by the Authority at the request of the manager or trustee of the scheme concerned<sup>17</sup>. If the Authority makes such an order, it must give written notice of the order to the manager and trustee of the scheme concerned<sup>18</sup>. The Authority may refuse a request to make such an order if it considers that: (a) the public interest requires that any matter concerning the scheme should be investigated before a decision is taken as to whether the authorisation order should be revoked; or (b) revocation would not be in the interests of the participants or would be incompatible with a European Community obligation<sup>19</sup>. If the Authority proposes to refuse a request, it must give separate warning notices to the manager and the trustee of the scheme<sup>20</sup>. If the Authority decides to refuse the request,

it must without delay give each of them a decision notice; and either of them may refer the matter to the Tribunal<sup>21</sup>.

- 1 As to the meaning of 'authorisation order' see PARA 608 note 14.
- 2 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 3 Financial Services and Markets Act 2000 s 254(1).
- 4 Financial Services and Markets Act 2000 s 254(1)(a).
- 5 As to the meaning of 'trustee' see PARA 606 note 16.
- 6 Financial Services and Markets Act 2000 s 254(1)(b).
- 7 Financial Services and Markets Act 2000 s 254(1)(c).
- 8 As to regulated activities see PARA 84 et seq.
- 9 Financial Services and Markets Act 2000 s 254(1)(d).
- 10 As to the meaning of 'participants' see PARA 603.
- 11 Financial Services and Markets Act 2000 s 254(1)(e). For the purposes of s 254(1)(e), the Authority may take into account any matter relating to: (1) the scheme; (2) the manager or trustee; (3) any person employed by or associated with the manager or trustee in connection with the scheme; (4) any director of the manager or trustee; (5) any person exercising influence over the manager or trustee; (6) any body corporate in the same group as the manager or trustee; (7) any director of any such body corporate; (8) any person exercising influence over any such body corporate: s 254(2). As to the meaning of 'body corporate' see PARA 86 note 11; as to the meaning of 'group' see PARA 351 note 37; and as to the meaning of 'director' see PARA 86 note 11.
- 12 Ie under the Financial Services and Markets Act 2000 s 254: see the text and notes 1-11.
- 13 As to warning notices see PARA 769.
- 14 Financial Services and Markets Act 2000 s 255(1).
- 15 As to decision notices see PARA 770.
- 16 Financial Services and Markets Act 2000 s 255(2). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 17 Financial Services and Markets Act 2000 s 256(1).
- 18 Financial Services and Markets Act 2000 s 256(2).
- 19 Financial Services and Markets Act 2000 s 256(3).
- 20 Financial Services and Markets Act 2000 s 256(4).
- 21 Financial Services and Markets Act 2000 s 256(5).

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## (B) TRUST SCHEME RULES

### **614. Trust scheme rules.**

The Financial Services Authority<sup>1</sup> may make rules ('trust scheme rules') as to: (1) the constitution, management and operation of authorised unit trust schemes<sup>2</sup>; (2) the powers, duties, rights and liabilities of the manager and trustee<sup>3</sup> of any such scheme; (3) the rights and duties of the participants<sup>4</sup> in any such scheme; and (4) the winding up of any such scheme<sup>5</sup>. Trust scheme rules may, in particular, make provision:

- 1461 (a) as to the issue and redemption of the units<sup>6</sup> under the scheme<sup>7</sup>;
- 1462 (b) as to the expenses of the scheme and the means of meeting them<sup>8</sup>;
- 1463 (c) for the appointment, removal, powers and duties of an auditor for the scheme<sup>9</sup>;
- 1464 (d) for restricting or regulating the investment and borrowing powers exercisable in relation to the scheme<sup>10</sup>;
- 1465 (e) requiring the keeping of records with respect to the transactions and financial position of the scheme and for the inspection of those records<sup>11</sup>;
- 1466 (f) requiring the preparation of periodical reports with respect to the scheme and the provision of those reports to the participants and to the Authority<sup>12</sup>; and
- 1467 (g) with respect to the amendment of the scheme<sup>13</sup>.

Trust scheme rules may make provision as to the contents of the trust deed, including provision requiring any of the matters mentioned in heads (a) to (g) above to be dealt with in the deed<sup>14</sup>. However, trust scheme rules are binding on the manager, trustee and participants independently of the contents of the trust deed and, in the case of the participants, have effect as if contained in it<sup>15</sup>.

If (i) a modification is made of the statutory provisions in force in Great Britain or Northern Ireland relating to companies<sup>16</sup>; (ii) the modification relates to the rights and duties of persons who hold the beneficial title to any shares in a company without also holding the legal title; and (iii) it appears to the Treasury<sup>17</sup> that, for the purpose of assimilating the law relating to authorised unit trust schemes to the law relating to companies as so modified, it is expedient to modify the rule-making powers conferred on the Authority<sup>18</sup>, then the Treasury may by order make such modifications of those powers as it considers appropriate<sup>19</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 As to the meaning of 'authorised unit trust scheme' see PARA 603.

3 As to the meaning of 'trustee' see PARA 606 note 16.

4 As to the meaning of 'participants' see PARA 603.

5 Financial Services and Markets Act 2000 ss 247(1), 417(1).

6 As to the meaning of 'units' see PARA 603.

7 Financial Services and Markets Act 2000 s 247(2)(a).

8 Financial Services and Markets Act 2000 s 247(2)(b).

9 Financial Services and Markets Act 2000 s 247(2)(c).

10 Financial Services and Markets Act 2000 s 247(2)(d).

11 Financial Services and Markets Act 2000 s 247(2)(e).

12 Financial Services and Markets Act 2000 s 247(2)(f).

- 13 Financial Services and Markets Act 2000 s 247(2)(g).
- 14 Financial Services and Markets Act 2000 s 247(3).
- 15 Financial Services and Markets Act 2000 s 247(4).
- 16 As to the statutory provisions relating to companies see generally **COMPANIES**.
- 17 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 18 Ie the powers conferred by the Financial Services and Markets Act 2000 s 247.
- 19 Financial Services and Markets Act 2000 s 247(5). As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. See also the Financial Services Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.

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### **615. Scheme particulars rules.**

The Financial Services Authority<sup>1</sup> may make rules ('scheme particulars rules') requiring the manager of an authorised unit trust scheme<sup>2</sup>: (1) to submit scheme particulars<sup>3</sup> to the Authority; and (2) to publish scheme particulars or make them available to the public on request<sup>4</sup>.

Scheme particulars rules may require the manager of an authorised unit trust scheme to submit, and to publish or make available, revised or further scheme particulars if there is a significant change affecting any matter which is contained in scheme particulars previously published or made available, and whose inclusion in those particulars was required by the rules<sup>5</sup>. Scheme particulars rules may require the manager of an authorised unit trust scheme to submit, and to publish or make available, revised or further scheme particulars if a significant new matter arises, and the inclusion of information in respect of that matter would have been required in previous particulars if it had arisen when those particulars were prepared<sup>6</sup>.

Scheme particulars rules may provide for the payment, by the person or persons who in accordance with the rules are treated as responsible for any scheme particulars, of compensation to any qualifying person<sup>7</sup> who has suffered loss as a result of any untrue or misleading statement in the particulars, or the omission from them of any matter required by the rules to be included<sup>8</sup>.

Scheme particulars rules do not affect any liability which any person may incur apart from the rules<sup>9</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 As to the meaning of 'authorised unit trust scheme' see PARA 603.

3 'Scheme particulars' means particulars in such form, containing such information about the scheme and complying with such requirements, as are specified in scheme particulars rules: Financial Services and Markets Act 2000 s 248(2).



- 4 Financial Services and Markets Act 2000 ss 248(1), 417(1).
- 5 Financial Services and Markets Act 2000 s 248(3).
- 6 Financial Services and Markets Act 2000 s 248(4).
- 7 'Qualifying person' means a person who: (1) has become or agreed to become a participant in the scheme; or (2) although not being a participant, has a beneficial interest in units in the scheme: Financial Services and Markets Act 2000 s 248(6). As to the meaning of 'participants' see PARA 603. As to the meaning of 'units' see PARA 603.
- 8 Financial Services and Markets Act 2000 s 248(5).
- 9 Financial Services and Markets Act 2000 s 248(7).

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#### **616. Disqualification of auditor for breach of trust scheme rules.**

If it appears to the Financial Services Authority<sup>1</sup> that an auditor has failed to comply with a duty imposed on him by trust scheme rules<sup>2</sup>, it may disqualify him from being the auditor for any authorised unit trust scheme<sup>3</sup> or authorised open-ended investment company<sup>4</sup>.

- 1 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 2 As to the trust scheme rules see PARA 614.
- 3 As to the meaning of 'authorised unit trust scheme' see PARA 603.
- 4 Financial Services and Markets Act 2000 s 249(1). As to the meaning of 'authorised open-ended investment company' see PARA 603. The provisions of s 345(2)-(5) (see PARA 767) have effect in relation to disqualification under s 249(1) as they have effect in relation to disqualification under s 345(1): s 249(2).

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#### **617. Modification or waiver of rules.**

The Financial Services Authority<sup>1</sup> may, on the application or with the consent of any person to whom any rules<sup>2</sup> apply, direct that all or any of the rules: (1) are not to apply to him as respects a particular scheme; or (2) are to apply to him, as respects a particular scheme, with such modifications as may be specified in the direction<sup>3</sup>. The Authority may, on the application or with the consent of the manager and trustee<sup>4</sup> of a particular scheme acting jointly, direct that all or any of the rules: (a) are not to apply to the scheme; or (b) are to apply to the scheme with such modifications as may be specified in the direction<sup>5</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebook, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 For these purposes, 'rules' means: (1) trust scheme rules (see PARA 614); or (2) scheme particulars rules (see PARA 615): Financial Services and Markets Act 2000 s 250(1).

3 Financial Services and Markets Act 2000 s 250(2). The provisions of s 148(3)-(9), (11) (modification or waiver of rules) (see PARA 23) have effect in relation to a direction under s 250(2) as they have effect in relation to a direction under s 148(2) but with modifications: see s 250(4) (amended by SI 2007/1973).

4 As to the meaning of 'trustee' see PARA 606 note 16.

5 Financial Services and Markets Act 2000 s 250(3). The provisions of s 148(3)-(9), (11) (see PARA 23) have effect in relation to a direction under s 250(3) as they have effect in relation to a direction under s 148(2) but with modifications: see s 250(5) (amended by SI 2007/1973).

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## (C) POWERS OF INTERVENTION

### 618. Directions.

The Financial Services Authority<sup>1</sup> may give a direction<sup>2</sup> if it appears to the Authority that<sup>3</sup>:

1468 (1) one or more of the requirements for the making of an authorisation order<sup>4</sup> are no longer satisfied<sup>5</sup>;

1469 (2) the manager or trustee<sup>6</sup> of an authorised unit trust scheme<sup>7</sup> has contravened, or is likely to contravene, a requirement imposed on him by or under the Financial Services and Markets Act 2000<sup>8</sup>;

1470 (3) the manager or trustee of such a scheme has, in purported compliance with any such requirement, knowingly or recklessly given the Authority information which is false or misleading in a material particular<sup>9</sup>; or

1471 (4) none of heads (1) to (3) above applies, but it is desirable to give a direction in order to protect the interests of participants<sup>10</sup> or potential participants in such a scheme<sup>11</sup>.

A direction may: (a) require the manager of the scheme to cease the issue or redemption, or both the issue and redemption, of units<sup>12</sup> under the scheme; (b) require the manager and trustee of the scheme to wind it up<sup>13</sup>.

If the authorisation order is revoked, the revocation does not affect any direction<sup>14</sup> which is then in force<sup>15</sup>. A direction may be given in relation to a scheme in the case of which the authorisation order has been revoked if a direction was already in force at the time of revocation<sup>16</sup>.

The Authority may, either on its own initiative or on the application of the manager or trustee of the scheme concerned, revoke or vary a direction given under the above provisions if it appears to the Authority: (i) in the case of revocation, that it is no longer necessary for the direction to take effect or continue in force; (ii) in the case of variation, that the direction should take effect or continue in force in a different form<sup>17</sup>.

If a person contravenes a direction, the statutory provisions relating to actions for damages<sup>18</sup> apply<sup>19</sup>.

- 1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
- 2 Ie under the Financial Services and Markets Act 2000 s 257.
- 3 Financial Services and Markets Act 2000 s 257(1).
- 4 As to the meaning of 'authorisation order' see PARA 608 note 14.
- 5 Financial Services and Markets Act 2000 s 257(1)(a).
- 6 As to the meaning of 'trustee' see PARA 606 note 16.
- 7 As to the meaning of 'authorised unit trust scheme' see PARA 603.
- 8 Financial Services and Markets Act 2000 s 257(1)(b).
- 9 Financial Services and Markets Act 2000 s 257(1)(c).
- 10 As to the meaning of 'participants' see PARA 603.
- 11 Financial Services and Markets Act 2000 s 257(1)(d).
- 12 As to the meaning of 'units' see PARA 603.
- 13 Financial Services and Markets Act 2000 s 257(2).
- 14 Ie under the Financial Services and Markets Act 2000 s 257.
- 15 Financial Services and Markets Act 2000 s 257(3).
- 16 Financial Services and Markets Act 2000 s 257(4).
- 17 Financial Services and Markets Act 2000 s 257(6).
- 18 Ie the provisions of the Financial Services and Markets Act 2000 s 150: see PARA 33.
- 19 Financial Services and Markets Act 2000 s 257(5).

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## **619. Procedure in relation to directions.**

A direction<sup>1</sup> takes effect: (1) immediately, if the notice given<sup>2</sup> states that that is the case; (2) on such date as may be specified in the notice; or (3) if no date is specified in the notice, when the matter to which it relates is no longer open to review<sup>3</sup>. A direction may be expressed to take effect immediately (or on a specified date) only if the Financial Services Authority<sup>4</sup>, having regard to the ground on which it is exercising its power<sup>5</sup>, considers that it is necessary for the direction to take effect immediately (or on that date)<sup>6</sup>. If the Authority proposes to give a direction<sup>7</sup>, or gives such a direction with immediate effect, it must give separate written notice to the manager and the trustee<sup>8</sup> of the scheme concerned<sup>9</sup>. The notice must:

- 1472 (a) give details of the direction<sup>10</sup>;
- 1473 (b) inform the person to whom it is given of when the direction takes effect<sup>11</sup>;
- 1474 (c) state the Authority's reasons for giving the direction and for its determination as to when the direction takes effect<sup>12</sup>;
- 1475 (d) inform the person to whom it is given that he may make representations to the Authority within such period as may be specified in it (whether or not he has referred the matter to the Financial Services and Markets Tribunal)<sup>13</sup>; and
- 1476 (e) inform him of his right to refer the matter to the Tribunal<sup>14</sup>.

If the direction imposes a requirement on the manager to cease the issue or redemption of units under the scheme<sup>15</sup>, the notice must state that the requirement has effect until a specified date, or a further direction<sup>16</sup>. If the direction imposes a requirement to wind the scheme up<sup>17</sup>, the scheme must be wound up by a date specified in the notice, or if no date is specified, as soon as practicable<sup>18</sup>.

If, having considered any representations made by a person to whom the notice was given, the Authority decides to give the direction in the way proposed, or if it decides, where a direction has been given, not to revoke the direction, it must give separate written notice to the manager and the trustee of the scheme concerned<sup>19</sup>. If, having considered any representations made by a person to whom the notice was given, the Authority decides: (i) not to give the direction in the way proposed; (ii) to give the direction in a way other than that proposed; or (iii) to revoke a direction which has effect, it must give separate written notice to the manager and the trustee of the scheme concerned<sup>20</sup>.

If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference<sup>21</sup>.

The provisions described above apply to the variation of a direction on the Authority's own initiative as they apply to the giving of a direction<sup>22</sup>.

If on an application for a direction to be revoked<sup>23</sup> or varied the Authority proposes to vary the direction otherwise than in accordance with the application, or to refuse to revoke or vary the direction, it must give the applicant a warning notice<sup>24</sup>. If the Authority decides to refuse to revoke or vary the direction, it must give the applicant a decision notice<sup>25</sup>; and the applicant may refer the matter to the Tribunal<sup>26</sup>.

If the Authority decides on its own initiative to revoke a direction<sup>27</sup>, it must give separate written notices of its decision to the manager and trustee of the scheme<sup>28</sup>. If on an application for a direction to be revoked or varied<sup>29</sup> the Authority decides to revoke the direction or vary it in accordance with the application, it must give the applicant written notice of its decision<sup>30</sup>. The notice<sup>31</sup> must specify the date on which the decision takes effect<sup>32</sup>. The Authority may publish such information about the revocation or variation in such way as it considers appropriate<sup>33</sup>.

1    I.e a direction under the Financial Services and Markets Act 2000 s 257: see PARA 618.

2    I.e the notice given under the Financial Services and Markets Act 2000 s 259(3): see the text to notes 7-9.

3    Financial Services and Markets Act 2000 s 259(1). For the purposes of head (3) in the text, whether a matter is open to review is to be determined in accordance with s 391(8) (see PARA 774): s 259(14).

4    As to the Financial Services Authority see PARAS 4, 6 et seq.

5    I.e under the Financial Services and Markets Act 2000 s 257: see PARA 618.

6    Financial Services and Markets Act 2000 s 259(2).

- 7    le under the Financial Services and Markets Act 2000 s 257: see PARA 618.
- 8    As to the meaning of 'trustee' see PARA 606 note 16.
- 9    Financial Services and Markets Act 2000 s 259(3).
- 10   Financial Services and Markets Act 2000 s 259(4)(a).
- 11   Financial Services and Markets Act 2000 s 259(4)(b).
- 12   Financial Services and Markets Act 2000 s 259(4)(c).
- 13   Financial Services and Markets Act 2000 s 259(4)(d). The Authority may extend the period allowed under the notice for making representations: s 259(7). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 14   Financial Services and Markets Act 2000 s 259(4)(e).
- 15   le a requirement under the Financial Services and Markets Act 2000 s 257(2)(a): see PARA 618 head (a).
- 16   Financial Services and Markets Act 2000 s 259(5).
- 17   le a requirement under the Financial Services and Markets Act 2000 s 257(2)(b): see PARA 618 head (b).
- 18   Financial Services and Markets Act 2000 s 259(6).
- 19   Financial Services and Markets Act 2000 s 259(8). A notice given under s 259(8) must inform the person to whom it is given of his right to refer the matter to the Tribunal: s 259(10).
- 20   Financial Services and Markets Act 2000 s 259(9). A notice under head (ii) in the text must comply with s 259(4) (see heads (a)-(e) in the text): s 259(11).
- 21   Financial Services and Markets Act 2000 s 259(12).
- 22   Financial Services and Markets Act 2000 s 259(13).
- 23   le under the Financial Services and Markets Act 2000 s 257(6): see PARA 618.
- 24   Financial Services and Markets Act 2000 s 260(1). As to warning notices see PARA 769.
- 25   As to decision notices see PARA 770.
- 26   Financial Services and Markets Act 2000 s 260(2).
- 27   le under the Financial Services and Markets Act 2000 s 257: see PARA 618.
- 28   Financial Services and Markets Act 2000 s 261(1).
- 29   le under the Financial Services and Markets Act 2000 s 257(6): see PARA 618.
- 30   Financial Services and Markets Act 2000 s 261(2).
- 31   le under the Financial Services and Markets Act 2000 s 261.
- 32   Financial Services and Markets Act 2000 s 261(3).
- 33   Financial Services and Markets Act 2000 s 261(4).

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## 620. Applications to the court.

Where the Financial Services Authority<sup>1</sup> is empowered to give a direction<sup>2</sup>, it may also apply to the High Court for an order: (1) removing the manager or the trustee<sup>3</sup>, or both the manager and the trustee, of the scheme; and (2) replacing the person or persons removed with a suitable person or persons nominated by the Authority<sup>4</sup>. If it appears to the Authority that there is no person it can nominate for the purposes of head (2) above, it may apply to the court for an order: (a) removing the manager or the trustee, or both the manager and the trustee, of the scheme; and (b) appointing an authorised person<sup>5</sup> to wind up the scheme<sup>6</sup>. On such an application the court may make such order as it thinks fit<sup>7</sup>. The Authority must give written notice of the making of an application to the manager and trustee of the scheme concerned<sup>8</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 See under the Financial Services and Markets Act 2000 s 257: see PARA 618.

3 As to the meaning of 'trustee' see PARA 606 note 16.

4 Financial Services and Markets Act 2000 s 258(1), (7). The Authority may nominate a person for the purposes of head (2) in the text only if it is satisfied that, if the order was made, the requirements of s 243(4)-(7) (see PARA 608) would be complied with: s 258(2). See further note 6.

5 As to authorised persons see PARA 314.

6 Financial Services and Markets Act 2000 s 258(3). The court may, on the application of the Authority, rescind any such order as is mentioned in s 258(3) and substitute such an order as is mentioned in s 258(1): s 258(5).

7 Financial Services and Markets Act 2000 s 258(4).

8 Financial Services and Markets Act 2000 s 258(6).

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## **D. OPEN-ENDED INVESTMENT COMPANIES**

### (A) INTRODUCTION

#### **621. Treasury power.**

Part XVIII Chapter IV of the Financial Services and Markets Act 2000 relates to open-ended investment companies<sup>1</sup>.

The Treasury<sup>2</sup> may by regulations make provision for: (1) facilitating the carrying on of collective investment by means of open-ended investment companies<sup>3</sup>; (2) regulating such companies<sup>4</sup>.

The regulations may in particular make provision:

- 1477 (a) for the incorporation and registration in Great Britain of bodies corporate<sup>5</sup>;

- 1478 (b) for a body incorporated by virtue of the regulations to take such form as may be determined in accordance with the regulations<sup>6</sup>;
- 1479 (c) as to the purposes for which such a body may exist, the investments which it may issue and otherwise as to its constitution<sup>7</sup>;
- 1480 (d) as to the management and operation of such a body and the management of its property<sup>8</sup>;
- 1481 (e) as to the powers, duties, rights and liabilities of such a body and of other persons, including the directors or sole director of such a body<sup>9</sup>, its depositary (if any)<sup>10</sup>, its shareholders and persons who hold the beneficial title to shares in it without holding the legal title<sup>11</sup>, its auditor<sup>12</sup>, and any persons who act or purport to act on its behalf<sup>13</sup>;
- 1482 (f) as to the merger of one or more such bodies and the division of such a body<sup>14</sup>;
- 1483 (g) for the appointment and removal of an auditor for such a body<sup>15</sup>;
- 1484 (h) as to the winding up and dissolution of such a body<sup>16</sup>;
- 1485 (i) for such a body, or any director or depositary of such a body, to be required to comply with directions by the Financial Services Authority<sup>17</sup>;
- 1486 (j) enabling the Authority to apply to a court for an order removing and replacing any director or depositary of such a body<sup>18</sup>;
- 1487 (k) for the carrying out of investigations by persons appointed by the Authority or the Secretary of State<sup>19</sup>;
- 1488 (l) corresponding to any provision made in relation to unit trust schemes<sup>20</sup>.

Regulations may also:

- 1489 (i) impose criminal liability<sup>21</sup>;
- 1490 (ii) confer functions on the Authority<sup>22</sup>;
- 1491 (iii) in the case of a provision made by virtue of head (l) above, authorise the making of rules<sup>23</sup> by the Authority<sup>24</sup>;
- 1492 (iv) confer jurisdiction on any court or on the Financial Services and Markets Tribunal<sup>25</sup>;
- 1493 (v) provide for fees to be charged by the Authority in connection with the carrying out of any of its functions under the regulations (including fees payable on a periodical basis)<sup>26</sup>;
- 1494 (vi) modify, exclude or apply (with or without modifications) any primary or subordinate legislation (including any provision of, or made under the Financial Services and Markets Act 2000)<sup>27</sup>;
- 1495 (vii) make consequential amendments, repeals and revocations of any such legislation<sup>28</sup>;
- 1496 (viii) modify or exclude any rule of law<sup>29</sup>.

No regulations are to be made under the provisions described above unless a draft of the regulations has been laid before Parliament and approved by a resolution of each House<sup>30</sup>.

In exercise of the power to make regulations the Treasury has made the Open-Ended Investment Companies Regulations 2001<sup>31</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 603. See also PARA 623 note 3.

2 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Financial Services and Markets Act 2000 s 262(1)(a). In exercise of the power under s 262(1), the Treasury has made the Open-Ended Investment Companies Regulations 2001, SI 2001/1228: see the text and note 31;

and PARA 623 et seq. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

4 Financial Services and Markets Act 2000 s 262(1)(b). See note 3.

5 Financial Services and Markets Act 2000 s 262(2)(a). As to the meaning of 'body corporate' see PARA 86 note 11. As to the meaning of 'Great Britain' see PARA 2 note 3.

6 Financial Services and Markets Act 2000 s 262(2)(b).

7 Financial Services and Markets Act 2000 s 262(2)(c).

8 Financial Services and Markets Act 2000 s 262(2)(d).

9 Financial Services and Markets Act 2000 s 262(2)(e)(i). As to directors see PARA 639.

10 Financial Services and Markets Act 2000 s 262(2)(e)(ii). As to the meaning of 'depository' see PARA 626.

11 Financial Services and Markets Act 2000 s 262(2)(e)(iii).

12 Financial Services and Markets Act 2000 s 262(2)(e)(iv).

13 Financial Services and Markets Act 2000 s 262(2)(e)(v).

14 Financial Services and Markets Act 2000 s 262(2)(f).

15 Financial Services and Markets Act 2000 s 262(2)(g).

16 Financial Services and Markets Act 2000 s 262(2)(h).

17 Financial Services and Markets Act 2000 s 262(2)(i). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

18 Financial Services and Markets Act 2000 s 262(2)(j).

19 Financial Services and Markets Act 2000 s 262(2)(k). As to the Secretary of State see PARA 3.

20 Financial Services and Markets Act 2000 s 262(2)(l). The provisions referred to in the text are those of Pt XVII Ch III (ss 242-261): see PARA 608 et seq.

21 Financial Services and Markets Act 2000 s 262(3)(a).

22 Financial Services and Markets Act 2000 s 262(3)(b).

23 As to the meaning of 'rule' see PARA 23 note 2.

24 Financial Services and Markets Act 2000 s 262(3)(c).

25 Financial Services and Markets Act 2000 s 262(3)(d). As to the Financial Services and Markets Tribunal see PARAS 43 et seq.

26 Financial Services and Markets Act 2000 s 262(3)(e).

27 Financial Services and Markets Act 2000 s 262(3)(f). The provision that may be made by virtue of s 262(3)(f) includes provision extending or adapting any power to make subordinate legislation: s 262(4).

28 Financial Services and Markets Act 2000 s 262(3)(g). Regulations under s 262 may, in particular revoke the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827 (Financial Services and Markets Act 2000 s 262(5)(a)), and provide for things done under or in accordance with those regulations to be treated as if they had been done under or in accordance with regulations under the Financial Services and Markets Act 2000 s 262 (s 262(5)(b)). The Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, have been revoked (see the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 85(1)); and anything done under or in accordance with the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, has effect as if done under or in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228 (see reg 85(2)). Without prejudice to the generality of reg 85(2), the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, provide that:



- 582 (1) a body incorporated by virtue of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, reg 3(1) (revoked) is to be treated as if it had been incorporated by virtue of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 3(1) (see PARA 623) (reg 85(3)(a));
- 583 (2) where an application under the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, reg 7 (revoked) had not been determined by the Authority at the time when the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 85 came into force, it is to be treated as if it were an application made under reg 12 (see PARA 627) (reg 85(3)(b));
- 584 (3) the Authority's registration functions under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Pt IV (regs 71-79) (see PARAS 668-670) apply to any documents or records delivered to the appropriate registrar pursuant to the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, reg 4 and Sch 1 (revoked) (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 85(3)(c)).

29 Financial Services and Markets Act 2000 s 262(3)(h).

30 Financial Services and Markets Act 2000 s 429(2).

31 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228; note 3; and PARA 622 et seq.

Certain provisions of the Financial Services and Markets Act 2000 apply in relation to notices given under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228:

- 585 (1) the Financial Services and Markets Act 2000 s 387 (warning notices) (see PARA 769) applies to a warning notice given under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, in the same way as it applies to a warning notice given under any provision of the Financial Services and Markets Act 2000 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 8(a));
- 586 (2) the Financial Services and Markets Act 2000 s 388 (decision notices) (see PARA 770) applies to a decision notice given under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, in the same way as it applies to a decision notice given under any provision of the Financial Services and Markets Act 2000 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 8(b));
- 587 (3) the Financial Services and Markets Act 2000 s 389 (notices of discontinuance) (see PARA 771) applies to the discontinuance of the action proposed in a warning notice or the action to which a decision notice relates given under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, in the same way as it applies to a warning notice or decision notice given under any provision of the Financial Services and Markets Act 2000 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 8(c));
- 588 (4) the Financial Services and Markets Act 2000 s 390 (final notices) (see PARA 772) applies to a decision notice given under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, in the same way as it applies to a decision notice given under any provision of the Financial Services and Markets Act 2000 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 8(d));
- 589 (5) the Financial Services and Markets Act 2000 s 391 (publication) (see PARA 774) applies to the notices mentioned in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 8 in the same way as it applies to any notice given under any provision of the Financial Services and Markets Act 2000 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 9);
- 590 (6) the Financial Services and Markets Act 2000 s 395 (procedures of the Financial Services Authority) (see PARAS 773, 777) applies to the procedure relating to the Authority's functions in relation to supervisory notices, warning notices and decision notices given under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228 (reg 10).

The Financial Services and Markets Act 2000 s 133 (which makes general provision in relation to proceedings: see PARA 46), applies to any reference to the Financial Services and Markets Tribunal under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228 as it applies to any reference to the Tribunal under the

Financial Services and Markets Act 2000: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 11. As to the Financial Services and Markets Tribunal see PARA 43 et seq.

## UPDATE

### 621 Treasury power

NOTE 30--2000 Act s 429(2) amended: Banking Act 2009 s 178.

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### 622. Rules made by the Financial Services Authority.

The powers of the Financial Services Authority<sup>1</sup> to make rules under the Financial Services and Markets Act 2000 in relation to authorised unit trust schemes<sup>2</sup> are, subject to the provisions of the Open-Ended Investment Companies Regulations 2001<sup>3</sup>, exercisable in relation to open-ended investment companies<sup>4</sup> for like purposes, and subject to the same conditions<sup>5</sup>.

The Authority may, on the application or with the consent of any person to whom any FSA rules<sup>6</sup> apply, direct that all or any of the FSA rules: (1) are not to apply to him as respects a particular open-ended investment company<sup>7</sup>; or (2) are to apply to him as respects such a company with such modifications as may be specified in the direction<sup>8</sup>.

On the application or with the consent of an open-ended investment company and its depositary<sup>9</sup> acting jointly, the Authority may direct that all or any of the FSA rules: (a) are not to apply to the company<sup>10</sup>; or (b) are to apply to the company with such modifications as may be specified in the direction<sup>11</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 247 (trust scheme rules) (see PARA 614) and s 248 (scheme particulars rules) (see PARA 615).

3 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

4 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 6(1). In the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, any document which a person is required to submit and publish by virtue of rules made by the Authority under reg 6(1) for like purposes to those in the Financial Services and Markets Act 2000 s 248 (see PARA 615) is referred to as a prospectus, and 'prospectus' means such a document: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 2(1), 6(2).

6 'FSA rules' means any rules made by the Authority under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 6(1): reg 2(1).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(1)(a).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(1)(b). In accordance with reg 7(3), the Financial Services and Markets Act 2000 s 148(3)-(9), (11) (modification or waiver of rules) (see PARA 23) has effect in relation to a direction under reg 7(1) as it has effect in relation to a direction under s 148(2)

(see PARA 23) but with modifications: see the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(3) (amended by SI 2007/1973).

9 As to the meaning of 'depository' see PARA 626.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(2)(a).

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(2)(b). In accordance with reg 7(4), the Financial Services and Markets Act 2000 s 148(3)-(9), (11) (modification or waiver of rules) (see PARA 23) has effect in relation to a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(2) as it has effect in relation to a direction under the Financial Services and Markets Act 2000 s 148(2) but with modifications: see the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 7(4) (amended by SI 2007/1973).

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## (B) FORMATION, SUPERVISION AND CONTROL

### *(a) In general*

#### **623. Incorporation and registration.**

If the Financial Services Authority<sup>1</sup> makes an authorisation order<sup>2</sup> then, immediately upon the coming into effect of the order, the body to which the authorisation order relates is to be incorporated as an open-ended investment company<sup>3</sup> (notwithstanding that, at the point of such incorporation, the body will not have any shareholders or property)<sup>4</sup>. The name of an open-ended investment company is the name mentioned in the authorisation order made in respect of the company or, if it changes its name in accordance with the Open-Ended Investment Companies Regulations 2001<sup>5</sup> and FSA rules<sup>6</sup>, its new name<sup>7</sup>.

Upon making an authorisation order, the Authority must forthwith register:

- 1497 (1) the instrument of incorporation of the company<sup>8</sup>;
- 1498 (2) a statement of the address of the company's head office<sup>9</sup>;
- 1499 (3) a statement, with respect to each person named in the application for authorisation as director of the company, of the required particulars<sup>10</sup>; and
- 1500 (4) a statement of the corporate name and registered or principal office of the person named in the application for authorisation as the depository<sup>11</sup> of the company<sup>12</sup>.

If an open-ended investment company which complies with the conditions necessary to enable it to enjoy the rights conferred by the UCITS Directive<sup>13</sup> so requests, the Authority may issue a certificate to the effect that the company complies with those conditions<sup>14</sup>. Such a certificate may be issued on the making of an authorisation order in respect of the company or at any subsequent time<sup>15</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 'Authorisation order' means an order made by the Authority under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14 (see PARA 628): reg 2(1).

3 For the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, 'open-ended investment company' means a body incorporated by virtue of reg 3(1) or a body treated as if it had been so incorporated by virtue of reg 85(3)(a) (see PARA 621 note 28): reg 2(1). See also PARA 603.

As to the characterisation of an entity as an 'open-ended investment company' see *Seymour v Caroline Ockwell & Co* [2005] EWHC 1137, [2005] All ER (D) 297 (Jun).

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 3(1).

5 le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

6 As to the meaning of 'FSA rules' see PARA 622 note 6.

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 3(2).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 4(1)(a). Any reference in reg 4 to 'the instrument of incorporation of a company' is a reference to the instrument of incorporation supplied for the purposes of reg 14(1)(c) (see PARA 628): reg 4(2).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 4(1)(b).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 4(1)(c). The particulars referred to in the text are those required by reg 13: see PARA 627.

11 As to the meaning of 'depository' see PARA 626.

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 4(1)(d).

13 le EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 17(1) (amended by SI 2003/2066).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 17(2).

## UPDATE

### 623 Incorporation and registration

NOTE 13--Directive 85/611 replaced: see PARA 6.

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### 624. Instruments of incorporation.

The Open-Ended Investment Companies Regulations 2001<sup>1</sup> make provision with respect to the contents, alteration and binding nature of the instrument of incorporation of an open-ended investment company<sup>2</sup>.

The instrument of incorporation of an open-ended investment company must contain the following statements<sup>3</sup>:

- 1501 (1) the head office of the company is situated in England, Wales or Scotland (as the case may be)<sup>4</sup>;
- 1502 (2) the company is an open-ended investment company with variable share capital<sup>5</sup>;
- 1503 (3) the shareholders<sup>6</sup> are not liable for the debts of the company<sup>7</sup>;
- 1504 (4) the scheme property<sup>8</sup> is entrusted to a depositary<sup>9</sup> for safekeeping (subject to any exceptions permitted by FSA rules)<sup>10</sup>; and
- 1505 (5) charges or expenses of the company may be taken out of the scheme property<sup>11</sup>.

The instrument of incorporation must contain provision as to the following matters<sup>12</sup>:

- 1506 (a) the object of the company<sup>13</sup>;
- 1507 (b) any matter relating to the procedure for the appointment, retirement and removal of any director of the company for which provision is not made in the Open-Ended Investment Companies Regulations 2001<sup>14</sup> or FSA rules<sup>15</sup>; and
- 1508 (c) the currency in which the accounts of the company are to be prepared<sup>16</sup>.

The instrument of incorporation must also contain provision as to the following matters<sup>17</sup>:

- 1509 (i) the name of the company<sup>18</sup>;
- 1510 (ii) the category, as specified in FSA rules, to which the company belongs<sup>19</sup>;
- 1511 (iii) the maximum and minimum sizes of the company's capital<sup>20</sup>;
- 1512 (iv) in the case of an umbrella company<sup>21</sup>, the investment objectives applicable to each part of the scheme property that is pooled separately<sup>22</sup>;
- 1513 (v) the classes of shares that the company may issue indicating, in the case of an umbrella company, which class or classes of shares may be issued in respect of each part of the scheme property that is pooled separately<sup>23</sup>;
- 1514 (vi) the rights attaching to shares of each class (including any provision for the expression in two denominations of such rights)<sup>24</sup>;
- 1515 (vii) if the company is to be able to issue bearer shares, a statement to that effect together with details of any limitations on the classes of the company's shares which are to include bearer shares<sup>25</sup>;
- 1516 (viii) in the case of a company which is a participating issuer, a statement to that effect together with an indication of any class of shares in the company which is a class of participating securities<sup>26</sup>;
- 1517 (ix) if the company is to dispense with the requirements relating to share certificates<sup>27</sup>, the details of any substituted procedures for evidencing title to the company's shares<sup>28</sup>; and
- 1518 (x) the form, custody and use of the company's common seal (if any)<sup>29</sup>.

Once an authorisation order has been made in respect of a company, no amendment may be made to the statements contained in the company's instrument of incorporation which are required as set out in heads (1)-(5) above<sup>30</sup>. Subject to this and to any restriction imposed by FSA rules, a company may amend any provision which is contained in its instrument of incorporation<sup>31</sup>. No amendment to a provision which is contained in a company's instrument of incorporation by virtue of heads (a)-(c) above<sup>32</sup> may be made unless it has been approved by the shareholders of the company in general meeting<sup>33</sup>.

The provisions of a company's instrument of incorporation are binding on the officers<sup>34</sup> and depositary of the company and on each of its shareholders; and all such persons (but no others) are to be taken to have notice of the provisions of the instrument<sup>35</sup>.

- 1 le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2.
- 2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(8). As to the meaning of 'open-ended investment company' see PARA 623 note 3.
- 3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 1(a).
- 4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 2(a).
- 5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 2(b).
- 6 In the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, any reference to a shareholder of an open-ended investment company is a reference to the person who holds the share certificate, or other documentary evidence of title relating to that share mentioned in reg 48 (see PARA 653) (reg 2(2)(a)) and the person whose name is entered on the company's register of shareholders in relation to any share other than a bearer share (reg 2(2)(b)). As to the meaning of 'register of shareholders' see PARA 626 note 22. As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see also PARA 653.
- 7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 2(c).
- 8 As to the meaning of 'scheme property' see PARA 626 note 1.
- 9 As to the meaning of 'depository' see PARA 626.
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 2(c). As to the meaning of 'FSA rules' see PARA 622 note 6.
- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 2(d).
- 12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 paras 1(b), 3(1).
- 13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 3(1)(a). The provision as to the object of an open-ended investment company must state clearly the kind of property in which the company is to invest and must state that the object of the company is to invest in property of that kind with the aim of spreading investment risk and giving its shareholders the benefit of the results of the management of that property: Sch 2 para 3(2).
- 14 le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 3(1)(b).
- 16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 3(1)(c).
- 17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 paras 1(b), 4(1).
- 18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(a).
- 19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(b).
- 20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(c). The size at any time of a company's capital is to be taken to be the value at that time, as determined in accordance with FSA rules, of the scheme property of the company less the liabilities of the company: Sch 2 para 4(2).
- 21 'Umbrella company' means an open-ended investment company whose instrument of incorporation provides for such pooling as is mentioned in the Financial Services and Markets Act 2000 s 235(3)(a) (collective investment schemes) (see PARA 603) in relation to separate parts of the scheme property and whose shareholders are entitled to exchange rights in one part for rights in another: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 2(1).
- 22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(d).
- 23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(e).
- 24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(f).
- 25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(g).
- 26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(h).

27 le the requirements of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46: see PARA 652.

28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(i).

29 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 4(1)(j).

30 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 5(1).

31 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 5(2).

32 le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 3(1).

33 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 5(3).

34 As to the meaning of 'officer' see PARA 626 note 17.

35 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2 para 6(1). A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company: Sch 2 para 6(2).

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## **625. Registrar's approval of names.**

Where, in respect of a proposed open-ended investment company<sup>1</sup>, it appears to the Financial Services Authority<sup>2</sup> that certain requirements for authorisation<sup>3</sup> are or will be met, the Authority must notify the appropriate registrar<sup>4</sup> of the name by which it is proposed that the company should be incorporated<sup>5</sup>.

Every open-ended investment company must obtain the Authority's approval to any proposed change in the name by which the company is incorporated and the Authority must notify the appropriate registrar of the proposed name<sup>6</sup>. If it appears to the appropriate registrar that the provisions in heads (1)-(3) below are not contravened in relation to the proposed name, he must notify the Authority to that effect<sup>7</sup>.

No open-ended investment company is to have a name that:

1519 (1) includes any of the following words or expressions: (a) limited, unlimited or public limited company, or their Welsh equivalents ('cyfyngedig', 'anghyfyngedig' and 'cwmni cyfyngedig cyhoeddus' respectively)<sup>8</sup>; or (b) European Economic Interest Grouping or any equivalent<sup>9</sup>;

1520 (2) includes an abbreviation of any of the words or expressions referred to in head (1)(a) above<sup>10</sup>; or

1521 (3) is the same as any other name appearing in the registrar's index of company names<sup>11</sup>.

Upon making an authorisation order in respect of an open-ended investment company or upon approving any change in the name of such a company, the Authority must notify the appropriate registrar of the name by which the company is incorporated or, as the case may be, of the company's new name<sup>12</sup>.

- 1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
- 2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
- 3 Ie the requirements of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1)(a)-(c): see PARA 628.
- 4 As to the meaning of 'appropriate registrar' see PARA 628 note 10.
- 5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 18(1).
- 6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 18(2).
- 7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 18(3).
- 8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 19(1)(a)(i).
- 9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 19(1)(a)(ii). The reference in the text is to any equivalent as set out in the European Economic Interest Grouping Regulations 1989, SI 1989/638, Sch 3: see **COMPANIES** vol 15 (2009) PARA 1632.
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 19(1)(b).
- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 19(1)(c). The Companies Act 1985 s 714 (prospectively repealed) (registrar's index of company and corporate names) (as to replacement provisions see the Companies Act 2006 s 1099) (see **COMPANIES** vol 14 (2009) PARA 163) has effect as if the bodies listed in the Companies Act 1985 s 714(1) included open-ended investment companies in respect of which an authorisation order has come into effect (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 20(2)(a)) and collective investment schemes which are open-ended investment companies and which have a head office situated in Northern Ireland (reg 20(2)(b)).

In determining for the purposes of reg 19(1)(c) whether one name is the same as another, there are to be disregarded:

- 591 (1) the definite article, where it is the first word of the name (reg 19(2)(a));
- 592 (2) the following word and expressions where they appear at the end of the name: (a) 'company' or its Welsh equivalent ('cwmni'); (b) 'and company' or its Welsh equivalent ('a'r cwmni'); (c) 'company limited' or its Welsh equivalent ('cwmni cyfyngedig'); (d) 'limited' or its Welsh equivalent ('cyfyngedig'); (e) 'unlimited' or its Welsh equivalent ('anghyfyngedig'); (f) 'public limited company' or its Welsh equivalent ('cwmni cyfyngedig cyhoeddus'); (g) 'European Economic Interest Grouping' or any equivalent set out in European Economic Interest Grouping Regulations 1989, SI 1989/638, Sch 3; (h) 'investment company with variable capital' or its Welsh equivalent ('cwmni buddsoddi â chyalaf newidiol'); (i) 'open-ended investment company' or its Welsh equivalent ('cwmni buddsoddiant penagored') (reg 19(2)(b));
- 593 (3) abbreviations of any of those words or expressions where they appear at the end of the name (reg 19(2)(c)); and
- 594 (4) type and case of letters, accents, spaces between letters and punctuation marks (reg 19(2)(d)),

and 'and' and '&' are to be taken as the same (reg 19(2)).

- 12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 20(1).

## UPDATE

### 625 Registrar's approval of names

NOTE 11--Repeal of Companies Act 1985 s 714 in force 1 October 2009: SI 2008/2860.



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## **626. Depositaries and safekeeping of property.**

All the scheme property<sup>1</sup> of an open-ended investment company<sup>2</sup> must be entrusted for safekeeping to a person appointed for the purpose (the 'depository')<sup>3</sup>. However, nothing in that requirement:

- 1522 (1) applies to any scheme property designated<sup>4</sup> by FSA rules<sup>5</sup>;
- 1523 (2) prevents a depository from entrusting to a third party all or some of the assets in its safekeeping<sup>6</sup> or, in such a case, authorising the third party to entrust all or some of those assets to other specified persons<sup>7</sup>.

On the coming into effect of an authorisation order<sup>8</sup> in respect of an open-ended investment company, the person named in the authorisation application<sup>9</sup> as depository of the company is deemed to be appointed as its first depository<sup>10</sup>. Any subsequent appointment of the depository of a company must be made by the directors of the company<sup>11</sup>.

Except upon the appointment of a new depository, the depository of a company may not retire voluntarily<sup>12</sup>.

The depository of a company has the following rights:

- 1524 (a) to receive all such notices of, and other communications relating to, any general meeting of the company as a shareholder of the company is entitled to receive<sup>13</sup>;
- 1525 (b) to attend any general meeting of the company<sup>14</sup>;
- 1526 (c) to be heard at any general meeting which it attends on any part of the business of the meeting which concerns it as depository<sup>15</sup>;
- 1527 (d) to convene a general meeting of the company when it sees fit<sup>16</sup>;
- 1528 (e) to require from the company's officers<sup>17</sup> such information and explanations as it thinks necessary for the performance of its functions as depository<sup>18</sup>; and
- 1529 (f) to have access, except in so far as they concern its appointment or removal, to any reports, statements or other papers which are to be considered at any meeting held by the directors of the company (when acting in their capacity as such), at any general meeting of the company or at any meeting of holders of shares of any particular class<sup>19</sup>.

Where the depository of a company ceases, for any reason other than by virtue of a court order<sup>20</sup>, to hold office, it may deposit at the head office of the company a statement of any circumstances connected with its ceasing to hold office which it considers should be brought to the attention of the shareholders or creditors of the company or, if it considers that there are no such circumstances, a statement that there are none<sup>21</sup>. If such a statement is of circumstances which the depository considers should be brought to the attention of the shareholders or creditors of the company, the company must, not later than 14 days after the deposit of the statement, either:

- 1530 (i) send a copy of the statement to each of the shareholders whose name appears on the register of shareholders<sup>22</sup> (other than the designated person) and take such steps as FSA rules<sup>23</sup> may require for the purpose of bringing the fact that the statement has been made to the attention of the holders of any bearer shares<sup>24</sup>; or
- 1531 (ii) apply to the court<sup>25</sup>.

Where an application is made under head (ii) above, the company must notify the depositary<sup>26</sup>. Unless the depositary receives notice of such application to the court before the end of the period of 21 days beginning with the day on which it deposited the statement, it must, not later than seven days after the end of that period, send a copy of the statement to the Financial Services Authority<sup>27</sup>.

If the court is satisfied that the depositary is using the statement to secure needless publicity for defamatory matter it must direct that copies of the statement need not be sent out and that the steps required by FSA rules need not be taken<sup>28</sup>. It may also order the company's costs on the application to be paid in whole or in part by the depositary notwithstanding that the depositary is not a party to the application<sup>29</sup>. The company must, not later than 14 days after the court's decision, take such steps in relation to a statement setting out the effect of the order as are required in head (i) above in relation to the statement deposited<sup>30</sup>.

If the court is not so satisfied, the company must, not later than 14 days after the court's decision, take the steps required by head (i) above and notify the depositary of the court's decision<sup>31</sup>. The depositary must, not later than seven days after receiving such a notice, send a copy of the statement to the Authority<sup>32</sup>.

The depositary who made the statement has, notwithstanding that it has ceased to hold office, the rights set out in heads (a) to (c) above<sup>33</sup> in relation to the general meeting of the company next following the date on which the copies were sent out<sup>34</sup>.

1 'Scheme property', in relation to an open-ended investment company, means the property subject to the collective investment scheme constituted by the company: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 2(1). As to the meaning of 'collective investment scheme' see PARA 603.

2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 2(1), 5(1).

4 Ie designated for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 5.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 5(2)(a). As to the meaning of 'FSA rules' see PARA 622 note 6. See also the Financial Services Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22. As to the Financial Services Authority see PARAS 4, 6 et seq.

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 5(2)(b)(i).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 5(2)(b)(ii).

8 As to the meaning of 'authorisation order' see PARA 623 note 2. As to authorisation orders see PARA 628.

9 Ie the application under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12: see PARA 627.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 1.

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 2. This is subject to reg 21 (see PARA 631) and reg 26 (see PARA 635).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 3.

- 13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(a).
- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(b).
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(c). The reference in the text to business concerning the depositary as depositary is to be construed in relation to a depositary who has ceased to hold office as a reference to business concerning it as former depositary: Sch 1 para 6(3).
- 16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(d).
- 17 'Officer', in relation to an open-ended investment company, includes a director or any secretary or manager: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 2(1).
- 18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(e).
- 19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(f).
- 20 In a court order under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26: see PARA 635. 'Court', in relation to any proceedings under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, involving an open-ended investment company the head office of which is situated (1) in England and Wales, means the High Court; and (2) in Scotland, means the Court of Session: reg 2(1).
- 21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(1).
- 22 'Register of shareholders' means the register kept under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 1(1) (see PARA 654): reg 2(1), Sch 3 para 1(1).
- 23 As to the meaning of 'FSA rules' see PARA 622 note 6.
- 24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(2)(a). An open-ended investment company may, if its instrument of incorporation so provides, issue shares evidenced by a share certificate, or by any other documentary evidence of title for which provision is made in its instrument of incorporation, which indicates that the holder of the document is entitled to the shares specified in it (reg 48(a)) and that no entry will be made on the register of shareholders identifying the holder of those shares (reg 48(b)). 'Bearer shares' means such shares: regs 2(1), 48.
- 25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(2)(b).
- 26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(2).
- 27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(3).
- 28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(4)(a).
- 29 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(4)(b).
- 30 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(4). The statement referred to in the text is the one deposited under Sch 1 para 5(1): see the text to note 21.
- 31 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(5). Where a notice of appeal is filed not later than 14 days after the court's decision, any reference to that decision in Sch 1 paras 5(4) (see the text and notes 28-30) and Sch 1 para 5(5) is to be construed as a reference to the final determination or withdrawal of that appeal, as the case may be: Sch 1 para 5(7).
- 32 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 5(6).
- 33 In the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 4(a)-(c).
- 34 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 1 para 6(1), (2).

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*(b) Authorisation*

**627. Applications for authorisation.**

Any application for an authorisation order<sup>1</sup> in respect of a proposed open-ended investment company<sup>2</sup>:

- 1532 (1) must be made in such manner as the Financial Services Authority<sup>3</sup> may direct<sup>4</sup>;
- 1533 (2) must state the required particulars with respect to each person proposed in the application as a director of the company<sup>5</sup>;
- 1534 (3) must state the corporate name and registered or principal office of the person proposed in the application as depositary<sup>6</sup> of the company<sup>7</sup>; and
- 1535 (4) must contain or be accompanied by such other information as the Authority may reasonably require for the purpose of determining the application<sup>8</sup>.

An application for an authorisation order must contain the following particulars with respect to each person proposed as a director of the company:

- 1536 (a) in the case of an individual, his present name<sup>9</sup>, any former name<sup>10</sup>, his usual residential address, his nationality, his business occupation (if any), particulars of any other directorships<sup>11</sup> held by him or which have been held by him and his date of birth<sup>12</sup>;
- 1537 (b) in the case of a body corporate or Scottish firm, its corporate or firm name and the address of its registered or principal office<sup>13</sup>.

At any time after receiving an application and before determining it the Authority may require the applicant to furnish additional information<sup>14</sup>.

A person commits an offence if, for the purposes of or in connection with any application for authorisation<sup>15</sup> or in purported compliance with any requirement imposed on him<sup>16</sup>, he furnishes information which he knows to be false or misleading in a material particular or recklessly furnishes information which is false or misleading in a material particular<sup>17</sup>.

1 As to authorisation orders see PARA 628.

2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebook, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(1)(a).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(1)(b).

6 As to the meaning of 'depositary' see PARA 626.

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(1)(c).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(1)(d).

9 'Name' means a person's Christian name (or other forename) and surname, except that in the case of a peer, or an individual usually known by a title, the title may be stated instead of his Christian name (or other forename) and surname or in addition to either or both of them: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(4)(a).

10 The reference to a former name does not include:

- 595 (1) in the case of a peer, or an individual normally known by a British title, the name by which he was known previous to the adoption of or succession to the title (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(4)(b)(i));
- 596 (2) in the case of any person, a former name which was changed or disused before he attained the age of 18 years or which has been changed or disused for 20 years or more (reg 13(4)(b)(ii)); or
- 597 (3) in the case of a married woman, the name by which she was known previous to the marriage (reg 13(4)(b)(iii)).

11 The reference in the text to directorships is a reference to directorships in any body corporate whether or not incorporated in Great Britain: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(4)(c). As to the meaning of 'Great Britain' see PARA 2 note 3.

The application need not contain particulars of a directorship:

- 598 (1) which has not been held by a director at any time during the five years preceding the date on which the application is delivered to the Authority (reg 13(2)(a));
- 599 (2) which is held by a director in a body corporate which is dormant and, if he also held that directorship for any period during those five years, which was dormant for the whole of that period (reg 13(2)(b)); or
- 600 (3) which was held by a director for any period during those five years in a body corporate which was dormant for the whole of that period (reg 13(2)(c)).

A body corporate is dormant during a period in which no significant transaction occurs, and it ceases to be dormant on the occurrence of such a transaction: reg 13(3). The reference to a significant transaction in reg 13(3) is, in relation to a company within the meaning of the Companies Act 1985 s 735(1) (prospectively repealed) (as to replacement provisions see the Companies Act 2006 ss 1, 1171) (see **COMPANIES** vol 14 (2009) PARAS 24, 32), a reference to a significant accounting transaction within the meaning of the Companies Act 2006 s 1169(2), other than a transaction to which s 1169(3) applies (see **COMPANIES** vol 14 (2009) PARA 28): Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(5) (amended by SI 2008/948).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(1)(a).

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 13(1)(b).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(2). Different directions may be given and different requirements imposed in relation to different applications: reg 12(3). Any information to be furnished to the Authority under reg 12 must be in such form or verified in such manner as it may specify: reg 12(4).

15 Ie any application under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12.

16 Ie imposed by or under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12.

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12(5). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both (reg 12(6)(a)); and is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding the statutory maximum or to both (reg 12(6)(b)). As to the statutory maximum see PARA 56 note 24.

## UPDATE

### 627 Applications for authorisation

NOTE 11--Repeal of Companies Act 1985 s 735(1) in force 1 October 2009: SI 2008/2860.

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## **628. Authorisation orders.**

Where an application is duly made<sup>1</sup>, the Financial Services Authority<sup>2</sup> may make an authorisation order in respect of an open-ended investment company<sup>3</sup> if:

- 1538 (1) it is satisfied that the company will, on the coming into effect of the authorisation order, comply with the requirements for authorisation<sup>4</sup>;
- 1539 (2) it is satisfied that the company will, at that time, comply with the requirements of FSA rules<sup>5</sup>;
- 1540 (3) it has been provided with a copy of the proposed company's instrument of incorporation<sup>6</sup> and a certificate signed by a solicitor to the effect that the instrument of incorporation complies with the Open-Ended Investment Companies Regulations 2001<sup>7</sup> and with such of the requirements of FSA rules as relate to the contents of that instrument of incorporation<sup>8</sup>; and
- 1541 (4) it has received a notification<sup>9</sup> from the appropriate registrar<sup>10</sup>.

If the Authority makes an authorisation order<sup>11</sup>, it must give written notice of the order to the applicant<sup>12</sup>.

An application must be determined by the Authority before the end of the period of six months beginning with the date on which it receives a completed application<sup>13</sup>. The Authority may determine an incomplete application if it considers it appropriate to do so and, if it does so, it must determine the application within the period of 12 months beginning with the date on which it first receives the application<sup>14</sup>.

The applicant may withdraw his application, by giving the Authority written notice, at any time before the Authority determines it<sup>15</sup>.

An authorisation order must specify the date on which it is to come into effect<sup>16</sup>.

1    Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12: see PARA 627.

2    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes(COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

3    As to the meaning of 'open-ended investment company' see PARA 623 note 3.

4    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1)(a). As to the requirements for authorisation see reg 15; and PARA 629.

5    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1)(b). As to the meaning of 'FSA rules' see PARA 622 note 6.

6    As to the instrument of incorporation see PARA 624.

7    Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 2: see PARA 624.

8    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1)(c).

- 9 le under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 18(3): see PARA 625.
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1)(d). 'Appropriate registrar' means: (1) the registrar of companies for England and Wales if the company's instrument of incorporation states that its head office is to be situated in England or Wales; (2) the registrar of companies for Scotland if the company's instrument of incorporation states that its head office is to be situated in Scotland: reg 2(1).
- 11 le under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(1).
- 12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(2).
- 13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(4).
- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(5).
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(6).
- 16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(7).

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## **629. Requirements for authorisation.**

There are several requirements under the Open-Ended Investment Companies Regulations 2001<sup>1</sup> in regard to authorisation<sup>2</sup>. The company and its instrument of incorporation<sup>3</sup> must comply with the requirements of the Open-Ended Investment Companies Regulations 2001 and FSA rules<sup>4</sup>.

The head office of the company must be situated in England, Wales, or Scotland<sup>5</sup>. The company must have at least one director<sup>6</sup>. The directors of the company must be fit and proper persons to act as such<sup>7</sup>. If the company has only one director, that director must be a body corporate which is an authorised person<sup>8</sup> and which has permission under the Financial Services and Markets Act 2000<sup>9</sup> to act as sole director of an open-ended investment company<sup>10</sup>. If the company has two or more directors, the combination of their experience and expertise must be such as is appropriate for the purposes of carrying on the business of the company<sup>11</sup>. The person appointed as the depositary<sup>12</sup> of the company:

- 1542 (1) must be a body corporate incorporated in the United Kingdom<sup>13</sup> or another EEA state<sup>14</sup>;
- 1543 (2) must have a place of business in the United Kingdom<sup>15</sup>;
- 1544 (3) must have its affairs administered in the country in which it is incorporated<sup>16</sup>;
- 1545 (4) must be an authorised person<sup>17</sup>;
- 1546 (5) must have permission under Part IV of the Financial Services and Markets Act 2000 to act as the depositary of an open-ended investment company<sup>18</sup>; and
- 1547 (6) must be independent of the company and of the persons appointed as directors of the company<sup>19</sup>.

The name of the company must not be undesirable or misleading<sup>20</sup>, and the aims of the company must be reasonably capable of being achieved<sup>21</sup>.

The company must meet one or both of the following requirements:

- 1548 (a) shareholders<sup>22</sup> are entitled to have their shares redeemed or repurchased upon request at a price related to the net value of the scheme property<sup>23</sup> and determined in accordance with the company's instrument of incorporation and FSA rules<sup>24</sup>; or
- 1549 (b) shareholders are entitled to sell their shares on an investment exchange at a price not significantly different from that mentioned in head (a)<sup>25</sup>.

1 le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 14(1)(a), 15(1). See also PARA 628.

3 As to instruments of incorporation see PARA 624.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(2). As to the meaning of 'FSA rules' see PARA 622 note 6.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(3).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(4).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(5). In determining whether the requirement referred to in reg 15(5) is satisfied in respect of any proposed director of a company, the Financial Services Authority may take into account:

601 (1) any matter relating to any person who is or will be employed by or associated with the proposed director, for the purposes of the business of the company (reg 14(3)(a));

602 (2) if the proposed director is a body corporate, any matter relating to any director or controller of the body, to any other body corporate in the same group, or to any director or controller of any such other body corporate (reg 14(3)(b));

603 (3) if the proposed director is a partnership, any matter relating to any of the partners (reg 14(3)(c)); and

604 (4) if the proposed director is an unincorporated association, any matter relating to any member of the governing body of the association or any officer or controller of the association (reg 14(3)(d)).

As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

8 As to authorised persons see PARA 314.

9 As to permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) see PARA 348 et seq.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(6) (amended by SI 2003/2066).

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(7).

12 As to the meaning of 'depository' see PARA 626.

13 As to the meaning of 'United Kingdom' see PARA 2 note 3.

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(a).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(b).

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(c).

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(d).



- 18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(e).
- 19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(8)(f).
- 20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(9). As to company names see PARA 625.
- 21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(10).
- 22 As to shareholders see PARA 624 note 6.
- 23 As to the meaning of 'scheme property' see PARA 626 note 1.
- 24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(11)(a).
- 25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 15(11)(b).

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### **630. Refusal of authorisation.**

If the Financial Services Authority<sup>1</sup> proposes to refuse an application for authorisation<sup>2</sup>, it must give the applicant a warning notice<sup>3</sup>. If the Authority decides to refuse the application it must give the applicant a decision notice<sup>4</sup> and the applicant may refer the matter to the Financial Services and Markets Tribunal<sup>5</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes Sourcebook (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

2 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12: see PARA 628.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 16(1). As to the application of relevant provisions of the Financial Services and Markets Act 2000 in relation to notices see PARA 621 note 31.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 16(2)(a).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 16(2)(b). As to the application of relevant provisions of the Financial Services and Markets Act 2000 in relation to references to the Financial and Services and Markets Tribunal see PARA 621 note 31. As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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### **631. Approval of the Financial Services Authority required for certain changes.**

An open-ended investment company<sup>1</sup> must give written notice to the Financial Services Authority<sup>2</sup> of:

- 1550 (1) any proposed alteration to the company's instrument of incorporation<sup>3</sup>;
- 1551 (2) any proposed alteration to the company's prospectus<sup>4</sup> which, if made, would be significant<sup>5</sup>;
- 1552 (3) any proposed reconstruction or amalgamation involving the company<sup>6</sup>;
- 1553 (4) any proposal to wind up the affairs of the company otherwise than by the court<sup>7</sup>;
- 1554 (5) any proposal to replace a director of the company, to appoint any additional director, or to decrease the number of directors in post<sup>8</sup>; and
- 1555 (6) any proposal to replace the depositary<sup>9</sup> of the company<sup>10</sup>.

Any proposal falling within heads (1) to (6) above may not be give effect unless: (a) the Authority, by written notice, has given its approval to the proposal<sup>11</sup>; or (b) one month, beginning with the date on which notice of the proposal was given, has expired without the company or the depositary having received from the Authority a warning notice<sup>12</sup> in respect of the proposal<sup>13</sup>.

If the Financial Services Authority proposes to refuse approval of a proposal to replace the depositary or any director of an open-ended investment company, it must give a warning notice<sup>14</sup> to the company<sup>15</sup>. If the Authority proposes to refuse approval of any other proposal<sup>16</sup>, it must give separate warning notices to the company and its depositary<sup>17</sup>. In order to be valid, the warning notice must be received by that person before the end of one month beginning with the date on which notice of the proposal was given<sup>18</sup>.

If, having given a warning notice to a person, the Authority decides to refuse approval, it must give him a decision notice<sup>19</sup>; and he may refer the matter to the Financial Services and Markets Tribunal<sup>20</sup>. If, having given a warning notice to a person, the Authority decides to approve the proposal, it must give him a written notice<sup>21</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes Sourcebook (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(a). Any notice given under reg 21(1)(a) must be accompanied by a certificate signed by a solicitor to the effect that the change in question will not affect the compliance of the instrument of incorporation with Sch 2 (see PARA 624) and with such of the requirements of FSA rules as relate to the contents of that instrument: reg 21(2). As to the meaning of 'FSA rules' see PARA 622 note 6.

4 As to the meaning of 'prospectus' see PARA 622 note 5.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(b).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(c).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(d).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(e). No change falling within reg 21(1)(e) may be made if any of the requirements set out in reg 15(4)-(7), (8)(f) (see PARA 629) would not be satisfied if the change were made: reg 21(4).

9 As to the meaning of 'depositary' see PARA 626.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(1)(f). No change falling within reg 21(1)(f) may be made if any of the requirements in reg 15(8) (see PARA 629) would not be satisfied if the change were made: reg 21(4).

- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(3)(a).
- 12 Is a warning notice under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22.
- 13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21(3)(b).
- 14 As to notices generally see PARA 621.
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(1).
- 16 Is any other proposal falling within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 21.
- 17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(2).
- 18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(3).
- 19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(4)(a).
- 20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(4)(b). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 22(5) (amended by SI 2005/923).

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### **632. Revocation.**

The Financial Services Authority<sup>1</sup> may revoke an authorisation order<sup>2</sup> if it appears to it that:

- 1556 (1) any requirement for the making of the order is no longer satisfied<sup>3</sup>;
- 1557 (2) the company, any of its directors or its depositary<sup>4</sup> has contravened any relevant provision<sup>5</sup> or has, in purported compliance with any such provision, knowingly or recklessly given the Authority information which is false or misleading in a material particular<sup>6</sup>;
- 1558 (3) no regulated activity has been carried on in relation to the company for the previous 12 months<sup>7</sup>; or
- 1559 (4) it is desirable to revoke the authorisation order in order to protect the interests of shareholders<sup>8</sup> or potential shareholders in the company<sup>9</sup>.

For the purposes of head (4) above, the Authority may take into account any matter relating to:

- 1560 (a) the company or its depositary<sup>10</sup>;
- 1561 (b) any director or controller of the depositary<sup>11</sup>;
- 1562 (c) any person employed by or associated, for the purposes of the business of the company, with the company or its depositary<sup>12</sup>;
- 1563 (d) any director of the company<sup>13</sup>;
- 1564 (e) any person exercising influence over any director of the company or its depositary<sup>14</sup>;

- 1565 (f) any body corporate in the same group as any director of the company or its depositary<sup>15</sup>;
- 1566 (g) any director of any such body corporate<sup>16</sup>;
- 1567 (h) any person exercising influence over any such body corporate<sup>17</sup>;
- 1568 (i) any person who would be such a person as is mentioned in the 'fit and proper person' requirement<sup>18</sup> were it to apply to a director as it applies to a proposed director<sup>19</sup>.

Before revoking any authorisation order that has come into effect, the Authority must ensure that such steps as are necessary and appropriate to secure the winding up of the company (whether by the court<sup>20</sup> or otherwise) have been taken<sup>21</sup>.

If the Authority proposes to make an order revoking an authorisation order (a 'revoking order'), it must give separate warning notices<sup>22</sup> to the company and its depositary<sup>23</sup>. If, having given warning notices, the Authority decides to make a revoking order it must without delay give the company and its depositary a decision notice<sup>24</sup> and either of them may refer the matter to the Financial Services and Markets Tribunal<sup>25</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes Sourcebook (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

2 As to the meaning of 'authorisation order' see PARA 623 note 2. As to authorisation orders see PARA 628.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(1)(a).

4 As to the meaning of 'depositary' see PARA 626.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(1)(b)(i).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(1)(b)(ii).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(1)(c).

8 As to shareholders see PARA 624 note 9.

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(1)(d).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(a).

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(b).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(c).

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(d).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(e).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(f).

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(g).

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(h).

18 Ie in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 14(3)(a)-(d): see PARA 629 note 7.

19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(2)(i).

20 As to the meaning of 'court' see PARA 626 note 20.

21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 23(3).

22 The Financial Services and Markets Act 2000 s 393 (see PARA 775) and s 394 (see PARA 776) apply to a warning notice given under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 24: reg 24(3).

23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 24(1). As to the meaning of 'depository' see PARA 626.

24 The Financial Services and Markets Act 2000 s 393 (see PARA 775) and s 394 (see PARA 776) apply to a decision notice given under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 24: reg 24(3).

25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 24(2). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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### *(c) Powers of Intervention*

#### **633. Directions.**

The Financial Services Authority<sup>1</sup> may give a direction<sup>2</sup> if it appears to it that:

- 1569 (1) one or more requirements for the making of an authorisation order<sup>3</sup> are no longer satisfied<sup>4</sup>;
- 1570 (2) the company, any of its directors or its depository<sup>5</sup> has contravened or is likely to contravene any relevant provision<sup>6</sup>, or has, in purported compliance with any such provision, knowingly or recklessly given the Authority information which is false or misleading in a material particular<sup>7</sup>; or
- 1571 (3) it is desirable to give a direction in order to protect the interests of shareholders or potential shareholders in the company<sup>8</sup>.

A direction<sup>9</sup> may:

- 1572 (a) require the company to cease the issue or redemption, or both the issue and redemption, of shares or any class of shares in the company<sup>10</sup>;
- 1573 (b) in the case of a director of the company who is the designated person<sup>11</sup>, require that director to cease transfers to or from, or both to and from, his own holding of shares, or of any class of shares, in the company<sup>12</sup>;
- 1574 (c) in the case of an umbrella company<sup>13</sup>, require that investments made in respect of one or more parts of the scheme property<sup>14</sup> which are pooled separately be realised and, following the discharge of such liabilities of the company as are attributable to the relevant part or parts of the scheme property, that the resulting funds be distributed to shareholders<sup>15</sup> in accordance with FSA rules<sup>16</sup>;
- 1575 (d) require any director of the company to present a petition to the court<sup>17</sup> to wind up the company<sup>18</sup>; or
- 1576 (e) require that the affairs of the company be wound up otherwise than by the court<sup>19</sup>.

If the authorisation order is revoked, the revocation does not affect the operation of any direction<sup>20</sup> which is then in force; and a direction may be given in relation to a company in the

case of which an authorisation order has been revoked if such a direction was already in force at the time of revocation<sup>21</sup>. However, where a winding-up order has been made by the court, no such direction is to have effect in relation to the company concerned<sup>22</sup>.

If a person contravenes a direction<sup>23</sup>, the provision of the Financial Services and Markets Act 2000 relating to actions for damages<sup>24</sup> applies to that contravention<sup>25</sup>.

The Authority may, on its own initiative or on the application of the company or its depositary, revoke or vary a direction<sup>26</sup> if it appears to the Authority, in the case of revocation, that it is no longer necessary for the direction to take effect or continue in force<sup>27</sup>, and, in the case of variation, that the direction should take effect or continue in force in a different form<sup>28</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

2 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25.

3 As to the meaning of 'authorisation order' see PARA 623 note 2. As to authorisation orders see PARA 628.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(1)(a).

5 As to the meaning of 'depositary' see PARA 626.

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(1)(b)(i). 'Relevant provision' means any requirement imposed by or under the Financial Services and Markets Act 2000: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 2(1).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(1)(b)(ii).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(1)(c). For the purposes of reg 25(1)(c), the Authority may take into account any matter relating to any of the persons mentioned in reg 23(2) (see PARA 632): reg 25(5).

9 Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(a).

11 'Designated person' means the person designated in the company's instrument of incorporation for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4 (see PARA 656): reg 2(1).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(b).

13 As to the meaning of 'umbrella company' see PARA 624 note 21.

14 As to the meaning of 'scheme property' see PARA 626 note 1.

15 As to shareholders see PARA 624 note 6.

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(c). As to the meaning of 'FSA rules' see PARA 622 note 6.

17 As to the meaning of 'court' see PARA 626 note 20.

18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(d).

19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(e).

20 Ie any direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25.

21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(3).

22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(4).

23 Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25.

- 24     le the Financial Services and Markets Act 2000 s 150: see PARA 33.
- 25     Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(6).
- 26     le a direction given under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25.
- 27     Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(7)(a).
- 28     Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(7)(b).

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#### **634. Procedure in regard to directions.**

A direction<sup>1</sup> takes effect: (1) immediately, if the notice<sup>2</sup> states that that is the case<sup>3</sup>; (2) on such date as may be specified in the notice<sup>4</sup>; or (3) if no date is specified in the notice, when the matter to which it relates is no longer open to review<sup>5</sup>.

A direction may be expressed to take effect immediately (or on a specified date) only if the Financial Services Authority<sup>6</sup>, having regard to the ground on which it is exercising its power<sup>7</sup>, considers that it is necessary for the direction to take effect immediately (or on that date)<sup>8</sup>.

If the Authority proposes to give a direction<sup>9</sup>, or gives such a direction with immediate effect, it must give separate written notices to the company and its depositary<sup>10</sup>. The notice must:

- 1577   (a)    give details of the direction<sup>11</sup>;
- 1578   (b)    inform the person to whom it is given of when the direction takes effect<sup>12</sup>;
- 1579   (c)    state the Authority's reasons for giving the direction and for its  
          determination as to when the direction takes effect<sup>13</sup>;
- 1580   (d)    inform the person to whom it is given that he may make representations to  
          the Authority within such period as may be specified in it (whether or not he has  
          referred the matter to the Financial Services and Markets Tribunal)<sup>14</sup>; and
- 1581   (e)    inform him of his right to refer the matter to the Tribunal<sup>15</sup>.

If the direction imposes certain specific requirements in regard to the cessation of share issues and transfers<sup>16</sup>, the notice must state that the requirement has effect until either a specified date, or a further direction<sup>17</sup>.

If the direction imposes certain specific requirements in regard to the winding up of the company<sup>18</sup>, the petition must be presented (or, as the case may be, the company must be wound up) either by a date specified in the notice, or (if no date is specified) as soon as possible<sup>19</sup>.

The Authority may extend the period allowed under the notice for making representations<sup>20</sup>.

If, having considered any representations made by a person to whom the notice was given, the Authority decides to give the direction in the way proposed<sup>21</sup> or if it decides, where a direction has been given, not to revoke the direction<sup>22</sup>, the Authority must give separate written notices to the company and its depositary<sup>23</sup>.

If, having considered any representations made by a person to whom the notice was given, the Authority decides not to give the direction in the way proposed<sup>24</sup>, to give the direction in a way other than that proposed<sup>25</sup>, or to revoke a direction which has effect<sup>26</sup>, then it must give separate written notices to the company and its depository<sup>27</sup>. If a notice informs a person of his right to refer a matter to the Tribunal<sup>28</sup>, it must give an indication of the procedure on such a reference<sup>29</sup>.

The provisions described above<sup>30</sup> apply to the variation of a direction on the Authority's own initiative as they apply to the giving of a direction<sup>31</sup>.

If on an application<sup>32</sup> for a direction<sup>33</sup> to be revoked or varied the Authority proposes to vary the direction otherwise than in accordance with the application<sup>34</sup> or to refuse to revoke or vary the direction<sup>35</sup>, it must give the applicant a warning notice<sup>36</sup>. If the Authority decides to refuse to revoke or vary the direction, it must give the applicant a decision notice<sup>37</sup> and the applicant may refer the matter to the Tribunal<sup>38</sup>. If the Authority decides on its own initiative to revoke a direction<sup>39</sup>, it must give separate written notices of its decision to the company and its depository<sup>40</sup>. If, on an application<sup>41</sup> for a direction to be revoked or varied, the Authority decides to revoke or vary it in accordance with the application, it must give the applicant written notice of its decision<sup>42</sup>. The notice<sup>43</sup> must specify the date on which the decision takes effect<sup>44</sup>.

The Authority may publish such information about the revocation or variation in such way as it considers appropriate<sup>45</sup>.

1    Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25: see PARA 633.

2    Ie the notice under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(3): see the text to note 10.

3    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(1)(a).

4    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(1)(b).

5    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(1)(c). For the purposes of reg 27(1)(c), whether a matter is open to review is to be determined in accordance with the Financial Services and Markets Act 2000 s 391(8) (see PARA 774): Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(14).

6    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

7    Ie its power under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25: see PARA 633.

8    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(2).

9    Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25: see PARA 633.

10   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(3). The Financial Services and Markets Act 2000 s 395 (the Authority's procedures) (see PARAS 773, 777) has effect as if s 395(13) included a reference to a notice given in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(3): reg 27(15).

11   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(a).

12   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(b).

13   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(c).

14   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(d). As to the Financial Services and Markets Tribunal see PARA 43 et seq.



- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(e).
- 16 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(a) or (b): see PARA 633.
- 17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(5).
- 18 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(2)(d) or (e): see PARA 633.
- 19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(6).
- 20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(7).
- 21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(8)(a).
- 22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(8)(b).
- 23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(8). A notice given under reg 27(8) must inform the person to whom it is given of his right to refer the matter to the Tribunal: reg 27(10). The Financial Services and Markets Act 2000 s 395 (the Authority's procedures) (see PARAS 773, 777) has effect as if s 395(13) included a reference to a notice given in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(8): reg 27(15).
- 24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(9)(a).
- 25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(9)(b). A notice under reg 27(9)(b) must comply with reg 27(4) (see heads (a)-(e) in the text): reg 27(11). The Financial Services and Markets Act 2000 s 395 (the Authority's procedures) (see PARAS 773, 777) has effect as if s 395(13) included a reference to a notice given in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(9)(b): reg 27(15).
- 26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(9)(c).
- 27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(9).
- 28 Eg as in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(4)(e) (see the text to note 15), reg 27(10) (see note 23) and reg 27(11) (see note 25).
- 29 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(12).
- 30 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27.
- 31 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(13).
- 32 Ie an application under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25(7): see PARA 633.
- 33 As to directions see PARA 633.
- 34 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 28(1)(a).
- 35 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 28(1)(b).
- 36 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 28(1). As to notices see PARA 621.
- 37 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 28(2)(a).
- 38 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 28(2)(b).
- 39 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25: see PARA 633.
- 40 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 29(1). As to the meaning of 'depository' see PARA 626.
- 41 See note 32.

- 42 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 29(2).
- 43 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 29.
- 44 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 29(3).
- 45 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 29(4).

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### **635. Applications to the High Court.**

In situations where the Financial Services Authority<sup>1</sup> could give a direction<sup>2</sup> in relation to an open-ended investment company<sup>3</sup>, it may apply to the High Court for an order removing the depositary<sup>4</sup> or any director of the company and replacing any such person with a person or persons nominated by the Authority<sup>5</sup>.

If it appears to the Authority that there is no person whom it may nominate for the above purposes<sup>6</sup>, it may apply to the court for an order removing the director in question or the depositary (or both) and appointing an authorised person<sup>7</sup> to wind up the company<sup>8</sup>. On such an application<sup>9</sup> the court may make such order as it thinks fit<sup>10</sup>.

The Authority must:

- 1582 (1) give written notice of the making of an application<sup>11</sup> to the company<sup>12</sup>, its depositary<sup>13</sup> and, where the application seeks the removal of any director of the company, that director<sup>14</sup>; and
- 1583 (2) take such steps as it considers appropriate for bringing the making of the application to the attention of the shareholders of the company<sup>15</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

2 Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 25: see PARA 633.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(1). As to the meaning of 'open-ended investment company' see PARA 623 note 3.

4 As to the meaning of 'depositary' see PARA 626.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(2). The Authority may nominate a person for the purposes of reg 26(2) only if it is satisfied that, if the order were made, the requirements of reg 15(4)-(7) (see PARA 629) or, as the case may be, of reg 15(8) (see PARA 629) would be met: reg 26(3).

6 Ie for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(2).

7 As to authorised persons see PARA 314.

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(4). The court may, on the application of the Authority, rescind any such order as is mentioned in reg 26(4) and substitute such an order as is mentioned in reg 26(2) (see the text to note 5): reg 26(6).

9 le under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(5).

11 le an application under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26.

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(7)(a)(i).

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(7)(a)(ii).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(7)(a)(iii).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 26(7)(b).

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#### *(d) Winding Up and Dissolution*

### **636. Winding up by the court.**

Where an open-ended investment company<sup>1</sup> is wound up as an unregistered company under Part V of the Insolvency Act 1986<sup>2</sup>, the provisions of that Act apply for the purposes of the winding up with a number of modifications<sup>3</sup>.

Where a petition for the winding up of an open-ended investment company is presented by a person other than the Financial Services Authority<sup>4</sup>: (1) that person must serve a copy of the petition on the Authority<sup>5</sup>; and (2) the Authority is entitled to be heard on the petition<sup>6</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 le the Insolvency Act 1986 Pt V (ss 220-229).

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 31(1). The modifications are as follows:

605 (1) a petition for the winding up of an open-ended investment company may be presented by the depositary of the company as well as by any person authorised under the Insolvency Act 1986 s 124 (application for winding up) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 450 et seq) or s 124A (petition for winding up on grounds of public interest) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 444), as those provisions apply by virtue of Pt V, to present a petition for the winding up of the company (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 31(2));

606 (2) if, before the presentation of a petition for the winding up by the court of an open-ended investment company as an unregistered company under the Insolvency Act 1986 Pt V, the affairs of the company are being wound up otherwise than by the court:

73. (a) s 129(2) (commencement of winding up by the court) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 489) is not to apply (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 31(4)(a)); and

74. (b) any winding up of the company by the court is to be deemed to have commenced at the time at which the Authority gave its approval to a proposal mentioned in reg 21(1)(d) (see PARA 631), or in a case falling within reg 21(3)(b) (see PARA 631), on the day following the end of the one-month period mentioned in reg 21(3)(b) (reg 31(4)(b)).

74

As to the meaning of 'depository' see PARA 626.

4 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 31(3)(a).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 31(3)(b).

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### **637. Dissolution on winding up by the court.**

The provisions in Part V of the Insolvency Act 1986<sup>1</sup> in regard to the winding up of unregistered companies on the final meeting of creditors and vacation of office by the liquidator<sup>2</sup> have effect, in relation to open-ended investment companies<sup>3</sup>, as if the reference to the registrar of companies was a reference to the Financial Services Authority<sup>4</sup>.

Where, in respect of an open-ended investment company, the Authority receives:

- 1584 (1) a notice given for the purposes of the final meeting of creditors and vacation of office by the liquidator as described above<sup>5</sup>; or  
 1585 (2) a notice from the official receiver that the winding up, by the court, of the company is complete<sup>6</sup>,

the Authority must, on receipt of the notice, forthwith register it and<sup>7</sup>, at the end of the period of three months beginning with the day of the registration of the notice, the company is to be dissolved<sup>8</sup>. The Secretary of State<sup>9</sup> may, on the application of the official receiver or any other person who appears to the Secretary of State to be interested, give a direction deferring the date at which the dissolution of the company is to take effect for such period as the Secretary of State thinks fit<sup>10</sup>. An appeal to the court lies from any decision of the Secretary of State on such an application for a direction<sup>11</sup>.

It is the duty of the person:

- 1586 (a) on whose application such a direction<sup>12</sup> is given<sup>13</sup>;  
 1587 (b) in whose favour an appeal with respect to an application for such a direction is determined<sup>14</sup>; or  
 1588 (c) on whose application an order for deferral is made where the winding-up order was made by the court in Scotland<sup>15</sup>,

not later than seven days after the giving of the direction, the determination of the appeal or the making of the order, to deliver to the Authority for registration a copy of the direction or

determination or, in respect of an order under head (c) above, a certified copy of the interlocutor<sup>16</sup>. If a person without reasonable excuse fails to fulfil this duty to deliver a copy<sup>17</sup>, he is guilty of an offence<sup>18</sup>.

1    Ie the Insolvency Act 1986 Pt V (ss 220-229): see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1146 et seq.

2    Ie the Insolvency Act 1986 s 172(8): see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 618.

3    As to the meaning of 'open-ended investment company' see PARA 623 note 3.

4    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(1).

5    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(2)(a). The notice referred to in the text is a notice given for the purposes of the Insolvency Act 1986 s 172(8).

6    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(2)(b).

7    Ie subject to the provisions of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32.

8    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(2).

9    As to the Secretary of State see PARA 3.

10   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(3). Regulation 32(3) does not apply to a case where the winding-up order was made by the Court of Session in Scotland, but in such a case the court may, on an application by any person appearing to the court to have an interest, order that the date at which the dissolution of the company is to take effect be deferred for such period as the court thinks fit: reg 32(5).

11   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(4). The direction referred to in the text is a direction under reg 32(3): see the text and note 10.

12   Ie a direction under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(3).

13   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(6)(a).

14   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(6)(b).

15   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(6)(c). As to the order for deferral see note 10.

16   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(6).

17   Ie as required by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(6): see the text and note 16.

18   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 32(7). A person guilty of such an offence is liable on summary conviction: (1) to a fine not exceeding level 1 on the standard scale (reg 32(8) (a)); and (2) on a second or subsequent conviction, instead of to the penalty set out in head (1) above, to a fine of £100 for each day on which the contravention is continued (reg 32(8)(b)). As to the standard scale see PARA 27 note 21.

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### 638. Dissolution in other circumstances.

Where the affairs of an open-ended investment company<sup>1</sup> have been wound up otherwise than by the court, the Financial Services Authority<sup>2</sup> must, as soon as is reasonably practicable after the winding up is complete, register that fact and<sup>3</sup>, at the end of the period of three months beginning with the day of the registration, the company is to be dissolved<sup>4</sup>.

The court may, on the application of the Authority or the company, make an order deferring the date at which the dissolution of the company is to take effect for such period as the court thinks fit<sup>5</sup>. It is the duty of the company, on whose application such an order of the court<sup>6</sup> is made, to deliver to the Authority, not later than seven days after the making of the order, a copy of the order for registration<sup>7</sup>.

Where any company, the head office of which is situated in England or Wales, is dissolved<sup>8</sup>, any sum of money (including unclaimed distributions) standing to the account of the company at the date of the dissolution must, on such date as is determined in accordance with FSA rules<sup>9</sup>, be paid into court<sup>10</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

3 Ie subject to the provisions of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(1).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(2).

6 Ie an order under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(2): see the text and note 5.

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(3).

8 Ie by virtue of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(1): see the text and note 4.

9 As to the meaning of 'FSA rules' see PARA 622 note 6.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(4).

Where any company, the head office of which is situated in Scotland, is dissolved, any sum of money (including unclaimed dividends and unapplied or undistributable balances) standing to the account of the company at the date of the dissolution must, on such date as is determined in accordance with FSA rules, be lodged in an appropriate bank or institution as defined in the Bankruptcy (Scotland) Act 1985 s 73(1) in the name of the Accountant of the Court (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(5)(a)) and thereafter be treated as if it were a sum of money lodged in such an account by virtue of the Insolvency Act 1986 s 193 (unclaimed dividends (Scotland)) as that provision applies by virtue of Pt V (ss 220-229) (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 33(5)(b)).

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### (C) CORPORATE CODE

## *(a) Administrative Provisions*

### **639. Directors.**

On the coming into effect of an authorisation order<sup>1</sup> in respect of an open-ended investment company<sup>2</sup>, the persons proposed in the application for authorisation<sup>3</sup> as directors of the company are deemed to be appointed as its first directors<sup>4</sup>. Any subsequent appointment as a director of a company must be made by the company in general meeting, except that the directors of the company may appoint a person to act as director to fill any vacancy until such time as the next annual general meeting of the company takes place or, if the company does not hold annual general meetings, the directors of the company may appoint a person to act as director<sup>5</sup>.

Any act of a director is valid notwithstanding any defect that may thereafter be discovered in his appointment or qualifications<sup>6</sup> or that it is afterwards discovered that his appointment had terminated by virtue of any provision contained in FSA rules<sup>7</sup> which required a director to retire upon attaining a specified age<sup>8</sup>.

The business of a company must be managed: (1) where a company has only one director, by that director<sup>9</sup>; or (2) where a company has more than one director, by the directors but subject to any provision contained in FSA rules as to the allocation between the directors of responsibilities for the management of the company (including any provision there may be as to the allocation of such responsibility to one or more directors to the exclusion of others)<sup>10</sup>.

Subject to the provisions of the Open-Ended Investment Companies Regulations 2001<sup>11</sup>, FSA rules and the company's instrument of incorporation, the directors of a company may exercise all the powers of the company<sup>12</sup>.

The matters to which a director of an open-ended investment company must have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its shareholders<sup>13</sup>. This duty<sup>14</sup> on a director is owed by him to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors<sup>15</sup>.

1 As to the meaning of 'authorisation order' see PARA 623 note 2. As to authorisation orders see PARA 628.

2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

3 I.e. under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 12: see PARA 627.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(1).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(2) (substituted by SI 2005/923). The Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(2) is subject to reg 21 (see PARA 631) and reg 26 (see PARA 635).

The directors of an open-ended investment company must, on a members' requisition, forthwith proceed duly to convene an extraordinary general meeting of the company and this applies notwithstanding anything in the company's instrument of incorporation: reg 34A(1) (reg 34A added by SI 2005/923). A members' requisition is a requisition (1) by members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company as at that date carries the right of voting at general meetings of the company; and (2) which states as the object of the meeting the removal of one or more directors appointed in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(2) and which must be signed by the requisitionists and deposited at the registered office of the company: reg 34A(2) (as so added). As to instruments of incorporation see PARA 624.

A company may by ordinary resolution at an extraordinary general meeting convened in accordance with reg 34A(1) remove any director or directors appointed in accordance with reg 34(2): reg 34A(3) (as so added). Regulation 34A is not to be treated as depriving a person removed under it of compensation or damages

payable to him in respect of the termination of his appointment as director or as derogating from any power to remove a director which exists apart from that provision: reg 34A(4) (as so added).

- 6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(3)(a).
- 7 As to the meaning of 'FSA rules' see PARA 622 note 6.
- 8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(3)(b).
- 9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(4)(a).
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(4)(b).
- 11 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
- 12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 34(5).
- 13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 35(1). As to shareholders see PARA 624 note 6.
- 14 Ie the duty imposed by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 35.
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 35(2). See **COMPANIES** vol 14 (2009) PARA 547.

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#### **640. Inspection of directors' service contracts.**

Every open-ended investment company<sup>1</sup> must keep at an appropriate place<sup>2</sup>: (1) in the case of each director whose contract of service with the company is in writing, a copy of that contract<sup>3</sup>; and (2) in the case of each director whose contract of service with the company is not in writing, a written memorandum setting out its terms<sup>4</sup>.

All copies and memoranda kept by a company in accordance with heads (1) and (2) above must be kept at the same place<sup>5</sup>. Every copy and memorandum required by heads (1) and (2) above to be kept must be open to the inspection of any shareholder<sup>6</sup> of the company<sup>7</sup>. If such an inspection is refused, the High Court may by order compel an immediate inspection of the copy or memorandum concerned<sup>8</sup>. Every copy and memorandum required to be kept by heads (1) and (2) above must be made available, for inspection, by the company at the company's annual general meeting<sup>9</sup> or, if the company does not hold annual general meetings, sent to any shareholder at his request within ten days of the company's receipt of such request by the company for inspection by any shareholder at the company's annual general meeting<sup>10</sup>.

The requirements in heads (1) and (2) above apply to a variation of a director's contract of service as they apply to the contract<sup>11</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Appropriate places are the company's head office (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(3)(a)), the place where the company's register of shareholders is kept (reg 36(3)(b)) and, where the designated person is a director of the company and is a body corporate, the registered or principal office of that person (reg 36(3)(c)).

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(1)(a).



- 4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(1)(b).
- 5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(2).
- 6 As to shareholders see PARA 624 note 6.
- 7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(4).
- 8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(5).
- 9 As to the meaning of 'annual general meeting' see PARA 641 note 2.
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(6) (substituted by SI 2005/923).
- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 36(7).

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#### **641. General meetings.**

Every open-ended investment company<sup>1</sup> incorporated before 6 April 2005 must in each year hold a general meeting (the 'annual general meeting')<sup>2</sup> in addition to any other meetings, whether general or otherwise, it may hold in that year<sup>3</sup>. However, if a company holds its first annual general meeting within 18 months of the date on which the authorisation order made by the Financial Services Authority<sup>4</sup> in respect of the company comes into effect, the company is not required<sup>5</sup> to hold any other meeting as its annual general meeting in the year of its incorporation or in the following year<sup>6</sup>. In addition, the directors of an open-ended investment company may elect to dispense with the holding of an annual general meeting by giving 60 days' written notice to all the company's shareholders<sup>7</sup>.

Subject to the above<sup>8</sup>, not more than 15 months may elapse between the date of one annual general meeting of a company and the date of the next<sup>9</sup>.

- 1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
- 2 'Annual general meeting' means such a meeting: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 2(1), 37(1).
- 3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(1) (amended by SI 2005/923). The Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(1) is subject to regs 37(2) and 37A.
- 4 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
- 5 Ie by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(1) (see the text and note 3).
- 6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(2).
- 7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37A(1) (reg 37A added by SI 2005/923). Such an election has effect for the year in which it is made and subsequent years, but does not

affect any liability already incurred by reason of default in holding an annual general meeting: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37A(2) (as so added).

8 le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 37(2), 37A.

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(3). The Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 37(3) is subject to regs 37(2) and 37A.

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#### **642. Name and particulars to be mentioned in documents.**

Every open-ended investment company<sup>1</sup> must have its name mentioned in legible characters in all letters of the company and in all other documents issued by the company in the course of business<sup>2</sup>.

If an officer<sup>3</sup> of a company or a person on the company's behalf signs or authorises to be signed on behalf of the company any cheque or order for money or goods in which the company's name is not mentioned as required above<sup>4</sup>, he is personally liable to the holder of the cheque or order for money or goods for the amount of it (unless it is duly paid by the company)<sup>5</sup>.

Every open-ended investment company must have the following particulars mentioned in legible characters in all letters of the company and in all other documents issued by the company in the course of business:

- 1589 (1) the company's place of registration<sup>6</sup>;
- 1590 (2) the number with which it is registered<sup>7</sup>;
- 1591 (3) the address of its head office<sup>8</sup>; and
- 1592 (4) the fact that it is an investment company with variable capital<sup>9</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 54(1).

3 As to the meaning of 'officer' see PARA 626 note 17.

4 le by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 54(1) (see the text and note 2).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 54(2).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 55(1)(a).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 55(1)(b). Where, in accordance with reg 72 (see PARA 668), the Financial Services Authority makes any change of existing registered numbers in respect of any open-ended investment company then, for a period of three years beginning with the date on which the notification of the change is sent to the company by the Authority, the requirement of reg 55(1)(b) is, notwithstanding reg 72(4), satisfied by the use of either the old number or the new: reg 55(2). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 55(1)(c).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 55(1)(d).

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### **643. Power and capacity of company, etc.**

An open-ended investment company<sup>1</sup> has power to do all such things as are incidental or conducive to the carrying on of its business<sup>2</sup>.

The validity of an act done by an open-ended investment company cannot be called into question on the ground of lack of capacity by reason of anything in the Open-Ended Investment Companies Regulations 2001<sup>3</sup>, FSA rules<sup>4</sup> or the company's instrument of incorporation<sup>5</sup>. However, this does not affect the duty of the directors to observe any limitation on their powers<sup>6</sup>.

In favour of a person dealing in good faith: (1) the power of the directors of an open-ended investment company (whether or not acting as a board) to bind the company, or authorise others to do so<sup>7</sup>; and (2) the power of such a company in general meeting to bind the company, or authorise others to do so<sup>8</sup>, are deemed to be free of any limitation under the company's constitution<sup>9</sup>. This does not affect any liability incurred by the directors or any other person by reason of the directors exceeding their powers<sup>10</sup>.

A party to a transaction with an open-ended investment company is not bound to inquire:

1593 (a) as to whether the transaction is permitted by the Open-Ended Investment Companies Regulations 2001<sup>11</sup>, FSA rules or the company's instrument of incorporation<sup>12</sup>; or

1594 (b) as to any limitation on the powers referred to in head (1) or head (2) above<sup>13</sup>.

A person is not to be taken to have notice of any matter merely because of its being disclosed in any document made available by an open-ended investment company for inspection; but this does not affect the question whether a person is affected by notice of any matter by reason of a failure to make such inquiries as ought reasonably to be made<sup>14</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 53.

3 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

4 As to the meaning of 'FSA rules' see PARA 622 note 6.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 38(1). As to instruments of incorporation see PARA 624.

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 38(2).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 39(1)(a).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 39(1)(b).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 39(1). The reference in reg 39(1) to any limitation under the company's constitution on the powers therein set out includes any limitation deriving from the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, from FSA rules or from a resolution of the company in general meeting or of a meeting of any class of shareholders: reg 39(3). As to general meetings see PARA 641; and as to shareholders see PARA 624 note 6. As to the meaning of 'FSA rules' see PARA 622 note 6.

For the purposes of reg 39:

- 607 (1) a person deals with a company if he is party to any transaction or other act to which the company is a party (reg 39(2)(a));
- 608 (2) a person is not to be regarded as acting in bad faith by reason only of his knowing that, under the company's constitution, an act is beyond any of the powers referred to in reg 39(1)(a) or (b) (see heads (1) and (2) in the text) (reg 39(2)(b)); and
- 609 (3) a person is presumed to have acted in good faith unless the contrary is proved (reg 39(2)(c)).

Heads (2) and (3) above do not apply where:

- 610 (a) by virtue of a limitation deriving from the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, or from FSA rules, an act is beyond any of the powers referred to in reg 39(1)(a) or (b) (see heads (1) and (2) in the text) (reg 39(4)(a)); and
- 611 (b) the person in question has actual knowledge of that fact (reg 39(4)(b)(i)) or has deliberately failed to make inquiries in circumstances in which a reasonable and honest person would have done so (reg 39(4)(b)(ii)).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 39(5).

11 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 40(a). As to instruments of incorporation see PARA 624.

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 40(b).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 41.

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#### **644. Restraint and ratification by shareholders.**

A shareholder<sup>1</sup> of an open-ended investment company<sup>2</sup> may bring proceedings to restrain the doing of an act which but for the statutory provisions relating to company capacity<sup>3</sup> would be beyond the company's capacity<sup>4</sup>. The provisions relating to the powers of directors and the general meeting to bind the company<sup>5</sup> do not affect any right of a shareholder of an open-ended investment company to bring proceedings to restrain the doing of an act which is beyond any of the powers referred to in those provisions<sup>6</sup>.

Any action by the directors of a company: (1) which, but for the provision on company capacity<sup>7</sup>, would be beyond the company's capacity<sup>8</sup>; or (2) which is within the company's capacity but beyond the powers of directors to bind the company<sup>9</sup>, may only be ratified by a resolution of the company in general meeting<sup>10</sup>. A resolution ratifying such an action does not affect any liability incurred by the directors or any other person, as relief from any such liability requires agreement by a separate resolution of the company in general meeting<sup>11</sup>.

Nothing in the provisions described above<sup>12</sup> affects any power or right conferred by or arising under the provisions in the Financial Services and Markets Act 2000 relating to actions for damages<sup>13</sup> or injunctions and restitution orders<sup>14</sup>.

- 1 As to shareholders see PARA 624 note 6.
- 2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
- 3 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 38(1): see PARA 643.
- 4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(1). No proceedings may be brought under reg 42(1) in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company; and reg 42(2) (see the text and note 6) does not have the effect of enabling proceedings to be brought in respect of any such act: reg 42(3).
- 5 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 39(1): see PARA 643.
- 6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(2).
- 7 See note 3.
- 8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(4)(a).
- 9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(4)(b). The powers referred to in the text are those mentioned in reg 39(1)(a): see PARA 643.
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(4)(b).
- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(5). As to general meetings see PARA 641.
- 12 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42.
- 13 Ie the Financial Services and Markets Act 2000 s 150: see PARA 33.
- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 42(6). The provisions relating to injunctions and restitution orders are the Financial Services and Markets Act 2000 s 380 (see PARA 470), s 382 (see PARA 474) or s 384 (see PARA 474).

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#### **645. Events affecting company status.**

Where either of the conditions mentioned in heads (a) and (b) below<sup>1</sup> is satisfied, an open-ended investment company<sup>2</sup> is not entitled to rely against other persons on the happening of any of the following events:

- 1595 (1) any alteration of the company's instrument of incorporation<sup>3</sup>;
- 1596 (2) any change among the directors of the company<sup>4</sup>;
- 1597 (3) as regards service of any document on the company, any change in the situation of the head office of the company<sup>5</sup>; or
- 1598 (4) the making of a winding-up order in respect of the company or, in circumstances in which the affairs of a company are to be wound up otherwise than by the court, the commencement of the winding up<sup>6</sup>.

The conditions mentioned above are that:

- 1599 (a) the event in question had not been officially notified<sup>7</sup> at the material time and is not shown by the company to have been known at that time by the other person concerned<sup>8</sup>; and
- 1600 (b) if the material time fell on or before the fifteenth day after the date of official notification (or where the fifteenth day was a non-business day, on or before the next day that was a business day), it is shown that the other person concerned was unavoidably prevented from knowing of the event at that time<sup>9</sup>.

1 le in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(2).

2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(1)(a). As to instruments of incorporation see PARA 624.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(1)(b). As to directors see PARA 639.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(1)(c).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(1)(d).

7 For the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43, 'official notification' means the notification in the Gazette (by virtue of reg 78 (see PARA 670)) of any document containing the information referred to in reg 43(1); and 'officially notified' is to be construed accordingly: reg 43(3).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(2)(a).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 43(2)(b).

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#### **646. Invalidity of certain transactions involving directors.**

Where: (1) an open-ended investment company<sup>1</sup> enters into a transaction<sup>2</sup> the parties to which include a director<sup>3</sup> of the company or any person who is an associate<sup>4</sup> of such a director<sup>5</sup>; and (2) in connection with the transaction, the directors of the company (whether or not acting as a board) exceed any limitation on their powers under the company's constitution<sup>6</sup>, the transaction is voidable at the instance of the company<sup>7</sup>.

Whether or not the transaction is avoided, any such party to the transaction as is mentioned in head (1) above<sup>8</sup>, and any director of the company who authorised the transaction, is liable to account to the company for any gain which he has made directly or indirectly by the transaction<sup>9</sup> and to indemnify the company for any loss or damage resulting from the transaction<sup>10</sup>.

Nothing in the provisions described above<sup>11</sup> is to be construed as excluding the operation of any other enactment or rule of law by virtue of which the transaction may be called into question or any liability to the company may arise<sup>12</sup>.

The transaction ceases to be voidable if:

- 1601 (a) restitution of any money or other asset which was the subject-matter of the transaction is no longer possible<sup>13</sup>;
- 1602 (b) the company is indemnified for any loss or damage resulting from the transaction<sup>14</sup>;
- 1603 (c) rights which are acquired, bona fide for value and without actual notice of the directors concerned having exceeded their powers, by a person who is not a party to the transaction would be affected by the avoidance<sup>15</sup>; or
- 1604 (d) the transaction is ratified by resolution of the company in general meeting<sup>16</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 'Transaction' includes any act: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(8)(b).

3 As to directors see PARA 639.

4 'Associate', in relation to any person who is a director of the company, means that person's spouse, civil partner, child or stepchild (if under 18), employee, partner or any body corporate of which that person is a director; and if that person is a body corporate, any subsidiary undertaking or director of that body corporate (including any director or employee of such subsidiary undertaking): Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(8)(a) (amended by SI 2005/2114).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(1)(a).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(1)(b). The reference in reg 44(1)(b) to any limitation on directors' powers under the company's constitution includes any limitation deriving from the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, from FSA rules or from a resolution of the company in general meeting or of a meeting of any class of shareholders: reg 44(8)(c). As to the meaning of 'FSA rules' see PARA 622 note 6. As to shareholders see PARA 624 note 6.

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(2).

8 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(1)(a).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(3)(a). A person other than a director of the company is not liable under reg 44(3) if he shows that at the time the transaction was entered into he did not know that the directors concerned were exceeding their powers: reg 44(6).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(3)(b). See note 9.

11 Ie in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(1)-(3).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(4). Regulation 44 does not affect the operation of reg 39 (see PARA 643) in relation to any party to the transaction not within reg 39(1)(a) (see PARA 643); but where a transaction is voidable by virtue of reg 44 and valid by virtue of reg 39 in favour of such a person, the High Court may, on the application of that person or of the company, make such order affirming, severing or setting aside the transaction, on such terms as appear to the court to be just: reg 44(7).

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(5)(a).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(5)(b).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(5)(c).

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 44(5)(d). As to general meetings see PARA 641.

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#### **647. Contracts, execution of documents, etc.**

A contract may be made by an open-ended investment company<sup>1</sup> by writing under its common seal<sup>2</sup> or on behalf of such a company, by any person acting under its authority (whether expressed or implied)<sup>3</sup>. Furthermore, any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of such a company<sup>4</sup>.

In relation to the execution of documents by an open-ended investment company<sup>5</sup>:

- 1605 (1) a document is executed by a company by the affixing of its common seal<sup>6</sup>;
- 1606 (2) a company need not, however, have a common seal, and heads (3) to (5)<sup>7</sup> below apply whether it does or not<sup>8</sup>;
- 1607 (3) a document that is signed by at least one director<sup>9</sup> and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company<sup>10</sup>;
- 1608 (4) a document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed and it is to be presumed, unless a contrary intention is proved, to be delivered upon its being executed<sup>11</sup>;
- 1609 (5) in favour of a purchaser<sup>12</sup>, a document is deemed to have been duly executed by a company if it purports to be signed by at least one director or, in the case of a director which is a body corporate, it purports to be executed by that director; and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, it is deemed to have been delivered upon its being executed<sup>13</sup>.

An open-ended investment company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place elsewhere than in the United Kingdom<sup>14</sup>. A deed executed by such an attorney on behalf of the company has the same effect as if it were executed under the company's common seal<sup>15</sup>.

A document or proceeding requiring authentication by an open-ended investment company is sufficiently authenticated for the purposes of the law of England and Wales by the signature of a director or other authorised officer of the company<sup>16</sup> or, in the case of a director which is a body corporate, if it is executed by that director<sup>17</sup>.

An open-ended investment company which has a common seal may have, for use for sealing shares<sup>18</sup> issued by the company and for sealing documents creating or evidencing shares so issued, an official seal which is a facsimile of its common seal with the addition on its face of the word 'securities'<sup>19</sup>. The official seal when duly affixed to a document has the same effect as the company's common seal<sup>20</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 56(a).



- 3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 56(b).
- 4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 56.
- 5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(1).
- 6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(2).
- 7 le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(4)-(6).
- 8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(3).
- 9 As to directors see PARA 639.
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(4).
- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(5).
- 12 For the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(6), 'purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property: reg 57(7).
- 13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 57(6).
- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 58(1). As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 58(2).
- 16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 59(a).
- 17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 59(b).
- 18 As to shares see PARA 651 et seq.
- 19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 60(1).
- 20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 60(2). Nothing in reg 60 affects the right of an open-ended investment company whose head office is in Scotland to subscribe such shares and documents in accordance with the Requirements of Writing (Scotland) Act 1995: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 60(3).

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#### **648. Personal liability for contracts and deeds.**

A contract, which purports to be made by or on behalf of an open-ended investment company<sup>1</sup> at a time before the coming into effect of an authorisation order<sup>2</sup> in relation to that company, has effect (subject to any agreement to the contrary) as a contract made with the person purporting to act for the company or as agent for it, and he is accordingly personally liable under the contract<sup>3</sup>. This applies to the making of a deed as it applies to the making of a contract<sup>4</sup>.

If a company enters into a transaction at any time after the authorisation order made in respect of the company has been revoked and the company fails to comply with its obligations in respect of that transaction within 21 days of being called upon to do so, the person who

authorised the transaction is liable, and where the transaction was authorised by two or more persons they are jointly and severally liable, to indemnify the other party to the transaction in respect of any loss or damage suffered by him by reason of the company's failure to comply with those obligations<sup>5</sup>.

Any provision, whether contained in the instrument of incorporation<sup>6</sup> of an open-ended investment company or in any contract with the company or otherwise:

- 1610 (1) which exempts any officer<sup>7</sup> of the company or any person (whether or not an officer of the company) employed by the company as auditor<sup>8</sup> from, or indemnifies him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company<sup>9</sup>; or
- 1611 (2) which exempts the depositary<sup>10</sup> of the company from, or indemnifies him against, any liability for any failure to exercise due care and diligence in the discharge of his functions in respect of the company<sup>11</sup>,

is void<sup>12</sup>. However this does not prevent a company: (a) from purchasing and maintaining for any such officer, auditor or depositary insurance against any such liability<sup>13</sup>; or (b) from indemnifying any such officer, auditor or depositary against any liability incurred by him in defending any proceedings (whether civil or criminal) in which judgment is given in his favour or he is acquitted<sup>14</sup> or in connection with any application<sup>15</sup> in which relief is granted to him by the court<sup>16</sup>.

- 1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
- 2 As to the meaning of 'authorisation order' see PARA 623 note 2. As to authorisation orders see PARA 628.
- 3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 61(1).
- 4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 61(2).
- 5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 61(3).
- 6 As to instruments of incorporation see PARA 624.
- 7 As to the meaning of 'officer' see PARA 626 note 17.
- 8 As to auditors see PARA 658 et seq.
- 9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(1)(a).
- 10 As to the meaning of 'depositary' see PARA 626.
- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(1)(b).
- 12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(2).
- 13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(3)(a).
- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(3)(b)(i).
- 15 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63: see PARA 649.
- 16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 62(3)(b)(ii).

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#### **649. Relief from liability.**

The provisions described below<sup>1</sup> apply to: (1) any proceedings for negligence, default, breach of duty or breach of trust against an officer<sup>2</sup> of an open-ended investment company<sup>3</sup> or a person (whether or not an officer of the company) employed by the company as auditor<sup>4</sup>; or (2) any proceedings against the depository<sup>5</sup> of such a company for failure to exercise due care and diligence in the discharge of his functions in respect of the company<sup>6</sup>.

If, in any such proceedings<sup>7</sup>, it appears to the court hearing the case:

- 1612 (a) that the officer, auditor or depository is or may be liable in respect of the cause of action in question<sup>8</sup>;
- 1613 (b) that, nevertheless, he has acted honestly and reasonably<sup>9</sup>; and
- 1614 (c) that, having regard to all the circumstances of the case (including those connected with his appointment), he ought fairly to be excused from the liability sought to be enforced against him<sup>10</sup>,

the court may relieve him, either wholly or partly, from his liability on such terms as it may think fit<sup>11</sup>.

If any such officer, auditor or depository has reason to apprehend that any claim will or might be made against him in proceedings to which these provisions apply, he may apply to the court for relief<sup>12</sup>. The court, on such an application<sup>13</sup>, has the same power to relieve the applicant as it would have had<sup>14</sup> if it had been a court before which the relevant proceedings against the applicant had been brought<sup>15</sup>.

1    le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63.

2    As to the meaning of 'officer' see PARA 626 note 17.

3    As to the meaning of 'open-ended investment company' see PARA 623 note 3.

4    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(1)(a). As to auditors see PARA 658 et seq.

5    As to the meaning of 'depository' see PARA 626.

6    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(1)(b).

7    le proceedings to which the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63 applies.

8    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(2)(a).

9    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(2)(b).

10   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(2)(c).

11   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(2). Where a case to which reg 63(2) applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant or defender ought in pursuance of reg 63(2) to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant or defender on such terms as to costs or otherwise as the judge may think proper: reg 63(5).

12   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(3).

- 13 le under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(3).
- 14 le under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63.
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 63(4).

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### **650. Punishment for fraudulent trading.**

If any business of an open-ended investment company<sup>1</sup> is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who was knowingly a party to the carrying on of the business in that manner is guilty of an offence<sup>2</sup>. This applies whether or not the company has been, or is in the course of being, wound up (whether by the court or otherwise)<sup>3</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 64(1). Such a person is liable on conviction on indictment to imprisonment not exceeding a term of two years or to a fine or to both (reg 64(1) (a)), and on summary conviction to imprisonment not exceeding a term of three months or to a fine not exceeding the statutory maximum or to both (reg 64(1)(b)). As to the statutory maximum see PARA 56 note 24.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 64(2).

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### **(b) Shares**

### **651. Shares generally.**

An open-ended investment company<sup>1</sup> may issue more than one class of shares<sup>2</sup>. A shareholder<sup>3</sup> may not have any interest in the scheme property<sup>4</sup> of the company<sup>5</sup>.

The rights which attach to each share of any given class are:

- 1615 (1) the right, in accordance with the instrument of incorporation<sup>6</sup>, to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the scheme property<sup>7</sup>;
- 1616 (2) the right, in accordance with the instrument of incorporation, to vote at any general meeting<sup>8</sup> of the company or at any relevant class meeting<sup>9</sup>; and
- 1617 (3) such other rights as may be provided for, in relation to shares of that class, in the instrument of incorporation of the company<sup>10</sup>.

In respect of any class of shares, the rights mentioned above<sup>11</sup> may, if the company's instrument of incorporation so provides, be expressed in two denominations; and in the case of any such class, one (the 'smaller') denomination is to be such proportion of the other (the 'larger') denomination as is fixed by the instrument of incorporation<sup>12</sup>. In respect of any class of shares thus expressed in two denominations<sup>13</sup>, any share to which rights expressed in the smaller denomination are attached is to be known as a 'smaller denomination share'; and any share to which rights expressed in the larger denomination are attached is to be known as a 'larger denomination share'<sup>14</sup>.

In respect of any class of shares, the rights which attach to each share of that class are:

- 1618 (a) except in respect of a class of shares expressed in two denominations<sup>15</sup>, equal to the rights that attach to each other share of that class<sup>16</sup>; and
- 1619 (b) in respect of a class of shares expressed in two denominations<sup>17</sup>, equal to the rights that attach to each other share of that class of the same denomination<sup>18</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(1).

3 As to shareholders see PARA 624 note 6.

4 As to the meaning of 'scheme property' see PARA 626 note 1.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(2).

6 As to instruments of incorporation see PARA 624.

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(3)(a).

8 As to general meetings see PARA 641.

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(3)(b).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(3)(c).

11 I.e. the rights mentioned in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(3).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(4). In respect of any class of shares within reg 45(4), the rights that attach to any smaller denomination share of that class are to be a proportion of the rights that attach to any larger denomination share of that class and that proportion is to be the same as the proportion referred to in reg 45(4): reg 45(7).

13 I.e. shares within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(4).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(5). 'Smaller denomination share' and 'larger denomination share' have the meanings described in the text: regs 2(1), 45(5).

15 I.e. shares within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(4).

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(6)(a).

17 I.e. shares within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(4).

18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 45(6)(b).

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## **652. Share certificates.**

An open-ended investment company<sup>1</sup> must prepare documentary evidence of title to its shares (known as 'share certificates'<sup>2</sup>) as follows:

- 1620 (1) in respect of any new shares issued by it<sup>3</sup>;
- 1621 (2) where a shareholder<sup>4</sup> has transferred part only of his holding back to the company, in respect of the remainder of that holding<sup>5</sup>;
- 1622 (3) where a shareholder has transferred part only of his holding to the designated person<sup>6</sup>, in respect of the remainder of that holding<sup>7</sup>;
- 1623 (4) where a company has registered a transfer of shares made to a person other than the company or a person designated as mentioned in head (3) above<sup>8</sup>, in respect of the shares transferred to the transferee<sup>9</sup> and in respect of any shares retained by the transferor which were evidenced by any certificate sent to the company for the purposes of registering the transfer<sup>10</sup>;
- 1624 (5) in respect of any holding of bearer shares for which a certificate evidencing title has already been issued but where the certificate has been surrendered to the company for the purpose of being replaced by two or more certificates which between them evidence title to the shares comprising that holding<sup>11</sup>; and
- 1625 (6) in respect of any shares for which a certificate has already been issued but where it appears to the company that the certificate needs to be replaced as a result of having been lost, stolen or destroyed or having become damaged or worn out<sup>12</sup>.

A company must exercise due diligence and take all reasonable steps to ensure that certificates prepared in accordance with heads (1) to (5) above<sup>13</sup> are ready for delivery as soon as reasonably practicable<sup>14</sup>. Certificates need be prepared in the circumstances referred to in heads (5) and (6) above<sup>15</sup> only if the company has received:

- 1626 (a) a request for a new certificate<sup>16</sup>;
- 1627 (b) the old certificate (if there is one)<sup>17</sup>;
- 1628 (c) such indemnity as the company may require<sup>18</sup>; and
- 1629 (d) such reasonable sum as the company may require in respect of the expenses incurred by it in complying with the request<sup>19</sup>.

A company is not required to prepare share certificates in the following cases<sup>20</sup>:

- 1630 (i) where the company's instrument of incorporation<sup>21</sup> states that share certificates will not be issued and contains provision as to other procedures for evidencing a person's entitlement to shares<sup>22</sup>;
- 1631 (ii) where a shareholder has indicated to the company in writing that he does not wish to receive a certificate<sup>23</sup>;
- 1632 (iii) where shares are issued or transferred to the designated person<sup>24</sup>;
- 1633 (iv) where shares are issued or transferred to a nominee of a recognised investment exchange<sup>25</sup> who is designated for these purposes<sup>26</sup>.

Each share certificate must state: (A) the number of shares the title to which is evidenced by the certificate<sup>27</sup>; (B) where the company has more than one class of shares, the class of shares

title to which is evidenced by the certificate<sup>28</sup>; and (c) except in the case of bearer shares<sup>29</sup>, the name of the holder<sup>30</sup>.

A share certificate specifying any shares held by any person which is under the common seal of the company<sup>31</sup>, or authenticated in accordance with the Open-Ended Investment Companies Regulations 2001<sup>32</sup>, is prima facie evidence of that person's title to the shares<sup>33</sup>.

- 1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
- 2 'Share certificate' has the meaning described in the text: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 2(1), 46(1).
- 3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(a). Regulation 46(1) is subject to regs 47, 48: see PARA 653.
- 4 As to shareholders see PARA 624 note 6.
- 5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(b).
- 6 As to the meaning of 'the designated person' see PARA 633 note 11.
- 7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(c).
- 8 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(c).
- 9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(d)(i).
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(d)(ii).
- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(e).
- 12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(f).
- 13 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(a)-(f).
- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(2).
- 15 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(1)(e), (f).
- 16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(3)(a).
- 17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(3)(b).
- 18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(3)(c).
- 19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(3)(d).
- 20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 47(2).
- 21 As to instruments of incorporation see PARA 624.
- 22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 47(3).
- 23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 47(4).
- 24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 47(5).
- 25 As to recognised investment exchanges see PARA 684 et seq.
- 26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 47(6). The nominee is designated in the rules of the investment exchange in question.
- 27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(4)(a). Regulation 46(5) provides that where, in respect of any class of shares, the rights that attach to shares of that class are expressed in two denominations, the reference in reg 46(4)(a) (as it applies to shares of that class) to the number of shares is a reference to the total of:

$$N + n/p$$

where:

- 612 (1)  $N$  is the relevant number of the larger denomination shares of the class in question (reg 46(6)(a));
- 613 (2)  $n$  is the relevant number of the smaller denomination shares of that class (reg 46(6)(b)); and
- 614 (3)  $p$  is the number of smaller denomination shares of that class that are equivalent to one larger denomination share of that class (reg 46(6)(c)).

Nothing in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, is to be taken as preventing the total arrived at under reg 46(5) being expressed on the certificate as a single entry representing the result derived from the formula set out above: reg 46(7).

28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(4)(b).

29 As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.

30 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(4)(c).

31 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(8)(a).

32 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(8)(b). As to authentication see reg 59; and PARA 647.

33 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(8). In Scotland, a share certificate specifying any shares held by any person which is under the common seal of the company (reg 46(9)(a)), or subscribed by the company in accordance with the Requirements of Writing (Scotland) Act 1995 (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 46(9)(b)), is, unless the contrary is shown, sufficient evidence of that person's title to the shares (reg 46(9)).

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### 653. Bearer shares.

An open-ended investment company<sup>1</sup> may, if its instrument of incorporation so provides, issue shares ('bearer shares')<sup>2</sup> evidenced by a share certificate, or by any other documentary evidence of title for which provision is made in its instrument of incorporation, which indicates that the holder of the document is entitled to the shares specified in it<sup>3</sup> and that no entry will be made on the register of shareholders<sup>4</sup> identifying the holder of those shares<sup>5</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 As to the meaning of 'bearer shares' see PARA 626 note 24.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 48(a).

4 As to the register of shareholders see PARA 654.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 48(b).



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#### **654. The register of shareholders.**

Every open-ended investment company<sup>1</sup> must keep a register of persons who hold shares in the company<sup>2</sup>. The register of shareholders is prima facie evidence of any matters which are directed or authorised<sup>3</sup> to be contained in it<sup>4</sup>. In the case of companies registered in England and Wales, no notice of any trust, express, implied or constructive, is to be entered on the company's register or to be receivable by the company<sup>5</sup>. A company must exercise all due diligence and take all reasonable steps to ensure that the information contained in the register is at all times complete and up to date<sup>6</sup>.

The register of shareholders must contain an entry consisting of the name of the designated person<sup>7</sup>, and a statement of the aggregate number of all shares in the company held by that person<sup>8</sup>. Where a company issues a share to any person and the name of that person is not already entered on the register, the company must enter his name on the register<sup>9</sup>.

In respect of any person whose name is entered on the register under these provisions<sup>10</sup> or on the transfer of registered shares<sup>11</sup>, the register must contain an entry consisting of:

- 1634 (1) the address of the shareholder<sup>12</sup>;
- 1635 (2) the date on which the shareholder's name was entered on the register<sup>13</sup>;
- 1636 (3) a statement of the aggregate number of shares held by the shareholder, distinguishing each share by its number (if it has one) and, where the company has more than one class of shares, by its class<sup>14</sup>.

The register of shareholders must contain a monthly statement of the aggregate number of all the bearer shares in issue except for any bearer shares in issue which, at the time when the statement is made, are held by the designated person<sup>15</sup>.

Where the aggregate number of shares referred to above<sup>16</sup> includes any shares to which rights expressed in two denominations are attached<sup>17</sup>, in respect of each class of such shares<sup>18</sup>, the number of shares of that class held by any person<sup>19</sup>, or the number of bearer shares of that class<sup>20</sup>, is to be taken<sup>21</sup> to be the total of:

$$N + n/p$$

where:

- 1637 (a)  $N$  is the relevant number of larger denomination shares of that class<sup>22</sup>;
- 1638 (b)  $n$  is the relevant number of smaller denomination shares of that class<sup>23</sup>;
- and
- 1639 (c)  $p$  is the number of smaller denomination shares of that class that are equivalent to one larger denomination share of that class<sup>24</sup>.

The register of shareholders of a company must be kept at its head office, except that, if the work of making it up is done at another office of the company, it may be kept there<sup>25</sup> and, if the company arranges with some other person for the making up of the register to be undertaken on its behalf by that other person, it may be kept at the office of the other person at which the work is being done<sup>26</sup>.

Every company must keep an index of the names of the holders of its registered shares<sup>27</sup>. The index must contain, in respect of each shareholder, a sufficient indication to enable the account of that shareholder in the register to be readily found<sup>28</sup>. The index must be at all times kept at the same place as the register of shareholders<sup>29</sup>. Not later than 14 days after the date on which any alteration is made to the register of shareholders, the company must make any necessary alteration in the index<sup>30</sup>.

The register of shareholders and the index of names must be open to the inspection of any shareholder (including any holder of bearer shares) without charge<sup>31</sup>. Any shareholder may require a copy of the entries on the register relating to him and the company must cause any copy so required by a person to be sent to him free of charge<sup>32</sup>. If an inspection<sup>33</sup> is refused, or if a copy so required is not sent, the High Court may by order compel an immediate inspection of the register and index, or direct that the copy required be sent to the person requiring it<sup>34</sup>.

Where the register of shareholders is kept at the office of some person other than the company<sup>35</sup> and by reason of any default of his the company fails to comply with any of the requirements relating to the index or inspection<sup>36</sup>, the person at whose office the register of shareholders is kept is guilty of an offence if he knowingly or recklessly authorises or permits the default in question<sup>37</sup>.

The power of the court in regard to inspection of the register and index<sup>38</sup> extends to the making of orders directed to the person at whose office the register of shareholders is kept and to any officer or employee of his<sup>39</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 1(1). This register is the 'register of shareholders': see PARA 626 note 22.

There is an exception to Sch 3 para 1(1) in that, to the extent that the aggregate numbers of shares mentioned in Sch 3 para 5(1)(b) and Sch 3 para 7 include bearer shares, nothing in Sch 3 requires any entry to be made in the register in respect of bearer shares: Sch 3 para 1(2). As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.

3 I.e. by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 2(1) (amended by SI 2001/3755).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 3(1).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 3(2).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 5(1)(a). As to the meaning of 'designated person' see PARA 633 note 11.

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 5(1)(b). For the purposes of Sch 3 para 5(1)(b), the designated person is to be taken as holding all shares in the company which are in issue and in respect of which no other person's name is entered on the register: Sch 3 para 5(2). The statement referred to in Sch 3 para 5(1)(b) must be updated at least once a day: Sch 3 para 5(3).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 6(2). Note that Sch 3 para 6 does not apply to any issue or transfer of shares to the designated person: Sch 3 para 6(1).

10 I.e. in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 6(2): see note 9.

11 I.e. in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 6. As to the transfer of shares see PARA 656.

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 6(3)(a). As to shareholders see PARA 624 note 6.

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 6(3)(b).

- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 6(3)(c).
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 7.
- 16 Ie in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 paras 5-7: see the text to notes 7-9, 12-15.
- 17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 8(1).
- 18 Ie shares to which rights expressed in two denominations are attached.
- 19 Ie as referred to in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 5 or 6: see the text to notes 7-9, 12-14.
- 20 Ie as referred to in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 7: see the text to note 15.
- 21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 8(2). Nothing in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, is to be taken as preventing the total arrived at under Sch 3 para 8(2) being expressed on the register as a single entry representing the result derived from the formula set out in the text: Sch 3 para 8(4).
- 22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 8(3)(a). As to larger denomination shares see PARA 651.
- 23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 8(3)(b). As to smaller denomination shares see PARA 651.
- 24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 8(3)(c).
- 25 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 9(a).
- 26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 9(b).
- 27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 10(1).
- 28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 10(2).
- 29 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 10(3).
- 30 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 10(4).
- 31 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 11(1). This is subject to reg 50 (see PARA 655) and to FSA rules. As to the meaning of 'FSA rules' see PARA 622 note 6.
- 32 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 11(2).
- 33 Ie required under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 11.
- 34 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 11(3).
- 35 Ie in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 9(b): see the text to note 26.
- 36 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 12(1). As to the requirements relating to the index and inspection see Sch 3 para 10 (see the text to notes 27-30) or Sch 3 para 11 (see the text to notes 31-34).
- 37 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 12(2). A person guilty of such an offence is liable in respect of each default on summary conviction to a fine not exceeding level 1 on the standard scale: Sch 3 para 12(3). As to the standard scale see PARA 27 note 21.
- 38 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 11(3): see the text to note 34.
- 39 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 3 para 12(4).

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### **655. Closure and rectification of register of shareholders.**

An open-ended investment company<sup>1</sup> may, on giving notice by advertisement in a national newspaper circulating in all the countries in which shares in the company are sold, close the register of shareholders<sup>2</sup> for any time or times not exceeding, in the whole, 30 days in each year<sup>3</sup>. This is subject to any requirements contained in FSA rules<sup>4</sup>.

An application to the High Court to rectify the register of shareholders of an open-ended investment company may be made<sup>5</sup> if:

- 1640 (1) the name of any person is, without sufficient cause, entered in or omitted from the register<sup>6</sup>;
- 1641 (2) default is made as to the details contained in any entry on the register in respect of a person's holding of shares in the company<sup>7</sup>; or
- 1642 (3) default is made or unnecessary delay takes place in amending the register so as to reflect the fact of any person having ceased to be a shareholder<sup>8</sup>.

Such an application may be made by the person aggrieved, by any shareholder of the company or by the company itself<sup>9</sup>.

The court may refuse the application or may order rectification of the register of shareholders and payment by the company of any damages sustained by any party aggrieved<sup>10</sup>. On such an application the court may decide any question necessary or expedient to be decided for rectification of the register including, in particular, any question relating to the right of a person who is a party to the application to have his name entered in or omitted from the register (whether the question arises as between shareholders and alleged shareholders, or as between shareholders or alleged shareholders on the one hand and the company on the other hand)<sup>11</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 As to the register of shareholders see PARA 654.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 50(1).

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 50(2) (substituted by SI 2001/3755). As to the meaning of 'FSA rules' see PARA 622 note 6.

5 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51.

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(1)(a).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(1)(b).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(1)(c). As to shareholders see PARA 624 note 6.

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(2).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(3).

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 51(4).

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## **656. Share transfers.**

The instrument of incorporation<sup>1</sup> may contain provision as to share transfers for the transfer of registered and bearer shares<sup>2</sup> in an open-ended investment company<sup>3</sup> in respect of any matter for which provision is not made in the Open-Ended Investment Companies Regulations 2001<sup>4</sup> or FSA rules<sup>5</sup>. Where any shares are transferred to the company, the company must cancel those shares<sup>6</sup>.

Where a transfer of shares is made by the person (if any) who is designated in the company's instrument of incorporation<sup>7</sup>, the company may not register the transfer unless such evidence as the company may require to prove that the transfer has taken place has been delivered to the company<sup>8</sup>.

Where for any reason a person ceases to be so designated<sup>9</sup>: (1) any shares held by that person which are not disposed of on or before his ceasing to be so designated are to be deemed to be the subject of a new transfer to him which takes effect immediately after he ceases to be so designated<sup>10</sup>; and (2) the company must make such adjustments to the register<sup>11</sup> as are necessary to reflect his change of circumstances<sup>12</sup>.

Except in the case of any transfer of shares mentioned above<sup>13</sup>, the company may not register any transfer unless the transfer documents<sup>14</sup> relating to that transfer have been delivered to the company<sup>15</sup>. In the case of any transfer of shares which meets the requirements described above<sup>16</sup>, the company must register the transfer<sup>17</sup> and, where the name of the transferee is not already entered on the register, enter that name on the register<sup>18</sup>.

A company may, before the end of the period of 21 days commencing with the date of receipt of the transfer documents relating to any transfer of shares, refuse to register the transfer if: (a) there exists a minimum requirement as to the number or value of shares that must be held by any shareholder<sup>19</sup> of the company and the transfer would result in either the transferor or transferee holding less than the required minimum<sup>20</sup>; or (b) the transfer would result in a contravention of any provision of the company's instrument of incorporation or would produce a result inconsistent with any provision of the company's prospectus<sup>21</sup>.

A company must give the transferee written notice of any refusal to register a transfer of shares<sup>22</sup>. Nothing in the Open-Ended Investment Companies Regulations 2001<sup>23</sup> requires a company to register a transfer or give notice to any person of a refusal to register a transfer where registering the transfer or giving the notice would result in a contravention of any provision of law (including any law that is for the time being in force in a country or territory outside the United Kingdom)<sup>24</sup>.

Where, in respect of any transfer of shares, the company certifies that it has received the transfer documents consisting of a share certificate or such other evidence of title<sup>25</sup> (as the case may be), that certification is to be taken as a representation by the company to any person acting on the faith of the certification that there has been produced to the company such evidence as on its face shows a prima facie title to the shares in the transferor named in the instrument of transfer<sup>26</sup>.

Where a person acts on the faith of a false certification by a company which is made negligently or fraudulently, the company is liable to make a payment to that person for any damage sustained by him<sup>27</sup>.

A transfer of title to any bearer share in a company is effected by the transfer from one person to another of the relevant instrument<sup>28</sup> which relates to that share<sup>29</sup>. Where the holder of bearer shares proposes to transfer to another person a number of shares which is less than the number specified in the instrument relating to those shares, he may only do so if he surrenders the instrument to the company and obtains a new instrument specifying the number of shares to be transferred<sup>30</sup>.

Nothing in the provisions described above<sup>31</sup> prejudices any power of the company to register as shareholder any person to whom the right to any shares in the company has been transmitted by operation of law<sup>32</sup>.

A transfer of registered shares that are held by a deceased person at the time of his death which is made by his personal representative is as valid as if the personal representative had been the holder of the shares at the time of the execution of the instrument of transfer<sup>33</sup>. On the death of any one of the joint holders of any shares, the survivor is to be the only person recognised by the company as having any title to or any interest in those shares<sup>34</sup>.

1 As to instruments of incorporation see PARA 624.

2 As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.

3 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

4 I.e. the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 1. As to the meaning of 'FSA rules' see PARA 622 note 6.

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 2.

7 I.e. for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4.

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4(1).

9 I.e. for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4(2)(a).

11 As to the register of shareholders see PARA 654.

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4(2)(b).

13 I.e. in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 4: see the text to notes 8-12.

14 For the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, 'transfer documents', in relation to any transfer of registered shares, means:

615 (1) a stock transfer within the meaning of the Stock Transfer Act 1963 (see **COMPANIES** vol 14 (2009) PARA 400) which complies with the requirements of that Act as to the execution and contents of a stock transfer or such other instrument of transfer as is authorised by, and completed and executed in accordance with any requirements in, the company's instrument of incorporation (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 2(1), Sch 4 para 5(3)(a));

616 (2) except in a case falling within reg 47(3) or (4) (see PARA 652), a share certificate relating to the shares in question (reg 2(1), Sch 4 para 5(3)(b));

617 (3) in a case falling within reg 47(3) (see PARA 652), such other evidence of title to those shares as is required by the instrument of incorporation of the company (reg 2(1), Sch 4 para 5(3)(c)); and

618 (4) such other evidence (if any) as the company may require to prove the right of the transferor to transfer the shares in question (reg 2(1), Sch 4 para 5(3)(d)).

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 5(1). No share certificate has to be delivered by virtue of Sch 4 para 5(1) in any case where shares are transferred by a nominee of a recognised investment exchange who is designated for the purposes of reg 47(6) (see PARA 652) in the rules of the investment exchange in question: Sch 4 para 5(2).

16 In the requirements of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 5(4) or (5): see the text to notes 8-15.

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 6(a).

18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 6(b).

19 As to shareholders see PARA 624 note 6.

20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 7(1)(a).

21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 7(1)(b). As to the meaning of 'prospectus' see PARA 622 note 5.

22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 7(2).

23 In the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 7(3). As to the meaning of 'United Kingdom' see PARA 2 note 3.

25 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 5(3)(b) or (c); and note 14.

26 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 8(1). For the purposes of Sch 4 para 8(1), a certification is made by a company if the instrument of transfer bears the words 'certificate lodged' (or words to the like effect) (Sch 4 para 8(2)(a)) and is signed by a person acting under authority (whether express or implied) given by the company to issue and sign such certifications (Sch 4 para 8(2)(b)). A certification under Sch 4 para 8(1) is not to be taken as a representation that the transferor has any title to the shares in question: Sch 4 para 8(3).

27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 8(4).

28 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 48; and PARA 653.

29 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 9.

30 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 10.

31 In the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 paras 1-10.

32 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 11.

33 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 12. The production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate, or confirmation as executor, of a deceased person having been granted to some person must be accepted by the company as sufficient evidence of the grant: reg 83.

34 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 4 para 13.

## UPDATE

### 656 Share transfers

TEXT AND NOTES--As to the transfer of share via electronic communication, see SI 2001/1228 Sch 4 paras 4A, 4C (added by SI 2009/553).

NOTE 14--SI 2001/1228 Sch 4 para 5(3) amended: SI 2009/553.

As to the definition of 'transfer documents' in relation to any transfer of registered shares made by means of electronic communication, see SI 2001/1228 Sch 4 para 5(3A) (added by SI 2009/553).

TEXT AND NOTES 17, 18--SI 2001/1228 Sch 4 para 6 amended: SI 2009/553.

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### *(c) Reports and Auditors*

#### **657. Reports.**

The directors<sup>1</sup> of an open-ended investment company<sup>2</sup> must prepare a report ('annual report') for each annual accounting period<sup>3</sup> of the company<sup>4</sup> and prepare a report ('half-yearly report') for each half-yearly accounting period<sup>5</sup> of the company<sup>6</sup>. However, where a company's first annual accounting period is a period of less than 12 months, a half-yearly report need not be prepared for any part of that period<sup>7</sup>.

The directors of a company must lay copies of the annual report before the company in general meeting<sup>8</sup>. The annual report of an open-ended investment company must, in respect of the annual accounting period to which it relates, contain accounts of the company<sup>9</sup>. The company's auditors<sup>10</sup> must make a report to the company's shareholders in respect of the accounts of the company contained in its annual report<sup>11</sup>. A copy of the auditor's report must form part of the company's annual report<sup>12</sup>.

If it appears to the directors of an open-ended investment company that any annual report of the company did not comply with the requirements of the Open-Ended Investment Companies Regulations 2001<sup>13</sup> or FSA rules, they may prepare a revised annual report<sup>14</sup>. Where copies of the previous report have been laid before the company in general meeting or delivered to the Financial Services Authority, the revisions must be confined to the correction of anything in the previous report which did not comply with the requirements of the Open-Ended Investment Companies Regulations 2001 or FSA rules<sup>15</sup> and the making of any necessary consequential alterations<sup>16</sup>.

1 As to directors see PARA 639.

2 As to the meaning of 'open-ended investment company' see PARA 622 note 3.

3 For the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 66, any reference to annual and half-yearly accounting periods of a company is a reference to those periods as determined in relation to that company in accordance with FSA rules: reg 66(5). Nothing in reg 66 or reg 67 prejudices the generality of reg 6(1) (see PARA 622) in relation to the powers of the Financial Services Authority as set out in that regulation: reg 66(4). As to the meaning of 'FSA rules' see PARA 622 note 6. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.



- 4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 66(1)(a). 'Annual report' has the meaning described in the text: regs 2(1), 66(1)(a).
- 5 See note 3.
- 6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 66(1)(b).
- 7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 66(2).
- 8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 66(3). As to general meetings see PARA 641.
- 9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 67(1).
- 10 As to auditors see PARA 658 et seq.
- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 67(2).
- 12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 67(3).
- 13 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 68(1).
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 68(2)(a).
- 16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 68(2)(b).

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### **658. Eligibility of auditors.**

No person is eligible for appointment as auditor of an open-ended investment company<sup>1</sup> unless he is eligible under the Companies Act 2006<sup>2</sup> for appointment as a statutory auditor<sup>3</sup>. A person is ineligible for appointment as auditor of an open-ended investment company if he is an officer<sup>4</sup> or employee of the company<sup>5</sup> or a partner or employee of such a person, or a partnership of which such a person is a partner<sup>6</sup>.

A person is also ineligible for appointment if there exists between that person, or any associate<sup>7</sup> of that person, and the company a connection of any such description as may be specified by regulations made by the Secretary of State<sup>8</sup> under the Companies Act 2006<sup>9</sup>.

No person is to act as auditor of a company if he is ineligible for appointment to the office<sup>10</sup>. If during his term of office an auditor of a company becomes ineligible for appointment to the office, he must vacate office and give notice in writing to the company concerned that he has vacated it by reason of ineligibility<sup>11</sup>. A person who acts as auditor of a company in contravention of the requirements described above<sup>12</sup> is guilty of an offence<sup>13</sup>.

An auditor who has failed to comply with a duty imposed on him by trust scheme rules<sup>14</sup> may be disqualified from being the auditor for any authorised open-ended investment company<sup>15</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Ie the Companies Act 2006 Pt 42 (ss 1209-1264): see **COMPANIES** vol 15 (2009) PARA 957 et seq.

3 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 1 (amended by SI 2008/948). As to actuaries and auditors see also PARA 764 et seq.

4 As to the meaning of 'officer' see PARA 626 note 17.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 2(1)(a).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 2(1)(b). For the purposes of Sch 5 para 2(1), an auditor of a company is not to be regarded as an officer or employee of the company: Sch 5 para 2(2).

7 For these purposes, 'associate' has the same meaning as in the Companies Act 2006 Pt 42 (ss 1209-1264) (see s 1260) (see **COMPANIES** vol 15 (2009) PARA 971): Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 2(4) (Sch 5 para 2(3) substituted and Sch 5 para 2(4), (5) added by SI 2008/948).

8 As to the Secretary of State see PARA 3.

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 2(3) (as substituted: see note 7). The regulations are under the Companies Act 2006 s 1214(4): see **COMPANIES** vol 15 (2009) PARA 971. The power of the Secretary of State to make regulations under s 1214(4) for the purposes of s 1214(1) in relation to statutory auditors is exercisable, subject to the same conditions, for the purposes of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 2(3) in relation to auditors of open-ended investment companies: Sch 5 para 2(5) (as added: see note 7).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 3(1).

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 3(2).

12 In contravention of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 3(1) or failure to give notice of vacating his office as required by Sch 5 para 3(2).

13 Such a person is liable, on conviction on indictment, to a fine (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 3(3)(a)) or, on summary conviction, to a fine not exceeding the statutory maximum (Sch 5 para 3(3)(b)). As to the statutory maximum see PARA 56 note 24.

In the case of continued contravention he is liable on a second or subsequent summary conviction to a fine not exceeding £100 in respect of each day on which the contravention is continued (instead of the fine mentioned in Sch 5 para 3(3)(b)): Sch 5 para 3(4). In proceedings against a person for an offence under Sch 5 para 3, it is a defence for him to show that he did not know and had no reason to believe that he was, or had become, ineligible for appointment: Sch 5 para 3(5).

14 As to the trust scheme rules see PARA 614.

15 See the Financial Services and Markets Act 2000 s 249(1); and PARA 616. As to the meaning of 'authorised open-ended investment company' see PARA 603.

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## **659. Appointment of auditors.**

Every company must appoint an auditor or auditors<sup>1</sup>. A company must, at each general meeting<sup>2</sup> at which the company's annual report<sup>3</sup> is laid, appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next general meeting at which an annual report is laid<sup>4</sup>.

The first auditors of a company may be appointed by the directors<sup>5</sup> of the company at any time before the first general meeting of the company at which an annual report is laid; and auditors so appointed are to hold office until the conclusion of that meeting<sup>6</sup>. Where no such

appointment is made<sup>7</sup>, the first auditors of any company may be appointed by the company in general meeting<sup>8</sup>.

No rules made under the Financial Services and Markets Act 2000<sup>9</sup> in regard to appointment of auditors apply in relation to open-ended investment companies<sup>10</sup>.

If, in any case, no auditors are appointed<sup>11</sup>, the Financial Services Authority<sup>12</sup> may appoint a person to fill the vacancy<sup>13</sup>. The directors of a company, or the company in general meeting, may fill a casual vacancy in the office of auditor<sup>14</sup>. While such a vacancy continues, any surviving or continuing auditor or auditors may continue to act<sup>15</sup>.

Where a partnership constituted under the law of England and Wales or Northern Ireland, or under the law of any country or territory in which a partnership is not a legal person, is appointed as auditor of a company<sup>16</sup>:

1643 (1) the appointment is, unless the contrary intention appears, an appointment of the partnership as such and not of the partners<sup>17</sup>;

1644 (2) where the partnership ceases, the appointment is to be treated as extending to any partnership which succeeds to the practice of that partnership and is eligible for the appointment<sup>18</sup> and any person who succeeds to that practice having previously carried it on in partnership and is eligible for the appointment<sup>19</sup>;

1645 (3) where the partnership ceases and no person succeeds to the appointment under head (2) above<sup>20</sup>, the appointment may with the consent of the company be treated as extending to a partnership or other person eligible for the appointment who succeeds to the business of the former partnership or to such part of it as is agreed by the company to be treated as comprising the appointment<sup>21</sup>.

1 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(1). The appointment must be made in accordance with Sch 5 para 4.

2 As to general meetings see PARA 641.

3 As to the meaning of 'annual report' see PARA 657 note 4.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(2) (amended by SI 2005/923). The Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(2) is subject to Sch 5 para 4(6), (7).

On the date on which the holding of an annual general meeting is dispensed with in accordance with reg 37A (see PARA 641), any auditor or auditors appointed in accordance with Sch 5 para 4(2) or Sch 5 para 4(3) (see the text to note 6) ceases to hold office and the directors must forthwith re-appoint the auditor or auditors or appoint a new auditor or auditors: Sch 5 para 4(6) (Sch 5 para 4(6), (7) added by SI 2005/923). The directors of any company which does not hold annual general meetings must appoint the auditor or auditors: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(7) (as so added).

5 As to directors see PARA 639.

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(3) (amended by SI 2005/923). The Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(3) is subject to Sch 5 para 4(6): see note 4.

7 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(3).

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(4).

9 Ie the Financial Services and Markets Act 2000 s 340: see PARA 764.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(5).

11 Ie as required by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 4(4).

- 12 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
- 13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 5.
- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 6(1).
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 6(2).
- 16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(1).
- 17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(2).
- 18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(3)(a). For the purposes of Sch 5 para 7(3), a partnership is to be regarded as succeeding to the practice of another partnership only if the members of the successor partnership are substantially the same as those of the former partnership; and a partnership or other person is to be regarded as succeeding to the practice of a partnership only if it or he succeeds to the whole or substantially the whole of the business of the former partnership: Sch 5 para 7(4).
- 19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(3)(b).
- 20 In the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(3).
- 21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 7(5).

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## **660. Rights of auditors.**

The auditors of a company have a right of access at all times to the company's books, accounts and vouchers and are entitled to require from the company's officers<sup>1</sup> such information and explanations as they think necessary for the performance of their duties as auditors<sup>2</sup>.

An officer of a company commits an offence if he knowingly or recklessly makes to the company's auditors a statement (whether written or oral) which conveys or purports to convey any information or explanations which the auditors require, or are entitled to require, as auditors of the company<sup>3</sup> and which is misleading, false or deceptive in a material particular<sup>4</sup>.

The auditors of a company are entitled:

- 1646 (1) to receive all such notices of, and other communications relating to, any general meeting<sup>5</sup> of the company as a shareholder<sup>6</sup> of the company is entitled to receive<sup>7</sup>;
- 1647 (2) to attend any general meeting of the company<sup>8</sup>; and
- 1648 (3) to be heard at any general meeting which they attend on any part of the business of the meeting which concerns them as auditors<sup>9</sup>.

The right to attend and be heard at a meeting is exercisable in the case of a body corporate or partnership by an individual authorised by it in writing to act as its representative at the meeting<sup>10</sup>.

1 As to the meaning of 'officer' see PARA 626 note 17.

- 2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 8(1).
- 3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 8(2)(a).
- 4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 8(2)(b). A person guilty of such an offence is liable, on conviction on indictment, to imprisonment not exceeding a term of two years or to a fine or to both (Sch 5 para 8(3)(a)) or, on summary conviction, to imprisonment not exceeding a term of three months or to a fine not exceeding the statutory maximum or to both (Sch 5 para 8(3)(b)). As to the statutory maximum see PARA 56 note 24.
- 5 As to general meetings see PARA 641.
- 6 As to shareholders see PARA 624 note 6.
- 7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9(1)(a).
- 8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9(1)(b).
- 9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9(1)(c).
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9(2).

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## **661. Remuneration of auditors.**

The remuneration of auditors of a company who are appointed by the company in general meeting<sup>1</sup> must be fixed by the company in general meeting or in such manner as the company in general meeting may decide<sup>2</sup>.

The remuneration of auditors who are appointed by the directors<sup>3</sup> or the Financial Services Authority<sup>4</sup> must be fixed by the directors or the Authority, as the case may be (and is payable by the company even where it is fixed by the Authority)<sup>5</sup>.

The power of the Secretary of State<sup>6</sup> to make regulations under the Companies Act 2006<sup>7</sup> in regard to the remuneration of auditors or their associates for non-audit work in relation to company auditors is to be exercisable in relation to auditors of open-ended investment companies<sup>8</sup> for like purposes<sup>9</sup> and subject to the same conditions<sup>10</sup>.

- 1 As to general meetings see PARA 641.
- 2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 10(1).
- 3 As to directors see PARA 639.
- 4 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 10(2).
- 6 As to the Secretary of State see PARA 3.
- 7 In the Companies Act 2006 s 494: see **COMPANIES** vol 15 (2009) PARA 921.
- 8 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

9 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 11(1)(a) (Sch 5 para 11(1) amended by SI 2008/948).

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 11(1)(b). For the purposes of the exercise of the power to make regulations under the Companies Act 2006 s 494 (see **COMPANIES**), as extended by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 11(1), the reference in the Companies Act 2006 s 494(4) to a note to a company's accounts is to be taken to be a reference to the annual report of an open-ended investment company: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 11(2) (amended by SI 2008/948). As to the meaning of 'annual report' see PARA 657 note 4.

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## **662. Removal of auditors.**

A company may by resolution remove an auditor from office notwithstanding anything in any agreement between it and him<sup>1</sup>. Where a resolution removing an auditor is passed at a general meeting<sup>2</sup> of a company, the company must, not later than 14 days after the holding of the meeting, notify the Financial Services Authority<sup>3</sup> of the passing of the resolution<sup>4</sup>.

A resolution at a general meeting of a company removing an auditor before the expiration of his period of office<sup>5</sup> or appointing as auditor a person other than the retiring auditor<sup>6</sup> is not effective unless notice of the intention to move it has been given to the open-ended investment company<sup>7</sup> at least 28 days before the meeting at which it is moved<sup>8</sup>. On receipt of notice of such an intended resolution, the company must forthwith send a copy to the person proposed to be removed or, as the case may be, to the person proposed to be appointed and to the retiring auditor<sup>9</sup>.

The auditor proposed to be removed or, as the case may be, the retiring auditor may make with respect to the intended resolution representations in writing to the company (not exceeding a reasonable length) and request their notification to the shareholders<sup>10</sup> of the company<sup>11</sup>.

The company must (unless the representations are received by the company too late for it to do so):

- 1649 (1) in any notice of the resolution given to the shareholders of the company, state the fact of the representations having been made<sup>12</sup>;
- 1650 (2) send a copy of the representations to each of the shareholders whose name appears on the register of shareholders<sup>13</sup> (other than the designated person) and to whom notice of the meeting is or has been sent<sup>14</sup>;
- 1651 (3) take such steps as FSA rules<sup>15</sup> may require for the purpose of bringing the fact that the representations have been made to the attention of the holders of any bearer shares<sup>16</sup>; and
- 1652 (4) at the request of any holder of bearer shares, provide a copy of the representations<sup>17</sup>.

If a copy of any such representations is not sent out as required because they were received too late or because of the company's default or if, for either of those reasons, any steps in head (3) or head (4) above<sup>18</sup> are not taken, the auditor may (without prejudice to his right to be heard orally) require that the representations be read out at the meeting<sup>19</sup>.

Copies of the representations need not be sent out, the steps in head (3) or head (4) above<sup>20</sup> need not be taken and the representations need not be read out at the meeting if, on the application of the company or any other person claiming to be aggrieved, the High Court is satisfied that the rights conferred<sup>21</sup> are being abused to secure needless publicity for defamatory matter; and the court may order the costs of the company on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application<sup>22</sup>.

An auditor who has been removed from office has, notwithstanding his removal, the various rights to receive notices, attend and be heard<sup>23</sup> in relation to any general meeting of the company at which his term of office would otherwise have expired or at which it is proposed to fill the vacancy caused by his removal<sup>24</sup>.

1 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 12(1).

2 As to general meetings see PARA 641.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 12(2). Nothing in Sch 5 para 12 is to be taken as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as auditor or of any appointment terminating with that as auditor: Sch 5 para 12(3).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(1)(a).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(1)(b).

7 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(1).

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(2).

10 As to shareholders see PARA 624 note 6.

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(3).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(4)(a).

13 As to the register of shareholders see PARA 654.

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(4)(b).

15 As to the meaning of 'FSA rules' see PARA 622 note 6.

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(4)(c). As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(4)(d).

18 Ie required by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(4) (c) or (d).

19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(5).

20 See note 18.

21 Ie conferred by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13.

22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 13(6).

23 The power conferred by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9: see PARA 660. The reference in Sch 5 para 9 to business concerning the auditors as auditors is to be construed in relation to an auditor who has been removed from office as a reference to business concerning him as former auditor: Sch 5 para 14(2).

24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 14(1).

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### **663. Resignation of auditors.**

An auditor of a company may resign his office by depositing a notice in writing to that effect at the company's head office<sup>1</sup>. Such a notice is not effective unless it is accompanied by the required statement<sup>2</sup>. An effective notice of resignation operates to bring the auditor's term of office to an end as of the date on which the notice is deposited or on such later date as may be specified in it<sup>3</sup>. The company must, not later than 14 days after the deposit of a notice of resignation, send a copy of the notice to the Financial Services Authority<sup>4</sup>.

Where a notice of resignation of an auditor is accompanied by a statement of circumstances which he considers ought to be brought to the attention of the shareholders or creditors of the company<sup>5</sup>, the auditor may deposit with the notice a signed requisition that a general meeting<sup>6</sup> of the company be convened forthwith for the purpose of receiving and considering such explanation of the circumstances connected with his resignation as he may wish to place before the meeting<sup>7</sup>.

The company must, not later than 21 days after the date of the deposit of such a requisition<sup>8</sup>, proceed to convene a meeting for a day not later than 28 days after the date on which the notice convening the meeting is given<sup>9</sup>.

The auditor may request the company to circulate a statement in writing (not exceeding a reasonable length) of the circumstances connected with his resignation to each of the shareholders of the company whose name appears on the register of shareholders<sup>10</sup> (other than the designated person): (1) before the meeting convened on his requisition<sup>11</sup>; or (2) before any general meeting at which his term of office would otherwise have expired or at which it is proposed to fill the vacancy caused by his resignation<sup>12</sup>, and to take such steps as FSA rules<sup>13</sup> may require for the purpose of bringing the fact that the statement has been made to the attention of the holders of any bearer shares<sup>14</sup>.

The company must (unless the statement is received by it too late for it to do so):

- 1653 (a) in any notice or advertisement of the meeting given or made to shareholders of the company, state the fact of the statement having been made<sup>15</sup>;
- 1654 (b) send a copy of the statement to every shareholder of the company to whom notice of the meeting is or has been sent<sup>16</sup>; and
- 1655 (c) at the request of any holder of bearer shares, provide a copy of the statement<sup>17</sup>.

If a copy of the statement is not sent out or provided as required because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the statement be read out at the meeting<sup>18</sup>.



Copies of a statement need not be sent out or provided and the statement need not be read out at the meeting if, on the application of the company or any other person claiming to be aggrieved, the High Court is satisfied that the rights conferred<sup>19</sup> are being abused to secure needless publicity for defamatory matter; and the court may order the costs of the company on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application<sup>20</sup>.

An auditor who has resigned has, notwithstanding his removal, the various rights to receive notices, attend and be heard<sup>21</sup> in relation to any such general meeting of the company as is mentioned in head (1) or head (2) above<sup>22</sup>.

1 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 15(1).

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 15(2). The statement is required by Sch 5 para 18: see PARA 664.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 15(3).

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 15(4). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(1).

6 As to general meetings see PARA 641.

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(2).

8 Ie under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16.

9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(3).

10 As to the register of shareholders see PARA 654.

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(4)(a).

12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(4)(b).

13 As to the meaning of 'FSA rules' see PARA 622 note 6.

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(4). As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.

15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(5)(a).

16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(5)(b).

17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(5)(c).

18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(6).

19 Ie conferred by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16.

20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 16(7).

21 Ie conferred by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 9: see PARA 660. The reference in Sch 5 para 9 to business concerning the auditors as auditors is to be construed in relation to an auditor who has resigned as a reference to business concerning him as former auditor: Sch 5 para 17(2).

22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 17(1). The general meeting referred to in the text is the one mentioned in Sch 5 para 16(4)(a) or (b): see heads (1) and (2) in the text.

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#### **664. Statement by auditor ceasing to hold office.**

Where an auditor ceases for any reason to hold office, he must deposit at the head office of the company a statement of any circumstances connected with his ceasing to hold office which he considers should be brought to the attention of the shareholders<sup>1</sup> or creditors of the company or, if he considers that there are no such circumstances, a statement that there are none<sup>2</sup>.

The statement must be deposited:

- 1656 (1) in the case of resignation, along with the notice of resignation<sup>3</sup>;
- 1657 (2) in the case of failure to seek re-appointment, not less than 14 days before the end of the time allowed for next appointing auditors<sup>4</sup>; and
- 1658 (3) in any other case, not later than the end of the period of 14 days beginning with the date on which he ceases to hold office<sup>5</sup>.

If the statement is of circumstances which the auditor considers should be brought to the attention of the shareholders or creditors of the company, the company must, not later than 14 days after the deposit of the statement, either: (a) send a copy of the statement to each of the shareholders whose name appears on the register of shareholders<sup>6</sup> (other than the designated person) and take such steps as FSA rules<sup>7</sup> may require for the purpose of bringing the fact that the statement has been made to the attention of the holders of any bearer shares<sup>8</sup>; or (b) apply to the court<sup>9</sup>. Where an application is made under head (b) above<sup>10</sup>, the company must notify the auditor<sup>11</sup>.

Unless the auditor receives notice of an application to the court before the end of the period of 21 days beginning with the day on which he deposited the statement, he must, not later than seven days after the end of that period, send a copy of the statement to the Financial Services Authority<sup>12</sup>.

If the court is satisfied that the auditor is using the statement to secure needless publicity for defamatory matter it must direct that copies of the statement need not be sent out and that the steps required by FSA rules need not be taken<sup>13</sup> and it may further order the company's costs on the application to be paid in whole or in part by the auditor notwithstanding that he is not a party to the application<sup>14</sup>. In addition, the company must, not later than 14 days after the court's decision, take such steps in relation to a statement setting out the effect of the order as are required by head (a) above<sup>15</sup> in relation to the statement of circumstances deposited at the company's head office<sup>16</sup>.

If the court is not so satisfied, the company must, not later than 14 days after the court's decision, send to each of the shareholders a copy of the auditor's statement and notify the auditor of the court's decision<sup>17</sup>. The auditor must, not later than seven days after receiving such a notice, send a copy of the statement to the Authority<sup>18</sup>. Where notice of appeal is filed not later than 14 days after the court's decision, any reference to that decision<sup>19</sup> is to be construed as a reference to the final determination or withdrawal of that appeal, as the case may be<sup>20</sup>.

If a person ceasing to hold office as auditor fails to comply with the requirements described above<sup>21</sup>, he is guilty of an offence<sup>22</sup>.

- 1 As to shareholders see PARA 624 note 6.
- 2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(1).
- 3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(2)(a).
- 4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(2)(b).
- 5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(2)(c).
- 6 As to the register of shareholders see PARA 654.
- 7 As to the meaning of 'FSA rules' see PARA 622 note 6. The Financial Services and Markets Act 2000 s 249(1) (disqualification of auditor for breach of trust scheme rules) (see PARA 616) applies to a failure by an auditor to comply with a duty imposed on him by FSA rules as it applies to a breach of trust scheme rules: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 20.
- 8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(3)(a). As to the meaning of 'bearer shares' see PARA 626 note 24. As to bearer shares see PARA 653.
- 9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(3)(b). As to the meaning of 'court' see PARA 626 note 20.
- 10 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(3)(b).
- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(3).
- 12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(4). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
- 13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(5)(a).
- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(5)(b).
- 15 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(3)(a).
- 16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(5). As to the requirement for such a statement to be deposited see Sch 5 para 18(1); and the text and note 2.
- 17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(6).
- 18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(7).
- 19 Ie in the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(5), (6): see the text to notes 13-17.
- 20 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18(8).
- 21 Ie the requirements of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 18.
- 22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 5 para 19. Such a person is liable, on conviction on indictment, to a fine (Sch 5 para 19(1)(a)) or, on summary conviction, to a fine not exceeding the statutory maximum (Sch 5 para 19(1)(b)). As to the statutory maximum see PARA 56 note 24. In proceedings for such an offence, it is a defence for the person charged to show that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence: Sch 5 para 19(2).

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*(d) Mergers and Divisions*

**665. Application to court.**

An open-ended investment company<sup>1</sup> may apply to the court under the Companies Act 2006<sup>2</sup> for an order in respect of a particular scheme<sup>3</sup> where:

- 1659 (1) the scheme in question involves a compromise or arrangement with its shareholders<sup>4</sup> or creditors or any class of its shareholders or creditors<sup>5</sup>; and
- 1660 (2) the consideration for the transfer or each of the transfers envisaged by the scheme is to be shares<sup>6</sup> in the transferee company receivable by shareholders of the transferor company<sup>7</sup> or, where there is more than one transferor company and any one or more of them is a public company, shares in the transferee company receivable by shareholders or members of the transferor companies (as the case may be)<sup>8</sup>,

in each case with or without any cash payment to shareholders<sup>9</sup>.

A public company may apply to the court under the Companies Act 1985<sup>10</sup> for an order sanctioning a particular scheme<sup>11</sup> where:

- 1661 (a) the scheme in question involves a compromise or arrangement with its members or creditors or any class of its members or creditors<sup>12</sup>; and
- 1662 (b) the consideration for the transfer or each of the transfers envisaged by the scheme is to be shares in the transferee company receivable by members of the transferor company<sup>13</sup> or where there is more than one transferor company and any one or more of them is an open-ended investment company, shares in the transferee company receivable by shareholders or members of the transferor companies (as the case may be)<sup>14</sup>,

in each case with or without any cash payment to shareholders<sup>15</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Ie the Companies Act 2006 s 896 or s 899 (power of company to compromise with creditors and members): see **COMPANIES**.

An application made by virtue of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 2 or Sch 6 para 3 (see the text and notes 3-15) is treated as one to which the Companies Act 2006 Pt 27 (ss 902-941) applies (mergers and divisions of public companies), and the provisions of Pt 27 and Pt 26 (ss 895-901) (see **COMPANIES**) have effect accordingly, subject to the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 6 (see below): Sch 6 para 5 (substituted by SI 2008/948). The provisions of the Companies Act 2006 have effect with such modifications as are necessary or appropriate for mergers and divisions involving open-ended investment companies: Sch 6 para 6(1) (amended by SI 2008/948). In particular, any reference in those provisions to a merger by absorption, a merger by formation of a new company or a division is to be taken to be a reference to a scheme falling within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(a), (b) or (c) (see PARA 666): Sch 6 para 6(2) (amended by SI 2008/948). Without prejudice to the generality of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 6(1), the following references in those provisions have effect as follows, unless the context otherwise requires:

- 619 (1) any reference to a scheme is to be taken to be a reference to a scheme falling within any of the provisions of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(a), (b) or (c) (Sch 6 para 6(3)(a));
- 620 (2) any reference to a company is to be taken to be a reference to an open-ended investment company (Sch 6 para 6(3)(b));

- 621 (3) any reference to members is to be taken to be a reference to shareholders of an open-ended investment company (Sch 6 para 6(3)(c));
- 622 (4) any reference to the registered office of a company is to be taken to be a reference to the head office of an open-ended investment company (Sch 6 para 6(3)(d));
- 623 (5) any reference to the memorandum and articles of a company is to be taken to be a reference to the instrument of incorporation of an open-ended investment company (Sch 6 para 6(3)(e));
- 624 (6) any reference to a report under the Companies Act 1985 s 103 (prospectively repealed) (non-cash consideration to be valued before allotment) (as to replacement provisions see the Companies Act 2006 ss 593-595) (see **COMPANIES** vol 15 (2009) PARAS 1120-1121) is to be taken to be a reference to any report with respect to the valuation of any non-cash consideration given for shares in an open-ended investment company which may be required by FSA rules (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 6(3)(f));
- 625 (7) any reference to annual accounts is to be taken to be a reference to the accounts contained in the annual report of an open-ended investment company (Sch 6 para 6(3)(g));
- 626 (8) any reference to the requirements of the Companies Act 2006 as to balance sheets forming part of a company's annual accounts is to be taken to be a reference to any requirements arising by virtue of FSA rules (see PARA 622 note 6) as to balance sheets drawn up for the purposes of the accounts contained in the annual report of an open-ended investment company (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 6(3)(i) (amended by SI 2008/948));
- 627 (9) any reference to paid up capital is to be taken to be a reference to the share capital of an open-ended investment company (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 6(3)(j)).

3    Ie a scheme falling within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(a)-(c): see PARA 666.

4    As to shareholders see PARA 624 note 6.

5    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 2(a) (Sch 6 para 2 amended by SI 2008/948).

6    As to shares see PARA 651 et seq.

7    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 2(b)(i).

8    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 2(b)(ii).

9    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 2(b).

10   See note 2.

11   Ie a scheme falling within the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(b) or (c): see PARA 666.

12   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 3(a).

13   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 3(b)(i).

14   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 3(b)(ii).

15   Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 3(b).

## **UPDATE**

### **665 Application to court**

NOTE 2--Head (6). Repeal of Companies Act 1985 s 103 in force 1 October 2009: SI 2008/2860.

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## **666. Relevant schemes.**

The schemes<sup>1</sup> are:

- 1663 (1) any scheme under which the undertaking, property and liabilities of an open-ended investment company<sup>2</sup> are to be transferred to another such company, other than one formed for the purpose of, or in connection with the scheme<sup>3</sup>;
- 1664 (2) any scheme under which the undertaking, property and liabilities of two or more bodies corporate, each of which is either an open-ended investment company<sup>4</sup> or a public company<sup>5</sup>, are to be transferred to an open-ended investment company formed for the purpose of, or in connection with, the scheme<sup>6</sup>;
- 1665 (3) any scheme under which the undertaking, property and liabilities of an open-ended investment company or a public company are to be divided among and transferred to two or more open-ended investment companies whether or not formed for the purpose of, or in connection with, the scheme<sup>7</sup>.

The court cannot sanction a scheme under which the whole or any part of the undertaking, property or liabilities of an open-ended investment company may be transferred to any person other than another such company<sup>8</sup>.

1    Ie the schemes referred to in PARA 665.

2    As to the meaning of 'open-ended investment company' see PARA 623 note 3.

3    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 paras 1, 4(1)(a).

4    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(b)(i).

5    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(b)(ii).

6    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(b).

7    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(1)(c).

8    Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Sch 6 para 4(2). Nothing in Sch 6 is to be taken as enabling the court to sanction such a scheme: see Sch 6 para 4(2).

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*(e) Provision for Employees on Cessation or Transfer of Business*

**667. Power to provide for employees on cessation or transfer of business.**

The powers of an open-ended investment company<sup>1</sup> include power to make provision for the benefit of persons employed or formerly employed by the company, that is to say, provision in connection with the cessation or the transfer to any person of the whole or part of the undertaking of the company<sup>2</sup>. This power<sup>3</sup> is exercisable notwithstanding that its exercise is not in the best interests of the company<sup>4</sup>.

The power which a company may exercise by virtue of the provisions described above<sup>5</sup> may only be exercised by the company:

- 1666 (1) in a case not falling within head (2) or head (3) below<sup>6</sup>, if sanctioned by a resolution of the company in general meeting<sup>7</sup>;
- 1667 (2) if so authorised by the instrument of incorporation<sup>8</sup>, in the case of a company that has only one director<sup>9</sup>, by a resolution of that director<sup>10</sup> and, in any other case, by such resolution of directors as is required by FSA rules<sup>11</sup>; or
- 1668 (3) if the instrument of incorporation requires the exercise of the power to be sanctioned by a resolution of the company in general meeting for which more than a simple majority of the shareholders<sup>12</sup> voting is necessary, by a resolution of that majority<sup>13</sup>.

In any case the power can only be exercised after compliance with any other requirements of the instrument of incorporation applicable to the exercise of the power<sup>14</sup>.

1 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(1).

3 Ie the power conferred by the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(1).

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(2).

5 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(1).

6 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(b) or (c).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(a). As to general meetings see PARA 641.

8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(b). As to instruments of incorporation see PARA 624.

9 As to directors see PARA 639.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(b)(i).

11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(b)(ii). As to the meaning of 'FSA rules' see PARA 622 note 6.

12 As to shareholders see PARA 624 note 6.

13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3)(b).

14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 65(3).

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## (D) THE REGISTER, RECORDS AND DOCUMENTS

### **668. Register of open-ended investment companies.**

The Financial Services Authority<sup>1</sup> must maintain a register of open-ended investment companies<sup>2</sup>. The Authority may keep the register in any form it thinks fit provided that it is possible to inspect the information contained on it and to obtain a copy of that information (or any part of it) for inspection<sup>3</sup>.

The Authority must allocate to every open-ended investment company a number, which is to be known as the company's registered number<sup>4</sup>. Companies' registered numbers must be in such form, consisting of one or more sequences of figures or letters, as the Authority may from time to time determine<sup>5</sup>. The Authority may, upon adopting a new form of registered number, make such changes of existing registered numbers (including numbers allocated by the appropriate registrar) as appear to it to be necessary<sup>6</sup>. A change in a company's registered number has effect from the date on which the company is notified by the Authority of the change<sup>7</sup>.

Any document which is required by the Open-Ended Investment Companies Regulations 2001<sup>8</sup> to be delivered to the Authority in order to be recorded on the register<sup>9</sup> must be delivered in such form as the Authority may from time to time specify<sup>10</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 71(1). As to the meaning of 'open-ended investment company' see PARA 623 note 3.

3 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 71(2). Any requirement of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, as to the supply by the Authority of a document may, if the Authority thinks fit, be satisfied by the communication of the information in any non-legible form the Authority thinks appropriate: reg 76.

4 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 72(1).

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 72(2).

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 72(3).

7 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 72(4).

8 Ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

9 Ie the register maintained pursuant to the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 71.

10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 73. Any document which is delivered to the Authority under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, and relates to an open-ended investment company (whether already registered or to be registered) whose instrument of incorporation states that its head office is to be situated in Wales, may be in Welsh but must be accompanied by a certified translation into English: reg 77(1), (2). For the purposes of reg 77, 'certified



translation' means a translation which is certified in the manner specified in FSA rules to be a correct translation: reg 77(5). As to the meaning of 'FSA rules' see PARA 622 note 6. As to instruments of incorporation see PARA 624. The requirement for a translation does not apply to documents of such description as may be specified in FSA rules (see reg 77(3)(a)) or to documents in a form prescribed by virtue of the Welsh Language Act 1993 s 26 (see **COMPANIES** vol 14 (2009) PARA 165) in Welsh, or partly in Welsh and partly in English (see the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 77(3)(b)). An open-ended investment company whose instrument of incorporation states that its head office is to be situated in Wales may deliver to the Authority a certified translation into Welsh of any document in English which relates to the company and which is or has been delivered to the Authority: reg 77(4).

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### **669. Company records.**

The information contained in a document delivered to the Financial Services Authority<sup>1</sup> under any provision of the Open-Ended Investment Companies Regulations 2001<sup>2</sup> may be recorded and kept by the Authority in any form it thinks fit, provided that it is possible to inspect the information and produce a copy of it in legible form<sup>3</sup>.

The originals of documents delivered to the Authority<sup>4</sup> in legible form must be kept by it for ten years after which they may be destroyed<sup>5</sup>. Where a company has been dissolved, the Authority may, at any time after the expiration of two years from the date of the dissolution, direct that any records in its custody relating to the company may be removed to the Public Record Office; and records in respect of which such a direction is given must be disposed of in accordance with the enactments relating to the Public Record Office and the rules made under them<sup>6</sup>.

Any person may inspect any records kept by the Authority for the purposes of the Open-Ended Investment Companies Regulations 2001<sup>7</sup> and may require a copy, in such form as the Authority considers appropriate, of any information contained in those records<sup>8</sup> or a certified copy of, or extract from, any such record<sup>9</sup>. The right of inspection extends to the originals of documents delivered to the Authority in legible form only where the record kept by the Authority of the contents of the document is illegible or unavailable<sup>10</sup>.

A copy of or extract from a record kept by the Authority under the Open-Ended Investment Companies Regulations 2001<sup>11</sup>, on which is indorsed a certificate signed by a member of the Authority's staff authorised by it for that purpose certifying that it is an accurate record of the contents of any document delivered to the Authority, is in all legal proceedings admissible in evidence as of equal validity with the original document and as evidence of any fact stated in it of which direct oral evidence would be admissible<sup>12</sup>.

No process for compelling the production of a document kept by the Authority under the Open-Ended Investment Companies Regulations 2001<sup>13</sup> is to issue from any court except with the leave of the court; and any such process must bear on it a statement that it is issued with the leave of the court<sup>14</sup>.

<sup>1</sup> As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

<sup>2</sup> ie the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.

<sup>3</sup> Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 74(1).

- 4 le delivered to the Authority under any provision of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
- 5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 74(2).
- 6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 74(3). Note that reg 74(3) does not apply to Scotland: reg 74(4).
- 7 le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, Pt IV (regs 71-79).
- 8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 75(1)(a).
- 9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 75(1)(b).
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 75(2).
- 11 le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
- 12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 75(3).
- 13 le the Open-Ended Investment Companies Regulations 2001, SI 2001/1228.
- 14 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 75(4).

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### **670. Restriction of deemed notice in regard to documents received by the Financial Services Authority.**

A person is not to be taken to have deemed notice of any matter merely because of its being disclosed in any document kept by the Financial Services Authority<sup>1</sup> (and thus available for inspection) under any provision of the Open-Ended Investment Companies Regulations 2001<sup>2</sup>.

- 1 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 2 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 79.

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## **(E) CONTRAVENTIONS AND OFFENCES**

### **671. Contraventions and offences.**

Any of the following persons, that is to say: (1) a person who contravenes any provision of the Open-Ended Investment Companies Regulations 2001<sup>1</sup>; and (2) an open-ended investment

company<sup>2</sup> (including any director<sup>3</sup> or depositary<sup>4</sup> of such a company) which contravenes any provision of FSA rules<sup>5</sup>, is to be treated as having contravened rules made under the general rule-making power in the Financial Services and Markets Act 2000<sup>6</sup>.

The provisions of the Financial Services and Markets Act 2000 relating to offences by bodies corporate<sup>7</sup>, and those relating to jurisdiction and procedure in respect of offences<sup>8</sup>, apply to offences under the Open-Ended Investment Companies Regulations 2001 as they apply to offences under the Financial Services and Markets Act 2000<sup>9</sup>.

1 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 80(a).

2 As to the meaning of 'open-ended investment company' see PARA 623 note 3.

3 As to directors see PARA 639.

4 As to the meaning of 'depositary' see PARA 626.

5 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 80(b). As to the meaning of 'FSA rules' see PARA 622 note 6.

6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 80. As to the general rule-making power see the Financial Services and Markets Act 2000 s 138; and PARA 21.

7 In the Financial Services and Markets Act 2000 s 400: see PARA 571.

8 In the Financial Services and Markets Act 2000 s 403: see PARA 574.

9 See the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, regs 81, 82.

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## ***E. RECOGNISED OVERSEAS SCHEMES***

### **(A) SCHEMES CONSTITUTED IN OTHER EEA STATES**

#### **672. Schemes constituted in other EEA states.**

A collective investment scheme<sup>1</sup> constituted in another EEA state<sup>2</sup> is a recognised scheme<sup>3</sup> if: (1) it satisfies the prescribed<sup>4</sup> requirements<sup>5</sup>; and (2) not less than two months before inviting persons in the United Kingdom to become participants<sup>6</sup> in the scheme, the operator<sup>7</sup> of the scheme gives notice to the Financial Services Authority<sup>8</sup> of his intention to do so, specifying the way in which the invitation is to be made<sup>9</sup>. However, these provisions do not make the scheme a recognised scheme if within two months of receiving the notice<sup>10</sup> the Authority notifies: (a) the operator of the scheme; and (b) the authorities of the state in question who are responsible for the authorisation of collective investment schemes, that the way in which the invitation is to be made does not comply with the law in force in the United Kingdom<sup>11</sup>.

The notice to be given to the Authority<sup>12</sup> must: (i) be accompanied by a certificate from the authorities mentioned in head (b) above to the effect that the scheme complies with the conditions necessary for it to enjoy the rights conferred by any relevant Community instrument; (ii) contain the address of a place in the United Kingdom for the service on the operator of notices or other documents<sup>13</sup> required or authorised to be served on him under the

Financial Services and Markets Act 2000; and (iii) contain or be accompanied by such other information and documents as may be prescribed<sup>14</sup>.

The operator of a recognised scheme may give written notice to the Authority that he desires the scheme to be no longer recognised<sup>15</sup>.

1 As to the meaning of 'collective investment scheme' see PARA 603.

2 As to the meaning of 'EEA state' see PARA 315 note 1. For the purposes of the Financial Services and Markets Act 2000 s 264, a collective investment scheme is constituted in another EEA state if: (1) it is constituted under the law of that state by a contract or under a trust and is managed by a body corporate incorporated under that law; or (2) it takes the form of an open-ended investment company incorporated under that law: s 264(5). As to the meaning of 'body corporate' see PARA 86 note 11. As to the meaning of 'open-ended investment company' see PARA 603.

3 As to the meaning of 'recognised scheme' see PARA 603.

4 'Prescribed' means prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 417(1). As to the regulations made see the Financial Services and Markets Act 2000 (Collective Investment Schemes Constituted in Other EEA States) Regulations 2001, SI 2001/2383. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 Financial Services and Markets Act 2000 s 264(1)(a). The requirements prescribed for the purposes of s 264 are that a collective investment scheme is one which, in accordance with the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities), is an undertaking for collective investment in transferable securities subject to that directive (the 'undertaking'): Financial Services and Markets Act 2000 (Collective Investment Schemes Constituted in Other EEA States) Regulations 2001, SI 2001/2383, reg 3 (amended by SI 2003/2066).

6 As to the meaning of 'participants' see PARA 603.

7 As to the meaning of 'operator' see PARA 606 note 16.

8 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

9 Financial Services and Markets Act 2000 s 264(1).

10 Ie under the Financial Services and Markets Act 2000 s 264(1): see the text to notes 1-9.

11 Financial Services and Markets Act 2000 s 264(2). As to the meaning of 'United Kingdom' see PARA 2 note 3. A notice given by the Authority under s 264(2) must: (1) give the reasons for which the Authority considers that the law in force in the United Kingdom will not be complied with; and (2) specify a reasonable period (which may not be less than 28 days) within which any person to whom it is given may make representations to the Authority: s 264(4).

If any representations are made to the Authority, before the period for making representations has ended, by a person to whom a notice was given by the Authority under s 264(2), then the Authority must, within a reasonable period, decide in the light of those representations whether or not to withdraw its notice: s 265(1), (2). If the Authority withdraws its notice the scheme is a recognised scheme from the date on which the notice is withdrawn: s 265(3). If the Authority decides not to withdraw its notice, it must give a decision notice to each person to whom the notice under s 264(2) was given: s 265(4). As to decision notices see PARA 770. The operator of the scheme to whom the decision notice is given may refer the matter to the Financial Services and Markets Tribunal: s 265(5). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

12 Ie under the Financial Services and Markets Act 2000 s 264(1).

13 As to the meaning of 'document' see PARA 10 note 10.

14 Financial Services and Markets Act 2000 s 264(3). The notice to be given to the Authority under s 264(1) must contain or be accompanied by: (1) the fund rules or instrument of incorporation of the undertaking (see note 5); (2) its full and simplified prospectus within the meaning of the UCITS Directive (ie EEC Council Directive 85/611 (OJ L375, 31.12.85, p 3)) Section VI; and (3) where appropriate, its latest annual report and any

subsequent half-yearly report: Financial Services and Markets Act 2000 (Collective Investment Schemes Constituted in Other EEA States) Regulations 2001, SI 2001/2383, reg 4 (amended by SI 2003/2066).

15 Financial Services and Markets Act 2000 s 264(6). On the giving of notice under s 264(6), the scheme ceases to be a recognised scheme: s 264(7).

## **UPDATE**

### **672 Schemes constituted in other EEA states**

NOTES 5, 14--Directive 85/611 replaced: see PARA 6.

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### **673. Disapplication of certain rules.**

Apart from: (1) financial promotion rules<sup>1</sup>; and (2) rules relating to facilities and information in the United Kingdom<sup>2</sup>, rules made by the Financial Services Authority<sup>3</sup> under the Financial Services and Markets Act 2000 do not apply to the operator<sup>4</sup>, trustee<sup>5</sup> or depositary<sup>6</sup> of a recognised scheme<sup>7</sup> in relation to the carrying on by him of regulated activities<sup>8</sup> for which he has permission in that capacity<sup>9</sup>.

1 As to financial promotion rules see PARA 29.

2 I.e. rules under the Financial Services and Markets Act 2000 s 283(1): see PARA 680. As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

4 As to the meaning of 'operator' see PARA 606 note 16.

5 As to the meaning of 'trustee' see PARA 606 note 16.

6 As to the meaning of 'depositary' see PARA 606 note 18.

7 'Scheme' means a scheme which is a recognised scheme by virtue of the Financial Services and Markets Act 2000 s 264 (see PARA 672): s 266(2).

8 As to regulated activities see PARA 84 et seq.

9 Financial Services and Markets Act 2000 s 266(1). However s 266(1) does not affect the application of rules to an operator of a scheme if the operator is an EEA firm falling within Sch 3 para 5(f) (ie a management company) (see PARA 315 note 1) who qualifies for authorisation under Sch 3: s 266(1A) (added by SI 2003/2066).

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#### 674. Power to suspend promotion of scheme.

If it appears to the Financial Services Authority<sup>1</sup> that the operator<sup>2</sup> of a scheme<sup>3</sup> has communicated an invitation or inducement in relation to the scheme in a manner contrary to financial promotion rules<sup>4</sup>, the Authority may give a direction suspending promotion of the scheme<sup>5</sup>.

A direction<sup>6</sup> takes effect: (1) immediately, if the notice given under head (a) below states that that is the case; (2) on such date as may be specified in the notice; or (3) if no date is specified in the notice, when the matter to which it relates is no longer open to review<sup>7</sup>. A direction may be expressed to take effect immediately (or on a specified date) only if the Authority, having regard to its reasons for exercising its power<sup>8</sup>, considers that it is necessary for the direction to take effect immediately (or on that date)<sup>9</sup>. If the Authority proposes to give a direction, or gives such a direction with immediate effect, it must: (a) give the operator of the scheme concerned written notice; and (b) inform the competent authorities in the scheme's home state of its proposal or (as the case may be) of the direction<sup>10</sup>. The notice must:

- 1669 (i) give details of the direction<sup>11</sup>;
- 1670 (ii) inform the operator of when the direction takes effect<sup>12</sup>;
- 1671 (iii) state the Authority's reasons for giving the direction and for its determination as to when the direction takes effect<sup>13</sup>;
- 1672 (iv) inform the operator that he may make representations to the Authority within such period as may be specified in it (whether or not he has referred the matter to the Financial Services and Markets Tribunal)<sup>14</sup>; and
- 1673 (v) inform him of his right to refer the matter to the Tribunal<sup>15</sup>.

If, having considered any representations made by the operator, the Authority decides to give the direction in the way proposed or if it decides, where a direction has been given, not to revoke the direction, the Authority must give the operator of the scheme concerned written notice, and inform the competent authorities in the scheme's home state of the direction<sup>16</sup>. If, having considered any representations made by a person to whom the notice was given, the Authority decides not to give the direction in the way proposed, to give the direction in a way other than that proposed, or to revoke a direction which has effect, the Authority must give the operator of the scheme concerned written notice, and inform the competent authorities in the scheme's home state of its decision<sup>17</sup>. The provisions described above<sup>18</sup> apply to the variation of a direction on the Authority's own initiative as they apply to the giving of a direction<sup>19</sup>.

If, on an application<sup>20</sup>, the Authority proposes to vary a direction otherwise than in accordance with the application, or to refuse the application, it must give the operator of the scheme concerned a warning notice<sup>21</sup>. If, on such an application, the Authority decides to vary a direction otherwise than in accordance with the application, or to refuse the application, it must give the operator of the scheme concerned a decision notice<sup>22</sup>. If the application is refused, the operator of the scheme may refer the matter to the Tribunal<sup>23</sup>. If, on such an application, the Authority decides to grant the application it must give the operator of the scheme concerned written notice<sup>24</sup>. If the Authority decides on its own initiative to revoke a direction<sup>25</sup>, it must give the operator of the scheme concerned written notice<sup>26</sup>. The Authority must inform the competent authorities in the scheme's home state of any notice given<sup>27</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 As to the meaning of 'operator' see PARA 606 note 16.

3 'Scheme' means a scheme which is a recognised scheme by virtue of the Financial Services and Markets Act 2000 s 264 (see PARA 672): s 267(8).

4 As to financial promotion rules see PARA 29.

5 Financial Services and Markets Act 2000 s 267(1), (2). The Authority may direct: (1) that the exemption for a recognised scheme from the restriction on promotion in s 238(1) provided by s 238(4)(c) (see PARA 606) is not to apply in relation to the scheme; and (2) that s 238(5) (see PARA 606) is not to apply with respect to things done in relation to the scheme: s 267(2).

A direction under s 267(2) has effect: (a) for a specified period; (b) until the occurrence of a specified event; or (c) until specified conditions are complied with: s 267(3). 'Specified', in relation to a direction, means specified in it: s 267(9). The Authority may, either on its own initiative or on the application of the operator of the scheme concerned, vary a direction given under s 267(2) if it appears to the Authority that the direction should take effect or continue in force in a different form: s 267(4). The Authority may, either on its own initiative or on the application of the operator of the recognised scheme concerned, revoke a direction given under s 267(2) if it appears to the Authority that the conditions specified in the direction have been complied with, or that it is no longer necessary for the direction to take effect or continue in force: s 267(5). If an event is specified, the direction ceases to have effect (unless revoked earlier) on the occurrence of that event: s 267(6).

For the purposes of ss 267-269: (i) the scheme's home state is the EEA state in which the scheme is constituted (within the meaning given by s 264 (see PARA 672)); (ii) the competent authorities in the scheme's home state are the authorities in that state who are responsible for the authorisation of collective investment schemes: s 267(7). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'collective investment scheme' see PARA 603.

6 Ie a direction under the Financial Services and Markets Act 2000 s 267: see the text and notes 1-5.

7 Financial Services and Markets Act 2000 s 268(1). For the purposes of head (3) in the text, whether a matter is open to review is to be determined in accordance with s 391(8) (see PARA 774): s 268(14).

8 Ie under the Financial Services and Markets Act 2000 s 267: see the text and notes 1-5.

9 Financial Services and Markets Act 2000 s 268(2).

10 Financial Services and Markets Act 2000 s 268(3).

11 Financial Services and Markets Act 2000 s 268(4)(a).

12 Financial Services and Markets Act 2000 s 268(4)(b).

13 Financial Services and Markets Act 2000 s 268(4)(c).

14 Financial Services and Markets Act 2000 s 268(4)(d). As to the Financial Services and Markets Tribunal see PARA 43 et seq. The Authority may extend the period allowed under the notice for making representations: s 268(5).

15 Financial Services and Markets Act 2000 s 268(4)(e). If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference: s 268(12).

16 Financial Services and Markets Act 2000 s 268(6), (7). A notice given to the operator must inform him of his right to refer the matter to the Tribunal: s 268(10).

17 Financial Services and Markets Act 2000 s 268(8), (9). A notice given to the operator as a result of the Authority deciding to give the direction in a way other than that proposed must comply with s 268(4) (see heads (i)-(v) in the text): s 268(11).

18 Ie the Financial Services and Markets Act 2000 s 268: see the text and notes 8-17.

19 Financial Services and Markets Act 2000 s 268(13).

20 Ie under the Financial Services and Markets Act 2000 s 267(4) or s 267(5): see the text and notes 11-15.

21 Financial Services and Markets Act 2000 s 269(1). As to warning notices see PARA 769.

22 Financial Services and Markets Act 2000 s 269(2). As to decision notices see PARA 770.

23 Financial Services and Markets Act 2000 s 269(3).

- 24 Financial Services and Markets Act 2000 s 269(4).
- 25 le a direction given under the Financial Services and Markets Act 2000 s 267: see the text and notes 1-5.
- 26 Financial Services and Markets Act 2000 s 269(5).
- 27 Financial Services and Markets Act 2000 s 269(6).

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## (B) SCHEMES AUTHORISED IN DESIGNATED COUNTRIES AND TERRITORIES, AND INDIVIDUALLY RECOGNISED SCHEMES

### **675. Schemes authorised in designated countries or territories.**

A collective investment scheme<sup>1</sup> which is not a scheme constituted in another EEA state<sup>2</sup> but is managed in, and authorised under the law of, a country or territory outside the United Kingdom<sup>3</sup> is a recognised scheme<sup>4</sup> if<sup>5</sup>:

- 1674 (1) that country or territory is so designated<sup>6</sup> by an order made by the Treasury<sup>7</sup>;
- 1675 (2) the scheme is of a class specified by the order<sup>8</sup>;
- 1676 (3) the operator<sup>9</sup> of the scheme has given written notice to the Financial Services Authority<sup>10</sup> that he wishes it to be recognised<sup>11</sup>; and
- 1677 (4) either: (a) the Authority, by written notice, has given its approval to the scheme's being recognised; or (b) two months, beginning with the date on which notice was given under head (3) above, have expired without the operator receiving a warning notice from the Authority<sup>12</sup>.

The Treasury may not make an order designating any country or territory for the purposes of these provisions unless satisfied: (i) that the law and practice under which relevant collective investment schemes<sup>13</sup> are authorised and supervised in that country or territory affords to investors in the United Kingdom protection at least equivalent to that provided for them by or under Part XVII of the Financial Services and Markets Act 2000<sup>14</sup> in the case of comparable authorised schemes<sup>15</sup>; and (ii) that adequate arrangements exist, or will exist, for co-operation between the authorities of the country or territory responsible for the authorisation and supervision of relevant collective investment schemes and the Authority<sup>16</sup>. If the Treasury is considering whether to make an order designating a country or territory for the purposes of these provisions: (A) the Treasury must ask the Authority for a report on the law and practice of that country or territory in relation to the authorisation and supervision of relevant collective investment schemes and on any existing or proposed arrangements for co-operation between it and the authorities responsible in that country or territory for the authorisation and supervision of relevant collective investment schemes<sup>17</sup>; (B) the Authority must provide the Treasury with such a report<sup>18</sup>; and (c) the Treasury must have regard to it in deciding whether to make the order<sup>19</sup>.

If the Authority proposes to refuse approval of a scheme's being a recognised scheme<sup>20</sup>, it must give the operator of the scheme a warning notice<sup>21</sup>. In order to be valid, the warning notice



must be received by the operator before the end of two months beginning with the date on which notice was given to the Authority requesting it to recognise the scheme<sup>22</sup>. If, having given a warning notice, the Authority decides to refuse approval, it must give the operator of the scheme a decision notice<sup>23</sup>; and the operator may refer the matter to the Financial Services and Markets Tribunal<sup>24</sup>.

1 As to the meaning of 'collective investment scheme' see PARA 603.

2 Ie by virtue of the Financial Services and Markets Act 2000 s 264: see PARA 672. As to the meaning of 'EEA state' see PARA 315 note 1.

3 As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 As to the meaning of 'recognised scheme' see PARA 603.

5 Financial Services and Markets Act 2000 s 270(1).

6 Ie for the purposes of the Financial Services and Markets Act 2000 s 270.

7 Financial Services and Markets Act 2000 s 270(1)(a). As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

See the Financial Services and Markets Act 2000 (Collective Investment Schemes) (Designated Countries and Territories) Order 2003, SI 2003/1181, which designates Guernsey, Jersey and the Isle of Man for the purposes of the Financial Services and Markets Act 2000 s 270. See also the Financial Services (Designated Countries and Territories) (Overseas Collective Investment Schemes) (Bermuda) Order 1988, SI 1988/2284, which was made under the Financial Services and Markets Act 1986 s 87 (repealed), designates Bermuda and has effect as if made under the Financial Services and Markets Act 2000 s 270(1): see the Financial Services and Markets Act 2000 (Transitional Provisions) (Authorised Persons etc) Order 2001, SI 2001/2636, art 67(1).

8 Financial Services and Markets Act 2000 s 270(1)(b). See note 7.

9 As to the meaning of 'operator' see PARA 606 note 16.

10 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

11 Financial Services and Markets Act 2000 s 270(1)(c). The notice to be given by the operator under s 270(1)(c) must: (1) contain the address of a place in the United Kingdom for the service on the operator of notices or other documents required or authorised to be served on him under the Financial Services and Markets Act 2000; and (2) contain or be accompanied by such information and documents as may be specified by the Authority: s 270(6). As to the meaning of 'document' see PARA 10 note 10.

12 Financial Services and Markets Act 2000 s 270(1)(d). A warning notice is given under s 271: see the text and notes 20-24. As to warning notices see PARA 769.

13 'Relevant collective investment schemes' means collective investment schemes of the class or classes to be specified by the order: Financial Services and Markets Act 2000 s 270(3).

14 Ie the Financial Services and Markets Act 2000 Pt XVII (ss 235-284).

15 Financial Services and Markets Act 2000 s 270(2)(a). 'Comparable authorised schemes' means whichever of the following the Treasury considers to be the most appropriate, having regard to the class or classes of scheme to be specified by the order: (1) authorised unit trust schemes; (2) authorised open-ended investment companies; (3) both such unit trust schemes and such companies: s 270(4). As to the meanings of 'authorised unit trust scheme', 'authorised open-ended investment company' and 'unit trust scheme' see PARA 603.

16 Financial Services and Markets Act 2000 s 270(2).

17 Financial Services and Markets Act 2000 s 270(5)(a). The Authority must make such a report having regard to the Treasury's need to be satisfied as mentioned in s 270(2): see the text and notes 13-16.

18 Financial Services and Markets Act 2000 s 270(5)(b).

- 19 Financial Services and Markets Act 2000 s 270(5)(c).
- 20 le by virtue of the Financial Services and Markets Act 2000 s 270: see the text and notes 1-19.
- 21 Financial Services and Markets Act 2000 s 271(1).
- 22 Financial Services and Markets Act 2000 s 271(2). Such a notice is given under s 270(1)(c): see head (3) in the text.
- 23 As to decision notices see PARA 770.
- 24 Financial Services and Markets Act 2000 s 271(3). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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#### **676. Individually recognised overseas schemes.**

The Financial Services Authority<sup>1</sup> may, on the application of the operator<sup>2</sup> of a collective investment scheme<sup>3</sup> which: (1) is managed in a country or territory outside the United Kingdom<sup>4</sup>; (2) is not a scheme constituted in another EEA state<sup>5</sup>; (3) is not managed in a designated country or territory<sup>6</sup> or, if it is so managed, is of a class not specified by the designation order; and (4) appears to the Authority to satisfy the following requirements, make an order declaring the scheme to be a recognised scheme<sup>7</sup>. The requirements are that:

- 1678 (a) adequate protection must be afforded to participants<sup>8</sup> in the scheme<sup>9</sup>;
- 1679 (b) the arrangements for the scheme's constitution and management must be adequate<sup>10</sup>;
- 1680 (c) the powers and duties of the operator and, if the scheme has a trustee<sup>11</sup> or depositary<sup>12</sup>, of the trustee or depositary must be adequate<sup>13</sup>;
- 1681 (d) the scheme must take the form of an open-ended investment company or (if it does not take that form) the operator must be a body corporate<sup>14</sup>;
- 1682 (e) the operator of the scheme must: (i) if an authorised person<sup>15</sup>, have permission to act as operator; (ii) if not an authorised person, be a fit and proper person to act as operator<sup>16</sup>;
- 1683 (f) the trustee or depositary (if any) of the scheme must: (i) if an authorised person, have permission to act as trustee or depositary; (ii) if not an authorised person, be a fit and proper person to act as trustee or depositary<sup>17</sup>;
- 1684 (g) the operator and the trustee or depositary (if any) of the scheme must be able and willing to co-operate with the Authority by the sharing of information and in other ways<sup>18</sup>;
- 1685 (h) the name of the scheme must not be undesirable or misleading<sup>19</sup>;
- 1686 (i) the purposes of the scheme must be reasonably capable of being successfully carried into effect<sup>20</sup>;
- 1687 (j) the participants must be entitled to have their units<sup>21</sup> redeemed in accordance with the scheme at a price related to the net value of the property to which the units relate and determined in accordance with the scheme<sup>22</sup>.

- 1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
- 2 As to the meaning of 'operator' see PARA 606 note 16.
- 3 As to the meaning of 'collective investment scheme' see PARA 603.
- 4 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 5 It does not satisfy the requirements prescribed for the purposes of the Financial Services and Markets Act 2000 s 264: see PARA 672. As to the meaning of 'EEA state' see PARA 315 note 1.
- 6 It is designated for the purposes of the Financial Services and Markets Act 2000 s 270: see PARA 675.
- 7 Financial Services and Markets Act 2000 s 272(1). As to the meaning of 'recognised scheme' see PARA 603.
- 8 As to the meaning of 'participants' see PARA 603.
- 9 Financial Services and Markets Act 2000 s 272(2).
- 10 Financial Services and Markets Act 2000 s 272(3). In deciding whether the matters mentioned in s 272(3) or s 272(4) (see the text to notes 11-13) are adequate, the Authority must have regard to: (1) any rule of law; and (2) any matters which are, or could be, the subject of rules, applicable in relation to comparable authorised schemes: s 272(5). 'Comparable authorised schemes' means whichever of the following the Authority considers the most appropriate, having regard to the nature of the scheme in respect of which the application is made: (a) authorised unit trust schemes; (b) authorised open-ended investment companies; (c) both such unit trust schemes and such companies: s 272(6). As to the meanings of 'authorised unit trust scheme', 'authorised open-ended investment company' and 'unit trust scheme' see PARA 603.
- 11 As to the meaning of 'trustee' see PARA 606 note 16.
- 12 As to the meaning of 'depository' see PARA 606 note 18.
- 13 Financial Services and Markets Act 2000 s 272(4). See note 10.
- 14 Financial Services and Markets Act 2000 s 272(7). As to the meaning of 'body corporate' see PARA 86 note 11.
- 15 As to authorised persons see PARA 314.
- 16 Financial Services and Markets Act 2000 s 272(8). For the purposes of heads (e)(ii) and (f)(ii) in the text, the Authority may take into account any matter relating to: (1) any person who is or will be employed by or associated with the operator, trustee or depository in connection with the scheme; (2) any director of the operator, trustee or depository; (3) any person exercising influence over the operator, trustee or depository; (4) any body corporate in the same group as the operator, trustee or depository; (5) any director of any such body corporate; (6) any person exercising influence over any such body corporate: s 273. As to the meaning of 'group' see PARA 351 note 37; and as to the meaning of 'director' see PARA 86 note 11.
- 17 Financial Services and Markets Act 2000 s 272(9). See note 16.
- 18 Financial Services and Markets Act 2000 s 272(10).
- 19 Financial Services and Markets Act 2000 s 272(11).
- 20 Financial Services and Markets Act 2000 s 272(12).
- 21 As to the meaning of 'units' see PARA 603.
- 22 Financial Services and Markets Act 2000 s 272(13). A scheme is to be treated as complying with s 272(13) if it requires the operator to ensure that a participant is able to sell his units on an investment exchange at a price not significantly different from that mentioned in s 272(13): s 272(14). Section 272(13) is not to be read as imposing a requirement that the participants must be entitled to have their units redeemed (or sold as mentioned in s 272(14)) immediately following a demand to that effect: s 272(15). As to investment exchanges see PARA 684 et seq.

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### **677. Applications for recognition of individual schemes.**

An application<sup>1</sup> for an order declaring a scheme to be a recognised scheme<sup>2</sup> must be made to the Financial Services Authority<sup>3</sup> by the operator<sup>4</sup> of the scheme<sup>5</sup>. The application must: (1) be made in such manner as the Authority may direct; (2) contain the address of a place in the United Kingdom<sup>6</sup> for the service on the operator of notices or other documents<sup>7</sup> required or authorised to be served on him under the Financial Services and Markets Act 2000; (3) contain or be accompanied by such information as the Authority may reasonably require for the purpose of determining the application<sup>8</sup>. At any time after receiving an application and before determining it, the Authority may require the applicant to provide it with such further information as it reasonably considers necessary to enable it to determine the application<sup>9</sup>. Different directions may be given, and different requirements imposed, in relation to different applications<sup>10</sup>. The Authority may require an applicant to present information which he is required to give under the provisions described above in such form, or to verify it in such a way, as the Authority may direct<sup>11</sup>.

An application<sup>12</sup> must be determined by the Authority before the end of the period of six months beginning with the date on which it receives the completed application<sup>13</sup>. The Authority may determine an incomplete application if it considers it appropriate to do so; and it must in any event determine such an application within 12 months beginning with the date on which it first receives the application<sup>14</sup>. If the Authority makes an order declaring a scheme to be a recognised scheme<sup>15</sup>, it must give written notice of the order to the applicant<sup>16</sup>.

If the Authority proposes to refuse an application<sup>17</sup> it must give the applicant a warning notice<sup>18</sup>. If the Authority decides to refuse the application it must give the applicant a decision notice<sup>19</sup>, and the applicant may refer the matter to the Financial Services and Markets Tribunal<sup>20</sup>.

1    Ie under the Financial Services and Markets Act 2000 s 272: see PARA 676.

2    As to the meaning of 'recognised scheme' see PARA 603.

3    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

4    As to the meaning of 'operator' see PARA 606 note 16.

5    Financial Services and Markets Act 2000 s 274(1).

6    As to the meaning of 'United Kingdom' see PARA 2 note 3.

7    As to the meaning of 'document' see PARA 10 note 10.

8    Financial Services and Markets Act 2000 s 274(2).

9    Financial Services and Markets Act 2000 s 274(3).

10   Financial Services and Markets Act 2000 s 274(4).

11   Financial Services and Markets Act 2000 s 274(5).

12   Ie under the Financial Services and Markets Act 2000 s 272: see PARA 676.

- 13 Financial Services and Markets Act 2000 s 275(1).
- 14 Financial Services and Markets Act 2000 s 275(2).
- 15 Ie under the Financial Services and Markets Act 2000 s 272(1): see PARA 676.
- 16 Financial Services and Markets Act 2000 s 275(3).
- 17 Ie an application made under the Financial Services and Markets Act 2000 s 272: see PARA 676.
- 18 Financial Services and Markets Act 2000 s 276(1). As to warning notices see PARA 769.
- 19 Financial Services and Markets Act 2000 s 276(2)(a). As to decision notices see PARA 770.
- 20 Financial Services and Markets Act 2000 s 276(2)(b). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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### **678. Alteration of individually recognised schemes and changes of operator, trustee or depositary.**

The operator<sup>1</sup> of an individually recognised scheme<sup>2</sup> must give written notice to the Financial Services Authority<sup>3</sup> of any proposed alteration to the scheme<sup>4</sup>. Any such proposal may not be given effect unless: (1) the Authority, by written notice, has given its approval to the proposal; or (2) one month, beginning with the date on which notice was given<sup>5</sup>, has expired without the Authority having given written notice to the operator that it has decided to refuse approval<sup>6</sup>. At least one month before any replacement of the operator, trustee<sup>7</sup> or depositary<sup>8</sup> of such a scheme, notice of the proposed replacement must be given to the Authority by the operator, trustee or depositary (as the case may be), or by the person who is to replace him<sup>9</sup>.

- 1 As to the meaning of 'operator' see PARA 606 note 16.
- 2 Ie a scheme recognised by virtue of the Financial Services and Markets Act 2000 s 272: see PARA 676.
- 3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
- 4 Financial Services and Markets Act 2000 s 277(1).
- 5 Ie under the Financial Services and Markets Act 2000 s 277(1).
- 6 Financial Services and Markets Act 2000 s 277(2).
- 7 As to the meaning of 'trustee' see PARA 606 note 16.
- 8 As to the meaning of 'depositary' see PARA 606 note 18.
- 9 Financial Services and Markets Act 2000 s 277(3).

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### **679. Requirements for schemes authorised in designated countries or territories and for individually recognised schemes.**

The Financial Services Authority<sup>1</sup> may make rules<sup>2</sup> imposing duties or liabilities on the operator<sup>3</sup> of a scheme authorised in a designated country or territory or an individually recognised scheme<sup>4</sup> for purposes corresponding to those for which rules may be made<sup>5</sup> in relation to authorised unit trust schemes<sup>6</sup>.

The Authority may direct that a scheme is to cease to be recognised<sup>7</sup> or revoke a recognition order<sup>8</sup> if it appears to the Authority<sup>9</sup>:

- 1688 (1) that the operator, trustee<sup>10</sup> or depositary<sup>11</sup> of the scheme has contravened a requirement imposed on him by or under the Financial Services and Markets Act 2000<sup>12</sup>;
- 1689 (2) that the operator, trustee or depositary of the scheme has, in purported compliance with any such requirement, knowingly or recklessly given the Authority information which is false or misleading in a material particular<sup>13</sup>;
- 1690 (3) in the case of an order<sup>14</sup>, that one or more of the requirements for the making of the order are no longer satisfied<sup>15</sup>; or
- 1691 (4) that none of heads (1) to (3) above applies, but it is undesirable in the interests of the participants<sup>16</sup> or potential participants that the scheme should continue to be recognised<sup>17</sup>.

If the Authority proposes to give a direction<sup>18</sup> or to make an order<sup>19</sup> revoking a recognition order, it must give a warning notice to the operator and (if any) the trustee or depositary of the scheme<sup>20</sup>. If the Authority decides to give such a direction or make such an order it must without delay give a decision notice<sup>21</sup> to the operator and (if any) the trustee or depositary of the scheme; and the operator or the trustee or depositary may refer the matter to the Financial Services and Markets Tribunal<sup>22</sup>.

If it appears to the Financial Services Authority that: (a) the operator, trustee or depositary of a relevant recognised scheme<sup>23</sup> has contravened, or is likely to contravene, a requirement imposed on him by or under the Financial Services and Markets Act 2000; (b) the operator, trustee or depositary of such a scheme has, in purported compliance with any such requirement, knowingly or recklessly given the Authority information which is false or misleading in a material particular; (c) one or more of the requirements for the recognition of a scheme<sup>24</sup> are no longer satisfied; or (d) none of heads (a) to (c) above applies, but the exercise of the power to give directions<sup>25</sup> is desirable in order to protect the interests of participants or potential participants in a relevant recognised scheme who are in the United Kingdom, it may direct that the scheme is not to be a recognised scheme for a specified period or until the occurrence of a specified event or until specified conditions are complied with<sup>26</sup>.

A direction takes effect: (i) immediately, if the notice given by the Authority<sup>27</sup> states that that is the case; (ii) on such date as may be specified in the notice; or (iii) if no date is specified in the notice, when the matter to which it relates is no longer open to review<sup>28</sup>. A direction may be expressed to take effect immediately (or on a specified date) only if the Authority, having regard to the ground on which it is exercising its power<sup>29</sup>, considers that it is necessary for the

direction to take effect immediately (or on that date)<sup>30</sup>. If the Authority proposes to give a direction<sup>31</sup>, or gives such a direction with immediate effect, it must give separate written notice to the operator and (if any) the trustee or depositary of the scheme concerned<sup>32</sup>. The notice must: (A) give details of the direction; (B) inform the person to whom it is given of when the direction takes effect; (C) state the Authority's reasons for giving the direction and for its determination as to when the direction takes effect; (D) inform the person to whom it is given that he may make representations to the Authority within such period as may be specified in it (whether or not he has referred the matter to the Tribunal); and (E) inform him of his right to refer the matter to the Tribunal<sup>33</sup>. The Authority may extend the period allowed under the notice for making representations<sup>34</sup>. If, having considered any representations made by a person to whom the notice was given, the Authority decides to give the direction in the way proposed, or if it decides, where a direction has been given, not to revoke the direction, it must give separate written notice to the operator and (if any) the trustee or depositary of the scheme concerned<sup>35</sup>. If, having considered any representations made by a person to whom the notice was given, the Authority decides not to give the direction in the way proposed, to give the direction in a way other than that proposed, or to revoke a direction which has effect, it must give separate written notice to the operator and (if any) the trustee or depositary of the scheme concerned<sup>36</sup>. The provisions described above<sup>37</sup> apply to the variation of a direction on the Authority's own initiative as they apply to the giving of a direction<sup>38</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.

2 As to the meaning of 'rule' see PARA 23 note 2.

3 As to the meaning of 'operator' see PARA 606 note 16.

4 Ie a scheme recognised under the Financial Services and Markets Act 2000 s 270 (see PARA 675) or s 272 (see PARA 676).

5 Ie under the Financial Services and Markets Act 2000 s 248: see PARA 615.

6 Financial Services and Markets Act 2000 s 278. As to the meaning of 'authorised unit trust scheme' see PARA 603.

7 Ie by virtue of the Financial Services and Markets Act 2000 s 270: see PARA 675.

8 Ie under the Financial Services and Markets Act 2000 s 272: see PARA 676.

9 Financial Services and Markets Act 2000 s 279.

10 As to the meaning of 'trustee' see PARA 606 note 16.

11 As to the meaning of 'depositary' see PARA 606 note 18.

12 Financial Services and Markets Act 2000 s 279(a).

13 Financial Services and Markets Act 2000 s 279(b).

14 Ie under the Financial Services and Markets Act 2000 s 272: see PARA 676.

15 Financial Services and Markets Act 2000 s 279(c).

16 As to the meaning of 'participants' see PARA 603.

17 Financial Services and Markets Act 2000 s 279(d).

18 Ie under the Financial Services and Markets Act 2000 s 279: see the text to notes 7-17.

19 Ie under the Financial Services and Markets Act 2000 s 279: see the text to notes 7-17.

- 20 Financial Services and Markets Act 2000 s 280(1).
- 21 As to decision notices see PARA 770.
- 22 Financial Services and Markets Act 2000 s 280(2). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 23 A 'relevant recognised scheme' means a scheme recognised under the Financial Services and Markets Act 2000 s 270 (see PARA 675) or s 272 (see PARA 676): s 281(1).
- 24 Ie under the Financial Services and Markets Act 2000 s 272: see PARA 676.
- 25 Ie the power conferred by the Financial Services and Markets Act 2000 s 281.
- 26 Financial Services and Markets Act 2000 s 281(2).
- 27 Ie the notice given under the Financial Services and Markets Act 2000 s 282(3): see the text to notes 31-32.
- 28 Financial Services and Markets Act 2000 s 282(1). For the purposes of head (iii) in the text, whether a matter is open to review is to be determined in accordance with s 391(8) (see PARA 774): s 282(12).
- 29 Ie under the Financial Services and Markets Act 2000 s 281: see the text and notes 23-26.
- 30 Financial Services and Markets Act 2000 s 282(2).
- 31 Ie under the Financial Services and Markets Act 2000 s 281: see the text and notes 23-26.
- 32 Financial Services and Markets Act 2000 s 282(3).
- 33 Financial Services and Markets Act 2000 s 282(4). If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference: s 282(10).
- 34 Financial Services and Markets Act 2000 s 282(5).
- 35 Financial Services and Markets Act 2000 s 282(6). A notice given under s 282(6) must inform the person to whom it is given of his right to refer the matter to the Tribunal: s 282(8).
- 36 Financial Services and Markets Act 2000 s 282(7). A notice that the Authority has decided to give a direction in a way other than that proposed must comply with s 282(4) (see the text to note 33): s 282(9).
- 37 Ie the Financial Services and Markets Act 2000 s 282: see the text and notes 29-36.
- 38 Financial Services and Markets Act 2000 s 282(11).

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## (C) FACILITIES AND INFORMATION

### **680. Facilities.**

The Financial Services Authority<sup>1</sup> may make rules<sup>2</sup> requiring operators<sup>3</sup> of recognised schemes<sup>4</sup> to maintain in the United Kingdom<sup>5</sup>, or in such part or parts of it as may be specified, such facilities as the Authority thinks desirable in the interests of participants<sup>6</sup> and as are specified in rules<sup>7</sup>.



- 1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
- 2 As to the meaning of 'rule' see PARA 23 note 2.
- 3 As to the meaning of 'operator' see PARA 606 note 16.
- 4 As to the meaning of 'recognised scheme' see PARA 603.
- 5 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 6 As to the meaning of 'participants' see PARA 603.
- 7 Financial Services and Markets Act 2000 s 283(1).

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#### **681. Information.**

The Financial Services Authority<sup>1</sup> may by notice in writing require the operator<sup>2</sup> of any recognised scheme<sup>3</sup> to include such explanatory information as is specified in the notice in any communication of his which: (1) is a communication of an invitation or inducement<sup>4</sup>; and (2) names the scheme<sup>5</sup>.

- 1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Collective Investment Schemes (COLL). As to the Handbook generally see PARA 22.
- 2 As to the meaning of 'operator' see PARA 606 note 16.
- 3 As to the meaning of 'recognised scheme' see PARA 603.
- 4 ie of a kind mentioned in the Financial Services and Markets Act 2000 s 21(1): see PARA 225.
- 5 Financial Services and Markets Act 2000 s 283(2). In the case of a communication originating outside the United Kingdom, s 283(2) only applies if the communication is capable of having an effect in the United Kingdom: s 283(3). As to the meaning of 'United Kingdom' see PARA 2 note 3.

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### ***F. POWER TO INVESTIGATE***

#### **682. The power to investigate in relation to open-ended investment companies.**

The Financial Services Authority<sup>1</sup> or the Secretary of State<sup>2</sup> may appoint one or more competent persons to investigate and report on the affairs of, or of any director or depositary<sup>3</sup> of, an open-

ended investment company<sup>4</sup> if it appears to either of them that it is in the interests of shareholders<sup>5</sup> or potential shareholders of the company to do so or that the matter is of public concern<sup>6</sup>.

A person so appointed<sup>7</sup> to investigate the affairs of, or of any director or depositary of, a company may also, if he thinks it necessary for the purposes of that investigation, investigate the affairs of (or of the directors, depositary, trustee or operator of):

- 1692 (1) an open-ended investment company, the directors of which include any of the directors of the company whose affairs are being investigated as described above<sup>8</sup>;
- 1693 (2) an open-ended investment company, the directors of which include any of the directors of the depositary whose affairs are being so investigated<sup>9</sup>;
- 1694 (3) an open-ended investment company, the depositary of which is: (a) the same as the depositary of the company whose affairs are being so investigated<sup>10</sup>; or (b) the depositary whose affairs are being so investigated<sup>11</sup>;
- 1695 (4) an open-ended investment company, the directors of which include: (a) the director whose affairs are being so investigated<sup>12</sup>; or (b) any director of a body corporate which is the director whose affairs are being so investigated<sup>13</sup>;
- 1696 (5) a collective investment scheme<sup>14</sup>, the manager, depositary or operator of which is a director of the company whose affairs are being so investigated<sup>15</sup>;
- 1697 (6) a collective investment scheme, the trustee of which is: (a) the same as the depositary of the company whose affairs are being so investigated<sup>16</sup>; or (b) the depositary whose affairs are being so investigated<sup>17</sup>; or
- 1698 (7) a collective investment scheme, the manager, depositary or operator of which is: (a) the director whose affairs are being so investigated<sup>18</sup>; or (b) a director of a body corporate which is the director whose affairs are being so investigated<sup>19</sup>.

If the person ('A') appointed to conduct an investigation<sup>20</sup> considers that a person ('B') is or may be able to give information which is relevant to the investigation, A may require B:

- 1699 (i) to produce to A any documents in B's possession or under his control which appear to A to be relevant to that investigation<sup>21</sup>;
- 1700 (ii) to attend before A<sup>22</sup>; and
- 1701 (iii) otherwise to give A all such assistance in connection with the investigation which B is reasonably able to give<sup>23</sup>.

It is B's duty to comply with that requirement<sup>24</sup>.

Certain provisions of the Financial Services and Markets Act 2000 relating to investigations apply in certain circumstances<sup>25</sup>.

No person may be required<sup>26</sup> to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on a banking business unless:

- 1702 (A) the imposition of the requirement is authorised by the Authority or the Secretary of State (as the case may be) or the person to whom the obligation of confidence is owed<sup>27</sup>; or
- 1703 (B) the person to whom it is owed is a director or depositary of any open-ended investment company which is under investigation, or any other person whose own affairs are under investigation<sup>28</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialists Sourcebooks, Collective Investment Schemes (COLL); Regulatory Processes, Authorisation Manual (AUTH). As to the Handbook generally see PARA 22.

- 2 As to the Secretary of State see PARA 3.
- 3 As to the meaning of 'depository' see PARA 626.
- 4 As to the meaning of 'open-ended investment company' see PARA 623 note 3.
- 5 As to shareholders see PARA 624 note 6.
- 6 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(1).
- 7 He appointed under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(1).
- 8 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(a).
- 9 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(b).
- 10 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(c)(i).
- 11 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(c)(ii).
- 12 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(d)(i).
- 13 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(d)(ii).
- 14 As to the meaning of 'collective investment scheme' see PARA 603.
- 15 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(e).
- 16 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(f)(i).
- 17 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(f)(ii).
- 18 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(g)(i).
- 19 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(2)(g)(ii).
- 20 He an investigation under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30.
- 21 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(3)(a).
- 22 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(3)(b).
- 23 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(3)(c).
- 24 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(3).

25 The provisions of the Financial Services and Markets Act 2000 s 170(5)-(9) (general provisions relating to investigations) (see PARA 451) apply if the Authority appoints a person under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30 to conduct an investigation on its behalf (reg 30(4)(a)) or the Secretary of State appoints a person under reg 30 to conduct an investigation on his behalf (reg 30(4)(b)), as they apply in the cases mentioned in the Financial Services and Markets Act 2000 s 170(1) (Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(4)).

The Financial Services and Markets Act 2000 s 174 (admissibility of statements made to investigators) (see PARA 452) applies to a statement made by a person in compliance with a requirement imposed on him under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30 as it applies to a statement mentioned in the Financial Services and Markets Act 2000 s 174: Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(5).

The Financial Services and Markets Act 2000 s 175(2)-(4), (6) (supplemental provisions relating to information and documents) (see PARA 453) and s 177 (offences) (see PARAS 451, 455) have effect as if the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30 were contained in the Financial Services and Markets Act 2000 Pt XI (ss 165-177) (information gathering and investigations) (see PARA 447 et seq): Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(6).

The provisions of the Financial Services and Markets Act 2000 s 176(1)-(9) (entry of premises under warrant) (see PARA 454) apply in relation to a person appointed under the Open-Ended Investment Companies

Regulations 2001, SI 2001/1228, reg 30(1) as if references to an investigator were references to a person so appointed (reg 30(7)(a)), references to an information requirement were references to a requirement imposed under reg 30 by a person so appointed (reg 30(7)(b)), and the premises mentioned in the Financial Services and Markets Act 2000 s 176(3)(a) were the premises of a person whose affairs are the subject of an investigation under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30 or of an appointed representative of such a person (reg 30(7)(b)). As to the meaning of 'appointed representative' see PARA 346.

26 le required under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30.

27 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(8)(a).

28 Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 30(8)(b).

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### **683. Power to investigate in relation to other collective investment schemes.**

If it appears to an investigating authority<sup>1</sup> that it is in the interests of the participants<sup>2</sup> or potential participants to do so or that the matter is of public concern, the investigating authority may appoint one or more competent persons to investigate on its behalf<sup>3</sup>:

1704 (1) the affairs of, or of the manager or trustee<sup>4</sup> of, any authorised unit trust scheme<sup>5</sup>;

1705 (2) the affairs of, or of the operator<sup>6</sup>, trustee or depositary<sup>7</sup> of, any recognised scheme<sup>8</sup> so far as relating to activities carried on in the United Kingdom<sup>9</sup>; or

1706 (3) the affairs of, or of the operator, trustee or depositary of, any other collective investment scheme<sup>10</sup> except a body incorporated by virtue of regulations made in relation to open-ended investment companies<sup>11</sup>.

A person appointed<sup>12</sup> to investigate the affairs of, or of the manager, trustee, operator or depositary of, any scheme (scheme 'A'), may also, if he thinks it necessary for the purposes of that investigation, investigate: (a) the affairs of, or of the manager, trustee, operator or depositary of, any other such scheme<sup>13</sup> whose manager, trustee, operator or depositary is the same person as the manager, trustee, operator or depositary of scheme A; (b) the affairs of such other schemes and persons (including open-ended investment companies<sup>14</sup> and the directors<sup>15</sup> and depositaries of such bodies) as may be prescribed<sup>16</sup>.

If the person appointed to conduct an investigation under these provisions ('B') considers that a person ('C') is or may be able to give information which is relevant to the investigation, B may require C: (i) to produce to B any documents<sup>17</sup> in C's possession or under his control which appear to B to be relevant to the investigation; (ii) to attend before B; and (iii) otherwise to give B all assistance in connection with the investigation which C is reasonably able to give, and it is C's duty to comply with that requirement<sup>18</sup>.

1 'Investigating authority' means the Financial Services Authority or the Secretary of State: Financial Services and Markets Act 2000 s 284(11). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Secretary of State see PARA 3.

2 As to the meaning of 'participants' see PARA 603.

3 Financial Services and Markets Act 2000 s 284(1). Section 170(5)-(9) (investigations) (see PARA 451) applies if an investigating authority appoints a person under s 284 to conduct an investigation on its behalf as it applies in the case mentioned in s 170(1) (see PARA 451); s 284(4). Section 174 (admissibility of statements made to investigators) (see PARA 452) applies to a statement made by a person in compliance with a requirement imposed under s 284 as it applies to a statement mentioned in s 174; s 284(5). Section 175(2)-(4), (6) (supplemental provisions relating to information and documents) (see PARA 453) and s 177 (offences) (see PARA 455) have effect as if s 284 were contained in Pt XI (ss 165-177): s 284(6).

Section 176(1)-(9) (entry of premises under warrant) (see PARA 454) applies in relation to a person appointed under s 284(1) as if: (1) references to an investigator were references to a person so appointed; (2) references to an information requirement were references to a requirement imposed under s 175 or under s 284(3) by a person so appointed; (3) the premises mentioned in s 176(3)(a) were the premises of a person whose affairs are the subject of an investigation under s 284 or of an appointed representative of such a person: s 284(7). As to the meaning of 'appointed representative' see PARA 346.

4 As to the meaning of 'trustee' see PARA 606 note 16.

5 Financial Services and Markets Act 2000 s 284(1)(a). As to the meaning of 'authorised unit trust scheme' see PARA 603.

6 As to the meaning of 'operator' see PARA 606 note 16.

7 As to the meaning of 'depository' see PARA 606 note 18.

8 As to the meaning of 'recognised scheme' see PARA 603.

9 Financial Services and Markets Act 2000 s 284(1)(b). As to the meaning of 'United Kingdom' see PARA 2 note 3.

10 As to the meaning of 'collective investment scheme' see PARA 603.

11 Financial Services and Markets Act 2000 s 284(1)(c). The regulations referred to in the text are regulations made under s 262: see PARA 621 et seq.

12 Ie under the Financial Services and Markets Act 2000 s 284(1): see the text to notes 1-11.

13 Ie any such scheme as is mentioned in the Financial Services and Markets Act 2000 s 284(1): see the text to notes 1-11.

14 Ie a body incorporated by virtue of regulations under the Financial Services and Markets Act 2000 s 262: see PARA 621 et seq.

15 As to the meaning of 'director' see PARA 86 note 11.

16 Financial Services and Markets Act 2000 s 284(2). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). At the date at which this volume states the law no such regulations had been made. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

17 As to the meaning of 'document' see PARA 10 note 10.

18 Financial Services and Markets Act 2000 s 284(3). No person may be required under s 284 to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless: (1) the person to whom the obligation of confidence is owed consents to the disclosure or production, or the imposing on the person concerned of a requirement with respect to information or such a document has been specifically authorised by the investigating authority; or (2) the person owing the obligation of confidence or the person to whom it is owed is: (a) the manager, trustee, operator or depository of any collective investment scheme which is under investigation; (b) the director of an open-ended investment company which is under investigation; (c) any other person whose own affairs are under investigation: s 284(8)-(10).

AREAS/(iii) Recognised Investment Exchanges and Clearing Houses/A. EXEMPTION/684. Exemption from the general prohibition.

### **(iii) Recognised Investment Exchanges and Clearing Houses**

#### **A. EXEMPTION**

##### **684. Exemption from the general prohibition.**

A recognised investment exchange<sup>1</sup> is exempt from the general prohibition<sup>2</sup> as respects any regulated activity<sup>3</sup> which is carried on as part of the exchange's business as an investment exchange<sup>4</sup> or which is carried on for the purposes of, or in connection with, the provision of clearing services by the exchange<sup>5</sup>.

A recognised clearing house<sup>6</sup> is exempt from the general prohibition as respects any regulated activity which is carried on for the purposes of, or in connection with, the provision of clearing services by the clearing house<sup>7</sup>.

1 For the purposes of the Financial Services and Markets Act 2000, 'recognised investment exchange' means an investment exchange in relation to which a recognition order is in force: ss 285(1)(a), 417(1). For the purposes of Pt XVIII (ss 285-313), 'recognition order' means an order made under s 290 (see PARA 709) or s 292 (see PARA 710): s 313(1).

2 As to the general prohibition see PARA 80.

3 As to regulated activities see PARA 84 et seq.

4 Financial Services and Markets Act 2000 s 285(2)(a).

5 Financial Services and Markets Act 2000 s 285(2)(b).

6 For the purposes of the Financial Services and Markets Act 2000, 'recognised clearing house' means a clearing house in relation to which a recognition order is in force: ss 285(1)(b), 417(1).

7 Financial Services and Markets Act 2000 s 285(3).

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#### **B. RECOGNITION**

##### **(A) IN GENERAL**

##### **685. Qualification for recognition.**

The Treasury<sup>1</sup> may make regulations<sup>2</sup> setting out the requirements: (1) which must be satisfied by an investment exchange or clearing house if it is to qualify as a body in respect of which the Financial Services Authority<sup>3</sup> may make a recognition order<sup>4</sup> under Part XVIII of the Financial Services and Markets Act 2000<sup>5</sup>; and (2) which, if a recognition order is made, it must continue to satisfy if it is to remain a recognised body<sup>6</sup>.

However, if regulations contain provision as to the default rules<sup>7</sup> of an investment exchange or clearing house, or as to proceedings taken under such rules by such a body, they require the approval of the Secretary of State<sup>8</sup>.

In the case of an investment exchange, the above requirements<sup>9</sup> are in addition to requirements which must be satisfied by the exchange<sup>10</sup> before the Authority may make a recognition order declaring the exchange to be a recognised investment exchange<sup>11</sup>.

Requirements resulting from the provisions described above<sup>12</sup> are referred to in Part XVIII of the Financial Services and Markets Act 2000 as 'recognition requirements'<sup>13</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 In exercise of this power the Treasury has made the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995: see also PARA 686 et seq. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

Nothing in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, is to be construed as requiring a recognised investment exchange to limit dealings on the exchange to dealings in investments, or as requiring a recognised investment exchange or recognised clearing house to limit the provision of its clearing services to clearing services in respect of transactions in investments: reg 7. As to the meaning of 'recognised investment exchange' see PARA 684 note 1. As to references to dealings on an exchange see PARA 687 note 11. As to the meaning of 'investments' see PARA 688 note 6. As to the meaning of 'recognised clearing house' see PARA 684 note 6. See note 5.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

4 As to the meaning of 'recognition order' see PARA 684 note 1.

5 Financial Services and Markets Act 2000 s 286(1)(a). The reference in the text is a reference to Pt XVIII (ss 285-313).

If regulations under the Financial Services and Markets Act 2000 s 286(1) require an investment exchange to make information available to the public in accordance with (1) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 29.1 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1); or (2) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 44.1 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1), the regulations may authorise the Authority to waive the requirement in the circumstances specified in the relevant provisions: Financial Services and Markets Act 2000 s 286(4A), (4E) (s 286(4A)-(4E) added by SI 2006/2975). For these purposes, the 'relevant provisions' are in a case falling within head (1) above, the Markets in Financial Instruments Directive art 29.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1); and in a case falling within head (2) above, the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 44.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1): Financial Services and Markets Act 2000 s 286(4B) (as so added).

If regulations under s 286(1) require an investment exchange to make information available to the public in accordance with (a) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 30.1 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1); or (b) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 45.1 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1), the regulations may authorise the Authority to defer the requirement in the circumstances specified, and subject to the requirements contained, in the relevant provisions: Financial Services and Markets Act 2000 s 286(4A), (4E) (as so added). For these purposes the 'relevant provisions' are in a case falling within head (a) above, the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 30.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1); and in a case falling within head (b) above, the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 45.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1): Financial Services and Markets Act 2000 s 286(4E) (as so added).

6 Financial Services and Markets Act 2000 s 286(1)(b). See note 5. For the purposes of Pt XVIII, 'recognised body' means a recognised investment exchange or a recognised clearing house: s 313(1).

7 'Default rules' means rules of an investment exchange or clearing house which provide for the taking of action in the event of a person's appearing to be unable, or likely to become unable, to meet his obligations in respect of one or more market contracts connected with the exchange or clearing house: Financial Services and Markets Act 2000 s 286(3).

References in Pt XVIII to rules of an investment exchange (or a clearing house) are to rules made, or conditions imposed, by the investment exchange (or the clearing house) with respect to: (1) recognition requirements (see the text to notes 12-13); (2) admission of persons to, or their exclusion from the use of, its facilities; or (3) matters relating to its constitution: s 313(2). 'Market contract' means: (a) a contract to which the Companies Act 1989 Pt VII (ss 154-191) (see PARA 509 et seq) applies as a result of s 155 or a contract to which the Companies (No 2) (Northern Ireland) Order 1990, SI 1990/1504 (NI 10) Pt V (arts 90-126) applies as a result of art 80; and (b) such other kind of contract as may be prescribed: Financial Services and Markets Act 2000 s 286(4).

8 Financial Services and Markets Act 2000 s 286(2). As to the Secretary of State see PARA 3.

9 Ie the requirements resulting from the Financial Services and Markets Act 2000 s 286.

10 Ie as a result of the Financial Services and Markets Act 2000 s 290(1A): see PARA 709.

11 Financial Services and Markets Act 2000 s 286(6) (added by SI 2007/126).

12 Ie Financial Services and Markets Act 2000 s 286.

13 Financial Services and Markets Act 2000 s 286(5). See PARA 686 et seq.

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## (B) RECOGNITION REQUIREMENTS

### *(a) Requirements for Investment Exchanges*

#### **686. Application for or by an investment exchange.**

There are specific recognition requirements<sup>1</sup> for investment exchanges for or by whom applications have been made for recognition orders<sup>2</sup>.

<sup>1</sup> As to recognition requirements generally see PARA 685.

<sup>2</sup> Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 4. The provisions of the Schedule Pt I (see PARAS 687-690) and Pt II (see PARAS 693-695) set out the requirements applying to bodies in respect of which a recognition order has been made under the Financial Services and Markets Act 2000 s 290(1)(a) (see PARA 709) or which have applied for such an order under s 287 (see PARA 706). As to the meaning of 'recognition order' see PARA 684 note 1.

As to the method of satisfying recognition requirements see PARA 705.



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### **687. Financial resources, suitability, systems and controls.**

In order to qualify for recognition, an exchange must have financial resources sufficient for the proper performance of its functions as a recognised investment exchange<sup>1</sup>. In considering whether this requirement is satisfied, the Financial Services Authority<sup>2</sup> must<sup>3</sup> take into account all the circumstances, including the exchange's connection with any person, and any activity carried on by the exchange, whether or not it is an exempt activity<sup>4</sup>.

The exchange must be a fit and proper person to perform the functions of a recognised investment exchange<sup>5</sup>. In considering whether this requirement is satisfied, the Authority may<sup>6</sup> take into account all the circumstances, including the exchange's connection with any person<sup>7</sup>.

The exchange must ensure that the systems and controls used in the performance of its functions are adequate, and appropriate for the scale and nature of its business<sup>8</sup>. This applies in particular to systems and controls concerning:

- 1707 (1) the transmission of information<sup>9</sup>;
- 1708 (2) the assessment, mitigation and management of risks to the performance of the exchange's functions<sup>10</sup>;
- 1709 (3) the effecting and monitoring of transactions on the exchange<sup>11</sup>;
- 1710 (4) the technical operation of the exchange, including contingency arrangements for disruption to its facilities<sup>12</sup>;
- 1711 (5) the operation of arrangements for the timely discharge of the rights and liabilities of the parties to the transactions effected on the exchange<sup>13</sup>; and
- 1712 (6) (where relevant) the safeguarding and administration of assets belonging to users of the exchange's facilities<sup>14</sup>.

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 1(1). References in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, to the performance of the functions of a recognised body are references to the carrying on by it of exempt activities together with the performance of its regulatory functions: reg 3(3). As to the meaning of 'recognised body' see PARA 685 note 6.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

3 Ie without prejudice to the generality of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 6(1) (see PARA 705) in regard to the method of satisfying recognition requirements.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 1(2) (amended by SI 2006/3386). 'Exempt activities', in relation to a recognised body, means the regulated activities in respect of which the body is exempt as a result of the Financial Services and Markets Act 2000 s 285(2) or (3) (see PARA 684): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 2(1).

6 See note 3.

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 2(2). The persons who effectively direct the business and operations of the exchange must be of sufficiently good repute and sufficiently experienced to ensure the sound and prudent management and operation of the financial markets operated by it: Schedule para 2(3) (Schedule para 2(3), (4) added by SI 2006/338). The persons who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly, must be suitable: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 2(4) (as so added).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(1).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(a).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(b).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(c). References in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, to dealings on an exchange, or transactions effected on an exchange, are references to dealings or transactions which are effected by means of the exchange's facilities or which are governed by the rules of the exchange; and references to the use of the facilities of an exchange include use which consists of any such dealings or entering into any such transactions: reg 3(2).

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(ca) (added by SI 2006/3386).

13 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(d). The arrangements referred to in the text are those mentioned in Schedule para 4(2)(d): see PARA 688.

14 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 3(2)(e).

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## **688. Safeguards for investors.**

In order to qualify for recognition, an exchange must ensure that business conducted by means of its facilities<sup>1</sup> is conducted in an orderly manner and so as to afford proper protection to investors<sup>2</sup>. Without prejudice to the generality of this, the exchange must ensure that:

1713 (1) access to the exchange's facilities is subject to criteria designed to protect the orderly functioning of the market and the interests of investors<sup>3</sup>;

1714 (2) it has transparent and non-discretionary rules and procedures (a) to provide for fair and orderly trading; and (b) to establish objective criteria for the efficient execution of orders<sup>4</sup>;

- 1715 (3) appropriate arrangements are made for relevant information<sup>5</sup> to be made available (whether by the exchange or, where appropriate, by issuers of the investments) to persons engaged in dealing in investments on the exchange<sup>6</sup>;
- 1716 (4) satisfactory arrangements<sup>7</sup> are made for securing the timely discharge (whether by performance, compromise or otherwise) of the rights and liabilities of the parties to transactions effected on the exchange (being rights and liabilities in relation to those transactions)<sup>8</sup>;
- 1717 (5) satisfactory arrangements are made for recording transactions effected on the exchange, and transactions (whether or not effected on the exchange) which are cleared or to be cleared by means of its facilities<sup>9</sup>;
- 1718 (6) appropriate arrangements are made to (a) identify conflicts between the interests of the exchange, its owners and operators and the interests of the persons who make use of its facilities or the interests of the financial markets operated by it; and (b) manage such conflicts so as to avoid adverse consequences for the operation of the financial markets operated by the exchange and for the persons who make use of its facilities<sup>10</sup>;
- 1719 (7) appropriate measures (including the monitoring of transactions effected on the exchange) are adopted to reduce the extent to which the exchange's facilities can be used for a purpose connected with market abuse<sup>11</sup> or financial crime<sup>12</sup>, and to facilitate their detection and monitor their incidence<sup>13</sup>; and
- 1720 (8) where the exchange's facilities include making provision for the safeguarding and administration of assets belonging to users of those facilities, satisfactory arrangements are made for that purpose<sup>14</sup>.

The exchange must make arrangements for (i) current bid and offer prices for shares<sup>15</sup>; and (ii) the depth of trading interest in shares at the prices which are advertised through its systems, to be made available to the public on reasonable commercial terms and on a continuous basis during normal trading hours, subject to certain requirements<sup>16</sup>.

The exchange must make arrangements for the price, volume and time of transactions executed in shares<sup>17</sup> to be made available to the public as soon as possible after the time of the transaction on reasonable commercial terms, subject to certain requirements<sup>18</sup>.

1 For the purposes of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, 'facilities', in relation to a recognised body, means the facilities and services it provides in the course of carrying on exempt activities; and references to the use of the facilities of an exchange are to be construed in accordance with reg 3(2) (see PARA 687): reg 3(1).

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(1).

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(a) (amended by SI 2006/3386). Such access must be in accordance with the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7B: see PARA 690.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(aa) (added by SI 2006/3386).

5 For the purposes of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(c), 'relevant information' means information which is relevant in determining the current value of the investments: Schedule para 4(3).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(c). For the purposes of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, 'investments' means investments of a kind specified for the purposes of the Financial Services and Markets Act 2000 s 22 (see PARA 85): Financial Services and Markets Act 2000

(Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1).

7     le which comply with the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7D: see PARA 690.

8     Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(d) (amended by SI 2006/3386).

9     Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(e).

10    Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(ea) (added by SI 2006/3386).

11    As to market abuse see PARA 437 et seq.

12    For the purposes of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, 'financial crime' is to be construed in accordance with the Financial Services and Markets Act 2000 s 6(3), (4) (see PARA 8): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1).

13    Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(f) (amended by SI 2006/3386).

14    Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4(2)(g).

15    For these purposes, 'shares' means shares admitted to trading on a regulated market: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4A(4) (Schedule para 4A added by SI 2006/3386). 'Regulated market' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.18: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386).

16    Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4A(1) (as added: see note 15). The requirements referred to are those contained in EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV.

If an exchange decides to give investment firms and credit institutions required to publish their quotes in shares (1) in accordance with the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 27, or (2) by the Financial Services Authority, access to the arrangements referred to in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4A(1), it must do so on reasonable commercial terms and on a non-discriminatory basis: Schedule para 4A(2) (as so added). As to the meaning of 'investment firm' see PARA 21 note 5. 'Credit institution' means (a) a credit institution authorised under the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions); or (b) an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its registered office (or if it does not have a registered office, its head office) in an EEA state: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386). As to the meaning of EEA state see PARA 315 note 1. As to the Financial Services Authority see PARAS 4, 6 et seq.

The Authority may waive the requirements of Schedule para 4A(1) in the circumstances specified: (i) in the case of shares to be traded on a multilateral trading facility operated by the exchange, in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 29.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV; or (ii) in the case of shares to be traded on a regulated market operated by the exchange, in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 44.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4A(3) (as so added). 'Multilateral trading facility' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.15: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386).

17 For these purposes, 'shares' means shares admitted to trading on a regulated market: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4B(5) (Schedule para 4B added by SI 2006/3386).

18 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4B(1) (as added: see note 17). The requirements referred to are those contained in EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV.

If an exchange decides to give investment firms and credit institutions required to make public details of their transactions in shares (1) in accordance with the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 28; or (2) by the Authority, access to the arrangements referred to in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4B(1), it must do so on reasonable commercial terms and on a non-discriminatory basis: Schedule para 4B(2) (as so added).

The Authority may permit exchanges to defer the publication required by Schedule para 4B(1) in the circumstances specified, and subject to the requirements contained: (a) in the case of shares traded on a multilateral trading facility operated by an exchange, in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 30.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV; or (b) in the case of shares traded on a regulated market operated by an exchange, in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 45.2 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch IV: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 4B(3) (as so added).

If the Authority permits exchanges to defer the publication required by Schedule para 4B(1), those exchanges must ensure that the existence of and the terms of the permission are disclosed to users and members of their facilities and to investors: Schedule para 4B(4) (as so added).

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## **689. Promotion and maintenance of standards.**

In order to qualify for recognition, an exchange must be able and willing to promote and maintain high standards of integrity and fair dealing in the carrying on of regulated activities<sup>1</sup> by persons in the course of using the facilities<sup>2</sup> provided by the exchange<sup>3</sup>.

The exchange must be able and willing to co-operate, by the sharing of information or otherwise, with the Financial Services Authority<sup>4</sup>, with any other authority, body or person having responsibility in the United Kingdom<sup>5</sup> for the supervision or regulation of any regulated activity or other financial service, or with an overseas regulator<sup>6</sup>.

1 As to regulated activities see PARA 84 et seq.

2 As to the meaning of 'facilities' see PARA 688 note 1.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 6(1).

4 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

5 As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 6(2). The reference in the text to an overseas regulator is a reference to an overseas regulator within the meaning of the Financial Services and Markets Act 2000 s 195: see PARA 457.

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## **690. Rules.**

In order to qualify for recognition, an exchange must ensure that appropriate procedures are adopted for it to make rules, for keeping its rules under review and for amending them<sup>1</sup>. The procedures must include procedures for consulting users of the exchange's facilities in appropriate cases<sup>2</sup>. The exchange must consult users of its facilities on any arrangements it proposes to make for dealing with penalty income<sup>3</sup> (or on any changes which it proposes to make to those arrangements)<sup>4</sup>.

The exchange must make clear and transparent rules concerning the admission of financial instruments<sup>5</sup> to trading on any financial market operated by it<sup>6</sup>.

The exchange must make transparent and non-discriminatory rules, based on objective criteria, governing access to, or membership of, its facilities<sup>7</sup>.

Where an exchange provides central counterparty, clearing or settlement facilities<sup>8</sup>, it must make transparent and non-discriminatory rules, based on objective criteria, governing access to those facilities<sup>9</sup>. The exchange may refuse access to those facilities on legitimate commercial grounds<sup>10</sup>.

The rules of the exchange must permit a user or member of a regulated market operated by it to use whatever settlement facility he chooses for a transaction<sup>11</sup>.

The rules of the exchange must provide that the exchange must not exercise its power to suspend or remove from trading on a regulated market operated by it any financial instrument which no longer complies with its rules, where such step would be likely to cause significant damage to the interests of investors or the orderly functioning of the financial markets<sup>12</sup>.

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7(1).

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7(2).

3 In accordance with the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(3): see PARA 691.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7(3).

5 'Financial instrument' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.17: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(1) (Schedule para 7A added by SI 2006/3386). The Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A is without prejudice to the generality of Schedule para 4 (see PARA 688): Schedule para 7A(11) (as so added).

The rules must ensure that all financial instruments admitted to trading on a regulated market operated by the exchange are capable of being traded in a fair, orderly and efficient manner (in accordance with EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch V, where applicable): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(2) (as so added). As to the meaning of 'regulated market' see PARA 688 note 15.

The rules must ensure that (1) all transferable securities admitted to trading on a regulated market operated by the exchange are freely negotiable (in accordance with EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) Ch V, where applicable); and (2) all contracts for derivatives admitted to trading on a regulated market operated by the exchange are designed so as to allow for their orderly pricing as well as for the existence of effective settlement conditions: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(3) (as so added). 'Transferable securities' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.18: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386). 'Derivatives' has the same meaning as in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(10) (as so added).

The exchange must maintain arrangements to provide sufficient publicly available information (or satisfy itself that sufficient information is publicly available) to enable the users of a multilateral trading facility operated by it to form investment judgments, taking into account both the nature of the users and the types of instrument traded: Schedule para 7A(4) (as so added). As to the meaning of 'multilateral trading facility' see PARA 688 note 16.

The exchange must maintain effective arrangements to verify that issuers of transferable securities admitted to trading on a regulated market operated by it comply with the disclosure obligations: Schedule para 7A(5) (as so added). 'Issuer' has the same meaning as in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(10) (as so added). The 'disclosure obligations' are the initial, ongoing and ad hoc disclosure requirements contained in the relevant articles and given effect (a) in the UK by the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (see PARA 385 et seq) and Part VI rules (within the meaning of s 73A: see PARA 385); or (b) in another EEA state by legislation transposing the relevant articles in that state: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(10) (as so added). 'Relevant articles' means (i) European Parliament and EC Council Directive 2003/6 (OJ L96, 12.4.2003, p 16) on insider dealing and market manipulation arts 6.1-6.4; (ii) European Parliament and EC Council Directive 2003/71 (OJ L345, 31.12.2003, p 64) on the prospectuses to be published when securities are offered to the public or admitted to trading arts 3, 5, 7, 8, 10, 14, 16; (iii) European Parliament and EC Council Directive 2004/109 (OJ L390, 31.12.2004, p 38) relating to the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market arts 4-6, 14, 16-19, 30; and (iv) Community legislation made under the provisions mentioned in heads (i)-(iii) above: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7A(10) (as so added). As to the meaning of 'EEA state' see PARA 315 note 1.

The exchange must maintain arrangements to assist users of a regulated market operated by it to obtain access to information made public under the disclosure obligations: Schedule para 7A(6) (as so added). The exchange must maintain arrangements regularly to review whether the financial instruments admitted to trading on a regulated market operated by it comply with the admission requirements for those instruments: Schedule para 7A(7) (as so added).

The rules must provide that where an exchange, without obtaining the consent of the issuer, admits to trading on a regulated market operated by it a transferable security which has been admitted to trading on another regulated market, the exchange (A) must inform the issuer of that security as soon as is reasonably practicable: and (B) may not require the issuer of that security to demonstrate compliance with the disclosure obligations: Schedule para 7A(8) (as so added).

The rules must provide that where an exchange, without obtaining the consent of the issuer, admits to trading on a multilateral trading facility operated by it a transferable security which has been admitted to trading on a regulated market, it may not require the issuer of that security to demonstrate compliance with the disclosure obligations: Schedule para 7A(9) (as so added).

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7B(1) (Schedule para 7B added by SI 2006/3386). As to the meaning of 'facilities' see PARA 688 note 1. The Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7B is without prejudice to the generality of Schedule para 4 (see PARA 688): Schedule para 7B(6) (as so added).

In particular those rules must specify the obligations for users or members of its facilities arising from: (1) the constitution and administration of the exchange; (2) rules relating to transactions on the market; (3) its professional standards for staff of any investment firm or credit institution having access to or membership of a financial market operated by the exchange; (4) conditions established under head (c) below for access to or membership of a financial market operated by the exchange by persons other than investment firms or credit institutions; and (5) the rules and procedures for clearing and settlement of transactions concluded on a financial market operated by the exchange: Schedule para 7B(2) (as so added). As to the meaning of 'investment firm' see PARA 21 note 5. As to the meaning of 'credit institution' see PARA 688 note 16.

Rules of the exchange about access to, or membership of, a financial market operated by it must permit the exchange to give access to or admit to membership (as the case may be) only: (a) an investment firm; (b) a credit institution; or (c) a person who (i) is fit and proper; (ii) has a sufficient level of trading ability and competence; (iii) where applicable, has adequate organisational arrangements; and (iv) has sufficient resources for the role he is to perform, taking account of the exchange's arrangements under Schedule para 4(2)(d) (see PARA 688 head (4)): Schedule para 7B(3) (as so added).

Rules under Schedule para 7B must enable (A) an investment firm authorised under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 5; or (B) a credit institution authorised under the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions), by the competent authority of another EEA state (including a branch established in the United Kingdom of such a firm or institution) to have direct or remote access to, or membership of, any financial market operated by the exchange on the same terms as a UK firm: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7B(4) (as so added). 'Competent authority', in relation to an investment firm or credit institution, means the competent authority in relation to that firm or institution for the purposes of the Markets in Financial Instruments Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386). 'Branch' in relation to an investment firm has the meaning given in the Markets in Financial Instruments Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)) art 4.1.26 and in relation to a credit institution has the meaning given in the Banking Consolidation Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)) art 4.3: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definition added by SI 2006/3386).

The exchange must make arrangements regularly to provide the Financial Services Authority with a list of the users or members of its facilities: Schedule para 7B(5) (as so added).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7C(1) (Schedule para 7C added by SI 2006/3386). 'Central counterparty', 'clearing' and 'settlement' have the same meanings as in the Markets in Financial Instruments Directive (ie EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1)): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1) (definitions added by SI 2006/3386).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7C(2) (as added: see note 8). The rules under Schedule para 7C para 3(2) must enable an investment firm or a credit institution authorised by the competent authority of another EEA state (including a branch established in the United Kingdom of such a firm or institution) to have access to those facilities on the same terms as a UK firm for the purposes of finalising or arranging the finalisation of transactions in financial instruments: Schedule para 7C(3) (as so added). 'UK firm' means an investment firm or credit institution which has a Part IV permission (see PARA 348) to carry on one or more regulated activities: reg 3(1) (definition added by SI 2006/3386). As to regulated activities see PARA 84 et seq.

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7C(4) (as added: see note 8).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7D(1) (Schedule para 7D added by SI 2006/3386). The Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7D(1) only applies where (1) such links and arrangements exist between the chosen settlement facility and any other settlement facility as are necessary to



ensure the efficient and economic settlement of the transaction; and (2) the exchange is satisfied that the smooth and orderly functioning of the financial markets will be maintained: Schedule para 7D(2) (as so added).

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 7E (added by SI 2006/3386).

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### **691. Discipline and complaints.**

In order to qualify for recognition, the exchange must have (1) effective arrangements (which include the monitoring of transactions effected on the exchange) for monitoring and enforcing compliance with its rules, including rules in relation to the provision of clearing services in respect of transactions<sup>1</sup> other than transactions effected on the exchange;<sup>2</sup> (2) effective arrangements for monitoring and enforcing compliance with arrangements made by it in regard to the timely discharge of the rights and liabilities of the parties to transactions effected on the exchange<sup>3</sup>; and (3) effective arrangements for monitoring transactions effected on the exchange in order to identify disorderly trading conditions<sup>4</sup>.

The arrangements mentioned above<sup>5</sup> must include procedures for investigating complaints made to the exchange about the conduct of persons in the course of using the exchange's facilities<sup>6</sup> and the fair, independent and impartial resolution of appeals against decisions of the exchange<sup>7</sup>.

Where the arrangements mentioned above include provision for requiring the payment of financial penalties, they must include arrangements for ensuring that any amount so paid is applied only in one or more of the following ways:

- 1721 (a) towards meeting expenses incurred by the exchange in the course of the investigation of the breach in respect of which the penalty is paid, or in the course of any appeal against the decision of the exchange in relation to that breach<sup>8</sup>;
- 1722 (b) for the benefit of users of the exchange's facilities<sup>9</sup>;
- 1723 (c) for charitable purposes<sup>10</sup>.

The exchange must have effective arrangements for the investigation and resolution of complaints arising in connection with the performance of, or failure to perform, any of its regulatory functions<sup>11</sup>. The arrangements must include arrangements for a complaint to be fairly and impartially investigated by a person independent of the exchange, and for him to report on the result of his investigation to the exchange and to the complainant<sup>12</sup>.

The arrangements must also confer on the independent person mentioned above<sup>13</sup> the power to recommend, if he thinks it appropriate, that the exchange makes a compensatory payment to the complainant<sup>14</sup>, remedies the matter complained of<sup>15</sup> or takes both of those steps<sup>16</sup>.

1 As to references to dealings and transactions effected on the exchange see PARA 687 note 11.

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(1)(a) (Schedule para 8(1) substituted by SI 2006/3386). As to rules generally see PARA 690.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(1)(b) (as substituted: see note 2). The arrangements referred to in the text are those mentioned in Schedule para 4(2)(d): see PARA 688 head (4).

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(1)(c) (as substituted: see note 2).

5 The arrangements made pursuant to the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(1).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(2)(a). As to the meaning of 'facilities' see PARA 688 note 1.

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(2)(b).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(3)(a).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(3)(b).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 8(3)(c).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(1). As to the meaning of 'regulatory functions', in relation to a recognised body, see PARA 719 note 2; definition applied by reg 3(1). As to the meaning of 'recognised body' see PARA 685 note 6.

However, Schedule para 9(1) does not extend to complaints about the content of rules made by the exchange; or complaints about a decision against which the complainant has the right to appeal under procedures of the kind mentioned in Schedule para 8(2)(b) (see the text to note 7): Schedule para 9(2).

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(3). Schedule para 9(3) is not to be taken as preventing the exchange from making arrangements for the initial investigation of a complaint to be conducted by the exchange: Schedule para 9(5).

13 The person mentioned in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(3).

14 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(4)(a).

15 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(4)(b).

16 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9(4).

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## **692. Operation of a multilateral trading facility.**

An exchange operating a multilateral trading facility<sup>1</sup> must also operate a regulated market<sup>2</sup>.

An exchange operating a multilateral trading facility must comply with those requirements<sup>3</sup> which are applicable to a market operator<sup>4</sup> operating such a facility<sup>5</sup>.

1 As to the meaning of 'multilateral trading facility' see PARA 688 note 16.

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9A(1) (Schedule para 9A added by SI 2006/3386). As to the meaning of 'regulated market' see PARA 688 note 15.

The requirements of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9A do not apply for the purposes of the Financial Services and Markets Act 2000 s 292(3)(a) (requirements for overseas investment exchanges and overseas clearing houses) (see PARA 710): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9A(3) (as so added).

3 Ie those requirements of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) Title II Ch I, and European Commission Directive 2006/73 (OJ L241, 2.9.2006, p 26) implementing European Parliament and EC Council Directive 2004/39 as regards organisation requirements and operating conditions for investment firms and defined terms.

4 Ie within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 9A(2) (as added: see note 2). See note 2.

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### **693. Default rules in respect of market contracts.**

The exchange must have default rules<sup>1</sup> which, in the event of a member of the exchange being or appearing to be unable to meet his obligations in respect of one or more market contracts<sup>2</sup>, enable action to be taken in respect of unsettled market contracts to which he is a party<sup>3</sup>.

The rules may authorise the taking of the same or similar action in relation to a member who appears to be likely to become unable to meet his obligations in respect of one or more market contracts<sup>4</sup>. The rules must enable action to be taken in respect of all unsettled market contracts, other than those entered into for the purposes of or in connection with the provision of clearing services for the exchange<sup>5</sup>.

1 As to the meaning of 'default rules' see PARA 685 note 7. 'Defaulter' and 'default' are to be construed in accordance with the Companies Act 1989 s 188(2); and references to action taken under the default rules of an exchange or clearing house are to be construed in accordance with s 188(4) (see PARA 510): Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1).

2 'Market contract' has the meaning given in the Financial Services and Markets Act 2000 s 286(4) (see PARA 685 note 7) (with reference, in the case of a recognised investment exchange, to the Companies Act 1989 s 155(2) (see PARA 510) or the Companies (No 2) (Northern Ireland) Order 1990, SI 1990/1504 (NI 10) art 80(2) or, in the case of a recognised clearing house, to the Companies Act 1989 s 155(3) (see PARA 510) or the Companies (No 2) (Northern Ireland) Order 1990, SI 1990/1504 (NI 10) art 80(3)); and references to a party to a market contract are to be construed in accordance with the Companies Act 1989 s 187 (see PARA 509): Financial

Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 3(1).

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 10(1). Nothing in the Schedule Pt II (paras 10-15) is to be taken as requiring a recognised investment exchange which does not enter into such contracts as are mentioned in the Companies Act 1989 s 155(2)(b) (see PARA 510) to have default rules, or to make any arrangements, relating to such contracts: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 8.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 10(2).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 10(3) (amended by SI 2006/3386).

## UPDATE

### 693 Default rules in respect of market contracts

TEXT AND NOTES 3-5--Where the exchange has arrangements for transacting business with, or in relation to common members of, a recognised clearing house or another recognised investment exchange, a recognised investment exchange must have default rules which in the event of the clearing house or the investment exchange being or appearing to be unable to meet its obligations in respect of one or more market contracts, enable action to be taken in respect of unsettled market contracts to which that person is a party: SI 2001/995 Schedule para 10(4), (5) (added by SI 2009/853).

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#### 694. Content of default rules.

In relation to certain contracts entered into by a member or designated non-member of the exchange with a person other than the exchange<sup>1</sup>, the default rules<sup>2</sup> must provide:

- 1724 (1) for all rights and liabilities between those party as principal to unsettled market contracts<sup>3</sup> to which the defaulter<sup>4</sup> is party as principal to be discharged and for there to be paid by one party to the other such sum of money (if any) as may be determined in accordance with the rules<sup>5</sup>;
- 1725 (2) for the sums so payable in respect of different contracts between the same parties to be aggregated or set off so as to produce a net sum<sup>6</sup>; and
- 1726 (3) for the certification by or on behalf of the exchange of the net sum payable or, as the case may be, of the fact that no sum is payable<sup>7</sup>.

The rules may make the same or similar provision, in relation to non-members designated in accordance with the relevant procedures<sup>8</sup>, as in relation to members of the exchange<sup>9</sup>.

The procedures must be designed to secure that: (a) a person is not, or does not remain, designated if failure by him to meet his obligations in respect of one or more market contracts

would be unlikely adversely to affect the operation of the market<sup>10</sup>; and (b) a description of persons is not, or does not remain, designated if failure by a person of that description to meet his obligations in respect of one or more market contracts would be unlikely adversely to affect the operation of the market<sup>11</sup>.

The exchange must have adequate arrangements for bringing a designation or withdrawal of designation to the attention of the person or description of persons concerned<sup>12</sup> and where a description of persons is designated, or the designation of a description of persons is withdrawn, for ascertaining which persons fall within that description<sup>13</sup>.

In relation to contracts entered into by the exchange with its members for the purpose of enabling the rights and liabilities of that member under transactions in investments to be settled<sup>14</sup>, the default rules<sup>15</sup> must provide:

- 1727 (i) for all rights and liabilities of the defaulter under or in respect of unsettled market contracts<sup>16</sup> to be discharged and for there to be paid by or to the defaulter such sum of money (if any) as may be determined in accordance with the rules<sup>17</sup>;
- 1728 (ii) for the sums so payable by or to the defaulter in respect of different contracts to be aggregated or set off so as to produce a net sum<sup>18</sup>;
- 1729 (iii) for that sum, if payable by the defaulter to the exchange, to be set off against any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property) so as to produce a further net sum; and if payable by the exchange to the defaulter, to be aggregated with any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property)<sup>19</sup>; and
- 1730 (iv) for the certification by or on behalf of the exchange of the sum finally payable or, as the case may be, of the fact that no sum is payable<sup>20</sup>.

Where the exchange provides clearing services, the rules of the exchange must provide that in the event of a default, margin provided by the defaulter for his own account is not to be applied to meet a shortfall on a client account<sup>21</sup>.

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(1). The contracts referred to are those falling within the Companies Act 1989 s 155(2)(a): see PARA 510.

2 I.e. the rules mentioned in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 10: see PARA 693. As to the meaning of 'default rules' see PARA 685 note 7. As to the meanings of 'defaulter' and 'default' see PARA 693 note 1.

3 As to the meaning of 'market contract' see PARA 693 note 2. The reference in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(2) to rights and liabilities between those party as principal to unsettled market contracts does not include rights and liabilities in respect of margin (Schedule para 11(3)(a)) or arising out of a failure to perform a market contract (Schedule para 11(3)(b)).

4 See note 2.

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(2)(a).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(2)(b).

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(2)(c).

8 le those procedures mentioned in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(5), which provides that, if such provision is made, the exchange must have adequate procedures:

- 628 (1) for designating the persons, or descriptions of person, in respect of whom action may be taken (Schedule para 11(5)(a));
- 629 (2) for keeping under review the question which persons or descriptions of person should be or remain so designated (Schedule para 11(5)(b)); and
- 630 (3) for withdrawing such designation (Schedule para 11(5)(c)).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(4).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(6)(a).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(6)(b).

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(7)(a).

13 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 11(7)(b).

14 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(1). The contracts referred to in the text are those falling within the Companies Act 1989 s 155(2)(b): see PARA 510.

15 See note 2.

16 The reference in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(2) to the rights and liabilities of a defaulter under or in respect of an unsettled market contract includes (without prejudice to the generality of that provision) rights and liabilities arising in consequence of action taken under provisions of the rules authorising:

- 631 (1) the effecting by the exchange of corresponding contracts in relation to unsettled market contracts to which the defaulter is party (Schedule para 12(3)(a));
- 632 (2) the transfer of the defaulter's position under an unsettled market contract to another member of the exchange (Schedule para 12(3)(b));
- 633 (3) the exercise by the exchange of any option granted by an unsettled market contract (Schedule para 12(3)(c)).

'Corresponding contract' means a contract on the same terms (except as to price or premium) as the market contract but under which the person who is the buyer under the market contract agrees to sell and the person who is the seller under the market contract agrees to buy: Schedule para 12(4). The provisions of Schedule para 12(4) apply with any necessary modifications in relation to a market contract which is not an agreement to sell: Schedule para 12(5). The reference in Schedule para 12(2) to the rights and liabilities of a defaulter under or in respect of an unsettled market contract does not include, where he acts as agent, rights or liabilities of his arising out of the relationship of principal and agent: Schedule para 12(6).

17 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(2)(a).

18 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(2)(b).

19 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(2)(c).

20 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 12(2)(d).

21 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 15(1). Schedule para 15(1) is without prejudice to the requirements of any rules relating to clients' money made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 138 (see PARA 21) and s 139 (see PARA 25); Schedule para 15(2). As to the Financial Services Authority see PARAS 4, 6 et seq.

## UPDATE

### 694 Content of default rules

NOTE 14--The contracts referred to in the text are now those falling within the Companies Act 1989 s 155(2)(b) or (c): SI 2001/995 Schedule para 12(1) (amended by SI 2009/853).

TEXT AND NOTES 18, 19--After the words 'different contracts' add 'entered into by the defaulter in one capacity for the purposes of the Companies Act 1989 s 187': SI 2001/995 Schedule para 12(2)(b) (amended by SI 2009/853). Add head (iia) if relevant, for that sum to be aggregated with, or set off against, any sum owed by or to the investment exchange by or to AP under an indemnity given or reimbursement or similar obligation in respect of a margin set off agreement in which the defaulter chose to participate so as to produce a net sum: SI 2001/995 Schedule para 12(2)(bb) (added by SI 2009/853). Substitute head (iii) for the net sum referred to in head (ii) or, if relevant, the net sum referred to in head (iia) above (1) if payable by the defaulter to the exchange, to be set off against (a) any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property); (b) to the extent (if any) that any sum remains after set off under head (a), any default fund contribution provided by the defaulter remaining after any application of such contribution; (2) to the extent (if any) that any sum remains after set off under head (1), to be paid from such other funds, including the default fund, or resources as the exchange may apply under its default rules; (3) if payable by the exchange to the defaulter, to be aggregated with (a) any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property); (b) any default fund contribution provided by the defaulter remaining after any application of such contribution: SI 2001/995 Schedule para 12(2)(c) (substituted by SI 2009/853).

'Margin set off agreement' means an agreement between the exchange and AP permitting any eligible position to which the participant member is party with the exchange and any eligible position to which the participant member is party with AP to be taken into account in calculating a net sum owed by or to the participant member to either the exchange or AP and/or margin to be provided to, either or both, the exchange and AP: SI 2001/995 Schedule para 12(2A) (paras 12(2A)-(2C), 12A added by SI 2009/853). 'AP' means a recognised clearing house or another recognised investment exchange of whom a participant member is a member; 'eligible position' means any position which may be included in the set off calculation; 'participant member' means a person who (1) is a member of the exchange; (2) is a member or participant of AP; and (3) chooses to participate, in accordance with the rules of the exchange, in such agreement: para 12(2B). The property, contribution, funds or resources referred to in head (iii) above, against which the net sum is to be set off (or with which it is to be aggregated) are subject to any unsatisfied claims arising out of the default of a defaulter before the default in relation to which the calculation is being made: para 12(2C). The rules of the exchange must provide that, in the event of a default, any default fund contribution provided by the defaulter must only be used in accordance with head (iii)(1) or (2): para 12A. 'Default fund' means the sum of the default fund contributions by the members or designated non-members of a recognised investment exchange to that exchange or by one recognised investment exchange to another or by the members of a recognised clearing house to that

clearing house or by one recognised clearing house to another to the extent those contributions have not been returned or otherwise applied: SI 2001/995 reg 3(1) (definition added by SI 2009/853). As to the meaning of 'default fund contribution' see Companies Act 1989 s 188(3A) (PARA 518).

TEXT AND NOTE 21--After the words 'shortfall on a client account' add 'other than a client account of the defaulter': SI 2001/995 Schedule para 15(1) (amended by SI 2009/853). 'Client account of the defaulter' means an account held by the exchange in the name of the defaulter in which relevant transactions (as to the meaning of which see Financial Markets and Insolvency Regulations 1991, SI 1991/880, reg 16(1)) effected by the defaulter have been recorded: SI 2001/995 Schedule para 15(3), (4) (added by SI 2009/853).

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#### **695. Default rules: notification and co-operation.**

The exchange must have adequate arrangements for ensuring that: (1) in the case of unsettled market contracts<sup>1</sup> with a defaulter<sup>2</sup> acting as principal, parties to the contract are notified as soon as reasonably practicable of the default and of any decision taken under the rules in relation to contracts to which they are a party<sup>3</sup>; and (2) in the case of unsettled market contracts with a defaulter acting as agent, parties to the contract and the defaulter's principals are notified as soon as reasonably practicable of the default and of the identity of the other parties to the contract<sup>4</sup>.

The exchange must be able and willing to co-operate, by the sharing of information and otherwise, with the Secretary of State<sup>5</sup>, any relevant office-holder<sup>6</sup>, and any other authority or body having responsibility for any matter arising out of, or connected with, the default of a member of the exchange or any designated non-member<sup>7</sup>.

1 As to the meaning of 'market contract' see PARA 693 note 2.

2 As to the meanings of 'defaulter' and 'default' see PARA 693 note 1.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 13(a).

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 13(b).

5 As to the Secretary of State see PARA 3.

6 I.e. within the meaning of the Companies Act 1989 s 189: see PARA 513 note 7.

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 14. As to the procedures for designation see Schedule para 11(5); and PARA 694 note 8.



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*(b) Requirements for Clearing Houses*

**UPDATE**

**695 Default rules: notification and co-operation**

TEXT AND NOTE 7--After the words 'any designated non-member' add 'or the default of a recognised clearing house or another recognised investment exchange': SI 2001/995 Schedule para 14 (amended by SI 2009/853).

**696. Application for or by a clearing house.**

In the same way as there are specific recognition requirements<sup>1</sup> for investment exchanges<sup>2</sup>, there are also specific recognition requirements for clearing houses for or by whom applications have been made for recognition orders<sup>3</sup>.

1 As to recognition requirements generally see PARA 685.

2 See PARA 686.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 5. The provisions of the Schedule Pt III (see PARAS 697-700) and Pt IV (see PARAS 702-704) set out the requirements applying to bodies in respect of which a recognition order has been made under the Financial Services and Markets Act 2000 s 290(1)(b) (see PARA 709) or which have applied for such an order under s 288 (see PARA 707). As to the meaning of 'recognition order' see PARA 684 note 1.

As to the method of satisfying recognition requirements see PARA 705.

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**697. Financial resources, suitability, systems and controls.**

In order to qualify for recognition, a clearing house must have financial resources sufficient for the proper performance of its functions as a recognised clearing house<sup>1</sup>. In considering whether this requirement is satisfied, the Financial Services Authority<sup>2</sup> may<sup>3</sup> take into account all the circumstances, including the clearing house's connection with any person, and any activity carried on by the clearing house, whether or not it is an exempt activity<sup>4</sup>.

The clearing house must be a fit and proper person to perform the functions of a recognised clearing house<sup>5</sup>. In considering whether this requirement is satisfied, the Authority may<sup>6</sup> take into account all the circumstances, including the clearing house's connection with any person<sup>7</sup>.

The clearing house must ensure that the systems and controls used in the performance of its functions are adequate, and appropriate for the scale and nature of its business<sup>8</sup>. This requirement applies in particular to systems and controls concerning:

- 1731 (1) the transmission of information<sup>9</sup>;
- 1732 (2) the assessment and management of risks to the performance of the clearing house's functions<sup>10</sup>;
- 1733 (3) the operation of its clearing services involving satisfactory arrangements for securing the timely discharge of the rights and liabilities of the parties to transactions in respect of which it provides such services<sup>11</sup>; and
- 1734 (4) (where relevant) the safeguarding and administration of assets belonging to users of the clearing house's facilities<sup>12</sup>.

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 16(1). As to references to the performance of the functions of a recognised body see PARA 687 note 1.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

3 Ie without prejudice to the generality of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 6(1): see PARA 705.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 16(2). As to the meaning of 'exempt activities' see PARA 687 note 4.

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 17(1). As to the meaning of 'recognised clearing house' see PARA 684 note 6.

6 See note 3.

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 17(2).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 18(1).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 18(2)(a).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 18(2)(b).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 18(2)(c). The matters referred to in the text are those mentioned in the Schedule para 19(2)(b): see PARA 698 head (2). As to the meaning of 'facilities' see PARA 688 note 1.

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 18(2)(d).

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## **698. Safeguards for investors.**

In order to qualify for recognition, a clearing house must ensure that its facilities<sup>1</sup> are such as to afford proper protection to investors<sup>2</sup>. Without prejudice to the generality of this, the clearing house must ensure that:

- 1735 (1) access to the clearing house's facilities is subject to criteria designed to protect the orderly functioning of those facilities and the interests of investors<sup>3</sup>;
- 1736 (2) its clearing services involve satisfactory arrangements for securing the timely discharge (whether by performance, compromise or otherwise) of the rights and liabilities of the parties to transactions in respect of which it provides such services (being rights and liabilities in relation to those transactions)<sup>4</sup>;
- 1737 (3) satisfactory arrangements are made for recording transactions which are cleared or to be cleared by means of its facilities<sup>5</sup>;
- 1738 (4) appropriate measures are adopted to reduce the extent to which the clearing house's facilities can be used for a purpose connected with market abuse<sup>6</sup> or financial crime<sup>7</sup>, and to facilitate their detection and monitor their incidence<sup>8</sup>; and
- 1739 (5) where the clearing house's facilities include making provision for the safeguarding and administration of assets belonging to users of those facilities, satisfactory arrangements are made for that purpose<sup>9</sup>.

1 As to the meaning of 'facilities' see PARA 688 note 1.

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(1).

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(2)(a).

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(2)(b).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(2)(c).

6 As to market abuse see PARA 437 et seq.

7 As to the meaning of 'financial crime' see PARA 688 note 12.

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(2)(d).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 19(2)(e).

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Recognition Requirements/(b) Requirements for Clearing Houses/699. Promotion and maintenance of standards.

### **699. Promotion and maintenance of standards.**

In order to qualify for recognition, a clearing house must be able and willing to promote and maintain high standards of integrity and fair dealing in the carrying on of regulated activities by persons in the course of using the facilities<sup>1</sup> provided by the clearing house<sup>2</sup>.

The clearing house must be able and willing to co-operate, by the sharing of information or otherwise, with the Financial Services Authority<sup>3</sup>, with any other authority, body or person having responsibility in the United Kingdom<sup>4</sup> for the supervision or regulation of any regulated activity or other financial service, or with an overseas regulator<sup>5</sup>.

1 As to the meaning of 'facilities' see PARA 688 note 1.

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 20(1).

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

4 As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 20(2). The reference in the text to an overseas regulator is a reference to an overseas regulator within the meaning of the Financial Services and Markets Act 2000 s 195: see PARA 457.

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### **700. Rules.**

In order to qualify for recognition, a clearing house must ensure that appropriate procedures are adopted for it to make rules, for keeping its rules under review and for amending them<sup>1</sup>. The procedures must include procedures for consulting users of the clearing house's facilities<sup>2</sup> in appropriate cases<sup>3</sup>. The clearing house must consult users of its facilities on any arrangements it proposes to make for dealing with penalty income<sup>4</sup> (or on any changes which it proposes to make to those arrangements)<sup>5</sup>.

The clearing house must make transparent and non-discriminatory rules, based on objective criteria, governing access to central counterparty, clearing or settlement<sup>6</sup> facilities provided by it<sup>7</sup>. The clearing house may refuse access to those facilities on legitimate commercial grounds<sup>8</sup>.

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21(1).

2 As to the meaning of 'facilities' see PARA 688 note 1.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21(2).

4 le in accordance with the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(3): see PARA 701.

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21(3).

6 As to the meanings of 'central counterparty', 'clearing' and 'settlement' see PARA 690 note 8.

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21A(1) (Schedule para 21A added by SI 2006/3386). The rules under the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21A(1) must enable an investment firm or a credit institution authorised by the competent authority of another EEA state (including a branch established in the United Kingdom of such a firm or institution) to have access to those facilities on the same terms as a UK firm for the purposes of finalising or arranging the finalisation of transactions in financial instruments: Schedule para 21A(2) (as so added). As to the meaning of 'investment firm' see PARA 21 note 5. As to the meaning of 'credit institution' see PARA 688 note 16. As to the meaning of 'competent authority' see PARA 694 note 7. As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'branch' see PARA 690 note 7. As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meaning of 'UK firm' see PARA 690 note 9. As to the meaning of 'financial instrument' see PARA 690 note 5.

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 21A(3) (as added: see note 7).

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## **701. Discipline and complaints.**

In order to qualify for recognition, the clearing house must have effective arrangements for monitoring and enforcing compliance with its rules<sup>1</sup>. The arrangements must include procedures for: (1) investigating complaints made to the clearing house about the conduct of persons in the course of using the clearing house's facilities<sup>2</sup>; and (2) the fair, independent and impartial resolution of appeals against decisions of the clearing house<sup>3</sup>.

Where the arrangements include provision for requiring the payment of financial penalties, they must include arrangements for ensuring that any amount so paid is applied only in one or more of the following ways:

- 1740 (a) towards meeting expenses incurred by the clearing house in the course of the investigation of the breach in respect of which the penalty is paid, or in the course of any appeal against the decision of the clearing house in relation to that breach<sup>4</sup>;
- 1741 (b) for the benefit of users of the clearing house's facilities<sup>5</sup>;
- 1742 (c) for charitable purposes<sup>6</sup>.

The clearing house must have effective arrangements for the investigation and resolution of complaints arising in connection with the performance of, or failure to perform, any of its regulatory functions<sup>7</sup>. The arrangements must include arrangements for a complaint to be fairly and impartially investigated by a person independent of the clearing house, and for him to

report on the result of his investigation to the clearing house and to the complainant<sup>8</sup>. The arrangements must confer on that person<sup>9</sup> the power to recommend, if he thinks it appropriate, that the clearing house makes a compensatory payment to the complainant<sup>10</sup>, remedies the matter complained of<sup>11</sup> or takes both of those steps<sup>12</sup>.

1 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(1). As to rules generally see PARA 690.

2 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(2)(a). As to the meaning of 'facilities' see PARA 688 note 1.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(2)(b).

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(3)(a).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(3)(b).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 22(3)(c).

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(1). However, this does not extend to complaints about the content of rules made by the clearing house (Schedule para 23(2)(a)) or complaints about a decision against which the complainant has the right to appeal under procedures of the kind mentioned in Schedule para 22(2)(b) (see head (2) in the text) (Schedule para 23(2)(b)).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(3). The provisions of Schedule para 23(3) are not to be taken as preventing the clearing house from making arrangements for the initial investigation of a complaint to be conducted by the clearing house: Schedule para 23(5).

9 I.e. the person mentioned in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(3).

10 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(4)(a).

11 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(4)(b).

12 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 23(4).

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## **702. Default rules in respect of market contracts.**

The clearing house must have default rules<sup>1</sup> which, in the event of a member of the clearing house being or appearing to be unable to meet his obligations in respect of one or more market contracts<sup>2</sup>, enable action to be taken to close out his position in relation to all unsettled market contracts to which he is a party<sup>3</sup>.

The rules may authorise the taking of the same or similar action where a member appears to be likely to become unable to meet his obligations in respect of one or more market contracts<sup>4</sup>.

1 As to the meaning of 'default rules' see PARA 685 note 7.

2 As to the meaning of 'market contract' see PARA 693 note 2.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 24(1). Nothing in the Schedule Pt IV (paras 24-28) is to be taken as requiring a recognised clearing house which does not enter into such contracts as are mentioned in the Companies Act 1989 s 155(3) (see PARA 510) to have default rules, or to make any arrangements, relating to such contracts: Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 8.

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 24(2).

## UPDATE

### 702 Default rules in respect of market contracts

TEXT AND NOTES--Where the clearing house has arrangements for transacting business with, or in relation to common members of, a recognised investment exchange or another recognised clearing house, a recognised clearing house must have default rules which in the event of the investment exchange or the clearing house being or appearing to be unable to meet its obligations in respect of one or more market contracts, enable action to be taken in respect of unsettled market contracts to which that person is a party: SI 2001/995 Schedule para 24(3), (4) (added by SI 2009/853).

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### 703. Content of default rules.

The default rules<sup>1</sup> must provide:

- 1743 (1) for all rights and liabilities of the defaulter<sup>2</sup> under or in respect of unsettled market contracts<sup>3</sup> to be discharged and for there to be paid by or to the defaulter such sum of money (if any) as may be determined in accordance with the rules<sup>4</sup>;
- 1744 (2) for the sums so payable by or to the defaulter in respect of different contracts to be aggregated or set off so as to produce a net sum<sup>5</sup>;
- 1745 (3) for that sum, if payable by the defaulter to the clearing house, to be set off against any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property) so as to produce a further net sum<sup>6</sup> and, if payable by the clearing house to the defaulter, to be aggregated with any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property); and
- 1746 (4) for the certification by or on behalf of the clearing house of the sum finally payable or, as the case may be, of the fact that no sum is payable<sup>8</sup>.

The rules of the clearing house must provide that in the event of a default, margin provided by the defaulter for his own account is not to be applied to meet a shortfall on a client account<sup>9</sup>.

1 As to the meaning of 'default rules' see PARA 685 note 7.

2 As to the meanings of 'defaulter' and 'default' see PARA 693 note 1.

3 As to the meaning of 'market contract' see PARA 693 note 2. The reference in the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1) to the rights and liabilities of a defaulter under or in respect of an unsettled market contract includes (without prejudice to the generality of that provision) rights and liabilities arising in consequence of action taken under provisions of the rules authorising:

634 (1) the effecting by the clearing house of corresponding contracts in relation to unsettled market contracts to which the defaulter is party (Schedule para 25(2)(a));

635 (2) the transfer of the defaulter's position under an unsettled market contract to another member of the clearing house (Schedule para 25(2)(b));

636 (3) the exercise by the clearing house of any option granted by an unsettled market contract (Schedule para 25(2)(c)).

'Corresponding contract' means a contract on the same terms (except as to price or premium) as the market contract but under which the person who is the buyer under the market contract agrees to sell and the person who is the seller under the market contract agrees to buy: Schedule para 25(3). The provisions of Schedule para 25(3) apply with any necessary modifications in relation to a market contract which is not an agreement to sell: Schedule para 25(4). The reference in Schedule para 25(1) to the rights and liabilities of a defaulter under or in respect of an unsettled market contract does not include, where he acts as agent, rights or liabilities of his arising out of the relationship of principal and agent: Schedule para 25(5).

4 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1)(a).

5 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1)(b).

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1)(c)(i).

7 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1)(c)(ii).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 25(1)(d).

9 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 28(1). The provisions of Schedule para 28 are without prejudice to the requirements of any rules relating to clients' money made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 138 (see PARA 21) and s 139 (see PARA 25): Schedule para 28(2). As to the Financial Services Authority see PARAS 4, 6 et seq.

## UPDATE

### 703 Content of default rules

TEXT AND NOTES 5-7--After the words 'different contracts' add 'entered into by the defaulter in one capacity for the purposes of the Companies Act 1989 s 187': SI 2001/995 Schedule para 25(1)(b) (amended by SI 2009/853). Add head (2a) if relevant, for that sum to be aggregated with, or set off against, any sum owed by or to the clearing house by or to AP under an indemnity given or reimbursement or similar obligation in respect of a margin set off agreement in which the defaulter chose to participate so as to produce a net sum: SI 2001/995 Schedule para 25(1)(bb) (added by SI 2009/853). Substitute head (3) for the net sum referred to in head (2) or, if relevant,



the net sum referred to in head (2a) (a) if payable by the defaulter to the clearing house, to be set off against (i) any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property); (ii) to the extent (if any) that any sum remains after set off under head (3)(a)(i), any default fund contribution provided by the defaulter remaining after any application of such contribution; (b) to the extent (if any) that any sum remains after set off under head (3), to be paid from such other funds, including the default fund, or resources as the clearing house may apply under its default rules; (c) if payable by the clearing house to the defaulter, to be aggregated with (i) any property provided by or on behalf of the defaulter as cover for margin (or the proceeds of realisation of such property); (ii) any default fund contribution provided by the defaulter remaining after any application of such contribution: SI 2001/995 Schedule para 25(1)(c) (substituted by SI 2009/853).

'Margin set off agreement' means an agreement between the clearing house and AP permitting any eligible position to which the participant member is party with the clearing house and any eligible position to which the participant member is party with AP to be taken into account in calculating a net sum owed by or to the participant member to or by either the clearing house or AP and/or margin to be provided to, either or both, the clearing house and AP: SI 2001/995 Schedule para 25(1A) (paras 25(1A)-(1C), 25A added by SI 2009/853). 'AP' means a recognised investment exchange or another recognised clearing house of whom a participant member is a member; 'eligible position' means any position which may be included in the set off calculation; 'participant member' means a person who (1) is a member of the clearing house; (2) is a member or participant of AP; and (3) chooses to participate, in accordance with the rules of the clearing house, in such agreement: para 25(1B). The property, contribution, funds or resources referred to in head (3), against which the net sum is to be set off (or with which it is to be aggregated) are subject to any unsatisfied claims arising out of the default of a defaulter before the default in relation to which the calculation is being made: para 25(1C). The rules of the clearing house must provide that in the event of a default, any default fund contribution provided by the defaulter must only be used in accordance with head (3)(a) or (b): para 25A.

TEXT AND NOTE 9--After the words 'shortfall on a client account' add 'other than a client account of the defaulter': SI 2001/995 Schedule para 28(1) (amended by SI 2009/853). 'Client account of the defaulter' means an account held by the exchange in the name of the defaulter in which relevant transactions (as to the meaning of which see Financial Markets and Insolvency Regulations 1991, SI 1991/880, reg 16(1)) effected by the defaulter have been recorded: SI 2001/995 Schedule para 28(3), (4) (added by SI 2009/853).

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#### **704. Default rules: notification and co-operation.**

The clearing house must have adequate arrangements for ensuring that parties to unsettled market contracts<sup>1</sup> with a defaulter<sup>2</sup> are notified as soon as reasonably practicable of the default and of any decision taken under the rules in relation to contracts to which they are a party<sup>3</sup>.

The clearing house must be able and willing to co-operate, by the sharing of information and otherwise, with the Secretary of State<sup>4</sup>, any relevant office-holder<sup>5</sup>, and any other authority or body having responsibility for any matter arising out of or connected with the default of a member of the clearing house<sup>6</sup>.

1 As to the meaning of 'market contract' see PARA 693 note 2.

2 As to the meanings of 'defaulter' and 'default' see PARA 693 note 1.

3 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 26.

4 As to the Secretary of State see PARA 3.

5 ie any relevant office-holder within the meaning of the Companies Act 1989 s 189: see PARA 513 note 7.

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, Schedule para 27.

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### *(c) Satisfying Recognition Requirements*

#### **UPDATE**

#### **704 Default rules: notification and co-operation**

TEXT AND NOTE 6--After the words 'default of a member of the clearing house' add 'or the default of a recognised investment exchange or another recognised clearing house': SI 2001/995 Schedule para 27 (amended by SI 2009/853).

#### **705. Method of satisfying recognition requirements.**

In considering whether a recognised body<sup>1</sup> or applicant<sup>2</sup> satisfies recognition requirements<sup>3</sup> applying to it under the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001<sup>4</sup>, the Financial Services Authority<sup>5</sup> may take into account all relevant circumstances including the constitution of the person concerned and its regulatory provisions and practices<sup>6</sup>.

Without prejudice to the generality of the provisions described above<sup>7</sup>, a recognised body or applicant may satisfy recognition requirements applying to it by making arrangements for functions to be performed on its behalf by any other person<sup>8</sup>.

1 As to the meaning of 'recognised body' see PARA 685 note 6.

2 As to applicants and applications see PARAS 706-707.

3 As to recognition requirements generally see PARA 685.

4 le the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995.

5 As to the Financial Services Authority see PARAS 4, 6 et seq.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

6 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 6(1). The reference to regulatory provisions and practices is a reference to those expressions within the meaning of the Financial Services and Markets Act 2000 s 302(1): see PARA 730 note 8.

7 le the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 6(1).

8 Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, reg 6(2). Where a recognised body or applicant makes arrangements of the kind mentioned in reg 6(2), the arrangements do not affect the responsibility imposed by the Financial Services and Markets Act 2000 on the recognised body or applicant to satisfy recognition requirements applying to it under the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001, SI 2001/995, but it is in addition a recognition requirement applying to the recognised body or applicant that the person who performs (or is to perform) the functions is a fit and proper person who is able and willing to perform them: reg 6(3).

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## (C) APPLICATIONS FOR RECOGNITION

### **706. Application for recognition by an investment exchange.**

Any body corporate<sup>1</sup> or unincorporated association may apply to the Financial Services Authority<sup>2</sup> for an order declaring it to be a recognised investment exchange<sup>3</sup> for the purposes of the Financial Services and Markets Act 2000<sup>4</sup>.

The application<sup>5</sup> must be made in such manner as the Authority may direct and must be accompanied by:

- 1747 (1) a copy of the applicant's<sup>6</sup> rules<sup>7</sup>;
- 1748 (2) a copy of any guidance issued by the applicant<sup>8</sup>;
- 1749 (3) the required particulars<sup>9</sup>; and
- 1750 (4) such other information as the Authority may reasonably require for the purpose of determining the application<sup>10</sup>.

1 As to the meaning of 'body corporate' see PARA 86 note 11.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

3 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

4 Financial Services and Markets Act 2000 s 287(1).

5 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII (ss 285-313), 'application' means an application for a recognition order made under s 287 or under s 288 (see PARA 707): s 313(1). As to the meaning of 'recognition order' see PARA 684 note 1.

6 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII, 'applicant' means a body corporate or unincorporated association which has applied for a recognition order: s 313(1).

7 Financial Services and Markets Act 2000 s 287(2)(a).

8 Financial Services and Markets Act 2000 s 287(2)(b).

9 Financial Services and Markets Act 2000 s 287(2)(c). The required particulars are:

- 637 (1) particulars of any arrangements which the applicant has made, or proposes to make, for the provision of clearing services in respect of transactions effected on the exchange (s 287(3)(a));
- 638 (2) if the applicant proposes to provide clearing services in respect of transactions other than those effected on the exchange, particulars of the criteria which the applicant will apply when determining to whom it will provide those services (s 287(3)(b));
- 639 (3) a programme of operations which includes the types of business the applicant proposes to undertake and the applicant's proposed organisational structure (s 287(3)(c) (s 287(3)(c)-(e), (4) added by SI 2007/126);
- 640 (4) such particulars of the persons who effectively direct the business and operations of the exchange as the Authority may reasonably require (Financial Services and Markets Act 2000 s 287(3)(d) (as so added));
- 641 (5) such particulars of the ownership of the exchange, and in particular of the identity and scale of interests of the persons who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly, as the Authority may reasonably require (s 287(3)(e) (as so added)).

Heads (3)-(5) above do not apply to an application by an overseas applicant: s 287(4) (as so added). For the purposes of Pt XVIII, 'overseas applicant' means a body corporate or association which has neither its head office nor registered office in the United Kingdom and in relation to which a recognition order is in force: s 313(1). As to the meaning of 'United Kingdom' see PARA 2 note 3.

10 Financial Services and Markets Act 2000 s 287(2)(d).

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## **707. Application for recognition by a clearing house.**

Any body corporate<sup>1</sup> or unincorporated association may apply to the Financial Services Authority<sup>2</sup> for an order declaring it to be a recognised clearing house<sup>3</sup> for the purposes of the Financial Services and Markets Act 2000<sup>4</sup>.

The application<sup>5</sup> must be made in such manner as the Authority may direct and must be accompanied by:

- 1751 (1) a copy of the applicant's<sup>6</sup> rules<sup>7</sup>;
- 1752 (2) a copy of any guidance issued by the applicant<sup>8</sup>;
- 1753 (3) the required particulars<sup>9</sup>; and

1754 (4) such other information as the Authority may reasonably require for the purpose of determining the application<sup>10</sup>.

1 As to the meaning of 'body corporate' see PARA 86 note 11.

2 As to the Financial Services Authority see PARAS 4, 6 et seq.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

3 As to the meaning of 'recognised clearing house' see PARA 684 note 6.

4 Financial Services and Markets Act 2000 s 288(1).

5 As to the meaning of 'application' see PARA 706 note 5.

6 As to the meaning of 'applicant' see PARA 706 note 6.

7 Financial Services and Markets Act 2000 s 288(2)(a).

8 Financial Services and Markets Act 2000 s 288(2)(b).

9 Financial Services and Markets Act 2000 s 288(2)(c). The required particulars are:

642 (1) if the applicant makes, or proposes to make, clearing arrangements with a recognised investment exchange, particulars of those arrangements (s 288(3)(a));

643 (2) if the applicant proposes to provide clearing services for persons other than recognised investment exchanges, particulars of the criteria which it will apply when determining to whom it will provide those services (s 288(3)(b)).

As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

10 Financial Services and Markets Act 2000 s 288(2)(d).

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## **708. Requirement for further information.**

At any time after receiving an application<sup>1</sup> and before determining it, the Financial Services Authority<sup>2</sup> may require the applicant<sup>3</sup> to provide such further information as it reasonably considers necessary to enable it to determine the application<sup>4</sup>.

Information which the Authority requires in connection with an application must be provided in such form, or verified in such manner, as the Authority may direct<sup>5</sup>. Different directions may be given, or requirements imposed, by the Authority with respect to different applications<sup>6</sup>.

1 As to the meaning of 'application' see PARA 706 note 5.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

- 3 As to the meaning of 'applicant' see PARA 706 note 6.
- 4 Financial Services and Markets Act 2000 s 289(1).
- 5 Financial Services and Markets Act 2000 s 289(2).
- 6 Financial Services and Markets Act 2000 s 289(3).

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### **709. Recognition orders.**

If it appears to the Financial Services Authority<sup>1</sup> that the applicant<sup>2</sup> satisfies the recognition requirements<sup>3</sup> applicable in its case, the Authority may make a recognition order<sup>4</sup> declaring the applicant to be: (1) a recognised investment exchange<sup>5</sup>; (2) a recognised clearing house<sup>6</sup>.

The Treasury's<sup>7</sup> approval of the making of a recognition order is required<sup>8</sup>. In considering an application<sup>9</sup>, the Authority may have regard to any information which it considers is relevant to the application<sup>10</sup>. A recognition order must specify a date on which it is to take effect<sup>11</sup>.

The Authority must not make a recognition order if it appears to the Authority that an existing or proposed regulatory provision of the applicant in connection with the applicant's business as an investment exchange or the provision by the applicant of clearing services, imposes or will impose an excessive requirement on the persons affected (directly or indirectly) by it<sup>12</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 As to the meaning of 'applicant' see PARA 706 note 6.

3 As to recognition requirements generally see PARA 685. See also notes 5, 12.

4 As to the meaning of 'recognition order' see PARA 684 note 1.

5 Financial Services and Markets Act 2000 s 290(1)(a). The application is made under s 287: see PARA 706. As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

In the case of an application for an order declaring the applicant to be a recognised investment exchange, the reference in s 290(1) to the recognition requirements applicable in its case includes a reference to requirements contained in any directly applicable Community regulation made under the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments): Financial Services and Markets Act 2000 s 290(1A) (s 290(1A)-(1C) added by SI 2007/126). In the case mentioned in the Financial Services and Markets Act 2000 s 290(1A), the application must be determined by the Authority before the end of the period of six months beginning with the date on which it receives the completed application: s 290(1B) (as so added). Section 290(1B) does not apply in the case of an application by an overseas applicant: s 290(1C) (as so added). As to the meaning of 'overseas applicant' see PARA 706 note 9.

6 Financial Services and Markets Act 2000 s 290(1)(b). The application is made under s 288: see PARA 707. As to the meaning of 'recognised clearing house' see PARA 684 note 6. See note 5.

7 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Financial Services and Markets Act 2000 s 290(2). As to the requirement for approval see s 307; and PARA 733.

9 As to the meaning of 'application' see PARA 706 note 5.

10 Financial Services and Markets Act 2000 s 290(3).

11 Financial Services and Markets Act 2000 s 290(4).

Section 298 (see PARA 716) has effect in relation to a decision to refuse to make a recognition order as it has effect in relation to a decision to revoke such an order (s 290(5)(a)) and as if references to a recognised body were references to the applicant (s 290(5)(b)). As to the meaning of 'recognised body' see PARA 685 note 6. Section 290(5) does not apply in a case in which the Treasury has failed to give its approval under s 307 (see PARA 733): s 290(6).

12 Financial Services and Markets Act 2000 s 290A(1) (s 290A added by the Investment Exchanges and Clearing Houses Act 2006 s 4).

The reference in the Financial Services and Markets Act 2000 s 290(1) (making of recognition order) (see the text to notes 1-6) to satisfying the applicable recognition requirements is read accordingly: s 290A(2) (as so added).

Expressions used in s 290A(1) that are defined for the purposes of s 300A (power of Authority to disallow excessive regulatory provision) (see PARA 721) have the same meaning as in that provision: s 290A(3) (as so added). The provisions of s 300A(3), (4) (determination whether regulatory provision excessive) (see PARA 721) apply for the purposes of s 290A as for the purposes of s 300A: s 290A(4) (as so added).

Section 298 (see PARA 716) has effect in relation to a decision under s 290A to refuse a recognition order (1) as it has effect in relation to a decision to revoke such an order; and (2) as if references to a recognised body were references to the applicant: s 290A(5) (as so added). Section 290A does not apply to an application for recognition as an overseas investment exchange or overseas clearing house: s 290A(6) (as so added). For the purposes of Pt XVIII (ss 285-313), 'overseas investment exchange' means a body corporate or association which has neither its head office nor its registered office in the United Kingdom and in relation to which a recognition order is in force: s 313(1). As to the meaning of 'body corporate' see PARA 86 note 11. As to the meaning of 'United Kingdom' see PARA 2 note 3. 'Overseas clearing house' means a body corporate or association which has neither its head office nor its registered office in the United Kingdom and in relation to which a recognition order is in force: s 313(1).

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## **710. Overseas investment exchanges and overseas clearing houses.**

An application<sup>1</sup> by an overseas applicant<sup>2</sup> must contain the address of a place in the United Kingdom<sup>3</sup> for the service on the applicant<sup>4</sup> of notices or other documents<sup>5</sup> required or authorised to be served on it under the Financial Services and Markets Act 2000<sup>6</sup>.

If it appears to the Financial Services Authority<sup>7</sup> that an overseas applicant satisfies the requirements mentioned below<sup>8</sup>, it may make a recognition order declaring the applicant to be: (1) a recognised investment exchange<sup>9</sup>; (2) a recognised clearing house<sup>10</sup>.

The requirements are that:

- 1755 (a) investors are afforded protection equivalent to that which they would be afforded if the body concerned were required to comply with certain recognition requirements<sup>11</sup>;

- 1756 (b) there are adequate procedures for dealing with a person who is unable, or likely to become unable, to meet his obligations in respect of one or more market contracts<sup>12</sup> connected with the investment exchange or clearing house<sup>13</sup>;
- 1757 (c) the applicant is able and willing to co-operate with the Authority by the sharing of information and in other ways<sup>14</sup>;
- 1758 (d) adequate arrangements exist for co-operation between the Authority and those responsible for the supervision of the applicant in the country or territory in which the applicant's head office is situated<sup>15</sup>.

1 le under the Financial Services and Markets Act 2000 s 287 (see PARA 706) or s 288 (see PARA 707).

2 As to the meaning of 'overseas applicant' see PARA 706 note 9.

3 As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 As to the meaning of 'applicant' see PARA 706 note 6.

5 As to the meaning of 'document' see PARA 10 note 10.

6 Financial Services and Markets Act 2000 s 292(1).

7 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

8 le the requirements of the Financial Services and Markets Act 2000 s 292(3): see heads (a)-(d) in the text.

9 Financial Services and Markets Act 2000 s 292(2)(a). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

In relation to an overseas applicant and a body or association declared to be a recognised investment exchange or recognised clearing house by a recognition order made by virtue of s 292(2):

644 (1) the reference in s 313(2) (see PARA 685) to recognition requirements is to be read as a reference to matters corresponding to the matters in respect of which provision is made in the recognition requirements (s 292(5)(a));

645 (2) s 296(1) (see PARA 714) and s 297(2) (see PARA 715) have effect as if the requirements mentioned in s 296(1)(a) and s 297(2)(a) were those of heads (a), (b), and (c) in the text (s 292(5)(b));

646 (3) s 297(2) has effect as if the grounds on which a recognition order may be revoked under that provision included the ground that in the opinion of the Authority arrangements of the kind mentioned in head (d) in the text no longer exist (s 292(5)(c)).

As to recognition requirements generally see PARA 685.

10 Financial Services and Markets Act 2000 s 292(2)(b). As to the meaning of 'recognised clearing house' see PARA 684 note 6. See note 9.

11 Financial Services and Markets Act 2000 s 292(3)(a) (amended by SI 2006/2975). The reference is to recognition requirements, other than any such requirements which are expressed in regulations under the Financial Services and Markets Act 2000 s 286 (see PARA 685) not to apply for the purposes of s 292(3)(a).

12 As to the meaning of 'market contract' see PARA 693 note 2.

13 Financial Services and Markets Act 2000 s 292(3)(b).

14 Financial Services and Markets Act 2000 s 292(3)(c).

15 Financial Services and Markets Act 2000 s 292(3)(d). In considering whether it is satisfied as to the requirements mentioned in heads (a) and (b) in the text, the Authority must have regard to the relevant law



and practice of the country or territory in which the applicant's head office is situated (s 292(4)(a)) and the rules and practices of the applicant (s 292(4)(b)).

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## **C. SUPERVISION**

### **711. Notification requirements.**

The Financial Services Authority<sup>1</sup> may make rules<sup>2</sup> requiring a recognised body<sup>3</sup> to give it: (1) notice of such events relating to the body as may be specified<sup>4</sup>; and (2) such information in respect of those events as may be specified<sup>5</sup>.

The rules may also require a recognised body to give the Authority, at such times or in respect of such periods as may be specified, such information relating to the body as may be specified<sup>6</sup>. An obligation imposed by the rules extends only to a notice or information which the Authority may reasonably require for the exercise of its functions under the Financial Services and Markets Act 2000<sup>7</sup>. The rules may require information to be given in a specified form and to be verified in a specified manner<sup>8</sup>.

If a recognised body alters or revokes any of its rules or guidance<sup>9</sup> or makes new rules or issues new guidance<sup>10</sup>, it must give written notice to the Authority without delay<sup>11</sup>.

If a recognised investment exchange<sup>12</sup> makes a change in the arrangements it makes for the provision of clearing services in respect of transactions effected on the exchange<sup>13</sup> or in the criteria which it applies when determining to whom it will provide clearing services<sup>14</sup>, it must give written notice to the Authority without delay<sup>15</sup>. If a recognised clearing house<sup>16</sup> makes a change in the recognised investment exchanges for whom it provides clearing services<sup>17</sup> or in the criteria which it applies when determining to whom (other than recognised investment exchanges) it will provide clearing services<sup>18</sup>, it must give written notice to the Authority without delay<sup>19</sup>.

A recognised investment exchange must as soon as practicable after a recognition order<sup>20</sup> is made in respect of it publish such particulars of the ownership of the exchange as the Authority may reasonably require<sup>21</sup>. If an ownership transfer<sup>22</sup> takes place in relation to a recognised investment exchange, the exchange must as soon as practicable after becoming aware of the transfer publish such particulars relating to the transfer as the Authority may reasonably require<sup>23</sup>. A recognised investment exchange must publish such particulars of any decision it makes to suspend or remove a financial instrument from trading on a regulated market<sup>24</sup> operated by it as the Authority may reasonably require<sup>25</sup>. The Authority may determine the manner of publication under the above provisions<sup>26</sup> and the timing of such publication<sup>27</sup>.

The Authority may require a recognised investment exchange to give the Authority such information as it reasonably requires in order to satisfy itself that the exchange is complying with any directly applicable Community regulation made under the Markets in Financial Instruments Directive<sup>28</sup>.

<sup>1</sup> As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 As to the meaning of 'rule' see PARA 23 note 2.

3 As to the meaning of 'recognised body' see PARA 685 note 6.

4 Financial Services and Markets Act 2000 s 293(1)(a). 'Specified' means specified in the Authority's rules: s 293(9).

5 Financial Services and Markets Act 2000 s 293(1)(b).

6 Financial Services and Markets Act 2000 s 293(2).

7 Financial Services and Markets Act 2000 s 293(3).

8 Financial Services and Markets Act 2000 s 293(4).

9 Financial Services and Markets Act 2000 s 293(5)(a). As to rules of a clearing house and rules of an investment exchange see PARA 685. As to guidance issued by an investment exchange and by a clearing house see PARA 730.

Section 293(5)-(7) does not apply to an overseas investment exchange or an overseas clearing house: s 293(8). As to the meanings of 'overseas investment exchange' and 'overseas clearing house' see PARA 709 note 12.

10 Financial Services and Markets Act 2000 s 293(5)(b). See note 9.

11 Financial Services and Markets Act 2000 s 293(5). See note 9.

12 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

13 Financial Services and Markets Act 2000 s 293(6)(a). See note 9.

14 Financial Services and Markets Act 2000 s 293(6)(b). See note 9.

15 Financial Services and Markets Act 2000 s 293(6). See note 9.

16 As to the meaning of 'recognised clearing house' see PARA 684 note 6.

17 Financial Services and Markets Act 2000 s 293(7)(a). See note 9.

18 Financial Services and Markets Act 2000 s 293(7)(b). See note 9.

19 Financial Services and Markets Act 2000 s 293(7). See note 9.

20 As to the meaning of 'recognition order' see PARA 684 note 1.

21 Financial Services and Markets Act 2000 s 292A(1) (s 292A added by SI 2007/126). The particulars published under the Financial Services and Markets Act 2000 s 292A(1) must include particulars of the identity and scale of interests of the persons who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly: s 292A(2) (as so added). Section 292A does not apply to an overseas investment exchange: s 292A(7) (as so added).

22 'Ownership transfer', in relation to an exchange, means a transfer of ownership which gives rise to a change in the persons who are in a position to exercise significant influence over the management of the exchange, whether directly or indirectly: Financial Services and Markets Act 2000 s 292A(3) (as added: see note 21). See note 21.

23 Financial Services and Markets Act 2000 s 292A(4) (as added: see note 21). See note 21.

24 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII (ss 285-313), 'regulated market' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.14: Financial Services and Markets Act 2000 s 313(1) (definition added by SI 2007/126).

25 Financial Services and Markets Act 2000 s 292A(5) (as added: see note 21). See note 21.

26 Ie under the Financial Services and Markets Act 2000 s 292A(1), (3), (5).

27 Financial Services and Markets Act 2000 s 292A(6) (as added: see note 21). The reference is to the timing of publication under s 292A(5). See note 21.

28 Financial Services and Markets Act 2000 s 293A (added by SI 2007/126). The reference is to European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1).

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## **712. Reports by overseas investment exchanges and overseas clearing houses.**

At least once a year, every overseas investment exchange<sup>1</sup> and overseas clearing house<sup>2</sup> must provide the Financial Services Authority<sup>3</sup> with a report<sup>4</sup>. The report must contain a statement as to whether any events have occurred which are likely to affect the Authority's assessment of whether it is satisfied as to certain requirements<sup>5</sup> or to have any effect on competition<sup>6</sup>.

The report must also contain such information as may be specified in rules made by the Authority<sup>7</sup>. The investment exchange or clearing house must provide the Treasury<sup>8</sup> and the Office of Fair Trading<sup>9</sup> with a copy of the report<sup>10</sup>.

1 As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

2 As to the meaning of 'overseas clearing house' see PARA 709 note 12.

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

4 Financial Services and Markets Act 2000 s 295(1).

5 As set out in the Financial Services and Markets Act 2000 s 292(3): see PARA 710 heads (a)-d).

6 Financial Services and Markets Act 2000 s 295(2).

7 Financial Services and Markets Act 2000 s 295(3). As to the meaning of 'rule' see PARA 23 note 2.

8 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

9 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

10 Financial Services and Markets Act 2000 s 295(4) (amended by the Enterprise Act 2002 Sch 25 para 40(1), (9)).

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## **713. Modification or waiver of rules relating to notification and reports.**

The Financial Services Authority<sup>1</sup> may, on the application or with the consent of a recognised body<sup>2</sup>, direct that certain rules<sup>3</sup> are not to apply to the body<sup>4</sup> or are to apply to the body with such modifications as may be specified in the direction<sup>5</sup>.

An application must be made in such manner as the Authority may direct<sup>6</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 As to the meaning of 'recognised body' see PARA 685 note 6.

3 The rules made under the Financial Services and Markets Act 2000 s 293 (see PARA 711) or s 295 (see PARA 712).

4 Financial Services and Markets Act 2000 s 294(1)(a).

5 Financial Services and Markets Act 2000 s 294(1)(b). Section 294(4)-(6) applies to a direction given under s 294(1): s 294(3).

The Authority may not give a direction unless it is satisfied that: (1) compliance by the recognised body with the rules, or with the rules as unmodified, would be unduly burdensome or would not achieve the purpose for which the rules were made (s 294(4)(a)); and (2) the direction would not result in undue risk to persons whose interests the rules are intended to protect (s 294(4)(b)). A direction may be given subject to conditions: s 294(5). The Authority may revoke a direction (s 294(6)(a)) or vary it on the application, or with the consent, of the recognised body to which it relates (s 294(6)(b)).

6 Financial Services and Markets Act 2000 s 294(2).

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## **714. The Financial Services Authority's power to give directions.**

If it appears to the Financial Services Authority<sup>1</sup> that a recognised body<sup>2</sup> has failed, or is likely to fail, to satisfy the recognition requirements<sup>3</sup> or has failed to comply with any other obligation imposed on it by or under the Financial Services and Markets Act 2000<sup>4</sup>, it may direct the body to take specified steps for the purpose of securing the body's compliance with (1) the recognition requirements<sup>5</sup>; or (2) any obligation of the kind in question<sup>6</sup>.

The above<sup>7</sup> also applies in the case of a recognised body which is a recognised investment exchange<sup>8</sup> if it appears to the Authority that the body has failed, or is likely to fail, to comply with any obligation imposed on it by any directly applicable Community regulation made under the Markets in Financial Instruments Directive<sup>9</sup>. In the case of a recognised investment exchange other than an overseas investment exchange<sup>10</sup>, the steps referred to above may include: (a) the granting to the Authority of access to the premises of the exchange for the purpose of inspecting those premises; or any documents on the premises which appear to the Authority to be relevant for the purpose<sup>11</sup>; (b) the suspension of the carrying on of any regulated activity<sup>12</sup> by the exchange for the period specified in the direction<sup>13</sup>.

A direction under these provisions is enforceable, on the application of the Authority, by an injunction<sup>14</sup>. The fact that a rule made by a recognised body has been altered in response to a

direction given by the Authority does not prevent it from being subsequently altered or revoked by the recognised body<sup>15</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 As to the meaning of 'recognised body' see PARA 685 note 6.

3 Financial Services and Markets Act 2000 s 296(1)(a). As to recognition requirements see PARA 685.

4 Financial Services and Markets Act 2000 s 296(1)(b).

5 Financial Services and Markets Act 2000 s 296(2)(a).

6 Financial Services and Markets Act 2000 s 296(2)(b).

7 I.e. the Financial Services and Markets Act 2000 s 296.

8 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

9 Financial Services and Markets Act 2000 s 296(1A) (added by SI 2007/126). The reference is to European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments.

10 As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

11 Financial Services and Markets Act 2000 s 296(2A)(a) (s 296(2A) added by SI 2007/126). The reference is to documents relevant for the purpose of the Financial Services and Markets Act 2000 s 296(2): see heads (1) and (2) in the text.

12 As to regulated activities see PARA 84 et seq.

13 Financial Services and Markets Act 2000 s 296(2A)(b) (as added: see note 11).

14 Financial Services and Markets Act 2000 s 296(3). As to injunctions generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

15 Financial Services and Markets Act 2000 s 296(4). As to rules of a clearing house and rules of an investment exchange see PARA 685 note 7.

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## **715. Power of the Financial Services Authority to revoke recognition.**

A recognition order<sup>1</sup> may be revoked by an order made by the Financial Services Authority<sup>2</sup> at the request, or with the consent, of the recognised body<sup>3</sup> concerned<sup>4</sup>.

If it appears to the Authority that a recognised body (1) is failing, or has failed, to satisfy the recognition requirements<sup>5</sup>; or (2) is failing, or has failed, to comply with any other obligation imposed on it by or under the Financial Services and Markets Act 2000<sup>6</sup>, it may make an order revoking the recognition order for that body even though the body does not wish the order to be made<sup>7</sup>.

If it appears to the Authority that a recognised body which is a recognised investment exchange<sup>8</sup> (a) has not carried on the business of an investment exchange during the period of 12 months beginning with the day on which the recognition order took effect in relation to it<sup>9</sup>; (b) has not carried on the business of an investment exchange at any time during the period of six months ending with the relevant day<sup>10</sup>; or (c) has failed, or is likely to fail, to comply with any obligation imposed on it by a directly applicable Community regulation made under the Markets in Financial Instruments Directive<sup>11</sup>, it may make an order revoking the recognition order for that body even though the body does not wish the order to be made<sup>12</sup>.

Such an order (a 'revocation order') must specify the date on which it is to take effect<sup>13</sup>. A revocation order may contain such transitional provisions as the Authority thinks necessary or expedient<sup>14</sup>.

1 As to the meaning of 'recognition order' see PARA 684 note 1.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

3 As to the meaning of 'recognised body' see PARA 685 note 6.

4 Financial Services and Markets Act 2000 s 297(1).

5 Financial Services and Markets Act 2000 s 297(2)(a).

6 Financial Services and Markets Act 2000 s 297(2)(b).

7 Financial Services and Markets Act 2000 s 297(2).

8 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

9 Financial Services and Markets Act 2000 s 297(2A)(a) (s 297(2A)-(2C) added by SI 2007/126). The Financial Services and Markets Act 2000 s 297(2A) does not apply to an overseas investment exchange: s 297(2C) (as so added). As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

10 Financial Services and Markets Act 2000 s 297(2A)(b) (as added: see note 9). The 'relevant day', for the purposes of s 297(2A)(b), is the day on which the power to make an order under s 297(2A) is exercised: s 297(2B) (as so added). See note 9.

11 Financial Services and Markets Act 2000 s 297(2A)(c) (as added: see note 9). The reference is to European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments. See note 9.

12 Financial Services and Markets Act 2000 s 297(2A) (as added: see note 9). See note 9.

13 Financial Services and Markets Act 2000 s 297(3). 'Revocation order' has the meaning described in the text: ss 297, 313(1). In the case of a revocation order made under s 297(2) or (2A), the specified date must not be earlier than the end of the period of three months beginning with the day on which the order is made: s 297(4) (amended by SI 2007/126).

14 Financial Services and Markets Act 2000 s 297(5).

## 716. Procedure for directions and revocation orders.

Before giving a direction<sup>1</sup> or making a revocation order<sup>2</sup>, the Financial Services Authority<sup>3</sup> must:

- 1759 (1) give written notice of its intention to do so to the recognised body<sup>4</sup> concerned<sup>5</sup>;
- 1760 (2) take such steps as it considers reasonably practicable to bring the notice to the attention of members (if any) of that body<sup>6</sup>; and
- 1761 (3) publish the notice in such manner as it thinks appropriate for bringing it to the attention of other persons who are, in its opinion, likely to be affected<sup>7</sup>.

A notice<sup>8</sup> must state why the Authority intends to give the direction or make the order; and draw attention to the right to make representations<sup>9</sup>. Before the end of the period for making representations<sup>10</sup> the recognised body<sup>11</sup>, any member of that body<sup>12</sup>, and any other person who is likely to be affected by the proposed direction or revocation order<sup>13</sup>, may make representations to the Authority<sup>14</sup>.

When the Authority has decided whether to give a direction<sup>15</sup> or to make the proposed revocation order, it must: (a) give the recognised body written notice of its decision<sup>16</sup>; and (b) if it has decided to give a direction or make an order, take such steps as it considers reasonably practicable for bringing its decision to the attention of members of the body or of other persons who are, in the Authority's opinion, likely to be affected<sup>17</sup>.

If the Authority considers it essential to do so, it may give a direction<sup>18</sup> without following the procedure described above<sup>19</sup> or, if the Authority has begun to follow that procedure, regardless of whether the period for making representations has expired<sup>20</sup>.

1    le under the Financial Services and Markets Act 2000 s 296: see PARA 714.

2    le under the Financial Services and Markets Act 2000 s 297(2) or (2A): see PARA 715.

3    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

4    As to the meaning of 'recognised body' see PARA 685 note 6.

5    Financial Services and Markets Act 2000 s 298(1)(a) (s 298(1) amended by SI 2007/126).

6    Financial Services and Markets Act 2000 s 298(1)(b).

7    Financial Services and Markets Act 2000 s 298(1)(c).

8    le under the Financial Services and Markets Act 2000 s 298(1).

9    Financial Services and Markets Act 2000 s 298(2). As to the right to make representations see s 298(3); and the text and notes 10-14.

10   The period for making representations is: (1) two months beginning with the date on which the notice is served on the recognised body (Financial Services and Markets Act 2000 s 298(4)(a)(i)) or, if later, with the date on which the notice is published (s 298(4)(a)(ii)); or (2) such longer period as the Authority may allow in the particular case (s 298(4)(b)).

11   Financial Services and Markets Act 2000 s 298(3)(a).

12   Financial Services and Markets Act 2000 s 298(3)(b).

13   Financial Services and Markets Act 2000 s 298(3)(c).

- 14 Financial Services and Markets Act 2000 s 298(3). In deciding whether to give a direction or make a revocation order, the Authority must have regard to any representations made in accordance with s 298(3): s 298(5).
- 15 Ie under the Financial Services and Markets Act 2000 s 296: see PARA 714.
- 16 Financial Services and Markets Act 2000 s 298(6)(a).
- 17 Financial Services and Markets Act 2000 s 298(6)(b).
- 18 Ie under the Financial Services and Markets Act 2000 s 296: see PARA 714.
- 19 Financial Services and Markets Act 2000 s 298(7)(a).
- 20 Financial Services and Markets Act 2000 s 298(7)(b). If the Authority has, in relation to a particular matter, followed the procedure set out in s 298(1)-(5), it need not follow it again if, in relation to that matter, it decides to take action other than that specified in its notice under s 298(1) (see the text and notes 1-7): s 298(8).

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### **717. Complaints about recognised bodies.**

The Financial Services Authority<sup>1</sup> must make arrangements for the investigation of any relevant complaint<sup>2</sup> about a recognised body<sup>3</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 'Relevant complaint' means a complaint which the Authority considers is relevant to the question of whether the body concerned should remain a recognised body: Financial Services and Markets Act 2000 s 299(2). As to the meaning of 'recognised body' see PARA 685 note 6.

3 Financial Services and Markets Act 2000 s 299(1).

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### **718. Disciplinary proceedings before the Financial Services and Markets Tribunal.**

The Treasury<sup>1</sup> has power, if it is satisfied that the condition mentioned below<sup>2</sup> is satisfied, to make an order conferring functions on the Financial Services and Markets Tribunal<sup>3</sup> with respect to disciplinary proceedings<sup>4</sup> of one or more investment exchanges in relation to which a recognition order<sup>5</sup> is in force or of such investment exchanges generally<sup>6</sup> or of one or more



clearing houses in relation to which a recognition order<sup>7</sup> is in force or of such clearing houses generally<sup>8</sup>.

The condition is that it is desirable to exercise the power described above<sup>9</sup> with a view to ensuring that: (1) decisions taken in disciplinary proceedings with respect to which functions are to be conferred on the Tribunal are consistent with decisions of the Tribunal in cases arising under Part VIII of the Financial Services and Markets Act 2000<sup>10</sup> and decisions taken in other disciplinary proceedings with respect to which the Tribunal has functions as a result of an order made by the Treasury<sup>11</sup>; or (2) the disciplinary proceedings are in accordance with the Convention rights<sup>12</sup>.

An order may modify or exclude any provision made by or under the Financial Services and Markets Act 2000 with respect to proceedings before the Tribunal<sup>13</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 Ie mentioned in the Financial Services and Markets Act 2000 s 300(2).

3 As to the Financial Services and Markets Tribunal see PARA 43 et seq.

4 'Disciplinary proceedings' means proceedings under the rules of an investment exchange or clearing house in relation to market abuse by persons subject to the rules: Financial Services and Markets Act 2000 s 300(4). As to rules of an investment exchange and rules of a clearing house see PARA 685 note 7. As to the meaning of 'market abuse' see PARA 437.

5 Ie under the Financial Services and Markets Act 2000 s 290: see PARA 709. As to the meaning of 'recognition order' generally see PARA 684 note 1.

6 Financial Services and Markets Act 2000 s 300(1)(a). At the date at which this volume states the law no such order had been made. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

7 Ie under the Financial Services and Markets Act 2000 s 290: see PARA 709.

8 Financial Services and Markets Act 2000 s 300(1)(b). See note 6.

9 Ie the power conferred by the Financial Services and Markets Act 2000 s 300(1).

10 Financial Services and Markets Act 2000 s 300(2)(a)(i). As to Pt VIII (ss 118-131A) see PARA 437 et seq.

11 Financial Services and Markets Act 2000 s 300(2)(a)(ii). The order referred to in the text is an order made under s 300.

12 Financial Services and Markets Act 2000 s 300(2)(b). 'Convention rights' has the meaning given in the Human Rights Act 1998 s 1 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): Financial Services and Markets Act 2000 s 300(5).

13 Financial Services and Markets Act 2000 s 300(3).

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## **719. Liability in relation to recognised body's regulatory functions.**

A recognised body<sup>1</sup> and its officers and staff are not liable in damages for anything done or omitted in the discharge of the recognised body's regulatory functions<sup>2</sup> unless it is shown that the act or omission was in bad faith<sup>3</sup>.

1 As to the meaning of 'recognised body' see PARA 685 note 6.

2 'Regulatory functions' means the functions of the recognised body so far as relating to, or to matters arising out of, the obligations to which the body is subject under or by virtue of the Financial Services and Markets Act 2000: s 291(3).

3 Financial Services and Markets Act 2000 s 291(1). However, s 291(1) does not prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of the Human Rights Act 1998 s 6(1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**): Financial Services and Markets Act 2000 s 291(2).

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## 720. Supervision of certain contracts.

The Secretary of State<sup>1</sup> and the Treasury<sup>2</sup>, acting jointly, may by regulations provide for certain provisions relating to safeguarding financial markets on an insolvency<sup>3</sup> to apply to relevant contracts as they apply to contracts connected with a recognised body<sup>4</sup>. 'Relevant contracts' means contracts of a prescribed<sup>5</sup> description in relation to which settlement arrangements are provided by a person for the time being included in a list (the 'list') maintained by the Financial Services Authority for these purposes<sup>6</sup>.

The approval of the Treasury is required for the conditions set by the Authority for admission to the list<sup>7</sup> and the arrangements for admission to, and removal from, the list<sup>8</sup>.

The Authority must publish the list as for the time being in force<sup>9</sup> and provide a certified copy of it to any person who wishes to refer to it in legal proceedings<sup>10</sup>. A certified copy of the list is evidence of the contents of the list<sup>11</sup>. A copy of the list which purports to be certified by or on behalf of the Authority is to be taken to have been duly certified unless the contrary is shown<sup>12</sup>.

1 As to the Secretary of State see PARA 3.

2 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Ie the Companies Act 1989 Pt VII (ss 154-191) (financial markets and insolvency) (see PARA 509 et seq) and the Companies (No 2) (Northern Ireland) Order 1990, SI 1990/1504 (NI 10) Pt V.

4 Financial Services and Markets Act 2000 s 301(1). As to the meaning of 'recognised body' see PARA 685 note 6. Regulations may be made under s 301 only if the Secretary of State and the Treasury are satisfied, having regard to the extent to which the relevant contracts concerned are contracts of a kind dealt in by persons supervised by the Financial Services Authority, that it is appropriate for the arrangements mentioned in s 301(2) to be supervised by the Authority: s 301(3). At the date at which this volume states the law no such regulations had been made. As to regulations made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

5 'Prescribed' means prescribed in regulations made by the Treasury: Financial Services and Markets Act 2000 s 417(1). See note 4.

6 Financial Services and Markets Act 2000 s 301(2).

7 Financial Services and Markets Act 2000 s 301(4)(a).

8 Financial Services and Markets Act 2000 s 301(4)(b). If the Treasury withdraws an approval given by it under s 301(4), all regulations made under s 301 and then in force are to be treated as suspended: s 301(5). However, if the Authority changes the conditions or arrangements (or both) (s 301(6)(a)) and the Treasury give a fresh approval under s 301(4) (s 301(6)(b)), the suspension of the regulations ends on such date as the Treasury may, in giving the fresh approval, specify (s 301(6)).

9 Financial Services and Markets Act 2000 s 301(7)(a).

10 Financial Services and Markets Act 2000 s 301(7)(b).

11 Financial Services and Markets Act 2000 s 301(8).

12 Financial Services and Markets Act 2000 s 301(9). Regulations under s 301 may, in relation to a person included in the list: (1) apply (with such exceptions, additions and modifications as appear to the Secretary of State and the Treasury to be necessary or expedient) such provisions of, or made under, the Financial Services and Markets Act 2000 as they consider appropriate (s 301(10)(a)); (2) provide for the provisions of the Companies Act 1989 Pt VII (see PARA 509 et seq) and the Companies (No 2) (Northern Ireland) Order 1990 Pt V to apply (with such exceptions, additions or modifications as appear to the Secretary of State and the Treasury to be necessary or expedient) (Financial Services and Markets Act 2000 s 301(10)(b)). See note 4.

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## ***D. DISALLOWANCE OF EXCESSIVE REGULATORY PROVISION***

### **721. Power of the Financial Services Authority to disallow excessive regulatory provision.**

Where a recognised body<sup>1</sup> proposes to make any regulatory provision<sup>2</sup> in connection with its business as an investment exchange or the provision by it of clearing services<sup>3</sup>, if it appears to the Financial Services Authority<sup>4</sup> (1) that the proposed provision will impose a requirement<sup>5</sup> on persons affected (directly or indirectly) by it<sup>6</sup>; and (2) that the requirement is excessive<sup>7</sup>, the Authority may direct that the proposed provision must not be made<sup>8</sup>. A requirement is excessive if (a) it is not required under Community law or any enactment or rule of law in the United Kingdom<sup>9</sup>; and (b) either it is not justified as pursuing a reasonable regulatory objective, or it is disproportionate to the end to be achieved<sup>10</sup>. In considering whether a requirement is excessive the Authority must have regard to all the relevant circumstances, including: (i) the effect of existing legal and other requirements<sup>11</sup>; (ii) the global character of financial services and markets and the international mobility of activity<sup>12</sup>; (iii) the desirability of facilitating innovation<sup>13</sup>; and (iv) the impact of the proposed provision on market confidence<sup>14</sup>. Any provision made in contravention of a direction under the above provisions is of no effect<sup>15</sup>.

For the purposes of the above provisions a variation of a proposal is treated as a new proposal<sup>16</sup>.

- 1 As to the meaning of 'recognised body' see PARA 685 note 6.
- 2 'Regulatory provision' means any rule, guidance, arrangements, policy or practice, and references to making provision must be read accordingly as including, as the case may require, issuing guidance, entering into arrangements or adopting a policy or practice: Financial Services and Markets Act 2000 s 300E(1) (s 300E added by Investment Exchanges and Clearing Houses Act 2006 s 2).
- 3 Financial Services and Markets Act 2000 s 300A(1) (s 300A added by the Investment Exchanges and Clearing Houses Act 2006 s 1). The Financial Services and Markets Act 2000 ss 300A-300D do not apply to an overseas investment exchange or overseas clearing house: s 300E(3) (as added: see note 2). As to the meanings of 'overseas investment exchange' and 'overseas clearing house' see PARA 709 note 12.
- 4 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 5 For these purposes, 'requirement' includes any obligation or burden: Financial Services and Markets Act 2000 s 300A(5) (as added: see note 3).
- 6 Financial Services and Markets Act 2000 s 300A(2)(a) (as added: see note 3).
- 7 Financial Services and Markets Act 2000 s 300A(2)(b) (as added: see note 3).
- 8 Financial Services and Markets Act 2000 s 300A(2) (as added: see note 3).
- 9 Financial Services and Markets Act 2000 s 300A(3)(a) (as added: see note 3). As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 10 Financial Services and Markets Act 2000 s 300A(3)(b) (as added: see note 3).
- 11 Financial Services and Markets Act 2000 s 300A(4)(a) (as added: see note 3).
- 12 Financial Services and Markets Act 2000 s 300A(4)(b) (as added: see note 3).
- 13 Financial Services and Markets Act 2000 s 300A(4)(c) (as added: see note 3).
- 14 Financial Services and Markets Act 2000 s 300A(4)(d) (as added: see note 3).
- 15 Financial Services and Markets Act 2000 s 300A(6).
- 16 Financial Services and Markets Act 2000 s 300E(2) (as added: see note 2).

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## **722. Duty to notify proposal to make regulatory provision.**

A recognised body<sup>1</sup> that proposes to make any regulatory provision<sup>2</sup> must give written notice of the proposal to the Financial Services Authority<sup>3</sup> without delay<sup>4</sup>. The Authority may by rules<sup>5</sup> (1) specify descriptions of regulatory provision in relation to which, or circumstances in which, the above duty<sup>6</sup> does not apply<sup>7</sup>; or (2) provide that the duty applies only to specified descriptions of regulatory provision or in specified circumstances<sup>8</sup>. The Authority may also by rules<sup>9</sup> (a) make provision as to the form and contents of the notice required<sup>10</sup>; and (b) require the body to provide such information relating to the proposal as may be specified in the rules or as the Authority may reasonably require<sup>11</sup>.

For the purposes of the above provisions a variation of a proposal is treated as a new proposal<sup>12</sup>.

- 1 As to the meaning of 'recognised body' see PARA 685 note 6.
- 2 As to the meaning of 'regulatory provision' see PARA 721 note 2.
- 3 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 4 Financial Services and Markets Act 2000 s 300B(1) (s 300B added by the Investment Exchanges and Clearing Houses Act 2006 s 2). The Financial Services and Markets Act 2000 ss 300A-300D do not apply to an overseas investment exchange or overseas clearing house: s 300E(3) (s 300E added by the Investment Exchanges and Clearing Houses Act 2006 s 2). As to the meanings of 'overseas investment exchange' and 'overseas clearing house' see PARA 709 note 12.
- 5 Ie under the Financial Services and Markets Act 2000 s 293 (notification requirements): see PARA 711.
- 6 Ie the duty under the Financial Services and Markets Act 2000 s 300B(1).
- 7 Financial Services and Markets Act 2000 s 300B(2)(a) (as added: see note 4).
- 8 Financial Services and Markets Act 2000 s 300B(2)(b) (as added: see note 4).
- 9 Ie under the Financial Services and Markets Act 2000 s 293.
- 10 Financial Services and Markets Act 2000 s 300B(3)(a) (as added: see note 4).
- 11 Financial Services and Markets Act 2000 s 300B(3)(b) (as added: see note 4).
- 12 Financial Services and Markets Act 2000 s 300E(2) (as added: see note 4).

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### **723. Restriction on making provision before the Financial Services Authority decides whether to act.**

Where notice of a proposal to make regulatory provision<sup>1</sup> is required to be given to the Financial Services Authority<sup>2</sup>, the provision must not be made (1) before that notice is given<sup>3</sup>; or (2) subject to the following provisions<sup>4</sup>, before the end of the initial period<sup>5</sup>. If before the end of the initial period the Authority notifies the body that it is calling in the proposal, specified provisions<sup>6</sup> apply as to when the provision may be made<sup>7</sup>. If (a) before the end of the initial period the Authority notifies the body that it is not calling in the proposal<sup>8</sup>; or (b) the initial period ends without the Authority having notified the body that it is calling in the proposal<sup>9</sup>, the body may then make the proposed provision<sup>10</sup>. Any provision made in contravention of the above provisions is of no effect<sup>11</sup>.

For the purposes of the above provisions a variation of a proposal is treated as a new proposal<sup>12</sup>.

- 1 As to the meaning of 'regulatory provision' see PARA 723 note 2.
- 2 Ie under the Financial Services and Markets Act 2000 s 300B: see PARA 722. As to the Financial Services Authority see PARAS 4, 6 et seq.
- 3 Financial Services and Markets Act 2000 s 300C(1)(a) (s 300C added by the Investment Exchanges and Clearing Houses Act 2006 s 2). The Financial Services and Markets Act 2000 ss 300A-300D do not apply to an

overseas investment exchange or overseas clearing house: s 300E(3) (s 300E added by the Investment Exchanges and Clearing Houses Act 2006 s 2). As to the meanings of 'overseas investment exchange' and 'overseas clearing house' see PARA 709 note 12.

4 le the following provisions of the Financial Services and Markets Act 2000 s 300C.

5 Financial Services and Markets Act 2000 s 300C(1)(b) (as added: see note 3). The initial period is (1) the period of 30 days beginning with the day on which the Authority receives notice of the proposal; or (2) if any consultation period announced by the body in relation to the proposal ends after that 30-day period, the end of the consultation period: s 300C(2) (as so added).

6 le the provisions of the Financial Services and Markets Act 2000 s 300D: see PARA 724.

7 Financial Services and Markets Act 2000 s 300C(3) (as added: see note 3).

8 Financial Services and Markets Act 2000 s 300C(4)(a) (as added: see note 3).

9 Financial Services and Markets Act 2000 s 300C(4)(b) (as added: see note 3).

10 Financial Services and Markets Act 2000 s 300C(4) (as added: see note 3).

11 Financial Services and Markets Act 2000 s 300C(5) (as added: see note 3).

12 Financial Services and Markets Act 2000 s 300E(2) (as added: see note 3).

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## **724. Consideration by the Financial Services Authority whether to disallow proposed provision.**

Where the Financial Services Authority<sup>1</sup> notifies a recognised body<sup>2</sup> that it is calling in a proposal to make regulatory provision<sup>3</sup>, the Authority must publish a notice (1) giving details of the proposed provision<sup>4</sup>; (2) stating that it has called in the proposal in order to consider whether to disallow it<sup>5</sup>; and (3) specifying a period during which representations with respect to that question may be made to it<sup>6</sup>. The Authority may extend the period for making representations<sup>7</sup>.

The Authority must notify the body of its decision whether to disallow the provision not later than 30 days after the end of the period for making representations, and must publish the decision and the reasons for it<sup>8</sup>. The body must not make the provision unless and until (a) the Authority notifies it of its decision not to disallow it<sup>9</sup>; or (b) the 30-day period<sup>10</sup> ends without the Authority having notified any decision<sup>11</sup>.

If the Authority notifies the body of its decision to disallow the provision and that decision is questioned in legal proceedings (i) the body must not make the provision until those proceedings, and any proceedings on appeal, are finally determined<sup>12</sup>; (ii) if the Authority's decision is quashed and the matter is remitted to it for reconsideration, the court may give directions as to the period within which the Authority is to complete its reconsideration<sup>13</sup>; and (iii) the body must not make the provision until (A) the Authority notifies it of its decision on reconsideration not to disallow the provision<sup>14</sup>; or (B) the period specified by the court ends without the Authority having notified any decision<sup>15</sup>.

For the purposes of the above provisions a variation of a proposal is treated as a new proposal<sup>16</sup>.

- 1 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 2 As to the meaning of 'recognised body' see PARA 685 note 6.
- 3 Financial Services and Markets Act 2000 s 300D(1) (s 300D added by the Investment Exchanges and Clearing Houses Act 2006 s 2). As to the meaning of 'regulatory provision' see PARA 721 note 2. The Financial Services and Markets Act 2000 ss 300A-300D do not apply to an overseas investment exchange or overseas clearing house: s 300E(3) (s 300E added by the Investment Exchanges and Clearing Houses Act 2006 s 2). As to the meanings of 'overseas investment exchange' and 'overseas clearing house' see PARA 709 note 12.
- 4 Financial Services and Markets Act 2000 s 300D(2)(a) (as added: see note 3).
- 5 Financial Services and Markets Act 2000 s 300D(2)(b) (as added: see note 3).
- 6 Financial Services and Markets Act 2000 s 300D(2)(c) (as added: see note 3).
- 7 Financial Services and Markets Act 2000 s 300D(3) (as added: see note 3).
- 8 Financial Services and Markets Act 2000 s 300D(4) (as added: see note 3).
- 9 Financial Services and Markets Act 2000 s 300D(5)(a) (as added: see note 3). Any provision made in contravention of s 300D(5) or (6) is of no effect: s 300D(7) (as so added).
- 10 Specified in the Financial Services and Markets Act 2000 s 300D(4).
- 11 Financial Services and Markets Act 2000 s 300D(5)(b) (as added: see note 3). See note 9.
- 12 Financial Services and Markets Act 2000 s 300D(6)(a) (as added: see note 3). See note 9.
- 13 Financial Services and Markets Act 2000 s 300D(6)(b) (as added: see note 3). See note 9.
- 14 Financial Services and Markets Act 2000 s 300D(6)(c)(i) (as added: see note 3). See note 9.
- 15 Financial Services and Markets Act 2000 s 300D(6)(c)(ii) (as added: see note 3). See note 9.
- 16 Financial Services and Markets Act 2000 s 300E(2) (as added: see note 3).

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## ***E. CONTROL OVER RECOGNISED INVESTMENT EXCHANGES***

### **725. Acquiring or increasing control.**

If a step which a person proposes to take would result in his acquiring<sup>1</sup> (1) control over a recognised investment exchange<sup>2</sup>; (2) an additional<sup>3</sup> kind of control<sup>4</sup> over an exchange; or (3) an increase<sup>5</sup> in a relevant kind of control which he already has<sup>6</sup> over an exchange, he must notify the Financial Services Authority<sup>7</sup> of his proposal<sup>8</sup>.

A person who, without himself taking any such step, acquires any such control or additional or increased control must notify the Authority before the end of the period of 14 days beginning with the day on which he first becomes aware that he has acquired it<sup>9</sup>. A person who is under

the duty to notify the Authority imposed by heads (1) to (3) above<sup>10</sup> must also give notice to the Authority on acquiring, or increasing, the control in question<sup>11</sup>.

Such a notice<sup>12</sup> is referred to<sup>13</sup> as a 'notice of control'<sup>14</sup>.

1 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII Ch IA (ss 301A-301G), a person (the 'acquirer') acquires control over a recognised investment exchange ('E') on first falling within any of the cases set out below: s 301B(1) (ss 301A, 301B, 301G added by SI 2007/126). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

The cases referred to above are where the acquirer:

- 647 (1) holds 20% or more of the shares in E (Financial Services and Markets Act 2000 s 301B(2)(a) (as so added));
- 648 (2) is able to exercise significant influence over the management of E by virtue of his shareholding in E (s 301B(2)(b) (as so added));
- 649 (3) holds 20% or more shares in a parent undertaking ('P') of E (s 301B(2)(c) (as so added));
- 650 (4) is able to exercise significant influence over the management of P by virtue of his shareholding in P (s 301B(2)(d) (as so added));
- 651 (5) is entitled to exercise, or control the exercise of, 20% or more of the voting power in E (s 301B(2)(e) (as so added));
- 652 (6) is able to exercise significant influence over the management of E by virtue of his voting power in E (s 301B(2)(f) (as so added));
- 653 (7) is entitled to exercise, or to control the exercise of, 20% or more of the voting power in P (s 301B(2)(g) (as so added)); or
- 654 (8) is able to exercise significant influence over the management of P by virtue of his voting power in P (s 301B(2)(h) (as so added)).

In s 301B(2) 'acquirer' means (a) the acquirer; (b) any of his associates; or (c) the acquirer and any of his associates: s 301B(3) (as so added). As to the meanings of 'associate', 'shares' and 'voting power' see PARA 591 note 16; definitions applied by s 310G (as so added). 'Controller', in relation to a recognised investment exchange, means a person who falls within any of the cases in the Financial Services and Markets Act 2000 s 301B(2) (see heads (1)-(8) above): s 301G (as so added). As to the meaning of 'parent undertaking' see PARA 351 note 32.

In Pt XVIII Ch IA (other than s 301B) 'acquiring control' or 'having control' includes: (i) acquiring or having an additional kind of control; or (ii) acquiring an increase in a relevant kind of control, or having increased control of a relevant kind: s 301B(7) (as so added). See also notes 4, 5.

2 See note 1.

3 As to additional control see note 1.

4 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII Ch IA, each of the following is to be regarded as a kind of control:

- 655 (1) control arising as a result of the holding of shares in E (s 301B(4)(a) (as added: see note 1));
- 656 (2) control arising as a result of the holding of shares in P (s 301B(4)(b) (as so added));
- 657 (3) control arising as a result of the entitlement to exercise, or control the exercise of, voting power in E (s 301B(4)(c) (as so added));
- 658 (4) control arising as a result of the entitlement to exercise, or control the exercise of, voting power in P (s 301B(4)(d) (as so added)).

5 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII Ch IA, a controller of E increases his control over E if:



- 659 (1) the percentage of shares held by the controller in E increases by the step mentioned in s 301B(6) (see below) (s 301B(5)(a) (as added: see note 1));
- 660 (2) the percentage of shares held by the controller in P increases by the step mentioned in s 301B(6) (see below) (s 301(5)(b) (as so added));
- 661 (3) the percentage of voting power which the controller is entitled to exercise, or control the exercise of, in E increases by the step mentioned in s 301B(6) (see below) (s 301(5)(c) (as so added));
- 662 (4) the percentage of voting power which the controller is entitled to exercise, or control the exercise of, in P increases by the step mentioned in s 301B(6) (see below) (s 301(5)(d) (as so added)); or
- 663 (5) the controller becomes a parent undertaking of E (s 301(5)(e) (as so added)).

The step referred to above is from 20% or more (but less than 50%) to 50% or more: s 301B(6) (as so added).

6 As to having control see note 1.

7 As to the Financial Services Authority see PARAS 4, 6 et seq.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

8 Financial Services and Markets Act 2000 s 301A(1) (as added: see note 1). Nothing in Pt XVIII Ch IA applies to an overseas investment exchange: s 301A(6) (as so added). As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

9 Financial Services and Markets Act 2000 s 301A(2) (as added: see note 1).

10 Ie under the Financial Services and Markets Act 2000 s 301A(1).

11 Financial Services and Markets Act 2000 s 301A(3) (as added: see note 1).

12 Ie under the Financial Services and Markets Act 2000 s 301A(1) or (2).

13 Ie in the Financial Services and Markets Act 2000 Pt XVIII Ch IA.

14 Financial Services and Markets Act 2000 ss 301A(4), 310G (as added: see note 1). Section 182 (see PARA 377) applies to a notice of control under Pt XVIII Ch IA as it applies to a notice of control under Pt XII (ss 178-192) (see PARA 377 et seq): s 301A(5) (as so added).

## UPDATE

### 725 Acquiring or increasing control

TEXT AND NOTES--2000 Act ss 301A, 301B replaced: Financial Services and Markets Act 2000 ss 301A-301C (notices of control) and ss 301D, E (acquiring and increasing control) (ss 301A-301E substituted by SI 2009/534).

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### 726. Duty of the Financial Services Authority in relation to notice of control.

The Financial Services Authority<sup>1</sup> must, before the end of the period of three months beginning with the date on which it receives a notice of control<sup>2</sup>, determine whether (1) to approve of the person concerned having the control<sup>3</sup> to which the notice relates<sup>4</sup>; or (2) to give a warning notice<sup>5</sup>. If the Authority decides to approve of the person concerned having the control to which the notice relates it must notify that person of its approval in writing without delay<sup>6</sup>.

If the Authority fails to comply with making the above determination within the three month period<sup>7</sup> it is to be treated as having given its approval and notified the person concerned at the end of the period so fixed<sup>8</sup>.

The Authority's approval remains effective only if the person to whom it relates acquires the control<sup>9</sup> in question:

1762 (a) before the end of such period as may be specified in the notice of approval<sup>10</sup>; or

1763 (b) if no period is specified, before the end of the period of one year beginning with the date (i) of the notice of approval<sup>11</sup>; (ii) on which the Authority is treated as having given approval<sup>12</sup>; or (iii) of a decision on a reference to the Financial Services and Markets Tribunal<sup>13</sup> which results in the person concerned receiving approval<sup>14</sup>.

The Authority may give a decision notice<sup>15</sup> unless it is satisfied that the approval requirement<sup>16</sup> is met<sup>17</sup>. If the Authority proposes to give the person concerned a decision notice<sup>18</sup>, it must give him a warning notice<sup>19</sup>. A person to whom a decision notice is given<sup>20</sup> may refer the matter to the Tribunal<sup>21</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 As to the meaning of 'notice of control' see PARA 725.

3 As to having control see PARA 725 note 1.

4 Financial Services and Markets Act 2000 s 301C(1)(a) (s 301C added by SI 2007/126).

5 Financial Services and Markets Act 2000 s 301C(1)(b) (as added: see note 4). The notice referred to is the notice under s 301C(7): see the text and note 21.

6 Financial Services and Markets Act 2000 s 301C(2) (as added: see note 4).

7 It fails to comply with the Financial Services and Markets Act 2000 s 301C(1).

8 Financial Services and Markets Act 2000 s 301C(3) (as added: see note 4). The period referred to is fixed by s 301C(1).

9 As to acquiring control see PARA 725 note 1.

10 Financial Services and Markets Act 2000 s 301C(4)(a) (as added: see note 4). The reference is to the notice of approval under s 301C(2).

11 Financial Services and Markets Act 2000 s 301C(4)(b)(i) (as added: see note 4). See note 8.

12 Financial Services and Markets Act 2000 s 301C(4)(b)(ii) (as added: see note 4). Approval is given under s 301C(3).

13 As to the Financial Services and Markets Tribunal see PARA 43 et seq.

14 Financial Services and Markets Act 2000 s 301C(4)(b)(iii) (as added: see note 4).

15 It under the Financial Services and Markets Act 2000 s 301C(5). As to decision notices see PARA 770.

16 The approval requirement is that the acquisition of control by the person who gave the notice of control does not pose a threat to the sound and prudent management of any financial market operated by the recognised investment exchange: Financial Services and Markets Act 2000 s 301C(6) (as added: see note 4). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

17 Financial Services and Markets Act 2000 s 301C(5) (as added: see note 4).

18 Ie under the Financial Services and Markets Act 2000 s 301C(5).

19 Financial Services and Markets Act 2000 s 301C(6) (as added: see note 4). As to warning notices see PARA 769.

20 Ie under the Financial Services and Markets Act 2000 s 301C(5).

21 Financial Services and Markets Act 2000 s 301C(7) (as added: see note 4).

## UPDATE

### 726 Duty of the Financial Services Authority in relation to notice of control

TEXT AND NOTES--2000 Act s 301C replaced: Financial Services and Markets Act 2000 ss 301F-301H (substituted by SI 2009/534).

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### 727. Objection to existing control.

If the Financial Services Authority<sup>1</sup> is not satisfied that the approval requirement<sup>2</sup> is met, it may give a decision notice<sup>3</sup> to a person if he has failed to comply with a duty to notify<sup>4</sup>. In regard to certain such failures<sup>5</sup>, the Authority may (instead of giving such a notice<sup>6</sup>) approve the acquisition of control<sup>7</sup> in question by the person concerned as if he had given it a notice of control<sup>8</sup>.

The Authority may also give a decision notice<sup>9</sup> to a person who is a controller<sup>10</sup> of a recognised investment exchange<sup>11</sup> if the Authority becomes aware of matters as a result of which it is satisfied that the approval requirement is not met with respect to the controller<sup>12</sup>.

If the Authority proposes to give a decision notice in the above two cases<sup>13</sup> to a person, it must give him a warning notice<sup>14</sup> before the end of the period of three months beginning (1) in the first case<sup>15</sup>, with the date on which it became aware of the failure to comply with the duty in question<sup>16</sup>; (2) in the second case<sup>17</sup>, with the date on which it became aware of the matters in question<sup>18</sup>.

A person to whom a decision notice is given<sup>19</sup> may refer the matter to the Financial Services and Markets Tribunal<sup>20</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 'Approval requirement' has the same meaning as in the Financial Services and Markets Act 2000 s 301C (see PARA 726): s 301D(6) (s 301D added by SI 2007/126).

- 3    le under the Financial Services and Markets Act 2000 s 301D. As to decision notices see PARA 770.
- 4    Financial Services and Markets Act 2000 s 301D(1) (as added: see note 2). The reference is to a duty to notify imposed under s 301A: see PARA 725.
- 5    le if the failure relates to the Financial Services and Markets Act 2000 s 301A(1) or (2): see PARA 725.
- 6    le a notice under the Financial Services and Markets Act 2000 s 301D(1).
- 7    As to acquiring control see PARA 725 note 1.
- 8    Financial Services and Markets Act 2000 s 301D(2) (as added: see note 2). As to the meaning of 'notice of control' see PARA 725.
- 9    le under the Financial Services and Markets Act 2000 s 301D.
- 10   As to the meaning of 'controller' see PARA 725 note 1.
- 11   As to the meaning of 'recognised investment exchange' see PARA 684 note 1.
- 12   Financial Services and Markets Act 2000 s 301D(3) (as added: see note 2).
- 13   le under the Financial Services and Markets Act 2000 s 301D(1) or (3).
- 14   As to warning notices see PARA 769.
- 15   le in the case of a notice to be given under the Financial Services and Markets Act 2000 s 301D(1): see the text and notes 1-4.
- 16   Financial Services and Markets Act 2000 s 301D(4)(a) (as added: see note 2).
- 17   le in the case of a notice to be given under the Financial Services and Markets Act 2000 s 301D(3): see the text and notes 9-12.
- 18   Financial Services and Markets Act 2000 s 301D(4)(b) (as added: see note 2).
- 19   le under the Financial Services and Markets Act 2000 s 301D.
- 20   Financial Services and Markets Act 2000 s 301D(5) (as added: see note 2). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

## UPDATE

### 727 Objection to existing control

TEXT AND NOTES--2000 Act s 301D replaced: Financial Services and Markets Act 2000 s 301I (substituted by SI 2009/534).

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### 728. Improperly acquired shares.

The powers<sup>1</sup> considered below are exercisable if a person has acquired, or has continued to hold, any shares in contravention of a decision notice<sup>2</sup>.

The Financial Services Authority<sup>3</sup> may by notice in writing given to the person concerned (a 'restriction notice') direct that any such shares which are specified in the notice are, until further notice, subject to one or more of the following restrictions:

- 1764 (1) a transfer of (or agreement to transfer) those shares, or in the case of unissued shares any transfer of (or agreement to transfer) the right to be issued with them, is void<sup>4</sup>;
- 1765 (2) no voting rights are to be exercisable in respect of the shares<sup>5</sup>;
- 1766 (3) no further shares are to be issued in right of them or in pursuance of any offer made to their holder<sup>6</sup>;
- 1767 (4) except in a liquidation, no payment is to be made of any sums due from the body corporate<sup>7</sup> on the shares, whether in respect of capital or otherwise<sup>8</sup>.

The High Court may, on the application of the Authority, order the sale of any shares<sup>9</sup> and, if they are for the time being subject to any such restriction<sup>10</sup>, that they are to cease to be subject to that restriction<sup>11</sup>.

No such order may be made<sup>12</sup> (a) until the end of the period within which a reference may be made to the Financial Services and Markets Tribunal<sup>13</sup> in respect of the decision notice in question<sup>14</sup>; and (b) if a reference is made, until the matter has been determined or the reference withdrawn<sup>15</sup>. If such an order has been made<sup>16</sup>, the court may, on the application of the Authority, make such further order relating to the sale or transfer of the shares as it thinks fit<sup>17</sup>.

If shares are sold in pursuance of such an order<sup>18</sup>, the proceeds of sale, less the costs of the sale, must be paid into court for the benefit of the persons beneficially interested in them; and any such person may apply to the court for the whole or part of the proceeds to be paid to him<sup>19</sup>.

A copy of the restriction notice must be given to (i) the recognised investment exchange to whose shares it relates<sup>20</sup>; and (ii) if it relates to shares held by an associate of that exchange, that associate<sup>21</sup>.

1 The powers conferred by the Financial Services and Markets Act 2000 s 301E.

Section 301E applies:

- 664 (1) in the case of an acquirer falling within s 301A(1) (see PARA 725), to all the shares (a) in the recognised investment exchange which the acquirer has acquired; (b) which are held by him or an associate of his; and (c) which were not so held immediately before he became a person having control over the exchange (s 301E(7)(a) (s 301E added by SI 2007/126));
- 665 (2) in the case of an acquirer falling within the Financial Services and Markets Act 2000 s 301A(2) (see PARA 725 note 1), to all the shares held by him or an associate of his at the time when he first became aware that he had acquired control over the exchange (s 301E(7)(b) (as so added)); and
- 666 (3) to all the shares in an undertaking ('C') (a) which are held by the acquirer or an associate of his; and (b) which were not so held before he became a person with control in relation to the exchange, where C is the undertaking in which shares were acquired by the acquirer (or an associate of his) and, as a result, he became a person with control in relation to that exchange (s 301E(7)(c) (as so added)).

As to the meanings of 'associate' and 'shares' see PARA 725 note 1. As to the meaning of 'recognised investment exchange' see PARA 684 note 1. As to acquiring control see PARA 725 note 1.

2 Financial Services and Markets Act 2000 s 301E(1) (as added: see note 1). The reference is to a decision notice under s 301C(5) (see PARA 726) or s 301D(1) or (3) (see PARA 727).

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

- 4 Financial Services and Markets Act 2000 s 301E(2)(a) (as added: see note 1).
- 5 Financial Services and Markets Act 2000 s 301E(2)(b) (as added: see note 1).
- 6 Financial Services and Markets Act 2000 s 301E(2)(c) (as added: see note 1).
- 7 As to the meaning of 'body corporate' see PARA 86 note 11.
- 8 Financial Services and Markets Act 2000 s 301E(2)(d) (as added: see note 1).
- 9 le to which the Financial Services and Markets Act 2000 s 301E applies.
- 10 le to any restriction under the Financial Services and Markets Act 2000 s 301(2).
- 11 Financial Services and Markets Act 2000 s 301E(3), (9) (as added: see note 1).
- 12 le under the Financial Services and Markets Act 2000 s 301E(3).
- 13 As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 14 Financial Services and Markets Act 2000 s 301E(4)(a) (as added: see note 1).
- 15 Financial Services and Markets Act 2000 s 301E(4)(b) (as added: see note 1).
- 16 le under the Financial Services and Markets Act 2000 s 301E(3).
- 17 Financial Services and Markets Act 2000 s 301E(5) (as added: see note 1).
- 18 le under the Financial Services and Markets Act 2000 s 301E.
- 19 Financial Services and Markets Act 2000 s 301E(6) (as added: see note 1).
- 20 Financial Services and Markets Act 2000 s 301E(8)(a) (as added: see note 1).
- 21 Financial Services and Markets Act 2000 s 301E(8)(b) (as added: see note 1).

## **UPDATE**

### **728 Improperly acquired shares**

TEXT AND NOTES--2000 Act s 301E replaced: Financial Services and Markets Act 2000 ss 301J, 301K (substituted by SI 2009/534).

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### **729. Offences in regard to acquisition of control.**

A person who fails to comply with certain duties to notify the Financial Services Authority<sup>1</sup> imposed on him<sup>2</sup> is in each case guilty of an offence<sup>3</sup>.

If a person who has given a notice of control<sup>4</sup> to the Authority carries out the proposal to which the notice relates, he is guilty of an offence if (1) the period of three months beginning with the date on which the Authority received the notice is still running<sup>5</sup>; and (2) the Authority has not responded to the notice by either giving its approval or giving him a warning notice<sup>6</sup>.

A person to whom the Authority has given a warning notice<sup>7</sup> is guilty of an offence if he carries out the proposal to which the notice relates before the Authority has decided whether to give him a decision notice<sup>8</sup>.

A person guilty of the above offences<sup>9</sup> is liable on summary conviction to a fine<sup>10</sup>.

A person to whom a decision notice<sup>11</sup> has been given is guilty of an offence if he acquires<sup>12</sup> or retains the control to which the notice applies at a time when the notice is still in force<sup>13</sup>. A person guilty of such an offence<sup>14</sup> is liable on summary conviction to a fine, and on conviction on indictment to imprisonment or a fine or both<sup>15</sup>.

It is a defence for a person charged with the first of the offences in regard to failure to notify the Authority<sup>16</sup> to show that he had, at the time of the alleged offence, no knowledge of the act or circumstances by virtue of which the duty to notify the Authority arose<sup>17</sup>.

If a person (a) was under such a duty to notify the Authority<sup>18</sup> but had no knowledge of the act or circumstances by virtue of which that duty arose<sup>19</sup>; but (b) subsequently becomes aware of that act or those circumstances<sup>20</sup>, he must notify the Authority before the end of the period of 14 days beginning with the day on which he first became so aware<sup>21</sup>. Such a person<sup>22</sup> is guilty of an offence and liable, on summary conviction, to a fine<sup>23</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

As to the power of the Authority to disallow excessive regulatory provision by recognised investment exchanges and clearing houses see PARA 721 et seq.

2 He imposed on him by the Financial Services and Markets Act 2000 s 301A(1) or by s 301A(2): see PARA 725.

3 Financial Services and Markets Act 2000 s 301F(1), (2) (s 301F added by SI 2007/126).

4 As to the meaning of 'notice of control' see PARA 725.

5 Financial Services and Markets Act 2000 s 301F(3)(a) (as added: see note 3).

6 Financial Services and Markets Act 2000 s 301F(3)(b) (as added: see note 3). The reference is to a warning notice under s 301C(7): see PARA 726. As to warning notices see PARA 769.

7 He under the Financial Services and Markets Act 2000 s 301C(7): see PARA 726.

8 Financial Services and Markets Act 2000 s 301F(4) (as added: see note 3). Such decision notice is under s 301C(5): see PARA 726. As to decision notices see PARA 770.

9 He of an offence under the Financial Services and Markets Act 2000 s 301F(1), (2), (3) or (4).

10 Financial Services and Markets Act 2000 s 301F(6) (as added: see note 3). The reference is to a fine not exceeding level 5 on the standard scale: see s 301F(6) (as so added). As to the standard scale see PARA 27 note 21.

11 He under the Financial Services and Markets Act 2000 s 301C(5) (see PARA 726) or s 301D(1) or (3) (see PARA 727).

12 As to acquiring control see PARA 725 note 1.

13 Financial Services and Markets Act 2000 s 301F(5) (as added: see note 3).

14 He an offence under the Financial Services and Markets Act 2000 s 301F(5).

15 Financial Services and Markets Act 2000 s 301F(7) (as added: see note 3). Such a person is liable (1) on summary conviction, to a fine not exceeding the statutory maximum; and (2) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or both: see s 301F(7) (as so added). As to the statutory maximum see PARA 56 note 24.

16 He an offence under the Financial Services and Markets Act 2000 s 301F(1): see the text to notes 1-3.

17 Financial Services and Markets Act 2000 s 301F(8) (as added: see note 3).

18 It is a duty to notify the Authority imposed by the Financial Services and Markets Act 2000 s 301A(1): see PARA 725.

19 Financial Services and Markets Act 2000 s 301F(9)(a) (as added: see note 3).

20 Financial Services and Markets Act 2000 s 301F(9)(b) (as added: see note 3).

21 Financial Services and Markets Act 2000 s 301F(9) (as added: see note 3).

22 It is a person who fails to comply with the duty to notify the Authority under the Financial Services and Markets Act 2000 s 301F(9).

23 Financial Services and Markets Act 2000 s 301F(10) (as added: see note 3). The reference is to a fine not exceeding level 5 on the standard scale: see s 301F(10) (as so added).

## UPDATE

### 729 Offences in regard to acquisition of control

TEXT AND NOTES--2000 Act s 301F replaced: Financial Services and Markets Act 2000 s 301L (substituted by SI 2009/534).

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## ***F. COMPETITION SCRUTINY***

### (A) FAIR TRADING

#### **730. Reports.**

The Financial Services Authority<sup>1</sup> must send to the Treasury<sup>2</sup> and to the Office of Fair Trading<sup>3</sup> a copy of any regulatory provisions<sup>4</sup> with which it is provided on an application for recognition<sup>5</sup>. The Authority must send to the Office of Fair Trading such information in its possession as a result of the application for recognition as it considers will assist it in discharging its functions in connection with the application<sup>6</sup>.

The Office of Fair Trading must issue a report as to whether: (1) a regulatory provision of which a copy has been sent to it<sup>7</sup> has a significantly adverse effect on competition<sup>8</sup>; or (2) a combination of regulatory provisions so copied to it have such an effect<sup>9</sup>. If the Office of Fair Trading's conclusion is that one or more provisions have a significantly adverse effect on competition, it must state its reasons for that conclusion<sup>10</sup>. The Office of Fair Trading must keep under review the regulatory provisions and practices of recognised bodies<sup>11</sup>.

If at any time the Office of Fair Trading considers that a regulatory provision or practice has a significantly adverse effect on competition<sup>12</sup> or regulatory provisions or practices, or a combination of regulating provisions and practices have such an effect<sup>13</sup>, it must make a report<sup>14</sup>. If at any time the Office of Fair Trading considers that a regulatory provision or practice does not have a significantly adverse effect on competition<sup>15</sup> or regulatory provisions



or practices, or a combination of regulatory provisions and practices do not have any such effect<sup>16</sup>, it may make a report to that effect<sup>17</sup>.

For the purposes of the law of defamation, absolute privilege attaches to any such report of the Office of Fair Trading<sup>18</sup>.

1 As to the Financial Services and Markets Tribunal see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

2 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

4 For the purposes of the Financial Services and Markets Act 2000 Pt XVIII Ch II (ss 302-310) and Ch III (ss 311, 312), 'regulatory provisions' means: (1) the rules of an investment exchange or a clearing house; (2) any guidance issued by an investment exchange or clearing house; (3) in the case of an investment exchange, the arrangements and criteria mentioned in s 287(3)(a), (b) (see PARA 706); (4) in the case of a clearing house, the arrangements and criteria mentioned in s 288(3) (see PARA 707): s 302(1) (definition amended by SI 2007/126). As to rules of a clearing house and rules of an investment exchange see PARA 685 note 7.

References in the Financial Services and Markets Act 2000 Pt XVIII (ss 285-313) to guidance issued by an investment exchange are references to guidance issued, or any recommendation made, in writing or other legible form and intended to have continuing effect, by the investment exchange to all or any class of its members or users (s 313(3)(a)) or persons seeking to become members of the investment exchange or to use its facilities (s 313(3)(b)), with respect to any of the matters mentioned in s 313(2)(a)-(c) (see PARA 685) (s 313(3)).

References in Pt XVIII to guidance issued by a clearing house are to guidance issued, or any recommendation made, in writing or other legible form and intended to have continuing effect, by the clearing house to all or any class of its members (s 313(4)(a)) or persons using or seeking to use its services (s 313(4)(b)), with respect to the provision by it or its members of clearing services (s 313(4)).

5 Financial Services and Markets Act 2000 s 303(1) (s 303(1)-(5) amended by the Enterprise Act 2002 Sch 25 para 40(1), (10)). As to the application for recognition see the Financial Services and Markets Act 2000 s 287 (see PARA 706) or s 288 (see PARA 707).

6 Financial Services and Markets Act 2000 s 303(2) (as amended: see note 5).

7 Ie under the Financial Services and Markets Act 2000 s 303(1).

8 Financial Services and Markets Act 2000 s 303(3)(a) (as amended: see note 5). For the purposes of Pt XVIII Ch II, regulatory provisions or practices have a significantly adverse effect on competition if: (1) they have, or are intended or likely to have, that effect (s 302(2)(a)); or (2) the effect that they have, or are intended or likely to have, is to require or encourage behaviour which has, or is intended or likely to have, a significantly adverse effect on competition (s 302(2)(b)).

'Practices' means: (a) in relation to a recognised investment exchange, the practices of the exchange in its capacity as such; and (b) in relation to a recognised clearing house, the practices of the clearing house in respect of its clearing arrangements: s 302(1). As to the meaning of 'recognised investment exchange' see PARA 684 note 1; and as to the meaning of 'recognised clearing house' see PARA 684 note 6.

If regulatory provisions or practices have, or are intended or likely to have, the effect of requiring or encouraging exploitation of the strength of a market position they are to be taken, for the purposes of Pt XVIII Ch II, to have an adverse effect on competition: s 302(3). In determining under Pt XVIII Ch II whether any regulatory provisions have, or are intended or likely to have, a particular effect, it may be assumed that persons to whom the provisions concerned are addressed will act in accordance with them: s 302(4).

In the case of an application for recognition under s 287 (see PARA 706), the Office of Fair Trading must issue its report under s 303(3) before the end of the period of 12 weeks beginning with the date on which it receives the copy sent to it under s 303(1): s 303(6) (s 303(6), (7) added by SI 2007/126). The Financial Services and Markets Act 2000 s 303(6) does not apply if the application is made by an overseas investment exchange: s 303(7) (as so added). As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

9 Financial Services and Markets Act 2000 s 303(3)(b) (as amended: see note 5). See note 8. When the Office of Fair Trading issues a report under s 303(3), it must send a copy of it to the Authority, the Competition

Commission and the Treasury: s 303(5) (as so amended). As to the Competition Commission see **COMPETITION** vol 18 (2009) PARA 9.

10 Financial Services and Markets Act 2000 s 303(4) (as amended: see note 5).

11 Financial Services and Markets Act 2000 s 304(1) (s 304(1)-(10) amended by the Enterprise Act 2002 Sch 25 para 40(1), (11)). As to the meaning of 'recognised body' see PARA 685 note 6.

12 Financial Services and Markets Act 2000 s 304(2)(a) (as amended: see note 11).

13 Financial Services and Markets Act 2000 s 304(2)(b) (as amended: see note 11).

14 Financial Services and Markets Act 2000 s 304(2) (as amended: see note 11). A report under s 304(2) must contain details of the adverse effect on competition: s 304(4). If the Office of Fair Trading makes a report under s 304(2), it must send a copy of it to the Treasury, to the Competition Commission and to the Authority (s 304(5)(a) (as so amended)) and publish it in the way appearing to it to be best calculated to bring it to the attention of the public (s 304(5)(b) (as so amended)). See further note 17.

15 Financial Services and Markets Act 2000 s 304(3)(a) (as amended: see note 11).

16 Financial Services and Markets Act 2000 s 304(3)(b) (as amended: see note 11).

17 Financial Services and Markets Act 2000 s 304(3) (as amended: see note 11). Before publishing a report under s 304, the Office of Fair Trading must, so far as practicable, exclude any matter which relates to the private affairs of a particular individual the publication of which, in the opinion of the Office, would or might seriously and prejudicially affect its interests: s 304(7) (as so amended). Before publishing such a report, the Office of Fair Trading must exclude any matter which relates to the affairs of a particular body the publication of which, in the opinion of the Office, would or might seriously and prejudicially affect its interests: s 304(8) (as so amended). The provisions of s 304(7), (8) do not apply to the copy of a report which the Office of Fair Trading is required to send to the Treasury, the Competition Commission and the Authority under s 304(5)(a) (see note 14) or s 304(6)(a) (see below): s 304(9) (as so amended).

If the Office of Fair Trading makes a report under s 304(3), it must send a copy of it to the Treasury, to the Competition Commission and to the Authority (s 304(6)(a) (as so amended)) and the Office may publish it (s 304(6)(b) (as so amended)).

18 Financial Services and Markets Act 2000 s 304(10) (as amended: see note 11).

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### **731. Investigations.**

For the purpose of investigating any matter<sup>1</sup>, the Office of Fair Trading<sup>2</sup> may exercise the powers conferred on it, which are described below<sup>3</sup>.

The Office of Fair Trading may by notice in writing require any person to produce to it or to a person appointed by it for the purpose, at a time and place specified in the notice, any document<sup>4</sup> which is specified or described in the notice<sup>5</sup> and is a document in that person's custody or under his control<sup>6</sup>.

The Office of Fair Trading may by notice in writing: (1) require any person carrying on any business to provide it with such information as may be specified or described in the notice<sup>7</sup>; and (2) specify the time within which, and the manner and form in which, any such information is to be provided<sup>8</sup>.

If a person (the 'defaulter') refuses, or otherwise fails, to comply with a notice under these provisions, the Office of Fair Trading may certify that fact in writing to the High Court and the

court may inquire into the case<sup>9</sup>. If, after hearing any witness who may be produced against or on behalf of the defaulter and any statement which may be offered in defence, the court is satisfied that the defaulter did not have a reasonable excuse for refusing or otherwise failing to comply with the notice, the court may deal with the defaulter as if he were in contempt<sup>10</sup>.

1     le with a view to its consideration under the Financial Services and Markets Act 2000 s 303 or s 304: see PARA 730.

2     As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

3     Financial Services and Markets Act 2000 s 305(1) (s 305(1)-(3), (5) amended by the Enterprise Act 2002 Sch 25 para 40(1), (12)).

4     As to the meaning of 'documents' see PARA 10 note 10.

5     Financial Services and Markets Act 2000 s 305(2)(a) (as amended: see note 3).

6     Financial Services and Markets Act 2000 s 305(2)(b) (as amended: see note 3). A requirement may be imposed under s 305(2) or s 305(3)(a) only in respect of documents or information which relate to any matter relevant to the investigation: s 305(4).

7     Financial Services and Markets Act 2000 s 305(3)(a) (as amended: see note 3). See note 6.

8     Financial Services and Markets Act 2000 s 305(3)(b) (as amended: see note 3).

9     Financial Services and Markets Act 2000 s 305(5) (as amended: see note 3), s 305(7).

10    Financial Services and Markets Act 2000 s 305(6).

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## (B) THE COMPETITION COMMISSION

### **732. Investigation and reports by the Competition Commission.**

The Competition Commission<sup>1</sup> must investigate the matter which is the subject of the report by the Office of Fair Trading<sup>2</sup> if the Office sends to the Competition Commission a report<sup>3</sup> or if the Office asks the Commission to consider a report<sup>4</sup>. The Commission must then make its own report on the matter unless it considers that, as a result of a change of circumstances, no useful purpose would be served by a report<sup>5</sup>.

Such a report must state the Commission's conclusion as to whether: (1) the regulatory provision or practice<sup>6</sup> which is the subject of the report has a significantly adverse effect on competition<sup>7</sup>; or (2) the regulatory provisions or practices or combination of regulatory provisions and practices which are the subject of the report have such an effect<sup>8</sup>.

A report stating the Commission's conclusion that there is a significantly adverse effect on competition must also state whether the Commission considers that that effect is justified<sup>9</sup> and, if it states that the Commission considers that it is not justified, state its conclusion as to what action, if any, the Treasury ought to direct the Financial Services Authority to take<sup>10</sup>.

Whenever the Commission is considering, for these purposes, whether a particular adverse effect on competition is justified, the Commission must ensure, so far as that is reasonably possible, that the conclusion it reaches is compatible with the obligations imposed on the recognised body<sup>11</sup> concerned by or under the Financial Services and Markets Act 2000<sup>12</sup>. Such a report must contain such an account of the Commission's reasons for its conclusions as is expedient, in the opinion of the Commission, for facilitating proper understanding of them<sup>13</sup>. If the Commission makes such a report it must send a copy to the Treasury, the Authority and the Office of Fair Trading<sup>14</sup>.

1 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARA 9.

2 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

3 le issued by him under the Financial Services and Markets Act 2000 s 303(3) (see PARA 730) which concludes that one or more regulatory provisions have a significantly adverse effect on competition, or made by him under s 304(2) (see PARA 730). As to the meaning of 'regulatory provisions', and as to regulatory provisions having a significantly adverse effect on competition, see PARA 730.

4 Financial Services and Markets Act 2000 s 306(1)-(3) (s 306(1)-(3), (12) amended by the Enterprise Act 2002 Sch 25 para 40(1), (13)). The report last referred to in the text is to one issued by the Office of Fair Trading under the Financial Services and Markets Act 2000 s 303(3) (see PARA 730) which concludes that one or more regulatory provisions do not have a significantly adverse effect on competition, or made by it under s 304(3) (see PARA 730).

If the case relates to an application for recognition under s 287 (see PARA 706), other than an application by an overseas applicant and s 306(2)(a) or 306(3)(a) applies (ie if the Office of Fair Trading has asked the Commission to consider such a report under s 303(3)), the Commission must (1) make a report under the Financial Services and Markets Act 2000 s 306, or a statement under s 306(5) (see note 5), before the end of the period of 12 weeks beginning with the date on which it receives a copy of the Office's report under s 303(3); and (2) if it makes a statement under s 306(5), send a copy to the Financial Services Authority and the Treasury: s 306(13), (14) (added by SI 2007/126). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

The provisions of Sch 14 (except Sch 14 para 2(b)) (see PARA 40) apply for the purposes of s 306 as they apply for the purposes of s 162 (see PARA 40): s 306(11).

5 Financial Services and Markets Act 2000 s 306(4). If the Commission decides in accordance with s 306(4) not to make a report, it must make a statement setting out the change of circumstances which resulted in that decision: s 306(5). See also note 4.

6 As to the meaning of 'practices' see PARA 730 note 8.

7 Financial Services and Markets Act 2000 s 306(6)(a). See note 4.

8 Financial Services and Markets Act 2000 s 306(6)(b). See note 4.

9 Financial Services and Markets Act 2000 s 306(7)(a). See note 4.

10 Financial Services and Markets Act 2000 s 306(7)(b). See note 4.

11 As to the meaning of 'recognised body' see PARA 685 note 6.

12 Financial Services and Markets Act 2000 s 306(8), (9). See note 4.

13 Financial Services and Markets Act 2000 s 306(10). See note 4.

14 Financial Services and Markets Act 2000 s 306(12) (as amended: see note 4). See note 4.

AREAS/(iii) Recognised Investment Exchanges and Clearing Houses/F. COMPETITION  
 SCRUTINY/(C) The Treasury/733. Power of the Treasury to refuse approval.

## (C) THE TREASURY

### 733. Power of the Treasury to refuse approval.

If, on an application<sup>1</sup> for a recognition order<sup>2</sup>: (1) the Office of Fair Trading<sup>3</sup> makes a report<sup>4</sup> but does not ask the Competition Commission<sup>5</sup> to consider it<sup>6</sup>; (2) the Competition Commission concludes that the applicant's<sup>7</sup> regulatory provisions<sup>8</sup> do not have a significantly adverse effect on competition<sup>9</sup> or, that if those provisions do have that effect, the effect is justified<sup>10</sup>, the Treasury<sup>11</sup> may refuse to approve the making of the recognition order only if it considers that the exceptional circumstances of the case make it inappropriate for it to give its approval<sup>12</sup>.

If, on an application for a recognition order, the Competition Commission concludes: (a) that the applicant's regulatory provisions have a significantly adverse effect on competition<sup>13</sup>; and (b) that that effect is not justified<sup>14</sup>, the Treasury must refuse to approve the making of the recognition order unless it considers that the exceptional circumstances of the case make it inappropriate for it to refuse its approval<sup>15</sup>.

1 As to the meaning of 'application' see PARA 706 note 5.

2 As to the meaning of 'recognition order' see PARA 684 note 1.

3 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

4 Ie under the Financial Services and Markets Act 2000 s 303: see PARA 730.

5 As to the Competition Commission see **COMPETITION** vol 18 (2009) PARA 9.

6 Financial Services and Markets Act 2000 s 307(1)(a) (amended by the Enterprise Act 2002 Sch 25 para 40(1), (14)(a)). The consideration referred to in the text is consideration under the Financial Services and Markets Act 2000 s 306: see PARA 732.

7 As to the meaning of 'applicant' see PARA 706 note 6.

8 As to the meaning of 'regulatory provisions' see PARA 730 note 4.

9 Financial Services and Markets Act 2000 s 307(1)(b)(i). As to regulatory provisions having a significantly adverse effect on competition see PARA 730.

10 Financial Services and Markets Act 2000 s 307(1)(b)(ii).

11 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

12 Financial Services and Markets Act 2000 s 307(2). See note 15.

13 Financial Services and Markets Act 2000 s 307(3)(a).

14 Financial Services and Markets Act 2000 s 307(3)(b).

15 Financial Services and Markets Act 2000 s 307(4). In the case of an application for recognition under s 287 (see PARA 706), other than an application by an overseas applicant, the Treasury must decide whether to approve the application before the end of the period of ten days beginning with (1) in a case falling within s 306(2)(a) or (3)(a) (see PARA 732), the date on which they receive a copy of the report under s 306, if no such report was made, of the statement under s 306(5) (see PARA 732 note 5); (2) in any other case, the date on which they receive a copy of the report from the Office of Fair Trading under s 303 (see PARA 730): s 307(5), (6) (added by SI 2007/126).

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### **734. Power of the Treasury to give directions.**

The provisions described below<sup>1</sup> apply if the Competition Commission<sup>2</sup> makes a report<sup>3</sup> (other than a report on an application for a recognition order<sup>4</sup>) which states the Commission's conclusion that there is a significantly adverse effect on competition<sup>5</sup>.

If the Commission's conclusion, as stated in the report, is that the adverse effect on competition is not justified, the Treasury<sup>6</sup> must give a remedial direction<sup>7</sup> to the Financial Services Authority<sup>8</sup>. If the Commission's conclusion, as stated in its report, is that the adverse effect on competition is justified<sup>9</sup> but the Treasury considers that the exceptional circumstances of the case require it to act<sup>10</sup>, the Treasury may give a direction to the Authority requiring it to take such action as it considers to be necessary in the light of the exceptional circumstances of the case<sup>11</sup> and as may be specified in the direction<sup>12</sup>.

If<sup>13</sup> the Treasury declines to act<sup>14</sup>, it must make a statement to that effect, giving its reasons<sup>15</sup>. If the Treasury gives a direction<sup>16</sup>, it must make a statement giving details of the direction<sup>17</sup>.

The Treasury must: (1) publish any statement made in the way appearing to it best calculated to bring it to the attention of the public<sup>18</sup>; and (2) lay a copy of it before Parliament<sup>19</sup>.

1    Ie the Financial Services and Markets Act 2000 s 308.

2    As to the Competition Commission see **COMPETITION** vol 18 (2009) PARA 9.

3    Ie under the Financial Services and Markets Act 2000 s 306(4); see PARA 732.

4    As to the meaning of 'recognition order' see PARA 684 note 1.

5    Financial Services and Markets Act 2000 s 308(1). As to regulatory provisions having a significantly adverse effect on competition see PARA 730. As to the meaning of 'regulatory provisions' see PARA 730 note 4.

6    As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

7    'Remedial direction' means a direction requiring the Financial Services Authority: (1) to revoke the recognition order for the body concerned; or (2) to give such directions to the body concerned as may be specified in it: Financial Services and Markets Act 2000 s 308(8). In considering the action to be specified in a remedial direction, the Treasury must have regard to any conclusion of the Commission included in the report because of s 306(7)(b) (see PARA 732): s 308(4).

8    Financial Services and Markets Act 2000 s 308(2). As to the Financial Services and Markets Tribunal see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Recognised Investment Exchanges and Recognised Clearing Houses (REC). As to the Handbook generally see PARA 22.

The Financial Services and Markets Act 2000 s 308(2) does not apply if the Treasury considers that, as a result of action taken by the Authority or the recognised body concerned in response to the Commission's report, it is unnecessary for it to give a direction (s 308(3)(a)) or that the exceptional circumstances of the case make it inappropriate or unnecessary for it to do so (s 308(3)(b)).

9    Financial Services and Markets Act 2000 s 308(5)(a).

10   Financial Services and Markets Act 2000 s 308(5)(b).

11   Financial Services and Markets Act 2000 s 308(6)(a).

12 Financial Services and Markets Act 2000 s 308(6)(b). If the action specified in a remedial direction is the giving by the Authority of a direction, the direction to be given must be compatible with the recognition requirements applicable to the recognised body in relation to which it is given (s 308(7)(a)), and s 296(3), (4) applies to it as if it were a direction given under s 296 (see PARA 714) (s 308(7)(b)).

13 Ie in reliance on the Financial Services and Markets Act 2000 s 308(3)(a) or (b): see note 8.

14 Ie under the Financial Services and Markets Act 2000 s 308(2).

15 Financial Services and Markets Act 2000 s 309(1).

16 Ie under the Financial Services and Markets Act 2000 s 308.

17 Financial Services and Markets Act 2000 s 309(2)(a). If the direction is given under s 308(6), the Treasury must give its reasons for giving it: s 309(2)(b).

18 Financial Services and Markets Act 2000 s 309(3)(a).

19 Financial Services and Markets Act 2000 s 309(3)(b).

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### **735. Procedure on exercise of powers by the Treasury.**

If the Treasury<sup>1</sup> is considering the exercise of certain of its powers<sup>2</sup>, the Treasury must: (1) take such steps as it considers appropriate to allow the exchange or clearing house concerned, and any other person appearing to the Treasury to be affected, an opportunity to make representations about any report made by the Office of Fair Trading<sup>3</sup> or by the Competition Commission<sup>4</sup> as to whether, and if so how, the Treasury should exercise its powers<sup>5</sup>; and (2) have regard to any such representations<sup>6</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 Ie: (1) whether to refuse its approval under the Financial Services and Markets Act 2000 s 307 (see PARA 733); (2) whether s 308(2) (see PARA 734) applies; or (3) whether to give a direction under s 308(6) (see PARA 734): s 310(1).

3 Ie under the Financial Services and Markets Act 2000 s 303 or s 304: see PARA 730. As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

4 Financial Services and Markets Act 2000 s 310(2)(a)(i) (amended by the Enterprise Act 2002 Sch 25 para 40(1), (14)(b)). The reference in the text to a report by the Competition Commission is to one under the Financial Services and Markets Act 2000 s 306: see PARA 732. As to the Competition Commission see **COMPETITION** vol 18 (2009) PARA 9.

5 Financial Services and Markets Act 2000 s 310(2)(a)(ii). The Treasury's powers referred to in the text are those under s 307 (see PARA 733) or s 308 (see PARA 734).

6 Financial Services and Markets Act 2000 s 310(2)(b).

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## (D) DISAPPLICATION OF PROVISIONS OF THE

### **736. Disapplication of the Chapter I prohibition.**

The Financial Services and Markets Act 2000 Pt XVIII Ch III<sup>1</sup> disapplies the general domestic competition law as it affects matters covered by the Act.

The prohibition on the restriction of competition affecting trade in the United Kingdom<sup>2</sup> imposed by the Competition Act 1998 (referred to as the 'Chapter I prohibition'<sup>3</sup>) does not apply to an agreement for the constitution of a recognised body<sup>4</sup> to the extent to which the agreement relates to the regulatory provisions<sup>5</sup> of that body<sup>6</sup>.

If the conditions below<sup>7</sup> are satisfied, the Chapter I prohibition does not apply to an agreement for the constitution of an investment exchange which is not a recognised investment exchange<sup>8</sup> or a clearing house which is not a recognised clearing house<sup>9</sup>, to the extent to which the agreement relates to the regulatory provisions of that body<sup>10</sup>. The conditions are that: (1) the body has applied for a recognition order<sup>11</sup> in accordance with the provisions of the Financial Services and Markets Act 2000<sup>12</sup>; and (2) the application has not been determined<sup>13</sup>.

The Chapter I prohibition does not apply to a recognised body's regulatory provisions<sup>14</sup>, nor does it apply to a decision made by a recognised body to the extent to which the decision relates to any of that body's regulatory provisions or practices<sup>15</sup>. The prohibition does not apply to practices of a recognised body<sup>16</sup>. The Chapter I prohibition does not apply to an agreement the parties to which consist of or include a recognised body<sup>17</sup> or a person who is subject to the rules of a recognised body<sup>18</sup>, to the extent to which the agreement consists of provisions the inclusion of which is required or encouraged by any of the body's regulatory provisions or practices<sup>19</sup>.

If a recognised body's recognition order is revoked, the provisions described above<sup>20</sup> have effect as if that body had continued to be recognised until the end of the period of six months beginning with the day on which the revocation took effect<sup>21</sup>.

1    Ie the Financial Services and Markets Act 2000 Pt XVIII Ch III (ss 311, 312).

2    As to the meaning of 'United Kingdom' see PARA 2 note 3.

3    'Chapter I prohibition' means the prohibition imposed by the Competition Act 1998 s 2(1) (see **COMPETITION** vol 18 (2009) PARA 116 et seq): Financial Services and Markets Act 2000 s 311(9). Expressions used in s 311 which are also used in the Competition Act 1998 Pt I (ss 1-60) are to be interpreted in the same way as for the purposes of the Competition Act 1998 Pt I: Financial Services and Markets Act 2000 s 311(10).

4    As to the meaning of 'recognised body' see PARA 685 note 6.

5    As to the meaning of 'regulatory provisions' see PARA 730 note 4.

6    Financial Services and Markets Act 2000 s 311(1).

7    Ie the conditions in the Financial Services and Markets Act 2000 s 311(3).

8    Financial Services and Markets Act 2000 s 311(2)(a). As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

9    Financial Services and Markets Act 2000 s 311(2)(b). As to the meaning of 'recognised clearing house' see PARA 684 note 6.



- 10 Financial Services and Markets Act 2000 s 311(2).
- 11 As to the meaning of 'recognition order' see PARA 684 note 1.
- 12 Financial Services and Markets Act 2000 s 311(3)(a).
- 13 Financial Services and Markets Act 2000 s 311(3)(b).
- 14 Financial Services and Markets Act 2000 s 311(4).
- 15 Financial Services and Markets Act 2000 s 311(5). As to the meaning of 'practices' see PARA 730 note 8.
- 16 Financial Services and Markets Act 2000 s 311(6).
- 17 Financial Services and Markets Act 2000 s 311(7)(a).
- 18 Financial Services and Markets Act 2000 s 311(7)(b).
- 19 Financial Services and Markets Act 2000 s 311(7). As to rules of a clearing house and rules of an investment exchange see PARA 685 note 7.
- 20 In the Financial Services and Markets Act 2000 s 311.
- 21 Financial Services and Markets Act 2000 s 311(8).

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### **737. Disapplication of the Chapter II prohibition.**

The prohibition on the abuse of a dominant position affecting trade in the United Kingdom<sup>1</sup> imposed by the Competition Act 1998 (referred to as the 'Chapter II prohibition'<sup>2</sup>) does not apply to:

- 1768 (1) practices<sup>3</sup> of a recognised body<sup>4</sup>;
- 1769 (2) the adoption or enforcement of such a body's regulatory provisions<sup>5</sup>;
- 1770 (3) any conduct which is engaged in by such a body or by a person who is subject to the rules of such a body to the extent to which it is encouraged or required by the regulatory provisions of the body<sup>6</sup>.

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 'Chapter II prohibition' means the prohibition imposed by the Competition Act 1998 s 18(1) (see **COMPETITION** vol 18 (2009) PARA 125 et seq); Financial Services and Markets Act 2000 s 312(2).

3 As to the meaning of 'practices' see PARA 730 note 8.

4 Financial Services and Markets Act 2000 s 312(1)(a). As to the meaning of 'recognised body' see PARA 685 note 6.

5 Financial Services and Markets Act 2000 s 312(1)(b). As to the meaning of 'regulatory provisions' see PARA 730 note 4.

6 Financial Services and Markets Act 2000 s 312(1)(c). As to rules of a clearing house and rules of an investment exchange see PARA 685 note 7.

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## **G. PASSPORT RIGHTS**

### **(A) EEA MARKET OPERATORS IN THE UNITED KINGDOM**

#### **738. Exercise of passport rights by EEA market operator.**

An EEA market operator<sup>1</sup> may, in pursuance of the right under the applicable provision<sup>2</sup>, make arrangements in the United Kingdom to facilitate access to, or use of, a specified<sup>3</sup> regulated market or specified multilateral trading facility operated by it if (1) the operator has given its home state regulator<sup>4</sup> notice of its intention to make such arrangements<sup>5</sup>; and (2) the home state regulator has given the Financial Services Authority<sup>6</sup> notice of the operator's intention<sup>7</sup>.

In making such arrangements<sup>8</sup>, the operator is exempt from the general prohibition<sup>9</sup> as respects any regulated activity<sup>10</sup> which is carried on as a part of its business of operating the market or facility in question, or in connection with, or for the purposes of, that business<sup>11</sup>.

1 'EEA market operator' means a person who is a market operator (within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.13) whose home state is an EEA state other than the United Kingdom: Financial Services and Markets Act 2000 s 312D (ss 312A, 312D added by SI 2007/126). 'Home state', in relation to an EEA market operator, means the EEA state in which it has its registered office, or if it has no registered office, its head office: Financial Services and Markets Act 2000 s 312D (as so added). As to the meaning of 'EEA state' see PARA 315 note 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 'Applicable provision' means (1) in the case of arrangements relating to a multilateral trading facility, the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 31.5; and (2) in the case of arrangements relating to a regulated market, the first subparagraph of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 42.6: Financial Services and Markets Act 2000 s 312D (as added: see note 1). 'Multilateral trading facility' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.15: Financial Services and Markets Act 2000 s 313(1) (definition added by SI 2007/126). As to the meaning of 'regulated market' see PARA 711 note 24. The exercise of EEA rights is known as 'passporting' or the exercise of 'passport' rights. As to the meaning of 'EEA right' see PARA 315 note 3.

3 'Specified' means specified in the notice referred to in the Financial Services and Markets Act 2000 s 312A(1)(a) (see head (1) in the text): s 312A(3) (as added: see note 1).

4 'Home state regulator' means the competent authority (within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 4.1.22) of the EEA state which is the home state in relation to the EEA market operator concerned: Financial Services and Markets Act 2000 s 312D (as added: see note 1).

5 Financial Services and Markets Act 2000 s 312A(1)(a) (as added: see note 1). Section 312A does not apply to an overseas investment exchange: s 312A(4) (as so added). As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

6 As to the Financial Services Authority see PARAS 4, 6 et seq.

7 Financial Services and Markets Act 2000 s 312A(1)(b) (as added: see note 1). See note 5.

- 8 le arrangements under the Financial Services and Markets Act 2000 s 312A(1).
- 9 As to the general prohibition see PARA 80. As to the general exemption of recognised investment exchanges and recognised clearing houses see PARA 684.
- 10 As to regulated activities see PARA 84 et seq.
- 11 Financial Services and Markets Act 2000 s 312A(2) (as added: see note 1). See note 5.

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### **739. Removal of passport rights from EEA market operator.**

The Financial Services Authority<sup>1</sup> may prohibit an EEA market operator<sup>2</sup> from making or, as the case may be, continuing arrangements in the United Kingdom<sup>3</sup>, in pursuance of the applicable provision<sup>4</sup>, to facilitate access to, or use of, a regulated market<sup>5</sup> or multilateral trading facility<sup>6</sup> operated by the operator if (1) the Authority has clear and demonstrable grounds for believing that the operator has contravened a relevant requirement<sup>7</sup>; and (2) the Authority has first complied with the requirements set out below<sup>8</sup> in subsections (3) to (9).

The first requirement is that the Authority must notify the operator and its home state regulator of its finding under head (1) above<sup>9</sup>.

The second requirements is that the Authority may not exercise the power under heads (1) and (2) above<sup>10</sup> unless satisfied (a) either that the home state regulator has failed or refused to take measures for the purpose<sup>11</sup>; or that the measures taken by the home state regulator have proved inadequate for that purpose<sup>12</sup>; and (b) that the operator is acting in a manner which is clearly prejudicial to the interests of investors in the United Kingdom or the orderly functioning of the financial markets<sup>13</sup>. If the Authority is so satisfied<sup>14</sup>, it must give written notice to the operator, and the home state regulator, of its intention to exercise the power<sup>15</sup>.

The third requirement is that if, having considered any representations<sup>16</sup> made by the operator, the Authority decides to exercise the power<sup>17</sup>, it must (i) notify the operator in writing that it will be prohibited from making or, as the case may be, continuing the arrangements<sup>18</sup> from the date specified in the notice<sup>19</sup>; and (ii) notify the home state regulator of the action to be taken in relation to the operator<sup>20</sup>.

If the Authority exercises the power under heads (1) and (2) above<sup>21</sup> it must at the earliest opportunity notify the European Commission of the action taken in relation to the operator<sup>22</sup>. The exemption from the general prohibition conferred on an operator<sup>23</sup> ceases to apply if the Authority exercises the power<sup>24</sup> in relation to the operator<sup>25</sup>.

The right to make the above arrangements<sup>26</sup> may be reinstated in relation to the operator (together with the above exemption<sup>27</sup>) if the Authority is satisfied that the contravention which led to the Authority exercising the power under heads (1) and (2) above has been remedied<sup>28</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 As to the meaning of 'EEA market operator' see PARA 738 note 1.

3 As to the meaning of 'United Kingdom' see PARA 2 note 3.

- 4 As to the meaning of 'applicable provision' see PARA 738 note 2.
- 5 As to the meaning of 'regulated market' see PARA 711 note 24.
- 6 As to the meaning of 'multilateral trading facility' see PARA 738 note 2.
- 7 Financial Services and Markets Act 2000 s 312B(1)(a) (s 312B added by SI 2007/126). A requirement is relevant if it is imposed: (1) by the operator's home state regulator in the implementation of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) or any Community legislation made under that directive; (2) by provision implementing that directive, or any Community legislation made under it, in the operator's home state; or (3) by any directly applicable Community regulation made under that directive: Financial Services and Markets Act 2000 s 312B(2) (as so added). As to the meaning of 'home state regulator' see PARA 738 note 4. As to the meaning of 'home state' see PARA 738 note 1.
- 8 Financial Services and Markets Act 2000 s 312B(1)(b) (as added: see note 7). The requirements referred to are those in s 312B(3)-(9).
- 9 Financial Services and Markets Act 2000 s 312B(3) (as added: see note 7). The notice to the home state regulator under s 312B(3) must: (1) request that the home state regulator take all appropriate measures for the purpose of ensuring that the operator puts an end to the contravention; and (2) state that the Authority proposes to exercise the power under s 312B(1) (see heads (1), (2) in the text) if the operator continues the contravention: s 312B(4) (as so added).
- 10 Ie the power under the Financial Services and Markets Act 2000 s 312B(1).
- 11 Financial Services and Markets Act 2000 s 312B(5)(a)(i) (as added: see note 7). The measures referred to are those mentioned in s 312B(4)(a): see note 9 head (2).
- 12 Financial Services and Markets Act 2000 s 312B(5)(a)(ii) (as added: see note 7).
- 13 Financial Services and Markets Act 2000 s 312B(5)(b) (as added: see note 7).
- 14 Ie as mentioned in the Financial Services and Markets Act 2000 s 312B(5).
- 15 Financial Services and Markets Act 2000 s 312B(6) (as added: see note 7). The power referred to is that under s 312B(1).  
A notice under s 312B(6) must (1) state why the Authority intends to exercise its power under s 312B(1); and (2) in the case of the notice to the operator, inform the operator that it may make representations to the Authority before the end of the representation period: s 312B(7) (as so added). The representation period is (a) the period of two months beginning with the date on which the notice is given to the operator; or (b) such longer period as the Authority may allow in a particular case: s 312B(8) (as so added).
- 16 As to representations see note 15.
- 17 Ie the power under the Financial Services and Markets Act 2000 s 312B(1).
- 18 Ie the arrangements mentioned in the Financial Services and Markets Act 2000 s 312B(1).
- 19 Financial Services and Markets Act 2000 s 312B(9)(a) (as added: see note 7).
- 20 Financial Services and Markets Act 2000 s 312B(9)(b) (as added: see note 7).
- 21 Ie the power under the Financial Services and Markets Act 2000 s 312B(1).
- 22 Financial Services and Markets Act 2000 s 312B(10) (as added: see note 7).
- 23 Ie the exemption conferred on an operator by the Financial Services and Markets Act 2000 s 312A(2): see PARA 738.
- 24 Ie the power under the Financial Services and Markets Act 2000 s 312B(1).
- 25 Financial Services and Markets Act 2000 s 312B(11) (as added: see note 7).
- 26 Ie the arrangements mentioned in the Financial Services and Markets Act 2000 s 312B(1).
- 27 Ie the exemption mentioned in the Financial Services and Markets Act 2000 s 312B(11).

28 Financial Services and Markets Act 2000 s 312B(12) (as added: see note 7).

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## (B) RECOGNISED INVESTMENT EXCHANGES OPERATING IN OTHER EEA STATES

### **740. Exercise of passport rights by recognised investment exchange.**

A recognised investment exchange<sup>1</sup> may, in pursuance of the right under the applicable provision<sup>2</sup>, make arrangements in an EEA state<sup>3</sup> (other than the United Kingdom<sup>4</sup>) to facilitate access to, or use of, a regulated market<sup>5</sup> or multilateral trading facility<sup>6</sup> operated by the exchange (the 'relevant arrangements')<sup>7</sup>.

The exchange must give the Authority written notice of its intention to make the relevant arrangements which (1) describes the arrangements<sup>8</sup>; and (2) identifies the EEA state in which it intends to make them<sup>9</sup>. The Authority must, within one month of receiving such a notice<sup>10</sup>, send a copy of it to the host state regulator<sup>11</sup>. The exchange may not make the relevant arrangements until the Authority has complied with this obligation to send a copy of the notice to the host state regulator<sup>12</sup>.

If the Authority receives a request for information<sup>13</sup> from the host state regulator<sup>14</sup>, the Authority must, as soon as reasonably practicable, comply with the request<sup>15</sup>.

1 As to the meaning of 'recognised investment exchange' see PARA 684 note 1.

2 As to the meaning of 'applicable provision' see PARA 738 note 2.

3 As to the meaning of 'EEA state' see PARA 315 note 1.

4 As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 As to the meaning of 'regulated market' see PARA 711 note 24.

6 As to the meaning of 'multilateral trading facility' see PARA 738 note 2.

7 Financial Services and Markets Act 2000 s 312C(1) (s 312C added by SI 2007/126). The Financial Services and Markets Act 2000 s 312C(1) is subject to s 312C(4): see the text and note 12. Section 321C does not apply to an overseas investment exchange: s 312C(8) (as so added). As to the meaning of 'overseas investment exchange' see PARA 709 note 12.

8 Financial Services and Markets Act 2000 s 312C(2)(a) (as added: see note 7). See note 7.

9 Financial Services and Markets Act 2000 s 312C(2)(b) (as added: see note 7). See note 7.

10 I.e. a notice under the Financial Services and Markets Act 2000 s 312C(2).

11 Financial Services and Markets Act 2000 s 312C(3) (as added: see note 7). 'Host state regulator' means the competent authority (within the meaning of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.22) of the EEA state in which the exchange intends to make, or has made, the relevant arrangements: Financial Services and Markets Act 2000 s 312C(7) (as so added). See note 7.

12 Financial Services and Markets Act 2000 s 312C(4) (as added: see note 7). The reference is to compliance with s 312C(3). See note 7.

13 le (1) under the second sub-paragraph of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 31.6 (in the case of relevant arrangements relating to a multilateral trading facility); or (2) under the third sub-paragraph of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 42.6 (in the case of relevant arrangements relating to a regulated market): see the Financial Services and Markets Act 2000 s 312C(5); and note 14.

14 Financial Services and Markets Act 2000 s 312C(5) (as added: see note 7). See note 7.

15 Financial Services and Markets Act 2000 s 312C(6) (as added: see note 7). See note 7.

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#### **(iv) Lloyd's**

##### **741. In general.**

Lloyd's is a society, incorporated by statute, which provides the facilities for the Lloyd's insurance underwriting market to carry on business<sup>1</sup>. Although supervised by the Financial Services Authority<sup>2</sup>, the Council of Lloyd's retains the capacity to make byelaws regulating the market and has responsibility for its functioning<sup>3</sup>.

1 As to Lloyd's generally see PARA 77; and **INSURANCE**.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. As to the regulation of Lloyd's see PARA 742 et seq. In particular, the Financial Services Authority may make a direction applying certain provisions of the Financial Services and Markets Act 2000 to members of Lloyd's (see ss 316, 317; and PARA 743), and may give directions to the Council of Lloyd's, to the Society, or to both (see s 318; and PARA 745).

3 See the Lloyd's Act 1982; and **INSURANCE**. The Financial Services Authority must keep itself informed about the way in which the Council of Lloyd's supervises and regulates the Lloyd's market and the way in which regulated activities are being carried out: see the Financial Services and Markets Act 2000 s 314; and PARA 742.

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##### **742. The general duty of the Financial Services Authority.**

The Financial Services Authority<sup>1</sup> must keep itself informed about: (1) the way in which the Council of Lloyd's<sup>2</sup> supervises and regulates the market at Lloyd's; and (2) the way in which regulated activities<sup>3</sup> are being carried on in that market<sup>4</sup>. The Authority must keep under review the desirability of exercising: (a) any of its powers under Part XIX of the Financial Services and Markets Act 2000<sup>5</sup>; (b) any powers which it has in relation to the Society of Lloyd's<sup>6</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.

2 As to Lloyd's generally see PARA 77; and **INSURANCE**.

3 As to regulated activities see PARA 84 et seq.

4 Financial Services and Markets Act 2000 s 314(1).

5 I.e. the Financial Services and Markets Act 2000 Pt XIX (ss 314-324).

6 Financial Services and Markets Act 2000 s 314(2). As to the powers referred to in the text see s 315; and PARA 744.

A term used in Pt XIX which is defined in the Lloyd's Act 1982 has the same meaning as in the Lloyd's Act 1982: Financial Services and Markets Act 2000 s 324(2).

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### **743. Application of the Financial Services and Markets Act 2000.**

The general prohibition<sup>1</sup> or (if the general prohibition is not applied under these provisions<sup>2</sup>) a core provision<sup>3</sup> applies to the carrying on of an insurance market activity<sup>4</sup> by: (1) a member of the Society of Lloyd's; or (2) the members of the Society taken together, only if the Financial Services Authority<sup>5</sup> so directs<sup>6</sup>. In deciding whether to give a direction<sup>7</sup>, the Authority must have particular regard to: (a) the interests of policyholders<sup>8</sup> and potential policyholders; (b) any failure by the Society to satisfy an obligation to which it is subject as a result of a provision of the law of another EEA state<sup>9</sup> which gives effect to any of the Insurance Directives<sup>10</sup>, and is applicable to an activity carried on in that state by a person to whom these provisions apply; (c) the need to ensure the effective exercise of the functions which the Authority has in relation to the Society<sup>11</sup>. A direction must be in writing<sup>12</sup>. A direction applying the general prohibition may apply it in relation to different classes of person<sup>13</sup>. An insurance market direction: (i) must specify each core provision, class of person and kind of activity to which it applies; (ii) may apply different provisions in relation to different classes of person and different kinds of activity<sup>14</sup>. A direction has effect from the date specified in it, which may not be earlier than the date on which it is made<sup>15</sup>. A direction must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>16</sup>. The Authority may charge a reasonable fee for providing a person with a copy of the direction<sup>17</sup>. The Authority must, without delay, give the Treasury<sup>18</sup> a copy of any direction which it gives<sup>19</sup>.

1 As to the general prohibition see PARA 80.

2 I.e. under the Financial Services and Markets Act 2000 s 316.

3 'Core provision' means a provision of the Financial Services and Markets Act 2000 mentioned in s 317: s 316(3). The core provisions are Pt V (ss 56-71) (see PARA 364 et seq), Pt X (ss 138-164) (see PARA 21 et seq), Pt XI (ss 165-177) (see PARA 447 et seq), Pt XII (ss 178-192) (see PARA 377 et seq), Pt XIV (ss 205-211) (see PARA 465), Pt XV (ss 212-224) (see PARA 575 et seq), Pt XVI (ss 225-234A) (see PARA 583 et seq), Pt XXII (ss 340-346) (see PARA 764 et seq), Pt XXIV (ss 355-379) (see PARA 490 et seq), ss 384-386 (see PARA 474), and Pt XXVI (ss 387-396) (see PARA 769 et seq): s 317(1). References in an applied core provision to an authorised person are (where necessary) to be read as references to a person in the class to which the insurance market direction (see note 6) applies: s 317(2). As to authorised persons see PARA 314. An insurance market direction may provide that a core provision is to have effect, in relation to persons to whom the provision is applied by the direction, with modifications: s 317(3).

4 'Insurance market activity' means a regulated activity relating to contracts of insurance written at Lloyd's: Financial Services and Markets Act 2000 s 316(3). As to regulated activities see PARA 84 et seq. As to the meaning of 'contracts of insurance' see PARA 351 note 13. As to Lloyd's generally see PARA 77; and **INSURANCE**.

5 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.

6 Financial Services and Markets Act 2000 s 316(1). A direction given under s 316(1) which applies a core provision is referred to in Pt XIX (ss 314-324) as an 'insurance market direction': s 316(2).

7 le under the Financial Services and Markets Act 2000 s 316(1).

8 As to the meaning of 'policyholder' see PARA 591 note 15.

9 As to the meaning of 'EEA state' see PARA 315 note 1.

10 As to the meaning of 'Insurance Directives' see PARA 86 note 6.

11 Financial Services and Markets Act 2000 s 316(4). The Authority has functions in relation to the Society as a result of s 315: see PARA 744.

12 Financial Services and Markets Act 2000 s 316(5).

13 Financial Services and Markets Act 2000 s 316(6).

14 Financial Services and Markets Act 2000 s 316(7).

15 Financial Services and Markets Act 2000 s 316(8).

16 Financial Services and Markets Act 2000 s 316(9).

17 Financial Services and Markets Act 2000 s 316(10).

18 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

19 Financial Services and Markets Act 2000 s 316(11).

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#### **744. Authorisation and permission in relation to the Society of Lloyd's.**

The Society of Lloyd's<sup>1</sup> is an authorised person<sup>2</sup>. The Society has permission to carry on a regulated activity<sup>3</sup> of any of the following kinds: (1) arranging deals<sup>4</sup> in contracts of insurance<sup>5</sup> written at Lloyd's (the 'basic market activity'); (2) arranging deals in participation in Lloyd's syndicates<sup>6</sup> (the 'secondary market activity'); and (3) an activity carried on in connection with, or for the purposes of, the basic or secondary market activity<sup>7</sup>. The power conferred on the Financial Services Authority<sup>8</sup> to vary or cancel a permission<sup>9</sup> may be exercised at any time<sup>10</sup>. The Society is not subject to any requirement of the Financial Services and Markets Act 2000 concerning the registered office of a body corporate<sup>11</sup>.

1 As to Lloyd's generally see PARA 77; and **INSURANCE**.

2 Financial Services and Markets Act 2000 s 315(1). As to authorised persons see PARA 314.

3 As to regulated activities see PARA 84 et seq.

4 'Arranging deals', in relation to the investments to which the Financial Services and Markets Act 2000 Pt XIX (ss 314-324) applies, means the investment described in Sch 2 para 3 (see PARA 84): s 324(1).



5 As to the meaning of 'contracts of insurance' see PARA 351 note 13.

6 'Participation in Lloyd's syndicates', in relation to the secondary market activity, means the investment described in the Financial Services and Markets Act 2000 Sch 2 para 21(1) (see PARA 85): s 324(1).

7 Financial Services and Markets Act 2000 s 315(2). For the purposes of Pt IV (ss 40-55) (permission to carry on regulated activities) (see PARA 348 et seq), the Society's permission is to be treated as if it had been given on an application for permission under Pt IV: s 315(3).

8 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.

9 Ie the power given by the Financial Services and Markets Act 2000 s 45: see PARA 355.

10 See the Financial Services and Markets Act 2000 s 315(4).

11 Financial Services and Markets Act 2000 s 315(5). As to the meaning of 'body corporate' see PARA 86 note 11.

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#### **745. Exercise of powers through the Council of Lloyd's.**

The Financial Services Authority<sup>1</sup> may give a direction<sup>2</sup> to the Council of Lloyd's<sup>3</sup> or to the Society of Lloyd's (acting through the Council) or to both<sup>4</sup>. The direction is given to the body concerned: (1) in relation to the exercise of its powers generally with a view to achieving, or in support of, a specified<sup>5</sup> objective; or (2) in relation to the exercise of a specified power which it has, whether in a specified manner or with a view to achieving, or in support of, a specified objective<sup>6</sup>. A direction does not, at any time, prevent the exercise by the Authority of any of its powers<sup>7</sup>. A direction must be in writing<sup>8</sup>, and must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>9</sup>. The Authority may charge a reasonable fee for providing a person with a copy of the direction<sup>10</sup>. The Authority must, without delay, give the Treasury<sup>11</sup> a copy of any direction which it gives<sup>12</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 318(1).

3 As to Lloyd's generally see PARA 77; and **INSURANCE**.

4 Financial Services and Markets Act 2000 s 318(1). A direction under s 318(1) may be given: (1) instead of giving a direction under s 316(1) (see PARA 743); or (2) if the Authority considers it necessary or expedient to do so, at the same time as, or following, the giving of such a direction: s 318(4). A direction may also be given under s 318(1) in respect of underwriting agents as if they were among the persons mentioned in s 316(1) (see PARA 743): s 318(5).

5 'Specified' means specified in the direction: Financial Services and Markets Act 2000 s 318(3).

6 Financial Services and Markets Act 2000 s 318(2).

7 Financial Services and Markets Act 2000 s 318(6).

8 Financial Services and Markets Act 2000 s 318(6).

9 Financial Services and Markets Act 2000 s 318(7).

- 10 Financial Services and Markets Act 2000 s 318(8).
- 11 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 12 Financial Services and Markets Act 2000 s 318(9).

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#### **746. Consultation.**

Before giving a direction<sup>1</sup>, the Financial Services Authority<sup>2</sup> must publish a draft of the proposed direction<sup>3</sup>. The draft must be accompanied by: (1) a cost benefit analysis<sup>4</sup>; and (2) notice that representations about the proposed direction may be made to the Authority within a specified time<sup>5</sup>. Before giving the proposed direction, the Authority must have regard to any representations made to it in accordance with head (2) above<sup>6</sup>. If the Authority gives the proposed direction it must publish an account, in general terms, of: (a) the representations made to it in accordance with head (2) above; and (b) its response to them<sup>7</sup>. If the direction differs from the published draft in a way which is, in the opinion of the Authority, significant: (i) the Authority must<sup>8</sup> publish details of the difference; and (ii) those details must be accompanied by a cost benefit analysis<sup>9</sup>. The provisions described above<sup>10</sup> do not apply if the Authority considers that the delay involved in complying with them would be prejudicial to the interests of consumers<sup>11</sup>. When the Authority is required to publish a document<sup>12</sup>, it must do so in the way appearing to it to be best calculated to bring it to the attention of the public<sup>13</sup>.

1 le under the Financial Services and Markets Act 2000 s 316 (see PARA 743) or s 318 (see PARA 745).

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 319(1). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 319(1): s 319(8).

4 Financial Services and Markets Act 2000 s 319(2)(a). 'Cost benefit analysis' means an estimate of the costs together with an analysis of the benefits that will arise: (1) if the proposed direction is given; or (2) if s 319(5)(b) (see head (ii) in the text) applies, from the direction that has been given: s 319(10). Neither s 319(2)(a) (see head (1) in the text) nor s 319(5)(b) (see head (ii) in the text) applies if the Authority considers: (a) that, making the appropriate comparison, there will be no increase in costs; or (b) that, making that comparison, there will be an increase in costs but the increase will be of minimal significance: s 319(7). 'Appropriate comparison' means: (i) in relation to s 319(2)(a) (see head (1) in the text), a comparison between the overall position if the direction is given and the overall position if it is not given; (ii) in relation to s 319(5)(b) (see head (ii) in the text), a comparison between the overall position after the giving of the direction and the overall position before it was given: s 319(11).

5 Financial Services and Markets Act 2000 s 319(2).

6 Financial Services and Markets Act 2000 s 319(3).

7 Financial Services and Markets Act 2000 s 319(4).

8 le in addition to complying with the Financial Services and Markets Act 2000 s 319(4): see the text to note 7.

9 Financial Services and Markets Act 2000 s 319(5). See note 4.

10 le the Financial Services and Markets Act 2000 s 319(1)-(5): see the text and notes 1-9.

- 11 Financial Services and Markets Act 2000 s 319(6).
- 12 As to the meaning of 'document' see PARA 10 note 10.
- 13 Financial Services and Markets Act 2000 s 319(9).

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#### **747. Former underwriting members.**

A former underwriting member<sup>1</sup> may carry out each contract of insurance<sup>2</sup> that he has underwritten at Lloyd's whether or not he is an authorised person<sup>3</sup>. If he is an authorised person, any Part IV permission<sup>4</sup> that he has does not extend to his activities in carrying out any of those contracts<sup>5</sup>. The Financial Services Authority<sup>6</sup> may impose on a former underwriting member such requirements as appear to it to be appropriate for the purpose of protecting policyholders<sup>7</sup> against the risk that he may not be able to meet his liabilities<sup>8</sup>. A person on whom a requirement is imposed may refer the matter to the Financial Services and Markets Tribunal<sup>9</sup>.

A requirement<sup>10</sup> takes effect: (1) immediately, if the notice given by the Authority<sup>11</sup> states that that is the case; (2) in any other case, on such date as may be specified in that notice<sup>12</sup>. If the Authority proposes to impose a requirement on a former underwriting member ('A')<sup>13</sup>, or imposes such a requirement on him which takes effect immediately, it must give him written notice<sup>14</sup>. The notice must: (a) give details of the requirement; (b) state the Authority's reasons for imposing it; (c) inform A that he may make representations to the Authority within such period as may be specified in the notice (whether or not he has referred the matter to the Tribunal); (d) inform him of the date on which the requirement took effect or will take effect; and (e) inform him of his right to refer the matter to the Tribunal<sup>15</sup>. If, having considered any representations made by A, the Authority decides to impose the proposed requirement, or if it decides, where the requirement has been imposed, not to revoke it, the Authority must give him written notice<sup>16</sup>. If the Authority decides not to impose a proposed requirement, or to revoke a requirement that has been imposed, it must give A written notice<sup>17</sup>. If the Authority decides to grant an application by A for the variation or revocation of a requirement, it must give him written notice of its decision<sup>18</sup>. If the Authority proposes to refuse an application by A for the variation or revocation of a requirement, it must give him a warning notice<sup>19</sup>. If the Authority, having considered any representations made in response to the warning notice, decides to refuse the application, it must give A a decision notice<sup>20</sup>. If the Authority decides to refuse an application for a variation or revocation of the requirement, the applicant may refer the matter to the Tribunal<sup>21</sup>. If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference<sup>22</sup>.

The Authority may make rules imposing such requirements on persons to whom the rules apply as appear to it to be appropriate for protecting policyholders against the risk that those persons may not be able to meet their liabilities<sup>23</sup>. The rules may apply to former underwriting members generally or to a class of former underwriting member specified in them<sup>24</sup>.

1 'Former underwriting member' means a person ceasing to be an underwriting member of the Society of Lloyd's on, or at any time after, 24 December 1996: Financial Services and Markets Act 2000 s 324(1). As to Lloyd's generally see PARA 77; and **INSURANCE**.

2 As to the meaning of 'contracts of insurance' see PARA 351 note 13.

- 3 Financial Services and Markets Act 2000 s 320(1). As to authorised persons see PARA 314.
- 4 As to the meaning of 'Part IV permission' see PARA 348.
- 5 Financial Services and Markets Act 2000 s 320(2).
- 6 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.
- 7 As to the meaning of 'policyholder' see PARA 591 note 15.
- 8 Financial Services and Markets Act 2000 s 320(3).
- 9 Financial Services and Markets Act 2000 s 320(4). As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 10 Is a requirement imposed under the Financial Services and Markets Act 2000 s 320: see the text to notes 1-9.
- 11 Is the notice given under the Financial Services and Markets Act 2000 s 321(2): see the text to notes 13-14.
- 12 Financial Services and Markets Act 2000 s 321(1).
- 13 Is under the Financial Services and Markets Act 2000 s 320: see the text to notes 1-9.
- 14 Financial Services and Markets Act 2000 s 321(2).
- 15 Financial Services and Markets Act 2000 s 321(3). The Authority may extend the period allowed under the notice for making representations: s 321(4).
- 16 Financial Services and Markets Act 2000 s 321(5). A notice given under s 321(5) must inform A of his right to refer the matter to the Tribunal: s 321(10).
- 17 Financial Services and Markets Act 2000 s 321(6).
- 18 Financial Services and Markets Act 2000 s 321(7).
- 19 Financial Services and Markets Act 2000 s 321(8). As to warning notices see PARA 769.
- 20 Financial Services and Markets Act 2000 s 321(9). As to decision notices see PARA 770. A notice given under s 321(9) in the case of a decision to refuse the application must inform A of his right to refer the matter to the Tribunal: s 321(10).
- 21 Financial Services and Markets Act 2000 s 321(11).
- 22 Financial Services and Markets Act 2000 s 321(12).
- 23 Financial Services and Markets Act 2000 s 322(1). Section 319 (see PARA 746) applies to the making of proposed rules under s 322 as it applies to the giving of a proposed direction under s 316 (see PARA 743): s 322(3). Part X (ss 138-164) (rules and guidance) (see PARA 21 et seq), except ss 152-154, does not apply to rules made under s 322: s 322(4).
- 24 Financial Services and Markets Act 2000 s 322(2).

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## **748. Transfer schemes.**

The Treasury<sup>1</sup> may by order provide for the application of any provision of Part VII of the Financial Services and Markets Act 2000<sup>2</sup> (with or without modification) in relation to schemes for the transfer of the whole or any part of the business carried on by one or more members of the Society of Lloyd's<sup>3</sup> or former underwriting members<sup>4</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 I.e. the Financial Services and Markets Act 2000 Pt VII (ss 104-117) (control of business transfers): see PARA 590 et seq.

3 As to Lloyd's generally see PARA 77; and **INSURANCE**.

4 Financial Services and Markets Act 2000 s 323. As to the meaning of 'former underwriting member' see PARA 747 note 1. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

The Treasury has ordered that the following provisions, that is to say: (1) s 104 (see PARA 591), ss 107-114 (see PARAS 593-599); (2) any regulations made under s 108 (see PARA 593); and (3) Sch 12 Pt I (see PARA 595), are to apply in relation to schemes for the transfer of the whole or any part of the business carried on by one or more members of the Society or former underwriting members (the 'members concerned') in the same way as they apply in relation to insurance business transfer schemes, but only if certain conditions are satisfied: Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001, SI 2001/3626, art 3. The conditions are: (a) that the scheme results in the business transferred being carried on from an establishment of the transferee in an EEA state; (b) that the Council of Lloyd's has by resolution authorised one person to act, in connection with the transfer for the members concerned, as transferor; and (c) that a copy of the resolution has been given to the Authority: art 4.

The provisions which apply by virtue of heads (1) and (2) above do so as if: (i) any reference to the authorised person concerned were a reference to the members concerned; and (ii) anything done in connection with the transfer by the person authorised in accordance with head (a) above had been done by the members concerned for whom he acted: art 5(1). In the application of the Financial Services and Markets Act 2000 Sch 12 Pt I to the members concerned, the conditions in Sch 12 para 1(2)(a), (3)(a), (4)(a) (see PARA 595) are treated as satisfied: Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001, SI 2001/3626, art 5(2).

## **UPDATE**

### **748 Transfer schemes**

TEXT AND NOTES--The Financial Services and Markets Act 2000 s 323 (amended by SI 2008/1469) now applies to all insurance business whenever written in the Lloyd's Market.

NOTE 4--Or under head (b) the Council has certified that one person has authority to act; and head (c) refers also to a copy of the certificate: SI 2001/3626 art 4 (amended by SI 2008/1725). Head (ii) now refers to head (b) and also to the person certified to have authority: SI 2001/3626 art 5(1), (2) (amended by SI 2008/1725). A transfer scheme may transfer the insurance business written on different syndicates and in different years of account of syndicates: SI 2001/3626 art 5(3) (added by SI 2008/1725).

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## **(v) Provision of Financial Services by Members of the Professions**

## 749. Designation of professional bodies.

The Treasury<sup>1</sup> may by order designate professional bodies for the purposes of Part XX of the Financial Services and Markets Act 2000<sup>2</sup>. The Treasury may designate a body only if it is satisfied that: (1) the basic condition; and (2) one or more of the additional conditions, are met in relation to it<sup>3</sup>.

The basic condition is that the body has rules applicable to the carrying on by members<sup>4</sup> of the profession in relation to which it is established of regulated activities<sup>5</sup> which, if the body were to be designated, would be exempt regulated activities<sup>6</sup>. The additional conditions are that:

- 1771 (a) the body has power under any enactment<sup>7</sup> to regulate the practice of the profession<sup>8</sup>;
- 1772 (b) being a member of the profession is a requirement under any enactment for the exercise of particular functions or the holding of a particular office<sup>9</sup>;
- 1773 (c) the body has been recognised<sup>10</sup> for the purpose of any enactment other than the Financial Services and Markets Act 2000 and the recognition has not been withdrawn<sup>11</sup>;
- 1774 (d) the body is established in an EEA state<sup>12</sup> other than the United Kingdom<sup>13</sup> and in that state: (i) the body has power corresponding to that mentioned in head (a) above; (ii) there is a requirement in relation to the body corresponding to that mentioned in head (b) above; or (iii) the body is recognised in a manner corresponding to that mentioned in head (c) above<sup>14</sup>.

The following bodies have been designated for the purposes of Part XX of the Financial Services and Markets Act 2000:

- 1775 (A) the Law Society<sup>15</sup>;
- 1776 (B) the Law Society of Scotland<sup>16</sup>;
- 1777 (C) the Law Society of Northern Ireland<sup>17</sup>;
- 1778 (D) the Institute of Chartered Accountants in England and Wales<sup>18</sup>;
- 1779 (E) the Institute of Chartered Accountants of Scotland<sup>19</sup>;
- 1780 (F) the Institute of Chartered Accountants in Ireland<sup>20</sup>;
- 1781 (G) the Association of Chartered Certified Accountants<sup>21</sup>;
- 1782 (H) the Institute of Actuaries<sup>22</sup>;
- 1783 (I) the Council for Licensed Conveyancers<sup>23</sup>;
- 1784 (J) the Royal Institution of Chartered Surveyors<sup>24</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 Financial Services and Markets Act 2000 s 326(1). A body designated under s 326(1) is referred to in Pt XX (ss 325-333) as a designated professional body: s 326(2). As to the bodies designated see the Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226; and heads (A)-(J) in the text. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

An order containing a provision to which, if the order is made, s 429(7) (see below) will apply is not to be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(6). Section 429(7) applies to a provision contained in an order if it is the first to be made in the exercise of the power conferred by s 326(1) or it removes a body from those for the time being designated under s 326(1): s 429(7)(a).

3 Financial Services and Markets Act 2000 s 326(3).

4 For the purposes of the Financial Services and Markets Act 2000 Pt XX (ss 325-333), 'members', in relation to a profession, means persons who are entitled to practise the profession in question and, in practising it, are

subject to the rules of the body designated in relation to that profession, whether or not they are members of that body: s 325(2).

5 As to regulated activities see PARA 84 et seq.

6 Financial Services and Markets Act 2000 s 326(4). For the purposes of Pt XX, 'exempt regulated activities' means regulated activities which may, as a result of Pt XX, be carried on by members of a profession which is supervised and regulated by a designated professional body without breaching the general prohibition: s 325(2). As to the general prohibition see PARA 80.

7 'Enactment' includes an Act of the Scottish Parliament, Northern Ireland legislation, and subordinate legislation (whether made under an Act, an Act of the Scottish Parliament or Northern Ireland legislation): Financial Services and Markets Act 2000 s 326(6).

8 Financial Services and Markets Act 2000 s 326(5)(a).

9 Financial Services and Markets Act 2000 s 326(5)(b).

10 'Recognised' means recognised by: (1) a Minister of the Crown; (2) the Scottish Ministers; (3) a Northern Ireland Minister; (4) a Northern Ireland department or its head: Financial Services and Markets Act 2000 s 326(7). As to the meaning of 'Minister of the Crown' see PARA 67 note 1.

11 Financial Services and Markets Act 2000 s 326(5)(c).

12 As to the meaning of 'EEA state' see PARA 315 note 1.

13 As to the meaning of 'United Kingdom' see PARA 2 note 3.

14 Financial Services and Markets Act 2000 s 326(5).

15 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(a). As to the Law Society see **LEGAL PROFESSIONS** vol 65 (2008) PARA 604 et seq.

16 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(b).

17 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(c).

18 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(d).

19 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(e).

20 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(f).

21 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(g).

22 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(h).

23 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(i) (added by SI 2004/3352).

24 Financial Services and Markets Act 2000 (Designated Professional Bodies) Order 2001, SI 2001/1226, art 2(j) (added by SI 2006/58).

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## 750. The general duty of the Financial Services Authority.

The Financial Services Authority<sup>1</sup> must keep itself informed about: (1) the way in which designated professional bodies<sup>2</sup> supervise and regulate the carrying on of exempt regulated activities<sup>3</sup> by members of the professions in relation to which they are established; (2) the way in which such members are carrying on exempt regulated activities<sup>4</sup>. The Authority must keep under review the desirability of exercising any of its powers under Part XX of the Financial Services and Markets Act 2000<sup>5</sup>. Each designated professional body must co-operate with the Authority, by the sharing of information and in other ways, in order to enable the Authority to perform its functions under Part XX<sup>6</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.

2 As to designated professional bodies see PARA 749.

3 As to the meaning of 'exempt regulated activities' see PARA 749 note 6.

4 Financial Services and Markets Act 2000 s 325(1).

5 Financial Services and Markets Act 2000 s 325(3). The reference is to Pt XX (ss 325-333).

6 Financial Services and Markets Act 2000 s 325(4).

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## 751. Exemption from the general prohibition.

The general prohibition<sup>1</sup> does not apply to the carrying on of a regulated activity<sup>2</sup> by a person ('P') if: (1) the following conditions<sup>3</sup> are satisfied; and (2) there is not in force a direction<sup>4</sup> or an order<sup>5</sup> which prevents this provision from applying to the carrying on of that activity by him<sup>6</sup>. The conditions are that:

1785 (a) P must be a member<sup>7</sup> of a profession or must be controlled or managed by one or more such members<sup>8</sup>;

1786 (b) P must not receive from a person other than his client<sup>9</sup> any pecuniary reward or other advantage, for which he does not account to his client, arising out of his carrying on of any of the activities<sup>10</sup>;

1787 (c) the manner of the provision by P of any service in the course of carrying on the activities must be incidental to the provision by him of professional services<sup>11</sup>;

1788 (d) P must not carry on, or hold himself out as carrying on, a regulated activity<sup>12</sup> other than: (i) one which rules made by the professional body<sup>13</sup> allow him to carry on; or (ii) one in relation to which he is an exempt person<sup>14</sup>;

1789 (e) the activities must not be of a description, or relate to an investment of a description, specified in an order made by the Treasury<sup>15</sup> for these purposes<sup>16</sup>;

1790 (f) the activities must be the only regulated activities<sup>17</sup> carried on by P (other than regulated activities in relation to which he is an exempt person)<sup>18</sup>.



- 1 As to the general prohibition see PARA 80.
  - 2 As to regulated activities see PARA 84 et seq.
  - 3 le the conditions set out in the Financial Services and Markets Act 2000 s 327(2)-(7): see the text and notes 7-16. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22. As to the Financial Services Authority see PARAS 4, 6 et seq.
  - 4 le a direction under the Financial Services and Markets Act 2000 s 328: see PARA 752.
  - 5 le an order under the Financial Services and Markets Act 2000 s 329: see PARA 753.
  - 6 Financial Services and Markets Act 2000 s 327(1).
  - 7 As to the meaning of 'members' see PARA 749 note 4.
  - 8 Financial Services and Markets Act 2000 s 327(2).
  - 9 For the purposes of the Financial Services and Markets Act 2000 Pt XX (ss 325-333), 'clients' means: (1) persons who use, have used or are or may be contemplating using, any of the services provided by a member of a profession in the course of carrying on exempt regulated activities; (2) persons who have rights or interests which are derived from, or otherwise attributable to, the use of any such services by other persons; or (3) persons who have rights or interests which may be adversely affected by the use of any such services by persons acting on their behalf or in a fiduciary capacity in relation to them: s 328(8). As to the meaning of 'exempt regulated activities' see PARA 749 note 6.
  - 10 Financial Services and Markets Act 2000 s 327(3).
  - 11 Financial Services and Markets Act 2000 s 327(4). 'Professional services' means services: (1) which do not constitute carrying on a regulated activity; and (2) the provision of which is supervised and regulated by a designated professional body: s 327(8). As to the designated professional bodies see PARA 749.
  - 12 For the purposes of the Financial Services and Markets Act 2000 s 327(5), (7), references to a 'regulated activity' and 'regulated activities' do not include:
    - 667 (1) any activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10(1) or art 10(2) (see PARA 100), where P is a member of the Society (art 13(1)(a)(i)), and by virtue of the Financial Services and Markets Act 2000 s 316 (application of the Act to Lloyd's underwriting) (see PARA 743), the general prohibition does not apply to the carrying on by P of that activity (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 13(1)(a)(ii)); or
    - 668 (2) any activity of the kind specified by art 10(2), where P is a former underwriting member (art 13(1)(b)(i)) and the contract of insurance in question is one underwritten by P at Lloyd's (art 13(1)(b)(ii)).
- As to the meanings of 'member of the Society' and 'former underwriting member' see the Lloyd's Act 1982 (see **INSURANCE** vol 25 (2003 Reissue) PARAS 24, 25); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 13(2).
- 13 le rules made as a result of the Financial Services and Markets Act 2000 s 332(3): see PARA 756.
  - 14 Financial Services and Markets Act 2000 s 327(5). As to the meaning of 'exempt person' see PARA 80 note 4.
  - 15 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
  - 16 Financial Services and Markets Act 2000 s 327(6). An order containing a provision to which, if the order is made, s 429(7) (see below) will apply is not to be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 429(6). The Financial Services and Markets Act 2000 s 429(7) applies to a provision contained in an order if it is the first to be made in the exercise of the power conferred by s 327(6) or it adds a description of regulated activity or investment to those for the time being specified for the purposes of s 327(6): s 429(7)(b). As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

The activities specified for the purposes of the Financial Services and Markets Act 2000 s 327(6) are those mentioned in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, arts 4-8 (see below): art 3.

The activity mentioned in art 4 is an activity of the kind specified by any of the following provisions of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544: art 5 (accepting deposits) (see PARA 89), art 9B (issuing electronic money) (see PARA 96), art 10 (effecting and carrying out contracts of insurance) (see PARA 100), art 14 (dealing in investments as principal) (see PARA 112), art 51 (establishing etc a collective investment scheme) (see PARA 171), art 52 (establishing etc a pension scheme) (see PARA 187), art 52B (providing basic advice on stakeholder products) (see PARA 188), art 57 (managing the underwriting capacity of a Lloyd's syndicate) (see PARA 198), art 59 (funeral plan contracts) (see PARA 200): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 4 (amended by SI 2001/3650; SI 2002/682; SI 2004/2737; SI 2006/1969).

The activity mentioned in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 4A is an activity kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 21 (dealing in investments as agent) (see PARA 126) or art 25 (arranging deals in investments) (see PARA 139) in so far as it relates to a transaction for the sale or purchase of rights under a contract of insurance, and is carried on by a person who is not included in the record of insurance intermediaries: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 4A (added by SI 2003/1476).

The activity mentioned in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 5 is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 37 (managing investments) (see PARA 152) in so far as it consists of buying or subscribing for a security or contractually based investment: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 5(1) (amended by SI 2003/1476). The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 5(1) does not apply: (1) if all routine or day to day decisions, so far as relating to that activity, are taken by an authorised person with permission to carry on that activity or by a person who is an exempt person in relation to such an activity; or (2) to an activity undertaken in accordance with the advice of an authorised person with permission to give advice in relation to such an activity or a person who is an exempt person in relation to the giving of such advice: art 5(2). As to the meaning of 'contractually based investment' see PARA 112 note 4; definition applied by art 2(1).

The activity mentioned in art 5A is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 39A (assisting in the administration and performance of a contract of insurance) (see PARA 104) if it is carried on by a person who is not included in the record of insurance intermediaries: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 5A (added by SI 2003/1476). As to the meaning of 'contract of insurance' see PARA 90 note 3; definition applied by the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 2(1) (definition added by SI 2003/1476). 'Record of insurance intermediaries' means the record maintained by the Authority under the Financial Services and Markets Act 2000 s 347 (the public record) (see PARA 475) by virtue of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 93 (recorded insurance intermediaries) (see PARA 476): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 2(1).

The activity mentioned in art 6 is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53 (advising on investments) (see PARA 174) where the advice in question falls within the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6(2), 6(3) or art 6(5) (see below): art 6(1) (amended by SI 2003/1476). Subject to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6(4), advice falls within art 6(2) in so far as: (a) it is given to an individual (or his agent) other than where the individual acts: (i) in connection with the carrying on of a business of any kind by himself or by an undertaking of which he is, or would become as a result of the transaction to which the advice relates, a controller; or (ii) in his capacity as a trustee of an occupational pension scheme; (b) it consists of a recommendation to buy or subscribe for a particular security or contractually based investment; and (c) the transaction to which the advice relates would be made: (i) with a person acting in the course of carrying on the business of buying, selling, subscribing for or underwriting the security or contractually based investment, whether as principal or agent; (ii) on an investment exchange or any other market to which that investment is admitted for dealing; or (iii) in response to an invitation to subscribe for such an investment which is, or is to be, admitted for dealing on an investment exchange or any other market: art 6(2) (amended by SI 2003/1476). Subject to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6(4), advice falls within art 6(3) in so far as it consists of a recommendation to a member of a personal pension scheme (or his agent) to dispose of any rights or interests which the member has in or under the scheme: art 6(3). Advice does not fall within art 6(2) or art 6(3) if it indorses a corresponding recommendation given to the individual (or, as the case may be, the member) by an authorised person with permission to give advice in relation to the proposed transaction or a person who is an exempt person in relation to the giving of such advice: art 6(4). Advice falls within art 6(5) in so far as it relates to a transaction for the sale or purchase of rights under a contract of insurance; and it is given by a person who is not included in

the record of insurance intermediaries: art 6(5) (added by SI 2003/1476). 'Occupational pension scheme' and 'personal pension scheme' have the meanings given by the Pension Schemes Act 1993 s 1 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARAS 710, 741): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 2(1).

The activity mentioned in art 6A is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A (advising on regulated mortgage contracts) (see PARA 174) where the advice in question falls within the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6A(2): art 6A(1) (art 6A added by SI 2003/1475). Subject to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6A(3), advice falls within art 6A(2) in so far as it consists of a recommendation, given to an individual, to enter as borrower into a regulated mortgage contract with a particular person; and in entering into a regulated mortgage contract that person would be carrying on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(1) (regulated mortgage contracts) (see PARA 203): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6A(2) (as so added). Advice does not fall within art 6A(2) if it endorses a corresponding recommendation given to the individual by an authorised person with permission to carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53A (see PARA 174) or a person who is an exempt person in relation to an activity of that kind: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6A(3) (as so added).

The activity mentioned in art 6B is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 61(1) or (2) (regulated mortgage contracts) (see PARA 203): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6B(1) (art 6B added as art 6A by SI 2001/3650; and renumbered by SI 2003/1475). The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6B(1) does not apply to an activity carried on by a person in his capacity as a trustee or personal representative where the borrower under the regulated mortgage contract in question is a beneficiary under the trust, will or intestacy: art 6B(2) (as so added and renumbered).

The activity mentioned in art 6C is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B (advising on regulated home reversion plans) (see PARA 174) where the advice in question falls within the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6C(2): art 6C(1) (art 6C added by SI 2006/2383). Subject to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6C(3), advice falls within art 6C(2) in so far as it consists of a recommendation, given to an individual to enter as reversion seller or plan provider into a regulated home reversion plan with a particular person; and in entering into a regulated home reversion plan that person would be carrying on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(1) (regulated home reversion plans) (see PARA 209): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6C(2) (as so added). Advice does not fall within art 6C(2) if it endorses a corresponding recommendation given to the individual by an authorised person with permission to carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53B (see PARA 174) or a person who is an exempt person in relation to an activity of that kind: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6C(3) (as so added). As to the meanings of 'reversion seller' and 'plan provider' see PARA 209; definitions applied by art 2(1) (definitions added by SI 2006/2383).

The activity mentioned in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6D is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63B(1) or (2) (regulated home reversion plans) (see PARA 209): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6D(1) (art 6D added by SI 2006/2383). The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6D(1) does not apply to an activity carried on by a person in his capacity as a trustee or personal representative where the reversion seller under the regulated home reversion plan in question is a beneficiary under the trust, will or intestacy: art 6D(2) (as so added).

The activity mentioned in art 6E is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53C (advising on regulated home purchase plans) (see PARA 174) where the advice in question falls within the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6E(2): art 6E(1) (art 6E added by SI 2006/2383). Subject to the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6E(3), advice falls within art 6E(2) in so far as it consists of a recommendation, given to an individual to enter as home purchaser into a regulated home purchase plan with a particular person; and in entering into a regulated home purchase plan that person would be carrying on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(1) (regulated home purchase plans) (see PARA 215): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6E(2) (as so added). Advice does not fall within art 6E(2) if it endorses

a corresponding recommendation given to the individual by an authorised person with permission to carry on an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 53C (see PARA 174) or a person who is an exempt person in relation to an activity of that kind: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6E(3) (as so added). As to the meanings of 'home purchaser' and 'regulated home purchase plan' see PARA 215; definitions applied by art 2(1) (definitions added by SI 2006/2383).

The activity mentioned in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6F is an activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 63F(1) or (2) (regulated home purchase plans) (see PARA 215): Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6F(1) (art 6F added by SI 2006/2383). The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 6F(1) does not apply to an activity carried on by a person in his capacity as a trustee or personal representative where the home purchaser under the regulated home purchase plan in question is a beneficiary under the trust, will or intestacy: art 6F(2) (as so added).

The activity mentioned in art 7 is advising a person to become a member of a particular Lloyd's syndicate: art 7(1). As to the meaning of 'syndicate' see PARA 198 note 2; definition applied by art 2(1). Article 7(1) does not apply to advice which indorses that of an authorised person with permission to give such advice or a person who is an exempt person in relation to the giving of such advice: art 7(2).

The activity mentioned in art 8 is agreeing to carry on any of the activities mentioned in arts 4-7 other than the activities mentioned in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 5, art 9B, and arts 10, 51, 52: Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001, SI 2001/1227, art 8 (amended by SI 2002/682).

17 See note 12.

18 Financial Services and Markets Act 2000 s 327(7).

## UPDATE

### 751 Exemption from the general prohibition

NOTE 16--SI 2001/1227 arts 6G, 6H added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes. The activity mentioned in art 6G is of the kind specified by SI 2001/544 art 53D (advising on regulated sale and rent back agreements) (PARA 174) where the advice in question falls within SI 2001/1227 art 6G(2): SI 2001/1227 art 6G(1). Advice falls within art 6G(2) if it consists of a recommendation, given to an individual to enter as agreement seller or agreement provider into a regulated sale and rent back agreement with a particular person, and in entering into a regulated sale and rent back agreement that person would be carrying on an activity of the kind specified by SI 2001/544 art 63J(1) (regulated sale and rent back agreements) (PARA 220A): SI 2001/1227 art 6G(2). Advice does not fall within art 6G(2) if it indorses a corresponding recommendation given to the individual by an authorised person with permission to carry on an activity of the kind specified by SI 2001/544 art 53D or a person who is an exempt person in relation to an activity of that kind: SI 2001/1227 art 6G(3). 'Agreement provider' has the meaning given by SI 2001/544 art 63J(3), read with art 63J(6); 'agreement seller' and 'regulated sale and rent back agreement' have the meaning given by art 63J(3): SI 2001/1227 art 2(1) (definitions added by SI 2009/1342 with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes).

The activity mentioned in art 6H is of the kind specified by SI 2001/544 art 63J(1) or 63J(2): SI 2001/1227 art 6H(1). Article 6H(1) does not apply to an activity carried on by a person in his capacity as a trustee or personal representative where the agreement seller under the regulated sale and rent back agreement in question is a beneficiary under the trust, will or intestacy: SI 2001/1227 art 6H(2).

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## **752. Directions in relation to the general prohibition.**

The Financial Services Authority<sup>1</sup> may direct that the statutory provision relating to the exemption from the general prohibition<sup>2</sup> is not to apply to the extent specified in the direction<sup>3</sup>. Such a direction: (1) must be in writing; (2) may be given in relation to different classes of person or different descriptions of regulated activity<sup>4</sup>. A direction must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>5</sup>. The Authority may charge a reasonable fee for providing a person with a copy of the direction<sup>6</sup>. The Authority must, without delay, give the Treasury<sup>7</sup> a copy of any direction<sup>8</sup>.

The Authority may exercise its power to make a direction<sup>9</sup> only if it is satisfied either (a) that it is desirable in order to protect the interests of clients<sup>10</sup>; or (b) that it is necessary to do so in order to comply with a Community obligation imposed by the Insurance Mediation Directive<sup>11</sup>. In considering whether it is satisfied of the matter specified in head (a) above, the Authority must have regard amongst other things to the effectiveness of any arrangements made by any designated professional body<sup>12</sup>:

- 1791 (i) for securing compliance with rules<sup>13</sup>;
- 1792 (ii) for dealing with complaints against its members in relation to the carrying on by them of exempt regulated activities<sup>14</sup>;
- 1793 (iii) in order to offer redress to clients who suffer, or claim to have suffered, loss as a result of misconduct by its members in their carrying on of exempt regulated activities<sup>15</sup>;
- 1794 (iv) for co-operating with the Authority<sup>16</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.

2 I.e. the Financial Services and Markets Act 2000 s 327(1): see PARA 751. As to the general prohibition see PARA 80.

3 Financial Services and Markets Act 2000 s 328(1).

4 Financial Services and Markets Act 2000 s 328(2). As to regulated activities see PARA 84 et seq.

5 Financial Services and Markets Act 2000 s 328(3).

6 Financial Services and Markets Act 2000 s 328(4).

7 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Financial Services and Markets Act 2000 s 328(5).

9 I.e. the power conferred by the Financial Services and Markets Act 2000 s 328(1): see the text to notes 1-3.

10 Financial Services and Markets Act 2000 s 328(6)(a) (s 328(6) substituted by SI 2003/1473). As to the meaning of 'clients' see PARA 751 note 9.

If a member of a profession is carrying on an exempt regulated activity in his capacity as a trustee, the persons who are, have been or may be beneficiaries of the trust are to be treated as persons who use, have used or are or may be contemplating using services provided by that person in his carrying on of that activity: Financial Services and Markets Act 2000 s 328(9). As to the meaning of 'exempt regulated activity' see PARA 749 note 6.

11 Financial Services and Markets Act 2000 s 328(6)(b) (as substituted: see note 10). The reference is to European Parliament and EC Council Directive 2002/92 (OJ L9, 15.1.2003, p 3) on insurance mediation.

12 Financial Services and Markets Act 2000 s 328(7) (amended by SI 2003/1473). As to the designation of professional bodies see PARA 749.

13 Financial Services and Markets Act 2000 s 328(7)(a). The rules referred to in the text are those made under s 332(1): see PARA 756.

14 Financial Services and Markets Act 2000 s 328(7)(b).

15 Financial Services and Markets Act 2000 s 328(7)(c).

16 Financial Services and Markets Act 2000 s 328(7)(d). The designated professional bodies must co-operate with the Authority under s 325(4): see PARA 750.

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### **753. Orders in relation to the general prohibition.**

If it appears to the Financial Services Authority<sup>1</sup> that a person to whom the general prohibition<sup>2</sup> does not apply<sup>3</sup> is not a fit and proper person to carry on regulated activities<sup>4</sup>, then the Authority may make an order disapplying the exemption from the general prohibition<sup>5</sup> in relation to that person to the extent specified<sup>6</sup> in the order<sup>7</sup>. The Authority may, on the application of the person named in such an order, vary or revoke it<sup>8</sup>. If a partnership<sup>9</sup> is named in an order, the order is not affected by any change in its membership<sup>10</sup>. If a partnership named in an order is dissolved, the order continues to have effect in relation to any partnership which succeeds to the business of the dissolved partnership<sup>11</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.

2 As to the general prohibition see PARA 80.

3 I.e. as a result of the Financial Services and Markets Act 2000 s 327(1): see PARA 751.

4 I.e. in accordance with the Financial Services and Markets Act 2000 s 327: see PARA 751. As to regulated activities see PARA 84 et seq.

5 I.e. the exemption set out in the Financial Services and Markets Act 2000 s 327(1): see PARA 751.

6 'Specified' means specified in the order: Financial Services and Markets Act 2000 s 329(4).

7 Financial Services and Markets Act 2000 s 329(1), (2).

8 Financial Services and Markets Act 2000 s 329(3).

9 As to the meaning of 'partnership' see PARA 86 note 11.

10 Financial Services and Markets Act 2000 s 329(5).

11 Financial Services and Markets Act 2000 s 329(6). For the purposes of s 329(6), a partnership is to be regarded as succeeding to the business of another partnership only if: (1) the members of the resulting partnership are substantially the same as those of the former partnership; and (2) succession is to the whole or substantially the whole of the business of the former partnership: s 329(7).

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#### **754. Consultation.**

Before giving a direction<sup>1</sup>, the Financial Services Authority<sup>2</sup> must publish a draft of the proposed direction<sup>3</sup>. The draft must be accompanied by: (1) a cost benefit analysis<sup>4</sup>; and (2) notice that representations about the proposed direction may be made to the Authority within a specified time<sup>5</sup>. Before giving the proposed direction, the Authority must have regard to any representations made to it in accordance with head (2) above<sup>6</sup>. If the Authority gives the proposed direction, it must publish an account, in general terms, of the representations made to it in accordance with head (2) above and its response to them<sup>7</sup>. If the direction differs from the draft in a way which is, in the opinion of the Authority, significant: (a) the Authority must<sup>8</sup> publish details of the difference; and (b) those details must be accompanied by a cost benefit analysis<sup>9</sup>. The provisions described above<sup>10</sup> do not apply if the Authority considers that the delay involved in complying with them would prejudice the interests of consumers<sup>11</sup>. When the Authority is required to publish a document<sup>12</sup>, it must do so in the way appearing to it to be best calculated to bring it to the attention of the public<sup>13</sup>.

1    Ie under the Financial Services and Markets Act 2000 s 328(1): see PARA 752.

2    As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.

3    Financial Services and Markets Act 2000 s 330(1). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 330(1): s 330(8).

4    'Cost benefit analysis' means an estimate of the costs together with an analysis of the benefits that will arise: (1) if the proposed direction is given; or (2) if head (b) in the text applies, from the direction that has been given: Financial Services and Markets Act 2000 s 330(10). Neither head (1) in the text nor head (b) in the text applies if the Authority considers: (a) that, making the appropriate comparison, there will be no increase in costs; or (b) that, making that comparison, there will be an increase in costs but the increase will be of minimal significance: s 330(7). 'Appropriate comparison' means: (i) in relation to head (1) in the text, a comparison between the overall position if the direction is given and the overall position if it is not given; (ii) in relation to head (b) in the text, a comparison between the overall position after the giving of the direction and the overall position before it was given: s 330(11).

5    Financial Services and Markets Act 2000 s 330(2).

6    Financial Services and Markets Act 2000 s 330(3).

7    Financial Services and Markets Act 2000 s 330(4).

8    Ie in addition to complying with the Financial Services and Markets Act 2000 s 330(4): see the text to note 7.

9    Financial Services and Markets Act 2000 s 330(5).

10   Ie the Financial Services and Markets Act 2000 s 330(1)-(5): see the text to notes 1-9.

11   Financial Services and Markets Act 2000 s 330(6).

12   As to the meaning of 'document' see PARA 10 note 10.

13   Financial Services and Markets Act 2000 s 330(9).

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### **755. Procedure on making or varying orders.**

If the Financial Services Authority<sup>1</sup> proposes to make an order<sup>2</sup>, it must give the person concerned a warning notice<sup>3</sup>. The warning notice must set out the terms of the proposed order<sup>4</sup>. If the Authority decides to make an order<sup>5</sup>, it must give the person concerned a decision notice<sup>6</sup>. The decision notice must: (1) name the person to whom the order applies; (2) set out the terms of the order; and (3) be given to the person named in the order<sup>7</sup>. Where an application for the variation or revocation of an order is made<sup>8</sup>: (a) if the Authority decides to grant the application, it must give the applicant written notice of its decision<sup>9</sup>; (b) if the Authority proposes to refuse the application, it must give the applicant a warning notice<sup>10</sup>; (c) if the Authority decides to refuse the application, it must give the applicant a decision notice<sup>11</sup>.

A person against whom the Authority has decided to make an order<sup>12</sup>, or whose application for the variation or revocation of such an order the Authority has decided to refuse, may refer the matter to the Financial Services and Markets Tribunal<sup>13</sup>.

The Authority may not make an order<sup>14</sup> unless: (i) the period within which the decision to make the order may be referred to the Tribunal has expired and no such reference has been made; or (ii) if such a reference has been made, the reference has been determined<sup>15</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.

2 Ie under the Financial Services and Markets Act 2000 s 329: see PARA 753.

3 Financial Services and Markets Act 2000 s 331(1). As to warning notices see PARA 769.

4 Financial Services and Markets Act 2000 s 331(2).

5 Ie under the Financial Services and Markets Act 2000 s 329: see PARA 753.

6 Financial Services and Markets Act 2000 s 331(3). As to decision notices see PARA 770.

7 Financial Services and Markets Act 2000 s 331(4).

8 Financial Services and Markets Act 2000 s 331(5). An application is made under s 329: see PARA 753.

9 Financial Services and Markets Act 2000 s 331(6).

10 Financial Services and Markets Act 2000 s 331(7).

11 Financial Services and Markets Act 2000 s 331(8).

12 Ie under the Financial Services and Markets Act 2000 s 329: see PARA 753.

13 Financial Services and Markets Act 2000 s 331(9). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

14 Ie under the Financial Services and Markets Act 2000 s 329: see PARA 753.

15 Financial Services and Markets Act 2000 s 331(10).



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## **756. Rules in relation to persons to whom the general prohibition does not apply.**

The Financial Services Authority<sup>1</sup> may make rules<sup>2</sup> applicable to persons to whom the general prohibition<sup>3</sup> does not apply<sup>4</sup>. This power is to be exercised for the purpose of ensuring that clients<sup>5</sup> are aware that such persons are not authorised persons<sup>6</sup>. A designated professional body<sup>7</sup> must make rules: (1) applicable to members<sup>8</sup> of the profession in relation to which it is established who are not authorised persons<sup>9</sup>; and (2) governing the carrying on by those members of regulated activities<sup>10</sup> (other than regulated activities in relation to which they are exempt persons)<sup>11</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Professional Firms (PROF). As to the Handbook generally see PARA 22.

2 As to the meaning of 'rule' see PARA 23 note 2.

3 As to the general prohibition see PARA 80.

4 Financial Services and Markets Act 2000 s 332(1). The general prohibition does not apply as a result of s 327(1): see PARA 751.

5 As to the meaning of 'clients' see PARA 751 note 9.

6 Financial Services and Markets Act 2000 s 332(2). As to authorised persons see PARA 314.

7 As to the designation of professional bodies see PARA 749.

8 As to the meaning of 'members' see PARA 749 note 4.

9 Financial Services and Markets Act 2000 s 332(3)(a). Rules made in compliance with s 332(3) must be designed to secure that, in providing a particular professional service to a particular client, the member carries on only regulated activities which arise out of, or are complementary to, the provision by him of that service to that client: s 332(4). Rules made by a designated professional body under s 332(3) require the approval of the Authority: s 332(5).

10 As to regulated activities see PARA 84 et seq. For the purposes of the Financial Services and Markets Act 2000 s 332(3)(b), the reference to 'regulated activities' does not include:

669 (1) any activity of the kind specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 10(1) or art 10(2) (see PARA 100), where P is a member of the Society (art 13(1)(a)(i)) and, by virtue of the Financial Services and Markets Act 2000 s 316 (application of the Act to Lloyd's underwriting) (see PARA 743), the general prohibition does not apply to the carrying on by P of that activity (Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 13(1)(a)(ii)); or

670 (2) any activity of the kind specified by art 10(2), where P is a former underwriting member (art 13(1)(b)(i)) and the contract of insurance in question is one underwritten by P at Lloyd's (art 13(1)(b)(ii)).

As to the meanings of 'member of the Society' and 'former underwriting member' see the Lloyd's Act 1982 (see **INSURANCE** vol 25 (2003 Reissue) PARAS 24, 25); definition applied by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 13(2).

11 Financial Services and Markets Act 2000 s 332(3)(b). As to the meaning of 'exempt person' see PARA 80 note 4. See note 9.

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### **757. False claims to be a person to whom the general prohibition does not apply.**

A person who: (1) describes himself (in whatever terms) as a person to whom the general prohibition<sup>1</sup> does not apply, in relation to a particular regulated activity<sup>2</sup>, as a result of Part XX of the Financial Services and Markets Act 2000<sup>3</sup>; or (2) behaves, or otherwise holds himself out, in a manner which indicates (or which is reasonably likely to be understood as indicating) that he is such a person, is guilty of an offence if he is not such a person<sup>4</sup>. In proceedings for such an offence, it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence<sup>5</sup>. A person guilty of such an offence is liable on summary conviction to imprisonment or a fine or both<sup>6</sup>. However, where the conduct constituting the offence involved or included the public display of any material, the maximum fine for the offence is the fine multiplied by the number of days for which the display continued<sup>7</sup>.

1 As to the general prohibition see PARA 80.

2 As to regulated activities see PARA 84 et seq.

3 Ie the Financial Services and Markets Act 2000 Pt XX (ss 325-333).

4 Financial Services and Markets Act 2000 s 333(1).

5 Financial Services and Markets Act 2000 s 333(2).

6 Financial Services and Markets Act 2000 s 333(3). Such a person is liable to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both: see s 333(3). As to the standard scale see PARA 27 note 21.

7 Financial Services and Markets Act 2000 s 333(4). The reference is to level 5 on the standard scale so multiplied.

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### **(vi) Mutual Societies and Industrial and Provident Societies**

#### **758. The Friendly Societies Commission.**

The Financial Services and Markets Act 2000 enabled the Treasury<sup>1</sup> to provide: (1) for any functions of the Friendly Societies Commission<sup>2</sup> to be transferred to the Financial Services Authority<sup>3</sup>; (2) for any functions of the Friendly Societies Commission not transferred to the Authority to be transferred to the Treasury<sup>4</sup>. It also gave the Treasury power to abolish the Friendly Societies Commission<sup>5</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 See also PARAS 2094, 2105. As to friendly societies generally see PARA 2081 et seq.

3 Financial Services and Markets Act 2000 s 334(1)(a). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Prudential Standards, Interim Prudential Sourcebook for Friendly Societies (IPRU(FSOC)). As to the Handbook generally see PARA 22. As to the transfer of functions to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 4(2). As to the application of the Financial Services and Markets Act 2000 in relation to functions transferred to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 2. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

4 Financial Services and Markets Act 2000 s 334(1)(b). As to the transfer of functions to the Treasury see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 1 Pt II.

5 See the Financial Services and Markets Act 2000 s 334(2). The Friendly Societies Commission ceases to exist in accordance with the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 10.

As to the removal of certain restrictions on the ability of incorporated friendly societies to form subsidiaries and control corporate bodies and connected amendments see the Financial Services and Markets Act 2000 Sch 18 Pt II.

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## **759. The Registry of Friendly Societies.**

The Financial Services and Markets Act 2000 enabled the Treasury<sup>1</sup> to provide for any functions of: (1) the Chief Registrar of Friendly Societies<sup>2</sup>, or of an assistant registrar of friendly societies for the central registration area; (2) the central office of the registry of friendly societies; and (3) the assistant registrar of friendly societies for Scotland, to be transferred to the Financial Services Authority<sup>3</sup>. It enabled the Treasury to provide for any of those functions not transferred to the Authority to be transferred to the Treasury<sup>4</sup>. The Financial Services and Markets Act 2000 also gave the Treasury power to abolish: (a) the office of Chief Registrar of Friendly Societies; (b) the office of assistant registrar of friendly societies for the central registration area; (c) the central office; or (d) the office of assistant registrar of friendly societies for Scotland<sup>5</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 See also PARAS 2094, 2105. As to friendly societies generally see PARA 2081 et seq.

3 Financial Services and Markets Act 2000 s 335(1)(a), (2)(a), (3)(a). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the transfer of functions to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 4(2). As to the application of the Financial Services and Markets Act 2000 in relation to functions transferred to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 2. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1.

4 Financial Services and Markets Act 2000 s 335(1)(b), (2)(b), (3)(b). As to the transfer of functions to the Treasury see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 1 Pt I.

5 See the Financial Services and Markets Act 2000 s 335(4); and the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 12.

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## **760. The Building Societies Commission.**

The Financial Services and Markets Act 2000 enabled the Treasury<sup>1</sup> to provide: (1) for any functions of the Building Societies Commission to be transferred to the Financial Services Authority<sup>2</sup>; (2) for any functions of the Building Societies Commission not transferred to the Authority to be transferred to the Treasury<sup>3</sup>. It also gave the Treasury power to abolish the Building Societies Commission<sup>4</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 Financial Services and Markets Act 2000 s 336(1)(a). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Prudential Standards, General Prudential Sourcebook (GENPRU), Prudential Sourcebook for Building Societies (BIPRU), Interim Prudential Sourcebook for Building Societies (IPRU(BSOC)). As to the Handbook generally see PARA 22. As to the transfer of functions to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 4(2). As to the application of the Financial Services and Markets Act 2000 in relation to functions transferred to the Authority see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 2. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to building societies generally see PARA 1856 et seq.

3 Financial Services and Markets Act 2000 s 336(1)(b). As to the transfer of functions to the Treasury see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 1 Pt III.

4 See the Financial Services and Markets Act 2000 s 336(2); and the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 9.

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## **761. The Building Societies Investor Protection Board.**

The Financial Services and Markets Act 2000 enabled the Treasury<sup>1</sup> to abolish the Building Societies Investor Protection Board<sup>2</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 See the Financial Services and Markets Act 2000 s 337; and the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 11. As to orders made under the Financial Services and Markets Act 2000 s PARA 67 note 1. As to building societies generally see PARA 1856 et seq.

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## **762. Industrial and provident societies and credit unions.**

The Financial Services and Markets Act 2000 enabled the Treasury<sup>1</sup> to provide for the transfer to the Financial Services Authority<sup>2</sup> of any functions conferred by: (1) the Industrial and Provident Societies Act 1965; (2) the Industrial and Provident Societies Act 1967; (3) the Friendly and Industrial and Provident Societies Act 1968; (4) the Industrial and Provident Societies Act 1975; (5) the Industrial and Provident Societies Act 1978; (6) the Credit Unions Act 1979<sup>3</sup>. It also enabled the Treasury to provide for the transfer to the Treasury of any functions under those enactments which were not transferred to the Authority<sup>4</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Credit Unions (CRED). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 338(1). As to the order that has been made see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617. As to orders made under the Financial Services and Markets Act 2000 see PARA 67 note 1. As to industrial and provident societies and credit unions generally see PARA 2394 et seq.

4 Financial Services and Markets Act 2000 s 338(2).

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## **763. Provisions that may be included in orders.**

The additional powers conferred<sup>1</sup> on a person making an order under the Financial Services and Markets Act 2000 include power for the Treasury<sup>2</sup>, when making an order in relation to mutual societies<sup>3</sup> transferring functions, to include provision<sup>4</sup>:

- 1795 (1) for the transfer of any functions of a member of the body, or servant or agent of the body or person, whose functions are transferred by the order<sup>5</sup>;
- 1796 (2) for the transfer of any property, rights or liabilities held, enjoyed or incurred by any person in connection with transferred functions<sup>6</sup>;
- 1797 (3) for the carrying on and completion by or under the authority of the person to whom functions are transferred of any proceedings, investigations or other matters commenced, before the order takes effect, by or under the authority of the person from whom the functions are transferred<sup>7</sup>;

- 1798 (4) amending any enactment relating to transferred functions in connection with their exercise by, or under the authority of, the person to whom they are transferred<sup>8</sup>;
- 1799 (5) for the substitution of the person to whom functions are transferred for the person from whom they are transferred, in any instrument, contract or legal proceedings made or begun before the order takes effect<sup>9</sup>.

The additional powers conferred<sup>10</sup> on a person making an order under the Financial Services and Markets Act 2000 include power for the Treasury, when making an order dissolving a mutual society<sup>11</sup>, to include provision<sup>12</sup>:

- 1800 (a) for the transfer of any property, rights or liabilities held, enjoyed or incurred by any person in connection with the office or body which ceases to have effect as a result of the order<sup>13</sup>;
- 1801 (b) for the carrying on and completion by or under the authority of such person as may be specified in the order of any proceedings, investigations or other matters commenced, before the order takes effect, by or under the authority of the person whose office, or the body which, ceases to exist as a result of the order<sup>14</sup>;
- 1802 (c) amending any enactment which makes provision with respect to that office or body<sup>15</sup>;
- 1803 (d) for the substitution of the Financial Services Authority<sup>16</sup>, the Treasury or such other body as may be specified in the order in any instrument, contract or legal proceedings made or begun before the order takes effect<sup>17</sup>.

On or after the making of an order<sup>18</sup> (the 'original order'), the Treasury may by order make any incidental, supplemental, consequential or transitional provision which it had power to include in the original order<sup>19</sup>.

A certificate issued by the Treasury that property vested in a person immediately before an order under Part XXI of the Financial Services and Markets Act 2000<sup>20</sup> took effect has been transferred as a result of the order is conclusive evidence of the transfer<sup>21</sup>.

1    le by the Financial Services and Markets Act 2000 s 428: see PARA 67 note 1.

2    As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3    le under the Financial Services and Markets Act 2000 s 334, s 335, s 336 or s 338: see PARAS 758-760, 762.

4    Financial Services and Markets Act 2000 s 339(1). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617; and the Financial Services and Markets Act 2000 (Consequential Amendments and Savings) (Industrial Assurance) Order 2001, SI 2001/3647. The provisions of the Financial Services and Markets Act 2000 s 339(1), (2) are not to be read as affecting in any way the powers conferred by s 428 (see PARA 67 note 1): s 339(5).

5    Financial Services and Markets Act 2000 s 339(1)(a). See note 4.

6    Financial Services and Markets Act 2000 s 339(1)(b). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 5 (consequential and transitional provisions in relation to transferred functions). See note 4.

7    Financial Services and Markets Act 2000 s 339(1)(c). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, arts 5, 6 (requirements to provide documents etc). As to the anticipatory exercise of powers see art 8. See note 4.

8    Financial Services and Markets Act 2000 s 339(1)(d). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 5. See note 4.

- 9 Financial Services and Markets Act 2000 s 339(1)(e). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 7 (consequential modification of non-statutory provisions). See note 4.
- 10 Ie by the Financial Services and Markets Act 2000 s 428: see PARA 67 note 1.
- 11 Ie under the Financial Services and Markets Act 2000 s 334(2), s 335(4), s 336(2) or s 337: see PARAS 759-761.
- 12 Financial Services and Markets Act 2000 s 339(2). See note 4.
- 13 Financial Services and Markets Act 2000 s 339(2)(a). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, arts 9-12. See note 4.
- 14 Financial Services and Markets Act 2000 s 339(2)(b). See note 4.
- 15 Financial Services and Markets Act 2000 s 339(2)(c). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, Sch 3 (amended by SI 2001/3647; SI 2001/3649). See note 4.
- 16 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 17 Financial Services and Markets Act 2000 s 339(2)(d). See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, arts 9-12. See note 4.
- 18 Ie under any of the provisions of the Financial Services and Markets Act 2000 ss 334-338: see PARAS 758-762.
- 19 Financial Services and Markets Act 2000 s 339(3). See the Financial Services and Markets Act 2000 (Transitional Provisions, Repeals and Savings) (Financial Services Compensation Scheme) Order 2001, SI 2001/2967.
- 20 Ie the Financial Services and Markets Act 2000 Pt XXI (ss 334-339).
- 21 Financial Services and Markets Act 2000 s 339(4).

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## **(10) ACTUARIES AND AUDITORS**

### **764. Appointment, resignation, etc.**

Rules<sup>1</sup> may require an authorised person<sup>2</sup>, or an authorised person falling within a specified<sup>3</sup> class: (1) to appoint an auditor<sup>4</sup>; or (2) to appoint an actuary<sup>5</sup>, if he is not already under an obligation to do so imposed by another enactment<sup>6</sup>. Rules may require an authorised person, or an authorised person falling within a specified class, to produce periodic financial reports and to have them reported on by an auditor or an actuary<sup>7</sup>. Rules may impose such other duties on auditors of, or actuaries acting for, authorised persons as may be specified<sup>8</sup>. An auditor or actuary appointed as a result of rules<sup>9</sup>, or on whom duties are imposed by rules<sup>10</sup>, must act in accordance with such provision as may be made by the rules, and has such powers in connection with the discharge of his functions as may be provided by the rules<sup>11</sup>.

An auditor or actuary<sup>12</sup> must without delay notify the Financial Services Authority if he: (a) is removed from office by an authorised person<sup>13</sup>; (b) resigns before the expiry of his term of office with such a person<sup>14</sup>; or (c) is not re-appointed by such a person<sup>15</sup>. If he ceases to be an auditor of, or actuary acting for, such a person, he must without delay notify the Authority of

any matter connected with his so ceasing which he thinks ought to be drawn to the Authority's attention, or notify it that there is no such matter<sup>16</sup>.

1 As to the meaning of 'rule' see PARA 23 note 2. 'Auditors and actuaries rules' means rules made under the Financial Services and Markets Act 2000 s 340: s 417(1).

2 As to authorised persons see PARA 314.

3 Ie specified in rules: Financial Services and Markets Act 2000 s 340(7).

4 Financial Services and Markets Act 2000 s 340(1)(a). For the purposes of s 340(1)-(3), 'auditor' or 'actuary' means an auditor, or actuary, who satisfies such requirements as to qualifications, experience and other matters (if any) as may be specified: s 340(6).

Rules under s 340(1) may make provision: (1) specifying the manner in which and time within which an auditor or actuary is to be appointed; (2) requiring the Financial Services Authority to be notified of an appointment; (3) enabling the Authority to make an appointment if no appointment has been made or notified; (4) as to remuneration; (5) as to the term of office, removal and resignation of an auditor or actuary: s 340(4). As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Chs 3-4. As to the Handbook generally see PARA 22.

5 Financial Services and Markets Act 2000 s 340(1)(b). See note 4.

6 Financial Services and Markets Act 2000 s 340(1). See note 4.

7 Financial Services and Markets Act 2000 s 340(2).

8 Financial Services and Markets Act 2000 s 340(3).

9 Ie under the Financial Services and Markets Act 2000 s 340(1): see the text to notes 1-6.

10 Ie under the Financial Services and Markets Act 2000 s 340(3): see the text to note 8.

11 Financial Services and Markets Act 2000 s 340(5).

12 Ie an auditor or actuary of an authorised person appointed under or as a result of a statutory provision: Financial Services and Markets Act 2000 ss 342(1), (2), 344(1).

13 Financial Services and Markets Act 2000 s 344(2)(a).

14 Financial Services and Markets Act 2000 s 344(2)(b).

15 Financial Services and Markets Act 2000 s 344(2)(c).

16 Financial Services and Markets Act 2000 s 344(3).

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## **765. Access to information.**

An appointed<sup>1</sup> auditor of, or an appointed actuary acting for, an authorised person<sup>2</sup>: (1) has a right of access at all times to the authorised person's books, accounts and vouchers<sup>3</sup>; and (2) is entitled to require from the authorised person's officers such information and explanations as he reasonably considers necessary for the performance of his duties as auditor or actuary<sup>4</sup>.

1 'Appointed' means appointed under or as a result of the Financial Services and Markets Act 2000: s 341(2). As to the appointment of auditors and actuaries see PARA 764. See also the Financial Services Authority's



Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Chs 3-4. As to the Handbook generally see PARA 22.

- 2 As to authorised persons see PARA 314.
- 3 Financial Services and Markets Act 2000 s 341(1)(a).
- 4 Financial Services and Markets Act 2000 s 341(1)(b).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/2. FINANCIAL SERVICES REGULATION/(10) ACTUARIES AND AUDITORS/766. Disclosure of information to the Financial Services Authority.

## **766. Disclosure of information to the Financial Services Authority.**

An auditor<sup>1</sup> or actuary<sup>2</sup> does not contravene any duty to which he is subject merely because he gives to the Financial Services Authority<sup>3</sup>: (1) information on a matter of which he has, or had, become aware in his capacity as auditor of, or actuary acting for, an authorised person or a person who has close links with an authorised person<sup>4</sup>; or (2) his opinion on such a matter, if he is acting in good faith and he reasonably believes that the information or opinion is relevant to any functions of the Authority<sup>5</sup>.

The Treasury<sup>6</sup> may make regulations prescribing circumstances in which an auditor or actuary must communicate matters to the Authority<sup>7</sup>. It is the duty of an auditor or actuary to whom any such regulations apply to communicate a matter to the Authority in the circumstances prescribed by the regulations<sup>8</sup>. The matters to be communicated to the Authority in accordance with the regulations may include matters relating to persons other than the authorised person concerned<sup>9</sup>.

1 These provisions apply: (1) to a person who is, or has been, an auditor of an authorised person appointed under or as a result of a statutory provision; and (2) to a person who: (a) is, or has been, an auditor of an authorised person appointed under or as a result of a statutory provision; and (b) is, or has been, an auditor of a person ('CL') who has close links with the authorised person: Financial Services and Markets Act 2000 ss 342(1), 343(1). As to authorised persons see PARA 314.

CL has close links with the authorised person concerned ('A') if CL is: (i) a parent undertaking of A; (ii) a subsidiary undertaking of A; (iii) a parent undertaking of a subsidiary undertaking of A; or (iv) a subsidiary undertaking of a parent undertaking of A: s 343(8). As to the meanings of 'parent undertaking' and 'subsidiary undertaking' see PARA 351 note 32. 'Subsidiary undertaking' includes all the instances mentioned in EC Seventh Council Directive 83/349 based on the article 54(3)(g) of the Treaty on Consolidated Accounts (OJ L193, 18.7.83, p 1) art 1(1), (2) in which an entity may be a subsidiary of an undertaking: Financial Services and Markets Act 2000 s 343(9).

2 These provisions apply: (1) to a person who is, or has been, an actuary acting for an authorised person and appointed under or as a result of a statutory provision; and (2) to a person who: (a) is, or has been, an actuary acting for an authorised person and appointed under or as a result of a statutory provision; and (b) is, or has been, an actuary acting for a person ('CL') who has close links with the authorised person: Financial Services and Markets Act 2000 ss 342(2), 343(2).

3 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Chs 3-4. As to the Handbook generally see PARA 22.

4 Financial Services and Markets Act 2000 ss 342(3)(a), 343(3)(a). Sections 342(3), 343(3) apply whether or not the auditor or actuary is responding to a request from the Authority: ss 342(4), 343(4).

5 Financial Services and Markets Act 2000 ss 342(3)(b), 343(3)(b). See note 4.

6 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

7 Financial Services and Markets Act 2000 ss 342(5), 343(5). Regulations have been made which provide that an auditor to whom s 342 or s 343 applies must communicate to the Authority information on, or his opinion on, matters mentioned in head (2) in the text in the following circumstances (Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 2(1)):

- 671 (1) the auditor reasonably believes that, as regards the person concerned there is or has been, or may be or may have been, a contravention of any relevant requirement that applies to the person concerned, and that contravention may be of material significance to the Authority in determining whether to exercise, in relation to the person concerned, any functions conferred on the Authority by or under any provision of the Financial Services and Markets Act 2000 other than Pt VI (ss 72-103) (official listing) (see PARA 385 et seq) (Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 2(2)(a));
- 672 (2) the auditor reasonably believes that the information on, or his opinion on, those matters may be of material significance to the Authority in determining whether the person concerned satisfies and will continue to satisfy the threshold conditions (reg 2(2)(b));
- 673 (3) the auditor reasonably believes that the person concerned is not, may not be or may cease to be a going concern (reg 2(2)(c));
- 674 (4) the auditor is precluded from stating in his report that the annual accounts or, where they are required to be made by any of the following provisions, other financial reports of the person concerned: (a) have been properly prepared in accordance with the Companies Act 2006 or, where applicable, give a true and fair view of the matters referred to in s 495(3) (formerly the Companies Act 1985 s 235(2)) (see **COMPANIES** vol 15 (2009) PARA 924); (b) have been prepared so as to conform with the requirements of the Building Societies Act 1986 Pt VIII (ss 71-81B) and the regulations made under it or, where applicable, give a true and fair view of the matters referred to in s 78(4) or s 78(7) (see PARA 2003); (c) have been prepared so as to conform with the Friendly Societies Act 1992 and the regulations made under it or, where applicable, give a true and fair view of the matters referred to in s 73(5A)-(5D) (see PARA 2343); (d) have been prepared so as to conform with the requirements of the Friendly and Industrial and Provident Societies Act 1968 or, where applicable, give a true and fair view of the matters referred to in s 9(2), (3) (see PARA 2515); or (e) have been prepared so as to conform with the requirements of rules made under the Financial Services and Markets Act 2000 where the auditor is, by rules made under s 340 (see PARA 764), required to make such a statement (see the Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 2(2)(d)); or
- 675 (5) where applicable, the auditor is required to state in his report in relation to the person concerned any of the facts referred to in the Companies Act 2006 s 498 (formerly the Companies Act 1985 s 237(2), (3), (4A)) (see **COMPANIES** vol 15 (2009) PARA 928) (see the Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 2(2)(e)).

'Person concerned' means in relation to an auditor of an authorised person, that authorised person; in relation to an auditor of a person who has close links (within the meaning of the Financial Services and Markets Act 2000 s 343: see note 1) with an authorised person, that authorised person: Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 1(2). 'Relevant requirement' means: a requirement which is imposed by or under any provision of the Financial Services and Markets Act 2000 other than Pt VI (listing) (see PARA 385 et seq) and which relates to authorisation under the Act (whether by way of permission under Pt IV (ss 40-55) (see PARA 348 et seq) or otherwise) or to the carrying on of any regulated activity; or a requirement which is imposed by or under any other Act and whose contravention constitutes an offence which the Authority has power to prosecute under the Financial Services and Markets Act 2000: Financial Services and Markets Act 2000 (Communications by Auditors) Regulations 2001, SI 2001/2587, reg 1(2). As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

Regulations have also been made which apply to any person who is, or has been, an actuary acting for an authorised person ('A') and who is or was appointed under or as a result of rules made by the Authority under the Financial Services and Markets Act 2000 s 340 (see PARA 764) or appointed under or as a result of any other statutory provision and subject to duties imposed by such rules (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(1)). Such an actuary and also an actuary acting for a person with close links with A (within the meaning of the Financial Services and Markets Act 2000 s 343(8): see note 1) must communicate to the Authority information on, or his opinion on, matters mentioned in head (2) of the text in the following circumstances (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(2), (3)):

- 676 (i) as regards A the actuary reasonably believes that (A) there is or has been, or may be or may have been, a contravention of any relevant requirement that applies to A; and (b) that

contravention may be of material significance to the Authority in determining whether to exercise, in relation to A, any functions conferred on the Authority by or under any provision of the Financial Services and Markets Act 2000 other than Pt VI (official listing) (see PARA 385 et seq) (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(4)(a));

- 677 (ii) the actuary reasonably believes that the information on, or his opinion on, those matters may be of material significance to the Authority in determining whether A satisfies and will continue to satisfy the threshold conditions (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(4)(b));
- 678 (iii) the actuary reasonably believes that, where applicable, there is a significant risk that assets representing a fund or funds maintained by A in respect of contracts of long-term insurance effected or carried out by him are or may be, or may become, insufficient to meet his liabilities attributable to such contracts (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(4)(c)); or
- 679 (iv) the actuary reasonably believes that, where applicable, there is a significant risk that A did not, does not or is unable to, or will not, may not or may become unable to, take into account in a reasonable and proportionate manner the interests of the policyholders of contracts of long-term insurance effected or carried out by him, and for these purposes the actuary may take into account: (A) the manner in which A exercises his discretion in relation to the operation of the fund or funds maintained by A in respect of contracts of long-term insurance effected or carried out by him, including the distribution and use of surplus assets; (B) the methodology used to determine bonuses; (C) the manner in which A takes into account the interests of different classes of policyholder; (D) the application of fixed or discretionary charges or benefits payable under such contracts; (E) representations made by A to policyholders or potential policyholders; and (F) any obligation (however phrased) imposed on A under the Financial Services and Markets Act 2000 to treat policyholders fairly (Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 2(4)(d), (5)).

'Relevant requirement' means a requirement which is imposed by or under any provision of the Financial Services and Markets Act 2000 other than Pt VI (official listing) (see PARA 385 et seq); or a requirement which is imposed by or under any other Act and whose contravention constitutes an offence which the Authority has power to prosecute under the Financial Services and Markets Act 2000: Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 1(2). 'Contract of long-term insurance' has the same meaning as in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (see PARA 90 note 3): Financial Services and Markets Act 2000 (Communications by Actuaries) Regulations 2003, SI 2003/1294, reg 1(2).

8 Financial Services and Markets Act 2000 ss 342(6), 343(6).

9 Financial Services and Markets Act 2000 ss 342(7), 343(7).

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## **767. Disqualification for failure to comply with a duty.**

If it appears to the Financial Services Authority<sup>1</sup> that an auditor or actuary<sup>2</sup> has failed to comply with a duty imposed on him under the Financial Services and Markets Act 2000, it may disqualify him from being the auditor of, or (as the case may be) from acting as an actuary for, any authorised person or any particular class of authorised person<sup>3</sup>. If the Authority proposes to disqualify a person in this way it must give him a warning notice<sup>4</sup>. If it decides to disqualify him it must give him a decision notice<sup>5</sup>. The Authority may remove any disqualification if satisfied that the disqualified person will in future comply with the duty in question<sup>6</sup>. A person who has been disqualified may refer the matter to the Financial Services and Markets Tribunal<sup>7</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Supervision Manual (SUP) Chs 3-4, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Is an auditor or actuary of an authorised person appointed under or as a result of a statutory provision: Financial Services and Markets Act 2000 ss 342(1), (2), 345(1). As to authorised persons see PARA 314.

3 Financial Services and Markets Act 2000 s 345(1). An auditor may also be disqualified for breaching trust scheme rules: see s 249; and PARA 616.

4 Financial Services and Markets Act 2000 s 345(2). As to warning notices see PARA 769.

5 Financial Services and Markets Act 2000 s 345(3). As to decision notices see PARA 770.

6 Financial Services and Markets Act 2000 s 345(4).

7 Financial Services and Markets Act 2000 s 345(5). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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## **768. Penalty for provision of false or misleading information.**

An authorised person<sup>1</sup> who knowingly or recklessly gives an auditor or actuary appointed under or as a result of the Financial Services and Markets Act 2000<sup>2</sup> information which is false or misleading in a material particular is guilty of an offence and liable to imprisonment or a fine or both<sup>3</sup>.

1 As to authorised persons see PARA 314.

2 See the Financial Services and Markets Act 2000 s 346(3). As to the appointment of auditors and actuaries see PARA 764.

3 Financial Services and Markets Act 2000 s 346(1). The authorised person is liable (1) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both: see s 346(1). As to the statutory maximum see PARA 56 note 24.

Section 346(1) applies equally to an officer, controller or manager of an authorised person: s 346(2). As to the meaning of 'controller' see PARA 591 note 16. As to the meaning of 'manager' see PARA 86 note 11.

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## **(11) MISCELLANEOUS PROCEDURAL AND OTHER MATTERS**

### **(i) Procedure for Notices given by the Financial Services Authority**

#### **769. Warning notices.**

A warning notice must:

- 1804 (1) state the action which the Financial Services Authority<sup>1</sup> proposes to take<sup>2</sup>;
- 1805 (2) be in writing<sup>3</sup>;
- 1806 (3) give reasons for the proposed action<sup>4</sup>;
- 1807 (4) state whether the statutory provision relating to access to Authority material<sup>5</sup> applies<sup>6</sup>; and
- 1808 (5) if that provision applies, describe its effect and state whether any secondary material exists to which the person concerned must be allowed access under it<sup>7</sup>.

The warning notice must specify a reasonable period (which may not be less than 28 days) within which the person to whom it is given may make representations to the Authority<sup>8</sup>. The Authority may extend the period specified in the notice<sup>9</sup>. The Authority must then decide, within a reasonable period, whether to give the person concerned a decision notice<sup>10</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 387(1)(a).

3 Financial Services and Markets Act 2000 s 387(1)(b).

4 Financial Services and Markets Act 2000 s 387(1)(c).

5 I.e. the Financial Services and Markets Act 2000 s 394: see PARA 776.

6 Financial Services and Markets Act 2000 s 387(1)(d).

7 Financial Services and Markets Act 2000 s 387(1)(e).

8 Financial Services and Markets Act 2000 s 387(2).

9 Financial Services and Markets Act 2000 s 387(3).

10 Financial Services and Markets Act 2000 s 387(4). As to decision notices see PARA 770.

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## **770. Decision notices.**

A decision notice must:

- 1809 (1) be in writing<sup>1</sup>;
- 1810 (2) give the Financial Services Authority's<sup>2</sup> reasons for the decision to take the action to which the notice relates<sup>3</sup>;
- 1811 (3) state whether the statutory provision relating to access to Authority material<sup>4</sup> applies<sup>5</sup>;

- 1812 (4) if that provision applies, describe its effect and state whether any secondary material exists to which the person concerned must be allowed access under it<sup>6</sup>; and
- 1813 (5) give an indication of: (a) any right to have the matter referred to the Financial Services and Markets Tribunal<sup>7</sup> which is given by the Financial Services and Markets Act 2000; and (b) the procedure on such a reference<sup>8</sup>.

If the decision notice was preceded by a warning notice<sup>9</sup>, the action to which the decision notice relates must be action under the same Part of the Financial Services and Markets Act 2000 as the action proposed in the warning notice<sup>10</sup>. The Authority may, before it takes the action to which a decision notice (the 'original notice') relates, give the person concerned a further decision notice which relates to different action in respect of the same matter<sup>11</sup>.

1 Financial Services and Markets Act 2000 s 388(1)(a).

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 388(1)(b).

4 In the Financial Services and Markets Act 2000 s 394: see PARA 776.

5 Financial Services and Markets Act 2000 s 388(1)(c).

6 Financial Services and Markets Act 2000 s 388(1)(d).

7 As to the Financial Services and Markets Tribunal see PARA 43 et seq.

8 Financial Services and Markets Act 2000 s 388(1)(e).

9 As to warning notices see PARA 769.

10 Financial Services and Markets Act 2000 s 388(2).

11 Financial Services and Markets Act 2000 s 388(3). The Authority may give a further decision notice as a result of s 388(3) only if the person to whom the original notice was given consents: s 388(4). If the person to whom a decision notice is given under s 388(3) had the right to refer the matter to which the original decision notice related to the Tribunal, he has that right as respects the decision notice under s 388(3): s 388(5).

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## **771. Notices of discontinuance.**

If the Financial Services Authority<sup>1</sup> decides not to take: (1) the action proposed in a warning notice<sup>2</sup>; or (2) the action to which a decision notice relates<sup>3</sup>, it must give a notice of discontinuance to the person to whom the warning notice or decision notice was given<sup>4</sup>. This does not apply if the discontinuance of the proceedings concerned results in the granting of an application made by the person to whom the warning or decision notice was given<sup>5</sup>. A notice of discontinuance must identify the proceedings which are being discontinued<sup>6</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 389(1)(a). As to warning notices see PARA 769.

3 Financial Services and Markets Act 2000 s 389(1)(b). As to decision notices see PARA 770.

4 Financial Services and Markets Act 2000 s 389(1).

5 Financial Services and Markets Act 2000 s 389(2).

6 Financial Services and Markets Act 2000 s 389(3).

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## **772. Final notices.**

If the Financial Services Authority<sup>1</sup> has given a person a decision notice<sup>2</sup> and the matter was not referred to the Financial Services and Markets Tribunal<sup>3</sup> within the 28-day period<sup>4</sup>, the Authority must, on taking the action to which the decision notice relates, give the person concerned and any person to whom the decision notice was copied a final notice<sup>5</sup>. If the Authority has given a person a decision notice and the matter was referred to the Tribunal, the Authority must, on taking action in accordance with any directions given by the Tribunal or the court<sup>6</sup>, give that person and any person to whom the decision notice was copied a final notice<sup>7</sup>.

A final notice about a statement must set out the terms of the statement and give details of the manner in which, and the date on which, the statement will be published<sup>8</sup>. A final notice about an order must set out the terms of the order and state the date from which the order has effect<sup>9</sup>. A final notice about a penalty must state the amount of the penalty, state the manner in which, and the period within which<sup>10</sup>, the penalty is to be paid and give details of the way in which the penalty will be recovered if it is not paid by the date stated in the notice<sup>11</sup>. A final notice about a requirement to make a payment or distribution<sup>12</sup> must state the persons to whom, the manner in which and the period within which<sup>13</sup>, it must be made<sup>14</sup>. In any other case, the final notice must give details of the action being taken and state the date on which the action is to be taken<sup>15</sup>.

If all or any of the amount of a penalty payable under a final notice is outstanding at the end of the period stated, the Authority may recover the outstanding amount as a debt due to it<sup>16</sup>. If all or any of a required payment or distribution has not been made at the end of a period stated in a final notice, the obligation to make the payment is enforceable, on the application of the Authority, by injunction<sup>17</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to decision notices see PARA 770.

3 As to the Financial Services and Markets Tribunal see PARA 43 et seq.

4 Ie the period mentioned in the Financial Services and Markets Act 2000 s 133(1): see PARA 46.

- 5 Financial Services and Markets Act 2000 s 390(1).
- 6 le under the Financial Services and Markets Act 2000 s 137 (appeal on a point of law): see PARA 69.
- 7 Financial Services and Markets Act 2000 s 390(2).
- 8 Financial Services and Markets Act 2000 s 390(3).
- 9 Financial Services and Markets Act 2000 s 390(4).
- 10 The period may not be less than 14 days beginning with the date on which the final notice is given: Financial Services and Markets Act 2000 s 390(8).
- 11 Financial Services and Markets Act 2000 s 390(5).
- 12 le in accordance with the Financial Services and Markets Act 2000 s 384(5): see PARA 474.
- 13 See note 10.
- 14 Financial Services and Markets Act 2000 s 390(6).
- 15 Financial Services and Markets Act 2000 s 390(7).
- 16 Financial Services and Markets Act 2000 s 390(9).
- 17 Financial Services and Markets Act 2000 s 390(10). As to injunctions see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

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### **773. Supervisory notice.**

The Financial Services Authority<sup>1</sup> may give a supervisory notice in the following circumstances<sup>2</sup>. The circumstances are that the Authority proposes:

- 1814 (1) to vary a permission to carry on regulated activities<sup>3</sup>;
- 1815 (2) to discontinue or suspend the listing of securities on its own initiative<sup>4</sup>;
- 1816 (3) to discontinue or suspend the listing of securities on the application of the issuer<sup>5</sup>;
- 1817 (4) to suspend trading in a financial instrument<sup>6</sup>;
- 1818 (5) to suspend or prohibit an offer to the public or the admission to trading on a regulated market<sup>7</sup>;
- 1819 (6) to exercise its power of intervention<sup>8</sup>;
- 1820 (7) to give a direction in relation to an authorised unit trust scheme<sup>9</sup>;
- 1821 (8) to give a direction in relation to a recognised overseas scheme<sup>10</sup>;
- 1822 (9) to impose a requirement on a former underwriting member of Lloyd's<sup>11</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 Financial Services and Markets Act 2000 s 395(13) (amended by SI 2005/381; SI 2005/1433; SI 2007/1973). 'Supervisory notice' means a notice given in accordance with the provisions mentioned in notes 3-11: see the Financial Services and Markets Act 2000 s 395(13) (as so amended). Section 395 has effect as if s



395(13) included a reference to a notice given in accordance with the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27(3), (8) or (9)(b): see reg 27(15); and PARA 634.

3 le in accordance with the Financial Services and Markets Act 2000 s 53(4), (7) or (8)(b): see PARA 357. As to regulated activities see PARA 84 et seq.

4 le in accordance with the Financial Services and Markets Act 2000 s 78(2) or (5): see PARA 389. As to the meaning of 'listing' see PARA 387 note 2; and as to the meaning of 'securities' see PARA 385 note 21.

5 le in accordance with the Financial Services and Markets Act 2000 s 78A(2) or (8)(b): see PARA 389. As to the meaning of 'issuer' see PARA 385 note 21.

6 le in accordance with the Financial Services and Markets Act 2000 s 96C: see PARA 390. As to the meaning of 'financial instrument' see PARA 385 note 12.

7 le in accordance with the Financial Services and Markets Act 2000 s 87O(2) or (5): see PARAS 406, 407.

8 le under the Financial Services and Markets Act 2000 s 197(3), (6) or (7)(b): see PARA 458.

9 le under the Financial Services and Markets Act 2000 s 259(3), (8) or (9)(b): see PARA 619.

10 le under the Financial Services and Markets Act 2000 s 268(3), (7)(a) or (9)(a) or s 282(3), (6) or (7)(b): see PARAS 674, 679.

11 le under the Financial Services and Markets Act 2000 s 321(2) or (5): see PARA 747.

## **UPDATE**

### **773 Supervisory notice**

TEXT AND NOTES--Also, head (10) to give a restriction notice under the Financial Services and Markets Act 2000 s 191B(1) (see PARA 384) or s 301J(1) (see PARA 728): Financial Services and Markets Act 2000 s 395(13) (amended by SI 2009/534).

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### **774. Publication.**

Neither the Financial Services Authority<sup>1</sup> nor a person to whom a warning notice<sup>2</sup> or decision notice<sup>3</sup> is given or copied may publish the notice or any details concerning it<sup>4</sup>.

A notice of discontinuance<sup>5</sup> must state that, if the person to whom the notice is given consents, the Authority may publish such information as it considers appropriate about the matter to which the discontinued proceedings related<sup>6</sup>. A copy of a notice of discontinuance must be accompanied by a statement that, if the person to whom the notice is copied consents, the Authority may publish such information as it considers appropriate about the matter to which the discontinued proceedings related, so far as relevant to that person<sup>7</sup>.

The Authority must publish such information about the matter to which a final notice<sup>8</sup> relates as it considers appropriate<sup>9</sup>.

When a supervisory notice<sup>10</sup> takes effect, the Authority must publish such information about the matter to which the notice relates as it considers appropriate<sup>11</sup>.

The Authority may not publish information if publication of it would, in its opinion, be unfair to the person with respect to whom the action was taken or prejudicial to the interests of consumers<sup>12</sup>. Information is to be published in such manner as the Authority considers appropriate<sup>13</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to warning notices see PARA 769.

3 As to decision notices see PARA 770.

4 Financial Services and Markets Act 2000 s 391(1). As to the distinction between disclosure of information under s 348 (see PARA 479) and its publication see *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd* [2007] EWCA Civ 197, [2007] 2 All ER 791.

5 'Notice of discontinuance' means a notice given under the Financial Services and Markets Act 2000 s 389 (see PARA 771): s 391(9).

6 Financial Services and Markets Act 2000 s 391(2).

7 Financial Services and Markets Act 2000 s 391(3).

8 As to final notices see PARA 772.

9 Financial Services and Markets Act 2000 s 391(4).

10 As to the meaning of 'supervisory notice' see PARA 773 note 2; definition applied by the Financial Services and Markets Act 2000 s 391(10).

11 Financial Services and Markets Act 2000 s 391(5). For the purposes of determining when a supervisory notice takes effect, a matter to which the notice relates is open to review if: (1) the period during which any person may refer the matter to the Financial Services and Markets Tribunal is still running; (2) the matter has been referred to the Tribunal but has not been dealt with; (3) the matter has been referred to the Tribunal and dealt with but the period during which an appeal may be brought against the Tribunal's decision is still running; or (4) such an appeal has been brought but has not been determined: s 391(8). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

12 Financial Services and Markets Act 2000 s 391(6). 'Consumers' means persons who are consumers for the purposes of s 138 (see PARA 21 note 5): s 391(11).

13 Financial Services and Markets Act 2000 s 391(7).

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### **775. Third party rights.**

If any of the reasons contained in a warning notice<sup>1</sup> relates to a matter which identifies a person (the 'third party') other than the person to whom the notice is given, and, in the opinion of the Financial Services Authority<sup>2</sup>, is prejudicial to the third party, a copy of the notice must be given to the third party<sup>3</sup>. A copy does not need to be given to the third party if the Authority: (1) has given him a separate warning notice in relation to the same matter<sup>4</sup>; or (2) gives him such a notice at the same time as it gives the warning notice which identifies him<sup>5</sup>. The notice

copied to a third party<sup>6</sup> must specify a reasonable period (which may not be less than 28 days) within which he may make representations to the Authority<sup>7</sup>.

If any of the reasons contained in a decision notice<sup>8</sup> relates to a matter which identifies a person (the 'third party') other than the person to whom the decision notice is given, and in the opinion of the Authority, is prejudicial to the third party, a copy of the notice must be given to the third party<sup>9</sup>. A copy does not need to be given to the third party if the Authority: (a) has given him a separate decision notice in relation to the same matter<sup>10</sup>; or (b) gives him such a notice at the same time as it gives the decision notice which identifies him<sup>11</sup>. If the person to whom a decision notice is given has a right to refer the matter to the Financial Services and Markets Tribunal<sup>12</sup>, then:

- 1823 (i) a person to whom a copy of the notice is given under these provisions may refer to the Tribunal the decision in question<sup>13</sup>, or any opinion expressed by the Authority in relation to him<sup>14</sup>;
- 1824 (ii) the copy must be accompanied by an indication of the third party's right to make a reference to the Tribunal<sup>15</sup> and of the procedure on such a reference<sup>16</sup>;
- 1825 (iii) a person who alleges that a copy of the notice should have been given to him, but was not, may refer to the Tribunal the alleged failure and the decision in question<sup>17</sup>, or any opinion expressed by the Authority in relation to him<sup>18</sup>.

The statutory provision relating to access to Authority material<sup>19</sup> applies to a third party as it applies to the person to whom the notice was given, in so far as the material which the Authority must disclose<sup>20</sup> relates to the matter which identifies the third party<sup>21</sup>.

Any person to whom a warning notice or decision notice was copied under the provisions described above must be given a copy of a notice of discontinuance<sup>22</sup> applicable to the proceedings to which the warning notice or decision notice related<sup>23</sup>.

1 As to warning notices see PARA 769. The Financial Services and Markets Act 2000 s 393 applies to a warning notice given in accordance with s 54(1) (see PARA 357), s 57(1) (see PARA 365), s 63(3) (see PARA 371), s 67(1) (see PARA 374), s 88(4)(b) (see PARA 426), s 89(2) (see PARA 426), s 92(1) (see PARA 429), s 126(1) (see PARA 442), s 207(1) (see PARA 468), s 255(1) (see PARA 613), s 280(1) (see PARA 679), s 331(1) (see PARA 755), s 345(2) (see PARA 767) (whether as a result of s 345(1) or s 249(1) (see PARA 616)), s 385(1) (see PARA 474) or s 412B(4) or (8) (see PARA 783): s 392(a) (amended by SI 2007/126).

2 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

3 Financial Services and Markets Act 2000 s 393(1). Section 393(1) does not require a copy of the notice to be given to a third party if the Authority considers it impracticable to do so: s 393(7).

4 Financial Services and Markets Act 2000 s 393(2)(a).

5 Financial Services and Markets Act 2000 s 393(2)(b).

6 I.e. under the Financial Services and Markets Act 2000 s 393(1): see the text to notes 1-3.

7 Financial Services and Markets Act 2000 s 393(3).

8 As to decision notices see PARA 770. The Financial Services and Markets Act 2000 s 393 applies to a decision notice given in accordance with s 54(2) (see PARA 357), s 57(3) (see PARA 365), s 63(4) (see PARA 371), s 67(4) (see PARA 374), s 88(6)(b) (see PARA 426), s 89(3) (see PARA 426), s 92(4) (see PARA 429), s 127(1) (see PARA 442), s 208(1) (see PARA 469), s 255(2) (see PARA 613), s 280(2) (see PARA 679), s 331(3) (see PARA 755), s 345(3) (see PARA 767) (whether as a result of s 345(1) or s 249(1) (see PARA 616)), s 386(1) (see PARA 474) or s 412B(5) or (9) (see PARA 783): s 392(b) (amended by SI 2007/126).

9 Financial Services and Markets Act 2000 s 393(4). If the decision notice was preceded by a warning notice, a copy of the decision notice must (unless it has been given under s 393(4)) be given to each person to whom

the warning notice was copied: s 393(5). Section 393(4) does not require a copy of the notice to be given to a third party if the Authority considers it impracticable to do so: s 393(7).

10 Financial Services and Markets Act 2000 s 393(6)(a).

11 Financial Services and Markets Act 2000 s 393(6)(b).

12 Financial Services and Markets Act 2000 s 393(8). As to the Financial Services and Markets Tribunal see PARA 43 et seq. As to the modified application of the provisions of the Financial Services and Markets Tribunal Rules 2001, SI 2001/2476, in regard to the filing of an Authority notice, statements of case and lists of documents where the reference was made under the Financial Services and Markets Act 2000 s 393(9) or s 393(11) see PARAS 47, 48 and 50.

13 In so far as it is based on a reason of the kind mentioned in the Financial Services and Markets Act 2000 s 393(4): see the text to note 9.

14 Financial Services and Markets Act 2000 s 393(9). See note 12.

15 In under the Financial Services and Markets Act 2000 s 393(9): see the text to note 14.

16 Financial Services and Markets Act 2000 s 393(10).

17 In so far as it is based on a reason of the kind mentioned in the Financial Services and Markets Act 2000 s 393(4): see the text to note 9.

18 Financial Services and Markets Act 2000 s 393(11). See note 12.

19 In the Financial Services and Markets Act 2000 s 394: see PARA 776.

20 In under the Financial Services and Markets Act 2000 s 394: see PARA 776.

21 Financial Services and Markets Act 2000 s 393(12). A copy of a notice given to a third party under s 393 must be accompanied by a description of the effect of s 394 (see PARA 776) as it applies to him: s 393(13).

22 As to notices of discontinuance see PARA 771.

23 Financial Services and Markets Act 2000 s 393(14).

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## **776. Access to material.**

If the Financial Services Authority<sup>1</sup> gives a person ('A') a notice<sup>2</sup>, it must: (1) allow him access to the material on which it relied in taking the decision which gave rise to the obligation to give the notice<sup>3</sup>; (2) allow him access to any secondary material<sup>4</sup> which, in the opinion of the Authority, might undermine that decision<sup>5</sup>. However, the Authority does not have to allow A access to material if the material is excluded material<sup>6</sup> or if it: (a) relates to a case involving a person other than A<sup>7</sup>; and (b) was taken into account by the Authority in A's case only for purposes of comparison with other cases<sup>8</sup>.

The Authority may refuse A access to particular material which it would otherwise have to allow him access to if, in its opinion, allowing him access to the material: (i) would not be in the public interest<sup>9</sup>; or (ii) would not be fair, having regard to the likely significance of the material to A in relation to the matter in respect of which he has been given a notice, and the potential prejudice to the commercial interests of a person other than A which would be caused by the material's disclosure<sup>10</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 The Financial Services and Markets Act 2000 s 394 applies to a warning notice given in accordance with s 54(1) (see PARA 357), s 57(1) (see PARA 365), s 63(3) (see PARA 371), s 67(1) (see PARA 374), s 88(4)(b) (see PARA 426), s 89(2) (see PARA 426), s 92(1) (see PARA 429), s 126(1) (see PARA 442), s 207(1) (see PARA 468), s 255(1) (see PARA 613), s 280(1) (see PARA 679), s 331(1) (see PARA 755), s 345(2) (see PARA 767) (whether as a result of s 345(1) or s 249(1) (see PARA 616)), s 385(1) (see PARA 474) or s 412B(4) or (8) (see PARA 783): s 392(a) (amended by SI 2007/126). As to warning notices see PARA 769. The Financial Services and Markets Act 2000 s 394 also applies to a decision notice given in accordance with s 54(2) (see PARA 357), s 57(3) (see PARA 365), s 63(4) (see PARA 371), s 67(4) (see PARA 374), s 88(6)(b) (see PARA 426), s 89(3) (see PARA 426), s 92(4) (see PARA 429), s 127(1) (see PARA 442), s 208(1) (see PARA 469), s 255(2) (see PARA 613), s 280(2) (see PARA 679), s 331(3) (see PARA 755), s 345(3) (see PARA 767) (whether as a result of s 345(1) or s 249(1) (see PARA 616)), s 386(1) (see PARA 474) or s 412B(5) or (9) (see PARA 783): s 392(b) (amended by SI 2007/126). As to decision notices see PARA 770.

3 Financial Services and Markets Act 2000 s 394(1)(a).

4 'Secondary material' means material, other than material falling within head (1) in the text which: (1) was considered by the Authority in reaching the decision mentioned in that head; or (2) was obtained by the Authority in connection with the matter to which the notice relates but which was not considered by it in reaching that decision: Financial Services and Markets Act 2000 s 394(6).

5 Financial Services and Markets Act 2000 s 394(1)(b).

6 'Excluded material' means material which: (1) is material the disclosure of which for the purposes of or in connection with any legal proceedings is prohibited by the Regulation of Investigatory Powers Act 2000 s 17 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 519); or (2) is a protected item (as defined in the Financial Services and Markets Act 2000 s 413 (see PARA 784)): s 394(7) (amended by the Regulation of Investigatory Powers Act 2000 Sch 4 para 11). See note 7.

7 Financial Services and Markets Act 2000 s 394(2)(a). If the Authority does not allow A access to material because it is excluded material consisting of a protected item, it must give A written notice of: (1) the existence of the protected item; and (2) the Authority's decision not to allow him access to it: s 394(4).

8 Financial Services and Markets Act 2000 s 394(2)(b). See note 7.

9 Financial Services and Markets Act 2000 s 394(3)(a). If the Authority refuses under s 394(3) to allow A access to material, it must give him written notice of: (1) the refusal; and (2) the reasons for it: s 394(5).

10 Financial Services and Markets Act 2000 s 394(3)(b). See note 9.

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## **777. Procedure for Financial Services Authority notices.**

The Financial Services Authority<sup>1</sup> must determine the procedure that it proposes to follow in relation to the giving of: (1) supervisory notices<sup>2</sup>; and (2) warning notices<sup>3</sup> and decision notices<sup>4</sup>. That procedure must be designed to secure, among other things, that the decision which gives rise to the obligation to give any such notice is taken by a person not directly involved in establishing the evidence on which that decision is based<sup>5</sup>. However, the procedure may permit a decision which gives rise to an obligation to give a supervisory notice to be taken by a person other than a person mentioned above<sup>6</sup> if: (a) the Authority considers that, in the particular case,

it is necessary in order to protect the interests of consumers<sup>7</sup>; and (b) the person taking the decision is of a level of seniority laid down by the procedure<sup>8</sup>.

The Authority must issue a statement of the procedure<sup>9</sup>. The statement must be published in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>10</sup>. The Authority may charge a reasonable fee for providing a person with a copy of the statement<sup>11</sup>. The Authority must, without delay, give the Treasury a copy of any statement which it issues under these provisions<sup>12</sup>.

When giving a supervisory notice, or a warning notice or decision notice, the Authority must follow its stated procedure<sup>13</sup>. If the Authority changes the procedure in a material way, it must publish a revised statement<sup>14</sup>. The Authority's failure in a particular case to follow its procedure as set out in the latest published statement does not affect the validity of a notice given in that case<sup>15</sup>.

Before issuing a statement of procedure<sup>16</sup>, the Authority must publish a draft of the proposed statement in the way appearing to the Authority to be best calculated to bring it to the attention of the public<sup>17</sup>. The draft must be accompanied by notice that representations about the proposal may be made to the Authority within a specified time<sup>18</sup>. Before issuing the proposed statement of procedure, the Authority must have regard to any representations made to it<sup>19</sup>. If the Authority issues the proposed statement of procedure it must publish an account, in general terms, of: (i) the representations made to it<sup>20</sup>; and (ii) its response to them<sup>21</sup>. If the statement of procedure differs from the published draft in a way which is, in the opinion of the Authority, significant, the Authority must publish details of the difference<sup>22</sup>. These requirements<sup>23</sup> also apply to a proposal to revise a statement of policy<sup>24</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Authority's Handbook of Rules and Guidance, Regulatory Processes, Decision Procedure and Penalties Manual (DEPP). As to the Handbook generally see PARA 22.

2 As to supervisory notices see PARA 773.

3 As to warning notices see PARA 769.

4 Financial Services and Markets Act 2000 s 395(1). As to decision notices see PARA 770.

5 Financial Services and Markets Act 2000 s 395(2).

6 I.e. a person mentioned in the Financial Services and Markets Act 2000 s 395(2): see the text to note 5.

7 Financial Services and Markets Act 2000 s 395(3)(a).

8 Financial Services and Markets Act 2000 s 395(3)(b). A level of seniority laid down by the procedure for the purposes of s 395(3)(b) must be appropriate to the importance of the decision: s 395(4).

9 Financial Services and Markets Act 2000 s 395(5).

10 Financial Services and Markets Act 2000 s 395(6).

11 Financial Services and Markets Act 2000 s 395(7).

12 Financial Services and Markets Act 2000 s 395(8).

13 Financial Services and Markets Act 2000 s 395(9).

14 Financial Services and Markets Act 2000 s 395(10).

15 Financial Services and Markets Act 2000 s 395(11). However, s 395(11) does not prevent the Financial Services and Markets Tribunal from taking into account any such failure in considering a matter referred to it: s 395(12). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

16 I.e. under the Financial Services and Markets Act 2000 s 395: see the text and notes 1-15.

- 17 Financial Services and Markets Act 2000 s 396(1). The Authority may charge a reasonable fee for providing a person with a copy of a draft published under s 396(1): s 396(6).
- 18 Financial Services and Markets Act 2000 s 396(2).
- 19 Financial Services and Markets Act 2000 s 396(3).
- 20 Financial Services and Markets Act 2000 s 396(4)(a).
- 21 Financial Services and Markets Act 2000 s 396(4)(b).
- 22 Financial Services and Markets Act 2000 s 396(5). This requirement is in addition to complying with s 396(4): see the text to notes 20, 21.
- 23 Ie the requirements of the Financial Services and Markets Act 2000 s 396: see the text and notes 16-22.
- 24 Financial Services and Markets Act 2000 s 396(7).

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## **(ii) Miscellaneous Matters**

### **A. REVIEW OF PAST BUSINESS**

#### **778. Schemes for reviewing past business.**

If the Treasury<sup>1</sup> is satisfied that there is evidence suggesting: (1) that there has been a widespread or regular failure<sup>2</sup> on the part of authorised persons<sup>3</sup> to comply with rules<sup>4</sup> relating to a particular kind of activity; and (2) that, as a result, private persons<sup>5</sup> have suffered (or will suffer) loss in respect of which authorised persons are (or will be) liable to make payments ('compensation payments'), the Treasury may make a scheme order<sup>6</sup>. A scheme order authorises the Financial Services Authority<sup>7</sup> to establish and operate a scheme for: (a) determining the nature and extent of the failure<sup>8</sup>; (b) establishing the liability of authorised persons to make compensation payments<sup>9</sup>; and (c) determining the amounts payable by way of compensation payments<sup>10</sup>. An authorised scheme<sup>11</sup> must be made so as to comply with specified<sup>12</sup> requirements<sup>13</sup>. A scheme order may be made only if: (i) the Authority has given the Treasury a report about the alleged failure and asked it to make a scheme order<sup>14</sup>; (ii) the report contains details of the scheme which the Authority proposes to make<sup>15</sup>; and (iii) the Treasury is satisfied that the proposed scheme is an appropriate way of dealing with the failure<sup>16</sup>. A scheme order may provide for specified provisions of or made under the Financial Services and Markets Act 2000 to apply in relation to any provision of, or determination made under, the resulting authorised scheme subject to such modifications (if any) as may be specified<sup>17</sup>. For the purposes of the Financial Services and Markets Act 2000, failure on the part of an authorised person to comply with any provision of an authorised scheme is to be treated (subject to any provision made by the scheme order concerned) as a failure on his part to comply with rules<sup>18</sup>. The Treasury may prescribe circumstances in which loss suffered by a person ('A') acting in a fiduciary or other prescribed capacity is to be treated, for the purposes of an authorised scheme, as suffered by a private person in relation to whom A was acting in that capacity<sup>19</sup>.

No order is to be made under the provisions described above<sup>20</sup> unless a draft of the order has been laid before Parliament and approved by a resolution of each House<sup>21</sup>.

- 1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 2 The provisions of the Financial Services and Markets Act 2000 s 404 apply whenever the failure in question occurred: s 404(8).
- 3 As to authorised persons see PARA 314.
- 4 As to the meaning of 'rule' see PARA 23 note 2.
- 5 'Private person' has such meaning as may be prescribed: Financial Services and Markets Act 2000 s 404(10). 'Prescribed' means prescribed in regulations made by the Treasury: s 417(1). At the date at which this volume states the law no such regulations had been made.
- 6 Financial Services and Markets Act 2000 s 404(1), (2). As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.  
Transitional provision has been made to provide that reviews of pension selling being conducted under the Financial Services Act 1986 are to be treated as if they constituted a scheme under the Financial Services and Markets Act 2000 s 404: see the Financial Services and Markets Act 2000 (Transitional Provisions) (Reviews of Pension Business) Order 2001, SI 2001/2512.
- 7 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 8 Financial Services and Markets Act 2000 s 404(2)(a).
- 9 Financial Services and Markets Act 2000 s 404(2)(b).
- 10 Financial Services and Markets Act 2000 s 404(2)(c).
- 11 'Authorised scheme' means a scheme authorised by a scheme order: Financial Services and Markets Act 2000 s 404(9).
- 12 Ie specified in a scheme order: Financial Services and Markets Act 2000 s 404(11).
- 13 Financial Services and Markets Act 2000 s 404(3).
- 14 Financial Services and Markets Act 2000 s 404(4)(a).
- 15 Financial Services and Markets Act 2000 s 404(4)(b).
- 16 Financial Services and Markets Act 2000 s 404(4)(c).
- 17 Financial Services and Markets Act 2000 s 404(5).
- 18 Financial Services and Markets Act 2000 s 404(6).
- 19 Financial Services and Markets Act 2000 s 404(7).
- 20 Ie under the Financial Services and Markets Act 2000 s 404.
- 21 Financial Services and Markets Act 2000 s 429(1)(a).

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## ***B. IMPLEMENTATION OF FOREIGN DECISIONS AND INTERNATIONAL OBLIGATIONS***



## 779. Third countries.

For the purpose of implementing a third country decision<sup>1</sup>, the Treasury<sup>2</sup> may direct the Financial Services Authority<sup>3</sup> to: (1) refuse an application for permission to carry on regulated activities<sup>4</sup> made by a body incorporated in, or formed under the law of, any part of the United Kingdom<sup>5</sup>; (2) defer its decision on such an application either indefinitely or for such period as may be specified in the direction<sup>6</sup>; (3) give a notice of objection to a person who has served a notice of control<sup>7</sup> to the effect that he proposes to acquire a 50 per cent stake<sup>8</sup> in a UK authorised person<sup>9</sup>; or (4) give a notice of objection to a person who has acquired a 50 per cent stake in a UK authorised person without having served the required notice of control<sup>10</sup>. A direction may also be given in relation to: (a) any person falling within a class specified in the direction; (b) future applications, notices of control or acquisitions<sup>11</sup>. The Treasury may revoke a direction at any time<sup>12</sup>, but revocation does not affect anything done in accordance with the direction before it was revoked<sup>13</sup>.

If a third country decision<sup>14</sup> has been taken, the Treasury may make a determination<sup>15</sup> in relation to an EFTA firm<sup>16</sup> which is a subsidiary undertaking<sup>17</sup> of a parent undertaking<sup>18</sup> which is governed by the law of the country to which the decision relates<sup>19</sup>. A determination may also be made in relation to any firm falling within a class specified in the determination<sup>20</sup>. The Treasury may withdraw a determination at any time<sup>21</sup>, but withdrawal does not affect anything done in accordance with the determination before it was withdrawn<sup>22</sup>. If the Treasury makes a determination in respect of a particular firm, or withdraws such a determination, it must give written notice to that firm<sup>23</sup>. The Treasury must publish notice of any determination (or the withdrawal of any determination) in such a way as it thinks most suitable for bringing the determination (or withdrawal) to the attention of those likely to be affected by it, and on, or as soon as practicable after, the date of the determination (or withdrawal)<sup>24</sup>.

The Treasury may by order modify certain provisions of the Financial Services and Markets Act 2000 in relation to firms which have their head office in Gibraltar or are otherwise connected with Gibraltar<sup>25</sup>.

1 'Third country decision' means a decision of the EC Council or the European Commission under: (1) the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 15(3); (2) the First Non-Life Insurance Directive (ie EEC Directive 73/239 (OJ L228, 16.8.73, p 3) on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance) art 29b(4); or (3) the Life Assurance Consolidation Directive (ie European Parliament and EC Council Directive 2002/83 (OJ L345, 19.12. 2002, p 1) concerning life assurance) art 59(4): Financial Services and Markets Act 2000 s 405(5) (amended by SI 2004/3379; SI 2006/3221; SI 2007/126).

2 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 As to the Financial Services Authority see PARAS 4, 6 et seq.

4 Ie under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.

5 Financial Services and Markets Act 2000 s 405(1)(a). As to the meaning of 'United Kingdom' see PARA 2 note 3. If the Authority refuses an application for permission as a result of a direction under s 405(1)(a), then: (1) s 52(7)-(9) (determination of applications) (see PARA 350) does not apply in relation to the refusal; but (2) the Authority must notify the applicant of the refusal and the reasons for it: s 407(1).

6 Financial Services and Markets Act 2000 s 405(1)(b). If the Authority defers its decision on an application for permission as a result of a direction under s 405(1)(b), then: (1) the time limit for determining the application mentioned in s 52(1) or (2) (determination of applications) (see PARA 350) stops running on the day of the deferral and starts running again (if at all) on the day the period specified in the direction (if any) ends or the day the direction is revoked; and (2) the Authority must notify the applicant of the deferral and the reasons for it: s 407(2).

7 As to the meaning of 'notice of control' see PARA 377 note 3.

8 For the purposes of the Financial Services and Markets Act 2000 s 405, a person (the 'acquirer') acquires a 50% stake in a UK authorised person ('A') on first falling within any of the cases mentioned in s 406(2) (see below): s 406(1). Those cases are where the acquirer: (1) holds 50% or more of the shares in A; (2) holds 50% or more of the shares in a parent undertaking ('P') of A; (3) is entitled to exercise, or control the exercise of, 50% or more of the voting power in A; or (4) is entitled to exercise, or control the exercise of, 50% or more of the voting power in P: s 406(2). For the purposes of s 406(2), 'acquirer' means: (a) the acquirer; (b) any of the acquirer's associates; or (c) the acquirer and any of his associates: s 406(3). As to the meaning of 'UK authorised person' see PARA 358 note 3. As to the meaning of 'parent undertaking' see PARA 351 note 32. As to the meanings of 'associate', 'shares' and 'voting power' see PARA 591 note 16.

9 Financial Services and Markets Act 2000 s 405(1)(c). If the Authority gives a notice of objection to a person as a result of a direction under s 405(1)(c) or s 405(1)(d) (see the text and note 10), then: (1) s 189 (improperly acquired shares) (see PARA 384) and s 191 (offences) (see PARA 377) have effect as if the notice was a notice of objection within the meaning of Pt XII (ss 178-192) (see PARA 383 note 9); and (2) the Authority must state in the notice the reasons for it: s 407(3).

10 Financial Services and Markets Act 2000 s 405(1)(d). See note 9.

11 Financial Services and Markets Act 2000 s 405(2).

12 Financial Services and Markets Act 2000 s 405(3).

13 Financial Services and Markets Act 2000 s 405(4).

14 See note 1; definition applied by the Financial Services and Markets Act 2000 s 408(9).

15 'Determination' means a determination that the firm concerned does not qualify for authorisation under the Financial Services and Markets Act 2000 Sch 3 (see PARAS 314-318, 323-329) even if it satisfies the conditions in Sch 3 para 13 or Sch 3 para 14 (see PARA 315): s 408(2).

16 'EFTA firm' means a firm, institution or undertaking which: (1) is an EEA firm as a result of the Financial Services and Markets Act 2000 Sch 3 para 5(a), (b) or (d) (see PARA 315); and (2) is incorporated in, or formed under the law of, an EEA state which is not a member state: s 408(8). As to the meaning of 'EEA firm' see PARA 315 note 1; and as to the meaning of 'EEA state' see PARA 315 note 1.

17 As to the meaning of 'subsidiary undertaking' see PARA 351 note 32.

18 As to the meaning of 'parent undertaking' see PARA 351 note 32.

19 Financial Services and Markets Act 2000 s 408(1).

20 Financial Services and Markets Act 2000 s 408(3).

21 Financial Services and Markets Act 2000 s 408(4).

22 Financial Services and Markets Act 2000 s 408(5).

23 Financial Services and Markets Act 2000 s 408(6).

24 Financial Services and Markets Act 2000 s 408(7).

25 See the Financial Services and Markets Act 2000 s 409. The Treasury may by order: (1) modify Sch 3 (see PARA 315 et seq) so as to provide for Gibraltar firms of a description specified in the order to qualify for authorisation under that Schedule in circumstances specified in the order; (2) modify Sch 3 so as to make provision in relation to the exercise by UK firms of rights under the law of Gibraltar which correspond to EEA rights; (3) modify Sch 4 (treaty rights) (see PARA 319) so as to provide for Gibraltar firms of a description specified in the order to qualify for authorisation under that Schedule in circumstances specified in the order; (4) modify s 264 (see PARA 672) so as to make provision in relation to collective investment schemes constituted under the law of Gibraltar; (5) provide for the Financial Services Authority to be able to give notice under s 264(2) on grounds relating to the law of Gibraltar; (6) provide for the Financial Services and Markets Act 2000 to apply to a Gibraltar recognised scheme as if the scheme were a scheme recognised under s 264: s 409(1), (5). 'Gibraltar firm' means a firm which has its head office in Gibraltar or is otherwise connected with Gibraltar: s 409(3). As to the meaning of 'UK firm' see PARA 323 note 4; and as to the meaning of 'EEA right' see PARA 315 note 3; definitions applied by s 409(6). As to the meaning of 'collective investment scheme' see PARA 603. 'Gibraltar recognised scheme' means a collective investment scheme: (a) constituted in an EEA state other than the United Kingdom; and (b) recognised in Gibraltar under provisions which appear to the Treasury to give

effect to the provisions of a relevant Community instrument: s 409(4). The fact that a firm may qualify for authorisation under Sch 3 as a result of an order under s 409(1) does not prevent it from applying for a Part IV permission: s 409(2). As to the meaning of 'Part IV permission' see PARA 348.

As to the order that has been made under s 409 see the Financial Services and Markets Act 2000 (Gibraltar) Order 2001, SI 2001/3084, which contains provisions relating to the exercise of deemed passport rights by Gibraltar-based firms (see art 2 (amended by SI 2005/1; SI 2006/1805; SI 2007/2932; SI 2007/3254)); EEA firms satisfying conditions under Gibraltar law (see the Financial Services and Markets Act 2000 (Gibraltar) Order 2001, SI 2001/3084, art 3 (amended by SI 2007/3254); and the exercise by UK firms of deemed passport rights in Gibraltar (see the Financial Services and Markets Act 2000 (Gibraltar) Order 2001, SI 2001/3084, art 4 (amended by SI 2006/3221)). As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

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## **780. International obligations.**

If it appears to the Treasury<sup>1</sup> that any action proposed to be taken by a relevant person<sup>2</sup> would be incompatible with European Community obligations or any other international obligations of the United Kingdom<sup>3</sup>, they may direct that person not to take that action<sup>4</sup>. If it appears to the Treasury that any action which a relevant person has power to take is required for the purpose of implementing any such obligations, it may direct that person to take that action<sup>5</sup>. A direction: (1) may include such supplemental or incidental requirements as the Treasury considers necessary or expedient<sup>6</sup>; and (2) is enforceable, on an application made by the Treasury, by injunction<sup>7</sup>.

<sup>1</sup> As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

<sup>2</sup> 'Relevant person' means: (1) the Financial Services Authority (see PARAS 4, 6 et seq); (2) any person exercising functions conferred by the Financial Services and Markets Act 2000 Pt VI (ss 72-103) (see PARA 385 et seq) on the competent authority; (3) any recognised investment exchange (other than one which is an overseas investment exchange); (4) any recognised clearing house (other than one which is an overseas clearing house); (5) a person included in the list maintained under s 301 (see PARA 720); or (6) the scheme operator of the ombudsman scheme: s 410(4). As to the competent authority see PARA 385. As to the meaning of 'recognised investment exchange' see PARA 684 note 1. As to the meaning of 'overseas investment exchange' see PARA 709 note 12. As to the meaning of 'recognised clearing house' see PARA 684 note 6. As to the meaning of 'overseas clearing house' see PARA 709 note 12. As to the scheme operator and the ombudsman scheme see PARA 575.

<sup>3</sup> As to the meaning of 'United Kingdom' see PARA 2 note 3.

<sup>4</sup> Financial Services and Markets Act 2000 s 410(1).

<sup>5</sup> Financial Services and Markets Act 2000 s 410(2).

<sup>6</sup> Financial Services and Markets Act 2000 s 410(3)(a).

<sup>7</sup> Financial Services and Markets Act 2000 s 410(3)(b). As to injunctions see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq.

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PROCEDURAL AND OTHER MATTERS/(ii) Miscellaneous Matters/C. ENFORCEABILITY OF GAMING CONTRACTS/781. Gaming contracts.

### ***C. ENFORCEABILITY OF GAMING CONTRACTS***

#### **781. Gaming contracts.**

A contract is not void or unenforceable because of provisions of any applicable gaming legislation<sup>1</sup> if: (1) it is entered into by either or each party by way of business<sup>2</sup>; (2) the entering into or performance of it by either party constitutes an activity of a specified<sup>3</sup> kind or one which falls within a specified class of activity<sup>4</sup>; and (3) it relates to an investment<sup>5</sup> of a specified kind or one which falls within a specified class of investment<sup>6</sup>.

1 Financial Services and Markets Act 2000 s 412(1) (amended by the Gaming Act 2005 Sch 17). See the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985, SI 1985/1204 (NI 11), art 170 which is the only provision remaining in the Financial Services and Markets Act 2000 s 412(1).

2 Financial Services and Markets Act 2000 s 412(2)(a).

3 It is specified in an order made by the Treasury: Financial Services and Markets Act 2000 s 412(6). The activities specified are any activity of the kind: (1) specified by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 14 or art 21 (dealing in investments as principal or agent) (see PARAS 112, 126); (2) specified by art 64 (agreeing to carry on specified kinds of activity) (see PARA 221), so far as relevant to either of those provisions; or (3) which would be so specified apart from any exclusion from any of those provisions made by the order: Financial Services and Markets Act 2000 (Gaming Contracts) Order 2001, SI 2001/2510, art 2(1). As to orders under the Financial Services and Markets Act 2000 generally see PARA 67 note 1. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 Financial Services and Markets Act 2000 s 412(2)(b).

5 'Investment' includes any asset, right or interest: Financial Services and Markets Act 2000 s 412(5).

6 Financial Services and Markets Act 2000 s 412(2)(c). The specified class is the class of investment consisting of securities and contractually based investments (within the meaning of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544 (see PARA 88 et seq)): Financial Services and Markets Act 2000 (Gaming Contracts) Order 2001, SI 2001/2510, art 2(2).

The provisions of the Financial Services and Markets Act 2000 Sch 2 Pt II (investments) (see PARA 85) apply for the purposes of s 412(2)(c), with the references to s 22 being read as references to s 412(2)(c): s 412(3). Nothing in Sch 2 Pt II, as applied by s 412(3), limits the power conferred by s 312(2)(c): s 412(4).

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### ***D. TRADE-MATCHING AND REPORTING SYSTEMS***

#### **782. Approval and monitoring of trade-matching and reporting systems.**

The Financial Services Authority<sup>1</sup> must approve a relevant system<sup>2</sup> if, on an application<sup>3</sup> by the operator of the system, it is satisfied that the arrangements established by the system for reporting transactions comply with the relevant Regulation<sup>4</sup>. If, at any time after approving a relevant system<sup>5</sup>, the Authority is not so satisfied, it may suspend or withdraw the approval<sup>6</sup>.

The operator of an approved relevant system must make reports to the Authority at specified<sup>7</sup> intervals containing specified information relating to the system, the reports made by the system<sup>8</sup> and the transactions to which those reports relate<sup>9</sup>. The Authority may by written notice require the operator of an approved relevant system to provide such additional information as may be specified in the notice, by such reasonable time as may be so specified, about any of the matters mentioned above<sup>10</sup>.

The Authority must keep under review the arrangements established by an approved relevant system for reporting transactions for the purpose of ensuring that the arrangements comply with the relevant Regulation<sup>11</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 In the Financial Services and Markets Act 2000 ss 412A, 412B 'relevant system' means a trade-matching or reporting system of a kind described in EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) art 12: Financial Services and Markets Act 2000 s 412A(9) (s 412A added by SI 2007/126). A relevant system is an approved relevant system if it is approved by the Authority under the Financial Services and Markets Act 2000 s 412A(2) (see the text to note 4) for the purposes of the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 25.5; and references in the Financial Services and Markets Act 2000 ss 412A, 412B to an 'approved relevant system' are to be read accordingly: s 412A(1) (as so added).

3 The Financial Services and Markets Act 2000 s 51(3), (4) (see PARA 349) applies to an application under s 412A as it applies to an application under Pt IV (ss 40-55) (see PARA 348 et seq): Financial Services and Markets Act 2000 s 412A(3) (as added: see note 2).

4 Financial Services and Markets Act 2000 s 412A(2) (as added: see note 2). The reference is to the EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1) art 12(1).

5 Ie under the Financial Services and Markets Act 2000 s 412A(2).

6 Financial Services and Markets Act 2000 s 412A(4) (as added: see note 2).

7 Ie specified by the Authority: see the Financial Services and Markets Act 2000 s 412A(6) (as added: see note 2).

8 Ie in accordance with the Markets in Financial Instruments Directive (ie European Parliament and EC Council Directive 2004/39 (OJ L145, 30.4.2004, p 1)) art 25 and EC Commission Regulation 1287/2006 (OJ L241, 2.9.2006, p 1).

9 Financial Services and Markets Act 2000 s 412A(6) (as added: see note 2).

10 Financial Services and Markets Act 2000 s 412A(7) (as added: see note 2). The reference is to the matters mentioned in s 412A(6): see the text to notes 7-9. The recipient of a notice under s 412A(7) must provide the information by the time specified in the notice: s 412A(8) (as so added).

11 Financial Services and Markets Act 2000 s 412A(5) (as added: see note 2). For the purposes of s 412A(5), the Authority must have regard to information provided to it under s 412A(6), (7) (see the text to notes 7-10): see s 412A(5) (as so added).

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### **783. Procedure for approval and suspension or withdrawal of approval.**

If the Financial Services Authority<sup>1</sup> approves<sup>2</sup> a relevant system<sup>3</sup>, it must give the operator of the system written notice specifying the date from which the approval has effect<sup>4</sup>.

If the Authority proposes to refuse to approve a relevant system, it must give the operator of the system a warning notice<sup>5</sup>. If the Authority decides to refuse to approve a relevant system, it must give the operator of the system a decision notice<sup>6</sup>. If the Authority proposes to suspend or withdraw its approval in relation to an approved relevant system<sup>7</sup>, it must give the operator of the system a warning notice<sup>8</sup>. If the Authority decides to suspend or withdraw its approval in relation to an approved relevant system, it must give the operator of the system a decision notice specifying the date from which the suspension or withdrawal is to take effect<sup>9</sup>.

If the Authority has suspended its approval in relation to an approved relevant system, and the operator of the system has applied for the suspension to be cancelled<sup>10</sup>:

- 1826 (1) the Authority must grant the application if it is satisfied that the relevant arrangements for reporting transactions are in compliance<sup>11</sup>; and in such a case the Authority must give written notice to the operator that the suspension is to be cancelled from the date specified in the notice<sup>12</sup>;
- 1827 (2) if the Authority proposes to refuse the application, it must give the operator a warning notice<sup>13</sup>;
- 1828 (3) if the Authority decides to refuse the application, it must give the operator a decision notice<sup>14</sup>.

A person who receives a decision notice<sup>15</sup> may refer the matter to the Financial Services and Markets Tribunal<sup>16</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq.

2 As to approval see PARA 782.

3 As to the meaning of 'relevant system' see PARA 782 note 2.

4 Financial Services and Markets Act 2000 s 412B(1) (s 412B added by SI 2007/126).

5 Financial Services and Markets Act 2000 s 412B(2) (as added: see note 4). As to warning notices see PARA 769.

6 Financial Services and Markets Act 2000 s 412B(3) (as added: see note 4). As to decision notices see PARA 770.

7 As to the meaning of 'approved relevant system' see PARA 782 note 2.

8 Financial Services and Markets Act 2000 s 412B(4) (as added: see note 4).

9 Financial Services and Markets Act 2000 s 412B(5) (as added: see note 4).

10 Financial Services and Markets Act 2000 s 412B(6) (as added: see note 4).

11 I.e. as mentioned in the Financial Services and Markets Act 2000 s 412A(2): see PARA 782.

12 Financial Services and Markets Act 2000 s 412B(7) (as added: see note 4).

13 Financial Services and Markets Act 2000 s 412B(8) (as added: see note 4).

14 Financial Services and Markets Act 2000 s 412B(9) (as added: see note 4).

15 I.e. under the Financial Services and Markets Act 2000 s 412B(3), (5) or (9): see the text to notes 6, 9, 14.

16 Financial Services and Markets Act 2000 s 412B(10) (as added: see note 4). As to the Financial Services and Markets Tribunal see PARA 43 et seq.

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## ***E. LIMITATION ON POWER TO REQUIRE DISCLOSURE OF PROTECTED ITEMS***

### **784. Protected items.**

A person may not be required under the Financial Services and Markets Act 2000 to produce, disclose or permit the inspection of protected items<sup>1</sup>. 'Protected items' means:

- 1829 (1) communications between a professional legal adviser and his client or any person representing his client which are made in connection with the giving of legal advice to the client, or in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings<sup>2</sup>;
- 1830 (2) communications between a professional legal adviser, his client or any person representing his client and any other person which are made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings<sup>3</sup>;
- 1831 (3) items which: (a) are enclosed with, or referred to in, such communications; (b) are made in connection with the giving of legal advice to the client, or in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings; and (c) are in the possession of a person entitled to possession of them<sup>4</sup>.

A communication or item is not a protected item if it is held with the intention of furthering a criminal purpose<sup>5</sup>.

- 1 Financial Services and Markets Act 2000 s 413(1).
- 2 Financial Services and Markets Act 2000 s 413(2)(a), (3).
- 3 Financial Services and Markets Act 2000 s 413(2)(b), (3).
- 4 Financial Services and Markets Act 2000 s 413(2)(c), (3).
- 5 Financial Services and Markets Act 2000 s 413(4).

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## ***F. SERVICE OF DOCUMENTS***

### **785. Power of the Treasury to make provision as to procedure.**

The Treasury<sup>1</sup> may by regulations make provision with respect to the procedure to be followed, or rules to be applied, when a provision of or made under the Financial Services and Markets Act 2000 requires a notice, direction or document<sup>2</sup> of any kind to be given or authorises the imposition of a requirement<sup>3</sup>.

The regulations may, in particular, make provision:

- 1832 (1) as to the manner in which a document must be given<sup>4</sup>;
- 1833 (2) as to the address to which a document must be sent<sup>5</sup>;
- 1834 (3) requiring, or allowing, a document to be sent electronically<sup>6</sup>;
- 1835 (4) for treating a document as having been given, or as having been received, on a date or at a time determined in accordance with the regulations<sup>7</sup>;
- 1836 (5) as to what must, or may, be done if the person to whom a document is required to be given is not an individual<sup>8</sup>;
- 1837 (6) as to what must, or may, be done if the intended recipient of a document is outside the United Kingdom<sup>9</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the meaning of 'document' see PARA 10 note 10.

3 Financial Services and Markets Act 2000 s 414(1). As to the regulations made see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420; and PARAS 786-789. As to regulations made under the Financial Services and Markets Act 2000 generally see PARA 67 note 1.

Section 414(1) applies however the obligation to give a document is expressed (and so, in particular, includes a provision which requires a document to be served or sent): s 414(3).

The Interpretation Act 1978 s 7 (service of notice by post) (see **STATUTES** vol 44(1) (Reissue) PARA 1388) has effect in relation to provisions made by or under the Financial Services and Markets Act 2000 subject to any provision made by regulations under s 414: s 414(4).

4 Financial Services and Markets Act 2000 s 414(2)(a). As to methods of service see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, regs 2, 7; and PARA 786.

5 Financial Services and Markets Act 2000 s 414(2)(b). As to the proper address for service see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4; and PARA 786.

6 Financial Services and Markets Act 2000 s 414(2)(c). As to service by electronic means of communication see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, regs 5, 8; and PARA 787.

7 Financial Services and Markets Act 2000 s 414(2)(d). As to deemed service see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, regs 6, 9, 10, 11; and PARA 788.

8 Financial Services and Markets Act 2000 s 414(2)(e). As to the appropriate person to be served see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3; and PARA 789.

9 Financial Services and Markets Act 2000 s 414(2)(f). As to the proper address for service see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4; and PARA 786.

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## **786. Methods of service, and proper address for service.**



Any relevant document<sup>1</sup> must be given by a relevant authority<sup>2</sup> to any person (the 'recipient') by one of the following methods<sup>3</sup>:

- 1838 (1) by delivering it to the recipient, the recipient's nominee<sup>4</sup> or the appropriate person<sup>5</sup>;
- 1839 (2) by leaving it at the proper address of the recipient, the recipient's nominee or the appropriate person<sup>6</sup>;
- 1840 (3) by posting<sup>7</sup> it to that address<sup>8</sup>; or
- 1841 (4) by transmitting it by fax or other means of electronic communication to the recipient, the recipient's nominee or the appropriate person<sup>9</sup>.

A relevant document which is to be given to a relevant authority may be given by any method of serving or transmitting documents<sup>10</sup>. Where a relevant document is given by delivering it to the relevant authority, it must be delivered: (a) to the employee or other individual with responsibility for the matter to which the document relates, if the identity of that individual is known<sup>11</sup>; or (b) in any other case, to the published address of that authority<sup>12</sup>. Where a relevant document is given to a relevant authority by leaving it at, or posting<sup>13</sup> it to, the address of a relevant authority, it must be left at or posted to the published address of that authority<sup>14</sup>.

The proper address:

- 1842 (i) in the case of any person who is required by any provision of or made under the Financial Services and Markets Act 2000 to provide to the Financial Services Authority an address of a place in the United Kingdom for the service of documents, is the address so provided<sup>15</sup>; and
- 1843 (ii) in the case of a person to whom no such requirement applies, is any current address provided by that person as an address for service of relevant documents<sup>16</sup>.

In the case of any person who has not provided an address as mentioned in heads (i) and (ii) above, the proper address is the last known address of that person (whether of his residence, or of a place where he carries on business or is employed), or any address under such of the following as may be applicable:

- 1844 (A) in the case of a body corporate<sup>17</sup> (other than a limited liability partnership)<sup>18</sup>, its secretary or its clerk, the address of its registered or principal office in the United Kingdom<sup>19</sup>;
- 1845 (B) in the case of a limited liability partnership or any of its designated members, the address of its registered or principal office in the United Kingdom<sup>20</sup>;
- 1846 (C) in the case of a partnership<sup>21</sup> (other than a limited liability partnership) or any of its partners, the address of its principal office in the United Kingdom<sup>22</sup>;
- 1847 (D) in the case of an unincorporated association other than a partnership, or its governing body, the address of its principal office in the United Kingdom<sup>23</sup>;
- 1848 (E) in the case of a member of a designated professional body<sup>24</sup>, if the member does not have a place of business in the United Kingdom, the address of that body<sup>25</sup>.

1 'Relevant document' means:

680 (1) a document in relation to which a provision of or made under the Financial Services and Markets Act 2000 (other than a provision of or made under Pt IX (ss 132-137) (see PARAS 43, 45-46, 65-69) or Pt XXIV (ss 355-379) (see PARA 490 et seq)) requires a document of that kind to be

given (Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2)); or

- 681 (2) where a provision of or made under the Financial Services and Markets Act 2000 (other than a provision of or made under Pt IX or Pt XXIV) authorises the imposition of a requirement, a document by which such a requirement is imposed (Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2)).

For these purposes, 'document' means a notice, direction or document (as defined in the Financial Services and Markets Act 2000 s 417 (see PARA 10 note 10)) of any kind: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2). In the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, references to a requirement to give any document apply however the requirement is expressed (and so, in particular, include any requirement for a document to be served or sent): reg 1(4).

2 'Relevant authority' means: the Financial Services Authority, the Secretary of State, the Office of Fair Trading, an investigator, the scheme manager, the scheme operator, or an ombudsman: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2) (definition amended by the Enterprise Act 2002 s 2). As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Secretary of State see PARA 3. As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq. 'Investigator' means a person appointed by an investigating authority under the Financial Services and Markets Act 2000 s 97(2) (see PARA 434), s 167 (see PARA 449), s 168(3) or (5) (see PARA 449), s 169(1)(b) (see PARA 450) or s 284 (see PARA 683), or under regulations made under s 262 (see PARA 621), to carry out an investigation: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2). 'Investigating authority' means the Financial Services Authority or the Secretary of State, as the case may be: reg 1(2). As to the meaning of 'scheme manager' see PARA 583. As to the meaning of 'scheme operator' see PARA 575. As to the meaning of 'ombudsman' see PARA 575 note 15; definition applied by reg 1(2). For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, the scheme operator and ombudsmen are treated as the same relevant authority (with the effect, in particular, that a document given to one is to be treated as also given to the other): reg 1(3).

3 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2(1), (2). The provisions of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, have effect subject to any contrary provision made by a relevant authority under the Financial Services and Markets Act 2000 with respect to the service of documents: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(6).

4 'Nominee', in relation to any person to whom a document is to be given ('A'), means a person ('B') who is authorised for the time being to receive relevant documents on behalf of A, to whom relevant documents may be given: (1) if A has notified the Financial Services Authority in writing that B is so authorised, by any relevant authority; or (2) if A has notified a relevant authority in writing that B is so authorised, by that relevant authority: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2). For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, 'writing' includes any means of electronic communication which may be processed to produce a legible text: reg 1(5).

5 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2(2)(a). 'Appropriate person' means: (1) an individual to whom a relevant document may be given, in accordance with reg 3(1) (see PARA 789), in order to give that document to a person who is not an individual; or (2) in the case of a relevant document given to an appointed representative, his principal: reg 1(2). As to appointed representatives see PARA 346.

6 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2(2)(b). Such person is determined in accordance with reg 4 (see heads (i)-(ii), (A)-(E) in the text).

7 For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2, 'posting' a relevant document means sending that document pre-paid by a postal service which seeks to deliver documents by post within the United Kingdom no later than the next working day in all or the majority of cases, and to deliver by post outside the United Kingdom within such a period as is reasonable in all the circumstances: reg 2(3). As to the meaning of 'United Kingdom' see PARA 2 note 3.

8 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2(2)(c).

9 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2(2)(d). As to such transmission see reg 5; and PARA 787.

10 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 7(1). This is subject to reg 7(2), (3) (see the text to notes 11, 12, 14), reg 8 (see PARA 787), and reg 10 (see PARA 789).

- 11 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 7(2)(a).
- 12 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 7(2)(b).
- 13 For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 7, 'posting' a document means sending it by a pre-paid postal service: reg 7(4).
- 14 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 7(3).
- 15 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(1)(a).
- 16 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(1)(b). However, where the address mentioned in reg 4(1)(b) is situated in a country or territory other than the United Kingdom, a relevant authority may give a relevant document by leaving it at, or posting it to, any applicable address of a place in the United Kingdom falling within reg 4(2) (see heads (A)-(E) in the text): reg 4(3).
- 17 As to the meaning of 'body corporate' see PARA 86 note 11. As to bodies corporate see generally **COMPANIES**.
- 18 As to limited liability partnerships see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.
- 19 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(2)(a).
- 20 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(2)(b).
- 21 As to the meaning of 'partnership' see PARA 86 note 11. As to partnerships generally see **PARTNERSHIP**.
- 22 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(2)(c).
- 23 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(2)(d).
- 24 As to designated professional bodies see PARA 749.
- 25 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 4(2)(e).

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### **787. Service by electronic means of communication.**

A relevant authority<sup>1</sup> may give a relevant document<sup>2</sup> by fax only if the person to whom it is to be given has indicated in writing<sup>3</sup> to that authority (and has not withdrawn the indication): (1) that he is willing to receive relevant documents by fax<sup>4</sup>; and (2) the fax number to which such documents should be sent<sup>5</sup>. If a relevant authority gives a relevant document by fax it must, by the end of the business day<sup>6</sup> following the day on which it did so, send a copy of that document to the person to whom the document is to be given by any method specified<sup>7</sup> other than fax<sup>8</sup>.

A relevant authority may give a relevant document by any other electronic means of communication only if the person to whom it is to be given:

- 1849 (a) has indicated in writing to that authority (and has not withdrawn the indication) that he is willing to receive relevant documents by those means<sup>9</sup>; and
- 1850 (b) has provided, in writing to that authority for this purpose, an e-mail address, or other electronic identification such as an ISDN or other telephonic link number<sup>10</sup>.

Where a relevant document which is to be given to a relevant authority is given by fax or other electronic means, it must be sent to a fax number, e-mail address or other electronic identification:

- 1851 (i) which has been notified to the sender by the relevant authority as the appropriate number, address or other electronic identification for the purpose of receiving relevant documents of the kind in question<sup>11</sup>; or
- 1852 (ii) in all other cases, which has been published by the relevant authority for the purpose of receiving relevant documents<sup>12</sup>.

Where any provision of or made under the Financial Services and Markets Act 2000 requires a person to give a relevant document to the Financial Services Authority before the end of a specified period, that person may give that document by fax only if by the end of the business day following the day on which he did so, he sends a copy of that document to the Authority by any method other than fax<sup>13</sup>.

1 As to the meaning of 'relevant authority' see PARA 786 note 2.

2 As to the meaning of 'relevant document' see PARA 786 note 1. In the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, references to a requirement to give any document apply however the requirement is expressed (and so, in particular, include any requirement for a document to be served or sent): reg 1(4).

3 For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, writing includes any means of electronic communication which may be processed to produce a legible text: reg 1(5).

4 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 5(1)(a). A fax number, e-mail address or other electronic identification provided to the Financial Services Authority for the purpose of accepting the service of relevant documents is sufficient indication, for any relevant authority, for the purposes of reg 5(1) or (3): reg 5(4). As to the Financial Services Authority see PARAS 4, 6 et seq.

5 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 5(1)(b). See note 4.

6 'Business day' means any day except Saturday, Sunday or a bank holiday, where 'bank holiday' includes Christmas Day and Good Friday: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2).

7 As specified in the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 2: see PARA 786.

8 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 5(2).

9 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 5(3)(a). See note 4.

10 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 5(3)(b). See note 4.

11 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 8(1)(a).

12 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 8(1)(b).

13 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 8(2).

PROCEDURAL AND OTHER MATTERS/(ii) Miscellaneous Matters/F. SERVICE OF DOCUMENTS/788. Deemed service etc.

### **788. Deemed service etc.**

A relevant document<sup>1</sup> which is given by a relevant authority<sup>2</sup> to any person in accordance with the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001<sup>3</sup> is, for each method of giving, to be treated as having been received on the days shown below<sup>4</sup>:

- 1853 (1) where the document is left at the proper address<sup>5</sup>, on the business day<sup>6</sup> after the day on which it is left at the proper address;
- 1854 (2) where the document is posted to an address in the United Kingdom<sup>7</sup>, on the second business day after posting;
- 1855 (3) where the document is posted to an address in any EEA state (other than the United Kingdom), on the fifth business day after posting;
- 1856 (4) where the document is sent by fax<sup>8</sup>, on the business day after the day on which the document is transmitted;
- 1857 (5) where the document is sent by other electronic means of communication, on the business day after the day on which the document is transmitted<sup>9</sup>.

Special provision is made for certain notices stated to take effect immediately<sup>10</sup>. No relevant document which is to be given to a relevant authority is to be treated as given until it is received by that authority in legible form; and for the purposes of any provision of or made under the Financial Services and Markets Act 2000 which requires a relevant authority to take any action within a specified period beginning with the day on which a document was received by that authority, that day is the day on which the document is actually received in legible form<sup>11</sup>.

For the purposes of any provision of or made under the Financial Services and Markets Act 2000 which requires a person to give a document to the Financial Services Authority before the end of a specified period, that person is to be regarded as having complied with that requirement (irrespective of the day on which the document is in fact received by the Authority if it is sent by post, fax or other electronic means) if he sends the document to the Authority in accordance with any applicable directions<sup>12</sup> before the end of the specified period or, where no such directions apply, if he:

- 1858 (a) delivers the document to an employee of the Authority with responsibility for the matter to which the document relates before the end of the specified period<sup>13</sup>;
- 1859 (b) leaves the document at the Authority's address before the end of the specified period, and obtains a time stamped receipt<sup>14</sup>;
- 1860 (c) posts<sup>15</sup> the document to the Authority's address before the final day of the specified period<sup>16</sup>;
- 1861 (d) sends the document to the Authority by fax before the end of the specified period, provided that he has also sent or subsequently sends a copy of that document by any method other than fax<sup>17</sup>; or
- 1862 (e) sends the document to the Authority by other electronic means of communication before the end of the specified period, and obtains electronic confirmation of receipt<sup>18</sup>.

No relevant document is to be treated as given by a relevant authority to a host state regulator<sup>19</sup> until it is received by that regulator<sup>20</sup>.

- 1 As to the meaning of 'relevant document' see PARA 786 note 1.
- 2 As to the meaning of 'relevant authority' see PARA 786 note 2.
- 3 In the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420.
- 4 See the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 6(1). This is subject to reg 11 (see the text to note 20). In the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, references to a requirement to give any document apply however the requirement is expressed (and so, in particular, include any requirement for a document to be served or sent): reg 1(4).
- 5 As to the proper address for service see PARA 786.
- 6 As to the meaning of 'business day' see PARA 787 note 6.
- 7 As to the meaning of the 'United Kingdom' see PARA 2 note 3.
- 8 Where a relevant document is given by fax, that document is to be treated as having been received on the deemed day of receipt of the fax, determined in accordance with the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 6(1), regardless of whether a relevant authority has sent a copy of that document in accordance with reg 5(2) (see PARA 787): reg 6(2).
- 9 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 6(1).
- 10 See the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 6(3) (added by SI 2005/274). Where (1) a notice given under the Financial Services and Markets Act 2000 s 53(4) (see PARA 357) states that a variation of an authorised person's Part IV permission (see PARA 348) takes effect immediately; (2) a notice given under s 78(2) (see PARA 389) states that a discontinuance or suspension of the listing of any securities takes effect immediately; or (3) a notice given under s 259(3) (see PARA 619), or under the Open-Ended Investment Companies Regulations 2001, SI 2001/1228, reg 27 (see PARA 634) states that a direction to which it relates takes effect immediately, that notice is to be treated as having been received at the time it is in fact received if that is earlier than the day on which heads (1)-(5) of the text would otherwise require it to be treated as having been received: see the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 6(3) (as so added).
- 11 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 9(1). For the purposes of reg 9(1), where a relevant document is given by fax and a copy sent in accordance with reg 8(2) (see PARA 787), that document is to be treated as given to the Financial Services Authority on either the day on which the fax is actually received by the Authority or the day on which the copy is actually received by the Authority, whichever day is the earlier: reg 9(2). As to the Financial Services Authority see PARAS 4, 6 et seq.
- 12 For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10, 'applicable direction' means any direction given by the Authority under the Financial Services and Markets Act 2000 which specifies the manner in which the relevant document in question is to be given: Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(2) (b).
- 13 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(1) (a).
- 14 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(1) (b).
- 15 For the purposes of the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10, 'posts' means:
  - 682 (1) where the person who is required to give a document is located in the United Kingdom, sending that document pre-paid by a postal service which seeks to deliver documents by post within the United Kingdom no later than the next working day in all or the majority of cases (reg 10(2)(a)(i)); and
  - 683 (2) where the person who is required to give a document is located outside the United Kingdom, sending that document pre-paid by a postal service which seeks to deliver documents by post in the fastest time which is reasonable in the circumstances (reg 10(2)(a)(ii)).
- 16 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(1) (c).

17 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(1) (d). As to the sending of the copy of the document see reg 8(2); and PARA 787.

18 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 10(1) (e).

19 As to the meaning of 'host state regulator' see PARA 323 note 10; definition applied by the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 1(2).

20 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 11.

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### **789. Appropriate person to be served.**

A relevant document<sup>1</sup> which is required to be given<sup>2</sup> by a relevant authority<sup>3</sup> to a person (other than a relevant authority) who is not an individual may:

- 1863 (1) where that person is a body corporate<sup>4</sup> (other than a limited liability partnership)<sup>5</sup>, be given to the secretary or the clerk of that body, or to any person holding a senior position in that body<sup>6</sup>;
- 1864 (2) where that person is a limited liability partnership, be given to any designated member<sup>7</sup>;
- 1865 (3) where that person is a partnership<sup>8</sup> (other than a limited liability partnership), be given to any partner<sup>9</sup>;
- 1866 (4) where that person is an unincorporated association other than a partnership, be given to any member of the governing body of the association<sup>10</sup>.

A relevant document which is required to be given to an appointed representative<sup>11</sup> may be given to his principal<sup>12</sup>.

1 As to the meaning of 'relevant document' see PARA 786 note 1.

2 In the Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, references to a requirement to give any document apply however the requirement is expressed (and so, in particular, include any requirement for a document to be served or sent): reg 1(4).

3 As to the meaning of 'relevant authority' see PARA 786 note 2.

4 As to the meaning of 'body corporate' see PARA 86 note 11. As to bodies corporate generally see **COMPANIES**.

5 As to limited liability partnerships see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

6 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3(1)(a). For the purposes of reg 3, persons holding a senior position in a body corporate include: (1) a director, the treasurer, secretary or chief executive (reg 3(3)(a)); and (2) a manager or other officer of that body who, in either case, has responsibility for the matter to which the relevant document relates (reg 3(3)(b)).

7 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3(1)(b). The reference in the text is a reference to any designated member within the meaning of the Limited Liability Partnerships Act 2000 s 8: see **PARTNERSHIP** vol 79 (2008) PARA 240.

- 8 As to the meaning of 'partnership' see PARA 86 note 11. See generally **PARTNERSHIP**.
- 9 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3(1)(c).
- 10 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3(1)(d).
- 11 As to appointed representatives see PARA 346.
- 12 Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001, SI 2001/1420, reg 3(2).

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## ***G. JURISDICTION IN CIVIL PROCEEDINGS***

### **790. Jurisdiction of the High Court.**

Proceedings arising out of any act or omission (or proposed act or omission) of: (1) the Financial Services Authority<sup>1</sup>; (2) the competent authority<sup>2</sup> for the purposes of Part VI of the Financial Services and Markets Act 2000<sup>3</sup>; (3) the compensation scheme manager<sup>4</sup>; or (4) the ombudsman scheme operator<sup>5</sup>, in the discharge or purported discharge of any of its functions under the Financial Services and Markets Act 2000 may be brought before the High Court<sup>6</sup>.

- 1 Financial Services and Markets Act 2000 s 415(1)(a). As to the Financial Services Authority see PARAS 4, 6 et seq.
- 2 As to the competent authority see PARA 385.
- 3 Financial Services and Markets Act 2000 s 415(1)(b). The reference is to the Financial Services and Markets Act 2000 Pt VI (ss 72-103): see PARA 385 et seq.
- 4 Financial Services and Markets Act 2000 s 415(1)(c). As to the scheme manager see PARA 583.
- 5 Financial Services and Markets Act 2000 s 415(1)(d).
- 6 Financial Services and Markets Act 2000 s 415(1). The jurisdiction conferred by s 415(1) is in addition to any other jurisdiction exercisable by the High Court: s 415(2).

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## **3. BANKING**

### **(1) INTRODUCTION**

#### **(i) Legislation and Common Law**

##### **791. Introduction.**



The statutory regulation of banking has changed considerably with the enactment of the Financial Services and Markets Act 2000<sup>1</sup>. Prior to this, the regulation of banking was governed by the Banking Act 1987 which covered the regulation of deposit-taking business<sup>2</sup>, the deposit protection scheme<sup>3</sup>, banking names and descriptions<sup>4</sup>, overseas institutions with representative offices<sup>5</sup>, restriction on disclosure of information<sup>6</sup> and miscellaneous related matters<sup>7</sup>. The Banking Act 1987 also gave the Bank of England supervisory duties over the field of banking<sup>8</sup>. The Financial Services and Markets Act 2000 takes away the distinction between banking and other forms of financial services and imposes a system to regulate all financial services<sup>9</sup>.

Although the statutory regulation of banking has been subsumed into that of financial services generally, there are a number of matters that remain distinctive to banks<sup>10</sup> and banking law. The Bank of England remains a powerful institution that has been granted new powers for the formulation of monetary policy under the Banking Act 1998<sup>11</sup>. The business of banking is primarily governed by the common law and covers such matters as the relation of banker and customer<sup>12</sup>, the payment of cheques and the protection and duties of the paying banker<sup>13</sup>, banker's lien<sup>14</sup>, the appropriation of payments<sup>15</sup>, statement of account<sup>16</sup>, the banker as bailee<sup>17</sup>, the collection of cheques and the protection and duties of the collecting banker<sup>18</sup>, electronic funds transfer<sup>19</sup>, bankers' books<sup>20</sup>, secrecy, references and advice<sup>21</sup>, letters of credit and performance bonds<sup>22</sup>, lending and security<sup>23</sup>, guarantees<sup>24</sup>, and freezing injunctions<sup>25</sup>. There are specific accounting requirements for banking companies and groups<sup>26</sup>.

One further statute that should be mentioned in this general context is the Banking (Special Provisions) Act 2008 which makes provision for the Treasury<sup>27</sup> in certain circumstances to make an order relating to the transfer of securities issued by, or of property, rights or liabilities belonging to, an authorised UK deposit-taker<sup>28</sup>.

1 See generally PARAS 2, 5 et seq. See also PARA 792.

2 See the Banking Act 1987 Pt I (ss 1-49) (repealed).

3 See the Banking Act 1987 Pt II (ss 50-66) (repealed).

4 See the Banking Act 1987 Pt III (ss 67-73) (repealed).

5 See the Banking Act 1987 Pt IV (ss 74-81) (repealed).

6 See the Banking Act 1987 Pt V (ss 82-87) (repealed).

7 See the Banking Act 1987 Pt VI (ss 88-110) (repealed).

8 See the Banking Act 1987 ss 1, 16, 17 (repealed).

9 See PARA 792; and PARAS 2, 5 et seq.

10 As to the constitution of banks see PARAS 793-814.

11 See PARA 793 et seq.

12 See PARAS 815-831.

13 See PARAS 832-859.

14 See PARAS 860-864.

15 See PARAS 865-872.

16 See PARAS 873-874.

17 See PARAS 875-878.

18 See PARAS 879-905.

19 See PARA 906.

20 See PARAS 907-909.

21 See PARAS 910-922.

22 See PARAS 923-966.

23 See PARAS 967-990.

24 See PARAS 991-997.

25 See PARAS 998-1012.

26 See generally the Companies Act 2006 Pt 15 (ss 380-474), Pt 16 (ss 475-539); the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, SI 2008/410; the Bank Accounts Directive (Miscellaneous Banks) Regulations 2008, SI 2008/567; and **COMPANIES**.

27 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

28 'Authorised UK deposit-taker' means a United Kingdom undertaking that under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) has permission (see PARA 348 et seq) to accept deposits (see PARA 89 et seq): Banking (Special Provisions) Act 2008 s 1(1). That expression does not, however, include such an undertaking with permission to accept deposits only for the purposes of, or in the course of, an activity other than accepting deposits: s 1(2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

The Banking (Special Provisions) Act 2008 received Royal Assent on 21 February 2008 and was intended to enable the United Kingdom government to nationalise high-street banks under emergency circumstances by secondary legislation. Specifically the Act was introduced in order to nationalise the failing bank Northern Rock plc after a private-sector solution was deemed of insufficient value to the taxpayer, although the legislation is of potentially wider application. It also has provisions on the following matters: cases where the Treasury's powers are exercisable (s 2); transfer of securities (s 3); extinguishment of subscription rights (s 4); compensation etc for securities transferred etc (s 5); transfer of property, rights and liabilities (s 6); compensation etc for property etc transferred (s 7); further transfers following transfer to public sector (s 8); supplementary provision about compensation schemes etc (s 9); tax consequences (s 10); modification of legislation applying in relation to building societies) (s 11) (see also PARA 1856 note 4); consequential and supplementary provision (s 12); orders and regulations: general (s 13); orders and regulations: retrospective provisions (s 14); interpretation (s 15); financial provision (s 16); short title, commencement and extent (s 17); transfer orders under s 3 (Sch 1); transfer orders under s 6 (Sch 2). The Northern Rock plc Transfer Order 2008, SI 2008/432, was made in exercise of the powers conferred by the Banking (Special Provisions) Act 2008 ss 3, 4, 12 and 13 to protect the public interest, in circumstances where the Treasury has provided financial assistance to Northern Rock plc, being an authorised UK deposit-taker (see above), for the purpose of maintaining the stability of the UK financial system (see also PARA 807). The Northern Rock plc Compensation Scheme Order 2008, SI 2008/718, was made under the Banking (Special Provisions) Act 2008 ss 5, 9, 12, 13 and provides a scheme for determining the amount of compensation, if any, payable by the Treasury to those whose securities were transferred, or whose rights were extinguished, by the Northern Rock plc Transfer Order 2008, SI 2008/432 (see above).

## UPDATE

### 791 Introduction

TEXT AND NOTES--The Banking Act 2009 Pts 1-3 (ss 1-168) make provision for when a bank is in financial difficulty: see PARAS 791A-791C. As to provision for the creation of inter-bank payment systems designed to facilitate or control the transfer of money between financial institutions see the Banking Act 2009 Pt 5 (ss 181-206); and PARA 791D. As to provision for the insolvency of investment banks see the Banking Act 2009 ss 232-236; and PARA 791E.

NOTE 28--The assumptions set out in the Banking (Special Provisions) Act 2008 s 5(4) which have been applied in determining the amount of compensation payable to former shareholders of a failed bank which has been taken into public ownership are

not unfair: *R (on the application of SRM Global Master Fund LP) v HM Treasury Comrs* [2009] EWCA Civ 788, [2009] All ER (D) 297 (Jul). See also the Banking Act 2009 s 237 (appointment of valuer). As to further secondary legislation made under the 2008 Act, see Bradford & Bingley plc Transfer of Securities and Property etc Order 2008, SI 2008/2546; Bradford & Bingley plc Compensation Scheme Order 2008, SI 2008/3249 (amended by SI 2009/790). SI 2008/718 amended: SI 2009/791. See also *R (on the application of Kaupthing Bank hf) v HM Treasury* [2009] EWHC 2542 (Admin), [2009] All ER (D) 220 (Oct).

As to orders made under the Banking (Special Provisions) Act 2008 s 6, see Heritable Bank plc Transfer of Certain Rights and Liabilities Order 2008, SI 2008/2644 (amended by SI 2009/310); Transfer of Rights and Liabilities to ING Order 2008, SI 2008/2666; and Kaupthing Singer & Friedlander Limited Transfer of Certain Rights and Liabilities Order 2008, SI 2008/2674 (amended by SI 2009/308).

The Northern Rock plc Transfer Order 2009, SI 2009/3226, has been made under the Banking (Special Provisions) Act 2008 ss 8, 12. The Northern Rock plc (Tax Consequences) Regulations 2009, SI 2009/3227, have been made under the Banking (Special Provisions) Act 2008 s 10.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/3. BANKING/(1) INTRODUCTION/(i) Legislation and Common Law/791A. Special resolution regime.

## **791A. Special resolution regime.**

### **1. Purpose of special resolution regime**

The purpose of the special resolution regime for banks is to address the situation where all or part of the business of a bank has encountered, or is likely to encounter, financial difficulties: Banking Act 2009 s 1(1). The special resolution regime consists of the three stabilisation options, the bank insolvency procedure (see Pt 2 (ss 90-135)); and PARA 791B) and the bank administration procedure (see Pt 3 (ss 136-168); and PARA 791C). The three stabilisation options are (1) transfer to a private sector purchaser (see s 11); (2) transfer to a bridge bank (see s 12); and (3) transfer to temporary public ownership (see s 13): Banking Act 2009 s 1(2). Each of the stabilisation options is achieved through the exercise of one or more of the stabilisation powers, which are the share transfer powers (see ss 15, 16, 26-31, 85) and the property transfer powers (see ss 33, 42-46): s 1(4). For the purposes of Pt 1 (ss 1-89), 'bank' means a United Kingdom institution which has permission under the Financial Services and Markets Act 2000 Pt 4 (ss 40-55) (see PARAS 348-361) to carry on the regulated activity of accepting deposits within the meaning of s 22, but does not include a building society within the meaning of the Building Societies Act 1986 s 119 (see PARA 1906), a credit union within the meaning of the Credit Unions Act 1979 s 31, or any other class of institution excluded by an order made by the Treasury (Banking Act 2009 s 2(1), (2)), or any institution with permission under the Financial Services and Markets Act Pt IV (ss 40-55) to effect or carry out contracts of insurance as principal (Banking Act 2009 (Exclusion of Insurers) Order 2010, SI 2010/35). Subject to certain specified exceptions, the Banking Act 2009 Pt 1 applies to building societies as it applies to banks: Banking Act 2009 s 84. The Treasury may by order make provision about the distribution of surplus assets of a building society which is the subject of a property transfer instrument or order and is later wound up or dissolved by consent: Banking Act 2009 s 86(1). The Treasury may also provide for the application of Pt 1 to credit unions: see the Banking Act 2009 s 89.

## **2. Objectives and code**

The Treasury, the Financial Services Authority and the Bank of England must have regard to the special resolution objectives in using, or considering the use of, the stabilisation powers, the bank insolvency procedure or the bank administration procedure: Banking Act 2009 s 4(2), (3). The special resolution objectives are (1) to protect and enhance the stability of the financial systems of the United Kingdom; (2) to protect and enhance public confidence in the stability of the banking systems of the United Kingdom; (3) to protect depositors; (4) to protect public funds; and (5) to avoid interfering with property rights in contravention of a right under the European Convention on Human Rights: s 4(4). The stability of the financial systems of the United Kingdom includes, in particular, a reference to the continuity of banking services: Banking Act 2009 s 4(5). The order in which the objectives are listed is not significant; they are to be balanced as appropriate in each case: s 4(6). The Treasury is required to issue a code of practice about the use of the stabilisation powers, the bank insolvency procedure and the bank administration procedure: see ss 5, 6.

## **3. Exercise of powers**

A stabilisation power may be exercised in respect of a bank only if the Financial Services Authority is satisfied that (1) the bank is failing, or is likely to fail, to satisfy the threshold conditions within the meaning of the Financial Services and Markets Act 2000 s 41(1) (permission to carry on regulated activities: see PARA 351); and (2) having regard to timing and other relevant circumstances it is not reasonably likely that, ignoring the stabilisation powers, action will be taken by or in respect of the bank that will enable the bank to satisfy the threshold conditions: Banking Act 2009 s 7(1)-(3). The Bank of England may exercise a stabilisation power in respect of a bank in accordance with s 11(2) or 12(2) only if satisfied that the exercise of the power is necessary, having regard to the public interest in the stability of the financial systems of the United Kingdom, the maintenance of public confidence in the stability of the banking systems of the United Kingdom, or the protection of depositors: Banking Act 2009 s 8(1), (2). Where the Treasury notifies the Bank of England that it has provided financial assistance in respect of a bank for the purpose of resolving or reducing a serious threat to the stability of the financial systems of the United Kingdom, the Bank may exercise a stabilisation power in respect of the bank in accordance with s 11(2) or 12(2) only if satisfied that the Treasury has recommended the Bank of England to exercise the power on the ground that it is necessary to protect the public interest, and, in the Bank's opinion, exercise of the power is an appropriate way to provide that protection: s 8(4), (5). The Treasury may exercise a stabilisation power in respect of a bank in accordance with s 13(2) (see PARA 791A.4) only if satisfied that either (a) the exercise of the power is necessary to resolve or reduce a serious threat to the stability of the financial systems of the United Kingdom; or (b) exercise of the power is necessary to protect the public interest, where the Treasury has provided financial assistance in respect of the bank for the purpose of resolving or reducing a serious threat to the stability of the financial systems of the United Kingdom: Banking Act 2009 s 9(1)-(3). The Treasury must make arrangements for a panel to advise it about the effect of the special resolution regime on banks, persons with whom banks do business, and the financial markets: Banking Act 2009 s 10(1), (2). As to the composition of the panel see s 10(3).

## **4. The stabilisation options**

The first stabilisation option is to sell all or part of the business of the bank to a commercial purchaser: Banking Act 2009 s 11(1). For that purpose the Bank of England may make one or more share transfer instruments and one or more property transfer instruments: s 11(2). The second stabilisation option is to transfer all or part of the business of the bank to a company

which is wholly owned by the Bank of England (a 'bridge bank'): Banking Act 2009 s 12(1). For that purpose the Bank of England may make one or more property transfer instruments: s 12(2). The third stabilisation option is to take the bank into temporary public ownership: Banking Act 2009 s 13(1). For that purpose the Treasury may make one or more share transfer orders in which the transferee is either a nominee of the Treasury or a company wholly owned by the Treasury: s 13(2). For the purpose of exercising the third stabilisation option in respect of a building society the Treasury may make one or more orders for the purposes of (1) arranging for deferred shares of a building society to be publicly owned; (2) cancelling private membership rights in the building society; (3) allowing the building society to continue in business while in public ownership; and (4) eventually either winding up or dissolving the building society: Banking Act 2009 s 85(1). See further s 85(2)-(8).

## **5. Transfer of securities**

A share transfer instrument is an instrument which provides for securities issued by a specified bank to be transferred, and makes other provision for the purposes of, or in connection with, the transfer of securities issued by a specified bank: Banking Act 2009 s 15(1). For the purposes of Pt 1 (ss 1-89), 'securities' includes (1) shares and stock (Class 1); (2) debentures, including debenture stock, loan stock, bonds, certificates of deposit, and any other instrument creating or acknowledging a debt (Class 2); (3) warrants or other instruments that entitle the holder to acquire anything in Class 1 or 2 (Class 3); and (4) rights which are granted by a deposit-taker, and form part of the deposit-taker's own funds (Class 4): Banking Act 2009 s 14. A share transfer instrument may relate to specified securities or securities of a specified description: s 15(2). A share transfer order is an order which provides for securities issued by a specified bank to be transferred, and makes other provision for the purposes of, or in connection with, the transfer of securities issued by a specified bank: Banking Act 2009 s 16(1). A share transfer order may relate to specified securities or securities of a specified description: Banking Act 2009 s 16(2). As to the taking of effect of a transfer provided for by a share transfer instrument or order see the Banking Act 2009 s 17. A share transfer instrument or order may provide for securities to be converted from one form or class to another: Banking Act 2009 s 19(1). A share transfer instrument and a share transfer order may give the Bank of England or the Treasury, as the case may be, various powers over the appointment and removal of the directors of a bank: Banking Act 2009 s 20. A share transfer instrument or order may permit or require the execution, issue or delivery of an instrument: Banking Act 2009 s 21(1). As to provision for the termination of rights see the Banking Act 2009 s 22, and as to procedural provision related to the making of share transfer instruments see the Banking Act 2009 ss 23-25.

## **6. Supplemental and reverse orders**

Where the Bank of England or Treasury, as the case may be, has made a share transfer instrument or order, it may make one or more supplemental share transfer instruments or supplemental share transfer orders: Banking Act 2009 ss 26(1), (2), 27(1), (2). A supplemental share transfer instrument or order is a share transfer instrument or order, as the case may be, which provides for the transfer of securities which were issued by the bank before the original instrument or order and have not been transferred by the original instrument or order or another supplemental share transfer instrument or order, and makes provision of a kind that a share transfer instrument or order may make under s 15(1)(b) or s 16(1)(b), as the case may be: ss 26(3), 27(3). Where the Treasury has made a share transfer order in respect of securities issued by a bank, it may make one or more onward share transfer orders, which are share transfer orders which (1) provide for the transfer of securities which were issued by the bank before the original order and have been transferred by the original order or a supplemental share transfer order, or securities which were issued by the bank after the original order; and

(2) makes other provision for the purposes of, or in connection with, the transfer of securities issued by the bank: Banking Act 2009 s 28(1)-(3). An onward share transfer order may not transfer securities to the transferor under the original order: s 28(4). Where the Treasury has made a share transfer order providing for the transfer of securities issued by a bank to a person, it may make one or more reverse share transfer orders in respect of securities issued by the bank and held by the original transferee: Banking Act 2009 s 29(1), (2). If the Treasury makes an onward share transfer order in respect of securities transferred by the original order, it may make one or more reverse share transfer orders in respect of securities issued by the bank and held by a transferee under the onward share transfer order of a company wholly owned by the Bank of England, a company wholly owned by the Treasury, or a nominee of the Treasury: s 29(3). A reverse share transfer order is a share transfer order which (a) provides for transfer to the transferor under the original order; (b) provides for transfer to the original transferee; and (c) makes other provision for the purposes of, or in connection with, the transfer of securities which are, could be or could have been so transferred: s 29(4). Where the Bank of England has made a property transfer instrument in respect of a bridge bank in accordance with s 12(2) (see PARA 791A.4), it may make one or more bridge bank share transfer instruments, which are share transfer instruments that provide for securities issued by the bridge bank to be transferred, and makes other provision for the purposes of, or in connection with, the transfer of securities issued by the bridge bank: Banking Act 2009 s 30(1)-(3). Where the Bank of England has made a bridge bank share transfer instrument providing for the transfer of securities to a company wholly owned by the Bank of England, a company wholly owned by the Treasury, or a nominee of the Treasury, it may make one or more bridge bank reverse share transfer instruments in respect of securities issued by the bridge bank and held by such a person: Banking Act 2009 s 31(1), (2). A bridge bank reverse share transfer instrument is a share transfer instrument which provides for transfer to the transferor under the original instrument, and makes other provision for the purposes of, or in connection with, the transfer of securities which are, could be or could have been so transferred: s 31(3).

## **7. Transfer of property**

A property transfer instrument is an instrument which provides for property, rights or liabilities of a specified bank to be transferred, and makes other provision for the purposes of, or in connection with, the transfer of property, rights or liabilities of a specified bank: Banking Act 2009 s 33(1). A property transfer instrument may relate to (1) all property, rights and liabilities of the specified bank; (2) all its property, rights and liabilities, subject to specified exceptions; (3) specified property, rights or liabilities; or (4) property, rights or liabilities of a specified description: s 33(2). As to the taking of effect of a property transfer instrument see the Banking Act 2009 s 34, and as to the property that may be transferred see the Banking Act 2009 s 35. A licence in respect of anything transferred by a property transfer instrument continues to have effect despite the transfer: Banking Act 2009 s 37(1). As to provision for the termination of rights see the Banking Act 2009 s 38. Where a property transfer instrument transfers foreign property, the transferor and the transferee must each take any necessary steps to ensure that the transfer is effective as a matter of foreign law: s 39(1), (3). For this purpose, 'foreign property' means property outside the United Kingdom and rights and liabilities under foreign law: Banking Act 2009 s 39(2). Until the transfer is effective as a matter of foreign law, the transferor must hold the property or right for the benefit of the transferee (together with any additional property or right accruing by virtue of the original property or right), or discharge the liability on behalf of the transferee: s 39(4). As to procedural provision relating to the making of property transfer instruments see the Banking Act 2009 ss 40, 41. Where the Bank of England has made a property transfer instrument, it may make one or more supplemental property transfer instruments: Banking Act 2009 s 42(1), (2). A supplemental property transfer instrument is a property transfer instrument which provides for property, rights or liabilities to be transferred from the transferor under the original instrument, and makes other provision of a kind that an original property transfer instrument may make under s 33(1)(b): s 42(3). Where

the Bank of England has made a property transfer instrument in respect of a bridge bank in accordance with s 12(2) (see PARA 791A.4), it may make one or more onward property transfer instruments: Banking Act 2009 s 43(1), (2). An onward property transfer instrument is a property transfer instrument which provides for property, rights or liabilities of the bridge bank to be transferred, and makes other provision for the purposes of, or in connection with, the transfer of property, rights or liabilities of the bridge bank: s 43(3).

## **8. Reverse property transfer instruments and orders**

Where the Bank of England has made a property transfer instrument providing for the transfer of property, rights or liabilities to a bridge bank, it may make one or more reverse property transfer instruments in respect of property, rights or liabilities of the bridge bank: Banking Act 2009 s 44(1), (2). If the Bank of England makes an onward property transfer instrument, the Bank may make one or more reverse property transfer instruments in respect of property, rights or liabilities of a transferee of a company wholly owned by the Bank of England, a company wholly owned by the Treasury, or a company wholly owned by a nominee of the Treasury: s 44(3). A reverse property transfer instrument is a property transfer instrument which (1) provides for transfer to the transferor under the original instrument; (2) provides for transfer to the bridge bank; and (3) makes other provision for the purposes of, or in connection with, the transfer of property, rights or liabilities that are, could be or could have been so transferred: s 44(4). Where the Treasury has made a share transfer order in respect of securities issued by a bank, it may make one or more property transfer orders, which are orders which provide for property, rights or liabilities of the bank to be transferred and make other provision for the purposes of, or in connection with, the transfer of property, rights or liabilities of the bank: Banking Act 2009 s 45(1)-(3). Where the Treasury has made a property transfer order providing for the transfer of property, rights or liabilities to a company wholly owned by the Bank of England, the Treasury, or a nominee of the Treasury, it may make one or more reverse property transfer orders in respect of property, rights or liabilities of the transferee under the original order: Banking Act 2009 s 46(1), (2). A reverse property transfer order is a property transfer order which provides for transfer to the transferor under the original order, and makes other provision for the purposes of, or in connection with, the transfer of property, rights or liabilities which are, could be or could have been transferred: s 46(3). The Treasury may by order (a) restrict the making of partial property transfers; (b) impose conditions on the making of partial property transfers; (c) require partial property transfers to include specified provision or provision to a specified effect; and (d) provide for a partial property transfer to be void or voidable, or for other consequences (including automatic transfer of other property, rights or liabilities) to arise, if or in so far as the partial property transfer is made or purported to be made in contravention of a provision of the order (or of another order under s 47): Banking Act 2009 s 47(2). For this purpose, 'partial property transfer' means a property transfer instrument which provides for the transfer of some, but not all, of the property, rights and liabilities of a bank: s 47(1). See further s 47(3), (4); and the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009, SI 2009/322 (amended by SI 2009/1286). The Treasury may by order (i) restrict the making of partial property transfers in cases that involve, or where they might affect, protected arrangements; (ii) impose conditions on the making of partial property transfers in cases that involve, or where they might affect, protected arrangements; (iii) require partial property transfers to include specified provision, or provision to a specified effect, in respect of or for purposes connected with protected arrangements; and (iv) provide for a partial property transfer to be void or voidable, or for other consequences (including automatic transfer of other property, rights or liabilities) to arise, if or in so far as the partial property transfer is made or purported to be made in contravention of a provision of the order (or of another order under the 2009 Act s 48): Banking Act 2009 s 48(2). In s 48, 'protected arrangements' means security interests, title transfer collateral arrangements, set-off arrangements and netting arrangements; 'security interests' means arrangements under which one person acquires, by way of security, an actual or

contingent interest in the property of another; 'title transfer collateral arrangements' are arrangements under which one person transfers assets to another person on terms providing for the latter to transfer assets if specified obligations are discharged; 'set-off arrangements' are arrangements under which two or more debts, claims or obligations can be set off against each other; and 'netting arrangements' are arrangements under which a number of claims or obligations can be converted into a net claim or obligation and include, in particular, 'close-out' netting arrangements, under which actual or theoretical debts are calculated during the course of a contract for the purpose of enabling them to be set off against each other or to be converted into a net debt: s 48(1). For this purpose, 'arrangements' includes arrangements which are formed wholly or partly by one or more contracts or trusts, arise under or are wholly or partly governed by the law of a country or territory outside the United Kingdom, wholly or partly arise automatically as a matter of law, involve any number of parties, or operate partly by reference to other arrangements between other parties: s 48(5). See further s 48(3), (4); and the Banking Act 2009 (Restriction of Partial Property Transfers) Order 2009, SI 2009/322.

## **9. Compensation**

Where the Bank of England makes a share transfer instrument or a property transfer instrument in accordance with s 11(2) (see PARA 791A.4), the Treasury must make a compensation scheme order: Banking Act 2009 s 50(1), (2). A 'compensation scheme order' is an order establishing a scheme for determining whether transferors should be paid compensation, or providing for transferors to be paid compensation, and establishing a scheme for paying any compensation: Banking Act 2009 s 49(2). An order made by virtue of s 50(2) may include a third party compensation order: Banking Act 2009 s 50(3). A 'third party compensation order' is provision made in accordance with s 59 for compensation to be paid to persons other than transferors: Banking Act 2009 s 49(3). See further the Banking Act 2009 ss 59, 60; and the Banking Act 2009 (Third Party Compensation Arrangements for Partial Property Transfers) Regulations 2009, SI 2009/319. In the case of a partial property transfer, an order made by virtue of s 50(2) must include a third party compensation order: Banking Act 2009 s 50(4). Where the Treasury makes a share transfer order in accordance with s 13(2), it must make either a compensation scheme order or a resolution fund order: Banking Act 2009 s 51(1), (2). A 'resolution fund order' is an order establishing a scheme under which transferors become entitled to the proceeds of the disposal of things transferred in specified circumstances and to a specified extent: Banking Act 2009 s 49(3). A resolution fund order made by virtue of s 51(2)(b) may include a compensation scheme order and a third party compensation order: s 51(3). A compensation scheme order made by virtue of s 51(2) may include a third party compensation order: s 51(4). Where the Bank of England makes a property transfer instrument in accordance with s 12(2), the Treasury must make a resolution fund order: Banking Act 2009 s 52(1), (2). An order made by virtue of s 52(2) may include a compensation scheme order and a third party compensation order: s 52(3). In the case of a partial property transfer, the resolution fund order must include a third party compensation order: s 52(4). Where the Treasury makes an onward share transfer order under s 28, a reverse share transfer order under s 29, a property transfer order under s 45, or a reverse property transfer order under s 46, or the Bank of England makes a bridge bank share transfer instrument under s 30, a bridge bank reverse share transfer instrument under s 31, an onward property transfer instrument under s 43, or a reverse property transfer instrument under s 44, the Treasury may make a compensation scheme order and a third party compensation order: Banking Act 2009 s 53. As to provision for the independent valuation of the compensation payable under a compensation scheme order see the Banking Act 2009 ss 54-57. A resolution fund order must include provision for determining (1) who will be entitled to a share of the proceeds on disposal of things transferred; (2) the way in which the proceeds will be calculated; and (3) the way in which shares will be calculated: Banking Act 2009 s 58(1). See further s 58(2)-(8). As to the making of orders see the Banking Act 2009 ss 61, 62. In exercise of these powers the Treasury has made the Dunfermline Building Society Compensation Scheme, Resolution Fund and Third



Party Compensation Order 2009, SI 2009/1800; and the Dunfermline Building Society Independent Valuer Order 2009, SI 2009/1810.

## **10. Incidental functions**

The residual bank and each group company must provide such services and facilities as are required to enable a transferee to operate the transferred business, or part of it, effectively: Banking Act 2009 s 63(2). For this purpose, 'residual bank' means a bank all or part of whose business has been transferred in accordance with s 11(2)(b) or 12(2) (see PARA 791A.4); 'group company' means anything which is, or was immediately before the transfer, a group undertaking in relation to a residual bank; 'transferee' means a commercial purchaser or bridge bank to whom all or part of the transferred business has been transferred; and 'the transferred business' means the part of the bank's business that has been transferred: s 63(1). See further s 63(3)-(7). The Bank of England may (1) cancel a contract or other arrangement between the residual bank and a group company; (2) modify the terms of a contract or other arrangement between the residual bank and a group company; (3) add or substitute a transferee as a party to a contract or other arrangement between the residual bank and a group company; (4) confer and impose rights and obligations on a group company and a transferee, which have effect as if created by contract between them; and (5) confer and impose rights and obligations on the residual bank and a transferee which have effect as if created by contract between them: Banking Act 2009 s 64(2). See further the s 64(3), (4). The continuity authority may provide for an obligation under s 63 to apply in respect of an onward transferee, and extend s 64 so as to permit action to be taken under s 64(2) for the purpose of enabling an onward transferee to operate transferred business, or part of it, effectively: Banking Act 2009 s 65(2). 'Onward transfer' means a transfer of property, rights or liabilities from a person who is a transferee under a property transfer instrument under s 12(2) or a bank, securities issued by which were earlier transferred by a share transfer order under s 13(2): s 65(1). See further s 65(4)-(8). Each former group company must provide such services and facilities as are required to enable the transferred bank to operate effectively: Banking Act 2009 s 66(2). For this purpose, 'former group company' means anything which was a group undertaking in relation to the transferred bank immediately before the transfer; and 'transferred bank' means a bank all or part of the ownership of which has been transferred in accordance with s 11(2)(a) or 13(2): s 66(1). See further s 66(3)-(8). The continuity authority may (a) cancel a contract or other arrangement between the transferred bank and a former group company; (b) modify the terms of a contract or other arrangement between the transferred bank and a former group company; and (c) confer and impose rights and obligations on a former group company and the transferred bank, which has effect as if created by contract between them: Banking Act 2009 s 67(2). For this purpose, 'the continuity authority' means the Bank of England, where ownership was transferred in accordance with s 11(2)(a), and the Treasury, where ownership was transferred in accordance with s 13(2): Banking Act 2009 s 66(1). See further the Banking Act 2009 s 67(3), (4). The continuity authority may provide for an obligation under s 66 to apply in respect of the bank after the onward transfer, and extend s 67 so as to permit action to be taken under s 67(2) to enable the bank to operate effectively after the onward transfer: Banking Act 2009 s 68(2). For this purpose, 'onward transfer' means a transfer of securities issued by a bank where securities issued by the bank were earlier transferred by share transfer order under s 13(2), or the bank was the transferee under a property transfer instrument under s 12(2): s 68(1). As to supplementary provision in relation to continuity obligations see the Banking Act 2009 ss 69, 70. A share transfer order, share transfer instrument or property transfer instruments may make provision about the consequences of a transfer for a pension scheme, and about property, rights and liabilities of any pension scheme of the bank: Banking Act 2009 s 71(1), (2). See further the s 71(3)-(7). Provision is also made concerning enforcement (see Banking Act 2009 s 72), disputes (see Banking Act 2009 s 73), tax (see Banking Act 2009 s 74) and the power of the Treasury to change the law to enable the powers to be used effectively having regard to the special resolution objectives (see Banking Act 2009 s 75). In exercise of the

power under s 75, the Treasury has made the Amendments to Law (Resolution of Dunfermline Building Society) Order 2009, SI 2009/814; and the Amendments to Law (Resolution of Dunfermline Building Society) (No 2) Order 2009, SI 2009/1805.

## **11. Treasury and holding companies**

The Bank of England may not exercise a stabilisation power (see PARA 791A.1) in respect of a bank if the Treasury notifies the Bank that the exercise would be likely to contravene an international obligation of the United Kingdom: Banking Act 2009 s 76(1). Where the Bank of England has transferred all or part of a bank's business to a bridge bank, it must comply with any notice of the Treasury requiring the Bank, for the purpose of ensuring compliance by the United Kingdom with its international obligations, to take specified action under Pt 1 (ss 1-89) in respect of the bridge bank, or not to take such action: Banking Act 2009 s 77(1), (2). The Bank of England is prohibited from taking certain action under Pt 1 without the Treasury's consent where it would have implications for public funds: see the Banking Act 2009 ss 78, 79. Where the Bank of England transfers all or part of a bank's business to a bridge bank, the Bank must report to the Chancellor of the Exchequer about the activities of the bridge bank: Banking Act 2009 s 80(1). See further 80(2)-(6). Where the Treasury makes one or more share transfer orders under s 13(2) in respect of a bank, the Treasury must lay before Parliament a report about the activities of the bank: Banking Act 2009 s 81(1). See further s 81(2)-(4). The Treasury may take a parent undertaking of a bank into temporary public ownership in accordance with s 13(2) where (1) the Financial Services Authority is satisfied that the general conditions for the exercise of a stabilisation power set out in s 7 are met in respect of the bank; (2) the Treasury is satisfied that it is necessary to take action in respect of the holding company for the purpose specified in s 9(2) or (3); and (3) the holding company is an undertaking incorporated in, or formed under the law of any part of, the United Kingdom: Banking Act 2009 s 82. See further the Banking Act 2009 s 83.

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## **791B. Bank insolvency.**

### **1. Features of bank insolvency**

The Banking Act 2009 Pt 2 (ss 90-135) provides for a procedure to be known as bank insolvency: Banking Act 2009 s 90(1). In Pt 2, 'bank' means a United Kingdom institution which has permission under the Financial Services and Markets Act 2000 Pt 4 (ss 40-55) (see PARAS 348-361) to carry on the regulated activity of accepting deposits, but does not mean (1) a building society within the meaning of the Building Societies Act 1986 s 119 (see PARA 1906); (2) a credit union within the meaning of the Credit Unions Act 1979 s 31; (3) any other class of institution excluded by an order made by the Treasury (Banking Act 2009 s 91(1), (2)); or (4) any institution with permission under the Financial Services and Markets Act Pt IV (ss 40-55) to effect or carry out contracts of insurance as principal (Banking Act 2009 (Exclusion of Insurers) Order 2010, SI 2010/35). The Treasury may by order provide for the Banking Act 2009 Pt 2 to apply, subject to modifications, to building societies and credit unions as it applies to banks: Banking Act 2009 ss 130, 131. See the Building Societies (Insolvency and Special Administration) Order 2009, SI 2009/805. The Lord Chancellor may modify the provisions of the Banking Act 2009 Pt 2 in their application to partnerships: Banking Act 2009 s 132(1). The main

features of bank insolvency are that (a) a bank enters the process by court order; (b) the order appoints a bank liquidator; (c) the bank liquidator aims to arrange for the bank's eligible depositors to have their accounts transferred or to receive their compensation from the Financial Services Compensation Scheme; (d) the bank liquidator then winds up the bank; and (e) for those purposes, the bank liquidator has powers and duties of liquidators, as applied and modified by the provisions of Pt 2: Banking Act 2009 s 90(2). In Pt 2 'eligible depositors' means depositors who are eligible for compensation under the Financial Services Compensation Scheme: Banking Act 2009 s 93(3). Detailed provision for the process of bank insolvency is made by the Bank Insolvency (England and Wales) Rules 2009, SI 2009/356, which also apply, with specified modifications, various provisions of the Insolvency Rules 1986, SI 1986/1925.

## **2. Bank insolvency orders**

A bank insolvency order is an order appointing a person as the bank liquidator of a bank: Banking Act 2009 s 94(1). A person is eligible for appointment as a bank liquidator if he is qualified to act as an insolvency practitioner and he has consented to act: s 94(2), (3). An application for a bank insolvency order may be made to the court by the Bank of England, the Financial Services Authority or the Secretary of State: Banking Act 2009 s 95(1). An application must nominate a person to be appointed as the bank liquidator: s 95(2). The Bank of England may apply for a bank insolvency order only if (1) the Authority has informed the Bank that it is satisfied that conditions 1 and 2 in s 7 (see PARA 791A.3) are met; and (2) the Bank is satisfied that the bank has eligible depositors and that Ground A or C applies: Banking Act 2009 s 96(1). 'Ground A' is that that a bank is unable, or likely to become unable, to pay its debts; and 'Ground C' is that the winding up of a bank would be fair: s 96(1)(a), (c). The Authority may apply for a bank insolvency order only if (a) the Bank of England consents; and (b) the Authority is satisfied that conditions 1 and 2 in s 7 are met, that the bank has eligible depositors and that Ground A or C applies: s 96(3). The Secretary of State may apply for a bank insolvency order only if satisfied that the bank has eligible depositors and that Ground B applies: s 96(4). 'Ground B' is that the winding up of a bank would be in the public interest: s 96(1)(b). The court may make a bank insolvency order on the application of the Bank of England or the Authority if satisfied that the bank has eligible depositors and that Ground A or C applies: Banking Act 2009 s 97(1). The court may make a bank insolvency order on the application of the Secretary of State if satisfied that the bank has eligible depositors and that Grounds B and C apply: s 97(2). On an application for a bank insolvency order the court may grant the application, adjourn the application (generally or to a specified date), or dismiss the application: s 97(3). As to the commencement of bank insolvency orders see the Banking Act 2009 s 98.

## **3. Bank liquidation**

A bank liquidator has the objectives of (1) working with the Financial Services Compensation Scheme so as to ensure that, as soon as is reasonably practicable, each eligible depositor has the relevant account transferred to another financial institution or receives payment from or on behalf of the Scheme; and (2) winding up the affairs of the bank so as to achieve the best result for the bank's creditors as a whole: Banking Act 2009 s 99(1)-(3). For the purpose of co-operating in the pursuit of the objective in head (1), the Financial Services Compensation Scheme may make or arrange for payments to or in respect of eligible depositors of the bank, and may make money available to facilitate the transfer of accounts of eligible depositors of the bank: Banking Act 2009 s 123(1). For supplementary provision relating to the transfer of eligible depositors' accounts from the bank to another financial institution see the Banking Act 2009 s 124. Following a bank insolvency order a liquidation committee must be established for the purpose of ensuring that the bank liquidator properly exercises the functions under Pt 2: Banking Act 2009 s 100(1). As to the membership and procedure of a liquidation committee

see ss 100(2)-(7), 101, 102. A bank liquidator may do anything necessary or expedient for the pursuit of its objectives: Banking Act 2009 s 103(1). Various statutory provisions relating to winding up apply with modifications to bank insolvencies: see s 103. Provision is also made with regard to (a) the additional general powers of a bank liquidator (Banking Act 2009 s 104); (b) the status of a bank liquidator as an officer of the court (Banking Act 2009 s 105); (c) the term of appointment of a bank liquidator (Banking Act 2009 s 106); (d) the resignation of a bank liquidator (Banking Act 2009 s 107); (e) the removal of a bank liquidator by order of the court (Banking Act 2009 s 108); the removal of a bank liquidator following a meeting of creditors (Banking Act 2009 s 109); (f) the disqualification of a bank liquidator (Banking Act 2009 s 110); (g) the release of a bank liquidator (Banking Act 2009 s 111); and (h) the replacement of a bank liquidator (Banking Act 2009 s 112). A bank liquidator who obtains money by realising assets in the course of the bank insolvency must pay it into the Insolvency Services Account: Banking Act 2009 s 127.

#### **4. Termination of process**

After the bank liquidator has presented a final report on the bank liquidation to the liquidation committee, the bank liquidator may, with the consent of the liquidation committee, make a proposal in accordance with the Insolvency Act 1986 s 1: Banking Act 2009 s 113(1)-(3). See further s 113(4)-(9). A bank liquidator who thinks that administration would achieve a better result for the bank's creditors as a whole than bank insolvency may apply to the court for an administration order under the 1986 Act Sch B1 para 38: Banking Act 2009 s 114(1). An application may be made only if (1) the liquidation committee has passed a full payment resolution; (2) the liquidation committee has resolved that moving to administration might enable the rescue of the bank as a going concern; and (3) the bank liquidator is satisfied, as a result of arrangements made with the Financial Services Compensation Scheme, that any depositors still eligible for compensation under the scheme will receive their payments or have their accounts transferred during administration: Banking Act 2009 s 114(2)-(5). A bank liquidator who thinks that the winding up of the bank is for practical purposes complete must summon a final meeting of the liquidation committee: Banking Act 2009 s 115(1). At the meeting the liquidation committee must consider the report and decide whether to release the bank liquidator: s 115(3). If the liquidation committee decides to release the bank liquidator, the bank liquidator must notify the court and the registrar of companies, and he vacates office, and has release, when the court is notified: s 115(4). At the end of the period of three months beginning with the day of the registration of such notice, the bank is dissolved: s 115(8). For supplementary provision relating to dissolution see the Banking Act 2009 s 116.

#### **5. Other processes**

On a petition for a winding-up order or an application for an administration order in respect of a bank the court may, instead, make a bank insolvency order: Banking Act 2009 s 117(1). Such an order may be made only on the application of the Financial Services Authority with the consent of the Bank of England, or on the application of the Bank of England: s 117(2). A resolution for voluntary winding up of a bank under the Insolvency Act 1986 s 84 has no effect without the prior approval of the court: Banking Act 2009 s 118(1). An application for an administration order in respect of a bank may not be determined unless specified conditions are satisfied: Banking Act 2009 s 120. As to the application of the Company Directors Disqualification Act 1986 to bank insolvencies see the Banking Act 2009 s 121.

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## **791C. Bank administration.**

### **1. Features of bank administration**

The Banking Act 2009 Pt 3 (ss 136-168) provides for a procedure to be known as bank administration: Banking Act 2009 s 136(1). The Treasury may by order provide for Pt 3 to apply, subject to modifications, to building societies and credit unions as it applies to banks: Banking Act 2009 ss 158, 159. See the Building Societies (Insolvency and Special Administration) Order 2009, SI 2009/805. The Lord Chancellor may modify the provisions of Pt 2 in their application to partnerships: Banking Act 2009 s 163(1). The main features of bank administration are that (1) it is used where part of the business of a bank is sold to a commercial purchaser in accordance with s 11 (see PARA 791A.4) or transferred to a bridge bank in accordance with s 12 (see PARA 791A.4); (2) the court appoints a bank administrator on the application of the Bank of England; (3) the bank administrator is able and required to ensure that the non-sold or non-transferred part of the bank ('the residual bank') provides services or facilities required to enable the commercial purchaser ('the private sector purchaser') or the transferee ('the bridge bank') to operate effectively; and (4) in other respects the process is the same as for normal administration under the Insolvency Act 1986, subject to specified modifications: Banking Act 2009 s 136(2). A bank administrator has the objectives of (a) ensuring the supply to the private sector purchaser or bridge bank of such services and facilities as are required to enable it, in the opinion of the Bank of England, to operate effectively ('Objective 1') (Banking Act 2009 s 138(1)); and (b) rescuing the residual bank as a going concern ('Objective 2(a)'), or achieving a better result for the residual bank's creditors as a whole than would be likely if the residual bank were wound up without first being in bank administration ('Objective 2(b)') (Banking Act 2009 s 140(1)). See further the Banking Act 2009 s 138(2)-(5). Objective 1 takes priority over Objective 2, but a bank administrator is obliged to begin working towards both objectives immediately on appointment: Banking Act 2009 s 137(2). Objective 1 ceases if the Bank of England notifies the bank administrator that the residual bank is no longer required in connection with the private sector purchaser or bridge bank: Banking Act 2009 s 139(1). Such a notice is to be known as an 'Objective 1 Achievement Notice': s 139(4). In pursuing Objective 2, a bank administrator must aim to achieve Objective 2(a) unless of the opinion either that it is not reasonably practicable to achieve it or that Objective 2(b) would achieve a better result for the residual bank's creditors as a whole: Banking Act 2009 s 140(2). In pursuing Objective 2(b) in bank administration following transfer to a bridge bank, the bank administrator may not realise any asset unless the asset is on a list of realisable assets agreed between the bank administrator and the Bank of England or the Bank has given an Objective 1 Achievement Notice: Banking Act 2009 s 140(3). Detailed provision for the process of bank administration is made by the Bank Administration (England and Wales) Rules 2009, SI 2009/357, which also apply, with specified modifications, various provisions of the Insolvency Rules 1986, SI 1986/1925. For provision relating to the sharing of information following transfer to a bridge bank see the Banking Act 2009 s 148; and the Bank Administration (Sharing Information) Regulations 2009, SI 2009/314 (which also apply to building societies, subject to modifications: see the Building Societies (Insolvency and Special Administration) Order 2009, SI 2009/805, Sch 2). For provision for multiple transfers see the Banking Act 2009 ss 149-152; the Banking Act 2009 (Bank Administration) (Modification for Application to Banks in Temporary Public Ownership) Regulations 2009, SI 2009/312 (which also apply to building societies, subject to modifications: see the Building Societies (Insolvency and Special Administration) Order 2009, SI 2009/805, Sch 2); and the Banking Act 2009 (Bank Administration) (Modification for Application to Multiple Transfers) Regulations 2009, SI 2009/313 (which also apply to building societies, subject to modifications: see the Building Societies (Insolvency and Special Administration) Order 2009, SI 2009/805, Sch 2).

## 2. Bank administration orders

A bank administration order is an order appointing a person as the bank administrator of a bank: Banking Act 2009 s 141(1). A person is eligible for appointment as a bank administrator if he is qualified to act as an insolvency practitioner and he has consented to act: Banking Act 2009 s 141(2), (3). A bank administrator is an officer of the court: Banking Act 2009 s 146. An application for a bank administration order may be made to the court by the Bank of England: Banking Act 2009 s 142(1). An application must nominate a person to be appointed as the bank administrator (s 142(2)), and the bank must be given notice of an application (s 142(3)). The Bank of England may apply for a bank administration order in respect of a bank if (1) the Bank has made or intends to make a property transfer instrument in respect of the bank in accordance with s 11(2) or 12(2) (see PARA 179A.4); and (2) the Bank is satisfied that the residual bank is unable to pay its debts or is likely to become unable to pay its debts as a result of the property transfer instrument which the Bank intends to make: Banking Act 2009 s 143. The court may make a bank administration order if satisfied that the conditions in s 143 were met: Banking Act 2009 s 144(1). On an application for a bank administration order the court may grant the application, adjourn the application (generally or to a specified date), or dismiss the application: s 144(2). Various provisions of the Insolvency Act 1986 apply with specified modifications to bank administrations as they apply to other administrations: see the Banking Act 2009 s 145. The bank administrator must as soon as is reasonably practicable, and before an Objective 1 Achievement Notice (see PARA 791C.1) has been given, make a statement that has been agreed with the Bank of England setting out proposals for achieving the objectives in s 137 and stating whether the bank administrator proposes to pursue Objective 2(a) or Objective 2(b) in s 140: Banking Act 2009 s 147(1)-(4). See further s 147(5)-(8).

## 3. Termination

If the Bank of England has given an Objective 1 Achievement Notice (see PARA 791C.1) and the bank administrator has pursued Objective 2(a) in s 140 and believes that it has been achieved, the bank administrator may give a notice under the Insolvency Act 1986 Sch B1 para 80 (notice bringing administrator's appointment to an end on achievement of objectives (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 367)): Banking Act 2009 s 153(1), (2). If the Bank of England has given an Objective 1 Achievement Notice and the bank administrator pursues Objective 2(b) in s 140, the bank administrator may give a notice under the 1986 Act Sch B1 para 84 (no more assets for distribution (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 367)) or make a proposal in accordance with s 1 (company voluntary arrangement (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 367)): Banking Act 2009 s 154(1), (2). See further s 154(3)-(7). As to the application of the Company Directors Disqualification Act 1986 to bank administrations see the Banking Act 2009 s 155.

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### 791D. Inter-bank payment systems.

#### 1. Recognised systems

The Banking Act 2009 Pt 5 (ss 181-206) enables the Bank of England to oversee certain systems for payments between financial institutions: Banking Act 2009 s 181. The Treasury may by order ('recognition order') specify an inter-bank payment system as a recognised system for the purposes of Pt 5: Banking Act 2009 s 184(1). In Pt 5, 'inter-bank payment system' means arrangements designed to facilitate or control the transfer of money between financial institutions who participate in the arrangements: Banking Act 2009 s 182(1). For this purpose, 'financial institutions' means banks and building societies (s 182(3)); and 'money' includes credit (s 182(4)). A recognition order must specify in as much detail as is reasonably practicable the arrangements which constitute the inter-bank payment system: Banking Act 2009 s 184(2). The Treasury may not specify an inter-bank system operated solely by the Bank of England: s 184(3). The Treasury may make a recognition order in respect of an inter-bank payment system only if satisfied that any deficiencies in the design of the system, or any disruption of its operation, would be likely to threaten the stability of, or confidence in, the United Kingdom financial system, or have serious consequences for business or other interests throughout the United Kingdom: Banking Act 2009 s 185(1). In considering whether to specify a system the Treasury must have regard to (1) the number and value of the transactions that the system presently processes or is likely to process in the future; (2) the nature of the transactions that the system processes; (3) whether those transactions or their equivalent could be handled by other systems; (4) the relationship between the system and other systems; and (5) whether the system is used by the Bank of England in the course of its role as a monetary authority: s 185(2). As to the duty of the Treasury to consult before making a recognition order see the Banking Act 2009 s 186. The Treasury may revoke a recognition order (Banking Act 2009 s 187(1)), and must revoke a recognition order if not satisfied that the criteria in s 185 are met in respect of the recognised inter-bank payment system (s 187(2)). As to the duty of the Treasury to consult before revoking a recognition order see s 187(3)-(5). The Bank of England may by notice in writing require a person to provide information which the Bank thinks will help the Treasury in determining whether to make a recognition order, or which the Bank otherwise requires in connection with its functions under Pt 5: Banking Act 2009 s 204(1). See further s 204(2)-(11).

## **2. Regulation**

The Bank of England may publish principles to which operators of recognised inter-bank payment systems are to have regard in operating the systems (Banking Act 2009 s 188), and publish codes of practice about the operation of recognised inter-bank payment systems (Banking Act 2009 s 189). In Pt 5 (ss 181-206) a reference to the 'operator' of an inter-bank payment system is a reference to any person with responsibility under the system for managing or operating it (Banking Act 2009 s 183(a)); and a reference to the operation of a system includes a reference to its management (s 183(b)). The Bank may also require the operator of a recognised inter-bank payment system (1) to establish rules for the operation of the system; (2) to change the rules in a specified way or so as to achieve a specified purpose; (3) to notify the Bank of any proposed change to the rules; and (4) not to change the rules without the approval of the Bank: Banking Act 2009 s 190(1). A requirement under head (3) or (4) above may be general or specific: s 190(2). The Bank of England may give directions to the operator of a recognised inter-bank payment system requiring or prohibiting the taking of specified action in the operation of the system, or setting standards to be met in the operation of the system: Banking Act 2009 s 191(1), (2). See further s 191(3)-(6). For further procedural provision see the Banking Act 2009 s 192, and as to the payment of fees by operators of recognised inter-bank payment systems see the Banking Act 2009 s 203. It is an offence for the operator of a non-recognised inter-bank payment system to assert that the system is recognised or to do anything which suggests that the system is recognised: Banking Act 2009 s 205.

## **3. Inspections**

The Bank of England may appoint one or more persons to inspect the operation of a recognised inter-bank payment system: Banking Act 2009 s 193(1). The operator of a recognised inter-bank payment system must grant an inspector access, on request and at any reasonable time, to premises on or from which any part of the system is operated, and otherwise co-operate with an inspector: s 193(2). A justice of the peace may on the application of an inspector issue a warrant entitling an inspector or a constable to enter premises if any part of the management or operation of a recognised inter-bank payment system is conducted on the premises (whether by an operator of the system or by someone providing services used by an operator), and any of certain specified conditions is satisfied: Banking Act 2009 s 194(1). The conditions are that (1) a requirement under s 204 (see PARA 791D.1) in connection with the payment system has not been complied with, and there is reason to believe that information relevant to the requirement is on the premises; (2) there is reason to suspect that, if a requirement under s 204 were imposed in connection with the payment system in respect of information on the premises, the requirement would not be complied with and the information would be destroyed or otherwise tampered with; (3) an inspector gave reasonable notice of a wish to enter the premises and was refused entry; and (4) a person occupying or managing the premises has failed to co-operate with an inspector: s 194(2)-(5). A warrant (a) permits an inspector or a constable to enter the premises; (b) permits an inspector or a constable to search the premises and copy or take possession of information or documents; and (c) permits a constable to use reasonable force: s 194(6).

#### **4. Other means of enforcement**

Where (1) the operator of a recognised inter-bank payment system is not taking sufficient account of principles published by the Bank of England under the Banking Act 2009 s 188 (see PARA 791D.2); (2) the operator is failing to comply with a code of practice under s 189 (see PARA 791D.2); or (3) the report is likely for any other reason to assist the Bank in the performance of its functions under Pt 5 (ss 181-206), the Bank may require the operator to appoint an expert to report on the operation of the system: Banking Act 2009 s 195(1), (2). The Bank may impose requirements about (a) the nature of the expert to be appointed; (b) the content of the report; (c) treatment of the report (including disclosure and publication); and (d) timing: s 195(3). The Bank of England may publish details of a compliance failure by the operator of a recognised inter-bank payment system: Banking Act 2009 s 197(1). In Pt 5, 'compliance failure' means a failure by the operator of a recognised inter-bank payment system to (i) comply with a code of practice under s 189; (ii) comply with a requirement under s 190 (see PARA 791D.2); (iii) comply with a direction under s 191 (see PARA 791D.2); or (iv) ensure compliance with a requirement under s 195: Banking Act 2009 s 196. The Bank may also publish details of a sanction imposed under ss 198-200: Banking Act 2009 s 197(2). The Bank of England may require the operator of a recognised inter-bank payment system to pay a penalty in respect of a compliance failure: Banking Act 2009 s 198(1). See further s 198(2)-(4). Where the Bank of England thinks that a compliance failure threatens the stability of, or confidence in, the United Kingdom financial system, or has serious consequences for business or other interests throughout the United Kingdom, it may give the operator of the inter-bank payment system concerned an order to stop operating the system (a 'closure order') either for a specified period, until further notice, or permanently: Banking Act 2009 s 199(1), (2). See further s 199(3)-(5). The Bank of England may by order prohibit a specified person from being an operator of a recognised inter-bank payment system or holding an office or position involving responsibility for taking decisions about the management of a recognised inter-bank payment system, either for a specified period, until further notice or permanently: Banking Act 2009 s 200. Before imposing a sanction on the operator of an inter-bank payment system or on another person the Bank of England must (A) give the operator or other person a notice (a 'warning notice'); (B) give the operator or other person at least 21 days to make representations; (C) consider any representations made;



and (D) as soon as is reasonably practicable, give the operator or other person a notice stating whether the Bank intends to impose the sanction: Banking Act 2009 s 201(1). As to provision for appeals see the Banking Act 2009 s 202.

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## **791E. Investment bank insolvency.**

### **1. Investment bank insolvency regulations**

The Treasury may by regulations ('investment bank insolvency regulations') (1) modify the law of insolvency in its application to investment banks; and (2) establish a new procedure for investment banks where they are unable, or are likely to become unable, to pay their debts (within the meaning of the Banking Act 2009 s 93(4) (see PARA 791B.1)) or their winding up would be fair (within the meaning of s 93(8) (see PARA 791B.1)): Banking Act 2009 s 233(1). For this purpose, 'investment bank' means an institution which (a) has permission under the Financial Services and Markets Act 2000 Pt 4 (ss 40-55) to carry on the regulated activity of (i) safeguarding and administering investments; (ii) dealing in investments as principal; or (iii) dealing in investments as agent; (b) holds client assets, meaning assets which an institution has undertaken to hold for a client; and (c) is incorporated in, or formed under the law of any part of, the United Kingdom: Banking Act 2009 s 232(1)-(5). Investment bank insolvency regulations may, in particular, (A) apply or replicate (with or without modifications) or make provision similar to provision made by or under the Insolvency Act 1986 or the Banking Act 2009 Pt 2 or 3; and (B) establish a new procedure either to operate for investment banks in place of liquidation or administration (under the 1986 Act) or to operate alongside liquidation or administration in respect of a particular part of the business or affairs of investment banks: Banking Act 2009 s 233(2). In making investment bank insolvency regulations the Treasury must have regard to the desirability of identifying, protecting, and facilitating the return of, client assets, protecting creditors' rights, ensuring certainty for investment banks, creditors, clients, liquidators and administrators, minimising the disruption of business and markets, and maximising the efficiency and effectiveness of the financial services industry in the United Kingdom: s 233(3).

### **2. Contents of regulations**

Investment bank insolvency regulations (see PARA 791E.1) may (1) provide for a procedure to be instituted by a court or by the action of one or more specified classes of person; (2) (a) confer functions on persons appointed in accordance with the regulations, which may, in particular, (i) be similar to the functions of a liquidator or administrator under the Insolvency Act 1986; or (ii) involve acting as a trustee of client assets; and (b) specify objectives to be pursued by a person appointed in accordance with the regulations; (3) make the application of a provision depend (a) on whether an investment bank is, or is likely to become, unable to pay its debts; (b) on whether the winding up of an investment bank would be fair; or (c) partly on those and partly on other considerations; (4) make provision about the relationship between a procedure established by the regulations and (a) liquidation or administration under the 1986 Act; (b) bank insolvency or bank administration under the 2009 Act Pt 2 or 3; and (c) provision made by or under any other enactment in connection with insolvency; (5) include provision (a) establishing a mechanism for determining which assets are client assets, subject to 232; (b)

establishing a mechanism for determining that assets are to be, or not to be, treated as client assets, subject to s 232; (c) about the treatment of client assets; (d) about the treatment of unsettled transactions (and related collateral); (e) for the transfer to another financial institution of assets or transactions; (f) for the creation or enforcement of rights (including rights that take preference over creditors' rights) in respect of client assets or other assets; (g) indemnifying a person who is exercising or purporting to exercise functions under or by virtue of the regulations; (h) for recovery of assets transferred in error; (6) confer functions on (a) a court or tribunal; (b) the Financial Services Authority; (c) the Financial Services Compensation Scheme; (d) the scheme manager of the Financial Services Compensation Scheme; and (e) any other specified person; (7) include provision about institutions that are or were group undertakings (within the meaning of the Companies Act 2006 s 1161(5)) of an investment bank; (8) replicate or apply, with or without modifications, a power to make procedural rules; and (9) include provision for assigning or apportioning responsibility for the cost of the application of a procedure established or modified by the regulations: Banking Act 2009 s 234. Provision is also made for the making of investment bank insolvency regulations (see the Banking Act 2009 s 235) and for reviews of investment bank insolvency regulations (see the Banking Act 2009 s 236).

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## **(ii) The Financial Services and Markets Act 2000**

### **792. The statutory regulation of financial services and markets.**

The Financial Services and Markets Act 2000 provides for the Financial Services Authority<sup>1</sup> to be the sole regulatory authority for the financial services industry, with powers of authorisation, supervision and enforcement<sup>2</sup>. It also creates a tribunal, known as the Financial Services and Markets Tribunal, to hear references from certain decisions of the Financial Services Authority<sup>3</sup>.

The Act contains a general prohibition, which prohibits a person from carrying on a regulated activity which relates to investment or property<sup>4</sup> unless he is either an authorised person or an exempt person<sup>5</sup>. The former prohibitions on investment advertisement and unsolicited calls are replaced with a new scheme to control financial promotion<sup>6</sup>. In addition to powers of investigation and enforcement<sup>7</sup>, there are powers to impose penalties for market abuse<sup>8</sup> which supplement the provisions relating to insider dealing<sup>9</sup>. The Act also makes provision for consumer protection<sup>10</sup>, and provides for there to be a single compensation scheme<sup>11</sup> and a single ombudsman<sup>12</sup>.

1 As to the Financial Services Authority see PARAS 4, 6 et seq. See also the Financial Services Authority's Handbook of Rules and Guidance, Prudential Standards, General Prudential Sourcebook (GENPRU), Prudential Sourcebook for Banks, Building Societies and Investment Firms (BIPRU). As to the Handbook generally see PARA 22.

2 See PARA 314 et seq. The Bank of England previously had the duty to supervise banking institutions under the Banking Act 1987 s 1 (repealed) but this duty was removed and transferred to the Financial Services Authority: see the Bank of England Act 1998 Pt III (ss 21-30), Sch 4 (ss 21, 23 amended, and ss 25-29 repealed, by SI 2001/3649). The Bank did not owe individual commercial banks a duty of care in carrying out its supervisory functions: *Minorities Finance Ltd v Arthur Young* [1989] 2 All ER 105. But it could be liable for misfeasance in public office: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, [2000] 3 All ER 1, HL.

- 3 As to the Financial Services and Markets Tribunal see PARA 43 et seq.
- 4 As to regulated activities see PARA 84 et seq.
- 5 See the Financial Services and Markets Act 2000 s 19; and PARA 80. As to authorisation see PARA 314 et seq. As to exemption see PARA 330 et seq.
- 6 See the Financial Services and Markets Act 2000 ss 21, 25; and PARA 225 et seq.
- 7 See eg the Financial Services and Markets Act 2000 Pt XI (ss 165-177); and PARA 447 et seq.
- 8 See the Financial Services and Markets Act 2000 Pt VIII (ss 118-131A); and PARA 437 et seq.
- 9 As to insider dealing see the Criminal Justice Act 1993 Pt V (ss 52-64).
- 10 See PARAS 8-9, 21.
- 11 See PARA 583 et seq.
- 12 See PARA 575 et seq.

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## **(2) CONSTITUTION OF BANKS**

### **(i) Bank of England**

#### **793. Governor and Company of the Bank of England.**

In 1694, by Act of Parliament<sup>1</sup> and by a charter granted under letters patent authorised by the Act<sup>2</sup>, the subscribers and contributors to a government loan of £1,200,000, their successors and assigns, were constituted a body corporate and politic by the name of the Governor and Company of the Bank of England, with perpetual succession and a common seal<sup>3</sup>. A supplemental charter was granted in 1896<sup>4</sup>.

On 1 March 1946<sup>5</sup>, the capital, amounting to £14,553,000<sup>6</sup>, was brought into public ownership by transfer to the Treasury Solicitor<sup>7</sup> to be held on behalf of the Treasury<sup>8</sup>. The existing charters were with some exceptions<sup>9</sup> revoked, and a new Bank of England charter was granted, as from the same date<sup>10</sup>.

1 See the Bank of England Act 1694 s 19 (amended by the Statute Law Revision Act 1888; and the Statute Law Revision Act 1948).

2 The letters patent were dated 27 July 1694.

3 Bank of England Act 1694 s 19 (as amended: see note 1).

4 This was granted by letters patent dated 19 August 1896, authorised by the Bank Act 1892 s 7(1) (repealed).

5 See the Bank of England (Appointed Day) Order 1946, SR & O 1946/237.

6 ie the amount specified in the Bank of England (Advance) Act 1816 s 3 (repealed).

7 The Treasury Solicitor was nominated as the transferee by the Bank of England (Transfer of Stock) Order 1946, SR & O 1946/238. As to the Treasury Solicitor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 541.

8 Bank of England Act 1946 s 1(1)(a).

9 The exceptions are those parts of the charter of 1694 which incorporate the Bank of England, constitute its capital stock, and authorise it to have a common seal, to hold land and other property as mentioned, and to sue and be sued: see the *Bank of England Charter* (Cmd 6752) (1 March 1946) art 1.

10 See the *Bank of England Charter* (Cmd 6752) (1 March 1946).

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## **794. Treasury control of the Bank of England.**

The Treasury may from time to time give such directions to the Bank of England as, after consultation with the Governor of the Bank, it thinks necessary in the public interest, except in relation to monetary policy<sup>1</sup>. Subject to any such directions, the affairs of the Bank are managed by the court of directors<sup>2</sup>.

If it thinks it necessary in the public interest, the Bank may request information from and make recommendations to bankers and may, if so authorised by the Treasury, issue directions to any banker<sup>3</sup> for the purpose of securing that effect is given to any such request or recommendation<sup>4</sup>. Before authorising the issue of any such directions, the Treasury must give the banker concerned or such person as appears to the Treasury to represent him, an opportunity of making representations with respect to the proposed direction<sup>5</sup>. No request or recommendations may be made by the Bank with respect to the affairs of any particular customer of a banker<sup>6</sup>.

1 Bank of England Act 1946 s 4(1) (amended by the Bank of England Act 1998 s 10). As to the Bank's relations with the Treasury in regard to the National Debt see the National Loans Act 1968 ss 12(7), 14(7) (s 12(7) amended by the Statute Law (Repeals) Act 1973; and the National Loans Act 1968 s 14(7) amended by SI 2002/2521; SI 2004/1662). As to the formulation of monetary policy see PARA 801. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

'From time to time' means 'as the occasion shall arise' or 'as and when it is appropriate so to do': see *Holliday v Wakefield Corp'n* (1887) 57 LT 559 at 562-563 per Mathew J; *Re Von Dembinska, ex p Debtor* [1954] 2 All ER 46 at 48, [1954] 1 WLR 748 at 750-751, CA, per Evershed MR.

2 As to the court of directors see the Bank of England Act 1998 s 1, Sch 1; and PARA 795.

3 'Banker' means any such person carrying on a banking undertaking as may be declared by order of the Treasury to be a banker for the purposes of the Bank of England Act 1946 s 4: see s 4(6), (7).

4 Bank of England Act 1946 s 4(3).

5 Bank of England Act 1946 s 4(3) proviso (b).

6 Bank of England Act 1946 s 4(3) proviso (a).

## **UPDATE**

## **794 Treasury control of the Bank of England**

TEXT AND NOTES--Nothing in the Banking Act 2009 affects the generality of the Bank of England Act 1946 s 4: Banking Act 2009 s 247.

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### **795. The court of directors.**

The court of directors consists of a Governor, two Deputy Governors and 16 directors of the Bank of England, all of whom are appointed by Her Majesty<sup>1</sup>.

Subject to Treasury directions<sup>2</sup>, the court of directors manages the affairs of the Bank of England (other than the formulation of monetary policy, which is the responsibility of the Bank's Monetary Policy Committee)<sup>3</sup>. In particular, the functions of the court of directors include determining the Bank's objectives (including objectives for its financial management) and its strategy<sup>4</sup>. In so doing, the aim of the court of directors is to ensure the effective discharge of the Bank's functions; but, subject to that, in determining objectives for the financial management of the Bank, its aim is to ensure the most efficient use of the Bank's resources<sup>5</sup>. The court of directors must also keep the procedures followed by the Monetary Policy Committee under review<sup>6</sup>; and, in particular, it must determine whether the Committee has collected the regional, sectoral and other information necessary for the purposes of formulating monetary policy<sup>7</sup>. The court of directors has custody of the Bank's seal<sup>8</sup>.

Certain functions of the court of directors are delegated to a sub-committee consisting of the directors of the Bank<sup>9</sup>. Those functions are:

- 1867 (1) keeping under review the Bank's performance in relation to the objectives and strategy for the time being determined by the court of directors<sup>10</sup>;
- 1868 (2) monitoring the extent to which the objectives set by the court of directors in relation to the Bank's financial management have been met<sup>11</sup>;
- 1869 (3) keeping under review the internal financial controls of the Bank with a view to securing the proper conduct of its financial affairs<sup>12</sup>;
- 1870 (4) determining how the functions relating to remuneration and pensions of executive members of the court of directors<sup>13</sup> should be exercised<sup>14</sup>; and
- 1871 (5) keeping under review the procedures followed by the Monetary Policy Committee<sup>15</sup>.

Provision is made as to the proceedings of the sub-committee, including the declaration of interests, and the further delegation of its functions to two or more of its members<sup>16</sup>.

1 Bank of England Act 1998 s 1(1), (2). As to the terms of office see s 1(4), Sch 1 paras 1-4. As to qualification for appointment see Sch 1 paras 5, 6. As to removal from office see Sch 1 paras 7, 8. As to remuneration see Sch 1 paras 14, 15. As to the powers, meetings and proceedings of the court of directors see Sch 1 paras 9-13. See also the House of Commons Disqualification Act 1975 s 1(1)(f), Sch 1 Pt III, which disqualifies the governor, deputy governor and any director of the Bank of England from membership of the House of Commons.

2 See PARA 794. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Bank of England Act 1998 s 2(1). A member of the court of directors is not eligible for appointment (ie under s 13(2)(b) or s 13(2)(c); see PARA 801) as a member of the Monetary Policy Committee: Sch 3 para 5(b). As to the Monetary Policy Committee and as to the formulation of monetary policy see PARA 801.

4 Bank of England Act 1998 s 2(2).

5 Bank of England Act 1998 s 2(3), (4).

6 Bank of England Act 1998 s 16(1).

7 Bank of England Act 1998 s 16(2).

8 Bank of England Act 1998 s 5(1). As to the Bank's seal see PARA 793. The seal may only be affixed to an instrument if the affixation has been authorised by the court of directors or by a sub-committee of that court acting in exercise of delegated authority: s 5(2). The affixing of the seal must be attested by the signature of: (1) two members of the court of directors; (2) one member of the court of directors and the secretary to that court; or (3) two other officers of the Bank authorised by the court of directors for the purpose: s 5(3).

9 Bank of England Act 1998 s 3(1).

10 Bank of England Act 1998 s 3(2)(a).

11 Bank of England Act 1998 s 3(2)(b).

12 Bank of England Act 1998 s 3(2)(c).

13 Ie the functions under the Bank of England Act 1998 Sch 1 para 14.

14 Bank of England Act 1998 s 3(2)(d).

15 Bank of England Act 1998 s 16(3). The function referred to in head (5) in the text is the function of the directors under s 16(1): see the text to note 6.

16 See the Bank of England Act 1998 s 3(3)-(7).

## UPDATE

### 795 The court of directors

TEXT AND NOTE 1--Bank of England Act 1998 s 1(2) amended: Banking Act 2009 s 239(1), (2). The number of directors must not exceed nine: Bank of England Act 1998 s 1(2A) (added by the Banking Act 2009 s 239(1), (3)).

NOTE 1--Bank of England Act 1998 Sch 1 amended: Banking Act 2009 ss 240, 241(1), 242(3), 243(1), (2). House of Commons Disqualification Act 1975 Sch 1 Pt III amended: SI 2009/1941.

TEXT AND NOTES 2-5--The Bank of England Act 1998 s 2A (see PARA 807A) and 11 set objectives for the Bank in relation to financial stability and monetary policy, and s 2(2)-(4) are subject to those provisions: Bank of England Act 1998 s 2(5) (added by the Banking Act 2009 s 238(2)).

TEXT AND NOTE 16--Bank of England Act 1998 s 3(3)-(7) amended: Banking Act 2009 ss 241(2), 242(2).

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### 796. Issue and recall of notes.

The Bank of England has the exclusive right of note issue in England and Wales<sup>1</sup>. The Bank may issue bank notes of such denominations as the Treasury may approve and no others<sup>2</sup>. Bank notes issued by the Bank may be put into circulation in Scotland and Northern Ireland as well as in England and Wales<sup>3</sup>.

Unless expressly made payable also at some other place, bank notes are payable only at the head office of the Bank<sup>4</sup>. Bank notes may be called in on the Bank's giving one month's notice in the London, Edinburgh and Belfast Gazettes, and on payment of their face value<sup>5</sup>.

On demand by the holder, bank notes of any denominations must be exchanged for bank notes of such lower denominations, being bank notes which for the time being are legal tender in the United Kingdom<sup>6</sup> or in England and Wales, as may be specified by him<sup>7</sup>.

The writing off of an amount from the total amount of bank notes issued from the issue department of the Bank of England does not affect the Bank's liability to pay any bank note included in the amount so written off<sup>8</sup>.

1 See the Bank Charter Act 1844 s 11 (amended by the Statute Law Revision Act 1891; and the Currency and Bank Notes Act 1928 Schedule). The amalgamation in 1921 of Messrs Fox, Fowler & Co of Wellington, Somerset, with Lloyds Bank Ltd marked the disappearance of the last private bank in England and Wales with note-issuing powers.

As to theft of notes etc see the Theft Act 1968 ss 1-7; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 282 et seq. As to counterfeiting of notes and related offences see the Forgery and Counterfeiting Act 1981 Pt II (ss 14-28); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 544 et seq.

2 Currency and Bank Notes Act 1954 s 1(1). 'Bank notes' means notes of the Bank of England payable to bearer on demand: s 3. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Currency and Bank Notes Act 1954 s 1(1).

4 Currency and Bank Notes Act 1954 s 1(3).

5 Currency and Bank Notes Act 1954 s 1(5). Any such notes with respect to which a notice has been so given cease to be legal tender on the expiration of the notice: s 1(5). See further PARA 797.

6 As to the meaning of 'United Kingdom' see PARA 2 note 3.

7 Currency and Bank Notes Act 1954 s 1(4). The demand must be made during office hours at the head office of the Bank of England or, in the case of notes payable also at some place other than the head office, either at the head office or at that other place: s 1(4).

8 Currency Act 1983 s 3(4). See further PARA 798.

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### **797. Notes as legal tender.**

All bank notes of denominations approved by the Treasury<sup>1</sup> which are issued by the Bank of England are legal tender in England and Wales, and all such notes of denominations of less than £5 are legal tender in Scotland and Northern Ireland<sup>2</sup>. Notes called in by the Bank cease to be legal tender on the expiration of the calling-in notice<sup>3</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 See the Currency and Bank Notes Act 1954 s 1(2), (6). See also *Suffell v Bank of England* (1882) 9 QBD 555 at 563, CA.

3 Currency and Bank Notes Act 1954 s 1(5). Currency notes issued under the Currency and Bank Notes Act 1914 (repealed) and not called in at 22 November 1928 were 'transferred currency notes' deemed to be bank notes (ie notes of the Bank of England), and the Bank of England was accordingly liable in respect of them: see the Currency and Bank Notes Act 1928 ss 4, 13(3). Transferred currency notes were called in pursuant to s 4(3) on 28 April 1933 and ceased to be legal tender on 1 August 1933.

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### **798. Amount of issue and assets held in the issue department.**

The Bank of England may not cause the limit on the amount of the fiduciary note issue to be exceeded<sup>1</sup>; and for these purposes the limit is that specified in the Currency Act 1983 or such other amount as may from time to time be specified in a direction given by the Treasury<sup>2</sup>, which may not be greater than the former limit by more than 25 per cent<sup>3</sup>. Such a direction must be given by a Treasury minute, a copy of which must be laid before each House of Parliament<sup>4</sup>. By order made by statutory instrument the Treasury may direct that the 25 per cent limitation is not to apply to any such direction which is given during a specified period not exceeding two years beginning with the day on which the order is made<sup>5</sup>.

The Bank may write off from the total amount of notes issued from the issue department of the Bank the amount of any bank notes<sup>6</sup> which have not been presented for payment and which, by virtue of the Currency and Bank Notes Act 1954<sup>7</sup>, have ceased to be legal tender and have not been legal tender for ten years<sup>8</sup>. Any amount so written off must be deducted from the amount included in the next weekly account<sup>9</sup> as the amount of issued bank notes, and a return of the amount so written off must forthwith be sent to the Treasury, which must lay a copy of the return before each House of Parliament<sup>10</sup>.

In addition to the gold coin and bullion for the time being in the issue department, the Bank of England must appropriate to and hold in the issue department securities<sup>11</sup> of an amount in value sufficient to cover the fiduciary note issue for the time being<sup>12</sup>. Such securities may include silver coin<sup>13</sup> to an amount not exceeding £5.5 million<sup>14</sup>.

The Bank of England must give a weekly account, which must be periodically published, of the amount of notes issued and of the gold and silver bullion and securities in the issue department<sup>15</sup>.

The assets held in the issue department must be valued, at market prices, at such times and in such manner as may be agreed between the Treasury and the Bank, but at least once in each financial year<sup>16</sup>; and if, as a result of such valuation, the value of the assets then held falls short of the total amount of the Bank of England notes then outstanding, the Treasury must assume a liability to the issue department of an amount equal to the difference<sup>17</sup>. The profits of the issue department must ordinarily be paid into the National Loans Fund<sup>18</sup>; but so long as any part of a liability assumed by the Treasury is outstanding, the profits must be applied towards meeting that liability, instead of being paid into the National Loans Fund<sup>19</sup>.



- 1 Currency Act 1983 s 2(1).
- 2 Currency Act 1983 s 2(2). The limit specified in s 2(2) is £13,500 million, but the limit was increased to £16,500 million by a Treasury minute dated 17 December 1986. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 3 Currency Act 1983 s 2(3). 'Former limit' means the limit which was in force under s 2 at the beginning of the period of two years ending with the day on which the direction is given: s 2(4).
- 4 Currency Act 1983 s 2(5).
- 5 Currency Act 1983 s 2(6). A draft of any statutory instrument containing an order under s 2(6) must be laid before Parliament: s 2(7).
- 6 'Bank notes' means notes of the Bank of England payable to bearer on demand: Currency Act 1983 s 4(2).
- 7 Ie the Currency and Bank Notes Act 1954 s 1(5): see PARA 797.
- 8 Currency Act 1983 s 3(1), (2). No writing off of an amount under s 3 affects the liability of the bank to pay any bank note which was included in that amount: s 3(1), (4).
- 9 Ie the weekly account rendered by the Bank under the Bank Charter Act 1844 s 6: see the text and note 15.
- 10 Currency Act 1983 s 3(1), (3). See also note 8.
- 11 For these purposes, 'securities' includes securities and assets in currency of any country and in whatever form held: Finance Act 1932 s 25(7) (amended by the Exchange Equalisation Account Act 1979 Schedule). Any liability assumed by the Treasury under the National Loans Act 1968 s 9(3) (see the text to note 17) is to be included among the assets held to cover the fiduciary note issue: s 9(4)(a).
- 12 Currency and Bank Notes Act 1928 s 3(1). The Bank must from time to time give to the Treasury such information as it may require with respect to the securities held in the issue department: s 3(3) (amended by the Statute Law (Repeals) Act 1973).
- 13 References to 'silver coin' in the Currency and Bank Notes Act 1928 s 3(2) include references to: (1) coin of cupro-nickel; and (2) coin specified in a proclamation made under the Coinage Act 1971 s 3(1)(cc) (see PARA 1282), not being coin of gold, silver or cupro-nickel or coin of a denomination of less than five pence: s 12(1), (2), Sch 2 (s 12(2) amended by the Currency Act 1983 s 1(7); and the Coinage Act 1971 Sch 2 amended by the Forgery and Counterfeiting Act 1981 Schedule Pt II; and by the Statute Law (Repeals) Act 1989).
- 14 Currency and Bank Notes Act 1928 s 3(2).
- 15 See the Bank Charter Act 1844 s 6, Sch (A) (s 6 amended by the Statute Law Revision Act 1891). That Schedule may be modified by the Treasury: see the Currency and Bank Notes Act 1928 s 10; and the Coinage Act 1971 s 12(1), (2), (4) (s 12(2) as amended: see note 13).
- 16 National Loans Act 1968 s 9(2).
- 17 See the National Loans Act 1968 s 9(3), (4).
- 18 National Loans Act 1968 s 9(1). As to the National Loans Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq; **PARLIAMENT** vol 78 (2010) PARA 1029.
- 19 Currency and Bank Notes Act 1928 s 6(1) (amended by the Currency Act 1983 s 3(6)); National Loans Act 1968 s 9(5).

## UPDATE

### 798 Amount of issue and assets held in the issue department

TEXT AND NOTES 11-14--The expression 'securities' includes securities and assets in currency of any country and in whatever form held: Currency and Bank Notes Act 1928 s 3(4) (added by the Statute Law (Repeals) Act 2008).

NOTE 11--Finance Act 1932 repealed: Statute Law (Repeals) Act 2008.

TEXT AND NOTE 15--Bank Charter Act 1844 s 6 repealed: Banking Act 2009 s 245.

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### **799. Stamp duty.**

The notes of the Bank of England are exempt from all stamp duty, and the Bank is no longer liable to make any payment in consideration of this exemption<sup>1</sup>.

1 Specific provisions exempting Bank of England notes from stamp duty, and relieving it from liability to make payment in consideration of the exemption, were made by the Bank Charter Act 1844 s 7, and by the Currency and Bank Notes Act 1928 s 6(4), respectively. These enactments were repealed by the Finance Act 1972 Sch 28 Pt XI as they were no longer necessary in view of the repeal by that Act (see ss 126, 134, Sch 28 Pt XI) of the provisions of the Stamp Act 1891 relating to stamp duty on bank notes. As to stamp duty generally see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

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### **800. Defective title or material alteration.**

A holder with no title or a defective title cannot compel payment of a bank note by the Bank of England<sup>1</sup>; but any person taking such a note honestly and for value acquires a good independent title to it and may enforce payment<sup>2</sup>.

Any material alteration in a bank note invalidates it, even in the hands of a holder in due course. An alteration of the number is a material alteration<sup>3</sup>.

1 *De la Chaumette v Bank of England* (1829) 9 B & C 208. Cf *Suffell v Bank of England* (1882) 9 QBD 555 at 567, CA; *Ransted v Bank of England* (1900) 21 Journal of the Institute of Bankers vol xxi 157.

2 *Raphael v Governor & Co of Bank of England* (1855) 17 CB 161, where a person taking, for full value and without knowledge that the party from whom he took had no title, was held entitled to payment even though he might have had the means of acquiring knowledge. The inability of a person with no title or a defective title to recover is not really an exception to the proposition that bank notes are currency. Honest acquisition is a condition of right, even to coin.

3 *Suffell v Bank of England* (1882) 9 QBD 555, CA, which is not affected by the Bills of Exchange Act 1882 s 64(1) proviso (see *Leeds & County Bank Ltd v Walker* (1883) 11 QBD 84 at 90), and which was distinguished in the case of accidental destruction of the number on a note or bill in *Hong Kong and Shanghai Banking Corp v Lo Lee Shi* [1928] AC 181, PC. See further PARA 1559. Any person who prints or stamps or by any like means impresses words, letters or figures on any bank note is liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence: Currency and Bank Notes Act 1928 s 12 (amended by the Criminal Law Act 1977 s 31(6); and the Criminal Justice Act 1982 ss 37, 46). As to the standard scale see PARA 27 note 21.

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### **801. Formulation of monetary policy by the Monetary Policy Committee.**

The objectives of the Bank of England in relation to monetary policy are to maintain price stability, and, subject to that, to support the economic policy of the government, including its objectives for growth and employment<sup>1</sup>. The Treasury may by notice in writing to the Bank specify what price stability is to be taken to consist of, or what the government's economic policy is to be taken to be<sup>2</sup>.

The Monetary Policy Committee of the Bank of England has responsibility within the Bank for formulating monetary policy<sup>3</sup>.

As soon as practicable after each meeting of the Committee, the Bank must publish a statement<sup>4</sup> as to whether it was decided at the meeting that the Bank should take any action, other than action by way of intervening in financial markets, for the purpose of meeting its objectives and, if so, what the action is<sup>5</sup>. If, at any meeting, the Committee decides that the Bank should intervene in financial markets, it must also consider at the meeting whether immediate publication of the decision would be likely to impede or frustrate the achievement of the intervention's purpose<sup>6</sup>.

After each meeting of the Committee, the Bank must publish minutes of the meeting<sup>7</sup> before the end of the period of six weeks beginning with the day of the meeting<sup>8</sup>. However, this does not apply to minutes of any proceedings relating to a decision to intervene in financial markets, or a decision about the publication of a decision to intervene in financial markets, unless the Committee has decided that publication of the decision to intervene would not be likely, or would no longer be likely, to impede or frustrate the achievement of the intervention's purpose<sup>9</sup>. Minutes published must record, in relation to any decision of the Committee, the voting preference of the members who took part in the vote on the decision<sup>10</sup>.

The procedures of the Committee are kept under review by the court of directors<sup>11</sup>.

1 Bank of England Act 1998 s 11. The Treasury no longer has power to give directions to the Bank in relation to monetary policy, except in the circumstances set out in s 19: see PARA 803. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 Bank of England Act 1998 s 12(1). The Treasury must specify these matters at least once a year, and must publish the notice in such manner as it thinks fit and lay a copy of it before Parliament: s 12(2), (3).

As to the nationalising powers of the Treasury under the Banking (Special Provisions) Act 2008 see PARA 791.

3 Bank of England Act 1998 ss 13(1), 20. The Committee consists of: (1) the Governor and Deputy Governors of the Bank (s 13(2)(a)); (2) two members appointed by the Governor of the Bank after consultation with the Chancellor of the Exchequer (s 13(2)(b)); and (3) four members appointed by the Chancellor of the Exchequer (s 13(2)(c)). Of the two members appointed under head (2) above, one must be a person who has executive responsibility within the Bank for monetary policy analysis, and the other must be a person who has executive responsibility within the Bank for monetary policy operations: s 13(3). The Chancellor of the Exchequer must only appoint a person under head (3) above if he is satisfied that the person has knowledge or experience which is likely to be relevant to the Committee's functions: s 13(4). As to members' terms of office, appointments to and qualification for membership, and meetings and proceedings of the Committee, see Sch 3 paras 1-13. Members of the Committee are disqualified for membership of the House of Commons: Sch 3 para 15. The Committee must submit a monthly report on its activities to the court of directors of the Bank: Sch 3 para 14. As to the Chancellor of the Exchequer see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 514. As to the court of directors see PARA 795.

4 The statement must be published in such manner as the Bank thinks fit: Bank of England Act 1998 s 14(6).

5 Bank of England Act 1998 s 14(1).

6 Bank of England Act 1998 s 14(2). If the Committee decides that immediate publication of a decision would not have that effect, the Bank must, when it publishes its statement, publish a statement as to what action by way of intervening in financial markets the Committee has decided the Bank should take: s 14(3). If it is decided that immediate publication of a decision would have that effect, the Committee must keep under consideration the question of whether publication of the decision would still have that effect: s 14(4). As soon as practicable after the Committee has decided that publication of such a decision would no longer have that effect, the Bank must publish a statement as to what action by way of intervening in financial markets the Committee decided the Bank should take and when the decision was made: s 14(5).

7 The minutes must be published in such manner as the Bank thinks fit: Bank of England Act 1998 s 15(5).

8 Bank of England Act 1998 s 15(1).

9 Bank of England Act 1998 s 15(2). Minutes of proceedings relating to a decision to intervene in financial markets, or a decision about the publication of a decision to intervene in financial markets, if not required to be published before the end of the period of six weeks beginning with the day of the meeting, must be published by the Bank before the end of the period of six weeks beginning with the day on which a statement about the decision to intervene is published under s 14(5) (see note 6): s 15(3).

10 Bank of England Act 1998 s 15(4).

11 See PARA 795. See also note 3.

## **UPDATE**

### **801 Formulation of monetary policy by the Monetary Policy Committee**

TEXT AND NOTES--The Bank of England has immunity in its capacity as a monetary authority: Banking Act 2009 s 244(1). For this purpose, (1) a reference to the Bank of England is a reference to the Bank and anyone who acts or purports to act as a director, officer, servant or agent of the Bank; (2) 'immunity' means immunity from liability in damages in respect of action or inaction; and (3) a reference to the Bank's capacity as a monetary authority includes a reference to functions exercised by the Bank for the purpose of or in connection with (a) acting as the central bank of the United Kingdom; or (b) protecting or enhancing the stability of the financial systems of the United Kingdom: s 244(2). The immunity does not extend to action or inaction in bad faith or in contravention of the Human Rights Act 1998 s 6(1): Banking Act 2009 s 244(3).

NOTE 3--Bank of England Act 1998 Sch 3 para 6 amended, Sch 3 para 2A added: Banking Act 2009 s 243(3), (4).

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### **802. Information and reports.**

The Bank of England may by notice<sup>1</sup> in writing require certain undertakings<sup>2</sup> to provide the Bank with such information as may be specified in the notice, being information about the relevant financial affairs<sup>3</sup> of the undertaking which the Bank considers it necessary or expedient to have for the purposes of its functions in relation to monetary policy<sup>4</sup>. A person who fails without reasonable excuse to comply with any such requirement imposed on him is guilty of an offence<sup>5</sup>.

The Bank must prepare and publish reports containing: (1) a review of the monetary policy decisions published by the Bank in the period to which the report relates<sup>6</sup>; (2) an assessment of the developments in inflation in the economy of the United Kingdom in that period; and (3) an indication of the expected approach to meeting the Bank's objectives<sup>7</sup>. No such report may be published without the approval of the Monetary Policy Committee<sup>8</sup>.

1 The notice may require information to be provided in specified form or manner, at a specified time or times, and in relation to a specified period or periods: Bank of England Act 1998 s 17(2).

2 This provision applies to an undertaking if:

684 (1) it has a place of business in the United Kingdom (Bank of England Act 1998 s 17(3)(a) (s 17(3) substituted, and s 17(3A)-(3D) added, by SI 2001/3649)); and

685 (2) it falls within heads (a) to (d) below (Bank of England Act 1998 s 17(3)(b) (as so substituted));

75. (a) it is a deposit-taker (s 17(3A) (as so added));  
75

76. (b) it is not a deposit-taker, but: (i) it falls within the subsector 'other monetary financial institution', as defined by EC Council Regulation 2223/96 on the European system of national and regional accounts in the Community (OJ L310, 30.11.96, p 1) Annex A para 2.48; (ii) it carries on a business of granting credits secured on land used for residential purposes; (iii) it has issued a debt security; or (iv) it has acted as an agent in connection with arranging or managing the issue of debt security (Bank of England Act 1998 s 17(3B) (as so added));  
76

77. (c) it is a financial holding company (s 17(3C) (as so added));  
77

78. (d) it is not a deposit-taker, but it continues to have a liability in respect of a deposit which was held by it in accordance with the Banking Act 1979 or the Banking Act 1987 or a permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 348 et seq) (Bank of England Act 1998 s 17(3D) (as so added)).  
78

'Undertaking' has the meaning given by the Companies Act 2006 s 1161(1) (see **COMPANIES** vol 14 (2009) PARA 26 note 2); Bank of England Act 1998 s 17(7D) (s 17(7A)-(7D) added by SI 2001/3649; Bank of England Act 1998 s 17(7D) amended by SI 2008/948)). 'Deposit taker' means: (A) a person who has permission under the Financial Services and Markets Act 2000 Pt IV to accept deposits; or (B) an EEA firm of the kind mentioned in Sch 3 para 5(b) or (c) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12(1)) to accept deposits or other repayable funds (see PARA 315); Bank of England Act 1998 s 17(7) (substituted by SI 2001/3649). 'Debt security' means any instrument creating or acknowledging indebtedness (including a government or public security): Bank of England Act 1998 s 17(7A) (as so added). The provisions of s 17(7) and s 17(7A) must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under s 22, and Sch 2 (see PARA 84 et seq): Bank of England Act 1998 s 17(7B) (as so added). 'Financial holding company' has the meaning given by European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) relating to the taking up and pursuit of the business of credit institutions art 4(19): Bank of England Act 1998 s 17(7C) (as so added; and amended by SI 2006/3321). As to the meaning of 'United Kingdom' see PARA 2 note 3.

The Treasury may by order amend the provisions of the Bank of England Act 1998 s 17(3) and s 17(3A)-(3D): s 17(5) (amended by SI 2001/3649). Before making such an order, the Treasury must consult the Bank, the Office for National Statistics, such persons as appear to be representative of persons likely to be materially affected by the order, and such other persons as it considers appropriate: Bank of England Act 1998 s 17(6). As to the Office for National Statistics see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 516, 528. Any power of the Treasury to make an order under the Bank of England Act 1998 is exercisable by statutory instrument: s 40(1). An order under s 17(4) (see note 3) or s 17(5) may not be made unless a draft of the order has been laid before and approved by resolution of each House of Parliament: s 40(2). At the date at which this volume states the law no order had been made under s 17(5). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 The Treasury may by order provide which financial affairs of an undertaking are relevant financial affairs, and may make different provision for different undertakings or classes of undertaking: Bank of England Act 1998 s 17(4). As to the making of orders under s 17 see note 2. As to the order that has been made under s 17(4) see the Bank of England (Information Powers) Order 1998, SI 1998/1270 (amended by SI 2001/3649).

4 Bank of England Act 1998 s 17(1). As to the formulation of monetary policy see PARA 801. As to restrictions on disclosure of such information see PARA 805.

5 Bank of England Act 1998 s 38(1). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 38(1). As to the standard scale see PARA 27 note 21. If after conviction under s 38(1) a person continues the failure for which he was convicted, he is guilty of a further offence and liable on summary conviction to be punished accordingly: s 38(2). A person who, in purported compliance with a requirement imposed on him under s 17(1), provides information which he knows to be false or misleading in a material particular, or recklessly provides information which is false or misleading in a material particular, is guilty of an offence and liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or to both; or (2) on summary conviction, to imprisonment for a term not exceeding three months, or to a fine not exceeding the statutory maximum, or to both: s 38(3). As to the statutory maximum see PARA 56 note 24.

Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly: Bank of England Act 1998 s 39(1). Where the affairs of a body corporate are managed by its members, s 39(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 39(2).

6 Such a report must relate to a period of three months, or such other period as the Treasury and the Monetary Policy Committee may agree: Bank of England Act 1998 s 18(3). As to the Monetary Policy Committee see PARA 801. Periods to which such reports relate are successive, the first such period commencing on such day within the period of three months ending with 1 June 1998 as the Treasury, after consultation with the Bank, specifies in writing to it: s 18(4). A report must be published as soon as practicable after the end of the period to which it relates and in such manner as the Bank thinks fit: s 18(6).

7 Bank of England Act 1998 s 18(1), (2). As to the Bank's objectives see s 11; and PARA 801.

8 Bank of England Act 1998 s 18(5).

## UPDATE

### 802 Information and reports

NOTE 2--Reference to Office for National Statistics now to Statistics Board (see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 605): Bank of England Act 1998 s 17(6) (amended by Statistics and Registration Service Act 2007 Sch 3 para 10).

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### 803. Reserve powers of the Treasury.

After consultation with the Governor of the Bank of England<sup>1</sup>, the Treasury<sup>2</sup> may by order give the Bank directions with respect to monetary policy if it is satisfied that the directions are required in the public interest and by extreme economic circumstances<sup>3</sup>. Such an order which does not cease to have effect before the end of the period of three months beginning with the day on which it is made ceases to have effect at the end of that period<sup>4</sup>. While such an order made by the Treasury has effect, it overrides the provisions relating to the objectives of the Bank in relation to monetary policy<sup>5</sup>.

1 As to the Governor of the Bank of England see PARA 794.

2 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Bank of England Act 1998 s 19(1). Such an order may include such consequential modifications of the Bank of England Act 1998 relating to the Monetary Policy Committee as the Treasury thinks fit: s 19(2). As to the Monetary Policy Committee see PARA 801. Any power of the Treasury to make an order under the Bank of England Act 1998 is exercisable by statutory instrument: s 40(1). A statutory instrument containing an order under s 19 must be laid before Parliament after being made: ss 19(3), 40(5). Unless an order under s 19 is approved by resolution of each House of Parliament before the end of the period of 28 days beginning with the day on which it is made, it ceases to have effect at the end of that period: s 19(4). In reckoning the period of 28 days for the purposes of s 19(4), no account is to be taken of any time during which Parliament is dissolved or prorogued or during which either House is adjourned for more than four days: s 19(5). At the date at which this volume states the law no order had been made under s 19.

4 Bank of England Act 1998 s 19(6).

5 Bank of England Act 1998 s 19(7). As to the provisions relating to the objectives of the Bank in relation to monetary policy see s 11; and PARA 801.

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#### **804. Cash ratio deposits.**

The Bank of England may give an eligible institution<sup>1</sup> a call notice<sup>2</sup>. A call notice must be in writing, and must specify the period to which it relates<sup>3</sup> and the amount which, in relation to that period, is the institution's depositable amount<sup>4</sup>. The depositable amount is the amount, or, as the case may be, the sum of the amounts, produced by multiplying so much of the institution's average liability base<sup>5</sup> for the reference period as falls into each value band by the ratio applicable to that band<sup>6</sup>.

Where the Bank has given an eligible institution a call notice, then, if at any time in the period to which the notice relates the following conditions are met, namely: (1) the institution is an eligible institution; and (2) the institution does not have on deposit in the appropriate account<sup>7</sup> with the Bank the amount specified in the notice as its depositable amount in relation to that period, the Bank may by notice<sup>8</sup> in writing require the institution to make a payment in lieu of deposit<sup>9</sup>.

The Bank may by notice<sup>10</sup> in writing require an eligible institution to provide such information as may be specified in the notice, being information which the Bank considers it necessary or expedient to have for the purposes of its functions in relation to cash ratio deposits<sup>11</sup>.

The provisions described above are modified in relation to the first call notice issued to an institution after it becomes an eligible institution<sup>12</sup>.

1 Each deposit-taker is an eligible institution for the purposes of the Bank of England Act 1998 Sch 2: Sch 2 para 1(1) (Sch 2 para 1(1) substituted, and Sch 2 para 1(1A)-(1C) added, by SI 2001/3649). 'Deposit-taker' has the meaning given in the Bank of England Act 1998 s 17 (see PARA 802), except that it does not include: (1) a credit union; (2) a friendly society; (3) a person who has permission to accept deposits under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) only in the course of effecting or carrying out contracts of insurance in accordance with that permission (see PARA 989 et seq); or (4) an EEA firm of the kind mentioned in the Financial Services and Markets Act 2000 s 37, Sch 3 PARA 5(c) (see PARA 315): Bank of England Act 1998 Sch 2 para 1(1A) (as so added). 'Credit union' has the meaning given by the Credit Unions Act 1979 (see PARA 2402): Bank of England Act 1998 Sch 2 para 1(1B) (as so added). 'Friendly society' means: (a) a society which is registered within the meaning of the Friendly Societies Act 1974; or (b) a society incorporated under the Friendly Societies Act 1992 (see PARA 2082): Bank of England Act 1998 Sch 2 para 1(1C) (as so added).

The Treasury may by order amend Sch 2 para 1(1) and Sch 2 para 1(1A)-(1C) as it thinks fit: Sch 2 para 1(2) (amended by SI 2001/3649). Before making an order under the Bank of England Act 1998 Sch 2, the Treasury must consult: (i) the Bank; (ii) such persons as appear to it to be representative of persons likely to be materially affected by the order; and (iii) such other persons as it thinks fit: Sch 2 para 10. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. Any power of the Treasury to make an order under the Bank of England Act 1998 is exercisable by statutory instrument: s 40(1). An order under Sch 2 para 1(2) may not be made unless a draft of the order has been laid before and approved by resolution of each House of Parliament: s 40(2). At the date at which this volume states the law no order had been made under Sch 2 para 1(2).

2 Bank of England Act 1998 Sch 2 para 3(1).

3 The period to be specified must be a period of six months beginning at least four working days after the date of the notice, and may not include any part of a period specified in a previous call notice given to the institution concerned: Bank of England Act 1998 Sch 2 para 3(3).

4 Bank of England Act 1998 Sch 2 para 3(2).

5 The liability base of an eligible institution at any time is the aggregate of those sterling and foreign currency liabilities of the institution which are eligible liabilities: Bank of England Act 1998 Sch 2 para 2(1). The Treasury may by order define eligible liabilities and make provision about the calculation of any description of eligible liability, including provision for the amount of a liability of any description to be treated as reduced by the amount of an asset of any description: Sch 2 para 2(2). In exercising the power to make orders under the Bank of England Act 1998 Sch 2 para 2(2), the Treasury must have regard to the financial needs of the Bank: Sch 2 para 11. As to the making of orders under the Bank of England Act 1998 see note 1. A statutory instrument containing an order under Sch 2 para 2(2) is subject to annulment in pursuance of a resolution of either House of Parliament: s 40(3). As to the order that has been made see the Cash Ratio Deposits (Eligible Liabilities) Order 1998, SI 1998/1130 (amended by SI 2000/2952; SI 2004/1862; SI 2005/3203).

6 Bank of England Act 1998 Sch 2 para 4(1). The Bank may use such method to calculate an institution's average liability base as it thinks fit, and may use different methods for different institutions: Sch 2 para 4(2). Value bands and the ratios applicable to them are such as may be specified by order made by the Treasury: Sch 2 paras 4(3), 5. As to the making of orders under the Bank of England Act 1998 see note 1. An order under Sch 2 para 5 may not be made unless a draft of the order has been laid before and approved by resolution of each House of Parliament: s 40(2). In exercising the power to make orders under Sch 2 para 5, the Treasury must have regard to the financial needs of the Bank: Sch 2 para 11. As to the order that has been made see the Cash Ratio Deposits (Value Bands and Ratios) Order 2004, SI 2004/1270.

7 The appropriate account, in relation to an eligible institution, is such account of the institution with the Bank as is designated by the Bank for the purpose: Bank of England Act 1998 Sch 2 para 6(5).

8 The notice must specify what period it covers, and the period specified must: (1) fall within the period to which the call notice relates; and (2) be a period throughout which the conditions mentioned in heads (1) and (2) in the text have been met: Bank of England Act 1998 Sch 2 para 6(2).

9 Bank of England Act 1998 Sch 2 para 6(1). The amount which the Bank may require an institution to pay is an amount equal to interest for the period covered by the notice, at 4% over the benchmark rate, on the average shortfall during that period: Sch 2 para 6(3), (6).

As to the determination of the benchmark rate of interest see Sch 2 para 7, which may be amended by order under Sch 2 para 8. As to the making of orders under the Bank of England Act 1998 see note 1. A statutory instrument containing an order under Sch 2 para 8 is subject to annulment in pursuance of a resolution of either House of Parliament: s 40(3). At the date at which this volume states the law no order had been made under Sch 2 para 8.

The Bank may use such method to calculate the average shortfall as it thinks fit: Sch 2 para 6(4).

10 Such a notice may require information to be provided: (1) in such form or manner as may be specified in the notice; (2) at such time or times as may be so specified; (3) in relation to such period or periods as may be so specified: Bank of England Act 1998 Sch 2 para 9(2).

11 Bank of England Act 1998 Sch 2 para 9(1). As to restrictions on disclosure of such information see PARA 805. Sections 38, 39 (offences in relation to the provision of information) apply to a requirement under Sch 2 para 9: see PARA 802 note 5.

12 See the Bank of England Act 1998 Sch 2 para 13.

## UPDATE



## 804 Cash ratio deposits

NOTE 6--SI 2004/1270 replaced: Cash Ratio Deposits (Value Bands and Ratios) Order 2008, SI 2008/1344.

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## 805. Restriction on disclosure of information.

Restricted information obtained for monetary policy or cash ratio deposit purposes<sup>1</sup> may not be disclosed by the Bank of England or any officer or servant of the Bank, or by any person obtaining the information directly or indirectly from the Bank, without the consent of the person from whom the Bank obtained the information and, if different, the person to whom the information relates<sup>2</sup>. Any person who discloses information in contravention of this provision is guilty of an offence<sup>3</sup>.

The disclosure of information is not precluded, however, in any case in which disclosure is for the purpose of enabling or assisting the Bank to discharge: (1) its functions as a monetary authority<sup>4</sup>; (2) its functions as a supervisor of systems for the transfer of funds between credit institutions<sup>5</sup> and their customers; or (3) its functions relating to cash ratio deposits<sup>6</sup>. The Bank may also disclose information to specified authorities if the Bank considers that the disclosure would enable or assist such an authority to discharge its functions<sup>7</sup>. The disclosure by any authority of information obtained by it in this way is not precluded if it is made with the consent<sup>8</sup> of the Bank, and for the purpose of enabling or assisting the authority to discharge its functions<sup>9</sup>. Disclosure of information is not prohibited if it is: (a) with a view to the institution of, or otherwise for the purposes of, any proceedings in connection with a payment in lieu of cash ratio deposit<sup>10</sup>; (b) with a view to the institution of, or otherwise for the purposes of, any criminal proceedings<sup>11</sup>; or (c) in pursuance of any Community obligation<sup>12</sup>.

1 Information is restricted information for this purpose if: (1) it is obtained by the Bank of England by virtue of the power conferred by the Bank of England Act 1998 s 17(1) (see PARA 802) or Sch 2 para 9 (see PARA 804), whether or not it was obtained pursuant to a notice under that provision; and (2) it relates to the business or other affairs of any person: s 37, Sch 7 para 1(1). Information is not restricted information if: (a) it has been made available to the public from other sources; or (b) it is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it: Sch 7 para 1(2).

2 Bank of England Act 1998 Sch 7 para 1(3).

3 Bank of England Act 1998 Sch 7 para 1(4). A person guilty of such an offence is liable: (1) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or to both; or (2) on summary conviction, to imprisonment for a term not exceeding three months, or to a fine not exceeding the statutory maximum, or to both: Sch 7 para 1(4). As to the statutory maximum see PARA 56 note 24.

4 See PARA 801.

5 'Credit institution' means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account: Bank of England Act 1998 Sch 7 para 2(2) (substituted by SI 2001/3649).

6 Bank of England Act 1998 Sch 7 para 2(1). As to the Bank's functions relating to cash ratio deposits see PARA 804.

7 Bank of England Act 1998 Sch 7 para 3(1). The specified authorities and functions are: (1) the Treasury, in relation to its functions under the Financial Services and Markets Act 2000 (see PARA 2); (2) the Secretary of State, in relation to his functions under the Financial Services and Markets Act 2000 (see PARAS 2, 3); (3) an inspector appointed under the Companies Act 1985 Pt XIV (ss 431-453C) or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Pt XV, in relation to his functions under those provisions (see **COMPANIES** vol 15 (2009) PARA 1541 et seq); (4) a person authorised to exercise powers under the Companies Act 1985 s 447, the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 440 or the Companies Act 1989 s 84, in relation to his functions under those provisions (see **COMPANIES** vol 15 (2009) PARA 1558); (5) a person appointed to conduct an investigation under the Financial Services and Markets Act 2000 s 167, s 168(3), s 168(5) or s 284, in relation to his functions relating to that investigation (see PARAS 449, 683); (6) the Financial Services Authority, in relation to its functions under the legislation relating to friendly societies (see PARA 2081 et seq), the Building Societies Act 1986 (see PARA 1856 et seq), the Companies Act 1989 Pt VII (ss 154-191) (see PARA 509 et seq) or the Financial Services and Markets Act 2000 (see PARA 6 et seq); (7) the competent authority for the purposes of the Financial Services and Markets Act 2000 Pt VI (ss 72-103), in relation to its functions under those provisions (see PARA 385); (8) the Office for National Statistics, in relation to its functions under the Statistics of Trade Act 1947 (see **TRADE AND INDUSTRY** vol 97 (2010) PARA 1009 et seq); (9) the Pensions Regulator in relation to its functions under the Pension Schemes Act 1993, the Pensions Act 1995, the Welfare Reform and Pensions Act 1999, the Pensions Act 2004 or any corresponding Northern Ireland enactment (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 598 et seq); Bank of England Act 1998 Sch 7 para 3, Table (substituted by SI 2001/3649; and amended by the Pensions Act 2004 Sch 12 para 70). As from a day to be appointed, in head (8) above the reference to 'the Office for National Statistics' is replaced by a reference to 'the Chancellor of the Exchequer or any person to whom any functions of the Chancellor of the Exchequer under the Statistics of Trade Act 1947 are delegated': Bank of England Act 1998 Sch 7 para 3, Table (prospectively amended by the Statistics and Registration Service Act 2007 Sch 2 para 7). At the date at which this volume states the law no such day had been appointed. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the Financial Services Authority see PARAS 4, 6 et seq. As to the Office for National Statistics see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 516, 528. As to the Pensions Regulator see **SOCIAL SECURITY AND PENSIONS**. As to the Secretary of State see PARA 3.

The list of authorities and functions may be amended by order: see the Bank of England Act 1998 Sch 7 para 3(2). The Treasury may by order restrict the circumstances in which, or impose conditions subject to which, disclosure is permitted in the case of any authority for the time being specified: Sch 7 para 3(3). Before making any order under Sch 7 para 3, the Treasury must consult the Bank: Sch 7 para 3(4). Any power of the Treasury to make an order under the Bank of England Act 1998 is exercisable by statutory instrument: s 40(1). An order under Sch 7 para 3(2) may not be made unless a draft of the order has been laid before and approved by resolution of each House of Parliament: s 40(2). A statutory instrument containing an order under Sch 7 para 3(3) is subject to annulment in pursuance of a resolution of either House of Parliament: s 40(3). At the date at which this volume states the law, no order had been made under the Bank of England Act 1998 Sch 7 para 3.

8 Before deciding whether to give its consent to disclosure, the Bank must take account of such representations as the authority proposing to make the disclosure may make about the desirability of or necessity for the disclosure: Bank of England Act 1998 Sch 7 para 4(2).

9 Bank of England Act 1998 Sch 7 para 4(1). The functions referred to in the text are any of its functions set out in Sch 7 para 3, Table: see note 7.

10 Bank of England Act 1998 Sch 7 para 5(a). As to payments in lieu of cash ratio deposits see PARA 804.

11 Bank of England Act 1998 Sch 7 para 5(b).

12 Bank of England Act 1998 Sch 7 para 5(c).

## UPDATE

### 805 Restriction on disclosure of information

TEXT AND NOTES--As to restrictions on the ability of the Bank of England to disclose information relating to financial stability see the Banking Act 2009 s 246; and para 807A.3.

NOTE 7--Amendment made by Statistics and Registration Service Act 2007 Sch 2 para 7 in force 1 April 2008: SI 2008/839. Office for National Statistics replaced by Statistics Board: see **REGISTRATION CONCERNING THE INDIVIDUAL** vol 39(2) (Reissue) PARA 605. Bank of England Act 1998 Sch 7 para 3(1) amended: SI 2009/1941.

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## **806. Annual report and accounts.**

As soon as practicable after the end of each of its financial years, the Bank of England must make to the Chancellor of the Exchequer<sup>1</sup> a report on its activities in that year<sup>2</sup>. The Bank must publish every report in such manner as it thinks appropriate<sup>3</sup>, and the Chancellor of the Exchequer is required to lay copies of every report before Parliament<sup>4</sup>.

The Bank has a duty to keep proper accounts and records in relation to the accounts<sup>5</sup>. It must prepare for each of its financial years a statement of accounts consisting of a balance sheet as at the last day of the year, and a profit and loss account<sup>6</sup>. The Bank must appoint an auditor or auditors to audit its accounts, including any statement of accounts<sup>7</sup>. As soon as practicable after receiving the report of its auditors on a statement, the Bank must send a copy of the report and the statement to the Chancellor of the Exchequer<sup>8</sup>.

After consulting the Bank, the Treasury<sup>9</sup> may by notice in writing to the Bank require it to publish in such manner as it thinks fit such additional information relating to its accounts as the Treasury may specify in the notice<sup>10</sup>.

<sup>1</sup> As to the Chancellor of the Exchequer see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 514.

<sup>2</sup> Bank of England Act 1998 s 4(1). The report must, in particular, contain: (1) a report by the directors of the Bank on the matters for which the sub-committee constituted by s 3 is responsible (see PARA 795); and (2) a copy of the statement for the year prepared under s 7(2) and the report of the Bank's auditors on it (see the text and notes 6-7): s 4(2). The report mentioned in head (1) above must, in particular, include a review of the Bank's performance in relation to its objectives and strategy, as determined by the court of directors of the Bank, in the financial year to which the report relates: s 4(3). A report must also contain: (a) a statement of the rate or rates at which directors of the Bank have been remunerated in the financial year to which the report relates; and (b) a statement of the Bank's objectives and strategy, as determined by the court of directors of the Bank, for the financial year in which the report is made: s 4(4). As to the court of directors see PARA 795.

<sup>3</sup> Bank of England Act 1998 s 4(5).

<sup>4</sup> Bank of England Act 1998 s 4(6).

<sup>5</sup> Bank of England Act 1998 s 7(1).

<sup>6</sup> Bank of England Act 1998 s 7(2). In preparing accounts under s 7(2), the Bank is subject to requirements corresponding to the relevant Companies Act requirements, except in so far as the accounts relate to the issue department: Bank of England Act 1998 s 7(3). The Bank may disregard a requirement to which it is subject under s 7(3) to the extent that it considers it appropriate to do so having regard to its functions: s 7(4). In s 7(3), the reference to 'the relevant Companies Act requirements' is a reference to the requirements to which the directors of a company which is a banking company for the purposes of the Companies Act 2006 are for the time being subject under that Act (except ss 412, 413 (directors' benefits)) in relation to the preparation of accounts under s 394 (see **COMPANIES** vol 15 (2009) PARA 716): see the Bank of England Act 1998 s 7(9) (amended by SI 2008/948).

<sup>7</sup> Bank of England Act 1998 s 7(5). As to auditors see further **COMPANIES** vol 15 (2009) PARA 958 et seq.

<sup>8</sup> Bank of England Act 1998 s 7(6).

<sup>9</sup> As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

<sup>10</sup> Bank of England Act 1998 s 7(7), (8). This may include information which the Bank has excluded under s 7(4) from a statement under s 7(2) (see note 6): s 7(7).

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### **807. Bank of England's other powers and duties.**

The Bank of England must keep registers of the holders of specified stocks<sup>1</sup> and bonds<sup>2</sup>. Gilts are registrable in the books of the Bank, following the closure to gilts of the National Savings Stock Register<sup>3</sup>.

The Bank may lend any sums which the Treasury<sup>4</sup> has power to borrow<sup>5</sup> in connection with the National Debt<sup>6</sup>.

The Bank of England no longer has statutory power to establish branches in any part of England<sup>7</sup>.

The Bank's supervisory role in the regulation of banking business under the Banking Act 1987 has been removed and that role is now performed by the Financial Services Authority<sup>8</sup>.

Apart from the monetary policy objective in the Bank of England Act 1998<sup>9</sup>, the Bank now has no general statutory objectives<sup>10</sup> but it has two core purposes<sup>11</sup> of monetary stability and financial stability. Monetary stability relates to stable prices<sup>12</sup> and confidence in the currency and financial stability involves the detection and reduction of threats to the financial system as a whole<sup>13</sup>. The Bank in pursuit of both the core purposes communicates its views and works closely with others including the Treasury and the Authority<sup>14</sup> and other central banks<sup>15</sup> and international organisations to improve the international monetary system.

<sup>1</sup> I.e. the stocks specified in the Finance Act 1942 s 47(1)(a), (1ZA), (1A), Sch 11 Pt I; and the Bank of England Act 1946 s 1, Sch 1 PARA 6. See further PARA 1335.

<sup>2</sup> See the Finance Act 1942 s 47(1)(b) (substituted by the Finance Act 2002 s 140(1)(a)); and the Government Stock Regulations 2004, SI 2004/1611. As to the Bank's liability in respect of acting on a forged transfer see *Welch v Bank of England* [1955] Ch 508, [1955] 1 All ER 811.

<sup>3</sup> See the Bank of England Act 1998 ss 33, 40(1), (4); and the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446 (amended by SI 2004/1662). As to the National Savings Stock Register see PARA 1347. 'Gilts' are stocks or bonds of any description included in the Finance Act 1942 Sch 11 Pt I (see PARA 1347 note 8); Bank of England Act 1998 s 33(6); National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 2(1).

<sup>4</sup> As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. See note 13.

<sup>5</sup> I.e. under the National Loans Act 1968 s 12: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 728.

<sup>6</sup> National Loans Act 1968 s 12(7) (amended by the Statute Law (Repeals) Act 1973).

<sup>7</sup> The Country Bankers Act 1826 s 15, which conferred such powers, was repealed by the Statute Law Revision Act 1958 s 1, Sch 1.

<sup>8</sup> As to the Financial Services Authority see PARA 792; and PARAS 4, 6 et seq.

<sup>9</sup> As to the formulation of monetary policy see PARA 801.

10 The Bank's functions as seen by the Treasury, the Authority and the Bank itself are described in the Memorandum of Understanding between them, issued in October 1997 and revised in March 2006.

11 It is as determined by the court of directors in its role in setting the Bank's objectives and strategy: see PARA 795. These core purposes were reaffirmed by a statement in March 2007. See also note 13.

12 Stable prices relate back to the government's inflation target, which the Bank seeks to meet through decisions on interest rates taken by the Monetary Policy Committee: see PARA 120.

13 The Bank has responsibility for the stability of the financial system as a whole while the Authority supervises individual banks and other financial organisations. In this role the Bank has surveillance and market intelligence functions. Threats to the financial system as a whole are reduced by strengthening the infrastructure and various financial operations both nationally and internationally, including in exceptional circumstances by acting as the 'lender of last resort' to financial institutions in difficulty (eg in the Northern Rock plc crisis of 2007/2008 but see also PARA 791 note 28). This is part of the Bank's central banking functions and would be exercised to prevent loss of confidence spreading through the system as a whole: it is set out in the Memorandum of Understanding (see note 10). Related to this is the Bank's role in oversight of payment systems (payment and settlement systems being at the centre of the financial infrastructure), its main objective being to ensure that sufficient weight is given to risk reduction and management in their design and operation while taking into account the potential effect of risk mitigation measures on system efficiency. The Bank's principal focus is on the UK payment systems and its oversight activities and priorities are set out in an annual Payment Systems Oversight Report. The Bank also takes part in a joint Working Group of the European System of Central Banks (ESCB) (see note 15) and the Committee of European Securities Regulators (CESR) on standards for securities settlement systems.

As to the nationalising powers of the Treasury under the Banking (Special Provisions) Act 2008 generally see PARA 791.

14 See the Memorandum of Understanding; and note 10.

15 The Bank is a member of the European System of Central Banks (ESCB) which comprises the European Central Bank (ECB) and the national central banks of all 27 EU member states. See also PARA 1398 note 5. At the date at which this volume states the law, the website for the ECB and ESCB is [www.ecb.int](http://www.ecb.int).

## **UPDATE**

### **807 Bank of England's other powers and duties**

TEXT AND NOTES 9-15--Provision has been made for the Bank of England to have a statutory objective of protecting and enhancing financial stability, and the Financial Stability Committee has been established for this purpose: see the Bank of England Act 1998 ss 2A-2C; and para 807A.

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#### **807A. Financial stability.**

##### **1. Financial stability objective**

An objective of the Bank of England is to contribute to protecting and enhancing the stability of the financial systems of the United Kingdom (the 'financial stability objective'): Bank of England Act 1998 s 2A(1) (s 2A added by the Banking Act 2009 s 238(1)). In pursuing the financial stability objective the Bank must aim to work with other relevant bodies, including the Treasury and the Financial Services Authority: Bank of England Act 1998 s 2A(2). The court of directors must, consulting the Treasury, determine and review the Bank's strategy in relation to the financial stability objective: Bank of England Act 1998 s 2A(3).

## **2. Financial Stability Committee**

There is to be a sub-committee of the court of directors of the Bank of England (the 'Financial Stability Committee') consisting of (1) the Governor of the Bank, who is to chair the Committee (when present); (2) the Deputy Governors of the Bank; and (3) four directors of the Bank, appointed by the chair of the court of directors: Bank of England Act 1998 s 2B(1) (ss 2B, 2C added by the Banking Act 2009 s 238(1)). The Committee has the following functions: (a) to make recommendations to the court of directors, which it must consider, about the nature and implementation of the Bank's strategy in relation to the financial stability objective (see PARA 807A.1); (b) to give advice about whether and how the Bank should act in respect of an institution, where the issue appears to the Committee to be relevant to the financial stability objective; (c) in particular, to give advice about whether and how the Bank should use stabilisation powers under the Banking Act 2009 Pt 1 (ss 1-89) (see PARA 791A) in particular cases; (d) to monitor the Bank's use of the stabilisation powers; (e) to monitor the Bank's exercise of its functions under the Banking Act 2009 Pt 5 (ss 181-206) (see PARA 791D); and (f) any other functions delegated to the Committee by the court of directors for the purpose of pursuing the financial stability objective: Bank of England Act 1998 s 2B(2). As to the procedure of the Committee see the Bank of England Act 1998 ss 2B(3), 2C.

## **3. Information**

The Bank of England may disclose information that it thinks relevant to the financial stability of individual financial institutions or one or more aspects of the financial systems of the United Kingdom: Banking Act 2009 s 246(1). Information about the business or other affairs of a specified or identifiable person may be disclosed only to (1) the Treasury; (2) the Financial Services Authority; (3) the scheme manager of the Financial Services Compensation Scheme; (4) an authority in a country or territory outside the United Kingdom which exercises functions similar to those of the Treasury, the Bank of England or the Financial Services Authority in relation to financial stability; and (5) the European Central Bank: Banking Act 2009 s 246(2). These provisions (a) override a contractual or other requirement to keep information in confidence; and (b) are without prejudice to any other power to disclose information: Banking Act 2009 s 246(3). As to the duty of the Financial Services Authority to collect information relating to financial stability see the Banking Act 2009 s 250; and PARA 447 TEXT AND NOTES.

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### **(ii) Banks Generally**

#### **808. Origin and constitution of banks.**

The development of joint stock banks began in 1826, when corporate bodies, or co-partnerships, unlimited in number, were authorised to carry on banking business, both deposit and issue, outside a radius of 65 miles from London<sup>1</sup>. In 1833, the carrying on of banking other than issue business within London and that radius by corporations, companies or partnerships, irrespective of the number of members, was recognised as permissible<sup>2</sup>.

In 1837, powers were given to the Crown to grant charters of incorporation to trading companies, including banking companies<sup>3</sup>, and provision was made for the renewal or extension of such charters<sup>4</sup>.

A system of constituting banks of more than six persons by letters patent was instituted in 1844. Pre-existing banks under the legislation of 1826 and 1833 were given the option of coming under the new system by petitioning for letters patent, but, if in operation before 6 May 1844, were not compelled to do so<sup>5</sup>. The powers and privileges of banks formed within the 65-mile radius under the 1833 legislation were assimilated to those formed outside it under the legislation of 1826<sup>6</sup>, except with regard to the right to issue notes<sup>7</sup>.

In 1857, a limit of ten members was imposed on all unregistered partnerships carrying on the business<sup>8</sup> of banking<sup>9</sup>, but partnerships of not more than ten were authorised to carry on banking business in all respects as any partnership of not more than six, before the passing of the Joint Stock Banking Companies Act 1857, could then do<sup>10</sup>. At the same time all banks consisting of seven or more members formed under the 1844 legislation were compelled to register with unlimited liability<sup>11</sup>. Those of the earlier joint stock banks or companies which had merely availed themselves of the privileges of the 1844 scheme were not affected, nor were any of the banks existing prior to 1844 which had merely stood on their rights; any of such banks, however, if consisting of more than seven members, or any new coalition of more than seven persons, was entitled to register as a banking company with unlimited liability<sup>12</sup>.

In 1858, banking companies, whether already registered or newly formed, were permitted to register with limited liability, save as to note issue, if any<sup>13</sup>.

All banks formed or registered under the legislation of 1857 and 1858 were made subject to the company legislation of 1862<sup>14</sup>, as if registered under it. This legislation, as subsequently amended and consolidated<sup>15</sup>, governs their constitution and that of all banks incorporated since 1862 otherwise than by royal charter or special Act of Parliament. Banks came into the regime of the company legislation as limited or unlimited according to their previous constitution<sup>16</sup>, but no existing or new bank could by registering with limited liability preclude the liability of its shareholders being unlimited with regard to note issue, if any<sup>17</sup>. In 1879 banking companies registered as unlimited were afforded the opportunity of registering as limited<sup>18</sup>.

1 See the Country Bankers Act 1826 ss 1, 2 (repealed).

2 Bank of England Act 1833 ss 1-3 (repealed). As to the Bank of England's exclusive right of note issue see PARA 796.

3 Chartered Companies Act 1837 s 2 (repealed).

4 Chartered Companies Act 1884 s 1 (repealed).

5 Joint Stock Banks Act 1844 ss 1, 44, 45 (repealed). Banking companies of more than six persons formed by agreement or co-partnership covenant on or after 6 May 1844, unless by virtue of letters patent, were illegal companies: s 1 (repealed). See also *O'Connor v Bradshaw* (1850) 5 Exch 882; *R v Whitmarsh* (1850) 15 QB 600.

6 Joint Stock Banks Act 1844 s 47 (repealed); Companies Act 1948 s 459(9)(f), Sch 18 (repealed); Companies Act 1967 s 129, Sch 7 (repealed).

7 See the Bank Charter Act 1844 ss 10, 11, 26, 27 (ss 10, 26, 27 repealed; s 11 amended by the Statute Law Revision Act 1891 and by the Currency and Bank Notes Act 1928 s 13, Schedule). See also PARA 796 note 1.

8 As to the meaning of 'banking business' see PARA 815.

9 Joint Stock Banking Companies Act 1857 s 13 (repealed). Before the passing of the Companies Act 1967, a partnership carrying on a banking business continued to be restricted to ten partners: Companies Act 1948 s 429 (repealed). Under the Companies Act 1967, a partnership carrying on banking business could consist of up to 20 partners, provided that, if there were more than ten partners, each partner had been authorised by the Department of Trade and Industry to be a partner: s 119 (repealed).

10 Joint Stock Banking Companies Act 1857 s 12 (repealed); Companies Act 1948 s 459(9)(f), Sch 18 (repealed); Companies Act 1967 s 129, Sch 7 (repealed).

11 Joint Stock Banking Companies Act 1857 s 4 (repealed).

12 Joint Stock Banking Companies Act 1857 ss 6, 13 (repealed).

13 Joint Stock Banks Act 1858 s 1 (repealed).

14 In the Companies Act 1862.

15 See **COMPANIES** vol 14 (2009) PARA 14.

16 Companies Act 1862 ss 175, 176 (repealed); Companies Act 1948 ss 377, 455 (repealed); Companies Act 1985 ss 675, 735 (both prospectively repealed) (as to replacement provisions for s 735 see the Companies Act 2006 ss 1, 1171).

17 Companies Act 1862 s 182 (repealed); Companies Act 1948 s 431 (repealed). As to the disappearance in 1921 of the last private bank with note issuing powers see PARA 796 note 1.

18 Companies Act 1879 s 4 (repealed); Companies Act 1948 s 430 (repealed).

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### **(iii) Savings Banks**

#### **A. TRUSTEE SAVINGS BANKS**

##### **809. Reorganisation of trustee savings banks.**

The Trustee Savings Banks Act 1985 was passed<sup>1</sup> for the purpose of enabling the then existing TSB group<sup>2</sup> to be reorganised into the new TSB group<sup>3</sup>. The Act provided for the transfer and vesting<sup>4</sup> of property, rights, liabilities and obligations and for the transfer of the business of each of the existing banks to its successor<sup>5</sup>; and the transfer included customers' accounts and rights, liabilities and obligations under contracts which are not normally capable of being transferred or assigned<sup>6</sup>.

The new TSB group was required to seek authority as necessary to take deposits; and its customers' accounts were governed by the normal relationship of banker and customer<sup>7</sup>. The Trustee Savings Banks Central Board was given additional powers to assist in the reorganisation<sup>8</sup>; and following the completion of that task, was wound up by the Treasury<sup>9</sup>.

1 The Trustee Savings Banks Act 1985 received the Royal Assent on 25 July 1985 and came into force on 25 September 1985: s 7(2). For a description of the legislative history of trustee savings banks from 1817 until their reorganisation in 1985 see *Ross v Lord Advocate* [1986] 3 All ER 79 at 84-93, [1986] 1 WLR 1077 at 1084-1095, HL, per Lord Templeman.

2 'Existing TSB group' means the following, taken as a whole:

686 (1) the existing trustee savings banks certified under the Trustee Savings Banks Act 1969 or the Trustee Savings Banks Act 1981 (the 'existing banks');

687 (2) the Trustee Savings Banks Central Board (the 'Central Board');

688 (3) Trustee Savings Banks (Holdings) Limited (the 'existing holding company'); and



689 (4) the existing subsidiaries of any of the existing banks, the Central Board or the existing holding company,

and 'existing' with reference to any of those banks or companies means existing immediately before 21 July 1986 (see note 4) and, in the case of a bank, with a certification under the Trustee Savings Banks Act 1969 or the Trustee Savings Banks Act 1981 effective on 17 December 1984: Trustee Savings Banks Act 1985 s 1(1)(a).

3 Trustee Savings Banks Act 1985 s 1(5). 'New TSB group' means the following, taken as a whole: (1) the companies formed or to be formed with objects including that of assuming and conducting, after 21 July 1986 (see note 4), the respective businesses of the existing banks and eligible to succeed them; (2) the companies which, immediately before 21 July 1986, were subsidiaries of the existing banks, the Central Board or the existing holding company (see note 2); (3) the company formed or to be formed with objects including that of acting as the holding company for the companies falling within heads (1) and (2) above and which, immediately before 21 July 1986, was a subsidiary of the Central Board (the 'new holding company'): s 1(1)(b).

4 The vesting day under the Trustee Savings Banks Act 1985 was to be appointed by the Treasury by order made by statutory instrument after consulting the Central Board: s 1(4). In exercise of the power so conferred, the Treasury appointed 21 July 1986 as the vesting day: see the Trustee Savings Banks Act 1985 (Appointed Day) (No 3) Order 1986, SI 1986/1222, art 2. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 See the Trustee Savings Banks Act 1985 s 3, Sch 1 (s 3 amended by the Employment Rights Act 1996 Sch 1 para 27; and the Trustee Savings Banks Act 1985 Sch 1 amended by the Banking Act 1987 Sch 6 para 19, Sch 7 Pt I; the Building Societies Act 1986 s 120, Sch 19 Pt I; SI 2001/3649; and SI 2002/1501). At the date of the passing of the Trustee Savings Banks Act 1985, the depositors had no proprietary interest in the surplus assets of the existing trustee savings banks and accordingly by s 3(3) such assets were transferred to the successor company: *Ross v Lord Advocate* [1986] 3 All ER 79, [1986] 1 WLR 1077, HL.

6 See the Trustee Savings Banks Act 1985 s 3(6).

7 See PARA 815 et seq. The TSB group was acquired by Lloyds Bank plc in 1994, and thus no longer exists as an independent entity.

8 See the Trustee Savings Banks Act 1985 s 2 (repealed by the Statute Law (Repeals) Act 2004).

9 See the Trustee Savings Banks Act 1985 s 2(4) (repealed: see note 8); and the Trustee Savings Banks Act 1985 (Appointed Day) (No 7) Order 1990, SI 1990/1982. As to the dissolution of the existing banks and the repeal of the Trustee Savings Banks Act 1981 see the Trustee Savings Banks Act 1985 s 4 (amended by the Statute Law (Repeals) Act 2004); the Trustee Savings Banks Act 1985 (Appointed Day) (No 2) Order 1986, SI 1986/1220; the Trustee Savings Banks Act 1985 (Appointed Day) (No 4) Order 1986, SI 1986/1223; and the Trustee Savings Banks Act 1985 (Appointed Day) (No 6) Order 1988, SI 1988/1168.

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## **B. THE NATIONAL SAVINGS BANK**

### **810. The National Savings Bank.**

The National Savings Bank (formerly known as the Post Office Savings Bank) exists for the receipt and repayment of deposits, and its business is carried on by the Director of Savings<sup>1</sup> who is appointed by the Treasury<sup>2</sup>. Regulations may be made by the Treasury for superintending, inspecting and regulating the manner in which accounts of depositors are kept and examined, and with respect to the making of deposits and the withdrawal of deposits and interest<sup>3</sup>. The National Savings Bank provided facilities for certified contractual savings schemes<sup>4</sup> and under the Savings Contracts Regulations 1969 savings contracts may be administered by the Director of Savings<sup>5</sup>.

1 National Savings Bank Act 1971 s 1. The Director of Savings may authorise another person, or that person's employees, to exercise certain of the Director's functions: see the Contracting Out (Functions Relating to National Savings) Order 1998, SI 1998/1449.

2 National Debt Act 1972 s 1(1). Unless required by any Act to be borne in some other manner, any expenses of the Director of Savings must be defrayed out of money provided by Parliament: s 1(2). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 e seq.

3 National Savings Bank Act 1971 s 2(1). Regulations may also be made as to particular matters: see s 8 (amended by the Finance Act 1982 Sch 2 para 1, Sch 20 para 1; and the Finance Act 2003 s 208). Regulations may restrict the classes of persons who may open accounts with the National Savings Bank, but any such restriction does not apply to any account opened before the coming into force of the regulations imposing the restriction: National Savings Bank Act 1971 s 2(1A) (added by the Finance Act 1989 s 184(1)). As to the regulations in force at the date at which this volume states the law see the National Savings Bank Regulations 1972, SI 1972/764 (amended by SI 1974/553; SI 1978/888; SI 1981/484; SI 1982/1282; SI 1982/1762; SI 1983/1750; SI 1984/9; SI 1984/602; SI 1986/2001; SI 1988/1166; SI 1988/2144; SI 1989/25; SI 1989/2045; SI 1991/72; SI 1992/2892; SI 1996/801; SI 1996/1724; SI 1998/1446; SI 1999/588; SI 1999/1611; SI 2001/858; SI 2003/2895; SI 2004/1662; SI 2006/1066; SI 2007/1265; SI 2008/734). As to the disapplication of particular regulations in relation to certain accounts see the National Savings Bank Regulations 1972, SI 1972/764, reg 2A (added by SI 2003/2895; and amended by SI 2008/734). Any provision which may be made in relation to investment deposits by regulations under the National Savings Bank Act 1971 s 2 may, in the case of deposits in investment accounts of any description first made available after the passing of the Finance Act 2003, be included instead in the terms and conditions of the accounts, although any such provision has effect subject to regulations under the National Savings Bank Act 1971 s 2 and orders under s 4 (see PARA 812): s 9A(1), (2) (s 9A added by the Finance Act 2003 s 208). For these purposes, 'terms and conditions' means terms and conditions set by the Treasury and published by the Director of Savings in a manner approved by the Treasury: National Savings Bank Act 1971 s 9A(3) (as so added). As to investment deposits see PARA 812.

Any power to make regulations, orders or warrants under the National Savings Bank Act 1971 is exercisable by statutory instrument: s 26(1). A statutory instrument containing regulations under s 2, or an order under s 4 (see PARA 812), is subject to annulment in pursuance of a resolution of either House of Parliament: s 26(2) (substituted by the Finance Act 2000 s 152(2)). As to the procedure for statutory instruments made under the National Savings Bank Act 1971 s 11 (see PARA 811 note 1) see s 26(4).

4 See the Income and Corporation Taxes Act 1988 s 326(1), (2) (repealed); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1192.

5 See the Savings Contracts Regulations 1969, SI 1969/1342 (amended by SI 1977/1456; SI 1984/599; SI 1986/2001; SI 1988/1358; SI 1991/76; SI 1992/3112; SI 1997/1858; SI 2005/2114).

## UPDATE

### 810 The National Savings Bank

NOTE 3--SI 1972/764 further amended: SI 2008/1142, SI 2008/1164. SI 1972/764 reg 2A further amended: SI 2008/3098.

NOTE 5--SI 1969/1342 further amended: SI 2010/291.

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#### 811. Kinds of deposit.

A deposit with the National Savings Bank may be made either as an ordinary deposit or as an investment deposit<sup>1</sup>. Treasury regulations<sup>2</sup> may make different provision with respect to ordinary deposits, investment deposits and investment deposits of different descriptions, and may prevent the making of an investment deposit or an investment deposit of a particular

description unless the person who will be the depositor in respect of the investment deposit is also a depositor in respect of ordinary deposits and the sum due to him in respect of those deposits is not less than such amount as may be specified in the regulations<sup>3</sup>.

An ordinary deposit of less than £10, and an investment deposit of less than £20, may only be made at the principal office of the National Savings Bank unless the Director of Savings, in any case in which he thinks fit, accepts any such deposit made at any other savings bank office<sup>4</sup>. Where an account is opened, a deposit book must be issued to the depositor in which deposits are to be duly entered<sup>5</sup>. Where investment deposits are to be made by or on behalf of a depositor, a separate account must be opened and a separate deposit book must be issued in respect of those deposits<sup>6</sup>.

1 National Savings Bank Act 1971 s 3(1). This is subject to any provision made in relation to ordinary accounts or ordinary deposits by regulations under s 2 (see PARA 810) made by virtue of s 8(3) (see PARA 810): s 3(1A) (added by the Finance Act 2003 s 208). As to the making of regulations see PARA 810 note 3. As to the management of ordinary deposits see PARA 813; and as to investment deposits see PARA 812.

2 The regulations made by the Treasury under the National Savings Bank Act 1971 s 2: see PARA 810. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 National Savings Bank Act 1971 s 3(2) (amended by the Finance Act 1982 Sch 20 para 2).

4 See the National Savings Bank Act 1971 s 8(1)(e); and the National Savings Bank Regulations 1972, SI 1972/764, regs 20, 28(5) (both substituted by SI 1988/2144; and amended by SI 1992/2892).

5 See the National Savings Bank Regulations 1972, SI 1972/764, regs 16, 19. The Treasury's power to make regulations under the National Savings Bank Act 1971 s 2 (see PARA 810) includes power to make regulations for the giving of statements of accounts or the issuing of depositors' books and for prescribing the entries to be made in such books: s 8(1)(b) (substituted by the Finance Act 1982 Sch 20 para 1). Except in such cases as the Director of Savings may direct, every person who may properly sign an application to withdraw deposits must sign his name in the space provided in the book: National Savings Bank Regulations 1972, SI 1972/764, reg 16(2). No charge may be made for a deposit book, which is the property of the Director of Savings and must be delivered up as and when required by him: reg 16(3), (4). Every depositor must, at such times as the Director of Savings may direct and whenever required, forward to the Director of Savings the deposit book relating to any account in his name: reg 17. On the application of a depositor, the Director of Savings may, if he thinks fit, issue a new deposit book to replace a lost one; and if in his opinion any deposit book has been tampered with or is in such a condition as to render the issue of a new book desirable, he may, if he thinks fit, require the surrender and cancellation of the book and issue a new book to the depositor: reg 18(1), (2). Notwithstanding anything in the National Savings Bank Regulations 1972, SI 1972/764, the Director of Savings may pay any sum in respect of any amount in the National Savings Bank without the production of the deposit book where he is satisfied that the depositor or other claimant is entitled to receive that sum: reg 18(3).

6 National Savings Bank Regulations 1972, SI 1972/764, reg 28(1).

## UPDATE

### 811 Kinds of deposit

TEXT AND NOTE 4--SI 1972/764 reg 28(6) (conditions for making investment deposits pursuant to telephone instructions) added: SI 2008/1164.

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### 812. Investment deposits.

Investment deposits<sup>1</sup> are received on such terms as to notice of withdrawal<sup>2</sup> and interest<sup>3</sup> (other than terms as to rate of interest) as the Treasury may from time to time prescribe, and in respect of interest different terms may be prescribed in relation to different descriptions of investment deposits<sup>4</sup>. The Treasury may by order prescribe an amount as the minimum balance for investment accounts and may provide for converting into a different description of investment account any account into which investment deposits of any description are made if the balance of that account falls below the minimum balance so prescribed for an account of that description<sup>5</sup>.

The maximum amount which any person may have in an investment deposit account (except for the credit of a treasurer's account or an individual savings account) or in one or more such accounts, whether solely or jointly with any other person, is £100,000<sup>6</sup>. The maximum amount that may be credited to a treasurer's account is £2,000,000<sup>7</sup>. The maximum deposit for crediting to an individual savings account is £3,600 in any year beginning on 6 April<sup>8</sup>. Interest on investment deposits is payable at such rates as the Treasury may from time to time determine, and different rates may be so determined in relation to different descriptions of investment deposits and different periods of notice of withdrawal<sup>9</sup>.

All sums received by the Director of Savings as investment deposits with the National Savings Bank must from time to time be paid by him into the National Loans Fund in accordance with directions given by the Treasury; and the sums required for repaying, or paying interest on, investment deposits with the National Savings Bank are to be charged on that Fund with recourse to the Consolidated Fund<sup>10</sup>. However, there may be retained by the Director of Savings out of the sums so received by him such amounts as may be required by him as a working balance; and there must be paid to him from time to time out of the National Loans Fund or, as the case may be, the Consolidated Fund, the sums required for repaying, or paying interest on, investment deposits or for increasing his working balance<sup>11</sup>.

1 As to the different kinds of deposit see PARA 811.

2 Except where the Director of Savings otherwise directs, money deposited in a treasurer's account by way of investment deposit, or any interest thereon, may not be withdrawn or transferred, except to an investment deposit account, unless the relevant prior notice of withdrawal or transfer in the approved form has been given to the Director of Savings: National Savings Bank Act 1971 s 7(2) (substituted by the Finance Act 1982 Sch 20 para 6(b)); National Savings Bank Regulations 1972, SI 1972/764, reg 29(1) (reg 29 substituted by SI 1996/801; and the National Savings Bank Regulations 1972, SI 1972/764, reg 29(1) amended by SI 1996/1724 and SI 2006/1066). The relevant prior notice is 30 days: National Savings Bank Regulations 1972, SI 1972/764, reg 29(1A) (reg 29 as so substituted; and reg 29(1A) added by SI 1996/1724 and amended by SI 2006/1066). Withdrawals and transfers from accounts other than a treasurer's account are governed by comparable provisions contained in the National Savings Bank Regulations 1972, SI 1972/764, reg 28A (added by SI 2006/1066).

3 'Interest', in relation to investment deposits, includes any bonus or other payment, whether payable annually or otherwise, which constitutes income derived from the whole or any part of the deposits: National Savings Bank Act 1971 s 27 (definition added by the Finance Act 1982 Sch 20 para 8). As to the calculation of interest see the National Savings Bank Regulations 1972, SI 1972/764, reg 42 (amended by SI 1983/1750; SI 1996/1724; SI 1999/588; SI 1999/1611).

4 See the National Savings Bank Act 1971 s 6(1) (amended by the Finance Act 1982 Sch 20 para 5(2)); and the National Savings Bank Act 1971 s 7(2) (amended by the Finance Act 1982 Sch 20 para 6(b)). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 National Savings Bank Act 1971 s 4(1A) (added by the Finance Act 1982 Sch 20 para 3(1)). As to the making of orders under the National Savings Bank Act 1971 see PARA 810 note 3.

6 See the National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3 (amended by SI 1993/1239; SI 1996/1854; SI 1999/1056). See note 8. The National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3 does not apply to an investment account of any description for which terms and conditions have been set pursuant to the National Savings Bank Act 1971 s 9A(1) (see PARA 810 note 3): National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3ZA (added by SI 2003/2895).

7 National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3A (added by SI 1996/1854). See note 8. As to treasurer's accounts see the National Savings Bank Regulations 1972, SI 1972/764, regs 29A-29K (all added by SI 1996/1724; and the National Savings Bank Regulations 1972, SI 1972/764, reg 29H amended by SI 2006/1066; and the National Savings Bank Regulations 1972, SI 1972/764, reg 29K amended by SI 1999/588).

Notwithstanding the National Savings Bank Regulations 1972, SI 1972/764, regs 21, 29, 29A, 29B(3), 29F-29H, 29K (see also PARA 823): (1) a treasurer's account may not be opened after 10 May 2007; (2) no deposit may be made to the credit of a treasurer's account after 10 August 2007; and (3) any withdrawal from a treasurer's account after 10 August 2007 must be a withdrawal of the balance standing to the credit of the account at the date of withdrawal and any accrued interest that has not been credited to the account: reg 2C (regs 2C, 2D added by SI 2007/1265). If a valid application to withdraw the whole amount referred to in the National Savings Bank Regulations 1972, SI 1972/764, reg 2C(c) (see head (3) above) from a treasurer's account has not been made before 10 November 2007, the Director of Savings may transfer the balance standing to the credit of that account and any accrued interest that has not been credited to that account to a special Director's account: reg 2D (as so added).

8 National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3B (added by SI 1999/1056; and amended by SI 2001/858; SI 2008/734). As to individual savings accounts see the National Savings Bank Regulations 1972, SI 1972/764, regs 29L-29R (all added by SI 1999/588; and the National Savings Bank Regulations 1972, SI 1972/764, reg 29L amended by SI 1999/1611; SI 2001/858; SI 2005/2114).

Nothing in the National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 3, art 3A or art 3B operates to prevent: (1) the receipt or crediting of any amount allowed by the National Savings Bank to a depositor by way of interest in respect of his investment deposit account; (2) the receipt or crediting of any amount transferred from the investment deposit account of another depositor in the National Savings Bank who has died; (3) the crediting of any amount by the Director of Savings under the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 45 (see PARA 814) or paid under the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 21 (see PARA 1347); (4) the receipt or crediting of any amount received or credited in contravention of art 21 from being treated as having been lawfully received or credited for such period as the Director of Savings, in his discretion, thinks appropriate provided that at the time the amount was received or credited the Director was unaware of the contravention and provided also that the Director considers it just and reasonable that the amount should be so treated; (5) the receipt of any amount for, or the crediting of any amount to, any account of the Accountant General of the Supreme Court of Judicature of Northern Ireland; or (6) the receipt or crediting of any amount to an individual savings account of a sum transferred by an account manager pursuant to the Individual Savings Account Regulations 1998, SI 1998/1870: see the National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 4(1) (substituted by SI 1981/108; and amended by SI 1987/329; SI 1988/1030; SI 1998/1446; SI 1999/2060; SI 2000/1421). A trustee is treated separately in his personal capacity and in his capacity as trustee and separately in respect of each trust fund: see the National Savings Bank (Investment Deposits) (Limits) Order 1977, SI 1977/1210, art 4(2), (3).

9 National Savings Bank Act 1971 s 6(2) (amended by the Finance Act 1982 Sch 20 para 5(2); and the Finance Act 2003 s 208). The Treasury may determine that the rate is to be produced by the operation of a formula: see the National Savings Bank Act 1971 s 6(2ZA) (added by the Finance Act 2003 s 208). Without prejudice to the generality of the National Savings Bank Act 1971 s 6(2), the Treasury may determine, in relation to an account into which investment deposits of any description are made, different rates of interest by reference to one or more of the following factors, namely: (1) the balance of that account at any time or over any period or the aggregate balance of that account and the depositor's other accounts of the same description, or the depositor's other investment accounts of any description, at any time or over any period; and (2) the number of withdrawals from that account over any period or the number of withdrawals from that account and the depositor's other accounts of the same description, or the depositor's other investment accounts of any description, over any period: s 6(2A) (added by the Finance Act 1982 Sch 20 para 5(3)).

The Director of Savings must give notice in the London, Edinburgh and Belfast Gazettes of any alteration in a rate of interest payable on investment deposits or investment deposits of a particular description (other than one occasioned by the operation of a formula); and any such alteration may affect deposits received at or before, as well as after, the time the alteration is made: National Savings Bank Act 1971 s 6(3) (amended by the Finance Act 1982 Sch 20 para 5(4); and the Finance Act 2003 s 208).

10 Finance Act 1980 s 120(1). As to the National Loans Fund and the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 711 et seq, 727 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

11 Finance Act 1980 s 120(2). The amounts to be retained by or paid to the Director of Savings must be determined by agreement between him and the Treasury: s 120(3). The expenses of the Director of Savings in connection with investment deposits are to be defrayed out of moneys provided by Parliament: s 120(6).

## UPDATE

## 812 Investment deposits

NOTE 3--SI 1972/764 reg 42 further amended: SI 2008/1164.

NOTE 6--SI 1977/1210 art 3 further amended: SI 2008/1164.

TEXT AND NOTE 8--As from 6 April 2010, such maximum deposit is £5,100: SI 1977/1210 art 3B (amended by SI 2009/2460).

NOTE 8--SI 1972/764 regs 29N, 29P amended: SI 2008/3098.

TEXT AND NOTES 10, 11--Such sums must now be transferred to a special Director's account in the National Savings Bank: National Savings (Unclaimed Moneys) Regulations 2009, SI 2009/1263, reg 2.

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## 813. Management of ordinary deposits.

The balance of ordinary deposits received in excess of the amount required to meet withdrawals must be paid over to, and invested by, the National Debt Commissioners, after deducting expenses incurred by them and by the Director of Savings<sup>1</sup>. The Director of Savings and the National Debt Commissioners must prepare annual statements with respect to matters relating to ordinary deposits and expenses<sup>2</sup>. If in any period the aggregate of the sums accrued by way of interest on the investment of surplus deposits<sup>3</sup>, after deduction of any sum required by the Treasury to be set aside to provide for depreciation in the value of the investments so made, exceeds the aggregate of:

1872 (1) the aggregate of the sums paid or credited during that period by way of interest on ordinary deposits; and

1873 (2) the amount of the expenses incurred during that period in connection with ordinary deposits,

then the excess must be paid into the Consolidated Fund<sup>4</sup>. If in any period the aggregate of the sums that so accrued, after deduction of any sum required to be so set aside, falls short of the second-mentioned aggregate, the deficiency must be made good out of that Fund<sup>5</sup>.

1 See the National Savings Bank Act 1971 s 17(1)-(3). As to the National Debt Commissioners see PARA 1332. As to securities in which ordinary deposits may be invested see s 18 (amended by the Finance Act 1999 s 134(7)). As to sums to be included in the expenses of the Director of Savings and the National Debt Commissioners see the National Savings Bank Act 1971 s 24(1), (2) (s 24(1) amended by the Superannuation Act 1972 Sch 6 para 83). As to limits on the amount of ordinary deposits, and the rate of interest payable on them, see the National Savings Bank Act 1971 ss 4, 5; and PARA 814.

2 See the National Savings Bank Act 1971 s 19 (amended by the Finance Act 1998 s 162).

3 Ie under the National Savings Bank Act 1971 s 17: see the text to note 1.

4 National Savings Bank Act 1971 s 20 (amended by the Finance Act 1998 s 162). If at any time claims in respect of ordinary deposits cannot be met, the Treasury must provide the Director of Savings with such sum out of the Consolidated Fund as is necessary to meet them: National Savings Bank Act 1971 s 25 (amended by

the Finance Act 1980 Sch 20 Pt XV). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

5 National Savings Bank Act 1971 s 20 (as amended: see note 4).

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#### **814. Regulation of deposit and withdrawal.**

Regulations for the conduct of business by the National Savings Bank are made by the Treasury<sup>1</sup>. The Treasury may by order limit the amount which may be received by way of deposit in the National Savings Bank from any person whatsoever either in one year or in the aggregate; and the limit which a person may have in an ordinary deposit account or accounts, whether solely or jointly with any other person, is £10,000, exclusive of money deposited or credited for specified purposes<sup>2</sup>. The Director of Savings may, with the consent of the Treasury, from time to time determine the rate or rates at which interest is to be payable on amounts deposited in ordinary accounts or determine that no interest is to be payable on such amounts<sup>3</sup>.

Deposits may be made by and in the name of any person who has attained the age of seven years and who is not under any legal disability, otherwise than by reason of his age<sup>4</sup>. Deposits may also be made on behalf of and in the name of a minor under the age of seven years, and of a person who lacks capacity<sup>5</sup>. Trust accounts may be opened<sup>6</sup>.

A depositor may apply to transfer deposits standing in his name into the name of any other depositor or into an account to be opened in the name of any person entitled to make deposits in the National Savings Bank; and, if the Director of Savings is satisfied as to the applicant's title, the death of the applicant before the transfer is effected will not, in the absence of notice, determine his authority for the transfer to be made<sup>7</sup>.

Withdrawals may be made by a depositor<sup>8</sup> on written application in the approved form, payments being made by warrant unless otherwise directed by the Director of Savings<sup>9</sup>.

Where the total amount due to a depositor at the date of his death does not exceed £5,000, the Director of Savings may dispense with probate or letters of administration and pay the amount due, or any part of it, to a person who has a beneficial interest in the deceased's estate or falls within certain other specified categories<sup>10</sup>. Where, on the death of a depositor, the aggregate value of specified assets<sup>11</sup> exceeds £50,000, the Director of Savings must, before making any payment or transfer of any of the deposits standing to the credit of the depositor either alone or jointly, require the production of a statement from the Commissioners for Revenue and Customs with regard to payment of inheritance tax<sup>12</sup>.

Before 1 May 1981, a depositor, being a person who had attained the age of 16 years, could nominate any person to receive any sum due to the depositor at his death in respect of deposits; but a nomination made after 30 April 1981 is of no effect<sup>13</sup>.

At the request of the depositor, investments may be made out of the deposit in government stock<sup>14</sup>.

Restrictions are imposed on the disclosure of depositors' names and of amounts deposited or withdrawn<sup>15</sup>.

Where a first or any other deposit is made or received in error, the Director of Savings may return the same and cancel all proceedings taken in respect of it, or may take such other steps as may be necessary to give effect to the intention of the parties<sup>16</sup>.

1 See the National Savings Bank Act 1971 ss 2(1), 8; and PARA 810. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 National Savings Bank Act 1971 s 4(1); Savings Banks (Ordinary Deposits) (Limits) Order 1969, SI 1969/939, art 3(1) (art 3(1), (2) amended by SI 1969/1699; SI 1987/330; SI 1998/1446). See also the Savings Banks (Ordinary Deposits) (Limits) Order 1969, SI 1969/939, arts 3(2)-(5), 4 (art 3(2) as so amended; and art 4 amended by SI 1969/1699).

3 See the National Savings Bank Act 1971 s 5(1) (amended by the Finance Act 1989 s 184(2)). As to the calculation of interest on ordinary deposits see the National Savings Bank Regulations 1972, SI 1972/764, reg 43 (substituted by SI 1991/72). An ordinary account may not be opened after 28 January 2004, nor may an ordinary deposit be made after 31 July 2004, and any withdrawal from an ordinary account after 31 July 2004 must be for the whole amount standing to the credit of the account at the date of the withdrawal and any accrued interest that has not been credited to the account: National Savings Bank Regulations 1972, SI 1972/764, reg 2B (added by SI 2003/2895).

4 National Savings Bank Regulations 1972, SI 1972/764, reg 5(1) (amended by SI 1989/2045). As to the particulars to be disclosed by a depositor and the declaration to be made see the National Savings Bank Regulations 1972, SI 1972/764, reg 4.

5 See the National Savings Bank Regulations 1972, SI 1972/764, regs 6(1), 7(1) (reg 7 amended by SI 2007/1898). As to the particulars to be disclosed by a minor of under seven years of age and a person who lacks capacity see the National Savings Bank Regulations 1972, SI 1972/764, reg 6(2)-(4) (reg 6(4) substituted by SI 1989/2045); the National Savings Bank Regulations 1972, SI 1972/764, reg 7(2)-(4) (as so amended), reg 45. As to persons unable to write see reg 46 (amended by SI 2006/1066).

6 See the National Savings Bank Regulations 1972, SI 1972/764, regs 5(2), 9 (both amended by SI 1989/2045; and the National Savings Bank Regulations 1972, SI 1972/764, reg 9 further amended by SI 2007/1898). As to the provisions preventing the Director of Savings from receiving, or being affected with, notice of any trust see the National Savings Bank Regulations 1972, SI 1972/764, reg 48. As to powers of attorney see reg 49.

Joint accounts could be opened before 1 January 1990 and friendly, charitable, building and other societies, corporations and government departments could open accounts before that date: see regs 8, 10-12 (reg 8 amended by SI 1984/9; SI 1989/2045; SI 2007/1898; the National Savings Bank Regulations 1972, SI 1972/764, regs 10-12 amended by SI 1989/2045; the National Savings Bank Regulations 1972, SI 1972/764, reg 11 further amended by SI 2003/2895). As to deposits by charities etc see the National Savings Bank Act 1971 s 16.

7 See the National Savings Bank Regulations 1972, SI 1972/764, reg 30(1), (2). As to the transfer of an ordinary deposit in the National Savings Bank to an overseas savings bank, and vice versa, see the National Savings Bank Act 1971 s 15; and the National Savings Bank Regulations 1972, SI 1972/764, reg 31. As to the addition of names to an account see reg 32.

8 An application for the withdrawal of money deposited by or in the name of a minor may be made by the minor if he has attained the age of seven years: National Savings Bank Regulations 1972, SI 1972/764, reg 25. As to withdrawals in the case of bankrupts see reg 26 (amended by SI 1986/2001).

9 See the National Savings Bank Act 1971 s 7(1) (amended by the Finance Act 1982 Sch 20 para 6(a)); and the National Savings Bank Regulations 1972, SI 1972/764, regs 21, 29 (reg 21 amended by SI 1982/1282; SI 2006/1066; and the National Savings Bank Regulations 1972, SI 1972/764, reg 29 substituted by SI 1996/801; and amended by SI 1996/1724; SI 2006/1066). In the case of ordinary deposits, the depositor is entitled to repayment within ten days of his demand: see the National Savings Bank Act 1971 s 7(1) (as so amended). As to withdrawal of investment deposit accounts see PARA 812 note 2. Withdrawal of ordinary deposits may be made without previous notice: (1) at any savings bank office, to an amount not exceeding £100 in cash; or (2) at a designated savings bank office, to an amount not exceeding £250 in cash: National Savings Bank Regulations 1972, SI 1972/764, reg 22(1) (substituted by SI 1982/1762; and amended by SI 1989/25). As to the provisos applicable to such payments see the National Savings Bank Regulations 1972, SI 1972/764, reg 22(1) provisos (i)-(vi) (substituted by SI 1982/1762). As to designated savings bank offices see the National Savings Bank Regulations 1972, SI 1972/764, reg 22(1A) (added by SI 1982/1762). As to authority for payment to third parties see the National Savings Bank Regulations 1972, SI 1972/764, reg 27 (amended by SI 2006/1066). As to exemption of warrants etc from stamp duty see the National Savings Bank Regulations 1972, SI 1972/764, reg 50. As to stamp duty generally see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.



As to treasurer's accounts and their closure see PARA 812 note 7.

The provisions of the Bills of Exchange Act 1882 ss 76, 77(1), (3), (4), (5) and (6) (so far as they relate to crossed cheques), ss 78-81 (s 80 as amended) and the Cheques Act 1957 ss 3, 4 (both as amended) (see PARAS 882, 890) apply to any crossed warrant issued under the National Savings Bank Regulations 1972, SI 1972/764, as if the warrant were a cheque drawn on the Director of Savings by the officer issuing it, but nothing in those regulations makes any such warrant negotiable: reg 21(5).

10 See the National Savings Bank Act 1971 s 9 (amended by SI 1984/539); and the National Savings Bank Regulations 1972, SI 1972/764, reg 40 (amended by SI 1984/602). As to the law applicable on the death of a depositor see the National Savings Bank Regulations 1972, SI 1972/764, reg 39.

11 In the assets held in the National Savings Bank and specified in the National Savings Bank Regulations 1972, SI 1972/764, reg 41(2), (3) (reg 41(2) amended by SI 1988/1166; the National Savings Bank Regulations 1972, SI 1972/764, reg 41(3) amended by SI 1978/888; and SI 2004/1662).

12 See the National Savings Bank Regulations 1972, SI 1972/764, reg 41(1) (amended by SI 1978/888; SI 1993/3130; SI 2005/2114). The functions of the Inland Revenue and of Her Majesty's Customs and Excise have been taken over by the Commissioners for Her Majesty's Revenue and Customs appointed under the Commissioners for Revenue and Customs Act 2005 s 1: see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq; **INCOME TAXATION**. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS; VALUE ADDED TAX** vol 49(1) (2005 Reissue) PARA 13. As to inheritance tax see **INHERITANCE TAXATION** vol 24 (Reissue) PARA 401 et seq.

13 National Savings Bank Regulations 1972, SI 1972/764, reg 33(1) (amended by SI 1981/484). As to the former power of nomination see the National Savings Bank Regulations 1972, SI 1972/764, regs 33-38A (regs 33, 35 amended by SI 1981/484; the National Savings Bank Regulations 1972, SI 1972/764, reg 35 further amended by SI 2005/2114; the National Savings Bank Regulations 1972, SI 1972/764, reg 37 amended by SI 2007/1898; the National Savings Bank Regulations 1972, SI 1972/764, reg 38 amended by SI 1998/1446; and the National Savings Bank Regulations 1972, SI 1972/764, reg 38A added by SI 1998/1446 and amended by SI 2004/1662).

14 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 45 (amended by SI 1989/2046).

15 See the National Savings Bank Act 1971 s 12 (amended by the Finance Act 1988 s 126(5); the Finance Act 1989 s 142(9), (10); and the Finance Act 1999 s 137).

16 National Savings Bank Regulations 1972, SI 1972/764, reg 47.

## **UPDATE**

### **814 Regulation of deposit and withdrawal**

NOTE 3--Where no valid application has been made to withdraw all the money in an ordinary account before 12 May 2008, that money may be transferred by the Director of Savings to an investment account in the National Savings Bank or, where he is unable to do so, to a special Director's account: SI 1972/764 regs 2BA, 2BB (added by SI 2008/1142).

NOTE 9--SI 1972/764 reg 21 further amended: SI 2008/1164, SI 2008/3098.

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## **(3) BUSINESS OF BANKING**

### **(i) Relation of Banker and Customer**

#### **815. Meanings of 'bank' and 'banker'.**

It is the existence of enactments, instruments, agreements, rules, usages and practices which apply to a person by virtue of his being a bank or banker that makes relevant the meanings of the terms 'bank' and 'banker'<sup>1</sup>.

The principal enactments which apply to a person by virtue of his being a bank or banker are the Bills of Exchange Act 1882 and the Cheques Act 1957<sup>2</sup>. Both statutes refer exclusively to 'banker'<sup>3</sup> rather than 'bank'<sup>4</sup>.

The characteristics usually found in bankers are: (1) that they accept money from, and collect cheques for, their customers and place them to their credit; (2) that they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and (3) that they keep current accounts in their books in which the credits and debits are entered<sup>5</sup>. This statement of the essentials of banking business is not, however, exhaustive of all that is ordinary in such business; transactions which lack the above characteristics may nevertheless be usual banking transactions<sup>6</sup>.

The judicial recognition of the banker's lien<sup>7</sup> implies the inclusion in banking business of the making of advances or the granting of overdrafts to customers.

1 See *United Dominions Trust Ltd v Kirkwood* [1966] 2 QB 431 at 445, [1966] 1 All ER 968 at 974, CA, where Lord Denning MR collected together the statutory privileges then enjoyed by bankers.

2 See PARA 819 et seq. For examples of other statutes which define 'bank' or 'banker' see: (1) the Bank Charter Act 1844 (which provides that the term 'banker' is to extend and apply to all corporations, societies, partnerships, and persons, and every individual person, carrying on the business of banking, whether by the issue of notes or otherwise, except only the Bank of England: see s 28 (amended by the Statute Law Revision Act 1891; and the Statute Law Revision (No 2) Act 1893)); (2) the Agricultural Credits Act 1928 (which provides that 'Bank' means the Bank of England, a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 348 et seq) to accept deposits, or an EEA firm of the kind mentioned in Sch 3 para 5(b) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12(1)) to accept deposits or other repayable funds from the public (see PARA 315): see the Agricultural Credits Act 1928 s 5(7) (definition substituted by SI 2001/3649). As to the meaning of 'banking business' see *Koh Kim Chai v Asia Commercial Banking Corpn Ltd* [1984] 1 WLR 850, PC.

3 In the Bills of Exchange Act 1882, 'banker', unless the context otherwise requires, includes a body of persons whether incorporated or not who carry on the business of banking: s 2. The Cheques Act 1957 contains no definition of 'banker' but is to be construed as one with the Bills of Exchange Act 1882: Cheques Act 1957 s 6(1).

4 See eg the Bills of Exchange Act 1882 ss 60, 73, 74, 79, 80; and the Cheques Act 1957 ss 1-4. As to these provisions see PARAS 1405, 1411, 1519, 1552, 1575.

5 *United Dominions Trust Ltd v Kirkwood* [1966] 2 QB 431 at 447, [1966] 1 All ER 968 at 975, CA, per Lord Denning MR, where the main question was whether the plaintiff finance house was excluded from the statutory definition of 'moneylenders' by virtue of an exception for 'any person bona fide carrying on the business of banking' (see the Moneylenders Act 1900 s 6(d) (repealed)). See further *Re Roe's Legal Charge, Park Street Securities Ltd v Roe* [1982] 2 Lloyd's Rep 370, CA.

6 *Royal Bank of Canada v IRC* [1972] Ch 665 at 679, [1972] 1 All ER 225 at 235 per Megarry J. Numerous other transactions are undertaken at the present day by banks. These include the payment, discounting and collection of bills; money transfers; the issue of letters of credit and performance bonds; the operation of credit and cash card systems; the issue of certificates of deposit and other commercial paper; the custody of valuables; and the issue of travellers' cheques. See PARA 832 et seq.

7 *Brandao v Barnett* (1846) 3 CB 519, HL. See PARA 860 et seq.

5TH EDITION, PARAS 1620-2586)/3. BANKING/(3) BUSINESS OF BANKING/(i) Relation of Banker and Customer/816. Meaning of 'customer'.

### 816. Meaning of 'customer'.

A customer is someone who has an account with a bank or who is in such relationship with the bank that the relationship of banker and customer exists, even though at this stage he has no account<sup>1</sup>. An occasional or even regular encashment of a cheque is not sufficient to establish the relationship of banker and customer<sup>2</sup>. At the same time, the duration of the relationship is not of the essence<sup>3</sup>. It is usual for banks to make inquiries as to prospective customers to ensure that they are suitable persons with whom to enter into relations; and failure to do so may be a factor in a subsequent claim against the bank for conversion of a cheque collected for the customer's account<sup>4</sup>. The inquiries the bank should make depend upon current banking practice related to the particular circumstances of the case<sup>5</sup>.

1 *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414 at 420-421, HL, per Lord Davey, and at 422-423 per Lord Brampton; *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166. See PARA 883. See also *Koh Kim Chai v Asia Commercial Banking Corpn Ltd* [1984] 1 WLR 850, PC, where a distinction was made between a customer and a third party giving security in support of an advance.

2 *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL.

3 *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683, PC.

4 *Turner v London and Provincial Bank Ltd* (1903) 2 Legal Decisions Affecting Bankers 33; *Ladbroke and Co v Todd* [1914] WN 165. The inquiries which a bank must undertake are now largely determined by the money laundering regulations: see PARA 831.

5 *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573 at 579, [1968] 1 WLR 956 at 972, CA, per Diplock LJ. See also *Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd* [1966] 2 Lloyd's Rep 373, CA; *Architects of Wine Ltd v Barclays Bank plc* [2007] EWCA Civ 239, [2007] 2 All ER (Comm) 285.

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### 817. Relation of banker and customer.

The receipt of money<sup>1</sup> by a banker from or on account of his customer constitutes him the debtor of the customer<sup>2</sup>. The banker is normally liable to repay only the person from whom he received the money<sup>3</sup>. The bank borrows the money and undertakes to repay it or any part of it<sup>4</sup> at the branch of the bank where the account is kept<sup>5</sup>, during banking hours, and upon payment being demanded<sup>6</sup>. Moreover, the bank undertakes to pay any part of the amount due against the written orders of the customer<sup>7</sup>, the relationship here being one of agent and principal, a cheque being the principal's order to his agent to pay the amount of the cheque to the payee<sup>8</sup>. The customer, on his part, undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or facilitate forgery and, if he becomes aware that forged cheques are being presented, to inform the bank<sup>9</sup>. The contract between banker and customer cannot be unilaterally varied<sup>10</sup>, though there may be terms implied into the contract<sup>11</sup>.

The banker is not a trustee for the customer<sup>12</sup>, who has no right to inquire into, or question the use of, the money by the banker<sup>13</sup>; but the position is otherwise if the banker assumes the office of trustee<sup>14</sup>. Moreover, a banker is affected by the existence of a trust where an account is opened by a customer acting in the capacity of trustee<sup>15</sup>, or where the banker is on notice

that a payment into or out of the account is in breach of trust<sup>16</sup>, or where money is paid to a banker for a particular purpose in circumstances such as to impress the payment with a trust<sup>17</sup>.

The receipt of money on deposit account constitutes the banker a debtor to the depositor<sup>18</sup> but not a trustee of the money for him<sup>19</sup>. No new contract is created every time there is a fresh deposit: the account is a continuing one<sup>20</sup>. The debt is repayable either on demand or on conditions agreed with the depositor. Specified notice may be stipulated for, and the return of the deposit book (or receipt) made a condition of repayment, or the deposit may be for a fixed period. If the return of the deposit book is a condition precedent, no actual debt arises until its return<sup>21</sup>. In case of the loss of the book, however, a court would exercise its equitable jurisdiction, and not allow the absence of the receipt to stand in the way of the depositor reclaiming his money<sup>22</sup>. Nor would the court require the depositor to give an indemnity, the deposit book or receipt not being a negotiable instrument<sup>23</sup>. However, for the purpose of satisfying High Court or county court judgments for the payment of money, a sum standing to a person's credit in a deposit account in a bank is deemed to be a sum due or accruing due to that person, and is attachable accordingly<sup>24</sup>.

The receipt of rent by a banker into a customer's account does not make the banker the agent of the owner for the purposes of the Public Health Act 1936<sup>25</sup>.

The banker owes his customer a contractual duty of secrecy<sup>26</sup>. The relation of banker and customer may also give rise to a contractual or tortious duty of care or a fiduciary duty where the banker gives his customer advice<sup>27</sup>; but where the parties are in a contractual relationship, it is not to the advantage of the law's development to search for liability in tort, particularly in a commercial relationship<sup>28</sup>.

The relation of banker and customer is not one which ordinarily gives rise to a presumption of undue influence; in the ordinary course of banking business a banker can explain the nature of a proposed transaction without laying himself open to a charge of undue influence<sup>29</sup>.

The banker has at law a right of lien<sup>30</sup> and a right to combine accounts<sup>31</sup>.

It is unlawful for any person concerned with the provision of banking services and facilities to the public or a section of the public to discriminate against a disabled person in refusing to provide, or deliberately not providing, those services or facilities, or in the standards or terms of those services or facilities<sup>32</sup>. It is also unlawful to discriminate on the grounds of sex, race, colour, ethnic or national origins, religion or belief or sexual orientation<sup>33</sup>.

1     le in so far as the receipt of money on current account consists in the collection of cheques and similar instruments: see PARA 881 et seq (bank as customer's agent for collection).

2     *Foley v Hill* (1848) 2 HL Cas 28. This rule has been confirmed on numerous occasions: see eg *Duggan v Governor of Full Sutton Prison* [2004] EWCA Civ 78, [2004] 2 All ER 966. As to the factors relevant to the proper law of the contract between banker and customer see *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, [1989] 3 All ER 252, where it was held that there was one contract governed in part by the law of England and in part by the law of New York; *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821, [1998] 15 LS Gaz R 32.

3     *Stoney Stanton Supplies (Coventry) Ltd v Midland Bank Ltd* [1966] 2 Lloyd's Rep 373, CA.

4     *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127, CA, per Atkin LJ.

5     *Clare & Co v Dresdner Bank* [1915] 2 KB 576; *Richardson v Richardson* [1927] P 228; cf *Joseph Leete & Sons v Direction der Disconto Gesellschaft* (1915) 85 LJBK 281.

6     *Isaacs v Barclays Bank Ltd and Barclays Bank (France) Ltd* [1943] 2 All ER 682 at 685 per Tucker J; *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127, CA, per Atkin LJ; *Libyan Arab Foreign Bank v Bankers Trust Co* [1988] 1 Lloyd's Rep 259 at 272 per Staughton J. The presentation of a cheque is a demand. The balance on a current account also becomes due when the relationship of banker and customer is ended: see *Re Russian Commercial and Industrial Bank* [1955] Ch 148, [1955] 1 All ER 75. A credit balance on current account is a liquidated sum of money, and the right of an enemy customer to payment is suspended and not abrogated

on the outbreak of war: see *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas) Ltd* [1952] 2 TLR 920; affd [1953] 2 QB 527, [1953] 2 All ER 263, CA; affd [1954] AC 495, [1954] 2 All ER 226, HL. See **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 573 et seq.

7 *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127, CA, per Atkin LJ. As to the banker's contractual duty of care not, without inquiry, to continue honouring cheques in certain circumstances see PARA 832. A bank which receives and acknowledges an irrevocable instruction from its customer to transfer funds owes no tortious duty of care to the intended beneficiary of the payment and will not be liable to him should the bank fail to execute the payment instruction: *Wells v First National Commercial Bank* [1998] PNLR 552, CA.

8 *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124 at 126, HL, per Lord Atkinson; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1107, [1968] 1 WLR 1555 at 1594 per Ungood-Thomas J. See also *Agip (Africa) Ltd v Jackson* [1991] Ch 547, [1992] 4 All ER 451, CA.

9 *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127, CA, per Atkin LJ; *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 at 381, CA, per Scrutton LJ (affd [1933] AC 51, HL). The customer's duty to inform the bank of any forged payment arises where the customer has actual, not constructive, knowledge of the forgery: see *Price Meats Ltd v Barclays Bank plc* [2000] 2 All ER (Comm) 346. See also PARA 829.

10 *Burnett v Westminster Bank Ltd* [1966] 1 QB 742, [1965] 3 All ER 81 (notice on cheque book cover restricting use of cheques to a particular account held to be ineffective).

11 There is no implied term in a contract between a bank and its customer requiring the bank to inform the customer of a new type of facility: *Suriya & Douglas (a firm) v Midland Bank plc* [1999] 1 All ER (Comm) 612, CA. Nor is there an implied term in a banking facility that the bank will give reasonable notice of termination: *Socomex Ltd, De Bolton and Socomex Futures Ltd v Banque Bruxelles Lambert SA* [1996] 1 Lloyd's Rep 156. See also *Barclays Bank plc v Green* (13 November 1995, unreported); *Cunnington v Barclays Bank plc* (3 April 1996, unreported).

12 See *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127, CA, per Atkin LJ. See also *Re I* [2007] EWHC 2025 (Admin), [2007] All ER (D) 45 (Jul) (where the operator of a money transfer service, who transferred funds in various currencies around the world, in accordance with agreed exchange rate, was considered to be in position more analogous to that of a banker than of a trustee).

13 *Foley v Hill* (1848) 2 HL Cas 28; *Re Agra and Masterman's Bank, ex p Waring* (1866) 36 LJ Ch 151.

14 In general a bank acting as trustee is under like duties to those of any other trustee. Where a trustee, such as a bank trust corporation, holds itself out as having the skill and expertise to carry on the specialised business of trust management, the duty of care of such a trustee is higher than the standard of care of the ordinary prudent man of business (as demanded of a trustee without specialised knowledge): see *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515, [1980] 1 All ER 139; *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92. Where a trust corporation fills the double capacity of trustee and banker, its successors in the trust are in no worse position as regards the obtaining of information with respect to the trust bank account than they would have been in if a third party had been the banker, although such a case may justify the drawing of a line between mere banking books or documents, and trust books or documents: see *Tiger v Barclays Bank Ltd* [1952] 1 All ER 85 at 88, CA, per Jenkins LJ. If the bank is a trustee and places trust money on deposit with itself, the terms of the charging clause in the trust instrument may be such as to exclude the bank from having to account to the beneficiaries for profit from employing the trust money in its business: see *Re Waterman's Will Trusts, Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054. See generally **TRUSTS**.

15 See PARA 824.

16 See PARA 843.

17 See PARA 825.

18 See note 2.

19 *Pearce v Creswick* (1834) 2 Hare 286; *Re Head, Head v Head* [1893] 3 Ch 426; *Re Head, Head v Head (No 2)* [1894] 2 Ch 236, CA.

20 *Hart (Inspector of Taxes) v Sangster* [1957] Ch 329, [1957] 2 All ER 208, CA.

21 Cf *Atkinson v Bradford Third Equitable Benefit Building Society* (1890) 25 QBD 377, CA; *Re Tidd, Tidd v Overell* [1893] 3 Ch 154; *Re Dillon* (1890) 44 ChD 76, CA. See also *Bagley v Winsome and National Provincial Bank Ltd* [1952] 2 QB 236, [1952] 1 All ER 637, CA. As to the attachment of deposit balances see the Supreme Court Act 1981 s 40; and PARA 870. The sterling negotiable certificates of deposit issued since 1968

acknowledge the receipt of a sterling deposit upon terms that it is payable to bearer on surrender of the certificate.

22 *Re Dillon* (1890) 44 ChD 76 at 81, CA, per Cotton LJ.

23 *Re Dillon* (1890) 44 ChD 76 at 83, CA, per Lindley LJ. Even if the deposit receipt had combined with it a form of cheque, and this was filled up and signed by the depositor before the loss, it is apprehended that, as the banker could not be sued on the cheque, he would not be entitled to an indemnity.

24 See PARA 870.

25 *Midland Bank Ltd v Conway Borough Council* [1965] 2 All ER 972, [1965] 1 WLR 1165, DC. As to the meaning of 'owner' for the purposes of the Public Health Act 1936 see s 343(1); and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 116.

26 See PARA 910 et seq.

27 See PARA 922.

28 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107, [1985] 2 All ER 947 at 957, PC; and see *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, CA; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, CA, sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, affd [1991] 2 AC 249, [1990] 2 All ER 947, HL.

29 *National Westminster Bank plc v Morgan* [1985] AC 686 at 707, [1985] 1 All ER 821 at 829; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 at PARA [10] per Lord Nicholls. See further PARA 970.

30 See PARA 860 et seq.

31 See PARA 867.

32 See the Disability Discrimination Act 1995 s 19(1); and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 585.

33 See the Sex Discrimination Act 1975 s 29; the Race Relations Act 1976 s 20; the Equality Act 2006 Pt 2 (ss 44-80); the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263; and **DISCRIMINATION** vol 13 (2007 Reissue) PARAS 382, 461, 691 et seq, 753.

## UPDATE

### 817 Relation of banker and customer

NOTE 21--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 818. Customers opening accounts.

Anyone may be a customer of a bank<sup>1</sup>. An account may be opened by a married woman<sup>2</sup>, a minor<sup>3</sup>, a trustee, an executor, a local authority, an unincorporated body or a company or corporation formed under the Companies Acts, royal charter or otherwise<sup>4</sup>. None of these customers except the minor is under any contractual disability in this connection<sup>5</sup>. Accounts may be opened for special purposes, as, for instance, in the case of 'wages' accounts intended to preserve a binding banker's priority in a winding up of the company<sup>6</sup>.

- 1 As to what gives rise to the relation of banker and customer see PARA 817.
- 2 As to married women see PARA 819; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 204 et seq.
- 3 As to minors see PARA 820; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 3 et seq.
- 4 As to companies and corporations see PARA 822; and **COMPANIES; CORPORATIONS**.
- 5 As to the contractual capability of minors see PARA 820; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 12 et seq; **CONTRACT** vol 9(1) (Reissue) PARA 630.
- 6 See the Insolvency Act 1986 ss 175, 386, Sch 6 paras 9-15; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 763, 769.

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### **819. Married women.**

A current account may be opened with a married woman in her own name. Opening it constitutes a binding contract with the married woman who contracts as a feme sole<sup>1</sup>. She has power to draw cheques and give a sufficient discharge<sup>2</sup>; and bona fide dealings with the account cannot subsequently be questioned to the prejudice of the banker<sup>3</sup>.

- 1 See the Law Reform (Married Women and Tortfeasors) Act 1935 ss 1, 2; the Married Women (Restraint upon Anticipation) Act 1949 s 1(1), (2); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 204.
- 2 Bills of Exchange Act 1882 s 22(1). See also PARAS 1465, 1466.
- 3 *Re Montague, ex p Ward v London and South Western Bank* (1897) 76 LT 203.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/3. BANKING/(3) BUSINESS OF BANKING/(i) Relation of Banker and Customer/820. Minors.

### **820. Minors.**

A minor is a person who has not reached the age of 18 years<sup>1</sup>. A current account may be opened with a minor so long as it is not allowed to be overdrawn; for a minor may be a creditor<sup>2</sup>. The recoverability of money lent to a minor by way of overdraft is governed by the rules of common law<sup>3</sup>. A bill drawn or indorsed by a minor entitles the holder to receive payment, and to enforce it against any other party to it<sup>4</sup>. A minor cannot reclaim money paid out to him or to others on his cheques<sup>5</sup>. In the case of joint deposit accounts in the name of an adult and a minor, the contract depends upon the terms on which the deposit is made<sup>6</sup>.

Where a guarantee is given in respect of an obligation of a party to a contract made on or after 9 June 1987<sup>7</sup> and the obligation is unenforceable against him, or he repudiates the contract,

because he was a minor when the contract was made, the guarantee is not for that reason alone unenforceable against the guarantor<sup>8</sup>.

1 See the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 3.

2 Cf *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL; and see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 23, 42, 49.

3 The Infants Relief Act 1874 s 1, which rendered 'absolutely void' all contracts entered into by infants for the repayment of money lent or to be lent, was repealed by the Minors' Contracts Act 1987 ss 1(a), 4(2), 5(2) as regards contracts made on or after 9 June 1987. As to the rules of common law see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 12. Where a person (the 'claimant') on or after 9 June 1987 enters into a contract with another (the 'defendant') and the contract is unenforceable against the defendant, or he repudiates it, because he was a minor when the contract was made, the court may, if it is just and equitable to do so, require the defendant to transfer to the claimant any property acquired by the defendant under the contract, or any property representing it: ss 3(1), 5(2). This power is without prejudice to any other remedy available to the claimant (s 3(2)), including presumably the remedy of tracing (see PARA 857).

4 Bills of Exchange Act 1882 s 22(2). See also PARA 1471.

5 The disability of minority goes no further than is necessary for the protection of the minor: *Burnaby v Equitable Reversionary Interest Society* (1885) 28 ChD 416 at 424 per Pearson J; *Valentini v Canali* (1889) 24 QBD 166; *Pearce v Brain* [1929] 2 KB 310. See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 37, 46, 50.

6 *McEvoy v Belfast Banking Co Ltd* [1935] AC 24, HL. See also PARA 823.

7 Ie the date on which the Minors' Contracts Act 1987 came into force: see s 5(2). See also note 3.

8 Minors' Contracts Act 1987 s 2. This reversed the position at common law, as to which see *Coutts & Co v Browne-Lecky* [1947] KB 104, [1946] 2 All ER 207, not following *Wauthier v Wilson* (1912) 28 TLR 239, CA; and see *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, [1961] 1 WLR 828, CA (where a third party's undertaking to indemnify against any loss arising out of a hire-purchase agreement with a minor was held valid as a contract of indemnity).

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## 821. Persons lacking capacity.

Where a person is mentally disabled or disordered or lacks capacity and the banker knows of it, he has no mandate on which to act; though if he collects a cheque for the person, it is likely that the banker could claim that he collected for a 'customer'; otherwise any balances and securities the person may have with the bank are tied, to be dealt with on the directions of the Court of Protection or by the depositor if he recovers and again becomes capable of contracting<sup>1</sup>. Money lent by a bank to meet necessities for such a person's household and estate may be recovered by right of subrogation; but claims for interest and charges do not lie<sup>2</sup>.

1 See generally **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 596 et seq, 641 et seq.

2 See *Re Beavan, Davies, Banks & Co v Beavan* [1912] 1 Ch 196; *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48; *Scarth v National Provincial Bank Ltd* (1930) 4 LDAB 241.



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## **822. Companies and corporations.**

In the absence of an express power, companies and corporations, whether trading or non-trading, ordinarily have implied power to open current and deposit accounts and to draw valid cheques and make withdrawals<sup>1</sup>.

<sup>1</sup> See *Serrell v Derbyshire, Staffordshire and Worcestershire Junction Rly Co* (1850) 9 CB 811 at 820 (where it was conceded that the directors had implied power to draw cheques for the lawful purposes of the company); *Bateman v Mid-Wales Rly Co* (1866) LR 1 CP 499 at 506 (distinguishing cheques from bills). As to the capacity of corporations to incur liability on negotiable instruments see PARA 1466.

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## **823. Joint accounts.**

Unless the contract otherwise provides, a sum standing to the credit of a joint account is a debt owed to the creditors jointly and is not enforceable by either on his own<sup>1</sup>. Where the mandate provides for both account holders to sign, the bank impliedly undertakes to each of them severally not to honour orders for payment without his or her signature<sup>2</sup>. A claim for breach of such an undertaking may be brought without joining the other account holder, and the measure of damages is prima facie equal to the value of the claimant's interest in the moneys wrongfully paid away<sup>3</sup>.

Where a person deposits money with a bank in the names of himself and another with instructions that it is to be payable to either person or the survivor, the other's right at common law against the bank depends on whether the depositor purported to make the other a party to the contract; if the depositor did so, then he must have had authority to act as the other's agent. If there was no such authority, the bank would not be under obligation to the other party unless the latter ratified the contract<sup>4</sup>.

If on the death of either party the current account is overdrawn, the survivor will be liable for the whole debt. Where the money is in the name of husband and wife, the position on the husband's death may depend upon the reason for setting up the joint account<sup>5</sup>.

<sup>1</sup> *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650; *Catlin v Cyprus Finance Corp'n (London) Ltd (Catlin, third party)* [1983] QB 759, [1983] 1 All ER 809.

<sup>2</sup> *Catlin v Cyprus Finance Corp'n (London) Ltd (Catlin, third party)* [1983] QB 759, [1983] 1 All ER 809, following *Jackson v White and Midland Bank Ltd* [1967] 2 Lloyd's Rep 68 (where it was held that, by the mandate, the bank had made an agreement with both customers jointly that it would honour cheques signed by them jointly, and also separate agreements with each of them severally that it would not honour any cheques unless the customer had signed, so that, having honoured cheques not signed by the plaintiff but forged by the other customer, the bank was liable to the plaintiff for breach of the separate agreement). Cf *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650 (where two executors opened a joint bank account and the mandate authorised the bank to honour any drawings on the account signed by both executors, and one executor forged the other's signature; it was held that the executors' right to have cheques honoured by the bank only if signed

by both of them was a right owed to them jointly, and it could only be enforced in an action brought either by both executors joining as plaintiffs or by one as plaintiff joining the other as defendant (this being merely a procedural matter), neither of which was possible because several persons cannot sue at law jointly unless each one is in a position to sue). See further PARA 849.

3 *Twibell v London Suburban Bank* [1869] WN 127; *Catlin v Cyprus Finance Corp'n (London) Ltd (Catlin, third party)* [1983] QB 759, [1983] 1 All ER 809, not following *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650.

4 See *McEvoy v Belfast Banking Co Ltd* [1935] AC 24, HL, in relation to joint deposits with a minor. A joint account holder is not prevented from succeeding to the joint account by survivorship on the ground that he has not contributed to the account where it is established that the deceased, the other account holder, intended that he should so succeed: *Aroso v Coutts & Co* [2002] 1 All ER (Comm) 241. The other named account holder may be able to invoke the Contracts (Rights of Third Parties) Act 1999 s 1(1)(b), which permits a third party to enforce a term of a contract if the term purports to confer a benefit on him, but not if on a true construction of the contract it appears that the parties did not intend the term to be enforceable by the third party (see s 1(2)). See **CONTRACT**.

5 Where the customers are husband and wife and the latter survives the former, the rule permitting the survivor to draw any balance standing to a joint account may not apply. The position depends on whether the wife was joined in the account as a matter of convenience or whether the husband intended to provide for her in the event of his death: see *Husband v Davis* (1851) 10 CB 645; *Re Williams, Williams v Davies* (1864) 3 Sw & Tr 437; *Marshall v Crutwell* (1875) LR 20 Eq 328; *Hall v Hall* [1911] 1 Ch 487; *Re Bishop, National Provincial Bank Ltd v Bishop* [1965] Ch 450, [1965] 1 All ER 249. In the case of a joint account between a husband and wife no restriction is implied into a mandate unless there is an express provision which limits a bank's freedom to honour a cheque drawn by one account-holder without reference to the other: *Fielding v Royal Bank of Scotland plc* [2004] EWCA Civ 64, [2004] All ER (D) 183 (Feb).

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## **824. Trust accounts.**

A trust account is an account opened by a customer acting as a trustee or fiduciary and designated as a trust account or in some other way to indicate its fiduciary nature<sup>1</sup>. The ordinary relation between a banker and a customer acting as trustee or fiduciary is that of debtor and creditor<sup>2</sup>. Strictly speaking, it is inaccurate to refer to the credit balance on a trust account as 'trust moneys'. Money so paid into a bank ceases altogether to be money of the customer, the subject matter of the trust being the right to repayment. The designation of an account as a trust account or in some equivalent way fixes the banker with notice of the existence of a trust, which limits the banker's right to combine accounts<sup>3</sup> and establishes a necessary element in any claim to render the banker liable as constructive trustee<sup>4</sup>.

1 For an example of an account headed in some other way see *Re Gross, ex p Adair* (1871) 24 LT 198; affd sub nom *Re Gross, ex p Kingston* (1871) 6 Ch App 632, where an account heading 'Police Account' was held to be as clear and distinct a statement that the moneys paid into it were trust moneys belonging to the county, as if the moneys had been put into a strong box labelled 'County Moneys'.

2 *Foley v Hill* (1848) 2 HL Cas 28; and see *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370 at 378, [1978] 1 WLR 798 at 803 per John Mills QC.

3 As to the banker's right to combine accounts see PARA 867.

4 As to the banker as constructive trustee see PARA 843.

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### **825. Money paid for a special purpose.**

The legal relation of debtor and creditor does not exclude the implication of a trust enforceable in equity, there being no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies<sup>1</sup>.

An arrangement for the payment of a person's creditors by a third party may give rise to a relationship of a fiduciary character or trust in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third party<sup>2</sup>. The lender acquires an equitable right to see that the payment is applied for the primary designated purpose, and when this purpose has been carried out, the lender has his remedy against the borrower in debt; if the primary purpose cannot be carried out and a secondary purpose has been agreed, expressly or by implication, the remedies of equity may be invoked to give effect to it<sup>3</sup>.

Where the debtor is a customer of the bank and the bank receives such a payment in circumstances where it is on notice that the arrangement includes a secondary trust, the bank may not, if the primary purpose fails, apply the payment to discharge a debt owed to it by the debtor<sup>4</sup>; and the money so paid will not form part of the debtor's assets so as to fall within the assets charged to the bank under a floating charge<sup>5</sup>.

<sup>1</sup> *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at 581, [1968] 3 All ER 651 at 656, HL, per Lord Wilberforce. For an analysis of the Quistclose trust, see the dissenting speech of Lord Millett in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 All ER 377.

<sup>2</sup> *Toovey v Milne* (1819) 2 B & Ald 683; *Edwards v Glyn* (1859) 2 E & E 29; *Re Rogers, ex p Holland and Hannen* (1891) 8 Morr 243; *Re Drucker, ex p Basden* [1902] 2 KB 237, CA; *Re Hooley, ex p Trustee* (1915) 84 LJB 1415; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL. As to whether such an arrangement gives rise to a trust see further *Re Chelsea Cloisters Ltd* (1980) 41 P & CR 98, CA; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155; *Re Multi Guarantee Co Ltd* [1987] BCLC 257; *Re EVTR, Gilbert v Barber* [1987] BCLC 646, CA.

<sup>3</sup> *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at 581, [1968] 3 All ER 651 at 656, HL, per Lord Wilberforce. See further **EQUITY**.

<sup>4</sup> *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL.

<sup>5</sup> *Re EVTR, Gilbert v Barber* [1987] BCLC 646, CA.

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### **826. Solicitors' client and trust accounts.**

With the concurrence of the Master of the Rolls, the Council of the Law Society<sup>1</sup> must make rules:

- 1 (1) as to the opening and keeping by solicitors of accounts at banks<sup>2</sup> or with building societies for clients' money;

- 2 (2) as to the keeping by solicitors of accounts containing particulars and information as to money received or held or paid by them for or on behalf of their clients; and
- 3 (3) empowering the Council to take such action as may be necessary to enable it to ascertain whether or not the rules are being complied with,

and the rules may specify the location of the branches at which the accounts are to be kept<sup>1</sup>.

With the concurrence of the Master of the Rolls, the Council must also make rules:

- 4 (a) as to the opening and keeping by solicitors of accounts at banks or with building societies for money comprised in controlled trusts<sup>2</sup>;
- 5 (b) as to the keeping by solicitors of accounts containing particulars and information as to money received or held or paid by them for or on account of any such trust; and
- 6 (c) empowering the Council to take such action as may be necessary to enable it to ascertain whether or not the rules are being complied with,

and the rules may specify the location of the branches at which the accounts are to be kept<sup>3</sup>.

The rules must make provision for requiring a solicitor, in such cases as may be prescribed by the rules, either:

- 7 (i) to keep on deposit in a separate account at a bank or with a building society for the benefit of the client money received for or on account of a client; or
- 8 (ii) to make good to the client out of the solicitor's own money a sum equivalent to the interest which would have accrued if the money so received had been so kept on deposit<sup>4</sup>.

Where a solicitor keeps an account with a bank or a building society, the bank or society does not incur any liability, nor is it under any obligation to make any inquiry, nor is it deemed to have any knowledge of any right of any person to any money paid or credited to the account, which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it; and the bank or society does not have any recourse or right against money standing to the credit of the account, in respect of any liability of the solicitor to the bank or society, other than a liability in connection with the account<sup>5</sup>. The purpose of the provisions of head (i) above is not to give the bank a special advantage but to ensure that it suffers no special disadvantage; their purpose is not to put a solicitor's client account in some special category in which constructive trusteeship can never arise<sup>6</sup>.

Money paid into a client account is a debt owing from the banker to the solicitor<sup>7</sup>; but it may also be, in effect, trust money to the banker's knowledge<sup>10</sup>. It will be attached by a third party debt order served on the bank<sup>11</sup>.

1 As to the constitution of the Council of the Law Society see **LEGAL PROFESSIONS** vol 65 (2008) PARA 604. As to the Master of the Rolls see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 303; **COURTS** vol 10 (Reissue) PARA 515.

2 Except where the context otherwise so requires, 'bank' means the Bank of England, a person (other than a building society) who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 348 et seq) to accept deposits, or an EEA firm of the kind mentioned in Sch 3 para 5(b) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12) to accept deposits (see PARA 315); Solicitors Act 1974 s 87(1) (definition substituted by SI 2001/3649). A body comprised in the new TSB group (see PARA 809 note 3) is a bank for the purposes of the Solicitors Act 1974: Trustee Savings Banks Act 1985 s 3(9), Sch 1 para 11(2)(b).

3 Solicitors Act 1974 s 32(1) (amended by the Building Societies Act 1986 Sch 18 para 11(1), (2), Sch 19 Pt I). The rules that have been made are the Solicitors' Accounts Rules 1998 (dated 22 July 1998): see **LEGAL PROFESSIONS** vol 66 (2009) PARA 835 et seq.

4 Except where the context otherwise requires, 'controlled trust', in relation to a solicitor, means a trust of which he is a sole trustee or co-trustee only with one or more of his partners or employees: Solicitors Act 1974 s 87(1).

5 Solicitors Act 1974 s 32(2) (amended by the Building Societies Act 1986 Sch 18 para 11(1), (2), Sch 19 Pt I). The rules that have been made are the Solicitors' Trust Accounts Rules 1986 (dated 11 December 1986).

6 Solicitors Act 1974 s 33(1) (amended by the Building Societies Act 1986 Sch 18 para 11(1), (3)). The rules that have been made are the Solicitors' Accounts (Deposit Interest) Rules 1988 (dated 21 July 1988).

7 Solicitors Act 1974 s 85 (amended by the Building Societies Act 1986 Sch 18 para 11(1), (4)).

8 *Lipkin Gorman v Karpnale Ltd* [1987] 1 WLR 987 at 997 per Allott J; revsd on appeal without affecting this point [1992] 4 All ER 409, [1989] 1 WLR 1340, CA.

9 *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107 at 118, [1936] 1 All ER 653 at 659 per du Parcq J.

10 *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107 at 117, [1936] 1 All ER 653 at 657 per du Parcq J.

11 See *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107 at 118, [1936] 1 All ER 653 at 659 per du Parcq J; *Roberts v Death* (1881) 8 QBD 319, CA; and PARA 869. See also **CIVIL PROCEDURE** vol 12 (2009) PARA 1411 et seq.

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## 827. Dispositions by customer.

Money on current account is subject to many of the legal incidents of a debt. It passes under a bequest by the customer of 'money owing to me at the time of my decease'<sup>1</sup>, though it equally falls within a bequest of 'ready money'<sup>2</sup>. It is payable to the legal representatives of a deceased customer on production of probate or letters of administration<sup>3</sup>. It is repayable on demand, the drawing of a cheque not being a condition precedent<sup>4</sup>. It may be legally assigned<sup>5</sup>, but probably only as a whole, by a single assignment<sup>6</sup>. In England a cheque is not an assignment<sup>7</sup>.

On the bankruptcy of the customer, any balance to his credit vests in his trustee in bankruptcy<sup>8</sup>, and the banker may be summarily compelled to pay it over<sup>9</sup>. Where, whether before or after the service of written notice by the trustee claiming for the bankrupt's estate any property which has been acquired by, or has devolved upon, a bankrupt since the commencement of the bankruptcy<sup>10</sup>, a banker enters into a transaction in good faith and without notice of the bankruptcy, the trustee is not in respect of that transaction entitled<sup>11</sup> to any remedy against that banker, or any person whose title to any property derives from him<sup>12</sup>.

1 *Re Derbyshire, Webb v Derbyshire* [1906] 1 Ch 135.

2 *Stein v Ritherdon* (1868) 37 LJ Ch 369. As to the meaning of 'money' and other testamentary descriptions of property see **WILLS** vol 50 (2005 Reissue) PARAS 577 et seq, 584.

3 *Tarn v Commercial Bank of Sydney* (1884) 12 QBD 294.

4 *Foley v Hill* (1848) 2 HL Cas 28 at 36, 43; *Pott v Clegg* (1847) 16 M & W 321; *Walker v Bradford Old Bank Ltd* (1884) 12 QBD 511; *Re Tidd, Tidd v Overell* [1893] 3 Ch 154. However, the obligation to repay only rises upon demand: *Joachimson v Swiss Bank Corp'n* [1921] 3 KB 110, CA.

5 Law of Property Act 1925 s 136(1); *Walker v Bradford Old Bank Ltd* (1884) 12 QBD 511. As to the assignment of deposit accounts see PARA 858. See further **CHOSER IN ACTION** vol 13 (2009) para 72 et seq.

6 *Re Steel Wing Co Ltd* [1921] 1 Ch 349; *Bank of Liverpool and Martins Ltd v Holland* (1926) 43 TLR 29. But see, contra, *Schroeder v Central Bank of London Ltd* (1876) 34 LT 735; *Skipper and Tucker v Holloway and Howard* [1910] 2 KB 630 (revsd [1910] 2 KB 635n, CA, upon the facts). In *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81 at 100, CA, Greer LJ held that an assignee of part of a debt was a mere equitable assignee.

7 Bills of Exchange Act 1882 s 53(1). See also PARA 1453.

8 See the Insolvency Act 1986 ss 283(1), 306, 385(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216.

9 See the Insolvency Act 1986 s 312(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 396.

10 *Id* pursuant to the Insolvency Act 1986 s 307: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 445 et seq.

11 *Id* by virtue of the Insolvency Act 1986 s 307.

12 See the Insolvency Act 1986 s 307(4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 446. As to the effect of a bankruptcy order on dispositions on and after the day of presentation of the petition see PARA 835.

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## **828. Customer's title to money paid in.**

A banker is not entitled to refuse his customer's demand for repayment on grounds of mere suspicion or curiosity<sup>1</sup>. Similarly, where a banker takes money from his customer in discharge of a debt, he is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it<sup>2</sup>.

A banker is, however, not only entitled but bound to refuse payment if he has, or a reasonable banker would have, grounds for believing that the authorised signatories on an account are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intentions<sup>3</sup>; or if he is on notice that the payment is in breach of trust<sup>4</sup>.

Where the customer's title to money or cheques paid into the account is defective, the banker may become exposed to a tracing claim<sup>5</sup>, a claim in conversion, or a claim for money had and received<sup>6</sup>.

1 *Gray v Johnston* (1868) LR 3 HL 1 at 11, HL, per Lord Cairns, and at 14 per Lord Westbury; *Bank of New South Wales v Goulburn Valley Butter Co Pty* [1902] AC 543, PC; *Backhouse v Charlton* (1878) 8 ChD 444; *Coleman v Bucks and Oxon Union Bank* [1897] 2 Ch 243; *Bhogal v Punjab National Bank* [1988] 2 All ER 296 at 300, CA, per Dillon LJ. See also *Tassell v Cooper* (1850) 9 CB 509. Note however that the money laundering legislation may affect the bank's approval in cases of suspicion: see eg the situation which arose in *Tayeb v HSBC Bank plc* [2004] EWHC 1529, [2004] 4 All ER 1024, [2004] 2 All ER (Comm) 880: see also PARA 831.

2 *Thomson v Clydesdale Bank Ltd* [1893] AC 282, HL. See also *Bodenham v Hoskins* (1852) 21 LJ Ch 864.

3 See PARA 832.

4 As to the circumstances in which a banker will be held liable as constructive trustee see PARA 843.

5 As to tracing claims see PARA 857.

6 See PARA 889.

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### **829. Customer's duty in operating current account.**

In operating his current account the customer owes to his bank two duties of care: (1) to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery<sup>1</sup>; and (2) to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it<sup>2</sup>.

The customer does not owe any wider duty of care in the operation of his current account; and in particular he does not owe a duty of care: (a) to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented to it; or (b) to take such steps to check his periodic bank statements as a reasonable customer in his position would take to enable him to notify the bank of any debit items in the account which he has not authorised<sup>3</sup>.

Mere silence, without resulting injury to the banker, does not operate as an estoppel or constitute adoption<sup>4</sup>.

The alteration in the position of the banker necessary to support adoption is not confined to payment of the cheque. Loss of opportunity of protecting himself against subsequent forgeries, if any, by the same person, and loss of the chance of taking proceedings, civil or criminal, against the forger, as by his escaping out of the jurisdiction, constitute sufficient alteration in the position of, and prejudice to, the banker<sup>5</sup>. It appears immaterial whether civil proceedings against the forger would have resulted in recovering any money or not<sup>6</sup>.

Where this principle of adoption applies, it covers all previous forgeries by the same person if, notified on the last occasion when the customer or other person had knowledge of the forgery, the bank might have taken steps to recover from the forger all money previously obtained by him<sup>7</sup>.

1 *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777, HL (amount in words filled in and figures altered by confidential clerk after signature), approving *Young v Grote* (1827) 4 Bing 253. In view of this judgment the statements in the judgment of the Privy Council to a contrary effect in *Colonial Bank of Australasia Ltd v Marshall* [1906] AC 559, PC, have lost their authority, as have also the dicta in *Baxendale v Bennett* (1878) 3 QBD 525, CA, questioning the authority of *Young v Grote* above. See also *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 101, [1985] 2 All ER 947 at 952-953, PC; *Joachimson v Swiss Bank Corp* [1921] 3 KB 110, CA; *Lumsden & Co v London Trustee Savings Bank* [1971] 1 Lloyd's Rep 114; *Price Meats Ltd v Barclays Bank plc* [2000] 2 All ER (Comm) 346; *Yorkshire Bank plc v Lloyd's Bank plc* [1999] 2 All ER (Comm) 153.

While the customer should not, for example, sign a blank cheque leaving the amount in words to be filled in by a clerk (see *London Joint Stock Bank Ltd v Macmillan and Arthur* above), there is no duty to fill in a blank between the name of the payee and 'or order' (see *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA).

2 *Greenwood v Martin's Bank Ltd* [1932] 1 KB 371, CA (affd [1933] AC 51, HL); *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC. See also *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL, which was not in fact the case of a customer, but of a stranger, as appears from the report. It is, however, treated as the case of a customer and explained on that ground in *Ogilvie v West Australian Mortgage and Agency Corp* [1896] AC 257, PC. In *William Ewing & Co v Dominion Bank* (1904) 24 SCR 133, the Supreme Court of Canada by a majority expressly extended the doctrine to the case of a businessman, not a customer,

on the ground of moral and commercial obligation. Special leave to appeal was refused by the Judicial Committee on the ground that no important question of law was involved, and that the question was one essentially for the dominion courts (*William Ewing & Co v Dominion Bank* [1904] AC 806, PC). See also *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187 (in which it was held that the customer's behaviour estopped her from denying the validity of payments by the bank made both before as well as after the representation). See also *National Westminster Bank plc v Somer International (UK) Ltd* [2001] EWCA Civ 970 at [44]-[45], [2002] QB 1286, [2002] 1 All ER 198, considering *Greenwood v Martin's Bank* above and *Ogilvie v West Australian Mortgage and Agency Corpn* above.

3 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 101, [1985] 2 All ER 947 at 952-953, PC.

4 *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL.

5 *Ogilvie v West Australian Mortgage and Agency Corpn Ltd* [1896] AC 257 at 270, PC; *Greenwood v Martin's Bank Ltd* [1933] AC 51, HL. See also the Scottish cases quoted in *M'Kenzie v British Linen Co* (1881) 6 App Cas 82 at 110, HL.

6 See the cases cited in note 5. Cf *Knights v Wiffen* (1870) LR 5 QB 660. See, however, *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49 at 57, PC.

7 See *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187.

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### 830. Closing of account.

A banker is not entitled arbitrarily to close a current account in credit<sup>1</sup>. He must give the customer reasonable notice<sup>2</sup> and make satisfactory provision for outstanding cheques.

A customer's instruction to his bank to close his account and transfer the balance to a third party does not end the relationship of banker and customer<sup>3</sup>, the instructions being revocable until the transferee is notified of the transfer<sup>4</sup>.

1 *Agra and Masterman's Bank Ltd v Hoffman* (1864) 5 New Rep 214; *Thomas v Howell* (1874) LR 18 Eq 198 at 202 per Malins V-C; *Buckingham & Co v London and Midland Bank Ltd* (1895) 12 TLR 70; and cf *Cumming v Shand* (1860) 5 H & N 95; and *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ. See also *Johnston v Commerical Bank* (1858) 20 D 790 (a South African decision).

2 See the cases cited in note 1. See also *Berry v Halifax Commercial Banking Co* [1901] 1 Ch 188; *Prosperity Ltd v Lloyds Bank Ltd* (1923) 39 TLR 372.

3 See *Rekstin v Severo Sibirsko, Gosudarstvennoe Akcionernoe Obschestvo Komseverputj Co and Bank for Russian Trade* [1933] 1 KB 47, CA.

4 *Rekstin v Severo Sibirsko, Gosudarstvennoe Akcionernoe Obschestvo Komseverputj Co and Bank for Russian Trade* [1933] 1 KB 47 at 62, CA, per Lord Hanworth MR. Quaere whether the transferee's assent is necessary: see *Rekstin v Severo Sibirsko, Gosudarstvennoe Akcionernoe Obschestvo Komseverputj Co and Bank for Russian Trade* above at 57 per Talbot J.

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### 831. Money laundering.

Regulations have been made in order to prevent the use of the financial system for the purposes of money laundering and terrorist financing<sup>1</sup>. Relevant persons<sup>2</sup> must, when undertaking certain activities in the course of business, apply customer due diligence measures<sup>3</sup> where they establish a business relationship, carry out an occasional transaction, suspect money laundering or terrorist finance or doubt the accuracy of customer identification information<sup>4</sup>. Relevant persons also have to undertake ongoing monitoring of their business relationships<sup>5</sup>. There is a general rule on the timing of the verification of the customer's identity subject to certain exceptions<sup>6</sup>. The regulations have specific measures on record-keeping, procedures and training<sup>7</sup>; and also provisions on supervision and registration<sup>8</sup>. There are enforcement powers<sup>9</sup> for certain supervisors, including powers to obtain information and enter and inspect premises<sup>10</sup>. Civil penalties may be imposed by these supervisors on persons who fail to comply with the regulations' requirements<sup>11</sup>. Miscellaneous matters<sup>12</sup> include provision for the recovery of penalties and charges through the court<sup>13</sup>, the imposition of an obligation on certain public authorities to report suspicions of money laundering or terrorist financing<sup>14</sup> and transitional provisions<sup>15</sup>.

The Financial Services Authority<sup>16</sup> has as one of its objectives the reduction of financial crime<sup>17</sup> and the Authority may make rules in relation to the prevention and detection of money laundering<sup>18</sup>.

There are also statutory provisions penalising those who assist in the retention of the proceeds of drug trafficking or criminal conduct and requiring banks and their employees to report suspicions or beliefs of money laundering to the police<sup>19</sup>. Anti-terrorism legislation has been enacted to prevent the retention or control of terrorist property, including money<sup>20</sup>.

1 See the Money Laundering Regulations 2007, SI 2007/2157; and PARA 539 et seq. The Regulations revoke and replace earlier regulations (the Money Laundering Regulations 2003, SI 2003/3075) and implement in part European Parliament and EC Council Directive 2005/60 (OJ L309, 25.11.2005, p 15) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. As to the commencement of the Money Laundering Regulations 2007, SI 2007/2157, see reg 1 which provides that the regulations are in force from 15 December 2007.

As to the action to be taken where an investigation into money laundering creates conflicts between the public interest in combating crime and the entitlement of a private body to obtain redress from the courts see *Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 All ER (Comm) 1023, [2001] 1 All ER (Comm) 1023; *Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit* [2003] EWHC 703 (Comm), [2003] 4 All ER 1225, [2003] 1 All ER (Comm) 900; *Squirrel Ltd v National Westminster Bank plc* [2005] EWHC 664 (Ch), [2005] 2 All ER 784, [2005] 1 All ER (Comm) 749. See also *Tayeb v HSBC Bank plc* [2004] EWHC 1529, [2004] 4 All ER 1024, [2004] 2 All ER (Comm) 880, [2004] 2 All ER (Comm) 880.

2 See the Money Laundering Regulations 2007, SI 2007/2157, reg 3 and as to exclusions see reg 4 (see PARA 540). 'Relevant persons' include credit institutions (including most banks and branches), financial institutions, auditors, accountants, tax advisers and insolvency practitioners, independent legal professionals, trust or company service providers, estate agents, high value dealers and casinos.

3 See the Money Laundering Regulations 2007, SI 2007/2157, reg 5; and PARA 542. As to customer due diligence see Pt 2 (regs 5-18). The measures consist of identifying and verifying the identity of the customer and any beneficial owner (see reg 6; and PARA 542) of the customer, and obtaining information on the purpose and intended nature of the business relationship.

Aspects of customer due diligence include a general rule on the timing of the verification of the customer's identity (part of which relates specifically to banks) with certain exceptions (see reg 9; and PARA 543); and when casinos must identify and verify their customers (see reg 10; and PARA 544). Failure to apply such measures means that a person cannot establish or continue a business relationship with the customer concerned or undertake an occasional transaction: see reg 11; and PARA 545 (and see also reg 12; and PARA 542 as to an exception from the requirement to identify the beneficial owner for debt issues held in trust). Relevant persons may apply simplified customer due diligence measures for certain products, customers or transactions (listed in reg 13: see PARA 542) and must apply enhanced measures in four situations (one of which relates specifically to banking): see reg 14; and PARA 546. There are obligations on relevant persons in respect of their overseas branches and subsidiaries: see reg 15; and PARA 547. There are also specific obligations in respect of shell banks

and anonymous accounts: see reg 16; and PARA 548. The regulations provide a list of persons on whom relevant persons can rely to perform customer due diligence measures: see reg 17; and PARA 549.

4 See the Money Laundering Regulations 2007, SI 2007/2157, reg 7; and PARA 542.

5 See the Money Laundering Regulations 2007, SI 2007/2157, reg 8; and PARA 543.

6 See the Money Laundering Regulations 2007, SI 2007/2157, reg 9; and PARA 543.

7 See the Money Laundering Regulations 2007, SI 2007/2157, Pt 3 (regs 19-21). As to obligations in respect of record-keeping see reg 19; and PARA 551. As to obligations in respect of policies and procedures see reg 20; and PARA 552. As to obligations in respect of staff training see reg 21; and PARA 552.

8 See the Money Laundering Regulations 2007, SI 2007/2157, Pt 4 (regs 22-35). As to the allocation of supervisory authorities for different relevant persons see reg 23; and PARA 553. As to the duties of supervisors see reg 24; and PARA 553. Money service businesses, high value dealers and trust or company service providers which are not otherwise registered are subject to a system of mandatory registration: see regs 25-30; and PARA 555. Money service businesses and trust or company service providers must not be registered unless the business, its owners, its nominated officer and senior managers are fit and proper persons: see reg 28; and PARA 555. Other sectors are only required to register if the supervisor decides to maintain a register: see regs 33, 34; and PARA 557. Supervisors are able to impose charges on persons they supervise: see reg 35; and PARA 558.

9 As to enforcement see the Money Laundering Regulations 2007, SI 2007/2157, Pt 5 (regs 36-47).

10 See the Money Laundering Regulations 2007, SI 2007/2157, regs 37-41; and PARAS 559-562.

11 See the Money Laundering Regulations 2007, SI 2007/2157, reg 42; and PARA 563. The requirements are those under Pts 2, 3 and 4. Provision is made for reviews of and appeals against such penalties: see regs 43, 44; and PARA 564. Relevant persons who fail to comply with the requirements of Pts 2, 3 and 4 are also guilty of a criminal offence (see regs 45-47; and PARAS 565, 566) although persons convicted of a criminal offence may not also be liable to a civil penalty.

12 See the Money Laundering Regulations 2007, SI 2007/2157, Pt 6 (regs 48-51).

13 See the Money Laundering Regulations 2007, SI 2007/2157, reg 48; and PARAS 544, 563.

14 See the Money Laundering Regulations 2007, SI 2007/2157, reg 49; and PARA 554.

15 See the Money Laundering Regulations 2007, SI 2007/2157, reg 50; and PARA 555.

16 As to the Financial Services Authority see PARAS 792; and PARAS 4, 6 et seq. As to the Bank of England see PARA 793 et seq.

17 See the Financial Services and Markets Act 2000 s 2(2); and PARA 8.

18 See the Financial Services and Markets Act 2000 s 146; and PARA 30.

19 See the Proceeds of Crime Act 2002 Pt 7 (ss 327-340); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 789 et seq.

20 See the Terrorism Act 2000; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 390 et seq.

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## **(ii) Payment of Cheques etc; Protection and Duties of Paying Banker**

### **832. Paying banker.**

A banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose<sup>1</sup>, or provided the cheques are within the limits of an agreed overdraft<sup>2</sup>, and may so pay them within a reasonable period after the bank's advertised closing time<sup>3</sup>. Where he pays in accordance with specific statutory provisions, he may claim protection against claims of the true owner<sup>4</sup>. He must either pay cheques or refuse payment at once; a request to re-present amounts to dishonour<sup>5</sup>. A banker must not continue to pay cheques without inquiry if a reasonable and honest banker with knowledge of the relevant facts would have considered that there was a serious or real possibility, albeit not amounting to a probability, that the customer was being defrauded or that moneys were being misappropriated<sup>6</sup>. Failure to inquire is not excused merely because of a conviction that the answer would be false<sup>7</sup>.

Post-dated cheques are not invalid<sup>8</sup>, but the banker should not pay such a cheque if presented before the date it bears<sup>9</sup>. If, therefore, a cheque dated on a Sunday is presented on the previous business day, it should be returned with the answer 'post-dated'<sup>10</sup>. A post-dated cheque, however, if presented at or after its ostensible date, should be paid though the banker knows it to be post-dated, and even if it has been presented before the date and refused payment<sup>11</sup>. A cheque is not payable on a non-business day<sup>12</sup>.

The Treasury has power, by order made by statutory instrument, to suspend financial dealings in the national interest for such time as may be specified in the order<sup>13</sup>. An obligation on a person to do a thing on a day on which he is prevented from doing it by such an order, or is unable to do it by reason of such an order, is deemed to be complied with if he does it as soon as practicable thereafter<sup>14</sup>.

A banker is justified in refusing payment of a cheque which is ambiguous in form<sup>15</sup>. He may be liable if he pays a cheque which is irregularly indorsed<sup>16</sup> in circumstances in which the absence of, or irregularity in, indorsement is not covered by statute<sup>17</sup>.

Bankers habitually refuse payment of what are called stale cheques, that is, cheques which have been outstanding for a period varying from 6 months in some banks to 12 months in others; but the practice has never received judicial sanction<sup>18</sup>.

Bankers usually refuse payment of an undated cheque, or one on which the date is incomplete, and it has been held that a banker is not bound to honour an undated cheque<sup>19</sup>. The date is a material particular, and the prima facie authority<sup>20</sup> of the person in possession to fill in the date must be exercised within a reasonable time<sup>21</sup>. Any alteration of the date of a cheque appears to be a material alteration<sup>22</sup>, and a banker should therefore refuse to pay a cheque on which the date appears to have been altered.

It is submitted that a banker should not pay a cheque to a payee he knows to be an undischarged bankrupt<sup>23</sup>. The validity of payment to a payee who is a minor has never been questioned<sup>24</sup>.

1 *Foley v Hill* (1848) 2 HL Cas 28; *Whitaker v Bank of England* (1835) 1 Cr M & R 744 at 750; *Marzetti v Williams* (1830) 1 B & Ad 415; *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 at 789, HL, per Lord Finlay LC; *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127, CA, per Atkin LJ. As to funds available see PARA 834.

2 See *Rouse v Bradford Banking Co Ltd* [1894] AC 586 at 596, HL, per Lord Herschell LC.

3 *Baines v National Provincial Bank* (1927) 96 LJB 801. Cf PARA 836 note 11.

4 As to open cheques see the Bills of Exchange Act 1882 s 60; the Cheques Act 1957 s 1; and PARA 1552. As to crossed cheques see the Bills of Exchange Act 1882 s 80; the Cheques Act 1957 s 1; and note 17.

5 *Bank of England v Vagliano Bros* [1891] AC 107 at 141, HL, per Lord Bramwell, and at 157 per Lord Macnaghten (dissenting from dictum of Maule J in *Roberts v Tucker* (1851) 16 QB 560 at 578). See also PARA 836 note 11; and cf PARA 846.

6 *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA; following *Barclays Bank plc v Quincecare Ltd and Unichem Ltd* [1992] 4 All ER 363; and not following *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1118, [1968] 1 WLR 1555 at 1609 per Ungood-Thomas J; *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210 at 1231, [1972] 1 WLR 602 at 609 per Brightman J. See also *Groves-Raffin Construction Ltd v Bank of Nova Scotia* [1976] 1 Lloyd's Rep 373, Can SC; *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370, [1978] 1 WLR 798; *Royal Products Ltd v Midland Bank Ltd* [1981] 2 Lloyd's Rep 194.

7 *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 2 All ER 1073 at 1118-1119, [1968] 1 WLR 1555 at 1608-1609 per Ungood-Thomas J.

8 Bills of Exchange Act 1882 s 13(2). See also PARA 1415. A post-dated cheque is not invalid even in the hands of a holder who has taken it before the ostensible date: *Carpenter v Street* (1890) 6 TLR 410.

9 *Da Silva v Fuller* (1776) Bayley on Bills (5th Edn) 326; *Morley v Culverwell* (1840) 7 M & W 174 at 178 per Parke B.

10 A cheque dated on Sunday is not invalid: Bills of Exchange Act 1882 s 13(2). See also PARA 1415. The making of any payment on a day following a bank holiday is equivalent to payment on the holiday, and the same applies to the performance of other acts: see the Banking and Financial Dealings Act 1971 s 1(4).

11 In *Emanuel v Robarts* (1868) 9 B & S 121, the bankers were held justified under a custom of London bankers in refusing payment of a post-dated cheque so re-presented. The ground of decision was the then existing doubt as to the legality of post-dated cheques; that legality is now established (see the text and note 8) and the custom could not obtain at the present day.

12 As to non-business days see the Bills of Exchange Act 1882 s 92 (amended by the Banking and Financial Dealings Act 1971 ss 3(1), 4(4)); and the Banking and Financial Dealings Act 1971 s 1(1), Sch 1. See also PARA 1437.

13 See the Banking and Financial Dealings Act 1971 s 2(1), (2) (s 2(1) amended by the Finance Act 1981 s 136(2); the Finance Act 1987 s 69(a); and by the Building Societies Act 1986 s 120, Sch 18 Pt I para 8(2); and the Banking and Financial Dealings Act 1971 s 2(1), (2) amended by SI 2001/1149). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. A person who knowingly or recklessly contravenes a direction given by such an order is guilty of an offence and is liable on summary conviction to a fine of not more than the prescribed sum, or on conviction on indictment to imprisonment for not more than two years or a fine, or to both: Banking and Financial Dealings Act 1971 s 2(4) (amended by the Magistrates' Courts Act 1980 s 32(2)). Consenting or conniving directors or officers of bodies corporate, or members of a body corporate managed by its members, have a personal criminal liability: see the Banking and Financial Dealings Act 1971 s 2(5). As to the prescribed sum see PARA 56 note 24.

14 Banking and Financial Dealings Act 1971 s 2(3).

15 He has no responsibility to the payee; he is not bound to decide legal questions, or to run unusual risks: see *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777 at 814, HL, per Lord Haldane; *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127, CA, per Atkin LJ. Cf *Emanuel v Robarts* (1868) 9 B & S 121; *Bank of England v Vagliano Bros* [1891] AC 107, HL. However, he is under a duty of care: see the text and note 6.

16 *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA; and see *Arab Bank Ltd v Ross* [1952] 2 QB 216, [1952] 1 All ER 709, CA.

17 Protection is given to bankers paying undorsed or irregularly indorsed cheques and certain other instruments not technically bills of exchange by the Cheques Act 1957 s 1: see PARA 836; and PARA 1552. Before the Cheques Act 1957, paying bankers required indorsement of order cheques for their own protection, since a banker would have had no defence had he paid an order cheque which was undorsed or irregularly indorsed to a person who had no title to it: cf PARA 836. The regularity of the indorsement depended upon mercantile custom, and books on practical banking contained pages of examples. Little attention was paid to the question of whether the indorsement, which was, generally speaking, in blank, was made or not made *animo indorsandi* or was merely a receipt. As to statutory provisions protecting paying bankers see also the Bills of Exchange Act 1882 ss 60, 80; and PARAS 836, 838. An irregular indorsement may yet be sufficient to pass title: see *Arab Bank Ltd v Ross* [1952] 2 QB 216 at 226, [1952] 1 All ER 709 at 715, CA, per Denning LJ.

18 Save in case of damage by non-presentation within a reasonable time, the drawer remains liable until discharged by lapse of time: *Robinson v Hawksford* (1846) 9 QB 52; *Laws v Rand* (1857) 3 CBNS 442; *King and Boyd v Porter* [1925] NI 107, CA. See **LIMITATION PERIODS** vol 68 (2008) PARA 963. In the notes to *Serle v Norton* (1841) 2 Mood & R 401, it is suggested that the practice is justified by the custom of bankers. In any event, the customer's credit would not be damaged by the cheque being returned marked with this ground of refusal.

19 *Griffiths v Dalton* [1940] 2 KB 264. A bill is not invalid by reason of its being undated: Bills of Exchange Act 1882 s 3(4)(a). See also PARA 1415.

20 Cf *Smith v Prosser* [1907] 2 KB 735, CA; *Foster v Driscoll* [1929] 1 KB 470, CA.

21 *Griffiths v Dalton* [1940] 2 KB 264.

22 Bills of Exchange Act 1882 s 64(2). See also PARA 1560.

23 It is the banker's duty, as far as possible, to obtain a good discharge for his customer. This prima facie the bankrupt cannot give, his estate having vested in the trustee: see the Insolvency Act 1986 ss 283(1), 306, 385(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216. The banker cannot know whether or not the cheque represents after-acquired property and, even if it does, payment may not be protected: see s 307; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 445 et seq. See also *Cohen v Mitchell* (1890) 25 QBD 262, CA; *Re Clarke, ex p Beardmore* [1894] 2 QB 393, CA; *Re Bennett, ex p Official Receiver* [1907] 1 KB 149.

24 As to the extent of the disability of minority see PARA 820.

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### **833. Authority to draw as condition of payment.**

The cheque must be drawn by a person having authority express or implied<sup>1</sup>. A per pro signature puts the banker on inquiry as to the authority of the person so signing<sup>2</sup>. Where the account is not that of an individual, it is customary to take a mandate setting out the parties authorised to draw and the form in which they are to sign; the mandate must be strictly observed.

Apart from agreement<sup>3</sup>, cheques on ordinary joint accounts should be drawn by all the parties in whose name the account stands<sup>4</sup>. However, the banker is justified, in case of death, in allowing the survivor to draw any balance standing to the joint account, except, as in the case of husband and wife, when the object with which the account was opened requires refusal<sup>5</sup>.

During partnership, and in the absence of instructions to the contrary<sup>6</sup>, any partner has the right to draw on the partnership account in the firm name<sup>7</sup>. The death of one or more partners does not absolutely preclude the surviving partner or partners from drawing on the firm account<sup>8</sup>, but the modern and preferable method is that, where to the knowledge of the banker a partner dies, the old account should be operated only for the purpose of winding up the partnership, and arrangements should be made for a new account, carrying over to it any balance remaining<sup>9</sup>. In the absence of agreement to the contrary, the bankruptcy of one partner involves the dissolution of the firm<sup>10</sup>; but this does not prevent the other partner or partners from drawing on the firm account for purposes of the partnership.

An account of a deceased person cannot be drawn upon or the money transferred until probate or letters of administration have been granted and registered with the banker. In the absence of special arrangement, one of several executors or administrators may draw on an account opened with the deceased, or with them as executors or administrators<sup>11</sup>. Trustees cannot delegate the drawing of cheques to one of their number, but a trustee may, by power of attorney, delegate this power for up to 12 months; the statutory power of delegation is strictly construed<sup>12</sup>.

- 1 Theoretically a cheque need not be drawn by a customer. Cf *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL, where protection was awarded under the Stamp Act 1853 s 19 to bankers' drafts, as being 'drawn upon a banker', which words are similar to those in the definition of a cheque contained in the Bills of Exchange Act 1882 s 73 (see further PARA 848). However, a banker is under no obligation to pay a cheque drawn by someone other than a customer, though he may place himself under such an obligation, as in the case of a demand draft drawn on him by a beneficiary under a letter of credit.
- 2 Bills of Exchange Act 1882 s 25. See also PARA 1474. For example, an executor cannot as a rule delegate his powers, though one of several executors may sign for all, and a cheque signed per pro an executor ought not to be paid without inquiry and satisfactory explanation. As to per pro indorsements see PARA 892.
- 3 See eg *Marshall v Crutwell* (1875) LR 20 Eq 328.
- 4 *Husband v Davis* (1851) 10 CB 645 at 650 per Maule J; and cf *Brandon v Scott* (1857) 7 E & B 234. As to the determination by one of the joint customers of the authority to pay see PARA 847. The common form of bank mandate relating to joint accounts embodies the authority of the signatories to the bank to honour cheques drawn by either or both, as the case may be, or the survivor. It may in addition give similar authority in respect of bills of exchange, the withdrawal of securities and property held for safe custody, the taking of advances, and the pledging and deposit of securities for advances. The effect of such a mandate is usually considered to be no more than an indication of the intention of the parties, because the mandate becomes ineffective on the death of either party, though it does not affect the rule of survivorship where this would otherwise apply: see *Husband v Davis* (1851) 10 CB 645; *Williams v Davies* (1864) 3 Sw & Tr 437; *Marshall v Crutwell* (1875) LR 20 Eq 328. See further PARA 823.
- 5 *Marshall v Crutwell* (1875) LR 20 Eq 328; *Re Harrison, Day v Harrison* (1920) 90 LJ Ch 186. See PARA 823.
- 6 For an example of the effect of such instructions see *Twibell v London Suburban Bank* [1869] WN 127.
- 7 Partnership Act 1890 ss 5, 8. Opening an account in the firm name is evidence of authority in each partner to draw.
- 8 *Backhouse v Charlton* (1878) 8 ChD 444.
- 9 See the Partnership Act 1890 s 38; *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427, CA; *Dickson v National Bank of Scotland* 1917 SC (HL) 50. The rights inter se of partners and the representatives of a deceased partner do not normally affect the banker.
- 10 See the Partnership Act 1890 s 33; and **PARTNERSHIP** vol 79 (2008) PARAS 176-177.
- 11 As to the devolution of trust powers to the surviving trustee or trustees see the Trustee Act 1925 s 18; and PARA 847. As to the administration of a deceased's estate generally see **EXECUTORS AND ADMINISTRATORS**.
- 12 See the Trustee Act 1925 s 25(1), (2) (substituted by the Trustee Delegation Act 1999 s 5(1), (2)); and cf *Green v Whitehead* [1930] 1 Ch 38 (affd on different grounds [1930] 1 Ch 38 at 46, CA). See further **TRUSTS** vol 48 (2007 Reissue) PARA 984.

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### **834. Funds to be available.**

There must be sufficient funds to cover the whole amount of the cheque presented, for, in the absence of special arrangement, there is no obligation on the banker to pay any part of a cheque for an amount exceeding the available balance<sup>1</sup>. A cheque is not an assignment of funds in the banker's hands<sup>2</sup>.

Cheques must be paid in the order in which they are presented, whether by post or otherwise<sup>3</sup>. If two cheques are presented simultaneously, for example through the same clearing, and there are funds sufficient to pay only one, it is doubtful whether both may be returned<sup>4</sup>.

The funds must be not only sufficient, but available. Even in the case of notes, the banker is entitled to reasonable time between the paying in and drawing against in which to carry out the necessary book-keeping entries<sup>5</sup>. In the case of cheques and other documents, he is entitled to a reasonable time for clearing or collection according to their respective nature<sup>6</sup>.

Mere crediting as cash is not sufficient to entitle the customer to draw against the cheque before clearing. There must be an agreement, express or implied, to permit the customer to draw<sup>7</sup>.

Where a bank is required by a client's standing order to pay a sum on a particular day of each month to a payee until further order, and there are insufficient funds in the client's account on the material date to satisfy the standing order, the bank is under no duty to review the account to meet the order as and when sufficient funds become available<sup>8</sup>.

1 The banker contracts with the customer to honour cheques only when he has 'sufficient' funds in hand: see *Carew v Duckworth* (1869) LR 4 Exch 313; *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127, CA, per Atkin LJ.

2 Bills of Exchange Act 1882 s 53(1). See also PARA 1453.

3 *Kilsby v Williams* (1822) 5 B & Ald 815; *Sednaoni, Zariffa, Nakes & Co v Anglo-Austrian Bank* (1909) 2 Legal Decisions Affecting Bankers 208.

4 Unnecessary damage would be caused to the customer's credit. It is hard to say which is the preferable course, but the smaller the amount of the cheque, the greater the damage may be.

5 *Marzetti v Williams* (1830) 1 B & Ad 415; *Whitaker v Bank of England* (1835) 1 Cr M & R 744; *Bransby v East London Bank* (1866) 14 LT 403.

6 *Forman v Bank of England* (1902) 18 TLR 339 (where a city cheque was passed through the country clearing and was not credited in time to meet a cheque drawn against it).

7 *Re Farrow's Bank Ltd* [1923] 1 Ch 41, CA; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA; and see *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; *Bevan v National Bank* (1906) 23 TLR 65. In *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL, there was in fact an agreement entitling the customer to draw against the uncleared cheque. See further *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL; and PARA 891.

8 *Whitehead v National Westminster Bank Ltd* (1982) 10 Legal Decisions Affecting Bankers 364.

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### **835. When funds not available.**

A balance at one branch of a bank does not entitle a customer to draw on another branch where he has no account or is overdrawn<sup>1</sup>, for different branches of a bank are for this purpose separate entities, though the bank may apply funds which it holds at one branch to meet an overdraft of the customer at another<sup>2</sup>. If the customer has, in the same capacity, accounts at two or more branches, the bank is entitled to combine them, in the absence of agreement or course of business suggesting otherwise, and to treat the ultimate credit balance, if any, as alone available for drawing purposes<sup>3</sup>.

A third party debt order founded on a judgment against the customer and served on the banker prevents any credit balance being available irrespective of the relative amounts of the

judgment and the balance<sup>4</sup>, unless the order requires the attachment of the balance up to a stated sum only.

The fact that bills discounted for the customer are not yet due does not render a credit balance on current account not available<sup>5</sup>.

If a banker has marked cheques<sup>6</sup> at the instance of the customer, he is entitled to retain funds to meet them. Where he does so at the instance of another banker, for clearing purposes, he binds himself to pay. While marking does not make the banker an acceptor, it may amount to a representation by him that the cheque will be paid if presented within a reasonable time<sup>7</sup>.

The presentation of a bankruptcy petition against a customer, and the making of a bankruptcy order, render money standing to his credit not available<sup>8</sup>; the same consequence flows from the presentation of a petition for the winding up of a corporate customer<sup>9</sup>.

1 *Woodland v Fear* (1857) 7 E & B 519; cf *Garnett v M'Kewan* (1872) LR 8 Exch 10; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC; *Union Bank of Australia Ltd v Murray-Aynsley* [1898] AC 693, PC; *McNaghten v Cox & Co* (1921) Times, 11 May. It must be noted that the ability to access account details via a computer system has effectively rendered this rule obsolete.

2 *Garnett v M'Kewan* (1872) LR 8 Exch 10. As in note 1, the ability to access account details via a computer system has effectively rendered this rule obsolete.

3 *Garnett v M'Kewan* (1872) LR 8 Exch 10, approved in *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC; *Buckingham & Co v London and Midland Bank Ltd* (1895) 12 TLR 70 (course of business precluding combination). See also *Re E J Morel (1934) Ltd* [1962] Ch 21, [1961] 1 All ER 796 (applying a dictum of Scrutton LJ in *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833 at 847, CA); *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL. See further PARA 867.

4 See *Rogers v Whiteley* [1892] AC 118, HL; *Yates v Terry* [1901] 1 KB 102 (revsd on another ground [1902] 1 KB 527, CA). See PARA 869.

5 *Bower v Foreign and Colonial Gas Co Ltd, Metropolitan Bank, Garnishees* (1874) 22 WR 740, distinguishing *Bolland v Bygrave* (1825) Ry & M 271; *Jeffries v Agra and Masterman's Bank* (1866) LR 2 Eq 674. In the event of a customer's insolvency, however, apart from any determination of the authority to pay cheques, the banker could hold a credit balance as against such bills: see *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL; *Baker v Lloyds Bank Ltd* [1920] 2 KB 322. See further PARA 867.

6 Cheques can be marked by bankers, at the instance of their own customers, as an indication to persons taking them that at the time the bankers hold sufficient funds on the drawer's account to meet the cheques. See PARA 847. Marking does not amount to an acceptance: *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC. As to the effect of marking a post-dated cheque see *Bank of Baroda Ltd v Punjab National Bank Ltd*.

7 See also PARA 847.

8 As to restrictions on disposition of property between the day of presentation of the petition and the vesting of the bankrupt's estate in a trustee see the Insolvency Act 1986 s 284; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217. As to the vesting of a bankrupt's estate in a trustee see also s 306; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 391.

9 See the Insolvency Act 1986 s 127; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 700-702. As to voluntary winding up see ss 87, 103; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 939 et seq. However, the honouring of a company's cheques does not involve a disposition to the paying bank for the purposes of s 127: *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555, [2001] 1 All ER 289, CA.



Cheques etc; Protection and Duties of Paying Banker/836. Payment of order cheques in good faith in ordinary course of business.

### **836. Payment of order cheques in good faith in ordinary course of business.**

A banker who in good faith and in the ordinary course of business pays a cheque<sup>1</sup> payable to order<sup>2</sup> drawn on him, to which the person in possession has no title by reason of the indorsement being forged, is protected from liability, and may debit his customer with the amount so paid<sup>3</sup>. A banker who in good faith and in the ordinary course of business pays a cheque drawn on him which is not indorsed or is irregularly indorsed does not incur any liability by reason only of the absence of, or irregularity in, indorsement<sup>4</sup>. A thing is done in good faith if it is done honestly, whether it is done negligently or not<sup>5</sup>.

Apart from the statutory provisions relating to crossed cheques<sup>6</sup>, payment contrary to the crossing would not be in the ordinary course of business<sup>7</sup>. Omission to ascertain that the ostensible indorsement was in proper form, for example, where one indorsement is 'placed to account of payee', would, prior to the passing of the Cheques Act 1957, have been a departure from the ordinary course of business<sup>8</sup>; but now a payment may be in good faith and in the ordinary course of business notwithstanding that the instrument bears no indorsement or an irregular indorsement and the banker will be deemed to have paid in due course<sup>9</sup>. Payment over the counter of a cheque for a large amount to a suspicious-looking person might be a departure from the ordinary course of business<sup>10</sup>.

Payment need not be in actual cash to the person presenting<sup>11</sup>. The banker's obligation to pay is during business hours<sup>12</sup>, but he is entitled to make a payment outside the usual banking hours and such payment seems to be within the ordinary course of business<sup>13</sup>.

1 It is of the nature of a cheque that it is payable on demand: see the Bills of Exchange Act 1882 s 73. See also PARAS 1405, 1410.

2 As to the meaning of 'order cheque', or cheque payable to order, see PARA 879. A cheque payable to order is negotiated by the indorsement of the holder and completed by delivery: Bills of Exchange Act 1882 s 31(3). See also PARA 1489. Indorsement of cheques is now largely a matter of theory since printed forms carrying the words 'account payee' or 'a/c payee' are no longer transferable and are only valid between the parties: see s 81A; and PARAS 895, 1500.

3 Bills of Exchange Act 1882 s 60. See also PARA 1552. It is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority: s 60. Section 60 does not apply to drafts between branch and head office (see PARA 896) or to documents payment of which is made conditional on the signature of an annexed receipt or on presentation within a limited time (see PARA 898). Payment in the ordinary course of business includes payment of order cheques not indorsed or irregularly indorsed: see the Cheques Act 1957 s 1(1); and the text to note 4.

If the banker is both paying and collecting banker, he must also show himself not to have been negligent within s 4 (see PARA 882): *Carpenters' Co v British Mutual Banking Co* [1938] 1 KB 511, [1937] 3 All ER 811, CA (decided in relation to negligence within the Bills of Exchange Act 1882 s 82 (repealed)). See also PARA 882.

4 Cheques Act 1957 s 1(1). See note 9. See also PARA 1552.

5 Bills of Exchange Act 1882 s 90. See also PARA 1401.

6 I.e. the Bills of Exchange Act 1882 ss 76-81; and the Cheques Act 1957 s 4: see PARA 880.

7 *Smith v Union Bank of London* (1875) 1 QBD 31, CA (in which the cheque was paid in disregard of its crossing).

8 In *Slingsby v District Bank Ltd* [1931] 2 KB 588 (affd [1932] 1 KB 544, CA), the court held that the Bills of Exchange Act 1882 s 60 afforded no protection as the cheque, having been altered, was defective, apart from the indorsement.

9 See the Cheques Act 1957 s 1. As to the requirement of indorsement of order cheques by bankers before the passing of the Cheques Act 1957 see PARA 832 note 17.

10 Cf *Bank of England v Vagliano Bros* [1891] AC 107 at 117, HL, per Lord Halsbury LC; *Auchteroni & Co v Midland Bank Ltd* [1928] 2 KB 294. See further PARA 846.

11 'Payment' within the meaning of the Bills of Exchange Act 1882 is broadly interpreted: see *Glasscock v Balls* (1889) 24 QBD 13 at 16, CA, per Lord Esher MR. A cheque drawn on one branch of a bank, paid in at another, and appearing as an item in balancing accounts between the branches, has been held to be paid: *Bissell & Co v Fox Bros & Co* (1885) 53 LT 193, CA; *Capital and Counties Bank v Gordon* [1903] AC 240, HL. Where payment was made by the paying banker by cheque, this was held to be payment within the Bills of Exchange Act 1882 s 79(2) (see PARA 839): see *Meyer & Co Ltd v Sze Hai Tong Banking and Insurance Co Ltd* [1913] AC 847, PC.

12 *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 127, CA, per Atkin LJ.

13 *Baines v National Provincial Bank* (1927) 96 LKB 801 (where Lord Hewart CJ held that a bank is entitled to deal with a cheque within a reasonable business margin after its advertised time of closing).

Many banks have automatic teller machines installed which dispense cash. Most systems involve the issue by the bank to its customer of a plastic card which is inserted into the machine to withdraw cash. Unless the system is directly linked to the bank's central computer account files so that the customer's account is debited immediately the withdrawal is made, the card is probably a credit token within the meaning of the Consumer Credit Act 1974 s 14 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 88). Automatic teller machines are capable of performing most other functions of a cashier (eg accepting deposits, giving the balance of a customer's account, and transferring funds). See further PARA 906.

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### **837. Payment of bearer cheques in good faith and without negligence.**

A banker who in good faith and without negligence<sup>1</sup> pays a bearer cheque<sup>2</sup> on presentation is free from all liability<sup>3</sup>, and may debit his customer<sup>4</sup>, though the holder had no title or a defective title to the cheque<sup>5</sup>. If the cheque has reached the payee actually or constructively, payment in due course by the banker discharges the customer (the drawer) both as to the cheque and as to the consideration<sup>6</sup>.

1 *Bellamy v Marjoribanks* (1852) 7 Exch 389; *Carlton v Ireland* (1856) 5 E & B 765; and see *Westminster Bank Ltd v Hilton* (1926) 136 LT 315. As to crossed cheques paid in good faith and without negligence see the Bills of Exchange Act 1882 s 80; and PARA 844.

2 A bearer cheque is one expressed to be payable to bearer or to a particular person or bearer: see PARA 879. As to cheques generally see PARAS 879-880.

3 *Charles v Blackwell* (1877) 2 CPD 151, CA (not liable to true owner).

4 *Charles v Blackwell* (1877) 2 CPD 151, CA.

5 This is referred to as discharge by payment in due course: see the Bills of Exchange Act 1882 s 59(1). See also PARA 1550. 'Holder' means the payee or indorsee of a bill or note who is in possession of it, or the bearer of it; and 'bearer' means the person in possession of a bill or note which is payable to bearer: s 2. See also PARA 1407. The definition of 'holder' merely requires possession without in any way limiting it to lawful possession. Neither definition involves any question of title.

6 *Charles v Blackwell* (1877) 2 CPD 151, CA. As to crossed cheques see the Bills of Exchange Act 1882 s 80; and PARA 838.

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### **838. Payment of crossed cheques in accordance with the crossing.**

A banker is protected if he pays a cheque, in good faith and without negligence, in accordance with its ostensible crossing<sup>1</sup>, notwithstanding that it may have been obliterated, or added to or altered otherwise than as authorised by the Bills of Exchange Act 1882<sup>2</sup>. 'Addition' means a material addition, effective under the provisions relating to crossed cheques; the addition of a memorandum such as 'account payee' would not justify the banker in refusing to pay the cheque, or in itself deprive him of protection in paying<sup>3</sup>. The 'opening' of a crossing, by writing 'pay cash' and initialling, is a patent alteration not authorised by the Act, and a banker pays such a cheque over the counter at the risk that the opening may prove unauthorised<sup>4</sup>. A banker paying in good faith and without negligence a cheque which at the time of presentation appears not to be crossed does not incur liability by reason only that the cheque was in fact or had been crossed<sup>5</sup>.

A banker paying a crossed cheque in good faith, without negligence<sup>6</sup>, and in accordance with the crossing, is protected, and may debit his customer, notwithstanding any defect of title in the collecting banker or the person from whom he received it<sup>7</sup>. If the cheque had come to the hands of the payee<sup>8</sup>, the drawer is discharged both on the cheque and on the consideration<sup>9</sup>.

Protection under the provisions relating to crossed cheques might be doubtful in the case of an open cheque crossed by a person having no authority to cross, such as an innocent person in possession under a forged indorsement, but the banker would be otherwise protected<sup>10</sup>.

The addition of 'not negotiable' to the crossing has no effect whatever on the paying banker, except to prevent his being a holder in due course<sup>11</sup>. 'Not negotiable' by itself, however, does not constitute a crossing<sup>12</sup>.

The banker's identification stamp may or may not be a crossing. If impressed on an open cheque by the collecting banker, it probably is. Similarly, the collecting banker's stamp on a cheque crossed generally would probably constitute it a cheque crossed specially to that banker<sup>13</sup>.

A banker paying a document, ostensibly a crossed cheque, to which his customer's name is forged as drawer is not protected; the instrument is not a cheque<sup>14</sup>.

1 Bills of Exchange Act 1882 s 80 (amended by the Cheques Act 1992 s 2). See also PARA 1575. The practice of bankers may be relevant to negligence: see *Arab Bank Ltd v Ross* [1952] 2 QB 216 at 222, [1952] 1 All ER 709 at 713, CA, per Somervell LJ. As to negligence in relation to the practice of collecting bankers see PARA 884.

2 See the Bills of Exchange Act 1882 s 79(2) proviso. See also PARA 1575. The proviso is defectively drawn. The wording 'added to or altered' etc grammatically refers to the cheque, not the crossing, but the words are intended to apply to the latter: *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA.

3 See *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465 at 472 per Bigham J; and see PARA 895. The paying banker could, as a rule, have no knowledge for whose account the cheque was being collected. The only doubtful case would be where the cheque bore indorsements after that of the payee, and one was forged. Quære whether payment in such case would be 'in the ordinary course of business' or 'without negligence'. The 'provisions relating to crossed cheques' are the Bills of Exchange Act 1882 ss 76-81; and the Cheques Act 1957 s 4: see PARA 880.

4 The practice of banks is not to recognise the opening of cheques unless signed by the drawer and presented for payment by him or his known agent: see Questions on Banking Practice (11th Edn) no 344; and see also *Smith and Baldwin v Barclays Bank Ltd* (1944) 5 Legal Decisions Affecting Bankers 370, in which Stable J said, in relation to a cheque crossed 'not negotiable' over which were written the words 'please pay cash', that the alteration to the printed form did not make the instrument any the less a crossed cheque. The crossed cheque provisions of the Bills of Exchange Act 1882 (ss 76-81A) have effect in relation to the instruments, other than cheques, to which the Cheques Act 1957 s 4 (see PARA 882) applies as they have effect in relation to cheques: see s 5; and PARA 880. As to the Bills of Exchange Act 1882 s 81A see also PARA 836 note 2; and PARAS 895, 1500.

5 Bills of Exchange Act 1882 s 79(2) proviso.

6 Payment on an irregular indorsement is negligence (*Slingsby v District Bank Ltd* [1932] 1 KB 544, CA), except as provided by the Cheques Act 1957 s 1, the protection of which is additional to that given by the Bills of Exchange Act 1882 s 80: see PARA 836. If the banker is both paying and collecting banker, he must also show himself not to have been negligent within the Cheques Act 1957 s 4: see PARAS 836, 882.

7 See the Bills of Exchange Act 1882 s 80 (as amended: see note 1).

8 It is presumed that 'constructive' coming to the payee's hands would be sufficient.

9 See the Bills of Exchange Act 1882 s 80 (as amended: see note 1).

10 Cf *Simmons v Taylor* (1857) 2 CBNS 528 at 539 per Cresswell J; affd (1858) 4 CBNS 463. However, if the cheque is an order cheque, the banker is protected under the Bills of Exchange Act 1882 s 60 (see PARA 836); if a bearer cheque, by having paid to bearer. As to the meanings of 'order cheque' and 'bearer cheque' see PARA 879.

11 Bills of Exchange Act 1882 s 81. See also PARA 1499. See *Algemene Bank Nederland NV v Happy Valley Restaurant Pte Ltd* [1991] 2 MLJ 289.

12 See the Bills of Exchange Act 1882 s 76. See also PARA 1411.

13 A collecting banker may specially cross to himself: Bills of Exchange Act 1882 s 77(6). See also PARA 1411. Transverse lines are not necessary to constitute crossing where a banker's name is put across the face of the cheque: s 76(2). Bankers habitually stamp all cheques collected by them, whether crossed or not, and the stamp is frequently horizontal, not transverse or 'across' the face of the cheque. The latter point would probably not be considered material.

14 It is not a cheque, but a mere piece of paper: *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC; and see PARA 850.

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### **839. Payment in contravention of the crossing.**

The Bills of Exchange Act 1882 does not, as the earlier crossed cheques legislation did, directly prohibit a banker from paying in contravention of the crossing, except in the case of a cheque crossed to more than one banker, none of whom is an agent for collection<sup>1</sup>. However, a banker so doing<sup>2</sup> is liable to the true owner for any loss the latter may sustain as a result<sup>3</sup>. In the case of a forged indorsement, he would also lose the protection afforded by statute<sup>4</sup>, payment contrary to the crossing not being in the ordinary course of business<sup>5</sup>.

Notwithstanding the absence of the direct prohibition, a banker cannot charge his customer with the amount of a crossed cheque paid in contravention of the crossing<sup>6</sup>, even, it would seem, though payment was made to the true owner<sup>7</sup>.

The fact that a crossed cheque has been refused payment does not make it an open cheque for the purpose of re-presentation<sup>8</sup>; nor does the fact that a crossing has been opened or obliterated render it an uncrossed cheque<sup>9</sup>.

1 See the Bills of Exchange Act 1882 s 79(1). See also PARA 1575.

2 Payment by means of the bank's own cheque is sufficient payment: *Meyer & Co Ltd v Sze Hai Tong Banking and Insurance Co Ltd* [1913] AC 847, PC.

3 Bills of Exchange Act 1882 s 79(2). But see *Meyer & Co Ltd v Sze Hai Tong Banking and Insurance Co Ltd* [1913] AC 847, PC (where the bank was protected by estoppel).

4 See under the Bills of Exchange Act 1882 s 60: see PARA 836.

5 *Smith v Union Bank of London* (1875) 1 QBD 31, CA. See also the Bills of Exchange Act 1882 s 80; and PARA 838.

6 *Smith v Union Bank of London* (1875) 1 QBD 31, CA. In that case, there was a direct prohibition; but the disability to debit the customer was apparently based on disobedience to mandate (*Bobbett v Pinkett* (1876) 1 ExD 368). Such payments would clearly be made negligently. See also the Bills of Exchange Act 1882 s 79(2) proviso; the provision that, in the circumstances covered by the proviso, the payment 'shall not be questioned' implies that the customer may normally repudiate payment contrary to the crossing. See PARA 838.

7 Payment had been made to the true owner, the bona fide holder, in *Smith v Union Bank of London* (1875) 1 QBD 31, CA. Possibly, however, the court would apply the doctrine laid down in *Reid v Rigby & Co* [1894] 2 QB 40, *Bevan v National Bank Ltd* (1906) 23 TLR 65, and *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48, as to adoption of a payment by taking the benefit of it. Contrast *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA.

8 It remains a crossed cheque: cf Questions on Banking Practice (11th Edn) no 345.

9 *Smith and Baldwin v Barclays Bank Ltd* (1944) 5 Legal Decisions Affecting Bankers 370.

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#### **840. Domiciled bill.**

Where a customer accepts a domiciled bill payable at his bank<sup>1</sup>, it constitutes an authority to the banker to pay it at maturity<sup>2</sup> and, if no funds are available, amounts to a request for an overdraft to the amount of the bill; but, in the absence of previous arrangement, the banker is under no obligation to pay the bill, even though he has sufficient funds in hand<sup>3</sup>. Where such an obligation exists, the banker, in the absence of special terms, is under a duty to identify the person to whom he makes payment with the person named as payee<sup>4</sup>. There is no statutory protection in regard to the payment of a domiciled bill.

A banker who in good faith and without negligence pays a bill payable to bearer, so accepted, to the bearer of it may charge his customer with the amount<sup>5</sup>.

1 A bill is said to be domiciled when it is accepted payable at a bank or by another paying agent.

2 *Kymer v Laurie* (1849) 18 LJQB 218.

3 *Roberts v Tucker* (1851) 16 QB 560; *Bank of England v Vagliano Bros* [1891] AC 107 at 157, HL, per Lord Macnaghten.

4 *Bank of England v Vagliano Bros* [1891] AC 107 at 131, HL, per Lord Watson, and at 157 per Lord Macnaghten.

5 See the Bills of Exchange Act 1882 ss 2, 8(3), 59. See further *Bank of England v Vagliano Bros* [1891] AC 107, HL; *Auchteroni & Co v Midland Bank Ltd* [1928] 2 KB 294.

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#### **841. Cheques drawn in breach of trust.**

It is not the banker's business or right to set up the title of persons other than his customer, and mere suspicion that a breach of trust is involved or intended in the drawing of a cheque on trust funds may not be sufficient to entitle the banker to refuse payment<sup>1</sup>. However, it is hardly conceivable that a court would award damages against the banker to a customer who had to admit, or against whom it was proved, that he drew the cheque for the purpose of defrauding the trust<sup>2</sup>.

1 *Gray v Johnston* (1868) LR 3 HL 1; and see further PARA 828. A paying banker may be liable as a constructive trustee: see PARA 843.

2 *Gray v Johnston* (1868) LR 3 HL 1 at 11 per Lord Cairns; *Hunt v Maniere* (1864) 34 Beav 157.

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#### **842. Breach of trust designed to benefit banker.**

A banker may not retain any benefit to himself from wrongful dealing with any fund he knows to be affected with a trust where such benefit has been designed or stipulated for by him<sup>1</sup>. A banker cannot assert his right of combination over an account known to be a trust account, whether so described or not<sup>2</sup>. A banker may, however, refuse to accept an account in any form which implies that it is affected by a trust<sup>3</sup>, but he is not at liberty to disregard intimations conveyed to him by the title or character in which the account is opened, or otherwise<sup>4</sup>.

1 *Gray v Johnston* (1868) LR 3 HL 1. In *Foxton v Manchester and Liverpool District Banking Co* (1881) 44 LT 406, Fry J appears to have held that the fact that the bank indirectly derived benefit from such dealing invalidated the transaction. In *Coleman v Bucks and Oxon Union Bank* [1897] 2 Ch 243, Byrne J shows that, to come within *Gray v Johnston* above, there must at least be an ascertained debt due to the bank, which on pressure by the bank is satisfied or reduced by payment from the trust account. Cf *Shields v Governor & Co of Bank of Ireland* [1901] 1 IR 222; *John v Dodwell & Co* [1918] AC 563, PC; *Reckitt v Barnett, Pembroke and Slater Ltd* [1929] AC 176, HL; *Imperial Bank of Canada v Begley* [1936] 2 All ER 367, PC; *Midland Bank Ltd v Reckitt* [1933] AC 1, HL.

2 *Re Gross, ex p Kingston* (1871) 6 Ch App 632; cf *Union Bank of Australia v Murray-Aynsley* [1898] AC 693, PC; *Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd* [1902] AC 543, PC. As to the banker's right to combine accounts see PARA 867.

3 *Re Gross, ex p Kingston* (1871) 6 Ch App 632 at 640 per Mellish LJ.

4 *Bodenham v Hoskins* (1852) 21 LJ Ch 864; *Re Gross, ex p Adair* (1871) 24 LT 198 (affd sub nom *Re Gross, ex p Kingston* (1871) 6 Ch App 632); *Bridgman v Gill* (1857) 24 Beav 302. Cf *Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd* [1902] AC 543, PC; *British America Elevator Co v Bank of British North America* [1919] AC 658, PC; *Cunningham v Northern Banking Co Ltd* [1928] NI 112, CA; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, [1968] 3 All ER 651, HL. As to money paid for a special purpose see PARA 825.

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### 843. The banker as constructive trustee.

Banks have been held liable as constructive trustees in circumstances wider than those of wrongfully obtaining by design or stipulation a benefit from a fund known to be affected by a trust<sup>1</sup>; and a constructive trust has been imposed upon a paying bank in circumstances where it has obtained no benefit for itself at all<sup>2</sup>. A bank may be held liable as constructive trustee even in respect of a payment made in accordance with its customer's mandate<sup>3</sup>. In relation to the category of constructive trusteeship known as dishonest assistance<sup>4</sup>, it is necessary to establish that the bank acted dishonestly<sup>5</sup>. The position is not as clear in relation to the other category of constructive trusteeship known as knowing receipt<sup>6</sup>, and the authorities conflict as to whether the bank will be liable when the relevant knowledge is merely of circumstances which would indicate the facts to an honest and reasonable person or would put an honest and reasonable person on inquiry or whether actual knowledge is required<sup>7</sup>.

1 As to the liability of a bank in such a case see PARA 842.

2 See *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555; *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210, [1972] 1 WLR 602; *Rowlandson v National Westminster Bank Ltd* [1978] 3 All ER 370, [1978] 1 WLR 798; *Baden, Delvaux and Lecuit v Société General pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, [1983] BCLC 325; *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA. See also *Barclays Bank plc v Quincecare and Unichem Ltd* [1992] 4 All ER 363, where claims of constructive trusteeship failed. In certain cases, eg *Lipkin Gorman v Karpnale Ltd* above, the facts are such that a claim of constructive trusteeship must fail if a contractual claim based on the same facts is unsuccessful.

3 *Selangor United Rubber Estates Ltd v Craddock (No 3)* [1968] 2 All ER 1073 at 1119, [1968] 1 WLR 1555 at 1609 per Ungood-Thomas J; *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210 at 1231, [1972] 1 WLR 602 at 629 per Brightman J. The status of these authorities is now somewhat doubtful: see *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA.

4 See **TRUSTS** vol 48 (2007 Reissue) PARA 704.

5 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97, PC. This case set new criteria for dishonest assistance and did not follow the previous guidelines set out by Lord Selborne LC in *Barnes v Addy* (1874) 9 Ch App 244. See Paget's Law of Banking (12th Edn, 2003) pp 459-465. The defendant must have acted dishonestly by the ordinary standards of reasonable and honest people, and he must have been aware that by those standards he was acting dishonestly: *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [2002] 2 All ER 377, HL.

6 See **TRUSTS** vol 48 (2007 Reissue) PARA 701.

7 Compare *Baden, Delvaux and Lecuit v Société General pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, [1983] BCLC 325, with *Re Montagu's Settlement Trusts* [1987] Ch 264, [1992] 4 All ER 308; *Barclays Bank plc v Quincecare and Unichem Ltd* [1992] 4 All ER 363; and *Lipkin*

*Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA. See **TRUSTS** vol 48 (2007 Reissue) PARA 704. See also Paget's Law of Banking (12th Edn, 2003) pp 493-500.

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#### **844. Banker paying without authority.**

Subject to questions of statutory protection, estoppel or adoption, a banker who has paid a cheque drawn without authority<sup>1</sup> or who has paid one in contravention of his customer's order, or, probably, negligently<sup>2</sup>, cannot debit the customer's account with the amount<sup>3</sup>. However, if such a cheque is paid in discharge of the customer's debts, the banker is entitled to take credit for it<sup>4</sup>.

The banker's duty in regard to the payment of cheques under a valid mandate is not necessarily fulfilled by his compliance with the mandate; he is under a contractual duty of care which may require him to question payment<sup>5</sup>.

When a company mandate authorises its bank to honour cheques if signed by any two signatories, but the board confers authority upon a single person to direct the transfer of a particular sum, the bank is entitled to act upon a cheque drawn on that person's single signature if he was acting within his authority<sup>6</sup>. If the bank fails to observe the discrepancy between the cheque and the mandate, or if it does so but makes no inquiries, it takes a risk in honouring the cheque that the sole signatory may not in fact be authorised<sup>7</sup>.

1 As to determination of authority to pay see PARA 847.

2 See the Bills of Exchange Act 1882 s 80 (protection to banker) which uses the words 'without negligence' (see PARA 838); *Bellamy v Marjoribanks* (1852) 7 Exch 389; *Carlton v Ireland* (1856) 5 E & B 765 at 770 per Crompton J. See also PARA 1575. The Bills of Exchange Act 1882 s 60 does not mention negligence: see PARA 836. If, therefore, payment on a forged indorsement is in the ordinary course of business, it may be protected, though negligent: see *Brighton Empire and Eden Syndicate v London and County Bank* (1904) Times, 24 March.

3 As to when the limitation period runs for a claim based on the wrongful debit of an account see *National Bank of Commerce v National Westminster Bank* [1990] 2 Lloyd's Rep 514, applying *Limpgrange Ltd v BCCI SA* [1986] FLR 36.

4 *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48. A bank which, without authority, pays out funds from its customer's account to a judgment creditor, in purported compliance with a third party debt order, which has not been made absolute, cannot claim the benefit of such payment: *Crantrave Ltd v Lloyd's Bank plc* [2000] QB 917, [2000] 4 All ER 473, CA. As to third party debt orders see PARA 869.

5 See PARA 828.

6 *London Intercontinental Trust Ltd v Barclays Bank Ltd* [1980] 1 Lloyd's Rep 241.

7 *London Intercontinental Trust Ltd v Barclays Bank Ltd* [1980] 1 Lloyd's Rep 241.

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### 845. Wrongful dishonour.

If, without justification, a banker dishonours his customer's cheque, he is liable to the customer in damages for injury to credit<sup>1</sup>; but he is not liable to the holder except where, as only rarely happens, he holds funds appropriated to the particular cheque and has so informed the holder<sup>2</sup>. Proof of actual injury to credit is not necessary to secure substantial damages, either for a business customer<sup>3</sup> or for personal customers<sup>4</sup>. The answer on a cheque dishonoured on presentation by a third person<sup>5</sup> may constitute libel, but such cases are rare<sup>6</sup>; in such cases general damages may be awarded.

1 *Marzetti v Williams* (1830) 1 B & Ad 415. Where a bank wrongly dishonoured a cheque and marked it 'not sufficient', the bank could not rely on qualified privilege as a defence against the alleged libel: *Davidson v Barclays Bank Ltd* [1940] 1 All ER 316. See **LIBEL AND SLANDER** vol 28 (Reissue) PARA 54.

2 *Boyd v Emmerson* (1834) 2 Ad & El 184. See also *Auchteroni & Co v Midland Bank Ltd* [1928] 2 KB 294.

3 Cf *Wilson v United Counties Bank Ltd* [1920] AC 102 at 112, HL, per Lord Birkenhead LC; *Evans v London and Provincial Bank Ltd* (1917) 3 Legal Decisions Affecting Bankers 152; *Cox v Cox & Co* (1921) Times, 18 March. See however *Rolin v Steward* (1854) 14 CB 595; *Summers v City Bank* (1874) LR 9 CP 580.

4 *Kpothraror v Woolwich Building Society* [1996] 4 All ER 119, [1996] 01 LS Gaz R 22, CA, distinguishing *Gibbons v Westminster Bank Ltd* [1939] 2 KB 882, [1939] 3 All ER 577 and *Rae v Yorkshire Bank Ltd* [1988] BTL 35, CA.

5 There is no libel in the case of a customer presenting a cheque payable to self: *Kinlan v Ulster Bank Ltd* [1928] 1 IR 171.

6 See *Frost v London Joint Stock Bank Ltd* (1906) 22 TLR 760, CA (words 'reason assigned--not stated' held not libellous); *Flach v London and South-Western Bank Ltd* (1915) 31 TLR 334 (words 'refer to drawer' held not libellous, although Grantham J left these words to the jury in *Szek v Lloyds Bank Ltd* (1908) 2 Legal Decisions Affecting Bankers 159); *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107, [1936] 1 All ER 653 (adopting the view taken in *Flach v London and South-Western Bank Ltd*). However see *Pyke v Hibernian Bank Ltd* [1950] IR 195 (words 'refer to drawer, present again' and 'refer to drawer' held libellous by court of first instance; judges of appeal court being equally divided, the judgment was affirmed). In *Jayson v Midland Bank Ltd* [1967] 2 Lloyd's Rep 563 (on appeal [1968] 1 Lloyd's Rep 409, CA), while the jury found that the words 'refer to drawer' were libellous, the point was immaterial in the sense that the statement that there were no funds to meet the charges was true. As to 'present again' see *Baker v Australia and New Zealand Bank Ltd* [1958] NZLR 907.

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### 846. Time for payment.

If the bill is ostensibly in order, the banker must pay or refuse to pay at once. He is not entitled to time in which to decide whether he may safely pay<sup>1</sup>. Some doubt has, however, been cast on this view<sup>2</sup>. Where presentment is made through a clearing house, the banker is probably entitled to the time allowed by the rules of that establishment for deciding whether to pay or not.

1 *Bank of England v Vagliano Bros* [1891] AC 107 at 157, HL, per Lord Macnaghten (dissenting from the dictum of Maule J in *Roberts v Tucker* (1851) 16 QB 560 at 577-578). See also *Bank of England v Vagliano Bros* above at 116-117 per Lord Halsbury, and at 141 per Lord Bramwell (dissenting on other grounds); and see *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176 at 184, [1944] 2 All ER 83 at 87, PC. Cf *Momm (t/a Delbrueck & Co) v Barclays Bank International Ltd* [1977] QB 790, [1976] 3 All ER 588. As to when payment by funds transfer may be deemed complete see *Tenax Steamship Co Ltd v Reinante Transoceanica Navegacion SA*,

*The Brimnes* [1973] 1 WLR 386; affd [1975] QB 929, CA; *Sutherland and Sutherland v Royal Bank of Scotland plc* [1997] 6 Bank LR 132; and Paget's Law of Banking (12th Edn, 2003) p 351 et seq.

2 *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 All ER 1210 at 1231, [1972] 1 WLR 602 at 629 per Brightman J.

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#### **847. Determination of authority to pay.**

The duty and authority to pay a cheque drawn by a customer are determined:

- 9 (1) by countermand of payment, commonly known as stopping a cheque<sup>1</sup>;
- 10 (2) by notice of the customer's death<sup>2</sup>;
- 11 (3) by notice of the customer's mental disorder or lack of capacity, where it is of a degree preventing his understanding the transaction<sup>3</sup>;
- 12 (4) by notice of the presentation of a bankruptcy petition against the customer<sup>4</sup> or the making of a bankruptcy order against him<sup>5</sup>;
- 13 (5) by notice of the presentation of a winding-up petition where the customer is a limited company<sup>6</sup>, or of the passing of a resolution for voluntary winding-up<sup>7</sup>.

The duty and authority of a bank to pay money from a client's account may also be established by a direct debit mandate. It has been suggested that failure to implement a properly concluded mandate might be breach of an implied term of a contract between the bank and its customer<sup>8</sup>, but such a mandate does not confer on a creditor any rights of the debtor against his own bank<sup>9</sup>. It has been held that cancelling a direct debit mandate is equivalent to countermanding a payment by cheque<sup>10</sup>.

1 Bills of Exchange Act 1882 s 75; *Mclean v Clydesdale Banking Co* (1883) 9 App Cas 95, HL. See also PARA 1403. As between separate branches of a bank there is a right to separate notice of countermand: *London Provincial and South-Western Bank v Buszard* (1918) 35 TLR 142. As to payment contrary to instructions see *Twibell v London Suburban Bank* [1869] WN 127; *Bale v Parr's Bank Ltd* (1909) 25 TLR 549; *Reade v Royal Bank of Ireland Ltd* [1922] 2 IR 22, CA. As to the authority of a principal to stop payment on an account, which he has opened in favour of an agent, see *Société Coloniale Anversoise v London and Brazilian Bank Ltd* [1911] 2 KB 1024. As to countermand addressed to a branch substituted by alteration, the cheque being magnetically lettered to the original branch addressee, see *Burnett v Westminster Bank Ltd* [1966] 1 QB 742, [1965] 3 All ER 81; and see also *Andrews v Andrews* 1967 SLT 14. As to joint accounts see PARA 823. Apart from any question of mandate, one partner has power to stop a cheque issued in the firm name, and one executor has power to stop a cheque signed by another: *Gaunt v Taylor* (1843) 2 Hare 413.

Stopping by teletransmission is sufficient: see *Curtice v London City and Midland Bank Ltd* [1908] 1 KB 293, CA (where it was held that, though a telegram countermanding a cheque might reasonably be acted upon by a banker, an unauthenticated telegram was not sufficient authority for refusing payment). See also *Reade v Royal Bank of Ireland Ltd* above; *Westminster Bank Ltd v Hilton* (1926) 136 LT 315. See further the Uniform Customs and Practice for Documentary Credits (1993 and 2007 Revisions), which uses the expression 'teletransmission' (see art 11; and PARA 932).

Where a banker has marked a cheque at the instance of the customer, the customer probably cannot countermand payment of the cheque after issue. By so marking (see PARA 835), the banker probably becomes bound to pay to any other banker presenting it: cf *Goodwin v Roberts* (1875) LR 10 Exch 337; *Gaden v Newfoundland Savings Bank* [1899] AC 281, PC; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC. See also *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC, in which English law and practice are considered. The Bills of Exchange Act 1882 s 75 does not include the case as an exception, but the banker is in the position of an agent with an interest: see further generally **AGENCY**. Even if the cheque is not crossed, it might be presented through a banker, or be subsequently crossed.

2 Bills of Exchange Act 1882 s 75. Cf *Rogerson v Ladbroke* (1822) 1 Bing 93. Where one of two or more partners or customers on joint account dies, the survivors or survivor may, as a rule, still draw on the account (see PARA 833); but, on the death of one of several trustees, the banker may not honour cheques on the trust account drawn by the survivor or survivors unless satisfied of his or their power so to draw under the terms of the trust, or in exercise of statutory authority (see the Trustee Act 1925 s 18; PARA 833; and **TRUSTS** vol 48 (2007 Reissue) PARAS 817, 981, 983).

3 *Drew v Nunn* (1879) 4 QBD 661, CA; *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, CA; *Bradford Old Bank Ltd v Sutcliffe* (1918) 34 TLR 299 (affd on other grounds [1918] 2 KB 833, CA) (a guarantee).

4 Bills of Exchange Act 1882 s 97(1); Insolvency Act 1986 s 284. See also PARA 1608. The right and duty to refuse payment in such case arise not so much from the actual determination of the customer's authority as from the provisions of the bankruptcy legislation: see further **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**. As to restrictions on the disposition of property between the day of presentation of a petition and the vesting of the bankrupt's estate in a trustee see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 217.

5 Insolvency Act 1986 ss 283(1), 306, 385(1). See further **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216 et seq.

6 As to the avoidance of property disposition etc see the Insolvency Act 1986 s 127; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 700-702. As to the meaning of 'disposition' in this context see *Hollicourt (Contracts) Ltd v Bank of Ireland* [2001] Ch 555, [2001] 1 All ER 289, CA, not applying *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 at 820, [1980] 1 WLR 711 per Buckley LJ.

7 See the Insolvency Act 1986 ss 87, 103; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 997.

8 *Weldon v GRE Linked Life Assurance Ltd* [2000] 2 All ER (Comm) 914.

9 *Mercedes-Benz Finance Ltd v Clydesdale Bank plc* 1997 SLT 905, [1997] CLC 81, OH.

10 *Esso Petroleum Co Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, CA. But this decision is questioned in Paget's Law of Banking (12th Edn, 2003) at p 335.

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#### **848. Cheque not drawn by customer.**

It would appear that a cheque, being a bill of exchange drawn on a banker, payable on demand, need not be drawn by a customer<sup>1</sup>, although payment of such a cheque would hardly be in the ordinary course of banking business. The protection extends to an instrument carrying a per pro indorsement<sup>2</sup>.

1 See *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL, where protection was accorded to banker's drafts (see PARA 896) under the Stamp Act 1853 s 19 (see PARA 896), in which the words 'drawn on a banker' are the same as in the Bills of Exchange Act 1882 s 60 (see PARA 836). The history of the legislation given in *Charles v Blackwell* (1877) 2 CPD 151 at 156, CA, and in *Capital and Counties Bank Ltd v Gordon* above at 250 per Lord Lindley should, however, be considered. There is nothing about 'ordinary course of business' in the Stamp Act 1853 s 19, but s 19 has been held to have been impliedly repealed by the Bills of Exchange Act 1882 s 60 as regards bills and cheques: see *Carpenters' Co v British Mutual Banking Co* [1938] 1 KB 511, [1937] 3 All ER 811, CA. See also PARA 833.

2 *Charles v Blackwell* (1877) 2 CPD 151, CA, decided in relation to the Stamp Act 1853 s 19, but applicable to the Bills of Exchange Act 1882 s 60 (see PARA 836). As to per pro indorsements see PARA 892.

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#### **849. Cheques materially altered.**

Whether a material alteration of a cheque precludes the banker from debiting his customer with the whole or part of the cheque appears to depend on the character and effect of the alteration<sup>1</sup>. If, despite the alteration, the customer's mandate has been substantially complied with, it is submitted that the banker may charge the customer<sup>2</sup>. If the alteration is in the amount, it would seem that the banker may be entitled to debit the customer with the amount originally inserted<sup>3</sup>.

1 The cases do not agree. The decision in *Simmons v Taylor* (1857) 2 CBNS 528 at 539, 541 (affd (1858) 4 CBNS 463) implies that any material alteration would absolutely debar the banker from debiting, for the cheque must be the customer's cheque in all respects. Other cases point the other way, as only the excess amount seems to have been treated as disputable: see *Hall v Fuller* (1826) 5 B & C 750 (date and amount altered); *Young v Grote* (1827) 4 Bing 253 (amount altered); *Halifax Union v Wheelwright* (1875) LR 10 Exch 183; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC (amount altered; in this case the cheque was described as good for the original amount). See also *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777, HL; and PARA 829 note 1. The alteration of an amount of money in the old currency to the equivalent decimal amount is not a material alteration for the purposes of the Bills of Exchange Act 1882 s 64(1) (by which a bill materially altered is avoided except against a party who has made, authorised or assented to the alteration, and subsequent indorsers: see PARA 1559): see the Decimal Currency Act 1969 s 3(2).

2 The paying banker, not being a holder, cannot avail himself of the Bills of Exchange 1882 s 64(1) proviso (by which a material alteration which is not apparent does not prevent a holder in due course from availing himself of a bill: see PARA 1559). It is submitted that that provision avoids the bill only as between the parties. Cf the common law rule as stated by Brett LJ in *Suffell v Bank of England* (1882) 9 QBD 555 at 568, CA, where he limited the avoidance to a party suing on the bill or setting it up as a direct defence. This is not the banker's position; he sets it up as an authority, not a bill. The ground alleged for the rule, namely that the bill must have been altered with the privity or by the neglect of the holder (see *Davidson v Cooper* (1843) 11 M & W 778, Ex Ch), is inapplicable to the banker. Alteration of the date of a cheque is a material alteration (Bills of Exchange Act 1882 s 64(2); *Vance v Lowther* (1876) 1 ExD 176), but it would be unreasonable if the alteration to an earlier date debarred the banker from debiting the customer, if paid after the original date. A bank collecting a stolen cheque or paying a draft which has been materially altered by the payee's name being fraudulently changed is not liable in conversion because the instrument is avoided under the Bills of Exchange Act 1882 s 64(1) (see PARA 1559): *Smith v Lloyds TSB Group plc*, *Harvey Jones Ltd v Woolwich plc* [2001] QB 541, [2001] 1 All ER 424, [2000] 2 All ER (Comm) 693, CA.

3 See the cases cited in note 1.

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#### **850. Payment on forged cheque.**

A document in cheque form on which the customer's name as drawer is forged or placed without authority is not a cheque but a nullity; and, unless the banker can establish adoption or estoppel, he may not debit the customer with any payment made on it<sup>1</sup>.

The common aphorism that a banker is under a duty to know his customer's signature is in fact incorrect, even as between the banker and his customer; the principle is simply that a banker

may not debit his customer's account on the basis of a forged signature, since he has in that event no mandate from the customer for doing so<sup>2</sup>.

1 *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834; and see *Smith v Mercer* (1815) 6 Taunt 76; *Cocks v Masterman* (1829) 9 B & C 902; *Hart v Frontino and Bolivia South American Gold Mining Co Ltd* (1870) LR 5 Exch 111 at 115 per Bramwell B; *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188 at 196 per Lindley J; *Sheffield Corp v Barclay* [1903] 2 KB 580 at 590, CA, per Vaughan Williams LJ (on appeal [1905] AC 392, HL). In the context of a fraudulently drawn bill of exchange, see *Kreditbank Cassel GmbH v Schenkers* [1927] 1 KB 826, CA.

2 *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654 at 666, [1974] 3 All ER 834 at 844 per Kerr J; and see *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7. As to the position where there is a forged signature on a cheque card see *First Sport Ltd v Barclays Bank plc* [1993] 3 All ER 789, [1993] 1 WLR 1229, CA.

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### **851. Payment of bill on forged acceptance or indorsement.**

A banker who has paid a bill on a forged acceptance may not charge his customer with the amount, unless the customer is precluded by estoppel or adoption from disputing his signature<sup>1</sup>.

A banker who has paid a bill on a forged indorsement may not charge his customer unless the customer is estopped from disputing the payment<sup>2</sup>. Negligence on the part of the customer directly leading to or enabling the loss, or a representation made to the banker by the customer on a material point on which the banker acted by paying money which he would not otherwise have paid, might constitute such estoppel<sup>3</sup>. Acceptance of a bill on which the payee's indorsement has been forged does not, however, stop the customer from refusing to be debited<sup>4</sup>.

If, however, the payee is a fictitious or non-existent person, the bill may be treated as payable to bearer<sup>5</sup>, and the banker may charge his customer, notwithstanding the forged indorsement.

Where a banker has paid a bill on a forged indorsement, he is liable for the amount to the true owner in conversion or for money had and received<sup>6</sup>.

1 *Bank of England v Vagliano Bros* [1891] AC 107, HL.

2 *Smith v Mercer* (1815) 6 Taunt 76; *Roberts v Tucker* (1851) 16 QB 560, Ex Ch; *Bank of England v Vagliano Bros* [1891] AC 107, HL. There is no protection in such a case for the banker similar to that given by the Bills of Exchange Act 1882 s 60 (see PARAS 836, 1552) with regard to demand drafts or cheques, or by the Stamp Act 1853 s 19 (see PARA 896) with regard to drafts or orders payable to order on demand drawn on a banker. As to forged or unauthorised signatures see also the Bills of Exchange Act 1882 s 24 (and see PARA 1425).

3 See *Bank of England v Vagliano Bros* [1891] AC 107, HL. The banker acts as agent for the customer in paying domiciled bills, and as such is entitled to the protection and consideration usually accorded to an agent. As to domiciled bills see PARA 840.

4 *Roberts v Tucker* (1851) 16 QB 560, Ex Ch.

5 Bills of Exchange Act 1882 s 7(3). See also PARA 1431. The bill may be so treated by anyone to whose interest it is so to treat it, which includes the paying banker: *Bank of England v Vagliano Bros* [1891] AC 107,

HL. As to when the payee is fictitious see *Vinden v Hughes* [1905] 1 KB 795; *North and South Wales Bank Ltd v Macbeth* [1908] AC 137, HL; and PARA 855.

6 *Smith v Union Bank of London* (1875) LR 10 QB 291; affd 1 QBD 31, CA (cheque; but the same principle applies to a bill, except that there is no protection); *Smith v Lloyds TSB Group plc, Harvey Jones Ltd v Woolwich plc* [2001] QB 541, [2001] 1 All ER 424, [2000] 2 All ER (Comm) 693, CA. Quaere, however, whether the banker could not escape this liability by returning the bill, if still in his possession, to the true owner, the cancellation of the acceptance being treated as made under a mistake within the Bills of Exchange Act 1882 s 63(3) (see PARA 1556). See *Castrique v Imrie* (1870) LR 4 HL 414 at 435 per Blackburn J, referring to *Novelli v Rossi* (1831) 2 B & Ad 757. This course seems suggested by *Charles v Blackwell* (1877) 2 CPD 151, CA. The acceptor would still be liable to the true owner, the bill not being discharged by the payment to the person wrongfully in possession of it.

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## 852. The principle in *Cocks v Masterman*.

The claim of a bank to recover money paid on a document which is a bill or cheque, and not a nullity ab initio, has been defeated<sup>1</sup> by a defence founded on the need to give notice of dishonour<sup>2</sup>. It seems that the principle which applies<sup>3</sup> is that, if the claimant fails to give notice on the day of payment that the bill contains a forged signature, and the money, having been paid in ignorance of that fact, is being claimed back, the defendant is deprived of the opportunity of giving notice of dishonour on the day when the bill falls due, and so is deemed to have changed his position and has a good defence to the claim on that ground<sup>4</sup>. The principle has been described as stringent<sup>5</sup> and very technical<sup>6</sup> and it is unlikely to be extended.

The defence appears to be available to a payee of a bill or cheque held under genuine indorsements following forged ones, since the holder's remedy against the indorsers subsequent to the forgery is on the instrument by estoppel and dependent on giving notice of dishonour in due time<sup>7</sup>. Where a person holds immediately under a forged indorsement, the banker is prima facie entitled to recover the money from him if demanded within a reasonable time after payment.

The principle mentioned above has no application where notice of dishonour is dispensed with<sup>8</sup>, as where the drawer of a cheque countermands payment<sup>9</sup>. The principle is not founded upon estoppel by representation, and the mere honouring of an undetectably forged cheque does not amount to a representation by the bank that the cheque is genuine, whether the cheque is presented for special collection or cleared in the normal way<sup>10</sup>.

1 The authorities are analysed by Kerr J in *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834.

2 For cases which adopt this analysis of the true foundation of the defence see *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49 at 58, PC; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654 at 668, [1974] 3 All ER 834 at 846 per Kerr J; *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 701, [1979] 3 All ER 522 at 541 per Robert Goff J. It may be noticed that in the leading case (*Cocks v Masterman* (1829) 9 B & C 902) the prejudice to the holder was defined as being the loss of his right to take steps against other parties to the bill the same day as it is dishonoured. This must refer to his immediate right of recourse on dishonour (Bills of Exchange Act 1882 s 47(2)) or the equally immediate right to give notice (s 49(12)) (see also PARAS 1525, 1531). There is no right of action until the next day (*Kennedy v Thomas* [1894] 2 QB 759, CA), and the right to give notice would hardly ever be lost until the next day (Bills of Exchange Act 1882 s 49(12)). This would seem to point to deprivation of the immediate right, not loss of the power to give notice, as the test. See also *Smith v Mercer* (1815) 6 Taunt 76 at 87 per Gibbs LJ ('The defendants, while the bill continued paid, could not have given notice to him (the indorser), for the bill was not

then dishonoured'); and *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* above at 702 and 541-542 per Robert Goff J.

3 The principle in *Cocks v Masterman* (1829) 9 B & C 902.

4 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 702, [1979] 3 All ER 522 at 541-542 per Robert Goff J.

5 *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49 at 57, PC.

6 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 703, [1979] 3 All ER 522 at 542 per Robert Goff J.

7 The remedy is not based on warranty, which applies only to a transferor by delivery: see the Bills of Exchange Act 1882 s 58; and PARA 1581. As to the estoppel of the indorser from denying the genuineness of previous indorsements see s 55(2)(b); and as to his liability to compensate the holder, subject to notice of dishonour being duly given, see s 55(2)(a). See also PARA 1577, 1578. Although the person in possession is not strictly a holder in due course, or even a holder, he is entitled by estoppel against indorsers subsequent to the forgery. See also generally **ESTOPPEL**.

8 As to the circumstances in which notice of dishonour is dispensed with see the Bills of Exchange Act 1882 s 50(2); and PARA 1535.

9 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 703, [1979] 3 All ER 522 at 542 per Robert Goff J.

10 *National Westminster Bank Ltd v Barclays International Ltd* [1975] QB 654, [1974] 3 All ER 834, explaining *Price v Neal* (1762) 3 Burr 1354 and *London and River Plate Bank Ltd v Bank of Liverpool Ltd* [1896] 1 QB 7.

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### **853. Mistake of fact or law; recovery of money paid.**

If a person pays money to another under a mistake<sup>1</sup> which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake<sup>2</sup>. A payment is made under a mistake of fact if it is so made honestly, notwithstanding that the payer has means, of which he did not avail himself, of knowing the true facts<sup>3</sup>. His claim may, however, fail if: (1) the payer intends that the payee is to have the money at all events, whether the fact be true or false, or is deemed in law so to intend<sup>4</sup>; or (2) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee, or a principal on whose behalf he is authorised to receive the payment, by the payer or by a third party by whom he is authorised to discharge the debt<sup>5</sup>; or (3) the payee has changed his position in good faith<sup>6</sup> or is deemed in law to have done so<sup>7</sup>. However, it is not necessary, in order to ground recovery, for the mistake: (a) to have induced the payer to believe that he was liable to pay the money to the payee or his principal; or (b) to be 'as between' the payer and the payee<sup>8</sup>.

Where a bank pays a cheque drawn on it by a customer, the bank's entitlement to recover the payment on the ground that it was paid under a mistake depends on whether the payment was effected with or without mandate<sup>9</sup>. Where the bank pays within its mandate, it has a right of recourse against its customer and its customer's obligation to the payee is discharged; the payee having given consideration for the payment, the money is irrecoverable unless the transaction itself is set aside. Where the bank pays without mandate, it has no recourse against

its customer, the customer's debt to the payee is not discharged, and prima facie the bank may recover payment<sup>10</sup>.

If payment is made to a bank acting as agent for a person as to whose identity there is a mistake of fact, and, before the mistake is discovered, the money has been paid by the bank to its principal, the payer cannot recover the amount from the bank<sup>11</sup>. Wherever money is received by an agent who, without knowledge of the mistake, pays it over to his principal, it cannot be recovered<sup>12</sup>.

Where money is paid on a negotiable instrument to a person innocent of any knowledge of mistake, it cannot be recovered if the payee's position might, but not necessarily would, be affected if he had to refund<sup>13</sup>. A mistake of fact in relation to negotiable instruments must be as to the instrument itself<sup>14</sup>.

Where the money has been received in bad faith, it may be recovered by the payer<sup>15</sup>.

1 The former rule of law that money was not recoverable if paid under a mistake of law (as distinct from a mistake of fact) was abrogated by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL. See further **MISTAKE** vol 77 (2010) PARA 11.

2 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Robert Goff J; *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, HL; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJBK 465, HL; *Holt v Markham* [1923] 1 KB 504, 92 LJBK 406; *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL.

The principles enunciated in this paragraph were formulated on the basis of the former rule that the mistake had to be one of fact; as to the abolition of that rule see note 1.

3 *Kelly v Solari* (1841) 9 M & W 54; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49 at 56, PC; *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL. The property in the money given in payment of a cheque passes, and the payment is complete, as soon as the money is placed on the bank counter: *Chambers v Miller* (1862) 13 CBNS 125; cf *Pollard v Bank of England* (1871) LR 6 QB 623.

4 *Kelly v Solari* (1841) 9 M & W 54; *Morgan v Ashcroft* [1938] 1 KB 49, [1937] 3 All ER 92, CA.

5 *Aiken v Short* (1856) 1 H & N 210; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJBK 465, HL. See also *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] QB 110, [1999] 1 All ER (Comm) 8, CA (restitution of a payment made by electronic transfer, under the mistaken belief that funds for the payment have cleared, will not be ordered where the payment is made to discharge a debt); *Customs and Excise Comrs v National Westminster Bank plc* [2002] EWHC 2204 (Ch), [2003] 1 All ER (Comm) 327 (there is no general rule that a bank could claim to be so authorised simply because it held an account for the client).

6 *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, HL.

7 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Robert Goff J.

8 See *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 696, [1979] 3 All ER 522 at 536, where Robert Goff J described the propositions that the conditions set out in heads (a) and (b) in the text are necessary as 'inconsistent with the simple principle of recovery established in the authorities'.

9 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 700, [1979] 3 All ER 522 at 539 per Robert Goff J. The two typical situations which exemplify payment, with or without mandate, arise: (1) where the bank pays in the mistaken belief that there are sufficient funds or overdraft facilities to meet the cheque (with mandate); and (2) where the bank overlooks notice of countermand given by the customer (without mandate). See also *Lloyds Bank plc v Independent Insurance Co Ltd* [2000] QB 110, [1999] 1 All ER (Comm) 8, CA.

10 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 700, [1979] 3 All ER 522 at 539 per Robert Goff J. As to the position where a bank mistakenly credits a customer's account see PARA 873.

11 *Gowers v Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All ER 766 at 773, CA, per Sir Wilfrid Green MR, citing *Kleinwort Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263 at 265, HL, per Lord Atkinson. See **AGENCY** vol 1 (2008) PARA 162.



12 See *Kleinwort Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, HL; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJB 465, HL; *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL.

13 *Cocks v Masterman* (1829) 9 B & C 902; *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7; but see *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC. See also PARA 852.

14 *Gowers v Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All ER 766, CA.

15 *Kendal v Wood* (1870) LR 6 Exch 243.

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### 854. Estoppel, ratification and adoption.

Mere silence or inaction cannot amount to a representation unless there is a duty to disclose or to act<sup>1</sup>. The customer owes his bank a duty to inform it of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it<sup>2</sup> or has reasonable grounds for believing it<sup>3</sup>. If he fails to do so within a reasonable time, and the bank alters its position for the worse, he is estopped from setting up the forgery<sup>4</sup>.

Ratification of a forged signature on a bill is not possible<sup>5</sup>. Adoption of such a signature requires valuable consideration<sup>6</sup>.

1 *Greenwood v Martin's Bank Ltd* [1933] AC 51 at 57, HL, per Lord Tomlin; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 110, [1985] 2 All ER 947 at 959, PC. See generally **ESTOPPEL**.

2 *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL; *Greenwood v Martin's Bank Ltd* [1933] AC 51, HL; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC. Constructive knowledge does not appear to be sufficient: see *Price Meats Ltd v Barclays Bank plc* [2000] 2 All ER (Comm) 346; *Patel v Standard Chartered Bank* [2001] Lloyd's Rep Bank 229.

3 *M'Kenzie v British Linen Co* (1881) 6 App Cas 82 at 92, 95, HL per Lord Selborne.

4 See the cases cited in note 2. For examples of cases where the bank failed to set up an estoppel see *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL; *Ogilvie v West Australian Mortgage and Agency Corp Ltd* [1896] AC 257, PC; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC. An estoppel was upheld in *London Intercontinental Trust Ltd v Barclays Bank Ltd* [1980] 1 Lloyd's Rep 241, but this ground of the decision may be open to doubt in the light of the decision in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* above. A person who allows his banker to pay a cheque to which his name has been forged is not estopped from disputing a subsequent forgery by the same hand unless the repetition of such payment establishes a course of business authorising the use of his name: *Morris v Bethell* (1869) LR 5 CP 47.

5 See the Bills of Exchange Act 1882 s 24. See also PARA 1425. See also *Brook v Hook* (1871) LR 6 Exch 89; *Greenwood v Martin's Bank Ltd* [1932] 1 KB 371 at 379, CA, per Scrutton LJ, and at 385 per Greer LJ (on appeal [1933] AC 51, HL, where the decision in the Court of Appeal was affirmed without dealing with this point); *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187. The decision in *Brook v Hook* above was made at a time when a person who remained silent when he knew that a forgery had been committed was guilty of the offence of misprision of felony. The modern equivalent (concealing an offence) is not committed if the only consideration for remaining silent is the making good of the loss caused or the making of reasonable compensation for it: see the Criminal Law Act 1967 s 5(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 734. Quaere whether this affects the principle of *Brook v Hook* above. For an example of ratification of a merely unauthorised signature see *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA; and see also *M'Kenzie v British Linen Co* (1881) 6 App Cas 82 at 99, HL, per Lord Blackburn.

6 *Greenwood v Martin's Bank Ltd* [1933] AC 51 at 57, HL, per Lord Tomlin. In *Cairncross v Lorimer* (1860) 3 Macq 827 at 830, HL, Lord Campbell appeared to consider actual knowledge necessary for adoption.

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### **855. Fictitious payee.**

A cheque of which the payee is a fictitious or non-existent person may be treated as payable to bearer<sup>1</sup>, though ostensibly payable to that payee or order<sup>2</sup>. Where the payee is a real person known to the drawer and intended by him to have the benefit of the cheque, although the drawer is induced to insert the name and draw by fraudulent representations of a third party, the ostensible payee could never enforce payment of the cheque<sup>3</sup>. In such case, however, the paying banker would usually be protected as having paid on a forged indorsement<sup>4</sup>. It would appear that documents made payable to an impersonal payee or order (for example, 'wages or order' or 'petty cash or order') are not within the statutory rule<sup>5</sup>; they are not bills of exchange, since these require payment to a specified person<sup>6</sup>.

1 As to the meaning of 'bearer cheque' see PARA 879. An order cheque on which the last or only indorsement is an indorsement in blank is equally payable to bearer: Bills of Exchange Act 1882 ss 8(3), 73. As to cheques generally see PARAS 879-880. See also PARAS 1405, 1410, 1428.

2 Bills of Exchange Act 1882 s 7(3); *Bank of England v Vagliano Bros* [1891] AC 107, HL; *Robinson v Midland Bank Ltd* (1924) 41 TLR 402, CA. See also PARA 1431. A bank has been held not entitled to rely on provisions corresponding to the Bills of Exchange Act 1882 s 7(3) where the name of the fictitious payee had been inserted in the cheque by an employee of the drawer with intent to defraud the drawer, and the cheque was marked 'not negotiable; account payee only': *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 (2) SA 703.

3 *Vinden v Hughes* [1905] 1 KB 795, distinguishing *Bank of England v Vagliano Bros* [1891] AC 107, HL, and *Clutton v Attenborough & Son* [1897] AC 90, HL. See also *North and South Wales Bank v Macbeth* [1908] AC 137, HL; *Town and County Advance Co Ltd v Provincial Bank of Ireland* [1917] 2 IR 421; *Goldman v Cox* (1924) 40 TLR 744, CA.

4 See PARA 836.

5 In the Bills of Exchange Act 1882 s 7(3). See *Grant v Vaughan* (1764) 3 Burr 1516 at 1523 per Lord Mansfield ('There was no person originally named as the payee. It runs, 'Pay to ship *Fortune* or bearer'), and at 1528 per Wilmot J ('No person at all is named. It is 'Pay to ship *Fortune* or bearer'). Cf the Bills of Exchange Act 1882 s 2 (definition of 'person'); *Bank of England v Vagliano Bros* [1891] AC 107 at 129, HL, per Lord Selborne (but see the judgment of Lord Herschell at 153).

6 *North and South Insurance Corp Ltd v National Provincial Bank Ltd* [1936] 1 KB 328 (where it was held that a document could not be a cheque because it was not a bill of exchange within the statutory definition, for the word 'cash' cannot be a specified person; and a document made out in the form 'pay cash or order' was construed as a document requiring payment of cash to bearer); and see *Cole v Milsome* [1951] 1 All ER 311; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA. As to bills of exchange generally see PARA 1400 et seq.

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### **856. Indorsement at request of banker.**

Where a person claims payment of an open order cheque over the counter, alleging that he is the payee of it, and only signs his name on the back at the request of the banker, it is submitted that the banker does not obtain protection<sup>1</sup>. The signature probably represents only a receipt<sup>2</sup>.

1 This view is supported by Lord Haldane LC in *Gerald McDonald & Co v Nash & Co* [1924] AC 625 at 633-634, HL. 'Indorsement' means an indorsement completed by delivery: Bills of Exchange Act 1882 s 2. See also PARA 1407. There can be no delivery to the drawee. The terms of the Bills of Exchange Act 1882 s 60 (see PARA 836 note 3; see also PARA 1552) as to 'indorsement of the payee or any subsequent indorsement' point to the indorsement being for negotiation, or at least collection; and those as to the banker being deemed to have paid the bill in due course, notwithstanding the forged indorsement, imply payment made to an ostensible holder under the indorsement: see *Keene v Beard* (1860) 8 CBNS 372 at 382, where Byles J held such signature a receipt, not an indorsement. Cf the Finance Act 1895 s 9 (repealed), treating such signature as a receipt. See *Charles v Blackwell* (1877) 2 CPD 151 at 157, CA, per Cockburn CJ. As to the meaning of 'order cheque' see PARA 879.

2 See note 1. Whether the Cheques Act 1957 s 1 (see PARA 836; and also PARA 1552) affords protection if the cheque is paid in good faith and in the ordinary course of business is yet to be determined; although presumably it does. The point will now rarely arise since banks will not normally pay a cheque in cash except for the account holder himself.

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### **857. Following money in equity.**

Equity will intervene to prevent a defendant from acting in an unconscionable manner; and money, or the credit which results from a customer paying in a cheque<sup>1</sup>, may be followed into the hands of a banker, being a volunteer, by any person who has equal or superior right in equity to the money or the chose or thing in action<sup>2</sup>.

Where executors mistakenly paid a legacy to a charity which was not entitled to it, and the amount of the legacy was credited to the charity by the bank of which the charity was the customer, and the means of identifying the money or disentangling it remained, the true beneficial owner was entitled to follow the testator's property into the hands of the bank and obtain repayment<sup>3</sup>. If the amount of the legacy has been mixed with the customer's own money in his bank account, the customer and the true beneficiary, having equal equities, are entitled to share the fund (that is to say, the amount credited by the bank to the customer), for, if both the customer and the true beneficial owner are innocent, equity will not regard it as unconscionable for the customer to put forward a claim to retain his own money<sup>4</sup>; although, if the banking account was an active account, money first paid into it would prima facie be treated as having been first paid out<sup>5</sup>. If, however, the customer is in a fiduciary capacity towards the true owner, it will be unconscionable for the customer to advance his own claim and accordingly the true owner will have priority<sup>6</sup>. Further, if the customer is not a volunteer, but is a purchaser for value without notice in respect of the cheque or money which he pays into his banking account, the title of the true owner will neither prevail over nor rank equally with that of the customer and the money will not be able to be followed into the customer's banking account<sup>7</sup>. Equity does not permit tracing into an overdrawn account<sup>8</sup>.

Mere payment under a mistake<sup>9</sup> does not found an equitable relationship nor give the payer an equitable interest in the funds<sup>10</sup>.

- 1 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 521-522, [1948] 2 All ER 318 at 347, CA, per Lord Greene MR, where the use of the term 'following money' is discussed in relation to cheques and negotiable instruments and the collection of cheques by bankers. See also **EQUITY** vol 16(2) (Reissue) PARA 861 et seq.
- 2 *Sinclair v Brougham* [1914] AC 398, HL (overruled on a different point in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL), as explained in *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 532, [1948] 2 All ER 318 at 353, CA, per Lord Greene MR. See also *Banque Belge Pour l'Etranger v Hambrouck* [1921] 1 KB 321, CA; *Agip (Africa) Ltd v Jackson* [1991] Ch 547, [1992] 4 All ER 451, CA; *Bank Tejarat v Hong Kong and Shanghai Banking Corpn (CI) Ltd and Hong Kong and Shanghai Bank Trustee (Jersey) Ltd* [1995] 1 Lloyd's Rep 239; *Boscawen v Bajwa* [1995] 4 All ER 769, [1996] 1 WLR 328, CA; *Bank of America v Arnell* [1999] Lloyd's Rep Bank 399. As to choses or things in action see generally **CHOSSES IN ACTION** vol 13 (2009) PARA 1 et seq.
- 3 *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA (where this right was held to be a right in rem, and was distinguished from a right in personam against the payee); affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL. The right of an underpaid legatee to claim directly against an overpaid legatee is subject to the qualification that he must first exhaust his remedies against the executor who made the wrongful payment: see *Ministry of Health v Simpson* [1951] AC 251 at 271, [1950] 2 All ER 1137 at 1142, HL, per Lord Simonds.
- 4 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 539, [1948] 2 All ER 318 at 357, CA, per Lord Greene MR.
- 5 *Re Diplock, Diplock v Wintle* [1948] Ch 465, [1948] 2 All ER 318, CA; *Re Diplock's Estate, Simpson v Lilburn* [1948] Ch 559, [1948] 2 All ER 429 (money was wrongly paid to a charity which placed it into its banking account, to the account of its general fund; on a claim for recovery of the money, the charity withdrew sums to the same amount and placed them with what was then the Post Office Savings Bank; it was held that there had been no earmarking of the money and that no right to trace existed).
- 6 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 539, [1948] 2 All ER 318 at 357, CA, per Lord Greene MR.
- 7 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 539, [1948] 2 All ER 318 at 356, CA, per Lord Greene MR.
- 8 *Bishopsgate Investment Management v Homan* [1995] Ch 211, [1995] 1 All ER 347, CA.
- 9 As to the right to recover money paid under a mistake of fact or law see PARA 853.
- 10 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL, disapproving *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1979] 3 All ER 1025.

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### **858. Assignment and transfer of deposit account.**

A deposit account, being a chose or thing in action, may be assigned as a whole under the Law of Property Act 1925<sup>1</sup>, but the mere transfer of a deposit receipt does not constitute such an assignment<sup>2</sup>.

A deposit receipt, even if in terms it is expressed to be transferable, has never been recognised as a negotiable instrument, or as giving the transferee a right to sue in his own name<sup>3</sup>. It is possible that a bank, having issued the document in a transferable form, might be estopped from disputing its character as such. Where a form of cheque is printed on the back of a deposit receipt, and any conditions imposed, such as previous notice, have been fulfilled, the bank cannot, as between itself and the depositor, refuse to pay the holder<sup>4</sup>. Payment to a person wrongfully dealing with even a signed deposit receipt is no discharge to the bank, unless the depositor is estopped by his conduct from disputing such payment<sup>5</sup>.

A deposit receipt<sup>6</sup> or deposit account books of a bank<sup>7</sup>, being essential indications of title, may be the subject of a *donatio mortis causa* although they may not contain all the material terms of the contract with the bank<sup>8</sup>, and the court will compel the legal representatives of the deceased to facilitate the receipt of the money by the donee<sup>9</sup>. Where a document combining the features of a deposit receipt and a cheque is so given, the validity of the gift will depend on which is the predominant characteristic<sup>10</sup>.

A deposit may be the subject of attachment by a third party debt order<sup>11</sup>.

1     le under the Law of Property Act 1925 s 136: see **CHOSSES IN ACTION** vol 13 (2009) PARA 72. See *Re Westerton Public Trustee v Gray* [1919] 2 Ch 104. See also PARA 827. As to choses or things in action generally see **CHOSSES IN ACTION** vol 13 (2009) PARA 1 et seq.

2     *Moore v Ulster Banking Co* (1877) IR 11 CL 512. It may be a good equitable assignment and, though incomplete, be perfected after the death of the assignor by the appointment of the assignee as his executor: *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408.

3     *Re Dillon* (1890) 44 ChD 76, CA; *Moore v Ulster Banking Co* (1877) IR 11 CL 512.

4     *Re Mead, Austin v Mead* (1880) 15 ChD 651; *Re Dillon* (1890) 44 ChD 76, CA.

5     *Evans v National Provincial Bank of England* (1897) 13 TLR 429; and see *Pearce v Creswick* (1843) 2 Hare 286; *Wood v Clydesdale Bank Ltd* 1914 SC 397, Ct of Sess.

6     *Re Mead, Austin v Mead* (1880) 15 ChD 651; *Re Dillon* (1890) 44 ChD 76, CA.

7     This includes the National Savings Bank: see PARA 810.

8     *Birch v Treasury Solicitor* [1951] Ch 298, [1950] 2 All ER 1198, CA.

9     *Re Dillon* (1890) 44 ChD 76, CA; *Re Mead, Austin v Mead* (1880) 15 ChD 651.

10    See *Re Dillon* (1890) 44 ChD 76, CA.

11    See PARA 869.

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### **859. Payment in by third persons.**

Money may be paid into a customer's current account by a third person<sup>1</sup>, and, in ordinary cases, the banker is bound to accept it. However, where a cheque for an amount larger than the available balance is presented for payment, it has been said that the banker should not allow the holder to pay in the deficit, and then pay the cheque<sup>2</sup>. The receipt of rent by a bank into the owner's banking account does not change the relationship between the two from that of banker and customer<sup>3</sup>.

1     This is common practice in the operation of the bank giro system, whereby a person may pay money into any bank to the credit of the current account of any person at any branch of any bank operating the system.

2     To do so would be unjustifiable disclosure of the customer's affairs, and, if followed by receipt of the difference and payment of the cheque, might constitute a fraud on other creditors of the customer: *Foster v Bank of London* (1862) 3 F & F 214; *Hardy v Veasey* (1868) LR 3 Exch 107.

3 le so as to render the bank the agent of the owner within the meaning of the Public Health Act 1936 s 343(1): see PARA 817 note 25.

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### (iii) Banker's Lien

#### 860. Banker's lien.

The general lien of bankers is part of the law merchant as judicially recognised<sup>1</sup>; it connotes the right of a banker to retain the subject matter of the lien until an indebtedness of the customer is paid or discharged. It attaches to all securities<sup>2</sup> deposited with a banker as a banker by a customer, or by a third party on a customer's account, to instruments paid in for collection<sup>3</sup>, and to money held to the account of a customer<sup>4</sup>, unless there is an express or implied contract between the banker and the customer which is inconsistent with the lien<sup>5</sup>. In the case of money, the banker's right is often a right of set-off; it arises only in relation to the customer's money and does not apply to money paid in under a mistake of fact<sup>6</sup>.

Where there is a contract inconsistent with the lien, it determines when the relationship of banker and customer ends, as on the liquidation of a company which is a customer<sup>7</sup>.

The lien is not limited to fully negotiable securities<sup>8</sup>, but has been held to cover share certificates<sup>9</sup>, an order to pay a particular person a sum of money<sup>10</sup>, and an insurance policy<sup>11</sup>.

1 *Brandao v Barnett* (1846) 12 Cl & Fin 787; *Misa v Currie* (1876) 1 App Cas 554 at 569, HL, per Lord Hatherley. As to the law merchant see PARAS 1400, 1610; **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 662 et seq. As to lien generally see **LIEN**.

2 See eg *Baker v Lloyd's Bank Ltd* [1920] 2 KB 322.

3 *Thompson v Giles* (1824) 2 B & C 422 at 431; *Misa v Currie* (1876) 1 App Cas 554, HL. Cf *Great Western Ry Co v London and County Banking Co Ltd* [1900] 2 QB 464, CA. In *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465, Bigham J treated collection as a special purpose excluding lien, but this is clearly not the case: see *Re Keever (a bankrupt)*, *ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719.

4 *Roxburghe v Cox* (1881) 17 ChD 520, CA; *Misa v Currie* (1876) 1 App Cas 554, HL. Money is, however, not usually the subject of lien, not being capable of being earmarked; the banker's claim in such cases is probably more rightly referred to as set-off: see *Roxburghe v Cox* above. It has been held that a bank has no lien but only a right of set-off in respect of a customer's account: *Re Morris, Coneys v Morris* [1922] 1 IR 136, CA. On the question whether the bank's rights may be properly described as an aspect of lien see *Halesowen Presswork and Assemblies Ltd v Westminster Bank Ltd* [1971] 1 QB 1, [1970] 1 All ER 33; on appeal [1971] 1 QB 25, [1970] 3 All ER 473, CA; *re* sub nom *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL. As to set-off see PARAS 868, 1012.

5 *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 806 per Lord Campbell; *Bock v Gorrissen* (1860) 2 De GF & J 434, CA; *British Guiana Bank v Official Receiver* (1911) 104 LT 754, PC. A banker has no recourse or right, whether by way of set-off or otherwise, against a solicitor's client account: see the Solicitors Act 1974 s 85(b); and PARA 826.

6 Cf *Scottish Metropolitan Assurance Co Ltd v P Samuel & Co* [1923] 1 KB 348; *Kerrison v Glyn Mills Currie & Co* (1911) 81 LJB 465, HL.

7 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

- 8 *Wylde v Radford* (1863) 33 LJ Ch 51 at 53 per Kindersley V-C.
- 9 *Re United Service Co, Johnston's Claim* (1871) 6 Ch App 212 at 217 per James LJ.
- 10 *Misa v Currie* (1876) 1 App Cas 554, HL.
- 11 *Re Bowes, Earl of Strathmore v Vane* (1886) 33 ChD 586.

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### 861. Lien over bills.

A banker has a lien on a bill handed to him by a customer for collection, if the customer is or becomes indebted to him<sup>1</sup>. If the customer has indorsed the bill, the banker has a remedy on it against the customer to the extent of such indebtedness<sup>2</sup>. Mere indorsement for collection, without indebtedness, gives no such title or remedy<sup>3</sup>, nor does indorsement necessarily imply parting with the entire property in the bill<sup>4</sup>. Whether the customer parts with the entire property depends on the nature of the dealing between him and the banker. Entering as cash before receipt of the money has been held evidence only of the banker's having taken the bill in his own right<sup>5</sup>. Whether it has greater effect now is doubtful<sup>6</sup>. It would seem to constitute an undertaking by the banker to honour cheques to the amount of the bill<sup>7</sup>.

In the case of an unindorsed order cheque, the banker has the same rights as if the holder had indorsed in blank<sup>8</sup>.

1 *Giles v Perkins* (1807) 9 East 12; *Re Firth, ex p Schofield* (1879) 12 ChD 337; *Dawson v Isle* [1906] 1 Ch 633; *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194; *Re Keever (a bankrupt), ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; *Bank of New South Wales v Ross, Stuckey and Morawa* [1974] 2 Lloyd's Rep 110. As to lien generally see **LIEN**.

2 Cf *Giles v Perkins* (1807) 9 East 12 at 14.

3 There is no consideration: *Re Firth, ex p Schofield* (1879) 12 ChD 337 at 343 per Brett LJ.

4 *Re Firth, ex p Schofield* (1879) 12 ChD 337; *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194. The indorsement may be merely by way of additional security.

5 *Giles v Perkins* (1807) 9 East 12; *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194 (bills not due); *Thompson v Giles* (1824) 2 B & C 422. Cf *Gaden v Newfoundland Savings Bank* [1899] AC 281 at 286, PC; *Dawson v Isle* [1906] 1 Ch 633.

6 As to the position in relation to cheques see PARA 890.

7 *Thompson v Giles* (1824) 2 B & C 422 at 429, 431.

8 *Midland Bank Ltd v Harris* [1963] 2 All ER 685, [1963] 1 WLR 1021; and see *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL. As to the meaning of 'order cheque' see PARA 879.

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## 862. When lien attaches.

Whatever the nature of the securities, the lien attaches only when they have come to the banker's hands in his capacity as a banker, that is to say, in the way of his business<sup>1</sup>. The common example is cheques paid in for collection, where the customer paying in has an overdraft or loan, or is entitled or permitted to draw against the cheques before they are cleared or then and there borrows against them<sup>2</sup>.

Either because the receipt of securities or valuables for safe custody is not part of the ordinary business of banking, or because receipt for such purposes involves an implied contract inconsistent with the assertion of lien, the lien does not attach to securities or articles in the banker's hands for safe custody<sup>3</sup>. Nor does the lien attach to any money or security known to the banker to be affected by a trust or not to be the actual property of the customer<sup>4</sup>, or to money paid in by a third person under mistake of fact<sup>5</sup>. Where securities are deposited which involve the collection of coupons or interest, the question is which component part is received for safe custody, and which is for the exercise thereon of the banker's business<sup>6</sup>.

Bills or money paid in to meet specific cheques or bills accepted payable at the bank are not subject to the lien<sup>7</sup>. Whether securities deposited to cover a specific advance, and, after repayment of that advance, remaining in the banker's hands, are subject to a general lien for a balance due to the banker, seems somewhat doubtful<sup>8</sup>.

Where, however, the security has been realised and produces more than enough to cover the specific advance, the banker's lien attaches to the surplus proceeds<sup>9</sup>.

The banker's lien extends to bills of a customer of another bank transmitted by that bank for collection, unless the receiving banker has notice that the bills are the property of that customer<sup>10</sup>.

Where bills, notes or cheques pass from a customer to a bank who takes them for collection, the banker is holder for value to the extent of any lien he may have<sup>11</sup>, and has full beneficial interest to that extent<sup>12</sup>, and may sue for the full amount, holding any surplus over the customer's indebtedness as trustee for him<sup>13</sup>. Where he holds as transferee, lien is excluded, but he has the ordinary rights of a holder for value, and may sue for the full amount irrespective of the customer's indebtedness, and without having to account for any balance received by him in excess of such indebtedness<sup>14</sup>.

1 *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 808 per Lord Campbell; *Lucas v Dorrien* (1817) 7 Taunt 278. As to lien generally see **LIEN**.

2 See *Re Keever (a bankrupt), ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719; *National Westminster Bank Ltd v Halesowen Pressworks and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

3 *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 808 per Lord Campbell; *Leese v Martin* (1873) LR 17 Eq 224.

4 *Re Gross, ex p Kingston* (1871) 6 Ch App 632; *Cuthbert v Robarts, Lubbock & Co* [1909] 2 Ch 226, CA. See PARA 842.

5 *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJB 465, HL. As to mistake of fact see PARA 853.

6 Where bonds are deposited with a banker for him to cut off the coupons and collect them, the lien probably attaches to the bonds and coupons. However, if the bonds and coupons are deposited merely for safe keeping and the customer cuts off the coupons and hands them to the banker to collect, the lien attaches to the coupons when handed to the banker, but not to the bonds.

7 *Farley v Turner* (1857) 26 LJ Ch 710. See also PARA 865.



8 This was doubted in *Jones v Peppercorne* (1858) John 430. In *Wilkinson v London and County Banking Co* (1884) 1 TLR 63, the House of Lords assumed that the customer was entitled to have back the securities in such a case independent of the state of account. In *Re Bowes, Earl of Strathmore v Vane* (1886) 33 ChD 586, North J held an agreement that a policy of insurance was to be security for £2,000 inconsistent with a general lien for a further balance of £1,000. However, in *Re London and Globe Finance Corp Ltd* [1902] 2 Ch 416, Buckley J held that securities deposited as cover for specified advances remaining after discharge in a banker's hands were liable to general lien. Cf *Wolstenholm v Sheffield Union Banking Co Ltd* (1886) 54 LT 746, CA. It would seem that, where securities are jointly deposited to cover a joint liability, one of the depositors, on paying his share of the liability, is not entitled to the return of a proportionate amount of the securities: *Coats v Union Bank of Scotland* 1929 SC (HL) 114. In view of the terms of forms of charge now used this question is probably academic.

9 *Jones v Peppercorne* (1858) John 430; *Re Bowes, Earl of Strathmore v Vane* (1886) 33 ChD 586 (where the right is attributed to set-off); *Baker v Lloyds Bank Ltd* [1920] 2 KB 322. Cf *Inman v Clare* (1858) John 769.

10 See PARA 887.

11 Bills of Exchange Act 1882 s 27(3). See also PARA 1487.

12 See the judgment of the Court of Appeal in *Great Western Rly Co v London and County Banking Co* [1900] 2 QB 464 (not affected on this point by its reversal in the House of Lords [1901] AC 414).

13 See *Barclays Bank Ltd v Aschaffenburg Zellstoffwerke AG* [1967] 1 Lloyd's Rep 387, CA.

14 See *Great Western Rly Co v London and County Banking Co* [1900] 2 QB 464 at 473 per Vaughan Williams LJ.

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### **863. Sale by virtue of lien.**

The banker's lien is something more than an ordinary lien; it is an implied pledge<sup>1</sup>. The distinction is not material in the case of bills, notes and cheques, the position of holder for value enabling the banker to deal with these when due; but, in the case of other negotiable instruments, such as bearer bonds, coming into the banker's hands in circumstances rendering them liable to the lien, his character of pledgee enables the banker to sell on default if a fixed time is appointed for repayment of the advance, or, where no time is fixed, after request for repayment and reasonable notice of intention to sell<sup>2</sup>.

1 See *Brandao v Barnett* (1846) 12 Cl & Fin 787 at 806 per Lord Campbell. As to lien generally see **LIEN**; and as to pledge generally see **PLEDGES AND PAWNS**.

2 *Burdick v Sewell* (1884) 13 QBD 159 at 174, CA, per Bowen LJ in a dissenting judgment which was upheld on appeal sub nom *Sewell v Burdick* (1884) 10 App Cas 74, HL; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA; *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396 at 403, CA, per Fry LJ; *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579, CA. It is desirable to give notice of intention to sell, even when a time is fixed for repayment. The statement by Lord Herschell in *North Western Bank v John Poynter, Son and Macdonalds* [1895] AC 56 at 69, HL, that a pledge gives no right of sale, must either have reference to Scots law, or to the absolute and immediate right of sale given in that case.

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#### **864. Banker's duty in respect of bills etc subject to lien.**

The fact that the banker holds bills, notes or cheques under a lien does not affect his duty as holder to present them for acceptance where necessary, and for payment in due course, and to give notice of dishonour<sup>1</sup>. Although there is some authority for saying that a banker who holds indorsed bills under a lien is entitled to negotiate them when the state of the customer's account renders such a course reasonable<sup>2</sup>, it would be very unusual to do so<sup>3</sup>.

1 This course is equally obligatory on him either as agent or holder for value. As to the duties of a holder see the Bills of Exchange Act 1882 ss 39-52 (ss 41, 45, 49, 51 as amended); and PARA 1509 et seq. As to the duties of an agent see **AGENCY** vol 1 (2008) PARA 74 et seq. As to lien generally see **LIEN**.

2 See PARA 888.

3 However, if he holds them as transferee for value, he may, of course, deal with them in any way he likes.

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#### **(iv) Appropriation of Payments; Combining Accounts; Third Party Debt Orders**

#### **865. Repayment and appropriation.**

The Limitation Act 1980 imposes time limits for the bringing of proceedings<sup>1</sup>. The balance on a current banking account is not actionable until the customer has demanded it or part of it, and time under that Act begins to run only from the date of the demand<sup>2</sup>. After a lapse of time the circumstances of the case may raise a presumption of repayment<sup>3</sup>.

On a current account, the earlier drawings out are, in the absence of appropriation, attributed to the earlier payments in<sup>4</sup>; and, where the money of several beneficiaries has been wrongfully mixed with a private account, their respective rights in any balance will be adjusted in accordance with this rule<sup>5</sup>. There are, however, exceptions to this rule; thus, where a trustee or other person in a fiduciary position has mixed sums of trust money in his private account, all drawings out are attributed to his own money so far as it will go<sup>6</sup>, and the rule may be excluded by the terms of a guarantee<sup>7</sup>, or, it seems, by sums being earmarked as particular property, such as a legacy<sup>8</sup>. The person paying the money has the primary right to say to what account it is to be appropriated; if the debtor makes no appropriation, the creditor has the right to appropriate; and, if neither exercises the right of appropriation, one may look on the matter as one of account and see how the creditor has dealt with the payment in order to ascertain how in fact he did appropriate it. If there is nothing more than a current account kept by the creditor or a particular account kept by the creditor, and he carries the money to that particular account, then the court concludes that the appropriation has been made; and, having been made, it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation<sup>9</sup>. Money paid into a current account to meet a particular bill or cheque must be applied accordingly<sup>10</sup>.

- 1 See **LIMITATION PERIODS**. As to when the limitation period runs for a claim based on the wrongful debit of an account see *National Bank of Commerce v National Westminster Bank* [1990] 2 Lloyd's Rep 514, applying *Limpgrange Ltd v BCCI SA* [1986] FLR 36.
- 2 *Joachimson v Swiss Bank Corp* [1921] 3 KB 110, CA.
- 3 *Douglass v Lloyds Bank Ltd* (1929) 34 Com Cas 263 (deposit account).
- 4 *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529 at 572, 608. As to the operation of the rule in *Devaynes v Noble, Clayton's Case* above in cases of company liquidation see *Re EJ Morel (1934) Ltd* [1962] Ch 21, [1961] 1 All ER 796; *Re James R Rutherford & Sons Ltd* [1964] 3 All ER 137, [1964] 1 WLR 1211; *Re Yeovil Glove Co Ltd* [1965] Ch 148, [1964] 2 All ER 849, CA. As to appropriation of the proceeds of mortgaged property to the non-preferential part of the bank's claim see *Re William Hall (Contractors) Ltd* [1967] 2 All ER 1150, [1967] 1 WLR 948.
- 5 *Re Stenning, Wood v Stenning* [1895] 2 Ch 433. As to a trustee's liability for mixing trust money with his own see **TRUSTS** vol 48 (2007 Reissue) PARA 1137 et seq; and as to the duty of an agent to keep separate his principal's property see **AGENCY** vol 1 (2008) PARA 84.
- 6 *Re Hallett's Estate, Knatchbull v Hallett* (1880) 13 ChD 696, CA. See further **EQUITY** vol 16(2) (Reissue) PARA 863; **TRUSTS** vol 48 (2007 Reissue) PARA 1138.
- 7 *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60.
- 8 *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 552, [1948] 2 All ER 318 at 363, CA, per Lord Greene MR; affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL. The principle decided was adhered to on subsequent consideration (see *Re Diplock's Estate, Simpson v Lilburn* [1948] Ch 559, [1948] 2 All ER 429, CA), but the decision reached was that the rule in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529 at 572 was not excluded, having regard to new evidence of fact, namely of the system of accounting and of the accounts themselves kept by the charity (the customer).
- 9 *Deeley v Lloyds Bank Ltd* [1912] AC 756 at 783, HL, per Lord Shaw; cf *The Mecca* [1897] AC 286, HL. It is unclear how far the decision in *Deeley v Lloyds Bank Ltd* has affected *Seymour v Pickett* [1905] 1 KB 715, CA, *Simson v Ingham* (1823) 2 B & C 65 and *London and Westminster Bank v Button* (1907) 51 Sol Jo 466.
- 10 *Farley v Turner* (1857) 26 LJ Ch 710.

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## **866. Appropriation when account guaranteed.**

The position and rights of a banker under a guarantee depend on the character and form of the guarantee and the parties to it<sup>1</sup>. A guarantee for a void debt cannot be enforced<sup>2</sup> unless it also takes effect as an unconditional indemnity.

Where there is a mere unbroken current account, part of which is covered by a guarantee, the other part not, as where the guarantee has been determined, there is, in the absence of appropriation, no presumption that money paid in is to be allocated to the unsecured rather than the secured portion or otherwise than in the usual sequence of payments in and out in order of date<sup>3</sup>.

Where the guarantee is a continuing one, a guarantor has no right, in the absence of special agreement, to control the appropriation of payments into the principal debtor's account<sup>4</sup>, so long as the banker deals with the accounts in the ordinary way of business<sup>5</sup>.

Payments in by the principal debtor or any third party may be appropriated to a pre-existing debt of which the surety had no notice or knowledge<sup>6</sup>; but it would be contrary to ordinary

business and good faith to open a new account during the currency of the guaranteed one, and carry all payments in to the new account<sup>7</sup>. On the determination of the guarantee, the banker may, however, close the account and open a new one, to which he may carry all payments in, leaving any debit on the old one to be covered by the guarantee<sup>8</sup>. Where an account is guaranteed to a limited extent, the banker is not entitled to split that account during the continuance of the guarantee and attribute all payments in to the unsecured balance<sup>9</sup>.

So long as an account is unbroken, a surety ought not to be prejudiced by any departure from the rule of appropriation of items in order of date, unless he has expressly consented to such departure, or his consent may be implied from the character of his engagement<sup>10</sup>.

1 As to guarantees see PARA 991 et seq; and see PARA 1013 et seq.

2 The position regarding guarantees of loans to minors is now governed by the Minors' Contracts Act 1987 s 2: see PARA 820.

3 *Deeley v Lloyds Bank Ltd* [1912] AC 756, HL.

4 *Williams v Rawlinson* (1825) 3 Bing 71; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

5 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

6 *Williams v Rawlinson* (1825) 3 Bing 71; cf *Hamilton v Watson* (1845) 12 Cl & Fin 109.

7 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 706, CA, per Cotton LJ; cf *Mutton v Peat* [1900] 2 Ch 79, CA (where it was said that the method of book-keeping was not to prejudice the real rights of the surety); and *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA. As to the opening of a fresh account without the knowledge of the surety see *National Bank of Nigeria Ltd v Oba MS Awolesi* [1964] 1 WLR 1311, PC.

8 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA, cited in *Deeley v Lloyds Bank Ltd* [1912] AC 756, HL, for the Lord Chancellor's statement of the principle in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529 at 572.

9 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

10 *The Mecca* [1897] AC 286, HL. Cf *City Discount Co Ltd v McLean* (1874) LR 9 CP 692; and see also *National Bank of Nigeria Ltd v Oba MS Awolesi* [1964] 1 WLR 1311, PC.

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### **867. Combination of accounts; banker's right of set-off.**

Unless precluded by agreement, express or implied from the course of business, the banker is entitled to combine accounts kept by the customer in his own right, even though at different branches of the same bank, and to treat the balance, if any, as the only amount really standing to his credit<sup>1</sup>; but the banker may not arbitrarily combine a current account with a loan account<sup>2</sup>. An agreement not to combine ceases to be effective as soon as the relationship of banker and customer comes to an end<sup>3</sup>. The customer, however, has not the equivalent right, and cannot utilise a credit balance at one branch for the purpose of drawing cheques on another branch where his account is overdrawn<sup>4</sup>. In the absence of agreement or course of business, and either by right of lien or set-off, the banker may retain enough on an account in credit to satisfy a debit on another kept in the same right<sup>5</sup>.

1 *Garnett v M'Kewan* (1872) LR 8 Exch 10; *Buckingham & Co v London and Midland Bank Ltd* (1895) 12 TLR 70 (where the banker was precluded by the course of business); *WP Greenhalgh & Sons v Union Bank of Manchester* [1924] 2 KB 153 (banker precluded by agreement). A dictum of Swift J in *WP Greenhalgh & Sons v Union Bank of Manchester* above at 164, that, if a banker agrees with his customer to open two or more accounts, he has not, without the assent of the customer, any right to move either assets or liabilities from the one account to the other, the very basis of his agreement with his customer being that the two accounts are to be kept separate, was criticised by Lord Denning MR in *Halesowen Presswork & Assemblies Ltd v Westminster Bank Ltd* [1971] 1 QB 1 at 35, [1970] 3 All ER 473 at 478, CA; this criticism was approved by Lord Kilbrandon despite reversal of the judgment by the House of Lords sub nom *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785 at 819, [1972] 1 All ER 641 at 661, HL. It has been held that a bank, in combining a customer's accounts, is not asserting a claim over the money in them, but is merely carrying out an accounting exercise to determine the customer's indebtedness to it or vice versa: *Re K (restraint order)* [1990] 2 QB 298, [1990] 2 All ER 562. See also *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL; *Hong Kong and Shanghai Banking Corp v Kloeckner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513.

As to set-off under the Insolvency Act 1986 with regard to companies see the Insolvency Rules 1986, SI 1986/1925, r 4.90; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 790. As to set-off under the Insolvency Act 1986 with regard to individuals see s 323; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547.

2 *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833 at 847, CA, per Scrutton LJ; applied in *Re EJ Morel (1934) Ltd* [1962] Ch 21, [1961] 1 All ER 796.

3 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

4 *Garnett v M'Kewan* (1872) LR 8 Exch 10; *McNaghten v Cox & Co* (1921) Times, 11 May (branches in the same building). See PARA 835.

5 See PARA 835 note 3.

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## 868. Equitable set-off.

Where accounts are maintained in different names so that the requirement of mutuality is prima facie lacking, there may be available an equitable set-off<sup>1</sup> when a credit balance is really and truly the property of one person, in the name of another, who is indebted to the bank on some other account<sup>2</sup>. Equitable set-off will be available in such circumstances only if the court, without any terms or any further inquiry, would oblige the nominee or trustee to transfer the account into the name of the true beneficial owner<sup>3</sup>.

1 As to equitable set-off generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 658 et seq; **EQUITY** vol 16(2) (Reissue) PARA 901 et seq.

2 *Re Willis Percival & Co, ex p Morier* (1879) 12 ChD 491, CA; *Re Hett Maylor & Co Ltd* (1894) 10 TLR 412. For other examples of set-off against a trustee creditor see *Jones v Mossop* (1844) 3 Hare 568; *Cochrane v Green* (1860) 9 CBNS 448; *Jefferies v Day* (1866) LR 1 QB 372; *Agra and Masterman's Bank v Leighton* (1866) LR 2 Exch 56; *Thornton v Maynard* (1875) LR 10 CP 695; *Bankes v Jarvis* [1903] 1 KB 549.

3 *Re Willis Percival & Co, ex p Morier* (1879) 12 ChD 491 at 502, CA, per Brett LJ, and at 503 per James LJ; *Bhogal v Punjab National Bank* [1988] 2 All ER 296 at 301, CA, per Dillon LJ, and at 307 per Bingham LJ. See also *Uttamchandani v Central Bank of India* (1989) 133 Sol Jo 262, CA (bank claimed the customer held the account as a nominee; there was held to be no right of equitable set-off); *Smith v Bridgend County Borough Council* [2001] UKHL 58, [2002] 1 AC 336, [2002] 1 All ER 292 (equitable set-off not permitted if its effect would be to

give the party claiming the set-off the same right as if a charge had been registered); *Saudi Arabian Monetary Agency v Dresdner Bank AG* [2003] EWHC 3271 (Ch), [2004] EWCA Civ 1074, [2004] 2 Lloyd's Rep 19.

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### **869. Third party debt orders.**

The Civil Procedure Rules contain rules which provide for a judgment creditor to obtain an order for the payment to him of money which a third party who is within the jurisdiction owes to the judgment debtor<sup>1</sup>. Third party debt orders were formerly known as garnishee orders.

On the application of a judgment creditor, the court may make a final third party debt order requiring a third party to pay to the judgment creditor: (1) the amount of any debt due or accruing due to the judgment debtor from the third party; or (2) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application<sup>2</sup>. The court must first make an interim third party debt order to fix a hearing to consider whether to make a final third party debt order and may direct that until that hearing the third party must not make any payment which reduces the amount he owes the judgment debtor to less than the amount specified in the order<sup>3</sup>.

A bank or building society<sup>4</sup> served with an interim third party debt order must carry out a search to identify all accounts held with it by the judgment debtor<sup>5</sup>. The bank or building society must disclose to the court and the creditor within seven days of being served with the order, in respect of each account held by the judgment debtor: (a) the number of the account; (b) whether the account is in credit; (c) if the account is in credit: (i) whether the balance of the account is sufficient to cover the amount specified in the order; (ii) the amount of the balance at the date it was served with the order, if it is less than the amount specified in the order; and (iii) whether the bank or building society asserts any right to money in the account, whether pursuant to a right of set-off or otherwise, and if so giving details of the grounds for that assertion<sup>6</sup>. If the judgment debtor does not hold an account with the bank or building society or the bank or building society is unable to comply with the order for any other reason<sup>7</sup>, the bank or building society must inform the court and the judgment creditor of that fact within seven days of being served with the order<sup>8</sup>.

If the judgment debtor is an individual and he is prevented from withdrawing money from his account with a bank or building society as a result of an interim third party debt order, and he or his family is suffering hardship in meeting ordinary living expenses as a result, the court may, on an application by the judgment debtor, make an order permitting the bank or building society to make a payment or payments out of the account (a 'hardship payment order')<sup>9</sup>. A hardship payment order may permit the third party to make one or more payments out of the account and specify to whom the payments may be made<sup>10</sup>.

If the judgment debtor or the third party objects to the court making a final third party debt order, he must file and serve written evidence stating the grounds for his objections<sup>11</sup>. If the judgment debtor or the third party knows or believes that a person other than the judgment debtor has any claim to the money specified in the interim order, he must file and serve written evidence stating his knowledge of that matter<sup>12</sup>. If the third party has given notice that he does not owe any money to the judgment debtor or that the amount which he owes is less than the amount specified in the interim order, and the judgment creditor wishes to dispute this, the judgment creditor must file and serve written evidence setting out the grounds on which he disputes the third party's case<sup>13</sup>.

At the hearing the court may: (A) make a final third party debt order; (B) discharge the interim third party debt order and dismiss the application; (C) decide any issues between the parties and any other person who has a claim to the money specified in the interim order; (D) direct a trial of any such issues and if necessary give directions<sup>14</sup>.

A final third party debt order is enforceable as an order to pay money<sup>15</sup>. If the third party pays money to the judgment creditor in compliance with a third party debt order, or the order is enforced against him, the third party, to the extent of the amount paid or realised by enforcement, is discharged from his debt to the judgment debtor<sup>16</sup>. This applies even if the third party debt order, or the original judgment or order against the judgment debtor, is later set aside<sup>17</sup>. It appears that a bank which receives a third party debt order will not incur liability to the creditor in tort if it negligently released the funds to the debtor himself, although it would obviously be guilty of contempt of court if it flouted the order deliberately<sup>18</sup>.

1 See CPR Pt 72; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1411 et seq. As to the attachment of money standing to the credit of a judgment debtor with the National Savings Bank see *Brooks Associates Inc v Basu* [1983] QB 220, [1983] 1 All ER 508. As to the National Savings Bank see PARA 810 et seq. As to the CPR generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

2 See CPR 72.2. As to applications for third party debt orders see CPR 72.3; *Practice Direction--Third Party Debt Orders* PD 72 PARA 1; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1417.

3 See CPR 72.4; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1418. An interim third party debt order becomes binding on a third party when it is served on him: see CPR 72.4(4). As to service of the interim order see CPR 72.5; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1419.

4 'Bank or building society' includes any person carrying on a business in the course of which he lawfully accepts deposits in the United Kingdom: CPR 72.1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 CPR 72.6(1). A bank or building society served with an interim third party debt order is only required, unless the order states otherwise: (1) to retain money in accounts held solely by the judgment debtor (or, if there are joint judgment debtors, accounts held jointly by them or solely by either or any of them); and (2) to search for and disclose information about such accounts: *Practice Direction--Third Party Debt Orders* PD 72 PARA 3.1. The bank or building society is not required, for example, to retain money in, or disclose information about, accounts in the joint names of the judgment debtor and another person or, if the interim order has been made against a firm, accounts in the names of individual members of that firm: *Practice Direction--Third Party Debt Orders* PD 72 PARA 3.2. See *Hirschorn v Evans* [1938] 2 KB 801, [1938] 3 All ER 491, CA.

6 CPR 72.6(2). As to the right of set-off see PARA 867.

7 Eg because the bank or building society has more than one account holder whose details match the information contained in the order, and cannot identify which account the order applies to: see CPR 72.6(3).

8 CPR 72.6(3).

9 See CPR 72.7(1)-(5); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1423. As to applications for hardship payment orders see *Practice Direction--Third Party Debt Orders* PD 72 PARA 5.

10 See CPR 72.7(6).

11 See CPR 72.8(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1424.

12 CPR 72.8(2). If the court is notified that some person other than the judgment debtor may have a claim to the money specified in the interim order, it must serve on that person notice of the application and hearing: CPR 72.8(5).

13 CPR 72.8(3).

14 CPR 72.8(6).

15 See CPR 72.9(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1425.

16 CPR 72.9(2).

17 CPR 72.9(3).

18 This would appear to follow from *Commissioners for Revenue and Customs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256 (although the case in fact related to a freezing order, rather than a third party debt order).

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### **870. Deposit accounts and withdrawable share accounts subject to third party debt orders.**

In deciding whether, for the purposes of the jurisdiction of the High Court to make third party debt orders, a sum standing to the credit of a person in any deposit account or any withdrawable share account with a deposit taker<sup>1</sup> is a sum due or accruing<sup>2</sup> to that person and, as such, may be made subject to a third party debt order<sup>3</sup>, the following conditions are to be disregarded: (1) any condition applying to the account that a receipt for money deposited in the account must be produced before any money is withdrawn; (2) any condition that notice is required before any money or share is withdrawn; (3) any condition that a personal application must be made before any money or share is withdrawn; (4) any condition that a deposit book or share account book must be produced before any money or share is withdrawn; or (5) any other prescribed condition<sup>4</sup>.

The Lord Chancellor may by order<sup>5</sup> make such provision as he thinks fit for all or any of the following purposes: (a) including in, or excluding from, the accounts to which the provisions described above apply accounts of any description specified in the order; (b) excluding from the accounts to which those provisions apply all accounts with any particular specified deposit taker or with any deposit taker of a specified description<sup>6</sup>.

1 For the purposes of the Supreme Court Act 1981 s 40, 'deposit taker' means a person who may, in the course of his business, lawfully accept deposits in the United Kingdom: Supreme Court Act 1981 s 40(6) (substituted by SI 2001/3649). As to the meaning of 'United Kingdom' see PARA 2 note 3. The Supreme Court Act 1981 s 40(6) must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision, and Sch 2 (see PARA 84): Supreme Court Act 1981 s 40(7) (added by SI 2001/3649). As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

2 Is due or accruing at a definite and certain approaching date: *Jones v Thompson* (1858) EB & E 63; *Webb v Stenton* (1883) 11 QBD 518; *Heppenstall v Jackson and Barclays Bank Ltd* [1939] 1 KB 585, [1939] 2 All ER 10, CA.

3 As to third party debt orders see CPR Pt 72; and PARA 869. As to the CPR see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

4 Supreme Court Act 1981 s 40(1)-(3) (s 40(1) amended by SI 2001/3649); CPR 72.2(3). As to the other condition that has been prescribed see CPR 72.2(3); and head (1) in the text.

The position is identical in the County Court: see the County Courts Act 1984 s 108; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1412.

5 Any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Supreme Court Act 1981 s 40(5). At the date at which this volume states the law no such order had been made.

6 Supreme Court Act 1981 s 40(4) (amended by SI 2001/3649).



**UPDATE****870 Deposit accounts and withdrawable share accounts subject to third party debt orders**

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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**871. Foreign currency subject to third party debt orders.**

A sum standing to the credit of a judgment debtor in a foreign currency may be made the subject of a third party debt order<sup>1</sup> in accordance with the following procedure:

- 14 (1) so soon as reasonably practicable after the time of service of the interim third party debt order, the bank must ascertain, at its then normal buying rate of exchange against sterling, the amount of the foreign currency balance of the judgment debtor that would, if converted at that rate, produce an amount equal to the sterling judgment debt and costs, and that amount of foreign currency as ascertained must be made subject to the order;
- 15 (2) so soon as reasonably practicable after service of the final third party debt order, the bank must purchase, at its then normal buying rate of exchange against sterling, the amount of the foreign currency, or so much as will by the application of that rate produce the sterling judgment debt and costs, and pay it into court or to the judgment creditor;
- 16 (3) in order that the final third party debt order should express the obligation of the bank under the procedure described above, the bank should inform the court of the amount of foreign currency and the rate of exchange used by the bank; and, when the order is made final, it should order the bank to pay the sterling equivalent of the foreign currency or the amount of the judgment debt and costs, whichever be the lesser<sup>2</sup>.

<sup>1</sup> See *Choice Investments Ltd v Jeromnimon* [1981] QB 149, [1981] 1 All ER 225, CA. As to third party debt orders see PARA 869; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1411 et seq.

<sup>2</sup> See *Choice Investments Ltd v Jeromnimon* [1981] QB 149 at 157, [1981] 1 All ER 225 at 228, CA, per Lord Denning MR.

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**872. Drawing against deposit account.**

It is doubtful whether valid cheques may be drawn against a deposit account at call<sup>1</sup>. Bankers may, however, honour such cheques, relying on a right of set-off against the money on deposit<sup>2</sup>. The position may be different where a course of business has been established.

1 The view expressed by Malins V-C in favour of their validity in *Hopkins v Abbott* (1875) LR 19 Eq 222 at 228 and *Stein v Ritherdon* (1868) 37 LJ Ch 369 seems inconsistent with the reasoning in *Re Head, Head v Head (No 2)* [1894] 2 Ch 236, CA, and finds no support in the summary of the banker's obligations given by Atkin LJ in *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 127, CA. Cf also *Re Tidd, Tidd v Overell* [1893] 3 Ch 154 at 156 per North J; and see *Re Glendinning, Steel v Glendinning* (1918) 88 LJ Ch 87.

2 See PARA 867.

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## **(v) Statement of Account**

### **873. Bank statements as evidence.**

Entries in statements of account to the credit of the customer are, when delivered to him, prima facie evidence against the banker; if such a statement is returned by the customer without objection, entries to his debit are prima facie evidence against him<sup>1</sup>.

Where credits appear by mistake in the statement, and the customer alters his position in reliance on them, the bank cannot afterwards debit the account with the amount<sup>2</sup>; but, in the absence of any change of position, credits mistakenly entered may be rectified within a reasonable time<sup>3</sup>. However, a bank would not be permitted to retain money paid in, but omitted to be credited, even if the customer had not noticed its omission from his bank statement.

Where a bank stamps a paying-in slip counterfoil, it bears the onus of showing that a different sum was actually received from that acknowledged on the counterfoil<sup>4</sup>.

1 For a consideration of the history of the pass-book, the predecessor to the bank statement, see *Devaynes v Noble, Baring v Noble* (1816) 1 Mer 529 at 535-536; *Commercial Bank of Scotland v Rhind* 1860 3 Macq 643. There would seem to be no reason why the law relating to pass-books should not apply equally to bank statements, but there is no authority to this effect. As to the admissibility of entries in a banker's books as evidence, including entries produced by computers, see PARA 908.

2 *Skyring v Greenwood* (1825) 4 B & C 281; *Holt v Markham* [1923] 1 KB 504, CA, followed in *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL; *Lloyds Bank Ltd v Brooks* (1950) 6 Legal Decisions Affecting Bankers 161; *United Overseas Bank v Jiwani* [1977] 1 All ER 733, [1976] 1 WLR 964. See also *Avon County Council v Howlett* [1983] 1 All ER 1073, [1983] 1 WLR 605, CA.

3 *Commercial Bank of Scotland v Rhind* (1860) 3 Macq 643 at 653, HL; *British and North European Bank Ltd v Zalstein* [1927] 2 KB 92.

4 *Docherty v Royal Bank of Scotland* 1963 SLT (Notes) 43, Ct of Sess.

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#### **874. Effect of periodic statement.**

If a bank wishes to impose upon a customer an express obligation to examine periodic bank statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of objection and of the sanction imposed must be brought home to the customer<sup>1</sup>. The test is undoubtedly rigorous, and is not satisfied by a contractual provision that statements are to be confirmed, and that, if not confirmed within a specified time, they may be taken by the banker as approved by the customer<sup>2</sup>. A fortiori, in the absence of such an obligation, the returning of a bank statement without objection does not give rise to a settled account by which both are bound<sup>3</sup>, even where the customer, upon receipt of periodic bank statements, returns a signed confirmation slip<sup>4</sup>.

1 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 110, [1985] 2 All ER 947 at 959, PC.

2 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 109-110, [1985] 2 All ER 947 at 958-959, PC.

3 As to the case law preceding *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC, see *Vagliano Bros v Bank of England* (1889) 23 QBD 243, CA (revsd sub nom *Bank of England v Vagliano Bros* [1891] AC 107, HL, but without affecting this point); *Lewes Sanitary Steam Laundry Co Ltd v Barclay & Co Ltd* (1906) 95 LT 444; *Kepitigalla Rubber Estates Ltd v National Bank of India Ltd* [1909] 2 KB 1010; *Walker v Manchester and Liverpool District Banking Co Ltd* (1913) 108 LT 728; cf *Blackburn Building Society v Cunliffe, Brooks & Co* (1882) 22 ChD 61, CA (affd sub nom *Cunliffe, Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857, HL); *Bank of England v Vagliano Bros* [1891] AC 107 at 115, HL.

4 See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 109, [1985] 2 All ER 947 at 958, PC (customer not bound by return, on receipt of periodic bank statements for its account with Chekiang First Bank Ltd, of confirmation slips signed by two authorised signatories).

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#### **(vi) Banker as Bailee**

##### **875. Property deposited for safe custody.**

Unless the undertaking of the care of valuable property<sup>1</sup> when required is made a condition of opening an account or offered as an inducement to do so, the position of the banker as regards any property deposited with him for custody is probably that of a bailee for value<sup>2</sup>. In default of agreement to the contrary, the bailment will be determinable at the will of the bailor<sup>3</sup>. The bailee will be bound to take the same care of the property entrusted to him as a reasonably prudent and careful person may fairly be expected to take of his own property of the like description<sup>4</sup>. It is submitted that this involves the employment of all the facilities at the banker's command<sup>5</sup>; and, in view of the facilities usually existing, the question whether the banker is a gratuitous bailee or a bailee for value does not seem material<sup>6</sup>. The banker's knowledge or ignorance of the nature of the goods entrusted to him does not appear to affect the question of his liability<sup>7</sup>. If, however, the customer misleads the banker as to the nature or value of the goods, he would presumably not be entitled to hold the banker to a greater degree

of care or to a larger compensation than was consistent with his own representations. An acknowledgment that the goods are received 'for safe custody' does not increase the liability of the banker<sup>8</sup>.

The bank is liable for loss caused by the negligence or criminal act of members of its own staff<sup>9</sup> carried out in the scope of their employment<sup>10</sup>.

If goods are brought to a bank for safe custody at the place to which they are brought, the bank may be liable for their loss if removed elsewhere<sup>11</sup>.

1 In *Isaacs v Barclays Bank Ltd and Barclays Bank (France) Ltd* [1943] 2 All ER 682, the question arose, but was not decided, whether the demand for the return of securities held for safe custody must be made at the branch at which they were deposited.

2 See *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580 at 589, [1978] 3 All ER 337 at 340, PC. Cf *Giblin v McMullen* (1868) LR 2 PC 317; *Re United Service Co, Johnston's Claim* (1871) 6 Ch App 212; *Leese v Martin* (1873) LR 17 Eq 224; *Brandao v Barnett* (1846) 12 Cl & Fin 787. For a discussion of the position of a gratuitous bailee see the remarks of Lord Goddard CJ in *Sachs v Miklos* [1948] 2 KB 23 at 37, [1948] 1 All ER 67 at 68, CA. See further **BAILMENT** vol 3(1) (2005 Reissue) PARA 6 et seq. See also PARA 876.

3 *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582, [1952] 1 All ER 572, HL.

4 *Giblin v McMullen* (1868) LR 2 PC 317; *Lloyd v Grace, Smith & Co* [1911] 2 KB 489 at 513, CA per Farwell LJ (revsd without affecting this point [1912] AC 716, HL). In the case of documents, the bank may be compelled to deliver them up: see *R v Daye* [1908] 2 KB 333. As to the standard of care required of bailees see *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694 at 698, [1962] 2 All ER 159 at 161, CA, per Ormerod LJ. See further **BAILMENT** vol 3(1) (2005 Reissue) PARA 39.

5 It seems that the utilisation of available means of securing safety must be part of the care a reasonable person would take.

6 A bailee for value is bound to adopt at his own expense all reasonable safeguards. A gratuitous bailee is bound to do his best with what he has got, using the best facilities at his command, but not more. A banker invariably has safes, strong-rooms etc. Cf *Queensland National Bank Ltd v P & O Steam Navigation Co* [1898] 1 QB 567, CA; and see the dicta of Ormerod LJ in *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694 at 698, [1962] 2 All ER 159 at 161, CA. See further **BAILMENT** vol 3(1) (2005 Reissue) PARA 39.

7 The rule as stated was laid down in *Giblin v McMullen* (1868) LR 2 PC 317, without qualification as to knowledge. The facts in that case appear to point to ignorance on the part of the banker as to the nature of the goods. The presumption is that they are valuable.

8 *Ross v Hill* (1846) 2 CB 877. An undertaking in such terms must be interpreted in the light of the legal consequences resulting from the relation between the parties.

9 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA.

10 See the remarks of Salmon LJ in *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 737 et seq, [1965] 2 All ER 725 at 738 et seq, CA.

11 *A/S Rendal v Arcos Ltd* [1937] 3 All ER 577 at 587-588, HL, per Lord Wright; and see PARA 877.

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## **876. Delivery to wrong person.**

Where the bank delivers the goods to the wrong person, and in consequence they are lost to the owner, the liability of the bank is absolute, though there is no element of negligence<sup>1</sup>. In law the banker could contract out of this liability, but he would be unlikely to do so in practice.

If the banker has suspicions as to the identity or authority of the person requiring delivery of the valuables or the genuineness of any written order produced by that person, the banker may retain the goods for a reasonable time in order to satisfy himself on these points, or, it is submitted, may decline to deliver them to the applicant, stating that he would himself send them to the owner, and doing so within a reasonable time<sup>2</sup>.

1 The case is one of wrongful conversion of the goods, and the bank is liable for this wrongful conversion, apart from any question of negligence. This view is supported by the following authorities: *Youl v Harbottle* (1791) Peake 68; *Stephenson v Hart* (1828) 4 Bing 476 at 482 per Park J ('from the cases which have been cited it is clear that trover lies against a carrier for misfeasance in delivering a parcel to a wrong person'), and at 488 per Gaselee J ('for delivery to a wrong person a carrier is no doubt responsible in trover'); *M'Kean v M'Ivor* (1870) LR 6 Exch 36 at 41 per Bramwell B ('I assume that a misdelivery would have been a conversion'); *Hiort v London and North Western Rly Co* (1879) 4 ExD 188, CA, per Bramwell LJ; *Glyn, Mills, Currie & Co v East and West India Dock Co* (1880) 6 QBD 475 at 493, CA, per Bramwell LJ (affd (1882) 7 App Cas 591, HL); *Bristol and West of England Bank v Midland Rly Co* [1891] 2 QB 653 at 657, CA, per Lopes LJ ('delivery to a wrong person would be conversion').

The cases of *Stephenson v Hart* above, *Duff v Budd* (1822) 3 Brod & Bing 177, and *Heugh v London and North Western Rly Co* (1870) LR 5 Exch 51, which have been supposed to support the contrary contention, are distinguishable on the ground that in each of them there had been a refusal to accept the goods or a failure to discover the consignee; the bailee was therefore in the position of an involuntary bailee, who has the implied authority of the real owner to deal with the goods in any reasonable manner, and is therefore liable only for negligence. Those cases were explained and distinguished on this ground by Bramwell LJ in *Hiort v Bott* (1874) LR 9 Exch 86 at 90.

2 Such retention would not be conversion, as it involves no disregard of or interference with the owner's title: cf *Hollins v Fowler* (1875) LR 7 HL 757 at 766 per Blackburn J; and *Clayton v Le Roy* [1911] 2 KB 1031, CA.

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## 877. Removal.

A banker who receives goods for custody at his bank is not justified in removing them elsewhere for safe keeping, and may be liable for any loss occurring while they were deposited elsewhere<sup>1</sup>.

If some of a number of similar items deposited with a bank are inadvertently sold by the bank and damages for conversion are awarded against it, the title to the goods sold vests in the bank<sup>2</sup>.

1 Cf *Lilley v Doubleday* (1881) 7 QBD 510. See also *A/S Rendal v Arcos Ltd* [1937] 3 All ER 577, HL; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 19.

2 See *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582, [1952] 1 All ER 572, HL (where 13 of 64 gold bars sold).

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### **878. Securities held for a foreign bank.**

If bonds are held in London to the order of a foreign bank for the account of a foreign national, there is no contractual relationship between him and the English bank<sup>1</sup>. If by the proper law of the bailment of the bonds to the foreign bank the bailor is not entitled to delivery of the bonds, the English bank, as bailee of the foreign bank, will not be compelled to deliver them up<sup>2</sup>. Similarly, if the delivery of the bonds would involve the foreign bank in doing an act abroad which was illegal<sup>3</sup> there, the English courts will not enforce delivery by a London branch of that bank<sup>4</sup>.

1 *Kahler v Midland Bank Ltd* [1950] AC 24, [1949] 2 All ER 621, HL.

2 *Kahler v Midland Bank Ltd* [1950] AC 24 at 28-29, [1949] 2 All ER 621 at 624-625, HL, per Lord Simonds.

3 See *Kahler v Midland Bank Ltd* [1950] AC 24, [1949] 2 All ER 621, HL (Lord MacDermott and Lord Reid dissenting). The illegality, both in this case and in the case cited in note 4, was under national foreign exchange laws, which were not of such a penal or confiscatory nature as that they should be disregarded in England: see *Kahler v Midland Bank Ltd* above at 28 and 624 per Lord Simonds. It may, however, be argued that no effect should have been given to those laws because they did not form a point of the law applicable to the contract at issue.

4 *Zivnostenska Bank National Corp'n v Frankman* [1950] AC 57, [1949] 2 All ER 671, HL. See also note 3.

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### **(vii) Collection of Cheques etc; Protection and Duties of Collecting Banker**

#### **879. Cheques.**

A cheque is a bill of exchange drawn on a banker, payable on demand<sup>1</sup>. A bearer cheque is one expressed to be payable to a particular person or bearer<sup>2</sup>, or to bearer; or a cheque on which the only or last indorsement is in blank<sup>3</sup>. An order cheque is one which is expressed to be so payable, or which is expressed to be payable to a particular person or body and does not contain words prohibiting transfer or indicating an intention that it should not be transferable<sup>4</sup>. A cheque payable to the order of a particular person, and not to him or his order, is nevertheless payable to him or his order at his option<sup>5</sup>. A cheque may be crossed either generally<sup>6</sup> or specially<sup>7</sup>.

A warrant given by the Registrar of Government Stock for making any payment on the exchange of government securities<sup>8</sup> is deemed to be a cheque<sup>9</sup> and is exempt from stamp duty<sup>10</sup>.

1 Bills of Exchange Act 1882 s 73. See PARAS 1405, 1410. In general, the provisions of the Bills of Exchange Act 1882 applicable to bills of exchange payable on demand apply to cheques: s 73. As to the nature of a cheque see also *Thairwall v Great Northern Ry Co* [1910] 2 KB 509, DC; and PARA 898 note 14. Banker's drafts are not cheques: see PARA 896. As to the meaning of 'bill of exchange' see the Bills of Exchange Act 1882 s 3(1);

and PARA 1405. As to cheque guarantee cards see PARA 903; and as to credit cards and charge cards see PARAS 904-905.

2 As to cheques made payable to a particular object eg 'wages' see PARAS 855, 898.

3 See the Bills of Exchange Act 1882 ss 8(3), 73.

4 Bills of Exchange Act 1882 ss 8(4), 73.

5 Bills of Exchange Act 1882 ss 8(5), 73.

6 See the Bills of Exchange Act 1882 s 76(1); and PARA 880.

7 See the Bills of Exchange Act 1882 s 76(2); and PARA 880.

8 See the National Loans Act 1968 s 14; and PARA 1345.

9 le within the meaning of the Bills of Exchange Act 1882: see the text to note 1.

10 National Loans Act 1968 s 14(7) (amended by SI 2004/1662).

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## **880. Crossing of cheques.**

The rules for the negotiation of bills and notes apply generally to cheques<sup>1</sup>, with this addition, that the negotiation of a cheque may be affected by 'crossing' it. This is done by drawing two parallel transverse lines across the face of the cheque. If the lines are drawn simply, or if the words 'and company' or any abbreviation are written within them, with or without the addition in either case of the words 'not negotiable', the cheque is said to be crossed generally; and in that case a holder who desires to receive payment of the cheque must present it through a banker<sup>2</sup>. However it should be noted that cheques are usually pre-printed with an 'account payee' or 'a/c payee' crossing with the result that the cheque is not transferable (and hence not negotiable): such an instrument is valid only as between the parties to it<sup>3</sup>.

If within the transverse lines there is written the name of a banker, with or without the words 'not negotiable', the cheque is said to be crossed specially, and to the banker named; and in that case a holder who desires to receive payment of the cheque must present it through that banker<sup>4</sup>.

The drawer of a cheque may, if he wishes, cross it either generally or specially<sup>5</sup>. The holder may: (1) if the cheque is uncrossed, cross it either generally or specially; (2) if the cheque is crossed generally, add the name of a banker so as to convert the general crossing into a special one; and (3) in either case, add the words 'not negotiable'<sup>6</sup>.

A banker: (a) to whom a cheque is crossed specially may cross it specially to another banker for collection; or (b) to whom a cheque that is uncrossed or crossed generally is sent for collection may cross it specially to himself<sup>7</sup>.

1 See the Bills of Exchange Act 1882 s 73; and PARA 879. As to rules regarding negotiation of bills and notes see generally PARA 1401 et seq.

2 Bills of Exchange Act 1882 s 76(1). As to ss 76, 77 see also PARA 1411. The crossed cheques provisions of the Bills of Exchange Act 1882 (ss 76-81) extend to any document issued by a customer of a banker which, though not a bill of exchange, is intended to enable a person to obtain payment of the sum mentioned from

that banker, any document issued by a public officer and intended to enable a person to obtain payment of the sum mentioned from the Paymaster General or the Queen's and Lord Treasurer's Remembrancer, and any banker's draft: Cheques Act 1957 ss 4(2), 5 (s 4(2) amended by the Cheques Act 1992 s 3). See also PARA 1411. As to the Paymaster General and the Queen's and Lord Treasurer's Remembrancer see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 714; **COURTS** vol 10 (Reissue) PARA 654.

It is unclear whether a cheque made payable to 'order' may be made non-transferable: *National Bank v Silke* [1891] 1 QB 435, CA. The judgments in this case have been read as implying that the 'not negotiable' crossing prohibited transfer. Such is clearly not the case: cf the Bills of Exchange Act 1882 s 81, which limits negotiability, not transferability (see PARA 838); *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL.

For a description of the operation of the clearing system see *Barclays Bank plc v Bank of England* [1985] 1 All ER 385.

As to cheques marked 'account payee' see PARA 895. See also note 3.

3 See the Bills of Exchange Act 1882 s 81A; and PARAS 836, 895, 1500.

4 Bills of Exchange Act 1882 s 76(2). Transverse parallel lines, although usual, are not necessary in a specially crossed cheque. The words 'not negotiable' do not by themselves constitute a crossing: see PARA 838.

5 Bills of Exchange Act 1882 s 77(1).

6 Bills of Exchange Act 1882 s 77(2), (3), (4). The holder includes the payee: see s 2; and PARA 837 note 5. See also *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL (in which the contention of Fletcher Moulton LJ in *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA, that a named payee could be holder in due course was finally disapproved). The term 'holder' also includes a banker who is a mere agent for collection: *Sutters v Briggs* [1922] 1 AC 1, HL.

7 Bills of Exchange Act 1882 s 77(5), (6). As to the duties and rights of bankers in regard to crossed cheques see ss 79, 80; the Cheques Act 1957 s 4; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240; and PARAS 838-839, 882. A bank which, acting as mere agent to collect, forwards a customer's cheque to the paying bank is a holder of the cheque, and accordingly, if the cheque is crossed generally, may cross it specially: *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; and see the Bills of Exchange Act 1882 s 77(3). See also *Sutters v Briggs* [1922] 1 AC 1, HL.

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## **881. Duties of a collecting banker.**

In collecting cheques and other instruments for a customer<sup>1</sup>, a banker acts basically as a mere agent or conduit to receive payment of the cheques from the banker on whom they are drawn and to hold the proceeds at the disposal of his customer<sup>2</sup>.

The character in which a banker receives a cheque is a matter of fact in each case: he may be a mere collecting agent, or he may take as a holder for value or in due course<sup>3</sup>.

As agent for collection he is bound to exercise diligence in the presentation of the cheque for payment. He fulfils his duty if, when the cheque is drawn on a bank in the same place, he presents it the day after receipt<sup>4</sup>, or, when it is drawn on a bank in another place, he either presents it or forwards it on the day following receipt<sup>5</sup>. The forwarding may be to another branch or to an agent of the bank<sup>6</sup>, who has the same time after receipt in which to present. A non-clearing bank may so utilise a clearing bank; but in any case the bank which has received the cheque from its customer remains liable to him for default of its agent<sup>7</sup>. Where presentation is made through the inter-bank clearing system, the presenting bank's responsibility to its customer in respect of the collection of the cheque is discharged only when the cheque is physically delivered to that branch of the paying bank for decision whether it should be paid or



not<sup>8</sup>. Presentation by post is sufficient<sup>9</sup>; and it would appear that, when a bank forwards a cheque by post to the bank on which it is drawn, the latter receives it as agent for presentment to itself<sup>10</sup>, and in that capacity may hold it till the day after receipt.

Where a cheque drawn by one customer of a bank is received from another customer, it is a question of fact whether it was presented for payment or paid in for collection. If the latter, the bank has the usual time of an agent for giving notice of dishonour<sup>11</sup>, but must pay in preference to a debt due to itself from the drawing customer<sup>12</sup>.

If a banker fails to present a cheque within a reasonable time after it reaches him, he is liable to his customer for loss arising from the delay<sup>13</sup>. The indorsers, if any, are discharged if presentation is not made within reasonable time after indorsement<sup>14</sup>. Where a cheque is not presented within a reasonable time of its issue, the drawer is discharged to the extent of any actual damage he may have suffered by the failure to pay of the bank on which the cheque was drawn<sup>15</sup>.

A banker receiving instruments delivered to him for collection and credit to a customer's account may collect solely for the customer or for himself or both. Where he collects for the customer, he may be liable in conversion if his customer has no title but, provided that he collects in good faith and without negligence, he may plead statutory protection<sup>16</sup>; the cause of action is conversion or money had and received and entails ultimately choosing between a claim based on the tort and a claim based on an implied contract<sup>17</sup>. If the banker collects for himself, he needs no such protection unless the instrument is affected by forgery<sup>18</sup>. He can be both an agent for collection and a holder for value at the same time<sup>19</sup>.

1 As to the customer see PARA 883.

2 *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. A bank receiving a cheque from an individual to purchase shares or return it does not owe a duty of care to the bank against which the cheque is drawn not to lose it: *Yorkshire Bank plc v Lloyds Bank plc* [1999] 2 All ER (Comm) 153. It appears that a collecting bank does not owe a general duty of care to parties other than its customers: see *Box v Barclays Bank plc* [1998] 18 LS Gaz R 33, [1998] Lloyd's Rep Bank 185.

3 See *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; *Bevan v National Bank Ltd* (1906) 23 TLR 65; *Jones & Co v Coventry* [1909] 2 KB 1029; *Re Farrow's Bank Ltd* [1923] 1 Ch 41, CA; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA. See also *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719. See PARA 891. As to the banker as a holder for value see PARA 890. The banker may take in both capacities at the same time: see PARA 890.

4 *Alexander v Burchfield* (1842) 7 Man & G 1061; *Rickford v Ridge* (1810) 2 Camp 537; *Forman v Bank of England* (1902) 18 TLR 339; and cf *Boddington v Schlencker* (1833) 4 B & Ad 752.

5 *Hare v Henty* (1861) 10 CBNS 65; *Prideaux v Criddle* (1869) LR 4 QB 455; *Heywood v Pickering* (1874) LR 9 QB 428; and contrast *Moule v Brown* (1838) 4 Bing NC 266; *Bailey v Bodenham* (1864) 16 CBNS 288. As to the meaning of 'in the same place' see *Hamilton Finance Co Ltd v Coverley Westray Walbaum and Tosetti Ltd, and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53.

6 *Prideaux v Criddle* (1869) LR 4 QB 455.

7 *Mackersy v Ramsays, Bonars & Co* (1843) 9 Cl & Fin 818, HL. Cf *Calico Printers' Association Ltd v Barclays Bank* (1931) 145 LT 51, CA (agent abroad).

8 *Barclays Bank plc v Bank of England* [1985] 1 All ER 385 (Bingham J sitting as arbitrator), distinguishing *Reynolds v Chettle* (1811) 2 Camp 596. See also *Turner v Royal Bank of Scotland plc* [1999] 2 All ER (Comm) 664, [1999] Lloyd's Rep Bank 231, CA.

9 *Prideaux v Criddle* (1869) LR 4 QB 455. As to presentation of bills of exchange see PARA 1509 et seq pos. It is the practice to treat presentation by post by one bank to another as sufficient, but not presentation by letter by an ostensible payee requesting remittance by post.

10 *Bailey v Bodenham* (1864) 16 CBNS 288 at 296 per Erle CJ.

11 *Boyd v Emmerson* (1834) 2 Ad & El 184.

12 *Kilsby v Williams* (1822) 5 B & Ald 815.

13 *Lubbock v Tribe* (1838) 3 M & W 607 at 612 per Lord Abinger CB; and see also *Hare v Henty* (1861) 10 CBNS 65.

14 Bills of Exchange Act 1882 ss 45(2), 73. See also PARAS 1405, 1410, 1516. For the rules as to presentation for payment see PARA 1509 et seq.

15 See the Bills of Exchange Act 1882 s 74 (differentiating the drawer of a cheque from the drawer of an ordinary bill under s 45); and PARA 1519.

16 See under the Cheques Act 1957 s 4: see PARA 882. It is arguable that negligence as a tort is different from the negligence which it is the statutory duty of a collecting banker to avoid under s 4. It has been argued (see *Arrow Transfer Co Ltd v Royal Bank of Canada, Bank of Montreal and Canadian Imperial Bank of Commerce* [1971] 3 WWR 241, BC CA) that collection of a cheque which is forged and which is a sham and outside the Cheques Act 1957 s 4 gives rise to liability for negligence although the contrary may well be the law. See also *Redmond v Allied Irish Banks plc* [1987] 2 FTLR 264.

17 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL.

18 See PARA 890.

19 *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527 at 538, [1970] 1 All ER 719 at 727 per Milmo J.

## UPDATE

### 881 Duties of a collecting banker

NOTE 3--See *Grosvenor Casinos Ltd v National Bank of Abu Dhabi* [2008] EWHC 511 (Comm), [2008] 2 All ER (Comm) 112 (where the Uniform Rules of Collection between a remitting bank and collecting bank are intended to reflect and support the highly structured and formalised manner of collection between banks).

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### 882. Protection of collecting banker.

Where a banker in good faith and without negligence<sup>1</sup> receives payment for a customer<sup>2</sup> of a cheque and the customer has no title or a defective title to the cheque, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment<sup>3</sup>. The banker is not to be treated<sup>4</sup> as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, indorsement of the cheque or other instrument<sup>5</sup>.

Where this statutory protection attaches, it covers the receipt of the cheque and every step taken in the ordinary course of business and intended to lead up to the receipt of payment<sup>6</sup>, such as stamping the bank identification stamp on the cheque. It has been suggested<sup>7</sup> that the protection did not extend to cheques obtained by 'larceny or analogous felony'<sup>8</sup>, but it is submitted that this suggestion is unfounded<sup>9</sup>.

1 See PARA 884.

2 See PARA 883.

3 Cheques Act 1957 s 4(1)(a), (2)(a). See also PARA 1411. This includes cheques which under the Bills of Exchange Act 1882 s 81A(1) (see PARA 895) or otherwise are not transferable: Cheques Act 1957 s 4(2)(a) (amended by the Cheques Act 1992 s 3). A banker who, having credited his customer's account with the amount of a cheque, receives payment of it for himself, has the same protection as a banker who receives payment for a customer: Cheques Act 1957 s 4(1)(b), (2)(a). Section 4 applies not only to cheques, but also to: (1) any document issued by a banker's customer which, though not a bill of exchange, is intended to enable a person to obtain payment from that banker of the sum mentioned in the document (see s 4(2)(b); and PARAS 898, 900-901); (2) any document issued by a public officer which is intended to enable a person to obtain payment from the Paymaster General or the Queen's and Lord Treasurer's Remembrancer of the sum mentioned in the document but which is not a bill of exchange (see s 4(2)(c); and PARA 898 note 5); and (3) any draft payable on demand drawn by a banker upon himself, whether payable at the head office or at some other office of his bank (see s 4(2)(d); and PARA 896). As to the Paymaster General and the Queen's and Lord Treasurer's Remembrancer see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 714; **COURTS** vol 10 (Reissue) PARA 654. See *Honourable Society of the Middle Temple v Lloyds Bank plc* [1999] 1 All ER (Comm) 193.

A bank may be entitled to the protection of the Cheques Act 1957 s 4 even though the payee was a different entity from the account holder, so long as there appears to be a significant match: see *Architects of Wine Ltd v Barclays Bank plc* [2007] EWCA Civ 239, [2007] 2 All ER (Comm) 285.

4 le for the purposes of the Cheques Act 1957 s 4.

5 Cheques Act 1957 s 4(3). 'Instrument' refers to any instrument specified in s 4(2): see the text and note 3.

6 *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 244, HL, per Lord Macnaghten. This view is not seriously affected by the dictum in *Taxation Comrs v English Scottish and Australian Bank Ltd* [1920] AC 683 at 688, PC.

7 Dicta of Lord Halsbury and Lord Brampton in *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL, have been taken to imply this.

8 The offence of larceny is replaced by that of theft: see the Theft Act 1968 ss 1, 33(3), Sch 3; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 282. The distinction between felony and misdemeanour was removed by the Criminal Law Act 1967 s 1: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 49.

9 The customer cannot have less than no title, the contingency against which the banker is protected under the Cheques Act 1957 s 4 (replacing the Bills of Exchange Act 1882 s 82 (repealed)).

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### 883. Receipt for customer.

To entitle the banker to protection he must receive payment for a customer<sup>1</sup>, but he may receive payment for himself and yet be entitled to the protection where, acting in a purely collecting capacity, he has nevertheless a lien or is otherwise a holder for value<sup>2</sup>. It seems that, in order to be a customer, a person need not have habitual dealings with the banker in the nature of ordinary banking business and that an isolated transaction may be enough to create the relationship of banker and customer<sup>3</sup>, but the continued cashing of crossed cheques over the counter from which the bank derives no direct benefit does not constitute such a relationship<sup>4</sup>.

The existence of a current account creates the relationship of banker and customer between the bank and the owner of the account<sup>5</sup>, as does the existence of a deposit account<sup>6</sup>. However, the banker may be entitled to the statutory protection before the account is opened provided

that it is intended that the account should be opened after the normal preliminaries have been completed<sup>7</sup>.

It will probably be enough to create the relationship of banker and customer if the customer habitually discounts bills at the bank. A first transaction, such as the payment in of a cheque to open an account, is protected<sup>8</sup>. If a person is not a customer, his drawing a counter cheque, or the entry of the transaction in the banker's books under such a heading as 'Sundry Customers', is of no avail<sup>9</sup>. A person is a customer although his account is overdrawn<sup>10</sup>. One bank may be a customer of another bank<sup>11</sup>.

Where a crossed cheque drawn on one office of a bank is paid in by a customer at another branch, and is credited in his account, the bank is protected both as a collecting and as a paying bank<sup>12</sup>. This is so also where the cheque is paid in for the credit of an account at the branch where the drawer's account is kept, though in order to avoid liability the bank must bring itself within both the protection afforded to a collecting bank and that afforded to a paying bank<sup>13</sup>.

1 Cheques Act 1957 s 4(1)(a). See also PARA 1002. The protection conferred by s 4 (see PARA 882) is conferred on a banker who receives payment for a customer, that is, who receives payment as an agent for collection; the bank should be 'a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer': *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 245-246, HL, per Lord Macnaghten. A receipt by a banker of cheques payable to himself but accompanied by a request to credit them to a customer is a receiving on behalf of the customer: *Lloyds Bank Ltd v Chartered Bank of India Australia and China* [1929] 1 KB 40, CA.

2 *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719. See also the Cheques Act 1957 s 4; and PARA 882. As to lien see PARAS 860-864.

3 *Ladbroke & Co v Todd* (1914) 111 LT 43; *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683 at 688, PC. But, to the contrary, see *Matthews v Brown & Co* (1894) 63 LJQB 494; *Kleinwort Sons & Co v Comptoir National d'Escompte de Paris* [1894] 2 QB 157; *Lacave & Co v Crédit Lyonnais* [1897] 1 QB 148; *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL. See also PARA 816.

4 *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL. As to crossing of cheques see PARA 880.

5 *Lacave & Co v Crédit Lyonnais* [1897] 1 QB 148.

6 *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414 at 421, HL, per Lord Davey.

7 *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166.

8 *Ladbroke & Co v Todd* (1914) 111 LT 43; *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683 at 688, PC. But see *Tate v Wilts and Dorset Bank* (1899) 1 Legal Decisions Affecting Bankers 286 per Darling J.

9 *Matthews v Brown & Co* (1894) 10 TLR 386; *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414, HL.

10 *Clarke v London and County Banking Co* [1897] 1 QB 552 (distinguished by Lord Lindley in *Great Western Rly Co v London and County Banking Co Ltd* [1901] AC 414 at 425, HL; but the doubt was whether the bank received only for the customer, not whether he was one). Cf *Hardy v Veasey* (1868) LR 3 Exch 107.

11 *Importers Co Ltd v Westminster Bank Ltd* [1927] 2 KB 297, CA. See also *Aschkenasy v Midland Bank Ltd* (1934) 51 TLR 34, CA (in which A instructed bank B to transfer money to bank C for D's credit; and B, not A, was the customer of C).

12 *Gordon v Capital and Counties Bank Ltd* [1902] 1 KB 242, CA (where the cheque was to order and bore a forged indorsement); affd on appeal on other grounds sub nom *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. However, the protection would also apply in the case of a bearer cheque: see PARA 837.

13 *Carpenters' Co v British Mutual Banking Co Ltd* [1938] 1 KB 511, [1937] 3 All ER 811, CA.

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#### **884. Acting in good faith and without negligence.**

If the collecting banker wishes to plead the statutory protection, his dealings throughout must be in good faith and without negligence<sup>1</sup>. Negligence in this connection is breach of a duty to the possible true owner, not the customer, created by the statute itself, the duty being not to disregard the interests of the true owner<sup>2</sup>. The test of negligence is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present is so out of the ordinary course that it ought to arouse doubts in the banker's mind and cause him to make inquiries<sup>3</sup>. In discharging his contractual duties in crediting an account with a dividend, a banker is not obliged to consider the tax implications of the matter<sup>4</sup>. He is bound to make inquiries when there is anything to raise suspicion that the cheque is being wrongfully dealt with in being paid into the customer's account<sup>5</sup>, but is not called upon to be abnormally suspicious<sup>6</sup>.

Disregard of the bank's own regulations may be evidence of negligence<sup>7</sup>; and the production of a certificate under the Registration of Business Names Act 1916 (now the Business Names Act 1985)<sup>8</sup> has been held sufficient to satisfy a banker put on inquiry<sup>9</sup>.

A bank is not liable for acts of negligence if these are induced or encouraged by the conduct of the true owner<sup>10</sup>. The banker cannot adduce pressure of exigencies of business or shortage of staff to modify what, in ordinary circumstances, would be negligence<sup>11</sup>, but he may plead contributory negligence on the part of the customer in mitigation of damages<sup>12</sup>.

A banker's failure to concern himself with the absence of, or an irregularity in, indorsement does not, by itself, constitute negligence<sup>13</sup>.

It may be negligent not to make inquiries as to a customer upon opening an account and collecting a cheque for him<sup>14</sup>. Unless the reference obtained in respect of a customer renders it superfluous, inquiry ought to be made concerning the character and circumstances of the customer<sup>15</sup>.

Fluctuations in the account may be a circumstance putting the bank upon inquiry<sup>16</sup>.

1 See the Cheques Act 1957 s 4(1). As to the statutory protection see PARA 882. Section 4(1) specifically mentions only the receipt of the money, but negligence in taking the cheque has always been held to preclude protection as necessarily involving the subsequent receipt. As to negligence generally see **NEGLIGENCE**.

2 *Bissell & Co v Fox Bros & Co* (1885) 53 LT 193, CA. See also *Union Bank of Australia Ltd v McClintock & Co* [1922] 1 AC 240, PC; *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1, [1960] 3 All ER 482, PC.

3 *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683, PC. See also *Hampstead Guardians v Barclays Bank Ltd* (1923) 39 TLR 229; *London and Montrose Shipbuilding and Repairing Co Ltd v Barclays Bank Ltd* (1926) 31 Com Cas 67 (affd 31 Com Cas 182, CA); *Lloyds Bank v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA. See further *Slingsby v District Bank Ltd* [1932] 1 KB 544 at 556, CA (disagreeing with the findings as to negligence in *Slingsby v Westminster Bank Ltd* [1931] 1 KB 173, and overruling *Slingsby v Westminster Bank Ltd (No 2)* [1931] 2 KB 583); *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201 at 232, HL, per Lord Wright; *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573 at 579, [1968] 1 WLR 968 at 972-973, CA, per Diplock LJ; *Thackwell v Barclays Bank plc* [1986] 1 All ER 676. An act or omission held to be a breach of duty at one time may not be a breach of duty at another: see *Marfani & Co Ltd v Midland Bank Ltd* above; *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA. See also *Architects of Wine Ltd v Barclays Bank plc* [2007] EWCA Civ 239, [2007] 2 All ER (Comm) 285 (evidence of banking practice in regard to 'sufficient match' between the payee name and the account name should not be rejected out of hand due to hindsight or scepticism about the process leading to the cheques being accepted).

4 *Schioler v Westminster Bank Ltd* [1970] 2 QB 719, [1970] 3 All ER 177. See, however, *Morgan v Lloyds Bank plc* [1998] Lloyd's Rep Bank 73 at 80, CA, where accepting a request for advice was said to be evidence of an assumption of responsibility. Where a bank assumes a duty to exercise reasonable care in giving advice and complies with that duty, it does not assume a further continuing obligation to keep the advice under review and, if necessary, correct it in the light of supervening events: *Fennoscandia Ltd v Clarke* [1999] 1 All ER (Comm) 365, CA; and see PARA 923.

5 See eg *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA (agent paying his principal's cheques into his own account); *Worshipful Co of Carpenters of City of London v British Mutual Banking Co Ltd* [1938] 1 KB 511, [1937] 3 All ER 811, CA (plaintiff's clerk paying into his own account cheques drawn by him on behalf of plaintiffs in favour of tradesmen). In *Motor Traders' Guarantee Corpn Ltd v Midland Bank Ltd* [1937] 4 All ER 90, it was held that the customer's banking history might be such as to put the banker on inquiry. See also *Marquess of Bute v Barclays Bank Ltd* [1955] 1 QB 202, [1954] 3 All ER 365 (order to pay A for B); *Baker v Barclays Bank Ltd* [1955] 2 All ER 571, [1955] 1 WLR 822; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA.

6 *Penmount Estates Ltd v National Provincial Bank Ltd* (1945) 173 LT 344. See also *Architects of Wine Ltd v Barclays Bank plc* [2007] EWCA Civ 239, [2007] 2 All ER (Comm) 285.

7 *Motor Traders' Guarantee Corpn v Midland Bank Ltd* [1937] 4 All ER 90; and see *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA.

8 See **COMPANIES** vol 14 (2009) PARA 223 et seq; **PARTNERSHIP** vol 79 (2008) PARA 8.

9 *Smith and Baldwin v Barclays Bank Ltd* (1944) 5 Legal Decisions Affecting Bankers 370.

10 *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; but see *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA; *Bank of Montreal v Dominion Gresham Guarantee and Casualty Co Ltd* [1930] AC 659, PC.

11 *Crumplin v London Joint Stock Bank Ltd* (1913) 109 LT 856. Cf *Ross v London County Westminster and Parr's Bank Ltd* [1919] 1 KB 678.

12 See the Law Reform (Contributory Negligence) Act 1945 s 1; and **NEGLIGENCE** vol 78 (2010) PARA 75 et seq. See also *Lumsden & Co v London Trustee Savings Bank* [1971] 1 Lloyd's Rep 114. In any circumstances in which proof of absence of negligence by a banker would be a defence in proceedings by reason of the Cheques Act 1957 s 4 (see PARA 882), a defence of contributory negligence is also available to the banker notwithstanding the provisions of the Torts (Interference with Goods) Act 1977 s 11(1) (see **TORT** vol 45(2) (Reissue) PARA 639): Banking Act 1979 s 47.

13 Cheques Act 1957 s 4(3).

14 *Ladbroke & Co v Todd* (1914) 111 LT 43; and see *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683 at 688, PC; *Hampstead Guardians v Barclays Bank Ltd* (1923) 39 TLR 229; *Linklaters v HSBC Bank plc* [2003] EWHC 1113 (Comm), [2003] 2 Lloyd's Rep 545. It is not clear whether the position at common law is affected by the inquiries which a bank is required to make under money laundering regulations (see PARA 831).

15 *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201, HL. See also the text and note 3.

16 *Crumplin v London Joint Stock Bank Ltd* (1913) 109 LT 856. On the other hand, see *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; *Taxation Comrs v English, Scottish and Australian Bank Ltd* [1920] AC 683, PC.

## UPDATE

### 884 Acting in good faith and without negligence

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### **885. When proceeds available.**

Where cheques are collected, the banker has a reasonable time, consistent with ordinary book-keeping, in which to pass the proceeds to current account before they are available for drawing against<sup>1</sup>. Where cheques are credited as cash prior to receipt of payment, the customer is entitled to draw on them at once only if there is an agreement, express or implied, to that effect<sup>2</sup>. If a cheque received for collection is dishonoured, or if the banker has to account to the true owner for the proceeds<sup>3</sup>, the banker is entitled to debit the customer's account accordingly<sup>4</sup>.

1 *Marzetti v Williams* (1830) 1 B & Ad 415.

2 See *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; *Bevan v National Bank Ltd* (1906) 23 TLR 65; *Jones & Co v Coventry* [1909] 2 KB 1029; *Re Farrow's Bank Ltd* [1923] 1 Ch 41, CA; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA. See also PARA 891 note 2.

3 *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA.

4 *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 248, HL, per Lord Lindley; and see *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA.

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### **886. Duties consequent upon dishonour.**

If a cheque is dishonoured on presentation, the collecting banker may debit the customer's account with the amount<sup>1</sup>. He must give due notice of dishonour<sup>2</sup> either to the parties liable on the cheque, or to his principal, the customer<sup>3</sup>. The usual course is to return the cheque to the customer, and this is deemed sufficient notice of dishonour<sup>4</sup>. Branches of the same bank are held to be separate persons for the transmission of notice of dishonour<sup>5</sup>.

Where a cheque drawn by one customer of a bank is paid in for collection by another customer, and there are not sufficient funds to meet it, the banker still has until the next day in which to return it<sup>6</sup>.

1 This is the universal custom of bankers, apparently recognised by Lord Lindley in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 248, HL. See also *Re Mills, Bawtree & Co, ex p Stannard* (1893) 10 Morr 193.

2 As to the general rules relating to notice of dishonour see PARA 1524 et seq. See also *Hamilton Finance Co Ltd v Coverley Westray Walbaum and Tosetti Ltd, and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53.

3 Bills of Exchange Act 1882 ss 49(13), 73. See also PARAS 1405, 1410, 1526, 1532.

4 *Clode v Bayley* (1843) 12 M & W 51; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC; *Fielding & Co v Corry* [1898] 1 QB 268, CA. A bank could apparently give notice of dishonour by telegram (see *Fielding & Co v Corry* [1898] 1 QB 268 at 271, CA, per AL Smith LJ); quare whether this principle now extends to telex, fax etc.

5 See *Clode v Bayley* (1843) 12 M & W 51; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC; *Fielding & Co v Corry* [1898] 1 QB 268, CA.

6 See *Boyd v Emmerson* (1834) 2 Ad & El 184.

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### **887. Duties and liabilities of banker collecting bills.**

If a banker undertakes the collection of bills<sup>1</sup> for a customer, he is bound to present them for acceptance and payment in accordance with the provisions of the Bills of Exchange Act 1882<sup>2</sup>, and must give notice of dishonour to his customer if they are dishonoured<sup>3</sup>. Where collection is undertaken at the customer's risk, under an agreement relieving the bank from all liability, the banker will be exempt from liability for the negligence of his agent<sup>4</sup>. If the banker employs a sub-agent for collection, he is responsible to the customer for negligence on the part of the sub-agent<sup>5</sup>, but has a remedy against the sub-agent.

A banker who collects a bill to which his customer has no title is liable to the true owner in conversion or for money had and received to the face value of the bill, and has no statutory protection whatever<sup>6</sup>.

Money received on a bill by a sub-agent is in law received by the banker, apart from any question of account between him and the sub-agent<sup>7</sup>. A banker receiving bills for collection from another banker is agent for the remitting banker, not for that banker's customer; unless, therefore, the banker has distinct notice that the bills are the property of the customer, they may be treated as the property of the remitting banker<sup>8</sup>, and are subject to a lien for any balance due from the latter<sup>9</sup>.

1 As to the collection of cheques see PARA 881.

2 See further PARA 1400 et seq.

3 Cf *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526; *Bank of Scotland v Dominion Bank (Toronto)* [1891] AC 592, HL.

4 *Calico Printers' Association Ltd v Barclays Bank Ltd* (1931) 145 LT 51, CA.

5 *Mackersy v Ramsays, Bonars & Co* (1843) 9 Cl & Fin 818; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC. Cf *Calico Printers' Association Ltd v Barclays Bank Ltd* (1931) 145 LT 51, CA; *Royal Products Ltd v Midland Bank Ltd and Bank of Valletta Ltd* [1981] 2 Lloyd's Rep 194. See further **AGENCY** vol 1 (2008) PARA 54.

6 *Arnold v Cheque Bank* (1876) 1 CPD 578; *Fine Art Society Ltd v Union Bank of London Ltd* (1886) 17 QBD 705, CA; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. As to the need for the claimant to establish title see *Box v Barclays Bank plc* [1998] 18 LS Gaz R 33, [1998] Lloyd's Rep Bank 185. As to the relevance of negligence to an action for money had and received see *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193.

7 *Mackersy v Ramsays, Bonars & Co* (1843) 9 Cl & Fin 818.

8 *Johnson v Robarts* (1875) 10 Ch App 505. Cf *Re Dilworth, ex p Armitstead* (1828) 2 Gl & J 371.



9 *Re Parker, ex p Froggatt* (1843) 3 Mont D & De G 322. Cf *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325 at 335, PC; *Re Burrough, ex p Sargeant* (1810) 1 Rose 153. In *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465 at 471, Bigham J used expressions with regard to cheques to the effect that collection was inconsistent with lien. This is clearly not the case: see PARA 860 note 3.

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### **888. Negotiation of bills by banker.**

A banker is not justified in negotiating bills, whether indorsed by the customer or not, which have been paid in for collection<sup>1</sup>, at any rate unless the state of the customer's account renders it a reasonable thing to do so<sup>2</sup>. Since 'account payee' cheques are no longer transferable in any event<sup>3</sup> issues of this kind will not now arise in practice.

1 *Thompson v Giles* (1824) 2 B & C 422; *Collins v Martin* (1797) 1 Bos & P 648 at 649; *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194.

2 Negotiation in some such circumstances is clearly contemplated in *Thompson v Giles* (1824) 2 B & C 422: see at 429 per Bayley J ('the banker could only be justified in negotiating them when that was rendered a reasonable course by the state of the customer's account'); see also at 432 per Holroyd J. Cf *Re Harrison, ex p Barkworth* (1858) 2 De G & J 194. It is submitted, however, that the right arises only when there has been agreement, express or implied, that the bills may be so dealt with on contingencies which have arisen. The proper course is to hold and collect the bills when due and retain the proceeds by virtue of set-off. See also PARA 864.

3 See the Bills of Exchange Act 1882 s 81A; and PARAS 836, 1500.

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### **889. Defective title of customer.**

If the customer for whom a banker collects has no title, or a defective title, prima facie the banker is liable to the true owner<sup>1</sup> for conversion or for money had and received to the face value of the cheque<sup>2</sup>; but if in collecting he acts in good faith and without negligence, he may claim statutory protection<sup>3</sup>. There is no difference in this respect between crossed and uncrossed cheques<sup>4</sup>. If the banker cannot establish the statutory protection, the damages may be reduced where the true owner also has been negligent<sup>5</sup>. Where, however, conversion will not lie, as where the collection has been for a customer having a revocable title unrevoked at the time the money was received and handed over, the banker will be protected as an innocent agent who has parted with the money to his principal before notice<sup>6</sup>.

1 As to the meaning of 'true owner' see *Union Bank of Australia Ltd v McClintock* [1922] 1 AC 240, PC; *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1, [1960] 3 All ER 482, PC. As to the circumstances in which a credit factor has sufficient title to sue see *International Factors Ltd v Rodriguez* [1979] QB 351, [1979] 1 All ER 17, CA.

2 *Fine Art Society Ltd v Union Bank of London Ltd* (1886) 17 QBD 705, CA; *Great Western Rly Co v London and County Banking Co Ltd* [1899] 2 QB 172 (on appeal [1900] 2 QB 464, CA; revsd [1901] AC 414, HL (reversing decisions of Bigham J and the Court of Appeal)); *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL; *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; *AL Underwood Ltd v Bank of Liverpool* [1924] 1 KB 775, CA; *Midland Bank Ltd v Reckitt* [1933] AC 1, HL; *Motor Traders Guarantee Corp Ltd v Midland Bank Ltd* [1937] 4 All ER 90; *Nu-Stilo Footwear Ltd v Lloyds Bank Ltd* (1956) 7 Legal Decisions Affecting Bankers 121; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA; *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573, [1968] 1 WLR 956, CA; *Thackwell v Barclays Bank plc* [1986] 1 All ER 676; *Linklaters v HSBC Bank plc* [2003] EWHC 1113 (Comm), [2003] 2 Lloyd's Rep 545. As to recovering the face value see *Bavins, Jnr and Sims v London and South Western Bank* [1900] 1 QB 270, CA; *Morison v London, County and Westminster Bank Ltd* above; *Midland Bank Ltd v Reckitt* above.

3 See the Cheques Act 1957 s 4; and PARA 882.

4 As to the crossing of cheques see PARA 880.

5 *Lumsden & Co v London Trustee Savings Bank* [1971] 1 Lloyd's Rep 114. See also the Banking Act 1979 s 47; and PARA 884.

6 *Holland v Russell* (1863) 4 B & S 14; *Tate v Wilts and Dorset Bank* (1899) 1 Legal Decisions Affecting Bankers 286; *Bavins, Jnr and Sims v London and South Western Bank* [1900] 1 QB 270, CA. In *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40 at 68, CA, Sankey LJ doubted whether *Tate v Wilts and Dorset Bank* above was good law since *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA.

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## **890. Bank as holder for value.**

A banker who is asked by a customer to collect a cheque and who, pursuant to a contract express or implied to do so, credits the customer forthwith with the amount of the cheque before the proceeds are received, in fact receives the sum for himself and not for the customer<sup>1</sup>; but he has the same statutory protection in such circumstances as if he had received payment of the cheque for the customer<sup>2</sup>. Where there is no question of a forged indorsement or of the 'not negotiable' or 'account payee' crossings, the banker may, in the case of both crossed and uncrossed cheques, escape liability for conversion if he can establish an independent title as holder in due course<sup>3</sup>. Every holder is deemed to be a holder in due course; but if the instrument is shown to be affected by fraud, a banker dealing with it must show that he gave value in good faith subsequent to the fraud<sup>4</sup>. The status of holder for value may be claimed by the bank in the following circumstances: where cash has been given for the cheque over the counter; where the cheque is paid in in reduction of an overdraft<sup>5</sup>; where the cheque is paid in on the footing that it may be at once drawn against<sup>6</sup>, whether in fact it is drawn against or not<sup>7</sup>; or where the cheque is subject to a lien<sup>8</sup>. The mere existence of an overdraft, though the banker's lien in respect of it makes him a holder for value to the extent of that lien<sup>9</sup>, would not preclude the statutory protection<sup>10</sup>.

Where, by any of the above methods, the banker becomes holder in due course of a cheque paid in, he has all the rights of such a holder, including that of suing the parties to it in his own name<sup>11</sup>.

The banker may perhaps also escape liability if he can show that the proceeds of the cheque have in fact reached the hands of the true owner, or been applied for his benefit<sup>12</sup>.

Prior to the passing of the Cheques Act 1957, the absence of an indorsement was fatal to any claim to be holding for value or in due course, for the possessor was no holder at all<sup>13</sup> unless the

cheque was drawn payable to bearer. The Cheques Act 1957 did away with the necessity for indorsement. A banker who gives value for, or has a lien on, a cheque payable to order which the holder delivers to him for collection without indorsing it has such, if any, rights as he would have had if, upon delivery, the holder had indorsed the cheque in blank<sup>14</sup>. A banker taking such a cheque is the holder of it<sup>15</sup> and, if the requisite conditions are present, a holder for value or in due course. It is not essential that the cheque be credited to the account of the holder<sup>16</sup>.

1 This is so because, by crediting the customer with the money before receiving it, the bank has become a holder for value: see *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 245, HL, per Lord Macnaghten ('It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value'). See also note 10. The conditions for becoming a holder for value in these circumstances are explained by Atkin LJ in *AL Underwood Ltd v Barclays Bank* [1924] 1 KB 775 at 805-806, CA. Cf *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL.

2 See the Cheques Act 1957 s 4; and PARA 882 note 3.

3 See the Bills of Exchange Act 1882 s 29; and *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719. See also PARAS 1485, 1486. As to forged indorsements see PARA 850; as to cheques marked 'not negotiable' see PARA 894; as to cheques crossed 'account payee' see PARA 895; and as to the crossing of cheques generally see PARA 880.

4 Bills of Exchange Act 1882 s 30(2). See PARAS 1478, 1486. See also *Baker v Barclays Bank Ltd* [1955] 2 All ER 571, [1955] 1 WLR 822.

5 *London and County Banking Co v Groome* (1881) 8 QBD 288. Valuable consideration for a bill may be constituted by: (1) any consideration sufficient to support a simple contract; or (2) an antecedent debt or liability: Bills of Exchange Act 1882 s 27(1). See also PARA 1479. Such a debt or liability must be the liability of the promisor or drawer of the bill and not that of a stranger: *Hasan v Willson* [1977] 1 Lloyd's Rep 431.

6 *National Bank v Silke* [1891] 1 QB 435 at 439, CA, per Bowen LJ. It does not appear essential that the cheque should actually be drawn against before clearance: see the cases cited in PARA 891 note 2. In *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL, the bank had reserved, on its paying-in slips, the right to refuse payment against uncleared effects, and this was held to preclude there being any implied agreement that the customer could draw against uncleared effects.

7 *Royal Bank of Scotland v Tottenham* [1894] 2 QB 715, CA.

8 See *Re Keever (a bankrupt), ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; and PARAS 860-864.

9 Bills of Exchange Act 1882 s 27(3). See also PARA 1487.

10 *Clarke v London and County Banking Co* [1897] 1 QB 552. The banker might be said to have waived his lien on the cheque, presented it on behalf of the customer, and retained the proceeds by virtue of his right of set-off. As to set-off see PARAS 868, 1012. Cf *Great Western Ry Co v London and County Banking Co Ltd* [1900] 2 QB 464 at 476, CA, per Romer LJ (reversed on appeal [1901] AC 414, HL, but without overruling *Clarke v London and County Banking Co* above). The courts gradually rescued the collecting banker from the apparent conflict indicated in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 245, HL, per Lord Macnaghten (see note 1). It is now accepted that a collecting banker may collect for a customer and plead the protection of the Cheques Act 1957 s 4 (see PARA 882), even though the bank is a holder in due course of the cheque or a holder for value to the extent of his lien: see *Re Keever, ex p Cork v Midland Bank Ltd* [1966] 2 Lloyd's Rep 475; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719.

As to lien arising by reason of an antecedent debt see *Re Keever (a bankrupt), ex p Trustee of the Property of the Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; *Barclays Bank Ltd v Astley Industrial Trust Ltd* above; and PARAS 860-864.

11 *London and County Banking Co v Groome* (1881) 8 QBD 288 (paid in to reduce overdraft); *Re Palmer, ex p Richdale* (1882) 19 ChD 409, CA; *Royal Bank of Scotland v Tottenham* [1894] 2 QB 715, CA (placing at once to credit).

12 *Reid v Rigby & Co* [1894] 2 QB 40; *Bevan v National Bank Ltd* (1906) 23 TLR 65; *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA (where the company's cheques had been paid into the customer's own account). Contrast *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA.

13 See the definition of 'holder' in the Bills of Exchange Act 1882 s 2; and PARA 837 note 5.

14 See the Cheques Act 1957 s 2. An undorsed cheque which appears to have been paid by the banker on whom it is drawn is evidence of the receipt by the payee of the sum payable by the cheque: s 3(1) (renumbered by SI 1996/2993). For these purposes, a copy of such a cheque is evidence of the cheque if: (1) the copy is made by the banker in whose possession the cheque is after presentment; and (2) it is certified by him to be a true copy of the original: Cheques Act 1957 s 3(2) (added by SI 1996/2993).

15 *Midland Bank Ltd v RV Harris Ltd* [1963] 2 All ER 685, [1963] 1 WLR 1021.

16 *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL.

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### **891. Crediting as cash.**

The mere fact that the banker has credited the cheque in his customer's account before receiving the proceeds does not deprive him of protection against the true owner in the event of his customer having no title, or a defective title, to the cheque<sup>1</sup>. Crediting the customer's account does not of itself alter the position of the banker from that of agent for collection to that of holder for value. It is a question of fact in each case. In order to constitute the banker a holder for value on this ground there must be a contract, express or implied, that the customer should be entitled to draw against the amount of the cheque before it is cleared<sup>2</sup>.

If the banker becomes a holder for value, he may, in the absence of a forged indorsement and unless the cheque is crossed 'not negotiable' or 'account payee', sue upon a cheque in his own name as a holder in due course<sup>3</sup>, and may debit the customer if the cheque is dishonoured<sup>4</sup>. He may apparently plead that he is a holder for value as against the person claiming as true owner, except where the indorsement is forged or the cheque is marked 'not negotiable' or 'account payee'.

1 See the Cheques Act 1957 s 4(1); and PARA 882. This provision replaces the combined effect of the Bills of Exchange Act 1882 s 82 and the Bills of Exchange (Crossed Cheques) Act 1906, the latter of which was passed in consequence of the decision in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL (see note 2; and PARA 890 note 1). It would seem that a banker who was a mere agent for collection was always within the protection of the Bills of Exchange Act 1882 s 82 (repealed): see the judgments of Bigham J in *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465, and Channell J in *Bevan v National Bank Ltd* (1906) 23 TLR 65. It may be that the protection extends to a banker who has become a holder in due course: see *Sutters v Briggs* [1922] 1 AC 1 at 15, HL, per Lord Birkenhead LC; *Re Keever, ex p Cork v Midland Bank Ltd* [1966] 2 Lloyd's Rep 475; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719. A contract between the banker and the customer that the banker will, before receipt of the proceeds of the cheques, honour cheques of the customer drawn against the cheques paid in is enough to constitute the banker a holder for value: see *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775 at 805, CA per Atkin LJ; *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL.

2 *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; *Bevan v National Bank Ltd* (1906) 23 TLR 65; *Jones & Co v Coventry* [1909] 2 KB 1029; *Re Farrow's Bank Ltd* [1923] 1 Ch 41, CA; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA. These cases explain the meaning of the judgment in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. A banker who is an agent for collection has been held to be a 'holder' within the meaning of the Gaming Act 1835 s 2 (repealed): *Sutters v Briggs* [1922] 1 AC 1, HL. See also *Westminster Bank Ltd v Zang* [1966] AC 182, [1966] 1 All ER 114, HL; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719. As to the bank as holder for value see PARA 890.

3 See *Royal Bank of Scotland v Tottenham* [1894] 2 QB 715, CA; *London and County Banking Co v Groome* (1881) 8 QBD 288; *Re Palmer, ex p Richdale* (1882) 19 ChD 409, CA. As to cheques crossed 'not negotiable' see PARA 894; and as to cheques crossed 'account payee' see PARA 895.

4 *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 248, HL, per Lord Lindley.

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## 892. Per pro indorsement.

A per pro indorsement<sup>1</sup> puts the collecting banker on inquiry as to the authority of the person making it, and disregard of this intimation is a matter for consideration in determining the question of negligence, but not where the instrument so indorsed is paid in for the credit of the claimant's account<sup>2</sup>. Failure to inquire as to the authority of the signatory will not, of itself, constitute negligence<sup>3</sup>. The inquiry must include not only the authority to indorse, but the authority to deal with the indorsed cheque in the manner proposed<sup>4</sup>. The principle is not limited to signatures 'per pro'. Any cheque purporting to be indorsed in a representative capacity stands on the same footing<sup>5</sup>. Where the indorsement is authorised, the banker is not affected by the existence of unfulfilled conditions<sup>6</sup>; and where the indorsement and application are authorised, he is not liable for misapplication of the proceeds in the absence of any ground of suspicion<sup>7</sup>.

1 A per pro signature is a signature by procuration (*per procuracionem*); it operates as notice that the agent has only a limited authority to sign: Bills of Exchange Act 1882 s 25. See also PARA 1474.

2 *Bissell & Co v Fox Bros & Co* (1885) 53 LT 193, CA; *Alexander v Mackenzie* (1848) 6 CB 766; *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; *Crumplin v London Joint Stock Bank Ltd* (1913) 109 LT 856; *Baker v Barclays Bank Ltd* [1955] 2 All ER 571, [1955] 1 WLR 822; *Universal Guarantee Pty Ltd v National Bank of Australasia Ltd* [1965] 2 All ER 98, [1965] 1 WLR 691, PC.

3 *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; but see the doubts about this decision expressed by Lord Wright in *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201 at 236, HL.

4 *Gompertz v Cook* (1903) 20 TLR 106.

5 The distinction between 'per pro' and other forms of representative signature as affecting a transferee of the instrument (see *O'Reilly v Richardson* (1865) 17 ICLR 74; *Gerald McDonald & Co v Nash & Co* [1922] WN 272, CA (revsd on other grounds [1924] AC 625, HL); *Alexander Stewart & Son of Dundee Ltd v Westminster Bank Ltd* [1926] WN 271, CA (the judgments in the latter two cases unreported on this point)) does not appear applicable to the case of either collecting or paying banker.

6 *Re Land Credit Co of Ireland, ex p Overend Gurney & Co* (1869) 4 Ch App 460; *Dey v Pullinger Engineering Co* [1921] 1 KB 77.

7 *Bank of Bengal v Macleod* (1849) 7 Moo PCC 35; *Bryant, Powis and Bryant v Quebec Bank* [1893] AC 170, PC; *Hambro v Burnand* [1904] 2 KB 10, CA; *Corporation Agencies Ltd v Home Bank of Canada* [1927] AC 318, PC. Cf, however, *Reckitt v Barnett, Pembroke and Slater* [1929] AC 176, HL, following *John v Dodwell & Co* [1918] AC 563, PC, and distinguishing *Hambro v Burnand* above.

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### 893. Cheques payable to officials.

Any indication that the customer is using for his own benefit a document prima facie created for the benefit of, and being the property of, another person with whom he stands in fiduciary relationship should put the banker on inquiry<sup>1</sup>. Under this head would come cheques payable to secretaries of companies or charitable institutions, and the like, in their official capacities, and cheques payable to a partnership and indorsed by one partner paying in to his private account<sup>2</sup>. It would ordinarily be negligent for a banker to take such cheques without inquiry for private account. It would perhaps be negligence to take for the private account of one executor a cheque payable to executors as such<sup>3</sup>. It has been held that the fact that cheques paid in by a stockbroker may possibly represent money of his clients in his hands does not necessarily put a banker on inquiry<sup>4</sup>.

It is equally negligence where the information which should put the bank on inquiry is divided between two offices of the same bank, as where a cheque is paid into one branch to the credit of an account at another<sup>5</sup>.

1 *Hannan's Lake View Central Ltd v Armstrong & Co* (1900) 16 TLR 236 (where the secretary of a company indorsed a cheque payable to the company and paid it into a private account); *Ross v London County, Westminster and Parr's Bank Ltd* [1919] 1 KB 678; *Souchette Ltd v London County, Westminster and Parr's Bank Ltd* (1920) 36 TLR 195; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA; *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA; *Motor Traders Guarantee Corp Ltd v Midland Bank Ltd* [1937] 4 All ER 90; *Marquess of Bute v Barclays Bank Ltd* [1955] 1 QB 202, [1954] 3 All ER 365. Statutory protection is given to banks in relation to solicitors' client accounts: see PARA 826.

2 *Bevan v National Bank Ltd* (1906) 23 TLR 65. The position may be different from that of a partner drawing on a partnership account and paying into a private account: see *Backhouse v Charlton* (1878) 8 ChD 444. The suggestion was repudiated by Mackinnon J in *London and Montrose Shipbuilding and Repairing Co Ltd v Barclays Bank Ltd* (1926) 31 Com Cas 67 (affd 31 Com Cas 182, CA) that a bank was put on inquiry where it collected for the indorsee a cheque payable to a limited company and indorsed over to that indorsee.

3 Cf, however, *Shields v Bank of Ireland* [1901] 1 IR 222 (where the court appears to have seen nothing irregular in an executor paying executorship money into his private account).

4 *Thomson v Clydesdale Bank Ltd* [1893] AC 282, HL.

5 *Lloyds Bank Ltd v EB Savory & Co* [1933] AC 201, HL. However, in *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA, the customer's expert witness agreed that if a number of different cashiers handle a particular account, it would be impossible for any one cashier to build up a reliable indication of what the ordinary pattern of transactions on that account was.

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### 894. 'Not negotiable'.

It has been suggested that the fact that a cheque is crossed 'not negotiable' of itself puts the banker on inquiry<sup>1</sup>; but it is submitted that such is not the case<sup>2</sup>.

Where a cheque is crossed 'not negotiable', the banker cannot avail himself of the defence that he dealt with the cheque pending revocation of a voidable title in the customer<sup>3</sup>.

1 *Great Western Ry Co v London and County Banking Co Ltd* [1901] AC 414 at 422, HL, per Lord Brampton; and see *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356 at 373, CA, per Lord Reading CJ. Cf *Bevan v National Bank Ltd* (1906) 23 TLR 65 at 67 per Channell J.

2 These words being merely part of the crossing, negligence in respect of a crossed cheque must be something outside the crossing. This particular crossing being for the protection of the public, the banker is entitled to correlative protection. In *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL, Lord Brampton's view (see note 1) was either not pressed or not adopted. Cf that case in the Court of Appeal sub nom *Gordon v Capital and Counties Bank Ltd* [1902] 1 KB 242 at 275 and *Crumplin v London Joint Stock Bank Ltd* (1913) 109 LT 856 (where a banker taking a 'not negotiable' cheque without making inquiries was held not guilty of negligence). In *Smith and Baldwin v Barclays Bank Ltd* (1944) 5 Legal Decisions Affecting Bankers 370, Stable J held that an instrument in the form of a cheque, crossed 'not negotiable' and over the crossing 'please pay cash', was none the less a crossed cheque, and that the Bills of Exchange Act 1882 s 82 could be pleaded. Section 82 has been repealed and replaced by the Cheques Act 1957 s 4 which applies to uncrossed as well as crossed cheques: see s 4, s 6(3), Schedule (repealed); and PARA 882.

3 As to this defence in the case of other cheques see *Tate v Wilts and Dorset Bank* (1899) 1 Legal Decisions Affecting Bankers 286. However, see the doubt cast upon this case by Sankey LJ in *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40 at 68, CA. As to the exclusion of the defence by non-negotiable crossing cf *Great Western Ry Co v London and County Banking Co Ltd* [1901] AC 414, HL.

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### 895. 'Account payee'.

Where a cheque is crossed and bears across its face the words 'account payee' or 'a/c payee', either with or without the word 'only', the cheque is not transferable, but is only valid as between the parties to it<sup>1</sup>. A banker is not to be treated<sup>2</sup> as having been negligent by reason only of his failure to concern himself with any purported indorsement of a cheque which is not transferable<sup>3</sup>.

Where a bank acts as agent for collection for a foreign bank of a cheque crossed 'account payee', the test<sup>4</sup> is whether there was anything in the circumstances which was noticed or which ought to have been noticed; if so, the bank is on inquiry and may not be able to discharge its onus of proving the absence of negligence<sup>5</sup>.

1 Bills of Exchange Act 1882 s 81A(1) (s 81A added by the Cheques Act 1992 s 1). As to the Bills of Exchange Act 1882 s 81A see also PARA 1500. As to the position before the enactment of this provision see *National Bank v Silke* [1891] 1 QB 435, CA; *Akrokerrri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465; *Bevan v National Bank Ltd* (1906) 23 TLR 65; *Morison v London, County and Westminster Bank Ltd* [1914] 3 KB 356, CA; *House Property Co of London Ltd and Baylis and Durlacher v London, County and Westminster Bank Ltd* (1915) 84 LJKB 1846; *AL Underwood Ltd v Bank of Liverpool and Martin's* [1924] 1 KB 775, CA; *Importers Co v Westminster Bank Ltd* [1927] 2 KB 297, CA; *Universal Guarantee Pty Ltd v National Bank of Australasia Ltd* [1965] 2 All ER 98, [1965] 1 WLR 691, PC; *Honourable Society of the Middle Temple v Lloyds Bank plc* [1999] 1 All ER (Comm) 193.

2 Ie for the purposes of the Bills of Exchange Act 1882 s 80: see PARA 838.

3 Bills of Exchange Act 1882 s 81A(2) (as added: see note 1). This applies to cheques which are not transferable under s 81A(1) or otherwise: s 81A(2).

4 Ie the test in applying the Cheques Act 1957 s 4: see PARA 882.

5 *Honourable Society of the Middle Temple v Lloyds Bank plc* [1999] 1 All ER (Comm) 193. See also *Linklaters v HSBC Bank plc* [2003] EWHC 1113 (Comm), [2003] 2 Lloyd's Rep 545.

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### **896. Drafts drawn by bank on itself.**

Drafts payable on demand drawn by a branch office on the head office of the same bank, or vice versa, are not cheques<sup>1</sup>, not being drawn by one person on another<sup>2</sup>, but the crossed cheques provisions of the Bills of Exchange Act 1882<sup>3</sup> apply to the drafts as if they were cheques<sup>4</sup>. Such a draft is one payable on demand and drawn by or on behalf of a bank upon itself, whether payable at the head office or some other office of the bank<sup>5</sup>. It is presumably negotiable<sup>6</sup>. It is also 'a draft or order drawn upon a banker' within the Stamp Act 1853<sup>7</sup>, and, if payable to order on demand, the issuing banker is protected if he pays in good faith, notwithstanding that the indorsement is forged or unauthorised<sup>8</sup>. Payment operates as a discharge<sup>9</sup>. A banker receiving payment in circumstances amounting to conversion is liable to the true owner<sup>10</sup> for the face value unless he can bring himself within the protection of the Cheques Act 1957<sup>11</sup>. A paying bank is protected if it has paid such drafts on a forged indorsement where they are payable to order on demand<sup>12</sup>, whether the draft be inland or foreign<sup>13</sup>, or if it is paying in good faith and in the ordinary course of business in the absence of an indorsement or on an irregular indorsement<sup>14</sup>.

Drafts between two branches or between a branch and head office of the same bank may not be issued payable to bearer on demand<sup>15</sup>.

Drafts of the above nature payable to order on demand may be crossed<sup>16</sup>. The protection against forged indorsements, in respect of uncrossed drafts, would generally be sufficient for the paying bank<sup>17</sup>.

If such a draft bearing a crossing is presented for payment across the counter, the banker may refuse to pay it<sup>18</sup>, but the holder may sue the bank either as drawer of a bill or maker of a promissory note<sup>19</sup>.

1 *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. The decision of Bailhache J in *Ross v London County, Westminster and Parr's Bank Ltd* [1919] 1 KB 678, to the opposite effect, appears to be wrong: see *Slingsby v Westminster Bank Ltd* [1931] 1 KB 173 at 187.

2 See the Bills of Exchange Act 1882 ss 3, 73. Cf PARA 897.

3 I.e. the Bills of Exchange Act 1882 ss 76-81; and the Cheques Act 1957 s 4(1) (replacing the Bills of Exchange Act 1882 s 82): see PARAS 880, 882.

4 Cheques Act 1957 s 5 (replacing the Bills of Exchange Act (1882) Amendment Act 1932). The Cheques Act 1957 ss 1, 4 apply to banker's drafts: see ss 1(2)(b), 4(2)(d); note 14; and PARA 882. See also PARA 1411.

5 See the Cheques Act 1957 ss 1(2)(b), 4(2)(d). The meaning of 'banker's draft' was formerly explicitly set out in the Bills of Exchange Act (1882) Amendment Act 1932 (repealed by the Cheques Act 1957 Schedule).

6 See the Bills of Exchange Act 1882 s 5(2). Thus, in the absence of a forged indorsement, an independent title may be set up where circumstances admit.

7 See the Stamp Act 1853 s 19. In *Worshipful Co of Carpenters of the City of London v British Mutual Banking Co Ltd* [1938] 1 KB 511, [1937] 3 All ER 811, CA, it was held that this provision had been implicitly repealed, in the case of cheques, by the Bills of Exchange Act 1882 s 60: see PARA 848 note 1.

8 Stamp Act 1853 s 19; Cheques Act 1957 s 1(2); *Charles v Blackwell* (1877) 2 CPD 151, CA; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL. It is submitted that payment in good faith is a condition of protection: see *Smith v Union Bank of London* (1875) LR 10 QB 291 at 296 per Blackburn J; affd (1875) 1 QBD



31 at 35, CA. The protection afforded by the Cheques Act 1957 s 1 is additional to that given by the Stamp Act 1853 s 19.

9 Cheques Act 1957 s 1(2); *Halifax Union v Wheelwright* (1875) LR 10 Exch 183.

10 As to the meaning of 'true owner' see PARA 889 note 1.

11 See the Cheques Act 1957 ss 4(1), (2)(d), 5 (replacing the combined effect of the Bills of Exchange Act 1882 s 82 and the Bills of Exchange Act (1882) Amendment Act 1932). See also PARA 1411.

12 Stamp Act 1853 s 19; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL.

13 It has been contended that the Stamp Act 1853 s 19 can apply only to inland drafts, but the enactment, though in the form of a proviso, is general in its terms. The fact that it is a proviso does not prevent its being a substantive enactment: *Matthiessen v London and County Bank* (1879) 5 CPD 7. The Supreme Court of Judicature (Consolidation) Act 1925 s 139 (repealed), referred to the Bills of Exchange Act 1882 s 60 (which gives a similar protection to bankers in the case of drafts or orders which are bills of exchange or cheques), as relating to 'the indorsement of drafts or orders drawn upon bankers for the payment of money', without specifying inland drafts. In *Brown Brough & Co v National Bank of India Ltd* (1902) 18 TLR 669, Bigham J clearly thought the Stamp Act 1853 s 19 applied to foreign drafts, and his ruling was not dissented from by the House of Lords in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240.

14 See the Cheques Act 1957 s 1(2), by which, where a banker, in good faith and in the ordinary course of business, pays a draft payable on demand drawn by him upon himself, whether payable at the head office or some other office of his bank, he does not, in doing so, incur any liability by reason only of the absence of or irregularity in indorsement, and the payment discharges the instrument. See also note 8.

15 Bank Charter Act 1844 s 11 (amended by the Statute Law Revision Act 1891; and the Currency and Bank Notes Act 1928 Schedule).

16 See the text and notes 3-4.

17 See the text and note 8.

18 See PARA 839.

19 Bills of Exchange Act 1882 s 5(2); *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL.

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### **897. Drafts drawn by one bank on another.**

Drafts drawn by one bank on another are normally merely cheques, and may in all respects be dealt with as such<sup>1</sup>.

1 See PARA 879 et seq. As to drafts drawn by a bank on itself see PARA 896.

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### **898. Orders for payment.**

An order for payment drawn by a customer on his banker payable conditionally<sup>1</sup> on the payee's signing a special attached receipt is not a cheque<sup>2</sup>; nor is an instrument in the form of a cheque which is drawn in favour of 'cash' or 'wages' or other impersonal payee<sup>3</sup>.

Such documents are not negotiable<sup>4</sup>; but they are documents issued by a customer which, though not bills of exchange, are intended to enable a person to obtain payment from the banker of the sum mentioned in them<sup>5</sup>.

The crossing on such documents has generally been regarded as affording both collecting and paying bankers the same protection as the crossing on cheques, and as imposing the same duties on the latter<sup>6</sup>. If the collecting banker has received the amount payable under any of such documents in circumstances constituting conversion of the document, he is liable to the true owner for the face value<sup>7</sup>, unless he can bring himself within the protection of the Cheques Act 1957<sup>8</sup>.

It would seem not to be regarded as negligence in a banker to take these documents for collection for a party other than the named payee<sup>9</sup>. Beyond this, their transferability would seem doubtful. Nor is a banker negligent in collecting by reason only of his failure to concern himself with absence of, or irregularity in, indorsement of an instrument<sup>10</sup>. As these documents are capable of being effectively crossed<sup>11</sup>, the banker paying in good faith and without negligence, and in accordance with the crossing, would be protected<sup>12</sup>.

Where a banker in good faith and in the ordinary course of business pays a document issued by his customer which, though not a bill of exchange, is intended to enable a person to obtain payment from him of the sum mentioned in the document, he does not, in doing so, incur any liability by reason only of the absence of, or irregularity in, indorsement, and the payment discharges the instrument<sup>13</sup>. Forgery of indorsement is probably irrelevant except in cases in which the banker has demanded an indorsement as a pre-requisite to payment<sup>14</sup>. The signature to a receipt is probably not an indorsement and, where the receipt is not signed by the payee, the banker has paid away his customer's money without authority, and cannot debit him.

Where documents are made payable by the banker<sup>15</sup> conditionally on presentation within a limited time<sup>16</sup>, it is a matter of doubt whether the banker is protected if he pays them on a forged indorsement.

It is usual for bankers to take indemnities from customers with regard to paying these documents, which, not being cheques, they are under no primary obligation to honour.

1 To disqualify the instrument from being a cheque, the condition must be a condition between drawer and banker, and not merely between drawer and payee: *Roberts & Co v Marsh* [1915] 1 KB 42, CA. Cf PARA 899.

2 *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 252, HL, per Lord Lindley.

3 See *North and South Insurance Corp'n Ltd v National Provincial Bank Ltd* [1936] 1 KB 328 (in which the order was construed as payable to bearer); *Cole v Milsome* [1951] 1 All ER 311; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA.

4 See the Cheques Act 1957 s 6(2); *Gordon v London City and Midland Bank Ltd* [1902] 1 KB 242 at 275, CA, per Collins MR (affd sub nom *London City and Midland Bank Ltd v Gordon* [1903] AC 240, HL). See also the Revenue Act 1883 s 17 proviso (repealed by the Cheques Act 1957 Schedule), which treated these instruments as being, and, when crossed, remaining, non-negotiable.

5 See the Cheques Act 1957 ss 1(2)(a), 4(2)(b). By the Revenue Act 1883 s 17 (repealed), Her Majesty's Paymaster General and the Queen's and Lord Treasurer's Remembrancer were deemed to be bankers, and the public officers drawing on them were deemed to be customers: see now the Cheques Act 1957 s 4(2)(c); and PARA 882. See also PARA 1411.

6 The crossed cheques provisions of the Bills of Exchange Act 1882 apply to such documents by virtue of the Cheques Act 1957 s 5 (replacing the Revenue Act 1883 s 17). The provisions so applied are the Bills of

Exchange Act 1882 ss 76-81 and the Cheques Act 1957 s 4(1) (replacing the Bills of Exchange Act 1882 s 82): see PARA 880. See also *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA; *Gordon v London, City and Midland Bank Ltd* [1902] 1 KB 242, CA (on appeal sub nom *London City and Midland Bank Ltd v Gordon* [1903] AC 240 at 252, HL, where certain expressions used by Lord Lindley, and concurred in by the other law lords, seemed to imply that the Revenue Act 1883 s 17 did not apply to these documents; but as the form of such documents was clearly within that provision, it can only be supposed that Lord Lindley meant that, though the documents were effectively crossed by virtue of s 17 and the crossed cheque provisions incorporated by it, the protection of the Bills of Exchange Act 1882 s 82 was lost by reason of the document having been credited as cash). The Cheques Act 1957 ss 1, 4 protect paying as well as collecting bankers: see ss 1(2)(a), 4(2)(b), (c); and PARA 882.

7 *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA; *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL.

8 See the Cheques Act 1957 s 4(1), (2)(b), (c) (replacing the combined effect of the Bills of Exchange Act 1882 s 82 and the Revenue Act 1883 s 17); and PARA 882.

9 Both in *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA, and in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL, the documents were taken from a third party, and no objection on this ground appears in the arguments or judgments. So far as a collecting banker is concerned there is no difference, in effect, between a cheque and the other instruments referred to in the Cheques Act 1957 s 4(2): see PARA 882.

10 Cheques Act 1957 s 4(3).

11 See note 6.

12 Bills of Exchange Act 1882 s 80 (amended by the Cheques Act 1992 s 2). See PARA 838.

13 Cheques Act 1957 s 1(2).

14 In *Thairlwall v Great Northern Rly Co* [1910] 2 KB 509, a statement that the instrument would not be honoured after three months from date of issue unless specially indorsed by the secretary of the defendant company was held not to make the order conditional so as to preclude it from being a cheque.

15 See note 1.

16 See note 14.

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### **899. Cheques with receipt attached.**

To conform with the definition in the Bills of Exchange Act 1882<sup>1</sup>, a cheque which a banker is bound to honour, must be an unconditional order in writing<sup>2</sup>. By a narrow but appreciable distinction, however, a condition, such as the signing of a receipt, imposed by the instrument on the holder and not addressed to the banker, that is, the drawee, does not destroy its character as a cheque<sup>3</sup>. Nevertheless a banker would probably refuse to pay such a document unless the receipt was duly signed<sup>4</sup>. Signature to the receipt is probably not an indorsement<sup>5</sup>, and it would seem that such signature would not give the banker protection under the Bills of Exchange Act 1882<sup>6</sup> if it proved to be a forgery. In other respects such instruments may be dealt with in the same manner as cheques.

1 See the Bills of Exchange Act 1882 ss 3, 73. See also PARAS 1405, 1410.

2 *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA; cf PARA 898 text and notes 2, 14.

3 See *Nathan v Ogdens Ltd* (1905) 93 LT 553 (affd 94 LT 126, CA); *Roberts & Co v Marsh* [1915] 1 KB 42, CA. As to the position where the signing of the receipt is made a condition of payment addressed to a banker cf PARA 898 text and note 2.

4 Cf PARA 898.

5 Cf PARA 898.

6 Ie under the Bills of Exchange Act 1882 s 60: see PARA 836.

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## 900. Dividend warrants.

A banker's duties, liabilities and protection with regard to dividend warrants, which are strictly in cheque form, are the same as they are with regard to other cheques. For example, dividend warrants, payment of which is made conditional on signature and production of an annexed receipt or on presentation within a specified period<sup>1</sup>, are not cheques<sup>2</sup>, but they are treated in the same category as cheques vis-à-vis the banker paying or collecting if they are documents issued by a customer which, though not bills of exchange, are intended to enable a person to obtain payment from that banker of the sum mentioned in them<sup>3</sup>.

The rules as to presentation and notice of dishonour applicable to cheques are not binding in the case of those dividend warrants which are not cheques. It is, however, the duty of the banker to present them in reasonable time and return them to the customer if not paid on presentation.

The crossed cheques provisions of the Bills of Exchange Act 1882<sup>4</sup> apply to dividend warrants<sup>5</sup>, if they are within the category laid down in the Cheques Act 1957<sup>6</sup>.

A forged indorsement or a 'not negotiable' or 'account payee' crossing precludes the banker from setting up an independent title<sup>7</sup>. Whether he may do so in other cases, or is justified in taking dividend warrants for collection from anyone other than the payee, depends on the negotiability of a dividend warrant, which has never been judicially recognised<sup>8</sup>. Where the amount of a dividend warrant has been received in circumstances constituting conversion of the document, the damages recoverable by the true owner would be the face value, independent of any question of negotiability<sup>9</sup>.

1 Cf *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL; *Thairlwall v Great Northern Rly Co* [1910] 2 KB 509; *Roberts & Co v Marsh* [1915] 1 KB 42, CA; and see PARA 898. An instrument is not a bill or cheque unless it is unconditional: see the Bills of Exchange Act 1882 ss 3, 73.

2 See PARA 898 text and note 2.

3 See the Cheques Act 1957 ss 1(2)(a), 4(2)(b), (c); and PARAS 882, 898.

4 Ie the Bills of Exchange Act 1882 ss 76-81; and the Cheques Act 1957 s 4(1) (replacing the Bills of Exchange Act 1882 s 82): see PARA 880.

5 Bills of Exchange Act 1882 s 95. See PARA 1619.

6 See the Cheques Act 1957 s 5. See also PARA 1411. This applies to instruments in the categories laid down in s 4(2)(b), (c); but quaere where warrants are credited as cash. See PARA 882 note 3.

7 As to forged indorsements see PARA 851. As to 'not negotiable' crossing see PARA 894; and as to 'account payee' crossing see PARA 895.

8 Cf *Partridge v Bank of England* (1846) 9 QB 396 at 424 per Tindal CJ, doubted in *Goodwin v Roberts* (1875) LR 10 Exch 337 at 354 (on appeal (1876) 1 App Cas 476, HL). Possibly a custom of merchants could be proved at the present day making dividend warrants negotiable if payable to bearer or order. The Bills of Exchange Act 1882 s 97(3)(d) (which saves the validity of any usage relating to dividend warrants or their indorsement) is not sufficient to confer negotiability. See also PARA 1619.

9 Cf *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA.

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### 901. Interest warrants.

The crossed cheques provisions of the Bills of Exchange Act 1882<sup>1</sup> were held to apply to warrants for the payment of interest on 3½ per cent War Loan<sup>2</sup>. The decision goes no further, and ordinary interest warrants (for example, for the payment of interest on debenture stock) drawn by a customer on a banker are either cheques or orders on a banker issued by the customer<sup>3</sup>.

1 The Bills of Exchange Act 1882 ss 76-81 and the Cheques Act 1957 s 4(1) (replacing the Bills of Exchange Act 1882 s 82): see PARA 880. The crossed cheques provisions apply to interest warrants by virtue of the Cheques Act 1957 s 5. See also notes 2-3.

2 See Bills of Exchange Act 1882 s 95 (which extends the crossed cheques provisions to warrants for the payment of 'dividend'). See also *Slingsby v Westminster Bank Ltd* [1931] 1 KB 173, in which it was held that a warrant for interest on 5 per cent War Stock 1929-47 was a dividend warrant within the meaning of the Bills of Exchange Act 1882 s 95 and also a cheque. See also PARA 1619. The stock was regulated by special legislation whereby payments on this security were designated 'dividends'. Warrants paying savings bank annuities sent by post are deemed to be cheques within the meaning of any enactment relating to cheques: see the Government Annuities Act 1929 s 59(1), (2). Certain regulations expressly provide that the crossed cheques provisions apply to warrants issued under the regulations as if the warrants were cheques: see eg the Savings Certificates Regulations 1991, SI 1991/1031, reg 7(2); and the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(2).

3 As to orders on bankers issued by the customer see the Cheques Act 1957 ss 1(2)(a), 4(2)(b); and PARAS 882, 898. Whether the provisions of the Bills of Exchange Act 1882 ss 95, 97(3)(d) (see PARA 900) extend to warrants for the payment of fixed interest or are confined to dividend warrants strictly so termed is uncertain. In practice, interest warrants, whether cheques or not, are often treated in the same manner as dividend warrants; and in any event, both paying and collecting bankers are protected by the Cheques Act 1957 ss 1(2)(a), 4(2)(b): see PARA 882.

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### 902. Travellers' cheques.

Travellers' cheques, used to enable travellers to obtain money abroad, take many forms; in appearance they resemble cheques, but they may not have the essential attributes of a

cheque. Some are drawn by the issuing banker, others by the person to whom they are issued, the place for the name of the payee in most cases being left blank. The grantee is required to sign them as soon as they are issued to him, and it is a condition of payment by the payer who fills in his own name as payee, that the grantee signs again in the presence of the payer so that the latter may compare the grantee's signature. The legal nature of any type of travellers' cheques has not been considered in any reported case in England<sup>1</sup>.

Where a contract contains an express term obliging a bank to refund the value of lost or stolen travellers' cheques, neither the fact of recklessness or of want of care by the purchaser, nor the bank's belief in their existence, constitutes grounds for refusing to make the refunds<sup>2</sup>.

1 In *Emerson v American Express Co* 90 A 2d 236 (1950), the Municipal Court of Appeals for the District of Columbia held that, when countersigned, travellers' cheques of the defendant company were fully negotiable; that the lack of a named payee did not render them incomplete in the hands of a subsequent holder for value; and that the beneficiary in countersigning other than in the presence of the paying agents was in breach of his contract with the issuers.

2 *El Awadi v Bank of Credit and Commerce International SA* [1990] 1 QB 606, [1989] 1 All ER 242. Cf *Braithwaite v Thomas Cook Travellers Cheques Ltd* [1989] QB 553, [1989] 1 All ER 235.

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### **903. Cheque guarantee cards.**

A cheque guarantee card is a card issued by a bank to its customer for use in conjunction with cheques drawn by him. The issuing bank undertakes<sup>1</sup> to the payee that payment of the drawer's cheques will be honoured subject to the fulfilment of specified conditions.

The conditions are normally that:

- 17 (1) the cheque is in settlement of one transaction only not exceeding the specified limit;
- 18 (2) the cheque is drawn on one of the bank's forms bearing the code number appearing on the cheque guarantee card;
- 19 (3) the cheque is dated before the date on which the cheque guarantee card expires;
- 20 (4) the cheque is signed in the presence of the payee, the drawer's signature corresponding with that on the cheque guarantee card;
- 21 (5) the number of the card is written on the back of the drawer's cheque by the payee.

On issuing the card, the issuing bank stipulates that the customer may not countermand payment of a cheque drawn in conjunction with the card<sup>2</sup>.

1 'By exhibiting to the payee a cheque card containing the undertaking by the bank to honour cheques drawn in compliance with the conditions indorsed on the back, and drawing the cheque accordingly, the drawer represents to the payee that he has actual authority from the bank to make a contract with the payee on the bank's behalf that it will honour the cheque on presentment for payment': *Metropolitan Police Comr v Charles* [1977] AC 177 at 182, [1977] 3 All ER 112 at 114, HL, per Lord Diplock. The description 'cheque guarantee card' is a misnomer as the obligation assumed by the bank is not a secondary obligation dependent on default by the

customer tendering the card but a separate and independent obligation: *First Sport Ltd v Barclays Bank plc* [1993] 3 All ER 789 at 795, [1993] 1 WLR 1229 at 1236, CA, per Evans LJ.

2 'The obligation undertaken by the bank to the supplier, which it enters into through the agency of its customer when he uses the bank card, is not to dishonour the cheque on presentation for want of funds in the account, so that it is obliged if necessary to advance moneys to the customer to meet it': *Re Charge Card Services Ltd* [1987] Ch 150 at 166, [1986] 3 All ER 289 at 301 per Millett J; on appeal: [1989] Ch 497, [1988] 3 All ER 702, CA. See also *R v Kassim* [1992] 1 AC 9, [1991] 3 All ER 713, HL.

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#### **904. Credit cards and charge cards.**

The normal features of credit card and charge card transactions<sup>1</sup> are:

- 22 (1) there is an underlying contractual scheme which pre-dates the individual contracts of sale whereby the supplier agrees to accept the credit card in payment of the price of the goods bought, and the purchaser is entitled to use the credit card to commit the card company to pay the supplier;
- 23 (2) the underlying scheme is established by two separate contracts, namely: (a) a contract between the card company and the seller, whereby the seller agrees to accept payment by use of the card from anyone holding the card and the card company agrees to pay to the supplier the price of the goods supplied less a discount; and (b) a contract between the card company and the card holder, whereby the card holder is provided with a card enabling him to pay the price by its use in return for agreeing to pay the card company the full amount of the price charged by the supplier;
- 24 (3) the underlying scheme is designed primarily for use in over-the-counter sales, that is to say sales where the only connection between a particular seller and a particular buyer is one sale;
- 25 (4) the actual sale and purchase of the commodity is the subject of a third bilateral contract made between the buyer and seller; in the majority of cases this sale contract will be an oral, over-the-counter sale, and tendering and acceptance of the credit card in payment is made on the tacit assumption that the legal consequences will be regulated by the separate underlying contractual obligations between the seller and the card company and the buyer and the card company;
- 26 (5) the card does not carry the address of the card holder and the supplier will have no record of his address; therefore the seller has no obvious means of tracing the purchaser save through the card company<sup>2</sup>.

Credit cards have come to be regarded as substitutes for cash; they are frequently referred to as 'plastic money'<sup>3</sup>.

A card scheme provides advantages to both seller and buyer: the seller is able to attract custom by agreeing to accept credit card payment; and the buyer, by using the card, minimises the need to carry cash and obtains at least a period of free credit during the period until payment to the card company is due<sup>4</sup>.

1 The practical difference between a credit card and a charge card is that a credit card agreement normally entitles the card holder to extended credit, subject to repayment of a minimum amount specified in the statement of account, whereas a charge card agreement normally requires the card holder to pay the total

amount within a specified period. As to the prohibition of restrictive agreements in the supply of credit card services see the Credit Cards (Merchant Acquisition) Order 1990, SI 1990/2158 (amended by SI 2000/2031); and the Credit Cards (Price Discrimination) Order 1990, SI 1990/2159 (amended by SI 2000/2031). See also the Price Indications (Method of Payment) Regulations 1991, SI 1991/199, which set out requirements for the indication of prices of certain goods where different prices are charged for payment by different methods.

2 *Re Charge Card Services Ltd* [1989] Ch 497, [1988] 3 All ER 702, CA.

3 *Re Charge Card Services Ltd* [1989] Ch 497 at 509, [1988] 3 All ER 702 at 705, CA, per Sir Nicolas Browne-Wilkinson V-C.

4 *Re Charge Card Services Ltd* [1989] Ch 497 at 509, [1988] 3 All ER 702 at 705, CA, per Sir Nicolas Browne-Wilkinson V-C.

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### **905. Payment by credit card or charge card.**

There is no general principle of law that, whenever a method of payment is adopted which involves a risk of non-payment by a third party, there is a presumption that the acceptance of payment through a third party is conditional upon the third party making the payment, and that, if he does not pay, the original obligation of the purchaser remains<sup>1</sup>.

Whether the seller's acceptance of payment by a credit card or charge card is conditional or absolute payment depends on the terms of the agreement between the parties, and, in the absence of express agreement, the correct approach in such a case is that the court should seek to infer from the parties' conduct and the surrounding circumstances what is the fair term to imply<sup>2</sup>.

The following factors, if present, point clearly to a conclusion that, subject to any special features of a particular card scheme, payment by card is unconditional payment of the price:

- 27 (1) the card holder's knowledge that, if he signs a voucher, the seller will be entitled to receive payment which would discharge his liability for the price;
- 28 (2) the card holder's knowledge that the card-issuing company will deduct commission in paying the seller;
- 29 (3) the seller's knowledge that, on signing the voucher, the card holder renders himself liable to the card company to pay to it the price;
- 30 (4) the underlying assumption of the buyer and seller in entering into their respective contracts with the card company before entering into the contract of sale that, on completion of a sale, the parties' future rights and obligations will be regulated by those underlying contracts;
- 31 (5) the fact that the seller has no record of the address of the customer and no ready means of tracing him<sup>3</sup>.

The following additional factors, if present, point the same way:

- 32 (a) the existence of a guarantee of the card company's obligations to the seller;
- 33 (b) the fact, if neither the seller nor the buyer envisages that the buyer/card holder will have to pay twice (once to the seller and once to the card company), that, under the terms of the agreement between the card holder and the card



company, the card holder may be required to pay the card company even though the card company has not paid the seller<sup>4</sup>.

A conclusion that payment by card is absolute accords with the popular perception of the role of credit cards in modern retail trade as 'plastic money'<sup>5</sup>.

Whether payment by the use of a cheque guarantee card<sup>6</sup> is to be analysed in the same way as payment by credit card or charge card is undecided<sup>7</sup>.

1 *Re Charge Card Services Ltd* [1989] Ch 497 at 511-512, [1988] 3 All ER 702 at 707, CA, per Sir Nicolas Browne-Wilkinson V-C.

2 For these purposes, there is no relevant distinction between credit cards and charge cards: *Re Charge Card Services Ltd* [1989] Ch 497 at 512, [1988] 3 All ER 702 at 707-708, CA, per Sir Nicolas Browne-Wilkinson V-C. See further *Customs and Excise Comrs v Diners Club Ltd* [1989] 2 All ER 385, [1989] 1 WLR 1196, CA.

3 *Re Charge Card Services Ltd* [1989] Ch 497 at 513 [1988] 3 All ER 702 at 708, CA, per Sir Nicolas Browne-Wilkinson V-C.

4 *Re Charge Card Services Ltd* [1989] Ch 497 at 514, [1988] 3 All ER 702 at 708-709, CA, per Sir Nicolas Browne-Wilkinson V-C.

5 *Re Charge Card Services Ltd* [1989] Ch 497 at 517, [1988] 3 All ER 702 at 711, CA, per Sir Nicolas Browne-Wilkinson V-C.

6 Where a buyer uses a cheque guarantee card, the obligation undertaken by the bank to the supplier, which it enters into through the agency of its customer when he uses the card, is not to dishonour the cheque, if drawn for a sum less than a specified amount, for want of funds in the account: see *Re Charge Card Services Ltd* [1987] Ch 150 at 166, [1986] 3 All ER 289 at 301; on appeal [1989] Ch 497, [1988] 3 All ER 702, CA. See also note 7.

7 In *Re Charge Card Services Ltd* [1987] Ch 150 at 166, [1986] 3 All ER 289 at 301-302, Millett J stated obiter that the presumption that the giving of a cheque operates as a conditional payment only would not be displaced merely by the fact that the cheque is accompanied by a bank card; on appeal [1989] Ch 497 at 517, [1988] 3 All ER 702 at 711, CA, per Sir Nicolas Browne-Wilkinson V-C, this point was expressly left open.

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## **(viii) Electronic Funds Transfer**

### **906. Electronic funds transfer.**

Payment by electronic funds transfer (EFT) is now very common, although there is no universally accepted legal definition<sup>1</sup>. There are two categories of EFT systems: (1) non-consumer activated systems<sup>2</sup>; and (2) consumer activated systems<sup>3</sup>. The main consumer activated systems are automated teller machines (ATMs) and electronic funds transfer at point of sale (EFTPOS). A customer may use an ATM to obtain cash, check an account balance, request a statement or make a deposit<sup>4</sup>. EFTPOS allows payment to be made for goods and services by the electronic transfer of funds from the customer's account to the supplier's account<sup>5</sup>.

There is no statutory regime in the United Kingdom governing the electronic transfer of funds and instead the general law of contract and agency must be invoked<sup>6</sup>. Banks and building societies have a code of conduct set out in the *Banking Code* (1 March 2005) and the *Business*

*Banking Code* (1 March 2005), covering matters such as the issue of cards and personal identification numbers, security of cards, lost or stolen cards and customer complaints; but compliance with this is voluntary<sup>7</sup>.

Cross-border credit transfers within the European Economic Area are, subject to various conditions, governed by regulations<sup>8</sup>. The provision of cross-border payment services will be subjected to further regulation when the EU Payment Services Directive is implemented towards the end of 2009<sup>9</sup>.

1 In the United States, the Electronic Fund Transfer Act 1978 defines EFT as 'any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorise a financial institution to debit or credit an account'. Cf the United Nations Commission on International Trade Law (UNCITRAL) which defines EFT as 'a funds transfer in which one or more of the steps in the process that were previously done by paper-based techniques are now done by electronic techniques': see UNCITRAL, *Legal Guide on Electronic Funds Transfers* (1987, United Nations, New York). For a full discussion of electronic funds transfer see Paget's *Law of Banking* (12th Edn, 2003) ch 17. In particular see *R v Preddy* [1996] AC 815, [1996] 3 All ER 481, HL; *R v Williams* [2001] 1 Cr App Rep 362, [2001] Crim LR 253, [2000] All ER (D) 1393, CA.

2 Non-consumer activated systems are those in which the bank selects and activates the system, eg the Clearing House Automated Payments System (CHAPS).

3 Consumer activated systems are those in which the consumer selects and activates the system, eg cash-dispensers, automated teller machines, tele-shopping and home banking.

4 To obtain access to an ATM, the bank's customer is issued with a plastic card with a magnetic strip, together with a four-digit personal identification number (PIN). The card must be inserted into the ATM, and the PIN must be entered. Once the PIN has been verified, the customer may select the function he requires and the card is returned to him on completion.

5 In the case of a retail sale, the customer presents the seller with a plastic EFTPOS debit card which has information relating to the customer's bank account encoded in a magnetic stripe on the back. The usual practice has been for the seller to swipe the card through a card reader and enter the amount. A voucher is issued for the customer to sign and the seller checks that this corresponds with the signature on the back of the card. The signature acts as the customer's mandate to his bank to debit his account and credit the seller's account and a message to this effect is transmitted via an EFTPOS network to the customer's bank and the seller's bank. A new system, known as 'chip and PIN', has been introduced, which enables the customer to enter his PIN number onto a pad instead of signing a voucher. As to the use of credit cards see PARA 904.

6 See **AGENCY; CONTRACT**. Principles of tort, restitution, property law, equity and criminal law may also be relevant.

7 The banks and building societies must also conform to the requirements of the Consumer Credit Act 1974, the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see **CONSUMER CREDIT; CONTRACT** vol 9(1) (Reissue) PARA 820 et seq. As to the extent to which the courts may take cognisance of the Banking codes see *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL. At the date at which this volume states the law, there is website setting out the Banking Code and supplying other relevant information: see [www.bankingcode.org.uk](http://www.bankingcode.org.uk).

8 See the Cross-Border Credit Transfers Regulations 1999, SI 1999/1876 (amended by SI 2000/2952, SI 2002/765, SI 2003/2066, SI 2003/3075; SI 2007/108). The regulations lay down certain standard conditions for cross-border credit transfers not exceeding 50,000 euros or its equivalent in another currency of a state within the EEA. A cross-border credit transfer is defined as a transaction or series of transactions carried out as a result of instructions given directly to an institution in one EEA state, the purpose of which is to make available to the ultimate recipient of the funds transferred at an institution in another EEA state an amount in euros or another currency of an EEA state. The regulations (1) set out the minimum information which must be made available to the actual and prospective customers of an institution which participates in the carrying out of cross-border credit transfers, and which must be given by an institution to customers on whose behalf it has carried out such a transfer; (2) enable a customer to seek undertakings regarding the time it will take to carry out a transfer and the charges to be made in connection therewith; (3) lay down maximum periods for the carrying out of a transfer, where there is no time limit agreed between a customer and the institution, and for payment of compensation where a transfer is completed late; (4) make provision regarding charging for transfers; and (5) make provision for the recovery of sums deducted from the amount transferred in contravention of the customer's instructions.

9 The proposed directive introduces the concept of a 'payment institution', which will be authorised to participate in the payments business but will not be permitted to accept deposits: see further PARA 1399.

## UPDATE

### 906 Electronic funds transfer

TEXT AND NOTES 8, 9--SI 1999/1876 replaced: Payment Services Regulations 2009, SI 2009/209 (see PARA 1399), which implement European Parliament and EC Council Directive 2007/64 (OJ L319, 5.12.2007, p 1) on payment services in the internal market (the Payment Services Directive).

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## (ix) Bankers' Books; Production in Evidence, Inspection, etc

### 907. Bankers' Books Evidence Act 1879.

The statutory privileges offered by the Bankers' Books Evidence Act 1879<sup>1</sup> extend to banks and bankers within the meaning of the Act, that is: (1) deposit takers<sup>2</sup>; and (2) the National Savings Bank<sup>3</sup>. The Bankers' Books Evidence Act 1879 does not apply to the Bank of England<sup>4</sup>, except in so far as it is applied to the Bank for particular purposes.

The provisions of the Bankers' Books Evidence Act 1879 apply for the purpose of proving any entry in the stock registers as if the Registrar were a bank and a banker<sup>5</sup>, and as if such entry or, where the information recorded in the register is not in readable form and is later transcribed into readable form, the transcribed version of such an entry, were an entry in a banker's book<sup>6</sup>.

1 See PARA 908.

2 'Deposit taker' means: (1) a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 348 et seq) to accept deposits; or (2) an EEA firm of the kind mentioned in Sch 3 para 5(b) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12(1)) to accept deposits or other repayable funds from the public (see PARA 315): Bankers' Books Evidence Act 1879 s 9(1A) (s 9(1A)-(1C) added by SI 2001/3649). A person is not a deposit-taker if he has permission to accept deposits only for the purpose of carrying on another regulated activity in accordance with that permission: Bankers' Books Evidence Act 1879 s 9(1B) (as so added). The provisions of s 9(1A), (1B) must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision, and Sch 2 (see PARA 84 et seq): Bankers' Books Evidence Act 1879 s 9(1C) (as so added).

3 Bankers' Books Evidence Act 1879 s 9(1) (substituted by the Banking Act 1979 Sch 6 Pt I para 1; and amended by the Trustee Savings Banks Act 1985 Sch 4; SI 2001/1149; and SI 2001/3649). As to the National Savings Bank see PARA 810 et seq.

4 *R v Lewis* [1955] Crim LR 374, Bow St Magistrates' Ct.

5 See heads (1) and (2) in the text.

6 Government Stock Regulations 2004, SI 2004/1611, reg 7(7). See PARA 807. Expressions in the Bankers' Books Evidence Act 1879 relating to 'bankers' books' include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism: s 9(2) (substituted by the Banking Act 1979 Sch 6 Pt I para 1). The words 'other records' in the Bankers' Books

Evidence Act 1879 must be construed ejusdem generis with 'ledgers, day books, cash books and account books'; assorted bundles of cheques and paying-in slips are not 'other records' within the meaning of the Act: *Williams v Williams* [1988] QB 161 at 168, [1987] 3 All ER 257 at 261, CA, per Sir John Donaldson MR. The expression 'used in the ordinary business' does not mean that the books must be in use every day; it is sufficient if the banker keeps a book to refer to if necessary: *Idiots' Asylum v Handysides* (1906) 22 TLR 573, CA. As to the inspection of documents not forming part of a banker's books see *Re Howglen Ltd* [2001] 1 All ER 376.

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### 908. Copies of entries as evidence.

In all legal proceedings<sup>1</sup>, a copy of any entry in a banker's books<sup>2</sup> is to be received as prima facie evidence of such entry<sup>3</sup>, and of the matters, transactions and accounts recorded in it<sup>4</sup>. A copy of an entry in a banker's books may not, however, be so received in evidence unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank<sup>5</sup>, or of the successors to the bank in whose custody or control it was when the entry was made<sup>6</sup>; and such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits<sup>7</sup>. It must also be proved that the copy has been examined with the original entry and is correct; and such proof must be given by some person who has examined the copy with the original entry, and may likewise be given either orally or by an affidavit<sup>8</sup>.

Although cheques and paying-in slips constitute part of a bank's records used in the ordinary course of its business, the adding of an individual cheque or paying-in slip to a bundle of cheques or paying-in slips does not constitute the making of an entry in those records<sup>9</sup>. A microfilm recording the payment of cheques by photographing the name of the payee appears to be an entry in a banker's books within the meaning of the Bankers' Books Evidence Act 1879<sup>10</sup>.

A letter from a banker to his customer is not a banker's book<sup>11</sup>.

1 'Legal proceeding' for this purpose means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes: (1) an arbitration (see generally **ARBITRATION** vol 2 (2008) PARA 1201 et seq); (2) an application to, or an inquiry or other proceeding before, the Solicitors Disciplinary Tribunal (see **LEGAL PROFESSIONS** vol 66 (2009) PARA 907); and (3) an investigation, consideration or determination of a complaint by a member of the panel of ombudsmen for the purposes of the ombudsman scheme within the meaning of the Financial Services and Markets Act 2000 (see PARA 575 et seq): Bankers' Books Evidence Act 1879 s 10 (definition amended by SI 2001/3649). As to the application of the Bankers' Books Evidence Act 1879 in service disciplinary proceedings and standing civilian courts see **ARMED FORCES** vol 2(2) (Reissue) PARA 487.

2 As to the meaning of 'bankers' books' see PARA 907 note 6.

3 Entries in bankers' books under the Bankers' Books Evidence Act 1879 are prima facie evidence against the world: *London and Westminster Bank v Button* (1907) 51 Sol Jo 466. The Bankers' Books Evidence Act 1879 makes copies of such entries evidence against anyone; thus the entries in a defendant's bankers' books are made evidence against the claimant: see *Harding v Williams* (1880) 14 ChD 197.

4 Bankers' Books Evidence Act 1879 s 3. Whether the non-existence of any entry in the material books is prima facie evidence of the non-existence of an account is undecided: see *Douglas v Lloyds Bank Ltd* (1929) 34 Com Cas 263.

5 Bankers' Books Evidence Act 1879 s 4.

6 *Idiots' Asylum v Handysides* (1906) 22 TLR 573, CA.

7 Bankers' Books Evidence Act 1879 s 4. Where the proceedings concerned are proceedings before a magistrates' court inquiring into an offence as examining justices, proof must be given by affidavit and not orally: s 4 (amended, in relation to alleged offences into which no criminal procedure has begun before 1 April 1997, by the Criminal Procedure and Investigations Act 1996 Sch 1 para 15). As from a day to be appointed the above words are repealed (except in relation to Northern Ireland): Bankers' Books Evidence Act 1879 s 4 (prospectively amended by the Criminal Justice Act 2003 Sch 3 Pt 2 para 30(1), (2), Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

8 Bankers' Books Evidence Act 1879 s 5; *R v Albutt* (1910) 75 JP 112. Where the proceedings concerned are proceedings before a magistrates' court inquiring into an offence as examining justices, proof must be given by affidavit and not orally: the Bankers' Books Evidence Act 1879 s 5 (amended, in relation to alleged offences into which no criminal procedure has begun before 1 April 1997, by the Criminal Procedure and Investigations Act 1996 Sch 1 para 16). As from a day to be appointed the above words are repealed (except in relation to Northern Ireland): Bankers' Books Evidence Act 1879 s 5 (prospectively amended by the Criminal Justice Act 2003 Sch 3 Pt 2 para 30(1), (3), Sch 37 Pt 4). At the date at which this volume states the law no such day had been appointed.

9 *Williams v Williams* [1988] QB 161 at 168, [1987] 3 All ER 257 at 261, CA, per Sir John Donaldson MR.

10 *Barker v Wilson* [1980] 2 All ER 81, [1980] 1 WLR 884, DC; *Williams v Williams* [1988] QB 161 at 168, [1987] 3 All ER 257 at 260, CA, per Sir John Donaldson MR.

11 *R v Dadson* (1983) 77 Cr App Rep 91, CA.

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### 909. Production of originals.

No banker or officer of a bank<sup>1</sup>, in any legal proceeding<sup>2</sup> to which the bank is not a party, may be compelled to produce any banker's book<sup>3</sup> the contents of which can be proved<sup>4</sup>, or to appear as a witness to prove the matters, transactions and accounts recorded in it, unless by order of a judge made for special cause<sup>5</sup>.

However, to obtain the benefit of this relief from attendance and production, the banker or officer must have furnished, or have been willing to furnish, verified copies of the required entries; and, if he has not done so, the books may still be obtained by order of the court<sup>6</sup>.

A bank which is a party to litigation is under the ordinary duty to give disclosure of relevant documents and to allow inspection<sup>7</sup>.

1 As to the meaning of 'bank' for the purposes of the Bankers' Books Evidence Act 1879 see PARA 907.

2 As to the meaning of 'legal proceeding' see PARA 908 note 1.

3 As to the meaning of 'banker's books' see PARA 907 note 6.

4 Ie under the Bankers' Books Evidence Act 1879: see PARA 908.

5 Bankers' Books Evidence Act 1879 s 6. As to the meaning of 'judge' see PARA 911 note 3. See also *Douglas v Pindling* [1996] AC 890, [1996] 3 WLR 242, PC.

6 *Emmott v Star Newspaper Co* (1892) 62 LJQB 77. See also *R v Daye* [1908] 2 KB 333.

7 See eg *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166.

**UPDATE****909 Production of originals**

NOTE 7--See *Earles v Barclays Bank plc* [2009] EWHC 2500 (QB), [2010] Bus LR 586, [2009] All ER (D) 179 (Oct).

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**(x) Secrecy, References and Advice****910. Obligation of secrecy.**

It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the express or implied consent of the customer, either the state of the customer's account, or any of his transactions with the bank or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a court, or the circumstances give rise to a public duty of disclosure or the protection of the banker's own interests requires it<sup>1</sup>.

If a bank chooses to organise its business through a corporate structure involving separate companies, disclosure by one such company to another may constitute a breach of the duty of secrecy<sup>2</sup>.

1 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, CA. This has been recognised by the legislature in conferring upon bankers privilege from disclosure under certain statutes: see further PARA 916 et seq.

As to disclosure pursuant to a public duty see *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, [1988] 1 Lloyd's Rep 259. As to the public interest in uncovering fraud overriding the banker's duty of confidentiality see *Pharaon v Bank of Credit and Commerce International SA (in liquidation) (Price Waterhouse (a firm) intervening)* [1998] 4 All ER 455, 142 Sol Jo LB 251.

The exceptions to the duty of secrecy which were recognised in *Tournier v National Provincial and Union Bank of England* above have been accepted in numerous subsequent cases, including: *Re State of Norway's Application* [1987] QB 433, [1989] 1 All ER 661, CA (affd [1990] AC 723, [1989] 1 All ER 745, HL); *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409, [1989] 1 WLR 1340, CA; *Bank of Tokyo Ltd v Karoon* [1987] AC 45n, [1986] 3 All ER 468, CA; *Bhogal v Punjab National Bank* [1988] 2 All ER 296, CA. See also *Barclays Bank plc v Taylor, Trustee Savings Bank of Wales and Border Counties v Taylor* [1989] 3 All ER 563, [1989] 1 WLR 1066, CA (disclosure pursuant to court order); *Adham v Bank of Credit and Commerce International SA (No 2), El Jawhary v Bank of Credit and Commerce International SA (No 2)* [1995] 2 BCLC 581 (the duty of confidentiality is not breached if confidential information about a customer is disclosed in pursuance of an obligation to give discovery in the course of proceedings); *Christofi v Barclays Bank plc* [1999] 4 All ER 437, [1999] 2 All ER (Comm) 417, CA (no implied duty on a bank not to disclose to a trustee in bankruptcy that property, over which the bank had a security, is not protected by the entry of a caution in the Land Registry). The distinction can be made between a duty of loyalty, which ends upon the termination of the contractual relationship, and a duty of confidentiality, which continues beyond that relationship: *MacLean v Arklow Investments* [2000] 1 WLR 594, PC.

As to disclosure pursuant to criminal law statutes see PARA 920.

2 *Bank of Tokyo Ltd v Karoon* [1987] AC 45n at 53-54, [1986] 3 All ER 468 at 475-476, CA, per Ackner LJ; and see *Bhogal v Punjab National Bank* [1988] 2 All ER 296 at 305, CA, per Dillon LJ.

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### **911. Order for inspection under the Bankers' Books Evidence Act 1879.**

The Bankers' Books Evidence Act 1879 provides that any party to a legal proceeding<sup>1</sup> may apply to the court or a judge for an order that the applicant be at liberty to inspect and take copies of any entries in a banker's book<sup>2</sup> for the purposes of such proceeding<sup>3</sup>.

The main object of these provisions is to enable evidence to be procured and given<sup>4</sup>, and to relieve bankers from the necessity of attending and producing their books<sup>5</sup>. They enable a party, who formerly had the right to issue a subpoena duces tecum to compel bankers to produce their books and to attend and be examined on them, to obtain an order for leave to inspect and take copies of the books<sup>6</sup>. They do not give any new power of disclosure<sup>7</sup>, or alter the principles of law or the practice with regard to disclosure<sup>8</sup>, or take away any previously existing ground of privilege<sup>9</sup>. Nor do they enable a party to obtain disclosure, before the trial, of entries which would be privileged or protected from production, or which are, or are sworn to be, irrelevant<sup>10</sup>, or which are sworn to tend to incriminate<sup>11</sup>, or which are not the subject of disclosure apart from the Bankers' Books Evidence Act 1879<sup>12</sup>. Where, therefore, a party swears that the entries sought to be inspected are irrelevant, his affidavit is conclusive, and no order for inspection should be made before the trial<sup>13</sup>.

The power to order inspection is a discretionary power<sup>14</sup>, and will be exercised with great caution<sup>15</sup>, and on sufficient grounds only<sup>16</sup>; and the order, if made, should be limited to relevant entries<sup>17</sup>. The order will be made only where the entries of which inspection is sought will be admissible in evidence at the trial<sup>18</sup>.

The fact that the banker's book containing the relevant entry is in the list of documents served by the other party does not preclude the obtaining of an order for inspection, and in a fit case an order will be made<sup>19</sup>. An order for inspection may be made against a bank which is a defendant to a tracing claim<sup>20</sup>.

Where a banker's book is in the possession, custody or power of a party to litigation and that party is in default of a court order requiring him to give disclosure of the documents, a bank which holds the documents as his agent may be required to disclose them<sup>21</sup>.

1 As to the meaning of 'legal proceeding' see PARA 908 note 1.

2 As to the meaning of 'bankers' books' see PARA 907 note 6.

3 Bankers' Books Evidence Act 1879 s 7; *Re Marshfield, Marshfield v Hutchings* (1886) 32 ChD 499. The order may be made on a bank in Scotland or Northern Ireland (*Kissam v Link* [1896] 1 QB 574, CA), and may be made by a magistrate (*R v Kinghorn* [1908] 2 KB 949). 'Court' means the court, judge, arbitrator, persons or person before whom a legal proceeding is held or taken; and 'judge' means, in England, a judge of the High Court, although a judge assigned to a county court district or acting as a judge so assigned may with respect to any proceedings in a county court exercise the powers of a judge under the Bankers' Books Evidence Act 1879: s 10 (definition amended by the Statute Law Revision Act 1898). As to the procedure on an application see PARA 913.

4 *Arnott v Hayes* (1887) 36 ChD 731, CA; *Emmott v Star Newspaper Co* (1892) 62 LJQB 77.

5 *Parnell v Wood* [1892] P 137, CA; *Emmott v Star Newspaper Co* (1892) 62 LJQB 77; *Pollock v Garle* [1898] 1 Ch 1, CA; *Re Bankers' Books Evidence Act 1879, R v Bono* (1913) 29 TLR 635, DC.

6 *Re Marshfield, Marshfield v Hutchings* (1886) 32 ChD 499.

7 *Arnott v Hayes* (1887) 36 ChD 731 at 737, CA, per Cotton LJ; but consider *Perry v Phosphor Bronze Co Ltd* (1894) 71 LT 854, CA.

- 8 *Pollock v Garle* [1898] 1 Ch 1 at 4, CA, per Lindley MR.
- 9 *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669 at 676, CA, per Kay LJ; *Parnell v Wood* [1892] P 137 at 139, CA, per Lindley LJ.
- 10 *Parnell v Wood* [1892] P 137, CA.
- 11 *Waterhouse v Barker* [1924] 2 KB 759, CA (majority decision). See also *Williams v Summerfield* [1972] 2 QB 512, [1972] 2 All ER 1334, where it was held that the Bankers' Books Evidence Act 1879 s 7 was available where the circumstances demanded, but that it should be applied only after the most careful thought on the clearest grounds; in a difficult case it was proper for justices to decline to make an order but to indicate that the application was more appropriate to the High Court.
- 12 *Pollock v Garle* [1898] 1 Ch 1, CA.
- 13 *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669, CA. In applications under the Bankers' Books Evidence Act 1879 s 7, the court is guided by the general rules regulating inspection of documents before trial: *Waterhouse v Barker* [1924] 2 KB 759, CA (by a majority of the Court of Appeal). See also *Bhimji v Chatwani (No 3)* [1992] 4 All ER 912, sub nom *Bhimji v Chatwani (No 2)* [1992] 1 WLR 1158.
- 14 *Emmott v Star Newspaper Co* (1892) 62 LJQB 77.
- 15 *Arnott v Hayes* (1887) 36 ChD 731 at 738, CA, per Bowen LJ; *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669 at 674, CA, per Lord Esher MR.
- 16 *Perry v Phosphor Bronze Co Ltd* (1894) 71 LT 854, CA. See also *Douglas v Pindling* [1996] AC 890, [1996] 3 WLR 242, PC (where it was held to be reasonable for a commission of inquiry to issue a summons for production of bankers' books where there was bona fide belief that the books might be of assistance in relation to matters within the commission's terms of reference).
- 17 *Arnott v Hayes* (1887) 36 ChD 731, CA. Where a defendant applied for inspection to assist him to justify a libel imputing pecuniary embarrassment, inspection was refused: *Emmott v Star Newspaper Co* (1892) 62 LJQB 77.
- 18 *Howard v Beall* (1889) 23 QBD 1 at 2 per Mathew J.
- 19 *Perry v Phosphor Bronze Co Ltd* (1894) 71 LT 854, CA; but see *Re Bankers' Books Evidence Act 1879, R v Bono* (1913) 29 TLR 635.
- 20 *A v C* [1981] QB 956n, [1980] 2 All ER 347, CA. As to tracing claims see PARA 915.
- 21 *Williams v Williams* [1988] QB 161 at 169, [1987] 3 All ER 257 at 261, CA, per Sir John Donaldson MR. It seems that disclosure may be required on the ground that the agent's failure to deliver up would aid and abet a contempt of court.

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## **912. Order for inspection of accounts of non-parties.**

There is jurisdiction to order inspection under the Bankers' Books Evidence Act 1879<sup>1</sup> of accounts of non-parties to the litigation<sup>2</sup>. Except where the account sought to be inspected is in form or substance really the account of a party to the litigation or is kept on his behalf, so that the entries in it would be evidence against him at trial<sup>3</sup>, the power to order such inspection will be exercised only in exceptional circumstances<sup>4</sup>, such as where the evidence and fruits of crime and fraud might otherwise disappear<sup>5</sup>. Notice of the application should be given to the account holder<sup>6</sup> and preferably also the bank<sup>7</sup>.



Where such an order is made without notice, the non-party in respect of whose account it is made, or that party's bank, may apply to have the order set aside without being joined as a party to the action<sup>8</sup>.

1 le under the Bankers' Books Evidence Act 1879 s 7: see PARA 911.

2 *Howard v Beall* (1889) 23 QBD 1; *R v Grossman* (1981) 73 Cr App Rep 302 at 308, CA, per Lord Denning MR, and at 309 per Oliver LJ; *DB Deniz Nakliyatı TAS v Yugopetrol* [1992] 1 All ER 205, [1992] 1 WLR 437, CA (standard of proof for order after judgment not lower than that before trial).

3 *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669, CA; *Pollock v Garle* [1898] 1 Ch 1, CA; *Ironmonger & Co v Dyne* (1928) 44 TLR 579, CA.

4 *Pollock v Garle* [1898] 1 Ch 1 at 5, CA, per Lindley MR; *R v Grossman* (1981) 73 Cr App Rep 302, CA; *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482, [1986] 1 All ER 653.

5 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482 at 499, [1986] 1 All ER 653 at 662 per Hoffmann LJ. For a further example of a case where an application under the Bankers' Books Evidence Act 1879 s 7 in respect of a non-party account was rejected see *Pollock v Garle* [1898] 1 Ch 1, CA. In practice, where such circumstances exist, the applicant is likely to be able to obtain relief under the court's jurisdiction to grant disclosure orders in aid of a tracing claim: see PARA 915. It may also be possible to join the bank as a party to the proceedings by claiming declaratory relief and/or an order for repayment of moneys paid under a mistake: see eg *A v C* [1981] QB 956n, [1980] 2 All ER 347, CA.

6 *South Staffordshire Tramways Co v Ebbsmith* [1895] 2 QB 669 at 677, CA, per Kay LJ; *R v Marlborough Street Magistrates' Court Metropolitan Stipendiary Magistrate, ex p Simpson* [1980] Crim LR 305.

7 *L'Amie v Wilson* [1907] 2 IR 130.

8 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482 at 492, [1986] 1 All ER 653 at 657 per Hoffmann LJ.

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### 913. Procedure on the application.

In the High Court an order for permission to inspect and take copies<sup>1</sup> may be made either with or without summoning the bank or any other party, and must be served on the bank three clear days before the order is to be obeyed, unless the court or judge otherwise directs<sup>2</sup>. In ordinary cases, the application should be supported by an affidavit showing what entries it is desired to inspect and the materiality of the inspection<sup>3</sup>, and that the application is made bona fide. An affidavit is not, however, essential<sup>4</sup>. The party whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted<sup>5</sup>.

The costs of the application, and of anything done or to be done under the order, are in the court's discretion<sup>6</sup>. Where the whole or any part of the costs have been occasioned by any default or delay on the bank's part, they may be ordered to be paid by the bank to any party, any such order against a bank being enforceable as if the bank were a party to the proceeding<sup>7</sup>.

1 As to the right to apply see PARA 911.

2 Bankers' Books Evidence Act 1879 s 7. As to the meanings of 'court' and 'judge' see PARA 911 note 3. A Sunday, Christmas Day, Good Friday and any bank holiday must be excluded from the computation of time: s 11. See also *Arnott v Hayes* (1887) 36 ChD 731, CA; *Davies v White* (1884) 53 LQB 275.

- 3 See *Howard v Beall* (1889) 23 QBD 1.
- 4 *Arnott v Hayes* (1887) 36 ChD 731, CA.
- 5 See PARA 911.
- 6 Bankers' Books Evidence Act 1879 s 8.
- 7 Bankers' Books Evidence Act 1879 s 8.

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#### **914. Disclosure order having extra-territorial effect.**

Save in exceptional circumstances<sup>1</sup>, the court will not make an order under the Bankers' Books Evidence Act 1879<sup>2</sup> or require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction, especially where the non-party is a foreign bank<sup>3</sup>. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction<sup>4</sup>. In accordance with this principle, the court will generally not give effect to an order made in foreign proceedings against a non-party bank requiring production of documents relating to accounts maintained within the jurisdiction<sup>5</sup>.

The fact that the evidence sought to be obtained may be obtained by the issue of letters of request to a foreign court<sup>6</sup>, or by an application to a foreign court, generally weighs heavily against the court's making an extra-territorial order<sup>7</sup>.

- 1 As to what constitutes exceptional circumstances see PARA 912.
- 2 ie an order under the Bankers' Books Evidence Act 1879 s 7: see PARA 911.
- 3 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482 at 493, [1986] 1 All ER 653 at 658 per Hoffmann J.
- 4 See *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482 at 493, [1986] 1 All ER 653 at 658 per Hoffmann J.
- 5 *X AG v A Bank* [1983] 2 All ER 464.
- 6 Such a procedure is generally available as between parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague, 18 March 1970; Cmd 6727) and in other cases covered by bilateral conventions.
- 7 See *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp* [1986] Ch 482 at 499, [1986] 1 All ER 653 at 662 per Hoffmann J.

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#### **915. Disclosure order in aid of tracing claims etc.**

If a person through no fault of his own becomes involved in the tortious acts of others so as to facilitate their wrong-doing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong-doers<sup>1</sup>. Where there are grounds for thinking that money in a bank has been obtained by a customer's wrong-doing and belongs in equity to the claimant, the court has jurisdiction to order the bank to disclose documents relating to the money<sup>2</sup>. The documents which may be ordered to be disclosed are not limited to those within the provisions<sup>3</sup> of the Bankers' Books Evidence Act 1879<sup>4</sup>. The claimant must give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the disclosure<sup>5</sup>. The international jurisdictional limits of this principle are the same as those for an order under the Bankers' Books Evidence Act 1879<sup>6</sup>.

1 *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL.

2 *Bankers Trust Co v Shapira* [1980] 3 All ER 353, [1980] 1 WLR 1274, CA, applying *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, [1973] 2 All ER 943, HL. In *A v C* [1981] QB 956n, [1980] 2 All ER 347, decided shortly before *Bankers Trust Co v Shapira* above, an order was made against a bank in similar circumstances under the more limited jurisdiction conferred by the Bankers' Books Evidence Act 1879 s 7 (see PARA 911). See also *Omar v Omar* [1995] 3 All ER 571, [1995] 1 WLR 1428 (disclosed documents legitimately used to amend plaintiff's statement of claim and to add a personal claim).

3 le within the provisions of the Bankers' Books Evidence Act 1879 s 7: see PARA 911.

4 *Bankers Trust Co v Shapira* [1980] 3 All ER 353 at 358-359, [1980] 1 WLR 1274 at 1283, CA, per Waller LJ.

5 *Bankers Trust Co v Shapira* [1980] 3 All ER 353 at 358, [1980] 1 WLR 1274 at 1282, CA, per Lord Denning MR.

6 *Mackinnon v Donaldson, Lufkin and Jenrette Securities Corp'n* [1986] Ch 482 at 498-499, [1986] 1 All ER 653 at 661 per Hoffmann J. See PARA 914.

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## **916. Disclosure order under the Evidence (Proceedings in Other Jurisdictions) Act 1975.**

Where an application is made to the High Court, and the court is satisfied: (1) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal (the 'requesting court') exercising jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom; and (2) that the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated, the court has power by order to make such provision for obtaining evidence in the part of the United Kingdom in which it exercises jurisdiction as may appear to it to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made<sup>1</sup>. Where the evidence sought to be obtained is evidence from a banker as to the affairs of a customer, the court, in exercising its discretion, must carry out a balancing exercise: in the scales on one side must be placed the desirable policy of assisting a foreign court, and, on the other, the opposing principle that the court will give great weight to the desirability of upholding the recognised duty of confidence<sup>2</sup>.

1 See the Evidence (Proceedings in Other Jurisdictions) Act 1975 ss 1, 2(1); and **CIVIL PROCEDURE** vol 11(2009) PARAS 1055, 1058. The court's jurisdiction is limited by s 2(3), (4): see **CIVIL PROCEDURE** vol 11 (2009) PARA 1058. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 *Re State of Norway's Application* [1987] QB 433 at 486, 490, [1989] 1 All ER 661 at 688, 691, CA, per Kerr and Glidewell LJ (affd [1990] AC 723, [1989] 1 All ER 745, HL), applying *British Steel Corpn v Granada Television Ltd* [1981] AC 1096, [1981] 1 All ER 417, HL. See also *First American Corp v Sheikh Zayed Al-Nahyan* [1998] 4 All ER 439, [1999] 1 WLR 1154, CA.

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### 917. Disclosure in insolvency proceedings.

Where: (1) an administration order is made in relation to a company; (2) an administrative receiver is appointed; (3) the company goes into liquidation; or (4) a provisional liquidator is appointed, the court may, on the application of the relevant office-holder, summon to appear before it (inter alios): (a) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company; or (b) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company<sup>1</sup>. The court may require any such person to submit an affidavit to the court containing an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in head (b) above<sup>2</sup>.

At any time after a bankruptcy order has been made the court may, on the application of the official receiver or the trustee of the bankrupt's estate, summon to appear before it (inter alios): (i) any person known or believed to have any property comprised in the bankrupt's estate in his possession or to be indebted to the bankrupt; (ii) any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs or property<sup>3</sup>. The court may require any such person to submit an affidavit to the court containing an account of his dealings with the bankrupt or to produce any documents in his possession or under his control relating to the bankrupt or the bankrupt's dealings, affairs or property<sup>4</sup>.

1 See the Insolvency Act 1986 s 236(1), (2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 679.

2 See the Insolvency Act 1986 s 236(1), (3); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 679. See also *Re Financial Insurance Co Ltd* (1867) 36 LJ Ch 687; *Re Contract Corpn, Druitt's Case* (1872) LR 14 Eq 6 (order made requiring disclosure of information by the managing clerk of the bank with which the contributory maintained an account, and for production of books and documents relating to such account).

3 See the Insolvency Act 1986 s 366(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 307.

4 See the Insolvency Act 1986 s 366(1).

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### **918. Disclosure to investigators etc.**

When inspectors are appointed to investigate the affairs of a company, it is the duty of all officers and agents<sup>1</sup> of the company, and of all officers and agents of any other body corporate which is or at any relevant time has been the company's subsidiary or holding company, or a subsidiary of its holding company or a holding company of its subsidiary, and which is being investigated: (1) to produce to the inspectors all documents of or relating to the company or, as the case may be, the other body corporate which are in their custody or power; (2) to attend before the inspectors when required to do so; and (3) otherwise to give the inspectors all assistance in connection with the investigation which they are reasonably able to give<sup>2</sup>.

In connection with its supervisory and enforcement functions, the Financial Services Authority may require a person authorised to carry on financial services, or a person connected with such a person, to provide specified information or documents in such form as the Authority requires<sup>3</sup>. The Authority may also require authorised persons to provide a report by a skilled person on any matter about which the Authority could require the provision of information or documents<sup>4</sup>. The Authority has power to appoint investigators into the business of authorised persons<sup>5</sup>. The Authority and its investigators may apply for a warrant to search for and seize documents or information<sup>6</sup>.

<sup>1</sup> In the Companies Act 1985 s 434, 'agents', in relation to a company or other body corporate, includes its bankers, whether they are or are not officers of the company or other body corporate: see s 434(4).

<sup>2</sup> See the Companies Act 1985 s 434(1); and **COMPANIES** vol 15 (2009) PARA 1544. These provisions apply also to an investigation into the ownership of a company under s 442: see s 443(1); and **COMPANIES** vol 15 (2009) PARA 1545. As to the Secretary of State's power to require documents and information see s 447; and **COMPANIES** vol 15 (2009) PARA 1558. Where the Secretary of State carries out an investigation under the Insolvency Act 1986 s 218(4) (prosecution of delinquent officers and members of the company: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1015), he may for the purposes of his investigation exercise any of the powers which are exercisable by inspectors appointed under the Companies Act 1985 s 431 or s 432: see the Insolvency Act 1986 s 218(5); and see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1016. As to the Secretary of State see PARA 3.

<sup>3</sup> See the Financial Services and Markets Act 2000 s 165; and PARA 447. As to the Financial Services Authority see PARA 792 and also PARAS 4, 6 et seq.

<sup>4</sup> See the Financial Services and Markets Act 2000 s 166; and PARA 448.

<sup>5</sup> See the Financial Services and Markets Act 2000 s 167; and PARA 449.

<sup>6</sup> See the Financial Services and Markets Act 2000 s 176; and PARA 454.

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### **919. Disclosure to HM Revenue and Customs.**

A bank may be required to give information to the Commissioners for Her Majesty's Revenue and Customs as to the receipt of income from United Kingdom securities by persons other than the holders or from United Kingdom bearer securities<sup>1</sup>; and to tax inspectors as to interest paid or credited by the bank without deduction of tax<sup>2</sup>. Further, the commissioners may by notice

require any person to furnish them within such time as they may direct, not being less than 28 days, with such particulars as they think necessary for the purposes of the tax provisions<sup>3</sup> relating to the transfer of assets abroad<sup>4</sup>. However, a bank is under no obligation to furnish particulars of any ordinary banking transactions between it and a customer carried out in the ordinary course of banking business<sup>5</sup> unless the bank has acted or is acting on behalf of the customer in connection with: (1) the formation or management of any body corporate resident or incorporated outside the United Kingdom which is, or if resident in the United Kingdom would be, a close company but not a trading company; or (2) the creation, or the execution of the trusts, of any settlement by virtue or in consequence of which income becomes payable to a person resident or domiciled outside the United Kingdom<sup>6</sup>.

1 See the Taxes Management Act 1970 s 24(1), (2); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1709. This provision extends to United Kingdom government and commercial securities: see s 24(4). It does not, however, impose on a bank the obligation to disclose particulars where the person beneficially entitled to the income is not resident in the United Kingdom: s 24(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. Note that the Inland Revenue merged with Her Majesty's Customs and Excise to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005 s 50: see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq. See also **INCOME TAXATION**.

2 See Taxes Management Act 1970 s 17(1); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1696. This provision applies only to the money received or retained in the United Kingdom: see s 17(4). It extends to the National Savings Bank: s 17(3). As to the National Savings Bank see PARA 810 et seq.

3 See the Income and Corporation Taxes Act 1988 Pt XVII Ch III (ss 739-746) (repealed from 2007-08 tax years): see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1607 et seq.

4 See the Income and Corporation Taxes Act 1988 s 745(1) (repealed from 2007-08 tax years); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1615.

There have been a number of well-publicised cases against well-known banks requiring disclosure of accounts with foreign branches: see in particular *Re an Application by Revenue and Customs Comrs to Serve section 20 Notice* [2006] STC (SCD) 71.

5 See *Royal Bank of Canada v IRC* [1972] Ch 665, [1972] 1 All ER 225, where the corresponding provisions of the Income Tax Act 1952 s 414(5) (repealed) were discussed.

6 See the Income and Corporation Taxes Act 1988 s 745(4), (5) (repealed from 2007-08 tax years); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1615.

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## **920. Disclosure pursuant to criminal law statutes.**

The Director of the Serious Fraud Office may by notice in writing require persons who are under investigation or any other person who may have relevant information to answer questions or otherwise furnish information, including documents<sup>1</sup>. A person may not be required to disclose information or produce a document in respect of which he owes an obligation of confidence by virtue of carrying on a banking business unless: (1) the person to whom the obligation is owed consents to the disclosure or production; or (2) the Director of the Serious Fraud Office has authorised the making of the requirement personally, or a member of the Serious Fraud Office designated by the Director for this purpose has done so<sup>2</sup>.

A constable may obtain access to specified material for the purposes of a criminal investigation by making an application for an order under the Police and Criminal Evidence Act 1984<sup>3</sup>. A bank

has no implied contractual obligation to support the confidentiality of its customers by resisting such an order or by informing a customer that such an order is being sought<sup>4</sup>.

1 See the Criminal Justice Act 1987 s 2(2), (3) (amended by the Criminal Justice Act 1988 Sch 15 para 113). See also **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1090-1091. As to powers in relation to money laundering see PARA 831. As to the Director of the Serious Fraud Office see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1067, 1089 et seq.

2 See the Criminal Justice Act 1987 s 2(10); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1090.

3 See the Police and Criminal Evidence Act 1984 s 9, Sch 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 874 et seq.

4 See *Barclays Bank plc v Taylor* [1989] 3 All ER 563, [1989] 1 WLR 1066, CA; *R v Manchester Crown Court, ex p Taylor* [1988] 2 All ER 769, [1988] 1 WLR 705, DC.

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## 921. Bankers' references.

With his customer's express or implied consent, a banker is justified in answering inquiries regarding his customer's general position and character put to him by a person contemplating business relations with that customer<sup>1</sup>.

However, no claim lies against the banker in respect of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any person<sup>2</sup> made to the intent or purpose that such person may obtain credit, money or goods, unless such representation or assurance is made in writing and signed by the banker<sup>3</sup>. This protection applies to fraudulent misrepresentations<sup>4</sup>, and to misrepresentations alleged to give rise to liability under the Misrepresentation Act 1967<sup>5</sup>, but it does not apply to negligent misrepresentations<sup>6</sup>. The representation must relate in some way to the creditworthiness of a person<sup>7</sup>. The signature on behalf of a company of its duly authorised agent acting within the scope of his authority is, for this purpose, the signature of the company<sup>8</sup>. A representation made by an individual must be in writing and signed by him, and accordingly no claim lies against a non-signing partner even if he has ratified the act of the signing partner<sup>9</sup>.

The making of a credit reference or other representation as to a person may give rise to liability for breach of fiduciary duty<sup>10</sup>, or for breach of a common law duty of care<sup>11</sup>.

Where the banker may be held responsible, it is immaterial whether he gave the information direct to the person acting on it or to another banker in order that it might be communicated to him<sup>12</sup>.

A disclaimer of liability which amounts to a notice which purports to exclude liability for negligence is therefore ineffective unless it satisfies the requirement of reasonableness<sup>13</sup>.

1 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, CA. See also *Robshaw v Smith* (1878) 38 LT 423 (exhibition of a libellous anonymous letter held to be privileged). A general practice among banks of replying to status inquiries from other banks does not justify imputing the customer's consent to the release of confidential information: *Turner v Royal Bank of Scotland plc* [1999] 2 All ER (Comm) 664, [1999] Lloyd's Rep Bank 231, CA.

2 'Person' includes a corporation: *Banbury v Bank of Montreal* [1918] AC 626, HL, approving *Hirst v West Riding Union Banking Co Ltd* [1901] 2 KB 560; *UBAF Ltd v European American Banking Corp* [1984] QB 713 at 719, [1984] 2 All ER 226 at 230, CA, per Ackner LJ.

3 Statute of Frauds Amendment Act 1828 s 6.

4 *Banbury v Bank of Montreal* [1918] AC 626, HL; distinguished in *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166; applied in *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850. See also *UBAF Ltd v European American Banking Corp* [1984] QB 713 at 718, [1984] 2 All ER 226 at 229, CA, per Ackner LJ.

5 le under the Misrepresentation Act 1967 s 2(1) (see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 801): see *UBAF Ltd v European American Banking Corp* [1984] QB 713 at 718, [1984] 2 All ER 226 at 229, CA, per Ackner LJ.

6 *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850; *UBAF Ltd v European American Banking Corp* [1984] QB 713 at 718, [1984] 2 All ER 226 at 229, CA, per Ackner LJ. As to negligent misrepresentation see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 762.

7 *Diamond v Bank of London and Montreal Ltd* [1979] QB 333, [1979] 1 All ER 561, CA; *UBAF Ltd v European American Banking Corp* [1984] QB 713 at 719, [1984] 2 All ER 226 at 230, CA, per Ackner LJ.

8 *UBAF Ltd v European American Banking Corp* [1984] QB 713, [1984] 2 All ER 226, CA, per Ackner LJ.

9 *Williams v Mason* (1873) 28 LT 232, explained in *UBAF Ltd v European American Banking Corp* [1984] QB 713 at 723, [1984] 2 All ER 226 at 229-230, CA.

10 *UBAF Ltd v European American Banking Corp* [1984] QB 713, [1984] 2 All ER 226, CA. See also *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166.

11 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; *UBAF v European American Banking Corp* [1984] QB 713, [1984] 2 All ER 226, CA. See also *Parsons v Barclay & Co Ltd* (1910) 103 LT 196, CA; *Robinson v National Bank of Scotland* 1916 SC (HL) 154 at 157, 1916 1 SLT 336 at 337 per Lord Haldane; *Wilson v United Counties Bank Ltd* [1920] AC 102, HL; *Batts Combe Quarry Co v Barclays Bank Ltd* (1931) 48 TLR 4; *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850; *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793, [1971] 1 All ER 150, PC.

12 See eg *Swift v Winterbotham* (1873) LR 8 QB 244 at 253, varied on other points sub nom *Swift v Jewsbury and Goddard* (1874) LR 9 QB 301. See also *Commercial Banking Co of Sydney Ltd v RH Brown & Co* [1972] 2 Lloyd's Rep 360, Aust HC.

13 *Smith v Eric S Bush, Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL. See, as to the requirement of reasonableness, the Unfair Contract Terms Act 1977 ss 1(1)(b), 2; and **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq. A disclaimer will not be effective if the answer is deliberately false or is given recklessly: see *Commercial Banking Co of Sydney Ltd v RH Brown & Co* [1972] 2 Lloyd's Rep 360, Aust HC.

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## 922. Advice on investments.

Where it is within the scope of a bank's business to advise on financial affairs, it owes a customer to whom it offers such advice or assistance a contractual duty to exercise reasonable skill and care<sup>1</sup>; and it will not avail the bank that it has issued secret instructions not to give such advice<sup>2</sup>. If the customer is advised in a matter in which the bank has conflicting interests, the conflict should be fully disclosed<sup>3</sup>.

Where advice is given to one who is not a customer, liability may arise where there exists a fiduciary relationship<sup>4</sup> or a relationship such as to found a common law duty of care<sup>5</sup>.



1 *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166, distinguishing *Banbury v Bank of Montreal* [1918] AC 626, HL. Having complied with its duty to exercise reasonable care in giving advice, there is no further continuing obligation on a bank to keep its advice under review and correct it in the light of supervening events: *Fennoscandia Ltd v Clarke* [1999] 1 All ER (Comm) 365, CA. See *Frost v James Finlay Bank Ltd* [2002] EWCA Civ 667, [2002] Lloyd's Rep IR 503 (where the bank was not holding itself out to be an insurance broker; and it was held that no duty was owed in relation to insurance advice).

Where a bank gives financial advice, it will be judged by the same standards as other professionals who give such advice: *Verity and Spindler v Lloyds Bank plc* [1996] Fam Law 213, [1995] CLC 1557. However see contra *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 2)* [1999] Lloyd's Rep PN 496, [1999] PNLR 496.

2 *Woods v Martins Bank Ltd* [1959] 1 QB 55 at 72, [1958] 3 All ER 166 at 173.

3 *Woods v Martins Bank Ltd* [1959] 1 QB 55 at 73, [1958] 3 All ER 166 at 174.

4 *Woods v Martins Bank Ltd* [1959] 1 QB 55 at 72, [1958] 3 All ER 166 at 173.

5 *Box v Midland Bank Ltd* [1979] 2 Lloyd's Rep 391; *Royal Bank Trust Co (Trinidad) Ltd v Pampellonne* [1987] 1 Lloyd's Rep 218, PC.

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## **(xi) Letters of Credit; Performance Bonds**

### **A. IN GENERAL**

#### **923. Nature of letters of credit.**

A letter of credit is an undertaking by a bank to pay to the beneficiary of the credit, or to accept and pay drafts drawn by the beneficiary, in accordance with the terms and conditions of the credit. A letter of credit may be addressed: (1) to banks generally, or to all banks within a specified country or territory; or (2) to one or more specified banks. All banks to whom a credit is addressed are known as nominated banks.

A credit may contain an instruction to a bank either merely to advise the beneficiary of the credit, without any commitment, or to add its confirmatory undertaking to it, in which case the beneficiary has the promise of both banks. Where a credit is intended to facilitate trade, it is called a commercial letter of credit<sup>1</sup>.

It is often made a condition of a mercantile contract that the buyer is to pay for the goods by means of an irrevocable credit<sup>2</sup>, and it is then the buyer's duty to procure that his bank, known as the issuing bank, issues an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country, to pay or accept drafts drawn upon him for the price of the goods, against the tender by the seller of the shipping documents.

1 As to commercial letters of credit see PARA 924.

2 As to irrevocable credits see further PARA 928.

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#### **924. Commercial letters of credit.**

Where buyer and seller are in different countries, the bank issuing the credit at the instance of a buyer does so usually through a bank in the other country; the authorisation of the issuing bank is addressed to the other bank and instructs it to advise the credit to the beneficiary with or without committing itself by adding its confirmation. The bank issuing the credit is called the issuing bank; the second bank, which advises the beneficiary, is an advising, negotiating, confirming or paying bank according to the role it plays<sup>1</sup>.

Commercial letters of credit may be of two types, namely revocable and irrevocable credits<sup>2</sup>. Irrevocable credits may be confirmed or unconfirmed<sup>3</sup>. They may take several forms, but the more common are those by which a banker undertakes to pay against documents of title to goods; or he may engage himself to negotiate drafts accompanied by such documents of title, or to accept drafts drawn under the credit<sup>4</sup>. Credits create a binding contract to accept or pay bills on the specified conditions, enforceable against the bank by a beneficiary who has acted on the faith of it<sup>5</sup>. Similarly, if the credit requests payments to be made or money advanced apart from acceptance of bills<sup>6</sup>, and such payments or advances are made to the grantee on production of the letter, the bank becomes liable to the party making them<sup>7</sup>. Where a credit issued pursuant to a cif contract<sup>8</sup> calls for a guarantee by the buyers through their bankers that documents will be taken up on first presentation, such a guarantee may be held to be exactly the same as a letter of credit and so have to be available within a reasonable time before the first date for shipment<sup>9</sup>. Possession of the letter is not sufficient evidence that the person presenting it is the grantee<sup>10</sup>.

A credit may be a revolving credit, of which one type is that in which sums drawn may be added to the balance so as to keep the total amount available always up to the permitted figure<sup>11</sup>.

1 See PARA 949.

2 See PARA 928.

3 See PARA 933.

4 See *Re BARNED'S BANKING CO, BANNER AND YOUNG V JOHNSTON* (1871) LR 5 HL 157. The usual form of import credit consists of an undertaking by the buyer's bank addressed to his foreign correspondent (the paying, negotiating or advising bank) that payment will be made against tender of documents (including usually full set of bills of lading, invoice (in duplicate or triplicate), and marine insurance policy) within a given period of time. Where 'usual documents' were called for, it was held that this meant those which under a cif contract would be expected in the particular trade: *BORTHWICK V BANK OF NEW ZEALAND* (1900) 17 TLR 2. As to cif contracts see note 8.

5 *MAITLAND V CHARTERED MERCANTILE BANK OF INDIA, LONDON AND CHINA* (1869) 38 LJ Ch 363; *UNION BANK OF CANADA V COLE* (1877) 47 LJCP 100, CA; *Re AGRA AND MASTERMAN'S BANK, ex p ASIATIC BANKING CORPN* (1867) 2 Ch App 391; *URQUHART, LINDSAY & CO LTD V EASTERN BANK LTD* [1922] 1 KB 318. See also *MA SASSOON & SONS LTD V INTERNATIONAL BANKING CORPN* [1927] AC 711, PC (distinguishing *Re AGRA AND MASTERMAN'S BANK, ex p ASIATIC BANKING CORPN* above). As to the transferability of credits subject to the ICC Uniform Customs and Practice for Documentary Credits see PARA 935.

6 Eg anticipatory or red-clause credits. The 'red-clause' authorises advances to the seller before shipment. A refinement is the 'green-clause', which also covers storage in the name of the bank.

7 See *MORGAN V LARIVIÈRE* (1875) LR 7 HL 423.

8 le a contract which provides that the price includes the cost of the goods, the freight and the insurance premium for the transit: see further **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 324 et seq.

9 *Sinason-Teicher Inter-American Grain Corp'n v Oilcakes and Oilseeds Trading Co Ltd* [1954] 3 All ER 468, [1954] 1 WLR 1394, CA; cf *Heisler v Anglo-Dal Ltd* [1954] 2 All ER 770, [1954] 1 WLR 1273, CA (seller's personal guarantee satisfying condition in fob contract calling for guarantee of delivery of goods). As to fob contracts see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 351 et seq.

10 *Orr and Barber v Union Bank of Scotland* (1854) 1 Macq 513; *British Linen Co v Caledonian Insurance Co* (1861) 4 Macq 107.

11 See *Nordskog & Co v National Bank* (1922) 10 Ll L Rep 652; *JW Mitchell Ltd v Ivan Pedersen Ltd* (1929) 34 Ll L Rep 310.

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## **925. Uniform Customs and Practice for Documentary Credits.**

Commercial letters of credit almost invariably incorporate the Uniform Customs and Practice for Documentary Credits (the 'Uniform Customs and Practice')<sup>1</sup>, which apply to all documentary credits<sup>2</sup>, including, to the extent to which they may be applicable, standby letters of credit<sup>3</sup>, where they are incorporated into the text of the credit; and they are binding on all parties unless otherwise expressly agreed<sup>4</sup>.

Where a credit incorporates the Uniform Customs and Practice for Documentary Credits 'except so far as otherwise stated', it is wrong to approach the construction of the credit by looking at the document first without reference to the Uniform Customs and Practice for Documentary Credits<sup>5</sup>; and, if there is ambiguity as to the meaning of the provisions of the Uniform Customs and Practice for Documentary Credits, the ambiguity should, if possible, be resolved in a way which will result in their reflecting the position under general maritime and commercial law<sup>6</sup>.

1 le the ICC Uniform Customs and Practice for Documentary Credits (2007 Revision) (UCP600), copyright 2006, International Chamber of Commerce (ICC), Paris. This replaces the ICC Uniform Customs and Practice for Documentary Credits (1993 Revision) (UCP500), copyright 1993, International Chamber of Commerce (ICC), Paris. Copies of these and other ICC publications are available from ICC Publishing SA, 38 Cours Albert 1er, 75008 Paris, France, or from ICC United Kingdom, 12 Grosvenor Place, London SW1X 7HH. For a comparison of the 1983 and the 1993 Revisions see Documentary Credits: UCP 500 and 400 compared (1993 revision) (UCP 511); and for a comparison of the 1993 and 2007 Revisions see Prof James Byrne *The Comparison of UCP600 and UCP500* (Institute of International Banking Law and Practice Inc).

The 2007 Revision has an 'effective' date of 1 July 2007 but this is a general guideline only as to when the rules should be put into effect and, as the rules are not law, this date has no binding effect. The 1993 Revision is likely to be relevant for some time to come as some letters of credit may specifically refer to that version. However according to the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 1, the rules apply to any documentary credit ('credit') (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules; furthermore they are binding on all parties thereto unless expressly modified or excluded by the credit. While there may be a period while adjustments are made, the majority of commercial letters of credit are likely to be issued subject to it after July 2007. It is considered that the 2007 Revision may be the most extensive revision of the six (revised) versions of the UCP (previous versions being issued in 1933 (UCP82), 1951 (UCP151), 1962 (UCP222), 1974 (UCP290), 1983 (UCP400) and 1993 (UCP500)). It has been reorganised, some new concepts and terms have been added and there are new expressions of older concepts with definitions and interpretations now located in their own provisions: see Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 2, 3. The 2007 Revision is intended to be clearer, simpler, easier to follow and more precise rather than to introduce radical change.

Also of relevance is the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (eUCP) which supplements the Uniform Customs and Practice for Documentary Credits (2007 Revision) in order to accommodate presentation of electronic records alone or in combination with paper documents. In a similar way it applies where the credit indicates that it is subject to it (see arts e1, e2). Like other ICC publications, it is available from the ICC Publishing SA or ICC United Kingdom.

What follows (see PARA 926 et seq) is a brief overview with reference to both the 2007 and 1993 Revisions of the Uniform Customs and Practice but for more detail and full texts specialist works should be consulted: see eg the *Encyclopaedia of Banking Law*.

It should be noted that, as the provisions of the Uniform Customs and Practice do not have the force of law, in the exceptional case where they are not incorporated, the position is governed by the common law. As to the application of the Uniform Customs and Practice generally see *Credit Agricole Indosuez v Generale Bank (Seco Steel Trading Inc) (No 2)* [1999] 2 All ER (Comm) 1016.

2 The Uniform Customs and Practice for Documentary Credits (2007 Revision) art 2 defines 'credit' as being any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation'. The definition in the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 2 is substantially broader defining the expressions 'documentary credit(s)' and 'standby letter(s) of credit' ('credit(s)') as meaning any arrangement, however named or described, whereby a bank (the 'issuing bank'), acting at the request and on the instructions of a customer (the 'applicant') or on its own behalf: (1) is to make a payment to or to the order of a third party (the 'beneficiary') or is to pay or accept bills of exchange ('drafts') drawn by the beneficiary; (2) authorises another bank to effect such payment, or to accept and pay such bills of exchange ('drafts'); or (3) authorises another bank to negotiate, against stipulated documents, provided that the terms and conditions of the credit are complied with: furthermore branches of a bank in different countries are considered another bank. Reference should also be made to art 9(a) referring to an irrevocable credit constituting a definite undertaking of the issuing bank. The much simpler and narrower definition in the 2007 Revision may well exclude some transactions thought to be letters of credit.

3 As to the meaning of 'standby letter(s) of credit' see note 2. The basic difference between a standby letter of credit and other documentary credits is that the standby letter of credit is issued to protect the beneficiary against non-performance or default, usually that of the applicant, whereas the traditional documentary letter of credit is intended to be drawn on where the beneficiary/seller performs his part of the underlying contract. The extent to which the Uniform Customs and Practice for Documentary Credits (1993 Revision) applies to standby letters of credit is left undefined. However as to the clearer and narrower definition in the Uniform Customs and Practice for Documentary Credits (2007 Revision) see note 2.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 1; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 1. See also note 1.

5 *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 2 All ER 400, [1986] 1 WLR 631, CA.

6 *Golodetz (M) & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1979] 2 All ER 726 at 738, [1980] 1 WLR 495 at 509; affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA.

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## **926. Credits as autonomous transactions.**

Credits<sup>1</sup>, by their nature, are separate transactions from the sales or other contract or contracts on which they may be based and banks are in no way concerned with, or bound by, such contract or contracts, even if any reference whatsoever to such contract or contracts is included in the credit<sup>2</sup>. Banks deal with documents, and not with goods, services or other performances to which the documents may relate<sup>3</sup>.

An international sale of goods transaction to be financed by means of a confirmed irrevocable documentary credit<sup>4</sup> in fact involves four autonomous though interconnected contractual relations:

- 34 (1) the underlying contract for the sale of goods, to which the only parties are the buyer and the seller;
- 35 (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to, or to the order of, the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents, and the buyer agrees to reimburse the issuing bank for payments made under the credit; for such reimbursement the stipulated documents, if they include a document of title such as a bill of lading, constitute a security available to the issuing bank;
- 36 (3) if payment is to be made through a confirming bank, the contract between the issuing bank and the confirming bank authorising the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit;
- 37 (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents<sup>5</sup>.

The interconnections are such that the contractual duty owed by confirming and issuing banks to the buyer to honour the credit notified by him on presentation of apparently conforming documents by the seller, despite the fact that they contain inaccuracies or even are forged, is matched by a corresponding liability of the confirming bank to the seller/beneficiary, in the absence of any fraud on his part, to pay the sum stipulated in the credit upon presentation of apparently conforming documents<sup>6</sup>. It is, however, undecided whether, in the case of payment under reserve where the documents are ultimately rejected<sup>7</sup>, the obligations owed by the issuing bank to the confirming bank<sup>8</sup> are matched by identical obligations owed by the confirming bank to the beneficiary<sup>9</sup>.

The autonomy of the credit is such that: (a) the beneficiary can in no case make use of the contractual relationships existing between the banks or between the applicant for the credit and the issuing bank<sup>10</sup>; (b) banks are not entitled to refuse payment in reliance upon the terms of the contract between the buyer and the seller<sup>11</sup>; and (c) the buyer is not entitled on the ground of alleged defects in the goods to an injunction restraining the seller from drawing on the credit<sup>12</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 4; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 3. See generally PARA 925 note 1. Consequently, the undertaking of a bank to honour or negotiate or fulfil any other obligations under the credit, is not subject to claims or defences by the applicant resulting from his relationships with the issuing bank or the beneficiary: art 4. The provisions are broadly similar but without that warning but the 2007 Revision version also has a warning against adding as part of the credit copies of the underlying contract or similar documents. As to the applicant and the beneficiary see PARA 925 note 2. See *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* (1919) 1 Ll L Rep 256, CA. In *Urquhart, Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318, Rowlatt J held that the paying banker was in the position of one who had contracted to buy documents. This view was adopted in *Dexters Ltd v Schenker & Co* (1923) 14 Ll L Rep 586. See also *Stein v Hambro's Bank of Northern Commerce* (1921) 9 Ll L Rep 433 (revsd without affecting this point (1922) 10 Ll L Rep 529, CA); *National Bank of South Africa v Banca Italiana di Sconto and Arnhold Bros & Co (Oleifici Nazionali of Genoa, third parties)* (1922) 10 Ll L Rep 531, CA; *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1 at 14, CA, obiter per Scrutton LJ; *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA (in which the court refused to restrain the sellers from dealing with the credit). See further *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep 424, CA; *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 2 All ER 406, [1998] 1 WLR 461, CA; *Sirius International Insurance Corp (Publ) v FAI General Insurance Co Ltd* [2004] UKHL 54, [2005] 1 All ER 191, [2004] 1 WLR 3251. See also *Oliver*

*v Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm), [2007] All ER (D) 135 (Sep); *Spiersbridge Property Developments Ltd v Muir Construction Ltd* [2008] CSOH 44, 2008 Scot (D) 17/3.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 5; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 4. The provisions are virtually identical. The principle is stated in numerous authorities: see eg *Westpac Banking Corp v South Carolina National Bank* [1986] 1 Lloyd's Rep 311 at 315, PC. See also *Mahonia Ltd v JP Morgan Chase Bank* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd's Rep 911; *Mahonia Ltd v West LB AG* [2004] EWHC 1938 (Comm), [2004] All ER (D) 10 (Aug) (where allegations of illegality and conspiracy as the true purposes of the relevant letters of credit were rejected).

4 As to irrevocable credits see PARA 928.

5 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 182-183, [1982] 2 All ER 720 at 725, HL, per Lord Diplock.

6 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL.

7 As to payment under reserve see PARA 956.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(a), 15(c), 16; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14: see PARA 953.

9 In *Co-operative Centrale Raiffeisen-Boereleenbank BA v Sumitomo Bank Ltd* [1987] 1 Lloyd's Rep 345 at 352, it was held by Gatehouse J that the obligations are matching. On appeal it was found unnecessary to determine the point, and it was expressly left open: see *Sumitomo Bank Ltd v Co-operative Centrale Raiffeisen-Boereleenbank BA* [1988] 2 Lloyd's Rep 250, CA.

10 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 4; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 3.

11 *Urquhart, Lindsay & Co v Eastern Bank Ltd* [1922] 1 KB 318 at 323; *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA.

12 *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, [1958] 1 All ER 262, CA. See further PARA 959.

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## 927. Performance bonds.

By issuing a performance bond or performance guarantee<sup>1</sup>, a bank assumes obligations to a buyer or other beneficiary analogous to those assumed by a confirming bank to the seller under a documentary credit<sup>2</sup>. A bank which gives a performance guarantee must honour that guarantee according to its terms; it is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not; and, subject to the fraud exception<sup>3</sup>, the bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions<sup>4</sup>. A performance bond is virtually a promissory note payable on demand<sup>5</sup>, and certainly has much more of the characteristics of a promissory note than of a guarantee<sup>6</sup>. The bank is simply concerned to see whether the event has happened upon which its obligation to pay arises<sup>7</sup>.

Where a performance bond is payable on demand upon the occurrence of a specified event, the beneficiary's demand must state that the event has occurred<sup>8</sup>.

1 The difference between the terms 'performance bond' and 'performance guarantee' appears to be purely semantic. As to more extensive discussion of performance bonds or performance guarantees see PARA 1271 et seq.

2 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 184, [1982] 2 All ER 720 at 725, HL, per Lord Diplock. As to the application of the Uniform Customs and Practice for Documentary Credits to standby letters of credit, which appear to be performance bonds under a different name, see PARA 925.

3 As to the fraud exception see PARA 958. See also *Turkiye IS Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611 (in challenging a demand made on a performance bond, the challenging party must show that the only inference the bank concerned could draw was that the demand was fraudulent; in doing so, it must put before the bank irrefutable evidence because it is not for the bank to verify mere allegations).

4 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 171, [1978] 1 All ER 976 at 983, CA, per Lord Denning MR, approving *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862.

5 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 170, [1978] 1 All ER 976 at 983, CA, per Lord Denning MR.

6 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 175, [1978] 1 All ER 976 at 986, CA, per Geoffrey Lane LJ.

7 *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 at 165, CA, per Roskill LJ.

8 *Esal (Commodities) Ltd and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 546 at 550, CA, per Ackner LJ (bond payable 'on your written demand in the event that the supplier fails to execute the contract in perfect performance'); it should be noted, however, that at 554 Neill LJ expressly reserved the point for future decision. See also *IE Contractors Ltd v Lloyd's Bank plc* [1990] 2 Lloyd's Rep 496, CA (a demand required to state that it is a claim for damages for breach of contract is valid if it does so in substance but not in express words).

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## **B. FORM AND NOTIFICATION OF CREDITS**

### **928. Revocable and irrevocable credits.**

Credits<sup>1</sup> may be either revocable or irrevocable; and all credits, therefore generally or at least previously were required to indicate clearly whether they are revocable or irrevocable<sup>2</sup>. A credit is irrevocable despite the absence of any indication to that effect<sup>3</sup>.

A bank authorised to effect payment is not bound to advise the beneficiary of the revocation of a revocable credit<sup>4</sup>; and, where a revocable credit takes the form of an authority to purchase drafts<sup>5</sup>, any bank acting on the strength of the authority must be deemed to know its terms<sup>6</sup>.

A credit<sup>7</sup> constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that the terms and conditions of the credit are complied with and there should be provision for the issuing bank to honour if the credit is available by sight payment, deferred payment, acceptance with the issuing bank or in certain circumstances with a nominated bank or by negotiation with a nominated bank and that nominated bank does not negotiate<sup>8</sup>.

Where a credit, not stated to be irrevocable or otherwise, states that it will remain in force for a given period, it cannot be revoked as against negotiators of bills drawn under the credit and negotiated within the period of validity on the strength of the credit<sup>9</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 6(a), (b). There is no corresponding article in the 2007 Revision: see note 3. See generally PARA 925 note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3 PARA 2; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 6(c). The provision of the 2007 Revision is almost identical although it makes no reference to revocability on the basis that revocable letters of credit are rarely encountered in practice; the 1993 Revision version provided that in the absence of any indication the credit was deemed to be irrevocable. A provision of the 1993 Revision (see the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 8) relates to revocation of a credit and therefore has no equivalent in the 2007 Revision. Under that provision a revocable credit could be amended or cancelled by the issuing bank at any moment and without prior notice to the beneficiary (see the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 8(a)). The issuing bank however still had several duties in regard to reimbursement: see art 8(b); and also *Gelpcke v Quentell* 74 NY 599 (1878), CA. Where a revocable credit is intended then this should be expressly stated in the body of the credit.

4 See *Cape Asbestos Co Ltd v Lloyds Bank Ltd* [1921] WN 274; and see also *Giddens v Anglo-African Produce Co Ltd* (1923) 14 Ll L Rep 230. Note however that in the Uniform Customs and Practice for Documentary Credits (2007 Revision) there is no provision about revocable credits: see note 3.

5 As to the meaning of 'draft' see PARA 925 note 2.

6 *Chartered Bank of India, Australia and China v P Macfayden & Co* (1895) 64 LJQB 367.

7 See note 3.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 7(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 9(a). In the 2007 Revision there is also a provision (see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 7(b)) that an issuing bank is irrevocably bound to honour as of the time it issues the credit but there is no such provision in the 1993 Revision, although otherwise the articles are similar though worded differently.

9 *Re Agra and Masterman's Bank, ex p Asiatic Banking Corp* (1867) 2 Ch App 391. See also *MA Sassoon & Sons Ltd v International Banking Corp* [1927] AC 711, PC.

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## 929. Buyer and issuing bank.

A letter of credit comes into being as the result of a formal written application by the applicant, usually the buyer<sup>1</sup>, and the contractual relationship is defined by the terms of the agreement between them under which the credit is issued. The buyer who pursuant to his sales contract instructs his bank to open a credit undertakes to put the bank in funds or to reimburse it, provided the documents against which the bank pays are what the bank calls for. The bank is bound to apply the funds to the purpose to which they are appropriated<sup>2</sup>; but, if it becomes insolvent before this is done, the buyer has only a right to prove<sup>3</sup>.

Where, in accordance with a credit opened at the request of the seller's agents (the defendants), an issuing bank accepted drafts against documents of title which it released in trust to the seller's agents, who delivered the documents to the buyer against payment which, after notice that the bank had gone into liquidation, they remitted to the seller, the issuing



bank was held not entitled to the money because it had evinced an intention not to honour the seller's draft at maturity; accordingly the seller's agents were released from their obligation to put the bank in funds and the seller was entitled to be released from his obligation under his pledge of the documents to the issuing bank<sup>4</sup>.

The bank must comply rigidly with its instructions<sup>5</sup>, and the same applies to the intermediary bank<sup>6</sup>, the latter being indemnified by the former if it complies strictly with its instructions<sup>7</sup>. There is ordinarily no privity between the buyer and the paying (intermediary) bank<sup>8</sup>.

1 Cf *Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849, [1967] 2 All ER 1092 (where the application was made by the seller's agents).

2 *Farley v Turner* (1857) 26 LJ Ch 710.

3 *Re Barned's Banking Co Ltd, Massey's Case* (1870) 39 LJ Ch 635.

4 *Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849, [1967] 2 All ER 1092.

5 *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL; *South African Reserve Bank v Samuel & Co* (1931) 40 Ll L Rep 291, CA; *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 2 All ER 754, [1974] 1 WLR 1234, PC.

6 *Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37, [1942] 2 All ER 694, CA; *Bank Melli Iran v Barclays Bank (Dominion Colonial and Overseas)* [1951] 2 TLR 1057.

7 *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL.

8 *Johnson v Robarts* (1875) 10 Ch App 505; *Calico Printers' Association v Barclays Bank* (1931) 145 LT 51, CA; *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL.

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### 930. Form of credits.

Previously there was a rule that instructions for the issue of credits<sup>1</sup>, the credits themselves, instructions for any amendments to them and the amendments themselves had to be complete and precise; and in order to guard against confusion and misunderstanding, banks should discourage any attempt to include excessive detail in the credit or in any amendment to the credit; and to give instructions in regard to a credit by reference to a credit previously issued where such previous credit has been subject to amendments<sup>2</sup>. If incomplete or unclear instructions were received in regard to a credit, the bank requested to act on such instructions could give preliminary notification to the beneficiary for information only and without responsibility; and the credit was to be issued, confirmed, advised or amended only when the necessary information had been received and if the bank is at that stage prepared to act on the instructions<sup>3</sup>.

All credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation; and they must nominate the bank (the 'nominated bank') which is authorised to pay, to incur a deferred payment undertaking, to accept drafts<sup>4</sup> or to negotiate<sup>5</sup>. There are various provisions governing nomination matters<sup>6</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 5(a), (b). There is no equivalent to art 5 in the 2007 Revision. See generally PARA 925 note 1. Notwithstanding the provision in the 1993 Revision modern credits tend to stipulate for presentation of numerous documents, and not infrequently refer to a state of fact without specifying the documentary evidence to be tendered in respect of such fact. See further PARA 950.

3 See the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 12 which also provides that banks should provide the necessary information without delay. As to the beneficiary see PARA 925 note 2. There is no equivalent to art 12 in the 2007 Revision. See generally PARA 925 note 1.

4 As to the meaning of 'draft' see PARA 925 note 2.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 6(a), (b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 10(a), (b).

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 12; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 10. These are substantially similar in substance if not in wording although the 2007 Revision version expressly permits a nominated bank to prepay or purchase its own accepted draft or a deferred payment undertaking. As to the obligation to reimburse see PARA 949.

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### **931. Applicant (buyer) and beneficiary (seller).**

If the underlying contract between the applicant (buyer) and the beneficiary (seller) provides for payment by confirmed credit, the credit, in the absence of express stipulation, must be available to the seller at the beginning of the shipment period<sup>1</sup> and the contract is not satisfied by the buyer procuring a revocable credit<sup>2</sup>.

Where the parties do not, in their sale contract, define the terms of the proposed letter of credit, the letter of credit as subsequently agreed between the parties may fill the contractual gap<sup>3</sup>.

Where a letter of credit is regarded as absolute payment, the buyer's obligation to pay the price is discharged upon the opening of a conforming credit even if the issuing bank becomes insolvent<sup>4</sup>. A letter of credit is, however, not to be regarded as absolute payment unless the seller expressly or impliedly stipulates that it should be so<sup>5</sup>. He may do so impliedly if he stipulates for the credit to be issued by a particular bank in such circumstances that it is to be inferred that the seller looks to that particular bank to the exclusion of the buyer<sup>6</sup>.

Where a letter of credit is conditional payment, the buyer is discharged if the seller fails to obtain payment because of failure on his part to comply with its terms<sup>7</sup>.

1 *Pavia & Co SpA v Thurmann-Nielsen* [1952] 2 QB 84 at 88, [1952] 1 All ER 492 at 495, CA, per Denning LJ; and see *AE Lindsay & Co Ltd v Cook* [1953] 1 Lloyd's Rep 328; *Sinason-Teicher Inter-American Grain Corp v Oilcakes and Oilseeds Trading Co Ltd* [1954] 3 All ER 468, [1954] 1 WLR 1394, CA. The rule applies to cif and fob contracts in general: see *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 QB 130 at 140-144, [1958] 1 All ER 542 at 547-549. As to cif and fob contracts see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 324 et seq, 351 et seq. The measure of damages for failure to procure a letter of credit within the proper time may be the seller's loss of profit on the transaction: *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA; *Ian Stach Ltd v Baker Bosley Ltd* above at 145 and 549.

2 *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473, CA. A seller may be held to have waived a condition requiring a confirmed credit: see *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep

388 at 392; *Plasticmoda SpA v Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, CA (waiver as to credit amount). A seller who waives as regards earlier shipments a condition requiring a confirmed credit may avail himself of the condition as regards later shipments, but only upon giving reasonable notice to the buyer: *Panoutsos v Raymond Hadley Corp of New York* above; and see also *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n. As to revocable credits (which are relatively rare in practice) see PARA 928.

3 *Ficom SA v Sociedad Cadex Ltda* [1980] 2 Lloyd's Rep 118 at 131; *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388 at 392.

4 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 209-210, [1972] 2 All ER 127 at 136-137, CA, per Lord Denning MR.

5 *Hindley & Co v Tothill, Watson & Co* (1894) 13 NZLR 13, NZCA; *Greenough v Munroe* 53 F 2d 362 (1931) (see, however, *Vivacqua Irmaos SA v Hickerson* 190 SO 657 (1939) (Louisiana) and *Ornstein v Hickerson* 40 F Supp 305 (1941)); *Newman Industries Ltd v Indo-British Industries Ltd* [1956] 2 Lloyd's Rep 219; *Soprama SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367; *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA (in which the above authorities were reviewed); *Man (ED & F) Ltd v Nigerian Sweets & Confectionery Co Ltd* [1977] 2 Lloyd's Rep 50.

6 *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 210, [1972] 2 All ER 127 at 137, CA, per Lord Denning MR.

7 *Ficom SA v Sociedad Cadex Ltda* [1980] 2 Lloyd's Rep 118; *Shamsher Jute Mills Ltd v Sethia (London) Ltd* [1987] 1 Lloyd's Rep 388.

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### **932. Teletransmitted and pre-advised credits.**

When an issuing bank instructs a bank (the 'advising bank') by an authenticated teletransmission to advise a credit<sup>1</sup> or an amendment to a credit, the teletransmission will be deemed to be the operative credit instrument or amendment, and any subsequent mail confirmation should be disregarded<sup>2</sup>. However, if the teletransmission states 'full details to follow' (or something of similar effect) or that the mail confirmation is to be the operative credit instrument or amendment, then the teletransmission will not be deemed to be the operative credit instrument or amendment; and the issuing bank must forward the operative credit instrument or amendment to the advising bank without delay<sup>3</sup>.

If a bank uses the services of an advising bank to have the credit advised to the beneficiary, it must also use the services of the same bank in regard to advising any amendments<sup>4</sup>.

A preliminary advice of the issue or amendment of a credit ('pre-advice'), must only be given by an issuing bank if such bank is prepared to issue the operative credit instrument or amendment and in such circumstances the issuing bank having given such pre-advice is irrevocably committed to issue or amend the credit, in terms not inconsistent with the pre-advice, without delay<sup>5</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 11(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 11(a)(i). The provisions are similar in substance although the 1993 Revision version is much wordier. See generally PARA 925 note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 11(a) (second paragraph); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 11(a)(ii) which are in similar terms.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 9(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 11(b). The provisions are broadly similar. As to the beneficiary see PARA 925 note 2.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 11(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 11(c). The provisions are similar although the 1993 Revision version refers to an 'irrevocable credit' (but see PARA 928).

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### 933. Advising and confirming of credits.

A credit<sup>1</sup> and any amendment may be advised to a beneficiary through another bank (the 'advising bank') and that bank, by advising the credit or amendment signifies that it has satisfied itself as to authenticity and related matters<sup>2</sup>.

Provided that the stipulated documents are presented to the bank confirming the credit<sup>3</sup> (the 'confirming bank') or to any other nominated bank and such documents amount to a complying presentation, the confirming bank must (1) honour if the credit is available by sight payment, deferred payment, acceptance with the issuing bank or in certain circumstances with a nominated bank or by negotiation with a nominated bank and that nominated bank does not negotiate; (2) negotiate if the credit is available by negotiation with the confirming bank<sup>4</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 9(a), (b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 7(a). If the bank elects not to advise the credit, it must inform the issuing bank without delay: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 9(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 7(a). The same bank must be used for advising a credit and advising any amendment to it: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 9(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 11(b). The provisions appear similar in effect although have different wording. In addition the 2007 Revision has a specific similar provision on where the advising bank uses the services of a second advising bank: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 9(c). The 1993 Revision also has a provision dealing with the situation where authenticity cannot be established and the actions that should be taken: see the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 7(b). As to the beneficiary, and as to the issuing bank, see PARA 925 note 2. See generally PARA 925 note 1.

3 As to irrevocable credits see PARA 928.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 8(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 9(b) which are in broadly similar terms although worded differently. In the 2007 Revision there is also a provision (see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 8(b)) that a confirming bank is irrevocably bound to honour as of the time it issues the credit but there is no such provision in the 1993 Revision. It has been held in the United States that a bank may confirm a non-bank's credit: *Barclays Bank DCO v Mercantile National Bank* [1973] 2 Lloyd's Rep 541, US Ct of Appeals.

The relation between the confirming (and issuing) bank and beneficiary is contractual: see *Urquhart, Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318 at 321 per Rowlatt J; *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1 at 14, CA, per Scrutton LJ; *United City Merchants (Investments) Ltd v Royal Bank of Canada*

[1983] 1 AC 168 at 183, [1982] 2 All ER 720 at 725, HL, per Lord Diplock. See also *Dexters Ltd v Schenker & Co* (1923) 14 Ll L Rep 586. As to the position of a confirming house see *Rusholme and Bolton and Roberts Hadfield Ltd v Read & Co (London) Ltd* [1955] 1 All ER 180, [1955] 1 WLR 146.

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## **C. AMENDMENT AND TRANSFER OF CREDITS**

### **934. Amendment of credits.**

A revocable credit<sup>1</sup> could be amended or cancelled by the issuing bank at any moment and without prior notice to the beneficiary<sup>2</sup>. An irrevocable credit<sup>3</sup> can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary; and partial acceptance of amendments contained in one and the same advice of amendment is not allowed and consequently will be deemed rejection of the amendment<sup>4</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2. As to revocable and irrevocable credits see PARA 928.

2 See the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 8(a). There is no direct equivalent in the 2007 Revision as it makes no reference to revocable credits: see further PARA 928. As to the issuing bank, and as to the beneficiary, see PARA 925 note 2.

3 Note that in the 2007 Revision all credits are irrevocable: see PARA 928.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 10(a), (e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 9(d)(i), (iv). Both are expressed to be subject to provisions on transferable credit: see PARA 935. In the 2007 Revision there is a provision requiring the bank advising an amendment to inform the bank from whom it received the amendment of any notification of acceptance or rejection: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 10(d). Generally the issuing bank will put itself at risk if it consents to an amendment without the prior consent of the applicant. As to the drafting of amendments see PARA 930.

The issuing bank is irrevocably bound by an amendment issued by it from the time of its issue; and a confirming bank may extend its confirmation to an amendment and is irrevocably bound as of the time of its advice of the amendment; however, a confirming bank may choose to advise an amendment to the beneficiary without extending its confirmation and if so must inform the issuing bank and the beneficiary in its advice without delay: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 10(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 9(d)(ii). The terms of the original credit (or one incorporating previously accepted amendments) remain in force for the beneficiary until he communicates his acceptance of the amendment to the bank that advised the amendment; the beneficiary must give notification of acceptance or rejection of amendments; and if the beneficiary fails to give the notification, the tender of documents to the nominated bank or the issuing bank that conform to the credit and to not yet accepted amendments, is deemed to be notification of acceptance by the beneficiary of the amendments and as of that moment the credit will be amended: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 10(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 9(d)(iii). The provisions are similar in effect with some minor differences in wording. See generally PARA 925 note 1. In the 2007 Revision there is also a provision that any amendment which provides that it shall enter into force unless rejected by the beneficiary by a certain time is to be disregarded: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 10(f).

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### 935. Transfer of credits.

A transferable credit is a credit<sup>1</sup> which says it is 'transferable' and a transferable credit may be made available in whole or in part to another beneficiary (the 'second beneficiary') at the request of the beneficiary (the 'first beneficiary') to the bank authorised to pay, incur a deferred payment undertaking, accept or negotiate (the 'transferring bank'), or in the case of a freely negotiable credit, the bank specifically authorised in the credit as a transferring bank<sup>2</sup>. The bank requested to effect the transfer (the 'transferring bank') is under no obligation to effect such transfer except to the extent and in the manner expressly consented to by such bank<sup>3</sup>. The mere designation of a credit as transferable is insufficient to constitute consent to a subsequent transfer request, since the request and consent contemplated are to effect a transfer to a particular extent and in a particular manner<sup>4</sup>.

Bank charges in respect of transfers are payable by the first beneficiary unless otherwise specified<sup>5</sup>.

Provision is made for partial transfer<sup>6</sup>. The transferred credit must reflect the terms and conditions of the credit, including confirmation, with the exception of the amount of the credit, any unit prices stated in it, the expiry date, the last shipment date or period, any or all of which may be reduced or curtailed; and there is provision for increase in insurance cover and for substitution of the name of the first beneficiary<sup>7</sup>.

The first beneficiary has the right to substitute his own invoices, and drafts<sup>8</sup> for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original unit prices if stipulated in the credit, and upon such substitution of invoices (and drafts) the first beneficiary can draw under the credit for the difference, if any, between his invoices and the second beneficiary's invoices<sup>9</sup>.

Provision is made for the first beneficiary of a transferable credit to request that the payment or negotiation be effected to a second beneficiary at the place to which the credit has been transferred up to and including the expiry date of the credit<sup>10</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(a), (b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(a), (b), (c). The two articles are similar in effect but the 2007 Revision has a number of clarifications and changes in definitions of transfer terms and has specific provisions about the duty of a transferring bank, the right to present the second beneficiary's documents and the place where the second beneficiary must present documents. See generally PARA 925 note 1.

For a case in which damages were awarded when the transferring bank sent a copy of the second beneficiary's invoice to a third party, instead of to the first beneficiary, leading to the third party ceasing to do business with the first beneficiary, see *Jackson v Royal Bank of Scotland* [2000] EWCA Civ 203, [2000] All ER (D) 881. See also *Struthers v Commercial Bank of Scotland* (1842) 4 D 460.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(c). There is also provision for the conditions under which amendments may be advised to the second beneficiary: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(d). Where a credit is transferred to more than one second beneficiary, there is provision for when there is refusal of an amendment by one or more second beneficiaries: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(f); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(e). See note 2.

4 *Bank Negara Indonesia 1946 v Lariza (Singapore) Pte Ltd* [1988] AC 583 at 599, PC.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(f). See note 2.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(g). A transferred credit cannot be transferred at the request of the second beneficiary to any subsequent third beneficiary. See note 2.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(g); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(h). See note 2.

8 As to the meaning of 'draft' see PARA 925 note 2.

9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(i); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(i). See note 2.

10 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38(h); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48(j). See note 2.

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### **936. Assignment of proceeds.**

The fact that a credit<sup>1</sup> is not stated to be transferable does not affect the beneficiary's right to assign any proceeds to which he may be or may become entitled under such credit, in accordance with the provisions of the applicable law<sup>2</sup>. This relates only to the assignment of proceeds and not to the assignment of the right to perform under the credit itself<sup>3</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 39; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 49. The two provisions are almost identical. See generally PARA 925 note 1. As to assignments of choses or things in action see **CHOSSES IN ACTION** vol 13 (2009) PARA 14 et seq.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 39; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 49. See note 2. Whether there can be a valid assignment of the right to present documents under a credit which is not stated to be transferable is undecided. The apparent intention (see also PARA 935) is that such an assignment should not be effective. This result could perhaps be reached either by reference to authorities in which the benefit of a personal contract has been held unassignable (see eg *Kemp v Baerselman* [1906] 2 KB 604, CA) or on the principle that parties may by agreement deprive an otherwise assignable chose or thing in action of the quality of assignability (see *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262).

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## **D. DOCUMENTS**

### **937. Documents to be stipulated precisely.**

It is to the obvious advantage of all parties to a documentary letter of credit that the documents to be presented should be stipulated with precision. All instructions for the issue of

credits<sup>1</sup> and the credits themselves and, where applicable, all instructions for amendments to credits and the amendments themselves, must, therefore, state precisely the document or documents against which payment, acceptance or negotiation is to be made<sup>2</sup>. Terms such as 'first class', 'well known', 'qualified', 'independent', 'official', 'competent' are not to be used to describe the issuer and any issuer except the beneficiary may issue the document<sup>3</sup>.

One original of each document is usually required and banks are to treat as original documents bearing an apparently original signature, mark, stamp or label unless there are indications that the document is not original<sup>4</sup>.

Unless otherwise indicated, banks will also accept as original documents any documents appearing to be written, typed, perforated or stamped by the document issuer's hand or appearing to be on the latter's original stationery or stating that it is original<sup>5</sup>.

Where copies of documents are required either originals or copies are permitted<sup>6</sup>. Credits that require multiple documents will be satisfied by the presentation of one original and the remaining number in copies except where indicated otherwise<sup>7</sup>.

A requirement that a document be legalised, visaed, certified or similar, will be satisfied by any signature, mark, stamp or label on the document appearing to satisfy the requirement<sup>8</sup>.

Documents may be dated prior to the issuance date of the credit but not later than its date of presentation<sup>9</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See PARA 930.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3 PARA 6; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(a). The 2007 Revision version is much simpler in language but appears to be of similar effect. See generally PARA 925 note 1.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 17(a), (b). There are no equivalent provisions in the 1993 Revision. See also note 5.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 17(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(b). The 1993 Revision version was rather different referring to documents produced by reprographic systems, or automated or computerised systems, as carbon copies, provided they are marked as original and, where necessary, appear to have been signed. These provisions address issues of originality (ie when original documents are required, what is an original, what is a copy and what is required when multiple copies are presented). The 2007 Revision version has some changes that reflect mistaken judicial interpretations of the 1993 Revision: see the ICC policy statement of July 1999. A document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol, or by any other mechanical or electronic method of authentication: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(b). See note 3. A signature is not a substitute for a marking as an original: *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135, CA. A document which is clearly the original, as it contains the relevant contract and is not itself a copy of some other document, is an original for the purposes of the rule: *Kredietbank Antwerp v Midland Bank plc; Karaganda Ltd v Midland Bank plc* [1999] 1 All ER (Comm) 801, CA, distinguishing *Glencore International AG v Bank of China* above. The position was codified by a policy statement issued by the ICC in July 1999, which was applied by the court in *Crédit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm), [2002] 2 All ER (Comm) 427.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 17(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(c)(i). The provisions are of similar effect although differently worded. See notes 3, 5.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 17(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(c)(ii). See notes 3, 5.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 20(d). See notes 3, 5.



9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(i); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 22. The 2007 Revision is rather simpler in language and forms part of a large new important provision (ie the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14) which represents a major reorganisation of many provisions from the 1993 Revision (eg the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 13, 14, 43, 21, 22, 30, 31) relating to general rules regarding compliance of documents.

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### 938. Doctrine of strict compliance.

The documents must conform strictly with the terms of the credit; and there is no room for documents which are almost the same or which will do just as well as those specified<sup>1</sup>. If, however, the documents conform with the terms of the credit, the banker is not concerned as to whether the documents for which the buyer has stipulated serve any useful commercial purpose or as to why the customer called for tender of a document of a particular description<sup>2</sup> or as to the legal effect of a document vis-à-vis the applicant<sup>3</sup>. It forms no part of the bank's function, when considering whether to pay against the documents presented to it, to speculate about the underlying facts<sup>4</sup>.

Where the credit calls for shipping documents, they must so conform to accustomed shipping documents as to be reasonably fit to pass current in commerce<sup>5</sup>. If, however, a bill of lading is merchantable in this sense, it is not a requirement, unless expressly so stipulated, that the bill must be in usual form<sup>6</sup>.

A tender of documents which, properly read and understood, call for further inquiry or are such as to invite litigation is clearly a bad tender<sup>7</sup>.

1 *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49 at 52 per Lord Sumner; applied in *Kydon Compania Naviera SA v National Westminster Bank Ltd, The Lena* [1981] 1 Lloyd's Rep 68 at 75; *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 729-730, [1983] 1 All ER 1137 at 1141, CA, per Sir John Donaldson MR. See also *Credit Agricole Indosuez v Generale Bank (Seco Steel Trading Inc) (No 2)* [1999] 2 All ER (Comm) 1016; *Credit Agricole Indosuez v Chaillease Finance Corp* [2000] 1 All ER (Comm) 399, CA. As to discrepancies in transport documents, insurance documents and commercial invoices see PARA 939 et seq.

2 *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279 at 286, [1972] 2 Lloyd's Rep 529, PC; *Kydon Compania Naviera SA v National Westminster Bank Ltd* [1981] 1 Lloyd's Rep 68 at 75.

3 *National Bank of Egypt v Hannevig's Bank* (1919) 1 Ll L Rep 69, CA; *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542, [1958] 1 All ER 264.

4 *Westpac Banking Corp and Commonwealth Steel Co Ltd v South Carolina National Bank* [1986] 1 Lloyd's Rep 311 at 315, PC.

5 *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 46, HL per Lord Sumner.

6 *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1979] 2 All ER 726 at 739-740, [1980] 1 WLR 495 at 510-511 per Donaldson J; affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA. As to bills of lading see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 313 et seq.

7 *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 46, HL; *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1979] 2 All ER 726 at 739-740, [1980] 1 WLR 495 at 510-511 per Donaldson J (affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA).

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### 939. Transport documents.

Unless a credit<sup>1</sup> calling for a transport document stipulates as such document a road, rail or inland waterway transport document, or a post receipt or certificate of posting<sup>2</sup>, then, unless otherwise stipulated in the credit, banks must accept a document of the type called for, however named, which appears to indicate the name of the carrier and to have been signed by the carrier or his agent or indicate receipt by signature or otherwise<sup>3</sup>; and indicates the place of shipment and the place of destination stipulated in the credit<sup>4</sup>. In the absence of any indication on the transport document as to the numbers issued, banks will accept the transport documents presented as constituting a full set<sup>5</sup>.

There are specific provisions accepting transshipment<sup>6</sup> even if the credit prohibits it<sup>7</sup>.

There are also provisions governing multimodal transport documents (which are transport documents covering at least two different modes of transport)<sup>8</sup>; and provisions relating to air transport documents<sup>9</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 A courier receipt however named must appear to indicate: (1) the name of the courier service and to have been stamped by that service at the place from which the credit states the goods are to be shipped; (2) a date of pick-up or of receipt or similar wording: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 25(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 29(b). See generally PARA 925 note 1.

3 The date of issue will be deemed to be the date of shipment unless the transport document contains a reception stamp, in which case the date of the reception stamp will be deemed to be the date of shipment: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 25(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 29(a). At common law the bills of lading must indicate that the goods have been 'shipped', not merely 'received for shipment': *Diamond Alkali Export Corp'n v Bourgeois* [1921] 3 KB 443; *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1; cf *Marlborough Hill (Ship) v Cowan & Sons* [1921] 1 AC 444. See also *Westpac Banking Corp'n v South Carolina National Bank* [1986] 1 Lloyd's Rep 311, PC.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 28(a).

5 see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 25(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 28(b). See note 3.

6 For this purpose, 'transshipment' means unloading and reloading from one means of conveyance to another, in different modes of transport, during the course of carriage from the place of shipment to the place of destination stipulated in the credit: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 28(c).

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 24(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 28(d). See note 3.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 19; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 26. The provisions are similar although the 2007 Revision version makes changes relating to providing the name of the master and transshipment.

9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 23; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 27. The provisions are similar but the 2007 Revision version changes the rule in regard to the date of issuance where the air waybill states an actual date of shipment.

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#### **940. Bills of lading, non-negotiable sea waybills and charter party bills of lading.**

If a credit<sup>1</sup> calls for a bill of lading or a non-negotiable sea waybill covering a port-to-port shipment, then such a document must appear to: (1) indicate the name of the carrier and to have been signed by or on behalf of the carrier or his named agent or the master or his named agent; (2) indicate that the goods have been loaded on board or shipped on a named vessel<sup>2</sup>; (3) indicate the port of loading and the port of discharge stated in the credit; (4) be the sole original bill of lading or non-negotiable sea waybill or the full set as so indicated; (5) contain all of the terms and conditions of carriage or if necessary refer to another source of documents; and (6) contain no indication that it is subject to a charter party<sup>3</sup>.

Unless transshipment<sup>4</sup> is prohibited by the terms of the credit, banks will accept a bill of lading or non-negotiable sea waybill which indicates that the goods will be transhipped, provided that the entire ocean carriage is covered by one and the same such document<sup>5</sup>. Transshipment may be permitted provided that the entire carriage is covered by one bill of lading or non-negotiable sea waybill, and even if the credit prohibits transshipment, a document will be acceptable if it indicates that transshipment will take place in containers, trailers or 'LASH' barges as evidenced by the document; clauses stating that the carrier reserves the right to tranship are to be disregarded<sup>6</sup>.

A charter party bill of lading must appear to: (a) be signed by or behalf of the master or his named agent, the owner or his named agent or the charterer or his named agent; (b) indicate that the goods have been loaded on board or shipped on a named vessel<sup>7</sup>; (c) indicate shipment from the port of loading and the port; (d) be the sole original bill of lading or the full set of such bills<sup>8</sup>. Banks will not examine such charter party contracts<sup>9</sup>.

It is essential that shipping documents so conform to accustomed shipping documents as to be reasonably and readily fit to pass current in commerce<sup>10</sup>. The documents must be in good merchantable order, so that, if the bank is not reimbursed, it has realisable documents from which it may reimburse itself<sup>11</sup>. The bill of lading must cover transit from the port of origin to the port of destination<sup>12</sup>. If the credit stipulates a particular time or date of shipment, the stipulation must be complied with<sup>13</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading or non-negotiable sea waybill or by onboard notation with the relevant date: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(a)(ii), 21(a)(ii); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 23(a)(ii), 24(a)(ii). The provisions are generally similar but there are new formulations of the rules in regard to signature and transshipment. See generally PARA 925 note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(a), 21(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 23(a), 24(a). See note 2.

4 'Transshipment' refers to unloading and reloading from one vessel to another vessel during the course of carriage from the port of loading to the port of discharge stipulated in the credit: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(b), 21(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 23(b), 24(b). There is a slight change in the wording: see note 2.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(c), 21(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 23(c), 24(c). See note 2.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 20(c), (d), 21(c), (d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) arts 23(b), 24(b). See note 2.

7 Loading on board or shipment on a named vessel may be indicated by pre-printed wording or onboard notation indicating the relevant date of shipment, and the date of issuance of the charter party bill of lading is deemed to be such date unless there is some contrary indication: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 22(a)(ii); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 25(a)(iv). See note 2.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 22(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 25(a). See note 2.

9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 22(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 25(b). See note 2.

10 *Hansson v Hamel & Horley Ltd* [1922] 2 AC 36 at 46, HL per Lord Sumner; *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, the Galatia* [1979] 2 All ER 726, [1980] 1 WLR 495 (affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA). A banker is not affected with knowledge of the custom and customary terms of particular trades: *Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37 at 41, [1942] 2 All ER 694 at 701, CA, per Mackinnon LJ.

11 *Skandinaviska Akt v Barclays Bank* (1925) 22 Ll L Rep 523 (bank held entitled to reject a bill of lading which did not contain the name of the shipper and which was indorsed in an illegible manner). As to the distinction between merchantable documents and usual documents see PARA 938.

12 *E Clemens Horst Co v Biddell Bros* [1912] AC 18, HL; *Landauer & Co v Craven and Speeding Bros* [1912] 2 KB 94; *Brazilian and Portuguese Bank Ltd v British and American Exchange Banking Corp Ltd* (1868) 18 LT 823; *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36, HL.

13 *Stein v Hambro's Bank of Northern Commerce* (1922) 10 Ll L Rep 529, CA; and see *Re General Trading Co and Van Stolk's Commissiehandel* (1911) 16 Com Cas 95; *Taylor & Sons Ltd v Bank of Athens* (1922) 91 LjKB 776. Unless called for by the credit, an acknowledgment that the provisions of a bill of lading have been met cannot be demanded: *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542, [1958] 1 All ER 264.

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#### **941. 'On deck', 'shipper's load and count', name of consignor.**

Banks will accept a transport document which contains a provision that the goods may be carried on deck, provided that it does not specifically state that they are or will be loaded on deck; bears a clause such as 'shipper's load and count' or 'said by shipper to contain'; or indicates as the consignor of the goods a party other than the beneficiary of the credit<sup>1</sup>.

<sup>1</sup> See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(k), 20(a), (b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 31. The provisions are similar but with the 2007 Revision they have been reorganised and their application extended to all transport documents rather than only to those involving carriage by sea. See generally PARA 925 note 1.

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#### **942. Freight.**

A transport document may have a reference whether by stamp or otherwise to charges additional to the freight<sup>1</sup>.

A transport document may be issued by any party other than a carrier, owner, master or charterer as long as the document meets other relevant requirements<sup>2</sup>.

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 26(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 33. The provisions are similar but the 2007 Revision version is much reduced in size and complexity. See generally PARA 925 note 1.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(l); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 30. The 2007 Revision version is much shorter and simpler and is part of the radically reorganised art 14 on examination of documents which collects together in one place many of the previous general rules on compliance of documents: see also PARA 937. The other requirements referred to are those in other articles: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 19-24. As to transport documents see PARA 939.

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#### **943. Clean transport documents.**

A bank will only accept a clean transport document which is one which bears no clause or notation expressly declaring a defective condition of the goods or packaging<sup>1</sup>. To render a bill of lading defective, the clause or notation must declare the defect to have existed at the time of shipment<sup>2</sup>.

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 27; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 33. 32(a). The provisions are very similar in effect although the 2007 Revision version is shorter and simpler and also states that it is unnecessary that the word 'clean' actually appear on the document for it to be 'clean on board'. See generally PARA 925 note 1. Where bills of lading bore clauses which 'so dealt with the condition of the meat or with what the ship said as to the condition of the meat for shipment as to seriously affect its price and its acceptability', the bills were not clean: *Westminster Bank Ltd v Banca Nazionale di Credito* (1928) 31 Ll L Rep 306 at 311 per Roche J. For a discussion as to the nature of a bill of lading (albeit not in a case involving a documentary credit) see *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] UKHL 11, [2005] AC 423, [2005] 1 All ER (Comm) 393.

2 *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1979] 2 All ER 726, [1980] 1 WLR 495; affd [1980] 1 All ER 501, [1980] 1 WLR 495, CA. See also *National Bank of Egypt v Hannevig's Bank* (1919) 1 Ll L Rep 69 at 70, CA, where Bankes LJ seemed to think that the position as to the acceptability of claused bills (ie bills bearing superimposed clauses) might depend upon the circumstances.

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#### 944. Insurance documents.

Insurance documents must appear to be issued and signed by insurance companies or underwriters, or their agents<sup>1</sup>. If there is more than one original, all the originals must be presented<sup>2</sup>. Cover notes issued by brokers will not be accepted<sup>3</sup>. Banks will accept an insurance policy in lieu of a certificate or a declaration under an open cover<sup>4</sup>.

Unless it is clear otherwise from the insurance document, the date of the document must be no later than the date of shipment<sup>5</sup>.

The amount of coverage must be indicated and be in the same currency as the credit<sup>6</sup>. There are reworded provisions on minimum cover<sup>7</sup>, including new provisions indicating that risks are covered at least between shipment and final destination<sup>8</sup>.

Credits must stipulate the type of insurance required and, if any, the additional risks which are to be covered<sup>9</sup>. An insurance document may indicate that the cover is subject to a franchise or an excess (deductible)<sup>10</sup>.

Where a credit stipulates insurance against 'all risks', banks must accept an insurance document which contains any 'all risks' notation or clause, whether or not under such a heading, without regard to any risk or risks being excluded<sup>11</sup>.

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(a). There are new provisions on signature in the 2007 Revision version and also on coverage, risks and exclusions. The 2007 Revision has a new amalgamated art 28 about what constitutes a complying insurance document but corresponds in general terms to arts 34-36 in the 1993 Revision version. See generally PARA 925 note 1. Where a credit called for an 'approved insurance policy', it was held that a certificate which failed to state the terms of insurance was deficient: *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1, CA. As to the sufficiency at common law of an open cover see *South African Reserve Bank v Samuel & Co Ltd* (1931) 40 Ll L Rep 291, CA. As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(b). See note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(c). See note 1.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(d). See note 1.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(e). See note 1.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(f)(i); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(f)(i). See note 1.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(f)(ii); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 34(f)(ii). See note 1. As to cif contracts see PARA 924.

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(f)(iii). See note 1.

9 If imprecise terms such as 'usual risks' or 'customary risks' are used, banks must accept insurance documents without responsibility for any risks not being covered: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(g); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 35(a). See note 1. Cf the position at common law as illustrated by *Borthwick v Bank of New Zealand* (1900) 17 TLR 2 (policy to pay 'total loss by total loss of vessel only' held inadequate in view of custom in meat trade to tender 'all risks' insurance).

10 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(j); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 35(c). See note 1.

11 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(h); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 36. See note 1.

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#### 945. Commercial invoices.

Commercial invoices must appear to be issued by the beneficiary named in the credit<sup>1</sup>, must be made out in the name of the applicant, must be in the same currency as the credit, and need not be signed<sup>2</sup>. In certain specified circumstances a nominated or confirming bank may accept a commercial invoice and its decision is binding upon all parties, provided that the bank has not honoured or negotiated for an amount in excess of that permitted by the credit<sup>3</sup>. The description of the goods, service or performance in the commercial invoice must correspond with the description in the credit; but, in other documents, the goods may be described in general terms not conflicting with the description in the credit<sup>4</sup>. The wording of the description in the invoice must follow the words of the credit, and this is so even where the beneficiary uses an expression which, although different from the words of the credit, has, as between buyer and seller, the same meaning as such words<sup>5</sup>. There is, however, a real distinction between an identification of goods and a description of goods. The latitude in relation to other documents extends only to description, and, however general the description, the identification must be unequivocal<sup>6</sup>. A distinction exists between words of description and words relating to the condition of the described goods<sup>7</sup>.

Linkage between documents is not, as such, necessary provided that each directly or indirectly refers unequivocally to the goods<sup>8</sup>.

1 An exception is made in relation to transferable credit: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 38; the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 48; and PARA 935. As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 18(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 37(a). The 2007 Revision version of the provision covering commercial invoices (see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(e), (j), art 18) is similar despite some considerable reorganisation and the new added requirement that the invoice be in the same currency as the credit. See also note 4. See generally PARA 925 note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 28(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 37(b). See note 3. As to the position at common law: see *Donald H Scott & Co Ltd v Barclays Bank Ltd* (1923) 28 Com Cas 253, CA, where it was suggested by Scrutton LJ at 263 that the tender is to be regarded as a request for collection so far as the excess is concerned.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(e), 18(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 37(c). Here there is a slight rewording with the 2007 Revision. See note 1. For an example see *Soproma SpA v Marine & Animal By-Products Corp* [1966] 1 Lloyd's Rep 367 at 389, decided under the similarly worded Uniform Customs and Practice for Documentary Credits (1962 Revision) art 33 (description of goods in bill of lading as 'Chilean Fishmeal' held sufficient under credit describing goods as 'Chilean Fish Full Meal'). See also *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135, CA; *Credit Agricole Indosuez v Chalease Finance Corp* [2000] 1 All ER (Comm) 399, CA; and the cases cited in notes 5-6.

5 *Kydon Compania Naviera SA v National Westminster Bank Ltd, The Lena* [1981] 1 Lloyd's Rep 68.

6 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 732, [1983] 1 All ER 1137 at 1142-1143, CA, where Sir John Donaldson MR observed that the Uniform Customs and Practice for Documentary Credits (1983 Revision) art 41(c) (see now the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 37(c); and the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(e), 18(c)) was less strict than the common law, which requires that the description in other documents must be consistent and *only* consistent with the commercial invoice and the credit. See *Re Reinhold & Co and Hansloh Arbitration* (1896) 12 TLR 422, DC (certificate of quality which failed to mention that bags were marked with an 'F' held defective where bill of lading did refer to bags so marked); *Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37, [1942] 2 All ER 694, CA (bill of lading covering 'machine-shelled ground-nut kernels' held defective under a credit calling for 'Coromandel ground nuts'); *Bank Melli Iran v Barclays Bank (Dominion, Colonial and Overseas)* [1951] 2 Lloyd's Rep 367 (certificate describing vehicles as 'in new condition' and 'new, good' held defective under credit calling for 'new' trucks); *Netherlands Trading Society v Wayne and Haylitt Co, Chan Soon Fat* (1952) 6 Legal Decisions Affecting Bankers 320, Hong Kong Sup Ct (bill of lading for '375 bales, gunny bags' held defective under credit calling for documents covering '375 bales, each containing 400 pieces New Indian Heavycee Bags . . .'). As to whether these cases would be decided in the same way under later revisions of the Uniform Customs and Practice for Documentary Credits see the observations of Sir John Donaldson MR in *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* above at 732 and 1142-1143 (in relation to the provisions in the Uniform Customs and Practice for Documentary Credits (1983 Revision)); and see also *Soproma SpA v Marine & Animal By-Products Corp'n* [1966] 1 Lloyd's Rep 367.

7 *Astro Exito Navegacion SA v Chase Manhattan Bank NA* [1986] 1 Lloyd's Rep 455 at 458; affd on appeal without affecting this point [1988] 2 Lloyd's Rep 217, CA.

8 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 732, [1983] 1 All ER 1137 at 1142-1143, CA, per Sir John Donaldson MR.

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#### 946. Other documents.

In the case of documents other than transport documents<sup>1</sup>, insurance documents<sup>2</sup> and commercial invoices<sup>3</sup>, to be acceptable the content of the credit<sup>4</sup> must appear to fulfil the document's function and not be in conflict with data in the document, any other document referred to or the credit itself<sup>5</sup>. In documents other than commercial invoices, goods, services or performance may be described in general terms not conflicting with the description in the credit<sup>6</sup>.

Previously if a credit called for an attestation or certification of weight in the case of transport other than by sea, banks had to accept a weight stamp or declaration of weight apparently superimposed on the transport document by the carrier or his agent unless the credit specifically stipulated that the attestation or certification of weight must be by means of a separate document<sup>7</sup>. A certificate by one expert is not sufficient where the credit calls for a certificate by 'experts'<sup>8</sup>. Where a credit calls for a certificate of inspection, the minimum requirement implicit in the ordinary meaning of the words is that the goods have been inspected, at any rate visually, by the person issuing the certificate. If it is intended that a particular method of inspection should be adopted or that particular information as to the result of the inspection should be recorded, this needs to be expressly stated<sup>9</sup>.

1 As to transport documents see PARA 939 et seq.

2 As to insurance documents see PARA 944.

3 As to commercial invoices see PARA 945.

4 As to the meaning of 'credit' see PARA 925 note 2.



5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(d), (f); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 21. There is considerable rewording and reorganisation with the 2007 Revision and the provisions are now part of the new article comprising the standard for examination of documents but the effect is similar: see also PARA 937. See generally PARA 925 note 1.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 37(c); and PARA 945.

7 See the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 38. There is no equivalent to art 38 in the 2007 Revision. See note 5.

8 *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL.

9 *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279 at 285, [1972] 2 Lloyd's Rep 529, PC.

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#### **947. Documents as security.**

The requirement of presentation of documents is for the protection of the banker or acceptor<sup>1</sup>. The bank looks to the documents as its security for any payment it may make; the delivery of the documents to the bank is an implied pledge<sup>2</sup>.

1 *Banner v Johnston* (1871) LR 5 HL 157; and see *Re Suse, ex p Dever* (1884) 13 QBD 766, CA.

2 *Banner v Johnston* (1871) LR 5 HL 157; *Rosenberg v International Banking Corpn and Far East Gerhard and Hey Co* (1923) 14 Ll L Rep 344 at 347 per Scrutton LJ; *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 at 68, HL. See also PARA 926.

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### **E. LIABILITIES AND RESPONSIBILITIES**

#### **948. Matters for which banks are not liable.**

Banks assume no liability or responsibility:

- 38 (1) for such matters as the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed on them, or for such matters as the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any documents, or for the good faith or acts and/or omissions, solvency, performance

- or standing of the consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person<sup>1</sup>;
- 39 (2) for the consequences arising out of such matters as delay, loss in transit, mutilation or other errors arising in the transmission of any telecommunication, or for various errors in translation or interpretation of technical terms, and reserve the right to transmit credit terms without translating them<sup>2</sup>;
- 40 (3) for the consequences arising out of the interruption of their business by acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control, or by any strikes or lockouts<sup>3</sup>.

Banks using the services of another bank or banks to give effect to the instructions of the applicant for the credit do so for the account and at the latter's risk<sup>4</sup>. Banks assume no liability or responsibility should the instructions they transmit not be carried out by another bank<sup>5</sup>. A party instructing another party to perform services is liable for any charges incurred by the instructed party in connection with its instructions<sup>6</sup>. The applicant for the credit is bound by, and liable to indemnify the bank against, all obligations and responsibilities imposed by foreign laws and usages<sup>7</sup>.

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 34; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 15. The provisions are very similar. See generally PARA 925 note 1.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 35; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 16. The provisions are similar but the 2007 Revision version qualifies the issuer's obligation where the method of transmission required by the credit is not followed and expands the provisions protecting beneficiaries and nominated banks when the documents are lost.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 36; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 17. The provisions are in similar terms.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 37; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 18(a). The provisions are in similar terms. See generally PARA 925 note 1.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 37(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 18(b). The provisions are in similar terms. See note 4.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 37(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 18(c). The provisions are in similar terms but in the 2007 Revision version there is also a warning added that a credit or amendment should not stipulate that the advising to a beneficiary is conditional upon the receipt by the advising bank or second advising bank of its charges. See note 4.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 37(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 18(d). The provisions are very similar. See note 4.

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#### **949. Issuing and paying banks.**

When a nominated bank (that is, the bank with which the credit<sup>1</sup> is available) decides that the presentation is in compliance and honours or negotiates, it must forward on the documents to the confirming bank (that is, the bank adding its confirmation to the credit) or the issuing bank (that is, the bank which issued the credit to start with)<sup>2</sup>.

If a credit states that reimbursement is to be obtained by a nominated bank (the 'claiming bank') claiming on another bank (the 'reimbursing bank'), the credit must state whether the reimbursement is subject to the rules on bank-to-bank reimbursements<sup>3</sup> in effect on the issuance date of the credit; and if the credit does not so state other rules apply<sup>4</sup>. An issuing bank is not relieved from any of its obligations to provide reimbursement itself if and when reimbursement is not made by the reimbursing bank<sup>5</sup>. The issuing bank is responsible to the claiming bank for any loss of interest in the event that reimbursement is not provided on first demand by the reimbursing bank in accordance with the credit<sup>6</sup>. Generally the reimbursing bank's charges are for the account of the issuing bank<sup>7</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 15(c). This is new but follows on from the corresponding provision in the 1993 Revision (see the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(a)) that the obligation of the issuer or confirming bank to reimburse a nominated bank is conditional on the complying documents being forwarded to the issuing bank or confirming bank. As to examination and rejection of documents see PARA 953. As to the obligation to reimburse see *Co-operative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank Ltd* [1987] 1 Lloyd's Rep 345 at 348; appeal allowed in part without affecting this point [1988] 2 Lloyd's Rep 250, CA.

3 I.e. the Rules for Bank-to-Bank Reimbursements issued by the International Chamber of Commerce: see generally PARA 925 note 1.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 13(a), (b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 19(a), (b). The 2007 Revision version has been modified and expanded to recognise the International Chamber of Commerce's Rules for Bank-to-Bank reimbursements (see note 3) although where there is no such reference to these rules the provisions are similar to those under the 1993 Revision. As to such other rules see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 13(b)(i)-(iv).

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 13(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 19(c).

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 13(b)(iii); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 19(d). See note 4.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 13(b)(iv); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 19(e). The provisions are similar and there are also similar terms where the charges are for the account of another party. See note 4.

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### **950. Credit stipulating state of fact but no document.**

Under the Uniform Customs and Practice for Documentary Credits, if a credit<sup>1</sup> contains conditions without stating the document or documents to be presented in compliance with the credit, banks deem such conditions as not stated and must disregard them<sup>2</sup>.

This differs from the position at common law, which is that where a credit stipulates a state of fact but fails to specify a document or documents to be presented, the paying bank has to be satisfied of that fact and is entitled to insist upon reasonable documentary proof to establish its existence<sup>3</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(h); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 13(c). See also PARA 953. The provisions are very similar and the 2007 Revision version is part of the new reorganised article on general rules regarding compliance of documents: see also PARA 937. See generally PARA 925 note 1.

3 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 728, [1983] 1 All ER 1137 at 1140, CA; *Astro Exito Navegacion SA v Chase Manhattan Bank NA* [1986] 1 Lloyd's Rep 455 at 462-463 (affd without affecting this point [1988] 2 Lloyd's Rep 217, CA).

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### 951. Ambiguity in the credit.

If the instructions given by the customer to the issuing bank as to documents to be tendered by the beneficiary are ambiguous or are capable of covering more than one kind of document, the bank is not in default if it acts upon a reasonable meaning of the ambiguous expression or accepts any kind of document which fairly falls within the wide description used<sup>1</sup>. The reason for this is that banks have to make quick decisions as to whether a document complies with the requirements of a credit at the risk of incurring liability to one or other of the parties to the transaction if the decision is wrong<sup>2</sup>. There are, however, limits to the operation of this principle, namely: (1) once a person enters into a contract, he is bound by its terms, which, in the event of dispute, will fall to be construed objectively; (2) a party relying on his own interpretation of the relevant instrument must have acted reasonably in all the circumstances in so doing, and, if the ambiguity is patent on the face of the document, it may well be right, especially with the facilities of modern communications, for an agent to have his instructions clarified by his principal, if time permits, before acting on them<sup>3</sup>.

1 *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147; approved in *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279 at 286, [1972] 2 Lloyd's Rep 529, PC. See also *Ireland v Livingston* (1872) LR 5 HL 395; *Miles v Haslehurst & Co* (1906) 23 TLR 142; *Samuel Montagu & Co v Banco de Portugal* (1924) 19 Ll L Rep 99, HL; *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL; *MA Sassoon & Sons Ltd v International Banking Corpn* [1927] AC 711, PC; *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 All ER (Comm) 172, [2000] 1 Lloyd's Rep 275, CA. The principle established by these cases is subject to the obligation of a bank which receives incomplete or unclear instructions to advise, confirm or amend a credit to request the issuing bank to provide the necessary information: see the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 12; and PARA 930, although there is no direct equivalent in the Uniform Customs and Practice for Documentary Credits (2007 Revision). See generally PARA 925 note 1.

2 *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 46, HL, per Lord Sumner; *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 279 at 286, [1972] 2 Lloyd's Rep 529, PC; *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 All ER (Comm) 172, [2000] 1 Lloyd's Rep 275, CA.

3 *European Asian Bank AG v Punjab & Sind Bank (No 2)* [1983] 2 All ER 508 at 517-518, [1983] 1 WLR 642 at 656, CA, per Robert Goff LJ.

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### **952. Documents to be examined with reasonable care.**

Banks must examine all documents referred to in the credit<sup>1</sup> with reasonable care to ascertain whether or not they appear to be in compliance with the terms and conditions of the credit<sup>2</sup>. Documents not required by the credit will be returned to the presenter<sup>3</sup>. Although data in the document when read with the document and international standard banking practice need not be identical it must not be in conflict with such data, the credit or any other documents referred to<sup>4</sup>. The duty is owed by the issuing bank to its customer and perhaps by a bank authorised to pay, accept or negotiate to the issuing bank; but the duty is not owed to the beneficiary<sup>5</sup>. If the documents do not appear on their face to be in accordance with the credit, the beneficiary is not entitled to be paid<sup>6</sup> and the paying bank is not entitled to be reimbursed if it does pay<sup>7</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 19(a), (b) art 13(a). See further PARA 953. The 2007 Revision version is similar (although it uses the phrase 'on the basis of the documents alone' while the 1993 Revision version uses the phrase 'on their face' in reference to the documents: but see also art 14(b); and PARA 953) and is part of the new reorganised article on general rules regarding compliance of documents: see also PARA 937. See generally PARA 925 note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(g); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 13(a). The 2007 Revision version is much simpler and also makes reference to the document being 'disregarded'. See note 2.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(d)); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 13(a). The 2007 Revision version is again much simpler but similar in effect. See note 2. See *Crédit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm) [2002] 2 All ER (Comm) 427. See also *Oliver v Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm), [2007] All ER (D) 135 (Sep).

5 *Kydon Compania Naviera SA v National Westminster Bank Ltd, The Lena* [1981] 1 Lloyd's Rep 68 at 78.

6 As to the terms of the undertakings constituted by the issue and confirmation of a credit see PARA 933.

7 As to the terms of the issuing bank's reimbursement obligation see PARA 930. See also *English, Scottish and Australian Bank Ltd v Bank of South Africa* (1922) 13 Ll L Rep 21 at 24 per Bailhache J; *Equitable Trust Co of New York v Dawson Partners Ltd* (1926) 27 Ll L Rep 49, HL; *Rayner & Co Ltd v Hambros Bank Ltd* [1943] KB 37, [1942] 2 All ER 694, CA.

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### **953. Examination and rejection of documents.**

The issuing bank, the confirming bank, if any, or a nominated bank, must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the credit<sup>1</sup>.

The issuing bank, the confirming bank, if any, or a nominated bank acting on its nomination, each have a certain time following the receipt of the documents, within which to determine compliance<sup>2</sup>. In the event of refusal to honour or negotiate the issuing bank, the confirming bank, if any, or a nominated bank acting on its nomination must give the relevant notice to that effect by telecommunication or, if that is not possible, by other expeditious means within a certain time<sup>3</sup>. The issuing bank or confirming bank, if any, is then entitled to claim from the remitting bank refund, with interest, of any reimbursement which may have been made to that bank<sup>4</sup>. The disposal notice is not required to use a precise form of words; it suffices that it is made clear that the documents are not being accepted<sup>5</sup>.

If the issuing bank or confirming bank fails to act in accordance with the provisions described above<sup>6</sup> then it is precluded from claiming that the documents are not in compliance<sup>7</sup>.

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(b). As to the meaning of 'credit' see PARA 925 note 2. The wording of the two provisions is different but the effect is similar. See also *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep 587; affd [1991] 2 Lloyd's Rep 443, CA. If the issuing bank determines that the documents are not in compliance, it may in its sole judgment approach the applicant for a waiver of the discrepancies: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(c). This does not extend the relevant period: see the text and note 2. See generally PARA 925 note 1.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 13(b). While the 1993 Revision version refers to 'a reasonable time not to exceed seven banking days' following receipt the 2007 Revision version provides instead for 'a maximum of five banking days following the day of presentation' which is not affected by any subsequent expiry date or last day for presentation. Although the bank has a reasonable time (ie under the 1993 Revision version), it must act promptly: see *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36 at 46, HL, per Lord Sumner; *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 730, [1983] 1 All ER 1137 at 1141, CA, per Sir John Donaldson MR; cf *Bank Melli Iran v Barclays (Dominion, Colonial and Overseas)* [1951] 2 Lloyd's Rep 367. As to what may amount to a reasonable time see *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep 587; affd [1991] 2 Lloyd's Rep 443, CA.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16(c), (d), (e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(d)(i), (ii). The 2007 Revision version refers to the notice needing to be received no later than the close of the fifth banking day following the day of presentation while the 1993 Revision version refers to such notice needing to be received without delay but no later than the close of the seventh banking day after receipt of the documents. In addition there has been considerable further modification with the 2007 Revision particularly in regard to what must be stated in the notice. Where a senior official of the beneficiary under whose aegis documents are presented is present at the bank to receive notice, a term has to be implied that notice can then and there be given in person rather than electronically: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36, CA. See also *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep 587; affd [1991] 2 Lloyd's Rep 443, CA; *Crédit Industriel et Commercial v China Merchants Bank* [2002] EWHC 973 (Comm) [2002] 2 All ER (Comm) 427.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16(g); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(d)(iii). The provisions appear to be similar in both wording and effect.

5 *Co-operative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank Ltd* [1988] 2 Lloyd's Rep 250, CA.

6 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14: see the text and notes 1-5; and PARA 949.

7 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16(f); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(e). The 2007 Revision version is simpler in wording. See also *Rafsanjan Pistachio Producers Co-operative v Bank Leumi (UK) plc* [1992] 1 Lloyd's Rep 513.

## UPDATE

## 953 Examination and rejection of documents

NOTE 3--See also *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] All ER (D) 189 (Jan).

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### 954. Estoppel, waiver and ratification.

The provisions relating to examination and rejection of documents<sup>1</sup> provide an estoppel against a bank which fails to act in accordance with them, and/or fails to hold the documents at the disposal of, or to return them to, the presenter. An estoppel may also arise between the beneficiary and the confirming or issuing bank<sup>2</sup>, or between a bank authorised to pay and the issuing bank<sup>3</sup>.

Under the Uniform Customs and Practice for Documentary Credits, a rejection notice must state all the discrepancies in respect of which the bank refuses the documents<sup>4</sup>. It follows that a bank cannot subsequently rely on a discrepancy which was not stated in its rejection notice. This differs from the position at common law, which is that the mere statement of a particular reason or reasons for rejecting documents is not alone enough to found a representation, waiver or promissory estoppel in relation to reasons not so stated<sup>5</sup>. A bank is entitled to rely upon a ground of rejection not relied upon at the time of rejection even where the ground actually relied upon is subsequently abandoned, although in such a case the bank lacks the practical support which it can derive from an actual rejection on the ground relied upon<sup>6</sup>.

Where a discrepancy is waived, the position appears to be just as if the document tendered had always conformed with the credit<sup>7</sup>.

Unreasonable delay by the issuing bank or the beneficiary may amount to ratification<sup>8</sup>.

1    I.e. the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(a), 15(c), 16; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14: see PARA 953. See generally PARA 925 note 1.

2    See eg *Floating Dock Ltd v Hong Kong and Shanghai Banking Corp*n [1986] 1 Lloyd's Rep 65 (estoppel as between beneficiary and issuing bank). As to estoppel generally see **ESTOPPEL**.

3    See eg *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508, [1983] 1 WLR 642, CA (issuing bank estopped from denying plaintiff's authority to negotiate the credit).

4    See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 16(c); the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(d)(ii); and PARA 953.

5    *Kydon Compania Naviera SA v National Westminster Bank Ltd, The Lena* [1981] 1 Lloyd's Rep 68 at 79; and see also *Skandinaviska Akt v Barclays Bank* (1925) 22 Ll L Rep 523.

6    See eg *Westpac Banking Corp*n and *Commonwealth Steel Co Ltd v South Carolina National Bank* [1986] 1 Lloyd's Rep 311 at 315, PC.

7    *Co-operative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank Ltd* [1987] 1 Lloyd's Rep 345 at 353; varied on appeal without affecting this point [1988] 2 Lloyd's Rep 250, CA. As to waiver generally see **CONTRACT** vol 9(1) (Reissue) PARA 1025 et seq.

8 *Orr & Barber v Union Bank of Scotland* (1854) 1 Macq 513, HL (SC); *Eigtved & Co v National Bank of Scotland* (1926) 25 Ll L Rep 99; *Westminster Bank Ltd v Banca Nazionale di Credito* (1928) 31 Ll L Rep 306; *Bank Melli Iran v Barclays Bank (Dominion, Colonial and Overseas)* [1951] 2 Lloyd's Rep 367. As to ratification generally see **AGENCY** vol 1 (2008) PARA 57 et seq.

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### **955. Forged documents.**

Banks assume no liability or responsibility for, inter alia, the accuracy, genuineness or falsification of any documents<sup>1</sup>. Accordingly, a bank is entitled to reimbursement where it pays against an inaccurate or forged document which appears on its face to be in accordance with the terms and conditions of the credit<sup>2</sup>. In the absence of fraud on the part of the beneficiary<sup>3</sup>, the obligation to take up apparently conforming documents exists even where at the time of presentation the documents are known by the beneficiary or the bank to be inaccurate or forged<sup>4</sup>. The beneficiary does not warrant to the paying bank the genuineness of third party documents tendered<sup>5</sup>. If a banker has given his acceptance to a draft, he is liable to a holder in due course notwithstanding the subsequent discovery of fraud<sup>6</sup>.

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 34; the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 15; and PARA 948. See generally PARA 925 note 1.

2 See *Woods v Thiedemann* (1862) 1 H & C 478; *Ulster Bank v Synott* (1871) IR 5 Eq 595; *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623; *Basse and Selve v Bank of Australia* (1904) 90 LT 618; *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 2 All ER 754, [1974] 1 WLR 1234, PC; *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL; *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 at 514, [1983] 1 WLR 642 at 652, CA. At common law, the buyer is entitled to reject a document which has obviously been altered: *Re Salomon & Co and Naudszus* (1899) 81 LT 325. Quaere whether the position is the same under the Uniform Customs and Practice for Documentary Credits.

3 Fraud on the part of the beneficiary is within the fraud exception: see PARA 958.

4 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL.

5 See *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623. It makes no difference that the third party fraud results in the document being a complete nullity: *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 3 All ER 697, [2002] 1 All ER (Comm) 257 at PARAS [58], [59] per Potter LJ.

6 *Robinson v Reynolds* (1841) 2 QB 196; *Thiedemann v Goldschmidt* (1859) 1 De GF & J 4.

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### **956. Payment under reserve or against indemnity.**



It commonly happens that documents tendered by the beneficiary are alleged by the confirming bank to contain discrepancies<sup>1</sup>. In such an event, a number of procedures are available: (1) the beneficiary may request the applicant to waive the discrepancies before the documents are remitted to the issuing bank; (2) the beneficiary may request an amendment to the credit; (3) the confirming bank may pay the beneficiary under reserve or against an indemnity in respect of specified discrepancies, whereupon the documents are forwarded to the issuing bank in the hope or expectation that they will be taken up<sup>2</sup>.

Payment under reserve creates a contract by which, in consideration for payment by the confirming bank, the beneficiary agrees to repay on demand in the event that the issuing bank rejects the documents in reliance upon some or all of the identified discrepancies<sup>3</sup>. Where payment is made against an indemnity, the indemnity will normally be contained in an undertaking by the beneficiary to be fully responsible for the discrepancies<sup>4</sup>.

If the remitting bank draws the attention of the issuing bank or the confirming bank, if any, to the discrepancies in the documents or advises such banks that it has paid, incurred a deferred payment undertaking, accepted drafts or negotiated under reserve or against an indemnity in respect of such discrepancies, the issuing bank or confirming bank is not thereby relieved from any of its obligations regarding the examination and rejection of documents<sup>5</sup>; such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained<sup>6</sup>. Where the issuing bank fails within a reasonable time to examine the documents and to determine whether to claim that payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit, the cause of any loss suffered by the confirming bank by way of financing costs in respect of such delay is the issuing bank's breach of its obligations, and such loss will generally not be recoverable under the beneficiary's indemnity in respect of discrepancies<sup>7</sup>.

Whether the confirming bank may demand payment in the event that the issuing bank rejects the documents in reliance upon discrepancies not identified by the confirming bank is undecided<sup>8</sup>.

1 In *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 733, [1983] 1 All ER 1137 at 1144, CA, it appeared from expert evidence at the trial that as many as two-thirds of presentations of documents against confirmed credits in London are thought to be discrepant.

2 It is important from the beneficiary's standpoint that the discrepancies be identified in order to prevent the repayment obligation being open-ended.

3 *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711, [1983] 1 All ER 1137, CA.

4 See eg *Co-operative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank Ltd* [1988] 2 Lloyd's Rep 250, CA.

5 See under the Uniform Customs and Practice for Documentary Credits (2007 Revision) arts 14(a), 15, 16; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(a)-(e): see PARA 953. See generally PARA 925 note 1.

6 Uniform Customs and Practice for Documentary Credits (1993 Revision) art 14(f). There is no equivalent to art 14(f) in the Uniform Customs and Practice for Documentary Credits (2007 Revision) although it seems that this omission would not affect any obligation to pay by the issuer or confirmer in regard to documents appearing to comply with the credit.

7 *Co-operative Centrale Raiffeisen-Boerenleenbank BA v Sumitomo Bank Ltd* [1988] 2 Lloyd's Rep 250, CA.

8 In *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] QB 711 at 734, [1983] 1 All ER 1137 at 1144, CA, where it was not necessary to decide the point, Kerr LJ inclined to the view that, to entitle the confirming bank to repayment, the issuing bank's grounds of rejection must include at least one of the grounds on which the confirming bank had relied.

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### **957. Acceptance and non-acceptance of the bill.**

On the bank's accepting the bill and the documents coming to its hands, it acquires a pledge and lien over and qualified property in the goods they represent<sup>1</sup>. What it does with the documents of title depends on its relation or arrangement with its customer (that is, the buyer) but, if it has to pay the acceptance, it may, if necessary, realise the goods; but it is advisable to apply to the customer for reimbursement and to give him notice of intention to sell if the application is not complied with<sup>2</sup>. In the absence of special agreement, the bank is not, however, entitled to sell before the due date in order to put itself in funds to meet the bill<sup>3</sup>. The statement on the face of a bill that it is drawn against specific cargo, goods, or credit, however minutely the same may be described, does not, without the documents of title, create any charge over or claim to the goods in favour of a holder in the event of the dishonour of the bill<sup>4</sup>. Nor would it appear that such a statement on the bill conveys to the acceptor any right over the goods apart from the documents of title<sup>5</sup>.

A bank which has accepted documentary bills is in no sense a trustee for the holder of the bills with respect to the goods or documents of title, and the bill holders have no right to question the bank's dealing with such goods or securities<sup>6</sup>.

If the issuing bank accepts the bill drawn by the seller or other beneficiary of the credit on the drawer's undertaking to forward bills of lading (which would be rare), the bank acquires an equitable claim to the bills of lading, valid against the customer's trustee in bankruptcy, but not against a third person who took them in good faith, and for value<sup>7</sup>.

If the bank does not accept a bill of exchange drawn under the credit, it has no right to retain any documents, and no property in the goods represented by them passes to him<sup>8</sup>.

1 See the Sale of Goods Act 1979 s 19; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 370, 373. He does not acquire absolute property in them, but a sufficient interest and right of disposition to constitute them sufficient security for his acceptance: see *Banner v Johnston* (1871) LR 5 HL 157; *Re Howe, ex p Brett* (1871) 6 Ch App 838; and contrast *The Odessa, The Wooston* [1916] 1 AC 145, PC, with *The Prinz Adalbert* [1917] AC 586, PC.

2 *Banner v Johnston* (1871) LR 5 HL 157.

3 *Banner v Johnston* (1871) LR 5 HL 157 is not an authority to the contrary.

4 *Inman v Clare* (1858) John 769; *Robey & Co's Perseverance Ironworks v Ollier* (1872) 7 Ch App 695; *Re Suse, ex p Dever* (1884) 13 QBD 766 at 777, CA, per Lindley LJ. Cf *Brown Shipley & Co v Kough* (1885) 29 ChD 848, CA.

5 See *Phelps Stokes & Co v Comber* (1885) 29 ChD 813 at 819, CA, per Cotton LJ.

6 *Banner v Johnston* (1871) LR 5 HL 157 at 168 per Lord Hatherley.

7 *Lutscher v Comptoir d'Escompte de Paris* (1876) 1 QBD 709.

8 See the Sale of Goods Act 1979 s 19(3); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 373. Cf *Cahn and Mayer v Pockett's Bristol Channel Steam Packet Co* [1899] 1 QB 643, CA.

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### 958. The fraud exception.

The obligation of the confirming bank to the seller under a confirmed credit to pay against documents which appear on their face to be in accordance with its terms and conditions is subject to one established exception, that is to say, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank<sup>1</sup> documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue<sup>2</sup>. The fraud must be that of the beneficiary<sup>3</sup>, but where it is, and the bank knows that the documents are forged or fraudulent, the bank is entitled to refuse payment if it finds out before payment, and to recover the money as paid under a mistake if it finds out after payment<sup>4</sup>. The principle also applies to performance bonds<sup>5</sup>.

The fraud must be clearly established, both as to the fact and as to the bank's knowledge, and it would not normally be sufficient that this rests upon the uncorroborated statement of the customer<sup>6</sup>. The court will generally expect the beneficiary to have been given an opportunity to answer the allegation of fraud and to have failed to provide any adequate answer in circumstances where one could be properly expected<sup>7</sup>. The bank's knowledge must be shown to exist prior to payment to the beneficiary<sup>8</sup>.

The exception for fraud on the part of the beneficiary is a clear application of the maxim *ex turpi causa non oritur actio* (fraud unravels all) and the courts will not allow their process to be used by a dishonest person to carry out a fraud<sup>9</sup>.

1 In principle, the exception must also apply where documents are fraudulently presented to the issuing bank.

2 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183, [1982] 2 All ER 720 at 725, HL, per Lord Diplock, approving the principle stated in *Sztejn v J Henry Schroder Banking Corp* 31 NYS 2d 631 (1941), New York Ct of Appeals. See also *KBC Bank v Industrial Steels (UK) Ltd* [2001] 1 All ER (Comm) 409.

3 As to the position where the fraud is not that of the beneficiary see PARA 955.

4 *Bank Russo-Iran v Gordon Woodroffe & Co Ltd* (1972) Times, 4 October; *Edward Owen (Engineering) Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *Etablissement Esefka International Anstalt v Central Bank of Nigeria* [1979] 1 Lloyd's Rep 445, CA; *Banco Santander SA v Bayfern Ltd* [2000] 1 All ER (Comm) 776, CA; *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 3 All ER 697, [2002] 1 All ER (Comm) 257.

5 *Edward Owen (Engineering) Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *Deutsche Rückversicherung v Walbrook Insurance Co Ltd* [1994] 4 All ER 181, [1995] 1 WLR 1017, DC (in an application for an injunction to restrain a reinsured from effecting payment under a letter of credit, it must be established that the reinsured would be acting fraudulently, in that it would be claiming payment to which it knew it had no entitlement). See also *SAFA v Banque du Caire* [2000] 2 All ER (Comm) 567, CA; *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 1059, [2001] 2 All ER (Comm) 217, [2001] 1 WLR 1800.

6 *Edward Owen (Engineering) Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 All ER 351n, [1984] 1 WLR 392n, CA (reported in full at [1984] 1 Lloyd's Rep 251); *Society of Lloyd's v Canadian Imperial Bank of Commerce* [1993] 2 Lloyd's Rep 579; *Deutsche Rückversicherung v Walbrook Insurance*; *Group Josi Reinsurance Co SA v Walbrook Insurance* [1994] 4 All ER 181, [1995] 1 WLR 1017, DC. Strong corroborative evidence is required to establish fraud and usually takes the form of contemporary documents: *Sunderland Association Football Club Ltd v Uruguay Montevideo FC* [2001] 2 All ER (Comm) 828.

7 *United Trading Corpn SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 561, CA, per Ackner LJ. Where fraud is relied on as a defence to an application for summary judgment in relation to obligations under a performance bond, the party must prove the defence has a real prospect of success: *Banque Saudi Fransi v Lear Siegler Services Inc* [2006] EWCA Civ 1130, [2007] 1 All ER (Comm) 67.

8 *United Trading Corpn SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 560, CA. See also the observations of Sir John Donaldson MR in *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 Lloyd's Rep 251 at 256.

9 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183, [1982] 2 All ER 720 at 725, HL, per Lord Diplock.

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### 959. Restraint of payment and drawing.

The court will ordinarily<sup>1</sup> not grant an injunction to restrain payment under a letter of credit or a performance bond. Where such an application is made, the court should ask itself whether there is any challenge to the validity of the letter or bond itself. If there is not or if the challenge is not substantial, *prima facie* no injunction should be granted and the bank should be left free to honour its contractual obligation, although restrictions may well be imposed upon the freedom of the beneficiary to deal with the money after he has received it. The wholly exceptional case where an injunction may be granted is where the fraud exception is made out<sup>2</sup>.

On an application for relief based upon the fraud exception, what has to be established is a good arguable case that the only realistic inference is fraud<sup>3</sup>. Even then the application may fail on the ground that the cause of action is tenuous<sup>4</sup> or that the balance of convenience weighs against the granting of an injunction<sup>5</sup>. An order made without notice restraining the beneficiary from drawing on the credit may be discharged on the application of the bank<sup>6</sup>.

The court will not recognise the order of a foreign court restraining payment under a letter of credit on the application of the buyer where the foreign court, applying a law which is not the proper law of the credit, has made a restraining order contrary to the principles described above<sup>7</sup>.

The Court of Appeal has granted an injunction to restrain beneficiaries from drawing on a demand guarantee<sup>8</sup>.

1 For a case in which payment on a demand guarantee was prohibited by legislation see *Shanning International Ltd v Lloyds TSB Bank plc* [2001] UKHL 31 [2001] 1 WLR 1462.

2 *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 All ER 351n, [1984] 1 WLR 392, CA; *Deutsche Ruckversicherung v Walbrook Insurance* [1994] 4 All ER 181, [1995] 1 WLR 1017, DC. See also *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890 (even where the fraud exception was alleged, there was a balance of convenience in the bank's favour in the absence of exceptional circumstances; *ex parte* injunction discharged). A dispute as to a party's entitlement to draw down the total amount guaranteed by the bond will not give rise to grounds for granting an injunction: *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* [2003] EWHC 762 (TCC), [2003] 1 All ER (Comm) 914. See also PARA 926. As to the fraud exception see PARA 958.

3 *United Trading Corpn SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 561, 565, CA.

4 See eg *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862.

5 See eg *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862; *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 at 165, CA; *United Trading Corp SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 565-566, CA; *Tukan Timber Ltd v Barclays Bank plc* [1987] 1 Lloyd's Rep 171 at 177; *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890

6 *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862; *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 at 165-166, CA.

7 *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA. As to the proper law of credits see PARA 966.

8 See *Themehelp Ltd v West* [1996] QB 84, [1995] 4 All ER 215, CA. This decision was, however, doubted in *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, [1999] 1 All ER (Comm) 890.

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## 960. Damages on breach of contract.

Where a banker is liable for breach of contract to pay under a credit, the measure of damages is in principle that which it could reasonably have been foreseen would flow<sup>1</sup> from the breach<sup>2</sup>. They are not simply the damages for non-payment of money<sup>3</sup>. However, special considerations, unless known to him or which he ought to have known, will not give rise to special damages for the damage which may flow from them<sup>4</sup>.

In principle, the beneficiary must take reasonable steps to mitigate his loss, but there are statements to the contrary<sup>5</sup>.

1 See on the basis of the decision in *Hadley v Baxendale* (1854) 9 Exch 341; cf *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, [1949] 1 All ER 997, CA. See **DAMAGES** vol 12(1) (Reissue) PARA 941 et seq.

2 *Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92; and see *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA (buyers' failure to procure letter of credit; buyers being aware that sellers could not obtain goods unless credit provided, sellers were entitled to damages representing loss of profit). As to the foreseeability of losses caused by fluctuations in foreign currency exchange rates see *Ozald Group (Export) Ltd v African Continental Bank Ltd* [1979] 2 Lloyd's Rep 231. See also note 4.

3 *Urquhart, Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318; *Belgian Grain and Produce Co Ltd v Cox & Co (France) Ltd* (1919) 1 Ll L Rep 256, CA; but see the judgment of Rowlatt J in *Stein v Hambros Bank of Northern Commerce* (1921) 9 Ll L Rep 507 (revsd without affecting this point (1922) 10 Ll L Rep 529, CA).

4 *Hammond & Co v Bussey* (1887) 20 QBD 79, CA; *British Columbia and Vancouver's Island Spar Lumber and Saw Mill Co Ltd v Nettleship* (1868) LR 3 CP 499; *Hydraulic Engineering Co v McHaffie, Goslette & Co* (1878) 4 QBD 670, CA; *Re R and H Hall Ltd and WH Pim Jnr & Co's Arbitration* (1928) 139 LT 50, HL; *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297, [1952] 1 All ER 970, CA.

5 See *Stein v Hambros Bank of Northern Commerce* (1921) 9 Ll L Rep 507 (revsd without affecting this point (1922) 10 Ll L Rep 529, CA); *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318. Since the amount payable under the credit is a contractual debt, there are very strong arguments to the effect that no duty to mitigate should arise.

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## **F. MISCELLANEOUS PROVISIONS**

### **961. Quantity and amount.**

Such words or expressions as 'about', 'approximately', 'circa' used in connection with the amount of the credit<sup>1</sup> or the quantity or the unit price stated in the credit are to be construed as allowing a difference not to exceed ten per cent more or ten per cent less than the relevant amount or quantity or unit price<sup>2</sup>.

A tolerance of five per cent more or five per cent less is permissible in the quantity of goods referred to, provided that the amount of the drawings does not exceed the amount of the credit and that this tolerance does not apply when the credit states the quantity in terms of a particular number of packing units or individual items<sup>3</sup>. Even when partial shipments are not permitted, a tolerance of five per cent less in the amount of the drawing is allowed, provided that if the credit states the quantity of the goods, such quantity of goods is shipped in full, and if the credit stipulates a unit price, such price is not reduced<sup>4</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 30(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 39(a). The provisions are in almost identical terms. See generally PARA 925 note 1. As to the position where the commercial invoice is for an amount in excess of the credit amount see PARA 945.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 30(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 39(b). The provisions are similar. See note 2. For examples of differences in specified amounts see *Moralice (London) Ltd v ED & F Man* [1954] 2 Lloyd's Rep 526; *Astro Exito Navegacion SA v Chase Manhattan Bank NA* [1986] 1 Lloyd's Rep 455 at 460-461 (affd on appeal without affecting this point [1988] 2 Lloyd's Rep 217, CA). See also *London and Foreign Trading Corp v British and Northern European Bank* (1921) 9 Ll L Rep 116 (bills of lading for 5,895 bags held defective under credit calling for documents covering 500 tons of metal).

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 30(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 39(c). The provisions are very similar. See note 2. This provision does not apply when certain expressions (see the text to notes 1-2) are used in the credit.

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### **962. Partial and instalment drawings and shipments.**

Partial drawings or shipments are permitted<sup>1</sup>.

Transport documents which appear to indicate that shipment has been made on the same means of conveyance and for the same journey, provided they indicate the same destination,

will not be regarded as covering partial shipments, even if the transport documents indicate different dates of shipment or different ports of loading, places of taking in charge, or despatch<sup>2</sup>.

Shipments made by post or by courier are not to be regarded as partial shipments if the relevant receipts, certificates or dispatch notes appear to have been stamped, signed by the same courier or postal service at the same place and date and for the same ultimate destination<sup>3</sup>.

If drawings or shipments by instalments within given periods are stated in the credit<sup>4</sup> and any instalment is not drawn or shipped within the period allowed, the credit ceases to be available for that and any subsequent instalments<sup>5</sup>.

1 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 31(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 40(a). The provisions are similar. See generally PARA 925 note 1.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 31(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 40(b). The provisions are similar although the 2007 Revision version adds further provisions indicating the date of shipment where there are multiple transport documents that are not partial shipments and clarifying what is included within a partial shipment.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 31(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 40(c). The provisions are similar.

4 As to the meaning of 'credit' see PARA 925 note 2.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 32; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 41. The provisions are very similar. As to dating and date terms see PARA 965.

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### **963. Expiry date and place for presentation of documents.**

All credits<sup>1</sup> must state an expiry date (and an expiry date stated for honour or negotiation is deemed an expiry date for presentation) and a place for presentation of documents<sup>2</sup>; and, except as provided below<sup>3</sup>, documents must be presented on or before such expiry date<sup>4</sup>. If an issuing bank states that the credit is to be available 'for one month', or for other such set periods, but does not specify the date from which the time is to run, the date of issue of the credit by the issuing bank is deemed to be the first day from which such time is to run<sup>5</sup>.

It frequently happens that the validity of a credit is extended by consent of all parties; and such consent may be implied from the tender and acceptance of documents after the expiry date<sup>6</sup>.

In addition to stipulating an expiry date for presentation of documents, every credit which calls for transport documents must also stipulate a specified period of time after the date of shipment<sup>7</sup> during which presentation must be made in compliance with the terms and conditions of the credit. If no such period of time is stipulated, banks must refuse documents presented to them later than 21 days after the date of shipment. In every case, however, documents must be presented not later than the expiry date of the credit<sup>8</sup>.

If the expiry date of the credit or the last day for presentation falls on a day on which the bank to which presentation has to be made is closed for reasons other than those of force majeure<sup>9</sup>, the expiry date or the last day for presentation of documents, as the case may be, is extended to the first following banking day<sup>10</sup>. The bank to which presentation is made on such first following business day must provide a statement that the documents were presented within the time limits extended in accordance with the above provisions<sup>11</sup>.

Banks are under no obligation to accept presentation of documents outside banking hours<sup>12</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 6(d); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 42(a). As to dating and date terms see PARA 965. The provisions are similar although the 2007 Revision version is expanded to restate a fundamental principle that a beneficiary can always make presentation to the issuer at the place where it issued the credit. See generally PARA 925 note 1.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 29(a); the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 44(a); and the text to notes 9-10.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 6(e); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 42(b). The provisions are similar. Where a letter of credit provides for documents 'to be accepted as presented', the time condition for presentation must still be complied with: *Credit Agricole Indosuez v Credit Suisse First Boston (Zurich)* [2001] 1 All ER (Comm) 1088.

5 Uniform Customs and Practice for Documentary Credits (1993 Revision) art 42(c). This way of indicating an expiry date was specifically discouraged in the 1993 Revision version and there appears to be no equivalent to art 42(c) in the Uniform Customs and Practice for Documentary Credits (2007 Revision).

6 *Co-operative Centrale Raiffesisen-Boerenleen Bank BA v Sumitomo Bank Ltd* [1988] 2 Lloyd's Rep 250, CA.

7 In cases in which the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 40(b) applies (see PARA 962), the date of shipment will be considered to be the latest shipment date on any of the transport documents presented: art 43(b). As to the meaning of 'shipment' see PARA 964. There appears to be no equivalent to art 43(b) in the Uniform Customs and Practice for Documentary Credits (2007 Revision).

8 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 43(a). The provisions are in similar terms on this point but see note 7.

9 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 36; the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 17; and PARA 948.

10 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 29(a); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 44(a). The latest date for shipment is not extended as a result: see the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 29(c); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 44(b). These provisions are broadly similar.

11 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 29(b); and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 44(c). The provisions appear to be broadly similar in effect although they are differently worded. The provisions referred to in the text are those of the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 29(a) or the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 44(a): see the text to notes 9-10. As to the effect of failure to provide the required statement see *Bayerische Vereinsbank Aktiengesellschaft AG v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59.

12 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 33; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 45.



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#### **964. Shipment.**

Unless otherwise stipulated in the credit<sup>1</sup>, the expression 'shipment' used in stipulating an earliest or a latest shipment date is to be understood to include such expressions as 'loading on board', 'dispatch', 'accepted for carriage', 'date of post receipt', 'date of pick-up', and, in the case of a credit calling for a multimodal transport document, to include the expression 'taking in charge'<sup>2</sup>. The use of such expressions as 'prompt', 'immediately', 'as soon as possible' should not be used; and if used will be disregarded<sup>3</sup>. If such expressions as 'on or about' are used, they are interpreted as a stipulation that an event is to take place during the period from five days before to five days after the specified date, both such dates to be included<sup>4</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 Uniform Customs and Practice for Documentary Credits (1993 Revision) art 46(a). There does not seem to be an equivalent to art 46(a) in the Uniform Customs and Practice for Documentary Credits (2007 Revision).

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 46(b). The provisions appear to be broadly similar.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 46(c). The provisions appear to be broadly similar.

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#### **965. Dating and date terms.**

A document may be dated before the issuance date of the credit<sup>1</sup>, but not later than its date of presentation<sup>2</sup>.

Such words as 'to', 'until', 'till', 'from' referring to a period of shipment include the date mentioned; and the words 'before' and 'after' exclude such date<sup>3</sup>.

The terms 'first half' and 'second half' of a month are construed respectively as the first to the fifteenth, and the sixteenth to the last day of such month, inclusive<sup>4</sup>. The terms 'beginning', 'middle' or 'end' of a month are construed respectively as from the first to the tenth, the eleventh to the twentieth and the twenty-first to the last day of such month, inclusive<sup>5</sup>.

1 As to the meaning of 'credit' see PARA 925 note 2.

2 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 14(i); the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 22; and PARA 937. As to time limits see PARA 963.

3 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 47(a), (b). These interpretation provisions are very similar. See generally PARA 925 note 1.

4 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 47(c). See note 3.

5 See the Uniform Customs and Practice for Documentary Credits (2007 Revision) art 3; and the Uniform Customs and Practice for Documentary Credits (1993 Revision) art 47(d). See note 3.

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## **966. Proper law.**

Where a letter of credit contains no express provision as to its proper law, the law applicable is the law with which the transaction has its closest and most real connection<sup>1</sup>. This will ordinarily be the law of the territory in which the seller's draft is to be presented to the banker for acceptance or payment<sup>2</sup>. A debt under a letter of credit is situated in the place where it is in fact payable against documents<sup>3</sup>.

1 *Offshore International SA v Banco Central SA* [1976] 3 All ER 749, [1977] 1 WLR 399; approved in *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA. See further **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 410.

2 *Offshore International SA v Banco Central SA* [1976] 3 All ER 749, [1977] 1 WLR 399; *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA.

3 *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233, CA.

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## **(xii) Lending and Security**

### **967. Lending by way of overdraft.**

A customer may borrow from a bank by way of a loan or by way of overdraft. A loan is a matter of special agreement. In the absence of agreement, express or implied from a course of business, a bank is not bound to allow his customer to overdraw<sup>1</sup>. An agreement for an overdraft must be supported by good consideration<sup>2</sup>, and it may be express or implied<sup>3</sup>.

Drawing a cheque or accepting a bill payable at a bank where there are not funds sufficient to meet it amounts to a request for an overdraft<sup>4</sup>.

1 *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857 at 864, HL, per Lord Blackburn; *Cumming v Shand* (1860) 5 H & N 95 (course of business entitling to overdraw). Circumstances may justify a bank in withdrawing the right to overdraw: *Parkinson v Wakefield & Co* (1889) 5 TLR 646, CA (security disturbed by customer). In practice, it would be difficult to establish an implied agreement because the modern practice is to record in an overdraft facility letter the terms on which an overdraft is granted.

2 *Fleming v Bank of New Zealand* [1900] AC 577, PC. An implied contract to pay interest would be sufficient consideration.

3 *Armfield v London and Westminster Bank* (1883) Cab & El 170; *Ritchie v Clydesdale Bank* (1886) 13 R 866 Ct of Sess. It is not inconsistent for a lender to grant a facility which both it and the borrower envisage will last for some time, but with the caveat that the lender retains the right to call for repayment at any time on demand: *Lloyds Bank plc v Lampert* [1999] 1 All ER (Comm) 161, CA. See also *Bank of Ireland v AMCD (Property Holdings) Ltd* [2001] 2 All ER (Comm) 894.

4 *Cuthbert v Roberts, Lubbock & Co* [1909] 2 Ch 226, CA; *Eaton v Bell* (1821) 5 B & Ald 34; *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857, HL. See also *Royal Bank of Scotland plc v Fielding* [2003] EWHC 986 (Ch), [2003] All ER (D) 36 (May) (affd sub nom *Fielding v Royal Bank of Scotland* [2004] EWCA Civ 64, [2004] All ER (D) 183 (Feb)), where the bank was entitled to advance a loan which exceeded the authorised overdraft limit; and note that *London Chartered Bank of Australia v McMillan* [1892] AC 292, PC, is distinguishable, as the overdraft arose from the unauthorised act of an agent, and the circumstances should have put the bank on inquiry. As to the power to borrow see eg **COMPANIES** vol 15 (2009) PARA 1256 et seq; **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1238; **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 594 et seq; **MORTGAGE** vol 77 (2010) PARAS 182, 183; **PARTNERSHIP** vol 79 (2008) PARA 51. As to a minor's power to borrow see PARA 820.

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## 968. Interest.

By the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts<sup>1</sup>. An unusual rate of interest can be justified, in the absence of express agreement, only where the customer is shown or must be taken to have agreed to the account being kept on that basis<sup>2</sup>. A customer who requests an overdraft impliedly consents to pay the bank's usual overdraft rate of interest<sup>3</sup>.

An implied term entitling a bank to charge interest is not restricted to accounts which are current for mutual transactions, nor is it terminated by a bank's demand for repayment, the commencement of legal proceedings, or the closing of the account<sup>4</sup>.

The taking of a mortgage to secure a fluctuating balance of an overdrawn account, is not, however, inconsistent with the relation of banker and customer, so as to displace a previously accrued right to charge compound interest<sup>5</sup>.

It is the practice of bankers to debit accrued interest to the borrower's current account at regular periods; where the current account is overdrawn or becomes overdrawn as the result of the debit, the effect is to add the interest to the principal, in which case it loses its quality of interest and becomes capital<sup>6</sup>.

1 *National Bank of Greece v Pinios Shipping Co* [1990] 1 AC 637 at 679, [1990] 1 All ER 78 at 85, HL, per Lord Goff of Chieveley, approving the decision, but not the reasoning, in *Crosskill v Bower, Bower v Turner* (1863) 32 LJ Ch 540; *Gwyn v Godby* (1812) 4 Taunt 346, Ex Ch. A banker was held not to be entitled to interest and bank charges in respect of an overdraft where the money had been applied for the maintenance of a person of unsound mind and his family in *Re Beavan, Davies Banks & Co v Beavan* [1912] 1 Ch 196. See PARA 821. See also *Lloyds Bank plc v Voller* [2000] 2 All ER (Comm) 978, CA. As to the distinction between computing and compounding interest see *Kitchen v HSBC Bank plc* [2000] 1 All ER (Comm) 787, CA. A default rate of interest, ie one which operates after a borrower is in default, is often charged by a bank: see eg *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752, [1996] 3 All ER 156. See also PARA 969.

2 *Fergusson v Fyffe* (1841) 8 Cl & Fin 121; *Spencer v Wakefield* (1887) 4 TLR 194; *London Chartered Bank of Australia v White* (1879) 4 App Cas 413, PC.

3 *Lloyds Bank plc v Voller* [2000] 2 All ER (Comm) 978, CA. See also *Emerald Meats (London) Ltd v AIB Group plc* [2002] EWCA Civ 460, [2002] All ER (D) 43 (Apr) where a term was implied into the contract between bank

and customer allowing the bank to credit interest to the customer, on funds received by it as collecting bank, in accordance with its own standard practices.

4 *National Bank of Greece v Pinios Shipping Co* [1990] 1 AC 637, [1990] 1 All ER 78, HL.

5 *National Bank of Australasia v United Hand in Hand and Band of Hope Co* (1879) 4 App Cas 391 at 409, PC.

6 *National Bank of Greece v Pinios Shipping Co* [1990] 1 AC 637 at 683-684, [1990] 1 All ER 78 at 88-89, HL, per Lord Goff of Chieveley; *Lloyds Bank plc v Voller* [2000] 2 All ER (Comm) 978, CA. See also *IRC v Holder* [1931] 2 KB 81, CA; affd without deciding this point sub nom *Holder v IRC* [1932] AC 624, HL. This decision as to constructive payment applies only as between banker and customer: *Paton v IRC* [1938] AC 341, [1938] 1 All ER 786, HL (where it was also held that, when the interest charge is added to the existing indebtedness, the interest is not paid). See also *Imperial Life Assurance Co of Canada v Efficient Distributors Ltd* [1992] 2 AC 85, [1992] 2 WLR 503, PC. The compounding of interest on overdrawn accounts was held to be legitimate in *Yourell v Hibernian Bank Ltd* [1918] AC 372, 87 LJPC 1, 117 LT 729, HL.

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### 969. Charges, commissions and costs.

The right of a banker to charges and commissions would seem, in the absence of an express agreement by the customer to pay them, to depend on the universal custom of bankers, as in the case of his right to charge interest on overdrafts<sup>1</sup>. It is doubtful whether the right can be based on acquiescence in the charges and commissions as disclosed in the bank statement, in view of the doubts cast on the existence of any obligation on the part of the customer to examine his bank statement<sup>2</sup>.

It is common for a bank's security documentation to contain an express provision for the payment of all costs, charges and expenses incurred by the bank in enforcing or obtaining payment of sums due to it. Such a provision does not oust the court's discretion as to costs, but, in exercising that discretion, the court starts from the position that the parties have contracted for payment of the bank's costs on an indemnity basis<sup>3</sup>.

Bank charges which were allegedly excessive were challenged by the Office of Fair Trading<sup>4</sup> in early 2008. Where a charge is made following a default, the charge may be unenforceable as a penalty unless it is a reasonable pre-estimate of the bank's likely loss as a result of the increased credit risk<sup>5</sup>.

1 See PARA 968.

2 See PARA 874. Furthermore, in *National Bank of Greece v Pinios Shipping Co* [1990] 1 AC 637 at 675, [1990] 1 All ER 78 at 82, HL, per Lord Goff of Chieveley, it was noted that resort to supposed acquiescence in the context of a bank's right to interest was an agreeable fiction whose only function had been to circumvent the usury laws, and that once the usury laws were repealed in 1854, there was no sensible basis on which the fiction should have been allowed to survive.

3 *Bank of Baroda v Panessar* [1987] Ch 335 at 355-357, [1986] 3 All ER 751 at 765-766 per Walton J.

4 As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq.

5 See eg *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752, [1996] 3 All ER 156.

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### 970. Relation between bank and party giving security.

Banks must be on inquiry as to whether a third party giving security has been improperly influenced whenever there is a non-commercial relationship between the bank's customer and the third party<sup>1</sup>. The principle rarely, if ever, applies in a commercial relationship as those engaged in business can be regarded as capable of looking after themselves and understanding the risks involved in the giving of security<sup>2</sup>.

A bank is always on inquiry when a wife provides security for her husband's debts or vice versa, or where the bank is aware of a relationship between the parties, either heterosexual or homosexual<sup>3</sup>. The bank must also be on inquiry where a person in such a relationship becomes surety for the debts of a company in which the other person has an interest, even if the person providing security is a shareholder, director or secretary of the company<sup>4</sup>. Once a bank has been put on inquiry it must take steps to bring home to the wife or other third party the risk she is running by standing as surety and advise her or him to take independent advice<sup>5</sup>. A bank can rely on confirmation from a solicitor acting for the wife or other third party that he has advised her or him appropriately<sup>6</sup>. Where a bank is relying on confirmation from a solicitor that it has advised a third party as to risk the bank is entitled to proceed on the assumption that the solicitor has done his job properly unless the bank knows that this is not the case<sup>7</sup>.

On the general law of agency, a bank which instructs an agent to obtain security for it is liable for any fraudulent misrepresentation made by the agent in achieving that end, including any continuing misrepresentation made earlier and not corrected<sup>8</sup> and also, presumably, any innocent misrepresentation.

1 As to the equitable doctrine of undue influence see **CONTRACT** vol 9(1) (Reissue) PARAS 712-716; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 839-853. The doctrine has been defined as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract: see **CONTRACT** vol 9(1) (Reissue) PARA 712. Where a person's consent is procured by undue influence the person is not bound by the agreement: see **CONTRACT** vol 9(1) (Reissue) PARA 715.

2 See *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [88], [2002] 2 AC 773 at [88], [2001] 4 All ER 449 at [88] per Lord Nicholls of Birkenhead.

3 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [44]-[48], [2002] 2 AC 773 at [44]-[48], [2001] 4 All ER 449 at [44]-[48] per Lord Nicholls of Birkenhead.

4 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [49], [2002] 2 AC 773 at [49], [2001] 4 All ER 449 at [49] per Lord Nicholls of Birkenhead.

5 *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [50], [2002] 2 AC 773 at [50], [2001] 4 All ER 449 at [50] per Lord Nicholls of Birkenhead, explaining *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL.

6 See *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [78], [2002] 2 AC 773 at [78], [2001] 4 All ER 449 at [78] per Lord Nicholls of Birkenhead, where at [79] he sets out the following conclusions: (1) the bank should check directly with the wife the name of the solicitor she wishes to act for her and inform her that it requires written confirmation from the solicitor that he has fully explained to her the nature of the documents and their implications and that she will then not be able to dispute that she is legally bound by the documents; (2) if the bank is not willing to explain the financial situation to the wife, it must provide her solicitor with the financial information he requires to do so and the consent of the husband must be obtained for this purpose or the transaction cannot proceed; (3) if the bank believes or suspects that the wife is being misled or is not acting of her own free will it must inform the wife's solicitors; (4) the bank must obtain a written confirmation from the solicitor that he has given the required explanations and advice.

7 See *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44 at [78], [2002] 2 AC 773 at [78], [2001] 4 All ER 449 at [78] per Lord Nicholls of Birkenhead. The solicitor is not the bank's agent for this purpose: *Royal Bank of Scotland plc v Etridge (No 2)* above at [77] per Lord Nicholls of Birkenhead.

8 *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423 at 427, [1986] 1 WLR 119 at 123, CA, per Dillon LJ. See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 754.

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### 971. Effect of mortgage.

The position of a banker taking a mortgage does not differ from that of any other mortgagee<sup>1</sup>. The taking of a legal mortgage for a definite amount may terminate the relationship of banker and customer as to that amount<sup>2</sup>. Where, however, a mortgage is taken to secure a floating balance, the relation of banker and customer still continues<sup>3</sup>. In taking security over a fund in court or subject to litigation, bankers are deemed to have notice, if they know a claim is pending, of the possible rights of solicitors to charging orders on, for example, the claimant's interest; and, if a charging order is made, it will ordinarily have priority to the bank's charge<sup>4</sup>.

The merger of a simple contract debt into a specialty debt depends on the intention of the parties, to be gathered from the documents they have signed. Where a person owes an existing simple contract debt and gives security for it and a charge on his property, then the simple contract debt is merged in the specialty unless there is express provision to the contrary. When, however, security is given for payment of amounts due, or to become due, on a running account, the doctrine of merger, if it applies at all, would at most apply only to the indebtedness which existed at the date when the security was taken and the charge given<sup>5</sup>.

Where a bank chooses to advise a customer as to the nature and effect of a mortgage in its favour prior to the customer executing the mortgage, the bank owes a contractual duty to exercise reasonable skill and care in so doing<sup>6</sup>.

1 As to legal mortgages (including charges by way of legal mortgage), equitable mortgages (including deposit of deeds), and the subject matter of mortgages and charges, see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

2 See eg *Fergusson v Fyffe* (1841) 8 Cl & Fin 121; *Williamson v Williamson* (1869) LR 7 Eq 542; *London Chartered Bank of Australia v White* (1879) 4 App Cas 413, PC.

3 See PARA 968.

4 *Wimbourne v Fine* [1952] Ch 869 at 878, [1952] 2 All ER 681 at 687 per Harman J. As to solicitors' charging orders on property recovered or preserved in litigation see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1011 et seq.

5 *Barclays Bank Ltd v Beck* [1952] 2 QB 47 at 53, [1952] 1 All ER 549 at 552, CA, per Denning LJ.

6 See eg *Cornish v Midland Bank plc* [1985] 3 All ER 513, CA.

The requirements of the Financial Services and Markets Act 2000 must now be complied with in relation to the provision of financial services: see PARA 792.

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### **972. Further advances secured on unregistered land.**

A banker holding a mortgage, whether or not made expressly for securing advances, may make further advances to rank in priority to subsequent mortgages, whether legal or equitable: (1) if an arrangement has been made to that effect with subsequent mortgagees<sup>1</sup>; (2) if he has had no notice<sup>2</sup> of such subsequent mortgages at the time when the further advance was made by him<sup>3</sup>; or (3) whether he has had such notice or not, where the mortgage imposes on the banker an obligation to make such further advances<sup>4</sup>. In the case of a mortgage made expressly for securing a current account or further advances, the banker is, in relation to the making of further advances, not deemed to have notice of a mortgage merely by reason that it was registered as a land charge if it was not so registered at the time when the original mortgage was created or when the last search, if any, by or on behalf of the banker was made, whichever last happened<sup>5</sup>. Subject to this, subsequent advances will be postponed to the later mortgage of which the banker has notice<sup>6</sup>. Specific performance will not be decreed of an agreement to make a loan<sup>7</sup>.

1 Law of Property Act 1925 s 94(1)(a).

2 As to what amounts to notice see **LAND CHARGES** vol 26 (2004 Reissue) PARA 616; **MORTGAGE** vol 77 (2010) PARA 210.

3 Law of Property Act 1925 s 94(1)(b); *Hopkinson v Rolt* (1861) 9 HL Cas 514; *Union Bank of Scotland v National Bank of Scotland* (1886) 12 App Cas 53, HL.

4 Law of Property Act 1925 s 94(1)(c).

5 Law of Property Act 1925 s 94(2) (amended by the Law of Property (Amendment) Act 1926 Schedule; and the Law of Property Act 1969 Sch 2 Pt 1).

6 See *Deeley v Lloyds Bank Ltd* [1912] AC 756. These provisions apply to mortgages created before or after 1925, but do not apply to charges on registered land: Law of Property Act 1925 s 94(4) (amended by the Land Registration Act 2002 Sch 11 para 2(1), (9)). As to charges on registered land see PARA 973.

7 *South African Territories v Wallington* [1898] AC 309, HL; *Kuala Pahi Rubber Estates Ltd v Mowbray* (1914) 111 LT 1072, CA; *Larios v Bonany y Gurety* (1873) LR 5 PC 346. See **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 834.

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### **973. Further advances secured on registered land.**

As regards registered land, registered charges on the same registered estate, or on the same registered charge, are to be taken to rank as between themselves in the order shown in the register and not according to the order in which they are created<sup>1</sup>. A banker may make a further advance on the security of the charge ranking in priority to a subsequent charge if: (1) he has not received from the subsequent chargee notice of the creation of the subsequent charge; (2) the advance is made in pursuance of an obligation and at the time of the creation of the subsequent charge the obligation was entered in the register; and (3) the parties to the

prior charge have agreed a maximum amount for which the charge is security and at the time of the creation of the subsequent charge the agreement was entered in the register<sup>2</sup>.

1 See the Land Registration Act 2002 s 48; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 944. In the case of the creation of a charge, the chargee, or his successor in title, must be entered in the register as the proprietor of the charge: see s 27, Sch 2; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 911 et seq.

2 See the Land Registration Act 2002 s 49; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 948.

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#### **974. Change of parties.**

A security may cease to be effectual as cover for future advances by reason of a change in the personality of the borrower, such as a change in the constitution of a firm<sup>1</sup>.

1 *Royal Bank of Scotland v Christie* (1840) 8 Cl & Fin 214; *Re Laurence, ex p M'Kenna, City Bank Case* (1861) 3 De GF & J 629 (where a person deposited title deeds for advances to be made to him, and it was held that the security did not cover advances made to him and others whom he took into partnership). If securities are deposited with a partnership or other unincorporated association for advances made by it, any change in the constitution of that organisation, such as the retirement of one partner and admission of another, would render the securities ineffective as cover for future advances: *Ex p Kensington* (1813) 2 Ves & B 79 at 83. As to partnerships generally see **PARTNERSHIP**.

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#### **975. Deposit by partner.**

A partner has implied authority to deposit title deeds of property, whether real or personal, belonging to the firm, as security for advances to the firm; and, when the partnership is terminated by the death of the last surviving partner but one, the banker is entitled to treat a subsequent deposit of such deeds as being in the course of winding up the partnership affairs and so legitimate<sup>1</sup>.

1 *Re Bourne, Bourne v Bourne* [1906] 2 Ch 427, CA. See **PARTNERSHIP** vol 79 (2008) PARA 52. Note that, in consequence of the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1), a mere deposit of title deeds does not create an equitable mortgage: see **MORTGAGE** vol 77 (2010) PARA 125 et seq.

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## 976. Deposit of negotiable securities.

Where a banker takes in good faith fully negotiable securities<sup>1</sup> as cover for an advance or overdraft, he is entitled to retain them until his debt is satisfied, notwithstanding that the borrower had no property in, and was wrongfully dealing with, the securities<sup>2</sup>. Knowledge that the customer is a stockbroker or occupies a fiduciary position, and that the securities may possibly not be his own, does not put the banker on inquiry, if he has no reason to doubt the honesty of the person tendering them as security, and the latter purports to deal with them as his own property<sup>3</sup>.

Where the banker takes fully negotiable securities in the above circumstances, he is entitled either to have them redeemed by the true owner, or to satisfy his advances by means of them on default, or, where no time is fixed for repayment, on giving reasonable notice to the depositor<sup>4</sup>.

1 As to what securities other than bills, notes and cheques are fully negotiable so as to come within this principle see PARAS 1610-1619.

2 *London Joint Stock Bank v Simmons* [1892] AC 201, HL; *Bentinck v London Joint Stock Bank* [1893] 2 Ch 120; *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333, HL, explained and distinguished in *London Joint Stock Bank v Simmons* above.

3 *London Joint Stock Bank v Simmons* [1892] AC 201, HL; *Fuller v Glyn Mills Currie & Co* [1914] 2 KB 168. Contrast *Jameson v Union Bank of Scotland* (1913) 109 LT 850 (relationship of solicitor and client held to put a bank on inquiry where the solicitor, who at the time owed the bank £16,000, purported to pledge his client's securities for securing his own loan account).

4 *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579, CA.

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## 977. Deposit by agent.

If a principal entrusts his agent with securities which, though not fully negotiable, purport on the face of them to convey all rights by mere transfer, especially if he holds out the agent as clothed with authority to transfer them as negotiable, the principal will be estopped from disputing the title of a banker who has taken the securities in good faith and for value from the agent, though the agent is acting for his own ends and in fraud of his principal<sup>1</sup>. In each case, the test is whether the possession by the agent and the terms of the document combined amount to a representation that the agent is invested with disposing power of a professedly negotiable instrument<sup>2</sup>.

1 *Goodwin v Roberts* (1876) 1 App Cas 476 at 489-490, HL; *Easton v London Joint Stock Bank* (1886) 34 ChD 95 at 113-114, CA, per Bowen LJ; *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267 at 285, HL, per Lord Herschell ('If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who has received it in good faith and for value'). See also *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA, which was distinguished in *Smith v Prosser* [1907] 2 KB 735, CA. See also *Paine v Bevan and Bevan* (1914) 110 LT 933 (drawer of a cheque held not estopped from saying, as against a donee not being a holder for value, that the cheque had been wrongfully filled up by an agent in excess of his authority). As to agency generally see **AGENCY**. As to choses or things in action see **CHOSSES IN ACTION** vol 13 (2009) PARA 1 et seq.

2 *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267 at 273, HL, per Lord Halsbury; *Farquharson Bros & Co v King & Co* [1902] AC 325 at 330, HL, per Lord Halsbury; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168. See further **AGENCY** vol 1 (2008) PARAS 24, 145.

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### **978. Security by transfer or deposit.**

Stock and shares may be utilised as security by transferring them to the banker or by merely depositing the relevant certificates<sup>1</sup>. The method of transfer depends on the nature of the stock or shares. In order to avoid the danger that the person transferring may be in a fiduciary position and not the beneficial owner, it is essential that the banker should not only take the stock or shares bona fide and for value, but also acquire the legal estate by registration<sup>2</sup>.

1 See PARA 982.

2 As to the effect of notice of the trust on the part of the person who takes a transfer of the legal estate see *Bank of Montreal v Sweeney* (1887) 12 App Cas 617, PC; and contrast *Bentinck v London Joint Stock Bank* [1893] 2 Ch 120. As to registration see PARA 979.

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### **979. Registration.**

In addition to actual transfer, registration in the register kept by the registrar of stocks and shares transferred is necessary to render the banker's title indefeasible or good against parties other than the pledgor who have beneficial interests in them<sup>1</sup>, or, failing registration, the transferee must have acquired a present absolute and unconditional right to be registered before he is affected with notice of the prior equitable title<sup>2</sup>. Registration does not, however, perfect a transfer which is in itself inoperative<sup>3</sup>.

1 *Shropshire Union Rlys and Canal Co v R* (1875) LR 7 HL 496.

2 *Société Générale de Paris and Colladon v Walker* (1885) 11 App Cas 20, HL; *Moore v North Western Bank* [1891] 2 Ch 599; *Ireland v Hart* [1902] 1 Ch 522. No court has defined what constitutes such a right, and it would not be safe to rely on its existence apart from registration.

3 *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 566, CA. See also *Burgis v Constantine* [1908] 2 KB 484, CA.

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## 980. Blank transfers.

Where stock or shares may be transferred only by deed<sup>1</sup>, a blank transfer will not be effective to pass the legal title<sup>2</sup>. Such a transfer may be validated by redelivery after the blanks are filled up, but an agent cannot effect the delivery unless himself authorised by deed<sup>3</sup>. Where the transfer is not necessarily by deed, a blank transfer operates as an authority to the transferee to fill up all necessary blanks, and, when so filled up, operates as an effective transfer without redelivery<sup>4</sup>. However, to preclude the rights of third parties, the transfer must in its then condition purport to carry to any person taking it in good faith for value a full immediate and absolute title to the subject matter<sup>5</sup>.

1 As to the transfer of the stock or shares of a company see **COMPANIES** vol 14 (2009) PARA 389. A company's articles may or may not provide that the transfer is to be by deed: see *Re Tahiti Cotton Co, ex p Sargent* (1873) LR 17 Eq 273. Title to securities may now be evidenced and transferred without a written instrument: see the Uncertificated Securities Regulations 2001, SI 2001/3755; and **COMPANIES** vol 14 (2009) PARA 420 et seq.

2 *Hibblewhite v McMorine* (1840) 6 M & W 200; *Swan v North British Australasian Co* (1863) 2 H & C 175, Ex Ch. 'We all know that both at common law and under these statutes, if you execute a transfer in blank, that instrument with the blanks is not a deed': *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 560, CA, per Lindley LJ. See also *Coleman v London County and Westminster Bank Ltd* [1916] 2 Ch 353. See further **COMPANIES** vol 14 (2009) PARA 389. As to restrictions on the circulation of blank transfers see **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1115.

3 *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 565, CA; *Société Générale de Paris and Colladon v Walker* (1885) 11 App Cas 20, HL.

4 *Ireland v Hart* [1902] 1 Ch 522 at 527.

5 *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267, HL; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168.

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## 981. Power of sale or return of stock and shares.

Where stock or shares have been effectually transferred to a banker as security, even though not by deed, he has an implied power of sale on default. If no time is fixed for repayment, he must give the borrower reasonable notice of his intention to sell unless repaid. A month's notice would be sufficient<sup>1</sup>.

The bank must return to the customer the identical shares deposited<sup>2</sup>, except, of course, so far as they have been sold under the power of sale.

1 *Deverges v Sandeman, Clarke & Co* [1902] 1 Ch 579, CA. The memorandum of deposit usually gives the banker authority to sell upon the borrower's default.

2 *Crerar v Bank of Scotland* 1921 SC 736; affd 1922 SC (HL) 137 (but judgment was given for the bank on the ground of acquiescence by the customer in the course pursued by the bank). The liability to return the identical shares is right in principle, but it is difficult to see what damage the customer would sustain by the bank's failure to return the identical shares. As to damages see *Rosenthal v Alderton & Sons Ltd* [1946] KB 374, [1946] 1 All ER 583, CA; *Sachs v Miklos* [1948] 2 KB 23, [1948] 1 All ER 67, CA; *Munro v Willmott* [1949] 1 KB 295, [1948] 2 All ER 983.

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## **982. Deposit of certificates.**

The mere deposit of stock certificates or share certificates constitutes only an equitable mortgage of the stock or shares which the court will enforce by order for transfer and foreclosure<sup>1</sup>. The mortgagee is not deprived of his remedy for foreclosure merely because the personal remedy to recover the debt is barred by lapse of time<sup>2</sup>, though the right to foreclosure may itself become barred, normally 12 years after the right accrued<sup>3</sup>.

1 *Harrold v Plenty* [1901] 2 Ch 314. Such certificates are not negotiable. The equitable mortgagee may obtain an injunction against transfer in fraud of his rights: *Société Générale de Paris v Tramway Union Co Ltd* (1884) 14 QBD 424 at 453 per Lindley LJ. Note that it is no longer possible to create an equitable mortgage of land by mere deposit of deeds: see further **MORTGAGE** vol 77 (2010) PARA 125 et seq.

2 *London and Midland Bank v Mitchell* [1899] 2 Ch 161. See further **MORTGAGE** vol 77 (2010) PARA 101 et seq.

3 See the Limitation Act 1980 s 20(2); and **LIMITATION PERIODS** vol 68 (2008) PARA 1124.

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## **983. Forged transfers.**

If a transfer to a banker proves to have been forged, the banker has no title to the stock or shares, his name will be removed from the register and that of the original holder restored, and he will be liable to refund to the company all dividends received<sup>1</sup>.

If the banker has parted with the stock or shares, and his transferee has been registered and had certificates issued to him, the banker is liable to indemnify the company<sup>2</sup>, which is estopped from disputing the title of such transferee. The company would be obliged to restore the original holders to the register and their rights, possibly having to buy in the stock or shares in order to do so; the price of the stock purchased, together with back dividends since that date, would be the measure of the banker's liability<sup>3</sup>.

The liability being based on indemnity, though the sending in of the transfer for registration by the company may also import warranty<sup>4</sup>, the cause of action against the banker does not arise until the company is compelled to reinstate the original holder; and the banker may accordingly be sued any time within six years of that date<sup>5</sup>. It is immaterial that he may have retransferred the shares. Nor is it any defence that the company on registration of the transfer issued certificates to him<sup>6</sup>.

1 *Re Bahia and San Francisco Rly Co* (1868) LR 3 QB 584; *Sheffield Corpn v Barclay* [1905] AC 392, HL.

2 *Sheffield Corpn v Barclay* [1905] AC 392, HL; applied in *Yeung Kai Yung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC. Had the latter case arisen in England, it might have

been necessary to consider whether, in the light of the Civil Liability (Contribution) Act 1978 (see **DAMAGES** vol 12(1) (Reissue) PARA 837 et seq), the rule in *Sheffield Corpn v Barclay* above should be reviewed: *Yeung Kai Yung v Hong Kong and Shanghai Banking Corpn* above at 799-800 and 607-608 per Lord Scarman.

3 *Sheffield Corpn v Barclay* [1905] AC 392, HL. Cf *Bank of England v Cutler* [1907] 1 KB 889; affd [1908] 2 KB 208, CA. As to the certification of transfers see now the Companies Act 2006 s 775; and **COMPANIES** vol 14 (2009) PARAS 405, 417.

4 *Sheffield Corpn v Barclay* [1905] AC 392, HL; *Yeung Kai Yung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC.

5 *Sheffield Corpn v Barclay* [1905] AC 392, HL. As to the limitation period see the Limitation Act 1980 s 5; and **LIMITATION PERIODS** vol 68 (2008) PARA 956.

6 Certificates had been issued to the banker in *Sheffield Corpn v Barclay* [1905] AC 392, HL. Cf *A-G v Odell* [1906] 2 Ch 47, CA. The banker cannot claim an estoppel produced by his own misrepresentation: see *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, CA (distinguished in *Balkis Consolidated Co Ltd v Tomkinson* [1893] AC 396, HL, and *Dixon v Kennaway & Co* [1900] 1 Ch 833). As to whether the same liabilities would attach to a banker sending in a forged transfer on behalf of a customer see *Starkey v Bank of England* [1903] AC 114, HL.

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#### **984. Advances on life policies.**

A policy on his own life effected by the debtor may be assigned as security for advances. Notice of the assignment should be given to the insurance company; and, if no notice is given, payment by the company before notice is good as against the assignee<sup>1</sup>.

The mere deposit of a policy as cover gives the banker the rights of an equitable mortgagee<sup>2</sup>.

Where a policy has been so deposited, even without a memorandum, and the depositor becomes bankrupt, his trustee cannot claim it without satisfying the debt to the banker<sup>3</sup>.

1 See the Policies of Assurance Act 1867 s 3. As to legal mortgages of life assurance policies see **MORTGAGE** vol 77 (2010) PARA 238 et seq.

2 *Spencer v Clarke* (1878) 9 ChD 137. As to the rights of an equitable mortgagee see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

3 *Re Wallis, ex p Jenks* [1902] 1 KB 719.

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#### **985. Banker's insurable interest.**

While a banker may take out an insurance policy on the life of a person indebted to him<sup>1</sup>, it is more usual for the debtor to utilise as security a policy which he has taken out himself<sup>2</sup>.

- 1 For the general law of life assurance see **INSURANCE** vol 25 (2003 Reissue) PARAS 525-566.
- 2 See PARA 984.

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### 986. Goods as security.

A banker may advance money on the security of goods or of documents of title to goods otherwise than by the acceptance of documentary bills or payment pursuant to an irrevocable credit<sup>1</sup>.

If his customer is the real owner of the goods and entitled to the documents, the transaction amounts to a pledge of the goods, with the resulting rights of a pledgee<sup>2</sup>, or it may give rise to an equitable charge<sup>3</sup>. Since neither goods nor documents of title to goods<sup>4</sup> are negotiable, the banker's title as pledgee at common law must depend on that of the pledgor.

A banker paying or accepting pursuant to an irrevocable credit becomes pledgee of the documents of title accompanying the draft<sup>5</sup>.

- 1 As to letters of credit see PARA 923 et seq.

- 2 See **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 122 et seq. The ordinary letter of trust on the terms of which the banker redelivers the documents of title to the pledgor, and by which the pledgor undertakes to hold the goods when received and the proceeds when sold as the banker's trustee and to remit the entire proceeds when realised, does not amount to a bill of sale and, if it did, would be a document used in the ordinary course of business: see *Re David Allester Ltd* [1922] 2 Ch 211. Where a bank (pledgee) surrendered the documents to the pledgors as trustees for sale, the latter became mercantile agents under the Factors Act 1889, and their subsequent unauthorised pledge was valid as against the bank: see *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147, [1938] 2 All ER 63, CA. As to the position of a banker pledgee giving a delivery order for goods see *Alicia Hosiery Ltd v Brown Shipley & Co Ltd* [1970] 1 QB 195, [1969] 2 All ER 504; and **BAILMENT** vol 3(1) (2005 Reissue) PARA 39.

- 3 *Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China and Strauss & Co Ltd (No 2)* [1937] 4 All ER 651 (receipts for goods were given to the bank as security for advances; although called trust receipts these documents did not create a trust (within the Indian Trusts Act 1882) of the goods, but an equitable charge on them). Cf *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638 (where a letter instructing the debtor to remit money to the creditor's bank, and expressed to be irrevocable, was held to constitute a charge on the book debt). See also PARA 1674 et seq.

- 4 There is a possible exception at common law for bills of lading: see *Lickbarrow v Mason* (1794) 5 Term Rep 683. 'The words of the special verdict in *Lickbarrow v Mason* admittedly overstate the law': see *Burdick v Sewell* (1884) 13 QBD 159 at 173, CA, per Bowen LJ; and see *Sewell v Burdick* (1884) 10 App Cas 74 at 98, HL, per Lord Blackburn. If fully negotiable there would have been no reason for including bills of lading with other documents of title in the Factors Act 1889 s 1(4) (see **AGENCY** vol 1 (2008) PARA 148) and the Sale of Goods Act 1979 s 61(1) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 157), whereas they are so included. See further on this point **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 314.

- 5 See *Ross T Smyth & Co Ltd v TD Bailey Son & Co* [1940] 3 All ER 60 at 68 per Lord Wright.

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### 987. Protection to banker.

In some cases, where the title of the borrower to goods pledged is defective, the banker may, under certain conditions, have statutory protection. The goods or documents of title to goods must be in the possession either of an unpaid vendor, a purchaser who has not paid for them, or a 'mercantile agent' within the broad definition given to that term by the legislation<sup>1</sup>. Moreover, the goods or the documents of title must have originally remained in or come into the possession of the person with whom the banker is dealing with the consent of the real owner<sup>2</sup>. In the case of a mercantile agent, a pledge of the documents for an antecedent debt would entitle the pledgee to acquire such rights only as the pledgor could have enforced at the time of the pledge<sup>3</sup>, and the same rule probably applies to purchasers or persons who have agreed to purchase<sup>4</sup>; in such a case the security would not be effective.

1 See the Factors Act 1889 s 1(1); and **AGENCY** vol 1 (2008) PARA 12.

2 See the Factors Act 1889 s 2; and **AGENCY** vol 1 (2008) PARA 148. See also *Cahn and Mayer v Pockett's Bristol Channel Steam Packet Co* [1899] 1 QB 643 at 658, CA; *National Employers' Mutual General Insurance Association Ltd v Jones* [1990] 1 AC 24, [1988] 2 All ER 425, HL.

3 See the Factors Act 1889 s 4; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 160.

4 See *Cahn and Mayer v Pockett's Bristol Channel Steam Packet Co* [1899] 1 QB 643 at 654, CA, per AL Smith LJ.

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### 988. Discounting of bills.

When a banker discounts a bill, he buys it for its face value less a sum representing interest for the period which the bill has to run. The banker takes the bill as transferee for value, and has the holder's normal right to sue on the bill if it is dishonoured. In the case of a customer, the amount of the bill, less discount, is normally carried to current account, and, if the bill is unpaid, the current account is normally debited and the bill is returned to the customer. If the banker wishes to retain his right of recourse to other parties because his customer's account cannot meet the debit, the banker retains the bill and debits a suspense account. Whether the bill is taken from a customer for collection or as security, or is discounted for him, is a question of fact<sup>1</sup>.

The presumption in favour of a bill being taken by way of absolute transfer rather than of pledge or security is not so appropriate in the case of banker and customer as in other cases. Indorsement of a specially indorsed bill is as necessary for collection as for transfer. Even indorsement by the customer of a bill indorsed generally is consistent with his merely putting his name on it as extra security<sup>2</sup>.

There is some doubt<sup>3</sup> whether the entry of the amount of such bills, less discount, as cash in the banker's books would be evidence of the banker having taken them as transferee. Possibly inferences might be drawn from whether the bank held itself out as a discounting bank or not<sup>4</sup>. Where the transaction is really one of discounting, the banker is, of course, at liberty to deal with the bill as he pleases, rediscounting or transferring it.

1 See PARAS 862, 890. As to the meaning of the word 'discount' where the discount is not paid to the discountee see *Hamilton Finance Co Ltd v Coverley Westray Walbaum and Tosetti Ltd*, and *Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53 at 60-62.

2 See *Re Firth, ex p Schofield* (1879) 12 ChD 337.

3 See *Capital and Counties Bank Ltd v Gordon* [1903] AC 240, HL; cf *Dawson v Isle* [1906] 1 Ch 633.

4 See *Gaden v Newfoundland Savings Bank* [1899] AC 281 at 286, PC. As to the distinction between lending and discounting see *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209, [1961] 3 All ER 1163, PC.

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### **989. Remedies of banker against customer.**

Where the banker has the customer's indorsement on the bill, he has the remedies of an indorsee against him; otherwise, he has only the remedies of a transferee by delivery<sup>1</sup>. Whether mere dishonour of a bill not indorsed by the customer gives the banker a right to debit the customer's account or to proceed against him on the bill must depend upon the terms on which the bill was delivered to him, that is to say, for collection, discount or otherwise. As a collecting agent the bank would have an agent's right to indemnity<sup>2</sup>.

Instead of indorsing each bill for discount separately, the customer may give to the banker a general guarantee of all bills discounted for him, which has, in relation to the banker, the same operation as specific indorsement in each case<sup>3</sup>.

1 As to the transferee's remedies see PARA 1490. Save in the event of the customer's insolvency, the banker has no right to set off a credit balance on current account against the customer's future or contingent liability as acceptor or indorser of a bill of exchange: see PARA 835.

2 As to an agent's right to indemnity see **AGENCY** vol 1 (2008) PARA 111 et seq. The dicta as to debiting a dishonoured cheque, though credited as cash, in *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 248, HL, could not be applied to a discounted bill.

3 *Re Fox Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA.

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### **990. Banker's remedies on bills or promissory notes.**

Where bills or promissory notes are deposited as security, and not absolutely transferred in consideration of the advance, the banker's position is that of pledgee, analogous to that which he holds by virtue of his lien<sup>1</sup>. If he took the bill or note without notice of any defect in the customer's title, he may in any event sue all parties to it to the extent of his advance<sup>2</sup>. If the customer had a good title, the banker may sue all parties for the full amount, holding the balance, if any, over and above the amount advanced as trustee for the customer<sup>3</sup>.



Although there are dicta that, in certain states of the account, a banker may negotiate bills or notes of a customer in his hands<sup>4</sup>, in the absence of any agreement to the contrary, the banker is probably not entitled to adopt this course where the instruments are security for an advance repayable at a definite date which has not arrived, or where the security is for existing or future overdrafts, without having made a prior request for payment. The usual and proper course is to keep the documents and present them for payment at maturity, and set off the proceeds against the advance. If instruments payable at a fixed date are not duly presented, the banker will have to bear any loss incurred by the omission<sup>5</sup>.

Where a bill or note is given strictly as collateral security, it does not, even while current, suspend the remedy on the debt; and, in the absence of any agreement to the contrary, the banker is entitled to sue for the advance pending the currency of the bill or note<sup>6</sup>. Where a bill or note is strictly collateral security, satisfaction of the debt does not necessarily discharge the bill or note<sup>7</sup>.

1 A banker's lien is an implied pledge: see PARA 863. As to a banker's lien see PARA 860 et seq; and see **LIEN**. As to pledge see **PLEDGES AND PAWNS**.

2 See the Bills of Exchange Act 1882 s 27(3); and PARA 1487.

3 *Barclay's Bank Ltd v Aschaffenburg Zellstoffwerke AG* [1967] 1 Lloyd's Rep 387, CA. It would appear, however, that any such surplus stands on the same footing as a credit balance on current account as regards the banker's right of set-off: see *Jones v Peppercorne* (1858) John 430; *Inman v Clare* (1858) John 769; *Re Bowes, Earl of Strathmore v Vane* (1866) 33 ChD 586; *Re London and Globe Finance Corp Ltd* [1902] 2 Ch 416; *Baker v Lloyd's Bank Ltd* [1920] 2 KB 322. As to the banker's right of set-off see PARA 867.

4 See PARA 888 note 2.

5 *Peacock v Pursell* (1863) 14 CBNS 728.

6 *Peacock v Pursell* (1863) 14 CBNS 728.

7 *Jenkins v Tongue* (1860) 29 LJ Ex 147; *Glasscock v Balls* (1889) 24 QBD 13, CA. In both cases, discharge of the debt was obtained by the holder of the security; there was no direct payment by the borrower, but this does not seem to affect the principle that payment of a debt does not discharge a note given as security for the debt if the note is in the hands of a holder for value in good faith. In *Jenkins v Tongue* above the note was being enforced by the payee, but the principle ought arguably to be confined to a holder from the payee in good faith: see *Glasscock v Balls* above. It would be inequitable that the payee, having satisfied himself, should still be able to sue on the security.

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### **(xiii) Guarantees**

#### **991. Guarantees and consideration.**

A pre-existing debt is not a good consideration for a guarantee<sup>1</sup>. Where no stipulation for future advances is made in a guarantee, the consideration must be supplied by forbearance to sue for the existing debt at the guarantor's request. This may be implied from the nature of the transaction and from the fact of forbearance<sup>2</sup>. Forbearance for a definite period is not essential<sup>3</sup>. If one only of several accounts is to be covered by a particular guarantee, this must be clearly expressed. The term 'ultimate balance' by itself signifies the ultimate balance owing, combining all accounts<sup>4</sup>.

Where the document is not a formal guarantee, but a letter of comfort, it is a matter of construction whether the document is intended to be legally binding, or whether it gives rise to a moral responsibility only<sup>5</sup>.

1 See *National Bank of Nigeria Ltd v Oba MS Awolesi* [1964] 1 WLR 1311, PC. As to guarantees or indemnities given in the context of payment against discrepant documents tendered under a letter of credit see PARA 956. As to performance bonds see PARA 927. The discussion as to guarantees here (ie in this paragraph and in PARAS 992-997) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

2 *Fullerton v Provincial Bank of Ireland* [1903] AC 309 at 316, HL; *Glegg v Bromley* [1912] 3 KB 474 at 491, CA, per Parker J. Cf *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266 at 290, CA, per Bowen LJ.

3 *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266, CA. It is, however, advisable to have such consideration expressed in the guarantee.

4 *Mutton v Peat* [1900] 2 Ch 79, CA.

5 *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785, [1989] 1 WLR 379, CA.

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## 992. Disclosure by banker to intending guarantor.

Subject to the requirement of disclosure where the guarantor is in a non-commercial relationship with the debtor<sup>1</sup>, a banker is not bound to volunteer to an intending guarantor information as to the state of the account or whether the customer was or was not in the habit of overdrawing<sup>2</sup>. If asked by the intending guarantor, however, he must give the information, this being sufficient reason for disclosing the customer's account<sup>3</sup>. During the continuance of a guarantee for an overdraft the banker is bound, on request, to acquaint the guarantor with the amount of his then liability, but not to give further information as to the account or to allow inspection of it<sup>4</sup>.

A guarantor whose signature to a guarantee has been obtained by the fraud of the borrowing customer is not estopped from denying that he had contracted to guarantee the account, if he can show both that there was a fundamental difference between the document he signed and that he thought he was signing, and that in signing he acted with reasonable care<sup>5</sup>.

1 See PARA 970.

2 *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 83, CA, per Farwell LJ; *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335; *Royal Bank of Scotland v Greenshields* 1914 SC 259, Ct of Sess; *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60 (nothing to indicate to the bank that information was material to the surety); *Cooper v National Provincial Bank Ltd* [1946] KB 1, [1945] 2 All ER 641 (where it was held that the bank was not required to disclose to a surety that the husband of the borrower was an undischarged bankrupt and was empowered to draw on the account). See also *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449; *Levett v Barclays Bank plc* [1995] 1 WLR 1260. As to avoidance of a guarantee by concealment etc see PARA 1036 et seq. The discussion as to guarantees here (ie in this paragraph and in PARAS 991, 993-997) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

3 See *Hamilton v Watson* (1845) 12 Cl & Fin 109 (approved per Vaughan Williams LJ in *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA, and per Pollock MR in *Lloyds Bank Ltd v Harrison* (1925) 4 Legal Decisions Affecting Bankers 12, CA); *Welton v Somes* (1889) 5 TLR 184, CA; and contrast *Stone v Compton* (1838) 5 Bing NC 142. See also *Seaton v Burnand* [1900] AC 135, HL; *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60; *Cooper v National Provincial Bank Ltd* [1946] KB 1, [1945] 2 All ER 641; and PARA 910.

4 See *Hardy v Veasey* (1868) LR 3 Exch 107.

5 *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 KB 489, CA. However, see also *Saunders (Executrix of the estate of Gallie) v Anglia Building Society (formerly Northampton Town and County Building Society)* [1971] AC 1004, [1970] 3 All ER 961, HL. Carelessness on the part of a person signing a document will preclude him later on from pleading *non est factum* on the principle that no man may take advantage of his own wrong: *Saunders (Executrix of the estate of Gallie) v Anglia Building Society* above (which, in so far as it decided that the guarantor's negligence was irrelevant in the absence of a specific duty to take care, overruled *Carlisle and Cumberland Banking Co v Bragg* above).

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### 993. Guarantee limited in amount.

When the guarantor's liability is limited to a specified sum, it depends on the wording of the guarantee whether the surety is surety for the whole debt with the specified limitation to his total liability, or whether he is surety for only part of the debt<sup>1</sup>. In the case of the bankruptcy of the principal debtor, the difference becomes material in determining whether the bank may prove for the whole indebtedness, even though the surety has paid the sum for which he is liable, or whether the surety may prove for that sum<sup>2</sup>. However, the question is usually decided in favour of the bank by special terms in the document.

The Banking Code<sup>3</sup> states that banks will not take unlimited or open-ended guarantees from private individuals: thus such guarantees should always stipulate a recovery limit.

1 See *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Re Houlder* [1929] 1 Ch 205. See further PARA 1088. The discussion as to guarantees here (ie in this paragraph and in PARAS 991-992, 994-997) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

2 *Midland Banking Co v Chambers* (1869) 4 Ch App 398; *Re Rees, ex p National Provincial Bank of England* (1881) 17 ChD 98, CA; and see *Re Fernandes, ex p Hope* (1844) 3 Mont D & De G 720. These cases recognise the principle as to a surety for part of the debt, but in each case the surety had by the guarantee contracted himself out of his rights. See also *Re Sass, ex p National Provincial Bank of England Ltd* [1896] 2 QB 12 (where the security was for the whole debt). See further PARA 1088; **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 504.

3 As to the Banking Code generally see PARA 906.

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### 994. Determination of guarantee.

A guarantor is, in general, entitled to determine the guarantee as to future advances by giving notice and paying what is then due<sup>1</sup>. Where the guarantee was under seal, this right appeared to exist in equity<sup>2</sup>, and was possibly recognised even though the guarantee was expressed to be for a definite period, if the banker was not under contract with the principal debtor to make further advances to him<sup>3</sup>.

It appears that a continuing guarantee cannot be revoked so as to exclude outstanding liabilities properly undertaken by the banker on the faith of it, such as bills accepted by him current at the time of notice of revocation<sup>4</sup>. Whether a guarantee covers liabilities which at its expiry are future or contingent is a matter of construction of the particular guarantee, there being no rule of law requiring a guarantee to contain specific wording to do so<sup>5</sup>.

Whether a continuing guarantee is determined as to subsequent advances by the mere fact of death of the guarantor has never been finally decided<sup>6</sup>. It seems probable that it is not. Where there is no provision for giving notice of termination by representatives in the event of death, it may be taken that actual notice of the death given by a responsible person, such as an executor or administrator, terminates the guarantee so far as subsequent advances are concerned<sup>7</sup>. Where, however, the document provides for determination by the surety at the end of a period of notice to the bank, the bank has the right to continue advances up to that time<sup>8</sup>. Whether constructive notice of death is equivalent to actual notice is doubtful<sup>9</sup>.

Where there is specific provision for notice of revocation by the guarantor or his representatives, notice of his death by executors or administrators will not terminate the guarantee. The notice must be one of revocation<sup>10</sup>.

Whether the death of one joint surety terminates the liability of the other for subsequent advances is also doubtful<sup>11</sup>; but, where the guarantee is joint and several, the death of one guarantor does not affect the liability of the survivor for subsequent advances<sup>12</sup>.

A guarantee ceases to be a continuing guarantee upon notice of the guarantor's mental incapacity<sup>13</sup>.

Even where a guarantee is joint only, judgment against one guarantor does not operate as a bar to any claim against the other or others<sup>14</sup>.

1 *Beckett v Addyman* (1882) 9 QBD 783 at 791, CA; *Lloyd's v Harper* (1880) 16 ChD 290 at 319, CA, per Lush LJ. As to determination of a guarantee generally see PARA 1189 et seq. The discussion as to guarantees here (ie in this paragraph and in PARAS 991-993, 995-997) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

2 *Re Crace, Balfour v Crace* [1902] 1 Ch 733 at 738; and see *Lloyd's v Harper* (1880) 16 ChD 290, CA. A guarantee, if it is to take effect as a deed rather than as a simple contract, must now comply with the requirements for the execution of deeds contained in the Law of Property (Miscellaneous Provisions) Act 1989, which abolished the requirement of a seal: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 7.

3 There is no direct authority for this proposition; but see *Lloyd's v Harper* (1880) 16 ChD 290 at 314, CA, per James LJ. It would not be equitable to determine the guarantee if the banker was bound to make further advances to the principal debtor; he is not released from such obligation by the withdrawal of the guarantee by the third party. In *Westminster Bank Ltd v Sassoon* (1926) 5 Legal Decisions Affecting Bankers 19, in which a guarantee finished 'This guarantee will expire on 30 June 1925', and the guarantor was called upon to pay in October 1925, it was held that the guarantee was a continuing one.

4 See *Hollond v Teed* (1848) 7 Hare 50 (where a guarantee given to a bank for advances and bills honoured, though terminated by the death of a partner in the bank, was held to apply to bills accepted by the bank, and current at his death).

5 *National House-Building Council v Fraser* [1983] 1 All ER 1090.

6 *Bradbury v Morgan* (1862) 1 H & C 249 (where the guarantee was held not determined by death); *Harriss v Fawcett* (1873) 8 Ch App 866 at 869 per Mellish LJ ('As mere matter of law, . . . I am of opinion that this guarantee was not determined by the death. If one were to suppose a case, which might very easily happen, where a bank holding such a guarantee was not aware of the death, I should think it very hard upon the bank that a guarantee worded like this was terminated by the death of the guarantor'); *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA (where the question was treated as undecided). Cf *Coulthart v Clementson* (1879) 5 QBD 42; *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 (all cases dealing with questions as to notice of death, but not deciding the effect of death by itself). See also *Bradford Old Bank Ltd v Sutcliffe* (1918) 34 TLR 299; affd on other grounds [1918] 2 KB 833, CA (notice of insanity of guarantor). See further PARA 1203.

7 See *Coulthart v Clementson* (1879) 5 QBD 42; *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 (all discussing the effect of constructive notice, but assuming that actual notice would be sufficient). It would be hard if death involved unlimited liability on the estate.

8 As to the duty to behave equitably in such circumstances see *Holland v Teed* (1848) 7 Hare 50.

9 Constructive notice was held to be equivalent to actual notice by Bowen J in *Coulthart v Clementson* (1879) 5 QBD 42; but the contrary view was taken by Romer J in *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573, and by Joyce J in *Re Crace, Balfour v Crace* [1902] 1 Ch 733.

10 *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573.

11 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 703-705, CA. See *Egbert v National Crown Bank* [1918] AC 903, PC.

12 *Beckett v Addyman* (1882) 9 QBD 783, CA.

13 *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA.

14 See the Civil Liability (Contribution) Act 1978 s 3.

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### **995. Change of company or firm guaranteed.**

Where either the bank or the guaranteed party is a body corporate, joint stock or otherwise, internal change by transfer of shares, issue of new capital, change of directors or the like has no effect on a guarantee as regards future advances<sup>1</sup>.

In the absence of any agreement to the contrary, any change in the constitution of a firm for which a guarantee is given will, however, revoke the guarantee as to future transactions<sup>2</sup>; and in the case of a bank which is a partnership, a change of partners would similarly nullify the guarantee as to future advances<sup>3</sup>.

Where guarantees are given to a corporate bank, its absorption of another bank does not affect the guarantees<sup>4</sup>, and guarantees given to the absorbed bank, so far as a definite amount is due at the date of absorption, inure for the benefit of the absorbing one<sup>5</sup>. Subject to contrary agreement<sup>6</sup>, in the case of amalgamation as distinguished from absorption, guarantees given to either bank would probably be determined<sup>7</sup>, except for ascertained and existing debts due at the time of the amalgamation and assigned by either to the joint body<sup>8</sup>.

1 A company regulated by the Companies Act 1985 or the Companies Act 2006 is a separate and distinct entity from its members: see **COMPANIES** vol 14 (2009) PARA 120. As to corporations generally see **CORPORATIONS**.

The discussion as to guarantees here (ie in this paragraph and in PARAS 991-994, 996-997) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

2 Partnership Act 1890 s 18. The Act applies only to 'firms', ie partnerships: see ss 1(1), 4; and **PARTNERSHIP** vol 79 (2008) PARA 1.

3 Partnership Act 1890 s 18.

4 See *Capital and Counties Bank v Bank of England* (1889) 61 LT 516.

5 *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA. This judgment is carefully limited to existing and ascertained debts, and the principle is, therefore, inapplicable to subsequent advances by the absorbing bank.

6 *First National Finance Corp'n Ltd v Goodman* [1983] BCLC 203, CA.

7 'An amalgamation between two banks need not necessarily cause the business thereafter carried on to be the same as was theretofore carried on by either': see *Prescott Dimsdale Cave Tugwell & Co Ltd v Bank of England* [1894] 1 QB 351 at 364-365, CA, per AL Smith LJ. See also *London Brighton and South Coast Rly Co v Goodwin* (1849) 3 Exch 320; *Eastern Union Rly Co v Cochrane* (1853) 9 Exch 197.

8 This is upon the principle of *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA (approving *Wheatley v Bastow* (1855) 7 De GM & G 261).

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### **996. Interest on bankruptcy.**

Where a guarantee provides for payment of interest on 'money remaining due' from the principal debtor, no claim may be maintained against the principal debtor for interest accruing after the making of a bankruptcy order<sup>1</sup> unless and until the bankrupt's estate pays 100 pence in the pound. However, a claim may be maintained where the words are 'until repayment of the principal sum'<sup>2</sup>.

1 *Re Moss, ex p Hallet* [1905] 2 KB 307. The reasoning is not that a creditor's rights to submit a proof in respect of interest are limited, but that bankruptcy prevents the debt being recoverable against the bankrupt, so that it is not due and owing.

As to guarantees more generally (ie other than in a banking context) see PARA 1013 et seq.

2 *Re Fitzgeorge, ex p Robson* [1905] 1 KB 462. As to bankruptcy generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

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### **997. Remedies of banker.**

The banker is not obliged to resort to securities in his hands before proceeding against the surety<sup>1</sup>.

Where a continuing guarantee under hand is given for a running account, it is doubtful at what time a cause of action accrues. In one case it was held that a cause of action arises as soon as any advance has been made, and that each item would be barred when six years had elapsed<sup>2</sup>; but in another the mere existence of a debt, without balance struck or demand made on the guarantor, was held not to make time run from that date<sup>3</sup>. Normally guarantees to banks provide for determination on demand by the bank or at the end of a stated period of notice by the surety or his personal representatives. Payment by the debtor of interest on account of principal before the expiration of the limitation period binds all persons liable for the debt<sup>4</sup>.

1 *Re Howe, ex p Brett* (1871) 6 Ch App 838 at 841 (laying down the rule that the surety has no right or interest in the securities until he has paid the debt); *Ewart v Latta* (1865) 4 Macq 983 at 987, 989, HL, per Lord

Westbury. See also *Duncan Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 10, 14, HL, per Lord Selborne, and at 18, 20 per Lord Blackburn; the remarks of Lord Watson at 22, as to the creditor's duty to take payment from the person primarily liable, are explainable, inasmuch as the contest was not between the holder of the securities and the surety. As to the discharge of the surety by dealings with the principal, and as to the right of the surety to securities on payment of the debt, see PARA 1138 et seq. The discussion as to guarantees here (ie in this paragraph and in PARAS 991-996) is in a banking context: as to guarantee and indemnity generally see PARA 1013 et seq.

2 *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA. See also *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 at 406. Cf the consideration of these cases in PARA 1013 et seq.

3 *Hartland v Jukes* (1863) 1 H & C 667. As to the unreasonableness of a bank granting an overdraft and immediately proceeding to sue for it see *Rouse v Bradford Banking Co Ltd* [1894] AC 586 at 596, HL, per Lord Herschell.

The difficulty may be avoided by taking a new guarantee before the end of the six years, or by specifying in the guarantee the liability of the surety to be to pay a certain time after demand. In *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA, it was held that no cause of action arose against the surety until demand had been made. The principle is recognised in *Joachimson v Swiss Bank Corp* [1921] 3 KB 110, CA. This view is probably the correct one. In *Lloyds Bank Ltd v Margolis* [1954] 1 All ER 734, [1954] 1 WLR 644, Upjohn J held that, where there was the relationship of banker and customer and the customer was allowed to overdraw against a legal charge providing for repayment on demand, that meant what it said (applying observations of Denning LJ in *Barclays Bank Ltd v Beck* [1952] 2 QB 47 at 54, [1952] 1 All ER 549 at 553, CA). See **LIMITATION PERIODS** vol 68 (2008) PARA 968.

4 See the Limitation Act 1980 s 31(7); and **LIMITATION PERIODS** vol 68 (2008) PARAS 1215, 1217. See also *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA. As to the appropriation of payments in the case of a guaranteed account see PARA 176.

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## (xiv) Freezing Injunctions

### 998. Nature of a freezing injunction.

A freezing injunction<sup>1</sup> is an interim order of the court restraining a party from removing from the jurisdiction assets<sup>2</sup> located there, or restraining a party from dealing with<sup>3</sup> any assets whether located within the jurisdiction or not<sup>4</sup>. The foundation of the court's jurisdiction is the need to prevent judgments of the court from being rendered ineffective, whether by the removal of the defendant's assets from the jurisdiction, or by dissipation<sup>5</sup>.

The purpose of a freezing injunction is not to improve the position of the claimant in an insolvency; a freezing injunction is not a form of pre-trial attachment, but a relief in personam which prohibits certain acts in relation to the assets in question; and it is not the purpose of the freezing jurisdiction to freeze a defendant's assets to ensure that there are funds from which the claimant will be able to satisfy a judgment, regardless of the defendant's need to draw on the funds to meet his debts as they fall due<sup>6</sup>.

A freezing injunction may be made without notice if it appears to the court that there are good reasons for not giving notice<sup>7</sup>. It is not uncommon for a claimant to apply at the same time for other interim remedies<sup>8</sup>.

1 Freezing injunctions were formerly called Mareva injunctions, the term 'Mareva injunction' deriving from *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n, CA. Such an injunction was first granted in *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093, CA. See further **CIVIL PROCEDURE** vol 11 (2009) PARA 396 et seq.

2 If there are no limitations put upon the word 'assets', it includes chattels such as motor vehicles, jewellery, objets d'art and other valuables as well as choses in action: *CBS United Kingdom Ltd v Lambert* [1983] Ch 37 at 42, [1982] 3 All ER 237 at 241, CA. A freezing injunction ordinarily covers any assets which are acquired between the granting of the order and the eventual execution of any judgment obtained in the proceedings or earlier discharge of the order: see *TDK Tape Distributor (UK) Ltd v Videochoice Ltd* [1985] 3 All ER 345 at 349, [1986] 1 WLR 141 at 145. As to choses or things in action see **CHOSSES IN ACTION** vol 13 (2009) PARA 1 et seq.

3 The words 'dealing with' are to be given a wide meaning and are not to be construed as ejusdem generis with 'removing from the jurisdiction'; and the freezing injunction extends to cases where there is a danger that the assets will be dissipated in this country as well as by removal out of the jurisdiction: *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 571, [1982] 1 All ER 556 at 561, CA, per Lord Denning MR.

4 CPR 25.1(f). As to the circumstances in which an order will be made in respect of assets outside the jurisdiction see PARA 1000. For an example of a freezing injunction see *Practice Direction--Interim Injunctions* PD 25 PARA 6, Annex. As to the CPR generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

5 See *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 at 253, [1977] 3 All ER 803 at 822, HL; *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1981] QB 65 at 70-72, [1980] 1 All ER 480 at 485-486 (and the cases there cited); *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 at 941, [1981] 2 All ER 565 at 577, CA, per Ackner LJ, and at 947 and 580-581 per Griffiths LJ; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 571, [1982] 1 All ER 556 at 561, CA, per Lord Denning MR, and at 584 and 571 per Kerr LJ; *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG, The Niedersachsen* [1984] 1 All ER 398 at 419-420, [1983] 1 WLR 1412 at 1423, CA. Banks owe no duty of care to ensure that funds held in accounts which are the subject of a freezing order are not dissipated, although they may be guilty of a contempt of court if the circumstances justify it: *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256, [2006] 2 All ER (Comm) 831.

6 *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 3 All ER 164, [1978] 1 WLR 966, CA; *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1981] QB 65, [1980] 1 All ER 480; *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923 at 942, [1981] 2 All ER 565 at 577, CA; *K/S A/S Admiral Shipping v Portlink Ferries Ltd* [1984] 2 Lloyd's Rep 166, CA. Cf *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 573, [1982] 1 All ER 556 at 562, CA, where Lord Denning MR described the injunction as a method of attaching the asset itself; the injunction operates in rem, but not so as to give a charge in favour of any particular creditor. This view can no longer be sustained in the light of later decisions: see *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 25, [1989] 1 All ER 433 at 438, CA; *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65 at 82, [1989] 1 All ER 1002 at 1011; *Mercedes-Benz AG v Leiduck* [1996] AC 284 at 300, [1995] 3 All ER 929 at 939, PC.

7 See CPR 25.3; and **CIVIL PROCEDURE** vol 11 (2009) PARA 321.

8 Such interim remedies include, for example: permission to issue and serve a claim form out of the jurisdiction (see eg *Third Chandris Shipping Corp v Unimarine SA, The Pythia, The Angelic Wings, The Genie* [1979] QB 645, [1979] 2 All ER 972, CA); a search order (see **CIVIL PROCEDURE** vol 11 (2009) PARA 319); permission to issue a writ ne exeat regno (see eg *Al Nahkel for Contracting and Trading Ltd v Lowe* [1986] QB 235, [1986] 1 All ER 729; *Allied Arab Bank Ltd v Hajjar* [1988] QB 787, [1987] 3 All ER 739; and see **EQUITY** vol 16(2) (Reissue) PARA 495); or an injunction to restrain the defendant from leaving the jurisdiction (see eg *Bayer AG v Winter* [1986] 1 All ER 733, [1986] 1 WLR 497, CA; *Re Oriental Credit Ltd* [1988] Ch 204, [1988] 1 All ER 892).

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### 999. Jurisdiction to grant freezing injunctions.

The power to grant freezing injunctions is statutory<sup>1</sup> and is exercisable in cases where a party to proceedings is, as well as in cases where he is not, domiciled, resident or present within the jurisdiction of the High Court<sup>2</sup>.

A freezing injunction is an interim remedy and not a final order<sup>3</sup>. Subject to provisions of the Civil Jurisdiction and Judgments Act 1982<sup>4</sup>, a right to obtain an interim remedy is not a cause of



action, and it cannot stand on its own; it is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the claimant for the enforcement of which the defendant is amenable to the jurisdiction of the court<sup>5</sup>.

A freezing injunction is ancillary to a substantive pecuniary claim for debt or damages<sup>6</sup>; and the court will not ordinarily grant a freezing injunction in support of a claim for purely declaratory relief<sup>7</sup>.

However, the High Court in England and Wales or Northern Ireland has power to grant interim relief<sup>8</sup> where: (1) proceedings have been or are to be commenced in a Brussels or Lugano Contracting State or a Regulation State<sup>9</sup> other than the United Kingdom or in a part of the United Kingdom<sup>10</sup> other than that in which the High Court in question exercises jurisdiction; and (2) the proceedings are or will be proceedings within the scope of the 1968 Convention<sup>11</sup>, whether or not that Convention has effect in relation to the proceedings<sup>12</sup>.

A freezing injunction granted before enforcement may be continued in force in aid of enforcement<sup>13</sup>; and the court has power to grant a freezing injunction after judgment in aid of enforcement<sup>14</sup>. A freezing injunction is not, however, 'made for the purpose of enforcing a judgment' and therefore cannot be registered<sup>15</sup> as a land charge under the Land Charges Act 1972<sup>16</sup>.

1 The power of the High Court is conferred by the Supreme Court Act 1981 s 37(1) (re-enacting with modifications the Supreme Court of Judicature (Consolidation) Act 1925 s 45); and the power of the county court is conferred by the County Courts Act 1984 s 38 (as substituted and amended): see **COURTS** vol 10 (Reissue) PARA 711. As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed. A freezing injunction may be granted in aid of arbitration proceedings: see the Arbitration Act 1996 s 44(2)(e); and **ARBITRATION** vol 2 (2008) PARA 1254. See also *The Rena K* [1979] QB 377 at 406-411, [1979] 1 All ER 397 at 417-420; *Third Chandris Shipping Corp v Unimarine SA, The Pythia, The Angelic Wings, The Genie* [1979] QB 645 at 663, [1979] 2 All ER 972 at 981, CA.

2 See the Supreme Court Act 1981 s 37(3). See note 1. As to the court's jurisdiction to grant a freezing injunction in respect of assets outside the jurisdiction see PARA 1000.

3 See CPR Pt 25. See also *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 at 253, [1977] 3 All ER 803 at 822, HL. As to the CPR generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

4 See the Civil Jurisdiction and Judgments Act 1982 s 25: see the text and notes 8-12.

5 *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 at 256, [1977] 3 All ER 803 at 824, HL. See, however, *Mercedes-Benz v Leiduck* [1996] AC 284, [1995] 3 All ER 929, PC. In exceptional cases the courts may grant a freezing injunction against a co-defendant against whom there is no claim, so long as it is ancillary and incidental to the claim against the other co-defendant: *TSB Private Bank International SA v Chabra* [1992] 2 All ER 245, [1992] 1 WLR 231; *Aiglon Ltd v Gau Shan Co Ltd* [1993] 1 Lloyd's Rep 164; *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366, [1994] 1 All ER 110, CA.

6 *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210 at 253, [1977] 3 All ER 803 at 822, HL.

7 See eg *Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co Ltd* [1986] 2 Lloyd's Rep 439n, CA; *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428.

8 For the purposes of the Civil Jurisdiction and Judgments Act 1982 s 25, 'interim relief', in relation to the High Court in England and Wales or Northern Ireland, means interim relief of any kind which that court has power to grant in proceedings relating to matters within its jurisdiction, other than a warrant for the arrest of property, or provision for obtaining evidence: s 25(7). It includes the grant of a freezing injunction: see eg *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA; *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

9 As to the meanings of 'Brussels Contracting State', 'Lugano Contracting State' and 'Regulation State' see the Civil Jurisdiction and Judgments Act 1982 ss 1, 50; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65.

10 'Part of the United Kingdom' means England and Wales, Scotland or Northern Ireland: Civil Jurisdiction and Judgments Act 1982 s 50. As to the meaning of 'United Kingdom' see PARA 2 note 3.

11 '1968 Convention' means the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Cmd 7395), including the Protocol annexed to that Convention, signed at Brussels on 27 September 1968; and, unless the context otherwise requires, references to, or to any provision of, the 1968 Convention are references to that Convention as amended: see the Civil Jurisdiction and Judgments Act 1982 ss 1(1), (2)(a), 50; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 65.

The proceedings must be within the scope of the 1968 Convention as determined by art 1: see the Civil Jurisdiction and Judgments Act 1982 s 25(1)(b); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 138. The 1968 Convention art 1 applies in civil and commercial matters whatever the nature of the court or tribunal; and it does not extend, in particular, to revenue, customs or administrative matters: art 1. The 1968 Convention does not apply to: (1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (2) bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (3) social security; (4) arbitration: art 1.

12 Civil Jurisdiction and Judgments Act 1982 s 25(1) (amended by the Civil Jurisdiction and Judgments Act 1991 Sch 2 para 12; and SI 2001/3929). On an application for any interim relief under the Civil Jurisdiction and Judgments Act 1982 s 25(1), the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from s 25 in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it: s 25(2). See *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, [1997] 3 All ER 724, CA.

13 *Stewart Chartering Ltd v C & O Managements SA, The Venus Destiny* [1980] 1 All ER 718, [1980] 1 WLR 460.

14 *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1985] 3 All ER 747, [1984] 1 WLR 1097.

15 le under the Land Charges Act 1972 s 6(1)(a): see **LAND CHARGES** vol 26 (2004 Reissue) PARA 654.

16 *Stockler v Fourways Estates Ltd* [1983] 3 All ER 501, [1984] 1 WLR 25.

## UPDATE

### 999 Jurisdiction to grant freezing injunctions

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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### 1000. Freezing injunctions over assets outside the jurisdiction.

The court has jurisdiction before or after judgment to grant a freezing injunction in respect of foreign assets<sup>1</sup>.

The cases in which it will be appropriate to grant a freezing injunction, pending trial, over assets worldwide will be rare<sup>2</sup>. Factors which, in combination, have been held sufficient to justify such an injunction are: (1) the plain and admitted intention of defendants to move their assets out of the reach of courts of law; (2) the resources they have obtained and the skill they have shown in doing so; and (3) the magnitude of the sums involved<sup>3</sup>. There are conflicting statements as to the relevance of evidence that a foreign court would be willing to make orders similar in effect to a freezing injunction<sup>4</sup>.

It may be made a requirement of a pre-judgment worldwide freezing injunction that, by undertaking or proviso or a combination of both: (a) oppression of the defendant by way of exposure to a multiplicity of proceedings is avoided; (b) the defendant is protected against misuse of information gained from the ordinary order for disclosure in aid of a freezing injunction<sup>5</sup>; and (c) the position of third parties is protected<sup>6</sup>.

A pre-judgment freezing injunction will more readily be granted in respect of assets outside the jurisdiction where the claimant asserts a proprietary or tracing claim<sup>7</sup>.

The arguments against granting a freezing injunction extending to assets outside the jurisdiction are much weaker in a case where judgment has been obtained than in a case where an interim order is sought before trial, and there will be many cases where justice requires that, once judgment has been obtained, a successful claimant should be able to obtain the protection of a freezing injunction extending to all the assets of the defendant whether within or outside the jurisdiction<sup>8</sup>. After judgment the parties' positions are different in the important respect that the claimant may attach assets of the defendant against whom he has obtained judgment<sup>9</sup>. It may be appropriate for the court to exercise its ample jurisdiction by making a temporary 'holding' injunction against the judgment debtor, requiring him not to move or deal with his assets without giving to the judgment creditor the few days' notice which is the minimum reasonably required to enable the judgment creditor to invoke any assistance which the local court may afford to him in respect of his judgment debt<sup>10</sup>. A post-judgment freezing injunction should normally be of limited duration: the claimant should be encouraged to proceed with proper methods of execution<sup>11</sup>.

The grant of worldwide freezing injunctions has given rise to the question as to how banks can be protected from committing an unintended contempt of court when they have branches abroad<sup>12</sup>.

1 *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA; *Derby & Co Ltd v Weldon* [1990] Ch 48, [1989] 1 All ER 469, CA; *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA; *Derby & Co Ltd v Weldon (No 3)* [1989] 3 All ER 118, [1989] 1 WLR 1244. See also *Ashtiani v Kashi* [1987] QB 888 at 901, [1986] 2 All ER 970 at 977, CA, per Dillon LJ, and at 904 and 979 per Neill LJ; *Allied Arab Bank Ltd v Hajjar* [1988] QB 787, [1987] 3 All ER 739. See the guidelines set out by the Court of Appeal in regard to applications to enforce a worldwide freezing order abroad in *Dadourian Group International Inc v Simms* [2006] EWCA Civ 399, [2006] 3 All ER 48 (in particular, permission to seek enforcement abroad of worldwide freezing order will be granted where there is a real prospect that there are assets in the country in which enforcement is sought); see also *Dadourian Group International Inc v Simms* [2006] EWCA Civ 1745, [2007] 2 All ER 329.

2 *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA. For an example of a case where the court declined to grant a Mareva injunction (ie the predecessor to a freezing injunction) over an asset outside the jurisdiction see *Intraco Ltd v Notis Shipping Corp'n, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, CA.

3 *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

4 Compare *Ashtiani v Kashi* [1987] QB 888 at 898-903, [1986] 2 All ER 970 at 975-979 with *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA.

5 See further PARA 1002.

6 See eg *Derby & Co Ltd v Weldon* [1990] Ch 48, [1989] 1 All ER 469, CA. As to the protection of third parties see further PARA 1003.

7 See *Ashtiani v Kashi* [1987] QB 888 at 901, [1986] 2 All ER 970 at 977, CA, per Dillon LJ, and at 905 and 980 per Neill LJ; *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA; *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

8 *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 41-43, [1989] 1 All ER 433 at 451-452, CA, per Neill LJ.

9 *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 42, [1989] 1 All ER 433 at 452, CA, per Nicholls LJ.

10 *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA.

11 *Republic of Haiti v Duvalier* [1990] 1 QB 202 at 214, [1989] 1 All ER 456 at 465, CA, obiter per Staughton LJ.

12 See *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA; *Derby & Co Ltd v Weldon (No 4)* [1990] Ch 65, [1989] 1 All ER 1002, CA; *Baltic Shipping Co v Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673; *Bank of China v NBM LLC* [2001] EWCA Civ 1933, [2002] 1 All ER 717.

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### **1001. Guidelines for the grant of a freezing injunction.**

The guidelines<sup>1</sup> to be observed on an application for a freezing injunction are:

- 41 (1) the claimant should make full and frank disclosure of all matters in his knowledge which are material for the judge to know<sup>2</sup>;
- 42 (2) the claimant should give particulars of his claim against the defendant, stating the ground of his claim and its amount, and fairly stating the points made against it by the defendant;
- 43 (3) the claimant should give some grounds for believing that the defendant has assets in the relevant place<sup>3</sup>; the existence of a bank account is enough, whether it is in overdraft or not;
- 44 (4) the claimant should give some grounds for believing that there is a risk of the defendant's assets being removed or dissipated<sup>4</sup> before the judgment or award is satisfied;
- 45 (5) the claimant will usually be required to give an undertaking in damages in case he fails in his claim or the injunction turns out to be unjustified; and in a suitable case this should be supported by a bond or security<sup>5</sup>;
- 46 (6) the claimant must establish a good arguable case<sup>6</sup>;
- 47 (7) the difference between a good arguable case and a serious question to be tried, which is incapable of definition, does not affect the applicability of the general principle that it is no part of the court's function at the interim stage to try to resolve factual disputes on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature consideration<sup>7</sup>;
- 48 (8) the defendant should not be prevented from using his assets for a purpose which does not conflict with the purpose of a freezing injunction, for example the making of payments which the defendant in good faith considers he should make in the ordinary course of business<sup>8</sup>;
- 49 (9) the order should normally specify a maximum sum, that is to say it should restrain removal or dissipation of assets save in so far as such assets exceed a specified sum<sup>9</sup>;
- 50 (10) the order should not be used to prevent a defendant from living as he has always lived, or from paying legal costs to defend the proceedings<sup>10</sup>;
- 51 (11) the order should make reasonable provision for the protection of third parties<sup>11</sup> and should include notice of their right to seek variation of the order<sup>12</sup>.

<sup>1</sup> The guidelines are based upon *Third Chandris Shipping Corp v Unimarine SA, The Pythia, The Angelic Wings, The Genie* [1979] QB 645 at 668-669, [1979] 2 All ER 972 at 984-985, CA, per Lord Denning MR, as

modified by later case law and with the modifications consequent on the replacement of the Mareva injunction with the freezing injunction (see PARA 998).

2 See *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 at 437-438 (and the cases there cited); *Gulf Interstate Oil Corp v ANT Trade & Transport Ltd of Malta, The Giovanna* [1999] 1 All ER (Comm) 97.

3 The words 'in the relevant place' have been substituted for 'here' to take account of the subsequent recognition of the court's jurisdiction to grant a freezing injunction over foreign assets: see PARA 1000.

4 The words 'or dissipated' have been added to take account of the now well-established principle that a freezing injunction may restrain not only the removal of assets from the jurisdiction but also dissipation of assets: see PARA 998.

5 In *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502, [1980] 1 WLR 1252, CA, it was held that a claimant funded by legal aid could be granted a Mareva injunction (now a freezing injunction) even though his undertaking might be worth nothing. For the form of undertaking see *Practice Direction--Interim Injunctions* PD 25 PARA 6, Annex.

6 *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG, The Niedersachsen* [1984] 1 All ER 398 at 414-415, [1983] 1 WLR 1412 at 1417, CA.

7 *Derby & Co Ltd v Weldon* [1990] Ch 48 at 57, [1989] 1 All ER 469 at 475, CA, per Parker LJ. Any attempt to persuade the court to resolve disputes of fact or to determine difficult points of law should be discouraged by appropriate orders as to costs: *Derby & Co Ltd v Weldon* above.

8 *Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell* [1981] QB 65, [1980] 1 All ER 480. One means of protecting the defendant in this respect is for the order to restrain disposal of assets save in the ordinary course of business as carried on before the grant of the injunction: see eg *Garvin v Domus Publishing Ltd* [1989] Ch 335, [1989] 2 All ER 344. The court is not limited to funds to which the defendant has a legal right if there are reasonable grounds for believing that there are other funds available to him: see *Atlas Maritime v Avalon Maritime (No 3)* [1991] 4 All ER 783, [1991] 1 WLR 917, CA.

9 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 576, [1982] 1 All ER 556 at 565, CA, per Lord Denning MR, and at 589 and 574-575 per Kerr LJ.

10 *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 158; appeal allowed by consent without affecting this point [1983] 2 All ER 697n, CA; *United Mizrahi Bank Ltd v Doherty* [1998] 2 All ER 230, [1998] 1 WLR 435.

11 See further PARA 1003.

12 *Guinness Peat Aviation (Belgium) NV v Hispania Lineas Aereas SA* [1992] 1 Lloyd's Rep 190.

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## **1002. Disclosure in aid of a freezing injunction.**

There is inherent in the statutory power to grant a freezing injunction the power to make all such ancillary orders as appear to the court to be just and convenient to ensure that the freezing order achieves its purpose<sup>1</sup>. The court has express power to grant an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction<sup>2</sup>.

An order for disclosure may, for example, require the defendant to disclose the nature, location and value of all his assets within and, in some cases, outside the jurisdiction, including the identity of any bank accounts whether held by the defendant in his own name or jointly or by

nominees or otherwise howsoever, but excluding any asset the value of which is less than a specific sum<sup>3</sup>. The order may require the defendant to give disclosure himself or by a specified agent, such as his solicitor<sup>4</sup>.

A defendant is liable to have permission to remove any further income or possessions out of the jurisdiction withdrawn unless and until he makes full and proper disclosure of his assets<sup>5</sup>.

1 *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923, [1981] 2 All ER 565, CA, approving on this point *A v C* [1981] QB 956n, [1980] 2 All ER 347.

2 CPR 25.1(g). As to the CPR generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

3 See eg the order made in *CBS United Kingdom Ltd v Lambert* [1983] Ch 37, [1982] 3 All ER 237. It appears that freezing injunctions issued in the Chancery Division include, almost as a matter of course, a direction for disclosure of assets: see *Ashtiani v Kashi* [1987] QB 888, [1986] 2 All ER 970, CA.

4 See eg *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA. See also PARA 998.

5 *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923, [1981] 2 All ER 565, CA.

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### **1003. Protection of third parties.**

The court must bear in mind not only the balance of convenience and justice between claimant and defendant, but above all also as between claimant and third parties. Where assets of a defendant are held by a third party incidentally to the general business of the third party, such as the accounts of the defendant held by a bank, or goods held by a bailee as custodian, for example in a warehouse, an effective indemnity in favour of the third party will adequately hold this balance, because service of the injunction will not lead to any major interference with the third party's business. However, where the effect of service must lead to interference with the performance of a contract between the third party and the defendant which relates specifically to the assets in question, the right of the third party in relation to his contract must clearly prevail over the claimant's desire to secure the defendant's assets for himself against the day of judgment<sup>1</sup>. Where the balance is in favour of the grant of an injunction, the claimant will normally be required to give such undertakings as the court considers reasonably necessary to protect third party interests. The claimant will normally be required to give undertakings: (1) to indemnify any third party affected by the order against all expenses reasonably incurred in complying with the order and all liabilities flowing from such compliance<sup>2</sup>; (2) in the case of a freezing injunction which may affect ships in port, an undertaking to pay the actual income lost to the relevant port authority as a consequence of the granting of the injunction<sup>3</sup>; (3) in the case of a freezing injunction over foreign assets, not to serve notice of the order on third parties outside the jurisdiction and/or not without permission of the court to take any action in any foreign jurisdiction in respect of any of the defendant's assets<sup>4</sup>.

All freezing injunctions which are intended to be served on banks should contain a suitable proviso preserving the bank's rights of set-off<sup>5</sup>.

An innocent third party will normally be permitted to intervene in the claim for the purpose of applying for a variation in a freezing order<sup>6</sup>. In such a case the claimant must expect to pay, and should in justice pay, all reasonable legal costs of a successful applicant<sup>7</sup>.

1 *Galaxia Maritime SA v Mineralimportexport, The Eleftherios* [1982] 1 All ER 796 at 799-800, [1982] 1 WLR 539 at 542, CA, per Kerr LJ; *Lewis & Peat (Produce) Ltd v Almatu Properties Ltd* [1993] 2 Bank LR 45, CA.

2 See *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 577, [1982] 1 All ER 556 at 565-566, CA, per Lord Denning MR.

3 *Clipper Maritime Co Ltd of Monrovia v Mineralimportexport, The Marie Leonhardt* [1981] 3 All ER 664, [1981] 1 WLR 1262, where the order also contained a proviso giving the port authority a discretion for operational reasons to move or order the movement of the vessel.

4 See further PARA 1004.

5 *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* [1983] 2 All ER 65, [1983] 1 WLR 1294. See further PARA 1012.

6 See eg *Project Development Co Ltd SA v KMK Securities Ltd* [1983] 1 All ER 465, [1982] 1 WLR 1470.

7 See *Project Development Co Ltd SA v KMK Securities Ltd* [1983] 1 All ER 465, [1982] 1 WLR 1470. See also *Bank of China v NBM LLC* [2001] EWCA Civ 1933, [2002] 1 All ER 717.

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#### **1004. General effect of freezing injunctions on third parties.**

In accordance with general principles, a freezing injunction takes effect at the very moment it is pronounced, even though the order has not then been drawn up and even though it has not then been served on the defendant<sup>1</sup>.

Every person who has knowledge of the order must do what he reasonably can to preserve the assets to which it relates. He must not assist in any way in the disposal of any such assets, for otherwise he is himself in contempt of court by aiding and abetting the contempt of the defendant<sup>2</sup>. This principle is one of the strengths of a freezing injunction, but its application to an injunction in respect of overseas assets causes a difficulty because it would be wrong for an English court, by making an order in respect of overseas assets against a defendant amenable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction<sup>3</sup>.

To meet this difficulty, it is the practice of the court to insert in a freezing injunction over foreign assets a proviso to make it clear that third parties are not affected by the order<sup>4</sup>. On one wording of the proviso, the order does not affect third parties unless and to the extent that the order is enforced by the court of the states in which any of the defendant's assets are located<sup>5</sup>. On another wording, the claimant leaves to the English court any decision whether action should be taken by him in any foreign jurisdiction in respect of any of the defendant's assets<sup>6</sup>. The proviso need apply only to assets outside England and Wales<sup>7</sup>. There are conflicting views as to whether the proviso should or should not apply to individuals, that is to say natural persons, who are resident in England and Wales<sup>8</sup>.

1 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 572, [1982] 1 All ER 556 at 562, CA, per Lord Denning MR; *Holtby v Hodgson* (1889) 24 QBD 103.

2 *Z Ltd v A-Z and AA-LL* [1982] QB 558, [1982] 1 All ER 556, CA, applying *Seaward v Paterson* [1897] 1 Ch 545; *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 All ER 1175, [1971] 1 WLR 1676, CA. See also *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA. See further PARA 1000 text and note 12.

3 *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 44, [1989] 1 All ER 433 at 453, CA, per Nicholls LJ.

4 See *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA.

5 The wording was suggested by Kerr LJ in *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA, and was adopted in *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

6 *Derby & Co Ltd v Weldon* [1990] Ch 48, [1989] 1 All ER 469, CA.

7 See *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

8 Compare the observations of Nicholls LJ in *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA, with those of Staughton LJ in *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456, CA.

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### **1005. Freezing injunctions against banks.**

The circumstances in which an application for a freezing injunction can properly be made against a bank are very rare. Two factors weigh against the grant of such an order: (1) a bank's stock in trade is money borrowed from its depositors and, in so far as the bank is called upon to repay its depositors, any reduction in the bank's assets will be in the ordinary course of its business; and (2) all banking business is dependent on the maintenance of confidence on the part of its customers and any order which could produce a run on the bank would be inimical to the purposes for which the jurisdiction to grant freezing injunctions exists<sup>1</sup>.

1 *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 at 786, CA, per Lord Donaldson MR. See also *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 All ER 728, [1997] 1 WLR 632, CA.

A bank, notified by a third party of a freezing injunction granted to the third party against one of the bank's customers affecting an account held by the customer with the bank, owed no duty to the third party to take reasonable care to comply with the terms of the injunction: see *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256.

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### **1006. Effect on bank of a freezing injunction against a customer.**

By far the greatest burden of policing freezing injunctions falls on banks<sup>1</sup>. The effect on a bank of a freezing injunction against a customer has been judicially considered in relation to: (1) searching for accounts maintained by the defendant<sup>2</sup>; (2) joint accounts and accounts in the name of third parties<sup>3</sup>; (3) maximum sum orders<sup>4</sup>; (4) honouring of cheques and cheque or credit cards<sup>5</sup>; (5) letters of credit and performance bonds<sup>6</sup>; and (6) the banker's right of set-off<sup>7</sup>.



1 *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* [1983] 2 All ER 65 at 71, [1983] 1 WLR 1294 at 1302.

2 See PARA 1007.

3 See PARA 1008.

4 See PARA 1009.

5 See PARA 1010.

6 See PARA 1011.

7 See PARA 1012.

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### **1007. Searching for accounts maintained by defendant.**

If the claimant is able to identify bank accounts maintained by the defendant, he should do so with as much precision as is reasonably practicable<sup>1</sup>, and normally any such account will be specified in the order itself.

If the claimant cannot identify a bank account, he may request the bank to conduct a search so as to see whether it holds any assets of the defendant, provided that he undertakes to pay the cost of the search<sup>2</sup>. Service of a freezing injunction on a bank obliges the bank, as a matter of self-defence for the purpose of complying with the order, to carry out a search throughout all its branches in order to see whether it holds any assets of the particular defendant<sup>3</sup>.

Where it is intended to serve a freezing injunction on a bank, it should be made clear that its terms do not apply, save in the case of assets specifically referred to, to shares or title deeds which a bank may hold as security, to articles in a safe deposit which the bank may hold in the name of the defendant, or to assets which come within the control of the bank subsequently to the date on which a copy of the order is served on the bank and after its ascertainment of the assets which it then holds<sup>4</sup>.

1 *Searose Ltd v Seatrain (UK) Ltd* [1981] 1 All ER 806, [1981] 1 WLR 894; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 575, [1982] 1 All ER 556 at 564, CA, per Lord Denning MR.

2 *Searose Ltd v Seatrain (UK) Ltd* [1981] 1 All ER 806, [1981] 1 WLR 894; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 575, [1982] 1 All ER 556 at 564, CA, per Lord Denning MR.

3 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 586, [1982] 1 All ER 556 at 573, CA, per Kerr LJ. In practice, banks are normally requested by the claimant to limit the search to a particular branch or to branches within a particular locality.

4 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 590-592, [1982] 1 All ER 556 at 576-577, CA, per Kerr LJ.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/3. BANKING/(3) BUSINESS OF BANKING/(xiv) Freezing Injunctions/1008. Joint accounts and accounts in the name of third parties.

### 1008. Joint accounts and accounts in the name of third parties.

Any freezing injunction which it is intended to serve on a bank is not applicable to a joint account in the name of the defendant and of some other person or persons unless the order is so drafted as to make it clear that it is intended to apply to it, but this would be justifiable only in rare cases<sup>1</sup>. Where the other holder of a joint account is not a party, the order should include reference to the joint account, and a copy of the order should be served on the other holder<sup>2</sup>.

The position in relation to accounts in the name of a third party is as follows:

- 52 (1) where a claimant invites the court to include within the scope of a freezing injunction assets which appear on their face to belong to a third party, for example a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant;
- 53 (2) where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances; and the same applies where it is the third party who makes the assertion, on an application to intervene;
- 54 (3) in deciding whether to accept the assertion of a defendant or a third party without further inquiry, the court will be guided by what is just and convenient, not only as between the claimant and the defendant, but also as between the claimant, the defendant and the third party;
- 55 (4) where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the claimant and the third party in advance of the main proceedings, or it may order that the issue await the outcome of the main proceedings, again depending in each case on what is just and convenient<sup>3</sup>.

1 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 577, [1982] 1 All ER 556 at 565, CA, per Lord Denning MR, and at 591 and 576 per Kerr LJ. The principles which have been established in relation to accounts in the names of third parties (see heads (1)-(4) in the text) presumably apply mutatis mutandis to joint accounts.

2 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 591, [1982] 1 All ER 556 at 576, CA, per Kerr LJ.

3 *SCF Finance Co Ltd v Masri* [1985] 2 All ER 747 at 753, [1985] 1 WLR 876 at 884, CA, per Lloyd LJ; approved in *Allied Arab Bank Ltd v Hajjar* [1989] Fam Law 68, CA.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/3. BANKING/(3) BUSINESS OF BANKING/(xiv) Freezing Injunctions/1009. Maximum sum orders.

### 1009. Maximum sum orders.

It is normal practice for a freezing injunction to restrain removal or disposal of or dealing with the defendant's assets save in so far as they exceed a maximum sum. A maximum sum order is preferable to an order which freezes all assets because: (1) it represents no more than what a claimant may justifiably request from the court; and (2) an order which freezes all assets is, in the ordinary case, bound to lead to an outcry from the defendant and to the need for an amendment, at any rate if he is resident or carries on business within the jurisdiction, and such an order cannot be justified in principle, save in wholly exceptional cases, unless it is clear that the defendant's assets within the jurisdiction are insufficient to meet the claim, and that he is neither resident nor carries on business within the jurisdiction<sup>1</sup>.

A maximum sum order is, however, unworkable so far as any individual bank is concerned because it cannot know what assets the defendant may or may not have elsewhere. To meet this difficulty, the first paragraph of an order which it is intended to serve on a bank should restrain the defendant up to the maximum sum in question, but the second paragraph should then qualify the first by providing that, so far as specified accounts are concerned, the defendant is not to be entitled to draw upon any of them except to the extent that any of them exceeds the maximum sum, or so as to reduce the balance below that sum<sup>2</sup>.

In calculating the amount which is not caught by a freezing injunction, a bank need make no provision in respect of future instalments of interest and repayment of principal due to it from the defendant<sup>3</sup>.

1 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 589, [1982] 1 All ER 556 at 575, CA, per Kerr LJ.

2 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 590, [1982] 1 All ER 556 at 575, CA, per Kerr LJ.

3 *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* [1983] 2 All ER 65 at 71, [1983] 1 WLR 1294 at 1301.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/3. BANKING/(3) BUSINESS OF BANKING/(xiv) Freezing Injunctions/1010. Honouring of cheques; cheque or credit cards.

#### **1010. Honouring of cheques; cheque or credit cards.**

Unless payment can be made out of funds in excess of the sum, if any, specified in the order<sup>1</sup>, a bank is not entitled to honour cheques drawn on the account whether before or after the making of the order<sup>2</sup>.

If, however, the defendant has used a cheque card or credit card<sup>3</sup> so as to give rise to obligations on the part of a bank to third parties, the bank is entitled, and indeed bound, to honour such obligations to the third parties concerned<sup>4</sup>. The order should not preclude the debiting of the defendant's account in respect of any cheque card or credit card transaction effected by the defendant prior to the date when the order is served on the bank<sup>5</sup> but the position in relation to transactions effected after that date may depend on whether the bank has taken reasonable steps to withdraw the card facilities from the defendant<sup>6</sup>.

1 As to maximum sum provisions see PARA 1009.

2 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 574, [1982] 1 All ER 556 at 563, CA, per Lord Denning MR.

3 As to cheque guarantee cards and credit cards see PARAS 903-905.

4 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 592-593, [1982] 1 All ER 556 at 576-577, CA, per Kerr LJ.

5 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 592, [1982] 1 All ER 556 at 577, CA, per Kerr LJ; and see the observations of Lord Denning MR at 574 and 563.

6 See *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 592, [1982] 1 All ER 556 at 577, CA, per Kerr LJ.

#### **UPDATE**

#### **1010 Honouring of cheques; cheque or credit cards**

NOTE 6--See *Lancore Services Ltd v Barclays Bank plc* [2009] EWCA Civ 752, [2010] 1 All ER 763.

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### **1011. Letters of credit; performance bonds.**

A freezing injunction will not be granted to restrain payment under a letter of credit or a performance bond, but a freezing injunction may apply to the proceeds as and when received by or for the defendant<sup>1</sup>. This can be achieved by confining the terms of the order, so far as it affects the defendant's bank accounts, to the accounts themselves, without extending it to the defendant's assets generally in so far as these may be under the control of banks on which a copy of the order is served<sup>2</sup>.

1 *Intraco Ltd v Notis Shipping Corpn, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, CA; *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607 at 613, [1981] 1 WLR 1233 at 1241-1242, CA; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 574, [1982] 1 All ER 556 at 563, CA, per Lord Denning MR. As to restraint of payment under letters of credit and performance bonds generally see PARA 959. As to letters of credit generally see PARA 923 et seq.

2 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 591, [1982] 1 All ER 556 at 576, CA, per Kerr LJ. See also PARA 1009.

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### **1012. Banker's right of set-off.**

There is a doubt whether, in the absence of express provision, a bank is entitled under a freezing injunction to exercise its right of set-off<sup>1</sup> so as to reduce or extinguish a credit balance on an account maintained by the defendant<sup>2</sup>. In order to avoid the necessity of banks going to court for variations to freezing injunctions, and in order to save court time, it is desirable that all freezing injunctions which are intended to be served on banks should contain a suitable proviso<sup>3</sup>.

1 As to a banker's right of set-off see PARAS 867-868.

2 *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* [1983] 2 All ER 65 at 71, [1983] 1 WLR 1294 at 1301.

3 *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* [1983] 2 All ER 65 at 71, [1983] 1 WLR 1294 at 1301.

The sample orders annexed to CPR *Practice Direction--Interim Injunctions* PD 25 PARA 6 include the following provision: 'this injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the respondent before it was notified of this order'. See also the wording approved in *Oceanica Castelana Armadora SA of Panama v Mineralimportexport, The Theotokos* above. As to the CPR generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 24 et seq.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/4. GUARANTEE AND INDEMNITY/(1) THE CONTRACT OF GUARANTEE/(i) The Nature of a Guarantee/A. DEFINITIONS/1013. Guarantee.

## **4. GUARANTEE AND INDEMNITY**

### **(1) THE CONTRACT OF GUARANTEE**

#### **(i) The Nature of a Guarantee**

##### **A. DEFINITIONS**

##### **1013. Guarantee.**

A guarantee is an accessory<sup>1</sup> contract<sup>2</sup> by which the promisor<sup>3</sup> undertakes to be answerable<sup>4</sup> to the promisee<sup>5</sup> for the debt, default or miscarriage<sup>6</sup> of another person<sup>7</sup>, whose primary liability to the promisee must exist or be contemplated<sup>8</sup>.

As in the case of any other contract<sup>9</sup>, a valid guarantee requires an agreement<sup>10</sup>, made between parties intending to create legal relations<sup>11</sup> and having the capacity to contract<sup>12</sup>, supported by consideration, actual or implied<sup>13</sup>. An additional statutory requirement is that the contract must either be in writing or be evidenced by a written note or memorandum signed by or on behalf of the party to be charged<sup>14</sup>.

A guarantee is often termed a 'collateral' or 'conditional' contract, in order to distinguish it from one that is 'original' or 'absolute'<sup>15</sup>. However, both of these expressions may be misleading. The word 'collateral' does not occur in the Statute of Frauds (1677)<sup>16</sup>, and cannot, therefore, safely be accepted as affording a certain criterion whether a promise is or is not within that enactment<sup>17</sup>. Nor is the obligation of a guarantor necessarily, or even usually, conditional, except in the broad sense that he will be discharged if the principal debtor performs the obligation guaranteed<sup>18</sup>.

A continuing guarantee is one which extends to a series of transactions and is not exhausted by nor confined to a single credit or transaction<sup>19</sup>.

Whether any particular contractual promise is to be classified as a guarantee so as to attract all or any of the legal consequences which flow from that classification depends upon the words in which the parties have expressed the promise. The use of the word 'guarantee' is not itself conclusive<sup>20</sup>. In commercial usage, the word 'guarantee' is often applied to obligations that do not fall within the narrow legal definition<sup>21</sup>. With the exception of performance bonds (or performance guarantees), which are discussed below<sup>22</sup>, such usages fall outside the scope of this title. Also outside the scope of this title are cheque guarantee cards<sup>23</sup>, export credit guarantees<sup>24</sup>, protection and indemnity ('P & I') club guarantees<sup>25</sup> and the modern law of bail in which the concept of suretyship is employed<sup>26</sup>.

1 See PARA 792.

2 'Suretyship arises out of contract': *Re Stratton, ex p Salting* (1883) 25 ChD 148 at 151, CA, per Fry LJ. 'The law of guarantee is part of the law of contract': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 346, [1972] 2 All ER 393 at 400, HL, per Lord Diplock.

3 The promisor is usually referred to as the guarantor or surety: see PARA 1017.

4 'Translated into modern legal terminology 'to answer for' is 'to accept liability for': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 347, [1972] 2 All ER 393 at 400-401, HL, per Lord Diplock. See further PARA 1052.

5 The promisee is usually referred to as the creditor: see PARA 1016.

6 The words 'debt, default or miscarriage' are taken from the Statute of Frauds (1677) s 4; ' . . . 'debt, default or miscarriage' is descriptive of failure to perform legal obligations, existing or future, arising from any source, not only from contractual promises, but in any other factual situations capable of giving rise to legal obligations such as those resulting from bailment, tort or unsatisfied judgments': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 347-348, [1972] 2 All ER 393 at 401, HL, per Lord Diplock. See PARA 1052 note 5.

7 This person is usually referred to as the principal debtor: see PARA 1015.

8 The definition in the text was cited with approval by Phillips J in *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. A list of other definitions of 'guarantee' may be found in *Re Conley, ex p Trustee v Barclays Bank Ltd*, *Re Conley, ex p Trustee v Lloyds Bank Ltd* [1938] 2 All ER 127 at 130-131, CA.

9 See **CONTRACT** vol 9(1) (Reissue) PARA 629 et seq.

10 See PARAS 1023-1026.

11 See PARAS 1027-1028.

12 See PARAS 1029-1032.

13 See PARAS 1047-1051.

14 See the Statute of Frauds (1677) s 4; and PARA 1052 et seq, where the principles for determining the promises of guarantee to which that provision applies are considered.

15 See *Birkmyr v Darnell* (1704) 1 Salk 27; *Gordon v Martin* (1731) Fitz-G 302 at 303; *Kirkham v Marter* (1819) 2 B & Ald 613 at 616; *Re Albert Life Assurance Co, ex p Western Life Assurance Society* (1870) LR 11 Eq 164 at 177; and PARA 1059.

16 Statute of Frauds (1677) s 4: see PARA 1052.

17 See *Harris v Huntbach* (1757) 1 Burr 373 at 375 per Lord Mansfield CJ, which has often been discussed in cases where the incidence of a mortgage debt was in controversy. According to these cases, the strict literal interpretation of 'collateral' is 'parallel' or 'additional' (*Re Athill, Athill v Athill* (1880) 16 ChD 211 at 222, CA), and it does not carry the signification 'secondary', unless the circumstances of the case justify such a construction (*Re Athill, Athill v Athill* at 222, 225). Neither does it necessarily of itself bear the meaning 'auxiliary' (*Early v Early, Williams v Early* (1878) 16 ChD 214n at 215 per Hall V-C), although 'further security' has been interpreted to do so (see *Stringer v Harper* (1858) 26 Beav 33). A security described as 'collateral' may, nevertheless, in view of its covenants and other provisions and the surrounding circumstances of the case, be held to be a complete, perfect and independent security (*Re Athill, Athill v Athill* above), although, where the words used by the parties, together with the facts of the case, indicate an intention to regard a particular security as 'collateral', it will be so construed by the court (see *Marquis of Bute v Cunynghame* (1826) 2 Russ 275; *Lipscomb v Lipscomb* (1868) LR 7 Eq 501; *De Rochefort v Dawes* (1871) LR 12 Eq 540). To describe a guarantee as a 'collateral contract' does not sufficiently emphasise its accessory character, although it would seem that the words 'collateral security' might do so, as the word 'security', even by itself, ordinarily means something auxiliary to an antecedent obligation: *National Telephone Co v IRC* [1899] 1 QB 250 at 258, CA, per AL Smith LJ; affd [1900] AC 1, HL.

18 In *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258-259, Lloyd J distinguished between two classes of guarantee: a promise which becomes effective if the debtor fails to perform his obligations, and a promise that the debtor will perform his obligations. Guarantees in the latter class are effectively unconditional, for the creditor (unless he has agreed to the contrary) may pursue either the principal debtor or the guarantor, as he chooses: *Jackson v Digby* (1854) 2 WR 540; *Ewart v Latta* (1865) 4 Macq 983, HL; *Carter v White* (1883) 25 ChD 666 at 670, CA, per Cotton LJ; *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 356-357, [1972] 2 All ER 393 at 408-409, HL, per Lord Simon of Glaisdale; *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624 at 635, 4 BCC 56 at 64-65; and see PARAS 1090 et seq, 1189 et seq. Cf *Amott v Holden* (1852) 18 QB 593 at 607-608; *White v Corbett* (1859) 1 E & E 692, Ex Ch; *Re Parrott, ex p Whittaker* (1891) 63 LT 777.

19 See PARA 1108 et seq.

20 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 349, [1972] 2 All ER 393 at 402, HL, per Lord Diplock.

21 'It is often used loosely in commercial dealings to mean an ordinary warranty. It is sometimes used to misdescribe what is in law a contract of indemnity and not of guarantee': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 349, [1972] 2 All ER 393 at 402, HL, per Lord Diplock. See eg *VAI Industries (UK) Ltd v Bostock & Bramley* [2003] EWCA Civ 1069, [2003] BLR 359, [2003] All ER (D) 384 (Jul), where the terms of a clause in a contract for the sale of goods headed 'Guarantee', but in the nature of a warranty, are set out at [5]. See also *Adams v Richardson and Starling Ltd* [1969] 2 All ER 1221, [1969] 1 WLR 1645, CA; *Heisler v Anglo-Dal Ltd* [1954] 2 All ER 770 at 772, [1954] 1 WLR 1273 at 1276, CA, per Somervell LJ (where, on the construction of a particular commercial contract, a party's undertaking to furnish a guarantee was held to have been satisfied by his own personal guarantee).

22 See PARA 1271 et seq.

23 As to cheque guarantee cards see PARA 903.

24 Under the Export and Investment Guarantees Act 1991 s 1, the Secretary of State may make arrangements with a view, inter alia, to facilitating, directly or indirectly, supplies by persons carrying on business in the United Kingdom of goods or services to persons carrying on business outside the United Kingdom (see s 1(1)) and for the purpose of rendering economic assistance to countries outside the United Kingdom (see s 1(2)). The arrangements that may be so made are arrangements for providing financial facilities or assistance for, or for the benefit of, persons carrying on business; and the facilities or assistance may be provided in any form, including guarantees, insurance, grants or loans: s 1(4). These powers are exercised by the Export Credits Guarantee Department (ECGD) whose functions in relation to short-term export credit insurance were privatised in December 1991. As to the power to make a scheme for the transfer of functions see **TRADE AND INDUSTRY** vol 97 (2010) PARA 924 et seq. The ECGD maintains an internet site on the World Wide Web where details of its products and services may be found. At the date at which this title states the law, this site was accessible at [www.ecgd.gov.uk](http://www.ecgd.gov.uk).

For these purposes, 'guarantee' includes indemnity: s 4(3). As to the meaning of 'United Kingdom' see PARA 2 note 3. For these purposes, however, references to the United Kingdom include the Isle of Man and the Channel Islands: Export and Investment Guarantees Act 1991 s 4(4). See further **TRADE AND INDUSTRY** vol 97 (2010) PARA 918 et seq.

25 In admiralty cases, where a vessel has been arrested as a means of obtaining security, one method of obtaining its release is for the shipowner to arrange for his protection and indemnity ('P & I') insurers to provide a club guarantee. A P & I club guarantee is a letter of undertaking to pay any amount found to be due from the defendant and not paid by him and is usually accepted in lieu of bail or payment into court. As to P & I club guarantees and other forms of security in admiralty cases such as bail bonds see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 171 et seq. As to applications for arrest see CPR 61.5; *Practice Direction--Admiralty Claims* PD61 PARA 5; and as to security in claims in rem see CPR 61.6.

26 As to bail in criminal cases see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1166 et seq.

## UPDATE

### 1013 Guarantee

NOTE 24--1991 Act s 1(1) amended: Industry and Exports (Financial Support) Act 2009 s 2(1). Arrangements under the 1991 Act s 1(1) may be made in connection with goods or services supplied before the arrangements are made or in connection with goods or services which are to be, or which may be, supplied: s 1(1A) (added by 2009 Act s 2(1)).

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### 1014. The principal obligation.

An agreement will not be a guarantee unless there exists or is contemplated some other, principal, obligation of some other, principal, obligor<sup>1</sup>, to which the guarantee is to be ancillary and subsidiary<sup>2</sup>. Although the principal obligation guaranteed is usually contractual, there can be a valid guarantee of non-contractual liabilities, such as those resulting from bailment, tort or unsatisfied judgments<sup>3</sup>.

Because a guarantee is an accessory contract, the principal obligation will not merge in the guarantee even if the principal obligation is merely a simple contract and the guarantee is made by deed<sup>4</sup>.

Unless the guarantee provides to the contrary<sup>5</sup>, the guarantee will be determined if the principal obligation is changed without the guarantor's consent<sup>6</sup> or if the principal obligation is itself determined<sup>7</sup>. Where, however, a lease is disclaimed as onerous property by a lessee's or assignee's trustee in bankruptcy or liquidator, it does not come to an end for all purposes<sup>8</sup>. Thus where a company is the original tenant, the liability of persons who have guaranteed the due payment of rent under the lease and the performance of other covenants contained in it is not affected by such disclaimer, although the guarantor's obligations will cease once the landlord retakes possession<sup>9</sup>; and similarly, a guarantor's contractual obligation to take up a new lease in the event of a liquidator of the tenant company disclaiming the lease survives disclaimer but comes to an end on the landlord retaking possession<sup>10</sup>.

1 If this is a contract of guarantee, the background must be one in which there is a principal debtor and a secondary debtor: *General Surety and Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16 at 21 per Donaldson J. There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of a transaction by matters ex post facto, and need not be so at the time, but until there is a principal debtor there can be no suretyship; nor can a person guarantee anybody else's debt unless there is a debt of some other person to be guaranteed: *Lakeman v Mountstephen* (1874) LR 7 HL 17 at 24-25 per Lord Selborne LC.

2 A guarantee is essentially a contract of an accessory nature, being always ancillary and subsidiary to some other contract or liability on which it is founded, without the support of which it must fail: see *Mountstephen v Lakeman* (1871) LR 7 QB 196 at 202, Ex Ch, per Willes J; affd sub nom *Lakeman v Mountstephen* (1874) LR 7 HL 17. See also *Swan v Bank of Scotland* (1836) 10 Bli NS 627, HL; *Lougher v Molyneux* [1916] 1 KB 718.

3 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 347-348, [1972] 2 All ER 393 at 400-401, HL, per Lord Diplock; *Kirkham v Marter* (1819) 2 B & Ald 613 at 616 per Abbott CJ, and at 617 per Holroyd J; *Re Young and Harston's Contract* (1885) 31 ChD 168, CA.

4 *White v Cuyler* (1795) 6 Term Rep 176; *Clarke v Henty* (1838) 3 Y & C Ex 187 at 189 per Lord Abinger CB. An arrangement under which the promisor undertakes an obligation which replaces and/or extinguishes the principal debtor's liability, whether by novation or otherwise, is not a guarantee: *Browning v Stallard* (1814) 5 Taunt 450; *Re International Life Assurance Society and Hercules Insurance Co, ex p Blood* (1870) LR 9 Eq 316; *Guild & Co v Conrad* [1894] 2 QB 885, CA.

5 Modern guarantees usually contain clauses preserving the guarantor's liability in these circumstances. See *Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA; and PARAS 1216-1217.

6 See PARA 1235 et seq; *General Steam-Navigation Co v Rolt* (1858) 6 CBNS 550; *Blest v Brown* (1862) 4 De GF & J 367; *Holme v Brunskill* (1878) 3 QBD 495, CA; *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 389, PC; *Coal Distributors Ltd v National Westminster Bank Ltd* (4 February 1981, unreported), QBD; *Vavasour Trust Co v Ashmore* [1976] CA Transcript 157; *National Westminster Bank plc v Riley* [1986] BCLC 268, CA.

7 See PARA 1189 et seq; and see *D Morris & Sons Ltd v Jeffreys* (1932) 148 LT 56; *Re Lennard, Lennard's Trustee v Lennard* [1934] Ch 235 at 242-243; *Re Moss, ex p Hallet* [1905] 2 KB 307; *Hastings Corp v Letton* [1908] 1 KB 378, DC, where it was held that a lease vested in a corporation determined on the dissolution of the corporation, and did not vest in the Crown as bona vacantia, with the result that the sureties' liability for the rent was also determined. See also *Re Wells, Swinburne-Hanham v Howard* [1933] Ch 29, CA; *Warnford Investments Ltd v Duckworth* [1979] Ch 127, [1978] 2 All ER 517. As to the effect of the dissolution of a corporation see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1304.



8 See *Hill v East & West India Dock Co* (1884) 9 App Cas 448, HL, followed in *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL. See also *Scottish Widows plc v Tripipatkul* [2003] EWHC 1874 (Ch), [2004] 1 P & CR 461, [2003] All ER (D) 24 (Aug).

9 *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL, overruling *Stacey v Hill* [1901] 1 KB 660, CA (a bankruptcy case). In order to avoid the effect of *Stacey v Hill*, leases sometimes included a clause to the effect that, in the event of disclaimer, a surety would take a new lease; such clauses are valid: *Re Yarmarine (IW) Ltd* [1992] BCLC 276, [1992] BCC 28; *Murphy v Sawyer-Hoare (Stacey and Bowie, third parties)* [1993] 2 EGLR 61, [1994] 2 BCLC 59; and see the text and note 10.

10 *Active Estates Ltd v Parness* [2002] EWHC 893 (Ch), [2002] 3 EGLR 13, [2002] 36 EG 147. See also *Scottish Widows plc v Tripipatkul* [2003] EWHC 1874 (Ch), [2004] 1 P & CR 461, [2003] All ER (D) 24 (Aug).

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### 1015. The principal debtor.

The person primarily liable to the creditor for the obligation guaranteed is usually referred to as the principal debtor<sup>1</sup>.

Although sometimes bound by the same instrument as his guarantor, the principal debtor is not a party to the guarantor's contract to be answerable to the creditor. There is not necessarily any privity between the guarantor and the principal debtor; they do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the guarantor contracts<sup>2</sup>.

The same person cannot be both sole principal debtor and guarantor<sup>3</sup>. However, one of two or more principal co-debtors will have some of the rights and liabilities of a guarantor<sup>4</sup> if it is agreed<sup>5</sup> between the co-debtors that the liability of one is to be secondary to that of the others<sup>6</sup>. Those rights and liabilities will exist between the co-debtors from the time that agreement is made<sup>7</sup>. In the absence of notice of the arrangement, however, the creditor is entitled to continue to treat all co-debtors as principals<sup>8</sup>. Once the creditor becomes aware<sup>9</sup> of the arrangement, he is obliged to respect the rights of the co-debtor who has assumed the position of guarantor<sup>10</sup>.

1 Though the obligation guaranteed need not be a debt: see PARA 1013 note 6.

2 *Bain v Cooper* (1841) 1 Dowl NS 11 at 14 per Parke B; *Rawstone v Parr* (1827) 3 Russ 539 at 541 per Lord Eldon LC; *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.

3 See *Lakeman v Mountstephen* (1874) LR 7 HL 17 at 24-25 per Lord Selborne LC, cited in PARA 1014 note 3. See also *Re Smith, ex p Bright* (1879) 10 ChD 566, CA, where the fact that consignees of goods guaranteed the payment of the purchase price of the goods to the consigning manufacturers established that the consignees were acting as agents for sale and were not themselves purchasing as principals: but cf *Heisler v Anglo-Dal Ltd* [1954] 2 All ER 770, [1954] 1 WLR 1273, CA, discussed in PARA 1013 note 21.

4 In such circumstances, there is suretyship in equity though not at common law: *Wauthier v Wilson* (1912) 28 TLR 239, CA.

5 The agreement may be express or implied and may be made at or before the time the principal obligation is undertaken, or at any time thereafter: see *Rouse v Bradford Banking Co* [1894] AC 586, HL.

6 Where a person incurs a joint liability with others, having done so only for the purpose of providing security for them, he will nevertheless not thereby be severally liable as a surety: *Other v Iveson* (1855) 3 Drew 177 at 182 per Kindersley V-C; and see *Jones v Beach* (1852) 2 De GM & G 886; *Rawstone v Parr* (1827) 3 Russ 539;

*Richardson v Horton* (1843) 6 Beav 185; *Strong v Foster* (1855) 17 CB 201; *Pooley v Harradine* (1857) 7 E & B 431; but cf *Thorpe v Jackson* (1837) 2 Y & C Ex 553. In such circumstances, and also where two joint debtors subsequently agree, to the knowledge of the creditor, that one shall be surety only for the other (see *Rouse v Bradford Banking Co* [1894] AC 586, HL; *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL; *Ashbee v Pidduck* (1836) 1 M & W 564; and see PARA 1130), the suretyship created, while it obliges the creditor to respect the rights of the surety (see eg *Rouse v Bradford Banking Co* above at 598 per Lord Watson; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 12, HL), leaves the surety still a joint debtor although possessed of certain surety's rights. Cases of joint liability are outside the Statute of Frauds (1677) s 4: see PARA 1059.

7 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 12, HL.

8 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 12, HL; *Nicholas v Ridley* [1904] 1 Ch 192, CA; and see *Kova Establishment v Sasco Investments Ltd* [1998] 2 BCLC 83.

9 It is not necessary that the principal debtor should consent to the arrangement, only that he should have notice of it, for the guarantor's rights in these circumstances are rights which arise in equity and not from contract; see eg *Rouse v Bradford Banking Co* [1894] AC 586, HL. To the extent that *York City and County Banking Co v Bainbridge* (1880) 43 LT 732 suggests the contrary, it is probably no longer good law. However, the creditor may (and often does) exclude the guarantor's equitable rights by the express terms of the guarantee: see PARAS 1216-1217.

10 *Rouse v Bradford Banking Co* [1894] AC 586, HL; *Hollier v Eyre* (1842) 9 Cl & Fin 1, HL; *Overend, Gurney & Co Ltd (liquidators) v Oriental Finance Corp'n Ltd (liquidators)* (1874) LR 7 HL 348; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639. Parol evidence is admissible to show that the creditor was aware of the true relationship between the co-debtors: *Mutual Loan Fund Association v Sudlow* (1858) 5 CBNS 449.

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### 1016. The creditor.

The person to whom the obligations of the principal debtor and the guarantor are owed is usually referred to as the creditor<sup>1</sup>.

The same person cannot be both creditor and surety<sup>2</sup>.

1 The obligation guaranteed need not, however, be a debt: see PARA 1013 note 6.

2 The Law of Property Act 1925 s 82 abrogated the common law rule that a covenant or agreement between a person and himself and others jointly was void and unenforceable: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 264. Even so, it is doubtful whether a person can guarantee the payment of a debt which is due to himself and others jointly: see *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 97, 99, CA.

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### 1017. The guarantor.

The person who engages with the creditor of a third party to be answerable, in the second degree<sup>1</sup>, for some debt, default or miscarriage<sup>2</sup> for which the third party then is, or may or is intended to become, primarily liable to the creditor is called the guarantor<sup>3</sup> or surety<sup>4</sup>.

The assumption of personal liability is not a necessary element in suretyship. A person who provides a pledge or security for the performance of another's obligation makes himself a surety for that other by means of that pledge or security, just as much as if he pledges his personal credit<sup>5</sup>.

1 The liability is 'secondary' whenever the promise to be answerable for another leaves that other primarily liable: *Mallet v Bateman* (1865) LR 1 CP 163, Ex Ch. The primary liability need not, however, be legally enforced before having recourse to the surety unless the surety has so stipulated: see PARA 1104. See also *Johannesburg Municipal Council v D Stewart & Co (1902) Ltd* (1909) 47 SLR 20, HL.

2 The words 'debt, default or miscarriage' are taken from the Statute of Frauds (1677) s 4: see PARA 1013 note 6, PARA 1052.

3 In English legal usage, the words 'guarantor' and 'surety' are interchangeable. However, in many American jurisdictions, the terms are distinguished to signify different types of obligation undertaken: see Laurence Simpson *Handbook of the Law of Suretyship* (1950) and *WT Rawleigh Co v Oversteet* 32 SE 2d 574 (1944). Here 'guarantor' is generally used unless the context requires otherwise.

4 A person generally takes the position of guarantor from a desire to assist the principal debtor, and not as the result of any distinct bargain between him and the creditor, or in consideration of any direct remuneration passing to him from the creditor: *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 793, CA, per Romer LJ; *revsd*, without reference to this point, sub nom *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL; and see *Ex p Minet* (1807) 14 Ves 189 at 190 per Lord Eldon LC. In an old Scottish case it was held to be an unlawful agreement for the cautioner (the guarantor) to stipulate for a valuable consideration: *King v Ker* (1711) 23 Mor Dict 9461; and see PARA 1047 et seq, dealing with the consideration for the guarantor's promise. A pledge or surety was, originally, a hostage delivered over to slavery, but subject to redemption: see 2 Pollock and Maitland's *History of English Law* at 186, 189, 209 and 211. The relationship between the guarantor and the creditor remained, juristically, that of the body-pledge down to the end of the thirteenth century, although the nature of the relation was obscured by the fact that the creditor had recourse to the surety's property rather than his person upon default: see T Hewitson *Suretyship: Its Origin and History in Outline* (1927) at p 118; and WD Morgan 'The History and Economics of Suretyship' (1927) 12 Corn LQ 153.

5 *Re Conley, ex p Trustee v Barclays Bank Ltd*, *Re Conley, ex p Trustee v Lloyds Bank Ltd* [1938] 2 All ER 127 at 131, CA, per Sir Wilfrid Greene MR; *Re a Debtor (No 24 of 1971)*, *ex p Marley v Trustee of the Property of the Debtor* [1976] 2 All ER 1010 at 1013, [1976] 1 WLR 952 at 954-955 per Foster J. See also *Smith v Wood* [1929] 1 Ch 14, CA; *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL.

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### 1018. Classes of suretyship.

It is important to distinguish between three kinds of case to which the principles of the law of guarantees may apply:

- 56 (1) those in which there is an agreement to constitute, for a particular purpose, the relation of principal debtor and guarantor, to which agreement the creditor secured by it is a party;
- 57 (2) those in which there is a similar agreement between the principal debtor and guarantor only, to which the creditor is a stranger; and
- 58 (3) those in which, without any such contract of guarantee, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid<sup>1</sup>.

It is only to the first of these classes that the doctrines evolved in equity for the protection of guarantors apply in their full extent<sup>2</sup>. Only in the first two of these classes is there any contract of guarantee. However, the relationship between the primary and secondary obligor in cases in the third class is sufficiently analogous to that of principal and surety to bring some of those doctrines into effect. In particular, if the person secondarily liable pays the debt to the creditor, he is not only entitled to reimbursement from the person principally liable, but also to take over by subrogation any securities or rights which the creditor may have against the person primarily liable<sup>3</sup>.

1 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 10-11, HL, per Lord Selborne LC.

2 See note 1.

3 *Re Downer Enterprises Ltd* [1974] 2 All ER 1074 at 1082, [1974] 1 WLR 1460 at 1468. This right of reimbursement, which carries with it the right of subrogation, is not confined to the case of a guarantee, but applies in any case where there is a primary and secondary liability for the same debt: *Re Downer Enterprises Ltd*. See also *Selous Street Properties Ltd v Oronel Fabrics Ltd* [1984] 1 EGLR 50, 270 Estates Gazette 643; *Becton Dickinson UK Ltd v Zwebner* [1989] QB 208, [1988] 3 WLR 1376; and PARA 1020 note 4.

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### **1019. Instances where suretyship arises.**

The acceptor of an accommodation bill is a guarantor for the payment by the drawer. If the holder, knowing that the acceptor is an accommodation acceptor, enters into a binding agreement with the drawer to give time for payment, the acceptor is thereby discharged<sup>1</sup>, unless either the accommodation party consents to the giving of time<sup>2</sup> or the holder expressly reserves his rights against the accommodation party when time is given<sup>3</sup>. Similarly the maker of an accommodation note is in the position of a guarantor, with all the guarantor's rights<sup>4</sup>.

Although the drawer of an ordinary bill of exchange is not strictly a guarantor for the acceptor, who is primarily liable<sup>5</sup>, the drawer may be in the nature of a guarantor<sup>6</sup>, and an indorser of a bill or note with notice of its dishonour becomes a guarantor to the holder for the acceptor or maker<sup>7</sup>, and entitled as such to the rights of a guarantor<sup>8</sup>. There is no distinction in this respect between the ordinary case of suretyship and that of suretyship arising out of a bill transaction<sup>9</sup>.

After the creditors have been notified of his retirement, a retired partner is in the position of a guarantor for the continuing members of the firm in respect of the partnership debts existing at the time of his retirement<sup>10</sup>.

Persons who join in mortgages for the purpose of guaranteeing the payment of principal and interest, or of interest alone, and the performance of covenants entered into by the mortgagor are guarantors, and, as such, are entitled as against the mortgagor, on payment of the mortgage debt in whole or in part, to a charge on the mortgaged estate<sup>11</sup>, and to have the benefit of all the remedies and advantages which the mortgagee possessed against the mortgagor<sup>12</sup>.

A person who was not originally a guarantor may be converted into one without the creditor's consent<sup>13</sup>. A guarantor may also be converted into a principal debtor<sup>14</sup>. If so, he loses the rights he previously possessed as a surety<sup>15</sup>.

1 *Re Acraman, ex p Webster* (1847) De G 414; *Bailey v Edwards* (1864) 4 B & S 761; *Ewin v Lancaster* (1865) 6 B & S 571; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348. As to what constitutes the giving of time see PARA 1227. As to the meaning of 'accommodation party' see the Bills of Exchange Act 1882 s 28(1). See also PARAS 1482, 1562-1565.

2 *Clark v Devlin* (1803) 3 Bos & P 363; *Atkins v Revell* (1860) 1 De GF & J 360; *Polak v Everett* (1876) 1 QBD 669, CA.

3 *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1037; *Oriental Financial Corpn v Overend, Gurney & Co* (1871) 7 Ch App 142 at 150 (affd sub nom *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348); *Jones & Co v Whitaker* (1887) 57 LT 216, CA; *Mahant Singh v U Ba Yi* [1939] AC 601, PC.

4 *Greenough v McClelland* (1860) 2 E & E 429, Ex Ch; *Bechervaise v Lewis* (1872) LR 7 CP 372.

5 See PARA 1456.

6 *Ex p Yonge* (1814) 3 Ves & B 31 at 40, HL, per Lord Eldon LC; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 14 per Lord Selborne LC; *Re Conley, ex p Trustee v Barclays Bank Ltd, Re Conley, ex p Trustee v Lloyds Bank Ltd* [1938] 2 All ER 127 at 131, CA, per Sir Wilfrid Greene MR.

7 See *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; and see also *Macdonald v Whitfield* (1883) 8 App Cas 733, PC; the Bills of Exchange Act 1882 s 55(2); and PARA 1577 et seq.

8 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL.

9 See note 8.

10 *Rouse v Bradford Banking Co* [1894] AC 586, HL; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639; and see PARA 1130. As to the liability of a retired partner see further *Stevens v Britten* [1954] 3 All ER 385, [1954] 1 WLR 1340, CA; and **PARTNERSHIP** vol 79 (2008) PARAS 77-78.

11 *Gedye v Matson* (1858) 25 Beav 310; *Allen v De Lisle* (1856) 3 Jur NS 928; and see *Kennedy v Campbell* [1899] 1 IR 59.

12 *Kennedy v Campbell* [1899] 1 IR 59; and see PARA 1142.

13 *Rouse v Bradford Banking Co* [1894] AC 586, HL; *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL; *Nisbet v Smith* (1789) 2 Bro CC 579; *Wilson v Lloyd* (1873) LR 16 Eq 60. See PARA 1130.

14 An account stated by the original principal debtor and his guarantor to the creditor is some evidence of the conversion of the guarantor into a principal debtor (*Buck v Hurst and Bailey* (1866) LR 1 CP 297), especially as the right of action, after an account stated, rests in general on the new promise to pay (*Laycock v Pickles* (1863) 4 B & S 497: see **CONTRACT** vol 9(1) (Reissue) PARA 1049).

15 *Reade v Lowndes* (1857) 23 Beav 361; affd 30 LTOS 110, CA in Ch; see PARAS 1232, 1244 et seq.

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## **1020. Instances where suretyship does not arise.**

Suretyship will not arise in every instance where there is a primary and secondary liability for the same obligation. So, even though there is a primary and secondary liability between the transferee and transferor of shares<sup>1</sup>, the relation between them is not that of principal debtor and guarantor<sup>2</sup>. An assignor of a lease granted before 1 January 1996<sup>3</sup> was not a guarantor, in the true sense of the term, for the assignee<sup>4</sup>. Nor is a mortgagor, who remains liable to the mortgagee after selling the mortgaged property, a guarantor for the purchaser<sup>5</sup>.

1 See the Insolvency Act 1986 s 74(2)(c); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 705.

2 *Roberts v Crowe* (1872) LR 7 CP 629 (compromise with transferee by liquidator does not affect transferee's liability to indemnify transferor); *Re Contract Corp'n, Hudson's Case* (1871) LR 12 Eq 1; *Helbert v Banner, Re Banned's Bank* (1871) LR 5 HL 28 (compromise by liquidator of claim against transferee does not release transferor from liability as contributory).

3 Is a lease which is not a 'new tenancy' for the purposes of the Landlord and Tenant (Covenants) Act 1995: see PARA 1081; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 578 et seq.

4 *Baynton v Morgan* (1888) 22 QBD 74, CA. As between the landlord and the original tenant, the liability of the original tenant was primary: *Warnford Investments Ltd v Duckworth* [1979] Ch 127, [1978] 2 All ER 517. However, as between the original tenant and his assignee, the liability of the assignee (and of any guarantor for the assignee) to pay the rent and to perform the tenant's covenants was primary or ultimate: see *Re Downer Enterprises Ltd* [1974] 2 All ER 1074 at 1083-1084, [1974] 1 WLR 1460 at 1470; *Selous Street Properties Ltd v Oronel Fabrics Ltd* [1984] 1 EGLR 50, 270 Estates Gazette 643; *Kumar v Dunning* [1989] QB 193 at 201, [1987] 2 All ER 801 at 807, CA. If the assignor paid rent for which the assignee was liable, he was subrogated to the landlord's rights and was entitled to be indemnified by the assignee or by any guarantor for the assignee: *Becton Dickinson UK Ltd v Zwebner* [1989] QB 208, [1988] 3 WLR 1376. See also *Johns v Pink* [1900] 1 Ch 296; PARA 1259; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 573.

5 However, the purchaser is impliedly liable to indemnify the vendor against his continuing personal liability to the mortgagee: see *Waring v Ward* (1802) 7 Ves 332 at 337; *Tweddell v Tweddell* (1787) 2 Bro CC 152 at 154 per Lord Thurlow LC; *Re Errington, ex p Mason* [1894] 1 QB 11 at 14, DC; *Re Windle (a bankrupt), ex p trustee of the bankrupt v Windle* [1975] 3 All ER 987 at 994-995, [1975] 1 WLR 1628 at 1637-1638.

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## **B. GUARANTEE DISTINGUISHED FROM OTHER CONTRACTS**

### **1021. Guarantee and indemnity.**

Contracts of guarantee and contracts of indemnity may perform similar commercial functions, in providing compensation to the creditor for the failure of a third party to perform his obligation. However, there is a conceptual distinction between a contract of guarantee and a contract of indemnity, in that under a contract of indemnity, the indemnifier undertakes an independent obligation which does not depend upon the existence of any other obligation of any other obligor<sup>1</sup>. A contract of indemnity is a contract by one party to keep the other harmless against loss<sup>2</sup>. It has no necessary reference in law to the obligation of any third persons<sup>3</sup>.

By contrast<sup>4</sup>, there can be no contract of guarantee unless there exists or is contemplated some other, principal, obligation of some other, principal, obligor, to which the guarantee is ancillary and subsidiary<sup>5</sup>. Under a contract of guarantee, the guarantor assumes a secondary liability to the creditor for the default of another who remains primarily liable to the creditor<sup>6</sup>.

Whether a contract is one of guarantee or of indemnity is a question of construction in each case<sup>7</sup>. In doubtful cases, the fact that the parties have described their agreement as an 'indemnity' or as a 'guarantee' may provide some guide, especially if the expression is used in the heading<sup>8</sup>, or is repeated a number of times in the body of the agreement<sup>9</sup>. Another guide is whether the creditor's rights against the principal debtor and against the indemnifier or

guarantor are the same. If the person liable under the agreement is liable even though the principal debtor is not in default<sup>10</sup>, or is liable for a greater amount than the principal debtor<sup>11</sup>, the agreement will probably be construed as an indemnity. On the other hand, the inclusion of a clause preserving the creditor's rights against the person liable under the agreement in the event of the creditor's giving time to the principal debtor, or varying the principal obligation, suggests that the contract is a guarantee<sup>12</sup>. There is authority that an undertaking to meet a loss which is incidental to the overall transaction will generally be an indemnity but, where the payment obligation is the central feature of the contract, it is more likely to constitute a guarantee<sup>13</sup>.

Agreements whose provisions are mainly those of a guarantee sometimes contain clauses which preserve the liability of the guarantor in circumstances where the principal debtor has either never been<sup>14</sup>, or has ceased to be, liable to the creditor, and clauses entitling the creditor to treat the guarantor as a principal debtor, either generally or in specific circumstances<sup>15</sup>. The inclusion of such clauses probably does not convert what would otherwise be a guarantee into an indemnity<sup>16</sup>. However, it may be that contracts which include such clauses should properly be regarded as hybrid in nature<sup>17</sup>.

1 *Western Credit Ltd v Alberry* [1964] 2 All ER 938, [1964] 1 WLR 945, CA; *Stadium Finance Co Ltd v Helm* (1965) 109 Sol Jo 471, CA. See PARA 1255.

2 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 830-831, CA, per Holroyd Pearce LJ; *Davys v Buswell* [1913] 2 KB 47 at 53-55, CA, per Vaughan Williams LJ.

3 *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at 555; and see *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 784, CA, per Vaughan Williams LJ.

4 See the comparison made between the two types of contract in *General Surety and Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16 at 21 per Donaldson J.

5 See *Lakeman v Mountstephen* (1874) LR 7 HL 17; and PARA 1013.

6 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 831, CA; *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493, [1967] 1 All ER 61, CA; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ.

7 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 349, [1972] 2 All ER 393 at 402, HL.

8 *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493 at 498, [1967] 1 All ER 61 at 64, CA, per Dankwerts LJ; *Western Credit Ltd v Alberry* [1964] 2 All ER 938 at 940, [1964] 1 WLR 945 at 949-950, CA, per Davies LJ. Cf *Stadium Finance Co Ltd v Helm* (1965) 109 Sol Jo 471, CA, where an agreement headed 'Indemnity Form' was held to be a guarantee, and so void because the principal obligation was void on account of the minority of the principal debtor.

9 *Heald v O'Connor* [1971] 2 All ER 1105 at 1110, [1971] 1 WLR 497 at 503.

10 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 297-298, [1961] 1 WLR 828 at 832-833, CA. However, the fact that the agreement makes no provision for a demand to be made on the principal debtor does not convert what would otherwise be a guarantee into an indemnity: see *Chiswell Shipping Ltd v State Bank of India, The World Symphony* [1987] 1 Lloyd's Rep 165.

11 *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ.

12 If the contract were an indemnity, such provisions would be unnecessary, because the creditor's conduct in giving time or varying the principal obligation would not discharge an indemnifier. See *Western Credit Ltd v Alberry* [1964] 2 All ER 938 at 940, [1964] 1 WLR 945 at 949-950, CA, per Davies LJ.

13 See *Pitts v Jones* [2007] EWCA Civ 1301, [2007] All ER (D) 93 (Dec). The case illustrates the importance of the distinction between a guarantee and an indemnity: there the arrangement was found to be a guarantee which was void for want of compliance with the Statute of Frauds (1677) s 4 (see PARA 1052), that provision not applying to contracts of indemnity.

14 Eg because the principal obligation is ultra vires the principal debtor, or the principal debtor is a minor.

15 *Heald v O'Connor* [1971] 2 All ER 1105, [1971] 1 WLR 497; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255; *National Westminster Bank plc v Riley* [1986] BCLC 268, CA; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546. See PARA 1217.

16 See the cases cited in note 15.

17 See *General Surety and Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16 at 21 per Donaldson J.

## UPDATE

### 1021 Guarantee and indemnity

NOTE 13--*Pitts*, cited, reported at [2008] 1 All ER 941.

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### 1022. Contracts of insurance.

The insurer under a contract of insurance agrees, in consideration of the payment to him of a premium, to pay a specified sum to the insured upon the happening of a specified event<sup>1</sup>. Where that event is a default by a debtor or obligor, the contract bears a striking resemblance to a guarantee<sup>2</sup>, both in substance and in economic function. However, there are distinctions between the nature of the two types of contract, and between the obligations which they create.

An insurer under a contract of insurance, like an indemnifier under a contract of indemnity, undertakes a principal rather than a secondary obligation to the creditor<sup>3</sup>. An insurer's liability is not dependent upon the existence of a third person's liability, whereas a contract cannot be a guarantee unless it is ancillary to the primary obligation of another person, to which the guarantor's liability is secondary<sup>4</sup>.

As a result, events such as the termination or variation of the principal obligation, which might discharge a surety<sup>5</sup>, will not generally discharge an insurer from his liability<sup>6</sup>.

A contract of insurance is a contract of the utmost good faith<sup>7</sup>. Contracts of guarantee are not subject to this doctrine, although there is a limited duty of disclosure<sup>8</sup>.

It has been said that there is no magic in the words 'insurance' or 'guarantee', and many contracts may with equal propriety be referred to by either name<sup>9</sup>. The substance and not the form of the transaction is decisive. The mere fact that a contract is in the form of an insurance policy<sup>10</sup> or that the party contracting as guarantor is an insurance company<sup>11</sup>, will not prevent the contract from being a contract of guarantee. Equally, a contract described as an 'indemnity guarantee' may in fact be a contract of insurance<sup>12</sup>.

1 See *Prudential Insurance Co v IRC* [1904] 2 KB 658 at 663 per Channell J.

2 See eg *Dane v Mortgage Insurance Corp'n Ltd* [1894] 1 QB 54, CA.

3 'A policy on a ship, for instance, is not an undertaking to pay the amount insured, if somebody else, eg, the owner of another ship that has caused the loss, does not, but to pay such amount on the loss of the ship': *Dane v Mortgage Insurance Corp'n Ltd* [1894] 1 QB 54 at 60, CA, per Lord Esher MR.



- 4 See *Lakeman v Mountstephen* (1874) LR 7 HL 17; and PARA 1013.
- 5 See PARA 1214 et seq.
- 6 See *Dane v Mortgage Insurance Corpn Ltd* [1894] 1 QB 54, CA; *Finlay v Mexican Investment Corpn* [1897] 1 QB 517.
- 7 *le uberrimae fidei*: see **INSURANCE** vol 25 (2003 Reissue) PARA 5.
- 8 See *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA; and PARA 1036 et seq.
- 9 See *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 792, CA, per Romer LJ; on appeal sub nom *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL.
- 10 See *Re Denton's Estate, Licences Insurance Corpn and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178, CA, where a 'mortgage insurance policy' by which an insurance company agreed to pay to a mortgagee the principal and interest due under the mortgage if the mortgagee became entitled to exercise his power of sale was held to be a contract of a suretyship. Cf *Woolwich Building Society v Brown* [1996] CLC 625 cited in note 12.
- 11 See *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1 at 16-17, [1936] 1 All ER 454 at 458-459, HL, where a joint and several bond by the contractors and an insurance company, conditioned for the due performance of the contractors' work by them, was held to be a contract of guarantee and not a contract of insurance. A similar bond was considered by Phillips J in *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised in (1991) 3 JIBFL 144 (revsd sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA); reconsidered [1992] 1 Lloyd's Rep 431. Phillips J, applying the definition in PARA 1013, held that the bond was in the nature of a guarantee. The Court of Appeal decided that it was not, holding that the nature of the bond defied tidy categorisation. As Nolan LJ put it, 'It stands in a class of its own which, in the light of the deficiencies in its terms which Lord Justice Parker has listed, is just as well.'
- 12 See eg *Woolwich Building Society v Brown* [1996] CLC 625.

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## **(ii) Essentials of a Guarantee**

### **A. AGREEMENT**

#### **1023. Making the agreement.**

As in the case of any other contract, a valid guarantee requires a sufficient agreement<sup>1</sup>. This is usually reached by the process of offer and acceptance and, where this is so, the law requires that there be an offer on ascertainable terms which receives an unqualified acceptance from the person to whom it is made<sup>2</sup>.

- 1 See **CONTRACT** vol 9(1) (Reissue) PARA 629 et seq.
- 2 See **CONTRACT** vol 9(1) (Reissue) PARA 631.

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### 1024. Offer.

Whether a statement amounts to an offer capable of being converted by acceptance into a binding contract of guarantee depends upon the words used and the context in which they are used. A statement that the offeror has no objection to guaranteeing has been held to be a mere invitation to treat<sup>1</sup>. By contrast, a statement of willingness to guarantee a particular shipment has been held to be a sufficient guarantee in the light of the dealings between the parties<sup>2</sup>. Words which are too vague cannot amount to a guarantee<sup>3</sup>.

To amount to a guarantee, the offer must be addressed to the creditor<sup>4</sup>. An offer, not addressed to any individual creditor, to contribute to the assets of the principal debtor is not a guarantee<sup>5</sup>.

1 *M'Iver v Richardson* (1813) 1 M & S 557.

2 *Sorby v Gordon* (1874) 30 LT 528.

3 *Westhead v Sproson* (1861) 6 H & N 728.

4 *Nash v Spencer* (1896) 13 TLR 78.

5 *Phillipps v Bateman* (1812) 16 East 356.

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### 1025. Revocation of the offer.

A guarantor's promise, unless made by deed, does not bind him until the promisee has accepted it<sup>1</sup>. A guarantee not made as a deed may therefore be revoked at any time before it has been accepted, provided that the revocation is communicated to the offeree<sup>2</sup>. This is so even though the offeror has indicated that he will keep his offer open for a specified time<sup>3</sup>.

If the guarantor dies before his offer has been accepted, the offer is revoked<sup>4</sup>.

1 Eg by fulfilling the prescribed conditions: *Westhead v Sproson* (1861) 6 H & N 728; *Glyn v Hertel* (1818) 8 Taunt 208; *Offord v Davies* (1862) 12 CBNS 748; *Hartland v Jukes* (1863) 1 H & C 667; and see *Mayhew v Crickett* (1818) 2 Swan 185 at 191, 193. It is not accurate to describe a guarantee as a unilateral contract, although it is sometimes so named: *Wynne v Hughes* (1873) 21 WR 628 at 629 per Bramwell B. It is in fact an instance of a contract with an executed consideration, taking the form of a request to perform the consideration followed by the performing of the consideration according to the request.

2 *Offord v Davies* (1862) 12 CBNS 748; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 at 737.

3 *Offord v Davies* (1862) 12 CBNS 748, where a guarantee expressed to last 'for the space of 12 calendar months' was held to have been validly revoked within that period, because the creditor had not acted on the faith of it by the time he received notice of revocation. Where the offeror has contracted to keep his offer open, revocation of that offer will amount to a breach of the contract of option: see **CONTRACT** vol 9(1) (Reissue) PARAS 640, 644.

4 See *Dickinson v Dodds* (1876) 2 ChD 463 at 475 per Mellish LJ (where the contract in question was not a contract of guarantee); and **CONTRACT** vol 9(1) (Reissue) PARA 648.

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### **1026. Acceptance.**

Unless the offer contemplates an express acceptance<sup>1</sup>, acceptance of a guarantee may be inferred<sup>2</sup>.

Generally speaking, therefore, where a guarantee is given to enable a third person to obtain a supply of goods on credit, or advances of money, or an appointment to some office or employment, no other acceptance of the guarantor's offer is necessary than the subsequent supply of the goods<sup>3</sup>, the making of the advances<sup>4</sup> or the appointment to the office or employment<sup>5</sup>.

Where no time limit is fixed, the acceptance must be given within a reasonable time<sup>6</sup>, must be absolute and unqualified<sup>7</sup>, and, in case of alternative offers, the acceptance should state which is accepted<sup>8</sup>.

<sup>1</sup> See *Mozley v Tinkler* (1835) 1 Cr M & R 692; *Morten v Marshall* (1863) 2 H & C 305; *Payne v Ives* (1823) 3 Dow & Ry KB 664 at 668 per Holroyd J.

<sup>2</sup> *Pope v Andrews* (1840) 9 C & P 564 at 568.

<sup>3</sup> *Morrell v Cowan* (1877) 7 ChD 151, CA; *Mockett v Ames* (1871) 23 LT 729; *Jays Ltd v Sala* (1898) 14 TLR 461; *White v Woodward* (1848) 5 CB 810; *Johnston v Nicholls* (1845) 1 CB 251.

<sup>4</sup> See *Oldershaw v King* (1857) 2 H & N 517, Ex Ch; *Chapman v Sutton* (1846) 2 CB 634.

<sup>5</sup> See *Kennaway v Treleavan* (1839) 5 M & W 498; *Lysaght v Walker* (1831) 5 Bli NS 1, HL; *Newbury v Armstrong* (1829) 6 Bing 201; *Norton v Powell* (1842) 4 Man & G 42.

<sup>6</sup> *Payne v Ives* (1823) 3 Dow & Ry KB 664 at 668; and see *Dunlop v Higgins* (1848) 1 HL Cas 381; *Ramsgate Victoria Hotel Co v Montefiore*; *Ramsgate Victoria Hotel Co v Goldsmid* (1866) LR 1 Exch 109.

<sup>7</sup> See generally **CONTRACT** vol 9(1) (Reissue) PARA 650 et seq; *Mozley v Tinkler* (1835) 1 Cr M & R 692; *Morten v Marshall* (1863) 2 H & C 305; *Montreal Gas Co v Vasey* [1900] AC 595, PC.

<sup>8</sup> *Lever v Koffler* [1901] 1 Ch 543.

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## **B. INTENTION TO CREATE LEGAL RELATIONS**

### **1027. The principle.**

An agreement of guarantee, even if supported by consideration, is not binding as a contract if it is made without any intention of creating legal relations<sup>1</sup>. In the case of an ordinary commercial

transaction there is a presumption that the parties intended to create legal relations<sup>2</sup>. Where the transaction is a commercial one, the onus of proving that there was no such intention is on the party who asserts that no legal effect was intended, and the onus is a heavy one<sup>3</sup>. Nevertheless, a guarantee contained solely in a 'subject to contract' proposal will not usually be legally binding<sup>4</sup>.

1 *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785 at 788, [1989] 1 WLR 379 at 383, CA, per Ralph Gibson LJ. A unilateral offer of a guarantee contained in a document marked 'subject to contract' is not an offer capable of acceptance so as to conclude an agreement: see *Carlton Communications plc v Football League* [2002] EWHC 1650 (Comm), [2002] All ER (D) 01 (Aug). A general, verbal assurance may be insufficient: see *Manches LLP v Freer* [2006] EWHC 991 (QB), [2006] All ER (D) 428 (Nov).

2 *Rose and Frank Co v JR Crompton & Bros Ltd* [1923] 2 KB 261 at 294, CA, per Atkin LJ (decision partly revsd [1925] AC 445, HL).

3 *Edwards v Skyways Ltd* [1964] 1 All ER 494 at 500, [1964] 1 WLR 349 at 355 per Megaw J. To decide whether legal effect was intended, the courts normally apply an objective test. They 'will attach weight (a) to the importance of the agreement to the parties, and (b) to the fact that one of them has acted in reliance upon it . . . In the search for agreed terms of a commercial transaction, businessmen may adopt language of deliberate equivocation in the hope that all will go well. It may, therefore, be artificial to try to ascertain the common intention of the parties as to the legal effect of such a claim if in fact their common intention was that the claim should have such effect as a judge or arbitrator should decide': *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785 at 788-789, [1989] 1 WLR 379 at 383, CA, per Ralph Gibson LJ.

4 See eg *Carlton Communications plc v The Football League* [2002] EWHC 1650 (Comm), [2002] All ER (D) 01 (Aug).

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## 1028. Letters of comfort.

The problem of deciding whether the parties intended to create legal relations frequently occurs in the context of letters of comfort<sup>1</sup>. A comfort letter is a letter written usually by a parent company or a government to the lender giving comfort to the lender about a loan made to a subsidiary or a public entity<sup>2</sup>. The concept extends to or includes a document under which comfort is given to the lender by the assumption not of a legal responsibility but of a moral responsibility only<sup>3</sup>.

In order to ascertain whether the parties intended a comfort letter to have legal effect, the terms of the document in question must be considered in the light of the surrounding circumstances<sup>4</sup>. The use of the expression 'comfort letter' may be an indication that the parties did not intend the document to have contractual effect, as may be the absence from the document of any express words of warranty or of promise<sup>5</sup>. A prior refusal to provide a legally binding guarantee may also be taken into account as a relevant circumstance<sup>6</sup>.

1 See eg *Chemco Leasing SpA v Rediffusion Ltd* (19 July 1985, unreported), QBD; affd [1987] 1 FTLR 201, CA; and *Kleinwort Benson Ltd v Malaysian Mining Corp Bhd* [1988] 1 All ER 714, [1988] 1 WLR 799; revsd [1989] 1 All ER 785, [1989] 1 WLR 379, CA.

2 *Wood Law and Practice of International Finance* (1st Edn, 1980) PARA 13.5, quoted by Staughton J in *Chemco Leasing SpA v Rediffusion Ltd* (19 July 1985, unreported), QBD (affd [1987] 1 FTLR 201, CA) and by Hirst J in *Kleinwort Benson Ltd v Malaysian Mining Corp Bhd* [1988] 1 All ER 714 at 719-720, [1988] 1 WLR 799 at 805-806 (revsd [1989] 1 All ER 785, [1989] 1 WLR 379, CA).

3 *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785 at 795, [1989] 1 WLR 379 at 391, CA, per Ralph Gibson LJ.

4 *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785 at 796, [1989] 1 WLR 379 at 392-393, CA, per Ralph Gibson LJ.

5 Neither circumstance, however, is in any way conclusive: *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785, [1989] 1 WLR 379, CA. In *Chemco Leasing SpA v Rediffusion Ltd* (19 July 1985, unreported), QBD (affd [1987] 1 FTLR 201, CA), where the comfort letter was held to amount to a guarantee, the parent company's letter stated that '... if we dispose of our interest we undertake to take over the remaining liabilities ...' of the subsidiary company to Chemco.

6 Though not as evidence of the subjective intention of the author of the letter: *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 All ER 785, [1989] 1 WLR 379, CA.

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## **C. CAPACITY TO CONTRACT**

### **1029. Insanity and drunkenness.**

Capacity to contract is as essential to the validity of a guarantee as it is to that of any other contract<sup>1</sup>.

Where, therefore, a guarantor lacks the mental capacity to contract, the guarantee is voidable at his option provided that the promisee was aware of the promisor's incapacity<sup>2</sup>. Even if the creditor was not aware of the guarantor's lack of mental capacity at the time that the guarantee was made, he can no longer rely upon it as a continuing guarantee in relation to further advances once he learns of the guarantor's incapacity<sup>3</sup>.

A guarantee given by a guarantor who at the time of contracting was so extremely drunk as to be incapable of understanding what he was doing is similarly voidable at his option, for the drunkard's condition will usually be apparent to the creditor<sup>4</sup>.

1 See generally **CONTRACT** vol 9(1) (Reissue) PARA 630.

2 *Imperial Loan Co v Stone* [1892] 1 QB 599, CA, approved and applied in *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC. See also *Molton v Camroux* (1848) 2 Exch 487 (affd (1849) 4 Exch 17); *York Glass Co Ltd v Jubb* (1925) 42 TLR 1, CA.

3 *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA. Under ordinary circumstances a continuing guarantee is also revoked as to future advances by notice of the death of the guarantor: *Coulthart v Clementson* (1879) 5 QBD 42; but see the judgments of the Court of Appeal in *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA, where the principle is considered open to doubt. As to the rights of the representatives of a continuing guarantor to terminate their liability and obtain a release see *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401.

4 *Gore v Gibson* (1845) 13 M & W 623; *Molton v Camroux* (1849) 4 Exch 17 at 19 per Patteson J; *Matthews v Baxter* (1873) LR 8 Exch 132. In *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA, the guarantors had advanced at first instance the defence that when they signed the guarantee they were so drunk that they did not know what they were doing, but it had been rejected on the facts. See also **CONTRACT** vol 9(1) (Reissue) PARA 717.

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### 1030. Minors.

A minor<sup>1</sup> does not have the legal capacity to enter into a contract of guarantee<sup>2</sup>. A contract of guarantee entered into by a minor is accordingly unenforceable<sup>3</sup> against him<sup>4</sup>.

Where a guarantee is given in respect of an obligation of a party to a contract and the obligation is unenforceable against him, or he repudiates the contract, because he was a minor when the contract was made, the guarantee is not for that reason alone unenforceable against the guarantor<sup>5</sup>.

1 The age of majority is 18; see generally, as to the attaining of full age and a child's capacity to contract, **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1 et seq.

2 For the rights and liabilities of minors in respect of contracts to which they become a party see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 12 et seq. It is unlikely that such a contract could ever be regarded as being for the minor's benefit: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 12.

3 The Infants Relief Act 1874 (repealed: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 14) provided that contracts of loan, contracts for goods other than necessities, and contracts for accounts stated entered into by a minor were 'absolutely void': and the expression 'void' was used in some old cases to describe the status of contracts by minors. However, in those old cases 'void' probably meant only 'incapable of being enforced' against the minor, and not 'devoid of all legal effect': see *Williams v Moor* (1843) 11 M & W 256 at 263-266 per Parke B.

4 *Re Davenport, ex p Bankrupt v Eric Street Properties Ltd* [1963] 2 All ER 850, [1963] 1 WLR 817, CA. In that case Lord Denning MR stated that the guarantee 'was void and could not be ratified' upon the guarantor's attaining the age of majority. See also *Beam v Beatty (No 2)* (1902) 4 OLR 554 at 559 per Garrow JA. Sed quaere, following the repeal of the Infants Relief Act 1874 s 2 by the Minors' Contracts Act 1987 s 1. At common law, the general principle was that a minor would become liable on a contract of this kind if he ratified it after reaching full age, even though there was no consideration for the new promise: *Southerton v Whitlock* (1726) 2 Stra 690; *Williams v Moor* (1843) 11 M & W 256. However, exceptionally, a penal bond was regarded as void and incapable of ratification: *Baylis v Dineley* (1815) 3 M & S 477; *Walter v Everard* [1891] 2 QB 369, CA.

5 Minors' Contracts Act 1987 s 2. Section 2 applies only where the principal obligation guaranteed is that of a party to a contract made after 9 June 1987: ss 2(a), 5(2). Prior to the coming into force of the 1987 Act, a loan to a minor was made void by statute: Infants Relief Act 1874 ss 1, 2 (repealed). The guarantors of such a loan, where the fact of the minority was known to all parties, could not be made liable on the guarantee: *Coutts & Co v Browne-Lecky* [1947] KB 104, [1946] 2 All ER 207, following *Swan v Bank of Scotland* (1836) 10 Bli NS 627, HL, where a bank was precluded by statute from recovering against the principal debtor because it had knowingly honoured unstamped drafts, and not following the decision of Pickford J in *Wauthier v Wilson* (1911) 27 TLR 582; affd on other grounds (1912) 28 TLR 239, CA. A contract to repay money lent to a minor was, however, always enforceable if on its true construction it was a contract of indemnity by which the contractor incurred an original and independent liability as a principal debtor, as distinct from a mere guarantee: see *Harris v Huntbach* (1757) 1 Burr 373; *Duncomb v Tickridge* (1648) Aleyn 94; *Wauthier v Wilson* (1912) 28 TLR 239, CA (explained in *Coutts & Co v Browne-Lecky* above). For an example of an indemnity collateral to a hire purchase agreement entered into by a minor see *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, [1961] 1 WLR 828, CA.

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### 1031. Corporations.

The validity of an act done by a company<sup>1</sup>, such as the giving of a guarantee, cannot be called into question on the ground of lack of capacity by reason of anything in the company's memorandum<sup>2</sup>. In favour of a person dealing with<sup>3</sup> a company in good faith<sup>4</sup>, the power of the board of directors to bind the company, or to authorise others to do so, is deemed to be free of any limitation<sup>5</sup> under the company's constitution<sup>6</sup>. A party to a transaction with a company, such as a guarantee, is not bound to inquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so<sup>7</sup>.

In other cases, if a guarantee is beyond the scope of the constitution of a corporation, it is ultra vires and void from its inception<sup>8</sup>.

Except in limited circumstances, a company may not give a guarantee in connection with a purchase or proposed purchase of its own shares<sup>9</sup>.

Although a promise that a corporation shall do something beyond its legal powers is void<sup>10</sup>, a guarantee by an individual for the performance by a corporation of an ultra vires contract may be enforceable if the transaction was entered into in good faith and the contract is not illegal or contrary to public policy<sup>11</sup>.

1   le a company formed and registered under the Companies Act 1985 or under any of the former Companies Acts (other than the Joint Stock Companies Act 1844), but excluding any company registered under the Companies (Consolidation) Act 1908 or earlier legislation in what was then Ireland: Companies Act 1985 s 735(1) (prospectively repealed) (as to replacement provisions see the Companies Act 2006 ss 1(1), 1171). This definition excludes companies incorporated abroad: cf *Re International Bulk Commodities* [1993] Ch 77 at 84-85, [1993] 1 All ER 361 at 365-366, [1992] BCLC 1074 at 1078-1079 per Mummery J. See generally **COMPANIES**.

2   See the Companies Act 1985 s 35(1) (s 35 substituted, and ss 35A, 35B added, by the Companies Act 1989 s 108(1)) (the Companies Act 1985 ss 35-35B prospectively repealed) (as to replacement provisions see the Companies Act 2006 ss 39, 40). The application of the Companies Act 1985 s 35 (prospectively repealed) to acts done by the company presupposes that either the agent doing the act has authority to bind the company, or the company ratifies his act. It remains the duty of the directors to observe any limitation on their powers flowing from the company's memorandum: see the Companies Act 1985 s 35(3) (as so substituted; prospectively repealed).

3   A person deals with a company if he is party to any transaction or other act to which the company is a party: Companies Act 1985 s 35A(2)(a) (as added (see note 2); prospectively repealed). See note 2.

4   A person is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution; and a person is presumed to have acted in good faith unless the contrary is proved: Companies Act 1985 s 35A(2)(b), (c) (as added (see note 2); prospectively repealed). See note 2.

5   le including limitations deriving from a resolution of the company in general meeting or a meeting of any class of shareholders, or from any agreement between members of the company or of any class of shareholders: Companies Act 1985 s 35A(3) (as added (see note 2); prospectively repealed). See note 2. Prior to the enactment of these provisions, it was held that the directors of a company could not bind the company by a guarantee given by them in the absence of proof of authority to do so: *Re Era Life Assurance Society* [1866] WN 309; and see *Colman v Eastern Counties Rly Co* (1846) 10 Beav 1; *Ridley v Plymouth Grinding and Baking Co; Kingsbridge Flour Mill Co v Plymouth Grinding and Baking Co* (1848) 2 Exch 711; *Re Cunningham & Co Ltd, Simpson's Claim* (1887) 36 ChD 532. A general power of management was sufficient authority if the giving of the guarantee was fairly within the scope of the company's business (*Re West of England Bank, ex p Booker* (1880) 14 ChD 317), but not otherwise (*Small v Smith* (1884) 10 App Cas 119, HL). See also *Charterbridge Corp'n Ltd v Lloyds Bank Ltd* [1970] Ch 62, [1969] 2 All ER 1185; *Rolled Steel Products (Holdings) Ltd v British Steel Corp'n* [1986] Ch 246, [1985] 3 All ER 52, CA.

6   Companies Act 1985 s 35A(1) (as added (see note 2); prospectively repealed). See note 2.

7   See the Companies Act 1985 s 35B (as added (see note 2); prospectively repealed). See note 2. As to authority to give a guarantee on behalf of a company see eg *Gransden & Co Ltd v Ballard (Kent) Ltd* [2001] All ER (D) 136 (Apr).

8 *Rosemary Simmons Memorial Housing Association Ltd v United Dominions Trust Ltd (Bates & Partners (a firm), third party)* [1987] 1 All ER 281, [1986] 1 WLR 1440 (where a charitable corporation was held to have implied power to guarantee transactions to advance its own charitable purposes, but not to guarantee the liabilities of a non-charitable body with which it was not associated in any legal sense). See also *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62, [1969] 2 All ER 1185; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, [1985] 3 All ER 52, CA; *Den Norske Creditbank v Sarawak Economic Development Corp* [1988] 2 Lloyd's Rep 616; affd [1989] 2 Lloyd's Rep 35, CA; and cf *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, [1991] 1 All ER 545, HL. See also **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1232. When mutual guarantees are given by companies in the same group, it is essential that each company fulfils all necessary formalities: *Ford and Carter Ltd v Midland Bank Ltd* (1979) 129 NLJ 543, HL.

9 See the Companies Act 1985 ss 151-158 (prospectively repealed) (as to replacement provisions see the Companies Act 2006 ss 677-683) (see **COMPANIES** vol 15 (2009) PARA 1223 et seq. At the date at which this volume states the law, the Companies Act 1985 ss 151-153, 156, 158 have been repealed (from 1 October 2008) for certain purposes only: see the Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007, SI 2007/3495, arts 5, 8, Sch 3 Pt 1.

10 *MacGregor v Dover and Deal Rly Co* (1852) 18 QB 618, Ex Ch.

11 See *Garrard v James* [1925] Ch 616; *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588; *Yorkshire Railway Waggon Co v Maclure* (1881) 19 ChD 478; affd on other grounds (1882) 21 ChD 309, CA. See also *Coutts & Co v Browne-Lecky* [1947] KB 104 at 111, [1946] 2 All ER 207 at 210; cf *Heald v O'Connor* [1971] 2 All ER 1105 at 1113, [1971] 1 WLR 497 at 506 per Fisher J.

## UPDATE

### 1031 Corporations

NOTES 2-7--Repeal of Companies Act 1985 ss 35-35B in force 1 October 2009: SI 2008/2860.

NOTE 9--Repeal of Companies Act 1985 ss 151-153, 156, 158 in force 1 October 2009 for remaining purposes: SI 2008/2860.

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### 1032. Transactions involving directors.

If the board of directors of a company<sup>1</sup> exceeds any limitation<sup>2</sup> on its powers under the company's constitution in connection with a transaction<sup>3</sup> to which a director<sup>4</sup> of the company or of its holding company<sup>5</sup> or any person connected with such a director or a company with whom such director is associated<sup>6</sup> is a party, the transaction is voidable at the instance of the company<sup>7</sup>.

A company may not give a guarantee<sup>8</sup> or provide security in connection with a loan made by any person to a director (including a shadow director<sup>9</sup>) of the company or of its holding company unless the transaction has been approved by a resolution of the members of the holding company<sup>10</sup>. A relevant company<sup>11</sup> may not make a loan or quasi-loan<sup>12</sup> to a director (including a shadow director) of the company or its holding company or a person connected with such director or enter into a credit transaction<sup>13</sup> as creditor for the benefit of a director (including shadow director) of a director of the company or of its holding company or a person connected with such a director, or give a guarantee or provide security in connection with a



loan or quasi-loan or credit transaction made by or entered into any person to such a director (or shadow director) or person connected with such a director, unless the transaction has been approved by a resolution of the members of the company<sup>14</sup>.

1 See PARA 1031 note 1.

2 Ie including limitations deriving from a resolution of the company in general meeting or a meeting of any class of shareholders, or from any agreement between members of the company or of any class of shareholders: Companies Act 1985 s 322A(8) (s 322A added by the Companies Act 1989 s 109(1)) (the Companies Act 1985 s 322A prospectively repealed) (as to replacement provisions see the Companies Act 2006 s 41) (see **COMPANIES** vol 14 (2009) PARA 264.

3 'Transaction' includes any act: Companies Act 1985 s 322A(8) (as added (see note 2); prospectively repealed). This definition is sufficiently wide to include a guarantee. See note 2.

4 Including any person occupying the position of director, by whatever name called: see the Companies Act 2006 s 250 (formerly the Companies Act 1985 s 741(1)); and **COMPANIES** vol 14 (2009) PARA 478.

5 As to the meaning of 'holding company' see the Companies Act 1985 ss 736, 736A (prospectively repealed) (as to replacement provisions see the Companies Act 2006 s 1159, Sch 6); and **COMPANIES** vol 14 (2009) PARA 25.

6 As to the meaning of 'connected' and 'associated' see the Companies Act 2006 ss 252-255 (formerly the Companies Act 1985 s 346); and **COMPANIES** vol 14 (2009) PARAS 481-482.

7 Companies Act 1985 s 322A(1), (2) (as added (see note 2); prospectively repealed). A person who is a party to the transaction but who is not a director of the company or of its holding company or a person connected with such a director or a company with whom such director is associated may still rely upon s 35A (prospectively repealed) (see PARA 1031): but where a transaction is voidable under s 322A (prospectively repealed) and valid by virtue of s 35A (prospectively repealed) in favour of such a person, the court may make such order affirming, severing or setting aside the transaction on such terms as appear to be just: s 322A(7) (as so added; prospectively repealed). See note 2.

8 For this purpose, 'guarantee' includes indemnity: see the Companies Act 1985 s 331(2) (repealed as from 1 October 2007 subject to transitional provisions).

9 A 'shadow director' is a person in accordance with whose instructions the directors of the company are accustomed to act: see the Companies Act 2006 s 251(1), (2) (formerly the Companies Act 1985 s 741(2)); and **COMPANIES** vol 14 (2009) PARA 479. However, a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity: Companies Act 2006 s 251(2).

10 See the Companies Act 2006 ss 197(1), 223(1) (formerly the Companies Act 1985 s 330(2), (5)); and **COMPANIES** vol 14 (2009) PARAS 561, 568.

11 Ie a company which (1) is a public company; or (2) a company associated with a public company: see the Companies Act 2006 s 198(1), 200(1) (formerly see the Companies Act 1985 s 331(6)); and **COMPANIES** vol 14 (2009) PARAS 569-570.

12 A 'quasi-loan' is a transaction under which one party (the 'creditor') agrees to pay, or pays otherwise than in pursuance of an agreement, a sum for another (the 'borrower') or agrees to reimburse, or reimburses otherwise than in pursuance of an agreement expenditure incurred by another party for another (the 'borrower') on terms that the borrower (or a person on his behalf) will reimburse the creditor, or in circumstances giving rise to a liability on the borrower to reimburse the creditor: see the Companies Act 2006 s 199(1) (formerly the Companies Act 1985 s 331(3)); and **COMPANIES** vol 14 (2009) PARA 569.

13 A 'credit transaction' is a transaction under which one party (the 'creditor') supplies goods or sells any land under a hire-purchase agreement or a conditional sale agreement or leases or hires any land or goods in return for periodical payments, or otherwise disposes of land or supplies goods or services on the understanding that payment (whether in a lump sum or instalments or by way of periodical payments or otherwise) is to be deferred: see the Companies Act 2006 s 202(1) (formerly the Companies Act 1985 s 331(7)); and **COMPANIES** vol 14 (2009) PARA 571. See further **CONSUMER CREDIT**.

14 See the Companies Act 2006 ss 198(1), (2), 200(1), (2), 201(1), (2) (formerly the Companies Act 1985 s 330(3), (4)); and **COMPANIES** vol 14 (2009) PARAS 569-571. A company may not enter into arrangements to achieve the same effect indirectly: see the Companies Act 2006 s 203(1) (formerly the Companies Act 1985 s 330(7)). The prohibition (ie without such approval) does not apply to certain other guarantees including relating

to expenditure on company business, defending proceedings etc, regulatory action or investigation, minor and business transactions, intra group transactions, and money-lending companies: see the Companies Act 2006 ss 204-211; and **COMPANIES** vol 14 (2009) PARA 568 et seq.

## UPDATE

### 1032 Transactions involving directors

NOTES 2-6---Repeal of Companies Act 1985 ss 322A, 736, 736A in force 1 October 2009: SI 2008/2860.

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## D. VITIATING FACTORS

### 1033. Mistake.

A common mistake, substantially shared by both parties, and relating to facts as they existed at the time the contract was made, which renders the subject matter of the contract essentially and radically different from the subject matter which the parties reasonably believed to exist, may render an apparent contract of guarantee void at common law<sup>1</sup>. There is, however, no jurisdiction in equity to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law<sup>2</sup>. Thus a party will not be allowed to evade performance of a contract such as a guarantee by the simple statement that he has made a mistake<sup>3</sup>. Nor will the doctrine of mistake avail a guarantor if the guarantee itself expressly or impliedly provides that he bears the risk of the relevant mistake<sup>4</sup>, or where the mistake consists of a belief entertained by him without reasonable grounds<sup>5</sup> or is otherwise the result of the guarantor's own fault<sup>6</sup>. A mutual mistake may, however, prevent there being a sufficient agreement between the parties to amount to a binding contract, particularly if the guarantor's mistake has been induced by the negligence of the creditor<sup>7</sup>.

A contract of guarantee will be voidable if the guarantor was, to the knowledge of the creditor<sup>8</sup>, under a fundamental mistake as to the nature or effect of the guarantee<sup>9</sup> or as to its subject matter<sup>10</sup> at the time when he entered into the guarantee<sup>11</sup>. In such circumstances, the guarantee may be set aside in whole or part, or may be rectified so as to accord with the guarantor's belief as to its terms<sup>12</sup>.

1 See *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 912-913, [1989] 1 WLR 255 at 268-269 per Steyn J, applying *Bell v Lever Bros Ltd* [1932] AC 161, HL. In *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* above the defendants had guaranteed to the plaintiffs the obligations of a principal debtor under agreements for the sale and leaseback of industrial machines. Unknown to the plaintiffs and the defendants, the machines which were the subject of the transaction did not exist. Steyn J held that the non-existence of the machines, which were the defendants' principal security, rendered the subject matter of the guarantee essentially different from that which both parties reasonably believed it to be. He therefore held that the agreements of guarantee were void at common law for common mistake. He also held that it was an express condition precedent to the agreement of guarantee that the machines existed: cf *De Brettes v Goodman* (1855) 9 Moo PCC 466. As to mistake generally see **CONTRACT** vol 9(1) (Reissue) PARA 703 et seq; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 68, 71; and **MISTAKE**.

2 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689, disapproving *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA and

*Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507, [1969] 2 All ER 891, CA. See further **EQUITY** vol 16(2) (Reissue) PARA 441.

3 *Tamplin v James* (1880) 15 ChD 215 at 217-218, CA, per Baggallay LJ; and see *Small v Currie* (1854) 2 Drew 102 at 114 per Kindersley V-C. Thus a guarantor who signs a guarantee which gives full effect to the intentions of a creditor who, on the faith of the guarantee, supplies goods to the principal debtor cannot repudiate his liability by asserting that he (the guarantor) meant something which he has not stated: *Haymen v Gover* (1872) 25 LT 903 at 905. Where a written agreement is in clear and unambiguous terms, a party cannot be heard to say that he misunderstood it: *Falck v Williams* [1900] AC 176, PC; *Small v Currie* above at 114-115 per Kindersley V-C; on appeal (1854) 5 De GM & G 141. See also *Stewart and McDonald v Young* (1894) 38 Sol Jo 385 where Wills J said that a surety will not be relieved from liability because the language of the guarantee carries more than the parties may have contemplated, even though the court may be of opinion that, had the surety understood this, he would not have entered into the guarantee.

4 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, Aust HC; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 913, [1989] 1 WLR 255 at 268 per Steyn J.

5 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 913, [1989] 1 WLR 255 at 268-269 per Steyn J.

6 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 913, [1989] 1 WLR 255 at 269 per Steyn J; cf *Solle v Butcher* [1950] 1 KB 671 at 693, [1949] 2 All ER 1107 at 1120, CA, per Denning LJ.

7 See *Lloyds Bank plc v Waterhouse* [1991] Fam Law 23 at 24, CA, per Sir Edward Eveleigh, applying *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564. As to the effect of mutual mistake on contracts in general see **CONTRACT** vol 9(1) (Reissue) PARA 703 et seq; and see generally **MISTAKE**.

8 The creditor must have actual knowledge of the surety's mistake. It is not enough that the creditor may have suspected that a mistake may have been made: *Agip SpA v Navigazione Alta Italia SpA, The Nai Genoa and the Nai Superba* [1984] 1 Lloyd's Rep 353, CA.

9 *Small v Currie* (1854) 2 Drew 102 at 114 per Kindersley V-C.

10 See *Royal Bank of Canada v Hale* (1961) 30 DLR (2d) 138; *Royal Bank of Canada v Oram* [1978] 1 WWR 564, BC SC.

11 As to the effect of unilateral mistake on contracts generally see *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA; *Agip SpA v Navigazione Alta Italia SpA, The Nai Genoa and the Nai Superba* [1984] 1 Lloyd's Rep 353, CA; *Taylor Barnard Ltd v Tozer* [1984] 1 EGLR 21, 269 Estates Gazette 225; *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd, The Ypatia Halcoussi* [1985] 2 Lloyd's Rep 364; and **MISTAKE**.

12 Cf *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545; *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA.

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### 1034. Non est factum.

A person under a disability<sup>1</sup> who signs a document such as a guarantee, which is fundamentally different from the document which he thinks that he is signing, and who can prove that he did not fail to take the precautions which he ought to have taken to ascertain the contents or significance of the document, may be able to escape liability under the guarantee by relying upon the doctrine of non est factum<sup>2</sup>.

However, the strict application of these requirements, in particular the requirement that the guarantor must prove that he was not careless, means that the doctrine is of very limited

application<sup>3</sup>. In modern times, cases in which persons who are adult and literate may successfully plead non est factum will be rare<sup>4</sup>.

1 The plea of non est factum is available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illiteracy) is not capable of both reading and sufficiently understanding the document to be signed: *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004 at 1034, [1970] 3 All ER 961 at 979, HL, per Lord Pearson.

2 *Lloyds Bank plc v Waterhouse* [1991] Fam Law 23, CA, per Purchas LJ (illiterate farmer who had signed an 'all moneys' guarantee in the mistaken belief that it was limited to the money required for a particular purpose was held not bound by his guarantee). For the general requirements of the doctrine of non est factum see *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL; *Norwich and Peterborough Building Society v Steed* [1993] Ch 116, sub nom *Norwich and Peterborough Building Society v Steed (No 2)* [1993] 1 All ER 330, CA. See also *Hunter v Walters* (1871) 7 Ch App 75; *National Provincial Bank of England v Jackson* (1886) 33 ChD 1; *King v Smith* [1900] 2 Ch 425.

3 *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281 at 285, CA, per Lord Denning MR. The doctrine of undue influence must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity: *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004 at 1015, [1970] 3 All ER 961 at 963, HL, per Lord Reid. See also *Norwich and Peterborough Building Society v Steed* [1993] Ch 116 at 125-127, sub nom *Norwich and Peterborough Building Society v Steed (No 2)* [1993] 1 All ER 330 at 336-339, CA, per Scott LJ. As to undue influence see PARA 1045.

4 *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004 at 1027, [1970] 3 All ER 961 at 973, HL, per Lord Wilberforce.

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### 1035. Misrepresentation.

A contract of guarantee, like any other contract<sup>1</sup>, is liable to be avoided if induced by a material<sup>2</sup> misrepresentation of an existing fact<sup>3</sup>, even if made innocently<sup>4</sup>.

Misrepresentation may be either written<sup>5</sup> or oral<sup>6</sup>. It usually consists of the direct assertion by the creditor<sup>7</sup> of a fact which is not a fact and which is calculated to influence a person becoming a guarantor<sup>8</sup>. However, it may also consist of statements by the creditor which tell only a misleading part of the truth<sup>9</sup>, or arise from the creditor's failure to correct a statement which he believed to be true when he made it but which he subsequently discovers to be untrue, or a statement which was true when made but which has subsequently become, to his knowledge, untrue<sup>10</sup>. Whether the non-disclosure of a fact amounts to a representation of its non-existence is, in every case, a question of fact dependent upon all the circumstances<sup>11</sup>.

The primary remedy for misrepresentation is rescission<sup>12</sup>. However, rescission may be refused and damages awarded in lieu if it is equitable to do so<sup>13</sup>, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss which rescission would cause to the other party<sup>14</sup>. The right to rescind may be lost by affirmation of the guarantee<sup>15</sup>, by the fact that the parties cannot be restored to their pre-contract positions<sup>16</sup>, and by the intervention of third party rights<sup>17</sup>. Damages may be awarded for loss caused by misrepresentation<sup>18</sup>. There are restrictions on the right to exclude or restrict liability for misrepresentation<sup>19</sup>.

1 See **CONTRACT** vol 9(1) (Reissue) PARA 767.

2 It may be that the requirement of materiality is to be applied less strictly in cases of gratuitous guarantee: see *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 475 per Fry J, who said '... there is no consideration in this case, as in many cases of suretyship, for the contract entered into; and therefore I think ... it is a contract in respect of which a very little is sufficient. Very little said which ought not to have been said ... would be sufficient to prevent the contract being valid'. See also *Bank of New South Wales v Rogers* (1941) 65 CLR 42.

3 See *National Bank of New Zealand v Macintosh* (1881) 3 NZLR 217, where it was held that a statement that the principal debtor was 'all right and would be able to meet the liabilities' was a statement of opinion and not a statement of fact so to amount to a misrepresentation.

4 *MacKenzie v Royal Bank of Canada* [1934] AC 468 at 475, PC. For the applicable principles see generally the Misrepresentation Act 1967; and **MISREPRESENTATION AND FRAUD**.

5 *Lee v Jones* (1864) 17 CBNS 482.

6 *Blest v Brown* (1862) 4 De GF & J 367.

7 As to the circumstances in which the creditor will be affected by misrepresentation or other wrongdoing by the principal debtor or other third party see PARA 1046.

8 *Foster v Mackinnon* (1869) LR 4 CP 704; *Lewis v Clay* (1897) 67 LJQB 224. Thus, if to a question asked by the proposed surety as to the existence of trade debts owing by the principal debtor the creditor's agent replies in the negative, when in point of fact there is one such debt owing, this amounts to misrepresentation (*Blest v Brown* (1862) 4 De GF & J 367), as does also a gratuitous assertion that an estate is free from incumbrances, other than those specifically mentioned, when in fact there is another and undisclosed incumbrance (*Willis v Willis* (1850) 17 Sim 218). See also *Stone v Compton* (1838) 5 Bing NC 142 (misleading statement that a sum owing by the principal debtor to the creditor had already been paid); *M'Kewan v Thornton* (1861) 2 F & F 594 (alleged misrepresentation as to the state of the principal debtor's account with the creditor bank).

9 See *Lee v Jones* (1864) 17 CBNS 482 at 498 per Shee J; *Willis v Willis* (1850) 17 Sim 218.

10 See *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 475 per Fry J.

11 *Lee v Jones* (1864) 17 CBNS 482; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 77, CA, per Vaughan Williams LJ. Apart from these cases, mere silence is not in general misrepresentation: see *Fox v Mackreth* (1788) 2 Bro CC 400; on appeal (1791) 2 Cox Eq Cas 320 at 320-321 per Lord Thurlow; *Bell v Lever Bros Ltd* [1932] AC 161 at 227, HL, per Lord Atkin. It may be that the Misrepresentation Act 1967 applies only to representations that have in fact been made, not to those which the law deems to have been made: see *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 at 760, sub nom *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952 at 1004, CA (affd on different grounds [1991] 2 AC 249, [1990] 2 All ER 947, HL). See also *Sabah Shipyard (Pakistan) Ltd v The Islamic Republic of Pakistan* [2007] EWHC 2602 (Comm), [2007] All ER (D) 193 (Nov). For the special rules relating to concealment and non-disclosure which are applicable to contracts of guarantee see PARA 1036.

12 See eg *MacKenzie v Royal Bank of Canada* [1934] AC 468, PC; the Misrepresentation Act 1967 s 1; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 801 et seq.

13 Except in cases of fraudulent misrepresentation: see the Misrepresentation Act 1967 s 2(2).

14 See the Misrepresentation Act 1967 s 2(2). In *Ward v National Bank of New Zealand* (1886) 4 NZLR 35, NZ CA, a guarantor was induced by misrepresentation to give a second guarantee in substitution for the first. The court refused to set the second guarantee aside except on terms that the guarantor restored the creditor bank to the position that it was in before the second guarantee was given.

15 See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 829-830.

16 See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 831.

17 See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 832.

18 See the Misrepresentation Act 1967 s 2; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 801, 811. In appropriate circumstances, a misrepresentation may also give rise to a cause of action in the tort of deceit or the tort of negligence: see eg *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA.

19 See the Misrepresentation Act 1967 s 3; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 803.

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### 1036. Non-disclosure and concealment.

An ordinary contract of guarantee, unlike a contract of insurance<sup>1</sup>, is not a contract of utmost good faith<sup>2</sup>, requiring full disclosure of all material facts by the contracting parties<sup>3</sup>. Where, however, a company which was the beneficiary of a guarantee for payment of its trading debts did not disclose to the guarantor its participation in a dishonest scheme to circumvent Russian exchange controls, the Privy Council held that the court's discretion to enforce the guarantee should not have been exercised<sup>4</sup>.

1 For the principle that insurance is a contract of utmost good faith see *London Assurance v Mansel* (1879) 11 ChD 363; *Container Transport International Inc and Reliance Group Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, CA; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep 496, CA; and **INSURANCE** vol 25 (2003 Reissue) PARAS 5, 36 et seq.

2 *le uberrimae fidei*. It was formerly held that a creditor's duty of disclosure when communicating with a surety was similar to that of a person seeking insurance: *Owen v Homan* (1851) 3 Mac & G 378 at 397.

3 *Williams v Rawlinson* (1825) 3 Bing 71 at 77 per Best CJ; *Hamilton v Watson* (1845) 12 Cl & Fin 109 at 118-119, HL, per Lord Campbell; *North British Insurance Co v Lloyd* (1854) 10 Exch 523; *Wythes v Labouchere* (1859) 3 De G & J 593; *Lee v Jones* (1864) 17 CBNS 482; *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 475 per Fry J; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 81, CA, per Farwell LJ, and at 85-86 per Kennedy LJ. There is no magic in the use of the word 'insurance' or 'guarantee'; many contracts may with equal propriety be called by either term; whether the contract is one requiring *uberrima fides* depends upon its substantial character: see *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 792, CA, per Romer LJ; *revsd*, without affecting this point, sub nom *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL. See also *Geest plc v Fyffes plc* [1999] 1 All ER (Comm) 672 (in a contract of indemnity or guarantee, the potential beneficiary's duty is confined to a duty not to make express or implied misrepresentations and there is no general duty to disclose to the party about to give the guarantee or indemnity all facts material to that party's decision whether to enter into that contract).

4 See *Far Eastern Shipping Co Public Ltd v Scales Trading Ltd* [2001] 1 All ER (Comm) 319, [2000] All ER (D) 2034, PC. This case was applied (in a different context) in *Lloyds TSB Bank plc v Shorney* [2001] EWCA Civ 1161, [2001] All ER (D) 277 (Jul).

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### 1037. Matters which need not be disclosed.

On the basis that an ordinary contract of guarantee is not one of utmost good faith<sup>1</sup>, it has been held that a creditor, who has not been specifically asked<sup>2</sup>, is under no duty to disclose to an intending surety the fact that the principal debtor is already overdrawn<sup>3</sup>, or the extent of that overdraft or other indebtedness to the creditor<sup>4</sup>, whether the principal debtor is in the habit of overdrawn<sup>5</sup>, how the principal debtor's account has been kept<sup>6</sup>, the fact that the principal debtor's account has been conducted in an irregular way<sup>7</sup>, whether the principal debtor has

been punctual in his dealings<sup>8</sup>, the fact that the creditor bank has dishonoured cheques drawn by the principal debtor<sup>9</sup>, the fact that the principal debtor has previously defaulted<sup>10</sup>, the fact that the creditor is suspicious that the principal debtor has been defrauding him<sup>11</sup>, the fact that the husband of the principal debtor, who has authority to draw on the account to be guaranteed, is an undischarged bankrupt<sup>12</sup>, the fact that the manager of the creditor bank has 'taken partial control' of the principal debtor's business<sup>13</sup>, whether the principal debtor has performed his promises in an honourable manner<sup>14</sup>, the fact that the creditor intends to lend a further substantial sum on the faith of the guarantee<sup>15</sup>, or the fact that the guarantee is required because another guarantor wishes to retire<sup>16</sup>.

1     *le uberrimae fidei*. For the exceptional circumstances in which the creditor is obliged to make disclosure see PARA 1038 et seq.

2     If the intending guarantor is unacquainted with the risk he is undertaking he should inquire about it: *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 793, CA, per Romer LJ; revsd without affecting this point, sub nom *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL. As to the creditor's obligation to give proper answers to the guarantor's questions see PARA 1039.

3     As it is not a matter of presumption that a customer's account stands clear at the time the guarantee is given, the surety should inquire about it: *Kirby v Duke of Marlborough* (1813) 2 M & S 18 at 22 per Lord Ellenborough CJ. Where a bond is given for the continuance of an old bank account the guarantor will not be discharged by the non-disclosure of the fact of the principal debtor's having a balance against him duly secured at the date of the bond, as it is well known that such accounts are not carried on until the old balance has been secured: *Williams v Rawlinson* (1825) 3 Bing 71 at 77 per Best CJ. See also *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60; *Lloyds Bank Ltd v Harrison* (1925) 4 Legal Decisions Affecting Bankers 12, CA; *Cooper v National Provincial Bank Ltd* [1946] KB 1, [1945] 2 All ER 641; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 455, 463, Aust HC. But cf *Lee v Jones* (1864) 17 CBNS 482, where the guarantee was of payments to be made by an agent to his merchant principals, and it was held that non-disclosure of existing arrears was in the circumstances evidence of fraud. 'It depends whether in such a transaction as that described in the agreement it might or might not naturally be expected that the matters might have allowed a balance of this extent to accumulate and might have allowed the amount to stand unsettled over so long a time': *Lee v Jones* at 505 per Blackburn J.

4     *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL; *Royal Bank of Scotland v Greenshields* 1914 SC 259, Ct of Sess; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA; *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335.

5     *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL. 'No surety asked to guarantee a banking account is entitled to assume that the customer of the bank has not been in the habit of overdrawing; the proper presumption in most instances is that he has been doing so, and wishes to do so again': *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 83, CA, per Farwell J.

6     *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA.

7     *Cooper v National Provincial Bank Ltd* [1946] KB 1, [1945] 2 All ER 641 (cheques drawn then countermanded).

8     *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL.

9     *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335.

10    *Roper v Cox* (1882) 10 LR Ir 200 (principal debtor guilty of gross irregularity and delay in paying rent, and substantially in arrears at date of guarantee); and see *Home Insurance Co v Holway* (1881) 39 American Reports 179.

11    *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335 at 339 per Horridge J; *Bank of Scotland v Morrison* 1911 SC 593 at 602, 605, Ct of Sess; *Royal Bank of Scotland v Greenshields* 1914 SC 259.

12    *Cooper v National Provincial Bank Ltd* [1946] KB 1, [1945] 2 All ER 641.

13    *Lloyds Bank Ltd v Harrison* (1925) 4 Legal Decisions Affecting Bankers 12, CA. The bank manager had agreed to give an extended credit to the principal debtor only on terms that he should not buy further stock, but should confine his business to selling his existing stock, and should lay off certain of his employees.

- 14 *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL.
- 15 *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60.
- 16 *North British Insurance Co v Lloyd* (1854) 10 Exch 523.

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### **1038. Where disclosure is required.**

There are four circumstances in which the creditor must make disclosure to an intending guarantor: (1) where the creditor is asked a specific question<sup>1</sup>; (2) where the bank would otherwise mislead the guarantor by volunteering only part of the truth<sup>2</sup>; (3) where the guarantor makes a statement in the creditor's presence that demonstrates that he entirely misunderstands the principal debtor's position<sup>3</sup>; and (4) where there is anything that might not naturally be expected to take place between the principal debtor and the creditor<sup>4</sup>.

Where a fiduciary advises his principal to enter into a guarantee he must prove affirmatively that the transaction in question is fair and that in the course of the negotiations he has made full disclosure of all facts material to the transaction<sup>5</sup>.

1 *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL; *Royal Bank of Scotland v Greenshields* 1914 SC 259; *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60. See PARA 1039.

2 *Royal Bank of Scotland v Greenshields* 1914 SC 259.

3 See note 2.

4 *Hamilton v Watson* (1845) 12 Cl and Fin 109 at 119, HL, per Lord Campbell; *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335 at 338 per Horridge J; *Lloyds Bank Ltd v Harrison* (1925) 4 Legal Decisions Affecting Bankers 12 at 13, CA, per Sir Ernest Pollock MR, and at 15-16 per Bankes LJ; *Cooper v National Provincial Bank Ltd* [1946] KB 1 at 6-7, [1945] 2 All ER 641 at 644 per Lawrence LJ. See PARA 1040.

5 See eg *Meara v Fox* [2001] All ER (D) 68 (Apr). As to the duties of fiduciaries see generally **EQUITY** vol 16(2) (Reissue) PARA 851 et seq.

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### **1039. The duty to answer questions.**

It is the duty of a creditor to give a true, honest and accurate answer to any specific question directed to him by an intending guarantor which is in any way material to the giving of the guarantee<sup>1</sup>. If the creditor's answer is misleading, it may amount to a misrepresentation and so entitle the guarantor to avoid the guarantee<sup>2</sup>.



1 *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60 at 69. The creditor is not obliged to make inquiries in order to answer, merely to answer truthfully from the information which he has: *Parsons v Barclay & Co Ltd and Goddard* (1910) 103 LT 196, CA.

2 See PARA 1035.

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#### **1040. Disclosure of special circumstances.**

The creditor must disclose to an intending guarantor anything which might not naturally be expected to take place between the parties who are concerned in the transaction, namely whether there is a contract between the debtor and the creditor to the effect that the debtor's position is to be different from that which the guarantor might naturally expect<sup>1</sup>.

The omission to mention any such special fact is an implied representation to the intending guarantor that it does not exist<sup>2</sup>, entitling the guarantor upon discovering the true position to avoid the guarantee<sup>3</sup>.

1 *Hamilton v Watson* (1845) 12 Cl & Fin 109 at 119, HL, per Lord Campbell. See also *Smith v Bank of Scotland* (1813) 1 Dow 272, HL; *Railton v Matthews* (1844) 10 Cl & Fin 934, HL; *North British Insurance Co v Lloyd* (1854) 10 Exch 523; *Lee v Jones* (1864) 17 CBNS 482 at 503-504 per Blackburn J; *Phillips v Foxall* (1872) LR 7 QB 666; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA; *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335 at 338 per Horridge J; *Royal Bank of Scotland v Greenshields* 1914 SC 259; *Lloyds Bank Ltd v Harrison* (1925) 4 Legal Decisions Affecting Bankers 12 at 13, CA, per Sir Ernest Pollock MR, and at 15-16 per Bankes LJ; *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60 at 69 per Tucker J; *Cooper v National Provincial Bank Ltd* [1946] KB 1 at 6, [1945] 2 All ER 641 at 644 per Lawrence LJ; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 447 per Gibbs CJ, Aust HC; *Levett v Barclays Bank plc* [1995] 2 All ER 615, [1995] 1 WLR 1260; *Lloyds TSB Bank plc v Shorney* [2001] EWCA Civ 1161, [2002] 1 FCR 673, [2002] 1 FLR 81.

2 See the cases cited in note 1.

3 See PARA 1035.

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#### **1041. Matters which ought to be disclosed.**

It depends on the circumstances of each case whether a fact not disclosed is such that it is impliedly represented not to exist<sup>1</sup>. In general, the guarantor should be informed of every private bargain between the creditor and the principal debtor varying the degree of the guarantor's responsibility<sup>2</sup>, and it may sometimes become necessary even to disclose the existence and nature of an agreement between the creditor and some person other than the principal debtor<sup>3</sup>.

It has, for example, been held that a creditor was obliged to disclose to an intending guarantor the existence of an agreement that part of the advance to be secured by the guarantee was to be applied to repay a pre-existing debt<sup>4</sup>. The guarantor was held to be discharged by the creditor's failure to disclose a further incumbrance, where an estate was conveyed to a person 'free from incumbrances' except those set out in a particular schedule, in consideration of that person and his guarantor doing certain things<sup>5</sup>. Where the creditor failed to disclose his understanding with the principal debtor that the promissory note, in which the guarantor had joined the principal debtor, should not be payable for five years but should bear interest at five per cent per annum, secured by a separate promissory note given by the principal debtor, the guarantor was also held to be discharged<sup>6</sup>. Similarly, the guarantor was held to be discharged where the creditor made a secret arrangement to take payment of his debt in full, the guarantee having been given to secure an advance to enable the debtor to pay a composition agreed by the general body of creditors<sup>7</sup>.

1 *Lee v Jones* (1864) 17 CBNS 482 at 506 per Blackburn J; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA, especially at 85-88 per Kennedy LJ, who distinguished between intrinsic and extrinsic circumstances: intrinsic circumstances forming the very ingredients of the contract and extrinsic circumstances forming no part of it, but only bearing upon it so as to enhance or diminish the price of the subject matter, or to operate as a motive to make or decline the contract. Extrinsic circumstances need only be disclosed in a contract *uberimae fidei*, but intrinsic circumstances must be disclosed in a contract of guarantee.

2 *Pidcock v Bishop* (1825) 3 B & C 605; *Re Mason, ex p Sharp* (1844) 3 Mont D & De G 490; *Stone v Compton* (1838) 5 Bing NC 142 at 157; *Pendlebury v Walker* (1841) 4 Y & C Ex 424; *Smith v Bank of Scotland* (1813) 1 Dow 272 at 292 et seq, HL, per Lord Eldon LC; *Burke v Rogerson* (1866) 14 LT 780; *Hamilton v Watson* (1845) 12 Cl & Fin 109, HL; *Railton v Mathews* (1844) 10 Cl & Fin 934, HL; *Mackreth v Walsmesley* (1884) 51 LT 19.

3 See *Stiff v Eastbourne Local Board* (1868) 19 LT 408; on appeal (1869) 20 LT 339, CA. In the case of a surety for payment of part of the purchase money of ships, it has been held that the fact that one of the ships is laden with munitions of war destined for a belligerent port should be disclosed to the surety: *Burke v Rogerson* (1866) 14 LT 780.

4 *Stone v Compton* (1838) 5 Bing NC 142 (mortgage for the same sum as the guarantee, which was read over to the guarantor, recited that the full sum was being advanced. In fact, it had been agreed that part of it should be kept back to pay a pre-existing debt, which the mortgage recited as paid). See also *Lee v Jones* (1864) 17 CBNS 482; and *Blest v Brown* (1862) 3 Giff 450; on appeal 4 De GF & J 367. Cf *Mackreth v Walsmesley* (1844) 51 LT 19 (where the creditor was held not to have been obliged to disclose an arrangement made by the principal debtor to pay a debt to another surety with the advance to be guaranteed), and the cases cited in PARA 1040 note 1.

5 *Willis v Willis* (1850) 17 Sim 218; and see *Blest v Brown* (1862) 4 De GF & J 367.

6 See *Espey v Lake* (1852) 10 Hare 260.

7 *Pendlebury v Walker* (1841) 4 Y & C Ex 424.

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## 1042. Fidelity guarantees.

The nature of a fidelity guarantee gives rise to a more extensive disclosure than is required in the case of a guarantee for a bank or other cash account<sup>1</sup>. Where the guarantee is of the good behaviour of an employee, the omission of the employer to disclose to the intending guarantor any previous dishonesty or misconduct<sup>2</sup> of the employee in his employment of which the employer is aware will entitle the guarantor to avoid the guarantee<sup>3</sup>.

The guarantor will not be entitled to avoid the guarantee if he knows of the dishonesty or misconduct from another source, since in those circumstances there is no effective misrepresentation<sup>4</sup>.

Where the guarantee is a continuing guarantee, the duty of disclosure continues throughout the guaranteed employment. If the employer discovers that the employee has been dishonest, but continues to employ him without telling the guarantor, the guarantor will not be liable for any subsequent dishonesty by the employee<sup>5</sup>.

1 *Railton v Mathews* (1844) 10 Cl & Fin 934, HL, as explained in *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 79-80, CA, per Vaughan Williams LJ. 'There is a wide distinction between a case like the present and the cases . . . of guarantees for overdrafts given to bankers . . . The surety may well complain 'I did not know that your servant was a thief'; but he cannot be heard to complain 'I did not know your customer had been overdrawn his account or what the nature of his business was': *London General Omnibus Co Ltd v Holloway* at 82 per Farwell LJ. Fidelity guarantees are now rarely encountered. See further PARA 1133.

2 For examples of mere irregularities not amounting to misconduct see *Durham Corpn v Fowler* (1889) 22 QBD 394; *Caxton and Arrington Union v Dew* (1899) 68 LJQB 380.

3 *Phillips v Foxall* (1872) LR 7 QB 666 at 672 per Quain J; and see *Smith v Bank of Scotland* (1813) 1 Dow 272, HL; *Railton v Mathews* (1844) 10 Cl & Fin 934, HL; *Lawder v Lawder* (1873) 7 ICLR 57; *Sanderson v Aston* (1873) LR 8 Exch 73; *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72, CA, reviewing the authorities. As to the onus of proof of the employer's knowledge of the employee's misconduct cf *Federal Supply and Cold Storage Co of South Africa v Angehrn and Piel* (1910) 80 LJPC 1 at 8. In a case where fraudulent concealment or misrepresentation was not sufficiently pleaded, a provision in a guarantee for the disclosure of misconduct was held not to apply to misconduct before the guarantee was entered into: *Byrne v Muzio* (1881) 8 LR Ir 396.

4 *Peel v Tatlock* (1799) 1 Bos & P 419; *Goring v Edmonds* (1829) 3 Moo & P 259; *Caxton and Arrington Union v Dew* (1899) 68 LJQB 380.

5 *Phillips v Foxall* (1872) LR 7 QB 666; *Sanderson v Aston* (1873) LR 8 Exch 73; *Enright v Falvey* (1879) 4 LR Ir 397. See also *Smith v Bank of Scotland* (1813) 1 Dow 272. Mere delay in informing the guarantor of the employee's misconduct will not discharge the guarantee in respect of that misconduct: see *Peel v Tatlock* (1799) 1 Bos & P 419.

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### **1043. Whether there is a duty to explain.**

It has been stated that there is no special obligation upon a person to whom another is about to give a guarantee to explain the meaning or effect of the guarantee, any more than a person who is taking from another any other species of deed or instrument which is to enure to the benefit of the person taking it is under such obligation<sup>1</sup>. If, however, the creditor does give the intending guarantor any explanation, it must be sufficiently accurate and complete so as not to be misleading<sup>2</sup>. Furthermore, where the creditor is a bank or other large institution and the relationship between the debtor and the guarantor is non-commercial, the guarantee may be unenforceable on the grounds of undue influence exerted by the debtor unless the creditor can establish that it has taken reasonable steps to bring home to the guarantor, in a meaningful way, the practical implications of the proposed transaction and the risks he or she is running by standing as surety<sup>3</sup>. The steps to be taken by the creditor in such situations are discussed below<sup>4</sup>.

1 *Small v Currie* (1853) 2 Drew 102 at 114-115 per Kindersley V-C.

2 *Cornish v Midland Bank plc (Humes, third party)* [1985] 3 All ER 513, CA. In *Midland Bank plc v Hubbard* (16 February 1993, unreported), CA, the bank manager told the wife, about to mortgage her home to secure the indebtedness of her husband's company, that the mortgage was to secure borrowing in accordance with arrangements agreed with her husband. He also explained to her what he called the 'worst scenario', which was that the bank could take possession of the house and sell it, and said that her rights were removed by signing the charge. Gibson LJ described this explanation as 'entirely adequate'. See now the text and notes 3-4; and PARAS 1045-1046.

3 *Barclays Bank v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

4 See PARA 1045-1046.

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#### 1044. Duress.

A guarantee procured by duress by the creditor<sup>1</sup> is liable to be set aside<sup>2</sup>.

Duress may take the form of physical coercion<sup>3</sup>, or of any other conduct or threat which the law regards as illegitimate<sup>4</sup> which coerces the will of the guarantor and so vitiates his consent to the guarantee<sup>5</sup>.

1 For the circumstances in which the creditor may be affected by improper pressure exercised by a third party see PARA 1046.

2 See eg *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389, [1937] 2 All ER 657, where a guarantee obtained from a family company by a threat to prosecute a family member was held voidable. The case was argued and decided as a case of undue influence, on the basis that 'the common law doctrine of duress has been superseded by the equitable doctrine of undue influence' (see at 394): *sed quaere*. See also *Kaufman v Gerson* [1904] 1 KB 591, CA; and see *Scott v Scott* (1847) 11 I Eq R 74; *Williams v Bayley* (1866) LR 1 HL 200; *Société des Hôtels Réunis SA v Hawker* (1913) 29 TLR 578; *affd* on a question of costs (1914) 30 TLR 423, CA. In *Barton v Armstrong* [1976] AC 104, [1975] 2 All ER 465, the Privy Council described certain deeds as being 'void' as a result of duress. However, such contracts are more commonly spoken of as being only voidable: see *DPP for Northern Ireland v Lynch* [1975] AC 653 at 695, sub nom *Lynch v DPP for Northern Ireland* [1975] 1 All ER 913 at 938, HL, per Lord Simon of Glaisdale (as a matter of criminal law, this case was overruled in *R v Howe* [1987] AC 417, [1987] 1 All ER 771, HL); *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, [1978] 3 All ER 1170; *Pao On v Lau Yiu Long* [1980] AC 614 at 634, [1979] 3 All ER 65 at 77-78, PC; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 383, [1982] 2 All ER 67 at 75, HL, per Lord Diplock, and at 400 and 89 per Lord Scarman.

3 See eg *Friedberg-Seeley v Klass* (1957) 101 Sol Jo 275; *Barton v Armstrong* [1976] AC 104, [1975] 2 All ER 465, PC.

4 Legitimate commercial pressure can never amount to duress: *Occidental Worldwide Investment Corp v Skibs A/S Avanti, The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293 at 336. 'In the vast majority of cases a customer who signs a bank guarantee . . . cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases caught by this rule . . . take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere': *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 336, [1974] 3 All ER 757 at 763, CA. See also *GMAC Commercial Credit Ltd v Dearden* [2002] All ER (D) 440 (May) (claimant requiring directors of company with which it had entered into invoice discounting agreement to sign personal guarantees; held that claimant had been acting to enforce its lawful rights under the agreement and defendants had no real prospect of establishing a defence of economic duress to a claim under the guarantees if the case proceeded to trial); *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] BLR 530; *Bulmer v Owllett* [2003] EWHC 2929 (Ch), [2003] All ER (D) 39 (Dec).

5 See *Occidental Worldwide Investment Corp v Skibs A/S Avanti, The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, [1978] 3 All ER 1170; *Pao On v Lau Yiu Long* [1980] AC 614 at 635-636, [1979] 3 All ER 65 at 78-79, PC; *Syros Shipping Co SA v Elaghill Trading Co, The Proodos C* [1981] 3 All ER 189 at 192, [1980] 2 Lloyd's Rep 390 at 393; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, [1982] 2 All ER 67, HL; *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, CA; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA; *Vantage Navigation Corp v Suhail and Saud Bahwan Building Materials Inc, The Alev* [1989] 1 Lloyd's Rep 138; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833, [1989] 1 All ER 641; *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152, [1991] 4 All ER 871, HL. For the effect of duress on contracts generally see **CONTRACT** vol 9(1) (Reissue) PARAS 710-711.

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### **1045. Undue influence; in general.**

A guarantee procured by undue influence on the part of the creditor<sup>1</sup> is liable to be set aside<sup>2</sup>. Such undue influence is either actual or presumed<sup>3</sup>.

In cases of actual undue influence, it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the transaction<sup>4</sup>. He must show that (1) the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant; (2) the influence was exercised; (3) its exercise was undue; and (4) its exercise brought about the transaction<sup>5</sup>. The line between permissible forms of coercion and persuasion on the one hand and undue influence on the other is regulated by considerations of public policy<sup>6</sup>. Relief will not be granted where all that is shown is impecuniosity or inequality of bargaining power<sup>7</sup>. There must be something in the nature of the conduct complained of which is unfair and improper, whether it takes the form of coercion, overreaching or cheating, before equity will intervene<sup>8</sup>.

Presumed undue influence arises out of a relationship between two persons where one person has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage<sup>9</sup>. Whether a transaction was brought about by the exercise of what is commonly called 'presumed undue influence' is a question of fact and the burden of proving it rests upon the person who claims to have been wronged<sup>10</sup>. A different form of presumption, however, arises in the case of certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected. In these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party; it is sufficient for him to prove the existence of the type of relationship<sup>11</sup>. That presumption does not arise from the normal relationship of banker and customer<sup>12</sup>; nor does the relationship of husband and wife as such give rise to the presumption<sup>13</sup>.

Reluctance to enter into a contract of guarantee or collateral security is not necessarily indicative that any improper pressure was being brought to bear; indeed reluctance on the part of the surety may rather show that he knew what he was doing and did it because he thought it was the right thing to do<sup>14</sup>.

The presumption of undue influence may be rebutted by proof that the guarantee was given as a result of full, free and informed thought by the guarantor about it<sup>15</sup>. Proof that the complainant received advice from an independent<sup>16</sup> third party before entering into the

impugned transaction may be very helpful in rebutting the presumption of undue influence. However such advice, including legal advice, is on the one hand not always necessary nor on the other hand always sufficient<sup>17</sup>. A bank cannot avoid being fixed with constructive notice of the complainant's equity merely by relying on an honest belief that the complainant was represented in the transaction by a solicitor, since it cannot be assumed that the solicitor's retainer extended to explaining to his client the nature and effect of the transaction<sup>18</sup>.

1 For the circumstances in which the creditor may be affected by undue influence exercised by a third party see PARA 1046.

2 See *Lloyds Bank Ltd v Bundy* [1975] QB 326, [1974] 3 All ER 757, CA; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Woodstead Finance Ltd v Petrou* [1986] BTLC 267; *Midland Bank plc v Phillips* (14 March 1986, unreported), CA. See also the cases cited in PARA 1046. As to the doctrine of undue influence generally see **CONTRACT** vol 9(1) (Reissue) PARA 712; and for a full treatment of this doctrine as an aspect of the equitable jurisdiction in cases of constructive fraud see **EQUITY** vol 16(2) (Reissue) PARA 416 et seq.

3 The wisdom of the practice of making a classification of cases of undue influence has been questioned (see *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 esp at [92] per Lord Clyde, at [107] per Lord Hobhouse and at [158], [161] per Lord Scott); however a distinction may still be drawn between actual undue influence and presumed undue influence. Cf however *Royal Bank of Scotland v Etridge (No 2)* at [92] per Lord Clyde ('on the face of it a division into cases of 'actual' and 'presumed' undue influence appears illogical'). The previous classification, in *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA and adopted by Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL, was into: (1) Class 1, cases of actual undue influence; (2) Class 2A, cases of presumed undue influence where the law presumes the legal relationship between the parties to be one of trust and confidence; and (3) Class 2B where the claimant must establish by affirmative evidence that he or she was accustomed to repose trust and confidence in the alleged wrongdoer.

4 See *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [103], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Hobhouse; cf *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 189, [1993] 4 All ER 417 at 423, HL, per Lord Browne-Wilkinson. See also *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL); *Wright v Cherrytree Finance Ltd (Scott and anor Pt 20 defendants)* [2001] EWCA Civ 449, [2001] 2 All ER (Comm) 877, 82 P & CR D20. *Royal Bank of Scotland v Etridge (No 2)* above has been applied on a number of occasions: see eg *Yorkshire Bank plc v Tinsley* [2004] EWCA Civ 816, [2004] 3 All ER 463; *National Westminster Bank plc v Waite* [2006] EWHC 1287 (QB), [2006] All ER (D) 289 (Jun); *Abbey National plc v Stringer* [2006] EWCA Civ 338, [2006] All ER (D) 91 (Apr). See further **EQUITY** vol 16(2) (Reissue) PARA 418.

5 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 967, [1992] 4 All ER 955 at 976, CA.

6 *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389 at 394-395, [1937] 2 All ER 657 at 661; *Kaufman v Gerson* [1904] 1 KB 591, CA. The courts have been careful not to define too clearly the circumstances in which the doctrine of undue influence may be invoked. 'There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence . . . A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable . . .': *National Westminster Bank plc v Morgan* [1985] AC 686 at 709, [1985] 1 All ER 821 at 831, HL, per Lord Scarman.

7 *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA; *National Westminster Bank plc v Morgan* [1985] AC 686 at 707-708, [1985] 1 All ER 821 at 830, HL, per Lord Scarman.

8 *Allcard v Skinner* (1887) 36 ChD 145 at 181, CA.

9 In *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [8], [2002] 2 AC 773, [2001] 4 All ER 449 Lord Nicholls of Birkenhead gave as an example from the nineteenth century *Bainbrigge v Browne* (1881) 18 ChD 188 where an impoverished father prevailed upon his inexperienced children to charge their reversionary interests under their parents' marriage settlement with payment of his mortgage debts. See also *Huguenin v Baseley* (1807) 14 Ves 273; *Allcard v Skinner* (1887) 36 ChD 145; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, PC; *Re Craig, Meneces v Middleton* [1971] Ch 95, [1970] 2 All ER 390; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA; *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL); *Simpson v Simpson* [1989] Fam Law 20. Cf *Re*

*Brocklehurst, Hall v Roberts* [1978] Ch 14, [1978] 1 All ER 767, CA. Not every fiduciary relationship gives rise to a presumption of undue influence: *Re Coomber, Coomber v Coomber* [1911] 1 Ch 723, CA.

10 The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personalities of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship and all the circumstances of the case. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. The court may then infer that the transaction was procured by undue influence. This situation is conventionally described as one in which a presumption of undue influence arises, the use of the word 'presumption' being descriptive of a shift in the evidential onus on a question of fact: *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. See also *Roche v Sheerington* [1982] 2 All ER 426, [1982] 1 WLR 599; *Hammond v Osborn* [2002] EWCA Civ 885, [2002] 2 P & CR D41, [2002] All ER (D) 232 (Jun).

11 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. Well-established categories of such a relationship are those between parent and child, guardian and ward, trustee and beneficiary, solicitor and client, doctor and patient and religious superior and inferior: see **EQUITY** vol 16(2) (Reissue) PARAS 419, 425-427.

12 *Lloyds Bank Ltd v Bundy* [1975] QB 326, [1974] 3 All ER 757, CA; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Cornish v Midland Bank plc (Humes, third party)* [1985] 3 All ER 513, CA; *Goldsworthy v Brickell* [1987] Ch 378, [1987] 1 All ER 853, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL). Nor does it arise from the normal relationship of employer and employee or of landlord and tenant or from a combination of the two: *Matthew v Bobbins* (1980) 41 P & CR 1, CA.

13 *Howes v Bishop* [1909] 2 KB 390, CA; *Bank of Montreal v Stuart* [1911] AC 120, PC; *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL; *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423, [1986] 1 WLR 119, CA; *Midland Bank plc v Perry* (1988) 56 P & CR 202, CA; *Midland Bank plc v Shephard* [1988] 3 All ER 17, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL). The presumption may be established where there are special circumstances of illness or dependency: *Simpson v Simpson* [1989] Fam Law 20. It seems, however, that the presumption may apply to engaged couples: *Page v Horne* (1848) 11 Beav 227; *Re Lloyds Bank Ltd, Bomze and Lederman v Bomze* [1931] 1 Ch 289; *Zamet v Hyman* [1961] 3 All ER 933, [1961] 1 WLR 1442, CA; cf *Re Craig, Meneces v Middleton* [1971] Ch 95, [1970] 2 All ER 390; *Halifax Building Society v Brown* [1995] 3 FCR 110, [1996] 1 FLR 103, CA.

14 *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705 at 715, CA, [1998] 3 FCR 675 at 686 (PARA 18), CA, per Stuart-Smith LJ, giving the judgment of the court; affd [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449 without the passage cited being affected by criticisms of part of the Court of Appeal reasoning. As to the burden of proof of undue influence see also *Barclays Bank plc v Boulter* [1999] 4 All ER 513, [1999] 1 WLR 1919, HL.

15 See *Zamet v Hyman* [1961] 3 All ER 933 at 938, [1961] 1 WLR 1442 at 1446, CA, per Lord Evershed MR; followed in *Re Craig, Meneces v Middleton* [1971] Ch 95 at 105, [1970] 2 All ER 390 at 396. See, for a longer formulation, *Allcard v Skinner* (1887) 36 ChD 145 at 171, CA, per Cotton LJ. For a case on the rebuttal of the presumption where the parties were close friends see *Banco Exterior Internacional SA v Thomas* [1997] 1 All ER 46, [1997] 1 WLR 221, CA.

16 If the third party is being retained by the bank, the bank cannot rely on inaccurate information supplied to it by the third party: *National Westminster Bank plc v Amin* [2002] UKHL 9, [2002] 1 FLR 735, [2002] All ER (D) 388 (Feb).

17 *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA, but note the criticism of one point in this decision in *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [58]-[61], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead; *Cloughton v Price* (1997) 30 HLR 396, [1997] EGCS 51, CA.

The weight, or importance, to be attached to such advice depends on all the circumstances. Generally advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do; but a person may fully understand the implications of a proposed transaction and yet still be acting under the undue influence of another. The question is not whether the complainant knew what he was doing and intended to do, but how the intention to act was created. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case: *Steeple v Lea* (1997) 76 P & CR 157, [1998] 2 FCR 144, CA; *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA; *Royal Bank of Scotland v Etridge (No 2)* [2001]

UKHL 44 at [20], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. See also *Massey v Midland Bank plc* [1995] 1 All ER 929, [1995] 1 FCR 380, CA.

18 *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, [2003] 1 P & CR 168, [2002] 3 FCR 448.

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### **1046. Misrepresentation or influence by third parties.**

Where the guarantor seeks to avoid the guarantee on the grounds of misrepresentation, duress or undue influence, it is not of itself sufficient for him to show that that misrepresentation, duress or undue influence was committed by the principal debtor or some other third party. He must show that the creditor is affected in law by the third party's wrongdoing<sup>1</sup>.

There are two distinct grounds on which the creditor may be affected by the actions of the principal debtor or a third party: they are (1) agency; and (2) notice<sup>2</sup>. On general principles, the creditor will be vicariously liable for the acts of his agents acting within the scope of their authority<sup>3</sup>. So if the wrongdoing principal debtor or other third party is acting as agent for the creditor in obtaining the guarantee, the guarantee so obtained may be set aside as against the creditor<sup>4</sup>. However, in the majority of cases where the creditor has required of the principal debtor that there must be a surety, the principal debtor will be acting on his own account and not for the creditor in seeking to procure the support of a guarantor<sup>5</sup>.

If the creditor has actual or constructive notice<sup>6</sup> at the time of execution of a guarantee that the guarantee has been procured by the exercise of undue influence, he cannot enforce the transaction<sup>7</sup>. What notice will be requisite will depend on the nature of the undue influence alleged. In a case of actual undue influence, the creditor must have notice of the circumstances alleged to constitute the actual exercise of the undue influence; in a presumption case he must have notice of the circumstances from which the presumption of undue influence is alleged to arise<sup>8</sup>.

Questions have typically arisen where a husband has borrowed money for his business from a bank secured by a mortgage on the jointly owned matrimonial home, and where, on the bank seeking to realise its security, the wife has claimed that she is not bound by her guarantee, having entered into the mortgage because of the undue influence of her husband. The principle<sup>9</sup> that has recently emerged is that in such circumstances the bank is 'put on inquiry'<sup>10</sup> and will be subject to the wife's claim unless it can establish that it has taken reasonable steps to bring home to her, as guarantor, in a meaningful way the practical implications of the proposed transaction and the risks she is running by standing as surety<sup>11</sup>. The duty to take these steps, it has been held, is not restricted to the husband/wife relationship but applies in all cases where the relationship between the surety and the debtor is non-commercial<sup>12</sup>. In these cases a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts<sup>13</sup>. Where, however, the money is being advanced to husband and wife jointly, a bank is not put on inquiry unless it is aware that the loan is being made for the husband's purposes as distinct from the couple's joint purposes<sup>14</sup>.

A bank may satisfy the requirements set out above if it insists that the wife or other guarantor attend a private meeting with a representative of the bank at which she is told of the extent of her liabilities as surety, warned of the risks she is running and urged to take independent advice. Alternatively the bank may seek protection by seeing to it that the wife is advised independently by a solicitor. To this end the bank should communicate directly with the wife,



informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor<sup>15</sup> whom she is willing to instruct to advise her separately from her husband and to act for her in giving the necessary confirmation to the bank. The bank should not proceed with the transaction until it has received an appropriate response directly from the wife<sup>16</sup>. The bank must supply the solicitor with all the necessary financial information after obtaining the husband's consent to the passing on of confidential information. Of course if consent is not forthcoming the transaction will not be able to proceed. If the solicitor cannot obtain from the bank all the information he needs, he should refuse to provide the confirmation sought by the bank. Having explained the position to the wife, setting out the risks involved, the solicitor should make it clear to the wife that she has a choice. The decision whether or not to proceed is hers and hers alone<sup>17</sup>. Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will. In such a case the bank must inform the wife's solicitors of the facts giving rise to its belief or suspicion<sup>18</sup>.

In every case the bank should obtain from the wife's solicitor an appropriate written confirmation of the matters referred to above<sup>19</sup>.

There is no special equity that entitles a wife or other cohabitee to set aside a guarantee merely on the grounds that she did not fully understand the transaction<sup>20</sup>.

1 *Bainbrigge v Browne* (1881) 18 ChD 188; *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Midland Bank plc v Perry and Perry* [1988] 1 FLR 161, CA; *Midland Bank plc v Shephard* [1988] 3 All ER 17, CA; *Bank of Baroda v Shah* [1988] 3 All ER 24, CA. Cf *Spencer v Handley* (1842) 4 Man & G 414; *Matthews v Bloxsome* (1864) 4 New Rep 139; and see *Greenfield v Edwards* (1865) 2 De GJ & Sm 582; *M'Taggart v Watson* (1836) 3 Cl & Fin 525 at 542-543, HL; *Jackman v Mitchell* (1807) 13 Ves 581.

2 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL. See also *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 971-972, [1992] 4 All ER 955 at 979, CA.

3 See **AGENCY** vol 1 (2008) PARAS 121 et seq; 150 et seq.

4 *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 193, [1993] 4 All ER 417 at 427, HL, per Lord Browne-Wilkinson.

5 *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 193, [1993] 4 All ER 417 at 427, HL, per Lord Browne-Wilkinson. The many earlier cases dating from *Turnbull & Co v Duval* [1902] AC 429, PC, in which it had been held or suggested that the creditor constitutes the principal debtor his agent merely by leaving the obtaining of the guarantee to the principal debtor (see *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233, CA; *Bunbury v Hibernian Bank* [1908] 1 IR 261; *Howes v Bishop* [1909] 2 KB 390, CA; *Talbot v Von Boris* [1911] 1 KB 854, CA; *Bank of Montreal v Stuart* [1911] AC 120, PC; *Shears & Sons Ltd v Jones* [1922] 2 Ch 802; *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, CA; *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423 at 427, sub nom *Kings North Trust Ltd v Bell* [1986] 1 WLR 119 at 123, CA, per Dillon LJ; *Midland Bank plc v Perry and Perry* [1988] 1 FLR 161, CA; *Bank of Baroda v Shah* [1988] 3 All ER 24, CA; *Barclays Bank plc v Kennedy* [1989] 1 FLR 356, CA; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 972, [1992] 4 All ER 955 at 980, CA) are expressly or impliedly overruled on this point.

6 If the circumstances are such as fairly to lead a reasonable person to believe that fraud must have been used in order to obtain the guarantor's agreement to the transaction, the creditor is bound to make inquiry and cannot shelter himself under the plea that he was not called on to ask and did not ask any questions on the subject: *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1034-1035 per Lord Cranworth LC.

7 *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL. See also *Kempson v Ashbee* (1874) 10 Ch App 15 at 21 per James LJ; *Bainbrigge v Browne* (1881) 18 ChD 188; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 973, [1992] 4 All ER 955 at 980, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* above).

8 *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at 973, [1992] 4 All ER 955 at 980-981, CA (overruled on other grounds by *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL). See also *Halifax Building Society v Brown* [1995] 3 FCR 110, [1996] 1 FLR 103, CA.

9 At one time the rules were often thought to be based on agency, but this theory has been discredited: *Barclays Bank v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL. Agency was established in *Turnbull & Co v Duval* [1902] AC 429, PC; *Chaplin & Co Ltd v Brammall* [1908] 1 KB 233, CA; *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423, [1986] 1 WLR 119, CA; *Barclays Bank plc v Kennedy* (1988) 58 P & CR 221, [1989] 1 FLR 356, CA; but not in *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429, CA; *Midland Bank plc v Shephard* [1988] 3 All ER 17, [1987] 2 FLR 175, CA; *Bank of Baroda v Shah* [1988] 3 All ER 24, [1988] NLJR 98, CA; *Lloyds Bank plc v Egremont* [1990] FCR 770, [1990] 2 FLR 351, CA.

10 He put on inquiry as to whether the wife understood the nature and effect of the transaction she was entering into: see *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [147], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Scott; cf at [44] where Lord Nicholls of Birkenhead observed that the phrase 'put on inquiry' is strictly a misnomer, for the bank is not required to make any inquiries.

11 *Barclays Bank v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL; *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

12 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [87], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. See *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, 123 Sol Jo 705, CA (son and elderly parents); *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA (employer and employee); *Greene King plc v Stanley* [2001] EWCA Civ 1966, [2002] BPIR 491, [2002] All ER (D) 56 (Jan); *National Westminster Bank plc v Amin* [2002] UKHL 9, [2002] 1 FLR 735, [2002] All ER (D) 388 (Feb) (English-speaking son and non-English speaking parents). See also *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127, PC.

13 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [44], [48], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. Likewise where a husband stands surety for his wife's debts; and similarly in the case of unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship. Cohabitation is not essential: *Royal Bank of Scotland v Etridge (No 2)* at [47].

14 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, [1993] 4 All ER 433, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [48], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead. The position is less clear cut where the wife becomes surety for the debts of a company whose shares are held by her and her husband: *Royal Bank of Scotland v Etridge (No 2)* at [49].

15 The solicitor may be the same solicitor who is acting for the husband in the transaction, provided the solicitor is satisfied that this is in the wife's best interests and satisfied also that this will not give rise to any conflicts of duty or interest: *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [69]-[74], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead.

16 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449.

17 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449. Dicta in the court below (see [1998] 4 All ER 705 at 715, [1998] 3 FCR 675 at 686, CA, per Stuart-Smith LJ; and PARA 19) and in *Crédit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 74 P & CR 384, CA, in effect giving the solicitor a power of veto were disapproved in *Royal Bank of Scotland v Etridge (No 2)* above at [59]-[61] per Lord Nicholls of Birkenhead. Any deficiencies in the advice given by the solicitor to the wife are a matter between the wife and the solicitor and do not affect the bank: *Royal Bank of Scotland v Etridge (No 2)* above at [78] per Lord Nicholls of Birkenhead.

18 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773, [2001] 4 All ER 449, esp at [79] per Lord Nicholls of Birkenhead.

19 *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44 at [79], [2002] 2 AC 773, [2001] 4 All ER 449 per Lord Nicholls of Birkenhead.

20 *Barclays Bank plc v O'Brien* [1994] 1 AC 180 at 193-194, 196, [1993] 4 All ER 417 at 427-428, 431, HL, per Lord Browne-Wilkinson (reversing on this point the Court of Appeal [1993] QB 109, [1992] 4 All ER 983, and disapproving *Yerkey v Jones* (1939) 63 CLR 649, HC of A). Nor is a creditor put on inquiry where the transaction concerned is an advance made jointly to the husband and wife together rather than a loan to the husband which the wife has guaranteed: *CIBC Mortgages plc v Pitt* [1994] 1 AC 200 at 211, [1993] 4 All ER 433 at 441, HL, per Lord Browne-Wilkinson. See also *Midland Bank plc v Massey* [1995] 1 All ER 929, [1995] 1 FCR 380, CA; *Allied Irish Bank v Byrne* [1995] 1 FCR 430, [1995] 2 FLR 325; *Banco Exterior Internacional v Mann* [1995] 1 All

ER 936, [1995] 2 FCR 282, CA; *TSB Bank plc v Camfield* [1995] 1 All ER 951, [1951] 1 WLR 430, CA; *Halifax Building Society v Brown* [1995] 3 FCR 110, [1996] 1 FLR 103, CA; *National Bank of Abu Dhabi v Mohamed* (1998) 30 HLR 383, [1997] NPC 62, CA; *Bank of Cyprus (London) Ltd v Markou* [1999] 2 All ER 707, 78 P & CR 208.

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## **E. CONSIDERATION**

### **1047. Necessity for consideration.**

Every guarantee not made by deed must, like other simple contracts, be supported by a valuable consideration<sup>1</sup>, that is to say, the mere existence of the debt, default or miscarriage of another person is not sufficient to support the guarantor's promise to the creditor<sup>2</sup>, which must in all cases be founded upon a new consideration<sup>3</sup>, the total failure of which entitles the guarantor to have his guarantee delivered up to be cancelled<sup>4</sup>.

1 *Barrell v Trussell* (1811) 4 Taunt 117; *Sheffield v Lord Castleton* (1700) 2 Vern 393; *Saunders v Wakefield* (1821) 4 B & Ald 595 at 600-601; *Pillans and Rose v Van Mierop and Hopkins* (1765) 3 Burr 1664 at 1666; *Jones v Ashburnham* (1804) 4 East 455 at 463-464; *Ex p Gardom* (1808) 15 Ves 286; *Boyd v Moyle* (1846) 2 CB 644 at 650; *French v French* (1841) 2 Man & G 644; *Barber v Fox* (1671) 2 Saund 136, and notes thereto; *Glover v Halkett* (1857) 2 H & N 487. These cases make it clear that when Lord Westbury in *Williams v Bayley* (1866) LR 1 HL 200 at 219 described a contract to give security for the debt of another as 'a contract without consideration', he meant that the consideration for such a contract is not necessarily a direct benefit or advantage to the guarantor. As to the necessity for consideration so far as it affects contracts in general see **CONTRACT** vol 9(1) (Reissue) PARA 727 et seq. See also *Herman v Jeuchner* (1885) 15 QBD 561 at 563, CA, per Sir Baliol Brett MR.

2 See *Forth v Stanton* (1669) 1 Saund 210 at 211a, 211b, note (f); and see *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 at 297, where it was held that the mere existence of an antecedent debt is not valuable consideration for a security given by a debtor: see PARA 1051 note 11.

3 *Forth v Stanton* (1669) 1 Saund 210 at 211a, 211b, note (f); *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291; and see *French v French* (1841) 2 Man & G 644; *Bell v Welch* (1850) 9 CB 154; *Crofts v Beale* (1851) 11 CB 172.

4 *Cooper v Joel* (1859) 1 De GF & J 240; and see *Re Barber & Co, ex p Agra Bank* (1870) LR 9 Eq 725; *Rolt v Cozens* (1856) 18 CB 673; and PARA 1211.

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### **1048. Requisites of consideration.**

The consideration for the guarantor's promise does not move from the principal debtor, but from the creditor<sup>1</sup>. It need not directly benefit the guarantor<sup>2</sup>, although it may do so<sup>3</sup>, and it may consist wholly of some advantage given to or conferred on the principal debtor by the creditor

at the guarantor's request<sup>4</sup>. Thus, the guarantor's promise often stipulates for a supply of goods<sup>5</sup> or an advance of money<sup>6</sup> to the principal debtor, or that the principal debtor should be taken into the creditor's service or employment<sup>7</sup>.

1 See *White v Cuyler* (1795) 6 Term Rep 176 at 177; *Dutchman v Tooth* (1839) 5 Bing NC 577. The authorities for the doctrine that the consideration for a promise must move from the promisee do not cover a case in which the consideration is supplied by an agent who, nevertheless, obtains the promise for and on behalf of his principal: see *Fleming v Bank of New Zealand* [1900] AC 577, PC.

2 *Ex p Minet* (1807) 14 Ves 189 at 190 per Lord Eldon LC; *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 793, CA, per Romer LJ (revsd without reference to this point sub nom *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL); *Morley v Boothby* (1825) 10 Moore CP 395 at 406 per Best CJ; *Nerot v Wallace* (1789) 3 Term Rep 17 at 24 per Buller J; *Bailey v Croft* (1812) 4 Taunt 611; *Ex p Gardom* (1808) 15 Ves 286; *Wright v Sandars* (1857) 3 Jur NS 504 at 507 per Stuart V-C.

3 *Re Willis, ex p Brook* (1850) 6 De GM & G 771.

4 *Coghlan v S H Lock (Australia) Ltd* (1987) 3 BCC 183, PC. See also *Morley v Boothby* (1825) 10 Moore CP 395; *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266 at 289, CA, per Bowen LJ.

5 *Morrell v Cowan* (1877) 7 ChD 151, CA; *Wood v Benson* (1831) 2 Cr & J 94; *Johnston v Nicholls* (1845) 1 CB 251; *Boyd v Moyle* (1846) 2 CB 644; *Mockett v Ames* (1871) 23 LT 729; *White v Woodward* (1848) 5 CB 810.

6 *Edwards v Jevons* (1849) 8 CB 436; *Broom v Batchelor* (1856) 1 H & N 255; *Grahame v Grahame* (1887) 19 LR Ir 249; *Offord v Davies* (1862) 12 CBNS 748; *Hartland v Jukes* (1863) 1 H & C 667.

7 See *Kennaway v Treleavan* (1839) 5 M & W 498; *Montefiore v Lloyd* (1863) 15 CBNS 203; *Newbury v Armstrong* (1829) 6 Bing 201; *Leathley v Spyer* (1870) LR 5 CP 595; *Lysaght v Walker* (1831) 5 Bli NS 1, HL.

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#### **1049. Forbearance as consideration.**

The consideration may take the form of forbearance by the creditor, at the guarantor's request, to sue the principal debtor<sup>1</sup>, or of the actual suspension of pending legal proceedings against him<sup>2</sup>. The mere fact of forbearance is not, however, of itself a consideration for a person's becoming a guarantor for the payment of a debt<sup>3</sup>. There must be either an undertaking to forbear, or an actual forbearance at the guarantor's express or implied request<sup>4</sup>.

An agreement to forbear for a reasonable time will provide sufficient consideration to support a guarantor's promise<sup>5</sup>. So will an agreement to forbear for an indefinite period, at least when a reasonable time can be inferred or where the guarantor has received the advantage contemplated<sup>6</sup>. Whilst the mere fact of forbearance, as opposed to an express promise to do so, will not supply the necessary consideration, an act of forbearance following a request, at the time the guarantee was entered into, so to act will do so, even if the request was not expressly agreed<sup>7</sup>. To be effectual the forbearance relied upon must be of a right capable of being enforced<sup>8</sup>. Therefore, where there is no person who could be sued for the debt the forbearance to sue cannot form any consideration<sup>9</sup>.

1 See *Rolt v Cozens* (1856) 18 CB 673; *Crears v Hunter* (1887) 19 QBD 341 at 344, 346, CA; *Coles v Pack* (1869) LR 5 CP 65; *Coe v Duffield* (1822) 7 Moore CP 252; *Ockford v Barelli* (1871) 25 LT 504.

2 *Payne v Wilson* (1827) 7 B & C 423; *Oldershaw v King* (1857) 2 H & N 517, Ex Ch; *Wynne v Hughes* (1873) 21 WR 628; *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266, CA; *Pullin v Stokes* (1794) 2 Hy BI 312, Ex Ch. The decision in *Ross v Moss* (1597) Cro Eliz 560, Ex Ch, that the mere discontinuance of an action is not a sufficient consideration to support a promise was disapproved in *Harris v Venables* (1872) LR 7 Exch 235, where it was held that the withdrawal of a petition presented for winding up a company was a sufficient consideration to support a promise to pay the costs incurred of and in relation to such petition.

3 *Crears v Hunter* (1887) 19 QBD 341 at 344, CA, per Lord Esher MR.

4 *Crears v Hunter* (1887) 19 QBD 341 at 346, CA, per Lopes LJ; *Jones v Ashburnham* (1804) 4 East 455; *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266 at 283, 285-286, CA, per Cotton LJ, and at 300 per Fry LJ. Where a surety who was liable on a promissory note jointly with the principal debtor, on being informed that proceedings were contemplated against himself and the principal debtor for the debt, stated, by letter, his intention to pay the debt, it was held (reversing the decision of Sir John Romilly MR in *Jones v Beach* (1851) 21 LJCh 543) that there was no consideration for this promise, and, consequently, on the surety's predeceasing the principal, the surety's estate was not liable as for a several debt: *Jones v Beach* (1852) 2 De GM & G 886. In proceedings founded on the collateral consideration of forbearance to sue another there never was any need to show, in the pleadings, the origin or cause of the debt guaranteed: see *Therne v Fuller* (1616) Cro Jac 396.

5 *Payne v Wilson* (1827) 7 B & C 423; *Oldershaw v King* (1857) 2 H & N 517, Ex Ch.

6 *Oldershaw v King* (1857) 2 H & N 517, Ex Ch. Earlier authorities for the view that forbearance for an unspecified but short period did not constitute good consideration (eg *Semple v Pink* (1847) 1 Exch 74) should be read in the light of this decision.

7 *Crears v Hunter* (1887) 19 QBD 341 at 344, CA, per Lord Esher MR.

8 *Jones v Ashburnham* (1804) 4 East 455 at 463, per Lord Ellenborough CJ.

9 *Jones v Ashburnham* (1804) 4 East 455.

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### 1050. Non-essentials.

The consideration for the guarantor's promise need not be commensurate with the promise, for its mere inadequacy will not invalidate the guarantee<sup>1</sup>. Neither need it be contemporaneous with it<sup>2</sup>, as it may consist of a compliance with some stipulated condition which the creditor, without being bound to observe, must fulfil before the guarantee will attach<sup>3</sup>. It may be entire (that is, given once and for all), or fragmentary (that is, supplied from time to time) and therefore divisible<sup>4</sup>.

The consideration for a promise of guarantee need not appear in writing<sup>5</sup>.

1 *Johnston v Nicholls* (1845) 1 CB 251 at 271; see also *Pullin v Stokes* (1794) 2 Hy BI 312, Ex Ch. Thus, the delivery up of an unenforceable guarantee may be a good consideration for the guarantor's promise: *Brooks v Haigh* (1840) 10 Ad & El 323, Ex Ch; and see *Westlake v Adams* (1858) 5 CBNS 248; *Meredith v Chute* (1702) 2 Ld Raym 759.

2 See *Goldshede v Swan* (1847) 1 Exch 154; *Butcher v Steuart* (1843) 11 M & W 857.

3 See *Kennaway v Treleavan* (1839) 5 M & W 498 at 501; *Westhead v Sproson* (1861) 6 H & N 728; *Offord v Davies* (1862) 12 CBNS 748; and the cases cited in PARA 1025 note 1.

4 *Lloyd's v Harper* (1880) 16 ChD 290 at 319, CA, per Lush LJ; and see *Cannon v Rands* (1870) 23 LT 817.

5 See the Mercantile Law Amendment Act 1856 s 3: and PARAS 1055, 1072.

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### 1051. Insufficient consideration.

An illegal consideration will not support a guarantee<sup>1</sup>.

A transaction of guarantee may be invalid where the consideration is the enabling of a preference to be given to one creditor over the general body of creditors of a bankrupt or insolvent<sup>2</sup>.

Neither a mere moral<sup>3</sup> nor a past consideration<sup>4</sup> will support a guarantee. Where, however, the language of the guarantee is equally expressive of a past or concurrent or future consideration<sup>5</sup> for the guarantor's promise, the maxim *ut res magis valeat quam pereat*<sup>6</sup> applies<sup>7</sup>, and oral evidence will, if necessary, be admitted to clear up the ambiguity<sup>8</sup>.

A mere promise to entertain a request by the guarantor or principal debtor to enter into transactions with the principal debtor does not amount to sufficient consideration to support a guarantee<sup>9</sup>. However, the actual advance of money following such a request does provide sufficient consideration to make the guarantor liable<sup>10</sup>.

The mere existence of an antecedent debt is not of itself valuable consideration for a security given by the debtor<sup>11</sup>, although such a debt is a sufficient consideration for a cheque or other negotiable security given on account of the debt. In such a case the negotiable security is equivalent to payment of the debt<sup>12</sup>. In the case of a promissory note given by a principal and a guarantor for a definite sum, payable on a fixed day, it is presumed to be given in consideration of an advance at the date of the note, and, if the creditor insists, as against the guarantor, that the object of the note was to secure the payment of the balance of an account current between the principal and the creditor, the burden of proof lies on the creditor<sup>13</sup>.

1 See *Wood v Barker* (1865) LR 1 Eq 139; *Coles v Strick* (1850) 15 QB 2. If the guaranteed debt is itself illegal, it cannot be recovered from the guarantor under his guarantee: see *Lougher v Molyneux* [1916] 1 KB 718; see also *Swan v Bank of Scotland* (1836) 10 Bli NS 627, HL, where, however, the basis of the decision was that the loan was not only illegal, but void by statute; and cf *Coutts & Co v Browne-Lecky* [1947] KB 104 at 109, [1946] 2 All ER 207 at 209; *Heald v O'Connor* [1971] 2 All ER 1105, [1971] 1 WLR 497. The stifling of a prosecution for a crime is an illegal consideration: *Jones v Merionethshire Permanent Benefit Building Society* [1891] 2 Ch 587; affd [1892] 1 Ch 173, CA; and see *Cannon v Rands* (1870) 23 LT 817; *Seear v Cohen* (1881) 45 LT 589, DC. It has, however, been held in Ireland that an agreement to abstain from instituting such a threatened prosecution is not an illegal consideration unless there are reasonable grounds for believing that the illegal offence was actually committed, or unless each party entered into the agreement on that assumption: *Rourke v Mealy* (1878) 4 LR Ir 166. A guarantee of an overdraft to enable the principal debtor to pay bets which he had lost is not illegal, and is therefore enforceable: *Re O'Shea, ex p Lancaster* [1911] 2 KB 981, CA. The mere fact that a guarantee is signed on a Sunday does not make it illegal: *Norton v Powell* (1842) 4 Man & G 42. Where loans were made as part of a conspiracy to defraud the creditors of a company, and the company was a victim of that conspiracy and not a party to it, the company's liquidators were not debarred from recovering those loans or enforcing the guarantees given in respect of them: *BCCI (Overseas) Ltd v Gokal* [1999] All ER (D) 1494. As to the effect of illegality on contracts see generally **CONTRACT** vol 9(1) (Reissue) PARA 869 et seq. As to the effect of international sanctions on the right to payment under a counter-guarantee see *Shanning International Ltd (in liquidation) v Lloyds TSB Bank plc* [1999] All ER (D) 1457.

2 It has been held that a guarantee which amounted to a fraudulent preference could not be enforced, and would be ordered to be delivered up to be cancelled, even to a party to the fraud: see *Jackman v Mitchell* (1807) 13 Ves 581. Similarly, a guarantee given to one of several creditors, without the knowledge of the rest, to induce him to sign a composition deed has been held to be a fraud on the rest of the creditors and void: *Coleman v Waller* (1829) 3 Y & J 212; *McKewan v Sanderson* (1875) LR 20 Eq 65. The concept of fraudulent

preference in insolvency has been replaced by the wider statutory concept of voidable preference: see the Insolvency Act 1986 ss 239, 340; **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 653 et seq; and **COMPANY AND PARTNERSHIP INSOLVENCY**.

3 *Eastwood v Kenyon* (1840) 11 Ad & El 438.

4 *Astley Industrial Trust Ltd v Grimston Electric Tools Ltd* (1965) 109 Sol Jo 149, where the guarantee, although expressed to be 'in consideration of your hiring to the hirer . . .', was actually executed four days after the hiring agreement. See also *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291; *Allnutt v Ashenden* (1843) 5 Man & G 392.

5 See *Bell v Welch* (1850) 9 CB 154; *Eastwood v Kenyon* (1840) 11 Ad & El 438; *Goldshede v Swan* (1847) 1 Exch 154; *Mockett v Ames* (1871) 23 LT 729; *Chalmers v Victors* (1868) 18 LT 481; *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282; and see *Raikes v Todd* (1838) 8 Ad & El 846.

6 Ie that the thing may be valid rather than a nullity.

7 *Steele v Hoe* (1849) 14 QB 431; *Broom v Batchelor* (1856) 1 H & N 255; *Goldshede v Swan* (1847) 1 Exch 154; *Edwards v Jevons* (1849) 8 CB 436; *Colbourn v Dawson* (1851) 10 CB 765; *Brooks v Haigh* (1840) 10 Ad & El 323, Ex Ch; *Mockett v Ames* (1871) 23 LT 729; *Grahame v Grahame* (1887) 19 LR Ir 249; *Johnston v Nicholls* (1845) 1 CB 251; *Wood v Priestner* (1866) LR 2 Exch 66; *Chapman v Sutton* (1846) 2 CB 634; *Re Duncan, ex p Littlejohn* (1843) 3 Mont D & De G 182.

8 See *Hoad v Grace* (1861) 7 H & N 494; *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282; *Edwards v Jevons* (1849) 8 CB 436; *Goldshede v Swan* (1847) 1 Exch 154; see also *Brunning v Odhams Bros Ltd* (1896) 75 LT 602, HL; *Bainbridge v Wade* (1850) 16 QB 89; *Shortrede v Cheek* (1834) 1 Ad & El 57; *Johnston v Nicholls* (1845) 1 CB 251. See also PARA 1084.

9 *Coghlan v SH Lock (Australia) Ltd* (1985) 4 NSWLR 158, NSWCA; affd (1987) 3 BCC 183, PC.

10 See note 9.

11 *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 (see PARA 1047 note 2), where, however, the security given was not a negotiable security; cf *Currie v Misa* (1875) LR 10 Exch 153 (cited in note 12); affd on another ground sub nom *Misa v Currie* (1876) 1 App Cas 554, HL. Where, however, a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security: *Glegg v Bromley* [1912] 3 KB 474 at 491, CA. See also *Leask v Scott Bros* (1877) 2 QBD 376, CA (transfer of a bill of lading to a transferee in good faith defeats the right of stoppage in transit even though the consideration for the transfer is an antecedent debt); *Fullerton v Provincial Bank of Ireland* [1903] AC 309 at 313-316, HL.

12 *Currie v Misa* (1875) LR 10 Exch 153; affd on another ground sub nom *Misa v Currie* (1876) 1 App Cas 554, HL, where it was laid down that all money paid into a bank is subject to a lien, and that all documents as well as money deposited with a bank are subject on the bank's part to a lien in respect of any balance that may be due to it from its customer: *Misa v Currie* at 569 per Lord Hatherley. In this case, which was not cited in *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291, it was not really necessary to decide whether an existing debt constitutes a sufficient consideration for the giving of the security, as there was ample consideration between the holders of the security (a cheque) sued upon and its drawer. An antecedent debt or liability of the drawer (but not of a third party) is of itself sufficient consideration to support a bill of exchange: see the Bills of Exchange Act 1882 s 27(1)(b); and PARA 1479.

13 *Re Boys, Eedes v Boys, ex p Hop Planters Co* (1870) LR 10 Eq 467.

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### (iii) Form of Contract of Guarantee

#### A. NECESSITY FOR WRITING

## 1052. The Statute of Frauds.

The Statute of Frauds (1677)<sup>1</sup> provides that no claim<sup>2</sup> is to be brought by which to charge the defendant upon any special promise<sup>3</sup> to answer for<sup>4</sup> the debt, default or miscarriages<sup>5</sup> of another person<sup>6</sup> unless the agreement upon which the claim is brought, or some memorandum or note of it, is in writing, signed by the party to be charged with it<sup>7</sup> or by some other person thereunto lawfully authorised by him<sup>8</sup>.

This enactment is merely an enactment as to evidence<sup>9</sup>. Where the original written evidence of a guarantee is lost, oral evidence of its having existed is admissible<sup>10</sup>. Moreover, a payment of money into court by a defendant to a claim on a guarantee dispenses with the production of written evidence of the contract<sup>11</sup> and admits the existence of an enforceable contract<sup>12</sup>, unless the Statute of Frauds is at the same time pleaded<sup>13</sup>. A plea of tender also dispenses with written proof of a guarantee<sup>14</sup>.

1 The common law of England did not require any written evidence of a guarantee, which could, accordingly, originally be proved in the same manner as any other contract: *Steele v M'Kinlay* (1880) 5 App Cas 754 at 768, HL, per Lord Blackburn. To prevent, however, the danger of a guarantee being established by false evidence, or by evidence of loose talk, when it never was really meant to make such a contract, the English legislature intervened: *Steele v M'Kinlay*. Much of the Statute of Frauds (1677) s 4 was repealed by the Law of Property Act 1925 s 207, Sch 7 and by the Statute Law Revision Acts 1883 and 1948 and the Law Reform (Enforcement of Contracts) Act 1954 s 1, and the section is now in force only in respect of the matters mentioned in this paragraph.

2 In fact the statutory wording is 'action': but see **CIVIL PROCEDURE** vol 11 (2009) PARA 18.

3 'Special promise' excludes implied promises arising by operation of law (*Gray v Hill* (1826) Ry & M 420), contracts made by deed or of record (*Holmes v Mitchell* (1859) 7 CBNS 361 at 368-369 per Willes J), and also liabilities for deceitful representation by which credit has been obtained for a third party (to remedy this the Statute of Frauds Amendment Act 1828 s 6 was passed (see PARA 1054); *Pasley v Freeman* (1789) 3 Term Rep 51; notes to *Chandelor v Lopus* (1603) Cro Jac 4 in 2 Smith LC (13th Edn) 57). Whether a 'special promise' is or is not within the enactment depends not on the consideration for the promise but on other matters (*Fitzgerald v Dressler* (1859) 7 CBNS 374 at 392 per Cockburn CJ; *Sutton & Co v Grey* [1894] 1 QB 285 at 289, CA, per Lord Esher MR; *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 788, CA; *Davys v Buswell* [1913] 2 KB 47, CA; *Huggard v Representative Church Body* [1916] 1 IR 1; notes to *Forth v Stanton* (1669) 1 Saund 210 at 211e, note (1)), although a different view on this subject has been expressed: see *Saunders v Wakefield* (1821) 4 B & Ald 595 at 600-601. A special promise is sometimes partly within the enactment and partly outside it. When this occurs, and the promise is not reduced to writing, if the parts are separable, the part outside the enactment may give rise to a claim (see *Wood v Benson* (1831) 2 Cr & J 94; and *Bromley v Smith* [1909] 2 KB 235); while if the parts are inseparable no action will lie in respect of either part (see *Chater v Beckett* (1797) 7 Term Rep 201; *Lord Lexington v Clarke* (1689) 2 Vent 223; *Thomas v Williams* (1830) 10 B & C 664; *Earl of Falmouth v Thomas* (1832) 1 Cr & M 89; *Wood v Benson*; *Head v Baldrey* (1837) 6 Ad & El 459; and *Savage v Canning* (1867) 16 WR 133).

4 'Translated into modern legal terminology 'to answer for' is 'to accept liability for': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 347, [1972] 2 All ER 393 at 400-401, HL, per Lord Diplock.

5 'Translated into modern legal terminology . . . 'debt, default or miscarriage' is descriptive of failure to perform legal obligations, existing or future, arising from any source, not only from contractual promises, but in any other factual situations capable of giving rise to legal obligations such as those resulting from bailment, tort or unsatisfied judgments': *Moschi v Lep Air Services Ltd* [1973] AC 331 at 347-348, [1972] 2 All ER 393 at 401, HL, per Lord Diplock.

The plural of 'miscarriage' is used in the Statute of Frauds (1677) s 4 (see note 1). Each word in the phrase 'debt, default or miscarriages' has a different signification: *Kirkham v Marter* (1819) 2 B & Ald 613 at 616 per Abbott CJ. Thus:

- 1 (1) 'debt' refers to a contractual liability already incurred (*Castling v Aubert* (1802) 2 East 325 at 330-331 per Lord Ellenborough CJ);
- 2 (2) 'default' refers to a future contractual liability (*Re Young and Harston's Contract* (1885) 31 ChD 168, CA; and see *Mountstephen v Lakeman* (1871) LR 7 QB 196 at 202, Ex Ch, per Willes J), and possibly to any future liability, whether or not founded in contract (*Kirkham v Marter* above at 617 per Holroyd J). Apart from its statutory significance, 'default' is a purely relative term, just



like 'negligence', meaning nothing more and nothing less than not doing what is reasonable under the circumstances; not doing something which one ought to do, having regard to the relations which the person defaulting occupies towards other persons interested in a particular transaction (*Re Young and Harston's Contract* above at 174 per Bowen LJ);

- 3 (3) 'miscarriages' comprehends that species of wrongful act for the consequences of which the law would make a person civilly responsible (*Kirkham v Marter* at 616 per Abbot CJ), although probably it and 'default' equally apply to a promise to answer for another, with respect to the non-performance of a duty, even where the duty is not founded in contract (*Kirkham v Marter* above at 617 per Holroyd J).

6 'Of another person' means that, to make the enactment apply, there must always be a principal debtor in existence, or in contemplation, for whom the surety is, or is to become, answerable to the creditor: *Lakeman v Mountstephen* (1874) LR 7 HL 17 at 24-25, per Lord Selborne LC. As to this see PARA 1058 et seq.

7 See *Laythoarp v Bryant* (1836) 2 Bing NC 735.

8 Statute of Frauds (1677) s 4 (as amended: see note 1). For the principles determining what is a guarantee within this enactment see PARA 1058 et seq; and for what written evidence of guarantee will satisfy the enactment see PARA 1064 et seq. There is no reason in principle for distinguishing, in this context, between contracts for the sale of land and contracts of guarantee: see *GMAC Commercial Credit Development Ltd v Sandhu* [2004] EWHC 716 (Comm), [2004] All ER (D) 589 (Mar). It appears that an email guarantee may satisfy the requirements of the Statute of Frauds (1677) s 4 so long as it has been 'signed' by the guarantor. However, the standard reproduction of the intending guarantor's email address is not referable to the intention to provide a guarantee and is thus of itself not a sufficient signature for the purposes of s 4: see *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All ER 891.

9 See *Fraser v Pape* (1904) 91 LT 340, CA; *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 97, CA, per Lindley LJ; *Gibson v Holland* (1865) LR 1 CP 1; *Lucas v Dixon* (1889) 22 QBD 357, CA. See further PARA 1072.

10 *Barrass v Reed* (1898) Times, 28 March; *Crays Gas Co v Bromley Gas Consumers' Co* (1901) Times, 23 March, CA.

11 *Middleton v Brewer* (1790) Peake 15; *Spurrier v Fitzgerald* (1801) 6 Ves 548.

12 *Lucas v Dixon* (1889) 22 QBD 357, CA.

13 *Lucas v Dixon* (1889) 22 QBD 357, CA. Under the previous civil procedure, it was held that the Statute of Frauds (1677) had to be specifically pleaded whenever the defendant wished to rely on it: see *Clarke v Callow* (1876) 46 LQB 53, CA; *Olley v Fisher* (1886) 34 ChD 367; *Morgan v Worthington* (1878) 38 LT 443. See also *Worthington & Co Ltd v Belton* (1902) 18 TLR 438, CA; *Bunning v Odhams Bros Ltd* (1896) 75 LT 602, HL. As to statements of case see now CPR Pt 16; and see **CIVIL PROCEDURE** vol 11 (2009) PARA 584 et seq. A claimant may defeat a plea of the statute by waiving a stipulation in his favour omitted in the memorandum, or by submitting to perform an omitted term in favour of the guarantor: see PARA 1073.

14 See 1 Wms Saund (1871 Edn) 52; *Middleton v Brewer* (1790) Peake 15.

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### 1053. Effect of oral guarantee.

Although an oral guarantee cannot be enforced by bringing a claim, it is not, on that account, void<sup>1</sup>. Thus, money actually paid under it cannot, it seems, be recovered<sup>2</sup>, and the existence of such a guarantee may be used as a defence<sup>3</sup>. When given by a solicitor an oral guarantee may be enforced against him by the court, by virtue of its summary jurisdiction over its officers<sup>4</sup>. On the other hand, an executor or administrator cannot retain a debt owing in respect of an oral guarantee<sup>5</sup>, and, should he pay such a debt, would commit a devastavit<sup>6</sup>. An oral guarantee

made abroad, and binding there, cannot be enforced in England and Wales by bringing a claim, since the mode of proof is governed by the *lex fori*<sup>7</sup>.

Although the creditor may have relied on an oral or unsigned guarantee, the guarantee is not thereby estopped from pleading the absence of a signed memorandum for the purposes of the Statute of Frauds (1667)<sup>8</sup>.

1 See *Maddison v Alderson* (1883) 8 App Cas 467, HL.

2 *Shaw v Woodcock* (1827) 7 B & C 73; and see *Cresswell v Wood* (1839) 10 Ad & El 460; *Sweet v Lee* (1841) 3 Man & G 452.

3 See *Lavery v Turley* (1860) 6 H & N 239.

4 *Re Greaves* (1827) 1 Cr & J 374n; and see *Evans v Duncombe* (1831) 1 Cr & J 372; *Re a Solicitor* (1900) 45 Sol Jo 104; and see generally **LEGAL PROFESSIONS** vol 65 (2008) PARA 749 et seq.

5 *Re Rownson, Field v White* (1885) 29 ChD 358, CA; and see *Re Midgley, Midgley v Midgley* [1893] 3 Ch 282, CA.

6 *Re Rownson, Field v White* (1885) 29 ChD 358, CA; see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 393, 792 et seq.

7 *Leroux v Brown* (1852) 12 CB 801; see **CIVIL PROCEDURE** vol 11 (2009) PARA 755; **CONFLICT OF LAWS** vol 8(3) (2003 Reissue) PARAS 11, 17.

8 Such pleading would be for the purposes of the Statute of Frauds Act (1677) s 4: see PARA 1052. The availability of an estoppel in such a case would render the provision nugatory: see *Actionstrength Ltd (t/a Vital Resources (formerly t/as Morson Alltrades)) v International Glass Engineering In.Gl.En SpA* [2003] UKHL 17, [2003] 2 AC 541, [2003] 2 All ER (Comm) 331.

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### 1054. The Statute of Frauds Amendment Act 1828.

By the Statute of Frauds Amendment Act 1828, commonly known as Lord Tenterden's Act<sup>1</sup>, no claim<sup>2</sup> may be brought by which to charge any person upon or by reason of any representation<sup>3</sup> or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person<sup>4</sup> in order that that other person may obtain credit, money or goods, unless the representation or assurance is made in writing<sup>5</sup>.

Only statements which relate in some way to the credit or creditworthiness of another person fall within the relevant provision of the Statute of Frauds Amendment Act 1828<sup>6</sup>. Moreover, that provision only applies to fraudulent misrepresentations<sup>7</sup>. It does not constitute a defence to claims based upon negligence<sup>8</sup>. The enactment only applies to claims upon representations as such, and not to claims in which the gist of the claim is a breach of duty<sup>9</sup>.

The representation relied upon must be signed by the party to be charged with it<sup>10</sup>. Where the party to be charged is an individual or a partnership, an agent's signature has been held insufficient<sup>11</sup>. However, the signature on behalf of a company of its duly authorised agent acting within the scope of his authority is the signature of the company for these purposes<sup>12</sup>. A partner signing in the firm name binds himself<sup>13</sup>. Where there are both written and oral representations

a claim lies if the written representation materially induced the person to whom it was given to give credit<sup>14</sup>.

1 See *Lyde v Barnard* (1836) 1 M & W 101 at 114 per Parke B. The Statute of Frauds Amendment Act 1828 was passed owing to a successful evasion of the Statute of Frauds (1677) s 4 (see PARA 1052), which took the form of treating the guarantor's oral promise to be answerable for another as a false representation, for which he was made liable in tort although not in contract: see *Lyde v Barnard*; *Tatton v Wade* (1856) 18 CB 371 at 381, Ex Ch, per Pollock CB; *Pasley v Freeman* (1789) 3 Term Rep 51; *Ex p Carr* (1814) 3 Ves & B 108 at 110 per Lord Eldon LC; *Banbury v Bank of Montreal* [1918] AC 626 at 639-640, 693-694, 711-712, HL.

2 The statutory wording is in fact 'action': but see **CIVIL PROCEDURE** vol 11 (2009) PARA 18.

3 See the cases cited in notes 4, 6.

4 'Person' includes a corporation: *Banbury v Bank of Montreal* [1918] AC 626 at 708, HL, per Lord Parker, and at 714 per Lord Wrenbury. Cf the Interpretation Act 1978, which by s 5, Sch 1 defines 'person' as including a body of persons corporate or unincorporate. This definition, however, only applies to Acts passed after 1889: s 22(1), Sch 2 para 4(1)(a). A fraudulent misrepresentation by one partner as to the credit of his firm is one as to the credit 'of another person' within the enactment: *Devaux v Steinkeller* (1839) 6 Bing NC 84.

5 Statute of Frauds Amendment Act 1828 s 6. An unsuccessful attempt to evade this enactment was made in *Haslock v Fergusson* (1837) 7 Ad & El 86. Evasions of the Statute of Frauds (1677) s 4 are to be discouraged by the courts: *Mallet v Bateman* (1865) LR 1 CP 163 at 170-171, Ex Ch, per Pollock CB. See also *Contex Drouzha Ltd v Wiseman* [2006] EWHC 2708 (QB), [2007] 1 BCLC 758.

6 *Clydesdale Bank Ltd v Paton* [1896] AC 381, HL (decided under equivalent Scottish provisions); *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 at 347, [1979] 1 All ER 561 at 565, CA, per Lord Denning MR, and at 351 and 568 per Shaw LJ; *UBAF Ltd v European American Banking Corp* [1984] QB 713 at 718, [1984] 2 All ER 226 at 229, CA. It has been held that a representation made in order that the party making the representation may obtain a benefit from the credit allowed to the third party (*Pearson v Seligman* (1883) 48 LT 842, CA), and a representation as to ability to pay (*Swann v Phillips* (1838) 8 Ad & El 457) are within the section. As to what representations are within the enactment see also the notes to *Chandelor v Lopus* (1603) Cro Jac 4 in 2 Smith LC (13th Edn) 57; *Swann v Phillips* above; *Turnley v MacGregor* (1843) 6 Man & G 46; *Lyde v Barnard* (1836) 1 M & W 101; *Swift v Winterbotham* (1873) LR 8 QB 244; varied on appeal sub nom *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch; *Bishop v Balkis Consolidated Co* (1890) 25 QBD 512, CA.

7 *Banbury v Bank of Montreal* [1918] AC 626, HL. See also *Behn v Kemble* (1859) 7 CBNS 260; *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 at 347, [1979] 1 All ER 561 at 565, CA, per Lord Denning MR; and *UBAF Ltd v European American Banking Corp* [1984] QB 713 at 718, [1984] 2 All ER 226 at 229, CA.

8 *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850; *UBAF Ltd v European American Banking Corp* [1984] QB 713 at 718-719, [1984] 2 All ER 226 at 229-230, CA. Where a bank is asked for a reference as to the standing and financial position of a customer, it need not make inquiries outside as to the solvency or otherwise of the person asked about, nor do anything more than answer the question put to it honestly from what it knows from the books and accounts before it: *Parsons v Barclay & Co Ltd and Goddard* (1910) 103 LT 196, CA.

9 *Banbury v Bank of Montreal* [1918] AC 626, HL.

10 Statute of Frauds Amendment Act 1828 s 6.

11 *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch. See also *Hirst v West Riding Union Banking Co* [1901] 2 KB 560, CA; *Williams v Mason* (1873) 28 LT 232; *Hyde v Johnson* (1836) 2 Bing NC 776.

12 *UBAF Ltd v European American Banking Corp* [1984] QB 713 at 724-725, [1984] 2 All ER 226 at 234, CA, distinguishing *Swift v Jewsbury* (1874) LR 9 QB 301, Ex Ch, and *Hirst v West Riding Union Banking Co Ltd* [1901] 2 KB 560, CA, and not following the dictum of Scrutton LJ in *Banbury v Bank of Montreal* [1917] 1 KB 409 at 413, CA (affd [1918] AC 626, HL).

13 *Fortune v Young* 1918 SC 1, Ct of Sess.

14 *Tatton v Wade* (1856) 18 CB 371 at 381, Ex Ch.

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### **1055. The Mercantile Law Amendment Act 1856.**

By the Mercantile Law Amendment Act 1856, no special promise to be made by any person to answer for the debt, default or miscarriage of another person, if in writing and signed by the party to be charged with it or some other person duly authorised by him, is deemed invalid to support a claim<sup>1</sup>, suit or other proceeding to charge the person making the promise, by reason only that the consideration for the promise does not appear in writing or by necessary inference from a written document<sup>2</sup>.

1 The statutory wording is in fact 'action': but see **CIVIL PROCEDURE** vol 11 (2009) PARA 18.

2 Mercantile Law Amendment Act 1856 s 3 (amended by the Statute Law Revision Act 1892). See further PARA 1072. This enactment, which does not dispense with the necessity for a consideration (see PARAS 1047, 1072), was rendered necessary by reason of its having been decided that, as the language of the Statute of Frauds (1677) s 4 (see PARA 1052) required 'the agreement' to be in writing, this must be taken to comprise both the promise and also the consideration for it (*Wain v Warlters* (1804) 5 East 10; 1 Smith LC (13th Edn) 358; *Saunders v Wakefield* (1821) 4 B & Ald 595), which together constitute an agreement not made by deed (see *Herman v Jeuchner* (1885) 15 QBD 561 at 563, CA, per Sir Baliol Brett MR). This construction, however, imposed a grievance on the mercantile community (see the notes to *Forth v Stanton* (1669) 1 Wms Saund (1871 Edn) 226 at 227; and the notes to *Birkmyr v Darnell* (1704) 1 Salk 27 in 1 Smith LC (13th Edn) 331 at 336), and was found, in practice, to lead to many unjust and merely technical defences to actions on guarantees.

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### **1056. Guarantees made by deed.**

A guarantee, if it is to take effect as a deed rather than as a simple contract, must comply with the requirements for the execution of deeds contained in the Law of Property (Miscellaneous Provisions) Act 1989<sup>1</sup>.

1 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1, which inter alia abolishes the requirement of a seal for the valid execution of an instrument as a deed by an individual and applies to instruments delivered as deeds after 31 July 1990: ss 1(11), 5(1), (2); Law of Property (Miscellaneous Provisions) Act 1989 (Commencement) Order 1990, SI 1990/1175. For the requirements for the valid execution of instruments delivered prior to that date see *First National Securities Ltd v Jones* [1978] Ch 109, [1978] 2 All ER 221, CA; *TCB Ltd v Gray* [1986] Ch 621, [1986] 1 All ER 587; affd (without discussing this point) [1987] Ch 458n, [1988] 1 All ER 860, CA; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 27 et seq. As to the execution of deeds by companies see the Companies Act 1985 s 36A (repealed for certain purposes) (as to replacement provisions see the Companies Act 2006 ss 44, 45; and **COMPANIES** vol 14 (2009) PARA 288). See also *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] EWHC 2240 (TCC), [2002] 4 All ER 668, [2002] 2 All ER (Comm) 1116.

## **UPDATE**

### **1056 Guarantees made by deed**

NOTE 1--Companies Act 1985 s 36A repealed for all purposes: Companies Act 2006 Sch 16; SI 2007/3495, SI 2008/2860.

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### **1057. Guarantees of regulated agreements.**

Any security<sup>1</sup> provided in relation to a consumer credit or consumer hire agreement regulated<sup>2</sup> under the Consumer Credit Act 1974 must be expressed in writing<sup>3</sup>. The form and contents of such instruments are prescribed by regulations made pursuant to that Act<sup>4</sup>.

1 'Security' includes inter alia an indemnity or guarantee: Consumer Credit Act 1974 s 189(1).

2 As to the meaning of 'regulated agreement' under the Consumer Credit Act 1974 see s 189(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79. See also PARA 1104 note 13.

3 Consumer Credit Act 1974 s 105(1).

4 See the Consumer Credit (Guarantees and Indemnities) Regulations 1983, SI 1983/1556, regs 3, 4, Schedule; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 201.

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### ***B. CONTRACTS WITHIN OR OUTSIDE THE STATUTE OF FRAUDS***

#### **1058. Requisites for application of the Statute of Frauds.**

To bring a case within the Statute of Frauds (1677)<sup>1</sup>, the primary liability of another person to the promisee for the debt, default or miscarriage to which the promise of guarantee relates must exist or be contemplated<sup>2</sup>, otherwise the statute does not apply, and the promise is then valid and can be sued on, even if it is not evidenced in writing. Accordingly it has been suggested that a promise to pay the rent in arrear to a landlord who has levied a distress, in consideration of his abandoning the distress, is not within the statute<sup>3</sup> on the ground that so long as he holds the goods under distress his remedy for the recovery of the rent by bringing a claim is suspended<sup>4</sup>.

The mere existence of a third person's liability is usually sufficient of itself to bring a guarantor's promise within the Statute of Frauds<sup>5</sup>, except where the promise to be answerable for that liability is not the immediate object of the contract, but is a mere incident of it<sup>6</sup>.

In order to bring a case within the statute it is not necessary that the principal debtor's liability should precede the surety's promise to be answerable<sup>7</sup>. Where it does not do so, however, it is

generally more difficult to decide to whom credit is given, a question which then becomes one to be determined by evidence<sup>8</sup>.

Even where the promise has reference to an existing liability of a third party, the statute does not apply if the consideration for the promise is the release or doing of something which has the effect of releasing the third party from liability<sup>9</sup>, as where the transaction between the parties amounts to a novation of a debt<sup>10</sup>, the release of the original debt being, as it usually is in such a case<sup>11</sup>, the consideration for the contract; or where there is a novation of a contract<sup>12</sup>.

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 This is the primary and main principle for testing whether the statute applies to a particular case: see generally *Birkmyr v Darnell* (1704) 1 Salk 27; 1 Smith LC (13th Edn) 331; *Eastwood v Kenyon* (1840) 11 Ad & El 438 at 446 per Denman CJ; *Hargreaves v Parsons* (1844) 13 M & W 561 at 570 per Parke B; *Lakeman v Mountstephen* (1874) LR 7 HL 17 at 24-25; *Tomlinson v Gill* (1756) Amb 330; *Kirkham v Marter* (1819) 2 B & Ald 613; *Lord Lexington v Clarke* (1689) 2 Vent 223; *Dixon v Hatfield* (1825) 2 Bing 439; *Bird v Gammon* (1837) 3 Bing NC 883; *Batson v King* (1859) 4 H & N 739; *Reader v Kingham* (1862) 13 CBNS 344; *Cripps v Hartnoll* (1863) 4 B & S 414, Ex Ch; *Mallet v Bateman* (1865) LR 1 CP 163, Ex Ch; *Wildes v Dudlow* (1874) LR 19 Eq 198; *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA; *Davys v Buswell* [1913] 2 KB 47, CA. For the four other principles for testing whether a promise is within the Statute of Frauds (1677) s 4, and not actionable unless evidenced in writing, see PARAS 1060-1063.

3 *Edwards v Kelly* (1817) 6 M & S 204. See also *Williams v Leper* (1766) 3 Burr 1886, where the landlord had entered to levy the distress, but had not actually distrained; but it appears to have been held that the landlord was nonetheless in possession of the goods, as if he had actually distrained. These cases, however, can be supported on the broader ground that the object of the promisor was to relieve the goods of an incumbrance so as to enable him to deal with them. See further *Bampton v Paulin* (1827) 4 Bing 264; and PARA 1062. This is probably the correct ground, for otherwise a promise made by a person who has no interest in the goods, merely for the purpose of causing them to be restored to the owner, would not be within the statute, a proposition contrary to decided cases: see *Rounce v Woodyard* (1846) 8 LTOS 186; *Bull v Collier* (1842) 4 ILR 107; *Fennell v Mulcahy* (1845) 8 ILR 434, which elaborately reviews the cases.

4 *Edwards v Kelly* (1817) 6 M & S 204 at 209 per Bailey and Holroyd JJ; *Lehain v Philpott* (1875) LR 10 Exch 242 at 246-247. The statute does, however, comprise a promise to pay rent to become due, in consideration of the distress being abandoned, and if the promise is to pay both rent in arrear and to become due, and is not severable (*Wood v Benson* (1831) 2 Cr & J 94), it cannot be enforced at all if not evidenced in writing (*Thomas v Williams* (1830) 10 B & C 664; and see *Lord Lexington v Clarke* (1689) 2 Vent 223).

5 See *Matson v Wharam* (1787) 2 Term Rep 80 at 81 per Buller J; *Anderson v Hayman* (1789) 1 Hy BI 120; *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 784, CA, per Vaughan Williams LJ; *Davys v Buswell* [1913] 2 KB 47, CA; *Colman v Eyles* (1817) 2 Stark 62; *Tomlinson v Gell* (1837) 6 Ad & El 564; *Gull v Lindsay* (1849) 4 Exch 45; *Chater v Beckett* (1797) 7 Term Rep 201; *Barber v Fox* (1816) 1 Stark 270; *Beard v Hardy* (1901) 17 TLR 633, CA. Where, however, a person certifies that another person is able to pay for goods, to be supplied to that other person's order, he does not incur any liability for that other person's default: *Block v Cox* (1860) 2 LT 517, Ex Ch. Nor does a solicitor incur liability for his client by writing to the client's creditor that he (the solicitor) is making arrangements for a loan to his client, and that if the creditor will hold a bill for a few days, he (the solicitor) will be prepared on the client's behalf to take it up: *Allaway v Duncan* (1867) 16 LT 264; and see *Downman v Williams* (1845) 7 QB 103, Ex Ch; *Lewis v Nicholson* (1852) 18 QB 503; *Jones v Beach* (1852) 2 De GM & G 886; *Dixon v Broomfield* (1814) 2 Chit 205. It seems, however, that one who covenants for the act of another is personally bound by his covenant, even though he describes himself in the deed as covenanting for and on the part and behalf of that other person: *Appleton v Binks* (1804) 5 East 148; *Re Bentley, ex p Bentley* (1833) 2 Deac & Ch 578. See also *Pitts v Jones* [2007] EWCA Civ 1301, [2007] All ER (D) 93 (Dec).

6 See PARA 1061.

7 *Matson v Wharam* (1787) 2 Term Rep 80; and see *Jones v Cooper* (1774) 1 Cowp 227; *Peckham v Faria* (1781) 3 Doug KB 13; *Anderson v Hayman* (1789) 1 Hy BI 120. It was formerly thought that, to bring a case within the Statute of Frauds (1677) s 4 (now as amended) it was essential that the principal debtor's liability should precede that of the guarantor: *Mawbrey v Cunningham* (1773) cited in 2 Term Rep at 81; *Jones v Cooper* (1774) 1 Cowp 227 at 228 per Lord Mansfield CJ.

8 See *Birkmyr v Darnell* (1704) 1 Salk 27; 1 Smith LC (13th Edn) 331; *Mountstephen v Lakeman* (1871) LR 7 QB 196 at 202, Ex Ch; affd sub nom *Lakeman v Mountstephen* (1874) LR 7 HL 17; *Gordon v Martin* (1731) Fitz-G 302; *Beard v Hardy* (1901) 17 TLR 633, CA; *Smith v Rudhall* (1862) 3 F & F 143; *Simpson v Penton* (1834) 2 Cr & M 430; *Keate v Temple* (1797) 1 Bos & P 158; *Rains v Storry* (1827) 3 C & P 130; *Croft v Smallwood* (1793) 1

Esp 121; *Anderson v Hayman* (1789) 1 Hy Bl 120; *Darnell v Tratt* (1825) 2 C & P 82; *Austen v Baker* (1698) 12 Mod Rep 250. Reference to book-keeping entries will sometimes indicate to whom credit was given: see *Austen v Baker*; *Storr v Scott* (1833) 6 C & P 241.

9 See *Goodman v Chase* (1818) 1 B & Ald 297; *Butcher v Steuart* (1843) 11 M & W 857; *Maggs v Ames* (1828) 4 Bing 470; *Tomlinson v Gell* (1837) 6 Ad & El 564; *Bird v Gammon* (1837) 3 Bing NC 883; *Lane v Burghart* (1841) 1 QB 933; *Re Lendon, ex p Lane* (1846) De G 300.

10 *Commercial Bank of Tasmania v Jones* [1893] AC 313, PC; *Anstey v Marden* (1804) 1 Bos & PNR 124; *Hodgson v Anderson* (1825) 5 Dow & Ry KB 735; *Re Lendon, ex p Lane* (1846) De G 300; and see *Wilson v Coupland* (1821) 5 B & Ald 228; *Lacy v M'Neile* (1824) 4 Dow & Ry KB 7; *Fairlie v Denton* (1828) 2 Man & Ry KB 353.

11 *Re Errington, ex p Mason* [1894] 1 QB 11 at 14, DC, per Vaughan Williams J; *Eastwood v Kenyon* (1840) 11 Ad & El 438.

12 *Browning v Stallard* (1814) 5 Taunt 450, where the buyer of goods, being unable to pay for them, transferred them to another who promised to pay for them; and see *Scarf v Jardine* (1882) 7 App Cas 345 at 351, HL, per Lord Selborne LC.

## UPDATE

### 1058 Requisites for application of the Statute of Frauds

NOTE 5--*Pitts*, cited, reported at [2008] 1 All ER 941.

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### 1059. Original promises outside the Statute of Frauds.

Original, as distinguished from collateral, conditional or accessory, promises are outside the Statute of Frauds (1677)<sup>1</sup>, because they bind the promisor to do something independently of and without regard to another's liability<sup>2</sup>.

The following are examples of promises which have been held to be original promises: a promise to pay a certain sum in consideration of the withdrawal of a disputed claim against a third party<sup>3</sup>, which must be distinguished from a promise to be answerable for the admitted liability of another in consideration of the creditor forbearing to sue, a promise which is within the statute<sup>4</sup>; a promise to pay another person's debt out of a fund or proceeds of sale of goods belonging to that other person<sup>5</sup>, or out of the debtor's own money, when it has been received by the promisor<sup>6</sup>; a promise to pay such debt should the promisor have money in his hands due to the debtor, on a proper assignment and a proper discharge from the debtor<sup>7</sup>; a promise that if the promisee will accept certain bills for a firm the promisor will take care that they will be met at maturity, and will provide the promisee with funds for the purpose<sup>8</sup>; a promise to pay, in certain events, a sum of money to another if that other will procure a loan for the promisor, and guarantee the lender the repayment of it<sup>9</sup>; a promise to a county court enforcement officer about to arrest a debtor under a warrant for non-payment of a judgment debt, to pay the amount of the judgment debt if he will refrain from executing the warrant<sup>10</sup>; a promise that another person will not leave the kingdom without paying his debt<sup>11</sup>; and a promise to procure the signature of another to a guarantee<sup>12</sup>.

A promise, however, to pay another's debt out of money due to the promisor himself when received by the promisor<sup>13</sup>, or a promise to give a guarantee<sup>14</sup>, or a promise to give bills for a debt due to a company<sup>15</sup> is collateral and accessory, and within the statute.

Although all guarantees are contracts of indemnity in the widest sense of the term 'indemnity'<sup>16</sup>, an indemnity, in a stricter sense of the word, is a contract in the nature of an original obligation<sup>17</sup>, and, therefore, outside the statute. Examples of promises outside the statute are a promise that, if another will, at the promisor's request, put his name to a bill of exchange, the promisor will see him harmless<sup>18</sup>; a promise to indemnify another from the consequences of entering into a surety bond<sup>19</sup>; a promise to hold a co-surety indemnified from all loss arising from the suretyship<sup>20</sup>; a promise to indemnify a third person against the cost of litigation undertaken at the promisor's request<sup>21</sup>; and a promise to be jointly liable with another<sup>22</sup>. In such cases there is really no principal debtor; there are only joint debtors, equally liable<sup>23</sup>.

1 Thus if two come to a shop, and one buys, and the other to gain him credit promises the seller that, if the buyer does not pay him, the promisor will do so, this is a collateral undertaking, and not actionable without writing; but on the other hand, if the buyer's friend says to the seller, 'Let him have the goods, and I will see you paid', this is an original undertaking for the promisor himself and outside the statute: *Birkmyr v Darnell* (1704) 1 Salk 27.

2 *Gordon v Martin* (1731) Fitz-G 302 at 303 per Lee J; *Watkins v Perkins* (1697) 1 Ld Raym 224; *Jarmain v Algar* (1826) 2 C & P 249; *Barrell v Trussell* (1811) 4 Taunt 117; *Read v Nash* (1751) 1 Wils 305; *Bird v Gammon* (1837) 3 Bing NC 883; *Pearce v Blagrove* (1855) 3 CLR 338. In *Tomlinson v Gill* (1756) Amb 330, Lord Hardwicke LC distinguished between a promise to pay the original debt on the footing of the original contract and where the promise is founded on a new consideration. This distinction no longer prevails. Moreover, whether the statute applies or not depends not on the consideration for the promise, but on other matters: see PARA 1058.

3 *Read v Nash* (1751) 1 Wils 305.

4 *Fish v Hutchinson* (1759) 2 Wils 94; *Kirkham v Marter* (1819) 2 B & Ald 613; *Cole v Dyer* (1831) 1 Cr & J 461.

5 *Parkins v Moravia* (1824) 1 C & P 376; *Stephens v Pell* (1834) 2 Cr & M 710; *Edwards v Kelly* (1817) 6 M & S 204; and see *Bampton v Paulin* (1827) 4 Bing 264; *Masters v Marriot* (1693) 3 Lev 363.

6 *Andrews v Smith* (1835) 2 Cr M & R 627; *Dixon v Hatfield* (1825) 2 Bing 439.

7 *Sweeting v Asplin* (1840) 7 M & W 165 at 171 per Parke B.

8 *Guild & Co v Conrad* [1894] 2 QB 885, CA, where the promisor's son was a partner in the firm whose bills the promisee was asked to accept.

9 *Re Bolton* (1892) 8 TLR 668.

10 *Reader v Kingham* (1862) 13 CBNS 344; see also PARA 1060 note 5; and see *Bayne v Hare* (1859) 1 LT 40 (payment of rent by mortgagee of leaseholds to avoid sale under distress; IOU given to mortgagee by subsequent mortgagee's brother).

11 *Elkins v Heart* (1731) Fitz-G 202.

12 *Bushell v Beavan* (1834) 1 Bing NC 103.

13 *Morley v Boothby* (1825) 3 Bing 107.

14 *Mallet v Bateman* (1865) LR 1 CP 163, Ex Ch.

15 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA.

16 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 784, CA, per Vaughan Williams LJ; and see *Sampson v Burton* (1820) 4 Moore CP 515.

17 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 785, CA; and see *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 830-831, CA, per Holroyd Pearce LJ; *Argo Caribbean Group Ltd*



*v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ; *Guild & Co v Conrad* [1894] 2 QB 885 at 896, CA, per Davey LJ; *Re Bolton* (1892) 8 TLR 668; *Davy's v Buswell* [1913] 2 KB 47 at 53-55, CA, per Vaughan Williams LJ. As to the contract of indemnity see PARA 1255 et seq.

18 *Batson v King* (1859) 4 H & N 739 at 740 per Pollock CB; *Guild & Co v Conrad* [1894] 2 QB 885, CA.

19 *Thomas v Cook* (1828) 8 B & C 728.

20 *Rae v Rae* (1857) 6 I Ch R 490.

21 *Howes v Martin* (1794) 1 Esp 162; *Adams v Dansey* (1830) 6 Bing 506; but see *Winckworth v Mills* (1796) 2 Esp 484, where it was ruled by Lord Kenyon CJ that a promise by the indorser of an unpaid note to indemnify the holder if he would proceed to enforce payment against the other parties to the note was within the statute. This must be viewed with some doubt. See also PARA 1255 et seq.

22 *Scholes v Hampson and Merriot* (1806) Fell on Mercantile Guarantees (2nd Edn) 27-28, where Chambre J held that an agreement whereby, in consideration of the supply by A to B of such cotton as he might want, C consented to credit being given by A to B and C jointly, is not within the statute. See also *Bain v Cooper* (1841) 1 Dowl NS 11 at 14 per Parke B.

23 See *Batson v King* (1859) 4 H & N 739; *Waugh v Carver* (1793) 2 Hy Bl 235. A person who was originally a guarantor may subsequently become jointly liable with the principal debtor: *Buck v Hurst and Bailey* (1866) LR 1 CP 297; and see PARA 1019.

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## **1060. Promise must be made to creditor.**

The Statute of Frauds (1677)<sup>1</sup> does not apply to any promise to be answerable for another, unless the promise is made to the creditor, that is to say to the person to whom another is already or is thereafter to become liable, and who can enforce such liability by bringing a claim<sup>2</sup>.

The statute does not, therefore, apply to a promise made to the principal debtor himself<sup>3</sup>, by one co-debtor to another<sup>4</sup>, nor to a promise that a contract will be performed by a third person, made to a stranger to that contract<sup>5</sup>, nor to a promise to indemnify a person becoming bail for another's appearance to a criminal charge<sup>6</sup>, nor, it seems, to a promise to a firm, of which the promisor is himself a member, to be answerable for another to that firm<sup>7</sup>.

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 Ever since *Eastwood v Kenyon* (1840) 11 Ad & El 438 the rule of law has been as stated in the text; and see *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 784, CA, per Vaughan Williams LJ.

3 *Eastwood v Kenyon* (1840) 11 Ad & El 438; and see *Wildes v Dudlow* (1874) LR 19 Eq 198; *Castling v Aubert* (1802) 2 East 325; *Gregory v Williams* (1817) 3 Mer 582.

4 *Thomas v Cook* (1828) 8 B & C 728; and see *Rae v Rae* (1857) 6 I Ch R 490.

5 *Hargreaves v Parsons* (1844) 13 M & W 561 at 570. So, a promise to a county court bailiff for payment of a judgment debt due to the judgment creditor in consideration of the bailiff's forbearing to execute a warrant of commitment against the debtor is outside the statute: *Reader v Kingham* (1862) 13 CBNS 344. See also *Love's Case* (1706) 1 Salk 28, where, however, the decision was that a promise by a third party to the sheriff who had levied under a writ of fieri facias to pay the debt if the sheriff would restore the goods, was a promise made for a legal consideration.

6 *Cripps v Hartnoll* (1863) 4 B & S 414, Ex Ch. As to the illegality of such a promise see, however, PARA 1269.

7 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 99, CA. It would seem that the Law of Property Act 1925 s 82 (see PARA 1016 note 2; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 264) does not affect this decision.

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### **1061. Liability must result from guarantor's promise only.**

The Statute of Frauds (1677)<sup>1</sup> does not apply to any case unless the guarantor's liability arises only from his express promise and not otherwise<sup>2</sup>.

Where the guarantee does not stand alone but is part of a larger transaction, even an oral guarantee may be enforceable<sup>3</sup>. A promise need not be in writing, even though it involves an obligation to discharge the debt of another, if the assumption of that obligation is only incidental to the transaction<sup>4</sup>. Where the payment of a debt or the fulfilment of a duty by another is a mere indirect incident<sup>5</sup>, or ulterior consequence<sup>6</sup>, of the terms in which the contract is framed, the transaction is outside the statute.

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 See the statement in the notes to *Forth v Stanton* (1669) 1 Saund 210 at 211e, note (I), adopted as correct by Cockburn CJ in *Fitzgerald v Dressler* (1859) 7 CBNS 374; and by the court in *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA, where the rule is stated in a different form at 786 per Vaughan Williams LJ; and in *Davys v Buswell* [1913] 2 KB 47 at 53-55, CA. See also *Bank of Scotland v Wright* [1991] BCLC 244 at 264, where the passage in the text, as contained in an earlier edition of this title, is discussed by Brooke J. As to the approach of the court when determining whether a guarantor's liability arises only from his express promise see *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA* [2001] EWCA Civ 1477, [2002] 4 All ER 468, [2002] 1 WLR 566; affd [2003] UKHL 17, [2003] 2 AC 541, [2003] 2 All ER 615.

3 *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at 123, [1981] 3 All ER 577 at 585, CA, per Eveleigh LJ, applying *Sutton & Co v Grey* [1894] 1 QB 285, CA; and see *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 AC 541, [2003] 2 All ER 615 (the ordinary rules of estoppel are applicable to guarantees); and **ESTOPPEL** vol 16(2) (Reissue) PARA 960.

4 See *Orrell v Coppock* (1856) 2 Jur NS 1244, where the promise was to pay a sum to compromise a claim against third parties, to which claim the promisor also was alleged to be liable, although he could have successfully resisted it; *Macrory v Scott* (1850) 5 Exch 907, where judgment had been recovered against the promisor as guarantor and he subsequently agreed that the judgment should be held by the creditor as security for the debt of another, notwithstanding that at the time of the agreement facts had occurred which had put an end to the promisor's liability under the judgment, although the judgment itself was still technically subsisting; *Masters v Marriot* (1693) 3 Lev 363, where the promise to be answerable for payment of money by the promisor's own agent was treated as being merely expressive of an already existing liability on the part of the promisor himself; *Arden v Rowney* (1805) 5 Esp 254, where the promisor merely agreed to be answerable for a definite sum due from another, to the extent only of the promisor's actual indebtedness to any such person; *Hodgson v Anderson* (1825) 5 Dow & Ry KB 735, where the promisors orally agreed to apply money, for which they were already accountable to their principal, in discharge of the principal's liability to his own creditor, to whom the promise was made; and *Stephens v Squire* (1696) 5 Mod Rep 205, where the promise was made by one of several defendants to pay a certain sum and costs if the action were abandoned against all the defendants. Perhaps also *Houlditch v Milne* (1800) 3 Esp 86 is to be explained on the ground that there the promisor himself was already liable for repairs to a third person's goods, independently of his express promise to be answerable for the same, in consideration of which the promisee abandoned his lien on the goods.

5 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 786, CA, per Vaughan Williams LJ; and see *Huggard v Representative Church Body* [1916] 1 IR 1.

6 *Walker v Hill* (1860) 5 H & N 419; *Sutton & Co v Grey* (1893) 69 LT 354 at 355 per Bowen LJ; affd [1894] 1 QB 285, CA.

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### **1062. Promisor interested in incumbered property.**

Where the person making the promise has personally, or through an agent, an interest in property which is subject to some incumbrance, such as a lien or the right of a creditor to distrain, and obtains a discharge of that incumbrance by promising the creditor to be responsible for the payment of the debt in respect of which it exists, the promise is not within the Statute of Frauds (1677)<sup>1</sup>.

The interest, however, must be a species of interest known to the law<sup>2</sup>, the object of the promise must be to liberate the property for the benefit of the promisor, and not merely for the benefit of the debtor, and the property must be surrendered to the promisor<sup>3</sup>, and if and in so far as the promise is to pay a debt in respect of which the property is not incumbered, the promise must be in writing<sup>4</sup>.

The Statute of Frauds applies with all its rigour to cases where the guarantor executes a guarantee for the liabilities of a third party where there is no pre-existing liability binding his property which he is seeking to release, whether or not he also charges his property with the performance of those liabilities as part of the same or some later series of transactions<sup>5</sup>.

1 See *Williams v Leper* (1766) 3 Burr 1886, where the promisor was an auctioneer employed by the holders of a bill of sale to sell the goods, and promised the landlord, who had entered for the purpose of distraining, that if he would refrain from exercising his right he would pay the rent in arrear. In the report of the case in 2 Wils 308 it is stated that the defendant was actually the holder of the bill of sale, but this does not affect the principle, for an auctioneer has a special property in the goods: see generally **AUCTION**. To the like effect are *Edwards v Kelly* (1817) 6 M & S 204; and *Bampton v Paulin* (1827) 4 Bing 264. See also *Walker v Taylor* (1834) 6 C & P 752, where the promise was made in consideration of the promisee's abandoning his lien on certain beer licences in which the promisor had a direct interest; *Castling v Aubert* (1802) 2 East 325, where it was agreed that if the promisee would surrender his lien on certain insurance policies in respect of acceptances which he had given for a third person, the promisor, who required possession of the policies in order to collect the amounts due under them on behalf of that third person, would provide for the acceptances at maturity; *Fitzgerald v Dressler* (1859) 7 CBNS 374, where the unpaid seller abandoned his lien and delivered the goods to a sub-purchaser on the sub-purchaser's undertaking to pay the purchase price due from the original purchaser. Contrast *Gull v Lindsay* (1849) 4 Exch 45, where a promise to satisfy a mere claim against a third person given in order to prevent the promisee asserting a lien based upon it was held to be within the statute.

2 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA; and see *Davys v Buswell* [1913] 2 KB 47, CA.

3 *Clancy v Piggott* (1835) 2 Ad & El 473; *Rounce v Woodyard* (1846) 8 LTOS 186; *Bull v Collier* (1842) 4 ILR 107; *Fennell v Mulcahy* (1845) 8 ILR 434. If *Houlditch v Milne* (1800) 3 Esp 86 decides anything to the contrary, it cannot be regarded as law. See also *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA. The case of *Barrell v Trussell* (1811) 4 Taunt 117 seems to have been decided on the ground that it did not appear that there was any promise to pay the debt of another at all. A distinction must be drawn between the cases where the promise was made to the creditor and those where it was made to somebody else, as in *Reader v Kingham* (1862) 13 CBNS 344, where the promise is not within the statute because it is not made to the creditor: see PARA 1060.

4 *Thomas v Williams* (1830) 10 B & C 664. The promise, however, may be severable, in which case, although unenforceable as regards the unsecured debt, it will be good as regards the secured debt: see *Wood v Benson* (1831) 2 Cr & J 94.

5 *Bank of Scotland v Wright* [1991] BCLC 244 at 264 per Brooke J.

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### 1063. Essential object of agreement.

For the case to fall within the Statute of Frauds (1677)<sup>1</sup>, the main or immediate object of the agreement between the parties must be to secure the payment of a debt or the fulfilment of a duty by a third person<sup>2</sup>.

Hence, the promise of a del credere agent who, for a higher commission, guarantees the solvency of those to whom he sells his principal's goods need not be in writing<sup>3</sup>. Such a contract is not really one of guarantee, but one settling the terms on which an agent is to be employed<sup>4</sup>, its main object being not to obtain a guarantee in respect of a third person's debt or liability but to secure the exercise of greater care by the agent in selling only to solvent purchasers<sup>5</sup>.

If, however, the payment of a third person's debt is the main object of a contract, the statute applies, whatever the motive may be for entering into the contract<sup>6</sup>.

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 *Macrory v Scott* (1850) 5 Exch 907 at 914. Thus, the statute does not apply to an agreement by which property already pledged for one debt is pledged for another, and where, although its ultimate object is the payment of a third person's debt, its immediate object is only to appropriate a fund in a particular way: *Macrory v Scott*. This rule also covers the property cases dealt with in PARA 1062: see *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA.

3 *Couturier v Hastie* (1852) 8 Exch 40; revsd on other grounds (1856) 5 HL Cas 673; *Wickham v Wickham* (1855) 2 K & J 478; *Wolff v Koppel* 5 Hill 458 (NY, 1846); *Fleet v Murton* (1871) LR 7 QB 126 at 132-133 per Blackburn J. An agreement in the nature of a del credere agreement may even be inferred from evidence of the course of conduct between the parties: *Shaw v Woodcock* (1827) 7 B & C 73. As to the meaning of 'del credere agent' see **AGENCY** vol 1 (2008) PARA 13.

4 *Sutton & Co v Grey* (1893) 69 LT 354 at 355 per Bowen LJ; affd [1894] 1 QB 285, CA.

5 See *Sutton & Co v Grey* (1893) 69 LT 354 at 355; affd [1894] 1 QB 285, CA; *Couturier v Hastie* (1852) 8 Exch 40; revsd on other grounds (1856) 5 HL Cas 673; *Wickham v Wickham* (1855) 2 K & J 478; *Wolff v Koppel* 5 Hill 458 (NY, 1846); *Fleet v Murton* (1871) LR 7 QB 126.

6 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA; *Davys v Buswell* [1913] 2 KB 47, CA. These cases explained and qualified the somewhat wide propositions laid down in *Sutton & Co v Grey* (1893) 69 LT 354; affd [1894] 1 QB 285, CA.

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## **C. NATURE OF WRITTEN EVIDENCE REQUIRED**

### **1064. Satisfying the statutory requirements.**

The Statute of Frauds (1677)<sup>1</sup> prescribes two separate ways in which a contract of guarantee may be made enforceable. The first way is by having a written<sup>2</sup> agreement signed<sup>3</sup> by the party to be charged or his agent<sup>4</sup>. The second way is by having a note or memorandum<sup>5</sup> of the agreement similarly signed. In the latter case, the agreement itself may be oral<sup>6</sup>.

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form: Interpretation Act 1978 s 5, Sch 1. This definition applies to Acts whenever passed: s 22(1), Sch 2 para 4(1)(b).

3 As to what constitutes a sufficient signature see PARA 1076.

4 As to who must sign the agreement or memorandum see PARAS 1074-1075.

5 As to what constitutes a sufficient memorandum see PARA 1067 et seq.

6 *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21 at 27, [1991] 3 All ER 758 at 762, HL, per Lord Brandon of Oakbrook. See also PARA 1066.

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### **1065. A written agreement.**

The requirements of the Statute of Frauds (1677)<sup>1</sup> will be satisfied where the contract of guarantee is made in writing, signed by the guarantor or his agent<sup>2</sup>. The requirements as to writing are equally applicable to a contract to give a guarantee<sup>3</sup> as to a contract of guarantee itself<sup>4</sup>.

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 See the Statute of Frauds (1677) s 4; and *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21 at 28, [1991] 3 All ER 758 at 762, HL, per Lord Brandon of Oakbrook. As to the meaning of 'writing' see PARA 1064 note 2. As to what constitutes a sufficient signature see PARA 1076.

3 It is a question of construction whether the words used amount to a guarantee or an offer to give one: see *Jones v Williams* (1841) 7 M & W 493; *Bank of Montreal v Munster Bank* (1876) 11 IR 47; *Jays Ltd v Sala* (1898) 14 TLR 461.

4 *Mallet v Bateman* (1865) LR 1 CP 163, Ex Ch.

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GUARANTEE/(iii) Form of Contract of Guarantee/C. NATURE OF WRITTEN EVIDENCE REQUIRED/1066. A written memorandum.

### 1066. A written memorandum.

As well as by a written agreement<sup>1</sup>, the requirements of the Statute of Frauds (1677)<sup>2</sup> may be satisfied by any sufficient note or memorandum of the promise of guarantee signed by the guarantor or his agent<sup>3</sup>. The memorandum will usually come into existence as a record of an already completed contract<sup>4</sup>. However, in one exceptional case, the memorandum may antedate the contract. Where there is a written and signed offer of guarantee, there will be a sufficient memorandum to bind the offeror, whether the acceptance of that offer is oral<sup>5</sup> or written<sup>6</sup>.

The existence of such a memorandum before a claim is brought is, however, essential<sup>7</sup>. This is anomalous, since the Statute of Frauds affects only the mode of proof, but the rule is founded on the wording of the relevant statutory provision<sup>8</sup>.

The statute need only once be satisfied by a memorandum in writing<sup>9</sup>. Where the original written evidence of a guarantee is lost, oral evidence of its having existed is admissible<sup>10</sup>.

1 See PARA 1065.

2 See the Statute of Frauds (1677) s 4; and PARA 1052.

3 See *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 100, CA, per AL Smith LJ, cited with approval in *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21 at 32-33, [1991] 3 All ER 758 at 766, HL, per Lord Brandon of Oakbrook. As to what constitutes a sufficient memorandum see PARA 1067 et seq.

4 See *Longfellow v Williams* (1804) Peake Add Cas 225; *Stewart v Eddowes*; *Hudson v Stewart* (1874) LR 9 CP 311; *Warner v Willington* (1856) 3 Drew 523.

5 *Powers v Fowler* (1855) 4 E & B 511; *Benecke v Chadwicke* (1856) 4 WR 687; *Warner v Willington* (1856) 3 Drew 523 at 532; *Smith v Neale* (1857) 2 CBNS 67; *Liverpool Borough Bank v Eccles* (1859) 4 H & N 139; *Reuss v Picksley* (1866) LR 1 Exch 342.

6 *Parker v Clark* [1960] 1 All ER 93 at 102, [1960] 1 WLR 286 at 295 per Devlin J, not following a contrary dictum of Fry J in *Munday v Asprey* (1880) 13 ChD 855 at 857.

7 *Lucas v Dixon* (1889) 22 QBD 357, CA; *Sievwright v Archibald* (1851) 17 QB 103 at 107; *Middleton v Brewer* (1790) Peake 15; *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 97, CA, per Lindley LJ; *Farr, Smith & Co Ltd v Messers Ltd* [1928] 1 KB 397.

8 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 97, CA, per Lindley LJ.

9 Before the Statute of Frauds Amendment Act 1828 s 1 (repealed by the Limitation Act 1939 Schedule and re-enacted in s 24(1), now itself re-enacted by the Limitation Act 1980 s 30(1): see **LIMITATION PERIODS** vol 68 (2008) PARA 1185), which required acknowledgments to be in writing, an oral promise was sufficient to revive a liability on a written guarantee which was barred by the Statute of Limitations: *Gibbons v McCasland* (1818) 1 B & Ald 690.

10 *Barrass v Reed* (1898) Times, 28 March; *Crays Gas Co v Bromley Gas Consumers' Co* (1901) Times, 23 March, CA.

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### 1067. Form of agreement or memorandum.

No special form of words is required to be used in framing a guarantee<sup>1</sup>, and the word 'guarantee' need not be employed, since what is material is the substance of the contract, not the name or form given to it by the parties<sup>2</sup>.

The rules governing the form of the memorandum of any other class of contract required by statute to be evidenced in writing apply in the case of a memorandum of a guarantee<sup>3</sup>. The document need not have been intended as a memorandum<sup>4</sup>. The following are examples<sup>5</sup> of documents which have been held to constitute a sufficient memorandum: a rough draft, the parties contemplating the execution of a more formal agreement<sup>6</sup>; a recital in a will<sup>7</sup>; an affidavit<sup>8</sup>; a letter to a third party<sup>9</sup>, including an agent of the guarantor<sup>10</sup> or his solicitor<sup>11</sup>, or the solicitor of the other party<sup>12</sup>; a reply to a requisition<sup>13</sup>; a receipt<sup>14</sup>; a resolution in the minute book of a company<sup>15</sup>; a pleading in previous proceedings<sup>16</sup>; a telegram<sup>17</sup>; a telex message<sup>18</sup>; a statement in a rent book<sup>19</sup>; a recital in a settlement<sup>20</sup>; and a signed entry in the guarantor's own diary<sup>21</sup>.

The memorandum must contain an express or implied recognition that a contract of guarantee was entered into<sup>22</sup>. So a document acknowledging the existence of a contract but repudiating liability under it may be a sufficient memorandum<sup>23</sup>, but not a document cancelling the contract<sup>24</sup> nor a document denying the existence of a contract<sup>25</sup>. The Statute of Frauds (1677)<sup>26</sup> does not preclude an application for rectification of a memorandum of guarantee to correct errors<sup>27</sup>.

The indorsement by a guarantor of his undertaking to be answerable, made on the agreement between the principal debtor and the creditor, and referring to it, suffices<sup>28</sup>.

If the limit on a guarantee is to be increased then the necessary amendment must itself constitute a sufficient memorandum for the purposes of the Statute of Frauds (1677)<sup>29</sup>.

1 *Welford v Beazely* (1747) 1 Ves Sen 6.

2 See eg *Seaton v Heath*, *Seaton v Burnand* [1899] 1 QB 782 at 792, CA, per Romer LJ (revsd without affecting this point sub nom *Seaton v Burnand*, *Burnand v Seaton* [1900] AC 135, HL); *Re Denton's Estate, Licenses Insurance Corp'n and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178 at 188, CA; *Reynolds v Wheeler* (1861) 10 CBNS 561. The name given to a contract is, however, some evidence of the intention of the parties: see eg *Dane v Mortgage Insurance Corp'n* [1894] 1 QB 54 at 60, CA.

3 See note 5.

4 *Welford v Beazely* (1747) 1 Ves Sen 6; and see the cases cited in PARA 1070. Cf *Daniels v Trefusis* [1914] 1 Ch 788 at 799.

5 Some of these examples are taken from cases concerning the Statute of Frauds (1677) s 17 (repealed) or the Law of Property Act 1925 s 40 (repealed).

6 *Gray v Smith* (1889) 43 ChD 208, CA; *Morgan v Worthington* (1878) 38 LT 443. It is, of course, essential to prove that the informal agreement amounts to a concluded contract.

7 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84, CA.

8 *Barkworth v Young* (1856) 4 Drew 1.

9 *Gibson v Holland* (1865) LR 1 CP 1.

10 *Moore v Hart* (1683) 1 Vern 110, 201; *Longfellow v Williams* (1804) Peake Add Cas 225; *Gibson v Holland* (1865) LR 1 CP 1.

11 *Smith-Bird v Blower* [1939] 2 All ER 406 (disapproved on another point in *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, CA). See also *Waldron v Jacob and Millie* (1870) IR 5 Eq 131; *Smith v Mansi* [1962] 3 All ER 857, [1963] 1 WLR 26, CA.

- 12 *Bateman v Phillips* (1812) 15 East 272.
- 13 *Buxton v Bellin* (1877) 3 VLR 243.
- 14 *Evans v Prothero* (1852) 1 De GM & G 572; *North v Loomes* [1919] 1 Ch 378.
- 15 *Jones v Victoria Graving Dock Co* (1877) 2 QBD 314, CA; *Re Strathblaine Estates Ltd* [1948] Ch 228, [1948] 1 All ER 162. Cf *Eley v Positive Government Security Life Assurance Co Ltd* (1875) 1 ExD 20; affd (1876) 1 ExD 88, CA.
- 16 *Grindell v Bass* [1920] 2 Ch 487; *Farr, Smith & Co v Messers Ltd* [1928] 1 KB 397.
- 17 *Godwin v Francis* (1870) LR 5 CP 295; *McBlain v Cross* (1871) 25 LT 804.
- 18 *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546.
- 19 *Hill v Hill* [1947] Ch 231, [1947] 1 All ER 54, CA.
- 20 *Re Holland, Gregg v Holland* [1902] 2 Ch 360, CA.
- 21 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 100, CA, per AL Smith LJ.
- 22 *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at 556 per Staughton J, applying *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, [1974] 1 All ER 209, CA.
- 23 *Jackson v Lowe* (1822) 1 Bing 9; *Wilkinson v Evans* (1866) LR 1 CP 407; *Buxton v Rust* (1872) LR 7 Exch 279; *Leather-Cloth Co v Hieronimus* (1875) LR 10 QB 140; *Dewar v Mintoft* [1912] 2 KB 373; *Thirkell v Cambi* [1919] 2 KB 590, CA.
- 24 *Elliott v Dean* (1884) Cab & El 283.
- 25 *Thirkell v Cambi* [1919] 2 KB 590, CA; *Soci  t   Capa Srl v Acatos & Co Ltd* [1953] 2 Lloyd's Rep 185.
- 26 Ie precluded by the Statute of Frauds (1677) s 4: see PARA 1052.
- 27 See *GMAC Commercial Credit Development Ltd v Sandhu* [2004] EWHC 716 (Comm), [2006] 1 All ER (Comm) 268, [2004] All ER (D) 589 (Mar).
- 28 *Stead v Liddard* (1823) 8 Moore CP 2; *Bluck v Gompertz* (1852) 7 Exch 862.
- 29 Ie a sufficient memorandum for the purposes of the Statute of Frauds (1677) s 4: see PARA 1052. For a case where the requirements of s 4 were found to be met see *Moat Financial Services v Wilkinson* [2005] EWCA Civ 1253.

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### **1068. Surety's liability on bill or note.**

A promise to guarantee the due honouring of a bill or note is within the Statute of Frauds (1677)<sup>1</sup>. However, a person who signs a bill of exchange as guarantor for the acceptor will be liable to the drawer or payee upon proof that that is what the parties intended<sup>2</sup>, even in the absence of a writing sufficient to satisfy the Statute of Frauds<sup>3</sup>.

1 *G & H Montage GmbH v Irvani* [1990] 2 All ER 225 at 229-230, [1990] 1 WLR 667 at 672, CA, per Mustill LJ. See also *Steele v M'Kinlay* (1880) 5 App Cas 754, HL; *Jenkins & Sons v Coomber* [1898] 2 QB 168; *MT Shaw & Co Ltd v Holland* [1913] 2 KB 15, CA.



2 He may, of course, enter into an effective guarantee by a collateral writing: see *Morris v Stacey* (1816) Holt NP 153, where a letter returning bills of exchange that were sent to the writer of the letter to indorse, which he refused to do, at the same time adding that should the bills not be honoured when due the writer would see them paid, was held to satisfy the statute. See also *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corp Ltd (liquidators)* (1874) LR 7 HL 348; *Singer v Elliott* (1888) 4 TLR 524, CA.

3 *G & H Montage GmbH v Irvani* [1990] 2 All ER 225 at 230, [1990] 1 WLR 667 at 672, CA, per Mustill LJ, affirming Saville J at [1988] 1 WLR 1285. See also *Wilkinson & Co v Unwin* (1881) 7 QBD 636, CA; *Gerald McDonald & Co v Nash & Co* [1924] AC 625, HL; *McCall Bros Ltd v Hargreaves* [1932] 2 KB 423. Cf *Singer v Elliott* (1888) 4 TLR 524, CA; *Stagg, Mantle and Co v Brodrick* (1895) 12 TLR 12, CA. See also the Bills of Exchange Act 1882 s 56; and PARA 1579. For the principle that oral evidence may not be adduced to vary the terms of the instrument see *Hitchings and Coulthurst Co v Northern Leather Co of America and Doushness* [1914] 3 KB 907; and PARA 1447.

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### **1069. Form of guarantee by company.**

A contract of guarantee may be made (1) by a company<sup>1</sup>, by writing under its common seal<sup>2</sup>; or (2) on behalf of a company, by any person acting under its authority, express or implied<sup>3</sup>. The requirements of the Statute of Frauds (1677)<sup>4</sup> apply to a guarantee by a company as they apply to guarantees by an individual<sup>5</sup>.

Directors may bind themselves personally by a guarantee which they sign or adopt<sup>6</sup>. When, therefore, they do not intend to bind themselves personally, but are acting solely on behalf of the company, they should be careful to word the contract accordingly<sup>7</sup>.

1 As to the meaning of 'company' see PARA 1031 note 1.

2 A company is no longer obliged to have a company seal. The same effect is produced if the document is signed by two directors (or, in the case of a private company, by a director and secretary). On the execution of documents generally see the Companies Act 1985 s 36A (repealed for certain purposes) (as to replacement provisions see the Companies Act 2006 s 44; and **COMPANIES** vol 14 (2009) PARA 288).

3 See the Companies Act 1985 s 36 (prospectively repealed) (as to replacement provisions see the Companies Act 2006 s 43; and **COMPANIES** vol 14 (2009) PARA 282).

4 See the Statute of Frauds (1677) s 4; and PARA 1052.

5 See the Companies Act 1985 s 36 (prospectively repealed); and note 3. As to the execution by companies of guarantees as deeds see PARA 1056; and as to contracts by companies see generally **COMPANIES** vol 14 (2009) PARA 282 et seq.

6 See *Re Dover and Deal Rly, Cinque Ports, Thanet and Coast Junction Co, Lord Londesborough's Case* (1854) 4 De GM & G 411; *Chapleo v Brunswick Permanent Building Society* (1881) 6 QBD 696, CA.

7 See *Chapman v Smethurst* [1909] 1 KB 927, CA, distinguishing *Dutton v Marsh* (1871) LR 6 QB 361; *W and T Avery Ltd v Charlesworth* (1914) 31 TLR 52, CA. Cf *VSH Ltd v BKS Air Transport Ltd and Stevens* [1964] 1 Lloyd's Rep 460; *Sun Alliance Pensions Life and Investments Services Ltd v Webster* [1991] 2 Lloyd's Rep 410; *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21, [1991] 3 All ER 758, HL. In those cases, directors' signatures on behalf of the company as principal debtor were held to be sufficient to satisfy the statute and to make the guarantee recited in those contracts enforceable against the directors as guarantors. Contrast, however, the decision in *Manches LLP v Freer* [2006] EWHC 991 (QB), [2006] All ER (D) 428 (Nov): see PARAS 1027, 1074.

### **UPDATE**

## 1069 Form of guarantee by company

NOTE 2--Companies Act 1985 s 36A repealed for all purposes: Companies Act 2006 Sch 16; SI 2007/3495, SI 2008/2860.

NOTE 3--Repeal of Companies Act 1985 s 36 in force 1 October 2009: SI 2008/2860.

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### 1070. Memorandum formed by more than one document.

The memorandum need not be in one single document. There are two situations in which a memorandum may be constituted by two or more documents: (1) if all the documents are signed by the guarantor or his agent and can be seen to refer to the same transaction<sup>1</sup>; (2) if only one of the documents is so signed, but that document contains some express or implied reference to another document, then oral evidence is admissible to identify that other document and the two documents may be read together<sup>2</sup>.

1 *Sheers v Thimbleby & Son* (1897) 76 LT 709, CA.

2 *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110 at 130, [1957] 3 All ER 265 at 276, CA, per Jenkins LJ; approved in *Elias v George Sahely & Co (Barbados) Ltd* [1983] 1 AC 646 at 655, [1982] 3 All ER 801 at 807, PC; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 (memorandum of guarantee consisting of two telex messages and, possibly, the charterparty itself).

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### 1071. Description of parties.

In order to satisfy the Statute of Frauds (1677)<sup>1</sup>, all the contracting parties must be named or sufficiently described as such in writing<sup>2</sup>. It is insufficient that their names are mentioned merely as descriptive of the subject matter of the contract<sup>3</sup>. The memorandum need not, however, be addressed to the other contracting party<sup>4</sup>.

A mere misdescription, whether it be of one of the parties or of the principal debtor, will not render a guarantee unenforceable<sup>5</sup>. It is otherwise where the name of the principal debtor is omitted<sup>6</sup>.

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 *Williams v Lake* (1859) 2 E & E 349; *Sheers v Thimbleby & Son* (1897) 76 LT 709 at 711, CA; and see *Brettell v Williams* (1849) 4 Exch 623 at 628. The ruling in *Walton v Dodson* (1827) 3 C & P 162 that a

memorandum, not addressed to or naming anybody, will enure for the benefit of those to whom or for whose use it was delivered, can scarcely be supported. Where agents are acting for principals, the agents' names suffice, even if the agency is not disclosed: *Filby v Hounsell* [1896] 2 Ch 737. Both the name and address of a company form part of its identity: *Dumford Trading AG v OAO Atlantrybflot* [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep 289. For a case in which an incorrect corporate name had been used but the circumstances clearly pointed to the defendant, see *Union Bank (UK) plc v Pathak* [2006] EWHC 2614 (Ch). [2006] All ER (D) 210 (May).

3 *Vandenbergh v Spooner* (1866) LR 1 Exch 316; *Newell v Radford* (1867) LR 3 CP 52.

4 *Gibson v Holland* (1865) LR 1 CP 1. Where a guarantee was addressed by the defendant to the plaintiff's attorney, it was held that the plaintiff was entitled to the benefit of it: *Bateman v Phillips* (1812) 15 East 272; and see *Longfellow v Williams* (1804) Peake Add Cas 225.

5 *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA, where oral evidence was admitted to prove the identity of the person referred to. See also *Dumford Trading AG v OAO Atlantrybflot* [2005] 1 Lloyd's Rep 289, [2004] All ER (D) 132 (May), considering dicta of Lord Phillips of Worth Matravers in *Shogun Finance Ltd v Hudson* [2003] UKHL 62 at [120]-[121], [2004] 1 AC 919, [2004] 1 All ER 215 (a case concerned with a hire-purchase agreement). See also *Dumford Trading AG v OAO Atlantrybflot* [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep 289; and note 2.

6 See *UCB Corporate Services Ltd (formerly UCB Bank plc) v Harris* [2000] All ER (D) 2203; *UCB Corporate Services Ltd v Clyde & Co (a firm)* [2000] All ER (D) 141 (where the question of a solicitor's liability in negligence to the bank for failing to obtain an enforceable guarantee is discussed).

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### **1072. Written evidence of consideration unnecessary.**

By virtue of the Mercantile Law Amendment Act 1856, provided that the requirements of the Statute of Frauds (1677)<sup>1</sup> are otherwise satisfied, a guarantee will not be unenforceable by reason only that the consideration for the guarantor's promise<sup>2</sup> does not appear in writing or by necessary inference from a written document<sup>3</sup>.

The 1856 Act does not make a promise good which was not so before<sup>4</sup>, but merely dispenses with any written statement of the consideration. It does not dispense with the necessity for a consideration<sup>5</sup>. If the written memorandum states a bad consideration, it will not be helped by the Act<sup>6</sup>. It seems that the parties are bound by any written statement of the consideration which they choose to make<sup>7</sup>, although, in cases of ambiguity, oral evidence is admissible to show that the consideration alleged is sufficient in law<sup>8</sup>. Where the whole promise cannot be collected from the written memorandum of the contract, the Statute of Frauds is not satisfied, and oral evidence of the consideration may not be given in order to explain the promise<sup>9</sup>. It is not, however, necessary for a written memorandum of guarantee, even though it unnecessarily embodies the consideration, to state by whom the consideration is payable, if this can be inferred, and the meaning then is that it was paid by the party to whom the memorandum was given<sup>10</sup>.

1 See the Statute of Frauds (1677) s 4; and PARA 1052.

2 It was formerly held that, because the Statute of Frauds (1677) s 4 required 'the agreement' to be in writing, there had to be written evidence, not only of the promise, but also of the consideration, in order to satisfy the requirements of the statute (see *Wain v Warlters* (1804) 5 East 10; 1 Smith LC (13th Edn) 358; *Saunders v Wakefield* (1821) 4 B & Ald 595; *Egerton v Mathews* (1805) 6 East 307), as the two together constitute the agreement, in the case of every contract not made by deed (*Herman v Jeuchner* (1885) 15 QBD

561 at 563, CA, per Sir Baliol Brett MR). The cases as to whether the consideration for the promise of guarantee duly appeared in writing, or by necessary inference from a written document, so as to satisfy the Statute of Frauds (1677) s 4 (now as amended) are very numerous. The Mercantile Law Amendment Act 1856 s 3 (as to which see note 3; and PARA 1055) has made these cases obsolete. However, as the principles established by them are still sometimes invoked when it has to be determined whether the surety's promise is sufficiently stated in writing, a brief reference will be made to them. From these cases it appears that it was not necessary that the consideration should be stated in express terms, it being sufficient if the written memorandum were so framed that a person of ordinary capacity must infer from it what the consideration really was (see *Hawes v Armstrong* (1835) 1 Scott 661; *Caballero v Slater* (1854) 14 CB 300; *Jarvis v Wilkins* (1841) 7 M & W 410; *Goldshede v Swan* (1847) 1 Exch 154), or if the nature of the consideration could be inferred from the written memorandum (see *James v Williams* (1834) 4 B & Ad 1109; *Raikes v Todd* (1838) 8 Ad & El 846; *Thackwell v Gardiner* (1851) 5 De G & Sm 58), with or without the aid of oral evidence as to extrinsic circumstances, or the meaning of the words used (see *Edwards v Jevons* (1849) 8 CB 436; *Goldshede v Swan* above; *Bainbridge v Wade* (1850) 16 QB 89; *Russell v Moseley* (1822) 3 Brod & Bing 211). On the other hand, the written memorandum was held to be insufficient to satisfy the Statute of Frauds if two distinct considerations could, with equal probability, be inferred from it as the inducement for the guarantor's promise: *Baring v Grieve* (1858) 6 WR 466; and see *Bentham v Cooper* (1839) 5 M & W 621; *Cole v Dyer* (1831) 1 Cr & J 461. When a defendant to an action on a guarantee pleaded that there was no memorandum in writing of the consideration, the plaintiff was at liberty to reply that the consideration was in writing without setting out the actual memorandum in his pleading: see *Wakeham v Sutton* (1834) 2 Ad & El 78. See also de Colyar's Law of Guarantees (3rd Edn) 166 et seq.

- 3 Mercantile Law Amendment Act 1856 s 3 (amended by the Statute Law Revision Act 1892).
- 4 *Holmes v Mitchell* (1859) 7 CBNS 361 at 367 per Byles J.
- 5 *Glover v Halkett* (1857) 2 H & N 487 at 489; and see *Baring v Grieve* (1858) 6 WR 466. As to the requirement for consideration in the case of a guarantee not made by deed see PARA 1047.
- 6 *Wood v Priestner* (1866) LR 2 Exch 66 at 70 per Bramwell B; affd (1867) LR 2 Exch 282, Ex Ch.
- 7 *Oldershaw v King* (1857) 2 H & N 517, Ex Ch.
- 8 *Hoad v Grace* (1861) 7 H & N 494.
- 9 *Holmes v Mitchell* (1859) 7 CBNS 361; *Sheers v Thimbleby & Son* (1897) 76 LT 709 at 711, CA; and see *Peek v North Staffordshire Rly Co* (1863) 10 HL Cas 473.
- 10 *Dutchman v Tooth* (1839) 5 Bing NC 577.

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### **1073. Memorandum must include all material terms.**

Except for the consideration<sup>1</sup>, the memorandum must evidence all the material terms of the contract of guarantee which have been expressly agreed<sup>2</sup>. However, it need not state any term which would be implied<sup>3</sup>. Nor need it state terms which form part of an independent collateral contract<sup>4</sup>. Objective extrinsic evidence is admissible to explain the meaning of the terms used in the memorandum<sup>5</sup>.

Oral evidence is admissible to show that a written document is not itself a contract and therefore at the most a memorandum, and then to show that the document does not record all the terms of the contract<sup>6</sup>.

Where a term omitted from the memorandum is solely for the creditor's benefit, he may waive it and enforce the guarantee as evidenced in the memorandum<sup>7</sup>. Equally, if the omitted term is

exclusively for the benefit of the guarantor, the creditor may consent to be bound by the omitted term and the entire agreement may then be enforced<sup>8</sup>.

The equitable remedy of rectification may be available where a term has been omitted from a written contract of guarantee owing to a mistake, provided that there is either a prior concluded agreement or a clear common intention of the parties which had some outward expression of accord<sup>9</sup>. Where the remedy is available the court may in one claim both rectify the contract and enforce it<sup>10</sup>.

1 See the Mercantile Law Amendment Act 1856 s 3; and PARA 1055.

2 *Holmes v Mitchell* (1859) 7 CBNS 361 at 367, 370: 'the whole of the promise must . . . appear in writing' (as to the authorship of the judgment in that case see the editor's note to *Perrylease Ltd v Imecar AG* [1987] 2 All ER 373 at 379, [1988] 1 WLR 463 at 471). See also *Cox v Middleton* (1854) 2 Drew 209; *Caddick v Skidmore* (1857) 2 De G & J 52; *Donnison v People's Café Co* (1881) 45 LT 187, CA; *Gray v Smith* (1889) 43 ChD 208, CA; *Van Praagh v Everidge* [1903] 1 Ch 434, CA; *Blackburn v Walker* [1920] WN 291; *Johnson v Humphrey* [1946] 1 All ER 460; *Hawkins v Price* [1947] Ch 645, [1947] 1 All ER 689; *Beckett v Nurse* [1948] 1 KB 535, [1948] 1 All ER 81, CA; *Burgess v Cox* [1951] Ch 383, [1950] 2 All ER 1212; *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, [1974] 1 All ER 209, CA; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at 556 per Staughton J. In *Barclays Bank Ltd v Caldwell* (25 July 1986, unreported), ChD, the guarantors signed an 'all moneys' guarantee in the bank's standard form, which did not refer to the oral agreement which they had reached with the manager limiting their liability to the additional money agreed to be lent. The guarantee was held to be unenforceable.

3 *Gray v Smith* (1889) 43 ChD 208, CA; *Ward v National Bank of New Zealand* (1886) 4 NZLR 35. Cf *Timmins v Moreland Street Property Co* [1958] Ch 110, [1957] 3 All ER 265, CA; *Farrell v Green* (1974) 232 Estates Gazette 587.

4 See *De Lassalle v Guildford* [1901] 2 KB 215, CA; *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733; *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853; *Tootal Clothing Ltd v Guinea Properties Management Ltd* (1992) 64 P & CR 452, [1992] 2 EGLR 80, CA.

5 *Perrylease Ltd v Imecar AG* [1987] 2 All ER 373 at 380, [1988] 1 WLR 463 at 472 per Scott J. See also *Heffield v Meadows* (1869) LR 4 CP 595 at 598 per Willes J; *Sheers v Thimbleby & Son* (1897) 76 LT 709 at 711-712, CA. For this purpose it does not matter whether the liability of the principal debtor is a present or a future liability: *Perrylease Ltd v Imecar AG* above.

6 *Beckett v Nurse* [1948] 1 KB 535, [1948] 1 All ER 81, CA.

7 *Martin v Pycroft* (1852) 2 De GM & G 785; *Smith v Wheatcroft* (1878) 9 ChD 223; *North v Loomes* [1919] 1 Ch 378 at 385 per Younger J; *Scott v Bradley* [1971] Ch 850, [1971] 1 All ER 583. For this purpose, it is irrelevant whether the term to be waived is important to the particular agreement: *Scott v Bradley* at 855 and at 587 per Plowman J, explaining the dictum of Younger J in *North v Loomes* above at 385 and disapproving the dictum of Evershed J in *Hawkins v Price* [1947] Ch 645 at 654, [1947] 1 All ER 689 at 692.

8 *Martin v Pycroft* (1852) 2 De GM & G 785; *Scott v Bradley* [1971] Ch 850, [1971] 1 All ER 583, not following *Burgess v Cox* [1951] Ch 383, [1950] 2 All ER 1212, and dictum of Evershed J in *Hawkins v Price* [1947] Ch 645 at 658, [1947] 1 All ER 689 at 693. Cf *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, HL, where the bank was permitted to enforce its third-party charge for the agreed, limited amount despite the fact that the only document signed by the chargor was the charge itself, which was in the bank's standard 'all-moneys' form, containing no mention of the limitation.

9 *Joscelyn v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA. As to the equitable remedy of rectification generally see **MISTAKE** vol 77 (2010) PARA 57 et seq.

10 *Craddock Bros v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196, PC.

GUARANTEE/(iii) Form of Contract of Guarantee/C. NATURE OF WRITTEN EVIDENCE REQUIRED/1074. Who must sign memorandum.

#### **1074. Who must sign memorandum.**

The memorandum need only be signed by the party to be charged or his agent<sup>1</sup>. A guarantee drawn up in the plural number, and concluding 'as witness our hands', but signed by one guarantor only, is a sufficient memorandum to be binding on the guarantor who signed it<sup>2</sup>. A guarantee beginning 'we hereby guarantee', signed with the name of a firm, and also by each of the partners of the firm, operates as a separate guarantee by each partner as well as a joint guarantee by the firm<sup>3</sup>. A person who signs a guarantee as agent (for example, on behalf of a company of which he is a director) does not thereby assume personal liability even if he has given verbal assurances to the creditor<sup>4</sup>.

1 Statute of Frauds (1677) s 4: see PARA 1052 et seq; and *Laythorp v Bryant* (1836) 2 Bing NC 735 at 743; *Smith v Neale* (1857) 2 CBNS 67; *Liverpool Borough Bank v Eccles* (1859) 4 H & N 139; *Reuss v Picksley* (1866) LR 1 Exch 342. As to signature by agents see PARA 1075. As to email signatures see *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All ER 891; and PARA 1052.

2 *Norton v Powell* (1842) 4 Man & G 42. Where, however, one guarantor expressly or impliedly stipulates that the other guarantor must also sign, this amounts to a condition precedent which must be fulfilled: see PARA 1106.

3 *Re Smith, Fleming & Co, ex p Harding* (1879) 12 ChD 557, CA; and see *Armstrong v Cahill* (1880) 6 LR Ir 440. See also *Bank of Scotland v Henry Butcher & Co* [2003] EWCA Civ 67, [2003] 2 All ER (Comm) 557, [2003] 1 BCLC 575 (claimant bank granted overdraft to customer who entered into negotiations with defendant firm with a view to a possible joint venture; consultancy agreement was drawn up by which, inter alia, it was agreed that firm would guarantee overdraft on customer's account up to a certain level. The partnership guarantee was signed by four of the firm's partners 'as partners [in the firm] and as individuals'. The firm's partnership deed provided that a partner might enter into a guarantee with the consent of the other partners; held that the firm was bound by the guarantee).

4 See *Manches LLP v Freer* [2006] EWHC 991 (QB), [2006] All ER (D) 428 (Nov).

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#### **1075. Memorandum signed by agent.**

An agent, authorised orally or in writing, may sign the memorandum<sup>1</sup>. He need not be of full age and capacity<sup>2</sup>. Nor, in order to render his principal liable, need he expressly sign as agent, oral evidence being admissible to show in what capacity he did sign<sup>3</sup>. Where reliance is placed on the signature of an agent as satisfying the Statute of Frauds (1677)<sup>4</sup>, it must be shown that the agent signing was duly authorised, whether the document signed is a record of the terms or a document referring to and recognising the document actually containing the record of the terms<sup>5</sup>. An oral ratification of the agent's signature is sufficient where he was not previously authorised<sup>6</sup>.

Certain agents possess implied authority to sign a guarantee<sup>7</sup>. Thus, a broker employed to buy or sell goods, it seems, possesses it<sup>8</sup>, but not a solicitor<sup>9</sup>. Nor has a person who is also a party to a contract any implied authority to sign for another contracting party, either by himself<sup>10</sup> or his employee<sup>11</sup>.

- 1 *Emmerson v Heelis* (1809) 2 Taunt 38; *Coles v Trecothick* (1804) 9 Ves 234.
- 2 *Watkins v Vince* (1818) 2 Stark 368.
- 3 *Young v Schuler* (1883) 11 QBD 651, CA. See the comments on the proper interpretation of the decision in this case in *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21 at 28 et seq, [1991] 3 All ER 758 at 762 et seq, HL.
- 4 See the Statute of Frauds (1677) s 4; and PARA 1052.
- 5 *John Griffiths Cycle Corp Ltd v Humber & Co Ltd* [1899] 2 QB 414, CA; revsd on another point sub nom *Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141, HL; and see *Hambro v Burnand* [1904] 2 KB 10, CA; *Watkins v Vince* (1818) 2 Stark 368; *Yonge v Toynbee* [1910] 1 KB 215, CA.
- 6 *Maclean v Dunn* (1828) 4 Bing 722; *Coles v Trecothick* (1804) 9 Ves 234. As to what constitutes ratification of an agent's acts see *Marsh v Joseph* [1897] 1 Ch 213, CA; *Bartram & Sons v Lloyd* (1904) 90 LT 357, CA; and **AGENCY** vol 1 (2008) PARA 57 et seq. A contract which purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract: see the Companies Act 1985 s 36C(1) (s 36C as added; prospectively repealed) (as to replacement provisions for the Companies Act 1985 s 36C see the Companies Act 2006 s 51; and **COMPANIES** vol 14 (2009) PARA 66). This provision also applies to the making of a deed: see the Companies Act 1985 s 36C(2) (as so added; prospectively repealed). A contract entered into by an agent on behalf of an unincorporated company cannot be ratified by the company after its incorporation: see *Natal Land etc Co v Pauline Colliery Syndicate* [1904] AC 120, PC.
- 7 See Fell's Law of Mercantile Guarantees (2nd Edn) 89, 94; de Colyar's Law of Guarantees (3rd Edn) 178 et seq.
- 8 Fell's Law of Mercantile Guarantees (2nd Edn) 89, 94. As to the meaning of 'broker' see **AGENCY** vol 1 (2008) PARA 12.
- 9 See *Earl of Glengal v Barnard* (1836) 1 Keen 769 at 787; on appeal sub nom *Lady Thynne v Earl of Glengall* (1848) 2 HL Cas 131; *Hasleham v Young* (1844) 5 QB 833 at 836; and see *Forster v Rowland* (1861) 7 H & N 103; *Smith v Webster* (1876) 3 ChD 49, CA; *Ridgway v Wharton* (1857) 6 HL Cas 238; *Bowen v Duc d'Orléans* (1900) 16 TLR 226, CA.
- 10 *Sharman v Brandt* (1871) LR 6 QB 720, Ex Ch; *Farebrother v Simmons* (1822) 5 B & Ald 333; *Wright v Dannah* (1809) 2 Camp 203; see **AGENCY** vol 1 (2008) PARA 10.
- 11 *Dixon v Broomfield* (1814) 2 Chit 205.

## UPDATE

### 1075 Memorandum signed by agent

NOTE 6--Repeal of Companies Act 1985 s 36C in force 1 October 2009: SI 2008/2860.

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### 1076. What is a sufficient signature.

The word 'signed' has been given an extended meaning by the courts; and the rules as to what is a sufficient signature are the same in the case of a guarantee as in the case of any other contract required to be evidenced in writing<sup>1</sup>.

A signature in pencil is sufficient<sup>2</sup>, as is a signature by initials<sup>3</sup>, or by means of a stamp or mark<sup>4</sup>. It is not necessary to prove that the person making the mark could not write his name<sup>5</sup>. A printed heading of the name of the guarantor<sup>6</sup> is a sufficient signature if the remainder of the document is written by him or at his dictation<sup>7</sup>, or is at the time or subsequently acknowledged by him<sup>8</sup>. The signature of instructions for a telegram is sufficient<sup>9</sup>, and a telegram itself may afford a sufficient signature, since the telegraph clerk may have the power delegated to him to sign<sup>10</sup>. The answerback of the sender of a telex probably constitutes a sufficient signature<sup>11</sup>.

The signature must be so placed as to authenticate every material and operative part of the instrument<sup>12</sup>.

Provided that there is a contract of guarantee<sup>13</sup>, the intention with which the guarantor signs the memorandum evidencing that contract is irrelevant<sup>14</sup>. The signature of the guarantor as testator to a will reciting the guarantee<sup>15</sup>, as signatory on behalf of the principal debtor to an agreement containing the guarantee<sup>16</sup>, and as a witness<sup>17</sup>, have all been held to be sufficient.

1 As to the power to modify legislation for the purpose of authorising or facilitating the use of electronic communications or electronic storage, instead of other forms of communication or storage, for the purposes of the doing of anything which under any such provisions is required to be or may be done or evidenced in writing see the Electronic Communications Act 2000 s 8(1)(a), (2)(a); and **CIVIL PROCEDURE** vol 11 (2009) PARA 947; and as to electronic signatures see s 7; and **CIVIL PROCEDURE** vol 11 (2009) PARA 948. The requirements of the Statute of Frauds (1677) s 4 (see PARA 1052) have not been modified under this power.

2 *Lucas v James* (1849) 7 Hare 410. See *Geary v Physic* (1826) 5 B & C 234.

3 *Chichester v Cobb* (1866) 14 LT 433; *Caton v Caton* (1867) LR 2 HL 127 at 143 per Lord Westbury. See also *Re Blewitt's Goods* (1880) 5 PD 116 (signature by initials sufficient for a will); *Jacob v Kirk* (1839) 2 Mood & R 221.

4 *Bennett v Brumfitt* (1867) 37 LJCP 25. See also *Jenkins v Gaisford and Thring* (1863) 3 Sw & Tr 93; *McDonald v John Twiname Ltd* [1953] 2 QB 304, [1953] 2 All ER 589, CA; *Goodman v J Eban Ltd* [1954] 1 QB 550, [1954] 1 All ER 763, CA.

5 *Baker v Dening* (1838) 8 Ad & El 94. Where an illiterate person held the top of the pen while another wrote his name, it was held to be a sufficient signature (*Helsham v Langley* (1841) 11 LJCh 17), but the mere tracing over a signature with a dry pen is not sufficient (see *Re Maddock's Goods* (1874) LR 3 P & D 169; *Re Cunningham's Goods* (1860) 4 Sw & Tr 194, both decisions on wills). See also *Brooks v Billingham* (1912) 56 Sol Jo 503.

6 The surname alone may be sufficient: *Lobb v Stanley* (1844) 5 QB 574. However, some indication of name is necessary: *Selby v Selby* (1817) 3 Mer 2; *Hubert v Treherne* (1842) 4 Scott NR 486.

7 *Schneider v Norris* (1814) 2 M & S 286; *Tourret v Cripps* (1879) 48 LJCh 567; *Hucklesby v Hook* (1900) 82 LT 117. See also *Evans v Hoare* [1892] 1 QB 593; *Leeman v Stocks* [1951] Ch 941, [1951] 1 All ER 1043. However, it is not possible to hold that the automatic insertion of an email address is intended for a signature: *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All ER 891, [2006] 1 All ER (Comm) 885.

8 *Tourret v Cripps* (1879) 48 LJCh 567; *Leeman v Stocks* [1951] Ch 941, [1951] 1 All ER 1043.

9 *Godwin v Francis* (1870) LR 5 CP 295.

10 *McBlain v Cross* (1871) 25 LT 804. There is no longer an inland telegram service: see **CONTRACT** vol 9(1) (Reissue) PARA 682.

11 *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at 554 per Staughton J. The answerback of the receiver of the telex probably does not, for it only authenticates the document and does not convey approval of the contents: *The Anemone*. Similar principles probably apply to the names printed automatically on transmission and receipt of a message sent by fax or email. See also *J Pereira Fernandes SA v Mehta* [2006] EWHC 813 (Ch), [2006] 2 All ER 891, [2006] 1 All ER (Comm) 885; and note 7. As to electronic signatures see note 1.



12 See *Durrell v Evans* (1862) 1 H & C 174, Ex Ch; *Bluck v Gompertz* (1852) 7 Exch 862; *Caton v Caton* (1867) LR 2 HL 127.

13 For the requirement of an intention to create legal relations for the formation of a contract of guarantee see PARA 1027.

14 'A letter to a third party has been held enough; an affidavit made in a different matter has been held to suffice; and I should say that an entry in a man's own diary, if it were signed by him and the contents were sufficient would do. The question is not what is the intention of the person signing the memorandum, but is one of fact, viz, is there a note or memorandum of the promise, signed by the party to be charged?': *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84 at 100, CA, per AL Smith LJ; cited with approval in *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21 at 32-33, [1991] 3 All ER 758 at 766, HL, per Lord Brandon of Oakbrook. See also *Re Hoyle* above at 99 per Bowen LJ; and the cases cited in notes 15-17.

15 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84, CA.

16 *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21, [1991] 3 All ER 758, HL. See also *VSH Ltd v BKS Air Transport Ltd and Stevens* [1964] 1 Lloyd's Rep 460; *Sun Alliance Pensions Life and Investments Services Ltd v Webster* [1991] 2 Lloyd's Rep 410.

17 *Wallace v Roe* [1903] 1 IR 32; and see *Welford v Beazely* (1747) 1 Ves Sen 6. Contrast *Gosbell v Archer* (1835) 2 Ad & El 500.

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### **1077. Alteration after signature.**

If the document is altered before the contract of guarantee is concluded, or is altered in order to correct a mistake in the written statement of an existing contract of guarantee, a signature already on the document will authenticate the alteration if the guarantor orally assents to the alteration<sup>1</sup>. Where, however, the alteration affects or evidences an amendment to an existing contract, oral consent is insufficient; there must be either a fresh signature (such as initialling the alteration), or some words or gestures sufficient to revive the existing signature<sup>2</sup>.

An immaterial alteration, such as the correction of an innocent misdescription of the principal debtor, will not prevent the guarantee being enforceable, even if the guarantor does not assent to the alteration being made<sup>3</sup>. However, a material alteration, not approved by all the parties to the original document, will render the guarantee void<sup>4</sup>. For a deed or other instrument to be rendered invalid by an alteration, the party seeking to avoid the contract must demonstrate that the alteration is one which is potentially prejudicial to his legal rights or obligations. Without an element of potential prejudice, no inference of fraud or improper motive is appropriate. There is, however, no division of rights and obligations contained within a contract or other instrument into essential terms to which the rule applies and procedural terms to which it does not; the critical question is one of prejudice or potential prejudice as a result of the alteration<sup>5</sup>.

1 *Bluck v Gompertz* (1852) 7 Exch 862 (correction of mistake). See also *Stewart v Eddowes* (1874) LR 9 CP 311; *Koenigsblatt v Sweet* [1923] 2 Ch 314, CA (alteration of draft agreement).

2 *New Hart Builders Ltd v Brindley* [1975] Ch 342, [1975] 1 All ER 1007. Goulding J at 352 and at 1012 recognised the distinction as illogical.

3 *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA. See also *Raiffeisen Zentralbank Österreich AG v Crossseas Shipping Ltd* [1999] 1 All ER (Comm) 626 (addition of the details of a guarantor's service agent after the conclusion of a guarantee and without the guarantor's knowledge not material alteration; guarantee enforceable); affd [2000] 3 All ER 274, [2000] 1 WLR 1135, CA.

4 *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA. See also *Pigot's Case* (1614) 11 Co Rep 26b; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 82 et seq. As to the effect of the amendment in pencil of a guarantee see *Co-operative Bank plc v Tipper* [1996] 4 All ER 366, (1996) Times, 5 July (where a document consists of print, type and ink writing, the most natural inference to draw from an amendment in pencil is that it was not, and was not intended to be, an operative and final alteration but is in the nature of a note or drafting amendment).

5 *Raiffeisen Zentralbank Österreich AG v Crossseas Shipping Ltd* [2000] 3 All ER 274, [2000] 1 WLR 1135, CA.

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### **1078. Estoppel.**

A guarantor may, by representations or conduct, estop himself from denying that a particular liability is covered by his guarantee, even though that liability is not mentioned in any writing sufficient to satisfy the Statute of Frauds (1677)<sup>1</sup>. The House of Lords has confirmed that the ordinary rules of estoppel are applicable to guarantees<sup>2</sup>.

1 *Humphries v Humphries* [1910] 2 KB 531, CA. See also *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1015, [1964] 1 All ER 300, PC; *Bank of Scotland v Wright* [1991] BCLC 244 at 266 per Brooke J. Cf also *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA. For the requirements of estoppel by representation see **ESTOPPEL** vol 16(2) (Reissue) PARA 1052 et seq; and for the requirements of estoppel by convention see **ESTOPPEL** vol 16(2) (Reissue) PARA 1065.

2 See *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 AC 541, [2003] 2 All ER 615; and **ESTOPPEL** vol 16(2) (Reissue) PARA 960. On the facts of that case, no estoppel was established.

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## **(iv) Miscellaneous Legislation Applying to Guarantees**

### **1079. Consumer credit legislation.**

Under the EC Consumer Credit Directive<sup>1</sup>, certain credit agreements must be made in writing and the consumer must receive a copy of the written agreement which must include a statement of the annual percentage rate of charge and a statement of the conditions under which the annual percentage rate of charge may be amended<sup>2</sup>. The written agreement must further include the other essential terms of the contract<sup>3</sup>. Member states must afford other

statutory protections for consumers with regard to advances on current accounts<sup>4</sup>, repossession of goods bought on credit<sup>5</sup>, early discharge of the obligations under a credit agreement<sup>6</sup>, assignment of the agreement<sup>7</sup>, making payment or giving security by means of bills of exchange including promissory notes<sup>8</sup>, consumers' rights against a supplier of goods on credit<sup>9</sup> and official authorisation of persons offering credit<sup>10</sup>. Member states must ensure that the provisions which they adopt in implementation of these requirements are not circumvented as a result of the way in which agreements are formulated, in particular by the device of distributing the amount of credit over several agreements<sup>11</sup>. It has, however, been held that these requirements do not cover a contract of guarantee for the repayment of credit where neither the guarantor nor the borrower is acting in the course of his trade or profession<sup>12</sup>.

Although some changes to secondary legislation were made in order to implement the Consumer Credit Directive into domestic law<sup>13</sup>, the Consumer Credit Act 1974 already met and in some respects exceeded the requirements of the directive<sup>14</sup>. A contract of guarantee may be regulated by the 1974 Act, in which case it is subject to particular requirements which are discussed below<sup>15</sup> and in more detail elsewhere in this work<sup>16</sup>.

1 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 69.

2 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 4(1), (2) (art 4(2) amended by EC Council Directive 90/88 (OJ L61, 10.03.90, p 14).

3 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 4(3).

4 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 6.

5 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 7.

6 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 8.

7 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 9.

8 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 10.

9 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 11.

10 See EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 12.

11 EC Council Directive 87/102 (OJ L 42, 12.02.87, p 48) art 13.

12 See Case C-208/98 *Berliner Kindl Brauerei AG v Siepert* [2001] All ER (EC) 673, ECJ.

13 In particular, in relation to information which must be provided to consumers in respect of overdrafts: see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 69.

14 See **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 69.

15 See PARA 1207 et seq.

16 See **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 78 et seq.

## UPDATE

### 1079 Consumer credit legislation

TEXT AND NOTES--Directive 87/102 repealed and replaced from 12 May 2010 by European Parliament and EC Council Directive 2008/48 (OJ L133, 22.5.2008, p 66) on credit agreements for consumers.

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### 1080. Other consumer protection legislation.

Numerous measures have been made by the European Community to protect and promote the interests of consumers, including EC Council Directive of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises<sup>1</sup> and EC Council Directive of 20 May 1997 on the protection of consumers in respect of distance contracts<sup>2</sup>. The European Court of Justice has held that a contract which benefits a third party standing outside the contractual relationship, such as a guarantee securing the performance of a credit agreement, is not excluded from the scope of the first of these directives on the sole ground that the goods or services purchased are intended for the use of that third party. However, since the directive is only designed to protect consumers, a contract of guarantee only comes within its scope where the guarantor has entered into a commitment for a purpose which can be 'regarded as outside his trade or profession'. It follows that a contract of guarantee concluded by a natural person who was not acting in the course of his trade or profession does not come under the protection of the directive where it guarantees repayment of a debt contracted by another person who, for his part, was acting within the course of his trade or profession<sup>3</sup>. It appears that guarantees of loans made to the principal debtor for private, as opposed to business, purposes, will fall within the directives mentioned above and the regulations implementing them for the purposes of domestic law<sup>4</sup>.

Contracts of guarantee may also fall within the provisions of the Unfair Contract Terms Act 1977<sup>5</sup> and of EC Council Directive of 5 April 1993 on unfair terms in consumer contracts<sup>6</sup> and the Unfair Terms in Consumer Contracts Regulations 1999<sup>7</sup> implementing that directive. Consumer protection legislation is discussed in detail elsewhere in this work<sup>8</sup>.

1    Ie EC Council Directive 85/577 (OJ L372, 31.12.85, p 31), implemented by the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 663 et seq. It is apprehended that contracts of guarantee do not, without more, fall within the category of excepted contracts in reg 3.

2    Ie EC Council Directive 97/7 (OJ L144, 4.6.97, p 19), implemented by the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 673 et seq. Quere, however, whether a guarantee of eg bank lending is an excepted contract: see reg 5.

3    Case C-45/96 *Bayerische Hypotheken- und Wechselbank AG v Dietzinger* [1998] All ER (EC) 332, [1998] ECR I-1199, ECJ.

4    As to implementation of the directives mentioned in the text see notes 1-2.

5    As to the Unfair Contract Terms Act 1977 see **CONTRACT** vol 9(1) (Reissue) PARA 820 et seq; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 450.

6    Ie EC Council Directive 93/13 (OJ L95, 21.4.93, p 29), implemented by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 452 et seq.

7    Ie the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

8    See **CONTRACT**; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 383 et seq.

### UPDATE

## 1080 Other consumer protection legislation

NOTE 1--SI 1987/2117 revoked: see now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816, ss 6(1), (2), Sch 3.

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### 1081. The Landlord and Tenant (Covenants) Act 1995.

Under the Landlord and Tenant (Covenants) Act 1995, a tenant who assigns premises demised to him is released from the tenant covenants of the tenancy<sup>1</sup> but may enter into an authorised guarantee agreement<sup>2</sup> with respect to the performance of those covenants by the assignee<sup>3</sup>. The rules of law relating to guarantees<sup>4</sup> are, subject to its terms, applicable in relation to any authorised guarantee agreement as in relation to any other guarantee agreement<sup>5</sup>. These provisions only apply in relation to tenancies which are 'new tenancies' for the purposes of the 1995 Act<sup>6</sup>.

The 1995 Act also restricts the liability of a former tenant or his guarantor for rent and service charges<sup>7</sup>. These provisions, which apply to both 'old' and 'new' tenancies<sup>8</sup>, are discussed elsewhere in this work<sup>9</sup>.

1 See the Landlord and Tenant (Covenants) Act 1995 s 5; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 582.

2 For these purposes an agreement is an authorised guarantee agreement if: (1) under it the tenant guarantees the performance of the relevant covenant to any extent by the assignee; and (2) it is entered into in the circumstances set out in the Landlord and Tenant (Covenants) Act 1995 s 16(3); and (3) its provisions conform with s 16(4), (5): s 16(2). Those circumstances are as follows: (a) by virtue of a covenant against assignment (whether absolute or qualified) the assignment cannot be effected without the consent of the landlord under the tenancy or some other person; (b) any such consent is given subject to a condition (lawfully imposed) that the tenant is to enter into an agreement guaranteeing the performance of the covenant by the assignee; and (c) the agreement is entered into by the tenant in pursuance of that condition: s 16(3). An agreement is not an authorised guarantee agreement to the extent that it purports to impose on the tenant any requirement to guarantee in any way the performance of the relevant covenant by any person other than the assignee or to impose on the tenant any liability, restriction or other requirement (of whatever nature) in relation to any time after the assignee is released from that covenant by virtue of the Landlord and Tenant (Covenants) Act 1995: s 16(4). Subject to s 16(4), an authorised guarantee agreement may: (i) impose on the tenant any liability as sole or principal debtor in respect of any obligation owed by the assignee under the relevant covenant; (ii) impose on the tenant liabilities as guarantor in respect of the assignee's performance of that covenant which are no more onerous than those to which he would be subject in the event of his being liable as sole or principal debtor in respect of any obligation owed by the assignee under that covenant; (iii) require the tenant, in the event of the tenancy assigned by him being disclaimed, to enter into a new tenancy of the premises comprised in the assignment whose term expires not later than the term of the tenancy assigned by the tenant and whose tenant covenants are no more onerous than those of that tenancy; (iv) make provision incidental or supplementary to any provision made by virtue of any of heads (i)-(iii) above: s 16(5).

3 Landlord and Tenant (Covenants) Act 1995 s 16(1). For these purposes it is immaterial that (1) the tenant has already made an authorised guarantee agreement in respect of a previous assignment by him of the tenancy referred to in s 16(1), it having been subsequently vested in him following a disclaimer on behalf of the previous assignee; or (2) the tenancy referred to in s 16(1) is a new tenancy entered into by the tenant in pursuance of an authorised guarantee agreement; and in any such case s 16(2)-(5) apply accordingly: s 16(7).

- 4 In particular those relating to the release of sureties: Landlord and Tenant (Covenants) Act 1995 s 16(8).
- 5 Landlord and Tenant (Covenants) Act 1995 s 16(8).
- 6 Landlord and Tenant (Covenants) Act 1995 s 1(1). For these purposes, a tenancy is a new tenancy if it is granted on or after 1 January 1996 otherwise than in pursuance of an agreement entered into before that date or an order of a court made before that date: s 1(3). See further **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 578.
- 7 See the Landlord and Tenant (Covenants) Act 1995 ss 17, 18; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 289, 291.
- 8 Landlord and Tenant (Covenants) Act 1995 s 1(2).
- 9 See **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 578 et seq.

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### **1082. No stamp duty or stamp duty land tax on guarantees.**

The stamp duty formerly imposed upon the memorandum of a guarantee is no longer chargeable<sup>1</sup>. Nor is stamp duty land tax chargeable on such a memorandum<sup>2</sup>.

1 The requirement that stamp duty should be paid on a guarantee neither under seal nor given for periodical payments was repealed by the Finance Act 1970 Sch 7 para 1(2)(a) (repealed with effect from 1 October 1999 by the Finance Act 1999 Sch 20 Pt V(2)). Ad valorem duty on guarantees was abolished by the Finance Act 1971 s 64 (likewise repealed); and the fixed duty of 50p on all documents (including guarantees) executed under seal was abolished by the Finance Act 1985 ss 85(1), 98, Schs 24, 27. Stamp duty is now chargeable only on instruments relating to stock or marketable securities (see the Finance Act 2003 s 125(1)) and is not chargeable on any description of instrument in respect of which duty was abolished by the Finance Act 1971 s 64 (repealed) (see the Finance Act 1999 s 112(3), Sch 13 para 25). See further **STAMP DUTY AND STAMP DUTY RESERVE TAX**.

2 A security interest is an exempt interest (Finance Act 2003 s 48(2)(a)) and for these purposes 'security interest' means an interest or right (other than a rentcharge) held for the purpose of securing the payment of money or the performance of any other obligation (s 48(2), (3)).

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## **(v) Construction of Guarantees**

### **1083. Principles of construction.**

The principles of construction governing contracts in general<sup>1</sup> apply equally to contracts of guarantee<sup>2</sup>. Dealing with a guarantee as a mercantile contract, the court does not apply to it merely technical rules, but construes it so as to reflect what may fairly be inferred to have been

the parties' real intention and understanding as expressed by them in writing<sup>3</sup>, and so as to give effect to it rather than not<sup>4</sup>.

1 The principles by which contractual documents are construed are summarised in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114 et seq, [1998] 1 WLR 896 at 912 et seq, HL, per Lord Hoffmann, applied in the context of guarantees in eg *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429, [2004] All ER (D) 04 (Apr); and see *UCB Corporate Services Ltd v Thomason* [2004] EWHC 1164 (Ch), [2004] 2 All ER (Comm) 774, [2004] All ER (D) 278 (May) (construction of agreement to waive liabilities pursuant to guarantees provided in respect of loan).

'The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they . . . chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed': *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 736, [1981] 2 All ER 1030 at 1035, HL, per Lord Diplock. See also *Marquis of Cholmondeley v Lord Clinton* (1820) 2 Jac & W 1 at 91-92, HL per Sir Thomas Plumer MR; *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430 at 431, [1964] 1 WLR 125 at 128, HL, per Lord Reid; *Reardon Smith Line Ltd v Hansen-Tangen*; *Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570 at 574-575, [1976] 1 WLR 989 at 996, HL, per Lord Wilberforce. For the general rules for interpreting deeds and non-testamentary instruments see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 164 et seq; cf **CONTRACT** vol 9(1) (Reissue) PARA 772 et seq. There are incidental discussions of the interpretation of guarantees in other parts of this title, particularly in PARA 1090 et seq, where the extent of the guarantor's liability is dealt with.

2 See eg *Hargreave v Smea* (1829) 6 Bing 244; *Mayer v Isaac* (1840) 6 M & W 605; *Allnutt v Ashenden* (1843) 5 Man & G 392; *Edwards v Jevons* (1849) 8 CB 436 at 440; *Eastern Union Rly Co v Cochrane* (1853) 9 Exch 197 at 204, 206; *Morten v Marshall* (1863) 2 H & C 305; *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282, Ex Ch; *Chalmers v Victors* (1868) 16 WR 1046; *Heffield v Meadows* (1869) LR 4 CP 595; *Nottingham Hide, Skin and Fat Market Co v Bottrill* (1873) LR 8 CP 694; *Faber v Earl of Lathom* (1897) 77 LT 168 at 169; *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254 at 266, DC, per Swift J; affd [1932] 1 KB 423, CA. Where a case concerns an ordinary commercial transaction, there is no good reason why a clause in question is not to be construed in accordance with the ordinary principles of construction for commercial contracts notwithstanding that one of the parties is a state: *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA Civ 1643, [2003] 2 Lloyd's Rep 571, [2002] All ER (D) 201 (Nov).

3 *Bank of Montreal v Munster Bank* (1876) IR 11 CL 47 at 55 per Fitzgerald J. See also *Barber v Mackrell* (1892) 68 LT 29, CA; *Other v Iveson* (1855) 3 Drew 177 at 182 per Kindersley V-C; *York City and County Banking Co v Bainbridge* (1880) 43 LT 732. In *Moschi v Lep Air Services Ltd* [1973] AC 331 at 345, [1972] 2 All ER 393 at 399, HL, Lord Reid said, when considering the extent of a guarantor's liability, 'I do not get much assistance from the authorities such as they are. I go by the terms of the . . . contract. I find nothing in the authorities which in any way prevents me from reaching what appears to me to be the natural meaning and effect of this contract'.

4 The statement in the text, as contained in an earlier edition of this title, was cited with approval and applied by Scott J in *Perrylease Ltd v Imecar AG* [1987] 2 All ER 373 at 378, [1988] 1 WLR 463 at 469-470. See also *Stewart and McDonald v Young* (1894) 38 Sol Jo 385; and the cases cited in PARA 1084 et seq.

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## 1084. Construing the guarantee in its context.

The modern approach of the courts is to use all the available aids for the construction of written documents to seek out from the words used what they believe to have been the true intention of the parties<sup>1</sup> when the guarantee was executed and not to be over-constrained by an interpretation based purely on internal linguistic considerations<sup>2</sup>.

Extrinsic evidence may assist in this process in two distinct ways. First, extrinsic evidence of the factual situation is admissible and necessary for the purpose of ascertaining whether

particular words in the guarantee apply to that factual situation or whether that factual situation comes within particular words<sup>3</sup>. Second, extrinsic evidence of the context in which the contract was made is admissible in order to construe the terms of the contract<sup>4</sup>. A mercantile contract such as a guarantee is particularly susceptible of explanation by reference to the circumstances existing at the time it was made<sup>5</sup>.

So, where the context showed that this was the clear intention of the parties, a guarantee expressed to cover the liabilities of a named company was held, on its true construction, to cover also the liabilities of that company's subsidiary through which the loan had in fact been made<sup>6</sup>. Similarly, a guarantee which did not state expressly that it covered the principal debtor's own liability as guarantor was held to do so, because the factual background showed that this was what the parties intended<sup>7</sup>. On the same basis, a guarantee of 'the proposed leasing' was construed with the aid of extrinsic evidence concerning the factual background known to the parties at or before the date of the guarantee<sup>8</sup> so as to cover the leasing arrangements which were in fact eventually entered into between the creditor and the principal debtor<sup>9</sup>.

Extrinsic evidence has also been held admissible to show that one of the apparent parties to the guarantee in fact contracted as agent for the creditor<sup>10</sup>; to show that a guarantee was subject to a condition precedent<sup>11</sup>; to show whether the guarantee refers to a past or future credit<sup>12</sup>; to show whether the consideration for a guarantee was that the creditor should refrain from suing the principal debtor for a specified period or that he should refrain altogether from suing him<sup>13</sup>; to identify matters referred to in the memorandum of guarantee<sup>14</sup>; to show whether a person is really a guarantor entitled to contribution, or a guarantor for his co-sureties<sup>15</sup>; and generally to show the surrounding circumstances and the position of the contracting parties at the time that the guarantee was entered into<sup>16</sup>.

However, neither evidence of negotiations nor direct evidence of the parties' intentions is admissible in construing a written contract such as a guarantee<sup>17</sup>. Nor is it permissible to take into account the actions of the parties after the contract was made, unless those actions evidence a new agreement or are the basis of an estoppel<sup>18</sup>.

Where unambiguous words have been used in a contract of guarantee, the court has a duty to attempt to interpret the contract by giving the words their ordinary meaning<sup>19</sup>.

1 On the meaning of the word 'intention' in this context see *Great Western Rly Co and Midland Rly Co v Bristol Corp* (1918) 87 LJCh 414, HL; *IRC v Raphael* [1935] AC 96, HL. 'The question to be answered always is, "What is the meaning of what the parties have said?" not "What did the parties mean to say?"': *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 263, [1973] 2 All ER 39 at 55, HL, per Lord Simon of Glaisdale, citing Norton on Deeds (1906) p 43. See also eg *Re European Arab Finance Ltd* [2002] All ER (D) 153 (Oct) (where the principles to be applied in interpreting the contract were those contained in the Libyan Civil Code); *Vodafone Ltd v GNT Holdings (UK) Ltd* [2004] EWHC 1526 (QB), [2004] All ER (D) 194 (Mar).

2 *Bank of Scotland v Wright* [1991] BCLC 244 at 259 per Brooke J.

3 Eg to prove the identity of a principal debtor who had been misdescribed in the guarantee: see *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762 at 764-765, [1991] 1 WLR 271 at 274, CA, per Dillon LJ.

4 See *Reardon Smith Line Ltd v Hansen-Tangen*; *Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570 at 573-574, [1976] 1 WLR 989 at 996, HL, per Lord Wilberforce. See also *Charrington & Co Ltd v Wooder* [1914] AC 71, HL; *Hvalfangerselskapet Polaris Aktieselskap v Unilever Ltd* (1933) 39 Com Cas 1, HL; *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, HL; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL.

5 *Johnston v Nicholls* (1845) 1 CB 251 at 269 per Maule J. See also *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502 at 506, CA, per Roskill LJ; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; affd [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL.



6 *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA. See also *Cambridge Credit Corp v Lombard Australia Ltd* (1977) 14 ALR 420, HC of A; *National Bank of New Zealand Ltd v West* [1978] 2 NZLR 451, NZ CA.

7 *Coghlan v SH Lock (Australia) Ltd* (1987) 3 BCC 183, PC; *Bank of Scotland v Wright* [1991] BCLC 244. Contrast *National Bank of New Zealand Ltd v West* [1977] 1 NZLR 29 at 34 per Casey J, NZ SC; affd on different grounds [1978] 2 NZLR 451, NZ CA.

8 The guarantee must be construed at the time it is entered into: *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311 at 1315, [1965] 2 Lloyd's Rep 389 at 391-392, PC; *First National Finance Corp Ltd v Goodman* [1983] BCLC 203 at 208-209, CA, per Stephenson LJ.

9 *Perrylease Ltd v Imecar AG* [1987] 2 All ER 373, [1988] 1 WLR 463. See also *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA.

10 *Bruns v Colocotronis, The Vasso* [1979] 2 Lloyd's Rep 412 at 420 per Robert Goff J.

11 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 907-908, [1989] 1 WLR 255 at 262 per Steyn J.

12 *Goldshede v Swan* (1847) 1 Exch 154; *Colbourn v Dawson* (1851) 10 CB 765; *Butcher v Steuart* (1843) 11 M & W 857; *Edwards v Jevons* (1849) 8 CB 436; *Steele v Hoe* (1849) 14 QB 431; *Broom v Batchelor* (1856) 1 H & N 255; and see *King v Cole* (1848) 2 Exch 628; *Haigh v Brooks* (1839) 10 Ad & El 309; affd sub nom *Brooks v Haigh* (1840) 10 Ad & El 323, Ex Ch.

13 *Board v Hoey* (1948) 65 TLR 43 (guarantee of debt, or such part of it as might not be repaid within six months, in consideration of creditor undertaking not to sue principal debtor; construed in circumstances of case as involving agreement on creditor's part to forbear from suing principal debtor for the six months only, and not to release him entirely: guarantor not discharged by creditor beginning proceedings against principal debtor and guarantor at the end of the six months); cf *Rolt v Cozens* (1856) 18 CB 673 (guarantee of payment of debt on specified date in consideration of creditor forbearing to take proceedings: guarantor discharged on creditor beginning proceedings before the specified date).

14 *Shortrede v Cheek* (1834) 1 Ad & El 57; *Bateman v Phillips* (1812) 15 East 272; *Brown v Fletcher* (1876) 35 LT 165; *Holmes v Mitchell* (1859) 7 CBNS 361 at 368; *Macdonald v Longbottom* (1860) 1 E & E 977, Ex Ch.

15 *Craythorne v Swinburne* (1807) 14 Ves 160; *Re Denton's Estate, Licenses Insurance Corp and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178 at 189, CA, per Vaughan Williams LJ.

16 *Heffield v Meadows* (1869) LR 4 CP 595; *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282, Ex Ch; *Montefiore v Lloyd* (1863) 15 CBNS 203; *Coles v Pack* (1869) LR 5 CP 65 at 70-71; *Leathley v Spyer* (1870) LR 5 CP 595; *Brown v Fletcher* (1876) 35 LT 165; *Nottingham Hide, Skin and Fat Market Co v Bottrill* (1873) LR 8 CP 694; *Spark v Heslop* (1859) 1 E & E 563 at 570; *Laurie v Scholefield* (1869) LR 4 CP 622; *Plant v Bourne* [1897] 2 Ch 281, CA; *Morrell v Cowan* (1877) 7 ChD 151, CA; *Henton v Paddison* (1893) 68 LT 405 at 407; *Grahame v Grahame* (1887) 19 LR Ir 249; and cf *Hogarth v Miller, Brother & Co* [1891] AC 48, HL; *Spencer, Turner and Boldero v Lotz* (1916) 32 TLR 373; *Board v Hoey* (1948) 65 TLR 43 at 44; *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; affd [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL. In many of these cases the court had to determine, by reference to the surrounding circumstances, whether a guarantee was a continuing guarantee or not. In *Chalmers v Victors* (1868) 16 WR 1046, a guarantee 'for liabilities incurred by A to B to the extent of £50' was, having regard to the extrinsic circumstances of the case, held to extend to £41 due from the principal debtor at the date of the guarantee and subsequent advances up to £9; and see *Morrell v Cowan* above.

17 *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, HL.

18 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, HL; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, HL. As to estoppel by convention see **ESTOPPEL** vol 16(2) (Reissue) PARA 1065.

19 See eg *Fliptex Ltd v Edney Enterprises Ltd* [2002] All ER (D) 439 (Nov).

## UPDATE

### 1084 Construing the guarantee in its context

NOTE 1--See *IIG Capital Ilc v Van der Merwe* [2008] EWCA Civ 542, [2008] 2 All ER (Comm) 1173.

NOTE 16--See *ING Lease (UK) Ltd v Harwood* [2008] EWCA Civ 786, [2009] 1 All ER (Comm) 1055.

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### **1085. Construction contra proferentem.**

Where, applying the principles of construction discussed in the preceding paragraphs, the words of the guarantee remain ambiguous, the guarantee may be interpreted against the creditor who drafted it<sup>1</sup> and in favour of the guarantor<sup>2</sup>.

1 As to the contra proferentem rule generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 178-179.

2 *Eastern Counties Building Society v Russell* [1947] 2 All ER 734, CA; *National House-Building Council v Fraser* [1983] 1 All ER 1090 at 1092 per Sir Douglas Frank QC. See also *First National Finance Corp Ltd v Goodman* [1983] BCLC 203, CA; *Coghlan v SH Lock (Australia) Ltd* (1987) 3 BCC 183, PC. There are statements in some old authorities that guarantees should be construed strictly against the guarantor, on the basis that the guarantor is the maker of the instrument: see eg *Mason v Pritchard* (1810) 12 East 227; *Mayer v Isaac* (1840) 6 M & W 605; *Merle v Wells* (1810) 2 Camp 413. In other authorities, it is said that guarantees should be construed liberally in favour of the guarantor (see eg *Nicholson v Paget* (1832) 1 Cr & M 48 at 52 per Bayley B) or strictly against the creditor: see *Eastern Counties Building Society v Russell* [1947] 1 All ER 500 at 503 per Hilbery J (the Court of Appeal, in affirming his decision at [1947] 2 All ER 734, simply applied the contra proferentem rule); *General Surety and Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16 at 21, per Donaldson J; *First National Finance Corp Ltd v Goodman* above at 208 per Stephenson LJ; *Coghlan v SH Lock (Australia) Ltd* above at 187. See also *Glyn v Hertel* (1818) 8 Taunt 208; *Bacon v Chesney* (1816) 1 Stark 192; *Stamford, Spalding and Boston Banking Co v Ball* (1862) 4 De GF & J 310; *Blest v Brown* (1862) 4 De GF & J 367 at 376 per Lord Westbury LC. The conflict between these two approaches does not appear to have been discussed or expressly resolved in any modern English authority. However, the reasoning and the actual decisions reached in the cases cited in PARA 1084 strongly suggest that the approach adopted by Swift J was correct when he said: 'I do not see that a guarantor stands in any better position than any other contractor, and I do not see that this contract is to be construed in any different way from any other contract': *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254 at 266, DC; affd [1932] 1 KB 423, CA. See also *Moschi v Lep Air Services Ltd* [1973] AC 331 at 345, [1972] 2 All ER 393 at 399, HL, per Lord Reid, cited in PARA 1083 note 3. See also PARA 1084.

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### **1086. Recitals, footnotes and sidenotes.**

Where the operative part of a guarantee is ambiguous<sup>1</sup>, but not otherwise<sup>2</sup>, its interpretation may be dependent upon its recitals<sup>3</sup>, where those recitals are inconsistent with a meaning which the operative part might otherwise have been taken to bear<sup>4</sup>.

The conditions of fidelity bonds are frequently explained by the recitals<sup>5</sup>. So in construing an agreement in the form of a bond in which a guarantor has become liable for the due fulfilment

of an agent's duties therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly and controlled by reference to the prior clauses specifying the extent of the agency<sup>6</sup>. Whether in a particular case the condition is capable of being restrained by the recital is not, however, always easy to determine<sup>7</sup>, although in many cases it will be found that the recital is the proper key to the meaning of the condition in a suretyship bond<sup>8</sup>. Where a guarantee recites a debt already in existence, express words are required to make it extend to any other debts<sup>9</sup>.

A guarantor is not estopped by a recital in a guarantee if it was intended as the statement of the creditor and not of the guarantor<sup>10</sup>, although he may be estopped if it was intended as his statement or as a statement which both parties have mutually agreed to admit as true<sup>11</sup>.

Where a standard printed form of guarantee supplied by the creditor contains footnotes or sidenotes for guidance, these may be used as an aid to construction of the contract only in cases of ambiguity<sup>12</sup>.

1 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 217.

2 *Re Baker, Collins v Rhodes, Re Seaman, Rhodes v Wish* (1881) 51 LJCh 315 at 320, CA, per Sir George Jessel MR.

3 See generally *Lord Arlington v Merricke* (1672) 2 Saund 403, and notes thereto; *Luning v Milton* (1890) 7 TLR 12; see also the cases cited in note 5. As to the use of recitals in the construction of an instrument see generally **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 217 et seq.

4 *Australian Joint Stock Bank v Bailey* [1899] AC 396, PC; and see *Sansom v Bell* (1809) 2 Camp 39; *Saunders v Taylor* (1829) 9 B & C 35; *Oswald v Berwick-upon-Tweed Corp* (1856) 5 HL Cas 856; *Bank of British North America v Cuvillier* (1861) 14 Moo PCC 187. The correct approach is probably to construe the guarantee as a whole: see *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at 512 per Bingham J; affd [1983] 2 Lloyd's Rep 298, CA. See also *Evans v Earle* (1854) 10 Exch 1.

5 See *Lord Arlington v Merricke* (1672) 2 Saund 403; *Peppin v Cooper* (1819) 2 B & Ald 431; *Hassell v Long* (1814) 2 M & S 363; *Wardens of St Saviour's, Southwark v Bostock* (1806) 2 Bos & PNR 175; *Stoughton v Day* (1647) Aley 10; *Anderson v Thornton* (1842) 3 QB 271; *North Western Rly Co v Whinray* (1854) 10 Exch 77; and see also *R v O'Callaghan* (1838) 1 I Eq R 439; *Liverpool Waterworks Co v Atkinson* (1805) 6 East 507.

6 *Napier v Bruce* (1842) 8 Cl & Fin 470, HL.

7 *Evans v Earle* (1854) 10 Exch 1; *Curling v Chalklen* (1815) 3 M & S 502; *Parker v Wise* (1817) 6 M & S 239.

8 *London Assurance Co v Bold* (1844) 6 QB 514 at 526 per Wightman J; *Danby v Coutts & Co* (1885) 29 ChD 500.

9 See *Pearsall v Summersett* (1812) 4 Taunt 593; *Sansom v Bell* (1809) 2 Camp 39; *Plastic Decoration and Papier-Maché Co Ltd v Massey-Mainwaring* (1895) 11 TLR 205.

10 See *Greer v Kettle* [1938] AC 156, [1937] 4 All ER 396, HL.

11 See *Greer v Kettle* [1938] AC 156 at 170, [1937] 4 All ER 396 at 403, HL; and see eg *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 20 TLR 665. See further **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 115; **ESTOPPEL** vol 16(2) (Reissue) PARA 1015.

12 See eg *Bank of Baroda v ANY Enterprises Ltd* (4 December 1986, unreported), CA.

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## 1087. Statement of consideration.

If the guarantee is expressed to be given for a specified consideration, that statement forms part of the guarantee and will be taken into account in construing it<sup>1</sup>. A condition on which the guarantee is based may be found in the expressed consideration<sup>2</sup>.

1 See eg *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 389, PC. Cf *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at 512 per Bingham J; affd [1983] 2 Lloyd's Rep 298, CA. In that case, the operative part of the guarantee was clear, and was held not to be governed and restricted by the more limited statements in the recited consideration.

2 *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 389, PC.

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### **1088. Whether surety is liable for the whole or part of the debt.**

When the guarantor's liability is limited to a fixed sum, it depends on the wording of the guarantee whether the guarantor guarantees the whole debt, subject to the specified limitation on his total liability, or whether his guarantee is applicable to a part only of the debt, co-extensive with the amount of the guarantee<sup>1</sup>.

In the case of the bankruptcy of the principal debtor, the difference becomes material in determining whether the creditor may prove for the whole indebtedness, even though the guarantor has paid the sum for which he is liable, or whether the guarantor alone may prove for that sum<sup>2</sup>.

The question is usually determined in favour of the creditor by the inclusion of special terms in the guarantee. However, where the matter is not expressly dealt with, the following principles of construction are applicable.

Where a guarantor gives a continuing guarantee, limited in amount, to secure a floating balance which may from time to time be due from the principal debtor to the creditor, the guarantee is as between the guarantor and the creditor to be construed, prima facie at least, as applicable to a part only of the debt co-extensive with the amount of the guarantee<sup>3</sup>. This principle can, however, admit exceptions<sup>4</sup>. On the other hand, a guarantee, limited in amount, for a debt already ascertained which exceeds that limit is not, prima facie, to be construed as a security for part of the debt only, it being for the court to determine in such cases whether the intention was to guarantee the whole debt, with a limitation on the guarantor's liability, or to guarantee a part of the debt only<sup>5</sup>.

1 See *Ellis v Emmanuel* (1876) 1 Ex D 157, CA; and *Re Houlder* [1929] 1 Ch 205.

2 *Midland Banking Co v Chambers* (1869) 4 Ch App 398; *Re Rees, ex p National Provincial Bank of England* (1881) 17 ChD 98, CA; and see *Re Fernandes, ex p Hope* (1844) 3 Mont D & De G 720. See also *Re Sass, ex p National Provincial Bank of England* [1896] 2 QB 12. See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 504.

3 *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Huggard v Representative Church Body* [1916] 1 IR 1, approving the statement in the text, as contained in an earlier edition of this title.

4 See eg *Ulster Bank Ltd v Lambe* [1966] NI 161.

5 *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Forster Dry Cleaning Co Ltd v Davidson* (1963) 187 Estates Gazette 519; *Hobson v Bass* (1871) 6 Ch App 792; *Ex p Rushforth* (1805) 10 Ves 409; *Bardwell v Lydall* (1831) 7 Bing 489; *Paley v Field* (1806) 12 Ves 435; *Gee v Pack* (1863) 33 LJQB 49; *Re Garner, ex p Holmes* (1839) Mont & Ch 301; *Thornton v M'Kewan* (1862) 32 LJCh 69; *Gray v Seckham* (1872) 7 Ch App 680; *Veitch v National Bank of Scotland* 1907 SC 554, Ct of Sess. Sometimes the language of a limited guarantee given to secure a floating balance clearly indicates an intention that it is to apply to the whole debt: *Re Sass, ex p National Provincial Bank of England* [1896] 2 QB 12; *Re Rees, ex p National Provincial Bank of England* (1881) 17 ChD 98, CA; *Midland Banking Co v Chambers* (1869) 4 Ch App 398.

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### **1089. Questions of law and fact.**

Where there are no words of doubtful trade meaning, and the extrinsic facts are not in controversy, the question whether the words used by the parties amount to a contract of guarantee is one of law<sup>1</sup>. Where, however, a guarantor has agreed to guarantee a specific sum, it has been treated as a question of fact<sup>2</sup> to say whether this sum comprised money advanced before the date of the guarantee as well as a subsequent advance<sup>3</sup>.

1 *Bank of Montreal v Munster Bank* (1876) IR 11 CL 47 at 55; and see *Faber v Earl of Lathom* (1897) 77 LT 168 at 169; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 167.

2 Distinctions between questions of law and questions of fact have, however, become of less significance with the disappearance of juries from most classes of cases within the court's civil jurisdiction. As to trial by judge and jury in civil proceedings (which is now only available in a restricted set of circumstances) see **CIVIL PROCEDURE** vol 12 (2009) PARA 1132.

3 *Matthews v Bloxsome* (1864) 33 LJQB 209 at 211.

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## **(2) LIABILITY OF GUARANTOR**

### **(i) Special Characteristics**

#### **1090. Secondary liability of the guarantor.**

There are two different kinds of guarantee<sup>1</sup>. One is a promise by the guarantor which becomes effective if the principal debtor fails to perform his obligations<sup>2</sup>. The other is a promise that the principal debtor will perform his obligations<sup>3</sup>. In both cases, the guarantor's liability is secondary<sup>4</sup>. The guarantor is under no liability if the principal debtor's obligation is discharged, by performance or otherwise, on or before the date of performance. In the one case, the conditional promise never becomes effective; in the other, there is no breach by the guarantor<sup>5</sup>.

Consequently a creditor may not, before any default has been committed, apply for a quia timet injunction against a guarantor to force him to set apart money to provide for the

possibility of a debt becoming due from the principal debtor and the principal debtor making default<sup>6</sup>. Nor can the creditor obtain a freezing injunction<sup>7</sup> against the guarantor, because he has no accrued cause of action to support it<sup>8</sup>. On the other hand, a guarantor is no more justified in placing the whole of his property out of the reach of liability to pay the guaranteed debt than if he were the principal debtor<sup>9</sup>.

1 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 344-345, [1972] 2 All ER 393 at 398, HL, per Lord Reid; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J; *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624 at 635, 4 BCC 56 at 64-65, per Knox J. Both of these kinds of guarantee fall within the first of Lord Selborne's three classes of case to which the principles of the law of guarantees may apply: see *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 10-11, HL, per Lord Selborne LC; and PARA 1018.

2 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 344-345, [1972] 2 All ER 393 at 398, HL, per Lord Reid; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J; *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624 at 635, 4 BCC 56 at 64-65, per Knox J. This kind of guarantee has been described as a contract to indemnify the promisee on a contingency: *Sampson v Burton* (1820) 4 Moore CP 515. See, however, note 5.

3 See *Moschi v Lep Air Services Ltd* [1973] AC 331 at 344-345, [1972] 2 All ER 393 at 398, HL, per Lord Reid; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J; *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624 at 635, 4 BCC 56 at 64-65, per Knox J.

4 The liability is secondary whenever the promise to be answerable for another does not exonerate that other from liability but leaves him primarily liable: *Mallet v Bateman* (1865) LR 1 CP 163 at 171, Ex Ch; *Fahey v MSD Speirs Ltd* [1973] 2 NZLR 655, NZ CA. Where the guarantor covenants jointly with the debtor and severally to pay a debt on a future day, the debt is not contingent, but present: *Atkinson v Grey* (1853) 1 Sm & G 577; see also *Re Houlder* [1929] 1 Ch 205.

5 *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J (a promise to pay if the principal debtor does not do so, irrespective of any obligation on the part of the debtor, is not a guarantee). For the guarantor's liability where the principal obligation is discharged by the creditor's acceptance of the debtor's breach, or by insolvency, see PARA 1100. Similarly, the distinction between the two possible types of guarantee does not produce a material distinction in the guarantor's legal liability where the principal obligation has not been terminated: *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624 at 635, 4 BCC 56 at 64-65, per Knox J.

6 *Antrobus v Davidson* (1817) 3 Mer 569, cited in *Wolmershausen v Gullick* [1893] 2 Ch 514 at 524 per Wright J.

7 Formerly known as a 'Mareva' injunction after *Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva* (1975) [1980] 1 All ER 213n, [1975] 2 Lloyd's Rep 509, CA. See generally **CIVIL PROCEDURE** vol 11 (2009) PARA 396 et seq.

8 See *Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co Ltd* [1986] 2 Lloyd's Rep 439n, CA, where the potential claim was under a counter-indemnity backing a guarantee.

9 *Goodricke v Taylor* (1864) 2 De GJ & Sm 135 at 141 per Turner LJ. See also *Re Ridler, Ridler v Ridler* (1882) 22 ChD 74, CA, where the guarantor's contingent liability under his guarantee was taken into account in deciding whether he was bankrupt at the date of a voluntary settlement. As to the avoidance of pre-bankruptcy transactions which defeat the interests of creditors see the Insolvency Act 1986 ss 339, 423; and see also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 653 et seq.

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### 1091. Evidence of guarantor's liability.

In a claim against the guarantor by the creditor, a judgment or award obtained by the creditor against the principal debtor is not evidence against the guarantor<sup>1</sup>. This is so even if the arbitration award arises from an arbitration clause in the contract which contains the obligations of the principal debtor which are the subject of the guarantee<sup>2</sup>. However, such a judgment or award may bind the guarantor if the guarantee on its true construction covers the liability of the principal debtor arising from the judgment or award itself<sup>3</sup>. In any event, the principal debtor's admissions of liability in such proceedings may be admissible as evidence against the guarantor if the requirements of the Civil Evidence Act 1995 are complied with<sup>4</sup>.

An account stated, delivered by an agent to his employer and charging himself, is evidence against the agent's guarantor on the question of appropriation of payments as between the agent and the employer<sup>5</sup>. After the death of the principal debtor, entries in his private records of receipts of money are admissible, as admissions against interest<sup>6</sup>. Similarly, entries in official books and reports which the person whose fidelity has been guaranteed was bound to keep as a duty incidental to his office are admissible after that person's death against the guarantor<sup>7</sup>.

1 *Re Kitchin, ex p Young* (1881) 17 ChD 668, CA; *Bruns v Colocotronis, The Vasso* [1979] 2 Lloyd's Rep 412. See also *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1894] 1 Ch 578; and cf *Cia Sudamericana de Fletes SA v African Continental Bank Ltd, The Rosarina* [1973] 1 Lloyd's Rep 21, considered in note 3. As to the admissibility of judgments as evidence see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 929 et seq; **CIVIL PROCEDURE** vol 12 (2009) PARA 1154 et seq.

2 *Bruns v Colocotronis, The Vasso* [1979] 2 Lloyd's Rep 412. Under the Contracts (Rights of Third Parties) Act 1999 ss 1, 8, however, the guarantor, although not a party to the contract between the guarantor and the principal debtor containing the arbitration clause, may be given the right to enforce that clause and be treated as a party to the arbitration agreement. See further **CONTRACT**.

3 *Cia Sudamericana de Fletes SA v African Continental Bank Ltd, The Rosarina* [1973] 1 Lloyd's Rep 21. In that case Mocatta J held, applying *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753, CA, that the principal debtor's obligation to meet the arbitration award was an obligation arising out of the agreement performance of which had been guaranteed, and was therefore covered by a guarantee of 'any obligation'. The matter was put beyond doubt by a separate promise in the guarantee to 'pay as surety . . . in accordance with any arbitration award'.

4 See **CIVIL PROCEDURE** vol 11 (2009) PARA 808 et seq. See also *Evans v Beattie* (1803) 5 Esp 26; *Bacon v Chesney* (1816) 1 Stark 192; *King v Norman* (1847) 4 CB 884. A receipt signed by a guarantor is not always conclusive evidence against him (*Straton v Rastall* (1788) 2 Term Rep 366), although a receipt given with full knowledge of all the circumstances depending between the parties is usually so regarded (*Bristow v Eastman* (1794) 1 Esp 172).

5 *Lysaght v Walker* (1881) 5 Bli NS 1, HL.

6 *Middleton v Melton* (1829) 5 Man & Ry KB 264; *Perchard and Hamerton v Tindall* (1795) 1 Esp 394.

7 *Goss v Watlington* (1821) 3 Brod & Bing 132; *Whitnash v George and Gifford* (1828) 8 B & C 556. In Ireland, such records have been held to be presumptive evidence against the guarantor, even though the principal debtor is still living: see *Abbeyleix Union Guardians v Sutcliffe* (1890) 26 LR Ir 332; and see *Union Town v Bermes* (1882) 43 American Reports 369. In a United States case a guarantor was held not to be estopped from contesting the correctness of the voluntary official reports made by the principal debtor as to the amount of money in his hands at the commencement of the term which the bond was intended to cover: *Van Sickel v Buffalo County* (1882) 42 American Reports 753. Sed quaere.

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## 1092. Conclusive evidence clauses.

Guarantees often contain a clause which states that a certificate or other document signed by or on behalf of the creditor shall be either prima facie or conclusive evidence against the guarantor of the extent of the principal debtor's liability to the creditor. Provided that they are expressed in sufficiently clear and explicit terms, such clauses are effective to bind the guarantor<sup>1</sup> in the absence of proof of fraud<sup>2</sup>, bad faith<sup>3</sup> or other special circumstances<sup>4</sup>.

1 *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437, CA. See also *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC.

2 Fraud unravels all contracts, both at law and in equity: *London General Omnibus Co Ltd v Holloway* [1912] 2 KB 72 at 81, CA, per Farwell LJ. Cf the 'fraud exception' to the obligation of a bank which has issued a standby letter of credit or a performance bond to pay against a conforming demand: see PARA 1275. See also generally PARA 791 et seq.

3 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, Aust HC. Cf *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170, [1992] 1 WLR 277, CA (third party certificate).

4 In *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 651, Aust HC, it was said that such a clause should not be interpreted as 'covering all grounds which go to the validity of the debt', citing illegality as an example. Manifest error may also prevent reliance on the clause: see *Je Maintiendrai Pty Ltd v Australia and New Zealand Banking Group Ltd* (1985) 38 SASR 70. It is also possible that the inclusion of a conclusive evidence clause in a standard form guarantee could be challenged under the Unfair Contract Terms Act 1977 s 3: see **CONTRACT** vol 9(1) (Reissue) PARA 823 et seq. Cf *Westpac Banking Corp v Sugden* (1988) NSW Conv R 55-377 where, applying the Contracts Review Act 1980 (NSW), Brownlie J held that the conclusive evidence clause went far beyond what was reasonably necessary for the protection of the bank.

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## **(ii) Extent of Guarantor's Liability**

### **A. SUBJECT MATTER OF LIABILITY**

#### **1093. Guarantor as favoured debtor.**

It has been said that a guarantor is a favoured debtor<sup>1</sup>. He is entitled to insist upon a rigid adherence to the terms of his obligation by the creditor, and cannot be made liable for more than he has undertaken<sup>2</sup>.

A receiver owes a duty, in equity, to the guarantor of a mortgagor's debt to act honestly and in good faith for the purpose of realising the security, and that duty may be more extensive, depending on the facts of any particular case<sup>3</sup>.

1 *Wheatley v Bastow* (1855) 7 De GM & G 261 at 279-280 per Turner LJ; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 703, CA, per Lord Selborne LC; *Blest v Brown* (1862) 4 De GF & J 367; *Williamson v Goolld* (1823) 1 Bing 171 at 176 per Dallas CJ. For a contrary view see *Eshelby v Federated European Bank Ltd* [1932] 1 KB 254 at 266 per Swift J; affd [1932] 1 KB 423, CA. See also *Re O'Neill* (1837) Sau & Sc 686.

2 *Wright v Russel* (1774) 2 Wm Bl 934 at 935; *Pearsall v Summersett* (1812) 4 Taunt 593 at 600; *Warre v Calvert* (1837) 7 Ad & El 143; *Leigh v Taylor* (1827) 7 B & C 491; *Gordon v Rae* (1858) 8 E & B 1065; *Morten v Marshall* (1863) 2 H & C 305; *Mortgage Insurance Corp v Pound* (1895) 65 LJQB 129, HL; *Plastic Decoration and Papier-Maché Co Ltd v Massey-Mainwaring* (1895) 11 TLR 205; *Wembley UDC v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1901) 17 TLR 516; and see *Luning v Milton* (1890) 7 TLR 12; *Tanner*



*v Woolmer* (1853) 8 Exch 482; *Hoole UDC v Fidelity and Deposit Co of Maryland* [1916] 1 KB 25; affd on different grounds [1916] 2 KB 568, CA; *Spencer, Turner and Boldero v Lotz* (1916) 32 TLR 373. It is probably in this context that the many statements to the effect that a guarantee is to be construed strictly in favour of the guarantor should be understood. For examples of such statements see *First National Finance Corp Ltd v Goodman* [1983] BCLC 203 at 208, CA, per Stephenson LJ; *Coghlan v SH Lock (Australia) Ltd* (1987) 3 BCC 183 at 187, PC; and the cases cited in PARA 1085 note 2.

3 See *Cohen v TSB Bank plc* [2002] 2 BCLC 32 at [42], [2001] All ER (D) 450 (Nov) per Etherton J.

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### **1094. Ascertaining the extent of liability.**

The extent of the liability undertaken by the guarantor will depend upon the terms of the contract of guarantee<sup>1</sup>. It need not be co-extensive with that of the principal debtor; but, in so far as it exceeds it, it is not a guarantee liability<sup>2</sup>.

In order to ascertain the extent of the guarantor's liability, if any, to the creditor, it is first necessary to determine the amount and nature of the principal debtor's debt to the creditor and the circumstances in which it has arisen. This having been done, the contract of guarantee should then be construed strictly to see whether it covers the nature, extent and circumstances of the principal debt sought to be recovered from the guarantor<sup>3</sup>.

1 See *Moschi v Lep Air Services Ltd* [1973] AC 331 at 345, [1972] 2 All ER 393 at 399, HL, per Lord Reid. That contract will be construed in accordance with the principles set out in PARA 1083 et seq. The extent of the guarantor's liability is the same at law and in equity: *Samuell v Howarth* (1817) 3 Mer 272 at 278 per Lord Eldon LC; *Ratcliffe v Graves* (1683) 1 Vern 196.

2 See PARA 1013 et seq. See also *Ferry v Burchard* 21 Conn 597 at 602 (1852) per Storrs J.

3 See *Associated Dairies Ltd v Pierce* (1982) 265 Estates Gazette 127 at 129, CA, per May LJ. This dictum was expressed to cover only situations where the underlying contract between creditor and principal debtor and the contract of guarantee were both still subsisting. However, it is probably of more general application. See also *Moschi v Lep Air Services Ltd* [1973] AC 331 at 345, [1972] 2 All ER 393 at 399, HL, per Lord Reid; *Kova Establishment v Sasco Investments Ltd* [1998] 2 BCLC 83 (debt owed by a third party and later assigned to the creditor not subject to guarantee); *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429, [2004] All ER (D) 04 (Apr) (the words 'my liability to you shall be in respect of the whole debt' capable of referring to the existing as well as any further future debt).

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### **1095. Nature of obligation guaranteed.**

A guarantor in a bond conditioned to answer for any balance which may become due from another to a bank is only liable for a balance which constitutes a legal debt<sup>1</sup>, that is to say a debt recoverable by bringing a claim<sup>2</sup>. If the guarantee stipulates that money is to be lent to a

principal debtor, the money lent must, apparently, first have reached the creditor's hand, and then have been lent to the principal debtor, to render the surety liable<sup>3</sup>. Where a guarantee unlimited in amount is given in respect of goods to be supplied to another, there must be a subsequent genuine supply, and to a reasonable extent, to render the guarantor liable<sup>4</sup>, although, subject to this condition, the amount supplied is discretionary<sup>5</sup>. Similarly, any condition to be performed by the creditor to render the principal debtor liable must be performed before the guarantor can be made liable<sup>6</sup>.

A guarantee of 'future indebtedness' has been held to cover not only a present obligation to pay a sum certain in the future, but also an unquantified sum in the future or on a contingency, including an obligation arising in the future<sup>7</sup>.

1 *Swan v Bank of Scotland* (1836) 10 Bli NS 627, HL.

2 *Re Moss, ex p Hallet* [1905] 2 KB 307 at 314 per Darling J; *Re British Salicylates Ltd* [1919] 2 Ch 155 at 159 per Astbury J.

3 See *Halford v Byron* (1701) Prec Ch 178; *Stone v Compton* (1838) 5 Bing NC 142; *Burton v Gray* (1873) 8 Ch App 932; and see *Offord v Davies* (1862) 12 CBNS 748; *Grahame v Grahame* (1887) 19 LR Ir 249.

4 *Westhead v Sproson* (1861) 6 H & N 728; *Boyd v Moyle* (1846) 2 CB 644 at 650; *Johnston v Nicholls* (1845) 1 CB 251; *Broom v Batchelor* (1856) 1 H & N 255; *Wood v Benson* (1831) 2 Cr & J 94.

5 *White v Woodward* (1848) 5 CB 810.

6 *Eshelby v Federated European Bank Ltd* [1932] 1 KB 423, CA.

7 *Banner Lane Realisations Ltd (in liquidation) v Berisford plc* [1997] 1 BCLC 380, CA.

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### **1096. Guarantor not liable beyond terms of contract.**

A promissory note given by a principal debtor and guarantor for a definite sum, payable on a fixed day, is presumed to be given in consideration of an advance at the date of the note, and not in payment of the balance of an account current between the principal debtor and the creditor, and unless this presumption is disproved the advance must have been made if the guarantor is to be liable<sup>1</sup>.

A guarantor who guarantees the payment of a bill of exchange to be drawn for a specific sum is not liable, even to the extent of that sum, on a bill given for a larger sum<sup>2</sup>. However, a guarantee given to a bank requiring the payment of a given sum will not be discharged by the creditor's subsequently agreeing to require a lesser sum from the debtor<sup>3</sup>; nor will a limited guarantee for money lent to a specified amount be invalidated by the fact of money being lent in excess of that amount, although the guarantor cannot be made liable beyond the amount prescribed by the guarantee<sup>4</sup>. A guarantee limited to the loan of a fixed sum will not extend the guarantor's liability for continuing payments made after part of that sum has been reimbursed<sup>5</sup>.

A guarantor for payment by joint purchasers of the purchase money of an estate will not be liable if it appears that one of the purported purchasers is not bound by the transaction<sup>6</sup>.

Where the consideration for the guarantor's promise is forbearance to sue, or to continue legal proceedings against, the principal debtor, all stipulations which constitute part of that

consideration must be strictly complied with or the guarantor will not be bound<sup>7</sup>. Nor will a guarantor for payment of what may be recovered by the claimant in a claim be held liable if, in a case where the guarantee stipulates that the claim is to be defended, judgment is allowed to go by default<sup>8</sup>.

- 1 *Re Boys, Eedes v Boys, ex p Hop Planters Co* (1870) LR 10 Eq 467.
- 2 *Philips v Astling* (1809) 2 Taunt 206; and see *Sumner v Powell* (1816) 2 Mer 30; affd (1823) Turn & R 423.
- 3 *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46 at 51, CA, per Amphlett JA.
- 4 *Hall v Grose* (1814) cited in Chitty on Commercial Law Vol III 323; and see *Williams v Rawlinson* (1825) 3 Bing 71 at 78; *Mason v Pritchard* (1810) 12 East 227; *Parker v Wise* (1817) 6 M & S 239; *R v O'Callaghan* (1838) 11 Eq R 439.
- 5 *Kirby v Duke of Marlborough* (1813) 2 M & S 18; and see *Browning v Baldwin* (1879) 40 LT 248.
- 6 *De Brettes v Goodman* (1855) 9 Moo PCC 466.
- 7 See PARAS 1106-1107.
- 8 *Luning v Milton* (1890) 7 TLR 12.

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### **1097. Landlord and tenant.**

At common law, in the absence of clear words, a guarantor of a tenant's obligations will be liable only for those arising under the original contract which he guaranteed. Accordingly, where the landlord waives a notice to quit given by him to a yearly tenant and thereby creates a new tenancy, a guarantor for payment of the rent under the original tenancy is not liable for rent accruing after the time when the notice to quit would have expired<sup>1</sup>. Nor is a guarantor for the rent of a business tenancy liable for rent accruing due for the period during which the tenancy is statutorily extended<sup>2</sup>. Even where the guarantee is expressed to extend into that period, further clear words will be required in order to make the guarantor liable for interim rent<sup>3</sup> ordered to be paid in excess of the contractual rent<sup>4</sup>. But a guarantee of all rent payable under an agreement which provides for the extension of a tenancy at the tenant's option extends to rent accruing due in the further period<sup>5</sup>. The benefit of a guarantee runs with the reversion and is enforceable by the landlord from time to time<sup>6</sup>.

Under the Landlord and Tenant (Covenants) Act 1995, the liability of a former tenant or his guarantor for rent and service charges is restricted<sup>7</sup>. These provisions, which apply to both 'old' and 'new' tenancies, are discussed elsewhere in this work<sup>8</sup>.

- 1 *Tayleur v Wildin* (1868) LR 3 Exch 303. See also *Freeman v Evans* [1922] 1 Ch 36, CA.
- 2 *Junction Estates Ltd v Cope* (1974) 27 P & CR 482; *A Plessner & Co Ltd v Davis* [1983] 2 EGLR 70, 267 Estates Gazette 1039.
- 3 See under the Landlord and Tenant Act 1954 s 24A: see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 730.

4 See *City of London Corp'n v Fell, Herbert Duncan Ltd v Cluttons (a firm)* [1993] QB 589, [1993] 2 All ER 449, CA. In *Collin Estates Ltd v Buckley* [1992] 2 EGLR 78, [1992] 40 EG 151 the guarantee expressly covered interim rent.

5 *Philip v Ryan* (1901) Times, 12 January. The liability of guarantors in a replevin bond is limited to the amount of rent in arrear at the time of the distress and the costs, and they are not liable for subsequent rent: *Ward v Henley* (1827) 1 Y & J 285.

6 *P & A Swift Investments (a firm) v Combined English Stores Group plc* [1989] AC 632, [1988] 2 All ER 885, HL. Payment by the guarantor under his guarantee is not payment of rent, so acceptance of that payment will not waive the landlord's right to forfeit: *London and County (A & D) Ltd v Wilfred Sportsman Ltd (Greenwoods (Hosiery & Outfitters) Ltd, third party)* [1971] Ch 764, [1970] 2 All ER 600, CA. However, it has been suggested that the landlord may refuse a tender from a third party such as a guarantor, where he might be prejudiced by accepting it: see *Richards v De Freitas* (1975) 29 P & CR 1.

7 See the Landlord and Tenant (Covenants) Act 1995 ss 17, 18; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 289, 291.

8 See **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 578 et seq.

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### 1098. Limitation of guarantor's liability.

The guarantor's liability will not be unduly extended<sup>1</sup>. He will not, therefore, be liable for the costs of a fruitless claim by the creditor against the principal debtor if the creditor has given him no notice of his intention to sue the principal debtor<sup>2</sup>, nor when his liability is limited to a fixed sum will he be liable for interest on a larger sum<sup>3</sup>. It nevertheless comprises all transactions which naturally and reasonably are entered into on the faith of the guarantee<sup>4</sup>.

1 So, when an assurance company gave a bond to the Board of Trade covering any loss or damage occasioned to a bankrupt's estate by any default of the trustee, it was not liable to make good the trustee's default in payment of the penal interest exacted from him for improper retention of money of the estate: *Board of Trade v Employers' Liability Assurance Corp'n Ltd* [1910] 2 KB 649, CA.

2 *Baker v Garratt* (1825) 3 Bing 56 at 60 per Best CJ. See also *Colvin v Buckle* (1841) 8 M & W 680; *Keily v Murphy* (1837) Sau & Sc 479. Where, however, as the result of criminal proceedings taken against a defaulting employee whose fidelity the guarantor had guaranteed, property was recovered, it was held that the costs of the proceedings should be deducted from the value of the property recovered before giving the guarantor credit for it under the guarantee: *Hatch, Mansfield & Co Ltd v Weingott* (1906) 22 TLR 366.

3 *Meek v Wallis* (1872) 27 LT 650. Bank guarantee forms sometimes provide to the contrary. If such a stipulation is expressed in clear words, it will be given effect: see PARA 1094 et seq.

4 *Ogden v Aspinall* (1826) 7 Dow & Ry KB 637; *Pattison v Belford Union Guardians* (1856) 1 H & N 523, Ex Ch; *Gwynne v Burnell* (1840) 7 Cl & Fin 572, HL; *Loveland v Knight* (1828) 3 C & P 106; *Melville v Doidge* (1848) 6 CB 450; *Saunders v Taylor* (1829) 9 B & C 35; *Barber v Mackrell* (1892) 41 WR 341, CA; *Pybus v Gibb* (1856) 6 E & B 902; *Skillett v Fletcher* (1867) LR 2 CP 469, Ex Ch; *Oswald v Berwick-upon-Tweed Corp'n* (1856) 5 HL Cas 856. A guarantor for the due payment over by a treasurer of a poor law union to the guardians, upon his (the treasurer's) removal from office, of the balances, money etc, which should then be in his possession by virtue of the office, was held liable for all money which had actually or in effect passed to the treasurer in his official capacity: *Pattison v Belford Union Guardians* above, where in the accounts of the treasurer, for whom the guarantor was liable, debits and credits were treated and allowed by the auditors as if they were actual payments in cash and therefore covered by the guarantee. Cf *Cosford Union Guardians v Grimwade* (1892) 8 TLR 775.

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### **1099. Liability for accruing interest.**

A covenant by a guarantor for the due payment of interest during the continuance of a mortgage security obliges him to pay interest so long as the principal sum remains unpaid, and therefore after default has been made by the principal debtor in payment of the mortgage money on the day prescribed<sup>1</sup>; and if he guarantees the payment of a bill of exchange by the acceptor, he is liable for the interest on the amount if not paid when due<sup>2</sup>.

Even after the right to recover the principal sum from a guarantor has become statute-barred, interest due on it is sometimes recoverable<sup>3</sup>, although normally interest, being accessory to the principal, is irrecoverable when the claim to the principal is barred<sup>4</sup>.

The recovery of judgment against the principal debtor for the principal sum due operates to relieve the guarantor from liability to pay future interest<sup>5</sup>. The bankruptcy of the principal debtor will not relieve from further liability for interest a guarantor whose guarantee provides for payment of interest 'until repayment'<sup>6</sup>. However, the bankruptcy of the principal debtor will relieve from further liability for interest a guarantor who is to continue liable for that interest only so long as anything remains due in respect of the principal money<sup>7</sup>. Where a guarantor pays a sum in respect of interest due from the principal debtor, that sum ranks as interest and not as a sum in lieu of interest for the purpose of any provision concerned with the payment of interest<sup>8</sup>.

1 *King v Greenhill* (1843) 6 Man & G 59.

2 *Ackermann v Ehrensperger* (1846) 16 M & W 99. So too he is liable for interest on the sum secured by a bond with a penalty (*Dawson v Raynes* (1826) 2 Russ 466), for such a bond is an interest-bearing security, carrying interest, although not mentioned, beyond the date fixed for the payment of the debt (*Re Dixon, Heynes v Dixon* [1900] 2 Ch 561, CA); and see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 126. There is no rule of law that upon a contract for the payment of money on a day certain, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied: *Cook v Fowler* (1874) LR 7 HL 27 at 37 per Lord Selborne LC. For a guarantee which, upon its proper construction, excluded a liability for interest upon a sum awarded in an arbitration see *Cia Sudamericana de Fletes SA v African Continental Bank Ltd, The Rosarino* [1973] 1 Lloyd's Rep 21.

3 *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA, where interest, commission and other banking charges were construed as being guaranteed on the same basis as advances of principal, and consequently interest and charges accruing due within six years of action brought were recoverable even though there was no longer a right to recover the amount of the actual advances from the guarantor. Cf *Re FitzGeorge, ex p Robson* [1905] 1 KB 462, where a guarantor who guaranteed the payment of interest on a debenture bond, issued by a company, until repayment of the principal sum was held liable to make payment of such interest after the dissolution of the company.

4 See eg *Elder v Northcott* [1930] 2 Ch 422.

5 *Faber v Earl of Lathom* (1897) 77 LT 168. Bank guarantee forms sometimes provide to the contrary. If such a stipulation is expressed in clear words, it will be given effect to: see PARA 1094 et seq.

6 *Re FitzGeorge, ex p Robson* [1905] 1 KB 462.

7 *Re Moss, ex p Hallet* [1905] 2 KB 307; and see also *Re Lennard, Lennard's Trustee v Lennard* [1934] Ch 235.

8 *Re Hawkins, Hawkins v Hawkins* [1972] Ch 714, [1972] 3 All ER 386.

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### **1100. Liability after determination of the principal contract.**

Where the guaranteed obligation is properly discharged by performance, the obligations of a guarantor of that obligation are also thereby discharged<sup>1</sup>. Similarly, the guarantor will be discharged where the underlying contract is discharged by frustration before the time for performance<sup>2</sup>.

However, the creditor's termination of the principal contract, whether by the exercise of an express right of termination<sup>3</sup> or by acceptance of the debtor's breach<sup>4</sup>, will not discharge the guarantor from liability. Where the liability of the guarantor under the guarantee equals in extent and amount that of the principal debtor, the guarantor makes himself responsible for any loss sustained by the creditor through the principal debtor's default<sup>5</sup>. Thus, where a creditor accepts the repudiation by a debtor of an agreement to pay a debt by instalments, the guarantor for that agreement is liable to the creditor for instalments accrued but unpaid at the date of termination<sup>6</sup>, and for damages representing the total debt<sup>7</sup>.

Similarly, where the guarantee is of the tenant's obligations under a lease, the landlord's action in forfeiting the lease on the grounds of the tenant's breach of covenant will not release the guarantor from his liability in respect of accrued causes of action<sup>8</sup>. Nor will it relieve the guarantor from liability in respect of damage suffered by the landlord after the termination of the tenancy if that damage is referable to a breach of the tenant's covenants, for example a failure to yield up the premises in accordance with a covenant to do so<sup>9</sup>.

The insolvency of the principal debtor does not discharge the guarantor from liability<sup>10</sup>. Further, where the trustee or liquidator of an insolvent principal debtor disclaims onerous property, the statutory release of the principal debtor from liabilities in or in respect of the disclaimed property<sup>11</sup> does not operate also to release any guarantor for those liabilities<sup>12</sup>.

The position is less clear where the principal debtor enters into an individual voluntary arrangement under Part VIII<sup>13</sup> of the Insolvency Act 1986<sup>14</sup>.

1 See *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258-259 per Lloyd J. As to the discharge of contracts by performance see generally **CONTRACT** vol 9(1) (Reissue) PARA 921 et seq.

2 As to the discharge of contracts by frustration see generally **CONTRACT** vol 9(1) (Reissue) PARA 909 et seq.

3 *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502 at 506, CA, per Roskill LJ; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; affd [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL.

4 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.

5 *Oastler v Pound* (1863) 11 WR 518; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 349, [1972] 2 All ER 393 at 402, HL, per Lord Diplock.

6 *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502 at 506, CA, per Roskill LJ; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; affd [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL.

7 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.

8 *Apus Properties Ltd v Douglas Farrow & Co Ltd* [1989] 2 EGLR 265, [1989] NPC 38. A guarantor's contractual obligation to pay arrears of rent or to take up a new lease in the event of a liquidator of the tenant company disclaiming the lease survives disclaimer but comes to an end on the landlord retaking possession: see *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL; *Active Estates Ltd v Parness* [2002] EWHC 893 (Ch), [2002] 3 EGLR 13, [2002] 36 EG 147; *Scottish Widows plc v Tripipatkul* [2003] EWHC 1874 (Ch), [2004] 1 P & CR 461, [2003] All ER (D) 24 (Aug).

9 *Associated Dairies Ltd v Pierce* (1982) 265 Estates Gazette 127, CA; *Thames Manufacturing Co Ltd v Perrotts (Nichol & Peyton) Ltd* (1984) 50 P & CR 1.

10 See the Insolvency Act 1986 s 281(7); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 644. The position was the same at common law: see *English v Darley* (1800) 2 Bos & P 61 at 62; *Browne v Carr* (1831) 7 Bing 508; *Ex p Jacobs, Re Jacobs* (1875) 10 Ch App 211 at 213; *Rainbow v Juggins* (1880) 5 QBD 422, CA. Cf *Re Moss, ex p Hallett* [1905] 2 KB 307, distinguished in *Bank of Montreal v McFatridge* (1958) 14 DLR (2d) 552; affd (1959) 17 DLR (2d) 557 (Nfld SC). The dissolution of a company after completion of the winding up does not generally release a guarantor of its obligations: *Re FitzGeorge, ex p Robson* [1905] 1 KB 462.

11 Under the Insolvency Act 1986 s 178(4) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 868) and s 315(3) (individuals: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 474).

12 *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL, overruling *Stacey v Hill* [1901] 1 KB 660, CA (a bankruptcy case); and see PARA 1014. See also *Scottish Widows plc v Tripipatkul* [2003] EWHC 1874 (Ch), [2004] 1 P & CR 461, [2003] All ER (D) 24 (Aug).

13 See under the Insolvency Act 1986 Pt VIII (ss 252-263G): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 81 et seq.

14 See *Johnson v Davies* [1999] Ch 117 at 138, [1998] 2 All ER 649 at 666, CA, per Chadwick LJ (it is up to the debtor to propose, and for the creditors to accept or reject, proposals which either do or do not have the effect of releasing co-debtors or sureties); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 107. Cf *RA Securities Ltd v Mercantile Credit Co Ltd* [1995] 3 All ER 581, [1994] 2 BCLC 721 (an outsider who was not a party could gain no assistance from the terms of the arrangement as such). See also *Greene King plc v Stanley* [2001] EWCA Civ 1966, [2002] All ER (D) 56 (Jan) (no relevant distinction between the position of a surety and that of a co-debtor and it has long been accepted that on the release of a co-debtor a creditor may reserve his rights against other co-debtors; accordingly, it is open to a creditor to release the debtor under an individual voluntary arrangement ('IVA') whilst reserving its rights against the debtor's sureties. Further, it is open to the court in construing an IVA to look at all the circumstances, including the dealings between the parties which have led to the IVA).

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### **1101. Guarantor's liability under fidelity guarantee, etc.**

A guarantor's liability for the faithful discharge by another person of duties attaching to a particular office does not extend to losses incurred in respect of the performance by that other person of duties ordinarily performed by another official<sup>1</sup>, or subsequently imposed by statute<sup>2</sup>. So a policy for the guarantee of the fidelity of an assistant overseer of a parish was held not to cover defalcations committed by him as clerk of the parish council<sup>3</sup>.

A guarantor for the due performance of his duties by a deputy appointed by the Court of Protection of the property and affairs of a mental patient is not liable for any default made in respect of the receipt of rents and profits after the death of the patient, since the deputy

himself is not responsible in that capacity<sup>4</sup>; but the guarantor is liable for everything for which the deputy is liable<sup>5</sup>.

The liability of a principal debtor and his guarantor on a bond with a penalty cannot exceed the penalty<sup>6</sup>.

1 *Wembley UDC v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1901) 17 TLR 516. Fidelity guarantees are now rarely encountered: see further PARA 1111 et seq.

2 *Bartlett v A-G* (1709) Park 277; and see *Nares v Rowles* (1811) 14 East 510; *Webb v James* (1840) 7 M & W 279; *Kepp v Wiggett* (1850) 10 CB 35; *Durham Corp v Fowler* (1889) 22 QBD 394 at 413. Cf *Napier v Bruce* (1842) 8 Cl & Fin 470, HL, where the guarantor was held not liable for an agent's failure to account for money received by him during the term of his agency, but not in pursuance of the particular agency recited in the fidelity bond, although the bond was conditioned for due accounting during the whole time the agent should continue to act as agent.

3 *Cosford Union v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1910) 103 LT 463.

4 See *Re Walker* [1907] 2 Ch 120, CA, decided under the old law relating to lunacy; see now, generally and as to the Court of Protection, **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 676, 750.

5 For the security required from any person other than the Official Solicitor appointed as receiver under the Mental Health Act 1983 see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 748. As to provisions in regard to a deputy under the Mental Capacity Act 2005 see also **MENTAL HEALTH** vol 30(2) (Reissue) see PARAS 749 et seq, 760. As to transitional provisions in regard to receivers see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 406.

6 *Butcher v Churchill* (1808) 14 Ves 567.

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### **1102. Allowable deductions.**

In estimating the loss occasioned by the principal debtor's default, the creditor must give credit for sums received by him from the principal debtor<sup>1</sup>, or paid by the guarantor to keep up a security for the guaranteed debt<sup>2</sup>, and he is not entitled to the benefit of any counter-security received by the guarantor from the principal debtor<sup>3</sup>.

1 *Burnand v Rodocanachi, Sons & Co* (1882) 7 App Cas 333 at 339, 341, HL, per Lord Blackburn; *Bardwell v Lydall* (1831) 7 Bing 489; *Gee v Pack* (1863) 33 LJQB 49; *Castellain v Preston* (1883) 11 QBD 380, CA; *Randal v Cockran* (1748) 1 Ves Sen 98; *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703; and see *Re Bedell, ex p Gilbey* (1878) 8 ChD 248, CA.

2 *Aylwin v Witty* (1861) 30 LJCh 860.

3 *Re Walker, Sheffield Banking Co v Clayton* [1892] 1 Ch 621. See PARA 1128.

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GUARANTOR/(ii) Extent of Guarantor's Liability/B. WHEN GUARANTOR'S LIABILITY ARISES/1103. Debtor's default.

## **B. WHEN GUARANTOR'S LIABILITY ARISES**

### **1103. Debtor's default.**

The guarantor's liability arises when the principal debtor has made default<sup>1</sup>, but not until then<sup>2</sup>.

To render the guarantor liable the default relied upon must not be due to the creditor's misconduct<sup>3</sup> or connivance<sup>4</sup>, nor, generally speaking, result from vis major, such as robbery with irresistible violence<sup>5</sup>.

It is not always easy to determine whether, in a particular case, a default has been committed, and, on this, precedent can only be suggestive<sup>6</sup>.

1 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255. See also *Belford Union Guardians v Pattison* (1856) 11 Exch 623; affd sub nom *Pattison v Belford Union Guardians* 1 H & N 523, Ex Ch; *Wright v Simpson* (1802) 6 Ves 714 at 733; *Barber v Mackrell* (1892) 68 LT 29 at 31, CA.

2 *Halliwell v Counsell* (1878) 38 LT 176; *Blest v Brown* (1862) 4 De GF & J 367; and see the old cases cited in note 1.

3 *Halliwell v Counsell* (1878) 38 LT 176; *Blest v Brown* (1862) 4 De GF & J 367.

4 See *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at 512 per Bingham J; affd [1983] 2 Lloyd's Rep 298, CA. See also *Dawson v Lawes* (1854) Kay 280; *M'Taggart v Watson* (1836) 3 Cl & Fin 525, HL; *Shepherd v Beecher* (1725) 2 P Wms 288; *Sanderson v Aston* (1873) LR 8 Exch 73; *Blest v Brown* (1862) 4 De GF & J 367; *Lodder v Slowey* [1904] AC 442, PC.

5 *Walker v British Guarantee Association* (1852) 18 QB 277; see also *King v Cole* (1848) 2 Exch 628. The surety of a clerk is liable as guarantor for money accidentally lost by the clerk when out riding in his employer's service: *Melville v Doidge* (1848) 6 CB 450; see also *Saunders v Taylor* (1829) 9 B & C 35; *Hornsby v Slack* (1850) 1 ICLR 126.

6 Eg the conversion to his own use by an administrator of a large portion of an intestate's assets is a breach of a condition in an administration bond well and truly to administer the intestate's goods according to law: *Archbishop of Canterbury v Robertson* (1833) 1 Cr & M 690; and see *Dobbs v Brain* [1892] 2 QB 207, CA; *Harvell v Foster* [1954] 2 QB 367, [1954] 2 All ER 736, CA. A mere error in book-keeping by a clerk is not, however, a default rendering a guarantor liable unless, of course, the guarantee stipulates that it is to be so considered: *Jephson v Howkins* (1841) 2 Man & G 366.

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### **1104. Notice of debtor's default unnecessary.**

On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default<sup>1</sup>, or previous recourse against the principal<sup>2</sup> or simultaneous recourse against co-guarantors<sup>3</sup>.

Unless a demand upon the principal debtor is necessary in order to establish the principal debtor's own liability to the creditor<sup>4</sup>, it is not necessary for the creditor, before proceeding against the guarantor, to request the principal debtor to pay<sup>5</sup>. Nor is it necessary for the creditor to sue the principal debtor, although solvent<sup>6</sup>, or to take arbitration proceedings against him even though the principal contract contains an arbitration clause<sup>7</sup>, unless this is expressly stipulated for in the guarantee<sup>8</sup>.

Nor is it necessary for the creditor to prosecute the principal debtor for any offence he may have committed<sup>9</sup> unless this is rendered essential by the terms of the guarantee<sup>10</sup>, or to resort to securities for the guaranteed debt received by the creditor from the principal debtor<sup>11</sup>.

However, service of a default notice under Part VII of the Consumer Credit Act 1974<sup>12</sup> is necessary before the creditor can become entitled, by reason of the debtor's breach of a regulated agreement<sup>13</sup> under that Act, to terminate the agreement, demand early repayment, treat any right conferred by the agreement on the debtor as terminated, restricted or deferred, or enforce any security<sup>14</sup>.

1 *Cutler v Southern* (1667) 1 Saund 116; *Ker v Mitchell* (1786) 2 Chit 487; *Carr v Browne* (1826) 12 Moore CP 62; *Hitchcock v Humfrey* (1843) 5 Man & G 559; *Warrington v Furber* (1807) 8 East 242; *Walton v Mascall* (1844) 13 M & W 452; *Carter v White* (1883) 25 ChD 666, CA; *Holbrow v Wilkins* (1822) 1 B & C 10; *Van Wart v Woolley* (1824) 3 B & C 439; *Britannia Steamship Insurance Association v Duff* (1909) 46 SLR 894, Ct of Sess.

2 See the text and notes 4-11.

3 *Moschi v Lep Air Services Ltd* [1973] AC 331 at 356-357, [1972] 2 All ER 393 at 408-409, HL, per Lord Simon of Glaisdale. The reason for the rule is that it is the guarantor's duty to see that the principal pays or performs his duty, as the case may be: see *Moschi v Lep Air Services Ltd* at 357 and at 408; and *Wright v Simpson* (1802) 6 Ves 714 at 734 per Lord Eldon LC.

4 Whether a demand is necessary in any given case is, essentially, a question of construction of the contract: *Joachimson v Swiss Bank Corp* [1921] 3 KB 110 at 129, CA, per Atkin LJ; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769 at 785, CA, per Dillon LJ. Generally, where there is a pre-existing debt, no demand is necessary to complete the creditor's cause of action, even where the debt is expressed to be payable on demand: see *Rowe v Young* (1820) 2 Bligh 391 at 465, HL per Bayley J; *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* above. However, there may be circumstances where a demand upon the principal debtor is necessary in order to establish his liability, for example where the creditor seeks to accelerate liability for payment of the whole of a debt otherwise payable by instalments (see eg *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474) or where the principal debtor's liability is itself a liability as guarantor (as in *Coghlan v SH Lock (Australia) Ltd* (1987) 8 NSWLR 88, 3 BCC 183, PC, and *Bank of Scotland v Wright* [1991] BCLC 244). In principle, a demand is necessary to terminate a bank overdraft facility and require repayment of the balance: see *Rouse v Bradford Banking Co* [1894] AC 586, HL; *Cripps (Pharmaceuticals) Ltd v Wickenden* [1973] 2 All ER 606 at 616, sub nom *RA Cripps & Son Ltd v Wickenden* [1973] 1 WLR 944 at 954-55, per Goff J; and cf *Joachimson v Swiss Bank Corp* above. However, see *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA. As to demands see PARA 1105.

5 *Belfast Banking Co v Stanley* (1867) 15 WR 989; *Rede v Farr* (1817) 6 M & S 121; *Walton v Mascall* (1844) 13 M & W 452; *Lilley v Hewitt* (1822) 11 Price 494; *Warrington v Furber* (1807) 8 East 242; *Holbrow v Wilkins* (1822) 1 B & C 10; *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; *Sheldon and Ackhoff v Milligan* (1907) 14 SLT 703; *DFC Financial Services Ltd v Coffey* [1991] 2 NZLR 513, [1991] BCC 218, PC.

6 *Re Lockey* (1845) 1 Ph 509; *Wright v Simpson* (1802) 6 Ves 714; *Jackson v Digby* (1854) 2 WR 540; *Palmer v Sheridan-Bickers* (1910) Times, 20 July; but see *Ewart v Latta* (1865) 4 Macq 983 at 986, HL, per Lord Westbury LC; *Law v East India Co* (1799) 4 Ves 824.

7 *Thermistocles Navegacion SA v Langton, The Queen Frederica* [1978] 2 Lloyd's Rep 164, CA.

8 *Thermistocles Navegacion SA v Langton, The Queen Frederica* [1978] 2 Lloyd's Rep 164, CA; *Holl v Hadley* (1835) 2 Ad & El 758; *Governor & Co of Bank of Ireland v Beresford* (1818) 6 Dow 233 at 238, HL, per Lord Eldon LC; *Palmer v Sheridan-Bickers* (1910) Times, 20 July. It would, of course be necessary for these steps to be taken if the guarantee was limited to sums payable by the principal debtor under a judgment or award. As to performance bonds see PARA 1271 et seq.

9 *Lee v Bayes and Robinson* (1856) 18 CB 599.

10 *London Guarantee Co v Fearnley* (1880) 5 App Cas 911, HL.

11 *Wilks v Heeley* (1832) 1 Cr & M 249; *Re Howe, ex p Brett* (1871) 6 Ch App 838 at 841. Even where the guarantee expressly stipulated that, before the guarantor could be called upon to pay, the creditor must have availed himself to the utmost of any bona fide securities which he held of the principal debtor, and it was proved that the creditor had neglected to adopt means to enforce payment of a bill by a party who was shown to be totally insolvent, it was held that the guarantor was not relieved from liability: *Musket v Rogers* (1839) 8 Scott 51. See also *Collins v Gwynne* (1833) 9 Bing 544; *revsd sub nom Gwynne v Burnell* (1840) 6 Bing NC 453, HL. There may, perhaps, be special circumstances in which it is necessary for the creditor, before having recourse to the guarantor, to seek indemnity from a third person: see *Cottin v Blane* (1795) 2 Anst 544; Story s 639.

12 *le the Consumer Credit Act 1974 Pt VII (ss 86A-104): see generally CONSUMER CREDIT.*

13 A 'regulated agreement' is a consumer credit agreement or consumer hire agreement, other than an exempt agreement: Consumer Credit Act 1974 s 189(1). As to the meanings of 'consumer credit agreement', 'consumer hire agreement' and 'exempt agreement' see s 189(1) (definition of 'exempt agreement' amended by the Consumer Credit Act 2006 s 5(10)); and **CONSUMER CREDIT**. Broadly, consumer credit agreements and consumer hire agreements comprise most agreements by which an individual (or partnership or other unincorporated body including at least one individual) is provided with credit, or with goods on hire: see the Consumer Credit Act 1974 ss 8, 15; and **CONSUMER CREDIT**.

14 Consumer Credit Act 1974 s 87(1). Regulations may provide that s 87(1) is not to apply to agreements described by the regulations: s 87(4). See also the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983, SI 1983/1561; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 263. 'Security' includes inter alia an indemnity or guarantee: see PARA 1057 note 1.

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## 1105. Demand.

Modern guarantee forms usually require the guarantor to pay on demand<sup>1</sup>. In such cases, a valid demand is a necessary ingredient of the creditor's cause of action against the guarantor<sup>2</sup>. The demand must comply with any requirements imposed by the contract of guarantee as to the form and manner of the demand<sup>3</sup>. Subject to those requirements, and to any particular requirements of the general law<sup>4</sup>, it seems that a valid demand under a guarantee can be made orally<sup>5</sup>. It is sufficient that the demand makes clear to the guarantor that the creditor requires to be paid a sum which is, in fact, due<sup>6</sup>.

Where there is no express or implied<sup>7</sup> requirement in the guarantee for a demand, and no circumstances rendering a demand upon him a legal obligation<sup>8</sup>, the guarantor is liable without being requested to pay<sup>9</sup>.

1 Whether a demand is necessary in any given case is, essentially, a question of construction of the contract: *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769 at 785, CA, per Dillon LJ. A guarantor may waive the contractual requirement for a written demand and then seek a contribution from his co-guarantor for any payment made to the creditor: *Stimpson v Smith* [1999] Ch 340, [1999] 2 All ER 833, CA.

2 *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA; *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474. This principle may not apply where the guarantee contains a clause making the guarantor liable as if he were a principal debtor:

*Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* at 366-367 and at 1483 per Walton J; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA; and cf *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43. See also *Phillips v Fordyce* (1779) 2 Chit 676; *Sicklemore v Thistleton* (1817) 6 M & S 9; *Payne v Ives* (1823) 3 Dow & Ry KB 664; *Batson v Spearman* (1838) 9 Ad & El 298; *Martin v Wright* (1845) 6 QB 917; *Hartland v Jukes* (1863) 1 H & C 667; *Knox v Gye* (1867) 16 LT 76 at 81 per Lord Chelmsford LC; *Rickaby v Lewis* (1905) 22 TLR 130.

3 Cf *Re Berker Sportcraft Ltd's Agreements, Hartnell v Berker Sportcraft Ltd* (1947) 177 LT 420; and see eg *GMAC Commercial Credit Development Ltd v Sandhu* [2001] EWCA Civ 1209, [2001] 2 All ER (Comm) 782, [2001] All ER (D) 122 (Jul). See also *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2000] All ER (D) 1152 (a performance guarantee case; held that as a matter of construction, the words 'we claim the sum of £500,000, P having failed to meet their contractual obligations to us' did not comply with the requirement of the guarantee that the claims should state that the principals had failed to pay under their contractual obligation, since the key concept underlying the wording of the guarantee was a 'failure to pay'; accordingly, P had not made a valid demand under the guarantee). As to performance guarantees see PARA 1271 et seq.

4 Eg under the Law of Property Act 1925 ss 103(i), 196 (see **MORTGAGE** vol 77 (2010) PARAS 453, 454), the Consumer Credit Act 1974 (see PARA 1104), or the Insolvency Act 1986 s 123(1)(a) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 446) or s 268(1)(a) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 127, 154 et seq).

5 The English courts (see *Re a Company* [1985] BCLC 37 at 41; *Bank of Credit and Commerce International SA v Blattner* (20 November 1986, unreported), CA) have accepted as 'a fair, working definition' of a valid demand the formulation proffered by Walker J in the Australian case *Re Colonial Finance, Mortgage, Investment and Guarantee Corp Ltd* (1905) 6 SRNSW 6 at 9: 'There must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect'.

6 *NRG Vision Ltd v Churchfield Leasing Ltd* [1988] BCLC 624, 4 BCC 56. A minor error in the amount demanded will not generally invalidate a demand: see *Deverges v Sandeman, Clark & Co* [1902] 1 Ch 579; *Stubbs v Slater* [1910] 1 Ch 632, CA. However, it is less clear whether a material over-statement of the amount due will do so. In *Dow Banking Corp v Mahnahk Spinning and Weaving Corp and Bank Mellat* [1983] 2 Lloyd's Rep 561 at 566, Lloyd J held that, in order to give the contract of guarantee business efficacy, it was necessary to imply a term that the demand should state clearly what the guarantor was required to pay. See also *Brown v Great Eastern Ry Co* (1877) 2 QBD 406; *Pigot v Cubley* (1864) 15 CBNS 701 (a pledge case, distinguished in *Deverges v Sandeman, Clark & Co* above); *Re a Company* [1985] BCLC 37 at 41-43 (a case concerning the validity of a statutory demand under the Companies Act 1948 s 223(a) (repealed; re-enacted, in a materially amended form, in the Insolvency Act 1986 s 123(1)(a): see note 4); and *Cryne v Barclays Bank plc* [1987] BCLC 548, CA (where the point does not seem to have been argued). Contrast *Bank of Baroda v Panessar* [1987] Ch 335, [1986] 3 All ER 751, where Walton J held that a demand on a principal debtor for 'all moneys due to us' was sufficient; and see *Bank Negara Indonesia 1946 v Taylor* [1995] CLC 225 (demand for more than was actually due held to constitute a valid demand).

7 See *Morten v Marshall* (1863) 2 H & C 305.

8 See *Payne v Ives* (1823) 3 Dow & Ry KB 664. A guarantor for payment by the acceptor of a bill or note is liable even though there has been no presentment: *Warrington v Furber* (1807) 8 East 242; *Walton v Mascall* (1844) 13 M & W 452. Unreasonable neglect, however, on the part of the holder of a bill or note to present it or to give notice of dishonour may, it seems, discharge from all liability a surety damnified by such neglect: *Philips v Astling* (1809) 2 Taunt 206; *Van Wart v Woolley* (1824) 3 B & C 439 at 447 per Abbott CJ; *Peacock v Pursell* (1863) 14 CBNS 728.

9 *Hitchcock v Humfrey* (1843) 5 Man & G 559; *Rede v Farr* (1817) 6 M & S 121; *Lilley v Hewitt* (1822) 11 Price 494. See also *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596, [1972] 1 All ER 1176.

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## **1106. Conditions precedent to guarantor's liability.**

Any express or implied conditions precedent to the guarantor's liability must be fulfilled before recourse can be had to him<sup>1</sup>.

Where a guarantee recited that the loan to the principal debtor was secured by a charge upon shares, which was also mentioned in the operative part of the guarantee, the existence of the security was held to constitute a condition precedent to the guarantor's liability, and the guarantor was held not to be estopped by the recital from asserting the non-existence of the shares, since the recital was intended as a statement by the creditor and not by him<sup>2</sup>.

Where a guarantor agrees to give a guarantee on condition that other named persons also sign the guarantee as co-guarantors, the guarantor will not be liable if any of those persons do not sign, or if the signature of any of those persons is forged<sup>3</sup>. It is the creditor's duty to see that the guarantee is executed by the proper parties, and the known insolvency of one of the named co-guarantors will not dispense with the duty of obtaining his signature to the guarantee<sup>4</sup>.

Similarly, where a guarantor stipulates that the principal debtor is to execute a particular instrument, this will be regarded as a condition precedent requiring fulfilment<sup>5</sup>. In such a case, however, the guarantor will not be discharged from liability if the principal debtor, although he has not executed the guarantee bond, has executed an instrument on which the guarantor may sue him and become his specialty creditor<sup>6</sup>.

The mere fact that the taking of other security is intended or contemplated by the creditor will not make the taking of that security a condition precedent to the guarantor's liability, unless the guarantor makes the fact that his guarantee is so conditional clear to the creditor before he gives it, or there are other exceptional circumstances<sup>7</sup>. The guarantor will not be relieved from liability simply because persons he merely thought or assumed would also sign the guarantee have not done so, or further security that he merely thought or assumed would be taken has not been taken<sup>8</sup>.

1 See *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255, and the cases cited in notes 2-8.

2 *Re Parent Trust and Finance Co Ltd* [1936] 3 All ER 432, CA; affd sub nom *Greer v Kettle* [1938] AC 156, [1937] 4 All ER 396, HL. See also *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255, discussed in PARA 1033 note 1.

3 *James Graham & Co (Timber) Ltd v Southgate-Sands* [1986] QB 80, [1985] 2 All ER 344, CA. See also *Re Semple* (1846) 3 Jo & Lat 488; *Emmet v Dewhurst* (1851) 3 Mac & G 587; *Evans v Bremridge* as reported in (1855) 25 LJCh 334; affd (1856) 25 LJCh 334; *Hansard v Lethbridge* (1892) 8 TLR 346, CA; *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; *Fitzgerald v M'Cowan* [1898] 2 IR 1; *West Riding Union Banking Co Ltd v Elmore* (1905) Times, 24 February, CA; *Re Cowardine* (1905) Times, 21 December; *National Provincial Bank of England v Brackenbury* (1906) 22 TLR 797; *Re Parent Trust and Finance Co Ltd* [1936] 3 All ER 432, CA; affd sub nom *Greer v Kettle* [1938] AC 156, [1937] 4 All ER 396, HL; *Lady Naas v Westminster Bank Ltd* [1940] AC 366, [1940] 1 All ER 485, HL. Where A executed a bond as the joint and several bond of himself and B, and signed it 'A and B', having no authority to do so, the bond was held to be a good several bond of A: *Elliot v Davis* (1800) 2 Bos & P 338. Where a person signs a promissory note on a representation that others are to join, and one afterwards refuses to sign, the payees cannot in general recover against the person who signed it: *Leaf v Gibbs* (1830) 4 C & P 466. See also *Hollies Stores Ltd v Timmis* [1921] 2 Ch 202 (lease; covenant by guarantors for payment of rent; option to renew on same terms, including covenant by the guarantors; death of one guarantor; failure of option).

4 *Fitzgerald v M'Cowan* [1898] 2 IR 1. Where a guarantee of the solvency of the underwriters of a policy recited that the policy had been signed by five underwriters, and that the signatures of the underwriters were known to the guarantors, evidence to show that the policy had not been signed by all the underwriters was held inadmissible: *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 20 TLR 665.

5 *Cooper v Evans* (1867) LR 4 Eq 45.

6 *Cooper v Evans* (1867) LR 4 Eq 45. See *Anglo-Californian Bank Ltd v London and Provincial Marine and General Insurance Co Ltd* (1904) 20 TLR 665.

7 See *Byblos Bank SAL v Al-Khudairy* [1987] BCLC 232, 2 BCC 99, CA.

8 *Byblos Bank SAL v Al-Khudairy* [1987] BCLC 232, 2 BCC 99, 549, CA. See also *Coyte v Elphick* (1874) 22 WR 541 at 544; *Lawrence v Harris* (1902) Times, 10 March; *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC; *Traill v Gibbons* (1861) 2 F & F 358; *Horne v Ramsdale* (1842) 9 M & W 329; *Dallas v Walls* (1873) 29 LT 599.

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### **1107. Effect of particular stipulations.**

Where the guarantor stipulates for forbearance for a stated time to sue or enforce payment from the principal debtor, the stipulation must be exactly fulfilled or the guarantor will not be liable<sup>1</sup>. Similarly, a stipulation that goods are to be supplied or advances made to the principal debtor must be fulfilled, as being a condition precedent to the guarantor's liability<sup>2</sup>.

A guarantor who agrees to pay the creditor within a stated period after the receipt by the principal debtor of a written notice demanding payment from him is nevertheless discharged from liability where the giving of that notice is no longer possible owing to the death of the principal debtor<sup>3</sup>.

A guarantor for payment of a promissory note across which words are written making it payable at a particular place is liable even though presentation is not made at that place, because, to be effectual, such words should be in the body of the note<sup>4</sup>. Failure by an employer to comply with statutory directions in his dealings with an employee will not necessarily discharge the employee's guarantor where such directions are not clearly imperative but are merely permissive<sup>5</sup>.

Notice by or on behalf of the creditor should be given to the guarantor of the waiver by the creditor of any stipulation, introduced for his benefit, the non-fulfilment of which would have discharged the guarantor<sup>6</sup>.

In the case of a guarantee for the good behaviour of another in an office or employment, the guarantor's liability does not commence until the principal debtor has been legally appointed to the office or employment<sup>7</sup>.

1 See *Rolt v Cozens* (1856) 18 CB 673. Cf *Board v Hoey* (1948) 65 TLR 43; and see PARA 1084 note 13. It has, however, been held in Scotland that where a guarantee stipulates that no payment of the principal sum to which it relates is to be demanded before a certain date, breach of this stipulation does not discharge the guarantor: see *London and Midland Bank Ltd v Forrest* (1899) 2 F 179, Ct of Sess. See also PARAS 1049, 1242-1243.

2 *Westhead v Sproson* (1861) 6 H & N 728; *Boyd v Moyle* (1846) 2 CB 644 at 650; *Broom v Batchelor* (1856) 1 H & N 255; *Johnston v Nicholls* (1845) 1 CB 251; *Wood v Benson* (1831) 2 Cr & J 94; *Hartland v Jukes* (1863) 1 H & C 667 at 675 per Pollock CB.

3 *Rickaby v Lewis* (1905) 22 TLR 130; and see *Bonser v Cox* (1841) 4 Beav 379; *Stoneham v Ocean, Railway and General Accident Insurance Co* (1887) 19 QBD 237.

4 *Stevenson v Brown* (1902) 18 TLR 268.

5 *Gwynne v Burnell* (1840) 7 Cl & Fin 572, HL.

6 *Morten v Marshall* (1863) 2 H & C 305.

7 *Kepp v Wiggett* (1850) 10 CB 35; *Holland v Lea* (1854) 9 Exch 430; *Nares v Rowles* (1811) 14 East 510; *Webb v James* (1840) 7 M & W 279. As to the circumstances in which a recital in the guarantee of the appointment of the principal debtor will operate as an estoppel against the guarantor see PARA 1086.

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### **C. DURATION OF GUARANTOR'S LIABILITY**

#### **1108. Duration of a guarantee.**

The duration<sup>1</sup> of the guarantor's liability depends upon the terms of the guarantee<sup>2</sup>. Some guarantees are intended to cover a single credit or transaction only<sup>3</sup>, while others, called 'continuing guarantees'<sup>4</sup>, are framed so as to apply to a series of credits or transactions. In the case of a single credit or transaction the guarantor's liability extends only to the one credit or transaction agreed upon, while in the case of a continuing guarantee the liability endures until the credits or transactions contemplated by the parties and covered by the guarantee have been exhausted or until the guarantee itself has been revoked<sup>5</sup>.

As the language of guarantees and their subject matter and the surrounding circumstances differ in almost every case, the question whether a guarantee is continuing or not cannot be determined by any hard and fast rule<sup>6</sup>. It is in each case a question of construction of the guarantee in its context<sup>7</sup>.

1 As to when time begins to run in favour of a guarantor see PARAS 1103 et seq, 1181: and see generally **LIMITATION PERIODS**.

2 Thus, where a bond on the face of it appears to be a simple money bond to secure a sum certain with interest, it must be construed, so far at least as regards the guarantor, as given to secure the debt then existing, and not a floating balance: *Walker v Hardman* (1837) 4 Cl & Fin 258, HL; *Re Medewe's Trust* (1859) 26 Beav 588. On the other hand, a guarantee given to secure 'whatever may be owing' up to the pecuniary limit of the guarantor's prescribed liability applies, prima facie at least, not to a specific and ascertained sum already due to the creditor from the principal debtor at the date of the guarantee, but to what may afterwards become due: *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282, Ex Ch. The words 'whatever may be owing' are, apparently, descriptive not so much of a present debt as of something to become due hereafter: *Wood v Priestner* (1866) LR 2 Exch 66. See also *Kirby v Duke of Marlborough* (1813) 2 M & S 18.

3 If a party means to be guarantor only for a single dealing he should take care to say so: *Merle v Wells* (1810) 2 Camp 413 at 414 per Lord Ellenborough.

4 As to the meaning of 'continuing guarantee' see PARA 1013. In the case of a guarantee to cover advances, the effect of the word 'continuing' is to extend the guarantee beyond the original advance to subsequent advances: *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460 at 466, CA, per Rigby LJ. See also *Re Quest Cae Ltd* [1985] BCLC 266 at 270 per Nourse J.

5 As to the revocation of guarantees see PARA 1200 et seq.

6 *Coles v Pack* (1869) LR 5 CP 65 at 70 per Bovill CJ.

7 See PARA 1084, especially at the text and note 16.

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### **1109. Mercantile or trade guarantees.**

Mercantile or trade guarantees are usually given either to secure the supply of goods on credit or advances of money, and, so far as the guarantor's liability is concerned, may be limited in amount<sup>1</sup> or absolutely unlimited<sup>2</sup>. Where there is a prescribed pecuniary limit, the guarantee, if continuing, is not exhausted by the first advance or credit equal to the prescribed amount<sup>3</sup>, but a guarantee, although continuing and limited to a certain given sum, may, and sometimes does, stipulate that the guarantor is only to be liable for a definite period of time and no longer<sup>4</sup>, in which case, as where it is given as security for the acceptor of bills, it is often a nice question of construction whether it covers transactions completed, but not matured, during the time limit<sup>5</sup>.

1 See *Laurie v Scholefield* (1869) LR 4 CP 622; *Wood v Priestner* (1866) LR 2 Exch 66; affd (1867) LR 2 Exch 282, Ex Ch; *Heffield v Meadows* (1869) LR 4 CP 595; *Beckett v Addyman* (1882) 9 QBD 783, CA; *Coles v Pack* (1869) LR 5 CP 65; *Harriss v Fawcett* (1873) 8 Ch App 866; *R v O'Callaghan* (1838) 1 I Eq R 439; *Grahame v Grahame* (1887) 19 LR Ir 249; *Parker v Wise* (1817) 6 M & S 239; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA; *Bradbury v Morgan* (1862) 1 H & C 249; *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Batson v Spearman* (1838) 9 Ad & El 298; *Browning v Baldwin* (1879) 40 LT 248; *Mason v Pritchard* (1810) 12 East 227; *Boyd v Robins and Langlands* (1859) 5 CBNS 597, Ex Ch; *Bastow v Bennett* (1812) 3 Camp 220; *Allan v Kenning* (1833) 9 Bing 618; *Mayer v Isaac* (1840) 6 M & W 605; *Martin v Wright* (1845) 6 QB 917; *Mann, Taylor & Co Ltd v Royal Bank of Canada* (1935) 40 Com Cas 267.

2 See *Hitchcock v Humfrey* (1843) 5 Man & G 559; *Nottingham Hide, Skin and Fat Market Co v Bottrill* (1873) LR 8 CP 694; *Burgess v Eve* (1872) LR 13 Eq 450; *Lloyd's v Harper* (1880) 16 ChD 290, CA; *Calvert v Gordon* (1828) 3 Man & Ry KB 124; *Coulthart v Clementson* (1879) 5 QBD 42; and see *Australian Joint Stock Bank v Bailey* [1899] AC 396, PC.

3 *Williams v Rawlinson* (1825) Ry & M 233; *Mason v Pritchard* (1810) 12 East 227; *Laurie v Scholefield* (1869) LR 4 CP 622; *Mayer v Isaac* (1840) 6 M & W 605; *Whelan v Keegan* (1858) 7 ICLR 544; *Hitchcock v Humfrey* (1843) 5 Man & G 559; and see *Australian Joint Stock Bank v Bailey* [1899] AC 396, PC; *Kirby v Duke of Marlborough* (1813) 2 M & S 18.

4 *Laurie v Scholefield* (1869) LR 4 CP 622.

5 See *Hollond v Teed* (1848) 7 Hare 50, where the guarantee was held to apply to bills accepted before but not payable until after its termination; and see generally PARA 791 et seq. Apparently a guarantee for payment of goods to be supplied will cover goods contracted for the day before it was given and subsequently supplied: see *Simmons v Keating* (1818) 2 Stark 426.

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### **1110. Framing non-continuing guarantees.**

Whatever is the nature of the guarantee, if it is intended to limit its scope and operation to a single transaction, great care should be taken in framing it<sup>1</sup>, and in the avoidance of words



consistent with or more suitable to an intention on the part of the guarantor to extend his responsibility to several transactions rather than to limit it to one transaction only<sup>2</sup>.

A continuing guarantee will normally be appropriate as security for an overdraft facility, since the overdraft will fluctuate in amount and will often continue for an indefinite period. Guarantees for bank overdrafts usually state in terms that they are to be by way of continuing security, and that they are not to be satisfied, discharged or affected by any intermediate payment or settlement of account<sup>3</sup>. The fact that a guarantee is a continuing one may sometimes be implied from a statement that the guarantor is to be liable for the ultimate balance<sup>4</sup>.

1 See *Merle v Wells* (1810) 2 Camp 413. As to mortgages to secure bank loans see *Hopkinson v Rolt* (1861) 9 HL Cas 514; *Bradford Banking Co Ltd v Briggs & Co Ltd* (1866) 12 App Cas 29, HL; *Bank of Africa Ltd v Salisbury Gold Mining Co* [1892] AC 281, PC; *Burgess v Eve* (1872) LR 13 Eq 450 at 459 per Malins V-C.

2 For examples of continuing guarantees see *Heffeld v Meadows* (1869) LR 4 CP 595; *Coles v Pack* (1869) LR 5 CP 65; *Bastow v Bennett* (1812) 3 Camp 220; *Burgess v Eve* (1872) LR 13 Eq 450; *Tanner v Moore* (1846) 9 QB 1; *Merle v Wells* (1810) 2 Camp 413; *Woolley v Jennings* (1826) 5 B & C 165; *Simpson v Manley* (1831) 2 Cr & J 12; *Browning v Baldwin* (1879) 40 LT 248; *Laurie v Scholefield* (1869) LR 4 CP 622; *Williams v Rawlinson* (1825) Ry & M 233; *Martin v Wright* (1845) 6 QB 917; *Allan v Kenning* (1833) 9 Bing 618; *Nottingham Hide, Skin and Fat Market Co v Bottrill* (1873) LR 8 CP 694; *Mayer v Isaac* (1840) 6 M & W 605; *Dry v Davy* (1839) 10 Ad & El 30; *Hitchcock v Humfrey* (1843) 5 Man & G 559; *Hargreave v Smee* (1829) 6 Bing 244; *Weston v Empire Assurance Corp Ltd* (1868) 19 LT 305. For examples of specific or non-continuing guarantees see *Kirby v Duke of Marlborough* (1813) 2 M & S 18; *Nicholson v Paget* (1832) 1 Cr & M 48; *Tayleur v Wildin* (1868) LR 3 Exch 303; *Kay v Groves* (1829) 6 Bing 276; *Bovill v Turner* (1815) 2 Chit 205; *Melville v Hayden* (1820) 3 B & Ald 593; *Walker v Hardman* (1837) 4 Cl & Fin 258, HL; *Re Medewe's Trust* (1859) 26 Beav 588; *Atwood v Crowdie* (1816) 1 Stark 483.

3 Without this provision it might be argued that by virtue of the operation of the rule in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529, 572 (sometimes referred to simply as *Clayton's Case*; see also *Deeley v Lloyds Bank Ltd* [1912] AC 756, HL), under which credits to the account are to be treated as appropriated to the earliest debits, the obligation secured no longer exists once sufficient credits have been paid into the account to repay the original borrowing, and that subsequent debits though not increasing the overdraft were new borrowings not covered by the guarantee: see *Re Quest Cae Ltd* [1985] BCLC 266 at 270 per Nourse J.

4 Cf *Wright v New Zealand Farmers' Co-operative Association of Canterbury Ltd* [1939] AC 439, [1939] 2 All ER 701, PC. The argument sometimes put forward by guarantors, that until all other recoveries have been completed there can be no ultimate balance, and so nothing for the guarantee to bite on, is misconceived.

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### 1111. Fidelity guarantees.

Continuing guarantees given for the fidelity of a person in some office or employment have often given rise to difficult questions as to the duration of the guarantor's liability<sup>1</sup>.

Where there is nothing to control the general and indefinite language of the condition of a fidelity bond, and it does not appear from any recital in it or in any other way that the office or employment for the due discharge of which the bond has been given is limited in duration, the liability of the guarantor is co-extensive in duration with that of the employee<sup>2</sup>.

1 Where a fidelity bond is given as part of the consideration for the appointment of the principal debtor to an office or employment, it should, in the guarantor's interest, expressly stipulate that the bond is to be

determinable by notice or by the guarantor's death: *Re Crace, Balfour v Crace* [1902] 1 Ch 733; *Gordon v Calvert* (1828) 4 Russ 581.

Where the office is for a specific time only, the guarantor's liability is confined to that specific time (see *Kitson v Julian* (1855) 4 E & B 854; *Bamford v Iles and Neale* (1849) 3 Exch 380; *Hassell v Long* (1814) 2 M & S 363; *Wardens of St Saviour's, Southwark v Bostock* (1806) 2 Bos & PNR 175) unless the fidelity bond contains apt words extending his liability to subsequent reappointments (*Peppin v Cooper* (1819) 2 B & Ald 431; *Augero v Keen* (1836) 1 M & W 390; and see also *Dartmouth Corp v Silly* (1857) 7 E & B 97; *Oswald v Berwick-upon-Tweed Corp* (1856) 5 HL Cas 856; *Portsea Island Union Guardians v Whillier* (1860) 6 Jur NS 887).

It sometimes happens that, while the condition of the bond is general and indefinite as to the time during which the guarantor is to remain liable for the employee, the recital shows that the employee's appointment to the office in question is for a specific time only. In such cases the condition is controlled by the recital and the guarantor's liability restricted to that specific time (*Lord Arlington v Merricke* (1672) 2 Saund 403; *Liverpool Waterworks Co v Atkinson* (1805) 6 East 507), whether the recital specifies in so many words the length of the term of office (*Lord Arlington v Merricke* above; *Liverpool Waterworks Co v Atkinson* above) or merely states that the appointment was made under some statute by which the office is expressly limited to a specified period (*Peppin v Cooper* above). However, this is not so when a statute is indefinite as to the period of duration of the appointment (*Curling v Chalklen* (1815) 3 M & S 502).

Even where the guarantor may have consented to the employee's reappointment, he is apparently only liable for defaults committed during the period for which the original appointment was made: *Kitson v Julian* (1855) 4 E & B 854; and see *Williams v Jones* (1729) Bunb 275.

Owing to delay in getting guarantee bonds passed in the head office of an English company in London it has happened that where the bond of an English guarantee company is accepted in Scotland, the time prescribed for finding security expires before the bond can be obtained. Accordingly, in *Cuthbertson v Macdougall* (1905) 13 SLT 205, Ct of Sess (OH), the Lord Ordinary directed a bond of a Scottish guarantee company to be substituted for that of an English company.

Fidelity guarantees are now rarely encountered: see further PARA 1133.

2 See *Birmingham Corp v Wright* (1851) 16 QB 623; *Sansom v Bell* (1809) 2 Camp 39; *Curling v Chalklen* (1815) 3 M & S 502.

See also *Tullamore UDC v Robins* (1913) 48 ILT 180, where the guarantor was held liable for defalcations committed before the date of the bond and failure after the date of the bond to account at audit. A bond conditioned for the due accounting by a collector of church and poor rates to the obligees 'and their successors', who were churchwardens and overseers, was held not to extend beyond their year of office, as the collector's appointment was only for such period (*Leadley v Evans* (1824) 2 Bing 32), although, apparently, had the collector's appointment been for a longer period than that of the obligees, the guarantors would have remained liable to 'the successors' of the original obligees (*M'Gahey v Alston* (1836) 1 M & W 386).

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### **1112. Principal's appointment to new office.**

Where the principal debtor for whom a fidelity guarantee has been given is subsequently appointed to a new office, and his original appointment is thereby terminated, the guarantor, unless the guarantee provides to the contrary, ceases to be liable, even though the second appointment does not involve additional or different duties from those originally imposed<sup>1</sup>. The guarantor is also freed from further liability under a fidelity guarantee where the old and new appointments of the principal debtor are so incompatible that acceptance of the new appointment necessarily vacates the old one<sup>2</sup>. However, the mere acceptance by the principal debtor of an incompatible office will not have this effect in a case where he cannot divest himself of his original office by his own act, but requires the concurrence of another authority to his resignation, that authority not being privy or consenting to the second appointment<sup>3</sup>. So where the second appointment does not operate as an implied resignation from the old office

because the authority making the second appointment cannot remove the principal debtor from his original office or accept a surrender of it, the guarantor continues liable<sup>4</sup>.

Where the new office or employment is not incompatible with the original one, so that the old appointment does not terminate, the guarantor is not discharged<sup>5</sup>.

1 *Malling Union v Graham* (1870) LR 5 CP 201. Fidelity guarantees are now rarely encountered. See further PARA 1133. See also PARA 1111.

2 *Frank v Edwards* (1852) 8 Exch 214; *Anderson v Thornton* (1842) 3 QB 271; and see *R v Pateman* (1788) 2 Term Rep 777; *Milward v Thatcher* (1787) 2 Term Rep 81. As to incompatible offices see generally **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1170.

3 *R v Patteson* (1832) 4 B & Ad 9.

4 *Worth v Newton* (1854) 10 Exch 247.

5 See *Frank v Edwards* (1852) 8 Exch 214; *Anderson v Thornton* (1842) 3 QB 271. Thus, where a person becomes guarantor for a clerk in a bank, who is afterwards appointed manager of the bank, the guarantor will not be relieved from liability unless it is proved that when the principal became manager he ceased to be a clerk: *Anderson v Thornton*.

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### **1113. Change in tenure of appointment.**

The conversion of the office filled by the principal debtor from an annual office into one during pleasure will determine the guarantor's liability<sup>1</sup> unless the guarantee provides to the contrary<sup>2</sup>. On the other hand, where one of the terms of a contract of service makes it determinable by one month's notice on either side, and afterwards, without the guarantor's knowledge, it is agreed that the service is to be terminable by three months' notice, the guarantor is not discharged where he has not chosen to make that term part of his own contract<sup>3</sup>.

1 *Cambridge Corpn v Dennis* (1858) EB & E 660.

2 *Oswald v Berwick-upon-Tweed Corpn* (1856) 5 HL Cas 856; *Dartmouth Corpn v Silly* (1857) 7 E & B 97.

3 *Sanderson v Aston* (1873) LR 8 Exch 73, where the guarantor was ultimately discharged from liability on other grounds; see also *Nicholsons v Burt* (1882) 10 R 121, Ct of Sess.

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### **1114. Change in duties of office.**

Any material alteration in the duties of the office of the principal debtor, whether effected by statute<sup>1</sup> or otherwise, will discharge the guarantor under a fidelity guarantee<sup>2</sup>. Where, however, the duties are not materially altered, but lessened, the guarantor's liability continues, even though the salary is reduced as well, unless the guarantee otherwise specifies<sup>3</sup>. Where the guarantor has guaranteed the fidelity of a person holding two offices, one of which is subsequently altered while the other is not, his guarantee still applies to the unaltered office<sup>4</sup>, although, in general, any alteration in the contract between the creditor and the principal debtor to which the guarantor has not consented will discharge the guarantor unless it is evident, without inquiry, that the alteration is insubstantial, or that it cannot but be beneficial to the guarantor<sup>5</sup>.

The sub-division of the original office in respect of which a fidelity guarantee has been given, when coupled with an alteration in the amount and character of the remuneration will terminate the guarantor's liability<sup>6</sup>.

1 *Pybus v Gibb* (1856) 6 E & B 902; *Bartlett v A-G* (1709) Park 277; *Malling Union v Graham* (1870) LR 5 CP 201.

2 *Bonar v Macdonald* (1850) 3 HL Cas 226; *Wembley UDC v Poor Law and Local Government Officers' Mutual Guarantee Association Ltd* (1901) 17 TLR 516.

3 *Frank v Edwards* (1852) 8 Exch 214.

4 *Skillett v Fletcher* (1867) LR 2 CP 469, Ex Ch; *Harrison v Seymour* (1866) LR 1 CP 518; *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46, CA; *Brown & Co v Brown, Brown v Brown & Co* (1877) 36 LT 272, CA.

5 *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA, per Cotton LJ; and see PARA 1235. Thus, a guarantor in a bond conditioned for the good conduct of a bank clerk is not liable for misbehaviour consequent upon his being allowed to become a customer and to keep an account with the bank: *Stoveld v Upton* (1836) 6 LJCP 126.

6 *R v Herron and Montgomery* [1903] 2 IR 474. Where, however, a person was appointed collector of poor rates for a whole parish, his subsequent transfer from one district to another district of the same parish did not per se discharge his guarantor: *Portsea Island Union Guardians v Whillier* (1860) 2 E & E 755.

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### **1115. Change of salary.**

Whether a reduction or increase of the principal debtor's salary or an alteration in the mode of its payment will relieve the guarantor from liability depends upon the construction of the guarantee<sup>1</sup>. If, however, the amount of the salary is to be treated as an essential ingredient in the contract, care must be taken by the guarantor to have a stipulation on the subject introduced into the guarantee or condition of the fidelity bond, as otherwise the alteration will not affect his liability<sup>2</sup>.

1 As to the interpretation of guarantees see PARA 1083 et seq.

2 *Frank v Edwards* (1852) 8 Exch 214 at 220-221 per Parke B. The substitution of payment by commission for remuneration at a fixed salary as originally arranged will, however, operate as a discharge: *North Western Rly Co v Whinray* (1854) 10 Exch 77.

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### **1116. Contemplated appointment not made.**

Where the principal debtor's appointment contemplated by the guarantee is not made at all, but another appointment is made at a higher salary, the guarantor will not be bound<sup>1</sup>. Moreover, when the original appointment is for an indefinite time, and the guarantor has agreed to be liable so long as the debtor continues in office, the subsequent reappointment of the principal debtor at a different salary will, unless the guarantee provides otherwise, revoke the original appointment and terminate the guarantor's liability<sup>2</sup>.

1 *Holland v Lea* (1854) 9 Exch 430.

2 *Bamford v Iles and Neale* (1849) 3 Exch 380 at 386 per Pollock CB; and see *Toames Co-operative Agricultural and Dairy Society Ltd v Foley* [1910] 2 IR 277, CA. Where the principal debtor obtained an increase of salary from his employers by fraud, not only was his guarantor not thereby discharged, but, on the contrary, the loss occasioned to the employers by the fraud was held to be recoverable from the guarantor under a policy for the due and faithful discharge of his duties by the principal debtor: *Bramley Union Guardians v Guarantee Society* (1900) 64 JP 308, CA.

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### **1117. Change in partnership.**

In the absence of agreement to the contrary, a continuing guarantee is revoked as to future transactions by any change in the constitution of the partnership to which or in respect of which a guarantee was given<sup>1</sup>.

1 Partnership Act 1890 s 18. Cf *Backhouse v Hall* (1865) 6 B & S 507 at 520 per Blackburn J; *Barclay v Lucas* (1783) 3 Doug KB 321 at 326 note (d); and see PARAS 1118-1119.

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### **1118. Increase in number of obligees.**

Whether the guarantor's liability will continue after an increase has taken place in the number of the persons to whom the guarantee was originally given is largely a question of intention, ascertainable by reference to the terms of the guarantee<sup>1</sup> and to its subject matter<sup>2</sup>. This intention should, however, be clearly expressed, if effect is to be given to it<sup>3</sup>, and the mere use of language indicating that the guarantee is given to certain individuals in their capacity as partners in a 'firm' or 'house' will not suffice for the purpose<sup>4</sup>.

So it has been held that a guarantee given to one person for the fidelity of another ceases to operate after the first person has taken a third party into partnership with him<sup>5</sup>; and that securities given to a banking firm for a current balance do not cover transactions subsequent to the admission of a new partner<sup>6</sup>.

1 *Backhouse v Hall* (1865) 6 B & S 507 at 519-520 per Blackburn J; and see *Pease v Hirst* (1829) 10 B & C 122; *Ex p Watson* (1815) 19 Ves 459; *Pariente v Lubbock* (1856) 8 De GM & G 5; *Eyton v Knight* (1838) 2 Jur 8.

2 *Barclay v Lucas* (1783) as reported in 1 Term Rep 291n at 293 per Lord Mansfield. This dictum still holds good, although the actual decision given can no longer be supported (see *Dance v Girdler* (1804) 1 Bos & PNR 34) having regard to the cases cited in note 4.

3 *Strange v Lee* (1803) 3 East 484 at 491 per Lawrence J; *Backhouse v Hall* (1865) 6 B & S 507 at 519-520 per Blackburn J; and see *Metcalf v Bruin* (1810) 12 East 400; *Kipling v Turner* (1821) 5 B & Ald 261; *Ex p Kensington* (1813) 2 Ves & B 79.

4 *Weston v Barton* (1812) 4 Taunt 673; and see *Pemberton v Oakes* (1827) 4 Russ 154; *Holland v Teed* (1848) 7 Hare 50; *Spier v Houston* (1829) 4 Bli NS 515, HL; *Wright v Russel* (1774) 3 Wils 530. A different view from that expressed in these cases was formerly held: see *Weston v Barton* above at 681 per Sir James Mansfield CJ; *Backhouse v Hall* (1865) 6 B & S 507 at 519 per Blackburn J; *Barclay v Lucas* (1783) as reported in 1 Term Rep 291n. This last-named case is apparently overruled: see *Dance v Girdler* (1804) 1 Bos & PNR 34; *Strange v Lee* (1803) 3 East 484; *Weston v Barton* above.

5 *Wright v Russel* (1774) 3 Wils 530.

6 *Eyton v Knight* (1838) 2 Jur 8; and see *Royal Bank of Scotland v Christie* (1841) 8 Cl & Fin 214, HL.

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### **1119. Decrease in number of obligees.**

The death of a member of the firm to which a guarantee is given will generally discharge the guarantor<sup>1</sup>, even though the guarantee is given for a fixed time which has not expired when the death occurs<sup>2</sup>, unless a contrary intention is indicated by the guarantee<sup>3</sup>. A bond given by a guarantor for repayment of such sums as may be advanced to meet bills drawn by two persons in partnership or either of them does not extend to bills drawn by one of those persons after the death of the other<sup>4</sup>. A bond conditioned for faithful service of the principal to the obligee and his executors does not make the guarantor liable for defaults committed by the principal, after the obligee's death, when in the service of the executors who continue the business and retain him in their employment<sup>5</sup>. The retirement of a partner from the firm to which a guarantee has been given will determine the guarantor's liability as to future transactions under it<sup>6</sup> in the absence of any expression of intention to the contrary contained in the guarantee<sup>7</sup>. Unless such an intention is indicated, the retirement from the firm of a partner for whose fidelity the guarantor has made himself liable will determine the guarantor's future liability, even where the guarantee contemplates its continuance after that partner's death<sup>8</sup>.

1 See the Partnership Act 1890 s 18; *Phillips v Alhambra Palace Co* [1901] 1 KB 59; *Strange v Lee* (1803) 3 East 484; *Weston v Barton* (1812) 4 Taunt 673; *Pemberton v Oakes* (1827) 4 Russ 154; *Chapman v Beckinton* (1842) 3 QB 703; *Royal Bank of Scotland v Christie* (1841) 8 Cl & Fin 214, HL. The effect of change by death etc in a firm to which an apprentice is bound on the contract of apprenticeship, and consequently on the liability of a guarantor for that contract, is uncertain: see *Lloyd v Blackburn* (1842) 9 M & W 363; *R v St Martin's, Exeter, Inhabitants* (1835) 2 Ad & El 655. As to the revocation of a continuing guarantee upon the death of the guarantor or the principal debtor see PARA 1202 et seq.

2 *Hollond v Teed* (1848) 7 Hare 50; and see the Partnership Act 1890 s 18.

3 See *Metcalf v Bruin* (1810) 12 East 400; and the Partnership Act 1890 s 18.

4 *Simson v Cooke* (1824) 1 Bing 452.

5 *Barker v Parker* (1786) 1 Term Rep 287.

6 *Myers v Edge* (1797) 7 Term Rep 254; *Dry v Davy* (1839) 10 Ad & El 30; *Solvency Mutual Guarantee Co v Freeman* (1861) 7 H & N 17; and see the Partnership Act 1890 s 18.

7 *Pease v Hirst* (1829) 10 B & C 122; *Re Carlill, ex p Marsh* (1815) 2 Rose 240 at 242; *Re Ireland and Harrison, ex p Lloyd* (1838) 3 Deac 305.

8 *Cambridge University v Baldwin* (1839) 5 M & W 580.

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## **1120. Change in principal's position.**

A guarantor for the fidelity of an agent is not liable after the agency has been entrusted by the employers to a new firm comprising that agent<sup>1</sup>, even where the guarantor had knowledge, before he executed the fidelity bond, that the agent intended to enter into the partnership after the execution of the fidelity bond<sup>2</sup>; although where on the true construction of the contract it appears that the guarantor agrees to remain liable after the principal has taken another into partnership with him, the guarantee will continue applicable to future transactions<sup>3</sup>.

1 *Bellairs v Ebsworth* (1811) 3 Camp 53.

2 *Montefiore v Lloyd* (1863) 15 CBNS 203; *London Assurance Co v Bold* (1844) 6 QB 514; and see *Mills v Alderbury Union Guardians* (1849) 3 Exch 590 at 596.

3 *Leathley v Spyer* (1870) LR 5 CP 595; and see *Bank of British North America v Cuvillier* (1861) 4 LT 159, PC.

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## **D. ENFORCEMENT OF GUARANTOR'S LIABILITY**

### 1121. Remedy against guarantor.

The remedy against a solvent<sup>1</sup> guarantor on his guarantee is by bringing a claim in the High Court or in a county court<sup>2</sup>. In both courts procedure exists by which the creditor may in a proper case recover final judgment against the guarantor in a summary manner<sup>3</sup>.

It is an abuse of process to present a winding-up petition against a solvent guarantor company as a means of putting pressure on it to pay money which is bona fide disputed, instead of applying for summary judgment<sup>4</sup>.

1 As to the effect of bankruptcy on a guarantee see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 490, 504 et seq. The guarantor for an account should be joined to the proceedings where the trustee in bankruptcy seeks to show that payments by the debtor to the person with whom he was in account are voidable as a transaction at an undervalue or a preference: *Re Idenden (a bankrupt), ex p Trustee of the Property of the Bankrupt v Bateman & Co Ltd* [1970] 2 All ER 387n, [1970] 1 WLR 1015; and see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 653 et seq.

2 A county court now has unlimited jurisdiction to hear and determine any claim founded on contract: see the County Courts Act 1984 s 15(1) (amended by SI 1991/724); and **COURTS** vol 10 (Reissue) PARA 712. For the limited exceptions (which do not affect guarantees) see the County Courts Act 1984 s 15(2); and **COURTS** vol 10 (Reissue) PARA 722. The remedy of the creditor against the guarantor may be barred by the running of time: see PARA 1180.

3 As to summary judgment see CPR Pt 24; and **CIVIL PROCEDURE** vol 11 (2009) PARA 524 et seq. For examples of cases concerning the principles applicable to applications for summary judgment involving claims under a guarantee see eg *Lloyds Bank plc v Ellis-Fewster* [1983] 2 All ER 424, [1983] 1 WLR 559, CA; *Banque de Paris et des Pays-Bas (Suisse) SA v de Naray* [1984] 1 Lloyd's Rep 21, CA; *Morgan Guaranty Trust Co v Hadjantonakis (No 2)* [1988] 1 Lloyd's Rep 375; *Den Norske Creditbank v Sarawak Economic Development Corp* [1988] 2 Lloyd's Rep 616; affd [1989] 2 Lloyd's Rep 35, CA; *Standard Chartered Bank Ltd v Yaacoub* [1990] CA Transcript 699; *National Westminster Bank plc v Daniel* [1994] 1 All ER 156, [1993] 1 WLR 1453, CA. Conversely, many authorities concerning the law of guarantees have been decided on applications for summary judgment: see eg *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502, CA; *Hyundai Heavy Industries Co v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; affd [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL; *Dow Banking Corp v Mahnakh Spinning and Weaving Corp and Bank Mellat* [1983] 2 Lloyd's Rep 561; *Byblos Bank SAL v Al-Khudairy* [1987] BCLC 232, CA.

4 See *Re a Company (No 0012209 of 1991)* [1992] 2 All ER 797, [1992] 1 WLR 351.

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### 1122. Joinder of parties.

Where a guarantee is given to two or more creditors jointly<sup>1</sup>, each of them if solvent<sup>2</sup> must, unless the court gives leave to the contrary, be a party to any claim on the guarantee<sup>3</sup>. If it is given to them severally, any one of them, or the personal representative of any one of them, may sue upon it by himself<sup>4</sup>, although all may join as claimants<sup>5</sup>. The court's permission is, however, required to add a party, unless the claim form has not been served<sup>6</sup>.

A claim may be maintained by the several partners of a firm upon a guarantee given to one of them, if it was given for the benefit of all<sup>7</sup>, and especially if the partner to whom the guarantee was addressed did not carry on any separate business to which the guarantee could relate<sup>8</sup>; but where a guarantee is given to one member of a firm personally, in consideration of his



undertaking not to sue certain debtors of the firm, he must sue on the guarantee alone without joining his partners as co-claimants<sup>9</sup>.

A claim may be maintained upon a bond, expressed to be payable to a firm, by the persons who constituted the firm when the bond was executed<sup>10</sup>.

1 By statute, a covenant or obligation under seal made after 1925 (or, as from 31 July 1990, executed as a deed) with two or more persons jointly is construed, in the absence of the expression of a contrary intention, as being also made with each of them: see the Law of Property Act 1925 s 81(1), (5) (s 81(5) added by the Law of Property (Miscellaneous Provisions) Act 1989 Sch 1 para 5). Apart from statute, where a guarantee is given to more persons than one it is a question of construction whether it is given to them jointly or severally. A joint security will not be construed to be joint and several even though one of the parties to it is a guarantor: *Jones v Beach* (1852) 2 De GM & G 886 at 888, doubting *Thorpe v Jackson* (1837) 2 Y & C Ex 553, contra. There is no principle of equity that a joint covenant or promise is to be treated as joint and several: see *Sumner v Powell* (1816) 2 Mer 30; affd (1823) Turn & R 423; *Other v Iveson* (1855) 3 Drew 177; *Kendall v Hamilton* (1879) 4 App Cas 504, HL. See **CONTRACT** vol 9(1) (Reissue) PARA 1083; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 116, 265.

2 Where one of two or more joint contractors is bankrupt, the other or others may sue or be sued in respect of that contract without the joinder of the bankrupt: Insolvency Act 1986 s 345(4); and see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 677.

3 See CPR 19.3(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 211. See also *Roche v Sherrington* [1982] 2 All ER 426, [1982] 1 WLR 599; *Pugh v Stringfield* (1857) 3 CBNS 2; *Pugh v Stringfield* (1858) 4 CBNS 364; *Anderson v Martindale* (1801) 1 East 497; but as to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

4 See *Place v Delegal* (1838) 4 Bing NC 426; *Palmer v Sparshott* (1842) 4 Man & G 137.

5 Any number of claimants or defendants may be joined as parties to a claim: CPR 19.1.

6 See CPR 19.4(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 214.

7 *Garrett v Handley* (1825) 4 B & C 664.

8 *Walton v Dodson* (1827) 3 C & P 162.

9 *Agacio v Forbes* (1861) 14 Moo PCC 160.

10 *Moller v Lambert* (1810) 2 Camp 548. As to claims by and against firms see generally CPR 7.2A, CPR 73.22; and **PARTNERSHIP**.

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### 1123. Trustees, etc.

A guarantee given to the trustees of an unincorporated company<sup>1</sup>, or to an official of a court of justice acting as trustee for a fluctuating and unknown body of suitors<sup>2</sup>, or to a committee of an association of underwriters<sup>3</sup> may be sued upon by such persons for the benefit of those whom they represent.

1 *Metcalf v Bruin* (1810) 12 East 400.

2 *Lamb v Vice* (1840) 6 M & W 467.

<sup>3</sup> *Lloyd's v Harper* (1880) 16 ChD 290, CA; and see *Leathley v Spyer* (1870) LR 5 CP 595; *Moller v Lambert* (1810) 2 Camp 548. As to the effect of amalgamation of firms or companies see PARA 1205.

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### **1124. Who may enforce guarantee.**

A guarantee which is not addressed to anyone may be enforced by the party to whom or for whose benefit it was given, if accepted by him in writing signed by him<sup>1</sup>.

A person who is not a party to a guarantee or indemnity or fidelity bond of guarantee may sometimes sue on it as being entitled to the benefit of it<sup>2</sup>. To entitle him to sue either of the contracting parties he must possess an actual beneficial right which places him in the position of beneficiary under the contract<sup>3</sup>.

Subject to any contractual restrictions contained within the guarantee itself, the person to whom a guarantee is given may assign the guaranteed debt and the securities for the debt<sup>4</sup>. Where he does so, the assignee acquires all the rights of the assignor<sup>5</sup>, including the right to sue in his own name on the guarantee<sup>6</sup>. It is not necessary, although it may be prudent, for the creditor to give notice to the guarantor of the assignment of a guarantee<sup>7</sup>. However, unless and until such notice is given, the creditor cannot recover the amount due under the guarantee in a claim to which the assignor is not a party<sup>8</sup>. In the context of an all-moneys guarantee of present and future debts, it will be a question of construction as to whether an assignment of the guarantee entitles the assignee to claim under the guarantee in respect of advances made by him (and not by the assignor) to the principal debtor after the date of the assignment<sup>9</sup>.

<sup>1</sup> *Williams v Byrnes* (1863) 1 Moo PCCNS 154 at 198; and see *Re Agra and Masterman's Bank, ex p Asiatic Banking Corp'n* (1867) 2 Ch App 391. The ruling in *Walton v Dodson* (1827) 3 C & P 162 seems to suggest that such a guarantee is enforceable even if not so accepted in writing, but it is difficult to reconcile this ruling with those cases (see PARA 1071) which decide that to satisfy the Statute of Frauds (1677) s 4 (see PARA 1052), the contracting parties must be named or sufficiently described in writing.

<sup>2</sup> See *Kenney v Employers' Liability Assurance Corp'n* [1901] 1 IR 301, CA (action by mortgagees as obligees and mortgagor as person entitled to equity of proceeds of mortgage security where bond given by defendant for due discharge of his duties by a fraudulent receiver appointed by mortgagees). Cf *Lloyd's v Harper* (1880) 16 ChD 290, CA (guarantee of performance of engagements by member of association of underwriters; association subsequently incorporated; committee of association, and corporation as its successors, entitled to enforce guarantee for benefit of all persons with whom member had contract engagement). In *Re Stratton, ex p Salting* (1883) 25 ChD 148, CA, a third person whose securities had been fraudulently pledged to a bank for a debt of a partnership firm was held entitled pro tanto to the benefit of a guarantee for payment to the bank of the partnership debt given by a member of the firm who was innocent of the fraudulent pledge.

<sup>3</sup> *Gandy v Gandy* (1885) 30 ChD 57 at 66-67, CA; *Lloyd's v Harper* (1880) 16 ChD 290, CA; *Tomlinson v Gill* (1756) Amb 330; *Re Flavell, Murray v Flavell* (1883) 25 ChD 89, CA; *Drimmie v Davies* [1899] 1 IR 176, CA; *Gregory v Williams* (1817) 3 Mer 582; *Page v Cox* (1852) 10 Hare 163; *Tweddle v Atkinson* (1861) 1 B & S 393; *Dickson v Reuter's Telegram Co* (1877) 3 CPD 1, CA; and see *Kenney v Employers' Liability Assurance Corp'n* [1901] 1 IR 301 at 307, CA; *West v Houghton* (1879) 4 CPD 197; *Beswick v Beswick* [1966] Ch 538, [1966] 3 All ER 1, CA; affd in part [1968] AC 58, [1967] 2 All ER 1197, HL (applying *Drimmie v Davies* above). See also **EQUITY** vol 16(2) (Reissue) PARA 609.

<sup>4</sup> *Wheatley v Bastow* (1855) 7 De GM & G 261 at 279-280 per Turner LJ; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA; but see *Re Barrington and Burton* (1804) 2 Sch & Lef 112; *Re Barned's Banking Co, ex p Stephens* (1868) 3 Ch App 753.

<sup>5</sup> *Wheatley v Bastow* (1855) 7 De GM & G 261 at 279-280 per Turner LJ.

6 See *Re Hallett & Co, ex p Cocks, Biddulph & Co* [1894] 2 QB 256, CA. As to assignments of debts and choses in action see the Law of Property Act 1925 s 136; and **CHOSSES IN ACTION** vol 13 (2009) PARA 14 et seq.

7 *Wheatley v Bastow* (1855) 7 De GM & G 261 at 280 per Turner LJ; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833 at 841-842, 846, 852, CA.

8 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, HL; *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1922] 2 KB 433, CA; affd [1924] AC 1, HL; *Central Insurance Co Ltd v Seacalf Shipping Corpn, The Aiolos* [1983] 2 Lloyd's Rep 25, CA; *Weddell v JA Pearce & Major* [1988] Ch 26, [1987] 3 All ER 624. A claim brought by an equitable assignee in his own name without joining the assignor is not a nullity. However, such a claim will usually be stayed pending joinder, either as a co-claimant or as co-defendant, of the assignor: *Weddell v JA Pearce & Major*; see also *EM Bowden's Patents Syndicate Ltd v H Smith & Co* [1904] 2 Ch 86; affd [1904] 2 Ch 122, CA. The requirement to join the assignors is not a legal one, but one of practice, and if the assignors retain no interest in the claims or their subject-matter, and there is no real purpose in having them before the court, that requirement is one which the court can dispense with: see *Central Insurance Co Ltd v Seacalf Shipping Corpn, The Aiolos* above at 33-34, CA. In particular, the court will not insist on joinder of the assignor where there is no risk of a separate claim by the assignor: see *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68 at [60], [2001] QB 825, [2001] 3 All ER 257 per Mance LJ.

9 *Sterling Bank v Rastogi* (12 March 2003, unreported) per Mitting J, a case about a guarantee governed by New York law.

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## 1125. Defendants to claim on guarantee.

The claimant may join as defendants to a claim on a guarantee all or any of the persons liable under it<sup>1</sup>, whether their liability is joint, joint and several or several<sup>2</sup>. The principal debtor and the guarantor may be sued in the same claim<sup>3</sup>. There is, in general, no need for the creditor to sue or arbitrate against the principal debtor, even if the principal debtor is solvent<sup>4</sup>; but the court may order a person to be added as a new party if it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings or there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue<sup>5</sup>.

1 The court's permission is required to remove, add or substitute a party, unless the claim form has not been served: see CPR 19.4(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 214.

2 Prior to the enactment of the Civil Liability (Contribution) Act 1978 s 3, judgment against one of two joint contractors, even though unsatisfied, released the others from liability: *King v Hoare* (1844) 13 M & W 494; *Kendall v Hamilton* (1879) 4 App Cas 504, HL. Judgment recovered against any person liable in respect of any debt or damage is not now a bar to a claim, or to the continuance of a claim, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage: see the Civil Liability (Contribution) Act 1978 s 3. Thus the claimant may now choose which of the joint contractors he wishes to sue, and need not join and cannot be compelled to join the other joint contractors. If the defendant wishes to claim contribution from co-guarantors who have not been made defendants, he must himself join them as third parties. Cases (such as *Cockburn v Thompson* (1809) 16 Ves 321 at 326; *Madox v Jackson* (1746) 3 Atk 405; *Fell v Goslin* (1852) 7 Exch 185; *Collins v Prosser* (1823) 1 B & C 682; *Ellis v Emmanuel* (1876) 1 ExD 157, CA; *Armstrong v Cahill* (1880) 6 LR 440) holding that all joint guarantors must be joined in a claim to recover the aggregate due from them are no longer good law.

3 See note 1. See also *Berwick-upon-Tweed Corpn v Murray* (1857) 7 De GM & G 497.

4 See PARA 1104.

5 See CPR 19.2(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 213.

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## 1126. Set-off.

In an appropriate case, a guarantor who has a money claim against the creditor may be able to rely upon that claim<sup>1</sup> as a total or partial defence by way of set-off to the creditor's claim under the guarantee. Similarly, in an appropriate case, the creditor may set up his claim under the guarantee as a defence to a money claim against him by the guarantor<sup>2</sup>.

Where all parties are solvent<sup>3</sup>, these defences are only available where both liabilities are presently payable. In the absence of agreement, the creditor may not set off the guarantor's contingent liability under the guarantee in reduction of the creditor's present debts or other money obligations to the guarantor<sup>4</sup>.

The right of set-off may be excluded by the terms of the contract of guarantee<sup>5</sup>.

Where the creditor or the guarantor is insolvent, the right of set-off is statutory<sup>6</sup>. Parties may not increase<sup>7</sup> or diminish<sup>8</sup> by contract the extent of the rights of set-off conferred in bankruptcy and liquidation. Where demand has been made under the guarantee prior to the insolvency, or the guarantee contains a principal debtor clause by virtue of which the guarantor is liable without demand<sup>9</sup>, the statutory set-off takes effect automatically<sup>10</sup>.

Where the guarantor's liability to the creditor is reduced by virtue of a set-off, that reduction also automatically reduces the liability of the principal debtor to the creditor<sup>11</sup>.

1 For the extent of the guarantor's entitlement to rely upon rights of set-off available to the principal debtor see PARA 1135.

2 A claim under a guarantee (which is properly regarded as a liability to the creditor for unliquidated damages: see *Moschi v Lep Air Services Ltd* [1973] AC 331 at 348-349, [1972] 2 All ER 393 at 401-402, HL, per Lord Diplock, and at 357 and 409 per Lord Simon of Glaisdale) cannot form the subject of a legal set-off until the amount of the liability in respect of which the guarantee was given has been established: *Axel Johnson Petroleum AB v MG Mineral Group AG, The Jo Lind* [1992] 2 All ER 163 at 166, [1992] 1 WLR 270 at 272, CA, per Leggatt LJ; *Crawford v Stirling* (1802) 4 Esp 207; *Morley v Inglis* (1837) 4 Bing NC 58. However, if the amount of that liability has been established (eg because the underlying obligation is a debt), so that the amount claimed against the guarantor is 'capable of being liquidated or ascertained with precision at the time of pleading' (*Morley v Inglis* (1837) 4 Bing NC 58 at 71 per Tindal CJ), it may form the subject of a set-off at law: *Axel Johnson Petroleum AB v MG Mineral Group AG* above; *Banco Central SA and Trevelan Navigation Inc v Lingoss & Falce Ltd and BFI Line Ltd, The Raven* [1980] 2 Lloyd's Rep 266. Where the claims are not for liquidated sums, they may nevertheless be the subject of an equitable set-off if they are sufficiently connected to make it inequitable to insist upon the one claim without taking the other into account: *The Raven*; *Axel Johnson Petroleum AB v MG Mineral Group AG* above; and see *Hanak v Green* [1958] 2 QB 9, [1958] 2 All ER 141, CA; *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927, [1978] 3 All ER 1066, CA; affd in part on a different point [1979] AC 757, [1979] 1 All ER 307, HL; *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309, CA. As to set-off at law, and the defence of equitable set-off, see *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] EWCA Civ 457, [2001] 2 Lloyd's Rep 93, [2001] All ER (D) 13 (Apr); and see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 634 et seq.

3 As to set-off in bankruptcy or company liquidation see the text and notes 6-10.

4 'You cannot retain a sum of money which is actually due against a sum of money which is only becoming due at a future time': *Jeffryes v Agra and Masterman's Bank* (1866) LR 2 Eq 674 at 680 per Page Wood V-C; *Bower v Foreign and Colonial Gas Co Ltd, Metropolitan Bank, Garnishees* (1874) 22 WR 740.

5 *Continental Illinois National Bank and Trust Co of Chicago v Papanicolaou, The Fedora, The Tatiana and The Eretrea II* [1986] 2 Lloyd's Rep 441, CA; *Hongkong and Shanghai Banking Corp v Kloeckner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513. However, where the guarantor deals as consumer or the guarantee is in the creditor's standard form, provisions excluding the right of set-off must satisfy the requirement of reasonableness imposed by the Unfair Contract Terms Act 1977 in order to be effective: cf *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] QB 600, [1992] 2 All ER 357, CA. See also *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 442, CA. Where the guarantee takes the form of a legal mortgage, the mortgagor guarantor cannot usually resist the creditor mortgagee's claim for possession by claiming an equitable set-off for a sum exceeding the amount secured: *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n, CA; *Ashley Guarantee plc v Zacaria* [1993] 1 All ER 254, [1993] 1 WLR 62, CA.

6 See the Insolvency Act 1986 s 323 in relation to bankruptcy; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547 et seq; the Insolvency Rules 1986, SI 1986/1925, r 4.90 in the case of company liquidation; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 792.

Where an insurer, in relation to which an administration order has been made, subsequently goes into liquidation, sums due from the insurer to another party are not to be included in the account of mutual dealings rendered under the Insolvency Rules 1986, SI 1986/1925, r 4.90 (mutual credits and set-off) if, at the time they became due: (1) an administration application had been made under the Insolvency Act 1986 Sch B1 para 12 in relation to the insurer; (2) in the case of an appointment of an administrator under Sch B1 para 14, a notice of appointment had been filed with the court under Sch B1 para 18 in relation to the insurer; or (3) in the case of an appointment of an administrator under Sch B1 para 22, a notice of intention to appoint had been filed with the court under Sch B1 para 27 in relation to the insurer: Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002, SI 2002/1242, art 5 (substituted by SI 2003/2134); and see also PARA 492.

7 *British Eagle International Air Lines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL.

8 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

9 See PARA 1105 note 2. A contingent debt under a guarantee which has not fallen due at the date of the bankruptcy order or order or resolution for winding up may be the subject of a set-off under the Insolvency Act 1986 s 323 or the Insolvency Rules 1986 r 4.90: see *Re Charge Card Services Ltd* [1987] Ch 150, [1986] 3 All ER 289 (affd without considering this point [1989] Ch 497, [1988] 3 All ER 702, CA), where Millett J held that contingent debts and liabilities which arose from mutual dealings prior to the insolvency could be the subject of a set-off under the Bankruptcy Act 1914 s 31 (now repealed) as applied to company liquidation (applying *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA; *Re a Debtor (No 66 of 1955), ex p the Debtor v Trustee of the Property of Waite* [1956] 3 All ER 225, [1956] 1 WLR 1226, CA; not following *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, [1985] 1 All ER 155; and explaining *Re Asphaltic Wood Pavement Co, Lee and Chapman's Case* (1885) 30 ChD 216, CA; *Re Daintrey, ex p Mant* [1900] 1 QB 546, CA). See also *Re Bank of Credit and Commerce International (in liquidation) No 8* [1998] AC 214, [1997] 4 All ER 568, HL; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 557. Cf the Insolvency Act 1986 s 322(3) and the Insolvency Rules 1986, SI 1986/1925, r 4.86(1), which provide for the valuation of contingent debts for the purpose of proving for them in the insolvency. See further **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 540; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 789. As to insurers see note 6.

10 *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA. So where the guarantor for a company's liabilities has deposited with the creditor bank a sum of money by way of security for his guarantee liability under a guarantee and charge containing clauses which state that his liability is to be as principal debtor, his liability under the guarantee is automatically set off in the bank's insolvency against the bank's liability to repay his deposit, thereby reducing or extinguishing not only his indebtedness to the bank under the guarantee, but also that of the principal debtor company: *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)*.

11 *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA. Where neither party is insolvent, this principle can be excluded by contract: *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)*; and see the cases cited in note 5.

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### **1127. Executor withholding sum due from guarantor.**

Where the creditor has by will bequeathed a legacy to the guarantor, the executor of the will is entitled to withhold out of the legacy the amount due from the guarantor to the testator under the guarantee<sup>1</sup>.

<sup>1</sup> *Coates v Coates* (1864) 33 Beav 249; and see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 488. See also *Re Melton, Milk v Towers* [1918] 1 Ch 37, CA; and **TRUSTS** vol 48 (2007 Reissue) PARA 923.

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### **1128. Counter-securities.**

The creditor is not entitled to the benefit of counter-bonds or collateral securities given by the principal debtor to the guarantor to indemnify the guarantor in respect of liability under the guarantee<sup>1</sup>.

<sup>1</sup> *Ex p Waring, Inglis, Clarke* (1815) 19 Ves 345; *Re Walker, Sheffield Banking Co v Clayton* [1892] 1 Ch 621: but see, contra, *Wright v Morley, Morley v St Alban* (1805) 11 Ves 12 at 22 per Sir William Grant MR, and *Maure v Harrison* (1692) 1 Eq Cas Abr 93, explained in *Re Walker, Sheffield Banking Co v Clayton* above.

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## **(3) GUARANTOR'S RIGHTS AGAINST CREDITOR**

### **(i) Guarantor's Rights before Payment**

#### **A. GUARANTOR'S RIGHTS BEFORE DEMAND OF PAYMENT**

### **1129. Guarantor's rights from relationship created.**

The rights of a guarantor against the creditor accrue to him from the relationship created by the guarantee<sup>1</sup>, and arise at the time of his becoming guarantor, and not merely when he

discharges the principal debtor's obligation<sup>2</sup>. It is not, therefore, the law that the guarantor has no rights until he pays the guaranteed debt<sup>3</sup>.

1 *Pooley v Harradine* (1857) 7 E & B 431; *Hollier v Eyre* (1840) 9 Cl & Fin 1, HL; *Greenough v McClelland* (1860) 2 E & E 429; *Samuell v Howarth* (1817) 3 Mer 272 at 277; *Craythorne v Swinburne* (1807) 14 Ves 160. For the position of a guarantor who is a volunteer see PARA 1148.

2 *Dixon v Steel* [1901] 2 Ch 602; and see *Lake v Brutton* (1856) 8 De GM & G 440; *Pledge v Buss* (1860) John 663; *South v Bloxam* (1865) 2 Hem & M 457.

3 *Dixon v Steel* [1901] 2 Ch 602 at 607 per Cozens-Hardy J; but see *Re Howe, ex p Brett* (1871) 6 Ch App 838 at 841 per Mellish LJ. See also *Themehelp Ltd v West* [1996] QB 84, [1995] 4 All ER 215, CA (interim injunction granted restraining defendants, against whom the claimant guarantors alleged fraud, from giving notice to enforce the guarantee until the trial of the claim). This decision was, however, doubted in *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 2 Lloyd's Rep 187, [1999] 1 All ER (Comm) 190. Cf the rights possessed by the guarantor against the principal debtor prior to satisfying the guaranteed debt, discussed in PARA 1151 et seq. Cf also the guarantor's limited rights against co-guarantors, discussed in PARA 1165 et seq; and the proposing guarantor's right to information, discussed in PARA 1038 et seq.

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### **1130. Arrangements between debtors.**

A person who executes an instrument or enters into an agreement as guarantor for another will have some of the rights and liabilities of a guarantor, even though the instrument or agreement makes him liable as principal debtor to the creditor and even though the instrument or agreement is a deed<sup>1</sup>. Similarly, where it is agreed between two or more principal co-debtors that the liability of one is to be secondary to that of the others, that one will have some of the rights and liabilities of a guarantor<sup>2</sup>.

Those rights and liabilities will exist between the person primarily liable and the person whose liability is agreed to be secondary from the time that the agreement between them is made<sup>3</sup>. The creditor, however, may treat both as principal debtors unless and until he has notice of the arrangement<sup>4</sup>. Once the creditor becomes aware of the arrangement, he is obliged to respect the rights of the co-debtor who has assumed the position of guarantor<sup>5</sup>. It is not necessary that the principal debtor should consent to the arrangement, only that he should have notice of it, for the guarantor's rights in these circumstances are rights which arise in equity and not from contract, and depend upon notice<sup>6</sup>.

1 *Wythes v Labouchere* (1859) 5 Jur NS 499 at 500; *White v Corbett* (1859) 1 E & E 692, Ex Ch; *Hollier v Eyre* (1840) 9 Cl & Fin 1, HL; *Mutual Loan Fund Association v Sudlow* (1858) 5 CBNS 449; *Pooley v Harradine* (1857) 7 E & B 431. At law this rule was confined to instruments not under seal. Before the introduction of equitable pleas by the Common Law Procedure Act 1854 ss 83-86 (repealed), oral evidence was inadmissible at law to prove that one of several persons, jointly and severally bound, was, in fact, only a surety and entitled to be so treated by the creditor. However, in equity such evidence was always admitted in proof of the fact: *Craythorne v Swinburne* (1807) 14 Ves 160 at 170-171 per Lord Eldon LC; and see *Clarke v Henty* (1838) 3 Y & C Ex 187. The rule in equity, which now prevails (see the Supreme Court Act 1981 s 49(1); PARA 1197; and **EQUITY** vol 16(2) (Reissue) PARA 500) was that the creditor was bound to regard the position of the surety by notice, and not by contract, and that notice after the contract was entered into was sufficient, and this rule extended to instruments under seal: see the cases cited above and in note 2; and see *Greenough v McClelland* (1860) 2 E & E 429, Ex Ch; *Wauthier v Wilson* (1912) 28 TLR 239, CA.

2 See *Rouse v Bradford Banking Co* [1894] AC 586, HL. See also *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL; *Ashbee v Pidduck* (1836) 1 M & W 564; *Oakford v European and American Steam Shipping Co* (1863) 1 Hem & M 182; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corp Ltd (liquidators)* (1874) LR 7 HL 348; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639. The agreement may be express or implied: *Rouse v Bradford Banking Co* above. See also *Other v Iverson* (1855) 3 Drew 177 at 182 per Kindersley V-C; *Jones v Beach* (1852) 2 De GM & G 886; *Rawstone v Parr* (1827) 3 Russ 539; *Richardson v Horton* (1843) 6 Beav 185; *Strong v Foster* (1855) 17 CB 201; *Pooley v Harradine* (1857) 7 E & B 431; but cf *Thorpe v Jackson* (1837) 2 Y & C Ex 553.

3 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL.

4 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Nicholas v Ridley* [1904] 1 Ch 192.

5 *Rouse v Bradford Banking Co* [1894] AC 586, HL. See also *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL; *Ashbee v Pidduck* (1836) 1 M & W 564; *Oakford v European and American Steam Shipping Co* (1863) 1 Hem & M 182; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corp Ltd (liquidators)* (1874) LR 7 HL 348; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639. Parol evidence is admissible to show that the creditor was aware of the true relationship between the co-debtors: *Mutual Loan Fund Association v Sudlow* (1858) 5 CBNS 449. However, the creditor may (and often does) exclude the guarantor's equitable rights by the express terms of the guarantee.

6 *Rouse v Bradford Banking Co* [1894] AC 586, HL (overruling *Swire v Redman and Holt* (1876) 1 QBD 536). See also *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL; *Ashbee v Pidduck* (1836) 1 M & W 564; *Oakford v European and American Steam Shipping Co* (1863) 1 Hem & M 182; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corp Ltd (liquidators)* (1874) LR 7 HL 348; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639. To the extent that *York City and County Banking Co v Bainbridge* (1880) 43 LT 732 suggests the contrary, it is probably no longer good law.

## UPDATE

### 1130 Arrangements between debtors

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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#### 1131. Whether guarantor can compel creditor to collect debt.

After the guaranteed debt has become due, and before he has been asked to pay it, the guarantor may require the creditor to call upon the principal debtor to pay off the debt<sup>1</sup>. It is doubtful, however, whether the guarantor has any right to require the creditor to do so if he has not discharged himself of his liability<sup>2</sup>. In the absence of agreement the creditor is not bound to sue the principal debtor before suing the guarantor<sup>3</sup>. Moreover the guarantor, even where he deposits the amount of the guaranteed debt, cannot without such agreement compel the creditor to proceed against the principal debtor unless he undertakes to indemnify the creditor for the risk, delay and expense which he thereby incurs<sup>4</sup>, and, apparently, satisfies him that the principal debtor is solvent<sup>5</sup>.

1 *Rouse v Bradford Banking Co* [1894] 2 Ch 32 at 75, CA, per AL Smith LJ; affd [1904] AC 586, HL; *Rees v Berrington* (1795) 2 Ves 540 at 542 per Lord Loughborough LC; *Wright v Simpson* (1802) 6 Ves 714 at 734 per



Lord Eldon LC; *Governor and Co of Bank of Ireland v Beresford* (1818) 6 Dow 233 at 238, HL, per Lord Eldon LC; *Nisbet v Smith* (1789) 2 Bro CC 579 at 582 per Lord Thurlow LC.

2 *Ewart v Latta* (1865) 4 Macq 983 at 987, 989, HL, per Lord Westbury LC; and see *Jackson v Digby* (1854) 2 WR 540; Story s 639.

3 See PARA 1104.

4 *Wright v Simpson* (1802) 6 Ves 714 at 734 per Lord Eldon LC; and see Story ss 327, 849.

5 See *Wheeler v Benedict* 43 NY 478 (1885).

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### **1132. Guarantor's right to sue principal debtor.**

At any time after the debt is due the guarantor may apply to the creditor and pay him off and then, on giving a proper indemnity for costs, he may sue the principal debtor in the creditor's name<sup>1</sup>, or, apparently, in his own name, should he obtain an assignment of the guaranteed debt<sup>2</sup>. There does not, however, seem to be any reported instance in which a guarantor has in practice exercised this right, and certainly the cases in which a guarantor makes use of it must be rare<sup>3</sup>.

1 *Swire v Redman and Holt* (1876) 1 QBD 536 at 541.

2 See the Law of Property Act 1925 s 136; and **CHOSER IN ACTION** vol 13 (2009) PARA 14 et seq. As to the position of a guarantor who is a volunteer see PARA 1148.

3 *Swire v Redman and Holt* (1876) 1 QBD 536 at 541.

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### **1133. Fidelity guarantees.**

Fidelity guarantees are now rarely encountered; and the impact of employment protection legislation on the principles set out below has not been judicially considered. The older authorities state that if, to the knowledge of a guarantor for the good behaviour of another in an employment, the employee is guilty of misconduct rendering him liable to dismissal, the guarantor may insist on the employer dismissing that employee<sup>1</sup>. Where the employer himself possesses the power of dismissal, the guarantor will be discharged from future liability on the guarantee if the employer fails to comply with the guarantor's demand for the employee's dismissal<sup>2</sup>. If misconduct by the employee during the currency of the guarantee is actually known to the employer but not to the guarantor<sup>3</sup>, and the employer without disclosing the misconduct to the guarantor<sup>4</sup> continues the employee in his employment, the guarantor will not be liable in respect of any further misconduct of the employee subsequent to the employer's

discovery of the original misconduct<sup>5</sup>. The guarantor is not, however, discharged where the power of dismissal is vested in other persons who are not parties to the contract of guarantee, and who refuse to exercise it when requested to do so by the employer<sup>6</sup>.

Where an employee for whom the guarantor is answerable has to his knowledge been guilty of dishonesty or other misconduct justifying dismissal, the guarantor, for his own protection, should insist on having the guarantee or fidelity bond given up to him, for otherwise he may be taken to have consented to remain liable, notwithstanding the misconduct<sup>7</sup>.

An employer may, alternatively, protect himself against an employee's misconduct by means of fidelity insurance, which is discussed elsewhere in this work<sup>8</sup>.

1 *Sanderson v Aston* (1873) LR 8 Exch 73 at 77; *Phillips v Foxall* (1872) LR 7 QB 666 at 678, 681-682; *Burgess v Eve* (1872) LR 13 Eq 450 at 457-459.

2 *Phillips v Foxall* (1872) LR 7 QB 666 at 678, 681-682; *Burgess v Eve* (1872) LR 13 Eq 450 at 457-459; *Lloyd's v Harper* (1880) 16 ChD 290 at 307, CA, per Fry J.

3 As to the necessity for proof of the employer's knowledge cf *Federal Supply and Coal Storage Co of South Africa v Angehrn and Piel* (1910) 80 LJPC 1 at 8; and see *Enright v Falvey* (1879) 4 LR Ir 397. Where it appears that the guarantor must have known of the misconduct, the onus is on the guarantor to prove his ignorance: *Caxton and Arrington Union v Dew* (1899) 68 LQB 380 at 383.

4 On discovering the misconduct the employer is under a duty to disclose it to the guarantor in order that the guarantor may, if he thinks fit, insist on the employee's dismissal: *Enright v Falvey* (1879) 4 LR Ir 397. As to the type of misconduct which must be disclosed see *Caxton and Arrington Union v Dew* (1899) 68 LQB 380 at 382; *Sanderson v Aston* (1873) LR 8 Exch 73 at 76-77; and see also *Byrne v Muzio* (1881) 8 LR Ir 396. For the effect of failure to disclose misconduct upon the creditor's right to recover in respect of the misconduct in question, as distinct from his right to recover in respect of subsequent misconduct, see PARA 1251. As to the effect of non-disclosure to an intending guarantor of misconduct before the guarantee is entered into see PARA 1042.

5 *Sanderson v Aston* (1873) LR 8 Exch 73; *Phillips v Foxall* (1872) LR 7 QB 666 at 672; *Enright v Falvey* (1879) 4 LR Ir 397.

6 *Caxton v Arrington Union v Dew* (1899) 68 LQB 380; *Byrne v Muzio* (1881) 8 LR Ir 396, where the employer had merely a power of suspending the employee.

7 *Shepherd v Beecher* (1725) 2 P Wms 288.

8 See **INSURANCE** vol 25 (2003 Reissue) PARAS 783-784. For a modern example see *New Hampshire Insurance Co v Philips Electronics North America Corp* (No 2) [1999] Lloyd's Rep IR 66, [1999] Lloyd's Rep IR 58, CA.

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### **1134. Equitable defences.**

In any claim that may be brought against a guarantor by the creditor on the guarantee, the guarantor may set up a defence of discharge from liability on equitable grounds<sup>1</sup>.

On application made to the Chancery Division of the High Court<sup>2</sup> a guarantee may be cancelled and set aside on equitable grounds. Thus a fidelity guarantee may be ordered to be cancelled where the employee has been guilty of misconduct and the employer has refused to dismiss him or to give up the guarantee<sup>3</sup>. Any division of the High Court may give effect to an equitable defence alleging grounds for the cancellation of a guarantee<sup>4</sup>.

1 See the Supreme Court Act 1981 s 49; and **EQUITY** vol 16(2) (Reissue) PARA 499. Formerly an injunction for the purpose was obtainable: *Hawkshaw v Parkins* (1819) 2 Swan 539 at 544; *Samuell v Howarth* (1817) 3 Mer 272; *Moore v Bowmaker* (1815) 6 Taunt 379; *Small v Currie* (1854) 5 De GM & G 141; *Allan v Inman* (1843) 7 Jur 433.

2 See the Supreme Court Act 1981 ss 49, 61, Sch 1 para 1(g); and **COURTS** vol 10 (Reissue) PARA 611; **EQUITY** vol 16(2) (Reissue) PARA 499. As to the equity jurisdiction of county courts see **COURTS** vol 10 (Reissue) PARA 719.

3 *Burgess v Eve* (1872) LR 13 Eq 450 at 458-459; *Phillips v Foxall* (1872) LR 7 QB 666 at 681-682. As to the cancelling of documents generally see **EQUITY** vol 16(2) (Reissue) PARAS 485-486.

4 See the Supreme Court Act 1981 s 49; and **EQUITY** vol 16(2) (Reissue) PARA 499.

## UPDATE

### 1134 Equitable defences

NOTES--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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## **B. GUARANTOR'S RIGHTS ON PAYMENT BEING DEMANDED**

### **1135. Guarantor's right to set-off and counterclaim.**

On being sued by the creditor for payment of the debt guaranteed, a guarantor may rely upon any right of set-off or counterclaim which the principal debtor could set up against the creditor in reduction of the guaranteed debt in reduction of the claim against him under the guarantee<sup>1</sup>. Whenever the set-off or counterclaim relied on does not operate directly to reduce the debt guaranteed, the principal debtor should be made a party, so as to bind him and prevent him afterwards claiming payment from the creditor<sup>2</sup>.

However, the guarantor will not be entitled to rely upon the principal debtor's rights of set-off or counterclaim if the guarantee, on its true construction, requires the guarantor to pay a particular amount due irrespective of the accounting position between the principal debtor and the creditor<sup>3</sup>. Nor, where the guarantee takes the form of a legal mortgage, can the mortgagor guarantor usually resist the creditor mortgagee's claim for possession by relying upon the fact that the principal debtor has a claim for unliquidated damages by way of set-off against the creditor for an amount which exceeds the amount secured<sup>4</sup>.

1 *Bechervaise v Lewis* (1872) LR 7 CP 372; *Murphy v Glass* (1869) LR 2 PC 408; *Alcoy and Gandia Rly and Harbour Co v Greenhill* (1897) 76 LT 542 at 552-553; on appeal (1898) 79 LT 257, CA; see also *Thornton v Maynard* (1875) LR 10 CP 695; *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pourmaras* [1978] 2 Lloyd's Rep 502 at 508, CA, per Roskill LJ, where the passage in the text as it appeared in an earlier edition of this title was cited with approval. The guarantor will be entitled to rely (provided all parties are solvent) upon any provision in the principal contract widening the principal debtor's right of set-off: *Aurora Borealis Compania Armadora SA and Buenamar Compania Naviera SA v Marine Midland Bank NA, The Maistros* [1984] 1 Lloyd's Rep 646. See also *Bowyear v Pawson* (1881) 6 QBD 540; *Newton v Lee* 139 NY 332 (1893); *Gillespie v Torrance* 25 NY 306 (1862); *Cheetham v Crook* (1825) M'Cle & Yo 307. Contrast *R v Shaw* (1901) 27 VLR 70 (Vict SC)

(where the decision to deny set-off may be explained on the grounds of public policy), and *Cellulose Products Pty v Truda* (1970) 92 WNSW 561. As to set-off see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 634 et seq.

2 *Murphy v Glass* (1869) LR 2 PC 408. Where the principal debtor's cross-claim would not provide him with a defence to the creditor's claim (as, for example, where the creditor's claim against the principal is under a bill of exchange or for charter hire or freight), it will similarly not provide the guarantor with a defence to the creditor's claim under the guarantee: *Aliakmon Maritime Corp v Trans Ocean Continental Shipping Ltd, The Aliakmon Progress* [1978] 2 Lloyd's Rep 499, CA.

3 *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502, CA; applied in *Hyundai Heavy Industries Co v Papadopoulos* [1979] 1 Lloyd's Rep 130, CA; and approved [1980] 2 All ER 29, [1980] 1 WLR 1129, [1980] 2 Lloyd's Rep 1, HL. In that case the underlying contract provided that payments were not to be withheld in consequence of any dispute, and the guarantee stated that 'in case the [principal debtor] is in default of any such payment [the guarantor] will forthwith make the payment in default on behalf of the [principal debtor]'. Since the application of this principle depends upon the construction of the guarantor's obligation under the contract of guarantee, not upon any breach or unexpected performance by the creditor, it is unlikely that it could be challenged under the Unfair Contract Terms Act 1977.

4 *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, [1993] 1 WLR 72n; *Ashley Guarantee plc v Zacaria* [1993] 1 All ER 254, [1993] 1 WLR 62, CA.

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### 1136. Marshalling.

When payment is demanded of the guarantor by the creditor, the guarantor may compel the creditor, if he has a claim upon two funds in respect of the guaranteed debt, of one only of which the guarantor can avail himself, to resort to the other first<sup>1</sup>.

A guarantor is not entitled to marshal in his favour securities held in respect of different debts or of a different part of the same debt<sup>2</sup>. Where, however, the creditor has security for a different debt from that guaranteed by the guarantor, and can consolidate that security with another held by him for the guaranteed debt, the guarantor may have the securities marshalled in his favour; thus, after the creditor has been paid in full the guarantor has a right to be reimbursed, not only out of the security for the guaranteed debt, but also, in case of any deficiency, out of the other security, and to insist, where the latter security is sufficient to cover both debts, upon having the guaranteed debt liquidated out of it<sup>3</sup>.

1 *Ex p Kendall* (1811) 17 Ves 514; *The Chioggia* [1898] P 1. See **EQUITY** vol 16(2) (Reissue) PARA 758 et seq.

2 *Wade v Coope* (1827) 2 Sim 155; *Re Butlers Wharf Ltd* [1995] 2 BCLC 43, [1995] BCC 717.

3 *Heyman v Dubois* (1871) LR 13 Eq 158; *Praed v Gardiner* (1788) 2 Cox Eq Cas 86; *Re Holland, ex p Alston* (1868) 4 Ch App 168; *Re Stratton, ex p Salting* (1883) 25 ChD 148, CA; *Aldrich v Cooper* (1803) 8 Ves 382 at 388-389; Story s 638; and see also *Drew v Lockett* (1863) 32 Beav 499; *Wright v Morley, Morley v St Alban* (1805) 11 Ves 12 at 22; *Newton v Chorlton* (1853) 10 Hare 646. As to the right of a mortgagee to marshal securities against a guarantor see *South v Bloxam* (1865) 2 Hem & M 457. As to the position of a guarantor in relation to tacking (the right to which is partially abolished: see **MORTGAGE** vol 77 (2010) PARA 264) and the consolidation of mortgages see PARAS 1143-1144; and as to marshalling see generally **EQUITY** vol 16(2) (Reissue) PARA 758 et seq; **MORTGAGE** vol 77 (2010) PARA 632 et seq.

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## (ii) Guarantor's Rights after Payment

### 1137. Recovery of money improperly paid.

Money improperly paid by a guarantor to the creditor under a mistake<sup>1</sup> may be recovered<sup>2</sup>.

1 *Mills v Alderbury Union Guardians* (1849) 3 Exch 590. As to the recovery of money paid under a mistake of fact see generally *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, [1979] 3 All ER 522; and **MISTAKE** vol 77 (2010) PARA 69 et seq. As to the defence of change of position see *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; and see generally **RESTITUTION**. It was formerly thought that money paid under a mistake of law could not be recovered (see eg *British Workman's and General Assurance Co Ltd v Cunliffe* (1902) 18 TLR 502, CA; *Re Carnac, ex p Simmonds* (1885) 16 QBD 308, CA; and see generally *Woolwich Equitable Building Society v IRC* [1993] AC 70, [1992] 3 All ER 737, HL); but see now *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; and see *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249; *Deutsche Morgan Grenfell Group plc v IRC* [2003] EWHC 1779 (Ch), [2003] 4 All ER 645, [2003] STC 1017.

2 See **EQUITY** vol 16(2) (Reissue) PARA 439 et seq; and **MISTAKE** vol 77 (2010) PARA 69 et seq. It has been held that a co-guarantor should not be joined in such a claim: *Mills v Alderbury Union Guardians* (1849) 3 Exch 590. As to the joinder of parties see now **CIVIL PROCEDURE** vol 11 (2009) PARA 210 et seq.

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### 1138. Guarantor's right of subrogation.

As soon as the guarantor has paid to the creditor what is due to the creditor under the guarantee, he is entitled, unless he has waived them<sup>1</sup>, to be subrogated<sup>2</sup> to all the rights possessed by the creditor in respect of the debt, default or miscarriages to which the guarantee relates<sup>3</sup>.

Thus, on payment, but not before<sup>4</sup>, the guarantor has a right to the benefit of all the securities (whether known to him or not at the time he became guarantor<sup>5</sup>) which the creditor has received from the principal debtor<sup>6</sup> before, contemporaneously with or after the creation of the guarantee<sup>7</sup>, and whether or not they existed at the time the guarantee was given<sup>8</sup>. Money which by contract is appropriated to a particular purpose stands, as regards the guarantor, on the same footing as securities<sup>9</sup>. Moreover, if the creditor assigns the guaranteed debt and the securities for the debt<sup>10</sup>, the assignment is subject to the obligation to preserve the securities for the guarantor's benefit<sup>11</sup>.

Where, however, the guarantor is reimbursed under a counter-guarantee, he loses his rights of subrogation, which are transferred by operation of law to the counter-guarantor<sup>12</sup>.

1 As to waiver of a guarantor's rights see PARA 1146.

2 As to subrogation see **EQUITY** vol 16(2) (Reissue) PARA 770 et seq; **INSURANCE**.

3 See the Mercantile Law Amendment Act 1856 s 5; and *Re Lord Churchill, Manisty v Churchill* (1888) 39 ChD 174; and see *Scholefield Goodman & Sons Ltd v Zyngier* [1986] AC 562, [1985] 3 All ER 105, PC; *Re Westdock Realisations Ltd* [1988] BCLC 354, 4 BCC 192. As to the rights of a guarantor who has paid a debt which is a preferential debt see PARA 1159. A person claiming to be subrogated to the rights of another can only have the rights possessed by the person whose position he takes: *The Millwall* [1905] P 155 at 163, CA, per Sir Richard Henn Collins MR; *Re Walters' Deed of Guarantee, Walters' Palm Toffee Ltd v Walters* [1933] Ch 321 (guarantor paying dividend on preference shares cannot recover amount as a debt from the company); see also *Re British Power Traction and Lighting Co Ltd, Halifax Joint Stock Banking Co Ltd v British Power Traction and Lighting Co Ltd* [1910] 2 Ch 470 (unpaid creditors of receiver of company subrogated only to net amount of receiver's indemnity against company assets, and not entitled to recover against receiver's guarantors). Cf the rights of subrogation possessed by insurers, as to which see *Finlay v Mexican Investment Corp* [1897] 1 QB 517; and **INSURANCE** vol 25 (2003 Reissue) PARA 195 et seq. Clear words (or the necessity of supplying those words by implication) are required if rights of subrogation are to be removed: *Liberty Mutual Insurance Co (UK) Ltd v HSBC Bank plc* [2002] EWCA Civ 691, [2002] All ER (D) 232 (May).

4 *Re Howe, ex p Brett* (1871) 6 Ch App 838 at 841 per Mellish LJ; and see *Re Jeffrey's Policy* (1872) 20 WR 857; *Lake v Brutton* (1856) 8 De GM & G 440. The right of a guarantor to a collateral security is not in abeyance until he is called upon to pay: *Dixon v Steel* [1901] 2 Ch 602 at 607.

5 *Forbes v Jackson* (1882) 19 ChD 615; *Leicestershire Banking Co v Hawkins* (1900) 16 TLR 317; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Nicholas v Ridley* [1904] 1 Ch 192, CA; *Mayhew v Crickett* (1818) 2 Swan 185 at 191; *Allen v De Lisle* (1856) 3 Jur NS 928; *Pearl v Deacon* (1857) as reported in 26 LJCh 761 (on appeal 1 De G & J 461); *Lake v Brutton* (1856) 8 De GM & G 440; *Merchants Bank of London v Maud* (1871) 19 WR 657; *Yonge v Reynell* (1852) 9 Hare 809; *Hodgson v Shaw* (1834) 3 My & K 183; *Craythorne v Swinburne* (1807) 14 Ves 160. A guarantee by one partner for the debt of the firm, which gives the creditor a right of proof against the separate estate of that partner, in addition to his right of proof against the partnership's joint estate, is a security within the meaning of the principle laid down in *Re Holland, ex p Alston* (1868) 4 Ch App 168 (*Re Stratton, ex p Salting* (1883) 25 ChD 148 at 153, CA, per Fry LJ), and to which, therefore, a person standing in the position of a guarantor is entitled (*Re Stratton, ex p Salting* at 152).

6 *Crispe v Perrit* (1744) Willes 467, sub nom *Ex p Crisp* 1 Atk 133; *Goddard v Whyte* (1860) 2 Giff 449; *O'Carroll's Case* (1745) Amb 61; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL; *Brandon v Brandon* (1859) 3 De G & J 524; *Parsons and Cole v Briddock* (1708) 2 Vern 608; *Morgan v Seymour* (1638) 1 Rep Ch 120; *Craythorne v Swinburne* (1807) 14 Ves 160; *Mayhew v Crickett* (1818) 2 Swan 185; *Wright v Morley* (1805) 11 Ves 12; *Pledge v Buss* (1860) John 663; *Ex p Rushforth* (1805) 10 Ves 409; *Robinson v Wilson* (1814) 2 Madd 434; *Hodgson v Shaw* (1834) 3 My & K 183; *Strange v Fooks* (1863) 4 Giff 408; *Swain v Wall* (1641) 1 Rep Ch 149.

7 *Forbes v Jackson* (1882) 19 ChD 615 at 621; *Pledge v Buss* (1860) John 663; *Lake v Brutton* (1856) 8 De GM & G 440; *Campbell v Rothwell* (1877) 47 LJQB 144; *Re Davison's Estate* [1894] 1 IR 56, CA.

8 Mercantile Law Amendment Act 1856 s 5. See also *Scott v Knox* (1838) 2 Jo Ex Ir 778; *Pledge v Buss* (1860) John 663; *Lake v Brutton* (1856) 8 De GM & G 440. As to the effect of loss of such securities see PARA 1244.

9 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 702, CA, per Lord Selborne LC.

10 See PARA 1124.

11 *Wheatley v Bastow* (1855) 7 De GM & G 261 at 279 per Turner LJ. As to the creditor's right to surrender the security and prove for the whole debt if the principal debtor becomes bankrupt without discharging the guarantor see *Rainbow v Juggins* (1880) 5 QBD 422; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 561. In proving for the whole debt he need not deliver up the guarantee or other collateral security not forming part of the principal debtor's property: *Re Goodman, ex p Goodman* (1818) 3 Madd 373.

12 *Brown Shipley & Co Ltd v Amalgamated Investment (Europe) BV* [1979] 1 Lloyd's Rep 488.

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### 1139. Origin and enforcement of right.

The guarantor's right to the creditor's securities on payment of the guaranteed debt is derived<sup>1</sup> from the obligation imposed on the principal debtor of indemnifying the surety<sup>2</sup>, which makes it inequitable for a creditor, by electing not to avail himself of the securities for the guaranteed debt, to throw the whole liability on to the guarantor<sup>3</sup>. This right, which prevents the creditor from appropriating a security for the guaranteed debt to the payment of any other debt or liability<sup>4</sup>, rests not upon contract but upon general principles of equity similar to those governing the marshalling of funds when one creditor of the same debtor may resort to either of two funds and another creditor to one only<sup>5</sup>.

If securities to which the guarantor is entitled are not voluntarily given up to him by the creditor, he may bring a claim to compel delivery<sup>6</sup>.

1 These rights of the guarantor, as developed in the authorities cited in this paragraph and PARA 1138, were recognised and enacted by the Mercantile Law Amendment Act 1856 s 5: see *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 19, HL, per Lord Blackburn.

2 *Yonge v Reynell* (1852) 9 Hare 809; *Nicholas v Ridley* [1904] 1 Ch 192, CA; *Lord Harberton v Bennett* (1829) Beat 386.

3 *Aldrich v Cooper* (1803) 8 Ves 382 at 389 per Lord Eldon LC.

4 *Pearl v Deacon* (1857) as reported in 26 LJCh 761.

5 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 12, HL, per Lord Selborne (discussed in *Niru Battery Manufacturing Co v Milestone Trading* [2004] EWCA Civ 487, [2004] 2 All ER (Comm) 289); and see *Heyman v Dubois* (1871) LR 13 Eq 158; *Aldrich v Cooper* (1803) 8 Ves 382. The right is available to the indorser of a bill of exchange on his paying the amount of it to the discounters of the bill after its dishonour by the acceptor: *Duncan, Fox & Co v North and South Wales Bank* above. As to marshalling see PARAS 1136, 1178; and **EQUITY** vol 16(2) (Reissue) PARA 758 et seq.

6 *Goddard v Whyte* (1860) 2 Giff 449.

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#### **1140. Guarantor for a limited sum.**

A guarantor for a limited sum only has, on payment of that sum, all the rights of the creditor in respect of that amount. He is entitled to share in any security held by the creditor for the whole debt<sup>1</sup>, even if that security was given without his knowledge and to secure a further debt in addition to that for which he became guarantor<sup>2</sup>. However, such a guarantor is not entitled to the benefit of a security given by the principal debtor to the creditor, without the guarantor's knowledge, at a different time and for another part of the debt to which his guarantee does not extend<sup>3</sup>.

1 *Goodwin v Gray* (1874) 22 WR 312.

2 *Scott v Knox* (1838) 2 Jo Ex Ir 778; and see *Berridge v Berridge* (1890) 44 ChD 168; *Lake v Brutton* (1856) 8 De GM & G 440. Where two debts were due from a debtor to a creditor, and there was a guarantor for the second debt only, it was held that, as the securities lodged by the debtor with his creditor for the first debt were more than sufficient to pay it, the guarantor was entitled to the benefit of the surplus towards the liquidation of the second debt: *Praed v Gardiner* (1788) 2 Cox Eq Cas 86; and see *Heyman v Dubois* (1871) LR 13 Eq 158.

3 *Wade v Coope* (1827) 2 Sim 155. Thus, where a guarantee is given to a bank to secure advances to one of its customers, and subsequently successive advances are made by the bank to him, not under the guarantee,

but independently of it, and against securities which on the repayment of each advance so made are returned by the bank to its customer, the guarantor, though he has not been consulted with reference to such transactions, has no valid ground of objection, and the customer is in such circumstances entitled, as against the guarantor, to retain the securities returned to him by the bank: *Wilkinson v London and County Banking Co* (1884) 1 TLR 63, HL.

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### **1141. Satisfied securities.**

If a guarantor for a debt or duty pays the debt or performs the duty in full<sup>1</sup>, he is entitled to have assigned to him all securities held by the creditor in respect of the debt or duty, whether or not the security is deemed at law to have been satisfied by the payment of the debt or performance of the duty<sup>2</sup>. A guarantor whose estate has been resorted to beyond what, in equity, it is bound to bear has the right to have an assignment made to him of every security which the creditor possesses against the principal debtor<sup>3</sup>, and the satisfied debt is dealt with as still subsisting to the extent to which the guarantor is improperly resorted to<sup>4</sup>.

This principle applies only where the joint liability arises out of contract. One of two joint tortfeasors who has paid the damages due under a judgment against him and his co-tortfeasor is not entitled to an assignment of the judgment to enable him to recover contribution from his co-tortfeasor<sup>5</sup>, although by statute he is entitled to contribution<sup>6</sup>.

The right to an assignment of satisfied securities may be enforced by bringing a claim<sup>7</sup>. Where the creditor has refused to assign the judgment, the guarantor may recover as damages the value of the specific assets which would have been available for execution under the judgment, if it had been duly assigned, without showing, in the first instance, that there were no other assets available<sup>8</sup>. In the case of insolvency, the right to stand in the place of a judgment creditor and to enforce that right against the insolvent estate is not affected by the circumstance that actual assignment of the judgment has not been obtained<sup>9</sup>.

When the judgment is assigned, the assignee must obtain leave to issue execution on it<sup>10</sup>. In considering whether leave ought to be given, the court may take into consideration the state of accounts between the parties entitled and liable to execution and generally their mutual rights and liabilities, legal or equitable<sup>11</sup>.

<sup>1</sup> If the guarantor does not pay the debt in full he is not entitled to an assignment of the principal security: *Ewart v Latta* (1865) 4 Macq 983, HL; *Re Howe, ex p Brett* (1871) 6 Ch App 838 at 841.

<sup>2</sup> Mercantile Law Amendment Act 1856 s 5. Section 5 abrogated the common law rule to the contrary, for which see *Copis v Middleton* (1823) Turn & R 224; *Gammon v Stone* (1749) 1 Ves Sen 339; *Woffington v Sparks* (1754) 2 Ves Sen 569; and see *Batchellor v Lawrence* (1861) 9 CBNS 543 at 552-553 per Williams J. A guarantor who has paid the debt in full is entitled to pursue all the creditor's remedies, including the use of the creditor's name, upon giving a proper indemnity, in order himself to obtain indemnity from the principal debtor or a co-guarantor, although against a co-guarantor he may recover only the proportion for which, as between themselves, the co-guarantor is liable: Mercantile Law Amendment Act 1856 s 5. As to the rights of co-guarantors among themselves see *Dale v Powell* (1911) 105 LT 291 at 294 per Parker J; *Brown v Cork* [1985] BCLC 363, CA; and PARA 1175. A right of distress for rent in arrear is not within the provisions of the Mercantile Law Amendment Act 1856: *Re Russell, Russell v Shoolbred* (1885) 29 ChD 254, CA.

<sup>3</sup> *Silk v Eyre* (1875) IR 9 Eq 393 at 395 per Chatterton V-C.

<sup>4</sup> *Silk v Eyre* (1875) IR 9 Eq 393 at 395 per Chatterton V-C; and see *Batchellor v Lawrence* (1861) 9 CBNS 543.



5 *The Englishman and The Australia* [1895] P 212.

6 See the Civil Liability (Contribution) Act 1978; and **TORT** vol 45(2) (Reissue) PARA 348 et seq.

7 *Phillips v Dickson* (1860) 8 CBNS 391; *The Englishman and The Australia* [1895] P 212.

8 *Oddy v Hallett* (1885) Cab & El 532. Refusal to assign the judgment does not release the guarantor, but merely discharges his liability to the extent to which he has suffered damage thereby: *Dale v Powell* (1911) 105 LT 291. The case is analogous to that which arises when securities obtained by the creditor after the contract are dealt with by the creditor to the prejudice of the guarantor's rights to them. See PARA 1244 et seq.

9 *Re M'Myn, Lightbown v M'Myn* (1886) 33 ChD 575; and cf *Re Lord Churchill, Manisty v Churchill* (1888) 39 ChD 174; *Re Lamplugh Iron Ore Co Ltd* [1927] 1 Ch 308.

10 See CPR Sch 1 RSC Ord 46 r 2(1)(b); *Kayley v Hothersall* [1925] 1 KB 607, CA, approving the dictum of Parker J in *Dale v Powell* (1911) 105 LT 291 at 292; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1274. As to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33. For the equivalent provisions in county courts see CPR Sch 2 CCR Ord 26 r 5(1)(b); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1285.

11 *Kayley v Hothersall* [1925] 1 KB 607 at 616, CA; *Dale v Powell* (1911) 105 LT 291 at 292, 294; and see note 10.

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#### **1142. Guarantor's right to transfer of mortgage security.**

Where the guaranteed debt is secured by a mortgage executed by the principal debtor the guarantor is, on payment of the debt, entitled to a transfer of the mortgage<sup>1</sup>, even though he was not originally aware of its existence<sup>2</sup>. Prior to the transfer a guarantor for payment of the mortgage debt itself has, on payment of any portion of it, an equitable charge on the mortgaged property<sup>3</sup> arising automatically, which is not, however, regarded as being an interest in the mortgaged land<sup>4</sup>.

Where a mortgage debt was in fact paid out of charges created by the guarantor further to secure the mortgage debt, he was entitled to the benefit of the mortgagee's securities against the mortgagor's land, although according to the proviso for redemption in the event of the mortgagor or his guarantor repaying the mortgage debt, the mortgagee undertook to reconvey the land and charges to the uses on which they were held before the execution of the mortgage deed<sup>5</sup>. Moreover, a guarantor who mortgages his own property as collateral security for a mortgage debt secured on another property has an interest in that other property and is a necessary party to a claim for its foreclosure or redemption<sup>6</sup>.

A guarantor is entitled to redeem if he has mortgaged property of his own to secure the debt due from the principal debtor<sup>7</sup>, or if he has joined in a mortgage of the principal debtor's property so as to render himself liable to payment of principal or interest, and the principal debtor defaults<sup>8</sup>. When the guarantor redeems a mortgage by the principal debtor, he is deemed to do so for his own benefit, and is not presumed, like the mortgagor, to have done so for the benefit of subsequent incumbrancers; for the guarantor is not in privity with them, and towards them he has undertaken no obligation for the discharge of their debts<sup>9</sup>. He is therefore entitled to have the mortgage assigned to him as against them, even though their securities were created before the contract of guarantee<sup>10</sup>.

Where a claim for foreclosure is brought only one six month period is allowed for redemption for both the mortgagor and the guarantor, and not two successive six month periods<sup>11</sup>.

1 Mercantile Law Amendment Act 1856 s 5; *Copis v Middleton* (1823) Turn & R 224 at 229; *Hodgson v Shaw* (1834) 3 My & K 183 at 189 per Lord Broughton LC. Some observations of Page Wood V-C in *South v Bloxam* (1865) 2 Hem & M 457 created a doubt whether the guarantor's right to the benefit of securities held by the creditor arises until the guarantor pays the guaranteed debt. According to subsequent decisions, however, a guarantor's right to a collateral security is not in abeyance until he is called upon to pay; *Dixon v Steel* [1901] 2 Ch 602; and see *Lake v Brutton* (1856) 8 De GM & G 440; *Pledge v Buss* (1860) John 663; and PARA 1129.

2 See the cases cited in PARA 1138 notes 5-7.

3 *Gedye v Matson* (1858) 25 Beav 310; *Green v Wynn* (1869) 4 Ch App 204; *Allen v De Lisle* (1856) 3 Jur NS 928; *Re Davison's Estate* (1893) 31 LR Ir 249; affd [1894] 1 IR 56, CA.

4 *Kennedy v Campbell* [1899] 1 IR 59.

5 *M'Neale v Read* (1857) 71 ICLR 251.

6 *Stokes v Clendon* (1790) 3 Swan 150n; *Gee v Liddell* [1913] 2 Ch 62; *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of the Property of the Debtor* [1976] 2 All ER 1010, [1976] 1 WLR 952. Similarly, where a mortgage of the estate of a married woman was in effect a security for her husband's debts, he was a necessary party: see *Hill v Edmonds* (1852) 5 De G & Sm 603. However, a guarantor is not a necessary party where he is bound by a personal covenant only, unless he has paid off part of the debt: *Newton v Earl of Egmont* (1831) 4 Sim 574; *Gedye v Matson* (1858) 25 Beav 310.

7 See *Dixon v Steel* [1901] 2 Ch 602; and see also *Gleaves v Paine* (1863) 1 De GJ & Sm 87; *Re Gleaves, ex p Paine* (1863) 3 De GJ & Sm 458.

8 *Green v Wynn* (1869) 4 Ch App 204 at 207; *Seligman v Eagle Insurance Co* [1917] 1 Ch 519 (right of guarantor for a debtor, who, since the mortgage, had become an alien enemy, to redeem and obtain a transfer of the security).

9 *Re Davison's Estate* (1893) 31 LR Ir 249 at 255; affd [1894] 1 IR 56, CA; and see *Allen v De Lisle* (1856) 5 WR 158.

10 *Re Davison's Estate* (1893) 31 LR Ir 249 at 254-255; affd [1894] 1 IR 56, CA; and see *Sawyer v Goodwin* (1875) 1 ChD 351, CA. Where the owner of two lots of land mortgaged one of them, his guarantor was held not entitled, on payment of the mortgage debt, to stand in the mortgagee's place as to that lot, where the other lot had been conveyed to him by the mortgagor by way of indemnity; *Cooper v Jenkins* (1863) 32 Beav 337; sed quaere: see *Brandon v Brandon* (1859) 3 De G & J 524; *Lake v Brutton* (1856) 8 De GM & G 440.

11 *Smith v Olding* (1884) 25 ChD 462. As to the period allowed for redemption and the necessary parties to a foreclosure claim see **MORTGAGE** vol 77 (2010) PARA 573 et seq.

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### 1143. Tacking.

Whether the right of a guarantor to a transfer of a mortgage can be postponed until he has paid off, in addition to the sum originally advanced and in respect of which he is guarantor, such further advances as may subsequently have been made<sup>1</sup>, is doubtful<sup>2</sup>. There can be no such postponement where the guarantor was wholly ignorant of the subsequent advances having been made, and such advances were not contemplated at the time of the original loan<sup>3</sup>, nor where there is a special contract excluding the right to tack a second advance to one previously made<sup>4</sup>. On the other hand, where the alleged guarantor is really a principal debtor,

he cannot claim the rights of a guarantor<sup>5</sup>, and therefore the right of tacking against such a person and his personal representatives will be upheld<sup>6</sup>.

The guarantor himself is not entitled, as against a second mortgagee, to tack to the first mortgage, on its transfer to him by the creditor, the costs of unsuccessfully defending an action brought against him by the creditor on his guarantee covenant<sup>7</sup>.

1 A mortgagee's right to tack, ie to add later advances to earlier advances so as to obtain priority over an intermediate incumbrancer, has been abolished except as to further advances made (1) by arrangement with a subsequent mortgagee; (2) without notice of a subsequent mortgage at the time of making a further advance; (3) under an obligation imposed by the mortgage: see the Law of Property Act 1925 s 94(1). See generally **MORTGAGE** vol 77 (2010) PARAS 264, 265. The cases cited in notes 2-7, which were all decided before the enactment of the 1925 legislation, should be read with this partial abolition in mind.

2 See *Williams v Owen* (1843) 13 Sim 597; *Nicholas v Ridley* [1904] 1 Ch 192, CA. In *Williams v Owen* above the right to tack against a guarantor, who had joined in the covenant in the mortgage deed, was upheld on the ground that he must have known of such right and have impliedly consented to its exercise. This decision was followed in *Farebrother v Wodehouse* (1856) 23 Beav 18, and approved in *Drew v Lockett* (1863) 32 Beav 499. On the other hand, it was neither cited nor followed in *Bowker v Bull* (1850) 1 Sim NS 29, and was disapproved in *Re Kirkwood's Estate* (1878) 1 LR Ir 108; *Dawson v Bank of Whitehaven* (1877) 4 ChD 639; on appeal 6 ChD 218, CA; and in *Forbes v Jackson* (1882) 19 ChD 615, where Hall V-C laid down the principle that the guarantor in effect bargains that the securities which the creditor takes are to be for the guarantor, if and when he is called upon to make any payment, and that it is the creditor's duty to keep the securities intact, and not to give them up and burden them with further advances. See note 1.

3 *Forbes v Jackson* (1882) 19 ChD 615; *Newton v Chorlton* (1853) 10 Hare 646. Sometimes the security expressly gives to the debtor an option to call for further advances: *West v Williams* [1899] 1 Ch 132, CA. In these circumstances a guarantor might, as in *Williams v Owen* (1843) 13 Sim 597, be held to have agreed that, should the option be exercised, the right to tack might be put in force against him. See note 1.

4 *Bowker v Bull* (1850) 1 Sim NS 29. See note 1.

5 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 11, HL, per Lord Selborne LC. See note 1.

6 *Nicholas v Ridley* [1904] 1 Ch 192, CA. See note 1.

7 *South v Bloxam* (1865) 2 Hem & M 457. In this case, which was subsequently explained in *Dixon v Steel* [1901] 2 Ch 602, it was also held that the doctrine of marshalling securities might be applied against a guarantor in favour of a second mortgagee: see **EQUITY** vol 16(2) (Reissue) PARA 759. As to the statutory abolition of the right to tack except in limited circumstances see note 1.

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#### **1144. Consolidation of mortgages.**

The position of a guarantor with regard to the right of a mortgagee to whom two properties have been separately mortgaged to insist on both mortgage debts being paid off as a condition of the redemption of either property<sup>1</sup> is superior to that of a second mortgagee; for the second mortgagee is necessarily a complete stranger to the first mortgagee, whilst between the first mortgagee and the guarantor a contract exists under which the guarantor has certain rights and equities which must not be impaired by the exercise of the right of consolidation or otherwise, and which bind the mortgage securities into whatever hands they may come<sup>2</sup>. Where, however, the guarantor has in the mortgage deed expressly covenanted that, as between himself and the mortgagee, he is to be treated and regarded as a principal debtor, the right of consolidation may, apparently, be exercised against him<sup>3</sup> in cases where it may be

exercised against the mortgagor<sup>4</sup>. This right can only arise when all the mortgages were originally made by the same mortgagor, and it is not enough that the different equities of redemption have passed into the same hands by assignment<sup>5</sup>.

Where a person whose estate is already mortgaged to a mortgagee joins as guarantor in a mortgage by which the estates both of the principal and of the guarantor are mortgaged to that mortgagee, the principal debtor's estate cannot be made liable for the money due under the original mortgage by the guarantor alone<sup>6</sup>.

1 For the doctrine of consolidation of mortgages see generally **MORTGAGE** vol 77 (2010) PARA 498 et seq. The right of consolidation was restricted by the Conveyancing Act 1881 s 17(1), which was repealed and substantially re-enacted by the Law of Property Act 1925 s 93(1). Cases decided prior to 1881 should now be read in the light of this statutory restriction.

2 *Bowker v Bull* (1850) 1 Sim NS 29 at 34, 36 per Lord Cranworth V-C; and see *Drew v Lockett* (1863) 32 Beav 499; *Forbes v Jackson* (1882) 19 ChD 615; *Nicholas v Ridley* [1904] 1 Ch 192, CA. See note 1.

3 See *Farebrother v Wodehouse* (1856) 23 Beav 18; *Nicholas v Ridley* [1904] 1 Ch 192, CA; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 11, HL, per Lord Selborne LC. See note 1.

4 See the Law of Property Act 1925 s 93; and **MORTGAGE** vol 77 (2010) PARA 500.

5 *Sharp v Rickards* [1909] 1 Ch 109.

6 *Aldworth v Robinson* (1840) 2 Beav 287. See note 1.

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#### **1145. Guarantor's right to all the creditor's equities.**

Besides his right to securities held by the creditor for the guaranteed debt, a guarantor is entitled to all the equities which the creditor could have enforced, and these prevail not only against the principal debtor himself but also against all persons claiming under him<sup>1</sup>.

1 *Drew v Lockett* (1863) 32 Beav 499; and see *Re Kirkwood's Estate* (1878) 1 LR Ir 108; *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195; *Brandon v Brandon* (1859) 3 De G & J 524.

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#### **1146. Waiver of rights of subrogation.**

The rights which a guarantor possesses of standing in the creditor's place as regards the creditor's securities and equities, and on the bankruptcy of the principal debtor, may be waived by express words in the contract of guarantee itself<sup>1</sup>. They may also be impliedly waived by the

guarantor's acceptance of an indemnity from the principal debtor in lieu of the right he would otherwise have possessed<sup>2</sup>, or in some other way<sup>3</sup>. Where there has been an express waiver, the fact that the guarantor, in the event of the principal debtor's bankruptcy, realises a counter-security received by him from the principal debtor by way of indemnity, and out of the proceeds discharges his liability to the creditor, will not prevent the creditor from proving for the whole of his debt, so long as he does not receive, in the whole, more than 100 pence in the pound<sup>4</sup>.

1 *Re Fernandes, ex p Hope* (1844) 3 Mont D & De G 720; *Earle v Oliver* (1848) 2 Exch 71; *Re Gillespie* (1887) 19 LR Ir 198; *Midland Banking Co v Chambers* (1869) 4 Ch App 398; *Metropolitan Bank of England and Wales v Coppee* (1896) 12 TLR 258, CA. A mere course of dealing between the parties before the bankruptcy will not, it seems, suffice: *Re Bulmer, ex p Johnson* (1853) 3 De GM & G 218. For cases in which the guarantor has agreed that recovery of dividends in the bankruptcy of a debtor should not prejudice the creditor's right to recover the balance from the guarantor see *Re Sass, ex p National Provincial Bank of England* [1896] 2 QB 12; *Re Sellers, ex p Midland Banking Co* (1878) 38 LT 395; *Re Blakely, ex p Aachener Disconto Gesellschaft* (1892) 9 Morr 173; *Re Rees, ex p National Provincial Bank of England* (1881) 17 ChD 98, CA; *Re Porter, ex p Miles* (1848) De G 623.

2 *Cooper v Jenkins* (1863) 32 Beav 337.

3 *Waugh v Wren* (1862) 1 New Rep 142, where the guarantor, on payment of the guaranteed sum, was held to have permitted the creditor to retain the securities against any further liability of the debtor.

4 *Midland Banking Co v Chambers* (1869) 4 Ch App 398; and see *Re Melton, Milk v Towers* [1918] 1 Ch 37 at 46-47, CA.

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## **(4) GUARANTOR'S RIGHTS AGAINST PRINCIPAL DEBTOR**

### **(i) Nature and Acquisition of Guarantor's Rights**

#### **1147. Guarantor's express right to indemnification.**

An express right to indemnification may be conferred upon the guarantor by the principal debtor<sup>1</sup>, in which case there can be no implied indemnity<sup>2</sup>. The precise extent of an express indemnity is a question of construction in each particular case<sup>3</sup>.

Until the guarantor has paid the creditor, the guarantor's right of indemnification against the principal debtor does not constitute a debt owed to the guarantor by the principal debtor<sup>4</sup>.

A bill of sale given by way of indemnity to a guarantor is void, because the statutory form is not applicable to such a security<sup>5</sup>.

1 See eg *Cooper v Jenkins* (1863) 32 Beav 337; *Re Moss, ex p Hallet* [1905] 2 KB 307. See also *Re Robinson, ex p Burrell* (1876) 1 ChD 537, CA; *Re Simons, ex p Allard* (1881) 16 ChD 505, CA; *Atkins v Revell* (1860) 1 De GF & J 360, where an indemnity was granted by an intended administratrix to an executor renouncing probate in respect of liability as guarantor for the testator. A counter-security given to a guarantor by a principal debtor reverts to the principal debtor on the discharge of the guarantor from liability: *M'Mahon v Fetherstonhaugh* [1895] 1 IR 182; cf *Brown Shipley & Co Ltd v Amalgamated Investment (Europe) BV* [1979] 1 Lloyd's Rep 488, cited in PARA 1138 text and note 12.

2 See PARA 1261 and the cases there cited. For the principle that the guarantor should sue on the express indemnity see PARA 1163.

3 See eg *Dumbell v Isle of Man Rly Co* (1880) 42 LT 745, PC, where an assignment to secure repayment of a loan made by an assignee to assignors and all other sums which might become due from them to him was held to cover money paid by the assignee as guarantor under a guarantee of a loan by a third party to the assignors. See also PARA 1264.

4 See PARA 1267 text and note 6. For the position of a guarantor who has paid the creditor see PARA 1158.

Where the indemnity takes the form of a deposit of title deeds with the guarantor by the principal debtor, and there is no agreement to execute a formal mortgage, the guarantor is only entitled to insist on having a memorandum signed by the principal debtor, specifying the terms of the deposit, and has no right to have a formal legal mortgage executed in his favour: *Sporle v Whayman* (1855) 20 Beav 607. It is no longer possible to create an equitable charge over land by the mere deposit of title deeds: see **MORTGAGE** vol 77 (2010) PARA 105.

5 *Hughes v Little* (1886) 18 QBD 32, CA. See also *Sibley v Higgs* (1885) 15 QBD 619; and PARA 1728.

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### **1148. Guarantor's implied rights against principal debtor.**

The implied rights possessed by a guarantor against the principal debtor are not identical with those which the creditor has against the principal debtor<sup>1</sup>, but are somewhat similar to those possessed by one guarantor against another<sup>2</sup>. They are available whenever the guarantee has been undertaken at the principal debtor's actual or constructive request<sup>3</sup>. Where such a request has been made, the right to indemnity<sup>4</sup> is an incident of the guarantee<sup>5</sup>, and the principal debtor will be liable without the necessity of any further request for all sums subsequently paid by the guarantor under the guarantee as money paid to the use of the principal debtor<sup>6</sup>.

A person cannot make himself a creditor of another merely by volunteering to discharge that other person's obligations<sup>7</sup>. However, even where the guarantee is given without any antecedent request, a guarantor may be entitled to be reimbursed by the principal debtor if the guarantor can bring himself within the principle which enables a person who has been compelled to make a payment for which another person is ultimately liable and of which that person obtains the benefit to recover payment from that other person<sup>8</sup>.

A guarantor for a receiver appointed by the court is entitled to be indemnified out of a balance due to him<sup>9</sup>.

1 *Badeley v Consolidated Bank* (1886) 34 ChD 536 at 556. Thus, although a creditor who has recovered judgment against one partner cannot sue another partner of the same firm, that rule does not take away the rights of a guarantor for one partner against another partner: *Badeley v Consolidated Bank* at 556.

2 *Woods v Creaghe* (1828) 2 Hog 50. As to the rights and liabilities of co-guarantors inter se see PARA 1165 et seq.

3 *Alexander v Vane* (1836) 1 M & W 511; *Re Debtor (No 627 of 1936)* [1937] Ch 156 at 163, CA; *Anson v Anson* [1953] 1 QB 636 at 641, [1953] 1 All ER 867 at 869; and cf *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA. See also *Hodgson v Shaw* (1834) 3 My & K 183 at 190; *Morrice v Redwyn* (1731) 2 Barn KB 26; *Ware v Horwood* (1807) 14 Ves 28; *Kearsley v Cole* (1846) 16 M & W 128; *Re Brooks, Boyd v Brooks* (1865) 34 LJCh 605; *Davies v Humphreys* (1840) 6 M & W 153; *Huntley v Sanderson* (1833) 1 Cr & M 467; *Reynolds v Doyle* (1840) 1 Man & G 753. As to a husband's entitlement to an indemnity from his wife, in respect of any payments made by him as guarantor for her liabilities, see *Re Salisbury-Jones, Hammond v Salisbury-Jones* [1938] 3 All ER 459; *Anson v Anson* above.

4 As to the nature of the guarantor's right of indemnification before he has paid the creditor see PARA 1151 text and note 1.

5 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL. The implied undertaking to repay arises at the time of the request (*Re a Debtor (No 627 of 1936)* [1937] Ch 156, CA) and is not negated by the mere fact that the guarantor is the husband of the principal debtor (*Anson v Anson* [1953] 1 QB 636, [1953] 1 All ER 867). Cf *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA.

6 *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA; *Exall v Partridge* (1799) 8 Term Rep 308; *Pitt v Purssord* (1841) 8 M & W 538; *Warrington v Furber* (1807) 8 East 242; *Davies v Humphreys* (1840) 6 M & W 153; *Pownall v Ferrand* (1827) 6 B & C 439; *Leigh v Dickeson* (1884) 15 QBD 60, CA; *Duffield v Scott* (1789) 3 Term Rep 374. For the right of a guarantor to redeem a mortgage see PARA 1142. Cf also *Scot v Bell* (1672) 2 Lev 70; *Beverly v Gatacre* (1623) 2 Roll Rep 305; *Barling v Bishopp* (1860) 29 Beav 417, where otherwise voluntary transfers of property to guarantors were held, by virtue of those guarantors' rights of indemnity, to be transfers for value.

7 *Hodgson v Shaw* (1834) 3 My & K 183 at 190 per Lord Brougham LC; *Exall v Partridge* (1799) 8 Term Rep 308 at 310; *Pearce v Blagrove* (1855) 3 CLR 338 at 340; and see *Leigh v Dickeson* (1884) 15 QBD 60 at 64 et seq, CA, per Sir Baliol Brett MR; *Johnson v Royal Mail Steam Packet Co* (1867) LR 3 CP 38 at 43.

8 *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA; and see *Re a Debtor (No 627 of 1936)* [1937] Ch 156 at 166, [1937] 1 All ER 1 at 10, CA, per Greene LJ; *Anson v Anson* [1953] 1 QB 636 at 642-643, [1953] 1 All ER 867 at 869-870 per Pearson J; and PARA 1258.

9 *Glossop v Harrison* (1814) 3 Ves & B 134: see **RECEIVERS** vol 39(2) (Reissue) PARA 478 et seq.

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### **1149. Where there is no right to indemnification.**

In certain cases it is illegal to indemnify the guarantor, and it follows that in those cases no right to indemnification can arise by implication of law<sup>1</sup>.

A guarantor cannot, in his own name, enforce a contract of indemnity against a person who has agreed to indemnify the principal debtor in respect of the guaranteed debt<sup>2</sup>. Where by an agreement between the guarantor and the principal debtor the performance of the guarantee by the guarantor is to operate as payment to the principal debtor of a sum due to him from the guarantor, the guarantor's right to indemnification in respect of payment made by him under the guarantee cannot be enforced<sup>3</sup>.

<sup>1</sup> See PARA 1269.

<sup>2</sup> *Re Law Courts Chambers Co Ltd* (1889) 61 LT 669; and see *Crafts v Tritton* (1818) 8 Taunt 365. He may, however, take an assignment of the contract of indemnity (see PARA 1263); and it appears that he might be allowed to sue upon it in the principal debtor's name.

<sup>3</sup> *Copland v Miller* (1903) Times, 28 November.

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AGAINST PRINCIPAL DEBTOR/(i) Nature and Acquisition of Guarantor's Rights/1150. Where right to indemnification is preserved.

### **1150. Where right to indemnification is preserved.**

The guarantor's right to be indemnified by the principal debtor or his estate will not be held to have been abandoned in the absence of a contract on his part to abandon it<sup>1</sup>, and the reservation in a composition deed of a creditor's remedies against a guarantor necessarily implies the continuance of the guarantor's right<sup>2</sup>.

1 *Close v Close* (1853) 4 De GM & G 176. Where a wife charged her separate estate as an indemnity to one of two guarantors for her husband, the guarantor so indemnified, by subsequently discharging the other guarantor from liability to contribution, released the wife's estate from the charge to that extent: *Hodgson v Hodgson* (1837) 2 Keen 704; and see *Way v Hearn* (1862) 11 CBNS 774 at 782; *Re Gervais' Estate* [1903] 1 IR 172.

2 *Close v Close* (1853) 4 De GM & G 176; *Cole v Lynn* [1942] 1 KB 142, [1941] 3 All ER 502, CA.

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## **(ii) Guarantor's Rights before He Satisfies the Guaranteed Debt**

### **1151. Guarantor's right to exoneration from liability.**

When the creditor has acquired a right to immediate payment of the debt from the guarantor, the guarantor is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the guarantor from his obligation, even though the guarantor has paid nothing under the guarantee<sup>1</sup>, and even though the creditor has not demanded payment from him or the principal debtor<sup>2</sup>.

It is not necessary that the creditor should have refused to sue the principal debtor in order that the guarantor may obtain this relief<sup>3</sup>, but, generally speaking, the guarantor is not entitled to relief until the debt is payable by him<sup>4</sup>. He may not therefore call upon the principal debtor to make provision for payment to the creditor before the debt is due<sup>5</sup>, and, moreover, it must be shown that a definite sum is payable<sup>6</sup>; it will not suffice to show that a demand has been made on the guarantor, and that on taking of accounts it may eventually be found that a debt is due<sup>7</sup>. In exceptional cases, however, a guarantor may obtain relief even though his liability has not yet accrued<sup>8</sup>.

1 This is a particular instance of the general equitable rule that a person entitled to an indemnity may enforce his right to it before he has suffered loss (see PARAS 1266-1267, and the cases there cited): see *Earl of Ranelagh v Hayes* (1683) 1 Vern 189 at 190 per Lord Keeper North, afterwards Lord Guildford; *Lee v Rook* (1730) Mos 318 per Sir Joseph Jekyll MR; *Nisbet v Smith* (1789) 2 Bro CC 579 at 592 per Lord Thurlow LC; *Antrobus v Davidson* (1817) 3 Mer 569 at 579 per Sir William Grant MR; *Bechervaise v Lewis* (1872) LR 7 CP 372 at 377 per Willes J; *Alcoy and Gandia Rly and Harbour Co v Greenhill* (1897) 76 LT 542 at 553; on appeal (1898) 79 LT 257, CA. As to claims for protection against future apprehended loss see **CIVIL PROCEDURE** vol 11 (2009) PARAS 362, 365, 367; **EQUITY** vol 16(2) (Reissue) PARA 484.

2 *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401; *Re Anderson-Berry, Harris v Griffith* [1928] Ch 290, CA; *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43; *Watt v Mortlock* [1964] Ch 84, [1963] 1



All ER 388; *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596, [1972] 1 All ER 1176. See also *Wolmershausen v Gullick* [1893] 2 Ch 514 (contribution between co-guarantors); *Gray v Phillips* 1905 13 SLT 145; *Doig v Lawrie* (1903) 5 F 295, Ct of Sess; and see the text and note 3.

3 *Mathews v Saurin* (1893) 31 LR Ir 181. See also *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 at 408 per Swinfen Eady J, refusing to follow the dictum to the contrary in *Padwick v Stanley* (1852) 9 Hare 627.

4 See *Lloyd v Dimmack* (1877) 7 ChD 398; *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 ChD 561; *Bradford v Gammon* [1925] Ch 132; *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325; *Re Ledgard, Attenborough v Ledgard* (1922) 66 Sol Jo 405; and PARA 1268.

5 *Dale v Lolley* (1808), referred to in an editor's note to *Nisbet v Smith* (1789) 2 Bro CC 579 at 582.

6 *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325.

7 *Antrobus v Davidson* (1817) 3 Mer 569.

8 *Re Anderson-Berry, Harris v Griffith* [1928] Ch 290, CA.

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## **1152. Mortgages and charges.**

A person who mortgages his property to secure the debt of another stands in the relation of guarantor towards the person whose debt is thus secured<sup>1</sup>, and is entitled to be exonerated by the principal debtor<sup>2</sup>. This principle also applies where jointly owned property is charged to secure the indebtedness of one co-owner<sup>3</sup>.

So, where a father helped his son to obtain a bank loan by transferring his house into their joint names as tenants in common in equal shares, and then joining with the son in charging the house to the bank as security for the son's debts, the son's debt to the bank was deducted from the son's half share in the house in valuing the interest which vested in the trustee on the son's bankruptcy<sup>4</sup>. However, the equity of exoneration is a principle of equity which depends upon the presumed intention of the parties<sup>5</sup>. So, where a husband and wife charged their jointly owned home to secure a bank account used by the husband both in connection with his business and for payment of expenses in connection with the matrimonial home, the equity of exoneration was held to apply only to those payments made purely for business purposes and for the husband's sole benefit<sup>6</sup>.

1 See *Re Conley, ex p Trustee v Barclays Bank Ltd, Re Conley, ex p Trustee v Lloyd's Bank Ltd* [1938] 2 All ER 127 at 131; *Barclays Bank plc v O'Brien* [1994] 1 AC 180, [1993] 4 All ER 417, HL.

2 *Lee v Rook* (1730) Mos 318; *Evelyn v Evelyn* (1731) 2 P Wms 659 at 663; on appeal (1733) 6 Bro Parl Cas 114, HL; *Piers v Piers* (1750) 1 Ves Sen 521; cf *Re Westzinthus* (1833) 5 B & Ad 817.

3 See *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of the Property of the Debtor* [1976] 2 All ER 1010, [1976] 1 WLR 952; *Re Pittortou, ex p Trustee of Property of Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58. In such a case, the effect of the equity of exoneration is to enhance the proprietary interest of the guarantor/joint mortgagor and not simply to give the guarantor a personal right to an indemnity from the principal debtor who is the other joint mortgagor: *Re Pittortou* at 288 and at 61 per Scott J.

4 *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of the Property of the Debtor* [1976] 2 All ER 1010, [1976] 1 WLR 952.

5 *Re Pittortou, ex p Trustee of Property of Bankrupt* [1985] 1 All ER 285 at 288, [1985] 1 WLR 58 at 62 per Scott J. See also *Re a Debtor (No 24 of 1971), ex p Marley v Trustee of the Property of the Debtor* [1976] 2 All ER 1010 at 1013, [1976] 1 WLR 952 at 955 per Foster J.

6 *Re Pittortou, ex p Trustee of Property of Bankrupt* [1985] 1 All ER 285, [1985] 1 WLR 58. See also *Knight v Lawrence* [1991] 1 EGLR 143, [1991] 01 EG 105; *Paget v Paget* [1898] 1 Ch 470, CA. As to the wife's equity of exoneration where her property is used as security for her husband's debts see also *Earl of Huntington v Countess of Huntington* (1702) 2 Vern 437, HL; *Pocock v Lee* (1707) 2 Vern 604; *Tate v Austin* (1714) 1 P Wms 264; *Christmas v Christmas* (1725) Cas temp King 20; *Partridge v Powlett* (1742) 2 Atk 383; *Piers v Piers* (1750) 1 Ves Sen 521; *Lewis v Nangle* (1752) Amb 150; *Earl of Kinnoul v Money* (1767) 3 Swan 202n; *Pitt v Pitt* (1823) Turn & R 180; *Ruscombe v Hare* (1828) 6 Dow 1, HL; *Lancaster v Evors* (1846) 10 Beav 154; *Thomas v Thomas* (1855) 2 K & J 79; *Nelson v Booth* (1857) 27 LJCh 110; *Gray v Dowman* (1858) 27 LJCh 702; *Scholefield v Lockwood (No 3)* (1863) 32 Beav 439; *Hall v Hall* [1911] 1 Ch 487. In *Re Woodstock* [1980] CLY 148, ChD, cited in *Re Pittortou* above, Walton J doubted the value of some of these early cases in modern social conditions. There are dicta which suggest that the wife's right of exoneration should be postponed to the rights of the husband's other creditors: see *Tate v Austin* above, cited with approval in *Clinton v Hooper* (1791) 3 Bro CC 201; but see *Hudson v Carmichael* (1854) Kay 613; and cf *Robinson v Gee* (1749) 1 Ves Sen 251.

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### **1153. Declaration of relief from further liability.**

A guarantor may, by a claim brought before payment against the principal debtor and creditor, obtain a declaration that he is relieved from all further liability under his guarantee where the acts and conduct of the creditor and principal debtor have in fact so relieved him<sup>1</sup>.

<sup>1</sup> *Wilson v Lloyd* (1873) LR 16 Eq 60; *Oakeley v Pasheller* (1836) 4 Cl & Fin 207, HL.

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### **1154. Guarantor's right to damages.**

By express contract the guarantor may before payment be entitled to recover damages from the principal debtor where, for instance, the principal debtor covenants with the guarantor to pay the amount due to the creditor on a day named and then makes default. In such a case, however, the guarantor is under a duty to pay the amount recovered to the creditor, and if the debtor paid the creditor after the due date, the damages subsequently recoverable by the guarantor would be merely nominal<sup>1</sup>.

<sup>1</sup> *Loosemore v Radford* (1842) 9 M & W 657; *Toussaint v Martinant* (1787) 2 Term Rep 100; *Penny v Foy* (1828) 8 B & C 11; *Hodgson v Bell* (1797) 7 Term Rep 97; *Carr v Roberts* (1833) 5 B & Ad 78; *Martin v Court* (1788) 2 Term Rep 640.

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### **1155. Rights of guarantor for company.**

Even before the guarantor for a company has paid the guaranteed debt, he may present a petition for the winding up of the company since he is a contingent or prospective creditor of the company<sup>1</sup>. It seems, however, that he cannot prove in a winding up so long as he has not paid the guaranteed debt<sup>2</sup>.

1 For the right of a contingent or prospective creditor to present such a petition see the Insolvency Act 1986 s 124(1); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 450. Formerly a guarantor could not present such a petition: *Re Vron Colliery Co* (1882) 20 ChD 442, CA.

2 See *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 760. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 506.

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### **1156. Stoppage in transit.**

A guarantor for the obligation of a buyer of goods to pay the price cannot exercise in his own name the seller's right of stoppage in transit against the goods on the buyer becoming insolvent, unless and until the guarantor himself pays the price of the goods to the seller<sup>1</sup>. However, upon paying the seller, the guarantor will be entitled to exercise that right, if not in his own name, at all events in that of the seller<sup>2</sup>.

Where the buyer transfers the bill of lading by way of pledge, the unpaid seller may stop in transit everything which is not covered by the pledge, and, being in a position analogous to that of a guarantor for the buyer to the pledgee, may compel the pledgee to have the amount secured by the pledge satisfied in the first instance as far as possible out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer<sup>3</sup>.

1 *Siffken v Wray* (1805) 6 East 371.

2 In such circumstances, the guarantor is 'a person who is in the position of the seller' within of the Sale of Goods Act 1979 s 38(2). The Mercantile Law Amendment Act 1856 s 5 may also lead to the same result: see *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195.

3 *Re Westzinthus* (1833) 5 B & Ad 817; *Kemp v Falk* (1882) 7 App Cas 573 at 582, HL. As to stoppage in transit generally see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 256 et seq.

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### **(iii) Guarantor's Rights after He Satisfies the Guaranteed Debt**

#### **1157. What amounts to payment.**

The taking of the guarantor's goods in execution<sup>1</sup>, or the payment by him of money to prevent the execution<sup>2</sup>, is equivalent to payment<sup>3</sup> entitling him to indemnification<sup>4</sup>. Similarly, the exercise by the creditor of a right of set-off possessed by him against the guarantor, or the automatic set-off which occurs upon the insolvency of the creditor or the guarantor<sup>5</sup>, are both equivalent to payment by the guarantor<sup>6</sup>.

It is doubtful whether the giving by the guarantor of a promissory note to the creditor has this effect<sup>7</sup>. The giving of a bond by the guarantor to the creditor<sup>8</sup> or the substitution of one bond for another<sup>9</sup> is not equivalent to payment, nor will the payment of part of the guaranteed debt by the guarantor, together with an indemnity from the creditor against personal liability in respect of the balance of the debt<sup>10</sup>, operate as a full payment of the guaranteed debt.

The court will be satisfied with slight evidence of payment, especially where there is an admission, by silence or otherwise, on the principal debtor's part, of due payment having been made by the guarantor<sup>11</sup>.

1 *Rodgers v Maw* (1846) 15 M & W 444.

2 *Edmunds v Wallingford* (1885) 14 QBD 811, CA; *Exall v Partridge* (1799) 8 Term Rep 308.

3 As to what amounts to payment by a guarantor claiming contribution from a co-guarantor see PARA 1170.

4 As to the guarantor's right of indemnification following payment of the guaranteed debt see PARA 1147 et seq.

5 As to set-off between the creditor and the guarantor see PARA 1126.

6 *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA. See also *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL.

7 *Barclay v Gooch* (1797) 2 Esp 571; *Rodgers v Maw* (1846) 15 M & W 444 at 449 per Pollock CB; *M'Kenna v Harnett* (1849) 13 ILR 206; *Taylor v Higgins* (1802) 3 East 169; *Maxwell v Jameson* (1818) 2 B & Ald 51; but see *Re Roberts, ex p Allen and Cazenove* (1858) 3 De G & J 447. Contrast *Gore v Gore* [1901] 2 IR 269, where a guarantor who gave a promissory note and executed a mortgage to a creditor was entitled to maintain an action against the principal debtor for money paid before payment was made on the note or mortgage; and see *M'Kenna v Harnett* above; *Fahey v Frawley* (1890) 26 LR Ir 78.

8 *Maxwell v Jameson* (1818) 2 B & Ald 51; *Taylor v Higgins* (1802) 3 East 169.

9 *Re Parkinson, ex p Sergeant* (1822) 1 GI & J 183; affd (1825) 2 GI & J 23.

10 *Soutten v Soutten* (1822) 5 B & Ald 852.

11 *Price v Burva* (1857) 6 WR 40.

AGAINST PRINCIPAL DEBTOR/(iii) Guarantor's Rights after He Satisfies the Guaranteed Debt/1158. Guarantor's rights on payment of part of guaranteed debt.

### **1158. Guarantor's rights on payment of part of guaranteed debt.**

As often as the guarantor pays anything under his guarantee in relief of the principal debtor he has, unless the terms of the guarantee provide otherwise, an immediate right of action against the principal debtor<sup>1</sup> or, if he is a sub-guarantor, against any principal guarantor<sup>2</sup>, although he cannot accelerate his remedy by paying the guaranteed debt before it becomes legally due<sup>3</sup>. Consequently the principal debtor or, as the case may be, a principal guarantor, may be exposed to several claims at the suit of the same guarantor. From this inconvenience and hardship he is not protected by any rule of law requiring the guarantor to pay the whole debt due from the principal debtor before compelling reimbursement<sup>4</sup>.

A guarantor for payment of the mortgage debt by the mortgagor is entitled, on liquidating any portion of the debt, to an equitable charge to that extent on the mortgaged property<sup>5</sup>.

1 *Davies v Humphreys* (1840) 6 M & W 153; *Taylor v Mills* (1777) 2 Cowp 525; *Paul v Jones* (1787) 1 Term Rep 599; *Ware v Horwood* (1807) 14 Ves 28. A common provision in standard form guarantees limits the guarantor's right to enforce his claim against the principal debtor until the guarantor has repaid all money to which the guarantee extends. For the position of a guarantor who is a volunteer see PARA 1148.

2 *Standard Brands Ltd v Fox* (1972) 29 DLR (3d) 167; affd (1973) 44 DLR (3d) 69 (NS App Div).

3 See *Coppin v Gray* (1842) 1 Y & C Ch Cas 205 at 210.

4 *Davies v Humphreys* (1840) 6 M & W 153 at 167 per Parke B.

5 See PARA 1142.

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### **1159. Guarantor's position after payment.**

A guarantor who has paid the creditor<sup>1</sup> in relief of the principal debtor becomes to that extent a creditor of the principal debtor<sup>2</sup>. The guarantor stands in the place of the original creditor<sup>3</sup>. So, where the guaranteed debt arose under a contract made by deed, the guarantor becomes a specialty creditor of the principal debtor<sup>4</sup>. A guarantor who makes a payment on account of a debt which is a preferential debt in bankruptcy, the administration of an insolvent estate or the winding up of a company is entitled to the same priority as the creditor would have enjoyed in respect of the amount so paid<sup>5</sup>. A guarantor who has paid the amount secured on the principal debtor's property is entitled to a lien on it<sup>6</sup>.

1 As to the nature of the guarantor's right of indemnification before he has paid the creditor see PARA 1267.

2 If payment is made after the debtor's death the guarantor is a creditor of the estate, and as such may be entitled to administration: *Williams v Jukes* (1864) 34 LJPM & A 60; and see *Wooldridge v Norris* (1868) LR 6 Eq 410. For the position of a guarantor who is a volunteer see PARA 1148.

3 Mercantile Law Amendment Act 1856 s 5; *Re Lord Churchill, Manisty v Churchill* (1888) 39 ChD 174 at 176 per North J; *Morris v Ford Motor Co Ltd* [1973] QB 792 at 809, [1973] 2 All ER 1084 at 1097, CA, per James LJ.

4 *Re Cochran's Estate, De Wolf v Lindsell* (1868) LR 5 Eq 209; *Ferguson v Gibson* (1872) LR 14 Eq 379 at 386; *Badeley v Consolidated Bank* (1886) 34 ChD 536 at 556 Stirling J; affd (1888) 38 ChD 238, CA. Formerly in such a case the guarantor was only a simple contract creditor, even where the original contract under which his liability and that of the principal debtor arose was made by deed: see *Badeley v Consolidated Bank* at 556 per Stirling J; *Copis v Middleton* (1823) Turn & R 224; *Simpkins v Poulett* (1824) 2 LJOs Ch 81. Contrast *Hodgson v Shaw* (1834) 3 My & K 183, where the principal debtor executed two bonds to secure the debt, a guarantor joining in one of the bonds only. The guarantor's representatives, having paid off the bond to which he was a party, procured an assignment of the bond to which he was not a party, and were held entitled to each as a specialty creditor of the principal debtor's estate.

5 *Re Lamplugh Iron Ore Co Ltd* [1927] 1 Ch 308 (rates); and cf *Re Lord Churchill, Manisty v Churchill* (1888) 39 ChD 174, where a guarantor to the Crown who had paid the debt was held entitled to the right of priority formerly enjoyed by the Crown by virtue of its prerogative in the administration of the principal debtor's estate. A guarantor for a Crown debtor on paying the debt was formerly entitled to have the writ of extent put in force on his behalf: see *R v Salter* (1856) 1 H & N 274; *R v Robinson* (1855) 1 H & N 275n. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 577 note 4; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 770.

6 *Munnings v Bury* (1829) Taml 147; *Re Jeffery's Policy* (1872) 20 WR 857. See also *Wilding v Richards* (1845) 1 Coll 655 (property conveyed by deed by principal debtor to guarantor upon trust to sell and to pay creditors out of proceeds; no notice to creditors of deed; deed not binding in favour of creditors; guarantor entitled to retain estate conveyed until discharged from liability as guarantor); *Imperial Bank v London and St Katharine Docks Co* (1877) 5 ChD 195 (purchase by broker for undisclosed principal; broker personally liable according to usage of market on principal's default; payment of vendors by broker; unpaid vendor's lien passed to broker, even though principal had pledged goods to third parties and indorsed delivery order to them).

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### 1160. Guarantor's right to indemnification.

The guarantor's right to indemnification is a right to be reimbursed the amount which he has actually paid for the principal debtor with interest<sup>1</sup>, to which he is entitled because of his right to full indemnification from the principal debtor<sup>2</sup>. Should the guarantor have sustained damage beyond the principal and interest which he has been compelled to pay under his guarantee, he is entitled to recover that damage as well<sup>3</sup>. On his death the amount expended in respect of the guarantee is a debt due to his estate<sup>4</sup>.

A guarantor for an insolvent company which is being wound up is entitled to interest up to the commencement of the winding up or administration (if there is one) on all sums paid by him under his guarantee, but not to interest accruing subsequently<sup>5</sup>.

A guarantor who compounds a debt for which he and the principal debtor have become jointly liable can only recover from the principal debtor the amount of the composition agreed to<sup>6</sup>.

The guarantor cannot recover from the principal debtor sums paid in respect of a claim which is statute-barred<sup>7</sup> or which the guarantor knows to be illegal<sup>8</sup> or void for fraud or immorality<sup>9</sup>.

1 *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA; *Hitchman v Stewart* (1855) 3 Drew 271; *Lawson v Wright* (1786) 1 Cox Eq Cas 275 at 277. As to the right of the guarantor to recover interest upon any sum paid by him in respect of interest upon the guaranteed debt see *Rigby v Macnamara* (1795) 2 Cox Eq Cas 415, the correctness of which was doubted in *Re Maria Anna and Steinbank Coal and Coke Co, McKewan's Case* (1877) 6 ChD 447 at 455, CA, per Malins V-C. As to the courts' power to award interest on debts and damages see the Supreme Court Act 1981 s 35A; the County Courts Act 1984 s 69; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149; **DAMAGES** vol 12(1) (Reissue) PARA 848.

2 *Petre v Duncombe* (1851) 2 LM & P 107 at 115-116 per Erle CJ; *Re Evans, ex p Davies* (1897) 66 LJQB 499; *Omnium Insurance Corp'n Ltd v United London and Scottish Insurance Co Ltd* (1920) 36 TLR 386; but see *Lancaster v Evors* (1847) 10 Beav 266. As to the right of a sub-guarantor to indemnity from a principal guarantor see *Standard Brands Ltd v Fox* (1972) 29 DLR (3d) 167; affd (1973) 44 DLR (3d) 69 (NS App Div).

3 *Badeley v Consolidated Bank* (1886) 34 ChD 536 at 556 per Stirling J; affd [1888] 38 ChD 238, CA.

4 *Willes v Greenhill* (1860) 29 Beav 376.

5 Insolvency Rules 1986, SI 1986/1925, r 4.93(1) (amended by SI 2005/527); see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 795; and cf *Re Beulah Park Estate, Sargood's Claim* (1872) LR 15 Eq 43; *Re Imperial Land Co of Marseilles, ex p Colborne and Strawbridge* (1870) LR 11 Eq 478, both cases decided under the pre-1986 law. As to the payment of interest on debts proved in the liquidation see the Insolvency Act 1986 s 189; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 827.

6 *Reed v Norris* (1837) 2 My & Cr 361. In this case, which was decided before satisfied securities could be assigned to the guarantor (see PARA 1141), the guarantor obtained an assignment to a trustee for himself of the debt compounded. See also *Ex p Rushforth* (1805) 10 Ves 409.

7 *Re Morris, Coneys v Morris* [1922] 1 IR 81; on appeal [1922] 1 IR 136, CA. For the circumstances in which a debt becomes statute-barred see generally the Limitation Act 1980; and **LIMITATION PERIODS**.

8 *Chambers v Manchester and Milford Rly Co* (1864) 5 B & S 588 at 612 per Blackburn J.

9 *Bryant v Christie* (1816) 1 Stark 329.

## UPDATE

### 1160 Guarantor's right to indemnification

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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#### 1161. Costs.

A guarantor may recover from the principal debtor the costs of defending a claim brought against him by the creditor if he undertook the defence with the debtor's authority<sup>1</sup>, or reasonably defended the proceedings in the debtor's interests<sup>2</sup>, or the costs were for some reason unavoidably incurred<sup>3</sup>. If, however, the guarantor defends the claim solely for his own benefit<sup>4</sup>, or incurs costs by unreasonably defending or persisting in defending the claim<sup>5</sup>, he cannot recover the costs from the principal debtor or any amount unreasonably incurred.

1 See *Crampton v Walker* (1860) 3 E & E 321; *Garrard v Cottrell* (1847) 10 QB 679. See also PARA 1265.

2 See *South v Bloxam* (1865) 2 Hem & M 457; *Baxendale v London, Chatham and Dover Rly Co* (1874) LR 10 Exch 35 at 44 per Quain J. See further PARA 1265.

3 *Pierce v Williams* (1854) 23 LJEx 322, where a writ issued against the guarantor was the first notification to the guarantor from the creditor of the principal debtor's default. The costs of the writ, but not the costs of the subsequent proceedings were held to be recoverable from the principal debtor. As to the recovery of costs from co-guarantors see PARA 1172. It was formerly the position that a guarantor who was entitled to recover from the principal debtor the costs of defending an action had a right to costs on the common fund basis: *Howard v*

*Lovegrove* (1870) LR 6 Exch 43. The appropriate basis would presumably now be the indemnity basis: cf *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and see **CIVIL PROCEDURE** vol 12 (2009) PARA 1806. Cf also PARA 1265. As to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

4 *Re International Contract Co, Hughes' Claim* (1872) LR 13 Eq 623 at 624-625 per Wickens V-C.

5 *Pierce v Williams* (1854) 23 LJEx 322; *Beech v Jones* (1848) 5 CB 696, which throws considerable doubt upon the proposition apparently laid down in *Jones v Brooke* (1812) 4 Taunt 464, and *Stratton v Mathews* (1848) 3 Exch 48, that an accommodation acceptor was as a matter of law entitled to recover the costs of an action brought against him.

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### **1162. Defence by guarantor to creditor's claim.**

A guarantor is not bound to resist the creditor's claim against him if he has no good defence to it, and may make the best compromise he can in such circumstances and then recover from the principal debtor indemnification in respect of the loss incurred<sup>1</sup>. Where, however, a guarantor seeks to recover under an indemnity bond the loss sustained by him, the mere production of a judgment signed against him by the creditor is not, apparently, of itself sufficient evidence of the loss<sup>2</sup>.

1 *Lord Newborough v Schroder* (1849) 7 CB 342 at 399; and see *Pettman v Keble* (1850) 9 CB 701. As to the liability of a principal debtor to his guarantor for expenses incurred by the guarantor in disputing for some time the payment of a just debt guaranteed by him, see *Re Garway, ex p Marshall* (1751) 1 Atk 262.

2 *King v Norman* (1847) 4 CB 884; see also *Price v Burva* (1857) 6 WR 40.

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### **(iv) Enforcement of Guarantor's Rights**

#### **1163. Claim by guarantor for indemnification.**

A guarantor who wishes to enforce his right to an indemnity from the principal debtor may bring a claim for indemnification either in the High Court or in a county court<sup>1</sup>. Representations made by the guarantor which do not give rise to a promissory estoppel or a contract of release will not prevent him from enforcing his right to an indemnity<sup>2</sup>.

Where the principal debtor has expressly agreed to indemnify the guarantor, the guarantor should sue on that agreement<sup>3</sup>. Apart from statute, if an express indemnity is given to more than one guarantor, it is a question of construction whether it is joint or several<sup>4</sup>.



Where there is no express agreement by the principal debtor to indemnify the guarantor, the guarantor may enforce his right by bringing a claim in his own name<sup>5</sup> against the principal debtor for money paid to the debtor's use at his request<sup>6</sup>. In the absence of an express stipulation on the subject between the parties an implied promise to indemnify exists<sup>7</sup>.

The guarantor may claim indemnification from the principal debtor by bringing a Part 20 claim<sup>8</sup> against him, whether or not the guarantor and the principal debtor are sued in the same claim by the creditor<sup>9</sup>.

1 Subject to certain exceptions, a county court now has unlimited jurisdiction to hear and determine any claim founded on contract: see the County Courts Act 1984 s 15; and **COURTS** vol 10 (Reissue) PARAS 712, 722. The remedy of the guarantor may be barred by the running of time: see PARA 1183 et seq. The way in which the guarantee arose should be stated in the claim form: see *Ahearn v O'Donovan* (1881) 15 ILT 7. As to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

2 *Chadwick v Manning* [1896] AC 231, PC.

3 *Toussaint v Martinnant* (1787) 2 Term Rep 100 at 104 per Ashhurst J.

4 *Toussaint v Martinnant* (1787) 2 Term Rep 100 at 104 per Ashhurst J. See also *Palmer v Sparshott* (1842) 4 Scott NR 743; and PARA 1122 note 1.

5 *Morris v Ford Motor Co Ltd* [1973] QB 792 at 800, [1973] 2 All ER 1084 at 1089, CA, per Lord Denning MR.

6 *Re a Debtor (No 627 of 1936)* [1937] Ch 156 at 160 per Slesser J.

7 *Toussaint v Martinnant* (1787) 2 Term Rep 100 at 105 per Buller J; and see *Dumbell v Isle of Man Rly Co* (1880) 42 LT 745, PC. See also *Anson v Anson* [1953] 1 QB 636 at 641 et seq per Pearson J, where the two possible legal bases for the right of reimbursement are considered.

8 Is a claim under CPR Pt 20: see **CIVIL PROCEDURE** vol 11 (2009) PARA 618 et seq.

9 See CPR 20.2(1)(b); and **CIVIL PROCEDURE** vol 11 (2009) PARA 618. As to filing a notice containing a statement of claim for an indemnity against another party see CPR 20.6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 623. As to whether a Part 20 claim should be dealt with separately from the main claim see CPR 20.9; and **CIVIL PROCEDURE** vol 11 (2009) PARA 625. Under the former civil procedure, it was held that when the guarantor availed himself of the procedure for serving a third party notice in order to enforce an express contract by the principal debtor to indemnify him, he could sign judgment against the principal debtor before anything has been paid under the guarantee: *English and Scottish Trust Co v Flatau* (1887) 36 WR 238. It was also held that while the guarantor could join the principal debtor by way of a third party notice, the principal debtor could not in general claim to be entitled to join the guarantor: see *Re Kitchin, ex p Young* (1881) 17 ChD 668 at 670, CA, per James LJ. As to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

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#### **1164. Set-off or counterclaim.**

In an appropriate case, a principal debtor who has a money claim against the guarantor may be able to rely upon that claim as a total or partial defence by way of set-off to the guarantor's claim for indemnification. Similarly, in an appropriate case, the guarantor may set up his claim for indemnification as a defence to a money claim against him by the principal debtor<sup>1</sup>. Where there is an express agreement of indemnity and all parties are solvent<sup>2</sup>, the right of set-off may be excluded by the terms of that agreement<sup>3</sup>.

Where the guarantor or the principal debtor is insolvent, the right of set-off is statutory<sup>4</sup>. Parties may not increase<sup>5</sup> or diminish<sup>6</sup> by contract the extent of the rights of set-off conferred in bankruptcy and liquidation. However, an agreement by the guarantor not to prove in the principal debtor's insolvency in competition with the creditor will be upheld<sup>7</sup>.

A guarantor who has not paid the liability guaranteed cannot set off his contingent claim against the insolvent principal debtor for an indemnity against a cross-claim which he owes to the principal debtor<sup>8</sup>. If he pays the liability after the creditor has proved in the principal debtor's insolvency, the creditor will hold any dividends received in the insolvency in respect of that liability on trust for the guarantor<sup>9</sup>. However, where the guarantor pays the guaranteed liability before the creditor proves for the debt<sup>10</sup> in the principal debtor's insolvency, the guarantor may himself prove for the debt and may rely upon his right of indemnity by way of set-off against any claims which the principal debtor may have against him<sup>11</sup>.

1 *Jones v Mossop* (1844) 3 Hare 568; *Ribblesdale v Forbes* (1916) 140 LT Jo 483, CA. As to set-off see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 634 et seq.

2 As to set-off in bankruptcy and company liquidation see the text and note 4.

3 Cf *Continental Illinois National Bank and Trust Co of Chicago v Papanicolaou, The Fedora, The Takana and The Eretrea II* [1986] 2 Lloyd's Rep 441, CA; *Hongkong and Shanghai Banking Corp v Kloeckner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513, CA. However, where the one party deals as consumer or the indemnity is in the other party's standard form, provisions excluding the right of set-off must satisfy the requirement of reasonableness imposed by the Unfair Contract Terms Act 1977 in order to be effective: cf *Stewart Gill Ltd v Horatio Myer Ltd* [1992] QB 600, [1992] 2 All ER 257, CA. See also *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 442, CA.

4 See the Insolvency Act 1986 s 323 in relation to bankruptcy; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547 et seq; the Insolvency Rules 1986, SI 1986/1925, r 4.90 in the case of company liquidation; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 792. As to insurers see the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002, SI 2002/1242, art 5; PARA 1126 note 6; and also PARA 492.

5 *British Eagle International Air Lines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL.

6 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

7 See *Kitchen's Trustee v Madders and Madders* [1950] Ch 134, [1949] 2 All ER 1079, CA.

8 *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA; cf *Re a Debtor (No 66 of 1955), ex p the Debtor v Trustee of the Property of Waite* [1956] 3 All ER 225 at 229-230, [1956] 1 WLR 1226 at 1233-1234, CA, per Lord Evershed MR. The reason is that the rule against double proof prevents both the creditor and the guarantor proving in the principal debtor's insolvency for the same debt. See *Re Fenton, ex p Fenton Textile Association Ltd* above; *Re a Debtor (No 66 of 1955), ex p the Debtor v Trustee of the Property of Waite* above; *Re Oriental Commercial Bank, ex p European Bank* (1871) 7 Ch App 99; *Barclays Bank Ltd v TOSG Trust Fund* [1984] AC 626, [1984] 1 All ER 628, CA; affd [1984] AC 626 at 664, [1984] 1 All ER 1060, HL. It follows that the guarantor will be able to prove, and so to set off, if the creditor renounces his right to prove: *Re Fenton* above.

9 See *Re Sass* [1896] 2 QB 12 at 15 per Vaughan Williams LJ; cf *Gray v Seckham* (1872) 7 Ch App 680, CA; *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85 at 118, CA, per Romer LJ.

10 See *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85 at 118, CA, per Romer LJ; but cf the suggestion in *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626 at 636, [1984] 1 All ER 628 at 636, CA, per Oliver LJ, and at 659-660 and 653 per Slade LJ, that the relevant date should be the date upon which a dividend on the creditor's proof is paid.

11 *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85 at 107, CA, per Lord Hanworth MR, and at 118 per Romer LJ. See also *Jones v Mossop* (1844) 3 Hare 568; *Re Moseley Green Coal and Coke Co Ltd, Barrett's Case* (1865) 4 De GJ & Sm 756. This latter case should be regarded as a case depending on its special facts: *Re a Debtor (No 66 of 1955), ex p the Debtor v Trustee of the Property of Waite* [1956] 3 All ER 225 at 229, [1956] 1 WLR 1226 at 1232, CA. Contrast *Re Norwich Equitable Fire Assurance Co, Brasnett's Case* (1885) 34 WR 206, CA.

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## **(5) MUTUAL RIGHTS AND LIABILITIES OF CO-GUARANTORS**

### **(i) Co-guarantor's Right to Contribution**

#### **A. BY AND AGAINST WHOM RIGHT TO CONTRIBUTION IS AVAILABLE**

##### **1165. How right to contribution arises.**

A guarantor who has paid more than his share of the common liability is entitled to compel contribution<sup>1</sup> from his co-guarantors<sup>2</sup>, whether they are bound jointly and severally<sup>3</sup> or severally<sup>4</sup>, and by the same or different instruments<sup>5</sup>, and whether the guarantor claiming contribution did or did not know, when he became bound as such, that he was co-guarantor with others<sup>6</sup>.

The right to contribution is not founded on contract, but is the result of a general equity arising at the inception of the contract of guarantee on the ground of equality of burden and benefit<sup>7</sup>. In determining whether a relationship is that of principal and guarantor, giving rise to contribution amongst co-guarantors, the substance of the transaction must be considered and the form of the instrument creating it may, in a proper case, be wholly disregarded<sup>8</sup>. A right to contribution may arise even though the payment was made without the co-guarantor's knowledge and prior consent and in the absence of a written demand by the creditor, as required by the contract of guarantee<sup>9</sup>.

It is not entirely clear whether the Civil Liability (Contribution) Act 1978<sup>10</sup> applies to claims for contribution between co-guarantors<sup>11</sup>. It seems that if the guarantor's promise is that a third party will perform specified obligations, then any failure by the third party to do so will mean that the guarantor becomes liable in damages for breach of his promise and the 1978 Act will apply. If, on the other hand, the guarantor's promise is that in certain events he will pay a sum of money, he becomes liable in debt once those events have happened and the 1978 Act does not apply<sup>12</sup>.

1 The overpaying guarantor may claim contribution from the underpaying guarantor to equalise the burden upon them in two ways: (1) directly, under the legal and equitable jurisdiction in such cases; or (2) by taking over the creditor's rights by subrogation under the Mercantile Law Amendment Act 1856 s 5. For the jurisdiction to order contribution between persons liable to a common demand see generally **RESTITUTION**. As to the concurrent jurisdiction in equity to compel contribution see generally **EQUITY** vol 16(2) (Reissue) PARAS 458-459; and see note 7. As to the Mercantile Law Amendment Act s 5 see PARA 1138 et seq.

2 *Morgan v Seymour* (1638) 1 Rep Ch 120; *Deering v Earl of Winchelsea* (1787) 2 Bos & P 270; *Turner v Davies* (1796) 2 Esp 478; *Cowell v Edwards* (1800) 2 Bos & P 268; *Ex p Gifford* (1802) 6 Ves 805; *Ware v Horwood* (1807) 14 Ves 28 at 31, 34; *Craythorne v Swinburne* (1807) 14 Ves 160; *Dunn v Slee* (1817) 1 Moore CP 2; *Stirling v Forrester* (1821) 3 Bligh 575, HL; *Browne v Lee* (1827) 6 B & C 689; *Davies v Humphreys* (1840) 6 M & W 153 at 167; *Kemp v Finden* (1844) 12 M & W 421; *Batard v Hawes* (1853) 2 E & B 287; *Reynolds v Wheeler* (1861) 10 CBNS 561; *Whiting v Burke* (1871) 6 Ch App 342; *Re Snowden, ex p Snowden* (1881) 17 ChD 44, CA; *Macdonald v Whitfield* (1883) 8 App Cas 733, PC.

3 *Underhill v Horwood* (1804) 10 Ves 209 at 226 per Lord Eldon LC; and see *Re Gervais' Estate* [1903] 1 IR 172.

4 See *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 765, PC.

5 *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; *Mayhew v Crickett* (1818) 2 Swan 185 at 192; *Pendlebury v Walker* (1841) 4 Y & C Ex 424; *Swain v Wall* (1641) 1 Rep Ch 149; *Craythorne v Swinburne* (1807) 14 Ves 160 at 167, 170 per Lord Eldon LC; *Dallas v Walls* (1873) 29 LT 599; *Ware v Horwood* (1807) 14 Ves 28.

6 *Craythorne v Swinburne* (1807) 14 Ves 160 at 165 per Lord Eldon LC; *Whiting v Burke* (1871) 6 Ch App 342.

7 *Deering v Earl of Winchelsea* (1787) 2 Bos & P 270; *Ramskill v Edwards* (1885) 31 ChD 100 at 110 per Pearson J; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 19, HL, per Lord Blackburn; *Stirling v Forrester* (1821) 3 Bligh 575 at 590, HL; *Craythorne v Swinburne* (1807) 14 Ves 160; *Shepherd v Bray* [1906] 2 Ch 235 at 253 per Warrington J; *American Surety Co of New York v Wrightson* (1910) 103 LT 663 at 667 obiter per Hamilton J; *Albion Insurance Co v Government Insurance Office of New South Wales* (1969) 121 CLR 342 at 349-350, [1970] ALR 441 at 446-447, Aust HC, obiter per Kitto J; *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] QB 887, [1992] 1 All ER 283, CA. The dicta of Hamilton J in *American Surety Co of New York v Wrightson* above and of Kitto J in *Albion Insurance Co v Government Insurance Office of New South Wales* above were cited with approval in *Eagle Star Insurance Co Ltd v Provincial Insurance plc* [1994] 1 AC 130 at 138-139, [1993] 3 All ER 1 at 6, PC.

8 *Reynolds v Wheeler* (1861) 10 CBNS 561.

9 *Stimpson v Smith* [1999] Ch 340, [1999] 2 All ER 833, CA.

10 See **TORT** vol 45(2) (Reissue) PARA 348 et seq.

11 *Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343, CA.

12 See *Hampton v Minns* [2002] 1 All ER (Comm) 481 at 505, [2002] 1 WLR 1 at 26 (PARA 91) per Kevin Garnett QC, sitting as a deputy judge of the High Court. *Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343, CA was referred to in the skeleton arguments but was not cited in the judgment in *Hampton v Minns* above.

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### **1166. When there is no right to contribution.**

Where parties are not liable to a common demand there is no right of contribution between them<sup>1</sup>, and there is no principle of law which requires a person to contribute to another's payment merely because he has derived a material benefit from it<sup>2</sup>.

There is no right of contribution when guarantors are bound by different instruments for equal portions of a debt due from the same principal debtor, the guarantee entered into by each being a separate and distinct transaction<sup>3</sup>, nor where it is expressly arranged by contract that each is to be individually answerable only for a given portion of one sum of money due from the principal debtor<sup>4</sup>.

Where co-defendants are decreed to pay the costs of a claim, it seems that one co-defendant cannot, by an independent claim, obtain contribution in respect of those costs against the other<sup>5</sup>.

1 *Hunter v Hunt* (1845) 1 CB 300; *Johnson v Wild* (1890) 44 ChD 146; *American Surety Co of New York v Wrightson* (1910) 103 LT 663 at 665 per Hamilton J.

2 *Ruabon Steamship Co v London Assurance* [1900] AC 6, HL; and see *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, CA; *Sharpe v Cummings* (1844) 2 Dow & L 504. So one tenant in common of a house who expends money on ordinary repairs, not being necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution: *Leigh v Dickeson* (1883) 12 QBD 194; affd (1884) 15 QBD 60, CA. Cf *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA.

3 *Coope v Twynam* (1823) Turn & R 426; and see *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC.

4 *Pendlebury v Walker* (1841) 4 Y & C Ex 424. An agreement by co-guarantors to share liability equally was held not to be binding because the settlement in consideration of which it was made could not be effected: *Arcedeckne v Lord Howard* (1875) 45 LJCh 622, HL. Two out of three persons jointly and severally bound in a bond of indemnity to a sheriff in a matter in which they are severally interested have, after having paid the whole sum secured by the bond, several claims, and not a joint claim, against the third obligee for contribution: *Kelby and Vernon v Steel* (1805) 5 Esp 194.

5 *Dearsley v Middleweek* (1881) 18 ChD 236; but see *Newry Salt Works Co v Macdonnell* [1903] 2 IR 454, where one co-defendant who had paid the entire costs was held entitled to recover contribution by an order in the original action. As to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

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### **1167. Exceptions to right to contribution.**

There is, it seems, no right of contribution against a person who became co-guarantor with another person either at the request of that other person<sup>1</sup> or on the promise and undertaking of that other person to indemnify him from loss<sup>2</sup>, where there are circumstances from which it can be inferred that, as between the two, one only was to be liable for the guaranteed debt. Nor is there any right of contribution where the surrounding circumstances and the language of the instrument under which several persons are bound indicate that there is a joint liability but no co-guarantee<sup>3</sup>. A sub-guarantor, that is to say a person standing guarantor for a principal guarantor, is not liable for contribution at the instance of a principal guarantor<sup>4</sup>.

There can be no contribution if the co-guarantor is not liable under his guarantee, either because liability has not yet attached<sup>5</sup> or because his guarantee has been avoided<sup>6</sup>. So, there is no right of contribution against a person who agreed to become guarantor on condition that another person would sign as a co-guarantor, if that condition has not been fulfilled<sup>7</sup>. Similarly, there can be no right to contribution if the person seeking to enforce it has been guilty of misrepresentation or non-disclosure amounting to misrepresentation<sup>8</sup>.

1 *Turner v Davies* (1796) 2 Esp 478 (which does not seem to be well reported), where the guarantor seeking to enforce contribution had received security from the principal in respect of his guarantee liability. If this security had been given in pursuance of an arrangement that the guarantor should be discharged by it, then certainly he would have no claim for contribution against his co-guarantor: *Dane v Walley* (1848) 2 Exch 198.

2 *Rae v Rae* (1857) 6 I Ch R 490. Oral evidence is admissible to prove the existence of such an indemnity: *Rae v Rae*.

3 *Re Denton's Estate, Licenses Insurance Corpn and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178, CA; and see *Re Gervais' Estate* [1903] 1 IR 172.

4 *Craythorne v Swinburne* (1807) 14 Ves 160, where oral evidence was admitted to show whether the defendant was a co-guarantor with the plaintiffs for the principal debtor, and as such bound to contribute, or was a guarantor for both the principal debtor and the plaintiffs, and therefore under no such liability; and see

*Re Denton's Estate, Licenses Insurance Corpn and Guarantee Fund Ltd v Denton* [1904] 2 Ch 178, CA; *Scholefield Goodman & Sons Ltd v Zyngier* [1986] AC 562, [1985] 3 All ER 105, PC.

5 Any express or implied conditions precedent to the guarantor's liability must be fulfilled before recourse can be had to him: see PARA 1106.

6 *Barry v Moroney* (1873) IR 8 CL 554, Ex Ch; *Mackreth v Walmesley* (1884) 51 LT 19. Cf *Eagle Star Insurance Co Ltd v Provincial Insurance plc* [1994] 1 AC 130 at 141-142, [1993] 3 All ER 1 at 8-9, PC; and see **INSURANCE** vol 25 (2003 Reissue) PARA 211. For factors which vitiate contracts of guarantee see PARA 1033 et seq.

7 *Barry v Moroney* (1873) IR 8 CL 554, Ex Ch.

8 See *Mackreth v Walmesley* (1884) 51 LT 19 at 30 per Kay J. A guarantor is not under any greater obligation in this respect to his co-guarantor than the creditor is under to them: *Mackreth v Walmesley*. For the creditor's duties of disclosure and liabilities in respect of misrepresentation see PARA 1035 et seq.

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## **B. WHEN RIGHT TO CONTRIBUTION ARISES**

### **1168. Relief before payment.**

A guarantor's right to contribution from his co-guarantors may arise before he has made payment under his guarantee<sup>1</sup>.

Where the creditor has obtained judgment, or something equivalent to judgment, against the guarantor, the guarantor may bring a claim against his co-guarantors to compel them to contribute to the common liability<sup>2</sup>. In such a claim, the guarantor may obtain a declaration of his right to contribution<sup>3</sup>.

A guarantor who holds an indemnity bond from a third person in respect of the guarantee liability may, after he has been called upon to pay, but before he has done so, maintain a claim against the third person's executors for administration, payment of the guaranteed debt and an indemnity<sup>4</sup>.

1 *Craythorne v Swinburne* (1807) 14 Ves 160 at 164; *Re Snowden, ex p Snowden* (1881) 17 ChD 44 at 47, CA; *Wolmershausen v Gullick* [1893] 2 Ch 514 at 520. There is very little authority to show the precise extent of the relief to which the guarantor is entitled where he seeks to enforce that right before he has paid more than his share of the guaranteed liability: *Wolmershausen v Gullick* at 520.

2 *Wolmershausen v Gullick* [1893] 2 Ch 514.

3 See *Wolmershausen v Gullick* [1893] 2 Ch 514 at 528-529 (distinguished, as regards the existence of power to order payment to a creditor not a party, in *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 at 405, a case of proceedings by a guarantor to enforce payment by the principal debtor: see PARA 1151). For a form of order, where there were four co-guarantors, making provision for the possible default of any of them, see *Kent v Abrahams* [1928] WN 266.

4 *Wooldridge v Norris* (1868) LR 6 Eq 410.

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### **1169. Relief after payment.**

In general, a guarantor's right to contribution from his co-guarantors after payment does not arise until the guarantor has paid more than his total proportion or share of the common liability<sup>1</sup>. He may not, therefore, sue his co-guarantors for a rateable proportion of what he has paid as soon as he has paid any part of the debt<sup>2</sup>. However, where the guaranteed debt is payable by instalments, and each instalment is to be regarded as a separate debt, a guarantor who has paid the whole of one instalment may, it seems, be entitled to recover contribution from his co-guarantors in respect of such payment to the common creditor<sup>3</sup>.

A guarantor may also claim contribution if the creditor has accepted his payment, even though not exceeding the guarantor's share of the liability guaranteed, in full and final settlement of the guaranteed liability. In those circumstances, the guarantor has paid all that he can ever be called upon to pay, and there is then an equitable debt for contribution upon which even a bankruptcy petition can be founded<sup>4</sup>.

A guarantor who has paid his full share of the guaranteed debt has a right of action against his co-guarantors whenever he pays anything further<sup>5</sup>.

1 *Ex p Gifford* (1802) 6 Ves 805; *Davies v Humphreys* (1840) 6 M & W 153; *Re Snowden, ex p Snowden* (1881) 17 ChD 44 at 47, CA; *Lever v Pearce* [1888] WN 105; *Gardner v Brooke* [1897] 2 IR 6, CA.

2 *Davies v Humphreys* (1840) 6 M & W 153 at 168-169 per Parke B, quoted with approval by Warrington J in *Stirling v Burdett* [1911] 2 Ch 418 at 423-424; and see *Ex p Gifford* (1802) 6 Ves 805.

3 *Re Macdonald, ex p Grant* [1888] WN 130, CA, as explained in *Stirling v Burdett* [1911] 2 Ch 418 at 429. It appears from an examination of the record in *Lawson v Wright* (1786) 1 Cox Eq Cas 275 (which has been treated as an authority for the proposition that if the debt is payable by instalments a guarantor who pays the whole of an instalment may recover contribution from his co-guarantor) that the amount paid by the guarantor who was claiming contribution was the whole of the money which was or could become due under the contract guaranteed by the co-guarantors, and was not merely the payment of one instalment of a debt of which further instalments remained to be paid (see *Stirling v Burdett* above at 427). In *Stirling v Burdett* it was held that although a certain number of guarantors had paid more than their share of interest on a mortgage debt and premiums on a life policy due at the time when the payment was made, their right to contribution had not arisen, as the principal, interest and premiums together constituted one debt, of which entire debt their due proportion had not been paid. It seems, therefore, that the proposition laid down in *Craythorne v Swinburne* (1807) 14 Ves 160 at 164 that a guarantor has a right to call upon his co-guarantor for contribution, if called upon by the creditor to pay the principal debt or any part of it, must be read subject to the qualifications (1) that the guarantor has paid more than his proper proportion of the sums recoverable from the debtor; and (2) that, where the debt is payable by instalments, each instalment can properly be regarded as a separate debt.

4 See *Re Snowden, ex p Snowden* (1881) 17 ChD 44 at 47, CA, per James LJ; and see *Lawson v Wright* (1786) 1 Cox Eq Cas 275.

5 *Davies v Humphreys* (1840) 6 M & W 153; *Lawson v Wright* (1786) 1 Cox Eq Cas 275.

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### 1170. What amounts to payment of the guaranteed debt.

The payment made by a guarantor under his guarantee is not treated as a payment made by him voluntarily<sup>1</sup>, and in order to be entitled to recover contribution he need not show that he abstained from paying the creditor until the creditor compelled him to pay<sup>2</sup>. The payment in respect of which contribution is claimed must, however, have been made by the guarantor in part at least out of his own money<sup>3</sup> or its equivalent<sup>4</sup>.

When a guarantor pays with the assistance of a stranger to whom securities for the guaranteed debt are thereupon assigned by the creditor, both will be treated as one person, and therefore the claim for contribution will be allowed only after the guarantor has brought into account money received by the stranger in respect of the securities<sup>5</sup>.

The guarantor should pay the money due to the person legally entitled to receive it<sup>6</sup>. Otherwise the payment may not operate to relieve him from liability under his guarantee, nor entitle him to claim contribution<sup>7</sup>.

1 *Pitt v Purssord* (1841) 8 M & W 538; *Davies v Humphreys* (1840) 6 M & W 153. As to voluntary payments in respect of which there is no contribution see *Leigh v Dickeson* (1884) 15 QBD 60 at 64, CA; and PARA 1148.

2 *Pitt v Purssord* (1841) 8 M & W 538.

3 *Geopel v Swinden* (1844) 13 LJQB 113; and see *Lucas v Wilkinson* (1856) 1 H & N 420.

4 See *Fahey v Frawley* (1890) 26 LR Ir 78, where the court treated the transfer by a guarantor of a mortgage security held by him as equivalent to a money payment. If a party gives a promissory note for another's debt, and the creditor accepts the note in payment, it operates as a payment to the party's use and may be received as such: *Barclay v Gooch* (1797) 2 Esp 571.

5 *Re Arcedeckne, Atkins v Arcedeckne* (1883) 24 ChD 709.

6 *Mann v Stennett* (1845) 8 Beav 189.

7 As to what amounts to payment see PARA 1157; and *Pattison v Belford Union Guardians* (1856) 1 H & N 523, Ex Ch; *Stewart v Aberdeen* (1838) 4 M & W 211; *Kaye v Brett* (1850) 5 Exch 269; *Underwood v Nicholls* (1855) 17 CB 239; *Bartlett v Pentland* (1830) 10 B & C 760; *Howard v Chapman* (1831) 4 C & P 508; *Todd v Reid* (1821) 4 B & Ald 210; *Russell v Bangley* (1821) 4 B & Ald 395.

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### **C. WHAT IS RECOVERABLE FROM A CO-GUARANTOR BY WAY OF CONTRIBUTION**

#### **1171. Amount recoverable from co-guarantor.**

The amount recoverable by a guarantor from each co-guarantor is always<sup>1</sup> regulated by the number of solvent guarantors<sup>2</sup>.

Where each guarantor is liable for an equal amount, all contribute equally towards the common debt, and, if not equally liable, then proportionately to the amount for which each is liable<sup>3</sup>. Where guarantors are bound by separate deeds and in unequal amounts, no one of them can



be called upon to contribute beyond the sum for which he is liable under his own particular deed<sup>4</sup>.

Interest is recoverable by a guarantor on the sum due to him for contribution from the date when he paid the common creditor<sup>5</sup>.

1 The subject to any adjustment under the Civil Liability (Contribution) Act 1978 s 2. As to whether that Act applies to claims for contribution between co-guarantors see PARA 1165. See generally **TORT** vol 45(2) (Reissue) PARA 349 et seq.

2 At law, a guarantor who had paid the whole debt could recover from each of his co-guarantors only an aliquot part according to the whole number of guarantors. If one was insolvent, he had no further right against the rest: *Cowell v Edwards* (1800) 2 Bos & P 268; *Browne v Lee* (1827) 6 B & C 689. In equity, however, he could make the solvent guarantors contribute rateably to the entire debt: *Peter v Rich* (1629) 1 Rep Ch 34; *Hole v Harrison* (1673) 1 Cas in Ch 246; *Hitchman v Stewart* (1855) 3 Drew 271. The equitable rule now prevails: see *Lowe v Dixon* (1885) 16 QBD 455 at 458 per Lopes J. See also *Ramskill v Edwards* (1885) 31 ChD 100; *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA; *Buchanan v Main* (1900) 3 F 215, Ct of Sess; and **EQUITY** vol 16(2) (Reissue) PARA 459.

3 *Pendlebury v Walker* (1841) 4 Y & C Ex 424 at 441 per Alderson B; *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; and see *Coope v Twynam* (1823) Turn & R 426; *Collins v Prosser* (1823) 1 B & C 682; *Re Macdonaghs* (1876) IR 10 Eq 269. It is sometimes difficult to determine in what proportions the common liability is to be borne: *Re Ennis, Coles v Peyton* [1893] 3 Ch 238, CA; *American Surety Co of New York v Wrightson* (1910) 103 LT 663.

4 See *Craythorne v Swinburne* (1807) 14 Ves 160; *Deering v Earl of Winchelsea* (1787) 2 Bos & P 270.

5 *Hitchman v Stewart* (1855) 3 Drew 271; *Swain v Wall* (1641) 1 Rep Ch 149; *Lawson v Wright* (1786) 1 Cox Eq Cas 275 at 277; *Petre v Duncombe* (1851) 2 LM & P 107; and see *Re Hunt, Harvey's Claim* (1902) 86 LT 504; *Re Swan's Estate* (1869) IR 4 Eq 209, CA. It appears that formerly interest was not recoverable by a guarantor claiming contribution: *Onge v Truelock* (1828) 2 Mol 31 at 44; *Salkeld v Abbott* (1832) Hayes & Jo 110; *Bell v Free* (1818) 1 Swan 90. As to interest on the common debt payable primarily by the principal debtor see PARA 1099; and as to the guarantor's right to recover interest from the principal debtor see PARA 1160. As to the courts' power to award interest on debts and damages see the Supreme Court Act 1981 s 35A; the County Courts Act 1984 s 69; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149; **DAMAGES** vol 12(1) (Reissue) PARA 848.

## UPDATE

### 1171 Amount recoverable from co-guarantor

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 1172. Costs.

The costs of a claim defended by a guarantor cannot, as a rule, be recovered by him as part of his claim for contribution against his co-guarantors unless he was authorised by them to defend<sup>1</sup>, or it is established that in defending the claim he adopted a prudent and reasonable course<sup>2</sup>. Thus, costs incurred in proceedings by which the common creditor's claim was reduced may be included in ascertaining the amount of contribution payable by one co-guarantor to another co-guarantor<sup>3</sup>.

When claiming contribution the guarantor must give credit for all that he has received from the principal debtor or by means of a counter-security given by way of indemnity<sup>4</sup>.

1 *Knight v Hughes* (1828) 3 C & P 467; *Roach v Thompson* (1830) Mood & M 487; *Blyth v Smith* (1843) 5 Man & G 405; *Tindall v Bell* (1843) 11 M & W 228. As to when costs are recoverable by a person claiming indemnity against another see generally PARA 1265. As to a guarantor's right to recover costs from the principal debtor see PARA 1161.

2 *Tindall v Bell* (1843) 11 M & W 228; *Broom v Hall* (1859) 7 CBNS 503.

3 *Wolmershausen v Gullick* [1893] 2 Ch 514. See also *Kemp v Finden* (1844) 12 M & W 421, where a share of the costs of executing a warrant of attorney (now obsolete) was recoverable from a co-guarantor.

4 *Knight v Hughes* (1828) Mood & M 247; *Steel v Dixon* (1881) 17 ChD 825; *Re Arcedeckne, Atkins v Arcedeckne* (1883) 24 ChD 709; and see *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; *Berridge v Berridge* (1890) 44 ChD 168.

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## **D. ENFORCEMENT OF RIGHT TO CONTRIBUTION**

### **1173. Claim for contribution.**

A guarantor who wishes to enforce his right to contribution from his co-guarantors may bring a claim either in the High Court or in a county court<sup>1</sup>. The claim is for money paid to the use of the co-guarantor sued, unless there is a covenant for payment, in which case the claim should be brought on that covenant<sup>2</sup>. A claim for money paid, however, is not available unless the claimant has actually paid money or its equivalent and the proportion of contribution recoverable has been ascertained<sup>3</sup>. Consequently proceedings to ascertain the amount may have to be taken. Particulars of demand are, moreover, required from a guarantor claiming from a co-guarantor payment of a definite sum by way of contribution, and not merely an account<sup>4</sup>.

The guarantor may claim a contribution from the principal debtor by bringing a Part 20 claim<sup>5</sup> against him, whether or not the guarantor and the principal debtor are sued in the same claim by the creditor<sup>6</sup>.

The amount of contribution recoverable from each of several co-guarantors is governed<sup>7</sup> by the number of solvent guarantors<sup>8</sup>.

1 Subject to certain exceptions, a county court now has unlimited jurisdiction to hear and determine any claim founded on contract: see the County Courts Act 1984 s 15; and **COURTS** vol 10 (Reissue) PARAS 712, 722. The remedy of the guarantor may be barred by the running of time: see PARA 1183 et seq.

2 *Crafts v Tritton* (1818) 2 Moore CP 411.

3 *Sharpe v Cummings* (1844) 2 Dow & L 504; *Bates v Townley* (1848) 2 Exch 152.

4 *Blackie v Osmaston* (1884) 28 ChD 119, CA.

5 I.e a claim under CPR Pt 20: see **CIVIL PROCEDURE** vol 11 (2009) PARA 618 et seq.

6 See CPR 20.2(1)(b); and **CIVIL PROCEDURE** vol 11 (2009) PARA 618. As to filing a notice containing a statement of claim for a contribution against another party see CPR 20.6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 623. As to whether a Part 20 claim should be dealt with separately from the main claim see CPR 20.9; and **CIVIL PROCEDURE** vol 11 (2009) PARA 625. As to the limited relief available to a guarantor before he has paid more than his rateable share of the guaranteed liability see PARA 1168. Under the former civil procedure, it was held that where the guarantor availed himself of the procedure for serving a third party notice in order to enforce an express contract by a co-guarantor to pay contribution, he could sign judgment against the co-guarantor before anything had been paid under the guarantee: cf *English and Scottish Trust Co v Flatau* (1887) 36 WR 238. As to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

7 le subject to any adjustment under the Civil Liability (Contribution) Act 1978 s 2. As to whether that Act applies to claims for contribution between co-guarantors see PARA 1165. See generally **TORT** vol 45(2) (Reissue) PARA 349 et seq.

8 See PARA 1171.

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#### **1174. Parties to claim for contribution.**

In a claim by a guarantor for contribution from his co-guarantors the principal debtor and each of the co-guarantors (or their personal representatives) should all be made parties unless the fact of their insolvency is admitted or clearly proved<sup>1</sup>. Even in such a case the claimant has, apparently, the right to elect whether he will bring the insolvent co-obligor or his representative before the court<sup>2</sup>.

In case of the death of a co-guarantor his representatives are liable to contribute, to the extent of his assets, what was due from him under his guarantee<sup>3</sup>.

1 *Hay v Carter* [1935] Ch 397, CA. Where the principal debtor is a party to the claim, his insolvency need not be proved (*Cowell v Edwards* (1800) 2 Bos & P 268; *Lawson v Wright* (1786) 1 Cox Eq Cas 275), although possibly such proof may be required where he is not a party to the claim (*Lawson v Wright*, cited by Lord Hanworth MR in *Hay v Carter* above at 403). As to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

2 1 Daniell's Chancery Practice (8th Edn) 195; and see *Wolmershausen v Gullick* [1893] 2 Ch 514; *Hole v Harrison* (1673) Cas temp Finch 15. However, the right to begin or continue proceedings against a company in administration or liquidation or against an individual who is subject to an interim order or a bankruptcy order is restricted by statute: see the Insolvency Act 1986 s 8, Sch B1 paras 43, 44, s 130(2); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 224, 490; s 252(2)(b), s 285(3); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 83, 218.

3 *Primrose v Bromley* (1739) 1 Atk 89; *Simpson v Vaughan* (1739) 2 Atk 31; *Batard v Hawes* (1853) 2 E & B 287; and see *Ashby v Ashby* (1827) 7 B & C 444 at 449 per Bayley J.

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### 1175. Set-off or counterclaim.

In an appropriate case, a co-guarantor who has a money claim against another co-guarantor may be able to rely upon that claim as a total or partial defence by way of set-off to the other co-guarantor's claim for contribution. Similarly, in an appropriate case, a co-guarantor may set up his claim for contribution as a defence to a money claim against him by another co-guarantor<sup>1</sup>. Where there is an express agreement for contribution and all parties are solvent<sup>2</sup>, the right of set-off may be excluded by the terms of that agreement<sup>3</sup>.

Where one or both of the co-guarantors is insolvent, the right of set-off is statutory<sup>4</sup>. Parties may not increase<sup>5</sup> or diminish<sup>6</sup> by contract the extent of the rights of set-off conferred in bankruptcy and liquidation.

A guarantor who has not paid the liability guaranteed cannot set off his contingent claim for contribution from the insolvent co-guarantor against a cross-claim which he owes that co-guarantor<sup>7</sup>. However, a guarantor who pays the whole debt to the creditor can take over the creditor's proof for the whole debt in the insolvency of the co-guarantor, although he cannot receive a dividend of more than the co-guarantor's share<sup>8</sup>. Where the creditor has not proved in the insolvency of the co-guarantor, the solvent guarantor who pays the debt can only prove for the insolvent co-guarantor's share<sup>9</sup>.

1 See *Jones v Mossop* (1843) 3 Hare 568; *Ribblesdale v Forbes* (1916) 140 LT Jo 483, CA. These were cases between guarantor and principal debtor, but the principles are equally applicable. As to set-off see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 634 et seq.

2 As to set-off in bankruptcy and company liquidation see the text and note 4.

3 See *Continental Illinois National Bank and Trust Co of Chicago v Papanicolaou, The Fedora, The Takana and The Eretria II* [1986] 2 Lloyd's Rep 441; *Hongkong and Shanghai Banking Corp v Kloeckner & Co AG* [1990] 2 QB 514, [1989] 3 All ER 513, CA. However, where the one party deals as consumer or the agreement is in the other party's standard form, provisions excluding the right of set-off must satisfy the requirement of reasonableness imposed by the Unfair Contract Terms Act 1977 in order to be effective: cf *Stewart Gill Ltd v Horatio Myer Ltd* [1992] QB 600, [1992] 2 All ER 257, CA. See also *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] BCLC 442, CA.

4 See the Insolvency Act 1986 s 323 in relation to bankruptcy; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547 et seq; the Insolvency Rules 1986, SI 1986/1925, r 4.90 in the case of company liquidation; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 792. As to insurers see the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002, SI 2002/1242, art 5; and PARA 1126 note 6; and see also PARA 492.

5 *British Eagle International Air Lines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL.

6 *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641, HL.

7 *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA; *Re a Debtor (No 66 of 1955), ex p the Debtor v Trustee of the Property of Waite* [1956] 3 All ER 225 at 229-230, [1956] 1 WLR 1226 at 1233-1234, CA, per Lord Evershed MR. The reason is that the rule against double proof prevents both the creditor and the guarantor proving in the co-guarantor's insolvency for the same debt. See *Re Oriental Commercial Bank, ex p Oriental Bank* (1871) 7 Ch App 99; *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626, [1984] 1 All ER 1060, HL. It follows that the guarantor will be able to prove, and so to set off, if the creditor renounces his right to prove: *Re Fenton* above.

8 *Re Clark, ex p Stokes and Goodman* (1848) De G 618; *Re Parker, Morgan v Hill* [1894] 3 Ch 400. As to rights of set-off between insolvent co-guarantors see also *Brown v Cork* [1985] BCLC 363 at 369, CA, per Oliver LJ.

9 *Re Parker, Morgan v Hill* [1894] 3 Ch 400.

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### **1176. Defences by co-guarantor to claim for contribution.**

A counterclaim against the creditor for damages for breach of warranty is not available as a defence in proceedings between co-guarantors, at least without bringing in the principal debtor whose claim it really is<sup>1</sup>.

A guarantor's right to recover contribution from a co-guarantor is not affected by the fact that the creditor has given time to the guarantor seeking to enforce contribution<sup>2</sup>. However, an agreement by one co-guarantor to give time to the principal debtor<sup>3</sup>, or to release him<sup>4</sup>, may have the effect of discharging the other co-guarantor from his obligation to contribute<sup>5</sup>.

Where one of two guarantors who holds an indemnity from a third person in respect of the guarantee liability discharges the other guarantor from his liability to pay contribution, to that extent he relieves the third person from his liability to indemnify<sup>6</sup>.

1 *Wilson v Mitchell* [1939] 2 KB 869, [1939] 2 All ER 869.

2 *Dunn v Slee* (1817) 1 Moore CP 2.

3 *Way v Hearn* (1862) 11 CBNS 774 at 782 per Erle CJ.

4 *Griffith v Wade* (1966) 60 DLR (2d) 62, Alta SC. See also *Fletcher v Grover* (1840) 11 New Hampshire Reports 368; *Sword v Victoria Super Service Ltd* (1958) 15 DLR (2d) 217, BC SC.

5 The reason for this rule is that the giving of time or the release affects the co-guarantor's right of indemnity against the principal debtor: see *Griffith v Wade* (1966) 60 DLR (2d) 62 at 67 per Johnson JA, Alta SC. Compare the effect of similar actions by the creditor, as to which see PARA 1224 et seq. It follows that there is no release where the co-guarantor's acts are obviously incapable of affecting the other co-guarantor's rights against the principal debtor. A clause which deems the co-guarantors to be principal debtors as between themselves and the creditor will prevent a co-guarantor from relying upon this principle to release him from liability to another co-guarantor who has paid off the debt and so stands in the place of the creditor: *Greenwood v Francis* [1899] 1 QB 312, CA. See also *Hodgson v Hodgson* (1837) 2 Keen 704; *Vorley v Barrett* (1856) 1 CBNS 225; *Re Gervais' Estate* [1903] 1 IR 172. In *Greenwood v Francis* above at 320, AL Smith LJ stated that the co-guarantor's defences to a claim for contribution were limited to those which one principal debtor could raise against another. However, the guarantee considered in that case made both guarantors liable as principal debtors, and *Way v Hearn* (1862) 11 CBNS 774 was not cited.

6 *Hodgson v Hodgson* (1837) 2 Keen 704; and see *Way v Hearn* (1862) 11 CBNS 774; *Re Gervais' Estate* [1903] 1 IR 172.

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### **(ii) Guarantor's Rights to Securities held by the Creditor or Co-guarantor**

#### **1177. Guarantor's right to securities.**

A guarantor who has made payment of more than his due proportion of the common liability is entitled to have assigned to him all the creditor's rights and securities, whether satisfied or not, for the purpose of obtaining contribution<sup>1</sup> including, apparently, securities received by the creditor from co-guarantors<sup>2</sup>, and he may recover contribution by means of those securities<sup>3</sup>.

He is similarly entitled to the benefit of all securities which have been taken by any other co-guarantor to indemnify himself against the common liability, and also of a judgment obtained by the creditor against the principal debtor and his guarantors<sup>4</sup>, and for the purposes of proof against an insolvent estate may stand in the shoes of the judgment creditor, whether the judgment has actually been assigned or not<sup>5</sup>.

1 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 19, HL, per Lord Blackburn. If several persons are indebted and one makes the payment, the creditor is bound in conscience (if not by contract) to give the party paying the debt all his remedies against the other debtors: *Stirling v Forrester* (1821) 3 Bligh 575 at 590, HL, per Lord Redesdale.

2 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL.

3 Mercantile Law Amendment Act 1856 s 5 (see also PARA 1141); *Re Parker, Morgan v Hill* [1894] 3 Ch 400, CA; *Ex p Crisp* (1744) 1 Atk 133 at 135; *Greenside v Benson* (1745) 3 Atk 248; *Aldrich v Cooper* (1803) 8 Ves 382 at 389 per Lord Eldon LC; and see *Dale v Powell* (1911) 105 LT 291 at 294.

4 *Done v Walley* (1848) 2 Exch 198; *Re Albert Life Assurance Co, ex p Western Life Assurance Society* (1870) LR 11 Eq 164 at 177; *Re Parker, Morgan v Hill* [1894] 3 Ch 400, CA; *Re Clark, ex p Stokes and Goodman* (1848) De G 618 at 621; Story s 499.

5 *Re M'Myn, Lightbown v M'Myn* (1886) 33 ChD 575.

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### **1178. Marshalling of securities.**

As between co-guarantors who have given security for the payment of the principal debt, a guarantor who pays more than his share of the guaranteed liability<sup>1</sup> is entitled to have the securities marshalled so as to ensure that each co-guarantor pays his due proportion and no more, without taking into account any rights of set-off that might otherwise exist as between the co-guarantors<sup>2</sup>. This is so, even though one or more of the co-guarantors is insolvent<sup>3</sup>.

1 As to the assessment of each guarantor's proportion of the guaranteed liability see PARA 1171.

2 *Brown v Cork* [1985] BCLC 363, CA. Whether 'marshalling' is strictly the right description of the process may be open to doubt, but the principle is clear: *Brown v Cork* at 374 per Oliver LJ. See also *Smith v Wood* [1929] 1 Ch 14, CA.

3 *Brown v Cork* [1985] BCLC 363, CA.

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### **1179. Hotchpot of counter-security.**

A co-guarantor must bring into hotchpot whatever he receives from any counter-security obtained by him from the principal debtor, even though he consented to become a guarantor only on condition of receiving such counter-security, and although the other co-guarantors were ignorant of this when they themselves became guarantors<sup>1</sup>.

When by means of a counter-security the guarantor has been repaid what he has paid on account of the guaranteed debt, and has shared the amount thus received by him with his co-guarantors, he will again be entitled to recover out of the counter-security the amount so handed over by him to them, whereupon their right to participate will again arise, and so on until the whole of the payments made by the co-guarantors on account of the guaranteed debt have been refunded or the value of the counter-security has been exhausted<sup>2</sup>.

1 *Steel v Dixon* (1881) 17 ChD 825; and see *Re Arcedekne, Atkins v Arcedekne* (1883) 24 ChD 709; *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75.

2 *Berridge v Berridge* (1890) 44 ChD 168.

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## **(6) LIMITATION PERIODS**

### **(i) Creditor's Claims**

#### **1180. Claims by the creditor.**

The creditor's claim against the guarantor under a guarantee is a claim in contract<sup>1</sup>. Where the guarantee is not made by deed<sup>2</sup>, a claim to enforce the guarantee may therefore not be brought after the expiration of six years from the date on which the cause of action accrued<sup>3</sup>. Where the guarantee is made by deed<sup>4</sup>, the period is 12 years from the accrual of the cause of action<sup>5</sup>.

1 See PARA 1013.

2 The Limitation Act 1980 s 5 in fact refers to actions founded on 'simple contract', as to the meaning of which see 2 Bl Com 465-466; and **CONTRACT** vol 9(1) (Reissue) PARA 618.

3 Limitation Act 1980 s 5. See **LIMITATION PERIODS** vol 68 (2008) PARA 956. As to the accrual of the cause of action see PARA 1181.

4 Strictly, the Limitation Act 1980 s 8(1) refers to actions (now 'claims') founded on a 'specialty', as to the meaning of which see *Leivers v Barber, Walker & Co Ltd* [1943] 1 KB 385 at 398, [1943] 1 All ER 386 at 397, CA, per Goddard LJ; and **LIMITATION PERIODS** vol 68 (2008) PARA 976. See also note 2.

5 Limitation Act 1980 s 8(1). See **LIMITATION PERIODS** vol 68 (2008) PARA 975. As to the accrual of the cause of action see PARA 1181.

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### **1181. Accrual of the creditor's cause of action.**

The creditor's cause of action accrues, and time begins to run against him and in favour of the guarantor, when the guarantor becomes liable to make payment under the guarantee<sup>1</sup>. When that liability accrues depends upon the terms of the guarantee<sup>2</sup>. The secondary nature of a contract of guarantee<sup>3</sup> means that the guarantor will generally<sup>4</sup> not be liable unless the principal debtor is liable<sup>5</sup>. However, the terms of the guarantee often prescribe conditions in addition to the liability of the principal debtor which must be satisfied before the guarantor also becomes liable.

For example where, on the true construction of the guarantee, a valid demand upon the guarantor is a necessary ingredient of the creditor's cause of action against the guarantor<sup>6</sup>, time will not begin to run until such a demand has been made<sup>7</sup>. Similarly, where the guarantee is for the safety of investments, time only runs from the date that they become unsafe<sup>8</sup>. Where the guarantee is expressed to be a continuing guarantee and to apply to the balance from time to time owing by the principal debtor to the creditor, time runs only from the date each such balance is constituted by the excess of total debits over total credits, not from the date each advance is made to the principal debtor<sup>9</sup>. If, however, the balance of indebtedness under the guarantee has accrued due and become payable in consequence of a demand, the creditor cannot start the limitation period running again by including that sum as part of a larger sum which is the subject of a fresh demand<sup>10</sup>.

Where no demand is necessary, and no other pre-conditions to the guarantor's liability are imposed by the terms of the guarantee, time will run from the moment that the cause of action against the principal debtor is complete, or the moment that the guarantee comes into effect<sup>11</sup>, if later<sup>12</sup>.

1 *Colvin v Buckle* (1841) 8 M & W 680; *Holl v Hadley* (1835) 2 Ad & El 758. As to the accrual of the cause of action in contract claims generally see *Lynn v Bamber* [1930] 2 KB 72; and **LIMITATION PERIODS** vol 68 (2008) PARA 958. As to the extension of the limitation period in cases of disability see the Limitation Act 1980 s 28; and **LIMITATION PERIODS** vol 68 (2008) PARA 1170 et seq. As to the postponement of the running of time in cases of concealment see the Limitation Act 1980 s 32 et seq; and **LIMITATION PERIODS** vol 68 (2008) PARA 1226 et seq. For the effect of an acknowledgment or part payment on the running of time see ss 29-31; and **LIMITATION PERIODS** vol 68 (2008) PARA 1181 et seq; and see eg *UCB Corporate Services Ltd v Kohli* [2004] EWHC 1126 (Ch), [2004] 2 All ER (Comm) 422, [2004] All ER (D) 205 (May) (where, however, the payments relied on by the claimant did not constitute payments by the company as the person liable for the debt or its agent for the purposes of the Limitation Act 1980 ss 29(5), 30(2) and had not caused the period of limitation to start afresh).

2 See *Joachimson v Swiss Bank Corpn* [1921] 3 KB 110 at 129, CA, per Atkin LJ; *Wright v New Zealand Farmers' Co-operative Association of Canterbury Ltd* [1939] AC 439 at 448-449, [1939] 2 All ER 701 at 705-706, PC; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* (No 2) [1993] 3 All ER 769 at 785, CA, per Dillon LJ.

3 See PARAS 1014, 1090.

4 Modern standard forms of 'guarantee' sometimes make the guarantor liable irrespective of the liability of the principal debtor, but this is not a true guarantee; see *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J, cited in PARA 1090 note 5.

5 See PARA 1103.



6 See PARA 1105.

7 *Re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA; *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358, [1975] 1 WLR 1474. For the effect of the inclusion of a clause in the guarantee making the guarantor liable as if he were a principal debtor see *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* at 366-367 and at 1483 per Walton J; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA; and cf *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43.

8 *Sheers v Thimbleby & Son* (1897) 76 LT 709 at 711, CA.

9 *Wright v New Zealand Farmers' Co-operative Association of Canterbury Ltd* [1939] AC 439, [1939] 2 All ER 701, PC.

10 *Bank of Baroda v Patel* [1996] 1 Lloyd's Rep 391.

11 As eg where the guarantee is given for a present debt already payable: see *Birks v Tripett* (1666) 1 Wms Saund 28, 32.

12 *Belford Union Guardians v Pattison* (1856) 11 Exch 623; affd sub nom *Pattison v Belford Union Guardians* (1856) 1 H & N 523, Ex Ch; *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA. In such a case time will run concurrently in favour of the guarantor and the principal debtor. See also PARA 1104.

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## **1182. Principal debt statute-barred.**

A guarantor cannot rely upon the provisions of the Limitation Act 1980 to defeat a claim by the creditor until the period of limitation applicable to claims under the guarantee<sup>1</sup> has itself expired. It is no defence for the guarantor simply to show that the creditor's claim against the principal debtor is time-barred, unless the claim under the guarantee is also thereby barred<sup>2</sup>.

Prima facie, the fact that the guaranteed debt was, as against the principal debtor, statute-barred at the time when he paid it will not prevent the guarantor from recovering an indemnity from the principal debtor<sup>3</sup>.

1 See PARAS 1180-1181.

2 *Carter v White* (1883) 25 ChD 666, CA (where the underlying claim was barred by the equitable doctrine of laches: see **EQUITY** vol 16(2) (Reissue) PARA 910 et seq). Cf *Curwen v Milburn* (1889) 42 ChD 424, CA (lien for statute-barred debts).

3 See *Wolmershausen v Gullick* [1893] 2 Ch 514. Cf *Alexander v Vane* (1836) 1 M & W 511; *Re Chetwynd's Estate, Dunn's Trust Ltd v Brown* [1938] Ch 13; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289, CA. In all of these cases, the guarantor was held entitled to an indemnity from the principal debtor despite the unenforceability of the principal obligation. Contrast *Re Morris, Coneys v Morris* [1922] 1 IR 81, affd [1922] 1 IR 136, where it was held that a guarantor who had paid a statute-barred debt was not entitled to an indemnity.

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## **(ii) Guarantor's Claims against Principal Debtor**

### **1183. Express indemnity.**

In cases where the principal debtor has entered into an express agreement to indemnify the guarantor, there is no implied indemnity<sup>1</sup>. The guarantor must found his claim for an indemnity upon the express agreement<sup>2</sup>. The period of limitation will therefore be that appropriate to the indemnity contract concerned. Where the indemnity is not made by deed<sup>3</sup>, a claim to enforce it may therefore not be brought after the expiration of six years from the date on which the cause of action accrued<sup>4</sup>. Where the indemnity is made by deed<sup>5</sup>, the period is 12 years from the accrual of the cause of action<sup>6</sup>.

1 See PARA 1147.

2 See PARA 1163.

3 See PARA 1180 note 2.

4 Limitation Act 1980 s 5. See **LIMITATION PERIODS** vol 68 (2008) PARA 956. As to the accrual of the cause of action under an express indemnity see PARA 1184.

5 See PARA 1180 note 4.

6 Limitation Act 1980 s 8(1). See **LIMITATION PERIODS** vol 68 (2008) PARA 975. As to the accrual of the cause of action under an express indemnity see PARA 1184.

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### **1184. When time runs under an express indemnity.**

The extent of the indemnity afforded by an express contract of indemnity and the time at which the cause of action under that indemnity arises will depend upon the terms of the contract<sup>1</sup>.

If the indemnity is a simple indemnity against liability, the cause of action will come into existence when the person indemnified incurs the liability<sup>2</sup>. In certain circumstances, a liability may be incurred for this purpose when the liability is still merely contingent<sup>3</sup>. So, where the directors of a housebuilding company agreed to indemnify the National House-Building Council against all losses which might be incurred by the council by reason of the company's failure to perform its obligations under the scheme, their obligation to indemnify the council arose when defective houses were built, not when the company failed to honour the award obtained by the house-owners<sup>4</sup>.

However, if the indemnity is a general indemnity, time will not begin to run until that liability has been established and ascertained by judgment, an arbitration award, or agreement<sup>5</sup>. The terms of the indemnity may prescribe additional conditions which must be satisfied before the indemnifier becomes liable<sup>6</sup>.

1 See eg *Bosma v Larsen* [1966] 1 Lloyd's Rep 22 at 27 per McNair J; *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566 per Neill J; *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at 41, [1990] 2 All ER 705 at 722, HL, per Lord Jauncey of Tullichettle. Cf the cases cited in PARA 1181 note 2. As to the extension of the limitation period in cases of disability see the Limitation Act 1980 s 28; and **LIMITATION PERIODS** vol 68 (2008) PARA 1170 et seq. As to the postponement of the running of time in cases of concealment see the Limitation Act 1980 s 32 et seq; and **LIMITATION PERIODS** vol 68 (2008) PARA 1226 et seq. As to the effect of an acknowledgment or part payment on the running of time see ss 29-31; and **LIMITATION PERIODS** vol 68 (2008) PARA 1181 et seq.

2 *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566 per Neill J.

3 *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566 per Neill J, citing *Forster v Outred & Co* [1982] 2 All ER 753, [1982] 1 WLR 86, CA. See also *Dove v Banhams Patent Locks Ltd* [1983] 2 All ER 833, [1983] 1 WLR 1436; *UBAF Ltd v European American Banking Corp* [1984] QB 713, [1984] 2 All ER 226, CA; *DW Moore & Co Ltd v Ferrier* [1988] 1 All ER 400, [1988] 1 WLR 267, CA; *Iron Trade Mutual Insurance Co Ltd v JK Buckenham Ltd* [1990] 1 All ER 808, [1989] 2 Lloyd's Rep 85; *Islander Trucking Ltd (in liquidation) v Hogg Robinson and Gardner Mountain (Marine) Ltd* [1990] 1 All ER 826; *Bell v Peter Browne & Co* [1990] 2 QB 495, [1990] 3 All ER 124, CA.

4 *National House-Building Council v Fraser* [1983] 1 All ER 1090, 22 BLR 43.

5 *R & H Green and Silley Weir Ltd v British Railways Board (Kavanagh, third party)* [1985] 1 All ER 237, [1985] 1 WLR 570n; *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566 per Neill J. Cf *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, [1989] 1 All ER 961, HL, where the same principle was applied to cases of indemnity insurance.

6 See *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1, [1990] 2 All ER 705, HL, where it was held that the 'pay to be paid' provisions in the club rules made payment to the third party by the club member a condition precedent to the member's right to indemnity from the club.

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### 1185. Implied indemnity.

Where there is no express agreement, the guarantor's cause of action for indemnification against the principal debtor is for money paid to the debtor's use at his request<sup>1</sup>. Such a claim is treated as one founded on a simple contract<sup>2</sup>, and so the period applicable is one of six years from the date on which the cause of action accrued<sup>3</sup>.

1 See PARA 1163.

2 See *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 514, [1948] 2 All ER 318 at 343, CA (affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL); and **LIMITATION PERIODS** vol 68 (2008) PARAS 955, 957.

3 Limitation Act 1980 s 5. See **LIMITATION PERIODS** vol 68 (2008) PARA 956. As to the accrual of the cause of action under an implied indemnity see PARA 1186.

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### 1186. When time runs under an implied indemnity.

The implied indemnity which arises when a guarantor enters into a guarantee at the request of the principal debtor is a general indemnity<sup>1</sup>. Although other relief is available under such an implied indemnity prior to the indemnified person making payment<sup>2</sup>, the guarantor's cause of action against the principal debtor for payment by way of indemnity does not arise until the guarantor has himself paid the creditor<sup>3</sup>. Time therefore does not begin to run against the guarantor until that moment<sup>4</sup>.

1 *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566-567 per Neill J.

2 See PARAS 1151 et seq, 1266 et seq.

3 See *Davies v Humphreys* (1840) 6 M & W 153; *Brittain v Lloyd* (1845) 14 M & W 762 at 773 per Pollock CB; *Re Richardson, ex p Governors of St Thomas' Hospital* [1911] 2 KB 705 at 712, CA, per Fletcher-Moulton LJ; *Re Mitchell, Freelove v Mitchell* [1913] 1 Ch 201 at 206 per Parker J; *Re Beavan, Davies, Banks & Co v Beavan* [1913] 2 Ch 595; *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, CA; *Re a Debtor (No 627 of 1936)* [1937] Ch 156 at 163-164, [1937] 1 All ER 1 at 8, CA, per Greene LJ; *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 253, [1985] 1 WLR 553 at 566-567 per Neill J; and PARA 1158. See also *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, [1989] 1 All ER 961, HL; *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1, [1990] 2 All ER 705, HL.

4 *Collinge v Heywood* (1839) 9 Ad & El 633; *Re Mitchell, Freelove v Mitchell* [1913] 1 Ch 201. See also the other cases cited in note 3. If the guarantor pays only part of the debt, time runs in respect of that part only: *Davies v Humphreys* (1840) 6 M & W 153. As to the extension of the limitation period in cases of disability see the Limitation Act 1980 s 28; and **LIMITATION PERIODS** vol 68 (2008) PARA 1170 et seq. As to the postponement of the running of time in cases of concealment see the Limitation Act s 32 et seq; and **LIMITATION PERIODS** vol 68 (2008) PARA 1226 et seq. As to the effect of an acknowledgment or part payment on the running of time see ss 29-31; and **LIMITATION PERIODS** vol 68 (2008) PARA 1181 et seq.

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### (iii) Contribution between Co-guarantors

#### 1187. Express agreement.

Where there is an express agreement for contribution between co-guarantors, the claim to contribution should be brought under that agreement<sup>1</sup>; and the accrual of the cause of action and the appropriate period of limitation will depend upon the terms of the agreement<sup>2</sup>.

1 See PARA 1173 text and note 2.

2 Cf PARAS 1183-1184, where the accrual of the cause of action and the appropriate period of limitation under an express indemnity are discussed.

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### 1188. Implied rights of contribution.

Where there is no express agreement, the guarantor's primary cause of action against a co-guarantor for contribution is for money paid to the debtor's use at his request<sup>1</sup>. Such a claim is treated as one founded on a simple contract<sup>2</sup>, and so the period applicable is one of six years from the date on which the cause of action accrued<sup>3</sup>.

In general, a guarantor's right of action against a co-guarantor for payment to him of contribution does not arise until the guarantor has paid more than his proportion of the common liability<sup>4</sup>. Time will begin to run against him from that moment<sup>5</sup>.

It is not entirely clear whether the Civil Liability (Contribution) Act 1978<sup>6</sup> applies to claims for contribution between co-guarantors<sup>7</sup>. It seems that if the guarantor's promise is that a third party will perform specified obligations, then any failure by the third party to do so will mean that the guarantor becomes liable in damages for breach of his promise and the 1978 Act will apply<sup>8</sup>. In such a case the period of limitation applicable will be a period of two years from the date of any judgment or award against the guarantor seeking contribution, or if there is no judgment or award, the earliest date on which the amount to be paid by him is agreed between him and the creditor<sup>9</sup>. If, on the other hand, the guarantor's promise is that in certain events he will pay a sum of money, he becomes liable in debt once those events have happened, the 1978 Act does not apply<sup>10</sup> and the period of limitation applicable will be six years<sup>11</sup>.

1 See PARA 1173.

2 See *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 514, [1948] 2 All ER 318 at 343, CA (affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL); and **LIMITATION PERIODS** vol 68 (2008) PARA 957.

3 Limitation Act 1980 s 5. See **LIMITATION PERIODS** vol 68 (2008) PARA 956.

4 See PARA 1169.

5 *Ex p Gifford* (1802) 6 Ves 805; *Davies v Humphreys* (1840) 6 M & W 153; *Re Snowden, ex p Snowden* (1881) 17 ChD 44, CA; *Gardner v Brooke* [1897] 2 IR 6, CA. As to the extension of the limitation period in cases of disability see the Limitation Act 1980 s 28; and **LIMITATION PERIODS** vol 68 (2008) PARA 1170 et seq. As to the postponement of the running of time in cases of concealment see the Limitation Act 1980 s 32 et seq; and **LIMITATION PERIODS** vol 68 (2008) PARA 1226 et seq. As to the effect of an acknowledgment or part payment on the running of time see ss 29-31; and **LIMITATION PERIODS** vol 68 (2008) PARA 1181 et seq.

6 Ie the Civil Liability (Contribution) Act 1978 s 1. See **TORT** vol 45(2) (Reissue) PARA 349 et seq.

7 See *Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343, CA.

8 See *Hampton v Minns* [2002] 1 All ER (Comm) 481 at 505, [2002] 1 WLR 1 at 26 (para 91) per Kevin Garnett QC, sitting as a deputy judge of the High Court. *Barclays Bank plc v Miller (Frank, third party)* [1990] 1 All ER 1040, [1990] 1 WLR 343, CA was referred to in the skeleton arguments but was not cited in the judgment in *Hampton v Minns* above.

9 See the Limitation Act 1980 s 10; and **LIMITATION PERIODS** vol 68 (2008) PARA 1006.

10 See *Hampton v Minns* [2002] 1 All ER (Comm) 481, [2002] 1 WLR 1, where it was held that the Limitation Act 1980 s 10 did not apply.

11 See notes 3, 10.

GUARANTEE/(i) Fulfilment of Purpose of the Guarantee/1189. Discharge by performance of principal obligation.

## **(7) DISCHARGE OF THE GUARANTEE**

### **(i) Fulfilment of Purpose of the Guarantee**

#### **1189. Discharge by performance of principal obligation.**

The secondary nature of the contract of guarantee<sup>1</sup> means that the guarantor is not liable unless the principal debtor is liable<sup>2</sup>. So, if the principal obligation is discharged by performance<sup>3</sup>, the guarantee is also thereby discharged<sup>4</sup>.

<sup>1</sup> See PARAS 1014, 1090.

<sup>2</sup> See PARA 1103. Modern standard forms of 'guarantee' usually make the guarantor liable irrespective of the liability of the principal debtor, but this is not a true guarantee: see *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258 per Lloyd J, cited in PARA 1090 note 5.

<sup>3</sup> Generally, the guarantor will also be discharged where the creditor releases the principal debtor from liability: see PARA 1218 et seq.

<sup>4</sup> See *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 at 258; and PARA 1090. In *Western Credit Ltd v Alberry* [1964] 2 All ER 938, [1964] 1 WLR 945, CA, the principal debtor exercised a right given to him by the terms of the principal contract to terminate the hiring by returning the car to the creditor and paying the amount necessary to bring the payments made by him up to three-quarters of the total hire-purchase price. The creditor's claim against the guarantor for its further loss of profit failed, because the principal debtor had fully performed his obligations in one of the ways contemplated by the principal contract. As to the discharge of contractual obligations by performance see generally **CONTRACT** vol 9(1) (Reissue) PARA 921 et seq.

Under many building contracts, however, the contractor's obligation to complete the work is not fulfilled until: (1) the work is complete in fact; and (2) the architect or engineer has issued a certificate that the work has been completed to his satisfaction. A surety is not discharged where the works have only been substantially completed: see **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARA 187.

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#### **1190. Payment by the principal debtor.**

The most common example of performance by the principal debtor discharging the guarantee by discharging the principal obligation is where the principal debtor pays the creditor the full amount of the guaranteed debt. Such a payment will normally<sup>1</sup> discharge the guarantor<sup>2</sup>.

Whether any particular payment discharges the principal contract depends upon the terms of the principal contract<sup>3</sup> and the circumstances of the payment. For example, if the creditor accepts a promissory note which, by its terms, constitutes a full discharge of the guaranteed debt<sup>4</sup>, this is a good payment discharging the guarantor from his guarantee. Whether a payment of less than the full amount discharges the guaranteed debt may turn on the question whether the agreement to take less is supported by consideration<sup>5</sup>, or is binding by virtue of a promissory estoppel<sup>6</sup>. In certain circumstances, it may depend upon the form of receipt given<sup>7</sup>. The mere fact of there being a balance, equal in amount to the guaranteed debt, due and owing from the creditor to the principal debtor in respect of other transactions outside the

scope of the guarantee will not operate as a payment so as to discharge the guarantor<sup>8</sup>. However, where such a balance is set off<sup>9</sup>, for example on the insolvency of the principal debtor<sup>10</sup>, that will amount to a payment discharging the guarantor<sup>11</sup>.

To have the effect of discharging the guarantee, the payment must be a valid payment under the principal contract. So it was held that a payment which was liable to be avoided as a fraudulent preference did not discharge the guarantee<sup>12</sup>.

The guarantor will be discharged to the extent of the sum received by the creditor from the principal debtor attributable to the principal contract, whether the principal debtor pays the guaranteed debt voluntarily<sup>13</sup> or under compulsion<sup>14</sup>.

1 For a particular example where guarantors were not discharged see *Re O'Callaghan* (1837) 1 I Eq R 448n.

2 *Re Parrott, ex p Whittaker* (1891) 63 LT 777, DC.

3 See eg *Western Credit Ltd v Alberry* [1964] 2 All ER 938, [1964] 1 WLR 945, CA, cited in PARA 1189 note 4.

4 *M'Clure v Fraser* (1840) 9 LJB 60. Cf *Lichfield Union Guardians v Greene* (1857) 1 H & N 884, where the creditor accepted payment from a bank in country banker's own notes which were subsequently dishonoured.

5 See eg *D and C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; and **CONTRACT** vol 9(1) (Reissue) PARA 1019 et seq.

6 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391, HL; *Youell v Bland Welch & Co Ltd (The 'Superhulls Cover' Case) (No 2)* [1990] 2 Lloyd's Rep 431; and **ESTOPPEL** vol 16(2) (Reissue) PARA 1082 et seq.

7 *Field v Robins* (1838) 8 Ad & El 90.

8 *Harrison v Nettleship* (1833) 2 My & K 423; but see *Ex p Hanson* (1806) 12 Ves 346.

9 As to set-off see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 634 et seq.

10 As to rights of set-off in bankruptcy see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547 et seq; and as to rights of set-off in company liquidation see generally **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 737 et seq.

11 Cf *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA, where the automatic set-off of mutual credits and debits between the creditor and the guarantor on the creditor's insolvency was held to give rise to a discharge, pro tanto, of the principal obligation. As to the guarantor's right to rely upon any set-off available to the principal debtor see PARA 1135.

12 *Petty v Cooke* (1871) LR 6 QB 790; *Pritchard v Hitchcock* (1843) 6 Man & G 151; *Re Conley, ex p Trustee v Barclays Bank Ltd, Re Conley, ex p Trustee v Lloyds Bank Ltd* [1938] 2 All ER 127, CA. The concept of fraudulent preference in insolvency has been replaced by the wider statutory concept of voidable preference: see the Insolvency Act 1986 ss 239, 340. The court may order any surety or guarantor whose obligations were released in whole or in part under a transaction at an undervalue or by the giving of a voidable preference to be under such new or revived obligations as the court thinks fit: s 241(1)(e) (company liquidation), s 342(1)(e) (bankruptcy). See also s 425(1)(e), which makes similar provisions for reviving the obligations of a guarantor where the court reverses the effect of a transaction defrauding creditors. In view of these specific statutory provisions, the cases cited above may have to be reconsidered. A guarantor of a payment challenged as a preference (or, probably, as a transaction at an undervalue or a fraud on creditors) should be joined as a party to the application: *Re Idenden (a bankrupt), ex p Trustee of the Property of the Bankrupt v Bateman & Co Ltd* [1970] 2 All ER 387n, [1970] 1 WLR 1015. As to the avoidance of preferences in insolvency see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 656 et seq; and **COMPANY AND PARTNERSHIP INSOLVENCY**.

13 The guarantor is also entitled to the benefits of payments voluntarily made by an agent of the principal debtor: *Williamson v Gould* (1823) 1 Bing 171.

14 *Pearl v Deacon* (1857) as reported in 26 LJCh 761. See also *Kinnaird v Webster* (1878) 10 ChD 139; *Taylor v Bank of New South Wales* (1886) 11 App Cas 596 at 603, PC.

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### **1191. Appropriation.**

In the absence of express contract<sup>1</sup> the mere fact that there is a guarantee does not take away from the principal debtor or the creditor any powers which they would otherwise possess of appropriating payment<sup>2</sup>.

In general, a debtor has the right when he makes a payment to appropriate the money to any debt which he chooses, and the creditor is bound, if he takes the money, to apply it in the manner directed by the debtor<sup>3</sup>. So, where the principal debtor owes money to the creditor on two accounts of which only one is guaranteed, he may appropriate a payment made by him to either of the accounts<sup>4</sup>. The debtor need not make his appropriation expressly, provided that his intention to appropriate can be inferred<sup>5</sup>. Where, therefore, there is evidence of an intention that payments made by a principal debtor are to be applied in relief of the guarantor's liability, they will be so applied<sup>6</sup>, but not otherwise<sup>7</sup>.

If the principal debtor makes no appropriation the creditor may usually do so<sup>8</sup>, and may do so at any time up to the very last moment, that is, until he has finally exercised the right or something has happened which would render it inequitable for him to exercise it<sup>9</sup>. So, the creditor may apply payments made by the principal debtor to a separate debt which was already in existence when the guarantee was given, whether or not the guarantor knew of that pre-existing debt when he became bound<sup>10</sup>.

Where neither debtor nor creditor exercises the option to appropriate payments, and no evidence is forthcoming from which a contrary intention is to be inferred<sup>11</sup>, the law appropriates them to the earliest debt or item of debit<sup>12</sup>. Although in the case of appropriation of payments interest is presumed to be paid before capital, this rule does not apply to the case of interest on an overdrawn account, which, according to banking practice, has been from time to time converted into principal<sup>13</sup>.

1 *Commercial Bank of Australia v John Wilson & Co's Estate (Official Assignee)* [1893] AC 181, PC; *Edwards v Hood-Barrs* [1905] 1 Ch 20; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA; *Williams v Rawlinson* (1825) 3 Bing 71. As to appropriation by the guarantor see PARA 1194.

2 *Kirby v Duke of Marlborough* (1813) 2 M & S 18; *Williams v Rawlinson* (1825) 3 Bing 71; *Re Mayor, ex p Whitworth* (1841) 2 Mont D & De G 164; *Holland v Teed* (1848) 7 Hare 50; *A-G of Jamaica v Manderson* (1848) 12 Jur 383, PC; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA. As to appropriation when a bank account is guaranteed see PARA 865 et seq. See also **CONTRACT** vol 9(1) (Reissue) PARA 960.

3 *Peters v Anderson* (1814) 5 Taunt 596; *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529, 572 at 608; *Simson v Ingham* (1823) 2 B & C 65; *Croft v Lumley* (1858) 6 HL Cas 672; *Cory Bros & Co v Mecca, Turkish Steamship (Owners), The Mecca* [1897] AC 286, HL.

4 See *Kinnaird v Webster* (1878) 10 ChD 139 at 145.

5 *Leeson v Leeson* [1936] 2 KB 156, [1936] 2 All ER 133, CA; *Stepney Corp v Osofsky* [1937] 3 All ER 289, CA. It may be inferred where the nature of the transaction or the circumstances of the case are such as to show that there was an intention to appropriate: see **CONTRACT** vol 9(1) (Reissue) PARA 956.

6 *Marryatts v White* (1817) 2 Stark 101; *Browning v Baldwin* (1879) 40 LT 248; *Kinnaird v Webster* (1878) 10 ChD 139; *Field v Carr* (1828) 5 Bing 13; *Toulmin v Copland* (1836) 3 Y & C Ex 625; affd sub nom *Copland v Toulmin* (1840) 7 Cl & Fin 349, HL; *Royal Bank of Scotland v Christie* (1841) 8 Cl & Fin 214, HL; *City Discount Co Ltd v McLean* (1874) LR 9 CP 692; *Young v English* (1843) 7 Beav 10.



7 *Plomer v Long* (1816) 1 Stark 153 at 154 note (a); *Williams v Rawlinson* (1825) 3 Bing 71; *Kirby v Duke of Marlborough* (1813) 2 M & S 18; *Wright v Hickling* (1866) LR 2 CP 199; *York City and County Banking Co v Bainbridge* (1880) 43 LT 732; *Browning v Baldwin* (1879) 40 LT 248; *Henniker v Wigg* (1843) 4 QB 792, followed in *City Discount Co Ltd v McLean* (1874) LR 9 CP 692.

8 *City Discount Co Ltd v McLean* (1874) LR 9 CP 692 at 700 per Blackburn J; *Kinnaird v Webster* (1878) 10 ChD 139 at 145 per Bacon V-C; and see *Simson v Ingham* (1823) 2 B & C 65; *Mills v Fowkes* (1839) 5 Bing NC 455. As to the restrictions upon the creditor's right of appropriation see PARA 1192.

9 *Cory Bros & Co v Mecca, Turkish Steamship (Owners), The Mecca* [1897] AC 286, HL; *Smith v Betty* [1903] 2 KB 317, CA; *Seymour v Pickett* [1905] 1 KB 715, CA (where the right to appropriate was exercised in the course of the trial).

10 *Kirby v Duke of Marlborough* (1813) 2 M & S 18; *Williams v Rawlinson* (1825) 3 Bing 71. It has been held in the United States of America that where credit is extended after a limited guarantee has expired all unappropriated payments must thereafter be applied by the creditor to the secured indebtedness: *Phipps v Willis* (1895) 32 South Western Reporter 801; and see *Shaw v Picton* (1825) 7 Dow & Ry KB 201.

11 *Lysaght v Walker* (1831) 5 Bli NS 1, HL; *City Discount Co Ltd v McLean* (1874) LR 9 CP 692; *Browning v Baldwin* (1879) 40 LT 248.

12 *Kinnaird v Webster* (1878) 10 ChD 139 at 144-145 per Bacon V-C; *Bodenham v Purchas* (1818) 2 B & Ald 39; *Henniker v Wigg* (1843) 4 QB 792.

13 *Parr's Banking Co Ltd v Yates* [1898] 2 QB 460, CA.

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### **1192. Restrictions on the creditor's right of appropriation.**

Prima facie, the creditor's right of appropriation does not apply where there is one entire account into which all receipts and payments are carried in order of date, so that all sums paid in form one blended fund<sup>1</sup>. In such a case, the presumption is that the first item on the debit side of the account is intended to be discharged or reduced by the first item on the credit side, and the various items are appropriated in the order in which the receipts and payments are set against each other in the account<sup>2</sup>. This presumption may, however, be rebutted by evidence of an agreement to the contrary or of circumstances from which a contrary intention is to be inferred<sup>3</sup>.

There are limits to the extent to which a banker may appropriate payments made by a customer to the prejudice of a guarantor for that customer's account<sup>4</sup>. Where the guarantee is a continuing one, the guarantor has no right, in the absence of special agreement, to control the appropriation of payments into the principal debtor's account<sup>5</sup>, so long as the banker deals with the accounts in the ordinary way of business<sup>6</sup>. However, while the account is unbroken, a guarantor should not be prejudiced by any departure from the rule of appropriation of items in order of date, unless he has expressly consented to such departure, or his consent may be implied from the character of his engagement<sup>7</sup>. So, where the guarantor has guaranteed the balance on an existing account, the banker cannot (unless the guarantee provides otherwise) open a new account for the customer during the currency of the guarantee and appropriate all payments in to the new account<sup>8</sup>. On the other hand, if the guarantee is terminated the banker may break the account and carry all payments in to the new, unsecured, account<sup>9</sup>.

Where it is evident from the terms of the guarantee that a guarantor for advances by a bank to its customer is only to be liable if the customer does not pay enough money into his account, then all subsequent payments from time to time made by the customer must be appropriated to the guaranteed debt<sup>10</sup>.

1 *Field v Carr* (1828) 5 Bing 13; *Bodenham v Purchas* (1818) 2 B & Ald 39 at 45 per Bayley J; *Hooper v Keay* (1875) 1 QBD 178; *City Discount Co Ltd v McLean* (1874) LR 9 CP 692.

2 *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529, 572; and see the other cases cited in **CONTRACT** vol 9(1) (Reissue) PARA 958 note 2. The principle in *Devaynes v Noble, Clayton's Case* only applies to a current account: *Cory Bros & Co v Mecca, Turkish Steamship (Owners), The Mecca* [1897] AC 286, HL; *Hay & Co v Torbet* 1908 SC 781.

3 See **CONTRACT** vol 9(1) (Reissue) PARA 958.

4 As to the banker's right of appropriation see *Simson v Ingham* (1823) 2 B & C 65; and PARA 865.

5 *Williams v Rawlinson* (1825) 3 Bing 71; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

6 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA.

7 *Cory Bros & Co v Mecca, Turkish Steamship (Owners), The Mecca* [1897] AC 286, HL. Cf *City Discount Co Ltd v McLean* (1874) LR 9 CP 692; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA; *Mutton v Peat* [1900] 2 Ch 79 at 85, CA (where it was said that the method of book-keeping was not to prejudice the real rights of the guarantor).

8 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 706, CA, per Cotton LJ. Cf *National Bank of Nigeria v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 289, PC (where a guarantee for an existing balance was held to be discharged by the opening of a new account, which permitted subsequent transactions to be carried out without the reduction which would otherwise have taken place in the liability guaranteed).

9 *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA. If the bank does not break the account, payments in will discharge the earliest debits, and so will pay off the secured portion of the debt before the later, unsecured, portion: *Deeley v Lloyds Bank Ltd* [1912] AC 756, HL. Bank guarantees often contain a provision entitling the bank to continue the customer's account but to treat it as if it had been broken. The efficacy of such clauses was upheld in *Westminster Bank Ltd v Cond* (1940) 46 Com Cas 60.

10 *Kinnaird v Webster* (1878) 10 ChD 139; *Browning v Baldwin* (1879) 40 LT 248 at 249 per Bacon V-C.

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### **1193. Appropriation in insolvency.**

On the insolvency of the principal debtor, the guarantor for a debt payable by instalments is not entitled, by virtue of the doctrine of appropriation of payments, to have the dividend received by the creditor in respect of the whole debt applied in discharge of one instalment of it, as that dividend must be applied rateably in part payment of each instalment as it becomes due<sup>1</sup>.

Where, at the time of a guarantee of a current account with the bank, the bank but not the guarantor knew that the debtor had already committed an act of bankruptcy, it was held that the guarantor's payments should be appropriated to that part of the debt which had been secured before the act of bankruptcy and so was provable<sup>2</sup>.

1 *Martin v Brecknell* (1813) 2 M & S 39.

2 *Re Mason, ex p Sharp* (1844) 3 Mont D & De G 490. The doctrine of relation back to the earliest available act of bankruptcy was abolished by the Insolvency Act 1986. The equivalent situation under the 1986 Act would be where the bank, but not the guarantor, knew of the presentation of a bankruptcy petition: see the Insolvency Act 1986 s 284; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 217, 504.

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### **1194. Payment by the guarantor.**

Payment to the creditor by the guarantor of the guaranteed debt discharges the guarantor<sup>1</sup>. Where the guarantor has other liabilities to the creditor apart from the guarantee, he should make it clear when making any payment to the creditor whether the payment is to be applied to the guarantee liability or not<sup>2</sup>. If the guarantor does not expressly or impliedly appropriate the payment to the guarantee liability, the creditor may exercise his right of appropriation<sup>3</sup>.

Payments made by a guarantor under his guarantee must, unless the guarantee provides otherwise<sup>4</sup>, be set against the liability of the principal debtor. The creditor cannot sue the principal debtor for an amount of the debt which the creditor has already received from a guarantor<sup>5</sup>.

1 As to what constitutes payment by a guarantor see PARAS 1157, 1170.

2 *Waugh v Wren* (1862) 11 WR 244; *Commercial Bank of Australia v John Wilson & Co's Estate (Official Assignee)* [1893] AC 181, PC.

3 For the principles governing the right to appropriate payments see PARAS 1191-1192.

4 Modern standard forms of guarantee often contain provisions which entitle the creditor to place payments made by the guarantor in a 'suspense', or 'securities realised' account. However, the payment which occurs as a result of the automatic set-off which takes place on the insolvency of the creditor or the guarantor is not something that the creditor can, as it were, place in a suspense account. It operates to reduce or extinguish the liability of the guarantor and necessarily therefore operates as in effect a payment by him to be set against the liability of the principal debtor: *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* (No 2) [1993] 3 All ER 769 at 785, CA, per Dillon LJ.

5 *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* (No 2) [1993] 3 All ER 769 at 785, CA, per Dillon LJ.

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### **(ii) Discharge by Agreement**

#### **A. EXPRESS AGREEMENT**

### 1195. Discharge by express agreement.

A guarantee, like any other contract, may be discharged by a subsequent agreement<sup>1</sup>. Where only the creditor and the guarantor are parties to the contract of guarantee, and the contract was entered into before 11 May 2000<sup>2</sup>, the mere fact that the guarantee is for the benefit of the principal debtor will not prevent the creditor and the guarantor agreeing without the principal debtor's concurrence to discharge the guarantee<sup>3</sup>. Where, however, the contract is entered into on or after that date, it is not exempted from the provisions of the Contracts (Rights of Third Parties) Act 1999<sup>4</sup>; the principal debtor's consent may thus be required if the statutory tests are met so that he has a right to enforce a term of the contract purporting to confer a benefit on him<sup>5</sup>.

In order to operate as a discharge of the guarantee, the subsequent agreement must<sup>6</sup> itself possess the characteristics of a valid contract. Thus, there must be an agreement made between parties intending to affect their legal relations and having the capacity to contract<sup>7</sup>, and that agreement must either be made as a deed or be supported by sufficient consideration<sup>8</sup>.

1 See eg *Barclays Bank Ltd v Thomas* [1979] 2 Lloyd's Rep 505, where the defence that the guarantee had been released by express agreement failed on the facts. See also *Shaw v Royce Ltd* [1911] 1 Ch 138, where resolutions passed by the necessary majority of debenture holders which released the guarantor of the debentures were held to be binding on all the debenture holders, including those who were not parties to the release and objected to it. As to the discharge of contractual obligations by subsequent agreement see generally **CONTRACT** vol 9(1) (Reissue) PARA 1013 et seq.

2 See the Contracts (Rights of Third Parties) Act 1999 s 10(2).

3 See **CONTRACT** vol 9(1) (Reissue) PARA 1014.

4 See the Contracts (Rights of Third Parties) Act 1999 s 6: see **CONTRACT**.

5 See the Contracts (Rights of Third Parties) Act 1999 ss 1, 2, 10(2); and **CONTRACT**.

6 As to the effect of the doctrine of promissory estoppel see PARA 1196.

7 A release by a life tenant of a guarantor's liability for interest on a debt owing to the settlement is effective only to the extent of the life interest: *Coates v Coates* (1864) 33 Beav 249.

8 See **CONTRACT** vol 9(1) (Reissue) PARA 1016. Cf PARA 1013. 'A debt can only be truly released and extinguished by agreement for valuable consideration or under seal': *Stamp Duties Comr v Bone* [1977] AC 511 at 519, [1976] 2 All ER 354 at 360, PC. As to what amounts to sufficient consideration see PARA 1196.

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### 1196. Consideration for release.

Where the contract of guarantee is still executory on both sides, sufficient consideration for the release of the guarantor will always be present, for it will be found in the guarantor's own release of his right to performance or further performance of the contract of guarantee by the creditor<sup>1</sup>. Where, however, the creditor has already fully performed his obligations under the contract of guarantee, his mere promise to release the guarantor will not bind him, unless it is made by deed or supported by some further consideration moving from the guarantor<sup>2</sup>.

A promise to release a guarantee, although not made by deed or supported by consideration, may prevent the creditor from claiming under the guarantee if the promise is enforceable against the creditor under the doctrine of promissory estoppel<sup>3</sup>.

1 See *Foster v Dawber* (1851) 6 Exch 839 at 851 per Parke B; and **CONTRACT** vol 9(1) (Reissue) PARA 1016.

2 *Cross v Sprigg* (1849) 6 Hare 552; on appeal (1850) 2 Mac & G 113. A promise to release not supported by consideration may, however, be effective under the doctrine of promissory estoppel: see the text and note 3.

3 As to the requirements of the doctrine of promissory estoppel and its effect on contractual obligations see eg *Yeomans v Williams* (1865) LR 1 Eq 184; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391, HL; *Youell v Bland Welch & Co Ltd (The 'Superhulls Cover' Case) (No 2)* [1990] 2 Lloyd's Rep 431; and **ESTOPPEL** vol 16(2) (Reissue) PARA 1082 et seq. See also *Bank of Baroda v Shah (Dilip)* (30 July 1999, unreported), CA.

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### **1197. Form of the release.**

An agreement releasing a guarantor from his guarantee does not have to be in any particular form, provided that it is sufficiently clear and certain to amount to a contract or other enforceable promise<sup>1</sup>. Even though a guarantee must itself be in writing or be evidenced in writing to be enforceable<sup>2</sup>, it may be released as effectually by a subsequent agreement made orally or by conduct as by a subsequent written agreement<sup>3</sup>. This is so even if the original guarantee was made by deed<sup>4</sup>. However, a mere variation of a guarantee must be in writing or evidenced in writing<sup>5</sup> to be effective<sup>6</sup>.

Sometimes<sup>7</sup> the creditor physically delivers up the guarantee to the guarantor. In the absence of evidence of a contrary intention, the inference from this action is that the guarantee has been treated between the creditor and the guarantor as at an end<sup>8</sup>. However, physical delivery up of a written guarantee is not an essential element of an effective release<sup>9</sup>.

1 See generally the cases cited in notes 3-9. At common law a contract under seal could only be rescinded by an agreement under seal (*Kaye v Waghorn* (1809) 1 Taunt 428) but this rule was not recognised in equity (*Webb v Hewitt* (1857) 3 K & J 438) and the equitable rule now prevails: see the Supreme Court Act 1981 s 49(1). As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed. As to the requirements for an effective release see PARAS 1195-1196.

2 Statute of Frauds (1677) s 4: see PARAS 1013, 1052 et seq.

3 *Taylor v Hilary* (1853) 1 Cr M & R 741. See also *Goman v Salisbury* (1684) 1 Vern 240; *Price v Dyer* (1810) 17 Ves 356; *Robinson v Page* (1826) 3 Russ 114; *Goss v Lord Nugent* (1833) 5 B & Ad 58; *King v Gillett* (1840) 7 M & W 55; *Sanderson v Graves* (1875) LR 10 Exch 234; *Vezey v Rashleigh* [1904] 1 Ch 634; *Morris v Baron & Co* [1918] AC 1, HL; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48, HL. If the release takes the form of a new and inconsistent guarantee, it will be effective as a release even though the new guarantee is itself unenforceable for want of writing: see *Morris v Baron & Co* above (a case on the Sale of Goods Act 1893 s 4 (now repealed)). Cf *Barclays Bank Ltd v Thomas* [1979] 2 Lloyd's Rep 505, where the replacement guarantee was delivered in escrow only and so did not discharge the earlier guarantee. As to implied release by subsequent inconsistent agreement see PARA 1198.

4 *Ward v Livesey* (1887) 5 RPC 102; *Steeds v Steeds* (1889) 22 QBD 537, DC; *Berry v Berry* [1929] 2 KB 316; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 133, [1956] 1 All ER 256n at 258 per Denning J. See also note 1.

5 Statute of Frauds (1677) s 4: see PARA 1052 et seq.

6 *Emmet v Dewhurst* (1851) 3 Mac & G 587; and see *Sanderson v Graves* (1875) LR 10 Exch 234; *Noble v Ward* (1867) LR 2 Exch 135; *Morris v Baron & Co* [1918] AC 1, HL.

7 Usually, but not exclusively, on payment of the guaranteed amount by the guarantor or the principal debtor.

8 *MacKinnon's Trustee v Bank of Scotland* 1915 SC 411 at 418, Ct of Sess; *Simpson v Jack* 1948 SLT (Notes) 415, Ct of Sess. A subsisting guarantee given up by its holder to the principal debtor, his intention being clearly to waive all rights under it and rely in future on some other security in lieu of the original one, is not thereafter enforceable: *Re Lorymer, ex p Powell* (1836) 2 Mont & A 533.

9 See the cases cited in notes 1-4.

## UPDATE

### 1197 Form of the release

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

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## **B. IMPLIED AGREEMENT AND MERGER**

### **1198. Implied release.**

Where there is no express agreement to release a guarantee, a release may be implied if the parties have entered into a new contract inconsistent with the previous one<sup>1</sup>. So, for example, a subsequent limited guarantee will impliedly discharge an earlier unlimited guarantee between the same parties for the same indebtedness<sup>2</sup>. However, the implication that the parties intended to release the earlier guarantee may not be justified where the parties to the earlier and later guarantees are not identical<sup>3</sup>; and the express terms of the later guarantee may prevent any implication that the earlier guarantee is released from arising.

1 See eg *Taylor v Hilary* (1835) 1 Cr M & R 741. Cf *Sanderson v Graves* (1875) LR 10 Exch 234; *Morris v Baron & Co* [1918] AC 1, HL; *British and Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48 at 68, HL, per Lord Sumner.

2 *Galloway v Bank of New Zealand* (25 February 1991, unreported), NZ CA.

3 See eg *Mahoney v McManus* (1981) 36 ALR 545, Aust HC. See also *Samuels Finance Group plc v Beechmanor Ltd (t/a Hurstwood Developments)* (1993) 67 P & CR 282, CA.

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### 1199. Merger.

On general principles, where a creditor takes from his debtor a security of a higher nature than that which he already possesses (for example if he takes a bond or covenant made by deed) his remedies on the minor security or cause of action are normally merged in the higher remedy by operation of law and are extinguished<sup>1</sup>. So, if the creditor takes from the guarantor a further security such as a deed of charge by way of legal mortgage in lieu of the original simple contract guarantee the original guarantee is thereby discharged<sup>2</sup>.

Since merger depends upon the intention of the parties<sup>3</sup>, it will only occur where the higher security appears to be intended to be taken in lieu of the lower, and not where the parties intended it to be additional or collateral<sup>4</sup>. Whether a particular security was taken in lieu of the original one is mainly a question of fact<sup>5</sup>, to be ascertained from the documents concerned<sup>6</sup> and the surrounding circumstances<sup>7</sup>.

Whether the original security is merged is a question of law<sup>8</sup>. No merger takes place where the securities are of equal degree<sup>9</sup>. Nor will there be a merger unless the higher security is made between the same parties in respect of the same obligation<sup>10</sup>. Where security is given for the amounts due and to become due on a running account, it is doubtful whether there can be any merger of the securities in so far as they apply to future indebtedness<sup>11</sup>.

1 *Owen v Homan* (1851) 3 Mac & G 378; *Price v Moulton* (1851) 10 CB 561; *Bell v Banks* (1841) 3 Man & G 258; *Marker v Kenrick* (1853) 13 CB 188. As to the doctrine of merger see generally **CONTRACT** vol 9(1) (Reissue) PARA 1062 et seq; **EQUITY** vol 16(2) (Reissue) PARA 764 et seq.

2 *Clarke v Henty* (1838) 3 Y & C Ex 187; *Boaler v Mayor* (1865) 19 CBNS 76.

3 *Barclays Bank Ltd v Beck* [1952] 2 QB 47, [1952] 1 All ER 549, CA.

4 *Twopenny v Young* (1824) 3 B & C 208; *Yates v Aston* (1843) 4 QB 182; *Holmes v Bell* (1841) 3 Man & G 213; *Norfolk Rly Co v M'Namara* (1849) 3 Exch 628; *Stamps Comr v Hope* [1891] AC 476, PC; *Barclays Bank Ltd v Beck* [1952] 2 QB 47, [1952] 1 All ER 549, CA. Where a bond given by two guarantors expressly provided that a fresh bond should be given on the death of either of them, it was held that the deceased guarantor's estate remained liable to contribute towards payment of the guaranteed debt even after a fresh bond had been given by the surviving guarantor and a new guarantor: *Re Ennis, Coles v Peyton* [1893] 3 Ch 238, CA.

5 *Clarke v Henty* (1838) 3 Y & C Ex 187; *Gordon v Calvert* (1828) 4 Russ 581; *Eyre v Everett* (1826) 2 Russ 381; *Twopenny v Young* (1824) 3 B & C 208 at 210. Where, before the guarantee was due for payment, the creditor took a bill of exchange from the guarantor for the guaranteed debt, but afterwards destroyed the bill in the guarantor's presence, there was held to be no waiver of the guarantee: *Collins v Owen* (1866) 15 LT 327.

6 Modern standard forms often include a clause excluding waiver.

7 *Barclays Bank Ltd v Beck* [1952] 2 QB 47 at 53, [1952] 1 All ER 549 at 552, CA, per Denning LJ.

8 *Boaler v Mayor* (1865) 19 CBNS 76.

9 See **CONTRACT** vol 9(1) (Reissue) PARA 603.

10 See **CONTRACT** vol 9(1) (Reissue) PARA 603. See also *Boaler v Mayor* (1865) 19 CBNS 76; and see *Clarke v Henty* (1838) 3 Y & C Ex p 187; *Bain v Cooper* (1841) 1 Dowl NS 11 at 14.

11 *Barclays Bank Ltd v Beck* [1952] 2 QB 47 at 53-54, [1952] 1 All ER 549 at 552, CA, per Denning LJ: 'The reason is because merger can only apply to existing debts. Future debts do not merge; they take their colour from the circumstances in which they arise'.

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### **C. REVOCATION**

#### **1200. Revocation of continuing guarantees.**

When a guarantee<sup>1</sup> does not expressly provide for its revocation by notice, the question whether it can be so determined mainly depends upon whether the consideration for the guarantor's promise is in its nature entire or divisible<sup>2</sup>. If the consideration is entire, no effectual notice of revocation can be given by the guarantor without the creditor's agreement<sup>3</sup>.

However, in the case of a continuing guarantee, where the consideration is not an entire consideration but the guarantee is given in respect of a continuing indebtedness such as a bank overdraft which may be changed from time to time by increases or decreases in that indebtedness, then in the absence of a provision as to notice the guarantor may terminate the guarantee at any time. If he does so, then he remains responsible for any sums incurred by the principal debtor which are the subject of the guarantee up to the time the notice was given, but he can by giving notice prevent himself from incurring further liability after the date of the notice<sup>4</sup>.

1 Depending upon the circumstances, a 'guarantee' form signed only by the guarantor may amount in law to no more than an offer to guarantee until the creditor, by accepting it, turns it into a contract of guarantee: see PARA 1023 et seq. Such an offer may be revoked at any time before it has been accepted, provided that the revocation is communicated to the creditor: see PARA 1025.

2 *Lloyd's v Harper* (1880) 16 ChD 290 at 319-320, CA; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 at 737-738.

3 *Lloyd's v Harper* (1880) 16 ChD 290, CA; and see *Calvert v Gordon* (1828) 3 Man & Ry KB 124; *Burgess v Eve* (1872) LR 13 Eq 450 at 457 per Malins V-C. See also *Re Consolidated Land Co Ltd, Ellerby's Claim* (1872) 20 WR 855 at 856 per Malins V-C. It was once considered that a guarantee made by deed was irrevocable: *Hassell v Long* (1814) 2 M & S 363 at 370-371 per Lord Ellenborough CJ; *Gordon v Calvert* (1828) 2 Sim 253; affd 4 Russ 581; contra *Hough v Warr* (1824) 1 C & P 151; *Shepherd v Beecher* (1725) 2 P Wms 288. However, this view no longer obtains: see the cases cited in note 4.

4 *National Westminster Bank Ltd v French* (20 October 1977, unreported), ChD. See also *Bastow v Bennett* (1812) 3 Camp 220; *Coulthart v Clementson* (1879) 5 QBD 42 at 46; *Lloyd's v Harper* (1880) 16 ChD 290 at 319-320, CA; *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401; *Wingfield v De St Croix* (1919) 35 TLR 432; *Silverburn Finance (UK) Ltd v Salt* [2001] EWCA Civ 279, [2001] 2 All ER (Comm) 438 (termination of legal relationship on which continuing guarantee was based revoking guarantee).

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#### **1201. Notice provisions.**

Guarantees given for continuing indebtedness such as a bank overdraft or other running account often expressly provide that they are revocable or determinable only upon the giving of a prescribed period of notice<sup>1</sup>.



In such a case, the guarantor's notice of termination of liability does not take effect until the expiry of the notice period. If during the notice period the principal debtor incurs any further indebtedness which falls within the scope of the guarantee, the guarantor remains responsible and is only released from any further liability upon the expiry of the notice period<sup>2</sup>.

The effect of the expiration of such a notice by the guarantor is merely to prevent future liability accruing under the guarantee. It does not release the guarantor from liability already accrued<sup>3</sup>. However, where the guarantee is only payable on demand and states that the expiration of the notice is not to relieve the guarantor from liability for amounts due under the guarantee at the termination, the guarantor will not be liable unless demand is made prior to expiration of the notice, because nothing is due prior to demand<sup>4</sup>.

1 *Solvency Mutual Guarantee Co v Froane* (1861) 7 H & N 5; *Boyd v Robins and Langlands* (1859) 5 CBNS 597, Ex Ch; *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325; *Westminster Bank Ltd v Sassoon* (1926) 5 Legal Decisions Affecting Bankers 19; *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596, [1972] 1 All ER 1176; *National Westminster Bank Ltd v French* (20 October 1977, unreported), ChD; *National House-Building Council v Fraser* [1983] 1 All ER 1090; *National Westminster Bank plc v Hardman* [1988] FLR 302, CA. A guarantee given by more than one guarantor and expressed to be subject to notice by them has been held enforceable against all until each has given notice: *Egbert v National Crown Bank* [1918] AC 903, PC.

2 *National Westminster Bank Ltd v French* (20 October 1977, unreported), ChD. See also *Westminster Bank Ltd v Sassoon* (1926) 5 Legal Decisions Affecting Bankers 19; *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596 at 600, [1972] 1 All ER 1176 at 1177 per Goff J; *National House-Building Council v Fraser* [1983] 1 All ER 1090, 22 BLR 43.

3 See the cases cited in note 2. See also *Bank of Credit and Commerce International SA v Simjee* [1997] CLC 135, CA.

4 *National Westminster Bank plc v Hardman* [1988] FLR 302, CA. For the cases where a valid demand is a necessary element of the creditor's cause of action see PARA 1105. In many standard form guarantees, the language is broader than that considered in *National Westminster Bank plc v Hardman*, and some forms state expressly that the guarantor's contingent liability in respect of advances made to the debtor prior to the expiry of the notice of termination shall not be affected: see Goode, 'Guarantees--rights, rites and rewrites' [1988] JBL 264, cited with approval by Hobhouse LJ in *Bank of Credit and Commerce International SA v Simjee* [1997] CLC 135, CA. A widely drafted clause making the guarantor liable as if he were a principal debtor may also have the effect of making the guarantor liable irrespective of demand: see *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358 at 366-367, [1975] 1 WLR 1474 per Walton J; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425 at 447, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769 at 785, CA, per Dillon LJ; and cf *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43.

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### (iii) Death of Parties

#### 1202. Death of principal debtor.

Where the principal's obligation ceases upon his death, the death of the principal debtor before he has committed any default will operate to discharge the guarantor from liability under his guarantee<sup>1</sup>. However, the death of the principal debtor will not usually discharge his estate from liability for debts contracted prior to his death, and so will not usually discharge a guarantor for those debts<sup>2</sup>.

1 *Sparrow v Sowgate* (1621) W Jo 29. Cf PARA 1189.

2 See **CONTRACT** vol 9(1) (Reissue) PARA 1078.

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### **1203. Death of guarantor.**

The death of a guarantor of which the creditor has no notice does not of itself determine the guarantee<sup>1</sup>.

Where the consideration for a guarantee is entire so that the guarantee is from its nature not revocable by the guarantor<sup>2</sup> then, if there is no express stipulation that it may be revoked, notice of the guarantor's death will not terminate the guarantee<sup>3</sup>. Where there is an express stipulation that a period of notice must be given to determine the guarantee, not confined to a notice to be given by the guarantor while still alive, that notice must be given<sup>4</sup>, and mere notice of death will not terminate the guarantee<sup>5</sup>.

In the case of a continuing guarantee, where the consideration is not an entire consideration but the guarantee is given in respect of a continuing indebtedness such as a bank overdraft, the guarantee is from its nature revocable at any time by the guarantor<sup>6</sup>. If such a guarantee does not expressly stipulate that it can only be revoked on notice, or if the stipulated notice can only be given by the guarantor in his lifetime, the guarantee will be revoked as to future transactions under it by notice of his death<sup>7</sup>.

If the stipulated notice can be given by the guarantor's executor, it may in certain cases be treated as given by him at once; for instance, if the principal debtor is the executor and the creditor knows that it is his duty to the estate to terminate the guarantee<sup>8</sup>; but the mere fact that there is notice of death and of the existence of a will does not raise a presumption that there is a breach of trust if the executor fails to give the required notice<sup>9</sup>.

Where notice of the surety's death revokes the guarantee it does not relieve his estate from liability in respect of previous transactions<sup>10</sup>.

1 *Ashby v Day* (1885) 33 WR 631; affd on appeal (1886) 54 LT 408, CA; *Harriss v Fawcett* (1873) 8 Ch App 866 at 869 per Mellish LJ; *Bradbury v Morgan* (1862) 1 H & C 249 at 256; *Coulthart v Clementson* (1879) 5 QBD 42 at 46 per Bowen J; and see *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 at 406. Quere as to the position if the guarantee is not acted upon at all or nothing else has occurred to make it a binding contract until after the guarantor's death. The dictum of Bramwell B in *Bradbury v Morgan* above to the effect that even so the guarantor's estate would be liable is not easy to reconcile with the principle of the decision in *Offord v Davies* (1862) 12 CBNS 748, coupled with the general rule that an offeror's death, although unknown to the offeree, revokes the offer.

2 See PARA 1200.

3 *Lloyd's v Harper* (1880) 16 ChD 290 at 317, CA, where a guarantee for the performance of the covenants in a lease and guarantee of the fidelity of a person to be taken into another's employment were cited as instances of such a guarantee. As to the application of the principle to a fidelity guarantee see *Calvert v Gordon* (1828) 3 Man & Ry KB 124; *Re Crace, Balfour v Crace* [1902] 1 Ch 733.

4 As to the effect of such a notice see PARA 1201.

5 See *Egbert v National Crown Bank* [1918] AC 903, PC; *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573.

6 See PARA 1200.

7 *Coulthart v Clementson* (1879) 5 QBD 42; *Re Whelan, Dodd v Whelan* [1897] 1 IR 575; and see *Harriss v Fawcett* (1873) LR 15 Eq 311; affd on different grounds 8 Ch App 866; *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401 at 406. The reasoning of Bowen J in *Coulthart v Clementson* above, although approved in *Lloyd's v Harper* (1880) 16 ChD 290 at 319-320, CA, per Lush LJ, and followed in *Re Whelan, Dodd v Whelan* above, has been criticised by Romer J in *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573, and by Joyce J in *Re Crace, Balfour v Crace* [1902] 1 Ch 733, in so far as Bowen J expressed the view that notice of death is constructive notice of the determination of the guarantee: see the text and note 9. It is to be observed also that the point whether notice of death terminates the guarantee was treated as an open one by Lord Selborne LC and Lord Coleridge CJ in *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692 at 703, 705, CA. As to the guarantor becoming mentally disordered see *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833, CA.

8 *Harriss v Fawcett* (1873) 8 Ch App 866.

9 *Re Silvester, Midland Rly Co v Silvester* [1895] 1 Ch 573 at 577; *Re Crace, Balfour v Crace* [1902] 1 Ch 733 at 739, criticising the view expressed in *Coulthart v Clementson* (1879) 5 QBD 42 at 47 per Bowen J.

10 Cf PARA 1200 text and note 4.

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#### **1204. Death of co-guarantor.**

Where a guarantee is joint and several, the death of one co-guarantor does not terminate the liability of the survivors<sup>1</sup>. On the death of a guarantor bound jointly with the principal debtor<sup>2</sup>, or with other guarantors, his estate ceases to be liable, even for the principal debtor's existing debts<sup>3</sup>. Similarly, on the death of the principal debtor, before the guarantor with whom he is jointly liable, his assets are no longer liable, but the liability survives to the guarantor<sup>4</sup>.

1 *Beckett v Addyman* (1882) 9 QBD 783, CA.

2 Ie where one of two joint debtors is, by agreement, guarantor for the other: see PARAS 1015 note 6, 1130.

3 *Rawstone v Parr* (1827) 3 Russ 539; *Jones v Beach* (1852) 2 De GM & G 886; *Other v Iveson* (1855) 3 Drew 177; and see *Ashby v Day* (1885) 33 WR 631; affd on appeal (1886) 54 LT 408, CA.

4 *Richardson v Horton* (1843) 6 Beav 185.

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#### **(iv) Change of Parties**

##### **1205. Change of status of principal debtor.**

The question whether a change in the status or constitution of the principal debtor discharges a guarantee as to future transactions between the creditor and the principal debtor is primarily a question of construction of the guarantee<sup>1</sup>.

A guarantee which by its terms applies only to the debts of a named individual will not usually be construed to secure debts incurred after that individual enters into a partnership<sup>2</sup>. However, partnership debts may be secured by such a guarantee, if it is clear from the surrounding circumstances that that is what the parties intended<sup>3</sup>.

Where the principal debtor is a partnership, in the absence of agreement to the contrary a continuing guarantee is revoked as to future transactions by any change in the constitution of the partnership<sup>4</sup>.

A guarantee for the debts of a named individual or partnership will not usually be construed to secure debts incurred by a company to which that business is transferred, even if that company is owned and controlled by the original principal debtors: for the company is a separate legal entity from its members, and its debts are not theirs<sup>5</sup>. Nor will a guarantee for the debts of one company normally be construed so as to extend to cover the debts of its parent, subsidiary or sister companies to which its business is transferred on a reconstruction or amalgamation<sup>6</sup>. However, such liabilities may be covered if it is clear that that is what the parties intended<sup>7</sup>. On the same principle that the company and its members are separate legal entities<sup>8</sup>, changes in the ownership or control of a company will not generally determine a continuing guarantee<sup>9</sup>.

1 For the principles to be applied in construing a guarantee see PARA 1083 et seq. As to the application in the context of guarantees of the doctrine of estoppel by convention see PARA 1078.

2 *Bellairs v Ebsworth* (1811) 3 Camp 53; *Montefiore v Lloyd* (1863) 15 CBNS 203. See also *Royal Bank of Scotland v Christie* (1840) 8 Cl & Fin 214, HL.

3 *Leatherley v Spyer* (1870) LR 5 CP 595; see also *Bank of British North America v Cuvillier* (1861) 4 LT 159, PC. Knowledge by the guarantor that the principal debtor proposed to enter into the partnership is a significant consideration (*Leatherley v Spyer*), but not the only factor to be taken into account: see *Montefiore v Lloyd* (1863) 15 CBNS 203. Modern standard forms of guarantee usually expressly extend to cover the liability of the principal 'in respect of any transaction whatsoever, either solely or jointly with any other person firm or company'. As to the use of surrounding circumstances in construing a guarantee see PARA 1084.

4 Partnership Act 1890 s 18. Cf *Backhouse v Hall* (1865) 6 B & S 507 at 520 per Blackburn J; *Barclay v Lucas* (1783) 3 Doug KB 321 at 326 note (d); *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203, CA. Modern standard forms of guarantee usually expressly provide that the guarantee is 'to remain in full force and effect notwithstanding any change in the constitution of the principal'. See *Pemberton v Oakes* (1827) 4 Russ 154; *Cambridge University v Baldwin* (1839) 5 M & W 580.

5 For the principle that a company and its members are separate legal entities see *A Saloman & Co v Saloman* [1897] AC 22, HL; and **COMPANIES** vol 14 (2009) PARAS 120, 121. 'Save in cases which turn on the words of particular statutes or contracts, the court is not free to disregard the principle of *Saloman v Saloman & Co* merely because it considers that justice so requires': *Adams v Cape Industries plc* [1990] Ch 433 at 536, [1991] 1 All ER 929 at 1019, CA. Cf the cases cited in notes 2-3.

6 See *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203 at 209 et seq, CA, per Stephenson LJ. There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that each company in a group of companies is a separate legal entity possessed of separate rights and liabilities: *Adams v Cape Industries plc* [1990] Ch 433 at 532, [1991] 1 All ER 929 at 1016, CA, citing *Albacruz (Cargo Owners) v Albazero (Owners)*, *The Albazero* [1977] AC 774 at 807, [1975] 3 All ER 21 at 28, CA, per Roskill LJ (decision revsd on appeal [1977] AC 774 at 840 et seq, [1976] 3 All ER 129, HL).

7 See eg *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 3 All ER 577, CA, discussed in PARA 1084. See also *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203, CA.

8 See the text and note 5.

9 So eg in *First National Finance Corpn Ltd v Goodman* [1983] BCLC 203, CA, the guarantor was held liable for advances made to the principal debtor company after he had ceased to be either a director of it or a shareholder in it.

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### **1206. Change of creditor's status.**

The question whether a change in the status or constitution of the creditor discharges a guarantee as to future transactions between the creditor and the principal debtor is primarily a question of construction of the guarantee<sup>1</sup>.

Unless the parties have agreed otherwise, any change in the identity of the creditor terminates the liability of a guarantor under a continuing guarantee in respect of future transactions<sup>2</sup>. So, for example, where the creditor is a partnership, in the absence of agreement to the contrary a continuing guarantee is revoked as to future transactions by any change in the constitution of the partnership<sup>3</sup>. Similarly, the subsequent incorporation of a voluntary society or private partnership to which a guarantee is given will generally terminate the guarantor's liability as to future transactions under it<sup>4</sup>; and except where an amalgamation or consolidation of two companies is effected by a statute which expressly or impliedly preserves rights against a guarantor<sup>5</sup>, a guarantee given to either of those companies is generally invalidated as to future transactions by that amalgamation or consolidation<sup>6</sup>.

However, it is open to the parties to agree otherwise. So a guarantee expressed to be in favour of a bank, its successors and assigns and any company with which it may amalgamate, will cover advances made by a successor bank with which it has amalgamated and to which its assets and undertaking have been transferred<sup>7</sup>. Even where there is no express agreement, guarantors may become estopped from denying their continuing liability following a reconstruction of the creditor company<sup>8</sup>.

A mere change in the name of the creditor company by which the rights of the creditor and the obligations of the guarantor are not altered will not release the guarantor from liability<sup>9</sup>.

1 For the principles to be applied in construing a guarantee see PARA 1083 et seq. As to the application in the context of guarantees of the doctrine of estoppel by convention see PARA 1078.

2 *First National Finance Corp'n Ltd v Goodman* [1983] BCLC 203 at 209, CA.

3 Partnership Act 1890 s 18; and see PARA 1205 note 4.

4 *Dance v Girdler* (1804) 1 Bos & PNR 34, where the guarantee was given to named persons as governors of a society and their successors.

5 *London, Brighton and South Coast Rly Co v Goodwin* (1849) 3 Exch 320, where the consolidation did not affect the responsibility of the principal for whose fidelity the guarantor had agreed to become liable. See also *Eastern Union Rly Co v Cochrane* (1853) 9 Exch 197. Where an amalgamation takes place of the firm to which a guarantee was given with some other body, rendering the guarantee inoperative as to future transactions under it, the guarantor's liability under the guarantee in respect of past transactions must be enforced by the persons to whom the guarantee was originally given, unless the cause of action has been assigned to the new body: *Lloyd's v Harper* (1880) 16 ChD 290, CA; *Moller v Lambert* (1810) 2 Camp 548; and see PARA 1124.

6 See *First National Finance Corp'n Ltd v Goodman* [1983] BCLC 203 at 211, CA, where the principle stated in the text, as set out in similar terms in an earlier edition of this title, was approved, subject to the proviso to the effect that the guarantee may expressly provide to the contrary.

7 *First National Finance Corp'n Ltd v Goodman* [1983] BCLC 203, CA.

8 *Ashby v Day* (1885) 33 WR 631; affd (1886) 34 WR 312, CA. See also PARA 1078.

9 *Wilson v Craven* (1841) 8 M & W 584; *Groux's Improved Soap Co Ltd v Cooper* (1860) 8 CBNS 800. See also *Capital and Counties Bank v Bank of England* (1889) 61 LT 516, and *Prescott, Dimsdale, Cave, Tugwell & Co v Bank of England* [1894] 1 QB 351, CA; these two cases do not involve guarantees, but were decided under the Bank Charter Act 1844 ss 23, 24 (repealed), to which similar principles applied.

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## **(v) The Consumer Credit Act 1974**

### **1207. Ineffective securities.**

Where a regulated agreement<sup>1</sup> under the Consumer Credit Act 1974 is cancelled<sup>2</sup> by the debtor<sup>3</sup> or hirer<sup>4</sup> under that Act, or is terminated because the creditor has recovered the goods in contravention of the provisions of that Act<sup>5</sup>, or an application for an order permitting enforcement of an agreement which would otherwise be unenforceable under that Act is refused otherwise than on technical grounds only<sup>6</sup>, or the agreement is declared unenforceable<sup>7</sup>, any security<sup>8</sup> provided in relation to that agreement is treated as never having effect, any property lodged with the creditor or owner solely for the purposes of that security must be returned, and the creditor or owner must cancel any entries in any register relating to the security, and must repay to the guarantor any money received on realisation of the security<sup>9</sup>.

1    le a consumer credit agreement or consumer hire agreement: see further PARA 1104 note 13.

2    le cancelled by notice served within the statutory 'cooling-off period' under the Consumer Credit Act 1974 s 69: see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 183 et seq.

3    As to the meaning of 'debtor' see the Consumer Credit Act 1974 s 189(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 81 note 3.

4    As to the meaning of 'hirer' see the Consumer Credit Act 1974 s 189(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 82 note 3.

5    le under the Consumer Credit Act 1974 s 91: see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 265.

6    le under the Consumer Credit Act 1974 s 40, s 65(1), s 124(1) or s 149(2): see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 125, 169, 221, 278.

7    le under the Consumer Credit Act 1974 s 142(1): see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 291.

8    'Security' includes inter alia an indemnity or guarantee: see PARA 1057 note 1. As to the full definition of 'security' see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 200 note 1.

9    Consumer Credit Act 1974 s 113(3), applying s 106; see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 221.

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### **1208. Evasion by security prohibited.**

Where a security<sup>1</sup> is provided in relation to an actual or prospective regulated agreement<sup>2</sup> under the Consumer Credit Act 1974, that security cannot be enforced so as to benefit the creditor<sup>3</sup> or owner<sup>4</sup>, directly or indirectly, to a greater extent than would be the case if the obligations of the debtor<sup>5</sup> or hirer<sup>6</sup> were carried out to the extent (if any) to which they would be enforced under the Act<sup>7</sup>.

Where the security is provided in relation to a prospective agreement or transaction, the security is only enforceable when the agreement is made; and until that time, the person providing the security may by notice to the creditor or owner require the security to be treated as never having effect, any property lodged with the creditor or owner solely for the purposes of that security to be returned, the creditor or owner to cancel any entries in any register relating to the security, and the repayment to the surety<sup>8</sup> of any money received on realisation of the security<sup>9</sup>.

1 As to the meaning of 'security' see PARA 1057 note 1.

2 As to the meaning of 'regulated agreement' see PARA 1104 note 13.

3 As to the meaning of 'creditor' see the Consumer Credit Act 1974 s 189(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 81 note 2.

4 As to the meaning of 'owner' see the Consumer Credit Act 1974 s 189(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 82 note 1.

5 As to the meaning of 'debtor' see the Consumer Credit Act 1974 s 189(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 81 note 3.

6 As to the meaning of 'hirer' see the Consumer Credit Act 1974 s 189(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 82 note 3.

7 See the Consumer Credit Act 1974 s 113(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 221.

8 'Surety' means the person by whom any security (defined so as to include inter alia an indemnity or guarantee) is provided, or the person to whom his rights and duties in relation to the security have passed by assignment or operation of law: Consumer Credit Act 1974 s 189(1). As to the meanings of 'surety' and 'guarantor' otherwise than in the Consumer Credit Act 1974 see PARA 1017 note 3.

9 See the Consumer Credit Act 1974 s 113(6) (which permits the application of s 106 in the circumstances described in the text); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 221.

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### **1209. Relief where creditor/debtor relationship unfair.**

If the court determines that the relationship between the creditor and debtor arising out of a credit agreement<sup>1</sup>, or such agreement taken with any related agreement<sup>2</sup>, is unfair to the debtor because of any terms of the agreement or related agreement, the way in which the creditor has exercised or enforced any of his rights under the agreement or related agreement or any other thing done or not done by or on behalf of the creditor either before or after the making of the agreement or related agreement<sup>3</sup>, it may make an appropriate order in connection with the agreement<sup>4</sup>. Such an order may be made only on an application made by the debtor or by a surety<sup>5</sup>, at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the

agreement or any related agreement, or at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant<sup>6</sup>. Such an order may be made notwithstanding that its effect is to place on the creditor, or any associate or former associate of his, a burden in respect of an advantage enjoyed by another person<sup>7</sup>.

Provisions in the Insolvency Act 1986 enable a trustee in bankruptcy to seek relief from the court in respect of extortionate credit transactions entered into by the bankrupt not more than three years before the commencement of the bankruptcy<sup>8</sup>.

1 In the context of the provisions relating to unfair relationships, 'credit agreement' means an agreement between an individual (the 'debtor') and any other person (the 'creditor'), by which the creditor provides the debtor with credit of any amount: see the Consumer Credit Act 1974 s 140C(1) (ss 140A-140C added by the Consumer Credit Act 2006 ss 19-21); and **CONSUMER CREDIT**. As to references to the creditor or debtor under a credit agreement see the Consumer Credit Act 1974 s 140C(2) (as so added); and **CONSUMER CREDIT**. As to the definition of 'individual' for this purpose see s 189(1) (definition as substituted); and **CONSUMER CREDIT**. As to the computation of the total charge for credit see s 20(1); the Consumer Credit (Total Charge for Credit) Regulations 1980, SI 1980/51; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 224-225.

2 As to references to an agreement related to a credit agreement see the Consumer Credit Act 1974 s 140C(4), (5), (7), (8) (as added: see note 1); and **CONSUMER CREDIT**.

3 See the Consumer Credit Act 1974 s 140A(1) (as added: see note 1); and **CONSUMER CREDIT**. In deciding whether to make such a determination the court must have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor): see s 140A(2) (as so added). For these purposes the court must (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor: see s 140A(3) (as so added). Such a determination may be made in relation to a relationship notwithstanding that the relationship may have ended: see s 140A(4) (as so added). An order under s 140B must not be made in connection with a credit agreement which is an exempt agreement by virtue of s 16(6C): see s 140A(5) (as so added). See generally **CONSUMER CREDIT**.

4 See the Consumer Credit Act 1974 s 140B (as added: see note 1); and **CONSUMER CREDIT**. Such an order may include doing one or more of the following: (1) requiring the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person); (2) requiring the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement; (3) reducing or discharging any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement; (4) directing the return to a surety of any property provided by him for the purposes of a security; (5) otherwise setting aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement; (6) altering the terms of the agreement or of any related agreement: see s 140B(1)(a)-(f) (as so added); and **CONSUMER CREDIT**. As to the meaning of 'surety' for these purposes see PARA 1208 note 8, but see also s 140C(6) (as added: see note 1).

As to the limited equitable jurisdiction to set aside harsh and unconscionable bargains see *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489; *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA; *Hart v O'Connor* [1985] AC 1000, [1985] 2 All ER 880, PC; and **EQUITY** vol 16(2) (Reissue) PARA 429.

5 See note 4.

6 See the Consumer Credit Act 1974 s 140B(2) (as added: see note 1); and **CONSUMER CREDIT**. A party to any such proceedings is entitled, in accordance with rules of court, to have any person who might be the subject of such an order made a party to the proceedings: see s 140B(8) (as so added); and **CONSUMER CREDIT**. The application may only be made in England and Wales to the county court: see ss 140B(4), 140C(3) (as so added). If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary: see s 140B(9) (as so added); and **CONSUMER CREDIT**.

7 See the Consumer Credit Act 1974 s 140B(3) (as added: see note 1); and **CONSUMER CREDIT**.

8 See the Insolvency Act 1986 s 343; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 672 et seq.



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### **1210. Restrictions on enforcement of security.**

The creditor under a regulated agreement<sup>1</sup> under the Consumer Credit Act 1974 is obliged, subject to certain conditions including the payment of a small fee, to provide the surety<sup>2</sup> under any security<sup>3</sup> given for that agreement upon written request with a copy of the executed agreement, a copy of the security instrument<sup>4</sup>, and details of the state of accounts between the creditor and the debtor<sup>5</sup>. If the creditor or owner fails to comply with this obligation, he is not entitled while the default continues to enforce the security<sup>6</sup>.

Where the creditor or owner serves a default notice<sup>7</sup> under the Consumer Credit Act 1974 on the debtor or hirer, he must also serve a copy on any surety<sup>8</sup>. If the creditor or owner fails to comply with this obligation, he may only enforce his security against the guarantor on an order of the court<sup>9</sup>.

1 As to the meaning of 'regulated agreement' see PARA 1104 note 13.

2 As to the meaning of 'surety' for these purposes see PARA 1208 note 8.

3 As to the meaning of 'security' for these purposes see PARA 1057 note 1.

4 As to the meaning of 'security instrument' see the Consumer Credit Act 1974 ss 105, 189(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 200.

5 See the Consumer Credit Act 1974 ss 107-109 (amended by SI 1998/997, setting the fee referred to in the text at £1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 202-204.

6 See the Consumer Credit Act 1974 ss 107(4)(a), 108(4)(a), 109(3)(a); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 202-204.

7 Or a notice under the Consumer Credit Act 1974 s 76(1) (notice required for demand for early payment, recovery of possession of goods, or termination or restriction of any right), or s 98(1) (notice of termination of agreement otherwise than in default cases): s 111(1). As to default notices see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 263.

8 Consumer Credit Act 1974 s 111(1).

9 Consumer Credit Act 1974 s 111(2).

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### **(vi) Discharge by Operation of Law**

#### **1211. Failure of consideration.**

Total failure of the consideration<sup>1</sup> for the guarantor's promise of guarantee will discharge him, and affords a good defence to a claim by the creditor against the guarantor. Thus, for example, a guarantor will be discharged where the consideration for his guarantee is a postponement,

with the consent of the execution creditor, of a sheriff's sale, and notwithstanding such consent the sale takes place<sup>2</sup>. So also a guarantor for payment of a composition to creditors will be discharged where the debtor is made bankrupt and the composition annulled<sup>3</sup>; or where the composition is expressed to require the assent of all creditors and this is not forthcoming<sup>4</sup>.

By contrast, it was held that where a bank issued a letter of credit permitting a company to draw bills upon it in consideration of the company's undertaking to do certain things with a view to providing means for the meeting of the bills when they became due, guarantors for the fulfilment of the undertaking were not discharged from liability under their guarantee on the ground of failure of consideration where, owing to the subsequent failure of the bank, after accepting the bills, the company wrongfully refused to carry out its undertaking and the bills were, partly in consequence of the refusal, not met at maturity<sup>5</sup>.

1 As to the consideration for a contract of guarantee see PARA 1047 et seq; and as to what constitutes total failure of consideration and its effects in relation to contracts generally see **CONTRACT** vol 9(1) (Reissue) PARA 992. It may be more accurate to say that the guarantor was not bound by the guarantee in the first place.

2 *Cooper v Joel* (1859) 1 De GF & J 240; *Pavy v Smith* (1901) 17 TLR 471.

3 *Walton v Cook* (1888) 40 ChD 325.

4 *Latter v White* (1870) LR 5 QB 622 at 641 per Cockburn CJ (revsd on another point (1871) LR 6 QB 474, Ex Ch; reversal affd (1872) LR 5 HL 578); and see *Weighton v Cuthbert & Son* (1906) 14 SLT 251. As to compositions see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 863.

5 *Re Barber & Co, ex p Agra Bank* (1870) LR 9 Eq 725. The aspects of this decision which bear on the law of letters of credit may perhaps require reconsideration in the light of *Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849, [1967] 2 All ER 1092: see PARA 929.

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## **1212. Material alteration of guarantee.**

An immaterial alteration, such as the correction of an innocent misdescription of the principal debtor or the insertion of details of the guarantor's service agent, will not prevent the guarantee being enforceable, even if the alteration is made after signature and the guarantor does not assent to the alteration being made<sup>1</sup>.

However, a material alteration, not approved by all the parties to the original document, will avoid the guarantee<sup>2</sup>. A material alteration is one which has an effect on some contract or right contained in or arising out of the instrument itself<sup>3</sup>. So a guarantee could be discharged by its conversion into a deed<sup>4</sup>, or by the striking out of the names of persons who are co-guarantors<sup>5</sup>, or by the addition, after its execution, of words reducing to a less amount the liability of one of several joint and several guarantors for a given sum each<sup>6</sup>.

Even if the unauthorised alterations were made by a stranger, they will invalidate the guarantee if they were made while the altered document was in the creditor's custody, for, so long as it is in the creditor's possession, he is bound to preserve it in its original state<sup>7</sup>.

1 *Raiffeisen Zentralbank Osterreich AG v Crosseas Shipping Ltd* [2000] 3 All ER 274, [2000] 1 WLR 1135, CA, applied in *Bank of Scotland v Henry Butcher & Co* [2003] EWCA Civ 67, [2003] 2 All ER (Comm) 557, [2003] 1 BCLC 575; *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA, applying

*Aldous v Cornwell* (1868) LR 3 QB 573; *Re Howgate and Osborn's Contract* [1902] 1 Ch 451; *Bishop of Crediton v Bishop of Exeter* [1905] 2 Ch 455. See also *Andrews v Lawrence* (1865) 19 CBNS 768; and see PARA 1077.

2 *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 2 All ER 762, [1991] 1 WLR 271, CA. See also *Pigot's Case* (1614) 11 Co Rep 26b, and the cases cited in notes 3-7. See also generally **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 81 et seq.

3 *Caldwell v Parker* (1869) IR 3 Eq 519 at 526 per Walsh MR.

4 *Davidson v Cooper* (1844) 13 M & W 343 at 352, Ex Ch (affixing seals opposite guarantors' signatures); but see *Barnes v Richards* (1902) 71 LJB 341 at 345. The removal of the seal from the name of one of the obligors of a several bond did not discharge the other obligors: *Collins v Prosser* (1823) 1 B & C 682. As to the present formal requirements of deeds see PARA 1056. As to cancellation of deeds generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 76 et seq.

5 *Bank of Hindostan, China and Japan v Smith* (1867) 36 LJCP 241; and see *Suffell v Bank of England* (1882) 9 QBD 555, CA.

6 *Ellesmere Brewery Co v Cooper* [1896] 1 QB 75; see also *Bank of Hindostan, China and Japan v Smith* (1867) 36 LJCP 241; *Gardner v Walsh* (1855) 5 E & B 83. The addition of a third party to a note originally issued as a joint and several promissory note by two persons is a material alteration of the note: *Gardner v Walsh*, overruling *Catton v Simpson* (1838) 8 Ad & El 136.

7 *Davidson v Cooper* (1844) 13 M & W 343 at 352, Ex Ch, per Denman CJ; *Bank of Hindostan, China and Japan v Smith* (1867) 36 LJCP 241. See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 160.

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### 1213. Effect of foreign law discharging guarantor.

The question whether a contract such as a contract of guarantee has been validly discharged is determined by the proper law of the contract<sup>1</sup>. In the case of most contracts made after 1 April 1991 the question of which law is to govern the obligations of the parties will be answered by the rules of the Rome Convention signed by the United Kingdom on 7 December 1981<sup>2</sup>.

It follows that the provisions of a foreign law relieving a guarantor from obligations under a contract of guarantee governed by English law cannot be relied upon in the English courts so as to enable him to avoid those obligations<sup>3</sup>.

1 Where a reference is made to the 'proper law of the contract' this means the law which governs the contract as it is determined by the provisions of the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980; Cmnd 8449) (the 'Rome Convention'), as introduced into the United Kingdom by the Contracts (Applicable Law) Act 1989. As to the meaning of 'United Kingdom' see PARA 2 note 3. For this reason, it is now common to use the expression 'applicable law' instead of 'proper law'. See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 349 note 7.

2 See further **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 349 et seq. See also note 1.

3 *National Bank of Greece and Athens SA v Metliss* [1958] AC 509, [1957] 3 All ER 608, HL; *Adams v National Bank of Greece SA* [1961] AC 255, [1960] 2 All ER 421, HL.

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## **(vii) Discharge by Conduct of Creditor**

### **A. EQUITABLE PROTECTION OF THE GUARANTOR**

#### **1214. The principle.**

Equity intervenes to protect a guarantor<sup>1</sup>. To protect the guarantor's right to pay the guaranteed debt and after paying it to sue the principal debtor in the name of the creditor<sup>2</sup>, a guarantor is discharged if the creditor, without his consent, either releases the principal debtor<sup>3</sup> or enters into a binding arrangement with him to give him time without reserving his rights against the guarantor<sup>4</sup>. Since, by virtue of the guarantee, a guarantor is as much concerned in every transaction with the principal debtor affecting the guaranteed liability as the creditor, any variation of the principal contract made without his consent discharges him from his guarantee, unless the variation is clearly insubstantial or obviously cannot prejudice him<sup>5</sup>.

To protect the guarantor's right on paying the guaranteed debt to have the benefit of all the securities which the creditor had<sup>6</sup>, a guarantor is discharged<sup>7</sup> if the creditor without the guarantor's consent fails to make that security properly available to the guarantor<sup>8</sup>. To protect the guarantor's right to contribution from co-guarantors<sup>9</sup>, the guarantor is discharged<sup>10</sup> if the creditor without the guarantor's consent releases any co-guarantor<sup>11</sup>.

A guarantor will also be discharged if the creditor acts in bad faith towards him<sup>12</sup>, or connives at the default by the principal debtor in respect of which the guarantee is given<sup>13</sup>. However, there is no general principle that merely irregular conduct on the part of the creditor, even if prejudicial to the interest of the guarantor, discharges the guarantor<sup>14</sup>.

1 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 544, [1989] 3 All ER 839 at 841, PC. See also PARA 1215.

2 *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA, per Cotton LJ. See also *Samuell v Howarth* (1817) 3 Mer 272 at 279 per Lord Eldon LC; *Swire v Redman and Holt* (1876) 1 QBD 536 at 541-542; *Polak v Everett* (1876) 1 QBD 669 at 674, CA, per Blackburn J; *Rouse v Bradford Banking Co* [1894] 2 Ch 32 at 75, CA, per AL Smith LJ; affd [1894] AC 586, HL; *Mahant Singh v U Ba Yi* [1939] AC 601 at 606-607, PC; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 348, [1972] 2 All ER 393 at 401, HL, per Lord Diplock; and see eg *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289, [2005] 1 WLR 2497 (refinancing agreements between the claimant creditor and the principal debtor discharged the guarantor); and PARAS 1218, 1224. For these rights of the guarantor see PARAS 1132, 1138 et seq.

3 *Mahant Singh v U Ba Yi* [1939] AC 601 at 606, PC. See also *Burke's Case* (circa 1780) cited in 2 Bos & P 62; *Law v East India Co* (1799) 4 Ves 824; *Webb v Hewitt* (1857) 3 K & J 438; *Re Natal Investment Co, Nevill's Case* (1870) 6 Ch App 43; *Cragoe v Jones* (1873) LR 8 Exch 81; *Lowes v Maughan and Fearon* (1884) Cab & El 340; *Commercial Bank of Tasmania v Jones* [1893] AC 313, PC; *Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA. See generally PARA 1218 et seq.

4 *Samuell v Howarth* (1817) 3 Mer 272 at 278 per Lord Eldon LC; *Creighton v Rankin* (1840) 7 Cl & Fin 325 at 346, HL; *Webb v Hewitt* (1857) 3 K & J 438; *Swire v Redman and Holt* (1876) 1 QBD 536. See PARA 1224 et seq. In *Polak v Everett* (1876) 1 QBD 669 at 673, CA, Blackburn J said that these principles of equity had been 'established for a very long time, beginning with *Rees v Berrington* (1795) 2 Ves 540 to the present day, without a single case going to the contrary'.

5 *Rees v Berrington* (1795) 2 Ves 540 at 543 per Lord Loughborough LC, cited in *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA, per Cotton LJ; *Egbert v National Crown Bank* [1918] AC 903 at 908-909, PC. See *Lloyds TSB Bank plc v Shorney* [2001] EWCA Civ 1161, [2002] 1 FCR 673, [2002] 1 FLR 81 (bank had duty to disclose variation of guarantee to co-surety); *Howard de Walden Estates Ltd v Pasta Place Ltd* [1995] 1 EGLR 79, [1995] 22 EG 143 (progressive release of use provision in lease; sureties not parties to variations); *Bank of Baroda v Pate* [1996] 1 Lloyd's Rep 391 (bank made facility available to principal debtor to be covered by ECGD cover;

operated facility without such cover being in place; held that this amounted to a variation in the terms of the facility which seriously prejudiced the surety). As to ECGD cover see PARA 1013 note 24. As to the effect of a clause in a guarantee stating that it is not to be affected by 'any variation' in the underlying contract see eg *Samuels Finance Group plc v Beechmanor Ltd (t/a Hurstwood Developments)* (1993) 67 P & CR 282 at 285, CA, per Lloyd LJ ('any variation' does not mean 'any minor variation' and will be widely construed; but 'variation' does not extend to a novation and changes falling short of a novation may be so fundamental that they could not properly be described as a variation at all); *Melvin International SA v Poseidon Schiffahrt GmbH, The Kalma* [1999] 2 All ER (Comm) 761, [1999] 2 Lloyd's Rep 374 (scope of the variation clause in a charterparty guarantee). See also *Triodos Bank NV v Dobbs (No 2)* [2005] EWCA Civ 630, (2005) Times, 30 May (agreement purporting to be variation was in fact new agreement). As to the effect on the guarantor's liability of any variation of the principal contract see further PARA 1235 et seq. As to the effect of any departure by the creditor from the contract of guarantee or any breach of the principal contract see PARAS 1242-1243.

6 As to these rights see PARA 1138.

7 The guarantor will be wholly discharged if the release or other dealing with the security constitutes a variation of the principal obligation (see eg *Polak v Everett* (1876) 1 QBD 669, CA) or if the maintenance of the security is a condition of the guarantee (see eg *Carter v White* (1883) 25 ChD 666, CA; *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232, CA; *TCB Ltd v Gray* [1987] Ch 458n, [1988] 1 All ER 108, CA; and cf *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC). In any other case, the guarantor will be released pro tanto to the extent that his rights have been impaired: *Carter v White* above at 670 per Cotton LJ. See PARA 1244.

8 *Wulff v Jay* (1872) LR 7 QB 756 at 762 per Cockburn CJ, cited in *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Pledge v Buss* (1860) John 663. See PARAS 1244-1245.

9 See PARA 1165 et seq.

10 A release of one of two or more joint guarantors or joint and several guarantors will wholly release the others: *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC. Where the co-guarantors are only severally bound, the release of one will discharge the others pro tanto to the extent that their rights of contribution are affected: *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC. See PARAS 1246-1247.

11 *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC; *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC. See PARAS 1246-1247.

12 *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at 515 per Bingham J; affd [1983] 2 Lloyd's Rep 298 at 301-302, CA, per Robert Goff LJ. Cf *Downsview Nominees Ltd v First City Corp'n Ltd* [1993] AC 295, PC. Where a mortgagee breaches his duty to obtain the current market value of a property he sells, a guarantor, although not discharged entirely, has his liability reduced pro tanto: *Skipton Building Society v Stott* [2001] QB 261, [2000] 2 All ER 779, CA. As to unequivocal information that the guarantor received independent legal advice as a defence to a plea of the absence of good faith see *Broadway v Clydesdale Bank plc* (2000) Times, 12 September, Ct of Sess; and see **EQUITY** vol 16(2) (Reissue) PARAS 422-424.

13 *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1982] 1 Lloyd's Rep 506 at 515 per Bingham J; affd [1983] 2 Lloyd's Rep 298 at 301-302, CA, per Robert Goff LJ.

14 *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1983] 2 Lloyd's Rep 298 at 302, CA, per Robert Goff LJ. See also *Lloyds Bank plc v Croad* [1998] All ER (D) 705, CA; and see PARA 1248.

## UPDATE

### 1214 The principle

NOTE 12--*Skipton*, cited, applied in *Barclays Bank plc v Kufner* [2008] EWHC 2319 (Comm), [2009] 1 All ER (Comm) 1.

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GUARANTEE/(vii) Discharge by Conduct of Creditor/A. EQUITABLE PROTECTION OF THE GUARANTOR/1215. The nature of the guarantor's rights.

### 1215. The nature of the guarantor's rights.

The obligations of the guarantor arise out of contract. The rights of the guarantor, in general, are the creatures of equity<sup>1</sup>. Equity protects the guarantor by providing him in certain circumstances with a defence in whole or part to the creditor's claims against him under the guarantee<sup>2</sup>; and, in that sense, it confers upon the guarantor certain rights and imposes upon the creditor certain duties. But it does not provide the guarantor with an independent cause of action against the creditor for damages for infringement of the rights or breach of the duties thereby conferred<sup>3</sup>. Moreover, the existence of these equitable rights and duties is inconsistent with the existence between the creditor and the guarantor of a general duty of care actionable in the tort of negligence<sup>4</sup>.

Nevertheless, these equitable principles only supplement, and do not replace, the contractual rights which the guarantor would in any event have at law. So, for example, a guarantor will also be discharged where the creditor commits a repudiatory breach of the contract of guarantee<sup>5</sup>, or fails to observe a non-promissory condition of the contract<sup>6</sup>. It follows that a guarantor may claim damages against the creditor for any breach of the express or implied terms of the guarantee<sup>7</sup>.

1 See *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd without affecting this point sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. See also *Watts v Shuttleworth* (1860) 5 H & N 235 at 248 per Pollock CB ('The rights of a guarantor depend rather upon principles of equity than upon the actual contract between him and the creditor'); and see *Rees v Berrington* (1795) 2 Ves 540 at 543 per Lord Loughborough LC ('a breach of the obligation in conscience and honesty . . . the clearest and most evident equity'); *Swire v Redman and Holt* (1876) 1 QBD 536 at 542 ('there is an equity'); *Polak v Everett* (1876) 1 QBD 669 at 673, CA, per Blackburn J ('on the principles of equity'); *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA; *Bolton v Salmon* [1891] 2 Ch 48 at 54 per Chitty J; *Rouse v Bradford Banking Co* [1894] AC 586 at 590, HL ('the general principle of equity'); *Egbert v National Crown Bank* [1918] AC 903 at 908-909, PC; *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 544, [1989] 3 All ER 839 at 841-842, PC. See also eg *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289, [2005] 1 WLR 2497; *Van Der Merwe v IIG Capital LLC* [2007] EWHC 2631 (Ch), [2007] All ER (D) 214 (Nov).

2 See PARA 1214.

3 See further Goode *Legal Problems of Credit and Security* (2nd Edn) pp 192-193, where the nature of the rights and duties is explained in Hohfeldian terms.

4 The tort of negligence has not yet subsumed all torts and does not supplant the principles of equity or contradict contractual promises or complement the remedy of judicial review or supplement statutory rights: *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 543-544, [1989] 3 All ER 839 at 841, PC. Cf also *O'Hara v Allied Irish Banks* [1985] BCLC 52; *Shamji v Johnson Matthey Bankers Ltd* [1986] BCLC 278, 2 BCC 98, 910, CA; *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363, [1988] FLR 166; *Barclays Bank plc v Khaira* [1992] 1 WLR 623, [1993] 1 FLR 343; *National Bank of Greece SA v Pinios Shipping Co, The Maira* [1990] 1 AC 637, [1989] 1 All ER 213, CA; revsd on a different point [1990] 1 AC 637, [1990] 1 All ER 78, HL; *Downsview Nominees Ltd v First City Corp'n Ltd* [1993] AC 295 at 315, PC. A creditor owed a duty to a guarantor to take reasonable care to ensure a proper price is obtained for any security: *Barclays Bank plc v Kingston* [2006] EWHC 533 (QB), [2006] 1 All ER (Comm) 519.

5 *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 70 ALR 641, Aust HC. As to the discharge of contracts by acceptance of a repudiatory breach see generally **CONTRACT** vol 9(1) (Reissue) PARA 1014 et seq.

6 See PARA 1214 text and note 7. As to the release of contractual obligations by non-performance of non-promissory conditions see generally **CONTRACT** vol 9(1) (Reissue) PARA 991.

7 As to the right to damages for breach of contract see **CONTRACT** vol 9(1) (Reissue) PARA 1012; and see generally **DAMAGES**.

**UPDATE****1215 The nature of the guarantor's rights**

NOTE 1--*IIG Capital*, cited, affirmed: [2008] EWCA Civ 542, [2008] All ER (D) 297 (May).

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**B. EXCLUSION OF THE GUARANTOR'S RIGHTS****1216. Terms of the guarantee.**

Contracts of guarantee often contain provisions which entitle the creditor to vary the principal contract, give time to or release the principal debtor, release security or other guarantors, or otherwise act in a way which would discharge the guarantor in equity<sup>1</sup>, while nevertheless preserving the guarantor's liability under the guarantee. Such provisions, if on their true construction they cover the events which have happened<sup>2</sup>, are effective to preserve the guarantor's liability to the creditor<sup>3</sup>.

Provisions of this kind in a contract of guarantee, which merely negate the equitable protections that the guarantor would otherwise enjoy, are probably outside the ambit of the Unfair Contract Terms Act 1977<sup>4</sup>. However, to the extent that the terms of the guarantee go further and seek to exclude the creditor's liability for a breach of contract<sup>5</sup> or of a common law duty<sup>6</sup>, they will be subject to the 1977 Act<sup>7</sup>.

1 See PARA 1214.

2 Eg in *Dowling v Ditanda Ltd* (1975) 236 Estates Gazette 485, Oliver J held that the terms of the guarantee preserving the guarantor's liability were (arguably) not wide enough to cover a surrender of the leasehold interest which formed the security for the principal debt, where the guarantee also contained an express provision for the transfer of the charge to the guarantor if he paid the money outstanding under the charge and the surrender constituted a breach of that term. In *Burnes v Trade Credits Ltd* [1981] 2 All ER 122, [1981] 1 WLR 805, PC, clauses extending the guarantee to cover 'any further advance' and entitling the creditor to grant time 'or any other indulgence or consideration' to the principal debtor, were held not to permit an increase in the rate of interest granted as the price of an extension of time for payment of the principal sum. Cf *Croydon Commercial Gas Co v Dickinson* (1876) 1 CPD 707; on appeal (1876) 2 CPD 46, CA, where a clause permitting the creditor to extend a 14-day period of credit was held not to authorise an extension granted after the 14-day period had already expired; and *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1 at 21, [1936] 1 All ER 454 at 463, HL, per Lord Atkin, where a clause authorising 'alteration' was held not to permit fundamental changes to the nature or location of the guaranteed works.

3 *Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA. See also *Cowper v Smith* (1838) 4 M & W 519; *Kearsley v Cole* (1846) 16 M & W 128; *Union Bank of Manchester Ltd v Beech* (1865) 3 H & C 672; *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 762-763, PC; *Yates v Evans* (1892) 61 LJQB 446 at 448; *Rouse v Bradford Banking Co* [1894] 2 Ch 32, CA; affd [1894] AC 586, HL; *Metropolitan Bank of England and Wales v Coppee* (1895) 12 TLR 129; on appeal (1896) 12 TLR 258, CA; *British Motor Trust Co Ltd v Hyams* (1934) 50 TLR 230; and *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 542-543, [1989] 3 All ER 839 at 840, PC, where Lord Templeman, having set out the provisions of the guarantee which provided that the guarantor's liability should not be affected by conduct of this kind on the part of the creditor, observed that 'the guarantor does not and cannot impugn the validity of the provisions of the guarantee'. If the clause preserving the guarantor's liability itself contains any conditions (such as notification to the guarantor), the clause will be

ineffective unless those conditions are complied with: *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 KB 346, [1950] 2 All ER 821, CA.

4 The Unfair Contract Terms Act 1977 ss 2, 3. The creditor commits no breach of contract or breach of a common law duty of care merely by acting in such a way as to discharge the guarantor in equity: see PARA 1215. See also Goode *Legal Problems of Credit and Security* (2nd Edn) pp 193-194; and **CONTRACT**.

5 Eg where it is a condition of the guarantee that there are to be other guarantors or other security, and the creditor in breach of that term releases those other guarantors or that other security: see eg the terms contended for by the guarantors in *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232, CA, and *TCB Ltd v Gray* [1987] Ch 458n, [1988] 1 All ER 108, CA. However, an express term entitling the creditor to release security at will may have the effect of preventing the implication of an inconsistent term requiring the maintenance of that security: *TCB Ltd v Gray*.

6 See eg *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410, CA.

7 *Standard Chartered Bank v Walker* [1982] 3 All ER 938 at 943, [1982] 1 WLR 1410 at 1416, CA, per Lord Denning MR. See Goode *Legal Problems of Credit and Security* (2nd Edn) pp 193-194.

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## 1217. Principal debtor clauses.

Guarantees also often contain a provision constituting the guarantor a principal debtor<sup>1</sup>. This may sometimes be in the form of a clause stating that the creditor is to be at liberty to act as though the guarantor were a principal debtor, for the purpose of waiving such of guarantor's rights as would be inconsistent with that status<sup>2</sup>. Sometimes, the clause states that any money not recoverable from the guarantor as a guarantor shall nevertheless be recoverable from him as sole or principal debtor in respect of it, for the purpose of preserving the guarantor's liability should the principal obligation be void or unenforceable for any reason<sup>3</sup>.

A principal debtor clause of the first type will, if appropriately worded, be effective to preserve the liability of the guarantor in circumstances where the guarantor would otherwise have been discharged in equity<sup>4</sup>. Such a clause will not usually convert what is in reality a guarantee into an indemnity, so as to preserve the guarantor's liability in the event that the principal obligation is void or unenforceable<sup>5</sup>. However, depending upon its wording, it may do so, either generally or upon the happening of certain events<sup>6</sup>.

1 As to the potential effect of the inclusion of such a clause on such matters as the need for a demand (see PARA 1105), set-off in insolvency (see PARA 1126), and the accrual of the cause of action for the purposes of limitation (see PARA 1181) see *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 3 All ER 358 at 366-367, [1975] 1 WLR 1474 at 1483 per Walton J; *National Westminster Bank plc v Skelton* [1993] 1 All ER 242 at 251, [1993] 1 WLR 72n at 80, CA, per Slade LJ; *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation)* [1993] Ch 425, sub nom *MS Fashions Ltd v Bank of Credit and Commerce International SA (in liquidation) (No 2)* [1993] 3 All ER 769, CA; and cf *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43.

2 For an example see the clause considered in *National Westminster Bank plc v Riley* [1986] BCLC 268 at 274, CA.

3 For an example see the clause recited in *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232 at 238, CA.

4 See *Greenwood v Francis* [1899] 1 QB 312, CA; *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255; *National Westminster Bank plc v Riley* [1986] BCLC 268, CA.



5 *Heald v O'Connor* [1971] 2 All ER 1105 at 1110, [1971] 1 WLR 497 at 503 per Fisher J. Cf *Coutts & Co v Browne-Lecky* [1947] KB 104, [1946] 2 All ER 207. The actual decision in *Coutts & Co v Browne-Lecky* has now been reversed by statute: see the Minors' Contracts Act 1987 s 2; and PARA 1030. See also *Coutts & Co v Stock* [2000] 2 All ER 56 at 64-65, obiter per Lightman J (the clearest language is required to impose on a guarantor liabilities of the principal debtor in cases where statute has decreed that the liabilities of the principal debtor are to be void).

6 See *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255, where Lloyd J held that a short clause declaring that 'my/our liability hereunder shall be as that of principal debtors' had the effect of turning the signatory into a principal debtor, not from the start, but in certain events, such as the principal debtor ceasing to be liable, and stated that although a principal debtor clause did not automatically convert every guarantee into an indemnity, its operation was not to be confined to the consequences of giving time or other indulgence to the principal debtor.

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### **C. RELEASE OF THE PRINCIPAL DEBTOR**

#### **1218. The principle.**

A guarantor is discharged if the creditor, without his consent<sup>1</sup>, unconditionally<sup>2</sup> releases the principal debtor<sup>3</sup>. The reason for this principle is sometimes stated to be simply that the release extinguishes the principal obligation<sup>4</sup>. It is also sometimes put on the basis that the guarantor's right to pay the guaranteed debt and after paying it to sue the principal debtor in the name of the creditor<sup>5</sup> is thereby interfered with<sup>6</sup>. Another, perhaps inconsistent, reason sometimes given for the rule is that it would be a fraud on the principal debtor for the creditor to release him from liability if the creditor were then able to proceed against the guarantor, who, in his turn, might sue the principal debtor and thus render the alleged release nugatory<sup>7</sup>.

The creditor's acceptance of the principal debtor's repudiatory breach of the principal contract, although it has the effect of discharging the principal debtor from his primary obligation further to perform the principal contract, is not a release of the principal debtor for the purposes of this principle: for there is substituted by law a secondary obligation upon the principal debtor, also arising from the principal contract, to pay to the creditor a sum of money to compensate him for the loss which he has sustained as a result of the failure to perform the primary obligation<sup>8</sup>.

1 The guarantee will often contain provisions designed to preserve the liability of the guarantor in these circumstances. Such provisions, if appropriately worded, are effective: see PARAS 1216-1217.

2 The guarantor may not be released if the 'release' of the principal debtor takes the form of a mere covenant not to sue, or is made subject to the creditor's express reservation of his rights against the guarantor: see PARA 1222.

3 *Mahant Singh v U Ba Yi* [1939] AC 601 at 606, PC. See also *Burke's Case* (circa 1780) cited in 2 Bos & P 62; *Law v East India Co* (1799) 4 Ves 824; *Webb v Hewitt* (1857) 3 K & J 438; *Re Natal Investment Co, Nevill's Case* (1870) 6 Ch App 43; *Cragoe v Jones* (1873) LR 8 Exch 81; *Lowes v Maughan and Fearon* (1884) Cab & El 340; *Commercial Bank of Tasmania v Jones* [1893] AC 313, PC; *Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA.

4 See eg *Commercial Bank of Tasmania v Jones* [1893] AC 313 at 316, PC.

5 As to these rights see PARAS 1132, 1138 et seq.

6 *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA, per Cotton LJ. Cf *Samuell v Howarth* (1817) 3 Mer 272 at 279 per Lord Eldon LC; *Polak v Everett* (1876) 1 QBD 669 at 674, CA, per Blackburn J; *Mahant Singh v U Ba Yi* [1939] AC 601 at 606-607, PC. See also *Moschi v Lep Air Services Ltd* [1973] AC 331 at 348, [1972] 2 All ER 393 at 401, HL, where Lord Diplock states that the reason for the rule is to prevent the guarantor being deprived of his right in equity to compel the debtor to perform his own obligation to the creditor.

7 *Re Natal Investment Co, Nevill's Case* (1870) 6 Ch App 43 at 47 per Mellish LJ. See also *Mahant Singh v U Ba Yi* [1939] AC 601 at 607, PC.

8 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.

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### 1219. Express release.

A guarantor is discharged where a release to the principal debtor is executed, even by one only of two partners to whom the guarantee is given, if it is in pursuance of an agreement with the principal debtor entered into by both partners<sup>1</sup>. A voluntary deed releasing the principal debtor in like manner as if he had obtained his discharge in bankruptcy frees the guarantor<sup>2</sup>, as does also the execution by the creditor, as a trustee, of a deed of assignment releasing the principal debtor<sup>3</sup>, unless (1) the guarantee otherwise provides<sup>4</sup>; or (2) the deed releasing the principal debtor itself contains a reservation of remedies against the guarantor<sup>5</sup>, thereby reducing it to a mere covenant not to sue<sup>6</sup>.

A guarantor for payment of a composition to creditors is discharged from liability to a particular creditor who, without his knowledge or consent, obtains from the compounding debtor an agreement binding the compounding debtor to pay the creditor's debt in full, as such a transaction avoids both the original debt and the composition<sup>7</sup>.

1 *Hawkshaw v Parkins* (1819) 2 Swan 539.

2 *Cragoe v Jones* (1873) LR 8 Exch 81; and see *Mayhew v Boyes* (1910) 103 LT 1, CA, and the cases there cited. Contrast *Browne v Carr* (1831) 7 Bing 508.

3 *Teede v Johnson* (1856) 11 Exch 840.

4 See PARAS 1216-1217.

5 *Kearsley v Cole* (1846) 16 M & W 128; *Keyes v Elkins* (1864) 5 B & S 240; *Bateson v Gosling* (1871) LR 7 CP 9; *Davidson v M'Gregor* (1841) 8 M & W 755; *Boulton v Stubbins* (1811) 18 Ves 20 at 22; *Re Slade, ex p Carstairs* (1820) Buck 560; *Re Renton, ex p Glendinning* (1819) Buck 517 at 520.

6 *Maltby v Carstairs* (1828) 1 Man & Ry KB 549; *North v Wakefield* (1849) 13 QB 536; *Nichols v Norris* (1831) 3 B & Ad 41; *Re Whitehouse, Whitehouse v Edwards* (1887) 37 ChD 683 at 694 per Stirling J; *Lindsay v Lord Downes* (1840) 2 L Eq R 307; *Green v Wynn* (1869) 4 Ch App 204 at 206 per Lord Hatherley LC; *Currey v Armitage* (1858) 6 WR 516 (Lord Campbell CJ); *Bateson v Gosling* (1871) LR 7 CP 9; *Webb v Hewitt* (1857) 3 K & J 438; *Kearsley v Cole* (1846) 16 M & W 128; *Vorley v Barrett* (1856) 1 CBNS 225; *Jones & Co v Whitaker* (1887) 57 LT 216, CA; *Muir v Crawford* (1875) LR 2 Sc & Div 456, HL. See PARA 1222.

7 *Mayhew v Boyes* (1910) 103 LT 1, CA. As to compositions see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 863.

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### **1220. Fraud.**

When the release of the principal debtor by the creditor is accomplished by means of a fraud on the part of the principal debtor<sup>1</sup>, the guarantor, if he has given no consideration, is not discharged even though he is no party to the fraud, upon the general principle that a volunteer cannot avail himself of what has been obtained by the fraud of another<sup>2</sup>.

<sup>1</sup> *Scholefield v Templer* (1859) 4 De G & J 429; affg on this point the decision of Page Wood V-C, as reported in 28 LJCh 452.

<sup>2</sup> *Scholefield v Templer* (1859) 4 De G & J 429 at 433-434; and see *Huguenin v Baseley* (1807) 14 Ves 273; *Re McCallum, McCallum v McCallum* [1901] 1 Ch 143, CA.

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### **1221. Release may be implied.**

A guarantor is also discharged from liability where the release of the principal debtor is not express, but results as a legal consequence from some transaction. Thus, a guarantor for payment of instalments under a hire purchase agreement is discharged if, before having recourse to him, the creditor seizes the goods and thereby determines the agreement<sup>1</sup>. He is also discharged by the acceptance by the creditor of a second security in discharge of the original one<sup>2</sup>, or by the substitution of a security for the personal liability of the principal debtor<sup>3</sup>. However, the mere acceptance of additional security from the principal debtor will not have this effect<sup>4</sup> unless there is an agreement to give time or the intention of the parties is manifestly that the original security is not to remain in force<sup>5</sup>.

<sup>1</sup> *Hewison v Ricketts* (1894) 63 LJQB 711; and see *Midland Motor Showrooms Ltd v Newman* [1929] 2 KB 256, CA; *Unity Finance Ltd v Woodcock* [1963] 2 All ER 270, [1963] 1 WLR 455. See **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 36.

<sup>2</sup> *Clarke v Henty* (1838) 3 Y & C Ex 187; and see *Tatum v Evans* (1885) 54 LT 336; *Boaler v Mayor* (1865) 19 CBNS 76. An agreement between a bond debtor and his creditor that the creditor takes all the debtor's property and pays the other creditors so much in the pound operates as a satisfaction of the bond debt: *Webb v Hewitt* (1857) 3 K & J 438. See also *Skip v Edwards* (1744) 9 Mod Rep 438.

<sup>3</sup> *Lowes v Maughan and Fearon* (1884) Cab & El 340.

<sup>4</sup> *Twopenny v Young* (1824) 3 B & C 208; *Eyre v Everett* (1826) 2 Russ 381; *Wyke v Rogers* (1852) 1 De GM & G 408; and see *Pearl v Deacon* (1857) as reported in 26 LJCh 761.

<sup>5</sup> *Overend, Gurney & Co (liquidators) v Oriental Financial Corpn (liquidators)* (1874) LR 7 HL 348 at 361 per Lord Cairns LC; *Twopenny v Young* (1824) 3 B & C 208 at 211 per Bayley J; *Munster and Leinster Bank v France* (1889) 24 LR Ir 82, CA. Where, therefore, a principal and guarantor are indebted on the same bond, a dealing with the principal by considering him as a debtor in another sum of money, or on another security, will not

discharge the guarantor in the first obligation: *Eyre v Everett* (1826) 2 Russ 381 at 384 per Lord Eldon LC; cf *Pearl v Deacon* (1857) as reported in 26 LJCh 761.

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### **1222. Covenant not to sue principal debtor.**

A mere covenant not to sue the principal debtor will not discharge the guarantor, especially if it is qualified by an express reservation of remedies against the guarantor<sup>1</sup>. But there can be no effectual reservation of rights against a guarantor where the transaction between the creditor and the principal debtor amounts to a novation<sup>2</sup> or satisfaction of the debt guaranteed, and is accompanied by a release to the principal debtor from further liability, whether past or future<sup>3</sup>.

1 *Price v Barker* (1855) 4 E & B 760; see *Re Natal Investment Co, Nevill's Case* (1870) 6 Ch App 43 at 47 per Mellish LJ; *Green v Wynn* (1869) 4 Ch App 204; *Bateson v Gosling* (1871) LR 7 CP 9; *Keyes v Elkins* (1864) 5 B & S 240; *North v Wakefield* (1849) 13 QB 536. Such a reservation should appear on the face of the instrument, and oral evidence of such a reservation is not in general admissible (*Cocks v Nash* (1832) 9 Bing 341; *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC; *Re Renton, ex p Glendinning* (1819) Buck 517 at 520), although the rule is not without exceptions (*Re Blakely, ex p Harvey, ex p Springfield* (1854) 4 De GM & G 881; *Wyke v Rogers* (1852) 1 De GM & G 408; *Norman v Bolt* (1883) Cab & El 77); and see the text and notes 2-3.

2 *Commercial Bank of Tasmania v Jones* [1893] AC 313, PC. As regards releases of contractual rights and covenants not to sue see **CONTRACT** vol 9(1) (Reissue) PARA 1053.

3 *Webb v Hewitt* (1857) 3 K & J 438 at 445; *Mahant Singh v U Ba Yi* [1939] AC 601 at 607, PC. See also *Cheetham v Ward* (1797) 1 Bos & P 630; *Nicholson v Revill* (1836) 4 Ad & El 675; *Kearsley v Cole* (1846) 16 M & W 128 at 136, explaining *Ex p Gifford* (1802) 6 Ves 805 at 807 et seq per Lord Eldon LC; *Green v Wynn* (1868) LR 7 Eq 28 at 32; on appeal (1869) 4 Ch App 204 at 207; *Bateson v Gosling* (1871) LR 7 CP 9 at 14 per Willes J; *Muir v Crawford* (1875) LR 2 Sc & Div 456, HL.

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### **1223. When guarantor is not discharged by release of principal debtor.**

A release of the principal debtor by the creditor will not discharge the guarantor if he has ceased to be a guarantor and become himself a principal debtor<sup>1</sup>, or has previously paid part of the debt and given a security for the remainder<sup>2</sup>, or has, in consideration of an extension of time to himself by the creditor, bound himself without the principal debtor's concurrence, to pay the whole sum for which he was originally guarantor only<sup>3</sup>, or has expressly agreed to remain liable, so that there is then no ground for the presumption that he is impliedly discharged<sup>4</sup>.

Moreover, where the whole guaranteed debt has not been discharged the guarantor may, where the guarantee is appropriately drafted, remain liable in respect of the undischarged balance even though the principal debtor has, to that extent, been released by the creditor<sup>5</sup>.

- 1 *Reade v Lowndes* (1857) 23 Beav 361; affd 30 LTOS 110, CA.
- 2 *Hall v Hutchons* (1833) 3 My & K 426.
- 3 *Defries v Smith* (1862) 10 WR 189.
- 4 *Cowper v Smith* (1838) 4 M & W 519; *Union Bank of Manchester Ltd v Beech* (1865) 3 H & C 672; *Metropolitan Bank of England and Wales v Coppee* (1896) 12 TLR 258, CA; *Perry v National Provincial Bank of England* [1910] 1 Ch 464, CA.
- 5 *Perry v National Provincial Bank of England* [1910] 1 Ch 464 at 478, CA, per Buckley LJ, where by the instrument under which the guarantee arose the creditors had full powers to vary, exchange or release securities held by them, and to give time to compound and make any arrangement with the principal debtor without discharging the guarantor. See PARAS 1216-1217.

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## **D. GIVING TIME TO THE PRINCIPAL DEBTOR**

### **1224. The principle.**

A guarantor is discharged if the creditor, without his consent<sup>1</sup>, and without expressly reserving his rights against the guarantor<sup>2</sup>, enters into a binding arrangement<sup>3</sup> with the principal debtor to give him time to perform the principal obligation<sup>4</sup>. Different reasons, given by different judges, may be found for this principle<sup>5</sup>. The main reason is usually stated to be that the guarantor's right at any time to require the creditor to call upon the principal debtor to pay off the guaranteed debt<sup>6</sup>, or himself to pay the debt and after paying it to sue the principal debtor in the name of the creditor<sup>7</sup>, is thereby interfered with<sup>8</sup>. Another, though inconsistent, reason sometimes given for the rule is that it would be a fraud on the principal debtor if the creditor, after making such an agreement, were able to sue the guarantor because the guarantor could then claim from the principal debtor in breach of the agreement to give time<sup>9</sup>.

Under this principle, the guarantor is released whether or not he is prejudiced by the giving of time<sup>10</sup>. The release extends not only to the guarantor's personal liability but also to any security he has given<sup>11</sup>.

1 The guarantee will often expressly authorise the creditor to give time to the principal debtor without discharging the guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability: see PARAS 1216-1217.

2 See PARA 1231.

3 *Clarke v Birley* (1889) 41 ChD 422; *Samuell v Howarth* (1817) 3 Mer 272 at 278 per Lord Eldon LC; and see *Creighton v Rankin* (1840) 7 Cl & Fin 325, HL.

4 *Mahant Singh v U Ba Yi* [1939] AC 601 at 606, PC. See also *Burke's Case* (circa 1780) cited in 2 Bos & P 62; *Nisbet v Smith* (1789) 2 Bro CC 579; *Rees v Berrington* (1795) 2 Ves 540; *Wright v Simpson* (1802) 6 Ves 714 at 734; *Samuell v Howarth* (1817) 3 Mer 272 at 278 per Lord Eldon LC; *Eyre v Bartrop* (1818) 3 Madd 221; *Governor & Co of Bank of Ireland v Beresford* (1818) 6 Dow 233, HL; *Hawkshaw v Parkins* (1819) 2 Swan 539 at 546 per Lord Eldon LC; *Lewis v Jones* (1825) 4 B & C 506 at 515; *Archer v Hale* (1828) 4 Bing 464; *Browne v Carr* (1831) 7 Bing 508 at 515 per Tindal CJ; *Combe v Woolf* (1832) 8 Bing 156; *Howell v Jones* (1834) 1 Cr M & R 97; *Blake v White* (1835) 1 Y & C Ex 420; *Oakeley v Pasheller* (1836) 10 Bli NS 548, HL; *Clarke v Henty* (1838)

3 Y & C Ex 187; *Creighton v Rankin* (1840) 7 Cl & Fin 325 at 346; *Isaac v Daniel* (1846) 8 QB 500; *Moss v Hall* (1850) 5 Exch 46; *Newton v Chorlton* (1853) 2 Drew 333 at 338; *Davies v Stainbank* (1855) 6 De GM & G 679; *Pooley v Harradine* (1857) 7 E & B 431; *Greenough v McClelland* (1860) 2 E & E 429, Ex Ch; *Bailey v Edwards* (1864) 4 B & S 761; *Ewin v Lancaster* (1865) 12 LT 632 at 633; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corp Ltd (liquidators)* (1874) LR 7 HL 348; *Swire v Redman and Holt* (1876) 1 QBD 536 at 541-542; *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46; *Polak v Everett* (1876) 1 QBD 669 at 673, CA; *Holme v Brunskill* (1878) 3 QBD 495 at 504-506 per Blackburn J; *Ward v National Bank of New Zealand* (1893) 8 App Cas 755 at 763, PC; *Rouse v Bradford Banking Co* [1894] AC 586 at 590, HL, per Lord Herschell LC; *Bolton v Buckenham* [1891] 1 QB 278, CA; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 348, [1972] 2 All ER 393 at 401, HL, per Lord Diplock; *Unigate Ltd v Bentley* [1986] CA Transcript 1055.

5 *Rouse v Bradford Banking Co* [1894] 2 Ch 32 at 75, CA, per AL Smith LJ; affd [1894] AC 586, HL.

6 As to this right see PARA 1131.

7 As to these rights see PARAS 1132, 1138 et seq.

8 *Rouse v Bradford Banking Co* [1894] 2 Ch 32 at 75, CA, per AL Smith LJ; affd [1894] AC 586, HL. See also *Samuell v Howarth* (1817) 3 Mer 272 at 279 per Lord Eldon LC; *Browne v Carr* (1831) 7 Bing 508 at 515 per Tindal CJ ('his remedy against the principal may become more uncertain by postponement'); *Swire v Redman and Holt* (1876) 1 QBD 536 at 541-542; *Polak v Everett* (1876) 1 QBD 669 at 674, CA, per Blackburn J; *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA, per Cotton LJ; *Mahant Singh v U Ba Yi* [1939] AC 601 at 606-607, PC; *Moschi v Lep Air Services Ltd* [1973] AC 331 at 348, [1972] 2 All ER 393 at 401, HL, per Lord Diplock.

9 *Mahant Singh v U Ba Yi* [1939] AC 601 at 607, PC. See also *Newton v Chorlton* (1853) 2 Drew 333 at 338 per Page Wood V-C; *Oakeley v Pasheller* (1856) 10 Bli NS 548, HL; *Re Natal Investment Co, Nevill's Case* (1870) 6 Ch App 43 at 47 per Mellish LJ; *Oriental Financial Corp v Overend, Gurney & Co* (1871) 7 Ch App 142 at 150 per Lord Hatherley LC; affd sub nom *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corp Ltd (liquidators)* (1874) LR 7 HL 348.

10 'If this right be suspended for a day or an hour, not injuring the guarantor to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, he is discharged': *Polak v Everett* (1876) 1 QBD 669 at 674, CA, per Blackburn J. See also *Ex p Gifford* (1802) 6 Ves 805 at 806; *Ex p Wilson* (1805) 11 Ves 410 at 411; *Samuell v Howarth* (1817) 3 Mer 272 at 279 ('even though manifestly for the benefit of the guarantor'); *Re Renton, ex p Glendinning* (1819) Buck 517 at 519 per Lord Eldon LC; *Blest v Brown* (1862) 4 De GF & J 367; *Petty v Cooke* (1871) LR 6 QB 790 at 795; *Swire v Redman and Holt* (1876) 1 QBD 536 at 541-542; *Holme v Brunskill* (1878) 3 QBD 495, CA; *Greenwood v Francis* [1899] 1 QB 312 at 320, CA, per AL Smith LJ; *R v Herron and Montgomery* [1903] 2 IR 474. The absolute nature of this principle has been the subject of some judicial criticism: see eg *Petty v Cooke* above at 795; *Polak v Everett* above at 674. There are dicta in *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46 at 51, CA, per Amphlett JA, which suggest that the ordinary rule concerning variations (that they will not discharge the guarantor where they are clearly insubstantial or obviously cannot prejudice him: see PARA 1235 text and note 8) can be applied to cases of giving time. However, the consensus of authority is to the effect that the rule regarding the giving of time is absolute: 'though this seems, if it may be permitted to speak in such terms of the doctrine sanctioned by very great lawyers, consistent neither with justice nor common sense, it has been long so firmly established that it can only be altered by the legislature': *Swire v Redman and Holt* above at 542.

11 *Bolton v Salmon* [1891] 2 Ch 48; *Smith v Wood* [1929] 1 Ch 14 at 23-24, 27-28, CA.

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### 1225. When the principle is applicable.

The principle set out in the previous paragraph applies only to cases where, at the moment when the agreement to give time is made, the parties occupy the relation of creditor, principal debtor and guarantor<sup>1</sup>. The giving of time will not discharge someone who is not a guarantor but merely occupies a position of secondary liability<sup>2</sup>.

A guarantor will be discharged under this principle, whether he originally contracted with the creditor as a guarantor, or originally contracted as a co-debtor and only became a guarantor by subsequent agreement between himself and his co-debtor<sup>3</sup>, provided that the creditor had notice of the guarantee at the time the agreement to give time was made<sup>4</sup>. Conversely, the principle will not apply to discharge a person who, although he originally contracted as a guarantor, had entered into an arrangement with the creditor by which he became a principal debtor prior to the giving of time<sup>5</sup>.

1 *British Airways Board v Parish* [1979] 2 Lloyd's Rep 361, CA. See also the cases cited in notes 2-5 and in PARA 1224 note 4.

2 *Way v Hearn* (1862) 11 CBNS 774; *British Airways Board v Parish* [1979] 2 Lloyd's Rep 361, CA (director liable for company's debt because full name of company not stated on company cheque signed by him not discharged by agreement between creditor and company to give time).

3 As to the rights which arise in these circumstances see generally PARA 1015.

4 *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corpn Ltd (liquidators)* (1874) LR 7 HL 348; *Oakeley v Pasheller* (1836) 10 Bli NS 548, HL; *Pooley v Harradine* (1857) 7 E & B 431; *Maingay v Lewis* (1870) IR 5 CL 229, Ex Ch; *Rouse v Bradford Banking Co* [1894] AC 586 at 591, 593, HL; *Leicestershire Banking Co Ltd v Hawkins* (1900) 16 TLR 317, DC; *Goldfarb v Bartlett and Kremer* [1920] 1 KB 639. Before the introduction of equitable pleas it was doubtful whether a guarantor could at law set up as a defence to an action on a guarantee that he was discharged by time given to the principal debtor, where the original contract between him and the creditor was not one of guarantee: *Manley v Boycot* (1853) 2 E & B 46; *Re Black, ex p Graham* (1854) 5 De GM & G 356; *Strong v Foster* (1855) 17 CB 201; *Taylor v Burgess* (1859) 5 H & N 1; *Lawrence v Walmsley* (1862) 12 CBNS 799 at 807; *York City and County Banking Co v Bainbridge* (1880) 43 LT 732. However, the equitable rule now prevails: see the Supreme Court Act 1981 s 49(1); and **EQUITY** vol 16(2) (Reissue) PARA 500.

5 *Reade v Lowndes* (1857) 23 Beav 361; affd 30 LTOS 110, CA.

## UPDATE

### 1225 When the principle is applicable

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 1226. The binding arrangement.

The agreement giving time must be really binding and capable of enforcement<sup>1</sup>, for valuable consideration<sup>2</sup> and made with the principal debtor<sup>3</sup>; and it must actually give time<sup>4</sup>. An agreement that if the creditor forbears to require due repayment of a loan the debtor will thereafter pay a higher rate of interest is not an agreement to give time if the creditor retains the option as to whether or not he will require such repayment<sup>5</sup>. The agreement to give time need not, however, be express<sup>6</sup>, and may be written or oral, whether the guaranteed contract is made by deed<sup>7</sup> or not.

1 *Clarke v Birley* (1889) 41 ChD 422; *Rouse v Bradford Banking Co* [1894] AC 586 at 594, HL, per Lord Herschell LC. See also *Badnall v Samuel* (1817) 3 Price 521; *Price v Edmunds* (1829) 10 B & C 578; *Vernon v Turley* (1836) 1 M & W 316; *Nicolsons v Burt* (1882) 10 R 121 at 127, Ct of Sess, per Lord Inglis, Lord President.

2 *English v Darley* (1800) 2 Bos & P 61 at 62; *Brickwood v Anniss* (1814) 5 Taunt 614; *Badnall v Samuel* (1817) 3 Price 521; *London Assurance Co v Buckle* (1820) 4 Moore CP 153; *Heath v Key* (1827) 1 Y & J 434; *Philpot v Briant* (1828) 4 Bing 717; *Blake v White* (1835) 1 Y & C Ex 420; *Clarke v Wilson* (1838) 3 M & W 208; *Smith v Winter* (1838) 4 M & W 454; *Bell v Banks* (1841) 3 Man & G 258; *Tucker v Laing* (1856) 2 K & J 745; *Price v Kirkham* (1864) 3 H & C 437; *Petty v Cooke* (1871) LR 6 QB 790. See also *Ladbroke v Hewett* (1832) 2 Dowl 488; *Rayner v Fussey* (1859) 28 LJEx 132; *McManus v Bark* (1870) LR 5 Exch 65.

3 The agreement giving time will not discharge the guarantor if it is made with a stranger (*Lyon v Holt* (1839) 5 M & W 250; *Frazer v Jordan* (1857) 8 E & B 303) or with one of several guarantors (*Clarke v Birley* (1889) 41 ChD 422).

4 *Prendergast v Devey* (1821) 6 Madd 124 at 126; *Pring v Clarkson* (1822) 1 B & C 14; *Jay v Warren* (1824) 1 C & P 532; *Philpot v Briant* (1828) 4 Bing 717; *Price v Edmunds* (1829) 10 B & C 578; *Whitfield v Hodges* (1836) 1 M & W 679; *Tatum v Evans* (1885) 54 LT 336; *Munster and Leinster Bank v France* (1889) 24 LR Ir 82, CA; *Bolton v Buckenham* [1891] 1 QB 278, CA; *Rouse v Bradford Banking Co* [1894] AC 586, HL.

5 *York City and County Banking Co v Bainbridge* (1880) 43 LT 732. Contrast *Burnes v Trade Credits Ltd* [1981] 2 All ER 122, [1981] 1 WLR 805, PC, where no such right was retained, and the guarantor was held to be discharged.

6 *Blake v White* (1835) 1 Y & C Ex 420; *Cross v Sprigg* (1850) 2 Mac & G 113; *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46, CA; *Bolton v Buckenham* [1891] 1 QB 278, CA.

7 This was not the case at law, although it was at equity: *Nisbet v Smith* (1789) 2 Bro CC 579.

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## 1227. What constitutes giving time.

The making of a new and valid contract, to which the guarantor does not assent, between the creditor and the principal debtor which extends the period at which, by the original contract between them, the principal debtor was obliged to pay the creditor amounts to a giving of time<sup>1</sup>. Thus, to substitute for payment in one sum payment by instalments amounts to a giving of time<sup>2</sup>. Again, whenever the taking of a new security from the principal debtor by the creditor operates as a giving of time, the guarantor is no longer liable<sup>3</sup>, but not where that transaction has no such effect<sup>4</sup>. The guarantor has been held to be discharged where an action of replevin was by agreement referred to arbitration, and, without the consent or privity of the guarantor in the replevin bond, the time for making the award was enlarged<sup>5</sup>, or where the creditor sued the principal debtor by direction of the guarantor, but without his knowledge agreed to stay execution<sup>6</sup>. Where a bill has been accepted to the knowledge of the holder for another's accommodation, the acceptor will be discharged if the holder gives time to the party accommodated<sup>7</sup>. The doctrine that where time is given to the principal debtor the guarantor is discharged also applies where the guarantee arises under a promissory note<sup>8</sup>.

1 *Howell v Jones* (1834) 1 Cr M & R 97 at 107 per curiam.

2 *Clarke v Henty* (1838) 3 Y & C Ex 187; cf *Bellingham & Co Ltd v Hurley* (1908) Times, 4 April, CA.

3 *Munster and Leinster Bank v France* (1889) 24 LR Ir 82, CA; *Overend, Gurney & Co (liquidators) v Oriental Financial Corp'n (liquidators)* (1874) LR 7 HL 348 at 361 per Lord Cairns LC.



4 *Overend, Gurney & Co (liquidators) v Oriental Financial Corp'n (liquidators)* (1874) LR 7 HL 348; *Bell v Banks* (1841) 3 Man & G 258; *Twopenny v Young* (1824) 3 B & C 208.

5 *Bowmaker v Moore, Shirreff and Trelfs* (1819) 7 Price 223.

6 *Rees v Berrington* (1795) 2 Ves 540.

7 *Re Acraman, ex p Webster* (1847) De G 414; *Bailey v Edwards* (1864) 4 B & S 761; *Ewin v Lancaster* (1865) 6 B & S 571. *Laxton v Peat* (1809) 2 Camp 185 may therefore be regarded as correct today, although at that time it was probably erroneous (see *Fentum v Pocock* (1813) 5 Taunt 192; *Manley v Boycot* (1853) 2 E & B 46), and it seems that *Kerrison v Cooke* (1813) 3 Camp 362 cannot now be treated as correct.

8 *Manley v Boycot* (1853) 2 E & B 46; *Greenough v McClelland* (1860) 2 E & E 429, Ex Ch; *Taylor v Burgess* (1859) 5 H & N 1; *Bellingham & Co Ltd v Hurley* (1908) Times, 4 April, CA.

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### **1228. Effect of omission to press for payment.**

If there is no binding agreement to give time, mere omission on the creditor's part to press the principal debtor for payment will not discharge the guarantor<sup>1</sup>, even if the debtor subsequently becomes insolvent<sup>2</sup>, unless the creditor is bound to use the utmost efforts to obtain payment from the principal debtor before suing the guarantor<sup>3</sup>.

1 *Shepherd v Beecher* (1725) 2 P Wms 288; *Peel v Tatlock* (1799) 1 Bos & P 419; *Wright v Simpson* (1802) 6 Ves 714 at 734; *Trent Navigation Co v Harley* (1808) 10 East 34; *Boulton v Stubbbs* (1811) 18 Ves 20 at 22; *Orme v Young* (1815) Holt NP 84; *Samuell v Howarth* (1817) 3 Mer 272 at 278; *Mayhew v Crickett* (1818) 2 Swan 185; *Perfect v Musgrave* (1818) 6 Price 111; *London Assurance Co v Buckle* (1820) 4 Moore CP 153; *Eyre v Everett* (1826) 2 Russ 381; *Goring v Edmonds* (1829) 6 Bing 94; *M'Taggart v Watson* (1836) 3 Cl & Fin 525, HL; *Creighton v Rankin* (1840) 7 Cl & Fin 325 at 346-347, HL; *Dawson v Lawes* (1854) Kay 280; *Black v Ottoman Bank* (1862) 10 WR 871, PC; *Price v Kirkham* (1864) 3 H & C 437 at 441; *Belfast Banking Co v Stanley* (1867) IR 1 CL 693; *Overend, Gurney & Co (liquidators) v Oriental Financial Corp'n (liquidators)* (1874) LR 7 HL 348; *York City and County Banking Co v Bainbridge* (1880) 43 LT 732.

2 *Trent Navigation Co v Harley* (1808) 10 East 34.

3 *Holl v Hadley* (1835) 2 Ad & El 758; *Watson v Allcock* (1853) 4 De GM & G 242; *London Guarantee Co v Fearnley* (1880) 5 App Cas 911, HL; *Mountague v Tidcombe* (1705) 2 Vern 518; but see *Musket v Rogers* (1839) 5 Bing NC 728.

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### **1229. Trade custom does not justify giving time.**

The custom of a trade does not justify the creditor in agreeing to give time to the principal debtor<sup>1</sup>. In the case, however, of a general guarantee against loss in a course of dealing the

guarantor is not, apparently, discharged by the creditor taking a bill at one month from the principal debtor in payment of an account for goods supplied, as the principal debtor and creditor are free to arrange the details of their transaction as they see fit, provided these are not at variance with the ordinary custom of merchants<sup>2</sup>.

<sup>1</sup> *Combe v Woolf* (1832) 8 Bing 156; *Holl v Hadley* (1835) 2 Ad & El 758; *Howell v Jones* (1834) 1 Cr M & R 97.

<sup>2</sup> *Stewart, Moir and Muir v Brown* (1871) 9 Macph 763 at 766, Ct of Sess, per Sir James Moncreiff, Lord Justice-Clerk; and see *Allan v Kenning* (1833) 9 Bing 618; *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA.

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### **1230. Continuing guarantees and severable contracts.**

In the case of a continuing guarantee, an agreement to give time may only partially relieve the guarantor from liability. Thus, one supply of goods to the principal debtor under such a guarantee at a longer credit than the guarantor has stipulated for will not relieve the guarantor from liability in respect of a past or subsequent supply at the prescribed credit<sup>1</sup>; and where a contract is severable in character, a guarantor for its performance will still be liable for the fulfilment of so much of the contract as is not affected by the agreement to give time<sup>2</sup>.

<sup>1</sup> *Bingham v Corbitt* (1864) 34 LJQB 37, Ex Ch.

<sup>2</sup> *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46, CA, followed in *Dowden v Levis* (1884) 14 LR Ir 307. See also *Harrison v Seymour* (1866) LR 1 CP 518; *Skillett v Fletcher* (1866) LR 2 CP 469. It is otherwise where the contract is not severable: see *Eyre v Bartrop* (1818) 3 Madd 221; *Midland Motor Showrooms Ltd v Newman* [1929] 2 KB 256, CA, where liability for payments under a hire-purchase agreement was held indivisible so that the creditor's agreement to give time for the payment of one instalment discharged the guarantor. Cf *WR Simmons Ltd v Meek* [1939] 2 All ER 645.

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### **1231. Effect of reserving remedies against guarantor.**

Even where there is a binding agreement to give time to the principal debtor, the guarantor is not discharged<sup>1</sup> if the remedies against him are expressly reserved<sup>2</sup>, with or without his consent or knowledge<sup>3</sup>. Such reservation of remedies may normally be expected to appear on the face of the agreement giving time<sup>4</sup>, but sometimes the reservation can be proved by oral evidence<sup>5</sup>, although not if such evidence varies the instrument giving time<sup>6</sup>.

- 1 For an explanation of the reason for this see *Webb v Hewitt* (1857) 3 K & J 438 at 442 per Page Wood V-C; and *Boulton v Stubbbs* (1811) 18 Ves 20 at 26 per Lord Eldon LC.
- 2 *Kearsley v Cole* (1846) 16 M & W 128 at 135-136 per Parke B; *Boaler v Mayor* (1865) 19 CBNS 76 at 83-84; *Close v Close* (1853) 4 De GM & G 176; *Owen and Gutch v Homan* (1853) 4 HL Cas 997 at 1037; *Wyke v Rogers* (1852) 1 De GM & G 408; *Ex p Gifford* (1802) 6 Ves 805 at 808; *Re Renton, ex p Glendinning* (1819) Buck 517 at 519; *Melville v Glendinning* (1816) 7 Taunt 126; *Lindsay v Lord Downes* (1840) 2 I Eq R 307; *Muir v Crawford* (1875) LR 2 Sc & Div 456, HL; *Nichols v Norris* (1831) 3 B & Ad 41.
- 3 *Kearsley v Cole* (1846) 16 M & W 128 at 135 per Parke B; *Webb v Hewitt* (1857) 3 K & J 438; *Re Renton, ex p Glendinning* (1819) Buck 517; *Boaler v Mayor* (1865) 19 CBNS 76; *Close v Close* (1853) 4 De GM & G 176; *Owen and Gutch v Homan* (1853) 4 HL Cas 997; *Wyke v Rogers* (1852) 1 De GM & G 408; *Bateson v Gosling* (1871) LR 7 CP 9 at 13 per Willes J.
- 4 *Re Renton, ex p Glendinning* (1819) Buck 517; *Boulton v Stubbbs* (1819) 18 Ves 20 at 22; *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corp Ltd (liquidators)* (1874) LR 7 HL 348.
- 5 *Re Blakely, ex p Harvey, ex p Springfield* (1854) 4 De GM & G 881 at 899 per Turner LJ; *Norman v Bolt* (1883) Cab & El 77; and see 4 B & C 515 note (a); but see, contra, *Re Renton, ex p Glendinning* (1819) Buck 517. Oral evidence is admissible to prove that there was a general understanding between the creditor and the principal debtor that the taking of a promissory note should not discharge the guarantor: see *Wyke v Rogers* (1852) 1 De GM & G 408.
- 6 *Re Renton, ex p Glendinning* (1819) Buck 517 at 520 per Lord Eldon LC; *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC.

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### **1232. When guarantor is not discharged by giving of time.**

An agreement between the creditor and the principal debtor that the creditor will not enforce his remedy against the principal debtor until a particular date does not discharge the guarantor if the date in question is earlier than the date when the creditor would otherwise have enforced his remedy<sup>1</sup>. Moreover, a guarantor is not discharged by an agreement giving time where he has himself agreed not to require the principal debtor to relieve him until he has himself been sued<sup>2</sup>, and, apparently, an extension of time to the principal debtor permitted by court order, though with the creditor's consent, will not discharge the guarantor<sup>3</sup>. Again, an agreement to give time to the principal debtor will not discharge a guarantor if it is made after the creditor has obtained judgment against the principal debtor and the guarantor<sup>4</sup>, or against the guarantor alone<sup>5</sup>, or after the guarantor has by agreement with the creditor converted himself into a debtor<sup>6</sup>, or if he has agreed in his guarantee<sup>7</sup> or in some other way that time may with impunity be given to the principal debtor<sup>8</sup>, or if he subsequently confirms the agreement giving time<sup>9</sup>.

- 1 Cf *Hulme v Coles* (1827) 2 Sim 12.
- 2 *Rouse v Bradford Banking Co* [1894] 2 Ch 32 at 57, CA, per Lindley LJ; affd [1894] AC 586, HL.
- 3 *Provincial Bank v Cussen* (1886) 20 ILT 73, CA.
- 4 *Re A Debtor (No 14 of 1913)* [1913] 3 KB 11.
- 5 *Jenkins v Robertson* (1854) 2 Drew 351. Cf *Woosnam v Price* (1833) 1 Cr & M 352. Where a creditor has a judgment debt assigned to him by his debtor, he does not necessarily, by giving time to the judgment debtor, become chargeable to his own debtor: *Williams v Price* (1824) 1 Sim & St 581 at 587 per Leach V-C.

6 *Reade v Lowndes* (1857) 23 Beav 361; affd 30 LTOS 110, CA. See also *Strong v Foster* (1855) 17 CB 201.

7 See PARAS 1216-1217. An agreement of this kind is invariably found in standard forms of guarantee.

8 *Yates v Evans* (1892) 61 LJQB 446; *Cowper v Smith* (1838) 4 M & W 519; *Kirkwood v Carroll* [1903] 1 KB 531, CA (where *Yates v Evans* above was approved, and *Kirkwood v Smith* [1896] 1 QB 582 was overruled); see also *Clark v Devlin* (1803) 3 Bos & P 363; *Smith v Winter* (1838) 4 M & W 454; *Tyson v Cox* (1823) Turn & R 395; *Union Bank of Manchester Ltd v Beech* (1865) 3 H & C 672; *Duffy v Orr* (1831) 5 Bli NS 620, HL; cf *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 KB 346, [1950] 2 All ER 821, CA, where the term in a hire-purchase agreement by which time might be given contained a proviso that the guarantor be informed if any payment was more than 30 days overdue, and on 17 November the debtor was allowed until 30 November to pay the instalment due on 31 October. The guarantor, who was not informed of the non-payment until 28 December, successfully disclaimed liability on the ground that he should have been informed on 30 November.

9 *Mayhew v Crickett* (1818) 2 Swan 185 at 192; *Smith v Winter* (1838) 4 M & W 454; *Phillips v Foxall* (1872) LR 7 QB 666 at 676-677.

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## **E. AGREEMENT TO GIVE TIME TO THE GUARANTOR**

### **1233. Agreement by creditor with debtor to give time to guarantor.**

A binding agreement by the creditor with the principal debtor, made without the guarantor's consent, to give time to the guarantor discharges the guarantor, as its effect is to alter prejudicially his position by tying the creditor's hands from receiving payment from the guarantor and so enabling the guarantor to sue the principal debtor<sup>1</sup>.

1 *Oriental Financial Corp'n v Overend, Gurney & Co* (1871) 7 Ch App 142 at 152 per Lord Hatherley LC; affd sub nom *Overend, Gurney & Co Ltd (liquidators) v Oriental Financial Corp'n Ltd (liquidators)* (1874) LR 7 HL 348; and see *Vyner v Hopkins* (1842) 6 Jur 889.

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### **1234. Agreement by creditor with guarantor giving time.**

A creditor may compound with and give time to a guarantor, or take security from him, without discharging co-guarantors or the principal debtor<sup>1</sup>. Moreover, where by separate contract with the guarantor, made on good consideration and without the concurrence of the principal debtor, the creditor gives the guarantor further time for payment of a bill of exchange accepted by the guarantor, and afterwards the principal debtor is released from his debt by the creditor, the guarantor is not discharged from liability<sup>2</sup>.

On the other hand, where there are two co-guarantors and the creditor, after granting a further loan to the principal debtor and taking a new security from him for that and the former loan, gives further time to him and one of the guarantors only without specially reserving the remedy against the other guarantor, that other guarantor is discharged<sup>3</sup>.

1 *Ex p Smith* (1713) 1 P Wms 237 at 238 per Lord Harcourt LC; *Bedford v Deakin* (1818) 2 B & Ald 210; *Dunn v Slee* (1817) 1 Moore CP 2.

2 *Defries v Smith* (1862) 10 WR 189. Cf *Clarke v Birley* (1889) 41 ChD 422.

3 *Vyner v Hopkins* (1842) 6 Jur 889.

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## **F. OTHER VARIATIONS OF THE PRINCIPAL CONTRACT**

### **1235. The principle.**

When considering the effect upon the liability of a guarantor of an agreement between the creditor and the principal debtor to vary the principal contract, the construction of the contract of guarantee is of critical importance, because it is vital to identify the precise nature of the obligation or obligations guaranteed<sup>1</sup>.

Where the obligations are those arising under a specific contract between debtor and creditor<sup>2</sup>, the terms of the contract giving rise to the obligations guaranteed may sometimes be embodied or incorporated<sup>3</sup> expressly or impliedly<sup>4</sup> in the contract of guarantee<sup>5</sup>. If in such a case the creditor, without the guarantor's consent<sup>6</sup>, enters into a binding agreement<sup>7</sup> which varies the principal contract in a way which is not manifestly insubstantial or incapable of prejudicing the guarantor<sup>8</sup>, the guarantor will be discharged from his obligations under the contract of guarantee<sup>9</sup>. This general rule is subject to the qualification that where the guarantee is for the performance of several and distinct contracts or duties, a change in one of those contracts or duties will not affect the guarantor's liability as to the rest<sup>10</sup>. Hence a guarantor may be liable for a default which occurred before the variation of the principal contract.

Where on the other hand the guarantee is given in respect of obligations arising out of a contemplated course of dealing without incorporating, expressly or impliedly, the terms of any specific contract, it is open to the creditor to vary the terms applying to the course of dealing so long as that course of dealing remains within the scope of the guarantee<sup>11</sup>.

1 *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. However, see the comments of Scott LJ in [1992] 2 Lloyd's Rep 365 at 375-376, cited in note 5. For a more recent example of a case where there was a dispute on the facts as to whether a loan agreement had been varied without the guarantor's consent, so as to discharge him, see *Lloyds TSB Bank plc v Hayward* [2002] EWCA Civ 1813, [2002] All ER (D) 161 (Dec), where the Court of Appeal ordered a retrial.

2 This may be evident from the terms of the contract of guarantee itself, where specific reference is made to the contract giving rise to the obligations guaranteed, or from a consideration of the circumstances surrounding the conclusion of the contract of guarantee, where these show that a specific contract was the subject matter of

the guarantee: *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. See also *Holme v Brunskill* (1878) 3 QBD 495, CA; *Sanderson v Aston* (1873) LR 8 Exch 73 at 76; *Whitcher v Hall* (1826) 5 B & C 269; and cf *Stewart v M'Kean* (1855) 10 Exch 675 at 689-690.

3 Where the terms of the principal contract are incorporated into the contract of guarantee, any breach of them constitutes a breach of the guarantee itself: *Glyn v Hertel* (1818) 8 Taunt 208; *Garrett v Handley* (1825) 4 B & C 664; *Holme v Brunskill* (1878) 3 QBD 495, CA; *Bacon v Chesney* (1816) 1 Stark 192; *Blest v Brown* (1862) 3 Giff 450; on appeal 4 De GF & J 367; *Whitcher v Hall* (1826) 5 B & C 269; *Holme v Brunskill* above at 505 per Cotton LJ. For the effect of breaches of the principal contract see PARA 1242 et seq.

4 The terms of the principal contract will not be treated as impliedly embodied in the guarantee if those terms have not been finalised at the date the guarantee is given: *Wardens etc of Mercers Co v New Hampshire Insurance Co* as reported in [1992] 2 Lloyd's Rep 365 at 370, CA, per Parker LJ, and at 371 per Nolan LJ.

5 *Wardens etc of Mercers Co v New Hampshire Insurance Co* as reported in [1992] 2 Lloyd's Rep 365, CA. However, in *Wardens etc of Mercers Co v New Hampshire Insurance Co* at 375-376, Scott LJ expressed the view that it was unhelpful to speak of the terms of the principal contract being 'embodied' in the guarantee, and that the vital question in deciding whether the guarantor was discharged by a variation was whether that variation altered the risk that the guarantor had contracted to undertake.

6 The guarantee will often expressly authorise the creditor to vary the principal obligation without discharging the guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability: see PARAS 1216-1217. It is for the creditor to prove that the guarantor has consented: *Provincial Bank of Ireland v Fisher* [1919] 2 IR 249, HL. See generally PARA 1241.

7 *Price v Kirkham* (1864) 3 H & C 437; *Egbert v National Crown Bank* [1918] AC 903, PC. Cf *Clarke v Birley* (1889) 41 ChD 422; *Samuell v Howarth* (1817) 3 Mer 272 at 278 per Lord Eldon LC; and see *Creighton v Rankin* (1840) 7 Cl & Fin 325, HL.

8 The court will not embark on an inquiry if the insubstantial nature and lack of prejudice to the guarantor is not self-evident: *Holme v Brunskill* (1878) 3 QBD 495 at 505, CA. See also *Rees v Berrington* (1795) 2 Ves 540 at 543 per Lord Loughborough LC ('I cannot try the cause by inquiring what mischief it might have done; for that would go into a vast variety of speculation, upon which no sound principle could be built'); *Hollier v Eyre* (1840) 9 Cl & Fin 1 at 57, HL, per Lord Cottenham; *Newton v Chorlton* (1853) 2 Drew 333 at 339 per Page Wood V-C; *Polak v Everett* (1876) 1 QBD 669 at 674, 677, CA; *Re Darwen and Pearce* [1927] 1 Ch 176. As a guarantor cannot succeed to the owner's rights of seizure of goods under a hire-purchase agreement, he cannot be prejudiced by the alteration of those rights and consequently is not released thereby: *Chatterton v Maclean* [1951] 1 All ER 761.

9 *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA, applying *Holme v Brunskill* (1878) 3 QBD 495. See also *Rees v Berrington* (1795) 2 Ves 540 at 543 per Lord Loughborough LC; *Eyre v Bartrop* (1818) 3 Madd 221; *Bellingham v Freer* (1837) 1 Moo PCC 333; *Warre v Calvert* (1837) 7 Ad & El 143; *Calvert v London Dock Co* (1838) 2 Keen 638; *Newton v Chorlton* (1853) 2 Drew 333 at 339 per Page Wood V-C; *General Steam-Navigation Co v Rolt* (1858) 6 CBNS 550; *Price v Kirkham* (1864) 3 H & C 437; *Burke v Rogerson* (1866) 12 Jur NS 635; *Stewart, Moir and Muir v Brown* (1871) 9 Macph 763 at 766, Ct of Sess, per Sir James Moncreiff, Lord Justice-Clerk; *Grant v Budd* (1874) 30 LT 319; *Polak v Everett* (1876) 1 QBD 669, CA; *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 763, PC; *Re Sherry, London and County Banking Co v Terry* (1884) 25 ChD 692, CA; *Taylor v Bank of New South Wales* (1886) 11 App Cas 596 at 603, PC; *Egbert v National Crown Bank* [1918] AC 903, PC; *Re Darwen and Pearce* [1927] 1 Ch 176; *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 389, PC; *Burnes v Trade Credits Ltd* [1981] 2 All ER 122, [1981] 1 WLR 805, PC; *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289, [2005] 1 WLR 2497; *Van Der Merwe v IIG Capital LLC* [2007] EWHC 2631 (Ch), [2007] All ER (D) 214 (Nov). See also *Triodos Bank NV v Dobbs (No 2)* [2005] EWCA Civ 630, (2005) Times, 30 May (agreement purporting to be variation was in fact new agreement).

10 *Skillett v Fletcher* (1867) LR 2 CP 469; *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46, CA. Cf *Midland Motor Showrooms Ltd v Newman* [1929] 2 KB 256, CA.

11 *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n,

[1992] 2 Lloyd's Rep 365, CA; *Stewart v M'Kean* (1855) 10 Exch 675; *Sanderson v Aston* (1873) LR 8 Exch 73; *National Westminster Bank plc v Riley* [1986] BCLC 268, CA.

## UPDATE

### 1235 The principle

NOTE 9--*IIG Capital*, cited, affirmed: [2008] EWCA Civ 542, [2008] All ER (D) 297 (May).

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### 1236. Basis of the principle.

The basis of the principle that a guarantor is discharged by an agreement between the creditor and the principal debtor which has the effect of varying the guarantee, is that it is the clearest and most evident equity not to carry on any transaction without the privity of the guarantor, who must necessarily have a concern in every transaction with the principal debtor<sup>1</sup>, and who cannot as guarantor be made liable for default in the performance of a contract which is not the one the fulfilment of which he has guaranteed<sup>2</sup>.

1 *Rees v Berrington* (1795) 2 Ves 540 at 543 per Lord Loughborough LC.

2 *Taylor v Bank of New South Wales* (1886) 11 App Cas 596 at 603, PC. See also *Blest v Brown* (1862) 4 De GF & J 367 per Lord Westbury LC; *Polak v Everett* (1876) 1 QBD 669, CA; *Holme v Brunskill* (1878) 3 QBD 495, CA; *Grant v Budd* (1874) 30 LT 319 at 320 per Blackburn J; *Egbert v National Crown Bank* [1918] AC 903 at 908, PC; *Smith v Wood* [1929] 1 Ch 14, CA; and see eg *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289 (refinancing agreements between the claimant creditor and the principal debtor discharged the guarantor).

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### 1237. Particular variations.

A guarantor for payment of a composition to creditors by the principal debtor is discharged from liability to a particular creditor who, without his consent or knowledge, obtains from the principal debtor an agreement binding the principal debtor to pay the creditor's debt in full<sup>1</sup>. A guarantor for the performance of an agreement which provides that advances are to be made to the principal debtor by means of consignments is discharged from liability if acceptances are substituted for the consignments<sup>2</sup>. A guarantor for payment of an annuity is wholly discharged from liability by the alteration, without his consent, of the time for and terms of its redemption<sup>3</sup>. The forfeiture of shares by a company, by reason of the non-payment of instalments, which the guarantor had guaranteed, releases the guarantor<sup>4</sup>. A guarantor of a particular bank account will be discharged where the bank agrees to open a second account for the principal debtor

while the guarantee is still current, thereby making it possible for the principal debtor to make payments into the bank without reducing the guarantor's liability on the guaranteed account<sup>5</sup>.

1 *Mayhew v Boyes* (1910) 103 LT 1, CA. As to compositions see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 863.

2 *Bellingham v Freer* (1837) 1 Moo PCC 333. A guarantor to the vendor of ships for payment of the purchase money by the purchasers is discharged from liability by the improper use by the vendor of one of the ships sold, which the vendor had agreed with the purchasers to freight: *Burke v Rogerson* (1866) 12 Jur NS 635. Where the principal contract obliges the creditor to give notice to the principal debtor requiring him to pay, and the creditor fails to give such notice, the guarantor will be discharged even though, owing to the death of the principal debtor, it has become impossible to fulfil this requirement: *Rickaby v Lewis* (1905) 22 TLR 130.

3 *Eyre v Bartrop* (1818) 3 Madd 221. So where a guarantor guarantees the redemption by the principal debtor of shares in a company to which the principal debtor is about to assign his business, and afterwards the mode of redemption is altered without the guarantor's consent and to his prejudice, the guarantor will be discharged: *Polak v Everett* (1876) 1 QBD 669, CA. A guarantee given for the due performance of a shipbuilding contract which stipulates for payment by instalments as certain stages of the work are reached is discharged if the building owner makes advance payments greater than those permitted by the contract: *General Steam-Navigation Co v Rolt* (1858) 6 CBNS 550; *Calvert v London Dock Co* (1838) 2 Keen 638; *Warre v Calvert* (1837) 7 Ad & El 143.

4 *Re Darwen and Pearce* [1927] 1 Ch 176. See also *Guy-Pell v Foster* [1930] 2 Ch 169, CA.

5 *National Bank of Nigeria Ltd v Awolesi* [1964] 1 WLR 1311, [1965] 2 Lloyd's Rep 389, PC.

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### **1238. Release of property pledged.**

Where a guarantor pledges his personal credit by bond or covenant, and by the same contract also pledges his goods, or mortgages or charges his land, as security for the same debt, any alteration of the contract by the mortgagee and the principal debtor behind the guarantor's back, for example by a consolidation deed, with a fresh covenant for payment of the principal sum and other money subsequently advanced at a later date, will discharge the guarantor from all personal liability and also release the property which he has included in the contract<sup>1</sup>.

1 *Bolton v Salmon* [1891] 2 Ch 48. Where, pursuant to a memorandum of charge, several persons deposited the title deeds of their respective properties with the chargee to secure payment to him of money due or to become due to him from a company and respectively charged their respective properties with the payment of those sums, the subsequent release by the chargee of the title deeds of the property of one of the depositors without the consent of the others, so as to enable that depositor to execute a mortgage of his property having priority to the charge, affected the right of any depositor to have all the properties marshalled so that the burden might fall rateably on the properties charged, and thus increased the risk on the remaining properties, with the result that the other depositors were released from liability: *Smith v Wood* [1929] 1 Ch 14, CA. It is no longer possible to create an equitable charge over land by the mere deposit of title deeds: see **MORTGAGE** vol 77 (2010) PARA 105.

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GUARANTEE/(vii) Discharge by Conduct of Creditor/F. OTHER VARIATIONS OF THE PRINCIPAL CONTRACT/1239. Effect of fraudulent variations.

### **1239. Effect of fraudulent variations.**

Certain departures from the terms of the principal contract will not discharge the guarantor. Thus, a guarantor cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted, where that conduct has been caused by the fraudulent act or omission against which the guarantor, by the contract of guarantee, has guaranteed the employer<sup>1</sup> to whom the guarantor owes a duty to see that the principal debtor performs his obligations<sup>2</sup>. Therefore guarantors who have guaranteed that a works contract be well and truly executed will not be discharged by the payment to the contractor of retention money upon a final certificate obtained by the contractor's fraud from the owner of the works, as such fraud is one of the risks covered by and incident to such a guarantee<sup>3</sup>.

Nor will a guarantor be discharged from liability where the principal debtor has obtained by fraud an increase of salary from his employers thereby varying the principal contract<sup>4</sup>.

1 *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494 at 504-505, CA, per Bowen LJ; and see *Bramley Union Guardians v Guarantee Society* (1900) 64 JP 308, CA.

2 *Creighton v Rankin* (1840) 7 Cl & Fin 325, HL.

3 *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494, CA; and see *Dawson v Lawes* (1854) Kay 280.

4 *Bramley Union Guardians v Guarantee Society* (1900) 64 JP 308, CA.

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### **1240. Other matters which do not discharge the guarantor.**

A guarantor who has guaranteed the due performance of a building contract which entitles the employer to superintend the execution of the works will not be discharged by the mere non-exercise of the right of superintendence<sup>1</sup>, as a mere omission on the part of an employer holding a guarantee will not discharge a guarantor unless, apparently, it is an omission to do some act which the employer has contracted with the guarantor to do, or to preserve some security to the benefit of which the guarantor is entitled<sup>2</sup>.

Where a guarantee for an agent leaves the mode of accounting between him and his principal to the principal's discretion, and the principal, by an agreement with the agent, substitutes for the original method of accounting another of a different but reasonable character, the guarantor will not be discharged<sup>3</sup>; nor will he necessarily be discharged by the employer's acquiescence in an irregular mode of accounting<sup>4</sup>, nor by the employer's non-compliance with its byelaws for the examination of its employees' accounts<sup>5</sup>, nor by negligence in auditing the accounts, nor by allowing the principal debtor to retain in his hands balances far exceeding the amount permitted by the guarantee bond and principal contract, without payment being required or notice given to the guarantor<sup>6</sup>.

A creditor's acceptance of a debtor's wrongful repudiation is not a variation of the contract<sup>7</sup>. Nor is the assignment of a head contract a variation discharging the guarantor of a sub-contract arising under it<sup>8</sup>.

In the case of a guarantee, limited as to amount, for the due and regular payment for goods to be supplied to a trader the guarantor is not discharged by a subsequent agreement between the vendors and the trader providing that the trader shall purchase from them all the goods he requires for his business, or in default pay them a fixed commission on all goods he may purchase elsewhere<sup>9</sup>. An indemnity in respect of all liability to be incurred in giving a bond to the Treasury<sup>10</sup> is applicable to a payment subsequently made by the obligor of the bond to the Treasury for the express purpose of obtaining the cancellation of the bond originally given, where the guarantor's position has not been materially altered by such payment<sup>11</sup>.

Where a person has become guarantor for the performance of two things which are separate and distinct, a subsequent variation, without the guarantor's consent, of the principal contract as to one of them only will not relieve the guarantor from liability in respect of the other thing should it not be performed<sup>12</sup>.

That which merely deprives the principal debtor of a moral inducement to perform his contract will, it seems, not discharge his guarantor from liability<sup>13</sup>.

1 *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494, CA.

2 *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494 at 508, CA, per Bowen LJ; and see *Clydebank and District Water Trustees v Fidelity and Deposit Co of Maryland* 1915 SC 362; affd 1916 SC (HL) 69.

3 *Stewart v M'Kean* (1855) 10 Exch 675; *Holme v Brunskill* (1878) 3 QBD 495, CA.

4 *Durham Corpn v Fowler* (1889) 22 QBD 394 (rate collector).

5 *Price v Kirkham* (1864) 3 H & C 437.

6 *Creighton v Rankin* (1840) 7 Cl & Fin 325, HL.

7 *Moschi v Lep Air Services Ltd* [1973] AC 331, [1972] 2 All ER 393, HL.

8 *Town of Truro v Toronto General Insurance Co* [1974] SCR 1129, 38 DLR (3d) 1, Can SC.

9 *Stewart and McDonald v Young* (1894) 38 Sol Jo 385.

10 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

11 *Webster v Petre* (1879) 4 ExD 127.

12 *Harrison v Seymour* (1866) LR 1 CP 518 (completion of one ship and repair of another); *Skillett v Fletcher* (1867) LR 2 CP 469, Ex Ch (duties as collector of poor rates and duties as collector of sewers and general rates); and see *Croydon Commercial Gas Co v Dickinson* (1876) 2 CPD 46, CA (agreement to take goods and pay for them monthly held to be severable into separate contracts in respect of each month) (distinguished in *Midland Motor Showrooms Ltd v Newman* [1929] 2 KB 256, CA, where liability under a hire-purchase agreement was held indivisible).

13 *Grant v Budd* (1874) 30 LT 319 at 320 per Blackburn J.

### 1241. Variation with guarantor's consent.

The guarantor is not discharged by any variation of the principal contract made with his consent<sup>1</sup>. The guarantee will often expressly authorise the creditor to vary the principal obligation without discharging the guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability<sup>2</sup>.

The onus of proving that the guarantor has consented is upon the person seeking to enforce the guarantee<sup>3</sup>. The guarantor is not bound to warn the creditor against doing an act which will discharge the guarantee, even though the guarantor knows of the creditor's intention to do the act<sup>4</sup>; nor will the guarantor's mere knowledge of irregularities committed by the creditor in carrying out the principal contract necessarily amount to consent to those irregularities<sup>5</sup>.

1 *Woodcock v Oxford and Worcester Rly Co* (1853) 1 Drew 521; and see *Browne v Carr* (1831) 7 Bing 508 at 515-516; *Hollier v Eyre* (1840) 9 Cl & Fin 1 at 52, HL, per Lord Cottenham; *Re Blakely, ex p Harvey, ex p Springfield* (1854) 4 De GM & G 881 at 899 per Turner LJ; *Oakford v European and American Steam Shipping Co* (1863) 1 Hem & M 182; *Swire v Redman and Holt* (1876) 1 QBD 536. After he has been discharged from his contract by the creditor's act, the guarantor may revive his liability by a subsequent promise or consent: see *Phillips v Foxall* (1872) LR 7 QB 666 at 676-677 per Quain J; *Mayhew v Crickett* (1818) 2 Swan 185; *Smith v Winter* (1838) 4 M & W 454.

2 See PARAS 1216-1217.

3 *Provincial Bank of Ireland v Fisher* [1919] 2 IR 249, HL; *General Steam Navigation Co v Rolt* (1858) 6 CBNS 550.

4 *Polak v Everett* (1876) 1 QBD 669 at 673, CA, per Blackburn J; and see *Rees v Berrington* (1795) 2 Ves 540.

5 *Warre v Calvert* (1837) 7 Ad & El 143 at 155 per Littledale J.

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### **G. DEPARTURE BY THE CREDITOR FROM THE PRINCIPAL CONTRACT**

#### 1242. The principle.

When considering the effect upon the liability of a guarantor of a departure by the creditor from the terms of the principal contract, the construction of the contract of guarantee is of critical importance, because it is vital to identify the precise nature of the obligation or obligations guaranteed<sup>1</sup>.

Where the obligations are those arising under a specific contract between debtor and creditor<sup>2</sup>, the terms of the contract giving rise to the obligations guaranteed may sometimes be embodied or incorporated<sup>3</sup> expressly or impliedly<sup>4</sup> in the contract of guarantee<sup>5</sup>. Any departure by the creditor from his contract with the guarantor without the guarantor's consent<sup>6</sup>, whether it be from the express terms of the guarantee itself<sup>7</sup> or from the embodied terms of the principal contract, which is not obviously and without inquiry quite insubstantial, will discharge the guarantor from liability<sup>8</sup>, whether it injures him or not<sup>9</sup>, for it constitutes an alteration in the guarantor's obligations.

Where on the other hand the guarantee is given in respect of obligations arising out of a contemplated course of dealing without incorporating, expressly or impliedly, the terms of any specific contract, the guarantor will not be discharged if what is done remains within the scope of the guarantee<sup>10</sup>. Even a breach by the creditor of the terms of the principal contract will not discharge the guarantor, unless it is a repudiatory breach<sup>11</sup>.

1 *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. However, see the comments of Scott J in [1992] 2 Lloyd's Rep 365 at 375-376, cited in note 5.

2 This may be evident from the terms of the contract of guarantee itself, where specific reference is made to the contract giving rise to the obligations guaranteed, or from a consideration of the circumstances surrounding the conclusion of the contract of guarantee, where these show that a specific contract was the subject matter of the guarantee: *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd on the particular facts of the case sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA. See also *Holme v Brunskill* (1878) 3 QBD 495, CA; *Sanderson v Aston* (1873) LR 8 Exch 73 at 76; *Whitcher v Hall* (1826) 5 B & C 269; and cf *Stewart v M'Kean* (1855) 10 Exch 675 at 689-690.

3 Where the terms of the principal contract are incorporated into the contract of guarantee, any breach of them constitutes a breach of the guarantee itself: *Glyn v Hertel* (1818) 8 Taunt 208; *Garrett v Handley* (1825) 4 B & C 664; *Holme v Brunskill* (1878) 3 QBD 495, CA; *Bacon v Chesney* (1816) 1 Stark 192; *Blest v Brown* (1862) 3 Giff 450; on appeal 4 De GF & J 367; *Whitcher v Hall* (1826) 5 B & C 269; *Holme v Brunskill* at 505 per Cotton LJ.

4 The terms of the principal contract will not be treated as impliedly embodied in the guarantee if those terms have not been finalised at the date the guarantee is given: *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365 at 370, CA, per Parker LJ and at 371 per Nolan LJ.

5 *Wardens etc of Mercers Co v New Hampshire Insurance Co* as reported in [1992] 2 Lloyd's Rep 365, CA. However, in *Wardens etc of Mercers Co v New Hampshire Insurance Co* at 375-377, Scott LJ expressed the view that it was unhelpful to speak of the terms of the principal contract being 'embodied' in the guarantee: see further note 11.

6 The guarantee will often expressly authorise the creditor to vary the principal obligation without discharging the guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability: see PARAS 1216-1217. It is for the creditor to prove that the guarantor has consented: *Provincial Bank of Ireland v Fisher* [1919] 2 IR 249, HL. Cf generally PARA 1241.

7 In *Blest v Brown* (1862) 4 De GF & J 367, the guarantor's engagement was construed by the court as one 'to be answerable for flour supplied in conformity with the requisitions of 'a contract between the debtor (a baker) and a third party. The flour supplied by the principal creditor (a corn factor) did not conform to those requisitions, although it did conform to the terms of the contract between the debtor and the creditor. The guarantor was held to be discharged.

8 *Blest v Brown* (1862) 4 De GF & J 367 at 376 per Lord Westbury LC; *Holme v Brunskill* (1878) 3 QBD 495 at 505-506, CA, per Cotton LJ; *Smith v Wood* [1929] 1 Ch 14 at 22-23, CA, per Lord Hanworth MR; *Re Darwen and Pearce* [1927] 1 Ch 176 at 183-184 per Lawrence J; *Egbert v National Crown Bank* [1918] AC 903 at 908-909, PC; *Vavasour Trust Co Ltd v Ashmore* [1976] CA Transcript 157; *National Westminster Bank plc v Riley* [1986] BCLC 268 at 275-276, CA; *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA. In the following cases the guarantor was held not to be discharged, as there had been no real departure from the terms of the guarantee: *Davey v Phelps* (1841) 2 Man & G 300; *Evans v Earle* (1854) 10 Exch 1; *Price v Kirkham* (1864) 3 H & C 437; *Taylor v Bank of New South Wales* (1886) 11 App Cas 596, PC; *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541. See also *Egbert v National Crown Bank* above; *Smith v Wood* above. In *Wardens etc of Mercers Co v New Hampshire Insurance Co* above Scott LJ expressed the view that, in cases where the guarantor is a professional compensated guarantor such as a bank or insurance company, binding authority may not prevent the adoption in England of the United States approach, which holds that the guarantor is not discharged absolutely but only pro tanto to the injury to the guarantor's rights.

9 *General Steam-Navigation Co v Rolt* (1858) 6 CBNS 550 at 575. See also *Bowmaker v Moore, Shirreff and Trelfs* (1819) 7 Price 223, Ex Ch; *Whitcher v Hall* (1826) 5 B & C 269; *Wright v Sandars* (1857) 3 Jur NS 504; *Blest v Brown* (1862) 4 De GF & J 367 at 376 per Lord Westbury LC; *Luning v Milton* (1890) 7 TLR 12.

10 *City of London v New Hampshire Insurance Co* (18 January 1991, unreported), QBD, but summarised at (1991) 3 JIBFL 144; revsd without affecting this point sub nom *Mercers Co v New Hampshire Insurance Co* [1992] 3 All ER 57n, sub nom *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 1 WLR 792n, [1992] 2 Lloyd's Rep 365, CA; see also *Stewart v M'Kean* (1855) 10 Exch 675; *Sanderson v Aston* (1873) LR 8 Exch 73; *National Westminster Bank plc v Riley* [1986] BCLC 268, CA.

11 *National Westminster Bank plc v Riley* [1986] BCLC 268 at 275-276, CA; *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA. As to the right of the innocent party to terminate a contract where the other party has committed a serious or repudiatory breach see **CONTRACT** vol 9(1) (Reissue) PARA 986 et seq. In *Wardens etc of Mercers Co v New Hampshire Insurance Co* at 376-377, Scott LJ rejected the distinction between embodied and non-embodied terms as unhelpful, and expressed the view that the question whether a guarantor was discharged should turn not on whether the breach was repudiatory, but on the impact of the breach on the risk undertaken; sed quare.

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### **1243. Particular departures by the creditor.**

Where a guarantee stipulates that a certain period of credit be given to the principal debtor, this stipulation must be strictly adhered to<sup>1</sup>. If, however, no definite period of credit is prescribed by the guarantee, then a reasonable credit must be given<sup>2</sup>, and not merely the strict customary credit of the trade<sup>3</sup>. A guarantor for payment of a bill of exchange to be given for a stated sum of money will not be liable, even for that sum, if the bill is given for a different amount<sup>4</sup>, nor in the case of renewed bills unless they substantially correspond with the originals<sup>5</sup>. A guarantor who has agreed to pay whatever another party is made to pay under an insurance policy is not liable for sums paid by that other party under a scheme of arrangement substituted for the policy<sup>6</sup>. A guarantor bond conditioned for payment of a sum to be awarded by the judgment of a court does not extend to a sum awarded under a judgment obtained by consent<sup>7</sup>. Moreover, a guarantor whose liability is defined by one statute may be wholly discharged if his position is subsequently changed by another statute<sup>8</sup>.

However, a guarantor for a customer's account with a bank will not be discharged if the bank commits a non-repudiatory breach of its agreement with the customer, as for example by wrongfully dishonouring a cheque or direct debit<sup>9</sup>. Where a guarantee is given of obligations under a building contract, the creditor's breach by a short delay in giving the principal debtor possession of the site will not discharge the guarantor, where the guarantor had in any event left the creditor and the principal debtor to settle the contractual date for possession<sup>10</sup>.

1 *Bacon v Chesney* (1816) 1 Stark 192 at 193 per Lord Ellenborough CJ.

2 *Henton v Paddison* (1893) 68 LT 405.

3 *Simpson v Manley* (1831) 2 Cr & J 12.

4 *Philips v Astling* (1809) 2 Taunt 206; and see *Pickles v Thornton* (1875) 33 LT 658, CA; *Clarke v Green* (1849) 3 Exch 619.

5 *Barber v Mackrell* (1892) 41 WR 341, CA.

6 *Mortgage Insurance Corp'n Ltd v Pound* (1894) 64 LJQB 394, CA; affd (1895) 65 LJQB 129, HL.

7 *Tatum v Evans* (1885) 54 LT 336.

8 *Finch v Jukes* [1877] WN 211. For other examples see *Bellairs v Ebsworth* (1811) 3 Camp 53; *Evans v Whyte* (1829) 5 Bing 485; *London Assurance Co v Bold* (1844) 6 QB 514; *Archer v Hudson* (1844) 7 Beav 551; *Mills v Alderbury Union Guardians* (1849) 3 Exch 590; *Blest v Brown* (1862) 3 Giff 450; on appeal 4 De GF & J 367.

9 *National Westminster Bank plc v Riley* [1986] BCLC 268, CA.

10 *Wardens etc of Mercers Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA.

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## **H. LOSS OF SECURITIES HELD BY CREDITOR**

### **1244. Effect of loss of securities.**

On paying the guaranteed debt the guarantor is entitled to have all securities held by the creditor<sup>1</sup> for the debt handed over to him by the creditor in exactly the same state and condition in which they were originally received<sup>2</sup>, whether they were in existence at the date of the contract of guarantee or came into existence subsequently<sup>3</sup>. To protect this right a guarantor is discharged<sup>4</sup> if the creditor without the guarantor's consent<sup>5</sup> fails to make those securities properly available to the guarantor<sup>6</sup>.

This principle will apply whenever the creditor, by reason of what he has done, cannot, on payment by the guarantor, give him the securities in exactly the same condition as they formerly stood in his hands<sup>7</sup>. So the guarantor will be discharged where the creditor loses securities which he had in his possession or power, or permits them to get into the possession of the principal debtor, or fails to perfect them<sup>8</sup>.

The guarantor will be wholly discharged if the release or other dealing with the security constitutes a variation of the principal obligation<sup>9</sup>, or if the maintenance of the security is a condition of the guarantee<sup>10</sup>. In any other case, the guarantor will be released pro tanto to the extent that his rights have been impaired<sup>11</sup>.

1 As to the guarantor's rights to securities held by the creditor in respect of the guaranteed debt see PARA 1141 et seq. These will include securities received by the creditor from co-guarantors: see PARA 1177. Securities held from a co-guarantor may not be wasted: see *Margrett v Gregory* (1862) 6 LT 543.

2 *Pledge v Buss* (1860) John 663 at 667 per Page Wood V-C; *Newton v Chorlton* (1853) 10 Hare 646 at 652 per Page Wood V-C; *Mayhew v Crickett* (1818) 2 Swan 185 at 191 per Lord Eldon LC; *Forbes v Jackson* (1882) 19 ChD 615 at 621-622 per Hall V-C; *Lord Harborton v Bennett* (1829) Beat 386; *Pearl v Deacon* (1857) as reported in 26 LJCh 761; *Strange v Fooks* (1863) 4 Giff 408 at 412 per Stuart V-C.

3 See *Pledge v Buss* (1860) John 663; *Campbell v Rothwell* (1877) 47 LJQB 144, not following on this point *Newton v Chorlton* (1853) 10 Hare 646. See also *Forbes v Jackson* (1882) 19 ChD 615 at 619-620.

4 For the extent to which the guarantor is discharged see the text and notes 9-11.

5 The guarantee will often expressly authorise the creditor to deal with or release security without discharging the guarantor. Such provisions, if appropriately worded, are effective to preserve the guarantor's liability: see PARAS 1216-1217. It is for the creditor to prove that the guarantor has consented: *Provincial Bank of Ireland v Fisher* [1919] 2 IR 249, HL.

6 *Wulff v Jay* (1872) LR 7 QB 756 at 762 per Cockburn CJ, cited in *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Pledge v Buss* (1860) John 663; and see the cases cited in notes 7-11. See

also eg *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289, [2005] 1 WLR 2497 (refinancing agreements between the claimant creditor and the principal debtor discharged the guarantor).

7 *Wulff v Jay* (1872) LR 7 QB 756 at 764 per Hannen J.

8 *Wulff v Jay* (1872) LR 7 QB 756. However, the guarantor will not be discharged if he has consented (see PARAS 1216-1217) or if the creditor's conduct does not amount to a breach of his equitable duties to the guarantor (see PARA 1245).

9 See eg *Polak v Everett* (1876) 1 QBD 669, CA; *Rainbow v Juggins* (1880) 5 QBD 138 at 142 per Manisty J; on appeal 5 QBD 422, CA; *Dale v Powell* (1911) 105 LT 291 at 294 per Parker J. As to the effect of variations of the principal obligation on the liability of the guarantor see generally PARA 1235 et seq.

10 See eg *Carter v White* (1883) 25 ChD 666, CA; *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232, CA; *TCB Ltd v Gray* [1987] Ch 458n, [1988] 1 All ER 108, CA; and cf *Ward v National Bank of New Zealand* (1883) 8 App Cas 755, PC.

11 *Carter v White* (1883) 25 ChD 666 at 670, CA, per Cotton LJ; *Watts v Shuttleworth* (1861) 7 H & N 353, Ex Ch; *Wulff v Jay* (1872) LR 7 QB 756; *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC. See also *Ex p Mure* (1788) 2 Cox Eq Cas 63; *Straton v Rastall* (1788) 2 Term Rep 366; *Williams v Price* (1824) 1 Sim & St 581; *Capel v Butler* (1825) 2 Sim & St 457; *Pledge v Buss* (1860) John 663; *Mutual Loan Fund Association v Sudlow* (1860) 5 CBNS 449; *Strange v Fooks* (1863) 4 Giff 408; *Rainbow v Juggins* (1880) 5 QBD 138; on appeal 5 QBD 422, CA; *Forbes v Jackson* (1882) 19 ChD 615. Where a landlord advanced money to his tenant on the security of a promissory note of the tenant and a guarantor and subsequently took a mortgage of the tenant's furniture for the same debt, and afterwards the landlord took the furniture under a distress for rent, the proceeds of the furniture were decreed to be applied in discharge of the guarantor pro tanto and not in discharge of the rent: *Pearl v Deacon* (1857) as reported in 26 LJCh 761. See also *Re Duffy's Estate, Dutch v O'Leary* (1880) 5 LR Ir 92; *Belfast Banking Co v Stanley* (1867) IR 1 CL 693; *Glenie v Smith* [1908] 1 KB 263, CA.

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### **1245. When guarantor is not discharged by loss of securities.**

The liability of a guarantor for the principal debtor is not affected by a sale by the principal debtor of the mortgaged property in the manner contemplated by the mortgage deed and with the mortgagee's consent<sup>1</sup>. Moreover, the creditor, on the bankruptcy of the principal debtor, is not required to keep up a policy on the principal debtor's life, but, on the contrary, should sell and realise such a security<sup>2</sup> or surrender the policy and prove for the whole debt<sup>3</sup>. Again, a guarantor is not discharged where, by the creditor's conduct, a right of distress for rent in arrear is destroyed, as a distress is not, strictly speaking, a security held by the creditor in respect of a debt<sup>4</sup>. On the other hand a guarantor is discharged where the creditor abandons an execution against the claimant debtor<sup>5</sup>.

A transaction which causes no loss of securities, or a loss not attributable to the fault of the creditor, will not discharge the guarantor<sup>6</sup>. Thus, if a creditor, having in respect of a debt owing to him a security upon the equitable interests in trust funds of his debtor and of the debtor's guarantor, assigns the debt, together with the securities for the debt, he does not thereby relieve the guarantor from liability, and he need not even give the guarantor notice of the assignment in order to render it binding and effectual<sup>7</sup>. A temporary loan of title deeds for a legitimate purpose by the creditor to the principal debtor on the principal debtor undertaking to return them, which he subsequently does, will not, it seems, discharge the guarantor<sup>8</sup>.

Where a security for the guaranteed debt proves worthless, whether it was originally so or became so afterwards, the guarantor is not discharged unless the loss or deficiency was

occasioned by the creditor's act<sup>9</sup>. The creditor is not liable to the principal debtor or to the guarantor for a decline in value of a security, unless the creditor was personally responsible for the decline<sup>10</sup>.

- 1 *Taylor v Bank of New South Wales* (1886) 11 App Cas 596, PC.
- 2 *Coates v Coates* (1864) 33 Beav 249; and see *Wheatley v Bastow* (1855) 7 De GM & G 261.
- 3 *Rainbow v Juggins* (1880) 5 QBD 138; on appeal 5 QBD 422, CA.
- 4 See *Re Russell, Russell v Shoolbred* (1885) 29 ChD 254, CA. Cf *Chatterton v Maclean* [1951] 1 All ER 761.
- 5 *Mayhew v Crickett* (1818) 2 Swan 185; *English v Darley* (1800) 3 Esp 49 at 50; *Williams v Price* (1824) 1 Sim & St 581 at 587 per Leach V-C. This was also the case, under the old law, when the execution was against the body of the debtor: *Watson v Allcock* (1853) 1 Sm & G 319; on appeal 4 De GM & G 242; *Wulff v Jay* (1872) LR 7 QB 756; but see *R v Fay* (1878) 4 LR Ir 606 at 616, CA.
- 6 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Wheatley v Bastow* (1855) 7 De GM & G 261 at 279-280 per Turner LJ; *Hardwick v Wright* (1865) 35 Beav 133; *Polak v Everett* (1876) 1 QBD 669 at 675, CA, per Blackburn J; *Carter v White* (1883) 25 ChD 666 at 670, CA.
- 7 *Wheatley v Bastow* (1855) 7 De GM & G 261.
- 8 *Bushell v Collett* (1862) 6 LT 20; *Newton v Chorlton* (1853) 10 Hare 646; but see *Pledge v Buss* (1860) John 663; and cf *Smith v Wood* [1929] 1 Ch 14, CA.
- 9 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC; *Hardwick v Wright* (1865) 35 Beav 133.
- 10 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 545, [1989] 3 All ER 839 at 842, PC.

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## **I. RELEASE OF CO-GUARANTOR**

### **1246. Release of co-guarantor.**

In accordance with the general rule of law<sup>1</sup>, a release of one of two joint or joint and several guarantors, without the consent of the other<sup>2</sup> and without reserving remedies against him<sup>3</sup>, will bar the creditor's right of action against the other on the guarantee<sup>4</sup>. Moreover, where one co-guarantor is released the security given by the other will also, apparently, be discharged<sup>5</sup>.

In each case, however, it has to be determined whether what has occurred amounts to a release, and, where no formal release is given and what is relied on is an agreement not made by deed, the surrounding circumstances and the intention of the parties must be regarded<sup>6</sup>.

Where co-guarantors are only severally bound, the release of one<sup>7</sup> will wholly or partially discharge the others if it destroys or injuriously affects the right of contribution or marshalling<sup>8</sup>. If, however, it is no part of the contract that others shall join in it as co-guarantors, that is to say if each guarantor contracts only severally, the release of one will not discharge the others if it does not affect the right of contribution<sup>9</sup>.



1 See *Deanplan Ltd v Mahmoud* [1993] Ch 151, [1992] 3 All ER 945; and **CONTRACT** vol 9(1) (Reissue) PARA 1089.

2 Modern forms of guarantee often contain provisions permitting the creditor to release one or more co-guarantors without affecting the liability of the others. Such provisions, if appropriately worded, are effective: see PARAS 1216-1217.

3 For an example of an effective reservation of rights against the other guarantor see *Commercial Bank of Australia v Wilson & Co's Estate (Official Assignee)* [1893] AC 181, PC. See also PARA 1247 notes 4-5. A reservation of rights may be implied in appropriate cases and prevent the discharge of a co-guarantor: *Finley v Connell Associates (a firm)* [1999] Lloyd's Rep PN 895, (1999) Times, 23 June.

4 *Mercantile Bank of Sydney v Taylor* [1893] AC 317, PC.

5 *Hodgson v Hodgson* (1837) 2 Keen 704; and see *Bolton v Salmon* [1891] 2 Ch 48 at 53 per Chitty J. See also *Smith v Wood* [1929] 1 Ch 14, CA (release of securities).

6 *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541 at 545 per Stirling J; and see *Done v Walley* (1848) 2 Exch 198. For instances of the transaction being held to amount to a release see *Ex p Slater* (1801) 6 Ves 146; *Vyner v Hopkins* (1842) 6 Jur 889; *Re EWA* [1901] 2 KB 642, CA; *Nicholson v Revill* (1836) 4 Ad & El 675. For instances of the converse see *Watters v Smith* (1831) 2 B & Ad 889; *Cardwell v Smith* (1886) 2 TLR 779.

7 At law the release of one of severally bound debtors does not discharge the others: *Collins v Prosser* (1823) 1 B & C 682.

8 *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541 (compromise by creditor with trustee in bankruptcy of one of several guarantors; solvent guarantors discharged to extent of dividend, which, but for compromise, creditor might have received); *Smith v Wood* [1929] 1 Ch 14, CA (release by creditor of title deeds deposited by guarantor; other guarantors discharged). See also *Mayhew v Crickett* (1818) 2 Swan 185 at 192-193 per Lord Eldon LC; *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 766, PC.

9 *Ex p Gifford* (1802) 6 Ves 805 (as explained in *Re Wolmershausen, Wolmershausen v Wolmershausen* (1890) 62 LT 541 at 545-546); *Ward v National Bank of New Zealand* (1883) 8 App Cas 755 at 765, PC; *Smith v Wood* [1929] 1 Ch 14 at 30, CA; and see *Re Wolmershausen, Wolmershausen v Wolmershausen* above.

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### **1247. Where co-guarantors are not discharged.**

A guarantor will not be discharged where there is no actual release of his co-guarantor by the creditor, but a mere compounding with or giving of time to the co-guarantor<sup>1</sup>, or a mere covenant not to sue<sup>2</sup>, or where the creditor acts with the guarantor's consent<sup>3</sup>; and in the case of a release of one co-guarantor, with a reservation of remedies against the other, that other is not discharged<sup>4</sup>, such a release operating as a covenant not to sue<sup>5</sup>. A release of a guarantor will, however, release his co-guarantors even though it reserves remedies against guarantors for the person released, since the relationship between co-guarantors is not that of principal and guarantor<sup>6</sup>.

Where guarantors are jointly liable under a guarantee, an unsatisfied judgment in a claim on a cheque given by one of them in respect of the common liability is no bar to a claim against the other on the guarantee<sup>7</sup>.

A release by a creditor of an ostensible partner in a firm does not discharge the person whose partner he has held himself out to be, as there is no right of contribution between them<sup>8</sup>.

For there to be a release of a joint obligor that discharges another joint obligor, whether the liability be joint or joint and several, the release must be immediate, or have become operative, and must be without reservation of rights against the other joint obligor<sup>9</sup>.

1 *Kearsley v Cole* (1846) 16 M & W 128 at 136 per Parke B.

2 *Price v Barker* (1855) 4 E & B 760 at 777 per Coleridge J.

3 *Kearsley v Cole* (1846) 16 M & W 128 at 136 per Parke B. The guarantor's consent will often be contained in a provision in the guarantee: see PARAS 1216-1217.

4 *Cheetham v Ward* (1797) 1 Bos & P 630; *Solly v Forbes* (1820) 2 Brod & Bing 38; *Thompson v Lack* (1846) 3 CB 540; *North v Wakefield* (1849) 13 QB 536; *Commercial Bank of Australia v John Wilson & Co's Estate (Official Assignee)* [1893] AC 181, PC. This method used to be frequently adopted where creditors executed a deed of composition (see *Re Slade, ex p Carstairs* (1820) Buck 560) before the Bankruptcy Act 1883 first preserved the guarantor's liability to a creditor executing a composition deed. See also *Greene King plc v Stanley* [2001] EWCA Civ 1966, [2002] All ER (D) 56 (Jan) (no relevant distinction between the position of a surety and that of a co-debtor and it has long been accepted that on the release of a co-debtor a creditor may reserve his rights against other co-debtors; accordingly, it is open to a creditor to release the debtor under an individual voluntary arrangement ('IVA') whilst reserving its rights against the debtor's sureties. Further, it is open to the court in construing an IVA to look at all the circumstances, including the dealings between the parties which have led to the IVA). See further PARA 1100. As to compositions see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 863.

Some transactions which release a debtor do not admit of a reservation of rights against another: see *Webb v Hewitt* (1857) 3 K & J 438.

5 *Willis v De Castro* (1858) 4 CBNS 216; *Re Armitage, ex p Good* (1877) 5 ChD 46, CA.

6 See *Liverpool Corn Trade Association v Hurst* [1936] 2 All ER 309.

7 See the Civil Liability (Contribution) Act 1978 s 3; and see also *Wegg-Prosser v Evans* [1895] 1 QB 108, CA; *Re EWA* [1901] 2 KB 642, CA.

8 *Re Armitage, ex p Good* (1877) 5 ChD 46, CA.

9 See *Koutrouzas v Lombard Natwest Factors Ltd* [2002] EWHC 1084 (QB) at [40], [2003] BPIR 444, [2002] All ER (D) 273 (Apr) per Field J. In that case, an individual voluntary arrangement entered into by one co-guarantor was interpreted as suspending the creditors' rights, not releasing the first co-guarantor from his obligations, and did not release the second co-guarantor from his obligations to the claimant under the guarantee.

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## **J. UNCONSCIONABLE DELAY BY CREDITOR**

### **1248. Creditor's laches discharging guarantor.**

The doctrine of unconscionable delay ('laches'), as generally applied, provides an equitable defence which bars claims where there has been undue delay in prosecuting them<sup>1</sup>. The chief element in laches, in this sense, is acquiescence<sup>2</sup>; and there is little uniformity in the way that the words 'laches' and 'acquiescence' are used<sup>3</sup>. However, in the law of guarantee, the word 'laches' is sometimes used in a specialised sense, to mean conduct by the creditor (usually the omission to do something) which has the effect of discharging the guarantor<sup>4</sup>.

In general, a creditor is entitled to consult his own interests, and is not obliged to take positive steps to protect or to improve the guarantor's position<sup>5</sup>. However, the terms of the contract of guarantee may impose obligations on the creditor, which if unperformed will prevent him from claiming against the guarantor<sup>6</sup>; and equity also requires him to take certain steps for the protection of the guarantor as a condition of permitting him to enforce the guarantee<sup>7</sup>. An omission by the creditor to do something which he is bound in equity to do for the protection of the guarantor will amount to laches, discharging the guarantor<sup>8</sup>. However, mere passive acquiescence in acts which, although contrary to the conditions of the guarantee<sup>9</sup>, do not amount to connivance or negligence, equivalent to shutting the eyes to fraud or conduct approximating to it, will not do so<sup>10</sup>.

1 See generally **EQUITY** vol 16(2) (Reissue) PARA 910 et seq.

2 See **EQUITY** vol 16(2) (Reissue) PARA 911.

3 *Goldsworthy v Brickell* [1987] Ch 378 at 410, [1987] 1 All ER 853 at 872, CA, per Nourse LJ.

4 See the cases cited in notes 5-10 and in PARAS 1249-1254.

5 See *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 545, [1989] 3 All ER 839 at 842, PC. See also the cases cited in PARA 1251. It is the task of the guarantor, not of the creditor, to see that the principal debtor performs the guaranteed obligation: *Wright v Simpson* (1802) 6 Ves 714; *M'Taggart v Watson* (1836) 3 Cl & Fin 525 at 540, HL, per Lord Brougham; *Durham Corpn v Fowler* (1888) 22 QBD 394; *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1983] 2 Lloyd's Rep 298, CA.

6 A contract of guarantee is a contract *strictissimi juris* in this sense, that the guarantor cannot be made liable under it unless its terms are strictly complied with: *Bacon v Chesney* (1816) 1 Stark 192 at 193 per Lord Ellenborough CJ. See PARAS 1106, 1244 the text and note 10.

7 As to the nature and extent of the guarantor's equitable rights and the creditor's equitable obligations see PARAS 1214-1215; and as to the extent to which the terms of the contract of guarantee may prevent these equitable obligations from arising see PARAS 1216-1217.

8 *Mansfield Union Guardians v Wright* (1882) 9 QBD 683 at 688, CA, per Hannen J; *Carter v White* (1883) 25 ChD 666 at 670, CA, per Cotton LJ; *Strong v Foster* (1855) 17 CB 201; *Wulff v Jay* (1872) LR 7 QB 756; *Durham Corpn v Fowler* (1889) 22 QBD 394; *Belfast Banking Co v Stanley* (1867) IR 1 CL 693, 15 WR 989; *Caxton and Arrington Union v Dew* (1899) 68 LJB 380; and see *Kingston-upon-Hull Corpn v Harding* [1892] 2 QB 494 at 508, CA, per Bowen LJ.

9 *Durham Corpn v Fowler* (1889) 22 QBD 394; *Eyre v Everett* (1826) 2 Russ 381; *Mayhew v Crickett* (1818) 2 Swan 185 at 191 per Lord Eldon LC; *Wright v Simpson* (1802) 6 Ves 714 at 734; *Trent Navigation Co v Harley* (1808) 10 East 34; *Creighton v Rankin* (1840) 7 Cl & Fin 325, HL.

10 *Dawson v Lawes* (1854) Kay 280. Merely 'irregular' conduct on the part of the creditor, even if prejudicial to the interest of the guarantor, will not discharge the guarantor: *Bank of India v Trans Continental Commodity Merchants Ltd and Patel* [1983] 2 Lloyd's Rep 298, CA.

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### 1249. Examples of laches.

A guarantor for the performance of a building contract is discharged from liability by the building owner's omission to insure the work undertaken against loss by fire in accordance with a stipulation in the contract notified to the guarantor before he became bound as such<sup>1</sup>. A

broker buying goods for his principal and undertaking for a stated commission to indemnify him from any loss on resale is not responsible if the principal neglects a fair opportunity of selling goods at a profit and is afterwards obliged to sell at a loss<sup>2</sup>. A person who has bound himself to indorse any bills that may be given in part payment of a debt to be contracted by a third person is discharged unless a demand is made upon him to fulfil his promise within a reasonable and convenient time<sup>3</sup>; while a guarantor for payment of a bill by the drawer or acceptor is not liable after the creditor fails to take necessary steps to obtain payment of the bill which might reasonably have been taken before the insolvency of the drawer and acceptor<sup>4</sup>. Such a guarantor will not, however, be discharged from liability by the creditor's failure to render the bill complete by inserting the drawer's name<sup>5</sup>. Nevertheless there may be circumstances showing a contract which binds the creditor, as between him and the guarantor, to make the principal debtor's liability complete, so that the guarantor will be entitled to relief should the creditor not do so<sup>6</sup>.

1 *Watts v Shuttleworth* (1861) 7 H & N 353, Ex Ch.

2 *Curry v Edensor* (1790) 3 Term Rep 524 at 527; *Mutual Loan Fund Association v Sudlow* (1858) 5 CBNS 449.

3 *Payne v Ives* (1823) 3 Dow & Ry KB 664.

4 *Philips v Astling* (1809) 2 Taunt 206.

5 *Carter v White* (1883) 25 ChD 666, CA; and see *Belfast Banking Co v Stanley* (1867) IR 1 CL 693; *Re Duffy's Estate, Dutch v O'Leary* (1880) 5 LR Ir 92.

6 *Jephson v Maunsell* (1847) 10 I Eq R 132 at 133 per Brady LC; and see *Carter v White* (1883) 25 ChD 666 at 670, CA, per Cotton LJ.

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### **1250. Laches in relation to fidelity guarantees.**

A guarantor for the good behaviour of another in an office or employment has a right to expect that persons associated with that other person will in all things affecting the guarantor's liability conduct themselves according to law and fulfil their duties<sup>1</sup>. The guarantor will not, however, be discharged, even where there are such persons who have been guilty of laches, unless it can also be proved that the person to whom the guarantor is bound has either prevented the principal debtor from doing the things for the due performance of which the guarantor is answerable or has connived at their omission or enabled the principal debtor to do what he ought not to have done, and that but for such conduct the omission or commission guaranteed against would not have occurred<sup>2</sup>.

The guarantor is discharged if the employer does not deal with the employee in the manner required by the nature of his office<sup>3</sup>. He may further require the employer to dismiss the employee where the employee has been guilty of misconduct, and should the employer possess the power to dismiss and fail to exercise it, the guarantor will be discharged<sup>4</sup>.

1 *M'Taggart v Watson* (1836) 3 Cl & Fin 525 at 542-543, HL, per Lord Brougham; *Mein v Hardie* (1830) 8 Sh 346, Ct of Sess; *Mountague v Tidcombe* (1705) 2 Vern 518; *Dawson v Lawes* (1854) Kay 280.

2 *M'Taggart v Watson* (1836) 3 Cl & Fin 525 at 542-543, HL, per Lord Brougham; *Dawson v Lawes* (1854) Kay 280; *Mansfield Union Guardians v Wright* (1882) 9 QBD 683, CA; *Madden v M'Mullen* (1860) 13 ICLR 305; *Durham Corpn v Fowler* (1889) 22 QBD 394. Failure to observe statutory requirements does not necessarily release a guarantor: *Wicklow County Council v Hibernian Fire and General Insurance Co* [1932] IR 581. As to the meaning of 'laches' see PARA 1248.

3 *Mein v Hardie* (1830) 8 Sh 346, Ct of Sess; *Mountague v Tidcombe* (1705) 2 Vern 518.

4 See PARA 1133.

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### **1251. Creditor's acts and omissions not amounting to laches.**

A creditor is not guilty of laches if, knowing that security held by him for the guaranteed debt is declining in value, he omits to exercise his power of sale so that the security eventually becomes worthless<sup>1</sup>.

A creditor's refusal to take legal proceedings which must prove abortive<sup>2</sup>, or failure by the principal debtor, with the creditor's connivance, to do something under the principal contract diminishing the guarantor's risk, is not laches<sup>3</sup>. Nor is it laches where, owing to the creditor's omission to reply to the guarantor's question, the guarantor wrongly interprets his silence to mean that a supply of goods to the principal debtor, stipulated for by the guarantee, has not been made, and in consequence gives up an indemnity he has received<sup>4</sup>.

Where a guarantor guarantees the honesty of an employee, he is not entitled to be discharged from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty<sup>5</sup>. Nor, it seems, is an employer debarred from recovering against the guarantor under a fidelity guarantee merely because he has delayed in giving notice to the guarantor of the employee's misconduct in respect of which the employer is seeking to recover, if the guarantor had become acquainted with the misconduct from another quarter<sup>6</sup>. A creditor who continues to trust the principal debtor after the principal debtor has been guilty of theft to the knowledge of the guarantor may enforce the guarantor's liability, in respect of a subsequent default of the principal debtor also amounting to theft, even though the guarantor has desired him not to trust the debtor any more with cash<sup>7</sup>, but he cannot do so if the guarantor has called upon him to dismiss the principal debtor<sup>8</sup>.

1 *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, [1989] 3 All ER 839, PC. As to the meaning of 'laches' see PARA 1248.

2 *Musket v Rogers* (1839) 5 Bing NC 728; *Holl v Hadley* (1835) 2 Ad & El 758.

3 *Re Barber & Co, ex p Agra Bank* (1870) LR 9 Eq 725.

4 *Oxley v Young* (1796) 2 Hy Bl 613.

5 *Black v Ottoman Bank* (1862) 15 Moo PCC 472.

6 See *Peel v Tatlock* (1799) 1 Bos & P 419. Cf *Snaddon v London, Edinburgh and Glasgow Assurance Co* (1902) 5 F 182, Ct of Sess, where the employee confessed his misconduct to his employer and, more than a fortnight later, absconded; the employer did not inform the guarantor of the misconduct until after the employee had absconded and was held to be debarred from recovering in respect of the misconduct. As to the effect of non-disclosure of misconduct upon the liability of the guarantor under the guarantee in the event of further misconduct subsequently occurring see PARA 1133.

7 *Shepherd v Beecher* (1725) 2 P Wms 288; cf *Mountague v Tidcombe* (1705) 2 Vern 518.

8 See PARA 1133 text to note 2.

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### **1252. Provision for sale of debtor's effects.**

Where it is provided by deed that the principal debtor's effects are to be sold before recourse is made to the guarantor, the guarantor is not discharged by the carelessness of the trustee under the deed in omitting to sell them and thereby enabling the goods to be seized and sold in bankruptcy<sup>1</sup>. On the other hand, if the creditor seizes and sells the principal debtor's goods under a bill of sale, the guarantor may plead, as a defence to a claim brought against him on his guarantee, that but for the mismanagement of the creditor's agents those goods would have realised sufficient to satisfy the guaranteed debt<sup>2</sup>.

1 *Lancaster v Harrison* (1830) 6 Bing 726. See also PARA 1103 et seq.

2 *Mutual Loan Fund Association v Sudlow* (1858) 5 CBNS 449.

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### **1253. No laches by Crown or court officer.**

In accordance with the general common law rule that there can be no laches by the Crown, the Crown cannot be guilty of laches towards a guarantor<sup>1</sup>. Moreover, the laches of an officer of the court will not, apparently, discharge a guarantor from liability under his guarantee<sup>2</sup>.

1 *R v Fay* (1878) 4 LR Ir 606, CA; but see *The Zoe* (1886) 11 PD 72; and see **EQUITY** vol 16(2) (Reissue) PARA 911. As to the meaning of 'laches' see PARA 1248.

2 *Jephson v Maunsell* (1847) 10 I Eq R 132.

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### **1254. When guarantor is not wholly discharged by laches.**

Where the creditor has been guilty of laches, the guarantor is not thereby necessarily wholly discharged from liability<sup>1</sup>, but may sometimes be only pro tanto relieved from it<sup>2</sup>. Whether or not a guarantor is wholly discharged depends, it seems, upon a distinction made in equity between those rights of the guarantor which he acquired at the time he entered into the guarantee, and those rights subsequently acquired by him. That which prejudicially affects rights acquired upon entry into the guarantee amounts to a breach of contract which wholly discharges the guarantor, but that which only affects rights acquired subsequent to the guarantee will usually do no more than discharge the guarantor to the extent to which he is actually injured<sup>3</sup>.

1 *Polak v Everett* (1876) 1 QBD 669 at 676, CA, per Blackburn J. As to the meaning of 'laches' see PARA 1248.

2 *Polak v Everett* (1876) 1 QBD 669 at 675-676, CA; and see *Taylor v Bank of New South Wales* (1886) 11 App Cas 596 at 603, PC; *Capel v Butler* (1825) 2 Sim & St 457; *Northern Banking Co Ltd v Newman and Calton* [1927] IR 520.

3 *Polak v Everett* (1876) 1 QBD 669 at 676, CA, per Blackburn J; *Dale v Powell* (1911) 105 LT 291 at 294 per Parker J. As to the distinction between a loss occasioned to a guarantor by the creditor's own act and loss not so occasioned see also *Hardwick v Wright* (1865) 35 Beav 133; *Smith v Wood* [1929] 1 Ch 14, CA.

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## **(8) CONTRACTS OF INDEMNITY**

### **(i) In general**

#### **A. NATURE AND CREATION OF RIGHTS OF INDEMNITY**

##### **1255. Nature of contract of indemnity.**

A contract of indemnity is a contract by one party to keep the other harmless against loss<sup>1</sup>.

In the widest sense of the term, therefore, it will include most contracts of insurance<sup>2</sup> and also a contract of guarantee<sup>3</sup>. All three types of contract may perform similar commercial functions, in providing compensation to the creditor for the failure of a third party to perform his obligations. However, the description 'contract of indemnity' is normally limited to describing a contract to save the promisee from loss caused by the claims of third parties, when it will not include a contract of marine insurance against loss or damage to the subject matter of the insurance<sup>4</sup>, and may even be differentiated from those contracts of insurance which have for their object the protection of the assured against liability to third parties<sup>5</sup>. It is normally used in law to denote a contract by which the promisor undertakes an original and independent obligation to indemnify, as distinct from a collateral contract in the nature of a guarantee by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee<sup>6</sup>. Performance bonds, which are considered separately below<sup>7</sup>, fall within this definition.

1 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 830-831, CA, per Holroyd Pearce LJ; *Davys v Buswell* [1913] 2 KB 47 at 53-55, CA, per Vaughan Williams LJ; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ. Cf the definition provided by the Indian Contract Act 1872 (No IX of 1872) (Ind) s 124: 'A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person, is called a contract of indemnity'.

2 See **INSURANCE** vol 25 (2003 Reissue) PARA 3.

3 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 830, CA, per Holroyd Pearce LJ; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ (cited with approval in *Scottish & Newcastle plc v Raguz* [2007] EWCA Civ 150, [2007] 2 All ER 871).

4 *Johnston v Salvage Association* (1887) 19 QBD 458, CA; *Clover Clayton & Co Ltd v Hessler & Co* [1925] 1 KB 1, CA. See also *Jones v Birch Bros Ltd* [1933] 2 KB 597 at 606, CA; *Lothian v Epworth Press* [1928] 1 KB 199n at 202, CA, per Scrutton LJ; and cf *Nelson v Empress Assurance Corp Ltd* [1905] 2 KB 281, CA.

5 *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, CA; *Law Guarantee Trust and Accident Society Ltd v Munich Reinsurance Co* (1915) 31 TLR 572. The importance of the distinction appears to be that the contract of indemnity, as such, is not a contract of the utmost good faith (*uberrimae fidei*) (*Law Guarantee Trust and Accident Society Ltd v Munich Reinsurance Co*), and that in the case of an insurance there is a legal and not merely an equitable right on the part of the assured to claim under the policy as soon as the event insured against (ie the liability to meet the claims of a third person) has arisen, and it is immaterial that he has not discharged the liability (see *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1, [1990] 2 All ER 705, HL; *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* above; *Re Eddystone Marine Insurance Co* [1892] 2 Ch 423). As to the doctrine of *uberrima fides* see **INSURANCE** vol 25 (2003 Reissue) PARAS 5, 36 et seq. See further *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA; *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA (which cases led to the passing of the Third Parties (Rights against Insurers) Act 1930: see PARA 1263; and **INSURANCE** vol 25 (2003 Reissue) PARA 679 et seq). As to the right to enforce an indemnity see PARA 1266 et seq.

6 *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294 at 296, [1961] 1 WLR 828 at 830, CA, per Holroyd Pearce LJ. See also *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 784, CA, per Vaughan Williams LJ; *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493, [1967] 1 All ER 61, CA; *Argo Caribbean Group Ltd v Lewis* [1976] 2 Lloyd's Rep 289 at 296, CA, per Orr LJ; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at 555. For the distinction between a guarantee and an indemnity see generally PARA 1021. In *Yeoman Credit Ltd v Latter* above at 299 and at 835, Harman LJ observed that the question whether a contract was one of guarantee or indemnity was 'a most barren controversy. It dates back . . . to the Statute of Frauds, 1677, and has raised many hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public . . . and the decided cases on the subject are hardly to be reconciled'.

7 See PARA 1271 et seq.

## UPDATE

### 1255 Nature of contract of indemnity

NOTE 3--*Raguz*, cited, reversed in part: [2008] UKHL 65, [2008] 1 WLR 2494, [2008] All ER (D) 283 (Oct).

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### 1256. Necessity for writing.



A promise in the nature of an indemnity is not within the Statute of Frauds (1677), and thus does not need to be evidenced by a written memorandum signed by the party to be charged or his duly authorised agent<sup>1</sup>, even though it may involve the obligation of compensating a loss caused by the failure of another to pay a debt<sup>2</sup>. Nor does the Statute of Frauds apply to a promise by one of several persons against whom a claim lies to discharge the claim<sup>3</sup>. The statute does not apply where the promise to answer for another's debt or default is only an incident of a contract dealing with other matters<sup>4</sup>, as in the case of an agreement by an agent to sell on a *del credere* commission<sup>5</sup>, or an agreement by an agent or employee to be answerable in respect of a certain proportion of bad debts incurred by him<sup>6</sup>. Where, however, the only object of the contract is to secure forbearance in favour of the person primarily liable, a promise to pay his debt is within the Statute of Frauds, whatever may be the promisor's ultimate motives<sup>7</sup>.

1 See the Statute of Frauds (1677) s 4; and PARA 1052 et seq, especially PARA 1059.

2 *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84, CA, where an undertaking by a partner to indemnify the firm in respect of debts owing by a named person was held not to be within the statute; *Guild & Co v Conrad* [1894] 2 QB 885, CA (acceptance of bills of exchange by plaintiff with guarantee from defendant; subsequent promise by defendant to indemnify in respect of bills); *Seaton v Burnand, Burnand v Seaton* [1900] AC 135, HL (undertaking by an underwriter at Lloyd's for the solvency of a guarantor for the maker of a promissory note). See also *Davys v Buswell* [1913] 2 KB 47, CA, where an oral promise to answer for another's debt was distinguished from an indemnity.

3 *Orrell v Coppock* (1856) 26 LJCh 269 (claim against trustees and a beneficiary who had bought a portion of the trust property from them in breach of trust; promise by the beneficiary to pay a certain sum in settlement of the claim); *Thomas v Cook* (1828) 8 B & C 728 (promise by one co-guarantor to another to see him harmless); *Guild & Co v Conrad* [1894] 2 QB 885, CA; *Huggard v Representative Church Body* [1916] 1 IR 1.

4 *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at 123, [1981] 3 All ER 577 at 585, CA, per Eveleigh LJ, applying *Sutton & Co v Grey* [1894] 1 QB 285, CA. See also *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA; *Couturier v Hastie* (1852) 8 Exch 40; revsd on another point (1856) 5 HL Cas 673; *Fleet v Murton* (1871) LR 7 QB 126 at 132; and PARA 1061.

5 *Shaw v Woodcock* (1827) 7 B & C 73; *Couturier v Hastie* (1852) 8 Exch 40; revsd on another point (1856) 5 HL Cas 673; *Wickham v Wickham* (1855) 2 K & J 478; *Thomas Gabriel & Sons v Churchill and Sim* [1914] 3 KB 1272, CA. See AGENCY vol 1 (2008) PARA 13.

6 *Sutton & Co v Grey* [1894] 1 QB 285, CA.

7 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778, CA.

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### 1257. Creation of rights of indemnity.

Rights of indemnity may arise from contract, express or implied, from an obligation resulting from the relation of the parties<sup>1</sup>, or by statute<sup>2</sup>. Whether in any particular case any right of indemnity arises, and the extent of any such indemnity, will depend upon the terms of the contract<sup>3</sup> or statute in question<sup>4</sup>, or the nature of the relationship<sup>5</sup>.

1 See eg *Re Downer Enterprises Ltd* [1974] 2 All ER 1074, [1974] 1 WLR 1460; *Selous Street Properties Ltd v Ornel Fabrics Ltd* [1984] 1 EGLR 50, 270 Estates Gazette 643; *Becton Dickinson UK Ltd v Zwebner* [1989] QB 208, [1988] 3 WLR 1376 (implied indemnity between persons primarily and secondarily liable); *Eastern Shipping*

*Co Ltd v Quah Beng Kee* [1924] AC 177 at 182-183, PC; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL (implied indemnity by tortfeasor to person vicariously liable); *Sheffield Corpn v Barclay* [1905] AC 392, HL; *Yeung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC; *Telfair Shipping Corpn v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243, [1985] 1 WLR 553; *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412, CA (implied indemnity against consequence of act done at indemnifier's request); *Lord Middleton v Eliot* (1847) 15 Sim 531 (mortgagor's right on redemption to express indemnity in respect of missing title deeds). As to the guarantor's implied right to an indemnity from the principal debtor see PARA 1148 et seq. In *Wynne v Tempest* [1897] 1 Ch 110 at 113, where trust money had been paid by a deceased trustee into the hands of a firm in which he was a partner, his co-trustee's right to recover the money from the firm was held not to be a right of indemnity against his liability in proceedings for breach of trust, since the right existed independently of the proceedings.

2 Among the many statutes which create an express right of indemnity (some of which are merely declaratory) are the Mercantile Law Amendment Act 1856 s 5 (see PARA 1141 note 2); the Partnership Act 1890 s 24(2) (see **PARTNERSHIP** vol 79 (2008) PARA 138); the Trustee Act 1925 s 62 (see **TRUSTS** vol 48 (2007 Reissue) PARA 1131); the Consumer Credit Act 1974 s 75(2) (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 250); the Companies Act 2006 s 767(3) (formerly the Companies Act 1985 s 117(8)) (see **COMPANIES** vol 14 (2009) PARA 76); the Land Registration Act 2002 s 8(b), s 103, Sch 8 (see **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 829, 983 et seq). By statute there is a right of contribution which may amount to an indemnity between persons liable in respect of the same damage: see the Civil Liability (Contribution) Act 1978; and **TORT** vol 45(2) (Reissue) PARA 348 et seq.

3 See PARA 1264.

4 See note 2.

5 *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at 417, 422, CA; *Dugdale v Lovering* (1875) LR 10 CP 196.

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### **1258. Implied contract or obligation of law.**

A right to indemnity based on an implied contract or an obligation imposed by law may arise in various ways.

Such a right may arise where money is paid at the request of another<sup>1</sup>. Similarly, where one person has been compelled by law to pay, or, being compellable by law, has paid money to another which a third party was ultimately liable to pay so that the third party obtains the benefit of the payment by the discharge of his liability, the person who made the payment may recover the amount of the payment from the third party<sup>2</sup>.

When an act is done by one person at the request of another, and the act is not in itself manifestly tortious to the knowledge of the person doing it, and it turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from the person who requested that it should be done<sup>3</sup>. This principle is not confined to cases of principal and agent<sup>4</sup>. A special situation exists where the person receiving the request or demand has a duty to act upon it, where the right of indemnity arises by operation of law<sup>5</sup>. It may also apply even though the person seeking the indemnity is acting in the exercise of his free discretion<sup>6</sup>. But it does not apply where the injury to the third party arose not as the natural and necessary consequence of the doing of an act but merely from the manner in which the act was done<sup>7</sup>, or where the liability to the third party arose from the person seeking the indemnity's own default or breach of duty<sup>8</sup>.

1 See **RESTITUTION** vol 40(1) (2007 Reissue) PARAS 6, 76.

2 See eg *Moule v Garrett* (1872) LR 7 Exch 101 at 104 (liability of ultimate assignee of lease to indemnify lessee against money which lessee had been compelled to pay to lessor in respect of dilapidations); *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1 at 10, HL, per Lord Selborne LC; *Re Downer Enterprises Ltd* [1974] 2 All ER 1074, [1974] 1 WLR 1460 (liability of insolvent ultimate lessee to indemnify intermediate lessee for rent paid to lessor after commencement of winding up); *Selous Street Properties Ltd v Oronel Fabrics Ltd* [1984] 1 EGLR 50, 270 Estates Gazette 643 (liability of assignee and guarantor for assignee to indemnify original lessee and guarantor for original lessee); *Kumar v Dunning* [1989] QB 193 at 201, [1987] 2 All ER 801 at 807, CA, per Sir Nicolas Browne-Wilkinson V-C; *Becton Dickinson UK Ltd v Zwebner* [1989] QB 208, [1988] 3 WLR 1376. See also PARA 1020 text and note 4; but note that leases granted on or after 1 January 1996 are 'new tenancies' for the purposes of the Landlord and Tenant (Covenants) Act 1995 under which a lessee who assigns the tenancy is released from the tenant covenants of the tenancy: see PARA 1259 note 7. Contrast *Metropolitan Police District Receiver v Croydon Corpn, Monmouthshire County Council v Smith* [1957] 2 QB 154, [1957] 1 All ER 78, CA, where the principle was held not to apply in a claim to recover wages and allowances paid to employees while incapable of duty in consequence of defendant's negligence; *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA (payment under voluntary guarantee). As to payments made under compulsion, and as to the meaning of 'compulsion', see further **RESTITUTION** vol 40(1) (2007 Reissue) PARA 64 et seq.

3 *Yeung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC; *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at 417, CA. See also *Toplis v Grane* (1839) 5 Bing NC 636; *Collins v Evans* (1844) 5 QB 804, Ex Ch; *Dugdale v Lovering* (1875) LR 10 CP 196 at 197; *Birmingham and District Land Co Ltd v London and North Western Rly Co* (1886) 34 ChD 261, CA; *Sheffield Corpn v Barclay* [1905] AC 392 at 397, HL, per Earl of Halsbury LC; *Secretary of State for India v Bank of India Ltd* [1938] 2 All ER 797 at 800, PC; *Welch v Bank of England* [1955] Ch 508 at 548-549, [1955] 1 All ER 811 at 830-831. See also the cases concerned with indemnities and other rights arising from carriage under bills of lading cited in PARA 1259 note 12. This is a general principle, not a conclusion of law which is always to be drawn. Whether there is an obligation to indemnify must greatly depend upon the circumstances of each individual case: *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* above at 417 per curiam. This principle may have to be reviewed in the light of the statutory provisions for contribution between persons liable in respect of the same damage (see the Civil Liability (Contribution) Act 1978; and **TORT** vol 45(2) (Reissue) PARA 348 et seq); *Yeung v Hong Kong and Shanghai Banking Corpn* above at 799-800, 608; see also PARA 1261 text and note 5.

4 *Sheffield Corpn v Barclay* [1905] AC 392 at 400, HL, per Lord Davey; *Dugdale v Lovering* (1875) LR 10 CP 196. For the right of an agent to indemnity, and for its extent, see **AGENCY** vol 1 (2008) PARA 111 et seq.

5 *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at 417, CA. The indemnity does not arise where there is a 'default' on the part of that person. However, the 'default' which disqualifies the claimant who acts ministerially is the same as the 'manifestly tortious' act which is an exception to the general principle. It always involves an element of turpitude and does not extend to the case where the actor has carelessly failed to make inquiries which would have revealed the true nature of the act, or where he has culpably but not recklessly drawn the wrong inference from such inquiries as he has made: *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* at 417; and see the text and note 8. See also *Sheffield Corpn v Barclay* [1905] AC 392 at 394, HL, per Lord Davey; *Bank of England v Cutler* [1908] 2 KB 208, CA; *Starkey v Bank of England* [1903] AC 114, HL; *Secretary of State for India v Bank of India Ltd* [1938] 2 All ER 797, PC; *Yeung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787, [1980] 2 All ER 599, PC.

6 *Secretary of State for India v Bank of India Ltd* [1938] 2 All ER 797 at 801, PC; and see eg *Dugdale v Lovering* (1875) LR 10 CP 196 (dispute as to ownership of trucks in plaintiffs' possession; plaintiffs sent trucks to defendant on his order; defendant bound to indemnify plaintiffs against money paid to true owners in respect of conversion). For other instances in which the principle has been held to apply see *Betts v Gibbins* (1834) 2 Ad & El 57 (goods delivered by wharfingers by order of vendor to persons other than purchasers); *Kirby v Chessum & Sons* (1914) 79 JP 81, CA (trespass by builders upon adjoining property on orders of building owner); *A-G v Odell* [1906] 2 Ch 47 at 68-69, 76-80, CA (possible liability of person procuring registration of forged transfer of registered land). See also the cases concerned with indemnities and other rights arising from carriage under bills of lading, cited in PARA 1259 note 12.

7 *W Cory & Son Ltd v Lambton and Hetton Collieries Ltd* (1916) 86 LJB 401, CA (negligence in removing hatch beams of ship).

8 See *Goulandris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74 at 98-99, [1957] 3 All ER 100 at 110-111 per Pearson J, and the cases there cited. For this purpose, 'default' only arises in the event of dishonesty, lack of good faith or failure to comply with the request, direction or demand of the person from whom the indemnity is sought: *Yeung v Hong Kong and Shanghai Banking Corpn* [1981] AC 787 at 798, [1980] 2 All ER 599 at 607, PC; and see *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at

417 (cited in note 5). Cf *Ellis v Pond* [1898] 1 QB 426, CA; **AGENCY** vol 1 (2008) PARA 113; and cf *Redmond v Allied Irish Banks* [1987] 2 FTLR 264.

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### **1259. Examples of rights of indemnity.**

An indorser of a bill of exchange is entitled to an indemnity from the acceptor<sup>1</sup>. An accommodation party<sup>2</sup> to a bill of exchange is entitled to an indemnity from the party accommodated<sup>3</sup>. A broker has a right to be indemnified by his client<sup>4</sup>. A contract of marine insurance is not a perfect contract of indemnity, but it and other contracts of insurance, except life assurance, are ordinarily termed contracts of indemnity<sup>5</sup>.

The assignor of a lease is not a guarantor for the assignee<sup>6</sup>, but a lessee is entitled to indemnity from his assignee for the assignee's breach of covenant<sup>7</sup>. A covenant by the assignee of a lease to perform and observe the covenants of the lease, or a covenant by a purchaser of freehold land to observe and perform covenants contained in a previous conveyance of the land, is construed as a covenant of indemnity only, and the covenantee is not entitled to insist on its observance except so far as is necessary for his indemnity<sup>8</sup>. But a covenant by an underlessor to observe the covenants in the head lease and indemnify the underlessee against them is not merely a covenant of indemnity against forfeiture proceedings by the head lessor, but one requiring the underlessor to comply with the obligations imposed by the head lease<sup>9</sup>.

A mortgagee is entitled to be paid his reasonable costs and expenses as mortgagee<sup>10</sup>. Partners are entitled to be indemnified out of the partnership assets against liabilities properly incurred in the partnership business<sup>11</sup>. Where a charterparty exempts shipowners from liability for negligence and the charterers by failing to introduce such an exemption into the bills of lading involve the shipowners in liability to third parties, the charterers must indemnify the shipowners<sup>12</sup>. An enforcement officer executing a distress is entitled to indemnity from the landlord<sup>13</sup>, and a judgment creditor who requires a sheriff or other enforcement officer to execute against particular goods is liable to indemnify him against a resulting claim by a third party<sup>14</sup>.

1 See PARA 1580. The indorser is in the position of a guarantor: cf PARA 1019; and see PARA 1580.

2 See the Bills of Exchange Act 1882 s 28(1); and PARA 1482.

3 See PARA 1583 et seq.

4 See eg *Smith v Reynolds* (1892) 66 LT 808, CA; affd sub nom *Reynolds v Smith* (1893) 9 TLR 494, HL.

5 See PARA 1255.

6 See PARA 1020 text and note 4.

7 See PARA 1020 text and note 4, and the cases there cited. A covenant for indemnity is commonly inserted in an assignment, and, where the assignment was for valuable consideration, such a covenant was formerly implied by statute: see the Law of Property Act 1925 s 77(1)(c), (d), Sch 2 Pts IX, X (repealed in relation to 'new tenancies' by the Landlord and Tenant (Covenants) Act 1995 Sch 2). However, in relation to new tenancies to which the 1995 Act applies a tenant is now released from the tenant covenants on assignment of the lease (see s 5) and the landlord may be released from the landlord covenants on assignment of the reversion (see s 6). See further PARA 1081; and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARAS 1214, 1215.

8 See eg *Harris v Boots Cash Chemists (Southern) Ltd* [1904] 2 Ch 376; *Reckitt v Cody* [1920] 2 Ch 452. See **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 576.

9 *Ayling v Wade* [1961] 2 QB 228, [1961] 2 All ER 399, CA (where the underlessee recovered from the underlessor damages which flowed from the underlessor's failure to comply with the repairing obligations imposed by the head lease); *Yorkbrook Investments Ltd v Batten* (1985) 52 P & CR 51, [1985] 2 EGLR 100, CA.

10 *Detillin v Gale* (1802) 7 Ves 583 at 585. See also *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and **MORTGAGE** vol 77 (2010) PARA 739 et seq.

11 See the Partnership Act 1890 s 24(2), which gives statutory effect to the principle; and **PARTNERSHIP** vol 79 (2008) PARA 138 et seq.

12 *Moel Tryvan Ship Co v Kruger & Co* [1906] 2 KB 792; on appeal [1907] 1 KB 809, CA; affd sub nom *Kruger & Co Ltd v Moel Tryvan Ship Co Ltd* [1907] AC 272, HL. See also the following cases concerned with indemnities and other rights arising from carriage under bills of lading: *Elder, Dempster & Co v Dunn & Co* (1909) 11 Asp MLC 337, HL; *Groves & Son v Webb and Kenward* (1916) 85 LJB 1533, CA; *Dawson Line v AG Adler für Chemische Industrie of Berlin* [1932] 1 KB 433, CA; *Strathlorne Steamship Co v Andrew Weir & Co* (1934) 40 Com Cas 168, CA; *Thomson v Louis Dreyfus & Co* (1936) 56 Ll L Rep 44, CA; *A/S Hansen-Tangens Rederi III v Total Transport Corp*, *The Sagona* [1984] 1 Lloyd's Rep 194; *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243, [1985] 1 WLR 553; *Ben Shipping Co (Pte) Ltd v An Bord Bainne, The C Joyce* [1986] 2 All ER 177, [1986] 2 Lloyd's Rep 285; *Naviera Moger SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412, CA; and see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 262 et seq. A provision in a towage contract that the tug be not liable for damage caused to or by the towed vessel is not an indemnity by the owners of the vessel against the liability for negligence of the tug's owners to third parties: *The Richmond* (1902) 19 TLR 29, DC. As to provisions for indemnity in contracts of towage see further **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 590.

13 See **DISTRESS** vol 13 (2007 Reissue) PARA 993.

14 *Humphrys v Pratt* (1831) 5 Bli NS 154, HL; *Sheffield Corp v Barclay* [1905] AC 392, HL. Contrast *Evans v Collins* (1844) 5 QB 804. As to a debtor's liability to indemnify third parties whose goods have been distrained or seized see PARA 1266 note 3.

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## 1260. Indemnities as incidents of legal relationships.

A right of indemnity is an incident of certain legal relationships, for example those of agency or employer and employee, where an agent or employee is liable to be indemnified by his principal or employer against liabilities incurred in the reasonable performance of his agency or employment<sup>1</sup>. Rights of indemnity may also arise under principles of equity. In case of breach of trust a trustee may be indemnified out of the interest of a beneficiary who has instigated the breach<sup>2</sup> or be entitled to contribution or indemnity from a co-trustee<sup>3</sup>. A personal representative is entitled to be indemnified out of the estate for his proper expenses<sup>4</sup>. A receiver is ordinarily entitled to be indemnified out of the assets against liabilities properly incurred by him<sup>5</sup>. A director of a company regulated by the Companies Act 1985 is entitled to be indemnified by the company for all debts, expenses and liabilities incurred in the ordinary course of business, and for money borrowed and applied for those purposes<sup>6</sup>.

The trustees or committee of a club are not in general entitled to be indemnified by the members against liabilities incurred on behalf of the club<sup>7</sup>. Rights of indemnity arising in relation to branches of law other than guarantee are discussed elsewhere in this work in the appropriate context<sup>8</sup>.

- 1 See **AGENCY** vol 1 (2008) PARA 111 et seq; **AUCTION** vol 2(3) (Reissue) PARA 225; **EMPLOYMENT** vol 39 (2009) PARA 39.
- 2 See the Trustee Act 1925 s 62; and **TRUSTS** vol 48 (2007 Reissue) PARA 1131.
- 3 See **TRUSTS** vol 48 (2007 Reissue) PARA 1129 et seq. As to a trustee's right to remuneration see **TRUSTS** vol 48 (2007 Reissue) PARA 930 et seq.
- 4 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 437 (right of indemnity), 458 (representative's liability and right to indemnity), 468 (power to employ and pay agents), 790 (torts by personal representative), 807 (indemnity for beneficiary's interest).
- 5 See the Insolvency Act 1986 ss 37(1)(b), (3), 44(1)(c), (3); **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 402; and **RECEIVERS** vol 39(2) (Reissue) PARA 306.
- 6 See *Re Norwich Yarn Co, ex p Bignold* (1856) 22 Beav 143; and see **COMPANIES** vol 14 (2009) PARA 536.
- 7 See **CLUBS** vol 13 (2009) PARA 248.
- 8 See eg the titles referred to in notes 1-7 and in PARA 1257 note 2.

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### **1261. Implied right excluded by express contract.**

In the absence of an indication of a contrary intention, the right to an implied indemnity is excluded by an express contract relating to the same subject matter<sup>1</sup>; for, where there is an express contract, the parties must be guided by it, and one party cannot relinquish it or abide by it as it may suit his convenience to do<sup>2</sup>. Thus the guarantor's implied right to be indemnified by the principal debtor is excluded by an express contract of indemnification between them<sup>3</sup>.

The statutory right to contribution<sup>4</sup> does not affect any express or implied contractual or other right to an indemnity which would be enforceable apart from that statutory right<sup>5</sup>.

- 1 See *Upton v Fergusson* (1833) 3 Moo & S 88. As to the implication of terms in contracts see generally **CONTRACT** vol 9(1) (Reissue) PARA 778 et seq.
- 2 *Cutter v Powell* (1795) 6 Term Rep 320 at 325 per Ashhurst J.
- 3 *Toussaint v Martinnant* (1787) 2 Term Rep 100 at 105 per Buller J; and see PARAS 1147, 1163e. See, however, *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243 at 254-255, [1985] 1 WLR 553 at 568 per Neill J.
- 4 See the right conferred by the Civil Liability (Contribution) Act 1978 s 1 to recover contribution from any other person liable in respect of the same damage.
- 5 Civil Liability (Contribution) Act 1978 s 7(3). See **DAMAGES** vol 12(1) (Reissue) PARA 837; **TORT** vol 45(2) (Reissue) PARA 349; and cf PARA 1258 note 3.

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### 1262. Quasi-indemnities.

Akin to implied indemnities are those cases where necessities are supplied to persons who, by reason of disability, cannot themselves contract, in circumstances which would justify the court in inferring an obligation to repay the money spent upon them. In cases of this kind the law implies an obligation on the part of such persons to pay for the necessities supplied out of their own property<sup>1</sup>.

<sup>1</sup> *Re Rhodes, Rhodes v Rhodes* (1890) 44 ChD 94, CA; *Nash v Inman* [1908] 2 KB 1, CA. In *Re Clabbon* [1904] 2 Ch 465 this principle was extended to relief supplied to a child under the former Poor Law Acts; but see *Pontypridd Union v Drew* [1927] 1 KB 214, CA. As to the liability of a child for necessities see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 18.

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### 1263. Assignment of right of indemnity.

Except in the case of certain contracts of insurance<sup>1</sup>, the right to enforce an indemnity is property which, on the bankruptcy of the person indemnified, passes to the trustee in bankruptcy<sup>2</sup>, and the trustee may recover the full amount for which the promisor is liable under the contract of indemnity, and not only the amount of dividend which the estate may pay to the creditor in respect of his claim<sup>3</sup>. The amount so recovered forms part of the assets divisible among the general body of creditors, and the creditor in respect of whose debt the indemnity was given may not in general claim payment of that amount to himself<sup>4</sup>.

The right to indemnification is also assignable, at any rate to the creditor, either by the indemnified party himself or by his trustee in bankruptcy, and the assignee may enforce it in his own name in an action against the indemnifier<sup>5</sup>. In certain cases, where the right to indemnification arises under a contract of insurance, the rights of the assured against the insurer, on the bankruptcy of the assured, are by statute transferred to the person to whom he has incurred the liability against which the contract insures him<sup>6</sup>.

<sup>1</sup> See the text and note 6.

<sup>2</sup> The right to indemnity is a 'thing in action' within the meaning of 'property' in the Insolvency Act 1986 s 436: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 400 et seq.

<sup>3</sup> *Re Law Guarantee Trust and Accident Society Ltd, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617, CA, where the position was held to be the same in equity whether the contract was treated as a contract of insurance or of indemnity; *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA; *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA; and see *Wolmershausen v Gullick* [1893] 2 Ch 514 at 528.

<sup>4</sup> *Wolmershausen v Gullick* [1893] 2 Ch 514 at 528; *Re Law Guarantee Trust and Accident Society, Godson's Claim* [1915] 1 Ch 340; *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA; *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA. Contrast *Re Richardson, ex p Governors of St Thomas' Hospital* [1911] 2 KB 705, CA, where the right of indemnity arose on equitable grounds and the creditor in respect of whose debt the indemnity arose was held entitled to money paid by the debtor.

For comment on this decision see *Re Law Guarantee Trust and Accident Society, Liverpool Mortgage Insurance Co's Case* [1914] 2 Ch 617 at 640-641, 650-651, CA; *Re Harrington Motor Co Ltd, ex p Chaplin* above at 123, 125; *Hood's Trustees v Southern Union General Insurance Co of Australasia* above at 805, CA. See, however, note 6.

5 *Re Perkins, Poyser v Beyfus* [1898] 2 Ch 182, CA; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, CA, distinguishing *Rendall v Morphew* (1914) 84 LJCh 517. In *Rendall v Morphew* above there was no liability any longer in existence in respect of which the contract to indemnify could operate.

6 See the Third Parties (Rights against Insurers) Act 1930 s 1 (amended by the Insolvency Act 1985 Sch 8 para 7(2); the Insolvency Act 1986 Sch 14; and by SI 2003/2096). In the case of compulsory motor vehicle insurance, the transfer of rights against the insurer by virtue of that Act does not affect the bankrupt's liability to the third party: see the Road Traffic Act 1988 s 153(1), (2); and **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 953. The 1930 Act does not apply to contracts of reinsurance: Third Parties (Rights against Insurers) Act 1930 s 1(5). It supersedes the decisions in *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA, and *Hood's Trustees v Southern Union General Insurance Co of Australasia Ltd* [1928] Ch 793, CA. See generally *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, [1967] 1 All ER 577, CA; *Murray v Legal and General Assurance Society Ltd* [1970] 2 QB 495, [1969] 3 All ER 794; *Farrell v Federated Employers Insurance Association* [1970] 3 All ER 632, [1970] 1 WLR 1400, CA; *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, [1989] 1 All ER 961, HL; and **INSURANCE** vol 25 (2003 Reissue) PARA 679 et seq.

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## **B. EXTENT OF INDEMNITY**

### **1264. Extent of liability under indemnity.**

The extent of a person's liability under an indemnity depends on the nature and terms of the contract, and each case must be governed, in general, by its own facts and circumstances<sup>1</sup>. A clause will not indemnify a person against damage caused by his negligence, where it also indemnifies against damage otherwise arising, unless it is clearly expressed to have such an effect<sup>2</sup>.

The holder of an indemnity, when acting within the scope of his authority, is generally entitled to recover the amount payable by him by virtue of any judgment recovered against or compromise reasonably made by him in any legal proceedings in respect of any matter comprised by the indemnity, together with all costs properly incurred in defending such legal proceedings, including his own costs<sup>3</sup>.

It is not necessary in order to bring the claim against the indemnifier that notice of the proceedings should have been given to the indemnifier, but if it is not given it will be open to him to impugn the judgment or the compromise<sup>4</sup>. It is therefore prudent to join him as a party to the proceedings<sup>5</sup>. If, having been put on notice, he then refuses so to act, he will, in general, be estopped from denying the validity of the judgment or the reasonableness of the compromise<sup>6</sup>, and it will be difficult for him to show that any costs incurred in defending the proceedings were improperly incurred<sup>7</sup>. Nevertheless, if they were improperly incurred, he will not be liable for them<sup>8</sup>.

1 *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA. Cf *Naviera Mogor SA v Société Metallurgique de Normandie, The Nogar Marin* [1988] 1 Lloyd's Rep 412 at 417, 422, CA. See also *Rank Enterprises Ltd v Gerard* [2000] 1 All ER (Comm) 449, [2000] 1 Lloyd's Rep 403, CA (indemnity afforded to buyers of vessels against consequences of claims incurred prior to delivery). See also *Westerngeco Ltd v ATP Oil & Gas (UK) Ltd* [2006] EWHC 1164 (Comm), [2006] 2 All ER (Comm) 637; *Tyco Fire and Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd* [2007] BLR 419, [2007] All ER (D) 86 (Jul) (implicit that contractor's duty to indemnify was



subject to employer's duty to obtain insurance). For examples of particular contracts see *Sumner v Powell* (1816) 2 Mer 30; affd (1823) Turn & R 423 (joint covenant to indemnify cannot be treated as joint and several so as to render the estate of a covenantor who predeceases the others liable); *Draper v Thompson* (1829) 4 C & P 84 (express indemnity by landlord to agent levying distress covered only case where distress illegal); *Lewis v Smith* (1850) 9 CB 610 (indemnity construed as an indemnity against lawful claims only); contrast *Ibbett v De la Salle* (1860) 6 H & N 233 (where the indemnity was held to cover unfounded claims); *Tanner v Woolmer* (1853) 8 Exch 482 (indemnity confined to certain specified claims); *Grylls v Grylls, Mann v Kendall* (1869) 18 WR 85 (covenant of indemnity given by continuing partner to incoming partners against firm's existing liabilities held to cover only payments made by incoming partners out of private means); *Dumbell v Isle of Man Rly Co* (1880) 42 LT 745, PC; *Hooper v Bromet* (1904) 90 LT 234, CA (indemnity against inaccuracy in copy of lost title deed; deed found; deed contained building restriction not in copy; action to enforce deed by adjoining owner; indemnity covered difference in value of land in light of restriction, but not costs of removing buildings erected after notice of true terms of deed or defences unreasonably put forward in action); *Webster v Petre* (1879) 4 ExD 127 (effect of subsequent legislation on the indemnity); *Gooch v Clutterbuck* [1899] 2 QB 148, CA (indemnity by assignee to assignor of lease against claims for breach of covenant held to apply to breaches committed at the date of the assignment); *Greenwood Ltd v Hawkings* (1906) 23 TLR 72 (undertaking of work by sub-contractors under contract constituted acceptance of term that they should indemnify contractors, although indemnity in writing left unsigned); *Croydon RDC v Sutton District Water Co* (1908) 72 JP 217, CA (indemnity by contractor against damage resulting from works; damage caused to highways by extraordinary traffic); *Great Western Rly Co v James Durnford & Sons Ltd* (1928) 44 TLR 415, HL (indemnity against all claims and demands or liability whatsoever held not to include claims by the party giving the indemnity); *The Carlton* [1931] P 186 (same point); *Montagu Stanley & Co v JS Solomon Ltd* [1932] 1 KB 611; affd [1932] 2 KB 287, CA (indemnity against 50% of 'loss sustained' by plaintiffs in connection with business introduced by defendant not enforceable merely on a customer signing a deed of assignment); *Bradstreets British Ltd v Harold Mitchell and Carapanayoti & Co Ltd* [1933] Ch 190 (extent of indemnity against loss owing to publication of a confidential communication which is libellous); *London and North Eastern Rly Co v Furness Shipbuilding Co Ltd* (1934) 150 LT 382, HL (indemnity not limited to acts for which the party giving the indemnity was responsible); *London Passenger Transport Board v T Walton (London) Ltd* (1934) 78 Sol Jo 224 (extent of indemnity against claims arising out of accident); *Great Western Rly Co v Port Talbot Dry Dock Co Ltd* [1944] 2 All ER 328 (whether indemnity clause applicable to subject matter of contract to repair a ship); *Henson v London and North Eastern Rly Co and Coote and Warren Ltd* [1946] 1 All ER 653, CA (wagon repairing company undertook to indemnify railway company against liability for injury to former's employees; requisition of railways and wagons during war; indemnity still effective); *John Lee & Son (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581, CA (meaning of 'loss which but for the tenancy hereby created would not have arisen'); *TF Maltby Ltd v Pelton Steamship Co Ltd* [1951] 2 All ER 954n (indemnity for all claims respecting personal injuries to employees); *William Hamilton & Co v Anderson & Co* 1953 SC 129, Ct of Sess (indemnity against claims incurred at common law); *Stevens v Britten* [1954] 3 All ER 385, [1954] 1 WLR 1340, CA (indemnity of outgoing partner against income tax liability); *Warrellow v Chandler and Braddick* [1956] 3 All ER 305, [1956] 1 WLR 1272 (indemnity by licensee against liability for personal injury 'which but for the permission hereby granted would not have arisen'; indemnity held to cover injury to licensee's employee on licensor's premises where, but for the licence, he would have been a trespasser); *Murfin v United Steel Cos Ltd* [1957] 1 All ER 23, [1957] 1 WLR 104, CA (indemnity against claims arising from causes other than negligence; 'negligence' did not include breach of statutory duty); *Re Hollebone's Agreement, Hollebone v WJ Hollebone & Sons Ltd* [1959] 2 All ER 152, [1959] 1 WLR 536, CA (vendor's liability, on sale of a business, in respect of its tax liability); *Unity Finance Ltd v Woodcock* [1963] 2 All ER 270, [1963] 1 WLR 455, CA (recourse agreement); *Bowmaker (Commercial) Ltd v Smith* [1965] 2 All ER 304, [1965] 1 WLR 855, CA (recourse agreement); *Bosma v Larsen* [1966] 1 Lloyd's Rep 22 (nature of indemnity by charterers to owners for acts of master on orders of charterers); *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493, [1967] 1 All ER 61, CA; *Wright v Tyne Improvement Comrs* [1968] 1 All ER 807, [1968] 1 WLR 336, CA (meaning of 'howsoever caused'); *Bentworth Finance Ltd v Lubert* [1968] 1 QB 680, [1967] 2 All ER 810, CA (hire-purchase agreements); *Westcott v JH Jenner (Plasterers) Ltd* [1962] 1 Lloyd's Rep 309, CA; *The White Rose* [1969] 3 All ER 374, [1969] 1 WLR 1098; *Smith v Vange Scaffolding and Engineering Co Ltd* [1970] 1 All ER 249, [1970] 1 WLR 733; *Richardson v Buckinghamshire County Council* [1971] 1 Lloyd's Rep 533, [1970] 69 LGR 327, CA (claim under standard form conditions of building contract for indemnity against costs of defending unsuccessful action brought by contractor's employee); *FMC (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep 221 (storage contract); *Moffat Tank Co Ltd v Canadian Indemnity Co* (1973) 42 DLR (3d) 260 (Alta App Div) (meaning of 'liability imposed by law'); *Blake v Richards and Wallington Industries Ltd and Fram Siegwart Ltd* (1974) 16 KIR 151 (whether crane owner entitled to indemnity from hirer for negligence of owner's own employee); *Clark v Sir William Arrol & Co Ltd* 1974 SLT 90, Ct of Sess; *Hair and Skin Trading Co Ltd v Norman Airfreight Carriers Ltd and World Transport Agencies* [1974] 1 Lloyd's Rep 443 (indemnity in contract of carriage); *County and District Properties Ltd v C Jenner & Son Ltd* [1976] 2 Lloyd's Rep 728 (indemnity by building sub-contractor to main contractor); *Boughen v Frederick Attwood Ltd and Cryoplants Ltd* [1978] 1 Lloyd's Rep 413 (extent of indemnity under Road Haulage Association standard conditions); *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205, [1983] 1 Lloyd's Rep 448; on appeal [1983] 2 All ER 205, [1983] 1 WLR 399, [1983] 2 Lloyd's Rep 152, HL (whether plaintiff's right to indemnity on breach of other contracts a penalty); *R & H Green & Silley Weir Ltd v British Railways Board (Kavanagh, third party)* [1985] 1 All ER 237, [1985] 1 WLR 570n (general indemnity in tipping contract); *Thompson v T Lohan (Plant Hire) Ltd (JW Hurdiss Ltd, third party)* [1987] 2 All ER 631, [1987] 1 WLR 649, CA (indemnity against liability for personal injuries or death); *Hancock Shipping Co Ltd v Deacon and Trysail (Pte)*

*Ltd, The Casper Trader* [1991] 2 Lloyd's Rep 550 (indemnity to vessel owner for acts of riding repair technicians); *EE Caledonia Ltd (formerly Occidental Petroleum (Caledonia) Ltd) v Orbit Valve Co Europe* [1993] 4 All ER 165, [1993] 2 Lloyd's Rep 418 (whether indemnity by contractors to owners of 'Piper Alpha' platform covered owners' liability to contractors' employee for owners' negligence causing employee's death); *Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* [2001] BLR 173, [2001] All ER (D) 59 (Feb) (where injury or damage arises from a sub-contractor's failure to fulfil an express duty assigned to him under a specific term of his contract of employment, a general indemnity clause will not render the sub-contractor's employer liable). See also *Guy-Pell v Foster* [1930] 2 Ch 169, CA, where the right to indemnity was lost in consequence of the breach by the indemnified party of an implied term of the contract, amounting to the removal of consideration for the indemnity.

2 *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL. See also *Canada Steamship Lines Ltd v R* [1952] AC 192, [1952] 1 All ER 305, PC; *North of Scotland Hydro Electric Board v Taylor* 1955 SLT 373, Ct of Sess; *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, CA; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA; *EE Caledonia Ltd (formerly Occidental Petroleum (Caledonia) Ltd) v Orbit Valve Co Europe* [1993] 4 All ER 165, [1993] 2 Lloyd's Rep 418 (plaintiff could not rely on an indemnity from a defendant in respect of damage caused both by negligence and by breach of statutory duty by the plaintiff, because (1) the indemnity did not, in the absence of express wording, extend to the plaintiff's own negligence; and (2) the breach of statutory duty had not on its own been sufficient to cause the damage, so the plaintiff's liability could not be indemnified on the basis of the breach alone). See further *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 All ER 210, [1954] 1 WLR 459, CA; *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028; *Clark v Sir William Arrol & Co Ltd* 1974 SLT 90, Ct of Sess; and **CONTRACT** vol 9(1) (Reissue) PARA 806.

3 *Howard v Lovegrove* (1870) LR 6 Exch 43; *Re Wells and Croft, ex p Official Receiver* (1895) 72 LT 359; *Simpson and Miller v British Industries Trust Ltd* (1923) 39 TLR 286; *Smith v Compton* (1832) 3 B & Ad 407 (but see the observations on this case in *Great Western Rly Co v Fisher* [1905] 1 Ch 316); *The Millwall* [1905] P 155, CA; see also *Ibbett v De la Salle* (1860) 6 H & N 233. So if two trustees are held liable for breach of trust, and as between them one is primarily liable, he is bound to indemnify his co-trustee against the amount which the co-trustee has to pay to the trust estate, including the costs incurred: *Lockhart v Reilly, Reilly v Lockhart* (1856) 25 LJCh 697; *Re Linsley, Cattley v West* [1904] 2 Ch 785.

4 *Duffield v Scott* (1789) 3 Term Rep 374 at 377; *Smith v Compton* (1832) 3 B & Ad 407. As to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

5 le under CPR Pt 19: see **CIVIL PROCEDURE** vol 11 (2009) PARA 210 et seq.

6 *Duffield v Scott* (1789) 3 Term Rep 374 at 377; *Jones v Williams* (1841) 7 M & W 493; and see *Gray v Lewis, Parker v Lewis* (1873) 8 Ch App 1035 at 1058-1059 per Mellish LJ, where it was held that the rule does not apply in cases of an implied indemnity consequential upon a breach of trust. Cf *Ben Shipping Co (Pte) Ltd v An Bord Bainne, The C Joyce* [1986] 2 All ER 177, [1986] 2 Lloyd's Rep 285.

7 See *The Millwall* [1905] P 155, CA; *Blyth v Smith* (1843) 5 Man & G 405; *Broom v Hall* (1859) 7 CBNS 503; *Smith v Howell* (1851) 6 Exch 730 at 737.

8 See PARA 1265.

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### **1265. When indemnity covers costs of proceedings.**

In all cases where there is a contract of indemnity the costs of legal proceedings properly incurred by the person indemnified are recoverable under the indemnity<sup>1</sup>, and in such cases it seems that costs on an indemnity basis<sup>2</sup> are to be awarded<sup>3</sup>. The person indemnified is not, however, entitled to defend a claim which must obviously be decided against him<sup>4</sup>.

Where one person promises to indemnify another from costs if he will stay proceedings against a third person and sue some one designated, the mere stay of proceedings will entitle the promisee to enforce the indemnity<sup>5</sup>.

The public policy against maintenance<sup>6</sup> may be a reason for ordering a person who has agreed to indemnify a party to litigation against the costs of the claim to pay the costs of the other party if that other party is successful<sup>7</sup>. However, although the court undoubtedly has power to order someone who is not a party to the litigation to pay the costs of it<sup>8</sup>, that power will only be exercised in exceptional circumstances<sup>9</sup>.

1 *Duffield v Scott* (1789) 3 Term Rep 374; *Jones v Williams* (1841) 7 M & W 493; *The Millwall* [1905] P 155, CA; and see *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL; *Allen v London Guarantee and Accident Co Ltd* (1912) 28 TLR 254, where an insurance company defended actions in the name of the assured without his consent, and was held, therefore, to have incurred a common law liability for the costs of the action; and *Bourne v Colodense Ltd* [1985] ICR 291, CA (when the plaintiff agreed to accept legal assistance offered by his union there was an understanding between the parties amounting in law to a contract that the union would discharge any liability for costs which the plaintiff might incur). In the absence of special circumstances, the costs of an appeal are not recoverable: see *Maxwell v British Thomson Houston Co Ltd* [1904] 2 KB 342; *Shepherd v Bray* [1906] 2 Ch 235 at 254; and see also *Great Western Rly Co v Fisher* [1905] 1 Ch 316 (costs of action to enforce arbitration award). An agreement to be bound by the result of an arbitration does not carry with it an implied agreement to pay the costs which may be incurred in it: *Thomas Jackson & Co Ltd v Henderson, Craig & Co Ltd* (1916) 115 LT 36, CA. See also *Potter v LCC* (1905) 70 JP 35, where the agreement was by the defendants to repay to the plaintiff any sum paid by way of compensation for damage caused to third parties by certain operations of the plaintiff and it was held that this was not a contract of indemnity under which the plaintiff could recover the costs of the proceedings in which the compensation was settled.

2 As to the assessment of costs on the indemnity basis see **CIVIL PARTNERSHIP** vol 12 (2009) PARA 1747.

3 *Smith v Compton* (1832) 3 B & Ad 407; *Howard v Lovegrove* (1870) LR 6 Exch 43, where it was held that the whole costs paid by the client to the solicitor were reasonable; *Born v Turner* [1900] 2 Ch 211; *Barnett v Eccles Corp* [1900] 2 QB 423 at 428, CA, per Vaughan Williams LJ. In *Maxwell v British Thomson Houston Co Ltd* [1904] 2 KB 342 at 344 per Kennedy J, it was held that a person who was indemnifying another against the costs of an action could not, unless there were some special circumstances, be called upon to pay them on the former solicitor and own client basis. It would appear, however, that there is a distinction between the case of a person who is entitled by contract to an indemnity and the case of a person who is simply recovering damages. A person so entitled to an indemnity may recover costs on what is now the indemnity basis, but a person simply recovering damages may not: *Great Western Rly Co v Fisher* [1905] 1 Ch 316 at 324; *Born v Turner* above; *Barnett v Eccles Corp* above; *Wiffen v Bailey and Romford UDC* [1915] 1 KB 600 at 607, CA, per Buckley LJ; see also *Hornby v Cardwell* (1881) 8 QBD 329 at 333, CA; *Penley v Watts* (1841) 7 M & W 601 at 609; *Tindall v Bell* (1843) 11 M & W 228. Cf *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA; and **MORTGAGE** vol 77 (2010) PARA 739 et seq. As to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

4 *Knight v Hughes* (1828) Mood & M 247; *Gillett v Rippon* (1829) Mood & M 406; *Smith v Howell* (1851) 6 Exch 730; *Beech v Jones* (1848) 5 CB 696; *Roach v Thompson* (1830) Mood & M 487; *Walker v Hatton* (1842) 10 M & W 249 at 259. See also *Hooper v Bromet* (1904) 90 LT 234, CA; *Re Empire Paper Ltd (in liquidation)* [1999] BCC 406.

5 *Wilson v Bevan* (1849) 7 CB 673; *Luning v Milton* (1890) 7 TLR 12, where leave to defend was given on condition that the defendant join in a bond with two sureties for the payment of any such sum as should be recovered in the action.

6 Maintenance is no longer a crime or a tort: see the Criminal Law Act 1967 ss 13(1)(a), 14(1). However, a contract may still be treated as contrary to public policy or otherwise illegal on the ground of maintenance: s 14(2); *Hill v Archbold* [1968] 1 QB 686, [1967] 3 All ER 110, CA; *Orme v Associated Newspapers Group* [1981] CA Transcript 809; *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL; *Brownnton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, CA; *Giles v Thompson* [1994] 1 AC 142, [1993] 3 All ER 321, HL.

7 See *Singh v Observer Ltd* [1989] 2 All ER 751 (revsd on new evidence at [1989] 3 All ER 777n, CA).

8 *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965, [1986] 2 All ER 409, HL.

9 See *Taylor v Pace Developments Ltd* [1991] BCC 406, CA; *Symphony Group plc v Hodgson* [1994] QB 179, [1993] 4 All ER 143.

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## **C. ENFORCEMENT OF INDEMNITY**

### **(A) WHEN RIGHT TO ENFORCE INDEMNITY ARISES**

#### **1266. Enforcement of indemnity at law and in equity.**

Before the passing of the Supreme Court of Judicature Acts 1873 and 1875 there was a difference between the remedies available to enforce an ordinary contract of indemnity at law on the one hand and in equity on the other<sup>1</sup>. At law the indemnified party had<sup>2</sup> to discharge the liability himself first and then sue the indemnifier for damages for breach of contract<sup>3</sup>. In equity, an ordinary contract of indemnity could be directed to be specifically performed by ordering that the indemnifier should pay the amount concerned directly to the third party to whom the liability was owed or in some cases to the party to be indemnified<sup>4</sup>. Since the passing of the Supreme Court of Judicature Acts 1873 and 1875, the equitable remedy has prevailed over the remedy at law<sup>5</sup>.

1 *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at 28, [1990] 2 All ER 705 at 711, HL, per Lord Brandon of Oakbrook.

2 Unless, that is, the contract included a special provision by virtue of which the right could be enforced at law before payment had been made: see *Toussaint v Martinant* (1787) 2 Term Rep 100; *Martin v Court* (1788) 2 Term Rep 640; *Hodgson v Bell* (1797) 7 Term Rep 97; *Warwick v Richardson* (1842) 10 M & W 284; *Spark v Heslop* (1859) 1 E & E 563; *English and Scottish Trust Co v Flatau* (1887) 36 WR 238. In particular this promise would arise when, coupled with the promise of indemnity, there was a promise by the promisor himself to discharge the claim against which the indemnity was given: see *Penny v Foy* (1828) 8 B & C 11; *Carr v Roberts* (1833) 5 B & Ad 78; *Smith v Howell* (1851) 6 Exch 730. An express promise to indemnify was unnecessary in such a case, for the breach of such a contract could raise an obligation to indemnify (see *Hornby v Cardwell* (1881) 8 QBD 329 at 333, CA, per Brett LJ), and gave the promisee an immediate cause of action (*Loosemoor v Radford* (1842) 9 M & W 657; *Ashdown v Ingamells* (1880) 5 ExD 280, CA; and see *Lethbridge v Mytton* (1831) 2 B & Ad 772).

3 See the text and note 2. See also *Goddard v Vanderheyden* (1771) 3 Wils 262; *Young v Hockley* (1772) 3 Wils 346; *Taylor v Mills* (1777) 2 Cowp 525; *Taylor v Young* (1820) 3 B & Ald 521; *Huntley v Sanderson* (1833) 1 Cr & M 467; *Collinge v Heywood* (1839) 9 Ad & El 633 (overruling *Bullock v Lloyd* (1825) 2 C & P 119); *Reynolds v Doyle* (1840) 1 Man & G 753. The amount so paid constituted a debt due to him from the promisor. Under the old system of pleading it could be recovered under the common money counts as money paid for the defendant's use, and could be set off: see *Rodgers v Maw* (1846) 15 M & W 444; *Hutchinson v Sydney* (1854) 10 Exch 438; *Crampton v Walker* (1860) 3 E & E 321. Payment for this purpose included the case where the indemnified's goods had been taken in execution and the proceeds of sale paid to the creditor: *Rodgers v Maw* above. If a person's goods are lawfully distrained upon or seized for another's debt, he may recover the amount which he pays to redeem them or the value of the goods, if they are sold, from the debtor as under an implied contract of indemnity: *Exall v Partridge* (1799) 8 Term Rep 308; *Edmunds v Wallingford* (1885) 14 QBD 811, CA.

4 *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at 28, [1990] 2 All ER 705 at 711-712, HL, per Lord Brandon of Oakbrook. See also *Johnston v Salvage Association* (1887) 19 QBD 458 at 460, CA, per Lindley LJ; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 at 481-482, CA, per Pickford LJ.

5 See now the Supreme Court Act 1981 s 49(1); *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at 28, [1990] 2 All ER 705 at 712, HL, per Lord Brandon of Oakbrook. See further **EQUITY** vol 16(2) (Reissue) PARA 500.

## UPDATE

### 1266 Enforcement of indemnity at law and in equity

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 1267. The remedies available.

Unless the terms of the contract expressly prohibit it, a person entitled to an indemnity may obtain relief as soon as his liability to the third person has arisen and before he has made payment<sup>1</sup>. He may therefore, where appropriate, obtain an order compelling the person giving the indemnity to set aside a fund out of which liability may be met<sup>2</sup> or to pay the amount due directly to the third person<sup>3</sup> or even, where the giver of the indemnity is under no liability to the third person<sup>4</sup>, to himself<sup>5</sup>. But the equitable right to enforce an indemnity does not constitute a debt<sup>6</sup>. An indemnified person is not precluded from obtaining relief by the fact that his liability to the third person cannot effectively be enforced against him<sup>7</sup>.

The date when time begins to run against a person entitled to an indemnity depends upon the nature and extent of the indemnity, and the nature of the relief claimed<sup>8</sup>.

1 See *Re National Financial Co, ex p Oriental Commercial Bank* (1868) 3 Ch App 791; *Wooldridge v Norris* (1868) LR 6 Eq 410; *Lacey v Hill, Crowley's Claim* (1874) LR 18 Eq 182; *Wolmershausen v Gullick* [1893] 2 Ch 514; *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401; *Re Richardson, ex p Governors of St Thomas' Hospital* [1911] 2 KB 705, CA. A contractual indemnity takes precedence over independent insurance: *Caledonia North Sea Ltd v Norton (No 2) Ltd (in liquidation)* [2002] UKHL 4, [2002] 1 All ER (Comm) 321, [2002] 1 Lloyd's Rep 553. As to the right of a guarantor to exoneration from liability as soon as his liability to the creditor has arisen see PARA 1151 et seq.

2 *Re Richardson, ex p Governors of St Thomas' Hospital* [1911] 2 KB 705 at 709, CA, per Cozens-Hardy MR.

3 *Ascherson v Tredegar Dry Dock and Wharf Co Ltd* [1909] 2 Ch 401; *Tate v Crewdson* [1938] Ch 869, [1938] 3 All ER 43; *Thomas v Nottingham Incorporated Football Club Ltd* [1972] Ch 596, [1972] 1 All ER 1176.

4 See *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105, CA.

5 *Lacey v Hill, Crowley's Claim* (1874) LR 18 Eq 182 at 191 per Sir George Jessel MR; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476 at 482, CA, per Pickford LJ and at 487 per Warrington LJ. The position is analogous to that which arises when the indemnity can be enforced at law before the promisee has suffered actual loss: see *Carr v Roberts* (1833) 5 B & Ad 78; *Re Harrington Motor Co Ltd, ex p Chaplin* [1928] Ch 105 at 115, CA, per Lord Hanworth MR. Such an order will not be made where the indemnifying party is also under a liability to the creditor, as the payment to the party indemnified will not discharge him from that liability: see *Wolmershausen v Gullick* [1893] 2 Ch 514 at 529.

6 *Re Mitchell, Freelove v Mitchell* [1913] 1 Ch 201, where a clause in a will forgiving 'all debts' due to the testator from his nephew, whose debt the testator had indemnified, was held not to deprive his executors of their right of indemnification by the nephew; *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85 at

113-114, CA; *Re A Debtor (No 66 of 1955)*, *ex p Debtor v Trustee of Property of Waite* [1956] 3 All ER 225 at 230-231, [1956] 1 WLR 1226 at 1234-1235, CA. See also *Israelson v Dawson* [1933] 1 KB 301, CA, where it was held that the liability of a car owner's insurers against third party risks to indemnify the insured is not a debt which can be attached by a person who has recovered judgment against the insured for personal injuries. As to the right of a company's guarantor to petition to wind up the company see PARA 1155. As to the position of a guarantor who has paid the guaranteed debt see PARA 1157 et seq.

7 *Cruse v Paine* (1868) LR 6 Eq 641; on appeal (1869) 4 Ch App 441; *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, CA, where the party indemnified was a married woman without separate estate against which a judgment claimed against her could be enforced; but see *Eddowes v Argentine Loan and Mercantile Agency Co Ltd* (1890) 63 LT 364, CA.

8 See *Telfair Shipping Corp v Inersea Carriers SA, The Caroline P* [1985] 1 All ER 243, [1985] 1 WLR 553; and PARA 1183 et seq.

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## 1268. Granting of further relief.

The court may grant relief even before any liability has actually arisen if there is real ground for fearing that the rights of the party indemnified are being put in jeopardy<sup>1</sup>, and if his claim to be indemnified is denied he can obtain a declaration that he has a right to be relieved from liability<sup>2</sup>. Apart, however, from these exceptional cases, it would seem that the court will not grant relief before any liability has arisen<sup>3</sup>, although, apparently, where it has arisen the court will declare the right to indemnity generally, with liberty to apply from time to time to work it out<sup>4</sup>.

Whether or not the person entitled to the indemnity and the person liable to indemnify him are already parties to the same claim, a claim by a defendant for an indemnity may be made under Part 20 of the Civil Procedure Rules ('CPR')<sup>5</sup>.

1 *Re Anderson-Berry, Harris v Griffith* [1928] Ch 290, CA.

2 *Hobbs v Wayet* (1887) 36 Ch D 256. For a guarantor's similar rights see PARA 1153.

3 *Lloyd v Dimmack* (1877) 7 ChD 398; *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 ChD 561; *Bradford v Gammon* [1925] Ch 132; *Morrison v Barking Chemicals Co Ltd* [1919] 2 Ch 325; *Re Ledgard, Attenborough v Ledgard* (1922) 66 Sol Jo 405. Conversely, a party who may be liable to indemnify cannot, before any claim is made upon him, bring an action for a declaration that he is not liable: *Re Clay, Clay v Booth* [1919] 1 Ch 66, CA.

4 *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 ChD 561 at 565 per Fry J.

5 See CPR 20.2(1)(b); and **CIVIL PROCEDURE** vol 11 (2009) PARA 618 et seq. When a guarantor availed himself of the former procedure for issuing a third party notice under RSC Ord 16 r 1 (revoked) in order to enforce an express contract by the principal debtor to indemnify him, it was held that he could sign judgment against the principal debtor before anything had been paid under the guarantee: *English and Scottish Trust Co v Flatau* (1887) 36 WR 238. As to the caution to be exercised in applying pre-CPR authorities see **CIVIL PROCEDURE** vol 11 (2009) PARA 33.

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INDEMNITY/(i) In general/C. ENFORCEMENT OF INDEMNITY/(B) When Indemnity is Unenforceable for Illegality/1269. Indemnities unenforceable for illegality.

## (B) WHEN INDEMNITY IS UNENFORCEABLE FOR ILLEGALITY

### 1269. Indemnities unenforceable for illegality.

An express indemnity may be unenforceable for illegality<sup>1</sup>. In cases where an express indemnity would be illegal, no right to an indemnity can arise by implication<sup>2</sup>. There is no right of indemnity where the party to the transaction or the doer of the act in respect of which indemnity is claimed knows it at the time to constitute a criminal offence<sup>3</sup> or would have known had he not been grossly negligent<sup>4</sup>. Nor is there such a right where the party to the transaction or the doer of the act, although he has full knowledge of the circumstances making the transaction an offence, does not appreciate that those circumstances constitute an offence<sup>5</sup>.

Punishment inflicted by a criminal court is personal to the offender and the civil courts will not entertain a claim by him to recover an indemnity against it, nor in general does public policy permit an indemnity to be enforced in respect of expenses which the offender has incurred by reason of being compelled to make civil reparation for his crime<sup>6</sup>.

A contract to indemnify a surety against liability under a recognisance on the admission of an accused person to bail in criminal proceedings is illegal<sup>7</sup>. So money deposited with such a surety for his protection against the accused person's default cannot be recovered, unless the person who deposited it did not take part in the illegality<sup>8</sup>; and it is immaterial that the defendant has not committed any default and the surety has not been called upon to pay anything<sup>9</sup>.

A guarantor for payment of an instalment under a deed of composition under which the principal debtor's property is vested in a trustee on behalf of one of the creditors, who has a power to seize it if default is made, is not entitled to the benefit of a counter-indemnity received by him from the principal debtor which the creditors have neither sanctioned nor authorised<sup>10</sup>, although such a guarantor is entitled to retain goods deposited with him by the principal debtor, unknown to the principal debtor's creditors, under an agreement to indemnify the guarantor in consideration of the guarantor's guaranteeing instalments under a deed of composition, if the terms of the composition leave the goods at the debtor's own disposal<sup>11</sup>.

1 *Collins v Blanter* (1767) 2 Wils 341 (indemnity in connection with agreement to stifle prosecution); *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621, [1957] 2 All ER 844, CA (indemnity inducing issue of bill of lading containing fraudulent misrepresentation). For an example of an indemnity expressly declared void by statute see the Land Commission Act 1967 s 83(1), (2)(c) (repealed). As to the principle that an illegal consideration will not support a guarantee see generally PARA 1051; and as to the effect of illegality on contracts generally see **CONTRACT** vol 9(1) (Reissue) PARA 839 et seq.

2 *Jones v Orchard* (1855) 16 CB 614; cf the text to note 7; and see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 65. As to the effect of illegality upon the implication of indemnity see further **AGENCY** vol 1 (2008) PARA 111 et seq; **RESTITUTION** vol 40(1) (2007 Reissue) PARA 73; **EMPLOYMENT** vol 39 (2009) PARA 39.

3 *Smith v White* (1866) LR 1 Eq 626 (indemnity on assignment of lease of premises known to be used as a brothel); *Burrows v Rhodes* [1899] 1 QB 816 at 829, DC.

4 *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35, cited in note 6.

5 *Burrows v Rhodes* [1899] 1 QB 816 at 829, DC; *Haseldine v Hosken* [1933] 1 KB 822, CA (unsuccessful claim to indemnity arising out of champertous agreement); *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554 at 568, [1971] 2 All ER 949 at 956, CA, per Lord Denning MR (a similar claim arising from an act amounting to manslaughter), as explained in *DPP v Newbury*, *DPP v Jones* [1977] AC 500, [1976] 2 All ER 365, HL. Cf *Haseldine v Hosken* above; *R v Chief National Insurance Comr, ex p Connor* [1981] QB 758, sub nom *R v National Insurance Comr, ex p Connor* [1981] 1 All ER 769, DC. Compare *Cointat v Myham & Son* [1913] 2 KB 220; revsd on another ground [1914] WN 46, CA (indemnity against consequences of offence of

strict liability upheld), and *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313, CA (damages against insurance agent including fine for driving while uninsured). See also *Meah v McCreamer* [1985] 1 All ER 367; and **DAMAGES** vol 12(1) (Reissue) PARA 835.

6 *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 at 38, where a wholesale wine merchant who bought from manufacturers and resold liquor which, but for his gross negligence, he would have known to be contaminated was not entitled to recover as damages from the manufacturers fines imposed on him or money refunded to his customers. See also eg *Colburn v Patmore* (1834) 1 Cr M & R 73 (criminal liability for libel); *R Leslie Ltd v Reliable Advertising and Addressing Agency Ltd* [1915] 1 KB 652 (offence against moneylending statutes; see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 73); *Meah v McCreamer* [1985] 1 All ER 367. For the general principle that there can be no reparation for a criminal act, and for the limits of the application of the principle, see **DAMAGES** vol 12(1) (Reissue) PARA 835.

7 See **CONTRACT** vol 9(1) (Reissue) PARA 849; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1176.

8 *Consolidated Exploration and Finance Co v Musgrave* [1900] 1 Ch 37 at 42, where the plaintiffs recovered from the surety shares which they had transferred to the prisoner for an innocent purpose, and which did not empower the prisoner to make use of the shares for the purpose of indemnifying the surety.

9 *Herman v Jeuchner* (1885) 15 QBD 561, CA, overruling on this point *Wilson v Strugnell* (1881) 7 QBD 548. The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the claimant requires any aid from the illegal transaction to establish his case: *Simpson v Bloss* (1816) 7 Taunt 246; *Taylor v Chester* (1869) LR 4 QB 309 at 314; *Herman v Jeuchner* above: but see now *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, [1988] 2 All ER 23, CA; *Tinsley v Milligan* [1992] Ch 310, [1992] 2 All ER 391, CA. As to the recovery of money paid under an illegal contract see further **CONTRACT** vol 9(1) (Reissue) PARA 883 et seq.

10 *Re Simons, ex p Allard* (1881) 16 ChD 505, CA; and see *Wood v Barker* (1865) LR 1 Eq 139.

11 *Re Robinson, ex p Burrell* (1876) 1 ChD 537, CA. As to compositions see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 863.

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## 1270. Indemnities not unenforceable for illegality.

An employer may be indemnified by a contractor for whose acts he is legally responsible against damage resulting from the execution of the work<sup>1</sup>. A motor insurance policy covering third party liability is enforceable even though the claim arises from manslaughter<sup>2</sup>.

An agreement for indemnifying any person against civil liability for libel in respect of the publication of any matter is not unlawful unless at the time of publication that person knows that the matter is defamatory and does not reasonably believe there is a good defence to any claim brought upon it<sup>3</sup>.

Apart from questions of illegality, indemnities against claims by third persons of the most varied kinds have always been allowed<sup>4</sup>, and they are not invalid on the grounds of maintenance<sup>5</sup>, even though involving and contemplating the institution or defence of legal proceedings, when given in the legitimate defence of a business, commercial or other common interest<sup>6</sup>.

1 *Newcombe v Yewen and Croydon RDC* (1913) 29 TLR 299, following the opinion of Lord Blackburn in *Hughes v Percival* (1883) 8 App Cas 443 at 446, HL. As to the right of an employer to be indemnified by his employee in respect of liability incurred as a result of the employee's negligence see **EMPLOYMENT** vol 39 (2009) PARA 53. For statutory provisions for contribution between joint tortfeasors see the Civil Liability (Contribution)



Act 1978; and as to the effect of those provisions on rights of indemnity see **TORT** vol 45(2) (Reissue) PARA 348 et seq.

2 *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327; *James v British General Insurance Co* [1927] 2 KB 311; *Marles v Philip Trant & Sons Ltd (Mackinnon, third party)* [1954] 1 QB 29 at 40, [1953] 1 All ER 651 at 659, CA, per Denning LJ; *Gray v Barr (Prudential Assurance Co Ltd, third party)* [1971] 2 QB 554, [1971] 2 All ER 949, CA. The motorist only has this right where the crime is committed negligently, not deliberately: *Gardner v Moore* [1984] AC 548 at 560, [1984] 1 All ER 1100 at 1105-1106, HL. See also *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, [1964] 2 All ER 742, CA; *Department of Trade and Industry v St Christopher Motorists' Association Ltd* [1974] 1 All ER 395, [1974] 1 WLR 99.

3 Defamation Act 1952 s 11; *Shackell v Rosier* (1836) 2 Bing NC 634; *WH Smith & Son v Clinton and Harris* (1908) 99 LT 840. It is not against public policy to agree not to publish a confidential communication which is libellous and to indemnify against the publication: *Weld-Blundell v Stephens* [1920] AC 956, HL; *Bradstreets British Ltd v Harold Mitchell and Carapanayoti & Co Ltd* [1933] Ch 190; contrast *Howard v Odham's Press Ltd* [1938] 1 KB 1, [1937] 2 All ER 509, CA; and see *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613, [1975] 1 All ER 41. As to the invalidity of an indemnity against criminal liability for libel see *Colburn v Patmore* (1834) 1 Cr M & R 73; and PARA 1269.

4 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1014-1015, CA, per Fletcher Moulton LJ.

5 See PARA 1265 text and notes 6-8.

6 *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006 at 1012, CA, per Cozens-Hardy MR, where the indemnities held to be valid took the form of agreements by manufacturers to indemnify their customers against actions by rival manufacturers for using an apparatus manufactured by the givers of the indemnity.

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## (ii) Performance Bonds

### 1271. Performance bonds or performance guarantees; in general.

Some contracts for the international sale of goods include provision for one party, often the seller, to procure a performance bond or an international bank guarantee from a bank or an insurance or other company in favour of the other contracting party, normally the buyer, the seller being known as the account party and the buyer the beneficiary of the bond or guarantee<sup>1</sup>. A performance bond or performance guarantee<sup>2</sup> commonly provides for payments to be made on the mere demand of the beneficiary, typically the buyer under the contract of sale, and consequently acts as an incentive to the seller to perform his obligations under that contract<sup>3</sup>. The contractual obligations arising under such guarantees or bonds are separate from, and not dependent on, those existing under the sale contract between the seller and the buyer<sup>4</sup>. A performance bond is thus not a guarantee in the strict sense at all. The obligation to pay is independent of the underlying contract between the account party and the beneficiary, or of the merits of any dispute under that contract, and the various equitable defences which are available to a surety are not available to the issuer of a performance bond<sup>5</sup>.

By issuing a performance bond or performance guarantee a bank assumes obligations to a buyer or other beneficiary analogous to those assumed by a confirming bank to the seller under a documentary credit<sup>6</sup>. A bank which gives a performance guarantee must honour that guarantee according to its terms. The bank is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has

performed his contractual obligation or not; nor with the question whether the supplier is in default or not; and, subject to the fraud exception<sup>7</sup>, the bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions<sup>8</sup>. A performance bond is virtually a promissory note payable on demand<sup>9</sup>, and certainly has much more of the characteristics of a promissory note than of a guarantee<sup>10</sup>. The bank is simply concerned to see whether the event has happened upon which its obligation to pay arises<sup>11</sup>.

In the construction industry advance payment guarantees are often issued to employers who make stage payments to contractors<sup>12</sup>. Similarly, refund guarantees are a common feature of the shipbuilding industry. However, there is no standard practice in relation to such guarantees; they can either be in the form of independent performance bonds (or standby letters of credit) or true guarantees. The question as to what is the nature of such a guarantee involves construing the relevant instrument in its factual and contractual context having regard to its commercial purpose<sup>13</sup>.

1 'Standby credits' are sometimes used to perform the same function. These are letters of credit under which the beneficiary may draw on presentation of the specified documents, in some cases limited to a certificate prepared by the beneficiary. They are typically used in international sale contracts involving the United States of America where banks do not have power to issue performance guarantees or performance bonds: see 12 USC PARA 24, 7th Power. 'USC' means the Code of the Laws of the United States of America. As to letters of credit and performance bonds generally see PARA 923 et seq. The absence of language in a guarantee indicating that a performance bond has been created gives rise to a strong presumption that the parties did not intend to create a performance bond: *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289, [2005] 1 WLR 2497. See also *Van Der Merwe v IIG Capital LLC* [2007] EWHC 2631 (Ch), [2007] All ER (D) 214 (Nov).

2 The difference between the terms 'performance bond' and 'performance guarantee' appears to be purely semantic.

3 Such a bond or guarantee may also go on to provide that such demand is itself conclusive evidence, as between bank and beneficiary, of the beneficiary's entitlement to recover under the guarantee or bond. Such a provision is valid: *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437, CA. However, the mere provision for payment on demand achieves a similar effect: see the cases cited in note 4. Where, however, the bond or guarantee provides that the beneficiary is entitled to payment in certain stipulated circumstances, it has been held that the beneficiary must, when making the demand for payment, commit himself to claiming that the stipulated event has occurred (see *Esal (Commodities) and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA, Banque du Caire SA v Wells Fargo Bank SA* [1985] 2 Lloyd's Rep 546 at 550, CA); but, unless the bond expressly requires the beneficiary to specify the details of the alleged breach, it is enough, where the bond so requires, that the beneficiary describes the nature of that breach (*Odebrecht Oil and Gas Services Ltd v North Sea Production Co Ltd* [1999] 2 All ER (Comm) 405). As to the validity of a demand see PARA 1273.

4 *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, [1977] 2 All ER 862; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, CA; *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161, CA; *Intraco Ltd v Notis Shipping Corp'n, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, CA; *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep 146; *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19, CA; *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 All ER 1189, [1989] 1 WLR 1147, CA; *Themehelp Ltd v West* [1996] QB 84, [1995] 4 All ER 215, CA; *Wahda Bank v Arab Bank plc* [1996] 1 Lloyd's Rep 470, CA.

5 See note 11 and the cases there cited.

6 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 184, [1982] 2 All ER 720 at 725, HL. However, performance bonds, unlike letters of credit, do not provide any security to the issuer: see *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19 at 29, CA, per Eveleigh LJ. Moreover, the doctrine of strict compliance, which applies to letters of credit and requires that the documents presented thereunder conform precisely to the letter of credit before there is payment, has no application to performance bonds: see *Siporex Trade AS v Banque Indosuez* [1986] 2 Lloyd's Rep 146 at 159 per Hirst J. As to the commercial advantages of a performance bond or an irrevocable letter of credit see eg *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR.

7 As to the fraud exception see PARA 1275. In the context of a claim by the beneficiary under the performance bond, where the issuer seeks to invoke the fraud exception, the court will, at the summary judgment stage, assess the weight of the evidence of fraud then before the court, or from which fraud can be

inferred, and can either refuse judgment or enter judgment with a stay of execution: see *Balfour Beatty Civil Engineering v Technical & General Guarantee Co Ltd* (1999) 68 ConLR 180, [1999] All ER (D) 1110, CA. However, the fraud must be one which can be shown to have come to the knowledge of the issuer in time: see *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1999] 1 All ER (Comm) 890, [1999] 2 Lloyd's Rep 187; but see *Banco Santander SA v Bayfern Ltd* [1999] 2 All ER (Comm) 18; affd [2000] 1 All ER (Comm) 776, CA.

8 See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 171, [1978] 1 All ER 976 at 983, CA, per Lord Denning MR. See also eg *Standard Bank London Ltd v Canara Bank* [2002] All ER (D) 340 (May); and see the authorities cited in PARA 1273.

9 See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 170, [1978] 1 All ER 976 at 983, CA, per Lord Denning MR

10 See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 175, [1978] 1 All ER 976 at 986, CA, per Geoffrey Lane LJ.

11 *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161 at 165, CA. See also *Manx Electricity Authority v JP Morgan Chase Bank* [2003] EWCA Civ 1324 at [37], [2003] BLR 477, [2003] All ER (D) 52 (Oct) per Rix LJ (repudiatory breach of contract; Rix LJ said that the suggestion that a performance guarantee is intended to cease to operate when the contract has failed because the principal has repudiated was 'extraordinary'). The question whether or not there has been compliance is for the issuer alone to determine, at the time when a demand is made: see *Ermis Skai Radio and Television v Banque Indosuez SA* (26 February 1997, unreported), Comm Ct, per Thomas J.

12 A guarantee for the repayment of an advance payment is not a performance guarantee: *Wardens etc of the Mercers' Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, CA.

13 See *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* [2001] EWCA Civ 1086 at [11], [2002] 1 All ER (Comm) 142, [2002] 1 Lloyd's Rep 617 per Tuckey LJ. In that case, it was held that the instrument in question had all the appearances of a first demand guarantee. 'It describes itself as a guarantee; but this is simply a label; it does not use the language of guarantee': *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* at [21] per Tuckey LJ.

For examples in use in the construction industry see *General Surety & Guarantee Co Ltd v Francis Parker* (1977) 6 BLR 16; *Tins Industrial Co v Kono Insurance* (1987) 42 BLR 110, HK CA; *Perar BV v General Surety & Guarantee Co Ltd* (1994) 66 BLR 72, (1994) 43 ConLR 110, CA; *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] AC 199, [1995] 3 All ER 737, HL.

## UPDATE

### 1271 Performance bonds or performance guarantees; in general

NOTE 1--*IIG Capital*, cited, affirmed: [2008] EWCA Civ 542, [2008] All ER (D) 297 (May).

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### 1272. Construction in accordance with proper law.

As with any other contract, the effect and construction of a performance bond falls to be determined in accordance with its proper law or (to use an alternative expression) the law applicable to it<sup>1</sup>. A performance bond given by or on behalf of a party to the underlying contract is normally governed by the law of the place where payment under it is to be made, and not necessarily by the law of the underlying contract<sup>2</sup>. Absent any contractual term as to the place of payment, that place is the place where the demand is made and where the liability crystallises<sup>3</sup>. If, however, a counter-guarantee is given by one bank to another which has issued

a performance bond, the proper law<sup>4</sup> of the performance bond may be the proper law of the counter-guarantee<sup>5</sup>.

1 See the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980; Cmnd 8449) (the 'Rome Convention') introduced into the law of the United Kingdom by the Contracts (Applicable Law) Act 1990. As to the meaning of 'United Kingdom' see PARA 2 note 3. See also PARA 1213. As to letters of credit and performance bonds generally see PARA 923 et seq.

2 *Attock Cement Co Ltd v Romanian Bank for Foreign Trade* [1989] 1 All ER 1189, [1989] 1 WLR 1147, CA.

3 *Britten Norman Ltd v State Ownership Fund of Romania* [2000] Lloyd's Rep Bank 315, [2000] All ER (D) 935.

4 As to the meaning of 'proper law' see PARA 1213 note 1.

5 See *Wahda Bank v Arab Bank plc* [1996] 1 Lloyd's Rep 470, CA.

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### **1273. Demand must be made within stipulated time and in stipulated form.**

The International Chamber of Commerce has published a standard set of rules, known as the Uniform Rules for Demand Guarantees ('URDG')<sup>1</sup>, which may be incorporated into performance bonds and performance guarantees, which require the beneficiary, normally the buyer, to support his demand by a written statement stating that the account party, typically the seller, is in breach of the contract of sale and indicating the respect in which the seller is in breach<sup>2</sup>. It is open for sellers to insist with their buyers that any performance bond they are prevailed on by their buyers to procure will incorporate the URDG.

The beneficiary must have done that which for the purpose of making a valid demand is required of him<sup>3</sup>. However, a demand required to state that it was based on a claim for damages for breach of contract is valid if it says so in substance but not in express words<sup>4</sup>. On the other hand, it has been held that the words 'we claim the sum of £500,000, P having failed to meet their contractual obligations to us' did not comply with the requirement of the performance guarantee that the claims should state that the principals had failed to pay under their contractual obligation, since the key concept underlying the wording of the guarantee was a 'failure to pay'; accordingly, the demand was not valid<sup>5</sup>. Oral demands are permissible, if provided for by the bond document, but the court will be very hesitant to construe a performance bond as payable on oral demand by the beneficiary<sup>6</sup>. The court must construe the performance bond to determine what the beneficiary must do to make an effective call under it; then it must construe the call documentation to determine whether it complies with the requirements of the bond<sup>7</sup>.

1 See the *Uniform Rules for Demand Guarantees* ('URDG') (1992, ICC Publication No 458). At the date at which this volume states the law, a revision of the Rules is under way.

2 See URDG art 20(a). As to letters of credit and performance bonds generally see PARA 923 et seq.

3 See *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1989] 2 Lloyd's Rep 205 at 208 per Leggatt J (revsd in part [1990] 2 Lloyd's Rep 496, CA, without affecting this dictum).

4 *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496, CA. See also *Esal (Commodities) and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA, Banque du Caire SAE v Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 546 at 550, CA; *Oval (717) Ltd v Aegon Insurance Co (UK) Ltd* (1997) 54 ConLR 74, 85 BLR 97; *Odebrecht Oil and Gas Services Ltd v North Sea Production Co Ltd* [1999] 2 All ER (Comm) 405.

5 *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2000] All ER (D) 1152. See also *Paddington Churches Housing Association v Technical and General Guarantee Co Ltd* (1999) 65 ConLR 132, [1999] BLR 244, [1999] All ER (D) 352 (no obligation to make payment on bond until insurer providing it had been provided with statement of damages sustained by beneficiary in accordance with contract).

6 *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496 at 499 per Staughton LJ.

7 See note 6.

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### **1274. Liability to account.**

Once payment has been made under the performance bond or performance guarantee, it is implicit in the nature of the bond or guarantee that, in the absence of clear stipulation to the contrary, there will be a financial adjustment between the parties, ensuring that the beneficiary retains so much of the funds paid under the bond or guarantee as represents the real loss arising from the breach of contract committed by the other party to the contract of sale<sup>1</sup>.

1 See *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep 424 at 431, CA, per Potter LJ; *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 2 All ER 406, [1998] 1 WLR 461, CA. See also *Spiersbridge Property Developments Ltd v Muir Construction Ltd* [2008] CSOH 44, 2008 Scot (D) 17/3. As to letters of credit and performance bonds generally see PARA 923 et seq.

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### **1275. Circumstances in which payment may be restrained.**

The account party may, exceptionally<sup>1</sup>, apply for an injunction to restrain the bank which is liable to pay under the performance bond from making such payment. If there is no challenge to the validity of the performance bond or performance guarantee itself, or if the challenge is not substantial, *prima facie* no injunction to restrain payment should be granted and the bank should be left free to honour its contractual obligation, although restrictions may well be imposed on the freedom of the beneficiary to deal with the money after he has received it<sup>2</sup>.

An injunction may be granted where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent<sup>3</sup>. The evidence must be clear, both as to the fact of fraud and as to the bank's knowledge<sup>4</sup>. In so challenging a demand made on a performance bond, the challenging party must show that the only inference the bank concerned could draw was that the demand was fraudulent; in doing so, it must put before the bank irrefutable evidence because it is not for the bank to verify

mere allegations<sup>5</sup>. Strong corroborative evidence is required to establish fraud which usually takes the form of contemporary documents<sup>6</sup>.

Other situations where the court will intervene to restrain payment<sup>7</sup> are:

- 59 (1) where there is breach of faith by a beneficiary in threatening a call on the bond<sup>8</sup>;
- 60 (2) where a call would be invalid, for example where a condition precedent to a call has not yet been fulfilled, where the bond is a 'see to it' bond necessitating prior proof of loss by the beneficiary or poor performance by the third party which has not yet been established, or where the demand or the supporting documents show that the demand does not conform to the requirements imposed by the bond for a valid demand<sup>9</sup>;
- 61 (3) where payment is prohibited by a sanctions order<sup>10</sup>.

A performance bond issued by a company which does not comply with the mandatory requirements of the Companies Act 1985 regarding the use of the company seal<sup>11</sup> is not for that reason expressly rendered illegal, a nullity or unenforceable<sup>12</sup>.

1 'The unique value of [an irrevocable] letter [of credit], performance bond or [performance] guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. . . . If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given . . . at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and [performance] guarantees will be undermined': *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR. As to letters of credit and performance bonds generally see PARA 923 et seq.

2 See *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR. The account party may obtain a freezing injunction against the beneficiary restraining him from dealing with the proceeds: see eg *Intraco Ltd v Notis Shipping Corpn, The Bhoja Trader* [1981] 2 Lloyd's Rep 256, [1981] Com LR 184, CA. Payment into court can be ordered (see *Themehelp Ltd v West* [1996] QB 84 at 103, [1995] 4 All ER 215 at 231, CA, per Evans LJ); but this will probably not be ordered if the performance bond requires payment to be made abroad (see *Britten-Norman Ltd v State Ownership Fund of Romania* [2000] Lloyd's Rep Bank 315). As to freezing injunctions (formerly known as 'Mareva' injunctions after *Mareva Cia Naviera SA v International Bulkcarriers SA, The Mareva* (1975) [1980] 1 All ER 213n, [1975] 2 Lloyd's Rep 509, CA) see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 396 et seq.

3 *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR; *Kvaerner John Brown Ltd v Midland Bank plc* [1998] CLC 446 (certificate required to be tendered with demand for payment manifestly untrue; injunction granted); and see *Turkiye IS Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611 (where Waller J, in refusing an injunction, held that for an injunction to be granted, 'the only realistic inference the bank could draw was that the demand was fraudulent'). See also *United Trading Corpn SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554n at 559n, CA (where Ackner LJ reported a dictum of Lord Denning MR in *State Trading Corpn of India Ltd v ED & F Man (Sugar) and State Bank of India* [1981] Com LR 235, CA); *GKN Contractors v Lloyd's Bank plc* (1985) 30 BLR 48, CA. As to the correct test to be applied where the beneficiary applies for summary judgment and the bank alleges fraud see *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 1059, [2001] 2 All ER (Comm) 217, [2001] 1 WLR 1800; *Balfour Beatty Civil Engineering v Technical & General Guarantee Co Ltd* (1999) 68 ConLR 180, [1999] All ER (D) 1110, CA; *Manx Electricity Authority v JP Morgan Chase Bank* [2003] EWCA Civ 1324, [2003] BLR 477, [2003] All ER (D) 52 (Oct).

4 *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR. In the context of letters of credit, it has been held that the bank must have knowledge of the fraud at the time of presentation (corresponding, in the case of a performance bond, to the time of the demand): see *Deutsche Rückversicherung AG v Walbrook Insurance Co Ltd, Group Josi Re (formerly known as Group Josi Reassurance SA) v Wallbrook Insurance Co Ltd* [1996] 1 All ER 791 at 800, sub nom *Group Josi Re (formerly known as Group Josi Reassurance SA) v Wallbrook Insurance Co Ltd* [1996] 1 WLR 1152 at 1160-1161, CA, per Staughton LJ. See also *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd*

[1999] 1 All ER (Comm) 890, [1999] 2 Lloyd's Rep 187. But see *Banco Santander SA v Bayfern Ltd* [1999] 2 All ER (Comm) 18; affd [2000] 1 All ER (Comm) 776, CA.

5 *Turkiye IS Bankasi AS v Bank of China* [1996] 2 Lloyd's Rep 611.

6 *Sunderland Association Football Club Ltd v Uruguay Montevideo FC* [2001] 2 All ER (Comm) 828. See also *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 All ER 351n at 352n, [1984] 1 WLR 392 at 393, CA, per Sir John Donaldson MR ('It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged').

7 See generally *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* [2003] EWHC 762 (TCC) at [39], [2003] 1 All ER (Comm) 914 and the authorities there cited.

8 See *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* [2003] EWHC 762 (TCC) at [46], [2003] 1 All ER (Comm) 914. The basis for a contention of a breach of faith must be established by clear evidence even for the purposes of interim relief. A breach of faith can arise in such situations as: a failure by the beneficiary to provide an essential element of the underlying contract on which the bond depends; a misuse by the beneficiary of the guarantee by failing to act in accordance with the purpose for which it was given; a total failure of consideration in the underlying contract; a threatened call by the beneficiary for an unconscionable ulterior motive; or a lack of an honest or bona fide belief by the beneficiary that the circumstances, such as poor performance, against which a performance bond has been provided, actually exist: *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* at [46] per Judge Thornton QC.

9 See *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* [2003] EWHC 762 (TCC) at [46], [2003] 1 All ER (Comm) 914 per Judge Thornton QC.

10 See eg *Shanning International Ltd v Lloyds Bank plc* [2001] UKHL 31, [2001] 1 WLR 1462.

11 In the requirements of the Companies Act 1985 s 350 (prospectively repealed) (as to replacement provisions see the Companies Act 2006 s 45; and **COMPANIES** vol 14 (2009) PARA 283).

12 *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] EWHC 2240 (TCC), [2002] 2 All ER (Comm) 1116 (where the company obtaining the bond had used a seal engraved with its trading name rather than with its registered name as required by the Companies Act 1985; held that the bond could be enforced).

## UPDATE

### 1275 Circumstances in which payment may be restrained

NOTE 11--Repeal of Companies Act 1985 s 350 in force 1 October 2009: SI 2008/2860.

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## 5. MONEY

### (1) MONEY AND INTEREST ON MONEY

#### (i) Money

#### A. IN GENERAL

#### 1276. Money in general.

The primary function of money is to serve as a medium of exchange, and as such it is accepted without question in final discharge of debts or payment for goods or services<sup>1</sup>. Money also serves as a common standard of value by reference to which the comparative values of different commodities are ascertained<sup>2</sup>, as a unit of account in which debts and liabilities are expressed<sup>3</sup>, and as a store of value or purchasing power<sup>4</sup>.

1 *Moss v Hancock* [1899] 2 QB 111 at 116 per Darling J. Money may be paid without any currency passing: see *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 QB 747, [1966] 2 All ER 414, CA.

2 I Bl Com (14th Edn) 276.

3 *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 at 148, HL, per Lord Russell of Killowen. See also the Bills of Exchange Act 1882 s 3(1) (requirement to pay a sum certain in money essential to a bill of exchange: see PARAS 1405, 1418); and the Sale of Goods Act 1979 s 2(1) (a money consideration, called the price, essential to a contract of sale: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 29.

4 See *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 508, HL, per Lord Macmillan.

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## **1277. Meaning of 'money'.**

The term 'money' generally includes banknotes<sup>1</sup> as well as coins<sup>2</sup>, although it may be limited to such of each as are legal tender<sup>3</sup> at the time and place in question. The term is sometimes used to include not only actual cash but also a right to receive cash, as, for example, sums standing to the credit of a bank account<sup>4</sup> or invested in securities<sup>5</sup>; and the term may in some cases be used in a popular sense to include all personal or even, exceptionally, all real and personal property<sup>6</sup>. Where the term 'money' is used in relation to the payment of money into court it is to be construed in its ordinary and natural meaning as including money in foreign currency<sup>7</sup>.

The precise meaning of the term depends upon the context in which it is used<sup>8</sup> so that, for example, it is usually given a wide meaning when used in a will and when that meaning gives effect to the intention of the testator<sup>9</sup>, an intermediate meaning in connection with claims for money paid or for money had and received<sup>10</sup>, and a narrow meaning in the criminal law<sup>11</sup> and in relation to execution<sup>12</sup>. In taxing or other statutes, references to money may be limited to sterling or may include foreign currencies, depending on the wording and purpose of the statute<sup>13</sup>.

1 *Wright v Reed* (1790) 3 Term Rep 554; and see *Suffel v Bank of England* (1882) 9 QBD 555 at 563, CA, per Jessel MR. See also PARA 1297; and PARA 796 et seq. See also note 8.

2 As to coinage see PARA 1279 et seq. See also note 8.

3 See PARAS 1278, 1279, 1297; and PARAS 796-797.

4 See *Re Collings, Jones v Collings* [1933] Ch 920. See also note 8.

5 *Re Smith, Henderson-Roe v Hitchins* (1889) 42 ChD 302; but see *Re Hodgson, Nowell v Flannery* [1936] Ch 203. See also note 8.

6 *Perrin v Morgan* [1943] AC 399 at 407, 413, [1943] 1 All ER 187 at 191, 193, HL, per Viscount Simon LC.

7 See *The Halcyon the Great* [1975] 1 All ER 882, [1975] 1 WLR 515. As to foreign currency see PARA 1299.



8 *Perrin v Morgan* [1943] AC 399, [1943] 1 All ER 187, HL, where a bequest of 'all moneys of which I die possessed' was held to include all the net personalty, but not the realty, of the testatrix.

Certainly any definition of 'money' is no longer limited to banknotes and coins and may include bank deposits etc: see generally C Proctor *Mann on the Legal Aspect of Money* (6th Edn, 2005) Ch 1.

9 *Perrin v Morgan* [1943] AC 399, [1943] 1 All ER 187, HL; and see **WILLS**.

10 See **CONTRACT** vol 9(1) (Reissue) PARA 1104 et seq. As to the recovery of money paid under mistake see **MISTAKE**.

11 See the Powers of Criminal Courts (Sentencing) Act 2000 s 148(1), (2); *Moss v Hancock* [1899] 2 QB 111; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 388. See also *R v Preddy* [1996] AC 815, [1996] 3 All ER 481, HL (mortgage advance obtained by deception).

12 See *Harrison v Paynter* (1840) 6 M & W 387 at 390 per Alderson B; and **CIVIL PROCEDURE**.

13 See *Capcount Trading v Evans (Inspector of Taxes)* [1993] 2 All ER 125, CA; and **STATUTES** vol 44(1) (Reissue) PARA 1320.

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## 1278. Legal money.

The tokens known as 'money', which constitute a legal medium of exchange, consist in England either of coins<sup>1</sup> made and issued by the Crown under the exclusive powers it enjoys at common law, which are now for the most part regulated by statute<sup>2</sup>, or of bank notes made and issued by the Bank of England under statutory powers<sup>3</sup>.

The special statutory offences relating to the coinage are discussed elsewhere in this work<sup>4</sup>.

1 See generally Sir CWC Oman *The Coinage of England* (1931). As to coins as legal tender see PARA 1279.

2 At common law the Crown enjoys the exclusive right of making and issuing money, though formerly this right was frequently granted out as a franchise and could be claimed by prescription; but in all cases the impression or stamping of coins was the Crown's prerogative, and the grantees of the franchise usually had the stamp sent to them by the Exchequer: 1 Bl Com (14th Edn) 277. The denomination or value at which the coin was to pass current was also determined by the Crown in all cases, though it seems that the value could not be debased or enhanced below or above the sterling value: 1 Bl Com (14th Edn) 277-278; 2 Co Inst 577. But as to enhancing or debasing the coinage see contra 1 Hale PC 194. These prerogative rights still exist, but have for the most part been placed upon a statutory basis: see PARA 1282. Where no statutory provision has been made, Her Majesty is empowered by proclamation made with the advice of the Privy Council to regulate any matters relating to the coinage within the prerogative, and to revoke or alter any proclamation previously made: see the Coinage Act 1971 s 3(1)(g), (h) (s 3(1) renumbered by the Currency Act 1983 s 1(4)(f)).

3 As to bank notes as legal tender see PARA 1297. As to the statutory powers and duties of the Bank of England regarding the issue of bank notes see PARA 1297; and PARA 796 et seq.

4 See PARA 1298; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 544 et seq. As to forgery generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 346 et seq.

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Money/B. THE COINAGE/(A) Legal Tender, Issue of Coins and the Mint/1279. Legal tender in coins.

## **B. THE COINAGE**

### **(A) LEGAL TENDER, ISSUE OF COINS AND THE MINT**

#### **1279. Legal tender in coins.**

Gold coins<sup>1</sup> are legal tender for payment of any amount<sup>2</sup>. Subject to any provision made by proclamation<sup>3</sup>, coins of cupro-nickel, silver or bronze are legal tender as follows: coins of cupro-nickel or silver of denominations<sup>4</sup> of more than 10 pence, for payment of any amount not exceeding £10; coins of cupro-nickel or silver of denominations of not more than 10 pence, for payment of any amount not exceeding £5; coins of bronze, for payment of any amount not exceeding 20 pence<sup>5</sup>. Other coins, if made current by a proclamation<sup>6</sup> are legal tender in accordance with the provision made by that proclamation or by any later proclamation<sup>7</sup>.

1 'Coins' means coins made by the Mint in accordance with the Coinage Act 1971 and not called in by proclamation under s 3 (see PARA 1282): s 2(3) (added by the Currency Act 1983 s 1(3)(c)). As to the Mint see PARA 1281.

2 Coinage Act 1971 s 2(1) (substituted by the Currency Act 1983 s 1(3)(a)). They are not legal tender if their weight has become less than that specified in the Coinage Act 1971 s 1, Sch 1 (see PARA 1285), or in the proclamation under which they are made, as the least current weight: s 2(1) (as so substituted). Coins that are not legal tender may, however, be accepted as a means of payment. As to legal money see also PARA 1278.

3 Ie under the Coinage Act 1971 s 3: see PARA 1282.

4 References to coins of any denomination include references to coins treated as being of such a denomination by virtue of a proclamation made in pursuance of the Decimal Currency Act 1969 s 15(5) (repealed): Coinage Act 1971 s 2(2) (amended by the Currency Act 1983 s 1(3)(b)). As to decimalisation see PARA 1283 note 3.

5 Coinage Act 1971 s 2(1A) (added by the Currency Act 1983 s 1(3)(a)).

6 Ie under the Coinage Act 1971 s 3: see PARA 1282.

7 Coinage Act 1971 s 2(1B) (added by the Currency Act 1983 s 1(3)(a)).

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#### **1280. Issue of coins.**

No piece of gold, silver, copper or bronze, or of any metal or mixed metal, of any value whatever, may be made or issued except by or with the authority of the Treasury, as a coin or a token for money, or as purporting that its holder is entitled to demand any value denoted on it<sup>1</sup>. Anyone contravening this provision is liable on summary conviction to a fine<sup>2</sup>.

1 Coinage Act 1971 s 9(1) (amended by the Government Trading Funds Act 1973 s 7(4)). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 Coinage Act 1971 s 9(2) (amended by virtue of the Criminal Justice Act 1982 ss 37, 46). The penalty is a fine not exceeding level 2 on the standard scale: see the Coinage Act 1971 s 9(2) (as so amended). As to the standard scale see PARA 27 note 21.

A penalty was imposed under earlier legislation (ie the Coinage Act 1870 s 5 (repealed)) on the owner of Lundy Island for unlawfully issuing 'puffins' and 'half-puffins' as tokens for money within the island: *Harman v Bolt* (1931) 47 TLR 219.

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## 1281. The Mint.

The Chancellor of the Exchequer is the master of the Mint<sup>1</sup>. There is also a deputy master appointed by the Treasury<sup>2</sup>. All duties, powers and authorities imposed on, vested in or to be transacted before the master of the Mint may be performed and exercised by or transacted before him or his sufficient deputy<sup>3</sup>. The Mint is subject to investigation by the Parliamentary Commissioner for Administration<sup>4</sup>.

Provision is made for the funding of the Mint<sup>5</sup>.

1 Coinage Act 1971 s 4(1). The Mint was originally established in the Tower of London but moved to the Mint on Tower Hill in 1810. It is now at Llantrisant, Pontyclun, Mid-Glamorgan. As to the Mint see Sir John Craig *The Mint* (1953). As to the Chancellor of the Exchequer see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 514.

2 Coinage Act 1971 s 4(2) (substituted by the Government Trading Funds Act 1973 s 7(2)). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Coinage Act 1971 s 4(5).

4 See the Parliamentary Commissioner Act 1967 s 4(1), Sch 2; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 41 et seq.

5 Expenses incurred by the Mint in the purchase of metal to be made into coins are to be defrayed out of money provided by Parliament, and all sums received by the master of the Mint or any deputy master or officer of the Mint in payment for coin made from metal purchased by him and all fees and payments received by him in that capacity are to be paid into the Consolidated Fund: Coinage Act 1971 s 4(6), (7). As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq. However, these provisions do not have effect for so long as any operations of the Mint are funded operations: Government Trading Funds Act 1973 s 7(2) (amended by the Government Trading Act 1990 s 2(4)). The Mint is a funded operation: see the Royal Mint Trading Fund Order 1975, SI 1975/501; and the Royal Mint Trading Fund (Extension and Variation) Order 2002, SI 2002/831. As to government trading funds see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 743 et seq.

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## (B) DIMENSIONS, DESIGNS, DENOMINATIONS AND STANDARDS OF COINS

### 1282. Prerogative rights as to coins.

By the royal prerogative the Crown enjoys the exclusive right of fixing the dimensions, designs, denominations and standards of weight and fineness of the various current coins<sup>1</sup>. Since 1870 that prerogative power has been limited by<sup>2</sup> and its exercise regulated by statute<sup>3</sup>. Under the Coinage Act 1971 Her Majesty may from time to time by proclamation made with the advice of Her Privy Council<sup>4</sup>:

- 62 (1) determine the denomination of coins to be made at the Mint<sup>5</sup>;
- 63 (2) determine the design of any coin<sup>6</sup>;
- 64 (3) determine the weight and fineness of any gold coins or coins of silver of the Queen's Maundy money<sup>7</sup>, the remedy to be allowed in making them and (for gold coins) their least current weight<sup>8</sup>;
- 65 (4) determine the weight and composition of any coins, other than gold coins or coins of silver of the Queen's Maundy money, and the remedy (if any) to be allowed in making them<sup>9</sup>;
- 66 (5) provide for the variation from the specified standard weight for a gold coin<sup>10</sup> to be measured in the manner specified in the proclamation<sup>11</sup>;
- 67 (6) determine the dimensions of any coins<sup>12</sup>;
- 68 (7) determine the percentage of impurities which coins other than gold coins and coins of silver of the Queen's Maundy money may contain<sup>13</sup>;
- 69 (8) call in coins of any date or denomination, or coins made before a date specified in the proclamation<sup>14</sup>;
- 70 (9) direct that coins made by the Mint other than gold, silver, cupro-nickel and bronze coins are to be current<sup>15</sup>;
- 71 (10) direct that any coin is to be legal tender for payment of any amount not exceeding such amount as may be specified in the proclamation or for payment of any amount (without limit)<sup>16</sup>;
- 72 (11) regulate any matter relating to coinage which was before 1870 within the royal prerogative and is not provided for by the Coinage Acts 1870 and 1971<sup>17</sup>; and
- 73 (12) revoke or alter any proclamation so made<sup>18</sup>.

1 1 BI Com (14th Edn) 277-278. The standard is determined by the fineness, and the true standard is termed 'sterling'. As to the present standard see PARA 1284 et seq. Where in early days the making of coins was granted out by the Crown in the form of franchises to monasteries and others, the Crown always retained the right of regulating the stamp or impression and denomination, and the grantees of those franchises usually had the Exchequer stamp sent to them: 1 BI Com (14th Edn) 277.

2 As to the standards fixed for the weight and fineness of certain coins see the Coinage Act 1870 s 3, Sch 1 (repealed); and the Coinage Act 1971 s 1(3), Sch 1; and PARA 1285.

3 See the Coinage Act 1870 s 11 (repealed); Coinage Act 1971 s 3; and the text to notes 5-18.

4 Proclamations determining the specifications and design of coins are published periodically in the London Gazette but are not listed in this work.

5 Coinage Act 1971 s 3(1)(a) (s 3(1) renumbered by the Currency Act 1983 s 1(4)). As to the Mint see PARA 1281.

6 Coinage Act 1971 s 3(1)(b).

7 I.e. other than those of a denomination mentioned in the Coinage Act 1971 Sch 1 (see PARA 1285).

8 Coinage Act 1971 s 3(1)(c) (substituted by the Currency Act 1983 s 1(4)). As to the meaning of 'remedy' see PARA 1284 note 3.

9 Coinage Act 1971 s 3(1)(cc) (added by the Currency Act 1983 s 1(4)(a)).

10 I.e. the standard weight in the Coinage Act 1971 for a gold coin of a denomination mentioned in Sch 1 (see PARA 1285).

- 11 Coinage Act 1971 s 3(1)(cd) (added by the Currency Act 1983 s 1(4)(a)).
- 12 Coinage Act 1971 s 3(1)(d) (amended by the Currency Act 1983 Act s 1(4)(b)).
- 13 Coinage Act 1971 s 3(1)(dd) (added by the Currency Act 1983 Act s 1(4)(c)). Where a proclamation is made as to the percentage of impurities which coins of a particular denomination may contain, any coin of that denomination made before the date of the proclamation is treated as if that provision had been in force when that coin was made: Currency Act 1983 s 1(5).
- 14 Coinage Act 1971 s 3(1)(e).
- 15 Coinage Act 1971 s 3(1)(f) (amended by the Currency Act 1983 s 1(4)(d)).
- 16 Coinage Act 1971 s 3(1)(ff) (added by the Currency Act 1983 s 1(4)(e)). As to coins as legal tender see PARAS 1278, 1279. So far as it relates to the matters mentioned in the Coinage Act 1971 s 3(1)(ff), a proclamation may make different provisions in relation to different parts of the United Kingdom: s 3(2) (added by the Currency Act 1983 s 1(4)(f)). As to the meaning of 'United Kingdom' see PARA 2 note 3. Both the Channel Islands and the Isle of Man (although not within the United Kingdom) use the pound sterling.
- 17 Coinage Act 1971 s 3(1)(g).
- 18 Coinage Act 1971 s 3(1)(h).

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### **1283. Denominations of money.**

The denominations of money in the currency of the United Kingdom<sup>1</sup> are the pound sterling and the penny (or new penny)<sup>2</sup>, the penny being one-hundredth part of a pound sterling<sup>3</sup>.

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 The penny may also be referred to as the new penny: Currency Act 1982 s 1(1).

3 Currency Act 1982 s 1(1). Decimalisation was introduced on 15 February 1971 (ie the day appointed under the Decimal Currency Act 1967 s 1 (repealed)). Prior to that date, the denominations were the pound sterling, the shilling and the penny, the shilling being one-twentieth part of a pound sterling and the penny being one-twelfth part of a shilling. The pound sterling was unchanged.

Transitional provisions, most of which are spent, provided rules for the invalidation of bills of exchange and promissory notes expressed in the old currency and for the conversion of references to shillings and pence in various documents, enactments and forms, including a power to make regulations for payments under friendly society and industrial insurance contracts: see the Decimal Currency Act 1969 ss 2-13 (amended by the Friendly Societies Act 1974 Sch 11; the Statute Law (Repeals) Act 1989; SI 1995/710; and SI 2001/3647).

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### **1284. Form, weight and fineness of coins.**

Coins other than gold coins and coins of silver of the Queen's Maundy money<sup>1</sup> must be of specified standard weight, composition and dimensions<sup>2</sup>; but in the making of the coins a remedy<sup>3</sup> is to be allowed not exceeding a specified amount<sup>4</sup>.

1 As to gold coins and silver coins of the Queen's Maundy money see PARA 1285.

2 I.e. specified by proclamation under the Coinage Act 1971 s 3 (see PARA 1282): s 1(1), (4) (s 1 substituted by the Currency Act 1983 s 1(1)).

3 A 'remedy', in relation to gold coins and coins of silver of the Queen's Maundy money, is a variation from the standard weight and fineness specified in the proclamation, and in relation to other coins (i.e. cupro-nickel coins), from the standard diameter and composition so specified: Coinage Act 1971 s 1(7) (as substituted: see note 2).

4 Coinage Act 1971 s 1(5) (as substituted: see note 2). The variation from the standard weight of any coins is to be measured as the average of a sample of not more than 1 kg of that coin: s 1(6) (as so substituted).

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### **1285. Maundy money.**

The Queen's Maundy money is issued each year for distribution as a royal bounty by the Lord High Almoner on Maundy Thursday<sup>1</sup>. It consists of gold £5, £2, sovereign (£1), and half sovereign coins, and silver 4p, 3p, 2p and 1p coins. Gold coins and coins of silver of the Queen's Maundy money are to be of specified standard weight and fineness<sup>2</sup>, but in the making of the coins a variation from the specified standard weight and fineness is allowed<sup>3</sup>.

1 I.e. the Thursday before Easter. The word 'Maundy' derives from *mandatum*, middle English *maundee* or *maund*, a command (see Skeat, Etym Dict 359, Langland, Piers Plowman (Whitaker Edn) 140), the command being that given in John 13: 14 'to wash one another's feet'; and see John 13: 34 ('I give you a new commandment'). The practice of washing feet has not been observed since the reign of James II, but the distribution of alms is still made each year.

2 Coins of a denomination mentioned in the Coinage Act 1971 s 1, Sch 1 (amended by the Currency Act 1983 s 1(2)) must be of the weight and fineness specified there (Coinage Act 1971 s 1(1), (2) (s 1 substituted by the Currency Act 1983 s 1(1))); and coins of any other denomination must be of such weight and fineness as may be specified in a proclamation under the Coinage Act 1971 s 3 (see PARA 1282) (s 1(3) (as so substituted)).

3 See the Coinage Act 1971 s 1(2), (3), (5) (as substituted: see note 2).

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### **1286. Standards.**

From time to time when necessary the Secretary of State<sup>1</sup> must cause to be made and verified standard trial plates to be used for determining the justness of gold, silver and cupro-nickel coins issued from the Mint, or of coins so issued of any other metal or mixture of metals specified in a proclamation<sup>2</sup>.

The plates and all books, documents and other things used in connection with the determination of the justness of coins must be in the Secretary of State's custody, and must be kept in accordance with his directions; and the performance of all duties in relation to the plates is to be part of the business of the National Weights and Measures Laboratory of the Department for Innovation, Universities and Skills<sup>3</sup>.

The master of the Mint must from time to time cause copies to be made of the coinage standards<sup>4</sup> maintained by the Secretary of State, and once at least in every year the Secretary of State and the master of the Mint must cause the copies to be compared with the coinage standards<sup>5</sup>.

1 As to the Secretary of State see PARA 3.

2 Coinage Act 1971 s 6(1). As to the power to specify by proclamation the composition of coins see s 3(1) (cc); and PARA 1282. As to the Mint see PARA 1281. The plates must be of the following composition: for gold coins of a denomination mentioned in the Coinage Act 1971 Sch 1 (see PARA 1285), eleven-twelfths fine gold and one-twelfth alloy; for other gold coins, gold of the standard fineness specified in the proclamation under which the coins are made; for silver coins, pure silver; for cupro-nickel coins, pure copper and pure nickel; for coins of any other metal or mixture of metals, such composition as may be prescribed by the proclamation under which the coins are made: Coinage Act 1971 s 6(2) (amended by the Currency Act 1983 s 1(6)).

3 Coinage Act 1971 s 6(3) (amended by SI 2007/3224). As to weights and measures generally see **WEIGHTS AND MEASURES**.

4 I.e. the standard weights for coins.

5 See the Coinage Act 1971 s 7.

## **UPDATE**

### **1286 Standards**

TEXT AND NOTE 3--Coinage Act 1971 s 6(3) amended: SI 2009/2748.

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## **(C) THE TRIAL OF THE PYX**

### **1287. Trial.**

For the purpose of ascertaining that coins issued from the Mint have been coined in accordance with the Coinage Act 1971, a trial of the pyx<sup>1</sup> must be held at least once in every year in which coins have been issued<sup>2</sup>. Her Majesty may from time to time by Order in Council make provisions with respect to the trial of the pyx and all matters incidental to it<sup>3</sup>, and in particular with respect to:

- 74 (1) the time and place of the trial<sup>4</sup>;

- 75 (2) setting apart out of the coins issued by the Mint certain coins for the trial<sup>5</sup>;
- 76 (3) summoning a jury of not less than six competent freemen of the Mystery of Goldsmiths of the City of London or other competent persons<sup>6</sup>;
- 77 (4) the attendance at the trial of the jury and the proper officers of the Treasury, the Department for Innovation, Universities and Skills and the Mint, and the production of the coins, the standard trial plates and the standard weights<sup>7</sup>;
- 78 (5) the proceedings at and the conduct of the trial, including the nomination of a person to preside and the method of examining the coins<sup>8</sup>;
- 79 (6) the recording and publication of the verdict, the custody of the record and any proceedings to be taken in consequence of the verdict<sup>9</sup>.

An Order in Council made under this power may be revoked or amended by a subsequent Order in Council<sup>10</sup>.

1 The pyx (from the Greek 'pyxis', meaning a box or container) is the name given to the chest in which the sample coins were deposited for the purpose of trying the issue whether the coins made by the Mint were of the required standard. As to the Mint see PARA 1281.

2 Coinage Act 1971 s 8(1).

3 See the Coinage Act 1971 s 8(2). As to orders made under this power see PARA 1288.

4 Coinage Act 1971 s 8(2)(a).

5 Coinage Act 1971 s 8(2)(b).

6 Coinage Act 1971 s 8(2)(c). As to the Mystery of Goldsmiths of the City of London see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1311.

7 Coinage Act 1971 s 8(2)(d) (amended by SI 2007/3224). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the standard trial plates and the standard weights see PARA 1286.

8 Coinage Act 1971 s 8(2)(e).

9 Coinage Act 1971 s 8(2)(f).

10 Coinage Act 1971 s 8(3).

## **UPDATE**

### **1287 Trial**

TEXT AND NOTE 7--Coinage Act 1971 s 8(2)(d) amended: SI 2009/2748.

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### **1288. Procedure.**

The rules and procedure to be observed at the trial of the pyx<sup>1</sup> are regulated by Orders in Council<sup>2</sup>, under which at least once every year a warrant, in the form provided, is issued by the Commissioners of the Treasury<sup>3</sup>, signed by any two or more of them, appointing a day for the



trial to be held at the Goldsmiths' Hall in the City of London, or, if that place is not available, then at such other place as the commissioners think fit<sup>4</sup>. The warrant is delivered to the Queen's Remembrancer, who presides at the trial<sup>5</sup>.

Notice of the time appointed for the trial must be given by the Treasury to the proper officers of the Department for Innovation, Universities and Skills (requiring them to produce the standard trial plates and weights and all other things in their possession usually produced at the trial of the pyx)<sup>6</sup>, to the deputy master of the Mint<sup>7</sup>, and to any other persons whose presence is thought necessary<sup>8</sup>.

1 See PARA 1287.

2 See the Trial of the Pyx Order 1998, SI 1998/1764 (amended by SI 2005/254).

3 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 4(1), (3), Sch 1 (amended by SI 2005/254).

5 Trial of the Pyx Order 1998, SI 1998/1764, arts 4(2), 5(1). The Senior Master of the Supreme Court is Queen's Remembrancer. As to the Queen's Remembrancer see **COURTS** vol 10 (Reissue) PARA 654. If the Queen's Remembrancer is unable to attend the trial, his place is to be taken by a master of the Queen's Bench Division: art 5(2). The trial may be adjourned by the Queen's Remembrancer or master from time to time and from place to place: art 5(3).

6 Trial of the Pyx Order 1998, SI 1998/1764, art 4(4) (amended by SI 2007/3224). As to the standard trial plates and the standard weights see PARA 1286.

7 As to the Mint see PARA 1281.

8 Trial of the Pyx Order 1998, SI 1998/1764, art 4(5).

## **UPDATE**

### **1288 Procedure**

NOTE 6--SI 1998/1764 art 4(4) further amended: SI 2009/2748.

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### **1289. Jury.**

The jury for the trial of the pyx<sup>1</sup> is summoned by precept issued by the Commissioners of the Treasury<sup>2</sup> to the prime warden and wardens of the Goldsmiths' Company<sup>3</sup> informing them of the time appointed for the trial and requesting them to summon a jury of not less than six of competent freemen of the Goldsmiths' Company, or of other competent persons, to attend at the trial as jurymen<sup>4</sup>.

The oath<sup>5</sup> is administered to the jury by the Queen's Remembrancer<sup>6</sup>.

1 See PARA 1287 note 1.

2 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 As to the Goldsmiths' Company see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1311.

4 See the Trial of the Pyx Order 1998, SI 1998/1764, art 4(6). The jury is not entitled to any payment: see the Juries Act 1974 s 19(6); and **JURIES** vol 61 (2010) PARA 854.

5 See the Trial of the Pyx Order 1998, SI 1998/1764, art 5(1), Sch 2 (amended by SI 2005/254).

6 Trial of the Pyx Order 1998, SI 1998/1764, art 5(1), Sch 2 (as amended: see note 5). As to the Queen's Remembrancer see **COURTS** vol 10 (Reissue) PARA 654.

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## **1290. Selection and trial of coins.**

The deputy master of the Mint must cause a minimum number of coins to be randomly selected and set apart with a view to the trial of the pyx<sup>1</sup>. One coin must be set apart out of every 2,000 gold coins ready for issue<sup>2</sup>, one out of every 150 platinum coins<sup>3</sup>, one out of every 150 silver Maundy coins<sup>4</sup>, one out of every 3,000 silver coins<sup>5</sup>, one out of every 3,000 gold-plated silver coins<sup>6</sup>, one out of every 5,000 cupro-nickel coins of a denomination of more than 10 pence<sup>7</sup>, one out of every 20,000 cupro-nickel coins of 10 pence or less<sup>8</sup> (provided that the total number of cupro-nickel coins subject to trial is greater than 250 million per year; if less than 250 million, one coin out of every 5,000 irrespective of denomination)<sup>9</sup>, one out of every 5,000 nickel-brass coins<sup>10</sup>, and one out of every 5,000 bimetallic coins<sup>11</sup>. However, the deputy master of the Mint must ensure that of the coins ready for issue not less than ten coins of each denomination (other than silver Maundy coins or platinum coins) and, in the case of silver Maundy coins or platinum coins, not less than ten such coins, are to be selected at random and set apart, irrespective of the number of such coins that are ready for issue<sup>12</sup>.

The coins set apart must be sealed up in separate packets at the Mint before being taken to the trial<sup>13</sup>. The jury must ascertain the number of coins in each packet produced to it and check that that number corresponds with the numbers represented by the officers of the Mint<sup>14</sup>.

1 See the Trial of the Pyx Order 1998, SI 1998/1764, art 3(1). See PARA 1287 note 1. As to the Mint see PARA 1281.

2 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(a). 'Coins ready for issue' means current coins which are held by the Mint for the purpose of being put into circulation or have been issued to banks for that purpose, and includes silver Maundy coins: art 2(1).

3 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(aa) (added by SI 2005/254).

4 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(b). 'Maundy coins' means coins of the Queen's Maundy money: art 2(1). As to the Queen's Maundy money see PARA 1285.

5 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(c).

6 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(d). 'Gold-plated silver coin' means a silver coin plated wholly or partly with gold: art 2(1).

7 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(e)(i).

8 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(e)(ii).

- 9 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(e) proviso.
- 10 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(f).
- 11 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1)(g). 'Bimetallic coin' means a coin with joined inner and outer sections, one section being made of cupro-nickel and the other of nickel-brass: art 2(1).
- 12 Trial of the Pyx Order 1998, SI 1998/1764, art 3(1) proviso (amended by SI 2005/254).
- 13 See the Trial of the Pyx Order 1998, SI 1998/1764, art 3(2) (amended by SI 2005/254).
- 14 Trial of the Pyx Order 1998, SI 1998/1764, art 6. As to the jury see PARA 1289.

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### **1291. Trial of gold coins.**

For the purpose of the trial of the gold coins, the jury must take out from each packet of gold coins<sup>1</sup> as many coins as it thinks necessary, and weigh them in bulk so as to ascertain whether they are on the whole within the permitted variation from the standard weight<sup>2</sup>. It must then group them by type and melt them into separate ingots for each type of gold coin and assay each ingot, comparing it with the standard trial plates of gold so as to ascertain whether the metal of the ingot is within the permitted variation from the standard fineness<sup>3</sup>. The residue of the coins remaining in the packets must then be weighed in bulk so as to ascertain whether they are on the whole within the permitted variation as to weight<sup>4</sup>, and then the jury must take out of the residue as many coins as it thinks fit and weigh and assay them separately<sup>5</sup>.

1 As to the selection of coins and the sealing of them into packets see PARA 1290. As to the jury see PARA 1289.

2 See the Trial of the Pyx Order 1998, SI 1998/1764, art 7(a). As to the permitted variations in weight and fineness see the Coinage Act 1971 s 1(2), (3), (5)-(7), Sch 1; and PARAS 1284-1285.

3 See the Trial of the Pyx Order 1998, SI 1998/1764, art 7(b).

4 Trial of the Pyx Order 1998, SI 1998/1764, art 7(c).

5 Trial of the Pyx Order 1998, SI 1998/1764, art 7(d).

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### **1292. Trial of platinum coins.**

For the purpose of the trial of the platinum coins, the jury must take out all the coins from the packets of platinum coins<sup>1</sup> and:

- 80 (1) weigh the coins in bulk so as to ascertain whether they are on the whole within the permitted variation from the standard weight<sup>2</sup>; and

- 81 (2) after weighing the coins, group them by type and assay such number of coins as it thinks fit, comparing them with the standard trial plate of platinum, so as to ascertain whether the metal of the coins of each type is on the whole within the permitted variation from the standard composition<sup>3</sup>.

1 As to the selection of coins and the sealing of them into packets see PARA 1290. As to the jury see PARA 1289.

2 Trial of the Pyx Order 1998, SI 1998/1764, art 7A(a) (art 7A added by SI 2005/254). As to the permitted variations in weight and fineness see the Coinage Act 1971 s 1(2), (3), (5)-(7), Sch 1; and PARAS 1284-1285.

3 Trial of the Pyx Order 1998, SI 1998/1764, art 7A(b) (as added: see note 2). As to the standard trial plates see PARA 1286.

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### **1293. Trial of silver Maundy coins.**

For the purpose of the trial of silver Maundy coins<sup>1</sup>, the jury must take out all the coins from the packets of silver coins<sup>2</sup> and weigh them in bulk so as to ascertain whether they are on the whole within the permitted variation from the standard weight<sup>3</sup>. It must then assay such number of coins as it thinks fit, comparing them with the standard trial plates of silver, so as to ascertain whether the metal of the coins is on the whole within the permitted variation from the standard fineness<sup>4</sup>.

1 As to the meaning of 'Maundy coins' see PARA 1290 note 4.

2 As to the selection of coins and the sealing of them into packets see PARA 1290. As to the jury see PARA 1289.

3 See the Trial of the Pyx Order 1998, SI 1998/1764, art 8(a). As to the permitted variations in weight and fineness see the Coinage Act 1971 s 1(2), (3), (5)-(7), Sch 1; and PARAS 1284-1285.

4 See the Trial of the Pyx Order 1998, SI 1998/1764, art 8(b). As to the standard trial plates see PARA 1286.

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### **1294. Trial of silver coins other than Maundy coins, cupro-nickel coins, nickel-brass coins, gold-plated silver coins and bimetallic coins.**

For the purpose of the trial of the silver coins that are not Maundy coins<sup>1</sup> and cupro-nickel coins, the jury must ascertain whether or not all the coins in the packets of silver coins that are not Maundy coins and cupro-nickel coins weigh more than 500 g, and whether or not the coins of each denomination in the packets weigh more than 1 kg<sup>2</sup>.

If the coins of any denomination weigh in all more than 1 kg, the jury must take from each packet as many coins of that denomination as it thinks fit, group them into lots weighing not less than 980 g nor more than 1 kg each and weigh each lot in bulk so as to ascertain whether the coins in it are on the whole within the permitted variation from the standard weight<sup>3</sup>. The jury must weigh in bulk the residue of the coins remaining in the packets, so as to ascertain whether they are on the whole within the permitted variation<sup>4</sup>. If the coins of any denomination weigh in all not more than 1 kg, the jury must weigh all of them in bulk so as to ascertain whether they are on the whole within the permitted variation<sup>5</sup>. If the coins weigh in all more than 500 g, the jury must assay such number of coins as it thinks fit, not weighing less in all than 500 g; if they weigh less than 500 g, the jury must assay all of them<sup>6</sup>.

In assaying the coins, the jury must compare them with the standard plate of silver (in the case of silver coins other than Maundy coins) and with the standard plates of copper and nickel (in the case of cupro-nickel coins) so as to ascertain whether the metal of the coins is on the whole within the permitted variation from the standard composition<sup>7</sup>.

If the number of cupro-nickel coins of any denomination is more than ten, the jury must measure the diameter of not less than ten and not more than twenty coins of that denomination; but if the number is not more than ten the jury must measure the diameter of all of them<sup>8</sup>. In measuring the diameter of the coins of any denomination the jury must ascertain whether their average diameter is within the permitted variation from the standard diameter<sup>9</sup>.

Corresponding provisions have been made in respect of the trial of gold-plated silver coins<sup>10</sup>, nickel-brass coins<sup>11</sup> and bimetallic coins<sup>12</sup>.

1 As to the meaning of 'Maundy coins' see PARA 1290 note 4.

2 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 9(1), 11(1). As to the selection of coins and the sealing of them into packets see PARA 1290. As to the jury see PARA 1289.

3 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 9(2)(a), 11(2)(a). As to the permitted variations in weight see the Coinage Act 1971 s 1(4)-(7); and PARA 1284.

4 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 9(2)(b), 11(2)(b).

5 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 9(3), 11(3).

6 See the Trial of the Pyx Order 1998, SI 1998/1764, arts 9(4), (5), 11(4), (5).

7 Trial of the Pyx Order 1998, SI 1998/1764, arts 9(6), 11(6) (art 9(6) amended by SI 2005/254). As to the permitted variations in composition see the Coinage Act 1971 s 1(4)-(7); and PARA 1284. As to the standard plates see PARA 1286.

8 Trial of the Pyx Order 1998, SI 1998/1764, art 11(7), (8).

9 the Trial of the Pyx Order 1998, SI 1998/1764, art 11(9). As to the permitted variations in diameter see the Coinage Act 1971 s 1(4)-(7); and PARA 1284.

10 See the Trial of the Pyx Order 1998, SI 1998/1764, art 10 (amended by SI 2005/254). As to the meaning of 'gold-plated silver coin' see PARA 1290 note 6.

11 See the Trial of the Pyx Order 1998, SI 1998/1764, art 12.

12 See the Trial of the Pyx Order 1998, SI 1998/1764, art 13. As to the meaning of 'bimetallic coin' see PARA 1290 note 11.

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### 1295. Findings of the jury.

By its verdict the jury<sup>1</sup> must find:

- 82 (1) whether the metal of the ingot for each type of gold coin is within the permitted variation from the standard fineness<sup>2</sup>;
- 83 (2) whether each group of gold coins weighed in bulk is on the whole within the permitted variation from the standard weight<sup>3</sup>;
- 84 (3) whether each of the gold coins separately weighed and assayed is within the permitted variations as to weight and fineness<sup>4</sup>;
- 85 (4) whether the platinum coins weighed and those assayed are on the whole respectively within the permitted variations from the standard weight and composition<sup>5</sup>;
- 86 (5) whether the silver Maundy coins weighed and those assayed are on the whole respectively within the permitted variations from the standard weight and fineness<sup>6</sup>;
- 87 (6) whether each group of silver coins other than Maundy coins which has been weighed in bulk is on the whole within the permitted variation from the standard weight<sup>7</sup>;
- 88 (7) whether the silver coins other than Maundy coins which have been assayed are on the whole within the permitted variations from the standard composition<sup>8</sup>;
- 89 (8) whether each group of gold-plated silver coins weighed in bulk is on the whole within the permitted variation from the standard weight<sup>9</sup>;
- 90 (9) whether the gold-plated silver coins assayed are on the whole within the permitted variation from the standard composition, and, in relation to the gold plating, within the permitted variation from the standard weight<sup>10</sup>;
- 91 (10) whether each group of cupro-nickel coins weighed in bulk is on the whole within the permitted variation from the standard weight<sup>11</sup>;
- 92 (11) whether the cupro-nickel coins assayed are on the whole within the permitted variation from the standard composition<sup>12</sup>;
- 93 (12) whether the average diameter of the cupro-nickel coins measured is within the permitted variations from the standard diameter<sup>13</sup>;
- 94 (13) whether each group of nickel-brass coins weighed in bulk is on the whole within the permitted variation from the standard weight<sup>14</sup>;
- 95 (14) whether the nickel-brass coins assayed are on the whole within the permitted variation from the standard composition<sup>15</sup>;
- 96 (15) whether the average diameter of the nickel-brass coins measured is within the permitted variation from the standard diameter<sup>16</sup>;
- 97 (16) whether each group of bimetallic coins weighed in bulk is on the whole within the permitted variation from the standard weight<sup>17</sup>;
- 98 (17) whether the bimetallic coins assayed are on the whole within the permitted variations from the standard composition in relation to their inner and outer sections<sup>18</sup>; and
- 99 (18) whether the average diameter of the bimetallic coins measured is on the whole within the permitted variation from the standard diameter<sup>19</sup>.

If the jury finds that in any case there is a variation from the standard weight or fineness or composition or diameter, it must specify in its verdict the amount of the variation<sup>20</sup>. The verdict of the jury must be in writing and signed by each of the jurymen<sup>21</sup>. It is to be handed to the Queen's Remembrancer who authenticates it with his signature, deposits it among the records

of his office and delivers a copy of it to the Treasury<sup>22</sup>. The Queen's Remembrancer must direct that the verdict, or those parts of the verdict which he considers appropriate, be read aloud in his presence<sup>23</sup>. The Treasury must deliver one copy of the verdict to the Department for Innovation, Universities and Skills, and another copy to the deputy master of the Mint<sup>24</sup>, and must publish the verdict in such manner as the Treasury considers appropriate<sup>25</sup>.

1 As to the jury see PARA 1289.

2 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(a). As to the permitted variations in fineness and weight see the Coinage Act 1971 s 1(2), (3), Sch 1; and PARA 1284.

3 See the Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(b).

4 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(c).

5 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(cc) (added by SI 2005/254).

6 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(d). As to the meaning of 'Maundy coins' see PARA 1290 note 4.

7 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(e).

8 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(f) (amended by SI 2005/254).

9 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(g).

10 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(h) (amended by SI 2005/254).

11 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(i).

12 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(j).

13 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(k).

14 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(l).

15 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(m).

16 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(n).

17 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(o).

18 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(p).

19 Trial of the Pyx Order 1998, SI 1998/1764, art 14(1)(q). As to the permitted variations in diameter see the Coinage Act 1971 s 1(4); and PARA 1284.

20 See the Trial of the Pyx Order 1998, SI 1998/1764, art 14(2).

21 Trial of the Pyx Order 1998, SI 1998/1764, art 15(1).

22 Trial of the Pyx Order 1998, SI 1998/1764, art 15(1). As to the Queen's Remembrancer see PARA 1288 note 5; and **COURTS** vol 10 (Reissue) PARA 654. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

23 Trial of the Pyx Order 1998, SI 1998/1764, art 15(1).

24 As to the Mint see PARA 1281.

25 Trial of the Pyx Order 1998, SI 1998/1764, art 15(2) (amended by SI 2005/254; SI 2007/3224).

## UPDATE

### 1295 Findings of the jury

NOTE 25--SI 1998/1764 art 4(4) further amended: SI 2009/2748.

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### **1296. Coins not to be melted down or broken up without licence.**

Coins which are current in the United Kingdom<sup>1</sup> or which, having been current there, have ceased to be so at any time after 16 May 1969, must not be melted down or broken up without a licence from the Treasury<sup>2</sup>. Any person contravening this is liable on conviction to a penalty<sup>3</sup>. If any condition attached to such a licence<sup>4</sup> is contravened or not complied with, the person to whom the licence was granted is liable on conviction to a penalty unless he proves that the contravention or non-compliance occurred without his consent or connivance and that he exercised all due diligence to prevent it<sup>5</sup>. Whether or not it imposes any other punishment, the court before which a person is convicted of an offence may order the articles in respect of which the offence was committed to be forfeited to the Crown<sup>6</sup>. Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly<sup>7</sup>.

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Coinage Act 1971 s 10(1). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Coinage Act 1971 s 10(2) (amended by the Magistrates' Courts Act 1980 s 32(2)). The penalty on summary conviction is a fine not exceeding the prescribed sum; and the penalty on conviction on indictment is a fine or imprisonment for a term not exceeding two years, or both: see the Coinage Act 1971 s 10(2) (as so amended). As to the prescribed sum see PARA 56 note 24.

4 Ie granted under the Coinage Act 1971 s 10(1).

5 Coinage Act 1971 s 10(3). The penalty on summary conviction is a fine not exceeding level 5 on the standard scale: see s 10(3). As to the standard scale see PARA 27 note 21.

6 Coinage Act 1971 s 10(4).

7 Coinage Act 1971 s 10(5).

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## **C. BANK NOTES**

### **1297. Bank notes.**



The Bank of England has the exclusive right of note issue in England and Wales<sup>1</sup>. The Bank may issue bank notes of such denominations as the Treasury may approve and no others<sup>2</sup>.

1 See the Bank Charter Act 1844 s 11; and PARA 796. Only Bank of England notes are legal tender in England and Wales; notes that are not legal tender may, however, be accepted as a means of payment. As to legal money see also PARA 1278. As to bank notes see also PARA 796 et seq. As to the Bank of England see PARA 793 et seq.

2 See the Currency and Bank Notes Act 1954 s 1(1); and PARA 796. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

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## ***D. COUNTERFEIT COINS AND NOTES***

### **1298. Offences relating to counterfeit coins and notes.**

There are various offences in relation to the making, passing, tendering and delivering of a counterfeit of a currency note or of a protected coin<sup>1</sup>; and the importation, landing, unloading or exportation<sup>2</sup> of a counterfeit of a currency note or of a protected coin without the consent of the Treasury is prohibited<sup>3</sup>.

1 As to counterfeiting offences, and the penalties for them, see the Forgery and Counterfeiting Act 1981 ss 14-19, 22; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 544 et seq. As to forgery generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 346 et seq.

'Currency note' means: (1) any note which has been lawfully issued in England and Wales, Scotland, Northern Ireland, any of the Channel Islands, the Isle of Man or the Republic of Ireland and is or has been customarily used as money in the country where it was issued and which is payable on demand; or (2) any note which has been lawfully issued in any other country and is customarily used as money in that country: s 27(1).

'Protected coin' means any coin which is customarily used as money in any country or is specified in an order made by the Treasury: s 27(1). See the Forgery and Counterfeiting (Protected Coins) Order 1981, SI 1981/1505, specifying sovereign, half-sovereign, Krugerrand, any coin denominated as a fraction of a Krugerrand and Maria-Theresia thaler bearing the date 1780. See also the Forgery and Counterfeiting (Protected Coins) Order 1999, SI 1999/2095, specifying euro coins. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

A thing is a counterfeit of a currency note or protected coin if it is not a currency note or protected coin but resembles a currency note or protected coin (whether on one side or both) to such an extent that it is reasonably capable of passing for a currency note or protected coin of that description, or if it is a currency note or protected coin which has been so altered that it is reasonably capable of passing for a currency note or protected coin of some other description: Forgery and Counterfeiting Act 1981 s 28(1).

2 A counterfeit of a currency note or protected coin which is removed from the United Kingdom to the Isle of Man is deemed to be exported for the purposes of this provision: Forgery and Counterfeiting Act 1981 s 21(2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 See the Forgery and Counterfeiting Act 1981 ss 20, 21; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 551. As to penalties for importation contrary to this prohibition see the Customs and Excise Management Act 1979 s 50; and **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 994. As to penalties for exportation contrary to this prohibition see the Customs and Excise Management Act 1979 s 68; and **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 1029.

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## **E. FOREIGN MONEY OBLIGATIONS**

### **1299. Construction of references to foreign currency and to gold.**

Where a debt is expressed in terms of a foreign currency, the reference to that currency may indicate the mode in which the debt is to be discharged or the means by which the amount of the debt is to be measured or both<sup>1</sup>.

Where English law is the proper law of the contract<sup>2</sup> under which a debt is payable, any reference in the contract to gold or gold coin will prima facie be construed as an indication of the means by which the amount of the debt is to be measured<sup>3</sup>, and not as a requirement to make actual payment in gold<sup>4</sup>; but in some cases a reference to gold in connection with a particular currency may be no more than part of the description of that currency<sup>5</sup>.

1 See *Feist v Société Intercommunale Belge d'Électricité* [1934] AC 161 at 172, HL, per Lord Russell of Killowen; *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 at 145-146, HL, per Lord Tomlin; *Bonython v Commonwealth of Australia* [1951] AC 201 at 216-217, PC; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL. See also PARA 1301. Foreign currencies are now largely treated on the same footing as sterling: see *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 All ER 728, [1997] 1 WLR 632, CA.

2 As to the determination of the law of the contract see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 349 et seq. Where the law of a foreign country is the proper law, the legislation of that country may invalidate a gold clause: see *R v International Trustee for the Protection of Bondholders AG* [1937] AC 500, [1937] 2 All ER 164, HL.

3 *Feist v Société Intercommunale Belge d'Électricité* [1934] AC 161, HL (bonds issued by Belgian company for payment 'in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on 1st September 1928'); *Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat* [1943] AC 507, [1943] 2 All ER 406, PC (promissory note expressed in 'Turkish gold pounds'); *New Brunswick Rly Co v British and French Trust Corp Ltd* [1939] AC 1, [1938] 4 All ER 747, HL (bonds issued by New Brunswick company repayable in 'gold coin of Great Britain of the present standard of weight and fineness').

4 See PARA 1298. See also *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 at 144, HL, per Lord Tomlin; *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127 at 159-160, [1956] 2 All ER 33 at 45-46, CA, per Morris LJ.

5 *St Pierre v South American Stores (Gath and Chaves) Ltd and Chilean Stores (Gath and Chaves) Ltd* [1937] 3 All ER 349, CA; *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127, [1956] 2 All ER 33, CA, where a covenant in English law to pay rent 'in gold sterling or in Bank of England notes to the equivalent value in gold sterling' was held merely to describe what was legal tender; *Campos v Kentucky and Indiana Terminal Railroad Co* [1962] 2 Lloyd's Rep 459.

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### **1300. Measure of liability.**

Where on the proper construction of the contract a particular currency, whether English<sup>1</sup> or foreign<sup>2</sup>, is referred to as providing the unit of account by reference to which the amount of the debt is to be measured, the measurement is to be made by reference to whatever at the time of payment is, according to the law of the country whose currency is referred to<sup>3</sup>, legal currency of the same nominal amount, regardless of any rise<sup>4</sup> or fall<sup>5</sup> in the real value or exchange value of the currency<sup>6</sup>. However, the parties to a contract may agree to value a debt by reference to an index so that the liability reflects the real value and not the nominal value of the currency<sup>7</sup>. If the units referred to are common to the currency of several countries (for example, pounds<sup>8</sup>, dollars<sup>9</sup> or francs<sup>10</sup>), including the country where payment is to be made, the contract will generally be construed as referring to the currency of the place of payment<sup>11</sup>, although this will not necessarily be so if there are other circumstances by reference to which the ambiguity can be resolved<sup>12</sup>.

1 *Case of Mixed Money* (1604) Dav Ir 18, PC (Ir).

2 *Re Chesterman's Trusts, Mott v Browning* [1923] 2 Ch 466, CA. As to foreign currency liabilities see PARA 1302.

3 See *Société des Hôtels le Touquet Paris-Plage v Cumming* [1922] 1 KB 451, CA; *R v International Trustee for Protection of Bondholders AG* [1937] AC 500, [1937] 2 All ER 164, HL; and the cases cited in note 2.

4 See *Addison v Brown* [1954] 2 All ER 213 at 217, [1954] 1 WLR 779 at 785 per Streatfield J; *Re United Railways of Havana and Regla Warehouses Ltd, Tomkinson v First Pennsylvania Banking and Trust Co* [1961] AC 1007, [1960] 2 All ER 332, HL.

5 See *Re Chesterman's Trusts, Mott v Browning* [1923] 2 Ch 466, CA.

6 See *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127 at 144, [1956] 2 All ER 33 at 36, CA, per Denning LJ; *Marrache v Ashton* [1943] AC 311, [1943] 1 All ER 276, PC; *Bonython v Commonwealth of Australia* [1951] AC 201, PC; *Lively Ltd v City of Munich* [1976] 3 All ER 851, [1976] 1 WLR 1004; and the cases cited in notes 4-8.

7 *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489 (dicta of Denning LJ in *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127 at 145, [1956] 2 All ER 33 at 36, CA, not followed).

8 *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122, HL (dividends payable in Australia by English company to English shareholders declared in pounds; held to mean Australian pounds); *De Bueger v J Ballantyne & Co Ltd* [1938] AC 452, [1938] 1 All ER 701, PC (contract made in England for payment in New Zealand by New Zealand company of salary expressed in pounds sterling; unit of account held to be British pounds); but cf *Bonython v Commonwealth of Australia* [1951] AC 201, PC (Australian government stock redeemable in England or in Australia expressed in pounds sterling; unit of account held to be Australian pounds); *National Bank of Australasia Ltd v Scottish Union and National Insurance Co Ltd* [1952] AC 493, PC (stock issued by Australian bank registered partly in Australia, partly in England, expressed in pounds; unit of account held to be Australian pounds); *National Mutual Life Association of Australasia Ltd v A-G for New Zealand* [1956] AC 369, [1956] 1 All ER 721, PC (New Zealand government stock and debentures expressed in pounds payable in Australia 'free of exchange'; these words held to show unit of account to be same as unit of payment, ie Australian pounds).

9 See *Bain v Field & Co Fruit Merchants Ltd* (1920) 5 Ll L Rep 16, CA.

10 *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 at 156, HL, per Lord Wright.

11 *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122 at 156, HL, per Lord Wright; *Auckland Corp'n v Alliance Assurance Co Ltd* [1937] AC 587, [1937] 1 All ER 645, PC.

12 See the cases cited in note 8.

### 1301. Mode of payment.

Where English law is the proper law of the contract under which a debt is payable<sup>1</sup>, the mode in which the debt is to be discharged (in the absence of express provision of another mode) is by payment in whatever at the time and place of payment is, according to the law of that place<sup>2</sup>, legal currency and legal tender<sup>3</sup>.

1 As to the determination of the law of the contract see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 349 et seq.

2 *British Bank for Foreign Trade Ltd v Russian Commercial and Industrial Bank* (1921) 38 TLR 65 (Russian roubles); *Anderson v Equitable Assurance Society of United States* (1926) 134 LT 557, CA (German marks); *Pymont Ltd v Schott* [1939] AC 145, [1938] 4 All ER 713, PC (Spanish pesetas); and see *Marrache v Ashton* [1943] AC 311, [1943] 1 All ER 276, PC.

3 *Ottoman Bank of Nicosia v Chakarian* [1938] AC 260, [1937] 4 All ER 570, PC; *Ottoman Bank, Haifa v Clement Menni* [1939] 4 All ER 9, PC; cf *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA, where it was held that the vendors had waived their right to payment in Kenyan currency. See also *Schorsch Meier GmbH v Hennin* [1975] QB 416, [1975] 1 All ER 152, CA, where it was held that where the currency of the contract was a foreign currency the English courts had power to give judgment in that currency. As to legal tender in England see PARAS 1278-1279; and PARAS 796-797. As to payment by cheque see PARA 832 et seq. As to bank transfer see PARA 906.

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### 1302. Foreign currency liabilities.

Where a person brings a claim for a sum of money due under a contract he is entitled to claim<sup>1</sup> and obtain judgment for the amount of the debt expressed in the currency of a foreign country if the money of account and payment was of that country<sup>2</sup>. Where a charterparty provides for demurrage to be calculated in one currency, in the absence of any contrary provision it is a reasonable inference that it is to be paid in that currency<sup>3</sup>. The power to give judgment in a foreign currency is not confined to contracts whose proper law is the law of a foreign country<sup>4</sup>. The court also has power to award damages for negligence in a foreign currency where appropriate<sup>5</sup>.

If an obligation in the currency of a foreign country, although sued upon in England, is payable in that country, payment in that country in the currency which will discharge the obligation there discharges the obligation for the purposes of the English claim<sup>6</sup>.

1 As to pleading claims in foreign currency see *Practice Direction* [1976] 1 All ER 669, [1976] 1 WLR 83; *Practice Direction* [1977] 1 All ER 544, [1977] 1 WLR 197.

2 *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 3 All ER 801, HL, overruling *Re United Railways of Havana and Regla Warehouses Ltd*, *Tomkinson v First Pennsylvania Banking and Trust Co* [1961] AC 1007, [1960] 2 All ER 332, HL; and see *The Despina R* [1978] QB 396 at 431-432, sub nom *Owners of the mv Eleftherotria v Owners of the mv Despina R*, *The Despina R* [1977] 3 All ER 874 at 897, CA, per Stephenson LJ (affd [1979] AC 685, [1979] 1 All ER 421, HL), where damages for breach of contract were awarded in a foreign currency. As to the appropriate currency in which a claimant's loss should be assessed see *A-G of the Republic of Ghana and Ghana National Petroleum Corp'n v Texaco Overseas Tankships Ltd*, *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473. See further *Schorsch Meier GmbH v Hennin* [1975] QB 416, [1975] 1 All ER 152, CA; and for comments on this case and the future approach of the courts see *Miliangos v George Frank (Textiles) Ltd* above at 465 and at 810 per Lord Wilberforce. See also *Jean Kraut AG v Albany Fabrics Ltd* [1977] QB 182, [1977] 2 All

ER 116; *Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA, The Folias* [1979] QB 491, [1977] 3 All ER 945. As to arbitration see *Jugoslavenska Oceanska Plovidba v Castle Instrument Co Inc* [1974] QB 292, [1973] 3 All ER 498, CA.

As to awards made in a foreign currency see *Practice Direction--Judgments and Orders* PD 40B para 10; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1137. As to judgment, enforcement and interest on a judgment debt in a foreign currency see *Practice Direction* [1976] 1 All ER 669, [1976] 1 WLR 83; *Practice Direction* [1977] 1 All ER 544, [1977] 1 WLR 197. As to the enforcement of foreign judgments see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 139 et seq. As to judgments see further **CIVIL PROCEDURE** vol 12 (2009) PARA 1136 et seq.

3 *The Bellami* [1979] 1 All ER 380, [1979] 1 WLR 59, CA. The rate of exchange applicable to demurrage is that prevailing on the date of the payment: see *The Bellami*. See also *President of India v Lips Maritime Corpn, The Lips* [1985] 2 Lloyd's Rep 180 (affd sub nom *Lips Maritime Corpn v President of India* [1988] AC 395, [1987] 3 All ER 110, HL), where the rate of exchange was that prevailing at the bill of lading date.

4 *The Maratha Envoy* [1977] QB 324, [1977] 2 All ER 41, CA, where the proper law of the contract was English law; *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270, [1976] 3 All ER 900.

5 See *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 468, [1975] 3 All ER 801 at 813, HL, per Lord Wilberforce. This was subsequently affirmed by one of the leading cases on foreign currency damages: see *Owners of the mv Eleftherotria v Owners of the mv Despina R, The Despina R* [1979] AC 685, [1979] 1 All ER 421, HL.

6 *Société des Hotels le Touquet Paris-Plage v Cummings* [1922] 1 KB 451, CA; *Adelaide Electric Supply Co Ltd v Prudential Assurance Co Ltd* [1934] AC 122, HL; cf *The Baarn (No 2)* [1934] P 171, CA.

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## (ii) Interest on Money

### A. THE RIGHT TO INTEREST

#### 1303. Interest in general.

Interest is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another<sup>1</sup>. Interest accrues from day to day even if payable only at intervals<sup>2</sup>, and is, therefore, apportionable in respect of time between persons entitled in succession to the principal<sup>3</sup>.

1 See *Re Farm Security Act 1944* [1947] SCR 394 at 411. See also *Dunn Trust Ltd v Feetham* [1936] 1 KB 22, CA; *Bennett v Ogston (Inspector of Taxes)* (1930) 15 TC 374; *Bond v Barrow Haematite Steel Co* [1902] 1 Ch 353; *Riches v Westminster Bank Ltd* [1947] AC 390, [1947] 1 All ER 469, HL. Money paid in lieu of interest is not itself interest: *Tomkins v Tomkins* (1978) Times, 24 May. See also *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, [2002] 1 All ER 97 (contractual term that, if the borrower should default on his repayments, interest would continue to be payable at the contractual rate until any judgment obtained by the bank was discharged; held not to be unfair under the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (now revoked: see the Unfair Terms in Consumer Contracts Regulations 1999/2083)).

2 *Re Rogers' Trusts* (1860) 1 Drew & Sm 338.

3 See **EQUITY** vol 16(2) (Reissue) PARA 456. For the statutory provisions for the apportionment of rents, annuities, dividends and other periodical payments see the Apportionment Act 1870; and **EXECUTORS AND ADMINISTRATORS; LANDLORD AND TENANT; RENTCHARGES AND ANNUITIES; SETTLEMENTS**.

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### 1304. Compound interest.

Compound interest was not usually allowed except where there was an agreement, express or implied<sup>1</sup>, to pay it<sup>2</sup>, or where the debtor had employed the money in trade and had presumably earned it<sup>3</sup>, or unless its allowance was in accordance with a usage of a particular trade or business<sup>4</sup>. However there are now indications that the courts have jurisdiction to award compound interest to a claimant seeking restitution of money paid under mistake when such an award would achieve a just result<sup>5</sup>. This is in line with a recommendation of the Law Commission and with Canadian authority on the matter<sup>6</sup>.

1 *Morgan v Mather* (1792) 2 Ves 15; *Lord Clancarty v Latouche* (1810) 1 Ball & B 420; *Newell v Jones* (1830) 4 C & P 124; cf *Fergusson v Fyffe* (1841) 8 Cl & Fin 121, HL; *Crosskill v Bower*, *Bower v Turner* (1863) 32 Beav 86; *National Bank of Greece SA v Pinios Shipping Co* [1990] 1 AC 637, [1990] 1 All ER 78, HL. As to the charging of interest by a banker on an overdraft see PARA 968.

2 *Fergusson v Fyffe* (1841) 8 Cl & Fin 121, HL; *Boddam v Ryley* (1787) 4 Bro Parl Cas 561, HL; *Ex p Bevan* (1803) 9 Ves 223.

3 *A-G v Alford* (1855) 4 De GM & G 843; *Burdick v Garrick* (1870) 5 Ch App 233.

4 *Bruce v Hunter* (1813) 3 Camp 467; *Eaton v Bell* (1821) 5 B & Ald 34; *Fergusson v Fyffe* (1841) 8 Cl & Fin 121, HL; *Williamson v Williamson* (1869) LR 7 Eq 542; and see *Re Lloyd Edwards*, *Williams v Trench* (1891) 61 LJ Ch 22; *Silkstone and Haigh Moor Coal Co v Edey* [1900] 1 Ch 167.

5 See *Sempre Metals Ltd v IRC* [2007] UKHL 34, [2007] 4 All ER 657, [2007] All ER (D) 294 (Jul).

6 The Law Commission in its report, *Pre-judgment Interest on Debts and Damages* (Law Com No 287; February 2004), recommended that the court should have a discretion to award compound interest. A Canadian decision also points out that a sharp distinction between principal and interest may not be justifiable: see *Bank of America Canada v Mutual Trust Co* [2002] 2 SCR 601, Sup Ct of Canada.

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### 1305. When interest is payable at common law.

At common law interest is payable<sup>1</sup>: (1) where there is an express agreement to pay interest<sup>2</sup>; (2) where an agreement to pay interest can be implied from the course of dealing between the parties<sup>3</sup> or from the nature of the transaction<sup>4</sup> or a custom or usage of the trade or profession concerned<sup>5</sup>; and (3) in certain cases by way of damages for breach of a contract<sup>6</sup>.

Except in the cases mentioned, debts do not carry interest at common law<sup>7</sup>.

1 Generally, a claim for interest must be pleaded: see **DAMAGES** vol 12(1) (Reissue) PARA 849. As to the content of a claim form see CPR 16.2; and **CIVIL PROCEDURE** vol 11 (2009) PARA 585.

2 *Page v Newman* (1829) 9 B & C 378; *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1893] AC 429, HL; *Velchand v Atherton* (1917) 33 TLR 232, CA. See also *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, [2002] 1 All ER 97; and PARA 1303 note 1. As to the payment of

interest under the rules of a building society see PARA 1915. The right to and the rate of interest are governed by the law of the contract: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 22, 365.

3 *Re Marquis of Anglesey, Willmot v Gardner* [1901] 2 Ch 548, CA; *Re WW Duncan & Co* [1905] 1 Ch 307. See also *Bruce v Hunter* (1813) 3 Camp 467; *Calton v Bragg* (1812) 15 East 223; *Denton v Rodie* (1813) 3 Camp 493; *Re Wilcocks, ex p Williams* (1813) 1 Rose 399; *Lawless v Bryce* (1870) IR 5 CL 190; *Great Western Insurance Co of New York v Cunliffe* (1874) 9 Ch App 525, CA; *Nichol v Thompson* (1807) 1 Camp 52n; *Admiralty Comrs v Ropner & Co Ltd* (1917) 86 LJB 1030; and cf *Re Lloyd Edwards, Williams v Trench* (1891) 61 LJ Ch 22.

4 See eg **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 112.

5 See eg *Blaney v Hendricks* (1771) 2 Wm Bl 761 (interest payable on money lent between merchants); cf *Calton v Bragg* (1812) 15 East 223 (no interest payable on a loan); and see also *Eddowes v Hopkins* (1780) 1 Doug KB 376; *Ikin v Bradley* (1818) 2 Moore CP 206, Ex Ch; *Bruce v Hunter* (1813) 3 Camp 467. As to interest payable by the custom of bankers see PARA 968. As to the nature and effect of custom and usage see **CUSTOM AND USAGE**.

6 The courts were formerly reluctant to award interest by way of general damages for breach of an obligation to pay money: see *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1893] AC 429, HL. However, artificialities of this kind have now been swept away by the House of Lords: see *Sempre Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2007] All ER (D) 294 (Jul). See also PARA 1304.

7 *President of India v La Pintada Cia Navegacion SA* [1985] AC 104, [1984] 2 All ER 773, HL; *Wadsworth v Lydall* [1981] 2 All ER 401, [1981] 1 WLR 598, CA; and see *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1893] AC 429, HL; *Re Gosman* (1881) 17 ChD 771, CA; *Hill v South Staffordshire Rly Co* (1874) LR 18 Eq 154; *Rhodes v Rhodes* (1860) John 653; *Frühling v Schroeder* (1835) 2 Bing NC 77; *Foster v Weston* (1830) 4 Moo & P 589; *Page v Newman* (1829) 9 B & C 378; *Higgins v Sargent* (1823) 3 Dow & Ry KB 613; *Shaw v Picton* (1825) 7 Dow & Ry KB 201; *Calton v Bragg* (1812) 15 East 223; *De Bernales v Fuller* (1810) 2 Camp 426; *De Havilland v Bowerbank* (1807) 1 Camp 50; *Walker v Constable* (1798) 1 Bos & P 306. There is no rule that, where the Crown has had the benefit of money from the sale of property seized as prize and the proceeds of sale are released, the successful claimant is entitled to interest (*The Dirigo, The Hallingdal etc* [1919] P 204), although it may be awarded in cases of hardship (*The Kronprinz Gustav Adolf* (1917) 2 P Cas 418 at 423).

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### 1306. Equitable right to interest.

In equity interest may be recovered in certain cases where a particular relationship exists between the creditor and the debtor, such as mortgagor and mortgagee<sup>1</sup>, obligor and obligee on a bond<sup>2</sup>, personal representative and beneficiary<sup>3</sup>, principal and surety<sup>4</sup>, vendor and purchaser<sup>5</sup>, principal and agent<sup>6</sup>, solicitor and client<sup>7</sup>, trustee and beneficiary<sup>8</sup>, pawnbroker and pawnor<sup>9</sup>, or where the debtor is in a fiduciary position to the creditor<sup>10</sup>. Interest is also allowed on pecuniary legacies not paid within a certain time<sup>11</sup>, on the dissolution of a partnership<sup>12</sup>, on the arrears of an annuity where there has been misconduct or improper delay in payment<sup>13</sup>, or in the case of money obtained or retained by fraud<sup>14</sup>. It may also be allowed where the defendant ought to have done something which would have entitled the claimant to interest at common law<sup>15</sup>, or has wrongfully prevented the claimant from doing something which would have so entitled him<sup>16</sup>.

1 See eg *Mendl v Smith* (1943) 112 LJ Ch 279; and **MORTGAGE** vol 77 (2010) PARA 101 et seq.

2 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 93, 96, 112.

3 See **EXECUTORS AND ADMINISTRATORS**.

4 See PARA 1013 et seq.

5 The general rule (which extends to land and other property) is that a vendor is entitled to interest from the time the purchaser takes possession until payment of the purchase price (*International Rly Co v Niagara Parks Commission* [1941] AC 328 at 344-348, [1941] 2 All ER 456 at 463-465, PC; *Birch v Joy* (1852) 3 HL Cas 565); and where the purchaser is entitled to rescind the contract and recover his deposit, he is entitled to interest on the deposit (*Day v Singleton* [1899] 2 Ch 320 at 327, CA). See **SALE OF LAND**. As to the payment of interest in the case of acquisitions under compulsory powers see **COMPULSORY ACQUISITION OF LAND**.

6 See **AGENCY** vol 2 (2008) PARAS 115, 121.

7 *Barclay v Harris and Cross* (1915) 85 LJB 115; and see **LEGAL PROFESSIONS** vol 65 (2008) PARA 755.

8 See *Re Hulkes, Powell v Hulkes* (1886) 33 ChD 552; and **CHARITIES** vol 8 (2010) PARA 450; **TRUSTS** vol 48 (2007 Reissue) PARA 1106.

9 See *Mathew v TM Sutton Ltd* [1994] 4 All ER 793, [1994] 1 WLR 1455; and **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARAS 3, 28.

10 *Burdick v Garrick* (1870) 5 Ch App 233; *Harsant v Blaine, Macdonald & Co* (1887) 56 LJB 511, CA; *Dominion Coal Co Ltd v Maskinonge Steamship Co Ltd* [1922] 2 KB 132; *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA (interest may be awarded under the court's equitable jurisdiction where a person had improperly profited from his fiduciary position). See also *John v James* [1986] STC 352 (deductions for tax not allowed in calculating compound interest payable on unpaid royalties).

11 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 421.

12 *Hugh Stevenson & Sons Ltd v AG für Cartonnagen-Industrie* [1918] AC 239 at 246, 256, HL. As to dissolution of partnerships see **PARTNERSHIP** vol 79 (2008) PARA 174 et seq.

13 See eg *Torre v Browne* (1855) 5 HL Cas 555 at 578-579; and **RENTCHARGES AND ANNUITIES**.

14 *Johnson v R* [1904] AC 817 at 822, PC. See also *Frühling v Schroeder* (1835) 2 Bing NC 77; *Sutton v South Eastern Rly Co* (1865) LR 1 Exch 32. The fraud must be proved in the claim in which the interest is sought to be recovered: *Johnson v R* above.

15 See PARA 1305.

16 *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1892] 1 Ch 120 at 142, CA, per Lindley LJ; on appeal [1893] AC 429, HL, per Lord Watson, approving on this point *Mackintosh v Great Western Rly Co* (1865) 4 Giff 683. See also *Hull and Selby Rly Co v North Eastern Rly Co* (1854) 5 De G M & G 872; *Rhoades v Lord Selsey* (1840) 2 Beav 359; *Barclay v Harris and Cross* (1915) 85 LJB 115. Where a contract has been executed there is, apart from fraud, nothing to attract the court's equitable jurisdiction: *Maine and New Brunswick Electrical Power Co v Hart* [1929] AC 631 at 640, PC.

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### 1307. Interest under statute.

A right to interest is conferred by statute in many cases, as, for example upon the late payment of some commercial debts<sup>1</sup>, in the administration of bankrupt estates<sup>2</sup> and in the liquidation of companies<sup>3</sup>; and, by statute, the court has a general discretion to award interest in claims for debt or damages<sup>4</sup>.

Subject to the rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages<sup>5</sup> simple interest<sup>6</sup> may be included in any sum for which judgment is given, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or where payment is made before judgment, for all or any part of the period between the date when the cause of



action arose and: (1) in the case of any sum paid before judgment, the date of the payment; and (2) in the case of the sum for which judgment is given, the date of judgment<sup>7</sup>. Similarly, in any proceedings tried<sup>8</sup> in any court of record<sup>9</sup> for the recovery of any debt or damages the court may, if it thinks fit<sup>10</sup>, order that there is to be included in the sum for which judgment is given interest at such rate as it thinks fit<sup>11</sup> on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment<sup>12</sup>. This power of the court is exercisable only if a claim for interest is specifically pleaded<sup>13</sup>.

An arbitration tribunal may<sup>14</sup> award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case<sup>15</sup>.

Every judgment debt<sup>16</sup> carries interest at eight per cent per annum from such time as prescribed by rules of court until it is satisfied<sup>17</sup>. The rules of court state that where interest is so payable<sup>18</sup> the interest begins to run from the date that judgment is given unless another rule or a practice direction makes different provision, or unless the court orders otherwise<sup>19</sup>. The court may order that interest is to begin to run from a date before the date that judgment is given<sup>20</sup>.

A contract to pay a debt with interest at a certain rate does not entitle a claimant to levy under his execution more than the statutory rate; the contract must state specifically that any judgment obtained for the recovery of the debt carries interest at a higher rate and that higher rate should form part of the judgment<sup>21</sup>.

Certain tribunals have special statutory powers to direct the payment of interest on their awards<sup>22</sup>.

1 See the Late Payment of Commercial Debts (Interest) Act 1998; and **SALE OF GOOD AND SUPPLY OF SERVICES**.

2 As to the administration of bankrupt estates see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 390 et seq.

3 As to the liquidation of companies see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

4 See the text and notes 5-13.

5 The words 'debt or damage' cover any sum recoverable by one party from another either at common law or in equity or under a statute such as the Law Reform (Frustrated Contracts) Act 1943: *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352, [1982] 1 All ER 925, HL. A claim as a creditor, other than a judgment creditor, in a company's winding up is not a claim for the recovery of any debt or damage: *Re Fine Industrial Commodities Ltd* [1956] Ch 256, [1955] 3 All ER 707. A court ordering stamp duty to be repaid under the Stamp Act 1891 s 13(4) may order it to be repaid with such interest as it may determine (see the Finance Act 1965 s 91 (now repealed for some purposes); and **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1112) despite the fact that the repayment of duty is not a debt (*Western United Investment Co Ltd v IRC* [1958] Ch 392, [1958] 1 All ER 257). A fraudulent preference is a debt: *Re FP & CH Matthews Ltd* [1982] Ch 257, [1982] 1 All ER 338, CA.

6 For the principle that income tax is deductible on payment of interest awarded see **INCOME TAXATION** vol 23(1) (Reissue) PARA 464 et seq.

7 Supreme Court Act 1981 s 35A(1) (s 35A added by the Administration of Justice Act 1982 Sch 1 Pt I). Interest in respect of a debt may not be awarded for a period during which, for whatever reason, interest on the debt already runs: Supreme Court Act 1981 s 35A(4) (as so added). Interest may be calculated at different rates in respect of different periods: s 35A(6) (as so added). Nothing in s 35A affects the damages recoverable for the dishonour of a bill of exchange: s 35A(8) (as so added). As to damages for dishonour of a bill of exchange see PARA 1602. As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

8 As to the meaning of 'tried' and the power of the court to award interest in a judgment debt obtained in default of appearance see *Alex Lawrie Factors Ltd v Modern Injection Moulds Ltd* [1981] 3 All ER 658.

9 As to courts of record see **COURTS** vol 10 (Reissue) PARA 308.

10 For examples of the court's exercise of discretion see *Public Trustee v Pearlberg* [1940] 2 KB 1 at 22, 25, [1940] 2 All ER 270 at 283-284, CA; *H Cousins & Co Ltd v D and C Carriers Ltd* [1971] 2 QB 230, [1971] 1 All ER 55, CA.

11 As to the exercise of the court's discretion see *FMC (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep 221; *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341. As to interest on a judgment debt expressed in foreign currency see *Miliangos v George Frank (Textiles) Ltd (No 2)* [1977] QB 489, [1976] 3 All ER 599; and PARA 1302.

12 Law Reform (Miscellaneous Provisions) Act 1934 s 3(1). This provision is repealed in its application to the High Court and the county courts by the Administration of Justice Act 1982 s 15(4), (5). It does not apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; nor does it affect the damages recoverable for the dishonour of a bill of exchange, nor authorise the giving of interest upon interest: see the Law Reform (Miscellaneous Provisions) Act 1934 s 3(1) proviso. Section 3(1) applies to judgments or proceedings by or against the Crown: see the Crown Proceedings Act 1947 s 24(3); and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 135. Provision in a contract for payment in lieu of interest is not an interest payment and so statutory interest can be awarded: *Tomkins v Tomkins* (1978) Times, 24 May. As to damages and interest generally see **DAMAGES** vol 12(1) (Reissue) PARAS 848-850. As to damages for dishonour of a bill of exchange see PARA 1602.

13 Particulars of claim must include a statement to the effect that the claimant is seeking interest and containing details as to the basis on which he is seeking interest: see CPR 16.4; and **CIVIL PROCEDURE** vol 11 (2009) PARA 587. There is no power to award interest on sums already paid out and which have not been the subject of the judgment: see *The Medina Princess* [1962] 2 Lloyd's Rep 17.

14 Ie unless the parties otherwise agree: see the Arbitration Act 1996 s 49(1), (2).

15 See the Arbitration Act 1996 s 49(3); and **ARBITRATION** vol 2 (2008) PARA 1260.

16 As to judgment debts generally see **CIVIL PROCEDURE**.

17 Judgments Act 1838 s 17(1) (amended by the Civil Procedure Acts Repeal Act 1879 Schedule Pt I; the Statute Law Revision (No 2) Act 1888; SI 1993/564; and SI 1998/2940). Rules of court may provide for the court to disallow all or part of any interest otherwise payable under the Judgments Act 1838 s 17(1): see s 17(2) (added SI 1998/2940). The amending orders were made under the Administration of Justice Act 1970 s 44. As to interest on judgment debts expressed in currencies other than sterling see s 44A; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.

18 Ie on a judgment pursuant to the Judgments Act 1838 s 17: see the text to note 17.

19 See CPR 40.8(1); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1148.

20 See CPR 40.8(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1148.

21 See *Re European Central Rly Co, ex p Oriental Financial Corpn* (1876) 4 ChD 33, CA; *Re Sneyd, ex p Fewings* (1883) 25 ChD 338, CA; *Arbuthnot v Bunsilall* (1890) 62 LT 234; *Economic Life Assurance Society v Osborne* [1902] AC 147, HL. See also *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, [2002] 1 All ER 97.

22 Eg the Lands Tribunal: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 745.

## UPDATE

### 1307 Interest under statute

NOTE 7--Appointed day is 1 October 2009: SI 2009/1604.

5TH EDITION, PARAS 1620-2586)/5. MONEY/(1) MONEY AND INTEREST ON MONEY/(ii) Interest on Money/A. THE RIGHT TO INTEREST/1308. Default interest.

### **1308. Default interest.**

As a means of ensuring prompt payment it is not uncommon for loan agreements to provide for a specified default interest rate, that a higher rate of interest would apply in the event of default by the borrower<sup>1</sup>. There has been some consideration as to whether such a default rate of interest constitutes a penalty; and it seems that it does not, provided that the higher rate is a reasonable reflection of the increased credit risk which flows from the default<sup>2</sup>.

<sup>1</sup> See PARA 968; and **MORTGAGE** vol 77 (2010) PARAS 218, 733.

<sup>2</sup> See *Wallingford v Mutual Society* (1880) 5 App Cas 685; *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205, [1983] 1 WLR 399, HL; *The Angelic Star* [1988] 1 Lloyd's Rep 122; CA; *Lordvale Finance plc v Bank of Zambia* [1996] QB 752, [1996] 3 All ER 156. See also **EQUITY** vol 16(2) (Reissue) PARAS 801, 802.

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## **B. THE RATE AND RECOVERY OF INTEREST**

### **1309. No limit to agreed rate.**

Subject to the statutory power of the court to set aside or vary a transaction in the case of certain unfair credit agreements<sup>1</sup>, there is no restriction on the terms which may be agreed between a borrower and a lender for the payment of interest, and the ordinary principles of the law of contract govern any such agreement<sup>2</sup>. The same principles apply to interest upon other debts.

<sup>1</sup> See now the provisions on relationships that are unfair to the debtor in the Consumer Credit Act 1974 ss 140A-140C (added by the Consumer Credit Act 2006 ss 19-21) (see **CONSUMER CREDIT**) replacing the former provisions on extortionate credit bargains (ie the Consumer Credit Act 1974 ss 137-140 (repealed)). See also *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, sub nom *Wilson v First County Trust Ltd* [2003] 4 All ER 97 (extortionate credit bargain; compatibility of the Consumer Credit Act 1974 s 127(3) (now repealed) and human rights legislation).

<sup>2</sup> See generally **CONTRACT**. See also *Provincial North West plc v Bennett* (1999) Times, 11 February, CA, where reference in a facility letter from a bank to '3% above the bank's base rate' was to be taken to mean the bank's base rate for the time being and from time to time, there being no necessity to give notice to vary such base rate.

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### **1310. Amount usually allowed by courts.**

Where the rate of interest is not fixed by statute, agreement, or usage, there is no hard and fast rule as to the amount that will be allowed<sup>1</sup>; and the rate may vary according to the practice of the particular court, the value of money for the time being and the circumstances of the particular case<sup>2</sup>. In the past the usual practice, apart from special circumstances, was to allow five per cent in cases where the interest was partly in the nature of a penalty<sup>3</sup>, and in commercial and speculative transactions<sup>4</sup>, and three or four per cent in others<sup>5</sup>, but more realistic rates based on modern conditions are now awarded<sup>6</sup>.

Where there is a contract for the payment of money on a fixed day, with interest at a fixed rate down to that day, and default is made in payment of the principal, the rate of interest mentioned in the contract is the rate usually allowed from the time of default<sup>7</sup>, without there being a general rule of law to that effect<sup>8</sup>.

1 *Re Metropolitan Coal Consumers' Association Ltd, ex p Wainwright's Case* (1889) 62 LT 30 at 33 per Kay J; *Cook v Fowler* (1874) LR 7 HL 27 at 32-33 per Lord Cairns LC; *London, Chatham and Dover Rly Co v South Eastern Rly Co* [1892] 1 Ch 120 at 133, CA, per Lindley LJ.

2 *Re Metropolitan Coal Consumers' Association Ltd, ex p Wainwright's Case* (1889) 62 LT 30; *Re Roberts, Goodchap v Roberts* (1880) 14 ChD 49, CA; *Capel & Co v Sim's Ships Compositions Co Ltd* (1888) 57 LJCh 713 at 718; *Re Unsworth's Trust* (1865) 2 Drew & Sm 337; *FMC (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep 221; *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341.

3 See eg (former) CPR Sch 1 RSC Ord 30 r 6(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149. See also *Gluckstein v Barnes* [1900] AC 240 at 255, HL; and PARA 1602.

4 *Lord Rokeby v Elliot* (1879) 13 ChD 277 at 281-282, CA; *Re Beulah Park Estate, Sargood's Claim* (1872) LR 15 Eq 43; *Dreyfus v Peruvian Guano Co* (1889) 42 ChD 66 at 74 (on appeal sub nom *Peruvian Guano Co Ltd v Dreyfus Bros & Co* [1892] AC 166 at 188, HL).

5 Interest at the rate of 4% has usually been allowed in the Chancery Division: see *Calcraft v Roebuck* (1790) 1 Ves 221 at 226 (interest on unpaid purchase money on sale of land); *Turner v Newport* (1846) 2 Ph 14 (adjustment between tenant for life and remainderman in relation to unauthorised investments); *Brown v Gellatly* (1867) 2 Ch App 751; *Re Owen, Slater v Owen* [1912] 1 Ch 519; *Re Beech, Saint v Beech* [1920] 1 Ch 40; *Re Baker, Baker v Public Trustee* [1924] 2 Ch 271; *Re Fawcett, Public Trustee v Dugdale* [1940] Ch 402; *Re Parry, Brown v Parry* [1947] Ch 23, [1946] 2 All ER 412 (adjustments between tenant for life and remainderman); *Re Davy, Hollingsworth v Davy* [1908] 1 Ch 61, CA (interest on advancements brought into hotchpot). When general rates of interest are low, interest has sometimes been given at 3% (see *Re Rowlls, Rowlls v Bebb, Walters v Treasury Solicitor* [1900] 2 Ch 107, CA; *Re Goodenough, Marland v Williams* [1895] 2 Ch 537; *Re Lambert, Middleton v Moore* [1897] 2 Ch 169), or 3.5% (see *Neumann v IRC* (1933) 148 LT 457 at 461, CA).

6 See eg *The Funabashi, Sycamore Steamship Co Ltd v Owners of SS White Mountain* [1972] 2 All ER 181, [1972] 1 WLR 666 (Admiralty); *FMC (Meat) Ltd v Fairfield Cold Stores Ltd* [1971] 2 Lloyd's Rep 221 (Commercial Court); *Cremer v General Carriers SA* [1974] 1 All ER 1, [1974] 1 WLR 341 (Commercial Court); *Jefford v Gee* [1970] 2 QB 130, [1970] 1 All ER 1202, CA; *Birkett v Hayes* [1982] 2 All ER 710, [1982] 1 WLR 816, CA (personal injuries); *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515, [1980] 2 All ER 92 (compensation for trustee).

7 *Price v Great Western Rly Co* (1847) 16 M & W 244; *Morgan v Jones* (1853) 8 Exch 620.

8 *Cook v Fowler* (1874) LR 7 HL 27; *Morgan v Jones* (1853) 8 Exch 620; *Keene v Keene* (1857) 3 CBNS 144; *Orme v Galloway* (1854) 23 LJ Ex 118; and see *Countess of Kildare v Hopson* (1734) 4 Bro Parl Cas 550, HL; *Parker v Hutchinson* (1796) 3 Ves 133 at 134; *Re Lane, ex p Hodge* (1857) 26 LJ Bcy 77; *Re Roberts, Goodchap v Roberts* (1880) 14 ChD 49, CA; *Arbuthnot v Bunsilall* (1890) 62 LT 234.

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### 1311. Proceedings for recovery of interest.

Interest, where there is a contract to pay it, may be recovered in a claim brought for interest only<sup>1</sup>; but interest payable by way of damages<sup>2</sup> is not a debt, and can only be recovered in proceedings for payment of the principal<sup>3</sup>.

<sup>1</sup> *Hudson v Fawcett* (1844) 7 Man & G 348; *Nordenstrom v Pitt* (1845) 13 M & W 723; *Re King, ex p Furber* (1881) 17 ChD 191. See also *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, [2002] 1 All ER 97.

<sup>2</sup> See PARA 1305.

<sup>3</sup> *Re Churcher and Stringer* (1831) 2 B & Ad 777; *Cameron v Smith* (1819) 2 B & Ald 305.

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### 1312. Discharge of interest by discharge of principal.

If the principal debt is merged in a judgment<sup>1</sup> or discharged by payment, or if the amount due is tendered<sup>2</sup>, interest ceases to run from that date, but outstanding arrears may still be claimed if they could not have been recovered in the claim<sup>3</sup>. If the principal is barred by a statute of limitation, the interest is, as a general rule<sup>4</sup>, barred also<sup>5</sup>.

If the principal remains unpaid by reason of the creditor's delay<sup>6</sup>, or from any cause outside the debtor's control<sup>7</sup>, interest may not be claimed.

<sup>1</sup> *Florence v Jennings* (1857) 2 CBNS 454; and see **CONTRACT** vol 9(1) (Reissue) PARA 1063.

<sup>2</sup> *Gyles v Hall* (1726) 2 P Wms 378; *Norton v Ellam* (1837) 2 M & W 461.

<sup>3</sup> *Florence v Jennings* (1857) 2 CBNS 454.

<sup>4</sup> See PARA 1099.

<sup>5</sup> *Hollis v Palmer* (1836) 2 Bing NC 713; *Clark v Alexander* (1844) 8 Scott NR 147 at 165; *Parkes v Smith* (1850) 15 QB 297; *Cheang Thye Phin v Lam Kin Sang* [1929] AC 670, PC; *Elder v Northcott* [1930] 2 Ch 422, where the statement in the text was approved. See also **LIMITATION PERIODS** vol 68 (2008) PARA 1206.

<sup>6</sup> *Edwards v Warden* (1876) 1 App Cas 281, HL; *Webster v British Empire Mutual Life Assurance Co* (1880) 15 ChD 169, CA; *Merry v Ryves* (1757) 1 Eden 1; *Duchess of Marlborough v Strong* (1723) 4 Bro Parl Cas 539, HL; *Laing v Stone* (1828) Mood & M 229n; *Cameron v Smith* (1819) 2 B & Ald 305; *Jones v Gardiner* [1902] 1 Ch 191. See also *Bann v Dalzel* (1828) Mood & M 228.

<sup>7</sup> *Sterling v Wynne* (1834) 1 Jo Ex Ir 51; *Scott v Sandeman* (1852) 1 Macq 293; *Bushnan v Morgan* (1833) 5 Sim 635; *A-G v Ludlow Corp* (1849) 1 H & Tw 216. See also *Rishton v Grissell* (1870) LR 10 Eq 393; *Caledonian Rly Co v Carmichael* (1870) LR 2 Sc & Div 56, HL.

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## (2) LOANS OF MONEY

### (i) In general

#### 1313. Nature of loans and contracts for loans.

A loan of money generally creates a debt<sup>1</sup> and not an obligation to return the specific coins lent<sup>2</sup>. At common law money constituting a debt is not regarded as identifiable, but in equity sums representing an original fund may in certain circumstances be traced into other property and other hands<sup>3</sup>. Where a loan is made by two or more persons jointly, whether or not they advance equal amounts, they are treated as tenants in common in equity with respect to their rights<sup>4</sup>.

A contract to lend money is, subject to certain provisions<sup>5</sup> and possibly to special rules as to the measure of damages for its breach<sup>6</sup>, governed by the ordinary law relating to contracts<sup>7</sup>.

The mere payment of a sum of money or a cheque is not evidence of the creation of a loan<sup>8</sup>; nevertheless there is a prima facie obligation to repay<sup>9</sup> in the absence of circumstances giving rise to a presumption of advancement. Payment of sums equal to interest is evidence of a loan<sup>10</sup> and an 'IOU' is sufficient prima facie evidence although not addressed to anyone<sup>11</sup>.

1 Eg a deposit in a bank account renders the banker his customer's debtor: see PARA 839. As to satisfaction of a debt see *Pinnel's Case* (1602) 5 Co Rep 117a; *Foakes v Beer* (1884) 9 App Cas 605, HL (as a general rule, a debt can only be discharged by payment of the sum owed). There may be a loan even though the person providing the money advanced could in law sue for its recovery as money lent: *De Vigier v IRC* [1964] 2 All ER 907, [1964] 1 WLR 1073, HL. To lend money is not the same thing as to carry on the business of moneylending: *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209 at 218, [1961] 3 All ER 1163 at 1168, PC. Note that the Moneylenders Acts 1900 to 1927 are now wholly repealed.

2 As to the bailment of money regarded as a specific chattel see **BAILMENT** vol 3(1) (2005 Reissue) PARA 20.

3 See PARA 857; **CHARITIES** vol 8 (2010) PARA 436; **EQUITY** vol 16(2) (Reissue) PARA 861 et seq.

4 See **EQUITY** vol 16(2) (Reissue) PARA 557. As to tenancy in common see **REAL PROPERTY** vol 39(2) (Reissue) PARA 207 et seq.

5 See PARAS 1314-1316.

6 As to damages for breach of contract see **DAMAGES** vol 12(1) (Reissue) PARA 941 et seq.

7 See generally **CONTRACT**. As to the assignment of the benefit of a contract to lend money see **CHOSSES IN ACTION** vol 13 (2009) PARA 75. As to a loan to discharge an obligation under an illegal contract see *Spector v Ageda* [1973] Ch 30, [1971] 3 All ER 417; and PARA 1315.

8 *Cary v Gerrish* (1801) 4 Esp 9; *Aubert v Walsh* (1812) 4 Taunt 293; *Welch v Seaborn* (1816) 1 Stark 474; *Pearce v Davis* (1834) 1 Mood & R 365; *Graham v Cox* (1848) 2 Car & Kir 702; *Chow Yoong Hong v Choong Far Rubber Manufactory* [1962] AC 209, [1961] 3 All ER 1163, PC. However, see *Seldon v Davidson* [1968] 2 All ER 755, [1968] 1 WLR 1083, CA; and **CIVIL PROCEDURE** vol 11 (2009) PARA 952.

9 *Seldon v Davidson* [1968] 2 All ER 755, [1968] 1 WLR 1083, CA.

10 *Howard v Danbury* (1846) 2 CB 803.

11 *Douglas v Holme* (1840) 12 Ad & El 641.

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### 1314. Security for loans.

The repayment of a loan may be secured by the giving of security in various forms, for example: (1) by the giving of a bill of sale over goods intended to remain in the borrower's possession<sup>1</sup>; (2) by the mortgage of land or property other than personal chattels<sup>2</sup>; (3) by the pawn or pledge of goods<sup>3</sup>; (4) by the giving of a bottomry bond on a ship and cargo or a respondentia bond on the cargo alone<sup>4</sup>; (5) by the issue of debentures or debenture stock<sup>5</sup> or of a certificate of deposit<sup>6</sup>; (6) by the deposit of bills of exchange, stocks and shares, life assurance policies or documents of title to goods<sup>7</sup>. A bill of exchange or promissory note may itself be prima facie evidence of a loan having been made by the payee, if payment is not contingent on some event inconsistent with such a presumption<sup>8</sup>.

Where a person has a claim against another, there may be circumstances under which a third person may have the benefit of enforcing the claim under the doctrine of subrogation<sup>9</sup>.

1 See PARA 1674 et seq. A bill of sale given by way of security for the payment of money is void if it is not in accordance with the statutory form and is not registered: see PARA 1711 et seq.

2 See generally **MORTGAGE** vol 77 (2010) PARA 101 et seq. As to the position of persons joining in a mortgage as sureties see PARA 1019. Where a mortgage deed contains no express covenant for repayment, a personal covenant to repay is implied: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 181-182.

3 See generally **PLEDGES AND PAWNS**.

4 See **SHIPPING AND MARITIME LAW** vol 93 (2008) PARAS 84, 437.

5 As to club debentures see **CLUBS** vol 13 (2009) PARAS 250-252; and as to company debentures see **COMPANIES** vol 15 (2009) PARA 1312 et seq.

6 See **INCOME TAXATION** vol 23(1) (Reissue) PARA 568.

7 See generally PARA 860 et seq.

8 See *Clerke v Martin* (1702) 2 Ld Raym 757 at 758 per Holt CJ; *Carter v Palmer* (1700) 12 Mod Rep 380; *Grant v Vaughan* (1764) 3 Burr 1516 at 1525 per Lord Mansfield CJ; *Thompson v Morgan* (1811) 3 Camp 101; *Morgan v Jones* (1830) 1 Cr & J 162; *Early v Bowman* (1831) 1 B & Ad 889.

9 See *Coptic Ltd v Bailey* [1972] Ch 446, [1972] 1 All ER 1242; *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd* [1971] Ch 81, [1970] 3 All ER 385, CA; *Paul v Speirway Ltd* [1976] Ch 220, [1976] 2 All ER 587; and **EQUITY** vol 16(2) (Reissue) PARA 770 et seq.

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### 1315. Irrecoverable loans.

A loan made for an illegal purpose cannot be recovered after the purpose has been wholly or partly carried out<sup>1</sup>.

Loans made knowingly for the purpose of unlawful gaming were previously irrecoverable<sup>2</sup>; and other loans made for betting or for paying betting debts are in general recoverable so long as the borrower is not actually bound by the terms of the loan to apply the money to these purposes<sup>3</sup>, and securities for betting loans are not invalidated<sup>4</sup>.

Loans made to minors are voidable<sup>5</sup>.

A loan made to another for the purpose of discharging an obligation which had arisen under a transaction which, to the knowledge of the person making the loan, was illegal, taints the loan itself with illegality and renders it unenforceable<sup>6</sup>.

1 As to the effect of illegality and unenforceability on securities for the repayment of a loan see **CONTRACT** vol 9(1) (Reissue) PARAS 839, 880 et seq. As to contracts governed by foreign law see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 359 et seq.

2 But see now the Gambling Act 2005 repealing the Gaming Act 1710 s 1 and the Gaming Act 1835 s 1. See **LICENSING AND GAMBLING**.

3 *Saxby v Fulton* [1909] 2 KB 208, CA; *Re O'Shea, ex p Lancaster* [1911] 2 KB 981, CA; and see **LICENSING AND GAMBLING**.

4 See **LICENSING AND GAMBLING**.

5 See PARA 1320.

6 See *Spector v Ageda* [1973] Ch 30, [1971] 3 All ER 417.

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### **1316. Relief of borrowers.**

A borrower of money may obtain relief on the ground that the contract is void or illegal<sup>1</sup>, or has been procured by misrepresentation or is affected with fraud<sup>2</sup> or is otherwise unconscionable<sup>3</sup>. Where relief is sought under the equitable jurisdiction of the court, relief will not normally be granted except upon the terms that the applicant for relief should himself do that which the court considers fair and equitable in the matter<sup>4</sup>. Relief is also available to debtors and sureties in appropriate cases where the court regards a credit agreement as unfair to the debtor<sup>5</sup>.

1 See *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305, CA; and **CONTRACT** vol 9(1) (Reissue) PARAS 842, 877.

2 See generally **MISREPRESENTATION AND FRAUD**.

3 As to relief in the case of usurious loans of the security of reversionary interests see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 854 et seq.

4 *Samuel v Newbold* [1906] AC 461 at 468, HL; and see **EQUITY** vol 16(2) (Reissue) PARA 560; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 854 et seq.

5 See now the provisions on relationships that are unfair to the debtor in the Consumer Credit Act 1974 ss 140A-140C (added by the Consumer Credit Act 2006 ss 19-21) (see **CONSUMER CREDIT**) replacing the former provisions on extortionate credit bargains (ie the Consumer Credit Act 1974 ss 137-140 (repealed)).



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## **(ii) Loans to and by Particular Persons**

### **1317. Borrowing by the government, local authorities etc.**

The methods by which the government<sup>1</sup> and local authorities<sup>2</sup> may borrow money, and the borrowing powers of various public bodies<sup>3</sup>, are discussed elsewhere in this work.

<sup>1</sup> See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 701 et seq. As to the National Debt and government securities see PARA 1325 et seq.

<sup>2</sup> See **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 594 et seq; **LONDON GOVERNMENT**. As to borrowing from the Public Works Loans Commissioners see PARA 1334 et seq.

<sup>3</sup> The borrowing powers of particular bodies, industries and undertakings are covered in the title relevant to the body, industry or undertaking in question.

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### **1318. Borrowing by companies, partners and other associations.**

The borrowing powers of a company regulated by the Companies Act 1985 are determined by that Act and by the constitution of the company<sup>1</sup>. Certain charges given by such a company to secure borrowings are void if not registered; but the contract to repay the money borrowed is not affected by non-registration of the charge, and the loan becomes repayable as soon as the charge is avoided<sup>2</sup>. Other commercial or trading corporations have implied power to borrow<sup>3</sup>. Where a loan is made to a company which the company has not power to borrow, and is properly spent by the company in paying its creditors, the lender may be subrogated to the rights of the creditors<sup>4</sup>.

In the case of a trading partnership or any other partnership carrying on a business which requires the borrowing of money, a partner has implied power to borrow on behalf of the partnership for the purposes of the business<sup>5</sup>, but if a partner borrows money in his own name on his own security the fact that it is used for partnership purposes with the knowledge of the other partners will not make them liable to the lender<sup>6</sup>.

The borrowing powers of friendly societies<sup>7</sup>, industrial and provident societies<sup>8</sup> and building societies<sup>9</sup> are dealt with elsewhere in this title.

<sup>1</sup> See **COMPANIES** vol 15 (2009) PARA 1256.

<sup>2</sup> See the Companies Act 1985 ss 395-399 (prospectively repealed) (as to the replacement provisions see the Companies Act 2006 ss 860, 861, 863, 864, 866, 867, 870, 874; and **COMPANIES** vol 15 (2009) PARA 1277 et seq).

<sup>3</sup> See *Re Badger, Mansell v Viscount Cobham* [1905] 1 Ch 568; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1238.

4 See **EQUITY** vol 16(2) (Reissue) PARA 774.

5 *Bank of Australasia v Breillat* (1847) 6 Moo PCC 152 at 194; but see *Greenslade v Dower* (1828) 1 Man & Ry KB 640; *Re Worcester Corn Exchange Co* (1853) 3 De GM & G 180 at 187. See further **PARTNERSHIP**.

6 *Bevan v Lewis* (1827) 1 Sim 376.

7 See PARA 2193.

8 See PARA 2453.

9 See PARA 1916 et seq.

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### **1319. Loans to or by married women.**

There is no presumption that a married woman living with her husband has his authority to borrow in his name; and a husband is not liable to repay loans borrowed by his wife in his name without authority, even where she has been deserted or turned out by him, and has borrowed the money for, and spent it on, necessities<sup>1</sup>.

1 See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 256.

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### **1320. Minors.**

The Infants Relief Act 1874 provided that all contracts entered into by minors for the repayment of money lent or for goods supplied or to be supplied (other than contracts for necessities<sup>1</sup>), and all accounts stated with minors were absolutely void, with the exception of contracts which might be entered into by minors under another rule of law<sup>2</sup>. However, that Act<sup>3</sup> does not apply to any contract made by a minor after 9 June 1987<sup>4</sup>. As a result of the disapplication of the Infants Relief Act 1874 the contracts in question are subject to the rules of common law, which provide that, subject to certain exceptions, a child's contract is generally voidable at the instance of the child, although it is binding upon the other party<sup>5</sup>.

1 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 18.

2 See the Infants Relief Act 1874 s 1 (repealed); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 14.

3 See also the Betting and Loans (Infants) Act 1892 s 5 (repealed), which invalidated contracts to repay loans advanced during minority.

4 Minors' Contracts Act 1987 ss 1, 5.

5 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 12 et seq. As to contract law generally see **CONTRACT**.

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### **1321. Loans by particular persons and bodies.**

The Consumer Credit Act 1974 regulates certain credit agreements, and for the purposes of that Act, 'credit' includes a cash loan and any other form of financial accommodation<sup>1</sup>. The Act also provides a new code for pawnbroking<sup>2</sup>. Loans by building societies<sup>3</sup> and friendly societies<sup>4</sup> are subject to special statutory provisions.

There are a number of public bodies concerned with the lending of money for particular purposes, for example the Public Works Loan Commissioners, who lend to local authorities<sup>5</sup>, and the Agricultural Mortgage Corporation Limited, which lends to farmers<sup>6</sup>.

1 As to consumer credit see generally **CONSUMER CREDIT**. As to the meaning of 'credit' see the Consumer Credit Act 1974 ss 9(1), 189(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 83. As to the main classification of agreements see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79 et seq.

2 See the Consumer Credit Act 1974 ss 114-121; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 208 et seq; **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 41.

3 See PARA 2005 et seq.

4 See PARA 2105 et seq.

5 See PARA 1334 et seq.

6 See **AGRICULTURAL LAND** vol 1 (2008) PARA 618.

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### **(iii) Offences**

#### **1322. Offences in connection with loans.**

It is an offence for any person to make a gain for himself or any other person by dishonestly making a false representation<sup>1</sup>. In addition to this general offence, there are various offences specifically associated with loans<sup>2</sup>; for example, a bankrupt is guilty of an offence if he obtains credit to the extent of the prescribed amount or more without giving the person from whom he obtains it the relevant information about his status<sup>3</sup>.

1 See the Fraud Act 2006 s 2; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

2 For full coverage of such offences see further PARA 1952 et seq; **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANIES**.

3 See the Insolvency Act 1986 s 360(1)(a); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 721.

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### **1323. Unlawful harassment of debtors.**

A person commits an offence<sup>1</sup> if, with the object of coercing another person to pay money claimed from the other as a debt due under a contract, he: (1) harasses the other with demands for payment which are calculated to subject him or members of his family or household to alarm, distress or humiliation; (2) falsely represents that criminal proceedings lie for failure to pay money claimed; (3) falsely represents himself to be authorised to claim or enforce payment; or (4) utters a document falsely represented by him to have some official character which he knows it has not<sup>2</sup>.

1 See under the Administration of Justice Act 1970 s 40(1): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 828. A person guilty of an offence under s 40 is liable on summary conviction to a fine of not more than level 5 on the standard scale: s 40(4) (amended by virtue of the Criminal Justice Act 1982 ss 35, 38, 46). As to the standard scale see PARA 27 note 21.

2 See the Administration of Justice Act 1970 s 40; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 838.

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### **1324. Offences in relation to minors.**

It is an offence for any person with a view to financial gain to send to a minor any document inviting him: (1) to borrow money; (2) to obtain goods on credit or hire; (3) to obtain services on credit; or (4) to apply for information or advice on borrowing money or otherwise obtaining credit or hiring goods<sup>1</sup>.

1 See the Consumer Credit Act 1974 s 50(1)(a); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 153.

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## **(3) THE NATIONAL DEBT**

## (i) Constitution of the National Debt

### 1325. Origin and subdivision of the National Debt.

The National Debt of the United Kingdom in its present form had its origin in a loan of £1,200,000 at eight per cent made to the Crown in 1694 on the security of the public funds, the subscribers being incorporated as the Bank of England<sup>1</sup>. Now the National Loans Fund, for which the Treasury is responsible, is held as an account at the Bank of England<sup>2</sup>. Money paid into this account forms one general fund to meet all outgoings from the fund<sup>3</sup>. Excess of payments out of the National Loans Fund over receipts into it are provided for by money being raised in such manner and on such terms and conditions as the Treasury thinks fit<sup>4</sup>.

The National Debt of the United Kingdom is divided into the External Debt, consisting of money borrowed from the governments of Canada, the United States of America and other overseas countries<sup>5</sup>, and the Internal Debt, consisting of the Funded Debt<sup>6</sup> and the Unfunded Debt<sup>7</sup>.

1 See the Bank of England Act 1694 s 19; and PARA 793. The capital of the bank and the amounts advanced by it to the government were increased under subsequent enactments (now repealed). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the Bank of England PARA 793 et seq.

2 As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

4 See the National Loans Act 1968 s 12(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 728.

5 Debt payable in sterling to overseas governments and international institutions is sometimes treated as part of the Unfunded Debt, eg loans from the International Bank for Reconstruction and Development and from the International Monetary Fund: see PARA 1391.

6 See PARA 1326.

7 See PARA 1327.

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### 1326. The Internal Debt: Funded Debt.

The Funded Debt is debt the principal of which the government need not repay until it wishes. It consists of the debts to the Banks of England<sup>1</sup> and Ireland<sup>2</sup> and, for the greater part, of undated government securities, that is to say securities not redeemable at any fixed date, for example, 2½ per cent Consolidated Stock ('Consols')<sup>3</sup>, 2¾ and 2½ per cent Perpetual Annuities<sup>4</sup>, and 3½ per cent War Loan<sup>5</sup> and 3 per cent Treasury Stock issued in exchange for Bank of England stock<sup>6</sup>. The process of reborrowing for a longer period, thus moving towards having no fixed date of redemption, is usually described as funding.

1 See PARA 1325.

2 See 21 & 22 Geo 3 c 16 (1782), 37 Geo 3 c 50 (1797), the Bank of Ireland Act 1808, and the Bank of Ireland Act 1821.

3 See the National Debt (Conversion) Act 1888 s 2(1) (amended by the Statute Law Revision Act 1908; and the Decimal Currency Act 1969 s 10(1)); and the National Debt (Conversion) Act 1888 s 2(2) (amended by the Statute Law (Repeals) Act 1986). The stock is to form part of the National Debt and annuities are payable by equal quarterly dividends on 5 January, 5 April, 5 July and 5 October in every year: National Debt (Conversion) Act 1888 s 2(3) (amended by the Statute Law Revision Act 1908). The 2½% consolidated stock is redeemable by Parliament on such notice, at such times and in such manner as Parliament may direct: see the National Debt (Conversion) Act 1888 s 2(2) (amended by the Statute Law (Repeals) Act 1986). The dividends on the stock are charged on the National Loans Fund with recourse to the Consolidated Fund: see the National Debt (Conversion) Act 1888 s 2(5) (amended by the Statute Law Revision Act 1959; the National Loans Act 1968 Sch 5; and the Statute Law (Repeals) Act 1986). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq.

4 The 2½% annuities were issued under 16 & 17 Vict c 23 (National Debt) (1853) (repealed), and the 2¾% annuities were issued under the National Debt (Conversion of Stock) Act 1884 s 1(1) (repealed). Both form part of the National Debt and are charged on the National Loans Fund with recourse to the Consolidated Fund: see the National Debt Act 1870 s 5 (amended by the Statute Law Revision Act 1950); the National Debt Act 1870 s 6 (amended by the National Loans Act 1968 s 13(6), Sch 5); and the National Debt (Conversion of Stock) Act 1884 s 1(4), (5) (amended by the National Loans Act 1968 Sch 5, Sch 6 Pt I; and the Statute Law (Repeals) Act 1986). As to their redemption see the National Debt (Conversion of Stock) Act 1884 s 1(2), (3) (s 1(2) amended by the Statute Law (Repeals) Act 1986).

5 This loan was raised under the War Loan Act 1916 s 1 (repealed). The principal of and interest on this 3½% War Loan Stock, together with the expenses incurred in connection with its redemption, are charged on the National Loans Fund with recourse to the Consolidated Fund: National Debt Act 1972 s 13.

6 Bank of England Act 1946 s 1(1)(b). The principal of and interest on the stock, and issue and redemption expenses, are charged on the National Loans Fund with recourse to the Consolidated Fund: s 1(5), Sch 1 para 1 (amended by the Statute Law Revision Act 1963; and the National Loans Act 1968 Sch 5).

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### 1327. The Internal Debt: Unfunded Debt.

The Unfunded Debt is debt the principal of which must be repaid at a definite date. It consists of all government internal borrowing apart from the Funded Debt<sup>1</sup>, including, for example, savings bonds and defence bonds<sup>2</sup>, funding stocks<sup>3</sup>, premium savings bonds<sup>4</sup>, savings certificates<sup>5</sup> and certificates of tax deposit<sup>6</sup>, and what is often referred to as the Floating Debt, which is made up of Treasury bills<sup>7</sup> and Ways and Means advances from the Bank of England<sup>8</sup>, the Paymaster General<sup>9</sup>, the National Debt Commissioners<sup>10</sup> and certain other departments<sup>11</sup>. Government stocks issued to the former owners of certain nationalised industries are also included in the Unfunded Debt<sup>12</sup>.

1 As to the Funded Debt see PARA 1326.

2 These were issued under the National Loans Act 1939 ss 1, 2 (repealed). The principal of and interest on them are charged on the National Loans Fund with recourse to the Consolidated Fund: s 3(3) (amended by the National Loans Act 1968 Sch 5). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq.

3 Eg 3½% Funding Stock 1999-2004 and 5½% Funding Stock 1982-1984 were issued under the National Loans Act 1939 s 1 (repealed), the principal, interest and management expenses being charged on the National Loans Fund with recourse to the Consolidated Fund: see s 3(3) (as amended: see note 2).

4 Premium savings bonds are issued under the Treasury's general powers to borrow pursuant to the National Loans Act 1968 s 12: see s 12(6)(a); the Premium Savings Bonds Regulations 1972, SI 1972/765; and PARA 1362 et seq. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 As to savings certificates see PARA 1352 et seq.

6 These are issued under the Treasury's general powers to borrow pursuant to the National Loans Act 1968 s 12, and replace the former tax reserve certificates: see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1798.

7 As to Treasury bills see the Treasury Bills Act 1877 ss 4, 8, 9; the Treasury Bills Regulations 1968, SI 1968/414; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 730. See also PARA 1612.

8 See PARA 1326.

9 As to the Paymaster General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 714.

10 As to the National Debt Commissioners see PARA 1332.

11 See the Exchequer and Audit Departments Act 1866 s 15; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 513.

12 Eg the coal industry (see the Coal Industry Nationalisation Act 1946 ss 32, 33 (repealed)). As to the coal industry see **MINES, MINERALS AND QUARRIES**.

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### **1328. The Contingencies Fund.**

A fund known as the Contingencies Fund<sup>1</sup> exists for providing temporary advances for the provision of any necessary working cash balances for various government requirements<sup>2</sup>. The fund has a permanent capital<sup>3</sup>, which may be increased by the Treasury issuing out of the National Loans Fund such sums as may be required for the purpose of temporarily increasing the capital of the Contingencies Fund<sup>4</sup>. The Treasury may direct when such sums are to be repaid<sup>5</sup>, and the sums remaining unpaid together with the permanent capital must not exceed an amount equal to two per cent of the authorised supply expenditure<sup>6</sup> for the year ending on the previous 31 March<sup>7</sup>.

1 See the Contingencies Fund Act 1970 s 1(1). The fund was formerly known as the Civil Contingencies Fund: see s 1(1), (2).

2 See the Miscellaneous Financial Provisions Act 1946 s 3(1). These include the requirements of the navy, army and air services: Contingencies Fund Act 1970 s 1(1).

3 Contingencies Fund Act 1974 s 1(1). The permanent capital is an amount of £1½ million: see s 1(1).

4 Miscellaneous Financial Provisions Act 1946 s 3(1). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 Miscellaneous Financial Provisions Act 1946 s 3(1) proviso (a) (amended by the Miscellaneous Financial Provisions Act 1955 Sch 2 Pt I; and the Contingencies Fund Act 1974 Schedule).

6 In relation to any year ending on 31 March, 'authorised supply expenditure' means the total of the sums which Acts passed before the end of that year have authorised the Treasury to issue out of the Consolidated Fund and apply towards making good the supply granted for that year: Contingencies Fund Act 1974 s 1(2). As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq.

7 Contingencies Fund Act 1974 s 1(1).

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### **1329. Treasury power to issue securities.**

For the purpose of providing for the National Debt<sup>1</sup>, providing any working balance in the National Loans Fund<sup>2</sup> and raising money which the Treasury considers it expedient to raise for the purpose of promoting sound monetary conditions in the United Kingdom<sup>3</sup>, the Treasury may create and issue such securities, at such rates of interest and subject to such conditions as to repayment, redemption and other matters, including provision for a sinking fund, as it thinks fit<sup>4</sup>.

1 le for providing sums required to meet excesses of payments out of the National Loans Fund over receipts into it: National Loans Act 1968 s 12(1)(a). As to the provision made for the National Debt as it existed on 31 March 1968 see s 13; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 728. As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

2 National Loans Act 1968 s 12(1)(b).

3 National Loans Act 1968 s 12(1) (amended by the Finance Act 1982 s 152(1)). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 National Loans Act 1968 s 12(2).

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### **1330. Guarantees in respect of loans.**

Guarantees of Her Majesty's United Kingdom government have been given in respect of various loans, including:

- 100 (1) loans made to the governments of colonial territories by the International Bank for Reconstruction and Development<sup>1</sup>;
- 101 (2) tithe redemption stock<sup>2</sup>;
- 102 (3) stock and temporary borrowings of certain nationalised industries<sup>3</sup>; and
- 103 (4) certain borrowings of a new town development corporation or the Commission for the New Towns<sup>4</sup>.



Where a loan which may be redeemed before maturity at the option of the borrower is guaranteed by the Treasury, the Treasury may also guarantee a conversion loan issued solely for the redemption of the first loan<sup>5</sup>.

1 See the Overseas Development and Co-operation Act 1980 ss 5, 8 (repealed). As to the provision of assistance to countries outside the United Kingdom see now the International Development Act 2002; PARAS 1391-1393; and **COMMONWEALTH** vol 13 (2009) PARA 811; **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 462. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See **ECCLESIASTICAL LAW**.

3 See eg the Transport Act 1962 s 21; and **WATER AND WATERWAYS** vol 101 (2009) PARA 755.

4 See the New Towns Act 1981; and **TOWN AND COUNTRY PLANNING**. The Commission for the New Towns has been merged with the Urban Regeneration Agency under the name English Partnerships: see **TOWN AND COUNTRY PLANNING**.

5 See the Finance Act 1934 s 25 (amended by the Statute Law Revision Act 1963). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

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### 1331. Contingent liabilities.

Contingent or nominal liability rests upon the Consolidated Fund<sup>1</sup> in respect of:

- 104 (1) funds due to suitors in the Supreme Court<sup>2</sup> and the county courts<sup>3</sup> and unpaid by the Accountant General;
- 105 (2) deficiencies in the Court of Session Consignations Account<sup>4</sup>;
- 106 (3) unclaimed stock and dividends transferred by the Bank of England or the Bank of Ireland to the National Debt Commissioners to which a title may subsequently be established, and deficiencies on the commissioners' account of unclaimed dividends<sup>5</sup>;
- 107 (4) costs, charges, expenses and claims which would have been chargeable on the Naval Prize Fund<sup>6</sup>;
- 108 (5) any deficiency of the Government Annuities Investment Fund<sup>7</sup>;
- 109 (6) any insufficiency of the funds held by the National Debt Commissioners to meet the claims of depositors in the National Savings Bank<sup>8</sup>.

1 As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq.

2 See *Re Williams' Settled Estates* [1910] 2 Ch 481. Where in the opinion of the Accountant General the cash balance in his account at the Bank of England exceeds the amount required to satisfy current demands, he must remit the excess to the National Debt Commissioners; and where in his opinion the balance is insufficient to meet those demands, they must remit to that account such sums as he requests in writing: Court Funds Rules 1987, SI 1987/821, r 56(1). As to the Accountant General see **COURTS** vol 10 (Reissue) PARA 663. As to the Bank of England see PARA 793 et seq. As to the National Debt Commissioners see PARA 1332 et seq.

3 See the Administration of Justice Act 1982 s 43; and **CIVIL PROCEDURE; COURTS**. As to the investment of money transferred under funds rules to the National Debt Commissioners see s 45; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1549.

4 See the Court of Session Consignations (Scotland) Act 1895 ss 13, 14.

5 See PARA 1346.

6 See the Naval Agency and Distribution Act 1864 s 17 (amended by the Statute Law Revision Act 1893; and the Armed Forces Act 1981 Sch 5 Pt II); and **ARMED FORCES; PRIZE**.

7 See the Government Annuities Act 1929 s 67(5). As to government annuities see PARA 1371 et seq.

8 See the National Savings Bank Act 1971 s 25; and PARA 813. As to the National Savings Bank see PARA 810 et seq.

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## **(ii) Reduction of the National Debt**

### **1332. The National Debt Commissioners.**

The Commissioners for the Reduction of the National Debt of the United Kingdom<sup>1</sup> (generally known as the National Debt Commissioners<sup>2</sup>) are: the Speaker of the House of Commons<sup>3</sup>, the Chancellor of the Exchequer<sup>4</sup>, the Master of the Rolls<sup>5</sup>, the Lord Chief Justice<sup>6</sup>, the Accountant General of the Supreme Court<sup>7</sup>, and the Governor and Deputy Governors of the Bank of England<sup>8</sup>. Any three commissioners may act for all of them<sup>9</sup>. Their functions are in fact exercised by the Comptroller General of the National Debt Office<sup>10</sup>. The National Debt Office is subject to investigation by the Parliamentary Commissioner for Administration<sup>11</sup>.

1 The name was first used in the Consolidated Fund Act 1816 s 13 (amended by the Statute Law Revision Act 1873; and the Statute Law Revision Act 1888). As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Interpretation Act 1978 ss 5, 22(1), Schs 1, 2 para 4(1)(b) (amended by the Family Law Reform Act 1987 Sch 2 para 74, Sch 4).

3 As to the Speaker of the House of Commons see **PARLIAMENT** vol 78 (2010) PARA 931 et seq.

4 As to the Chancellor of the Exchequer see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 514.

5 As to the Master of the Rolls see **CONSTITUTIONAL LAW AND HUMAN RIGHTS; COURTS**.

6 As to the Lord Chief Justice see **CONSTITUTIONAL LAW AND HUMAN RIGHTS; COURTS**. The Lord Chief Justice became a commissioner in place of the Lord Chief Baron of the Exchequer, who was added to the number of commissioners by the Life Annuities Act 1808 s 32 (as originally enacted).

7 As to the Accountant General see **COURTS** vol 10 (Reissue) PARA 663. The place of the Accountant General of the Supreme Court was originally held by the Accountant General of the Court of Chancery, whose office was abolished and whose powers were transferred to the Paymaster General by the Court of Chancery (Funds) Act 1872 ss 4, 6 (repealed). These powers were transferred by the Administration of Justice Act 1925 s 11 (repealed) to the newly created Accountant General of the Supreme Court.

8 National Debt Reduction Act 1786 s 14 (amended by the Statute Law Revision Act 1871; the Statute Law Revision Act 1888; and the Bank of England Act 1998 s 9(1)). As to the Governor and Deputy Governors of the Bank of England see PARA 793 et seq.

9 National Debt Commissioners Act 1818 s 1.

10 The commissioners may appoint and employ such clerks and other officers as may be necessary: National Debt Reduction Act 1786 s 15 (amended by the Statute Law Revision Act 1888). They may also appoint persons to purchase public debts and annuities on their behalf: see the National Debt Reduction Act 1786 s 16

(amended by the Statute Law Revision Act 1888). As to the commissioners' functions in relation to the Insolvency Services Account and the Insolvency Services Investment Account see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 26-30. As to their functions in connection with the National Insurance Fund see the Social Security Administration Act 1992 s 161(3), (4); and **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 8. As to the Comptroller General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 724-726.

11 See the Parliamentary Commissioner Act 1967 s 4(1), Sch 2; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 41 et seq.

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### 1333. Sinking funds.

The National Debt Commissioners<sup>1</sup> operate a number of specific sinking funds<sup>2</sup> issued to them for the redemption of specific securities out of the Consolidated Fund<sup>3</sup>. These funds are used for the discharge of the capital of terminable annuities charged upon the Consolidated Fund<sup>4</sup>, in providing for the sinking funds in respect of certain bonds and loans<sup>5</sup>. The National Debt Commissioners also operate the Account of Donations and Bequests towards reducing the National Debt<sup>6</sup>, which is used to purchase stock for cancellation<sup>7</sup>.

1 As to the National Debt Commissioners see PARA 1332.

2 There is now no general sinking fund. The Old Sinking Fund established under the Sinking Fund Act 1875 s 5 (repealed) and the New Sinking Fund (1928) established under the Finance Act 1928 s 23 (repealed) ceased to operate in 1954: see the Finance Act 1954 s 34 (as originally enacted).

3 See the National Loans Act 1968 ss 13(4), 17(2). As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq.

4 These annuities were issued under the Government Annuities Act 1929: cf PARA 1371.

5 See eg the Finance Act 1921 s 45 (amended by the Statute Law Revision Act 1968; and the National Loans Act 1968 Sch 5, Sch 6 Pt I).

6 See the National Debt Reduction Act 1823 s 8 (amended by the Statute Law Revision Act 1873; and the Statute Law Revision Act 1890). As to the validity of trusts for the reduction of the National Debt where the income is directed to be accumulated for a period which would otherwise offend against the rule against perpetuities see the Superannuation and other Trust Funds (Validation) Act 1927 s 9(1); and **TRUSTS** vol 48 (2007 Reissue) PARA 686. Income arising from property held upon trust in accordance with directions which are valid under s 9 is exempt from income and corporation tax: see the Income and Corporation Taxes Act 1988 ss 9(4); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1224.

See the National Debt Reduction Act 1866 s 6 (amended by the Statute Law Revision Act 1893).

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### (iii) The National Loans Fund and the Consolidated Fund

### **1334. The National Loans Fund and the Consolidated Fund.**

The National Loans Fund exists as a general fund for all central government borrowing operations and certain domestic lending transactions<sup>1</sup>, including the issuing of such sums as are required by the Public Works Loan Commissioners<sup>2</sup>. The National Loans Fund is closely linked with the Consolidated Fund, and both funds are operated by the Treasury<sup>3</sup>. All public moneys payable to the Exchequer are paid into the Consolidated Fund<sup>4</sup>, which is balanced daily by means of a transfer to or from the National Loans Fund; and where liabilities of the National Loans Fund exceed its assets or where its costs exceed its income, the Consolidated Fund may be called on.

1 See the National Loans Act 1968 s 1; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

2 See the National Loans Act 1968 s 3(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 736. See also PARA 1325. As to the Public Works Loan Commissioners see PARA 1377. The Local Loans Fund, which was established by the National Debt and Local Loans Act 1887, was wound up on 31 March 1968; certain loans were written off, and the cash balance was paid into the National Loans Fund: see the National Loans Act 1968 s 3(8), (9), (10), Sch 3 (all repealed).

3 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 See the Exchequer and Audit Departments Act 1866 s 10; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq.

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## **(4) GOVERNMENT SECURITIES**

### **(i) Government Stock**

#### **1335. Regulations as to registration, transfer and certificates.**

The Treasury<sup>1</sup> has provided by regulations for the registration and transfer<sup>2</sup> of, and the issue of documents of title to, certain government securities<sup>3</sup>. The power to make regulations, and the regulations themselves, do not apply to government stock represented by any outstanding stock certificate issued under the National Debt Act 1870<sup>4</sup> or any other bearer security<sup>5</sup>, or to premium savings bonds<sup>6</sup>. The Treasury may also make regulations for, inter alia, the transfer in law by instrument in writing or otherwise of certain government securities and as to the issue, except in such cases as appear to the Treasury to be appropriate, of documents of title<sup>7</sup>. Further, the Treasury may make provision by regulations for the operation of a computer-based system for the transfer of securities issued by the government to be established by the Bank of England<sup>8</sup>, and for the paperless transfer of title to securities, including government securities<sup>9</sup>.

The Treasury may also by regulations<sup>10</sup> provide:

- 110 (1) for the administration of such stock and bonds (including the registration of holders) by such one or more persons as the Treasury may appoint in accordance with the regulations and the closure of any register<sup>11</sup>;
- 111 (2) for the redemption of such stock and bonds<sup>12</sup>;

- 112 (3) for the exchange of any such stock and bonds (whenever issued) for strips of them<sup>13</sup>;
- 113 (4) for exchanges by which such strips (whether deriving from the same security or from different securities) are consolidated into a single security of a specified description<sup>14</sup>;
- 114 (5) as to the issue except in such cases as appear to the Treasury to be appropriate of documents of title relating to such stock and bonds and as to evidence of title to them<sup>15</sup>; and
- 115 (6) for any incidental, supplementary or transitional matters relating to such stock and bonds, and to transactions connected with them, for which it appears to the Treasury to be necessary or expedient to provide<sup>16</sup>.

Regulations made by virtue of head (3) or head (4) above<sup>17</sup> may: (a) provide, for the purpose of authorising the making of exchanges, for any stock or bonds to be treated as issued on such terms as may be specified in the regulations<sup>18</sup>; (b) contain such provision as the Treasury thinks fit about the circumstances in which and the conditions subject to which exchanges may be effected<sup>19</sup>; and (c) contain any such provision as could be contained in the Treasury rules as to exchange of securities<sup>20</sup>. However, the regulations made by virtue of head (3) or head (4) above may not make provision for the exchange of any stock or bonds, or of any strips, in any cases other than those where the exchange is at the request of the holder or in accordance with an order made by a court<sup>21</sup>.

Persons appointed for the administration of stock and bonds<sup>22</sup> are appointed on such terms (including terms as to the making of payments by the Treasury) as the Treasury considers appropriate, and the persons so appointed include the Bank of England<sup>23</sup>.

Regulations<sup>24</sup> may make different provision for different cases and contain such exceptions and exclusions as the Treasury thinks fit<sup>25</sup>. When the Treasury proposes to make any such regulations<sup>26</sup>, it must lay a draft before Parliament; and if either House of Parliament within the period of 40 days beginning with the day on which the draft of the regulations is laid before it resolves that the regulations are not to be made, no further proceedings may be taken, but without prejudice to the laying of new draft regulations before Parliament<sup>27</sup>.

The Treasury may also make regulations modifying enactments which apply in relation to government securities or to any description of such securities, or for any other purpose refer to such securities or to any description of them, in connection with the issue or transfer of strips or the consolidation of strips into other securities, and such regulations may, inter alia, impose a charge to tax<sup>28</sup>. Any statutory provision applying in relation to all or any strippable government securities also applies in relation to every strip of any government securities<sup>29</sup>. This, however, does not apply to any statutory provision relating to any tax under the care and management of the Commissioners for Her Majesty's Revenue and Customs<sup>30</sup>, or where the context otherwise requires<sup>31</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the purposes for which the Treasury may create and issue securities see PARA 1329. As to the transfer of stock see PARA 1339.

3 See the Finance Act 1942 s 47(1)(a), (2) (s 47(1)(a) amended by the Stock Transfer Act 1982 Sch 2 para 2); the Finance Act 1942 Sch 11 Pt I (amended by the Finance Act 1963 Sch 14 Pt VII; the National Loans Act 1968 Sch 6 Pt II; the Statute Law (Repeals) Act 1986; and the Finance Act 1989 Sch 17 Pt XIV); and the Government Stock Regulations 2004, SI 2004/1611. The regulations apply to stock. 'Stock' means any amount of stock or registered bonds of any of the descriptions specified in the Finance Act 1942 Sch 11 Pt I: Government Stock Regulations 2004, SI 2004/1611, reg 2(1). Those descriptions are: 2½% and 2¾% Annuities, 2½% Consolidated Stock, 3½% Conversion Loan, 3½% War Loan, 4% Consolidated Loan, Guaranteed 4½% Bonds, stock and registered bonds issued or deemed to be issued under the National Loans Act 1939: Finance Act 1942 Sch 11 Pt I. However, in the Government Stock Regulations 2004, SI 2004/1611, reg 7(1) (see PARA

1337), regs 12-15 (see PARAS 1339-1342), and reg 29 (see PARA 1345), 'stock' does not include any strip: reg 2(1). For these purposes, 'strip' means a security representing any amount, being one penny or any multiple thereof, payable under one or more strips within the meaning of the Finance Act 1942 s 47 (see note 13), of any stock, regardless whether that amount corresponds to the total amount payable under any security issued for the purpose of effecting any particular exchange of stock for strips: Government Stock Regulations 2004, SI 2004/1611, reg 2(1).

4 le under the National Debt Act 1870 Pt V (ss 26-42) (repealed).

5 See the Finance Act 1942 s 47(4)(a).

6 National Loans Act 1968 s 16(3). As to premium savings bonds see PARA 1362.

7 See the Stock Transfer Act 1982 s 3; and **COMPANIES** vol 14 (2009) PARA 430.

8 See the Stock Transfer Act 1982 ss 1, 3; and **COMPANIES** vol 14 (2009) PARA 430.

9 See the Companies Act 2006 ss 783-787 (formerly the Companies Act 1989 s 207); and **COMPANIES** vol 14 (2009) PARA 420.

10 Regulations under the Finance Act 1942 s 47(1) may make provision with respect to the purchase and sale of such stock and bonds by any person, or any description of person, through the person or persons appointed in accordance with regulations under s 47(1)(b) (see the text to note 11) and, in relation to purchase or sale under the regulations, may: (1) make provision with respect to the commission and fees payable; and (2) make provision limiting the amount which any person, or any description of person, may purchase or sell on any day: s 47(1ZA) (added by the Bank of England Act 1998 s 34; and amended by SI 2004/1486). Regulations under the Finance Act 1942 s 47(1) may also make provision authorising the person or persons appointed in accordance with regulations under s 47(1)(b) (see the text to note 11), in such circumstances and subject to such conditions as may be prescribed in the regulations, to transfer stock and bonds in the name of a deceased person into the name of another person without requiring the production of probate, confirmation or letters of administration: s 47(1A) (added by the Finance Act 1989 s 183(1); and amended by SI 2004/1486).

11 Finance Act 1942 s 47(1)(b) (substituted by the Finance Act 2002 s 140(1)(a)).

12 Finance Act 1942 s 47(1)(bb) (added by the Finance Act 1989 s 183(1)). As to the redemption of government stock see PARA 1351.

13 Finance Act 1942 s 47(1)(bc) (added by the Finance Act 1996 s 202(1)). For the Finance Act 1942 s 47(1), 'strip', in relation to any stock or bond, means a security issued under the National Loans Act 1968 which: (1) is issued for the purpose of representing the right to, or of securing: (a) a payment corresponding to a payment of interest or principal remaining to be made under the stock or bond; or (b) two or more payments each corresponding to a different payment remaining to be so made; (2) is issued in conjunction with the issue of one or more other securities which, together with that security, represent the right to, or secure, payments corresponding to every payment remaining to be made under the stock or bond; and (3) is not itself a security that represents the right to, or secures, payments corresponding to a part of every payment so remaining: s 47(1B) (s 47(1B)-(1F) added by the Finance Act 1996 s 202(2)). For these purposes, where the balance has been struck for a dividend on any stock or bond, any payment to be made in respect of that dividend is, at times falling after that balance has been struck, to be treated as not being a payment remaining to be made under the stock or bond: Finance Act 1942 s 47(1C) (as so added). As to the meaning of 'strip' see also the Income Tax (Trading and Other Income) Act 2005 s 444(1)-(4); and **INCOME TAXATION**.

14 Finance Act 1942 s 47(1)(bd) (added by the Finance Act 1996 s 202(1)). The text refers to a security of a description specified in the Finance Act 1942 Sch 11 Pt I: see note 3.

15 Finance Act 1942 s 47(1)(c) (amended by the Stock Transfer Act 1982 Sch 2 para 2).

16 Finance Act 1942 s 47(1)(e).

17 le by virtue of the Finance Act 1942 s 47(1)(bc) (see the text and note 13) or s 47(1)(bd) (see the text and note 14).

18 Finance Act 1942 s 47(1D)(a) (as added: see note 13).

19 Finance Act 1942 s 47(1D)(b) (as added: see note 13).

20 Finance Act 1942 s 47(1D)(c) (as added: see note 13). The rules referred to in the text are those made under the National Loans Act 1968 s 14(3): see PARA 1345.

- 21 Finance Act 1942 s 47(1E) (as added: see note 13).
- 22 Ie under the Finance Act 1942 s 47(1)(b) (see the text to note 11).
- 23 Finance Act 1942 s 47(1EA) (added by the Finance Act 2002 s 140(1)(b)). As to the Bank of England see PARA 793 et seq.
- 24 Ie under the Finance Act 1942 s 47(1).
- 25 Finance Act 1942 s 47(1F) (as added: see note 13). The powers of the Treasury to make regulations under s 47(1) are without prejudice to any of its powers under the National Loans Act 1968: Finance Act 1942 s 47(1F) (as so added).
- 26 Ie under the Finance Act 1942 s 47(1).
- 27 Finance Act 1942 s 47(3). In reckoning any such period of 40 days no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days: s 47(3).
- 28 See the Finance Act 1996 s 202(5)-(7).
- 29 See the Gilt Strips (Consequential Amendments) Regulations 1997, SI 1997/2646, regs 3, 4 (amended by SI 2004/3327)
- 30 Note that the Inland Revenue has merged with Her Majesty's Customs and Excise to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005. As to the Commissioners for Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) para 900 et seq.
- 31 See the Gilt Strips (Consequential Amendments) Regulations 1997, SI 1997/2646, reg 5; and see also the Commissioners for Revenue and Customs Act 2005 s 50.

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### **1336. Appointment of registrar.**

The Treasury<sup>1</sup> may from time to time appoint a person for the purposes of the administration of stock<sup>2</sup>, including the registration of holders<sup>3</sup>. A person so appointed is known from the date on which the appointment takes effect (the 'transfer day'), as the 'Registrar of Government Stock' (the 'registrar')<sup>4</sup>.

From the transfer day, the new registrar<sup>5</sup> must administer stock and maintain the register<sup>6</sup>. Save where the previous registrar<sup>7</sup> has been appointed as the new registrar, the previous registrar must, before the beginning of the transfer day, transfer to the person appointed to become the new registrar:

- 116 (1) the register; and
- 117 (2) the record of uncertificated general public sector securities<sup>8</sup>,

as at the close of the last business day preceding that transfer day<sup>9</sup>.

Where, before the transfer day, a valid instrument in writing for the transfer of stock has been delivered to the previous registrar but the previous registrar has not given effect to the transfer, the instrument is deemed to have been delivered to the new registrar on the day of its delivery to the previous registrar<sup>10</sup>.

Where the previous registrar has not been appointed as the new registrar, the previous registrar must, as soon as is reasonably practicable on or following the transfer day, provide to the new registrar all relevant records<sup>11</sup> which:

- 118 (a) are in the possession of the previous registrar immediately before the transfer day<sup>12</sup>; and
- 119 (b) are reasonably required by the new registrar for the purposes of the administration of stock, including the registration of holders<sup>13</sup>.

Any relevant records which are received by the previous registrar on or after the transfer day must, as soon as is reasonably practicable, be forwarded to the new registrar<sup>14</sup>.

The previous registrar must provide to the person appointed to become the new registrar such relevant records at such time or times before the transfer day as that person may reasonably require, in order to ensure that he can properly commence the administration of stock (including the registration of holders) on the transfer day<sup>15</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the meaning of 'stock' see PARA 1335 note 3.

3 Government Stock Regulations 2004, SI 2004/1611, reg 3(1). Appointments made under this provision take effect from the date specified by the Treasury in, or for the purpose of, that appointment: reg 3(3).

4 Government Stock Regulations 2004, SI 2004/1611, regs 2(1), 3(2). The Bank of England was deemed appointed by the Treasury as the first registrar on 1 July 2004 (see regs 1, 3(4)), but Computershare Investment Services PLC took over as the registrar on 20 December 2004. As to the Bank of England see PARA 793 et seq.

5 'New registrar' means a person appointed as the registrar with effect from the transfer day: Government Stock Regulations 2004, SI 2004/1611, reg 2(1).

6 See the Government Stock Regulations 2004, SI 2004/1611, reg 4(1). For the purposes of Pt II, 'register' means the registers required by reg 7 (see PARA 1337) to be kept in respect of each description of stock: reg 2(1).

7 'Previous registrar' means: (1) in relation to the first transfer day, the Bank of England; and (2) in relation to any subsequent period, a person holding the appointment as the registrar immediately before the transfer day: Government Stock Regulations 2004, SI 2004/1611, reg 2(1). 'First transfer day' means the day on which the first appointment made by the Treasury under reg 3 took effect (see the text and note 4): reg 2(1).

8 Ie within the meaning of the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 21(2) (see **COMPANIES** vol 14 (2009) PARA 425): see the Government Stock Regulations 2004, SI 2004/1611, reg 4(2)(b).

9 Government Stock Regulations 2004, SI 2004/1611, reg 4(2). 'Business day' means any day other than: (1) a Saturday or Sunday; (2) Good Friday or Christmas Day; (3) a day which, in England and Wales, is a bank holiday under the Banking and Financial Dealings Act 1971 (see PARA 832); (4) a day specified in an order under the Banking and Financial Dealings Act 1971 s 2(1) (see PARA 832) and declared by that order to be a non-business day; or (5) a day appointed by Royal proclamation as a public fast or thanksgiving day: Government Stock Regulations 2004, SI 2004/1611, reg 2(1).

10 Government Stock Regulations 2004, SI 2004/1611, reg 5.

11 In the Government Stock Regulations 2004, SI 2004/1611, reg 6, 'relevant records' includes any records, data, documents, information or communications (including any electronic communication) or copies of the same in the possession of the previous registrar, which relate to the transfer or registration of stock or to any associated transaction or to the record of uncertificated public sector securities referred to in reg 4(2)(b) (see note 8): reg 6(5).

12 See the Government Stock Regulations 2004, SI 2004/1611, reg 6(1), (2)(a).

13 See the Government Stock Regulations 2004, SI 2004/1611, reg 6(1), (2)(b).



14 See the Government Stock Regulations 2004, SI 2004/1611, reg 6(3).

15 Government Stock Regulations 2004, SI 2004/1611, reg 6(4).

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### **1337. Stock registers.**

The registrar<sup>1</sup> must keep in respect of each description of stock<sup>2</sup> registers wherein is entered the name and address of each person who is for the time being a holder of stock of that description and the amount of that stock which he holds, but, if more than four persons are joint holders of any stock, the names and addresses of only four such persons are required to be entered in the register<sup>3</sup>.

The registrar must keep in respect of each description of strips<sup>4</sup> registers wherein is entered the name and address of each person who is for the time being a holder of a strip of that description and the amount payable under that strip<sup>5</sup>.

Where the terms subject to which the relevant strips are held provide for the members of any class of strips described therein (or in accordance therewith) to be indistinguishable one from another, or to become so indistinguishable on the happening of some contingency, each such class, the members of which are for the time being required to be so indistinguishable in accordance with those terms, is treated as a separate description of strips<sup>6</sup> and, accordingly<sup>7</sup>:

- 120 (1) separate registers must not be kept in respect of different categories of strips comprised within any description, whether by reference to the description of the parent stock or any other circumstance<sup>8</sup>; and
- 121 (2) where, in accordance with those terms, strips of any description are required to become indistinguishable from strips of any other description, the registers of those descriptions are to be amalgamated and a single register kept thenceforth in respect of the new description<sup>9</sup>.

Any register so kept<sup>10</sup> is prima facie evidence of any matters directed or authorised<sup>11</sup> to be entered therein and of the title of the persons whose names are entered therein as holders of stock<sup>12</sup>.

In the event of the redemption of any stock<sup>13</sup> the register relating to that stock may be closed for transfers for not more than one month immediately preceding the redemption date<sup>14</sup>.

Every register required to be kept under these provisions<sup>15</sup> must be made of paper or of any material in or on which the information required can be recorded and from which such information can be reproduced on paper, or partly of paper and partly of any such other material; any information required to be entered in a register under these provisions must be so entered or recorded<sup>16</sup>.

1 As to the registrar see PARA 1336.

2 As to the meaning of 'stock' see PARA 1335 note 3.

3 Government Stock Regulations 2004, SI 2004/1611, reg 7(1). The account may be designated in such manner as the stockholder may specify (see reg 23(1)), but the bank may decline to register an unreasonably long or elaborate designation (see reg 23(3)(a)). The stockholder may be described in the register as trustee of

a specified trust, or as trustee without specifying a trust, or in any other manner indicating the capacity in which he holds the stock: reg 23(1). Where he occupies an office or official position, his official description may be registered in lieu of his name: see reg 23(2). The bank need not register both the official description and the name: see reg 23(3)(b). Apart from this, no notice of any trust may be entered in any register, or in any certificate, or be receivable by the registrar: see reg 24. Notwithstanding that the stockholder is described as mentioned in reg 23, the registrar is not required to inquire into the propriety of anything done in relation to the stock: see reg 24.

4 As to the meaning of 'strips' see PARA 1335 note 3.

5 Government Stock Regulations 2004, SI 2004/1611, reg 7(2).

6 Ie for the purposes of the Government Stock Regulations 2004, SI 2004/1611, reg 7(2) (see the text and notes 4-5).

7 Government Stock Regulations 2004, SI 2004/1611, reg 7(3).

8 Government Stock Regulations 2004, SI 2004/1611, reg 7(3)(a).

9 Government Stock Regulations 2004, SI 2004/1611, reg 7(3)(b).

10 Ie under the provisions of the Government Stock Regulations 2004, SI 2004/1611, reg 7(1), (2): see the text and notes 1-5.

11 Ie by the provisions of the Government Stock Regulations 2004, SI 2004/1611.

12 Government Stock Regulations 2004, SI 2004/1611, reg 7(4). The Bankers' Books Evidence Act 1879 (see PARA 907 et seq) applies to the register as if the registrar were a bank and a banker within the meaning of that Act and as if the register entry were an entry in a banker's book: see the Government Stock Regulations 2004, SI 2004/1611, reg 7(7).

13 As to the redemption of stock see PARA 1351.

14 Government Stock Regulations 2004, SI 2004/1611, reg 7(5).

15 Ie under the Government Stock Regulations 2004, SI 2004/1611, reg 7(1), (2): see the text and notes 1-5.

16 See the Government Stock Regulations 2004, SI 2004/1611, reg 7(6). Where any information is recorded in a register otherwise than in readable form and is later transcribed into readable form, the transcribed version of such information is deemed to be part of the register: reg 7(6).

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### **1338. Stock certificates.**

Every person whose name is entered in a register as a holder of stock<sup>1</sup> is entitled, without payment, to a certificate representing that stock<sup>2</sup>. This certificate is prima facie evidence of the title of the person named in it to the stock specified in it<sup>3</sup>. Where there is more than one joint holder only one certificate is issued<sup>4</sup>. On a transfer of part of a holding, the holder is entitled to a certificate representing the part retained<sup>5</sup>. If a certificate is lost or destroyed, the registrar may, on receipt of such evidence and indemnity as the registrar may require, and on the surrender of the certificate in a case in which the certificate is defaced, issue a duplicate of it, and may charge a fee<sup>6</sup>.

Stock or registered bonds issued under the National Loans Act 1968 are subject to the provisions of the National Debt Act 1870<sup>7</sup>.

The Treasury is empowered to make regulations in respect of all or any description of government securities for which bearer bonds are available<sup>a</sup>.

- 1 As to the meaning of 'stock' see PARA 1335 note 3.
- 2 Government Stock Regulations 2004, SI 2004/1611, reg 8(1). As to the form of the certificate see reg 9(1), (2).
- 3 Government Stock Regulations 2004, SI 2004/1611, reg 9(3).
- 4 Government Stock Regulations 2004, SI 2004/1611, reg 8(5). Delivery of a certificate to one of several joint holders is sufficient delivery to all of them: reg 8(5).
- 5 See the Government Stock Regulations 2004, SI 2004/1611, reg 8(3).
- 6 See the Government Stock Regulations 2004, SI 2004/1611, reg 8(3). The fee is £20: reg 8(3). As to the registrar see PARA 1336.
- 7 National Loans Act 1968 s 16(4). References to stock or registered bonds issued under the National Loans Act 1968 include references to a strip (within the meaning of the Finance Act 1942 s 47: see PARA 1335 note 13) of any stock or bond (whether the stock or bond is issued under the National Loans Act 1968 or otherwise): s 16(4A) (added by the Finance Act 1996 s 202(4)).
- 8 See the Finance Act 1963 s 71 (amended by the Statute Law Revision Act 1986; and the Finance Act 1987 Sch 16 Pt XI). As to regulations made under the Finance Act 1963 s 71 see the Government Bearer Bond (Prescribed Securities) Order 1963, SI 1963/1701, the Government Bearer Bond (Prescribed Securities) (No 2) Order 1963, SI 1963/1958, the Government Bearer Bond (Prescribed Securities) Order 1964, SI 1964/1883 and the Government Bearer Bond (Prescribed Securities) Order 1965, SI 1965/212. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

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### **1339. Transfer of stock.**

Government stock<sup>1</sup> is generally transferable by instrument in writing in accordance with the Stock Transfer Act 1963<sup>2</sup> delivered to the registrar<sup>3</sup>. However, units of stock which are recorded on a register kept by the operator of a relevant system under the Uncertificated Securities Regulations 2001<sup>4</sup> are transferable only by means of that system<sup>5</sup>. A strip<sup>6</sup> is transferable only by means of a relevant system operated by an operator in accordance with those regulations<sup>7</sup>.

The registrar gives effect to a transfer by entering the requisite particulars in the appropriate register<sup>8</sup>. The registrar need not give effect to a transfer until the expiration of ten clear days after the day on which the registrar receives the written instrument of transfer<sup>9</sup>. The transferor remains the holder until the transfer is effected<sup>10</sup>. The registrar may decline to give effect to a transfer unless evidence of the transferor's right to make the transfer is produced<sup>11</sup>. The registrar may also decline to give effect to a transfer of any stock by instrument in writing unless: (1) the transfer is accompanied by the certificate showing that the transferor is the holder of the stock<sup>12</sup>; or (2) evidence of the certificate's loss or destruction is furnished to the registrar together with an indemnity<sup>13</sup>; or (3) the transfer is accompanied by a certificate showing that the transferor is the holder of part of the stock being transferred, and as to the residue there is furnished to the registrar such evidence as the registrar may require that a certificate showing that the transferor is the holder of such residue has been lost or destroyed and there is given to the registrar such indemnity in respect of such lost or destroyed

certificate as he may require<sup>14</sup>. These rights and duties are modified in the case of stock transferred by means of a relevant system<sup>15</sup>.

Stock registered in the name of a deceased person is transferable by his personal representative<sup>16</sup>, but if there is more than one personal representative the registrar may require all of them to execute the transfer<sup>17</sup>. Where any stock is entered in a register in the name of a deceased person the production to the registrar of any document which is by the law of the place where the register is kept sufficient evidence of probate of the will, or of letters of administration of the estate, or confirmation as executor to the estate, of that person having been granted to some person, is to be accepted by the registrar as sufficient evidence of the grant<sup>18</sup>. Where the total value of all holdings of stock entered in the register in the name of a deceased person at the time of his death does not exceed £5,000, and probate of his will, or letters of administration of his estate, or confirmation as executor to the estate is not or are not produced to the registrar within such time as the registrar thinks reasonable in the circumstances of the case, the registrar may transfer the stock or any part of it: (a) to a person appearing to the registrar to be entitled to take out such probate, letters of administration or confirmation; or (b) to any other person appearing to the registrar to be a fit and proper person to receive it<sup>19</sup>.

Special provisions apply to the transfer of registered bonds transferable in fixed denominations<sup>20</sup>.

The certification by the registrar of a transfer of any stock or of a stock transfer or broker's transfer under the Stock Transfer Act 1963 relating to any stock is to be taken as a representation by the registrar to any person acting on the faith of the certification that documents showing a prima facie title to the stock in the transferor have been produced to the registrar, but not as a representation that the transferor has any title to the stock<sup>21</sup>.

The transfer of stock may in appropriate circumstances be restrained by a charging order or by a stop order or stop notice<sup>22</sup>.

1 As to the stock to which these provisions apply see PARA 1335 note 3.

2 The simplified form of transfer under the Stock Transfer Act 1963 applies to all securities issued by the United Kingdom government except stock or bonds in the National Savings Stock Register and except national savings certificates: see s 1(4)(c) (amended by the Finance Act 1964 Sch 8 para 10, Sch 9; and the Post Office Act 1969 s 108(1)(f)). See **COMPANIES** vol 14 (2009) PARA 430. As to the National Savings Stock Register see PARA 1347. As to National Savings Certificates see PARA 1352 et seq. As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 Government Stock Regulations 2004, SI 2004/1611, reg 15(1). The registrar must retain any such instrument that is delivered to him: reg 15(1). Any instrument retained may be destroyed at any time after the expiry of 12 years after the date when particulars of the stock transfer were entered in the register: reg 15(2). As to the registrar see PARA 1336.

4 I.e. the Uncertificated Securities Regulations 2001, SI 2001/3755, which provide for paperless transfers: see **COMPANIES** vol 14 (2009) PARA 340. As to the meaning of 'operator of a relevant system' see **COMPANIES** vol 14 (2009) PARA 421; definition applied by the Government Stock Regulations 2004, SI 2004/1611, reg 2(2). CRESTCo has been approved as an operator of a relevant system: see PARAS 75-76.

5 See the Government Stock Regulations 2004, SI 2004/1611, reg 15(3).

6 As to the meaning of 'strip' see PARA 1335 note 3.

7 See the Government Stock Regulations 2004, SI 2004/1611, reg 15(4).

8 Government Stock Regulations 2004, SI 2004/1611, reg 22.

9 Government Stock Regulations 2004, SI 2004/1611, reg 21.

10 Government Stock Regulations 2004, SI 2004/1611, reg 20.

- 11 See the Government Stock Regulations 2004, SI 2004/1611, reg 16.
- 12 See the Government Stock Regulations 2004, SI 2004/1611, reg 19(a).
- 13 See the Government Stock Regulations 2004, SI 2004/1611, reg 19(b).
- 14 See the Government Stock Regulations 2004, SI 2004/1611, reg 19(c).
- 15 See the Uncertificated Securities Regulations 2001, SI 2001/3755; and **COMPANIES** vol 14 (2009) PARA 340. See also the text and note 4.
- 16 Government Stock Regulations 2004, SI 2004/1611, reg 17(1).
- 17 Government Stock Regulations 2004, SI 2004/1611, reg 17(2).
- 18 Government Stock Regulations 2004, SI 2004/1611, reg 17(3). As to deaths in the United Kingdom see also the Finance (No 2) Act 1915 s 48 (amended by the Post Office Act 1968 s 108(1)(a); the Statute Law (Repeals) Act 1986, SI 2001/3755; and SI 2004/1662); and as to deaths in the Isle of Man or the Channel Islands see the Finance Act 1949 s 48 (amended by the Statute Law (Repeals) Act 1986; SI 2001/3755; and SI 2004/1662).
- 19 Government Stock Regulations 2004, SI 2004/1611, reg 17(4).
- 20 See the Government Stock Regulations 2004, SI 2004/1611, reg 28.
- 21 See the Government Stock Regulations 2004, SI 2004/1611, reg 18.
- 22 As to charging orders and stop notices on government stock see **CIVIL PROCEDURE** vol 12 (2009) PARA 1467 et seq.

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### **1340. Purchase of stock on application to registrar.**

Stock<sup>1</sup> in the register<sup>2</sup> may be purchased on application to the registrar<sup>3</sup>. The Treasury<sup>4</sup> may from time to time indicate the descriptions of stock available for purchase by: (1) notice in writing sent to each person who is for the time being registered as a holder of stock, which: (a) is sent to his address for the time being recorded on a relevant register<sup>5</sup>; and (b) where stock is registered in the names of more than one person being joint holders, is sent to all such persons; or (2) notice published in the London, Edinburgh and Belfast Gazettes<sup>6</sup>. Application to purchase stock must be made by delivering to the registrar an application in the approved form accompanied, except where the registrar otherwise directs, by a sum sufficient to include the purchase price of the stock and the proper amount payable<sup>7</sup> by way of commission on the purchase<sup>8</sup>. As soon as practicable after receiving such an application, the registrar must give instructions to the Treasury, which must<sup>9</sup> effect the purchase of the stock<sup>10</sup>.

If the sum received by the registrar in respect of an application to purchase stock is insufficient to defray the aggregate of the purchase price of the stock and the commission payable, the Treasury is not required to effect the purchase of the stock; however, if the Treasury does so, the registrar must send to the applicant a notification of the amount of the deficiency, and, if that amount is not received within seven days after the day on which the notification was sent, the Treasury may effect the sale of the stock and may, before paying the proceeds of that sale to the applicant, deduct from those proceeds the amount of the deficiency, and the amount payable by way of commission on the sale<sup>11</sup>. If the sum received by the registrar in respect of an application to purchase stock exceeds the sum required to defray the amount of the

purchase price of the stock and the commission payable in respect of the purchase, the registrar must return to the applicant the amount of the excess<sup>12</sup>.

- 1 As to the meaning of 'stock' see PARA 1335 note 3.
- 2 As to the registers see PARA 1337.
- 3 See the Government Stock Regulations 2004, SI 2004/1611, reg 12(1). As to the registrar see PARA 1336.
- 4 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 5 I.e. a register referred to in the Government Stock Regulations 2004, SI 2004/1611, reg 11(2): see PARA 1351 note 3.
- 6 Government Stock Regulations 2004, SI 2004/1611, reg 12(2).
- 7 I.e. under the provisions of the Government Stock Regulations 2004, SI 2004/1611, reg 14: see PARA 1342.
- 8 Government Stock Regulations 2004, SI 2004/1611, reg 12(3). An application or tender for stock made in pursuance of a prospectus issued by the Treasury is not revocable between:
  - 4 (1) in the case of an application, the time specified in the prospectus for the opening of the application lists for the stock; or
  - 5 (2) in the case of a tender, the time specified in the prospectus as the latest time by which tenders for the stock must be lodged,
 and 10 am on the day following the second clear day thereafter: see reg 10(1). In reckoning any period for the purposes of reg 10(1) any day, which is not a business day, must be disregarded: see reg 10(2).
- 9 I.e. subject to the Government Stock Regulations 2004, SI 2004/1611, reg 12(5): see the text to note 11.
- 10 Government Stock Regulations 2004, SI 2004/1611, reg 12(4).
- 11 Government Stock Regulations 2004, SI 2004/1611, reg 12(5).
- 12 Government Stock Regulations 2004, SI 2004/1611, reg 12(6). The registrar may return any such excess by means of a warrant sent by post and, in the absence of special instructions, any such warrant may be sent to any address given in the application to purchase the stock: reg 12(7). This does not affect the right of the registrar to return the excess by any other means of payment for which the approved form may provide or which may otherwise be agreed between the applicant and the registrar: reg 12(8).

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### **1341. Sale of stock on application to registrar.**

Stock<sup>1</sup> in the register<sup>2</sup> may be sold on application to the registrar<sup>3</sup>. The Treasury<sup>4</sup> may from time to time indicate the descriptions of stock available for sale by: (1) notice in writing sent to each person who is for the time being registered as a holder of stock, which: (a) is sent to his address for the time being recorded on a relevant register<sup>5</sup>; and (b) where stock is registered in the names of more than one person being joint holders, is sent to all such persons; or (2) notice published in the London, Edinburgh and Belfast Gazettes<sup>6</sup>. Application to sell stock must be made by sending to the registrar an application in the approved form accompanied, except where the registrar otherwise directs, by any certificate relating to the stock<sup>7</sup>. As soon as practicable after receiving such an application, the registrar must give instructions to the Treasury and as soon as practicable thereafter the Treasury must effect the sale of the stock<sup>8</sup>,

but the registrar may decline to give such instructions to the Treasury unless there is furnished to the registrar such evidence as he may require of the right of the applicant to authorise the sale<sup>9</sup>.

On completion of the sale of any stock, the registrar must, before paying the proceeds of the sale to the person entitled to it, deduct the amount payable<sup>10</sup> by way of commission on the sale<sup>11</sup>.

1 As to the meaning of 'stock' see PARA 1335 note 3.

2 As to stock registers see PARA 1337.

3 Government Stock Regulations 2004, SI 2004/1611, reg 13(1). As to the registrar see PARA 159.

4 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 I.e. a register referred to in the Government Stock Regulations 2004, SI 2004/1611, reg 11(2): see PARA 1351 note 3.

6 See the Government Stock Regulations 2004, SI 2004/1611, reg 13(2).

7 Government Stock Regulations 2004, SI 2004/1611, reg 13(3).

8 Government Stock Regulations 2004, SI 2004/1611, reg 13(4).

9 Government Stock Regulations 2004, SI 2004/1611, reg 13(5).

10 I.e. under the provisions of the Government Stock Regulations 2004, SI 2004/1611, reg 14: see PARA 1342.

11 Government Stock Regulations 2004, SI 2004/1611, reg 13(6). The registrar may pay the net proceeds of the sale by means of a warrant sent by post and, in the absence of special instructions, any such warrant may be sent to any address given in the application to sell the stock or to the address specified in the register in relation to the person who, immediately before the sale was effected, was registered as the holder of the stock: reg 13(7). This does not affect the right of the registrar to pay the net proceeds of sale by any other means of payment for which the approved form may provide or which may otherwise be agreed between the applicant and the registrar: reg 13(8).

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### **1342. Commission payable on purchase or sale of stock on application to registrar.**

Commission is payable to the registrar<sup>1</sup> on behalf of the Treasury<sup>2</sup> in respect of the purchase or sale of stock<sup>3</sup> at the specified rates<sup>4</sup>.

1 As to the registrar see PARA 1336.

2 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 I.e. in accordance with the provisions of the Government Stock Regulations 2004, SI 2004/1611, regs 12, 13: see PARAS 1340-1341.

4 Government Stock Regulations 2004, SI 2004/1611, reg 14. As to the specified rates see Schedule.

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### 1343. Payments.

When the Treasury imprest for the payment out of the National Loans Fund has been issued<sup>1</sup>, the registrar must without delay apply the money in payment of dividends on the stock<sup>2</sup>. Where a dividend warrant is sent by post to a stockholder in accordance with regulations<sup>3</sup>, the posting of the warrant is, as respects the liability of the registrar, the Bank of England or any previous registrar, equivalent to delivery of the warrant to the stockholder<sup>4</sup>.

The registrar, the Bank of England and any previous registrar is not liable in respect of any payment duly made or act duly done in accordance with the Government Stock Regulations 1965<sup>5</sup> or the Government Stock Regulations 2004<sup>6</sup>; and any such payment, subject to the provisions for saving the rights of third parties<sup>7</sup>, is deemed to have been a valid payment, and the receipt of the person to whom the money was paid is a full discharge to the registrar, the Bank of England or, as the case may be, any previous registrar, for the amount of the payment<sup>8</sup>. Where a warrant for payment of any amount payable in respect of any stock is sent by post in accordance with the provision relating to the redemption of stock by the registrar<sup>9</sup>, the posting of the letter containing the warrant is, as respects the liability of the registrar, the Bank of England or, as the case may be, any previous registrar, equivalent to the delivery of the warrant to the person entitled to receive it<sup>10</sup>.

An order or decree of any court in the United Kingdom is sufficient authority to the registrar to pay dividends in accordance with that order or decree<sup>11</sup>.

1 Sufficient money to pay dividends is issuable out of the National Loans Fund and payable on the order of the Treasury: see the National Debt Act 1870 s 12 (amended by the National Loans Act 1968 Sch 5), and the National Debt Act 1870 s 14(1) (s 14 substituted by SI 2004/2744). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

2 National Debt Act 1870 s 15 (substituted by SI 2004/2744). Any person who, at the time of the balance being struck for a dividend on stock, is entered in a relevant register as a stockholder is, as between himself and any transferee of the stock, entitled to the then current half-year's or quarter's dividend: see the National Debt (Stockholders Relief) Act 1892 s 2 (substituted in relation to dividends for which the balance is struck on or after 21 March 1997 by the Finance Act 1997 s 108; and amended by SI 2001/3755; and by SI 2004/1662). Where any stock is exchanged for strips of that stock and that exchange takes place after the balance has been struck for a dividend on that stock but before the day on which that dividend is payable, any person who would have been entitled to that dividend but for the exchange remains entitled to that dividend notwithstanding the exchange: see the National Debt (Stockholders Relief) Act 1892 s 2A (added by the Finance Act 1996 s 202(3)). As to the registrar see PARA 1336.

3 The Treasury may from time to time make regulations for the payment of dividends on stock either by sending warrants by post or by payment through a banker: National Debt Act 1889 s 4(1) (substituted by SI 2004/1662). These provisions apply to all stock of any company or corporation, funds or annuities, transferable in the registers kept by the registrar in accordance with regulations under the Finance Act 1942 s 47 (see the Government Stock Regulations 2004, SI 2004/1611, reg 7; and PARA 1337), or in the manner provided by those regulations: National Debt Act 1889 s 4(6) (amended by SI 2004/1662).

4 National Debt Act 1889 s 4(2) (amended by SI 2004/1662). As to the Bank of England see PARA 793 et seq.

5 Ie the Government Stock Regulations 1965, SI 1965/1420 (revoked).

6 Ie the Government Stock Regulations 2004, SI 2004/1611.

7 Nothing in the regulations for the protection of the registrar, the Bank of England, or any previous registrar in respect of any act done or any money paid operates to prevent the recovery by any person or his



representative of any stock or money lawfully due to him from the person to whom that stock was transferred or that money was paid by or under the direction of the registrar, the Bank of England, or any previous registrar, or from the representatives of that person, or affect the rights which any person or his representatives may have in respect of any stock against a third party: see the Government Stock Regulations 1965, SI 1965/1420, reg 22B (revoked); and the Government Stock Regulations 2004, SI 2004/1611, reg 33.

8 See the Government Stock Regulations 2004, SI 2004/1611, reg 32.

9 See the Government Stock Regulations 1965, SI 1965/1420, reg 3B (revoked); and the Government Stock Regulations 2004, SI 2004/1611, reg 11. See PARA 1351.

10 See the Government Stock Regulations 2004, SI 2004/1611, reg 32(2).

11 See the Finance Act 1916 s 66 (amended by SI 2004/1662). As to the meaning of 'United Kingdom' see PARA 2 note 3.

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### **1344. Government stock held by minors.**

Where the holder or a joint holder of government stock<sup>1</sup> is a minor, the registrar may, if he thinks fit, pay the dividends on it in accordance with the written instructions of a parent or guardian of the minor<sup>2</sup>. If satisfied that the minor has attained the age of seven<sup>3</sup>, the registrar may pay any redemption money payable in respect of the stock in accordance with the written instructions of the minor and of a parent or guardian of his<sup>4</sup>, and may give effect to a transfer of the stock in accordance with such instructions<sup>5</sup>. Any such payment discharges the bank's liability<sup>6</sup>, and any such transfer is not revocable at the minor's instance except where it would be revocable apart from the minority<sup>7</sup>.

Where a minor is the sole survivor in an account, or where a minor holds stock jointly with a person under disability, or where stock has by mistake been brought in or transferred into the sole name of a minor, the registrar, at the request in writing of the minor's parent, guardian or litigation friend, may receive the dividends and apply them to the purchase of like stock which must be added to the original investment<sup>8</sup>.

1 'Government stock' means any registered securities issued by the United Kingdom government: see the Finance (No 2) Act 1975 s 73(4). As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 Finance (No 2) Act 1975 s 73(1)(a) (s 73(1)-(3) amended by SI 2004/1662). As to the registrar see PARA 1336. 'Minor' means a person under the age of 18: see the Family Law Reform Act 1969 s 1; and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

3 Finance (No 2) Act 1975 s 73(2) (as amended: see note 2).

4 Finance (No 2) Act 1975 s 73(1)(b) (as amended: see note 2).

5 Finance (No 2) Act 1975 s 73(1)(c) (as amended: see note 2). In the case of units of stock which are recorded on a register kept by the operator of a relevant system: (1) the reference to the registrar in s 73(1) so far as it relates to s 73(1)(c); (2) the references to the registrar in s 73(2), (3) so far as they apply for the purposes of s 73(1)(c), are to be taken to be reference to that operator; and (3) 'operator' and 'relevant system' have the same meanings as in the Uncertificated Securities Regulations 2001, SI 2001/3755 (see **COMPANIES** vol 14 (2009) PARA 421); Finance (No 2) Act 1975 s 73(4A) (added by SI 2001/3755; and amended by SI 2004/1662).

6 Finance (No 2) Act 1975 s 73(3)(a) (as amended: see note 2).

7 Finance (No 2) Act 1975 s 73(3)(b) (as amended: see note 2).

8 See the National Debt (Stockholders Relief) Act 1892 s 3 (amended by SI 2004/1662). Note that the term 'next friend' (which is used in the National Debt (Stockholders Relief) Act 1892) has been replaced by 'litigation friend': see **CHILDREN AND YOUNG PERSONS** vol 5(4) (2008 Reissue) PARA 1411 et seq; **CIVIL PROCEDURE** vol 11 (2009) PARA 222.

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### **1345. Exchange of securities.**

For the purpose of carrying out any arrangement made by it for the exchange of any government securities, whether on or before maturity, and whether with or without any further payment, the Treasury<sup>1</sup> may create and issue such other securities<sup>2</sup> as it thinks fit<sup>3</sup>. The Treasury has made rules with respect to the surrender, issue or exchange of securities in pursuance of such arrangements<sup>4</sup>. These rules prescribe the procedure for the acceptance of offers of exchange<sup>5</sup>, the person by whom acceptance may be made in special cases<sup>6</sup> and the persons to whom acceptances must be made<sup>7</sup>, and prescribe for the application to the new securities of trusts, charges, rights, stop notices and restraints affecting the old securities<sup>8</sup>. Protection is also given to the registrar, the Bank of England and any previous registrar in relation to acting on evidence authorised by the rules<sup>9</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 See securities under the National Loans Act 1968 s 12: see PARA 1329.

3 National Loans Act 1968 s 14(2).

4 See the Exchange of Securities (General) Rules 1979, SI 1979/1678, made under the National Loans Act 1968 s 14(3). Note that the Exchange of Securities (General) Rules 1979, SI 1979/1678, do not apply to the exchange of any stock for strips, or to the exchange of any strips for stock: Government Stock Regulations 2004, SI 2004/1611, reg 29. As to the meanings of 'stock' and 'strip' see PARA 1335 note 3. Rules may require holders of securities which are to be redeemed desiring cash repayment to apply accordingly (National Loans Act 1968 s 14(4)(a)), and may secure that if no application is duly made the holder is to be deemed to have accepted the offer of securities in exchange for the securities which are to be redeemed (s 14(4)(b)).

5 See the Exchange of Securities (General) Rules 1979, SI 1979/1678, r 6 (amended by SI 1985/1147; SI 1998/2505; SI 1999/1207; SI 2001/3755; SI 2004/1662).

6 See the Exchange of Securities (General) Rules 1979, SI 1979/1678, r 7 (amended by SI 2004/1662). Acceptance on behalf of joint holders may be made by a majority of them: Exchange of Securities (General) Rules 1979, SI 1979/1678, r 8. Acceptance where a stop order is in force may be made by any person who would be entitled to accept if the notice were not in force: r 9. As to stop orders see **CIVIL PROCEDURE** vol 12 (2009) PARA 1486 et seq.

7 Acceptances in respect of securities registered with the registrar and bearer bonds are to be lodged with the registrar; acceptances in respect of all securities registered in the National Savings Stock Register are to be lodged with the Director of Savings: see the Exchange of Securities (General) Rules 1979, SI 1979/1678, r 5(1) (amended by SI 1998/2505; SI 2004/1662). Acceptance forms may be lodged with the Treasury for onward transmission to the person to whom the acceptance is required to be lodged; and where acceptances are required to be lodged by any particular time, it is sufficient if the acceptance is lodged with the Treasury by that time: Exchange of Securities (General) Rules 1979, SI 1979/1678, r 5(2) (added by SI 1998/2505). The person to whom the acceptance is to be made may accept, as evidence of any fact on which the validity of an acceptance depends, a statutory declaration of that fact made by one or more competent persons, but this imposes no obligation to require proof by statutory declaration of any fact of which he has other satisfactory evidence: Exchange of Securities (General) Rules 1979, SI 1979/1678, r 10. As to the Director of Savings see PARA 810 et seq.

8 See the Exchange of Securities (General) Rules 1979, SI 1979/1678, r 11.

9 See the Exchange of Securities (General) Rules 1979, SI 1979/1678, r 12 (substituted by SI 2004/1662). As to the registrar see PARA 1336. As to the Bank of England see PARA 793 et seq.

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### **1346. Unclaimed dividends and redemption money.**

The registrar<sup>1</sup> must from time to time pay to the National Debt Commissioners<sup>2</sup> the balance of all money due on government stock<sup>3</sup> which has been entrusted to him for payment but which is unclaimed<sup>4</sup>. Where the registrar, having paid unclaimed money to the commissioners, subsequently pays it to the person entitled, the commissioners must repay it to the registrar<sup>5</sup>.

Unclaimed redemption money paid to the commissioners must be invested by them in such government stock as the Treasury directs and the investments must be placed to the credit of their account of unclaimed redemption money<sup>6</sup>. The commissioners also keep an account of unclaimed dividends to which there must be paid all unclaimed sums paid to the commissioners by the registrar, other than unclaimed redemption money<sup>7</sup>, and all dividends on the investments of the commissioners' account of unclaimed redemption money<sup>8</sup>. Any deficiency on the account of unclaimed dividends is to be issued out of the National Loans Fund, and any surplus<sup>9</sup> is to be paid into the National Loans Fund<sup>10</sup>.

Certain provisions of the National Debt Act 1870 and other enactments continue to have effect in relation to the retransfer of stock transferred as being unclaimed to the commissioners<sup>11</sup> before 27 July 1955<sup>12</sup>, and unclaimed dividends and sums unclaimed on coupons paid to the commissioners before that date<sup>13</sup>.

1 As to the registrar see PARA 1336.

2 As to the National Debt Commissioners see PARA 1332.

3 'Government stock' includes 2½% Consolidated Stock ('Consols'); 2½% and 2¾% Annuities; Guaranteed 2¾% and 3% Stock; 3½% War Loan; Guaranteed 4½% Bonds; any securities issued under the War Loan Act 1919 (repealed); the National Loans Act 1939; Finance Act 1935 s 28 (repealed) or s 29 (repealed); the Bank of England Act 1946 s 1; the Coal Industry Nationalisation Act 1946 s 21 (repealed) or s 32 (repealed); or the Cable and Wireless Act 1946; any such stock as is mentioned in the Iron and Steel Act 1967 s 26(1) (repealed); and any securities issued under the National Loans Act 1968 other than national savings certificates, premium savings bonds, national savings stamps, national savings gift tokens and such securities as the Treasury may specify by order: National Debt Act 1972 s 15(1) (amended by the Finance Act 1989 Sch 17 Pt XIV); definition applied by the National Debt Act 1972 s 15(2). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 See the Miscellaneous Financial Provisions Act 1955 s 5(2) (s 5(1)-(5), (8) amended by SI 2004/1662). For this purpose money must be treated as unclaimed if it has not been claimed for five years or, in the case of redemption money, two years after it fell due and may be so treated earlier: see the Miscellaneous Financial Provisions Act 1955 s 5(3) (as so amended). The Treasury may empower the registrar to investigate the title to unclaimed sums, and may allow just compensation for the registrar's trouble and expense: see s 5(8) (as so amended).

5 See the Miscellaneous Financial Provisions Act 1955 s 5(4) (as amended: see note 4). Repayments in respect of dividends come out of the commissioners' account of unclaimed dividends (s 5(5) (as so amended)), and repayments in respect of redemption money out of their account of unclaimed redemption money or, if that is insufficient, out of the unclaimed dividend account (s 5(7)).

6 Miscellaneous Financial Provisions Act 1955 s 5(6). Investments made under the Finance Act 1921 Sch 3 para 6 (repealed) also stand to the credit of this account: Miscellaneous Financial Provisions Act 1955 s 5(6).

7 Miscellaneous Financial Provisions Act 1955 s 5(5) (as amended: see note 4).

8 Miscellaneous Financial Provisions Act 1955 s 5(7).

9 Ie any surplus above £100,000, or such other figure as the Treasury may determine: Miscellaneous Financial Provisions Act 1955 s 5(9).

10 Miscellaneous Financial Provisions Act 1955 s 5(9) (amended by the National Loans Act 1968 Sch 5). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

11 Ie transferred under the National Debt Act 1870 s 51 (repealed), and former Acts: see s 67. Dividends on stock so transferred are payable to the commissioners and must be held by them for the public subject to the claims of parties entitled to them: s 54 (amended by the Finance Act 1949 Sch 11 Pt VII). The registrar may re-transfer any stock transferred under the National Debt Act 1870 Pt VII (ss 54-67) to any person showing his right to it to the registrar's satisfaction, and pay the dividends due on it, as if the stock or dividends had not been transferred or paid to the National Debt Commissioners: see s 55 (amended by SI 2004/1662). If the claim is not admitted by the registrar, the claimant may apply for an order by petition served on the Attorney General and on the National Debt Commissioners, and the court may make such order, including costs, as seems to be just: National Debt Act 1870 s 55 (as so amended). As to advertisements of claims exceeding £20, and the withholding of payment for three months after advertisement, on the direction of the registrar see the Finance Act 1937 s 28(1) (amended by SI 2004/1662).

The following cases have been decided under the National Debt Act 1870 s 55, or the enactment which s 55 replaces: *Re Bigg* (1835) 1 Y & C Ex 245 (title to be proved); *Howard v Kay* (1857) 4 Drew 151 (evidence in support of title); *Ex p Jameson* (1875) LR 19 Eq 430 (transfer to beneficiary); *Re Ashmead's Trust* (1872) 8 Ch App 113 (legal owner a necessary party to claim by beneficiary: right to accumulations); *Re National Debt Act 1870, ex p Byrne* [1897] 1 IR 61 (terms of transfer of stock and dividends into court); *Re May* (1885) 28 ChD 516, CA (leave of court to fresh petition); *Lawrence v Maule* (1859) 4 Drew 472 (capacity of Attorney General in proceedings); *Hunt v Peacock* (1848) 6 Hare 361 (form of proceedings); *Re Ackland's Trusts* (1872) 26 LT 418 (retransfer to executor). As to ordering inquiries as to beneficiaries see *Ex p Gillett, ex p Bacon* (1818) 3 Madd 28; *Ex p Lavell* (1820) 2 Jac & W 397; *Ex p Ram* (1837) 3 My & Cr 25; *Re Bishton and Crockett* (1858) 27 LJ Ch 168; *Re Molony* (1860) 3 LT 465 (inquiry directed); *Ex p Nicholl* (1823) Turn & R 119; *Re Avery* (1830) 1 Russ & M 356; *Ex p Bouts* (1859) 5 Jur NS 951 (inquiry not directed). In the absence of special circumstances, the taxed costs of the Attorney General and the commissioners are directed to be paid out of the fund recovered: see *Ex p Martin* (1821) Jac 55; *Re Holland* (1844) 1 Ph 379; *Re Ackland's Trusts* above; and see the National Debt Act 1870 s 55 (as so amended). As to applications to rescind or vary an order for retransfer or payment see s 58. As to the non-liability of the registrar to a second claimant after retransfer or payment see s 59 (amended by SI 2004/1662). As to orders in favour of a second claimant showing title, who is unable to recover from a first claimant see the National Debt Act 1870 s 60 (amended by the Finance Act 1949 Sch 11 Pt VII). As to indemnity in respect of retransfers and payments see the National Debt Act 1870 s 66 (amended by SI 2004/1662). As to the transfer of stock on authority of court order see the Finance Act 1916 s 66; and PARA 1343.

12 Ie the date on which the Miscellaneous Financial Provisions Act 1955 s 5 (as originally enacted) came into force.

13 See the National Debt Act 1870 ss 61, 62 (both repealed except as respects stock transferred and dividends paid before 27 July 1955); the Finance Act 1921 s 49(2) (repealed except as respects money paid before 27 July 1955); the Finance Act 1949 s 52(10), Sch 11 Pt VII (repealed); and the Miscellaneous Financial Provisions Act 1955 s 5(1) (amended by SI 2004/1662). Where any principal money which became payable on the redemption of any government stock was not claimed by the stockholder within one year from the date of redemption, the unclaimed money was paid to the commissioners, and held and dealt with by them in like manner as dividends under the National Debt Act 1870 s 61 (repealed with savings): Finance Act 1921 s 50, Sch 3 para 6 (repealed).

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### 1347. The National Savings Stock Register.

The Director of Savings<sup>1</sup> must cause such entries to be made in the National Savings Stock Register<sup>2</sup> as are necessary to show the name and address of every holder of stock and the denomination of stock held by him<sup>3</sup>.

Certain government stock<sup>4</sup> may be registered in the National Savings Stock Register<sup>5</sup>. The register is governed by regulations made by the Treasury<sup>6</sup>. Since 1 July 2004 the registrar has been required to keep a register of persons holding strips of government stock<sup>7</sup>.

Since 20 July 1998 the National Savings Stock Register has been closed to gilts<sup>8</sup>. All gilts registered in the register at the beginning of that day were transferred to the books of the Bank of England<sup>9</sup>. Similarly, all the rights and duties of the Director of Savings arising before 20 July 1998 in relation to the registration of gilts or any associated transaction with them were transferred to the Bank of England<sup>10</sup>.

1 As to the Director of Savings see PARA 810 et seq.

2 The register was originally established as the Post Office Register by the War Loan (Supplemental Provisions) Act 1915 s 1 (repealed). Such stock registers as by virtue of the Savings Banks Act 1880 (repealed) had been established by savings bank authorities were amalgamated with the Post Office Register by the Savings Banks Act 1929 s 12(2) (repealed), and its name was changed to the National Savings Stock Register by the Post Office Act 1969 s 108(1). It is continued in existence by the National Debt Act 1972 s 2(1). As to the Post Office see **POST OFFICE**.

3 National Savings Stock Register Regulations 1976, SI 1976/2012, reg 4(1). On 20 July 1986 the parts of the register kept by the trustee savings banks had to be closed and all the stock registered in those parts had to be transferred to that part of the register kept by the Director of Savings: Trustee Savings Banks Act 1985 s 3(9), Sch 1 para 13; Trustee Savings Bank Act 1985 (Appointed Day) Order 1986, SI 1986/1219.

4 I.e. any description of government stock which is not for the time being included in the Finance Act 1942 s 47(1)(a), Sch 11 Pt I (see PARA 1335): National Debt Act 1972 s 2(3) (substituted by SI 1998/1446). As to the meaning of 'government stock' see PARA 1346 note 3.

5 See the National Debt Act 1972 s 2(3) (as substituted: see note 4). In practice, the range of stock and securities on the register is limited, largely to those issued through the Post Office, being stock or securities not inscribed or registered in the holders' names in the books of the Bank of England. As to the Bank of England see PARA 793 et seq.

6 See the National Savings Stock Register Regulations 1976, SI 1976/2012 (as originally enacted); and PARA 1348. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

7 See the Government Stock Regulations 2004, SI 2004/1611; and PARA 1335 et seq. The definition of 'stock' in the Government Stock Regulations 2004, SI 2004/1611, includes for most purposes strips of gilts: see note 8; and PARA 1335 note 3. As to the registrar see PARA 1336.

8 See the Bank of England Act 1998 s 33; and the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, arts 2(1), 3. 'Gilts' means stock or bonds of any of the descriptions included in the Finance Act 1942 Sch 11 Pt I (see PARA 1335 note 3): National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 2(1).

9 See the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 4. The National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, also makes consequential, incidental and supplementary provisions in connection with the closure of the register to gilts and includes provision amending primary and secondary legislation. In particular the order makes provision for: applications and proceedings relating to gilts (see arts 6-15); existing rules and arrangements to be preserved in certain cases (see arts 16-21 (arts 16, 18-20 amended by SI 2004/1662)); unclaimed gilts and moneys (see the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, arts 22-24); existing certificates to be imputed to the registrar (see art 25 (substituted by SI 2004/1662)); previously issued warrants (see the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 26); payment without grant of representation where the holder dies before 20 July 1998 (see art 27); the Director of Savings to provide relevant records to the Bank of England (see art 28); indemnity (see art 29 (amended by SI 2004/1662)); and various consequential amendments, repeals and revocations (see the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 30, Schs 1, 2).

- 10 See the National Savings Stock Register (Closure of Register to Gilts) Order 1998, SI 1998/1446, art 5.

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### **1348. Regulations as to the National Savings Stock Register.**

The National Savings Stock Register Regulations<sup>1</sup> govern subscriptions for and the transfer<sup>2</sup> and redemption of stock and securities registered in the National Savings Stock Register<sup>3</sup>. Provision is made for the keeping of the register<sup>4</sup> and the subscription for stock<sup>5</sup>, conversion<sup>6</sup>, redemption<sup>7</sup>, and transfer<sup>8</sup> of stock<sup>9</sup>, and the issue of certificates and subscription books<sup>10</sup>. Provision is also made for dividends<sup>11</sup> and payments<sup>12</sup>, for nominations<sup>13</sup>, for payments from and into National Savings Bank accounts<sup>14</sup>, as to joint holders<sup>15</sup>, trustees and beneficiaries under trusts<sup>16</sup> and persons under disability<sup>17</sup>, as to powers of attorney<sup>18</sup>, as to the death of the holder<sup>19</sup>, as to unclaimed dividends and redemption money<sup>20</sup>, as to lost documents<sup>21</sup> and the rectification of mistakes<sup>22</sup>, as to evidence of identity<sup>23</sup> and the obligation of secrecy<sup>24</sup>, for the indemnification of the Treasury<sup>25</sup>, the National Debt Commissioners and the Director of Savings and his officers<sup>26</sup>, savings for rights of third parties<sup>27</sup> and for fees<sup>28</sup>.

1 See the National Savings Stock Register Regulations 1976, SI 1976/2012, made under the National Debt Act 1972 s 3 (amended by the Trustee Savings Banks Act 1976 Sch 5 para 19, Sch 6; the Finance Act 1989 s 183(2); and SI 1998/1446). As to the application of the National Savings Stock Register Regulations 1976, SI 1976/2012, to Northern Ireland see reg 60 (amended by SI 1986/2001); as to their application to the Isle of Man see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 61 (amended by SI 2007/1898); and as to their application to the Channel Islands see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 62 (amended by SI 1986/2001; and SI 2007/1898).

2 Where the stock is uncertificated, the Uncertificated Securities Regulations 2001, SI 2001/3755, will govern the transfer of stock: see **COMPANIES** vol 14 (2009) PARA 420 et seq.

3 As to the National Savings Stock Register see PARA 1347.

4 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 4(1), (2) (amended by SI 1998/1446).

5 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 5 (amended by SI 1987/1635; SI 1998/1446).

6 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 13.

7 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 14 (amended by SI 2004/1662).

8 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 15, 18, 20 (reg 15 amended by SI 1998/1446).

9 As to the limit on the total holding of certain stock see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 8 (amended by SI 1987/1635). As to the forfeiture of stock see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 9. As to the commission payable see reg 12.

10 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 10.

11 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 21.

12 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 22, 24, 25, 28 (reg 22 amended by SI 2001/2616; and the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 24 amended by SI 1986/2001). See also note 26.

13 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 32-39A (regs 32, 34 amended by SI 1981/485; the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 35, 36 amended by SI 1981/485; SI 1998/1446; SI 2005/2114; the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 39 amended by SI 1998/1446; and the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 39A added by SI 1998/1446; and amended by SI 2004/1662).

14 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 45 (amended by SI 1989/2046).

15 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 26, 27.

16 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 28, 29.

17 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 30 (amended by SI 1989/2046; SI 1998/1446; SI 2001/3649) (minors); and the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 31 (amended by SI 1989/2046; SI 2007/1898).

18 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 50.

19 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 40, 41 (amended by SI 1984/600; SI 2004/1662); the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 42 (amended by SI 1993/3131; SI 2004/1662; SI 2005/2114).

20 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 43, 44; and PARA 1349.

21 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 46. As to the form of documents see reg 55.

22 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 48. As to persons unable to write see reg 47.

23 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 56.

24 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 57 (amended by SI 1988/1355; SI 1989/2046; SI 1997/1864).

25 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

26 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 53. As to the Director of Savings see PARA 810 et seq. As to receipts for payment being a good discharge to the Treasury or Director of Savings see reg 58.

27 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 54.

28 Eg fees on the reference of disputes (see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 49) and for birth, death and marriage certificates (see reg 52 (amended by SI 2005/2114)).

## **UPDATE**

### **1348 Regulations as to the National Savings Stock Register**

NOTE 20--SI 1976/2012 regs 43, 44 revoked: SI 2009/1263.

NOTE 24--SI 1976/2012 reg 57 further amended: SI 2010/291.

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### **1349. Redemption; unclaimed securities.**

In the event of the redemption of any government stock<sup>1</sup>, the National Savings Stock Register<sup>2</sup> may be closed for transfers of the stock for not more than one month immediately preceding the redemption date<sup>3</sup>.

Sums equal to the amount of all money due on stock and unclaimed for certain periods must be paid to the National Debt Commissioners by the Director of Savings<sup>4</sup>.

1 As to the meaning of 'government stock' see PARA 1346 note 3.

2 As to the National Savings Stock Register see PARA 1347.

3 National Debt Act 1972 s 4.

4 See the National Savings Stock Register Regulations 1976, SI 1976/2012, regs 43, 44. As to the National Debt Commissioners see PARA 1332. As to the Director of Savings see PARA 810 et seq.

## **UPDATE**

### **1349 Redemption; unclaimed securities**

TEXT AND NOTE 4--Such sums must now be transferred to an investment account in the National Savings Bank, to be held either in a special Director's account on behalf of the persons entitled, or in an investment account in the name of the persons entitled: SI 1976/2012 reg 43A (added by SI 2009/1263). SI 1976/2012 regs 43, 44 revoked: SI 2009/1263.

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### **1350. Nomination and payment out on death.**

A holder of stock<sup>1</sup> registered on the National Savings Stock Register, if he was a holder who had attained the age of 16, had power to make a nomination before 1 May 1981 directing that, on his death, his interest in any stock then held by him and registered in his name should devolve on the persons specified, and in the portions or fractions specified, in the nomination<sup>2</sup>. Where, on the death of the holder of any stock so registered, any payment is made in accordance with the law of the place where the holder resided at the date of his death, the payment is to be deemed to have been duly made unless, before the payment was made, the Director of Savings had been notified in writing that the holder was at that time domiciled elsewhere<sup>3</sup>. Subject to certain exceptions, the production of a statement from the Commissioners for Her Majesty's Revenue and Customs as to the payment of tax chargeable on death is required before any payment or transfer may be made on the death of a holder the aggregate value of whose specified assets exceeds £50,000<sup>4</sup>.

In the case of stock so registered the Director of Savings may require evidence to be given to his satisfaction of the identity of any person or the title of any person to any stock, document



or money<sup>5</sup>. A statement or information that a person has not been heard of for seven years or more may be accepted as conclusive proof of death<sup>6</sup>.

Where the value of the holding at the time of the holder's death does not exceed £5,000 or, as the case may be, the amount due to the depositor at the time of his death does not exceed £5,000 exclusive of interest, payment may be made to the appropriate person entitled without requiring probate or letters of administration<sup>7</sup>.

1 For these purposes, 'stock' means stock or securities registered in the National Savings Stock Register: National Savings Stock Register Regulations 1976, SI 1976/2012, reg 2(1). As to the National Savings Stock Register see PARA 1347.

2 National Savings Stock Register Regulations 1976, SI 1976/2012, reg 32(1) (amended by SI 1981/485). A nomination made after 30 April 1981 is of no effect: National Savings Stock Register Regulations 1976, SI 1976/2012, reg 32(1) (as so amended). A nomination may provide: (1) that the interest of the nominator in the whole of the stock registered in his name at the date of his death is to devolve on any one or more persons specified in the nomination; or (2) that the interest of the nominator in any specified portion or fraction of the stock is to devolve on any nominee or nominees so specified; or (3) where there is more than one nominee, that the interest of the nominator in different specified portions or fractions of the stock is to devolve on different nominees: reg 32(2). The nomination must be in a form approved by the Director of Savings, must be signed by the nominator and witnessed, and must be dispatched to the Director of Savings during the nominator's lifetime: reg 33. It is revoked, inter alia, by the nominee's death in the nominator's lifetime, by the nominator's marriage or formation of a civil partnership, by written notice of revocation or by a subsequent inconsistent nomination: see reg 36 (amended by SI 1981/485; SI 1998/1446; SI 2005/2114). As to the record of nominations see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 34 (amended by SI 1981/485). As to the effect on nomination of transfer of stock to another part of the register see the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 35. As to the particulars to be furnished by the nominator to the Director of Savings see reg 37. As to the operation of nomination see reg 38. As to nominations made before 1 October 1921 see reg 39 (amended by SI 1998/1446). As to the Director of Savings see PARA 810 et seq.

No nomination may be effected after 30 April 1979 in respect of stock in that part of the register kept by the trustees of trustee savings banks: see the Trustee Savings Banks Regulations 1972, SI 1972/583, reg 11 (amended by SI 1975/1802; SI 1979/259). That part of the register kept by the trustees savings banks was closed on 20 July 1986: see PARA 1347 note 2.

3 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 40.

4 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 42 (amended by SI 1993/3131; SI 2004/1662; SI 2005/2114); and see also the Commissioners for Revenue and Customs Act 2005 s 50. Note that the Inland Revenue has merged with Her Majesty's Customs and Excise to form Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005. See **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) para 900 et seq; **INCOME TAXATION**.

5 National Savings Stock Register Regulations 1976, SI 1976/2012, reg 56(1).

6 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 56(2).

7 See the National Savings Stock Register Regulations 1976, SI 1976/2012, reg 41 (amended by SI 1984/600; SI 2004/1662).

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### **1351. Redemption of stock by registrar.**

When the registrar is carrying out the redemption of any stock the following procedure is to be followed<sup>1</sup>. Not less than eight weeks before the redemption date of stock of a particular description the registrar must<sup>2</sup> send to each person who is for the time being registered as a

holder of stock of that description at his registered address<sup>3</sup> a notice in writing containing the following particulars<sup>4</sup>: (1) the redemption date of the stock<sup>5</sup>; and (2) notice<sup>6</sup> that, unless a request<sup>7</sup> to the contrary in writing signed by the holder is received by the registrar on or before a date<sup>8</sup> specified in the notice, a warrant<sup>9</sup> in respect of the redemption moneys drawn in favour of the holder will be sent to him by post at his registered address<sup>10</sup>.

The registrar has a right in any case to require the consent in writing of the holder or holders of any stock before making any payment in respect of the redemption of the stock<sup>11</sup>.

1 See the Government Stock Regulations 2004, SI 2004/1611, reg 11(1). As to the meaning of 'stock' see PARA 1335 note 3. As to the registrar see PARA 1336.

2 See subject to the Government Stock Regulations 2004, SI 2004/1611, reg 11(5): see the text to notes 6-9.

3 See his address for the time being recorded on: (1) a register under the Government Stock Regulations 2004, SI 2004/1611, reg 7(1), (2) (see PARA 1337); or (2) a register kept by the operator of a relevant system under the Uncertificated Securities Regulations 2001, SI 2001/3755 (see **COMPANIES** vol 14 (2009) PARA 421): see the Government Stock Regulations 2004, SI 2004/1611, reg 11(2).

4 Government Stock Regulations 2004, SI 2004/1611, reg 11(2).

5 Government Stock Regulations 2004, SI 2004/1611, reg 11(3)(a).

6 Where any stock falling to be redeemed is registered in the names of more than one person, being joint holders of the stock, the notice must be sent to all such persons: Government Stock Regulations 2004, SI 2004/1611, reg 11(5)(a).

7 Where any stock falling to be redeemed is registered in the names of more than one person, being joint holders of the stock, any such request must be signed by each person registered as a joint holder of the stock: Government Stock Regulations 2004, SI 2004/1611, reg 11(5).

8 This date must in no case be more than four weeks before the redemption date: Government Stock Regulations 2004, SI 2004/1611, reg 11(4).

9 Where any stock falling to be redeemed is registered in the names of more than one person, being joint holders of the stock, the notice must state that the warrant will be drawn in favour of the first named such person: Government Stock Regulations 2004, SI 2004/1611, reg 11(5)(b).

10 Government Stock Regulations 2004, SI 2004/1611, reg 11(3)(b).

11 Government Stock Regulations 2004, SI 2004/1611, reg 11(6).

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## **(ii) Savings Certificates**

### **1352. National savings certificates.**

The Treasury's power to borrow<sup>1</sup> extends to raising money under the auspices of the Director of Savings, including the issue under his auspices of national savings certificates<sup>2</sup>, bearing such rate of interest<sup>3</sup> and subject to such conditions as to repayment or otherwise as the Treasury thinks fit<sup>4</sup>. The principal of, interest<sup>5</sup> on, and issuing expenses of the certificates are chargeable on the National Loans Fund with recourse to the Consolidated Fund<sup>6</sup>. The Treasury may direct that the expiration date of any savings certificates be prolonged to such extent and on such conditions as to interest as it directs<sup>7</sup>.

The Treasury may make regulations with respect to the manner in which and the conditions under which money may be raised under the auspices of the Director of Savings by (among other things) the issue of national savings certificates<sup>8</sup>.

1     le under the National Loans Act 1968 s 12: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 728-729. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2     Post Office Act 1969 s 109 (amended by the Income and Corporation Taxes Act 1988 Sch 16). National savings certificates were originally issued under the Finance Act 1920 s 59 (repealed), and subsequently under the National Debt Act 1958 s 7(1) (repealed) and the National Loans Act 1968 s 12(5)(a) (see note 1). Money raised by the issue of certificates under those provisions by the Post Office is treated as having been raised under the National Loans Act 1968 under the auspices of the Director of Savings: National Debt Act 1972 s 11(3)(c). See also the National Loans Act 1968 s 12(6)(b). As to the Director of Savings see PARA 810 et seq. As to the Post Office see **POST OFFICE**.

3     National Debt Act 1972 s 8(1).

4     National Debt Act 1972 s 8(2).

5     As to the exemption from corporation tax for income from savings certificates see the Income and Corporation Taxes Act 1988 s 46; and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1225.

6     National Debt Act 1972 s 8(1). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq.

7     National Debt Act 1972 s 8(2). This does not, however, prejudice the holder's right to have the amount payable under the certificate paid to him on or before maturity: s 8(3).

8     See the National Debt Act 1972 s 11(1)(a); the Savings Certificates Regulations 1991, SI 1991/1031 (amended by SI 1992/2835; SI 1992/3115; SI 1993/3133; SI 1994/343; SI 1997/1859; SI 2005/2114); and the Savings Certificates (Children's Bonus Bonds) Regulations 1991, SI 1991/1407 (amended by SI 1992/3113; SI 1997/1860; SI 2005/2114; SI 2007/1898).

## UPDATE

### 1352 National savings certificates

NOTE 2--National Loans Act 1968 s 12(5)(a) amended: SI 2009/1941.

NOTE 8--SI 1991/1031, SI 1991/1407 further amended: SI 2010/291.

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### 1353. War savings certificates.

War savings certificates<sup>1</sup> held immediately before 9 August 1972 continue to be held on the conditions applicable to them before that date<sup>2</sup>. The principal of, interest on<sup>3</sup>, and redemption expenses of war savings certificates are chargeable on the National Loans Fund with recourse to the Consolidated Fund<sup>4</sup>.

1 'War savings certificates' means the certificates issued by that name under the War Loan Act 1915 s 1 (repealed) or the Finance Act 1916 s 58 (repealed); National Debt Act 1972 s 9(3).

2 National Debt Act 1972 s 9(1). The Savings Certificates Regulations 1991, SI 1991/1031 (see PARA 1352 note 8) apply to war savings certificates, for 'certificate' in the regulations includes a war savings certificate: see reg 2(1); and PARA 1354 note 1.

3 As to the exemption from corporation tax see the Income and Corporation Taxes Act 1988 s 46; and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1225.

4 National Debt Act 1972 s 9(2). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq.

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### **1354. Purchase of savings certificates.**

Applications to purchase a certificate<sup>1</sup> must be made in such manner as the Director of Savings may approve<sup>2</sup> and certificates are to be issued at such places as the Director of Savings determines and by such persons as he authorises<sup>3</sup>. A savings certificate may be purchased and held by any person<sup>4</sup> aged seven or upwards who is under no legal disability other than by reason of age<sup>5</sup>, by a friendly society<sup>6</sup>, or by any other body of persons approved for the purposes by the Director of Savings<sup>7</sup>, or by any two or more such persons or bodies jointly<sup>8</sup>. Subject to these provisions, a certificate may be purchased:

- 122 (1) on behalf of and in the name of any person or persons entitled<sup>9</sup> to purchase and hold a certificate, by any other person or persons<sup>10</sup>;
- 123 (2) on behalf of and in the name of a person or persons under the age of seven years, by any other person or persons<sup>11</sup>; and
- 124 (3) on behalf of and in the name of a person who lacks capacity<sup>12</sup>, by his deputy<sup>13</sup>,

and any certificate so purchased is deemed to be held by the person or persons on whose behalf it is purchased<sup>14</sup>. However, no certificate may be purchased under head (1) above by any person or persons on behalf of any body of persons (other than a friendly society), whether corporate or unincorporate, without the approval (either general or limited) of the Director of Savings<sup>15</sup>.

Further, a certificate may be purchased and held by a trustee or by two or more trustees jointly<sup>16</sup>. A certificate may also be purchased by a person acting as trustee on behalf of any person not under disability otherwise than by reason of his age, and in the joint names of the trustee and beneficiary, in which case the certificate is to be held by them jointly<sup>17</sup>. Savings certificates may also be purchased in instalments<sup>18</sup>.

An index-linked national savings certificate issued before 7 September 1981 may be purchased and held only by a person who, if a man, has attained the age of 65 or, if a woman, has attained the age of 60, or by two or more such persons jointly<sup>19</sup>. These age restrictions no longer apply.

A certificate purchased or held by any person not so entitled to do so or in excess of the maximum holding<sup>20</sup> may be forfeited at the discretion of the Director of Savings<sup>21</sup>.

1 'Certificate' means a certificate issued under the name of a war savings certificate or a national savings certificate by the Treasury through the department of the Postmaster General or under the auspices of the Director of Savings for the purpose of raising money authorised to be raised by any Act: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1). As to the Treasury see **PARA 3**; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) **PARA 512** et seq. As to the transfer of functions from the Postmaster General see **POST OFFICE** vol 36(2) (Reissue) **PARAS 1-4**. As to the Director of Savings see **PARA 810** et seq.

2 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 3(2). The applicant must deliver such documents and other information to the Director of Savings in writing as he may require: reg 3(2). As to the manner approved by the Director of Savings see **PARA 1359**.

3 Savings Certificates Regulations 1991, SI 1991/1031, reg 3(1). The names of all holders of certificates must be recorded: reg 3(3).

4 As to the restrictions which apply to the persons entitled to hold index-linked certificates purchased before 7 September 1981 see the Savings Certificates Regulations 1991, SI 1991/1031, reg 4(6), Sch 1 Pt I (amended by SI 2007/1898). 'Index-linked certificate' means a certificate issued under the name of an index-linked national savings certificate: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1).

5 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(1)(a).

6 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(1)(b). For these purposes, 'friendly society' means a friendly society registered under the Friendly Societies Act 1974 or a branch registered under it of a friendly society so registered: reg 2(1); and see reg 34(a). As to friendly societies see further **PARA 2081** et seq.

7 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(1)(c).

8 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(1). When a holder attains the age of seven the Director of Savings may subsequently require a specimen signature: reg 4(5).

9 Is entitled under the Savings Certificates Regulations 1991, SI 1991/1031, reg 4(1): see the text to notes 4-8.

10 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2)(a).

11 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2)(b).

12 'Person who lacks capacity' means a person who lacks capacity within the meaning of the Mental Capacity Act 2005 (see **MENTAL HEALTH**): Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition added by SI 2007/1898); and see the Savings Certificates Regulations 1991, SI 1991/1031, regs 34(b), 35(2)(a), 36(2)(a), (3)(a) (all amended by SI 2007/1898). If any person holding, or having an interest in, any certificate is a person who lacks capacity or is under legal disability for any other reason except his age alone, anything which under the regulations is required or authorised to be done by or to the holder of the certificate must or may be done by or to the deputy (see note 13) or other person having power in law to administer his estate: Savings Certificates Regulations 1991, SI 1991/1031, reg 18 (amended by SI 2007/1898).

13 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2)(c) (amended by SI 2007/1898). 'Deputy', in relation to England and Wales, means, in relation to any decision made by a person who lacks capacity, a deputy appointed by the Court of Protection (see **MENTAL HEALTH** vol 30(2) (Reissue) **PARAS 676, 681** et seq) for that purpose with power to make decisions in relation to the matters in question: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition added by SI 2007/1898); and see the Savings Certificates Regulations 1991, SI 1991/1031, regs 34(c), 35(2)(b), 36(2)(b), (3)(b) (all amended by SI 2007/1898).

14 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2).

15 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2) proviso.

16 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(3)(a). However, no certificate may be purchased under reg 4(3)(a) by a trustee or trustees on behalf of any body of persons (other than a friendly society), whether corporate or unincorporate, without the approval (either general or specific) of the Director of Savings: reg 4(3) proviso. The regulations do not affect the mutual rights of joint holders (reg 32(1)) or authorise trustees to act otherwise than in accordance with the trust instrument and the law relating to the trust (reg 32(2)). The records kept by the Director of Savings may describe a trustee under reg 4(3)(a) as such, with or without specifying the trust (reg 4(4)), but otherwise no notice of a charge, trust or other equitable interest is receivable by the Director of Savings who is not affected by notice of any trust or of the fiduciary character of the holder (see reg 25(1), (2)).

17 Savings Certificates Regulations 1991, SI 1991/1031, reg 4(3)(b).

18 See the Savings Certificates (Yearly Plan) Regulations 1984, SI 1984/779 (amended by SI 1985/1035; SI 1986/2001; SI 1988/1357; SI 1989/1521; SI 1991/75; SI 1992/3114; SI 1993/3132, SI 1997/1863; SI 2004/1662; SI 2005/2114; SI 2007/1898).

19 See the Savings Certificates Regulations 1991, SI 1991/1031, Sch 1 Pt I para 1. Such a certificate may be purchased on behalf of such a person, if he is a person who lacks capacity, by his deputy, and is then deemed to be held by that person: see reg 4(2) (amended by SI 2007/1898); and the text to note 14.

20 As to the maximum holding see PARA 1355.

21 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 21 (amended by SI 1994/343).

## UPDATE

### 1354 Purchase of savings certificates

NOTE 18--SI 1984/779 further amended: SI 2010/291.

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### 1355. Maximum holding.

A person may not purchase any certificates<sup>1</sup> of a unit series<sup>2</sup> or hold any such certificates purchased on his behalf<sup>3</sup>, if the total number of units which will be held by him<sup>4</sup> immediately after the purchase, whether solely or jointly with any person, will exceed the prescribed limits<sup>5</sup>.

1 As to the meaning of 'certificate' see PARA 1354 note 1.

2 'Unit series' means any series of certificates which is not a money value series: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition added by SI 1994/343). 'Money value series' means any series of certificates issued under a prospectus which permits certificates to be issued for amounts which are neither a unit nor a multiple of a unit; and 'money value certificate' means a certificate of such a series: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition added by SI 1994/343). 'Unit' means, in relation to certificates of any series, the minimum amount for which a certificate of that series may be issued (regardless of whether, in particular circumstances, a certificate may be issued only for a greater amount) or would, apart from the minimum purchase requirement applicable to non index-linked certificates issued after 31 March 1977 but not later than 28 January 1979, have been issued: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition amended by SI 1992/1835).

3 I.e. under the Savings Certificates Regulations 1991, SI 1991/1031, reg 4(2) or under Sch 1 Pt I para 2: see PARA 1354.

4 As to the calculation of the total number of units that a person holds see the Savings Certificates Regulations 1991, SI 1991/1031, reg 5(5). Trusteeship is treated separately from personal capacity: see reg 5(2). For the purposes of reg 5, each holding of certificates in the name of the Accountant General of the Supreme Court is to be treated separately: reg 5(4).

5 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 5(1) (amended by SI 1994/343). The limit depends on the date of issue. In the case of index linked certificates issued after 30 June 1985 and certificates, not being index linked certificates, issued after 25 September 1985, the maximum number of units which may be purchased is that specified in the prospectus relating to the certificates: Savings Certificates Regulations 1991, SI 1991/1031, reg 5(1)(a), (b). In the case of other certificates, the maximum number of certificates which may be purchased is set out in Sch 1 Pt II. As to the forfeiture of excess holdings see reg 21; and PARA 1354. A person may not purchase any money value certificates, or hold any such certificates purchased on his behalf

under reg 4(2) (see PARA 1354) if, immediately after the purchase, he will hold (whether solely or jointly with any person) certificates the aggregate purchase price of which will exceed the sum specified by or in accordance with the prospectus as the maximum value of certificates, in terms of purchase price, which may be held by any one person in relation to that description of certificate (and such prospectus may provide that different maximum values are to apply in different circumstances): see reg 5(1A), (1B) (added by SI 1994/343).

The Savings Certificates Regulations 1991, SI 1991/1031, reg 5(1) does not apply to the transfer of a certificate to a person in accordance with reg 13(7) (see PARA 1356), but in relation to any subsequent purchase by him or on his behalf certificates so transferred are to be included for the purpose of calculating the number of units he holds: reg 5(3).

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### **1356. Transfer of certificates; nominations.**

Every transfer of a certificate<sup>1</sup> must be effected, on written application<sup>2</sup>, by the Director of Savings causing the name of the transferee to be recorded as the holder<sup>3</sup>.

Since 1 May 1981 it has not been possible for the holder of a certificate to make a nomination directing that on his death his interest in any certificate is to devolve on persons specified by him in his nomination<sup>4</sup>.

1 As to the meaning of 'certificate' see PARA 1354 note 1. The Director of Savings may in his discretion refuse to transfer a certificate, but if he does so he must send an intimation of his refusal to the person desiring the transfer: Savings Certificates Regulations 1991, SI 1991/1031, reg 13(2). As to the Director of Savings see PARA 810 et seq.

2 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 13(3). Application must be made by the holder in a manner approved by the Director of Savings and accompanied, save where the Director of Savings otherwise directs, by the certificate: reg 13(3). As to the manner approved by the Director of Savings see PARA 1359.

3 Savings Certificates Regulations 1991, SI 1991/1031, reg 13(1). See also reg 13(4). The holder may also apply for other persons to be recorded as joint holders with him: see reg 13(5). As to transfers between trustees and beneficiaries see reg 13(6). So far as applicable, reg 13 applies to transfers on death: see reg 13(7).

4 As to nominations made before 1 May 1981 see the Savings Certificates Regulations 1991, SI 1991/1031, reg 37, Sch 2 (amended by SI 2005/2114).

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### **1357. Repayment of certificates.**

The holder of a certificate<sup>1</sup> may apply in a manner approved by the Director of Savings for the payment of the amount repayable<sup>2</sup> in respect of it<sup>3</sup>, or, subject to the Director of Savings' approval, may authorise another person to apply for or receive that amount<sup>4</sup>. Payment is made by means of a warrant except to the extent that:

- 125 (1) payment is made by any other means in accordance with the terms and conditions subject to which the certificate is held;
- 126 (2) the Director of Savings otherwise directs; or
- 127 (3) the applicant requests that all or part of the amount repayable be used to purchase another certificate, or a national savings bond,

and the Director of Savings consents<sup>5</sup>. Any such warrant which is crossed ranks as a cheque drawn on the Director of Savings, but is not negotiable<sup>6</sup>. An uncrossed warrant must not be paid until the receipt for the amount payable has been duly signed by the payee or some person authorised by him to receive payment<sup>7</sup>. Except where the Director of Savings otherwise directs, a warrant may not be paid until the certificate in respect of which the repayment is to be made has been delivered to him<sup>8</sup>. An uncrossed warrant is payable at the place named in it or otherwise in accordance with the directions contained in it<sup>9</sup>. Where the Director of Savings is unable for any reason to obtain a valid discharge for any payment he may open an account in the National Savings Bank in the recipient's name and retain the amount due in that account<sup>10</sup>.

1 As to the meaning of 'certificate' see PARA 1354 note 1.

2 'Amount repayable' includes: (1) in relation to any money value certificate, any part of the purchase price of that certificate which is repayable separately from the rest of that price under the relevant prospectus, and any interest or bonus or other sum which has accrued due in respect of that certificate or that part of the purchase price which is to be repaid as the case may be; and (2) in relation to any certificate of a unit series, any interest or bonus or other sum which has accrued due in respect of that certificate: Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition substituted by SI 1994/343). As to the meaning of 'money value certificate' see PARA 1355 note 2. For the purpose of determining the amount repayable, the payment of that amount is deemed to be effected on the date appearing on the warrant: Savings Certificates Regulations 1991, SI 1991/1031, reg 7(7). That date will not be more than 21 days from the date on which application for payment is received by the Director of Savings, unless the holder has requested a later date: reg 7(8). If the Director is satisfied that it is or was not practicable to dispatch the warrant to enable payment to be made in time, then the date appearing on the warrant will be no later than the earliest date by which he is satisfied it would be practicable for the payee to obtain payment: see reg 7(7), (9), (10). As to the Director of Savings see PARA 810 et seq.

Where, in accordance with the prospectus relating to any money value series, a partial repayment of the purchase price is made (together with payment of such interest or bonus or other sum which may have accrued due in respect of the portion repaid under that prospectus), a replacement certificate must be issued showing as its purchase price the amount of the original purchase price that has not been repaid: reg 6(2A) (added by SI 1994/343).

3 Savings Certificates Regulations 1991, SI 1991/1031, reg 6(1). Where repayment is requested on a specified date the application may not, unless the Director of Savings otherwise agrees, be made more than two months before that date: see reg 6(1). Unless the Director otherwise directs or agrees, applications must be made to Savings Certificates and SAYE Office, Durham: reg 6(1). In the case of a multiple certificate, application may be made for the repayment of any number of the units: reg 6(2). 'Multiple certificate' means a certificate representing more than one unit certificate: see reg 2(1). In general, no repayment may be made if the holder is under the age of seven: reg 9(1). Where the holder is a person who lacks capacity his deputy must apply for repayment: reg 9(2) (amended by SI 2007/1898). As to the meaning of 'person who lacks capacity' see PARA 1354 note 12. As to the meaning of 'deputy' see PARA 1354 note 13. Where the holder is under seven the Director of Savings has a discretion to make a repayment to any proper person: see the Savings Certificates Regulations 1991, SI 1991/1031, reg 9(3). Where the Director is satisfied that any person holding, or having an interest in, a certificate is a person who lacks capacity in respect of whom no deputy has been appointed, the Director may, if he thinks fit, pay the whole or part of the amount repayable in respect of the certificate to any person who satisfies him that he will apply the payment for the maintenance or otherwise for the benefit of the person who lacks capacity: reg 9(4) (amended by SI 2007/1898). As to repayment of certificates held jointly see the Savings Certificates Regulations 1991, SI 1991/1031, reg 10 (amended by SI 2007/1898). As to repayment to friendly societies and other bodies see the Savings Certificates Regulations 1991, SI 1991/1031, reg 11. As to repayment to the official receiver or trustee in bankruptcy where the holder is bankrupt see reg 12. The Director of Savings may require evidence of the identity or title of any person: see reg 30(1). As to the official receiver see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 503 et seq. As to the trustee in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 316 et seq.

4 Savings Certificates Regulations 1991, SI 1991/1031, reg 6(3). Where a warrant is issued in good faith and without negligence to some person other than the holder or person entitled, and the issue is attributable to



some act or omission on the part of the holder or person entitled, it is deemed to have been duly issued to a person entitled, but subject to reg 28 (which saves the rights of third persons): reg 27(2).

5 Savings Certificates Regulations 1991, SI 1991/1031, reg 7(1) (substituted by SI 2000/3110). In the absence of such a request or direction, and subject to the terms and conditions subject to which the certificate is held, every application for payment of the amount repayable in respect of a certificate is treated as implying an authority to the Director of Savings to issue a warrant for that amount and pay it in accordance with the terms of the warrant, or to make payment by such other means as may be provided for in those terms and conditions: Savings Certificate Regulations 1991, SI 1991/1031, reg 7(1A) (added by SI 2000/3110). The death of any person who made an application for payment of the amount repayable in respect of a certificate does not of itself determine such authority, but if the Director of Savings receives notice that the applicant has died or has countermanded such authority, the Director of Savings: (1) may not issue a warrant, or, if such warrant has already been issued, he must take all reasonable steps to stop repayment of it; and (2) may not initiate the making of payment by other means or, if such payment has already been initiated, must take all reasonable steps (if any) as may, having regard to the nature of the means of payment concerned, be within his power to prevent completion of the payment: Savings Certificate Regulations 1991, SI 1991/1031, reg 7(1B) (added by SI 2000/3110).

For the purposes of determining the amount repayable in respect of a certificate where repayment is not made by warrant because the proceeds are used to purchase another certificate or a national savings bond, repayment will be deemed to be effected on the date entered in the records kept by the Director of Savings as the date of purchase of the new certificate or bond: Savings Certificate Regulations 1991, SI 1991/1031, reg 8.

6 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 7(2), which applies the Bills of Exchange Act 1882 ss 76, 77(1), (3)-(6), 78-81 (see PARAS 1411, 1499, 1560, 1575; and also PARAS 838, 839, 880); and the Cheques Act 1957 ss 3, 4 (see PARAS 900-901).

7 Savings Certificates Regulations 1991, SI 1991/1031, reg 7(3). The receipt operates as a full discharge to the Treasury and the Director of Savings, subject to reg 28 (which saves the rights of third persons): reg 27(1). Where an uncrossed warrant is paid to a person purporting to be the payee or his authorised agent then, even if the receipt is signed by someone else, the making of the payment is a full discharge to the Treasury and the Director of Savings if the payment is made in good faith and without negligence and the making of the payment is attributable to some act or omission on the part of the holder, the payee or authorised agent: reg 7(3) proviso. Where an uncrossed warrant is made payable to the holder, it may be paid to another person who signs the receipt and forthwith reinvests the money in certificates in the name of the holder: reg 7(4). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Savings Certificates Regulations 1991, SI 1991/1031, reg 7(5).

9 Savings Certificates Regulations 1991, SI 1991/1031, reg 7(6). The Director of Savings may dispatch the warrant to the place named in it, and where he does so he must dispatch a notice informing the payee that he has done so: reg 7(6). The posting of a warrant or the notice referred to in reg 7(6) to any person at the last address furnished to the Director of Savings will, as regards the liability of the Treasury or the Director of Savings, be equivalent to the delivery of the warrant or notice to that person: see reg 7(11).

10 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 19(1). However: (1) if the person to whom the payment is due has an account in the National Savings Bank, the Director of Savings may, if he thinks fit, instead of opening a new account, credit the amount payable to the existing account; and (2) in the case of an account opened by the Director of Savings: (a) no sum is to be received by way of deposit for the credit of the account except in pursuance of the Savings Certificates Regulations 1991, SI 1991/1031; and (b) the regulations requiring a declaration to be made by a depositor in the National Savings Bank do not apply with respect to any payment into the account by the Director of Savings: reg 19(1) proviso. Any sum credited under reg 19(1) is ignored in relation to the rule limiting the amount which may be deposited in a savings bank account: see reg 19(2). As to the National Savings Bank see PARA 810 et seq.

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### 1358. Death of holder.

On the death of the holder of a certificate<sup>1</sup>, the production of probate or letters of administration, or a certified copy, granted in respect of personal estate including the certificate by a court in the United Kingdom<sup>2</sup>, the Isle of Man<sup>3</sup> or the Channel Islands<sup>4</sup> is sufficient authority to the Director of Savings to pay the amount repayable<sup>5</sup> on the certificate, or to transfer the certificate to or to the direction of the grantee<sup>6</sup>.

On the death of the sole holder of certificates in respect of which the amount repayable does not exceed £5,000, the Director of Savings may pay the amount repayable, without the production of probate or letters of administration<sup>7</sup>, to the person appearing to him to be entitled to take out probate or letters of administration<sup>8</sup>, or, where the holder made a will<sup>9</sup>, to the person to whom, in the Director of Savings' opinion, the amount would be repayable on probate or administration with the will annexed<sup>10</sup>, or to a person who satisfies the Director of Savings that he is entitled to receive the amount or any part of it in right of his being the person who paid the funeral expenses, or a creditor, or a person having a beneficial interest in the estate<sup>11</sup>, or to some other specified person<sup>12</sup>.

Where the aggregate value of specified assets<sup>13</sup> of a deceased holder of certificates, not being a person holding solely as a trustee, exceeds £50,000, the Director of Savings must, before payment or transfer, and subject to certain exceptions<sup>14</sup>, require the production of a statement as to payment of inheritance tax on death<sup>15</sup>.

1 As to the meaning of 'certificate' see PARA 1354 note 1.

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 As to the application of the Savings Certificates Regulations 1991, SI 1991/1031, to the Isle of Man see reg 35 (amended by SI 2007/1898).

4 As to the application of the Savings Certificates Regulations 1991, SI 1991/1031, to the Channel Islands see reg 36 (amended by SI 2007/1898).

5 As to the meaning of 'amount repayable' see PARA 1357 note 2. As to the Director of Savings see PARA 810 et seq.

6 Savings Certificates Regulations 1991, SI 1991/1031, reg 14(1). If it subsequently appears that the grant was invalid or deficient, the payment or transfer is nevertheless deemed to have been duly made: reg 14(2). The Director of Savings may require evidence of the identity or title of a payee: see reg 30(1). He may accept as conclusive proof of the holder's death any evidence establishing that the holder has not been heard of for at least seven years; and 'holder of the certificate' includes any person beneficially interested at any time, whether absolutely or contingently, in the personal estate of the deceased holder of a certificate: reg 30(2).

7 Savings Certificates Regulations 1991, SI 1991/1031, reg 15(1).

8 Savings Certificates Regulations 1991, SI 1991/1031, reg 15(1)(a).

9 'Will' includes a codicil: Savings Certificates Regulations 1991, SI 1991/1031, reg 15(4).

10 Savings Certificates Regulations 1991, SI 1991/1031, reg 15(1)(b). Recipients under reg 15(1)(b) or reg 15(1)(c) (see the text and note 11) who are aged 16 or over may give valid receipts: see reg 15(2). In making any payment under reg 15(1)(b) or reg 15(1)(c), the Director of Savings must in general have regard to the rules of law as to the distribution of estates of deceased persons, but, if he is of the opinion that hardship or inconvenience would be thereby caused, he may depart from those rules in such manner and to such extent as he considers just: reg 15(3). Where a person to whom reg 15(1)(b) or reg 15(1)(c) applies has died before payment has been made to him, that sum or any part of it may be paid to any person to whom it might have been paid if the first mentioned person had, immediately before his death, been the sole holder of the certificates in question: reg 15(3) proviso. As to distribution on intestacy and as to administration with the will annexed see **EXECUTORS AND ADMINISTRATORS**.

11 Savings Certificates Regulations 1991, SI 1991/1031, reg 15(1)(c). See note 10.

12 As to the recipient where the deceased was a British citizen whose next of kin reside outside the United Kingdom, the Isle of Man and the Channel Islands see the Savings Certificates Regulations 1991, SI 1991/1031, reg 15(1)(d). As to the recipient where the deceased was a foreign seaman or foreign subject see reg 15(1)(e),

(f). As to the recipient where the estate devolves on the Crown see reg 15(1)(g). Payment made in accordance with the law of the holder's residence at the time of his death is deemed to have been duly made unless before making payment the Director of Savings received notice that the holder was at the time of his death domiciled elsewhere: reg 16. As to British citizenship generally see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 7 et seq.

13 The 'specified assets' are the following assets (not being assets in respect of which it is shown to the satisfaction of the Director of Savings that the deceased holder had no interest otherwise than as a trustee):

- 6 (1) the total amount which would have been repayable (if repayment had been demanded) at the date of the death of the holder in respect of all certificates recorded in his name alone or in his name jointly with any other person (Savings Certificates Regulations 1991, SI 1991/1031, reg 17(2)(a));
- 7 (2) the total amount (including interest) which, at the date of the death of the holder, stands to the credit of all accounts in his name alone, or in his name jointly with any other person, in the National Savings Bank (reg 17(2)(b));
- 8 (3) all stock and securities registered on the National Savings Stock Register at the date of the death of the holder in his name alone or in his name jointly with any other person (reg 17(2)(c));
- 9 (4) any amount repayable and any other sum payable in respect of all premium savings bonds recorded in the holder's name (reg 17(2)(d));
- 10 (5) the total amount (including any bonus or interest) which would have been repayable (if repayment had been demanded) at the date of the death of the holder in respect of all savings contracts entered into by him and registered by the Director of Savings under a contractual savings scheme certified by the Treasury in accordance with the Income and Corporation Taxes Act 1988 s 326(2) (repealed) (see now the Income Tax (Trading and Other Income) Act 2005 ss 703(2), (3), 704(2), 705(1)) (see **INCOME TAXATION**) (Savings Certificates Regulations 1991, SI 1991/1031, reg 17(2)(e));
- 11 (6) the total amount (including interest) which would have been repayable (if repayment had been demanded) at the date of the death of the holder in respect of all agreements entered into or certificates held by the holder in accordance with the Savings Certificates (Yearly Plan) Regulations 1984, SI 1984/779 (see PARA 1354 note 18) (Savings Certificates Regulations 1991, SI 1991/1031, reg 17(2)(f)).

For these purposes, the value of the stock and securities referred to in head (3) above is: (a) in the case of stock which is of a description corresponding to stock or securities transferable in the registers kept by the Government Stock in accordance with regulations under the Finance Act 1942 s 47 (see the Government Stock Regulations 2004, SI 2004/1611; and PARA 1335 et seq), the market value thereof at the date of the death of the holder; and (b) in all other cases, the total amount (including interest and any other sum payable) which would have been repayable (if repayment had been demanded) at the date of the death of the holder: Savings Certificates Regulations 1991, SI 1991/1031, reg 17(3) (amended by SI 2004/1662). As to the National Savings Bank see PARA 810 et seq. As to the National Savings Stock Register see PARA 1347. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

14 See the Savings Certificates Regulations 1991, SI 1991/1031, reg 17(1) proviso (amended by SI 2005/2114).

15 Savings Certificates Regulations 1991, SI 1991/1031, reg 17(1) (amended by SI 1993/3133). As to inheritance tax see **INHERITANCE TAXATION**.

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### 1359. Documents.

The loss or destruction of any document issued by or under the auspices of the Director of Savings in pursuance of the Savings Certificates Regulations 1991<sup>1</sup> must be notified in writing

to him as soon as practicable by the person entitled to possession of the document<sup>2</sup>. If it appears to the Director of Savings that any document so issued has been issued in error, lost, destroyed or tampered with, or is in such a condition as to render it desirable that it should be replaced by a new document, he may issue<sup>3</sup> a new document in lieu of the old document to any person who satisfies him that he is entitled to the possession of the document<sup>4</sup>.

Where any application is required<sup>5</sup> to be made in a manner approved by the Director of Savings, the document in which the application is made must contain a full and specific statement of the particulars required to be given, and any such document which is required by the Director of Savings to be signed by any person must be signed by that person<sup>6</sup>. Where any document is required<sup>7</sup> to be signed by any person and that person is unable to write, it is sufficient if the document is marked by that person in the presence of a witness in such manner as the Director of Savings may require<sup>8</sup>. Any mistake in any document received from the Director of Savings must, as soon as practicable, be notified in writing to the Director of Savings by the person receiving the document<sup>9</sup>. If the Director of Savings is satisfied that any transaction effected or thing done, or purporting to have been effected or done has been effected or done in error, he may cancel the transaction and may take all such steps as are, in his opinion, necessary to rectify the error, and may for that purpose require the surrender to him of any certificate or other document<sup>10</sup>.

1    Ie the Savings Certificates Regulations 1991, SI 1991/1031. As to the Director of Savings see PARA 810 et seq.

2    Savings Certificates Regulations 1991, SI 1991/1031, reg 20(1).

3    The Director of Savings may attach to the issue of any new document such conditions as to indemnity or otherwise as he thinks fit: Savings Certificates Regulations 1991, SI 1991/1031, reg 20(2).

4    Savings Certificates Regulations 1991, SI 1991/1031, reg 20(2).

5    Ie by the Savings Certificates Regulations 1991, SI 1991/1031.

6    Savings Certificates Regulations 1991, SI 1991/1031, reg 29.

7    Ie by the Director of Savings or by the Savings Certificates Regulations 1991, SI 1991/1031.

8    Savings Certificates Regulations 1991, SI 1991/1031, reg 22.

9    Savings Certificates Regulations 1991, SI 1991/1031, reg 23(1).

10   Savings Certificates Regulations 1991, SI 1991/1031, reg 23(2).

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### **1360. Obligation of secrecy.**

A person employed in connection with business arising under the Savings Certificates Regulations 1991<sup>1</sup> must not disclose to any person, other than the Director of Savings<sup>2</sup> or a person employed in carrying the regulations into execution, the name of the purchaser or holder of any certificate<sup>3</sup>, the number of certificates purchased by any person, or the amount repaid in respect of any certificate<sup>4</sup>. However, this does not prevent the disclosure by a person authorised for the purpose by the Director of Savings from disclosing information to any person in connection with an offence committed with reference to any certificate or for the purpose of

ascertaining whether or not an offence has been so committed nor does it prevent the Director of Savings from complying with a notice served on him under the requirement<sup>5</sup> to deliver or make available documents relating to liability of a taxpayer<sup>6</sup>.

Information such as the name of the purchaser or holder of any certificate, the number of certificates purchased, or the amount repaid in respect of any certificate<sup>7</sup> may be disclosed in accordance with, and subject to such conditions as may be specified in, arrangements made by the Director of Savings for the purpose of enabling the person to whom the information is disclosed to provide, or assist in connection with the provision of, relevant information<sup>8</sup> to the purchaser or holder of any certificate, and any such person is thereby subject to the obligation of secrecy as if he were a person employed in connection with business arising under the regulations<sup>9</sup>.

1    Ie the Savings Certificates Regulations 1991, SI 1991/1031.

2    As to the Director of Savings see PARA 810 et seq.

3    As to the meaning of 'certificate' see PARA 1354 note 1.

4    Savings Certificates Regulations 1991, SI 1991/1031, reg 31(1). As to the purchase of savings certificates see PARA 1354.

5    Ie under the Taxes Management Act 1970 s 20(3): see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1700.

6    Savings Certificates Regulations 1991, SI 1991/1031, reg 31(2).

7    Ie information of the description mentioned in the Savings Certificates Regulations 1991, SI 1991/1031, reg 31(1) (see the text to note 4).

8    For these purposes, 'relevant information' means information about any investment opportunities, services or facilities available from or through the Director of Savings, including any information about: (1) the National Savings Bank; (2) the National Savings Stock Register; or (3) any means by which the Treasury raises money under the auspices of the Director of Savings: Savings Certificates Regulations 1991, SI 1991/1031, reg 31(4) (added by SI 1997/1859). As to the National Savings Bank see PARA 810 et seq. As to the National Savings Stock Register see PARA 1347. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

9    Savings Certificates Regulations 1991, SI 1991/1031, reg 31(3) (added by SI 1997/1859).

## **UPDATE**

### **1360 Obligation of secrecy**

NOTES 5, 6--SI 1991/1031 reg 31(2) amended: SI 2010/291.

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### **1361. Determination of disputes.**

Any dispute<sup>1</sup> between the Director of Savings and the holder of any certificate<sup>2</sup>, or a person who is or claims to be the personal representative, next of kin or creditor of a holder, or the trustee in bankruptcy or assignee of a bankrupt or insolvent holder<sup>3</sup>, or a person who claims to be

entitled to any certificate<sup>4</sup>, must be referred in writing to a person known as an 'adjudicator'<sup>5</sup>, whose award is final and binding on all parties<sup>6</sup>.

1 As to what amounts to a dispute cf *R v Chief Registrar of Friendly Societies, ex p Mills* [1970] 3 All ER 1076, [1970] 1 WLR 1534, DC.

2 Savings Certificates Regulations 1991, SI 1991/1031, reg 24(1)(a). As to the meaning of 'certificate' see PARA 178 note 1. As to the Director of Savings see PARA 810 et seq.

3 Savings Certificates Regulations 1991, SI 1991/1031, reg 24(1)(b).

4 Savings Certificates Regulations 1991, SI 1991/1031, reg 24(1)(c).

5 Savings Certificates Regulations 1991, SI 1991/1031, reg 24(1) (amended by SI 1992/3115). 'Adjudicator' means a person appointed under the Friendly Societies Act 1992 s 84 (now repealed): Savings Certificates Regulations 1991, SI 1991/1031, reg 2(1) (definition added by SI 1992/3115). Where a dispute was referred before 1 January 1993 to the chief registrar of friendly societies or a deputy appointed by him, that dispute is to be treated as if it had been referred to the adjudicator; and any thing done in relation to such a dispute by the chief registrar, any deputy appointed by him or the assistant registrar is to be treated as a thing done by the adjudicator: Savings Certificates Regulations 1991, SI 1991/1031, reg 24(5) (added by SI 1992/3115). The adjudicator may administer oaths to witnesses appearing before him: Savings Certificates Regulations 1991, SI 1991/1031, reg 24(2) (amended by SI 1992/3115). As to fees see the Savings Certificates Regulations 1991, SI 1991/1031, reg 24(4) (amended by SI 1992/3115).

6 Savings Certificates Regulations 1991, SI 1991/1031, reg 24(4) (amended by SI 1992/3115).

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### (iii) Premium Savings Bonds

#### 1362. Premium savings bonds generally.

The Treasury's power to borrow<sup>1</sup> extends to raising money by the creation and issue of premium savings bonds<sup>2</sup>. The principal of and interest on money so borrowed, the issuing expenses and the prizes allotted are charged on the National Loans Fund with recourse to the Consolidated Fund<sup>3</sup>.

Premium savings bonds are a government security and are eligible for inclusion in draws for cash prizes which are free from United Kingdom income tax and capital gains tax<sup>4</sup>.

1 Ie under the National Loans Act 1968 s 12: see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 728-729. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 National Loans Act 1968 s 12(6)(a). Premium savings bonds were first issued under a prospectus dated 1 November 1956. These bonds were known as bonds of series A. A second issue was known as series B: see the Finance Act 1960 s 77.

3 National Loans Act 1968 s 12(4); Finance Act 1968 s 54(1), Sch 18 para 2. As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq.

4 National Loans Act 1968 Sch 18 para 1. As to the meaning of 'United Kingdom' see PARA 2 note 3. As to income tax see generally **INCOME TAXATION**; and as to capital gains tax see **CAPITAL GAINS TAXATION**.

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### 1363. Purchase of premium bonds.

Premium savings bonds are issued by the Treasury in units of £1<sup>1</sup> at such places as the Director of Savings determines and by such persons as he authorises<sup>2</sup>. A bond may be purchased and held by any person<sup>3</sup> who has attained the age of 16<sup>4</sup>, being a person who is not under any legal disability otherwise than by reason of age<sup>5</sup>. Bonds purchased or held by a person not entitled to do so may be forfeited, if the Director of Savings so directs<sup>6</sup>.

An application to purchase a bond must be made in a manner approved by the Director of Savings, and, for the purposes of any such application, the applicant must deliver to the Director of Savings such documents and other information in writing as he may require<sup>7</sup>. The Director of Savings then causes such entries to be made in the register as are necessary to show the names of the holders of the bonds<sup>8</sup>.

Bonds are not transferable either during the lifetime or on the death of the registered holder<sup>9</sup>.

1 Finance Act 1968 s 54(1), Sch 18 para 2. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3(1). As to the Director of Savings see PARA 810 et seq.

3 A bond may not be purchased or held by more than one person or by a body of persons, whether corporate or unincorporate: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 4(2). Subject to reg 4(3) (see note 4), a bond may not be purchased or held by any person on behalf of another person: reg 4(2A) (added by SI 1991/1337).

4 Subject to the provisions of the Premium Savings Bonds Regulations 1972, SI 1972/765, a bond may be purchased:

- 12 (1) on behalf of and in the name of a person under 16, by his parent or guardian or grandparent or by any person who satisfies the Director of Savings that he is a proper person to act on behalf of the first mentioned person;
- 13 (2) on behalf of and in the name of a person who lacks capacity, by his deputy; and
- 14 (3) subject to the approval of the Director of Savings, on behalf of and in the name of an eligible person, by any other person acting in pursuance of a power of attorney created by that eligible person,

and any bond so purchased is deemed to be held by the person on whose behalf it is purchased: reg 4(3) (substituted by SI 1980/767; and amended by SI 1981/310; SI 1999/3305; SI 2007/1898). 'Person who lacks capacity' means a person who lacks capacity within the meaning of the Mental Capacity Act 2005 (see **MENTAL HEALTH**); and 'deputy', in relation to England and Wales, means, in relation to any decision made by a person who lacks capacity, a deputy appointed by the Court of Protection (see **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 676, 681 et seq) for that purpose with power to make decisions in relation to the matters in question: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 2(1) (definitions added by SI 2007/1898).

Where a bond has been purchased on behalf of a person who was, at the date of purchase, under the age of 16, the Director of Savings may, at any time after that person has attained 16, require a specimen of his signature: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 4(4).

5 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 4(1). If a holder is a person who lacks capacity or is under disability for any other reason except his age alone, anything required or authorised to be done by or to the holder is to be done by or to his deputy or other person administering his estate: reg 16 (amended by

SI 2007/1898). No notice of a trust is receivable by the Director of Savings in respect of a bond: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 23.

6 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 19(1)(a).

7 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3(2).

8 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3(3). 'Holder' means, in relation to a bond, the person in whose name the bond is registered in the register kept by the Director of Savings: reg 2(1).

9 Finance Act 1968 Sch 18 para 4; Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3(4). As to payment on death see PARA 1367. No responsibility can be accepted in respect of the use of bonds as security for a loan: Finance Act 1968 Sch 18 para 4.

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### **1364. Maximum holding.**

A person may not purchase any premium savings bond or hold one purchased on his behalf if the total number of bond units<sup>1</sup> which will be held by him immediately after the purchase will exceed 30,000<sup>2</sup>. Any bond purchased in contravention of this provision will not be eligible for inclusion in any draw until the holding has been reduced to 30,000<sup>3</sup>; and any bond purchased or held in contravention of this provision may be forfeited, if the Director of Savings so directs<sup>4</sup>.

1 'Unit' means, in relation to bonds of any series, the unit in which bonds of that series are denominated: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 2(1) (definition substituted by SI 1976/1543).

2 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 5(1) (amended by SI 1976/1543; SI 1993/782). In calculating the total number of bond units a person holds, a multiple bond is taken to be such number of bond units as it represents: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 5(2) (amended by SI 1976/1543). 'Multiple bond' means a bond representing any number of bond units and entitling the holder to receive the aggregate amount of the sums repayable in respect of that number of bond units: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 2(1) (definition amended by SI 1976/1543).

As to the minimum purchase of bonds see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 6 (substituted by SI 1976/1543) which provides that not less than five bond units may be purchased in the name of any one person at a time, and bonds must not be purchased except in five bond units or multiples thereof.

3 See the Finance Act 1968 s 54(1), Sch 18 para 9.

4 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 19(1)(b) (amended by SI 1976/1543). As to the Director of Savings see PARA 810 et seq.

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### **1365. Interest, draws and prizes.**

The rate of interest on premium savings bonds is  $4\frac{5}{8}$  per cent or such other rate as may be prescribed by the Treasury<sup>1</sup>. The monthly prize fund is determined by calculating one month's interest on each bond unit eligible<sup>2</sup> for the draws in that month<sup>3</sup>. Each £1 unit bond has one



chance in each draw for which it is eligible; it may not win more than one prize in each such draw and in draws producing more than one prize it will be allotted the highest prize for which it is drawn<sup>4</sup>. The serial numbers of prize-winning bonds are published and the holders are notified by post<sup>5</sup>.

All matters relating to the method and conduct of the draw and allotment of prizes are at the sole discretion of the Director of Savings, whose decision as to which bonds have drawn prizes is final<sup>6</sup>.

1 See the Finance Act 1968 s 54(1), Sch 18 paras 5, 15(a) (amended by SI 2004/2353). Notwithstanding any requirement in the terms and conditions applicable to premium savings bonds to give notice of a change in the prize fund rate, the Treasury may change that rate at any time without notice: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3A(1) (regs 3A, 3B added by SI 2004/2353). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. Where notice of a change in the prize fund interest rate or of a change in the scale of prizes (see note 4) has been given before 1 July 1972 but the period of notice ends after that date, the effective date of change may be brought forward; any decision to make such a change in effective date must be published in the London, Edinburgh and Belfast Gazettes: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3A(5) (as so added).

2 A bond is eligible for inclusion in the first draw held after the expiration of three clear calendar months following the month in which it is purchased (unless sooner repaid) and thereafter in each succeeding draw (unless repaid before the first day of the month in which the draw is held or the holder has died before the first day of a period of 12 consecutive calendar months preceding the month in which the draw is held): Finance Act 1968 Sch 18 para 7. Bonds held in excess of the maximum holding are not eligible: see Sch 18 para 9.

3 Finance Act 1968 Sch 18 para 5. See also the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3A(3) (as added: see note 1).

4 Finance Act 1968 Sch 18 para 8. Notwithstanding any requirement in the terms and conditions applicable to premium savings bonds to give notice of a change in the scale of prizes for a draw, the Treasury may change the scale without notice: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3A(2) (as added: see note 1). A change in the scale of prizes for a draw is a change in the way the number of prizes for that draw is calculated, or a change in the way the prize fund for that draw is shared amongst the different prize values, or both: reg 3A(4) (as so added). See further note 1.

5 See the Finance Act 1968 Sch 18 para 11 (amended by SI 2004/2353). Notwithstanding any requirement in the terms and conditions applicable to premium savings bonds to publish the serial numbers of winning bonds in the London Gazette, the Director of Savings may instead publish such numbers on the National Savings and Investments website: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 3B (as added: see note 1). As to the Director of Savings see PARA 810 et seq.

6 See the Finance Act 1968 Sch 18 para 12. Note that the reference in Sch 18 para 12 to the Postmaster General appears not to have been formally amended so as to refer to the Director of Savings, but cf the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 35(3). As to the transfer of functions from the Postmaster General see **POST OFFICE** vol 36(2) (Reissue) PARAS 1-4.

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### **1366. Repayments in respect of premium bonds.**

The purchase price of a premium savings bond is repayable in full on application made by the holder<sup>1</sup> in writing in a manner approved by the Director of Savings<sup>2</sup>.

Every payment in respect of a bond must be made by crossed warrant except to the extent that:

- 128 (1) payment is made by any other means in accordance with the terms and conditions subject to which the bond is held;
- 129 (2) the Director of Savings otherwise directs; or
- 130 (3) the applicant for the payment requests that all or part of the amount payable be used to (a) purchase another bond or bonds or any other description of security issued by the Treasury for the purpose of raising money under the auspices of the Director of Savings; or (b) make a deposit with the National Savings Bank,

and the Director of Savings consents thereto<sup>3</sup>.

In the absence of a direction or request within head (1) or head (2) above, every application for payment in respect of a bond is to be treated as conferring authority on the Director of Savings<sup>4</sup>:

- 131 (i) subject to the terms and conditions subject to which the bond is held, to issue a crossed warrant for that amount and pay it in accordance with the terms of the warrant<sup>5</sup>; or
- 132 (ii) to make payment by such other means (if any) as may be provided for in those terms and conditions<sup>6</sup>.

Where the Director of Savings is unable for any reason to obtain a valid discharge for any payment falling to be made to any person in respect of a bond, he may open a National Savings Bank account in that person's name<sup>7</sup> and, until payment can be made to that person, retain the amount due in that account<sup>8</sup>.

The Treasury, the Director of Savings and any person authorised by him are not liable in respect of payments duly made or acts duly done in accordance with regulations; and any such payment is deemed to have been a valid payment, and the recipient's receipt is a full discharge<sup>9</sup>.

None of these provisions, however, operates to prevent the recovery by any person or his representatives of any money lawfully due to him from the person to whom it was paid by the Director of Savings or from that person's representatives, or affects the right which any person or his representatives may have in respect of a bond against a third party<sup>10</sup>.

Unclaimed money<sup>11</sup> may be paid to the National Debt Commissioners<sup>12</sup>.

1 As to the meaning of 'holder' see PARA 1363 note 8. As to evidence of identity see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 29(1). A holder aged 16 or over may, subject to the approval of the Director of Savings, authorise any person to apply for or receive repayment on his behalf: reg 7(3). No payment may be made to a bondholder under 16 (see reg 9(1)), but an application may, however, be made on his behalf by the person who purchased the bond or some other proper person (see reg 9(2) (substituted by SI 1981/310)). Application for payment in respect of a bond held by a person who lacks capacity is to be made by his deputy: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 10(1) (amended by SI 2007/1898). Where it is shown to the satisfaction of the Director of Savings that the holder of a bond is a person who lacks capacity for whom no deputy has been appointed in relation to his property and affairs, the Director of Savings may, where it is shown to his satisfaction that it is expedient that the whole or any part of the sum repayable, or of any other sum payable, should be applied for the maintenance or otherwise for the benefit of the holder, if he thinks fit pay that sum or that part of it to any person who satisfies him that he will apply it for such purposes: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 10(2) (substituted by SI 1991/1337; and amended by SI 2007/1898). In the case of a bankrupt, payment is made to and on the application of the official receiver or trustee in bankruptcy: see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 11 (amended by SI 1986/2001). As to the Director of Savings see PARA 810 et seq. As to the meanings of 'person who lacks capacity' and 'deputy' see PARA 1363 note 4. As to the official receiver see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 503 et seq. As to the trustee in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 316 et seq.

2 Finance Act 1968 s 54(1), Sch 18 para 13; Premium Savings Bonds Regulations 1972, SI 1972/765, reg 7(1). In the case of a multiple bond, an application may be made for repayment of any number of the bond

units it represents: reg 7(2) (amended by SI 1976/1543). As to the meaning of 'multiple bond' see PARA 1364 note 2. As to the meaning of 'unit' see PARA 1364 note 1. As to the manner approved by the Director of Savings see PARA 1368.

3 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(1) (substituted by SI 2004/2353). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the National Savings Bank see PARA 810 et seq. The provisions of the Bills of Exchange Act 1882 ss 76, 77(1), (3)-(6), 78-81 (see PARAS 1411, 1499, 1560, 1575; and also PARAS 838, 839, 880), and of the Cheques Act 1957 ss 3, 4 (see PARAS 900-901) apply to a crossed warrant as if it were a cheque drawn on the Director of Savings (see PARAS 921-922), but nothing in the Premium Savings Bonds Regulations 1972, SI 1972/765, makes such a warrant negotiable: reg 8(2). Except where the Director of Savings directs, a warrant will not be paid until the bond (or document in lieu of it) has been produced or, where the bond or any bond unit represented by a multiple bond is being repaid, delivered to the Director of Savings: reg 8(4) (amended by SI 1976/1543). The posting of a warrant to any person at the last address furnished to the Director of Savings is, as regards the liability of the Treasury or the Director of Savings, equivalent to the delivery of the warrant to that person: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(6) (substituted by SI 2004/2353). Where repayment is made in respect of a bond, the payment of the amount repayable under it is, for the purpose of determining whether any other sum is payable in respect of that bond, deemed to be effected on the date on which the warrant is issued: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(7) (added by SI 1980/767).

Where a warrant is issued payable to some person other than the bondholder or person entitled, but was issued in good faith and without negligence and the issue is attributable to some act or omission on the part of the bondholder or person entitled, the warrant is deemed to have been duly issued to a person entitled: see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 26(2). This is expressed to be subject to reg 27 (saving of rights of third parties): see the text to note 10.

4 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(1A) (added by SI 2004/2353). The death of any person who made an application for payment in respect of a bond does not of itself determine the authority mentioned in the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(1A), but if the Director of Savings receives notice that the applicant has countermanded such authority or has died, the Director of Savings: (1) may not issue a warrant or, if such a warrant has already been issued, must take all reasonable steps to stop payment of it; and (2) may not initiate the making of payment by other means or, if such payment has already been initiated, must take all reasonable steps (if any) as may, having regard to the nature of the means of payment concerned, be within his power to prevent completion of the payment: see reg 8(1B) (added by SI 2004/2353).

5 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(1A)(a) (as added: see note 4).

6 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 8(1A)(b) (as added: see note 4).

7 If the person already has such an account, the money may be paid into it: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 17(1) proviso (a). In determining the amount in an account for the purposes of the provisions limiting deposits, no account is taken of sums credited under reg 17: reg 17(2).

8 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 17(1). In the case of an account opened by the Director of Savings: (1) no sum is to be received by way of deposit for the credit of the account except in pursuance of the Premium Savings Bonds Regulations 1972, SI 1972/765; and (2) the requirement that a declaration is to be made by a depositor in the National Savings Bank does not apply with respect to any payment into the account by the Director of Savings: reg 17(1) proviso (b). As to the National Savings Bank see PARA 810 et seq.

9 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 26(1). This is expressed to be subject to reg 27 (saving of rights of third parties): see the text to note 10.

10 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 27.

11 For these purposes, any moneys due on bonds and not claimed by the person entitled are deemed to be unclaimed if a period of five years has elapsed since the due date, but the Director of Savings may treat any such moneys as unclaimed before the expiration of that period: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 15(2).

12 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 15(1). As to the National Debt Commissioners see PARA 1332. Where the Director of Savings makes a payment to the National Debt Commissioners in respect of any moneys due on bonds, and afterwards pays those moneys to the person entitled, the amount paid to the National Debt Commissioners in respect of those moneys must be repaid by them to the Director of Savings: reg 15(3). Any sums so paid to the National Debt Commissioners must be placed to their account of unclaimed dividends, and any repayment by them to the Director of Savings under reg 15(3) must be made out of that account: reg 15(4).

**UPDATE****1366 Repayments in respect of premium bonds**

TEXT AND NOTES 11, 12--Unclaimed money must now be transferred to an investment account in the National Savings Bank, to be held either in a special Director's account on behalf of the persons entitled, or in an investment account in the name of the persons entitled: SI 1972/765 reg 15A (added by SI 2009/1263). SI 1972/765 reg 15 revoked: SI 2009/1263.

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**1367. Death of a bondholder.**

On the death of the holder of a premium savings bond, the production of, or of a certified copy of, probate or letters of administration granted in respect of personalty comprising the bond by a court in the United Kingdom<sup>1</sup>, the Isle of Man<sup>2</sup> or the Channel Islands<sup>3</sup> is sufficient authority to the Director of Savings to pay the amount repayable or any sum payable in respect of the bond to or as directed by the person to whom the grant was made<sup>4</sup>.

On the death of the holder of bonds in respect of which the amount payable does not exceed £5,000, the Director of Savings may pay the sum repayable or any other sum payable in respect of the bonds, without the production of probate or letters of administration<sup>5</sup>, to a person appearing to him to be entitled to take out probate or letters of administration<sup>6</sup>, or, where the holder made a will<sup>7</sup>, to the person to whom, in the opinion of the Director of Savings, the amount would be payable on probate or administration with the will annexed<sup>8</sup>, or to a person who satisfies the Director of Savings that he is entitled to receive the amount or any part of it in right of his being the person who paid the funeral expenses, or a creditor, or a person having a beneficial interest in the estate<sup>9</sup>, or to some other specified person<sup>10</sup>.

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 As to the application of the Premium Savings Bonds Regulations 1972, SI 1972/765, to the Isle of Man see reg 33 (amended by SI 2007/1898).

3 As to the application of the Premium Savings Bonds Regulations 1972, SI 1972/765, to the Channel Islands see reg 34 (amended by SI 1986/2001; SI 2007/1898).

4 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 12(1). If it subsequently appears that the grant was invalid or deficient, the payment is nevertheless deemed to have been duly made: reg 12(2). The Director of Savings may require evidence of the identity or title of a payee: see reg 29(1). He may accept as conclusive proof of the death of the holder of the bond any evidence which establishes to his satisfaction the fact that the holder has not been heard of for at least seven years: reg 29(2). 'Holder of a bond' includes any person beneficially interested at any time, whether absolutely or contingently, in the personal estate of the deceased holder of a bond: reg 29(2). As to the Director of Savings see PARA 810 et seq.

5 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(1) (amended by SI 1984/601).

6 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(1)(a).

7 'Will' includes a codicil: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(3).

8 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(1)(b). Recipients under reg 13(1)(b) or reg 13(1)(c) (see the text and note 9) who are aged 16 or over may give valid receipts: see reg 13(2). Where a person to whom any sum may be paid under reg 13(1)(b) or reg 13(1)(c) has died before payment has been made to him, that sum or any part of it may be paid to any person to whom it might have been paid if the first mentioned person had, immediately before his death, been the holder of the bonds in question: reg 13(1) proviso. As to administration with the will annexed see **EXECUTORS AND ADMINISTRATORS**.

9 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(1)(c). See further note 8.

10 As to the recipient where the deceased was a British subject whose next of kin reside abroad see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 13(1)(d). As to the recipient where the deceased was a foreign seaman or foreign subject see reg 13(1)(e), (f). As to the recipient where the estate devolves on the Crown see reg 13(1)(g). As to British citizenship generally see **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 7 et seq.

Payment made in accordance with the law of the holder's residence at the time of his death is deemed to have been duly made unless before making payment the Director of Savings received notice that the holder was at the time of his death domiciled elsewhere: reg 14.

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### **1368. Documents.**

The loss or destruction of any document issued by the Director of Savings in pursuance of the Premium Savings Bonds Regulations<sup>1</sup> must be notified in writing to the Director of Savings as soon as practicable by the person entitled to possession of the document<sup>2</sup>. If it appears to the Director of Savings that any document so issued has been issued in error, lost, destroyed or tampered with, or is in such a condition as to render it desirable that it should be replaced by a new document, he may issue<sup>3</sup> a new document in lieu of the old document to any person who satisfies him that he is entitled to the possession of the document<sup>4</sup>.

Where any application is required<sup>5</sup> to be made in a manner approved by the Director of Savings, the document in which the application is made must contain a full and specific statement of the particulars required to be given, and any such document which is required by the Director of Savings to be signed by any person must be signed by that person<sup>6</sup>. Where any document is required<sup>7</sup> to be signed by any person and that person is unable to write, it is sufficient if the document is marked by that person in the presence of a witness in such manner as the Director of Savings may require<sup>8</sup>. Any mistake in any document received from the Director of Savings<sup>9</sup> must, as soon as practicable, be notified in writing to the Director of Savings by the person receiving the document<sup>10</sup>. If the Director of Savings is satisfied that any transaction effected or thing done, or purporting to have been effected or done<sup>11</sup>, has been effected or done in error, he may cancel the transaction and may take all such steps as are, in his opinion, necessary to rectify the error, and may for that purpose require the surrender to him of any bond or other document<sup>12</sup>.

1 I.e. the Premium Savings Bonds Regulations 1972, SI 1972/765. Regulation 18(1) also applies to any document issued by the Postmaster General or the Director of Savings in pursuance of any regulation revoked by the Premium Savings Bonds Regulations 1972, SI 1972/765: reg 18(1). As to the Director of Savings see PARA 810 et seq. As to the transfer of functions from the Postmaster General see **POST OFFICE** vol 36(2) (Reissue) PARAS 1-4.

2 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 18(1).

3 The Director of Savings may attach to the issue of any new document such conditions as to indemnity or otherwise as he thinks fit: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 18(3).

- 4 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 18(2).
- 5 le by the Premium Savings Bonds Regulations 1972, SI 1972/765.
- 6 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 28.
- 7 le by the Director of Savings or by the Premium Savings Bonds Regulations 1972, SI 1972/765.
- 8 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 20.
- 9 le in pursuance of the Premium Savings Bonds Regulations 1972, SI 1972/765. Regulation 21(1) also applies to any document received from the Postmaster General or the Director of Savings in pursuance of any regulations revoked by the Premium Savings Bonds Regulations 1972, SI 1972/765: see reg 21(1).
- 10 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 21(1).
- 11 le in accordance with the Premium Savings Bonds Regulations 1972, SI 1972/765, or any regulations revoked by them: see reg 21(2).
- 12 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 21(2).

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### **1369. Obligation of secrecy.**

A person employed in connection with business arising under the Premium Savings Bonds Regulations 1972<sup>1</sup> must not disclose to any person, other than the Director of Savings or a person employed in carrying the regulations into execution, the name of the purchaser or holder of any bond, the number of bonds purchased or held by any person, or the amount paid to any person in respect of a bond<sup>2</sup>. However, this does not prevent a person authorised for the purpose by the Director of Savings from disclosing information to any person in connection with an offence committed with reference to any bond or for the purpose of ascertaining whether or not an offence has been so committed nor does it prevent the Director of Savings from complying with a notice served on him under the requirement<sup>3</sup> to deliver or make available documents relating to liability of a taxpayer<sup>4</sup>.

Information such as the name of the purchaser or holder of any bond, the number of bonds purchased or held by any person and the amount paid in respect of a bond<sup>5</sup> may be disclosed in accordance with, and subject to such conditions as may be specified in, arrangements made by the Director of Savings for the purpose of enabling the person to whom the information is disclosed to provide, or assist in connection with the provision of, relevant information<sup>6</sup> to the purchaser or holder of any bond, and any such person is thereby subject to the obligation of secrecy as if he were a person employed in connection with business arising under the regulations<sup>7</sup>.

- 1 le the Premium Savings Bonds Regulations 1972, SI 1972/765.
- 2 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 30(1). As to the purchase of premium bonds see PARA 1363. As to the Director of Savings see PARA 810 et seq.
- 3 le under the Taxes Management Act 1970 s 20(3): see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1700.
- 4 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 30(2) (amended by SI 1988/1356; SI 1991/1337).

5 The information of the description mentioned in the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 30(1) (see the text to note 2).

6 For these purposes, 'relevant information' means information about any investment opportunities, services or facilities available from or through the Director of Savings, including any information about: (1) the National Savings Bank; (2) the National Savings Stock Register; or (3) any means by which the Treasury raises money under the auspices of the Director of Savings: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 30(4) (added by SI 1997/1862). As to the National Savings Bank see PARA 810 et seq. As to the National Savings Stock Register see PARA 1347. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

7 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 30(3) (added by SI 1997/1862).

## UPDATE

### 1369 Obligation of secrecy

NOTE 4--SI 1972/765 reg 30(2) further amended: SI 2010/291.

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### 1370. Determination of disputes.

Any dispute<sup>1</sup> between the Director of Savings<sup>2</sup> and the holder of any premium savings bond<sup>3</sup>, or a person who is or claims to be the personal representative, next of kin or creditor of a holder, or the trustee in bankruptcy or assignee of a bankrupt or insolvent holder<sup>4</sup>, or a person who claims to be entitled to any bond<sup>5</sup>, must be referred in writing to a person known as the 'adjudicator'<sup>6</sup>, whose award is final and binding on all parties<sup>7</sup>.

1 As to what amounts to a dispute cf *R v Chief Registrar of Friendly Societies, ex p Mills* [1970] 3 All ER 1076, [1970] 1 WLR 1534, DC.

2 As to the Director of Savings see PARA 810 et seq.

3 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(1)(a).

4 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(1)(b).

5 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(1)(c).

6 Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(1) (amended by SI 1991/3116). 'Adjudicator' means a person appointed under the Friendly Societies Act 1992 s 84 (now repealed): Premium Savings Bonds Regulations 1972, SI 1972/765, reg 2(1) (definition added by SI 1992/3116). Where a dispute was referred before 1 January 1993 to the chief registrar of friendly societies or a deputy appointed by him, that dispute is to be treated as if it had been referred to the adjudicator, and any thing done in relation to such a dispute by the chief registrar, any deputy appointed by him or the assistant registrar is to be treated as a thing done by the adjudicator: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(5) (added by SI 1992/3116). The adjudicator may administer oaths to witnesses appearing before him: Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(2) (amended by SI 1992/3116). As to fees see the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(4) (amended by SI 1992/3116). As to the trustee in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 316 et seq.

7 See the Premium Savings Bonds Regulations 1972, SI 1972/765, reg 22(3) (amended by SI 1992/3116).

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## **(iv) Government Annuities**

### **1371. Power to grant annuities.**

Although the National Debt Commissioners<sup>1</sup> formerly had power to grant immediate annuities for life, either as government annuities<sup>2</sup> or as savings banks annuities<sup>3</sup>, their power to do so is now limited to power to grant life annuities<sup>4</sup> by way of commutation of a savings bank insurance<sup>5</sup> or to grant an insurance or a savings bank annuity<sup>6</sup> on the surrender of a savings bank insurance or on default in the payment of premiums in respect of such an insurance<sup>7</sup>.

Immediate life annuities and savings bank annuities are charged on the National Loans Fund<sup>8</sup>, and issued out of the National Loans Fund with recourse to the Consolidated Fund<sup>9</sup> at such times as the Treasury directs<sup>10</sup>, and deferred life annuities and savings bank annuities and all savings bank insurances are charged on and paid out of the Government Annuities Investment Fund<sup>11</sup>.

<sup>1</sup> As to the National Debt Commissioners see PARA 1332. Anything under the Government Annuities Act 1929 required or authorised to be done to, by or in respect of the commissioners may be done to, by or in respect of the Comptroller General or Assistant Comptroller acting under the commissioners: see s 68. As to the Comptroller General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 724-726.

<sup>2</sup> *Ie* under the Government Annuities Act 1929 s 1 (repealed).

<sup>3</sup> *Ie* under the Government Annuities Act 1929 s 37 (repealed).

<sup>4</sup> *Ie* under the Government Annuities Act 1929 s 45: see PARA 1372.

<sup>5</sup> 'Savings bank insurance' meant a contract for the payment of a sum of money: (1) on the death of the person or one of the persons with whom it was made; or (2) to be made on the attainment by the person with whom it was made of a specified age or sooner in the case of his death: Government Annuities Act 1929 s 37 (repealed).

<sup>6</sup> *Ie* under the Government Annuities Act 1929 s 46: see PARA 1373.

<sup>7</sup> Finance Act 1962 s 33(1), (2) (s 33(1) amended by the Statute Law (Repeals) Act 1974).

<sup>8</sup> As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 *et seq*.

<sup>9</sup> As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 *et seq*; **PARLIAMENT** vol 78 (2010) PARA 1028 *et seq*.

<sup>10</sup> Government Annuities Act 1929 s 8(1) (amended by the Finance Act 1962 Sch 11 Pt VI; the Statute Law Revision Act 1963; and the National Loans Act 1968 s 8(1), (2)); Government Annuities Act 1929 s 41(1) (amended by the Statute Law Revision Act 1963; and the National Loans Act 1968 s 8(1), (2)). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 *et seq*.

<sup>11</sup> Government Annuities Act 1929 ss 8(2), 41(2). As to the Government Annuities Investment Fund see s 67 (amended by the Finance Act 1962 Sch 11 Pt VI; and the Statute Law Repeals Act 1963). The fund was established under the Government Annuities (Investments) Act 1864 (repealed).



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### **1372. Commutation of savings bank insurance for annuity.**

Any person entitled to a savings bank insurance<sup>1</sup> is entitled to commute it for a life annuity equivalent to the sum payable on death under the insurance on depositing during his lifetime with the National Debt Commissioners<sup>2</sup> a written direction to that effect and nominating in a form approved by them the person to whom the annuity is to be paid<sup>3</sup>.

1 As to the meaning of 'savings bank insurance' see PARA 1371 note 5.

2 As to the National Debt Commissioners see PARA 1332. See also PARA 1371 note 1.

3 Government Annuities Act 1929 s 45(1). When approved by the commissioners the annuity commences on the 6 January, 6 April, 6 July or 6 October next following the death, and is paid in respect of the quarter commencing on that date: s 45(2). For the purposes of ss 45, 46, the tables constructed under s 53 (repealed) for calculating the amounts of annuities and insurances continue in force by virtue of the Finance Act 1962 s 33(3), and may be varied, added to or substituted by virtue of s 33(4). As to the tables see the Savings Bank Annuities (Tables) Order 1954, SI 1954/1578, and the Savings Bank Annuities (Tables) Order 1955, SI 1955/419 (both amended by SI 1963/1178; SI 1968/1731; SI 1973/1407; SI 1974/1935; SI 1975/692; SI 1977/1536). As to the use of these tables to assess the value of an ordinary annuity to an estate for what are now inheritance tax purposes cf *Westminster Bank Ltd v IRC* [1954] 1 All ER 240, [1954] 1 WLR 242.

As to transfers of life annuities see the Government Annuities Act 1929 s 13 (amended by the Finance Act 1962 Sch 11 Pt VI); and as to the transfer of savings bank annuities see the Government Annuities Act 1929 s 44.

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### **1373. Surrender of savings bank insurance or default in paying premiums.**

If a person entitled to a savings bank insurance<sup>1</sup>, having paid premiums for not less than two years, desires to surrender his policy, or defaults in paying premiums, the National Debt Commissioners<sup>2</sup>, at his option, must pay him an ascertained sum of money or grant him such paid up policy or such immediate or deferred savings bank annuity as is equivalent in value to that sum<sup>3</sup>.

1 As to the meaning of 'savings bank insurance' see PARA 1371 note 5.

2 As to the National Debt Commissioners see PARA 1332. See also PARA 1371 note 1.

3 Government Annuities Act 1929 s 46. This does not, however, apply to an insurance granted on condition that no part of the premiums paid are to be returnable: s 46 proviso. As to tables for ascertaining values see PARA 1372 note 3.

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### **1374. Payment of annuities.**

Government annuities are payable quarterly on 5 January, 5 April, 5 July and 5 October<sup>1</sup>. At the expiration of 30 days after proof of any death on which a life annuity expires a further quarterly payment becomes payable, if claimed within two years of the death, to the person entitled to the annuity or his personal representatives<sup>2</sup>.

Payment is made in the case of a life annuity by warrant<sup>3</sup>, except that in the case of a savings bank annuity it may instead be credited to the savings bank account of the person entitled<sup>4</sup>. Under certain conditions, warrants may be sent by post<sup>5</sup> and a large proportion are so sent.

There are special provisions as to the validity of payments to personal representatives<sup>6</sup>, and as to the payment of sums not exceeding £5,000 on death without probate or other proof of title of the personal representatives<sup>7</sup>.

1 Government Annuities Act 1929 ss 9(1), 42(1). Money for payment is issued out of the National Loans Fund: National Loans Act 1968 s 8(1). As to the certification of amounts payable on the quarter days see the Government Annuities Act 1929 s 19 (amended by the National Loans Act 1968 s 8). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

2 See the Government Annuities Act 1929 ss 9(3), 11, 42(3), (4) (ss 9(3), 42(3) amended by the Finance Act 1962 Sch 11 Pt VI).

3 See the Government Annuities Act 1929 ss 10, 27(2), 43, 52(1); Treasury Warrant dated 22 September 1930, SR & O 1930/754; the Government Annuities Payment Regulations 1958, SI 1958/1181, reg 1; and the Savings Bank Annuities Regulations 1969, SI 1969/1336, reg 3(1), (3), (6).

4 Trustee Savings Banks Life Annuity Regulations 1930, SR & O 1930/106, regs 13, 14 (reg 13 amended by SI 1965/567); Government Annuities Payment Regulations 1958, SI 1958/1181, reg 2; Savings Bank Annuity Regulations 1969, SI 1969/1336, reg 3(1), (2).

5 See the Government Annuities Act 1929 ss 24, 59 (both amended by the National Loans Act 1968 s 8(2)); the Government Annuities Payment Regulations 1958, SI 1958/1181, reg 3(1); and the Savings Bank Annuity Regulations 1969, SI 1969/1336, reg 3(6).

6 See the Government Annuities Act 1929 ss 20, 56.

7 See the Government Annuities Act 1929 ss 21, 57 (both amended by virtue of SI 1984/539).

### **UPDATE**

### **1374 Payment of annuities**

NOTE 3--SI 1958/1181 reg 1 amended: SI 2010/773.

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### **1375. Unclaimed annuities.**

The National Debt Commissioners<sup>1</sup> must annually make up an account of all government life and savings banks annuities which have remained unclaimed for three years; and all such annuities, and all expired annuities, with the unclaimed quarterly arrears in each case, cease to

be charged on and issued out of the National Loans Fund<sup>2</sup> as from the date from which they have remained unclaimed or on which they expired<sup>3</sup>.

1 As to the National Debt Commissioners see PARA 1332. See also PARA 1371 note 1.

2 As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

3 See the Government Annuities Act 1929 ss 15(1), 50. This does not operate, however, to prejudice the rights of persons entitled to unclaimed government life annuities to claim the quarterly arrears and future payments, on supplying the proof of the existence of the nominee required by s 10 (see PARA 1110), and on such claim and proof the commissioners may reinstate the annuity and charge it, with the quarterly payments, on the National Loans Fund: s 15(1) proviso. Nor does this prejudice the rights of any person entitled to an unclaimed savings bank annuity who may at any subsequent period prove his title to the commissioners' satisfaction: s 50 proviso.

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### **1376. Offences and penalties.**

Any person who receives a payment under a government life annuity after the death of the nominee, knowing him to be dead, is liable to forfeit treble the amount so received and also £500<sup>1</sup>. Any person who receives a payment under a savings bank annuity after the death of the nominee must pay the National Debt Commissioners double the amount so received, with interest at five per cent<sup>2</sup>. Any person giving a false certificate or making an untrue declaration is liable to a penalty<sup>3</sup>. It is also an offence to obtain property by fraud<sup>4</sup>. There are special provisions as to offences in Scotland, Northern Ireland, the Channel Islands and the Isle of Man<sup>5</sup>.

1 See the Government Annuities Act 1929 s 31. Penalties and forfeitures imposed under Pt I (ss 8-36), other than those recoverable summarily, are recoverable by civil action in the High Court (see s 35(1); the Crown Proceedings Act 1947 s 13, Sch 1 para 1; and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 107), and must be paid into the Exchequer (Government Annuities Act 1929 s 35(2)). As to the reward of informers see s 35(3).

2 Government Annuities Act 1929 s 61(1). The penalty is recoverable in a county court: s 61(1). As to the National Debt Commissioners see PARA 1332. See also PARA 1371 note 1.

3 See the Government Annuities Act 1929 ss 32, 62(2) (s 32 amended by the Finance Act 1962 Sch 11 Pt VI); the Criminal Justice Act 1982 ss 37, 38, 46; and by the Statute Law (Repeals) Act 1998). As to the certificates and declarations see the Government Annuities Act 1929 s 25.

4 See the Fraud Act 2006 s 1; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 310.

5 See the Government Annuities Act 1929 s 32(4) (amended by the Statute Law (Repeals) Act 1998); the Government Annuities Act 1929 s 33 (amended by the Finance Act 1962 Sch 11 Pt VI); the Government Annuities Act 1929 ss 35(1), 62(3), (4) (s 62(3), (4) amended by the Statute Law (Repeals) Act 1998); and the Government Annuities Act 1929 s 63 (amended by the Finance Act 1962 Sch 11 Pt VI).

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## **(5) LOANS BY PUBLIC WORKS LOAN COMMISSIONERS**

### **(i) Administration**

#### **1377. The Public Works Loan Commissioners.**

The Public Works Loan Commissioners<sup>1</sup> were constituted for the purpose of making loans to local authorities and certain other bodies<sup>2</sup> under the enactments relating to public works loans<sup>3</sup>. There are 12 commissioners<sup>4</sup>. They are appointed by Her Majesty, one being appointed to be chairman and one to be deputy chairman<sup>5</sup>, and they hold office for four years, three of them retiring each year on 1 April in that year<sup>6</sup>. The commissioners may not receive any salary, fee or emolument for their services<sup>7</sup>.

Meetings of the commissioners are convened by the secretary to the commissioners from time to time, as the business to be transacted may require<sup>8</sup>. A minute book must be kept, in which applications for loans and minutes of the proceedings of the commissioners are to be recorded<sup>9</sup>. Where minutes of a meeting of the commissioners are signed by a person purporting to be chairman of that or the next meeting, they are receivable in evidence without further proof and, unless the contrary is proved, the meeting is deemed to have been properly held<sup>10</sup>.

1 The commissioners together constitute the Public Works Loan Board, which operates within the UK Debt Management Office, an executive agency of the Treasury. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the objects for which money may be lent see PARA 1385.

3 See the Public Works Loans Act 1875 s 4. The enactments referred to in the text are the Public Works Loans Act 1875 and any enactment passed before or after that Act authorising or referring to public works loans: see s 4.

4 Public Works Loans Act 1946 s 1(2).

5 Public Works Loans Act 1946 s 1(1), (2) (s 1(1) amended by the Statute Law Revision Act 1963). A commissioner must sign a form of declaration: see the Public Works Loans Act 1875 s 4 (amended by the Public Works Loans Act 1946 Sch 2). As to the form itself see the Public Works Loans Act 1875 s 4, Sch 2.

6 Public Works Loans Act 1946 s 1(3) (amended by the Statute Law Revision Act 1963). A retired commissioner is eligible for reappointment, and a commissioner appointed to fill a casual vacancy holds office only until the person he replaces would have retired: s 1(4), (5). An act or proceeding of the commissioners is not to be questioned on account of any vacancy or vacancies in their body: Public Works Loans Act 1875 s 5(5).

7 Public Works Loans Act 1946 s 4.

8 Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 1(1); and see PARA 1381 note 2. As to the secretary see PARA 1378. If at any meeting the chairman is not present, the deputy chairman is to be the chairman of the meeting; if neither is present, the commissioners present must choose one of their number to be the chairman: reg 1(2). Three commissioners form a quorum: reg 1(3). All questions arising at any meeting are to be decided by a majority of votes, and in the event of an equality of votes the chairman of the meeting has a second or casting vote: reg 1(4).

9 Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 1(5).

10 See the Public Works Loans Act 1875 s 5(4).

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### **1378. Secretary and other officers.**

The Public Works Loan Commissioners<sup>1</sup> may appoint or employ a secretary, solicitor, civil engineer, surveyor, and such number of officers, clerks, messengers and other persons as they may, with the consent of the Minister for the Civil Service, deem necessary<sup>2</sup>. The secretary may act for the commissioners under their direction<sup>3</sup> in conveyancing matters, in relation to mortgages<sup>4</sup> and in relation to local loans under the Public Works Loans Act 1965<sup>5</sup>, and securities for loans may be taken by him on their behalf<sup>6</sup>. Property vested in and securities given to the secretary for the time being vest automatically in his successor on his death, removal or resignation<sup>7</sup>. If the secretary is ill or absent or otherwise unable to act, the commissioners may authorise an assistant secretary to perform his functions<sup>8</sup>.

1 As to the Public Works Loans Commissioners see PARA 1377.

2 Public Works Loans Act 1875 s 6; Minister for the Civil Service Order 1968, SI 1968/1656, art 2(1)(e). The commissioners may from time to time assign to any person so appointed or employed by them such salary or remuneration as they may, with the sanction of the Minister for the Civil Service, think proper: Public Works Loans Act 1875 s 6; Minister for the Civil Service Order 1968, SI 1968/1656, art 2(1)(e). As to the remuneration to be paid to such appointed persons see the Public Works Loans Act 1875 s 6. As to the Minister for the Civil Service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 427, 549-550.

3 The secretary is presumed, unless the contrary is shown by an interested party, to have acted under the direction of the commissioners: Public Works Loans Act 1875 s 8.

4 See the Public Works Loans Act 1875 s 8. When the commissioners take possession of mortgaged property, the mortgagor's interest and powers vest in the secretary: s 22(1).

5 See the Public Works Loans Act 1875 s 8; and the Public Works Loans Act 1965 s 2(5), Schedule para 3 (amended by the Public Works Loans Act 1967 s 2(3)).

6 Public Works Loans Act 1875 s 20. The fact that the secretary is a party to a security is conclusive evidence that the security is in the prescribed form: see s 32; and see also PARA 1388.

7 See the Public Works Loans Act 1875 s 7 (amended by the Crown Proceedings Act 1947 Sch 2). Receipts required to be given on behalf of the commissioners are to be given by the secretary: Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 5. All documents of the commissioners are, if purporting to be signed by the secretary, deemed, until the contrary is proved, to be made or issued by the commissioners; directions given or acts done by him are deemed, until the contrary is proved, to be given or done by them; all documents may be proved by the production of a copy or extract purporting to be certified by him to be true; and no proof is required of his handwriting or official position: reg 6.

8 Public Works Loans Act 1944 s 4(1). If an assistant secretary purports to exercise powers under s 4 he is presumed, unless the contrary is shown, to do so with the commissioners' authority: s 4(2). The assistant secretary and not more than two other officers authorised by the commissioners for the purpose are competent to perform any act authorised by the Local Loans (Procedure) Regulations 1968, SI 1968/458, to be performed by the secretary: reg 7.

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### **1379. Accounts.**

The Public Works Loan Commissioners<sup>1</sup> must keep at the Bank of England such accounts as the Treasury may direct<sup>2</sup>. Two main accounts are kept: the Public Works Loans Account into which payments by borrowers from the commissioners in respect of repayments or interest are to be made<sup>3</sup>, and the Public Works Loans (Advances) Account into which money required by the commissioners for advances is paid by the National Loans Fund<sup>4</sup>.

The commissioners must, in respect of each financial year, prepare in such form and manner as the Treasury may direct an account of all loans made by them in that year, and of the sums paid or applicable in that year in or towards the discharge of the principal or interest of all loans made by them<sup>5</sup>. This account is required to be sent by the end of the November after the end of the financial year to which it relates to the Comptroller and Auditor General<sup>6</sup>, who is required to examine, certify and report on the account and lay copies of it together with his report before each House of Parliament<sup>7</sup>.

1 As to the Public Works Loans Commissioners see PARA 1377.

2 Public Works Loans Act 1875 s 43 (amended by the National Loans Act 1968 Sch 6 Pt II). Every such account is deemed to be a public account: Public Works Loans Act 1875 s 43 (as so amended). As to the Bank of England see PARA 793 et seq. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 See the Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 4.

4 See the Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 3(2). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

5 See the National Loans Act 1968 s 3(6).

6 As to the Comptroller and Auditor General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 724-726.

7 See the National Loans Act 1968 s 3(6).

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### **1380. Returns.**

The Public Works Loan Commissioners<sup>1</sup> must annually cause to be made out up to the end of every financial year<sup>2</sup> a report of their transactions during the year, and the report must contain or have annexed to it the prescribed particulars<sup>3</sup> respecting money issued to and loans granted by them, and the execution of their duties, and such other particulars as they think fit<sup>4</sup>.

1 As to the Public Works Loans Commissioners see PARA 1377.

2 'Financial year' means the year ending the 31 March: Public Works Loans Act 1875 s 51.

3 Money required by the commissioners is issued out of the National Loans Fund: see PARAS 1334, 1383. As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

4 See the Public Works Loans Act 1875 s 5(3). The particulars must include a statement of any difference that may have arisen between the commissioners and any public department regarding the grant of any loan or

the construction of any Act relating to loans by them: s 5(3). The report must be transmitted to the Treasury and laid by the Treasury before both Houses of Parliament: s 5(3) (amended by the National Loans Act 1968 Sch 6 Pt II). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the laying of documents before Parliament see the Laying of Documents before Parliament (Interpretation) Act 1948; and **PARLIAMENT** vol 34 (Reissue) PARA 942; **STATUTES**.

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### **1381. Regulations.**

The Public Works Loan Commissioners<sup>1</sup> have power with Treasury approval to make regulations for carrying into effect the Public Works Loans Act 1875<sup>2</sup>. The fees to be paid by applicants for loans are no longer governed by these regulations, but by regulations made by the Treasury after consultation with the commissioners<sup>3</sup>.

1 As to the Public Works Loans Commissioners see PARA 1377.

2 See the Public Works Loans Act 1875 s 41. The regulations may relate in particular to the commissioners' quorum and proceedings, the authentication of documents etc, application for loans, forms to be used and the relations between the commissioners and the Bank of England: see s 41 (amended by virtue of the Local Authorities Loans Act 1945 s 2(3); and by the National Loans Act 1968 Sch 6 Pt II). As to the Bank of England see PARA 793 et seq. Regulations must be submitted for the approval of the Treasury; notification of their making and the place where copies may be purchased must be published in the London Gazette; and copies must be laid before both Houses of Parliament, normally before the regulations come into operation: Public Works Loans Act 1875 s 41 (amended by the Statute Law (Repeals) Act 1986); Statutory Instruments Act 1946 ss 4(3), 12(2); and see **STATUTES**. Regulations may be rescinded, altered or added to: Public Works Loans Act 1875 s 41. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to laying documents before Parliament see the Laying of Documents before Parliament (Interpretation) Act 1948; and **PARLIAMENT** vol 34 (Reissue) PARA 942; **STATUTES**.

The regulations in force under s 41 are the Local Loans (Procedure) Regulations 1968, SI 1968/458 (amended by SI 1991/1139; SI 1992/1565). As to meetings of the commissioners see the Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 1; and PARA 1377. As to applications for loans see reg 2; and PARA 1384. As to payment of loans see reg 3; and PARA 1379. As to repayment of loans see reg 4; and PARA 1379. As to receipts and discharges see reg 5; and PARA 1378. As to powers of the secretary see reg 6; and PARA 1378. As to powers of other officers see reg 7; and PARA 1378.

In the Public Works Loans Act 1875, 'prescribed' means prescribed by regulations made under s 41 with the approval of the Treasury: s 51. Power to prescribe forms of security is conferred by s 32, but forms prescribed under s 32 are not printed in the statutory instruments series.

3 See the Local Authorities Loans Act 1945 s 2(3). Regulations made under the Local Authorities Loans Act 1945 must be laid before Parliament and are subject to annulment in pursuance of a resolution of either House of Parliament: see s 9(1), (2) (s 9(1) amended by the Statute Law Revision Act 1953); the Statutory Instruments Act 1946 ss 4, 5; and **STATUTES**. The regulations in force are the Public Works Loans (Fees) Regulations 1991, SI 1991/1539 (amended by SI 1992/1566; SI 1997/985).

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### **1382. Legal proceedings and service of notices.**

The Public Works Loan Commissioners<sup>1</sup> are an authorised government department for the purpose of taking and defending legal proceedings<sup>2</sup>. They also have power for the purpose of the execution of the Public Works Loans Act 1875, to conduct voluntary examinations, to administer oaths and to take affidavits and declarations<sup>3</sup>. Notices, directions, orders and other documents may be served and sent by post and, until the contrary is proved, are deemed to have been served and received respectively at the time when the letter containing them would be delivered in the ordinary course of post<sup>4</sup>. Notices and documents required<sup>5</sup> to be served on the commissioners may be served by serving them on their secretary, or by sending them addressed to or delivering them at the office of the commissioners<sup>6</sup>.

1 As to the Public Works Loan Commissioners see PARA 1377.

2 As to legal proceedings by the Crown see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 107 et seq; and as to legal proceedings against the Crown see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 110 et seq.

3 Public Works Loans Act 1875 s 5(2).

4 See the Public Works Loans Act 1875 s 47. In proving such service or sending, it is sufficient to prove that the letter containing the notice etc was prepaid, and properly addressed, and put into the post: s 47.

5 le required by the Public Works Loans Act 1875 or by any regulation made under it: see s 48.

6 Public Works Loans Act 1875 s 48. As to the secretary see PARA 1378. Notices and documents required to be served by or on the commissioners, or to be made or issued by them, must be in writing or in print or partly in writing and partly in print: s 48.

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### **1383. Funds from which loans are made.**

The Treasury<sup>1</sup> may issue out of the National Loans Fund<sup>2</sup> such sums as are required by the Public Works Loan Commissioners for making authorised loans<sup>3</sup>. Interest on loans made by the commissioners is to be paid at such rates as the Treasury may determine<sup>4</sup>. All sums paid or applicable in or towards the discharge of the principal or interest of any loans made are to be paid into the National Loans Fund<sup>5</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

3 See the National Loans Act 1968 s 3(1); and see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 736. As to the Public Works Loan Commissioners see PARA 1377.

4 See the National Loans Act 1968 s 3(2); PARA 1386; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 736.

5 See the National Loans Act 1968 s 3(3). Where any security for a loan is enforced the net receipts only are to be paid into the National Loans Fund: s 3(3) proviso; and see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 736.



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## **(ii) Loans**

### **1384. The granting of loans.**

In considering whether to make a loan the Public Works Loan Commissioners<sup>1</sup> must have regard to the sufficiency of the security<sup>2</sup>. However, they are no longer required in considering the propriety of a loan to justify it on the basis of the public benefit which could be expected on its application<sup>3</sup>. The purposes for which the commissioners may make a loan are specified in the National Loans Act 1968<sup>4</sup>. A limit is imposed on the total amount of the loans which may be made by the commissioners<sup>5</sup>.

The power of the Public Works Loan Commissioners to make loans<sup>6</sup> includes the power to enter into undertakings to make loans<sup>7</sup>.

Applications for loans must be in the form required by the commissioners, and the commissioners may require applicants to provide such information as they think necessary for their consideration of the applications<sup>8</sup>.

1 As to the Public Works Loans Commissioners see PARA 1377. As to the purposes for which the commissioners may lend see PARA 1385.

2 As to the security for repayment of loans see PARA 1388.

3 See the Public Works Loans Act 1964 s 3(a) (repealed).

4 See the National Loans Act 1968 s 3(11), Sch 4; and PARA 1385.

5 The aggregate of: (1) any commitments of the commissioners outstanding in respect of undertakings entered into by them to grant local loans; and (2) any amount outstanding in respect of the principal of any local loans, must not at any time exceed £55,000 million or such other lower or higher sum, not exceeding £70,000 million, as the Treasury may from time to time specify by order made by statutory instrument: National Loans Act 1968 s 4(1) (s 4 substituted by the Finance Act 1984 s 125(1); and the National Loans Act 1961 s 4(1) amended by the Finance Act 1990 s 130). See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 736. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

6 See under the National Loans Act 1968 s 3(1): see PARA 1383.

7 National Loans Act 1968 s 3(5) (amended by the Finance Act 1984 Sch 23).

8 Local Loans (Procedure) Regulations 1968, SI 1968/458, reg 2.

## **UPDATE**

### **1384 The granting of loans**

NOTE 5--Aggregate limit increased to £70,000 million: SI 2008/3004.

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### **1385. Objects for which money may be lent.**

The Public Works Loan Commissioners<sup>1</sup> may lend money<sup>2</sup> to any local authority<sup>3</sup> for any purpose for which the authority has power to borrow whether by virtue of any enactment or otherwise<sup>4</sup>. The commissioners also have powers to lend money for certain other statutory purposes<sup>5</sup>, but beyond this the commissioners' lending powers extend no further.

1 As to the Public Works Loans Commissioners see **PARA 1377**.

2 The loans are known as 'local loans': National Loans Act 1968 s 3(12). See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) **PARA 736**.

3 'Local authority' means:

- 15 (1) in relation to England and Wales: (a) a billing authority, or a precepting authority as defined in the Local Government Finance Act 1992 s 69 (see **RATING AND COUNCIL TAX** vol 39(1) (Reissue) **PARA 821**; **LOCAL GOVERNMENT** vol 29(1) (Reissue) **PARA 524**); (b) a fire and rescue authority in Wales constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 or a scheme to which s 4 applies (see **FIRE SERVICES**); (c) a levying body within the meaning of the Local Government Finance Act 1988 s 74 or a body as regards which s 75 applies (see **LOCAL GOVERNMENT** vol 29(1) (Reissue) **PARA 530**); (d) a functional body within the meaning of the Greater London Authority Act 1999 (see **LONDON GOVERNMENT** vol 29(2) (Reissue) **PARA 213**); and (e) the Greater London Magistrates' Courts Authority (see **LONDON GOVERNMENT** vol 29(2) (Reissue) **PARA 616**) (National Loans Act 1968 s 3(11) (amended by the Finance Act 1984 s 125(2); National Loans Act 1968 s 3, Sch 4 para 1(a) (substituted by SI 1990/776; and amended by the Local Government Finance Act 1992 Sch 13 para 26; the Access to Justice Act 1999 Sch 12 para 2, Sch 15 Pt V; the Greater London Authority Act 1999 Sch 34 Pt I; the Courts Act 2003 Sch 8 para 127, Sch 10; and by the Fire and Rescue Services Act 2004 Sch 1 para 22));
- 16 (2) any port health authority or joint board constituted by an order under the Public Health Act 1936 or any enactment repealed by it (National Loans Act 1968 Sch 4 para 1(b)).

4 National Loans Act 1968 Sch 4 para 1. As to the borrowing powers of local authorities see **LOCAL GOVERNMENT** vol 29(1) (Reissue) **PARA 594** et seq.

5 The loans to any authority in Great Britain under the Harbours and Passing Tolls etc Act 1861 s 3 (see **PORTS AND HARBOURS** vol 36(1) (2007 Reissue) **PARA 680**) (National Loans Act 1968 Sch 4 para 2 (amended by the Merchant Shipping Act 1988 Sch 7)); and loans to any person under the Housing Act 1985 s 451 (see **HOUSING** vol 22 (2006 Reissue) **PARA 687**) or the Housing Act 1996 s 23 (see **HOUSING** vol 22 (2006 Reissue) **PARA 66**) (National Loans Act 1968 Sch 4 para 3 (amended by the Housing (Consequential Provisions) Act 1985 Sch 2 para 15; and by SI 1996/2325)). As to the meaning of 'Great Britain' see **PARA 2** note 3.

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### **1386. Fees for and interest on loans.**

The fees to be paid to the Public Works Loan Commissioners<sup>1</sup> by persons to whom they make loans are fixed by Treasury regulations<sup>2</sup>. The rates of interest to be charged on loans made by the commissioners are determined by the Treasury<sup>3</sup>.

1 As to the Public Works Loans Commissioners see **PARA 1377**.

2 See the Local Authorities Loans Act 1945 s 2(3). As to the regulations see the Public Works Loans (Fees) Regulations 1991, SI 1991/1539 (amended by SI 1992/1566; SI 1997/985). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 See the National Loans Act 1968 s 3(2). As to the determination of the rate of interest see s 5; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 736. References in the Housing (Financial Provisions) Act 1958 Sch 3 para 7(1) proviso (repealed) and the Local Authorities (Land) Act 1963 s 3(4) (see **LOCAL GOVERNMENT** vol 69 (2009) PARA 522) to the rate of interest in respect of any particular class of loans to local authorities, and references in any other enactment passed, or in any document made, before 27 February 1964 (ie the date of passing of the Public Works Loans Act 1964) to the rate fixed by the Treasury under the Public Works Loans Act 1897 s 1 (repealed), in respect of loans of a particular class are subject to the National Loans Act 1968 s 6(2): s 6(1). Where the time in question falls after 31 March 1968 any such reference to the rate at that time is to be construed as a reference to the rate at that time determined by the Treasury in respect of local loans of the class in question made on the security of local rates or, where more than one rate is so applicable, to such one of those rates as the Treasury may direct generally or with respect to any particular enactment or document: s 6(2). The directions made are to be published in the London Gazette: s 6(2). For the purposes of s 6(2), 'local rate' means any rate levied or assessed, the proceeds of which are applicable to public local purposes and which is levied on the basis of a valuation of property, and includes any sum which, although obtained in the first instance by a precept, certificate or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of the rate (s 6(3)(a)); and 'security of local rates' includes a security guaranteed by local rate (s 6(3)(b)).

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### **1387. Time for repayment of loans.**

Loans granted by the Public Works Loan Commissioners<sup>1</sup> are to be made repayable within 50 years or such other period as may be authorised by a special Act<sup>2</sup> relating to the loan<sup>3</sup> or, in the case of a loan to a local authority for any purpose<sup>4</sup>, by the Act authorising the authority to borrow for that purpose<sup>5</sup>. Where a loan is made repayable within less than the full permissible period the commissioners may extend the time for repayment within that period<sup>6</sup>.

The Treasury has power on the recommendation of the commissioners to postpone for not more than five years the payment of instalments of principal and interest, or either, in respect of a loan granted by the commissioners<sup>7</sup>. The commissioners have power to accept payment of the whole or any part of the principal and interest of any loan or other money secured by a mortgage before it falls due<sup>8</sup>; and if an individual liable as principal or surety in respect of principal or interest of any loan becomes bankrupt or insolvent, or enters into any composition or arrangement with his creditors, or has his affairs liquidated by arrangement, or, in the case of a company so liable, is wound up, the whole loan becomes due immediately unless in the case of a surety the commissioners think fit to accept some other surety<sup>9</sup>.

1 As to the Public Works Loans Commissioners see PARA 1377.

2 Ie any Act passed before the Public Works Loans Act 1875 which authorises the commissioners to lend money for the purposes of any work mentioned in s 9, Sch 1 (repealed), or any Act passed after that Act which authorises the commissioners to lend money for any purpose: s 51. As to the objects for which money may be lent see PARA 1385.

3 See the Public Works Loans Act 1875 s 11 (amended by the Public Works Loans Act 1911 s 4; and the Public Works Loans Act 1964 Sch 3). Where no period is authorised by a special Act relating to the loan, the period of 50 years may in special circumstances be extended by the Treasury on the recommendation of the commissioners: see the Public Works Loans Act 1875 s 11 (as so amended). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 As to the commissioners' general power to lend to a local authority for any purpose for which it has power to borrow see PARA 1385.

5 See the Local Authorities Loans Act 1945 s 2(2) (amended by the National Loans Act 1968 Sch 6 Pt II). As to the borrowing powers of a local authority see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 594 et seq.

6 Public Works Loans Act 1875 s 11 (as amended: see note 3). Before granting an extension the commissioners must be satisfied as to the sufficiency of the security for the loan: s 11 (as so amended). As to security for repayment of loans see PARA 1388. The expiration of the time fixed for repayment of a loan does not affect the commissioners' power of enforcing payment of sums due in respect of it: s 34.

7 Public Works Loans Act 1875 s 37. The postponement may be made on such terms as to the completion and improvement of the work for which the loan was made and the ultimate payment of the principal and interest as the Treasury may authorise on the recommendation of the commissioners: see s 37. In the case of a loan to a local authority, the commissioners and the authority may agree that it is to be a condition of the postponement of any interest payment that the interest postponed be added to the principal of the loan: see the Local Authorities Loans Act 1945 s 4(3). Nothing in any enactment requiring the instalments of repayment of a loan to a local authority to be equal and periodical is to prevent these arrangements: see s 4(2).

8 Public Works Loans Act 1875 s 29; Public Works Loans Act 1965 s 2(5) (amended by the Local Government and Housing Act 1989 Sch 11 para 6); Public Works Loans Act 1967 s 2(2)(b), (3). The commissioners may release or convey the security for the loan to the person making the payment: see the Public Works Loans Act 1875 s 29.

9 See the Public Works Loans Act 1875 s 31. As to bankruptcy generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**; and as to the winding up of companies generally see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

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### **1388. Security for repayment of loans.**

Before advancing any money in respect of a loan, the Public Works Loan Commissioners<sup>1</sup> must take security<sup>2</sup> for its repayment with interest<sup>3</sup> unless the borrower is a relevant authority under the Public Works Loans Act 1965<sup>4</sup>. The security, where required, must consist of the security authorised by the special Act<sup>5</sup> relating to the loan, or, if none is so authorised, of a mortgage of property<sup>6</sup> or of a rate<sup>7</sup>, or of both property and a rate<sup>8</sup>. Personal security must also be taken, unless the commissioners think fit to dispense with such security in a case in which in their opinion the mortgaged property or rate is sufficient security for the payment of the principal and interest of the loan within the stipulated period<sup>9</sup>.

If default is made in any payment to the commissioners in respect of a loan they may enforce the security for the loan: (1) in the case of a mortgage or charge on property, by taking possession of<sup>10</sup>, selling, mortgaging or letting<sup>11</sup> the property or any part of it<sup>12</sup>; (2) in the case of a charge on any rate, by assuming by notice in writing the powers of the mortgagor as to the making and levying of the rate<sup>13</sup>; or (3) in the case of any personal security, by taking the appropriate proceedings<sup>14</sup>. If the commissioners exercise the powers mentioned under head (1) or head (2) above, neither they nor their agents are liable to account for any money other than that which they actually receive out of the property or rate<sup>15</sup>, and they are required to pay their net receipts only into the National Loans Fund<sup>16</sup>.

Where the borrower is a relevant authority<sup>17</sup>, the commissioners may enter into a loan agreement with it<sup>18</sup> and so long as any part of the principal of and interest on the loan remains outstanding, the loan becomes a charge on all the revenues of the borrowing authority<sup>19</sup>, and such a charge ranks equally with any other charges on these revenues, subject to any provision to the contrary made under any other enactment<sup>20</sup>.

- 1 As to the Public Works Loans Commissioners see PARA 1377.
- 2 'Security' includes a mortgage; and 'mortgage' includes a charge and any instrument in the nature of a mortgage or charge: Public Works Loans Act 1875 s 51. As to mortgage generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.
- 3 Public Works Loans Act 1875 s 12. This provision does not apply to a loan secured by an automatic charge: Public Works Loans Act 1965 s 2(5), Schedule para 5. 'Automatic charge' means a charge imposed for securing a loan made in pursuance of an agreement to which s 2 (see the text and notes 17-20) applies: see s 2(5).
- 4 See the Public Works Loans Act 1965 s 2(1). 'Relevant authority' means: (1) a billing authority or a precepting authority as defined in the Local Government Finance Act 1992 s 69 (see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) PARAS 5, 229; **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 524); (2) a fire and rescue authority in Wales constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 or a scheme to which s 4 applies (see **FIRE SERVICES**); (3) a levying body within the meaning of the Local Government Finance Act 1988 s 74 or a body as regards which s 75 applies (see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 530); (4) a functional body within the meaning of the Greater London Authority Act 1999 (see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 213); and (5) the Greater London Magistrates' Courts Authority (see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 616) (Public Works Loans Act 1965 s 2(1)(a) (amended by SI 1990/776; the Local Government Finance Act 1992 Sch 13 para 26; the Access to Justice Act 1999 Sch 12 para 2, Sch 15 Pt V; the Greater London Authority Act 1999 Sch 34 Pt I; the Courts Act 2003 Sch 8 para 127, Sch 10; and by the Fire and Rescue Services Act 2004 Sch 1 para 22)). Any relevant authority which does not otherwise have power to raise money by means of an agreement with the commissioners which gives rise to an automatic charge has the power to raise money by those means: Public Works Loans Act 1967 s 2(1).
- 5 As to the meaning of 'special Act' see PARA 1387 note 2.
- 6 Any toll, due, rent, imposition and other sum not being a rate (ie within the definition in note 7) is deemed to be property for this purpose: Public Works Loans Act 1875 s 51.
- 7 'Rate' means a rate, cess or assessment the proceeds of which are applicable to public local purposes and leviable on the basis of a valuation of property, and includes any sum which, although obtained in the first instance by a precept, certificate or other instrument requiring payment from some authority or officer, is or can be ultimately raised out of a rate: see the Public Works Loans Act 1875 s 51.
- 8 See the Public Works Loans Act 1875 s 12. See also s 18 (charge on property and priority of loans), s 19 (charge on rate of loan), s 30 (discharge of security and reversion of property on repayment of loan), s 32 (security to be in such form as may be prescribed by the commissioners under s 41 (see PARA 1381)), s 35 (security for works not commenced or completed at time of loan), s 38 (commissioners' power to accept substituted security), and s 39 (commissioners' power to concur in dispositions of mortgaged property). All money borrowed by a local authority together with any interest on the money borrowed, is charged indifferently on all revenues of the authority and all securities created by a local authority rank equally without any priority: Local Government Act 2003 s 13(3), (4); and see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 558 et seq. References to mortgagors or borrowers in the Public Works Loans Act 1875 include, if need be, their successors, heirs, executors, administrators and assigns and persons claiming through or under them: s 51.
- 9 Public Works Loans Act 1875 s 12.
- 10 See the Public Works Loans Act 1875 s 22 (commissioners' power when in possession, including power to make advances for the completion, repair etc of the property).
- 11 See the Public Works Loans Act 1875 s 25 (exercise of powers to sell or mortgage), s 26 (purchaser or mortgagee not liable to see to the validity of the sale or mortgage or to the application of money paid by him) and s 27 (terms of lease, sale, mortgage etc; protection of persons having interests in priority to loan and of lessees).
- 12 See the Public Works Loans Act 1875 s 21. See also s 28 (application of money arising from taking possession, lease, sale, mortgage etc). As to the general powers and liabilities of mortgagees see **MORTGAGE** vol 77 (2010) PARA 101 et seq.
- 13 See the Public Works Loans Act 1875 s 23 (which also provides for application of money levied).
- 14 See the Public Works Loans Act 1875 s 33 (amended by the Statute Law Revision Act 1898; the Courts Act 1971 Sch 11 Pt IV; and by the Statute Law (Repeals) Act 2004). The special procedure set out in the Public Works Loans Act 1875 s 33 is now superseded: see the Crown Proceedings Act 1947 ss 13, 15, s 23(1), Sch 1;

and **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 107 et seq. The commissioners are an authorised government department for the purpose of taking proceedings: see PARA 1382.

15 Public Works Loans Act 1875 s 24. Apart from s 24 the commissioners would be liable to account also for money which, but for their wilful neglect or default, they might have received: see *Gaskell v Gosling* [1896] 1 QB 669 at 691, CA; and **MORTGAGE** vol 77 (2010) PARA 101 et seq.

16 National Loans Act 1968 s 3(3). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

17 Ie other than a relevant authority authorised to borrow money under the Local Government Act 2003 s 1 or s 19, Sch 1 para 2: see the Public Works Loans Act 1965 s 2(3) (amended by the Local Government and Housing Act 1989 Sch 11 para 6; the Local Government Act 2003 Sch 7 para 2(a); and by SI 2004/533). As to the meaning of 'relevant authority' see note 4.

18 See the Public Works Loans Act 1965 s 2(1) (as amended: see note 4).

19 See the Public Works Loans Act 1965 s 2(3) (as amended: see note 17). This provision does not apply to any authority in the case of which some other enactment is in force which of itself imposes a charge for securing loans of all descriptions on all the revenues of the authority: see the Public Works Loans Act 1967 s 2(2) (amended by the Local Government and Housing Act 1989 Sch 11 para 7; the Local Government Act 2003 Sch 7 para 3; and by SI 2004/533).

20 See the Public Works Loans Act 1965 s 2(4).

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## **(6) INTERNATIONAL FINANCIAL ARRANGEMENTS**

### **(i) The Exchange Equalisation Account**

#### **1389. Constitution of the Exchange Equalisation Account.**

The Exchange Equalisation Account is an account under Treasury control<sup>1</sup> to which is issued out of the National Loans Fund, at such times and in such manner as the Treasury directs, such sums as the Treasury may determine<sup>2</sup>. If at any time the Treasury is of opinion that the assets in sterling of the Exchange Equalisation Account are in excess of what is required for the purposes of the account<sup>3</sup>, the Treasury may direct that the excess be paid into the National Loans Fund<sup>4</sup>.

For each financial year in which the Exchange Equalisation Account operates the Treasury must prepare, in such form and on such basis as it prescribes, accounts in relation to the transactions, assets and liabilities of the Exchange Equalisation Account, and send the accounts to the Comptroller and Auditor General not later than 30 November of the financial year following that to which the accounts relate<sup>5</sup>. The Comptroller and Auditor General must examine and certify the accounts, issue a report on them and send the certified accounts and the report to the Treasury not later than 15 January of that financial year<sup>6</sup>. The Treasury must lay the certified accounts and the report before each House of Parliament not later than 31 January of that financial year<sup>7</sup>.

In certifying the accounts<sup>8</sup> the Comptroller and Auditor General must state whether or not it is his opinion, having regard to his examination of the accounts, that:

- 133 (1) the resources of the Exchange Equalisation Account have been used<sup>9</sup> in accordance with the provisions of the Exchange Equalisation Account Act 1979<sup>10</sup>;  
 134 (2) the transactions of the Exchange Equalisation Account are in accordance with any relevant authority<sup>11</sup>; and  
 135 (3) the accounts have been prepared in the form, and on the basis, prescribed<sup>12</sup> under these provisions<sup>13</sup>.

1 Exchange Equalisation Account Act 1979 s 1(1), (2). The account was originally established under the Finance Act 1932 s 24 (repealed) after the United Kingdom abandoned the gold standard. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the Exchange Equalisation Account Act 1979 s 2(1). Sums so issued and for the time being outstanding constitute a liability of the account to the National Loans Fund: see s 2(2). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

3 As to the purposes of the Exchange Equalisation Account see PARA 1390.

4 Exchange Equalisation Account Act 1979 s 2(3).

5 Exchange Equalisation Account Act 1979 s 4(1), (2) (s 4 substituted by the Finance Act 2000 s 24(7)). The Treasury may by order made by statutory instrument amend any of the dates for the time being specified in the Exchange Equalisation Account 1979 s 4(2)-(4) (see the text and notes 6, 7): s 4(6) (as so substituted). Before making such an order the Treasury must consult the Comptroller and Auditor General: s 4(7) (as so substituted). A statutory instrument containing an order under s 4(6) is subject to annulment in pursuance of a resolution of the House of Commons: s 4(8) (as so substituted). At the date at which this volume states the law no such order had been made. As to the Comptroller and Auditor General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 724 et seq.

6 Exchange Equalisation Account Act 1979 s 4(3) (as substituted: see note 5). See note 5.

7 Exchange Equalisation Account Act 1979 s 4(4) (as substituted: see note 5). See note 5.

8 Ie under the Exchange Equalisation Account Act 1979 s 4(3): see the text to note 6.

9 A reference to the use of resources is a reference to their expenditure, consumption or reduction in value: Exchange Equalisation Account Act 1979 s 4(9) (as substituted: see note 5).

10 Exchange Equalisation Account Act 1979 s 4(5)(a) (as substituted: see note 5).

11 Exchange Equalisation Account Act 1979 s 4(5)(b) (as substituted: see note 5).

12 Ie the form and basis prescribed under the Exchange Equalisation Account Act 1979 s 4(1): see the text to note 5.

13 Exchange Equalisation Account Act 1979 s 4(5)(c) (as substituted: see note 5).

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### **1390. Purposes for which the Exchange Equalisation Account is to be used.**

The Exchange Equalisation Account is to be used for:

- 136 (1) checking undue fluctuations in the exchange value of sterling<sup>1</sup>;

- 137 (2) securing the conservation or disposition in the national interest of the means of making payments abroad<sup>2</sup>;
- 138 (3) payment of charges to the International Monetary Fund<sup>3</sup>; and
- 139 (4) carrying out any of the functions of the United Kingdom government under the Articles of Agreement of the International Monetary Fund which relate to special drawing rights<sup>4</sup>.

The Treasury<sup>5</sup> may cause any funds in the Exchange Equalisation Account to be invested in securities<sup>6</sup> or in the purchase of gold<sup>7</sup>, or in the acquisition of special drawing rights under the Articles of Agreement of the International Monetary Fund<sup>8</sup>.

1 Exchange Equalisation Account Act 1979 s 1(3)(a).

2 Exchange Equalisation Account Act 1979 s 1(3)(b).

3 Exchange Equalisation Account Act 1979 s 1(3)(c). This is the purpose specified in the International Monetary Fund Act 1979 s 1(3): see PARA 1391. As to the International Monetary Fund see PARA 1391.

4 Exchange Equalisation Account Act 1979 s 1(3)(d). Any special drawing rights received or disposed of by the United Kingdom government must, in the case of receipts, be treated as assets of the Exchange Equalisation Account and, in the case of disposals, be transferred from the Exchange Equalisation Account: s 3(2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

6 'Securities' includes securities and assets in currency of any country and in whatever form held: Exchange Equalisation Account Act 1979 s 3(3). The reference to currency of any country includes a reference to units of account defined by reference to more than one currency: s 3(4) (added by the Finance Act 1986 s 113).

7 Exchange Equalisation Account Act 1979 s 3(1)(a).

8 Exchange Equalisation Account Act 1979 s 3(1)(b).

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## **(ii) International Financial Institutions**

### **1391. International financial organisations.**

The International Bank for Reconstruction and Development<sup>1</sup>, the International Monetary Fund<sup>2</sup>, the International Finance Corporation<sup>3</sup> and the International Development Association<sup>4</sup> are international financial and economic institutions which have been established by treaty and of which the United Kingdom is a member<sup>5</sup>.

Charges payable to the International Monetary Fund by the United Kingdom government<sup>6</sup> are to be paid out of the Exchange Equalisation Account<sup>7</sup>. The Treasury is empowered to lend to the International Monetary Fund in accordance with the International Monetary Fund's borrowing arrangements<sup>8</sup>. Subscriptions, compensation and other payments by the government to the International Monetary Fund may be paid out of the National Loans Fund<sup>9</sup> or by the Secretary of State out of money provided by Parliament<sup>10</sup>. Receipts from the International Monetary Fund, other than sums received by reason of the operation of the Exchange Equalisation Account, are



to be paid into the National Loans Fund<sup>11</sup>. Exchange contracts<sup>12</sup> which involve the currency of any member of the International Monetary Fund and which are contrary to the exchange control regulations of such member maintained or imposed consistently with the fund agreement are unenforceable in the territory of any other member of the fund<sup>13</sup>. Such contracts will therefore be unenforceable in the United Kingdom if they contravene the laws of other countries which are members of the fund<sup>14</sup>.

The Secretary of State has power to make payment of initial subscriptions and other subscriptions and payments to a multilateral development bank<sup>15</sup>.

The Treasury may, in such manner and on such conditions as it thinks fit, undertake to indemnify the Bank of England in respect of its financial assistance to the central bank of any overseas country<sup>16</sup>. The sums required or received in pursuance of any such undertaking are to be paid out of, or into, the Consolidated Fund<sup>17</sup>.

1 The International Bank for Reconstruction and Development was established by an agreement drawn up at the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire, USA in July 1944 (see the Bretton Woods Agreement Act 1945 preamble (repealed)) in order to assist in the reconstruction and development of members' territories by facilitating the investment of capital for productive purposes: see the Articles of Agreement of the International Bank for Reconstruction and Development (Washington, 27 December 1945; TS 21 (1946); Cmd 6885), art I. As to the immunities and privileges of the International Bank for Reconstruction and Development see PARA 1392.

2 The International Monetary Fund was established at the same time as the International Bank for Reconstruction and Development (see note 1). For the fund's functions in relation to currency exchange and balance of payments see the Articles of Agreement of the International Bank for Reconstruction and Development. For the Treasury's power to create and issue to the fund certain non-interest-bearing and non-negotiable notes or other obligations see the International Monetary Fund Act 1979 s 4(1). Sums payable under these notes and obligations are charged on the National Loans Fund with recourse to the Consolidated Fund: s 4(2). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq. As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 The International Finance Corporation, which is an affiliate of the International Bank for Reconstruction and Development (see note 1), was established to encourage the development of productive private enterprise, particularly in the less developed countries: see the Articles of Agreement of the International Finance Corporation (Washington, 25 May 1955; TS 37 (1961); Cmd 1377), art I. As to the immunities and privileges of the International Finance Corporation see PARA 1392.

4 The purpose of the International Development Association, which is an affiliate of the International Bank for Reconstruction and Development, and is for operational purposes one with it, is to promote economic development, increase productivity and raise standards of living in less developed areas: see the Articles of Agreement of the International Development Association (Washington, 29 January 1960; TS 1 (1961); Cmd 1244), art I. See also the International Development Act 2002; and the International Development Association (Eleventh Replenishment) Order 1998, SI 1998/1149. As to the immunities and privileges of the International Development Association see PARA 1392.

5 See **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 533. As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 I.e. charges payable under the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development (Final Act of the Bretton Woods Conference) (Washington, 27 December 1945; TS 21 (1946); Cmd 6885), art V s 8.

7 See the International Monetary Fund Act 1979 s 1(3). As to the Exchange Equalisation Account see PARAS 1389-1390.

As to the Secretary of State's requirement to report annually on total expenditure on international aid and the breakdown of such aid see PARA 1394.

8 See the International Monetary Fund Act 1979 s 2(1) (substituted by the International Monetary Arrangements Act 1983 s 1; and amended SI 1997/1611). The aggregate amount outstanding in respect of the principal of loans must not exceed 2577 million special drawing rights: International Monetary Fund Act 1979 s 2(1) (as so substituted). For these purposes, a loan under the International Monetary Fund Act 1979 s 2, or

repayment of such a loan, in any currency is to be treated as a loan (or repayment) of the amount of special drawing rights which for the purposes of the fund's borrowing arrangements is the value of the loan or repayment: s 2(1A) (added by the International Monetary Arrangements Act 1983 s 1). As to the power of the Treasury to raise or further raise the limit on lending see the International Monetary Fund Act 1979 s 2(2), (3). Loans are to be made out of the National Loans Fund: s 2(4). The 'fund's borrowing arrangements' are the arrangements made by the International Monetary Fund for enabling it to borrow the currency of any member of the fund taking part in the arrangements: s 2(5).

9 See the International Monetary Fund Act 1979 s 1(1). This provision enables payment of:

- 17 (1) subscriptions in the event of increases in the United Kingdom's quota under the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development, art III s 3(a) (International Monetary Fund Act 1979 s 1(1)(a));
- 18 (2) sums payable in respect of the maintenance of value of assets under the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development, art V s 11 (International Monetary Fund Act 1979 s 1(1)(b));
- 19 (3) sums required to implement the guarantee against loss on the failure or default of a designated depository required by the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development, art XIII s 3 (International Monetary Fund Act 1979 s 1(1)(c)); and
- 20 (4) compensation required to be paid to the International Monetary Fund or any member of it on withdrawal or liquidation under the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development, Sch J or Sch K (International Monetary Fund Act 1979 s 1(1)(d)).

The United Kingdom's subscription to the International Monetary Fund was increased to 10,738.5 million special drawing rights by the International Monetary Fund (Increase in Subscription) Order 1998, SI 1998/1854.

10 As to the power to make payments relating to international development see the International Development Act 2002; PARAS 1392-1393; and **COMMONWEALTH** vol 13 (2009) PARA 811; **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 462. As to the Secretary of State see PARA 3.

11 See the International Monetary Fund Act 1979 s 3.

12 'Exchange contract' is not defined for this purpose: *Kahler v Midland Bank Ltd* [1948] 1 All ER 811 at 819, CA; affd [1950] AC 24, [1949] 2 All ER 621, HL. It should be liberally construed having regard to the objects of the Bretton Woods Agreements to protect the currencies of member states: *Sharif v Azad* [1967] 1 QB 605 at 618, [1966] 3 All ER 785 at 789-790, CA, per Diplock LJ. The wider obiter definition of Lord Denning MR in that case has not been followed: see eg *Wilson, Smithett and Cope Ltd v Terruzzi* [1976] QB 683 at 700, [1975] 2 All ER 649 at 662 per Kerr J; affd [1976] QB 683 at 709, [1976] 1 All ER 817, CA. It has been held to mean a contract to exchange the currency of one country for the currency of another: *Wilson, Smithett and Cope Ltd v Terruzzi* at 714 and 822 per Lord Denning MR, at 715 and 824 per Ormrod LJ, and at 722 and 829 per Shaw LJ (following *Re United Railways of Havana and Regla Warehouses Ltd, Tomkinson v First Pennsylvania Banking and Trust Co* [1961] AC 1007 at 1059, [1960] 2 All ER 332 at 350, HL, per Lord Radcliffe). For a case where the court found an exchange contract, though disguised, see *The American Accord* [1979] 1 Lloyd's Rep 267 sub nom *United City Merchants (Investments) Ltd and Glass Fibres and Equipment Ltd v Royal Bank of Canada* [1983] 1 AC 168, [1982] 2 All ER 720, HL ('exchange contract' included documentary credit used to finance illegal contract of sale which was partly a monetary transaction in disguise to exchange Peruvian currency for American dollars); *Mansouri v Singh* [1986] 2 All ER 619, [1986] 1 WLR 1393, CA (cheque part of unenforceable exchange contract).

As to the repeal of the exchange control legislation in the United Kingdom see PARA 1395.

13 See the Bretton Woods Agreements Order in Council 1946, SR & O 1946/36, art 3, Schedule art VIII s 2(b) (amended by SI 1977/825); and *Ispahani v Bank Melli Iran* (1997) Times, 29 December, CA. Apart from these provisions, the English court will regard a contractual obligation as invalidated or discharged by exchange control legislation if that legislation is part of the proper law of the contract or part of the law of the place of performance (see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 349 et seq).

14 See, however, *Wilson, Smithett and Cope Ltd v Terruzzi* [1976] QB 683 at 691, 696, [1975] 2 All ER 649 at 654, 658, where Kerr J expressed the view that to decide whether the exchange control regulations of a member state are maintained or imposed consistently with the Bretton Woods Agreements the agreements must be considered as a whole, and that the court will require evidence if it is to hold that foreign legislation is not so maintained or imposed.

15 See the International Development Act 2002 s 11; and PARA 1393. As to the meaning of 'multilateral development bank' see PARA 1393. For examples of agreements establishing development banks and subscription orders see PARA 1393 note 5.

16 See the International Monetary Arrangements Act 1983 s 2(1), (2). This applies to financial assistance of any kind provided by the Bank of England which appears to the Treasury to be provided in pursuance of arrangements made: (1) in co-operation with the Bank for International Settlements or any central bank or other monetary authority of any country outside the United Kingdom (s 2(2)(a)); and (2) for the purpose of assisting the central bank or other monetary authority of any country outside the United Kingdom (s 2(2)(b)). The Treasury must lay a statement of the undertaking before each House of Parliament: s 2(3). As to the Bank of England see PARA 793 et seq. The Bank for International Settlements is an organisation established to foster co-operation among central banks and other agencies and whose services are provided exclusively to central banks and international organisations.

17 International Monetary Arrangements Act 1983 s 2(4). The Treasury must lay a statement relating to the sum issued before each House of Parliament: s 2(5).

## UPDATE

### 1391 International financial organisations

NOTE 8--SI 1997/1611 replaced: International Monetary Fund (Limit on Lending) Order 2009, SI 2009/1830; the aggregate amount outstanding in respect of the principal of loans must not now exceed 12,470 million special drawing rights.

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### 1392. Immunities and privileges of international financial organisations.

Her Majesty may by Order in Council make such provision as is considered necessary<sup>1</sup> to give effect to provisions of the agreement establishing an international financial institution<sup>2</sup> relating to the status, privileges or immunities of:

- 140 (1) that institution<sup>3</sup>;
- 141 (2) the governors, directors, executive-directors (or alternates) of that institution<sup>4</sup>; or
- 142 (3) the officers and employees of that institution<sup>5</sup>.

For these purposes, the following are international financial institutions<sup>6</sup>: (a) the International Bank for Reconstruction and Development<sup>7</sup>; (b) the International Finance Corporation<sup>8</sup>; and (c) the International Development Association<sup>9</sup>.

1 No recommendation may be made to Her Majesty in Council to make an order under these provisions unless a draft of the order has been laid before Parliament and approved by resolution of each House of Parliament: International Development Act 2002 s 12(4). At the date at which this volume states the law, no such order had been made. The provisions of s 12 are without prejudice to the powers conferred by the International Organisations Act 1968 or any other Act: see the International Development Act 2002 s 12(6). See also the International Organisations Act 1968; the Multilateral Investment Guarantee Agency (Overseas Territories) Order 1988, SI 1988/791; and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 309.

2 See the text to notes 6-9. As to international financial institutions see further PARA 1391.

3 International Development Act 2002 s 12(1), (2)(a).

As to the Secretary of State's requirement to report annually on total expenditure on international aid and the breakdown of such aid see PARA 1394.

4 International Development Act 2002 s 12(1), (2)(b).

5 International Development Act 2002 s 12(1), (2)(c).

6 See the International Development Act 2002 s 12(3). The Secretary of State may by order amend s 12(3) by making additions to or deletions from the institutions that are for the time being listed there: s 12(5). At the date at which this volume states the law, no such order had been made. As to the Secretary of State see PARA 3.

7 International Development Act 2002 s 12(3)(a). See PARA 1391 note 1. As to the savings of provisions regarding guarantees of loans made by the International Bank for Reconstruction and Development under the Overseas Development and Co-operation Act 1980 s 8 (repealed) see the International Development Act 2002 s 20, Sch 5 para 2.

8 International Development Act 2002 s 12(3)(b). See PARA 1391 note 3.

9 International Development Act 2002 s 12(3)(c). See PARA 1391 note 4. Any order made under the Overseas Development and Co-operation Act 1980 s 6 (repealed) which had effect immediately before 17 June 2002, has effect on and after that time as if it were an order made under the International Development Act 2002 s 11 (see PARA 1393): see Sch 5 para 1(1).

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### **1393. Multilateral development banks.**

A multilateral development bank is an international financial institution<sup>1</sup> having as one of its objects economic development either generally or in any region of the world<sup>2</sup>. Where the government of the United Kingdom is bound<sup>3</sup> to make a relevant payment<sup>4</sup> to a multilateral bank, the Secretary of State may make<sup>5</sup>:

143 (1) the relevant payment<sup>6</sup>; or

144 (2) where it has been paid, any payment required to maintain its value<sup>7</sup>; or

145 (3) a payment to redeem any non-interest-bearing and non-negotiable notes, or other obligations, issued or created by him, that are accepted by the bank in accordance with the agreement or arrangements under which the relevant payment is required to be made<sup>8</sup>.

1 Eg the European Bank for Reconstruction and Development. Unlike the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development is not a United Nations agency; it does, however, enjoy certain immunities. As to international financial institutions see PARA 1391; and as to their immunities and privileges see PARA 1392.

2 See the International Development Act 2002 s 11(2).

3 Ie where the United Kingdom government has become bound before the coming into force of the International Development Act 2002 s 11 (ie before 7 June 2002), or thereafter becomes bound: see s 11(1). As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 'Relevant payment' means: (1) an initial subscription, or other initial contribution to the capital stock of the bank, that the international agreement for the establishment and operation of the bank requires the members of the bank to make; or (2) a further payment to the bank required to be made by the members under any arrangements: see the International Development Act 2002 s 11(2).

5 le by an order and with the approval of the Treasury: see the International Development Act 2002 s 11(4). Such orders may not be made unless a draft of the order has been laid before and approved by the House of Commons: s 11(5). See the African Development Fund (Additional Subscriptions) Order 2002, SI 2002/2404; the Caribbean Development Bank (Further Payments) Order 2002, SI 2002/2405; the International Development Association (Thirteenth Replenishment) Order 2002, SI 2003/700; the African Development Fund (Ninth Replenishment) Order 2003, SI 2003/1739; the International Fund for Agricultural Development (Fifth Replenishment) Order 2003, SI 2003/2157; the International Fund for Agricultural Development (Sixth Replenishment) Order 2004, SI 2004/3170; the International Development Association (Fourteenth Replenishment) Order 2006, SI 2006/1071; the African Development Fund (Multinational Debt Relief Initiative) Order 2006, SI 2006/2321; the International Development Association (Multinational Debt Relief Initiative) Order 2006, SI 2006/2323; the Asian Development Bank (Eighth Replenishment of the Asian Development Fund) Order 2006, SI 2006/2324; the Caribbean Development Bank (Sixth Replenishment of the Unified Special Development Fund) Order 2006, SI 2006/2325; and the African Development Bank (Tenth Replenishment of the African Development Fund) Order 2006, SI 2006/2327. As to the Secretary of State see PARA 3. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

As to the Secretary of State's requirement to report annually on total expenditure on international aid and the breakdown of such aid see PARA 1394.

6 International Development Act 2002 s 11(3)(a)(i).

7 International Development Act 2002 s 11(3)(a)(ii).

8 International Development Act 2002 s 11(3)(b).

## UPDATE

### 1393 Multilateral development banks

NOTE 5--SI 2006/2321 amended: SI 2008/2089. SI 2006/2323 amended: SI 2008/2086. See also the International Fund for Agricultural Development (Seventh Replenishment) Order 2007, SI 2007/3547; the African Development Bank (Eleventh Replenishment of the African Development Fund) Order 2008, SI 2008/2088; the International Development Association (Fifteenth Replenishment) Order 2008, SI 2008/2090; the Asian Development Bank (Ninth Replenishment of the Asian Development Fund) Order 2009, SI 2009/1368, and the Caribbean Development Bank (Seventh Replenishment of the Unified Special Development Fund) Order 2009, SI 2009/2947.

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### 1394. International development reporting and transparency.

It is the duty of the Secretary of State<sup>1</sup> to lay before each House of Parliament each year<sup>2</sup> a report about international aid<sup>3</sup>. Each annual report must include specified information<sup>4</sup> and, in particular, the Secretary of State must include in each annual report his assessment of the year in which he expects that the target for expenditure on official development assistance to amount to 0.7 per cent of gross national income will be met by the United Kingdom<sup>5</sup>. Provision is made for the Secretary of State to include his assessment on issues relating to the Millennium Development Goals 1-7<sup>6</sup>. The Secretary of State must include in each annual report such general or specific observations as he thinks appropriate on the effects of policies and programmes pursued by government departments on the promotion of sustainable development in countries outside the United Kingdom and the reduction of poverty in such countries<sup>7</sup>. The Secretary of State must also include such observations as he thinks appropriate

about the contribution by the government departments to the promotion of transparency in the provision of aid and the use made of aid provided<sup>8</sup>, and observations about progress in relation to specified matters<sup>9</sup>.

1 As to the Secretary of State see PARA 3.

2 An annual report must be laid before each House of Parliament as soon as practicable after 31 March each year: International Development (Reporting and Transparency) Act 2006 s 1(3).

3 International Development (Reporting and Transparency) Act 2006 s 1(1).

4 International Development (Reporting and Transparency) Act 2006 s 2. As to such specified information see Sch 1.

5 International Development (Reporting and Transparency) Act 2006 s 3. As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 International Development (Reporting and Transparency) Act 2006 s 4. 'Millennium Development Goals 1-7' means the Goals 1 to 7 set out in the Annex to United Nations General Assembly document A/56/326 6 September 2001, entitled 'Road map towards the implementation of the United Nations Millennium Declaration: Report of the Secretary General', as those goals may be amended or modified from time to time: s 4(2)(a).

7 International Development (Reporting and Transparency) Act 2006 s 5(1). Such observations are to include observations on the pursuit of Millennium Development Goal 8, as set out in the Annex to the document referred to in note 6: s 5(2), (3).

8 International Development (Reporting and Transparency) Act 2006 s 6(1).

9 International Development (Reporting and Transparency) Act 2006 s 6(2).

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### **(iii) Repeal of Exchange Control Legislation**

#### **1395. In general.**

Under the Exchange Control Act 1947, the Treasury<sup>1</sup> was given powers to control a wide variety of transactions in currency, gold and securities. The object of the legislation was to assist in conserving the United Kingdom's gold and foreign currency reserves, to protect the sterling system and to help maintain the balance of payments. From 24 October 1979, the Act was rendered largely a reserve power as persons in or resident in the United Kingdom (including the Channel Islands and the Isle of Man) were exempted from their obligations under it<sup>2</sup>, and in 1987 it was finally repealed<sup>3</sup>. However, the Treasury retained certain powers to validate retrospectively acts done before 13 December 1979<sup>4</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 See the Exchange Control (Gold and Foreign Currency) (Exemption) Order 1979, SI 1979/1331; the Exchange Control (Payments etc) (Exemption) Order 1979, SI 1979/1332; the Exchange Control (Securities etc) (Exemption) Order 1979, SI 1979/1333; the Exchange Control (Import and Export) (Exemption) Order 1979, SI 1979/1334; the Exchange Control (Settlements) (Exemption) Order 1979, SI 1979/1336; the Exchange Control (Bodies Corporate) (Exemption) Order 1979, SI 1979/1337; and the Exchange Control (Revocation) Directions 1979, SI 1979/1339 (all lapsed). As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 See the Finance Act 1987 s 68(1), Sch 16 Pt XI. The repeal extended to the Channel Islands and the Isle of Man: s 68(4).

4 Notwithstanding the repeal of the Exchange Control Act 1947, the Treasury retains the right to issue certificates under s 18(2) (repealed) including that provision as applied by s 28(3) or s 29(3) (both repealed): see the Finance Act 1987 s 68(2).

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## **(7) ECONOMIC AND MONETARY UNION**

### **1396. European financial and economic co-operation.**

In connection with the distribution after the 1939-45 war of American aid<sup>1</sup> and with the promotion of joint European economic recovery, the Organisation for European Economic Co-operation was set up by the governments of the United Kingdom and other European countries<sup>2</sup>. Temporary agreements were made between member countries for intra-European payments and compensations<sup>3</sup>, which were superseded in 1950 by the European Payments Union Agreement<sup>4</sup>, which itself was superseded in 1958<sup>5</sup> by the European Monetary Agreement<sup>6</sup>.

A further agreement has been signed establishing a financial support fund in relation to the Organisation for Economic Co-operation and Development, which is the successor to the Organisation for European Economic Co-operation<sup>7</sup>. Payments for direct financing of the support fund are paid out of the National Loans Fund<sup>8</sup> and sums received on account of such payments and the proceeds of the liquidisation of the support fund are to be paid into the National Loans Fund<sup>9</sup>. Any payments required to be made to support borrowings by the support fund are to be paid out of the Consolidated Fund<sup>10</sup>, which is to be credited with any sums received on account of such payments<sup>11</sup>.

In regard to United Kingdom membership of the European Community, there is to be charged on and issued out of the Consolidated Fund or, if so determined by the Treasury<sup>12</sup>, the National Loans Fund the amounts required to meet any Community obligation to make payments to any of the Communities or member states, or any Community obligation in respect of contributions to the capital or reserves of the European Investment Bank<sup>13</sup> or in respect of loans to that bank, or to redeem any notes or obligations issued or created in respect of any such Community obligation, as well as for various other expenses incidental to Community membership<sup>14</sup>.

1 This was known as Marshall Aid and was granted by Act of Congress of the United States of America known as the Economic Co-operation Act 1948 and administered pursuant to the American Aid and European Payments (Financial Provisions) Act 1949 (repealed).

2 See the Convention for European Economic Co-operation (Paris, 16 April 1948; TS 59 (1949); Cmd 7796). As to the meaning of 'United Kingdom' see PARA 2 note 3.

As to the Secretary of State's requirement to report annually on total expenditure on international aid and the breakdown of such aid see PARA 1394.

3 See the Agreement for Intra-European Payments and Compensations (Paris, 16 October 1948; Misc 8 (1948); Cmd 7546); and the Agreement for Intra-European Payments and Compensations for 1949-50 (Paris, 7 September 1949; Misc 13 (1949); Cmd 7812) (amended by Supplementary Protocol No 2 (Paris, 22 April 1950; Misc 11 (1950); Cmd 8010)).

4 See the Agreement for the Establishment of a European Payments Union (Paris, 19 September 1950; Misc 14 (1950); Cmd 8064) (amended by Supplementary Protocols No 2 (Paris, 4 August 1951; Misc 12 (1951); Cmd 8372), No 3 (Paris, 11 July 1952; Misc 13 (1952); Cmd 8644), No 4 (Paris, 30 June 1953; Misc 12 (1953); Cmd 8930), No 5 (Paris, 30 June 1954; Misc 25 (1954); Cmd 9257), Nos 6, 7 (Paris, 29 June and 5 August 1955; Misc 19 (1955); Cmd 9601), No 8 (Paris, 29 June 1956; Misc 10 (1956); Cmd 9867), No 9 (Paris, 28 June 1957; Misc 21 (1957); Cmd 259), No 10 (Paris, 27 June 1958; Misc 13 (1958); Cmd 555)).

5 See as from 27 December 1958 on the introduction of a measure of convertibility of currency by a number of member countries.

6 See the European Monetary Agreement (Paris, 5 August 1955; Misc 20 (1955); Cmd 9602); and PARA 1397.

7 See the Agreement establishing a Financial Support Fund of the Organisation for Economic Co-operation and Development (Paris, 9 April-31 May 1975; Misc 20 (1975); Cmd 6242); and the OECD Support Fund Act 1975. The organisation was established by the Convention on the Organisation for Economic Co-operation and Development (Paris, 14 December 1960; TS 21 (1962); Cmd 1646). As to tax exemption see the OECD Support Fund Act 1975 s 4 (amended by the Finance Act 1990 Sch 19 Pt VI). As to immunities see the OECD Financial Support Fund (Immunities and Privileges) Order 1976, SI 1976/224 (amended by SI 1980/1096).

8 OECD Support Fund Act 1975 s 2(1). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

9 OECD Support Fund Act 1975 s 2(2).

10 OECD Support Fund Act 1975 s 3(1). As to the Consolidated Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARA 1028 et seq. Undertakings given by members of the support fund to support borrowings by the fund must be reported to Parliament: see s 3(3).

11 OECD Support Fund Act 1975 s 3(2).

12 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

13 As to the European Investment Bank see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 304.

14 See the European Communities Act 1972 s 2(3).

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### **1397. The European Monetary Agreement.**

The European Monetary Agreement<sup>1</sup> made provision for the establishment of a European Fund and multilateral system of settlements<sup>2</sup>, the purposes of the fund being:

146 (1) to enable discretionary credits for periods up to two years to be given on request to parties to the Agreement to help them through temporary balance of payment crises; and

147 (2) to facilitate the operation of the settlements system<sup>3</sup>,

and the capital of the fund consisting partly of assets transferred from the European Payments Union<sup>4</sup> and partly of contributions by the parties to be called up when needed<sup>5</sup>. Sums advanced and payments made by the United Kingdom were to be paid out of, and sums received were to be paid into, the National Loans Fund<sup>6</sup>.



The United Kingdom implementing legislation, the European Monetary Agreement Act 1959, was repealed as obsolete by the International Monetary Fund Act 1979, which consolidated enactments relating to the International Monetary Fund<sup>7</sup>.

1 See the European Monetary Agreement (Paris, 5 August 1955; Misc 20 (1955); Cmd 9602) (amended by Supplementary Protocols No 2 (Paris, 27 June 1958; Misc 12 (1958); Cmd 554), No 3 (Paris, 15 January 1960; Misc 2 (1960); Cmd 959), and No 4 (Paris, 12 December 1961; Misc 7 (1962); Cmd 1705)). The agreement came into force on 27 December 1958: see the European Monetary Agreement Act 1959 s 1 (repealed). The European Monetary Agreement must be distinguished from the European Monetary System, of which as at the date this volume states the law the United Kingdom is not a member. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See the European Monetary Agreement art 1.

As to the Secretary of State's requirement to report annually on total expenditure on international aid and the breakdown of such aid see PARA 1394.

3 See the European Monetary Agreement arts 2, 7.

4 As to the European Payments Union see PARA 1396.

5 See the European Monetary Agreement arts 3-5 (amended by Supplementary Protocol No 2). Provision was made for the fund to be liquidated on the termination of the Agreement: European Monetary Agreement, Annex.

6 See the European Monetary Agreement Act 1959 s 2(1), (4) (repealed); and the National Loans Act 1968 ss 2, 24(2), Sch 2, Sch 6 Pt I (s 2 amended and Sch 2 repealed by the Overseas Development and Co-operation Act 1980 Sch 2 Pt 1). As to the National Loans Fund see PARA 1334; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 727 et seq.

7 As to the International Monetary Fund and the International Monetary Fund Act 1979 see PARA 1391.

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### **1398. Economic and Monetary Union.**

The Maastricht Treaty states that one of the European Union's objectives is to promote economic and social progress which is balanced and sustainable, through various means and in particular through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of the Treaty<sup>1</sup>.

As a result of the findings of the Report on economic and monetary union in the European Community in 1989, the European Council proposed to introduce economic and monetary union (known as 'EMU') in three stages<sup>2</sup>.

The first stage began on 1 July 1990 with the abolition of all remaining restrictions on the movement of capital between member states to encourage closer economic relations between them.

Stage two was initiated by the establishment of the European Monetary Institute in Frankfurt on 1 January 1994, the objective of which was to contribute to the realisation of the conditions necessary for the transition to the third stage of EMU, in particular by: (1) strengthening the co-ordination of monetary policies with a view to ensuring price stability; (2) making the preparations required for the establishment of the European System of Central Banks, and for the conduct of a single monetary policy and the creation of a single currency in the third stage; and (3) overseeing the development of the European currency<sup>3</sup>. During the second stage the

eligibility of member states to join the EMU was assessed, with the Council of the European Union deciding whether a member state satisfied the necessary requirements to adopt the single currency. On 1 June 1998, the European Central Bank was established<sup>4</sup>, replacing the European Monetary Institute. The European Central Bank, together with representatives of the national central banks of member states who join the single currency, form the European System of Central Banks the primary objective of which is to maintain price stability<sup>5</sup>.

The third and final stage of economic and monetary union started on 1 January 1999 with the entry of 11 qualifying member states into the single currency<sup>6</sup>. The United Kingdom did not then join, but reserved its right to do so at some future date if it is in the national economic interest and if the case for joining is clear and unambiguous<sup>7</sup>.

The Chancellor of the Exchequer announced that there is in principle no constitutional bar to joining the single currency; and that if the government decides it is right to enter, the issue will be put to a national referendum<sup>8</sup>.

1 See the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485) Title I art 2.

2 See the Report on economic and monetary union in the European Community, 17 April 1989 (the 'Delors Report').

3 See the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485), Protocol on the Statute of the European Monetary Institute, art 2. Note that the Maastricht Treaty refers to the European currency unit ('ecu'). The European Council agreed in 1995 that this would be re-named the 'euro'. As to the euro see PARA 1399.

4 See the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485), Protocol on the Statute of the European System of Central Banks and of the European Central Bank, art 1.

5 See the Treaty on European Union (Maastricht, 7 February 1992; TS 12 (1994); Cm 2485), Protocol on the Statute of the European System of Central Banks and of the European Central Bank, art 2.

The European Central Bank (ECB), which is located in Frankfurt in Germany, is the central bank for Europe's single currency, the euro (see also PARA 1399). The ECB's main task is maintenance of the euro's purchasing power and thus price stability in the euro area. The euro area comprises the 13 EU countries that have adopted the euro since 1999. The euro area came into being when responsibility for monetary policy was transferred from the national central banks of 11 EU member states in January 1999; Greece and Slovenia joining subsequently (see note 6). To join the euro area, the 13 countries had to fulfil convergence criteria as will any countries joining in the future (see also note 7). The criteria set out the economic and legal preconditions for successful participation in EMU.

The European System of Central Banks (ESCB) consists of the ECB and the national central banks of all EU member states whether they have adopted the euro or not. The Eurosystem comprises the ECB and the national central banks that have adopted the euro. The Eurosystem and ESCB will co-exist as long as there are EU member states outside the euro area.

The Eurosystem and the single monetary policy for which it is responsible has the primary objective of maintaining price stability (see the Treaty Establishing the European Community art 105(1)). Related objectives are achieving a favourable economic environment and a high level of employment. The ECB is the sole issuer of bank notes and bank reserves and thus it can set out the conditions at which banks borrow from it and influence the conditions at which banks trade with each other in the money market. To achieve the primary objective of maintaining price stability, the Eurosystem uses a set of monetary policy instruments and procedures which forms the operational framework for implementing the single monetary policy. The monetary policy instruments are: open market operations; standing facilities; and minimum reserve requirements for credit institutions. The main guiding principles for the operational framework are said to be: operational efficiency; equal treatment and harmonisation in regard to credit institutions; decentralised implementation through the national central banks; and simplicity, transparency, continuity, safety and cost efficiency. For more information on the ECB and the ESCB see the ECB website. At the date at which this volume states the law, the website is [www.ecb.int](http://www.ecb.int).

6 See EC Council Regulation 974/98 (OJ L139, 11.5.98, p 1) on the introduction of the euro, art 2. The original participating countries were: Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain: see art 1. From 1 January 2002 Greece also adopted the single currency: EC Council Decision 427/2000 (OJ L167, 07.07.2000 p 19) on the adoption by Greece of the single currency. As to Slovenia see EC Council Regulation 1647/2006 (OJ L309, 9.11.2006, p 2); as to Cyprus see EC Council

Regulation 835/2007 (OJ L186, 18.7.2007, p 1); and as to Malta see EC Council Regulation 836/2007 (OJ L186, 18.7.2007, p 3).

7 See the statement to the House of Commons by the Chancellor of the Exchequer at 299 HC Official Report (6th series), 27 October 1997, col 586; and *UK membership of the single currency: an assessment of the five economic tests* (Cm 5776) (2003). The five economic tests that define whether a clear and unambiguous case can be made are: (1) whether there can be sustainable convergence between Britain and the economies of the single currency; (2) whether there is sufficient flexibility to cope with economic change; (3) the effect on investment; (4) the impact on the financial services industry; and (5) whether it is good for employment: see 299 HC Official Report (6th series), 27 October 1997, cols 584-585. See also note 5.

8 See 299 HC Official Report (6th series), 27 October 1997, cols 586-587.

## UPDATE

### 1398 Economic and Monetary Union

NOTE 6--As to Slovakia see EC Council Regulation 608/2008 (OJ L195, 24.7.2008, p 1).

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### 1399. The euro.

As from 1 January 2002, the European Central Bank<sup>1</sup> and the central banks of the participating member states have put into circulation euro banknotes and coins so that notes and coins in national currencies have been replaced in those states<sup>2</sup>.

There are seven euro notes in denominations of 5, 10, 20, 50, 100, 200 and 500 euros, each depicting symbolic European architectural designs<sup>3</sup>. There are eight euro coins in denominations of 1 and 2 euros, and in 1, 2, 5, 10, 20 and 50 cents; each euro coin has a European design on one face and a national design on the other<sup>4</sup>.

All euro notes and coins, wherever minted and of whatever national design, are legal tender in all participating member states<sup>5</sup>.

While the introduction of the single currency has resulted in the market in wholesale financial services operating on a pan-European basis in participating member states, the market in retail financial services has remained fragmented along national lines. An EC Commission report published in early 2007 found a number of barriers to entry to national markets in retail financial services including cooperation between banks within national markets and banks' pricing policies but it also found a significant entry barrier created by payment systems and services and the way they operate. Varying transfer costs and terms of business have meant that the euro has not contributed to cross-border trade or stimulated competition to the extent originally envisaged. At the date at which this volume states the law, there are single market initiatives in this area involving the European Payments Council (EPC), the creation of the Single Euro Payments Area (SEPA) and the necessary legal framework for it in the form of the Payment Services Directive, a legislative proposal (ultimately to be implemented by individual member states by November 2009) which is intended to enhance competition within the market for payment services, to enhance market transparency and to harmonise the legal framework for payments and industry practices. In October 2007 it was announced that the Financial Services Authority<sup>6</sup> will be the UK regulator for the provision of payment services, established by the Payment Services Directive. In December 2007 the Treasury<sup>7</sup> announced a

consultation on the implementation of the Directive, and in January 2008 there was the official launch of the SEPA.

- 1 As to the establishment of the European Central Bank see PARA 1398.
- 2 See EC Council Regulation 974/98 (OJ L139, 11.5.98, p 1) on the introduction of the euro, arts 10, 11, 15 (amended by EC Council Regulation 2169/2005 (OJ L346, 29.12.2005, p 1)). Provision is made for continuity of contracts and other legal instruments so that the introduction of the euro does not affect obligations under contracts unless the parties to those contracts have agreed otherwise: EC Council Regulation 1103/97 (OJ L162, 19.6.97, p 1) on certain provisions relating to the euro, art 3. See PARA 1398 note 5. See also **CONTRACT**.
- 3 Final designs for the euro notes were agreed by the European Council at Dublin, December 1996: see Decision of the European Bank 98/6 (OJ L8, 14.1.99, p 36) on the denominations, specifications, reproduction, exchange and withdrawal of euro bank notes, art 1.
- 4 Final designs for the euro coins were agreed by the European Council at Amsterdam, June 1997: see EC Council Resolution of 19 January 1998 (OJ C035, 2.2.98, p 5) on denominations and technical specifications of euro coins intended for circulation; and the EC Council Regulation 975/98 (OJ L139, 11.5.98, p 6) on denominations and technical specifications of euro coins intended for circulation, art 1 (amended by EC Council Regulation 975/98 (OJ L139, 11.5.98, p 6)).
- 5 See EC Council Regulation 974/98 (OJ L139, 11.5.98, p 1) on the introduction of the euro, arts 10, 11 (as amended: see note 2).
- 6 As to the Financial Services Authority see PARAS 4, 6 et seq.
- 7 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

## UPDATE

### 1399 The euro

TEXT--See Payment Services Regulations 2009, SI 2009/209 (amended by SI 2009/2475), which implement European Parliament and EC Council Directive 2007/64 (OJ L319, 5.12.2007, p 1) (amended by European Parliament and EC Council Directive 2009/111 (OJ L302, 17.11.2009, p 97)) on payment services in the internal market (the Payment Services Directive). The 2009 Regulations (1) require the Financial Services Authority ('the Authority') to establish a register of payment services providers and set out the procedures and conditions in relation to registration (see regs 5-17, Schs 2, 3); (2) prescribe the requirements to be met by authorised payment institutions and provide the mechanism for them to establish a branch or provide services in another member state (see regs 18-26, Sch 3); (3) require authorised payment institutions and small payment institutions to meet specified criteria (see regs 27-32); (4) require all payment service providers to meet specified requirements in relation to the provision of information to users (see regs 33-50, Sch 4); (5) provide for the rights and obligations relating to the provision of payment services (see regs 51-79); (6) confer functions on the Authority in relation to the supervision and enforcement of specified provisions (see regs 80-95, Sch 5); (7) provide for access to payment systems in specified circumstances (see regs 96-109); and (8) create offences for the contravention of specified provisions and set out penalties in respect of those offences (see regs 110-118).

INSTRUMENTS/(1) BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES/(i)  
Introduction/1400. Origin of the law relating to bills, etc.

## **6. BILLS OF EXCHANGE AND OTHER NEGOTIABLE INSTRUMENTS**

### **(1) BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES**

#### **(i) Introduction**

##### **1400. Origin of the law relating to bills, etc.**

The law relating to bills of exchange, cheques and promissory notes was consolidated and reduced to the terms of a code in 1882<sup>1</sup>. In origin, however, it was part of the common law known as the law merchant, consisting of those commercial practices, well established in trade and commerce, that had been ratified by the courts, upon such usages being proved before them, and adopted as settled law<sup>2</sup>.

The codifying statute, for the most part, crystallises the effect of the judicial decisions which preceded it, and such cases are referred to in this title where they may be of assistance<sup>3</sup>. However, the Act of 1882 also deliberately altered the law in certain respects<sup>4</sup>, and its provisions must be read predominantly in the light of those decisions made in cases subsequent to its coming into effect.

<sup>1</sup> Bills of Exchange Act 1882. As to the meanings of 'bills of exchange', 'cheques' and 'promissory notes' see PARA 1405.

<sup>2</sup> These rules of the law merchant were the product of the decisions in more than 2,000 cases and represented the gist of the practice in this country during the preceding 200 years. See **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 662-664. The law relating to other negotiable instruments is still known as the law merchant: see PARA 1610.

<sup>3</sup> Cf *Bank of England v Vagliano Bros* [1891] AC 107 at 144-145, HL, per Lord Herschell. The Bills of Exchange Act 1882 provides that rules of common law, including the law merchant, continue to apply except where they are inconsistent with the Act's express provisions: s 97(2). Where any Act or document refers to any enactment repealed by the Bills of Exchange Act 1882, the Act or document is construed, and operates, as if it referred to the corresponding provisions of the 1882 Act (s 99). However, nothing in the Act or in repeals effected by it affects (1) any law or enactment for the time being in force relating to the revenue (s 97(3)(a) (amended by the Statute Law Revision Act 1898)); or (2) the provisions of the Companies Act 1862 (repealed) or Acts amending it, or any Act relating to joint stock banks or companies (Bills of Exchange Act 1882 s 97(3) (b)); or (3) the provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively (s 97(3)(c)). As to savings made in respect of dividend warrants see PARA 1619.

<sup>4</sup> See eg the Bills of Exchange Act 1882 s 7(2) (enabling bills to be made payable to one or more of several payees and to holders of offices) (see PARA 1430); s 8(4) (making all bills negotiable unless the contrary intention is expressed) (see PARA 1428); and s 34(4) (relating to bills indorsed in blank) (see PARA 1492).

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#### **(ii) Negotiability**

##### **1401. Principles of negotiability.**

The outstanding characteristics common to bills of exchange, cheques and promissory notes<sup>1</sup> which found expression in the cases decided before 1882, and are embodied in the codifying statute, are: (1) that a valuable consideration is presumed, so that there is no necessity to state it<sup>2</sup>; (2) that such instrument may be transferred<sup>3</sup> from one person<sup>4</sup> to another by indorsement<sup>5</sup> or by delivery<sup>6</sup>, so as to enable the transferee to enforce it in his own name; and (3) that the transferee who takes such an instrument in good faith<sup>7</sup> and for value<sup>8</sup> obtains a good title in spite of any defect of title in the transferor<sup>9</sup>.

1 As to the meanings of 'bills of exchange', 'cheques' and 'promissory notes' see PARA 1405.

2 As to consideration see PARA 1478 et seq.

3 As to transfer see PARA 1489 et seq. The term 'negotiable' is first used in the Bills of Exchange Act 1882 s 8(1) (see PARA 1440) and is impliedly distinguished from transfer which is, of course, an element in negotiation. That the terms have different meanings is clear from s 8(1). As to restrictions on negotiability see PARA 1440.

4 For the purposes of the Bills of Exchange Act 1882, 'person' includes a body of persons whether incorporated or not: s 2.

5 As to the meaning of 'indorsement' see PARA 1407.

6 As to the meaning of 'delivery' see PARA 1406.

7 For the purposes of the Bills of Exchange Act 1882, something is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not: s 90.

8 For the purposes of the Bills of Exchange Act 1882, 'value' means valuable consideration: s 2. See also PARA 1416. As to the meaning of 'valuable consideration' see s 27(1); and PARA 1479.

9 As to freedom from defect in title see PARA 1488.

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## **1402. Meaning of 'negotiable instrument'.**

A negotiable instrument is one which embodies the characteristics of negotiability<sup>1</sup>. In the case of bills and cheques, they must order the payment of money; in the case of notes, the instrument must contain a promise to pay<sup>2</sup>. To be a negotiable instrument a document should contain substantially an order or a promise to pay a definite sum of money and no more<sup>3</sup>; hence a document which is a receipt but contains no such promise is not a negotiable instrument<sup>4</sup>.

1 As to negotiability see PARA 1401. In this title the words 'negotiable instrument' or 'instrument' have been used wherever possible to cover the terms 'bill of exchange', 'cheque' and 'promissory note', because the provisions of the Bills of Exchange Act 1882 applicable to a bill of exchange payable on demand apply, except as otherwise provided, to a cheque (see s 73; and PARA 1405), and the provisions of the Act relating to bills of exchange apply, with necessary modifications, to promissory notes except as provided by ss 83-88 and s 89(2), (3) (see s 89(1); and PARA 1405). Where these terms cannot be used the particular form of instrument referred to is named.

2 *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 381 per Blackburn J, approving notes to *Miller v Race* (1758) 1 Burr 452, in 1 Smith LC (2nd Edn) at 259, (13th Edn) at 533-534. As to the meanings of 'bills',

'cheques' and 'notes' see PARA 1405. As to other negotiable instruments (to which the provisions of the Bills of Exchange Act 1882 do not apply) see PARA 1610 et seq.

3 See *Akbar Khan v Attar Singh* [1936] 2 All ER 545 at 550, PC (following in effect the English decision in *Mortgage Insurance Corp v IRC* (1888) 21 QBD 352, CA); *Claydon v Bradley* [1987] 1 All ER 522, [1987] 1 WLR 521, CA; and see also *Wirth v Weigel Leygonie & Co Ltd* [1939] 3 All ER 712 at 720 per du Parcq LJ. A bill of exchange payable on the condition that a bill of lading attached to it is genuine has been held not to be a negotiable instrument: see *Guaranty Trust Co of New York v Hannay & Co* [1918] 1 KB 43.

4 See *Jones & Co v Coventry* [1909] 2 KB 1029 at 1041 (receipt for army pension bearing indorsement at foot: 'this receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, and is to be left by the banker at the Paymaster General's Office one day for examination'); *Akbar Khan v Attar Singh* [1936] 2 All ER 545, PC (deposit receipt).

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### **1403. Bills, notes and cheques as negotiable instruments.**

Both bills of exchange and promissory notes<sup>1</sup> were in use in this country in the seventeenth century<sup>2</sup>, but while negotiability was an admitted attribute of a bill of exchange, it was denied to a promissory note<sup>3</sup>. The difficulty thus created was, however, overcome by statute<sup>4</sup>, and since then both bills of exchange and promissory notes have been recognised by the courts as negotiable instruments<sup>5</sup>.

Cheques are a special form of bills of exchange<sup>6</sup>, being drawn on a banker<sup>7</sup> payable on demand<sup>8</sup>, and are covered by the Bills of Exchange Act 1882<sup>9</sup>, as well as by the Cheques Act 1957<sup>10</sup>.

1 As to the meanings of 'bills of exchange' and 'promissory notes' see PARA 1405.

2 The first reported case on a bill of exchange is *Martin v Boure* (1603) Cro Jac 6.

3 *Buller v Crips* (1703) 6 Mod Rep 29 per Lord Holt CJ.

4 3 & 4 Anne (An Act for giving like remedy upon Promissory Notes as is now used upon Bills of Exchange) (1704) c 8, repealed by the Bills of Exchange Act 1882 s 96, Sch 2 (repealed). For the equivalent provisions now enacted in the Bills of Exchange Act 1882 see Pt IV (ss 83-89); and PARA 1405 text to notes 10-13.

5 As to the meaning of 'negotiable instrument' see PARA 1402.

6 As to the meaning of 'cheque' see PARA 1405.

7 In the Bills of Exchange Act 1882, 'banker' includes a body of persons whether incorporated or not who carry on the business of banking: s 2.

8 The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment, or notice of the customer's death: Bills of Exchange Act 1882 s 75. It has been held that, because modern commercial practice treats a direct debit in the same way as payment by cheque, the effect of cancelling a direct debit is equivalent to countermanding payment by cheque: *Eso Petroleum Ltd v Milton* [1997] 2 All ER 593, [1997] 1 WLR 938, CA. As to the determination of authority of a banker to pay a cheque generally see PARA 868.

9 See the Bills of Exchange Act 1882 s 73; and PARAS 1405, 1410.

10 As to the collection of cheques by bankers and the effect of the Cheques Act 1957 see PARA 900 et seq.

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#### **1404. Bills, notes and cheques as chattels and choses in action.**

Although bills and notes<sup>1</sup> in their negotiable quality<sup>2</sup> partake so largely of the nature of money, they retain their innate character of chattels and choses in action. They will, therefore, pass as chattels under a will<sup>3</sup>. As chattels they may be bought or sold<sup>4</sup>, or deposited to secure the payment of book debts<sup>5</sup>. As choses in action they may be assigned<sup>6</sup> or charged<sup>7</sup>. In all these cases the person<sup>8</sup> taking them acquires the same title as that of the person from whom he took them<sup>9</sup>.

Bills<sup>10</sup> and notes<sup>11</sup> may pass also by a donatio mortis causa<sup>12</sup>. So, too, cheques<sup>13</sup> of a third party held by the donor will pass<sup>14</sup>, but not cheques drawn by the donor<sup>15</sup>, which are revocable by notice to the banker of the drawer's death<sup>16</sup>.

1 As to the meanings of 'bill' and 'note' see PARA 1405.

2 See PARA 1401.

3 As to the passing of personal estate under a will see generally **WILLS**.

4 I.e. when they are transferable by delivery; cf *Fenn v Harrison* (1790) 3 Term Rep 757 at 759 per Lord Kenyon CJ; and see PARAS 1581-1582.

5 See the Companies Act 1985 s 396(2) (prospectively repealed) (as to the replacement provision see the Companies Act 2006 s 861(3); and **COMPANIES** vol 15) (2009) PARA 1279).

6 *Re Barrington and Burton* (1804) 2 Sch & Lef 112. As to the assignment of choses in action see **CHOSSES IN ACTION** vol 13 (2009) PARA 14 et seq.

7 See *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142 at 158, where bills of exchange were held to constitute book debts within the meaning of a debenture. As to the charging of choses in action see **CHOSSES IN ACTION** vol 13 (2009) PARA 37.

8 As to the meaning of 'person' see PARA 1401 note 4.

9 Cf the Bills of Exchange Act 1882 s 31(4). As to transfer without indorsement see PARA 1490. The transferee will be well advised to obtain the indorsement to him of the transferor. Should the instrument remain in the latter's possession after the sale or assignment, an indorsement by him, though later in date, to a holder who took it under the conditions of s 29 (see PARA 1485) would give such holder a complete title to the instrument.

10 Whether payable to bearer (*Miller v Miller* (1735) 3 P Wms 356) or to order (*Rankin v Weguelin* (1832) 27 Beav 309; *Re Mead, Austin v Mead* (1880) 15 ChD 651; *Clement v Cheesman* (1884) 27 ChD 631; and see *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889). As to instruments payable to bearer or to order see PARA 1428.

11 *Veal v Veal* (1859) 27 Beav 303. It is doubtful whether a note made payable to the donee would entitle him to recover; but see *Re Whitaker* (1889) 42 ChD 119, CA.

12 I.e. they may be delivered to the donee as a gift from the donor, who is in imminent expectation of death, and who thereafter actually dies. As to bills of exchange and gifts mortis causa see **GIFTS** vol 52 (2009) PARA 275. Delivery to an agent of the donee is sufficient: *Powell v Hellicar* (1858) 26 Beav 261.

13 As to the meaning of 'cheque' see PARA 1405.



14 *Clement v Cheesman* (1884) 27 ChD 631.

15 *Hewitt v Kaye* (1868) LR 6 Eq 198; *Re Beak's Estate, Beak v Beak* (1872) LR 13 Eq 489; *Re Beaumont, Beaumont v Ewbank* [1902] 1 Ch 889. But the gift of a deposit note on the back of which there is a form of cheque filled up by the donor entitles the donee to the proceeds: *Re Dillon, Duffin v Duffin* (1890) 44 ChD 76, CA.

16 See the Bills of Exchange Act 1882 s 75; and PARA 1403 note 8; *Re Swinburne, Sutton v Featherley* [1926] Ch 38, CA (incomplete gift inter vivos). As to the meaning of 'drawer' see PARA 1406.

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### **(iii) Defined Terms**

#### **1405. Bill of exchange, cheque, promissory note.**

A bill of exchange is defined by statute as an unconditional order<sup>1</sup> in writing<sup>2</sup>, addressed by one person<sup>3</sup> to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain<sup>4</sup> in money to or to the order of a specified person, or to bearer<sup>5</sup>.

A cheque is a bill of exchange drawn on a banker<sup>6</sup> payable on demand<sup>7</sup>. An instrument<sup>8</sup> drawn by a banker on himself is probably not a cheque<sup>9</sup>.

A promissory note is an unconditional promise in writing made by one person to another, signed by the maker<sup>10</sup>, engaging to pay, on demand or at a fixed or determinable future time<sup>11</sup>, a sum certain in money<sup>12</sup>, to, or to the order of, a specified person<sup>13</sup> or to bearer<sup>14</sup>.

An instrument which does not comply with one or other of these definitions (such as a deposit receipt<sup>15</sup> or an irrevocable undertaking to pay contained in a letter<sup>16</sup>) is not a bill of exchange or a cheque, or a promissory note<sup>17</sup>.

When an instrument is so ambiguous in form as to be capable of being treated either as a bill of exchange or as a promissory note, it is in the option of the holder<sup>18</sup> to treat it as either<sup>19</sup>.

An instrument signed by an acceptor<sup>20</sup>, but without the name of the person giving it, and not addressed to anyone, is not a bill of exchange, though good as a promissory note<sup>21</sup>. The addition of conditional clauses to the promise to pay will prevent a document from being a promissory note<sup>22</sup>.

1 As to an unconditional order to pay see PARA 1424.

2 For the purposes of the Bills of Exchange Act 1882, 'writing' includes print and 'written' includes printed: s 2.

3 As to the meaning of 'person' see PARA 1401 note 4.

4 As to a sum certain see PARA 1418 et seq.

5 Bills of Exchange Act 1882 s 3(1). References to 'bills' are references to bills of exchange: s 2. As to the meaning of 'bearer' see PARA 1407. As to instruments payable to bearer or to order see PARA 1428. An instrument in favour of 'cash' is not a bill of exchange: *North and South Insurance Corpn Ltd v National Provincial Bank Ltd* [1936] 1 KB 328; *Cole v Milsome* [1951] 1 All ER 311; applied in *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA, in which Sellers LJ said that although

'cash can give no order the effect is, no doubt, that it is equivalent to a payment to bearer'. As to the undertaking by the drawer or indorser of a bill that it will be accepted and paid and (of a cheque) that it will be paid see PARAS 1574-1575, 1577.

6 As to the meaning of 'banker' see PARA 1403 note 7.

7 Bills of Exchange Act 1882 s 73. Except as otherwise provided in Pt III (ss 73-81A), the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque: s 73. See PARA 1410 et seq.

8 As to the meaning of 'instrument' see PARA 1402 note 1.

9 *London City and Midland Bank Ltd v Gordon* [1903] AC 240, HL; *Slingsby v Westminster Bank Ltd* [1931] 1 KB 173 at 187 per Finlay J, doubting *Ross v London County, Westminster and Parr's Bank Ltd* [1919] 1 KB 678; but see the Cheques Act 1957 ss 1, 4; and PARA 917.

10 As to the meaning of 'maker' see PARA 1406.

11 An instrument expressed to be payable '180 days from the date of the bill of lading' probably does not constitute a promissory note because it cannot be ascertained from the date of the document: see *Credit Agricole Indosuez v Ecumet (UK) Ltd* [2001] All ER (D) 351 (Mar), distinguishing *Novaknit Hellas SA v Kumar Bros International Ltd* [1998] Lloyd's Rep Bank 287, CA (see PARAS 1436, 1476, 1579).

12 Is a promissory note is a document which consists substantially of a promise to pay a sum of money, and of nothing else: see *Mortgage Insurance Corp'n v IRC* (1888) 21 QBD 352 at 358, CA, per Bowen LJ; *Wirth v Weigel Leygonie & Co Ltd* [1939] 3 All ER 712 at 720 per du Parcq LJ. A document containing a promise to pay money in a currency which is not that of the country where the note is made and payable may, notwithstanding that, be a promissory note (*Syndic in Bankruptcy of Salim Nasrallah Khoury v Khayat* [1943] AC 507, [1943] 2 All ER 406, PC (decided on the Palestine Bills of Exchange Ordinance 1929 (No 47 of 1929)); and see *John Burrows Ltd v Subsurface Surveys Ltd* [1968] SCR 607, 68 DLR (2d) 354, Can SC; and PARA 1436 note 6.

13 A document which contains a promise to pay a named payee or into his banking account is probably not a promissory note ('I doubt whether a promise to pay to a man or to somebody else who may be his creditor or debtor is a promissory note': see *Wirth v Weigel Leygonie & Co Ltd* [1939] 3 All ER 712 at 721 per du Parcq LJ). A document in the form of a promissory note but which does not comply with the statutory definition (eg sterling and dollar certificates of deposit) probably operates as an equitable assignment.

14 Bills of Exchange Act 1882 s 83(1). References to 'notes' are references to promissory notes: s 2. The provisions of the Bills of Exchange Act 1882 apply, with necessary modifications and subject to the provisions and exceptions provided for under Pt II (ss 3-72), to promissory notes (s 89(1)). In applying these provisions the maker of a note is deemed to correspond with the acceptor of a bill, and the first indorser of a note is deemed to correspond with the drawer of an accepted bill payable to drawer's order: s 89(2). But the provisions relating to bills and their presentment for acceptance, their acceptance, their acceptance supra protest, and the provisions relating to bills in a set, naturally do not apply to notes: s 89(3); see further PARAS 1451, 1509, 1566, 1586.

15 See *Akbar Khan v Attar Singh* [1936] 2 All ER 545, PC (deposit receipt not a promissory note within the Indian Stamp Act 1899 (No 2 of 1899)); *Claydon v Bradley* [1987] 1 All ER 522, [1987] 1 WLR 521, CA (receipt for the sum of £10,000 'as a loan to be paid back' held not to be a promissory note within the Bills of Exchange Act 1882 s 83(1)).

16 See *Wirth v Weigel Leygonie & Co Ltd* [1939] 3 All ER 712.

17 Bills of Exchange Act 1882 ss 3(2), 73, 83, 89. But it may be valid as another form of instrument, eg as an equitable assignment: *Buck v Robson* (1878) 3 QBD 686; cf *Percival v Dunn* (1885) 29 ChD 128.

18 As to the meaning of 'holder' see PARA 1407.

19 *Edis v Bury* (1827) 6 B & C 433; and see *Peto v Reynolds* (1854) 9 Exch 410; *Fielder v Marshall* (1861) 9 CBNS 606.

20 As to the meaning of 'acceptor' see PARA 1406.

21 *Mason v Lack* (1929) 140 LT 696; see also *Haseldine v Winstanley* [1936] 2 KB 101, [1936] 1 All ER 137; *Britannia Electric Lamp Works Ltd v D Mandler & Co and Mandler* [1939] 2 KB 129, [1939] 2 All ER 469.

22 *Balck v Pilcher* (1909) 25 TLR 497.

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#### **1406. Drawer, acceptor, maker, etc.**

'Drawer' means the party who draws a bill of exchange or cheque<sup>1</sup>.

'Drawee' means the party on whom a bill of exchange or cheque is drawn<sup>2</sup>.

'Acceptor' means the drawee of a bill of exchange, who has signified his assent to the order of the drawer<sup>3</sup>.

'Acceptance' means the signification of such assent completed by delivery or notification thereof<sup>4</sup>.

'Maker' means the party who makes a promissory note<sup>5</sup>.

'Payee' means the party to whom a bill of exchange, cheque or note is made payable<sup>6</sup>.

'Delivery' means transfer of possession, actual or constructive, from one person<sup>7</sup> to another<sup>8</sup>.

'Issue' means the first delivery of a bill of exchange, cheque or note, complete in form, to a person who takes it as a holder<sup>9</sup>.

1 See PARAS 1408, 1410, 1413. As to the meanings of 'bill of exchange' and 'cheque' see PARA 1405.

2 See PARAS 1408, 1410.

3 See PARAS 1408, 1451. There is no acceptor of a cheque, but see *Keene v Beard* (1860) 8 CBNS 372; and PARAS 1410, 1454.

4 Bills of Exchange Act 1882 s 2; and see PARA 1451. Provisions of the Act relating to acceptance are inapplicable to promissory notes: s 89(3)(b). As to the meaning of an 'approved acceptance' see *McDowall and Neilson's Trustee v Snowball Co Ltd* (1905) 7 F 35, Ct of Sess.

5 See PARA 1413. As to the meaning of 'promissory note' see PARA 1405.

6 See PARAS 1408, 1410, 1413, 1429-1431.

7 As to the meaning of 'person' see PARA 1401 note 4.

8 Bills of Exchange Act 1882 s 2; and see PARA 1440 et seq. As to transfer generally see PARA 1489 et seq. Constructive transfer is involved in three cases: (1) where a person holding a bill on his own account subsequently holds it as agent for another; (2) where, having held it as agent for one, subsequently he holds it as agent for another; (3) where, having held it as agent for another, he subsequently holds it on his own account. See also *Belcher v Campbell* (1845) 8 QB 1; *Ancona v Marks* (1862) 31 LJEx 163.

9 Bills of Exchange Act 1882 ss 2, 73. As to the meaning of 'holder' see PARA 1407. See *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356 at 378-379, CA; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40, CA.

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### 1407. Negotiation, indorser, bearer, holder, etc.

'Negotiation' means the transfer for value<sup>1</sup> of a bill of exchange, cheque<sup>2</sup> or promissory note<sup>3</sup> to a person<sup>4</sup>, who thereupon becomes entitled to hold it, and is capable of suing thereon in his own name<sup>5</sup>.

'Indorsement' means the writing<sup>6</sup> on a bill, cheque or note the name of the transferor and its delivery<sup>7</sup> to the transferee<sup>8</sup>.

'Indorsee' means the person to whom a bill of exchange, cheque or promissory note is transferred by indorsement<sup>9</sup>.

'Bearer' means the person in possession of a bill or note which is payable to bearer<sup>10</sup>.

'Holder' means the payee<sup>11</sup> or indorsee of a bill of exchange, cheque or promissory note who is in possession of it, or the bearer thereof<sup>12</sup>.

'Holder for value' means, as regards the acceptor<sup>13</sup> and all parties prior to the time when value was given, a holder of a bill of exchange, cheque or promissory note for which value has at any time been given<sup>14</sup>.

'Holder in due course' means a holder of a bill of exchange, cheque or promissory note, complete and regular on the face of it, who takes it in good faith<sup>15</sup> and for value before it is overdue, and without notice either of its previous dishonour or of any defect in the title of the person who negotiated it to him<sup>16</sup>.

1 As to the meaning of 'value' see PARA 1401 note 8.

2 Questions of negotiation will not now arise in relation to cheques as a result of the Cheques Act 1992.

3 As to the meanings of 'bill of exchange', 'cheque' and 'promissory note' see PARA 1405.

4 As to the meaning of 'person' see PARA 1401 note 4.

5 See PARAS 1489-1491. Cf *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 381 per Blackburn J, citing with approval the notes to *Miller v Race* (1758) 1 Burr 452, in 1 Smith LC (2nd Edn) at 259, (13th Edn) at 534.

6 As to the meaning of 'writing' see PARA 1405 note 2.

7 As to the meaning of 'delivery' see PARA 1406.

8 Bills of Exchange Act 1882 s 2; see PARAS 1491-1495; *Marston v Allen* (1841) 8 M & W 494 at 504 per Alderson B; *Denton v Peters* (1870) LR 5 QB 475.

9 'Indorsee' is not defined in the Bills of Exchange Act 1882 but has been held to mean 'a person who has the rights which are given by statute in respect of a bill or cheque by virtue of an indorsement' and 'is not limited to one who has received a cheque with a signature actually written on the back': *Midland Bank Ltd v RV Harris Ltd* [1963] 2 All ER 685 at 687, [1963] 1 WLR 1021 at 1024 per Megaw J (a case decided under the Cheques Act 1957). 'Indorser' is not defined in the Bills of Exchange Act 1882 either, but in practice is taken to mean 'a person who effects an indorsement'.

10 Bills of Exchange Act 1882 ss 2, 73. See PARA 1428.

11 As to the meaning of 'payee' see PARA 1406.

12 Bills of Exchange Act 1882 ss 2, 73. See also PARA 1600; and cf *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794 at 806, CA, per Fletcher Moulton LJ; *Re Hayward, ex p Hayward* (1871) 6 Ch App 546 at 548 per James LJ; and *Walters v Neary* (1904) 21 TLR 146 at 147, CA. The term 'holder' includes (1) the original payee of a bill; and (2) a banker who is a mere agent for collection: *Sutters v Briggs* [1922] 1 AC 1, HL, a decision on the term 'holder' in the Gaming Act 1835 s 2 (repealed); but the definition of the term was argued and adjudged with reference to the Bills of Exchange Act 1882, and *Nicholls v Evans* [1914] 1 KB 118 was overruled. See also *Dey v Meyo* [1920] 2 KB 346, CA; *Akrokerry (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465 at 472.

13 As to the meaning of 'acceptor' see PARA 1406.

14 Bills of Exchange Act 1882 s 27(2), (3). It would seem that the holder of a cheque who has a lien on it is by virtue of s 27(3) deemed to have taken that cheque for value within the meaning of s 29(1)(b) (see note 15) to the extent of the sum for which he has a lien (*Re Keever (a bankrupt), ex p Trustee of Property of Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631, [1966] 2 Lloyd's Rep 475; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719); see also *Paine v Bevan and Bevan* (1914) 110 LT 933 (in which it was held the bookmaker payees of cheques for which they did not give value were liable in conversion to the true owner), and see further PARAS 1478-1481. See also PARA 881 et seq.

15 As to the meaning of 'good faith' see PARA 1401 note 7.

16 Bills of Exchange Act 1882 s 29(1)(a), (b); see PARA 1485. An original payee is not a holder in due course: *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL; and see PARAS 1450 note 3, 1486.

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## **(iv) Necessary Parties**

### **A. BILLS OF EXCHANGE**

#### **1408. Necessary parties to bill of exchange.**

The necessary parties to a bill of exchange<sup>1</sup> are: (1) the party giving the order, who must sign it, and who is called the drawer<sup>2</sup>; (2) the party to whom the order is given, who is called the drawee<sup>3</sup>, and who on assenting to the terms of the order and signing it is called the acceptor<sup>4</sup>; and (3) the party to whom the money is to be paid, who is called the payee<sup>5</sup>, or, if the bill be expressed to be payable to bearer<sup>6</sup>, the bearer<sup>7</sup>.

The same person<sup>8</sup> sometimes fills the position of two of these three necessary parties<sup>9</sup>.

Thus the drawer may also be the payee when the bill is expressed 'pay to us', 'pay to our order', 'pay to us or order', or 'pay to \_\_\_\_ order'<sup>10</sup>.

The drawee may also be the payee, for example, where the bill is expressed 'pay to your own order'<sup>11</sup>. Here, though the instrument<sup>12</sup> is in form a bill, there is nothing to enforce until the bill has been negotiated, that is, transferred for value<sup>13</sup> by being indorsed by the drawee or payee to some other party.

The drawer may also be the drawee. In this case, as also in the case of the drawee being a fictitious person or a person not having capacity to contract<sup>14</sup>, the holder<sup>15</sup> may treat the instrument at his option either as a bill of exchange or as a promissory note<sup>16</sup>. A banker's draft<sup>17</sup> may also be treated either as a bill of exchange or as a promissory note<sup>18</sup>.

1 As to the meaning of 'bill of exchange' see PARA 1405.

2 As to the meaning of 'drawer' see PARA 1406. A document in the form of a bill signed by the acceptor but not by the drawer is not a bill, but may be valid as an acknowledgment of debt: *Lawson's Executors v Watson* 1907 SC 1353, Ct of Sess. As to the right of the holder to complete an incomplete bill see PARA 1449. As to the nature of the contract made by the drawer see PARA 1574.

3 As to the meaning of 'drawee' see PARA 1406. Where the instrument, though in form a bill, is addressed to no drawee, it may be treated as a note, even where it cannot be treated as a bill: *Felder v Marshall* (1861) 9

CBNS 606; *Mason v Lack* (1929) 140 LT 696. See also *Haseldine v Winstanley* [1936] 2 KB 101, [1936] 1 All ER 137.

4 As to the meaning of 'acceptor' see PARA 1406. As to the nature of the contract made by the acceptor see PARA 1451 et seq.

5 As to the meaning of 'payee' see PARA 1406.

6 As to instruments payable to bearer see PARA 1428.

7 As to the meaning of 'bearer' see PARA 1407.

8 As to the meaning of 'person' see PARA 1401 note 4.

9 A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee: Bills of Exchange Act 1882 s 5(1).

10 As to the last example see *Chamberlain v Young* [1893] 2 QB 206, CA; and text to PARA 1429 note 10. As to instruments payable to order see PARA 1428.

11 Formerly such an instrument was not a bill of exchange.

12 As to the meaning of 'instrument' see PARA 1402 note 1.

13 As to the meaning of 'value' see PARA 1401 note 8.

14 As to fictitious persons see PARA 1431. As to restrictions on capacity see PARA 1469. Notice of dishonour may be dispensed with also when the drawer and drawee are the same person; see PARA 1529.

15 As to the meaning of 'holder' see PARA 1407.

16 Bills of Exchange Act 1882 s 5(2); *Miller v Thomson* (1841) 3 Man & G 576; *Allen v Sea, Fire and Life Assurance Co* (1850) 9 CB 574. See also *Re British Trade Corpn* [1932] 2 Ch 1, CA, in which the instrument was drawn by a branch office on the head office.

17 As to the meaning of 'banker's draft' see PARA 1411 note 24.

18 As to the meaning of 'promissory note' see PARA 1405.

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### **1409. Referee in case of need.**

Besides the parties necessary to a bill of exchange<sup>1</sup> another party may be introduced at the option of the drawer<sup>2</sup> and any indorser<sup>3</sup>, called the 'referee in case of need'<sup>4</sup>. The drawer or indorser in that event inserts on the face of the bill the name of a person<sup>5</sup> to whom resort may be had 'in case of need', that is in the event of the bill being dishonoured by non-acceptance or non-payment<sup>6</sup>. The holder<sup>7</sup> of the bill is at liberty to choose whether he will resort to the referee or not<sup>8</sup>, but in the case of a bill, where it is desired to charge a drawer or indorser resident in a foreign country, the holder should ascertain whether the law of that country does not require him first to resort to the referee in case of need<sup>9</sup>. A dishonoured bill must be protested<sup>10</sup>, or at least noted for protest, for non-payment before it is presented for payment to the referee in case of need<sup>11</sup>.

1 As to the meaning of 'bill of exchange' see PARA 1405.

- 2 As to the meaning of 'drawer' see PARA 1406.
- 3 As to the meaning of 'indorser' see PARA 1407 note 8.
- 4 See the Bills of Exchange Act 1882 s 15.
- 5 As to the meaning of 'person' see PARA 1401 note 4.
- 6 As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525.
- 7 As to the meaning of 'holder' see PARA 1407.
- 8 Bills of Exchange Act 1882 s 15.
- 9 See PARA 1597.
- 10 As to the meaning of 'protest' see PARA 1539.
- 11 Bills of Exchange Act 1882 ss 67(1), 93. This provision applies also to dishonoured bills accepted for honour supra protest: see PARA 1569. As to noting and protest see PARA 1537 et seq.

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## **B. CHEQUES**

### **1410. Necessary parties to cheque.**

The necessary parties to a cheque are the same as those to a bill of exchange, save that the drawee<sup>1</sup> must be a banker<sup>2</sup>. The banker does not become acceptor<sup>3</sup> of the cheque, but there is an implied contract between the banker and his customer that he will honour cheques drawn upon him by his customer up to the amount of the funds of his customer which he has in his hands or, where there is an agreement to let the customer overdraw, up to the limits of the amount of the overdraft agreed on<sup>4</sup>. The banker's liability is to the drawer<sup>5</sup> (his customer) only; the mere dishonour of a cheque gives no right of claim to anyone other than the drawer<sup>6</sup>. With certain exceptions which will be noticed hereafter, the law applying to bills of exchange payable on demand applies equally to cheques<sup>7</sup>.

- 1 As to the meaning of 'drawee' see PARA 1406.
- 2 As to the meanings of 'cheque' and 'bill of exchange' see PARA 1405. As to the meaning of 'banker' see PARA 1403 note 7.
- 3 As to the meaning of 'acceptor' see PARA 1406.
- 4 As to the position of the banker see further PARA 1454. See also PARA 853 et seq.
- 5 As to the meaning of 'drawer' see PARA 1406.
- 6 *Hopkinson v Forster* (1874) LR 19 Eq 74. As to claims in relation to bills of exchange see further PARA 1599 et seq.
- 7 Bills of Exchange Act 1882 s 73. See further PARAS 1411, 1415, 1454, 1499-1500, 1519, 1521, 1523, 1552, 1560.

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### **1411. Crossing of cheques.**

The rules for the negotiation<sup>1</sup> of bills and notes apply generally to cheques<sup>2</sup> but the negotiation of a cheque may be affected by crossing it<sup>3</sup>.

A cheque is crossed where it bears across its face an addition of: (1) the words 'and company' or any abbreviation thereof between two parallel transverse lines<sup>4</sup>; or (2) two parallel transverse lines simply<sup>5</sup>; or (3) the name of a banker<sup>6</sup>. In heads (1) and (2) above, the cheque is said to be crossed generally<sup>7</sup>; in head (3), it is said to be crossed specially, and to the banker so named<sup>8</sup>. The words 'not negotiable' may be added in any of these cases<sup>9</sup>, but these words by themselves do not constitute a crossing<sup>10</sup>.

The drawer<sup>11</sup> of a cheque may cross it either generally or specially<sup>12</sup>. The holder<sup>13</sup> may cross an uncrossed cheque generally or specially<sup>14</sup>, or may cross a cheque specially that is crossed generally<sup>15</sup>. The holder may also add the words 'not negotiable' to a cheque that is crossed either generally or specially<sup>16</sup>.

By operation of the Cheques Act 1957<sup>17</sup>, the crossed cheque provisions of the Bills of Exchange Act 1882<sup>18</sup> apply not only to cheques<sup>19</sup> but extend to: (a) any document issued by a customer of a banker<sup>20</sup> which, though not a bill, is intended to enable a person<sup>21</sup> to obtain payment of the sum mentioned therein from that banker<sup>22</sup>; (b) any document issued by a public officer and intended to enable a person to obtain payment from the Paymaster General or the Queen's and Lord Treasurer's Remembrancer<sup>23</sup>; and (c) a banker's draft<sup>24</sup>.

1 As to the meaning of 'negotiation' see PARA 1407.

2 Bills of Exchange Act 1882 s 73. As to the meanings of 'bill', 'note' and 'cheque' see PARA 1405. In relation to cheques, however, note the comment in PARA 1403 note 10; see also PARA 1407 note 2.

3 As to crossing of cheques generally see PARAS 859-860, 901.

4 Bills of Exchange Act 1882 s 76(1)(a).

5 Bills of Exchange Act 1882 s 76(1)(b).

6 Bills of Exchange Act 1882 s 76(2). As to the meaning of 'banker' see PARA 1403 note 7. It is customary, but not necessary, to add two parallel transverse lines in this case also: see PARA 901.

7 Bills of Exchange Act 1882 s 76(1).

8 Bills of Exchange Act 1882 s 76(2). Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection: s 77(5). A banker may also, where an uncrossed cheque or a cheque crossed generally is sent to him for collection, cross it specially to himself: s 77(6).

9 See the Bills of Exchange Act 1882 s 76(1)(a), (b), (2).

10 As to cheques marked 'not negotiable' see PARA 1499.

11 As to the meaning of 'drawer' see PARA 1406.

12 Bills of Exchange Act 1882 s 77(1).



- 13 As to the meaning of 'holder' see PARA 1407.
- 14 Bills of Exchange Act 1882 s 77(2).
- 15 Bills of Exchange Act 1882 s 77(3).
- 16 Bills of Exchange Act 1882 s 77(4).
- 17 See the Cheques Act 1957 s 5.
- 18 Bills of Exchange Act 1882 ss 76-81A: see PARAS 1499-1500, 1560, 1575.
- 19 Cheques Act 1957 ss 4(2)(a), 5. This includes cheques that are not transferable, whether or not so made under the provisions of the Bills of Exchange Act 1882 s 81A (see PARAS 900, 1500): Cheques Act 1957 s 4(2)(a) (amended by the Cheques Act 1992 s 3).
- 20 As to the meaning of 'banker' see PARA 1403 note 7; definition applied by the Cheques Act 1957 s 6(1).
- 21 As to the meaning of 'person' see PARA 1401 note 4; definition applied by the Cheques Act 1957 s 6(1).
- 22 Cheques Act 1957 ss 4(2)(b), 5.
- 23 Cheques Act 1957 ss 4(2)(c), 5. As to the Paymaster General and the Queen's and Lord Treasurer's Remembrancer see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 714; **COURTS** vol 10 (Reissue) PARA 654.
- 24 Cheques Act 1957 ss 4(2)(d), 5. A banker's draft is a draft payable on demand by a banker on himself, whether payable at the head office or some other office of his bank: s 4(2)(d).

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### **1412. Marking of cheques by bankers.**

Occasionally cheques<sup>1</sup> are marked or certified by the bankers<sup>2</sup> on whom they are drawn. Doing so does not convert the banker into an acceptor<sup>3</sup> or make him liable on the cheque, but it may constitute a representation by him, on which he may be held liable, that the cheque will be paid as drawn if presented within a reasonable time<sup>4</sup>.

- 1 As to the meaning of 'cheque' see PARA 1405.
- 2 As to the meaning of 'banker' see PARA 1403 note 7.
- 3 As to the meaning of 'acceptor' see PARA 1406.
- 4 See *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC. As to such marking in general and its effect see PARAS 856, 868.

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## **C. PROMISSORY NOTES**

### **1413. Necessary parties to promissory note.**

The necessary parties to a promissory note<sup>1</sup> are: (1) the person<sup>2</sup> who makes the promise, and who is called the maker<sup>3</sup>; (2) the person to whom the promise is made, and who is called the payee<sup>4</sup>. Where the same person fills the position of both parties, for example, where the instrument<sup>5</sup> is expressed 'pay to my order', the instrument is not a note unless and until it is indorsed by the maker<sup>6</sup>. In the application of the statutory provisions relating to bills of exchange<sup>7</sup> to a promissory note, the maker of a note is deemed to correspond with the acceptor<sup>8</sup> of a bill and the first indorser<sup>9</sup> of a note is deemed to correspond with the drawer<sup>10</sup> of an accepted bill payable to drawer's order<sup>11</sup>.

1 As to the meaning of 'promissory note' see PARA 1405.

2 As to the meaning of 'person' see PARA 1401 note 4.

3 As to the nature of the contract made by the maker see PARA 1576.

4 See the Bills of Exchange Act 1882 s 83(1); and PARA 1405. A note may also be payable to bearer: see the Bills of Exchange Act 1882 s 83(1); and PARA 1428.

5 As to the meaning of 'instrument' see PARA 1402 note 1.

6 Bills of Exchange Act 1882 s 83(2).

7 See the Bills of Exchange Act 1882 Pt II (ss 3-72). As to the meaning of 'bill of exchange' see PARA 1405.

8 As to the meaning of 'acceptor' see PARA 1406.

9 As to the meaning of 'indorser' see PARA 1407 note 8.

10 As to the meaning of 'drawer' see PARA 1406.

11 Bills of Exchange Act 1882 s 89(2). As to instruments payable to order see PARA 1428.

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### **(v) Requirements of Form**

#### **1414. Wording.**

It is not necessary to adhere to any form of words so long as the conditions of the definition are observed<sup>1</sup>, in which case the language in which the instrument<sup>2</sup> is written is immaterial<sup>3</sup>.

1 As to the definitions see PARA 1405.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 *Re Marseilles Extension Railway and Land Co, Smallpage's and Brandon's Cases* (1885) 30 ChD 598, where the fact of a bill being drawn in French did not prevent its being treated as an inland bill.

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### **1415. Date.**

Omission of the date does not invalidate a bill or note<sup>1</sup>. Where an instrument expressed to be payable at a fixed period after date<sup>2</sup> is issued<sup>3</sup> undated, or where the acceptance<sup>4</sup> of a bill payable at a fixed period after sight<sup>5</sup> is undated, any holder<sup>6</sup> may insert the true date of issue or acceptance, and the instrument becomes payable accordingly<sup>7</sup>. Where the holder inserts a wrong date in good faith<sup>8</sup> and by mistake, and in every case where a wrong date is inserted<sup>9</sup>, if the instrument subsequently comes into the hands of a holder in due course<sup>10</sup>, the instrument is not invalidated, but the date so inserted is deemed to be the true one<sup>11</sup>.

Where an instrument remains undated it would seem that it should be taken to be dated on the date when it was issued<sup>12</sup>, that is, when it was first delivered complete in form to a person<sup>13</sup> taking it as holder.

Where the drawing or indorsement<sup>14</sup> of any instrument or the acceptance of any bill is dated, the date, unless the contrary be proved, is deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be<sup>15</sup>.

An instrument is not invalid by reason only that it is antedated or postdated or that it bears date on a Sunday<sup>16</sup>.

1 Bills of Exchange Act 1882 ss 3(4)(a), 89. As to the meanings of 'bill' and 'note' see PARA 1405. Cheques are in a somewhat different position. Omission of the date may not, and probably does not, invalidate the cheque, but bankers usually refuse payment of an undated cheque, presumably on the ground that, unlike a bill or note, it is revocable in certain circumstances. See eg *Griffiths v Dalton* [1940] 2 KB 264. See also *Aspinall's Club Ltd v Al-Zayat* [2007] EWCA Civ 1007, [2007] All ER (D) 302 (Oct).

2 As to the meaning of 'instrument' see PARA 1402 note 1. As to the meanings of 'bill payable after date' and 'note payable after date' see PARA 1434.

3 As to the meaning of 'issue' see PARA 1406.

4 As to the meaning of 'acceptance' see PARA 1406.

5 As to the meaning of 'bill payable after sight' see PARA 1435.

6 As to the meaning of 'holder' see PARA 1407.

7 Bills of Exchange Act 1882 ss 12, 89. The date which the section allows to be inserted is the date of issue or acceptance so the section, as between immediate parties, does not apply to a case where an agreement provides the date from which the bill is to run irrespective of the date of the bill or the sight of the bill, and a date which is not the date in the agreement is inserted in the bill as the date from which the bill is to run: *Foster v Driscoll* [1929] 1 KB 470 at 495, CA, per Scrutton LJ.

8 As to the meaning of 'good faith' see PARA 1401 note 7.

9 Bills of Exchange Act 1882 s 12 proviso (1), s 89.

10 As to the meaning of 'holder in due course' see PARA 1407.

11 Bills of Exchange Act 1882 s 12 proviso (2), s 89.

12 This proposition derives from the provision that where a bill is expressed to be payable with interest, interest runs from the date of the bill (unless the instrument provides otherwise) and if the bill is undated, interest runs from the date of its issue: Bills of Exchange Act 1882 ss 9(3), 89.

13 As to the meaning of 'person' see PARA 1401 note 4.

14 As to the meaning of 'indorsement' see PARA 1407.

15 Bills of Exchange Act 1882 ss 13(1), 89.

16 Bills of Exchange Act 1882 ss 13(2), 89. Where one in possession of a blank acceptance fills it up as a bill with himself as drawer, and antedates it by a whole year, the bill is good: *Armfield v Allport* (1857) 27 LJEx 42. Again, where a bill is dated at a time subsequent to that at which the payee who indorsed it actually died, it has been held that the postdating may be proved and the bill recovered on: *Pasmore v North* (1811) 13 East 517. As to postdated cheques see *Royal Bank of Scotland v Tottenham* [1894] 2 QB 715, CA; and PARA 853. As to marking a postdated cheque see *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC; and PARA 1412.

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#### **1416. Value.**

Omission to specify the value<sup>1</sup> given or that any value has been given does not invalidate an instrument<sup>2</sup>, since the presumption always remains, unless actually negated, that every party whose signature appears on a bill<sup>3</sup> has become a party thereto for value<sup>4</sup>.

Evidence may be adduced to show absence, failure<sup>5</sup>, or illegality of consideration<sup>6</sup> or fraud<sup>7</sup>, whether the instrument is expressed to be for value or not, and generally contemporary evidence in writing may be given to negative the presumption or statement, if any, of value given; but, parol evidence, the effect of which would be to vary the terms of the instrument as they appear upon its face, is inadmissible<sup>8</sup>.

1 As to the meaning of 'value' see PARA 1401 note 8.

2 Bills of Exchange Act 1882 ss 3(4)(b), 89. As to the meaning of 'instrument' see PARA 1402 note 1.

3 As to the meaning of 'bill' see PARA 1405.

4 See the Bills of Exchange Act 1882 s 30(1); and PARA 1478.

5 See PARA 1481.

6 As to consideration see PARA 1478 et seq. As to illegality of consideration see PARA 1484.

7 As to fraud see PARA 1483.

8 *Ridout v Bristow* (1830) 1 Cr & J 231; *Hill v Wilson* (1873) 8 Ch App 888. See also PARA 1447. As to parol evidence of consideration generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 192, 194.

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INSTRUMENTS/(1) BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES/(v) Requirements of Form/1417. Place of drawing, etc.

### **1417. Place of drawing, etc.**

It is customary, but not necessary, to state in a bill the place where it is drawn, or in a note the place where it is made<sup>1</sup>.

It is also unnecessary to state the place where it is to be paid<sup>2</sup>. The instrument<sup>3</sup> may, however, be so expressed, and may be made payable alternatively in one of two places<sup>4</sup>.

1 Bills of Exchange Act 1882 ss 3(4)(c), 89(1). As to the meanings of 'bill' and 'note' see PARA 1405.

2 Bills of Exchange Act 1882 ss 3(4)(c), 87(1).

3 As to the meaning of 'instrument' see PARA 1402 note 1.

4 *Beeching v Gower* (1816) Holt NP 313; *Pollard v Herries* (1803) 3 Bos & P 335 (where a note was made payable in Paris or London at the choice of the holder, according to the rate of exchange); and *Forman v Bank of England* (1902) 18 TLR 339 (bank's choice of place of payment successfully disputed).

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### **1418. For payment of money only.**

A bill of exchange, cheque or promissory note<sup>1</sup> must be for the payment of money only<sup>2</sup>; an instrument that orders any other act to be done in addition is not a bill of exchange, cheque or promissory note<sup>3</sup>. Further, it is essential that the money which is to be paid should be a sum certain<sup>4</sup>, for otherwise the drawee<sup>5</sup> could not tell what he is to pay, or the payee<sup>6</sup> or holder<sup>7</sup> what he is entitled to demand. However, there is no limit set to the amount for which a bill may be drawn<sup>8</sup>. A bill of exchange or promissory note drawn or made on or after 15 February 1971 is invalid if it is drawn wholly or partly in shillings and pence<sup>9</sup>. Reference to the old currency in shillings and pence, in cheques and other instruments to which the relevant provisions of the Cheques Act 1957<sup>10</sup> apply, in bills of exchange (other than cheques) and in promissory notes, is to be read as meaning the corresponding amount in the new currency calculated in accordance with the provisions of the Decimal Currency Act 1969<sup>11</sup> and any alteration done to make the instrument read in accordance with such provisions does not affect the validity of the instrument and, in the case of a bill of exchange or promissory note, does not render the alteration a material alteration<sup>12</sup>.

1 As to the meanings of 'bill of exchange', 'cheque' and 'promissory note' see PARA 1405.

2 See the Bills of Exchange Act 1882 ss 3, 73, 83; and PARA 1405.

3 See the Bills of Exchange Act 1882 ss 3(2), 73, 89; and PARA 1405. See also *Akbar Khan v Attar Singh* [1936] 2 All ER 545 at 550, PC. Thus an instrument ordering the delivery up of houses and a wharf in addition to the payment of a sum of money is not a valid bill: *Martin v Chantry* (1747) 2 Stra 1271. See also *Dickie v Singh* 1974 SLT 129 (instrument providing for employment and payment of staff in addition to the payment of a sum of money held not to be a promissory note).

4 See the Bills of Exchange Act 1882 ss 3(1), 9, 73, 83(1); and PARA 1405. Therefore a note to pay a given sum and whatever else may be due to the payee is not a good note (*Smith v Nightingale* (1818) 2 Stark 375; *Crowfoot v Gurney* (1832) 9 Bing 372), nor a note to pay '£13 and all fines according to rule' (*Ayrey v Fearnside* (1838) 4 M & W 168), nor is a bill to pay the proceeds of the sale of a consignment of goods even when valued by the drawer at a definite sum a good bill (*Jones v Simpson* (1823) 2 B & C 318).

5 As to the meaning of 'drawee' see PARA 1406.

6 As to the meaning of 'payee' see PARA 1406.

7 As to the meaning of 'holder' see PARA 1407.

8 48 Geo 3 (Bills of Exchange) (1808) c 88, by which bills or notes for less than 20s were made void, was repealed by the Bills of Exchange Act 1882 s 96, Sch 2 (repealed).

9 Decimal Currency Act 1969 s 2(1), (2).

10 In the Cheques Act 1957 s 4: see the Decimal Currency Act 1969 s 3(3)(a). As to the application of the Cheques Act 1957 s 4 see PARA 1411.

11 In as given in the Decimal Currency Act 1969 Sch 1: s 3(1).

12 Decimal Currency Act 1969 s 3(2). The alteration of an amount of money in the pre-decimal currency to the equivalent decimal amount is not a material alteration for the purposes of the Bills of Exchange Act 1882 s 64: Decimal Currency Act 1969 s 3(2). As to material alterations see PARA 1560; and as to the rights of the transferee of an altered instrument see PARA 1505.

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### **1419. Sum payable with interest.**

The sum payable is not to be regarded as uncertain although it is required to be paid with interest<sup>1</sup>.

In English law there is no limit to the amount of interest that may be charged<sup>2</sup>, but many foreign countries have usury laws, and bills or notes in such countries must not bear interest at a rate higher than that which the law permits. In England and Wales, where a bill or note is expressed to be with interest, but no rate is prescribed, a court would probably allow the appropriate commercial rate<sup>3</sup>. An instrument<sup>4</sup> payable with 'lawful interest' is thus not invalid for uncertainty<sup>5</sup>.

1 Bills of Exchange Act 1882 s 9(1)(a).

2 As to excessive interest in consumer credit and moneylenders' transactions see PARA 1286; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 269-270. In *Re Tillman* (1918) 34 TLR 322, an acceptor of bills drawn by a drawer who became an enemy alien was not allowed to charge against the enemy alien commission or compound interest, but only the interest the acceptor had paid to the Bank of England in respect of an advance to enable the acceptances to be met, and, after the bank had been repaid, simple interest only at 5%.

3 See *Practice Direction (Claims for Interest)* [1983] 1 All ER 934, [1983] 1 WLR 377.

4 As to the meaning of 'instrument' see PARA 1402 note 1.

5 *Warrington v Early* (1853) 23 LJQB 47 (where it was held that a note in these terms valid in itself was rendered invalid by a subsequent alteration). But see contra, *Lamberton v Aiken* (1899) 37 SLR 138, Ct of Sess

(where a note for a sum of money 'together with any interest that may accrue thereon' was held invalid in Scotland on the ground of uncertainty).

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#### **1420. Payment by instalments.**

The sum may also be expressed to be payable by stated instalments with or without a provision that upon default in payment of any instalment the whole shall become due<sup>1</sup>, but the dates of the instalments must be stated<sup>2</sup>.

1 Bills of Exchange Act 1882 s 9(1)(b), (c); *Carlton v Kenealy* (1843) 12 M & W 139. Unless the note so states the holder may not sue for the whole balance on default in payment of an instalment: *Van der Westhuizen v Lochner* (1908) 18 CTR 446 (SA). Where a promissory note containing such a provision and a bill of sale are both given to secure the same debt, the bill of sale is invalidated by the stipulation in the note, but the note itself is good: *Monetary Advance Co v Cater* (1888) 20 QBD 785, DC. As to statutory defeasances of a bill of sale see PARAS 1748-1749.

2 *Moffat v Edwards* (1841) Car & M 16, where the instrument was in this form: 'I owe £6 which is to be paid by instalments for rent', and was held not to be a note.

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#### **1421. Sum payable at stated rate of exchange.**

The sum may also be expressed to be payable according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the instrument<sup>1</sup>. Bills<sup>2</sup> are sometimes drawn in this country payable in another country with 'exchange as per indorsement' or some variant of this; in such cases it would seem advisable to ensure that the particular form of words used binds the acceptor<sup>3</sup> to pay according to them<sup>4</sup>. A bill for an amount expressed in foreign currency is not invalidated because a rate of exchange is not indicated on the face of the bill, and evidence of the practice of bankers<sup>5</sup> in dealing with cheques drawn in England on an English bank in foreign currency may be given<sup>6</sup>.

The addition to the instrument of a rate of exchange after acceptance<sup>7</sup> is a material alteration which invalidates the instrument<sup>8</sup>.

An instrument may be expressed to be payable in the alternative at one of two places in the choice of the holder<sup>9</sup> according to the course of exchange between the two<sup>10</sup>.

1 Bills of Exchange Act 1882 s 9(1)(d). See also *Re Hodgson & Co and Wigglesworth & Co Ltd* [1920] WN 198. As to the meaning of 'instrument' see PARA 1402 note 1. For the method to be used in arriving at the rate of exchange in certain cases where the rate is not fixed by the instrument see PARA 1594. For the general rules of conversion into English currency see PARAS 1278-1279.

- 2 As to the meaning of 'bill' see PARA 1405.
- 3 As to the meaning of 'acceptor' see PARA 1406.
- 4 *Tropic Plastic and Packaging Industry v Standard Bank of South Africa Ltd* 1969 (4) SA 108 (where it was held that in a bill bearing under the amount in words, the expression 'exchange as per indorsement', the mere setting out of the calculation of sterling into rand at a stated rate of exchange then obtaining was not an indorsement binding on the drawee).
- 5 As to the meaning of 'banker' see PARA 1403 note 7.
- 6 See *Cohn v Boulken* (1920) 36 TLR 767. As to what will be treated as the currency of a foreign country see *Lindsay, Gracie & Co v Russian Bank for Foreign Trade* (1918) 34 TLR 443 (payment 'in Russian currency').
- 7 As to the meaning of 'acceptance' see PARA 1406.
- 8 *Hirschfeld v Smith* (1866) LR 1 CP 340. As to material alterations see PARA 1560.
- 9 As to the meaning of 'holder' see PARA 1407.
- 10 *Pollard v Herries* (1803) 3 Bos & P 335. See also PARA 1417 text to note 4.

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## **1422. Words prevail over figures.**

It is customary for bills and notes<sup>1</sup> to have the amount written in figures at the top of the instrument and also in words in the body of the instrument. The figures at the top (the marginal figures, as they are sometimes called) are not in fact a necessary part of an instrument, though they are commonly placed there. It would seem that their original purpose was that the amount of the instrument might strike the eye immediately and be a note, index or summary of the contents<sup>2</sup>.

Where there is a discrepancy between the words used to express a sum payable and the figures so used, the sum denoted by the words is the amount payable<sup>3</sup>, and evidence cannot be adduced to show that in fact there was a mistake made in omitting words in the body of the instrument<sup>4</sup>. Probably if there is a marginal figure and there are no words in the body of the instrument, it is a valid instrument for the marginal figure<sup>5</sup>.

Obvious and intelligible mistakes in the written words, however, do not invalidate an instrument<sup>6</sup>.

- 1 As to the meanings of 'bill' and 'note' see PARA 1405.
- 2 *Garrard v Lewis* (1882) 10 QBD 30 at 32-35 per Bowen LJ, discussing at length the subject of marginal figures and citing, at 33, *Nouguier, Lettres de Change* (1875 Edn) 127: '*Les chiffres ne sont pas que pour simple note*'.
- 3 Bills of Exchange Act 1882 s 9(2). It is the practice of bankers in England to return the cheque with the answer 'amounts differ' unless the difference is insignificant or if the smaller amount only is claimed, when it is the custom to pay it. See *Macmillan v London Joint Stock Bank* [1917] 2 KB 439 at 448, CA, per Swinfen Eady LJ; revsd on other points sub nom *London Joint Stock Bank v Macmillan* [1918] AC 777, HL.
- 4 *Saunderson v Piper* (1839) 5 Bing NC 425.



5 *Heeney v Addy* [1910] 2 IR 688; but see *Garrard v Lewis* (1882) 10 QBD 30.

6 A bill for 'twenty-five, seventeen shillings and three-pence' has been held to be a good bill for £25 17s 3d: *Phipps v Tanner* (1833) 5 C & P 488. See also *Banco di Roma SpA v Orru* [1973] 2 Lloyd's Rep 505, CA.

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### **1423. Peremptory order to pay.**

The wording of a bill of exchange<sup>1</sup> must import a demand, not a request<sup>2</sup>.

1 As to the meaning of 'bill of exchange' see PARA 1405.

2 Bills of Exchange Act 1882 s 3(1). Thus an instrument in the form 'Please to let bearer have £ \_\_\_\_\_, and you will oblige me', has been held not to be a valid bill: *Little v Slackford* (1828) Mood & M 171; and cf *Russell v Powell* (1845) 14 M & W 418; *Hamilton v Spottiswoode* (1849) 4 Exch 200. But see *Ruff v Webb* (1794) 1 Esp 130 at 131 per Lord Kenyon CJ holding an instrument expressed in the form 'Mr Nelson will much oblige Mr Webb by paying to J Ruff or order 20 guineas on his account', to be a good bill.

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### **1424. Unconditional order to pay.**

The order must be not only peremptory but unconditional<sup>1</sup>, for any condition made would at once import uncertainty. Thus a cheque<sup>2</sup> drawn on a bank payable on the condition of signing a particular receipt form at the foot of the cheque may be conditional<sup>3</sup>, unless it is clear that the words importing the condition are not addressed to the drawee-bank<sup>4</sup>. The addition of the words 'as per agreement' does not make a note conditional<sup>5</sup>; and the words 'to be retained', written by the drawer<sup>6</sup> of a cheque across its face, although they import a condition as between the drawer and the payee<sup>7</sup>, leave the order to pay addressed to the banker unconditional<sup>8</sup>.

An order to pay out of a particular fund is not an unconditional order, and an instrument<sup>9</sup> with such a provision is not therefore a good bill or note<sup>10</sup>. But an indication of a particular fund out of which the drawee is to reimburse himself, or of a particular account to be debited with the amount payable, does not by itself prevent an order being unconditional<sup>11</sup>, nor does the recital on the instrument of the transaction that gave rise to the instrument<sup>12</sup>. A note is not invalid by reason only that it contains also a pledge of collateral security, with authority to sell or dispose thereof<sup>13</sup>.

1 Bills of Exchange Act 1882 ss 3(1), 73, 83(1); see also PARA 1405.

2 As to the meaning of 'cheque' see PARA 1405.

3 *Bavins, Jnr and Sims v London and South Western Bank Ltd* [1900] 1 QB 270, CA. The instrument in this case was in the following form: 'Pay to \_\_\_\_\_ provided that the receipt form at foot hereof is duly signed, stamped, and dated'. Then followed signatures of the officers of the company drawing the instrument, and the receipt form was as follows: 'Received from the \_\_\_\_\_ Co the above-named sum as per particulars furnished. This receipt is not to be detached from the cheque.'

Signature \_\_\_\_\_ Dated \_\_\_\_\_ 1890.'

4 *Nathan v Ogdens Ltd* (1905) 93 LT 553; affd on another point 94 LT 126, CA, where the instrument had at the foot 'The receipt at back hereof must be signed, which signature will be taken as an indorsement of this cheque', and on the back 'Received from Mr \_\_\_\_\_ (liquidator of Ogdens, Limited) this cheque for \_\_\_\_\_, being my share of the second and final bonus distribution of the company'. This was held by Lawrence J to be unconditional, 'for though the words are imperative in terms, they are not addressed to the bankers, and do not affect the nature of the order to them'. As to the meaning of 'drawee' see PARA 1406.

5 *Jury v Barker* (1858) EB & E 459. In *Wirth v Weigel Leygonie & Co Ltd* [1939] 3 All ER 712, du Parc LJ (sitting as an additional judge), held that in the surrounding circumstances a document in the following terms was not a promissory note within the meaning of the Bills of Exchange Act 1882: 'Reference AC 3 TR/WLIS Kischner, London, WC1. We confirm herewith that we undertake to pay irrevocably the sum of £200 to you or into your banking account on May 25, 1935, in respect of the above reference'.

6 As to the meaning of 'drawer' see PARA 1406.

7 As to the meaning of 'payee' see PARA 1406.

8 *Roberts & Co v Marsh* [1915] 1 KB 42, CA.

9 As to the meaning of 'instrument' see PARA 1402 note 1.

10 Bills of Exchange Act 1882 ss 3(3), 89. As to the meanings of 'bill' and 'note' see PARA 1405. Thus an order to pay 'out of the moneys now due or hereafter to become due to me under the will of my late father and before making any payment to me thereout' is not a valid bill (*Fisher v Calvert* (1879) 27 WR 301), nor is the promise to pay out of the proceeds of a sale a valid note: *Hill v Halford* (1801) 2 Bos & P 413. See also *Dawkes v De Loraine* (1771) 2 Wm Bl 782; *Jenney v Herle* (1724) 2 Ld Raym 1361; *Haydock v Lynch* (1729) 2 Ld Raym 1563.

11 Bills of Exchange Act 1882 ss 3(3)(a), 89. A note expressed 'Pay \_\_\_\_\_ £9 10s as my quarterly half-pay' has been held a valid note (*Macleed v Snee* (1727) 2 Stra 762), and so, too, has a bill drawn on the official liquidator of a company to pay to \_\_\_\_\_ £ \_\_\_\_\_ 'on account of moneys advanced by me to the company': *Griffin v Weatherby* (1868) LR 3 QB 753. See also *Re Boyse, Crofton v Crofton, Canonge's Claim* (1886) 33 ChD 612, where a bill for £ \_\_\_\_\_, 'which sum is on account on the dividends and interest due on the capital and dividends registered in the books of the Governor and the Bank of England and Company in the name of \_\_\_\_\_ and \_\_\_\_\_, which you will please charge to my account and credit according to a registered letter which I have addressed to you', was held good.

12 Bills of Exchange Act 1882 ss 3(3)(b), 89. See *The Elmville* [1904] P 319.

13 Bills of Exchange Act 1882 s 83(3). See *Wise v Charlton* (1836) 4 Ad & El 786.

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### 1425. Signature of drawer.

A bill must be signed by the drawer<sup>1</sup>, for though a bill may be accepted before it has the drawer's signature<sup>2</sup>, it remains incomplete, and so cannot be issued<sup>3</sup>.

Where, however, a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount using the signature for that of the drawer, the acceptor<sup>4</sup> or an indorser<sup>5</sup>,

provided that the instrument<sup>6</sup> is filled up within a reasonable time<sup>7</sup> and strictly in accordance with the authority given<sup>8</sup>.

The drawer's or maker's<sup>9</sup> signature is usually to be found at the foot of the instrument, but in the case of a note it may be sufficient if the maker's name is inserted in the body thereof<sup>10</sup>.

A valid signature may be made in pencil<sup>11</sup>, or in the case of an illiterate person by his mark<sup>12</sup>.

Where a signature on a bill or note<sup>13</sup> is forged or placed thereon without the authority of the person<sup>14</sup> whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the instrument or to give a discharge for it<sup>15</sup> or to enforce payment of it against any party thereto can be acquired through or under that signature unless the party against whom it is sought to retain or enforce payment of the instrument is precluded from setting up the forgery or want of authority<sup>16</sup>, but this does not affect the ratification of an unauthorised signature not amounting to forgery<sup>17</sup>.

1 Bills of Exchange Act 1882 s 3(1); *M'Call v Taylor* (1865) 34 LJCP 365. As to the meaning of 'bill' see PARA 1405. As to the meaning of 'drawer' see PARA 1406.

2 See PARA 1459.

3 As to the meaning of 'issued' see PARA 1406.

4 As to the meaning of 'acceptor' see PARA 1406.

5 See the Bills of Exchange Act 1882 s 20(1); and PARA 1448. As to the meaning of 'indorser' see PARA 1407 note 8.

6 As to the meaning of 'instrument' see PARA 1402 note 1.

7 Bills of Exchange Act 1882 s 20(2). 'Reasonable time' for this purpose is a question of fact: s 20(2). See also PARA 1433 note 11.

8 See the Bills of Exchange Act 1882 s 20(2); *London and South Western Bank v Wentworth* (1880) 5 ExD 96; *Schultz v Astley* (1836) 2 Bing NC 544; *Awde v Dixon* (1851) 6 Exch 869. As to the holder's authority to fill in the name of the addressee see PARA 1449.

9 As to the meaning of 'maker' see PARA 1406.

10 *Taylor v Dobbins* (1720) 1 Stra 399. But the intention to use the name as a signature must appear.

11 *Geary v Physic* (1826) 5 B & C 234.

12 *George v Surrey* (1830) Mood & M 516.

13 As to the meaning of 'note' see PARA 1405.

14 As to the meaning of 'person' see PARA 1401 note 4.

15 As to discharges see PARA 1550 et seq.

16 Bills of Exchange Act 1882 ss 24, 89. As to the effect of forgery on bills of exchange see PARA 1503.

17 Bills of Exchange Act 1882 s 24 proviso, s 89.

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## 1426. Certainty as to drawee.

The drawee<sup>1</sup> must be named or otherwise indicated in a bill with reasonable certainty<sup>2</sup>, for it is clear that a holder<sup>3</sup> must know to whom he has to present the bill, whether for acceptance or for payment<sup>4</sup>.

A bill may be addressed to two or more drawees, whether they are partners or not, but an order addressed to two drawees in the alternative<sup>5</sup> or to two or more drawees in succession is not a bill of exchange<sup>6</sup>, because, in the interests of certainty, there cannot be a series of acceptors<sup>7</sup>.

1 As to the meaning of 'drawee' see PARA 1406.

2 Bills of Exchange Act 1882 s 6(1). As to the meaning of 'bill' see PARA 1405. This requisite is naturally complied with by naming the drawee precisely; but a bill expressed to be payable 'at \_\_\_\_\_', if accepted by the person who lives there, is a good bill (*Gray v Milner* (1819) 8 Taunt 739), and a bill addressed 'at Messrs \_\_\_\_\_' is a bill drawn on the firm of that name: *Shuttleworth v Stephens* (1808) 1 Camp 407. See also *Mason v Lack* (1929) 140 LT 696. In *Haseldine v Winstanley* [1936] 2 KB 101, [1936] 1 All ER 137, it was held that where an instrument not bearing the name of a drawee had been accepted, the acceptor's name might be filled in as drawee by virtue of the Bills of Exchange Act 1882 s 21. As to s 21 see PARAS 1441-1445.

3 As to the meaning of 'holder' see PARA 1407.

4 As to presentment for acceptance see PARA 1509 et seq. As to presentment for payment see PARA 1516 et seq.

5 An apparent exception to this is the 'referee in case of need', but his functions are distinct from those of the drawee: see PARA 1409. In the case of a note, too, the parties who draw the note may be both jointly and severally liable on it; see PARA 1427.

6 Bills of Exchange Act 1882 s 6(2).

7 *Jackson v Hudson* (1810) 2 Camp 447 at 448 per Lord Ellenborough CJ. See also *Re Barnard, Edwards v Barnard* (1886) 32 ChD 447, CA. As to the meaning of 'acceptor' see PARA 1406.

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## 1427. Joint and several makers of a note.

A note<sup>1</sup> may be made by two or more makers<sup>2</sup>, and they may be liable on it jointly or jointly and severally according to its tenor<sup>3</sup>, but where there are two or more makers they cannot be liable in the alternative<sup>4</sup>. Where a note runs, 'I promise to pay', etc, and is signed by two or more persons<sup>5</sup>, it is deemed to be their joint and several note<sup>6</sup>; but if it runs, 'We promise to pay', etc, then it is their joint note only.

After a note is once issued<sup>7</sup> the name of a new maker cannot be added without invalidating the note<sup>8</sup>.

1 As to the meaning of 'note' see PARA 1405.

2 As to the meaning of 'maker' see PARA 1406.

3 Bills of Exchange Act 1882 s 85(1). See *Re Jeffery, ex p Honey* (1871) 7 Ch App 178.

4 *Ferris v Bond* (1821) 4 B & Ald 679.

5 As to the meaning of 'person' see PARA 1401 note 4.

6 Bills of Exchange Act 1882 s 85(2); but where the makers are partners, and it is signed by one of them for the firm, there is no separate right of action against that partner: see *Re Clarke, ex p Buckley* (1845) 14 M & W 469; and PARA 1467.

7 As to the meaning of 'issue' see PARA 1406.

8 *Gardner v Walsh* (1855) 5 E & B 83; *Flanagan v National Bank Ltd* [1939] IR 352.

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## **(vi) Classification of Instruments**

### **A. BEARER AND ORDER BILLS, ETC**

#### **1428. Meaning and effect.**

An instrument<sup>1</sup> may be made payable: (1) to bearer<sup>2</sup>; or (2) to a specified person<sup>3</sup> or to his order<sup>4</sup>.

An instrument is payable to bearer which is simply so expressed, or on which the only or last indorsement<sup>5</sup> is an indorsement in blank<sup>6</sup>.

An instrument is payable to order which is payable to, or to the order of, a specified person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable<sup>7</sup>.

Where an instrument is made payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option<sup>8</sup>.

Where an instrument is not payable to bearer, the payee must be named or otherwise indicated with reasonable certainty<sup>9</sup>, for in no other way can the drawee<sup>10</sup> of a bill<sup>11</sup>, if he accepts it, know to whom he may properly pay it, so as to discharge himself from all further liability<sup>12</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the meaning of 'bearer' see PARA 1407.

3 As to the meaning of 'person' see PARA 1401 note 4.

4 Bills of Exchange Act 1882 ss 3(1), 73, 83(1).

5 As to the meaning of 'indorsement' see PARA 1407.

6 Bills of Exchange Act 1882 s 8(3); and see PARA 1492.

7 Bills of Exchange Act 1882 s 8(4). As to restrictions on negotiability see PARA 1440. As to transfer generally see PARA 1489 et seq.

8 Bills of Exchange Act 1882 s 8(5). So, too, when a bill is made payable 'to order of X' and the word 'order' is struck out, the acceptor inserting over his acceptance the words 'in favour of drawer only', the character of the instrument is not altered, and the drawer may indorse the bill to another party as if no alteration had been made. By a majority of three to two the House of Lords held that the acceptance was general and not qualified, and the bill negotiable: *Meyer & Co v Decroix, Verley et Cie* [1891] AC 520, HL. As to general and qualified acceptance see PARAS 1462-1463. As to material alterations see PARA 1560.

9 Bills of Exchange Act 1882 s 7(1).

10 As to the meaning of 'drawee' see PARA 1406.

11 As to the meaning of 'bill' see PARA 1405.

12 As to discharges generally see PARA 1550 et seq.

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### **1429. No payee named.**

An instrument<sup>1</sup> drawn in favour of 'cash or order' is not a bill of exchange<sup>2</sup>. Where the payee's<sup>3</sup> name is not filled in, it is open to any holder for value<sup>4</sup> to write his own name in<sup>5</sup> and sue on the instrument; but if his right to do so is contested, he must be prepared to prove that he was not acting outside the scope of his authority<sup>6</sup>. In the hands of any subsequent holder in due course<sup>7</sup> the instrument is valid and effectual for all purposes<sup>8</sup>.

Where a bill is in the form 'Pay to \_\_\_\_\_ order', and is indorsed in that form by the drawer<sup>9</sup>, the bill is equivalent to one drawn 'Pay to my order', and is a good bill<sup>10</sup>. Where a bill is in the form 'Pay to \_\_\_\_\_ or order', and is accepted or indorsed while in that state, the effect is doubtful<sup>11</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 *North and South Insurance Corpn v National Provincial Bank Ltd* [1936] 1 KB 328; *Cole v Milsome* [1951] 1 All ER 311. As to the meaning of 'bill of exchange' see PARA 1405. Similarly an instrument drawn in favour of 'wages' or 'office' or some impersonal account is not a bill of exchange: *North and South Insurance Corpn v National Provincial Bank Ltd* above at 336 per Branson J; *Orbit Mining and Trading Co Ltd v Westminster Bank Ltd* [1963] 1 QB 794, [1962] 3 All ER 565, CA, approving the cases cited above.

3 As to the meaning of 'payee' see PARA 1406.

4 As to the meaning of 'holder for value' see PARA 1407.

5 See the Bills of Exchange Act 1882 s 20(1); and PARA 1448. See also *Crutchley v Clarence* (1813) 2 M & S 90; and see *Atwood v Griffin* (1826) 2 C & P 368; *Chamberlain v Young* [1893] 2 QB 206 at 210, CA, per Bowen LJ.

6 See the Bills of Exchange Act 1882 s 20(2); and PARA 1425. See also *Crutchly v Mann* (1814) 5 Taunt 529; and PARAS 1449-1450.

7 As to the meaning of 'holder in due course' see PARA 1407.

8 See the Bills of Exchange Act 1882 s 20(2); and PARA 1425.

9 As to the meaning of 'drawer' see PARA 1406.

10 *Chamberlain v Young* [1893] 2 QB 206, CA; and see PARA 1408 text to note 10. Where the drawer drew a bill, 'Pay to order', and it was accepted by the drawee and indorsed by the drawer to the plaintiff without the payee's name being filled in, it was held to be the equivalent of a bill payable 'to my order'.

11 *Chamberlain v Young* [1893] 2 QB 206 at 210, CA, per Bowen LJ. See also *Wookey v Pole* (1820) 4 B & Ald 1; contra *R v Randall* (1811) Russ & Ry 195.

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### **1430. Payee by name or description.**

Where the payee<sup>1</sup> is named incorrectly, or where his name is misspelt, the instrument<sup>2</sup> is not invalidated, the payee being permitted to indorse the instrument as he was described, adding, if he thinks fit, his proper signature<sup>3</sup>.

It is sufficient that the payee should be indicated without being actually named if the indication is reasonably precise<sup>4</sup>.

Where there are two persons of the same name who are possible payees, the presumption will be that the one indorsing the instrument was the person intended<sup>5</sup>.

An instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees<sup>6</sup>.

An instrument may also be made payable to the holder of an office for the time being<sup>7</sup>.

1 As to the meaning of 'payee' see PARA 1406.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 Bills of Exchange Act 1882 s 32(4); and see PARA 1491. See *Willis v Barrett* (1816) 2 Stark 29.

4 *Cowie v Stirling* (1856) 6 E & B 333. Cf *Soares v Glyn* (1845) 8 QB 24.

5 *Stebbing v Spicer* (1849) 8 CB 827. But, this apart, it has been held that where father and son have the same name the payee will be presumed to be the father: *Sweeting v Fowler* (1815) 1 Stark 106.

6 Bills of Exchange Act 1882 s 7(2).

7 Bills of Exchange Act 1882 s 7(2).

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### **1431. Fictitious or non-existing payee.**

Where an instrument<sup>1</sup> is made payable to a fictitious or non-existing person<sup>2</sup>, it may be treated as payable to bearer<sup>3</sup>.

The words 'fictitious or non-existing person' have given occasion for much difference of opinion. Even now the meaning of 'non-existing' is not clear, but it would appear to mean a person who does not exist at the time the instrument is drawn, whether he ever existed previously or not<sup>4</sup>.

The meaning of 'fictitious' has been elucidated by a series of cases, the effect of which is that<sup>5</sup> whenever the name inserted as that of the payee<sup>6</sup> is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person or of one who has no existence<sup>7</sup>.

The meaning here placed upon 'fictitious' may be illustrated by the analogy of the phrases 'a fictitious indorsement' or 'a fictitious entry', by which it is clearly intended to imply not that the indorsement<sup>8</sup> or entry did not exist, but that they were brought into existence entirely for the purpose of deception<sup>9</sup>.

But where an instrument is made payable to a person known by the drawer<sup>10</sup> to be an existing person and intended by the drawer to be the payee, such a person is not to be deemed fictitious, even although the signature of the drawer has been obtained by fraud<sup>11</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the meaning of 'person' see PARA 1401 note 4.

3 Bills of Exchange Act 1882 s 7(3). As to the meaning of 'bearer' see PARA 1407. As to instruments payable to bearer see PARA 1428.

4 Where a firm has been induced by one of its employees by means of fraudulent vouchers to sign cheques payable to one who was in fact a non-existing person, and the employee has cashed them for his own benefit, the firm cannot recover the value of the cheques from the banker who cashed them: *Clutton v Attenborough & Son* [1897] AC 90, HL. Quaere, however, whether the result would have been the same if the payee had been 'fictitious' instead of non-existing: at 93-94 per Lord Halsbury LC, commented on in *Vinden v Hughes* [1905] 1 KB 795 at 800 per Warrington J. See also *Ashpitel v Bryan* (1864) 5 B & S 723; *Town and County Advance Co Ltd v Provincial Bank of Ireland Ltd* [1917] 2 IR 421.

5 *Bank of England v Vagliano Bros* [1891] AC 107, HL (in this case one Glyka, the clerk of Messrs Vagliano Brothers, had perpetrated a series of frauds by inducing his employers to accept bills which he had drawn himself, and in which he had fraudulently inserted as the drawers and payees the names of different firms with which his employers were accustomed to transact business; he then forged the indorsements of the payees, and obtained cash for himself from the bankers). Cf *Clutton v Attenborough & Son* [1897] AC 90, HL.

6 As to the meaning of 'payee' see PARA 1406.

7 *Bank of England v Vagliano Bros* [1891] AC 107 at 153, HL, per Lord Herschell.

8 As to the meaning of 'indorsement' see PARA 1407.

9 *Bank of England v Vagliano Bros* [1891] AC 107 at 152-153, HL, per Lord Herschell; and see *Stone v Freeland* (1769) 1 Hy BI 316n.

10 As to the meaning of 'drawer' see PARA 1406.

11 *Vinden v Hughes* [1905] 1 KB 795 (where a clerk in the employ of plaintiffs, who were market salesmen, being in the habit of writing out cheques for the plaintiffs to sign payable to persons with whom they did business, obtained the signatures of the plaintiffs to a series of cheques payable to such persons, and, forging the indorsements, obtained cash from the defendant, a friend, who took them honestly and paid them through his bank: nevertheless the plaintiffs were held entitled to recover the amount of their loss from the defendant). See also *North and South Wales Bank v Macbeth* [1908] AC 137, HL; *Town and County Advance Co Ltd v Provincial Bank of Ireland Ltd* [1917] 2 IR 421; *Goldman v Cox* (1924) 40 TLR 744, CA. The distinction between the cases cited in this note and *Bank of England v Vagliano Bros* [1891] AC 107, HL, is that the last mentioned was not a case in which the drawer intended the payee to receive the proceeds of the bill; see per Lord Loreburn LC in *North and South Wales Bank v Macbeth* above at 140.



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## ***B. INLAND AND FOREIGN BILLS AND NOTES***

### **1432. Definition.**

A bill of exchange<sup>1</sup> may be either an inland or a foreign bill<sup>2</sup>. An inland bill is a bill which is, or upon the face of it purports to be, (1) both drawn and payable within the British Islands<sup>3</sup>; or (2) drawn within the British Islands upon some person<sup>4</sup> resident therein. Any other bill is a foreign bill<sup>5</sup>. However, unless the contrary appears on the face of the bill, the holder<sup>6</sup> may treat it as an inland bill<sup>7</sup>.

A note<sup>8</sup> which is, or on the face of it purports to be, both made and payable within the British Islands, is an inland note. Any other note is a foreign note<sup>9</sup>.

1 As to the meaning of 'bill of exchange' see PARA 1405.

2 Bills of Exchange Act 1882 s 4.

3 For the purposes of the Bills of Exchange Act 1882, 'British Islands' means any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty: s 4(1). In this context, 'British Islands' is construed to exclude the Republic of Ireland: see the Irish Free State (Consequential Adaptation of Enactments) Order 1923, SR & O 1923/405, made under the Irish Free State (Consequential Provisions) Act 1922 (Session 2) s 6. As to the meanings of 'United Kingdom' and 'Great Britain' see PARA 2 note 3.

4 As to the meaning of 'person' see PARA 1401 note 4.

5 Bills of Exchange Act 1882 s 4(1). In the case of foreign bills, where there is conflict between British and foreign laws, the statute provides rules for resolution: see s 72; and PARA 1589 et seq.

6 As to the meaning of 'holder' see PARA 1407.

7 Bills of Exchange Act 1882 s 4(2).

8 As to the meaning of 'note' see PARA 1405.

9 Bills of Exchange Act 1882 s 83(4).

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## ***C. SIGHT AND TIME BILLS, ETC***

### **1433. Payable on demand, at sight or on presentation.**

Bills and notes<sup>1</sup> are payable either on demand or at a fixed or determinable future time<sup>2</sup>. Cheques are always payable on demand<sup>3</sup>.

Bills and notes are payable on demand (1) when they are expressed to be payable on demand or at sight<sup>4</sup> or on presentation<sup>5</sup>; or (2) when no time for payment is expressed<sup>6</sup>. Such a bill or note may be presented for payment at any time in the option of the holder<sup>7</sup>, but it must be within a reasonable time after its issue<sup>8</sup> or making in order to render the drawer<sup>9</sup> liable<sup>10</sup> and within a reasonable time<sup>11</sup> after its indorsement<sup>12</sup> to render the indorser<sup>13</sup> liable<sup>14</sup>.

An instrument<sup>15</sup> payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time<sup>16</sup>.

An instrument payable otherwise than on demand which has been accepted or indorsed when overdue is deemed, as regards the acceptor<sup>17</sup> or indorser concerned, to be an instrument payable on demand<sup>18</sup>.

1 As to the meanings of 'bill' and 'note' see PARA 1405.

2 Bills of Exchange Act 1882 ss 3(1), 83(1).

3 Bills of Exchange Act 1882 s 73. As to the meaning of 'cheque' see PARA 1405.

4 As to the meanings of 'bill payable after sight' and 'note payable after sight' see PARA 1435.

5 Bills of Exchange Act 1882 ss 10(1)(a), 89. As to presentment for payment see PARA 1516 et seq.

6 Bills of Exchange Act 1882 ss 10(1)(b), 89. In *Korea Exchange Bank v Debenhams (Central Buying) Ltd* [1979] 1 Lloyd's Rep 548 at 550, CA, the Court of Appeal left open the question whether a bill which failed to comply with the Bills of Exchange Act 1882 s 11(1) might still be a bill payable on demand by virtue of s 10(1)(b).

7 As to the meaning of 'holder' see PARA 1407.

8 As to the meaning of 'issue' see PARA 1406.

9 As to the meaning of 'drawer' see PARA 1406.

10 Bills of Exchange Act 1882 ss 45(2), 89. See PARA 1518.

11 What is a reasonable time is to be determined by having regard to the nature of the instrument, the usage of trade with regard to similar instruments, and the facts of the particular case: Bills of Exchange Act 1882 ss 45(2), 86(2). See PARA 1518.

12 As to the meaning of 'indorsement' see PARA 1407.

13 As to the meaning of 'indorser' see PARA 1407 note 8.

14 Bills of Exchange Act 1882 ss 45(2), 86(1); see PARA 1518. Cheques also should be presented within a reasonable time, but as to this see PARA 1519; and PARA 853.

15 As to the meaning of 'instrument' see PARA 1402 note 1.

16 Bills of Exchange Act 1882 s 36(3). What constitutes an unreasonable length of time for this purpose is a question of fact in each case: s 36(3). As to overdue promissory notes payable on demand see PARA 1518.

17 As to the meaning of 'acceptor' see PARA 1406.

18 Bills of Exchange Act 1882 ss 10(2), 89.

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### 1434. Time bills.

An instrument<sup>1</sup> is payable at a determinable future time when it is expressed to be payable: (1) at a fixed period after date<sup>2</sup> or sight<sup>3</sup>; (2) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain<sup>4</sup>. It cannot be made payable simply after date or after sight, for that would involve uncertainty.

When the term 'month' is used it means a calendar month<sup>5</sup>. The period for which the bill<sup>6</sup> has to run is called the 'usance'.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the case of an instrument expressed to be payable at a fixed period after date but issued undated see PARA 1415.

3 Bills of Exchange Act 1882 ss 11(1), 89. As to the meanings of 'bill payable after sight' and 'note payable after sight' see PARA 1435.

4 Bills of Exchange Act 1882 ss 11(2), 89.

5 See the Bills of Exchange Act 1882 s 14(4); and PARA 1439.

6 As to the meaning of 'bill' see PARA 1405.

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### 1435. Fixed period after sight.

Where a bill<sup>1</sup> is payable at a fixed period after sight the time is to be calculated from the date of the acceptance<sup>2</sup> if the bill is accepted, and from the date of noting or protest<sup>3</sup> if the bill is noted or protested for non-acceptance or for non-delivery<sup>4</sup>.

In the case of a note<sup>5</sup> the phrase 'after sight' means after exhibition thereof to the maker<sup>6</sup> for the purpose of founding a claim for payment<sup>7</sup>. A note payable at a certain period after sight is payable at that period after presentment for sight<sup>8</sup>. A bill payable so many days after sight imposes different legal consequences from a bill payable so many days after acceptance; neither in its words nor in its potential effect is the latter form of bill expressed to be payable at a fixed period after sight<sup>9</sup>.

In the case of a bill payable after sight which has been accepted for honour, the date of its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour<sup>10</sup>.

1 As to the meaning of 'bill' see PARA 1405.

2 As to the meaning of 'acceptance' see PARA 1406.

3 As to noting and protest see PARA 1537 et seq.

4 Bills of Exchange Act 1882 s 14(3); *Campbell v French* (1795) 6 Term Rep 200.

5 As to the meaning of 'note' see PARA 1405.

6 As to the meaning of 'maker' see PARA 1406.

7 *Holmes v Kerrison* (1810) 2 Taunt 323; *Sturdy v Henderson* (1821) 4 B & Ald 592; *Dixon v Nuttall* (1834) 1 Cr M & R 307. A note is not accepted (see the Bills of Exchange Act 1882 s 89(3); and PARA 1509) and thus differs from a bill of exchange.

8 *Sturdy v Henderson* (1821) 4 B & Ald 592.

9 *Korea Exchange Bank v Debenhams (Central Buying) Ltd* [1979] 1 Lloyd's Rep 548 at 553, CA, per Megaw LJ (bill drawn 'At 90 days D/A ... pay' held not to be payable at a fixed or determinable future time).

10 Bills of Exchange Act 1882 s 65(5); *Williams v Germaine* (1827) 7 B & C 468. As to acceptance for honour see PARA 1566 et seq.

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### **1436. Events from which time may be reckoned.**

The specified event on, or at a fixed period after, the occurrence of which the instrument<sup>1</sup> is to be payable may be at any distance of time so long as it is an event which is certain to happen<sup>2</sup>.

The instrument may also be made payable at or at a fixed period after 'any feast, civil or religious', or at any 'fixed holiday', or at a fair, even if the precise date of the fair is not fixed at the time the instrument is drawn<sup>3</sup>, or 'from shipment' or 'from first presentation of documents'<sup>4</sup>.

The specified event may also be one of a public nature<sup>5</sup>, which for that very reason is held certain to take place.

However, the instrument must not be expressed to be payable on a contingency<sup>6</sup>, and the happening of the event does not cure the defect<sup>7</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Bills of Exchange Act 1882 ss 11(2), 89. Thus a note made payable six weeks after the death of the father of the maker is a good note: *Colehan v Cooke* (1742) Willes 393. So too is one made payable to one then a minor on his coming of age (*Goss v Nelson* (1757) 1 Burr 226), and one payable one year after notice (*Clayton v Gosling* (1826) 5 B & C 360), or two months after demand in writing (*Price v Taylor* (1860) 5 H & N 540).

3 See *Colehan v Cooke* (1742) Willes 393 at 399.

4 *Novaknit Hellas SA v Kumar Bros International Ltd* [1998] Lloyd's Rep Bank 287, CA.

5 As on the paying off of a ship of Her Majesty's Navy (*Andrews v Franklin* (1717) 1 Stra 24; *Evans v Underwood* (1749) 1 Wils 262), or on the receipt of prize money (*R v Mackintosh* (1800) 2 East PC 942 at 956). But the arrival of a ship at its destination is only a contingency: *Palmer v Pratt* (1824) 2 Bing 185.

6 Bills of Exchange Act 1882 ss 11, 89. Thus a note payable at \_\_\_\_\_ days after the marriage of the maker is not valid (*Beardesly v Baldwin* (1741) 2 Stra 1151; *Pearson v Garrett* (1693) 4 Mod Rep 242); nor is one to pay \_\_\_\_\_ on the death of a third party 'provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it' (*Roberts v Peake* (1757) 1 Burr 323; see *Leeds v Lancashire* (1809) 2 Camp 205); nor is one to pay 90 days after sight or when realised (*Alexander v Thomas* (1851) 16 QB 333); nor, again, a note payable on or before a given date: *Williamson v Rider* [1963] 1 QB 89, [1962] 2 All ER 268, CA; *Claydon v Bradley* [1987] 1 All ER 522, [1987] 1 WLR 521, CA. The dissenting view of Ormerod LJ in *Williamson v Rider* above was preferred by the court in *John Burrows Ltd v Subsurface Surveys Ltd* [1968] SCR 607, 68 DLR (2d)

354, Can SC, where a note was held to be unconditional which provided that 'the maker may pay on account of principal from time to time the whole or any portion thereof upon giving thirty (30) days' notice', and also in *Creative Press Ltd v Harman* [1973] IR 313; and see *Palmer v Pratt* (1824) 2 Bing 185, cited in note 5.

7 Bills of Exchange Act 1882 ss 11, 89; *Hill v Halford* (1801) 2 Bos & P 413.

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### **1437. Calculation of time of payment.**

Where a bill<sup>1</sup> is not payable on demand, it is due and payable in all cases on the last day of the time of payment as fixed by the bill or, if that is a non-business day, on the succeeding business day<sup>2</sup>.

Where an instrument is payable at a fixed period after date<sup>3</sup>, after sight<sup>4</sup>, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment<sup>5</sup>.

Where the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded<sup>6</sup>. Non-business days for the purposes of the Bills of Exchange Act 1882 are: (1) Saturday, Sunday, Good Friday and Christmas Day<sup>7</sup>; (2) a bank holiday<sup>8</sup> under the Banking and Financial Dealings Act 1971<sup>9</sup>; (3) a day appointed by royal proclamation as a public fast or thanksgiving day<sup>10</sup>; and (4) a day declared by an order under the Banking and Financial Dealings Act 1971<sup>11</sup> to be a non-business day<sup>12</sup>. Any other day is a business day<sup>13</sup>.

1 As to the meaning of 'bill' see PARA 1405.

2 Bills of Exchange Act 1882 s 14(1) (substituted by the Banking and Financial Dealings Act 1971 s 3(2)).

3 As to the meanings of 'bill payable after date' and 'note payable after date' see PARA 1434.

4 As to the meanings of 'bill payable after sight' and 'note payable after sight' see PARA 1435.

5 Bills of Exchange Act 1882 s 14(2). See *Campbell v French* (1795) 6 Term Rep 200.

6 Bills of Exchange Act 1882 s 92.

7 Bills of Exchange Act 1882 s 92(a) (amended by the Banking and Financial Dealings Act 1971 s 3(1)).

8 In England and Wales bank holidays are on Easter Monday, the last Mondays in May and August, 26 December if not a Sunday and 27 December if 25 or 26 December is a Sunday: Banking and Financial Dealings Act 1971 s 1(1), Sch 1. By proclamations made under s 1(3), New Year's Day (or, as appropriate, 2 January) has been declared each year since 1974 to be a bank holiday in England, Wales and Northern Ireland; and since 1978 the first Monday in May has been declared a bank holiday. For appointed dates in Scotland and Northern Ireland see Sch 1.

9 Bills of Exchange Act 1882 s 92(b) (amended by the Banking and Financial Dealings Act 1971 s 4(4)).

10 Bills of Exchange Act 1882 s 92(c).

11 Ie under the Banking and Financial Dealings Act 1971 s 2(1): see PARA 853.

12 Bills of Exchange Act 1882 s 92(d) (added by the Banking and Financial Dealings Act 1971 s 4(4)).

13 Bills of Exchange Act 1882 s 92.

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#### **1438. Due date.**

An instrument<sup>1</sup> must not be presented for payment until it is due<sup>2</sup>. Any earlier presentment is invalid<sup>3</sup>. If it is presented on the due date, and payment is refused, the instrument is dishonoured, and the holder<sup>4</sup> is entitled to give notice of dishonour, but no right of action accrues to the holder until the following day, for the acceptor<sup>5</sup> may, in spite of refusal in the first instance, make a valid payment at any time in the course of the day and if he does so the notice of dishonour becomes void<sup>6</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 See PARA 1516 et seq.

3 *Wiffen v Roberts* (1795) 1 Esp 261 at 262. As to unavoidable delay in presentation for payment see PARA 1518.

4 As to the meaning of 'holder' see PARA 1407.

5 As to the meaning of 'acceptor' see PARA 1406.

6 *Kennedy v Thomas* [1894] 2 QB 759, CA; and see *Cocks v Masterman* (1829) 9 B & C 902; but see *Eaglehill Ltd v J Needham Builders Ltd* [1973] AC 992, [1972] 3 All ER 895, HL (where the acceptor was known to be in liquidation and it was uncertain whether the dishonour or the notice came first, the presumption was that the dishonour was first in point of time and the notice accordingly valid). As to notice of dishonour see PARA 1524 et seq. As to dishonour by non-payment see PARA 1525.

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#### **1439. Calculation of period of one month.**

As the term 'month' means a calendar month<sup>1</sup>, an instrument drawn or made on the thirty-first of any month succeeded by a month with fewer days and payable one month after date<sup>2</sup> is nominally payable on the last day of the succeeding month, so that, for example, bills<sup>3</sup> payable one month after date and drawn on 29, 30 and 31 January are all nominally payable on 28 February, or, in the case of a leap year, 29 February.

1 Bills of Exchange Act 1882 s 14(4).

2 As to the meaning of 'bill payable after date' and 'note payable after date' see PARA 1434.

3 As to the meaning of 'bill' see PARA 1405.

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## **(vii) Delivery**

### **A. IN GENERAL**

#### **1440. Restriction on negotiability.**

Bills of exchange or promissory notes<sup>1</sup> are always prima facie negotiable<sup>2</sup>. They may, however, contain words prohibiting transfer or indicating an intention that they should not be transferable<sup>3</sup>, and in such case they are only valid as between the parties<sup>4</sup>. An instrument<sup>5</sup> may also contain an express stipulation on the part of the drawer<sup>6</sup> or maker<sup>7</sup> or any indorser<sup>8</sup> either: (1) negating or limiting his own liability to the holder<sup>9</sup>; or (2) waiving as regards himself some or all of the holder's duties<sup>10</sup>. Thus any party may sign the instrument adding words such as 'sans recours' or 'without recourse to me'<sup>11</sup>, or words such as 'notice of dishonour waived'.

The negotiability of a cheque<sup>12</sup> is restricted by crossing it 'not negotiable'<sup>13</sup>, and a cheque crossed 'account payee' or 'a/c payee', with or without the word 'only', is not transferable (and, therefore, not negotiable)<sup>14</sup>.

1 As to the meanings of 'bill of exchange' and 'promissory note' see PARA 1405.

2 See PARA 1428. As to cheques see PARAS 1410 et seq, 1499 et seq.

3 See *National Bank v Silke* [1891] 1 QB 435, CA (where the mention of a particular account to be credited or debited was held not to be such an indication). A bill crossed 'not negotiable' and drawn 'pay to the order of X only' has been held to prohibit transfer and to limit payment to an agent of X for the purposes of X: *Hibernian Bank Ltd v Gysin and Hanson* [1939] 1 KB 483, [1939] 1 All ER 166, CA. As to the principles of negotiability see PARA 1401. As to transfer generally see PARA 1489 et seq.

4 Bills of Exchange Act 1882 ss 8(1), 89. As to cheques see PARA 1410.

5 As to the meaning of 'instrument' see PARA 1402 note 1.

6 As to the meaning of 'drawer' see PARA 1406.

7 As to the meaning of 'maker' see PARA 1406.

8 As to the meaning of 'indorser' see PARA 1407 note 8.

9 Bills of Exchange Act 1882 ss 16(1), 89. As to the meaning of 'holder' see PARA 1407.

10 Bills of Exchange Act 1882 ss 16(2), 89. As to the holder's duties see PARA 1509 et seq.

11 *Goupy v Harden* (1816) 7 Taunt 159 at 163 per Dallas J; cf *Castrique v Buttigieg* (1856) 10 Moo PCC 94. A note containing the following stipulation: 'No time given to, or security taken from, or composition or arrangement entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party', is not invalid: *Kirkwood v Carroll* [1903] 1 KB 531, CA, overruling *Kirkwood v Smith* [1896] 1 QB 582, DC, and approving *Yates v Evans* (1892) 61 LJQB 446, DC.

12 As to the meaning of 'cheque' see PARA 1405.

13 See PARA 1499.

14 See PARA 1500.

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#### **1441. Delivery essential.**

Delivery<sup>1</sup> is essential to the issue of an instrument<sup>2</sup>, for by issue is meant the first delivery of the instrument complete in form to a person<sup>3</sup> who takes it as holder<sup>4</sup>. It is equally essential to the negotiation<sup>5</sup> of an instrument, for an instrument payable to bearer<sup>6</sup> must be transferred by delivery<sup>7</sup>, and, in the case of every other instrument, indorsement<sup>8</sup> is incomplete without it<sup>9</sup>. In fact, every contract on an instrument, whether it be the drawer's<sup>10</sup>, the maker's<sup>11</sup>, the acceptor's<sup>12</sup>, or an indorser's<sup>13</sup>, is incomplete and revocable until delivery is made in order to give effect to it<sup>14</sup>. An indorsement may pass title even though it is irregular<sup>15</sup>.

1 As to the meaning of 'delivery' see PARA 1406.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 As to the meaning of 'person' see PARA 1401 note 4.

4 Bills of Exchange Act 1882 ss 2, 21(1). As to the meaning of 'issue' see PARA 1406. As to the meaning of 'holder' see PARA 1407. A holder includes a payee, indorsee in possession, and bearer: s 2; *Re Hayward, ex p Hayward* (1871) 6 Ch App 546 at 548 per James LJ.

5 As to the meaning of 'negotiation' see PARA 1407.

6 As to the meaning of 'bearer' see PARA 1407. As to instruments payable to bearer see PARA 1428.

7 See the Bills of Exchange Act 1882 s 31(1), (2); and PARA 1489.

8 As to the meaning of 'indorsement' see PARA 1407.

9 See the Bills of Exchange Act 1882 s 31(3); and PARA 1489. As to the meaning of 'indorsement' see PARA 1407; *Marston v Allen* (1841) 8 M & W 494; *Abrey v Crux* (1869) LR 5 CP 37 at 42; and see note 14.

10 As to the meaning of 'drawer' see PARA 1406.

11 As to the meaning of 'maker' see PARA 1406.

12 As to the meaning of 'acceptor' see PARA 1406.

13 As to the meaning of 'indorser' see PARA 1407 note 8.

14 Bills of Exchange Act 1882 ss 21(1), 84. Cf *Re Deveze, ex p Cote* (1873) 9 Ch App 27 at 31 per Mellish LJ: 'In order to make the property in the bills pass, it is not sufficient to indorse them; they must be delivered to the indorsee or to the agent of the indorsee. If the indorser delivers them to his own agent, he can recover them; if to the agent of the indorsee, he cannot recover them'. See also *Cox v Troy* (1822) 5 B & Ald 474; *Brind v Hampshire* (1836) 1 M & W 365; *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526.

15 *Arab Bank Ltd v Ross* [1952] 2 QB 216, [1952] 1 All ER 709, CA.

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### 1442. What amounts to delivery.

'Delivery' means transfer of possession, actual or constructive, from one person to another<sup>1</sup>. However, where an acceptance<sup>2</sup> is written<sup>3</sup> on a bill<sup>4</sup>, and the drawee<sup>5</sup> gives notice to or according to the direction of the person entitled to the bill that he has accepted it, the acceptor's<sup>6</sup> contract then becomes complete and irrevocable<sup>7</sup>. Where the drawee has accepted a bill, but given no intimation of acceptance to the drawer<sup>8</sup>, he is entitled to revoke his act<sup>9</sup>, and this is so even where a bill has been deposited with the drawee for acceptance, and the holder<sup>10</sup> on calling for the bill is told that the bill has been mislaid and is requested to call again on the following day<sup>11</sup>.

So, too, a note<sup>12</sup> is incomplete and revocable until delivery to the payee<sup>13</sup>, and such a note cannot be issued<sup>14</sup> to the payee by an executor after the maker's<sup>15</sup> decease<sup>16</sup>.

1 Bills of Exchange Act 1882 s 2; and see PARA 1406. As to transfer generally see PARA 1489 et seq. As to the meaning of 'person' see PARA 1401 note 4.

2 As to the meaning of 'acceptance' see PARA 1406.

3 As to the meaning of 'writing' see PARA 1405 note 2.

4 As to the meaning of 'bill' see PARA 1405.

5 As to the meaning of 'drawee' see PARA 1406.

6 As to the meaning of 'acceptor' see PARA 1406.

7 Bills of Exchange Act 1882 s 21(1) proviso.

8 As to the meaning of 'drawer' see PARA 1406.

9 *Cox v Troy* (1822) 5 B & Ald 474.

10 As to the meaning of 'holder' see PARA 1407.

11 *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526.

12 As to the meaning of 'note' see PARA 1405.

13 *Chapman v Cottrell* (1865) 34 LJEx 186. As to the meaning of 'payee' see PARA 1406.

14 As to the meaning of 'issue' see PARA 1406.

15 As to the meaning of 'maker' see PARA 1406.

16 *Bromage v Lloyd* (1847) 1 Exch 32. Where, however, a note is made, and directions are left by the maker that it shall be delivered to the payee after his death, it may perhaps constitute a charge on the maker's estate: *Re Richards, Shenstowe v Brock* (1887) 36 ChD 541. But see *Re Whitaker* (1889) 42 ChD 119 at 125, CA, per Cotton LJ, dissenting from *Re Richards, Shenstowe v Brock* above in so far, if at all, as it lays down the proposition that the payee of a promissory note without any consideration might in equity have a claim by way of debt.

INSTRUMENTS/(1) BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES/(vii) Delivery/A. IN GENERAL/1443. Mode of delivery.

### **1443. Mode of delivery.**

Delivery<sup>1</sup> may be made by post, but where it is so made it is made at the risk of the sender<sup>2</sup>, unless the intended recipient has in some way authorised such means of delivery. When a bill<sup>3</sup> has once been posted, delivery is in English law irrevocable<sup>4</sup>, for a letter, once sent, cannot be reclaimed, but until actually entrusted to a postal operator<sup>5</sup> the property remains in the sender, so that where a letter containing a bill is closed and placed in the letter-box of an office, but stolen therefrom before being posted, the theft is from the sender<sup>6</sup>.

Part delivery does not complete the contract, so that when a note is cut in half, and the sender, having forwarded one half, decides not to send the other, he cannot be compelled to do so<sup>7</sup>.

When delivery has been made by mistake and it is desired to revoke it, this may be done by consent<sup>8</sup>.

1 As to the meaning of 'delivery' see PARA 1406.

2 *Pennington v Crossley* (1897) 13 TLR 513, CA. See *Warwicke v Noakes* (1791) Peake 98.

3 As to the meaning of 'bill' see PARA 1405.

4 *Re Deveze, ex p Cote* (1873) 9 Ch App 27. It is otherwise, however, in a country where the letter can be reclaimed from the postal authorities: *Re Deveze, ex p Cote*.

5 As to the meaning of 'postal operator' see PARA 1510 note 10.

6 *Arnold v Cheque Bank* (1876) 1 CPD 578.

7 *Smith v Mundy* (1860) 29 LJQB 172.

8 *Re Deveze, ex p Cote* (1873) 9 Ch App 27.

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### **1444. Delivery by or to agent.**

As between the immediate parties, and as regards a remote party other than a holder in due course<sup>1</sup>, the delivery<sup>2</sup>, in order to be effectual, must be made either by, or under the authority<sup>3</sup> of, the party drawing, accepting or indorsing, as the case may be<sup>4</sup>.

Delivery made to an agent may afterwards be ratified by the principal even after a claim has been brought in the principal's name<sup>5</sup>.

The effect of delivery of dishonoured cheques<sup>6</sup> by a collecting banker to his customer may depend upon whether the banker retains any rights he may have to the cheques<sup>7</sup>.

1 As to the meaning of 'holder in due course' see PARA 1407.

2 As to the meaning of 'delivery' see PARA 1406.

3 'Authority' here relates to the authority to deliver rather than to any mode of physical transfer that may be prescribed: *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, PC (where, in a case decided under the Jamaican equivalent of the Bills of Exchange Act 1882 s 21(2)(a), an intermediary made a valid delivery of a cheque on behalf of an agent who held the formal authority to deliver).

4 Bills of Exchange Act 1882 s 21(2)(a).

5 *Ancona v Marks* (1862) 31 LJEx 163 (instrument sued on was delivered by one Wright to a firm of solicitors with directions that they should hold it for the plaintiff and sue in his name, and the plaintiff was held entitled to ratify after action brought).

6 As to the meaning of 'cheque' see PARA 1405.

7 *Westminster Bank Ltd v Zang* [1966] AC 182 at 196, [1965] 1 All ER 1023, CA; affd without addressing this point [1966] AC 182 at 211, [1966] 1 All ER 114, HL.

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## **B. CONDITIONAL DELIVERY**

### **1445. Effect of conditional delivery.**

As between immediate parties and as regards a remote party other than a holder in due course<sup>1</sup> delivery<sup>2</sup> may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill<sup>3</sup>. But if a bill is in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed<sup>4</sup>. And in every case where a bill is no longer in the possession of a party who has signed it as drawer<sup>5</sup>, acceptor<sup>6</sup> or indorser<sup>7</sup>, a valid and unconditional delivery by him is presumed until the contrary is proved<sup>8</sup>.

Although a conditional delivery is valid, the condition attaches exclusively to the delivery. It does not affect the rule that a bill must be drawn<sup>9</sup>, and a note<sup>10</sup> made, unconditionally<sup>11</sup>.

1 As to the meaning of 'holder in due course' see PARA 1407.

2 As to the meaning of 'delivery' see PARA 1406.

3 Bills of Exchange Act 1882 s 21(2)(b); *Bell v Lord Ingestre* (1848) 12 QB 317. If the person to whom the instrument is so conditionally delivered misappropriates it, the true owner can recover it from him or a party taking it from him with notice: *Goggerley v Cuthbert* (1806) 2 Bos & PNR 170; *Arnold v Cheque Bank* (1876) 1 CPD 578; *North and South Wales Bank v Macbeth* [1908] AC 137, HL. As to the meaning of 'bill' see PARA 1405.

4 Bills of Exchange Act 1882 s 21(2); see PARA 1488.

5 As to the meaning of 'drawer' see PARA 1406.

6 As to the meaning of 'acceptor' see PARA 1406.

7 As to the meaning of 'indorser' see PARA 1407 note 8.

8 Bills of Exchange Act 1882 s 21(3).

9 *Colehan v Cooke* (1742) Willes 393 at 398.

- 10 As to the meaning of 'note' see PARA 1405.
- 11 As to conditional indorsement see PARA 1493.

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#### **1446. Difference from escrow.**

The delivery<sup>1</sup> of a bill<sup>2</sup> conditionally or for a special purpose is akin to the delivery of a deed in escrow, but there is this difference, that the deed must be delivered to a party outside the contract<sup>3</sup>, whereas the negotiable instrument<sup>4</sup> may be delivered to one of the parties to it<sup>5</sup>.

- 1 As to the meaning of 'delivery' see PARA 1406.
- 2 As to the meaning of 'bill' see PARA 1405.
- 3 *Bell v Lord Ingestre* (1848) 12 QB 317. As to delivery as an escrow see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 34, 37-39.
- 4 As to the meaning of 'negotiable instrument' see PARA 1402.
- 5 Cf *Davis v Jones* (1856) 17 CB 625.

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#### **1447. Evidence of nature of delivery.**

Evidence in writing that is contemporaneous<sup>1</sup> with or even subsequent to the date of the instrument<sup>2</sup> may be adduced, and may control the effect of it if there is consideration for the subsequent agreement<sup>3</sup>. Oral evidence may not be adduced to vary the terms of the instrument<sup>4</sup>, but may be adduced to deny the existence of consideration<sup>5</sup> or to show that an apparently complete contract is not so in fact<sup>6</sup>.

As between the parties there may be an agreement to renew the instrument<sup>7</sup>, but evidence of a parol agreement to such effect is not admissible, though such evidence may be admitted to show that the instrument was only delivered as an escrow, or that it is not to take effect as a contract until some condition is fulfilled<sup>8</sup>.

- 1 *Maillard v Page* (1870) LR 5 Exch 312.
- 2 As to the meaning of 'instrument' see PARA 1402 note 1.
- 3 *McManus v Bark* (1870) LR 5 Exch 65; *Overend, Gurney & Co (Liquidators) v Oriental Financial Corp'n (Liquidators)* (1874) LR 7 HL 348.

4 *Foster v Jolly* (1835) 1 Cr M & R 703; *Abbott v Hendricks* (1840) 1 Man & G 791; *Besant v Cross* (1851) 10 CB 895; *Woodbridge v Spooner* (1819) 3 B & Ald 233; *Stott v Fairlamb* (1883) 53 LJQB 47 at 50, CA, per Bowen LJ; *New London Credit Syndicate Ltd v Neale* [1898] 2 QB 487, CA; *Hitchings and Coulthurst Co v Northern Leather Co of America and Doushness* [1914] 3 KB 907; *Cohn v Boulken* (1920) 36 TLR 767; *Kettle v Dunster and Wakefield* (1927) 138 LT 158. But see also *Elliott v Bax-Ironside* [1925] 2 KB 301, CA, and *Britannia Electric Lamp Works Ltd v D Mandler & Co and Mandler* [1939] 2 KB 129, [1939] 2 All ER 469.

5 *Abbott v Hendricks* (1840) 1 Man & G 791. As to parol evidence of consideration generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 194. As to the parol evidence rule in contract generally see **CONTRACT** vol 9(1) (Reissue) PARA 622.

6 *Lindley v Lacey* (1864) 34 LJCP 7; *New London Credit Syndicate Ltd v Neale* [1898] 2 QB 487, CA. See further, as to parol evidence where there was no intention to make a binding contract, **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 190.

7 *Maillard v Page* (1870) LR 5 Exch 312; *Salmon v Webb and Franklin* (1852) 3 HL Cas 510. This is prima facie for one renewal only: *Innes v Munro* (1847) 1 Exch 473. The application for renewal must be made within reasonable time, but not necessarily before maturity: see PARA 1563.

8 *New London Credit Syndicate v Neale* [1898] 2 QB 487 at 490, CA.

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## **C. BLANK SIGNATURES AND INCOMPLETE INSTRUMENTS**

### **1448. Blank signature.**

The delivery<sup>1</sup> by the signer of a simple signature upon a blank paper in order that the paper may be converted into a bill or note<sup>2</sup> operates as a prima facie authority to fill the paper up as a complete instrument<sup>3</sup> for any amount, using the signature for that of the drawer<sup>4</sup>, acceptor<sup>5</sup>, maker<sup>6</sup> or indorser<sup>7</sup>. A blank acceptance<sup>8</sup> may be converted into a complete instrument after the death of the acceptor, and this is the case even where the party to whom the blank acceptance was delivered also dies, if his administrator inserts his own name as drawer<sup>9</sup>.

1 As to the meaning of 'delivery' see PARA 1406.

2 As to the meanings of 'bill' and 'note' see PARA 1405.

3 As to the meaning of 'instrument' see PARA 1402 note 1.

4 As to the meaning of 'drawer' see PARA 1406.

5 As to the meaning of 'acceptor' see PARA 1406.

6 As to the meaning of 'maker' see PARA 1406.

7 Bills of Exchange Act 1882 ss 20(1), 89 (s 20(1) amended by the Finance Act 1970 Sch 8 Pt V). As to the meaning of 'indorser' see PARA 1407 note 8. See also PARAS 1425, 1429; and *Montague v Perkins* (1853) 22 LJCP 187. For instances of the use of the signature see *Collis v Emett* (1790) 1 Hy BI 313 (drawer); *Montague v Perkins* above; *Schultz v Astley* (1836) 2 Bing NC 544; *London and South Western Bank v Wentworth* (1880) 5 ExD 96 (acceptor); *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA (maker); *Foster v Mackinnon* (1869) LR 4 CP 704 at 712 (indorser).

As to blank acceptances see *Baxendale v Bennett* (1878) 3 QBD 525, CA; *Smith v Prosser* [1907] 2 KB 735, CA; cf *Herdman v Wheeler* [1902] 1 KB 361; and *Ingham v Primrose* (1859) 7 CBNS 82 (bill accepted by A who tore it into two, intending to destroy it, and threw it away. B, in A's presence, recovered it and later pasted it

together and put it into circulation: held, A was liable to a holder without notice). As to estoppel see *Lloyds Bank Ltd v Cooke* above; *Wilson and Meeson v Pickering* [1946] KB 422, [1946] 1 All ER 394, CA (where the cheque was crossed 'not negotiable' and the principle of estoppel was held to be limited to negotiable instruments); *Paine v Bevan and Bevan* (1914) 110 LT 933; and also PARA 1576 note 6. A blank acceptance, although not a bill or note or security for the payment of money, or a writing the value of which exceeds £10 within the Carriers Acts (*Stoessiger v South Eastern Rly Co* (1854) 3 E & B 549; as to limitation of carriers' liability see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 28), is evidence of a debt (*Lawson's Executors v Watson* 1907 SC 1353).

For the effect of the position of signatures on a bill see *Glenie v Bruce Smith* [1908] 1 KB 263, CA; *Re Gooch, ex p Judd* [1921] 2 KB 593, CA. Cf *Jenkins & Sons v Coomber* [1898] 2 QB 168 (where the bill had not been negotiated and the Bills of Exchange Act 1882 s 20 did not apply), and *MT Shaw & Co Ltd v Holland* [1913] 2 KB 15, CA (where the prima facie authority given by the Bills of Exchange Act 1882 s 20 was limited by the circumstances) as explained in *Gerald McDonald & Co v Nash & Co* [1924] AC 625 at 633, HL, per Lord Haldane LC, and at 648 per Lord Sumner (which was applied in *McCall Bros Ltd v Hargreaves* [1932] 2 KB 423); and see *Lombard Banking Ltd v Central Garage and Engineering Co Ltd* [1963] 1 QB 220, [1962] 2 All ER 949.

A bill drawn by the drawers to their order, accepted by the acceptors, indorsed by backers of the bill and delivered to the drawers is an incomplete bill, but the incompleteness can be cured and the indorsers rendered liable to the drawers by the drawers indorsing their names as payees above the backers' indorsement: *Gerald McDonald & Co v Nash & Co* above.

8 As to the meaning of 'acceptance' see PARA 1406.

9 *Carter v White* (1883) 25 ChD 666, CA; *Re Duffy's Estate, Dutch v O'Leary* (1880) 5 LR Ir 92.

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### 1449. Incomplete instrument.

Where a person<sup>1</sup> is in possession of an instrument<sup>2</sup> wanting in any material particular, he has prima facie authority to fill up the omission in any way he thinks fit<sup>3</sup>. But, in order that any such instrument when completed may be enforceable against any person who became a party to it prior to its completion, it must be filled up within a reasonable time<sup>4</sup>, and strictly in accordance with the authority given<sup>5</sup>.

1 As to the meaning of 'person' see PARA 1401 note 4.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 See the Bills of Exchange Act 1882 ss 20(1), 89; and PARA 1448. See the cases cited in PARA 1448 note 7. As to filling in the amounts see *Montague v Perkins* (1853) 22 LJCP 187; *Garrard v Lewis* (1882) 10 QBD 30. As to filling in the date see PARA 1415. See also PARAS 1425, 1429. As to adding the name of the addressee see *Haseldine v Winstanley* [1936] 2 KB 101, [1936] 1 All ER 137; and PARA 1426 note 2.

4 Bills of Exchange Act 1882 ss 20(2), 89. See also PARAS 1425, 1429. The question as to what is a reasonable time is a question of fact in each case: s 20(2). See *Temple v Pullen* (1853) 22 LJEx 151. Where a party gives a blank acceptance and then becomes bankrupt, but the bill is not filled up or negotiated before his discharge, the holder can recover from him as acceptor: *Goldsmid v Hampton* (1858) 5 CBNS 94. The payee of an acceptance uncompleted for more than six years cannot fill up the bill and sue the acceptor on it: *Re Bethell, Bethell v Bethell* (1887) 34 ChD 561.

5 Bills of Exchange Act 1882 ss 20(2), 89; *Watkin v Lamb* (1901) 85 LT 483; *MT Shaw & Co Ltd v Holland* [1913] 2 KB 15, CA; *Re Gooch, ex p Judd* [1921] 2 KB 593, CA; *Gerald McDonald & Co v Nash & Co* [1924] AC 625, HL. See *Awde v Dixon* (1851) 6 Exch 869. See also *Frontier Finance Ltd v Hynes and Niagara Sewing Machine Co, Frontier Finance Ltd v Butka and Niagara Sewing Machine Co* [1957] OWN 353, 10 DLR (2d) 206, Ont CA (notes signed in blank and filled in without authority; defendant not estopped from relying on lack of authority).

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### **1450. Effect of negotiation after completion.**

Where, however, any such instrument after completion<sup>1</sup> is negotiated<sup>2</sup> to a holder in due course<sup>3</sup>, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given<sup>4</sup>.

1 See PARA 1449.

2 As to the meaning of 'negotiation' see PARA 1407.

3 As to the meaning of 'holder in due course' see PARA 1407. An original payee is not a holder in due course, and delivery to the payee is not negotiation: *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL, in which case the view of Lord Russell of Killowen CJ in *Lewis v Clay* (1897) 67 LQB 224 at 227 was preferred to that of Fletcher Moulton LJ in *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794 at 808, CA. Where, however, the instrument has been signed and delivered to a third person for the purpose of enabling him to obtain an advance from the payee, the payee is entitled to enforce it on the ground of estoppel: *Lloyds Bank Ltd v Cooke*; but cf *Herdman v Wheeler* [1902] 1 KB 361, DC. But where the holder of a cheque is not a holder for value, the drawer of the cheque is not estopped as against the holder from saying that the cheque has been wrongly filled up: *Paine v Bevan and Bevan* (1914) 110 LT 933. See also *Guildford Trust Ltd v Goss* (1927) 136 LT 725; and PARA 1576 note 6.

4 Bills of Exchange Act 1882 s 20(2) proviso, s 89; *Schultz v Astley* (1836) 2 Bing NC 544; *London and South Western Bank v Wentworth* (1880) 5 ExD 96. A holder in due course must ex hypothesi have taken the instrument when complete and regular on the face of it; if the holder without inquiry takes a blank acceptance and fills up the blanks himself, he cannot claim to be a holder in due course or to have a better title than his transferor; *Hatch v Searles, Stanway's Case, Conway's Case* (1854) 2 Sm & G 147; *France v Clark* (1884) 26 ChD 257, CA. Where a person, without authority to do so, gives a blank acceptance in his firm's name to another who transfers it to a third person for value, the third person cannot complete the instrument and recover from the firm to which the giver of the blank acceptance belongs, if he knew that such giver gave it without authority: *Hogarth v Latham & Co* (1878) 3 QBD 643, CA. When a person is induced by a false representation as to the nature of the instrument to give his signature on a bill or note, he is not liable on it if he acted without negligence: *Foster v Mackinnon* (1869) LR 4 CP 704, as to which case see also *Howatson v Webb* [1908] 1 Ch 1, CA; *Lewis v Clay* (1897) 67 LQB 224; *Bagot v Chapman* [1907] 2 Ch 222. As to the question of non est factum generally see *Saunders (Executrix of the Estate of Rose Maud Gallie) v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL, approving *Foster v Mackinnon* above, and overruling *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 KB 489, CA. See also *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281, CA; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 69 et seq.

As regards the cognate question where a negotiable instrument is so filled up as to enable it to be altered to a larger amount and as to the effect of alterations as a discharge see PARAS 1559-1561.

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### **(viii) Acceptance**

## **A. LIABILITY OF ACCEPTOR**

### **1451. Drawee as acceptor.**

The acceptance<sup>1</sup> of a bill<sup>2</sup> is the signification by the drawee<sup>3</sup> of his assent to the order of the drawer<sup>4</sup>. Thereafter the drawee is called the acceptor<sup>5</sup>. But the drawee, in the absence of any special agreement, is under no obligation to accept a bill<sup>6</sup>.

1 As to the meaning of 'acceptance' see PARA 1406.

2 As to the meaning of 'bill' see PARA 1405.

3 As to the meaning of 'drawee' see PARA 1406.

4 Bills of Exchange Act 1882 s 17(1). As to the meaning of 'drawer' see PARA 1406. But a bill may be complete and regular and may be sued upon by a person to whom it has been negotiated before it has been accepted: see *National Park Bank of New York v Berggren & Co* (1914) 110 LT 907.

5 *Rowe v Young* (1820) 2 Bligh 391 at 402, HL. As to the meaning of 'acceptor' see PARA 1406.

6 See PARA 1453. As to cheques see PARA 1410. The provisions of the Bills of Exchange Act 1882 in so far as they relate to acceptance do not apply to promissory notes: s 89(3)(b).

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### **1452. Acceptance by drawee or agent.**

The signature of any person other than the drawee<sup>1</sup> or his agent, though purporting to be an acceptance<sup>2</sup>, is not one in fact<sup>3</sup>, nor is the marking or certification of a cheque<sup>4</sup> an acceptance<sup>5</sup>. Where a bill<sup>6</sup> is accepted for the drawee by his agent, instead of by the drawee himself, the acceptance is good<sup>7</sup>. The hand that holds the pen is immaterial if in fact there is authority to sign<sup>8</sup>. Where a bill is addressed to an agent, and the agent accepts, the principal is not bound, even if the agent accepts the bill in the principal's name and by his authority<sup>9</sup>.

1 As to the meaning of 'drawee' see PARA 1406.

2 As to the meaning of 'acceptance' see PARA 1406.

3 *Jackson v Hudson* (1810) 2 Camp 447; *Davis v Clarke* (1844) 6 QB 16; and cf *Steele v M'Kinlay* (1880) 5 App Cas 754 at 770, HL, per Lord Blackburn. See also *Stacey & Co Ltd v Wallis* (1912) 106 LT 544 ('... a bill addressed to 'A' cannot be accepted by 'B' so as to make him liable as acceptor': per Scrutton J at 211); *Maxform SpA v B Mariani & Goodville Ltd* [1979] 2 Lloyd's Rep 385 at 387. As to a referee in case of need see PARA 1409; as to an acceptor for honour see PARA 1566.

4 As to the meaning of 'cheque' see PARA 1405. As to marking of cheques by bankers see PARA 1412.

5 *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC.

6 As to the meaning of 'bill' see PARA 1405.

7 See the Bills of Exchange Act 1882 s 91(1); and PARA 1473.



8 But the fact of agency must be proved if necessary (see *Lindus v Bradwell* (1848) 5 CB 583; where a husband's promise to pay a bill drawn on him and accepted by his wife in her own name was held sufficient evidence of his having either authorised or ratified the acceptance). See also *Jenkins v Morris* (1847) 16 M & W 877; *Okell v Charles* (1876) 34 LT 822, CA; *Attwood v Munnings* (1827) 7 B & C 278. As to liability on signatures see the Bills of Exchange Act s 25; and PARA 1473 et seq. However, the Bills of Exchange Act s 25 relates only to rights and liabilities whilst the bill is current, and where it has been in fact paid, though signed without authority, the section does not operate or give a remedy to the principal: *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356 at 367-368, CA; but see *Midland Bank Ltd v Reckitt* [1933] AC 1 at 16, HL, per Lord Atkin. As to the liability of the agent see the Bills of Exchange Act 1882 s 26; and PARA 1476 et seq. As to acceptance on behalf of a company see the Companies Act 1985 s 37 (prospectively repealed) (as to replacement provisions see the Companies Act 2006 s 52), the Companies Act 2006 ss 82, 84 (formerly the Companies Act 1985 s 349); and **COMPANIES** vol 14 (2009) PARAS 220, 293. As to the principles of agency generally see **AGENCY**.

9 Cf *Polhill v Walter* (1832) 3 B & Ad 114; *Steele v M'Kinlay* (1880) 5 App Cas 754, HL; and see **AGENCY** vol 1 (2008) PARA 128.

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### **1453. Drawee not liable without accepting.**

The party primarily liable on a bill of exchange<sup>1</sup> is the acceptor<sup>2</sup>; that is the person to whom the order to pay is addressed. He is on the face of the bill as drawn, the drawee<sup>3</sup>; but as such he is not, apart from special contract, by English law under any obligation to accept the bill<sup>4</sup>. A drawee who does not accept is not, therefore, liable on the bill<sup>5</sup>. A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof<sup>6</sup>.

1 As to the meaning of 'bill of exchange' see PARA 1405.

2 As to the meaning of 'acceptor' see PARA 1406.

3 As to the meaning of 'drawee' see PARA 1406.

4 See *Rowe v Young* (1820) 2 Bligh 391; and PARA 1451.

5 Bills of Exchange Act 1882 s 53(1).

6 Bills of Exchange Act 1882 s 53(1). For the position under Scottish law see PARA 1596.

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### **1454. No acceptance of cheques.**

In English law, a banker on whom a cheque<sup>1</sup> is drawn by a customer in legal form is bound to honour the customer's cheques up to the amount to which he is entitled to draw<sup>2</sup>. But the

banker is only liable on his contract with his customer, and not to the payee<sup>3</sup> or holder<sup>4</sup> of the cheque<sup>5</sup>.

- 1 As to the meaning of 'cheque' see PARA 1405.
- 2 See PARA 853.
- 3 As to the meaning of 'payee' see PARA 1406.
- 4 As to the meaning of 'holder' see PARA 1407.
- 5 *Marzetti v Williams* (1830) 1 B & Ad 415.

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#### **1455. Effect of acceptance and non-acceptance.**

In the case of a bill of exchange<sup>1</sup>, when the drawee<sup>2</sup> does accept he undertakes that he will pay the bill according to the tenor of his acceptance<sup>3</sup>, but, where the drawee declines to accept, the drawer<sup>4</sup> must bear all the losses and expenses incurred as well by reason of the non-acceptance as of the non-payment<sup>5</sup>.

- 1 As to the meaning of 'bill of exchange' see PARA 1405.
- 2 As to the meaning of 'drawee' see PARA 1406.
- 3 Bills of Exchange Act 1882 s 54(1); *Smith v Vertue* (1860) 30 LJCP 56. As to the meaning of 'acceptance' see PARA 1406. As to the tenor of the acceptance see PARAS 1461-1463.
- 4 As to the meaning of 'drawer' see PARA 1406.
- 5 See the Bills of Exchange Act 1882 s 55(1)(a); and PARA 1574.

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#### **1456. Acceptor primarily liable.**

Whenever a bill<sup>1</sup> is accepted the acceptor<sup>2</sup> is and remains the party primarily liable on the bill whatever may happen to the other parties<sup>3</sup>, and whether any of the other parties are discharged or not<sup>4</sup>. Should an indorser<sup>5</sup> have to pay the bill, the acceptor by the fact of his acceptance<sup>6</sup> is liable to indemnify him<sup>7</sup>.

In the case of a bill drawn for the accommodation of another party, the actual position differs from that appearing on its face<sup>8</sup>. The acceptor is only surety for the party accommodated, so

that he is entitled to be indemnified by him, and if a holder<sup>9</sup> has recovered part of the amount due from the party accommodated, he can only recover the balance from the acceptor<sup>10</sup>.

- 1 As to the meaning of 'bill' see PARA 1405.
- 2 As to the meaning of 'acceptor' see PARA 1406.
- 3 *Anderson v Cleveland* (1769) 13 East 430n.
- 4 As to discharge of parties see PARA 1564 et seq. Cf *Smith v Knox* (1799) 3 Esp 46.
- 5 As to the meaning of 'indorser' see PARA 1407 note 8.
- 6 As to the meaning of 'acceptance' see PARA 1406.
- 7 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL.
- 8 As to such bills see PARA 1482.
- 9 As to the meaning of 'holder' see PARA 1407.
- 10 *Cook v Lister* (1863) 13 CBNS 543. As to the right of indemnity see PARAS 1583-1585.

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### **1457. Estoppel of acceptor.**

There are certain estoppels which bind the acceptor<sup>1</sup> in regard to a holder in due course<sup>2</sup>. The acceptor cannot deny to him the existence of the drawer<sup>3</sup>, the genuineness of his signature<sup>4</sup> and his capacity and authority to draw the bill<sup>5</sup>.

If the instrument is payable to the order of the drawer, the acceptor cannot deny to a holder in due course the capacity of the drawer to indorse at the time of such indorsement<sup>6</sup>, nor if the instrument is payable to the order of a third party can he deny the existence of such third party or his capacity to indorse at the time of such indorsement<sup>7</sup>; but in neither case is he bound to admit the genuineness<sup>8</sup> or validity<sup>9</sup> of the indorsement<sup>10</sup>.

- 1 Bills of Exchange Act 1882 s 54(2); *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA; *Paine v Bevan and Bevan* (1914) 110 LT 933. As to the meaning of 'acceptor' see PARA 1406.
- 2 A holder in due course does not include the original payee of a cheque: *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL. As to the meaning of 'holder in due course' see PARA 1407.
- 3 As to the meaning of 'drawer' see PARA 1406.
- 4 *Sanderson v Collman* (1842) 4 Man & G 209; *Cooper v Meyer* (1830) 10 B & C 468. As to the effect of forgery see PARA 1503.
- 5 Bills of Exchange Act 1882 s 54(2)(a); *Hallifax v Lyle* (1849) 3 Exch 446. See PARA 1465. As to the meaning of 'bill' see PARA 1405.
- 6 Bills of Exchange Act 1882 s 54(2)(b); *Pitt v Chappelow* (1841) 8 M & W 616; *Braithwaite v Gardiner* (1846) 8 QB 473; *Ashpitel v Bryan* (1864) 5 B & S 723. As to the meaning of 'indorsement' see PARA 1407.
- 7 Bills of Exchange Act 1882 s 54(2)(c).

8 *Beeman v Duck* (1843) 11 M & W 251; *Garland v Jacomb* (1873) LR 8 Exch 216.

9 *Robinson v Yarrow* (1817) 7 Taunt 455.

10 Bills of Exchange Act 1882 s 54(2)(b), (c).

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### **1458. Acceptance by partners, etc.**

When a bill<sup>1</sup> is addressed personally to one who is also a partner in a firm, and he accepts it in the name of the firm, it is nevertheless not the firm's acceptance<sup>2</sup>, but his own<sup>3</sup>. So, too, when a bill is addressed to a firm, and a partner accepts the bill in the name of the firm, adding his own name, the acceptance is that of the firm, not of the partner<sup>4</sup>. A bill addressed to a firm, and accepted by one member of the firm in his own name is an acceptance by that member of the firm, and he is liable as such acceptor<sup>5</sup>. An acceptance in its true style by a firm wrongly addressed is a valid acceptance<sup>6</sup>.

A man trading in a name other than his own may accept in either name<sup>7</sup>.

A bill addressed to a married woman as 'Mrs John Smith' would be properly accepted by her in the style 'Emma Smith, wife of John Smith'.

An acceptor cannot escape liability to the payee<sup>8</sup> on the ground that his acceptance was given under a mistake unless, perhaps, the mistake was fundamental to the transaction<sup>9</sup>.

1 As to the meaning of 'bill' see PARA 1405.

2 As to the meaning of 'acceptance' see PARA 1406.

3 *Nicholls v Diamond* (1853) 9 Exch 154; cf *Mare v Charles* (1856) 5 E & B 978 (acceptance purporting to be on behalf of company). As to a partner's implied authority to draw, indorse and accept bills see **PARTNERSHIP** vol 79 (2008) PARA 50.

4 *Re Barnard, Edwards v Barnard* (1886) 32 ChD 447, CA; see also the Bills of Exchange Act 1882 s 23(2) and PARA 1467.

5 *Owen v Van Uster* (1850) 10 CB 318. As to the meaning of 'acceptor' see PARA 1406. When all the members of a firm accept a bill, the presumption is that it is accepted for the purposes of the firm (*Rossland Cycle Co v M'Creadie* 1907 SC 1208, Ct of Sess). As to authority of partners in respect of bills of exchange see **PARTNERSHIP** vol 79 (2008) PARA 60. Where the partners in a firm agreed to dissolve the partnership and to have the affairs of the firm liquidated by an agent, and a bill addressed to the firm was accepted by the agent in his own name and the name of a member of the firm, the latter was held not to have accepted the bill: *Odell v Cormack Bros* (1887) 19 QBD 223.

6 *Lloyd v Ashby* (1831) 2 B & Ad 23.

7 See the Bills of Exchange Act 1882 s 23 proviso (1); and PARA 1468.

8 As to the meaning of 'payee' see PARA 1406.

9 *Ayres v Moore* [1940] 1 KB 278, [1939] 4 All ER 351 (where it was held that, as against the payee and holder, the acceptor of a bill could not rely on his own mistake of fact as, if it had been true, it would not have affected his liability to accept the bill). As to mistake generally see **MISTAKE**.

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## **B. TIME OF ACCEPTANCE**

### **1459. When bill may be accepted.**

A bill<sup>1</sup> may be accepted before it has been signed by the drawer<sup>2</sup> or while otherwise incomplete<sup>3</sup>.

It may also be accepted when it is overdue or after it has been dishonoured by a previous refusal to accept or by non-payment<sup>4</sup>; but a bill accepted when it is overdue is deemed as regards the acceptor<sup>5</sup> to be payable on demand<sup>6</sup>.

If a bill payable after sight<sup>7</sup> is dishonoured by non-acceptance<sup>8</sup>, and the drawee<sup>9</sup> afterwards accepts it, the holder<sup>10</sup> is entitled, in the absence of any agreement to the contrary, to have the bill accepted as of the date of the first presentment to the drawee for acceptance<sup>11</sup>.

1 As to the meaning of 'bill' see PARA 1405.

2 As to the meaning of 'drawer' see PARA 1406.

3 Bills of Exchange Act 1882 s 18(1); see also PARA 1449. As to the meaning of 'acceptance' see PARA 1406.

4 Bills of Exchange Act 1882 s 18(2); *Mutford v Walcot* (1700) 1 Ld Raym 574; *Wynne v Raikes* (1804) 5 East 514.

5 As to the meaning of 'acceptor' see PARA 1406.

6 Bills of Exchange Act 1882 s 10(2). As to bills payable on demand see PARA 1433. As to overdue bills see PARA 1497.

7 As to the meaning of 'bill payable after sight' see PARA 1435.

8 As to dishonour by non-acceptance see PARA 1515.

9 As to the meaning of 'drawee' see PARA 1406.

10 As to the meaning of 'holder' see PARA 1407.

11 Bills of Exchange Act 1882 s 18(3); *Roberts v Bethell* (1852) 12 CB 778.

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### **1460. Dating of acceptance.**

In general, an acceptance<sup>1</sup> need not be dated; but if the bill is payable after sight<sup>2</sup>, the date of acceptance should always be inserted. If in such a case a date is not inserted, the holder<sup>3</sup> is entitled to insert it himself<sup>4</sup>.

Where the date of the acceptance is not inserted, the presumption will be made that it was before maturity of the bill and within a reasonable time of its issue<sup>5</sup>.

1 As to the meaning of 'acceptance' see PARA 1406.

2 As to the meaning of 'bill payable after sight' see PARA 1435.

3 As to the meaning of 'holder' see PARA 1407.

4 See the Bills of Exchange Act 1882 ss 12, 13; and PARA 1415.

5 See *Roberts v Bethell* (1852) 12 CB 778 (where the drawee accepted without dating a bill payable three months after date, and came of age just before its maturity, in which case it was presumed that he accepted it while still a minor).

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### **C. FORM AND NATURE OF ACCEPTANCE**

#### **1461. Written, signed and delivered.**

The acceptance<sup>1</sup> must be written<sup>2</sup> on the bill<sup>3</sup> and be signed by the drawee<sup>4</sup>. It is not complete until delivery<sup>5</sup> or notification<sup>6</sup>.

Any appropriate words may be made use of by the drawee to convey his assent to the drawer's<sup>7</sup> order, but his mere signature, without additional words, is sufficient<sup>8</sup>.

An acceptance is usually written across the face of the bill, but it may be anywhere on the face and perhaps even on the back<sup>9</sup>.

An acceptance must in no case state that the drawee will fulfil his obligation otherwise than by payment of money<sup>10</sup>.

1 As to the meaning of 'acceptance' see PARA 1406.

2 As to the meaning of 'writing' see PARA 1405 note 2.

3 As to the meaning of 'bill' see PARA 1405. The provisions of the Bills of Exchange Act 1882 in so far as they relate to acceptance do not apply to promissory notes: s 89(3)(b).

4 Bills of Exchange Act 1882 s 17(2)(a). As to the meaning of 'drawee' see PARA 1406.

5 As to the meaning of 'delivery' see PARA 1406.

6 See PARAS 1406, 1441; *Cox v Troy* (1822) 5 B & Ald 474; *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526.

7 As to the meaning of 'drawer' see PARA 1406.

8 Bills of Exchange Act 1882 s 17(2)(a).

9 See *Young v Glover and Glover* (1857) 3 Jur NS 637.

10 Bills of Exchange Act 1882 s 17(2)(b); *Russell v Phillips* (1850) 14 QB 891.

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### **1462. General and qualified acceptances.**

An acceptance<sup>1</sup> may be either general or qualified<sup>2</sup>. A general acceptance assents without qualification to the order of the drawer<sup>3</sup>. A qualified acceptance in express terms varies the effect of the bill<sup>4</sup> as drawn<sup>5</sup>.

If the acceptor<sup>6</sup> desires to qualify his acceptance, he must do so in definite terms on the face of the bill, so that anyone taking the bill may clearly understand that it was accepted subject to an express qualification<sup>7</sup>. In the absence of such an express qualification, the acceptance will be deemed absolute<sup>8</sup>.

1 As to the meaning of 'acceptance' see PARA 1406.

2 Bills of Exchange Act 1882 s 19(1).

3 Bills of Exchange Act 1882 s 19(2). As to the meaning of 'drawer' see PARA 1406. In *London and Northern Trading Co Ltd v Arcos Ltd* (1933) 38 Com Cas 242, HL, the Court of Appeal's judgment that bills should have been accepted subject to the provisions of the contracts under which they were to be accepted was varied in the House of Lords, Lord Buckmaster stating, at 247, that 'such a form of acceptance, if it were possible under the Bills of Exchange Act, would destroy the whole negotiability of the document'.

4 As to the meaning of 'bill' see PARA 1405. The provisions of the Bills of Exchange Act 1882 in so far as they relate to acceptance do not apply to promissory notes: s 89(3)(b).

5 Bills of Exchange Act 1882 s 19(2). As to kinds of qualified acceptance see PARA 1463.

6 As to the meaning of 'acceptor' see PARA 1406.

7 *Meyer & Co v DeCroix, Verley et Cie* [1891] AC 520, HL (where the drawee wrote above his acceptance 'in favour of Mr L Delobbel Flipo only', the bill being drawn payable 'to order Mr L Delobbel Flipo', and this was held not to be a qualified acceptance); and see *Canadian Bank of Commerce v British Columbia Interior Sales Ltd* (1957) 23 WWR 682, 11 DLR (2d) 609, BC CA (where the words 'subject to our adjustments' were not considered to be a valid qualification).

8 *Fanshawe v Peet* (1857) 26 LJEx 314 (where it was held that an addition to his acceptance by the drawee of words giving a wrong date for the maturity of the bill did not prevent the acceptance being general). But see *Sproat v Matthews* (1786) 1 Term Rep 182.

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### **1463. Kinds of qualified acceptance.**

An acceptance may be qualified<sup>1</sup> in a variety of ways: (1) it may be conditional, that is, it may make payment of the bill<sup>2</sup> by the acceptor<sup>3</sup> dependent on the fulfilment of a condition stated by him in his acceptance<sup>4</sup>; or (2) it may be partial, that is, an acceptance to pay part only of the amount for which the bill is drawn<sup>5</sup>; or (3) it may be local, that is, to pay only at a particular specified place; unless, however, the acceptance expressly states that the bill is to be paid there and there only, it will be regarded as a general acceptance<sup>6</sup>; or (4) it may be qualified as to time<sup>7</sup>; or (5) it may be qualified by being accepted by one or more of the drawees<sup>8</sup>, but not by all<sup>9</sup>.

1 As to the meaning of 'qualified acceptance' see PARA 1462.

2 As to the meaning of 'bill' see PARA 1405. The provisions of the Bills of Exchange Act 1882 in so far as they relate to acceptance do not apply to promissory notes: s 89(3)(b).

3 As to the meaning of 'acceptor' see PARA 1406.

4 Bills of Exchange Act 1882 s 19(2)(a). For example, the acceptance may be to pay when goods conveyed to the drawee are sold (*Smith v Abbot* (1741) 2 Stra 1152), or when in cash for the cargo of a ship (*Julian v Shobrooke* (1754) 2 Wils 9). See also *Pierson v Dunlop* (1777) 2 Cowp 571; *Banbury v Lisset* (1744) 2 Stra 1211; *Smith v Vertue* (1860) 30 LJCP 56.

5 Bills of Exchange Act 1882 s 19(2)(b). An acceptance 'as far as £100 part thereof' of a bill for £127 is a valid, though qualified, acceptance: *Wegersloff v Keene* (1719) 1 Stra 214. So, too, when the drawee accepted a bill partly in cash, partly in bills, the acceptance was held to be a valid, though qualified, acceptance in regard to the part accepted in cash: *Petit v Benson* (1697) Comb 452.

6 Bills of Exchange Act 1882 s 19(2)(c). As to the meaning of 'general acceptance' see PARA 1462. When bills are accepted 'payable at Messrs \_\_\_\_\_' (the drawee's bankers), this is a general acceptance, but when stated to be 'payable at Messrs \_\_\_\_\_ and not elsewhere', the acceptance is qualified: *Sebag v Ahitbol* (1816) 4 M & S 462 at 466. The word 'only' need not be actually used: *Higgins v Nichols* (1839) 7 Dowl 551. See also *Halstead v Skelton* (1843) 5 QB 86; *Sproat v Matthews* (1786) 1 Term Rep 182; *Rhodes v Gent* (1821) 5 B & Ald 244. See also *Ex p Hayward* (1887) 3 TLR 687, DC (acceptance in London of bill payable in Ceylon was a general acceptance); *Bank Polski v KJ Mulder & Co* [1942] 1 KB 497, [1942] 1 All ER 396, CA (acceptances of bills drawn in Poland and expressed to be payable in Amsterdam were general acceptances and not local as the bills contained no express stipulation that they were payable only in Amsterdam and not elsewhere).

7 Bills of Exchange Act 1882 s 19(2)(d). When a bill was dated 28 November 1836, payable 42 months after date, and was accepted 'on the condition of its being renewed until 28 November 1844, without interest payable by me at Messrs \_\_\_\_\_', the acceptance was held to be good though qualified by time: *Russell v Phillips* (1850) 14 QB 891.

8 As to the meaning of 'drawee' see PARA 1406.

9 Bills of Exchange Act 1882 s 19(2)(e). As to bills addressed to more than one drawee see also s 6(2); and PARA 1426.

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#### **1464. Holder and qualified acceptance.**

The holder<sup>1</sup> of a bill<sup>2</sup> may refuse to take a qualified acceptance<sup>3</sup>, and if he does not obtain an unqualified acceptance he may treat the bill as dishonoured by non-acceptance<sup>4</sup>.



If he consents to take a qualified acceptance, he should at once inform the drawer<sup>5</sup> and indorser<sup>6</sup>, since in such case, if the drawer or an indorser has not expressly or impliedly authorised him to take it or does not subsequently assent to it, the drawer or indorser in question is discharged from liability on the bill<sup>7</sup>.

When, however, the drawer or indorser has had notice of the qualified acceptance, and does not within a reasonable time dissent from it, he is deemed to have assented to it<sup>8</sup>.

When, by the terms of a qualified acceptance, presentment for payment is required, the acceptor<sup>9</sup>, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures<sup>10</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 As to the meaning of 'bill' see PARA 1405. The provisions of the Bills of Exchange Act 1882 in so far as they relate to presentment for acceptance do not apply to promissory notes: s 89(3)(a).

3 As to the meaning of 'qualified acceptance' see PARA 1462.

4 Bills of Exchange Act 1882 s 44(1). As to dishonour by non-acceptance see PARA 1515. When a bill is a foreign bill (as to which see PARA 1432), and the qualification attaching to the acceptance is 'partial', the holder cannot treat the bill as dishonoured. He can only protest the bill in respect of the balance which was not accepted: see s 44(2). As to protest see PARA 1538 et seq.

5 As to the meaning of 'drawer' see PARA 1406.

6 As to the meaning of 'indorser' see PARA 1407 note 8.

7 Bills of Exchange Act 1882 s 44(2). However, this is not so in the case of a partial acceptance where notice is duly given: s 44(2). As to the partial acceptance of a foreign bill see note 4. As to discharge of parties see PARA 1564 et seq.

8 Bills of Exchange Act 1882 s 44(3).

9 As to the meaning of 'acceptor' see PARA 1406.

10 See the Bills of Exchange Act 1882 s 52(2); *Smith v Vertue* (1860) 30 LJCP 56; and PARA 1516.

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## **(ix) Capacity and Authority of Parties**

### **A. CAPACITY AND AUTHORITY**

#### **1465. Capacity to incur liability and authority to sign.**

In general, capacity to incur liability as a party to a bill or note<sup>1</sup> is co-extensive with capacity to contract<sup>2</sup>.

The signature of any party possessing such capacity may be written<sup>3</sup> either by himself or by some other person<sup>4</sup> acting by or under his authority<sup>5</sup>.

The person to whom liability is to attach must have capacity to sign. The person who actually signs must, if he is not the person liable, have his authority to do so. Capacity means power to contract so as to bind oneself; authority means power to contract on behalf of another so as to bind him. Capacity is a matter of law; authority, as derived from the act of the parties, is usually a question of fact.

1 As to the meanings of 'bill' and 'note' see PARA 1405.

2 Bills of Exchange Act 1882 ss 22(1), 89. As to capacity of parties generally to contract see **CONTRACT** vol 9(1) (Reissue) PARA 630. As to the capacity of a company to become a party to a bill see the Bills of Exchange Act 1882 s 22(1) proviso; and PARA 1466.

3 As to the meaning of 'writing' see PARA 1405 note 2.

4 As to the meaning of 'person' see PARA 1401 note 4.

5 Bills of Exchange Act 1882 s 91(1); and see PARA 1452.

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## **1466. Corporations.**

A company<sup>1</sup> has power to issue or accept negotiable instruments<sup>2</sup> where on a fair consideration of its memorandum and articles of association such a power is expressly or impliedly conferred<sup>3</sup>.

Unless the power is expressly or impliedly given by the Act of Parliament<sup>4</sup>, charter, or other instrument creating it, a non-trading company or corporation is not able to incur liability on a bill of exchange or promissory note<sup>5</sup>.

Where, however, an instrument has been drawn or indorsed by such a non-trading company or corporation the holder<sup>6</sup> is entitled to have the instrument paid and to enforce it against any other party to it<sup>7</sup>.

A bill of exchange or promissory note<sup>8</sup> is deemed to have been made, accepted or indorsed on behalf of a company if made, accepted or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority<sup>9</sup>. Where the Bills of Exchange Act 1882 requires any instrument or writing<sup>10</sup> to be signed, it is sufficient if the instrument or writing is sealed with the corporate seal, although nothing in the Act requires the bill or note of a corporation to be under seal<sup>11</sup>.

1 I.e. a company as defined by the Companies Act 1985 s 735(1) (prospectively repealed) (as to replacement provisions see the Companies Act 2006 ss 1(1), 1171) (see **COMPANIES** vol 14 (2009) PARA 1 et seq).

2 As to the meaning of 'negotiable instrument' see PARA 1402. As to the meanings of 'acceptance' and 'issue' see PARA 1406.

3 See the Companies Act 1985 s 35 (prospectively repealed), s 35A (prospectively repealed), s 35B (prospectively repealed) (as to replacement provisions see the Companies Act 2006 ss 39, 40; and **COMPANIES** vol 14 (2009) PARA 263 et seq). See also *Peruvian Railways Co v Thames and Mersey Marine Insurance Co, Re Peruvian Railways Co* (1867) 2 Ch App 617; *Re General Estates Co, ex p City Bank* (1868) 3 Ch App 758. As to a company's power to deal with bills and notes see **COMPANIES** vol 14 (2009) PARA 292 et seq.

- 4 See eg *Slark v Highgate Archway Co* (1814) 5 Taunt 792; *Murray v East India Co* (1821) 5 B & Ald 204.
- 5 *Harmer v Steele* (1849) 4 Exch 1; *Bateman v Mid Wales Rly Co* (1866) LR 1 CP 499 at 505; Bills of Exchange Act 1882 s 22(1) proviso, s 89. As to a company's implied power to draw cheques see PARA 843. As to a corporation's power to incur liability on bills of exchange or promissory notes see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1237.
- 6 As to the meaning of 'holder' see PARA 1407.
- 7 Bills of Exchange Act 1882 ss 22(2), 89.
- 8 As to the meanings of 'bill of exchange' and 'promissory note' see PARA 1405.
- 9 See the Companies Act 1985 s 37 (prospectively repealed) (as to the replacement provision see the Companies Act 2006 s 52; and **COMPANIES** vol 14 (2009) PARA 293). In *Stacey & Co Ltd v Wallis* (1912) 106 LT 544, Scrutton J held it to be sufficient if the name of the company appeared on the bill as addressee.
- 10 As to the meaning of 'writing' see PARA 1405 note 2.
- 11 Bills of Exchange Act 1882 s 91(2).

## UPDATE

### 1466 Corporations

NOTES 1, 3, 9--Repeal of Companies Act 1985 ss 35-35B, 37, 735(1) in force 1 October 2009: SI 2008/2860.

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### 1467. Partnerships.

A partner in a trading firm, as distinct from a non-trading firm<sup>1</sup>, has full power to incur liability on behalf of his firm as a party to a bill or note<sup>2</sup> for any purpose of the firm that falls within (but not outside<sup>3</sup>) the scope of its ordinary business<sup>4</sup>, and the signature by him of the firm's name will bind all his partners equally with himself<sup>5</sup>. Accepting bills in blank is not a mercantile business transaction the power to do which can be implied from the existence of an ordinary trading partnership<sup>6</sup>.

If a partner signs a joint and several note for himself and his partners, he cannot bind them severally<sup>7</sup>, but he does bind himself and them jointly<sup>8</sup> and himself separately<sup>9</sup>. If a bill is accepted by a partner in the name of the firm, but in fraud, the onus is on the holder<sup>10</sup> as against the other partner of showing that value was given for the bill<sup>11</sup>.

Where two partners without knowledge of one another sign the firm's name on two separate bills to satisfy the same debt, the firm may be liable on both bills should they pass into the hands of holders in due course<sup>12</sup>.

1 A partner in a non-trading firm has no authority to draw bills binding the partnership unless expressly given authority; see *Wheatley v Smithers* [1906] 2 KB 321, DC (revsd on appeal, but not on this point [1907] 2 KB 684, CA); cf *Higgins v Beauchamp* [1914] 3 KB 1192 at 1194-1195, DC; and the Partnership Act 1890 s 6 proviso (see **PARTNERSHIP** vol 79 (2008) PARA 58). Whether or not the firm is a trading firm must in each case

depend on the nature of the business: *Dickinson v Valpy* (1829) 10 B & C 128. As to bills of exchange and the powers of a partner to bind his firm see **PARTNERSHIP** vol 79 (2008) PARA 60.

2 As to the meanings of 'bill' and 'note' see PARA 1405.

3 *Re Cunningham & Co Ltd, Simpson's Claim* (1887) 36 ChD 532. As a partner has already full powers to bind his firm on partnership bills, it seems that if a fellow-partner who is going abroad grants him a power of attorney to deal with bills, such power applies to non-partnership bills only: *Attwood v Munnings* (1827) 7 B & C 278.

4 See the Partnership Act 1890 ss 5, 6; and **PARTNERSHIP** vol 79 (2008) PARA 45 et seq.

5 Bills of Exchange Act 1882 s 23 proviso (2), s 89. See *Pinkney v Hall* (1697) 1 Ld Raym 175; *Lewis v Reilly* (1841) 1 QB 349; *Re Barnard, Martins Bank v Trustee* [1932] 1 Ch 269; *Ringham v Hackett* (1980) 124 Sol Jo 201, CA.

6 *Hogarth v Latham & Co* (1878) 3 QBD 643, CA. As to acceptance of bills by partners see PARA 1458.

7 *Perring v Hone* (1826) 4 Bing 28 (the note was not signed in the firm's name).

8 *MacLae v Sutherland* (1854) 3 E & B 1.

9 *Elliot v Davis* (1800) 2 Bos & P 338; *Gillow v Lillie* (1835) 1 Bing NC 695.

10 As to the meaning of 'holder' see PARA 1407.

11 *Hogg v Skeen* (1865) 18 CBNS 426.

12 *Davison v Robertson* (1815) 3 Dow 218. As to the meaning of 'holder in due course' see PARA 1407.

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### **1468. Sole traders.**

Where any person<sup>1</sup> signs an instrument<sup>2</sup> in a trade or assumed name he is liable on it as if he had signed it in his own name<sup>3</sup>.

1 As to the meaning of 'person' see PARA 1401 note 4.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 Bills of Exchange Act 1882 s 23 proviso (1), s 89. See *Wilde v Keep* (1833) 6 C & P 235; *Edmunds v Bushell and Jones* (1865) LR 1 QB 97; cf *Alliance Bank Ltd v Kearsley* (1871) LR 6 CP 433. See also PARA 1458 text to note 7.

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## **B. RESTRICTIONS ON CAPACITY AND AUTHORITY**

### 1469. Restrictions.

The principal instances in which there is want of capacity are: (1) persons of unsound mind<sup>1</sup>; (2) minors<sup>2</sup>; (3) non-trading corporations<sup>3</sup>. In addition to these there are certain classes to which special disabilities attach.

Previously the clergy were debarred from engaging in trade for lucre or profit<sup>4</sup>, but this prohibition only rendered them liable to ecclesiastical punishments and did not make void any instruments to which they have become parties<sup>5</sup>. They could not escape liability on instruments even if the other parties to the instrument knew that they were dealing with clergymen<sup>6</sup>. The capacity of a clergyman to incur liability on a bill is thus the same as that of any other individual, and is not affected by his special status.

Bankers and banking companies in England and Wales other than the Bank of England have, since 1844, been prohibited from the issue of bills or notes<sup>7</sup>, which in legal effect are payable to bearer on demand, except, under certain conditions, where they did so at the time the statute was passed<sup>8</sup>.

Restrictions have been imposed on taking and negotiating instruments in connection with consumer credit and consumer hire agreements<sup>9</sup>.

1 See PARA 1470.

2 See PARA 1471.

3 See PARA 1466.

4 See the Pluralities Act 1838 s 29 (repealed); and **ECCLESIASTICAL LAW** vol 14 PARA 684.

5 See the Pluralities Act 1838 s 31 (repealed); and **ECCLESIASTICAL LAW** vol 14 PARA 685.

6 *Lewis v Bright* (1855) 4 E & B 917.

7 As to the meanings of 'bill' and 'note' see PARA 1405. 'Bank notes' means notes of the Bank of England payable to bearer on demand: see the Currency and Bank Notes Act 1954 s 3; PARA 1613; and PARA 796.

8 See the Bank Charter Act 1844 s 11; and PARA 796.

9 See PARA 1472.

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### 1470. Persons of unsound mind, etc.

Contracts made by mentally disordered persons<sup>1</sup> are voidable, not void<sup>2</sup>. By their signature to a bill or note<sup>3</sup> such persons, therefore, incur no liability to anyone who is aware of their condition, but that condition is not a defence against a holder for value<sup>4</sup> without notice<sup>5</sup>.

1 As to the definition and classification of mental disorder see the Mental Health Act 1983 s 1; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 402.

2 As to civil capacity to contract see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 600 et seq. As to void and voidable contracts see **CONTRACT** vol 9(1) (Reissue) PARA 607.

3 As to the meanings of 'bill' and 'note' see PARA 1405.

4 As to the meaning of 'holder for value' see PARA 1407.

5 *Imperial Loan Co v Stone* [1892] 1 QB 599, CA. See also *Brown v Jodrell* (1827) 3 C & P 30; *Levy v Baker* (1827) Mood & M 106n; and cf *Re Whitaker* (1889) 42 ChD 119, CA. In *Manches v Trimborn* [1946] WN 63, the defendant was to the plaintiff's knowledge incapable of understanding substantially the nature and effect of a transaction of which the cheque she issued formed part, but she was capable of understanding that the cheque would have the effect of transferring funds to the plaintiff for the benefit of a third person. Judgment was given in her favour.

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### 1471. Minors.

A minor<sup>1</sup> cannot make himself liable as either drawer<sup>2</sup>, acceptor<sup>3</sup> or indorser<sup>4</sup> of a bill of exchange or promissory note<sup>5</sup>, even if it be for necessities supplied<sup>6</sup>; but if the instrument<sup>7</sup> has been drawn or indorsed by him, the holder<sup>8</sup> is entitled to receive payment and to enforce the instrument as against any other party to it<sup>9</sup>.

A postdated cheque<sup>10</sup> drawn by a minor payable after his coming of age appears to stand on the same footing as a cheque drawn by a minor dated before his coming of age<sup>11</sup>. Where, however, a bill is drawn during the minority of the drawee<sup>12</sup>, but accepted by him after he attains his majority, it is valid and may be enforced against him<sup>13</sup>.

1 The age of majority is 18: see the Family Law Reform Act 1969 s 1(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

2 As to the meaning of 'drawer' see PARA 1406.

3 As to the meaning of 'acceptor' see PARA 1406.

4 As to the meaning of 'indorser' see PARA 1407 note 8.

5 As to the meanings of 'bill of exchange' and 'promissory note' see PARA 1405.

6 *Re Soltykoff, ex p Margrett* [1891] 1 QB 413, CA. As to the position at common law see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 12 et seq. The statutory provisions of the Infants Relief Act 1874 (which invalidated certain contracts made by minors and prohibited actions to enforce contracts ratified after majority) and the Betting and Loans (Infants) Act 1892 s 5 (which invalidated contracts to repay loans advanced during minority) were repealed by the Minors' Contracts Act 1987 s 1 with regard to contracts made by a minor after 9 June 1987: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 14; **CONTRACT** vol 9(1) (Reissue) PARA 1051.

7 As to the meaning of 'instrument' see PARA 1402 note 1.

8 As to the meaning of 'holder' see PARA 1407.

9 Bills of Exchange Act 1882 ss 22(2), 89; *Grey v Cooper* (1782) 3 Doug KB 65; *Taylor v Croker* (1802) 4 Esp 187. In *Wauthier v Wilson* (1912) 28 TLR 239, CA, on a joint and several promissory note by a father and a minor son to secure a loan to the latter from a moneylender, the father was held liable as a principal.

10 As to the meaning of 'cheque' see PARA 1405.

- 11 *Hutley v Peacock* (1913) 30 TLR 42.
- 12 As to the meaning of 'drawee' see PARA 1406.
- 13 *Stevens v Jackson* (1815) 4 Camp 164.

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### **1472. Restrictions on taking and negotiating instruments in connection with consumer credit and consumer hire agreements.**

A creditor or owner must not take a negotiable instrument<sup>1</sup>, other than a bank note<sup>2</sup> or cheque<sup>3</sup>, in discharge of any sum payable by the debtor or hirer under a regulated consumer credit or consumer hire agreement<sup>4</sup>, or by any person as surety in relation to the agreement<sup>5</sup>.

The creditor or owner must not negotiate a cheque taken by him in discharge of a sum payable as mentioned above except to a banker<sup>6</sup>.

The creditor or owner must not take a negotiable instrument as security for the discharge of any sum payable as mentioned above<sup>7</sup>.

1 As to the meaning of 'negotiable instrument' see PARA 1402.

2 As to the meaning of 'bank note' see PARA 1469 note 7.

3 As to the meaning of 'cheque' see PARA 1405.

4 Consumer Credit Act 1974 s 123(1)(a). As to regulated consumer credit or consumer hire agreements see ss 8(3), 15; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 79, 81-82. As to restrictions on taking and negotiating instruments see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 219.

5 Consumer Credit Act 1974 s 123(1)(b). A person takes a negotiable instrument as security for the discharge of a sum if the sum is intended to be paid in some other way, and the negotiable instrument is to be presented for payment only if the sum is not paid in that way: s 123(4). The provisions in s 123 do not apply where the regulated agreement is a non-commercial agreement (s 123(5)) or where the regulated agreement has a connection with a country outside the United Kingdom provided that the goods are hired in the course of the hirer's business: s 123(6); Consumer Credit (Negotiable Instruments) (Exemption) Order 1984, SI 1984/435.

After any contravention of the Consumer Credit Act 1974 s 123 has occurred in relation to a sum payable by the debtor or hirer under a regulated consumer credit or consumer hire agreement, the agreement under which the sum is payable is enforceable against the debtor or hirer on an order of the county court only: ss 124(1), 189(1). After any contravention has occurred in relation to a sum payable by a surety the security is enforceable on an order of the county court only: ss 124(2), 189(1). Where an application for an order under s 124(2) is dismissed, s 106 (ineffective securities) applies: s 124(3).

For consequences of contravention see s 125(1), (3); and note 4.

6 Consumer Credit Act 1974 s 123(2). 'Banker' has the same meaning as in the Bills of Exchange Act 1882: see the Consumer Credit Act 1974 s 123(2); and PARA 1403 note 7. Negotiating a cheque in contravention of the provision constitutes a defect in his title: s 125(2).

7 Consumer Credit Act 1974 s 123(3). A person who takes a negotiable instrument in contravention of s 123(1) or s 123(3) is not a holder in due course and is not entitled to enforce the instrument: s 125(1). If a person mentioned in s 123(1)(a) or s 123(1)(b) becomes liable to the holder in due course of an instrument

taken in contravention of s 123(1) or s 123(3), or taken from a person mentioned in s 123(1)(a) or s 123(1)(b) and negotiated in contravention of s 123(2), the creditor or owner must indemnify him: s 125(3). Nothing in the Consumer Credit Act 1974 affects the rights of the holder in due course of any negotiable instrument: s 125(4).

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## **(x) Signature by and Liability of Agents**

### **A. SIGNATURE BY AGENT**

#### **1473. Sufficiency of signature by agent.**

Where, by the Bills of Exchange Act 1882, any instrument<sup>1</sup> or writing<sup>2</sup> is required to be signed by any person<sup>3</sup>, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written on it by some other person by or under his authority<sup>4</sup>. In this case the person signing is an agent. The authority to sign may be created in any terms; it may be express or implied<sup>5</sup>, and it may be for a special purpose or not.

However, a general authority to transact business and to receive and discharge debts may not in itself confer upon an agent the power of accepting and indorsing bills or notes<sup>6</sup> so as to charge his principal<sup>7</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the meaning of 'writing' see PARA 1405 note 2.

3 As to the meaning of 'person' see PARA 1401 note 4.

4 Bills of Exchange Act 1882 s 91(1). As to sufficiency of an agent's signature generally see **AGENCY** vol 1 (2008) PARA 42.

5 *Edmunds v Bushell and Jones* (1865) LR 1 QB 97; *Furze v Sharwood* (1841) 2 QB 388.

6 As to the meanings of 'bill' and 'note' see PARA 1405.

7 *Murray v East India Co* (1821) 5 B & Ald 204; *Hogg v Snaith* (1808) 1 Taunt 347; *Esdaile v La Nauze* (1835) 1 Y & C Ex 394. However see *Australia and New Zealand Bank Ltd v Ateliers de Constructions Electriques de Charleroi* [1967] 1 AC 86, PC (implied authority may be gathered from surrounding circumstances).

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#### **1474. Mode of signing by agent.**



An agent may simply sign in the name of his principal, or indicate, by signing by procuration or otherwise, that he does so in the capacity of agent. The important points are the signature and the authority to place it on the instrument, which are matters of evidence<sup>1</sup>.

When the agent signs by procuration, the form of the signature operates as notice that he has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority<sup>2</sup>. But where the agent has authority, the fact that he may have abused his authority does not affect the rights of a bona fide holder for value<sup>3</sup> of a negotiable instrument<sup>4</sup> indorsed by him apparently within his authority<sup>5</sup>. Where, however, an agent draws a cheque<sup>6</sup> per pro outside the scope of his authority, the principal is not liable on the instrument, although he must account to the drawee<sup>7</sup> for any money which has thereby come into his possession<sup>8</sup>.

An agent does not bind his principal if he signs in his own name<sup>9</sup> unless he is acting under a power of attorney granted by his principal<sup>10</sup>.

1 *Lord v Hall* (1849) 8 CB 627 (where, in the case of a man whose affairs were managed by his wife, his signature was actually written, not by his wife, but by his daughter in his wife's presence and with her authority). See especially at 631 per Maule J commenting on *Re Marshall, ex p Sutton* (1788) 2 Cox Eq Cas 84.

2 Bills of Exchange Act 1882 s 25; *Attwood v Munnings* (1827) 7 B & C 278; *National Bank of Scotland v Dewhurst, The Gonchar and The Izgar* (1896) 1 Com Cas 318; cf *West London Commercial Bank v Kitson* (1884) 13 QBD 360, CA. See also PARA 1452 note 8. The expression 'by procuration' may be limited to agency on behalf of a natural person and not extend to signature on behalf of a company which cannot sign by itself: *Alexander Stewart & Son of Dundee Ltd v Westminster Bank Ltd* [1926] WN 126 per Rowlatt J; overruled on other grounds: [1926] WN 271, CA.

3 As to the meaning of 'holder for value' see PARA 1407.

4 As to the meaning of 'negotiable instrument' see PARA 1402.

5 *Bryant, Powis and Bryant v Banque du Peuple* [1893] AC 170 at 180, PC.

6 As to the meaning of 'cheque' see PARA 1405.

7 As to the meaning of 'drawee' see PARA 1406.

8 *Reid v Rigby & Co* [1894] 2 QB 40, DC.

9 *Ducarrey v Gill* (1830) Mood & M 450.

10 See the Powers of Attorney Act 1971 s 7(1)(a); and **AGENCY** vol 1 (2008) PARA 45.

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### **1475. Determination of capacity.**

In determining whether a signature on an instrument<sup>1</sup> is that of the principal or that of the agent by whose hand it is written<sup>2</sup>, the construction is adopted which is most favourable to the validity of the instrument<sup>3</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the meaning of 'writing' see PARA 1405 note 2.

3 Bills of Exchange Act 1882 s 26(2); see *Elliott v Bax-Ironside* [1925] 2 KB 301, CA (names of directors following the name of the company and, in view of particular circumstances, description did not indicate signature in representative capacity), explained in *Britannia Electric Lamp Works Ltd v D Mandler & Co and Mandler* [1939] 2 KB 129 at 135, [1939] 2 All ER 469 at 472 per Branson J. See also *Rolfe Lubell & Co v Keith* [1979] 1 All ER 860, sub nom *Rolfe Lubbell & Co v Keith* [1979] 2 Lloyd's Rep 75, DC.

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## **B. LIABILITY OF AGENT**

### **1476. Liability of agent.**

The signature of an agent in his own name with the mere addition of words describing him as an agent or as filling a representative character does not exempt him from personal liability, but he may escape liability if he adds words indicating that he signs for or on behalf of a principal or in a representative character<sup>1</sup>. This is the case where he is sued by a party who is in fact aware of his true position<sup>2</sup>.

If the agent signs an instrument<sup>3</sup> in his principal's name, he is not liable on the instrument itself, even though he has signed without his principal's authority; but he may be made liable to the holder<sup>4</sup> in proceedings for deceit or breach of warranty of authority<sup>5</sup>.

1 Bills of Exchange Act 1882 s 26(1); *Leadbitter v Farrow* (1816) 5 M & S 345; *The Elmville* [1904] P 319; *Landes v Marcus and Davids* (1909) 25 TLR 478. The relevant decisions bearing upon persons signing in a representative capacity are as follows: a note for the payment of money lent to a parish, and signed by the churchwardens as such, has been held to bind them personally (*Rew v Pettet* (1834) 1 Ad & El 196), and drafts on a banker by inclosure commissioners have had a similar effect: *Eaton v Bell* (1821) 5 B & Ald 34. Where four directors of a company signed a promissory note in the following form, 'We the directors of \_\_\_\_\_ promise to pay \_\_\_\_\_', they were held liable personally, even though the seal of the company was placed in one corner of the note and purported to be witnessed by another party: *Dutton v Marsh* (1871) LR 6 QB 361; and see *Courtauld v Sanders* (1867) 16 LT 562. But where the secretary of a company signed a promissory note thus, 'for the \_\_\_\_\_ company, John Sizer, secretary', he was held not to be personally liable (*Alexander v Sizer* (1869) LR 4 Exch 102); but see *Gray v Raper* (1866) LR 1 CP 694; and *M'Meekin v Easton* (1889) 16 R 363, Ct of Sess (where a note in the form, 'We, the undersigned, in the name and on the behalf of the Reformed Presbyterian Church, Stranraer, promise to pay', was held to bind the signatories personally).

In *Chapman v Smethurst* [1909] 1 KB 927, CA, a director was held not to be personally liable upon a promissory note beginning 'I promise to pay', and signed 'JHS's Laundry and Dye Works Ltd, JHS Managing Director'; but in *Elliott v Bax-Ironside* [1925] 2 KB 301, the Court of Appeal without comment on *Chapman v Smethurst* held the directors personally responsible as indorsees on a bill accepted in the form: 'Accepted payable at the W Bank-- AB and CD directors. Fashions Ltd', and signed on the back 'Fashions Ltd, AB and CD directors'; and in *Kettle v Dunster and Wakefield* (1927) 138 LT 158, a receiver on behalf of debenture holders who drew bills signing himself 'AB Receiver, Ford Paper Works (1923) Ltd', was held to be a party to the bills and entitled to sue upon them. See also *Britannia Electric Lamp Works Ltd v D Mandler & Co and Mandler* [1939] 2 KB 129, [1939] 2 All ER 469 (signature of D Mandler held not to be the signature of the company); *Rolfe Lubell & Co v Keith* [1979] 1 All ER 860, sub nom *Rolfe Lubbell & Co v Keith* [1979] 2 Lloyd's Rep 75, DC (words 'for and on behalf of the company' and 'director' held not to vary a clear agreement between payee and indorsee that indorsee would indorse bills in a personal capacity); *Bondina Ltd v Rollaway Shower Blinds Ltd* [1986] 1 All ER 564, [1986] 1 WLR 517, CA (director who signed a cheque printed with a company name and bank account number held to have a plainly arguable defence notwithstanding that he had given no indication that he was signing as a representative of the company and not on his own behalf); *Novaknit Hellas SA v Kumar Bros International Ltd* [1998] Lloyd's Rep Bank 287, CA (agents liable on bills which omitted the word 'Limited' from the company's name).

On the death of the holder of a bill or note the executors or administrators may indorse so as to negative personal liability: Bills of Exchange Act 1882 s 31(5). However where an executor at the direction of his testator carried on business and signed bills in his own name as 'executor of \_\_\_\_\_', he was held personally liable: *Liverpool Borough Bank v Walker* (1859) 4 De G & J 24. See also *Childs v Monins* (1821) 2 Brod & Bing 460.

2 *Leadbitter v Farrow* (1816) 5 M & S 345.

3 As to the meaning of 'instrument' see PARA 1402 note 1.

4 As to the meaning of 'holder' see PARA 1407.

5 *Polhill v Walter* (1832) 3 B & Ad 114; *West London Commercial Bank Ltd v Kitson Ltd* (1884) 13 QBD 360, CA; and see **AGENCY** vol 1 (2008) PARAS 128, 160.

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### **1477. Liability to principal.**

When an agent is negligent, for example, in presenting an instrument<sup>1</sup> for payment or giving due notice of dishonour, he may be liable to his principal in damages for the loss incurred<sup>2</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526. As to negligence generally see **NEGLIGENCE**.

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## **(xi) Consideration**

### **A. SUFFICIENCY OF CONSIDERATION**

#### **1478. Presumption of consideration.**

Bills of exchange and promissory notes<sup>1</sup>, unlike other forms of simple contract, are presumed to stand upon the basis of a valuable consideration<sup>2</sup>. Not only is this so in the case of the immediate parties to the bill or note, but it is so also in the case of those who become parties to it subsequently by indorsement<sup>3</sup>, for every party whose signature appears on a bill is prima facie deemed to have become a party to it for value<sup>4</sup>.

The effect of the presumption, therefore, is to shift the burden of proof from the claimant who relies upon the instrument to the defendant who impugns it.

But when, in an action<sup>5</sup> on a bill or note, it is admitted or proved that the acceptance<sup>6</sup>, issue<sup>7</sup> or subsequent negotiation<sup>8</sup> of the instrument<sup>9</sup> is affected with fraud, duress, or force and fear, or

illegality<sup>10</sup>, the burden of proof is shifted unless and until the holder<sup>11</sup> proves that, subsequent to the alleged fraud or illegality, value has been given for the instrument in good faith<sup>12</sup>.

1 As to the meanings of 'bill of exchange' and 'promissory note' see PARA 1405.

2 See PARA 1401 head (1).

3 As to the meaning of 'indorsement' see PARA 1407.

4 Bills of Exchange Act 1882 ss 30(1), 89. As to the meaning of 'value' see PARA 1401 note 8.

5 For the purposes of the Bills of Exchange Act 1882, this includes counterclaim and set-off: s 2.

6 As to the meaning of 'acceptance' see PARA 1406.

7 As to the meaning of 'issue' see PARA 1406.

8 As to the meaning of 'negotiation' see PARA 1407.

9 As to fraud, duress and illegality see PARAS 1483-1484.

10 As to the meaning of 'instrument' see PARA 1402 note 1.

11 As to the meaning of 'holder' see PARA 1407.

12 Bills of Exchange Act 1882 ss 30(2), 89; *Baker v Barclays Bank Ltd* [1955] 2 All ER 571, [1955] 1 WLR 822; *Hall v Featherstone* (1858) 3 H & N 284 (citing *Harvey v Towers* (1851) 6 Exch 656; and *Smith v Braine* (1851) 16 QB 244); *Fuller v Alexander Bros* (1882) 52 LJQB 103; *Tatam v Haslar* (1889) 23 QBD 345; *Jones v Gordon* (1877) 2 App Cas 616 at 627, HL, per Lord Blackburn; *Robinson v Benkel* (1913) 29 TLR 475. However, the provision in the Bills of Exchange Act 1882 s 30(2) for shifting the burden of proof does not apply to a case where the holder seeking to enforce the instrument is the person to whom it was originally delivered and in whose hands it remains: *Talbot v Von Boris* [1911] 1 KB 854, CA. When the burden of proof is shifted, it seems that the plaintiff must give evidence as to both value and good faith: *Tatam v Haslar* above; and see *Berrett v Smith*, *Smith v Brenkley* [1965] NZLR 460. As to the meaning of 'good faith' see PARA 1401 note 7. As to the meaning of a 'holder in due course' see PARA 1407; see also PARA 1485.

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### 1479. Meaning of consideration.

Valuable consideration for an instrument<sup>1</sup> may be constituted by either: (1) any consideration sufficient to support a simple contract<sup>2</sup>; or (2) an antecedent debt or liability<sup>3</sup>. In the absence of valuable consideration a claim on an instrument, as on any other simple contract, will fail<sup>4</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Bills of Exchange Act 1882 s 27(1)(a). As to consideration sufficient for simple contracts see **CONTRACT** vol 9(1) (Reissue) PARA 727 et seq. Forebearing, at the request of the promisor, to claim under a promissory note during the currency of a postdated cheque given as collateral security for the money due under the note is sufficient consideration to support an action on the cheque by the payee: *Elkington v Cooke-Hill* (1914) 30 TLR 670. If the liability is that of a third party there must be some relationship between the receipt of the instrument and the antecedent debt or liability such as a forbearance or promise to forbear, express or implied, on the part of the recipient in regard to the third party's debt or liability: *Oliver v Davis* [1949] 2 KB 727, [1949] 2 All ER 353, CA; applying *Crears v Hunter* (1887) 19 QBD 341, CA. See also *Ayres v Moore* [1940] 1 KB 278, [1939] 4 All ER 351; *Pollway Ltd v Abdullah* [1974] 2 All ER 381, [1974] 1 WLR 493, CA. As between immediate parties,

consideration must move from the promisee: *Oliver v Davis* above; see also *Diamond v Graham* [1968] 2 All ER 909, [1968] 1 WLR 1061, CA; *Hasan v Willson* [1977] 1 Lloyd's Rep 431 at 442. See also *MK International Development Co Ltd v Housing Bank* (1991) Financial Times, 22 January, [1991] 1 Bank LR 74, CA. As to the absence of consideration in the context of gaming contracts see *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

As to debts owing by customers to their bankers see *M'Lean v Clydesdale Banking Co* (1883) 9 App Cas 95, HL; and *PARA 1487*.

3 Bills of Exchange Act 1882 s 27(1)(b). It is immaterial whether the instrument is payable on demand or at a future time: s 27(1)(b). The antecedent debt or liability must be that of the drawer or maker of the relevant instrument: *Oliver v Davis* [1949] 2 KB 727, [1949] 2 All ER 353, CA; *Hasan v Willson* [1977] 1 Lloyd's Rep 431 at 440-442; and see *Poirier v Morris* (1853) 2 E & B 89; *Currie v Misa* (1875) LR 10 Exch 153; affd sub nom *Misa v Currie* (1876) 1 App Cas 554, HL; cited with approval in *Fleming v Bank of New Zealand* [1900] AC 577 at 586, PC; *Stott v Fairlamb* (1883) 53 LJQB 47, CA. As to consideration of the nature of an antecedent debt or liability which may be sufficient consideration, see *Lomax Leisure Ltd (in liquidation) v Mill* [2007] EWHC 2508 (Ch), [2007] All ER (D) 164 (Oct).

4 Thus where an instrument is given as a present the donee cannot maintain an action against the donor thereon: *Milnes v Dawson* (1850) 5 Exch 948 at 950 per Parke B; *Holliday v Atkinson* (1826) 5 B & C 501. Where a note was originally given for no consideration, the renewal of the note from time to time, even with interest added, will not make it valid: *Edwards v Chancellor* (1888) 52 JP 454, DC. Neither in law nor in equity can the payee of a promissory note, which appears on the facts before the court to be voluntary, have any claim as a creditor: *Re Whitaker* (1889) 42 ChD 119 at 124, CA, per Cotton LJ.

Where by a misrepresentation, although innocent, the defendant is induced to give a note, there is no valid consideration: *Southall v Rigg*, *Forman v Wright* (1851) 11 CB 481. A merely moral obligation is insufficient to support a bill (*Eastwood v Kenyon* (1840) 11 Ad & El 438); but the promise to give up a will, thought by the holder to be invalid, is sufficient (*Smith v Smith* (1863) 13 CBNS 418). So, too, is the existence of a debt which could not in fact be recovered because it was statute barred (*La Touche v La Touche* (1865) 3 H & C 576); or the destruction of a right of action in conversion against a thief who later returned the securities which he had stolen (*London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535, CA).

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## **1480. Adequacy of consideration.**

The adequacy of the consideration<sup>1</sup> is not in general the subject of inquiry<sup>2</sup> in relation to a bill, but if upon the evidence given there is a patent and gross inadequacy of consideration, the transaction is open to the presumption of fraud<sup>3</sup>.

1 As to the meaning of 'consideration' see *PARA 1479*.

2 *Solomon v Turner* (1815) 1 Stark 51; *Adib El Hinnawi v Yacoub Fahmi* [1936] 1 All ER 638, PC. As to the adequacy of consideration generally according to the principles of the law of contract see **CONTRACT** vol 9(1) (Reissue) *PARA 736*.

3 *Jones v Gordon* (1877) 2 App Cas 616, HL. In *Cole v Milsome* [1951] 1 All ER 311, it was decided that where the payee to whom the drawer was not indebted received a cheque in good faith from the agent of the drawer and dealt with the cheque in accordance with the agent's instructions by making payments against it, the payments constituted sufficient consideration to support an action against the drawer.

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### **1481. Total or partial failure of consideration.**

In the absence, or subsequent failure, of consideration<sup>1</sup>, the instrument<sup>2</sup> is invalid as between parties in immediate relationship, but not as between remote parties when the holder is a holder for value<sup>3</sup>.

Where the consideration for which a party signed a bill or note<sup>4</sup> consists of a definite sum of money or of something the value of which is definitely ascertained in money, and it was either originally absent in part or has subsequently failed in part, the sum which a holder standing in immediate relation to such a party is entitled to receive from him is pro tanto reduced<sup>5</sup>. However, a remote party who has given value for the instrument may be entitled to receive payment in full<sup>6</sup>.

1 As to the meaning of 'consideration' see PARA 1479.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 As to the meaning of 'holder for value' see PARA 1407. Where the defendant has given a note to a person in consideration of his promising to be his executor, and in fact actually survives him, the personal representatives of the latter are not entitled to enforce it: *Solly v Hinde* (1834) 2 Cr & M 516.

4 As to the meanings of 'bill' and 'note' see PARA 1405.

5 *Day v Nix* (1824) 9 Moore CP 159; *Southall v Rigg*, *Forman v Wright* (1851) 11 CB 481 at 488; see also *Oscar Harris, Son & Co v Vallarman & Co* [1940] 1 All ER 185, CA. Cf also *Clark v Lazarus* (1840) 2 Man & G 167; *Warwick v Nairn* (1855) 10 Exch 762; *Tye v Gwynne* (1809) 2 Camp 346; *Thoni GmbH & Co KG v RTP Equipment Ltd* [1979] 2 Lloyd's Rep 282, CA; and see further PARA 1599 text to note 13.

6 *Munroe v Bordier* (1850) 8 CB 862.

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### **1482. Accommodation bills.**

An accommodation party to a bill<sup>1</sup> is a person<sup>2</sup> who has signed a bill as drawer<sup>3</sup>, acceptor<sup>4</sup>, or indorser<sup>5</sup>, without receiving value<sup>6</sup> for it, and for the purpose of lending his name to some other person<sup>7</sup>.

Any person who thus signs a bill is liable on it to a holder for value<sup>8</sup>, whether the latter knew when he took the bill that such person was an accommodation party or not<sup>9</sup>.

Though an accommodation party may sign in any capacity the bill will, properly speaking, only be an accommodation bill when the accommodation party signs as acceptor of it<sup>10</sup>.

Where there is a fluctuating balance between the parties the bill is not to be deemed an accommodation bill, even if at the moment of drawing, acceptance<sup>11</sup> or payment the balance may be in favour of the acceptor<sup>12</sup>.

When there are cross acceptances, even if for accommodation purposes only with no other basis to the contract, the consideration is deemed sufficient<sup>13</sup>.

- 1 As to the meaning of 'bill' see PARA 1405.
- 2 As to the meaning of 'person' see PARA 1401 note 4.
- 3 As to the meaning of 'drawer' see PARA 1406.
- 4 As to the meaning of 'acceptor' see PARA 1406.
- 5 As to the meaning of 'indorser' see PARA 1407 note 8.
- 6 As to the meaning of 'value' see PARA 1401 note 8.
- 7 Bills of Exchange Act 1882 s 28(1).
- 8 As to the meaning of 'holder for value' see PARA 1407.
- 9 Bills of Exchange Act 1882 s 28(2). As to discharge of accommodation bills see PARA 1553.
- 10 *Scott v Lifford* (1808) 1 Camp 246.
- 11 As to the meaning of 'acceptance' see PARA 1406.
- 12 *Re Overend, Gurney & Co Ltd, ex p Swan* (1868) LR 6 Eq 344; cf *Re London, Bombay and Mediterranean Bank, ex p Cama* (1874) 9 Ch App 686.
- 13 *Rose v Sims* (1830) 1 B & Ad 521 at 526; cf *Hasan v Willson* [1977] 1 Lloyd's Rep 431 at 439-440.

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## **B. FRAUD AND ILLEGALITY**

### **1483. Fraud and duress.**

Fraud vitiates every contract into which it enters, and an instrument<sup>1</sup>, the consideration for which is fraudulent even in part, is voidable at the option of the party defrauded except against a holder in due course<sup>2</sup>. However, the liability of the drawer<sup>3</sup> or maker<sup>4</sup> of an instrument to the original payee<sup>5</sup> is not affected by fraud if the fraud is that of a third party<sup>6</sup>.

Fraud may consist in negotiating the instrument in breach of faith, as when a bill<sup>7</sup> is indorsed to a party for the special purpose of having it discounted by him, and the latter instead of doing so negotiates it to another person<sup>8</sup>.

When the fraud is at the expense not of one of the immediate parties, but of persons who are strangers to the contract altogether, the effect is the same<sup>9</sup>.

Duress, or taking an undue advantage of a party (as when he is drunk), is also a ground for denying the consideration for an instrument and rendering it voidable<sup>10</sup>.

In all such cases, where the consideration is clearly fraudulent and the instrument is in the hands of a party with notice, the court may order it to be given up at once. When only a prima

facie case of fraud is made out, the court may restrain the negotiation<sup>11</sup> of an instrument for a specified time in order that the question may be tried<sup>12</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 *Jones v Gordon* (1877) 2 App Cas 616, HL; cf *Dawes v Harness* (1875) LR 10 CP 166; *Watson v Russell* (1864) 5 B & S 968, as explained in *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 at 681, 689, 693, 700, HL. See also *Solomon v Turner* (1815) 1 Stark 51 (where the defendant had bought some pictures and given a note in payment for them; an action was brought on the note, and the defendant was about to offer evidence of the inadequacy of the consideration in order to reduce the damages, when Lord Ellenborough CJ said, at 52: 'I will not admit the evidence for the purpose of reducing the damages, by showing that the pictures were of an inferior value, but if you can, by the inadequacy of the value and other circumstances, prove fraud on the part of the plaintiff so as to show that there was no contract at all, the evidence will be admissible; if it fall short of that it will be unavailable'); *Lewis v Cosgrave* (1809) 2 Taunt 2. As to the meaning of 'holder in due course' see PARA 1407. As to voidable contracts see **CONTRACT** vol 9(1) (Reissue) PARA 607. As to fraud generally see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 755 et seq.

3 As to the meaning of 'drawer' see PARA 1406.

4 As to the meaning of 'maker' see PARA 1406.

5 As to the meaning of 'payee' see PARA 1406.

6 *Watson v Russell* (1864) 5 B & S 968; *Talbot v Von Boris* [1911] 1 KB 854, CA; *Hasan v Willson* [1977] 1 Lloyd's Rep 431 at 443-444, not following *Ayres v Moore* [1940] 1 KB 278, [1939] 4 All ER 351. See also *First Discount Ltd v Cranston* [2002] EWCA Civ 71. [2002] All ER (D) 340 (Jan).

7 As to the meaning of 'bill' see PARA 1405.

8 Cf *Lloyd v Howard* (1850) 15 QB 995; *Barber v Richards* (1851) 6 Exch 63. See the Bills of Exchange Act 1882 s 21(2); and PARAS 1445, 1497 note 4.

9 Eg where a debtor gives a bill or note to one of his creditors in fraudulent preference of the rest (*Cockshott v Bennett* (1788) 2 Term Rep 763; *Knight v Hunt* (1829) 5 Bing 432; *Howden v Haigh* (1840) 11 Ad & El 1033; *Atkinson v Denby* (1861) 30 LJ Ex 361; affd (1862) 7 H & N 934), or where a note or bill is given to one creditor for better security (*Leicester v Rose* (1803) 4 East 372).

10 *Kearns v Durell* (1848) 6 CB 596; *Gore v Gibson* (1845) 13 M & W 623; *Talbot v Von Boris* [1911] 1 KB 854, CA. See **CONTRACT** vol 9(1) (Reissue) PARA 710.

11 As to the meaning of 'negotiation' see PARA 1407.

12 See *Jones v Lane* (1839) 3 Y & C Ex 281. For cases on non est factum see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 69 et seq.

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### 1484. Illegality.

If the consideration is illegal either wholly or in part<sup>1</sup>, the instrument<sup>2</sup> cannot be recovered on except by a holder in due course<sup>3</sup>. The illegality may consist either in its being against the general principle of the common law or in its special prohibition or interdiction by statute.

Common law illegality obtains wherever the consideration is founded upon a transaction which is against sound morals, public policy, public rights or public interests<sup>4</sup>. A contract containing a term which is void for illegality would not necessarily be wholly void if the terms are severable<sup>5</sup>.



Previously under the old Gaming Acts<sup>6</sup>, all bills and notes<sup>7</sup> (and like instruments), where the whole or any part of the consideration for them was money or any valuable thing won at certain games, or won by betting on such games, or given for reimbursing or repaying any money knowingly lent or advanced for such gaming or betting, were void in the hands of a holder<sup>8</sup> who had notice of the consideration, but could be recovered on by a holder in due course<sup>9</sup>. That legislation is repealed by the Gambling Act 2005<sup>10</sup> and the fact that a contract relates to gambling no longer prevents its enforcement<sup>11</sup>; but that is without prejudice to any rule of law preventing the enforcement of a contract on the grounds of unlawfulness (other than a rule relating specifically to gambling)<sup>12</sup>.

1 The legality of the consideration for a cheque given abroad but drawn in English upon a London bank is to be determined by English law as the law of the place where the bill is payable: *Moulis v Owen* [1907] 1 KB 746, CA. Cf *Saxby v Fulton* [1909] 2 KB 208, CA; see also *United Dominions Trust Ltd v Bycroft* [1954] 3 All ER 455, [1954] 1 WLR 1345, CA (illegality under the Hire Purchase Act 1938 s 5(c) (repealed)); *Vinall v Howard* [1954] 1 QB 375, [1954] 1 All ER 458, CA (illegality under the Road Traffic Acts 1930 and 1934); *Bank für Gemeinwirtschaft AG v City of London Garages Ltd* [1971] 1 All ER 541, [1971] 1 WLR 149, CA, where failure to comply with exchange control regulations was held not to affect a holder in due course.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 If the evidence shows that there was an illegal consideration given for the instrument, the onus of proof is on the holder to show that he is a holder in due course: see the Bills of Exchange Act 1882 s 30(2); and PARA 1478; *Bailey v Bidwell* (1844) 13 M & W 73. As to the meaning of 'holder in due course' see PARA 1407; see also PARA 1485.

4 *Willison v Patteson* (1817) 7 Taunt 439 (alien enemy); *Lowe v Peers* (1770) 4 Burr 2225 (restraint of marriage); *Flower v Sadler* (1882) 10 QBD 572, CA; *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173, CA (stifling prosecution); *Société des Hôtels Réunis SA v Hawker* (1913) 29 TLR 578; affd (1914) 30 TLR 423, CA (threat of legal proceedings). In *Sharif v Azad* [1967] 1 QB 605, [1966] 3 All ER 785, CA, Diplock LJ said that 'A cheque issued in performance of an agreement which is merely unenforceable is not 'affected by illegality'.'

5 *Fielding and Platt Ltd v Najjar* [1969] 2 All ER 150, [1969] 1 WLR 357, CA.

6 See the Gaming Act 1710 s 1 (repealed by the Gambling Act 2005 s 334(1)(a)) and the Gaming Act 1835 s 1 (repealed by the Gambling Act 2005 s 334(1)(b)). Those repeals do not permit enforcement of a right which was created, or which emanates from an agreement made, before s 334 came into force (ie before 1 September 2007: see the Gambling Act 2005 (Commencement No 6 and Transitional Provisions) Order 2006, SI 2006/3272, art 2(4)): Gambling Act 2005 s 334(2).

7 As to the meanings of 'bill' and 'note' see PARA 1405.

8 As to the meaning of 'holder' see PARA 1407.

9 *Hay v Ayling* (1851) 16 QB 423 at 431 per Lord Campbell CJ. Where the defendant lost money to a person on bets made on a horse and drew a cheque for his losses in favour of that person, the plaintiff to whom the cheque was indorsed, and who took the cheque with notice of the consideration, could not recover thereon: *Woolf v Hamilton* [1898] 2 QB 337, CA; see also *Ladup Ltd v Shaikh* [1983] QB 225, [1982] 3 WLR 172. But although money knowingly lent or advanced for gaming or betting could not be recovered on the ground that the consideration was illegal, money lent to enable the borrower to pay betting debts already incurred was in a different category, and it was held in such a case where the borrower became bankrupt that the lender who had been given two promissory notes to secure the debt could prove in the bankruptcy: *Re Lister, ex p Pyke* (1878) 8 ChD 754, CA; *Re O'Shea, ex p Lancaster* [1911] 2 KB 981, CA. Money knowingly lent abroad for the purposes of gaming in a country where gaming was not illegal could possibly be recovered in the English courts (*Saxby v Fulton* [1909] 2 KB 208, CA); but action upon a cheque given upon such a consideration and payable in England could not be maintained, as the legality of the consideration fell to be decided by English law: *Moulis v Owen* [1907] 1 KB 746, CA; *Browne v Bailey* (1908) 24 TLR 644.

10 See the Gambling Act 2005 s 334; and note 6.

11 See the Gambling Act 2005 s 335(1).

12 Gambling Act 2005 s 335(2).

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## **C. RIGHTS OF HOLDER**

### **1485. Indorsement to holder for value.**

Where value<sup>1</sup> has at any time been given for an instrument<sup>2</sup>, the holder is deemed to be a holder for value<sup>3</sup> as regards the acceptor<sup>4</sup> and all parties to the instrument who became parties prior to that time<sup>5</sup>. Value may be constituted by an antecedent debt or liability<sup>6</sup>.

He is said to be a holder in due course<sup>7</sup> if he has taken an instrument, which is complete and regular on the face of it<sup>8</sup>, under the following conditions: (1) that he became the holder<sup>9</sup> of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact<sup>10</sup>; (2) that he took the instrument in good faith<sup>11</sup> and for value, and that at the time the instrument was negotiated<sup>12</sup> to him he had no notice of any defect in the title of the person<sup>13</sup> who negotiated it<sup>14</sup>. In particular, the title of a person who negotiates an instrument is defective when he obtained the instrument, or the acceptance<sup>15</sup> of it, by fraud, duress, or force and fear, or other unlawful means or an illegal consideration, or when he negotiates it in breach of faith, or in such circumstances as amount to fraud<sup>16</sup>.

1 As to the meaning of 'value' see PARA 1401 note 8.

2 As to the meaning of 'instrument' see PARA 1402 note 1. For the effect of a transfer for value of a bill payable to order where it is not indorsed see PARA 1490.

3 As to the meaning of 'holder for value' see PARA 1407.

4 As to the meaning of 'acceptor' see PARA 1406.

5 Bills of Exchange Act 1882 s 27(2).

6 See the Bills of Exchange Act 1882 s 27(1)(b); and PARA 1479 text to note 3.

7 As to the meaning of 'holder in due course' see PARA 1407.

8 In *Arab Bank Ltd v Ross* [1952] 2 QB 216 at 226, [1952] 1 All ER 709 at 715, CA, Denning LJ explained what is meant by regularity (promissory notes in favour of 'Fathi and Faysal Nabulsy Company or Order' were indorsed 'Fathi and Faysal Nabulsy'; the indorsement was held to be irregular). As to unindorsed cheques see the Cheques Act 1957; and *Westminster Bank Ltd v Zang* [1966] AC 182 at 196, [1965] 1 All ER 1023, CA; affd [1966] AC 182 at 211, [1966] 1 All ER 114, HL.

9 As to the meaning of 'holder' see PARA 1407.

10 Bills of Exchange Act 1882 s 29(1)(a). As to the position after dishonour see PARA 1498.

11 As to the meaning of 'good faith' see PARA 1401 note 7.

12 As to the meaning of 'negotiation' see PARA 1407.

13 As to the meaning of 'person' see PARA 1401 note 4.

14 Bills of Exchange Act 1882 s 29(1)(b). An original payee, though he is a holder when in possession of a bill (see PARA 1407 note 11), cannot be a holder in due course (*RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL); and see *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719.

15 As to the meaning of 'acceptance' see PARA 1406.

16 Bills of Exchange Act 1882 s 29(2). 'Fraud' means common law fraud: *Österreichische Länderbank v S'Elite Ltd* [1981] QB 565, [1980] 2 All ER 651, CA. As to the effect of fraud, duress and illegality see also PARAS 1483-1484.

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### **1486. Consideration enures for benefit of holder.**

Where value<sup>1</sup> has at any time been given for an instrument<sup>2</sup>, the holder is deemed to be a holder for value<sup>3</sup> as regards the acceptor<sup>4</sup> and all parties to the instrument who became parties prior to such time<sup>5</sup>.

Moreover, every holder of an instrument, except the payee<sup>6</sup>, is prima facie deemed to be a holder in due course<sup>7</sup>. The payee is presumed to be a holder for value<sup>8</sup> though he cannot be a holder in due course<sup>9</sup>.

A holder (whether for value or not) who derives his title to an instrument through a holder in due course, and who is not himself a party to any fraud or illegality affecting it (whether he has notice of the fraud or not<sup>10</sup>), has all the rights of that holder in due course as regards the acceptor and all parties to the instrument prior to that holder<sup>11</sup>. If he gave value for it, he has the same rights against that holder also.

1 As to the meaning of 'value' see PARA 1401 note 8.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 As to the meaning of 'holder for value' see PARA 1407.

4 As to the meaning of 'acceptor' see PARA 1406.

5 See the Bills of Exchange Act 1882 s 27(2); and PARA 1485; *Hunter v Wilson* (1849) 4 Exch 489; *Munroe v Bordier* (1850) 8 CB 862. However, the Bills of Exchange Act 1882 s 27(2) does not override the requirement that, as between immediate parties, consideration must move from the promisee. In so far as *Diamond v Graham* [1968] 2 All ER 909, [1968] 1 WLR 1061, CA, decided otherwise, it has been questioned (see *Pollway Ltd v Abdullah* [1974] 2 All ER 381, [1974] 1 WLR 493, CA) and held to be inconsistent with *Oliver v Davis* [1949] 2 KB 727, [1949] 2 All ER 353, CA (see *Hasan v Willson* [1977] 1 Lloyd's Rep 431 at 442). It is unlikely that the Bills of Exchange Act 1882 s 27(2) applies where value is given by someone who never becomes a party to the instrument: see *MK International Development v Housing Bank* (1991) Financial Times, 22 January, [1991] 1 Bank LR 74, CA.

6 *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL. As to the meaning of 'payee' see PARA 1406.

7 See the Bills of Exchange Act 1882 s 30(2); and PARA 1478. As to the meaning of 'holder in due course' see PARA 1407. However when fraud or illegality in the making or negotiation of a bill is established the presumption is lost, the burden of proof is shifted and the onus of proving value and good faith is thrown upon the holder: see s 30(2); and PARAS 1478, 1483-1484.

8 See the Bills of Exchange Act 1882 s 30(1); and PARA 1478.

9 *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL; and see PARA 1450 note 3.

10 *May v Chapman* (1847) 16 M & W 355; *Masters v Ibberson* (1849) 8 CB 100.

11 Bills of Exchange Act 1882 s 29(3). 'Fraud' means common law fraud: *Österreichische Länderbank v S'Elite Ltd* [1981] QB 565, [1980] 2 All ER 651, CA. Where a payee discounts a bill to his bank, which in turn

indorses the bill back to the payee upon dishonour, the payee is capable of being a holder within the Bills of Exchange Act 1882 s 29(3): see *Jade International Steel Stahl und Eisen GmbH & Co KG v Robert Nicholas (Steels) Ltd* [1978] QB 917, [1978] 3 All ER 104, CA.

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### 1487. Lien of holder.

Any person who discounts an instrument<sup>1</sup>, or to whom an instrument is negotiated for the purpose of being discounted, is, although the property in it does not pass until it is discounted<sup>2</sup>, a holder<sup>3</sup> of the instrument for its full value<sup>4</sup>. But where the holder of an instrument has a lien<sup>5</sup> upon it arising either from contract or by implication of law, he is deemed to be a holder for value<sup>6</sup> to the extent of the sum for which he has a lien<sup>7</sup>. He is, however, entitled to enforce payment of the full amount if his transferor could have sued on the instrument, but otherwise can only recover the amount of his lien<sup>8</sup>. In the former case he is trustee for his transferor of the surplus beyond the amount of his lien<sup>9</sup>.

This is a case which occurs in the relation of banker and customer<sup>10</sup>. It is therefore important to distinguish carefully between bills<sup>11</sup> and such instruments when they are deposited with bankers as security and when they are handed to them for discount, as in the latter case the banker becomes a holder for the full value of the bill<sup>12</sup>.

A bill broker may have a lien in the same way as a banker<sup>13</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 *Re Firth, ex p Schofield* (1879) 12 ChD 337; *Dawson v Isle* [1906] 1 Ch 633.

3 As to the meaning of 'holder' see PARA 1407.

4 *Giles v Perkins* (1807) 9 East 12 at 14 per Lord Ellenborough CJ; *Re Gomersall* (1875) 1 ChD 137 at 144, CA, per Mellish LJ. But the holder who has discounted acceptances with notice that they are fraudulent can only prove in the bankruptcy of the acceptor for the amount given by him for them: *Re Gomersall*.

5 As to lien generally see LIEN.

6 As to the meaning of 'holder for value' see PARA 1407.

7 Bills of Exchange Act 1882 s 27(3); *Re Keever (a bankrupt), ex p Trustee of Property of Bankrupt v Midland Bank Ltd* [1967] Ch 182, [1966] 3 All ER 631; *Barclays Bank Ltd v Aschaffenburg Zellstoffwerke AG* [1967] 1 Lloyd's Rep 387, CA; *Barclays Bank Ltd v Astley Industrial Trust Ltd* [1970] 2 QB 527, [1970] 1 All ER 719; *Midland Bank Ltd v Reckitt* [1933] AC 1 at 18, HL, per Lord Atkin. See also *Attenborough v Clarke* (1858) 27 LJEx 138; *Atwood v Crowdie* (1816) 1 Stark 483; *Re Bunyard, ex p Newton, ex p Griffin* (1880) 16 ChD 330, CA. But the presumption is that a holder holds absolutely and not by way of security: *Hills v Parker* (1866) 14 LT 107; *Re Boys, Eedes v Boys, ex p Hop Planters' Co* (1870) LR 10 Eq 467.

8 *Peacock v Pursell* (1863) 32 LJCP 266 at 268 per Byles J.

9 *Reid v Furnival* (1833) 1 Cr & M 538 at 539; *Cook v Lister* (1863) 32 LJCP 121 at 127 per Willes J.

10 The right acquired by a general lien is that of an implied pledge: *Brandao v Barnett* (1846) 3 CB 519 at 531, HL, per Lord Campbell; cf *Jeffryes v Agra and Masterman's Bank* (1866) LR 2 Eq 674; and see PARA 863.

Where a banker before collecting a bill or cheque for his customer credits the customer's account, that fact does not, without more, make the banker a holder for value: *AL Underwood Ltd v Bank of Liverpool and Martins, Same v Barclays Bank* [1924] 1 KB 775, CA.

Where, after an action by the drawer of a bill against a party to whom he had handed it to be discounted for the recovery of the bill, the bill was recovered and was in the possession of the drawer's solicitor, the latter had no power to sue the acceptor on the instrument with a view to satisfying out of the proceeds his bill of costs against the drawer: *Redfern & Son v Rosenthal Bros* (1902) 86 LT 855, CA.

11 As to the meaning of 'bill' see PARA 1405.

12 See *Re Firth, ex p Schofield* (1879) 12 ChD 337; *Dawson v Isle* [1906] 1 Ch 633; and see *Re Bowes, Earl of Strathmore v Vane* (1886) 33 ChD 586. In general the presumption is that, when a negotiable or transferable bill is transferred to a banker, he takes it as a holder, not as a bailee or depository: *Re Boys, Eedes v Boys, ex p Hop Planters' Co* (1870) LR 10 Eq 467. As to banker's lien generally see PARA 860 et seq.

13 *Jones v Peppercorne* (1858) 28 LJCh 158.

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#### **1488. Freedom from defect of title.**

A holder who is a holder in due course<sup>1</sup> holds the instrument<sup>2</sup> free from any defect of title of prior parties as well as from mere personal defences available to prior parties among themselves, and he may enforce payment against all parties liable thereon<sup>3</sup>. Even if the holder's<sup>4</sup> title to an instrument is defective, a holder in due course to whom he negotiates it obtains a good and complete title to it<sup>5</sup>, and a payment made by any person<sup>6</sup> in due course to the holder, whether his title is defective or not, operates for that person as a valid discharge of the instrument<sup>7</sup>.

1 As to the meaning of 'holder in due course' see PARA 1407.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 Bills of Exchange Act 1882 s 38(2). As to the presumption in his favour in regard to an incomplete instrument see PARAS 1415, 1450; and in regard to valid delivery see PARAS 1441-1442. As to transfer of an altered instrument see PARA 1505. As to freedom from defect of title in the case of a bill dishonoured before maturity see PARA 1498. Where a previous holder of an instrument has renounced the liabilities of any party thereto before, at, or after maturity, the rights of a holder in due course who has received no notice of such renunciation are unaffected; see PARA 1555. See also *Re Keever (a bankrupt), ex p Trustee of Property of Bankrupt v Midland Bank Ltd* [1967] Ch 182 at 191-193, [1966] 3 All ER 631 at 635-637.

4 As to the meaning of 'holder' see PARA 1407.

5 Bills of Exchange Act 1882 s 38(3)(a); *Marston v Allen* (1841) 8 M & W 494 at 504 per Alderson B.

6 As to the meaning of 'person' see PARA 1401 note 4.

7 Bills of Exchange Act 1882 s 38(3)(b). As to the meanings of 'discharge of the instrument' and 'payment in due course' see PARA 1550.

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## (xii) Transfer

### A. TRANSFER BY NEGOTIATION

#### 1489. Negotiation by delivery or indorsement and delivery.

Bills and notes<sup>1</sup> are negotiated<sup>2</sup> when they are transferred from one person<sup>3</sup> to another in such a manner as to constitute the transferee the holder<sup>4</sup> of the bill or note<sup>5</sup>.

Negotiable bills and notes<sup>6</sup> may be payable either to order or to bearer<sup>7</sup>. Where they are payable to bearer<sup>8</sup>, they are negotiated simply by delivery<sup>9</sup>; where they are payable to order (whether payable simply to A B or to A B's order, or to A B or order), they are negotiated by indorsement<sup>10</sup> and delivery<sup>11</sup>.

The specified payee<sup>12</sup> of an instrument<sup>13</sup> payable to order negotiates it either by indorsing it in blank, or by directing payment to another specified party and signing his name beneath the direction, which is written on the back of the instrument<sup>14</sup>. He thus becomes an indorser<sup>15</sup> of the instrument, and the party to whom he directs payment to be made becomes the indorsee<sup>16</sup>. The indorsee may in his turn direct payment to another by indorsing over to him<sup>17</sup>.

Every instrument the transfer of which is not expressly prohibited by words appearing on its face<sup>18</sup> may be negotiated.

1 As to the meanings of 'bill' and 'note' see PARA 1405.

2 As to the meaning of 'negotiation' see PARA 1407. The delivery of a cheque to the original payee is not a negotiation: see *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 at 680, 687, 695, HL.

3 As to the meaning of 'person' see PARA 1401 note 4.

4 As to the meaning of 'holder' see PARA 1407.

5 Bills of Exchange Act 1882 ss 31(1), 89.

6 As to the meaning of 'negotiable instrument' see PARA 1402.

7 Bills of Exchange Act 1882 ss 8(2), 89. As to instruments payable to bearer or to order see PARA 1428.

8 As to the meaning of 'bearer' see PARA 1407.

9 Bills of Exchange Act 1882 ss 31(2), 89. Delivery may be actual or constructive: see PARA 1406.

10 As to the meaning of 'indorsement' see PARA 1407.

11 Bills of Exchange Act 1882 ss 31(2), 89. Delivery may be actual or constructive: see PARA 1406.

12 As to the meaning of 'payee' see PARA 1406.

13 As to the meaning of 'instrument' see PARA 1402 note 1.

14 See PARA 1492.

15 As to the meaning of 'indorser' see PARA 1407 note 8.

16 As to the meaning of 'indorsee' see PARA 1407.

17 The possibility of successive indorsements is recognised in the Bills of Exchange Act 1882 ss 32(5), 59(2) (b): see PARAS 1491, 1558.

18 See PARA 1440. When in spite of such words a bill is indorsed, the indorser is liable to the indorsee on his indorsement, for he is virtually the drawer of a new bill (aliter, however, if the instrument is a note); see *Gwinnell v Herbert* (1836) 6 Nev & MKB 723; *Plimley v Westley* (1835) 2 Bing NC 249.

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#### **1490. Transfer of order bill without indorsement.**

Where the holder<sup>1</sup> of a bill<sup>2</sup> payable to his order<sup>3</sup> transfers it for value<sup>4</sup> without indorsing it, the transfer gives the transferee such title as the transferor had in the bill and the transferee in addition acquires the right to have the indorsement<sup>5</sup> of the transferor<sup>6</sup>. In such a case the date of indorsement is deemed to be the true date of negotiation<sup>7</sup>; and until the indorsement takes place the transferee's position is no better than that of an equitable assignee of an ordinary chose in action<sup>8</sup>. He is affected by any notice of fraud received by him prior to the indorsement<sup>9</sup>. He cannot sue on the bill except in the name of the transferor, and he cannot negotiate it to another party<sup>10</sup>. If he writes on the bill the name of the transferor, it is an unauthorised signature and, as such, wholly inoperative<sup>11</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 As to the meaning of 'bill' see PARA 1405.

3 As to instruments payable to order see PARA 1428.

4 As to the meaning of 'value' see PARA 1401 note 8.

5 As to the meaning of 'indorsement' see PARA 1407.

6 Bills of Exchange Act 1882 s 31(4); *Walters v Neary* (1904) 21 TLR 146, CA. The right to have the instrument indorsed may be enforced by action (see *Rose v Sims* (1830) 1 B & Ad 521); and if the transferor is dead or bankrupt, his executor or trustee respectively will be compelled to indorse: *Watkins v Maule* (1820) 2 Jac & W 237; *Re Everest, ex p Mowbray* (1820) 1 Jac & W 428. If the transferee returns the bill to the transferor for indorsement and the latter loses or destroys the bill, the transferee has no remedy on the bill against the acceptor but only against the transferor: *Edge v Bumford* (1862) 31 Beav 247.

7 *Whistler v Forster* (1863) 14 CBNS 248 at 257-258. As to the meaning of 'negotiation' see PARA 1407.

8 As to the rights of such an assignee see **CHOSES IN ACTION** vol 13 (2009) PARA 68.

9 *Whistler v Forster* (1863) 14 CBNS 248 at 257 per Willis J: 'The general rule of law is undoubted, that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law-merchant as to negotiable instruments . . . If such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner whereby a title is acquired according to [statute], and not to (sic) a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action, and it is therefore clear, that, in order to acquire the benefit of this rule, the holder of the bill must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud received before he does so'.

10 *Harrop v Fisher* (1861) 10 CBNS 196.

11 *Harrop v Fisher* (1861) 10 CBNS 196; and see the Bills of Exchange Act 1882 ss 24, 32(1); and PARAS 1425, 1491, 1503.

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### **1491. Transfer by indorsement.**

In order to operate as a negotiation<sup>1</sup> the indorsement<sup>2</sup> must be written<sup>3</sup> on the bill itself<sup>4</sup> and be signed by the indorser<sup>5</sup>. The simple signature of the indorser on the bill without additional words is sufficient<sup>6</sup>. When written on an allonge<sup>7</sup>, or on a copy of the bill issued or negotiated in a country where copies are recognised, it is deemed to be written on the bill itself<sup>8</sup>. Notwithstanding the primary meaning of the term, a signature on the face of a bill may be a valid indorsement<sup>9</sup>.

The indorsement must be an indorsement of the entire instrument<sup>10</sup>. A partial indorsement, that is to say an indorsement which purports to transfer to the indorsee<sup>11</sup> a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the instrument<sup>12</sup>, but may authorise the indorsee to receive payment of the amount specified<sup>13</sup>.

An instrument which is payable to two or more payees<sup>14</sup> or indorsees may be indorsed by one of them if they are partners in a trading firm or if he has authority to indorse for them all; otherwise all payees or indorsees must indorse it<sup>15</sup>.

Where in an indorsement on an instrument the indorsee is wrongly designated or his name misspelt, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature<sup>16</sup>.

Where there are two or more indorsements on an instrument, each indorsement is deemed to have been made in the order in which it appears on the instrument until the contrary is proved<sup>17</sup>.

1 As to the meaning of 'negotiation' see PARA 1407.

2 As to the meaning of 'indorsement' see PARA 1407.

3 As to the meaning of 'writing' see PARA 1405 note 2.

4 Bills of Exchange Act 1882 s 32(1). As to the meaning of 'bill' see PARA 1405. The important thing is that the indorsement should appear on the bill itself. An assignment in writing, but not on the instrument itself, is not an indorsement: *Re Barrington and Burton* (1804) 2 Sch & Lef 112. 'But it is proved that according to a well established usage it is the common and almost invariable practice of bill-brokers in the city of London not to go through the form of putting their names upon every bill which they rediscount with their bankers, but to give instead a general indemnity or guarantee to their bankers, by which they undertake to be liable to the bankers upon each bill which they rediscount with them just as if they had indorsed that bill . . . I am aware of no authority and I can see no principle for holding that the liability [inter partes] which is created by such a guarantee differs from that which is created by the indorsement of a bill of exchange': *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400 at 414, CA, per James LJ.

5 As to the meaning of 'indorser' see PARA 1407 note 8.

6 Bills of Exchange Act 1882 s 32(1). Although additional words are unnecessary, they are not harmful so long as they do not conflict with the presumed intention to indorse; where the holder writes on the back of an instrument 'I bequeath . . . pay the within contents to . . . or his order at my death', and gives it to the person named, the writing is not an indorsement, but a testamentary gift void for want of witness: *Re Patterson's Estate, Mitchell v Smith* (1864) 4 De GJ & Sm 422. But it is not uncommon, and in some countries (see



*Hirschfeld v Smith* (1866) LR 1 CP 340) it is obligatory, that the indorsement should recite the consideration given.

7 An allonge is a slip which may be attached to the bill and used in the event of the indorsements being numerous or lengthy enough to occupy the whole available space on the back of the bill itself. Precautions should, and in some countries must, be taken to avoid fraud by making the last writing on the bill and the first on the allonge part of the same indorsement.

8 Bills of Exchange Act 1882 s 32(1).

9 *Re Smith, ex p Yates* (1857) 2 De G & J 191.

10 Bills of Exchange Act 1882 s 32(2).

11 As to the meaning of 'indorsee' see PARA 1407.

12 Bills of Exchange Act 1882 s 32(2).

13 *Heilbut v Nevill* (1869) LR 4 CP 354 at 358 per Willes J. Although an indorsement must not transfer the bill to two or more indorsees severally, it may do so alternatively: Bills of Exchange Act 1882 s 7(2). As to alternative payees impliedly applicable to indorsees by virtue of s 34(3) see PARA 1492. See *Absolon v Marks* (1847) 17 LJQB 7; *Watson v Evans* (1863) 32 LJEx 137.

14 As to the meaning of 'payee' see PARA 1406.

15 Bills of Exchange Act 1882 s 32(3); *Carvick v Vickery* (1783) 2 Doug KB 653n. The usage in the case of dividend warrants payable to two or more persons is to accept the indorsement of one of them. This usage is preserved by the Bills of Exchange Act 1882 s 97(3)(d); see PARA 1619.

16 Bills of Exchange Act 1882 s 32(4); *Leonard v Wilson* (1834) 2 Cr & M 589; but see *Kirk v Blurton* (1841) 9 M & W 284. An instrument payable to 'A B per X' should be indorsed 'A B per X' and not simply 'X': *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA. When an indorsement is addressed to a married woman as 'Mrs John Smith', she may sign her name as 'Emma Smith, wife of John Smith'. As to indorsement by a rubber stamp with variations of a company's name see *Bird & Co (London) Ltd v Thomas Cook & Son Ltd* [1937] 2 All ER 227, where it was held that the intention of the indorser governs any misdescription of an indorsee. See also *Arab Bank Ltd v Ross* [1952] 2 QB 216, [1952] 1 All ER 709, CA (cited in PARA 1485 note 8).

17 Bills of Exchange Act 1882 s 32(5); *Macdonald v Whitfield* (1883) 8 App Cas 733, PC.

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## **B. DIFFERENT KINDS OF INDORSEMENTS**

### **1492. Blank or special indorsements.**

The indorsement<sup>1</sup> on an instrument<sup>2</sup> may be either in blank or special<sup>3</sup>. When it is in blank it consists merely of the signature of the indorser<sup>4</sup>, that is, it specifies no indorsee<sup>5</sup>, and an instrument so indorsed becomes payable to bearer<sup>6</sup> and may therefore be thenceforward negotiated by delivery<sup>7</sup>. When it is special it specifies the person<sup>8</sup> to whom, or to whose order, the instrument is to be payable<sup>9</sup>; such a person is known as the indorsee, and, subject to necessary modifications, he is in a position similar to that of the original payee<sup>10</sup>.

Where an instrument has been indorsed in blank, any holder<sup>11</sup> may convert the blank indorsement into a special indorsement by writing<sup>12</sup> above the indorser's signature a direction to pay the instrument to or to the order of himself or some other person<sup>13</sup>.

- 1 As to the meaning of 'indorsement' see PARA 1407.
- 2 As to the meaning of 'instrument' see PARA 1402 note 1. It is today unnecessary to indorse a cheque payable to order unless it is to be negotiated: see the Cheques Act 1957 s 1; and PARA 832.
- 3 Bills of Exchange Act 1882 s 32(6).
- 4 As to the meaning of 'indorser' see PARA 1407 note 8.
- 5 As to the meaning of 'indorsee' see PARA 1407.
- 6 Bills of Exchange Act 1882 s 34(1). As to the meaning of 'bearer' see PARA 1407. As to instruments payable to bearer see PARA 1428.
- 7 See the Bills of Exchange Act 1882 31(2); and PARA 1489. See also *Peacock v Rhodes* (1781) 2 Doug KB 633.
- 8 As to the meaning of 'person' see PARA 1401 note 4.
- 9 Bills of Exchange Act 1882 s 34(2). The special indorsement may be 'to A B', 'to the order of A B', or 'to A B or order'.
- 10 Bills of Exchange Act 1882 s 34(3). As to the meaning of 'payee' see PARA 1406. For the position of the original payee see ss 7, 8; and PARAS 1430-1431, 1489.
- 11 As to the meaning of 'holder' see PARA 1407.
- 12 As to the meaning of 'writing' see PARA 1405 note 2.
- 13 Bills of Exchange Act 1882 s 34(4). See *Hirschfeld v Smith* (1866) LR 1 CP 340 at 353 per Erle CJ. An instrument is not payable to bearer, unless expressly made so, or unless the only or last indorsement is an indorsement in blank: Bills of Exchange Act 1882 s 8(3); and see PARA 1428.

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### **1493. Conditional indorsements.**

An indorsement<sup>1</sup> may be conditional, but the condition may be disregarded by the payer, and payment to the indorsee<sup>2</sup> is valid whether the condition has been fulfilled or not<sup>3</sup>.

- 1 As to the meaning of 'indorsement' see PARA 1407.
- 2 As to the meaning of 'indorsee' see PARA 1407.
- 3 Bills of Exchange Act 1882 s 33.

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### 1494. Restrictive indorsements.

The indorsement<sup>1</sup> of the instrument<sup>2</sup> may also contain terms making it restrictive<sup>3</sup>.

A restrictive indorsement is an indorsement which does one of the following<sup>4</sup>: (1) prohibits the further negotiation<sup>5</sup> of the instrument<sup>6</sup>; or (2) expresses that it is a mere authority to deal with the instrument as directed by the indorsement and not a transfer of the ownership<sup>7</sup>, as, for example, if the indorsement constitutes the indorsee<sup>8</sup> the agent of the indorser<sup>9</sup> for a special purpose<sup>10</sup>, or vests<sup>11</sup> the title in the indorsee in trust for or to the use of some other person<sup>12</sup>.

The effect of a restrictive indorsement is to confer upon the indorsee<sup>13</sup>:

- 148 (a) the right to receive payment of the instrument;
- 149 (b) the same right against any other party to the instrument that his indorser had<sup>14</sup>;
- 150 (c) the power, but only in accordance with the express terms of his authority, to transfer the instrument and his rights on it to another<sup>15</sup>.

Where a restrictive indorsement authorises further transfer, all subsequent indorseees take the instrument with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement<sup>16</sup>.

1 As to the meaning of 'indorsement' see PARA 1407.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 Bills of Exchange Act 1882 s 32(6).

4 Bills of Exchange Act 1882 s 35(1).

5 As to the meaning of 'negotiation' see PARA 1407.

6 Eg where the indorsement is 'Pay to A B only': Bills of Exchange Act 1882 s 35(1).

7 Eg where the indorsement is 'Pay D or order for collection': Bills of Exchange Act 1882 s 35(1).

8 As to the meaning of 'indorsee' see PARA 1407.

9 As to the meaning of 'indorser' see PARA 1407 note 8.

10 *Lloyd v Sigourney* (1829) 5 Bing 525; *Williams, Deacon & Co v Shadbolt* (1885) Cab & El 529.

11 Eg where the indorsement is 'Pay D for the account of X': Bills of Exchange Act 1882 s 35(1).

12 *Ancher v Bank of England* (1781) 2 Doug KB 637.

13 Bills of Exchange Act 1882 s 35(2).

14 *Evans v Cramlington* (1687) Carth 5. But where a bill is restrictively indorsed for collection and the indorsee pays the amount to the indorser, he cannot acquire rights on the bill against the acceptor before maturity, the indorsee for collection being an agent only: *Williams, Deacon & Co v Shadbolt* (1885) Cab & El 529.

15 See *Lloyd v Sigourney* (1829) 5 Bing 525. As to transfer generally see PARA 1489 et seq.

16 Bills of Exchange Act 1882 s 35(3). See *Truettell v Barandon* (1817) 8 Taunt 100.

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### **1495. Indorsements negating or extending liability.**

The indorser<sup>1</sup> may insert an express stipulation negating or limiting his own liability to the holder<sup>2</sup>, or he may waive as regards himself some or all of the holder's duties<sup>3</sup>.

In the special case of a person<sup>4</sup> who is under obligation to indorse in a representative capacity, he may indorse the instrument<sup>5</sup> in such terms as to negative personal responsibility<sup>6</sup>. Such indorsements<sup>7</sup> are more properly termed qualified indorsements.

1 As to the meaning of 'indorser' see PARA 1407 note 8.

2 See the Bills of Exchange Act 1882 s 16(1); and PARA 1440. As to the meaning of 'holder' see PARA 1407. Thus he may indorse sans recours or make other reservation as to his personal liability. Cf *Goupy v Harden* (1816) 7 Taunt 159; *Castrique v Buttigieg* (1856) 10 Moo PCC 94. See also *Wakefield v Alexander & Co and Chapronière* (1901) 17 TLR 217 (the right to indorse sans recours applies to any indorser or quasi indorser and is not confined to an indorser who can give title to a bill; a quasi indorser is one who is not a party to the instrument: see PARA 1579).

3 See the Bills of Exchange Act 1882 s 16(2); and PARA 1440. Thus he may waive duties as regards due presentment (see PARA 1516 et seq) or notice of dishonour (see PARA 1524 et seq).

4 As to the meaning of 'person' see PARA 1401 note 4.

5 As to the meaning of 'instrument' see PARA 1402 note 1.

6 Bills of Exchange Act 1882 s 31(5). See also s 26(1); and PARA 1476 note 1.

7 As to the meaning of 'indorsement' see PARA 1407.

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## **C. DURATION OF NEGOTIABILITY**

### **1496. Cessation of negotiability.**

An instrument which is negotiable<sup>1</sup> in its origin continues to be negotiable until it has been either restrictively indorsed<sup>2</sup> or discharged by payment or otherwise<sup>3</sup>.

Subject to certain limitations<sup>4</sup>, the fact that an instrument is overdue, or even that it has been dishonoured and a claim brought upon it, is no bar to its further negotiation<sup>5</sup>. Except where an indorsement<sup>6</sup> bears date after the maturity of the instrument, every negotiation is prima facie deemed to have been effected before it was overdue<sup>7</sup>.

1 As to the meaning of 'negotiable instrument' see PARA 1402.

2 Bills of Exchange Act 1882 s 36(1)(a). A restrictive indorsement bars the negotiation of the bill. As to restrictive indorsements see PARA 1494.

3 Bills of Exchange Act 1882 s 36(1)(b); *Callow v Lawrence* (1814) 3 M & S 95 at 97 per Lord Ellenborough CJ ('A bill of exchange is negotiable ad infinitum until it has been paid by or discharged on behalf of the acceptor'). As to the meaning of 'discharge of the instrument' see PARA 1550.

4 See PARA 1497.

5 Cf *Deuters v Townsend* (1864) 33 LJQB 301. As to the meaning of 'negotiation' see PARA 1407.

6 As to the meaning of 'indorsement' see PARA 1407.

7 Bills of Exchange Act 1882 s 36(4).

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### **1497. Overdue instrument.**

Where an overdue<sup>1</sup> instrument<sup>2</sup> is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person<sup>3</sup> who takes it can acquire or give a better title than that of the person from whom he took it<sup>4</sup>.

If, however, the person from whom the holder<sup>5</sup> took it had at the time when the instrument matured a good title, the holder is not affected by a defect in the title of a previous holder<sup>6</sup>.

Where an instrument, in its origin an accommodation bill, is negotiated after maturity, the mere absence of consideration is immaterial<sup>7</sup>. But a negotiation<sup>8</sup> in breach of an agreement expressed or implied that such a bill shall not be negotiated after maturity invalidates the holder's right to be a holder in due course<sup>9</sup>.

Where there is no defect in the title of the person from whom the holder took the overdue instrument, a set-off or other matter of counterclaim outstanding between that person and a prior party does not affect the holder's right<sup>10</sup>, even if its existence was known to the holder when he took the instrument<sup>11</sup>.

1 As to when an instrument payable on demand is overdue see PARA 1433.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 As to the meaning of 'person' see PARA 1401 note 4.

4 Bills of Exchange Act 1882 s 36(2); *Redfern & Son v Rosenthal Bros* (1902) 86 LT 855, CA. Defect of title, as a phrase, is the statutory equivalent in this connection of an equity attaching to the bill: see *Tinson v Francis* (1807) 1 Camp 19; *Sturtevant v Ford* (1842) 4 Man & G 101. Thus where a bill is indorsed by the drawer to a person to have it discounted, and that person, in fraud of the drawer, further indorses it when overdue to the plaintiff, the plaintiff cannot recover on the bill from the acceptor: *Lloyd v Howard* (1850) 15 QB 995. So where an overdue bill is purchased by an official of a bank with money stolen by him from the bank, and indorsed to another party, the claim of the bank constitutes an equity attaching to the bill in the hands of the indorsee: *Re European Bank, ex p Oriental Commercial Bank* (1870) 5 Ch App 358. Similarly, where a bill is accepted subject to a condition expressly agreed on by the drawer and acceptor, and is indorsed when overdue to another party, that party is bound by the original condition: *Holmes v Kidd* (1858) 28 LJEx 112.

However, where a bill drawn and accepted in England was indorsed in blank and delivered in Norway to the agent of an English firm, and, having been seized in that country in execution of a judgment obtained there against a member of the English firm, was subsequently sold after maturity to a holder who indorsed it to a holder in England, who took the bill without knowledge of his indorser's title, it was held that, as that indorser's title was good in Norway, the holder in England who took it from him could recover from the acceptor: *Alcock v Smith* [1892] 1 Ch 238, CA.

Title to an instrument is not defective on the ground of sovereign immunity if the state which claims immunity has never been a party to the instrument: *Cardinal Financial Investments Corp v Central Bank of Yemen* [2001] Lloyd's Rep Bank 1, CA.

5 As to the meaning of 'holder' see PARA 1407.

6 Eg where a bill accepted for an illegal consideration is indorsed before it is due to a holder in due course, a party to whom the latter indorses it after maturity can recover on it: *Chalmers v Lanion* (1808) 1 Camp 383; *Fairclough v Pavia* (1854) 9 Exch 690. See the Bills of Exchange Act 1882 s 29(3); and PARA 1486. As to the meaning of 'holder in due course' see PARA 1407.

7 *Sturtevant v Ford* (1842) 4 Man & G 101; *Stein v Yglesias* (1834) 1 Cr M & R 565; *Charles v Marsden* (1808) 1 Taunt 224. As to defect of title see note 4. As to accommodation bills see PARA 1482.

8 As to the meaning of 'negotiation' see PARA 1407.

9 *Parr v Jewell* (1855) 16 CB 684. As to the meaning of 'holder in due course' see PARA 1407. As to an agreed set-off see *Collenridge v Farquharson* (1816) 1 Stark 259; *Oulds v Harrison* (1854) 10 Exch 572 at 579 per Parke B.

10 *Burrough v Moss* (1830) 10 B & C 558; and see *Holmes v Kidd* (1858) 28 LJEx 112 at 113 per Crompton J; *Oulds v Harrison* (1854) 10 Exch 572; *Re Overend, Gurney & Co Ltd, ex p Swan* (1868) LR 6 Eq 344.

11 *Whitehead v Walker* (1842) 10 M & W 696.

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### **1498. Negotiation after dishonour.**

Where a bill which is not overdue has been dishonoured, any person<sup>1</sup> who takes it with notice of the dishonour takes it subject to any defect of title attaching to it at the time of dishonour<sup>2</sup>. But a holder in due course<sup>3</sup> ex hypothesi has no such notice, and there is no such defect in his title<sup>4</sup>. Moreover, where a bill is dishonoured by non-acceptance<sup>5</sup> and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission are not prejudiced thereby<sup>6</sup>.

1 As to the meaning of 'person' see PARA 1401 note 4.

2 Bills of Exchange Act 1882 s 36(5); *Hornby v McLaren* (1908) 24 TLR 494, CA; *Crossley v Ham* (1811) 13 East 498 (where an indorsee taking a bill with notice of its dishonour was held bound by an agreement made in regard to the bill by prior indorsers before its dishonour).

3 As to the meaning of 'holder in due course' see PARA 1407.

4 Bills of Exchange Act 1882 s 36(5).

5 As to dishonour by non-acceptance see PARA 1515.

6 Bills of Exchange Act 1882 s 48(1). See also *Clifford Chance v Silver* (1992) Financial Times, 31 July, [1992] 2 Bank LR 11, CA (where an instrument was dishonoured and notice was given, it was arguable that the holders in due course relinquished their rights by accepting a smaller sum in part payment).

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### **1499. 'Not negotiable' cheque.**

In the case of a cheque<sup>1</sup> crossed 'not negotiable', the person<sup>2</sup> who takes it does not acquire and cannot give a better title to it than that of the person from whom he took it<sup>3</sup>. The legal effect of adding the words 'not negotiable' to a cheque is, therefore, not to impede transfer, but to perpetuate in the hands of any transferee whatever defect or infirmity of title may affect the person who first transferred the cheque with those words on it<sup>4</sup>.

1 As to the meaning of 'cheque' see PARA 1405.

2 As to the meaning of 'person' see PARA 1401 note 4.

3 Bills of Exchange Act 1882 s 81; and see PARA 1411. See *Fisher v Roberts* (1890) 6 TLR 354, CA (where, two persons being partners, one of the partners in fraud of the other indorsed a cheque drawn in favour of the firm, crossed and marked 'not negotiable', to the defendant, who gave cash for it; and in an action brought by the partner who was defrauded, it was held that the amount could be recovered). See also *Wilson and Meeson v Pickering* [1946] KB 422, [1946] 1 All ER 394, CA (where it was held that a 'person' included the payee whose name had been entered in a blank cheque by an employee of the drawer and contrary to his instructions). As to crossed cheques generally see PARAS 838, 880. In *Great Western Rly Co v London and County Banking Co* [1901] AC 414, HL, the object of the provision was defined by Lord Brampton, at 422, as being 'to afford to the drawer or the holder of a cheque who is desirous of transmitting it to another person as much protection as can reasonably be afforded to it against dishonesty or accidental miscarriage in the course of its transit'.

4 As to the effect of the crossing 'not negotiable' upon the liability of a banker through whom fraudulent cheques have been collected see *Crumplin v London Stock Bank Ltd* (1913) 109 LT 856; *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA. As to the effect of the words on a bill other than a cheque see *Hibernian Bank Ltd v Gysin and Hanson* [1938] 2 KB 384, [1938] 2 All ER 575; affd [1939] 1 KB 483, [1939] 1 All ER 166, CA. See PARA 894. As to transfer generally see PARA 1489 et seq.

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### **1500. Non-transferable cheques.**

In the case of a cheque<sup>1</sup> which is crossed and bears across its face the words 'account payee' or 'a/c payee', either with or without the word 'only', the cheque is not transferable, and is valid only as between the parties to it<sup>2</sup>.

A banker<sup>3</sup> is not negligent<sup>4</sup> by reason only of his failure to concern himself with any purported indorsement<sup>5</sup> of a cheque which is not transferable, regardless of how it was made so<sup>6</sup>.

1 As to the meaning of 'cheque' see PARA 1405.

2 Bills of Exchange Act 1882 s 81A(1) (s 81A added by the Cheques Act 1992 s 1). As to the effect of the words 'account payee' see also PARA 894. As to transfer generally see PARA 1489 et seq.

3 As to the meaning of 'banker' see PARA 1403 note 7.

4 As to the purposes of the Bills of Exchange Act 1882 s 80: see PARA 1575.

5 As to the meaning of 'indorsement' see PARA 1407.

6 ie whether it was made not transferable in accordance with the Bills of Exchange Act 1882 s 81A(1) or otherwise: s 81A(2) (as added: see note 2).

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### **1501. Negotiation back to prior party.**

Where an instrument<sup>1</sup> is negotiated back to a prior party (whether drawer<sup>2</sup>, acceptor<sup>3</sup> or indorser<sup>4</sup>), that party may, subject to the provisions in regard to discharge<sup>5</sup>, reissue<sup>6</sup> and further negotiate it<sup>7</sup>. However, he is not entitled to enforce payment against any intervening party to whom he was personally liable in his former capacity<sup>8</sup>, though he may do so against persons to whom he was not so liable<sup>9</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the meaning of 'drawer' see PARA 1406.

3 As to the meaning of 'acceptor' see PARA 1406.

4 As to the meaning of 'indorser' see PARA 1407 note 8.

5 As to discharges generally see PARA 1550 et seq.

6 As to the meaning of 'issue' see PARA 1406.

7 Bills of Exchange Act 1882 s 37. The discharge of a bill operates as a bar to its further negotiation: s 36(1) (b); and see PARA 1496. In the case of an acceptor, his becoming the holder of it at or after its maturity operates ipso facto as a discharge. See also *Attenborough v Mackenzie* (1856) 25 LJEx 244.

8 Bills of Exchange Act 1882 s 37.

9 'When the relations between the prior parties are such that the second could not sue the first, the fact that the third party is also the first is no answer for the second party when sued by the third': *Re Gooch, ex p Judd* [1921] 2 KB 593 at 605, CA, per Scrutton LJ. But if, as payee or prior indorser, he formerly indorsed 'sans recours', he is able to sue the intervening parties, for the object of the rule is to prevent the possibility of actions which would nullify the effect of each other, and in the case supposed the intervening parties would have no right of action against him: *Wilkinson & Co v Unwin* (1881) 7 QBD 636, CA; *JW Holmes & Co v Durkee* (1883) Cab & El 23; *Glenie v Bruce Smith* [1907] 2 KB 507; affd [1908] 1 KB 263, CA, which was followed in *Re Gooch, ex p Judd* above, in preference to *MT Shaw & Co Ltd v Holland* [1913] 2 KB 15, CA.

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### **1502. Striking out indorsements.**



The holder<sup>1</sup> or his agent may at any time<sup>2</sup> strike out any indorsement<sup>3</sup> which is not necessary to his title, with the result that he thereby frees the indorser<sup>4</sup> whose indorsement is struck out, and all indorsers subsequent to him, from liability on the instrument<sup>5</sup>.

If an instrument is paid by an indorser, or being a bill payable to drawer's order<sup>6</sup> is paid by the drawer, the payer, who is thereby remitted to his former rights as regards the acceptor<sup>7</sup> or antecedent parties, may, if he thinks fit, strike out his own and<sup>8</sup> subsequent indorsements and again negotiate it<sup>9</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 Even at the trial: *Mayer v Jadis* (1833) 1 Mood & R 247.

3 As to the meaning of 'indorsement' see PARA 1407.

4 As to the meaning of 'indorser' see PARA 1407 note 8.

5 See the Bills of Exchange Act 1882 s 63(2) and PARA 1556; *Fairclough v Pavia* (1854) 9 Exch 690. However an indorser whose indorsement is struck out by mistake is not relieved (*Wilkinson v Johnson* (1824) 3 B & C 428); and title may sometimes be made through a cancelled indorsement: *Fairclough v Pavia* above per curiam at 695. As to the meaning of 'instrument' see PARA 1402 note 1.

6 As to bills payable to order see PARA 1428. As to the meaning of 'drawer' see PARA 1406.

7 As to the meaning of 'acceptor' see PARA 1406.

8 Note that the word 'and' appears to be needed between the words 'own' and 'subsequent' but does not appear in the Queen's printers copy of the Act.

9 See the Bills of Exchange Act 1882 s 59(2)(b); and PARA 1558.

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## **D. EFFECT OF FORGERY ON TRANSFER**

### **1503. Forgery and unauthorised signature.**

Where a signature on a bill or note<sup>1</sup> is forged or placed there without the authority of the person<sup>2</sup> whose signature it purports to be<sup>3</sup>, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a valid discharge<sup>4</sup> for it or to enforce payment of it against any party thereto can be acquired through or under that signature unless the party against whom it is sought to retain the bill or enforce payment of it is precluded from setting up the forgery or want of authority as a defence<sup>5</sup>.

If a signature on the bill has been forged and the forgery comes to the knowledge of the party whose signature has been forged, that party, if he does not give information of the forgery to the holder<sup>6</sup>, may be estopped from setting it up or relying upon it<sup>7</sup>. An acceptor<sup>8</sup> who has admitted the authority of his signature cannot afterwards refuse to honour it on the ground that it is forged<sup>9</sup>, but if he has paid a bill on which his signature as acceptor has been forged, he is not estopped from refusing to pay a similar bill on the ground that that is forged also<sup>10</sup>.

Independently of any other estoppel the acceptor of a bill is precluded from denying to a holder in due course<sup>11</sup> the genuineness of the drawer's<sup>12</sup> signature or his authority to draw<sup>13</sup>, and the

indorser<sup>14</sup> from denying to a holder in due course the genuineness and regularity in all respects of the signature of the drawer and all previous indorsers<sup>15</sup>.

Where the signature of a party to an instrument<sup>16</sup> has been forged, the fact that the holder has subsequently obtained the genuine signature of that party does not restore validity to the instrument<sup>17</sup>, but, presumably, that party may be estopped thereafter from setting up the forgery. An instrument on which it is proved that a forged signature has been placed may be ordered by the court to be delivered up<sup>18</sup>.

A holder who on presenting an instrument has been paid in good faith and has received payment in good faith, but whose title is derived through a forged indorsement<sup>19</sup>, may be compelled to return the money paid<sup>20</sup>.

Where an indorsement is forged abroad, and the instrument gets into the hands of a bona fide holder, the title of the holder must be determined according to the laws of the country where the instrument was transferred<sup>21</sup>.

Where a paper bearing only a signature is stolen and then filled up and negotiated to a bona fide holder for value<sup>22</sup>, the signer is not estopped from setting up the fraud<sup>23</sup>.

1 As to the meanings of 'bill' and 'note' see PARA 1405.

2 As to the meaning of 'person' see PARA 1401 note 4.

3 If a person of the same name as the payee named in a bill of exchange indorses the bill, knowing he is not the person in whose favour it is drawn, he is guilty of forgery: see *Mead v Young* (1790) 4 Term Rep 28. A genuine signature by an agent who indicates on the face of the bill that he signs as an agent, but who is fraudulently misusing his authority, is not a forgery: see *Morison v London County and Westminster Bank Ltd* [1914] 3 KB 356, CA; and for a conflicting view see *Alexander Stewart & Son of Dundee Ltd v Westminster Bank Ltd* [1926] WN 271, CA (in which it was held that the signature of a person who indorses an instrument intending to steal is an unauthorised signature).

4 As to discharges generally see PARA 1550 et seq.

5 Bills of Exchange Act 1882 ss 24, 89 (see PARA 1425); *Robarts v Tucker* (1851) 16 QB 560. In the case of cheques, bankers are specially protected: see the Bills of Exchange Act 1882 ss 60, 80; the Cheques Act 1957 ss 1, 4; PARAS 1552, 1575; and PARAS 836, 882. Where there is a conflict of laws other considerations may arise; see PARA 1589 et seq.

6 As to the meaning of 'holder' see PARA 1407.

7 *William Ewing & Co v Dominion Bank* [1904] AC 806, PC; *Greenwood v Martins Bank Ltd* [1933] AC 51, HL. A reasonable time may be allowed: cf *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL. But where a customer of a bank, whose signature was forged by one of the clerks of the bank, was requested by one of the agents of the bank to maintain silence in the interests of the bank, he was not estopped from relying on the forgery in an action against the bank: *Ogilvie v West Australian Mortgage and Agency Corp'n Ltd* [1896] AC 257, PC.

8 As to the meaning of 'acceptor' see PARA 1406.

9 *Leach v Buchanan* (1802) 4 Esp 226; and see *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187.

10 *Morris v Bethell* (1869) LR 5 CP 47.

11 As to the meaning of 'holder in due course' see PARA 1407.

12 As to the meaning of 'drawer' see PARA 1406.

13 See the Bills of Exchange Act 1882 s 54(2)(a); and PARA 1457. See *Bank of England v Vagliano Bros* [1891] AC 107, HL.

14 As to the meaning of 'indorser' see PARA 1407 note 8.

15 See the Bills of Exchange Act 1882 s 55(2)(b); and PARA 1578: cf *Heilbut v Nevill* (1870) LR 5 CP 478. See also PARA 1457.

- 16 As to the meaning of 'instrument' see PARA 1402 note 1.
- 17 *Esdaile v La Nauze* (1835) 1 Y & C Ex 394.
- 18 *Esdaile v La Nauze* (1835) 1 Y & C Ex 394.
- 19 As to the meaning of 'indorsement' see PARA 1407.
- 20 *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC; and see *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7. See PARA 1551.
- 21 *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA. See PARA 1591.
- 22 As to the meaning of 'holder for value' see PARA 1407.
- 23 *Baxendale v Bennett* (1878) 3 QBD 525, CA; *Smith v Prosser* [1907] 2 KB 735, CA. Cf *Guildford Trust Ltd v Goss* (1927) 136 LT 725.

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#### **1504. Theft.**

A valid title vests in a holder in due course<sup>1</sup> who has taken a bill or note<sup>2</sup> for value<sup>3</sup> and without notice of its prior theft<sup>4</sup>, so that no order can in such case be made for restitution of money paid to such a holder, and no claim can be maintained for the recovery of the instrument<sup>5</sup>.

- 1 As to the meaning of 'holder in due course' see PARA 1407.
- 2 As to the meanings of 'bill' and 'note' see PARA 1405.
- 3 As to the meaning of 'value' see PARA 1401 note 8.
- 4 As to theft see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 282.
- 5 *Chichester v Hill & Son* (1882) 52 LJQB 160. See also *Moss v Hancock* [1899] 2 QB 111, DC. As to the meaning of 'instrument' see PARA 1402 note 1.

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### ***E. RIGHTS OF TRANSFEREE***

#### **1505. Rights of transferee of altered instrument.**

Where an alteration, even though material, has been made in an instrument<sup>1</sup>, if it is not apparent, a holder in due course<sup>2</sup> may avail himself of the instrument as if it had not been altered, and may enforce payment of it according to its original tenor<sup>3</sup>.

- 1 As to the meaning of 'instrument' see PARA 1402 note 1.
- 2 As to the meaning of 'holder in due course' see PARA 1407.
- 3 Bills of Exchange Act 1882 s 64(1) proviso. The alteration of an amount of money to the equivalent decimal amount is not a material alteration for this purpose: see the Decimal Currency Act 1969 s 3(2); and PARA 1418 note 12. As to alteration of an instrument or an acceptance see PARA 1559. As to rights of holder to hold an instrument free from defects in title see PARA 1488.

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### **1506. Transfer in foreign country.**

Where an instrument<sup>1</sup> is transferred in a foreign country, and different parties claim it, the title of the transferee depends upon the law of the place of transfer<sup>2</sup>.

- 1 As to the meaning of 'instrument' see PARA 1402 note 1.
- 2 *Alcock v Smith* [1892] 1 Ch 238, CA; *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA; and see PARA 1591.

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## **F. LOSS OF INSTRUMENT**

### **1507. Duplicate of lost bill.**

Where an instrument<sup>1</sup> has been lost before it is overdue, the person<sup>2</sup> who was its holder<sup>3</sup> may apply to the drawer<sup>4</sup> to give him another bill<sup>5</sup> of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost should be found again<sup>6</sup>; and if the drawer refuses to comply with such application he may be compelled to do so<sup>7</sup>. The Bills of Exchange Act 1882 contains no provision for obtaining the signatures of the indorsers<sup>8</sup> or acceptor<sup>9</sup> on the duplicate.

- 1 As to the meaning of 'instrument' see PARA 1402 note 1.
- 2 As to the meaning of 'person' see PARA 1401 note 4.
- 3 As to the meaning of 'holder' see PARA 1407.
- 4 As to the meaning of 'drawer' see PARA 1406.
- 5 As to the meaning of 'bill' see PARA 1405.

6 Bills of Exchange Act 1882 s 69.

7 Bills of Exchange Act 1882 s 69. See *King v Zimmerman* (1871) LR 6 CP 466, where in an action under the Common Law Procedure Act 1854 s 87, the provisions of which are similar to those of the Bills of Exchange Act 1882 s 70 (see PARA 1508 note 4), the plaintiff sued on a lost bill without offering to give an indemnity against the claims of other persons on the bill, and the court would only order that the loss of the bill should not be set up as a defence on the terms that the plaintiff paid the costs of the action up to the time that the order was made, beside giving a proper indemnity.

8 As to the meaning of 'indorser' see PARA 1407 note 8.

9 As to the meaning of 'acceptor' see PARA 1406.

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### **1508. Claim on lost bill.**

In any action<sup>1</sup> upon an instrument<sup>2</sup> the court or a judge may order that the loss of the instrument in question is not to be set up as a defence, provided that an indemnity is given to the satisfaction of the court or judge against the claim of any other person<sup>3</sup> upon the instrument in question<sup>4</sup>.

1 For the purposes of the Bills of Exchange Act 1882, this includes counterclaim and set-off: s 2.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 As to the meaning of 'person' see PARA 1401 note 4.

4 Bills of Exchange Act 1882 s 70. See also the Common Law Procedure Act 1854 s 87 (see **EQUITY** vol 16(2) (Reissue) PARA 446), which applies to all negotiable instruments, and is similar to the Bills of Exchange Act 1882 s 70 in its terms.

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### **(xiii) Duties of Holder**

#### **A. PRESENTMENT FOR ACCEPTANCE**

### **1509. Presentment of bills.**

Presentment for acceptance<sup>1</sup> applies to bills of exchange<sup>2</sup>, but not to promissory notes<sup>3</sup> or to cheques<sup>4</sup>. In the case of bills of exchange, though not always required by the form of the particular instrument<sup>5</sup>, acceptance is necessary in order to render the drawee<sup>6</sup> a party liable

thereon<sup>7</sup>, but is not necessary in order that a party, to whom it has been negotiated prior to acceptance, may, as a holder in due course<sup>8</sup>, sue an acceptor<sup>9</sup> who subsequently accepts<sup>10</sup>.

The bills which require presentment for acceptance<sup>11</sup> are:

- 151 (1) those which are payable after sight<sup>12</sup>;
- 152 (2) those on the face of which it is expressly stipulated that they shall be presented for acceptance<sup>13</sup>;
- 153 (3) those which are drawn payable elsewhere than at the residence or place of business of the drawee<sup>14</sup>.

In the class under head (1) above, presentment is required to fix the maturity of the instrument<sup>15</sup>; in the classes under heads (2) and (3) above, presentment for acceptance must precede presentment for payment<sup>16</sup>. In no other case is presentment for acceptance necessary in order to render a party liable on the bill<sup>17</sup>.

It is, however, prudent for the holder<sup>18</sup> to present the bill for acceptance in every case, for acceptance obtains the security of the acceptor's signature. If a bill is dishonoured by non-acceptance<sup>19</sup>, the holder will obtain<sup>20</sup> the immediate liability of all previous parties to the bill and relief from the necessity of presentment for payment<sup>21</sup>.

1 As to the meaning of 'acceptance' see PARA 1406.

2 As to the meaning of 'bill of exchange' see PARA 1405.

3 As to the meaning of 'promissory note' see PARA 1405. There is no acceptor to a note: see the Bills of Exchange Act 1882 s 89(3)(a).

4 As to the meaning of 'cheque' see PARA 1405. There is no acceptor to a cheque: see *Bank of Baroda Ltd v Punjab National Bank Ltd* [1944] AC 176, [1944] 2 All ER 83, PC; and PARA 1454. As to marked cheques see PARA 1412; and see also PARAS 835, 847.

5 As to the meaning of 'instrument' see PARA 1402 note 1.

6 As to the meaning of 'drawee' see PARA 1406.

7 See the Bills of Exchange Act 1882 ss 17, 53(1); and PARA 1451 et seq. But a bill may be validly drawn requiring payment without acceptance: *R v Kinnear* (1838) 2 Mood & R 117.

8 As to the meaning of 'holder in due course' see PARA 1407.

9 As to the meaning of 'acceptor' see PARA 1406.

10 *National Park Bank of New York v Berggren & Co* (1914) 19 Com Cas 234.

11 As to excuses for non-presentment see PARA 1514.

12 Bills of Exchange Act 1882 s 39(1). As to the meaning of 'bill payable after sight' see PARA 1435.

13 Bills of Exchange Act 1882 s 39(2). As to presentment for payment see PARA 1516 et seq.

14 Bills of Exchange Act 1882 s 39(2).

15 Bills of Exchange Act 1882 s 39(1).

16 Bills of Exchange Act 1882 s 39(2).

17 Bills of Exchange Act 1882 s 39(3).

18 As to the meaning of 'holder' see PARA 1407.

19 See PARA 1515.

- 20 Subject to compliance with requirements as to notice of dishonour and protest (see PARA 1524 et seq).
- 21 Bills of Exchange Act 1882 s 43(2).

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### **1510. Time and mode of presentment.**

Presentment for acceptance<sup>1</sup> should be made by or on behalf of the holder<sup>2</sup>, at a reasonable hour on a business day<sup>3</sup> and before the bill<sup>4</sup> is overdue, to the drawee<sup>5</sup> or to some person<sup>6</sup> authorised to accept or refuse on his behalf<sup>7</sup>. The mere exhibition of the bill by a servant of the holder to some person unknown to him on the premises of the drawee is not a due presentment<sup>8</sup>.

The drawee may, however, accept when the bill is overdue, if he is willing to do so<sup>9</sup>. A presentment through a postal operator<sup>10</sup> is sufficient where it is authorised by agreement or by usage<sup>11</sup>.

- 1 As to presentment for acceptance see PARA 1509.
- 2 As to the meaning of 'holder' see PARA 1407.
- 3 As to the meaning of 'business day' see PARA 1437.
- 4 As to the meaning of 'bill' see PARA 1405. Presentment for acceptance does not apply to promissory notes or to cheques: see PARA 1509.
- 5 As to the meaning of 'drawee' see PARA 1406.
- 6 As to the meaning of 'person' see PARA 1401 note 4.
- 7 Bills of Exchange Act 1882 s 41(1)(a). If a bill is handed to an agent for presentment, the agent must not be guilty of negligence in presenting the bill: *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526. The manner of presentment depends on various circumstances. If the place of presentment is a bank, then the bill must be presented in banking hours: *Parker v Gordon* (1806) 7 East 385; *Elford v Teed* (1813) 1 M & S 28. If it is the place of business of a merchant or trader, then it must be within business hours: *Allen v Edmundson* (1848) 2 Exch 719 at 723 per Parke B. If it is at a private residence, then any time during which the drawee may be expected to be found is reasonable: *Wilkins v Jadis* (1831) 2 B & Ad 188, where 8 pm was held reasonable.
- 8 *Cheek v Roper* (1804) 5 Esp 175.
- 9 See the Bills of Exchange Act 1882 s 18(2); and PARA 1459.
- 10 As to the meaning of 'postal operator' see the Postal Services Act 2000 s 125(1) (see **POST OFFICE**): Bills of Exchange Act 1882 s 2 (definition added by SI 2001/1149).
- 11 Bills of Exchange Act 1882 s 41(1)(e) (amended by SI 2001/1149).

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### 1511. Several drawees.

If a bill<sup>1</sup> is addressed to two or more drawees<sup>2</sup> who are not partners, presentment<sup>3</sup> must be made to them all, unless one has authority to accept for all, in which case presentment may be made to him only<sup>4</sup>.

1 As to the meaning of 'bill' see PARA 1405.

2 As to the meaning of 'drawee' see PARA 1406.

3 As to presentment for acceptance (which does not apply to promissory notes or to cheques) see PARA 1509.

4 Bills of Exchange Act 1882 s 41(1)(b). In the case of partners (as to which see PARA 1467), it is clear that if the partnership is a trading one, then one member of the partnership can bind all his colleagues.

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### 1512. Bills payable after sight.

Except when one or more of the grounds of excuse referred to below<sup>1</sup> exists, a bill payable after sight<sup>2</sup> must either be presented by the holder<sup>3</sup> for acceptance<sup>4</sup> or further negotiated within a reasonable time<sup>5</sup>, otherwise the drawer<sup>6</sup> and all indorsers<sup>7</sup> prior to that holder are discharged<sup>8</sup>.

In determining what is a reasonable time for this purpose, the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case are to be taken into consideration<sup>9</sup>; and the interests of the holder, as well as those of the drawee<sup>10</sup>, are to be taken into account<sup>11</sup>.

1 See PARA 1513 et seq.

2 As to the meaning of 'bill payable after sight' see PARA 1435.

3 As to the meaning of 'holder' see PARA 1407.

4 As to presentment for acceptance (which does not apply to promissory notes or to cheques) see PARA 1509.

5 Bills of Exchange Act 1882 s 40(1).

6 As to the meaning of 'drawer' see PARA 1406.

7 As to the meaning of 'indorser' see PARA 1407 note 8.

8 Bills of Exchange Act 1882 s 40(2). As to discharge of parties see PARA 1564 et seq.

9 Bills of Exchange Act 1882 s 40(3). What is a reasonable time has at times been treated as a pure question of fact, but it would seem that it is really a mixed question of law and fact: *Ramchurn Mullick v Luchmeechund Radakissen* (1854) 9 Moo PCC 46 at 66 per Parke B. See also *Straker v Graham* (1839) 4 M & W 721 (where a bill was drawn in Newfoundland on London, payable 90 days after sight, and no reason being given for delay in presentment, two months was held to be an unreasonable time, but some emphasis was laid on the fact that the bill was drawn in sets; as to bills in a set see PARA 1586 et seq); and contrast *Mellish v Rawdon* (1832) 9 Bing 416 (where the payee of a bill payable 60 days after sight in Rio De Janeiro refrained from presentment for four months, as the rate of exchange was against Rio, and the delay was held to be not unreasonable). No doubt the



term would be interpreted with much greater strictness in the case of an inland bill, but when a bill drawn in Windsor and payable in London one month after date was withheld for presentment for four days the delay was held not unreasonable: *Fry v Hill* (1817) 7 Taunt 397; cf *Shute v Robins* (1828) 3 C & P 80. Given the rapidity of modern means of communication, these early cases must be treated with caution.

10 As to the meaning of 'drawee' see PARA 1406.

11 *Ramchurn Mullick v Luchmeechund Radakissen* (1854) 9 Moo PCC 46 at 67 per Parke B.

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### **1513. Delay.**

Where there is not time for the holder<sup>1</sup> of a bill<sup>2</sup> drawn payable elsewhere than at the place of business or residence of the drawee<sup>3</sup>, with the exercise of reasonable diligence, to present it for acceptance<sup>4</sup> before presenting it for payment on the day it falls due, the delay caused by presenting it for acceptance before presenting it for payment is excused and does not discharge the drawers<sup>5</sup> and indorsers<sup>6</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 As to the meaning of 'bill' see PARA 1405.

3 As to the meaning of 'drawee' see PARA 1406.

4 As to presentment for acceptance (which does not apply to promissory notes or to cheques) see PARA 1509.

5 As to the meaning of 'drawer' see PARA 1406. As to discharge of parties see PARA 1564 et seq.

6 Bills of Exchange Act 1882 s 39(4). As to the meaning of 'indorser' see PARA 1407 note 8.

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### **1514. Excuses for non-presentment.**

In the case of a drawee<sup>1</sup> who is dead or bankrupt, presentment for acceptance<sup>2</sup> is excused, and the bill may be treated as dishonoured by non-acceptance<sup>3</sup>, or it may be presented for acceptance to the dead man's personal representative or to the bankrupt or his trustee<sup>4</sup>.

Due presentment for acceptance is also excused, and the bill may be treated as dishonoured by non-acceptance if: (1) the drawee is a fictitious person<sup>5</sup> or a person not having the capacity to contract by bill<sup>6</sup>; or (2) after the exercise of reasonable diligence, presentment cannot be effected<sup>7</sup>; or (3) although the presentment has been irregular, the acceptance has been refused on some other ground<sup>8</sup>.

The fact that the holder<sup>9</sup> has reason to believe that the bill on presentment will be dishonoured does not excuse presentment<sup>10</sup>.

- 1 As to the meaning of 'drawee' see PARA 1406.
- 2 As to presentment for acceptance see PARA 1508.
- 3 As to dishonour by non-acceptance see PARA 1515. As to the meaning of 'bill' see PARA 1405. Presentment for acceptance does not apply to promissory notes or to cheques; see PARA 1509.
- 4 Bills of Exchange Act 1882 s 41(1)(c), (d), (2)(a). A bankrupt includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy: s 2. See generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.
- 5 As to the meaning of 'person' see PARA 1401 note 4.
- 6 Bills of Exchange Act 1882 s 41(2)(a). Where the drawer and drawee are the same person or the drawee is a fictitious person or a person not having the capacity to contract the holder may treat the bill, if he wishes, as a promissory note (s 5(2)), to which presentment for acceptance would not apply: s 89(3). As to drawer and drawee being the same person see PARA 1408. As to the meaning of 'fictitious person' see PARA 1431. As to persons not having the capacity to contract by bill see PARA 1469.
- 7 Bills of Exchange Act 1882 s 41(2)(b). Due diligence is a question of fact in each case: *Bateman v Joseph* (1810) 12 East 433; *The Staffordshire* (1872) LR 4 PC 194 at 208.
- 8 Bills of Exchange Act 1882 s 41(2)(c).
- 9 As to the meaning of 'holder' see PARA 1407.
- 10 Bills of Exchange Act 1882 s 41(3); *Re Agra Bank, ex p Tondeur* (1867) LR 5 Eq 160 at 165.

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### **1515. Dishonour by non-acceptance and notice thereof.**

A bill<sup>1</sup> is dishonoured by non-acceptance when it is duly presented for acceptance<sup>2</sup>, and such acceptance as is prescribed by the Bills of Exchange Act 1882 is refused or cannot be obtained<sup>3</sup>; it is also dishonoured by non-acceptance when presentment for acceptance is excused<sup>4</sup> and the bill is not accepted<sup>5</sup>. When a bill is duly presented for acceptance, and is not in fact accepted within the customary time, the person<sup>6</sup> presenting it must treat it as dishonoured by non-acceptance<sup>7</sup>, and notice of dishonour must be given to the drawer<sup>8</sup> and each indorser<sup>9</sup>, for otherwise the holder<sup>10</sup> will lose his right of recourse against them<sup>11</sup>. Liability for dishonour on the part of both drawer and indorser is subject to the proviso that the requisite proceedings on dishonour be duly taken<sup>12</sup>.

If the required notices are duly given on dishonour by non-acceptance it is unnecessary to give notice of a subsequent dishonour by non-payment, unless the bill has in the meantime been accepted<sup>13</sup>.

Even if the required notice is not given, the rights of a holder in due course<sup>14</sup> subsequent to the omission are not prejudiced<sup>15</sup>.

- 1 As to the meaning of 'bill' see PARA 1405.
- 2 As to presentment for acceptance (which does not apply to promissory notes or to cheques) see PARA 1509.
- 3 Bills of Exchange Act 1882 s 43(1)(a).
- 4 See PARA 1514.
- 5 Bills of Exchange Act 1882 s 43(1)(b).
- 6 As to the meaning of 'person' see PARA 1401 note 4.
- 7 Bills of Exchange Act 1882 s 42. The customary time is 24 hours, after which the drawee to whom the bill was delivered for acceptance must redeliver it with acceptance granted or declined. In reckoning the 24 hours non-business days must be excluded: see *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526; and PARA 1437. As to the time for giving notice of dishonour see the Bills of Exchange Act 1882 s 49(12); and PARA 1531.
- 8 As to the meaning of 'drawer' see PARA 1406.
- 9 Bills of Exchange Act 1882 s 48. As to the meaning of 'indorser' see PARA 1407 note 8. As to notice of dishonour see PARA 1524. An inland bill may, and a foreign bill must, also be protested for non-acceptance: see PARAS 1542-1543.
- 10 As to the meaning of 'holder' see PARA 1407.
- 11 Bills of Exchange Act 1882 ss 42, 48. If the indorsers on the bill are discharged by the failure of the holder at the time in not giving due notice of the dishonour of it, their responsibility cannot be revived by the shifting of the bill into other hands: *Roscow v Hardy* (1810) 12 East 434 at 436 per Lord Ellenborough CJ. They are released not only from liability on the bill, but also from liability on the consideration therefor: see *Bridges v Berry* (1810) 3 Taunt 130 (where the defendant, who was the acceptor of a bill which he could not pay on presentment, and who on time being given to him indorsed to the plaintiff a bill drawn by himself to his own order, was held to be released from liability on both bills by the delay of the plaintiff, who omitted to give him notice of the dishonour by non-acceptance of the second bill); *Peacock v Pursell* (1863) 32 LJCP 266.
- 12 Bills of Exchange Act 1882 s 55. As to liability of drawer see PARA 1574; as to liability of indorser see PARA 1577.
- 13 See the Bills of Exchange Act 1882 s 48(2); and PARA 1524.
- 14 As to the meaning of 'holder in due course' see PARA 1407.
- 15 See the Bills of Exchange Act 1882 s 48(1); and PARA 1524. *Dunn v O'Keeffe* (1816) 5 M & S 282, in which the drawer was held not to be discharged for want of notice, the bill being in the hands of a bona fide indorsee for value without notice of the dishonour.

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## **B. PRESENTMENT FOR PAYMENT**

### **1516. Presentment of bills and notes.**

Bills of exchange and promissory notes<sup>1</sup> must be duly presented for payment, except where otherwise provided by statute, and unless a bill is duly presented for payment, where that is necessary, the drawer<sup>2</sup> and indorsers<sup>3</sup> are discharged<sup>4</sup>.

A bill, the acceptance<sup>5</sup> of which is qualified by the requirement of presentment for payment, must be so presented, but the acceptor<sup>6</sup>, in the absence of an express stipulation to that effect, is not discharged by the omission to present it for payment on the day that it matures<sup>7</sup>.

Although in general presentment for payment is not necessary in order to charge the person<sup>8</sup> primarily liable<sup>9</sup> on the instrument<sup>10</sup>, it is necessary in order to obtain the right of recourse against the drawer and indorsers<sup>11</sup>, and even in relation to the person primarily liable it is the more prudent course, for, if a claim is brought upon the instrument without presentment for payment, the court will be disposed to charge the claimant with the costs<sup>12</sup>, and to fix the time from which interest is to be calculated at the date at which the action is begun<sup>13</sup>.

1 As to the meanings of 'bill of exchange' and 'promissory note' see PARA 1405.

2 As to the meaning of 'drawer' see PARA 1406.

3 As to the meaning of 'indorser' see PARA 1407 note 8.

4 Bills of Exchange Act 1882 ss 45, 89; and see *Hamilton Finance Co Ltd v Coverley Westray, Walbaum and Tosetti Ltd and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53. As to the exceptions see PARA 1517. As to bills which must be presented for acceptance before presentment for payment see PARA 1509. As to mode of presentment see PARA 1522. As to discharge of parties see PARA 1564 et seq.

5 As to the meaning of 'acceptance' see PARA 1406.

6 As to the meaning of 'acceptor' see PARA 1406.

7 Bills of Exchange Act 1882 s 52(2); *Smith v Vertue* (1860) 30 LJCP 56. Unless the terms of the acceptance state expressly that it is to be payable at a particular place only, the acceptance is deemed to be a general one; see PARA 1462.

8 As to the meaning of 'person' see PARA 1401 note 4.

9 I.e. the acceptor in the case of a bill, the maker in the case of a note: Bills of Exchange Act 1882 ss 52(1), 87(1), 89(1), (2); *Rowe v Young* (1820) 2 Bligh 391; *Price v Mitchell* (1815) 4 Camp 200.

10 As to the meaning of 'instrument' see PARA 1402 note 1.

11 Bills of Exchange Act 1882 ss 45, 87(2), 89(2); and see *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343.

12 *Macintosh v Haydon* (1826) Ry & M 362 at 363.

13 Cf *Pierce v Fothergill* (1835) 2 Bing NC 167.

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### **1517. Excuses for non-presentment.**

Presentment is dispensed with, however, where after the exercise of reasonable diligence it cannot be effected as the statute requires<sup>1</sup>, or where the drawee<sup>2</sup> is a fictitious person<sup>3</sup>, or where it is expressly or impliedly waived<sup>4</sup>. Further, presentment is not required in order to charge the drawer<sup>5</sup> where the drawee or acceptor<sup>6</sup> is not bound, as between himself and the drawer, to accept or pay the bill<sup>7</sup>, and the drawer has no reason to believe that the bill would be

paid if presented<sup>8</sup>; nor in order to charge an indorser<sup>9</sup> where the instrument was made or accepted for his accommodation<sup>10</sup>, and he has no reason to expect it to be paid if presented<sup>11</sup>.

The fact that the holder<sup>12</sup> has reason to believe that the bill will be dishonoured on presentment does not dispense with the necessity for presentment<sup>13</sup>.

1 Bills of Exchange Act 1882 s 46(2)(a). See *Hamilton Finance Co Ltd v Coverley Westray, Walbaum and Tosetti Ltd and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53. What amounts to due diligence is a matter of fact to be decided in each case. Thus, where a note was made payable at a town where the maker had no residence, a presentment at two banks was held sufficient: *Hardy v Woodroffe* (1818) 2 Stark 319; see also *Hine v Allely* (1833) 4 B & Ad 624; *Buxton v Jones* (1840) 1 Man & G 83. But where a bill was accepted on behalf of the drawee by his agent, and in the drawee's absence at maturity no presentment was made to the agent, it was held that insufficient diligence was shown: *Phillips v Astling* (1809) 2 Taunt 206. This subsection operates to dispense with the need for presentment where it is impossible owing to occupation of territory by the enemy: *Cornelius v Banque Franco-Serbe* [1942] 1 KB 29, [1941] 2 All ER 728 (where it was also decided that the illegality of the presentment does not preclude the holder from suing on the bill). See also *Re Francke and Rasch* [1918] 1 Ch 470 at 479.

2 As to the meaning of 'drawee' see PARA 1406.

3 Bills of Exchange Act 1882 s 46(2)(b); *Smith v Bellamy* (1817) 2 Stark 223. As to the meaning of 'fictitious person' see PARA 1431.

4 Bills of Exchange Act 1882 s 46(2)(e); *Hopley v Dufresne* (1812) 15 East 275. But waiver of notice of dishonour does not of itself imply waiver of the fact of presentment: *Hill v Heap* (1823) Dow & Ry NP 57. See also *Barclays Bank plc v Bank of England* [1985] 1 All ER 385 at 394 per Bingham J. As to presentment for payment of bills and notes see PARA 1516.

5 As to the meaning of 'drawer' see PARA 1406.

6 As to the meaning of 'acceptor' see PARA 1406.

7 As to the meaning of 'bill' see PARA 1405.

8 Bills of Exchange Act 1882 s 46(2)(c). Where the drawer knows he has not sufficient funds to meet the bill, presentment is not necessary to charge the drawer: *Terry v Parker* (1837) 6 Ad & El 502; *Wirth v Austin* (1875) LR 10 CP 689. See also *Fiorentino Comm Giuseppe Srl v Farnesi* [2005] EWHC 160 (Ch), [2005] 2 All ER 737 (a payee of a cheque should be able to satisfy the second condition of the Bills of Exchange Act 1882 s 46(2)(c) at any time when he could show that the drawer had no reason to believe *at that time* that the cheque would be paid if presented).

9 As to the meaning of 'indorser' see PARA 1407 note 8.

10 As to accommodation bills see PARA 1482.

11 Bills of Exchange Act 1882 s 46(2)(d). However where the instrument is drawn for the accommodation of the drawer, it must be presented if it is desired to charge an indorser: *Saul v Jones* (1858) 28 LJQB 37 at 40 per Lord Campbell CJ. Where it is desired to charge a person who was not a party to the bill, but merely guaranteed its payment (at all events on behalf of the acceptor), presentment is not necessary: *Carter v White* (1883) 25 ChD 666 at 670, CA, per Cotton LJ. Quaere if this is so where the party guaranteed by the surety was the drawer or an indorser, for by the terms of the Bills of Exchange Act 1882 s 45 (see PARAS 1516, 1518 et seq), want of due presentment discharges the drawer or indorsers; and in any case this would not apply to a case where by custom a broker, instead of indorsing a number of bills individually, gives a guarantee of liability to the bankers who discount them: cf *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA.

12 As to the meaning of 'holder' see PARA 1407.

13 Bills of Exchange Act 1882 s 46(2)(a). This is so even when the acceptor has told the holder that he will not pay the bill when due: *Re Brereton, ex p Bignold* (1836) 1 Deac 712; *Hill v Heap* (1823) Dow & Ry NP 57. Presentment must also be made when the acceptor becomes bankrupt (*Warrington v Furber* (1807) 8 East 242 at 245 per Lord Ellenborough CJ; cf *Esdaile v Sowerby* (1809) 11 East 114), or when the maker of a note becomes insolvent and absconds without leaving effects behind: *Sands v Clarke* (1849) 8 CB 751; *Camidge v Allenby* (1827) 6 B & C 373.

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### **1518. Time for presentment: bills and notes.**

When the instrument<sup>1</sup> is not payable on demand it must be presented on the day that it falls due<sup>2</sup>.

When it is payable on demand, then in the case of a bill<sup>3</sup> it must be presented within a reasonable time after its issue<sup>4</sup> in order to render the drawer<sup>5</sup> liable, and within a reasonable time after its indorsement<sup>6</sup> in order to render the indorser<sup>7</sup> liable<sup>8</sup>; and in the case of a note<sup>9</sup> which has been indorsed it must be presented within a reasonable time after its indorsement, or the indorser will be discharged<sup>10</sup>. In determining what is a reasonable time in the case of either instrument, the nature of the instrument, the usage of trade, and the facts of the particular case will be taken into consideration<sup>11</sup>.

When a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder<sup>12</sup> with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue<sup>13</sup>.

Delay in making presentment for payment is excused where it is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence, but when the cause of delay ceases to operate presentment must be made with reasonable diligence<sup>14</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Bills of Exchange Act 1882 s 45(1); and see *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343. As to presentment for payment of bills and notes see PARA 1516.

3 As to the meaning of 'bill' see PARA 1405.

4 As to the meaning of 'issue' see PARA 1406.

5 As to the meaning of 'drawer' see PARA 1406.

6 As to the meaning of 'indorsement' see PARA 1407.

7 As to the meaning of 'indorser' see PARA 1407 note 8.

8 Bills of Exchange Act 1882 s 45(2).

9 As to the meaning of 'note' see PARA 1405.

10 Bills of Exchange Act 1882 s 86(1); *Chartered Mercantile Bank of India, London and China v Dickson* (1871) LR 3 PC 574. As to discharge of parties see PARA 1564 et seq.

11 Bills of Exchange Act 1882 ss 45(2), 86(2). The nature of the instrument, whether bill or note, differs widely, for while it is true that 'a prompt and regular demand of payment may frequently obtain payment from an acceptor of a bill and maker of a note, who is in a state of progressive insolvency, when a subsequent application of the same nature would become unavailing' (see Story's Bills of Exchange (4th Edn) s 325), yet a note, being more likely than a bill to be intended as a continuing security, may be reasonably the subject of a comparatively long delay before presentment. See *Chartered Mercantile Bank of India, London and China v Dickson* (1871) LR 3 PC 574; and PARA 1515 note 7.

12 As to the meaning of 'holder' see PARA 1407.

13 Bills of Exchange Act 1882 s 86(3); *Brooks v Mitchell* (1841) 9 M & W 15 (where it was held that such a note could not be deemed overdue because it was indorsed years after its date, and no interest had been paid

on it for a considerable time before indorsement); *Glasscock v Balls* (1889) 24 QBD 13, CA. As to a banker's liability for presentment see PARA 1519.

14 Bills of Exchange Act 1882 s 46(1). As to delay when a bill payable elsewhere than at the place of business or residence of the drawee is presented late for acceptance see PARA 1513. The difficulty of communication incident to wars or political disturbance may excuse delay (*Patience v Townley* (1805) 2 Smith KB 223). But in ordinary times, delay which is unexplained, even when of very short duration, will result in the holder being found guilty of laches: see *Anderton v Beck* (1812) 16 East 248 (where the delay was for one day only). A delay by request of the drawer or indorser, if he is the person sought to be charged, would no doubt be held excusable: *Lord Ward v Oxford, Worcester and Wolverhampton Rly Co* (1852) 2 De GM & G 750.

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### **1519. Time for presentment: cheques.**

A cheque is a bill<sup>1</sup> drawn on a banker<sup>2</sup> payable on demand<sup>3</sup>, and should be presented for payment within a reasonable time of its issue<sup>4</sup>. But failure so to present it does not discharge the drawer<sup>5</sup>, as a right of action subsists against him<sup>6</sup>, and is only barred by the operation of the Statutes of Limitation<sup>7</sup>.

Where, however, a cheque is not presented within a reasonable time of its issue, and the drawer or the person<sup>8</sup> on whose account it is drawn has the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage<sup>9</sup>.

Where the drawer or the person on whose account the cheque is drawn is so discharged, the holder<sup>10</sup> becomes the creditor of the banker to the extent of such discharge, and is entitled to recover the amount from him<sup>11</sup>.

An indorser<sup>12</sup> is discharged if the presentment is not duly made within reasonable time after indorsement<sup>13</sup>.

What is a reasonable time is a question of fact in each case, and in determining it regard must be had to the nature of the instrument<sup>14</sup>, the usage of trade and of bankers, and the facts of the particular case<sup>15</sup>. A banker who takes an unreasonable time in presenting a cheque paid in by his customer is liable to his customer for the loss (if any) which results from the delay<sup>16</sup>.

1 As to the meaning of 'bill' see PARA 1405.

2 As to the meaning of 'banker' see PARA 1403 note 7.

3 See the Bills of Exchange Act 1882 s 73; and PARA 1405.

4 Bills of Exchange Act 1882 ss 45(2), 73. See PARA 881. As to presentment for payment of bills and notes see PARA 1516.

5 As to the meaning of 'drawer' see PARA 1406. As to discharge of parties see PARA 1564 et seq.

6 *Robinson v Hawksford* (1846) 9 QB 52; *Laws v Rand* (1857) 3 CBNS 442; *King and Boyd v Porter* [1925] NI 107, CA.

7 As to claims barred by lapse of time see PARA 1604. As to limitation periods generally see **LIMITATION PERIODS**.

8 As to the meaning of 'person' see PARA 1401 note 4.

9 Bills of Exchange Act 1882 s 74(1). The extent of the damage is the extent to which the drawer or the person on whose account the cheque is drawn is a creditor of the banker to a larger amount than he would have been had the cheque been paid: s 74(1). See PARA 881.

10 As to the meaning of 'holder' see PARA 1407.

11 Bills of Exchange Act 1882 s 74(3).

12 As to the meaning of 'indorser' see PARA 1407 note 8.

13 Bills of Exchange Act 1882 ss 45(2), 73. As to the meaning of 'indorsement' see PARA 1407.

14 As to the meaning of 'instrument' see PARA 1402 note 1.

15 Bills of Exchange Act 1882 s 74(2); *Serle v Norton* (1841) 2 Mood & R 401. The provision as to reasonable time is held to be complied with where (1) the holder and the banker on whom it is drawn are in the same place, if the cheque is presented for payment on the day after it is received (*Alexander v Burchfield* (1842) 7 Man & G 1061); and (2) the holder and the banker on whom it is drawn are in different places, if the cheque is forwarded for presentment for payment on the day after it is received, and the agent to whom it is forwarded presents it or again forwards it on the day after he receives it: *Hare v Henty* (1861) 30 LJCP 302; *Prideaux v Criddle* (1869) LR 4 QB 455. But allowance will be made for special circumstances, eg where the payee is ill: *Firth v Brooks* (1861) 4 LT 467. In determining the question, non-business days (see PARA 1437) must of course be excluded.

16 *Hare v Henty* (1861) 30 LJCP 302; cf *Forman v Bank of England* (1902) 18 TLR 339. See further PARA 881.

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### **1520. Proper place of presentment: bills and notes.**

A bill or note<sup>1</sup> is presented at the proper place when a place of payment is specified in the instrument<sup>2</sup>, and it is presented there<sup>3</sup>; if alternative places are specified, then presentment may be made at either<sup>4</sup>.

Where a note is in the body of it made payable at a particular place, it must be presented at that place in order to render either the maker<sup>5</sup> or an indorser<sup>6</sup> liable<sup>7</sup>, but where a place of payment is indicated by way of memorandum only, presentment at that place will render the indorser liable, while a presentment to the maker elsewhere, if sufficient in other respects, is equally effective<sup>8</sup>.

Where no place of payment is specified, but the address of the person<sup>9</sup> to make payment is given in the instrument, it may be there presented<sup>10</sup>. Where no place is specified, and no address is given, the instrument may be presented at the usual place of business, if known, and if not, then at the ordinary residence, if known, of the person to make payment<sup>11</sup>. In any other case, the instrument may be presented to the person to make payment wherever he can be found or at his last known place of business or residence<sup>12</sup>.

Where an instrument is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or to refuse payment can be found there, no further presentment to the person primarily liable is required<sup>13</sup>.

If two or more persons, who are not partners, are primarily liable, and no place of payment is specified, presentment must be made to them all<sup>14</sup>, unless one of them has authority to act for the others<sup>15</sup>.



If the person primarily liable is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be and if, with the exercise of reasonable diligence, he can be found<sup>16</sup>.

- 1 As to the meanings of 'bill' and 'note' see PARA 1405.
- 2 As to the meaning of 'instrument' see PARA 1402 note 1.
- 3 Bills of Exchange Act 1882 ss 45(4)(a), 87. The place may be specified either by the drawer (*Gibb v Mather* (1832) 2 Cr & J 254) or by the acceptor (*Saul v Jones* (1858) 28 LJQB 37). See also *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343. As to presentment for payment of bills and notes see PARA 1516. As to cheques drawn on a branch see PARA 881. As to provisions relating to alternative places of presentment of cheques see PARA 1521.
- 4 *Beeching v Gower* (1816) Holt NP 313.
- 5 Bills of Exchange Act 1882 s 87(1); *Spindler v Grellett* (1847) 1 Exch 384; *Sands v Clarke* (1849) 8 CB 751. 'In the body of it' means in the terms of the actual contract to pay: *Re British Trade Corp'n* [1932] 2 Ch 1, CA. As to the meaning of 'maker' see PARA 1406.
- 6 As to the meaning of 'indorser' see PARA 1407 note 8.
- 7 Bills of Exchange Act 1882 s 87(3); *Roche v Campbell* (1812) 3 Camp 247. Presentment for payment at the specified place is of the essence of a claimant's cause of action upon a bill so expressed and accordingly a defence of failure to comply with that requirement is not a statutory defence and need not be pleaded in the county court: *Pritchard v Couch* (1913) 57 Sol Jo 342.
- 8 Bills of Exchange Act 1882 s 87(3); *Saunderson v Judge* (1795) 2 Hy Bl 509; *Price v Mitchell* (1815) 4 Camp 200; *Williams v Waring* (1829) 10 B & C 2; *Masters v Baretto* (1849) 8 CB 433.
- 9 As to the meaning of 'person' see PARA 1401 note 4.
- 10 Bills of Exchange Act 1882 s 45(4)(b); *Buxton v Jones* (1840) 1 Man & G 83.
- 11 Bills of Exchange Act 1882 s 45(4)(c); cf *Crosse v Smith* (1813) 1 M & S 545.
- 12 Bills of Exchange Act 1882 s 45(4)(d).
- 13 Bills of Exchange Act 1882 s 45(5); *Hine v Allely* (1833) 4 B & Ad 624. See also *Bailey v Porter* (1845) 14 M & W 44 (where it was decided that where a bill is accepted payable at a banker's, and that banker becomes the holder, further presentment is superfluous). As to the person primarily liable see PARA 1516 note 9.
- 14 Bills of Exchange Act 1882 s 45(6).
- 15 See the Bills of Exchange Act 1882 s 41(1)(b); and PARA 1511.
- 16 Bills of Exchange Act 1882 s 45(7).

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### **1521. Alternative place of presentment: cheques.**

Where the banker<sup>1</sup> on whom a cheque<sup>2</sup> is drawn has by notice published in the London, Edinburgh and Belfast Gazettes specified an address at which cheques drawn on him may be presented<sup>3</sup>; and has not by notice so published cancelled the specification of that address<sup>4</sup>, the cheque is also presented at the proper place if it is presented there<sup>5</sup>.

- 1 As to the meaning of 'banker' see PARA 1403 note 7.
- 2 As to the meaning of 'cheque' see PARA 1405.
- 3 Bills of Exchange Act 1882 s 74A(a) (s 74A added by SI 1996/2993). As to the proper place of presentment for bills and notes see PARA 1520.
- 4 Bills of Exchange Act 1882 s 74A(b) (as added: see note 3).
- 5 Bills of Exchange Act 1882 s 74A (as added: see note 3).

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## **1522. Mode of presentment.**

Presentment for payment, to be sufficient, must be made personally by the holder<sup>1</sup> or by some person<sup>2</sup> authorised to receive payment on his behalf<sup>3</sup>, except where presentment through a postal operator<sup>4</sup> is authorised by special agreement or general usage<sup>5</sup>. Moreover, presentment for payment must be made at a reasonable hour<sup>6</sup>, on a business day<sup>7</sup>, and at the proper place<sup>8</sup>; and it must be made to the person designated by the bill<sup>9</sup> as payer<sup>10</sup>, or to some person authorised to pay or to refuse payment on his behalf, if with the exercise of reasonable diligence such person can be found at the place of presentment<sup>11</sup>.

It is the duty of the holder, when he presents an instrument<sup>12</sup> for payment, to exhibit it to the person from whom payment is demanded, and on receiving payment to deliver it up to the party paying it<sup>13</sup>.

- 1 As to the meaning of 'holder' see PARA 1407.
- 2 As to the meaning of 'person' see PARA 1401 note 4.
- 3 Bills of Exchange Act 1882 s 45(3). As to presentment for payment see PARA 1516. The person who presents the instrument must be able to give a valid discharge in case of payment (see s 41(1)(a); and PARA 1510); where the presentment is made by an agent of the holder, the agent is bound to use due diligence on behalf of his principal: *Bank of Van Diemen's Land v Bank of Victoria* (1871) LR 3 PC 526.
- 4 As to the meaning of 'postal operator' see PARA 1510 note 10.
- 5 Bills of Exchange Act 1882 s 45(8) (amended by SI 2001/1149); *Heywood v Pickering* (1874) LR 9 QB 428. An alternative means of presentment for payment is also available to a banker when presenting a cheque for payment: see PARA 1523.
- 6 Where the bill is payable at a bank presentment must be within banking hours: *Parker v Gordon* (1806) 7 East 385; *Whitaker v Bank of England* (1835) 6 C & P 700. The inference that presentment was within such hours cannot be drawn from it being made by a notary: *Elford v Teed* (1813) 1 M & S 28. Where it is payable at the business premises of a merchant or trader, the hours are not so strict (*Barclay v Bailey* (1810) 2 Camp 527), nor at those of a solicitor (*Triggs v Newnham* (1825) 1 C & P 631; subsequent proceedings 10 Moore CP 249). In both these cases the time was 8 pm. When at a private house, in the opinion of the court 12 midnight would be unreasonable, but 7 to 8 pm would not, though at the time the house was shut up, and there was no one there to pay the bill: *Wilkins v Jadis* (1831) 2 B & Ad 188.
- 7 As to what is a business day see PARA 1437. As to when the instrument falls due on a non-business day see the Bills of Exchange Act 1882 s 14; and PARA 1437.

8 As to the proper place see PARA 1520.

9 As to the meaning of 'bill' see PARA 1405.

10 In general this will be the acceptor or the drawee of a bill or the maker of a note.

11 Bills of Exchange Act 1882 s 45(3).

12 As to the meaning of 'instrument' see PARA 1402 note 1.

13 Bills of Exchange Act 1882 s 52(4); *Ramuz v Crowe* (1847) 1 Exch 167. This duty is dispensed with where the alternative means of presentment applicable to cheques is used: see PARA 1523. As to the case of a bill lost or destroyed see PARA 1507.

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### **1523. Alternative means of presentment: cheques.**

Where a banker<sup>1</sup> presents a cheque<sup>2</sup> for payment to the banker on whom it is drawn, he may simply notify to the latter its essential features<sup>3</sup> by electronic means or otherwise instead of presenting the cheque itself<sup>4</sup>, and this renders both bankers subject to the same duties in relation to the collection and payment of the cheque as if the cheque itself had been presented for payment<sup>5</sup>.

Where a cheque is presented for payment in this way, presentment need not be made at the proper place or at a reasonable hour on a business day<sup>6</sup>; nor do the duties to present an instrument<sup>7</sup> for payment and to deliver the instrument up after payment<sup>8</sup> apply<sup>9</sup>.

1 As to the meaning of 'banker' see PARA 1403 note 7.

2 As to the meaning of 'cheque' see PARA 1405.

3 For these purposes, the essential features of a cheque are: (1) the serial number of the cheque; (2) the code which identifies the banker on whom the cheque is drawn; (3) the account number of the drawer of the cheque; and (4) the amount of the cheque is entered by the drawer of the cheque: Bills of Exchange Act 1882 s 74B(6) (s 74B added SI 1996/2993). Although, under head (4) above, the word 'is' appears in the Queen's printers copy of the statutory instrument, the word 'as' appears to be intended.

4 Bills of Exchange Act 1882 s 74B(1) (as added: see note 3). This mode of presentment has effect in relation to cheques drawn on or after 28 November 1996: Deregulation (Bills of Exchange) Order 1996, SI 1996/2993, art 4(2).

5 Bills of Exchange Act 1882 s 74B(5) (as added: see note 3). However, if, before the close of business on the next business day following such a presentment, the banker on whom the cheque is drawn requests the banker by whom the cheque was presented to present the cheque itself then (1) the presentment must be disregarded; and (2) this mode of presentment will not apply to the subsequent presentment of the cheque: s 74B(3)(a), (b) (as so added). Such a request for the presentment of a cheque does not constitute dishonour of the cheque by non-payment: s 74B(4) (as so added).

6 Bills of Exchange Act 1882 s 74B(2) (as added: see note 3). As to what constitutes a reasonable hour, a business day and the proper place when this alternative mode of presentment does not apply see PARA 1522.

7 As to the meaning of 'instrument' see PARA 1402 note 1.

8 As required by the Bills of Exchange Act 1882 s 52(4): see PARA 1522.

9 Bills of Exchange Act 1882 s 74C (added by SI 1996/2993).

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## **C. NOTICE OF DISHONOUR**

### **1524. Necessity for notice of dishonour.**

As in the case of dishonour by non-acceptance<sup>1</sup>, so also in that of dishonour by non-payment<sup>2</sup>, notice of dishonour must be given to the drawer<sup>3</sup> and each indorser<sup>4</sup>; otherwise the drawer or any indorser to whom such notice is not given is discharged<sup>5</sup>. But where a bill<sup>6</sup> has been dishonoured by non-acceptance, and due notice of dishonour has been given, it is unnecessary to give notice of a subsequent dishonour by non-payment unless the bill has in the meantime been accepted<sup>7</sup>.

The rules for giving due notice of dishonour<sup>8</sup> are the same whether the dishonour has been by non-acceptance or non-payment.

1 See PARA 1515 (where also the effect on the rights of a subsequent holder in due course of want of dishonour by non-acceptance is described).

2 As to dishonour by non-payment see PARA 1525.

3 As to the meaning of 'drawer' see PARA 1406.

4 Bills of Exchange Act 1882 s 48. As to the meaning of 'indorser' see PARA 1407 note 8. A drawer or indorser is not liable until he has received notice: *Warrington v Furbor* (1807) 8 East 242; *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL. As to the necessity for protest on dishonour see PARAS 1542-1543.

5 Bills of Exchange Act 1882 s 48; and see *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343. Cf *Forster v Jurdison* (1812) 16 East 105 (where the holder of a bill gave notice to the drawer of dishonour, but added that, having reason to believe that it would be taken up on behalf of the acceptor, he would hold it (unless the drawer sent instructions to the contrary) until the end of the week; this was held a sufficient notice to make the drawer liable without further notice at the expiration of the week). Mere knowledge that the bill is dishonoured is not an equivalent to notice: *Cory v Scott* (1820) 3 B & Ald 619, distinguishing *Bickerdike v Bollman* (1786) 1 Term Rep 405; *Caunt v Thompson* (1849) 7 CB 400; *Re Fenwick, Stobart & Co, Deep Sea Fishery Co's (Ltd) Claim* [1902] 1 Ch 507; *Carter v Flower* (1847) 16 M & W 743. As to discharge of parties see PARA 1564 et seq.

6 As to the meaning of 'bill' see PARA 1405.

7 See the Bills of Exchange Act 1882 s 48(2); and PARA 1515.

8 See PARA 1526 et seq.

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### 1525. Dishonour by non-payment.

An instrument<sup>1</sup> is dishonoured by non-payment either when it is duly presented for payment and payment is refused or cannot be obtained, or when, presentment being excused, the instrument is overdue and unpaid<sup>2</sup>.

There accrues to the holder<sup>3</sup> immediately after dishonour by non-payment the right of recourse against all persons<sup>4</sup> secondarily liable on the instrument<sup>5</sup>. The onus of proof of dishonour, that is, that the right of action has arisen, lies on the claimant suing on the bill<sup>6</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Bills of Exchange Act 1882 s 47(1). As to presentment for payment and excuses for non-presentment see PARA 1516 et seq.

3 As to the meaning of 'holder' see PARA 1407.

4 As to the meaning of 'person' see PARA 1401 note 4.

5 Bills of Exchange Act 1882 s 47(2). This right is stated to be subject to the provisions of the Act: relevant provisions include s 16(1) (enabling a drawer or indorser to negative or limit his liability) (see PARA 1440), s 48 (dealing with notice) (see PARA 1524), s 51 (dealing with protest) (see PARAS 1537-1549) and ss 65-68 (dealing with bills accepted for honour) (see PARAS 1566-1570).

6 *Castrique v Bernabo* (1844) 6 QB 498. As to the meaning of 'bill' see PARA 1405.

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### 1526. By whom and for whom notice may be given.

Notice of dishonour must be given by or on behalf of the holder<sup>1</sup>, or by or on behalf of an indorser<sup>2</sup> who at the time of giving it is himself liable on the instrument<sup>3</sup>.

If the instrument is in an agent's hands when dishonoured, the agent may give notice either to his principal or to the parties liable on the instrument<sup>4</sup>, and if he adopts the latter course he may give notice in his own name or in the name of any party entitled to give notice, whether that party is his principal or not<sup>5</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 As to the meaning of 'indorser' see PARA 1407 note 8.

3 Bills of Exchange Act 1882 s 49(1). As to the meaning of 'instrument' see PARA 1402 note 1.

4 Bills of Exchange Act 1882 s 49(13); *Clode v Bayley* (1843) 12 M & W 51.

5 Bills of Exchange Act 1882 s 49(2); *Lysaght v Bryant* (1850) 19 LJCP 160. Where an agent for one party to an instrument gives notice by mistake on behalf of another party (for whom he is not agent), this does not avoid the notice, but any defence in relation thereto, available against the party in whose name notice was given, may be set up: *Harrison v Ruscoe* (1846) 15 M & W 231. As to the time for giving notice see PARA 1531.

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### **1527. Effect of notice.**

Notice given by or on behalf of the holder<sup>1</sup> enures for the benefit of all subsequent holders and all prior indorsers<sup>2</sup> who have a right of recourse against the party to whom it is given<sup>3</sup>.

Where given by or on behalf of an indorser entitled to give notice<sup>4</sup>, it enures for the benefit of the holder<sup>5</sup> and all indorsers subsequent to the party to whom notice is given<sup>6</sup>.

- 1 As to the meaning of 'holder' see PARA 1407.
- 2 As to the meaning of 'indorser' see PARA 1407 note 8.
- 3 Bills of Exchange Act 1882 s 49(3).
- 4 See PARA 1526.
- 5 Including, no doubt, a subsequent holder.
- 6 Bills of Exchange Act 1882 s 49(4).

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### **1528. To whom notice must be given.**

It is unnecessary in order to render the acceptor<sup>1</sup> of a bill<sup>2</sup> or the maker<sup>3</sup> of a note<sup>4</sup> liable on it that he should be given notice of dishonour<sup>5</sup>. But in order to render the drawer<sup>6</sup> or any indorser<sup>7</sup> liable notice is, as a rule, necessary<sup>8</sup>.

It is for the holder<sup>9</sup> to give notice to such parties as he desires to charge. He may give notice to all prior parties or only to his immediate indorser, and the latter may in turn give notice to his immediate indorser, and so forth until the chain is complete up to the drawer himself<sup>10</sup>.

However, the sequence may be broken at any point by a failure to give notice within the proper time, the effect of which is to release from liability all parties antecedent to the indorser who has thus broken the sequence<sup>11</sup>. In addition to this, there is the increased difficulty of proving the sending of notice in each case. Hence it is the more prudent course for the holder to give notice to all prior parties at once.

- 1 As to the meaning of 'acceptor' see PARA 1406.
- 2 As to the meaning of 'bill' see PARA 1405.
- 3 As to the meaning of 'maker' see PARA 1406.
- 4 As to the meaning of 'note' see PARA 1405.

- 5 Bills of Exchange Act 1882 ss 52(3), 89(1), (2); *Pearse v Pemberthy* (1812) 3 Camp 261.
- 6 As to the meaning of 'drawer' see PARA 1406.
- 7 As to the meaning of 'indorser' see PARA 1407 note 8.
- 8 Bills of Exchange Act 1882 ss 48, 89(1), (2). For the exceptions see PARA 1529.
- 9 As to the meaning of 'holder' see PARA 1407.
- 10 *Rowe v Tipper* (1853) 13 CB 249.
- 11 See *Harrison v Ruscoe* (1846) 15 M & W 231 at 234 per Parke B.

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### **1529. When notice unnecessary.**

In the case of the drawer<sup>1</sup>, notice of dishonour is not required<sup>2</sup> where: (1) the drawer and the drawee<sup>3</sup> are the same person<sup>4</sup>; (2) the drawee is a fictitious person or a person not having the capacity to contract<sup>5</sup>; (3) the drawer is the person to whom the bill is presented for payment<sup>6</sup>; (4) the drawee or acceptor<sup>7</sup> is as between himself and the drawer under no obligation to accept or pay the bill<sup>8</sup>; (5) the drawer has countermanded payment.

In the case of an indorser<sup>9</sup> it is not required<sup>10</sup> where: (a) the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time that he indorsed the instrument<sup>11</sup>; (b) the indorser is the person to whom the bill is presented for payment; (c) the instrument was accepted or made for his accommodation.

As regards persons who are not parties to the instrument, notice of dishonour is not required in the case of guarantors<sup>12</sup>, but it would seem that persons who are liable on the consideration are entitled to notice<sup>13</sup>.

- 1 As to the meaning of 'drawer' see PARA 1406.
- 2 Bills of Exchange Act 1882 s 50(2)(c). In all these cases the drawer is in the position, usually occupied by the acceptor, of the person primarily liable; see PARAS 1456-1457. In the first and second case the instrument may be treated at the option of the holder as a bill or note: s 5(2); see PARA 1408.
- 3 As to the meaning of 'drawee' see PARA 1406.
- 4 As to the meaning of 'person' see PARA 1401 note 4. As to the drawer and drawee being the same person see PARA 1408.
- 5 As to fictitious or non-existing payees see PARA 1431. As to restrictions on capacity see PARA 1469.
- 6 In this case the drawer has first-hand knowledge of the payment or non-payment of the bill: *Caunt v Thompson* (1849) 7 CB 400. As to the meaning of 'bill' see PARA 1405.
- 7 As to the meaning of 'acceptor' see PARA 1406.
- 8 I.e. where the bill is an accommodation bill (under the Bills of Exchange Act 1882 s 28); see PARA 1482. Where the drawer of a bill makes it payable at his own house, that fact is evidence that the bill is a mere accommodation bill: *Sharp v Bailey* (1829) 9 B & C 44.

9 As to the meaning of 'indorser' see PARA 1407 note 8.

10 Bills of Exchange Act 1882 s 50(2)(d). In these cases, again, the indorser is in the position of a party primarily liable on the instrument. However where the indorser for whose accommodation the instrument was accepted or made is not the first indorser, the previous indorsers cannot be sued unless they have had notice of dishonour: *Turner v Samson* (1876) 2 QBD 23, CA. Even where the indorser gave no value for the instrument, the holder is not absolved from the duty of giving notice of dishonour: *Carter v Flower* (1847) 16 M & W 743.

11 As to the meaning of 'instrument' see PARA 1402 note 1.

12 *Carter v White* (1883) 25 ChD 666, CA.

13 *Smith v Mercer* (1867) LR 3 Exch 51 (where the defendants gave an approved banker's bill to the plaintiffs for the price of goods supplied; the bill was dishonoured at maturity, but the defendants did not receive notice thereof; on action brought for the price of the goods it was held that both on principle and on authority, if the plaintiffs meant to have recourse to the defendants, they should have given them notice upon finding the bill was dishonoured); *Camidge v Allenby* (1827) 6 B & C 373; *Robson v Oliver* (1847) 10 QB 704; contra *Swinyard v Bowes* (1816) 5 M & S 62; *Van Wart v Woolley* (1824) 3 B & C 439.

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### **1530. Notice to party liable or his agent, etc.**

Notice may be given to any party whom it is sought to render liable by giving it either to the party himself or to his agent in that behalf<sup>1</sup>.

If the drawer<sup>2</sup> or indorser<sup>3</sup> is dead to the knowledge of the party giving notice, the notice must be given to a personal representative of the deceased, if there is one and if with reasonable diligence he can be found<sup>4</sup>. If the drawer or indorser is bankrupt<sup>5</sup>, notice may be given either to the party himself or to his trustee in bankruptcy<sup>6</sup>.

Where there are two or more parties to be made jointly liable, and they are partners, notice to any one partner is notice to all<sup>7</sup>, but where they are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others<sup>8</sup>.

1 Bills of Exchange Act 1882 s 49(8). In general, notice delivered at the business premises of the party is sufficient (*Crosse v Smith* (1813) 1 M & S 545; *Allen v Edmundson* (1848) 2 Exch 719 at 723; *Viale v Michael* (1874) 30 LT 463; and cf *The Elmville* [1904] P 319); and in the case of a non-trader a message orally given to the wife of the party has been held a valid notice: *Houseto v Cowne* (1837) 2 M & W 348. It would appear that, if one person makes another his agent for the purpose of indorsing an instrument, that person is also an agent for the purpose of receiving notice of dishonour (*Firth v Thrush* (1828) 8 B & C 387 at 391 per Lord Tenterden); but where the name of a person is inserted by an indorser as a referee in case of need (as to which see PARA 1409), notice to that person is insufficient (*Re Leeds Banking Co, ex p Prange* (1865) LR 1 Eq 1). For the purpose of receiving notice each branch of a bank must be considered as a separate entity: *Clode v Bayley* (1843) 12 M & W 51. See also *Fielding & Co v Corry* [1898] 1 QB 268, CA. Where there were three separate companies, and company No 1 had drawn a bill on company No 2 to its own order and indorsed it to company No 3, notice of dishonour to No 3 must not be taken to be notice to No 1, although No 1 and No 3 had the same secretary, for, on the particular facts of the case, the secretary knew of the dishonour as secretary of No 3 in circumstances in which it was not his duty to communicate it to company No 1: *Re Fenwick, Stobart & Co, Deep Sea Fishery Co's (Ltd) Claim* [1902] 1 Ch 507. See also **AGENCY** vol 1 (2008) PARA 138.

2 As to the meaning of 'drawer' see PARA 1406.

3 As to the meaning of 'indorser' see PARA 1407 note 8.



4 Bills of Exchange Act 1882 s 49(9). Presumably, if there is no personal representative, notice may be sent to the last residence or last place of business of the deceased: see PARA 1520 text to note 11, where similar contingencies are provided for in the case of presentment for payment.

5 As to the meaning of 'bankrupt' see PARA 1514 note 4.

6 Bills of Exchange Act 1882 s 49(10); *Re Bellman, ex p Baker* (1877) 4 ChD 795, CA.

7 So even where the drawer is one of the partners in a firm which accepted a bill, the notice received by any member of the firm of the dishonour of the bill is sufficient to bind the partner who drew the bill (*Hills v Thorowgood* (1836) 5 LJB 214); and where a bill drawn by partners is dishonoured after the dissolution of the partnership, notice of dishonour to the continuing partner is sufficient notice to the retiring partner (*Goldfarb v Bartlett and Kremer* [1920] 1 KB 639). As to partnerships see PARA 1467.

8 Bills of Exchange Act 1882 s 49(11). Quaere whether, if the joint parties are not partners, notice to one of them would bind even him.

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### **1531. Time of notice.**

Time is an element of the utmost importance in regard to the due sending of notice of dishonour<sup>1</sup>.

Notice may be given as soon as the instrument<sup>2</sup> is dishonoured<sup>3</sup>, and it must at all events be given within a reasonable time thereafter<sup>4</sup>. What is a 'reasonable time' must, as in the case of presentment for payment<sup>5</sup>, be to some extent a matter of fact dependent upon the circumstances of the case<sup>6</sup>; but in respect of notices of dishonour the rules laid down by law for its determination are much more precise.

In the absence of special circumstances<sup>7</sup>, notice is not deemed to have been given within a reasonable time unless (1) where the party giving and the party to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the instrument<sup>8</sup>; or (2) where the party giving and the party to receive notice reside in different places, the notice is sent off on the day after the dishonour of the instrument, if there is a post at a convenient hour on that day, or, if there is no such post on that day, then by the next post thereafter<sup>9</sup>.

As notice of dishonour is one of the things required by the statute to be done in less than three days, non-business days are excluded in reckoning the time<sup>10</sup>.

1 As to the necessity for notice of dishonour see PARA 1524.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 Bills of Exchange Act 1882 s 49(12). As to time for giving notice see *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245 at 255. As to notice given on the same day as dishonour where dishonour was certain see *Eaglehill Ltd v J Needham Builders Ltd* [1973] AC 992, [1972] 3 All ER 895, HL. The time when notice was given may be a matter for inference: see *Ladup Ltd v Shaikh* [1983] QB 225 at 233, [1982] 3 WLR 172 at 177.

4 Bills of Exchange Act 1882 s 49(12); *Hirschfeld v Smith* (1866) LR 1 CP 340.

5 See PARAS 1518-1519.

6 See *The Elmville* [1904] P 319 at 330 per Gorell Barnes J.

7 'Special circumstances' is a term which is no doubt intended to leave the court a wide discretion. It would cover the facts in *The Elmville* [1904] P 319 (notice delivered as soon as possible after inquiries made). It would also cover the facts in a case where an indorsee, who was a Jew, omitted to send notice on a Jewish festival, on which he was forbidden by his religious law to attend to secular business: *Lindo v Unsworth* (1811) 2 Camp 602. In *Lombard Banking Ltd v Central Garage and Engineering Co Ltd* [1963] 1 QB 220, [1962] 2 All ER 949, it was held that where the plaintiffs sent off notices of dishonour only after the dishonoured bills were returned to them by their bankers, they acted reasonably and that the circumstances were special exempting them from the timetable set out in the Bills of Exchange Act 1882 s 49(12), (13). As to s 49(13) see PARA 1532.

8 Bills of Exchange Act 1882 s 49(12)(a). See *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343. If, in the ordinary course of post, the notice would reach its destination on the right day, it is sufficient (*Hilton v Fairclough* (1811) 2 Camp 633), but where an indorser received notice one day and posted it on so late on the following day that the next party in order received it on the day after that, it was held insufficient (*Smith v Mullett* (1809) 2 Camp 208). As to what is the 'same place' see *Hamilton Finance Co Ltd v Coverley Westray, Walbaum and Tosetti Ltd and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53.

9 Bills of Exchange Act 1882 s 49(12)(b); *Williams v Smith* (1819) 2 B & Ald 496.

10 See the Bills of Exchange Act 1882 s 92; and PARA 1437. Where a bill was dishonoured in a place where the post went out at 9.30 am and the day was Saturday, it was held a sufficient notice when sent out by the post on Tuesday morning: *Hawkes v Salter* (1828) 4 Bing 715. So, too, an indorser who received notice on a Sunday was held to have given sufficient notice by sending it out on Tuesday morning, for he was not obliged to open the letter apprising him of the dishonour on the Sunday: *Wright v Shawcross* (1819) 2 B & Ald 501n.

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### **1532. Time for passing on notice.**

Where a party receives due notice of dishonour, he has the same period of time after the receipt of such notice for giving notice to antecedent parties as the holder<sup>1</sup> has after the dishonour<sup>2</sup>.

So, too, if a dishonoured instrument<sup>3</sup> is in the hands of an agent who elects to give notice to his principal instead of to the parties liable on the instrument, he must give the notice within the same time as if he were the holder, and the principal upon receipt of the notice has himself the same time for giving notice as if the agent had been an independent holder<sup>4</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 Bills of Exchange Act 1882 s 49(14); *Rowe v Tipper* (1853) 13 CB 249. As to whom notice of dishonour must be given see PARA 1528. In the case of a sequence of holders, each successive notice must be given in due time, so that, if there has been any failure to give such due notice, a prior party cannot be made liable by showing that, having regard to the total time between the dishonour and the time that such prior party has received notice, he has received it as soon as he should; for where the break in the sequence occurred the party to whom notice was given too late has become a stranger to the bill, and cannot himself give notice to another: *Turner v Leech* (1821) 4 B & Ald 451. The fact that a party sent notice to an indorser, which notice, owing to the intervention of a Sunday, might have been sent to reach that indorser a day later than it actually did, does not excuse the latter for not sending notice to the drawers within the required time: *Miers v Brown* (1843) 11 M & W 372. See also *Studdy v Beesty and Higgins* (1889) 60 LT 647, CA.

3 As to the meaning of 'instrument' see PARA 1402 note 1. As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525.

4 Bills of Exchange Act 1882 s 49(13); *Clode v Bayley* (1843) 12 M & W 51; *Goodall v Polhill* (1845) 14 LJCP 146; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC; *Fielding & Co v Corry* [1898] 1 QB 268, CA. The

principal may not add on to his own time for giving notice any time saved by the agent in giving notice to him: *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343.

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### **1533. Delay in giving notice.**

Delay in giving notice of dishonour is excused when the delay is caused by circumstances which are beyond the control of the party giving notice and are not imputable to his default, misconduct or negligence, but when the cause of delay ceases to operate the notice must be given with reasonable diligence<sup>1</sup>.

<sup>1</sup> Bills of Exchange Act 1882 s 50(1); see *The Elmville* [1904] P 319, cited in PARA 1531 note 7. See also *Gladwell v Turner* (1870) LR 5 Exch 59 (where all the parties lived in the same place; on the morning after the bill was dishonoured the holder applied to his indorser for information as to the residence of the drawer; his indorser was out at the time, and although he obtained the information from him later in the day and then posted notice to the drawer, the notice did not reach the drawer that day, as it should have done; it was held, however, that he had acted with reasonable diligence, and the notice was therefore sufficient). As to delay in post see *Hamilton Finance Co Ltd v Coverley Westray, Walbaum and Tosetti Ltd and Portland Finance Co Ltd* [1969] 1 Lloyd's Rep 53 at 74.

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### **1534. Form and service of notice.**

Notice may be given in writing<sup>1</sup> or by personal communication<sup>2</sup>. When it is in writing it need not be delivered personally. It may be sent through the post, and in that case if it is duly addressed and posted, a fact which it rests with the sender to prove, the sender is absolved from liability for any miscarriage by a postal operator<sup>3</sup>.

It may also be sent by special messenger<sup>4</sup>, but if it thereby reaches its destination on a later day than that on which it would have been delivered in the ordinary course by a postal operator, it is ineffectual<sup>5</sup>.

A written notice need not be signed<sup>6</sup>, and an insufficient written notice may be supplemented and validated by oral communication<sup>7</sup>.

It may be given in any terms which sufficiently identify the instrument<sup>8</sup> and intimate that it has been dishonoured by non-acceptance or non-payment, as the case may be<sup>9</sup>.

A misdescription of the instrument does not vitiate the notice unless the party to whom notice is given is in fact misled thereby<sup>10</sup>.

The return of a dishonoured instrument to the drawer<sup>11</sup> or indorser<sup>12</sup> is in point of form deemed to be a sufficient notice of dishonour<sup>13</sup>.

1 As to the meaning of 'writing' see PARA 1405 note 2.

2 Bills of Exchange Act 1882 s 49(5); *Metcalfe v Richardson* (1852) 11 CB 1011; *Prideaux v Criddle* (1869) LR 4 QB 455. As to the necessity for notice of dishonour see PARA 1524.

3 Bills of Exchange Act 1882 s 49(15) (amended by SI 2001/1149). As to the meaning of 'postal operator' see PARA 1510 note 10; *Dobree v Eastwood* (1827) 3 C & P 250. As to being duly addressed, the notice should be sent to the place of business of the person whom it is desired to notify, or to his residence: *Berridge v Fitzgerald* (1869) LR 4 QB 639. It should not in general be addressed to Messrs ----- at some larger place, eg London (*Walter v Haynes* (1824) Ry & M 149); but where the party in question has so described himself on the instrument, such an address will suffice (*Burmester v Barron* (1852) 17 QB 828). Where notice was by mistake sent to the wrong branch of a large bank, a subsequent telegram correcting the address has been held sufficient: *Fielding & Co v Corry* [1898] 1 QB 268, CA. As to due posting see *Saunderson v Judge* (1795) 2 Hy Bl 509.

4 See *Pearson v Crallan* (1805) 2 Smith KB 404.

5 *Darbishire v Parker* (1805) 6 East 3.

6 Bills of Exchange Act 1882 s 49(7); *Armstrong v Christiani* (1848) 5 CB 687. As to a banker giving notice see *Maxwell v Brain* (1864) 10 LT 301.

7 Bills of Exchange Act 1882 s 49(7); cf *Fielding & Co v Corry* [1898] 1 QB 268, CA.

8 As to the meaning of 'instrument' see PARA 1402 note 1.

9 Bills of Exchange Act 1882 s 49(5). As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525. See *Caunt v Thompson* (1849) 7 CB 400 at 411 per Cresswell J, summing up the previous cases ('In substance these cases seem to establish that in order to make a prior holder responsible he must derive from some person entitled to call for payment information that the bill has been dishonoured, and that the party is in a condition to sue him, from which he may infer that he is responsible'). Cf *Hedger v Steavenson* (1837) 2 M & W 799 at 805 per Parke B, holding that if the notice discloses by a reasonable intendment, and if it would be inferred from it by any man of business, that the bill had been presented to the acceptor and had not been paid by him, it is sufficient, although it does not so state in terms. See also *Paul v Joel* (1859) 4 H & N 355 (which points out that the contrary decision in *Solarte v Palmer* (1834) 1 Bing NC 194 was a decision on particular facts only) and *Bailey v Porter* (1845) 14 M & W 44.

As to what is a sufficient description of the bill see *Shelton v Braithwaite* (1841) 7 M & W 436 (which decides that, if it is set up that there is more than one bill to which the notice might apply, proof thereof lies on the defendant).

10 Bills of Exchange Act 1882 s 49(7); *Bromage v Vaughan* (1846) 9 QB 608; *Mellersh v Rippen* (1852) 7 Exch 578. In *Rowlands v Springett* (1845) 14 LJEx 227, a card was left at the house of the drawer of a bill with the name and address of an indorser, and on the back was written 'Bill for £30 drawn by S on W dishonoured lies due as on the other side'; in fact, the indorser was not then the holder, and the bill was not at his address, but the notice was held sufficient. It is immaterial if in the notice the instrument is described as a note when it should have been a bill (*Stockman v Parr* (1843) 11 M & W 809), or vice versa (*Messenger v Southey* (1840) 1 Man & G 76); nor is it material if the capacities in which the parties sign the bill are wrongly described: *Mellersh v Rippen* (1852) 7 Exch 578.

11 As to the meaning of 'drawer' see PARA 1406.

12 As to the meaning of 'indorser' see PARA 1407 note 8.

13 Bills of Exchange Act 1882 s 49(6).

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### **1535. When notice dispensed with.**

Notice of dishonour is dispensed with altogether where despite the exercise of reasonable diligence it cannot be given to or does not reach the drawer<sup>1</sup> or indorser<sup>2</sup> whom it is sought to charge<sup>3</sup>.

1 As to the meaning of 'drawer' see PARA 1406.

2 As to the meaning of 'indorser' see PARA 1407 note 8.

3 Bills of Exchange Act 1882 s 50(2)(a). As to the necessity for notice of dishonour otherwise see PARA 1524. The question of reasonable diligence is a question of fact in each case: *Bateman v Joseph* (1810) 12 East 433. Where the drawer told the holder before maturity that he had no regular residence, and would call and see if the bill was honoured by the acceptor, the holder was held absolved from the duty of giving notice to him: *Phipson v Kneller* (1815) 4 Camp 285. So, too, where the holder went to the place of business of the drawer and found it shut up, it was held that notice might be dispensed with (*Allen v Edmundson* (1848) 2 Exch 719), but where the holder failed to find the drawer at the address given, yet was afterwards, but before action brought, informed of a place where the drawer was to be found, he was held not to be absolved from the duty of giving notice (*Studdy v Beesty and Higgins* (1889) 60 LT 647, CA).

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### **1536. Waiver of notice.**

Notice of dishonour may be waived expressly<sup>1</sup> or by implication<sup>2</sup>, and either before the time for giving notice has arrived<sup>3</sup>, or after the omission to give<sup>4</sup> due notice<sup>5</sup>; but an admission of liability by the drawer<sup>6</sup> or an indorser<sup>7</sup> must be made with full knowledge of the facts, or it will not operate as a waiver of notice<sup>8</sup>.

1 As to express waiver see the Bills of Exchange Act 1882 s 16(2); and PARA 1440. If the drawer or an indorser so waives his right to notice of dishonour, no subsequent party need give him notice, but it does not affect the duty of giving notice to prior parties: *Turner v Leech* (1821) 4 B & Ald 451.

2 As to implied waiver, suffering judgment by default in an action by the second indorser is evidence of notice or of a waiver of notice in a claim by the first indorser: *Rabey v Gilbert* (1861) 6 H & N 536.

3 *Phipson v Kneller* (1815) 4 Camp 285 (where the drawer, who had told the holder that he had no fixed address, promised, shortly before the bill fell due, to call in a few days to see if the bill had been paid); *Brett v Levett* (1811) 13 East 213 (where the drawer told the holder that the bill would not be paid when it fell due).

4 *Mills v Gibson* (1847) 16 LJCP 249; *Woods v Dean* (1862) 3 B & S 101 (where an indorser, who had not received notice of dishonour, on being told that the holder was going to sue him, said he would pay if given time); *Cordery v Colvin* (1863) 14 CBNS 374 (where the drawer of a bill, made payable at his own house, repeatedly promised, after its dishonour, to pay it).

5 Bills of Exchange Act 1882 s 50(2)(b).

6 As to the meaning of 'drawer' see PARA 1406.

7 As to the meaning of 'indorser' see PARA 1407 note 8.

8 Thus, where the drawer after the maturity of a bill wrote to the holder admitting liability in ignorance of the fact that it had not been presented, it was held that he had not by his admission dispensed with the duty of presentment or the consequences of the want of it: *Keith v Burke* (1885) Cab & El 551; cf *Pickin v Graham* (1833) 1 Cr & M 725.

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## ***D. NOTING AND PROTEST***

### **1537. Noting.**

A notary public is a duly appointed officer whose duty it is to draw, attest or certify documents<sup>1</sup>. In the case of bills of exchange<sup>2</sup> the notary or his clerk makes a formal demand upon the drawee<sup>3</sup> or acceptor<sup>4</sup> for acceptance or payment<sup>5</sup>, as the case may be, and on refusal notes the bill; that is, he writes a minute on the face of the bill. This minute consists of his initials, the date, the noting charges, and a reference to the notary's register.

A ticket or label is also attached to the bill, on which is written the answer given to the notary's clerk who makes the presentment, for example, 'No orders' or 'No effects'. Before sending out the bill the notary makes a full copy of it in his register and subsequently adds the answer, if any<sup>6</sup>.

Where an instrument<sup>7</sup> is required by the statute to be protested within a specified time or before some further proceeding is taken, it is sufficient that the instrument has been noted for protest before the expiration of the specified time or the taking of that proceeding, and the formal protest may be extended at any time thereafter as of the date of the noting<sup>8</sup>.

1 See **LEGAL PROFESSIONS** vol 66 (2009) PARA 1412.

2 As to the meaning of 'bill of exchange' see PARA 1405.

3 As to the meaning of 'drawee' see PARA 1406.

4 As to the meaning of 'acceptor' see PARA 1406.

5 As to presentment for acceptance see PARA 1509 et seq. As to presentment for payment see PARA 1516 et seq.

6 For the function of notaries in respect of bills of exchange see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1457. An entry made in the notary's register by the clerk who presented the instrument at the time of the dishonour is receivable as evidence in an action on proof of the death of the clerk: *Poole v Dicus* (1835) 1 Bing NC 649. The costs of the notary are recoverable as damages: see PARA 1602.

7 As to the meaning of 'instrument' see PARA 1402 note 1.

8 Bills of Exchange Act 1882 s 93. As to the course to be pursued where no notary public is available see PARA 1540. As to notice of protest see PARA 1548. As to the situation arising upon formal protest after noting see PARA 1566.

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### 1538. Time of noting or protest.

The noting of a dishonoured instrument<sup>1</sup> may take place on the day of its dishonour and must take place not later than the next succeeding business day<sup>2</sup>, but when it has been duly noted the protest<sup>3</sup> may subsequently be extended as of the date of the noting<sup>4</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1. As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525. As to noting see PARA 1537.

2 As to the meaning of 'business day' see PARA 1437.

3 As to the meaning of 'protest' see PARA 1539.

4 Bills of Exchange Act 1882 s 51(4) (amended by the Bills of Exchange (Time of Noting) Act 1917 s 1). It may be extended up to any time, even at or after commencement of proceedings: *Geralopulo v Wieler* (1851) 20 LJCP 105.

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### 1539. Meaning of protest; protest before notary.

A protest is a declaration on behalf of the holder<sup>1</sup> that the bill<sup>2</sup> has been presented for payment and was unpaid<sup>3</sup>. It must be made and signed by a notary public<sup>4</sup>.

The object of requiring the protest to be made by a notary public is that his office is universally recognised not only in the courts of this country, but also in many foreign countries. By the law of nations his acts have credit everywhere<sup>5</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 As to the meaning of 'bill' see PARA 1405.

3 See PARA 1537.

4 Bills of Exchange Act 1882 s 51(7). As to the meaning of 'notary public' see PARA 1537. Signature is, as a matter of fact, always issued with the official seal of the notary. See **LEGAL PROFESSIONS** vol 66 (2009) PARA 1457.

5 *Hutcheon v Mannington* (1802) 6 Ves 823 at 824 per Lord Eldon LC.

## UPDATE

### 1539 Meaning of protest; protest before notary

NOTE 4--'Notary' includes a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to any activity which constitutes a notarial activity (within the meaning of that Act) (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 516); Bills of Exchange Act 1882 s 51(7A) (added by Legal Services Act 2007 Sch 21 para 9).

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### **1540. Protest where no notary available.**

In cases where a protest is necessary<sup>1</sup>, and where the services of a notary cannot be obtained at the time and place where they are required, any householder or substantial resident of the place may in the presence of two witnesses give a certificate signed by them attesting the dishonour of the instrument<sup>2</sup>, and such a certificate operates, in all respects, as if it were a notarial protest<sup>3</sup>.

1 See PARAS 1542-1543.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 Bills of Exchange Act 1882 s 94. For form of protest for use in such a case see Sch 1.

## **UPDATE**

### **1540 Protest where no notary available**

NOTE 3--Renumbered as Bills of Exchange Act 1882 s 94(1) (amended by Legal Services Act 2007 Sch 21 para 10). 'Notary' includes a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to any activity which constitutes a notarial activity (within the meaning of that Act) (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 516): Bills of Exchange Act 1882 s 94(2) (added by Legal Services Act 2007 Sch 21 para 10).

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### **1541. Contents of protest.**

A protest<sup>1</sup>, besides being made and signed, must contain a copy of the instrument<sup>2</sup>, and must specify: (1) the person<sup>3</sup> at whose request the instrument is protested<sup>4</sup>; (2) the place and date of protest<sup>5</sup>; (3) the cause or reason for protesting the instrument<sup>6</sup>; (4) the demand made<sup>7</sup>; and (5) the answer given, if any, or the fact that the drawee<sup>8</sup> or acceptor<sup>9</sup> could not be found<sup>10</sup>.

Where an instrument is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written<sup>11</sup> particulars thereof<sup>12</sup>.

A protest may be made out in duplicate, and the second copy is as much primary evidence as the copy first drawn out<sup>13</sup>.

No witnesses are required to attest a protest by a notary public<sup>14</sup>.



- 1 As to the meaning of 'protest' see PARA 1539.
- 2 Bills of Exchange Act 1882 s 51(7). As to the meaning of 'instrument' see PARA 1402 note 1. As to the requirement for a protest to be made and signed see PARA 1539.
- 3 As to the meaning of 'person' see PARA 1401 note 4.
- 4 Bills of Exchange Act 1882 s 51(7)(a).
- 5 Bills of Exchange Act 1882 s 51(7)(b).
- 6 Bills of Exchange Act 1882 s 51(7)(b).
- 7 Bills of Exchange Act 1882 s 51(7)(b).
- 8 As to the meaning of 'drawee' see PARA 1406.
- 9 As to the meaning of 'acceptor' see PARA 1406.
- 10 Bills of Exchange Act 1882 s 51(7)(b).
- 11 As to the meaning of 'writing' see PARA 1405 note 2.
- 12 Bills of Exchange Act 1882 s 51(8). As to protest made on a copy see PARA 1549. As to lost instruments see PARAS 1507-1508.
- 13 *Geralopulo v Wieler* (1851) 20 LJCP 105.
- 14 Brooke's Notary (11th Edn, 1992) p 98. As to the meaning of 'notary public' see PARA 1537.

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#### **1542. Necessity for protest: inland instruments.**

Where the instrument<sup>1</sup> which has been dishonoured is an inland instrument<sup>2</sup>, it may, if the holder<sup>3</sup> thinks fit, be noted for non-acceptance or non-payment<sup>4</sup>; but it is not necessary to note or protest<sup>5</sup> it in order to preserve the recourse against the drawer<sup>6</sup> or indorser<sup>7</sup>. There are certain advantages in causing even an inland instrument to be noted. Not only is the notary a person whose business it is to know and to adopt the proper measures when an instrument is dishonoured, and therefore both the best agent for the carrying out of such measures and the best witness at a trial of their having been carried out, but his minute on the instrument itself is the most satisfactory record of the non-payment of the instrument for the information of the parties who may thereafter be called upon to pay.

The costs of noting an inland instrument are recoverable as damages<sup>8</sup>.

It is necessary if it is desired to obtain an acceptance or payment for honour that the instrument should first be protested, or at least noted for protest<sup>9</sup>.

Protest is dispensed with altogether by any circumstance which would dispense with notice of dishonour<sup>10</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

- 2 As to the meaning of 'inland bill' and 'inland note' see PARA 1432.
- 3 As to the meaning of 'holder' see PARA 1407.
- 4 As to noting see PARA 1537.
- 5 As to the meaning of 'protest' see PARA 1539.
- 6 As to the meaning of 'drawer' see PARA 1406.
- 7 Bills of Exchange Act 1882 s 51(1). As to the meaning of 'indorser' see PARA 1407 note 8. It is of course in any case unnecessary to note or protest in order to render liable the acceptor or maker: see s 52(3); and PARA 1528.
- 8 Bills of Exchange Act 1882 s 57(1)(c). See also PARA 1602.
- 9 See the Bills of Exchange Act 1882 ss 65(1), 68(1); and PARAS 1566, 1571. As to noting for protest see PARA 1537.
- 10 Bills of Exchange Act 1882 s 51(9). As to when notice of dishonour can be dispensed with see PARA 1535; and *Legge v Thorpe* (1810) 12 East 171 (where it was held that in the case of an action against a drawer, who could not reasonably have expected the bill to be honoured by the drawee, protest might be dispensed with); *Campbell v Webster* (1845) 15 LJCP 4 (where it was held that a promise to pay constitutes waiver of protest and notice).

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### **1543. Necessity for protest: foreign bills.**

Protest<sup>1</sup> is only necessary in the case of a foreign bill<sup>2</sup> appearing on its face to be such. Where such a bill has been dishonoured by non-acceptance<sup>3</sup>, it must be duly protested for non-acceptance; and where it has not been previously dishonoured by non-acceptance, but is dishonoured by non-payment<sup>4</sup>, it must be duly protested for non-payment, otherwise the drawer<sup>5</sup> and indorsers<sup>6</sup> are discharged<sup>7</sup>. The costs of protest, when necessary, can be recovered as liquidated damages<sup>8</sup>.

A bill which has been protested for non-acceptance may be subsequently protested for non-payment<sup>9</sup>.

However, a bill which is in reality a foreign bill, but does not on the face of it appear to be so, need not be protested in case of dishonour<sup>10</sup>. Nor is protest necessary, for the purposes of English law, where a foreign promissory note is dishonoured<sup>11</sup>.

- 1 As to the meaning of 'protest' see PARA 1539.
- 2 As to the meaning of 'foreign bill' see PARA 1432.
- 3 As to dishonour by non-acceptance see PARA 1515.
- 4 As to dishonour by non-payment see PARA 1525.
- 5 As to the meaning of 'drawer' see PARA 1406.
- 6 As to the meaning of 'indorser' see PARA 1407 note 8.

7 Bills of Exchange Act 1882 s 51(2). As to discharge of parties see PARA 1564 et seq.

8 See PARA 1602.

9 Bills of Exchange Act 1882 s 51(3).

10 Bills of Exchange Act 1882 s 51(2). A foreign bill, that does not appear on the face of it to be so, may be treated by the holder as an inland bill: see s 4(2); and PARA 1432. See also note 11.

11 Bills of Exchange Act 1882 s 89(4); *Bonar v Mitchell* (1850) 5 Exch 415. As to the meaning of 'promissory note' see PARA 1405. However both in this case and in the case of a foreign bill which does not appear to be such it must be remembered that the release from duty to protest applies to English law only. In order to charge a party in a foreign country, protest should be made in case it is required by the laws of that country.

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#### **1544. Protest for better security.**

Where the acceptor<sup>1</sup> becomes a bankrupt<sup>2</sup> or insolvent, or suspends payment before maturity of the bill<sup>3</sup>, the holder<sup>4</sup> may cause the bill to be protested<sup>5</sup> for better security against the drawer<sup>6</sup> and indorsers<sup>7</sup>. The advantage of this course, beyond the inherent one of having the circumstances placed on record for the information of the drawer and indorsers, is that it enables the bill to be accepted for honour<sup>8</sup>.

The expenses, however, of a protest for better security are not recoverable, whereas those for protest for non-acceptance or non-payment are<sup>9</sup>.

1 As to the meaning of 'acceptor' see PARA 1406.

2 As to the meaning of 'bankrupt' see PARA 1514 note 4.

3 As to the meaning of 'bill' see PARA 1405.

4 As to the meaning of 'holder' see PARA 1407.

5 As to the meaning of 'protest' see PARA 1539.

6 As to the meaning of 'drawer' see PARA 1406.

7 Bills of Exchange Act 1882 s 51(5). As to the meaning of 'indorser' see PARA 1407 note 8.

8 See the Bills of Exchange Act 1882 s 65(1); and PARA 1566.

9 Bills of Exchange Act 1882 s 57(1)(c). The expenses of noting, or, when protest is necessary and the protest has been extended, the expenses of protest, are part of the damages recoverable on dishonour: s 57(1)(c). See PARAS 1542, 1543. However protest for better security is not 'necessary', and the expenses therefor cannot be recovered: *Re English Bank of the River Plate, ex p Bank of Brazil* [1893] 2 Ch 438. If, after noting or protest, the drawee determines to honour the bill, he must repay to the holder the expenses of noting or protest: Bills of Exchange Act 1882 s 57(1)(c).

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### **1545. Protest where acceptance partial or qualified.**

Where there is a qualified acceptance<sup>1</sup> the holder<sup>2</sup> is entitled to treat the bill as dishonoured by non-acceptance<sup>3</sup>, and the better course is so to treat it and to protest<sup>4</sup> absolutely for want of acceptance according to the tenor of the bill, unless the holder is authorised by antecedent parties to assent to the qualification; otherwise any antecedent party (whether drawer<sup>5</sup> or indorser<sup>6</sup>) who has not authorised or does not subsequently assent<sup>7</sup> to the qualification is released from his liability on the bill<sup>8</sup>.

In the case of a foreign bill<sup>9</sup> which has been accepted in part the bill must be protested as to the balance<sup>10</sup>.

The provisions described above do not apply to a partial acceptance, whereof due notice has been given<sup>11</sup>.

1 As to the meaning of 'qualified acceptance' see PARA 1462.

2 As to the meaning of 'holder' see PARA 1407.

3 See the Bills of Exchange Act 1882 s 44(1); and PARA 1464.

4 As to the meaning of 'protest' see PARA 1539.

5 As to the meaning of 'drawer' see PARA 1406.

6 As to the meaning of 'indorser' see PARA 1407 note 8.

7 Where the drawer or indorser receives notice of a qualified acceptance and does not within a reasonable time express his dissent to the holder, he is deemed to have assented thereto: see the Bills of Exchange Act 1882 s 44(3); and PARA 1464.

8 See the Bills of Exchange Act 1882 s 44(2); and PARA 1464.

9 As to the meaning of 'foreign bill' see PARA 1432.

10 See the Bills of Exchange Act 1882 s 44(2); and PARA 1464.

11 See the Bills of Exchange Act 1882 s 44(2); and PARA 1464.

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### **1546. Place of protest.**

The general rule is that a bill<sup>1</sup> must be protested<sup>2</sup> at the place where it is dishonoured<sup>3</sup>; but when it has been presented through a postal operator<sup>4</sup>, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day<sup>5</sup>.

When, being drawn payable at the place of business or residence of some person<sup>6</sup> other than the drawee<sup>7</sup>, it has been dishonoured by non-acceptance<sup>8</sup>, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary<sup>9</sup>.

1 As to the meaning of 'bill' see PARA 1405.

2 As to the meaning of 'protest' see PARA 1539.

3 Bills of Exchange Act 1882 s 51(6); *Mitchell v Baring* (1829) 10 B & C 4 (where upon protest for non-acceptance a bill drawn abroad on a firm in Liverpool and payable to a firm in London was accepted in London for the honour of the payee, the acceptance for honour being in these terms: 'if regularly protested and refused when due'. The bill was presented at maturity to the drawees at Liverpool, and on being dishonoured by them was duly protested there. It was held that the bill was rightly presented and protested there.)

4 As to the meaning of 'postal operator' see PARA 1510 note 10.

5 Bills of Exchange Act 1882 s 51(6)(a) (amended by SI 2001/1149).

6 As to the meaning of 'person' see PARA 1401 note 4.

7 As to the meaning of 'drawee' see PARA 1406.

8 As to dishonour by non-acceptance see PARA 1515.

9 Bills of Exchange Act 1882 s 51(6)(b).

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#### **1547. Excuses for delay.**

Delay in noting or protesting<sup>1</sup> is excused when the delay is caused by circumstances beyond the control of the holder<sup>2</sup> and not imputable to his default, misconduct, or negligence; but, when the cause of delay ceases to operate, the instrument<sup>3</sup> must be noted or protested with reasonable diligence<sup>4</sup>.

1 As to noting and protest see PARA 1537 et seq.

2 As to the meaning of 'holder' see PARA 1407.

3 As to the meaning of 'instrument' see PARA 1402 note 1.

4 Bills of Exchange Act 1882 s 51(9). As to delay in giving notice of dishonour see PARA 1533; see also *Rothschild v Currie* (1841) 1 QB 43 (where, in the case of a foreign bill drawn on a firm in Paris and payable there, the day on which the protest and registration should have taken place was the *fête du roi*, and the public registry was therefore closed at 12 noon, in consequence of which and of the pressure on the office by the accumulated business on the following day the notary was unable to complete registration until after post-time on that day, and notice was not sent out until the day after that, but it was nevertheless held that due diligence had in fact been used).

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### **1548. Notice of protest.**

It is not necessary for purposes of proceedings in England to send a copy of the protest<sup>1</sup> or even to state in the notice of dishonour<sup>2</sup> that the bill<sup>3</sup> has been protested<sup>4</sup>.

- 1 As to noting and protest see PARA 1537 et seq.
- 2 As to notice of dishonour see PARA 1524 et seq.
- 3 As to the meaning of 'bill' see PARA 1405.
- 4 *Re Lowenthal, ex p Lowenthal (No 2)* (1874) 9 Ch App 591 at 593 per James LJ.

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### **1549. Protest on copy.**

If the instrument<sup>1</sup> has been lost or destroyed or is wrongly detained from the person entitled to hold it<sup>2</sup>, such person may cause protest<sup>3</sup> to be made on a copy or written<sup>4</sup> particulars thereof<sup>5</sup>.

- 1 As to the meaning of 'instrument' see PARA 1402 note 1.
- 2 As to lost bills see PARA 1507. As to the meaning of 'holder' see PARA 1407. As to the meaning of 'person' see PARA 1401 note 4.
- 3 As to the meaning of 'protest' see PARA 1539.
- 4 As to the meaning of 'writing' see PARA 1405 note 2.
- 5 See the Bills of Exchange Act 1882 s 51(8); and PARA 1541. However, the person entitled is not discharged from the duty of giving notice of dishonour: *Thackray v Blackett* (1812) 3 Camp 164.

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## **(xiv) Discharge**

### **A. BY STATUTE**

#### **1550. Payment in due course.**

Discharge of the instrument<sup>1</sup>, that is to say the ending of the life of the instrument and of all rights of action thereon, may be caused in a variety of ways.

By statute, an instrument may be discharged by payment in due course to the holder<sup>2</sup> by or on behalf of the drawee<sup>3</sup> or acceptor<sup>4</sup> (if the instrument is a bill<sup>5</sup>) or the maker<sup>6</sup> (if it is a note)<sup>7</sup>.

Payment in due course means payment<sup>8</sup> at or after the maturity of the instrument<sup>9</sup>, for otherwise a subsequent holder might take the instrument in ignorance of the fact of its payment<sup>10</sup>. The payment must be to the holder, and it must be made in good faith<sup>11</sup> and without notice of defect in his title to the instrument<sup>12</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1. 'Discharge of the instrument' is to be distinguished from the release or discharge of a party to the instrument; a clear example of the distinction is afforded by comparison of the Bills of Exchange Act 1882 s 62(1) and s 62(2) (see PARA 1564). For the survival of rights of action notwithstanding the discharge where they arise out of the circumstances of the transaction see PARA 1564.

2 As to the meaning of 'holder' see PARA 1407.

3 As to the meaning of 'drawee' see PARA 1406.

4 As to the meaning of 'acceptor' see PARA 1406.

5 As to the meaning of 'bill' see PARA 1405.

6 As to the meaning of 'maker' see PARA 1406.

7 Bills of Exchange Act 1882 ss 59(1), 89. As to the meaning of 'note' see PARA 1405. For the effect of payment by a stranger see PARA 1562 text to note 11. A bill paid at maturity cannot be reissued, and no action can afterwards be maintained upon it by a subsequent indorsee: *Burbridge v Manners* (1812) 3 Camp 193 at 195 per Lord Ellenborough CJ.

8 As to the meaning of 'payment' see *Jones v Broadhurst* (1850) 9 CB 173; and **CONTRACT** vol 9(1) (Reissue) PARA 942 et seq. In *London Banking Corpn Ltd v Horsnail, Hayward and Cooper* (1898) 14 TLR 266, 3 Com Cas 105 Bigham J held that a 'banker's payment' (ie an order given by a bank directing payment at the banker's clearing house) constituted payment in law, but because with the assent of both parties the banker's payment had not been acted upon there had been no payment in fact, and the bill had not been discharged.

9 Bills of Exchange Act 1882 ss 59(1), 89.

10 A payment before the instrument becomes due does not extinguish it any more than if it were merely discounted: *Burbridge v Manners* (1812) 3 Camp 193 at 195 per Lord Ellenborough CJ. See also *Morley v Culverwell* (1840) 7 M & W 174; *Factory Investments (Pty) v Ismails* 1960 (2) SA 10 (promissory note paid before due date, no defence to claim by holder in due course).

11 As to the meaning of 'good faith' see PARA 1401 note 7.

12 Bills of Exchange Act 1882 ss 59(1), 89. As to defect of title see PARAS 1478, 1483-1484, 1498. As to payment of bearer cheques see PARA 837.

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### **1551. Payment to wrong person.**

There is a general right to recover money paid under a mistake, whether of fact or law<sup>1</sup>, subject to the defences available in the law of restitution<sup>2</sup>.

If agents for an acceptor<sup>3</sup> honour a bill<sup>4</sup> when due, mistakenly believing a forged signature to be that of the acceptor, they cannot recover the money paid from the holder<sup>5</sup>, for he was deprived of the opportunity of giving notice of dishonour and is therefore deemed to have changed his position<sup>6</sup>. Nor can repayment be recovered from an agent where money has been received by an innocent agent who has paid it out to his principal or on his instructions<sup>7</sup>.

If the party primarily liable on an instrument<sup>8</sup> pays the amount thereof to a wrong person, who holds it under a forged or unauthorised indorsement<sup>9</sup>, he remains liable for the amount to the true owner, though he may recover the amount from the person whom he has wrongly paid<sup>10</sup>.

1 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249. As to money paid under mistake of law see **MISTAKE** vol 77 (2010) PARA 71. As to the abolition of the distinction between mistake of law and mistake of fact see **MISTAKE** vol 77 (2010) PARA 11.

2 As to these defences see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 38 et seq.

3 As to the meaning of 'acceptor' see PARA 1406.

4 As to the meaning of 'bill' see PARA 1405.

5 As to the meaning of 'holder' see PARA 1407.

6 *Cocks v Masterman* (1829) 9 B & C 902; *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC. These authorities were reviewed in *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834, and *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, [1979] 3 All ER 522. For the application of this principle to banking see PARA 852. For the general discussion of the law relating to change of position see *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL.

7 *Transvaal and Delagoa Bay Investment Co Ltd v Atkinson* [1944] 1 All ER 579 (secretary paid cheques acquired in fraud of employer into banking account of wife who knew nothing of the fraud and had paid away the money; no right to recover against wife); but see *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465, HL.

8 As to the meaning of 'instrument' see PARA 1402 note 1.

9 As to the meaning of 'indorsement' see PARA 1407.

10 Cf *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834.

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## 1552. Payment by banker.

A banker<sup>1</sup> is in a somewhat exceptional position, for where a bill is drawn on him payable to order on demand<sup>2</sup>, and he pays the bill in good faith<sup>3</sup> and in the ordinary course of business, it is not incumbent on him to show that any indorsement<sup>4</sup> on the instrument<sup>5</sup> was made by or under the authority of the person<sup>6</sup> whose indorsement it purports to be; and he is deemed to have paid the bill in due course although the indorsement has been forged or made without authority<sup>7</sup>.

The need for indorsement of cheques was abolished in the majority of cases by the Cheques Act 1957 so that a banker paying a cheque<sup>8</sup> in good faith<sup>9</sup> and in the ordinary course of



business which is not indorsed or is irregularly indorsed does not in so doing incur any liability by reason only of the absence of, or irregularity in, indorsement and he is deemed to have paid in due course<sup>10</sup>. But if he pays a cheque on which his customer's signature as drawer<sup>11</sup> is forged, he cannot charge him with the money paid<sup>12</sup>.

1 As to the meaning of 'banker' see PARA 1403 note 7.

2 As to bills payable to order see PARA 1428.

3 As to the meaning of 'good faith' see PARA 1401 note 7.

4 As to the meaning of 'indorsement' see PARA 1407.

5 As to the meaning of 'instrument' see PARA 1402 note 1.

6 As to the meaning of 'person' see PARA 1401 note 4.

7 Bills of Exchange Act 1882 s 60. Protection is also afforded to a banker who pays a crossed cheque in accordance with the crossing, in good faith and without negligence: see s 80; and PARA 1575 note 18. 'Crossed cheque' includes a cheque which is not transferable either under the Bills of Exchange Act 1882 s 81A (see PARA 1500; and PARA 880) or otherwise: s 80 (amended by the Cheques Act 1992 s 2). As to crossed cheques see PARA 1411. As to payment of cheques by banker see PARA 836 et seq.

8 As to the meaning of 'cheque' see PARA 1405.

9 As to the meaning of 'good faith' see PARA 1401 note 7; definition applied by the Cheques Act 1957 s 6(1).

10 Bills of Exchange Act 1882 s 1(1); see also PARA 836.

11 As to the meaning of 'drawer' see PARA 1406.

12 See *London and River Plate Bank v Bank of Liverpool* [1896] 1 QB 7; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654, [1974] 3 All ER 834; see also PARA 850; **MISTAKE** vol 77 (2010) PARA 69 et seq.

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### **1553. Accommodation bill.**

In the case of an accommodation bill<sup>1</sup>, the party accommodated is in reality the principal debtor and a payment in due course<sup>2</sup> by him operates as a discharge of the bill<sup>3</sup>. The reason is that although, on the face of the bill, the acceptor<sup>4</sup> of the accommodation bill is the person primarily liable, he is in fact only a surety for the debt of the party accommodated; evidence is admissible in a claim to show the real relationship of the parties<sup>5</sup>.

1 As to accommodation bills see PARA 1482.

2 As to the meaning of 'payment in due course' see PARA 1550.

3 Bills of Exchange Act 1882 s 59(3); *Lazarus v Cowie* (1842) 3 QB 459; *Parr v Jewell* (1855) 16 CB 684; *Cook v Lister* (1863) 13 CBNS 543. As to the meaning of 'bill' see PARA 1405.

4 As to the meaning of 'acceptor' see PARA 1406.

5 See *Overend, Gurney & Co (Liquidators) v Oriental Financial Corpn (Liquidators)* (1874) LR 7 HL 348; *Ewin v Lancaster* (1865) 6 B & S 571.

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### **1554. Acceptor becoming holder.**

Another mode of discharge of the instrument<sup>1</sup> referable to the same principle<sup>2</sup> arises when the acceptor of a bill<sup>3</sup> or maker of a note<sup>4</sup> becomes the holder<sup>5</sup> of it in his own right at or after its maturity<sup>6</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 I.e. the principle given at PARA 1553.

3 As to the meaning of 'acceptor' see PARA 1406. As to the meaning of 'bill' see PARA 1405.

4 As to the meaning of 'maker' see PARA 1406. As to the meaning of 'note' see PARA 1405.

5 As to the meaning of 'holder' see PARA 1407.

6 Bills of Exchange Act 1882 s 61; *Harmer v Steele* (1849) 4 Exch 1. However this is not so if he is not the holder in his own right: *Nash v De Freville* [1900] 2 QB 72, CA. 'In his own right' must mean something more than 'not in a representative capacity' as executor for instance. It could not possibly mean that, if a thief stole the note from the holder and placed it in the possession of the maker at or after maturity, the note should ipso facto be satisfied. I think 'in his own right' must mean having a right not subject to that of anyone else, but his own—good against all the world' (at 89 per Collins LJ).

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### **1555. Renunciation by the holder.**

The discharge of the instrument<sup>1</sup> is also achieved in certain cases by the action of the holder<sup>2</sup>, as where either at or after its maturity he absolutely and unconditionally renounces his rights against the maker<sup>3</sup> or acceptor<sup>4</sup>, and the liabilities of any party to an instrument may be absolutely and unconditionally renounced by the holder before, at, or after maturity<sup>5</sup>. However, a renunciation will not affect the rights of a holder in due course<sup>6</sup> who has no notice of the renunciation<sup>7</sup>. The renunciation must be in writing<sup>8</sup>, unless the instrument is actually delivered up to the maker or acceptor<sup>9</sup>.

1 As to the meaning of 'discharge of the instrument' see PARA 1550.

2 As to the meaning of 'holder' see PARA 1407.

3 As to the meaning of 'maker' see PARA 1406.

4 Bills of Exchange Act 1882 ss 62(1), 89; *Whatley v Tricker* (1807) 1 Camp 35; *Re Dickinson, Dickinson v Lucas* (1909) 101 LT 27. As to the meaning of 'acceptor' see PARA 1406.

5 Bills of Exchange Act 1882 ss 62(2), 89.

6 As to the meaning of 'holder in due course' see PARA 1407.

7 Bills of Exchange Act 1882 ss 62(2), 89. Cf *De la Torre v Barclay and Salkeld* (1814) 1 Stark 7.

8 Bills of Exchange Act 1882 ss 62(1), 89; *Rimall v Cartwright* (1924) 93 LJB 823, CA; *Re George, Francis v Bruce* (1890) 44 ChD 627 at 632 per Chitty J. Quaere whether it need be signed. As to the meaning of 'writing' see PARA 1405 note 2.

9 Bills of Exchange Act 1882 ss 62(1), 89. Where the renunciation is not in writing, a delivery of the instrument to the legatees or devisees of the maker or acceptor is insufficient to discharge the instrument: *Edwards v Walters* [1896] 2 Ch 157, CA. See also *Abrey v Crux* (1869) LR 5 CP 37. It seems, however, that, had it been delivered up to the executors, that would have been sufficient, because they might have been sued on the instrument as standing in the place of the maker or acceptor.

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### **1556. Cancellation by holder.**

Discharge of the instrument<sup>1</sup> also occurs where it is cancelled by the holder or his agent<sup>2</sup> in such a way that the cancellation is apparent on the instrument<sup>3</sup>. It must be cancelled intentionally, for a cancellation made unintentionally or under a mistake or without the authority of the holder is inoperative<sup>4</sup>. Where, however, the instrument appears to be cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority<sup>5</sup>.

Where the signature of any party to an instrument is intentionally cancelled by the holder or his agent, the party whose signature is cancelled, and any subsequent party to whom that party is liable, is released from his liability on the instrument<sup>6</sup>.

1 As to the meaning of 'discharge of the instrument' see PARA 1550.

2 As to the meaning of 'holder' see PARA 1407. As to agents see PARAS 1473-1477.

3 Bills of Exchange Act 1882 s 63(1); *Ingham v Primrose* (1859) 7 CBNS 82.

4 Bills of Exchange Act 1882 s 63(3); *Sweeting v Halse* (1829) 9 B & C 365.

5 Bills of Exchange Act 1882 s 63(3); *Raper v Birkbeck* (1812) 15 East 17; *Novelli v Rossi* (1831) 2 B & Ad 757; *Prince v Oriental Bank Corpn* (1878) 3 App Cas 325, PC. See also *Dominion Bank v Anderson & Co* (1888) 15 R 408, Ct of Sess. Where an instrument is allowed by an agent to be cancelled without his principal's authority, the agent is liable for the loss: *Bank of Scotland v Dominion Bank, Toronto* [1891] AC 592, HL.

6 Bills of Exchange Act 1882 s 63(2).

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INSTRUMENTS/(1) BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES/(xiv) Discharge/A. BY STATUTE/1557. Discharge under statute.

### **1557. Discharge under statute.**

One or more of the parties to an instrument may be discharged by circumstances that do not operate as a discharge of the instrument<sup>1</sup>.

1 As to the meaning of 'discharge of the instrument' see PARA 1550. The cases specifically noted by the Bills of Exchange Act 1882 are: s 44(2) (see PARA 1464); ss 42, 45; s 48 (see PARAS 1515-1516); s 59(2)(b) (see PARA 1558); s 62(1), (2) (see PARA 1555); s 63(2) (see PARA 1556); s 64(1) (see PARAS 1559-1561). As to discharge of parties at common law see PARA 1565.

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### **1558. Payment by indorser or drawer.**

If the instrument<sup>1</sup> is paid by an indorser<sup>2</sup>, the liability of the indorser to his indorsee<sup>3</sup> and all subsequent parties is extinguished, and he resumes the rights which he possessed as a holder<sup>4</sup> before he indorsed the instrument as regards the acceptor<sup>5</sup> or maker<sup>6</sup> and other antecedent parties<sup>7</sup>. He may therefore at his discretion strike out his own subsequent<sup>8</sup> indorsements<sup>9</sup> and again negotiate the instrument<sup>10</sup>.

The effect is the same in the case of a bill payable to drawer's<sup>11</sup> order<sup>12</sup> which is paid by the drawer, for then the drawer is also the first indorser<sup>13</sup>.

But where the instrument is a bill drawn payable to a third party, payment thereof by the drawer, though it releases him from liability and entitles him to enforce payment against the acceptor<sup>14</sup>, does not entitle him to reissue<sup>15</sup> the bill<sup>16</sup>, for that would be to vary the contract by substituting himself for the payee<sup>17</sup> and thereby materially to alter the bill<sup>18</sup>.

Payment of an accommodation bill by the drawer or indorser for whose accommodation it was drawn discharges the instrument<sup>19</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the meaning of 'indorser' see PARA 1407 note 8.

3 As to the meaning of 'indorsee' see PARA 1407.

4 As to the meaning of 'holder' see PARA 1407.

5 As to the meaning of 'acceptor' see PARA 1406.

6 As to the meaning of 'maker' see PARA 1406.

7 Bills of Exchange Act 1882 s 59(2)(b).

8 The word 'and' appears to be needed between the words 'own' and 'subsequent' but does not appear in the Queen's printers copy of the Act.

9 As to the meaning of 'indorsement' see PARA 1407.

- 10 Bills of Exchange Act 1882 s 59(2)(b).
- 11 As to the meaning of 'drawer' see PARA 1406.
- 12 As to instruments payable to order see PARA 1428.
- 13 Bills of Exchange Act 1882 s 59(2)(b); *Jones v Broadhurst* (1850) 9 CB 173; *Kemp v Balls* (1854) 10 Exch 607.
- 14 Bills of Exchange Act 1882 s 59(2)(a).
- 15 As to the meaning of 'issue' see PARA 1406.
- 16 Bills of Exchange Act 1882 s 59(2)(a); *Williams v James* (1850) 15 QB 498 at 505 per Patteson J.
- 17 As to the meaning of 'payee' see PARA 1406.
- 18 As to the effect of material alterations see PARA 1559.
- 19 See PARA 1553.

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## **B. BY ALTERATION**

### **1559. Alteration of instrument or of acceptance.**

Where an instrument<sup>1</sup>, or if a bill<sup>2</sup> the acceptance<sup>3</sup> thereon, is materially altered<sup>4</sup> without the assent of all the parties liable on it, the instrument is avoided<sup>5</sup> as regards all the parties except any one who has himself made, authorised, or assented to the alteration, and those who have become parties to the instrument subsequent to the material alteration<sup>6</sup>. But where the alteration, although material, is not apparent<sup>7</sup>, a holder in due course<sup>8</sup>, in whose hands the instrument is, may avail himself of the instrument as if it had not been altered, and may enforce payment of it according to its original tenor<sup>9</sup>.

The materiality of an alteration has been said to be a question of law<sup>10</sup>. It does not matter whether the parties ever benefited or not<sup>11</sup> by the alteration. The onus is on a person claiming on a bill manifestly altered to show that the alterations do not alter the liability of parties, either by English law, or, if the bill is governed by foreign law, by that law<sup>12</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the meaning of 'bill' see PARA 1405.

3 As to the meaning of 'acceptance' see PARA 1406.

4 As to material alterations see PARA 1560. The alteration must be made once the bill is complete: see *Foster v Driscoll* [1929] 1 KB 470, CA; *Koch v Dicks* [1933] 1 KB 307, CA.

5 The effect of the word 'avoided' is that a stolen non-negotiable cheque or a stolen banker's draft that has been fraudulently and materially altered by the deletion of the original payee's name and the insertion of the name of a third party becomes a worthless piece of paper, and no action for damages in conversion for its face value can be brought against a bank collecting such a cheque or paying such a draft: *Smith v Lloyds TSB Group plc*; *Harvey Jones Ltd v Woolwich plc* [2001] QB 541, [2001] 1 All ER 424, CA.

6 Bills of Exchange Act 1882 ss 64(1), 89; *Master v Miller* (1793) 2 Hy Bl 141; *Hamelin v Bruck* (1846) 9 QB 306. The alteration has the same effect upon the parties to the instrument if the alteration is made by one who is not a party to it; for the party who may suffer if a bill is avoided by alteration has no right to complain, since there cannot be any alteration except through fraud or laches on his part, ie a fraudulent alteration effected by the party, or carelessness permitting it to be effected by another: *Davidson v Cooper* (1844) 13 M & W 343. As to accidental alteration, the provisions of the Bills of Exchange Act 1882 s 64 relate only to alterations effected at the will of the person by whom or under whose directions they are made and do not apply to a change made due to pure accident, which negatives the possibility of assent: *Hong Kong and Shanghai Bank Corp v Lo Lee Shi* [1928] AC 181, PC.

7 'Apparent' means noticeable on reasonable scrutiny by an intending holder: *Woollatt v Stanley* (1928) 138 LT 620.

8 As to the meaning of 'holder in due course' see PARA 1407.

9 Bills of Exchange Act 1882 s 64(1) proviso, s 89; *Scholfield v Earl of Londesborough* [1896] AC 514, HL (where the drawer altered an acceptance for £500 to one for £3,500, and a holder in due course was permitted to recover £500 only); *Bank of Montreal v Exhibit and Trading Co* (1906) 11 Com Cas 250 (where the word 'Limited' was added to the name of the makers of a promissory note by an indorser); *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC. See also *Smith v Prosser* [1907] 2 KB 735 at 746, CA, per Vaughan Williams LJ; *Lewes Sanitary Steam Laundry Co v Barclay & Co Ltd* (1906) 11 Com Cas 255. These cases leave unimpaired the authority of *Young v Grote* (1827) 4 Bing 253 (where it was held that if a cheque was so carelessly drawn as to enable it to be tampered with without the alteration being apparent, the drawer was estopped by his own negligence from setting up the alteration, for a customer owes his banker a duty of care in the manner in which he fills his cheque, but no such duty exists as between the acceptor and the holder of a bill). In *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777, HL (where the House of Lords expressly approved *Young v Grote* above), a trusted clerk presented to his employer for signature an uncompleted cheque bearing the figure '2' in such a position that the clerk in completing the cheque for £2, as he was authorised to do, was enabled to surround the '2' with other figures making it £120; having inserted 'one hundred and twenty' pounds in the space provided for words the clerk presented the cheque, was paid in cash and absconded; the bank was held entitled to debit the employer's account with the full amount of the cheque. In view of this judgment the statements of the Privy Council to a contrary effect in *Colonial Bank of Australasia Ltd v Marshall* [1906] AC 559, PC, have lost their authority; and see *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 101, [1985] 2 All ER 947 at 952-953, PC, per Lord Scarman; *Joachimson v Swiss Bank Corp* [1921] 3 KB 110, CA; *Lumsden & Co v London Trustee Savings Bank* [1971] 1 Lloyd's Rep 114.

Leaving a space to the right of the payee's name between that and the words 'or order' is not a breach of the duty of care: *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA.

10 *Vance v Lowther* (1876) 1 ExD 176 at 178. See *Suffell v Bank of England* (1882) 9 QBD 555 at 568, CA, per Brett LJ ('any alteration seems to me material which would alter the business effect of the instrument if used for any ordinary business purpose').

11 *Gardner v Walsh* (1855) 5 E & B 83 at 89; *Koch v Dicks* [1933] 1 KB 307 at 320-321, CA, per Scrutton LJ.

12 *Koch v Dicks* [1933] 1 KB 307 at 321, CA, per Scrutton LJ.

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### 1560. Material alterations.

The following alterations are specifically declared to be material<sup>1</sup>: any alteration of: (1) the date<sup>2</sup>; (2) the sum payable<sup>3</sup>; (3) the time of payment<sup>4</sup>; (4) the place of payment<sup>5</sup>, or the addition of a place of payment where none is mentioned by the acceptor<sup>6</sup>, without the acceptor's assent<sup>7</sup>.

Other alterations which have held to be material are the addition<sup>8</sup> or alteration<sup>9</sup> of a rate of interest, the insertion of a particular rate of exchange<sup>10</sup>, the alteration of the description of the payee<sup>11</sup>, the alteration of the place of drawing of a complete bill<sup>12</sup>, which changes the bill from an inland to a foreign bill<sup>13</sup>, the addition of the name of a new maker to a joint and several note<sup>14</sup>, or the elimination of the name of an existing maker<sup>15</sup>, and the conversion of a joint note into a joint and several note<sup>16</sup>.

A crossing of a cheque as authorised by the Bills of Exchange Act 1882 becomes a material part of the cheque, so that an obliteration of the crossing or an addition thereto, when not so authorised, is a material alteration of the cheque, and is not lawful<sup>17</sup>.

In general terms, a materially altered cheque is a worthless piece of paper and, since it accordingly has no value, no action may be brought in conversion with respect to the face value of the instrument<sup>18</sup>.

1 Bills of Exchange Act 1882 ss 64(2), 89.

2 Bills of Exchange Act 1882 ss 64(2), 89. See *Outhwaite v Luntley* (1815) 4 Camp 179; *Vance v Lowther* (1876) 1 ExD 176; *Hirschman v Budd* (1873) LR 8 Exch 171.

3 Bills of Exchange Act 1882 ss 64(2), 89. See *Hamelin v Bruck* (1846) 9 QB 306; *Scholfield v Earl of Londesborough* [1896] AC 514, HL; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC; and see the Decimal Currency Act 1969 s 3(2) (conversion to decimal currency of a bill or note made or issued before 15 February 1971 is not a material alteration); and PARA 1418.

4 Bills of Exchange Act 1882 ss 64(2), 89. See *Outhwaite v Luntley* (1815) 4 Camp 179; *Vance v Lowther* (1876) 1 ExD 176; *Alderson v Langdale* (1832) 3 B & Ad 660.

5 Bills of Exchange Act 1882 ss 64(2), 89. See *Tidmarsh v Grover* (1813) 1 M & S 735.

6 As to the meaning of 'acceptor' see PARA 1406.

7 Bills of Exchange Act 1882 s 64(2). See *Cowie v Halsall* (1821) 4 B & Ald 197; *Burchfield v Moore* (1854) 23 LJQB 261. Aliter, where the acceptor assents: *Walter v Cubley* (1833) 2 Cr & M 151.

8 *Warrington v Early* (1853) 23 LJQB 47.

9 *Sutton v Toomer* (1827) 7 B & C 416.

10 *Hirschfeld v Smith* (1866) LR 1 CP 340.

11 *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA. See also *Smith v Lloyds TSB Group plc*; *Harvey Jones Ltd v Woolwich plc* [2001] QB 541, [2001] 1 All ER 424, CA (original payee's name deleted and replaced by name of fraudster). As to the meaning of 'payee' see PARA 1406.

12 As to the meaning of 'bill' see PARA 1405.

13 *Koch v Dicks* [1933] 1 KB 307, CA; but see *Foster v Driscoll* [1929] 1 KB 470, CA (alteration of place of drawing of incomplete bill held not to be material). As to the meanings of 'inland bill' and 'foreign bill' see PARA 1432.

14 *Gardner v Walsh* (1855) 5 E & B 83; *Flanagan v National Bank Ltd* [1939] IR 352. As to joint and several makers of a note see PARA 1427.

15 *Mason v Bradley* (1843) 11 M & W 590; *Nicholson v Revill* (1836) 4 Ad & El 675.

16 *Perring v Hone* (1826) 4 Bing 28.

17 Bills of Exchange Act 1882 s 78. As to crossing of cheques see PARA 1411. As to cheques materially altered generally see PARA 849.

18 *Smith v Lloyds TSB Bank plc*; *Harvey Jones Ltd v Woolwich plc* [2001] 1 All ER 424, [2000] 2 All ER (Comm) 693.

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### **1561. Alterations not material.**

The following alterations have been held to be immaterial: the addition of a wrong date for the maturity of the instrument<sup>1</sup>, the elimination of the words 'or order' in an instrument payable to order<sup>2</sup>, the conversion of an instrument payable to the payee<sup>3</sup> 'or bearer' into one payable to him 'or order'<sup>4</sup>, the alteration of the style of the drawee<sup>5</sup> (when wrongly stated in the bill) to his true style as signed by him in his acceptance<sup>6</sup>, the alteration of the place where the bill was drawn<sup>7</sup> (unless it has the effect of changing the bill from an inland to a foreign bill<sup>8</sup>), or the addition to a promissory note<sup>9</sup> of the name of an addressee<sup>10</sup>.

The conversion of a blank indorsement into a special indorsement is sanctioned by statute<sup>11</sup>.

Though the materiality or otherwise of an alteration has been said to be a matter of law<sup>12</sup>, the circumstances in which the alteration took place are a matter of fact; and where an instrument appears to have been altered, it rests with the party who seeks to enforce the instrument to give some evidence of what those circumstances were<sup>13</sup>.

A holder<sup>14</sup> who cannot recover on an instrument that has been materially altered cannot recover on the consideration which he gave for it<sup>15</sup>, unless the alteration was made without his knowledge and before he took the instrument<sup>16</sup>, or, where the alteration was made while in his possession, provided it was not made fraudulently, and the party from whom he seeks payment would have had no right of recourse if the alteration had not been made<sup>17</sup>; in this last case, if the bill is given for goods sold, the holder can sue for the price.

1 *Fanshawe v Peet* (1857) 26 LJEx 314. As to the meaning of 'instrument' see PARA 1402 note 1.

2 Cf *Meyer & Co v Decroix, Verley et Cie* [1891] AC 520, HL.

3 As to the meaning of 'payee' see PARA 1406.

4 *Atwood v Griffin* (1826) 2 C & P 368. As to instruments payable to bearer or to order see PARA 1428.

5 As to the meaning of 'drawee' see PARA 1406.

6 *Farquhar v Southey* (1826) Mood & M 14. As to the meaning of 'acceptance' see PARA 1406. Cf *Bank of Montreal v Exhibit and Trading Co* (1906) 11 Com Cas 250 (where the question whether the addition of the word 'Limited' to the name of the makers of a promissory note was material was not decided).

7 *Foster v Driscoll* [1929] 1 KB 470 at 494, CA (alteration made while bill was incomplete); and see note 8. As to the meaning of 'bill' see PARA 1405.

8 See *Koch v Dicks* [1933] 1 KB 307, CA, in which Greer LJ distinguishing *Foster v Driscoll* [1929] 1 KB 470, CA, said that 'it may be said that in the present case [*Koch v Dicks*] it was too late, when the alteration was made, to undo the mistake that had been made by those who signed the bills as drawers . . . If, however, instead of altering the bills after they had passed into the hands of the holder . . . the drawers had recalled them . . . and had then altered them, it would seem that the alteration would have been effective . . .'. As to the meanings of 'foreign bill' and 'inland bill' see PARA 1432.

9 As to the meaning of 'promissory note' see PARA 1405.

10 *Haseldine v Winstanley* [1936] 2 KB 101, [1936] 1 All ER 137.

11 See the Bills of Exchange Act 1882 s 34(4); and PARA 1492.



12 See PARA 1559 note 10.

13 *Knight v Clements* (1838) 8 Ad & El 215; *Clifford v Parker* (1841) 2 Man & G 909. Where a note originally in the form 'Pay ---- or other' was altered to 'Pay ---- or order', and the person who prepared the note stated in evidence that he could not say if the alteration was in his handwriting, but that it was what he ought to have written, the evidence was held sufficient: *Cariss v Tattersall* (1841) 2 Man & G 890.

14 As to the meaning of 'holder' see PARA 1407.

15 *Alderson v Langdale* (1832) 3 B & Ad 660. As to consideration see PARA 1478 et seq.

16 *Burchfield v Moore* (1854) 23 LJQB 261.

17 *Atkinson v Hawdon* (1835) 2 Ad & El 628.

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## **C. BY COMMON LAW**

### **1562. Discharge of instrument at common law.**

An instrument<sup>1</sup> may be discharged by any form of discharge which at common law applies to a simple contract for the payment of money and is not inconsistent with the terms of the Bills of Exchange Act 1882<sup>2</sup>.

Thus, if sufficiently long<sup>3</sup>, lapse of time, although it does not discharge the instrument, will operate as a bar to an action on it<sup>4</sup>.

A release granted to the principal debtor on the instrument<sup>5</sup> operates as a discharge, but the release must be at or after maturity, for otherwise, though good between the parties, it will not discharge the instrument<sup>6</sup>. A release by one of two or more joint holders<sup>7</sup> or a release to one of two or more joint acceptors<sup>8</sup> or makers<sup>9</sup> operates as a valid discharge<sup>10</sup>.

Accord and satisfaction as between the holder and the principal debtor, whether acceptor or maker, will also discharge the instrument; and this may be the case if the satisfaction be afforded on behalf of the principal debtor by a third party who is a stranger to the instrument<sup>11</sup>. However, an accord and satisfaction, even when afforded by another party to the instrument, does not discharge the principal debtor, unless expressly made on his behalf<sup>12</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Rules of common law continue to apply except where they are inconsistent with the Bills of Exchange Act 1882 Act: see s 97(2); and PARA 1400 note 3. For forms of discharge applying to contracts at common law see **CONTRACT** vol 9(1) (Reissue) PARA 920 et seq.

3 As to the statutory periods of limitation see PARA 1604; and for a general account of limitation of actions see **LIMITATION PERIODS**.

4 *Re Rutherford, Brown v Rutherford* (1880) 14 ChD 687 at 692, CA, per Jessel MR (note made in May 1857 on which it was sought unsuccessfully to prove in the administration of an estate, interest paid on it until August 1858; thereafter no demand for payment either of principal or interest). If this is the case in respect of a note, it should be so a fortiori in the case of a bill, 'for a note payable on demand is intended to be a continuing security': *Brooks v Mitchell* (1841) 9 M & W 15 at 18 per Parke B.

5 *Foster v Dawber* (1851) 6 Exch 839; *Overend, Gurney & Co (Liquidators) v Oriental Finance Corpn (Liquidators)* (1874) LR 7 HL 348; *Woodcock v Eames* (1925) 69 Sol Jo 444.

6 See *Ashton v Freestun* (1840) 2 Man & G 1; *Dod v Edwards* (1827) 2 C & P 602. Cf PARA 1550 note 10. The appointment by the holder of the principal debtor as executor of his will discharges the instrument from the date of the death of the testator: *Freakley v Fox* (1829) 9 B & C 130; *Jenkins v Jenkins* [1928] 2 KB 501, DC.

7 As to the meaning of 'holder' see PARA 1407. As to joint payees see PARA 1430.

8 As to the meaning of 'acceptor' see PARA 1406. As to acceptance by partners see PARA 1458.

9 As to the meaning of 'maker' see PARA 1406. As to joint makers of a note see PARA 1427.

10 *Nicholson v Revill* (1836) 4 Ad & El 675; *Jenkins v Jenkins* [1928] 2 KB 501, DC.

11 See *Belshaw v Bush* (1851) 11 CB 191; *Hirachand Punamchand v Temple* [1911] 2 KB 330, CA. As to accord and satisfaction see **CONTRACT** vol 9(1) (Reissue) PARA 1043 et seq.

12 *Jones v Broadhurst* (1850) 9 CB 173.

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### **1563. Renewal as conditional satisfaction only.**

Prima facie the giving of a new instrument<sup>1</sup> in place of an existing one (such as payment of a bill<sup>2</sup> by cheque<sup>3</sup> with the bill attached) has the effect not of discharging the instrument then existing, but of being a conditional satisfaction of it<sup>4</sup>, so that if the new instrument is duly paid at maturity the first instrument is discharged<sup>5</sup>; but if not, then the dormant rights on the first instrument are revived<sup>6</sup>. Parties to the first instrument who do not assent to its renewal are in any case discharged<sup>7</sup>.

Where there is an agreement to renew, the renewal must be applied for within a reasonable time of the maturity of the instrument, though it need not be before maturity<sup>8</sup>. Where there is an agreement to renew, it is prima facie an agreement for one renewal only<sup>9</sup>.

If the consideration on which the instrument to be renewed was based was either absent<sup>10</sup> or illegal<sup>11</sup>, the new instrument is vitiated by the same defect in the hands of parties with notice.

So, too, a party who could not have sued upon the first instrument, owing to participation in or cognisance of fraud in connection with it, equally cannot sue upon the new one<sup>12</sup>. If a party primarily liable on a bill that is materially altered<sup>13</sup> without his knowledge renews the bill in ignorance of the facts, he is not liable on the renewed bill any more than on the old one<sup>14</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the meaning of 'bill' see PARA 1405.

3 As to the meaning of 'cheque' see PARA 1405.

4 *Kendrick v Lomax* (1832) 2 Cr & J 405.

5 *Dillon v Rimmer* (1822) 1 Bing 100; *Mascarenhas v Mercantile Bank of India Ltd, Da Silva v Mercantile Bank of India Ltd* (1931) 47 TLR 611, PC (negotiable debentures exchanged for new ones; held that the original owners of the old ones, who had been defrauded of them by their agents, could not claim against the bank to

whom the agent had pledged the originals and to whom the new debentures had been issued; the bank were holders in due course of the new ones which were new and independent obligations).

6 *Ex p Barclay* (1802) 7 Ves 597; cf *Norris v Aylett* (1809) 2 Camp 329. As to payment of interest on the first instrument see *Lumley v Musgrave* (1837) 4 Bing NC 9; *Lumley v Hudson* (1837) 4 Bing NC 15.

7 Cf *Latham v Chartered Bank of India* (1874) LR 17 Eq 205 at 214 per Bacon V-C; *Hall v Cole* (1836) 4 Ad & El 577. It is otherwise, however, where the parties are cognisant of the renewal and do not dissent: *Torrance v Bank of British North America* (1873) LR 5 PC 246.

8 *Maillard v Page* (1870) LR 5 Exch 312.

9 *Innes v Munro* (1847) 1 Exch 473.

10 *Southall v Rigg, Forman v Wright* (1851) 11 CB 481; *Edwards v Chancellor* (1888) 52 JP 454.

11 *Chapman v Black* (1819) 2 B & Ald 588. But where the consideration, though illegal at the time the first instrument was given, has ceased to be so in the interval, the new instrument can be recovered on: *Flight v Reed* (1863) 1 H & C 703. As to consideration see PARA 1478 et seq.

12 *Lee v Zagury* (1817) 8 Taunt 114. However where a party accepted a bill, and a bill exactly similar, whereon his signature as acceptor was forged, was presented to him by a holder in due course for payment, and he thereupon gave a new bill for the same amount, it was held that he was liable on the new bill: *Mather v Lord Maidstone* (1856) 18 CB 273.

13 As to material alterations see PARA 1560.

14 *Bell v Gardiner* (1842) 4 Man & G 11.

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#### **1564. Discharge of instrument not necessarily discharge of parties.**

A discharge of the instrument<sup>1</sup> may leave surviving rights of action between the parties to the instrument arising out of the circumstances of the relation of those parties to one another in respect of the instrument: for example, where there are two or more joint makers of a note<sup>2</sup>, and the note is discharged by payment by one of them, there remains a claim for contribution by that one as against the other<sup>3</sup>, or where a bill drawn for the accommodation of one party<sup>4</sup> has been discharged by payment by another, there remains a right of action against the party for whose accommodation the bill was drawn on the implied contract of indemnity<sup>5</sup>.

1 As to the meaning of 'discharge of the instrument' see PARA 1550.

2 As to joint and several makers of a note see PARA 1427.

3 *Harmer v Steele* (1849) 4 Exch 1 per curiam at 13.

4 As to accommodation bills see PARA 1482.

5 *Stratton v Mathews* (1848) 3 Exch 48. He is in the position of a surety, and has all a surety's rights: *Bechervaise v Lewis* (1872) LR 7 CP 372. Moreover, where two persons become parties to a bill for the accommodation of a third, and one of the two is compelled to pay the amount of the bill, the relation inter se of the two is that of co-sureties, and the one who has paid is entitled to call upon the other for contribution without regard to their respective liabilities on the face of the bill: *Reynolds v Wheeler* (1861) 30 LJCP 350; *Godsell v Lloyd* (1911) 27 TLR 383. As to sureties generally see PARA 1013 et seq.

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### **1565. Discharge by giving of time.**

The giving of time to the acceptor<sup>1</sup> or maker<sup>2</sup> may discharge those secondarily liable<sup>3</sup>.

Where there is a binding agreement to give time, all the persons secondarily liable are discharged, and the acceptor or maker remains the sole party against whom there is a right of action<sup>4</sup>, unless the agreement by its terms reserves the rights of the holder<sup>5</sup> against such parties<sup>6</sup>. However, mere delay in enforcing payment against the acceptor or maker does not have this result<sup>7</sup>.

Where persons are jointly liable on an instrument<sup>8</sup> the discharge of one operates as a discharge of them all, whether they are principals<sup>9</sup> or merely sureties<sup>10</sup>; and if they are jointly and severally liable, a discharge of one of them *prima facie* operates as a discharge of the others<sup>11</sup>.

1 As to the meaning of 'acceptor' see PARA 1406.

2 As to the meaning of 'maker' see PARA 1406.

3 As to the liability of parties see PARA 1574 et seq.

4 For the effect of agreement to give time see PARA 1224 et seq; and cf *Philpot v Briant* (1828) 4 Bing 717; *Polak v Everett* (1876) 1 QBD 669, CA. An agreement made with any party other than the maker or acceptor does not discharge the other parties: *Fraser v Jordan* (1857) 26 LJQB 288.

5 As to the meaning of 'holder' see PARA 1407.

6 *Oriental Financial Corp'n v Overend, Gurney & Co* (1871) 7 Ch App 142, CA.

7 But the agreement itself may by its terms require payment to be demanded within a certain time, and if this is exceeded, the parties will be discharged: *Lawrence v Walmsley* (1862) 31 LJCP 143.

8 As to the meaning of 'instrument' see PARA 1402 note 1.

9 Eg the joint makers of a note: *King v Hoare* (1844) 13 M & W 494; and see PARA 1427.

10 *Ward v National Bank of New Zealand Ltd* (1883) 8 App Cas 755, PC; *Mayhew v Boyes* (1910) 103 LT 1, CA.

11 *Beaumont v Greathead* (1846) 2 CB 494; *Ward v National Bank of New Zealand Ltd* (1883) 8 App Cas 755 at 764, PC; *Re EWA (a debtor)* [1901] 2 KB 642, CA. It is otherwise if there is a reservation of rights, or in the case of discharge by operation of law: *Re Jacobs, ex p Jacobs* (1875) 10 Ch App 211 (composition in bankruptcy agreed to by holder of a bill). However see PARA 1562 note 6.

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### **(xv) Acceptance and Payment for Honour**

## **A. ACCEPTANCE FOR HONOUR**

### **1566. Acceptor for honour.**

Upon the protest or noting for protest of a bill<sup>1</sup> a new party to the bill may be joined in the person of the acceptor for honour supra protest<sup>2</sup>.

He may intervene either where a bill has been protested for dishonour by non-acceptance or where it has been protested for better security and is not overdue<sup>3</sup>. But in either case he must be a person<sup>4</sup> who is not already liable as a party to the bill<sup>5</sup>; and he must have the consent of the holder<sup>6</sup>.

His acceptance may be for the honour of the drawer<sup>7</sup> or the indorser<sup>8</sup>, or one or more of them, or for the honour of the bill, that is, of all the parties liable on it<sup>9</sup>; but where an acceptance for honour does not expressly state for whose honour it is made, it is presumed to be for the honour of the drawer<sup>10</sup>. The acceptance for honour may be for part only of the sum for which the bill is drawn<sup>11</sup>.

In order to be valid, an acceptance for honour supra protest must be written<sup>12</sup> on the bill, signed by the acceptor for honour, and indicate that it is an acceptance for honour<sup>13</sup>.

1 As to the meaning of 'bill' see PARA 1405. Provisions of the Bills of Exchange Act 1882 relating to acceptance supra protest are not applicable to promissory notes: s 89(3)(c). As to noting and protest see PARA 1537 et seq.

2 Bills of Exchange Act 1882 s 65(1).

3 Bills of Exchange Act 1882 s 65(1). As to protest for dishonour see PARA 1539, and as to protest for better security see PARA 1544. As to the date of maturity of a bill payable after sight which has been accepted for honour see PARA 1435.

4 As to the meaning of 'person' see PARA 1401 note 4.

5 Bills of Exchange Act 1882 s 65(1). This phrase would seem to include the drawee, who, though declining to accept the bill outright, may yet accept it for the honour of the drawer or an indorser, and thereby incur a minor risk of ultimate loss.

6 Bills of Exchange Act 1882 s 65(1). As to the meaning of 'holder' see PARA 1407.

7 As to the meaning of 'drawer' see PARA 1406.

8 As to the meaning of 'indorser' see PARA 1407 note 8.

9 Bills of Exchange Act 1882 s 65(1).

10 Bills of Exchange Act 1882 s 65(4).

11 Bills of Exchange Act 1882 s 65(2).

12 As to the meaning of 'writing' see PARA 1405 note 2.

13 Bills of Exchange Act 1882 s 65(3)(a), (b). It is the usual practice for the acceptance for honour to be attested by a notarial 'act of honour' recording the acceptance. See *Mitchell v Baring* (1829) 10 B & C 4; and PARA 1571.

INSTRUMENTS/(1) BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES/(xv) Acceptance and Payment for Honour/A. ACCEPTANCE FOR HONOUR/1567. Second acceptor for honour.

### **1567. Second acceptor for honour.**

It remains in doubt whether, after one has accepted a bill supra protest for the honour of one party<sup>1</sup>, another may accept it supra protest for the honour of another party, for such a proceeding would be repugnant to the principle that there cannot be more than one general acceptance of a bill<sup>2</sup>; but it may be that if the acceptor for honour becomes bankrupt<sup>3</sup> or insolvent or suspends payment before the bill matures, a second acceptance for honour may be obtained.

1 As to acceptance for honour supra protest see PARA 1566. As to the meaning of 'bill' see PARA 1405. Provisions of the Bills of Exchange Act 1882 relating to acceptance supra protest are not applicable to promissory notes: s 89(3)(c).

2 Cf *Jackson v Hudson* (1810) 2 Camp 447. As to the meaning of 'general acceptance' see PARA 1462.

3 As to the meaning of 'bankrupt' see PARA 1514 note 4.

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### **1568. Liabilities and rights on acceptance.**

The contract made by the acceptor for honour<sup>1</sup> by his acceptance is that he will on due presentment pay the bill<sup>2</sup> according to the tenor of his acceptance, if it is not paid by the drawee<sup>3</sup>, provided that it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts<sup>4</sup>.

By so accepting he makes himself liable to the holder<sup>5</sup> and to all parties to the bill subsequent to the party for whose honour he has accepted<sup>6</sup>, and he is bound alike by the estoppels which bind the original acceptor and those which bind the party for whose honour he has accepted<sup>7</sup>.

If, in pursuance of his acceptance, he is called upon to pay, and does pay, the bill, he succeeds to the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to that party<sup>8</sup>.

1 As to acceptance for honour supra protest see PARA 1566.

2 As to the meaning of 'bill' see PARA 1405. Provisions of the Bills of Exchange Act 1882 relating to acceptance supra protest are not applicable to promissory notes: s 89(3)(c).

3 As to the meaning of 'drawee' see PARA 1406.

4 Bills of Exchange Act 1882 s 66(1); *Hoare v Cazenove* (1812) 16 East 391; *Williams v Germaine* (1827) 7 B & C 468. As to presentment for payment see PARA 1516 et seq. As to the meaning of 'protest' see PARA 1539.

5 As to the meaning of 'holder' see PARA 1407.

6 Bills of Exchange Act 1882 s 66(2).

7 As to what these are see PARA 1457. See also *Phillips v Im Thurn* (1866) LR 1 CP 463 (where it was held that an acceptor for the honour of the drawer was estopped from denying that the bill was a valid bill, and from pleading that the payee was a fictitious person, of which fact he was in ignorance when he accepted the bill for honour).

8 See the Bills of Exchange Act 1882 s 68(5); and PARA 1573. Given the circumstances in which a bill can be protested for better security (as to which see PARA 1544), 'all parties liable to that party' will include the acceptor where a bill is so protested.

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### **1569. Presentment for payment to acceptor for honour.**

Where a dishonoured bill has been accepted for honour *supra protest*<sup>1</sup>, it must be protested for non-payment before it is presented for payment to the acceptor for honour<sup>2</sup>. Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity<sup>3</sup>; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him<sup>4</sup>.

When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him<sup>5</sup>.

1 As to acceptance for honour *supra protest* see PARA 1566.

2 Bills of Exchange Act 1882 s 67(1). This provision applies also to dishonoured bills naming a referee in case of need: see PARA 1409. As to the meaning of 'protest' see PARA 1539.

3 Bills of Exchange Act 1882 s 67(2). For the calculation of the date of maturity in relation to bills payable after sight and after time see PARA 1437.

4 Bills of Exchange Act 1882 s 67(2).

5 Bills of Exchange Act 1882 s 67(4).

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### **1570. Excuses for delay, etc.**

Delay in presentment or non-presentment to the acceptor for honour<sup>1</sup> is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment<sup>2</sup>.

- 1 As to acceptance for honour supra protest see PARA 1566.
- 2 Bills of Exchange Act 1882 s 67(3). As to excuses for non-presentment for payment see PARA 1517.

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## **B. PAYMENT FOR HONOUR**

### **1571. Payment for honour.**

Any person<sup>1</sup>, whether liable as a party to the bill<sup>2</sup> or not, may intervene after it has been protested for non-payment<sup>3</sup> and pay it supra protest for the honour of any party liable on it, or for the honour of the person for whose account it was drawn<sup>4</sup>.

In order to operate as a payment for honour supra protest, and not as a mere voluntary payment, the transaction must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it<sup>5</sup>; but this notarial act of honour must be founded upon a declaration made by the payer for honour, or by his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays it<sup>6</sup>.

Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill is the one preferred<sup>7</sup>.

- 1 As to the meaning of 'person' see PARA 1401 note 4.
- 2 As to the meaning of 'bill' see PARA 1405.
- 3 As to necessity for protest see PARAS 1542-1543.
- 4 Bills of Exchange Act 1882 s 68(1). Although the provisions of the Bills of Exchange Act 1882 relating to acceptance supra protest are not applicable to promissory notes (s 89(3)(c)), a promissory note may perhaps be paid supra protest.
- 5 Bills of Exchange Act 1882 s 68(3). As to notarial acts generally see **LEGAL PROFESSIONS** vol 66 (2009) PARAS 1461-1462.
- 6 Bills of Exchange Act 1882 s 68(4). Cf *Re Wyld, ex p Wyld* (1860) 30 LJ Bcy 10.
- 7 Bills of Exchange Act 1882 s 68(2). This will as a rule give preference to a payer for the honour of the drawer, and so in order of priority. As to discharge of parties see PARA 1564 et seq.

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### **1572. Duty of holder to accept payment.**



The holder<sup>1</sup> of a bill<sup>2</sup> must accept payment supra protest<sup>3</sup> when it is offered, otherwise he loses his right of recourse against any party who would have been discharged by such payment<sup>4</sup>.

- 1 As to the meaning of 'holder' see PARA 1407.
- 2 As to the meaning of 'bill' see PARA 1405.
- 3 As to payment for honour supra protest see PARA 1571.
- 4 Bills of Exchange Act 1882 s 68(7). As to discharge of parties see PARA 1564 et seq.

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### **1573. Effect of payment for honour.**

The effect of a payment for honour<sup>1</sup> is to discharge all parties to the bill<sup>2</sup> subsequent to the party for whose honour it is paid and to substitute for the holder<sup>3</sup> the payer for honour, who thereby succeeds both to the rights and to the duties of the holder in regard to the party for whose honour the bill is paid and all parties liable to that party<sup>4</sup>. On payment to the holder of the amount of the bill and the notarial expenses incidental to its dishonour, the payer for honour is entitled to receive both the bill itself and the protest<sup>5</sup>. If the holder does not deliver them up to him on demand, the holder is liable to him in damages<sup>6</sup>.

The bill when paid supra protest and delivered up to the payer for honour ceases to be negotiable<sup>7</sup>.

- 1 As to payment for honour supra protest see PARA 1571.
- 2 As to the meaning of 'bill' see PARA 1405. As to discharge of parties see PARA 1564 et seq.
- 3 As to the meaning of 'holder' see PARA 1407.
- 4 Bills of Exchange Act 1882 s 68(5); *Re Overend, Gurney & Co, ex p Swan* (1868) LR 6 Eq 344 (rights); *Goodall v Polhill* (1845) 14 LJCP 146 (duties).
- 5 Bills of Exchange Act 1882 s 68(6). As to noting and protest see PARA 1537 et seq.
- 6 Bills of Exchange Act 1882 s 68(6).
- 7 *Re Overend, Gurney & Co, ex p Swan* (1868) LR 6 Eq 344. As to the meaning of 'negotiable instrument' see PARA 1402.

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### **(xvi) Liability of the Parties**

## **A. DRAWER OF BILL**

### **1574. Liability of drawer.**

The drawer<sup>1</sup> of a bill of exchange<sup>2</sup> undertakes that the bill on due presentment will be accepted and paid according to its tenor<sup>3</sup> and that if it is dishonoured he will compensate the holder<sup>4</sup> or any indorser<sup>5</sup> who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken<sup>6</sup>.

He is precluded from denying to a holder in due course<sup>7</sup> the existence of the payee<sup>8</sup> and his then capacity to indorse<sup>9</sup>.

The drawer of a bill may insert in the bill an express stipulation negating or limiting his own liability to the holder or waiving as regards himself some or all of the holder's duties<sup>10</sup>.

1 As to the meaning of 'drawer' see PARA 1406.

2 As to the meaning of 'bill of exchange' see PARA 1405.

3 Except in the case of a bill drawn for the drawer's accommodation: see PARA 1482. As to the liability of a drawer of a cheque see PARA 1575.

4 As to the meaning of 'holder' see PARA 1407.

5 As to the meaning of 'indorser' see PARA 1407 note 8.

6 Bills of Exchange Act 1882 s 55(1)(a). As to the requisite proceedings on dishonour see PARAS 1515, 1524; *Whitehead v Walker* (1842) 9 M & W 506. If there is only a qualified acceptance (as to which see PARA 1462) and the holder refuses to take it, the drawer becomes primarily liable. If the drawer receives notice of a qualified acceptance and does not, within a reasonable time, dissent from the holder's taking it, he is deemed to have given his assent: PARA 1464. As to notice of dishonour in case of a bill accepted for accommodation of the drawer see PARA 1529 text to notes 7-8.

7 As to the meaning of 'holder in due course' see PARA 1407.

8 As to the meaning of 'payee' see PARA 1406.

9 Bills of Exchange Act 1882 s 55(1)(b); *Collis v Emett* (1790) 1 Hy Bl 313.

10 See the Bills of Exchange Act 1882 s 16; and PARA 1440. As to the position where the payee is a confirming bank under a letter of credit see *Ng Chee Chong (t/a Maran Road Saw Mill) v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep 156.

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### **1575. Liability on cheques.**

The drawer<sup>1</sup> of a cheque<sup>2</sup> gives an undertaking similar to that given by the drawer of a bill<sup>3</sup>, save that he undertakes that on presentment it will be duly paid (not accepted), and if it is not paid the holder<sup>4</sup> is referred for his remedy to the drawer<sup>5</sup>.

Where a cheque is crossed specially<sup>6</sup> to more than one banker<sup>7</sup>, except when it is crossed to an agent for collection being a banker, the banker on whom it is drawn must refuse payment of it<sup>8</sup>. If the banker nevertheless pays such a cheque, or if he pays a cheque that is crossed generally<sup>9</sup>

otherwise than to a banker, or if he pays a cheque that is crossed specially otherwise than to the banker to whom it is crossed (or to his agent for collection being a banker), he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid<sup>10</sup>.

However, where a cheque is presented for payment<sup>11</sup> which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by the Bills of Exchange Act 1882, the banker paying such a cheque in good faith<sup>12</sup> and without negligence is not responsible and does not incur any liability<sup>13</sup>. Nor may the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by the Bills of Exchange Act 1882<sup>14</sup>, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed (or to his agent for collection being a banker), as the case may be<sup>15</sup>.

The drawer of a crossed cheque<sup>16</sup> which has come into the hands of the payee<sup>17</sup> and, if crossed generally, has been paid by the banker on whom it is drawn to another banker, or, if crossed specially, has been paid to the banker to whom it is crossed or to that banker's agent for collection, that agent also being a banker, is entitled to the same rights and is placed in the same position as if payment of the cheque had been made to the true owner, whether that is in fact the case or not<sup>18</sup>.

1 As to the meaning of 'drawer' see PARA 1406. As to the liability of a drawer of a bill of exchange see PARA 1574.

2 As to the meaning of 'cheque' see PARA 1405.

3 As to the meaning of 'bill' see PARA 1405.

4 As to the meaning of 'holder' see PARA 1407.

5 As to the rights of the drawer to have his cheques honoured by the drawee (his banker) see PARA 1454; and PARA 832. In Ireland it has been held that a payee of a cheque countermanded prior to presentation has a cause of action on the cheque against the drawer: *Gaynor v McDyer* [1968] IR 295.

6 As to the meaning of 'special crossing' see PARA 1411.

7 As to the meaning of 'banker' see PARA 1403 note 7.

8 Bills of Exchange Act 1882 s 79(1).

9 As to the meaning of 'general crossing' see PARA 1411.

10 Bills of Exchange Act 1882 s 79(2).

11 As to the presentment for payment of cheques see PARA 1519 et seq.

12 As to the meaning of 'good faith' see PARA 1401 note 7.

13 Bills of Exchange Act 1882 s 79(2) proviso.

14 As to the crossing of cheques and authorised alterations to such crossings see PARA 1411.

15 Bills of Exchange Act 1882 s 79(2) proviso.

16 As to the meaning of 'crossed cheque' see PARA 1552 note 7.

17 As to the meaning of 'payee' see PARA 1406.

18 Bills of Exchange Act 1882 s 80. The benefit of this section appears to be available to the drawer only where the banker on whom the cheque is drawn has paid it in good faith and without negligence. As to the meaning of 'true owner' see *Marquess of Bute v Barclays Bank Ltd* [1955] 1 QB 202 at 211, [1954] 3 All ER 365 at 368.

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## **B. MAKER OF PROMISSORY NOTE**

### **1576. Liability of maker.**

By making a promissory note<sup>1</sup> the maker<sup>2</sup> undertakes that he will pay it according to its tenor<sup>3</sup>, and is precluded from denying to a holder in due course<sup>4</sup> the existence of the payee<sup>5</sup> and his then capacity to indorse<sup>6</sup>.

1 As to the meaning of 'promissory note' see PARA 1405.

2 As to the meaning of 'maker' see PARA 1406.

3 Bills of Exchange Act 1882 s 88(1). So that where a person guarantees the payment of a note, a failure by the maker to pay it according to its tenor and effect when due will render the surety liable: *Walton v Mascall* (1844) 13 M & W 452.

4 As to the meaning of 'holder in due course' see PARA 1407.

5 As to the meaning of 'payee' see PARA 1406.

6 Bills of Exchange Act 1882 s 88(2); *Drayton v Dale* (1823) 2 B & C 293. It has been doubted whether the payee of a note could be a holder in due course, and in the case of *Herdman v Wheeler* [1902] 1 KB 361, where the maker, intending to borrow £15 from one lender, signed a blank stamped paper, which that lender afterwards filled in for a larger amount and made payable to a second lender, fraudulently keeping the balance for himself, the second lender failed to recover from the maker on the ground that he was not a holder in due course. In *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, the House of Lords held that the original payee of a cheque is not a holder in due course and (distinguishing *Watson v Russell* (1864) 3 B & S 34; on appeal 5 B & S 968) that when A by fraud of B is induced to draw a cheque in favour of C who cashes the cheque, A can recover the money as money paid under a mistake and that there is nothing in the Bills of Exchange Act 1882, concerning the position of a payee of a cheque, to prevent such recovery.

In *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, the Court of Appeal held that where a note was fraudulently filled in for a larger sum than was authorised by a joint maker, that joint maker was estopped from denying the validity of the note by the common law rules of estoppel; see also *Brocklesby v Temperance Permanent Building Society* [1895] AC 173, HL. The general rule of estoppel is that a person who has signed an instrument in blank cannot be heard, as against a person who has changed his position on faith of it, to assert that the instrument as filled in is a forgery or that it was filled in in excess of the agent's authority: see *Wilson and Meeson v Pickering* [1946] KB 422 at 427, [1946] 1 All ER 394 at 397, CA. See also cases cited in PARAS 1448 note 7, 1450 note 3. As to the principles of estoppel generally see **ESTOPPEL**.

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## **C. INDORSER**

### **1577. Liability of indorser.**

The indorser<sup>1</sup> of a bill<sup>2</sup> by indorsing it undertakes that on due presentment it will be accepted, and paid according to its tenor<sup>3</sup>, and that, should it be dishonoured, he will compensate the holder<sup>4</sup> or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken<sup>5</sup>. But it is open to him, as it is to the drawer<sup>6</sup>, to insert in the instrument<sup>7</sup> special stipulations restricting or extending his liability<sup>8</sup>.

In regard to his immediate indorsee<sup>9</sup> the liability of an indorser of an instrument arises out of the contract between them, which is founded not merely on the indorsement<sup>10</sup> itself, but also upon the delivery<sup>11</sup> to the indorsee and upon the intention with which the delivery was made and accepted, as proved by words spoken or written by the parties, and the circumstances, such as the usage of the place, and the course of dealing between the parties, under which the delivery takes place<sup>12</sup>.

In regard to the holder, the drawer and indorsers of any instrument are jointly and severally liable for its due payment and, in case of a bill, for its due acceptance also<sup>13</sup>.

1 As to the meaning of 'indorser' see PARA 1407 note 8.

2 As to the meaning of 'bill' see PARA 1405.

3 As to presentment for acceptance and presentment for payment see PARA 1509 et seq.

4 As to the meaning of 'holder' see PARA 1407.

5 Bills of Exchange Act 1882 s 55(2)(a). As to the requisite proceedings on dishonour see PARAS 1515, 1524.

6 As to the meaning of 'drawer' see PARA 1406.

7 As to the meaning of 'instrument' see PARA 1402 note 1.

8 See PARA 1440.

9 As to the meaning of 'indorsee' see PARA 1407.

10 As to the meaning of 'indorsement' see PARA 1407.

11 As to the meaning of 'delivery' see PARA 1406.

12 *Castrique v Buttigieg* (1856) 10 Moo PCC 94.

13 See *Rouquette v Overmann* (1875) LR 10 QB 525.

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### **1578. Estoppels of indorser.**

An indorser<sup>1</sup> is precluded from denying to a holder in due course<sup>2</sup> the genuineness and regularity in all respects of the drawer's<sup>3</sup> signature and all previous indorsements<sup>4</sup>, and from denying to his immediate or a subsequent indorsee<sup>5</sup> that the instrument<sup>6</sup> was at the time of his indorsement a valid and subsisting instrument, and that he had then a good title to it<sup>7</sup>.

- 1 As to the meaning of 'indorser' see PARA 1407 note 8.
- 2 As to the meaning of 'holder in due course' see PARA 1407.
- 3 As to the meaning of 'drawer' see PARA 1406.
- 4 Bills of Exchange Act 1882 s 55(2)(b); *MacGregor v Rhodes* (1856) 6 E & B 266. As to the meaning of 'indorsement' see PARA 1407.
- 5 As to the meaning of 'indorsee' see PARA 1407.
- 6 As to the meaning of 'instrument' see PARA 1402 note 1.
- 7 Bills of Exchange Act 1882 s 55(2)(c).

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### **1579. Persons liable as indorsers.**

Where a person<sup>1</sup> signs an instrument<sup>2</sup> otherwise than as a maker<sup>3</sup>, drawer<sup>4</sup> or acceptor<sup>5</sup>, he incurs the liabilities of an indorser<sup>6</sup> to a holder in due course<sup>7</sup>. However, if there is ambiguity as to the capacity in which a party signed an instrument, the whole facts and circumstances attendant upon the making, issue<sup>8</sup> and transfer<sup>9</sup> of the instrument may be legitimately referred to for the purpose of ascertaining the true relation of the parties to each other; and reasonable inferences, derived from these facts and circumstances are admitted to the effect of qualifying, altering or even inverting the relative liabilities which the law merchant<sup>10</sup> would otherwise assign to them<sup>11</sup>.

This ambiguity as to the true relation of the parties can arise in relation to bills which are 'backed' or which are accommodation bills<sup>12</sup>. In the case of such a bill, the signature of a relation or friend of the acceptor for whose accommodation the bill is drawn, placed on the back of the bill, constitutes the party an indorser of the bill, and it is immaterial whether the drawer who advances money to the parties accommodated on the strength of their acceptance<sup>13</sup> does so before or after the signature is placed on the back of the bill<sup>14</sup>. If two persons indorse a note as co-sureties for the maker, the first indorser will not be liable to indemnify the second indorser, as normally he would be, but as between them their rights will be regulated in accordance with the law which regulates the rights of co-sureties<sup>15</sup>.

Again, if the drawer of a bill drawn to his order<sup>16</sup> indorses it to the surety, and the surety re-indorses it to him, then the surety, while liable to the holder<sup>17</sup> in the event of the bill being dishonoured<sup>18</sup>, will have no right to be indemnified by the drawer, and if the drawer sues him on the bill, will not be able to avail himself of the defence, usually open to an indorser when sued by the drawer, of circuity of action<sup>19</sup>. Even if a backer-indorser indorses the bill before the drawer, the drawer will have the right, in accordance with the authority conferred upon him by the agreement with the backer, to add his indorsement<sup>20</sup> above the latter's, and the position will then be the same as if the drawer had indorsed the bill first in point of time<sup>21</sup>.

It has been held also that, even if the drawer, when he indorses the bill in such circumstances, places his indorsement below instead of above the backer's (as strictly he ought to do), it will not have the effect of nullifying the intention of the parties, and consequently, if it is proved that the intention was that the backer should render himself liable to the drawer by indorsing the bill, he will still, as indorser, be liable to the drawer<sup>22</sup>.

- 1 As to the meaning of 'person' see PARA 1401 note 4.
- 2 As to the meaning of 'instrument' see PARA 1402 note 1.
- 3 As to the meaning of 'maker' see PARA 1406.
- 4 As to the meaning of 'drawer' see PARA 1406.
- 5 As to the meaning of 'acceptor' see PARA 1406.
- 6 As to the meaning of 'indorser' see PARA 1407 note 8. As to the liability of an indorser see PARA 1577.
- 7 Bills of Exchange Act 1882 ss 56, 89(1), (2). As to the meaning of 'holder in due course' see PARA 1407. However, where the signature gives rise to a contract governed by foreign law, the liability of the person signing will not necessarily be that of an indorser: *G & H Montage GmbH v Irvani* [1990] 2 All ER 225, [1990] 1 WLR 667, CA.
- 8 As to the meaning of 'issue' see PARA 1406. 'Making' refers to the making of a promissory note: see PARA 1405.
- 9 As to transfer generally see PARA 1489 et seq.
- 10 As to the meaning of 'law merchant' see PARA 1400.
- 11 *Macdonald v Whitfield* (1883) 8 App Cas 733 at 745, PC, per Lord Watson; applied in *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343. See also *Novaknit Hellas SA v Kumar Bros International Ltd* [1998] Lloyd's Rep Bank 287, CA.
- 12 As to accommodation bills see PARA 1482.
- 13 As to the meaning of 'acceptance' see PARA 1406.
- 14 *Steele v M'Kinlay* (1880) 5 App Cas 754, HL. In this case M'Kinlay obtained a loan in favour of his two sons from a party who drew a bill of exchange on them with the view of advancing the money on the strength of their acceptances. The sons duly accepted the bill and M'Kinlay himself signed his name on the back of the bill before returning it to the lender. The acceptors became bankrupt, and in an action by the representatives of the lender against those of M'Kinlay, both the lender and M'Kinlay being dead, it was held that the latter was liable as an indorser, not as an acceptor of the bill, and, per Lord Watson (at 782), that it made no difference whether his signature was placed there before the money was lent or not.
- 15 *Macdonald v Whitfield* (1883) 8 App Cas 733, PC; and see PARA 1165 et seq.
- 16 As to bills payable to order see PARA 1428.
- 17 As to the meaning of 'holder' see PARA 1407.
- 18 As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525.
- 19 *Wilkinson & Co v Unwin* (1881) 7 QBD 636, CA; *JW Holmes & Co v Durkee* (1883) Cab & El 23.
- 20 As to the meaning of 'indorsement' see PARA 1407.
- 21 *Glenie v Bruce Smith* [1908] 1 KB 263, CA; *Gerald McDonald & Co v Nash & Co* [1924] AC 625, HL.
- 22 *Re Gooch, ex p Judd* [1921] 2 KB 593, CA; *Bernardi v National Sales Corpn Ltd* [1931] 2 KB 188; *McCall Bros Ltd v Hargreaves* [1932] 2 KB 423. In *Lombard Banking Ltd v Central Garage and Engineering Co Ltd* [1963] 1 QB 220, [1962] 2 All ER 949, backers were liable although the drawer placed his indorsement underneath the backers'. Scarman J considered that the older authorities supporting the proposition that such a bill is not regular on the face of it had been overruled by *Gerald McDonald & Co v Nash & Co* [1924] AC 625, HL. In *Yeoman Credit Ltd v Gregory* [1963] 1 All ER 245, [1963] 1 WLR 343, Megaw J held a backer liable where the drawer's indorsement was a restrictive one, as well as being subsequent to and below the backer's. As to written evidence of promises of guarantee see PARA 1052 et seq.

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### **1580. Rights of indorser.**

The contract of the indorser<sup>1</sup> is one of surety, and he is entitled as against the holder<sup>2</sup> to have the benefit of any securities which the maker<sup>3</sup> or acceptor<sup>4</sup> of the instrument<sup>5</sup> may have deposited with the holder to cover his liability; this is the case whether at the time of his indorsement<sup>6</sup> he knew of the existence or deposit of the securities or not<sup>7</sup>.

1 As to the meaning of 'indorser' see PARA 1407 note 8.

2 As to the meaning of 'holder' see PARA 1407.

3 As to the meaning of 'maker' see PARA 1406.

4 As to the meaning of 'acceptor' see PARA 1406.

5 As to the meaning of 'instrument' see PARA 1402 note 1.

6 As to the meaning of 'indorsement' see PARA 1407.

7 *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL. As to the surety's rights against the creditor see PARA 1129 et seq.

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### **D. TRANSFEROR BY DELIVERY**

#### **1581. Warranties by transferor by delivery.**

A transferor by delivery is a holder<sup>1</sup> of a bill payable to bearer<sup>2</sup> which he negotiates by delivery<sup>3</sup> without indorsing it<sup>4</sup>. A transferor by delivery is not liable on the instrument<sup>5</sup>, but when he negotiates it he warrants to his immediate transferee, if the latter is a holder for value<sup>6</sup>, three distinct things in regard to it, namely: (1) that the instrument is what it purports to be<sup>7</sup>, for example, that if it purports to be a foreign bill of exchange<sup>8</sup> drawn at some place abroad, it is, in fact, a foreign and not an inland bill<sup>9</sup> and was in fact drawn as it appears to be drawn<sup>10</sup>; and (2) that he has a right to transfer it<sup>11</sup>; and (3) that at the time of transfer he is not aware of any fact which renders it valueless<sup>12</sup>, for example, that he does not know that any of the signatures on it are forged or unauthorised<sup>13</sup>, or that it has been altered in a material particular<sup>14</sup>. He is not liable on the bill<sup>15</sup>.

If the instrument is found not to correspond with the warranty, the transferee can recover the money paid for it, but he must act with reasonable diligence<sup>16</sup>.

1 As to the meaning of 'holder' see PARA 1407.



- 2 As to the meaning of 'bill' see PARA 1405. As to the meaning of 'bearer' see PARA 1407. As to instruments payable to bearer see PARA 1428.
- 3 As to the meaning of 'delivery' see PARA 1406.
- 4 Bills of Exchange Act 1882 s 58(1).
- 5 Bills of Exchange Act 1882 s 58(2). As to the meaning of 'instrument' see PARA 1402 note 1.
- 6 As to the meaning of 'holder for value' see PARA 1407; see also PARA 1486.
- 7 Bills of Exchange Act 1882 s 58(3). The reason is that no person is liable on an instrument in any capacity who has not signed it as such: s 23.
- 8 As to the meaning of 'foreign bill' see PARA 1432.
- 9 As to the meaning of 'inland bill' see PARA 1432.
- 10 *Gompertz v Bartlett* (1853) 2 E & B 849.
- 11 Bills of Exchange Act 1882 s 58(3). As to transfer generally see PARA 1489 et seq.
- 12 Bills of Exchange Act 1882 s 58(3).
- 13 *Gurney v Womersley* (1854) 4 E & B 133. As to mode of signing by an agent see PARA 1474. As to the presumption regarding signatures generally see PARA 1478.
- 14 *Leeds and County Bank Ltd v Walker* (1883) 11 QBD 84. As to material alterations see PARA 1560.
- 15 Bills of Exchange Act 1882 s 58(2).
- 16 *Pooley v Brown* (1862) 11 CBNS 566.

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## **1582. Extent of liability.**

The liability on the warranties by a transferor by delivery<sup>1</sup> must be distinguished from a liability on the consideration. A transferor by delivery is in effect the vendor of an instrument<sup>2</sup> precisely as he might be the vendor of any other chattel<sup>3</sup>. Beyond the actual points in regard to it which he warrants, he is in no way responsible for the value of what he sells. If, therefore, its value diminishes or even vanishes altogether, for example, through the bankruptcy of any of the parties to it, he is not bound to compensate the transferee for his consequent loss<sup>4</sup>. However, where the instrument is transferred, not by way of sale, but in payment of a debt, the transferor is liable on the consideration unless the instrument was taken in absolute satisfaction of the debt<sup>5</sup>.

If, however, the transferor, on negotiating an instrument which passes by delivery, indorses it, he makes himself liable as an indorser<sup>6</sup>.

- 1 As to warranties by transferor by delivery see PARA 1581.
- 2 As to the meaning of 'instrument' see PARA 1402 note 1.
- 3 Cf *Sard v Rhodes* (1836) 1 M & W 153.

4 *Fyde v Clark* (1796) 1 Esp 447 at 448 per Lord Kenyon CJ ('If . . . he took the bills or notes he must be bound by it. The bankers parted with them supposing them to be good and he took them under the same impression. Having taken them without indorsement he has taken the risk on himself. They were the holders of the bills and by not indorsing them have refused to pledge their credit to their validity, and [the plaintiff] must be taken to have received them in their own credit only').

5 *Camidge v Allenby* (1827) 6 B & C 373; *Lichfield Union Guardians v Greene* (1857) 1 H & N 884.

6 See the Bills of Exchange Act 1882 s 55(2); PARAS 1577, 1580; and cf *Fairclough v Pavia* (1854) 9 Exch 690 at 695. As to the meaning of 'indorser' see PARA 1407 note 8.

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## **E. ACCOMMODATION PARTY**

### **1583. Duty to provide funds or indemnity.**

Where the instrument<sup>1</sup> is an accommodation bill<sup>2</sup>, it is the duty of the party for whose accommodation it was drawn to provide funds to meet the bill at maturity<sup>3</sup>, or in default of that to indemnify the acceptor<sup>4</sup> or any other party who has been compelled to pay the holder<sup>5</sup>. The indemnity to be given may be extended to include the costs of a claim brought unsuccessfully against the holder, if there was a prima facie ground of defence<sup>6</sup>.

The duty to provide funds or to indemnify is a contract which may be expressed or implied. It is not required to be in writing<sup>7</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 See PARA 1482.

3 See *Sleigh v Sleigh* (1850) 5 Exch 514. The acceptor is entitled to retain funds provided for this purpose, although after providing the funds and before maturity of the instrument the party accommodated becomes bankrupt: *Yates v Hoppe* (1850) 19 LJCP 180.

4 As to the meaning of 'acceptor' see PARA 1406.

5 As to the meaning of 'holder' see PARA 1407. This carries with it the right to benefit from securities belonging to the party accommodated in the hands of the holder: *Bechervaise v Lewis* (1872) LR 7 CP 372 at 377; cf *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, HL. As to the meaning of 'holder' see PARA 1407.

6 *Bagnall v Andrews* (1830) 7 Bing 217 at 222 per Tindal CJ; *Stratton v Mathews* (1848) 3 Exch 48. Aliter, if there is no prima facie defence (*Beech v Jones* (1848) 5 CB 696), though the indemnity will certainly cover costs where there is any evidence of a request on the part of the party accommodated to defend: *Garrard v Cottrell* (1847) 10 QB 679. See also *Hammond & Co v Bussey* (1887) 20 QBD 79, CA; and **DAMAGES** vol 12(1) (Reissue) PARA 831.

7 *Batson v King* (1859) 4 H & N 739 (contract of indemnity, Statute of Frauds 1677 s 4 not applicable). As to whether a promise is an indemnity or guarantee see *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, [1961] 1 WLR 828, CA.

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#### **1584. Contribution between accommodation parties.**

If two or more persons agree to become parties to an instrument<sup>1</sup> for the accommodation of some other party<sup>2</sup>, they are entitled and liable inter se to contribution as co-sureties without regard to the order of priority of their names upon the instrument<sup>3</sup>, and an accommodation party is entitled to contribution from another accommodation party although at the time when the former becomes party to the bill he is unaware of the capacity in which the latter had signed<sup>4</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 As to the meaning of 'accommodation party' see PARA 1482.

3 *Reynolds v Wheeler* (1861) 30 LJCP 350; cf *Macdonald v Whitfield* (1883) 8 App Cas 733, PC; and cf *Wolmershausen v Gullick* [1893] 2 Ch 514.

4 *Reynolds v Wheeler* (1861) 30 LJCP 350; *Macdonald v Whitfield* (1883) 8 App Cas 733, PC; *Godsell v Lloyd* (1911) 27 TLR 383.

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#### **1585. Enforcement of indemnity.**

The right to an indemnity may be enforced by bringing a claim, but in such a claim the claimant must show not merely that the money paid pro tanto discharges the liability of the defendant to the holder of the instrument, but also that it was paid at the request, express or implied, of the defendant<sup>1</sup>. If the situation is such that he might be compelled by law to pay the money a request to pay will be implied, but a mere voluntary payment made with full knowledge that payment could not be compelled is no ground for an indemnity<sup>2</sup>.

In the case of the bankruptcy of the drawer<sup>3</sup> there cannot be a double proof against his estate, that is one proof by the holder of the bill, and the other proof by the acceptor<sup>4</sup> on the contract of indemnity<sup>5</sup>.

1 See *Brittain v Lloyd* (1845) 14 M & W 762; *Re A Debtor (No 627 of 1936)* [1937] Ch 156, CA. As to the meaning of 'instrument' see PARA 1402 note 1. As to the meaning of 'holder' see PARA 1407. As to discharge of parties see PARA 1564 et seq.

2 *Sleigh v Sleigh* (1850) 5 Exch 514. However when the party accommodated discounts the bill with bill brokers in the City of London, the bill brokers have an implied authority in following the ordinary custom of their business to make themselves liable on a guarantee of the bill to their bankers, and are entitled to recover the amount paid on the guarantee from the party accommodated, or his estate if he becomes bankrupt: *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA.

3 As to the meaning of 'drawer' see PARA 1406. As to the meaning of 'bankrupt' see PARA 1514 note 4.

4 As to the meaning of 'acceptor' see PARA 1406.

5 *Re Oriental Commercial Bank, ex p European Bank* (1871) 7 Ch App 99 at 103 per Mellish LJ; *Re Hoey, ex p Hoey* (1918) 88 LJB 273, DC. See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 495.

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## **(xvii) Bills in a Set**

### **1586. Nature and object.**

Bills of exchange<sup>1</sup> may be drawn in sets of two, three, or more parts.

Each part should be numbered and contain a reference to every other part of the set<sup>2</sup> and a condition that a part will be payable only so long as all the other parts are unpaid.

The whole of the parts constitute in such a case one bill<sup>3</sup>.

1 As to the meaning of 'bill of exchange' see PARA 1405. Provisions of the Bills of Exchange Act 1882 relating to bills in a set are not applicable to promissory notes: s 89(3)(d).

2 Bills of Exchange Act 1882 s 71(1). Cf *Société Générale v Metropolitan Bank Ltd* (1873) 27 LT 849; *Davison v Robertson* (1815) 3 Dow 218, HL.

3 Bills of Exchange Act 1882 s 71(1).

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### **1587. Rights and duties of holder.**

A holder<sup>1</sup> who negotiates a bill drawn in a set<sup>2</sup> is bound to deliver all the parts in his possession, but a negotiation<sup>3</sup> of one part by him does not warrant his possession of the other parts or make him liable to deliver them if not in his possession<sup>4</sup>.

Where he indorses two or more parts to different persons<sup>5</sup>, he is liable on every such part; and every indorser<sup>6</sup> subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills<sup>7</sup>.

However, as between different holders in due course, the holder whose title first accrues is deemed to be the true owner of the bill<sup>8</sup>. The true owner may possibly be entitled to recover the other parts even from a holder of them in due course<sup>9</sup>, but in any case the rights of a person who in due course accepts or pays the part first presented to him are preserved<sup>10</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 As to the nature and object of such bills see PARA 1586.

3 As to the meaning of 'negotiation' see PARA 1407.

4 *Pinard v Klockmann* (1863) 32 LJQB 82. Where, however, the payee of bills drawn in a set contracted to deliver them up, it was held that he had not fulfilled his contract by delivering one part of each: *Kearney v West Granada Gold and Silver Mining Co* (1856) 26 LJEx 15.

5 As to the meaning of 'person' see PARA 1401 note 4.

6 As to the meaning of 'indorser' see PARA 1407 note 8.

7 Bills of Exchange Act 1882 s 71(2).

8 Bills of Exchange Act 1882 s 71(3).

9 See *Holdsworth v Hunter* (1830) 10 B & C 449; *Lang v Smyth* (1831) 7 Bing 284; *Perreira v Jopp* (1793) 10 B & C 450n.

10 Bills of Exchange Act 1882 s 71(3).

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### **1588. Rights and duties of drawee.**

The drawee<sup>1</sup> may write<sup>2</sup> his acceptance<sup>3</sup> on any part of a bill drawn in a set<sup>4</sup>, but he should do so on one part only, otherwise if two or more parts bearing his acceptance get into the hands of different holders in due course he is liable on every such part as if it were a separate bill<sup>5</sup>.

Where the bill or a part of it is presented to the acceptor<sup>6</sup> for payment, he should require the part which he has accepted to be handed over to him on payment of the bill, for otherwise, if the part bearing his acceptance is outstanding at maturity in the hands of a holder in due course<sup>7</sup>, he is liable on it<sup>8</sup>. Subject to this, however, the payment or other discharge of one part involves the discharge of the whole bill<sup>9</sup>.

1 As to the meaning of 'drawee' see PARA 1406.

2 As to the meaning of 'writing' see PARA 1405 note 2.

3 As to the meaning of 'acceptance' see PARA 1406.

4 As to the nature and object of such bills see PARA 1586.

5 Bills of Exchange Act 1882 s 71(4). See *Ralli v Dennistoun* (1851) 6 Exch 483; *Holdsworth v Hunter* (1830) 10 B & C 449.

6 As to the meaning of 'acceptor' see PARA 1406.

7 As to the meaning of 'holder in due course' see PARA 1407.

8 Bills of Exchange Act 1882 s 71(5).

9 Bills of Exchange Act 1882 s 71(6). As to the meaning of 'discharge of the instrument' see PARA 1550.

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### **(xviii) Conflict of Laws**

#### **1589. Lex loci contractus generally applicable.**

Inasmuch as bills of exchange, cheques, and (though to a lesser extent) promissory notes<sup>1</sup> are more than local in their character and use, it follows that in the course of their existence they may be subject to the laws of foreign countries, which laws may, and in many cases do, differ from the law of England. This fact is recognised to some extent in the distinction between foreign and inland instruments<sup>2</sup>. But the special provisions of the statute, for example, as to the protest of foreign bills<sup>3</sup>, are more in the nature of practical expedients suited to the convenience of special cases than attempts to meet the difficulty of a conflict of laws.

It is therefore of the highest importance to determine by what principles the rights and liabilities of the various parties are to be governed where the laws of more than one country are concerned<sup>4</sup>. The principle adopted with regard to negotiable instruments<sup>5</sup> is in general that the *lex loci contractus*<sup>6</sup> should prevail<sup>7</sup>.

1 As to the meanings of 'bill of exchange', 'cheque' and 'promissory note' see PARA 1405.

2 As to the meanings of 'foreign bill', 'foreign note', 'inland bill' and 'inland note' see PARA 1432.

3 As to the necessity for protesting foreign bills see PARA 1543.

4 As to the law governing contracts see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 349-365.

5 As to the meaning of 'negotiable instrument' see PARA 1402.

6 I.e. the law of the place in which the contract is made.

7 A notable exception is the question of legality: see *Moulis v Owen* [1907] 1 KB 746, CA; and Dicey and Morris *Conflict of Laws* (13th Edn, 2000) p 1445, where the editors submit that any contract embodied in a negotiable instrument must be legal according to the law governing the bill or note and also according to its own proper law. See PARA 1591 et seq. Note that the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980) does not apply to obligations arising under bills of exchange, cheques and promissory notes: see art 1 para 2(c); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 349, 350.

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#### **1590. Law applicable to requisites in form.**

As a general rule validity of an instrument<sup>1</sup> as regards requisites in form<sup>2</sup> is determined by the law of the place of issue<sup>3</sup> and the place of issue is the place at which the instrument is first delivered complete in form, not the place where it is signed<sup>4</sup>.

To this general rule, however, certain exceptions are admitted in the interests of persons<sup>5</sup> who become parties to a foreign instrument<sup>6</sup> in this country. Thus an instrument issued out of the United Kingdom is not invalid in this country by reason only that it is not stamped in accordance with the law of the place of issue<sup>7</sup>.

Where an instrument issued out of the United Kingdom conforms as regards requisites in form to the law of this country it may for the purpose of enforcing payment<sup>8</sup> be treated as valid as between all persons who negotiate, hold, or become parties to it in this country<sup>9</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 The question whether a bill is conditional or not is a question relating to requisites of form: *Guaranty Trust Co of New York v Hannay & Co* [1918] 1 KB 43. (The correctness of the decision of Bailhache J on this point was left open in the Court of Appeal: see [1918] 2 KB 623.)

3 Bills of Exchange Act 1882 s 72(1).

4 *Chapman v Cottrell* (1865) 34 LJEx 186. See also PARA 1406.

5 As to the meaning of 'person' see PARA 1401 note 4.

6 As to the meanings of 'foreign bill' and 'foreign note' see PARA 1432.

7 Bills of Exchange Act 1882 s 72(1)(a). See *Wynne v Jackson* (1826) 2 Russ 351.

8 Obtaining a declaration that a holder who has been paid is entitled to retain his money is not 'enforcing payment': *Guaranty Trust Co of New York v Hannay & Co* [1918] 1 KB 43.

9 Bills of Exchange Act 1882 s 72(1)(b); *Re Marseilles Extension Railway and Land Co, Smallpage's and Brandon's Cases* (1885) 30 ChD 598.

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### **1591. Law applicable to drawing and supervening contracts.**

Where a bill<sup>1</sup> drawn in one country is negotiated, accepted or payable in another, the law of the place where the particular contract is made determines: (1) the validity as regards requisites in form of the supervening contracts, such as acceptance or indorsement or acceptance *supra protest*<sup>2</sup>; and (2) the interpretation of the drawing, acceptance<sup>3</sup>, indorsement and acceptance *supra protest*<sup>4</sup>; but where an inland instrument<sup>5</sup> is indorsed abroad the indorsement is to be interpreted as regards the payer by the law of this country<sup>6</sup>.

As regards the payer, this rule perhaps contemplates the place of making the contract and the place of payment of the instrument being identical; if that be so, a qualification must be made where the places of contract and of payment are different. Where such is the case the interpretation of the contract would seem to be determined by the law of the place of payment<sup>7</sup>.

So, too, in the event of dishonour, the extent of the liability of each party to the instrument is governed by the law of the place at which he undertakes to pay it<sup>8</sup>.

1 As to the meaning of 'bill' see PARA 1405.

2 Bills of Exchange Act 1882 s 72(1). As to the meaning of 'acceptance' see PARA 1406. As to the meaning of 'acceptance supra protest' see PARA 1566. As to the meaning of 'indorsement' see PARA 1407.

3 See *Bank Polski v KJ Mulder & Co* [1942] 1 KB 497 at 500, [1942] 1 All ER 396 at 398, CA, per Mackinnon LJ.

4 Bills of Exchange Act 1882 s 72(1), (2). See *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA (where a bill was taken in good faith and without negligence by an Austrian bank under a forged indorsement in Austria and forwarded to London by the bank as holder to the defendants for collection, and the validity of the bank's title to the bill was held to be determined by Austrian, not by English, law); *Koechlin et Cie v Kestenbaum Bros* [1927] 1 KB 889, CA (where the indorsees of a bill indorsed simpliciter without the words 'per pro' by the drawer in France as agent of the payee were held to have obtained a good title to the bill by such indorsement valid by French law); *Allen v Kemble* (1848) 6 Moo PCC 314; *Bradlaugh v De Rin* (1868) LR 3 CP 538 (revsd on other grounds (1870) LR 5 CP 473); *Horne v Rouquette* (1878) 3 QBD 514, CA; *Haarbleicher and Schumann v Baerselman* (1914) 137 LT Jo 564. So where the time for presentment for payment is extended as regards the acceptor by a moratorium (see PARA 1518 note 14), the indorser remains liable in spite of the delay: *Rouquette v Overmann* (1875) LR 10 QB 525; *Re Francke and Rasch* [1918] 1 Ch 470. See also *G & H Montage GmbH v Irvani* [1990] 2 All ER 225 at 232, [1990] 1 WLR 667 at 675, CA, per Mustill LJ; PARA 1592 note 5; and *Banco Atlantico SA v British Bank of the Middle East* [1990] 2 Lloyd's Rep 504, CA.

5 As to the meaning of 'instrument' see PARA 1402 note 1. As to the meanings of 'inland bill' and 'inland note' see PARA 1432.

6 Bills of Exchange Act 1882 s 72(2) proviso; *Lebel v Tucker* (1867) LR 3 QB 77.

7 *Robinson v Bland* (1760) 1 Wm Bl 234, 256 at 258 per Lord Mansfield. See also *Moulis v Owen* [1907] 1 KB 746, CA (where in the case of a cheque given in the French colony of Algiers, but payable in London, it was held that the contract was to be interpreted by English law (the court being unanimous on this point), and that, the cheque being given for a gambling transaction illegal in this country, payment of the cheque could not be enforced by English law). See also the Bills of Exchange Act 1882 s 72(5); and PARA 1593.

8 *Cooper v Earl Waldegrave* (1840) 2 Beav 282 (where it was held that, a bill having been accepted in Paris, but payable in London, interest was to be charged at the English, not the French, rate); and see *Gibbs v Fremont* (1853) 9 Exch 25.

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## 1592. Duties of holder.

The duties of the holder<sup>1</sup> with respect to presentment for acceptance or payment<sup>2</sup> and the necessity for or sufficiency of a protest or notice of dishonour<sup>3</sup>, or otherwise, are determined by the law of the place where the act is done or the instrument<sup>4</sup> dishonoured<sup>5</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 As to presentment for acceptance see PARA 1509 et seq. As to presentment for payment see PARA 1516 et seq.

3 As to notice of dishonour see PARA 1524 et seq. As to the meaning of 'protest' see PARA 1539.

4 As to the meaning of 'instrument' see PARA 1402 note 1.

5 Bills of Exchange Act 1882 s 72(3); *Hirschfeld v Smith* (1866) LR 1 CP 340; *Horne v Rouquette* (1878) 3 QBD 514, CA; *Cornelius v Banque Franco-Serbe* [1942] 1 KB 29, [1941] 2 All ER 728. In *Bank Polski v KJ Mulder & Co* [1941] 2 KB 266, [1941] 2 All ER 647; affd on the question of general acceptance [1942] 1 KB 497, [1942] 1 All ER 396, CA, bills were drawn in Poland on a firm in London and accepted generally, and the fact that the bills were expressed to be payable (but not payable only) in Amsterdam and in guilders did not make Dutch law of presentment applicable, English law being the proper law of the contract. See also *G & H Montage GmbH v*



*Irvani* [1990] 2 All ER 225, [1990] 1 WLR 667, CA, where the defendant's authorisation of the addition in Germany of the words 'bon pour aval pour les tirés' above his signature was held to give rise to a claim by way of aval, governed by German law ('aval' being an indorsement guaranteeing payment); the bills in question were payable in England, and the Court of Appeal accordingly determined the question whether notice of dishonour and protest were required by reference to English law, holding that neither of those requirements was applicable to a claim by way of aval.

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### **1593. Date.**

Where an instrument<sup>1</sup> is drawn or made in one country and payable in another, its due date is determined according to the law of the place where it is payable<sup>2</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Bills of Exchange Act 1882 s 72(5). The day that the instrument is payable being governed by the law of the place where payment is to be made, in a country where days of grace are allowed they must, therefore, be taken into consideration: *Rouquette v Overmann* (1875) LR 10 QB 525; *Re Francke and Rasch* [1918] 1 Ch 470.

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### **1594. Sum payable.**

In the event of an instrument<sup>1</sup> drawn abroad being payable in this country, but the sum payable not being expressed in the currency of this country, it may be paid either in legal tender of the foreign currency or in sterling at the rate of exchange at which units of the foreign legal tender can, on the day when the money is payable, be bought in London in a recognised and accessible market, irrespective of any official rate of exchange between that currency and sterling<sup>2</sup>. A similar rule applies in the case of instruments drawn in this country and payable abroad<sup>3</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270, [1976] 3 All ER 900, decided by reference to the Bills of Exchange Act 1882 s 72(4) (now repealed).

3 See *Susé v Pompe* (1860) 8 CBNS 538.

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INSTRUMENTS/(1) BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES/(xviii) Conflict of Laws/1595. Validity of transfer.

### **1595. Validity of transfer.**

Where an instrument<sup>1</sup> is transferred in a foreign country, and different persons claim it, the validity of the transfer and the title to the instrument must be determined by the law of the place where the transfer was effected<sup>2</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 *Alcock v Smith* [1892] 1 Ch 238, CA; *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA (see PARA 1591 note 4). As to transfer generally see PARA 1489 et seq.

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### **1596. Scotland.**

In Scotland, where the drawee<sup>1</sup> of a bill<sup>2</sup> has in his hands funds available for the payment of it, the bill operates as an assignment of the sum for which it is drawn in favour of the holder<sup>3</sup> from the time when the bill is presented to the drawee<sup>4</sup>. Therefore where a bill is payable in Scotland this rule must be taken into account when interpreting the contract.

1 As to the meaning of 'drawee' see PARA 1406.

2 As to the meaning of 'bill' see PARA 1405.

3 As to the meaning of 'holder' see PARA 1407.

4 See the Bills of Exchange Act 1882 s 53(2) (which applies to Scotland only) and is subject to s 75A (also applicable to Scotland only). Generally Scottish matters are beyond the scope of this work. For the position under English law see PARA 1453.

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### **1597. Referee in case of need.**

Where the name of a referee in case of need<sup>1</sup> has been inserted abroad, the holder<sup>2</sup> here has it in his option whether to apply to him or not<sup>3</sup>; but, in as much as in some countries application to the referee in case of need is obligatory, it is the more prudent course for a holder in this country to exercise his option in favour of such an application.

- 1 As to the meaning of 'referee in case of need' see PARA 1409.
- 2 As to the meaning of 'holder' see PARA 1407.
- 3 See the Bills of Exchange Act 1882 s 15; and PARA 1409.

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### **1598. Discharge.**

In the matter of discharge, the rules to be followed are the general rules of private international law, forming part of the common law<sup>1</sup>. Applying these rules, the validity and effect of the discharge of any party will depend upon the proper law of the contract involving that party, while discharge of the instrument<sup>2</sup> itself under the law of the place of payment will presumably discharge all parties<sup>3</sup>. Statements in the older cases that the law of the place where the particular contract affecting the party in question was made must prevail<sup>4</sup>, and that the discharge of a contract by the law of a place where the contract was not made or to be performed is not a discharge of it in any other country<sup>5</sup>, should now be read in the light of modern conflict of laws principles<sup>6</sup>. The common law rules relating to foreign limitation periods were replaced by the Foreign Limitation Periods Act 1984, which provides that, where any matter is governed by the law of a foreign country, then the rules of foreign law as to limitation (whether procedural or substantive) will generally apply<sup>7</sup>, unless there is a conflict with English public policy<sup>8</sup>.

- 1 Rules of common law continue to apply except where they are inconsistent with the Bills of Exchange Act 1882 Act: s 97(2); see PARA 1400 note 3. As to discharges generally see PARA 1550 et seq.
- 2 As to the meaning of 'instrument' see PARA 1402 note 1.
- 3 See Dicey and Morris *Conflict of Laws* (13th Edn, 2000) pp 1445-1446.
- 4 *Potter v Brown* (1804) 5 East 124 (where it was held that a drawer having been discharged in bankruptcy in America, where the bill was drawn, could not be sued in England on the bill). See also *Allen v Kemble* (1848) 6 Moo PCC 314; *Ralli v Dennistoun* (1851) 6 Exch 483.
- 5 Story's *Conflict of Laws* (2nd Edn) s 342, quoted with approval in *Bartley v Hodges* (1861) 30 LJQB 352 at 354, by Blackburn J; *Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 at 407, CA, per Lord Esher MR.
- 6 See further **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 349 et seq.
- 7 See the Foreign Limitation Periods Act 1984 s 1; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 26.
- 8 See the Foreign Limitation Periods Act 1984 s 2(1); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 26.

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## (2) LEGAL ENFORCEMENT

### (i) Legal Proceedings

#### A. CLAIMS

##### 1599. Claims.

Proceedings in the High Court on a bill of exchange<sup>1</sup> are started when the court issues a claim form at the request of the claimant<sup>2</sup>. The claim form must contain a concise statement of the nature of the claim and must specify the remedy sought by the claimant<sup>3</sup>. If the defendant files an acknowledgment of service or a defence, the claimant may then make an application for summary judgment<sup>4</sup>. If the case is one in which notice of dishonour<sup>5</sup> must be proved, the allegation that it was given must be included in the particulars of claim<sup>6</sup>, which must itself be verified by a statement of truth<sup>7</sup>.

A substantive allegation of fraud<sup>8</sup> against a holder<sup>9</sup> raises a triable issue entitling the defendant to permission to defend<sup>10</sup>; but where there is clear evidence of value given in good faith and no grounds are shown on which such evidence can be challenged, then the defendant's allegation of fraud does not constitute material which would afford a defence and permission to defend should not be given<sup>11</sup>. As between immediate parties<sup>12</sup>, the defendant may also raise by way of defence a total failure of consideration, an ascertained and liquidated partial failure of consideration<sup>13</sup>, and, possibly, an ascertained and liquidated cross-claim arising under the contract which forms the consideration for the bill of exchange<sup>14</sup>.

Subject to the foregoing exceptions, a holder for value<sup>15</sup> of a bill of exchange is entitled, save in truly exceptional circumstances<sup>16</sup>, on its maturity to have it treated as cash, so that in an action upon it the court will refuse to regard either as a defence or as grounds for a stay of execution, any set-off, legal or equitable, or any counterclaim, whether arising on the particular transaction upon which the bill of exchange came into existence or arising in any other way<sup>17</sup>. The rule of practice is thus, in effect, pay on the bill of exchange first and pursue claims later<sup>18</sup>.

It is unclear whether a defendant who is induced to draw an instrument<sup>19</sup> by the claimant's innocent misrepresentation is entitled to permission to defend<sup>20</sup>.

If an action is stayed on payment of the debt and costs, the claimant has no right to retain the bill<sup>21</sup>.

1 As to the meaning of 'bill of exchange' see PARA 1405.

2 CPR 7.2(1). As to the commencement of proceedings generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq.

3 CPR 16.2(1)(a), (b). As to claim forms generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 584 et seq.

4 Ie under CPR 24. Summary judgment is normally available to the issuer of an instrument which is treated as equivalent to cash but this may be inappropriate where the instrument is not honoured and a defence that it was voidable through misrepresentation may provide a real prospect of success pursuant to CPR 24.2(a)(ii): *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 1059, [2001] 2 All ER (Comm) 217, [2001] 1 WLR 1800 (in relation to a performance bond), adopting the approach taken in *SAFA Ltd v Banque du Caire* [2000] 2 All ER (Comm) 567, CA (in relation to a letter of credit). If the defendant has not filed an acknowledgment of service or a defence, an application for summary judgment may only be made where the court gives permission or where a practice direction provides otherwise: CPR 24.4(1).

5 As to notice of dishonour see PARA 1524 et seq.

6 *Frühauf v Grosvenor & Co* (1892) 61 LJQB 717, DC; *Roberts v Plant* [1895] 1 QB 597, CA (statement of claim amended).

- 7 See CPR 22.1(1)(a); and **CIVIL PROCEDURE** vol 11 (2009) PARA 613.
- 8 As to the effect of fraud and the parties whose fraud is relevant see PARAS 1478, 1483.
- 9 As to the meaning of 'holder' see PARA 1407.
- 10 *Powszechny Bank Związkowy W Polsce v Paros* [1932] 2 KB 353, CA; *Millard v Baddeley* (1884) Bitt Rep in Ch 125; *Fuller v Alexander Bros* (1882) 52 LJQB 103 (onus of proof shifted; cf PARA 1478).
- 11 *Bank für Gemeinwirtschaft v City of London Garages Ltd* [1971] 1 All ER 541 at 545, [1971] 1 WLR 149 at 155, CA.
- 12 Immediate parties are drawer and acceptor, payee and drawer, payee and the maker of a note, and indorsee and indorser.
- 13 *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463 at 469, [1977] 1 WLR 713 at 720, HL; *Warwick v Nairn* (1855) 10 Exch 762; *Agra and Masterman's Bank Ltd v Leighton* (1866) LR 2 Exch 56; *James Lamont & Co Ltd v Hyland Ltd* [1950] 1 KB 585, [1950] 1 All ER 341, CA; *Brown, Shipley & Co Ltd v Alicia Hosiery Ltd* [1966] 1 Lloyd's Rep 668, CA; and see PARA 1481.
- 14 See *MK International Development Co Ltd v Housing Bank* (1990) Financial Times, 21 December; affd on this point (1991) Financial Times, 22 January, [1991] 1 Bank LR 74, CA.
- 15 As to the meaning of 'holder for value' see PARA 1407.
- 16 See eg *Saga of Bond Street Ltd v Avalon Promotions Ltd* [1972] 2 QB 325n, [1972] 2 All ER 545n, CA (leave to defend upon the whole amount of a bill of exchange being paid into court).
- 17 *Warwick v Nairn* (1855) 10 Exch 762; *James Lamont & Co Ltd v Hyland Ltd* [1950] 1 KB 585, [1950] 1 All ER 341, CA; *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 2 All ER 463, [1977] 1 WLR 713, HL; *Cebora SNC v SIP (Industrial Products) Ltd* [1976] 1 Lloyd's Rep 271, CA; *Montecchi v Shimco (UK) Ltd* [1979] 1 WLR 1180, [1980] 1 Lloyd's Rep 50, CA; *Thoni GmbH & Co KG v RTP Equipment Ltd* [1979] 2 Lloyd's Rep 282, CA; *Montebianco Industrie Tessili SpA v Carlyle Mills (London) Ltd* [1981] 1 Lloyd's Rep 509, CA.
- 18 See *Cebora SNC v SIP (Industrial Products) Ltd* [1976] 1 Lloyd's Rep 271 at 278, CA, per Sir Eric Sachs. See also *Brown, Shipley & Co Ltd v Alicia Hosiery Ltd* [1966] 1 Lloyd's Rep 668 at 669, CA, per Lord Denning MR.
- 19 As to the meaning of 'instrument' see PARA 1402 note 1.
- 20 See *Clovertogs Ltd v Jean Scenes Ltd* [1982] Com LR 88, CA; *Brass and Alloy Pressings (Deritend) Ltd v DA Allen* (8 December 1986, unreported), CA; *Famous Ltd v Ge Im Ex Italia SRL* (1987) Times, 3 August, CA.
- 21 *Cornes v Taylor* (1854) 10 Exch 441; *Davis v Tunnicliff* (1838) 7 LJCP 238.

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## **1600. Right to sue.**

The holder<sup>1</sup> has the right to sue on the instrument<sup>2</sup> in his own name<sup>3</sup>. Where the instrument is payable to bearer<sup>4</sup>, the holder who has it in his actual or constructive possession may sue on it in his own name, or in the name of a principal provided that the latter ratifies his act, which ratification may take place even after the proceedings have begun<sup>5</sup>. Where the bill<sup>6</sup> is made payable or indorsed to a specified person the claim should be brought in that person's name<sup>7</sup>.

The holder may or may not ever have had any personal interest in the bill<sup>8</sup> or, having had such interest, may have ceased to have any<sup>9</sup>.

He may sue either for himself or as agent or trustee for another party. In the second case he so far stands in the position of that other party that a defence or set-off which would have been

good against that other party is equally good against him<sup>10</sup>. Conversely, where he personally is the defendant in proceedings, he cannot use in defence an instrument which he holds as agent or trustee for another<sup>11</sup>.

1 As to the meaning of 'holder' see PARA 1407; and see *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374. Where the consideration for a bill payable to drawer's order is goods supplied to the drawee, and the drawer negotiates the bill to a third party who is in possession of the same at the date of commencement of the action, the drawer cannot sue the acceptor for the price of the goods, for he is not the holder of the bill, and recovery of the bill, before the action is actually tried, is insufficient to remedy his original lack of title to sue: *Davis v Reilly* [1898] 1 QB 1, DC.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 Bills of Exchange Act 1882 s 38(1).

4 As to instruments payable to bearer see PARA 1428.

5 *Ancona v Marks* (1862) 31 LJEx 163.

6 As to the meaning of 'bill' see PARA 1405.

7 *Bawden v Howell* (1841) 3 Man & G 638.

8 *Law v Parnell* (1859) 7 CBNS 282.

9 *Poirier v Morris* (1853) 2 E & B 89.

10 *De la Chaumette v Bank of England* (1829) 9 B & C 208; see also *Barclays Bank Ltd v Aschaffenburg Zellstoffwerke AG* [1967] 1 Lloyd's Rep 387, CA.

11 *London, Bombay, and Mediterranean Bank v Narraway* (1872) LR 15 Eq 93; *Fair v M'iver* (1812) 16 East 130, approved in *Forster v Wilson* (1843) 12 M & W 191 at 204 per Parke B. See also *Lackington v Combes* (1839) 6 Bing NC 71.

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## **B. DAMAGES**

### **1601. Parties entitled to damages.**

In the event of dishonour<sup>1</sup>, damages may be recovered by the several parties to the instrument<sup>2</sup>. The holder<sup>3</sup> may recover from any party liable on the instrument. The drawer<sup>4</sup> of a bill which he has been compelled to pay may recover from the acceptor<sup>5</sup>. An indorser<sup>6</sup> of an instrument which he has been compelled to pay may recover from the person<sup>7</sup> primarily liable on the instrument<sup>8</sup>, or on his default from any other prior party, for example, the drawer of a bill or any prior indorser<sup>9</sup>. But it seems that an accommodation party<sup>10</sup> cannot recover if he has paid voluntarily without legal obligation, when for example he is discharged by not receiving notice of dishonour<sup>11</sup>.

1 As to dishonour by non-acceptance see PARA 1515. As to dishonour by non-payment see PARA 1525.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

- 3 As to the meaning of 'holder' see PARA 1407.
- 4 As to the meaning of 'drawer' see PARA 1406.
- 5 As to the meaning of 'acceptor' see PARA 1406.
- 6 As to the meaning of 'indorser' see PARA 1407 note 8.
- 7 As to the meaning of 'person' see PARA 1401 note 4.
- 8 If the maker of a note, the drawer of a cheque, or the acceptor of a bill (see PARA 1453 et seq), except where it is an accommodation bill in which the person primarily liable is the person for whose accommodation the bill is drawn (see PARAS 1583-1585).
- 9 Bills of Exchange Act 1882 s 57(1). As to the drawer and indorsers see PARAS 1574, 1577 respectively. But an indorser who has been compelled to pay a bill in an action brought by his indorsee cannot recover from the acceptor the costs which he has had to pay in such action: *Dawson v Morgan* (1829) 9 B & C 618.
- 10 As to the meaning of 'accommodation party' see PARA 1482.
- 11 Cf *Sleigh v Sleigh* (1850) 5 Exch 514. As to notice of dishonour see PARA 1524 et seq.

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## **1602. Measure of damages.**

The damages to be recovered are deemed to be liquidated damages<sup>1</sup>, and they may include<sup>2</sup>: (1) the amount of the instrument<sup>3</sup>; (2) interest<sup>4</sup> thereon, from the time of presentment for payment if the instrument is payable on demand, and from its maturity in any other case<sup>5</sup>; the interest claimed by way of damages may, however, be withheld wholly or in part if the justice of the case so requires<sup>6</sup>, and where the instrument is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate<sup>7</sup>; and (3) the expenses of noting, or when protest is necessary, and the protest has been extended, the expenses of protest<sup>8</sup>.

Damages may be awarded in the currency of the bill<sup>9</sup>.

1 Bills of Exchange Act 1882 s 57. As to the procedure in a claim for a liquidated demand see CPR 12.1-12.3 (default judgment) (see **CIVIL PROCEDURE** vol 11 (2009) PARAS 506-507); CPR 16.2-16.3 (contents of claim form) (see **CIVIL PROCEDURE** vol 11 (2009) PARAS 585-586); CPR 24 (summary judgment) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 524 et seq).

2 Bills of Exchange Act 1882 s 57(1). In the case of *Prehn v Royal Bank of Liverpool* (1870) LR 5 Exch 92 other expenses incurred by the holder were allowed but that was an action on the contract and not on the bill; Kelly CB (at 97) said, 'It has been pointed out that in an action on a bill of exchange by an indorsee against an acceptor, neither general nor special damage can be recovered, the right of the indorsee being limited to the amount of the bill and interest. However in the case before us the action is not brought on the bill, but on a special contract, the incidents of which differ materially from those which belong to the contract constituted by becoming a party to a negotiable instrument and which are strictly limited by the law merchant.' As to the meaning of 'law merchant' see PARA 1400. Though that case was before the Bills of Exchange Act 1882, the reasoning was adopted by Mathew J in *Banque Populaire de Bienne v Cavé* (1895) 1 Com Cas 67 at 69. See also *Re English Bank of the River Plate, ex p Bank of Brazil* [1893] 2 Ch 438.

3 Bills of Exchange Act 1882 s 57(1)(a). As to the meaning of 'instrument' see PARA 1402 note 1. As to the distinction between the rights of an ordinary holder for value and those of a person who has merely lent money on the security of the instrument see PARA 1487. As to the rate of exchange of a bill expressed in foreign

currency see PARA 1421; and as to damages in a foreign currency see **DAMAGES** vol 12(1) (Reissue) PARA 1132 et seq.

4 In the absence of an agreement to the contrary, a rate around or somewhat above base rate may properly be claimed; the Short Term Investment Account rate is a safe guide: *Practice Direction* [1983] 1 All ER 934, [1983] 1 WLR 377.

5 Bills of Exchange Act 1882 s 57(1)(b); *Re East of England Banking Co* (1868) 4 Ch App 14; *Lithgow v Lyon* (1805) Coop G 29; *Laing v Stone* (1828) 2 Man & Ry KB 561. As to the practice on claiming interest see *Practice Direction* [1983] 1 All ER 934, [1983] 1 WLR 377. Where in the case of a bill payable on demand no demand has been made, interest will run from service: *Pierce v Fothergill* (1835) 2 Bing NC 167. The bill must, it seems, be produced at the trial in order to recover interest before service: *Hutton v Ward* (1850) 15 QB 26. Interest will apparently run until payment or judgment (*London and Universal Bank v Earl of Clancarty* [1892] 1 QB 689; *Lawrence & Sons v Willcocks* [1892] 1 QB 696, CA), unless there has been a tender of the amount due, in which case it will cease as from the date of the tender: *Dent v Dunn* (1812) 3 Camp 296. The guarantor of the due payment of a bill is liable for interest (*Ackermann v Ehrensperger* (1846) 16 M & W 99 at 103 per Pollock CB), and he may in some cases recover interest from the acceptor: *Re Fox, Walker & Co, ex p Bishop* (1880) 15 ChD 400, CA; see PARA 1585 note 2. Where payment would be illegal owing to the outbreak of war before the date of payment arrives, interest is only payable from the termination of the war: *Biedermann v Allhausen & Co* (1921) 37 TLR 662; *NV Ledeboter and Van der Held's Textielhandel v Hibbert* [1947] KB 964. The damages recoverable are not affected by the power to award interest under the Supreme Court Act 1981 s 35A: see the Supreme Court Act 1981 s 35A(8); the County Courts Act 1984 s 69(7); and **DAMAGES** vol 12(1) (Reissue) PARA 848.

6 Bills of Exchange Act 1882 s 57(3). Cf *Webster v British Empire Mutual Life Assurance Co* (1880) 15 ChD 169, CA.

7 Bills of Exchange Act 1882 s 57(3); *Ward v Morrison* (1842) Car & M 368; *Keene v Keene* (1857) 3 CBNS 144. Cf *Gibbs v Fremont* (1853) 9 Exch 25; *Cameron v Smith* (1819) 2 B & Ald 305.

8 Bills of Exchange Act 1882 s 57(1)(c). As to where protest is necessary see PARAS 1542-1543. The expression 'bank charges' on a specially indorsed writ was held to be a sufficient description of the expenses of noting under this subsection of the statute: see *Dando v Boden* [1893] 1 QB 318, DC.

The expenses of protest for better security (see PARA 1544) are not recoverable under this subsection, even though the acceptor became insolvent before maturity of the instrument; nor is a commission paid by the drawer to the acceptor for honour in consideration of his acceptance: *Re English Bank of the River Plate, ex p Bank of Brazil* [1893] 2 Ch 438.

9 *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* [1977] QB 270, [1976] 3 All ER 900.

## UPDATE

### 1602 Measure of damages

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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## C. COSTS

### 1603. Costs.

A holder<sup>1</sup> who has begun proceedings against several parties to the instrument<sup>2</sup> may, after payment of the instrument by one party, continue against the others for costs<sup>3</sup>. So also, in proceedings against the acceptor<sup>4</sup>, the holder may proceed for costs after payment of the instrument has been tendered by another party to the instrument and he has taken it<sup>5</sup>.



But an accommodation acceptor<sup>6</sup>, who pays the amount of a bill<sup>7</sup> to the holder after proceedings have commenced, cannot recover from the party liable to him the costs of the action<sup>8</sup>, unless there is some understanding or implied request from the party liable that he should defend<sup>9</sup>.

Where the holder brings two claims on two bills of exchange against the same parties where he might have brought one for the two bills, he may be allowed the costs of one claim only<sup>10</sup>.

In the discretion of the court a foreign claimant suing on a bill of exchange may be ordered to give security for costs<sup>11</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 *London and Suburban Bank v Walkinshaw* (1871) 25 LT 704.

4 As to the meaning of 'acceptor' see PARA 1406.

5 *Goodwin v Cremer* (1852) 18 QB 757.

6 As to accommodation bills see PARA 1482.

7 As to the meaning of 'bill' see PARA 1405.

8 *Roach v Thompson* (1830) Mood & M 487. See PARA 1583.

9 *Garrard v Cottrell* (1847) 10 QB 679. See PARA 1583.

10 *Jackson v Fleeman* (1872) 26 LT 584.

11 CPR 25.12-25.13. See also *Banque du Rhône SA v Fuerst Day Lawson Ltd (Promat SA, third party)* [1968] 2 Lloyd's Rep 153, CA; and *Aeronave SpA v Westland Charters Ltd* [1971] 3 All ER 531, [1971] 1 WLR 1445, CA.

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## **(ii) Limitation of Action**

### **1604. Proceedings barred by lapse of time.**

If proceedings to enforce payment against any party liable on an instrument<sup>1</sup> are not brought within six years from the time at which the right accrued, proceedings will, in general, be barred<sup>2</sup>.

The date at which the time begins to run, in the case of a negotiable instrument<sup>3</sup>, depends not upon its acquisition by a holder<sup>4</sup>, but upon the contract entered into by the parties liable.

In the case of the acceptor<sup>5</sup> of a bill<sup>6</sup> it runs from the maturity<sup>7</sup> of the bill, unless: (1) the bill was accepted subject to the condition of presentment for payment<sup>8</sup>, in which case time begins to run from the date of presentment; or (2) the bill was accepted after maturity<sup>9</sup>, in which case, it seems, time will run from the date of such acceptance; or (3) at maturity there was no person in existence capable of issuing a claim<sup>10</sup>.

If, however, a bill is accepted in blank and is not filled up for more than six years, the acceptor is nonetheless liable at the suit of a bona fide holder for value<sup>11</sup>, and in such a case time does not run against a bona fide holder for value until the bill, as filled up, becomes due<sup>12</sup>. But if such a bill remains uncompleted in the hands of the payee<sup>13</sup> for more than six years, the payee cannot then fill up the bill and sue the acceptor on it<sup>14</sup>.

In the case of a note<sup>15</sup> payable at a specified period after date<sup>16</sup> or after demand or sight<sup>17</sup> time runs for the maker<sup>18</sup> from the maturity of the note. Where the instrument is payable on demand, then time is, in general, calculated from the date of the instrument<sup>19</sup>, but, if the form of the instrument is such that presentment is necessary, time runs from the date of presentment<sup>20</sup>. The same principles apply where the instrument is in form a bill, but, by reason of the fact that the drawer<sup>21</sup> and drawee<sup>22</sup> are in law the same person<sup>23</sup>, the holder is entitled to treat it as a note<sup>24</sup>. If a note payable on demand is deposited with a banker for delivery<sup>25</sup> to the payee on his producing another note cancelled, time runs only from the date when the note is delivered by the banker<sup>26</sup>.

Time begins to run against the drawer or the indorser<sup>27</sup> of a bill or note from the date of receipt of notice of dishonour<sup>28</sup>. It is presumed that where notice of dishonour is excused time will begin to run from the date of the dishonour<sup>29</sup>. In the case of a bill payable at a fixed time after date time runs in favour of the drawer only from the date at which the bill or note becomes due, even although the action is for money lent for which the note is a security, because the money does not become payable until the time has expired<sup>30</sup>.

If a bill is dishonoured by non-acceptance, a future dishonour by non-payment does not create a fresh right of action so as to make time run from the latter date<sup>31</sup>.

1 As to the meaning of 'instrument' see PARA 1402 note 1.

2 Limitation Act 1980 s 5. As to the effect of an instrument containing an obligation collateral to a contract of loan, which contract (1) does not provide for repayment of the debt on or before a fixed or determinable date; and (2) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter see s 6(2). As to the extension of time in certain cases see PARA 1606. If time expires on a day when the court offices are closed, the period is extended to the next working day: *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336, [1973] 1 All ER 617, CA. See further **LIMITATION PERIODS** vol 68 (2008) PARA 901 et seq.

3 As to the meaning of 'negotiable instrument' see PARA 1402.

4 As to the meaning of 'holder' see PARA 1407.

5 As to the meaning of 'acceptor' see PARA 1406.

6 As to the meaning of 'bill' see PARA 1405.

7 As to maturity see PARAS 1436-1439.

8 As to presentment for payment see PARA 1516 et seq.

9 See PARA 1459.

10 See PARA 1606 note 2.

11 As to the meaning of 'holder for value' see PARA 1407.

12 *Montague v Perkins* (1853) 22 LJCP 187. The principle that an instrument must be filled up within a reasonable time does not apply as against a bona fide holder for value after completion (at 189 per Jervis CJ); see PARA 1450.

13 As to the meaning of 'payee' see PARA 1406.

14 *Re Bethell, Bethell v Bethell* (1887) 34 ChD 561 at 568; cf *Temple v Pullen* (1853) 8 Exch 389.

15 As to the meaning of 'note' see PARA 1405.

16 *Fryer v Roe* (1852) 12 CB 437. As to the meanings of 'bill payable after date' and 'note payable after date' see PARA 1434.

17 *Thorpe v Booth* (1826) Ry & M 388; *Thorpe v Coombe* (1826) 8 Dow & Ry KB 347; see also *Moore v Petchell* (1856) 22 Beav 172. As to the meaning of 'note payable after sight' see PARA 1435. In the case of a note payable at a fixed time after sight or demand, a demand is presumed to have been made if interest is paid on the bill and receipt thereof acknowledged, and time will run having regard to the date of such acknowledgment: *Re Rutherford, Brown v Rutherford* (1880) 14 ChD 687, CA.

18 As to the meaning of 'maker' see PARA 1406.

19 *Norton v Ellam* (1837) 2 M & W 461; *Christie v Fonsick* (1811) 1 Selwyn's Law of Nisi Prius (13th Edn) 301; *Rumball v Ball* (1711) 10 Mod Rep 39; *Re George, Francis v Bruce* (1890) 44 ChD 627.

20 *Re British Trade Corpn* [1932] 2 Ch 1, CA.

21 As to the meaning of 'drawer' see PARA 1406.

22 As to the meaning of 'drawee' see PARA 1406.

23 See PARA 1408.

24 *Re British Trade Corpn* [1932] 2 Ch 1, CA.

25 As to the meaning of 'delivery' see PARA 1406.

26 *Savage v Aldren* (1817) 2 Stark 232.

27 As to the meaning of 'indorser' see PARA 1407 note 8.

28 *Re Boyse, Crofton v Crofton, Canonge's Claim* (1886) 33 ChD 612 at 623 per North J. Cf *Webster v Kirk* (1852) 17 QB 944; *Castrique v Bernabo* (1844) 6 QB 498; *Re Bethell, Bethell v Bethell* (1887) 34 ChD 561 (in which, however, it was held that if a cheque is given undated on the understanding that the drawer will advise the payee as soon as there are funds to meet it, and that the payee will then present it, time will begin to run as soon as the payee receives an intimation that funds will not be forthcoming).

29 Cf *Kennedy v Thomas* [1894] 2 QB 759, CA.

30 *Wittersheim v Lady Carlisle* (1791) 1 Hy Bl 631; *Buckler v Moor* (1672) 1 Mod Rep 89.

31 *Whitehead v Walker* (1842) 9 M & W 506.

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### **1605. Collateral transactions.**

When a cheque<sup>1</sup> is given, not in payment of a debt but as a loan, time begins to run against the lender from the time when the cheque is paid, for the claim is not on the instrument<sup>2</sup>, but is a claim for the recovery of the loan<sup>3</sup>. In the same way with any other instrument where the claim is not on the instrument itself, but to enforce an obligation collateral to, although arising out of, the transaction for which the instrument was given, time will begin to run from the date when the particular obligation arises<sup>4</sup>.

1 As to the meaning of 'cheque' see PARA 1405.

2 As to the meaning of 'instrument' see PARA 1402 note 1.

3 *Garden v Bruce* (1868) LR 3 CP 300.

4 Eg where the acceptor of a bill drawn for the drawer's accommodation is compelled to pay the bill (see PARA 1553), the time within which he must bring his action for indemnity against the drawer runs from the date of his payment of the bill: *Reynolds v Doyle* (1840) 1 Man & G 753. Where several persons are jointly liable on an instrument, an action by one of them who has paid it for contribution from the others must be begun within six years from his payment of the bill: *Davies v Humphreys* (1840) 6 M & W 153.

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### **1606. Extension of time.**

The date at which time will begin to run may be postponed by circumstances peculiar to the holder<sup>1</sup>, for example if the holder is under a disability to sue<sup>2</sup>.

The right of action against any party liable on an instrument<sup>3</sup> may, as in the case of any other contract, be renewed or revived by an acknowledgment in writing, signed by that party or his agent, of his liability<sup>4</sup>, or by part payment<sup>5</sup>, but a right of action, once barred by the Limitation Act 1980, is not revived by any subsequent acknowledgment or payment<sup>6</sup>.

An acknowledgment or payment must be made to the person, or an agent of the person, whose title or claim is being acknowledged or in respect of whose claim the payment is being made<sup>7</sup>.

The running of time may also in certain circumstances be postponed on the ground of fraud or mistake<sup>8</sup>.

1 As to the meaning of 'holder' see PARA 1407.

2 See the Limitation Act 1980 ss 28(1), 38(2); and **LIMITATION PERIODS** vol 68 (2008) PARAS 1170-1171; *Scarpellini v Atcheson* (1845) 7 QB 864.

3 As to the meaning of 'instrument' see PARA 1402 note 1.

4 Limitation Act 1980 ss 29(5)-(7), 30(1), (2)(a); cf *Bourdin v Greenwood* (1871) LR 13 Eq 281; *Langrish v Watts* (1903) 72 LJKB 435, CA. An acknowledgment binds only the party by or on whose behalf it is made and his successors: see the Limitation Act 1980 s 31(6); and **LIMITATION PERIODS** vol 68 (2008) PARA 1181 et seq.

5 Limitation Act 1980 s 29(5). If a part payment is made before the expiration of the original period of limitation, it binds all persons liable in respect of the debt (s 31(7)). A payment, unless it amounts to the admission that more is due, cannot operate as an admission of any still existing debt: *Tippets v Heane* (1834) 1 Cr M & R 252; and see **LIMITATION PERIODS** vol 68 (2008) PARAS 1184, 1194 et seq.

6 Limitation Act 1980 s 29(7).

7 Limitation Act 1980 s 30(2)(b). For the purposes of the Bills of Exchange Act 1882, a claim includes counterclaim and set-off: s 2. See *Stamford, Spalding and Boston Banking Co v Smith* [1892] 1 QB 765, CA.

8 See the Limitation Act 1980 ss 1(2), 32; and **LIMITATION PERIODS** vol 68 (2008) PARA 1220 et seq.

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### (iii) Operation of Law

#### **A. DEATH**

##### **1607. Death.**

By the ordinary operation of law the title to bills and notes<sup>1</sup> passes at the death of the holder<sup>2</sup> to his personal representatives, who can thereupon either sue on the instrument<sup>3</sup> or indorse it to a new holder as they think fit<sup>4</sup>. This principle applies also to cheques<sup>5</sup>. In doing so it is open to them expressly to disclaim personal responsibility<sup>6</sup>. Even where an instrument is specifically bequeathed to a legatee, the latter must obtain the indorsement of the testator's executor before attempting either to negotiate or to enforce it<sup>7</sup>.

1 As to the meanings of 'bill' and 'note' see PARA 1405.

2 As to the meaning of 'holder' see PARA 1407.

3 As to the meaning of 'instrument' see PARA 1402 note 1.

4 *Rawlinson v Stone* (1746) 3 Wils 1. As to the meaning of 'indorsement' see PARA 1407.

5 *Re Robson, Robson v Hamilton* [1891] 2 Ch 559. As to the meaning of 'cheque' see PARA 1405.

6 See the Bills of Exchange Act 1882 s 31(5); and PARA 1495.

7 *Bishop v Curtis* (1852) 21 LJQB 391. As to negotiation see PARA 1489 et seq.

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#### **B. BANKRUPTCY**

##### **1608. Bankruptcy.**

The rules in bankruptcy relating to bills of exchange, promissory notes and cheques<sup>1</sup> were expressly saved by the Bills of Exchange Act 1882<sup>2</sup>. Therefore, in the event of the bankruptcy of the holder<sup>3</sup>, the title to all bills, notes and cheques of which at the date of the bankruptcy he was the beneficial owner vests in his trustee without any form of transfer whatever<sup>4</sup>, as also does any lien which he may have had upon any such instrument<sup>5</sup>.

It seems that in the event of a bill being indorsed to a bankrupt before he obtains his discharge he may, unless his trustee intervenes, sue on it in his own name<sup>6</sup>, and he may during bankruptcy indorse a bill accepted for his accommodation prior thereto<sup>7</sup>.

1 As to the meanings of 'bill of exchange', 'promissory note' and 'cheque' see PARA 1405.

2 Bills of Exchange Act 1882 s 97(1). As to the meaning of 'bankrupt' see PARA 1514 note 4. As to bills of exchange and bankruptcy generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 512 et seq.

3 As to the meaning of 'holder' see PARA 1407.

4 See the Insolvency Act 1986 s 306; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 391 et seq. As to transfer generally see PARA 1489 et seq.

5 *Re Kensington, ex p Buchanan* (1812) 1 Rose 280. As to the meaning of 'instrument' see PARA 1402 note 1.

6 *Herbert v Sayer* (1844) 5 QB 965; approved in *Jameson & Co v Brick and Stone Co Ltd* (1878) 4 QBD 208; *Cohen v Mitchell* (1890) 25 QBD 262, CA. See also *Re Bennett, ex p Official Receiver* [1907] 1 KB 149.

7 *Willis v Freeman* (1810) 12 East 656. As to accommodation bills see PARA 1482.

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## **C. EXECUTION**

### **1609. Execution.**

Although at common law negotiable instruments<sup>1</sup> of all sorts and money itself were formerly immune from seizure in execution, they are alike by statute made liable to seizure by the sheriff under a writ of fieri facias<sup>2</sup> and a claim may be brought on them when the time of payment thereof arrives in the name of the sheriff on his receiving an indemnity therefor<sup>3</sup>.

They are also liable to seizure by a bailiff or officer executing any warrant of execution issuing out of the county court<sup>4</sup>, in which case the district judge<sup>5</sup> is to hold them as a security for the amount directed to be levied by such execution or so much of it as has not been otherwise levied or raised for the benefit of the claimant, and the claimant may sue on them, when the time of payment thereof arrives, in the name of the defendant or in the name of any person in whose name the defendant might have sued<sup>6</sup>.

1 As to the meaning of 'negotiable instrument' see PARA 1402.

2 As to writs of fieri facias see **CIVIL PROCEDURE** vol 12 (2009) PARA 1266; and **SHERIFFS** vol 42 (Reissue) PARA 1117.

3 See the Judgments Act 1838 s 12; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1315. The instruments named are cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money: Judgments Act 1838 s 12.

4 See the County Courts Act 1984 s 89(1)(b); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1315. The instruments named are bills of exchange, promissory notes, bonds, specialties, or other securities for money: s 89(1)(b). As to the issue of warrants of execution see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1283-1284.

5 As to district judges see **COURTS** vol 10 (Reissue) PARAS 661-662.

6 County Courts Act 1984 s 91 (amended by virtue of the Courts and Legal Services Act 1990 s 74(1), (3)).

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### (3) OTHER NEGOTIABLE INSTRUMENTS

#### (i) Rules for Determining Negotiability

##### 1610. Law governing other negotiable instruments.

Though bills of exchange, cheques and promissory notes<sup>1</sup> are the only instruments specifically dealt with by the codifying statute, there are many other instruments to which the attribute of negotiability has gradually come to be ascribed, and which must now be regarded as having been definitely admitted to the same category<sup>2</sup>. The branch of the law from which, apart from statute, these other instruments draw their authority is the law merchant<sup>3</sup>. This term denotes the accumulated product of the customs of trade to which sanction has from time to time been given by decisions of the courts<sup>4</sup>, but not a permanently fixed and stereotyped body of law<sup>5</sup>. Customs and usages of trade indeed vary from time to time just as they vary in one place and another, and a custom that is known and recognised by the law merchant as existing in one place may be absolutely unknown elsewhere<sup>6</sup>. Moreover, the exigencies of trade and finance are continually expanding, and have led to new customs and usages being more speedily devised, adopted and recognised than formerly<sup>7</sup>.

1 As to the meanings of 'bill of exchange', 'cheque' and 'promissory note' see PARA 1405.

2 As to the meaning of 'negotiable instrument' see PARA 1402. As to bills of lading and other instruments relating to the transfer of goods, eg dock warrants (which in some respects resemble negotiable instruments) see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 313 et seq.

3 As to the meaning of 'law merchant' see PARA 1400; and **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 662-664.

4 See *Goodwin v Roberts* (1875) LR 10 Exch 337 at 352 per Cockburn CJ.

5 *Edelstein v Schuler & Co* [1902] 2 KB 144 at 154 per Bigham J.

6 Eg a bill operates in Scotland as an assignment of funds in the hands of a drawee available for its payment, but not in England; and this usage was conferred by statute: see the Bills of Exchange Act 1882 s 53(2); and PARA 1596. Cf *Lang v Smyth* (1831) 7 Bing 284. As to the immemorial existence of custom see generally **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 607 et seq.

7 Even in 1902 this matter was considered: see *Edelstein v Schuler & Co* [1902] 2 KB 144 at 154 per Bigham J. As to customs and usages of trade see further **CUSTOM AND USAGE**.

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##### 1611. Requisites for negotiability.

There remain, however, always the same prime requirements with which an instrument must comply before it can be accorded negotiability. One of these requirements is the form of the instrument itself; the other is the custom of trade in regard to it.

It must be in a form which renders it capable of being sued on by the holder of it in his own name; and it must be by the custom of trade transferable, like cash, by delivery<sup>1</sup>. Failure to

comply with either of these requirements prevents the instrument being a negotiable instrument at all<sup>2</sup>. Negotiable instruments come into existence for the purpose only of recording an agreement to pay money and nothing more<sup>3</sup>.

1 Including indorsement and delivery in the case of an instrument payable to order.

2 Cf *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 381 per Blackburn J; *Miller v Race* (1758) 1 Burr 452. See PARA 1618 note 5.

3 See *Akbar Khan v Attar Singh* [1936] 2 All ER 545 at 550, PC, per Lord Atkin. See also the observation per Dillon LJ in *Claydon v Bradley* [1987] 1 All ER 522 at 526, [1987] 1 WLR 521 at 526, CA, that if the statutory definition of a promissory note in the Bills of Exchange Act 1882 s 83 (see PARA 1405) is applied literally, it would seemingly cover a range of documents which no one would ordinarily dream of regarding as promissory notes or in any other way negotiable, such as four year covenants in favour of charities.

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## **(ii) What Instruments are Negotiable**

### **A. TREASURY BILLS**

#### **1612. Extent of negotiability.**

Treasury bills<sup>1</sup> of the British government are negotiable instruments, and are thus expressed: 'This Treasury Bill entitles ----- or order to the payment of, etc.' So long as the blank remains unfilled the bill is an instrument transferable by delivery; so soon as the blank is filled in it becomes an instrument payable to order. In either case it is negotiable.

1 As to Treasury bills see the Treasury Bills Act 1877; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 730.

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### **B. BANK NOTES AND POSTAL ORDERS**

#### **1613. Bank notes and certificates of deposit as negotiable instruments.**

In England, bank notes are issued solely by the Bank of England and are in effect promissory notes payable on demand<sup>1</sup>.

Since 1968, instruments described as negotiable certificates of deposit have been issued by banks certifying the receipt of a stated sum deposited on terms that it is payable (with interest)



to bearer on a fixed date against surrender of the certificate. The instruments appear not to be promissory notes; so far they have not been considered by the courts.

1 See PARA 1469; and PARAS 796-798. As to bank notes and legal tender see PARA 1278.

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### **1614. Postal orders not negotiable.**

Post Office postal orders are not negotiable; if presented by a banker unsigned but bearing the banker's stamp, the effect is only to make the stamp of the banker a substitute for the signature to the receipt of the original payee<sup>1</sup>.

1 *Fine Art Society v Union Bank of London* (1886) 17 QBD 705 at 713, CA. As to the meaning of 'payee' see PARA 1406.

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## **C. BRITISH AND FOREIGN BONDS**

### **1615. Foreign bonds.**

The bonds of a foreign government<sup>1</sup>, as also those of a foreign corporation<sup>2</sup>, may be negotiable<sup>3</sup>. For them to be recognised as such here they must either purport on their face to be transferable by indorsement or delivery or be shown to be otherwise negotiable according to the law of the country of issue<sup>4</sup>, and must be negotiable by custom in this country<sup>5</sup>. It is not sufficient to prove merely that they are negotiable in the country of issue<sup>6</sup>.

It has further been suggested that a foreign instrument is not negotiable here unless negotiable where it was made<sup>7</sup>; but it may be open to doubt how far this qualification would now be allowed to prevail.

1 *Gorgier v Mievill* (1824) 3 B & C 45; *A-G v Bouwens* (1838) 4 M & W 171; *Heseltine v Siggers* (1848) 1 Exch 856; *Goodwin v Robarts* (1875) LR 10 Exch 337 (affd (1876) 1 App Cas 476, HL); *London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535, CA; *London Joint Stock Bank v Simmons* [1892] AC 201 at 224, HL, per Lord Macnaghten.

2 *Venables v Baring Bros & Co* [1892] 3 Ch 527 (holding it to be immaterial that the bonds were secured by a mortgage of property to trustees); *Bentinck v London Joint Stock Bank* [1893] 2 Ch 120; *Edelstein v Schuler & Co* [1902] 2 KB 144; *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333, HL, which is in apparent conflict with the above cases, and was decided upon special facts, the bonds in question having been pledged with bankers, who, in the opinion of the court, should have made fuller inquiries than they did before accepting them. See *London Joint Stock Bank v Simmons* [1892] AC 201 at 225, HL, per Lord Macnaghten.

3 No distinction is to be made for this purpose between the bonds of a foreign government and those of a foreign corporation, except that a foreign government can in no case be sued in this country either in its own name or in that of its agent (*Twycross v Dreyfus* (1877) 5 ChD 605, CA).

4 *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267 at 285, HL; *London and County Banking Co v London and River Plate Bank* (1887) 20 QBD 232; on appeal (1888) 21 QBD 535, CA, where the point was not raised.

5 *Easton v London Joint Stock Bank* (1886) 34 ChD 95 at 113; CA, per Bowen LJ; *Bentinck v London Joint Stock Bank* [1893] 2 Ch 120.

6 See *Picker v London and County Banking Co* (1887) 18 QBD 515, CA (where it was held that proof of the negotiability of Prussian bonds in Berlin was insufficient to establish their negotiability here; otherwise, 'if it were proved that cowries are part of the currency of Africa, they must be treated as money in this country, though there were no custom here to treat them as money': at 520 per Fry LJ).

7 See notes to *Miller v Race* (1758) 1 Burr 452, in 1 Smith LC (13th Edn) 536 (a discussion of the case of *Lang v Smyth* (1831) 7 Bing 284). 'These are not English instruments, recognised by the law of England, but Neapolitan securities brought to the notice of the court for the first time, and as judges we are not allowed to form an opinion on them unless supplied with evidence as to the law of the country whence they come': *Lang v Smyth* at 293 per Tindal CJ. However, it has been stated that 'evidence that an instrument is accustomably transferable from hand to hand in this country is prima facie evidence that it is also so abroad': 1 Smith LC (13th Edn) 536-537 (quoting from *Lang v Smyth*, and citing a suggestion of Lord Esher in *Picker v London and County Banking Co* (1887) 18 QBD 515 at 518, CA).

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### **1616. Bonds issued by English companies.**

An attempt was made to distinguish between the bonds of a foreign country or company and those issued by an English company in England<sup>1</sup>, but the case in which this distinction was drawn has been overruled<sup>2</sup>; and it is now settled that English and foreign bonds are upon the same footing. So well established, indeed, is the fact that English debenture bonds payable to bearer are negotiable that the court has stated that it would be prepared to presume the usage without proof thereof<sup>3</sup>.

An alleged custom that an unpaid seller of bearer bonds should have a lien over them or that they should be impressed with a trust in favour of an unpaid seller is inconsistent with the nature of negotiable securities and invalid<sup>4</sup>.

1 *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 384.

2 See *Goodwin v Robarts* (1875) LR 10 Exch 337; affd (1876) 1 App Cas 476, HL (where the instrument, though a foreign one, was issued in England). The whole question of the validity of the judgment in *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 was discussed by Kennedy J in *Bechuanaland Exploration Co v London Trading Bank Ltd* [1898] 2 QB 658 at 669 et seq.

3 *Edelstein v Schuler & Co* [1902] 2 KB 144 at 155 per Bigham J.

4 *Lloyds Bank Ltd v Swiss Bankverein* (1913) 108 LT 143, CA.

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## **D. SCRIP AND SHARE WARRANTS**

### **1617. Scrip.**

Scrip to bearer issued for debenture bonds is also negotiable, there being no real distinction between the scrip and the bonds themselves<sup>1</sup>.

1 *Goodwin v Robarts* (1875) LR 10 Exch 337; affd (1876) 1 App Cas 476, HL.

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### **1618. Share warrants.**

On the same principle<sup>1</sup> scrip certificates to bearer for shares in a joint stock company are negotiable<sup>2</sup>, and so also are share warrants to bearer<sup>3</sup>. Share warrants not to bearer are not negotiable instruments<sup>4</sup>.

If certificates for company shares issued with a blank form of transfer, which have been signed but not filled in by the original holder of the shares, are delivered by or with the authority of the owner with intent to transfer them, such delivery will suffice to pass title; but if there has been no intent on the part of the owner to transfer them, a good title can only be obtained as against him if he has so acted as to preclude himself from setting up a claim to them<sup>5</sup>.

1 Ie the principle given at PARA 1617.

2 *Rumball v Metropolitan Bank* (1877) 2 QBD 194, DC.

3 *Webb, Hale & Co v Alexandria Water Co Ltd* (1905) 93 LT 339, DC; cf *Stern v R* [1896] 1 QB 211.

4 *London and County Banking Co v London and River Plate Bank* (1887) 20 QBD 232, not dealt with by the Court of Appeal (1888) 21 QBD 535; *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267, HL. As to the meaning of 'negotiable instrument' see PARA 1402.

5 *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267 at 285, HL, per Lord Herschell; and cf *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168; *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 381 per Blackburn J (citing with approval the notes to *Miller v Race* (1758) 1 Burr 452, in 1 Smith LC (2nd Edn) 259, (13th Edn) 534).

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INSTRUMENTS/(3) OTHER NEGOTIABLE INSTRUMENTS/(ii) What Instruments are Negotiable/D. SCRIIP AND SHARE WARRANTS/1619. Dividend warrants.

### **1619. Dividend warrants.**

The negotiability of dividend warrants was rendered doubtful by a decision<sup>1</sup> prior to the Bills of Exchange Act 1882; but in other cases<sup>2</sup> it has been assumed that they were negotiable, and the Act itself appears to contemplate their being so<sup>3</sup>. If drawn in accordance with the statutory definition of a cheque<sup>4</sup>, they are clearly negotiable.

1 *Partridge v Bank of England* (1846) 9 QB 396.

2 *Eg Lang v Smyth* (1831) 7 Bing 284; *Goodwin v Robarts* (1875) LR 10 Exch 337 at 354.

3 See the Bills of Exchange Act 1882 s 97(3)(d), which specially preserves the usage relating to dividend warrants and their indorsement, and s 95, which applies to them the provisions of that Act which relate to crossed cheques. See also PARA 900.

4 See the Bills of Exchange Act 1882 s 73; and PARA 1405.

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## **7. BILLS OF SALE**

### **(1) INTRODUCTION**

#### **(i) Common Law**

#### **1620. Nature of bill of sale.**

A bill of sale may be described as an instrument in writing whereby one person transfers to another the property he has in goods or chattels<sup>1</sup>, or as a document given with respect to the transfer of goods or chattels, used in cases where possession is not intended to be given<sup>2</sup>. Where possession of goods is given immediately to the transferee, whether by way of sale, gift or mortgage, the delivery of possession perfects the transferee's title, and it will usually be unnecessary for him to rely on any document to establish his claim to the goods<sup>3</sup>. Hence the use of the term 'bill of sale' is normally confined to describing instruments of transfer given in transactions where it is intended that the transferor shall remain in possession of the goods<sup>4</sup>. However, the provisions of the Bills of Sale Acts 1878 and 1882<sup>5</sup> have considerably extended the classes of document that are to be regarded as bills of sale, and the fact that possession is intended to be given immediately to the transferee does not by itself prevent a document from amounting to a bill of sale within the Acts<sup>6</sup>.

A bill of sale is not the only method by which the transfer of ownership of goods, whether absolutely or by way of security, may be effected<sup>7</sup>; and there are also certain forms of consensual security over goods which do not involve the transfer of ownership to the secured party at all<sup>8</sup>.

- 1 See *Allsop v Day* (1861) 7 H & N 457.
- 2 *Johnson v Diprose* [1893] 1 QB 512, CA.
- 3 See PARA 1634.
- 4 See *Johnson v Diprose* [1893] 1 QB 512 at 515, CA, per Lord Esher MR; *Mills v Charlesworth* (1890) 25 QBD 421 at 424, CA, per Lord Esher MR.
- 5 See the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see the Bills of Sale Act (1878) Amendment Act 1882 s 1; and PARA 1630.
- 6 See PARAS 1638, 1640.
- 7 See PARAS 1621-1623.
- 8 See PARAS 1627-1629.

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### **1621. Classification.**

There are two kinds of bill of sale, namely, absolute bills and conditional, or security, bills. A bill is termed absolute when it is given otherwise than as security for the payment of money. A conditional or security bill is a bill given to secure a money payment<sup>1</sup>.

<sup>1</sup> In normal parlance, the term 'security bill' would also embrace bills given to secure performance of a non-monetary obligation, but the Bills of Sale Act (1878) Amendment Act 1882 is limited to bills given as security for the payment of money (see s 3; and PARA 1638), and other security bills are for the purpose of the Bills of Sale Acts equated with absolute bills. This treatment is adopted in the text.

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### **1622. Transfer of existing goods at common law.**

At common law, the voluntary transfer of the legal title to existing goods may be effected by sale, exchange, mortgage or gift<sup>1</sup>. The goods must be ascertained before the property can pass<sup>2</sup>. Subject to this, the property will pass on a sale when the parties intend it to pass<sup>3</sup>, and, if their intention is expressed in the agreement, the law will give effect to it<sup>4</sup>. The agreement may be made orally, and the transfer of title is not dependent either on a written document or, except for gift, on the delivery of possession. Similar principles govern the passing of property on an exchange<sup>5</sup>.

A legal mortgage of goods is effected by assignment with a proviso, express or implied, for re-assignment on redemption<sup>6</sup>. Where possession is given by way of security without any express transfer of ownership, the court must ascertain the intention of the parties in order to determine the nature of the security interest created, that is, whether there was a transfer of

title by way of mortgage or whether title remained in the debtor and possession was given merely by way of equitable charge, pledge or contractual lien<sup>7</sup>.

A gift of goods *inter vivos* must, to be effective at law, be made either by deed<sup>8</sup> or by delivery of possession<sup>9</sup>, though beneficial ownership can be transferred in equity by declaration of trust or transfer to a third party as trustee for the donee<sup>10</sup>. A purported gift not effected by one of these methods is nugatory<sup>11</sup>.

1 See **GIFTS; MORTGAGE** vol 77 (2010) PARA 101 et seq; **PERSONAL PROPERTY; SALE OF GOODS AND SUPPLY OF SERVICES**.

2 In the case of a contract for the sale of goods this principle is embodied in the Sale of Goods Act 1979 s 16. See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 124.

3 In relation to a contract for the sale of goods see the Sale of Goods Act 1979 s 17(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 112.

4 In relation to a contract for the sale of goods see the Sale of Goods Act 1979 s 17(2); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 112. Section 18 lays down rules for ascertaining the intention of the parties where no different intention appears in the contract: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 113 et seq.

5 2 Bl Com (14th edn) 446; and see **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1258; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 1. Contracts of exchange are, however, outside the Sale of Goods Act 1979, as by definition a contract of sale requires that the consideration for the transfer of the property be a money consideration: see s 2(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 29.

6 *Santley v Wilde* [1899] 2 Ch 474, CA; *Maugham v Sharpe* (1864) 17 CBNS 443. See also *London County and Westminster Bank Ltd v Tompkins* [1918] 1 KB 515, CA. The legal ownership of personal chattels being indivisible, it is not possible, as can be done in the case of land, to create a legal mortgage of chattels by demise for a term of years. A legal mortgage usually involves the transfer of title from the mortgagor himself but exceptionally it may be transferred by a third party: see *Maas v Pepper* [1905] AC 102, HL; and PARA 1677. A bank financing the purchase of imported goods usually takes delivery of the indorsed bill of lading by way of pledge (see PARA 1680), but there is nothing to prevent the parties agreeing that the bank shall take a full legal title by way of mortgage: see *Sewell v Burdick* (1884) 10 App Cas 74 at 95-97, HL. As to personal chattels see PARA 1662 et seq.

Since the law does not recognise divided interests in pure personalty, a legal mortgage of goods divests the mortgagor of his legal title and leaves him merely with an equitable interest in the form of an equity of redemption, so that if he thereafter grants a second mortgage, this is a disposition of an equitable interest which, to be valid, must be in writing signed by him or on his behalf: Law of Property Act 1925 s 53(1)(c). Section 53(1)(c) does not apply to any transfer of title to uncertificated units of a security by means of a relevant system and any disposition or assignment of an interest in uncertificated units of a security title to which is held by a relevant nominee: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(5), (6). See further, in regard to the disapplication of the Law of Property Act 1925 s 53(1)(c) in relation to financial collateral arrangements, the Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 4(2). See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24. See further PARA 1678.

7 See *Sewell v Burdick* (1884) 10 App Cas 74 at 95-97, HL. As to the distinction between mortgages and pledges see PARAS 1627 et seq, 1676 et seq; and **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 3.

8 As to the requirements for a valid deed see the Law of Property (Miscellaneous Provisions) Act 1989 s 1; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 7-8, 32-34.

9 *Koppel v Koppel* [1966] 2 All ER 187, [1966] 1 WLR 802, CA; *Re Kirkland* (1964) 108 Sol Jo 197, CA; *Re Cole (a bankrupt)*, *ex p Trustee of the Property of the Bankrupt v Cole* [1964] Ch 175, [1963] 3 All ER 433, CA.

10 *Ellison v Ellison* (1802) 6 Ves 656.

11 See the cases cited in note 9.

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### **1623. Transfer of future goods at common law.**

Subject to three exceptions, a purported transfer of goods inter vivos which at the date of the transfer were not owned by the transferor, either because they belonged to another or because they had not then come into existence, was of no dispositive effect at common law<sup>1</sup>, and could at most amount to a contract to transfer, creating no rights over the goods even after acquisition by the transferor<sup>2</sup>. The three exceptions to this rule were: (1) sales of future goods, which passed the property on fulfilment of the conditions agreed between the parties<sup>3</sup>; (2) transfers of potential produce<sup>4</sup> of property already owned by the transferor and conveyed by the transfer, which operated to pass the legal title to the produce in question when it came into existence without any further act by the transferor<sup>5</sup>; and (3) transfers of future goods which specified or contemplated the performance of some 'new act' of transfer by the transferor, in performance of his contract, after he had acquired the goods, which passed the legal title to the transferee when the new act in question was performed<sup>6</sup>. These remain the only three cases in which a transfer of future goods inter vivos can have effect at law.

In so far as a transfer of future goods is effective at common law no special formality is required<sup>7</sup> and an oral agreement suffices.

1 *Akron Tyre Co Pty Ltd v Kittson* (1951) 82 CLR 477, Aust HC; *Re Wait* [1927] 1 Ch 606, CA; *Reeves v Barlow* (1884) 12 QBD 436, CA, distinguishing *Holroyd v Marshall* (1862) 10 HL Cas 191; *Carr v Allatt* (1858) 27 LJEx 385; *Lunn v Thornton* (1845) 1 CB 379. As to the position in equity see PARA 1624.

2 See the cases cited in note 1. However, a disposition of goods by will to A for life with remainder to B was considered to create an executory interest in favour of B which, though having no effect as a transfer of property to B during A's lifetime, operated to vest the goods in B at law on A's death without further act of transfer (*Re Thynne, Thynne v Grey* [1911] 1 Ch 282; following *Re Tritton, ex p Singleton* (1889) 61 LT 301). This remains the position: see **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1230. See also PARA 1635.

3 See the Sale of Goods Act 1979 ss 2(5), (6), 5, 18 Rule 5; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 27, 47, 125-127.

4 Eg the progeny of livestock, wool to be grown on sheep.

5 *Grantham v Hawley* (1615) Hob 132; *Petch v Tutin* (1846) 15 M & W 110. Aliter potential produce of property not owned by the grantor at the date of assignment: *Grantham v Hawley* above.

6 See the cases cited in note 1.

7 *Flory v Denny* (1852) 7 Exch 581.

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### **1624. Transfer of goods in equity.**

A transfer of existing goods which is not effective in law, because it is merely an executory agreement for transfer or because the transferor's own interest in the goods is merely equitable<sup>1</sup>, will normally take effect in equity, pursuant to the maxim that equity treats as done

that which ought to be done<sup>2</sup>. To this principle there are two exceptions. First, an uncompleted agreement for a gift has no effect even in equity, which does not perfect imperfect gifts<sup>3</sup>; and secondly, an agreement to sell goods is a pure contract, since the passing of property is governed by the Sale of Goods Act 1979, which deals with the legal title and is considered to leave no scope for equity to operate on the agreement<sup>4</sup> unless, of course, the terms of the agreement themselves create an equitable interest in favour of the buyer, as by providing that the seller is to hold the goods as the buyer's trustee pending transfer of the legal title.

Although the common law did not in general accord a proprietary effect to a transfer of future goods<sup>5</sup>, in equity a transfer, or agreement for transfer, of future goods, if for value<sup>6</sup> and if the goods are described sufficiently to be identifiable when acquired<sup>7</sup>, passes the beneficial ownership to the transferee when the goods are acquired by the transferor, without the necessity for any new act of transfer<sup>8</sup>. However, this equitable principle does not apply to contracts of sale, these being governed by the provisions of the Sale of Goods Act 1979, under which the property in future goods passes in accordance with the provisions of that Act<sup>9</sup> and until then the buyer has a mere contractual right to them<sup>10</sup>; and a voluntary transfer of future goods is nugatory, even in equity<sup>11</sup>.

A transfer of future goods does not require writing in order to be effective in equity<sup>12</sup>.

1 If the debtor has already granted a legal mortgage a second mortgage is necessarily equitable: see PARA 1622 note 6.

2 See **EQUITY** vol 16(2) (Reissue) PARA 561. However, the transferee's title is imperfect until he has actually made his advance: see *Shaw v Foster* (1872) LR 5 HL 321; *Lysaght v Edwards* (1876) 2 ChD 499; *Rayner v Preston* (1881) 18 ChD 1 at 13, CA, per James LJ. Although these cases are concerned with the transfer of land the same principle applies in relation to goods.

3 See *Milroy v Lord* (1862) 4 De GF & J 264; and **EQUITY** vol 16(2) (Reissue) PARA 610; **GIFTS** vol 52 (2009) PARA 267. See also note 11.

4 See *Re Wait* [1927] 1 Ch 606 at 635-636, CA, per Atkin LJ, whose dictum is generally accepted as representing the law: *Re London Wine Co (Shippers) Ltd* [1986] PCC 121; *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785, [1986] 2 All ER 145, HL.

5 See PARA 1623.

6 See the text and note 3.

7 *Holroyd v Marshall* (1862) 10 HL Cas 191; *Tailby v Official Receiver* (1888) 13 App Cas 523, HL.

8 *Holroyd v Marshall* (1862) 10 HL Cas 191.

9 See the Sale of Goods Act 1979 s 16, s 18 Rule 5(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 124-125.

10 See *Re Wait* [1927] 1 Ch 606, CA; and note 4.

11 *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697; *Meek v Kettlewell* (1843) 1 Ph 342. This is the case even if the assignment is by deed: *Re Ellenborough, Towry Law v Burne*; *Meek v Kettlewell* above. See also *Re Brooks' Settlement Trusts, Lloyds Bank Ltd v Tillard* [1939] Ch 993, [1939] 3 All ER 920.

12 *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697 at 700 per Buckley J; *Tailby v Official Receiver* (1888) 13 App Cas 523 at 543, HL, per Lord Macnaghten. The same is true at law in those cases where such an assignment is recognised.



## 1625. Forms of consensual security in goods.

English law recognises four distinct forms of security in goods, namely, the mortgage, the pledge, the contractual lien and the equitable charge<sup>1</sup>.

<sup>1</sup> See PARAS 1626-1629.

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## 1626. Mortgage.

A mortgage of goods is a transfer of ownership by way of security. The mortgagor parts with his full interest in the goods and transfers this to the mortgagee, subject only to a right of retransfer on redemption<sup>1</sup>. As security owner the mortgagee has in theory an immediate right to possession, unless otherwise agreed, as well as a power of sale in certain conditions.

<sup>1</sup> See generally PARAS 1677-1678, 1689-1690; and **MORTGAGE** vol 77 (2010) PARA 101 et seq.

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## 1627. Pledge.

A pledge of goods is effected by the delivery of possession by way of security and, unlike a mortgage, does not pass ownership but endows the pledgee with what has been termed a special property<sup>1</sup> (by which is meant a possessory interest enforceable at law and carrying with it an implied right of sale in the event of default by the pledgor<sup>2</sup>). The delivery of possession may be actual or constructive, and may be effected by the pledgor himself or by a third party with his authority<sup>3</sup>.

<sup>1</sup> See PARA 1676; and **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 3.

<sup>2</sup> See PARA 1676; and **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 9.

<sup>3</sup> Constructive delivery may be effected in various ways, as by giving control of the goods through delivery of a key (*Wrightson v McArthur and Hutchisons (1919) Ltd* [1921] 2 KB 807) or an indorsed bill of lading (*Glyn, Mills, Currie & Co v East and West India Dock Co* (1880) 6 QBD 475, CA), or by procuring a third party having custody of the goods to attorn to the pledgee, that is, to acknowledge that he holds them for the pledgee (*Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, PC). See further **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 13.

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### **1628. Contractual lien.**

A contractual lien is a contractual right to retain possession pending payment of sums due to the possessor. The contractual lien, which is often equated with a pledge, is to be distinguished from it in that possession is taken for purposes other than security (for example, for storage or repair) and unless otherwise agreed the lienholder has merely a right to detain the goods until payment of what is due to him, not a right to sell them on default in payment<sup>1</sup>.

<sup>1</sup> See PARA 1675; and **LIEN** vol 68 (2008) PARA 808.

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### **1629. Equitable charge.**

A form of security which neither involves the transfer of ownership nor is dependent on the delivery of possession is the equitable charge, or hypothecation. A mere charge (that is, one that does not include an agreement for a mortgage) gives the creditor no interest in the goods, merely a right in preference to other creditors, to look to the goods to satisfy the debt due to him, and for this purpose to follow the goods into the hands of any third party other than a purchaser for value of the legal title without notice of the charge or a person having a charge or other claim over the goods ranking in priority to that of the chargee<sup>1</sup>. As a charge involves no transfer of ownership, an instrument of charge would not, at common law, have been considered a bill of sale<sup>2</sup>; but the extended definition of 'bill of sale' in the Bills of Sale Act 1878 now covers such instruments<sup>3</sup>.

<sup>1</sup> *Re Slee, ex p North Western Bank* (1872) LR 15 Eq 69; *Tennant v Trenchard* (1869) 4 Ch App 537. A charge may be created by act of parties or by statute. The former derives from equity or, in the case of maritime hypothecations, from maritime law.

<sup>2</sup> *Re Slee, ex p North Western Bank* (1872) LR 15 Eq 69. The case of *Edwards v Edwards* (1876) 2 ChD 291, CA, which might appear to suggest the contrary, is to be explained on the basis that the document in that case, while purporting to create a charge, was in fact an equitable mortgage because it included a covenant to assign: see *Re Standard Manufacturing Co* [1891] 1 Ch 627 at 638, CA, per Fry LJ.

<sup>3</sup> See the Bills of Sale Act 1878 s 4; and PARA 1638 et seq.

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### **(ii) Legislation**

### 1630. Legislation governing bills of sale.

The practice of granting bills of sale under arrangements by which the grantor remained in possession after execution of the bill caused much hardship to creditors, who might be led to extend credit to the grantor of the bill on the strength of his apparent ownership of goods which he had in fact conveyed to another. In order to prevent secret transfers, the Bills of Sale Act 1854 introduced a requirement of registration; and by the Bills of Sale Act 1866 renewal of registration was required every five years. These Acts were repealed by the Bills of Sale Act 1878<sup>1</sup> (the 'principal Act')<sup>2</sup>, and replaced by that Act. This was subsequently amended by the Bills of Sale Act (1878) Amendment Act 1882 (the 'amending Act'). The two Acts may be cited together as the Bills of Sale Acts 1878 and 1882<sup>3</sup>. The Bills of Sale Act 1890, as amended by the Bills of Sale Act 1891, provides that certain instruments hypothecating imported goods are not to be deemed bills of sale within the meaning of the principal and amending Acts<sup>4</sup>; and various other statutes confer exemption from the Bills of Sale Acts 1878 and 1882 as regards specified classes of transfer<sup>5</sup>. Absolute assignments of book debts, though not bills of sale, are in certain circumstances required to be registered as if they were bills of sale<sup>6</sup>.

There is no other legislation directly governing bills of sale<sup>7</sup>, apart from local registration rules made pursuant to the principal Act<sup>8</sup>, and rules of court<sup>9</sup>.

1 Repealed by the Bills of Sale Act 1878 s 23 (relevant words repealed), by which it was also provided that the repealed Acts continued in force, and had effect in place of the new legislation, as regards bills of sale executed before 1 January 1879 (see s 2 (amended by the Statute Law Revision Act 1894)), except that any subsequent renewal after that date of a bill registered under the previous legislation would be made under the new legislation. As to renewals see PARA 1781 et seq.

2 See the Bills of Sale Act (1878) Amendment Act 1882 s 3.

3 Bills of Sale Act (1878) Amendment Act 1882 s 1. So far as consistent with its tenor, the amending Act is to be construed as one with the Bills of Sale Act 1878: see the Bills of Sale Act (1878) Amendment Act 1882 s 3. The Bills of Sale Acts have attracted considerable opprobrium, both from litigants and from the courts, because of the great obscurity and technicality of the statutory provisions. They were severely criticised in the *Report of the Committee on Consumer Credit* (Cmnd 4596) (1971), which recommended their repeal and replacement by a comprehensive Lending and Security Act regulating all security interests in personal property, based on Article 9 of the American Uniform Commercial Code. Similar recommendations were made by the Insolvency Law Review Committee in its report *Insolvency Law and Practice* (Cmnd 8558) (1982) and by Professor AL Diamond in his report *A Review of Security Interests in Property* (1989). No legislation has so far been enacted to give effect to any of these recommendations. Over the last 30 or so years the number of registrations has fallen to the point where the number registered is currently in the region of only 5000. Almost all of these are security bills, the vast majority of which relate to finance for motor vehicles.

4 See the Bills of Sale Act 1890 s 1; and PARA 1661. As to the meaning of 'bills of sale' in the principal and amending Acts see PARA 1638.

5 See PARA 1684 et seq.

6 See PARA 1854.

7 Note, however, that a bill of sale taken to secure an agreement which is a regulated agreement for the purposes of the Consumer Credit Act 1974 is governed by various provisions of that Act (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 200, 222).

8 Repealed under the Bills of Sale Act 1878 s 21: see the Bills of Sale (Local Registration) Rules 1960, SI 1960/2326; and PARA 1776.

9 Repealed by CPR Sch 1 RSC Ord 95; see **CIVIL PROCEDURE** vol 12 (2009) PARA 1699. For procedural guidance see also *The Queen's Bench Guide* (2006 Edn).

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### **1631. Absolute and security bills.**

The regulation of absolute bills of sale differs markedly from that of security bills, and this reflects the difference in the objects of the Bills of Sale Act 1878 (the 'principal Act') and the Bills of Sale Act (1878) Amendment Act 1882 (the 'amending Act')<sup>1</sup>. The purpose of the principal Act, like that of the enactments it replaced<sup>2</sup>, was to prevent credit being given to persons on the strength of their apparent ownership of goods in their possession which in fact had ceased to belong to them as the result of a secret transfer<sup>3</sup>. The principal Act seeks to protect creditors from such secret transfers by requiring bills of sale to be registered and by rendering unregistered bills void against execution creditors and trustees in bankruptcy or liquidators of the grantor, in cases where the grantor remained in possession after executing the bill<sup>4</sup>.

The purpose of the amending Act<sup>5</sup> was twofold. First, it was designed to strengthen protection for creditors, as by rendering void, except as against the grantor, after-acquired property clauses in bills of sale<sup>6</sup>. Its second and predominant objective was to prevent needy persons being trapped into signing complicated documents which they might often be unable to comprehend, and so being subjected by their creditors to the enforcement of harsh and unreasonable provisions<sup>7</sup>. To this end, the amending Act prescribes a form of bill of sale which must be closely followed<sup>8</sup> and which is intended to ensure that the nature and terms of the loan and security are clearly set out<sup>9</sup>. The statutory form and various provisions in the body of the Act severely restrict the terms that may validly be inserted in a security bill<sup>10</sup>. Indeed, the requirement of conformity with the statutory form may have the result that certain classes of document falling within the statutory definition of 'bill of sale' cannot be employed at all, as they are by nature incompatible with the statutory form<sup>11</sup>.

The amending Act, so far as is consistent with the tenor thereof, is to be construed as one with the principal Act<sup>12</sup>. It does not apply to bills of sale given otherwise than as security for the payment of money<sup>13</sup>. Accordingly, absolute bills are unaffected by the amending Act; and to the extent to which the amending Act contains provisions repealing portions of the principal Act<sup>14</sup> the impact of those provisions is limited to security bills, leaving absolute bills controlled by the principal Act in its original form<sup>15</sup>. Security bills, on the other hand, are governed by both the principal and the amending Acts<sup>16</sup>.

1 As to the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882 see PARA 1630.

2 See PARA 1630.

3 *Charlesworth v Mills* [1892] AC 231 at 235, HL, per Lord Halsbury LC; *Manchester, Sheffield and Lincolnshire Rly Co v North Central Wagon Co* (1888) 13 App Cas 554 at 560, HL, per Lord Herschell LC.

4 See the Bills of Sale Act 1878 ss 8, 9; and PARA 1851 et seq.

5 ie the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

6 See the Bills of Sale Act (1878) Amendment Act 1882 ss 4-6.

7 *Manchester, Sheffield and Lincolnshire Rly Co v North Central Wagon Co* (1888) 13 App Cas 554 at 560, HL, per Lord Herschell LC.

8 See the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. The amending Act requires registration of a security bill not only to make it effective against third parties but also to preserve the validity of the security against the grantor. It is difficult to see how the grantor can either benefit from

registration or suffer from non-registration. Third parties would, of course, be prejudiced by the absence of machinery for giving notice of a bill, but they are protected by the separate provisions of the principal Act, if falling within one of the limited categories of person against whom a bill is rendered void for want of registration: see the Bills of Sale Act 1878 s 8; and PARA 1849.

9 *Charlesworth v Mills* [1892] AC 231 at 235, HL, per Lord Halsbury LC.

10 See PARA 1715 et seq.

11 See PARA 1711.

12 Bills of Sale Act (1878) Amendment Act 1882 s 3. For the effect of a provision that two Acts are to be construed as one see **STATUTES** vol 44(1) (Reissue) PARA 1485.

13 Bills of Sale Act (1878) Amendment Act 1882 s 3. It is the substance not the form of a transaction that is to be looked at for the purpose of deciding whether a document is given to secure the payment of money: see PARAS 1641, 1692 et seq.

14 Bills of Sale Act (1878) Amendment Act 1882 ss 10, 15 (both amended by the Statute Law Revision Act 1989), repealing the Bills of Sale Act 1878 ss 8, 10 (in part) and s 20. Although part of the repealing provisions have themselves been repealed by the Statute Law Revision Act 1898, this does not revive the original provisions: see **STATUTES** vol 44(1) (Reissue) PARA 1306.

15 *Swift v Pannell* (1883) 24 ChD 210; *Robinson v Tucker* (1883) Cab & El 173; *Heseltine v Simmons* [1892] 2 QB 547. The only exception is the Bills of Sale Act (1878) Amendment Act 1882 s 16 which partially repealed and re-enacted the Bills of Sale Act 1878 s 16: see PARAS 1773-1775.

16 For the main differences between the statutory treatment of security bills and that of absolute bills see PARA 1839.

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### **1632. Impact of the Bills of Sale Acts on the transfer of goods.**

The Bills of Sale Acts<sup>1</sup> regulate documents by which an interest in the property in goods is transferred or a charge or right of seizure over goods is given. The Acts do not constitute a code replacing the rules of common law and equity relating to the transfer of goods. They engraft statutory provisions on to the common law, which continues to apply except to the extent to which it has been modified by the Acts. Accordingly, while the Acts require that written instruments of transfer must be registered and must conform to certain requirements, they do not apply to oral transactions<sup>2</sup> or displace common law rules permitting the transfer of goods otherwise than in writing<sup>3</sup>. Again, apart from limited restrictions on the right of the grantee of a security bill to seize and sell the security<sup>4</sup>, the Acts do not regulate the rights of the parties to a valid bill, which continue to be governed by the common law and, in the case of a sale, by the Sale of Goods Act 1979<sup>5</sup>. Thus, subject to such restrictions, the right of the grantee of a security bill to enforce the personal covenants in the bill, to realise his security by sale or to obtain foreclosure, and of the grantor of such a bill to redeem the security before sale or foreclosure, are unaffected by the Acts and are governed by general principles of mortgage law<sup>6</sup>.

The principal impact of the Acts is to render void, either wholly or in part, certain types of written transfer that would be fully effective at common law and to impose in relation to written transfers within the Acts various formal requirements which do not exist at common law.

1 <sup>1</sup> ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 See PARA 1639.

3 As to which see PARAS 1622-1624. Moreover it is in some cases necessary to refer to the common law rules in order to determine whether a document is a bill of sale within the Acts. This applies, for example, to building contracts containing a vesting clause (see PARA 1649) and to mortgages of future growing crops on land owned by the mortgagor at the date of the mortgage (see PARA 1699 note 3).

4 See PARA 1779.

5 See generally **SALE OF GOODS AND SUPPLY OF SERVICES**.

6 See PARAS 1785-1786; and **MORTGAGE** vol 77 (2010) PARA 101 et seq.

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### **1633. Transactions affected by the Bills of Sale Acts.**

Before a transaction can be affected by the Bills of Sale Acts<sup>1</sup>, five conditions must be fulfilled.

154 (1) There must be a document on which the Acts can operate. Oral transactions are unaffected by the Acts<sup>2</sup>.

155 (2) The document must constitute a bill of sale within the statutory definition. This definition is considerably wider than the common law understanding of the term 'bill of sale', but it also excludes certain classes of document that would have been considered bills of sale at common law<sup>3</sup>.

156 (3) The document must relate to personal chattels as defined by the Acts<sup>4</sup>. The statutory definition embraces forms of property that would not be classified as personal chattels at common law<sup>5</sup> and excludes types of property that would constitute personal chattels at common law<sup>6</sup>.

157 (4) The document must confer on the grantee, by its express or implied terms or as a matter of law, a power to seize or take possession of some or all of such personal chattels<sup>7</sup>.

158 (5) The grantee's rights over such personal chattels must for some moment of time derive from the document, not from some independent act or event such as the taking of possession<sup>8</sup>.

1 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 See PARA 1639. Similarly, the Acts do not apply to a lien, charge or right of disposal conferred by operation of law, as there is then no document on which the Acts can fasten: *Re Vulcan Ironworks Ltd* (1888) 4 TLR 312; *Lord's Trustee v Great Eastern Rly Co* [1908] 2 KB 54 at 60, CA, per Cozens-Hardy MR; *Re Webber, ex p Slater* (1891) 64 LT 426.

3 As to the statutory definition of 'bill of sale' see the Bills of Sale Act 1878 s 4; and PARA 1638 et seq.

4 As to the statutory definition of 'personal chattels' see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq.

5 Notably fixtures and growing crops, when separately assigned: see PARAS 1666, 1670.

6 Namely farming stock and produce: see PARA 1671.

7 See the Bills of Sale Act 1878 s 3. Prior to the enactment of the Bills of Sale Act 1878 a charge on goods would probably have been outside the legislation, as a charge confers no right to take possession, and although the chargee can appoint a receiver the latter is not his agent: see *Bank of Victoria Ltd v Langlands Foundry Co*

*Ltd* (1898) 24 VLR 230 at 252-256 per Holroyd J, discussing *Edwards v Edwards* (1876) 2 ChD 291, CA; PARA 1629 note 2; and **RECEIVERS** vol 39(2) (Reissue) PARA 303. However, the expanded definition of 'bill of sale' in the Bills of Sale Act 1878 s 4, covering an agreement by which a 'right in equity to personal chattels, or to any charge or security thereon, shall be conferred' (see PARA 1638), must be taken to have enlarged the meaning of the phrase 'power . . . to seize' in s 3. See further PARA 1638 note 10.

8 *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690, CA; *Wilkinson v Girard Frères* (1891) 7 TLR 266; *Bowker v Williamson* (1889) 5 TLR 382, DC. Where the grantor does retain possession, the fact that the document confers on the grantee a right to immediate possession and that it was intended that he should be given immediate possession does not exclude the operation of the Acts: see *Re Townsend, ex p Parsons* (1886) 16 QBD 532, CA; and PARA 1647.

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### **1634. Spent bills.**

Even where all five of the requisite conditions<sup>1</sup> are satisfied, so that the Bills of Sale Acts<sup>2</sup> become applicable to a document, the Acts will cease to apply, and the bill of sale will become spent, if after execution of the bill and before the occurrence of an avoiding event the grantee either perfects his title in some other manner, as by exercising a right to take possession of the chattels<sup>3</sup> or by taking a new and valid bill<sup>4</sup>, or exercises a right to dispose of the chattels<sup>5</sup>.

The requirement that the seizure or sale must be in pursuance of a right to seize or sell sets a limit on the extent to which the grantee, by taking possession or realising his security, can avoid the adverse consequences resulting from the invalidity of the bill he has taken. In this respect, there is an important distinction between an absolute bill and a security bill<sup>6</sup>.

Apart from the statutory provision relating to successive bills<sup>7</sup>, an absolute bill is never rendered void against the grantor for non-compliance with the Bills of Sale Act 1878<sup>8</sup>. The sole consequence of infringement is that the bill is rendered void against a very limited class of third parties<sup>9</sup>. It follows that the grantee of an absolute bill is entitled, as against the grantor, to exercise a right of seizure or sale conferred by the bill, even if it is not registered or otherwise fails to comply with the Bills of Sale Act 1878; and the perfection of his title in this way will be effective against everyone other than a person who, at the time of seizure or sale, was a member of the class of third parties against whom the bill is rendered void through contravention of the Act<sup>10</sup>.

As regards security bills, the position is somewhat different, because: (1) the breach of certain of the statutory provisions renders the bill void, either as to the security or as a whole, even against the grantor, with the result that any right of possession or sale which might otherwise have been exercisable under the bill is nullified<sup>11</sup>, and any purported sale by the grantee is ineffective because he has no title to convey<sup>12</sup>; and (2) even where the statutory provision infringed avoids the bill only against third parties and not against the grantor, such avoidance is not limited, as in the case of absolute bills, to a restricted category of third parties but extends to all persons other than the grantor.

The taking of a new bill in place of a prior bill renders the prior bill spent, and avoids the consequences of its invalidity, provided that the new bill is not given within seven days of the old bill<sup>13</sup> and that, in the case of a security bill, the consideration is openly stated as the discharge of a prior invalid bill<sup>14</sup>.

1 See PARA 1633.

2 le the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

3 *Re Tooth, Trustee v Tooth* [1934] Ch 616; and see PARA 1788. A similar principle protects vesting clauses in building contracts against attack under the Bills of Sale Acts: see PARA 1649.

4 *Carrard v Meek* (1880) 50 LJQB 187; *Wilson v Watherspoon* (1881) 71 LT Jo 230; and see *Re Tweedale, ex p Tweedale* [1892] 2 QB 216, DC.

5 *Antoniadi v Smith* [1901] 2 KB 589, CA; *Hall v Smith* (1887) 3 TLR 805, CA; *Hay v Nathan* (1886) 3 TLR 11, CA; *Cookson v Swire* (1884) 9 App Cas 653, HL. The decision in *Karet v Kosher Meat Supply Association Ltd* (1877) 2 QBD 361, where the grantee of an absolute bill assigned his rights under the bill before it was registered, and the goods comprised in it, and the assignee's title was held to be defeated by non-renewal of the original bill, is to be explained on the basis that the correct ground of invalidity of the assignee's title was not non-renewal of the original bill but failure of the assignee to register the assignment itself as a bill of sale: see *Antoniadi v Smith* above at 594-595 per Stirling J; *Cookson v Swire* (1884) 9 App Cas 653 at 663, HL, per Earl of Selborne LC. Earlier cases such as *Chapman v Knight* (1880) 5 CPD 308 and *Re Walden, ex p Odell* (1878) 10 ChD 76, CA (in which it appears to have been overlooked that as the law then stood non-registration of a bill of sale, whether absolute or by way of security, did not affect the title of the grantee except as against one of the classes of person mentioned in the Bills of Sale Act 1878 s 8 (see PARA 1849)) must be reconsidered in the light of these later decisions. See also *Hopkins v Gudgeon* [1906] 1 KB 690, DC. However, under the Bills of Sale Act (1878) Amendment Act 1882, non-registration of a security bill avoids the security even as against the grantor: see s 9; and the text and note 11. The transfer or assignment of a registered bill does not itself require to be registered as a bill of sale (Bills of Sale Act 1878 s 10 (see also PARA 1842)), and registration of the original bill does not have to be renewed by reason only of such transfer (s 11); however, the position is otherwise if the instrument of transfer goes beyond a mere assignment or if the grantee, instead of assigning the bill, exercises a right to sell the goods (see PARA 1791).

6 As to absolute and security bills see PARA 1631.

7 See the Bills of Sale Act 1878 s 9; and PARA 1755.

8 le the Bills of Sale Act 1878.

9 le the grantor's trustee in bankruptcy or liquidator, execution creditors and sheriffs or bailiffs levying execution on their behalf: see the Bills of Sale Act 1878 s 8; and PARAS 1849-1850. However the apparently limited impact of s 8 is somewhat expanded by s 10, which has been construed by the courts as giving a registered bill priority over a previous unregistered bill even though the grantee of the later bill is not, as such, within the classes of person protected by s 8: see PARA 1800.

10 *Cookson v Swire* (1884) 9 App Cas 653 at 662-664, HL, per Earl of Selborne LC, and at 666-667, 669, per Lord Blackburn; *Antoniadi v Smith* [1901] 2 KB 589 at 593, CA, per Vaughan Williams LJ. But see note 9.

11 *Kent v Parer* [1922] VLR 32, Vict FC; *Griffin v Union Deposit Bank* (1887) 3 TLR 608; *Re Townsend, ex p Parsons* (1886) 16 QBD 532 at 542-543, 547, CA. However, the position is otherwise if the grantee of the void bill can show that he took possession pursuant to some subsequent and distinct oral agreement: *Re Townsend, ex p Parsons* at 542-543, 547.

12 It is otherwise if the grantee acquired a title independently of the void bill, as by a subsequent effective transfer or the taking of a valid new bill (see the text and notes 13-14), or if the grantor expressly or by conduct adopted the sale (see *Wallis v Sayer* [1890] WN 120, DC, where on the facts it was held that the grantor had not affirmed the sale).

13 Unless for the purpose of correcting some material error: see the Bills of Sale Act 1878 s 9; and PARA 1755. The new bill will not, of course, be effective if title has meanwhile been acquired by a third party: see the cases cited in note 10.

14 *Bouchette v Consolidated Credit and Mortgage Corp'n Ltd* (1889) 5 TLR 653. See PARA 1704 note 13.

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## 1635. Future goods.



Despite certain dicta to the contrary<sup>1</sup>, after-acquired chattels have rightly been held to constitute personal chattels for the purpose of the Bills of Sale Acts<sup>2</sup> even if they are not merely not owned by the grantor at the date of the bill of sale but are not then in existence; and a document purporting to assign future chattels is, it is thought, a bill of sale governed by the Acts even if not embracing any existing goods at all<sup>3</sup>. This was not the case under the Bills of Sale Act 1854, under which a document assigning future goods was held not to constitute an assurance of goods capable of complete transfer by delivery<sup>4</sup>. However, the Bills of Sale Act 1878, in order to catch agreements conferring a right in equity over after-acquired goods<sup>5</sup>, added a third limb to the statutory definition of 'bill of sale'<sup>6</sup>. Moreover, that Act has to be read with the Bills of Sale Act (1878) Amendment Act 1882<sup>7</sup>, which was designed not only to safeguard borrowers but also to protect creditors against various forms of abuse, of which the most strongly criticised was the after-acquired property clause in bills of sale<sup>8</sup>; and it is not to be supposed that the Bills of Sale Act (1878) Amendment Act 1882, when rendering void against third parties security given over after-acquired chattels, intended that documents confined to such chattels should be outside the scope of the Acts altogether<sup>9</sup>.

1 *Thomas v Kelly* (1888) 13 App Cas 506 at 521, HL, per Lord Macnaghten; contra Lord Fitzgerald at 514, 517; and see *R v Greig* [1931] VLR 413 at 440 per Cussen ACJ, Vict FC, pointing out that Lord Macnaghten's judgment in *Thomas v Kelly* concentrated on the phrase 'capable of complete transfer by delivery' but made no mention of the third limb added by the Bills of Sale Act 1878 to the definition of 'bill of sale' (see PARA 1638). See also *Re Reis, ex p Clough* [1904] 2 KB 769 at 788, CA, per Vaughan Williams LJ; *Re Grezzana, Painter v Short* (1932) 4 ABC 216.

2 *Welsh Development Agency v Export Finance Co Ltd* [1991] BCLC 936 [1990] BCC 393 (revsd as to the effect of the agreement [1992] BCLC 148, [1992] BCC 270, CA), disapproving Lord Macnaghten's dictum in *Thomas v Kelly* (1888) 13 App Cas 506 at 521 (see note 1). As to personal chattels see PARA 1662 et seq.

3 See *Re Reis, ex p Clough* [1904] 2 KB 769 at 788, CA, per Vaughan Williams LJ; *Re Standard Manufacturing Co* [1891] 1 Ch 627 at 645, CA, per Bowen LJ. See also PARAS 1662-1665. In Australia, the bills of sale legislation has been held inapplicable to after-acquired property, but the decisions to this effect make it clear that this is because the enactments in question differed from the English Acts in vital respects, as by (1) retaining the definition of 'bill of sale' which featured in the Bills of Sale Act 1854 (repealed) without the third limb added by the Bills of Sale Act 1878; and (2) not having any requirement corresponding to that in the Bills of Sale Act (1878) Amendment Act 1882 s 5 (see PARA 1697) that the grantor must be the true owner at the date of the bill and that the goods must be specifically described: see *R v Greig* [1931] VLR 413, Vict FC; *Re Grezzana, Painter v Short* (1932) 4 ABC 216; *Malick v Lloyd* (1913) 16 CLR 483, Aust HC; *Bank of Victoria Ltd v Langlands Foundry Co Ltd* (1898) 24 VLR 230, Vict FC; *Akron Tyre Co Pty Ltd v Kittson* (1951) 82 CLR 477, Aust HC.

4 *Brantom v Griffiths* (1877) 2 CPD 212, CA; affg (1876) 1 CPD 349.

5 Ie under the rule in *Holroyd v Marshall* (1862) 10 HL Cas 191. See also PARA 1623. The rule is based on the equitable principle that equity looks on that as done which ought to be done: see **EQUITY** vol 16(2) (Reissue) PARA 561. For the position where the assignment takes effect at law and not in equity see PARA 1699 note 3.

6 See *R v Greig* [1931] VLR 413 at 440 per Cussen ACJ, Vict FC; and PARA 1638.

7 Ie the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

8 The provisions of the Bill leading to the Bills of Sale Act (1878) Amendment Act 1882 were the subject of a Report from the Select Committee of the House of Commons, which devoted much of its attention to after-acquired property clauses in such bills that had the effect of depriving creditors of their claims against the apparent assets of the grantor upon his bankruptcy.

9 Otherwise the Acts could be readily evaded, both as to stock-in-trade and other types of property, by the taking of a bill shortly before the grantor had acquired ownership of the assets in question.

Two difficult decisions are *Re Thynne, Thynne v Grey* [1911] 1 Ch 282 and *Re Tritton, ex p Singleton* (1889) 61 LT 301, in both of which it was held that an assignment of an executory interest in chattels bequeathed subject to a prior life interest created by the will was outside the Acts because such an interest was not a chose in possession but a mere chose in action and thus excluded from the statutory definition of personal chattels. If these decisions were correct, the principles enunciated would not be confined to executory interests arising in this way but would extend to all chattels of which the grantor was not the owner at the date of the bill, thus

rendering the Bills of Sale Act (1878) Amendment Act 1882 s 5 (see PARA 1697) entirely nugatory. Indeed, such an approach would mean that s 5, which speaks of personal chattels not owned by the grantor at the date of the bill, would be a contradiction in terms, since lack of ownership would, on the reasoning of the above cases, prevent the subject matter of the bill from constituting personal chattels. The fallacy of the decisions lies in their failure to recognise that, whilst the assignment of an executory interest may be an immediate transfer of a chose in action, in the sense of a right to obtain judicial protection of the executory interest even before it has vested (*Re Swan, Witham v Swan* [1915] 1 Ch 829), it is also a future assignment of personal chattels as choses in possession, and thus falls within the third limb of the statutory definition of 'bill of sale' (see PARA 1638), which otherwise would be deprived of significance.

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### 1636. Territorial application of the Acts.

The Bills of Sale Acts do not extend to Scotland or Northern Ireland<sup>1</sup>, and thus do not form part of the law of either of those countries. It does not follow from this that, as a matter of English law, the Acts are confined to transactions in England, but the Bills of Sale Act 1882 expressly excludes bills of sale of goods in foreign parts or at sea<sup>2</sup>, and for this purpose Scotland and Northern Ireland are considered 'foreign parts', so that a bill of sale given in England over goods in Scotland or Northern Ireland is not affected by the Acts<sup>3</sup>.

Whether the Acts apply where a foreign element other than the location of the goods is concerned, as where a bill of sale is executed in a foreign country over goods situated in England, appears never to have been decided. The answer to this question depends on whether the Acts are to be interpreted as confined to bills of sale governed by English law. If they are so confined, the applicability of English law would fall to be determined by conflict of laws principles<sup>4</sup>, but as the Acts were enacted for the purpose of preventing frauds on creditors and protecting grantors of security bills against oppression, their provisions would, it is thought, be regarded by an English court as mandatory in character, so as to be applicable to a bill of sale over goods situated in England regardless of the applicable law and of any choice of law clause in the bill of sale purporting to select a foreign law to govern the transaction<sup>5</sup>. Quite independently of this principle (which applies even if the selection of foreign law is made in good faith and not for the purpose of evasion) an English court would be unlikely to give effect to a choice of law clause selecting a foreign legal system for the sole or primary purpose of evading the Bills of Sale Acts<sup>6</sup>.

1 Bills of Sale Act 1878 s 24; Bills of Sale Act (1878) Amendment Act 1882 s 18. As to the position of Northern Ireland see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 67 et seq. Scots law does not in principle recognise non-possessory chattel mortgages.

2 Bills of Sale Act 1878 s 4.

3 *Coote v Jecks* (1872) LR 13 Eq 597 (the word 'not' in the penultimate line at the foot of p 600 of this report appears to be an error), 41 LJCh 599; *Brookes v Harrison* (1880) 6 LR Ir 85 (affd 6 LR Ir 332, CA). It is thought that this construction of the words 'foreign parts' in the Bills of Sale Act 1878 s 4 continues to be valid despite the provision in the Ireland Act 1949 s 2 that for the purpose of any enactment in force in any part of the United Kingdom the Republic of Ireland is not a foreign country (see further **COMMONWEALTH**).

4 In general, the transfer of tangible movables is governed by the *lex situs*, that is, the law of the state in which the movables in question are situated at the time of the transfer: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 405. In the case of a security bill, the fact that the bill is executed abroad would not by itself render the Acts inapplicable, because the Bills of Sale Act (1878) Amendment Act 1882 s 8 provides a special time limit for registration of security bills executed out of England (see PARA 1759). This provision would seem to indicate that in relation to all bills of sale, whether or not by way of security, Parliament did not contemplate execution abroad as being a foreign element that would by itself displace the application of the Acts. For the conflict of

laws rules governing the contractual aspect of bills of sale see the Contracts (Applicable Law) Act 1990, giving effect to the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 349 et seq.

5 See *English v Donnelly* 1958 SC 494, Ct of Sess; *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, [1939] 1 All ER 513, PC. No foreign element other than the location of the goods at the time of execution of the bill appears to be relevant, because the Acts are expressed to be inapplicable to bills of sale of goods in foreign parts or at sea (see the text to note 2), and, if the goods are situated in England, the mandatory character of the provisions would bring the bill within the Acts regardless of any foreign element in the transaction. As under conflict of laws rules the efficacy of a bill of sale would ordinarily be determined by the *lex situs* in any event, the only effect of the mandatory character of the legislation would be to displace a choice of law clause in the bill itself. See generally **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 405 et seq.

6 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, [1939] 1 All ER 513, PC.

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### **1637. Effect of choice of English law where otherwise inapplicable.**

The converse question to that examined in the previous paragraph is whether a written chattel mortgage which would otherwise fall outside the Bills of Sale Acts<sup>1</sup> because of the foreign element involved (for example, location of the goods abroad) becomes subject to the Acts because the mortgage is expressed to be governed by English law. By parity of reasoning this would seem not to be the case. Just as the scope of the Acts as mandatory statutes cannot be narrowed by choosing foreign law, so also it cannot be expanded by designating English law as the foreign law. The reach of the Acts depends in every case on the interpretation of the legislation itself. Thus as the Acts do not apply to bills of sale relating to goods situated abroad<sup>2</sup> the choice of English law to govern a bill of sale comprising goods so situated will not by itself render the Acts applicable. Moreover, it is not competent to parties to contract into legislative provisions dealing with issues that could not effectively have been regulated by express terms of the contract, for example, the statutory machinery for registration of bills of sale and the provisions relating to priority of bills and avoidance of a bill of sale against third parties.

1 I.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 See PARA 1636.

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## **(2) DEFINITIONS COMMON TO SECURITY AND ABSOLUTE BILLS**

### **(i) Meaning of 'Bill of Sale'**

#### **1638. Statutory definition.**

The term 'bill of sale' is defined at length in the Bills of Sale Act 1878<sup>1</sup>, and this definition is extended to cover instruments giving powers of distress<sup>2</sup>.

The Bills of Sale Act 1878 declares that the expression 'bill of sale', unless there is something in the subject or context repugnant to such construction, includes bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels<sup>3</sup>, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred<sup>4</sup>.

This definition<sup>5</sup> divides bills of sale into three broad categories, namely: (1) instruments transferring legal or beneficial ownership of personal chattels; (2) instruments conferring a right to take possession of personal chattels as security for any debt<sup>6</sup>; and (3) agreements by which a right in equity to any personal chattels, or to any charge or security thereon, is to be conferred. The first two categories correspond to those originally provided in the Bills of Sale Act 1854<sup>7</sup>, and decisions on that Act are therefore relevant to determine whether a document is a bill of sale within either of these two limbs of the Bills of Sale Act 1878. The third limb of the definition in the Bills of Sale Act 1878 was new and was evidently intended to catch documents containing an assignment of future goods which would vest in the assignee in equity<sup>8</sup> upon acquisition by the assignor<sup>9</sup>. The addition of this third limb therefore significantly extends the meaning of the term 'bill of sale' beyond that which it bore under the Bills of Sale Act 1854<sup>10</sup>. It is, however, restricted to agreements conferring a right in equity, and thus does not embrace documents under which the vesting of future property does not arise automatically on acquisition by the assignor but is dependent on some new act by him after acquisition; for the effect of such act is to vest the goods in the assignor at law, and not merely in equity<sup>11</sup>.

1 See the Bills of Sale Act 1878 s 4. The statutory definition of 'bills of sale' only extends to documents: see PARAS 1639-1640. As to the documents which are expressly excluded from the definition see PARA 1656 et seq.

2 See the Bills of Sale Act 1878 s 6; and PARA 1652.

3 Bills of Sale Act 1878 s 4. The meaning of 'personal chattels' is discussed at PARA 1662 et seq. Only transfers inter vivos are within the definition. Chattels bequeathed by will do not thereby vest in the legatee on the death of the testator but, like other property of the testator, pass to the testator's personal representatives by operation of law: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 335.

4 Bills of Sale Act 1878 s 4. Certain of the constituent elements of this definition are considered in PARA 1639 et seq. The term 'bill of sale' has the same meaning in the Bills of Sale Act (1878) Amendment Act 1882, save for one important qualification, namely, that the latter Act does not apply to bills of sale given otherwise than by way of security for the payment of money: Bills of Sale Act (1878) Amendment Act 1882 s 3.

5 The constituent parts of the definition are analysed in turn in PARA 1642 et seq.

6 A mere licence to seize otherwise than as security for a debt is outside this limb of the definition. It is for this reason, inter alia, that vesting clauses in building contracts do not normally attract the operation of the Bills of Sale Acts: see PARA 1649.

7 The Bills of Sale Act 1854 was repealed by the Bills of Sale Act 1878 s 23, and was replaced by that Act: see PARA 1630.

8 I.e. under the rule in *Holroyd v Marshall* (1862) 10 HL Cas 191: see PARA 1635.

9 See *R v Greig* [1931] VLR 413 at 440 per Cussen ACJ, Vict FC; and the other cases cited in PARA 1635 note 3.

10 *R v Greig* [1931] VLR 413, Vict FC. It would also appear to enlarge the effect of the Bills of Sale Act 1878 s 3 (see PARA 1633) to cover cases where the power of seizure is exercisable only by a receiver, as in the case of a charge. See PARAS 1633 note 7, 1651 note 4. As to vesting at law see PARAS 1649, 1699 note 3.

11 *Reeves v Barlow* (1884) 12 QBD 436, CA. For the common law rules, under which the vesting of the property takes place at law and is not dependent on the equitable principle enunciated in *Holroyd v Marshall* (1862) 10 HL Cas 191, see PARA 1629. This is a further reason why a vesting clause in a building contract does not make the contract a bill of sale: see PARA 1649. Similarly the definition does not extend to a document giving a mortgage or charge over future growing crops on land owned by the grantor at the date of execution of the document: see PARA 1699 note 3. Certain instruments falling within the statutory definition of 'bill of sale' are not capable of being reduced to the statutory form and therefore cannot be used: see PARA 1711.

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### 1639. Oral transactions.

The Bills of Sale Acts<sup>1</sup> affect documents, not transactions, and leave unimpeached titles or rights acquired by oral contract or transfer completed without writing<sup>2</sup>. They do not require that any transaction be put into writing<sup>3</sup>, but they do require that if a transaction is reduced to writing constituting a bill of sale of personal chattels within the statutory definition, the document must be registered<sup>4</sup>.

If the bargain between the parties is complete without any writing, so that the property intended to be dealt with passes independently, the Acts have no application to a document which merely refers to or confirms the transaction<sup>5</sup>; and the fact that such a document is drawn up without being registered does not invalidate the transaction<sup>6</sup>. The test is whether the grantee can establish his rights over the goods solely by reliance on the oral agreement. If he can, the Acts do not apply to the subsequent written document. If, however, the grantee cannot establish his title without putting the document in evidence<sup>7</sup> or if the document varies or enlarges the rights of the parties under the oral contract<sup>8</sup>, the Acts will apply to it.

1 *Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.*

2 *North Central Wagon Co v Manchester, Sheffield and Lincolnshire Rly Co* (1887) 35 ChD 191, CA (affd (1888) 13 App Cas 554, HL); *Newlove v Shrewsbury* (1888) 21 QBD 41, CA. See also PARA 1633 note 2.

3 Other rules of law may, however, bear on the validity of oral transactions. Thus a gift of chattels made otherwise than by declaration of trust and unaccompanied by the delivery of possession is ineffective unless made by deed: *Re Cole (a bankrupt), ex p Trustee of the Property of the Bankrupt* [1964] Ch 175, [1963] 3 All ER 433, CA; *Re Kirkland* (1964) 108 Sol Jo 197, CA. See further PARA 1852. A mortgage of goods securing an agreement which is a regulated agreement within the Consumer Credit Act 1974 need not itself be in writing but must be embodied in the required written agreement (ie referred to in it: s 189(4)) and the agreement must describe the security: see the Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, regs 2, 3(7); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 162, 164. As to regulated agreements under the Consumer Credit Act 1974 see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 79, 157 et seq.

4 *United Forty Pound Loan Club v Bexton* [1891] 1 QB 28n, DC; *Newlove v Shrewsbury* (1888) 21 QBD 41, CA. As to personal chattels see PARA 1662 et seq. As to the registration of documents see PARA 1754 et seq.

5 *Ramsay v Margrett* [1894] 2 QB 18 at 23, CA, per Lord Esher MR. Thus the existence of a document which does not express, or which is not intended to express, the real agreement between the parties does not necessarily exclude proof of title under an independent oral contract: see *Newlove v Shrewsbury* (1881) 21 QBD 41, CA, where proof of an oral transfer as security was not excluded by the existence of a written receipt as on sale; and *Parker v Lyon* (1888) 5 TLR 10, CA, where an oral grant of a lien for purchase money, paid on a sale by deed, was upheld. See also note 6.

6 Thus a written notification of assignment to a bank, sent by the assignor through the bank to auctioneers then in possession of the goods for the purpose of sale, was held not to be within the Bills of Sale Acts: *London and Yorkshire Bank Ltd v White* (1895) 11 TLR 570. See also *Parker v Lyon* (1888) 5 TLR 10, CA, where it was held that though a deed of 'sale' was in reality a mortgage and void for non-compliance with the Bills of Sale

Acts, a subsequent agreement to rescind the 'sale' and to give the 'purchaser' (ie the mortgagee) a lien to secure repayment of the advances created a possessory right independent of the original deed, and was thus unaffected by the Bills of Sale Acts.

7 *Haydon v Brown* (1888) 59 LT 810, CA.

8 *Charlesworth v Mills* [1892] AC 231 at 239, HL, per Lord Halsbury LC. See also *Prudential Mortgage Co v Marylebone Borough Council* (1910) 8 LGR 901.

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### **1640. Pledges.**

The Bills of Sale Acts<sup>1</sup> apply to documents, not to transactions. It follows that where, as will usually be the case, a pledge comes into existence independently of any document, as where the debtor physically delivers the goods to the creditor or orally attorns to him, the Acts will not apply, even where a document later comes into existence which refers to the pledge or its terms<sup>2</sup>. Whether an antecedent agreement in writing recording an intention to create a pledge is a bill of sale depends upon whether it binds the debtor to give possession of the goods to the creditor, in which case it falls within the statutory definition as a licence to seize<sup>3</sup>, or whether (as is more usual) the delivery of possession is voluntary and is merely a non-promissory condition of the creditor's willingness to make the advance, in which case the agreement is not a bill of sale, for it confers no licence to seize or any other rights in the goods (the pledge itself being dependent on delivery of possession) and the creditor's possession derives from delivery, not from the document<sup>4</sup>. Similarly, a mandate to hold and sell goods which is intended to operate only after possession has actually been transferred is not a bill of sale<sup>5</sup>.

The position is otherwise where the pledge is effected by way of constructive delivery through the debtor's written attornment<sup>6</sup> or where, though created orally, it is subsequently recorded in a written agreement between debtor and creditor which supersedes or varies the prior oral contract so as to become, wholly or in part, the source of the creditor's rights over the goods<sup>7</sup>. In the first case the pledge derives from the document from the beginning; in the second, the pledgee's rights over the goods, though initially based on an oral agreement, become subject, wholly or in part, to a written agreement. In both cases the document is registrable as a bill of sale unless falling within one of the statutory exclusions.

It would seem that a written attornment given not by the debtor himself but by a third party in possession of the goods, for example as carrier or warehouseman, is not a bill of sale, for the third party may have attorned without the debtor's authority and even if he acted with authority there could be no pledge in the absence of agreement between debtor and creditor. Such an agreement does not of itself constitute a bill of sale, for the reasons stated above, and the courts have refused to treat a combination of a written agreement for a pledge between debtor and creditor and a written attornment by a third party as together constituting a bill of sale<sup>8</sup>.

1 ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690, CA; *Charlesworth v Mills* [1892] AC 231, HL; *Wilkinson v Girard Frères* (1891) 7 TLR 266; *Re Cunningham & Co Ltd, Attenborough's Case* (1884) 28 ChD 682; *Re Hall, ex p Close* (1884) 14 QBD 386. Cf *Re David Allester Ltd* [1922] 2 Ch 211; *Wrightson v McArthur and Hutchisons (1919) Ltd* [1921] 2 KB 807.

3 *Re Townsend, ex p Parsons* (1886) 16 QBD 532, CA; *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690 at 697, CA, per Lord Esher MR, and at 700 per Bowen LJ.

4 *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690 at 696-697, CA, per Lord Esher MR.

5 *Charlesworth v Mills* [1892] AC 231, HL; *Morris v Delobbel-Flipo* [1892] 2 Ch 352.

6 *Dublin City Distillery Ltd v Doherty* [1914] AC 823, HL, where on the facts it was held there was no effective attornment.

7 See *Morris v Delobbel-Flipo* [1892] 2 Ch 352 at 355 per Stirling J; *Wrightson v McArthur and Hutchisons (1919) Ltd* [1921] 2 KB 807 at 814 per Rowlatt J.

8 *Re Hall, ex p Close* (1884) 14 QBD 386, cited with approval in *Dublin City Distillery Ltd v Doherty* [1914] AC 823, HL.

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#### **1641. Substance of the transaction.**

Parties are entitled to carry out a transaction in a manner which does not attract the operation of the Bills of Sale Acts<sup>1</sup>, and, if the documents employed are not on their face documents of a character bringing them within the scope of the Acts and they genuinely record the agreement reached between the parties, the court will enforce the documents according to their terms, even if the avowed intention of the parties was to avoid the Acts<sup>2</sup>. However, the court looks at the substance of the transaction and is entitled to go behind the documents if not satisfied of their veracity, and where it appears that these were sham documents intended to cloak the true nature of a transaction that would bring them within the Acts, then the Acts will apply to them<sup>3</sup>. Thus, if what is in reality a loan on the security of goods is dressed up as a sale and letting back on hire-purchase or a sale and repurchase under reservation of title, the documents will be treated as a security bill of sale<sup>4</sup>. The same applies where, though the documents genuinely record the intention of the parties, the transaction is incapable of taking effect as a sale and supply back and is in substance a mortgage<sup>5</sup>.

1 The Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 *British Railway Traffic and Electric Co v Kahn* [1921] WN 52; *Victoria Dairy Co v West* (1895) 11 TLR 233, DC. Cf *Yorkshire Railway Wagon Co v Maclure* (1882) 21 ChD 309, CA (whether sale and hiring back constituted a loan transaction ultra vires the company).

3 *Re Watson, ex p Official Receiver in Bankruptcy* (1890) 25 QBD 27; *Madell v Thomas & Co* [1891] 1 QB 230, CA; *Re Lovegrove, ex p Lovegrove & Co (Sales) Ltd* [1935] Ch 464 at 495-496, CA, per Maugham LJ; *Polisky v S and A Services, S and A Services v Polisky* [1951] 1 All ER 185 at 189 (affd [1951] 1 All ER 1062n, CA); *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 QB 747, [1966] 2 All ER 414, CA.

4 See the cases cited in note 3; and PARA 1692.

5 See PARA 1692 et seq.

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### **1642. 'Bills of sale'.**

The opening words of the definition of 'bill of sale'<sup>1</sup> state, somewhat unhelpfully, that this expression includes 'bills of sale', which evidently means instruments in the form of a bill of sale<sup>2</sup> by which the property in goods is transferred<sup>3</sup>.

1 See the Bills of Sale Act 1878 s 4; and PARA 1638. As to the documents which are expressly excluded from the statutory definition of 'bill of sale' see PARA 1656 et seq.

2 As opposed to 'transfers', which produce the same effect but are not in the form of a bill of sale: see PARA 1643.

3 See *Allsopp v Day* (1861) 7 H & N 457; and PARA 1620.

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### **1643. 'Assignments', 'transfers' and 'declarations of trust'.**

The expressions 'assignments' and 'transfers' appear to mean the same thing.

'Transfers' are instruments which, though not in form bills of sale, purport to transfer the property in goods as a bill of sale would do<sup>1</sup>. An agreement for the transfer or assignment of goods is normally effective as a transfer or assignment in equity and if in writing constitutes a bill of sale<sup>2</sup>. However, an agreement by which the document is to operate and the property in the goods is to pass only on the occurrence of some external act, such as the delivery of possession or the bringing of goods on to land, is not even an equitable assignment but a mere contract<sup>3</sup> and is therefore not within this, or indeed any other, limb of the statutory definition.

A 'declaration of trust' of goods is a statement by one party that he holds the goods on trust for another. The effect is that whilst the legal title remains in the trustee, beneficial ownership passes to the designated beneficiary. Declarations of trust of chattels may be made orally<sup>4</sup>, in which case they will not be within the Bills of Sale Acts<sup>5</sup>. If, however, the trust is reduced to writing the Bills of Sale Acts will apply to it unless it falls within one of the categories excluded from the statutory definition<sup>6</sup> or the grantee's rights over the goods stem from a prior, independent pledge<sup>7</sup>.

1 *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690 at 696, CA, per Lord Esher MR.

2 *Re Jeavons, ex p Mackay, ex p Brown* (1873) 8 Ch App 643; *Edwards v Edwards* (1876) 2 ChD 291 at 297, CA, per Mellish LJ. An agreement to give a bill of sale is not in accordance with the statutory form (see PARA 1711), which embodies an actual transfer. See further PARA 1651. The impossibility of drawing an agreement for a bill of sale to conform to the statutory form does not mean that such an agreement is taken outside the Bills of Sale Acts but has the effect that it is void.

3 *Reeves v Barlow* (1884) 12 QBD 436 at 442, CA, per Bowen LJ. Hence in *Brown v Bateman* (1876) LR 2 CP 272 and *Re Garrud, ex p Newitt* (1880) 16 ChD 522, CA, the party attacking the instrument as a bill of sale did not attempt to argue that it was an assignment but sought to bring it within the phrase 'other assurances', which the court rejected, holding that this latter expression had to be construed ejusdem generis with the



preceding words 'assignments, transfers, declarations of trust without transfer' in the Bills of Sale Act 1854 s 7 (now the Bills of Sale Act 1878 s 4: see PARA 1638). As to 'other assurances' see PARA 1645. As to the documents which are expressly excluded from the statutory definition of 'bill of sale' see PARA 1656 et seq.

4 *Benbow v Townsend* (1833) 1 My & K 506. See **TRUSTS** vol 48 (2007 Reissue) PARA 644.

5 See PARA 1639. As to the Bills of Sale Acts see PARA 1630.

6 See the Bills of Sale Act 1878 s 4; and PARA 1656 et seq.

7 See PARAS 1625, 1627, 1680.

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#### **1644. 'Inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods'.**

The expression 'bill of sale' includes 'inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels'<sup>1</sup>. The controlling words are 'other assurances of personal chattels', and inventories and receipts do not come within the Bills of Sale Acts unless they are assurances on which the title claimed depends<sup>2</sup>. In other words, the inventory or receipt is not a bill of sale unless it is intended to be part of the bargain to pass the property in the goods<sup>3</sup>.

It is questionable whether an invoice and receipt given as separate instruments and not intended to be operative in connection with each other can be regarded as an inventory of goods with receipt thereto attached<sup>4</sup>. But an inventory and receipt may be as solemn an assurance as a deed<sup>5</sup> and, if embodying and intended to embody the terms of the contract, an inventory and receipt, or a receipt alone, may be a bill of sale<sup>6</sup>.

Where, however, there is a complete and effectual oral contract of sale or charge, enforceable without the need to rely on any document, an instrument of the kind mentioned, though drawn up contemporaneously with the transaction, will not affect the parties' rights so as to require registration as a bill of sale<sup>7</sup>. Thus, where goods are bought by oral contract and paid for, the buyer stipulating that a receipt shall be drawn up by a solicitor, the buyer's title is complete even though afterwards the seller gives a receipt in the form of an assurance<sup>8</sup>.

1 See the Bills of Sale Act 1878 s 4; and PARA 1638. As to the documents which are expressly excluded from the statutory definition of 'bill of sale' see PARA 1656 et seq. As to personal chattels see PARA 1662 et seq.

2 *Manchester, Sheffield and Lincolnshire Rly Co v North Central Wagon Co* (1888) 13 App Cas 554 at 569, HL, per Lord Macnaghten; *Prudential Mortgage Co v Marylebone Borough Council* (1910) 8 LGR 901.

3 *Ramsay v Margrett* [1894] 2 QB 18 at 23-24, CA, per Lord Esher MR.

4 *Manchester, Sheffield and Lincolnshire Rly Co v North Central Wagon Co* (1888) 13 App Cas 554 at 568-569, HL, per Lord Macnaghten.

5 *Re Baum, ex p Cooper* (1878) 10 ChD 313, CA.

6 *Re Hood, ex p Burgess* (1893) 42 WR 23, CA, where a receipt by the sheriff on a private sale by order of the court, containing the terms on which the sheriff sold, was held to be a bill of sale, there being no sale independently of the receipt.

7 *Ramsey v Margrett* [1894] 2 QB 18, CA. In the following cases inventories and receipts, or receipts alone, were held not to be assurances or bills of sale: *Allsop v Day* (1861) 7 H & N 457; *Byerley v Prevost* (1871) LR 6 CP 144 (receipts); *Graham v Wilcockson* (1876) 46 LJQB 55 (receipt with memorandum); *Woodgate v Godfrey* (1879) 5 ExD 24, CA; *Marsden v Meadows* (1881) 7 QBD 80, CA (receipts and inventories on sales by sheriff); *Haydon v Brown* (1888) 59 LT 810, CA (the like, including goods not subject to the execution); *Fox v Barnett* (1886) 2 TLR 233, CA (receipt on sale); *Parnacott v Dieudonné* (1885) 2 TLR 98 (receipt and inventory on sale by trustee in liquidation); *Preece v Gilling* (1885) 53 LT 763, DC (receipt on sale of furniture); *Manchester, Sheffield and Lincolnshire Rly Co v North Central Wagon Co* (1888) 13 App Cas 554, HL (inventory and sale on receipt of wagons); *Hay v Nathan* (1886) 3 TLR 11, CA (receipt on sale); *Shepherd v Pulbrook* (1888) 59 LT 288, CA (list and receipt, sent after agreement to sell); *Newlove v Shrewsbury* (1888) 21 QBD 41, CA (receipt given on oral contract of sale); *Jones v Tower Furnishing Co* (1889) 61 LT 84 (receipt and inventory on sale by sheriff under private contract); *Grace v Gard* (1889) 6 TLR 74, DC (inventory and memorandum on sale); *Clapham v Ives* (1904) 91 LT 69, DC (valuation, inventory and lease); *Lock v Heath* (1892) 8 TLR 295 (inventory attached to deed poll after gift); *Ramsay v Margrett* above (receipt for purchase money of goods acknowledging that the goods were the purchaser's); *Stammers v Margrett* (1905) 21 TLR 342 (inventory and receipt on sale by sheriff); *Prudential Mortgage Co v Marylebone Borough Council* (1910) 8 LGR 901 (receipt and inventory on sale of furniture, followed by lease of furniture with option to buy).

In the following cases inventories and receipts or receipts alone were held to be bills of sale: *Re Walden, ex p Odell* (1878) 10 ChD 76, CA (inventory with receipt attached); *Re Baum, ex p Cooper* (1878) 10 ChD 313, CA (inventory with receipt attached); *Re Hood, ex p Burgess* (1893) 42 WR 23, CA (receipt by the sheriff on a private sale by order of the court containing the terms on which the sheriff sold, there being no sale independent of the receipt); *Phillips v Gibbins* (1857) 29 LTOS 91 (receipt for goods sold and left in seller's possession); *Snell v Heighton* (1883) Cab & El 95 (receipt); *French v Bombardier* (1888) 60 LT 48, DC (inventory and receipt on sale under distress); *Re Lavey, ex p Trustee* [1918-19] B & CR 116 (receipt for purchase money of furniture by husband to wife); *Youngs v Youngs* [1940] 1 KB 760, [1940] 1 All ER 349, CA (receipt and inventory on sale of furniture by master to servant).

8 *Ramsay v Margrett* [1894] 2 QB 18, CA.

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### 1645. 'Other assurances'.

The words 'other assurances of personal chattels'<sup>1</sup>, which control the preceding words of the definition<sup>2</sup>, must be construed ejusdem generis with those words<sup>3</sup>. They therefore do not cover vesting clauses in a building contract<sup>4</sup>. But an express lien for unpaid purchase money, given by written agreement over goods sold and delivered to the purchaser, is an assurance within the Bills of Sale Acts<sup>5</sup>. So also a memorandum of the sale of goods in an auctioneer's book, signed by his clerk for the purchaser and by the auctioneer himself for the seller, may be an assurance within the Act requiring registration<sup>6</sup>.

An agreement by which a manufacturer, with a view to obtaining earlier payment for his goods, undertakes for the future to sell them at a discount to a sales company is not an assurance of personal chattels within the Acts, but merely regulates the terms on which goods will be sold in the future<sup>7</sup>.

The word 'assurances' would not, without more, embrace assignments of future property, since these convey nothing until the property is acquired by the grantor<sup>8</sup>. But the third limb of the statutory definition of 'bill of sale' includes such assignments so far as they take effect in equity and not at law<sup>9</sup>.

1 See the Bills of Sale Act 1878 s 4; and PARA 1638. As to the documents which are expressly excluded from the statutory definition of 'bill of sale' see PARA 1656 et seq. As to personal chattels see PARA 1662 et seq.

2 See PARA 1644.

3 *Brown v Bateman* (1867) LR 2 CP 272 at 281 per Bovill CJ.

4 See PARA 1649.

5 See the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630; and *Coburn v Collins* (1887) 35 ChD 373. It is otherwise in the case of an unpaid seller's lien arising by operation of law and not by express contract: *Re Vulcan Ironworks Co* (1888) 4 TLR 312.

6 *Re Roberts, Evans v Roberts* (1887) 36 ChD 196, where no part of the price was paid, the buyer being given six months' credit by the contract, and the whole of the goods remaining on the seller's premises and in his apparent possession.

7 *Re Lovegrove, ex p Lovegrove & Co (Sales) Ltd* [1935] Ch 464, CA.

8 See PARA 1623.

9 See the Bills of Sale Act 1878 s 4; and PARA 1638.

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#### **1646. 'Powers of attorney'.**

A power of attorney is a formal instrument by which one person, the donor of the power, confers on another, the donee, power to act on behalf of the donor in the performance of a specified act or classes of act or generally<sup>1</sup>. A power of attorney is within the Bills of Sale Acts<sup>2</sup> only where it confers the power, directly or indirectly, to take possession of personal chattels (as defined by the Acts)<sup>3</sup> as security for a debt<sup>4</sup>. If the debtor gives the creditor a power of attorney to execute a bill of sale in the name and on behalf of the debtor, the power of attorney is itself a bill of sale<sup>5</sup>, and, as the nature of the document is such that it cannot be made to accord with the statutory form for a security bill, the document is void<sup>6</sup>. The subsequent execution of a bill of sale by the grantee in the grantor's name pursuant to the purported power will therefore be nugatory<sup>7</sup>.

1 See **AGENCY** vol 2 (2008) PARAS 31-32.

2 See the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

3 See PARA 1662 et seq.

4 See the Bills of Sale Act 1878 s 4; and PARA 1638. As to the distinction between debt and damages in this connection see eg *Re Garrud, ex p Newitt* (1881) 16 ChD 522, CA. As to the documents which are expressly excluded from the statutory definition of 'bill of sale' see PARA 1656 et seq.

5 See the Bills of Sale Act 1878 s 4; and PARA 1638.

6 See under the Bills of Sale Act (1878) Amendment Act 1882 s 9; see PARA 1711.

7 In *Furnival v Hudson* [1893] 1 Ch 335, it was held that the court would not grant an injunction to restrain the execution of a bill of sale in proper form by the grantee in the name of the grantor pursuant to a power of attorney given by the latter. However, argument in that case was directed solely to the question whether a bill of sale could be executed under a power of attorney and, if so, whether the grantee could be the attorney. The court answered both questions in the affirmative, but the point was not taken that the power of attorney was itself void as constituting a bill of sale not in accordance with the statutory form. Had this point been argued, the result of the case would almost certainly have been different. As to the statutory form see PARA 1711.

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#### **1647. 'Authorities or licences to take possession'.**

Licences to take possession otherwise than as security for a debt are not bills of sale<sup>1</sup>. However, a licence or authority in writing to take possession as security for a debt is within the Bills of Sale Acts<sup>2</sup> even if the intention is to secure a future debt and no debt exists at the time when the authority or licence is given<sup>3</sup>. A licence to sell has been said to import a licence to seize<sup>4</sup>, but, if possession is given to the grantee at the time of the licence, the Acts will not apply, because they only operate in cases where the grantor remains in possession<sup>5</sup>. Hence a document recording the terms on which goods have been pledged is not within the Acts, the pledgee's power over the goods deriving from his possession, not from the document<sup>6</sup>. Similarly, a licence to the grantee to retain goods already in his possession, or to sell such goods, is not within the Acts<sup>7</sup>.

1 *Re Garrud, ex p Newitt* (1881) 16 ChD 522, CA; *Stocks v Wilson* [1913] 2 KB 235. As to licences to seize in hire-purchase agreements see PARA 1650.

2 *le the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.*

3 *Stevens v Marston* (1890) 60 LJQB 192, CA. See further PARAS 1728-1729.

4 *Johns v Ware* [1899] 1 Ch 359 at 363.

5 *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690, CA (authority to sell goods deposited by way of pledge); *Wrightson v McArthur and Hutchisons (1919) Ltd* [1921] 2 KB 807 (goods locked in two rooms, keys in possession of pledgee who had the right to remove goods as desired); and see PARA 1640.

6 The position is otherwise, of course, if the document is executed before the delivery of possession and confers a right to take possession. In such a case the Acts will apply to the document (see PARA 1640), and, if the document is void for non-compliance with the Acts, the grantee will not be able to rely on it as authorising him to seize the goods and will thus not be able to perfect his title by taking possession unless he reaches a subsequent independent agreement with the grantor empowering him to do so: see PARA 1634.

7 *Spencer v Midland Rly Co* (1895) 11 TLR 542, CA; *Lord's Trustee v Great Eastern Rly Co* [1908] 2 KB 54 at 60, CA, per Cozens-Hardy MR (revsd sub nom *Great Eastern Rly Co v Lord's Trustee* [1909] AC 109, HL, on the ground that the grantees were in possession of the goods).

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#### **1648. Licences to distrain.**

Although ordinary powers of distress in a lease are outside the Bills of Sale Acts<sup>1</sup>, the inclusion in a lease of powers of seizure going beyond what is usually provided to secure the rent payable under a lease will make the lease a bill of sale<sup>2</sup>.

1     le the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630; and see *Re Roundwood Colliery Co, Lee v Roundwood Colliery Co* [1897] 1 Ch 373, CA.

2     See PARA 1653.

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### **1649. Vesting clauses in building contracts.**

A provision in a building contract that all materials brought on to the site by the contractor shall become the property of the building owner, whether the vesting is expressed to take effect immediately or only on default by the contractor, does not make the contract a bill of sale<sup>1</sup>. It is outside the first limb of the statutory definition since it is not an 'assurance' of personal chattels<sup>2</sup>, the word 'assurances' being required to be construed ejusdem generis with the preceding words<sup>3</sup>. It is not within the second limb of the definition<sup>4</sup>, as a licence to seize, even where expressed to become operative on default by the builder and to be provided as damages or in reduction of damages payable by him on his default, for damages do not constitute a debt and the licence to seize is thus not given 'as security for a debt' within the definition<sup>5</sup>. It is outside the third limb<sup>6</sup> because the bringing of the materials onto the land constitutes a new act which vests the materials in the building owner at law, not merely in equity<sup>7</sup>.

1     *Re Garrud, ex p Newitt* (1880) 16 ChD 522, CA; *Blake v Izard* (1867) 16 WR 108; *Brown v Bateman* (1867) LR 2 CP 272. See also **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARAS 86-87.

2     As to the statutory definition see the Bills of Sale Act 1878 s 4; and PARA 1638. The definition repeats the definition in the Bills of Sale Act 1854 (repealed), apart from adding a reference to inventories and receipts. As to the documents which are expressly excluded from the statutory definition of 'bill of sale' see PARA 1656 et seq. As to personal chattels see PARA 1662 et seq.

3     *Re Garrud, ex p Newitt* (1880) 16 ChD 522, CA; *Blake v Izard* (1867) 16 WR 108; *Brown v Bateman* (1867) LR 2 CP 272.

4     See the Bills of Sale Act 1878 s 4; and PARA 1638.

5     *Re Garrud, ex p Newitt* (1880) 16 ChD 522, CA.

6     le 'an agreement by which a right in equity to any personal chattels is . . . conferred': see PARA 1638.

7     *Reeves v Barlow* (1884) 12 QBD 436, CA, distinguishing *Holroyd v Marshall* (1862) 10 HL Cas 191. See PARA 1635.

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### **1650. Licences to seize in hiring, hire-purchase and conditional sale agreements.**

The Bills of Sale Acts<sup>1</sup> are concerned with documents by which the owner of personal chattels grants to another a licence to seize them in stated events<sup>2</sup>. Hence the Acts do not apply to an ordinary hiring, hire-purchase or conditional sale agreement empowering the owner or seller of the goods to repossess them in the event of default, for in this case the licence to seize is given by the hirer or buyer, not by the owner, and merely empowers the owner to retake possession of his own property<sup>3</sup>. However, if a purported sale and hiring back is a disguised chattel mortgage, and there is no genuine hire-purchase agreement at all, the Acts will apply<sup>4</sup>.

1 The Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 *McEntire v Crossley Bros Ltd* [1895] AC 457, HL; *United Forty Pound Loan Club v Bexton* [1891] 1 QB 28n, DC; *Re Robertson, ex p Crawcour* (1878) 9 ChD 419, CA. As to personal chattels see PARA 1662 et seq.

3 See the cases in note 2. Those cases were all concerned with conditional sale agreements (though described as hire-purchase agreements), but the principle applies equally to hire-purchase agreements.

4 See PARAS 1692-1695.

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### **1651. Agreements.**

An agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels<sup>1</sup>, or to any charge or security thereon, is to be conferred is a bill of sale<sup>2</sup>. This part of the statutory definition did not feature in the Bills of Sale Act 1854 and is evidently intended to reverse decisions under that Act<sup>3</sup> to the effect that an assignment of future goods was not a bill of sale<sup>4</sup>. In consequence, such an assignment constitutes a bill of sale within the Bills of Sale Acts<sup>5</sup>, and it is to be inferred that future goods are to be considered articles capable of complete transfer by delivery so as to constitute personal chattels within the Acts, even though they would not have been so regarded for the purpose of the corresponding provision of the Bills of Sale Act 1854<sup>6</sup>.

A written agreement to give a bill of sale of existing goods was a bill of sale even under the Bills of Sale Act 1854<sup>7</sup>, which did not expressly mention this class of document, and it is within the express words of the Bills of Sale Act 1878<sup>8</sup>. Consequently such an agreement will not confer any rights over the goods unless it complies with the requirements of the Bills of Sale Acts<sup>9</sup>. However, where the agreement is given to secure a money payment, compliance with those requirements would seem impossible, as a mere agreement to transfer is not in accordance with the statutory form of a security bill, which requires an actual assignment; and failure to accord with the statutory form renders the instrument void<sup>10</sup>.

Where a written agreement to give a bill of sale is void for want of registration or compliance with the statutory form, it cannot form the basis of an action for specific performance, and any power of attorney which the agreement purports to confer, whether on the grantee or on anyone else, to execute a bill of sale in the name of the grantor is of no effect<sup>11</sup>.

An oral agreement to give a bill of sale is not within the Bills of Sale Acts<sup>12</sup>, nor is an agreement pursuant to which after-acquired property vests at law, and not merely in equity<sup>13</sup>.

1 As to personal chattels see PARA 1662 et seq.

2 See the Bills of Sale Act 1878 s 4; and PARA 1638. An agreement for a bill of sale is not in accordance with the statutory form, which embodies a completed transfer, and is therefore void: see the text and notes 3-13; and PARA 1711. As to the documents which are expressly excluded from the statutory definition of 'bill of sale' see PARA 1656 et seq.

3 Eg *Brantom v Griffiths* (1877) 2 CPD 212, CA; affg (1876) 1 CPD 349.

4 See *R v Greig* [1931] VLR 413 at 440 per Cussen ACJ, Vict FC; and see PARA 1635. The new words added by the Bills of Sale Act 1878 would have no significance if construed to refer only to agreements to assign existing goods, as these were within the scope of the earlier legislation. The reference to agreements by which a right to a charge is conferred must also be taken to enlarge the meaning of 'power . . . to seize' in the Bills of Sale Act 1878 s 3; see PARA 1633.

5 le the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

6 See PARA 1635. However, this limb of the definition is confined to documents under which a right is conferred in equity. If the future goods will vest at law as potential property or because of some new act of transfer after acquisition, the document will not be within the statutory definition of 'bill of sale': see PARAS 1638, 1699.

7 See *Re Jeavons, ex p Mackay, ex p Brown* (1873) 8 Ch App 643; *Edwards v Edwards* (1876) 2 ChD 291, CA.

8 See the Bills of Sale Act 1878 s 4; and PARA 1638.

9 *Jarvis v Jarvis* (1893) 63 LJCh 10; *Shears & Sons Ltd v Jones* [1922] 2 Ch 802 (an agreement to give a bill of sale, to secure payment of a debt, in the event of the debt not being paid by a certain date).

10 See the Bills of Sale Act (1878) Amendment Act 1882 s 9; and PARA 1711.

11 See PARA 1646.

12 *Re Hemingway, ex p Hauxwell* (1883) 23 ChD 626, CA.

13 See *Reeves v Barlow* (1884) 12 QBD 436, CA (instrument providing that all materials brought on the land were to become the property of the building owner held not to be a bill of sale, the building owner's interest being a legal, and not an equitable, right); *Morris v Delobbel-Flipo* [1892] 2 Ch 352 (agreement giving an agent a retainer for advances on goods coming into his possession held to confer a legal and not an equitable right, as it depended on possession); *Spencer v Midland Rly Co* (1895) 11 TLR 542, CA (agreement providing that all goods stored on a railway company's premises should be deemed to be in its possession and subject to a lien held not to be a bill of sale). See also *Great Eastern Rly Co v Lord's Trustee* [1909] AC 109, HL, where a similar agreement affecting goods in a portion of a railway yard leased to a coal merchant but under the physical control of the railway company was held not to be a bill of sale. See also PARA 1649.

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## **1652. Instruments with power of distress.**

Any attornment instrument or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, is deemed to be a bill of sale of any personal chattels<sup>1</sup> which may be seized or taken under such power of distress<sup>2</sup>. The effect of this provision is that such an instrument must be registered as if it were a bill of sale, but being only 'deemed to be' a bill of sale, need not be in accordance with the statutory form<sup>3</sup>.

1 As to personal chattels see PARA 1662 et seq.

2 Bills of Sale Act 1878 s 6.

3 *Green v Marsh* [1892] 2 QB 330 at 334, CA. See also PARA 1655. As to the statutory form see PARA 1711.

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### **1653. Landlord's power of distress.**

Mining leases are expressly excluded from the provisions set out above<sup>1</sup> and are thus not deemed to be bills of sale even if granted to reserve rent by way of security for a debt; and this exclusion extends to a power of distress in a mining lease on goods upon land or premises near to and worked with those demised<sup>2</sup>.

Apart from this exception, the powers of distress which exist at common law, or are reserved to landlords in any usual form of lease<sup>3</sup>, are not affected by the Bills of Sale Acts<sup>4</sup>. If, however, with the object of securing a debt, a power of distress is given in terms so general as to be outside the scope of ordinary leases or agreements between landlord and tenant, the instrument is to be deemed a bill of sale<sup>5</sup>. The essential test is whether the power of distress is inserted to secure the payment of a genuine rent for the demised premises<sup>6</sup> or to secure payment of a debt<sup>7</sup> or rent for premises other than those demised by the instrument conferring the power<sup>8</sup>.

Where a power of distress results in the lease being deemed a bill of sale, this affects the instrument only as regards the power of distress and does not alter the relationship of the parties as landlord and tenant or preclude the lessor from enforcing the covenants in the lease otherwise than by distress, as by bringing proceedings for possession for rent in arrear<sup>9</sup>.

1 Ie the Bills of Sale Act 1878 s 6: see PARA 1652.

2 *Re Roundwood Colliery Co, Lee v Roundwood Colliery Co* [1897] 1 Ch 373, CA.

3 As to powers of distress at common law see **DISTRESS** vol 13 (2007 Reissue) PARA 902. As to distress for rent see **DISTRESS** vol 13 (2007 Reissue) PARA 905 et seq.

4 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630. See also *Re Willis, ex p Kennedy* (1888) 21 QBD 384 at 397, CA, per Lindley LJ.

5 *Pulbrook v Ashby & Co* (1887) 56 LQB 376 (brewer's lease giving power to distrain for price of liquor supplied by landlord to tenant of tied house); *Stevens v Marston* (1890) 60 LQB 192, CA (lease giving landlords the same right of distress for current account and advances as for rent in arrear).

6 *Re Roundwood Colliery Co, Lee v Roundwood Colliery Co* [1897] 1 Ch 373, CA.

7 *Re Roundwood Colliery Co, Lee v Roundwood Colliery Co* [1897] 1 Ch 373, CA; *Pulbrook v Ashby & Co* (1887) 56 LQB 376.

8 *Re Roundwood Colliery Co, Lee v Roundwood Colliery Co* [1897] 1 Ch 373, CA.

9 *Stevens v Marston* (1890) 60 LQB 192, CA.

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5TH EDITION, PARAS 1620-2586)/7. **BILLS OF SALE/(2) DEFINITIONS COMMON TO SECURITY AND ABSOLUTE BILLS/(i) Meaning of 'Bill of Sale'/1654. Indemnities against rentcharges, etc.**

### **1654. Indemnities against rentcharges, etc.**

Although at one time some doubt existed, it is now declared by statute that a power of distress given by way of indemnity against a rent (or any part thereof) payable in respect of land, or against the breach of any covenant or condition in relation to land, is not and is not deemed ever to have been a bill of sale within the meaning of the Bills of Sale Acts<sup>1</sup>.

<sup>1</sup> Law of Property Act 1925 s 189(1). As to the meaning of 'bill of sale' in the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630) see the Bills of Sale Act 1878 s 4; and PARA 1638. As to the apportionment of rents see further the Law of Property Act 1925 s 190; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 551; **RENTCHARGES AND ANNUITIES** vol 39(2) (Reissue) PARAS 850-851. No new rentcharges can now be created: see the Rentcharges Act 1977 s 2; and **RENTCHARGES AND ANNUITIES** vol 39(2) (Reissue) PARA 751 et seq.

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### **1655. Mortgages.**

Before the Bills of Sale Act 1878 came into force<sup>1</sup>, an attornment clause inserted in a mortgage deed, though having the effect of conferring on the mortgagee an additional security by way of a power of distress on goods for both principal and interest<sup>2</sup>, was not on that account alone within the Bills of Sale Acts<sup>3</sup>. A mortgage containing such an attornment clause is now deemed to be a bill of sale for the purposes of the Bills of Sale Act 1878<sup>4</sup> so as to render the clause void<sup>5</sup>, and any distress under it unlawful, unless the clause has been registered under the Bills of Sale Act (1878) Amendment Act 1882 as a bill of sale<sup>6</sup>. This is so whether the distress is on the goods of the borrower or of a third party<sup>7</sup>, and whether the power of distress is express or conferred by law as incident to the demise<sup>8</sup>. The attornment clause is, however, void only to the extent of the power of distress it would otherwise have conferred: it remains fully effective to establish the relationship of landlord and tenant between the parties<sup>9</sup>.

The instrument is only 'deemed to be' a bill of sale of any personal chattels which may be seized or taken under the power of distress<sup>10</sup>. It, therefore, need not be in accordance with the statutory form; it is simply treated as if it were a bill of sale for the purpose of registration and, if not registered, is void as regards chattels which may be seized or taken under the power<sup>11</sup>.

It is, however, provided that a demise by a mortgagee in possession to the mortgagor at a fair and reasonable rent is not to be deemed a bill of sale<sup>12</sup>, although this does not give exemption where actual possession has not been taken by the mortgagee, and the inclusion of an attornment clause in the mortgage deed does not of itself make the mortgagee a mortgagee in possession for this purpose<sup>13</sup>. Thus, where a mortgagor under a mortgage with an attornment clause, being in arrear with interest, undertakes in writing to hold as tenant of the mortgagee at a fair rent, but the mortgagee is not at the time in actual possession, the intention being further to secure the mortgage debt and not to create a real demise, the instrument is a bill of sale, and, unless it has been registered, a distress levied by the mortgagee is avoided<sup>14</sup>.

In determining what is a fair and reasonable rent, the court will not make fine calculations, the statute being aimed not at leases at a genuine rent but at transactions where the rent fixed is so excessive, considering the nature of the property, as to lead to the conclusion that the lease

was a mere device to enable the mortgagee to obtain an additional security<sup>15</sup>. However, the words of the statute cannot be ignored; and, whereas for bankruptcy purposes the essential question is whether the transaction is genuine or an attempt to evade bankruptcy law, the Bills of Sale Acts will apply to the lease if the rent is excessive, even if it is intended as a genuine rent and not as a means of further securing the loan made by the mortgagee<sup>16</sup>.

1 The Bills of Sale Act 1878 came into force on 1 January 1879: see s 2.

2 *Re Betts, ex p Harrison* (1881) 18 ChD 127, CA. This right of distress could be exercised not merely on the goods of the borrower but also on those of a stranger: *Kearsley v Philips* (1883) 11 QBD 621, CA.

3 *Morton v Woods* (1869) LR 4 QB 293; *Re Stockton Iron Furnace Co* (1879) 10 ChD 335, CA. It would be otherwise if the mortgage deed had been executed for the purpose of evading the Bills of Sale Acts: see *Morton v Woods*; *Re Stockton Iron Furnace Co* above. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

4 See the Bills of Sale Act 1878 s 6; and PARA 1652. As the power of distress is ex hypothesi given to secure payment of a debt (because otherwise s 6 would not apply), the mortgage is a security bill of sale within the Bills of Sale Act (1878) Amendment Act 1882.

5 Ie under the Bills of Sale Act (1878) Amendment Act 1882 s 8: see PARA 1704.

6 *Green v Marsh* [1892] 2 QB 330 at 335, CA.

7 *Green v Marsh* [1892] 2 QB 330, CA.

8 *Re Willis, ex p Kennedy* (1888) 21 QBD 384, CA, disapproving dicta in *Hall v Comfort* (1886) 18 QBD 11; *Green v Marsh* [1892] 2 QB 330 at 334, CA.

9 *Mumford v Collier* (1890) 25 QBD 279. It has been said that at the present day the clause is of no advantage to the mortgagee (see *Portman Building Society v Young* [1950] 2 All ER 443 at 444-445 per Danckwerts J; revsd, but not on this point, [1951] 1 All ER 191, CA), but more recently it has been held that the inclusion of an attornment clause, by creating the relationship of landlord and tenant, enables restrictive covenants imposed on the mortgagor by the mortgage deed to run with the land so as to bind the mortgagor's successors in title (*Regent Oil Co Ltd v JA Gregory (Hatch End) Ltd* [1966] Ch 402, [1965] 3 All ER 673, CA). See also **MORTGAGE** vol 77 (2010) PARA 343.

10 *Green v Marsh* [1892] 2 QB 330 at 335, CA. As to personal chattels see PARA 1662 et seq.

11 *Green v Marsh* [1892] 2 QB 330, CA. As to the statutory form see PARA 1711.

12 Bills of Sale Act 1878 s 6 proviso.

13 *Re Willis, ex p Kennedy* (1888) 21 QBD 384, CA; *Green v Marsh* [1892] 2 QB 330, CA. As to what amounts to actual possession by a mortgagee see **MORTGAGE** vol 77 (2010) PARA 413.

14 *Green v Marsh* [1892] 2 QB 330, CA.

15 *Re Bowes, ex p Jackson* (1880) 14 ChD 725, CA; *Re Thompson, ex p Williams* (1877) 7 ChD 138, CA; *Green v Marsh* [1892] 2 QB 330, CA.

16 In this respect the cases cited in note 15 will not necessarily be followed where the issue is the applicability of the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882.

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## **(ii) Documents Excluded from the Statutory Definition of 'Bill of Sale'**

## 1656. Exclusions from the statutory definition.

The Bills of Sale Act 1878 provides that the expression 'bill of sale' does not include assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented<sup>1</sup>. In addition, the Bills of Sale Acts 1890 and 1891 exempt certain letters of hypothecation relating to imported goods<sup>2</sup>, while other statutes remove various classes of security instrument from the operation of the Bills of Sale Acts<sup>3</sup>.

1 Bills of Sale Act 1878 s 4. Certain of the constituent elements of this exclusion are considered in PARA 1657 et seq. As to the documents which do comprise bills of sale for these purposes see s 4; and PARA 1638 et seq. Section 4 also provides for the exclusion of India warrants from the statutory definition, but these are now obsolete.

2 See the Bills of Sale Act 1890 s 1; and PARA 1661.

3 See PARA 1684 et seq. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

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## 1657. Assignments for the benefit of creditors.

Assignments for the benefit of the creditors of the person making or giving the same are excluded from the statutory definition of 'bill of sale'<sup>1</sup>. To be within the exception such assignments must be available for creditors generally who choose to come in<sup>2</sup>, none being excluded from the benefits of the deed<sup>3</sup>. However, a deed of assignment is nonetheless for the benefit of creditors because a time limit is fixed within which they must accede<sup>4</sup>. If, however, the deed is for the benefit of certain creditors only, it is a bill of sale<sup>5</sup>, and so is a licence to seize given to a creditor with an authority to pay himself and other creditors out of the proceeds<sup>6</sup>.

An assignment of chattels to secure a composition is also within the exemption if it is for the benefit of creditors generally<sup>7</sup>.

1 See the Bills of Sale Act 1878 s 4; and PARA 1656. Such assignments are regulated by the Deeds of Arrangement Act 1914, as to which, and for the validity of deeds of arrangement as against creditors and in bankruptcy, see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 860 et seq.

As to the documents which do comprise bills of sale for these purposes, see the Bills of Sale Act 1878 s 4; and PARA 1638 et seq.

2 *General Furnishing and Upholstery Co v Venn* (1863) 2 H & C 153.

3 *Paine v Matthews* (1885) 53 LT 872; *Boldero v London and Westminster Loan and Discount Co* (1879) 5 Ex D 47. Cf *Spencer v Slater* (1878) 4 QBD 13.

4 *Hadley & Son v Beedom* [1895] 1 QB 646.

5 *R v Creese* (1874) LR 2 CCR 105. Cf *Re Saumarez, ex p Salaman* [1907] 2 KB 170, CA.

6 *Re Townsend, ex p Parsons* (1886) 16 QBD 532, CA.

7 *Hedges v Preston* (1899) 80 LT 847; *Beevor v Savage* (1867) 16 LT 358.

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### 1658. Marriage settlements.

Marriage settlements are not bills of sale within the Bills of Sale Acts<sup>1</sup>. The exception includes instruments which create a trust for the purpose of carrying out provision for a marriage. Thus an informal ante-nuptial memorandum of agreement for a marriage settlement is excepted<sup>2</sup>, and a transfer of chattels after marriage in pursuance of an ante-nuptial contract is within the exception, as, for example, an assignment of chattels, acquired after marriage, in pursuance of a covenant contained in an ante-nuptial marriage settlement to transfer to trustees the settlor's after-acquired property<sup>3</sup>.

Post-nuptial settlements not made pursuant to an ante-nuptial agreement are not marriage settlements within the exception<sup>4</sup>. When they are carried out by means of absolute transfers, they require attestation and registration under the provisions of the Bills of Sale Act 1878<sup>5</sup>, but post-nuptial settlements do not come within the Bills of Sale Act (1878) Amendment Act 1882 unless they are assurances by way of security for the payment of money<sup>6</sup>.

1 See the Bills of Sale Act 1878 s 4; and PARA 1656. As to marriage settlements generally see **SETTLEMENTS** vol 42 (Reissue) PARAS 603, 628 et seq. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630. As to the documents which do comprise bills of sale for these purposes see the Bills of Sale Act 1878 s 4; and PARA 1638 et seq.

2 *Wenman v Lyon & Co* [1891] 2 QB 192, CA. As to the validity of marriage settlements against creditors, apart from the Bills of Sale Acts, see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 409.

3 *Re Reis, ex p Clough* [1904] 2 KB 769, CA (affd sub nom *Clough v Samuel* [1905] AC 442, HL); *Courcier v Bardili* (1883) 27 Sol Jo 276, CA.

4 *Fowler v Foster* (1859) 28 LJQB 210; *Ashton v Blackshaw* (1870) LR 9 Eq 510. As to chattels in common establishment see PARA 1852.

5 See the Bills of Sale Act 1878 ss 8, 10; and PARAS 1758, 1842. See also *Casson v Churchley* (1884) 53 LJQB 335.

6 See the Bills of Sale Act (1878) Amendment Act 1882 s 3; and PARA 1638.

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AND ABSOLUTE BILLS/(ii) Documents Excluded from the Statutory Definition of 'Bill of Sale'/1659. Transfers of ships.

### **1659. Transfers of ships.**

Although any transfer of a registered ship<sup>1</sup>, or a share in such a ship, is required to be effected by a bill of sale satisfying prescribed requirements<sup>2</sup>, transfers or assignments of ships are not 'bills of sale' for the purposes of the Bills of Sale Acts<sup>3</sup> notwithstanding any requirement as to registration under the Merchant Shipping Act 1995<sup>4</sup>. The exception applies to a transfer or assignment of anything ordinarily called a vessel, and not only of what is technically so called, and includes a dumb barge worked by oars<sup>5</sup>, but not a mere boat<sup>6</sup>.

1 As to the registration of British ships see the Merchant Shipping Act 1995 Pt II (ss 8-23); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 245 et seq.

2 Transfers and assignments of ships and vessels are governed by the provisions of the Merchant Shipping Act 1995 s 16, Sch 1, which require a transfer of a registered ship to be by bill of sale satisfying the prescribed requirements (see Sch 1 para 2(1); the Merchant Shipping (Registration of Ships) Regulations 1993, SI 1993/3138; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 306 et seq). In this context, 'bill of sale' denotes an absolute transfer. A mortgage of a registered vessel must likewise be in the prescribed form (see Sch 1 para 7; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 318 et seq). See also PARA 1690.

3 I.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630. As to the documents which do comprise bills of sale for these purposes see the Bills of Sale Act 1878 s 4; and PARA 1638 et seq.

4 See the Bills of Sale Act 1878 s 4; and PARA 1656. See also *Union Bank of London v Lenanton* (1878) 3 CPD 243, CA; *Gapp v Bond* (1887) 19 QBD 200, CA; *British Credit Trust Ltd v Owners of 'The Shizelle'* [1992] 2 Lloyd's Rep 444.

5 *Gapp v Bond* (1887) 19 QBD 200, CA.

6 *Gapp v Bond* (1887) 19 QBD 200, CA.

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### **1660. Transfers in the ordinary course of business.**

Transfers of goods in the ordinary course of business of any trade or calling<sup>1</sup> are excluded from the statutory definition of 'bills of sale'<sup>2</sup>, as are bills of sale of goods in foreign parts or at sea<sup>3</sup>, bills of lading, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods<sup>4</sup>, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented<sup>5</sup>.

Whether a transfer is in the ordinary course of business must necessarily depend on the facts of the particular case and on business practice prevailing at the relevant time. Hence previous cases dealing with transfers in the ordinary course of business cannot be taken to lay down any absolute or unchangeable rule, as what may then have been a transfer in the ordinary course of business may have ceased to be normal through a change in business practice, and transfers at one time regarded as outside the ordinary course of business may now be considered to be within it.

A trust receipt<sup>6</sup> taken by a bank as a condition of release of documents of title to imported goods the purchase of which has been financed by the bank falls within this exception, as well as being excepted on other grounds<sup>7</sup>. Similarly, a letter of hypothecation over goods still in the possession of a third party<sup>8</sup>, such as a carrier or warehouse, is excepted, but it is doubtful whether a general letter of pledge or lien taken by a bank over its customer's future purchases in general, rather than an identified consignment of goods in particular, would be treated as within the exception<sup>9</sup>. Retention of title clauses are not of themselves within the exception<sup>10</sup>.

1     le the trade or calling of the grantor: *R v Greig* [1931] VLR 413 at 423 per Cussen ACJ, Vict FC. The word 'goods' in the phrase 'transfer of goods in the ordinary course of business' bears its normal common law meaning and thus covers industrial growing crops even though not at the date of the instrument of transfer capable of complete transfer by delivery so as to constitute personal chattels within the Bills of Sale Act 1878 s 4: *Stephenson v Thompson* [1924] 2 KB 240, CA.

2     As to the statutory definition see the Bills of Sale Act 1878 s 4; and PARA 1638 et seq.

3     See *R v Townshend* (1884) 15 Cox CC 466. As to the meaning of 'foreign parts' see PARA 1636.

4     The words 'any other documents used in the ordinary course of business as proof of possession or control of goods' are to be construed ejusdem generis with the preceding reference to 'bills of lading, warehouse keepers' certificates, warrants or orders for the delivery of goods': *Ian Chisholm Textiles Ltd v Griffiths* [1994] 2 BCLC 291, [1994] BCC 96.

5     See the Bills of Sale Act 1878 s 4; and PARA 1656. Section 4 also provides for the exclusion of India warrants from the statutory definition, but these are now obsolete.

6     A trust receipt is also termed a letter of trust. A letter of lien, also termed a letter of pledge, letter of charge and letter of hypothecation, is to be distinguished from a trust receipt in that it relates to future consignments generally rather than to an identified consignment of existing goods. See also the text and note 10.

7     See PARA 1661.

8     *Re Hamilton, Young & Co, ex p Carter* [1905] 2 KB 772, CA.

9     There is no authority on the point, but it is hard to see how a transfer of goods not yet in existence or acquired by the debtor can be a transfer in the ordinary course of business. It has been held that a general charge on future goods does not enjoy the separate exemption in favour of letters of hypothecation of imported goods. See PARA 1661.

10    *Ian Chisholm Textiles Ltd v Griffiths* [1994] 2 BCLC 291, [1994] BCC 96. As to retention of title clauses generally see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 110.

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### **1661. Hypothecations of imported goods.**

An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory or store or to their being reshipped for export, or delivered to a purchaser not being the person giving or executing such instrument, is not to be deemed a 'bill of sale' within the meaning of the Bills of Sale Acts<sup>1</sup>. A trust receipt taken by a bank as a condition of release of documents of title to imported goods the purchase of which has been financed by the bank would, in addition to being excepted on other grounds<sup>2</sup>, fall within this exception if related to imported goods and otherwise fulfilling

the conditions of the excepting provision<sup>3</sup>. The exception is, however, confined to instruments covering identified goods or an identified consignment of goods and does not extend to a general letter of charge over all goods from time to time to be imported by the pledgor<sup>4</sup>.

1 Bills of Sale Act 1890 s 1 (substituted by the Bills of Sale Act 1891 s 1). As to the documents which do comprise bills of sale for the purposes of the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630) see the Bills of Sale Act 1878 s 4; and PARA 1638 et seq.

2 Ie because (1) it is a transfer in the ordinary course of business (see PARA 1660); and (2) the bank's rights over the goods derive not from the document itself but from a prior, independent pledge: see PARAS 1640, 1680.

3 Ie the Bills of Sale Act 1890 s 1: see the text to note 1.

4 *NV Slavenburg's Bank v Intercontinental Natural Resources Ltd* [1980] 1 All ER 955, [1980] 1 WLR 1076.

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### (iii) Meaning of 'Personal Chattels'

#### 1662. The statutory definition.

The Bills of Sale Acts<sup>1</sup> relate only to personal chattels<sup>2</sup>, which term bears a special meaning. The Bills of Sale Act 1878 provides that the expression 'personal chattels' means goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged)<sup>3</sup> fixtures and growing crops, but does not include chattel interests in real estate, nor fixtures (except trade machinery as therein defined)<sup>4</sup>, when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action<sup>5</sup>, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale<sup>6</sup>.

1 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 See the Bills of Sale Act 1878 s 3; and PARA 1633. As to the documents which comprise bills of sale see s 4; and PARA 1638 et seq.

3 A written charge on goods cannot, it seems, be made in conformity with the Bills of Sale Acts, as it does not take the form of a transfer of ownership and is thus incompatible with the statutory form (as to which see PARA 1711).

4 See PARA 1667.

5 Eg shares in a horse: see *Re Sugar Properties (Derisley Wood) Ltd* [1988] BCLC 146, (1986) 3 BCC 88; and **CHOSES IN ACTION** vol 13 (2009) PARA 4.

6 Bills of Sale Act 1878 s 4. See further PARA 1663 et seq.

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### **1663. Classes of personal chattels.**

The definition of 'personal chattels' for the purposes of the Bills of Sale Acts<sup>1</sup> has the effect of dividing personal chattels into four classes of things: (1) goods, furniture and other articles capable of complete transfer by delivery; (2) growing crops, when assigned or charged separately from the land; (3) fixtures (other than trade machinery), when assigned or charged separately from the land; and (4) trade machinery, which, even if it would otherwise have constituted a fixture, is to be deemed personal chattels for the purpose of the Acts<sup>2</sup>. The subject matter of bills of sale within the Acts is confined to things which come under one or other of these four heads.

It will be seen that the definition of 'personal chattels' embraces unsevered growing crops and fixtures that could not, under the general law, be regarded as chattels at all<sup>3</sup>, but excludes from the definition farm stock and produce that would constitute personal chattels under the general law.

1     le for the purposes of the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630. As to the meaning of 'personal chattels' see PARAS 1662, 1664 et seq.

2     As to these categories see PARA 1665 et seq.

3     Industrial growing crops have always been considered goods: see PARA 1670.

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### **1664. Relevance of statutory definition.**

The definition of 'personal chattels' in the Bills of Sale Act 1878 is applicable only for the purposes of the Bills of Sale Acts<sup>1</sup>. Thus growing crops or fixtures, though assigned, were held not to be goods within the former statutory provisions relating to reputed ownership in bankruptcy<sup>2</sup>. Again, it is only for the purpose of the Bills of Sale Acts that trade machinery is deemed to be personal chattels<sup>3</sup>, and the question whether goods have become fixtures, for the purpose of resolving conflicting claims by the owner of the goods and a person having an interest in the land to which they are claimed to have become affixed, is determined by common law principles<sup>4</sup>, not by reference to the Bills of Sale Acts.

The definition of 'personal chattels' is relevant to the applicability of the Bills of Sale Acts both in relation to absolute transfers and in relation to transfers by way of security, neither types of transfer being within the Act unless they include personal chattels as defined. In the case of security bills, however, the definition of 'personal chattels' has added significance in that a security bill, in order to accord with the statutory form prescribed by the Bills of Sale Act (1878) Amendment Act 1882<sup>5</sup>, must be confined to personal chattels<sup>6</sup>. Hence, where a security bill contains some personal chattels, so that the Bills of Sale Acts apply, the inclusion of items which are outside the definition of personal chattels, such as real property, chattels real or



choses in action, renders the bill not in accordance with the statutory form and thus void except in relation to the items outside the definition<sup>7</sup>.

1 *Meux v Jacobs* (1875) LR 7 HL 481. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630. As to the statutory definition of 'personal chattels' and the division of that definition into classes see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq.

2 *Meux v Jacobs* (1875) LR 7 HL 481. The reputed ownership provisions were contained in the Bankruptcy Act 1914 s 38(c), and when that Act was repealed (except for ss 121-123) by the Insolvency Act 1985 those provisions were not re-enacted.

3 See the Bills of Sale Act 1878 s 5; and PARA 1667.

4 As to the rules for determining what are fixtures see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 172 et seq.

5 See PARA 1711.

6 See PARA 1725.

7 See PARA 1712.

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### **1665. Articles capable of complete transfer by delivery.**

The first category of personal chattels defined for the purposes of the Bills of Sale Acts<sup>1</sup> comprises 'goods, furniture, and other articles capable of complete transfer by delivery'<sup>2</sup>. Under the Bills of Sale Act 1854, this phrase was held not to include growing crops, as, even if these were industrial growing crops so as to constitute goods at common law<sup>3</sup>, they were not goods capable of complete transfer by delivery in their unsevered state<sup>4</sup>. The current definition, however, now expressly covers growing crops when separately assigned or charged<sup>5</sup>.

The words 'capable of complete transfer by delivery' refer to the physical characteristics of the asset sought to be transferred, not to the ability of the transferor to deliver the asset, and the fact that the goods comprised in the bill are in the hands of a third party at the date of the transfer does not alter their character as goods capable of complete transfer by delivery<sup>6</sup>. Moreover, since the third limb of the statutory definition of the bill of sale is aimed at after-acquired property<sup>7</sup>, so far as vesting in equity and not at law<sup>8</sup>, what is relevant is the physical character of the asset as described in the bill, whether or not it is then owned by the grantor or, indeed, in existence at all. Thus a bill of sale assigning after-acquired property (whether or not in existence at the date of the bill) is a bill comprising goods capable of complete transfer by delivery, if the description of the property in the bill is wide enough to cover assets possessing this physical characteristic<sup>9</sup>. There appears to be no distinction in this respect between a bill covering both currently-owned and after-acquired property and a bill dealing exclusively with after-acquired property<sup>10</sup>.

1 ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 As to the statutory definition of 'personal chattels' and the division of that definition into classes see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq. Note, however, that the Bills of Sale Acts only apply where such chattels, though capable of complete transfer by delivery, have not actually been delivered (*Brantom v Griffiths*

(1877) 2 CPD 212 at 214, CA) and do not affect transactions completed by delivery independently of any document. The term 'goods' embraces all personal chattels capable of physical possession: see *Stadium Finance Ltd v Robbins* [1962] 2 QB 664 at 676, [1962] 2 All ER 633 at 639, CA, per Danckwerts LJ, considering the meaning of 'goods' for the purpose of the Factors Act 1889 (in relation to which see **AGENCY** vol 1 (2008) PARA 148). Money, though excluded from the definition of 'goods' for the purpose of the Sale of Goods Act 1979 (see s 61(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 30), constitutes personal chattels, whether used as currency or retained in specie as a collector's curio. Hence in theory it is possible to have a bill of sale of money, provided that it is identifiable, as by being kept separately in a chest or bag: *Taylor v Plumer* (1815) 3 M & S 562 at 570 per Lord Ellenborough. As regards money which is legal currency, though, such a bill would be of limited efficacy, since upon the money coming into the possession of a person taking in good faith and for value he would acquire title free from the bill: see *Miller v Race* (1758) 1 Burr 452 at 457-458 per Lord Mansfield; *Clarke v Shee and Johnson* (1774) 1 Cowp 197 at 200 per Lord Mansfield. Title deeds relating to land, though savouring of the realty, are nevertheless goods to the extent that they are possessed as pieces of parchment and wax, as opposed to mere indicia of title to land (*Swanley Coal Co v Denton* [1906] 2 KB 873, CA; *Re Knight's Question* [1959] Ch 381, [1958] 1 All ER 812); and a bill of sale can properly include title deeds as personal chattels if they are intended to be dealt with as such and not for the purpose of creating an equitable mortgage or charge on the land (*Swanley Coal Co v Denton* above).

3 See PARA 1670.

4 *Brantom v Griffiths* (1877) 2 CPD 212, CA. It has never been directly decided whether the words 'capable of complete transfer by delivery' govern the whole phrase 'goods, furniture and other articles' or whether they merely qualify 'other articles', but even if they are so confined, the effect appears to be that both 'goods' and 'furniture' have to be construed ejusdem generis with 'other articles capable of complete transfer by delivery', and thus to be confined to such articles: *Brantom v Griffiths* at 214 per Cockburn CJ.

5 See the Bills of Sale Act 1878 s 4; and see further PARA 1670.

6 *Re WF Le Cornu Ltd, Liquidator v Federal Traders Ltd* [1931] SASR 425; *Re Grezzana, Painter v Short* (1932) 4 ABC 216.

7 See PARA 1635.

8 See PARAS 1635, 1699 note 3.

9 See PARA 1635.

10 The bill cannot, of course, transfer any interest over after-acquired property until acquisition but it constitutes an agreement 'by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred' for the purposes of the Bills of Sale Act 1878 s 4 (see PARA 1638 et seq).

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## **1666. Fixtures.**

The expression 'personal chattels' does not include fixtures<sup>1</sup> (other than trade machinery<sup>2</sup>) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed<sup>3</sup>. It is only when fixtures are separately assigned or charged<sup>4</sup> by the bill of sale that the Bills of Sale Acts<sup>5</sup> apply to them<sup>6</sup>. However, the Bills of Sale Act 1878 provides that no fixtures are to be deemed to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed without otherwise taking possession of or dealing with such land or building, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed is also conveyed or assigned to the same person or persons<sup>7</sup>.

The effect of these statutory provisions, as regards fixtures other than trade machinery, is that: (1) a conveyance or mortgage of land which is silent as to fixtures does not constitute a separate assignment of the fixtures even though at common law these effectively pass under

the conveyance as part of the land<sup>8</sup>; (2) fixtures included in a conveyance or mortgage of land<sup>9</sup> do not constitute personal chattels even if they are assigned by separate words and even if power is given to the purchaser or mortgagee to sever them or sell them separately from the land<sup>10</sup>; (3) a conveyance or mortgage of fixtures alone without land always constitutes a separate assignment, even if by a contemporaneous conveyance or mortgage the land to which they are affixed is conveyed or mortgaged to the same person<sup>11</sup> unless it is confined to fixed motive-powers, fixed power machinery and steam, gas or water pipes used in or attached to a factory or workshop, all of which are specifically excluded from the definition of personal chattels<sup>12</sup>; (4) the fact that other goods are assigned with them will not by itself preclude fixtures from being regarded as separately assigned<sup>13</sup>.

Where fixtures are separately assigned, they constitute personal chattels for the purpose of the Bills of Sale Acts even though at common law they would be considered part of the land; and whereas, as previously stated<sup>14</sup>, ordinary goods are outside the definition of personal chattels unless capable of complete transfer by delivery, this qualification does not apply to fixtures.

1 Fixtures are articles which have become affixed to land or buildings in such a way that they form part of the land, in accordance with the maxim that whatever is affixed to the soil belongs to the soil (*quicquid plantatur solo, solo cedit*), and lose their character as chattels: see generally **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 172 et seq; **MORTGAGE** vol 77 (2010) PARA 195.

2 See PARAS 1667-1669.

3 As to the statutory definition of 'personal chattels' and the division of that definition into classes see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq.

4 'Separately assigned or charged' means assigned or charged separately from the land to which they are affixed: *Roberts v Roberts* (1884) 13 QBD 794, CA.

5 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

6 Where fixtures are separately assigned or charged, they will be personal chattels for the purpose of the Bills of Sale Acts (the words 'capable of complete transfer by delivery' (see PARA 1665) not qualifying this part of the definition) even if under the general law they would be regarded as part of the land and therefore as having ceased to be chattels. Hence, if fixtures constituting personal chattels for the purpose of the Acts are comprised in a bill of sale which for some reason is void in relation to them, it is not open to the grantee to claim that they nevertheless pass to him as fixtures under a mortgage of the land: *Johns v Ware* [1899] 1 Ch 359. Fixtures separately assigned or charged are personal chattels only for the purpose of the Acts and not for other purposes: see PARA 1662 et seq.

7 Bills of Sale Act 1878 s 7.

8 *Meux v Jacobs* (1875) LR 7 HL 481; *Re Rogerstone Brick and Stone Co, Southall v Wescomb* [1919] 1 Ch 110, CA. See **MORTGAGE** vol 77 (2010) PARA 195. Fixtures also pass by implication on a conveyance or mortgage of land in the absence of a contrary intention by virtue of the Law of Property Act 1925 s 62(2): see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236.

9 Ie conveyed or mortgaged by the same instrument: see the Bills of Sale Act 1878 s 7; and the text and notes 1-6.

10 See the Bills of Sale Act 1878 s 7; and the text and notes 1-6.

11 *Waterfall v Penistone* (1856) 6 E & B 876.

12 See the Bills of Sale Act 1878 s 5; and PARAS 1667-1669.

13 *Roberts v Roberts* (1884) 13 QBD 794, CA.

14 See PARA 1662 et seq.

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### **1667. Trade machinery deemed to be personal chattels.**

In the case of trade machinery, the foregoing rules relating to fixtures<sup>1</sup> do not apply. Trade machinery, by which is meant machinery used in or attached to any factory or workshop<sup>2</sup> other than certain fixed machinery and effects which are specifically excluded<sup>3</sup>, is deemed to be personal chattels<sup>4</sup>, even though the machinery is not 'separately assigned' within the meaning of the Bills of Sale Act 1878; and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels is to be deemed a bill of sale within the meaning of the Act<sup>5</sup>.

1 See PARA 1666.

2 'Factory or workshop' means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them: (1) in or incidental to the making of any article or part of an article; (2) in or incidental to the altering, repairing, ornamenting or finishing of any article; or (3) in or incidental to the adapting for sale of any article: Bills of Sale Act 1878 s 5.

3 See PARA 1668.

4 Bills of Sale Act 1878 s 5.

5 Bills of Sale Act 1878 s 5. For the Bills of Sale Acts to apply, however, the bill of sale must show an intention to deal with the machinery separately as chattels: see PARA 1669. As to the statutory definition of 'personal chattels' and the division of that definition into classes see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

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### **1668. Trade machinery excluded from definition of personal chattels.**

Certain fixed machinery and effects are excluded from the statutory definition of 'trade machinery'<sup>1</sup>, and these are not deemed to be personal chattels within the meaning of the Bills of Sale Acts<sup>2</sup>, even though assigned separately from the land to which they are affixed, or assigned with land other than land to which they are affixed<sup>3</sup>. The machinery and effects so excluded are: (1) the fixed motive-powers, such as the water wheels and steam engines, and the steam boilers, donkey engines, and other fixed appurtenances of such motive-powers; (2) the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive-powers to the other machinery, fixed and loose; and (3) the pipes for steam, gas and water in the factory or workshop<sup>4</sup>. A bill of sale may give an effective security over machines or effects so excluded although void as regards things within the definition of personal chattels<sup>5</sup>.

1 See PARA 1667.

2 As to the statutory definition of 'personal chattels' and the division of that definition into classes see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

3 *Topham v Greenside Glazed Fire-Brick Co* (1887) 37 ChD 281 (mortgage of land and of machinery fixed to other land belonging to third party).

4 Bills of Sale Act 1878 s 5.

5 *Re Burdett, ex p Byrne* (1888) 20 QBD 310, CA.

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### **1669. What constitutes an assignment of personal chattels as regards trade machinery.**

A document dealing only with land and containing no reference to trade machinery will not be deemed to be an assignment of personal chattels simply because the land has trade machinery affixed to it which as a matter of law passes as part of the land by virtue of the conveyance<sup>1</sup>. In this respect there is no distinction between a disposition of leasehold property and a disposition of freehold property<sup>2</sup>. In order for the document to be caught as a bill of sale assigning personal chattels in the form of trade machinery, it must contain some specific provision covering that machinery showing an intention to deal with it separately as chattels. As regards machinery constituting a fixture<sup>3</sup>, the same principles apply as operated prior to the enactment of the Bills of Sale Act 1878 to determine whether a document was a separate assignment of fixtures<sup>4</sup>. The document will be regarded as showing an intention to deal with the machinery separately as chattels if it confers rights over the machinery beyond those that would pass as a matter of law on a conveyance of the land<sup>5</sup>. This will be the case if the document confers on the grantee a power to sever the machinery from the land or to sell or otherwise deal with it separately from the land<sup>6</sup>. The power may be expressly stated or it may be inferred from a reading of the instrument as a whole, as where the machinery is grouped with separate chattels so as to indicate that it may be dealt with in like manner<sup>7</sup>, but the mere inclusion of separate words of disposition relating to the machinery will not by itself make the document a bill of sale of personal chattels within the Bills of Sale Acts if the disposition does not confer on the grantee greater rights over the machinery than would pass at law on a conveyance or mortgage of the land<sup>8</sup>. In this respect, there is a distinction between a transfer of freehold land and a transfer of leasehold land. An outright, express assignment of trade machinery affixed to freehold land will not of itself carry more than would pass on a transfer of the land alone; but the assignor of a leasehold estate cannot transfer more than the term vested in him, so that, if he includes in his assignment a separate disposition of trade machinery which is not limited to the residue of the leasehold term assigned but is, for example, an absolute disposition of the machinery, this will constitute a separate dealing with the machinery as chattels so as to bring the document within the Bills of Sale Acts<sup>9</sup>.

1 *Meux v Jacobs* (1875) LR 7 HL 481; *Re Yates, Batcheldor v Yates* (1888) 38 ChD 112, CA; *Re Brooke, Brooke v Brooke* [1894] 2 Ch 600. A mortgage of land carries with it as a matter of law all fixtures annexed to the land, without express mention (see the Law of Property Act 1925 ss 62, 205(1)(ii); **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 236; **MORTGAGE** vol 77 (2010) PARA 195); and this is so whether the mortgage is express or implied, as by deposit of the title deeds: *Re Lusty, ex p Lusty v Official Receiver* (1889) 60 LT 160; *Williams v Evans* (1856) 23 Beav 239. It has, however, been held that the mere fact that a mortgage

enumerates only those classes of trade fixtures which are outside the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630), and not those within the Acts, does not prevent the latter passing under the mortgage by operation of law. The enumeration is not by itself sufficient to justify the inference that the non-enumerated classes are intended to be excluded from the mortgage: *Southport and West Lancashire Banking Co v Thompson* (1887) 37 ChD 64, CA; *Mather v Fraser* (1856) 2 K & J 536.

As to the statutory definition of 'personal chattels' and the division of that definition into classes see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq.

2 *Meux v Jacobs* (1875) LR 7 HL 481.

3 The other than the fixed motive-powers, and other machinery and effects excluded from the definition of trade machinery in the Bills of Sale Act 1878; see PARA 1668. If the trade machinery is not a fixture, an express assignment of it in the document will, of course, attract the operation of the Bills of Sale Acts, as without express mention the machinery would not pass under a conveyance or mortgage of the land.

4 These principles, though overridden by the Bills of Sale Act 1878 s 7 in relation to fixtures generally (see PARA 1666), continue to apply to such fixed trade machinery as falls within the definition of 'trade machinery' in s 5, as by that section such machinery is to be deemed personal chattels (see PARA 1667). It is, however, unlikely that these pre-1878 Act principles will normally operate, because in most cases fixed machinery will be within the exclusion contained in s 5 (see PARA 1668). If the machinery is not fixed, it will not, of course, pass merely by virtue of a conveyance of the land or buildings where it is situated but will require to be expressly mentioned or included in a group of chattels referred to in the deed.

5 *Johns v Ware* [1899] 1 Ch 359.

6 *Johns v Ware* [1899] 1 Ch 359; *Re Eslick, ex p Alexander* (1876) 4 ChD 503. See also the cases cited in note 8.

7 *Small v National Provincial Bank of England* [1894] 1 Ch 686.

8 *Re Rogerstone Brick and Stone Co, Southall v Wescomb* [1919] 1 Ch 110, CA; *Re Brooke, Brooke v Brooke* [1894] 2 Ch 600; *Re Yates, Batcheldor v Yates* (1888) 38 ChD 112, CA; *Re Joyce, ex p Barclay* (1874) 9 Ch App 576.

9 *Re Wilde, ex p Daglish* (1873) 8 Ch App 1072; *Paine v Matthews* (1885) 53 LT 872, DC; *Re Reed, ex p Brown* (1878) 9 ChD 389, CA; *Hawtry v Butlin* (1873) LR 8 QB 290; *Begbie v Fenwick* (1871) 8 Ch App 1075n (revsd on other grounds (1871) 25 LT 441).

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## 1670. Growing crops.

At common law, growing crops other than industrial growing crops were not goods until severance<sup>1</sup>, and even as regards industrial growing crops the Bills of Sale Act 1854 did not apply, as these were not considered goods capable of complete transfer by delivery<sup>2</sup>. Severed crops were always regarded as goods, and this remains the case<sup>3</sup>. As regards unsevered crops, the Bills of Sale Act 1878 largely assimilated these with fixtures, so that such crops will constitute personal chattels if separately assigned or charged<sup>4</sup>, but not otherwise. As in the case of fixtures<sup>5</sup>, an assignment or charge of growing crops by separate words, or containing a power to sever and sell them apart from the land, does not operate as a separate assignment if by the same instrument any freehold or leasehold interest in the land is also conveyed or assigned to the same person or persons<sup>6</sup>.

Where a document transfers or charges existing crops which have been severed or which, though unsevered, have been separately assigned or charged, the document will be registrable as a bill of sale unless: (1) the crops are industrial growing crops assigned by a transfer made

in the ordinary course of business<sup>7</sup>; (2) they are farming stock or produce which by virtue of any covenant or agreement or custom of the country ought not to be removed from the farm<sup>8</sup>; or (3) the document is otherwise excluded from the definition of 'bill of sale'<sup>9</sup> or is exempt from the Bills of Sale Acts, for example as an agricultural charge<sup>10</sup>.

1 *Brantom v Griffiths* (1877) 2 CPD 212, CA; *Re Phillips, ex p National Mercantile Bank* (1880) 16 ChD 104, CA. However, industrial growing crops (or emblements), ie annual crops such as corn, grain, potatoes, produced by agricultural labour, have always been considered goods: *Stephenson v Thompson* [1924] 2 KB 240, CA; *Evans v Roberts* (1826) 5 B & C 829; and see **AGRICULTURAL LAND** vol 1 (2008) PARAS 347, 369, 370. Accordingly, a transfer of industrial growing crops in the ordinary course of business falls within the exception in the Bills of Sale Act 1878 s 4 (see PARA 1666) (*Stephenson v Thompson* [1924] 2 KB 240, CA) even if they are transferred before severance.

2 See *Brantom v Griffiths* (1877) 2 CPD 212, CA. As to articles capable of complete transfer by delivery see PARA 1665.

3 *Re Phillips, ex p National Mercantile Bank* (1880) 16 ChD 104, CA.

4 See the Bills of Sale Act 1878 s 4; and PARA 1666. As in the case of fixtures, 'separately assigned or charged' means assigned or charged separately from the land, irrespective of whether they are included in an assignment with other goods: *Roberts v Roberts* (1884) 13 QBD 794, CA. As to the statutory definition of 'personal chattels' and the division of that definition into classes see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq.

5 See PARA 1666.

6 Bills of Sale Act 1878 s 7. As to future crops see PARA 1699 note 3.

7 *Stephenson v Thompson* [1924] 2 KB 240, CA, distinguishing *Brantom v Griffiths* (1877) 2 CPD 212, CA (decided on the wording of the Bills of Sale Act 1854 (repealed)); see note 1. This does not apply to unsevered naturally growing crops (*fructus naturales*) as these are not goods and thus do not come within the exemption in the Bills of Sale Act 1878 s 4, relating to transfers of goods in the ordinary course of business: see PARA 1660.

8 See PARA 1671.

9 See PARA 1656 et seq. As to documents mortgaging or charging future crops to be grown on land owned by the grantor at the date of the mortgage see PARA 1699 note 3.

10 See PARA 1687.

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### **1671. Farming stock and produce.**

The statutory definition of 'personal chattels' expressly excludes stock or produce<sup>1</sup> upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country<sup>2</sup> ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale<sup>3</sup>. It would seem that, to the extent to which the prohibition against removal of produce, by agreement or custom, has been overridden by statute<sup>4</sup>, such prohibition is not effective to take the produce out of the definition of 'personal chattels', so that a bill of sale of produce which the grantor has a right to remove under the Agricultural Holdings Act 1986, notwithstanding any custom of the country or the provisions of the contract of tenancy or of any agreement respecting the disposal of crops or the method of cropping arable land, is within the Bills of Sale Acts unless exempt on some other ground, as, for example, an agricultural charge<sup>5</sup>.

The grantee of any bill of sale covering goods, chattels, stock or crop of any person or persons engaged or employed in husbandry on any lands let to farm is not permitted to take, use or dispose of any hay, straw, grass or grasses, turnips, or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed, or other dressings intended for such lands, and being thereon, in any other manner and for any other purpose than the grantor of the bill ought to have taken, used or disposed of the same if no such bill of sale had been granted<sup>6</sup>.

1 As to the statutory definition of 'personal chattels' and the division of that definition into classes see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq. The phrase 'stock or produce' covers all movable property on or belonging to the farm (see *Harvey v Harvey* (1863) 32 Beav 441), and thus includes livestock, dead stock, movable tools or equipment and severed crops. But whilst in its ordinary connotation the word 'stock' would cover growing crops (*Re Roose, Evans v Williamson* (1880) 17 ChD 696; and cf the Agricultural Credits Act 1928 s 5(7); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1328), yet, in the context of the Bills of Sale Acts, crops appear to be within the exemption only if severed: *Brantom v Griffiths* (1876) 1 CPD 349. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

2 'Custom of the country' denotes not a custom from time immemorial in the strict legal sense but prevalent usage in the neighbourhood where the land is situated, being usage which has subsisted for a reasonable length of time: *Williams v Lewis* [1915] 3 KB 493 at 494 per Bray J; *Tucker v Linger* (1882) 21 ChD 18 at 34, CA, per Jessel MR. A common custom is that relating to the removal of away-going crops by an agricultural tenant: see **AGRICULTURAL LAND** vol 1 (2008) PARA 353 et seq. Apart from any applicable statutory provisions, the right of removal depends on custom, and the custom may be not that the outgoing tenant shall remove a standing crop but that this should be purchased by the incoming tenant at valuation. See, however, the Agricultural Holdings Act 1986 s 15(1); and **AGRICULTURAL LAND** vol 1 (2008) PARA 344. As to custom and usage see further **CUSTOM AND USAGE**.

3 See the Bills of Sale Act 1878 s 4; and PARA 1662. It would seem that the words 'covenant or agreement' do not extend to a covenant or agreement in the bill of sale itself: *Teague v Farrell* (1880) 6 VLR 480.

4 See the Agricultural Holdings Act 1986 s 15(1); and **AGRICULTURAL LAND** vol 1 (2008) PARA 344.

5 See PARA 1687.

6 See the Sale of Farming Stock Act 1816 s 11; and **AGRICULTURAL LAND** vol 1 (2008) PARA 602.

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## 1672. Choses in action.

Choses or things in action are excluded from the definition of 'personal chattels'<sup>1</sup>. The term 'chose in action' embraces all rights of a kind enforceable only by action, not by possession<sup>2</sup>. In its current usage, the term covers not only rights in personam but also incorporeal property conferring rights in rem. It thus includes patents<sup>3</sup> and copyrights<sup>4</sup> as well as bills of exchange<sup>5</sup>, bills of lading<sup>6</sup>, debts<sup>7</sup>, shares and debentures in companies<sup>8</sup>, shares in a partnership<sup>9</sup>, policies of insurance<sup>10</sup> and legacies<sup>11</sup>. It has also been held to include the interest of a remainderman in chattels subject to a life interest<sup>12</sup>, but the conclusion that on that account the assignment of such an executory interest does not also constitute a transfer of personal chattels for the purpose of the Bills of Sale Acts does not appear to be warranted<sup>13</sup>.

The transfer of the owner's rights under a hire-purchase agreement is a transfer of a chose in action, because such assignment does not by implication carry ownership of the goods comprised in the agreement<sup>14</sup>. However, if title to the goods is expressly included in the transfer, the instrument will be a bill of sale covering personal chattels<sup>15</sup>.



The transfer of a bill of sale carries with it the ownership of the goods comprised in the bill and thus itself constitutes a bill of sale of personal chattels, not merely the transfer of a chose in action<sup>16</sup>. The assignment of the benefit of a charge on goods, though not itself transferring ownership<sup>17</sup>, conveys an equitable right over the goods and so constitutes a bill of sale of personal chattels<sup>18</sup>.

1 As to the statutory definition of 'personal chattels' and the division of that definition into classes see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq.

2 *Torkington v Magee* [1902] 2 KB 427 (revsd on other grounds [1903] 1 KB 644, CA); *Colonial Bank v Whinney* (1885) 30 ChD 261 at 285, CA, per Fry LJ (approved on this point (1886) 11 App Cas 426, HL). See generally **CHOSES IN ACTION** vol 13 (2009) PARA 1 et seq.

3 *Edwards & Co v Picard* [1909] 2 KB 903, CA; *British Mutoscope and Biograph Co Ltd v Homer* [1901] 1 Ch 671.

4 Ie the copyright itself as opposed to the physical property which is the subject of the copyright: see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 3 et seq.

5 Ie in so far as concerns the rights which the bill embodies. As a document, a bill of exchange is a chattel and transferable as such: *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA.

6 *Caldwell v Ball* (1786) 1 Term Rep 205 at 216. However, the indorsement and delivery of a bill of lading transfers not only the contractual rights created by the bill but also ownership of the goods comprised in it, if so intended.

7 Although book debts are choses in action, a general assignment of trade debts, whilst not within the Bills of Sale Acts, must in certain circumstances be registered as if it were a bill of sale: see PARA 1854. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

8 *Colonial Bank v Whinney* (1886) 11 App Cas 426, HL (shares); *Re Pryce, ex p Rensburg* (1877) 4 ChD 685 (debentures).

9 *Re Bainbridge, ex p Fletcher* (1878) 8 ChD 218. The disposal of a share in a partnership must be distinguished from disposal by the partners of a chattel forming part of the partnership property. A document effecting the transfer of the latter is a bill of sale of personal chattels within the Bills of Sale Acts: see eg *Re Tamplin & Son, ex p Barnett* (1890) 59 LQB 194.

10 *Re Moore, ex p Ibbetson* (1878) 8 ChD 519, CA.

11 *Deeks v Strutt* (1794) 5 Term Rep 690.

12 *Re Thynne, Thynne v Grey* [1911] 1 Ch 282; *Re Tritton, ex p Singleton* (1889) 61 LT 301.

13 See PARA 1635 note 9.

14 *Re Davis & Co, ex p Rawlings* (1888) 22 QBD 193, CA; *Re Isaacson, ex p Mason* [1895] 1 QB 333, CA.

15 *Re Isaacson, ex p Mason* [1895] 1 QB 333, CA.

16 See PARA 1634 note 5. If, however, the bill so transferred is registered, the transfer neither requires to be registered as a bill of sale nor necessitates renewal of registration of the original bill (see the Bills of Sale Act 1878 ss 10, 11; and PARAS 1634, 1832).

17 This is because a charge does not involve the transfer of ownership but merely constitutes an incumbrance: see PARA 1679.

18 The exemption from registration conferred by the Bills of Sale Act 1878 s 10 will not normally apply, as this is confined to a transfer of a registered bill, and a charge on goods, being incompatible with the statutory form (see PARAS 1638, 1662 note 2), is not capable of effective registration.

5TH EDITION, PARAS 1620-2586)/7. BILLS OF SALE/(2) DEFINITIONS COMMON TO SECURITY AND ABSOLUTE BILLS/(iii) Meaning of 'Personal Chattels'/1673. Other property outside the definition of personal chattels.

### **1673. Other property outside the definition of personal chattels.**

Apart from the exemptions, previously referred to, in respect of fixtures<sup>1</sup>, growing crops<sup>2</sup>, farming stock and produce<sup>3</sup> and choses in action<sup>4</sup>, the Bills of Sale Act 1878 excludes from the definition of 'personal chattels': (1) chattel interests in real estate<sup>5</sup>; and (2) shares or interests in the stock, funds or securities of any government<sup>6</sup>, or in the capital or property of incorporated or joint stock companies<sup>7</sup>. All these kinds of property would in any event fall outside the term 'personal chattels' even if not expressly excluded by the statutory provisions.

The list of exclusions from the definition of 'personal chattels' does not mention real property (other than fixtures)<sup>8</sup>, or incorporeal hereditaments<sup>9</sup>, but it is clear that, with the exception of fixtures separately assigned or charged<sup>10</sup>, these types of property do not fall within the expression 'personal chattels'.

1 See PARA 1666.

2 See PARA 1670.

3 See PARA 1671.

4 See PARA 1672.

5 As to the statutory definition of 'personal chattels' and the division of that definition into classes see the Bills of Sale Act 1878 s 4; and PARA 1662 et seq. The usual term for chattel interests in real estate is 'chattels real'. The most important of these are leaseholds: 2 Bl Com 386. Tenant right (ie the customary right of an outgoing tenant to be compensated for standing crops and for tillage and other acts of husbandry enuring for the benefit of the landlord or the incoming tenant (see **AGRICULTURAL LAND** vol 1 (2008) PARA 364)) is also a chattel real and outside the Bills of Sale Acts: *Cochrane v Entwistle* (1890) 25 QBD 116, CA. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

6 The specific reference to these forms of property in the Bills of Sale Act 1878 s 4 (see PARA 1662) is superfluous, as they are comprehended in the wider term 'choses in action' (see PARA 1672) referred to later in that provision.

7 See PARA 1657. As to the exemption from the Bills of Sale Acts of debentures and charges by companies see PARA 1684.

8 See PARA 1662 et seq.

9 Ie rights over the land of another. The most important of these are easements, rights of way, profits à prendre and rents: see **EASEMENTS AND PROFITS A PRENDRE**.

10 Such fixtures are specifically dealt with in Bills of Sale Act 1878: see PARA 1666.

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## **(3) SECURITY BILLS OF SALE**

### **(i) Creation of Security over Goods**

#### **1674. Forms of security over goods.**

Consensual security<sup>1</sup> over goods may take the form of a contractual lien, a pledge, a legal or equitable mortgage, or a mere equitable charge (or hypothecation)<sup>2</sup>. A person may make a declaration of trust by way of security but this is not an independent form of security, merely a particular type of equitable mortgage.

1 Security over goods may also be conferred by operation of law, as in the case of possessory and equitable liens.

2 See PARAS 1675-1680.

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### **1675. Contractual lien.**

A contractual lien is a right given to a person by contract to detain goods of another to secure payment of charges arising from the delivery of goods for some independent purpose such as custody, storage or repair<sup>1</sup>. The contractual lien is often equated with pledge but differs from the latter both in nature and in effect. The two forms of security differ in their nature in that a contractual lien is exercised over goods deposited not (or not primarily) for the purpose of giving security but for some independent purpose such as described above, whereas in the case of pledge the sole or primary purpose of the delivery is to furnish security; and they differ in their effect in that a pledge carries with it an implied right of sale on default in payment whereas a contractual lien gives a mere right of detention unless otherwise agreed<sup>2</sup>.

1 See further **LIEN**. See also PARA 1628.

2 *Donald v Suckling* (1866) LR 1 QB 585; *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690 at 698, CA, per Bowen LJ; *The Odessa, The Woolston* [1916] 1 AC 145, PC; and see generally **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 3 et seq.

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### **1676. Pledge.**

A pledge is a delivery of possession of goods to secure payment of money or the performance of some other obligation owed to the deliverer<sup>1</sup>. A pledge can only be created by the delivery of actual or constructive possession<sup>2</sup>, but once possession has been given with the intention to create a pledge no other formality is necessary, except in the case of a pledge taken by a pawnbroker to secure a regulated agreement within the Consumer Credit Act 1974<sup>3</sup>. A pledge does not by itself confer more than a possessory interest enforceable at law and carrying with it an implied right of sale in the event of default<sup>4</sup>; and, as the pledgee's rights over the goods stem from the delivery of possession, the mere fact that a document is executed setting out

the terms on which possession is to be held does not attract the operation of the Bills of Sale Acts<sup>5</sup>.

1 See further **PLEDGES AND PAWNS**. See also PARA 1627.

2 *Dublin City Distillery Ltd v Doherty* [1914] AC 823, HL; *Martin v Reid* (1862) 11 CBNS 730.

3 See **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 208 et seq.

4 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA; *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396 at 403, CA, per Fry LJ; *Burdick v Sewell* (1884) 13 QBD 159 at 174, CA, per Bowen LJ in a dissenting judgment which was upheld on appeal, sub nom *Sewell v Burdick* (1884) 10 App Cas 74, HL.

5 *Waight v Waight and Walker* [1952] P 282, [1952] 2 All ER 290; *Re David Allester Ltd* [1922] 2 Ch 211. The position is otherwise where the pledgee's possession is constructive and derives from a document of title or other written attornment issued by the pledgor. See PARA 1640. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

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### **1677. Legal mortgage.**

A legal mortgage of goods is a transfer of legal title to the creditor with an express or implied proviso for retransfer on redemption<sup>1</sup>. In order for a mortgage of chattels to take effect at law, the transfer must usually<sup>2</sup> be a present transfer, not merely an agreement for transfer, and it must relate to goods to which the transferor holds the legal title at the date of the transfer<sup>3</sup>. If these two conditions are satisfied, no further formality is necessary and the mortgage can be effected by word of mouth<sup>4</sup>. Almost invariably, a legal mortgage involves the passing of legal title from the mortgagor himself, but this is not essential, and a legal mortgage can be effected even where the mortgagor does not himself hold the legal title but directs a third party who holds it to transfer it to the mortgagee by way of security<sup>5</sup>.

1 See PARA 1622 note 6. As to legal mortgages see further **MORTGAGE** vol 77 (2010) PARAS 117, 187 et seq.

2 For the exceptional cases where a transfer of future goods can, upon their acquisition by the transferor, take effect at law without a new act, see PARA 1623.

3 The transferor need not, however, necessarily be the mortgagor himself: see the text to note 5.

4 *Newlove v Shrewsbury* (1888) 21 QBD 41, CA; *Flory v Denny* (1852) 7 Exch 581; *Reeves v Capper* (1838) 5 Bing NC 136.

5 See eg *Maas v Pepper* [1905] AC 102, HL. A bank taking an indorsed bill of lading from the seller as security for an advance of the price on behalf of the buyer usually does so by way of pledge, not mortgage, but there is nothing to prevent the transfer from being by way of mortgage if the parties so intend: *Sewell v Burdick* (1884) 10 App Cas 74, HL.

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### 1678. Equitable mortgage.

An equitable mortgage of goods is a transfer of equitable title to the creditor, or a declaration of trust in his favour, with an express or implied proviso for retransfer or termination of the trust on redemption. An equitable mortgage can be effected in one of two ways, namely by a present mortgage of an equitable interest or by an agreement to give a legal or equitable mortgage<sup>1</sup>.

An example of the first method is a second mortgage of goods where the first mortgage is a legal mortgage. The second mortgage is necessarily equitable in this case, as the effect of the legal mortgage is to divest the transferor of his legal title, leaving him only with an equity of redemption<sup>2</sup>. A transfer by way of equitable mortgage requires no consideration, being an assignment and not a contract<sup>3</sup>, but since it is *ex hypothesi* a transfer of an equitable interest it must be in writing in order to be effective<sup>4</sup>.

The second method of creating an equitable mortgage, namely by agreement to create a mortgage, rests on contract, not on assignment, and must therefore be supported by consideration or made by deed<sup>5</sup>. If at the time of the agreement the mortgagor has the legal title to the goods, or is able to procure its transfer by a third party, the agreement, if supported by consideration so as not to require to be by deed, may be made orally<sup>6</sup>, but, if at the date of the agreement the mortgagor can only make or procure a transfer of an equitable interest in the goods, the agreement must be in writing<sup>7</sup>. Where the mortgagor has not himself any interest in the goods, either legal or equitable, at the date of the agreement, and is thus agreeing to mortgage after-acquired property, the effect of the agreement is usually<sup>8</sup> to create an equitable interest attaching to the goods when they are acquired<sup>9</sup>, and as the agreement does not, at the time of its formation, relate to a presently existing interest, it must be supported by consideration<sup>10</sup> even if made by deed<sup>11</sup>. If consideration is given, the agreement need not, however, be in writing<sup>12</sup>.

1 As to equitable mortgages see further **MORTGAGE** vol 77 (2010) PARA 118 et seq.

2 This is because the legal ownership of chattels is indivisible: see PARA 1622 note 6. However, if the first mortgage is equitable, there is no reason why the second mortgage should not take effect as a legal mortgage.

3 See *Kekewich v Manning* (1851) 1 De GM & G 176; and **EQUITY** vol 16(2) (Reissue) PARA 642.

4 See the Law of Property Act 1925 s 53(1)(c).

5 A past consideration will not normally suffice: see **CONTRACT** vol 9(1) (Reissue) PARAS 738-739.

6 It is outside the Law of Property Act 1925 s 53(1)(c) since it is an agreement for the transfer of a legal title, not an equitable interest.

7 As being a disposition of an equitable interest within the Law of Property Act 1925 s 53(1)(c). The fact that the equitable owner of the goods has expressed himself as merely agreeing to transfer in the future, and not as making a present transfer, does not appear to exclude s 53(1)(c), as the agreement takes effect as a disposition in equity: see eg *Oughtred v IRC* [1960] AC 206, [1959] 3 All ER 623, HL.

8 See, however, PARA 1624.

9 *Holroyd v Marshall* (1862) 10 HL Cas 191.

10 See PARA 1624 notes 3, 11.

11 See PARA 1624 note 11.

12 See PARA 1624 note 12.

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### **1679. Charge.**

A charge on goods (that is, a bare charge unaccompanied by an agreement for a mortgage) involves no transfer of ownership, but is merely an incumbrance on the goods, the chargee having the right to look to the goods to satisfy the debt due to him. A charge is thus necessarily equitable<sup>1</sup>. Since it rests on agreement and requires the assistance of the court to perfect it, a charge not made by deed requires consideration<sup>2</sup> but no other formality<sup>3</sup>. An agreement to give a charge, which itself amounts to a charge<sup>4</sup>, likewise requires consideration to support it unless made by deed<sup>5</sup>. Similarly, a purported charge on goods in which the chargor has no interest at the time of the charge is merely an agreement for a charge requiring consideration to support it<sup>6</sup>; and since it relates to an interest not yet in existence the fact that it is made by deed does not dispense with the necessity for consideration<sup>7</sup>.

1 Except as otherwise provided by statute, as in the case of a charge on loan by way of legal mortgage: see the Law of Property Act 1925 ss 85-87; and **MORTGAGE** vol 77 (2010) PARAS 104, 187 et seq. The terms 'charge' and 'mortgage' are frequently used interchangeably, and the former does not in all contexts bear its narrow technical meaning; see PARA 1686 note 3.

2 An equitable chargee cannot sell or appoint a receiver except by order of the court (*Tennant v Trenchard* (1869) 4 Ch App 537) unless the charge is by deed: Law of Property Act 1925 ss 101(1), 205(1)(xvi).

3 *Rolleston v Morton* (1842) 1 Dr & War 171. An equitable charge is not within the Law of Property Act 1925 s 53(1)(c) (see PARA 1678), as it merely creates an equitable interest and does not transfer an equitable interest.

4 *Rolleston v Morton* (1842) 1 Dr & War 171.

5 *Brown, Shipley & Co v Kough* (1885) 29 ChD 848 at 854, CA, per Chitty J.

6 As to a transfer of future property see PARA 1624. The principle applies a fortiori to a charge.

7 See PARA 1624 note 11.

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### **1680. Declaration of trust.**

A declaration of trust by way of security leaves the legal title, if he has it, in the debtor as trustee, the creditor obtaining beneficial ownership in equity by way of security<sup>1</sup>. No consideration is necessary<sup>2</sup>, and a declaration of trust of goods to which the trustee has the legal title may be made by word of mouth<sup>3</sup> or may even be inferred from conduct<sup>4</sup>. However, if the trustee's interest in the goods is purely equitable, the declaration of trust must be in writing<sup>5</sup>.

A trust receipt<sup>6</sup> of the kind taken by a bank as a condition of releasing pledged documents of title to imported goods appears to be *sui generis*. It is an instrument which preserves the

efficacy of the pledge after the pledgee has parted with possession, whilst at the same time establishing a 'trust', which in this context denotes not a trust in the normal equity sense but a trust agency by which the pledgor holds the legal title to the goods<sup>7</sup> as fiduciary agent for sale<sup>8</sup>.

1 See **TRUSTS** vol 48 (2007 Reissue) PARA 644 et seq.

2 The trust is completely constituted by the declaration: *Milroy v Lord* (1862) 4 De GF & J 264 at 274.

3 *Benbow v Townsend* (1833) 1 My & K 506.

4 *O'Flaherty v Brown* [1907] 2 IR 416.

5 This is because the declaration of trust will then constitute a disposition of an equitable interest within the Law of Property Act 1925 s 53(1)(c) (see PARA 1678): *Grey v IRC* [1960] AC 1, [1959] 3 All ER 603, HL.

6 See PARA 1660.

7 I.e. the goods acquired under the contract of sale. The delivery of the indorsed bill of lading to the bank, if by way of pledge, does not pass the full legal title but only a legal possessory interest (*Sewell v Burdick* (1884) 10 App Cas 74, HL), though the fact that the pledgor requires the authority of the pledgee to dispose of the goods suffices to make the pledgee the 'owner' for the purpose of the Factors Act 1889 s 2 (in relation to which see **AGENCY** vol 1 (2008) PARA 148), so enabling a bona fide purchaser or another pledgee to exercise a claim over the goods free from the pledge in favour of the bank: *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* [1938] 2 KB 147, [1938] 2 All ER 63, CA.

8 *Re David Allester Ltd* [1922] 2 Ch 211. It is perhaps more realistic to regard the pledgor as selling on his own account, as the sale takes place because he has negotiated the contract for his own purposes rather than because the pledgee is enforcing a power of sale (although the pledgor requires the authority of the pledgee to sell, and thus owes a duty analogous to that of an agent). Once the goods have been sold, however, the trust attaches to the proceeds as a normal trust.

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## **(ii) General Effect of Bills of Sale Acts**

### **1681. Acts not a code.**

The Bills of Sale Acts<sup>1</sup> do not constitute a code, but are engrafted on to the common law, leaving rules of law and equity relating to the transfer or mortgage of goods intact except to the extent to which these are displaced by the statutory provisions<sup>2</sup>.

1 I.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 See further PARA 1632.

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### **1682. Nature of statutory control.**

Where a bill of sale within the statutory definition<sup>1</sup> is given by way of security for the payment of money<sup>2</sup> and confers on the grantee a power of seizure<sup>3</sup> over personal chattels<sup>4</sup>, the Bills of Sale Act (1878) Amendment Act 1882 imposes various requirements and restrictions on the grantee. In particular, the bill must usually be limited to goods of which the grantor is the true owner<sup>5</sup>; it must truly state the consideration for which it is given<sup>6</sup>, which must not be less than £30<sup>7</sup>; it must be in accordance with the appropriate form<sup>8</sup>; and it must be attested and registered in accordance with the requirements of the Bills of Sale Acts<sup>9</sup>. The Bills of Sale Act (1878) Amendment Act 1882 prohibits the grantee from seizing the goods comprised in the bill except for one or more of certain specified causes<sup>10</sup>, although the Act has nothing to do with the reasonableness or unreasonableness of the bargain between the parties<sup>11</sup>.

The restriction imposed by the Bills of Sale Act 1878 on successive bills<sup>12</sup> applies to security as well as absolute bills; and, as with absolute bills, any defeasance, condition or declaration of trust subject to which the bill is given must either be contained in the body of the bill or be written on the same paper or parchment therewith before registration and be truly set forth in the copy required to be filed<sup>13</sup>.

The effect of non-compliance with the statutory requirements varies according to which requirement is infringed<sup>14</sup>.

1 See PARA 1638 et seq.

2 The Bills of Sale Act (1878) Amendment Act 1882 is confined to bills of sale given by way of security for the payment of money: see s 3; and PARA 1631.

3 The Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630) do not apply if the instrument does not give such a power: see the Bills of Sale Act 1878 s 3; and PARA 1633.

4 Ie as defined by the Bills of Sale Act 1878 s 4: see PARA 1662 et seq.

5 See the Bills of Sale Act (1878) Amendment Act 1882 s 5; and PARA 1697 et seq.

6 See the Bills of Sale Act 1878 s 8; the Bills of Sale Act (1878) Amendment Act 1882 s 8; and PARA 1702 et seq.

7 See the Bills of Sale Act 1878 s 12; and PARA 1703.

8 See the Bills of Sale Act 1878 s 9. As to the form see PARA 1711.

9 As to attestation see the Bills of Sale Act 1878 ss 8-10; and PARA 1753. As to registration see s 8; and PARA 1754 et seq. A bill is valid without registration during the seven-day period allowed for registration: see PARA 1759.

10 See the Bills of Sale Act 1878 s 7; and PARA 1789.

11 See PARA 1713 note 11.

12 See the Bills of Sale Act 1878 s 9; and PARA 1755.

13 See the Bills of Sale Act 1878 s 10(3); and PARA 1748.

14 See PARA 1712 et seq.



### 1683. Effect of valid security bill.

A valid security bill of sale<sup>1</sup>, duly registered, operates to transfer the legal title to the goods comprised in the bill<sup>2</sup>, with an express or implied proviso for retransfer on redemption<sup>3</sup>. In general, the legal title acquired by the grantee is valid against the world<sup>4</sup>, but there are certain situations in which a third party may subsequently acquire an interest free from, or ranking in priority to, the interest of the grantee<sup>5</sup>.

Except in those matters for which the Bills of Sale Acts<sup>6</sup> make provision, the rights and duties of the parties to a security bill are governed by the terms of the bill itself, if within the limits permitted by the Acts<sup>7</sup>, and by principles of law and equity applicable to mortgages, and in particular to mortgages of chattels<sup>8</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 The statutory form of bill of sale, coupled with the requirement that it must relate to goods of which the grantor is the true owner (see PARA 1697), almost invariably results in a transfer of the legal title. The only situation where this will not be true of a bill complying with the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630) is where, in addition to personal chattels owned by the grantor, it extends to those classes of after-acquired property which are permitted by the Bills of Sale Act (1878) Amendment 1882 ss 5, 6 (see PARA 1701). As to these, the grantee acquires no interest in them at all until they are acquired, and in the absence of any new act of transfer after that date his title is purely equitable (*Holroyd v Marshall* (1862) 10 HL Cas 191) except as regards the produce of or natural increase in property already owned by the grantor and transferred to the grantee under the bill (see PARAS 1623-1624). As to the meaning of 'personal chattels' see PARA 1662 et seq.

3 The statutory form (see the Bills of Sale Act (1878) Amendment Act 1882 s 9; and PARA 1711) contains no express proviso for retransfer on redemption, but it envisages the inclusion of such a proviso when referring to the insertion of terms providing for the defeasance of the security. In any event, a proviso for reassignment on redemption is implied in any mortgage by assignment, whether created by bill of sale or otherwise: see *Johnson v Diprose* [1893] 1 QB 512, CA; and see also PARA 1796.

4 See PARA 1805.

5 See PARA 1805 et seq.

6 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

7 The inclusion of stipulations not permitted by the Bills of Sale Acts will usually vitiate the bill entirely, and not merely in relation to the offending terms: see PARA 1737 et seq.

8 See PARA 1786. A mortgage of goods differs in various respects from a mortgage of land. The former may be governed by the Bills of Sale Acts and is effected at law by an assignment of the goods, with an express or implied term for reassignment on redemption. The latter is outside the Bills of Sale Acts and can only take effect at law if granted by demise for a term of years absolute or by a charge by deed expressed to be by way of legal mortgage: see the Law of Property Act 1925 s 85(1); and **MORTGAGE** vol 77 (2010) PARAS 104, 190. A legal mortgage of goods, unlike a legal mortgage of land, does not create a legal interest concurrent with that of the mortgagor but divests the mortgagor of his legal title, transferring it to the mortgagee. It follows that there can be only one legal mortgage of chattels at any one time, whereas in the case of land an indefinite number of legal mortgages can subsist concurrently.

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### (iii) Charges Exempted from the Bills of Sale Acts

## 1684. Debentures of incorporated companies.

The Bills of Sale Act (1878) Amendment Act 1882 provides that nothing contained in it is to apply to any debenture issued by any mortgage, loan, or other incorporated company or by any limited liability partnership, and secured upon the capital stock or goods, chattels and effects of such company or a limited liability partnership<sup>1</sup>. The words 'other incorporated company' in the statutory provision are not limited to companies ejusdem generis with mortgage and loan companies<sup>2</sup>, but, even if so construed, would cover any incorporated company authorised to raise money on loan or mortgage<sup>3</sup>, including a company incorporated abroad<sup>4</sup>. A society, incorporated under the legislation relating to industrial and provident societies, though having corporate status by virtue of that legislation<sup>5</sup>, is not an incorporated company within the exemption conferred by the Bills of Sale Act (1878) Amendment Act 1882<sup>6</sup>; however, there is now a separate statutory exemption for charges by registered industrial and provident societies<sup>7</sup>.

Any document which is a debenture in the common acceptance of the term, or has the same legal effect<sup>8</sup>, and which is secured on chattels of the company issuing it is within the statutory exemption<sup>9</sup>.

1 Bills of Sale Act (1878) Amendment Act 1882 s 17 (amended by SI 2001/1090). However, a transfer by the mortgagee of a mortgage of the chattels of a company appears to be within the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630): see *Jarvis v Jarvis* (1893) 63 LJCh 10. A charge by a company created or evidenced by an instrument which would have been registrable as a bill of sale if executed by an individual must be registered under the Companies Act 1985 s 395 (prospectively repealed) (see **COMPANIES** vol 15 (2009) PARA 1279): see s 396(1)(c) (prospectively repealed) (as to replacement provisions for ss 395, 396 see the Companies Act 2006 ss 860, 861, 870, 874).

2 *Re Standard Manufacturing Co* [1891] 1 Ch 627, CA, disapproving *Jenkinson v Brandley Mining Co* (1887) 19 QBD 568, DC.

3 *Re Standard Manufacturing Co* [1891] 1 Ch 627, CA.

4 The reported cases refer only to companies incorporated in a part of what was formerly the British Empire (*Clark v Balm, Hill & Co* [1908] 1 KB 667) and, more recently, Bermuda (*NV Slavenburg's Bank v Intercontinental Natural Resources Ltd* [1980] 1 All ER 955 at 975-976, [1980] 1 WLR 1076 at 1099 per Lloyd J, citing *Clark v Balm, Hill & Co* above), but there seems no reason why the exemption should not apply to a company incorporated under any foreign law.

5 See the Industrial and Provident Societies Act 1965 s 3; and PARAS 2394, 2416.

6 *Great Northern Rly Co v Coal Co-operative Society* [1896] 1 Ch 187; *Re North Wales Produce and Supply Society Ltd* [1922] 2 Ch 340 (cases on the earlier industrial and provident societies legislation).

7 See PARA 1686.

8 The term 'debenture', though well understood in the business world, is not legally precise. It has been said to embody any document creating or acknowledging a debt (*Levy v Abercorris Slate and Slab Co* (1887) 37 ChD 260 at 264 per Chitty J) but this is probably too wide. It would seem that all instruments of charge on a company's property are debentures, but that an unsecured debenture connotes an indebtedness which is intended to be of a more than purely temporary character. The exemption in the Bills of Sale Act (1878) Amendment Act 1882 s 17 is, of course, concerned only with debentures secured on personal chattels. See also note 9. As to the meaning of 'personal chattels' see PARA 1662 et seq.

9 Thus an agreement to give a debenture has been held to constitute a debenture, even though not itself in the usual form of a debenture: *Levy v Abercorris Slate and Slab Co* (1887) 37 ChD 260. A debenture trust deed, referred to in the older cases as a 'covering deed', is also a debenture: *Richards v Kidderminster Overseers, Richards v Kidderminster Corpn* [1896] 2 Ch 212.

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### **1685. Other charges and securities by companies.**

The defining of 'debenture' for the purposes of the exception in the Bills of Sale Act (1878) Amendment Act 1882<sup>1</sup> is not crucial, since the courts have held that quite independently of that express exception any instrument of charge or other security issued by a company is outside the mischief against which the Bills of Sale Acts are aimed<sup>2</sup>, whether or not the charge is of a kind which is registrable under the Companies Act 1985<sup>3</sup>.

<sup>1</sup> See PARA 1684.

<sup>2</sup> *Richards v Kidderminster Overseers, Richards v Kidderminster Corpn* [1896] 2 Ch 212; *Re Standard Manufacturing Co* [1891] 1 Ch 627, CA; and see *Re Royal Marine Hotel Co, Kingstown Ltd* [1895] 1 IR 368. In certain earlier cases (see *Brocklehurst v Railway Printing and Publishing Co* [1884] WN 70; *Jenkinson v Brandley Mining Co* (1887) 19 QBD 568), where mortgages executed by incorporated companies were held void for want of registration under the Bills of Sale Acts, no account was taken of the registration provisions in the Companies Acts (as to which see PARA 1684), but the decisions in these cases are no longer a correct statement of the law. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

<sup>3</sup> Ie the Companies Act 1985 s 395 (prospectively repealed) (as to replacement provisions see the Companies Act 2006 ss 860(1), 861(5), 870(1), 874); see PARA 1684 note 1. See *NV Slavenburg's Bank v Intercontinental Natural Resources Ltd* [1980] 1 All ER 955, [1980] 1 WLR 1076.

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### **1686. Charges by industrial and provident societies.**

An instrument executed after 14 September 1967<sup>1</sup> by a registered industrial and provident society<sup>2</sup> with registered offices in England or Wales and which creates or is evidence of a fixed or floating charge<sup>3</sup> on assets of the society is not a bill of sale for the purposes of the Bills of Sale Acts<sup>4</sup>, and is not invalidated by the Acts, if an application for the recording of the charge is made in accordance with the statutory requirements<sup>5</sup>.

Instruments of charge executed before 14 September 1967, or executed at any time by a society whose registered offices are not in England or Wales, are not registrable under the Industrial and Provident Societies Act 1967<sup>6</sup>, and, if regulated by the Bills of Sale Acts, must be executed, attested and registered as required by the Acts.

<sup>1</sup> Ie the date on which the Industrial and Provident Societies Act 1967 came into force (see s 8(2)).

<sup>2</sup> As to the registration of industrial and provident societies see the Industrial and Provident Societies Act 1965; and PARAS 2394 et seq, 2410 et seq.

<sup>3</sup> Except where statute otherwise provides, a charge on goods is to be distinguished from a mortgage in that a mortgagee has a proprietary interest in the goods, whereas a chargee has merely a right, in preference to other creditors, to look to the goods to satisfy the debt due to him: see PARA 1679. However, as was pointed out in *London County and Westminster Bank Ltd v Tompkins* [1918] 1 KB 515, CA, the terms 'mortgage' and

'charge' are not always used in their technical sense; and statutes and statutory instruments tend to use these terms interchangeably, according to the expression normally adopted in practice for the instrument in question, and it is accordingly thought that the word 'charge' in the Industrial and Provident Societies Act 1965 is used loosely and is intended to cover both mortgages and charges in their strict sense.

4 As to bills of sale for the purposes of the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630) see PARA 1638 et seq.

5 Industrial and Provident Societies Act 1967 s 1(1). For the statutory requirements see s 1(2); and PARA 2454. Section 1 does not apply to a debenture registered under the Agricultural Credits Act 1928 s 14 (see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1332); Industrial and Provident Societies Act 1967 s 2(2).

6 See the Industrial and Provident Societies Act 1967 s 1; and PARA 2454.

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### **1687. Agricultural charges.**

An agricultural charge, whether fixed, floating or both, created by a farmer in favour of a bank on all or any of his farming stock and other agricultural assets, has effect notwithstanding anything in the Bills of Sale Acts<sup>1</sup> and is not deemed to be a bill of sale within those Acts<sup>2</sup>.

1 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 Agricultural Credits Act 1928 s 8(1). As to the meanings of 'farmer', 'bank', 'farming stock' and 'other agricultural assets' see s 5(7), (7A); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1328. As to the registration of agricultural charges see s 9; and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1331; and see further PARA 1688. As to bills of sale for the purposes of the Bills of Sale Acts see PARA 1638 et seq.

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### **1688. Floating charges by agricultural societies and agricultural marketing boards.**

Debentures issued by a registered industrial and provident society<sup>1</sup>, creating in favour of a bank<sup>2</sup> a floating charge<sup>3</sup> on farming stock<sup>4</sup>, may be registered in like manner as an agricultural charge<sup>5</sup>, and if so registered are valid as respects such property notwithstanding anything in the Bills of Sale Acts<sup>6</sup> and are not deemed to be bills of sale within those Acts<sup>7</sup>. Similar provisions apply to debentures issued by an agricultural marketing board in favour of a bank creating a floating charge on farming stock in England or Wales the property in which is vested in the board<sup>8</sup>.

1 As to the registration of industrial and provident societies see the Industrial and Provident Societies Act 1965; and PARAS 2394 et seq, 2410 et seq. As to charges by industrial and provident societies see PARA 1686.

2 As to the meaning of 'bank' see the Agricultural Credits Act 1928 s 5(7), (7A); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1328.

3 Unlike the provisions dealing with an agricultural charge by a farmer (see PARA 1687), this provision does not extend to fixed charges.

4 The property which is farming stock within the meaning of the Agricultural Credits Act 1928 Pt II (ss 5-14), as to which see s 5(7); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1328.

5 As to the registration of agricultural charges see the Agricultural Credits Act 1928 s 9; and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1331.

6 The Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

7 See the Agricultural Credits Act 1928 s 14; and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1332. As to bills of sale for the purposes of the Bills of Sale Acts see PARA 1638 et seq.

8 See the Agricultural Marketing Act 1958 s 15(5); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1106.

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### **1689. Mortgages of aircraft.**

Any mortgage of an aircraft<sup>1</sup> registered in the United Kingdom nationality register maintained by the Civil Aviation Authority may be entered in the register of aircraft mortgages<sup>2</sup>. The Bills of Sale Acts<sup>3</sup>, in so far as they relate to bills of sale<sup>4</sup> and other documents given by way of security for the payment of money, do not apply to any mortgage of an aircraft registered in the United Kingdom nationality register which is made on or after 1 October 1972<sup>5</sup>. This exemption is not dependent on registration of the mortgage in the register of aircraft mortgages, but failure to register the mortgage may result in its being subordinated to a subsequent mortgage which is registered<sup>6</sup>.

1 For this purpose, 'mortgage of an aircraft' includes a mortgage which extends to any store of spare parts for that aircraft but does not otherwise include a mortgage created as a floating charge: see the Mortgaging of Aircraft Order 1972, SI 1972/1268, art 2(2). As to the distinction between a charge and a mortgage see PARA 667 note 3.

2 See the Mortgaging of Aircraft Order 1972, SI 1972/1268, arts 2(2), 4(1).

3 The Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

4 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

5 Mortgaging of Aircraft Order 1972, SI 1972/1268, art 16(1). 1 October 1972 was the date on which the Mortgaging of Aircraft Order 1972, SI 1972/1268, was brought into force: see art 1.

6 See the Mortgaging of Aircraft Order 1972, SI 1972/1268, art 14(1). As to priority notices see arts 5, 14(2).

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## 1690. Mortgages of ships.

A mortgage of a ship or vessel or any share thereof is not a bill of sale for the purpose of the Bills of Sale Acts<sup>1</sup>, whether or not the ship or vessel is registered or registrable under the Merchant Shipping Acts 1995<sup>2</sup>.

1 See the Bills of Sale Act 1878 s 4; and PARA 1638. As to bills of sale for the purposes of the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630) see PARA 1638 et seq.

2 *Union Bank of London v Lenanton* (1878) 3 CPD 243, CA. As to the registration of ships see the Merchant Shipping Act 1995 Pt II (ss 8-23); and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 245 et seq. As to mortgages of ships see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 318 et seq.

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### (iv) Sale and Supply Back

## 1691. Security bill framed as absolute bill.

In deciding whether a bill of sale<sup>1</sup> is given by way of security for the payment of money so as to fall within the Bills of Sale Act (1878) Amendment Act 1882, the court looks at the real nature of the transaction<sup>2</sup> and if a document, though purporting to be an absolute transfer, is in fact given by way of security, the Bills of Sale Act (1878) Amendment Act 1882 will apply to it<sup>3</sup>, unless it is a document which is exempt from the Bills of Sale Acts<sup>4</sup> altogether<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Re Watson, ex p Official Receiver in Bankruptcy* (1890) 25 QBD 27, CA.

3 *Re Watson, ex p Official Receiver in Bankruptcy* (1890) 25 QB D 27, CA. See also the cases cited in PARA 1693 note 1.

4 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

5 See PARA 1656 et seq.

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## 1692. Sales with hiring back or repurchase.

The most common method by which a party wishing to lend money on the security of another's goods seeks to avoid the Bills of Sale Acts<sup>1</sup> is to buy the goods and supply them back to the

seller under a hire-purchase or conditional sale agreement containing a power to repossess the goods in the event of default in payment or breach of any other terms stipulated in the agreement. The effect of the two transactions is that the original owner of the goods receives a sum of money which he repays by instalments, repayment being secured by a right of seizure over the goods. In the result, the parties to such an accommodation transaction are in much the same position as if the original owner had mortgaged the goods to secure repayment of a loan, which is precisely the type of document against which the Bills of Sale Acts are aimed. Where the transaction is a sham, in that the documents do not truly record the agreement of the parties, it will be struck down as a disguised chattel mortgage<sup>2</sup>, with all the consequences thereby entailed<sup>3</sup>: indeed, even if the documents truly record the agreement between the parties for a sale and supply back the court may conclude that by reason of its terms and the other circumstances it is in substance a chattel mortgage<sup>4</sup>.

1. See the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2. See PARAS 1693-1694.

3. See PARA 1696.

4. See PARA 1695.

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### **1693. Sham transactions.**

The validity of a sale followed by a hire-purchase or conditional sale back to the original seller is usually attacked on the ground that the documents are a sham, the parties never intending that beneficial ownership should pass from the seller to the buyer under the purported contract of sale<sup>1</sup>. If the documents are genuine, the Bills of Sale Acts<sup>2</sup> will not normally apply even though the avowed intention of the parties, in selecting this procedure, was to avoid the Acts<sup>3</sup>. If on the other hand, the documents are a sham, and the court finds that the parties never intended that the purported seller should be divested of beneficial ownership of the goods, the alleged hire-purchase agreement will constitute a security bill of sale for the purpose of the Acts<sup>4</sup>, assuming that the Acts would have applied to the transaction if openly carried out as a mortgage<sup>5</sup>.

The same principle applies where the reverse supply is not to the original seller but to his nominee<sup>6</sup>, where the sale purports to be by a third party but is in truth a sale of goods belonging to the intended borrower which he has allowed a third party to represent as his own<sup>7</sup>, or where, instead of the buyer himself supplying the goods back on hire-purchase or conditional sale to the seller, the buyer resells to a finance house which then supplies them to the original seller under a hire-purchase or conditional sale agreement<sup>8</sup>.

The principle is not confined to situations in which the intended borrower already owns the goods, but extends to cases where the borrower, wishing to acquire goods with the aid of a loan to be secured on the goods, arranges with the intended lender that the lender will buy the goods and let them to the borrower on hire-purchase. Such a transaction is the normal method by which a finance house extends hire-purchase facilities, and where the documents are genuine they will not be within the Bills of Sale Acts. If, however, the court concludes that the supposed buyer was never intended to buy on his own account but purchased the goods as

nominee or trustee of the supposed hirer, the purported hire-purchase agreement being a mere device to secure repayment, the agreement will be void as contravening the Bills of Sale Acts<sup>9</sup>.

1 *Re Watson, ex p Official Receiver in Bankruptcy* (1890) 25 QBD 27, CA; *Madell v Thomas & Co* [1891] 1 QB 230, CA; *Re Lovegrove, ex p Lovegrove & Co (Sales) Ltd* [1935] Ch 464 at 495-496, CA, per Maugham LJ; *Polisky v S and A Services, S and A Services v Polisky* [1951] 1 All ER 185 at 189 (affd [1951] 1 All ER 1062n, CA); *Kingsley v Sterling Industrial Securities Ltd* [1967] 2 QB 747, [1966] 2 All ER 414, CA; *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537, [1965] 1 All ER 513, CA; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, [1967] 1 All ER 518, CA; *Spencer v North Country Finance Co* [1963] CLY 212.

2 The Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

3 *British Railway Traffic and Electric Co v Kahn* [1921] WN 52; *Victoria Dairy Co v West* (1895) 11 TLR 233, DC. Cf *Yorkshire Railway Wagon Co v Maclure* (1882) 21 ChD 309, CA (whether sale and hiring back constituted a loan transaction ultra vires the company); and see the cases cited in note 1.

4 See cases cited in notes 1, 3. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to whether the parties to a purported sale or hire-purchase document are estopped from disputing its veracity see PARA 1827.

5 It is conceivable that in some situations the Bills of Sale Acts would be held to apply even where they would not have done so had the true nature of the transaction been openly recorded. For example, a mortgage of goods, described as such, may be exempt as a transfer of goods made in the ordinary course of business (see PARA 1660) but the effect of disguising it as a sale and hiring back may be to convert it into a form of transaction that would not be considered a transfer in the ordinary course of business.

6 Although there appears to be no authority directly in point, a case involving these facts (although decided on a different line of argument) is *Union Transport Finance Ltd v Ballardie* [1937] 1 KB 510, [1937] 1 All ER 420. However, the same principle applies as was enunciated in the cases cited in notes 1, 3.

7 *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600, [1957] 2 All ER 525, CA; *North Central Wagon Finance Co Ltd v Brailsford* [1962] 1 All ER 502, [1962] 1 WLR 1288.

8 *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537, [1965] 1 All ER 513, CA; *Spencer v North Country Finance Co* [1963] CLY 212. Such a transaction is commonly, though misleadingly, referred to as a refinancing transaction.

9 *Maas v Pepper* [1905] AC 102, HL.

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#### **1694. Test of a sham transaction.**

Whether the documents employed in a sale and hiring back are to be regarded as genuine or a sham may be a question of considerable difficulty, the determination of which ultimately depends entirely on the inferences drawn by the court from the facts and the documents. That the sale and letting back on hire-purchase were linked, and not two unconnected transactions, is a factor to be taken into account but is in no sense conclusive<sup>1</sup>.

Other features which the court will view with suspicion are:

159 (1) that a party who is in a position to give evidence as to the facts is not called as a witness<sup>2</sup>;

160 (2) that a receipt is produced showing the payment of a sum of money when in fact no cash passed<sup>3</sup>;



- 161 (3) that the purported sale price was fixed not by reference to the market price or value of the goods but by reference to the sum required to discharge the seller's liability on another transaction<sup>4</sup> or was otherwise tailored to his financial requirements<sup>5</sup>;
- 162 (4) that the sale did not take place until after the seller had signed the hire-purchase agreement<sup>6</sup>; and
- 163 (5) that the agreement contains oppressive powers unlikely to be found in a normal hire-purchase agreement<sup>7</sup>.

1 *British Railway Traffic and Electric Co v Kahn* [1921] WN 52.

2 *Maas v Pepper* [1905] AC 102, HL.

3 *Polsky v S and A Services, S and A Services v Polsky* [1951] 1 All ER 185 (affd [1951] 1 All ER 1062n, CA); *Colchester Motor Hire-Purchase Co Ltd v Stewart* (1924) Jones and Proudfoot's Notes on Hire-Purchase Law (2nd Edn) 49, 90.

4 *Colchester Motor Hire-Purchase Co Ltd v Stewart* (1924) Jones and Proudfoot's Notes on Hire-Purchase Law (2nd Edn) 49, 52.

5 *Kan Yeow Wing v Keng Soon Motor Finance Co* (1962) 28 MLJ 391.

6 *Colchester Motor Hire-Purchase Co Ltd v Wragge* (1923) Jones and Proudfoot's Notes on Hire-Purchase Law (2nd Edn) 90.

7 *Motor Trade Finance Ltd v HE Motors Ltd* (1926, unreported), HL, cited in *Re George Inglefield Ltd* [1933] Ch 1 at 20, CA.

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### **1695. Genuine transactions.**

Even where the transaction is genuine in that the documents truly record the intention of the parties to effect a sale and supply back, it will be held a bill of sale if in substance it constitutes a mortgage, as where its terms are such that it is incapable of operating as a sale<sup>1</sup>.

1 *Re Curtain Dream plc* [1990] BCLC 925, [1990] BCC 341; *Welsh Development Agency v Export Finance Co Ltd* [1991] BCLC 936, [1990] BCC 393; revsd as to the effect of the agreement [1992] BCLC 148, [1992] BCC 270, CA. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

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### **1696. Consequences of sale and supply back being held a bill of sale.**

If, looking at the substance of the transaction, a sale with supply back is found to be in truth a security bill of sale<sup>1</sup>, it will inevitably be void, not merely as regards the chattels, for want of

registration under the Bills of Sale Acts<sup>2</sup>, but also as to the personal covenants in the bill, since it will not be in accordance with the statutory form<sup>3</sup>. As the supposed sale preceding the agreement will ex hypothesi have been held a sham or otherwise ineffective as a sale<sup>4</sup> the result is that the property in the goods will never have passed to the 'buyer' under the original 'sale', and he will have neither title to the goods nor a valid security interest in them<sup>5</sup>. The terms as to payment and other obligations imposed by the hire-purchase or conditional sale agreement will be nugatory, and the 'owner' or 'seller' under that agreement (that is, the original 'buyer') will be treated as a lender/mortgagee and restricted to a restitutionary claim for the repayment of his advance, with reasonable interest, in an action for money had and received<sup>6</sup>. Even this relief will be denied him if the agreement constitutes a regulated consumer credit agreement within the Consumer Credit Act 1974, for almost certainly it will not comply with the formalities prescribed by the Act and regulations under it, and the agreement will therefore constitute an improperly executed agreement and be unenforceable except on an order of the court<sup>7</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See the Bills of Sale Act (1878) Amendment Act 1882 s 8; and PARA 1754 et seq. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

3 See *Re Townsend, ex p Parsons* (1886) 16 QBD 532, CA; *Madell v Thomas & Co* [1891] 1 QB 230, CA. As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.

4 See PARA 1694.

5 *Polsky v S and A Services, S and A Services v Polsky* [1951] 1 All ER 185; affd [1951] 1 All ER 1062n, CA.

6 *North Central Wagon Finance Co Ltd v Brailsford* [1962] 1 All ER 502, [1962] 1 WLR 1288; *Bradford Advance Co Ltd v Ayers* [1924] WN 152. Interest in these cases was fixed at 5%, but it is thought that the rate of interest awarded at any time is likely to reflect the prevailing commercial rate; cf *Jefford v Gee* [1970] 2 QB 130 at 148, [1970] 1 All ER 1202 at 1210, CA, per Lord Denning MR.

7 As to the circumstances in which an agreement may be improperly executed, see the Consumer Credit Act 1974 ss 61-64; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 158, 160 et seq. As to the consequences of improper execution see s 65; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 169. As to enforcement orders in cases of infringement see s 127; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 290.

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## **(v) Who may Grant Security Bills**

### **1697. Grantor must be true owner.**

Subject to certain exceptions<sup>1</sup>, a security bill of sale<sup>2</sup> is void, except as against the grantor, in respect of any personal chattels<sup>3</sup> specifically described in the schedule to the bill of which the grantor was not the true owner at the time of the execution of the bill<sup>4</sup>. This provision, with the marginal note including the words 'after acquired property'<sup>5</sup>, embraces not only bills of sale which by their terms deal with property to be acquired by the grantor in the future, which property may or may not be in existence, but existing property which the grantor is purporting to transfer as owner but to which he does not in fact have title. Indeed, it is to this latter category of bill that the provision is most likely to apply, since it is confined to bills of after-acquired chattels specifically described in the schedule to the bill, and a bill which is expressed

to cover after-acquired property is unlikely to contain a description of that property sufficiently specific to attract the operation of the provision.

It would seem<sup>6</sup> that the Bills of Sale Acts<sup>7</sup> apply even to a document which is confined to after-acquired chattels<sup>8</sup>.

1    le the exceptions contained in the Bills of Sale Act (1878) Amendment Act 1882 s 6: see PARA 1699.

2    As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3    As to the meaning of 'personal chattels' see PARA 1662 et seq.

4    Bills of Sale Act (1878) Amendment Act 1882 s 5. As to the circumstances in which a person may be said to be the 'true owner' of a chattel see PARA 1698. For a fuller analysis of the consequences of an infringement of this provision see PARA 1701.

5    As to the use of marginal notes (or sidenotes) as an aid to the construction of statutes see **STATUTES** vol 44(1) (Reissue) PARA 1276.

6    See PARA 1635.

7    le the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

8    le unless it is given by a company: see PARA 1685.

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### **1698. Meaning of 'true owner'.**

The grantor is the true owner for the purpose of the provisions regulating the granting of security bills of sale<sup>1</sup>: (1) if he holds the legal title to the goods, even though beneficial ownership is in another<sup>2</sup>; (2) if he is beneficially entitled to the goods, even though the legal title is in another<sup>3</sup>; or (3) if the real owner, though not the grantor himself, has held out the grantor to be the true owner and is thus estopped from denying the validity of the bill<sup>4</sup>. If the grantor holds goods as joint tenant or tenant in common or as a partner, he is the true owner to the extent of his interest, and, even though the bill is not expressed to be limited to that interest, the provision requiring the grantor to be the true owner will be considered as complied with and the bill will be effective to transfer to the grantee that interest which the grantor in fact has<sup>5</sup>.

A bill of sale contravenes the provision, however, where it is made jointly by two grantors in relation to goods which are not jointly owned by them but of which some belong to one grantor and some to the other<sup>6</sup>, or where two persons as joint grantors purport to assign chattels which are the sole property of one of them<sup>7</sup>.

A grantor whose title to the goods is voidable, as where the disposition to him was in fraud of creditor<sup>8</sup> or was induced by his fraud or misrepresentation<sup>9</sup>, is nevertheless the true owner for the purpose of the provision if at the date of execution of the bill his title has not been avoided<sup>10</sup>.

A grantor who, prior to execution of the bill, has parted with the goods by an outright disposition, so that he no longer holds an interest in them at the date of the bill, is not the true

owner<sup>11</sup>, but, if he has merely mortgaged the goods, for example under a prior security bill of sale, he remains the true owner by virtue of his equity of redemption<sup>12</sup>.

A person holding goods as hirer under a hire-purchase agreement is not the owner for the purpose of the provision<sup>13</sup>, and the same is true of a person holding as buyer under a conditional sale agreement<sup>14</sup>.

1     le the Bills of Sale Act (1878) Amendment Act 1882 s 5: see PARA 1697. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2     *Re Sarl, ex p Williams* [1892] 2 QB 591.

3     *Thomas v Searles* [1891] 2 QB 408, CA (mortgagor held true owner by reason of his equity of redemption); *Re Feild, ex p Pratt* (1890) 63 LT 289 (husband settling goods on himself and wife during joint lives and after death to survivor absolutely held owner by reason of his prospective rights by survivorship); *Re Tamplin & Son, ex p Barnett* (1890) 59 LJQB 194 (partner held owner of partnership goods to extent of his interest).

4     *Westen v Fairbridge* [1923] 1 KB 667 (wife making declaration that husband true owner held estopped from denying such ownership). It would seem that in such cases the bill will be effective not only against the party estopped but against third parties generally, since the effect of the estoppel is that a real, and not merely a metaphorical, title is transferred: see *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600, [1957] 2 All ER 525, CA. It would seem also that the Bills of Sale Act (1878) Amendment Act 1882 s 5 will not prevent the grant of an effective security bill by a non-owner under statutory provisions based on estoppel such as the Factors Act 1889 s 2(1) (see **AGENCY** vol 1 (2008) PARA 148). See also PARA 1822.

5     *Re Feild, ex p Pratt* (1890) 63 LT 289; *Re Tamplin & Son, ex p Barnett* (1890) 59 LJQB 194.

6     *Saunders v White* [1902] 1 KB 472, CA.

7     *Gordon v Goldstein* [1924] 2 KB 779. It is otherwise if the person having no interest in the goods is joined in the bill otherwise than as a grantor: *Brandon Hill Ltd v Lane* [1915] 1 KB 250, DC.

8     le under what was the Law of Property Act 1925 s 172 (repealed): see now the Insolvency Act 1986 s 423; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664.

9     See generally **MISREPRESENTATION AND FRAUD**.

10    *Harrods Ltd v Stanton* [1923] 1 KB 516, DC.

11    *Tuck v Southern Counties Deposit Bank* (1889) 42 ChD 471, CA.

12    *Thomas v Searles* [1891] 2 QB 408, CA; *Usher v Martin* (1889) 24 QBD 272, DC. If registration of a security bill expires without renewal, the grantor again becomes the legal owner and as such can pass a full legal title under a fresh bill: *Fenton v Blythe* (1890) 25 QBD 417, DC. This is not the case where the unrenewed bill is an absolute bill, since the Bills of Sale Act (1878) Amendment Act 1882 does not apply to an absolute bill (see PARA 1631), and failure to renew registration of an absolute bill merely renders the bill void against the classes of person mentioned in the Bills of Sale Act 1878 s 8 (see PARA 1849), which do not include the grantor himself. Hence the grantee's failure to renew registration of an absolute bill does not enable the grantor to grant a subsequent security bill as owner, since ownership does not revert in him.

13    *Lewis v Thomas* [1919] 1 KB 319, DC.

14    This is because until fulfilment of the condition such an agreement transfers no property interest to the buyer but is merely an executory contract: see eg *McEntire v Crossley Bros Ltd* [1895] AC 457, HL.

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### **1699. Exceptions to requirement of ownership.**

The requirement of the Bills of Sale Act (1878) Amendment Act 1882 that the grantor must be the true owner at the time of execution of the bill of sale<sup>1</sup> does not apply in respect of (1) any growing crops separately assigned or charged<sup>2</sup> where such crops were actually growing at the time when the bill was executed<sup>3</sup>; or (2) any fixtures separately assigned or charged<sup>4</sup>, and any plant<sup>5</sup> or trade machinery<sup>6</sup>, where such fixtures, plant or trade machinery are used in, attached to or brought upon any land, farm, factory, workshop<sup>7</sup>, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to the bill of sale<sup>8</sup>. Hence a bill may validly embrace after-acquired fixtures, plant and trade machinery if these are in substitution for like articles specifically described in the bill<sup>9</sup>, but not if they are in addition to such articles<sup>10</sup>.

Quite independently of the express statutory exemption described above, a bill of sale may provide for the replacement of articles damaged or worn out, and for the assignment to the grantee of goods substituted for them, a provision to this effect being permitted as being for the maintenance of the security<sup>11</sup> and therefore being in accordance with the statutory form, which expressly requires the insertion of terms agreed for the maintenance of the security<sup>12</sup>.

1 See PARAS 1697-1698. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 I.e. assigned or charged separately from the land on which they are growing: *Roberts v Roberts* (1884) 13 QBD 794, CA. See further PARA 1670. If assigned or charged as part of the land, growing crops are not personal chattels within the meaning of the Bills of Sale Acts (see PARA 1662 et seq), so that the Acts do not apply to them at all: see PARA 1687. As to the Bills of Sale Acts (i.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

3 If the document relates to future crops to be grown on land owned by the grantor at the date of execution of the document, it will not be a bill of sale within the Bills of Sale Acts at all. The first two limbs of the statutory definition of 'bill of sale' will not apply, as the document is not an assurance of goods capable of complete transfer by delivery at the time of execution of the document (see *Brantom v Griffiths* (1877) 2 CPD 212, CA; and PARAS 1635, 1638); and the document is not within the third limb (relating to agreements conferring a right in equity over goods) since the future crops are potential property which on coming into existence vests at law and not in equity (see PARAS 1623, 1638).

4 See PARA 1666.

5 The classic definition of 'plant' is that given by Lindley LJ in *Yarmouth v France* (1887) 19 QBD 647 at 658, DC: 'It includes whatever apparatus is used by a business man for carrying on his business--not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business'. This definition has been frequently adopted in income tax cases: see *McVeigh (Inspector of Taxes) v Arthur Sanderson & Sons Ltd* [1969] 2 All ER 771, [1969] 1 WLR 1143; *Rose & Co (Wallpaper and Paints) Ltd v Campbell* [1968] 1 All ER 405, [1968] 1 WLR 346; *Jarrold (Inspector of Taxes) v John Good & Sons Ltd* [1963] 1 All ER 141, [1963] 1 WLR 214, CA; *Attwood (Inspector of Taxes) v Anduff Car Wash Ltd* [1996] STC 110 (affd [1997] STC 1167, CA); and **INCOME TAXATION** vol 23(1) (Reissue) PARA 296 et seq. 'Plant' thus includes tools, appliances, apparatus and even animals used in carrying on trade upon particular premises, eg a horse used for turning a mill: see *London and Eastern Counties Loan and Discount Co v Creasey* [1897] 1 QB 768 at 771, CA, per Chitty LJ. But see note 8.

6 As to the meaning of 'trade machinery' see PARA 1667.

7 As to the meaning of 'factory or workshop' see PARA 1667 note 2.

8 Bills of Sale Act (1878) Amendment Act 1882 s 6. The words 'or other place' must be construed ejusdem generis with the preceding words, so that the section is confined to plant, etc., in some specific locality and not, for example, cab-horses used in the street: *London and Eastern Counties Loan and Discount Co v Creasey* [1897] 1 QB 768, CA. It would seem that to be within the exemption in the Bills of Sale Act (1878) Amendment Act 1882 s 6 the substituted articles must be those brought on by the grantor, and a bill expressed to cover substituted articles brought on by the grantee would not be exempt: see *Great West Liquor Co v Colquhoun* (1914) 17 DLR 568 (Alta).

9 The bill of sale, when covering after-acquired property, must expressly limit this to substituted articles of the kind described in the Bills of Sale Act (1878) Amendment Act 1882 s 6 or such other articles as are necessary for the maintenance of the security (see the text and notes 10-12) as otherwise it will infringe s 5 (see PARA 1697).

10 *Thomas v Kelly* (1888) 13 App Cas 506, HL.

11 *Seed v Bradley* [1894] 1 QB 319, CA; *Coates v Moore* [1903] 2 KB 140, CA. As to the meaning of 'maintenance of the security' see PARA 1737.

12 See the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.

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### **1700. Accessions.**

Accessions to chattels assigned by a bill of sale<sup>1</sup> vest automatically in the grantee by operation of law, whether they are accessions arising by physical attachment or by natural increase<sup>2</sup>. Where such accessions are left to vest in this way and are not mentioned in the bill, no question either of infringement of the 'true owner' requirement of the Bills of Sale Act (1878) Amendment Act 1882<sup>3</sup> or of non-compliance with the statutory form<sup>4</sup> arises. If, however, accessions are expressly referred to in the bill, then whilst the 'true owner' requirement has no impact on them, since it is only the bill that is affected and the accessions vest independently of the document, the bill becomes void as not being in conformity with the statutory form<sup>5</sup>. This would appear to be the case whether the reference to the accession is contained in the body of the bill or in the schedule<sup>6</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the acquisition of goods by accession see **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1238. If the bill is void, however, the property in the goods comprised in it will not pass to the grantee, and the accession will thus not vest in him, in the absence of some subsequent effective transfer.

3 I.e. the Bills of Sale Act (1878) Amendment Act 1882 s 5: see PARAS 1697-1698.

4 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.

5 See PARA 1701. The result is that the grantee does not acquire an effective interest in the principal goods or in the accession: see note 2.

6 See *Cochrane v Entwistle* (1890) 25 QBD 116, CA; *Re Burdett, ex p Byrne* (1888) 20 QBD 310, CA; and PARA 1725.

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### **1701. Effect of bill not being granted by true owner.**

By reason of the requirement that the grantor must be the true owner of the personal chattels<sup>1</sup>, a security bill of sale<sup>2</sup> covering after-acquired personal chattels specifically described in the schedule is void as to those chattels except as against the grantor; and, as regards after-

acquired personal chattels not so described, the same effect is produced by the requirement that those chattels must be so described<sup>3</sup>. However, both these requirements, which are inapplicable to certain substituted goods that are exempted<sup>4</sup> or necessary for the maintenance of the security<sup>5</sup>, are controlled by the overriding effect of the provision<sup>6</sup> by which a bill not in accordance with the statutory form is wholly void<sup>7</sup>.

If a reference to after-acquired chattels is included in the bill, whether in the body or in the schedule, the bill is rendered void as not being in accordance with the statutory form, which requires that the bill be confined to personal chattels capable of specific description<sup>8</sup>. To this requirement there are two exceptions. First, after-acquired chattels within the exception to the 'true owner' requirement<sup>9</sup> may be included in the bill, though these may only be described in the schedule, not in the body of the bill<sup>10</sup>, unless falling also within the second exception. Inclusion of such substituted goods in the schedule is to be regarded as permitted by the exception for certain after-acquired chattels even though the body of the statutory form itself refers only to goods 'specifically described' in the schedule, since goods within that exception must be taken to be specifically described for this purpose<sup>11</sup>. Secondly, provision for the replacement of lost, damaged or worn out goods by similar goods is for the maintenance of the security<sup>12</sup>, and such a provision requires to feature in the body of the bill, in accordance with the statutory form<sup>13</sup>, though there is no objection to a reference to such replacement goods in the schedule also.

1 See the Bills of Sale Act (1878) Amendment Act 1882 s 5; and PARAS 1697-1698. As to the meaning of 'personal chattels' see PARA 1662 et seq.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 See the Bills of Sale Act (1878) Amendment Act 1882 s 5; and PARA 1697. As to after-acquired chattels generally see PARA 1635.

4 I.e. by the Bills of Sale Act (1878) Amendment Act 1882 s 6(2): see PARA 1699 head (2).

5 See PARA 1699. As to the meaning of 'maintenance of the security' see PARA 1737.

6 I.e. the Bills of Sale Act (1878) Amendment Act 1882 s 9: see PARA 1711.

7 *Thomas v Kelly* (1888) 13 App Cas 506, HL.

8 *Thomas v Kelly* (1888) 13 App Cas 506, HL; and see PARA 1711.

9 I.e. the Bills of Sale Act (1878) Amendment Act 1882 s 6(2): see PARA 1699 head (2).

10 *Thomas v Kelly* (1888) 13 App Cas 506, HL.

11 *Thomas v Kelly* (1888) 13 App Cas 506, HL.

12 See PARA 1737 et seq.

13 See PARA 1716.

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## **(vi) Consideration**

### **1702. The consideration for a bill of sale.**

The Bills of Sale Acts<sup>1</sup> contain various provisions relating to the consideration for a bill of sale<sup>2</sup>. In particular, a minimum amount is prescribed for security bills<sup>3</sup> and every bill is required to contain a true statement of the consideration<sup>4</sup>. In construing the statutory provisions it is necessary to distinguish the consideration for which a bill is given from the sum which it secures. The consideration for the bill is that which the grantor receives or is to receive for it or, where it is given for past advances, the amount of the pre-existing indebtedness; the sum secured is that which the grantor has to pay in order to discharge the bill<sup>5</sup>. The grantee will usually expect interest on his advance, so that the sum secured by the bill will normally substantially exceed the consideration for which it is given. The consideration usually consists of an advance by the grantee to the grantor but it may also take the form of a payment by the grantee to a third party at the grantor's request<sup>6</sup> or of a retention by the grantee of part of the advance to satisfy a debt already due to him from the grantor<sup>7</sup> or simply the grantor's pre-existing indebtedness to the grantee which is left outstanding to be secured by the bill<sup>8</sup>. Further, there seems no reason why a bill should not be taken in consideration of advances which are genuinely intended to be made in the future<sup>9</sup> so long as these amount in total to not less than £30<sup>10</sup>.

The Bills of Sale Acts thus allow the parties almost unlimited freedom in regard to the consideration for a security bill. Only two factors control the consideration: (1) it must not be less than the prescribed minimum of £30<sup>11</sup>; and (2) it must be truly stated<sup>12</sup>.

1    le the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2    As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3    See text to note 11; and PARA 1703.

4    See PARA 1704 et seq.

5    See *Re Rogers, ex p Challinor* (1880) 16 ChD 260, CA.

6    See PARA 1708.

7    See PARA 1710.

8    See PARA 1706.

9    See PARA 1707.

10   See PARA 1703. The need to specify the amount and time of repayment of future advances and the rate of interest payable (see PARAS 1728-1729) restricts the ability of the parties to use a bill of sale to secure future advances.

11   See PARA 1703.

12   See PARA 1704 et seq.

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### **1703. Nature and amount of consideration.**



Every bill of sale<sup>1</sup> by way of security made or given in consideration of any sum under £30 is void<sup>2</sup>. This provision would seem to preclude a consideration which is purely non-monetary, such as delivery of goods under a contract of sale, the seller taking a bill of sale to secure payment of the price<sup>3</sup>. There appears, however, to be no objection to the giving of a bill in consideration partly of money and partly of money's worth<sup>4</sup>, provided that the money consideration is not less than £30.

In order for the bill to be valid, there must be a real, not merely an illusory, consideration of not less than £30. Thus, whilst there is nothing to prevent a bill of sale from being given for past advances<sup>5</sup>, the amount outstanding in respect of these cannot be counted towards the required £30 except to the extent to which, under the terms of the agreement pursuant to which they were made or some other agreement prior to and independent of the bill, they have become repayable at the date the bill is given; hence the amount outstanding on a promissory note payable by instalments cannot, except as regards those instalments that have become payable, be added to a new advance to make up a consideration of £30<sup>6</sup>. Legal costs incurred by the grantee in connection with the transaction and deducted from the amount of the advance and paid by the grantee with the consent of the grantor can properly be counted as part of the consideration making up the required £30<sup>7</sup>.

If there is an advance of £30 with an agreement at the same time to repay part of it on demand, then provided that the advance is genuine and there was no understanding that the demand for partial repayment should be immediately made and complied with, the statutory requirements as to the amount of the consideration are satisfied<sup>8</sup>. This will not, however, assist the grantee, since the inclusion of a provision for repayment on demand renders the bill void as not in conformity with the statutory form<sup>9</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act (1878) Amendment Act 1882 s 12.

3 See exchanges between counsel and the court in *London and Provinces Discount Co v Jones* [1914] 1 KB 147 at 148, DC. However, the consideration must be distinguished from the obligations secured (see PARA 1702). If the obligations secured, whether undertaken for a money or for a non-money consideration, are exclusively non-money obligations the Bills of Sale Act (1878) Amendment Act 1882 does not apply at all: see s 3; and PARA 1638.

4 As, indeed, the statutory form itself seems to contemplate in requiring a statement of the sum 'now paid to AB by CD [ . . . or whatever else the consideration may be]': see the Bills of Sale Act (1878) Amendment Act 1882 Schedule; PARA 1711; and *Heseltine v Simmons* [1892] 2 QB 547 at 551-552, CA, per Kay LJ. In so far as the statement by Kay LJ implies that a wholly non-monetary consideration is permissible this would seem to be incorrect, for it would then be impossible to satisfy the requirement of a minimum consideration of £30. The case in question did not involve the Bills of Sale Act (1878) Amendment Act 1882 s 12. The words 'or whatever else the consideration may be' in the statutory form would also cover the case of a money sum that is not 'now paid' but has been paid previously or is to be advanced in the future.

5 *Darlow v Bland* [1897] 1 QB 125, CA. Since a bill of sale in statutory form is necessarily made by deed, the covenants are fully enforceable even though the consideration is a past consideration, which would not be sufficient in the case of an agreement not made by deed.

6 *Darlow v Bland* [1897] 1 QB 125, CA.

7 *London and Provinces Discount Co v Jones* [1914] 1 KB 147.

8 *Davis v Usher* (1884) 12 QBD 490. But see note 9.

9 See PARA 1730. This point was not taken in *Davis v Usher* (1884) 12 QBD 490. If it had been, it is difficult to see how the court could have upheld the validity of the bill.

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#### **1704. Necessity for correct statement of consideration.**

The Bills of Sale Act 1878 provides that every bill of sale to which it applies<sup>1</sup> must set forth the consideration for which it was given<sup>2</sup>; and the Bills of Sale Act (1878) Amendment Act 1882, which is limited to security bills, requires that every bill truly set forth the consideration for which it was given<sup>3</sup>.

The addition of the word 'truly' in the Bills of Sale Act (1878) Amendment Act 1882 is purely verbal<sup>4</sup>, as in each case the true consideration must be set forth, but whereas an untrue statement of consideration in an absolute bill of sale renders it void only against the classes of third party mentioned in the Bills of Sale Act 1878<sup>5</sup>, leaving it valid as between the parties to the bill, mis-statement of the consideration in a security bill renders the bill void in respect of the personal chattels comprised therein<sup>6</sup>, so that the security is not enforceable even against the grantor. However, such a mis-statement does not result in the bill failing to accord with the statutory form<sup>7</sup>, so that it is not totally void, but remains valid as to the covenants contained in it<sup>8</sup>. Failure to insert any statement of consideration at all, however, would render the bill not in accordance with the statutory form, and would totally invalidate it<sup>9</sup>.

The facts respecting the consideration should be set forth with substantial accuracy, according to their legal or business effect<sup>10</sup>. A verbal inaccuracy, when not, intentionally or otherwise, misleading, does not amount to a mis-statement of the consideration<sup>11</sup>, and the court adopts a tolerant attitude towards honest mistakes and clerical errors which do not mislead and have not substantially impaired the accuracy of the document<sup>12</sup>. The statement of consideration must be looked at broadly and not in a narrow spirit<sup>13</sup>.

The bill of sale must state the whole consideration, so that this can be seen from the face of the document and not merely from a receipt forming no part of the bill<sup>14</sup>, and the consideration will not be truly stated if part of it is undisclosed in the bill and is provided in some collateral agreement<sup>15</sup>.

If the consideration consists of a present advance, an acknowledgment of receipt must be included<sup>16</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act 1878 s 8.

3 Bills of Sale Act (1878) Amendment Act 1882 s 8.

4 *Staniforth v Capon* (1886) 2 TLR 493, DC; *Re Hockaday, ex p Nelson* (1887) 35 WR 264, CA. Hence cases decided on the meaning of the Bills of Sale Act 1878 s 8 in regard to the statement of consideration are authorities on the equivalent provision in the Bills of Sale Act (1878) Amendment Act 1882: *Re Hockaday, ex p Nelson*.

5 I.e. the grantor's trustee in bankruptcy or liquidator, trustees under an assignment for the benefit of the grantor's creditors, the grantor's execution creditors and sheriffs and other officers seizing goods on their behalf: see the Bills of Sale Act 1878 s 8; and PARA 1849.

6 Bills of Sale Act (1878) Amendment Act 1882 s 8. As to the meaning of 'personal chattels' see PARA 1662 et seq.

7 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.

8 *Heseltine v Simmons* [1892] 2 QB 547, CA. The decision in *Sharp v McHenry, Sharp v Brown* (1887) 38 ChD 427 (in which the bill secured simple interest but a contemporaneous agreement provided for compound interest) is sometimes cited in support of the proposition that mis-statement of the consideration renders the bill not in accordance with the statutory form, but this point, though argued in that case, was clearly misconceived, since the consideration is that which the grantor receives, not the sum he covenants to pay (see PARA 1702), so that no question of mis-statement of the consideration arose in that case, nor was it a ground stated in the judgment. See further PARA 1718 note 1.

9 See PARAS 1711, 1716.

10 *Credit Co v Pott* (1880) 6 QBD 295, CA.

11 *Hughes v Little* (1886) 18 QBD 32, CA; *Roberts v Roberts* (1884) 13 QBD 794, CA; *Collis v Tuson* (1882) 46 LT 387, DC; *Re Chapman, ex p Johnson* (1884) 26 ChD 338, CA; and see *Griffith v Williams* (1892) 93 LT Jo 8, DC. If, however, the statement of consideration is misleading, the statutory provision will be contravened even though the error or inaccuracy was not intentional: *Roberts v Roberts* (1884) 13 QBD 794 at 802, CA, per Brett MR.

12 *Griffith v Williams* (1892) 93 LT Jo 8, DC; *Roberts v Roberts* (1884) 13 QBD 794, CA; *Collis v Tuson* (1882) 46 LT 387, DC; *Ex p Probyn* (1880) 24 Sol Jo 344, CA.

13 *Re Rouard, ex p Trustee* (1915) 85 LJB 393 at 395, DC, per Horridge J. If a bill is taken in substitution for a prior invalid bill, that fact must be stated in the new bill; otherwise the consideration will not be considered truly stated (*Bouchette v Consolidated Credit and Mortgage Corp Ltd* (1889) 5 TLR 653), since it is represented, expressly or impliedly, as the giving up of rights under the original bill when in fact no such rights exist.

14 *Re Parker, ex p Charing Cross Advance and Deposit Bank* (1880) 16 ChD 35, CA.

15 *Sharp v McHenry, Sharp v Brown* (1887) 38 ChD 427. See also PARA 1718.

16 See PARA 1724.

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### **1705. Statement of consideration as money 'now paid'.**

The statutory form<sup>1</sup> refers to consideration of a stated amount 'now paid' to the grantor. It does not appear to be necessary to state the time of payment of the consideration<sup>2</sup>, but if this is stated it must be substantially correct and must not be set forth so as to be misleading<sup>3</sup>.

The words 'now paid', if used, imply a payment made at the time the bill is executed or within a very short time thereafter. Payment a few hours<sup>4</sup> or one day<sup>5</sup> after execution of the bill has been held sufficiently early to justify a statement of consideration 'now paid', but if there is a delay of a few days before payment is made the sum in question cannot properly be stated as 'now paid' or as paid 'at or before the execution hereof'<sup>6</sup>.

However, the rule is less strictly applied in the case of payments made before the execution of the bill. Provided that the consideration stated is not a past but a present consideration, in that the bill was intended to be given for a contemporaneous advance, the fact that payment is made in advance of the bill does not render untrue a statement that the consideration was 'now paid'. Thus, payment made as consideration for a bill intended to be given in the immediate future has been held properly described as 'now paid' if given a few days<sup>7</sup>, and even some weeks<sup>8</sup>, before execution of the bill. Indeed, even the amount of what is prima facie a past indebtedness may properly be shown as 'now paid' if there is in effect a new lending, as by agreement for a fresh advance to be applied in discharge of the existing debt<sup>9</sup>. In such a case, it is not necessary to recite the fact that the advance has been so applied; it amounts to

a present payment, and the particular form which that present payment takes is irrelevant to a statement of the consideration<sup>10</sup>.

It is unnecessary to state that payment is by cheque, and since, in the absence of objection to a cheque by the grantor, payment by cheque is a good payment unless and until the cheque is dishonoured, the amount of the cheque can be stated as 'now paid'<sup>11</sup>, if it is not a post-dated cheque. If the consideration is a cheque or bill of exchange which does not become payable until a later date, such a statement would not be a true statement of the consideration<sup>12</sup>.

1 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.

2 See *Carrard v Meek* (1880) 50 LJQB 187.

3 *Re Threapleton, ex p Carter* (1879) 12 ChD 908.

4 *Henshall v Widdison* (1923) 130 LT 607.

5 *Re Smith, ex p Smith* (1880) 15 LJNC 39.

6 *Re Spindler, ex p Rolph* (1881) 19 ChD 98, CA; *Criddle v Scott* (1895) 59 JP 119, DC. However, the word 'paid', as opposed to the words 'now paid', is apt to cover both present and past advances: *Carrard v Meek* (1880) 50 LJQB 187.

7 *Re Chapman, ex p Johnson* (1884) 26 ChD 338, CA.

8 *Re Rouard, ex p Trustee* (1915) 85 LJBK 393, DC.

9 See *Credit Co v Pott* (1880) 6 QBD 295, CA; *Stott v Shaw and Lee Ltd* [1928] 2 KB 26, CA.

10 *Re Davies, ex p Equitable Investment Co Ltd* (1897) 77 LT 567.

11 *D'Usez v Traffics and Discoveries Ltd* (1924) 40 TLR 441.

12 *Re Moore, ex p Official Receiver* (1897) 4 Mans 51.

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### **1706. Statement of consideration as money 'now owing'.**

Where the consideration consists of the grantor's pre-existing indebtedness to the grantee which is not being paid out of the new advance, it should be expressed as money 'now owing' or 'due and owing' or words to similar effect, and not as money 'now paid', for there is no payment<sup>1</sup>. Unless otherwise indicated in the bill, the words 'now owing' or 'due and owing' or 'now due and owing', in reference to the consideration, imply that the whole amount of the consideration consists of a past advance or advances which have become repayable at the date of the bill<sup>2</sup>. Accordingly, the statement of consideration as money 'due and owing' is not a true statement of the consideration where part of the consideration consists of a present advance<sup>3</sup>, or where, though the whole consideration consists of past advances, part of the debt has not become due at the date of the bill<sup>4</sup>. Similarly, a sum which the grantor is contingently liable to reimburse to the grantee in respect of a bill of exchange accepted by the grantee for the grantor's accommodation cannot properly be stated as 'then owing' if the bill of exchange has not become due at the date of execution of the bill of sale<sup>5</sup>.

- 1 See PARA 1710. As to statements of consideration as money 'now paid' see PARA 1705.
- 2 *Davies v Jenkins* [1900] 1 QB 133; *Darlow v Bland* [1897] 1 QB 125, CA.
- 3 *Davies v Jenkins* [1900] 1 QB 133.
- 4 *Darlow v Bland* [1897] 1 QB 125, CA (consideration stated as money 'now owing', when sum in question was payable under promissory note by instalments, only one of which had become due). If the parties agree to treat as 'now owing' a sum equivalent to the present value of the future debt, a statement that the reduced sum is 'now owing' would seem to be in order provided that the agreement is stated in the bill: *Cochrane v Moore* (1890) 25 QBD 57 at 73, CA, per Fry LJ; *Darlow v Bland* above at 131 per Rigby LJ. However, the present value of a debt is obviously less than the future value, and the court will not infer an agreement to treat a future debt as immediately payable if there is no reduction in the debt: *Darlow v Bland* at 131. Such an agreement would in any event be legally inoperative in the absence of consideration, unless made by deed.
- 5 *Mayer and Fulda v Mindlevich* (1888) 59 LT 400, DC.

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### **1707. Statement of consideration for future advances.**

Nothing in the Bills of Sale Act (1878) Amendment Act 1882 appears to preclude the parties from agreeing to a bill of sale<sup>1</sup> being given in consideration of a future advance, so long as the consideration is not less than £30<sup>2</sup> and the bill makes it clear that it is to be furnished in the future and does not represent it as a sum 'now paid'<sup>3</sup>.

- 1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.
- 2 See the Bills of Sale Act (1878) Amendment Act 1882 s 12; and PARA 1703.
- 3 As to statements of consideration as money 'now paid' see PARA 1705. See also PARAS 1702 note 10, 1727-1728.

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### **1708. Payment to person other than grantor.**

If, at the request or with the consent of the grantor<sup>1</sup>, the consideration is paid by the grantee to a third party in satisfaction of a debt incurred by the grantor<sup>2</sup> to that party, this is equivalent to payment to the grantor himself and a statement of the consideration as now paid to him is correct<sup>3</sup>. This is so whether the payment is made by the grantee to the third party direct or through another person or through the grantor and another person jointly<sup>4</sup>.

- 1 But not otherwise: *Bishop v Consolidated Credit Corpn* (1889) 5 TLR 378.

2 The fact that the debt incurred by the grantor to the third party has not yet become payable is immaterial: *Re Wiltshire, ex p Eynon* [1900] 1 QB 96, DC. The position is otherwise where the grantee retains part of the advance to satisfy a debt incurred to him which has not yet become due: see PARA 1710.

3 *Richardson v Harris* (1889) 22 QBD 268 at 274, CA, per Bowen LJ; *Hamlyn v Betteley* (1880) 5 CPD 327. As to statements of consideration as money 'now paid' see PARA 1705.

4 *Peace v Brookes* [1895] 2 QB 451.

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### **1709. Payment by person other than grantee.**

The statement of the consideration must show by whom the advance was truly made, and if part of the advance was contributed by a third party by payment direct to the debtor, this fact must also be stated<sup>1</sup>. Similarly, if the grantee, though physically transmitting the full sum himself, was advancing it on behalf of others than himself or others as well as himself, a statement in the bill that he alone paid the sum in question is untrue<sup>2</sup>.

Conversely, payment made to the grantor by a person other than the grantee can properly be described as made by the grantee if it was made on his behalf so that he is the true lender<sup>3</sup>.

1 *Kinnersley v Payne* (1909) 100 LT 229.

2 *Rimmer v Brereton* (1897) 41 Sol Jo 510, DC. The decision in *Re Smith, ex p Tarbuck* (1894) 72 LT 59, DC, is of doubtful authority and must be treated as confined to the special facts of that case. See *Kinnersley v Payne* (1909) 100 LT 229 at 230. As to the requirement that a statement of consideration be true see PARA 1704.

3 *Re Jones, ex p Official Receiver* (1910) 55 Sol Jo 30, DC.

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### **1710. Money retained by or repaid to the grantee.**

A statement of the consideration as 'now paid' to the grantor<sup>1</sup> will be sufficient, although the consideration or part of it is repaid to, or at the grantor's request retained by, the grantee to satisfy a debt then due<sup>2</sup> to him, provided that the debt arose independently of the bill of sale<sup>3</sup> and of any new loan to be secured by the bill<sup>4</sup>. However, a sum cannot be correctly described as 'now paid' to the grantor if it includes money deducted or paid away without his consent<sup>5</sup>, or includes a sum stated to be owing which in fact was more than was due from the grantor to the grantee<sup>6</sup>.

The consideration is not truly stated as 'now paid' if part of the sum said to have been paid is retained by the grantee for the purpose of discharging a debt incurred by the grantor to the grantee which is not due until a future date<sup>7</sup>, or for paying an indebtedness which arises under or in relation to the bill of sale itself<sup>8</sup>. In such cases, the grantee is not regarded as having effectively made a payment to the grantor, but on the contrary is simply receiving a benefit, in

the form of an acceleration of payment, which is not apparent from the statement of the consideration. The liability of the grantor for expenses relating to the bill, or for interest or commission on the transaction, does not arise independently of the transaction, and there is no debt in respect of them due or payable by the grantor until after the execution of the bill. Therefore, if such expenses, interest or commission are retained by the grantee or deducted on his behalf they cannot be stated as part of the consideration paid to the grantor<sup>9</sup>.

A statement that the consideration has been 'now paid' is not rendered untrue by reason of the fact that after execution of the bill of sale and receipt of the consideration the grantor voluntarily pays the expenses<sup>10</sup>, or that a solicitor acting for both the grantor and the grantee, having received the advance from the grantee for transmission to the grantor, agrees with the grantor that costs or expenses shall be deducted<sup>11</sup>. If, however, before execution of the bill of sale, it is stipulated that the grantor shall pay the expenses out of the advance, the whole cannot be stated as paid to him<sup>12</sup>.

A sham payment, by which money is handed to the grantor and then immediately taken back from him so as never to have been genuinely at his disposal, cannot be recorded as a payment made to him, nor can a sum retained by the grantee without the grantor's consent<sup>13</sup>. However, if the grantor, without any stipulation by the grantee that he should do so, immediately pays back part of the advance to the grantee in discharge of an existing debt, this does not vitiate a statement in the bill recording payment of the full advance<sup>14</sup>.

1 As to statements of consideration as money 'now paid' see PARA 1705.

2 See the text and note 14. The full amount retained in respect of a part indebtedness must have become repayable. If part only has become due, this precludes a statement of the whole as 'now paid' even if, as a result of default in payment of the part that had become due, the grantee had acquired a right to realise the security: *Parsons v Equitable Investment Co Ltd* [1916] 2 Ch 527, CA. It is otherwise if the default in payment of the part made the full balance of the earlier debt become immediately payable.

3 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

4 *Thomas v Searles* [1891] 2 QB 408, CA; *Re Davies, ex p Equitable Investment Co Ltd* (1897) 77 LT 567. In both these cases part of the advance was utilised by the grantor to repay an advance outstanding under a prior bill of sale given to the grantee, and it was held that a statement of this fact was unnecessary and that the consideration for the new bill was truly stated as paid to the grantor.

5 *Bishop v Consolidated Credit Corpn* (1889) 5 TLR 378.

6 *Hoare v Adam Smith (London) Ltd* [1938] 4 All ER 283.

7 *Parsons v Equitable Investment Co Ltd* [1916] 2 Ch 527, CA; *Richardson v Harris* (1889) 22 QBD 268, CA; *Re Gordon, ex p Bernstein* (1883) 74 LT Jo 245. There is, however, nothing in the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630) which renders such an agreement improper; the breach is not the futurity of the consideration but the statement of it as a present consideration. Hence if the consideration is expressed as money 'to be paid' this would seem unobjectionable. See also PARAS 1702, 1707.

8 See cases cited in note 9. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

9 See *Richardson v Harris* (1889) 22 QBD 268, CA, *Re Cowburn, ex p Firth* (1882) 19 ChD 419, CA, *Re Spindler, ex p Rolph* (1881) 19 ChD 98, CA (sums deducted for expenses); *Hamilton v Chaine* (1881) 7 QBD 319, CA (deduction for expenses and commission made); *Re Parker, ex p Charing Cross Advance and Deposit Bank* (1880) 16 ChD 35, CA (deed contained receipt in full but deduction made for expenses and interest); *Re Gordon, ex p Bernstein* (1883) 74 LT Jo 245 (amount of stamps deducted). See also *London and Provinces Discount Co v Jones* [1914] 1 KB 147, where the above principle was referred to (although the case turned on a different point). These decisions qualify earlier cases in which the principle here set forth was not fully recognised: see *Re Haynes, ex p National Mercantile Bank* (1880) 15 ChD 42, CA, and *Re Rogers, ex p Challinor* (1880) 16 ChD 260, CA. The infringement lies not in the deduction of expenses, which can quite lawfully be done, and can be included in the computation of the minimum permitted £30 consideration (see PARA 1703), but in the failure to state the facts in the bill.

10 Voluntarily in the sense that the payment is not pursuant to a stipulation made by the grantee: see note 11.

11 *Re Cann, ex p Hunt & Co* (1884) 13 QBD 36. The point of this case (distinguishing *Re Cowburn, ex p Firth* (1882) 19 ChD 419) was that the payment of the solicitor's costs was not a term of the bill or a stipulation by the grantee. The grantee simply sent the advance to the solicitor for dispatch to the grantor, and was in no way concerned with the application of the advance or with any agreement between the solicitor and the grantor as to the deduction of costs.

12 *Cohen v Higgins, Jones v Higgins* (1891) 8 TLR 8, DC.

13 *Bishop v Consolidated Credit Corp* (1889) 5 TLR 378, DC.

14 *Cochrane v Dixon* (1887) 3 TLR 717.

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## **(vii) Form and Contents**

### **A. STATUTORY REQUIREMENTS GENERALLY**

#### **1711. The statutory form.**

A bill of sale<sup>1</sup> made or given by way of security for the payment of money by the grantor thereof<sup>2</sup> is void unless made in accordance with the form contained in the Schedule to the Bills of Sale Act (1878) Amendment Act 1882<sup>3</sup>. This provision extends to all the instruments which come within the definition of 'bill of sale', if given by way of security, but it does not embrace those instruments giving powers of distress which by the Bills of Sale Act 1878 are merely deemed to be bills of sale<sup>4</sup>, and such instruments, although given by way of security, are not required to be in accordance with the statutory form<sup>5</sup>.

The bill of sale is not required to be 'in' the statutory form but merely 'in accordance with' the form<sup>6</sup>, so that deviations are permitted so long as they do not mislead the grantor and do not add to or detract from the legal effect of or permitted by the statutory form<sup>7</sup>.

If an instrument which comes within the definition of a 'bill of sale' in the Bills of Sale Act 1878 cannot be reduced to the statutory form, it cannot be given by way of security at all<sup>8</sup>, nor will possession taken and retained under an instrument avoided by not being in accordance with the statutory form improve the grantee's position<sup>9</sup>. Such instruments include inventories, receipts, powers of attorney and agreements conferring a right in equity over goods, such as charges or agreements for a charge<sup>10</sup>. The impossibility of making them conform to the statutory form does not on that account exempt them from the provisions of the Bills of Sale Act (1878) Amendment Act 1882<sup>11</sup>, and the consequence is that they cannot be used<sup>12</sup> except where the disposition of the property is absolute<sup>13</sup> or the document is of a category excluded from the definition of 'bill of sale'<sup>14</sup> or relates to chattels excluded from the definition of personal chattels<sup>15</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 The Bills of Sale Act (1878) Amendment Act 1882 s 9 does not apply if the bill is given to secure payment by a third party.



3 Bills of Sale Act (1878) Amendment Act 1882 s 9; and see *Thomas v Kelly* (1888) 13 App Cas 506, HL. The form set out in the Bills of Sale Act (1878) Amendment Act 1882, Schedule possesses 14 distinct characteristics, which are considered in PARA 1716 et seq, and reads:

'This Indenture made the -- day of -- between AB of -- of the one part, and CD of -- of the other part, witnesseth that in consideration of the sum of £ -- now paid to AB by CD, the receipt of which the said AB hereby acknowledges [*or whatever else the consideration may be*], he the said AB doth hereby assign unto CD, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ -- and interest thereon at the rate of -- per cent per annum [*or whatever else may be the rate*]. And the said AB doth further agree and declare that he will duly pay to the said CD the principal sum aforesaid, together with the interest then due, by equal payments of £ -- on the -- day of -- [*or whatever else may be the stipulated times or time of payment*]. And the said AB doth also agree with the said CD that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said CD for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act 1882.

In Witness, etc

Signed and sealed by the said AB in the presence of me EF [*add witness' name, address, and description*].'

4 See the Bills of Sale Act 1878 s 6; and PARA 1652.

5 *Green v Marsh* [1892] 2 QB 330, CA.

6 *Thomas v Kelly* (1888) 13 App Cas 506 at 520, HL, per Lord Macnaghten; *De Braam v Ford* [1900] 1 Ch 142 at 147, CA, per Lindley MR.

7 See PARA 1715.

8 *Re Townsend, ex p Parsons* (1886) 16 QBD 532, CA.

9 *Re Townsend, ex p Parsons* (1886) 16 QBD 532, CA; and see PARA 1634.

10 The statutory form embodies an outright transfer of goods, and is thus quite different in effect from a mere charge or agreement. See PARAS 1638, 1651, 1725.

11 *Re Townsend, ex p Parsons* (1886) 16 QBD 532, CA. See further PARA 1713.

12 *Re Townsend, ex p Parsons* (1886) 16 QBD 532 at 545, CA, per Lord Esher MR: '... and I take it the legislature intended to say, if you cannot make your agreement by a document in the form specified in the schedule, you shall not be able to make it by any document at all'.

13 There is no required form for an absolute bill of sale: see PARA 1839.

14 As to the documents which are expressly excluded from the statutory definition of 'bill of sale' see PARA 1656 et seq.

15 As to the meaning of 'personal chattels' see PARA 1662 et seq. As to the excluded chattels see PARA 1666 et seq.

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### **1712. Effect of bill not in statutory form.**

A bill of sale<sup>1</sup> which is void as not being made in accordance with the statutory form<sup>2</sup> cannot be treated as a licence to take possession<sup>3</sup>, and agreements for payment of principal and interest contained in such a bill are also void<sup>4</sup>. However, a bill of sale, like other contracts, may be

divisible and good in part, though otherwise void<sup>5</sup>, and thus a bill of sale so avoided may be effectual in so far as it is an assurance of machinery or effects which are excluded from the definition of personal chattels<sup>6</sup>, or in so far as it is an assurance of leaseholds<sup>7</sup> or of any property other than personal chattels<sup>8</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.

3 *Griffin v Union Deposit Bank* (1887) 3 TLR 608.

4 *Davies v Rees* (1886) 17 QBD 408, CA. See further PARA 1823.

5 See **CONTRACT** vol 9(1) (Reissue) PARA 877.

6 *Re Burdett, ex p Byrne* (1880) 20 QBD 310, CA; *Re Bansha Woollen Mills Co* (1888) 21 LR Ir 181. As to the meaning of 'personal chattels' see PARA 1662 et seq; and as to things excluded from that definition see PARA 1666 et seq.

7 *Re O'Dwyer* (1886) 19 LR Ir 19.

8 See *Re Isaacson, ex p Mason* [1895] 1 QB 333, CA, where an assignment of rights under a hire-purchase agreement was held divisible from a transfer of the chattels hired. This rule does not, however, make an assurance of personal chattels and other property valid as a separate assignment of the chattels: see *Cochrane v Entwistle* (1890) 25 QBD 116, CA; *Re North Wales Produce and Supply Society* [1922] 2 Ch 340.

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### **1713. Other provisions affecting form and contents of bill.**

The Bills of Sale Acts<sup>1</sup> contain other provisions which, though not concerned with the statutory form<sup>2</sup>, affect the permitted or required content of a bill of sale<sup>3</sup>. Thus, the consideration for the bill must be truly stated<sup>4</sup>; the bill must be confined to goods of which the grantor is the true owner at the date of execution of the bill<sup>5</sup>; the goods must be specifically described in a schedule to the bill<sup>6</sup>; and any defeasance, condition or declaration of trust subject to which the bill is given and not contained in the body of it must be written on the same paper or parchment therewith before registration<sup>7</sup>. The effect of non-compliance with these provisions is less severe than in the case of non-conformity with the statutory form, the bill being at worst rendered void as to the security, whilst remaining valid as to the personal covenants comprised in it<sup>8</sup>, although in certain cases breach of such a provision will also produce non-conformity with the statutory form<sup>9</sup>, and in that event the bill will be rendered totally void<sup>10</sup>. Apart from the above matters and requirements as to the form of the bill the Bills of Sale Acts have nothing to do with the reasonableness or unreasonableness of the bargain between the parties<sup>11</sup>.

1 I.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.

3 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

4 See the Bills of Sale Act (1878) Amendment Act 1882 s 8; and PARA 1702 et seq.

5 See the Bills of Sale Act (1878) Amendment Act 1882 s 5; and PARA 1697 et seq.

6 See the Bills of Sale Act (1878) Amendment Act 1882 s 4; and PARAS 1746-1747.

7 Bills of Sale Act 1878 s 10(3).

8 See PARAS 1824, 1825.

9 As where a term agreed for the defeasance of the bill is omitted (see PARA 1748) or the goods are described in the body of the bill instead of in the schedule (see PARA 1726).

10 See PARA 1712.

11 *Re Barber, ex p Stanford* (1886) 17 QBD 259 at 263, CA, per Lord Esher MR. For the provisions of the Consumer Credit Act 1974 relating to relationships that are unfair to the debtor see ss 140A-140C (added by the Consumer Credit Act 2006 ss 19-21); and **CONSUMER CREDIT**.

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#### **1714. Bill of sale securing regulated agreement.**

Where a bill of sale<sup>1</sup> secures an agreement which is a regulated agreement under the Consumer Credit Act 1974<sup>2</sup> the agreement must conform to the requirements of that Act and of regulations under it, otherwise the agreement will be improperly executed and unenforceable except on a court order<sup>3</sup>. For this purpose enforcement of the agreement would include the exercise of remedies under the bill. A regulated agreement is required to 'embody' any security<sup>4</sup>. However, incorporation of a bill of sale into the regulated agreement itself would almost inevitably render the bill not in accordance with the statutory form<sup>5</sup>, so that in practice the bill must be embodied in the regulated agreement by being referred to in it, and the debtor is then entitled to receive a copy of the bill under the statutory provisions<sup>6</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to regulated agreements under the Consumer Credit Act 1974 see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 79, 157 et seq.

3 As to the circumstances in which an agreement may be improperly executed see the Consumer Credit Act 1974 ss 61-64; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 158, 160 et seq. As to the consequences of improper execution see s 65; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 169. As to enforcement orders see s 127; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 290.

4 See the Consumer Credit Act 1974 s 105(9); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 161. A document 'embodies' a provision if the provision is set out either in the document itself or in another document referred to in it: see s 189(4); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 162.

5 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.

6 See the Consumer Credit Act 1974 ss 62(1), 63(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 171-172. It is a curious feature of the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878)

Amendment Act 1882: see PARA 1630) that despite the elaborate provisions regulating the form and content of a security bill for the protection of the debtor there is no requirement to supply him with a copy of it.

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## **B. STATUTORY FORM CONSIDERED**

### **1715. Limits of permitted variation.**

To be in accordance with the statutory form<sup>1</sup> a bill of sale<sup>2</sup> must fulfil two distinct requirements. First, it must produce the same legal effect. If the legal effect of the instrument is greater or less than would result from use of the statutory form, this represents a material divergence which renders the bill void<sup>3</sup>. For this reason a grantor cannot purport to assign the goods as beneficial owner, for these words would introduce the covenants implied by virtue of the Law of Property Act (Miscellaneous Provisions) Act 1994<sup>4</sup>, and a legal effect different from that of the statutory form would thereby be produced<sup>5</sup>. Secondly, the bill of sale must not depart from any characteristic of the statutory form, even where the same legal effect is produced<sup>6</sup>. Thus the address and description of the attesting witness<sup>7</sup> and the description of the grantee<sup>8</sup> are material parts of the form, and a bill of sale omitting them will be void.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 *Re Barber, ex p Stanford* (1886) 17 QBD 259, CA; *Blaiberg v Beckett* (1887) 18 QBD 96, CA.

4 See the Law of Property (Miscellaneous Provisions) Act 1994 ss 1(1), 3 (which replace, with effect from 1 July 1995, the general provisions as to covenants for title contained in the Law of Property Act 1925 s 76(1) (repealed)); and **SALE OF LAND** vol 42 (Reissue) PARAS 350-351. The provisions of the Law of Property Act (Miscellaneous Provisions) Act 1994 ss 1(1), 3 are not confined to land: see s 1(4).

5 See *Re Barber, ex p Stanford* (1886) 17 QBD 259, CA.

6 *Thomas v Kelly* (1888) 13 App Cas 506, HL; *Parsons v Brand, Coulson v Dickson* (1890) 25 QBD 110, CA.

7 *Parsons v Brand, Coulson v Dickson* (1890) 25 QBD 110, CA.

8 *Altree v Altree* [1898] 2 QB 267.

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### **1716. Characteristics of the statutory form.**

The statutory form<sup>1</sup> possesses the following 14 characteristics, all of which must feature in a bill of sale<sup>2</sup> if it is to accord with the statutory form:

- 164 (1) the date of the bill<sup>3</sup>;
- 165 (2) the names and addresses of the parties<sup>4</sup>;
- 166 (3) a statement of the consideration<sup>5</sup>;
- 167 (4) an acknowledgment of receipt, if the advance is a present advance<sup>6</sup>;
- 168 (5) an assignment by way of security of personal chattels capable of specific description<sup>7</sup>;
- 169 (6) exclusion of any description of the chattels from the body of the bill and relegation of such description to the schedule<sup>8</sup>;
- 170 (7) the securing of a monetary obligation, as opposed to some other form of obligation<sup>9</sup>;
- 171 (8) a statement of the sum secured, the rate of interest and the instalments by which repayment is to be made<sup>10</sup>;
- 172 (9) any agreed terms for the maintenance or defeasance of the security<sup>11</sup>;
- 173 (10) a proviso limiting the grounds of seizure<sup>12</sup>;
- 174 (11) execution by the grantor<sup>13</sup>;
- 175 (12) an attestation clause<sup>14</sup>;
- 176 (13) the name, address and description of the attesting witness<sup>15</sup>; and
- 177 (14) a schedule in which a reference is made to chattels comprised in the bill<sup>16</sup>.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. The form itself is set out in PARA 1711 note 3.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 Bills of Sale Act (1878) Amendment Act 1882 Schedule; see further PARA 1720.

4 Bills of Sale Act (1878) Amendment Act 1882 Schedule; see further PARA 1721.

5 Bills of Sale Act (1878) Amendment Act 1882 Schedule; see further PARAS 1718, 1723.

6 Bills of Sale Act (1878) Amendment Act 1882 Schedule. An acknowledgment of receipt need not be included unless the advance is a present advance: see PARA 1724.

7 Bills of Sale Act (1878) Amendment Act 1882 Schedule. Omission of the words 'by way of security' does not vitiate the bill if it is otherwise apparent from the bill that it was in fact given as security: see PARA 1725. As to the meaning of 'personal chattels' see PARA 1662 et seq.

8 Bills of Sale Act (1878) Amendment Act 1882 Schedule; see further PARA 1726.

9 Bills of Sale Act (1878) Amendment Act 1882 Schedule; see further PARA 1727.

10 Bills of Sale Act (1878) Amendment Act 1882 Schedule; see further PARAS 1728-1736.

11 Bills of Sale Act (1878) Amendment Act 1882 Schedule; see further PARAS 1737-1740.

12 Bills of Sale Act (1878) Amendment Act 1882 Schedule. The proviso must limit the grounds of seizure to those specified in s 7 (see PARA 1789): Schedule. See further PARAS 1741-1743.

13 Bills of Sale Act (1878) Amendment Act 1882 Schedule. A seal is no longer necessary: Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b). For the current statutory regime for the execution of deeds, which replaces any requirements of prior statutes, see s 1; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 7-8, 32-34. See further PARA 1744.

14 Bills of Sale Act (1878) Amendment Act 1882 Schedule. See further PARA 1745. It is thought that omission of the testimonium preceding the grantor's signature would not be considered a material departure from the statutory form.

15 Bills of Sale Act (1878) Amendment Act 1882 Schedule; see further PARA 1745.

16 Bills of Sale Act (1878) Amendment Act 1882 Schedule; see further PARA 1746.

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### **1717. Misleading variations.**

If, by reason of a variation in form, a bill of sale<sup>1</sup> is misleading<sup>2</sup>, or if its wording produces what has been termed 'a puzzle', as, for instance, by the use of inconsistent clauses<sup>3</sup>, it is not in accordance with the statutory form<sup>4</sup>. A bill of sale must, however, be construed like any other legal document<sup>5</sup>, and the fact that different courts have not been agreed upon its construction does not necessarily make it misleading<sup>6</sup>. Moreover, the bill will not be avoided by a verbal omission where the meaning is clear, as by the omission of the word 'pounds' after the sum named in the agreement to repay<sup>7</sup>, and when it is clear from the bill itself that only a security is given, the omission of the words 'by way of security' is a minor deviation which will not render the bill void<sup>8</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Re Barber, ex p Stanford* (1886) 17 QBD 259, CA.

3 *Furber v Cobb* (1887) 18 QBD 494, CA; *Curtis v National Bank of Wales* (1889) 5 TLR 338, CA.

4 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716 et seq.

5 *Weardale Coal and Iron Co v Hodson* [1894] 1 QB 598, CA.

6 *Haslewood v Consolidated Credit Co* (1890) 25 QBD 555, CA.

7 *Mourmand v Le Clair* [1903] 2 KB 216.

8 *Roberts v Roberts* (1884) 13 QBD 794, CA. See further PARA 1725 note 4.

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### **1718. Bill need not be a complete record.**

Despite certain dicta suggesting the contrary<sup>1</sup>, it would seem that there is no requirement that a bill of sale<sup>2</sup> must contain a complete and accurate statement of the consideration or record the whole bargain between the parties in order to be in accordance with the statutory form<sup>3</sup>. The Bills of Sale Act 1878 does, it is true, require any defeasance, condition or declaration of trust subject to which the bill is given to be written on the same paper or parchment therewith<sup>4</sup>, but, except in the case of a term for maintenance or defeasance of the security<sup>5</sup>, failure to comply with this provision is not in itself a deviation from the statutory form<sup>6</sup>. The form requires the insertion of all terms agreed between the parties for the maintenance or defeasance of the

security<sup>7</sup>, and if any such term is omitted the bill will not be in accordance with the statutory form<sup>8</sup>, but the omission of a term which is neither a defeasance nor a provision for maintenance of the security is not a defect in form<sup>9</sup>, though it may offend against the Bills of Sale Acts in some other way<sup>10</sup>. It follows that there is nothing to prevent the parties from having the terms of the loan agreement set out in one document and the provision for the security in a separate bill of sale<sup>11</sup>, so long as the agreement does not provide for the maintenance or defeasance of the security<sup>12</sup>, any other condition which if included in the bill would have rendered it not in accordance with the statutory form<sup>13</sup>, a declaration of trust<sup>14</sup>, or a term which falsifies the statement of consideration in the bill<sup>15</sup>.

1 *Sharp v McHenry, Sharp v Brown* (1887) 38 ChD 427 at 454-455 per Kay J; *Simpson v Charing Cross Bank* (1886) 34 WR 568 at 568-569, DC, per Denman J. The former case, in which a written agreement to give a bill of sale provided for the payment of compound interest but the bill was restricted to simple interest as required by the statutory form, is not free from difficulty, since the judgment does not make it clear what statutory provision was considered to be infringed. The bill was attacked not only for non-conformity with the statutory form but also as not truly stating the consideration, but this latter point seems ill-founded: see PARA 1704 note 8. The true ground of the decision would seem to be that the bill was in fact securing not the simple interest stated on the face of it but the compound interest the subject of the written agreement. In effect, the bill and the agreement to give it had to be considered as one document, and the provision for compound interest rendered the bill not in accordance with the statutory form.

Later cases, such as *Edwards v Marcus* [1894] 1 QB 587, CA, have laid down the principle that the Bills of Sale Act (1878) Amendment Act 1882 s 9 (see PARA 1711) does not require either that the consideration should be stated accurately or that the whole bargain should be set out in the body of the bill, these matters being specifically regulated by s 8 (see PARA 1704) and by the Bills of Sale Act 1878 s 10(3) (see PARA 1748), which would otherwise be deprived of effect. Hence on this point *Sharp v McHenry* above should now be regarded as decided on its own particular facts. However, it remains authority for the proposition that, if the omitted condition is one which would have been void if included in the bill, so that the bill is in effect securing an obligation not permitted by the statutory form, the bill is void under the Bills of Sale Act (1878) Amendment Act 1882 s 9. In this respect *Edwards v Marcus* above must itself be read in the light of later cases such as *Smith v Whiteman* [1909] 2 KB 437, CA; see PARAS 1749, 1750. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 *Edwards v Marcus* [1894] 1 QB 587 at 592-593, CA, per Kay LJ; *Heseltine v Simmons* [1892] 2 QB 547, CA; *Stott v Shaw and Lee Ltd* [1928] 2 KB 26, CA; *Thomas v Searles* [1891] 2 QB 408, CA. However, if the bill does not contain a true statement of the consideration it will infringe the Bills of Sale Act (1878) Amendment Act 1882 s 8: see PARA 1704.

4 See the Bills of Sale Act 1878 s 10(3); and PARA 1748 et seq.

5 The omission of a term for maintenance or defeasance of the security renders the bill not in accordance with the statutory form: see PARAS 1737-1740, 1748.

6 *Edward v Marcus* [1894] 1 QB 587, CA; *Heseltine v Simmons* [1892] 2 QB 547, CA.

<sup>7</sup> As to the meaning of 'maintenance of the security' see PARA 1737.

8 *Hall v Whiteman* [1912] 1 KB 683, CA; *Ellis v Wright* (1897) 76 LT 522, CA; *Monetary Advance Co v Cater* (1888) 20 QBD 785. The decision in *Counsell v London and Westminster Loan and Discount Co* (1887) 19 QBD 512, CA, in which a promissory note given in connection with a bill of sale and stated by the court to be a defeasance of the bill was held merely to avoid registration of the bill under the Bills of Sale Act 1878 s 10(3), and not to make the bill defective in form under the Bills of Sale Act (1878) Amendment Act 1882 s 9, is to be explained on the basis that the provision embodied in the note was a condition, not a defeasance: see *Edwards v Marcus* [1894] 1 QB 587 at 595, CA, per Kay LJ. See also PARA 1787.

9 *Edwards v Marcus* [1894] 1 QB 587, CA, where, however, the court concentrated on the effect of omission of an agreed term for payment of compound interest but did not consider the point taken in later cases that such a term goes beyond what is permitted by the statutory form and, being in effect part of the bill by virtue of the Bills of Sale Act 1878 s 10(3), renders the bill void as not in accordance with the statutory form. See also note 1; and PARA 1748.

A bill is not in accordance with the statutory form if it contains a covenant to perform stipulations contained in some other document not forming part of the bill where the stipulations are not apparent on the face of the bill and can only be ascertained by reference to the other document: *Lee v Barnes* (1886) 17 QBD 77.

10 Eg when it constitutes a condition or declaration of trust within the Bills of Sale Act 1878 s 10(3) or renders untrue the statement of the consideration in the bill, contrary to the Bills of Sale Act (1878) Amendment Act 1882 s 8. For the position where the agreed term omitted from the bill goes beyond what is permitted by the statutory form see PARA 1750.

11 Indeed, this would be necessary in the case of a bill securing a regulated agreement within the Consumer Credit Act 1974. As to the meaning of 'regulated agreement' see PARA 1714; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79.

12 See PARA 1748.

13 See PARA 1750.

14 See PARA 1751.

15 See PARA 1704.

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### **1719. Description of deed.**

The statutory form of a security bill of sale opens with the words 'This Indenture'<sup>1</sup>, but the term 'indenture' is no longer used, and the words 'This Deed' or 'This Bill of Sale' or any other words accurately conveying the nature of the instrument will suffice<sup>2</sup>.

1 As to the statutory form and the requirement that security bills of sale are in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716 et seq. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See the Law of Property Act 1925 s 57; the Law of Property (Miscellaneous Provisions) Act 1989 s 1(2)-(3); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 3, 7-8, 33.

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### **1720. Date of bill.**

Omission of the date of execution of a bill of sale<sup>1</sup> would appear to be a material departure from the statutory form<sup>2</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the



form see PARA 1716. Omission of the date of the bill may make it difficult to detect whether or not the bill is void as not being registered in time, or, if the bill is not registered, make it difficult to detect whether a bill subsequently given infringes the Bills of Sale Act 1878 s 9 (see PARA 1755) by being executed within seven days of a previous unregistered bill.

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## **1721. Parties.**

The statutory form of a security bill of sale requires insertion of the names and addresses of the grantor and the grantee<sup>1</sup>, but it is not necessary to insert the occupation or description of the parties, this being a matter to be stated in the affidavit of the attesting witness<sup>2</sup>. There is, however, nothing improper in including a description of the parties in the bill.

There is no provision in the Bills of Sale Acts<sup>3</sup>, other than by the statutory form, for stating the names of the parties<sup>4</sup>, so a party need not be given his forename or his surname but may be described in any way which enables him to be identified<sup>5</sup>, as by a business name under which he trades<sup>6</sup>. If the name, or description, though ambiguous, is such as would be held sufficient in any mercantile document without the aid of extrinsic evidence the requirement of the statutory form is satisfied<sup>7</sup>.

Although the address given will normally be that where the party resides or carries on business, this is not essential, and the address of a club where the grantor did not reside but at which he was certain to receive letters sent to him has been held sufficient<sup>8</sup>.

A bill can be made jointly by two grantors in respect of chattels jointly owned by them, but not in respect of chattels of which some belong to one grantor and some to another or all belong to one joint grantor only<sup>9</sup>, and a bill given to several grantees to secure different debts is not in accordance with the statutory form<sup>10</sup>.

There appears to be no reason why a partnership firm cannot grant or be granted a security bill in the name of the firm without stating the names of the individual partners<sup>11</sup>, and one partner can be authorised to execute the bill on behalf of the firm<sup>12</sup>.

1 *Altree v Altree* [1898] 2 QB 267, where the grantees were stated as the Staffordshire Financial Company Ltd, without address, and the bill was held void. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See PARA 1753.

3 I.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

4 *Re Wood, ex p McHattie* (1878) 10 ChD 398, CA; *Central Bank of London v Hawkins* (1890) 62 LT 901 (where the assumed name of the grantor was used, the grantee taking in good faith); *Stokes v Spencer* [1900] 2 QB 483, DC (where the real name of the grantor, who was known by an assumed name, was used); *Downs v Salmon* (1888) 20 QBD 775 (where the grantor's name was falsified for the purpose of concealment). As to misdescription of name on registration see PARA 1767.

5 *Simmons v Woodward* [1892] AC 100 at 105-106, HL, per Lord Halsbury LC.

6 *Simmons v Woodward* [1892] AC 100, HL, where the grantee was described by his trade name. See also the cases cited in note 4; and *Monson v Milner* (1892) 8 TLR 447.

7 *Simmons v Woodward* [1892] AC 100, HL, where it was held that on the facts there was no ambiguity.

8 See *Dolcini v Dolcini* [1895] 1 QB 898, where it was pointed out that whilst the statutory form directs the address and description of the attesting witness to be inserted, there is no such requirement in relation to the parties to the bill, apart from the indefinite expression 'of . . . '.

9 *Saunders v White* [1902] 1 KB 472, CA; *Gordon v Goldstein* [1924] 2 KB 779. However, where the husband as grantor and owner of the chattels joined his wife as a party but not as grantor, the joinder was held to be mere surplusage: *Brandon Hill Ltd v Lane* [1915] 1 KB 250; distinguished in *Gordon v Goldstein* above.

10 *Melville v Stringer* (1884) 13 QBD 392, CA. See also PARA 1709 note 2.

11 See *Simmons v Woodward* [1892] AC 100, HL, where an impersonal trading name was held sufficient. There seems no good reason to treat any differently the trading style adopted by two or more persons carrying on business in partnership.

12 *Furnivall v Hudson* [1893] 1 Ch 335. It is no longer necessary for the authority to be given by deed as a power of attorney: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(c); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 7, 34.

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## **1722. Recitals.**

Although the statutory form of a security bill of sale does not contain any recitals, the inclusion of recitals in a bill does not prevent it from being in accordance with the statutory form<sup>1</sup>.

1 *Brandon Hill Ltd v Lane* [1915] 1 KB 250. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

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## **1723. Consideration.**

Some consideration must be inserted in the bill of sale<sup>1</sup>, but an untrue statement of consideration does not itself vitiate the form<sup>2</sup>, though under a separate provision of the Bills of Sale Act (1878) Amendment Act 1882 it renders the bill void in respect of the personal chattels comprised in it<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Heseltine v Simmons* [1892] 2 QB 547. CA. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the necessity of a correct statement of consideration see generally PARA 1702 et seq.

3 See the Bills of Sale Act (1878) Amendment Act 1882 s 8; and PARA 1704. As to the meaning of 'personal chattels' see PARA 1662 et seq.

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#### **1724. Acknowledgment of receipt.**

If the consideration includes a present advance, the grantor must acknowledge receipt of the money in the bill of sale<sup>1</sup>, as in the statutory form<sup>2</sup>, and such a receipt is obligatory in the case of a present advance even though the money is paid not to the grantor himself but to a third party at the grantor's request<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Davies v Jenkins* [1900] 1 QB 133. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716.

3 *Burchell v Thompson* [1920] 2 KB 80, CA.

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#### **1725. Assignment of personal chattels by way of security.**

The statutory form of a security bill of sale<sup>1</sup> involves an assignment of personal chattels<sup>2</sup> by way of security. A mere agreement to assign is thus not in accordance with the statutory form, and nor is any other document not in the nature of an assignment, such as a charge, a declaration of trust or a power of attorney, even though such documents are included in the statutory definition of 'bill of sale'<sup>3</sup>. Omission of the words 'by way of security' does not vitiate the bill if it otherwise appears on the face of the bill that it is given by way of security, as where there is a recital to this effect<sup>4</sup>.

Only personal chattels capable of specific description may be included in a security bill if it is to accord with the statutory form<sup>5</sup>. Thus it is not as a rule permissible to include after-acquired chattels<sup>6</sup>; nor may property other than personal chattels, such as chattels real, land or choses in action, be comprised in the bill<sup>7</sup>.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq; and see further PARA 1651. As to bills of sale at common law see PARA 1620 et seq.

2 As to the meaning of 'personal chattels' see PARA 1662 et seq.

3 See PARA 1638 et seq.

4 See *Roberts v Roberts* (1884) 13 QBD 794, CA. Note that the position is otherwise where this is not apparent, as where a bill which is in truth given by way of security is made to appear absolute in form: *Madell v Thomas & Co* [1891] 1 QB 230, CA; *Polsky v S and A Services, S and A Services v Polsky* [1951] 1 All ER 185 (affd [1951] 1 All ER 1062n, CA). As to recitals see PARA 1722.

5 *Thomas v Kelly* (1888) 13 App Cas 506, HL; and see PARA 1746.

6 *Thomas v Kelly* (1888) 13 App Cas 506, HL. For the exceptions see PARA 1699.

7 *Cochrane v Entwistle* (1890) 25 QBD 116, CA; *Re Burdett, ex p Byrne* (1888) 20 QBD 310, CA.

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### **1726. Exclusion of description of chattels from body of bill.**

The statutory form of a security bill of sale<sup>1</sup> requires the description of the chattels comprised in the bill to be relegated to the schedule, and if a description is provided in the body of the bill, whether in addition to or in lieu of a description in the schedule, the bill will not accord with the statutory form<sup>2</sup>. This does not, however, preclude a provision in the body of the bill for replacement of lost, damaged or worn out goods by similar chattels, since such a provision is for the maintenance of the security<sup>3</sup> and as such must feature in the body of the bill in order to comply with the statutory form<sup>4</sup>.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq; and see further PARA 1651. As to bills of sale at common law see PARA 1620 et seq.

2 *Thomas v Kelly* (1888) 13 App Cas 506, HL. This is so even as regards substituted goods falling within the Bills of Sale Act (1878) Amendment Act 1882 s 6(2) (see PARA 1699 head (2)), for, whilst these are exempt from the requirements of ss 4, 5 (see PARAS 1697 et seq, 1746 et seq), s 6(2) does not override the requirement that the bill be in accordance with the statutory form: see *Thomas v Kelly*.

3 As to the meaning of 'maintenance of the security' see PARA 1737.

4 *Coates v Moore* [1903] 2 KB 140, CA; *Seed v Bradley* [1894] 1 QB 319, CA; and see PARA 1737 et seq. See also PARA 1701.

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### **1727. Securing of monetary obligation.**

The statutory form of a security bill of sale<sup>1</sup> involves an assignment of personal chattels<sup>2</sup> as security for payment of a sum of money. If no money is secured, the bill is not within the Bills of Sale Act (1878) Amendment Act 1882 at all<sup>3</sup>, and the parties are then free to use any form they

choose. If, however, the bill is given to secure a money payment so as to come within the Act, it would not appear permissible to make the bill secure in addition a non-monetary obligation, other than an obligation validly created by the bill itself<sup>4</sup>.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq; and see further PARA 1651. As to bills of sale at common law see PARA 1620 et seq.

2 As to the meaning of 'personal chattels' see PARA 1662 et seq.

3 See the Bills of Sale Act (1878) Amendment Act 1882 s 3; and PARA 1638.

4 Eg such as an obligation to insure the goods or to maintain the security: see PARA 1737 et seq.

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### **1728. Amount secured.**

The statutory form of a security bill of sale<sup>1</sup> requires that a fixed sum be secured, and a bill cannot be given by way of guarantee or indemnity, the amount ultimately payable being uncertain<sup>2</sup>, nor can the bill validly secure further advances where the amount to be advanced is uncertain or is not stated in the bill or the rate of interest on such advances cannot be stated<sup>3</sup>. This principle does not, however, apply to stipulations for the recovery of outgoings where those stipulations are for the maintenance of the security<sup>4</sup>, for the statutory form expressly provides for the insertion of terms for the maintenance of the security<sup>5</sup>.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Hughes v Little* (1886) 18 QBD 32, CA (bill of sale given to secure indemnity of guarantee as guarantor of debt due from grantor to third party). Cf *Re Hill, Official Receiver v Ellis* (1895) 2 Mans 208, DC.

3 *Cook v Taylor* (1887) 3 TLR 800. If these amounts can be stated there appears to be no objection to a bill to secure future advances. It has been held that the fact that a bill is taken to secure future advances does not on that account remove it from the scope of the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630): *Stevens v Marston* (1890) 60 LQB 192.

4 As to the meaning of 'maintenance of the security' see PARA 1737.

5 See PARA 1737 et seq.

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### **1729. Interest.**

Interest is an essential part of the statutory form of a security bill of sale<sup>1</sup>, and it must be stated as a rate<sup>2</sup>. The rate need not be expressed as a percentage<sup>3</sup>, but may be stated, for example, as a given amount in the pound per period, and the period need not be annual but may be a month, a quarter or any other period the parties may agree<sup>4</sup>. However, the amount of interest payable, and its time of payment, must be certain at the date of the bill<sup>5</sup>, so that a statement of a rate of interest geared to some shifting or variable base rate would not be in accordance with the statutory form. Interest cannot be expressed merely as a lump sum, without reference to a rate<sup>6</sup>, nor can a provision be inserted accelerating the liability for payment of interest in the event of default, since the essence of interest is that it is only payable on a sum that has actually become due<sup>7</sup>, and whilst there is no objection to a provision calling up the full outstanding balance of the principal upon default in payment of an instalment and directing interest to run on such outstanding balance as from the date it is called up<sup>8</sup>, the bill cannot provide for payment on that date of interest not then accrued due<sup>9</sup>.

Interest cannot be made chargeable on interest<sup>10</sup> or capitalised so as to produce compound interest<sup>11</sup>.

The principal sum advanced and interest on it at the stated rate are the only sums which the form allows to be secured, other than sums laid out for the maintenance of the security<sup>12</sup>, and the insertion of a provision for payment of a bonus will render the bill void<sup>13</sup>.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Blankenstein v Robertson* (1890) 24 QBD 543; *Myers v Elliott* (1886) 16 QBD 526, CA; *Davis v Burton* (1883) 11 QBD 537. Earlier cases to the contrary, such as *Thorpe v Cregeen* (1885) 55 LJQB 80, DC, and *Wilson v Kirkwood* (1883) 48 LT 821, would not now be followed.

3 *Lumley v Simmons* (1887) 34 ChD 698, CA.

4 *Lumley v Simmons* (1887) 34 ChD 698, CA. See also *Simmons v Woodward* [1892] AC 100, HL; *Re Bargen, ex p Hasluck* [1894] 1 QB 444.

5 *Attia v Finch* (1904) 91 LT 70, DC.

6 *Blankenstein v Robertson* (1890) 24 QBD 543, DC; *Myers v Elliott* (1886) 16 QBD 526, CA; *Re Johnstone, ex p Abrams* (1884) 50 LT 184.

7 *Re Johnstone, ex p Abrams* (1884) 50 LT 184.

8 See *Goldstrom v Tallerman* (1886) 18 QBD 1, CA, where a bill providing for payment of interest on overdue instalments was held valid. The same reasoning applies where the outstanding instalments of principal have become repayable as a result of default, and interest is then made payable thereon.

9 *Re Johnstone, ex p Abrams* (1884) 50 LT 184; *Davis v Burton* (1883) 11 QBD 537, CA. It follows that, if the instalments by which the debt is repayable combine principal and interest, a provision calling up the whole balance on default without deduction of the interest component accelerates the liability for interest and renders the bill void: *Roe v Mutual Loan Fund* (1887) 56 LT 631; revsd on other grounds (1887) 19 QBD 347, CA.

10 *Dresser v Townsend* (1886) 81 LT Jo 23. There is, however, no objection to charging interest on overdue instalments of principal. This does not duplicate interest charges, as the stipulated contract interest is payable only for the period up to the date when the instalments become due, and does not cover interest on overdue instalments: *Goldstrom v Tallerman* (1886) 18 QBD 1 at 4, CA. In the absence of an express provision for interest on overdue instalments, interest would have to be assessed as damages under the Supreme Court Act 1981 s 35A or the County Courts Act 1984 s 69 (see **DAMAGES** vol 12(1) (Reissue) PARA 848).

11 *Davis v Burton* (1883) 11 QBD 537, CA, where the whole debt, including capitalised interest, was made payable immediately on default.

12 As to the meaning of 'maintenance of the security' see PARA 1737.

13 *Myers v Elliott* (1886) 16 QBD 526, CA.

## UPDATE

### 1729 Interest

NOTE 10--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 1730. Time of repayment.

To accord with the statutory form of a security bill of sale<sup>1</sup>, a bill must contain an agreement to repay the principal sum at a certain stipulated time or times<sup>2</sup>. The time of payment is probably considered certain for this purpose if it is fixed by reference to a known event which is bound to occur<sup>3</sup>, but not if payment is made to depend on the mere choice or volition of the grantee, as in the case of a provision for payment on demand<sup>4</sup> or within a stated time after demand<sup>5</sup>, or depends on some contingency, such as the event of the grantee being called upon to discharge his liability under a guarantee given for the grantor, as a result of the latter's default<sup>6</sup>. This is the case even if the contingency is not expressed on the face of the bill, so that the sum secured appears to be payable at a certain time<sup>7</sup>.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Re Moore, ex p Official Receiver* (1897) 4 Mans 51 at 52. If a day of the month, without specifying the year, is named for payment, the day is the next ensuing day complying with the description: *Grannell v Monck* (1889) 24 LR Ir 241.

3 *Hetherington v Groome* (1884) 13 QBD 789 at 792, CA, per Fry LJ.

4 *Hetherington v Groome* (1884) 13 QBD 789, CA; *Mackay v Merritt* (1886) 34 WR 433. The position is similar where payment is to be made 'forthwith': *Re Williams, ex p Pearce* (1883) 25 ChD 656.

5 See *Sibley v Higgs* (1885) 15 QBD 619, DC (payment to be made seven days after demand in writing); *Bishop v Beale* (1884) 1 TLR 140 (payment to be made 48 hours after demand); *Clemson v Townsend* (1884) Cab & El 418 (payment to be made 24 hours after demand).

6 *Hughes v Little* (1886) 18 QBD 32, CA.

7 *Re Hill, Official Receiver v Ellis* (1895) 2 Mans 208, DC.

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### 1731. Prepayment and acceleration.

Though the time of payment cannot be left in the discretion of the grantee of a bill of sale<sup>1</sup>, there is no objection to a provision permitting prepayment by the grantor, whether expressly or by a stipulation for payment on or before a stated date or after giving a specified period of notice<sup>2</sup>. This constitutes an obligation to make the payment by the date stated, with a defeasance in favour of the grantor if he chooses to make payment earlier<sup>3</sup>. Moreover, the bill can provide for alternative times of payment, for example by stipulating payment at a specified date with a proviso that the grantee would accept payment by instalments if the grantee did not commit any breaches of covenant or become bankrupt<sup>4</sup>.

There is no objection to a provision making the whole outstanding balance immediately repayable on default in payment of any one instalment<sup>5</sup>, but this acceleration of payment must be limited to the principal sum<sup>6</sup>, though it is legitimate to provide for interest to be paid on that sum thereafter in lieu of the interest that would have been payable if the acceleration clause had not come into operation.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 It would seem that, since the grantor has no right of prepayment (see PARA 1796), except where the bill secures an agreement which is a regulated agreement under the Consumer Credit Act 1974 (see s 95; the Consumer Credit (Rebate on Early Settlement) Regulations 1983, SI 1983/1562 (prospectively revoked); the Consumer Credit (Early Settlement) Regulations 2004, SI 2004/1483; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 253), the bill can properly provide for payment of interest in lieu of notice. Such a provision does not oblige the grantor to pay interest in excess of what is permitted by the Bills of Sale Act (1878) Amendment Act 1882; it merely makes such payment a condition of the grantee's waiving the notice stipulated in the bill. However, the position is unclear, as also is the question whether the bill must provide for a rebate of interest where the grantor exercises a right of prepayment. As to regulated agreements under the Consumer Credit Act 1974 see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 79, 157 et seq.

3 *De Braam v Ford* [1900] 1 Ch 142, CA.

4 *Re Coton, ex p Payne* (1887) 56 LT 571.

5 *Lumley v Simmons* (1887) 34 ChD 698, CA.

6 See PARA 1729 note 9.

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### **1732. Manner of repayment.**

The general principle is that, so long as the times fixed for payment are certain, the manner of payment may be such as the parties agree<sup>1</sup>, provided that the agreement is not misleading or contrary to the provisions of the Bills of Sale Acts<sup>2</sup>.

1 See PARAS 1733-1736.

2 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.



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### **1733. Instalments or lump sum.**

Payment by instalments is not obligatory, and the bill of sale<sup>1</sup> may validly provide for payment in one sum with interest on it until payment<sup>2</sup>. Where payment is by instalments, these need not be equal, despite the fact that the statutory form refers to equal payments<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Watkins v Evans* (1887) 18 QBD 386, CA.

3 *Re Cleaver, ex p Rawlings* (1887) 18 QBD 489, CA. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716.

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### **1734. Separate payments of principal and interest.**

Though permissible, it is not necessary that principal and interest should be repayable together. Thus it is quite legitimate to provide that the principal is to be paid before the interest<sup>1</sup>, or the interest before the principal<sup>2</sup>, or that payment is to be made by instalments which combine principal and interest<sup>3</sup>. In the last case, the bill of sale<sup>4</sup> may go on to say how payments amounting to less than the sums due are to be appropriated as between principal and interest<sup>5</sup>.

1 *Goldstrom v Tallerman* (1886) 18 QBD 1, CA.

2 *Edwards v Marston* [1891] 1 QB 225, CA.

3 *Linfoot v Pockett* [1895] 2 Ch 835, CA.

4 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

5 In the absence of an express provision, payment of less than the amount due will normally be appropriated first to interest and then to principal, under the rule in *Abrahams v Dimmock* [1915] 1 KB 662, CA.

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### 1735. Computation of equal payments.

The part of the statutory form of a security bill of sale<sup>1</sup> referring to equal payments is ambiguous in that it is not clear whether the sum required to be inserted is an aliquot part of the principal alone or of the total of the principal and interest. It has accordingly been held that both methods of completing the form are in order, so that the form is considered to be complied with whether the sum inserted is for principal only, leaving the amount of the interest to be calculated<sup>2</sup>, or includes interest also<sup>3</sup>. Prima facie the form contemplates that the sum inserted covers an aliquot portion of both principal and interest<sup>4</sup>, but this is in all cases a question of construction, so that if, for example, the instalments payable amount in total only to the principal sum it is evident that these do not include interest.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Goldstrom v Tallerman* (1886) 18 QBD 1, CA.

3 *Rosefield v Provincial Union Bank* [1910] 2 KB 781, CA; *Haslewood v Consolidated Credit Co* (1890) 25 QBD 555, CA.

4 *Rosefield v Provincial Union Bank* [1910] 2 KB 781, CA.

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### 1736. Tax deductible from interest.

Where income tax is deductible from payments of interest, it is not necessary to state this in the bill of sale<sup>1</sup>, the right and obligation to make the deduction being conferred by the taxing statutes<sup>2</sup>, but there seems no objection to an express statement in the bill that interest is to be paid less income tax at the basic rate for the time being in force, since this does no more than set out the legal effect of the instrument. However, a provision for payment of such an amount of interest as will, after deduction of tax at the basic rate for the time being in force, amount to a specified figure would, it is thought, contravene the statutory form<sup>3</sup>, since it leaves the contractual amount of interest uncertain at the date of the bill of sale<sup>4</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to when income tax is deductible from interest see **INCOME TAXATION** vol 23(1) (Reissue) PARA 520 et seq.

3 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716.

4 This objection does not apply where the gross amount of interest is stipulated in the bill, since this is the contractual interest, and the obligation to deduct tax at a rate which may vary is imposed ab extra by the taxing statutes.

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### **1737. Maintenance or defeasance of security.**

The statutory form of a security bill of sale<sup>1</sup> permits, and indeed requires, the parties to insert such terms as they may agree for the maintenance or defeasance of the security, though as regards maintenance provisions the power of seizure must be limited to provisions necessary to maintain the security and must not be extended to provisions which, though for the maintenance of the security, are not necessary for that purpose<sup>2</sup>. However, the inclusion of terms for maintenance which may be superfluous or unnecessary does not vitiate the bill so long as the grantee is not given power to seize for breach of those terms<sup>3</sup>.

The statutory form does not permit the inclusion of any covenants or stipulations of any kind beyond covenants for payment of principal and interest<sup>4</sup> and terms for the maintenance or defeasance of the security. The inclusion of any other terms will render the bill void as not in accordance with the statutory form<sup>5</sup>.

'Maintenance of the security' means the preservation of the whole security given by the bill of sale, as regards both the chattels assigned and the grantee's title to them, in as good a condition as when the security was created<sup>6</sup>. The grantee is accordingly entitled to include provisions to this end even if the security would be fully adequate without such provisions, as the phrase 'maintenance of the security' refers to the subject matter of the bill, not to what is necessary for securing repayment of the debt<sup>7</sup>.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Topley v Corsbie* (1888) 20 QBD 350, DC; *Furber v Cobb* (1887) 18 QBD 494, CA. As to terms for defeasance or the maintenance of security see PARAS 1738-1740.

3 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA.

4 See PARA 1727 et seq.

5 *Blaiberg v Beckett* (1886) 18 QBD 96, CA.

6 *Furber v Cobb* (1887) 18 QBD 494, CA.

7 *Furber v Cobb* (1887) 18 QBD 494, CA.

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### **1738. Covenants upheld as being for maintenance of security.**

The following covenants by the grantor are among those which have been held valid as being for the maintenance of the security<sup>1</sup>:

- 178 (1) to pay all rent, rates and taxes payable in respect of the premises and insure the goods and pay the insurance premiums, producing the receipts to the grantee when so required<sup>2</sup>;
- 179 (2) to allow the grantee, on the grantor's default, to make payments for the insurance of the goods and for the outgoings of the premises in which the goods are situated<sup>3</sup>, together with interest thereon<sup>4</sup>, the sums paid to be a charge on the goods<sup>5</sup>;
- 180 (3) not to assign or underlet the goods without consent<sup>6</sup>;
- 181 (4) to keep the goods in good and substantial repair and perfect working order and to replace worn out articles with like articles of comparable value<sup>7</sup>;
- 182 (5) to allow the grantee to seize the goods<sup>8</sup> and for that purpose to enter the premises where the goods are situated<sup>9</sup>;
- 183 (6) to allow entry to inspect the goods<sup>10</sup>;
- 184 (7) not to remove the goods, except for necessary repairs, from the premises in which they are situated at the date of the bill, without the previous consent of the grantee<sup>11</sup>;
- 185 (8) to execute such further assurances as may be necessary to perfect the title to the personal chattels<sup>12</sup>.

Other covenants which can, it is thought, be legitimately included as being for the maintenance of the security are covenants to encumber the goods in favour of another creditor (commonly termed a negative pledge), and covenants to notify the grantee of any new address to which the goods may be moved.

1 As to the meaning of 'maintenance of the security' see PARA 1737.

2 See *Hammond v Hocking* (1884) 12 QBD 291; *Duff v Valentine* (1883) Bitt Rep in Ch 115. See also *Watkins v Evans* (1887) 18 QBD 386, CA (covenant to insure and produce receipts for premiums); *Turner & Co v Culpan* (1888) 58 LT 340, DC (covenant punctually to pay rent, rates, taxes, assessments and outgoings, take receipts and produce on demand in writing); *Cartwright v Regan* [1895] 1 QB 900 (similar covenant).

3 See *Re Barber, ex p Stanford* (1886) 17 QBD 259, CA (insurance); *Briggs v Pike* (1892) 61 LJQB 418, CA (insurance); *Goldstrom v Tallerman* (1886) 18 QBD 1, CA (rent, rates, taxes, charges, assessments and outgoings); *Topley v Corsbie* (1888) 20 QBD 350, DC (expenditure on repairs); *Harrison v Shallis & Co* (1909) 25 TLR 664 (insurance and repairs).

4 *Re Barber, ex p Stanford* (1886) 17 QBD 259, CA; *Goldstrom v Tallerman* (1886) 18 QBD 1, CA.

5 *Goldstrom v Tallerman* (1886) 18 QBD 1, CA. However, no power of seizure for default in such payments must be given as this would go outside the terms of the Bills of Sale Act (1878) Amendment Act 1882 s 7 (see PARA 1789). The grantor can merely be sued for the amounts paid and disabled from redeeming until payment: *Real and Personal Advance Co v Clears* (1888) 20 QBD 304, CA.

6 *Coates v Moore* [1903] 2 KB 140, CA; *Seed v Bradley* [1894] 1 QB 319, CA.

7 *Topley v Corsbie* (1888) 20 QBD 350 (covenant to keep in repair); *Furber v Cobb* (1887) 18 QBD 494, CA (covenant to repair and replace).

8 This power is limited to the grounds specified in the Bills of Sale Act (1878) Amendment Act 1882 s 7: see PARA 1789.

9 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA. It seems that the bill of sale may even permit forcible entry by breaking open doors and windows (*Re Morritt, ex p Official Receiver*; *Lumley v Simmons* (1887) 34 ChD 698, CA), which is no longer a criminal offence unless accompanied by the use or threat of violence (see the Criminal Law Act 1977 s 6(1) (replacing the old offence of forcible entry under the Forcible Entry Acts 1381 to 1429); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 602).

10 *Re Paxton, ex p Pope* (1889) 60 LT 428, DC.

11 *Seed v Bradley* [1894] 1 QB 319, CA; *Harrison v Shallis & Co* (1909) 25 TLR 664.

12 *Re Cleaver, ex p Rawlings* (1887) 18 QBD 489, CA. As to the meaning of 'personal chattels' see PARA 1662 et seq. A covenant for further assurance which purports to bind the grantor not only for himself and those claiming through him but for any other person claiming an interest in the goods goes beyond what is permitted as being for the maintenance of the security: *Liverpool Commercial Investment Society v Richardson* (1886) 2 TLR 602, DC.

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### **1739. Covenants held not to be for the maintenance of the security.**

Provisions which have been held not to be for the maintenance of the security<sup>1</sup>, and therefore to render the bill of sale void for non-compliance with the statutory form of a security bill<sup>2</sup>, include covenants by the grantor not to obtain credit to the extent of £10 without the consent of the grantee<sup>3</sup>, covenants to allow the grantee to affix to premises in the occupation of the grantor placards referring to the goods<sup>4</sup>, and provisions that upon exercise of a power of sale by the grantee the purchaser should not be bound to inquire whether default had been made by the grantor<sup>5</sup>.

1 As to the meaning of 'maintenance of the security' see PARA 1737.

2 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 *Peace v Brookes* [1895] 2 QB 451.

4 *Bardell v Daykin* (1887) 3 TLR 526, DC.

5 *Blaiberg v Parsons* (1886) 17 QBD 336; *Blaiberg v Beckett* (1886) 18 QBD 96. As was pointed out in the latter case, such a provision cannot be said to be for the maintenance of the security since it does not operate until after the power of sale has been exercised, and nor is it a defeasance, for it fulfils instead of defeating the operation of the deed, and its effect is to prejudice the grantor by depriving him of a possible remedy against a purchaser taking with notice of the bill of sale.

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### **1740. Defeasance.**

A defeasance, for the purposes of the statutory form of a security bill of sale<sup>1</sup>, is a provision which limits or defeats the operation of the bill<sup>2</sup>.

1 The term 'defeasance' ordinarily denotes a provision which defeats the operation of a deed but is contained in some other deed or document, as opposed to being a term of the deed itself: *Re Storey, ex p Popplewell* (1882) 21 ChD 73 at 81, CA, per Jessel MR. However, this strict construction is obviously not applicable in the context of the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630), which require terms for defeasance to be inserted in the bill itself; and for the purpose of the Bills of Sale Acts a defeasance must accordingly be taken to denote a condition in the nature of a defeasance: *Blaiberg v Beckett* (1886) 18 QBD 96 at 101, CA, per Lord Esher MR.

As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Blaiberg v Beckett* (1886) 18 QBD 96 at 101, CA, per Lord Esher MR. As to the meaning of 'defeasance' see further PARA 1749.

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### 1741. Power of seizure.

The statutory form of a security bill of sale<sup>1</sup> contains a proviso limiting the grounds of seizure<sup>2</sup>. This proviso, the omission of which apparently renders the bill void as not in accordance with the form<sup>3</sup>, makes it clear that a bill will not conform to the form if it stipulates, directly or indirectly<sup>4</sup>, for a power to seize in events other than those specified<sup>5</sup>. Thus if the grantee is given the right to seize for breach of a covenant which, though for the maintenance of the security, is not necessary for that purpose, the bill will be void<sup>6</sup>. It is for the court to decide whether the covenant is necessary for the maintenance of the security<sup>7</sup>, and the court is not bound by a statement in the bill itself that the covenant is necessary for such maintenance<sup>8</sup>.

If power is given in the bill to seize on grounds other than those permitted by statute<sup>9</sup>, the defect in form thus produced is not cured by inclusion of the proviso in the statutory form limiting the grounds of seizure to those set out in the statute<sup>10</sup>, for the inclusion of the wider power is misleading and inconsistent with the proviso.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 The grounds of seizure are limited to those set out in the Bills of Sale Act (1878) Amendment Act 1882 s 7: see PARA 1789.

3 *Thomas v Kelly* (1888) 13 App Cas 506 at 519, HL, per Lord Macnaghten.

4 *Barr v Kingsford* (1887) 56 LT 861, where a provision for payment on default in performance of agreements not necessary for maintaining the security was held to avoid the bill.

5 *Davis v Burton* (1883) 11 QBD 537, CA. The reference in the text to events other than those specified is a reference to events other than those specified in the Bills of Sale Act (1878) Amendment Act 1882 s 7: see PARA 1789. Thus a bill is avoided by a power to seize if the grantor should enter into liquidation, or compound with his creditors (*Barr v Kingsford* (1887) 56 LT 861), or take the benefit of any bankruptcy legislation (*Gilroy v Bowey* (1888) 59 LT 223), or do any act whereby he renders himself liable to become bankrupt (*Re Williams, ex p Pearce* (1883) 25 ChD 656). However, a power to seize if the grantor should do or suffer anything whereby he becomes bankrupt is in substance the same as the Bills of Sale Act (1878) Amendment Act 1882 s 7(2) (see PARA 1789), and valid: *Re Munday, ex p Allam* (1884) 14 QBD 43, DC.

6 See the cases cited in note 5.

- 7 As to the meaning of 'maintenance of the security' see PARA 1737.
- 8 *Furber v Cobb* (1887) 18 QBD 494, CA.
- 9 le by the Bills of Sale Act (1878) Amendment Act 1882 s 7: see PARA 1789.
- 10 *Furber v Cobb* (1887) 18 QBD 494, CA.

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## **1742. Power of sale.**

An express power of sale may be inserted in a bill of sale<sup>1</sup>, but this is not obligatory, since the Bills of Sale Act (1878) Amendment Act 1882 provides for a power to seize in certain events<sup>2</sup>, and after the expiration of five clear days from the seizure, within which period the grantor may apply for relief<sup>3</sup>, the grantee can proceed with removal and sale<sup>4</sup>.

The statutory powers of sale conferred upon mortgagees by deed<sup>5</sup> do not apply to bills of sale in the statutory form<sup>6</sup>. A power may be given to sell on or off the premises by public auction or private contract<sup>7</sup> but not to affix placards to the premises<sup>8</sup>. A power may not be given to the grantee to purchase the chattels at a valuation<sup>9</sup>, or, if he is an auctioneer, to retain commission as if selling for the grantor<sup>10</sup>.

Provisions that the purchaser upon a sale shall not be bound to inquire whether default has been made<sup>11</sup>, or that the receipt of the grantee shall be a sufficient discharge, the buyer not being required to see to the application of the purchase money<sup>12</sup>, go beyond the legal effect of the statutory form and are not for the maintenance of the security<sup>13</sup>.

1 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to the proceeds of sale see PARA 1743.

2 See the Bills of Sale Act (1878) Amendment Act 1882 s 7; and PARA 1789.

3 See the Bills of Sale Act (1878) Amendment Act 1882 ss 7 proviso, 13; and PARAS 1791, 1795.

4 *Watkins v Evans* (1887) 18 QBD 386, CA; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA; and see PARA 1791.

5 le the powers conferred by the Law of Property Act 1925 s 101: see **MORTGAGE** vol 77 (2010) PARA 443 et seq.

6 *Calvert v Thomas* (1887) 19 QBD 204, CA, explaining views expressed in *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA, and *Watkins v Evans* (1887) 18 QBD 386, CA. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716.

7 *Bourne v Wall* (1891) 64 LT 530.

8 *Bardell v Daykin* (1887) 3 TLR 526, DC.

9 *Lyon v Morris* (1887) 19 QBD 139, CA.

10 *Furber v Cobb* (1887) 18 QBD 494, CA.

11 *Blaiberg v Beckett* (1886) 18 QBD 96, CA.

12 *Gibbs v Parsons* (1887) 22 LJNC 96, DC.

13 See PARA 1739. As to the meaning of 'maintenance of the security' see PARA 1737.

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### **1743. Proceeds of sale.**

A bill of sale<sup>1</sup> may provide that the grantee shall be at liberty to retain out of the proceeds of sale<sup>2</sup> his principal and interest, with all costs incurred in maintaining his security<sup>3</sup>, but a wider clause for retention of all expenses of attending the sale or incurred in relation to the security<sup>4</sup>, or to which the grantee may be put<sup>5</sup>, is not in accordance with the statutory form<sup>6</sup>, being capable of embracing expenses improperly incurred and also expenses incurred prior to execution of the bill<sup>7</sup>. A prior or contemporaneous collateral agreement for payment of commission to the grantee on sale of the goods is permissible, for it does not touch the security or affect the rights of the parties under the statutory form, but if such an agreement goes further and entitles the grantee to take the commission out of the proceeds of sale the effect is to enlarge the security conferred by the bill beyond what the statutory form permits, thus constituting a condition (and possibly also a declaration of trust) which is deemed to be part of the bill so that it is not in accordance with the statutory form<sup>8</sup>. These provisions do not, however, extend to a separate agreement made subsequent to and independent of the bill of sale<sup>9</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the power of sale see PARA 1742.

3 *Lumley v Simmons* (1887) 34 ChD 698, CA; *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA (where the bill of sale provided for the retention of principal, interest, costs and expenses, with rent, rates or taxes paid by the grantee, and payments for discharging any distress, execution or incumbrance on the chattels, and seizing, retaining and keeping possession thereof, and in or about their carriage, removal, warehousing and sale). Such a trust of proceeds of sale is substantially the same as would be implied if there were no declaration: *Re Cleaver, ex p Rawlings* (1887) 18 QBD 489, CA. As to the meaning of 'maintenance of the security' see PARA 1737.

4 *Calvert v Thomas* (1887) 19 QBD 204, CA.

5 *Macey v Gilbert* (1888) 57 LJQB 461, DC.

6 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716.

7 *Calvert v Thomas* (1887) 19 QBD 204, CA.

8 See PARA 1750.

9 *Furber v Cobb* (1887) 18 QBD 494; and see PARA 1752. For the position where the subsequent agreement operates to vary the bill see PARA 1831.



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#### **1744. Execution by grantor.**

The statutory form of a security bill of sale<sup>1</sup> requires the bill to be signed, sealed and delivered by the grantor. It is not, however, essential that execution should be at the foot of the body of the bill: execution at the foot of an annexed schedule suffices<sup>2</sup>. Moreover, sealing is no longer required for the valid execution of a deed by an individual<sup>3</sup>.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Melville v Stringer* (1883) 12 QBD 132; revsd on another point (1884) 13 QBD 392, CA. Execution by the grantor's attorney is sufficient: see *Furnival v Hudson* [1893] 1 Ch 335, where it was further held that the grantee was not excluded from being appointed such attorney (but see PARA 1646 note 7).

3 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b). For the statutory regime for the execution of deeds, which replaces any requirements of prior legislation, see s 1; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 7-8, 32-34.

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#### **1745. Attestation.**

The attestation clause is an essential part of the statutory form of a security bill of sale<sup>1</sup> and must be meticulously completed. The name, address<sup>2</sup> and description<sup>3</sup> of the attesting witness or witnesses<sup>4</sup> are required by the statutory form to be stated, and the name alone without address and description is insufficient<sup>5</sup>. A slight error in the description will not invalidate the bill if the description is substantially correct and does not mislead<sup>6</sup>, but a material defect is fatal and cannot be cured by a correction in the supporting affidavit filed on registration<sup>7</sup> or by extraneous evidence. Where a witness attests more than one attestation clause, adding his description to only one, it is sufficient if it appears on the face of the bill, as by comparison of handwriting, that the witness in each case is the same, but if extraneous evidence is necessary to prove this fact, the bill of sale will be void as not in accordance with the statutory form<sup>8</sup>.

1 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 This may be the business address of the witness, not necessarily his private residence: *Simmons v Woodward* [1892] AC 100, HL; and see PARA 1753.

3 By 'description' is meant the profession, trade or calling of the witness (*Coulson v Dickson* (1890) 25 QBD 110, CA), or if he has none, his style or addition (see *Sims v Trollope & Sons* [1897] 1 QB 24, CA, where the witness had no occupation). The description of a person of no occupation as a 'gentleman' has been held sufficient, it not being necessary to add that the person described has no occupation: *Gray v Jones* (1863) 14

CBNS 743; *Morewood v South Yorkshire Rly and River Dun Co* (1858) 3 H & N 798; *Smith v Cheese* (1875) 1 CPD 60. A peer may be described by his title: *Re Earl of Limerick* (1862) 7 Ir Jur NS 65. Hence the word 'description', though including occupation, is wider than this and, since almost everybody must have some style or addition, even if they have no occupation, the fact that the attesting witness has no occupation will not normally justify the absence of any description whatsoever: *Sims v Trollope & Sons* above at 26 per Lord Esher MR. Similarly, the words 'of no occupation' will not normally suffice as a description. A witness who is a married woman must state her occupation if she has one (*Kemble v Addison* [1900] 1 QB 430, DC), otherwise she is sufficiently described as 'married woman' (*Usher v Martin* (1889) 61 LT 778, DC), or as 'the wife of . . . ' (although if a married woman so describes herself when she also engages in business to a limited extent, the description may not be sufficient if the failure to refer to her occupation tends to mislead as to identification: see *Neverson v Seymour* (1907) 97 LT 788, DC, a decision on the sufficiency of a description of the grantor's occupation in the affidavit of due execution).

4 Apart from the requirements of the statutory form, a bill of sale by way of security is void as regards the chattels comprised in it unless attested by one or more credible witnesses, not being parties: see PARA 1753.

5 *Parsons v Brand* (1890) 25 QBD 110, CA; *Blankenstein v Robertson* (1890) 24 QBD 543, DC.

6 See *Re Wood, ex p McHattie* (1878) 10 ChD 398, CA, a decision on the sufficiency of a description of the grantor's name and address.

7 *Parsons v Brand, Coulson v Dickson* (1890) 25 QBD 110, CA. A fortiori omission of the description altogether cannot be cured by the affidavit: *Blankenstein v Robertson* (1890) 24 QBD 543, DC.

8 *Bird v Davey* [1891] 1 QB 29, CA.

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## 1746. Schedule.

Every bill of sale<sup>1</sup> by way of security must have annexed to it, or written on it, a schedule containing an inventory of the personal chattels<sup>2</sup> comprised in it<sup>3</sup>. The Bills of Sale Act (1878) Amendment Act 1882 provides that a bill has effect only in respect of the personal chattels specifically described in the schedule and, save as that Act otherwise provides<sup>4</sup>, is void, except as against the grantor, in respect of any personal chattels not so specifically described<sup>5</sup>. However, where the bill entirely omits a schedule, this provision, which leaves the bill valid as against the grantor, gives way to the provision which renders a bill totally void if it is not in accordance with the statutory form<sup>6</sup>, and since the statutory form refers to a schedule, the omission of a schedule precludes the bill from according with the form<sup>7</sup>.

The schedule must be confined to personal chattels capable of specific description<sup>8</sup>. It cannot therefore include after-acquired chattels other than substituted articles falling within the statutory exception<sup>9</sup>, nor can it embrace property other than personal chattels, such as land or chattels real<sup>10</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the meaning of 'personal chattels' see PARA 1662 et seq.

3 Bills of Sale Act (1878) Amendment Act 1882 s 4. The Bills of Sale Act 1878 requires that a copy of every schedule or inventory annexed to or referred to in a bill of sale be registered: see s 10(2); and PARA 1760.

4 This requirement of the Bills of Sale Act (1878) Amendment Act 1882 s 4 does not apply to any growing crops, fixtures, plant or machinery within s 6, which also exempts such things from the requirement of true ownership (see PARA 1699). Moreover, quite apart from s 6 the bill may legitimately provide for the replacement

of worn out, damaged or destroyed chattels, this being a term for the maintenance of the security (see PARA 1737), and the chattels to be substituted are obviously incapable of specific description at the time the bill is given.

5 Bills of Sale Act (1878) Amendment Act 1882 s 4.

6 In the Bills of Sale Act (1878) Amendment Act 1882 s 9: see PARA 1711. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see s 9, Schedule; and PARA 1711. As to the characteristics of the form see PARA 1716 et seq.

7 *Griffin v Union Deposit Bank* (1887) 3 TLR 608; *Brocklehurst v Railway Printing and Publishing Co* [1884] WN 70. The schedule must be attached at or before the time the bill of sale is executed: *Griffin v Union Deposit Bank* above.

8 *Thomas v Kelly* (1888) 13 App Cas 506, HL. However if chattels capable of specific description are included in the schedule without a sufficient description, this is not a defect in form within the Bills of Sale Act (1878) Amendment Act 1882 s 9 (see PARA 1711), but merely offends against s 4 so as to render the bill void, except as against the grantor, in respect of such chattels: *Thomas v Kelly*. As to what constitutes a specific description for these purposes see PARA 1747.

9 In the Bills of Sale Act (1878) Amendment Act 1882 s 6(2): see PARA 1699 head (2).

10 *Cochrane v Entwistle* (1890) 25 QBD 116, CA; *Re Burdett, ex p Byrne* (1888) 20 QBD 310, CA.

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### **C. DESCRIPTION OF CHATTELS**

#### **1747. What description suffices.**

The Bills of Sale Act (1878) Amendment Act 1882 requires any bill of sale<sup>1</sup> by way of security for the payment of money to have annexed to it or written on it a schedule containing an inventory of the personal chattels<sup>2</sup> comprised in it, and makes such a bill void, except as against the grantor, in respect of any personal chattels not so specifically described<sup>3</sup>. This provision embodies two distinct requirements: (1) an inventory; and (2) a specific description. The effect of this is that the bill must contain or have annexed to it that which in the ordinary business sense would be considered an inventory<sup>4</sup>, and that the bill will be effective against third parties only as regards such chattels in the inventory as are specifically described.

The description must be sufficient to distinguish the class of chattels assigned<sup>5</sup>, but where the bill comprises all chattels on the premises a less detailed description is sufficient and it may not be necessary to describe each article, or to state the number of articles in each class, especially in the case of chattels in a particular room of a private house<sup>6</sup>.

In the case of chattels of a kind requiring to be replaced from time to time, such as livestock on a farm or stock-in-trade in a shop or showroom, a more specific description is required than for articles that are not normally changed with frequency, such as furniture in a private house<sup>7</sup>. A mere description by number will not in general suffice in the case of stock<sup>8</sup> unless it is clear from the bill that the stated number is intended to represent all the stock on the premises<sup>9</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the meaning of 'personal chattels' see PARA 1662 et seq.

3 See the Bills of Sale Act (1878) Amendment Act 1882 s 4; and PARA 1746.

4 *Witt v Banner* (1887) 20 QBD 114, CA.

5 See *Roberts v Roberts* (1884) 13 QBD 794, CA, where the description 'household furniture and effects' was held insufficient. A description of a bathchair as a four-wheeled carriage and set of cloth cushions has been held sufficient: *Edwards v Marston* [1891] 1 QB 225, CA. So also has the description of a Premier 'plating' machine by clerical error for 'platen': *Simmonds v Hughes* (1890) 6 TLR 443, CA. To support an objection to a description of chattels, on the ground that it is not sufficiently specific, it must be shown either that, from the nature of the description, the articles cannot be identified, or that, in the particular case, the chattels themselves are incapable of identification: *Hickley v Greenwood* (1890) 25 QBD 277, DC. It is not necessary to describe the premises where the goods are situated: *Re Lane, ex p Hill* (1886) 17 QBD 74, DC.

6 *Davidson v Carlton Bank* [1893] 1 QB 82, CA ('Study: 1,800 vols of books as per catalogue. Miscellaneous: silver-plated goods, china tea service, coffee service, knives, forks . . .'); *Jones v Roberts* (1890) 34 Sol Jo 254 ('all my farming stock, comprising four horses, five cows'); *Cooper v Huggins* (1889) 34 Sol Jo 96 ('twelve oil paintings in gilt frames').

7 *Davies v Jenkins* [1900] 1 QB 133, DC (where a description as 'stock: two horses, four cows' was held insufficient); followed in *Herbert's Trustee v Higgins* [1926] Ch 794.

8 *Witt v Banner* (1887) 20 QBD 114, CA (where a description by number of a stock of oil paintings and water-colours in gilt frames, and unframed, was held insufficient); *Carpenter v Deen* (1889) 23 QBD 566, CA (where a description of farm stock as 'twenty-one milch cows' was held insufficient). In *Herbert's Trustee v Higgins* [1926] Ch 794, the description 'nineteen short-horns and Jersey cow' was held sufficient, having regard to the identification by breed, whereas 'store-cattle: two steers, five heifers' was held insufficient.

9 *Jones v Roberts* (1890) 34 Sol Jo 254; *Hickley v Greenwood* (1890) 25 QBD 277, DC. In the latter case, the decisions in *Witt v Banner* (1887) 20 QBD 114, CA, and *Carpenter v Deen* (1889) 23 QBD 566, CA (see note 8), were distinguished on the ground that the bills of sale in those cases were construed by the court as intended to cover stock of the stated number from time to time on the premises and not the specific items of stock on the premises when the bills were given.

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## **D. DEFEASANCES, CONDITIONS AND DECLARATIONS OF TRUST**

### **1748. Defeasances, etc, deemed part of bill.**

The Bills of Sale Act 1878 provides that, if a bill of sale<sup>1</sup> is made or given subject to any defeasance or condition, or declaration of trust not contained in the body of the bill, the defeasance, condition or declaration of trust is deemed to be part of the bill, and must be written on the same paper or parchment therewith before the registration, and be truly set forth in the copy required<sup>2</sup> to be filed with it, and as part of it, otherwise the registration is to be void<sup>3</sup>. However, if terms agreed to for the defeasance of the security are not inserted in a security bill, then under the Bills of Sale Act (1878) Amendment Act 1882 the bill will be void for failure to comply with the statutory form<sup>4</sup>.

The Bills of Sale Act 1878 avoids registration of a bill of sale not complying with the prescribed formalities, whether the defeasance, condition or declaration of trust is in favour of the grantor or the grantee, and the avoidance is not, as was at one time supposed<sup>5</sup>, confined to a defeasance, condition or declaration of trust limiting the rights of the grantee or affecting them prejudicially in favour of the grantor<sup>6</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 le by the Bills of Sale Act 1878 s 10(3): see the text and notes 3-6.

3 Bills of Sale Act 1878 s 10(3). The object of this provision is to ensure that the true bargain is registered: see *Pettit v Lodge and Harper* [1908] 1 KB 744 at 749, CA, per Fletcher Moulton LJ; *Kinnersley v Payne* (1909) 100 LT 229; *Smith v Whiteman* [1909] 2 KB 437, CA; *Hall v Whiteman* [1912] 1 KB 683, CA; *Cornell v May* (1915) 112 LT 1085, DC. The difficulty of registration arising from the fact that only a defeasance anterior to or contemporaneous with a bill of sale can be registered would apparently require subsequent variations to be embodied in a new bill of sale: *Cornell v May* (1915) 112 LT 1085 at 1087, DC. See further PARAS 1740, 1749-1752. As to registration see PARA 1754 et seq.

4 See the Bills of Sale Act (1878) Amendment Act 1882 s 9; and PARAS 1737-1740. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see PARA 1711 et seq.

5 *Re Lees, ex p Collins* (1875) 10 Ch App 367.

6 *Edwards v Marcus* [1894] 1 QB 587, CA.

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### **1749. Meaning of 'defeasance'.**

A provision for defeasance of the security<sup>1</sup> is one which defeats or limits the operation of a bill of sale<sup>2</sup> or stipulates for its discharge in stated events. A stipulation is not a defeasance for the purpose of the Bills of Sale Acts<sup>3</sup> unless it is a term which is part and parcel of the agreement under which the bill is given<sup>4</sup>. A subsequent agreement varying or determining a bill is not a defeasance within the Acts<sup>5</sup>, though it may itself be registrable as a bill of sale<sup>6</sup>. Similarly, a mortgage granted prior to the bill is not a defeasance of the bill<sup>7</sup>.

Whilst the mere provision of collateral security is not a defeasance<sup>8</sup>, a collateral agreement which enables the grantee to call for payment earlier than he could call for it under the bill is a defeasance, since if payment were demanded and made under the collateral agreement this would discharge the bill sooner than would appear from the bill itself<sup>9</sup>. For the same reason, a promissory note or bill of exchange given at the same time as a bill of sale, for the same loan and as part of the same transaction, forms part of a single contract between the parties and is a defeasance if calling up payment earlier than it could have been called up under the bill<sup>10</sup>, although it is valid as a promissory note<sup>11</sup>. Indeed, any prior or contemporaneous bargain different from that expressed in the bill and suspending its operation<sup>12</sup> or limiting its effect as a security, as for example by altering the events on which a seizure may be made, is a defeasance which must be incorporated in the bill of sale and registered. Thus where a bill of sale provides for payment of principal by weekly instalments, together with the interest then due, an arrangement to substitute weekly instalments of a higher amount covering both principal and interest, so as to avoid the difficulty of calculating amounts of interest week by week, is a defeasance, even though the aggregate amount or principal and interest is not altered<sup>13</sup>.

The essence of a defeasance is that it in some way defeats or limits the operation of the bill. A condition which does not defeat but fulfils the operation of the deed, such as a condition for sale on default, is not a defeasance<sup>14</sup>, and neither is a condition which does not come into operation until after enforcement of the bill, such as a condition that upon sale by the grantee the purchaser shall not be bound to inquire whether default has been made<sup>15</sup>.

- 1   le within the meaning of the Bills of Sale Act 1878 s 10(3): see PARA 1748.
- 2   As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.
- 3   le the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.
- 4   *Lester v Hickling* [1916] 2 KB 302.
- 5   *Lester v Hickling* [1916] 2 KB 302.
- 6   *Cornell v May* (1915) 112 LT 1085 at 1087, DC. As to registration see PARA 1754 et seq.
- 7   *Re Jones, ex p Official Receiver* (1910) 55 Sol Jo 30, DC.
- 8   *Stott v Show and Lee Ltd* [1928] 2 KB 26, CA; *Carpenter v Deen* (1889) 23 QBD 566, CA. Similarly a guarantee taken by the grantee from a third party is not a defeasance: *Oakes v Green* (1907) 23 TLR 560.
- 9   *Ellis v Wright* (1897) 76 LT 522, CA; *Counsell v London and Westminster Loan and Discount Co* (1887) 19 QBD 512, CA. See further PARA 1787.
- 10   *Counsell v London and Westminster Loan and Discount Co* (1887) 19 QBD 512, CA. See further PARA 1787.
- 11   *Monetary Advance Co v Cater* (1888) 20 QBD 785, DC.
- 12   Eg if a bill of exchange or promissory note is taken not as collateral security but as conditional payment. See PARA 1787.
- 13   *Pettit v Lodge and Harper* [1908] 1 KB 744, CA, overruling *Reed v Franks* (1900) 16 TLR 347.
- 14   *Blaiberg v Beckett* (1886) 18 QBD 96, CA. However a condition which confers rights beyond what is contemplated by the statutory form renders the bill void as not in accordance with the form: see *Blaiberg v Beckett*; and PARA 1750. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.
- 15   *Blaiberg v Beckett* (1886) 18 QBD 96, CA. See PARA 1742.

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### **1750. Condition other than defeasance.**

The word 'condition'<sup>1</sup> denotes a covenant or agreement which affects the right to redeem the goods on the one side, or the right to seize them on the other, but does not defeat or limit the operation of the bill of sale<sup>2</sup>. The distinction between a defeasance and a condition is important for two reasons. First, whilst the statutory form<sup>3</sup> requires all terms agreed for the defeasance of the security to be inserted in the bill<sup>4</sup>, a condition is not an integral part of the statutory form and its omission from the bill does not by itself prevent the bill from being in accordance with the statutory form but merely avoids the registration of the bill<sup>5</sup>. Secondly, whereas the parties are free to reach any agreement they choose as to maintenance or defeasance of the security<sup>6</sup>, other covenants in the bill must be limited to those contemplated by the statutory form<sup>7</sup>, and, since a condition not expressed in the bill but subject to which it is given is deemed to form part of the bill<sup>8</sup>, a condition that is not for the maintenance or defeasance of the security and that goes beyond what is permitted by the statutory form renders the bill void as not in conformity with the statutory form, even though the condition is not stated in the body of the

bill<sup>9</sup>. Thus if there is a prior agreement to pay compound interest, the bill itself being restricted to simple interest as permitted by the statutory form, the prior agreement renders the bill void as not in accordance with the statutory form<sup>10</sup>. Hence, in the case of security bills, the provision in the Bills of Sale Act 1878 avoiding registration for failure to set out a condition subject to which the bill is given only has independent force where the unrecorded condition is one which would have been valid if inserted in the body of the bill<sup>11</sup>. If the condition could not have been validly stipulated in the bill, the provision in the Bills of Sale Act 1878 gives way to the stronger provision in the Bills of Sale Act (1878) Amendment Act 1882 rendering a bill totally void if it is not in accordance with the statutory form<sup>12</sup>.

1 See the Bills of Sale Act 1878 s 10(3); and PARA 1748.

2 *Stott v Show and Lee Ltd* [1928] 2 KB 26 at 36, CA, per Shearman J, explaining *Edwards v Marcus* [1894] 1 QB 587, CA; *Heseltine v Simmons* [1892] 2 QB 547, CA. Thus not all stipulations are conditions or defeasances: see PARA 1752. As to defeasances see PARA 1749. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see PARA 1711 et seq.

4 See PARAS 1737, 1748.

5 Ie under the Bills of Sale Act 1878 s 10(3): see PARA 1748. See also *Edwards v Marcus* [1894] 1 QB 587, CA. The avoidance of registration of a security bill does not merely avoid the bill against the classes of third party mentioned in the Bills of Sale Act 1878 s 8 (see PARA 1849), but renders the bill void, even as against the grantor, in respect of the personal chattels comprised in it: Bills of Sale Act (1878) Amendment Act 1882 s 8. As to the meaning of 'personal chattels' see PARA 1662 et seq.

6 See PARAS 1737-1738.

7 *Blaiberg v Beckett* (1886) 18 QBD 96, CA (stipulation that on sale by grantee purchaser should not be bound to inquire whether default made); *Blaiberg v Parsons* (1886) 17 QBD 336, DC (similar stipulation); *Gibbs v Parsons* (1887) 22 LJNC 96, DC (provision that grantee's receipt should be sufficient discharge to purchaser, who should not be required to see to application of purchase money by grantee). See also *Peace v Brookes* [1895] 2 QB 451; *Bardell v Daykin* (1887) 3 TLR 526, DC; and PARA 1739.

8 Bills of Sale Act 1878 s 10(3).

9 See *Hall v Whiteman* [1912] 1 KB 683, CA; *Smith v Whiteman* [1909] 2 KB 437, CA; *Sharp v McHenry*, *Sharp v Brown* (1887) 38 ChD 427; *Simpson v Charing Cross Bank* (1886) 34 WR 568; and PARA 1718.

10 *Sharp v McHenry*, *Sharp v Brown* (1887) 38 ChD 427; and see PARA 1718 note 1.

11 See eg *Heseltine v Simmons* [1892] 2 QB 547, CA (agreement not to resort to bill until other securities exhausted); *Re Southam, ex p Southam* (1874) LR 17 Eq 578 (antecedent agreement to repay by instalments).

12 Bills of Sale Act (1878) Amendment Act 1882 s 9. See *Sharp v McHenry*, *Sharp v Brown* (1887) 38 ChD 427; and PARA 1711.

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### 1751. Declaration of trust.

It had been held under the Bills of Sale Act 1854 that the provision in that Act requiring registration of declarations of trust as part of a bill of sale<sup>1</sup> was aimed at sham bills by which

the grantor, though ostensibly parting with his interest in the goods so as to place them outside the reach of creditors, took them back under a secret declaration of trust by the grantee, and the provision was considered not to apply where the grantee's declaration of trust was made not in favour of the grantor but in favour of a third party who had in fact advanced the money which ostensibly came from the grantee<sup>2</sup>. However, it seems that, under the provision of the Bills of Sale Act 1878<sup>3</sup>, any prior or contemporaneous declaration of trust affecting the rights of one of the parties to a bill of sale is to be deemed part of the bill, and registrable as such, whether or not it favours the grantor<sup>4</sup> and even where the declaration of trust is made by the grantee for the benefit of a third party<sup>5</sup>. However, a declaration of trust made subsequently to the bill is not affected by these provisions. An agreement by which the money advanced under a bill of sale is to be applied to discharge an existing indebtedness of the grantor to the grantee does not constitute a trust over the advanced sum in favour of the lender, who is merely a creditor, and does not constitute a declaration of trust<sup>6</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Robinson v Collingwood* (1864) 17 CBNS 777.

3 See the Bills of Sale Act 1878 s 10(3); see PARA 1748.

4 See *Edwards v Marcus* [1894] 1 QB 587, CA, in which it was held that despite dicta to the contrary by James LJ in *Re Lees, ex p Collins* (1875) 10 Ch App 367, a condition need not be one which prejudicially affects the grantee in order for the statutory provisions to apply.

5 *Kinnersley v Payne* (1909) 100 LT 229. Moreover, if the declaration of trust in favour of the third party is given because he advanced the consideration, though this is stated in the bill to have been furnished by the grantee, the bill is open to objection on the additional ground that the consideration is not truly stated: see *Kinnersley v Payne*; and PARAS 1704, 1709.

6 *Thomas v Searles* [1891] 2 QB 408, leaving open the question whether an effective trust of money advanced by the lender would fall within the statutory provisions.

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## **1752. Stipulations not affected.**

It is not every collateral stipulation between the parties that is a defeasance, condition or declaration of trust for the purposes of the Bills of Sale Act 1878<sup>1</sup>. Only stipulations that affect the security, either directly or indirectly through personal covenants linked to the enforcement or redemption of the security, are brought within the statutory provisions<sup>2</sup>. Collateral agreements which do not in any way detract from the force of the bill of sale<sup>3</sup> or render it liable to discharge earlier than is apparent from the face of the bill are unaffected and do not require registration as part of the bill<sup>4</sup>. Thus an understanding that out of the advance the grantor should repay a debt owing by him to the grantee, in part secured by an existing bill of sale, is not a condition or declaration of trust<sup>5</sup>. Similarly a mere deposit by the grantor of a policy of insurance as collateral security for the debt secured by the bill of sale is not a defeasance or a condition<sup>6</sup>, nor is the guarantee of a third party to pay on demand any unpaid balance of loan and interest in the event of the bill of sale becoming inoperative or proving an insufficient security<sup>7</sup>.



Terms made subsequently to the bill and constituting a separate transaction are not within the statutory provisions<sup>8</sup>, and a prior mortgage is not a defeasance of a bill of sale given to secure the same loan<sup>9</sup>.

1    le the Bills of Sale Act 1878 s 10(3): see PARA 1748.

2    See *Stott v Shaw and Lee Ltd* [1928] 2 KB 26, CA.

3    As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

4    As to registration see PARA 1754 et seq.

5    *Thomas v Searles* [1891] 2 QB 408, CA.

6    *Carpenter v Deen* (1889) 23 QBD 566, CA.

7    *Oakes v Green* (1907) 23 TLR 560.

8    *Lester v Hickling* [1916] 2 KB 302.

9    *Re Jones, ex p Official Receiver* (1910) 55 Sol Jo 30, DC. However, if it varies the bill of sale the prior mortgage may be separately registrable as a bill itself: see PARA 1831.

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## **(viii) Attestation**

### **1753. The requirement of attestation.**

The Bills of Sale Act (1878) Amendment Act 1882 requires that the execution by the grantor of a bill of sale<sup>1</sup> given by way of security must be attested by one or more credible witness or witnesses, not being a party or parties to it<sup>2</sup>. If a named party to a bill is in truth a trustee for another, under some prior declaration of trust, then since that declaration of trust is deemed part of the bill<sup>3</sup>, the beneficiary is himself a party to the bill and cannot attest it<sup>4</sup>.

The provisions relating to attestation merely provide that failure to have the bill duly attested renders the bill void as regards the personal chattels<sup>5</sup> comprised in it<sup>6</sup>, but the statutory form<sup>7</sup> of a security bill requires the bill to be witnessed and the name, address and description of the witness to be inserted, and failure to comply with these requirements will render the bill wholly void for want of form<sup>8</sup>.

1    As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2    Bills of Sale Act (1878) Amendment Act 1882 s 10 (amended by the Statute Law Revision Act 1898). Normally one witness is sufficient, but if, instead of the grantor signing the bill himself, it is signed at his direction and in his presence then two attesting witnesses are required: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 33. Although a party cannot attest a bill of sale, his agent or manager may do so: *Peace v Brookes* [1895] 2 QB 451.

3    See the Bills of Sale Act 1878 s 10(3); and PARA 1748 et seq.

4    *Kinnersley v Payne* (1909) 100 LT 229.

- 5 As to the meaning of 'personal chattels' see PARA 1662 et seq.
- 6 Bills of Sale Act (1878) Amendment Act 1882 s 8.
- 7 As to the statutory form and the requirement that security bills of sale are to be in accordance with it see PARA 1711 et seq.
- 8 See the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARAS 1711, 1745.

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## **(ix) Registration**

### **A. IN GENERAL**

#### **1754. Necessity for registration.**

The Bills of Sale Act (1878) Amendment Act 1882 requires every security bill of sale<sup>1</sup> to be registered under the Bills of Sale Act 1878<sup>2</sup>. If this is not done within the prescribed time and manner<sup>3</sup> the bill is rendered void in respect of the personal chattels<sup>4</sup> comprised in it<sup>5</sup>.

- 1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.
- 2 Bills of Sale Act (1878) Amendment Act 1882 s 8.
- 3 See PARA 1755 et seq.
- 4 As to the meaning of 'personal chattels' see PARA 1662 et seq.
- 5 Bills of Sale Act (1878) Amendment Act 1882 s 8.

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#### **1755. Registration of successive bills.**

Before the Bills of Sale Act 1878 came into operation<sup>1</sup>, it had become a practice to grant a series of bills of sale<sup>2</sup>, each being granted before the time for registration of the preceding bill had expired and each cancelling the preceding bill, so that the grantee was able to obtain a continuous security interest whilst deferring registration until this became necessary, in which event he would register the last in the series<sup>3</sup>. Avoidance of the registration requirements in this way is prevented by the Bills of Sale Act 1878, which provides that a bill of sale executed within, or on the expiration of seven days after, the execution of a prior unregistered bill is void so far as it is a security for the same debt and so far as respects any personal chattels<sup>4</sup> which were comprised in the prior bill, unless the later bill is proved to have been given bona fide for

the purpose of correcting some material error in the prior bill<sup>5</sup>. A second bill executed more than seven days after execution of a prior unregistered bill of sale of the same chattels is valid<sup>6</sup>.

1 The Bills of Sale Act 1878 came into force on 1 January 1879: see s 2.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 See *Ramsden v Lupton* (1873) LR 9 QB 17. Cf *Re Renshaw & Co Ltd* [1908] WN 210, where debentures were issued successively to avoid registration. As to the necessity for registration see PARA 1754.

4 As to the meaning of 'personal chattels' see PARA 1662 et seq.

5 Bills of Sale Act 1878 s 9.

6 *Carrard v Meek* (1880) 50 LJQB 187.

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### **1756. Effect of valid registration.**

Registration of a bill of sale<sup>1</sup>, although necessary to maintain the validity of the security, does not of itself constitute notice to third parties, since for these purposes the doctrine of constructive notice does not apply to chattels<sup>2</sup>. As a rule this will not prejudicially affect the grantee, because having registered he will usually be able to assert against the world the legal title acquired by him under the bill. It is thought that, following the abolition of the doctrine of market overt<sup>3</sup>, there are no exceptions to the rule *nemo dat quod non habet*<sup>4</sup> applicable to security bills of sale which pass the legal title<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to registration generally see PARA 1754 et seq.

2 *Joseph v Lyons* (1884) 15 QBD 280 at 286, CA, per Cotton LJ.

3 The doctrine of market overt was abolished by the Sale of Goods (Amendment) Act 1994 s 1: see **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) PARA 1026.

4 I.e. no one can give what he does not have.

5 As to security bills in which the grantee's title is purely equitable, leaving it liable to be overridden on a transfer of the legal title to a bona fide purchaser without notice, see PARA 1817. As to absolute bills see PARAS 1801, 1840.

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### **1757. Remedies for wrongful registration.**

A person prejudicially affected by an improper registration of a bill of sale<sup>1</sup>, or by registration of a document which does not constitute a bill of sale at all, can apply for an order expunging the registration<sup>2</sup>. The power to make such an order derives not from the Bills of Sale Acts<sup>3</sup> but from the inherent jurisdiction of the court to direct removal from its files and registers of any matter improperly placed on them<sup>4</sup>. No claim for damages will lie for improper registration unless the claimant proves malice on the part of the defendant<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to the necessity for registration see PARA 1754.

2 Application is made by witness statement or affidavit or claim form (see CPR Sch 1 RSC Ord 95 r 1; *Practice Direction--Bills of Sale* PD 95). As to applications see further **CIVIL PROCEDURE** vol 12 (2009) PARA 1699. As to expunging the registration see also PARAS 1784-1785.

3 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

4 See *Nixon v Loundes* [1909] 2 IR 1.

5 *Horsley v Style* (1893) 69 LT 222, CA. The same principle apparently applies to publication of a copy of the register: *Searles v Scarlett* [1892] 2 QB 56, CA. Cf *Williams v Smith* (1888) 22 QBD 134, DC; and observations on that case in *Searles v Scarlett* above at 62.

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### **1758. Mode of registration.**

The mode of registration of a security bill of sale<sup>1</sup> is regulated by the Bills of Sale Act 1878. The bill, with every schedule or inventory annexed to it or referred to in it<sup>2</sup>, and a true copy<sup>3</sup> of the bill and of every schedule or inventory and of every attestation of the execution of such bill, together with an affidavit containing the required particulars<sup>4</sup>, must be presented to the registrar<sup>5</sup>, and the copy of the bill of sale and the original affidavit must be filed with him<sup>6</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to the necessity for registration see PARA 1754.

2 A catalogue of chattels referred to in the schedule to a bill of sale, when the chattels can be identified without referring to the catalogue, is not a schedule or inventory within the meaning of the Bills of Sale Act 1878: *Davidson v Carlton Bank* [1893] 1 QB 82, CA.

3 See PARA 1761 et seq.

4 As to the affidavit see PARA 1764 et seq.

5 The office of the registrar is executed by the masters of the Supreme Court, Queen's Bench Division, any one of whom may perform all or any of the duties of the registrar: see the Bills of Sale Act 1878 s 13. As from a day to be appointed, the reference to the Supreme Court is replaced by a reference to the Senior Courts: s 13 (prospectively amended by the Constitutional Reform Act 2005 Sch 11 Pt 2 para 4(1), (3)). At the date at which this volume states the law no such day had been appointed.

6 Bills of Sale Act 1878 s 10(2). See further PARAS 1760-1763. As to the copies required for local registration see PARA 1776 et seq.

### **UPDATE**

## 1758 Mode of registration

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

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## 1759. Time limit for registration.

A security bill of sale<sup>1</sup> must be registered<sup>2</sup> within seven clear days<sup>3</sup> after its execution or, if executed in any place out of England, within seven clear days after the time at which it would, in the ordinary course of post, arrive in England, if posted immediately after its execution<sup>4</sup>. During the time allowed for registration, a bill, if otherwise valid, is effectual though unregistered<sup>5</sup>, and this is so even if within that time there purports to have been registration which turns out to be insufficient<sup>6</sup>. If an execution creditor has the goods seized within the time allowed for registration of the bill and before it has been registered, the unregistered bill is at that time effective against the execution creditor<sup>7</sup>, who will be liable to the grantee for damages for conversion<sup>8</sup>. This would appear to be the case even if the bill is not subsequently registered in due time, and indeed even if it is never registered at all<sup>9</sup>, but whilst non-registration will not validate the original wrongful seizure by the execution creditor, yet, once the period allowed for registration has expired without registration taking place, the bill becomes void as to the chattels comprised in it<sup>10</sup>, so that from that moment the grantee's security comes to an end and the rights of the execution creditor prevail<sup>11</sup>.

During the period allowed for registration the bill remains effective even if before registration the grantor becomes bankrupt, and such bankruptcy does not affect the grantee's right to perfect his title by registration during the remainder of the period<sup>12</sup>. However, once the period has expired, the bill, if not registered in due time, becomes void as to the security and thus ceases to have any effect on the grantor's trustee in bankruptcy or creditors.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the necessity for registration see PARA 1754.

3 As to the computation of such periods see **TIME** vol 97 (2010) PARA 329 et seq. When the time for registration expires on a Sunday or other day on which the registrar's office is closed, the registration is valid if made on the next following day on which the office is open: Bills of Sale Act 1878 s 22. Hence a bill made on a Saturday may be registered at any time up to and including the second Monday afterwards. Weekends and public holidays are not, however, otherwise excluded from the computation of the seven days. Power is given to extend the time for registration in certain cases: see s 14; and PARA 1779 et seq. As to the registrar see PARA 1758 note 5.

4 Bills of Sale Act (1878) Amendment Act 1882 s 8.

5 *Marples v Hartley* (1861) 3 E & E 610; *Banbury v White* (1863) 2 H & C 300.

6 *Banbury v White* (1863) 2 H & C 300.

7 *Marples v Hartley* (1861) 3 E & E 610; *Hollingsworth v White* (1862) 6 LT 604.

8 As to damages for conversion see **DAMAGES** vol 12(1) (Reissue) PARA 861. See also **TORT** vol 45(2) (Reissue) PARA 615 et seq.

9 *Brignall v Cohen* (1872) 21 WR 25, Ex Ch.

10 Bills of Sale Act (1878) Amendment Act 1882 s 8.

11 This is so even if the execution creditor was aware of the bill of sale at the time the debt to him was contracted: *Edwards v Edwards* (1876) 2 ChD 291, CA.

12 *Re Hewer, ex p Kahen* (1882) 21 ChD 871; *Re Broadbent, ex p Homan* (1871) LR 12 Eq 598. As to bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

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## **B. THE BILL OF SALE**

### **1760. Complete bill must be presented.**

On registration the bill of sale<sup>1</sup> presented for inspection<sup>2</sup> must be the whole bill, complete with schedule and inventory<sup>3</sup>, and with a written record of any defeasance, condition or declaration of trust subject to which the bill is given<sup>4</sup>. A true copy of the bill comprising all these documents must then be filed<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to the necessity for registration see PARA 1754.

2 Ie under the Bills of Sale Act 1878 s 10(2): see PARA 1758.

3 Bills of Sale Act 1878 s 10(2). As to the schedule and inventory see PARAS 1746-1747.

4 See the Bills of Sale Act 1978 s 10(3); and PARA 1748.

5 See PARAS 1761-1763.

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## **C. THE FILED COPY**

### **1761. True copy to be filed.**

The filed copy of a bill of sale<sup>1</sup> must be substantially a true copy, but need not be an exact copy, and clerical or verbal errors which cannot mislead will not avoid the registration<sup>2</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to the necessity for registration see PARA 1754.

2 *Re Hewer, ex p Kahen* (1882) 21 ChD 871 (where words were left out); *Sharp v McHenry, Sharp v Brown* (1887) 38 ChD 427 (where blanks in the copy were filled up in the original); *Gardnor v Shaw* (1871) 24 LT 319 (where there was a small mistake in the spelling of the name); *Elliott v Freeman* (1863) 7 LT 715 (where the

consideration stated in the body of the bill was £1,000 whereas elsewhere it was stated correctly as £100); *Thomas v Roberts* [1898] 1 QB 657, DC (where the date of execution was stated in the original and in the affidavit filed with the copy but omitted from the copy itself); *Coates v Moore* [1903] 2 KB 140, CA (where the omission of the signatures of the grantor and attesting witness, with description, was supplied by the affidavit filed with the copy). Cf *Burchell v Thompson* [1920] 2 KB 80, CA (where the words 'per annum' were omitted in the statement of the interest); *Commercial Credit Co of Canada Ltd v Fulton Bros* [1923] AC 798, PC (a case decided under the Bills of Sale Act 1918 of Nova Scotia s 8(2), where there was a misdescription of the weight of a motor vehicle, which was an integral part of the description of the vehicle, and the copy omitted certain equipment and accessories which, in the original, were shown as included in the price).

As to the court's power of rectification see PARAS 1779-1780.

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### **1762. Omissions cured by affidavit.**

If the filed copy of a bill of sale<sup>1</sup> is substantially correct but omits certain matters such as the signature of the grantor and the signature, address and description of the attesting witness, these omissions, if they do not have a misleading effect, may be supplied by reference to the affidavit of due execution<sup>2</sup>. It is otherwise, however, if what is omitted renders the copy misleading, as where, in stating the rate of interest specified in the bill, the copy omits the words 'per annum'<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to the necessity for registration see PARA 1754.

2 *Coates v Moore* [1903] 2 KB 140, CA.

3 *Burchell v Thompson* [1920] 2 KB 80, CA.

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### **1763. Proving truth of copy.**

The onus is on a party relying on a registered bill of sale<sup>1</sup> to establish that the filed copy is a true copy<sup>2</sup>, but any copy of a registered bill purporting to be an office copy is in all proceedings admissible as prima facie evidence of it and of the fact and date of registration shown on it<sup>3</sup>, and also, it appears, of execution of the bill by the grantor<sup>4</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to the necessity for registration see PARA 1754.

2 *Emmott v Marchant* (1878) 3 QBD 555, DC; and see PARAS 1761-1762.

3 See the Bills of Sale Act 1878 s 16; and PARA 1773.

4 See *Re Slater, ex p Slater* (1897) 76 LT 704, CA, decided in relation to the Deeds of Arrangement Act 1887 (repealed) which was in the same words as the Bills of Sale Act 1878 s 16: see the text to note 3.

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## **D. AFFIDAVIT OF DUE EXECUTION**

### **1764. Contents of affidavit.**

The affidavit presented to and filed with the registrar<sup>1</sup> must prove:

- 186 (1) the due execution and attestation of the bill of sale<sup>2</sup>;
- 187 (2) the residence<sup>3</sup> and occupation<sup>4</sup> of the grantor and of every attesting witness<sup>5</sup>;  
and
- 188 (3) the true date and time of execution of the bill of sale<sup>6</sup>.

<sup>1</sup> le under the Bills of Sale Act 1878 s 10(2): see PARA 1758. As to the necessity for registration see PARA 1754. As to the registrar see PARA 1758 note 5.

<sup>2</sup> Bills of Sale Act 1878 s 10(2). As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. It is sufficient to state that the bill of sale was executed on the day of which it bears the date. An obvious mistake in the date, as 1806 for 1876, is not a fatal defect: *Lamb v Bruce, Duggan v Bruce, Cooper v Bruce* (1876) 45 LJQB 538, DC.

<sup>3</sup> See PARA 1768.

<sup>4</sup> See PARA 1769.

<sup>5</sup> Bills of Sale Act 1878 s 10(2). The affidavit must not merely verify the signature of the attesting witness, it must indicate, expressly or by inference (*Yates v Ashcroft* (1882) 47 LT 337, DC), that the attesting witness was present and saw the grantor execute the bill (*Re Moulson, ex p Knightly* (1882) 51 LJCh 823; *Sharpe v Birch* (1881) 8 QBD 111, DC; *Ford v Kettle* (1882) 9 QBD 139, CA).

<sup>6</sup> Bills of Sale Act 1878 s 10(2). This refers only to the time of execution, which, however, clearly involves a statement both of the time of day and of the date. An affidavit as opposed to a witness statement is required (see CPR 32.15(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 989).

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### **1765. By whom affidavit may be made.**

The affidavit<sup>1</sup> need not be made by the attesting witness himself but may be made by anyone having knowledge of the facts deposed to<sup>2</sup>.

<sup>1</sup> le under the Bills of Sale Act 1878 s 10(2): see PARA 1758.

<sup>2</sup> *Crawcour v Salter* (1881) 18 ChD 30, CA.



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### **1766. Before whom affidavit may be sworn.**

Affidavits<sup>1</sup> may be sworn before a master of any division of the High Court of Justice or a commissioner for oaths<sup>2</sup>, and every officer so empowered by the Civil Procedure Rules has authority to take oaths and affidavits for the purpose of proceedings in the Supreme Court<sup>3</sup>.

The Civil Procedure Rules relating to affidavits<sup>4</sup> apply to an affidavit on registration of a bill of sale<sup>5</sup>, and such an affidavit must be sworn before a person who is independent of the parties and their representatives<sup>6</sup>. If an affidavit on registration is sworn in contravention of the Civil Procedure Rules, registration of the bill is rendered void<sup>7</sup>.

Where the commissioner does not sign his name to the jurat, this is an omission of substance rendering the affidavit incomplete and registration of the bill void<sup>8</sup>.

1    Ie under the Bills of Sale Act 1878 s 10(2): see PARA 1758.

2    Bills of Sale Act 1878 s 17 (amended by the Perjury Act 1911 s 17). The reference in the provision is to a commissioner empowered to take affidavits in the Supreme Court. As from a day to be appointed, the reference to the Supreme Court is replaced by a reference to the Senior Courts: Bills of Sale Act 1878 s 17 (prospectively amended by the Constitutional Reform Act 2005 Sch 11 Pt 2 para 4(1), (3)). At the date at which this volume states the law no such day had been appointed. Every solicitor holding a current practising certificate has the powers conferred on a commissioner for oaths: see the Solicitors Act 1974 s 81(1); and **LEGAL PROFESSIONS** vol 65 (2008) PARA 736.

It is perjury wilfully to make or use any false affidavit for the purpose of the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630): see the Perjury Act 1911 s 2(2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 716.

3    See *Practice Direction--Written Evidence* PD 32 PARA 9.1.

4    See CPR Pt 32; *Practice Direction--Written Evidence* PD 32 PARAS 2-16; **CIVIL PROCEDURE** vol 11 (2009) PARAS 979 et seq, 989 et seq.

5    *Baker v Ambrose* [1896] 2 QB 372. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to the necessity for registration see PARA 1754.

6    See *Practice Direction--Written Evidence* PD 32 PARA 9.2. See also the Commissioners for Oaths Act 1889 s 1(3); the Solicitors Act 1974 s 81(2); *Baker v Ambrose* [1896] 2 QB 372; and **CIVIL PROCEDURE** vol 11 (2009) PARA 1026; **LEGAL PROFESSIONS** vol 65 (2008) PARA 736.

7    *Baker v Ambrose* [1896] 2 QB 372.

8    *Brown v London and County Advance and Discount Co* (1889) 5 TLR 199.

### **UPDATE**

### **1766 Before whom affidavit may be sworn**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

5TH EDITION, PARAS 1620-2586)/7. BILLS OF SALE/(3) SECURITY BILLS OF SALE/(ix) Registration/D. AFFIDAVIT OF DUE EXECUTION/1767. Description of parties and witnesses.

### **1767. Description of parties and witnesses.**

The affidavit filed on registration<sup>1</sup> must contain a description of the residence and occupation of the grantor<sup>2</sup> and of every attesting witness to the bill of sale<sup>3</sup>, in order that creditors and others concerned may make inquiries before dealing with the grantor<sup>4</sup>.

Although the Bills of Sale Acts<sup>5</sup> make no provision for stating the names of the parties, a wrong forename or surname, when coupled with a misdescription of occupation or residence, may make the latter so inaccurate and misleading as to avoid registration<sup>6</sup>.

The statutory form of a bill of sale by way of security requires the address and description of the grantor and every attesting witness to be stated on the face of the bill<sup>7</sup>, but this information must be given also in the affidavit filed on registration<sup>8</sup>.

If the affidavit contains no description<sup>9</sup> or an untrue or mis-stated description<sup>10</sup>, registration will be avoided, and a bill of sale containing a correct description cannot be used to cure a wrong description<sup>11</sup> or absence of description<sup>12</sup> in the affidavit. Reference may, however, be made to the bill of sale in order to supplement an insufficient or ambiguous description in the affidavit<sup>13</sup>, and mere surplusage in the affidavit may be rejected if the meaning is clear<sup>14</sup>.

The affidavit need not itself verify the address and occupation directly: it suffices if the affidavit refers to the description of address and occupation given in the bill<sup>15</sup>.

The burden of proof is on the person alleging that the description is misleading<sup>16</sup> or should have been otherwise stated<sup>17</sup>, or that, where no occupation is described, the person in fact has one<sup>18</sup>, and, when the facts are ascertained, the question of sufficiency of description is for the judge<sup>19</sup>.

Where the omission or mis-statement of the grantor's name, residence or occupation was due to inadvertence, the court may cure this by ordering rectification of the register<sup>20</sup>.

<sup>1</sup> See under the Bills of Sale Act 1878 s 10(2): see PARA 1758. As to the necessity for registration see PARA 1754.

<sup>2</sup> See further PARAS 1768-1769. Description to the best of the deponent's belief was sufficient to satisfy the corresponding requirement of the Bills of Sale Act 1854: *Roe v Bradshaw* (1866) LR 1 Exch 106. Where the description is given in the introductory part but is left blank in the body of the affidavit, the registration is valid: *Blaiberg v Parke* (1882) 10 QBD 90. A description is sufficient if it identifies the grantor and attesting witnesses and enables a person by ordinary inquiry to ascertain where to find the objects of his search: *Blount v Harris* (1878) 4 QBD 603, CA ('Acton in the City of London' held not to vitiate the affidavit although Acton was in Middlesex). The description must be of residence and occupation at the time of registration of the bill, not at the time of its execution: *Button v O'Neill* (1879) 4 CPD 354, CA. The description of the grantor as carrying on a business when he had ceased to be a partner and continued merely as manager (*Cooper v Davis* (1883) 48 LT 831; cf *Proctor v Lucius* (1903) 19 TLR 458, DC), or as 'until lately' a commercial traveller (*Castle v Downton* (1879) 5 CPD 56) is insufficient, but where the grantor absconded before registration, the description of his address as in the bill of sale was held sufficient (*Re Hewer, ex p Kahen* (1882) 21 ChD 871).

<sup>3</sup> Bills of Sale Act 1878 s 10(2). Every witness must be described (*Pickard v Marriage* (1876) 1 ExD 364) and every grantor (*Hooper v Parmenter* (1862) 10 WR 648). As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

<sup>4</sup> *Jones v Harris* (1871) LR 7 QB 157.

<sup>5</sup> See the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

<sup>6</sup> *Lee v Turner* (1888) 20 QBD 773, DC; *Stokes v Spencer* [1900] 2 QB 483, DC.

<sup>7</sup> See PARA 1745. As to the statutory form and the requirement that security bills of sale are to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711.

- 8 Bills of Sale Act 1878 s 10(2). The address need not be the grantor's home address: see PARA 1768.
- 9 *Hatton v English* (1857) 7 E & B 94. Cf *Brandon Hill Ltd v Lane* [1915] 1 KB 250, DC, where the wife was a party to the bill of sale given to secure a joint debt, but, as she was not the grantor of the bill, the affidavit was not defective by reason that it did not set out her address or description.
- 10 *Brodrick v Scalé* (1871) LR 6 CP 98.
- 11 *Murray v Mackenzie* (1875) LR 10 CP 625; *Marks v Derrick* (1899) 80 LT 60, DC.
- 12 *Pickard v Bretz* (1859) 5 H & N 9.
- 13 *Jones v Harris* (1871) LR 7 QB 157; *Re Bent, ex p Mackenzie* (1873) 42 LJ Bcy 25. Cf *Dolcini v Dolcini* [1895] 1 QB 898, where the address of the grantor given in the bill was that of a club, but the address at which he resided was given in the affidavit.
- 14 *Blount v Harris* (1878) 4 QBD 603, CA, where the addition of 'in the City of London' to the description 'Acton' was disregarded.
- 15 *Wilcoxon v Searby, Foulger v Taylor* (1860) 5 H & N 202. The decision in *Sladden v Sergeant* (1858) 1 F & F 322, upholding an affidavit in which the attesting witness described himself merely as 'deponent', would not, it is thought, be followed.
- 16 *Throssell v Marsh* (1885) 53 LT 321, DC.
- 17 *Grant v Shaw* (1872) LR 7 QB 700, DC.
- 18 *Sutton v Bath* (1858) 3 H & N 382.
- 19 *Phillips v Burt* (1862) 2 F & F 862. It is in any event extremely unlikely that in the present day such a dispute would come before a jury.
- 20 See PARAS 1779-1780.

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## 1768. Residence.

The residence of the grantor and attesting witnesses must be described in the affidavit<sup>1</sup> with such reasonable certainty and sufficiency as to identify them, the degree of particularity required depending on the circumstances of the case<sup>2</sup>. In some instances, the description may need to be more detailed than in others, so that whilst a small town may be a sufficient address without giving a street<sup>3</sup>, in a more populated locality it may be necessary to state not only the street but the number of the residence, and a misleading mistake in number may avoid registration<sup>4</sup>.

The residence required is not necessarily the place where the party lives<sup>5</sup>. An address where he is likely to be found, as, for instance, his place of business or his employer's place of business, is sufficient<sup>6</sup>. However, it is not necessary to set out every residence or place of business, and if the person described has two or more addresses it suffices to describe him as being of the principal one<sup>7</sup>.

1     le under the Bills of Sale Act 1878 s 10(2): see PARA 1758. Under certain circumstances, local registration may be necessary: see PARA 1776 et seq.

2     See *Briggs v Boss* (1868) LR 3 QB 268 (where the description of the witness as 'of Hanley', without further address, was held sufficient, letters so addressed reaching him). Subsequent decisions, however, indicate that

this was an extreme case which will not be extended: *Larchin v North Western Deposit Bank* (1875) LR 10 Exch 64; *Murray v Mackenzie* (1875) LR 10 CP 625.

3 *Hickley v Greenwood* (1890) 63 LT 288, DC; *Gardner v Smart* (1883) Cab & El 14; *Briggs v Boss* (1868) LR 3 QB 268. The likelihood of such an address being sufficient is greater where the name of grantor or witness in question is unusual: *Gardner v Smart* above.

4 *Murray v Mackenzie* (1875) LR 10 CP 625; *Marks v Derrick* (1899) 80 LT 60, DC.

5 *Blackwell v England* (1857) 8 E & B 541; *Attenborough v Thompson* (1857) 2 H & N 559; *Hewer v Cox* (1860) 3 E & E 428.

6 Thus a clerk may be sufficiently described as of his employer's address, where he can be found during business hours: *Simmons v Woodward* [1892] AC 100, HL; *Blackwell v England* (1857) 8 E & B 541.

7 *Greenham v Child* (1889) 24 QBD 29, DC; *Re Moulson, ex p Knightly* (1882) 51 LJCh 823.

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## 1769. Occupation.

Occupation, for the purpose of the affidavit<sup>1</sup>, is the trade, business or calling which a person pursues to get a living<sup>2</sup>, or the business in which a man is usually engaged<sup>3</sup>. If a person has an occupation, it must be described<sup>4</sup>, and, where he has a second occupation which is not a mere subsidiary occupation<sup>5</sup>, this must be described if its omission would mislead<sup>6</sup>, but not otherwise<sup>7</sup>. If a person has no occupation, it is unnecessary to state this in the affidavit<sup>8</sup>; nor is it necessary to set out details of business undertakings in which he may be interested or engaged<sup>9</sup>.

If the true description of the occupation is omitted, it is immaterial whether creditors are in fact misled or likely to be misled<sup>10</sup>.

1 See under the Bills of Sale Act 1878 s 10(2): see PARA 1758.

2 *Tuton v Sanoner* (1858) 3 H & N 280. See also *Barron v Potter* [1915] 3 KB 593, CA, adopting the definition of Kelly CB in *Luckin v Hamlyn* (1869) 21 LT 366 ('the trade or calling by which the maker of the bill ordinarily seeks to get his livelihood').

3 *Luckin v Hamlyn* (1869) 21 LT 366; *Neversson v Seymour* (1907) 97 LT 788, DC.

4 The following descriptions have been held sufficient: a description of a merchant shipbroker as broker (*Gugen v Sampson* (1866) 4 F & F 974); a description as a government clerk, without stating his department (*Grant v Shaw* (1872) LR 7 QB 700); a description as an insurance clerk (*Grant v Shaw*); a description of a clerk to an accountant as an accountant (*Briggs v Boss* (1868) LR 3 QB 268); a description as a clerk, not stating his employer's occupation (*Lamb v Bruce, Duggan v Bruce, Cooper v Bruce* (1876) 45 LJQB 538, DC).

The following descriptions have been held to be insufficient: 'married woman' if she has an occupation (*Kemble v Addison* [1900] 1 QB 430, DC); 'gentleman' where the person described has any office or employment (*Allen v Thompson* (1856) 1 H & N 15), or is a solicitor's clerk (*Brodrick v Scalé* (1871) LR 6 CP 98; *Beales v Tennant* (1860) 29 LJQB 188), or a silk buyer (*Adams v Graham* (1864) 33 LJQB 71). It is not a correct description to describe a person as a Baptist minister where the person described, though a qualified Baptist minister, has had no pastorate for five years and is a director of several companies (*Barron v Potter* [1915] 3 KB 593, CA); to describe a manager of a theatre (*Re Vining, ex p Hooman* (1870) LR 10 Eq 63) or a commercial traveller (*Matthews v Buchanan* (1889) 5 TLR 373, CA) as 'esquire' or as 'gentleman of no occupation'; to describe a schoolmaster as a tutor and by a wrong name (*Lee v Turner* (1888) 20 QBD 773, DC); to describe a clerk in the accountant's department of a railway company as an accountant (*Larchin v North Western Deposit Bank* (1875) LR 10 Exch 64); or to describe a partner in a soap business as of no occupation (*Re Boddington, ex p Salaman* (1915) 84 LJB 2119).

5 See *Re Haynes, ex p National Mercantile Bank* (1880) 15 ChD 42, CA, where it was considered doubtful whether the activity asserted should have been described as an occupation, and it was also held unnecessary to state an occupation which the grantor had ceased to carry on at the date of execution of the bill.

6 *Barron v Potter* [1915] 3 KB 593 at 608, CA, per Pickford LJ, and at 599 per Atkin LJ; *Re Fitzpatrick* (1886) 19 LR 206.

7 *Throssell v Marsh* (1885) 53 LT 321, DC.

8 *Smith v Cheese* (1875) 1 CPD 60; *Re Symonds, ex p Young* (1880) 42 LT 744.

9 *Luckin v Hamlyn* (1869) 21 LT 366 (where a widow, so described, was managing a farm as executrix); *Davies v Jenkins* [1900] 1 QB 133 (where a married woman, so described, was running a farm in her husband's absence); *Usher v Martin* (1889) 61 LT 778, DC (where a married woman was the leaseholder of a public house conducted by her husband). The question whether a description of the occupation of a named woman carrying on a business who lives with and keeps house for her husband is sufficient is one of degree: *Neverson v Seymour* (1907) 97 LT 788. Cf *Re Boddington, ex p Salaman* (1915) 84 LJB 2119, in which the court declined to follow *Feast v Robinson* (1894) 63 LJCh 321 (where the sleeping partner in a business was held correctly described as of no occupation).

10 *Barron v Potter* [1915] 3 KB 593 at 599 per Atkin J; affd [1915] 3 KB 593 at 601 et seq, CA.

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## **E. PROCEDURE ON REGISTRATION**

### **1770. Documents to be presented.**

The grantee must present at the Central Office of the High Court<sup>1</sup> the original bill of sale<sup>2</sup> (including any schedule or inventory annexed or therein referred to<sup>3</sup>) for inspection and return, together with one true copy of these documents, such further copies as may be required for local registration<sup>4</sup> and the affidavit of due execution<sup>5</sup>. The copy or copies of the bill are filed with the affidavit after payment of the requisite court fees<sup>6</sup>.

1 As to the enrolment of deeds and other documents see **CIVIL PROCEDURE** vol 11 (2009) PARA 86.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 See PARA 1758 note 2.

4 As to local registration see PARA 1776 et seq.

5 As to the affidavit of due execution see PARAS 1764-1769. To comply with rules of court the copy of the bill should be properly marked as an exhibit (see *Practice Direction--Written Evidence* PD 32 PARA 11; and **CIVIL PROCEDURE** vol 11 (2009) PARA 990) and the affidavit should be indorsed with a note showing certain information including on whose behalf it is filed and the dates of swearing (*Practice Direction--Written Evidence* PD 32 PARA 3.2; and **CIVIL PROCEDURE** vol 11 (2009) PARA 990), but it is not the practice of the court to refuse registration for non-compliance with these formalities.

6 As to court fees see PARA 1771.

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### **1771. Court fees.**

Court fees are payable on the filing of the affidavit and the copy of the bill of sale<sup>1</sup>, but no additional fee is charged in respect of further copies filed for local registration<sup>2</sup>.

1 The fee payable on filing a bill of sale and affidavit is £10 for each document: Civil Proceedings Fees Order 2004, SI 2004/3121, art 2, Sch 1 Fee 9.1 (Sch 1 substituted by SI 2005/3445). As to the affidavit of due execution see PARAS 1764-1769. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to local registration see PARA 1776 et seq.

### **UPDATE**

#### **1771 Court fees**

NOTE 1--SI 2004/3121 replaced: Civil Proceedings Fees Order 2008, SI 2008/1053 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 87).

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## ***F. THE REGISTER***

### **1772. Form and contents of register.**

The register of bills of sale<sup>1</sup> in the form prescribed by the Bills of Sale Act 1878<sup>2</sup> is maintained in the Central Office of the High Court<sup>3</sup>. There is a single register for each year, divided alphabetically and subdivided by vowel. Entry is effected against the surname of the grantor. Each volume has an index at the beginning which is itself alphabetical, in accordance with the requirements of the Bills of Sale Act 1878<sup>4</sup>. In the volumes of the register are entered in separate columns, in conformity with the statutory form, the date of entry of satisfaction, the serial number allotted to the bill, the name, residence and occupation of the grantor (or person against whom process issued<sup>5</sup>), the name of the grantee, the nature of the instrument, its date, the date of registration and the date of registration of any affidavit of renewal<sup>6</sup>. Absolute and security bills are entered in the same register without being segregated, but the former are identified by an 'A' in the 'Instrument' column<sup>7</sup>. When registration is renewed a fresh entry is made.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the prescribed form see the Bills of Sale Act 1878 s 12, Sch B.

3 As to the enrolment of deeds and other documents see **CIVIL PROCEDURE** vol 11 (2009) PARA 86.

4 Bills of Sale Act 1878 s 12.

5 This does not normally arise in the case of a security bill. When a sheriff's officer or bailiff sells goods under an execution and the sale is embodied in a document to which the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630) apply as the result of the officer or bailiff retaining possession for a period, he is the grantor for the purpose of those Acts but the residence and occupation to be registered is that of the debtor: Bills of Sale Act 1878 s 12.

6 See the Bills of Sale Act 1878 s 12, Sch B.

7 As to absolute bills of sale see PARA 1838 et seq.

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### **1773. Proof of registration.**

It is not necessary to produce the registered bill of sale<sup>1</sup> itself in order to prove the bill or its registration, for the Bills of Sale Act 1878 provides that any copy of a registered bill and affidavit purporting to be an office copy of it must in all courts, and before all arbitrators or other persons, be admitted as prima facie evidence of it and of the fact and date of registration as shown on it<sup>2</sup>. Production of an office copy of the bill alone, however, is not of itself evidence that the proper affidavit was also filed<sup>3</sup>, but the proper course, if objection is taken on this ground, is to adjourn the hearing for the production of the affidavit or an office copy or other suitable evidence<sup>4</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act 1878 s 16 (amended by the Bills of Sale Act (1878) Amendment Act 1882 s 16).

3 *Turner & Co v Culpan* (1888) 36 WR 278, DC.

4 *Turner & Co v Culpan* (1888) 36 WR 278, DC; *Emmott v Marchant* (1878) 3 QBD 555.

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### **1774. Searches.**

Any person is entitled at all reasonable times and on payment of a fee of 5p to search the register and also to inspect, examine and make extracts from any and every registered bill of sale<sup>1</sup>, without being required to make a written application, or to specify any particulars in reference thereto<sup>2</sup>.

Searches may be made personally or by requisitioning an official search. A personal search is effected by completing a general search form<sup>3</sup>, lodging this in the Central Office of the High Court<sup>4</sup> and inspecting the register there, making such extract as may be required upon payment of a further 5p for each bill of sale inspected<sup>5</sup>. An official search is requisitioned by

completing a form of requisition for official search<sup>6</sup>, stamping this with the prescribed fee<sup>7</sup> and lodging it with the Central Office, when the applicant will be told when the official certificate of the result of the search will be ready for collection<sup>8</sup>. Since registration of a bill of sale has to be renewed every five years<sup>9</sup>, it is not necessary to search back for longer than this period.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act (1878) Amendment Act 1882 s 16 (amended by the Statute Law Revision Act 1898; and the Decimal Currency Act 1969 s 10(1)). Extracts are limited to: (1) the dates of execution, registration, renewal of registration and satisfaction; (2) the names, addresses and occupations of the parties; (3) the amount of the consideration; and (4) any further particulars which may be prescribed by rules made under the Bills of Sale Act (1878) Amendment Act 1882: s 16 (as so amended). For these purposes, 'prescribed' means prescribed by rules made under the provisions of the Bills of Sale Act 1878, and power to make or alter such rules is conferred on such persons, and is exercisable in the same manner, as in the case of rules of court: see ss 4, 21; and the Bills of Sale Act (1878) Amendment Act 1882 s 3. At the date at which this volume states the law no such rules had been made. As to searches in local registers see PARA 1778.

3 The form is obtainable from the Royal Courts of Justice.

4 As to the enrolment of deeds and other documents see **CIVIL PROCEDURE** vol 11 (2009) PARA 86.

5 Bills of Sale Act (1878) Amendment Act 1882 s 16 (as amended: see note 2). The fee is paid by judicature stamp: s 16.

6 The requisition form is obtainable from the Royal Courts of Justice.

7 The prescribed fee is £5: Civil Proceedings Fees Order 2004, SI 2004/3121, art 2, Sch 1 Fee 9.2 (Sch 1 substituted by SI 2005/3445).

8 Any master of the Queen's Bench Division must, on a request in writing giving sufficient particulars, and on payment of a fee, cause a search to be made in the register of bills of sale and issue a certificate of the result of the search: see CPR Sch 1 RSC Ord 95 r 4.

9 See the Bills of Sale Act 1878 s 11; and PARA 1781.

## **UPDATE**

### **1774 Searches**

NOTE 7--SI 2004/3121 replaced: Civil Proceedings Fees Order 2008, SI 2008/1053 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 87).

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### **1775. Office copies and extracts.**

Any person is entitled to have an office copy or extract of any registered bill of sale<sup>1</sup>, and affidavit of execution<sup>2</sup> filed with it, or copy of it, and of any affidavit filed with it, if any, or registered affidavit of renewal, upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice<sup>3</sup>. Such office copy or extract is obtained by lodging a bespeak form<sup>4</sup> in the Central Office of the High Court<sup>5</sup>. The applicant will be told when the office copies are available, and the appropriate fee is paid when these are collected<sup>6</sup>.



1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the affidavit of due execution see PARAS 1764-1769.

3 Bills of Sale Act 1878 s 16.

4 The form is obtainable from the Central Office of the High Court.

5 As to the enrolment of deeds and other documents see **CIVIL PROCEDURE** vol 11 (2009) PARA 86.

6 For the fees payable see the Civil Proceedings Fees Order 2004, SI 2004/3121, art 2, Sch 1 Fee 4 (Sch 1 substituted by SI 2005/3445).

## **UPDATE**

### **1775 Office copies and extracts**

NOTE 6--SI 2004/3121 replaced: Civil Proceedings Fees Order 2008, SI 2008/1053 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 87).

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## **G. LOCAL REGISTRATION**

### **1776. When local registration necessary.**

Where the affidavit of due execution<sup>1</sup> describes the residence of the person making or giving the same, or of the person against whom the process is issued<sup>2</sup>, as being in some place outside the London insolvency district<sup>3</sup>, or if the bill of sale<sup>4</sup> describes the chattels enumerated in it as being in some place outside the London insolvency district, the registrar<sup>5</sup> must forthwith, and within three clear days<sup>6</sup> after registration in the principal registry, and in accordance with prescribed directions<sup>7</sup>, transmit a copy of the bill of sale<sup>8</sup> to the district judge<sup>9</sup> in whose district such places are situated, and, if such places are in the districts of different district judges, to each such district judge<sup>10</sup>. To enable this to be done there must be presented to the registrar, in addition to the true copy of the bill required to be presented for registration with the bill of sale, such number of copies of the bill and every schedule and inventory annexed to it as the registrar may deem necessary for the purpose of local registration<sup>11</sup>.

Every copy of a bill of sale which is so transmitted to a district judge must bear a certificate by the registrar showing the date on which the registration or, as the case may be, the renewal of registration<sup>12</sup>, of the bill was effected and the date on which the copy of the bill of sale is transmitted to the district judge<sup>13</sup>.

1 As to the affidavit of due execution see PARAS 1764-1769.

2 See PARA 1772 note 5.

3 As to the courts comprised in the London insolvency district see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 7.

4 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

5 As to the registrar see PARA 1758 note 5.

6 As to the computation of such periods see **TIME** vol 97 (2010) PARA 329 et seq.

7 For these purposes, 'prescribed' means prescribed by rules made under the provisions of the Bills of Sale Act 1878 (see s 4); and power to make or alter such rules is conferred on such persons, and is exercisable in the same manner, as in the case of rules of court (see s 21). The rules currently in force are the Bills of Sale (Local Registration) Rules 1960, SI 1960/2326 (amended by virtue of the Courts and Legal Services Act 1990 s 74(1)(a), (3)).

8 The Bills of Sale Act (1878) Amendment Act 1882 s 11 originally provided for the transmission of an abstract of the contents of the bill, but the effect of the Administration of Justice Act 1925 s 23(1) is to provide for the transmission of a copy of the bill: see the text to note 10.

9 The Bills of Sale Act (1878) Amendment Act 1882 refers to the 'county court registrar' but that office was restyled 'district judge' by the Courts and Legal Services Act 1990 s 74(1): see the text to note 10.

10 Bills of Sale Act (1878) Amendment Act 1882 s 11 (amended by the Insolvency Act 1985 Sch 8 para 1; and by virtue of the Courts and Legal Services Act 1990 s 74(1)(a), (3)); Administration of Justice Act 1925 s 23(1). These provisions are directory only and the registrar's default in transmitting the copy of the bill to a district judge does not avoid registration: *Trinder v Raynor* (1887) 56 LQB 422.

11 Bills of Sale Act 1878 s 10(2); Administration of Justice Act 1925 s 23(2). The usual requirement is one additional copy of the bill for every county court in which local registration is to be effected.

12 As to renewal of registration see PARA 1781 et seq.

13 Bills of Sale (Local Registration) Rules 1960, SI 1960/2326, r 3 (amended by virtue of the Courts and Legal Services Act 1990 s 74(1)(a), (3)). Though this provision actually refers to transmission of a copy of an affidavit of renewal under the Bills of Sale Act (1878) Amendment Act 1882 s 11, that latter provision, read with the Administration of Justice Act 1925, does not in fact provide for the transmission of any document other than a copy of the bill of sale: see note 8.

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### **1777. Maintenance of local register.**

Every district judge<sup>1</sup> must number consecutively the copies of bills of sale<sup>2</sup> and of affidavits of renewal<sup>3</sup> transmitted to him for local registration<sup>4</sup> and must file and keep them in the court office<sup>5</sup>.

1 As to 'district judge' see PARA 1776 note 9.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 The Bills of Sale (Local Registration) Rules 1960, SI 1960/2326, r 5 refers to affidavits of renewal transmitted to the district judge under the Bills of Sale Act (1878) Amendment Act 1882 s 11, but that provision, read with the Administration of Justice Act 1925, does not in fact provide for the transmission of any document other than a copy of the bill of sale: see PARA 1776.

4 In accordance with the Bills of Sale Act (1878) Amendment Act 1882 s 11: see PARA 1776.

5 Bills of Sale Act 1878 s 4; Bills of Sale Act (1878) Amendment Act 1882 s 3; Bills of Sale (Local Registration) Rules 1960, SI 1960/2326, r 5 (rr 5, 6 amended by virtue of the Courts and Legal Services Act

1990 s 74(1)(a), (3)). In addition, the Bills of Sale (Local Registration) Rules 1960, SI 1960/2326, r 6 (as so amended) requires the district judge to keep an alphabetical index of the copies of bills of sale (and of affidavits of renewal: see PARA 1776 note 13) transmitted to him under the Bills of Sale Act (1878) Amendment Act 1882 s 11 (see PARA 1776), and to enter in the index under the first letter of the surname of the grantor of every bill the grantor's full name, address and description and the number of the copy of the bill of sale (or affidavit).

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### **1778. Local searches.**

Any person may search, inspect, make extracts from, and obtain copies of the bills of sale<sup>1</sup> registered in a local register in the like manner and upon the like terms as to payment or otherwise, as may be, as in the case of bills of sale registered by the registrar under the Bills of Sale Act 1878<sup>2</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act (1878) Amendment Act 1882 s 11; and see PARAS 1774-1775. As to the registrar see PARA 1758 note 5.

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## ***H. RECTIFICATION AND EXTENSION OF TIME***

### **1779. Extent of relief given.**

A judge of the High Court or a master of the Supreme Court, on being satisfied that the omission to register a bill of sale<sup>1</sup> or an affidavit of renewal thereof within the time prescribed<sup>2</sup>, or the omission or mis-statement of the name, residence or occupation of any person, was accidental or due to inadvertence, has power in his discretion to order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence or occupation, or by extending the time for such registration on such terms and conditions, if any, as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct<sup>3</sup>. The Court of Appeal apparently has no original jurisdiction to make an order under these provisions<sup>4</sup>.

Application for rectification is made without notice to a master of the Queen's Bench Division<sup>5</sup> and must be supported by an affidavit or witness statement setting out particulars of the bill of sale and of the omission or mis-statement in question and stating the grounds on which the application is made<sup>6</sup>.

Although the Bills of Sale Act 1878 refers to the omission or mis-statement of the name, residence or occupation of 'any person'<sup>7</sup>, relief is limited to rectification of the register, and, since it is only the name, residence and occupation of the grantor (or person against whom process is issued) that features in the register, it follows that there is no jurisdiction to rectify

omissions or mis-statements relating to other persons, such as an attesting witness; nor has the court power to surmount this difficulty by giving leave to file an affidavit correcting a mistake in the affidavit filed on registration<sup>8</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 This is a reference to the time for registration prescribed by the Bills of Sale Act 1878 s 22 (see PARA 1759) and not to anything prescribed by rules under s 21 (see PARA 1774).

3 Bills of Sale Act 1878 s 14; CPR Sch 1 RSC Ord 95 r 1. The authority to confer jurisdiction on a master by rules of court derives from the Supreme Court Act 1981 ss 68, 84 (both as amended). As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

4 *Re Morris, ex p Webster* (1882) 48 LT 295, CA.

5 CPR Sch 1 RSC Ord 95 r 1(1)(b).

6 CPR Sch 1 RSC Ord 95 r 1(2).

7 See the Bills of Sale Act 1878 s 14; and the text to notes 1-2.

8 *Crew v Cummings* (1888) 21 QBD 420, CA.

## UPDATE

### 1779 Extent of relief given

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

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### 1780. Rights of third parties.

An order for rectification of the register, or for extension of the time for registration, will only be granted subject to rights which have already accrued to third persons<sup>1</sup>. It will not be granted to the prejudice of an execution creditor who has seized, or of a trustee in the grantor's bankruptcy<sup>2</sup>, or of any person whose rights would be affected by registration, even though there has been no change of property in the chattels sought to be protected<sup>3</sup>.

An order made in accordance with the form now in use is expressed to be without prejudice to the rights of parties acquired prior to the time when the bill of sale<sup>4</sup> is actually registered or re-registered<sup>5</sup>. It would appear that such protection is limited to secured creditors and creditors in the grantor's bankruptcy and does not extend to unsecured creditors of the grantor where no bankruptcy has supervened<sup>6</sup>.

1 *Crew v Cummings* (1888) 21 QBD 420, CA.

2 *Re Parsons, ex p Furber* [1893] 2 QB 122, CA, holding that *Re Dobbin's Settlement* (1887) 56 LJQB 295, DC, is overruled by *Crew v Cummings* (1888) 21 QBD 420, CA.

3 See *Re Spiral Globe Ltd* [1902] 1 Ch 396 (where leave to register out of time under the Companies Act 1900 s 15 (repealed) a debenture, given by a company which had subsequently gone into liquidation, was made subject to the condition that it should be without prejudice to the rights of intervening third parties, to protect creditors in the winding up).

4 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

5 See Form PF182QB; and *Practice Direction--Forms* PD 4 PARA 4. However, an order in wider terms is valid unless set aside: *Re Parke* (1884) 13 LR 85.

6 See *Re Kris Cruisers Ltd* [1949] Ch 138, [1948] 2 All ER 1105, a decision on an application to register a company charge out of time under the Companies Act 1948 s 101 (repealed).

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## **I. RENEWAL OF REGISTRATION**

### **1781. When renewal required.**

The registration of a bill of sale<sup>1</sup> must be renewed once at least every five years, and, if a period of five years elapses from the registration, or renewed registration, of a bill of sale without renewal or further renewal, as the case may be, the registration becomes void<sup>2</sup>. However, a renewal of registration does not become necessary by reason only of a transfer or assignment of a bill of sale<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act 1878 s 11. The date of expiry is not an item of information recorded in the register. Expiry of the bill will not affect the grantee's rights if he has perfected his title by taking possession of the chattels under the bill before expiry of the registration: *Re Tooth, Trustee v Tooth* [1934] Ch 616. However, if the registration expires before possession has been taken, the consequential avoidance of the security extinguishes the efficacy of the bill as a licence to seize, and the grantee will not be able to perfect his title by seizure except pursuant to some subsequent valid agreement.

3 Bills of Sale Act 1878 s 11.

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### **1782. Mode of renewal.**

The renewal of a registration of a bill of sale<sup>1</sup> is effected by filing with the registrar<sup>2</sup> an affidavit<sup>3</sup> stating the date of the bill and of its last registration, and the names, residences<sup>4</sup> and occupations<sup>5</sup> of the parties to it as stated in it, and that the bill of sale is still a subsisting security<sup>6</sup>. The particulars relating to the parties must be those stated in the bill, even though they are there stated incorrectly, although the correct particulars may be added<sup>7</sup>. Failure to comply with these requirements renders the renewal of registration void<sup>8</sup>.

Where local registration of a bill of sale was effected upon first registration of the bill<sup>9</sup>, the registrar is required<sup>10</sup> to transmit to the district judge<sup>11</sup> concerned a copy of the affidavit of renewal<sup>12</sup> bearing a certificate by the registrar, showing the date on which the renewal of registration was effected and the date on which the copy of the renewal affidavit is transmitted to the district judge<sup>13</sup>. There is no provision for local registration of a bill of sale, or of renewal of a bill of sale, where the grantor or the chattels comprised in the bill have moved to a place outside the London insolvency district subsequently to the date of original registration.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the registrar see PARA 1758 note 5.

3 A form of affidavit is set out in the Bills of Sale Act 1878 s 11, Sch A (see s 11), but for the modern form see Form PF181QB; and *Practice Direction--Forms* PD 4 PARA 4. A fee of £10 is payable for renewal of the bill (Civil Proceedings Fees Order 2004, SI 2004/3121, art 2, Sch 1 Fee 9.1 (Sch 1 substituted by SI 2005/3445)) and is stamped on the affidavit. No separate fee is payable for filing of the affidavit.

4 The statutory form (see note 3) does not in fact require statement of the residence of the parties but only of an address at which communications may be expected to reach them (see PARA 1768), and it is clear that repetition of this in the affidavit of renewal is to be considered a statement of the 'residence' set out in the bill.

5 The statutory form (see note 3) does not require the bill to state the occupation of the parties (see PARA 1769), and if none is stated in the bill then none need be set out in the renewal affidavit. The form gives an optional form of renewal affidavit (see the Bills of Sale Act 1878 s 11; and PARA 1781) and this refers to the 'descriptions' of the parties. This term usually has a wider meaning than 'occupation' (see PARA 1769), but, in view of s 11, this must be interpreted in the form as a reference to the description of the grantor's occupation, if given in the bill.

6 Bills of Sale Act 1878 s 11.

7 *Re Morris, ex p Webster* (1882) 22 ChD 136, CA.

8 *Re Morris, ex p Webster* (1882) 22 ChD 136, CA.

9 As to local registration see PARAS 1776-1778.

10 Ie by the Bills of Sale (Local Registration) Rules 1960, SI 1960/2326, r 3. See also PARA 1776 note 12.

11 The Bills of Sale Act 1878 refers to the 'county court registrar' but that office was restyled 'district judge' by the Courts and Legal Services Act 1990 s 74(1): see PARA 1776 note 9.

12 Ie the affidavit referred to in the text which is made for the purpose of renewing the registration under the Bills of Sale Act 1878 s 11: Bills of Sale (Local Registration) Rules 1960, SI 1960/2326, r 2(2).

13 Bills of Sale (Local Registration) Rules 1960, SI 1960/2326, r 3 (amended by virtue of the Courts and Legal Services Act 1990 s 74(1)(a), (3)).

## UPDATE

### 1782 Mode of renewal

NOTE 3--SI 2004/3121 replaced: Civil Proceedings Fees Order 2008, SI 2008/1053 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 87).

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**1783. Extension of time.**

The time for renewal of registration of a bill of sale<sup>1</sup> may be extended by order of a judge of the High Court or a master of the Supreme Court<sup>2</sup> where the omission to renew is accidental or due to inadvertence<sup>3</sup>. The order will be made without prejudice to the rights of third parties acquired before re-registration<sup>4</sup>.

1 See PARA 1781. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act 1878 s 14; CPR Sch 1 RSC Ord 95 r 1. The authority to confer jurisdiction on a master by rules of court derives from the Supreme Court Act 1981 ss 68, s 84 (both as amended). As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

3 Bills of Sale Act 1878 s 14. For a form of order see Form PF182QB; and *Practice Direction--Forms* PD 4 PARA 4.

4 See PARA 1780.

**UPDATE****1783 Extension of time**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

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***J. EXPUNGING OF REGISTRATION*****1784. Instrument improperly registered.**

The court has an inherent jurisdiction to order that an instrument improperly registered be expunged from the register<sup>1</sup>.

1 See PARA 1757. As to the register see PARA 1772 et seq.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/7. BILLS OF SALE/(3) SECURITY BILLS OF SALE/(ix) Registration/J. EXPUNGING OF REGISTRATION/1785. Entry of satisfaction.

**1785. Entry of satisfaction.**

Upon payment or satisfaction of the debt secured by a bill of sale, the bill is not expunged from the register but, upon leave being given to enter up satisfaction, a memorandum of satisfaction is written upon any registered copy of the bill and the date of satisfaction is recorded in the register<sup>1</sup>.

1 See PARAS 1836-1837. As to the register see PARA 1772 et seq.

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## **(x) Rights of Grantee against Grantor**

### **1786. Summary of grantee's rights.**

The grantee of a valid security bill of sale<sup>1</sup> has all the rights and remedies of any other mortgagee of goods<sup>2</sup>, subject to certain restrictions imposed by the Bills of Sale Acts<sup>3</sup> where they apply. In particular, the grantee has the right:

- 189 (1) to enforce the covenant for payment and other personal covenants contained in the bill of sale<sup>4</sup>;
- 190 (2) to apply to the court to restrain acts of waste and other injurious acts likely to impair his security<sup>5</sup>;
- 191 (3) to seize and take possession of the goods for one or more of the causes specified in the Bills of Sale Act (1878) Amendment Act 1882<sup>6</sup>;
- 192 (4) to remove and sell the seized goods after expiration of the time prescribed by the Bills of Sale Act (1878) Amendment Act 1882<sup>7</sup>;
- 193 (5) to apply the proceeds of sale of the seized goods in the manner provided by the bill of sale<sup>8</sup>.

As an alternative to sale, the grantee may apply to the court for an order of foreclosure<sup>9</sup>, or for the appointment of a receiver<sup>10</sup>, and where an action or matter is pending in relation to the security the court can, in the exercise of its usual powers, make orders for the detention, custody, preservation or inspection of the security<sup>11</sup> and for the sale of the security where it is perishable<sup>12</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the rights and remedies of mortgagees of goods generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

3 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

4 The right of enforcement will depend on whether or not the covenants are permitted by the Bills of Sale Acts and accord with the statutory form (see PARA 1711 et seq).

5 See *Harper v Alpin* (1886) 54 LT 383; and **MORTGAGE** vol 77 (2010) PARA 439.

6 See PARA 1788 et seq.

7 See PARA 1791.



8 See PARA 1792. As to separate restrictions imposed by the Consumer Credit Act 1974 see PARA 1789.

9 As to foreclosure see **MORTGAGE** vol 77 (2010) PARA 566 et seq.

10 See eg *Taylor v Eckersley* (1876) 2 ChD 302, CA. As to the appointment of receivers see generally **RECEIVERS**. The grantee has no implied or statutory power to appoint a receiver himself. The power of appointment conferred on a mortgagee by the Law of Property Act 1925 s 101 is not exercisable until he has become entitled to exercise the power of sale conferred by s 103 (see s 109(1); and **MORTGAGE** vol 77 (2010) PARAS 476, 483), and that power of sale does not apply in the case of a mortgage by bill of sale within the Bills of Sale Acts (*Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA; *Calvert v Thomas* (1887) 19 QBD 204, CA).

Whether it is compatible with the statutory form (see PARA 1711 et seq) to include an express power to appoint a receiver appears never to have been decided. Such a provision could be upheld as being for the maintenance of the security (see PARA 1737 et seq), but only, it is thought, if it excludes the usual inference that the receiver is to be deemed the agent of the mortgagor.

11 See CPR 25.1(1)(c)(i); and **CIVIL PROCEDURE** vol 11 (2009) PARA 315.

12 See CPR 25.1(1)(c)(v); and **CIVIL PROCEDURE** vol 11 (2009) PARA 315.

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### **1787. Effect of grantee taking promissory note or other security.**

The grantee may properly take from the grantor a collateral security, such as a promissory note or mortgage, for payment of the sum stipulated in the bill of sale<sup>1</sup>, provided that the amount, time and manner of payment specified in the security instrument match the payment provisions in the bill<sup>2</sup>. However, if the promissory note or mortgage provides for payment of a sum greater than that payable under the bill, as by stipulating for compound interest when the bill, in accordance with the requirements of the statutory form, is restricted to simple interest<sup>3</sup>, the bill will not represent a true record of the agreed terms of payment and the collateral security will amount to a defeasance<sup>4</sup> rendering the bill void as not in accordance with the form<sup>5</sup>. Similarly, if the terms of the promissory note are such that the sums payable under it may become payable sooner than they would under the bill, as where the note calls up the full outstanding balance on default in payment of an instalment when no such provision is contained in the bill, the promissory note will be a defeasance of the bill, since its provisions may result in the bill being discharged earlier than is apparent from the face of the bill itself<sup>6</sup>. Although the bill of sale is thus avoided, the grantee's right to sue on the note is unaffected<sup>7</sup>.

A promissory note taken not as collateral security but by way of conditional payment is a defeasance of the bill, since the rights of the grantee under the bill are suspended until default is made in payment of the note<sup>8</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Stott v Shaw and Lee Ltd* [1928] 2 KB 26, CA.

3 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq. As to the necessity to restrict interest to simple interest in order to accord with the statutory form see PARA 1729.

4 *Edwards v Marcus* [1894] 1 QB 587, CA. See also note 5. As to defeasances see PARA 1748 et seq.

5 *Sharp v McHenry, Sharp v Brown* (1887) 38 ChD 427. The case cited in note 4, which merely held the registration to be void under the Bills of Sale Act 1878 s 10(3) (see PARA 1748), must now be read in the light of *Smith v Whiteman* [1909] 2 KB 437, CA, in which attention was for the first time focused on the fact that the inclusion of terms as to defeasance was not merely prescribed by the Bills of Sale Act 1878 s 10(3) but was a requirement of the statutory form. Moreover, where the court takes the view that the bill of sale was in truth securing a covenant, such as for payment of compound interest, not permitted by the statutory form, the bill will be void as not in conformity with the statutory form, even though it does not refer to that covenant on its face: *Sharp v McHenry, Sharp v Brown* above.

6 *Counsell v London and Westminster Loan and Discount Co* (1887) 19 QBD 512, CA; *Monetary Advance Co v Cater* (1888) 20 QBD 785.

7 *Monetary Advance Co v Cater* (1888) 20 QBD 785.

8 See *Belshaw v Bush* (1851) 11 CB 191; *Bence v Shearman* [1898] 2 Ch 582, CA; and **CONTRACT** vol 9(1) (Reissue) PARA 951.

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### **1788. Restrictions on right of seizure.**

The grantee under a security bill of sale within the Bills of Sale Acts<sup>1</sup> cannot seize and take possession of the goods except for the causes specified in the Bills of Sale Act (1878) Amendment Act 1882<sup>2</sup>, and the insertion in the bill of sale<sup>3</sup> of a covenant or provision purporting to extend the grounds of seizure beyond those causes renders the bill void as not in accordance with the statutory form<sup>4</sup>. In order for a seizure to be lawful, the conditions of the Bills of Sale Act (1878) Amendment Act 1882 must be strictly observed<sup>5</sup>. If they are not, the grantee is liable to the grantor for damages for trespass and conversion<sup>6</sup>.

Possession may be taken for any one or more of the statutory causes even though no express power of seizure is conferred by the bill, for the provisions of the Bills of Sale Act (1878) Amendment Act 1882, together with the statutory form, give an implied power of seizure<sup>7</sup>. However, the fact that the power has become exercisable against the grantor does not necessarily mean that the grantee is entitled to take the goods from the possession or custody of a third party, such as the grantor's landlord<sup>8</sup> or a receiver<sup>9</sup>.

1 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 Ie specified in the Bills of Sale Act (1878) Amendment Act 1882 s 7: see PARA 1789.

3 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

4 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.

5 Thus a written demand for the last receipt for rent to be sent to the grantee by post goes beyond a mere demand for production of the receipt, and non-compliance with it is justifiable and is not a ground for seizure: *Ex p Wickens* [1898] 1 QB 543, CA.

6 *Brierly v Kendall* (1852) 17 QB 937. As to damages for trespass to goods see **TORT** vol 45(2) (Reissue) PARA 671. As to damages for conversion see **TORT** vol 45(2) (Reissue) PARA 615 et seq. As to the measure of damages see PARA 1798; and **DAMAGES** vol 12(1) (Reissue) PARA 851 et seq.

7 *Watkins v Evans* (1887) 18 QBD 386, CA. The provisions of the Bills of Sale Acts displace, in relation to security bills of sale within those Acts, the power of sale conferred on a mortgagee by what is now the Law of

Property Act 1925 s 101: *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA; *Calvert v Thomas* (1887) 19 QBD 204, CA. As to the power of sale under the Law of Property Act 1925 s 101 see **MORTGAGE** vol 77 (2010) PARA 443.

8 See PARA 1790.

9 See PARA 1811.

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### **1789. Statutory grounds for seizure.**

The causes giving rise to liability for seizure laid down in the Bills of Sale Act (1878) Amendment Act 1882<sup>1</sup>, at least one of which must exist if the grantee is to be able to take possession of the security without the consent of the grantor, are:

- 194 (1) If the grantor makes default in the payment of the sum or sums secured by the bill of sale at the time provided for payment in it<sup>2</sup>. The grantee is, however, entitled to seize the goods on default in payment of any instalment due under a bill of sale even though the bill does not provide that the whole debt shall become due on non-payment of one instalment<sup>3</sup>. Where payment is demanded not by the grantee himself but by a third party on his behalf, the grantor does not default in payment merely because he defers payment for the period necessary to enable him to ascertain that the third party is in fact acting with the grantee's authority<sup>4</sup>.
- 195 (2) If the grantor makes default in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security<sup>5</sup>.
- 196 (3) If the grantor becomes bankrupt<sup>6</sup>. A grantor becomes bankrupt when a bankruptcy order is made against him<sup>7</sup>. Bankruptcy is not constituted by a composition made by a grantor with his creditors<sup>8</sup>, or by a voluntary arrangement<sup>9</sup>.
- 197 (4) If the grantor suffers the goods assigned by the bill of sale, or any of them, to be distrained for rent, rates or taxes<sup>10</sup>.
- 198 (5) If the grantor fraudulently either removes or suffers the goods or any of them comprised in the bill of sale to be removed from the premises<sup>11</sup>.
- 199 (6) If the grantor does not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates and taxes<sup>12</sup>. A written demand that the last receipt for rent be sent to the grantee by post is not a demand for production of the receipt, and in failing to comply with the demand the grantor is not guilty of failure to produce the receipt without reasonable excuse, for the grantor is not obliged to part with written evidence of the payment of rent<sup>13</sup>. If rent has recently accrued due, it is a reasonable excuse for not producing the receipt that the landlord has not required payment<sup>14</sup>, and this would presumably be the case where, though the grantor had paid the rent, the landlord had failed to furnish a receipt.
- 200 (7) If execution is levied against the goods of the grantor under any judgment at law<sup>15</sup>.

Where in relation to a bill of sale securing a regulated agreement under the Consumer Credit Act 1974 the grantee institutes proceedings for recovery of the goods instead of exercising a right of seizure the court may make a time order allowing the grantor time to pay the arrears<sup>16</sup>

and may suspend the operation of any order for delivery of the goods until such time as the court directs or until the occurrence of a specified act or omission<sup>17</sup>.

1 Bills of Sale Act (1878) Amendment Act 1882 s 7.

2 Bills of Sale Act (1878) Amendment Act 1882 s 7(1). Section 7(1) does not apply to a default relating to a bill of sale given by way of security for the payment of money under a regulated agreement to which the Consumer Credit Act 1974 s 87(1) (need for default notice: see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 263) applies, unless the restriction imposed by s 88(2) (restricting the exercise of repossession and other remedies during the currency of a default notice, which must be at least 14 days: see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 264) has ceased to apply to the bill, or if, by virtue of s 89 (due compliance with default notice: see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 264), the default is to be treated as not having occurred: Bills of Sale Act (1878) Amendment Act 1882 s 7A(1) (added by the Consumer Credit Act 1974 Sch 4 para 1). As to regulated agreements under the Consumer Credit Act 1974 see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 79, 157 et seq. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 *Re Wood, ex p Woolfe* [1894] 1 QB 605. If he seizes for his whole debt he may be paid off although the time for payment has not arrived, but not if he takes possession only to secure the instalment overdue: see PARA 1796.

4 *Moore v Shelley* (1883) 8 App Cas 285, PC.

5 Bills of Sale Act (1878) Amendment Act 1882 s 7(1). See note 2. As to provisions in a bill of sale for the maintenance or defeasance of the security see PARAS 1737-1740.

6 Bills of Sale Act (1878) Amendment Act 1882 s 7(2).

7 See the Insolvency Act 1986 s 278; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 213 et seq.

8 *Gilroy v Bowey* (1888) 59 LT 223, DC; *Barr v Kingsford* (1887) 56 LT 861.

9 See under the Insolvency Act 1986 Pt VIII (ss 252-263G): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 81 et seq.

10 Bills of Sale Act (1878) Amendment Act 1882 s 7(2).

11 Bills of Sale Act (1878) Amendment Act 1882 s 7(3).

12 Bills of Sale Act (1878) Amendment Act 1882 s 7(4). A covenant for production which is in terms unqualified by any reference to reasonable excuse is nevertheless valid if, on a construction of the bill as a whole, it is apparent that seizure for breach of that covenant is to be limited to the case provided by s 7(4), namely a failure to produce without reasonable excuse: *Cartwright v Regan* [1895] 1 QB 900; *Turner & Co v Culpan* (1888) 58 LT 340; *Weardale Coal and Iron Co v Hodson* [1894] 1 QB 598, CA.

13 *Ex p Wickens* [1898] 1 QB 543, CA.

14 *Ex p Cotton* (1883) 11 QBD 301, DC; *Ex p Wickens* [1898] 1 QB 543, CA.

15 Bills of Sale Act (1878) Amendment Act 1882 s 7(5). A covenant that the grantor shall not do anything whereby execution may be levied on the goods is valid so long as the power of seizure is limited to a ground specified in the statute: *Re Paxton, ex p Pope* (1889) 60 LT 428, DC.

16 See the Consumer Credit Act 1974 s 129; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 292.

17 See the Consumer Credit Act 1974 s 135(1)(b); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 296.

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### 1790. Entry on premises.

A bill of sale<sup>1</sup> may validly empower the grantee to enter upon premises where the goods are situated for the purpose of exercising a right of seizure<sup>2</sup>, and a power of entry will be considered to accord with the statutory form<sup>3</sup> even if it authorises the grantee to break open windows and doors of the grantor's premises<sup>4</sup> for the purpose of effecting entry<sup>5</sup>. For the purpose of civil proceedings, the grantee will incur no liability to the grantor for breaking into the premises if he is authorised to do so by the bill in order to exercise a right of seizure<sup>6</sup>, and forcible entry no longer constitutes a criminal offence unless accompanied by violence or the threat of violence<sup>7</sup>.

In the absence of a power of entry contained in the bill, the grantee has no right to enter upon the premises without the grantor's consent<sup>8</sup>. Even where there is an express power of entry, this is available only against the grantor and does not entitle the grantee to enter upon premises in which the grantor has no interest or in which his interest has come to an end<sup>9</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA.

3 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.

4 A provision in a bill purporting to confer a right to break into premises and rooms owned or tenanted by a third party is, however, illegal: *Winnall v Simmons* (1886) 2 TLR 434.

5 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA; *Lumley v Simmons* (1887) 34 ChD 698, CA.

6 *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720, CA.

7 See the Criminal Law Act 1977 s 6(1) (replacing the old offence of forcible entry under the Forcible Entry Acts 1381 to 1429, which were repealed by the Criminal Law Act 1977 Sch 13); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 602.

8 See *Webb v Beavan* (1844) 6 Man & G 1055, which establishes the principle that entry on another's premises for the purpose of recovering goods is not lawful except where the other's possession of the goods was wrongful ab initio.

9 *Smith v Brown* (1879) 48 LJCh 694.

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### 1791. Removal and sale.

Personal chattels<sup>1</sup> seized or of which possession is taken under a security bill of sale<sup>2</sup> must, before removal or sale, remain on the premises where seized or taken possession of until after the expiration of five clear days<sup>3</sup> from the day they were so seized or taken possession of<sup>4</sup>. During this time, the grantor may apply to the court for relief<sup>5</sup>. Removal may take place, however, before expiration of the period of five days if the grantor consents<sup>6</sup>. After the five-day period has expired, the grantee may remove the goods and proceed to sell them, although the bill contains no express power of sale<sup>7</sup>. Power may be conferred by the bill to sell the goods either by private treaty or by public auction, and either on or off the premises<sup>8</sup>.

Seizure and removal by the grantee do not affect the grantor's right to redeem before sale upon tender of the amount outstanding and expenses<sup>9</sup>, but in the absence of such tender the court will not restrain the grantee from exercising his legal remedies<sup>10</sup>.

In exercising his power of sale the grantee is not a trustee for the grantor and is entitled to give preference to his own interests over those of the grantor<sup>11</sup>, but he must take reasonable care to obtain whatever is the true market value of the goods at the time he chooses to sell them, it not being sufficient that he acted honestly and without reckless disregard of the grantor's interests<sup>12</sup>.

1 As to the meaning of 'personal chattels' see PARA 1662 et seq.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 As to the computation of such periods see **TIME** vol 97 (2010) PARA 329 et seq.

4 Bills of Sale Act (1878) Amendment Act 1882 s 13 (amended by the Statute Law Revision Act 1898). Cf *O'Neil v City and County Finance Co* (1886) 17 QBD 234, where chattels comprising a horse and cab were seized under a bill of sale in a public street and removed to the grantee's yard, where they were kept for five clear days, and it was held that the seizure was lawful and that no action would lie for the removal in the absence of special damage. If the grantee, having seized the goods, does remove them in breach of the statutory provisions, it would seem that the grantor cannot sue in trespass, since he lacks either possession or the right to possession at the time of removal, but can sue for damages for breach of statutory duty. Cf *Carr v James Broderick & Co Ltd* [1942] 2 KB 275, [1942] 2 All ER 441, which decided a similar point on the effect of seizure in breach of the Courts (Emergency Powers) Acts 1939 to 1941 (repealed).

5 See the Bills of Sale Act (1878) Amendment Act 1882 s 7 proviso; and PARA 1795. The relevant court is the High Court or a judge of that court in chambers (s 7 proviso), except where s 7(1) applies in relation to a bill of sale securing a regulated agreement under the Consumer Credit Act 1974 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 79), in which case the relevant court is the county court (Bills of Sale Act (1878) Amendment Act 1882 s 7A(2) (added by the Consumer Credit Act 1974 Sch 4 para 1)).

6 *Lane v Tyler* (1887) 56 LJQB 461, DC; *Tomlinson v Consolidated Credit and Mortgage Corpn* (1889) 24 QBD 135, CA. The consent has to be genuine: cf *Mercantile Credit Co Ltd v Cross* [1965] 2 QB 205, [1965] 1 All ER 577, CA.

7 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA.

8 *Bourne v Wall* (1891) 64 LT 530; *Lumley v Simmons* (1887) 34 ChD 698, CA. See also PARA 1742.

9 See PARA 1796.

10 *Hill v Kirkwood* (1880) 42 LT 105, CA; *Pearce v Kirkwood* (1898) 105 LT Jo 424.

11 *Cuckmere Brick Co Ltd v Mutual Finance Ltd, Mutual Finance Ltd v Cuckmere Brick Co Ltd* [1971] Ch 949, [1971] 2 All ER 633, CA.

12 *Cuckmere Brick Co Ltd v Mutual Finance Ltd, Mutual Finance Ltd v Cuckmere Brick Co Ltd* [1971] Ch 949, [1971] 2 All ER 633, CA.

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## **1792. Application of proceeds of sale.**

A bill of sale<sup>1</sup> may contain express provisions dealing with application of the proceeds of sale provided that they are in accordance with the statutory form<sup>2</sup>. Provision may be made that the

grantee may, out of the proceeds of sale, retain: (1) his unpaid principal with interest to the date of sale; (2) the expenses of sale<sup>3</sup>; (3) costs properly incurred in defending and maintaining his rights under the security<sup>4</sup>; and (4) any rent, rates, taxes or other valid incumbrances on the chattels discharged by him<sup>5</sup>. In the absence of express provisions, terms to the above effect will be implied<sup>6</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See PARA 1743. As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.

3 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA.

4 *Lumley v Simmons* (1887) 34 ChD 698, CA. Taxation has been ordered of costs, agreed to be paid by the grantor, and retained by the grantee out of the proceeds of sale after the grantor's bankruptcy: *Re Ford, ex p Official Receiver* (1901) 84 LT 329, DC.

5 *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222, CA.

6 *Re Cleaver, ex p Rawlings* (1887) 18 QBD 489, CA.

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### **1793. No right of consolidation.**

Even under the Bills of Sale Act 1878 it was held that the doctrine of consolidation<sup>1</sup> did not apply to bills of sale<sup>2</sup> so as to enable the grantee to consolidate with his bill of sale a security over other property of the grantor and thus claim against an execution creditor the right to have the surplus proceeds of sale, after discharge of the sum due under the bill, applied towards satisfaction of the prior mortgage<sup>3</sup>. The Bills of Sale Act (1878) Amendment Act 1882 would appear to preclude consolidation even against the grantor himself, no third party being involved, for the right to consolidate does not arise unless the instrument expresses an intention to confer it<sup>4</sup>, and a provision for consolidation would be incompatible with the statutory form<sup>5</sup>.

1 As to consolidation see **MORTGAGE** vol 77 (2010) PARA 498 et seq.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 *Chesworth v Hunt* (1880) 5 CPD 266.

4 See the Law of Property Act 1925 s 93(1); and **MORTGAGE** vol 77 (2010) PARA 500.

5 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.

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## **(xi) Rights of Grantor against Grantee**

### **1794. Effect of seizure.**

A bill of sale by way of security in the statutory form<sup>1</sup> vests the chattels assigned in the grantee, leaving the right to their possession in the grantor until any of the events mentioned as causes of seizure<sup>2</sup> in the Bills of Sale Act (1878) Amendment Act 1882 occur<sup>3</sup>.

When, for any of such causes, the grantee seizes the chattels, the grantor's legal interest in them ceases, and upon expiry of the statutory five-day period during which the goods cannot be removed<sup>4</sup> the grantee is entitled to take them away and cannot be sued in trespass for so doing, even if he removes them after tender of principal, interest and costs<sup>5</sup>. The remedy of the grantor, if he has not applied for statutory relief within the five-day period<sup>6</sup>, is to take proceedings for redemption, in which case he will be put on the usual terms<sup>7</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.

2 See PARA 1789.

3 See the Bills of Sale Act (1878) Amendment Act 1882 s 7; and *Johnson v Diprose* [1893] 1 QB 512, CA.

4 See the Bills of Sale Act (1878) Amendment Act 1882 s 13; and PARA 1791. As to the grantor's remedy where the grantee wrongfully removes the goods during the five days after seizure see PARA 1791 note 4.

5 This is because the grantor does not have the right to possession necessary to maintain the action, and the grantee has the right to possession, subject to any redemption order that may be made: *Johnson v Diprose* [1893] 1 QB 512, CA. As to the grantor's remedy for damage caused to the goods in the course of removal see PARA 1799.

6 See PARA 1795.

7 See PARA 1796.

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### **1795. Terms on which statutory relief granted.**

On the grantor's application within five days from seizure, the court or judge, if satisfied that, by payment of money or otherwise, the cause of seizure no longer exists<sup>1</sup>, may restrain the grantee from removing or selling the chattels or may make such other order as may seem just<sup>2</sup>. Thus a sale may be restrained on condition that instalments overdue are paid, with interest and costs<sup>3</sup>. If the grantor is otherwise in default, as for non-payment of rent, relief may be refused if that default is not made good<sup>4</sup>.

The form of relief contemplated by the statute is the restoration of possession to the grantor on making good his default, so that the bill of sale will continue in force as a security for the future instalments payable under it<sup>5</sup>. The statutory provisions do not empower the court to order the



grantee to submit to redemption of the bill of sale ahead of time where such relief would not have been given in equity<sup>6</sup>.

- 1 Where goods are seized for default in payment, the cause of seizure ceases to exist when the grantor tenders the arrears and costs, even if the grantee refuses to accept the tender: *Ex p Cotton* (1883) 11 QBD 301, DC.
- 2 Bills of Sale Act (1878) Amendment Act 1882 s 7 proviso. Until expiration of the five-day period the grantee cannot remove the goods from the premises or sell them: see s 13; and PARA 1791.
- 3 *Ex p Cotton* (1883) 11 QBD 301, DC.
- 4 *Cowley v Tyler, Re Bill of Sale* (1884) Bitt Rep in Ch 189, where the grantor had not repaid rent paid at his request by the grantee to avoid a distress.
- 5 It should be noted that, except possibly in the case of an extortionate credit bargain (see now the provisions on relationships that are unfair to the debtor in the Consumer Credit Act 1974 ss 140A-140C (added by the Consumer Credit Act 2006 ss 19-21); and **CONSUMER CREDIT**), no such power is conferred by that Act, under which relief, so far as available, is given by suspending an order for delivery of the goods and does not extend to returning the goods to the debtor after seizure.
- 6 See PARA 1796.

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### **1796. Redemption.**

Quite independently of the statutory relief, the grantor has an equitable right to redeem at any time before sale or foreclosure<sup>1</sup>. He cannot ordinarily redeem before the time agreed for payment, for the grantee has the right to keep his money outstanding for the stipulated period in order that he can earn the full agreed interest<sup>2</sup>.

The grantee is entitled, on default in payment of an instalment, to take possession to protect his security and to hold possession until the amount overdue is paid<sup>3</sup>. If he takes possession for this purpose and not for the purpose of realisation, the grantor's right to redeem is not accelerated, and the grantee cannot be compelled to give up his bill of sale<sup>4</sup> on tender of principal not yet due, with interest to date, but may merely be ordered to withdraw from possession on payment of the instalments in arrear with interest and costs of seizure, leaving the bill of sale in force as security for future instalments<sup>5</sup>.

Where, however, the grantee takes possession in order to realise his security, he is bound to accept the grantor's tender of principal, though not yet due, with interest to date and expenses, and, though he is not liable for trespass if he proceeds with removal of the goods despite such tender<sup>6</sup>, he may be ordered to withdraw and give up the bill of sale on payment being made<sup>7</sup>.

If chattels comprised in a bill of sale are seized in execution and in interpleader proceedings a third party lays claim to them<sup>8</sup>, the court may order a sale and direct application of the proceeds of sale without being fettered by ordinary rules of equity<sup>9</sup>, and such an order may provide for the compulsory redemption of the bill of sale before the time for payment has arrived, with interest to the date of redemption<sup>10</sup>.

The grantee will not, as a general rule, be restrained from exercising his legal rights unless the grantor offers or pays into court the full sum claimed to be due<sup>11</sup>, but the court may grant an

injunction on terms of payment of a lower figure where it is clear that the grantee is claiming too much<sup>12</sup>.

1 See *Johnson v Diprose* [1893] 1 QB 512, CA; and **MORTGAGE** vol 77 (2010) PARA 303.

2 *Ex p Ellis* [1898] 2 QB 79, CA. This is so even if the period of repayment is not expressly stated but is a matter of calculation: *Re Davies, ex p Equitable Investment Co* (1897) 77 LT 567.

3 *Ex p Ellis* [1898] 2 QB 79, CA. The position is otherwise where the bill of sale secures an agreement which is a regulated agreement under the Consumer Credit Act 1974: see PARA 1789 note 2. As to regulated agreements under the Consumer Credit Act 1974 see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 79, 157 et seq.

4 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

5 See note 3.

6 See PARA 1794 note 5.

7 *Ex p Wickens* [1898] 1 QB 543, CA. Where the seizure was wrongful, the grantee may be ordered to pay the costs of the application for relief: *Ex p Wickens*.

8 See CPR Sch 1 RSC Ord 17 r 2; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1596, 1598.

9 See CPR Sch 1 RSC Ord 17 r 6; *Forster v Clowser* [1897] 2 QB 362, CA; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1616.

10 *Forster v Clowser* [1897] 2 QB 362, CA.

11 *Hill v Kirkwood* (1880) 42 LT 105, CA; *Pearce v Kirkwood* (1898) 105 LT Jo 424.

12 *Hickson v Darlow* (1883) 23 ChD 690, CA.

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### **1797. Delivery up of bill.**

When the debt secured by a bill of sale<sup>1</sup> has been satisfied, the grantor is entitled to have the bill delivered up to him, and the grantee may be ordered to surrender the bill where he refuses to do this voluntarily<sup>2</sup>. A provision in the bill purporting to entitle the grantee to retain it after payment is a deviation from the statutory form and renders the bill void<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Ex p Wickens* [1898] 1 QB 543, CA.

3 *Watson v Strickland* (1887) 19 QBD 391, CA (where it was held that such a stipulation in the bill of sale made it at variance with the statutory form and with the rights of the parties thereunder and thus invalidated the bill). As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.

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### 1798. Wrongful seizure.

If the grantor, on the day appointed for payment<sup>1</sup>, pays or tenders the principal and interest due, the grantee will be liable in damages for trespass if he seizes the goods<sup>2</sup>. He is similarly liable if he seizes before default<sup>3</sup> or before any of the statutory causes for seizure have arisen<sup>4</sup>.

The measure of damages for wrongful seizure by the grantee under a valid bill of sale<sup>5</sup> is usually limited by the value of the grantor's interest in the goods, not their full value<sup>6</sup>, although the circumstances in which the wrongful seizure was made may justify an award of aggravated damages<sup>7</sup> or even, in exceptional circumstances, exemplary damages<sup>8</sup>.

1 The grantor usually has no right to accelerate payment: see PARA 1796.

2 *Johnson v Diprose* [1893] 1 QB 512, CA; *Monson v Milner* (1892) 8 TLR 447. A promise without consideration to extend the time for payment does not of itself prevent the grantee taking possession (*Williams v Stern* (1879) 5 QBD 409, CA), in the absence of any equitable estoppel created by the promise (see **CONTRACT** vol 9(1) (Reissue) PARA 1030; **ESTOPPEL** vol 16(2) (Reissue) PARA 1082). Cf *Albert v Grosvenor Investment Co* (1867) LR 3 QB 123. As to trespass to goods see **TORT** vol 45(2) (Reissue) PARA 659; and as to damages for trespass to goods see **DAMAGES** vol 12(1) (Reissue) PARA 860; **TORT** vol 45(2) (Reissue) PARA 671.

3 *Moore v Shelley* (1883) 8 App Cas 285, PC; *Massey v Sladen* (1868) LR 4 Exch 13; *Toms v Wilson* (1862) 4 B & S 442. The bill of sale remains a security notwithstanding wrongful seizure: *Monson v Milner* (1892) 8 TLR 447.

4 See the Bills of Sale Act (1878) Amendment Act 1882 s 7; and PARA 1789 et seq.

5 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

6 *Brierly v Kendall* (1852) 17 QB 937. The value of the grantor's interest is presumably to be taken as the value of the goods at the date of seizure less the amount outstanding under the bill.

7 *Moore v Shelley* (1883) 8 App Cas 285, PC. A grantor, notwithstanding his bankruptcy, may recover damages for personal annoyance and loss caused by wrongful seizure of goods under a bill of sale: *Rose v Buckett* [1901] 2 KB 449, CA. As to aggravated damages see **DAMAGES** vol 12(1) (Reissue) PARAS 811, 1111 et seq.

8 See eg *Thomas v Harris* (1858) 27 LJEx 353. For more recent statements of the principles applicable to the granting of exemplary damages see *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL; *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, HL; *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122, [2001] 3 All ER 193; and **DAMAGES** vol 12(1) (Reissue) PARA 1115 et seq.

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### 1799. Damage to goods during or after removal.

Where possession of the goods is lawfully taken by the grantee of a bill of sale<sup>1</sup>, then the grantor's legal interest in the goods ceases<sup>2</sup>, and an action for trespass does not lie either in respect of the removal of the goods or in respect of damage caused during or after removal<sup>3</sup>.

The grantor is, however, entitled to be credited with the loss caused by such damage on redeeming, or, if he is sued for the balance of the debt, may claim that it be deducted<sup>4</sup>, and if the goods are damaged or destroyed as a result of the grantee's negligence, the grantor is entitled to damages not exceeding the value of his interest<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See PARA 1794.

3 *Johnson v Diprose* [1893] 1 QB 512, CA. As to trespass to goods see **TORT** vol 45(2) (Reissue) PARA 659.

4 *Johnson v Diprose* [1893] 1 QB 512, CA.

5 In *Johnson v Diprose* [1893] 1 QB 512, CA, the plaintiff asserted negligence, but his cause of action was framed in trespass, and it failed because he did not have the right to possession which is essential for that tort. Negligence was not then fully recognised as an independent tort; but it seems clear that a claim for negligence would now lie. As to damages generally see **DAMAGES**. As to claims for negligence see **NEGLIGENCE** vol 78 (2010) PARA 62 et seq; **TORT** vol 45(2) (Reissue) PARA 394 et seq.

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## (xii) Priority of Successive Bills

### 1800. Statutory provisions.

If two or more bills of sale<sup>1</sup> are given comprising, in whole or in part, any of the same chattels, they have priority in the order of the date of their registration respectively as regards such chattels<sup>2</sup>. This rule applies to regulate priorities between absolute bills of sale as well as between bills of sale given by way of security for the payment of money<sup>3</sup>. Moreover, it not only governs precedence as between two registered bills but also gives a registered bill priority over an unregistered bill<sup>4</sup>. However, the rule is subject to the provision in the Bills of Sale Act (1878) Amendment Act 1882<sup>5</sup> that a bill is void, except as against the grantor, in respect of any personal chattels<sup>6</sup> specifically described in the schedule of which the grantor is not the true owner at the time of execution of the bill. Accordingly, if a security bill is executed after an unregistered absolute bill, it is void even if registered, and the priority rule contained in the Bills of Sale Act 1878<sup>7</sup> will not avail the grantee<sup>8</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act 1878 s 10. Bills of sale formerly took priority according to date of execution: *Re Middleton, ex p Allen, ex p Page* (1870) LR 11 Eq 209. The provisions of the Bills of Sale Act 1878 s 9 (rendering successive bills void in certain circumstances: see PARA 1755) have no application to this situation, since s 9 deals with successive bills of sale securing the same debt, whereas the case here discussed involves different debts to different creditors. See further PARAS 1801-1804.

The Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630) do not apply to mortgages of aircraft or ships, for which there are separate statutory registration regimes with distinct priority rules (see PARAS 1689-1690).

3 *Tuck v Southern Counties Deposit Bank* (1889) 42 ChD 471, CA. As to absolute bills of sale see PARA 1838 et seq.

4 *Lyons v Tucker* (1881) 7 QBD 523, CA; *Conelly v Steer* (1881) 7 QBD 520, CA.

5 *le* the Bills of Sale Act (1878) Amendment Act 1882 s 5: see PARA 1697 et seq.

6 As to the meaning of 'personal chattels' see PARA 1662 et seq.

7 *le* the Bills of Sale Act 1878 s 10: see the text to note 2.

8 *Tuck v Southern Counties Deposit Bank* (1889) 42 ChD 471, CA.

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### **1801. Priority where both bills absolute.**

If the two bills of sale are both absolute and both are registered<sup>1</sup>, priority is given<sup>2</sup> to the first to register<sup>3</sup>. The second bill is valid despite the previous disposition, because the requirement that the grantor of a security bill of sale must be the true owner appears only in the Bills of Sale Act (1878) Amendment Act 1882, which is limited to security bills<sup>4</sup>. The effect of this<sup>5</sup> is thus to create an exception to the rule *nemo dat quod non habet*<sup>6</sup>, as, if the grantee of the second bill is the first to register, he acquires a good title despite the fact that his grantor, having granted the first bill, had no title to convey<sup>7</sup>. It would seem that the grantee of the second bill obtains priority in this case even if he took with notice of the first bill<sup>8</sup>.

If neither bill is registered, priority is determined by general equitable principles. The grantee under the first bill obtains priority<sup>9</sup> unless his interest under that bill is purely equitable and the grantee under the second bill acquires the legal title for value and without notice of the prior bill, in which case he has priority<sup>10</sup>. However, the priority established by application of these principles is provisional only, since it may be displaced later as a result of registration by one of the grantees within the permitted time as extended by the court<sup>11</sup>.

1 As to absolute bills of sale see PARA 1838 et seq. As to registration see PARA 1844 et seq. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *le* under the Bills of Sale Act 1878 s 10: see PARA 1800.

3 See *Lyons v Tucker* (1881) 7 QBD 523, CA. A grantee who would be postponed under this priority rule does not improve his position by taking possession (*Lyons v Tucker*; *Re Middleton, ex p Allen, ex p Page* (1870) LR 11 Eq 209), although where the grantee of the prior unregistered bill takes possession before the second bill is given he takes priority, since the prior bill becomes spent so that the Bills of Sale Act 1878 s 10 does not avail the grantee of the second bill even if he registers (*Maugham v Sharpe* (1864) 17 CBNS 443).

4 See the Bills of Sale Act (1878) Amendment Act 1882 s 3.

5 *le* the Bills of Sale Act 1878 s 10.

6 *le* no one can give what he does not have.

7 *Lyons v Tucker* (1881) 7 QBD 523, CA. In addition, the Bills of Sale Act 1878 s 10 expands the operation of s 8 (see PARA 1849), since failure to register would not, under that provision, avoid the bill against the grantee of a subsequent bill.

8 Cf *Edwards v Edwards* (1876) 2 ChD 291, CA (execution creditor is entitled to set up non-registration against the grantor of the bill even though the execution creditor was aware of the bill at the time the debt was contracted to him). It would seem that, if the grantee of the second bill is the first to register, he obtains priority even if the time for registration of the first bill has not yet expired, and it is thought that, as between two persons claiming title under bills of sale, the priority rule established by the Bills of Sale Act 1878 s 10 (see PARA

1800) takes precedence over the provisions of the Factors Act 1889 s 8 and of the Sale of Goods Act 1979 s 24, which enable a seller remaining in possession to pass title to a bona fide purchaser or other transferee by transfer or delivery of the goods (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 157); see the Sale of Goods Act 1979 s 62(3) (which provides that nothing in that Act is to affect enactments relating to bills of sale); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 10.

9 Although the Bills of Sale Act 1878 s 8 renders an unregistered bill void against stated categories of third party (see PARA 1849), these do not include subsequent transferees.

10 This is in accordance with the maxim that where equities are equal the law prevails: see **EQUITY** vol 16(2) (Reissue) PARA 570; **MORTGAGE** vol 77 (2010) PARA 274.

11 In this event the grantee effecting registration gains priority under the Bills of Sale Act 1878 s 10: see PARA 1800.

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### **1802. Priority where both bills security.**

If the two bills of sale<sup>1</sup> are both security bills, priority is determined according to the order of registration<sup>2</sup>. The second bill is valid because the previous disposition, being by way of mortgage only, leaves the grantor with an equity of redemption, so that he continues to be the true owner for the purpose of the provision avoiding bills as respects after-acquired property<sup>3</sup>, and is therefore competent to grant the second bill<sup>4</sup>. If neither bill is registered, no question of priority arises, as both are void as to the security<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See PARA 1800. As to registration see PARA 1754 et seq.

3 I.e. the Bills of Sale Act (1878) Amendment Act 1882 s 5: see PARA 1701.

4 *Thomas v Searles* [1891] 2 QB 408, CA.

5 See the Bills of Sale Act (1878) Amendment Act 1882 s 8.

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### **1803. Security bill followed by absolute bill.**

Where an absolute bill of sale<sup>1</sup> is granted after the grant of a security bill, priority is also determined by registration<sup>2</sup>, the second bill being validly given as, despite execution of the first bill, the grantor remained the owner by virtue of his equity of redemption<sup>3</sup>.

1 As to absolute bills of sale see PARA 1838 et seq. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to registration see PARA 1754 et seq. As to the registration of absolute bills see PARA 1844 et seq.

3 *Thomas v Searles* [1891] 2 QB 408, CA.

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#### **1804. Absolute bill followed by security bill.**

Where the first bill of sale<sup>1</sup> is absolute, the grantor wholly divests himself of title, with the result that, even if the absolute bill is unregistered, a subsequent security bill given by the grantor will be void<sup>2</sup> unless one of the exceptions to the requirement of true ownership applies<sup>3</sup>. In that event, priority would be determined by the order of registration<sup>4</sup>.

1 As to absolute bills of sale see PARA 1838 et seq. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Tuck v Southern Counties Deposit Bank* (1889) 42 ChD 471, CA.

3 See PARA 1699.

4 As to registration see PARA 1754 et seq. As to the registration of absolute bills see PARA 1844 et seq.

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#### **(xiii) Impact of Other Subsequent Dealings and Events**

##### **1805. Grantee's title usually prevails.**

Where, as is usually the case, a security bill of sale<sup>1</sup> operates to transfer a legal title to the grantee, this will usually prevail over all claimants whose interests arise subsequently, including a purchaser, even if buying in good faith and without notice<sup>2</sup>, and a pledgee<sup>3</sup>. The statutory provisions by which a seller of goods who remains in possession can, in certain circumstances, pass a good title to an innocent transferee for value<sup>4</sup> will not apply to a disposition by one who remains in possession after granting a security bill, since he is not a seller for this purpose<sup>5</sup>. Hence such a disposition will not override a legal title previously acquired by the grantee under the bill of sale. If, however, the title acquired by the grantee is purely equitable<sup>6</sup>, a person subsequently acquiring a legal title or interest for value and without notice<sup>7</sup> will, unless himself holding under a registrable bill of sale<sup>8</sup>, prevail over the grantee of the bill.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Taylor v McKeand* (1880) 5 CPD 358; *Payne v Fern* (1881) 6 QBD 620, DC. See also PARA 1756.

3 *Joseph v Webb* (1884) Cab & El 262. Such parties, if taking or delivering possession of the goods, are liable to the grantee in conversion, even if acting in good faith. Similarly an auctioneer selling on the instructions of the grantor is liable (*Consolidated Co v Curtis & Son* [1892] 1 QB 495; *Cochrane v Rymill* (1879) 40 LT 744, CA), unless he does not deal with the goods themselves but only introduces a purchaser (*National Mercantile Bank v Rymill* (1881) 44 LT 767, CA).

4 See the Factors Act 1889 s 8 and the Sale of Goods Act 1979 s 24: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 157.

5 See the Sale of Goods Act 1979 s 62(3), (4); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 8, 10. The Factors Act 1889 contains no express provision on the point, but the distinction between a sale and a mortgage is well established at common law: see eg *Beckett v Tower Assets Co* [1891] 1 QB 1.

6 This would be the case if, at the date of the bill, the grantor's interest in the goods was only an equitable interest or if, within the limits permitted by the Bills of Sale Acts (see PARA 1697 et seq), the goods were not owned by the grantor at the date of the bill but were acquired subsequently, vesting in him in equity under the rule in *Holroyd v Marshall* (1862) 10 HL Cas 191: see PARAS 1622, 1635. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

7 Eg under a sale, legal mortgage or pledge. Such a person does not have constructive notice merely by reason of registration of the bill of sale: see PARA 1756.

8 In the case of registrable bills, priorities will be determined in accordance with the principles stated in PARA 1800 et seq.

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### **1806. Sale by grantor in ordinary course of business.**

If the grantee permits the grantor left in possession of chattels to hold himself out as having the property in them, as where they consist of stock-in-trade or other assets of a kind likely to be disposed of in the course of carrying on a business, a purchaser from the grantor, in the ordinary course of the grantor's business, taking in good faith and without notice of the bill of sale<sup>1</sup>, obtains a good title against the grantee<sup>2</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *National Mercantile Bank v Hampson* (1880) 5 QBD 177; *Walker v Clay* (1880) 49 LJQB 560.

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### **1807. Distress for rent.**

At common law, a landlord can distrain for rent on all goods on the demised premises, whether or not belonging to the tenant<sup>1</sup>. By statute, however, a person other than the tenant whose goods are distrained may secure their release by service of a declaration and inventory on the



landlord<sup>2</sup>. These provisions now apply in relation to bills of sale<sup>3</sup> and can accordingly be invoked by the grantee of a bill.

If a landlord distrains on goods included in a bill of sale, and on other goods the property of the grantor, he may be required, under the equitable doctrine of marshalling, to resort in the first place, for satisfaction of rent, to goods not assigned by the bill of sale<sup>4</sup>. When the goods in a bill of sale are taken under a distress for rent which the grantor ought to have paid, the grantee is entitled to be indemnified by the grantor, and, it seems, to recover anything paid by him to discharge the rent<sup>5</sup>.

1 *Lyons v Elliott* (1876) 1 QBD 210 at 213 per Blackburn J.

2 See the Law of Distress Amendment Act 1908 s 1; and **DISTRESS** vol 13 (2007 Reissue) PARA 956.

3 At one time bills of sale were excluded by the Law of Distress Amendment Act 1908 s 4 (see **DISTRESS** vol 13 (2007 Reissue) PARA 954) but that provision was repealed in relation to bills of sale and hire-purchase agreements by the Consumer Credit Act 1974 Sch 5. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

4 *Re Stephenson, ex p Stephenson* (1847) De G 586. The doctrine is now of diminished importance in this situation in view of the grantee's ability to protect his interest in the goods by serving a notice under the Law of Distress Amendment Act 1908 s 1: see the text to note 2. As to the equitable doctrine of marshalling see **EQUITY** vol 16(2) (Reissue) PARA 758 et seq.

5 *Edmunds v Wallingford* (1885) 14 QBD 811, CA, questioning *England v Marsden* (1866) LR 1 CP 529. Money so paid by the grantee for rent must be repaid on redemption, and can be retained by the grantee out of the proceeds of sale of his security: cf *Cowley v Tyler, Re Bill of Sale* (1884) Bitt Rep in Ch 189. The grantee is entitled to provide for this expressly in his bill of sale: see PARA 1792.

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### **1808. Distress for taxes.**

A bill of sale<sup>1</sup> given by way of security is no protection against a distress for taxes<sup>2</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act (1878) Amendment Act 1882 s 14. As to distress for taxes see **DISTRESS** vol 13 (2007 Reissue) PARA 1127 et seq.

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### **1809. Distress for money due under court order.**

Where default is made in payment of a sum adjudged to be paid by a conviction or order of a magistrates' court, the court may issue a warrant of distress for the purpose of levying the sum due<sup>1</sup>, but only the goods of the person against whom the order is made may be seized<sup>2</sup>.

1 See the Magistrates' Courts Act 1980 s 76(1); and **MAGISTRATES** vol 29(2) (Reissue) PARA 860.

2 See the Criminal Procedure Rules 2005, SI 2005/384, r 52.8(1)(a), (b); and **MAGISTRATES** vol 29(2) (Reissue) PARA 860.

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### **1810. Levy of execution.**

A valid bill of sale<sup>1</sup> is effective against an execution creditor<sup>2</sup>. However, when chattels seized in execution in the High Court are claimed under a security bill, the sheriff may interplead<sup>3</sup>, and an order may then be made for sale of the whole or part of them, and directions may be given for the application of the proceeds of sale in such manner and on such terms as may be just and as may be specified in the order<sup>4</sup>. No such order should be made unless there is reasonable ground to believe that there will be a surplus for the execution creditor, nor, if the security is of doubtful value, should an order for sale be made without the grantee's consent, unless the execution creditor guarantees him against loss<sup>5</sup>.

If the execution is avoided by the judgment debtor's bankruptcy and the chattels, not having been sold, are claimed by the official receiver or trustee, the latter does not stand in the shoes of the execution creditor and there is no power to order a sale<sup>6</sup>.

If an order is made for sale and satisfaction of the grantee's claim, as stated in his particulars, he cannot afterwards claim any further sum from the sheriff<sup>7</sup>.

Where money is paid into court to abide an issue, and the goods are then seized under another execution, the grantee, if he again claims, may be ordered again to find security, on the second interpleader<sup>8</sup>.

If the grantor becomes bankrupt pending an interpleader issue, the trustee of his estate, where there has been no sale, cannot claim, as representing the goods, money paid into court by the grantee<sup>9</sup>.

Although a grantee, by paying money into court to abide the event of an issue, does not thereby acquire any property in the goods, an execution creditor who succeeds on the issue and takes the money out of court cannot again seize the goods under the same judgment<sup>10</sup>.

Where the grantee is made claimant on an interpleader issue, the defendant may defeat his claim by setting up the title of a third party, under a prior bill of sale, in order to prove that the claimant had not, at the date of seizure, the property in the goods or a right to their possession<sup>11</sup>, and such title may be set up even though it has priority over the defendant's claim<sup>12</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 For the circumstances in which a bill of sale may be rendered void against execution creditors see PARAS 1828-1829.

- 3 As to interpleader generally see **CIVIL PROCEDURE** vol 12 (2009) PARA 1585 et seq.
- 4 See CPR Sch 1 RSC Ord 17 r 6; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1616. An order for sale may also be made where the claim is by the grantee of an absolute bill of sale if it seems to the court just and reasonable to do so: *Paquin Ltd v Robinson* (1901) 85 LT 5, CA. As to absolute bills of sale see PARA 1838 et seq.
- 5 *Stern v Tegner* [1898] 1 QB 37, CA.
- 6 *Stern v Tegner* [1898] 1 QB 37, CA.
- 7 *Hockey v Evans* (1887) 18 QBD 390, CA.
- 8 *Kotchie v Golden Sovereigns Ltd* [1898] 2 QB 164, CA.
- 9 *Shuckburgh v Duthoit, Pike, Claimant* (1892) 8 TLR 710, CA.
- 10 *Haddow v Morton* [1894] 1 QB 565, CA. However, where, after the claimant under a bill of sale had paid money into court to abide an issue, third parties claimed part of the goods, on their title being admitted by the claimant and execution creditors, and the bill of sale being found void, the execution creditors were held entitled to all the money in court, without deducting the value of the goods claimed by the third parties: *Wells v Hughes* [1907] 2 KB 845, CA.
- 11 *Richards v Jenkins* (1887) 18 QBD 451, CA. See further PARAS 1816-1817.
- 12 *Richards v Jenkins* (1887) 18 QBD 451, CA.

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### **1811. Appointment of receiver.**

Without leave of the court, the grantee cannot seize goods in the possession of a receiver duly appointed by the court<sup>1</sup>, and nor can he, after a receiver has been so appointed, remove the goods even if he was in possession before the receiver<sup>2</sup>. Indeed, since the possession of the receiver is the possession of the court<sup>3</sup>, any interference with the receiver's possession is a contempt of court and punishable accordingly<sup>4</sup>. This prohibition is not limited to physical repossession but precludes the grantee from instituting proceedings for recovery of possession without obtaining the leave of the court which appointed the receiver<sup>5</sup>.

These restrictions do not apply where the receiver is appointed by a mortgagee out of court, for the receiver is then not an officer of the court but the agent of the mortgagor, whether appointed under the statutory power<sup>6</sup> or under an express power<sup>7</sup>.

1 *Re Mead, ex p Cochrane* (1875) LR 20 Eq 282. Unless otherwise ordered a receiver is not considered duly appointed for this purpose until it is certified that his security has been completed: *Edwards v Edwards* (1876) 2 ChD 291, CA. As to the appointment of receivers see generally **RECEIVERS**.

2 *Re Fells, ex p Andrews* (1876) 4 ChD 509.

3 *Russell v East Anglian Rly Co* (1850) 3 Mac & G 104.

4 *Russell v East Anglian Rly Co* (1850) 3 Mac & G 104. As to contempt of court see generally **CONTEMPT OF COURT**.

5 *Angel v Smith* (1804) 9 Ves 335.

6 I.e. under the Law of Property Act 1925 s 109(2): see **MORTGAGE** vol 77 (2010) PARA 478.

7 *Jefferys v Dickson* (1866) 1 Ch App 183; *Law v Glenn* (1867) 2 Ch App 634.

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### **1812. Lien.**

Where the grantor of goods comprised in a security bill of sale<sup>1</sup> deposits them with a third party in such circumstances as to give rise to a lien, the third party will in certain circumstances be entitled to exercise such lien against the grantee as well as against the grantor<sup>2</sup>. Even where he cannot do this, the grantee seeking recovery of his goods may, as a condition of being granted an order for specific delivery, be required to compensate the third party for the value he has added to the goods by doing work on them<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 In general, a lien is not exercisable against the owner of goods unless he deposited them with the person claiming the lien or they were so deposited by one having actual or ostensible authority from the owner so to do: see *Tappenden v Artus* [1964] 2 QB 185, [1963] 3 All ER 213, CA; and **LIEN** vol 68 (2008) PARA 842.

3 *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA.

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### **1813. Bankruptcy of grantor.**

In the absence of any grounds for attacking his security<sup>1</sup> the grantee has the usual rights of a secured creditor upon the grantor's bankruptcy<sup>2</sup>. If the grantee proves his debt and gives up his security, the trustee in bankruptcy stands in his place, and a subsequent bill of sale is not advanced<sup>3</sup>. The same result follows where the trustee buys up a bill of sale<sup>4</sup>.

1 See PARAS 1828-1829.

2 See the Insolvency Rules 1986, SI 1986/1925, Pt 6 Ch 9 (rr 6.115-6.119); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 560 et seq.

3 *Cracknall v Janson* (1877) 6 ChD 735.

4 Cf *Bell v Sunderland Building Society* (1883) 24 ChD 618. A grantee compromising a trustee's claim to avoid a bill of sale, on the terms that the bankruptcy should be annulled, is remitted to his original rights on the order for annulment being discharged: *Re Spanton, ex p Jarvis* (1879) 10 ChD 179, CA.

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#### **1814. Attachment of chattels to land or buildings.**

If chattels comprised in a security bill of sale<sup>1</sup> later become attached to the land or building of a third party in such a way as to become fixtures, they cease to be chattels and become part of the land<sup>2</sup>, with the result that in certain circumstances they will vest in the third party and the grantee will lose title<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 In accordance with the maxim *quicquid plantatur solo, solo cedit* (ie whatever is affixed to the soil belongs to the soil); see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 172.

3 See *Minshall v Lloyd* (1837) 2 M & W 450; *Wake v Hall* (1880) 7 QBD 295, CA (affd (1883) 8 App Cas 195, HL); and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 172 et seq.

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#### **1815. Attachment of chattels to other goods.**

If chattels comprised in a security bill of sale<sup>1</sup> are subsequently annexed to goods of a third party so as to become an accession to those goods, title to the chattels will usually pass to the third party as owner of the principal goods<sup>2</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See *Appleby v Myers* (1867) LR 2 CP 651; and **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1238.

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#### **(xiv) Impact of Dealings Prior to Grant of Bill**

##### **1816. Power to grant security bill.**

Subject to the statutory provisions relating to the priority of successive bills of sale<sup>1</sup>, the grantor of a security bill cannot usually transfer a greater interest than he himself possesses, so that, if he had previously divested himself of legal title to the goods, no interest in them will pass to the grantee under the bill.

<sup>1</sup> See the Bills of Sale Act 1878 s 10; and PARA 1800. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

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### **1817. Subordination of prior transferee.**

Where a prior transfer, not being itself a registrable bill of sale<sup>1</sup>, passed merely an equitable title, a subsequent bill of sale passing a legal title to a grantee taking in good faith and for value will have priority<sup>2</sup>. Moreover, even where the prior transferee obtained a full legal title, he may be estopped from disputing the authority or right of the transferor to give a security bill, as where the owner, in leaving business assets in the possession of the grantor, holds the grantor out as having authority to raise money on such assets in the ordinary course of business or as being still the owner of the assets<sup>3</sup>.

There are also statutory provisions by which the grantor of a security bill may be able to pass a good title to the grantee despite a prior transfer<sup>4</sup>, but some of these provisions will rarely apply because they operate only where the non-owner delivers the goods pursuant to the disposition made by him, and the grantor of a security bill of sale will almost invariably remain in possession himself<sup>5</sup>.

<sup>1</sup> As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

<sup>2</sup> *Joseph v Lyons* (1884) 15 QBD 280, CA; *Hallas v Robinson* (1885) 15 QBD 288, CA. Different considerations arise where the prior transfer was itself a registrable bill of sale, since the priority rule embodied in the Bills of Sale Act 1878 s 10 then comes into play: see PARA 1800. As to registration see PARA 1754 et seq.

<sup>3</sup> See *Joseph v Lyons* (1884) 15 QBD 280, CA (where the transferor subsequently pledged the goods); *National Mercantile Bank v Hampson* (1880) 5 QBD 177; *Walker v Clay* (1880) 49 LJQB 560 (subsequent sale by transferor). Where the original transferee is thus estopped, he is precluded from relying on the Bills of Sale Act (1878) Amendment Act 1882 s 5 (bill void as to chattels of which grantor not true owner) to defeat the grantee's claim, since the grantor is in these circumstances to be taken to be the true owner for the purpose of s 5: see PARA 1697; and **ESTOPPEL**.

<sup>4</sup> See eg the Factors Act 1889 s 2 (disposition by mercantile agent: see **AGENCY** vol 1 (2008) PARA 148), s 8 (disposition by seller remaining in possession: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 157), s 9 (disposition by buyer in possession: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 158). Sections 8, 9 are reproduced almost verbatim in the Sale of Goods Act 1979 ss 24, 25 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 157-158). If the prior transfer was not a sale but a mortgage, s 25(1) (and it would seem the Factors Act 1889 s 8) does not apply: see the Sale of Goods Act 1979 s 62(4); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 8.

<sup>5</sup> The Factors Act 1889 ss 8, 9 and the Sale of Goods Act 1979 ss 24, 25 protect the transferee only where he has taken delivery: see further **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 158.

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### **(xv) Avoidance**

## **A. GROUNDS FOR AVOIDANCE**

### **1818. Grounds for avoidance.**

A security bill of sale<sup>1</sup> may be rendered void:

- 201 (1) under the general law of contract, as where there is no *consensus ad idem*<sup>2</sup> or a plea of *non est factum* is established<sup>3</sup> or where the bill, though not initially void, is later avoided for fraud or misrepresentation<sup>4</sup>;
- 202 (2) under various provisions of the Bills of Sale Acts<sup>5</sup>; or
- 203 (3) under the provisions of other statutes, such as the Consumer Credit Act 1974<sup>6</sup> and the Insolvency Act 1986<sup>7</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Ie no common agreement on which a binding contract can be made: see **CONTRACT** vol 9(1) (Reissue) PARA 631.

3 Ie a plea that it is not his deed: see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 69.

4 See PARAS 1819-1821. As to fraud and misrepresentation see **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MISREPRESENTATION AND FRAUD**.

5 See PARA 1822 et seq. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

6 See PARAS 1714, 1731; and **CONSUMER CREDIT**.

7 See PARA 1828 et seq; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

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## **B. RESCISSION FOR FRAUD OR MISREPRESENTATION**

### **1819. Rescission by grantor.**

Where the grantor was induced to give the bill of sale<sup>1</sup> by reason of the grantee's fraud, the grantor may rescind the bill<sup>2</sup>, so long as he acts within a reasonable time after discovery of the fraud and does not adopt the transaction after such recovery<sup>3</sup>. Thus a bill of sale may be set aside for fraud where the rate of interest was misrepresented<sup>4</sup> or where the lender deliberately concealed his true identity in order to induce the taking of the loan<sup>5</sup> or where the bill was taken in place of a prior bill which the grantee deliberately failed to disclose was void on legal grounds<sup>6</sup>. Similarly a bill may be rescinded for innocent misrepresentation<sup>7</sup>, subject to the statutory power of the court to declare the bill subsisting and award damages in lieu of rescission<sup>8</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Moorhouse v Woolfe* (1882) 46 LT 374; *Gordon v Street* [1899] 2 QB 641, CA. As to rescission generally see **CONTRACT** vol 9(1) (Reissue) PARA 986 et seq.

3 See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 826 et seq.

4 *Moorhouse v Woolfe* (1882) 46 LT 374. See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 813.

5 *Gordon v Street* [1899] 2 QB 641, CA.

6 *Bouchette v Consolidated Credit and Mortgage Corpn Ltd* (1889) 5 TLR 653. The position is otherwise if the new deed is honestly taken because of a defect in the prior deed and there is no fraud or concealment: see eg *Re Munday, ex p Allam* (1884) 14 QBD 43, DC.

7 See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 782.

8 See the Misrepresentation Act 1967 s 2(2); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 834.

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## **1820. Rescission by grantee.**

A grantee induced to lend money on the security of a bill of sale<sup>1</sup> by the fraud or misrepresentation of the grantor may rescind the loan transaction, with the result that the parties must be restored to their positions prior to the loan and the security surrendered to the grantor<sup>2</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 784, 813, 831. As to rescission generally see **CONTRACT** vol 9(1) (Reissue) PARA 986 et seq. A grantor who obtains a loan on a bill of sale of chattels by representing that they are unencumbered when in fact they are the subject of a prior bill may be convicted of dishonestly obtaining property by deception, contrary to the Theft Act 1968 s 15 (now repealed: see the Fraud Act 2006) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 310); see *R v Meakin* (1869) 20 LT 544 (a decision on the former offence of obtaining money by false pretences). However, if the prior bill was void, eg for want of registration, so that in truth there was no effective incumbrance, no offence is committed under the Theft Act 1968 s 15 (now repealed: see the Fraud Act 2006): see *R v Deller* (1952) 36 Cr App Rep 184, CCA (a decision on obtaining money by false pretences); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 5.

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## **1821. Bars to rescission.**

The right to rescind may be barred in the same way as with other contracts, for example by reason of a third party acquiring an interest in the security or by exercise of an election to affirm the transaction after knowledge of the fraud or misrepresentation in question<sup>1</sup>.



<sup>1</sup> See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 784, 826 et seq. As to rescission generally see **CONTRACT** vol 9(1) (Reissue) PARA 986 et seq.

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## **C. AVOIDANCE UNDER THE BILLS OF SALE ACTS**

### **1822. Types of avoidance.**

The extent of avoidance resulting from infringement of the provisions of the Bills of Sale Acts<sup>1</sup> varies according to the particular provision that is contravened. The statutory provisions in question fall into three groups:

- 204 (1) those which render the bill of sale<sup>2</sup> totally void<sup>3</sup>;
- 205 (2) those which render the bill void as to the personal chattels<sup>4</sup> comprised in it, leaving the personal covenants valid<sup>5</sup>; and
- 206 (3) those which render the bill void against third parties as to the personal chattels comprised in it, or as to some of such chattels, leaving the bill fully effective against the grantor both as to the personal covenants and as to the security, and also effective against third parties as to those chattels in respect of which the bill does not contravene the statutory provisions<sup>6</sup>.

In certain cases the grantee may be able to escape the effect of the avoiding provisions by invoking an estoppel against the grantor<sup>7</sup> or by perfecting his title independently of the defective bill<sup>8</sup>. Even where the bill is totally void and these avenues are not open to him, he can pursue a restitutionary remedy for the recovery of his money, with reasonable interest<sup>9</sup>.

<sup>1</sup> I.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

<sup>2</sup> As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

<sup>3</sup> See PARA 1823.

<sup>4</sup> As to the meaning of 'personal chattels' see PARA 1662 et seq.

<sup>5</sup> See PARA 1824.

<sup>6</sup> See PARA 1825.

<sup>7</sup> See PARA 1827. As to estoppel of the true owner from disputing ownership of the grantor for the purpose of the Bills of Sale Act (1878) Amendment Act 1882 s 5 where the true owner has held out the grantor as the owner see PARA 1698. As to estoppel generally see **ESTOPPEL**.

<sup>8</sup> See PARA 1634.

<sup>9</sup> *North Central Wagon Finance Co Ltd v Brailsford* [1962] 1 All ER 502, [1962] 1 WLR 1288; *Bradford Advance Co Ltd v Ayers* [1924] WN 152; and see PARA 1696 note 6.

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### **1823. Bill totally void.**

A bill of sale<sup>1</sup> by way of security for the payment of money is wholly void if it is not in accordance with the statutory form<sup>2</sup> or if it is made in consideration of any sum under £30<sup>3</sup>. The consequence is that the grantee is disabled not merely from enforcing his security but also from enforcing the covenants for payment and other personal covenants contained in the bill<sup>4</sup>. Avoidance of the bill also renders void contracts of guarantee given to secure performance of the covenants in the bill<sup>5</sup>.

The grantee of a void bill is entitled, however, to recover his loan, with reasonable interest, in an action or claim for money had and received<sup>6</sup>, unless this right of recovery is precluded on some other ground, such as contravention of the Consumer Credit Act 1974 or regulations applying to a regulated agreement secured by the bill<sup>7</sup>.

Where a document mortgages not only personal chattels<sup>8</sup> within the Bills of Sale Acts but other types of property as well, the avoidance of the document as a bill of sale does not affect its validity as to that other property, even where it is the inclusion of that other property which renders the bill void as a bill of sale as not being in accordance with the statutory form<sup>9</sup>. Thus the inclusion of chattels real in the body of the bill avoids the document as to the personal chattels comprised in it but leaves it effective as a security over the chattels real<sup>10</sup>. Again, an unregistered attornment clause in a mortgage, though void in relation to the power of distress it purports to confer, remains effective to establish the relationship of landlord and tenant<sup>11</sup>, and a bill of sale avoided by the Bills of Sale Acts may be valid in so far as it is an assurance of machinery and effects excluded by the Bills of Sale Act 1878<sup>12</sup> from the definition of personal chattels<sup>13</sup> or in so far as it is an assurance of leaseholds<sup>14</sup> or of any property other than personal chattels<sup>15</sup>.

The cases in which a document void as a bill of sale of personal chattels has been held valid in relation to other classes of property were decided on the principle that the Bills of Sale Acts affect documents only to the extent that they are bills of sale, so that such part of the security as does not constitute personal chattels is severable from the remainder<sup>16</sup>. This principle presupposes that the covenant for payment remains valid, for it is not possible for the grantee to retain an effective security for a non-existent monetary obligation. It thus appears that the inclusion in the bill of property not constituting personal chattels within the Bills of Sale Acts may preserve the validity of a personal covenant which would otherwise be rendered wholly void.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.

3 See the Bills of Sale Act (1878) Amendment Act 1882 s 12; and PARA 1703.

4 See PARA 1712.

5 *Brown v Blaine* (1884) 1 TLR 158. Where the bill is not wholly void, a surety for the debt secured by the bill is discharged to the extent of the security lost through non-compliance with the Bills of Sale Acts: *Wulff v Jay* (1872) LR 7 QB 756. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

6 See PARA 1822 note 8.

- 7 As to regulated agreements under the Consumer Credit Act 1974 see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 79, 157 et seq.
- 8 As to the meaning of 'personal chattels' see PARA 1662 et seq.
- 9 See PARAS 1712, 1725.
- 10 *Cochrane v Entwistle* (1890) 25 QBD 116, CA; and see PARA 1712.
- 11 *Mumford v Collier* (1890) 25 QBD 279; and see PARA 1655. Similarly, where a power of distress in a lease results in it being deemed a bill of sale, this does not alter the relationship of landlord and tenant so as to preclude the landlord from enforcing the covenants in the lease: see PARA 1653.
- 12 See the Bills of Sale Act 1878 s 5; and PARA 1667 et seq.
- 13 *Re Burdett, ex p Byrne* (1888) 20 QBD 310, CA.
- 14 *Re O'Dwyer* (1886) 19 LR 19; *Re North Wales Produce and Supply Society* [1922] 2 Ch 340.
- 15 Eg a chose in action: *Re Isaacson, ex p Mason* [1895] 1 QB 333, CA.
- 16 As to the doctrine of severance in relation to contracts generally see **CONTRACT** vol 9(1) (Reissue) PARA 877.

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#### **1824. Bill void as regards personal chattels.**

A security bill of sale<sup>1</sup> is void in respect of the personal chattels<sup>2</sup> comprised in it:

- 207 (1) if it is not duly registered<sup>3</sup>;
- 208 (2) if the consideration is not truly set forth<sup>4</sup>;
- 209 (3) to the extent to which the chattels comprised in the bill were comprised in a prior unregistered bill executed within the preceding seven days<sup>5</sup>;
- 210 (4) if registration of the bill expires without renewal<sup>6</sup> or is avoided as the result of the bill being subject to an unregistered defeasance<sup>7</sup>, condition or declaration of trust<sup>8</sup>.

Every bill of sale is void in respect of the personal chattels comprised in it if the bill is not duly attested<sup>9</sup>. However, in the case of security bills this provision gives way to the controlling provision rendering a bill totally void if it is not in accordance with the statutory form, and failure to attest a security bill will prevent it from according with the statutory form, so that the bill will be wholly void<sup>10</sup>. A security bill will likewise be rendered wholly void, under that controlling provision, if a statement of the consideration is omitted altogether<sup>11</sup>, if an agreed term for defeasance is not inserted in the bill<sup>12</sup>, or if other agreed terms are embodied in a separate document considered to form part of the bill and are terms which are incompatible with the statutory form<sup>13</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the meaning of 'personal chattels' see PARA 1662 et seq.

- 3 See the Bills of Sale Act (1878) Amendment Act 1882 s 8; and PARA 1754 et seq.
- 4 See the Bills of Sale Act (1878) Amendment Act 1882 s 8; and PARA 1704. See, however, the text to note 11.
- 5 See the Bills of Sale Act 1878 s 9; and PARA 1755. See, however, PARA 1779.
- 6 See the Bills of Sale Act 1878 s 11; and PARA 1781 et seq.
- 7 See, however, the text to note 12.
- 8 See the Bills of Sale Act 1878 s 10(3); and PARA 1748 et seq.
- 9 See the Bills of Sale Act (1878) Amendment Act 1882 s 8; and PARA 1753.
- 10 As to the statutory form and the requirement that a security bill of sale is to be in accordance with it see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.
- 11 See PARA 1704.
- 12 See PARA 1748 et seq.
- 13 See PARA 1750.

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### **1825. Bill void only against third parties.**

The Bills of Sale Act (1878) Amendment Act 1882 provides that with certain exceptions a security bill of sale<sup>1</sup> is void, except as against the grantor, in respect of chattels which are not specifically described in the schedule<sup>2</sup> or of which the grantor was not the true owner at the time of execution of the bill<sup>3</sup>. However, the inclusion of after-acquired property in the bill usually has the additional effect of preventing the bill from according with the statutory form<sup>4</sup>, thus attracting the stronger provisions of the Bills of Sale Act (1878) Amendment Act 1882 making such a bill wholly void<sup>5</sup>. The true owner may, however, be estopped from disputing that the grantor of a bill was not the owner of the goods when the bill was executed<sup>6</sup>.

- 1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.
- 2 See the Bills of Sale Act (1878) Amendment Act 1882 ss 4, 6; and PARAS 1746-1747.
- 3 See the Bills of Sale Act (1878) Amendment Act 1882 s 5; and PARA 1697 et seq.
- 4 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.
- 5 Bills of Sale Act (1878) Amendment Act 1882 s 9; and see PARAS 1701, 1711.
- 6 See PARA 1698.

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### **1826. Title acquired independently of bill.**

In general, possession taken under a void bill of sale<sup>1</sup> does not improve the grantee's position, nor is the bill of sale any defence to an action against the grantee for seizure of the goods<sup>2</sup>. The grantee may, however, by a subsequent independent bargain or licence acquire an interest in the goods or a right to possess them, and so long as such bargain or licence is not itself adversely affected by the Bills of Sale Acts<sup>3</sup> it can be relied on by the grantee if, at the time it was made or given, no third party had acquired title to the goods; however, no new licence will be inferred merely from the fact that the grantor acquiesces in the exercise by the grantee of his purported right of seizure under the void bill<sup>4</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See PARA 1634.

3 I.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

4 *Furber v Cobb* (1887) 18 QBD 494, CA. If the grantor consents to the appropriation of the proceeds of sale of chattels comprised in a bill of sale, he cannot, nor can those representing him, claim them on the ground that the bill of sale was void: *Parsons v Dewsbury and Clarke* (1887) 3 TLR 354, CA.

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### **1827. Whether parties estopped from disputing validity of bill.**

Since the Bills of Sale Act (1878) Amendment Act 1882 was enacted for the protection of grantors of security bills of sale<sup>1</sup>, a grantor is as a rule entitled to assert that a bill of sale is invalid, or that a document purporting to be an absolute transfer is in truth a security bill within the Bills of Sale Acts<sup>2</sup>, despite his signature of the document and his awareness that it did not truly record the bargain concluded between the parties<sup>3</sup>.

In special circumstances, however, where the grantor has in judicial proceedings asserted or relied on the validity of the bill for his own advantage, he may be estopped from alleging that the bill was invalid, even if it is evident from the facts that such allegation would be well-founded<sup>4</sup>. This principle applies with particular force where the grantor has asserted the validity of the bill to the detriment of third parties<sup>5</sup>. However, the court will not lightly hold a party estopped from invoking a statute designed to protect him<sup>6</sup>.

Whilst the grantor of a bill is, except in the case above mentioned, entitled to place the facts before the court and to adduce evidence of any matters affecting the validity of the bill<sup>7</sup>, the grantee would not seem to be in the same position. The Bills of Sale Acts were not enacted for his protection, and there is no good reason why he should be permitted to dispute the validity

of a document which he has taken for his own protection, particularly where this would involve his attacking the veracity of a document at the falsity of which he himself connived.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 I.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

3 *Polsky v S and A Services, S and A Services v Polsky* [1951] 1 All ER 185 (affd [1951] 1 All ER 1062n, CA); *Madell v Thomas & Co* [1891] 1 QB 230, CA; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, [1964] 1 All ER 300, PC. See also *Hoare v Adam Smith (London) Ltd* [1938] 4 All ER 283 at 286 per du Parcq LJ.

4 *Comitti v Maher* (1905) 94 LT 158; *Roe v Mutual Loan Fund Ltd* (1887) 19 QBD 347, CA, as explained in *Re A Bankruptcy Notice* [1924] 2 Ch 76 at 100, CA, per Atkin LJ; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, [1964] 1 All ER 300, PC. As to estoppel see **ESTOPPEL**.

5 *Comitti v Maher* (1905) 94 LT 158; *Roe v Mutual Loan Fund Ltd* (1887) 19 QBD 347, CA.

6 *Re A Bankruptcy Notice* [1924] 2 Ch 76, CA; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, [1964] 1 All ER 300, PC.

7 See *Polsky v S and A Services, S and A Services v Polsky* [1951] 1 All ER 185 (affd [1951] 1 All ER 1062n, CA); *Madell v Thomas & Co* [1891] 1 QB 230, CA; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, [1964] 1 All ER 300, PC. See also *Hoare v Adam Smith (London) Ltd* [1938] 4 All ER 283 at 286 per du Parcq LJ.

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## **D. AVOIDANCE UNDER THE INSOLVENCY ACT 1986**

### **1828. Rights of trustee in bankruptcy.**

A trustee of the grantor's estate, in addition to any claim under the Bills of Sale Acts<sup>1</sup>, may impeach a bill of sale<sup>2</sup> under general insolvency law<sup>3</sup>. Subject to the provisions of this and any other relevant statute, the trustee stands in the shoes of the bankrupt and has no greater right to avoid a security bill than has the bankrupt himself<sup>4</sup>.

The court will not interfere by injunction with the rights of a grantee in possession on the mere suggestion by the trustee that he may be able to impeach the bill of sale, unless some facts are deposed to, which, if established, would make the bill void<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 I.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

3 See PARA 1829; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 653 et seq. There were numerous decisions on the effect of the grantor's bankruptcy under the Bankruptcy Act 1914, but with the repeal of that Act by the Insolvency Act 1985, itself repealed and re-enacted by the Insolvency Act 1986, which has substantially changed the law, such decisions are no longer relevant.

4 *Re Mapleback, ex p Caldecott* (1876) 4 ChD 150, CA. If the trustee claims the proceeds of a sale by the grantee, he cannot afterwards proceed in conversion: *Smith v Baker* (1873) LR 8 CP 350.

5 *Re Hart, ex p Bayly* (1880) 15 ChD 223, CA.

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### **1829. Avoidance under the Insolvency Act 1986.**

A security bill of sale<sup>1</sup> may be avoided under the Insolvency Act 1986 as a preference<sup>2</sup> or an extortionate credit transaction<sup>3</sup>. It is not, however, susceptible to attack as a transaction at an undervalue, for the grant of security for an existing indebtedness does not reduce the net assets of the grantor<sup>4</sup>, it merely gives the grantee an advantage over other creditors<sup>5</sup>. In consequence it is also outside the statutory provisions relating to transactions in fraud of creditors<sup>6</sup>, which are confined to transactions at an undervalue<sup>7</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Ie* under the Insolvency Act 1986 ss 340-342: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 657-661.

3 *Ie* under the Insolvency Act 1986 s 343: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 672-675.

4 Since enforcement of the security pro tanto discharges the debt, the debtor's net asset position is unchanged.

5 *Re MC Bacon Ltd* [1990] BCLC 324, [1990] BCC 78.

6 *Ie* under the Insolvency Act 1986 ss 423-425: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 664-667.

7 See the Insolvency Act 1986 s 423(1); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 664.

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### **1830. Payments under void bill.**

Where the grantee of a bill of sale<sup>1</sup>, void against a trustee in bankruptcy, has in good faith<sup>2</sup> made payments which have relieved the estate, then, whilst such payments do not cure the invalidity of the bill, the trustee's rights to the goods comprised in it will be subjected to a charge in favour of the grantee to secure recoupment to him of the payments so made<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Re Townsend, ex p Hall* (1880) 14 ChD 132, CA.

3 *Re James, ex p Harris* (1874) LR 19 Eq 253 (discharge of prior valid bills of sale); *Re Cole, ex p Mutton* (1872) LR 14 Eq 178 (paying out executions); *Re Ayshford, ex p Lovering* (1887) 35 WR 652 (paying out distress).

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## **(xvi) Variation**

### **1831. Mode of variation.**

When a security bill of sale<sup>1</sup> is given and subsequently, by independent agreement, the parties agree to vary the terms of the bill, such an agreement is not a defeasance, condition or declaration of trust requiring registration as part of the original bill<sup>2</sup>. However, the policy of the Bills of Sale Acts<sup>3</sup> is to ensure that a document giving security over chattels is in accordance with the statutory form<sup>4</sup> and is duly registered so that third parties can inspect the document and make extracts from it. The purpose of the Bills of Sale Acts would be largely frustrated if, after registration of a bill, the parties were to be free to vary it in any way they thought fit by an unregistered document.

It would therefore appear that any document embodying variations of a kind that would, if the document had been executed at the time of the bill, have made the document registrable with the bill as a defeasance, condition or declaration of trust<sup>5</sup>, must itself be registered as a security bill of sale within the Bills of Sale Acts and be in accordance with the statutory form. There seems no reason why the later document should not recite that it is made by way of variation of the existing bill, although being itself a new bill the document must comply with all the requirements of the Bills of Sale Acts. In particular it must state the consideration for which it is given, which must not be less than £30<sup>6</sup>, and, unless given for the purpose of correcting some material error in the original bill, it must not be given within seven days after execution of the original bill, if the latter is unregistered<sup>7</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Lester v Hickling* [1916] 2 KB 302; *Cornell v May* (1915) 112 LT 1085 at 1087; and see PARA 1748 et seq. As to registration see PARA 1754 et seq.

3 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

4 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.

5 See PARA 1748 et seq.

6 See the Bills of Sale Act (1878) Amendment Act 1882 s 12; and PARA 1703.

7 See the Bills of Sale Act 1878 s 9; and PARA 1755.

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## (xvii) Transfer

### 1832. Registration unnecessary.

A transfer or assignment of a registered bill of sale<sup>1</sup> need not be registered<sup>2</sup>, nor is renewal of registration necessary by reason only of a transfer or assignment of a bill of sale<sup>3</sup>.

A memorandum of charge by the transferee of a bill of sale, given by way of sub-mortgage and accompanied by a deposit of the bill of sale and transfer, need not be registered, even though the transferee afterwards acquires the grantor's equity of redemption<sup>4</sup>.

If both grantor and grantee join in transferring a bill of sale on which a balance remains due, a further advance being made to the grantor by the transferee on different terms, but so that the amount secured at any time does not exceed the amount of the original loan with interest thereon, the transfer need not be registered, at all events to the extent of the balance remaining due on the original bill of sale<sup>5</sup>. However, if there is an increase in the amount secured, the transfer amounts to a new bill of sale and must be registered as such<sup>6</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act 1878 s 10. As to registration see PARA 1781 et seq.

3 Bills of Sale Act 1878 s 11. As to renewal PARA 1781 et seq.

4 *Re Parker, ex p Turquand* (1885) 14 QBD 636, CA.

5 *Horne v Hughes* (1881) 6 QBD 676, CA.

6 *Marshall and Snelgrove Ltd v Gower* [1923] 1 KB 356. Cf *Cornell v May* (1915) 112 LT 1085, where it was held that the original bill no longer expressed the true meaning and intent of the parties.

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### 1833. Position of transferee.

A transferee of a security bill of sale<sup>1</sup> stands in no better position than the transferor<sup>2</sup>, and, if he permits the period of renewal to elapse, the transferred bill will cease to be effective as regards the chattels comprised in it<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 The principle is established in *Re Walden, ex p Odell* (1878) 10 ChD 76, CA; *Chapman v Knight* (1880) 5 CPD 308 (though as the law then stood these cases were probably wrongly decided: see PARA 1634 note 5). There is no provision in the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630) protecting a bona fide assignee for value without notice of the contravention.

3 See the Bills of Sale Act 1878 s 11; and the Bills of Sale Act (1878) Amendment Act 1882 s 8. The decision in *Karet v Kosher Meat Supply Association* (1877) 2 QBD 361 is sometimes cited in support of this proposition, but needs reconsideration in the light of later cases: see PARA 1634 note 5.

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## **(xviii) Discharge**

### **1834. Modes of discharge.**

A security bill of sale<sup>1</sup> may be discharged:

- 211 (1) by redemption<sup>2</sup>;
- 212 (2) by cancellation under a subsequent bill of sale or other agreement<sup>3</sup>;
- 213 (3) by release of the debt or security<sup>4</sup>; or
- 214 (4) in any other manner by which a mortgage of personal property may be satisfied<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See PARA 1796.

3 See PARA 1835.

4 See **MORTGAGE** vol 77 (2010) PARA 690.

5 See **MORTGAGE** vol 77 (2010) PARA 643 et seq. As to the circumstances in which a bill of sale may be avoided at common law or by statute see PARA 1818 et seq. As to entering up satisfaction of a discharged bill see PARA 1836.

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### **1835. Subsequent bill of sale.**

A security bill of sale<sup>1</sup> may be cancelled by another bill relating to the same goods, either by express provision in the later bill or by implication<sup>2</sup>. Where, however, the later bill is taken within seven days of the earlier bill, it will be void unless given for the purpose of correcting some material error in the prior bill and not for the purpose of evading the Bills of Sale Act 1878<sup>3</sup>, and will thus not be effective by itself to cancel the earlier bill.

If the later bill is taken for the purpose of correcting some supposed defect in the first bill when in fact the first bill is valid, the later bill, being intended to operate only in the event of the invalidity of the prior bill, will not be effective to cancel the prior bill<sup>4</sup>. Again, if the second bill is taken in substitution for the first bill under a mistake of fact which leads the grantee to believe that the second bill is valid whereas in truth it is void, as where the grantee is unaware that since execution of the first bill and before the giving of the second bill the grantor had become bankrupt, the prior bill will remain operative<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Bresnovich v Levison* (1889) 87 LT Jo 37, DC.

3 See the Bills of Sale Act 1878 s 9; and PARA 1755.

4 *Cooper v Zeffert* (1883) 32 WR 402, CA.

5 *Re Bagen, ex p Hasluck* [1894] 1 QB 444.

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### **1836. Entering up satisfaction.**

Where the debt secured by a bill of sale<sup>1</sup> has been satisfied or discharged, the registrar may order a memorandum of satisfaction to be written upon any registered copy of the bill<sup>2</sup>. Where a consent to the satisfaction of the bill signed by the person entitled to the benefit of the bill can be obtained, application for leave to enter up satisfaction may be made without notice by affidavit or witness statement<sup>3</sup>. The application will normally be dealt with without a hearing. Where consent cannot be obtained, an order for writing a memorandum of satisfaction must be applied for by claim form<sup>4</sup>, which must be served on the person entitled to the benefit of the bill and must be supported by evidence that the debt (if any) for which the bill of sale was made has been satisfied or discharged<sup>5</sup>.

Where there has been local registration of a bill of sale, a notice of entering up satisfaction in the prescribed form<sup>6</sup> must be transmitted to every district judge to whom a copy of such bill of sale was transmitted under the Bills of Sale Act (1878) Amendment Act 1882<sup>7</sup>, and the district judge must annex the notice to the copy of the bill of sale to which it relates and add to the entry in the index relating to the bill of sale a note that it has been satisfied<sup>8</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act 1878 s 15. As to the registrar see PARA 1758 note 5.

3 See CPR Sch 1 RSC Ord 95 r 2; *Practice Direction--Bills of Sale* PD 95. A fee of £10 is payable: Civil Proceedings Fees Order 2004, SI 2004/3121, art 2, Sch 1 Fee 9.1 (Sch 1 substituted by SI 2005/3445).

4 See in accordance with CPR Pt 8. The fee on issue of the claim form starts at £400: see the Civil Proceedings Fees Order 2004, SI 2004/3121, Sch 1 Fee 1.1 (Sch 1 substituted by SI 2005/3445).

5 CPR Sch 1 RSC Ord 95 r 2; *Practice Direction--Bills of Sale* PD 95. Where necessary Form PF184QB (see *Practice Direction--Forms* PD 4 PARA 4) may be included in the claim form.

6 As to the prescribed form see the Bills of Sale (Local Registration) Rules 1960, SI 1960/2326, r 4, Schedule (rr 4, 7, Schedule amended by virtue of the Courts and Legal Services Act 1990 s 74(1)(a), (3)).

7 Bills of Sale (Local Registration) Rules 1960, SI 1960/2326, r 4 (as amended: see note 6). The statutory provisions refer to the 'county court registrar' but that office was restyled 'district judge' by the Courts and Legal Services Act 1990 s 74(1): see the text to note 8. As to the transmission of copies of bills of sale for local registration see the Bills of Sale Act (1878) Amendment Act 1882 s 11; and PARA 1776.

8 Bills of Sale (Local Registration) Rules 1960, SI 1960/2326, r 7 (as amended: see note 6).

**UPDATE****1836 Entering up satisfaction**

NOTES 3, 4--SI 2004/3121 replaced: Civil Proceedings Fees Order 2008, SI 2008/1053 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 87).

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**1837. Effect of satisfaction.**

Satisfaction of a bill of sale<sup>1</sup> brings its operation to an end without the need for any reassignment and whether or not satisfaction has been entered, and a bill of sale which has been paid off cannot be set up against an execution creditor even though satisfaction has not been entered<sup>2</sup>. A grantee may, on payment under the bill being completed, be ordered to give up his bill of sale<sup>3</sup>, and cannot stipulate that it shall remain in his possession after payment<sup>4</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 *Waterton v Baker* (1868) 17 LT 494.

3 *Ex p Wickens* [1898] 1 QB 543, CA.

4 *Watson v Strickland* (1887) 19 QBD 391, CA, where it was held that such a stipulation in the bill rendered it void as not in accordance with the statutory form. As to the statutory form see PARA 1711 et seq.

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**(4) ABSOLUTE BILLS OF SALE****(i) General Effect of the Bills of Sales Acts****1838. Nature of absolute bill of sale.**

An absolute bill of sale<sup>1</sup>, for the purposes of the Bills of Sale Acts<sup>2</sup>, is a bill of sale given otherwise than by way of security for the payment of money<sup>3</sup>. Absolute bills, whether given as an outright transfer or as security for performance of a non-monetary obligation, are outside the application of the Bills of Sale Act (1878) Amendment Act 1882 and are governed only by the Bills of Sale Act 1878<sup>4</sup>. An absolute bill of sale given by a company is outside the Bills of Sale Acts altogether<sup>5</sup>, even though the bill of sale is one which falls outside the registration provisions for companies<sup>6</sup>.

- 1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.
- 2 Ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.
- 3 Cf the Bills of Sale Act (1878) Amendment Act 1882 s 3.
- 4 Bills of Sale Act (1878) Amendment Act 1882 s 3. In addition to being governed by the Bills of Sale Act 1878, absolute bills given to secure non-monetary obligations will also be regulated by general principles of mortgage law affecting personal property. Bills of sale of this kind are rare, most absolute bills being by way of outright transfer not securing any obligation, a fact which is assumed in PARA 1840 et seq. Very few absolute bills are registered, as in most cases the transferee takes immediate possession, so that registration is unnecessary. An absolute bill of sale will usually be used only for transactions where it is felt necessary or convenient that the transferor should retain possession for a period, or for transactions where the delivery of possession may otherwise be difficult to prove, as in the case of goods in common establishment: see PARA 1852.
- 5 See *NV Slavenburg's Bank v Intercontinental Natural Resources Ltd* [1980] 1 All ER 955, [1980] 1 WLR 1076. That case was concerned with a security bill of sale but the principle applies generally to bills of sale by companies.
- 6 See *NV Slavenburg's Bank v Intercontinental Natural Resources Ltd* [1980] 1 All ER 955, [1980] 1 WLR 1076. The registration provisions of the Companies Act 1985 (ie ss 395, 396 (prospectively repealed) (as to replacement provisions see the Companies Act 2006 ss 860, 861, 870, 874): see PARA 1684 note 1; and **COMPANIES** vol 15 (2009) PARA 1279) are confined to charges and therefore do not cover absolute bills of sale.

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### **1839. Differences in statutory treatment of absolute and security bills.**

The differences between the statutory treatment of absolute bills of sale and security bills of sale are as follows<sup>1</sup>.

- 215 (1) An absolute bill does not have to be in any particular form, while a security bill is required to be in accordance with the statutory form<sup>2</sup>.
- 216 (2) An absolute bill must be attested by a solicitor and the attestation must state that before the execution of the bill the effect of it was explained to the grantor by the attesting witness<sup>3</sup>. A security bill may be attested by any credible witness who is not a party to the bill, and the attestation clause need contain no reference to any explanation given to the grantor<sup>4</sup>.
- 217 (3) The various restrictions imposed by the Bills of Sale Act (1878) Amendment Act 1882 on the permissible terms of a security bill<sup>5</sup> do not apply to an absolute bill.
- 218 (4) In the case of an absolute bill, there is no special time limit for registration where the bill is executed out of England<sup>6</sup>.
- 219 (5) Local registration, which is mandatory for security bills<sup>7</sup>, is not prescribed for absolute bills<sup>8</sup>.
- 220 (6) Whilst infringement of certain provisions of the Bills of Sale Acts<sup>9</sup> will render a security bill of sale totally void<sup>10</sup>, contravention of the Bills of Sale Act 1878 never wholly vitiates an absolute bill but merely renders it liable to avoidance against certain classes of third party in circumstances detailed in that Act<sup>11</sup>.
- 221 (7) Priorities between holders of conflicting bills vary according to whether one or other of the bills is an absolute or a security bill<sup>12</sup>.

- 222 (8) The statutory provisions as to satisfaction of bills are appropriate only in relation to security bills<sup>13</sup>.
- 223 (9) An absolute bill, unlike a security bill<sup>14</sup>, gives protection against distress for taxes due from the grantor<sup>15</sup>.
- 224 (10) A hirer or buyer holding a motor vehicle on hire-purchase or conditional sale can pass a good title to a bona fide private purchaser under an absolute bill of sale not given by way of mortgage<sup>16</sup>, whereas the grant of a security bill will not be effective for this purpose<sup>17</sup>.

Except as indicated above, the discussion of the statutory provisions contained in the Bills of Sale Act 1878 affecting security bills of sale applies equally to absolute bills<sup>18</sup>.

- 1 As to security bills of sale see PARA 1674 et seq. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.
- 2 As to the statutory form see the Bills of Sale Act (1878) Amendment Act 1882 s 9, Schedule; and PARA 1711 et seq.
- 3 See the Bills of Sale Act 1878 s 10(1); and PARA 1842.
- 4 See the Bills of Sale Act (1878) Amendment Act 1882 s 10; and PARA 1753.
- 5 See PARAS 1711, 1716 et seq.
- 6 See PARAS 1759, 1844.
- 7 See the Bills of Sale Act (1878) Amendment Act 1882 s 11; and PARA 1776.
- 8 See, however, PARA 1846.
- 9 See the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.
- 10 See PARA 1822 et seq.
- 11 See PARA 1847 et seq.
- 12 See PARA 1800.
- 13 See PARAS 1836-1837.
- 14 See PARA 1808.
- 15 The Bills of Sale Act (1878) Amendment Act 1882 s 14 only applies to security bills: see s 3.
- 16 See the Hire-Purchase Act 1964 ss 27-29; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 55-57.
- 17 This is because 'disposition', for the purpose of the Hire-Purchase Act 1964 Pt III (ss 27-29), does not include a mortgage: see s 29(1); and **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 55.
- 18 See also PARA 1847 note 2.

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#### **1840. Effect of valid absolute bill.**

Even without registration an absolute bill of sale<sup>1</sup>, which divests the grantor of his title to the goods, is generally effective against all third parties<sup>2</sup> except those designated by the Bills of Sale Act 1878<sup>3</sup>. Registration makes the bill effective even as against those designated persons. However, the grantee of an absolute bill given as part of a sale transaction<sup>4</sup> does not have complete protection because, if the grantor, remaining in possession of the goods, delivers them under a sale, pledge or other disposition to a person receiving the goods in good faith and without notice of the bill of sale, that person acquires title<sup>5</sup>. The same applies at common law if the grantee of the bill has allowed the grantor to hold himself out as the true owner or as authorised to dispose of the goods<sup>6</sup>. In all these cases the grantee of the bill loses title, and he is not protected even by registration of the bill, since, quite apart from any holding out that would estop him from disputing the grantor's right of disposal, the doctrine of constructive notice by registration is not applicable in regard to chattels or commercial transactions, so that the transferee is not fixed with notice of the bill merely by reason of registration<sup>7</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Ie other than the grantee of another absolute bill, since priority is then governed by the date of registration under the Bills of Sale Act 1878 s 10: see PARA 1801.

3 Ie those designated in the Bills of Sale Act 1878 s 8: see PARA 1849.

4 The Sale of Goods Act 1979 s 24 (see note 5) applies only to a seller remaining in possession.

5 See the Factors Act 1889 s 8; the Sale of Goods Act 1979 s 24; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 157. However, it seems that if the disposition to the third party is itself effected by a bill of sale, those provisions are displaced by the Bills of Sale Act 1878 s 10: see PARA 1801 note 8.

6 *National Mercantile Bank v Hampson* (1880) 5 QBD 177, DC.

7 *Joseph v Lyons* (1884) 15 QBD 280 at 286, CA, per Cotton LJ.

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## **(ii) Form, Contents and Attestation**

### **1841. Requirements as to form and content.**

An absolute bill of sale<sup>1</sup>, unlike a security bill<sup>2</sup>, is not required to be in accordance with any particular form, save that it must set forth the consideration for which it is given<sup>3</sup>, must contain or have annexed to it any defeasance, condition or declaration of trust subject to which it is given<sup>4</sup> and must be attested in accordance with the requirements of the Bills of Sale Act 1878<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See PARA 1711 et seq.

3 See the Bills of Sale Act 1878 s 8; and PARA 1704. There would seem to be no reason why the bill should not express the transfer as being by way of gift, in consideration of natural love and affection, or as the case may be.

4 See the Bills of Sale Act 1878 s 10(3); and PARA 1748 et seq.

5 See PARA 1842.

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## **1842. Attestation requirements.**

An absolute bill of sale<sup>1</sup> must be attested by a solicitor of the Supreme Court, and the attestation must state that, before the execution of the bill of sale, its effect has been explained to the grantor by the attesting solicitor<sup>2</sup>, otherwise the bill will be void to the extent, and against the persons, specified in the Bills of Sale Act 1878<sup>3</sup>, though remaining valid as between the parties<sup>4</sup>.

Although the attestation must state that an explanation of the bill has been given, it is not a requirement of the Bills of Sale Act 1878 that an explanation should be given<sup>5</sup>. The affidavit filed on registration need not verify the fact of explanation<sup>6</sup>.

An absolute bill may be attested by the solicitor for both parties<sup>7</sup>, or by the grantee's solicitor<sup>8</sup> or his managing clerk if a solicitor, even though not practising on his own account<sup>9</sup>. However, a solicitor who is party to the bill of sale cannot attest it<sup>10</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 Bills of Sale Act 1878 s 10(1). As from a day to be appointed, the reference to the Supreme Court is replaced by a reference to the Senior Courts: s 10(1) (prospectively amended by the Constitutional Reform Act 2005 Sch 11 Pt 2 para 4(1), (3)). At the date at which this volume states the law no such day had been appointed.

This provision, by virtue of the Bills of Sale Act (1878) Amendment Act 1882 s 3, is not repealed by s 10 as regards bills of sale given otherwise than by way of security: *Casson v Churchley* (1884) 53 LJQB 335. Cf *Swift v Pannell* (1883) 24 ChD 210. This makes it difficult to apply to an absolute bill the reasoning in *Furnivall v Hudson* [1893] 1 Ch 335, that the grantor of a security bill may execute the bill by his attorney, there being no requirement that the effect of a security bill be explained to the grantor.

3 See the Bills of Sale Act 1878 s 8; and PARA 1849.

4 *Davis v Goodman* (1880) 5 CPD 128, CA.

5 *Re Haynes, ex p National Mercantile Bank* (1880) 15 ChD 42, CA.

6 *Re Roper, ex p Bolland* (1882) 21 ChD 543, CA.

7 *Vernon v Cooke* (1880) 49 LJQB 767, CA.

8 *Penwarden v Roberts, Wilson v Roberts, Heath v Roberts* (1882) 9 QBD 137, DC.

9 *Hill v Kirkwood* (1880) 42 LT 105, CA.

10 *Seal v Claridge* (1881) 7 QBD 516, CA.

## **UPDATE**

### **1842 Attestation requirements**

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.



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### **1843. Affidavit of attestation.**

An affidavit proving due attestation must be filed on registration<sup>1</sup>. It is not enough to verify the handwriting of the attesting solicitor; the affidavit must depose to the fact that the solicitor whose name appears as the attesting witness was present when the bill of sale<sup>2</sup> was executed by the grantor<sup>3</sup>. It will be sufficient if it can be inferred from the whole affidavit that the solicitor did in fact attest the bill although this is not expressly stated<sup>4</sup>.

1 Bills of Sale Act 1878 s 10(2). For the form of affidavit see Form PF180QB; and *Practice Direction--Forms* PD 4 PARA 4.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 *Ford v Kettle* (1882) 9 QBD 139, CA; *Sharpe v Birch* (1881) 8 QBD 111; *Re Moulson, ex p Knightly* (1882) 51 LJCh 823.

4 *Yates v Ashcroft* (1882) 47 LT 337, DC; *Cooper v Zeffert* (1883) 32 WR 402, CA.

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### **(iii) Registration**

#### **1844. Time limit for registration.**

An absolute bill of sale<sup>1</sup> must be registered within seven clear days<sup>2</sup> after it is made or given<sup>3</sup>. No extension of time is provided for bills executed out of England, as is prescribed for security bills<sup>4</sup>, though the court has a general power to extend the time for registration where failure to register within the time permitted was accidental or due to inadvertence<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the computation of such periods see **TIME** vol 97 (2010) PARA 329 et seq. When the time for registration expires on a Sunday or other day on which the registrar's office is closed, the registration is valid if made on the next following day on which the office is open: Bills of Sale Act 1878 s 22. Hence a bill made on a Saturday may be registered at any time up to and including the second Monday afterwards. Weekends and public holidays are not, however, otherwise excluded from the computation of the seven days. Power is given to extend the time for registration in certain cases: see s 14; and PARA 1779 et seq. As to the registrar see PARA 1758 note 5.

3 Bills of Sale Act 1878 ss 8, 10(2).

4 See PARA 1759.

5 See PARAS 1779-1780.

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### **1845. Mode of registration.**

The method of registration of an absolute bill of sale is the same as for a security bill<sup>1</sup>. The bill cannot be registered unless the original is produced to the Central Office of the High Court<sup>2</sup>, but, where the bill cannot be immediately stamped because it requires adjudication, it is the practice of that department to proceed with registration against a solicitor's undertaking to produce the original after adjudication<sup>3</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq. As to the registration of security bills see PARA 1758.

2 As to the enrolment of deeds and other documents see **CIVIL PROCEDURE** vol 11 (2009) PARA 86.

3 There is no specified form of undertaking; an ordinary letter suffices.

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### **1846. Local registration.**

The Bills of Sale Acts<sup>1</sup> do not prescribe local registration of absolute bills of sale<sup>2</sup>, but it is the practice of the Central Office of the High Court to transmit copies of absolute bills for local registration in the same circumstances as for security bills<sup>3</sup>, and additional copies should therefore be lodged<sup>4</sup> for that purpose, where requisite. However, registration will not be refused merely because these are not provided.

1 I.e. the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882: see PARA 1630.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 See PARA 1776 et seq.

4 As to the enrolment of deeds and other documents see **CIVIL PROCEDURE** vol 11 (2009) PARA 86.

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## (iv) Avoidance

### 1847. Grounds for avoidance.

An absolute bill of sale<sup>1</sup> is not wholly avoided for any contravention of the Bills of Sale Act 1878, but may be rendered void to the extent thereby prescribed<sup>2</sup> where:

- 225 (1) it contravenes the provisions as to successive bills<sup>3</sup>;
- 226 (2) it fails to set forth the consideration for which it is given<sup>4</sup>; or
- 227 (3) the requirements of the Bills of Sale Act 1878 as to attestation and registration<sup>5</sup> are not observed.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 See PARA 1848. An absolute bill may also be avoided under the Insolvency Act 1986 ss 339, 340, 423: see PARA 1829; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 657-661, 664-667. Unlike a security bill an absolute bill is capable of constituting a transaction at an undervalue.

3 See the Bills of Sale Act 1878 s 9; and PARAS 1755, 1848.

4 See the Bills of Sale Act 1878 s 8; and PARAS 1704, 1848.

5 See the Bills of Sale Act 1878 s 10; and PARAS 1842, 1844, 1848.

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### 1848. Extent of avoidance.

An absolute bill of sale<sup>1</sup> which, in contravention of the provisions of the Bills of Sale Act 1878, is given within seven days of a prior unregistered bill, is void to the extent to which it is a security for the same debt or part thereof and so far as respects the personal chattels<sup>2</sup> or part thereof comprised in the prior bill<sup>3</sup>. Failure to set forth the consideration for which the bill is given, or to have the bill attested and registered in accordance with the Bills of Sale Act 1878, renders the bill void as against the persons<sup>4</sup> and in the circumstances<sup>5</sup> set out in that Act.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the meaning of 'personal chattels' see PARA 1662 et seq.

3 See the Bills of Sale Act 1878 s 9; and PARA 1755.

4 See PARA 1849.

5 See PARA 1850.

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5TH EDITION, PARAS 1620-2586)/7. **BILLS OF SALE/(4) ABSOLUTE BILLS OF SALE/(iv) Avoidance/1849. Persons against whom bill avoided.**

### **1849. Persons against whom bill avoided.**

An absolute bill of sale<sup>1</sup> in which the consideration is not stated or which is not attested and registered in conformity with the Bills of Sale Act 1878 is avoided against trustees or assignees in the grantor's bankruptcy or liquidation<sup>2</sup>, trustees or assignees under any assignment for the benefit of his creditors<sup>3</sup>, sheriffs' officers, and other persons seizing chattels under execution against the grantor; and every person on whose behalf that process of execution has been issued<sup>4</sup>. The bill is not avoided against the grantor or any persons other than those mentioned above<sup>5</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 'Trustees' includes the Official Receiver when acting as trustee of the bankrupt's estate (Insolvency Act 1986 s 293(3)) but not, it is thought, when acting as interim receiver under s 286 or as receiver and manager under s 370 prior to his being appointed as trustee or the appointment of an outside trustee. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 233.

3 Such an assignment, if made otherwise than in bankruptcy proceedings, is regulated by the Deeds of Arrangement Act 1914: see generally **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 860 et seq.

4 Bills of Sale Act 1878 s 8; and see *Robinson v Tucker* (1883) Cab & El 173. As to the circumstances in which a bill will be avoided against such persons see PARA 1850.

5 Eg the liquidator of a company (see note 2); and unsecured creditors of an insolvent estate (*Re Count D'Epineuil, Tadman v D'Epineuil* (1882) 20 ChD 217).

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### **1850. Circumstances in which bill avoided.**

An absolute bill of sale<sup>1</sup> is only avoided<sup>2</sup> so far as regards the property in, or the right to possession of, any chattels comprised in such bill of sale, which at or after the time of the filing of a petition for bankruptcy or liquidation, or of the execution of any assignment for the benefit of creditors, or of the execution of process of any court authorising the seizure of the chattels, as the case may be, and after the expiration of the seven days from execution of the bill of sale allowed for its registration, are in the possession or apparent possession of the grantor<sup>3</sup>. During the seven days allowed for registration, an absolute bill, if otherwise valid, is not avoided by the occurrence of the events mentioned above, although the grantor remains in uncontrolled possession of the chattels comprised therein<sup>4</sup>. If before the occurrence of any of those events the grantee takes and holds actual possession, registration is unnecessary<sup>5</sup>. However, if the grantor remains in apparent possession after the seven days have expired and the bill of sale is unregistered, it is avoided by a current execution of the process of the court, even if this was initiated within the seven days<sup>6</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 le against the persons mentioned in PARA 1849.

3 Bills of Sale Act 1878 s 8.

4 See PARA 1759.

5 *Marples v Hartley* (1861) 3 E & E 610.

6 See PARA 1759.

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### **1851. Apparent possession.**

The rule as to apparent possession now only affects bills of sale<sup>1</sup> to which the Bills of Sale Act (1878) Amendment Act 1882 does not apply. For the purpose of the Bills of Sale Act 1878, personal chattels<sup>2</sup> are deemed to be in the apparent possession of the grantor of a bill so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him<sup>3</sup>, or are used and enjoyed by him in any place whatever<sup>4</sup>, notwithstanding that formal possession of them may have been taken by or given to any other person<sup>5</sup>.

Chattels not in the possession of the grantor but held for him by a bailee may remain in his apparent possession<sup>6</sup>, though it is otherwise in the case of goods held under a pledge or lien<sup>7</sup>.

Chattels may still be in the grantor's apparent possession although a demand of possession or threat to take forcible possession has been made by the grantee<sup>8</sup>.

1 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

2 As to the meaning of 'personal chattels' see PARA 1662 et seq.

3 This means de facto occupation in the ordinary sense of the term: see *Robinson v Briggs* (1870) LR 6 Exch 1 (where the tenant of the rooms in which the goods were placed resided elsewhere and, having given up the keys to the grantee, was held not to be in occupation). Moreover, occupation means sole occupation. Goods are not in the apparent possession of the grantor merely because they are in premises of which he shares the occupation with another: *Koppel v Koppel* [1966] 2 All ER 187 at 195, [1966] 1 WLR 802 at 813, CA, per Diplock LJ; *French v Gething* [1922] 1 KB 236, CA. See also PARA 1852.

4 Chattels are not 'used and enjoyed' by the grantor where they have been let to a third person, together with the house (*Re Westray, ex p Morrison* (1880) 42 LT 158, where part of the rent was payable to the grantee), or where use and enjoyment is shared with another (see *Koppel v Koppel* [1966] 2 All ER 187 at 195, [1966] 1 WLR 802 at 813, CA, per Diplock LJ; and PARA 1852).

5 Bills of Sale Act 1878 s 4.

6 *Ancona v Rogers* (1876) 1 ExD 285, CA; *Re Wood, ex p Newsham* (1879) 40 LT 104 (where goods in the hands of the police, included by the grantor in a bill of sale, were held to be in his apparent possession). As to bailment generally see **BAILMENT**.

7 *Lincoln Waggon and Engine Co v Mumford* (1879) 41 LT 655; and see **LIEN**.

8 *Ancona v Rogers* (1876) 1 ExD 285, CA.

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### **1852. Chattels in common establishment.**

When two persons are together in the enjoyment of chattels, the law refers possession to the one who has the legal title<sup>1</sup>. Thus, if a husband settles on his wife, or sells to her, the furniture and effects of the matrimonial home, the chattels in question are thereafter, in general, deemed to be in her possession and not in the possession or apparent possession of her husband, and the transaction cannot be impeached on the ground that the document of transfer was not registered as a bill of sale<sup>2</sup>. The principle applies not merely between husband and wife but generally between persons sharing a common establishment<sup>3</sup>, though not as between master and servant<sup>4</sup>. However, for the principle to be successfully invoked it must be shown that all necessary steps have been taken to transfer the legal title from the grantor to the person sharing the enjoyment of the chattels and in whose possession they are claimed to be<sup>5</sup>.

1 *Koppel v Koppel* [1966] 2 All ER 187, [1966] 1 WLR 802, CA; *Ramsay v Margrett* [1894] 2 QB 18, CA; *French v Gething* [1922] 1 KB 236, CA; *Youngs v Youngs* [1940] 1 KB 760, CA.

2 *French v Gething* [1922] 1 KB 236, CA; *Re Satterthwaite, ex p Trustee* (1895) 2 Mans 52; *Shepherd v Pulbrook* (1888) 59 LT 288, CA. As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 *Antoniadi v Smith* [1901] 2 KB 589, CA (son-in-law and mother-in-law); *French v Gething* [1922] 1 KB 236 at 247, CA, per Atkin LJ; *Youngs v Youngs* [1940] 1 KB 760 at 769-770, CA, per Goddard LJ; *Koppel v Koppel* [1966] 2 All ER 187, [1966] 1 WLR 802, CA (married man and housekeeper, where latter held to be living in house not as an ordinary paid domestic servant but as a person sharing a common establishment with the married man). It seems clear from the last two cases that the principle applies as between a man and his mistress.

4 *Youngs v Youngs* [1940] 1 KB 760, CA.

5 See *Re Cole (a bankrupt), ex p Trustee of Property of Bankrupt* [1964] Ch 175, [1963] 3 All ER 433; *Re Kirkland* (1964) 108 Sol Jo 197, CA; and PARA 1622.

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### **1853. Termination of apparent possession.**

To terminate the grantor's apparent possession there must be more than formal possession on the part of another<sup>1</sup>. Something must be done which in the eyes of everybody who sees the goods, or is concerned in the matter, plainly takes the goods out of the possession or apparent possession of the grantor. Where possession is taken merely to prevent removal of the goods, these continuing to be used by the grantor or everything proceeding as it did before, the goods remain in his apparent possession<sup>2</sup>. However, if the grantee has taken actual possession, even though it be wrongful<sup>3</sup>, and the goods no longer appear to be in the possession of the grantor, the Bills of Sale Act 1878 does not apply, even though the goods remain on premises occupied

by the grantor<sup>4</sup>. Chattels of which the sheriff has taken and holds actual possession under an execution do not remain in the grantor's apparent possession<sup>5</sup>.

1 *Gough v Everard* (1863) 2 H & C 1. See also *Sales Agency Ltd v Elite Theatres* [1917] 2 KB 164, CA.

2 *Re Blenkhorn, ex p Jay* (1874) 9 Ch App 697. For other instances of formal possession being insufficient see *Re Vining, ex p Hooman* (1870) LR 10 Eq 63; *Seal v Claridge* (1881) 7 QBD 516, CA (where, though possession was taken, the grantor retained the key of the premises and used them as he pleased); *Pickard v Marriage* (1876) 1 ExD 364 (where the grantor resided on the premises as servant to the grantee and used the goods as part salary for managing the business); *Youngs v Youngs* [1940] 1 KB 760, CA (where the grantee was a domestic servant and the grantor was her employer residing on the premises and using the goods); *Re Henderson, ex p Lewis* (1871) 6 Ch App 626 (where possession was taken and a sale announced, not stated to be under the bill of sale); *Ancona v Rogers* (1876) 1 ExD 285, CA (where there were threats to seize but the grantor remained in possession).

3 *Re Henley, ex p Fletcher* (1877) 5 ChD 809, CA.

4 *Smith v Wall* (1868) 18 LT 182. For other cases in which real possession terminated apparent possession see *Davies v Jones* (1862) 7 LT 130 (where possession was taken and the business conducted by the grantee); *Gibbons v Hickson* (1885) 55 LJQB 119 (where on sale of a business the name was altered and the creditors were informed, though the vendor continued to conduct the business); *Robinson v Briggs* (1870) LR 6 Exch 1 (where the goods were in the grantor's rooms but the key was handed to the grantee); *Re Westray, ex p Morrison* (1880) 42 LT 158 (where the goods were let by the grantor, the grantee receiving part of the rent); *Emanuel v Bridger* (1874) LR 9 QB 286; *Re Blenkhorn, ex p Jay* (1874) 9 Ch App 697 (where the grantee had commenced to remove and pack the goods into vans); *Antoniadi v Smith* [1901] 2 KB 589, CA (where the buyer of goods used them as his own, though living in the same house as the seller).

5 *Re Brenner, ex p Saffery* (1881) 16 ChD 668, CA; *Re Eales, ex p Steel* (1905) 54 WR 202. Cf *Taylor v Eckersley* (1877) 5 ChD 740 (possession of receiver appointed by the court takes goods out of the order and disposition of bankrupt; but the order or disposition clause in bankruptcy legislation disappeared with the repeal of the Bankruptcy Act 1914 by the Insolvency Act 1985). See, however, *Sales Agency Ltd v Elite Theatres* [1917] 2 KB 164, CA.

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## **(5) GENERAL ASSIGNMENT OF BOOK DEBTS**

### **1854. Necessity for registration.**

Debts and other choses in action are outside the definition of 'personal chattels' for the purpose of the Bills of Sale Acts<sup>1</sup>, so that an assignment of debts is not a bill of sale<sup>2</sup> and is not in general registrable. However, where a person engaged in any business makes a general assignment to another person of his existing or future book debts, or any class of them, and is subsequently adjudged bankrupt, the assignment is void against the trustee of his estate as regards any book debts which were not paid before the presentation of the bankruptcy petition, unless the assignment has been registered under the Bills of Sale Act 1878<sup>3</sup>. The term 'assignment' includes an assignment by way of security or charge on book debts<sup>4</sup> but 'general assignment' does not include an assignment of book debts due at the date of the assignment from specified debtors or of debts becoming due under specified contracts, or any assignment of book debts included either in a transfer of business made in good faith and for value, or in an assignment of assets for the benefit of creditors generally<sup>5</sup>.

This provision, being confined to the eventuality of bankruptcy, does not apply to general assignments made by a company<sup>6</sup>.

1 See the Bills of Sale Act 1878 s 4; and PARA 1662 et seq. As to the Bills of Sale Acts (ie the Bills of Sale Act 1878 and the Bills of Sale Act (1878) Amendment Act 1882) see PARA 1630.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 See the Insolvency Act 1986 s 344(1), (2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 676. See also CPR Sch 1 RSC Ord 95 r 6.

4 Insolvency Act 1986 s 344(3)(a).

5 Insolvency Act 1986 s 344(3)(b).

6 However, a charge on book debts by a company is registrable under the Companies Act 1985 ss 395, 396(1)(e) (prospectively repealed) (see PARA 1684 note 1): see **COMPANIES** vol 15 (2009) PARA 1279.

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### **1855. Form and filing.**

Since a general assignment of book debts<sup>1</sup> is not declared to be a bill of sale<sup>2</sup> but is merely registrable under the Bills of Sale Act 1878 as if it were a bill of sale given otherwise than as security for the payment of a sum of money<sup>3</sup>, it does not require to be in accordance with any particular form, even if made by way of security. However, the registration provisions of the Bills of Sale Act 1878<sup>4</sup> have an impact on the form of the assignment in that they require the assignment, as a deemed bill of sale, to be witnessed<sup>5</sup> and any defeasance, condition or declaration of trust to be written on the same paper or parchment before registration and filed with it and as part of it<sup>6</sup>. The assignment must be filed in the separate register of assignments of book debts kept in the Central Office of the High Court<sup>7</sup>. Application for registration is made by producing at the Central Office a true copy of the assignment, and of every schedule to it, together with a witness statement or affidavit verifying the date and the time<sup>8</sup>, and the due execution of the assignment in the presence of the witness, and setting out the particulars of the assignment and the parties to it<sup>9</sup>. The copy of the assignment and schedule or schedules, together with the affidavit or witness statement, are filed, and particulars of the assignment are entered in the register<sup>10</sup>.

1 See PARA 1854.

2 As to the statutory definition of 'bill of sale' see PARA 1638 et seq. As to bills of sale at common law see PARA 1620 et seq.

3 See the Insolvency Act 1986 s 344(4). This also provides that the provisions of the Bills of Sale Act 1878 with respect to the registration of bills apply accordingly with such necessary modifications as may be made by rules under that Act. For the current rules see CPR Sch 1 RSC Ord 95 r 6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 43. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 676.

4 Ie the Bills of Sale Act 1878 s 10: see PARA 1758 et seq.

5 Bills of Sale Act 1878 s 10. Attestation is also rendered necessary by the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3) (see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 33) if the assignment is by deed and, whether or not it is by deed, by the filing requirements imposed by CPR Sch 1 RSC Ord 95 r 6(2). See the text and notes 8-9. It is important to record not only the date but the time of day of execution as this is required to be stated in the verifying affidavit: see the Bills of Sale Act 1878 s 10(2). It is not the practice to refuse registration merely because the time of day is omitted but in view of the mandatory requirements of s



10(2) failure to include the time in the affidavit is likely to vitiate the registration and render the assignment liable to avoidance under the Insolvency Act 1986 s 344: see PARA 1854; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 676.

6 See the Bills of Sale Act 1878 s 10(3); and PARAS 1748-1751.

7 See CPR Sch 1 RSC Ord 95 r 6(1). The register is arranged alphabetically and records the date of entry of satisfaction, the serial number allotted to the assignment, the actual name, trading name, residence, business address and occupation of the assignor, the name of the assignee, the nature of the debts assigned (eg 'book debts'), the date of registration and the date of registration of any affidavit of renewal. As to the enrolment of deeds and other documents see **CIVIL PROCEDURE** vol 11 (2009) PARA 86.

8 See note 5.

9 See CPR Sch 1 RSC Ord 95 r 6(2). For the form of affidavit see Form PF186QB; and *Practice Direction--Forms* PD 4 PARA 4.

10 See CPR Sch 1 RSC Ord 95 r 6(3).

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## **8. MUTUAL SOCIETIES**

### **(1) BUILDING SOCIETIES**

#### **(i) Constitution of Building Societies**

##### **A. INTRODUCTION**

##### **(A) NATURE OF BUILDING SOCIETIES**

##### **1856. General nature of building societies.**

A building society is a society incorporated under the Building Societies Act 1986<sup>1</sup>. A society may be established if (1) its purpose or principal purpose is that of making loans which are secured on residential property<sup>2</sup> and are funded substantially by its members<sup>3</sup>; and (2) its principal office is in the United Kingdom<sup>4</sup>.

Building societies are mutual associations which were originally unincorporated and terminating. Over the years terminating societies have been replaced by permanent societies. Members subscribe to a society by investing in its shares, upon which interest is paid in accordance with the society's rules. Unlike the share capital of a limited liability company the share capital of a building society is, with limited exceptions<sup>5</sup>, subject to fluctuation, and a society has no fixed amount of authorised share capital. No limit is therefore placed on the number of shares which it may issue, and, subject to the society's rules and the terms on which their shares were issued, members may withdraw their share investments. A society may accept deposits or loans from members or non-members, to be applied for its purposes<sup>6</sup>. Out of the funds so acquired loans may be made to members secured on residential property<sup>7</sup>.

<sup>1</sup> Building Societies Act 1986 ss 5(3), 119(1), 125. A society incorporated under the enactments repealed by the Building Societies Act 1986 (see PARA 1858), whose principal office immediately before the commencement

of s 5 was in the United Kingdom, is deemed to be registered and incorporated under the Building Societies Act 1986: s 5(4). As to the incorporation of societies see PARAS 1865-1866. As to the requirements for principal offices see PARA 1872. The constitution, powers and regulation of societies are dealt with in Sch 2 (see PARA 1867 et seq): see s 5(8) (amended by the Building Societies Act 1997 s 3(1)). As to the meaning of 'United Kingdom' see PARA 2 note 3.

The Treasury has power by order to make such modifications to the Building Societies Act 1986 as it considers appropriate for or in connection with facilitating the provision of relevant financial assistance by the Bank of England to building societies (ie building societies incorporated (or deemed to be incorporated) under the Building Societies Act 1986): Banking (Special Provisions) Act 2008 s 11(1), (5). For these purposes 'relevant financial assistance' means any financial assistance provided for the purpose of maintaining the stability of the financial system in the United Kingdom: s 11(2). An order under s 11 may in particular make provision for or in connection with modifying the operation of any of the following: (1) the Building Societies Act 1986 s 5 (see also PARAS 1865, 1867), s 6 (see PARAS 1916, 2008), s 7 (see PARA 1916), Sch 2 (see PARA 1865 et seq) (establishment, constitution and powers, the lending limit and the funding limit); (2) any other provision of the Building Societies Act 1986 which might otherwise prevent any relevant financial assistance from being provided by the Bank of England to building societies or affect the amount of any such assistance; (3) s 8 (see PARAS 1905, 1917), s 9A (see PARA 2040) and s 9B (see PARA 2042) (restrictions on raising funds and borrowing, on transactions involving derivative instruments etc and on creation of floating charges); (4) any other provision of the Building Societies Act 1986 which might otherwise prevent building societies from entering into any transaction in connection with the provision of financial assistance by the Bank of England to building societies; (5) s 90 (see PARA 2071), s 90A (see PARA 2079), Sch 15 (see PARA 2071 et seq) and Sch 15A (see PARA 2079) (application of companies winding up legislation and other companies insolvency legislation to building societies): Banking (Special Provisions) Act 2008 s 11(4). At the date at which this volume states the law no such order had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the Bank of England see PARA 74; and PARA 793 et seq. See also PARA 791.

2 'Residential property' means land at least 40% of which: (1) is normally used as, or in connection with, one or more dwellings; or (2) has been, is being or is to be developed or adapted for such use: Building Societies Act 1986 s 5(10) (substituted by the Building Societies Act 1997 s 1(4)). For the purposes of the Building Societies Act 1986 s 5(10), the area of any land which comprises a building or other structure containing two or more storeys is taken to be the aggregate of the floor areas of each of those storeys: s 5(10) (as so substituted).

3 As to membership see PARA 1888 et seq.

4 Building Societies Act 1986 s 5(1) (substituted by the Building Societies Act 1997 s 1(1)). If, after its establishment, a society fails to comply with these requirements, the powers conferred on the Financial Services Authority by the Building Societies Act 1986 s 36 (power to direct restructuring of the business) (see PARA 2047) or s 37 (power to petition for winding up the society) (see PARA 2049) become exercisable in relation to the society, but the failure does not affect the validity of any transaction or other act: s 5(4A) (added by the Building Societies Act 1997 s 1(2); and amended by SI 2001/2617). As to the Financial Services Authority see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

As from a day to be appointed, the provisions of the Building Societies Act 1986 s 5(11)-(14) are added by the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 s 1(2). At the date at which this volume states the law, no such day had been appointed. The Treasury may by order amend the Building Societies Act 1986 s 5(1)(a) (see head (1) in the text) so as to alter the extent to which the making of loans is required to be funded by a society's members: s 5(11) (as so prospectively added). An order under s 5 may make such consequential, saving, supplementary or transitional provision as the Treasury thinks necessary or expedient: s 5(12) (as so prospectively added). The consequential provision that may be made by virtue of s 5(12) includes, in particular, provision amending any of the following so far as relating to funding by the members of a society: (1) s 1(1)(a) (functions of the Authority in relation to building societies) (see PARA 1863); (2) s 93(2)(a) (amalgamations) (see PARA 1918); (3) Sch 2 para 2 (memorandum) (see PARAS 1867, 1874): s 5(13) (as so prospectively added). The power to make an order under s 5 is exercisable by statutory instrument, but no such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 5(14) (as so prospectively added).

5 Ie permanent interest bearing shares which are deferred shares: see PARA 1906 text and notes 7-8.

6 But note the restrictions on the acceptance of deposits from individuals: see PARA 1917.

7 The funds may be used for other permitted purposes. It is unlawful for a society to discriminate on the ground of colour, race, ethnic or national origins, disability, religion or belief or sexual orientation in the provision of services: see the Sex Discrimination Act 1975 s 29; the Race Relations Act 1976 s 20; the Disability Discrimination Act 1995 s 19; the Equality Act 2006 Pt 2 (ss 44-80); the Equality Act (Sexual Orientation) Regulations 2007, SI 2007/1263; and **DISCRIMINATION** vol 13 (2007 Reissue) PARAS 382, 461, 582 et seq, 691 et seq, 753. As to circumstances where less favourable treatment is justified in relation to guarantees and deposits in respect of goods and facilities see PARA 839.

**UPDATE****1856 General nature of building societies**

NOTE 1--As to provision which enables the Treasury to modify the 1986 Act for the purpose of facilitating, or in connection with, the provision of financial assistance to building societies by the Treasury, the Bank of England, another central bank of a member state of the European Economic Area, or the European Central Bank, see the Banking Act 2009 s 251. See further the Building Societies (Financial Assistance) Order 2008, SI 2008/1427, which modifies the application of the 1986 Act to facilitate the provision of relevant financial assistance by the Bank of England to building societies.

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**1857. Exemption from stamp duty and stamp duty land tax.**

There is a general exemption from stamp duty<sup>1</sup> for any instrument required or authorised to be given, issued, signed, made or produced under the Building Societies Act 1986 or the rules of a building society<sup>2</sup>. Certain documents are expressly exempted from stamp duty by the Act including:

- 228 (1) any copy of the rules of a society<sup>3</sup>;
- 229 (2) any transfer of a society share<sup>4</sup>;
- 230 (3) any bond or other security to be given to, or on account of, a society or by an officer<sup>5</sup> of a society<sup>6</sup>; and
- 231 (4) any instrument appointing or revoking the appointment of an agent of a society<sup>7</sup>.

No stamp duty arises on any transfer of business to a commercial company<sup>8</sup>.

For the purposes of stamp duty land tax<sup>9</sup>, a land transaction<sup>10</sup> effected by or in consequence of an amalgamation of two or more building societies<sup>11</sup> or a transfer of engagements between building societies<sup>12</sup>, is exempt from charge<sup>13</sup>. Relief under this provision must be claimed in a land transaction return<sup>14</sup> or an amendment of such a return<sup>15</sup>.

1 As to stamp duty generally see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

2 Building Societies Act 1986 s 109(1)(e) (s 109(1) renumbered by the Finance Act 1988 Sch 12 para 8).

3 Building Societies Act 1986 s 109(1)(a) (as renumbered: see note 2).

4 Building Societies Act 1986 s 109(1)(b) (as renumbered: see note 2).

5 As to the meaning of 'officer' see **PARA 1944**.

6 Building Societies Act 1986 s 109(1)(c) (as renumbered: see note 2).

7 Building Societies Act 1986 s 109(1)(d) (as renumbered: see note 2).

8 Building Societies Act 1986 s 109(2) (added by the Finance Act 1988 Sch 12 para 8). The text refers to a transfer effected by the Building Societies Act 1986 s 97(6) or s 97(7): see PARA 1938.

9 As to stamp duty land tax see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

10 'Land transaction' has the meaning given by the Finance Act 2003 s 43(1) (see **STAMP DUTIES AND DUTY RESERVE TAX**): Building Societies Act 1986 s 109A(3) (s 109A added by SI 2003/2867).

11 Ie an amalgamation under the Building Societies Act 1986 s 93: see PARAS 1918-1919.

12 Ie a transfer of engagements under the Building Societies Act 1986 s 94: see PARAS 1920-1921.

13 Building Societies Act 1986 s 109A(1) (as added: see note 10).

14 'Land transaction return' has the meaning given by the Finance Act 2003 s 76(1) (see **STAMP DUTIES AND DUTY RESERVE TAX**): Building Societies Act 1986 s 109A(3) (as added: see note 10).

15 Building Societies Act 1986 s 109A(2) (as added: see note 10).

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## (B) REVIEW OF LEGISLATION

### 1858. Building societies legislation.

The Building Societies Act 1986 repealed the Building Societies Act 1962, which was largely a consolidating Act drawing together provisions from previous legislation, particularly the Building Societies Act 1874. The Building Societies Act 1986 makes major reform to the legislation governing building societies<sup>1</sup>. All building societies are now governed by the Building Societies Act 1986, which makes provision for many matters to be dealt with by delegated legislation, reflecting the need for flexibility in the application of the Act. The Building Societies Act 1986 has in turn been substantially amended including by the Building Societies (Joint Account Holders) Act 1995<sup>2</sup>, the Building Societies Act 1997<sup>3</sup>, the Building Societies (Distributions) Act 1997<sup>4</sup> and the Financial Services and Markets Act 2000<sup>5</sup>.

1 See the preamble to the Building Societies Act 1986, which indicates that it is an 'Act to make fresh provision with respect to building societies'. As to the commencement of the Act see s 126 (amended by the Statute Law (Repeals) Act 2004); the Building Societies Act 1986 (Commencement No 1) Order 1986, SI 1986/1560; and the Building Societies Act 1986 (Commencement No 2) Order 1989, SI 1989/1083.

2 As to the commencement of the Building Societies (Joint Account Holders) Act 1995 see s 2.

3 As to the commencement of the Building Societies Act 1997 see s 47; the Building Societies Act 1997 (Commencement No 1) Order 1997, SI 1997/1307; the Building Societies Act 1997 (Commencement No 2) Order 1997, SI 1997/1427; the Building Societies Act 1997 (Commencement No 3) Order 1997, SI 1997/2668; and the Building Societies Act 1997 (Expiry of Transitional Period) Order 1998, SI 1998/2835.

4 As to the commencement of the Building Societies (Distributions) Act 1997 see s 2.

5 As to the commencement of the Financial Services and Markets Act 2000 see s 431; and PARA 2. Note also the importance of the Authority's Handbook of Rules and Guidance: see PARA 1863; and generally PARA 21 et seq.

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### **1859. Application of the Building Societies Act 1986.**

The Building Societies Act 1986 generally applies to England and Wales, Scotland and Northern Ireland<sup>1</sup>. Appropriate definitions, substitutions and variations relating to Scotland or Northern Ireland are contained in the Act<sup>2</sup>.

1 See the Building Societies Act 1986 s 5(4) (see PARA 1856), s 122(1) (amended by the Statute Law (Repeals) Act 2004). The Building Societies Act 1986 s 122(1) is subject to s 120(3) which provides that where any enactment amended or repealed or revoked by the Building Societies Act 1986 extends to any part of the United Kingdom, the amendment, repeal or revocation extends to that part. As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 See eg the interpretation provisions contained in the Building Societies Act 1986 s 119(1), (2).

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### **1860. Power to modify legislation to assimilate to company law.**

The Treasury<sup>1</sup> has power to modify<sup>2</sup> relevant provisions<sup>3</sup> of the Building Societies Act 1986 as it thinks appropriate for the purpose of assimilating the law relating to companies<sup>4</sup> and the law relating to building societies<sup>5</sup>. This power includes the power to modify the relevant provisions of the Building Societies Act 1986 so as to confer power to make orders, regulations, rules or other subordinate legislation, create criminal offences or provide for the charging of fees but not any charge in the nature of taxation<sup>6</sup>. Such an order may make consequential amendments of or repeals in other provisions of the Building Societies Act 1986<sup>7</sup>, or make such transitional or saving provisions as appear to the Treasury to be necessary or expedient<sup>8</sup>. The power to make such an order is exercisable by statutory instrument but no such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament<sup>9</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 'Modification' includes any additions and, as regards modifications of the statutory provisions relating to companies, any modification whether effected by any future Act or by an instrument made after the passing of the Building Societies Act 1986 under an Act whenever passed: s 104(6). 'Statutory provisions' includes the provisions of any instrument made under an Act: s 104(6).

3 The relevant provisions are so much of the Building Societies Act 1986 Pt VI (ss 36-57) as relates to investigations or inspections (see PARA 2047 et seq), Pt VII (ss 58-70) (management) (see PARA 1944 et seq), Pt VIII (ss 71-81) (accounts and audit) (see PARAS 1991-2004), so much of Pt X (ss 86-103) as relates to winding up or insolvency (see PARAS 1918 et seq, 2041, 2066 et seq), and s 110 (exemption of officers and auditors from liability) (see PARAS 1970-1971): s 104(2) (amended by the Companies Act 1989 s 211(1); and the Building Societies Act 1997 Sch 7 para 48).

4 As to the law relating to companies generally see **COMPANIES**.

5 See the Building Societies Act 1986 s 104(1). As to the modification orders made under s 104 see the Building Societies Act 1986 (Modifications) Order 1991, SI 1991/1729 (modifying the Building Societies Act 1986 ss 71-76, 78, 79, 119(1)); and the Building Societies Act 1986 (Modifications) (No 2) Order 1991, SI 1991/2738 (modifying the Building Societies Act 1986 s 110). See also the Building Societies Act 1986 (International Accounting Standards and Other Accounting Amendments) Order 2004, SI 2004/3380.

6 Building Societies Act 1986 s 104(3). See note 5.

7 Building Societies Act 1986 s 104(4)(a).

8 Building Societies Act 1986 s 104(4)(b).

9 Building Societies Act 1986 s 104(5).

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### **1861. Application of company law to the registration of charges created by building societies.**

For the purpose of securing the registration of charges created by building societies, the Secretary of State<sup>1</sup> may, by order made with the concurrence of the Treasury<sup>2</sup>, provide that such of the provisions of Part XII of the Companies Act 1985<sup>3</sup> and Part XIII of the Companies (Northern Ireland) Order 1986<sup>4</sup> as may be specified in the order apply in relation to societies, and charges created by societies, with such modifications as may be so specified<sup>5</sup>. Such an order may make different provision for different cases or different areas and may contain such incidental, supplemental and transitional provisions as may appear to the Secretary of State to be necessary or expedient<sup>6</sup>. The power to make such an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament<sup>7</sup>.

1 As to the Secretary of State see PARA 3.

2 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 Ie the Companies Act 1985 Pt XII (ss 395-424) (prospectively repealed): see **COMPANIES** vol 15 (2009) PARA 1277 et seq (as to replacement provisions see the Companies Act 2006 Pt 25 (ss 860-894)).

4 Ie the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), Pt XIII (arts 402-417) (registration of charges).

5 Building Societies Act 1986 s 104A(1) (s 104A added by the Building Societies Act 1997 s 42; and the Building Societies Act 1986 s 104A(1) amended by SI 2001/2617). At the date at which this volume states the law no such order had been made.

6 Building Societies Act 1986 s 104A(2) (as added: see note 5).

7 Building Societies Act 1986 s 104A(3) (as added: see note 5).

### **UPDATE**

## **1861 Application of company law to the registration of charges created by building societies**

TEXT AND NOTES 1-5--Building Societies Act 1986 s 104A(1) further amended: SI 2009/1941.

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### **1862. Conveyancing services.**

The following provisions were to have effect but are now prospectively repealed<sup>1</sup>. The Courts and Legal Services Act 1990 provides for building societies, if they become 'authorised practitioners', to provide conveyancing services. Authorised practitioners will be permitted to provide conveyancing services and the statutory restriction<sup>2</sup> limiting the categories of person who may provide conveyancing services will not apply to any act done in connection with the provision of conveyancing services by an authorised practitioner<sup>3</sup>. On an application made by a person who proposes to provide conveyancing services, the Authorised Conveyancing Practitioners Board must authorise that person to provide those services, if<sup>4</sup>: (1) it is satisfied that the applicant's business is, and is likely to continue to be, carried on by fit and proper persons or, in the case of an application by an individual, that he is a fit and proper person<sup>5</sup>; and (2) it is of the opinion that the applicant will comply with the statutory requirements<sup>6</sup>.

1 The Courts and Legal Services Act 1990 ss 36, 37, 43 were to be brought into force by order made by the Lord Chancellor or by the Secretary of State or by both acting jointly under s 124(3) as from a day to be appointed but those provisions are repealed by the Legal Services Act 2007 ss 208(1), 210, Sch 21 paras 83, 87, Sch 23 as from a day to be appointed under s 211(2). At the date at which this volume states the law no such day had been appointed. As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq. As to the Secretary of State see PARA 3. As to the Legal Services Act 2007 generally see **COURTS; LEGAL PROFESSIONS**.

The provisions relating to the provision of conveyancing services by building societies and others in the Building Societies Act 1986 s 124, Sch 21 (provision of conveyancing services by recognised institutions and practitioners) were repealed (by the Statute Law (Repeals) Act 2004) before they were brought into force.

2 The restriction imposed by the Solicitors Act 1974 s 22: see **LEGAL PROFESSIONS** vol 65 (2008) PARA 595.

3 See the Courts and Legal Services Act 1990 s 36(1). The Secretary of State may make regulations about the competence and conduct of authorised practitioners: see s 40 (amended by SI 2003/1881). At the date at which this volume states the law no such regulations had been made. See note 1.

4 Courts and Legal Services Act 1990 s 37(1). As to the Authorised Conveyancing Practitioners Board see s 34; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 1319. See note 1.

5 Courts and Legal Services Act 1990 s 37(1)(a). See note 1.

6 Courts and Legal Services Act 1990 s 37(1)(b). The statutory requirements referred to in the text relate to compliance with rules made by the Board or regulations made by the Lord Chancellor, arrangements for covering against claims made against the applicant in connection with conveyancing services, procedures for dealing with complaints and payment of compensation, protection of clients if the applicant ceases to provide conveyancing services, and membership of the Conveyancing Ombudsman Scheme: s 37(7). As to the Conveyancing Ombudsman Scheme see s 43 (amended by SI 2003/1887). See note 1.

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## (C) THE FINANCIAL SERVICES AUTHORITY

### **1863. Functions of the Financial Services Authority in relation to building societies.**

Building societies are regulated by the Financial Services Authority, a body corporate<sup>1</sup> whose functions are conferred by or under the Financial Services and Markets Act 2000<sup>2</sup>. In relation to societies, the general functions of the Authority under the Financial Services and Markets Act 2000 are amplified by its additional functions under the Building Societies Act 1986, which are<sup>3</sup>:

- 232 (1) to secure that the principal purpose of societies remains that of making loans which are secured on residential property<sup>4</sup> and are funded substantially by their members<sup>5</sup>;
- 233 (2) to administer the system of regulation of societies provided for by or under the Building Societies Act 1986<sup>6</sup>; and
- 234 (3) to advise and make recommendations to the Treasury<sup>7</sup> and other government departments on any matter relating to societies<sup>8</sup>.

In relation to societies, the Authority also has the other functions conferred by or under the Building Societies Act 1986 or any other enactment<sup>9</sup>, of:

- 235 (a) registering memoranda and rules of societies<sup>10</sup>;
- 236 (b) confirming and registering amalgamations<sup>11</sup>, transfers of engagements<sup>12</sup> and dissolutions<sup>13</sup>; and
- 237 (c) maintaining the public records of societies<sup>14</sup>.

1 As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

2 See the Financial Services and Markets Act 2000 s 1; and PARA 6. As to the Financial Services Authority generally see PARAS 4, 6 et seq. See also generally the Authority's Handbook of Rules and Guidance, Building Societies Regulatory Guide (BSOG); Prudential Standards: General Prudential Sourcebook (GENPRU); Prudential Sourcebook for Banks and Building Societies (BIPRU); Interim Prudential Sourcebook for Building Societies (IPRU (BSOC)). As to the Handbook generally see PARA 22.

3 Building Societies Act 1986 s 1(1) (s 1 substituted by SI 2001/2617).

4 As to the meaning of 'residential property' see PARA 1856 note 2.

5 Building Societies Act 1986 s 1(1)(a) (as substituted: see note 3). As to membership see PARA 1888 et seq.

6 Building Societies Act 1986 s 1(1)(b) (as substituted: see note 3).

7 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Building Societies Act 1986 s 1(1)(c) (as substituted: see note 3).

9 Building Societies Act 1986 s 1(2) (as substituted: see note 3).

10 See the Building Societies Act 1986 s 5(8), Sch 2 para 4; and PARAS 1876, 1881.

11 See the Building Societies Act 1986 s 93; and PARA 1918.



- 12 See the Building Societies Act 1986 s 94; and PARA 1920.
- 13 See the Building Societies Act 1986 s 97; and PARAS 1927-1928, 1938.
- 14 See the Building Societies Act 1986 s 106; and PARA 1864.

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#### **1864. The public file.**

The Financial Services Authority<sup>1</sup> must prepare and maintain a public file relating to each building society which<sup>2</sup>: (1) contains the documents or, as the case may be, the copies of the documents and the records of the matters directed by or under any provision of the Building Societies Act 1986 to be kept in the public file of the society<sup>3</sup>; and (2) is available for inspection on reasonable notice by members of the public<sup>4</sup>. The Authority may charge a reasonable fee for making the public file available to any person for inspection under head (2) above<sup>5</sup>. Any member of the public is entitled to be furnished with a copy of all or any of the documents or records kept in the public file of a society<sup>6</sup>, and the Authority may charge a reasonable fee for furnishing any person with a copy of any such documents or records<sup>7</sup>. The Authority may by directions<sup>8</sup> make provision with respect to the form of, and particulars to be included in, any document to be sent to it<sup>9</sup>.

1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 Building Societies Act 1986 s 106(1) (s 106(1), (2) amended, and s 106(3) added, by SI 2001/2617), Building Societies Act 1986 s 119(1) (definition amended by SI 2001/2617).

3 Building Societies Act 1986 ss 106(1)(a), 119(1) (as amended: see note 2).

4 Building Societies Act 1986 ss 106(1)(b), 119(1) (both as amended: see note 2). Section 106(1)(b) is expressed to be subject to s 106(3) (see the text to note 5): s 106(1)(b) (as so amended).

5 Building Societies Act 1986 s 106(3) (as added: see note 2).

6 Building Societies Act 1986 s 106(2) (as amended: see note 2). This provision is expressed to be subject to s 106(3) (see the text to note 5): s 106(2) (as so amended).

7 Building Societies Act 1986 s 106(3) (as added: see note 2).

8 The directions under the Building Societies Act 1986 s 116. The directions have effect subject to any other provision of or made under the Building Societies Act 1986: s 116(2) (s 116 substituted by SI 2001/2617).

9 Building Societies Act 1986 s 116(1) (as substituted: see note 8).

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## ***B. ESTABLISHMENT OF A BUILDING SOCIETY***

### **1865. Establishment and incorporation of a new building society.**

In order to establish a building society ten or more persons are required to<sup>1</sup>:

- 238 (1) agree upon the purpose or principal purpose of the society<sup>2</sup> and the extent of its powers in a memorandum<sup>3</sup> the provisions of which comply with the requirements of the Building Societies Act 1986<sup>4</sup>;
- 239 (2) agree upon rules for the regulation of the society which comply with the requirements of the Act<sup>5</sup>; and
- 240 (3) send to the Financial Services Authority<sup>6</sup> three copies of the memorandum and the rules, each copy signed by at least ten of those persons (or, if there are only ten, by all of them) and by the intended secretary<sup>7</sup>.

If the Authority is satisfied that<sup>8</sup>:

- 241 (a) the provisions of the memorandum are in conformity with the Act and any instruments made under it<sup>9</sup>;
- 242 (b) the rules are in conformity with the Act<sup>10</sup>; and
- 243 (c) the intended name of the society is not, in its opinion, undesirable<sup>11</sup>,

it must register the society and issue it with a certificate of incorporation<sup>12</sup>. The society is incorporated as from the date on which it is registered by the Authority<sup>13</sup>.

On registering a society the Authority must<sup>14</sup>:

- 244 (i) retain and register one copy of the memorandum and of the rules<sup>15</sup>;
- 245 (ii) return another copy to the secretary of the society, together with a certificate of registration<sup>16</sup>; and
- 246 (iii) keep another copy, together with a copy of the certificate of incorporation, and of the certificate of registration of the memorandum and the rules, in the public file of the society<sup>17</sup>.

1 See the Building Societies Act 1986 s 5(2), (8), Sch 2 para 1(1).

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 As to the purpose or principal purpose of the society see PARA 1856.

3 As to the meaning of 'memorandum' see PARA 1873 note 2.

4 Building Societies Act 1986 Sch 2 para 1(1)(a). The text refers to the requirements of Sch 2 Pt I (paras 1-15).

5 Building Societies Act 1986 Sch 2 para 1(1)(b). The text refers to the requirements of Sch 2 Pt I.

6 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

7 Building Societies Act 1986 Sch 2 para 1(1)(c) (amended by SI 2001/2617). In order to undertake business a newly established society must be authorised by the Authority: see the text to notes 8-13. As to the office of secretary see PARAS 1966-1967.

8 Building Societies Act 1986 Sch 2 para 1(2) (Sch 2 para 1(2), (3) amended by SI 2001/2617).

- 9 Building Societies Act 1986 Sch 2 para 1(2)(a).
- 10 Building Societies Act 1986 Sch 2 para 1(2)(b).
- 11 Building Societies Act 1986 Sch 2 para 1(2)(c). As to the naming of societies see PARA 1867 et seq.
- 12 Building Societies Act 1986 Sch 2 para 1(2). As to the effects of incorporation see PARA 1866.
- 13 Building Societies Act 1986 s 5(2) (amended by SI 2001/2617). A society has the powers conferred on it by its memorandum subject to the provisions of the Building Societies Act 1986: s 5(5) (substituted by the Building Societies Act 1997 s 1(3)). See further PARA 1873.
- 14 Building Societies Act 1986 Sch 2 para 1(3) (as amended: see note 8).
- 15 Building Societies Act 1986 Sch 2 para 1(3)(a).
- 16 Building Societies Act 1986 Sch 2 para 1(3)(b).
- 17 Building Societies Act 1986 Sch 2 para 1(3)(c). As to the public file see PARA 1864.

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### **1866. Effects of incorporation.**

Although the court cannot declare the incorporation of a building society<sup>1</sup> void on the ground that it has been obtained by fraud or irregularity<sup>2</sup> the Financial Services Authority<sup>3</sup> has the power to cancel the registration of a society<sup>4</sup> if it is satisfied that the certificate of incorporation has been obtained for the society by fraud or mistake<sup>5</sup> and that the society does not have permission under Part IV of the Financial Services and Markets Act 2000<sup>6</sup> to accept deposits<sup>7</sup>. Before cancelling the registration on this ground it must give the society not less than two months' previous notice<sup>8</sup>, specifying briefly the grounds of the proposed cancellation<sup>9</sup>. Where the registration is so cancelled the society may appeal to: (1) the High Court<sup>10</sup>, where the principal office of the society is situated in England and Wales or in Northern Ireland<sup>11</sup>; or (2) the Court of Session, where the principal office is situated in Scotland<sup>12</sup>. The court may set aside the cancellation if it thinks it is just to do so<sup>13</sup>.

A building society, since it is a body corporate<sup>14</sup>, may sue and be sued in its registered name<sup>15</sup>.

1 As to the incorporation of building societies see PARA 1865.

2 *Glover v Giles* (1881) 18 ChD 173.

3 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

4 As to the procedure on cancellation of registration see PARA 2076.

5 As to fraud and mistake generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE; MISREPRESENTATION AND FRAUD; MISTAKE**.

6 Ie permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.

7 Building Societies Act 1986 s 103(2)(a) (s 103(2)(a), (4) amended by SI 2001/2617). 'Deposit' includes a loan, and a subordinated deposit, ie a deposit which, on a winding up, would fall to be repaid only after

repayment in full had been made to the holders of shares in the society other than deferred shares, and cognate expressions are to be construed accordingly: Building Societies Act 1986 s 119(1) (definition substituted by the Building Societies Act 1997 Sch 7 para 53(1)(g)). As to the winding up of societies see PARA 2071 et seq. As to shares in relation to societies see PARA 1905 et seq. As to the meaning of 'deferred shares' see PARA 1906.

8 'Notice' means written notice, and 'notice to' a person means notice given to that person, and 'notify' is to be construed accordingly: Building Societies Act 1986 s 119(1). As to the service of notices see PARA 1885.

9 Building Societies Act 1986 s 103(4) (as amended: see note 7).

10 'High Court' means in relation to England and Wales, Her Majesty's High Court of Justice in England, and in relation to Northern Ireland, Her Majesty's High Court of Justice in Northern Ireland: Interpretation Act 1978 s 5, Sch 1. See further **COURTS** vol 10 (Reissue) PARA 602 et seq.

11 Building Societies Act 1986 s 103(5)(a). As to the requirements for principal offices see PARA 1872.

12 Building Societies Act 1986 s 103(5)(b).

13 Building Societies Act 1986 s 103(5).

14 As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

15 See **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1101, 1286-1287.

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## ***C. NAME AND PRINCIPAL OFFICE***

### **(A) NAME OF BUILDING SOCIETY**

#### **1867. Limitations on choice of name.**

The name of the building society must be specified both in the memorandum<sup>1</sup> and in the rules<sup>2</sup>. Before registering a new society the Financial Services Authority<sup>3</sup> must be of the opinion that the intended name of the society is not undesirable<sup>4</sup>.

1 See the Building Societies Act 1986 s 5(8), Sch 2 para 2(2)(a) (substituted by the Building Societies Act 1997 Sch 7 para 56(3)). As to the meaning of 'memorandum' see PARA 1873 note 2.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 See the Building Societies Act 1986 Sch 2 para 3(1), (4). See also PARA 1878.

3 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

4 See the Building Societies Act 1986 Sch 2 para 1(2)(c); and PARA 1865. As to restrictions on the use of names see PARAS 1868, 2059.

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### **1868. Use of registered name.**

Every building society must paint or affix, and keep painted or affixed, its registered name<sup>1</sup> on the outside of every office or place in which its business is carried on, in a conspicuous position and in letters easily legible<sup>2</sup>. If a society does not paint or affix its registered name or keep its registered name painted or affixed, as so required, the society will be liable on summary conviction to a fine<sup>3</sup>.

Every society must state its registered name in legible characters which are reasonably prominent in all of the following documents, in every electronic communication<sup>4</sup> containing any of the following documents and on every website on which any of the following documents is published<sup>5</sup>:

- 247 (1) its business letters<sup>6</sup>;
- 248 (2) its account statements, including those relating to deposit<sup>7</sup>, share<sup>8</sup>, loan or mortgage<sup>9</sup> accounts<sup>10</sup>;
- 249 (3) its passbooks<sup>11</sup>;
- 250 (4) its notices<sup>12</sup> and publications, including all documents sent to members<sup>13</sup>;
- 251 (5) its invoices and receipts<sup>14</sup>;
- 252 (6) its letters of credit and any instruments creating or acknowledging its indebtedness<sup>15</sup>;
- 253 (7) its contracts, agreements, mortgages and deeds<sup>16</sup>; and
- 254 (8) its bills of exchange, promissory notes, indorsements, cheques and orders for money or goods<sup>17</sup>.

A society which, without reasonable excuse, does not comply with this requirement is liable on summary conviction to a fine<sup>18</sup>. If an officer<sup>19</sup> of a society or a person on its behalf issues or authorises the issue of any document mentioned in heads (1) to (7) above, in which the society's registered name is not stated as so required, he is liable on summary conviction to a fine<sup>20</sup>. If an officer of a society or a person on its behalf signs or authorises to be signed on behalf of the society any document mentioned in head (8) above in which the society's registered name is not stated as so required he is liable on summary conviction to a fine<sup>21</sup>, and he is further personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount of it (unless it is duly paid by the society)<sup>22</sup>.

The society must in all documents mentioned in heads (1) to (8) above state in legible characters an address in the United Kingdom<sup>23</sup> at which service of any document relating in any way to the business will be effective<sup>24</sup>. The society must also in any premises where the business is carried on and to which the members of the society, the customers of the business or suppliers of any goods or services to the business have access, display in a prominent position so that it may easily be read by such persons a notice containing the society's registered name and the address for service<sup>25</sup>. The society must secure that the registered name and the address for service are immediately given, by written notice, to any person with whom anything is done or discussed in the course of the business and who asks for the registered name or the address for service<sup>26</sup>. A society which, without reasonable excuse, does not comply with the statutory requirements relating to disclosure of registered name and address for service<sup>27</sup>, or any associated regulations<sup>28</sup>, is liable on summary conviction to a fine<sup>29</sup>.

The common seal of a society must bear the society's registered name<sup>30</sup>.

1 For the purposes of the Building Societies Act 1986 s 5(8), Sch 2 paras 9, 10-10C, 'registered name', in relation to a building society, means the name of the society which is for the time being registered with the Financial Services Authority: Building Societies Act 1986 Sch 2 para 9(8) (added by the Building Societies Act 1997 s 36(2); and amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 Building Societies Act 1986 Sch 2 para 9(2) (Sch 2 para 9(2) substituted, and Sch 2 para 9(2A) added, by the Building Societies Act 1997 s 36(1)).

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

3 Building Societies Act 1986 Sch 2 para 10(1) (Sch 2 para 10 substituted by the Building Societies Act 1997 s 36(3)). The fine must not exceed level 3 on the standard scale: Building Societies Act 1986 Sch 2 para 10(1) (as so substituted). As to the standard scale see PARA 27 note 21.

4 'Electronic communication' means an electronic communication within the meaning of the Electronic Communications Act 2000 (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 616) the processing of which on receipt is intended to produce writing: Building Societies Act 1986 s 119(1) (definition added by SI 2003/404). As to the meaning of 'writing' see PARA 1064 note 2.

5 Building Societies Act 1986 Sch 2 para 9(2A) (as added (see note 2); and amended by SI 2003/404), Building Societies Act 1986 Sch 2 para 10B(1) (Sch 2 paras 10B, 10C added by the Building Societies Act 1997 s 36(4)).

6 Building Societies Act 1986 Sch 2 para 9(2A)(a) (as added: see note 2).

7 As to the meaning of 'deposit' see PARA 1866 note 7.

8 As to shares in relation to societies see PARA 1905 et seq.

9 'Mortgage' includes charge: Building Societies Act 1986 s 119(1). As to mortgages generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

10 Building Societies Act 1986 Sch 2 para 9(2A)(b) (as added: see note 2).

11 Building Societies Act 1986 Sch 2 para 9(2A)(c) (as added: see note 2).

12 As to the meaning of 'notice' see PARA 1866 note 8.

13 Building Societies Act 1986 Sch 2 para 9(2A)(d) (as added: see note 2). As to membership see PARA 1888 et seq.

14 Building Societies Act 1986 Sch 2 para 9(2A)(e) (as added: see note 2).

15 Building Societies Act 1986 Sch 2 para 9(2A)(f) (as added: see note 2).

16 Building Societies Act 1986 Sch 2 para 9(2A)(g) (as added: see note 2). As to contracts generally see **CONTRACT**; and as to deeds generally see **DEEDS AND OTHER INSTRUMENTS**.

17 Building Societies Act 1986 Sch 2 para 9(2A)(h) (as added: see note 2). As to bills of exchange generally see PARA 1400 et seq.

18 Building Societies Act 1986 Sch 2 para 10(2) (as substituted: see note 3), Sch 2 para 10C(2) (as added: see note 5). The fine must not exceed level 3 on the standard scale: Sch 2 para 10(2) (as so substituted), Sch 2 para 10C(2) (as so added).

19 As to the meaning of 'officer' see PARA 1944.

20 Building Societies Act 1986 Sch 2 para 10(3) (as substituted: see note 3). The fine must not exceed level 3 on the standard scale: Sch 2 para 10(3) (as so substituted).

21 Ie not exceeding level 3 on the standard scale: Building Societies Act 1986 Sch 2 para 10(4)(a) (as substituted: see note 3).

22 Building Societies Act 1986 Sch 2 para 10(4)(b) (as substituted: see note 3).

23 As to the meaning of 'United Kingdom' see PARA 2 note 3.

24 Building Societies Act 1986 Sch 2 para 10B(2) (as added: see note 5). As to the service of documents see PARA 1885.

25 Building Societies Act 1986 Sch 2 para 10B(3) (as added: see note 5). The Treasury may by regulations require a notice under Sch 2 para 10B(3) or Sch 2 para 10B(4) (see the text to note 26) to be displayed or given in a specified form: Sch 2 para 10B(5) (as so added; and amended by SI 2001/2617). Regulations made under the Building Societies Act 1986 Sch 2 para 10B(5) must be made by statutory instrument subject to annulment by resolution of either House of Parliament: Sch 2 para 10C(5) (as added: see note 5). Such regulations may contain such transitional provisions and savings as the Treasury thinks fit, and may make different provision for different cases or classes of case: Sch 2 para 10C(6) (as so added; and amended by SI 2001/2617). The Building Societies (Business Names) Regulations 1998, SI 1998/3186 (amended by SI 2001/3649; SI 2002/881; SI 2002/1397) have been made under the Building Societies Act 1986 Sch 2 para 10C(6). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

26 Building Societies Act 1986 Sch 2 para 10B(4) (as added: see note 5). See note 25.

27 In the requirements of the Building Societies Act 1986 Sch 2 para 10B(2), (3), (4): see the text to notes 23-26.

28 In any regulations made under the Building Societies Act 1986 Sch 2 para 10B(5): see note 25.

29 See the Building Societies Act 1986 Sch 2 para 10C(2) (as added: see note 5). The fine must not exceed level 3 on the standard scale: Sch 2 para 10C(2) (as so added).

30 Building Societies Act 1986 Sch 2 para 9(1).

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### **1869. Method of changing name.**

A building society may change its name by special resolution<sup>1</sup>. Notice<sup>2</sup> of the change of name must be sent to the Financial Services Authority<sup>3</sup> and unless the Authority is of the opinion that the changed name is undesirable, it must register the notice of the change of name and give the society a certificate of registration<sup>4</sup>. The change of name takes effect on the date on which the certificate of registration is issued or on such later date as may be specified in the certificate<sup>5</sup>. The change of name does not affect the rights and obligations of the society or of any of its members<sup>6</sup> or of any other person concerned<sup>7</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 9(3). As to the meaning of 'special resolution' see PARA 1980.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 As to the meaning of 'notice' see PARA 1866 note 8.

3 It is an offence if a building society fails to send to the Authority a notice which it is required to send to it under the Building Societies Act 1986 Sch 2 para 9(4), and the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine not exceeding level 3 on the standard scale: Sch 2 para 10(5) (Sch 2 para 10 substituted by the Building Societies Act 1997 s 36(3); and the Building Societies Act 1986 Sch 2 paras 9(4), (6), 10(5) amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'officer' see PARA 1944. As to the standard scale see PARA 27 note 21.

4 Building Societies Act 1986 Sch 2 para 9(4) (as amended: see note 3). The Authority must keep a copy of the certificate of registration in the public file of the society: Sch 2 para 9(6) (as so amended). As to the public file see PARA 1864.

5 Building Societies Act 1986 Sch 2 para 9(5).

6 As to membership see PARA 1888 et seq.

7 Building Societies Act 1986 Sch 2 para 9(7).

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### **1870. Restrictions on business names.**

Where a building society carries on business under a name other than<sup>1</sup>:

255 (1) its registered name<sup>2</sup>;

256 (2) its registered name with the omission of the words 'Building Society'<sup>3</sup>; and

257 (3) its registered name with an addition which merely indicates that the business is carried on in succession to a former building society with which it has merged<sup>4</sup>,

the society must not, without the written approval of the Financial Services Authority<sup>5</sup>, carry on business under a name which would be likely to give the impression that the business is connected with Her Majesty's government or with any local authority<sup>6</sup>, or includes any word or expression for the time being specified in regulations made by the Treasury<sup>7</sup>. A society which contravenes this provision is liable on summary conviction to a fine<sup>8</sup>.

Where the society proposes to carry on business under a name which is or includes any such word or expression, and a government department or other body is specified in regulations made by the Treasury<sup>9</sup> in relation to that word or expression, the society must<sup>10</sup>:

258 (a) request, in writing<sup>11</sup>, the relevant body to indicate whether (and if so why) it has any objections to the proposal<sup>12</sup>; and

259 (b) submit to the Authority a statement that such a request has been made and a copy of any response received from the relevant body<sup>13</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 10A(1) (Sch 2 paras 10A, 10C added by the Building Societies Act 1997 s 36(4)).

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 Building Societies Act 1986 Sch 2 para 10A(1)(a) (as added: see note 1). As to the meaning of 'registered name' see PARA 1868 note 1.

3 Building Societies Act 1986 Sch 2 para 10A(1)(b) (as added: see note 1).

4 Building Societies Act 1986 Sch 2 para 10A(1)(c) (as added: see note 1).

5 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

6 For this purpose, 'local authority' means: (1) any local authority within the meaning of the Local Government Act 1972, the Common Council of the City of London or the Council of the Isles of Scilly; (2) any local authority within the meaning of the Local Government etc (Scotland) Act 1994; (3) any district council within the meaning of the Local Government Act (Northern Ireland) 1972: Building Societies Act 1986 Sch 2 para 10A(5) (as added: see note 1). As to local government areas and authorities see **LOCAL GOVERNMENT** vol 69



(2009) PARA 22 et seq. As to the Common Council of the City of London see **LONDON GOVERNMENT** vol 29(2) (Reissue) PARA 51 et seq. As to local government in the Isles of Scilly see **LOCAL GOVERNMENT** vol 69 (2009) PARA 36.

7 Building Societies Act 1986 Sch 2 para 10A(2) (as added (see note 1); and amended by SI 2001/2617).

The Treasury may by regulations specify words or expressions for the use of which as or as part of a business name the approval of the Authority is required by the Building Societies Act 1986 Sch 2 para 10A(2): Sch 2 para 10A(3)(a) (as so added; and amended by SI 2001/2617). For the words and expressions that have been specified see the Building Societies (Business Names) Regulations 1998, SI 1998/3186 (amended by SI 2001/3649; SI 2002/881; SI 2002/1397). Regulations made under the Building Societies Act 1986 Sch 2 para 10A(3) are to be made by statutory instrument subject to annulment by resolution of either House of Parliament: Sch 2 para 10C(5) (as added: see note 1). Such regulations may contain such transitional provisions and savings as the Treasury thinks fit, and may make different provision for different cases or classes of case: Sch 2 para 10C(6) (as so added; and amended by SI 2001/2617). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Building Societies Act 1986 Sch 2 para 10C(1) (as added: see note 1). The fine must not exceed level 3 on the standard scale: Sch 2 para 10C(1) (as so added). As to the standard scale see PARA 27 note 21.

9 The Treasury may by regulations, in relation to any such word or expression, specify a government department or other body for the purposes of Building Societies Act 1986 Sch 2 para 10A(4) (see the text to notes 10-13): Sch 2 para 10A(3)(b) (as added (see note 1); and amended by SI 2001/2617). As to the making of regulations under the Building Societies Act 1986 Sch 2 para 10A(3) see note 7. For the government departments and bodies that have been specified as relevant bodies see the Building Societies (Business Names) Regulations 1998, SI 1998/3186 (as amended: see note 7).

10 Building Societies Act 1986 Sch 2 para 10A(4) (as added: see note 1).

11 As to the meaning of 'writing' see PARA 1064 note 2.

12 Building Societies Act 1986 Sch 2 para 10A(4)(a) (as added: see note 1).

13 Building Societies Act 1986 Sch 2 para 10A(4)(b) (as added (see note 1); and amended by SI 2001/2617).

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### **1871. Civil remedies for breach of statutory requirements relating to disclosure.**

Any legal proceedings brought by a building society to which the restrictions on business names apply<sup>1</sup> to enforce a right arising out of a contract made in the course of a business in respect of which the society was, at the time the contract was made, in breach of the statutory requirements relating to disclosure of registered name and address for service<sup>2</sup> must be dismissed if the defendant to the proceedings shows<sup>3</sup>:

- 260 (1) that he has a claim against the claimant arising out of that contract which he has been unable to pursue by reason of the claimant's breach of such requirements as to disclosure<sup>4</sup>; or
- 261 (2) that he has suffered some financial loss in connection with the contract by reason of the claimant's breach of such requirements as to disclosure<sup>5</sup>,

unless the court<sup>6</sup> before which the proceedings are brought is satisfied that it is just and equitable to permit the proceedings to continue<sup>7</sup>. This is without prejudice to the right of any person to enforce such rights as he may have against another person in any proceedings brought by that person<sup>8</sup>.

1 le the Building Societies Act 1986 s 5(8), Sch 2 para 10A: see PARA 1870.

2 le in breach of the Building Societies Act 1986 Sch 2 para 9(2A), Sch 2 para 10B(2), Sch 2 para 10B(3) or Sch 2 para 10B(4): see PARA 1868.

3 Building Societies Act 1986 Sch 2 para 10C(3) (Sch 2 para 10C added by the Building Societies Act 1997 s 36(4)). As to the law of contract generally see **CONTRACT**.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

4 Building Societies Act 1986 Sch 2 para 10C(3)(a) (as added: see note 3).

5 Building Societies Act 1986 Sch 2 para 10C(3)(b) (as added: see note 3).

6 'Court', in relation to a building society, normally means the court which has jurisdiction under the applicable winding up legislation to wind up the society: Building Societies Act 1986 s 119(1) (definition substituted by the Building Societies Act 1997 Sch 7 para 53(1)(e)). However, the definitions in the Building Societies Act 1986 s 119(1) are expressed to apply except where the context otherwise requires and it is thought that, in the context of Sch 2 para 10C(3), the word 'court' can only be read as meaning the court before which the proceedings are brought.

7 Building Societies Act 1986 Sch 2 para 10C(3) (as added: see note 3). As to procedure for civil proceedings see **CIVIL PROCEDURE**.

8 Building Societies Act 1986 Sch 2 para 10C(4) (as added: see note 3).

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## (B) PRINCIPAL OFFICE OF BUILDING SOCIETY

### **1872. Requirements for principal office.**

The address of a building society's principal office must be specified both in the memorandum<sup>1</sup> and in the rules<sup>2</sup>. A society may change its principal office in such manner as its rules direct, or if there is no such direction in the rules, by an ordinary resolution<sup>3</sup>. No alteration of the memorandum or rules of a society is necessary by reason only that its principal office has changed<sup>4</sup>, but notice<sup>5</sup> of the change and of the date of it must be sent to the Financial Services Authority<sup>6</sup> within seven days after the change, and the Authority must keep the notice in the public file<sup>7</sup> of the society<sup>8</sup>.

It is an offence if a society fails to send to the Authority such a notice, and the society, and any officer<sup>9</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>10</sup>.

1 See the Building Societies Act 1986 s 5(8), Sch 2 para 2(2)(a) (substituted by the Building Societies Act 1997 s 43, Sch 7 para 56(3)). As to the meaning of 'memorandum' see PARA 1873 note 2. As to the requirement that the principal office be in the United Kingdom see PARA 1856.

2 See the Building Societies Act 1986 Sch 2 para 3(1), (4). See also PARA 1878.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

- 3 Building Societies Act 1986 Sch 2 para 11(1) (amended by the Building Societies Act 1997 Sch 7 para 56(9)). As to the meaning of 'ordinary resolution' see PARA 1983.
- 4 Building Societies Act 1986 Sch 2 para 11(3).
- 5 As to the meaning of 'notice' see PARA 1866 note 8.
- 6 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 7 As to the public file see PARA 1864.
- 8 Building Societies Act 1986 Sch 2 para 11(2) (Sch 2 para 11(2), (4) amended by SI 2001/2617).
- 9 As to the meaning of 'officer' see PARA 1944.
- 10 Building Societies Act 1986 Sch 2 para 11(4) (as amended: see note 8). The fine must not exceed level 4 on the standard scale: Sch 2 para 11(4) (as so amended). As to the standard scale see PARA 27 note 21.

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## ***D. MEMORANDUM AND RULES***

### **(A) MEMORANDUM**

#### **1873. Effect of memorandum.**

The memorandum of a building society is a matter of agreement between the members of a society and together with the rules forms a contract between the society and its members<sup>1</sup>. The provisions of the memorandum<sup>2</sup>, as read with the provisions of the Building Societies Act 1986 as in force for the time being, are binding upon<sup>3</sup>: (1) each of the members<sup>4</sup> and officers<sup>5</sup> of the society<sup>6</sup>; and (2) all persons claiming on account of a member or under the rules<sup>7</sup>, and all such members, officers and persons so claiming and all persons dealing with the society are taken to have notice of the provisions of the memorandum<sup>8</sup>.

A society must supply, on demand, a printed copy of its memorandum for the time being free of charge to any member of the society to whom a copy has not previously been supplied, and to any other person upon payment of such fee as the society may require, not exceeding the prescribed amount<sup>9</sup>. It is an offence if a society fails to comply with this requirement, and the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine<sup>10</sup>.

Subject to the provisions of the Building Societies Act 1986, a building society has the powers conferred on it by its memorandum<sup>11</sup>.

1 For authorities relating to a society's rules, which it is thought would apply equally to the memorandum, see PARA 1878 note 1. As to contracts generally see **CONTRACT**.

2 'Memorandum', in relation to a building society, means the memorandum of the purpose and the extent of the powers of the society including the record of any alteration under the Building Societies Act 1986 s 5(8), Sch 2 para 4 (see PARAS 1876, 1879 et seq): s 119(1), Sch 2 para 1(4) (substituted by the Building Societies Act 1997 Sch 7 para 56(2)).

3 Building Societies Act 1986 Sch 2 para 2(4). As to the power to amend Sch 2 para 2 under s 5(13) see PARA 1856 note 4.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

4 As to membership see PARA 1888 et seq.

5 As to the meaning of 'officer' see PARA 1944.

6 Building Societies Act 1986 Sch 2 para 2(4)(a).

7 Building Societies Act 1986 Sch 2 para 2(4)(b).

8 Building Societies Act 1986 Sch 2 para 2(4).

9 Building Societies Act 1986 Sch 2 para 12(1), (2)(b). The 'prescribed amount' is £1 or such other amount as the Treasury prescribes by order made by statutory instrument: Sch 2 para 12(4) (amended by SI 2001/2617). At the date at which this volume states the law no such order had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

10 Building Societies Act 1986 Sch 2 para 12(3). The fine must not exceed level 4 on the standard scale: Sch 2 para 12(3). As to the standard scale see PARA 27 note 21.

11 Building Societies Act 1986 s 5(5) (substituted by the Building Societies Act 1997 s 1(3)).

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## **1874. Content of memorandum.**

The memorandum<sup>1</sup> of a building society must:

- 262 (1) state the purpose or principal purpose of the society<sup>2</sup> to be that of making loans which are secured on residential property<sup>3</sup> and are funded substantially by its members<sup>4</sup>; and
- 263 (2) specify (a) the name of the society and the address of its principal office<sup>5</sup>; (b) any purposes of the society other than that mentioned in head (1) above<sup>6</sup>; and (c) the powers of the society<sup>7</sup>.

1 As to the meaning of 'memorandum' see PARA 1873 note 2.

2 As to the purpose or principal purpose of the society see PARA 1856.

3 As to the meaning of 'residential property' see PARA 1856 note 2.

4 Building Societies Act 1986 s 5(8), Sch 2 para 2(1) (Sch 2 para 2(1), (2) substituted by the Building Societies Act 1997 Sch 7 para 56(3)). As to membership see PARA 1888 et seq. As to the power to amend the Building Societies Act 1986 Sch 2 para 2 under s 5(13) see PARA 1856 note 4.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

5 Building Societies Act 1986 Sch 2 para 2(2)(a) (as substituted: see note 4). As to the naming of societies see PARA 1867 et seq. As to the requirements for principal offices see PARA 1872.

6 Building Societies Act 1986 Sch 2 para 2(2)(b) (as substituted: see note 4).

- 7 Building Societies Act 1986 Sch 2 para 2(2)(c) (as substituted: see note 4).

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### **1875. Power to change memorandum.**

A building society may by special resolution<sup>1</sup> alter its purposes or powers<sup>2</sup>. Any provision in the rules of a society that the memorandum<sup>3</sup> may be altered without passing a special resolution is void<sup>4</sup>.

- 1 As to the meaning of 'special resolution' see PARA 1980.

- 2 Building Societies Act 1986 s 5(8), Sch 2 para 4(1) (substituted by the Building Societies Act 1997 Sch 7 para 56(6)).

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

- 3 As to the meaning of 'memorandum' see PARA 1873 note 2.

- 4 Building Societies Act 1986 Sch 2 para 4(6).

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### **1876. Registration of alteration of memorandum.**

Any building society altering its purpose or powers must send to the Financial Services Authority<sup>1</sup>:

- 264 (1) three copies of a record of the alteration signed by the secretary<sup>2</sup>; and
- 265 (2) a statutory declaration by the secretary that the alteration was effected by a resolution passed as a special resolution<sup>3</sup> and that the record is a true record of the resolution<sup>4</sup>.

It is an offence if a society fails to comply with this requirement, and the society, and any officer<sup>5</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>6</sup>.

On altering its purpose or powers the society must determine the date on which it intends the alteration to take effect and the record of the alteration must specify that date (the 'specified date')<sup>7</sup>. If the Authority is satisfied that the alteration is in conformity with the Building Societies Act 1986 and, where applicable, any instruments under it, the Authority must<sup>8</sup>:

- 266 (a) retain and register one of the copies<sup>9</sup>;

- 267 (b) return another to the secretary of the society together with a certificate of registration of the alteration<sup>10</sup>; and
- 268 (c) keep another copy, together with a copy of the certificate of registration of the alteration, in the public file<sup>11</sup> of the society<sup>12</sup>.

An alteration of the purpose or powers takes effect on the specified date or, if registration of the alteration is not effected until a later date, that later date<sup>13</sup>. If a society arranges for the publication in a consolidated form of its memorandum as altered for the time being, it must send a copy to the Authority, and the Authority must keep the copy in the public file of the society but not register the copy<sup>14</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 4(2) (amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 Building Societies Act 1986 Sch 2 para 4(2)(a). As to the office of secretary see PARAS 1966-1967.

3 As to the meaning of 'special resolution' see PARA 1980.

4 Building Societies Act 1986 Sch 2 para 4(2)(b).

5 As to the meaning of 'officer' see PARA 1944.

6 Building Societies Act 1986 Sch 2 para 4(8). The fine must not exceed level 4 on the standard scale: Sch 2 para 4(8). As to the standard scale see PARA 27 note 21.

7 Building Societies Act 1986 Sch 2 para 4(3).

8 Building Societies Act 1986 Sch 2 para 4(4) (amended by the Building Societies Act 1997 Sch 7 para 56(7), Sch 9; and SI 2001/2617).

9 Building Societies Act 1986 Sch 2 para 4(4)(a).

10 Building Societies Act 1986 Sch 2 para 4(4)(b).

11 As to the public file see PARA 1864.

12 Building Societies Act 1986 Sch 2 para 4(4)(c).

13 Building Societies Act 1986 Sch 2 para 4(5).

14 Building Societies Act 1986 Sch 2 para 4(7) (amended by SI 2001/2617).

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### **1877. Effect of registration.**

Following the case law relating to rules<sup>1</sup> the certificate of the Financial Services Authority<sup>2</sup> will be conclusive that the necessary preliminary steps have been taken to make the alteration of a memorandum binding on the building society and members<sup>3</sup>, but the fact that an alteration has been registered is not conclusive as to its legality or validity. The Authority's duties when

alterations are presented for registration, are merely to consider whether or not the alterations are in conformity with the Building Societies Act 1986 and, where applicable, any instruments under it<sup>4</sup>. If the Authority refuses to register an alteration, the proper remedy is judicial review seeking a mandatory order<sup>5</sup>.

1 See PARA 1882.

2 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

3 As to membership see PARA 1888 et seq.

4 See the Building Societies Act 1986 s 5(8), Sch 2 para 4(4); and PARA 1876.

5 See generally PARA 1882. As to mandatory orders and judicial review see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

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## (B) RULES GENERALLY

### 1878. Effect of rules.

The rules, together with the memorandum, of a building society form the contract between the society and the members<sup>1</sup>. This contract is to be found in the rules for the time being in force, having regard to any alterations duly made<sup>2</sup>. They are binding (except as to any particular rule which is void by statute<sup>3</sup>) upon each of the members and officers of the society and on all persons claiming on account of a member, or under the rules, all of which persons (but no others) are taken to have notice of the rules<sup>4</sup>.

A society must supply, on demand, a printed copy of its rules for the time being, with a copy of the certificate of incorporation<sup>5</sup> annexed to it, free of charge to any member of the society to whom a copy has not previously been supplied, and to any other person upon payment of such fee as the society may require, not exceeding the prescribed amount<sup>6</sup>. It is an offence if a society fails to comply with this requirement, and the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine<sup>7</sup>.

1 See *Auld v Glasgow Working Men's Building Society* (1887) 12 App Cas 197 at 205, HL, per Lord Macnaghten; *Re Doncaster Permanent Benefit Building and Investment Society* (1866) 14 LT 13 per Wood V-C; *Walton v Edge* (1884) 10 App Cas 33 at 35-36, HL, per Earl of Selborne LC; *Re West Riding of Yorkshire Permanent Benefit Building Society, ex p Pullman, ex p Charnock, ex p Johnson and Greenwood* (1890) 45 ChD 463. See also PARA 1873. In the case of a shareholding member (see PARA 1894), the contract contained in the rules is likely to be supplemented by a separate agreement setting out the terms on which the particular shares held by the member have been issued (eg terms specifying the interest which the society will pay on the shares and terms regulating withdrawals by the member). Similarly, in the case of a borrowing member (see PARA 1894), his mortgage constitutes a separate contract between himself and the society. As to the memorandum see PARA 1873 et seq. As to membership see PARA 1888 et seq. As to contracts generally see **CONTRACT**.

2 *Barnard v Tomson* [1894] 1 Ch 374 at 392 per North J. *Re Norwich and Norfolk Provident Permanent Benefit Building Society, Smith's Case* (1875) 1 ChD 481, must be taken to have been decided on its special facts. See *Wilson v Miles Platting Building Society* (1887) 22 QBD 381n, CA. As to the required content of the rules see PARA 1883; and as to registration of alteration of rules see PARA 1881.

3 Under the Building Societies Act 1986 s 110, subject to stated exceptions, a provision exempting directors, officers or auditors from liability for negligence, default, breach of duty or breach of trust is void: see PARAS 1970-1971. For another example of a rule which would be void see PARA 1879. As to the meaning of 'officer' see PARA 1944. As to the office of auditor see PARA 1998 et seq.

4 Building Societies Act 1986 s 5(8), Sch 2 para 3(2). Nothing in Sch 2 para 3 is taken to authorise any provision to be made which is inconsistent with the Building Societies Act 1986 or an instrument made under it by the Treasury or to affect the operation of any provision of the Building Societies Act 1986 making rules void to any specified extent: Sch 2 para 3(3) (amended by SI 2001/2617). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

5 As to the incorporation of societies see PARAS 1865-1866.

6 Building Societies Act 1986 Sch 2 para 12(1), (2)(a). As to the prescribed amount see PARA 1873 note 9.

7 Building Societies Act 1986 Sch 2 para 12(3). The fine must not exceed level 4 on the standard scale: Sch 2 para 12(3). As to the standard scale see PARA 27 note 21.

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### **1879. Power to change rules.**

The rules of a building society can only be altered in the manner authorised by statute<sup>1</sup>, that is by special resolution<sup>2</sup>. Any provision in the rules of a society that the rules may be altered without passing such a resolution is void<sup>3</sup>.

1 *Auld v Glasgow Working Men's Building Society* (1887) 12 App Cas 197 at 205, HL, per Lord Macnaghten, where it was held that the rights of withdrawing members under the rules could not be altered by an ordinary resolution.

2 See the Building Societies Act 1986 s 5(8), Sch 2 para 4(1) (substituted by the Building Societies Act 1997 Sch 7 para 56(6)). As to the meaning of 'special resolution' see PARA 1980.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

3 Building Societies Act 1986 Sch 2 para 4(6).

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### **1880. Extent of power to change rules.**

Subject to compliance with the Building Societies Act 1986, no limit is placed by the Act upon the power to alter the rules of a building society, and the power is very extensive. Thus



alterations may be made whereby the rights of members who have given notice of withdrawal are altered to their detriment<sup>1</sup>, the sums standing to the credit of investing members are diminished<sup>2</sup>, and the sums payable by borrowing members in respect of their mortgages are increased<sup>3</sup>. It is no objection that the alteration affects members who have an existing claim on the society<sup>4</sup>. However, though the limits of the power of altering rules are not defined, the alterations must relate only to the internal rights of the members of the society<sup>5</sup>, and there are certain classes of alterations which are clearly invalid. No alteration of a rule can be valid which is not made in good faith or which purports to affect the rights of outside creditors or to change the nature of the constitution of the society or which is directed against a particular individual<sup>6</sup>. A society which is recognised to be in a state of insolvency cannot make alterations in its rules the effect of which would be to alter the rights of the members in a winding up<sup>7</sup>, although it may make such alterations as will facilitate the realisation of assets and the discharge of obligations<sup>8</sup>.

The alteration must be such as can reasonably be considered to have been within the contemplation of the members of the society when the contract of membership was made<sup>9</sup>. An alteration in the purposes of the society or of the amount of the share subscription which a member is liable to take up will not be binding on a member who has not assented to this<sup>10</sup>.

1 *Davies v Second Chatham Permanent Benefit Building Society* (1889) 61 LT 680, DC; *Pepe v City and Suburban Permanent Building Society* [1893] 2 Ch 311. It seems that this would not apply to a person who had already ceased to be a member on giving notice of withdrawal under the rules: see *Christie v Northern Counties Permanent Benefit Building Society* (1889) 43 ChD 62 at 68 per North J. As to membership see PARA 1888 et seq.

2 *Strohmenger v Finsbury Permanent Investment Building Society* [1897] 2 Ch 469, CA. Such a result cannot be effected by an ordinary resolution: *Auld v Glasgow Working Men's Building Society* (1887) 12 App Cas 197 at 201, HL, per Lord Halsbury LC.

3 *Wilson v Miles Platting Building Society* (1887) 22 QBD 381n, CA; *Rosenberg v Northumberland Building Society* (1889) 22 QBD 373, CA; *Bradbury v Wild* [1893] 1 Ch 377. In these cases the securities were framed so as to secure the payment of sums payable under the rules for the time being of the society. If a mortgagor has made a special contract with the society, such contract cannot be altered by an alteration of rules: *Re Norwich and Norfolk Provident Permanent Benefit Building Society, Smith's Case* (1875) 1 ChD 481; *Wilson v Miles Platting Building Society* above. As to the law of contract generally see **CONTRACT**.

4 *R v Brabrook* (1893) 69 LT 718, DC.

5 *Strohmenger v Finsbury Permanent Investment Building Society* [1897] 2 Ch 469 at 480, CA, per Chitty LJ; *Sixth West Kent Mutual Building Society v Hills* [1899] 2 Ch 60 at 69 per Byrne J. See also *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87 at 96, HL, per Lord Macnaghten.

6 *Strohmenger v Finsbury Permanent Investment Building Society* [1897] 2 Ch 469, CA.

7 *Sixth West Kent Mutual Building Society v Shove* [1899] 2 Ch 64n. As to the winding up of societies see PARA 2071 et seq.

8 *Sixth West Kent Mutual Building Society v Hills* [1899] 2 Ch 60.

9 *Hole v Garnsey* [1930] AC 472 at 500, HL, per Lord Tomlin.

10 *Hole v Garnsey* [1930] AC 472 at 495-496, HL, per Lord Atkin, and at 500 per Lord Tomlin. In this case it was held (distinguishing *Biddulph and District Agricultural Society v Agricultural Wholesale Society* [1927] AC 76, HL) that an alteration in the rules of an industrial and provident society whereby members of the society were required to subscribe for additional shares was not binding on members who had neither voted for the alteration nor otherwise assented to it. As to the purposes of societies see PARA 1856. As to shares in relation to societies see PARA 1905 et seq.

Constitution of Building Societies/D. MEMORANDUM AND RULES/(B) Rules Generally/1881.  
Registration of alteration of rules.

# **1881. Registration of alteration of rules.**

Any building society altering its rules must send to the Financial Services Authority<sup>1</sup>:

- 269 (1) three copies of a record of the alteration signed by the secretary<sup>2</sup>; and
- 270 (2) a statutory declaration by the secretary that the alteration was effected by a resolution passed as a special resolution<sup>3</sup> and that the record is a true record of the resolution<sup>4</sup>.

It is an offence if a society fails to comply with this requirement, and the society, and any officer<sup>5</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>6</sup>.

On altering its rules the society must determine the date on which it intends the alteration to take effect and the record of the alteration must specify that date (the 'specified date')<sup>7</sup>. If the Authority is satisfied that the alteration is in conformity with the Building Societies Act 1986 and, where applicable, any instruments under it, the Authority must<sup>8</sup>:

- 271 (a) retain and register one of the copies<sup>9</sup>;
- 272 (b) return another to the secretary of the society together with a certificate of registration of the alteration<sup>10</sup>; and
- 273 (c) keep another copy, together with a copy of the certificate of registration of the alteration, in the public file<sup>11</sup> of the society<sup>12</sup>.

An alteration of the rules takes effect on the specified date or, if registration of the alteration is not effected until a later date, that later date<sup>13</sup>. If a society arranges for the publication in a consolidated form of its rules as altered for the time being, it must send a copy to the Authority, and the Authority must keep the copy in the public file of the society but not register the copy<sup>14</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 4(2) (amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 Building Societies Act 1986 Sch 2 para 4(2)(a). As to the office of secretary see PARAS 1966-1967.

3 As to the meaning of 'special resolution' see PARA 1980.

4 Building Societies Act 1986 Sch 2 para 4(2)(b).

5 As to the meaning of 'officer' see PARA 1944.

6 Building Societies Act 1986 Sch 2 para 4(8). The fine must not exceed level 4 on the standard scale: Sch 2 para 4(8). As to the standard scale see PARA 27 note 21.

7 Building Societies Act 1986 Sch 2 para 4(3).

8 Building Societies Act 1986 Sch 2 para 4(4) (amended by the Building Societies Act 1997 Sch 7 para 56(7), Sch 9; and SI 2001/2617).

9 Building Societies Act 1986 Sch 2 para 4(4)(a).

10 Building Societies Act 1986 Sch 2 para 4(4)(b).

- 11 As to the public file see PARA 1864.
- 12 Building Societies Act 1986 Sch 2 para 4(4)(c).
- 13 Building Societies Act 1986 Sch 2 para 4(5).
- 14 Building Societies Act 1986 Sch 2 para 4(7) (amended by SI 2001/2617).

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### **1882. Effect of registration.**

The certificate of the Financial Services Authority<sup>1</sup> is conclusive that the necessary preliminary steps have been taken to make an alteration to the rules of a building society binding on the society and members<sup>2</sup>, but the fact that a rule has been registered is not conclusive as to its legality or validity<sup>3</sup>. The Authority's duties, when rules are presented for registration, are merely to consider whether or not the alterations are in conformity with the Building Societies Act 1986 and, where applicable, any instruments under it<sup>4</sup>. If the Authority refuses to register a rule or alteration, the proper remedy is judicial review seeking a mandatory order<sup>5</sup>.

1 The certificate was formerly issued by the central office of the registry of friendly societies. The functions of the central office in this instance have been transferred to the Financial Services Authority: see the Building Societies Act 1986 s 5(8), Sch 2 para 4(4); the Financial Services and Markets Act 2000 s 335(2)(a), (4); the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 13(1), Sch 3 paras 131, 200(a); and PARA 1881. As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 See *Dewhurst v Clarkson* (1854) 3 E & B 194; *Rosenberg v Northumberland Building Society* (1889) 22 QBD 373, CA. The decision in *Rosenberg v Northumberland Building Society* has been followed in *Re Quinn and National Catholic Benefit and Thrift Society's Arbitration* [1921] 2 Ch 318, and also in Ireland (*Butler v Springmount Dairy Society* [1906] 2 IR 193, a case under the Industrial and Provident Societies Act 1893), and in New South Wales (*Montgomery v Fox* (1900) 21 NSW Eq 127). However in *Osborne v Amalgamated Society of Railway Servants* [1909] 1 Ch 163, CA (affd [1910] AC 87, HL), a case dealing with the effect of registration of rules under the Trade Union Acts 1871 and 1876, some doubt is expressed as to the correctness of the decision: see at 178-179 per Fletcher Moulton LJ. The cases cited in this paragraph were decided in relation to a previous certification authority. As to membership see PARA 1888 et seq.

3 See *Laing v Reed* (1869) 5 Ch App 4. See also *Re Birkbeck Permanent Benefit Building Society* [1912] 2 Ch 183 at 207, CA, per Cozens-Hardy MR, and at 228 per Buckley LJ; and cf *Birch v National Union of Railwaymen* [1950] Ch 602 at 611, [1950] 2 All ER 253 at 259 per Danckwerts J.

4 See the Building Societies Act 1986 Sch 2 para 4(4); *R v Brabrook* (1893) 69 LT 718, DC; and PARA 1876.

5 See *R v Brabrook* (1893) 69 LT 718, DC. As to mandatory orders and judicial review see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(1) BUILDING SOCIETIES/(i) Constitution of Building Societies/D. MEMORANDUM AND RULES/(C) Content of Rules/1883. Required content of rules.

## (C) CONTENT OF RULES

### 1883. Required content of rules.

The rules of a building society must provide for a number of matters set out in the Building Societies Act 1986<sup>1</sup>. The rules must cover:

- 274 (1) the name of the society and the address of its principal office<sup>2</sup>;
- 275 (2) the manner in which the funds of the society are to be raised<sup>3</sup>;
- 276 (3) the manner in which the terms are to be determined on which shares are to be issued and the manner in which shareholders are to be informed of changes in the terms on which their shares are held<sup>4</sup>;
- 277 (4) whether any preferential or deferred shares are to be issued and, if so, within what limits<sup>5</sup>;
- 278 (5) the manner in which loans are to be made and repaid, and the conditions on which a borrower may redeem the amount due from him before the end of the period for which the loan was made<sup>6</sup>;
- 279 (6) the manner in which losses are to be ascertained and provided for<sup>7</sup>;
- 280 (7) the manner in which membership is to cease<sup>8</sup>;
- 281 (8) the manner of remunerating the auditors<sup>9</sup>;
- 282 (9) as respects directors:

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- 1. (a) the manner of electing them and whether they may be co-opted<sup>10</sup>;
- 2. (b) any conditions which must be satisfied with respect to the holding of shares in the society if a person is to become, or is to remain, a director<sup>11</sup>;
- 3. (c) the manner of remunerating and, where it is not to be fixed by resolution at the annual general meeting, the maximum amount of the remuneration to be paid to, directors<sup>12</sup>; and
- 4. (d) the circumstances in which pensions may be awarded to persons by virtue of their office as director and the method of determining the terms of such pensions<sup>13</sup>;

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- 283 (10) the powers and duties of the board of directors<sup>14</sup>;
- 284 (11) the custody of the mortgage deeds and other securities belonging to the society<sup>15</sup>;
- 285 (12) the form, custody and use of the society's common seal<sup>16</sup>;
- 286 (13) the calling and holding of meetings and, in particular:

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- 5. (a) the right of members to requisition meetings<sup>17</sup>;
- 6. (b) the right of members to move resolutions at meetings<sup>18</sup>;
- 7. (c) the manner in which notice of any resolutions to be moved at meetings is to be given to members<sup>19</sup>;
- 8. (d) the procedure to be observed at meetings<sup>20</sup>;
- 9. (e) the form of notice for the convening of a meeting and the manner of its service<sup>21</sup>;
- 10. (f) the voting rights of members, the right to demand a poll and the manner in which a poll is to be taken<sup>22</sup>;

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- 287 (14) the entitlement of members to participate in the distribution of any surplus assets after payments to creditors, on the winding up, or dissolution by consent, of the society<sup>23</sup>.

Nothing in the rules of a society prevents the service of a notice or other document by the society by sending it electronically to an electronic address<sup>24</sup> notified for the purpose in accordance with express provision made by the Building Societies Act 1986, or by its publication on a website in accordance with any such provision<sup>25</sup>.

The rules of a building society must provide that no person will be a member of the society unless he is a shareholding member<sup>26</sup> or a borrowing member<sup>27</sup> or both<sup>28</sup>. The rules may exclude minors from admission as members<sup>29</sup>.

The rules may provide for certain disputes to be referred to arbitration<sup>30</sup>.

1 See the Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4).

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 Building Societies Act 1986 Sch 2 para 3(4), Table item 1. As to the naming of societies see PARA 1867 et seq. As to the requirements for principal offices see PARA 1872.

3 Building Societies Act 1986 Sch 2 para 3(4), Table item 2 (amended by the Building Societies Act 1997 Sch 7 para 56(5)(a)). As to raising funds see PARAS 1916-1917.

4 Building Societies Act 1986 Sch 2 para 3(4), Table item 3. As to shares in relation to societies see PARA 1905 et seq.

5 Building Societies Act 1986 Sch 2 para 3(4), Table item 4.

6 Building Societies Act 1986 Sch 2 para 3(4), Table item 5 (amended by the Building Societies Act 1997 Sch 7 para 56(5)(b)). As to borrowing money see PARAS 1916-1917.

7 Building Societies Act 1986 Sch 2 para 3(4), Table item 6.

8 Building Societies Act 1986 Sch 2 para 3(4), Table item 7. As to membership see PARA 1888 et seq. As to cessation of membership see PARA 1904.

9 Building Societies Act 1986 Sch 2 para 3(4), Table item 8. As to the office of auditor see PARA 1998 et seq.

10 Building Societies Act 1986 Sch 2 para 3(4), Table item 9(a). As to the office of director see PARAS 1944-1963.

11 Building Societies Act 1986 Sch 2 para 3(4), Table item 9(b).

12 Building Societies Act 1986 Sch 2 para 3(4), Table item 9(c). As to annual general meetings see PARA 1977.

13 Building Societies Act 1986 Sch 2 para 3(4), Table item 9(d).

14 Building Societies Act 1986 Sch 2 para 3(4), Table item 10. As to powers and duties of directors see PARAS 1962-1963.

15 Building Societies Act 1986 Sch 2 para 3(4), Table item 11. As to mortgage deeds generally see **DEEDS AND OTHER INSTRUMENTS; MORTGAGE** vol 77 (2010) PARA 101 et seq.

16 Building Societies Act 1986 Sch 2 para 3(4), Table item 12.

17 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(a). As to meetings see PARAS 1974-1990.

18 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(b). As to the right to propose and circulate resolutions see PARA 1990.

19 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(c).

20 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(d).

21 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(e).

- 22 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(f). As to the right to vote see PARA 1984; and as to the right to demand a poll see PARA 1987.
- 23 Building Societies Act 1986 Sch 2 para 3(4), Table item 14. As to dissolution and winding up see PARAS 2066-2079.
- 24 'Electronic address' includes any number or address used for the purposes of receiving electronic communications which are sent electronically: Building Societies Act 1986 s 119(1) (definition added by SI 2003/404). As to the meaning of 'electronic communication' see PARA 1868 note 4.
- 25 Building Societies Act 1986 Sch 2 para 3(5) (added by SI 2003/404).
- 26 As to the meaning of 'shareholding member' see PARA 1894.
- 27 As to the meaning of 'borrowing member' see PARA 1894.
- 28 Building Societies Act 1986 Sch 2 para 5(1) (substituted by the Building Societies Act 1997 s 2(1)).
- 29 See the Building Societies Act 1986 Sch 2 para 5(3); and PARA 1891.
- 30 See the Building Societies Act 1986 s 85, Sch 14 Pt II (paras 4-8); and PARAS 2062-2063.

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#### **1884. Choice of rules.**

Provided that the rules of a building society do not conflict with the general law or the express provisions of the Building Societies Act 1986 and do not make the society a thing different from a building society<sup>1</sup>, such as a bank<sup>2</sup>, a society may make such rules as it pleases<sup>3</sup>.

1 *Murray v Scott* (1884) 9 App Cas 519 at 538, HL, per Lord Selborne LC.

2 *Re Birkbeck Permanent Benefit Building Society* [1912] 2 Ch 183 at 207, CA, per Cozens-Hardy MR. As to banks generally see PARA 791 et seq.

3 As to the effect, alteration and content of rules see PARAS 1878-1883.

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### ***E. SERVICE, RECORDS AND EVIDENCE***

#### **1885. Service of notices, directions and documents.**

Any notice<sup>1</sup>, directions or other document required or authorised by or under the Building Societies Act 1986, or by the rules of a building society, to be served on any person other than the Financial Services Authority<sup>2</sup> may (subject, in the case of notices or other documents to be

given or sent to members of a society<sup>3</sup>, to any provision of its rules)<sup>4</sup> be served on that person by<sup>5</sup>: (1) delivering it to him<sup>6</sup>; (2) leaving it at his proper address<sup>7</sup>; or (3) sending it by post to him at that address<sup>8</sup>. Any such document may: (a) in the case of a society, be served on its secretary<sup>9</sup>; (b) in the case of a body corporate, other than a society, be served on the secretary or clerk of that body<sup>10</sup>; (c) in the case of a partnership, be served on any partner<sup>11</sup>; and (d) in the case of an unincorporated association other than a partnership, be served on any member of its governing body<sup>12</sup>.

In a wide range of documents relating to the society, the society must state an address in the United Kingdom at which service of any document relating in any way to the business will be effective<sup>13</sup>.

1 As to the meaning of 'notice' see PARA 1866 note 8.

2 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

3 As to membership see PARA 1888 et seq.

4 Building Societies Act 1986 s 115(1) (amended by SI 2001/2617).

5 Building Societies Act 1986 s 115(2).

6 Building Societies Act 1986 s 115(2)(a). The reference to delivering a document to a person includes a reference to sending it electronically to an electronic address which that person has notified for the purpose in accordance with express provision made by the Building Societies Act 1986: s 115(2A) (added by SI 2003/404). As to the meaning of 'electronic address' see PARA 1883 note 24.

7 Building Societies Act 1986 s 115(2)(b). For the purposes of s 115 and the Interpretation Act 1978 s 7 (service of documents) in its application to the Building Societies Act 1986 s 115, the proper address of any person is: (1) in the case of a society or its secretary, the address of its principal office; (2) in the case of a member of a society, his registered address; (3) in the case of a director or the chief executive of a society, his officially notified address; (4) in the case of a body corporate (other than a society), its secretary or clerk, the address of its registered or principal office in the United Kingdom; (5) in the case of an unincorporated association (other than a partnership) or a member of its governing body, its principal office in the United Kingdom; and (6) in any other case, the person's last known address (whether of his residence, or of a place where he carries on business, or is employed): s 115(4). As to the meaning of 'registered address' in relation to a member of a building society see PARA 1972. 'Officially notified', in relation to the appointment or address of a director or the chief executive of a building society, means respectively notified to, and the last address notified to, the Authority under s 61(13) (see PARA 1951) or s 59(6) (see PARA 1964), as the case may be: s 119(1) (definition amended by SI 2001/2617). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the office of secretary see PARAS 1966-1967. As to the office of director see PARAS 1944-1963. As to the office of chief executive see PARAS 1964-1965. As to the requirements for principal offices of societies see PARA 1872. As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

8 Building Societies Act 1986 s 115(2)(c).

9 Building Societies Act 1986 s 115(3)(a).

10 Building Societies Act 1986 s 115(3)(b).

11 Building Societies Act 1986 s 115(3)(c).

12 Building Societies Act 1986 s 115(3)(d).

13 See the Building Societies Act 1986 Sch 2 para 10B; and the documents in question are set out at PARA 1868.

5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(1) BUILDING SOCIETIES/(i) Constitution of Building Societies/E. SERVICE, RECORDS AND EVIDENCE/1886. Records.

### **1886. Records.**

Unless there is anything to the contrary in the Building Societies Act 1986, or any regulations under it, any record kept by a building society may be kept in any manner<sup>1</sup>. However, where records are not kept by making entries in a bound book, but by some other means, adequate precautions must be taken for guarding against falsification and facilitating its discovery<sup>2</sup>. It is an offence if default is made in complying with these provisions, and the society, and any officer<sup>3</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>4</sup>, and, in the case of a continuing offence, to an additional fine<sup>5</sup> for every day during which the offence continues<sup>6</sup>.

1 Building Societies Act 1986 s 114(1). The power extends to recording matters otherwise than in legible form so long as the recording is capable of being reproduced in a legible form: s 114(3). In such cases, any duty imposed by or under the Building Societies Act 1986 to allow inspection of, or to furnish a copy of, the record or any part of it, is to be treated as a duty to allow inspection of, or to furnish, a reproduction of the recording or of the relevant part of it, in a legible form: s 114(3). The Treasury may by regulations make such provision in addition to s 114(3) as it considers appropriate in connection with such records as are kept otherwise than in legible form; and the regulations may make modifications of the Building Societies Act 1986 so far as it relates to the records of societies: s 114(4) (amended by SI 2001/2617). At the date at which this volume states the law no such regulations had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the protection of information under the Data Protection Act 1998 see **CONFIDENCE AND DATA PROTECTION**.

2 Building Societies Act 1986 s 114(2).

3 As to the meaning of 'officer' see PARA 1944.

4 Ie not exceeding level 4 on the standard scale: Building Societies Act 1986 s 114(5)(a). As to the standard scale see PARA 27 note 21.

5 Ie not exceeding £100: Building Societies Act 1986 s 114(5)(b).

6 Building Societies Act 1986 s 114(5).

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### **1887. Evidence.**

Any document<sup>1</sup> bearing the seal or stamp of the Financial Services Authority is to be received in evidence without further proof<sup>2</sup>. Any document purporting to have been signed by a person authorised to do so on behalf of the Authority, in the absence of any evidence to the contrary, is to be received in evidence without proof of the signature<sup>3</sup>.

Any printed document purporting to be a copy of the rules or memorandum<sup>4</sup> of a building society, and certified by the secretary<sup>5</sup> or other officer<sup>6</sup> of the society to be a true copy of its rules or memorandum as registered, will be received in evidence and is, in the absence of any evidence to the contrary, deemed to be a true copy of its rules or memorandum<sup>7</sup>.



1 For the purposes of the Building Societies Act 1986 s 113(1) and s 113(1A), 'document' means any document issued, received or created by the Financial Services Authority for the purposes of or in connection with the Building Societies Act 1986: s 113(1B) (s 113(1) substituted, and s 113(1A), (1B) added, by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 Building Societies Act 1986 s 113(1) (as substituted: see note 1). Any reference in the Building Societies Act 1986 to the seal of the Authority is a reference to the seal provided for in regulations made under the Friendly Societies Act 1974 s 109(1)(b) (see PARA 2107) (and not to the Authority's common seal): Building Societies Act 1986 s 119(1A) (added by SI 2001/2617).

3 Building Societies Act 1986 s 113(1A) (as added: see note 1).

4 As to the meaning of 'memorandum' see PARA 1873 note 2.

5 As to the office of secretary see PARAS 1966-1967.

6 As to the meaning of 'officer' see PARA 1944.

7 Building Societies Act 1986 s 113(2).

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## **F. MEMBERS AND DEPOSITORS**

### **(A) MEMBERSHIP**

#### **1888. Test of membership.**

The rules of a building society must provide that no person will be a member of the society unless he is a shareholding member<sup>1</sup> or a borrowing member<sup>2</sup> or both<sup>3</sup>.

It would seem that, in the case of unincorporated societies, it was competent for each society to prescribe by its rules what should be considered primary, if not conclusive, evidence of membership, and that such rules would be enforced by the court<sup>4</sup>. It is probable that a similar view would be taken by the court in the case of incorporated societies<sup>5</sup>.

For the purpose of liquidation, the question whether a person is or is not a member must be fixed as at the date of the liquidation and as if the society were a going concern; and when it has once been established that a person has been a member of the society in liquidation, it lies with him to show that he has ceased to be a member<sup>6</sup>.

1 As to the meaning of 'shareholding member' see PARA 1894.

2 As to the meaning of 'borrowing member' see PARA 1894.

3 Building Societies Act 1986 s 5(8), s 119(1), Sch 2 para 5(1) (substituted by the Building Societies Act 1997 s 2(1)). By the Building Societies Act 1986 s 119(1), the term 'member' is to be construed in accordance with Sch 2 para 5 (definition substituted by the Building Societies Act 1997 Sch 7 para 53(1)(j)). The effect is that the members of a building society are its shareholding and borrowing members (and no one else).

4 Such as signing the share-book (*Dobinson v Hawks* (1848) 16 Sim 407; *Re St George's Benefit Building Society, ex p Foote, Jennings and Dearsley* (1858) 6 WR 766), or being appointed a director (*Re St George's Benefit Building Society* above).

5 See *Knox v Shepherd* (1860) 2 LT 351; *Re Victoria Permanent Benefit Building, Investment and Freehold Land Society, Empson's Case* (1870) LR 9 Eq 597.

6 *Irvine and Fullarton Property Investment and Building Society v Cuthbertson* (1905) 8 F 1, Ct of Sess. See also *Re West Riding of Yorkshire Permanent Benefit Building Society, ex p Pullman, ex p Charnock, ex p Johnson and Greenwood* (1890) 45 ChD 463.

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### **1889. Joint shareholders and borrowers.**

Two or more persons may jointly hold shares in a building society<sup>1</sup>, and where they do so the joint holder who is first named in the records of the society is called the representative joint holder<sup>2</sup>. Where a loan secured on land<sup>3</sup> is made by a society to two or more persons jointly<sup>4</sup> the joint borrower who is named first in the record of the society is called the representative joint borrower<sup>5</sup>. Joint holders and borrowers are entitled to choose the order in which they are named in the records of the society<sup>6</sup>. The entry relating to a member in the register of members<sup>7</sup> must, if he is a representative joint holder or borrower, indicate that fact<sup>8</sup>. Unless the rules provide to the contrary, any notice<sup>9</sup> or other document may be given or sent by the society to the joint holders or borrowers by giving or sending it to the representative joint holder or borrower<sup>10</sup>.

For the purposes of determining (1) who is entitled to vote in an election of directors of the society<sup>11</sup>; (2) who is qualified to vote on a resolution of the society<sup>12</sup>; and (3) where it is relevant<sup>13</sup>, the number of votes a person may then give<sup>14</sup>, the representative joint holder or borrower is to be treated as the sole holder of the shares or rights<sup>15</sup>, and a person who is a member of the society by reason only of being a joint holder or borrower, and who is not the representative joint holder or borrower, is not therefore entitled to vote in any such election or qualified to vote on any such resolution<sup>16</sup>.

For the purposes of the provisions relating to dissolution of a society by consent<sup>17</sup>, mergers<sup>18</sup> and the transfer of a society's business to a commercial company<sup>19</sup>, the shares or rights<sup>20</sup> are to be treated as held by the representative joint holder or borrower alone, and a person who is a member of the society by reason only of being a joint holder or borrower, and who is not the representative joint holder or borrower, is not therefore regarded as a member for the purposes of those provisions<sup>21</sup>. The representative joint holder or borrower, but none of the other joint holders or borrowers, has the right to join in making an application for the Financial Services Authority<sup>22</sup> to appoint inspectors or to call a special meeting of a society<sup>23</sup> and any reference to the total membership of a society must be construed accordingly<sup>24</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 7(1). As to shares in relation to societies see PARA 1905 et seq.

2 See the Building Societies Act 1986 Sch 2 para 7(2). As to the keeping of records by a society see PARA 1886.

3 As to loans secured on land see PARA 2006.

4 Building Societies Act 1986 Sch 2 para 8(1) (amended by the Building Societies Act 1997 Sch 7 para 56(8)).

5 See the Building Societies Act 1986 Sch 2 para 8(2).

- 6 See the Building Societies Act 1986 Sch 2 paras 7(8), 8(8).
- 7 As to the register of members see PARAS 1972-1973.
- 8 See the Building Societies Act 1986 Sch 2 paras 7(7), 8(7).
- 9 As to the meaning of 'notice' see PARA 1866 note 8.
- 10 See the Building Societies Act 1986 Sch 2 paras 7(3), 8(3). This does not, however, prevent any of the joint holders or borrowers from exercising the rights of a member of a building society to obtain from the society on demand a copy of the summary financial statement, the annual accounts and the annual business statement: see Sch 2 paras 7(3), 8(3). For the rights of members to obtain copies of the summary financial statement see PARA 1996; for their right to receive copies of the annual accounts see PARA 1997. As to the annual business statement see PARA 1994. There is no specific duty to supply copies of the annual business statement to members; but a copy must be annexed to any copy of the balance sheet (which forms part of the annual accounts) which is issued by the society: see s 80(6)(c).
- 11 Building Societies Act 1986 Sch 2 paras 7(4)(a), 8(4)(a). As to the office of director see PARAS 1944-1963; and as to the election of directors see PARAS 1945-1949.
- 12 Building Societies Act 1986 Sch 2 paras 7(4)(b), 8(4)(b). As to the right to vote see PARA 1984.
- 13 This applies only in the case of joint shareholders: see the Building Societies Act 1986 Sch 2 para 7(4)(c).
- 14 Building Societies Act 1986 Sch 2 para 7(4)(c).
- 15 In the case of joint borrowers, the reference is to rights of the joint borrowers; accordingly, the rights of the joint borrowers are treated as those of the representative joint borrower alone: see the Building Societies Act 1986 Sch 2 para 8(4). In the case of representative joint holders, the reference is to the shares of the joint holders; accordingly, the shares of the joint holders are treated as those of the representative joint holder alone: see Sch 2 para 7(4).
- 16 Building Societies Act 1986 Sch 2 paras 7(4), 8(4).
- 17 Ie the Building Societies Act 1986 s 87: see PARA 2066 et seq.
- 18 Ie the Building Societies Act 1986 ss 93-96: see PARAS 1918-1926.
- 19 Ie the Building Societies Act 1986 ss 97-102: see PARAS 1927-1941.
- 20 See note 10.
- 21 Building Societies Act 1986 Sch 2 paras 7(5), 8(5). In its application to s 100 (see PARAS 1928-1929, 1932), Sch 2 para 7(5) has effect subject to s 102A (see PARA 1939): Sch 2 para 7(5A) (added by the Building Societies (Joint Account Holders) Act 1995 ss 1(2), 2).
- 22 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 23 Ie under the Building Societies Act 1986 s 56: see PARA 2058.
- 24 Building Societies Act 1986 Sch 2 paras 7(6), 8(6).

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### **1890. Number of members.**

No restriction is imposed by the Building Societies Act 1986 as to the number of members which a building society may have, except that at its incorporation<sup>1</sup> a society is required to have not fewer than ten members<sup>2</sup>.

1 As to the incorporation of building societies see PARAS 1865-1866.

2 See the Building Societies Act 1986 s 5(8), Sch 2 para 1(1); and PARA 1865. A register of members is required to be kept: see Sch 2 para 13(1); and PARAS 1972-1973. As to the reduction of the number of members below ten as a ground for winding up see PARA 2072.

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### **1891. Minors.**

A person under the age of 18<sup>1</sup> may be admitted as a member of a building society if the rules of the society do not prohibit such admission<sup>2</sup>, and it seems that there is no necessity of obtaining any consent. He can give all necessary receipts<sup>3</sup>, but during minority cannot propose a resolution, vote or hold any office in the society<sup>4</sup> and cannot join in requisitioning a special meeting, or nominate, or join in nominating a person for election as a director of the society<sup>5</sup>. Any receipt or acknowledgement given to a society by a person who is a minor in respect of the payment to him of any sum due in respect of a deposit made by him with the society, is not invalid on the ground that he is under 18 years of age<sup>6</sup>.

1 Family Law Reform Act 1969 s 1(1), (2).

2 Building Societies Act 1986 s 5(8), Sch 2 para 5(3)(a).

3 Building Societies Act 1986 Sch 2 para 5(3)(a).

4 Building Societies Act 1986 Sch 2 para 5(3)(b) (amended by the Building Societies Act 1997 s 2(2)(a)). As to the right to vote see PARA 1984.

5 Building Societies Act 1986 Sch 2 para 5(3)(c) (amended by the Building Societies Act 1997 s 2(2)(b)). A minor member can consent to the dissolution of a society (*Dennison v Jeffs* [1896] 1 Ch 611), but cannot execute a mortgage in favour of the society (*Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL). As to special meetings on members' requisition see PARA 1978. As to the election of directors see PARAS 1945-1949.

6 Building Societies Act 1986 s 32, Sch 7 para 2; Family Law Reform Act 1969 s 1(1), (2).

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### **1892. Corporations.**

A society registered under the Industrial and Provident Societies Acts 1965 to 2003, unless its rules provide to the contrary, may be a member of a building society<sup>1</sup>. Any other kind of body corporate (at least if a limited liability company) may be a member if so empowered by its memorandum of association or otherwise<sup>2</sup>.

1 See the Industrial and Provident Societies Act 1965 s 31(b); and PARA 2498.

2 *Bristol and Clifton Permanent Benefit Building Society v Harbour* (1886) 81 LT Jo 171. As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

However, from the date that the Building Societies Act 1997 ss 2, 9 apply to each relevant building society (ie 1 December 1997, or in the case of an existing building society whose record of alterations takes effect or is registered after 1 December 1997, on the date specified in that record: see the Building Societies Act 1997 (Commencement No 3) Order 1997, SI 1997/2668, art 2, Schedule Pt II item (b), (h), (aa)): (1) a body corporate cannot be issued with shares in a society, other than deferred shares; and (2) a body corporate taking a loan from a society is not a borrowing member: see the Building Societies Act 1986 ss 5(8), 8(1)(c), (8), Sch 2 para 5(2); the Building Societies Act 1997 s 46(1), Sch 8 paras 5, 8(1)(d); and PARAS 1894, 1917. As to shares in relation to societies see PARA 1905 et seq. As to the meaning of 'deferred shares' see PARA 1906. As to the meaning of 'borrowing member' see PARA 1894. The rights of bodies corporate who were borrowing members immediately before the commencement of the Building Societies Act 1997 s 2, or who held shares immediately before the commencement of s 9, are not affected; but in the case of shares, no further shares may be issued to a body corporate, other than deferred shares: Building Societies Act 1997 Sch 8 paras 5, 8(1)(d). See further PARA 1917.

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### **1893. Certain persons who are not members.**

Depositors, that is to say persons depositing money with a building society by way of loan<sup>1</sup>, personal representatives of deceased members<sup>2</sup> and the trustee in bankruptcy of a member<sup>3</sup>, and (for the purpose of winding up<sup>4</sup>) past members, are not members; but the rules of a society may admit the personal representatives of deceased members to all the privileges of the deceased members whom they represent, and if they avail themselves of this right they will be liable to all the incidents of membership<sup>5</sup>.

1 *Re Mutual Aid Permanent Benefit Building Society* (1885) 30 ChD 434, CA.

2 *Re Bowling and Welby's Contract* [1895] 1 Ch 663 at 670, CA, per Lindley J. As to personal representatives generally see **EXECUTORS AND ADMINISTRATORS**.

3 *Re Bowling and Welby's Contract* [1895] 1 Ch 663, CA. As to trustees in bankruptcy generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 316 et seq.

4 As to the winding up of societies see PARA 2071 et seq.

5 *Knox v Shepherd* (1860) 2 LT 351. An executor is not entitled on behalf of his testator's estate to take shares in a building society: *Thorne v Thorne* [1893] 3 Ch 196. As to his borrowing money from the society see *Cruikshank v Duffin* (1872) LR 13 Eq 555; and *Thorne v Thorne* above. As to restrictions in members see PARA 1894.

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## (B) RIGHTS AND LIABILITIES OF MEMBERS AND DEPOSITORS

### 1894. Classes of members.

The rules of a building society must provide that no person may be a member of the society unless he is a shareholding member or a borrowing member or both<sup>1</sup>. A 'shareholding member' is a person who holds a share in the society<sup>2</sup>. A 'borrowing member' is<sup>3</sup> an individual who is indebted to the society<sup>4</sup>: (1) in respect of a loan which is fully secured on land<sup>5</sup>; or (2) if the rules of the society so provide, in respect of a loan which is (within the meaning of the rules) substantially secured on land<sup>6</sup>.

If the rules of a society so provide, an individual ceases to be a borrowing member at any time if at that time the society<sup>7</sup>: (a) takes possession of, or exercises its power of sale in relation to, the whole or any part of the land on which the loan is secured<sup>8</sup>; or (b) obtains an order for foreclosure absolute<sup>9</sup>. Unless the rules of a society so provide, an individual is not a borrowing member at any time if at that time the loan is owed to the society in equity rather than at law<sup>10</sup>.

A borrowing member gives a mortgage to secure a loan made by the society<sup>11</sup>. In respect of such mortgage the member may sue and be sued as borrower. A borrowing member may or may not (according to the rules of the particular society) be entitled to share in the profits. While it was formerly the case that, if the rules so provided, a borrowing member might be made liable for losses<sup>12</sup>, the liability of such a member is now limited by statute to the amount payable under the mortgage or other security by which his indebtedness to the society in respect of the loan is secured<sup>13</sup>.

A shareholding member is one who, in consideration of paying his subscriptions (and all other money due under the rules) at specified times until the total value of his shares has been paid, or who holds paid-up shares for which he has paid in full in one sum<sup>14</sup>, has a claim on the assets of the society for the amount of his shares, subject to any losses<sup>15</sup> incurred by the society<sup>16</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 5(1) (Sch 2 paras 5(1), (2) substituted, and Sch 2 paras 5(2A), (2B) added, by the Building Societies Act 1997 s 2(1)).

2 Building Societies Act 1986 s 119(1) (definition added by the Building Societies Act 1997 Sch 7 para 53(1)(o)), Building Societies Act 1986 Sch 2 para 5(2) (as substituted: see note 1). Funds raised from an individual must be by the issue of shares, and funds raised from a body corporate, or from a bare trustee for a body corporate or for persons who include a body corporate, cannot be issued with shares, other than deferred shares: see s 8(1); and PARA 1917. As to the meaning of 'deferred shares' see PARA 1906. As to shares in relation to societies see PARA 1905 et seq. As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

3 Ie subject to the Building Societies Act 1986 Sch 2 para 5(2A) (see the text to notes 7-9), Sch 2 para 5(2B) (see the text to note 10), Sch 2 para 29(2) (see PARA 1982).

4 Building Societies Act 1986 s 119(1) (definition substituted by the Building Societies Act 1997 Sch 7 para 53(1)(c)), Building Societies Act 1986 Sch 2 para 5(2) (as substituted: see note 1).

5 Building Societies Act 1986 s 119(1) (definition as substituted: see note 4), Sch 2 para 5(2)(a) (as substituted: see note 1). As to loans fully secured on land see PARA 2007.

6 Building Societies Act 1986 s 119(1) (definition as substituted: see note 4), Sch 2 para 5(2)(b) (as substituted: see note 1). As to loans secured on land see PARA 2006.

7 Building Societies Act 1986 Sch 2 para 5(2A) (as added: see note 1).

8 Building Societies Act 1986 Sch 2 para 5(2A)(a) (as added: see note 1).

9 Building Societies Act 1986 Sch 2 para 5(2A)(b) (as added: see note 1). In Scotland it would be foreclosure in respect of the whole or any part of that land but generally Scottish matters are beyond the scope of this work. As to orders of foreclosure absolute see **MORTGAGE** vol 77 (2010) PARAS 603-607.

10 Building Societies Act 1986 Sch 2 para 5(2B) (as added: see note 1).

11 See PARA 2005 et seq. Where the loan to the borrower is secured by a mortgage granted by a third party, the borrower (rather than the mortgagor) will be the borrowing member. As to mortgages generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

12 See *Re Albion Mutual Permanent Benefit Building Society* (1883) 43 ChD 410n; *Re West Riding of Yorkshire Permanent Benefit Building Society* (1890) 43 ChD 407. A borrowing member, even if entitled to share in profits, was not liable for losses in the absence of a provision to that effect in the rules: *Brownlie v Russell* (1883) 8 App Cas 235, HL; *Tosh v North British Building Society* (1886) 11 App Cas 489, HL.

13 See the Building Societies Act 1986 s 5(8), Sch 2 para 6(2); and PARA 1898.

14 See PARA 1905 et seq.

15 The liability of a shareholding member at any time is statutorily limited to the amount which, at that time, as actually been paid, or is in arrear, on his shares in the society: see Building Societies Act 1986, Sch 2 para 6(1) and PARA 1898. A shareholding member may be entitled to a share in the profits of the society if so provided in the society's rules or in the terms on which his shares are issued.

16 A person may, of course, have received a loan from a society and at the same time hold investment shares in the society, thus being both a borrowing and a shareholding member.

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### **1895. Status of members.**

Members of a building society are members of a corporation<sup>1</sup>, and creditors must therefore look to the society, and not to the individual members<sup>2</sup>. However, societies are not limited liability companies, still less ordinary partnerships, but are societies of a special kind formed and regulated by statute for special purposes, and the relation of their members to non-members is controlled by statute<sup>3</sup>.

1 See the Building Societies Act 1986 s 5, s 119(1); and PARAS 1888, 1891, 1894. As to corporations generally see **CORPORATIONS**.

2 *Re Sheffield and South Yorkshire Permanent Building Society* (1889) 22 QBD 470, DC.

3 *Brownlie v Russell* (1883) 8 App Cas 235 at 248, HL, per Lord Selborne LC; *Tosh v North British Building Society* (1886) 11 App Cas 489 at 498, HL, per Lord Herschell LC; *Auld v Glasgow Working Men's Building Society* (1887) 12 App Cas 197 at 201, HL, per Lord Halsbury LC; *Irvine and Fullarton Property Investment and Building Society v Cuthbertson* (1905) 8 F 1, Ct of Sess.

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## 1896. Right to be given accounts.

A building society must send a copy of its summary financial statement<sup>1</sup> and, where appropriate, of the auditors' report<sup>2</sup>, not later than 21 days before the annual general meeting<sup>3</sup> at which the accounts and reports are to be considered, to every member who is entitled to receive notice<sup>4</sup> of the meeting, and two copies of the documents to the Financial Services Authority<sup>5</sup>. It is an offence if a society fails to comply with this requirement, and the society, and any officer<sup>6</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>7</sup>, and, in the case of a continuing offence, to an additional fine<sup>8</sup> for every day during which the offence continues<sup>9</sup>.

A copy of the summary financial statement and, where appropriate, of the auditors' report must be given or sent by the society free of charge at any time before the publication of the next summary financial statement to<sup>10</sup>: (1) any individual who for the first time subscribes for shares in the society<sup>11</sup>, on his first subscribing for the shares<sup>12</sup>; and (2) any member of the society who was not sent a copy<sup>13</sup>, within seven days of his making a demand for a copy<sup>14</sup>. It is an offence if a society fails to comply with this requirement, and the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine<sup>15</sup>, and, in the case of a continuing offence, to an additional fine<sup>16</sup> for every day during which the offence continues<sup>17</sup>.

1 See the Building Societies Act 1986 s 76; and PARA 1996.

2 See the Building Societies Act 1986 s 78(6); and PARA 2003.

3 As to annual general meetings see PARA 1977.

4 As to persons entitled to receive notice of meetings see PARA 1985.

5 See the Building Societies Act 1986 s 76(8), (8A) (substituted and added by SI 2001/2617). See further PARA 1996. As to the electronic sending of such documents see the Building Societies Act 1986 s 76(8B)-(8D); and PARA 1996. As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

6 As to the meaning of 'officer' see PARA 1944.

7 I.e a fine not exceeding level 5 on the standard scale: Building Societies Act 1986 s 76(10)(a). As to the standard scale see PARA 27 note 21.

8 I.e a fine not exceeding £200: Building Societies Act 1986 s 76(10)(b).

9 Building Societies Act 1986 s 76(10).

10 Building Societies Act 1986 s 76(9).

11 As to shares in relation to societies see PARA 1905 et seq.

12 Building Societies Act 1986 s 76(9)(a) (substituted by the Building Societies Act 1997 Sch 7 para 33(2)). As to the electronic sending of such documents see the Building Societies Act 1986 s 76(9A)-(9B), (9E); and PARA 1996.

13 I.e not sent a copy under the Building Societies Act 1986 s 76(8); see the text to notes 1-5.

14 Building Societies Act 1986 s 76(9)(b) (amended by SI 2004/355). As to the electronic sending of such documents see the Building Societies Act 1986 s 76(9C)-(9E); and PARA 1996.

15 I.e a fine not exceeding level 3 on the standard scale: Building Societies Act 1986 s 76(11)(a).

16 I.e a fine not exceeding £40: Building Societies Act 1986 s 76(11)(b).

17 Building Societies Act 1986 s 76(11).

## UPDATE



## **1896 Right to be given accounts**

NOTE 5--Building Societies Act 1986 s 76(8A) amended: SI 2008/1519.

TEXT AND NOTE 10--Building Societies Act 1986 s 76(9) further amended: SI 2008/1519.

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## **1897. Other rights of members.**

Members of building societies have other rights under the Building Societies Act 1986, including the right, in specified circumstances, to inspect the society's register of members<sup>1</sup>, to receive notices of meetings<sup>2</sup>, to requisition a special meeting<sup>3</sup>, to propose resolutions<sup>4</sup> and to vote<sup>5</sup>, and to elect directors<sup>6</sup>.

1 See the Building Societies Act 1986 s 5(8), Sch 2 para 15; and PARA 1973. As to the register of members see PARAS 1972-1973.

2 See the Building Societies Act 1986 Sch 2 para 22; and PARA 1985. As to the transmission of notices of meetings to an electronic address and the publication of such notices on a website see Sch 2 paras 22A-22B; and PARA 1985.

3 See the Building Societies Act 1986 Sch 2 para 20A; and PARA 1978.

4 See the Building Societies Act 1986 Sch 2 para 31; and PARA 1990.

5 See the Building Societies Act 1986 Sch 2 para 23; and PARA 1984.

6 See the Building Societies Act 1986 s 60(2); and PARA 1945.

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## **1898. Liability to outside creditors.**

Creditors can only enforce payment against the building society, and the liability of members to contribute to the funds of the society is, in the case of a shareholding member<sup>1</sup>, limited to the amount which, at that time, has been actually paid, or is in arrear, on his shares<sup>2</sup> in the society<sup>3</sup>. The liability in the case of a borrowing member<sup>4</sup> is limited to the amount which, at that time, is payable under the mortgage<sup>5</sup> or other security by which his indebtedness to the society in respect of the loan is secured<sup>6</sup>.

On the winding up or dissolution by consent<sup>7</sup> of a society, a borrowing member is not liable to pay any amount other than one which, at that time, is payable under the mortgage or other security by which his indebtedness to the society in respect of the loan is secured<sup>8</sup>.

1 As to the meaning of 'shareholding member' see PARA 1894.

2 As to shares in relation to societies see PARA 1905 et seq.

3 See the Building Societies Act 1986 s 5(8), Sch 2 para 6(1) (Sch 2 para 6 substituted by the Building Societies Act 1997 s 2(3)); and *Brownlie v Russell* (1883) 8 App Cas 235 at 250, HL, per Lord Selborne LC, and at 256 per Lord Watson. See a different view expressed in *Re Sheffield and South Yorkshire Permanent Building Society* (1889) 22 QBD 470 at 477-478, DC, per Cave J, and in *Sibun v Pearce* (1890) 44 ChD 354 at 372, CA, per Lindley LJ.

4 As to the meaning of 'borrowing member' see PARA 1894.

5 As to the meaning of 'mortgage' see PARA 1868 note 9. As to mortgages generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

6 See the Building Societies Act 1986 Sch 2 para 6(2) (as substituted: see note 3); and *Brownlie v Russell* (1883) 8 App Cas 235, HL.

In respect of a person who, immediately before the commencement of the Building Societies Act 1997 s 2 (ie 1 December 1997, or in the case of an existing building society whose record of alterations takes effect or is registered after 1 December 1997, on the date specified in that record: see the Building Societies Act 1997 (Commencement No 3) Order 1997, SI 1997/2668, art 2(2)-(5), Schedule Pt II item (b), (aa)(i)), is the holder of a share on which an advance has been made, his liability is limited to the amount payable on the share under any mortgage or other security or under the rules of the society: see the Building Societies Act 1997 s 46(1), Sch 8 para 4(1). The issue of advanced shares to borrowing members has passed into disuse, there being no need to issue such shares to borrowing members to make them members of the society or to enable them to exercise the statutory rights of borrowing members. It is thought that any advanced shares which still remain in issue would not constitute 'shares' within the meaning of the Building Societies Act 1986, since they would not have been issued for the purpose of raising funds: see PARA 1905.

7 As to dissolution and winding up see PARAS 2066-2079.

8 Building Societies Act 1986 s 92 (substituted by the Building Societies Act 1997 Sch 7 para 40); and see PARA 2078.

## UPDATE

### 1898 Liability to outside creditors

TEXT AND NOTE 7--After 'dissolved by consent' read 'or is in building society insolvency or building society special administration': Building Societies Act 1986 s 92 (amended by SI 2009/805). As to building society insolvency or building society special administration, see PARA 2079.

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### 1899. Rights and liabilities between themselves.

The rights and liabilities of members of a building society between themselves are regulated by the rules, which (together with the memorandum) constitute a contract between the members<sup>1</sup>.

Unless the rules otherwise provide, the rights and liabilities of the members between themselves are not varied by reason of the winding up of the society<sup>2</sup>; nor can members escape from the incidents of membership even when the incidents are such as were not anticipated at the time they joined<sup>3</sup>. In cases for which the rules do not expressly provide (where, that is, the contract is not explicit) the rules are to be applied as nearly as possible<sup>4</sup>.

1 See PARA 1878. As to contracts generally see **CONTRACT**.

2 *Walton v Edge* (1884) 10 App Cas 33, HL. See *Re Birkbeck Permanent Benefit Building Society* [1912] 2 Ch 183, CA; varied sub nom *Sinclair v Brougham* [1914] AC 398, HL. As to repayment to the liquidator of payments made under a scheme subsequently varied by an appellate court see *Re Birkbeck Permanent Benefit Building Society* [1915] 1 Ch 91. As to the winding up of societies see PARA 2071 et seq.

3 *London Provident Building Society v Morgan* [1893] 2 QB 266 at 272, DC, per Kennedy J. However see PARA 1880 as regards the limits on the extent to which the incidents of membership may be changed by subsequent alterations in the rules.

4 *Re Middlesbrough, Redcar and Saltburn etc Building Society* (1889) 58 LJCh 771 at 778 per Stirling J.

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## 1900. Members or depositors dying.

Where a member of, or a depositor<sup>1</sup> with, a building society dies, testate or intestate, domiciled in any part of the United Kingdom<sup>2</sup>, leaving a sum of money in the funds of the society not exceeding £5,000<sup>3</sup>, the society, on receiving satisfactory evidence of the death<sup>4</sup> and a statutory declaration by a claimant to the money that the member or depositor has died and that the claimant is the person entitled to receive the sum either beneficially under the will or under the law of intestacy<sup>5</sup>, may pay the amount due to the claimant, without probate of the will or the grant of letters of administration or confirmation<sup>6</sup>. Payment so made is valid and effectual with respect to any demand against the funds of the society from any other person claiming to be entitled to it, but without prejudice to that other person's pursuing his remedy for the amount against the person who received it<sup>7</sup>.

1 As to the meaning of 'depositor' see PARA 1866 note 7.

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 Building Societies Act 1986 s 32, Sch 7 para 1(1). The Treasury may from time to time by order direct that Sch 2 para 1 has effect as if for the reference in Sch 7 para 1(1) to £5,000 there were substituted a reference to such higher amount as may be specified in the order: Sch 7 para 1(4). Such an order applies in relation to deaths occurring after the expiration of a period of one month beginning with the date on which the order comes into force: Sch 7 para 1(5). The power to make such an order is exercisable by statutory instrument but no such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: Sch 7 para 1(6). At the date at which this volume states the law no such order had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 Building Societies Act 1986 Sch 7 para 1(2)(a).

5 Building Societies Act 1986 Sch 7 para 1(2)(b). As to wills generally see **WILLS**. As to intestate succession see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 583 et seq.

6 Building Societies Act 1986 Sch 7 para 1(2). As to grants of probate or administration see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 72 et seq.

7 Building Societies Act 1986 Sch 7 para 1(3).

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## (C) FINES AND FORFEITURES

### 1901. Power to impose fines and forfeitures.

The right to impose fines or forfeitures, if referred to in the rules of a building society, will form part of the contract between members<sup>1</sup>. The Building Societies Act 1986, unlike earlier legislation, does not require societies to state in their rules what fines and forfeitures are to be imposed on members<sup>2</sup>. Rules as to fines cannot be arbitrarily dispensed with<sup>3</sup>.

The liability to be fined is in some cases, as, for instance, in that of executors or administrators of deceased members, a test of membership<sup>4</sup>.

1 See PARA 1878. As to contracts generally see **CONTRACT**.

2 It is not one of the express matters to be covered by the rules: see the Building Societies Act 1986 s 5(8), Sch 2 para 3; and PARA 1883.

3 Cf *Handley v Farmer* (1861) 29 Beav 362 at 368 per Sir John Romilly; *Cotterell v Stratton* (1872) 8 Ch App 295 at 307 per Sir WM James LJ; *Re Ilfracombe Permanent Mutual Benefit Building Society* [1901] 1 Ch 102 at 110 per Wright J.

4 *Knox v Shepherd* (1860) 2 LT 351. As to personal representatives generally see **EXECUTORS AND ADMINISTRATORS**.

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### 1902. Nature and enforcement of fines.

Fines are not penalties<sup>1</sup>, nor are they interest by way of a penalty<sup>2</sup>. It is, however, likely that fines are not enforceable unless they are reasonable<sup>3</sup>. No interest is chargeable on fines unless the rules of a building society otherwise provide<sup>4</sup>, but fines secured by covenant in a mortgage form part of the principal in foreclosure, and are payable with interest<sup>5</sup>. Fines for non-payment of fines may be recovered, if the rules so provide<sup>6</sup>. If the rules as to fines are not duly enforced, they cannot, as in liquidation proceedings, be revived against those members who have been allowed to escape their effect<sup>7</sup>.

The fact that fines are not entered up against a member by the proper official does not absolve the member from liability<sup>8</sup>.

1 *Pilkington v Baker* [1877] WN 210.

2 *Parker v Butcher* (1867) LR 3 Eq 762. As to relief against penalties and forfeitures see **EQUITY** vol 16(2) (Reissue) PARA 801 et seq.

3 The Building Societies Act 1986 makes no provision as to fines. In the case of unincorporated societies the Building Societies Act 1836 s 1 (repealed) conferred power to impose 'reasonable' fines. Unreasonable fines, such as those which were cumulative in arithmetical progression, could not be enforced, but if possible the rules would be construed so as to make the fines reasonable and, if reasonable, they would be enforced: *Re Tierney's Estate* (1874) IR 9 Eq 1; *Lovejoy v Mulkern* (1877) 46 LJCh 630, CA; *Re Middlesbrough Building Society* (1884) 54 LJCh 592. As to what fines are reasonable see *Parker v Butcher* (1867) LR 3 Eq 762; *Pilkington v Baker* [1877] WN 210. It is thought that, nowadays, a term in the rules which conferred a right on the society to impose fines on members would, unless qualified so as to ensure that any fine was proportionate to the loss suffered by the society by reason of the member's default, be vulnerable to challenge as an unfair term within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq.

4 *Parker v Butcher* (1867) LR 3 Eq 762; *Ingoldby v Riley* (1873) 28 LT 55.

5 *Provident Permanent Building Society v Greenhill* (1878) 9 ChD 122; *Re Knight, ex p Voisey* (1882) 21 ChD 442 at 450, CA, per Bacon CJ. As to mortgages generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

6 *Re Middlesbrough Building Society* (1884) 54 LJCh 592.

7 *North British Building Society v M'Lellann* (1887) 14 R 827, Ct of Sess.

8 *Handley v Farmer* (1861) 29 Beav 362 at 368 per Sir John Romilly.

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### 1903. Effect of forfeiture.

Forfeiture usually takes place on non-payment for a definite period of subscriptions and fines or on small or dormant investment accounts, when the sums already paid by the defaulting member become forfeited to the building society<sup>1</sup>. Rules as to forfeiture of shares will be enforced by the court, if reasonable<sup>2</sup>. Whether the forfeiture takes effect, not ipso facto on default, but at the option of the directors, depends on the construction of the rules<sup>3</sup>. But although the forfeiture is binding so far as the shares are concerned, the shareholder is not therefore absolved from all liability to the society. He may, for instance, still be liable to be placed on the list of contributories in a winding up<sup>4</sup>.

1 *Irvine and Fullarton Property Investment and Building Society v Cuthbertson* (1905) 8 F 1, Ct of Sess. The rules or the terms of a share account may provide in the case of dormant investment accounts that the moneys are forfeited to the society.

2 *Card v Carr* (1856) 1 CBNS 197. As to unfair terms in consumer contracts see the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083; and **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq.

3 *Moore v Rawlins* (1859) 6 CBNS 289 at 310 per Byles J; *R v D'Eyncourt* (1864) 4 B & S 820 at 835 per Blackburn J. Cf *Re East Kongsberg Co, Bigg's Case* (1865) LR 1 Eq 309 (a company case). See, however, *Irvine and Fullarton Property Investment and Building Society v Cuthbertson* (1905) 8 F 1, Ct of Sess. As to the office of director see PARAS 1944-1963.

4 *Re St George's Benefit Building Society, ex p Foote, Jennings and Dearsley* (1858) 6 WR 766. As to the winding up of societies see PARA 2071 et seq.

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## (D) CESSATION OF MEMBERSHIP

### 1904. Cessation of membership.

The rules of a building society must state the manner in which membership is to cease<sup>1</sup>. Generally, membership comes to an end when, in the case of a shareholding member, he has withdrawn the whole amount standing to his credit in respect of his shares<sup>2</sup> or when, in the case of a borrowing member, all sums due from him in respect of the loan secured by the mortgage have been repaid<sup>3</sup>. Membership may also cease upon the dissolution of the society<sup>4</sup>, upon the discharge of all liabilities in the winding up of a society<sup>5</sup>, upon forfeiture<sup>6</sup>, or upon death<sup>7</sup>.

Although power to expel members is not expressly given in the Building Societies Act 1986, such a power can, it is conceived, be exercised if the rules of the society so provide.

1 See the Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4), Table item 7; and see PARA 1883.

2 *Re Sheffield and South Yorkshire Permanent Benefit Building Society* (1889) 22 QBD 470, DC; and cf *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society (No 2)* (1885) 53 LT 203. As to withdrawal and the effect of winding up on withdrawing members see PARAS 1909-1915.

3 See *Re West Riding of Yorkshire Permanent Benefit Building Society, ex p Pullman, ex p Charnock, ex p Johnson and Greenwood* (1890) 45 ChD 463.

4 As to the dissolution of societies see PARA 2066 et seq.

5 As to the winding up of societies see PARA 2071 et seq.

6 As to the effect of forfeiture see PARA 1903.

7 As to the position of the representatives of deceased members see *Re Bowling and Welby's Contract* [1895] 1 Ch 663 at 670, CA, per Lindley LJ, and at 673 per AL Smith LJ; *Knox v Shepherd* (1860) 2 LT 351; and PARA 1893.

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## G. SHARES

### (A) SHARES AND SUBSCRIPTIONS

#### 1905. Nature and restriction of shares.

Subject to certain exceptions, a building society must not<sup>1</sup>:

- 288 (1) accept a deposit<sup>2</sup> from an individual<sup>3</sup>;
- 289 (2) raise funds<sup>4</sup> from an individual otherwise than by the issue of shares<sup>5</sup>; and
- 290 (3) raise funds from a body corporate<sup>6</sup>, or from a bare trustee for a body corporate or for persons who include a body corporate, otherwise than by the issue of deferred shares<sup>7</sup>.

The rules of a society must state<sup>8</sup>: (a) the manner in which the funds of the society are to be raised<sup>9</sup>; (b) the manner in which the terms are to be determined on which shares are to be issued and the manner in which shareholders are to be informed of changes in the terms on which their shares are held<sup>10</sup>; and (c) whether any preferential or deferred shares are to be issued and, if so, within what limits<sup>11</sup>.

Shares in societies differ in essence from shares in limited liability companies in that the latter constitute definite portions of the capital of the company, and are strictly limited in number, whereas the former represent no proportionate quota of the capital of the society, and are unlimited in number. There may be as many shares in a building society as people like to apply for<sup>12</sup>.

The statutory funding limit must be complied with<sup>13</sup>.

1 Building Societies Act 1986 s 8(1) (s 8 substituted by the Building Societies Act 1997 s 9). The exceptions are stated in the Building Societies Act 1986 s 8(2): see PARA 1917. As to raising funds and borrowing see PARAS 1916-1917.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 As to the meaning of 'deposit' see PARA 1866 note 7.

3 Building Societies Act 1986 s 8(1)(a) (as substituted: see note 1).

4 As to the meaning of 'raise funds' see PARA 1917 note 4.

5 Building Societies Act 1986 s 8(1)(b) (as substituted: see note 1). 'Share', in relation to a building society, is to be construed in accordance with s 8 (see PARA 1917): s 119(1) (definition substituted by the Building Societies Act 1997 Sch 7 para 53(1)(n)).

6 As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

7 Building Societies Act 1986 s 8(1)(c) (as substituted: see note 1). As to the meaning of 'deferred shares' see PARA 1906.

8 As to the required content of the rules see PARA 1883.

9 Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4), Table item 2 (amended by the Building Societies Act 1997 Sch 7 para 56(5)(a)); and see PARA 1883.

10 Building Societies Act 1986 Sch 2 para 3(1), (4), Table item 3; and see PARA 1883.

11 Building Societies Act 1986 Sch 2 para 3(1), (4), Table item 4; and see PARA 1883.

12 *Irvine and Fullarton Property Investment and Building Society v Cuthbertson* (1905) 8 F 1, Ct of Sess; but see PARAS 1856, 1917.

13 See the Building Societies Act 1986 s 7; and PARA 1916.

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## 1906. Classes of shares.

The rules of a building society must state: (1) the manner in which the terms are to be determined on which shares are to be issued<sup>1</sup>; and (2) whether preferential or deferred shares<sup>2</sup> are to be issued and, if so, within what limits<sup>3</sup>.

Commonly societies issue paid-up shares and subscription shares and, where permitted by the rules, preferential and deferred shares. The terms on which preferential shares are issued may differ widely from society to society, so it is not possible to identify particular features which must in all cases be possessed by a preferential share. It may, however, be said that, to qualify as preferential, a share must be issued as a preferential share under rules which provide for the issue of such shares. Moreover, where the rules specify the respects in which a preferential share is to be accorded preference, a share will only qualify as preferential if it carries the preferential rights for which the rules provide<sup>4</sup>. In practice, a preferential share would typically be issued on terms that it carries a guaranteed rate of interest; that, in the event of a deficiency in a winding up, it will be repaid in priority to ordinary investment shares; and that the holders of preferential shares will be liable for the society's losses only after the funds belonging to deferred and ordinary shareholders have been exhausted<sup>5</sup>. The right of preferential payment of capital sometimes depends on notice of withdrawal having been given<sup>6</sup>.

Deferred shares are shares of a class defined by order of the Treasury<sup>7</sup> in a statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament<sup>8</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4), Table item 3; and see PARA 1883.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 See the text to notes 7-8.

3 Building Societies Act 1986 Sch 2 para 3(1), (4), Table item 4; and see PARA 1883.

4 *Alliance Perpetual Building Society v Clifton* [1962] 3 All ER 828, [1962] 1 WLR 1270 (where a share which carried a guaranteed fixed rate of interest was held not to be a preferential share because it was not accorded priority in any of the other respects specified in the rules).

5 *Re Reliance Permanent Benefit Building Society* (1892) 61 LJCh 453. Note that the liability at any time of a shareholding member of a building society is limited to the amount which, at that time, has actually been paid, or is in arrear, on his shares in the society: see the Building Societies Act 1986 s 5(8), Sch 2 para 6(2) and PARA 1898.

6 See *Murray v Scott, Agnew v Murray, Brimelow v Murray* (1884) 9 App Cas 519, HL; *Sixth West Kent Mutual Building Society v Shove* [1899] 2 Ch 64n.

7 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Building Societies Act 1986 s 119(1) (definition amended by SI 2001/2617). As to the order made under the Building Societies Act 1986 s 119(1) see the Building Societies (Deferred Shares) Order 1991, SI 1991/701 (amended by SI 2001/3649). Shares which are issued by a society upon terms which have the effect of the 'key term' set out in the Building Societies (Deferred Shares) Order 1991, SI 1991/701, Schedule and in respect of which the conditions set out in heads (1)-(3) below are satisfied, are shares of a class defined as deferred shares for the purposes of the Building Societies Act 1986 s 119: Building Societies (Deferred Shares) Order 1991, SI 1991/701, art 3(1). The conditions mentioned in art 3(1) are that:



- 1 (1) the document containing the issue terms, or where the issue terms are contained in a series of documents, one of those documents, being in either case a document which is furnished to every applicant for the shares (the 'issue document'), and every document evidencing title to the shares (the 'title document'), contains a prominent statement to the effect that the shares are deferred shares for the purposes of the Building Societies Act 1986 s 119 (Building Societies (Deferred Shares) Order 1991, SI 1991/701, art 3(2)(a) (art 3(2) substituted by SI 2001/3649));
- 2 (2) where the issue document was issued before 1 December 2001 or where the title document evidences title obtained before that date, that document contains a prominent statement to the effect that the shares are not protected investments for the purposes of payments out of the Building Societies Investor Protection Fund (Building Societies (Deferred Shares) Order 1991, SI 1991/701, art 3(2)(b) (as so substituted)); and
- 3 (3) where the issue document was issued on or after 1 December 2001 or where the title document evidences title obtained on or after that date, that document contains a prominent statement stating whether or not the shares are an investment in respect of which a claim may be entertained by the Financial Services Compensation Scheme (art 3(2)(c) (as so substituted)).

The 'key term' is a term which has effect so as to prohibit the repayment of any principal to the shareholders in respect of the shares except (a) on the winding up or dissolution of the society in circumstances where all sums due from the society to creditors claiming in the winding up or dissolution are paid in full; or (b) with the granting of relevant consent by the Financial Services Authority: art 3(1), Schedule (amended by SI 2001/3649). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq. The term 'creditors', in relation to a society extends to members holding shares in the society, other than deferred shares, as regards the principal of those shares and all interest due thereon in accordance with their terms: Building Societies (Deferred Shares) Order 1991, SI 1991/701, art 2. 'Relevant consent' means consent applied for by the society otherwise than in consequence of a provision among the issue terms requiring the society so to apply or granting the society any benefit for so applying or imposing a sanction against failure so to apply: art 2. 'Issue terms' in relation to an issue of deferred shares means the provisions of a document which sets out, or of a connected series of documents which set out, the rights and obligations of the society and shareholders in respect of those shares: art 2. 'Society' in relation to deferred shares means a society which proposes to issue or, as the case may be, has issued, such shares: art 2.

Any shares issued by a society prior to 1 June 1991 (ie the date on which the Building Societies (Deferred Shares) Order 1991, SI 1991/701, came into force) and in respect of which the terms are in compliance with art 3 continue to be shares of a class defined as deferred shares for the purpose of the Building Societies Act 1986 s 119: Building Societies (Deferred Shares) Order 1991, SI 1991/701, art 4. The most common form of deferred shares are permanent interest-bearing shares (PIBs). The requirements for deferred shares to qualify as a permanent interest bearing shares (a question which is primarily relevant in determining whether the shares can be counted as part of the issuing society's Tier 1 capital) are now to be found in the Financial Services Authority Handbook of Rules and Guidance. As to the Handbook generally see PARA 22.

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### **1907. Title to shares.**

Registration in the books of a building society constitutes prima facie legal title to shares. A payment to the person legally, though not equitably, entitled to shares, without notice of the equitable title, is good, even if some of the special provisions of the rules with regard to payment have not been complied with<sup>1</sup>.

<sup>1</sup> *Nolloth v Simplified Permanent Benefit Building Society* (1885) 53 LT 859.

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### 1908. Rights of members to transfer shares.

Shares in building societies are subject to transfer<sup>1</sup>. The motive of the transfer cannot be inquired into<sup>2</sup>. Where rules regulating the method of transfer exist they must be strictly complied with<sup>3</sup>.

Building societies come within the Forged Transfers Acts<sup>4</sup>, which empower the societies to provide for the payment of compensation for losses arising from transfers of shares or securities in pursuance of forged transfers or forged powers of attorney<sup>5</sup>.

If the holder of shares in a society sells and transfers them after an order has been made for the compulsory winding up of the society, the transferee is not entitled to be registered as owner without the sanction of the court<sup>6</sup>.

Shares in societies may be bequeathed, as such, to a charity<sup>7</sup>. They may pass on a residuary bequest of 'money', in view of the wide modern interpretation of that expression<sup>8</sup>, if as a matter of construction of the will this is the expressed intention of the testator<sup>9</sup>, and they may be the subject of a donatio mortis causa, if the instrument handed over is the essential evidence of title, possession or production of which entitled the possessor to the property purported to be given<sup>10</sup>. It has been held that a minor could not transfer shares in a building society<sup>11</sup>.

1 See *Allan v Urquhart* (1887) 25 SLR 47, shares being a class of property of which the right to transfer is a necessary incident. Transfers of society shares are exempt from stamp duty: see the Building Societies Act 1986 s 109(1)(b); and PARA 1857.

2 *Re Stranton Iron and Steel Co* (1873) LR 16 Eq 559; *Pender v Lushington* (1877) 6 ChD 70; *Moffatt v Farquhar* (1878) 7 ChD 591. All these are cases relating to limited companies, the principle of which, however, seems applicable.

3 *Allan v Urquhart* (1887) 25 SLR 47.

4 The Forged Transfers Act 1891 and the Forged Transfers Act 1892: see **COMPANIES** vol 14 (2009) PARA 433.

5 See the Forged Transfers Act 1891 ss 1, 3; and **COMPANIES** vol 14 (2009) PARA 433.

6 *Re Onward Building Society* [1891] 2 QB 463, CA. As to the winding up of societies see PARA 2071 et seq.

7 *Entwistle v Davis* (1867) LR 4 Eq 272.

8 As to the meaning of 'money' generally see PARA 1277.

9 See *Perrin v Morgan* [1943] AC 399, [1943] 1 All ER 187, HL. Cf *Collins v Collins* (1871) LR 12 Eq 455, where building society shares were held not to pass on a bequest of 'all the money both in the house and out of it'. See further **WILLS** vol 50 (2005 Reissue) PARA 476 et seq.

10 This is the test suggested by Evershed MR in *Birch v Treasury Solicitor* [1951] Ch 298 at 311, [1950] 2 All ER 1198 at 1207, CA. Cf *Re Weston, Bartholomew v Menzies* [1902] 1 Ch 680 (certificates of building society shares considered not to be the proper subject matter of a donatio mortis causa); and *Griffiths and the Abbey National Building Society* (1947) [1938-1949] Registrar's Reports of Selected Disputes 14 (where the Registrar of Friendly Societies held that a donatio of building society shares can be made if the document of title delivered to the donee contains the essential terms of the contract). In *Birch v Treasury Solicitor* above at 311 and 1207 per Evershed MR the view was taken that the test of the validity of the donatio that the document handed over should contain all the essential terms of the contract goes further than is necessary. See further **GIFTS** vol 52 (2009) PARAS 271-278.

11 *Swears v Mayfair Mutual Benefit Building Society* 1881 Reg Rep 39 (Chief Registrar of Friendly Societies). As to minors as members see PARA 1891.

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## (B) WITHDRAWAL OF SHARES

### 1909. Right of withdrawal.

The rules of a building society must state the manner in which membership is to cease<sup>1</sup>. Under earlier legislation the rules were required to state the terms on which shares might be withdrawn<sup>2</sup> and it was thought that the right of withdrawal was an essential part of a member's contract. Societies may now, however, issue deferred shares on terms which exclude the right to withdraw<sup>3</sup>. The rights of withdrawal depend on the rules of the society<sup>4</sup> and the terms on which the particular shares are issued.

Notice of withdrawal can be required to be given, the period varying according to the rules. An informal notice will be sufficient if accepted by the society, although a special form is provided by the rules<sup>5</sup>. Notice is waived if the member subsequently accepts a loan from the society on the footing of his continuing to be a member, even if the loan is ultra vires<sup>6</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4), Table item 7. As to membership see PARA 1888 et seq.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 See the Building Societies Act 1962 s 4(1)(c) (repealed), which made it obligatory for all societies under that Act to state in their rules the terms on which subscription shares could be withdrawn.

3 As to deferred shares (of which the most common examples are permanent interest bearing shares) see PARA 1906 note 8.

4 *Walton v Edge* (1884) 10 App Cas 33, HL; *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society (No 2)* (1885) 53 LT 203. Rules may be so framed as to give withdrawing members a charge on certain funds, thereby affecting the order of payment: *Re Alliance Society* (1885) 28 ChD 559, CA; *Botten v City and Suburban Permanent Benefit Building Society* (1895) 72 LT 375, CA.

5 *Re Blackburn and District Benefit Building Society* (1883) 24 ChD 421 at 424, CA; affd sub nom *Walton v Edge* (1884) 10 App Cas 33, HL (not appealed against on this point).

6 *Re Counties Conservative Permanent Benefit Building Society, Davis v Norton* [1900] 2 Ch 819.

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### 1910. Liability of withdrawing member.

A withdrawing member is not liable to make any further contribution after the date of his notice either while the building society continues or in a winding up<sup>1</sup>. However, if before the notice expires the stoppage of the business of the society is recognised as inevitable, or the society is wound up, the notice has no effect, and gives no priority for payment over members who have given no notice<sup>2</sup>.

1 *Sibun v Pearce* (1890) 44 ChD 354 at 372, CA, per Lindley LJ. As to membership see PARA 1888 et seq. As to members' liability generally see PARA 1898. As to the winding up of societies see PARA 2071 et seq.

2 *Re Sunderland 36th Universal Building Society* (1890) 24 QBD 394; *Re Ambition Investment Building Society* [1896] 1 Ch 89.

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### **1911. Position of matured member.**

For certain purposes matured members<sup>1</sup> of a building society are still members. Thus they are subject to rules compelling disputes between members to be referred to arbitration<sup>2</sup>, and they must be counted among the number of members when calculating the majority necessary to constitute a valid instrument of dissolution<sup>3</sup>, and further they are liable to have the rules altered to their prejudice<sup>4</sup>, and to have their notices postponed by rules made after the notices were given<sup>5</sup>, but not so as to render the notices of no effect<sup>6</sup>. Matured members, relative to continuing members, are creditors of the society, and have priority in a winding up<sup>7</sup>.

If the rules provide that members may withdraw 'provided the funds permit', and there are no funds when a notice of withdrawal matures, the member giving the notice acquires a right to receive payment when funds permit, and will have priority over non-withdrawing members in a winding up<sup>8</sup>.

1 The term 'matured member' relates to a member who has given notice of withdrawal which has expired but to whom payment has not yet been made. A member withdrawing passes through two stages: first, from the date the notice is given to that of its expiration; secondly, from the date of the expiration of the notice to that of payment. Such a member, therefore, occupies in turn three different positions. For the purposes of clarity a different title is used for each position, ie for a member during the currency of the notice being called a 'withdrawing' member, after the expiration of the notice and before a payment a 'matured' member and after payment a 'withdrawn' member. As to membership generally see PARA 1888 et seq.

2 *Wright v Deeley* (1866) 4 H & C 209; *Mitchell v Caledonian Property Investment Building Society* (1886) 23 SLR 651; *Walker v General Mutual Building Society* (1887) 36 ChD 777, CA. As to arbitration generally see **ARBITRATION** vol 2 (2008) PARA 1201 et seq.

3 *Sibun v Pearce* (1890) 44 ChD 354, CA. As to instruments of dissolution see the Building Societies Act 1986 s 87(2); and PARA 2066.

4 *Pepe v City and Suburban Permanent Building Society* [1893] 2 Ch 311. However this does not apply where, under the rules, a member has ceased to be a member: see *Christie v Northern Counties Permanent Benefit Building Society* (1889) 43 ChD 62 at 68 per North J; *R v Brabrook* (1893) 69 LT 718, DC.

5 *R v Brabrook* (1893) 69 LT 718, DC.

6 *Walton v Edge* (1884) 10 App Cas 33 at 36, HL, per Lord Selborne LC.

7 *Walton v Edge* (1884) 10 App Cas 33 at 36-38, HL, per Lord Selborne LC; *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society (No 2)* (1885) 53 LT 203; *Re Carrick (North British Building Society in Liquidation)* (1885) 22 SLR 833; *Blair v Broadfoot's Trustees* (1890) 27 SLR 859. However they are not creditors within the preference provisions of the Insolvency Act 1986 s 239 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 843, 846-849): *Re Gwawr-y-Gweithyr Industrial and Provident Society* [1901] 2 KB 477, DC. As to the winding up of societies see PARA 2071 et seq. As to the Treasury's power by order under the Building Societies Act 1986 s 90B to alter priorities on a dissolution or winding up to ensure parity between ordinary creditors and non-deferred shareholders see PARA 2080.

8 *Walton v Edge* (1884) 10 App Cas 33 at 37-38, HL, per Lord Selborne LC.

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### **1912. Operation of notice.**

Notice of withdrawal is self-operating<sup>1</sup>, and at the expiration of the notice if all subscriptions, fines, and other liabilities to the building society are paid, and the amount due under the rules is paid to the member, the shares are withdrawn<sup>2</sup>; and the withdrawn member ceases to be a member, and is under no liability on dissolution or winding up<sup>3</sup>.

1 *Re Sheffield and South Yorkshire Permanent Building Society* (1889) 22 QBD 470 at 475, DC, per Cave J.

2 *Re Sheffield and South Yorkshire Permanent Building Society* (1889) 22 QBD 470 at 475, DC, per Cave J; *Re West Riding of Yorkshire Permanent Benefit Building Society, ex p Pullman, ex p Charnock, ex p Johnson and Greenwood* (1890) 45 ChD 463. As to membership see PARA 1888 et seq. As to members' liability generally see PARA 1898.

3 *Re Sheffield and South Yorkshire Permanent Benefit Building Society* (1889) 22 QBD 470, DC; *Re West Riding of Yorkshire Permanent Building Society, ex p Pullman, ex p Charnock, ex p Johnson and Greenwood* (1890) 45 ChD 463. As to dissolution and winding up see PARAS 2066-2079.

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### **1913. Loss of right of withdrawal.**

The right to withdraw from a building society is put to an end by a winding-up order, which acts as a compulsory withdrawal<sup>1</sup>, by insolvency of the society, and by stoppage of business, or by a condition of things that renders stoppage of business inevitable<sup>2</sup>. However, a notice which has matured before any of those events is nevertheless effective<sup>3</sup>.

1 *Brownlie v Russell* (1883) 8 App Cas 235, HL. As to the effect of winding-up orders see PARA 1914. As to the winding up of societies see PARA 2071 et seq.

2 *Re Carrick (North British Building Society in Liquidation)* (1885) 22 SLR 833; *Re Sunderland 36th Universal Building Society* (1890) 24 QBD 394; *Re Ambition Investment Building Society* [1896] 1 Ch 89.

3 *Re Ambition Investment Building Society* [1896] 1 Ch 89 at 100 per Vaughan Williams J.

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### **1914. Effect of winding-up order.**

The rights of withdrawing, of matured, and even in some circumstances of withdrawn, members of a building society are liable as against the outside public to be modified by an order for winding up<sup>1</sup> though the validity and force of the contract between them, that is of the rules, is not thereby impaired<sup>2</sup>.

The rule as to priority of payment when a society is being wound up is as follows: outside creditors, including persons who have deposited money by way of loan<sup>3</sup>, must be paid first<sup>4</sup>; then realised<sup>5</sup> members and those matured members<sup>6</sup> whose notices had expired before the winding up began; then withdrawing members and continuing members *pari passu*<sup>7</sup>. The members of each class are entitled to be paid in full<sup>8</sup> before any payment is made to the classes behind them; priority between the members of each class depends on the rules of the society<sup>9</sup>. Preference shareholders are entitled to be paid in full after all outside creditors have been paid, subject to the rules and the terms on which the shares were issued. There is doubt as to the priority between preference shareholders and matured members whose notice of withdrawal has expired before the commencement of the winding up<sup>10</sup>.

The above order of priority is subject, as respects payment to members, to any contrary provision contained in the society's rules<sup>11</sup>.

A member who, having given notice of withdrawal, afterwards accepts from the society a loan upon terms whereby he still continues to receive interest upon his share, but pays interest upon his advance, cannot in the winding up set off the amount of his share against the unpaid balance of the loan<sup>12</sup>.

1 For the procedure on a petition to the court for winding up see PARA 2071 et seq. As to membership see PARA 1888 et seq.

2 *Walton v Edge* (1884) 10 App Cas 33, HL.

3 *Re Mutual Aid Permanent Benefit Building Society* (1885) 30 ChD 434, CA. As to the position of depositors, where the society has, ultra vires, carried on in this case a banking business, see *Re Birkbeck Permanent Benefit Building Society* [1912] 2 Ch 183, CA; varied sub nom *Sinclair v Brougham* [1914] AC 398, HL. In such a case a depositor may have a lawful claim, but the onus of proof is on him. Cf *Re Birkbeck Permanent Benefit Building Society* above at 229 per Buckley LJ; *Birkbeck Building Society v Birkbeck* (1913) 29 TLR 218, DC; cf also *Re Birkbeck Permanent Benefit Building Society* [1913] 1 Ch 400 (which decided that, where a society carried on an ultra vires business, a former employee could not prove for the capital value of his pension in a winding up).

4 As to the Treasury's power by order under the Building Societies Act 1986 s 90B to alter priorities on a dissolution or winding up to ensure parity between ordinary creditors and non-deferred shareholders see PARA 2080.

5 *Re Norwich and Norfolk Provident Building Society, ex p Rackham* (1876) 45 LJCh 785, CA. By a 'realised' share is meant one which has by due payment of all necessary subscriptions become fully paid up: *Auld v Glasgow Working Men's Building Society* (1887) 12 App Cas 197 at 200, HL, per Lord Herschell.

6 *Walton v Edge* (1884) 10 App Cas 33, HL (even though between the giving of the notices and the winding up there never were any funds for payment). See *Barnard v Tomson* [1894] 1 Ch 374. As to matured members see PARA 1911.

7 *Re Ambition Investment Building Society* [1896] 1 Ch 89.

8 *Re Counties Conservative Permanent Benefit Building Society, Davis v Norton* [1900] 2 Ch 819.

9 *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society (No 2)* (1885) 53 LT 203.

10 *Re Reliance Permanent Benefit Building Society* (1892) 61 LJCh 453; *Sixth West Kent Mutual Building Society v Shove* [1899] 2 Ch 64n.

11 In the past, rules were sometimes encountered which gave priority to widows and children of deceased members, or to the executors of deceased members, over all other members, including matured or withdrawing members: see *Thompson v Atlas Permanent Building Society* (1894) 97 LT Jo 218, CA; *Re West London and General Permanent Benefit Building Society* (1898) 78 LT 393; *Barnard v Tomson* [1894] 1 Ch 374 at 392 per North J; *Re Counties Conservative Permanent Benefit Building Society, Davis v Norton* [1900] 2 Ch 819. While it is thought that the principle that the normal order or priority can be altered by the rules is still sound, it is highly improbable that, in modern conditions, the rules of a society would seek to accord priority to classes of the kinds favoured by the rules under consideration in these authorities.

12 *Re Counties Conservative Permanent Benefit Building Society, Davis v Norton* [1900] 2 Ch 819.

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### 1915. Right to interest.

For the purposes of the Building Societies Act 1986, 'interest' in relation to shares, includes dividends<sup>1</sup>.

Interest, whether simple or compound<sup>2</sup>, is payable by the building society in case of withdrawal if the rules so provide<sup>3</sup>; and if by the rules the day for payment of the sum payable on withdrawal is fixed, and payment is not made by the society, a member who brings proceedings for recovery of the money may be able to obtain an award of interest on the sum due, although the rules do not provide for interest<sup>4</sup>. But if the payment depends on a condition, such as the determination by the directors or the committee of the rate, or the availability of funds, payment cannot be enforced unless and until the condition is fulfilled<sup>5</sup>. Interest, if payable, may in the case of withdrawals between half-yearly dates of payment be recovered for the period between the last such date of payment and the day of withdrawal<sup>6</sup>.

1 Building Societies Act 1986 s 119(1) (definition added by the Building Societies Act 1997 Sch 7 para 53(1) (h)).

2 *Re Doncaster Permanent Benefit Building and Investment Society* (1866) 14 LT 13.

3 *Re Middlesbrough, Redcar, Saltburn-by-the-Sea, and Cleveland District Permanent Benefit Building Society (No 2)* (1885) 53 LT 203, followed in *Re Reliance Permanent Benefit Building Society* (1892) 61 LJCh 453.

4 See the Law Reform (Miscellaneous Provisions) Act 1934 s 3(1) (repealed in relation to the High Court and county courts); the Supreme Court Act 1981 s 35A (added by the Administration of Justice Act 1982 Sch 1 Pt 1) (which makes provision in relation to the High Court); and the County Courts Act 1984 s 69 (amended by the Courts and Legal Services Act 1990 Sch 18 para 46; and the Civil Procedure Act 1997 Sch 2 para 2(2)) (which makes provision in relation to county courts). See further **DAMAGES** vol 12(1) (Reissue) PARA 848. As from a day to be appointed, the Supreme Court Act 1981 is to be renamed as the Senior Courts Act 1981: see the

Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1. At the date at which this volume states the law no such day had been appointed.

5 *Re Blackburn and District Building Society* [1886] WN 22, CA; *Re Sunderland 36th Universal Building Society* (1890) 24 QBD 394. As to the office of director see PARAS 1944-1963.

6 *Perratt v London Scottish Permanent Benefit Building Society* (1888) 59 LT 31.

## **UPDATE**

### **1915 Right to interest**

NOTE 4--Appointed day is 1 October 2009: SI 2009/1604.

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## **H. RAISING FUNDS AND BORROWING MONEY**

### **1916. The funding limit.**

Broadly speaking, the purpose of the funding limit is to ensure that shares in the society held by individuals account for not less than 50 per cent of the funds raised by the society and its subsidiary undertakings. This objective is secured by placing the society under a duty to secure that the difference between: (1) the value of X on any quarter day<sup>1</sup>; and (2) the value of Y on that day or the value of Y on the immediately preceding quarter day, whichever is the greater<sup>2</sup>, does not exceed 50 per cent of that value of X<sup>3</sup>. If a society fails to comply with this requirement the powers conferred on the Financial Services Authority<sup>4</sup> become exercisable in relation to the society, but the failure does not affect the validity of any transaction or other act<sup>5</sup>.

For these purposes X equals the aggregate of: (a) the principal value of, and interest<sup>6</sup> accrued on, shares<sup>7</sup> in the society<sup>8</sup>; (b) the principal of, and interest accrued on, sums deposited with the society or any subsidiary undertaking<sup>9</sup> of the society<sup>10</sup>; and (c) the principal value of, and interest accrued under, bills of exchange<sup>11</sup>, instruments or agreements creating or acknowledging indebtedness and accepted, made, issued or entered into by the society or any such undertaking<sup>12</sup>. For these purposes Y equals the principal value of, and interest accrued on, shares in the society held by individuals otherwise than as bare trustees for bodies corporate<sup>13</sup> or for persons who include bodies corporate<sup>14</sup>. However, the following must be disregarded: (i) any sums or amounts which are own funds<sup>15</sup>; and (ii) to the extent that they are not included in the total liabilities of the society and any subsidiary undertakings of the society as shown in the society's accounts<sup>16</sup> (A) any sums deposited with the society or any such undertaking<sup>17</sup>; and (B) any indebtedness created or acknowledged by bills of exchange, instruments or agreements accepted, made, issued or entered into by the society or any such undertaking<sup>18</sup>.

Where an individual declares that he is acquiring any shares in a building society otherwise than as a bare trustee for a body corporate, or for persons who include a body corporate, he is, unless the contrary is shown, conclusively presumed<sup>19</sup> to hold the shares otherwise than as such a trustee<sup>20</sup>.



1 Building Societies Act 1986 s 7(1)(a) (s 7 substituted by the Building Societies Act 1997 s 8). For the purposes of the Building Societies Act 1986 s 6 (see PARA 2008) and s 7, 'quarter day', in relation to a building society, means a day on which a financial year of the society ends, or a day which is three months, six months or nine months after such day: s 6(14) (s 6 substituted by the Building Societies Act 1997 s 4). References to any value on a quarter day are references to that value at the close of business on that day: Building Societies Act 1986 s 6(14) (as so substituted). If an agreement between the Financial Services Authority and a building society so provides, the definition of 'quarter day' has effect in relation to the society as if for any reference to a number of months there were substituted a reference to a number of days specified in the agreement: s 6(15) (as so substituted; and amended by SI 2001/2617). As to the meaning of 'financial year' see PARA 1992 note 2. As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 Building Societies Act 1986 s 7(1)(b) (as substituted: see note 1).

3 Building Societies Act 1986 s 7(1) (as substituted: see note 1).

As from a day to be appointed, the provisions of s 7(6A)-(6C), (8A) are added by the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 s 1(1). At the date at which this volume states the law, no such day had been appointed. The Treasury may, by order (1) provide for the Building Societies Act 1986 s 7(1) to have effect as if the reference to 50% were a reference to such greater percentage (not exceeding 75) as it thinks appropriate; (2) prohibit a society from applying the increased percentage unless a resolution of the society of such description as the Treasury thinks appropriate is passed in favour of applying the increased percentage: s 7(6A) (as so prospectively added). An order under s 7(6A) is of no effect at any time unless, at the same time, there is also in force an order under s 90B (power to alter priorities on dissolution and winding up) (see PARA 2080): s 7(6B) (as so prospectively added). An order under head (1) above (a) may not be amended so as to reduce the percentage specified in the order; (b) may not be revoked, unless it is replaced by another such order specifying the same or a greater percentage: s 7(6C) (as so prospectively added). The power to make an order under s 7(6A) is exercisable by statutory instrument but no such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 7(8A) (as so prospectively added). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. See note 8.

4 The powers conferred by the Building Societies Act 1986 s 36 (power to direct restructuring of business): see PARA 2047.

5 Building Societies Act 1986 s 7(5) (as substituted (see note 1); and amended by SI 2001/2617).

6 As to the meaning of 'interest' see PARA 1915.

7 As to shares in relation to societies see PARA 1905 et seq.

8 Building Societies Act 1986 s 7(2)(a) (as substituted: see note 1). The Treasury may by order: (1) modify s 7(2), (3) (see the text to notes 9-18) in its application to liabilities of subsidiary undertakings; (2) apply s 7(2), (3) to corresponding liabilities of associated undertakings; or (3) modify s 7(2), (3) in its application to such liabilities: s 7(7) (as so substituted; and amended by SI 2001/2617). An order under the Building Societies Act 1986 s 7(7) may make different provision for different circumstances, provision for particular liabilities of undertakings to be disregarded, and such supplementary, transitional and saving provision as appears to the Treasury to be necessary or expedient: Building Societies Act 1986 s 7(8) (as so substituted; and amended by SI 2001/2617). As from a day to be appointed, there is an amendment to the provision so that the reference is to an order under the Building Societies Act 1986 s 7(6A) or s 7(7) (as to s 7(6A) see note 3): s 7(8) (prospectively amended by the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 s 1(1)). At the date at which this volume states the law no such day had been appointed. The power to make such an order is exercisable by statutory instrument, which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 7(9) (as so substituted). As to orders made see the Building Societies Act 1986 (Modification of the Lending Limit and Funding Limit Calculations) Order 2004, SI 2004/3200 (amended by SI 2006/3221); and the Building Societies Act 1986 (Substitution of Specified Amounts and Modification of the Funding Limit Calculation) Order 2007, SI 2007/860.

'Associated undertaking' has the meaning given by the Building Societies Act 1986 s 119A: s 119(1) (definition added by SI 2008/948). In the Building Societies Act 1986 'associated undertaking', in relation to a building society, means an undertaking (other than a subsidiary undertaking of the society) (a) in which the society (or the group of which the society is a member) holds a participating interest; and (b) over whose operating and financial policy the society (or group) exercises a significant influence: s 119A(1) (s 119A added by SI 2008/948). 'Participating interest' means an interest in the shares of the undertaking held on a long term basis for the purpose of securing a contribution to the activities of the society (or group) by the exercise of control or influence arising from or related to that interest: Building Societies Act 1986 s 119A(2) (as so added). For this

purpose (i) a holding of 20% or more of the shares of an undertaking is presumed to be a participating interest unless the contrary is shown; (ii) an 'interest in shares' includes (A) an interest that is convertible into an interest in shares; and (B) an option to acquire shares or any such interest, and an interest or option falls within head (A) or (B) above notwithstanding that the shares to which it relates are, until the conversion or the exercise of the option, unissued; (iii) an interest held on behalf of an undertaking is treated as held by it: s 119A(3) (as so added). A holding of 20% or more of the voting rights in an undertaking is presumed to result in the exercise of such influence as is mentioned in head (b) above, unless the contrary is shown: s 199A(4) (as so added). For this purpose (aa) the voting rights in an undertaking means the rights conferred on shareholders in respect of their shares or, in the case of an undertaking not having a share capital, on members, to vote on all, or substantially all, matters affecting the undertaking; and (bb) the provisions of the Companies Act 2006 Sch 7 paras 5-11 (rights to be taken into account and attribution of rights) (see **COMPANIES** vol 14 (2009) PARA 27) apply in determining whether the society (or the group) holds 20% or more of the voting rights in an undertaking: Building Societies Act 1986 s 119A(5) (as so added). References in s 119A to the group of which the society is a member at any time are to the undertakings that would fall to be included in the consolidation if consolidated group accounts were to be drawn up by the society at that time: s 119A(6) (as so added). An undertaking is not an 'associated undertaking' of a building society for the purposes of the Building Societies Act 1986 if, in such accounts, it would fall to be dealt with as a joint venture (that is, an undertaking managed jointly with one or more undertakings not included in the consolidation): s 119A(7) (as so added). As to the meaning of 'subsidiary undertaking' see note 9.

9 'Subsidiary undertaking' and 'undertaking' have the same meaning as in the Companies Acts (see the Companies Act 2006 ss 1161(1), 1162, Sch 7; and **COMPANIES** vol 14 (2009) PARAS 26, 27); Building Societies Act 1986 s 119(1) (definitions added by SI 2008/948).

As to the application of the Building Societies Act 1986 s 7(2) to liabilities of subsidiary undertakings see the Building Societies Act 1986 (Modifications of the Lending Limit and Funding Limit Calculations) Order 2004, SI 2004/3200; and note 8.

10 Building Societies Act 1986 s 7(2)(b) (as substituted: see note 1). See note 8.

11 As to bills of exchange generally see PARA 1400 et seq.

12 Building Societies Act 1986 s 7(2)(c) (as substituted: see note 1). See note 8.

13 As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

14 Building Societies Act 1986 s 7(2) (as substituted: see note 1). See note 8. Unless the contrary is shown, a society may assume that any shares in the society which are held by an individual on 1 December 1997 (ie the date the Building Societies Act 1997 s 8 came into force: see the Building Societies Act 1997 (Commencement No 3) Order 1997, SI 1997/2668, art 2(2)-(5), Schedule Pt II(g)) are held otherwise than as a bare trustee for a body corporate, or for persons who include a body corporate: Building Societies Act 1997 s 46(1), Sch 8 para 7.

15 Building Societies Act 1986 s 7(3)(a) (as substituted: see note 1). See note 8. 'Own funds' means own funds as defined in European Parliament and EC Council Directive 2006/48 (OJ L177, 30.06.2006, p 1) relating to the taking up and pursuit of the business of credit institutions Title V Ch 2 Section 1: Building Societies Act 1986 s 119(1) (definition added by SI 2001/3649); Building Societies Act 1986 s 119(2B) (added by SI 1996/1669; and substituted by SI 2006/3221).

16 Building Societies Act 1986 s 7(3)(b) (as substituted: see note 1). See note 8. For the purposes of ss 6, 7 (see PARA 2008), 'accounts' in relation to a building society without subsidiary undertakings, means individual accounts (see PARA 1992), and in relation to such a society with such undertakings, means group accounts: s 6(14) (as substituted (see note 1); and amended by SI 2004/3380).

The reference in the Building Societies Act 1986 s 7(3) to anything being shown in a society's accounts is to be construed: (1) in relation to a quarter day on which a financial year of the society ends, as a reference to its being shown in the accounts prepared by the society for that year; (2) in relation to any other quarter day, as a reference to its being shown in the accounts which would have been prepared by the society for the year ending on that day if that year were a financial year of the society: s 7(4) (as substituted: see note 1).

17 Building Societies Act 1986 s 7(3)(b)(i) (as substituted: see note 1). See note 8.

18 Building Societies Act 1986 s 7(3)(b)(ii) (as substituted: see note 1). See note 8.

19 Ie for the purposes of the Building Societies Act 1986 s 7.

20 Building Societies Act 1986 s 7(6) (as substituted: see note 1).

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### **1917. Raising funds and borrowing.**

A building society must not do any of the following things, namely<sup>1</sup>:

- 291 (1) accept a deposit<sup>2</sup> from an individual<sup>3</sup>;
- 292 (2) raise funds<sup>4</sup> from an individual otherwise than by the issue of shares<sup>5</sup>; and
- 293 (3) raise funds from a body corporate, or from a bare trustee for a body corporate or for persons who include a body corporate, otherwise than by the issue of deferred shares<sup>6</sup>.

However, contravention of these prohibitions does not invalidate any transaction or other act<sup>7</sup>.

The prohibition in head (1) above does not apply in relation to<sup>8</sup>:

- 294 (a) the maintenance on behalf of an individual of a current account, or a deposit account which contains in its title the word 'client' or the words 'trust' or 'trustee'<sup>9</sup>;
- 295 (b) the issue to an individual of a transferable instrument<sup>10</sup>;
- 296 (c) the acceptance from an individual of a qualifying time deposit<sup>11</sup> or an overseas deposit<sup>12</sup>; or
- 297 (d) in the case of a society which has announced publicly that it intends<sup>13</sup> to transfer the whole of its business to a company, anything done by the society during the period of two years beginning with the date of the announcement<sup>14</sup>.

Where an individual declares that he is acquiring any shares in a society otherwise than as a bare trustee for a body corporate, or for persons who include a body corporate, he is, unless the contrary is shown, conclusively presumed for the purposes of the provisions relating to raising funds and borrowing<sup>15</sup> to hold the shares otherwise than as such a trustee<sup>16</sup>.

The power of a society to raise funds by the issue of shares is a power<sup>17</sup>: (i) to issue shares of one or more denominations, whether in sterling or another currency<sup>18</sup>; and (ii) to issue them either as shares paid up in full or as shares to be paid by periodical or other payments, and (in either case) with accumulating or other interest<sup>19</sup>, and funds so raised may be repaid when they are no longer required for the purposes of the society<sup>20</sup>. In the case of deferred shares, the power of a society to raise funds by the issue of shares includes the issue of shares at a premium<sup>21</sup>. For the purposes of the provisions relating to raising funds and borrowing, the acceptance of deposits, including the issue of debt securities, does not constitute the raising of funds<sup>22</sup>.

1 See the Building Societies Act 1986 s 8(1); and PARA 1905. The substitution of s 8 does not affect the operation of the Building Societies Act 1986 in relation to:

- 4 (1) any deposit accepted by a society from an individual before 1 December 1997 (ie the date on which the Building Societies Act 1997 s 9 came into force: see the Building Societies Act 1997 (Commencement No 3) Order 1997, SI 1997/2668, art 2(2)-(5), Schedule Pt II(h)) (Building Societies Act 1997 s 46(1), Sch 8 para 8(1)(a));
- 5 (2) any deposit accepted by a society from an individual if: (a) his deposit is held in a deposit account opened before 1 December 1997; (b) he has been notified by the society that he may

transfer the deposit without penalty into an account which, at the date of the notice, was an equivalent share account; and (c) he has chosen not to do so (Sch 8 para 8(1)(b), (2));

- 6 (3) any deposit accepted by a society from an individual which is to be credited to a tax-exempt special savings account opened before 1 December 1997 (Sch 8 para 8(1)(c)); or
- 7 (4) any share issued by a society to a body corporate before 1 December 1997 (Sch 8 para 8(1)(d)).

'Equivalent share account', in relation to a deposit account, means a share account: (i) whose access period is no longer than that of the deposit account; and (ii) whose rate of interest is not less than that of each other share account with the society which has the same access period or, where there is no such account, that of any one share account with the society which has a longer access period: Sch 8 para 8(3). 'Access period', in relation to a deposit or share account, means the period of notice required for making withdrawals from the account: Sch 8 para 8(3). For these purposes, 'tax-exempt special savings account' has the same meaning as in the Income and Corporation Taxes Act 1988 s 326A(2) (repealed) (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1194): Building Societies Act 1997 Sch 8 para 8(3). As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 As to the meaning of 'deposit' see PARA 1866 note 7.

3 See the Building Societies Act 1986 s 8(1)(a); and PARA 1905.

4 'Raise funds' means, subject to the Building Societies Act 1986 s 8(8) (see the text to note 22), raise funds by the issue of shares or other securities: s 8(9) (s 8 substituted by the Building Societies Act 1997 s 9). See note 8.

5 See the Building Societies Act 1986 s 8(1)(b); and PARA 1905.

6 See the Building Societies Act 1986 s 8(1)(c); and PARA 1905. As to the meaning of 'deferred shares' see PARA 1906.

7 Building Societies Act 1986 s 8(4) (as substituted: see note 4).

8 Building Societies Act 1986 s 8(2) (as substituted: see note 4). The Treasury may by order vary the provisions of s 8(2), (9), (10) (see the text and notes 4, 9-14) by adding to or deleting from them any provision or by varying any provision contained in them; and such an order may make such supplementary, transitional and saving provision as appears to the Treasury to be necessary or expedient: s 8(12) (as so substituted; and amended by SI 2001/2617). The power to make such an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 8(13) (as so substituted). At the date at which this volume states the law no such order had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

9 Building Societies Act 1986 s 8(2)(a) (as substituted: see note 4). See note 8.

10 Building Societies Act 1986 s 8(2)(b) (as substituted: see note 4). 'Transferable instrument' means an instrument which embodies a transferable right to receive an amount referable to a deposit with the society: s 8(9) (as so substituted). A right is transferable for these purposes if it is transferable by delivery of the instrument, or it is a right: (1) which may, under the terms of the instrument, be held by any person, or by any person other than a person of a description specified in the instrument; (2) express provision for the transfer of which is included in the instrument; and (3) the transfer of which, under the terms of the instrument, does not require the consent of any person: s 8(10) (as so substituted). See note 8.

11 For these purposes 'qualifying time deposit' has the same meaning as in the Income Tax Act 2007 s 866(2), (3) (see **INCOME TAXATION**): Building Societies Act 1986 s 8(9) (as substituted (see note 4); and definition amended by the Income Tax Act 2007 Sch 1 para 273). According to the Income Tax Act 2007 s 866(2), (3), an investment is a qualifying time deposit for these purposes if: (1) it is a deposit consisting of a loan of at least £50,000; (2) the terms of the deposit require its repayment at a specified time within five years beginning with the date on which it is made; (3) those terms do not make provision for the transfer of the right to repayment; and (4) those terms prevent partial withdrawals of, or additions to, the deposit; and if a deposit is denominated in a foreign currency, head (1) above has effect as if it referred to an amount which is at least the equivalent in that currency of £50,000 at the time the deposit is made. See note 8. As to transitional provisions, savings, etc in relation to the amendment of the definition by the Income Tax Act 2007 see s 1030(1).

12 Building Societies Act 1986 s 8(2)(c) (as substituted: see note 4). For these purposes 'overseas deposit' means a deposit which is accepted by a branch or agency of the society in a country or territory outside the

United Kingdom and is repayable in such a country or territory: s 8(9) (as so substituted). See note 8. As to the meaning of 'United Kingdom' see PARA 2 note 3.

13 Ie in accordance with the Building Societies Act 1986 s 97 and the other applicable provisions of the Building Societies Act 1986: see PARAS 1927-1941. As to the applicable provisions see PARA 1927 note 1.

14 Building Societies Act 1986 s 8(2)(d) (as substituted: see note 4). See note 8. In relation to anything which, after 1 December 1997 (ie the date on which the Building Societies Act 1997 s 9 came into force: see note 1), is done by a society under the Building Societies Act 1986 s 8(2)(d), the Building Societies Act 1997 Sch 8 para 8(1), (2) (see note 1) has effect as if any reference to 1 December 1997 were a reference to the expiry of the period mentioned in the Building Societies Act 1986 s 8(2)(d): Building Societies Act 1997 Sch 8 para 8(4).

The Financial Services Authority may, if it thinks fit, extend or further extend the period mentioned in s 8(2)(d) if written application is made to it before the expiry of that period or that period as extended; and a direction under s 8(3) must be in writing and may be given subject to such limitations or conditions as the Authority may think fit: s 8(3) (as so substituted; and amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'written' see PARA 1064 note 2.

15 Ie the Building Societies Act 1986 s 8.

16 Building Societies Act 1986 s 8(11) (as substituted: see note 4).

17 Building Societies Act 1986 s 8(5) (as substituted: see note 4).

18 Building Societies Act 1986 s 8(5)(a) (as substituted: see note 4).

19 Building Societies Act 1986 s 8(5)(b) (as substituted: see note 4). As to the meaning of 'interest' see PARA 1915.

20 Building Societies Act 1986 s 8(5) (as substituted: see note 4).

21 Building Societies Act 1986 s 8(6) (as substituted: see note 4). If a society issues deferred shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares must be transferred to the society's reserves: s 8(7) (as so substituted).

22 Building Societies Act 1986 s 8(8) (as substituted: see note 4).

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## ***I. MERGERS AND TRANSFERS OF BUSINESS***

### **(A) AMALGAMATIONS AND TRANSFERS OF ENGAGEMENTS**

#### **1918. Method and procedure of amalgamation.**

Two or more building societies desiring to amalgamate may do so by establishing a building society as their successor<sup>1</sup>. In order to establish a society as their successor the societies desiring to amalgamate must<sup>2</sup>:

- 298 (1) agree the purpose or principal purpose<sup>3</sup> of their successor to be that of making loans which are secured on residential property<sup>4</sup> and are funded substantially by its members<sup>5</sup>, and agree upon the extent of its powers, in a memorandum which complies with the requirements of the Building Societies Act 1986 relating to memoranda<sup>6</sup>;

- 299 (2) agree on the rules for the regulation of their successor which comply with the requirements of the Building Societies Act 1986 relating to rules<sup>7</sup>;
- 300 (3) each approve the terms of the amalgamation by two resolutions which also approve the memorandum and the rules of their successor and of which<sup>8</sup>: (a) one is passed as a shareholding members' resolution<sup>9</sup>; and (b) the other is passed as a borrowing members' resolution<sup>10</sup>, in accordance with the applicable provisions of the Building Societies Act 1986<sup>11</sup>;
- 301 (4) make a joint application to the Financial Services Authority<sup>12</sup> for confirmation of the amalgamation and send to the Authority three copies of the rules and of the memorandum, each copy signed by the secretary of each of the societies<sup>13</sup>.

If the Authority confirms the amalgamation<sup>14</sup>, and is satisfied, as regards the proposed successor, of the matters relating to its rules, its purpose and powers and its name as to which it must<sup>15</sup> be satisfied before it registers a society, it must<sup>16</sup>:

- 302 (i) register the successor society<sup>17</sup>;
- 303 (ii) issue to it a certificate of incorporation, specifying a date (the 'specified date') as from which the incorporation takes effect<sup>18</sup>;
- 304 (iii) retain and register one copy of the memorandum and of the rules<sup>19</sup>;
- 305 (iv) return another copy to the secretary of the successor together with a certificate of registration<sup>20</sup>; and
- 306 (v) keep another copy, together with a copy of the certificate of incorporation and of the certificate of registration of the memorandum and the rules, in the public file<sup>21</sup> of the successor society<sup>22</sup>.

1 Building Societies Act 1986 s 93(1). As to compensation for loss of office and bonuses to members on an amalgamation see PARAS 1924-1925. See also the Financial Services Authority's Handbook of Rules and Guidance, Building Societies Regulatory Guide (BSOG) Ch 2. As to the Handbook generally see PARA 22.

2 Building Societies Act 1986 s 93(2).

3 As to the purpose or principal purpose of the society see PARA 1856.

4 As to the meaning of 'residential property' see PARA 1856 note 2.

5 As to membership see PARA 1888 et seq.

6 Building Societies Act 1986 s 93(2)(a) (substituted by the Building Societies Act 1997 Sch 7 para 41(a)). For the requirements relating to the memorandum see the Building Societies Act 1986 s 93, Sch 2; and PARA 1873 et seq. As to the power to amend s 93(2)(a) under s 5(13) see PARA 1856 note 4.

7 Building Societies Act 1986 s 93(2)(b). For the requirements relating to the rules see Sch 2; and PARA 1883.

8 Building Societies Act 1986 s 93(2)(c) (substituted by the Building Societies Act 1997 Sch 7 para 41(b)).

9 Building Societies Act 1986 s 93(2)(c)(i) (as substituted: see note 8). As to the meaning of 'shareholding members' resolution' see PARA 1981.

10 Building Societies Act 1986 s 93(2)(c)(ii) (as substituted: see note 8). As to the meaning of 'borrowing members' resolution' see PARA 1982.

11 Building Societies Act 1986 s 93(2)(c) (as substituted: see note 8). For the applicable provisions see Sch 2; and PARA 1936.

12 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

13 Building Societies Act 1986 s 93(2)(d) (s 93(2)(d), (3) amended by SI 2001/2617). As to the office of secretary see PARAS 1966-1967.

14 As to confirmation by the Authority see the Building Societies Act 1986 s 95; and PARA 1926. For the circumstances in which the Authority may refuse to confirm the amalgamation see s 95(4)-(6); and PARA 1926. As to the effect of amalgamation see PARA 1919.

15 Ie under the Building Societies Act 1986 Sch 2 para 1: see PARA 1865. As to the naming of societies see PARA 1867 et seq.

16 Building Societies Act 1986 s 93(3) (as amended: see note 13).

17 Building Societies Act 1986 s 93(3)(a).

18 Building Societies Act 1986 s 93(3)(b). As to the incorporation of societies see PARAS 1865-1866.

19 Building Societies Act 1986 s 93(3)(c).

20 Building Societies Act 1986 s 93(3)(d).

21 As to the public file see PARA 1864.

22 Building Societies Act 1986 s 93(3)(e).

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### **1919. Effect of amalgamation.**

On the date specified in the certificate of incorporation as the date from which the incorporation takes effect<sup>1</sup>, all the property, rights and liabilities of each of the building societies whose amalgamation was confirmed by the Financial Services Authority<sup>2</sup> (whether or not capable of being transferred or assigned) are transferred to and vested in the building society so incorporated as their successor<sup>3</sup>. On the specified date, each of the societies to which the successor succeeds is dissolved<sup>4</sup>, but the transfer of all the property, rights and liabilities of each of the societies amalgamating is deemed to have been effected immediately before the dissolution<sup>5</sup>. If, on the specified date, each of the societies whose amalgamation was confirmed by the Authority has permission under Part IV of the Financial Services and Markets Act 2000<sup>6</sup> to accept deposits, the Authority must, with effect from that date, give their successor such permission under Part IV as it considers appropriate, and must notify the successor of the permission by giving the successor a decision notice<sup>7</sup>.

1 See PARA 1918. As to the incorporation of building societies see PARAS 1865-1866.

2 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq. As to confirmation of amalgamation by the Authority see PARAS 1918, 1926.

3 Building Societies Act 1986 s 93(4) (amended by SI 2001/2617). Compare *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538; [2006] 1 WLR 1704, CA, referred to in PARA 1921 note 2. As to compensation for loss of office and bonuses to members on an amalgamation see PARAS 1924-1925. As to exemption from stamp duty land tax for such amalgamations see PARA 1857.

4 As to the dissolution of societies see PARA 2066 et seq.

5 Building Societies Act 1986 s 93(5). Where the Authority is satisfied that the society has been dissolved by virtue of s 93(5), the Authority must cancel its registration: s 103(1)(a) (amended by SI 2001/2617).

6 Ie the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.

7 Building Societies Act 1986 s 93(6) (s 93(6) substituted, and s 93(6A)-(6C) added, by SI 2001/2617).

The Financial Services and Markets Act 2000 Pt XXVI (ss 387-396) (see PARA 769 et seq) applies to a decision notice given under the Building Societies Act 1986 s 93 as it applies to a decision notice given under the Financial Services and Markets Act 2000 s 52(9) by virtue of s 52(9)(a) (see PARA 350), except that s 390 (final notices) (see PARA 772) does not apply, and for the purposes of s 391 (publication) (see PARA 774) the decision notice is to be treated as if it were a final notice rather than a decision notice: Building Societies Act 1986 s 93(6A) (as so added). The giving of permission pursuant to s 93(6) is to be treated for the purposes of the Financial Services and Markets Act 2000 s 55 (right to refer matters to the Financial Services and Markets Tribunal) (see PARA 361) as if it were the determination of an application made by the successor under Pt IV, and Pt IX (ss 132-137) (hearings and appeals) (see PARAS 43 et seq, 67 et seq) applies accordingly (but subject to the Building Societies Act 1986 s 93(6C)): s 93(6B) (as so added). In the application of the Financial Services and Markets Act 2000 Pt IX by virtue of the Building Societies Act 1986 s 93(6B), the Financial Services and Markets Act 2000 s 133(9) (which prevents the Authority from taking action specified in a decision notice until after any reference and appeal) (see PARA 46) is omitted: Building Societies Act 1986 s 93(6C) (as so added).

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## **1920. Method and procedure of transfer of engagements.**

A building society may<sup>1</sup> transfer its engagements to any extent to another building society which<sup>2</sup> undertakes to fulfil the engagements<sup>3</sup>. In order to transfer its engagements, a society must resolve to do so by two resolutions, of which one is passed as a shareholding members' resolution<sup>4</sup> and the other as a borrowing members' resolution<sup>5</sup>. In order to transfer some but not all of its engagements to its members<sup>6</sup> in respect of shares<sup>7</sup> held by them (with or without other engagements), a society must, in addition to resolving to transfer the engagements by the two resolutions so required, resolve to do so by an affected shareholders' resolution<sup>8</sup>.

In order to undertake to fulfil the engagements of another society, a society must resolve to do so<sup>9</sup>: (1) by two resolutions, of which one is passed as a shareholding members' resolution and the other as a borrowing members' resolution<sup>10</sup>; or (2) by a resolution of the board of directors<sup>11</sup>, if the Financial Services Authority<sup>12</sup> consents to that mode of proceeding<sup>13</sup>. The extent of the transfer, as so resolved by the society making and the society taking the transfer, must be recorded in an instrument of transfer of engagements<sup>14</sup>. A transfer of engagements between societies is of no effect unless<sup>15</sup>: (a) the transfer is confirmed by the Authority<sup>16</sup>; and (b) a registration certificate is issued in respect of the transfer<sup>17</sup>. Where the Authority confirms a transfer of engagements between societies, it must register a copy of the instrument of transfer of engagements, and issue a registration certificate to the society taking the transfer<sup>18</sup>.

1 In accordance with the Building Societies Act 1986 s 94, Sch 16: see PARAS 1922-1923, 1926.

2 See note 1.

3 Building Societies Act 1986 s 94(1). As to compensation for loss of office and bonuses to members on a transfer of engagements see PARAS 1924-1925. As to exemption from stamp duty land tax for a transfer of engagements see PARA 1857. See also the Financial Service Authority's Handbook of Rules and Guidance, Building Societies Regulatory Guide (BSOG) Ch 2. As to the Handbook generally see PARA 22.

4 As to the meaning of 'shareholding members' resolution' see PARA 1981.

5 Building Societies Act 1986 s 94(2) (s 94(2), (4), (5)(a) amended by the Building Societies Act 1997 Sch 7 para 42). As to the meaning of 'borrowing members' resolution' see PARA 1982.



- 6 As to membership see PARA 1888 et seq.
- 7 As to shares in relation to societies see PARA 1905 et seq.
- 8 Building Societies Act 1986 s 94(3). For the purposes of s 94 in its application to a transfer by a society of engagements in respect of some shares in the society, an 'affected shareholders' resolution' is a resolution passed by a majority of the holders of those shares who, under the rules of the society, would be entitled to vote on a shareholding members' resolution, disregarding for this purpose any shares of theirs in respect of which the society's engagements are not to be transferred: s 94(4) (as amended: see note 5).
- 9 Building Societies Act 1986 s 94(5).
- 10 Building Societies Act 1986 s 94(5)(a) (as amended: see note 5).
- 11 As to the office of director see PARAS 1944-1963.
- 12 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 13 Building Societies Act 1986 s 94(5)(b) (s 94(5)(b), (7)(a), (8) amended by SI 2001/2617).
- 14 Building Societies Act 1986 s 94(6). As to the exemption from stamp duty of instruments made under the Building Societies Act 1986 see PARA 1857.
- 15 Building Societies Act 1986 s 94(7).
- 16 Building Societies Act 1986 s 94(7)(a) (as amended: see note 13). As to confirmation by the Authority see s 95; and PARA 1926.
- 17 Building Societies Act 1986 s 94(7)(b).
- 18 Building Societies Act 1986 s 94(8) (as amended: see note 13).

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## **1921. Effect of transfer of engagements.**

On the date specified in the registration certificate issued to a building society taking a transfer of engagements<sup>1</sup>, the property, rights and liabilities of the society transferring its engagements (whether or not capable of being transferred or assigned) are transferred to and vested in the society taking the transfer to the extent provided in the instrument of transfer of engagements<sup>2</sup>. The Financial Services Authority<sup>3</sup> must keep a copy of the instrument and of the registration certificate<sup>4</sup> in the public file<sup>5</sup> of the society taking the transfer<sup>6</sup>. If the transfer is of all its engagements the society which has transferred its engagements is dissolved on the date specified in the registration certificate, but the transfer is deemed to have been effected immediately before the dissolution<sup>7</sup>.

1 See PARA 1920.

2 Building Societies Act 1986 s 94(8). As to the effect of a transfer of engagements generally see *Sun Permanent Benefit Building Society v Western Suburban and Harrow Road Permanent Building Society* [1921] 2 Ch 438, 456. In *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538; [2006] 1 WLR 1704, CA, it was held that a transfer of engagements by an industrial and provident society will be effective to pass a contractual right which could only have been assigned at common law with the consent of the other contracting party (which had not been obtained). That conclusion was reached even though, in contrast to the Building

Society 1986 s 94(8), the relevant statutory provision (the Industrial and Provident Societies Act 1965 s 1(1); see also PARA 2414) does not expressly state that it applies to rights which are not otherwise capable of being assigned. As to the instrument of transfer see PARA 1920. As to compensation for loss of office and bonuses to members on a transfer of engagements see PARAS 1924-1925. As to exemption from stamp duty and stamp duty land tax in relation to a transfer of engagements see PARA 1857.

3 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

4 le issued under the Building Societies Act 1986 s 94(8): see PARA 1920.

5 As to the public file see PARA 1864.

6 Building Societies Act 1986 s 94(9) (amended by SI 2001/2617).

7 Building Societies Act 1986 s 94(10). Where the Authority is satisfied that the society has been so dissolved, the Authority must cancel its registration: s 103(1)(a) (amended by SI 2001/2617). As to the dissolution of societies see PARA 2066 et seq.

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## **1922. Information to be given to members.**

A building society which desires to: (1) amalgamate with one or more other building societies<sup>1</sup>; or (2) transfer its engagements to another building society<sup>2</sup>; or (3) undertake to fulfil the engagements of another building society<sup>3</sup>, must send to every member<sup>4</sup> entitled to notice<sup>5</sup> of a meeting of the society a statement<sup>6</sup>, the contents of which, so far as they concern the matters specified in heads (a) to (f) below, have been approved by the Financial Services Authority<sup>7</sup>. The statement concerns:

- 307 (a) the financial position of the society and that of the other society or societies participating in the amalgamation or transfer of engagements<sup>8</sup>;
- 308 (b) the interest of the directors<sup>9</sup> of the society in the amalgamation or transfer of engagements<sup>10</sup>;
- 309 (c) the compensation<sup>11</sup> or other consideration, if any, proposed to be paid to or in respect of the directors or other officers<sup>12</sup> of the society and of the other society or societies participating in the amalgamation or transfer<sup>13</sup>;
- 310 (d) the payments, if any, to be made to members of the society and of the other society or societies participating in the amalgamation or transfer by way of a distribution of funds<sup>14</sup> in consideration of the amalgamation or transfer<sup>15</sup>;
- 311 (e) the changes, if any, to be made, in connection with the amalgamation or transfer of engagements, in the terms governing outstanding loans made by the society which are secured on land<sup>16</sup>; and
- 312 (f) any other matter which the Authority requires in the case of the particular amalgamation or transfer of engagements<sup>17</sup>.

A society must include the statement in or with the notice to be sent to its members of the meeting at which the resolutions required for the approval of the amalgamation or, as the case may be, the transfer are to be moved<sup>18</sup>. Provision is made for the statement to be sent electronically<sup>19</sup>.

The requirement to send such a statement does not apply to a society wishing to undertake to fulfil another's engagements if the Authority has consented<sup>20</sup> to the society's proceeding by resolution of the board of directors<sup>21</sup>.

1 Building Societies Act 1986 s 95(1), Sch 16 para 1(1)(a). As to the amalgamation of societies see PARAS 1918-1919.

2 Building Societies Act 1986 Sch 16 para 1(1)(b). As to the transfer of engagements between societies see PARAS 1920-1921.

3 Building Societies Act 1986 Sch 16 para 1(1)(c). However note the qualification in the text to notes 20, 21.

4 As to membership see PARA 1888 et seq.

5 As to the meaning of 'notice' see PARA 1866 note 8.

6 Building Societies Act 1986 Sch 16 para 1(1).

7 Building Societies Act 1986 Sch 16 para 1(3) (Sch 16 para 1(1), (3), (4)(f) amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

8 Building Societies Act 1986 Sch 16 para 1(4)(a).

9 As to the office of director see PARAS 1944-1963.

10 Building Societies Act 1986 Sch 16 para 1(4)(b).

11 'Compensation' includes the provision of benefits in kind: Building Societies Act 1986 s 96(8); definition applied by Sch 16 para 1(6).

12 As to the meaning of 'officer' see PARA 1944.

13 Building Societies Act 1986 Sch 16 para 1(4)(c).

14 'Distribution of funds' with reference to bonuses paid to members, includes distribution by means of a special rate of interest available to members for a limited period: Building Societies Act 1986 s 96(8); definition applied by Sch 16 para 1(6).

15 Building Societies Act 1986 Sch 16 para 1(4)(d).

16 Building Societies Act 1986 Sch 16 para 1(4)(e) (amended by the Building Societies Act 1997 Sch 7 para 66(1)(a)).

17 Building Societies Act 1986 Sch 16 para 1(4)(f) (as amended: see note 7).

18 Building Societies Act 1986 Sch 16 para 1(2).

19 See the Building Societies Act 1986 Sch 16 para 1(2A)-(2C) (added by SI 2003/404). Where a statement is required under the Building Societies Act 1986 Sch 16 para 1(2) (see the text to note 18) to be sent to a member in or with the notice of the meeting: (1) in a case where notice of the meeting is given to that member electronically in accordance with Sch 2 para 22A (see PARA 1985), the statement may be sent to him electronically only if it is sent to the same electronic address, and at the same time, as the notice; (2) in a case where notice of the meeting is given on a website in accordance with Sch 2 para 22B (see PARA 1985), the requirement to send it is also treated as satisfied if the conditions set out in Sch 16 para 1(2B) are satisfied: Sch 16 para 1(2A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

The conditions mentioned in head (2) above are satisfied in the case of a statement if: (a) the society and that member have agreed that information that is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the statement in question; (c) at the same time and in the same manner as the society notifies that person of the publication of the notice of the meeting, it notifies him of the publication of the statement on a website, the address of that website, the place on that website where the statement may be accessed, and how it may be accessed; and (d) the statement is published continuously on that website throughout the period beginning with the giving of that notification and ending with the decision of the Authority whether to confirm the amalgamation or transfer of engagements pursuant to s 95 (see PARA 1926): Sch 16 para 1(2B) (as so added).

Where, in a case in which head (2) above is relied on for compliance with a requirement under Sch 16 para 1(2), a statement is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, that failure does not invalidate the proceedings of a meeting or prevent the requirements of Sch 16 para 1(2B) from being treated as fulfilled in relation to s 95(4)(c) (see PARA 1926): Sch 16 para 1(2C) (as so added).

20 le under the Building Societies Act 1986 s 94(5): see PARA 1920.

21 Building Societies Act 1986 Sch 16 para 1(1) (as amended: see note 7).

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### **1923. Notice of other merger or transfer proposals.**

A building society which receives a proposal in writing<sup>1</sup> by another building society desiring to merge with it, for the societies to merge, with or without terms for the merger<sup>2</sup>, must send a merger statement in respect of the proposal to every member<sup>3</sup> entitled to notice<sup>4</sup> of a meeting of the society<sup>5</sup>. The merger statement must contain the fact that a merger proposal has been made and the identity of the proposer, with or without other particulars regarding the proposal<sup>6</sup>. The merger statement is not required to be sent to members if the proposer has requested in writing that the details are to be treated as confidential; and if the request for confidentiality is at a later date withdrawn in writing, the society receiving the proposal is<sup>7</sup> to treat the proposal as having been received on that date instead of any earlier date<sup>8</sup>.

A society must include in or with every notice of its annual general meeting<sup>9</sup> a merger statement with respect to any merger proposal (other than a proposal of which notice has already been given<sup>10</sup>) which (1) has been received by it during the period of 12 months ending with the ninth month of the last financial year<sup>11</sup> of the society before that meeting<sup>12</sup>; or (2) is treated as having been received by it during the last three months of that financial year<sup>13</sup>, and it may also include a merger statement with respect to any proposal received, or treated as received, after the end of either period<sup>14</sup>. It is an offence if a society fails to comply with this requirement, and the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine<sup>15</sup>.

Where resolutions are to be moved at any meeting of a society for the approval of a merger<sup>16</sup>, every notice of the meeting must have included in or with it<sup>17</sup>: (a) a merger statement with respect to any merger proposal, other than a proposal of which notice has already been given, received by it more than 42 days before the date of the meeting<sup>18</sup>; and (b) a transfer proposal notification<sup>19</sup> with respect to any transfer proposal so received by it<sup>20</sup>. It is an offence if a society fails to comply with this requirement, and the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine<sup>21</sup>.

Provision is made for the merger statement or transfer proposal notification to be sent electronically<sup>22</sup>.

Where a society sends a merger statement or transfer proposal notification to its members in connection with a meeting of the society, it must send a copy of the statement to the Financial Services Authority<sup>23</sup> at least 14 days before the date of the meeting<sup>24</sup>, and the Authority must keep the copy in the public file<sup>25</sup> of that society<sup>26</sup>. It is an offence if a society fails to comply with

this requirement, and the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine<sup>27</sup>.

1 As to the meaning of 'writing' see PARA 1064 note 2.

2 Building Societies Act 1986 s 95(2), Sch 16 para 2. 'Merger' means an amalgamation of building societies under s 93 (see PARAS 1918-1919) or a transfer of all the engagements of one building society to another under s 94 (see PARAS 1920-1921), and 'merge' has a corresponding meaning: Sch 16 para 2.

3 As to membership see PARA 1888 et seq.

4 As to the meaning of 'notice' see PARA 1866 note 8.

5 See the Building Societies Act 1986 Sch 16 para 3(1).

6 Building Societies Act 1986 Sch 16 paras 2, 3(2).

7 Ie for the purposes of the Building Societies Act 1986 Sch 16 Pt II (ss 2-6).

8 Building Societies Act 1986 Sch 16 para 3(3).

9 As to annual general meetings see PARA 1977.

10 Building Societies Act 1986 Sch 16 para 4(1).

11 As to the meaning of 'financial year' see PARA 1992 note 2.

12 Building Societies Act 1986 Sch 16 para 4(1)(a).

13 Ie under the Building Societies Act 1986 Sch 16 para 3(3): Sch 16 para 4(1)(b).

14 Building Societies Act 1986 Sch 16 para 4(1).

15 Building Societies Act 1986 Sch 16 para 6(1) (renumbered by SI 2003/404). The fine must not exceed level 4 on the standard scale: Building Societies Act 1986 Sch 16 para 6(1) (as so renumbered). As to the standard scale see PARA 27 note 21. See note 22.

16 Ie under the Building Societies Act 1986 s 93(2) or s 94(2): see PARAS 1918, 1920.

17 Building Societies Act 1986 Sch 16 paras 2, 4(2) (Sch 16 para 4(2) substituted, and Sch 16 para 4(3) added, by the Building Societies Act 1997 Sch 7 para 66(2)).

18 Building Societies Act 1986 Sch 16 para 4(2)(a) (as substituted: see note 17).

19 'Transfer proposal', in relation to a building society, means a proposal in writing by a company for a transfer by the society to the company, with or without terms for the transfer; and 'proposer' has a corresponding meaning: Building Societies Act 1986 Sch 17 para 5A (added by the Building Societies Act 1997 Sch 5 Pt II); definition applied by the Building Societies Act 1986 Sch 16 para 4(3) (as added: see note 17). 'Transfer proposal notification' means a transfer proposal notification (within the meaning of Sch 17 Pt IA (paras 5A-5E) (see PARA 1935 note 3)) required to be sent to members by Sch 17 para 5B(1) (see PARA 1935): Sch 16 para 4(3) (as so added).

20 Building Societies Act 1986 Sch 16 para 4(2)(b) (as substituted: see note 17).

21 Building Societies Act 1986 Sch 16 para 6(1) (as renumbered: see note 15). The fine must not exceed level 4 on the standard scale: Sch 16 para 6(1) (as so renumbered). See also note 22.

22 See the Building Societies Act 1986 Sch 16 paras 4(2A)-(2C), 6(2) (added by SI 2003/404). Where a merger statement or a transfer proposal notification is required under the Building Societies Act 1986 Sch 16 para 4(1) (see the text to notes 9-14) or under Sch 16 para 4(2) (see the text to notes 16-20) to be sent to a person in or with the notice of a meeting of the society: (1) in a case where notice of a meeting is given electronically to a person in accordance with Sch 2 para 22A (see PARA 1985), the merger statement or transfer proposal notification may be sent to him electronically only if it is sent to the same electronic address and at the same time as the notice; (2) in a case where notice of a meeting is given on a website in accordance with Sch 2 para 22B (see PARA 1985), the requirement to send the statement or notification is also treated as satisfied if the conditions set out in Sch 16 para 4(2B) are satisfied: Sch 16 para 4(2A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

The conditions mentioned in head (2) above are satisfied in the case of a merger statement or transfer proposal notification if: (a) the society and that person have agreed that information that is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the merger statement or transfer proposal notification in question; (c) at the same time and in the same manner as the society notifies that person of the publication of the notice of the meeting, it notifies him of the publication of the merger statement or transfer proposal notification on a website, the address of that website, the place on that website where that statement or notification may be accessed, and how it may be accessed; and (d) the statement or notification is published continuously on that website throughout the period beginning when the person is notified in accordance with head (c) above and ending with the conclusion of the meeting: Sch 16 para 4(2B) (as so added).

Where, in a case in which head (2) above is relied on for compliance with a requirement under Sch 16 para 4(1) or Sch 16 para 4(2), a statement or notification is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, that failure does not invalidate the proceedings of a meeting or prevent the requirements of Sch 16 para 4(2B) from being treated as fulfilled in relation to s 95(4)(c) (see PARA 1926): Sch 16 para 4(2C) (as so added).

Where, in a case in which head (2) above is relied on for compliance with a requirement under Sch 16 para 4(1) or Sch 16 para 4(2), a merger statement or transfer proposal notification is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, no offence is committed under Sch 16 para 6 (see the text to notes 15, 21) by reason of that failure: Sch 16 para 6(2) (as so added).

23 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

24 Building Societies Act 1986 Sch 16 para 5(1) (amended by the Building Societies Act 1997 Sch 7 para 66(3); and SI 2001/2617).

25 As to the public file see PARA 1864.

26 Building Societies Act 1986 Sch 16 para 5(2) (amended by the Building Societies Act 1997 Sch 7 para 66(4)).

27 Building Societies Act 1986 Sch 16 para 6(1) (as renumbered: see note 15). The fine must not exceed level 4 on the standard scale: Sch 16 para 6(1) (as so renumbered).

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## **1924. Compensation for loss of office.**

The terms of an amalgamation<sup>1</sup> of or transfer of engagements<sup>2</sup> between building societies may include provision for compensation<sup>3</sup> to be paid by a society to or in respect of any director<sup>4</sup> or other officer<sup>5</sup> of that or any other society for loss of office<sup>6</sup> or diminution of emoluments attributable to the amalgamation or transfer, but the provision must be authorised as follows<sup>7</sup>:

313 (1) except in so far as head (2) below applies, the provision for such compensation to be paid by a society must be approved by the society by a resolution passed as a special resolution<sup>8</sup>, not being one of the two resolutions required<sup>9</sup> for the approval of the other terms of the amalgamation or transfer<sup>10</sup>;

314 (2) if regulations are made authorising payments of such compensation within prescribed limits<sup>11</sup> and the provision for such compensation includes only payments of amounts not exceeding the prescribed limits, the passing of the two resolutions

approving the terms of the amalgamation or transfer is sufficient authority for their payment<sup>12</sup>.

A director or other officer is not prevented by the above provisions<sup>13</sup> from receiving payments from societies which, in the aggregate, exceed any limit applicable to him<sup>14</sup> if the excess payment is included in provision approved as required by head (1) above; but if any payment is received which has not been authorised under head (1) or head (2) above it must be repaid<sup>15</sup>.

- 1 As to the amalgamation of building societies see PARAS 1918-1919.
- 2 As to the transfer of engagements between building societies see PARAS 1920-1921.
- 3 As to the meaning of 'compensation' see PARA 1922 note 11.
- 4 As to the office of director see PARAS 1944-1963.
- 5 As to the meaning of 'officer' see PARA 1944.
- 6 'Loss of office' includes, in relation to a director or other officer of a building society holding office in any other body by virtue of his position in that society, the loss of that office: Building Societies Act 1986 s 96(8) (amended by the Building Societies Act 1997 Sch 7 para 44(4)).
- 7 Building Societies Act 1986 s 96(1).
- 8 As to the meaning of 'special resolution' see PARA 1980.
- 9 Is required by the Building Societies Act 1986 s 93(2)(c) or s 94(2): see PARAS 1918, 1920.
- 10 See the Building Societies Act 1986 s 96(1)(a) (s 96(1)(a), (b) amended by the Building Societies Act 1997 Sch 7 para 44(1)).
- 11 'Prescribed' with reference to limits on compensation means prescribed by regulations made under the Building Societies Act 1986 s 96(2): s 96(8). The Treasury may by regulations authorise payments by societies of compensation to directors or other officers for loss of office or diminution of emoluments attributable to amalgamations of, or transfers of engagements between, societies subject to limits specified in or determinable under the regulations; and the regulations may make different provision for different classes of person: s 96(2) (amended by SI 2001/2617). The power to make such regulations is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 96(7). At the date at which this volume states the law no such regulations had been made. Accordingly, all compensation payments must be approved under s 96(1)(a): see the text and notes 8-10. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 12 Building Societies Act 1986 s 96(1)(b) (as amended: see note 10).
- 13 Is by anything in the Building Societies Act 1986 s 96(1) or s 96(2): see the text and notes 1-12.
- 14 Is under the Building Societies Act 1986 s 96(2): see note 11.
- 15 Building Societies Act 1986 s 96(3).

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## **1925. Distribution of funds to members.**

The terms of an amalgamation<sup>1</sup> of, or transfer of engagements<sup>2</sup> between, building societies may include provision for part of the funds of one or more of the participating societies to be distributed in consideration of the amalgamation or transfer among any of the members<sup>3</sup> of the participating societies, but the provision must be authorised<sup>4</sup>. Authorisation must be by each of the two resolutions giving the approval of the society to the terms of the amalgamation or transfer<sup>5</sup>, and the provision for such a distribution by a society must not exceed the limits prescribed by regulations<sup>6</sup>. If the prescribed limits are exceeded the distribution must be approved by each of the two resolutions of the society desiring it and each of the other societies participating in the amalgamation or transfer by which each approved the terms of the amalgamation or transfer<sup>7</sup>.

Where the terms of a transfer of engagements include provision for a distribution of the funds of the society transferring or the society undertaking the engagements and the society undertaking the engagements applies to the Financial Services Authority<sup>8</sup> for consent to the society's approving the transfer by a resolution of the board of directors<sup>9</sup> instead of a shareholding members' resolution and a borrowing members' resolution<sup>10</sup>, the Authority must not give its consent unless it is satisfied that the proposed distribution to be made by each society will not exceed the prescribed limits<sup>11</sup>.

1 As to the amalgamation of building societies see PARAS 1918-1919.

2 As to the transfer of engagements between building societies see PARAS 1920-1921.

3 As to membership see PARA 1888 et seq.

4 Building Societies Act 1986 s 96(4).

5 As to the resolutions giving such approval see the Building Societies Act 1986 s 93(2), s 94(2); and PARAS 1918, 1920.

6 Building Societies Act 1986 s 96(4)(a) (s 96(4)(a), (b) amended by the Building Societies Act 1997 Sch 7 para 44(2)). The Building Societies Act 1986 s 96(4)(a) is expressed to be subject to s 96(4)(b) (see the text to note 7). 'Prescribed' with reference to limits on distribution of assets means prescribed by regulations made under s 96(5): s 96(8). The Treasury must by regulations authorise distributions of funds to members by societies participating in amalgamations or transfers of engagements subject to limits specified in or determinable under the regulations; and the regulations may make different provision for different circumstances: s 96(5) (amended by SI 2001/2617). The power to make such regulations is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 96(7). The prescribed limit on any distribution among members of any one society is the lesser of (1) 5% of the value of the society's total assets; and (2) the sum calculated by deducting the value of the society's fixed assets, both tangible and intangible, from the aggregate of the society's general reserves and, if any, revaluation and other reserves, the relevant values in each case being those given in the statement sent under Sch 16 Pt I or, if the values are not given in the statement, their values as determined for the purposes of making that statement: see the Building Societies (Mergers) Regulations 1987, SI 1987/2005, regs 2, 3(1), (2)(a), (3), (4) (amended by SI 1995/1874). In the case of a partial transfer of engagements, the prescribed limit is the lesser of (a) 5% of the liabilities in respect of the value of the shares being transferred; and (b) such proportion of the sum mentioned in head (2) above as the value of the liabilities in respect of shares that are transferred bears to the value of the liabilities in respect of the totality of shares in the society (both those being transferred and those not being transferred): see the Building Societies (Mergers) Regulations 1987, SI 1987/2005, regs 2, 3(1), (2)(b), (3), (4) (as so amended). As to the statement sent under the Building Societies Act 1986 Sch 16 Pt I see PARA 1922. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

7 Building Societies Act 1986 s 96(4)(b) (as amended: see note 6).

8 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

9 As to the office of director see PARAS 1944-1963.

10 As to the two resolutions required by the Building Societies Act 1986 s 94(5)(a): see PARA 1920. As to the meaning of 'shareholding members' resolution' see PARA 1981; and as to the meaning of 'borrowing members' resolution' see PARA 1982.



11 Building Societies Act 1986 s 96(6) (amended by the Building Societies Act 1997 Sch 7 para 44(3); and SI 2001/2617).

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### **1926. Confirmation by the Financial Services Authority.**

An application for confirmation by the Financial Services Authority<sup>1</sup> of an amalgamation<sup>2</sup> or transfer of engagements<sup>3</sup> must be made in such manner as the Authority may direct<sup>4</sup>. The building society applying for confirmation must publish notice<sup>5</sup> of the application in any one or more of the London Gazette, the Edinburgh Gazette or the Belfast Gazette, as the Authority directs and, if it so directs, in one or more newspapers<sup>6</sup>. The notice must:

- 315 (1) state that any interested party has the right to make representations to the Authority with respect to the application<sup>7</sup>;
- 316 (2) specify a date determined by the Authority before which any written<sup>8</sup> representations or notice of a person's intention to make oral representations must be received by the Authority<sup>9</sup>; and
- 317 (3) specify a date determined by the Authority as the day on which it intends to hear any oral representations<sup>10</sup>.

After the date mentioned in head (2) above the Authority must<sup>11</sup>:

- 318 (a) determine the time and place at which oral representations may be made<sup>12</sup>;
- 319 (b) give notice of the determination to the societies participating in the amalgamation or transfer and any persons who have given notice of their intention to make oral representations<sup>13</sup>; and
- 320 (c) send copies of the written representations received by the Authority to the societies participating in the amalgamation or transfer<sup>14</sup>.

Any society participating in the amalgamation or transfer must be allowed an opportunity to comment on the written representations, whether at a hearing or in writing before the expiration of such period as the Authority specifies in a notice to the society<sup>15</sup>.

Where an application is made to the Authority for confirmation of an amalgamation or transfer of engagements the Authority must confirm the amalgamation or transfer except where this is precluded<sup>16</sup>. The Authority must not give its confirmation if it considers that<sup>17</sup>:

- 321 (i) some information material to the members' decision about the amalgamation or transfer was not made available to all the members eligible to vote<sup>18</sup>; or
- 322 (ii) the vote on any resolution approving the amalgamation or transfer does not represent the views of the members eligible to vote<sup>19</sup>; or
- 323 (iii) some relevant requirement<sup>20</sup> of the Building Societies Act 1986 or the rules of any of the societies participating in the amalgamation or transfer was not fulfilled or not fulfilled as regards that society<sup>21</sup>.

However, the Authority is not precluded from giving its confirmation by virtue only of the non-fulfilment of some relevant requirement of the Building Societies Act 1986 or the rules of a society, if it appears to the Authority that it could not have been material to the members' decision about the amalgamation or transfer and the Authority directs that the failure is to be disregarded<sup>22</sup>. Where the Authority is precluded from giving its confirmation by reason of any of the defects specified in heads (i) to (iii) above, it may direct any society concerned to take such steps to remedy the defect or defects, including the calling of a further meeting, as it specifies in the direction, and to furnish the Authority with satisfactory evidence that it has done so<sup>23</sup>. If the Authority is satisfied that the steps have been taken and the defect or defects has or have been substantially remedied it must give its confirmation, but if it is not so satisfied it must refuse its confirmation<sup>24</sup>.

A failure to comply with a relevant requirement of the Building Societies Act 1986 or any rules of a society does not invalidate an amalgamation or transfer of engagements, but if a society fails without reasonable excuse to comply with such a requirement it is an offence and the society, and any officer<sup>25</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>26</sup>.

1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 As to the amalgamation of building societies see PARAS 1918-1919.

3 As to the transfer of engagements between building societies see PARAS 1920-1921.

4 Building Societies Act 1986 s 95(3), Sch 16 para 7 (Sch 16 paras 7-9 amended by SI 2001/2617).

5 As to the meaning of 'notice' see PARA 1866 note 8.

6 Building Societies Act 1986 Sch 16 para 8(1) (as amended: see note 4).

7 Building Societies Act 1986 Sch 16 para 8(2)(a) (as amended: see note 4).

8 As to the meaning of 'written' see PARA 1064 note 2.

9 Building Societies Act 1986 Sch 16 para 8(2)(b) (as amended: see note 4).

10 Building Societies Act 1986 Sch 16 para 8(2)(c) (as amended: see note 4).

11 Building Societies Act 1986 Sch 16 para 9(1) (as amended: see note 4).

12 Building Societies Act 1986 Sch 16 para 9(1)(a).

13 Building Societies Act 1986 Sch 16 para 9(1)(b).

14 Building Societies Act 1986 Sch 16 para 9(1)(c) (as amended: see note 4).

15 Building Societies Act 1986 Sch 16 para 9(2) (as amended: see note 4).

16 Building Societies Act 1986 s 95(3) (amended by the Building Societies Act 1997 Sch 7 para 43(1); and SI 2001/2617). As to the exceptions to this provision see the text and notes 17-21.

17 Building Societies Act 1986 s 95(4) (s 95(4)-(6) amended by SI 2001/2617).

18 Building Societies Act 1986 s 95(4)(a). As to membership see PARA 1888 et seq. As to the right to vote see PARA 1984.

19 Building Societies Act 1986 s 95(4)(b).

20 'Relevant requirement', with reference to the Building Societies Act 1986 or the rules of a society, means a requirement of s 93 (see PARAS 1918-1919), or s 94 (see PARAS 1920-1921), or s 95, or Sch 16 (see PARAS 1922-1923), or of any rules prescribing the procedure to be followed by the society in approving or effecting an amalgamation or transfer of engagements: s 95(11).

- 21 Building Societies Act 1986 s 95(4)(c).
- 22 Building Societies Act 1986 s 95(5) (as amended: see note 17).
- 23 Building Societies Act 1986 s 95(6) (as amended: see note 17).
- 24 Building Societies Act 1986 s 95(6) (as amended: see note 17).
- 25 As to the meaning of 'officer' see PARA 1944.
- 26 Building Societies Act 1986 s 95(10). The fine must not exceed level 4 on the standard scale: s 95(10). As to the standard scale see PARA 27 note 21.

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## (B) TRANSFER OF BUSINESS TO COMMERCIAL COMPANY

### 1927. Transfer of business.

A building society may transfer the whole of its business to a company<sup>1</sup>, its 'successor'<sup>2</sup>. The successor company may be a company formed by the society wholly or partly for the purpose of assuming and conducting the society's business in its place or an existing company which is to assume and conduct the society's business in its place<sup>3</sup>. In order to transfer its business to its successor a society must:

- 324 (1) in the case of a transfer to a specially formed company<sup>4</sup>, secure that it is formed having articles of association with the requisite protective provisions<sup>5</sup>;
- 325 (2) agree conditionally with its successor in a transfer agreement<sup>6</sup> on the terms of the transfer which, in so far as they are regulated terms<sup>7</sup>, comply with the Building Societies Act 1986<sup>8</sup> and transfer regulations<sup>9</sup>;
- 326 (3) approve the transfer and the terms of the transfer by the requisite transfer resolutions<sup>10</sup>; and
- 327 (4) obtain the confirmation of the Financial Services Authority<sup>11</sup> of the transfer and its terms<sup>12</sup>.

A society is prohibited from using a dissolution of the society to effect or facilitate the transfer of the society's engagements to any other society or to a company without the Authority's consent<sup>13</sup>.

1 'Company' means a company within the meaning of the Companies Act 1985 or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), which is a public company limited by shares: Building Societies Act 1986 s 97(12). See **COMPANIES**. A company is a 'specially formed' company if it is formed by a building society (and by no others than its nominees) for the purpose of assuming and conducting its business in its place, and is an 'existing' company if it is a company carrying on business as a going concern on the date of the transfer agreement: see s 97(12). References in s 97, and the other applicable provisions of the Building Societies Act 1986, to a company include references to a body corporate which is incorporated in an EEA state other than the United Kingdom, and has power under its constitution to offer its shares or debentures to the public: s 97(13) (added by the Building Societies Act 1997 Sch 7 para 45(4)). The applicable provisions of the Building Societies Act 1986 other than s 97 are s 98 (see PARAS 1934-1935, 1937), s 99 (see PARA 1930), s 99A (see PARA 1931), s 100 (see PARAS 1928-1929, 1932), s 101 (see PARA 1933), s 102 (see notes 7, 9), s 102B (see PARA 1940), s 102C (see PARA 1941), s 102D (see PARA 1940), Sch 2 para 30 (see PARA 1936), Sch 17 (see PARAS 1934-1935, 1937): s

97(2) (amended by the Building Societies Act 1997 Sch 7 para 45(1); and the Building Societies (Distributions) Act 1997 s 1(2)). 'EEA state' means a contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3), as adjusted by the Protocol signed at Brussels on 17 March 1993 (Cm 2183; OJ L1, 3.1.94, p 572): Building Societies Act 1986 s 97(13) (as so added). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to bodies corporate see generally **COMPANIES**; **CORPORATIONS**. As to companies generally see **COMPANIES**.

2 Building Societies Act 1986 s 97(1), (12). See also generally the Financial Services Authority's Handbook of Rules and Guidance, Building Societies Regulatory Guide (BSOG) Ch 3. As to the Handbook generally see PARA 22.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

3 Building Societies Act 1986 s 97(3) (amended by the Building Societies Act 1997 Sch 7 para 45(2), Sch 9).

4 See note 1.

5 Building Societies Act 1986 s 97(4)(a). 'Requisite protective provisions' means the provisions required to be made by s 101(2) (see PARA 1933): s 97(12).

6 'Transfer agreement' means the agreement required by the Building Societies Act 1986 s 97(4)(b) (see the text to note 9) and, in relation to it, 'conditionally' means conditional on the approval of the transfer by the requisite transfer resolutions and on confirmation of the transfer: s 97(12). As to the terms of the transfer agreement see PARAS 1928-1929. The 'requisite transfer resolutions' are resolutions passed by the members of the society in accordance with Sch 2 para 30 (see PARA 1936): s 97(4)(c), (12).

7 'Regulated terms' means any terms of a transfer agreement (see note 6) which are regulated terms under the Building Societies Act 1986 s 99 (see PARA 1930), s 100 (see PARAS 1928-1929, 1932) or s 102 (see note 9): s 97(12). Any terms of a transfer of business to which s 99(2) (see PARA 1930), s 100(2) (see PARA 1929), s 100(8), (9), (10), (11) (see PARA 1932), regulations under s 99(3) (see PARA 1930), or transfer regulations (see note 9) apply are regulated terms for the purposes of s 97: ss 99(6), 100(12), 102(4).

8 See the Building Societies Act 1986 ss 99, 100; and PARAS 1930-1932.

9 Building Societies Act 1986 s 97(4)(b). The Treasury may, by transfer regulations under s 102, make provision regulating transfers of business under s 97: ss 97(12), 102(1) (amended by SI 2001/2617). Transfer regulations may, in particular make provision:

8 (1) for and in connection with the transition from regulation by and under the Building Societies Act 1986 to regulation by and under the Companies Act 1985 or, as regards Northern Ireland, the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6) (Building Societies Act 1986 s 102(2)(a) (amended by SI 2001/2617));

9 (2) for the treatment, in the hands of companies taking such transfers, of the property, rights and liabilities transferred and for the modification of any enactment in its application to property, rights and liabilities so transferred (Building Societies Act 1986 s 102(2)(b));

10 (3) for the purposes of and incidental to s 100 (see PARAS 1928-1929, 1932), s 101 (see PARA 1933), s 102B (see PARA 1940), s 102C (see PARA 1941), s 102D (see PARA 1940) (s 102(2)(c) (amended by the Building Societies (Distributions) Act 1997 s 1(3))).

The power to make transfer regulations is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 102(3). As to the regulations made under s 102 see the Building Societies (Transfer of Business) Regulations 1998, SI 1998/212; and PARAS 1934, 1938. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

10 Building Societies Act 1986 s 97(4)(c). As to the requisite transfer resolutions see note 6; and PARA 1936.

11 'Confirmation', in relation to a transfer, means the confirmation of the Financial Services Authority required by the Building Societies Act 1986 s 97(4)(d): s 97(12) (s 97(4)(d), (12) amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq. As to confirmation by the Authority see PARA 1937.

12 Building Societies Act 1986 s 97(4)(d) (as amended: see note 11). See note 9.

13 See the Building Societies Act 1986 s 87(8), (9); and PARA 2067. As to the dissolution of societies see PARA 2066 et seq.

## UPDATE

### 1927 Transfer of business

NOTE 1--Definition of 'company' amended: SI 2009/1941.

NOTE 2--Day appointed is 16 January 2009: SI 2009/36. In exercise of the power conferred on it, the Treasury has made the Mutual Societies (Transfers) Order 2009, SI 2009/509.

NOTE 9--Head (1). Building Societies Act 1986 s 102(2)(a) further amended: SI 2009/1941.

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### 1928. Terms of the transfer agreement.

The terms of the transfer of a building society's business<sup>1</sup> to a successor company<sup>2</sup> must be set out in the transfer agreement<sup>3</sup>, and certain regulated terms<sup>4</sup> must be included<sup>5</sup>. The transfer agreement is between the society and its successor, but in so far as it provides for rights to be conferred on members or officers<sup>6</sup> of the society, whether or not in pursuance of regulated terms, the members or officers must, in relation to those provisions, be treated as if they had been parties to the agreement, and their rights are enforceable accordingly<sup>7</sup>. Subject to certain requirements<sup>8</sup>, the terms of the transfer may include provision for part of the funds of the society or its successor to be distributed among, or other rights in relation to shares in the successor conferred on, members of the society, in consideration of the transfer<sup>9</sup>.

1 As to the transfer of business see PARA 1927.

2 As to the meaning of 'company' see PARA 1927 note 1.

3 As to the meaning of 'transfer agreement' see PARA 1927 note 6.

4 As to the meaning of 'regulated terms' see PARA 1927 note 7.

5 See the Building Societies Act 1986 s 97(4)(b); and PARA 1927. As to the required provisions of the transfer agreement see PARA 1929.

6 As to the meaning of 'officer' see PARA 1944. As to membership see PARA 1888 et seq.

7 Building Societies Act 1986 s 97(5). The terms of transfer may provide for compensation to be paid to any officer of the company for loss of office: see s 99; and PARA 1930.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies

(Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

8 le subject to the Building Societies Act 1986 s 100(2)-(10): see PARAS 1929, 1932.

9 Building Societies Act 1986 s 100(1). See PARA 1932.

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### **1929. Required provisions of the transfer agreement.**

The terms of the transfer of a building society's business<sup>1</sup> to a successor company must<sup>2</sup>:

328 (1) require the successor to assume as from the vesting date<sup>3</sup> a liability to every qualifying member of the society<sup>4</sup> as in respect of a deposit<sup>5</sup> made with the successor corresponding in amount to the value of the qualifying shares held by him in the society<sup>6</sup>; and

329 (2) confer a right<sup>7</sup> to a distribution of funds, whether of the society or its successor, by way of bonus on every qualifying member of the society<sup>8</sup> equal to the relevant proportion of the value of the qualifying shares held by him in the society<sup>9</sup>.

1 As to the transfer of business see PARA 1927. As to the terms of the transfer agreement see PARA 1928.

2 Building Societies Act 1986 s 100(2). As to the meaning of 'company' see PARA 1927 note 1.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

3 'Vesting date' means the date specified in or determined under the transfer agreement as the vesting date for the purposes of the Building Societies Act 1986 s 97(6) (see PARA 1938): s 97(12).

4 For the purposes of the liabilities assumed under the Building Societies Act 1986 s 100(2)(a) by the society's successor, a member is a qualifying member if he held shares in the society on the day immediately preceding the vesting date and his qualifying shares are those held by him on that day: s 100(3). As to membership see PARA 1888 et seq. As to shares in relation to societies see PARA 1905 et seq.

5 As to the meaning of 'deposit' see PARA 1866 note 7.

6 Building Societies Act 1986 s 100(2)(a).

7 le subject to the Building Societies Act 1986 s 100(7): see note 9.

8 For the purposes of the rights conferred under the Building Societies Act 1986 s 100(2)(b) on members of the society, a member is a qualifying member if he held shares in the society on the qualifying day and was not eligible to vote on the requisite shareholders' resolution, his qualifying shares are those held by him on that day and the relevant proportion is the proportion which (as shown in the latest balance sheet of the society) the society's reserves bear to its total liability to its members in respect of shares: s 100(4) (amended by the Building Societies Act 1997 Sch 7 para 47). He must, in addition to satisfying those requirements, be a member at the vesting date: *Abbey National Building Society v Building Societies Commission* (1989) 5 BCC 259 at 266 per Browne-Wilkinson V-C. For the purposes of the Building Societies Act 1986 s 100(4), (8), (9) (see PARA 1932), 'qualifying day' means the day specified for the purpose in the transfer agreement: s 100(13). As to the meaning of 'requisite shareholders' resolution' see PARA 1936.

9 Building Societies Act 1986 s 100(2)(b) (amended by the Building Societies Act 1997 Sch 9). Where the Financial Services Authority confirms a transfer of a society's business to an existing company, it may, as it thinks fit having regard to what is equitable between the members of the society, direct that no bonus distribution of funds in pursuance of the Building Societies Act 1986 s 100(2)(b) may be made or that the amount distributed is to be such lesser amount as is provided for in the direction, and where the Authority gives such a direction, no liability to make such a distribution arises, or the liability may be discharged by payment of a lesser amount: s 100(7) (amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

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### **1930. Compensation for loss of office.**

The terms of a transfer of a building society's business<sup>1</sup> to a successor company<sup>2</sup> may include provision for compensation<sup>3</sup> to be paid by the society or the company to or in respect of any director<sup>4</sup> or other officer<sup>5</sup> of the society for loss of office<sup>6</sup> or diminution of emoluments attributable to the transfer<sup>7</sup>, but any such provision must be authorised so far as the society is concerned<sup>8</sup>. Authorisation must be by a special resolution<sup>9</sup> of the society, not being one of the requisite transfer resolutions<sup>10</sup>. The Treasury<sup>11</sup> may by regulations authorise payments of compensation to directors or other officers attributable to transfers of business<sup>12</sup> subject to limits specified in or determinable under the regulations and the regulations may make different provision for different classes of person<sup>13</sup>. If regulations are so made authorising payments of such compensation within prescribed limits<sup>14</sup> and the provision for such compensation includes only payments of amounts not exceeding the prescribed limits, the passing of the requisite transfer resolutions is sufficient authority for their payment<sup>15</sup>.

A director or other officer is not prevented<sup>16</sup> from receiving payments which, in the aggregate, exceed any limit applicable to him<sup>17</sup> if the excess payment is included in provision approved by a special resolution<sup>18</sup>; but if any payment is received which has not been authorised<sup>19</sup> it must be repaid<sup>20</sup>.

1 As to the transfer of business see PARA 1927. As to the terms of the transfer agreement see PARAS 1928-1929.

2 As to the meaning of 'company' see PARA 1927 note 1.

3 'Compensation' includes the provision of benefits in kind: Building Societies Act 1986 s 99(6).

4 As to the office of director see PARAS 1944-1963.

5 As to the meaning of 'officer' see PARA 1944.

6 'Loss of office' includes, in relation to a director or other officer of a building society holding office in any other body by virtue of his position in that society, the loss of that office: Building Societies Act 1986 s 99(6) (definition amended by the Building Societies Act 1997 Sch 7 para 46).

7 Building Societies Act 1986 s 99(1).

8 Building Societies Act 1986 s 99(2).

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies

(Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

9 As to the meaning of 'special resolution' see PARA 1980.

10 Building Societies Act 1986 s 99(2)(a). As to the meaning of 'requisite transfer resolutions' see PARA 1927 note 6.

11 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

12 le under the Building Societies Act 1986 s 97: see PARAS 1927-1928, 1938.

13 Building Societies Act 1986 s 99(3) (amended by SI 2001/2617). The power to make regulations under the Building Societies Act 1986 s 99(3) is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 99(5). At the date at which this volume states the law no such regulations had been made. Since the Treasury has not used this power, which is similar to the power under s 96(2) relating to mergers (see PARA 1924), all compensation payments must be approved under s 99(2) (a) (see the text to notes 9-10).

14 'Prescribed', with reference to limits on compensation, means prescribed by regulations under the Building Societies Act 1986 s 99(3) (see the text to notes 11-13): s 99(6). See note 13.

15 Building Societies Act 1986 s 99(2)(b).

16 le by anything in the Building Societies Act 1986 s 99(2) (see the text to notes 8-10, 14-15) or s 99(3) (see the text to notes 11-13).

17 le under either the Building Societies Act 1986 s 99(2) (see the text to notes 8-10, 14-15) or s 99(3) (see the text to notes 11-13).

18 le as required by the Building Societies Act 1986 s 99(2)(a): see the text to notes 9-10.

19 le under the Building Societies Act 1986 s 99(2)(a) (see the text to notes 9-10) or s 99(2)(b) (see the text to notes 14-15).

20 Building Societies Act 1986 s 99(4).

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### **1931. Increased remuneration.**

The terms of a transfer of business<sup>1</sup> by a building society to its successor company<sup>2</sup> may include provision for any director<sup>3</sup> or other officer<sup>4</sup> of the society to receive increased emoluments in consequence of the transfer, whether by way of increased remuneration or the grant of share options or otherwise<sup>5</sup>. An ordinary resolution<sup>6</sup> approving any such provision must be put before a meeting of the society<sup>7</sup>.

1 As to the transfer of business see PARA 1927. As to the terms of the transfer agreement see PARAS 1928-1929.

2 As to the meaning of 'company' see PARA 1927 note 1.

3 As to the office of director see PARAS 1944-1963.

4 As to the meaning of 'officer' see PARA 1944.



5 Building Societies Act 1986 s 99A(1) (s 99A added by the Building Societies Act 1997 s 31).

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

6 As to the meaning of 'ordinary resolution' see PARA 1983.

7 Building Societies Act 1986 s 99A(2) (as added: see note 5). As to meetings generally see PARA 1974 et seq.

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### **1932. Restrictions.**

Where, in connection with any transfer of business<sup>1</sup> of a building society to its successor company<sup>2</sup>, rights are to be conferred on members of a society<sup>3</sup> to acquire shares in priority to other subscribers, the right must be restricted to those members who held shares in the society<sup>4</sup> throughout the period of two years which expired on the qualifying day<sup>5</sup>. 'Subscribers' means persons taking or agreeing to take shares in a company for cash<sup>6</sup> but extends here to the situation where the transfer agreement obliges the subscriber to vest shares free of charge in members<sup>7</sup>.

Where the successor is an existing company<sup>8</sup> any distribution of funds to members of the society, except for the distribution by way of bonus<sup>9</sup>, must only be made to those members who held shares in the society throughout the period of two years which expired with the qualifying day<sup>10</sup>. Where the successor is a specially formed company<sup>11</sup> no distribution of funds may be made, except for the distribution by way of bonus<sup>12</sup>, and where negotiable instruments acknowledging rights to shares are issued by the successor within two years of the vesting date<sup>13</sup> no such instruments may be issued to former members of the society unless they are also issued, and on the same terms, to all other members of the company<sup>14</sup>. Where the successor is a specially formed company, the terms of the transfer must include provision to secure that the society ceases to hold any shares in the successor by the date on which the society is dissolved<sup>15</sup>.

1 As to the transfer of business see PARA 1927. As to the terms of the transfer agreement see PARAS 1928-1929.

2 As to the meaning of 'company' see PARA 1927 note 1.

3 As to membership see PARA 1888 et seq.

4 As to shares in relation to societies see PARA 1905 et seq.

5 Building Societies Act 1986 s 100(8). It is unlawful for any right in relation to shares to be conferred in contravention of this provision: s 100(8). As to the meaning of 'qualifying day' see PARA 1929 note 8. It has been held that the 'rights to acquire shares' which were subject to the restriction in s 100(8) were rights which were conferred on members by the transfer agreement; that the 'other subscribers' referred to in s 100(8) were persons who, in connection with the transfer, subscribed or were entitled to subscribe for shares in the successor company, but who did so, or were entitled to do so, on terms which were less favourable than those conferred on members or on some class of members under the transfer agreement, such as some other class of

members, employees or pensioners, existing members of the successor company where the successor was an existing company, or members of the public in circumstances where, in connection with the transfer, the successor company made a public offer of its shares; and that where there was no one who, in connection with the transfer, could subscribe or be entitled to subscribe to shares in the successor company other than those persons upon whom rights were conferred by the transfer agreement and those persons enjoyed the same rights inter se, there could be no 'other subscribers' for the purposes of s 100(8). In the case of the transfer of the business of Halifax Building Society to a specially formed successor company, it was accordingly held that there were no persons who were or could become 'other subscribers' in relation to a fixed allocation of free shares in the successor company to be made under the terms of transfer where (1) the classes of members who were entitled to free shares under the terms of transfer were entitled to them on the same terms as those which applied to the classes of employees and pensioners who were also entitled to free shares under the terms of transfer; and (2) no offer of shares in the successor company was to be made to the public, or any section of the public, in connection with the transfer. Given that there were no members of the public who constituted 'other subscribers', it followed that the exclusion of the public from the allocation of free shares did not involve any infringement of s 100(8): *Building Societies Commission v Halifax Building Society* [1997] Ch 255, [1995] 3 All ER 193.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

6 *Governments Stock and Other Securities Investment Co Ltd v Christopher* [1956] 1 All ER 490, [1956] 1 WLR 237.

7 *Abbey National Building Society v Building Societies Commission* (1989) 5 BCC 259 (building society proposed to subscribe for shares in successor company and issue shares free to members (whether or not they had been members for two years) and then offer future shares to members for cash; the Building Societies Act 1986 s 100(8) would be infringed unless the class of members entitled to 'free' shares was the same class as the class entitled to 'subscribe' for new shares, since entitlement to the free shares would be in priority to the entitlement to subscribe). Underwriters obliged to take up shares not otherwise taken up are not in competition for shares, so that it cannot be said that rights of members to subscribe for such shares are conferred 'in priority to' underwriters: *Abbey National Building Society v Building Societies Commission* at 263-264 per Browne-Wilkinson V-C.

8 As to the meaning of 'existing company' see PARA 1927 note 1.

9 Is required by the Building Societies Act 1986 s 100(2)(b): see PARA 1929.

10 Building Societies Act 1986 s 100(9). It is unlawful for any distribution to be made in contravention of this provision: s 100(9). Under s 100(9), it is just as unlawful for a third party such as the successor company's parent company to make cash payments to members who have not held shares for at least two years as it is for the successor company itself to do so: see *Cheltenham and Gloucester Building Society v Building Societies Commission* [1995] Ch 185, [1994] 4 All ER 65.

11 As to the meaning of 'specially formed company' see PARA 1927 note 1.

12 See note 9.

13 As to the meaning of 'vesting date' see PARA 1929 note 3.

14 Building Societies Act 1986 s 100(10). It is unlawful for any distribution to be made in contravention of this provision: s 100(10).

15 Building Societies Act 1986 s 100(11). As to the dissolution of societies see PARA 2066 et seq.

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### 1933. Protective provisions for specially formed successors.

The Building Societies Act 1986 contains provisions<sup>1</sup> to reduce the risk of a take-over of, or the building up of too substantial a stake in, a specially formed successor company<sup>2</sup> within five years from the vesting date<sup>3</sup>. The company specially formed by a building society to be its successor must not, during the period beginning with the date of the company's incorporation and ending five years after the vesting date or, if this prohibition ceases to apply to the company, ending on the date on which it ceases (the 'protective period')<sup>4</sup>:

- 330 (1) offer for sale or invite subscription for any shares<sup>5</sup> in the company or allot or agree to allot any such shares with a view to their being offered for sale<sup>6</sup>;
- 331 (2) allot or agree to allot any share in the company<sup>7</sup>; or
- 332 (3) register a transfer<sup>8</sup> of shares in the company<sup>9</sup>,

if the effect would be that more shares than the permitted proportion<sup>10</sup> would be held by any one person (other than the society), or by any two or more persons who are parties to a concert party agreement<sup>11</sup> which relates to shares in the company<sup>12</sup>.

The articles of association of the successor company must include provision such as will secure that the company does not offer, invite subscriptions for, allot, or register transfers of, shares in contravention of these provisions, and no alteration in such provision may be made by the company during the protective period<sup>13</sup>. Any provision (including any altered provision) of the company's articles of association which is to any extent inconsistent with these provisions is void to that extent, and any allotment or registration of a transfer of shares in contravention of these provisions is void<sup>14</sup>.

These provisions cease to apply to a company if:

- 333 (a) a person who is an authorised person<sup>15</sup> becomes a subsidiary undertaking<sup>16</sup> of the company, or the company or such an undertaking acquires the whole, or substantially the whole, of the business of such a person<sup>17</sup>;
- 334 (b) a special resolution to that effect is passed by the requisite majority<sup>18</sup> of the members of the company<sup>19</sup>; or
- 335 (c) the Financial Services Authority<sup>20</sup> by notice<sup>21</sup> to the company gives a direction to that effect<sup>22</sup>.

1 See the Building Societies Act 1986 s 101; and the text and notes 2-22.

2 As to the meanings of 'specially formed company' and 'company' see PARA 1927 note 1.

3 As to the meaning of 'vesting date' see PARA 1929 note 3.

4 Building Societies Act 1986 s 101(1) (s 101 substituted by the Building Societies Act 1997 s 41).

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

5 Any reference in the Building Societies Act 1986 s 101 to shares includes a reference (1) to any warrant or other instrument entitling the holder to subscribe for shares; and (2) to any certificate or other instrument issued by or on behalf of the company and conferring a right to acquire shares otherwise than by subscription, and for the purposes of s 101(1) any shares to which any such instrument relates must be deemed to be held by the holder of the instrument: s 101(8) (as substituted: see note 4).

For the purposes of s 101, shares (a) held by a person in a fiduciary capacity must be treated as not held by him; (b) held by a person as nominee for another must be treated as held by the other; and (c) must be

regarded as held as nominee for another if any voting rights attaching to them are exercisable only on his instructions or with his consent or concurrence: s 101(7) (as so substituted).

Any expression used in s 101 and in the Companies Acts (as defined in the Companies Act 2006 s 2: see **COMPANIES** vol 14 (2009) PARA 16) has the same meaning in the Building Societies Act 1986 s 101 as in that Act or that order: s 101(6) (as so substituted; amended by SI 2007/2194).

6 Building Societies Act 1986 s 101(1)(a) (as substituted: see note 4).

7 Building Societies Act 1986 s 101(1)(b) (as substituted: see note 4).

8 'Transfer', in relation to shares, does not include a transfer to a person to whom the right to any shares has been transmitted by operation of law: Building Societies Act 1986 s 101(6) (as substituted: see note 4).

9 Building Societies Act 1986 s 101(1)(c) (as substituted: see note 4).

10 The 'permitted proportion', in relation to shares in the company, is 15% of the company's issued share capital: Building Societies Act 1986 s 101(6) (as substituted: see note 4).

11 'Concert party agreement' is an agreement to which the Companies Act 2006 s 824 (see **COMPANIES** vol 14 (2009) PARA 440) applies: Building Societies Act 1986 s 101(6) (as substituted (see note 4); definition amended by SI 2007/2194).

12 Building Societies Act 1986 s 101(1) (as substituted: see note 4).

13 Building Societies Act 1986 s 101(2) (as substituted: see note 4). See PARA 1927 note 5. If s 101 ceases to apply to a company, any provision included in its articles of association by virtue of s 101(2) ceases to have effect: s 101(5).

14 Building Societies Act 1986 s 101(3) (as substituted: see note 4). Where before 21 March 1997 (ie the passing of the Building Societies Act 1997) a company had been specially formed by a society to be its successor, nothing in the Building Societies Act 1986 s 101 as substituted by the Building Societies Act 1997 s 41 is to be taken: (1) to impose any requirement which would not be imposed, or to render void any provision, allotment or registration which would not be rendered void, if s 41 had not been enacted; or (2) to prevent any alterations in the provisions of the company's articles of association which are such as to secure that the company does not contravene, or that those provisions are consistent with the Building Societies Act 1986 s 101(1): Building Societies Act 1997 s 46(1), Sch 8 para 10.

15 Ie within the meaning of the Financial Services and Markets Act 2000 s 31: see PARA 314.

16 As to the meaning of 'subsidiary undertaking' see PARA 1916 note 9.

17 Building Societies Act 1986 s 101(4)(a) (as substituted (see note 4); and amended by SI 2001/3649).

18 'Requisite majority' means a majority of the members having the right to attend and vote at a general meeting of the company, being a majority together holding not less than 75% in nominal value of the shares giving that right: Building Societies Act 1986 s 101(6) (as substituted: see note 4).

19 Building Societies Act 1986 s 101(4)(b) (as substituted: see note 4).

20 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

21 As to the meaning of 'notice' see PARA 1866 note 8.

22 Building Societies Act 1986 s 101(4)(c) (as substituted (see note 4); and amended by the Bank of England Act 1998 Sch 5 para 38(2)). The Authority must not give such a direction unless it considers it desirable to do so in the interests of the depositors and potential depositors of the company: Building Societies Act 1986 s 101(4) (as so substituted and amended).

Business to Commercial Company/1934. Issue of transfer statement or transfer summary to members.

### **1934. Issue of transfer statement or transfer summary to members.**

A building society which desires to transfer its business<sup>1</sup> to a successor company<sup>2</sup> must send a transfer statement<sup>3</sup>, or a transfer summary<sup>4</sup>, to every member entitled to notice of a meeting<sup>5</sup> of the society<sup>6</sup>.

A transfer statement must contain:

- 336 (1) the particulars required, in relation to the prescribed matters<sup>7</sup>, by the regulations made by the Treasury<sup>8</sup>; and
- 337 (2) particulars of any other matters required by the Financial Services Authority<sup>9</sup> in the case of the particular transfer<sup>10</sup>,

with or without other particulars regarding the transfer<sup>11</sup>.

A transfer summary must contain:

- 338 (a) the information required by the regulations made by the Treasury<sup>12</sup>; and
- 339 (b) any other information required by the Authority in the case of a particular transfer<sup>13</sup>,

with or without other particulars regarding the transfer<sup>14</sup>.

The contents of the transfer statement must be approved by the Authority in so far as they concern the prescribed matters or any matter of which particulars are required to be given under head (2) above<sup>15</sup>.

Subject to the required contents having been approved by the Authority, a society must, in relation to a transfer of business, include a transfer statement, or a transfer summary, in or with the notice to be sent to its members of the meeting of the society at which the requisite transfer resolutions are to be moved<sup>16</sup>. Provision is made for the transfer statement or transfer summary to be sent electronically<sup>17</sup>.

Subject to the required contents having been approved by the Authority, where a society sends a transfer summary, a transfer statement<sup>18</sup> must be handed forthwith and free of charge to any member to whom the summary was sent who asks for such a statement at an office or branch of the society<sup>19</sup> and must be sent forthwith and free of charge to any such member who asks for such a statement otherwise than at such an office or branch<sup>20</sup>. In the latter case provision is made for the transfer statement to be sent electronically<sup>21</sup>.

1 As to the transfer of business see PARA 1927.

2 As to the meaning of 'company' see PARA 1927 note 1.

3 'Transfer statement', in relation to a transfer of business by a building society, means the statement with respect to the transfer which may be sent or handed to members of the society under the Building Societies Act 1986 Sch 17 para 2: s 98(1) (amended by the Building Societies Act 1997 s 30(1)), Building Societies Act 1986 Sch 17 para 1 (Sch 17 substituted by the Building Societies Act 1997 Sch 5 Pt II). As to membership see PARA 1888 et seq.

4 'Transfer summary', in relation to a transfer of business by a building society, means the summary of the transfer statement which may be sent to members of the society under the Building Societies Act 1986 Sch 17 para 2 (see the text to note 6): Sch 17 para 1 (as substituted: see note 3).

5 As to the meaning of 'notice' see PARA 1866 note 8. As to members entitled to receive notice of meetings see PARA 1985.

6 Building Societies Act 1986 Sch 17 para 2 (as substituted: see note 3). As to meetings generally see PARA 1974 et seq.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

7 'Prescribed matters' in relation to any transfer of the business of a building society to its successor, means the matters relating to the transfer, the society, its officers, members or depositors, or the successor, which are prescribed in regulations made under the Building Societies Act 1986 Sch 17 para 5(1) (see note 8): Sch 17 para 1 (as substituted: see note 3). As to the matters prescribed see the Building Societies (Transfer of Business) Regulations 1998, SI 1998/212; and note 8. As to the meaning of 'officer' see PARA 1944. As to the meaning of 'depositor' see PARA 1866 note 7.

8 Building Societies Act 1986 Sch 17 para 3(1)(a) (as substituted: see note 3). The Treasury may make regulations for the purpose of specifying, as prescribed matters, the matters of which transfer statements are to give particulars, and the regulations may also require particulars to be given of any alternatives to the particular transfer which were available to the society making the transfer: Sch 17 para 5(1) (as so substituted; and Sch 17 para 5(1), (2) amended by SI 2001/2617). Any power to make regulations under the Building Societies Act 1986 Sch 17 para 5 is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Sch 17 para 5(3) (as so substituted). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

The Building Societies (Transfer of Business) Regulations 1998, SI 1998/212, have been made under the Building Societies Act 1986 Sch 17 para 5(1), (2) (see note 12), and prescribe the matters which must be set out in all transfer statements, those further matters which must be set out depending on whether the transfer is to an existing or a specially formed company, and the matters which must be set out if shares or rights are to be offered in connection with the transfer: see the Building Societies (Transfer of Business) Regulations 1998, SI 1998/212, reg 3(1), Sch 1 (amended by SI 2001/3649). If particulars are required of any matter which is not ascertainable at the time of making the statement, a forecast must be substituted for that matter, together with particulars of the person making the forecast, any persons consulted and the facts and assumptions on which it is based: see the Building Societies (Transfer of Business) Regulations 1998, SI 1998/212, reg 3(2). Where a proposal for a merger or a transfer of business has been made to the society by another society or a company other than the successor company, the transfer statement must contain the terms of such proposal, except to the extent that any such term is subject to a request, which has not been withdrawn, that it remain confidential: see reg 3(3), (4).

9 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

10 Building Societies Act 1986 Sch 17 para 3(1)(b) (as substituted (see note 3); and Sch 17 paras 3(1)(b), (2) (b), 4(3) amended by SI 2001/2617).

11 Building Societies Act 1986 Sch 17 para 3(1) (as substituted: see note 3).

12 Building Societies Act 1986 Sch 17 para 3(2)(a) (as substituted: see note 3). The Treasury may make regulations for the purpose of specifying the information which transfer summaries are to give: Sch 17 para 5(2) (as so substituted; and amended: see note 8). The specified information is set out in the Building Societies (Transfer of Business) Regulations 1998, SI 1998/212, reg 4, Sch 2.

13 Building Societies Act 1986 Sch 17 para 3(2)(b) (as substituted (see note 3); and amended (see note 10)).

14 Building Societies Act 1986 Sch 17 para 3(2) (as substituted: see note 3).

15 Building Societies Act 1986 Sch 17 para 4(3) (as substituted (see note 3); and amended (see note 10)).

16 Building Societies Act 1986 Sch 17 para 4(1) (as substituted: see note 3). As to the meaning of 'requisite transfer resolutions' see PARA 1927 note 6.

17 See the Building Societies Act 1986 Sch 17 para 4(1A)-(1C) (added by SI 2003/404). Where a transfer statement or transfer summary is required under the Building Societies Act 1986 Sch 17 para 4(1) (see the text to note 16) to be sent to a member in or with the notice of the meeting of the society at which the requisite transfer resolutions are to be moved: (1) in a case where notice of that meeting is given to that member

electronically in accordance with Sch 2 para 22A (see PARA 1985), the transfer statement or transfer summary may be sent to him electronically only if it is sent to the same electronic address, and at the same time as the notice; (2) in a case where notice of that meeting is given on a website in accordance with Sch 2 para 22B (see PARA 1985), the requirement to send the statement or summary to that member is also treated as satisfied if the conditions set out in Sch 17 para 4(1B) are satisfied: Sch 17 para 4(1A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

The conditions mentioned in head (2) above are satisfied in the case of a transfer statement or transfer summary if: (a) the society and that member have agreed that information which is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the statement or summary in question; (c) at the same time and in the same manner as the society notifies that member of the publication of the notice of the meeting, it notifies him of the publication of the statement or summary on a website, the address of that website, the place on that website where that statement or summary may be accessed, and how it may be accessed; and (d) the statement or summary is published continuously on that website throughout the period beginning when the member is notified in accordance with head (a) above and ending with the decision of the Authority whether to confirm the transfer pursuant to s 98 (see PARA 1937): Sch 17 para 4(1B) (as so added).

Where, in a case in which head (2) above is relied on for compliance with a requirement under Sch 17 para 4(1), a statement is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, the failure does not invalidate the proceedings of a meeting or prevent the requirements of Sch 17 para 4(1B) from being treated as fulfilled in relation to s 98 (see PARA 1937): Sch 17 para 4(1C) (as so added).

18 Building Societies Act 1986 Sch 17 para 4(2) (as substituted: see note 3).

19 Building Societies Act 1986 Sch 17 para 4(2)(a) (as substituted: see note 3).

20 Building Societies Act 1986 Sch 17 para 4(2)(b) (as substituted: see note 3).

21 See the Building Societies Act 1986 Sch 17 para 4(2A)-(2C) (added by SI 2003/404). Where a transfer statement is required under the Building Societies Act 1986 Sch 17 para 4(2)(b) (see the text to note 20) to be sent to a member: (1) it may be sent to him electronically only if it is sent to an electronic address notified by him to the society for the purpose; (2) the requirement to send it is also treated as satisfied if the conditions set out in Sch 17 para 4(2B) are satisfied: Sch 17 para 4(2A) (as so added).

The conditions are satisfied in the case of a transfer statement if: (a) the society and that member have agreed that information which is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the transfer statement in question; (c) the society notifies the member forthwith, on receiving a request from him for such a statement, of the publication of the statement on a website, the address of that website, the place on that website where the statement may be accessed and how it may be accessed; and (d) that statement is published continuously on that website for the period beginning with the giving of that notification and ending with the decision of the Authority whether to confirm the transfer pursuant to s 98 (see PARA 1937): Sch 17 para 4(2B) (as so added).

Where, in a case in which head (2) above is relied on for compliance with a requirement under Sch 17 para 4(2)(b), a statement is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, the failure does not invalidate the proceedings of a meeting or prevent the requirements of Sch 17 para 4(2B) from being treated as fulfilled in relation to s 98 (see PARA 1937): Sch 17 para 4(2C) (as so added).

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### **1935. Notification of transfer proposals.**

A building society which receives a transfer<sup>1</sup> proposal<sup>2</sup>, must send a transfer proposal notification<sup>3</sup> in respect of the proposal to every member<sup>4</sup> entitled to notice<sup>5</sup> of a meeting of the society<sup>6</sup>. A transfer proposal notification must contain the fact that a transfer proposal has been

made, and the identity of the proposer, with or without other particulars regarding the proposal<sup>7</sup>. The notification is not required to be sent to members if the proposer has requested in writing<sup>8</sup> that the requisite details are to be treated as confidential<sup>9</sup>. Where such a request is made and is at a later date withdrawn in writing, the society receiving the proposal must for these purposes<sup>10</sup> treat the proposal as having been received on that date instead of any earlier date<sup>11</sup>.

A society must include in or with every notice of its annual general meeting<sup>12</sup> a transfer proposal notification with respect to any transfer proposal, other than a proposal of which notice has already been given<sup>13</sup>: (1) received by it during the period of 12 months ending with the ninth month of the last financial year<sup>14</sup> of the society before that meeting<sup>15</sup>; or (2) treated<sup>16</sup> as having been received by it during the last three months of that financial year<sup>17</sup>. The society may also include a transfer proposal notification with respect to any proposal received, or treated as received, by it after the end of either period<sup>18</sup>. It is an offence if a society fails to comply with this requirement, and the society, and any officer<sup>19</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>20</sup>. Provision is also made in regard to transfer proposal notifications where the notice of the meeting has been sent electronically<sup>21</sup>.

Where a society sends a transfer proposal notification to its members<sup>22</sup> in connection with a meeting of the society, it must send a copy of the notification to the Financial Services Authority<sup>23</sup> at least 14 days before the date of the meeting<sup>24</sup>, and the Authority must keep the copy in the public file<sup>25</sup> of that society<sup>26</sup>. It is an offence if a society fails to comply with this requirement, and the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine<sup>27</sup>.

1 'Transfer', in relation to a building society, means a transfer of the whole of its business to a company under the Building Societies Act 1986 s 97 (see PARAS 1927-1928, 1938): s 98(1A) (added by the Building Societies Act 1997 s 30(2); and amended by SI 2001/2617), Building Societies Act 1986 Sch 17 para 5A (Sch 17 paras 5A-5E added by the Building Societies Act 1997 Sch 5). As to the meaning of 'company' see PARA 1927 note 1.

2 As to the meaning of 'transfer proposal' see PARA 1923 note 19.

3 'Transfer proposal notification' means a notification containing the requisite particulars of a transfer proposal: Building Societies Act 1986 Sch 17 para 5A (as added: see note 1). 'Requisite particulars', in relation to a transfer proposal, means the particulars required by Sch 17 para 5B(2) (see the text to note 7) to be given in a transfer proposal notification: Sch 17 para 5A (as so added).

4 As to membership see PARA 1888 et seq.

5 As to the meaning of 'notice' see PARA 1866 note 8.

6 Building Societies Act 1986 Sch 17 para 5B(1) (as added: see note 1) (which is expressed to be subject to Sch 17 para 5B(3) (see the text to notes 8-11)). As to meetings generally see PARA 1974 et seq.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

7 Building Societies Act 1986 Sch 17 para 5B(2) (as added: see note 1).

8 As to the meaning of 'writing' see PARA 1064 note 2.

9 Building Societies Act 1986 Sch 17 para 5B(3) (as added: see note 1).

10 Ie for the purposes of the Building Societies Act 1986 Sch 17 Pt IA (paras 5A-5E).

11 Building Societies Act 1986 Sch 17 para 5B(3) (as added: see note 1).

12 As to annual general meetings see PARA 1977.



- 13 Building Societies Act 1986 Sch 17 para 5C(1) (as added (see note 1); and renumbered by SI 2003/404).
- 14 As to the meaning of 'financial year' see PARA 1992 note 2.
- 15 Building Societies Act 1986 Sch 17 para 5C(1)(a) (as added (see note 1); and renumbered (see note 13)).
- 16 Ie by the Building Societies Act 1986 Sch 17 para 5B(3): see the text to notes 8-9.
- 17 Building Societies Act 1986 Sch 17 para 5C(1)(b) (as added (see note 1); and renumbered (see note 13)).
- 18 Building Societies Act 1986 Sch 17 para 5C(1) (as added (see note 1); and renumbered (see note 13)).
- 19 As to the meaning of 'officer' see PARA 1944.
- 20 Building Societies Act 1986 Sch 17 para 5E(1) (as added (see note 1); and renumbered by SI 2003/404). The fine must not exceed level 4 on the standard scale: Building Societies Act 1986 Sch 17 para 5E(1) (as so added and renumbered). As to the standard scale see PARA 27 note 21. See also note 21.
- 21 See the Building Societies Act 1986 Sch 17 paras 5C(2)-(4), 5E(2) (added by SI 2003/404). Where a transfer proposal notification is required under the Building Societies Act 1986 Sch 17 para 5C(1) (see the text to notes 13-18) to be sent to a member in or with the notice of an annual general meeting of the society: (1) in a case where notice of that meeting is given to that member electronically in accordance with Sch 2 para 22A (see PARA 1985), the transfer proposal notification may be sent to him electronically only if it is sent to the same electronic address, and at the same time as the notice; (2) in a case where notice of that meeting is given on a website in accordance with Sch 2 para 22B (see PARA 1985), the requirement to send it is also treated as satisfied if the conditions set out in Sch 17 para 5C(3) are satisfied: Sch 17 para 5C(2) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.
- The conditions are satisfied in the case of a transfer proposal notification if: (a) the society and the member have agreed that information that is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the transfer proposal notification in question; (c) at the same time and in the same manner as the society notifies that person of the publication of the notice of the meeting, it notifies him of the publication of the transfer proposal notification on a website, the address of that website, the place on that website where that notification may be accessed, and how it may be accessed; and (d) the notification is published continuously on that website throughout the period beginning when the person is notified in accordance with head (c) above and ending with the conclusion of the meeting: Sch 17 para 5C(3) (as so added).
- Where, in a case in which head (2) above is relied on for compliance with a requirement under Sch 17 para 5C(1), a statement is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, the failure does not invalidate the proceedings of a meeting: Sch 17 para 5C(4) (as so added).
- No offence is committed under Sch 17 para 5E (see also the text to note 20), in a case in which head (2) above is relied on for compliance with a requirement under Sch 17 para 5C(1), where: (i) a transfer proposal notification is published for a part, but not all, of the period mentioned in head (d) above; and (ii) the failure to publish that notification throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid: Sch 17 para 5E(2) (as so added).
- 22 Ie under the Building Societies Act 1986 Sch 17 para 5C: see the text and notes 12-18, 21.
- 23 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 24 Building Societies Act 1986 Sch 17 para 5D(1) (as added (see note 1); and amended by SI 2001/2617).
- 25 As to the public file see PARA 1864.
- 26 Building Societies Act 1986 Sch 17 para 5D(1) (as added (see note 1); and amended (see note 24)).
- 27 Building Societies Act 1986 Sch 17 para 5E(1) (as added (see note 1); and renumbered (see note 20)). The fine must not exceed level 4 on the standard scale: Sch 17 para 5E (as so added and renumbered).

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### **1936. Required resolutions to approve the transfer.**

One of the requirements to be fulfilled in order for a building society to transfer its business<sup>1</sup> to its successor is that the transfer and its terms<sup>2</sup> must be approved by the requisite transfer resolutions, being resolutions passed by the members of the society<sup>3</sup> in accordance with the following provisions<sup>4</sup>. Two resolutions are required, of which one is passed as a borrowing members' resolution<sup>5</sup> and the other is passed in accordance with the requirements for a requisite shareholders' resolution<sup>6</sup>.

If the successor is a specially formed company<sup>7</sup> the requisite shareholders' resolution must<sup>8</sup>: (1) be passed as a shareholding members' resolution<sup>9</sup>; and (2) be passed on a poll on which not less than 50 per cent of the members of the society qualified to vote on a shareholding members' resolution voted<sup>10</sup>. The notice of the resolution<sup>11</sup> must specify that the resolution will not be effective unless the requirements of heads (1) and (2) above are fulfilled<sup>12</sup>.

If the successor is an existing company<sup>13</sup> the requisite shareholders' resolution must be passed as a shareholding members' resolution and must be passed<sup>14</sup>: (a) by not less than 50 per cent of the members qualified to vote on a shareholding members' resolution<sup>15</sup>; or (b) by the holders, being members qualified to vote on a shareholding members' resolution, of shares in the society to a value, on the voting date<sup>16</sup>, representing not less than 90 per cent of the total value of the shares held on that date by the members so qualified to vote<sup>17</sup>. In either case, the resolution must be a resolution in relation to which the notice of the resolution<sup>18</sup> includes a statement specifying that the resolution will not be effective unless the requirements of head (a) or head (b) above are fulfilled<sup>19</sup>.

If the Financial Services Authority<sup>20</sup> considers it expedient, in relation to a transfer of the business of a society to an existing company, to do so for the purpose of protecting the investments of the shareholders of or depositors<sup>21</sup> with the society, it may give a direction<sup>22</sup> that the requisite shareholders' resolution is to be effective if it is passed as a shareholding members' resolution<sup>23</sup>.

The Treasury<sup>24</sup> may by order amend the percentages referred to above so as to substitute for the percentage for the time being specified such other percentage as it thinks appropriate<sup>25</sup>.

1 As to the transfer of business see PARA 1927.

2 As to the terms of the transfer agreement see PARAS 1928-1929.

3 As to membership see PARA 1888 et seq.

4 See the Building Societies Act 1986 s 97(4)(c), (12), Sch 2 para 30; and the text and notes 5-25.

5 Building Societies Act 1986 Sch 2 para 30(1)(a). As to the meaning of 'borrowing members' resolution' see PARA 1982.

6 See the Building Societies Act 1986 Sch 2 para 30(1)(b). See the text and notes 7-23.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

- 7 As to the meaning of 'specially formed company' see PARA 1927 note 1.
- 8 Building Societies Act 1986 Sch 2 para 30(2).
- 9 Building Societies Act 1986 Sch 2 para 30(2)(a) (amended by the Building Societies Act 1997 Sch 7 para 57(10)(a)). As to the meaning of 'shareholding members' resolution' see PARA 1981.
- 10 Building Societies Act 1986 Sch 2 para 30(2)(b) (amended by the Building Societies Act 1997 Sch 7 para 57(10)(a); and SI 1997/2714). See note 25. As to the right to demand a poll see PARA 1987; and as to the right to vote see PARA 1984.
- 11 le required by the Building Societies Act 1986 Sch 2 para 27A(b): see PARA 1981.
- 12 Building Societies Act 1986 Sch 2 para 30(2) (amended by the Building Societies Act 1997 Sch 7 para 57(10)(b)).
- 13 As to the meaning of 'existing company' see PARA 1927 note 1.
- 14 Building Societies Act 1986 Sch 2 para 30(3) (amended by the Building Societies Act 1997 Sch 7 para 57(11)(a)). The Building Societies Act 1986 Sch 2 para 30(3) is expressed to be subject to any direction under Sch 2 para 30(5) (see the text to note 23).
- 15 Building Societies Act 1986 Sch 2 para 30(3)(a) (as amended: see note 14). The effect is that, in contrast to the position where the successor is a specially formed company (as to which, see the text to notes 7-10), it is necessary for at least 50% of the members qualified to vote on the requisite shareholders' resolution to vote in favour of the resolution, as opposed merely to voting on the resolution (whether for or against). In either case, the requirement for the resolution to be passed as a shareholding members' resolution means that it must be passed by not less than 75% of those who vote on it: see Sch 2 para 27A(b) and PARA 1981.
- 16 'Voting date', with reference to any resolution, means: (1) the date of the meeting at which the resolution is intended to be moved, except where heads (2)-(4) below apply; (2) where voting on the resolution is to be conducted by postal ballot or by electronic ballot in the case of which not all the voting is electronic (within the meaning of the Building Societies Act 1986 Sch 2 para 33A (see PARA 1988)), the date which the society specifies as the final date for the receipt of completed ballot papers; (3) in the case of an election conducted by electronic ballot in which all the voting is electronic voting (within the meaning of the Sch 2 para 33A (see PARA 1988)), the date which the society specifies as the final date for registering votes; (4) in the case of a member appointing a proxy to vote instead of him at a meeting, the date which the society specifies as the final date for the receipt of appointments of proxies to vote on that resolution: Sch 2 para 23(6) (amended by SI 2003/404); definition applied by the Building Societies Act 1986 Sch 2 para 30(8). As to postal and electronic ballots see PARA 1988. As to the appointment of proxies see PARA 1986.
- 17 Building Societies Act 1986 Sch 2 para 30(3)(b) (as amended: see note 14). As to shares in relation to societies see PARA 1905 et seq.
- 18 See note 11.
- 19 Building Societies Act 1986 Sch 2 para 30(3) (amended by the Building Societies Act 1997 Sch 7 para 57(11)(b), (c), Sch 9).
- 20 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 21 As to the meaning of 'depositor' see PARA 1866 note 7.
- 22 Building Societies Act 1986 Sch 2 para 30(4) (amended by SI 2001/2617).
- 23 Building Societies Act 1986 Sch 2 para 30(5) (amended by the Building Societies Act 1997 Sch 7 para 57(12)).
- 24 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 25 Building Societies Act 1986 Sch 2 para 30(6) (amended by SI 2001/2617). The power to make such orders is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 Sch 2 para 30(7). An order has been made under Sch 2 para 30(6) which amends Sch 2 para 30(2)(b) (see the text and note 10) so as to substitute '50 per cent' for '20 per cent': see the Building Societies (Transfer Resolutions) Order 1997, SI 1997/2714.

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### **1937. Procedure for confirmation by the Financial Services Authority.**

Application must be made by a building society to the Financial Services Authority<sup>1</sup> for confirmation<sup>2</sup> of the transfer of its business<sup>3</sup> to a company<sup>4</sup> in the manner directed by the Authority<sup>5</sup>. The society must publish a notice<sup>6</sup> of the application in any one or more of the London Gazette, the Edinburgh Gazette or the Belfast Gazette, as the Authority directs and, if it so directs, in one or more newspapers<sup>7</sup>. The notice must:

- 340 (1) state that any interested party has the right to make representations to the Authority with respect to the application<sup>8</sup>;
- 341 (2) specify a date determined by the Authority before which any written<sup>9</sup> representations or notice of a person's intention to make oral representations must be received by the Authority<sup>10</sup>; and
- 342 (3) specify a date determined by the Authority as the day on which it is to hear any oral representations<sup>11</sup>.

After the date specified in the notice in pursuance of head (2) above, the Authority must<sup>12</sup>:

- 343 (a) determine the time and place at which oral representations may be made<sup>13</sup>;
- 344 (b) give notice of that determination to the society making the transfer and any persons who have given notice of their intention to make oral representations<sup>14</sup>; and
- 345 (c) send copies of the written representations received by the Authority to the society making the transfer<sup>15</sup>.

The Authority must allow the society making the transfer an opportunity to comment on the written representations, whether at a hearing or in writing, before the expiration of such period as the Authority specifies in a notice to the society<sup>16</sup>.

Where an application is made to the Authority for confirmation of a transfer of business to a company it must confirm the transfer except where this is precluded<sup>17</sup>. The Authority must not give its confirmation if it considers that<sup>18</sup>:

- 346 (i) some information material to the members<sup>19</sup> decision about the transfer was not made available to all the members eligible to vote<sup>20</sup>; or
- 347 (ii) the vote on any resolution approving the transfer does not represent the views of the members eligible to vote<sup>21</sup>; or
- 348 (iii) there is a substantial risk that the successor will not have such permission to carry on regulated activities under Part IV of the Financial Services and Markets Act 2000<sup>22</sup>, or such permission as a result of qualifying for authorisation<sup>23</sup>, as will enable it to carry on the business which it will have as a result of the transfer without being taken<sup>24</sup> to have contravened a requirement imposed on it by the Authority under the Financial Services and Markets Act 2000<sup>25</sup>; or

349 (iv) some relevant requirement<sup>26</sup> of the Building Societies Act 1986 or the rules of the society was not fulfilled<sup>27</sup>.

However, the Authority is not precluded from giving its confirmation by virtue only of the non-fulfilment of some relevant requirement of the Building Societies Act 1986 or the rules of the society, if it appears to the Authority that it could not have been material to the members' decision about the transfer and the Authority directs that the failure is to be disregarded<sup>28</sup>. Where the Authority is precluded from giving its confirmation owing to any of the defects stated in heads (i) to (iv) above, it may direct the society making the transfer to<sup>29</sup>: (A) take such steps to remedy the defect or defects, including the calling of a further meeting, securing the variation of the transfer agreement<sup>30</sup> or securing the alteration of the approved protective provisions of the articles of association of its successor as it specifies in the direction<sup>31</sup>; and (B) furnish the Authority with satisfactory evidence that it has done so<sup>32</sup>. If the Authority is satisfied that the steps have been taken and the defect or defects has or have been substantially remedied it must give its confirmation, but if it is not so satisfied it must refuse its confirmation<sup>33</sup>.

A failure to comply with a relevant requirement of the Building Societies Act 1986 or the rules of a society does not invalidate a transfer of the business of the society, but if a society fails without reasonable excuse to comply with such a requirement it is an offence and the society, and any officer<sup>34</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>35</sup>.

1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 As to the meaning of 'confirmation' see PARA 1927 note 11.

3 As to the transfer of business see PARA 1927.

4 As to the meaning of 'company' see PARA 1927 note 1.

5 Building Societies Act 1986 s 98(2) (s 98(2)-(5) amended by SI 2001/2617), Building Societies Act 1986 Sch 17 para 6 (Sch 17 paras 6-8 amended by SI 2001/2617).

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

6 As to the meaning of 'notice' see PARA 1866 note 8.

7 Building Societies Act 1986 Sch 17 para 7(1) (as amended: see note 5).

8 Building Societies Act 1986 Sch 17 para 7(2)(a) (as amended: see note 5).

9 As to the meaning of 'written' see PARA 1064 note 2.

10 Building Societies Act 1986 Sch 17 para 7(2)(b) (as amended: see note 5).

11 Building Societies Act 1986 Sch 17 para 7(2)(c) (as amended: see note 5).

12 Building Societies Act 1986 Sch 17 para 8(1) (as amended: see note 5).

13 Building Societies Act 1986 Sch 17 para 8(1)(a).

14 Building Societies Act 1986 Sch 17 para 8(1)(b).

15 Building Societies Act 1986 Sch 17 para 8(1)(c) (as amended: see note 5).

16 Building Societies Act 1986 Sch 17 para 8(2) (as amended: see note 5).

- 17 Building Societies Act 1986 s 98(2) (as amended: see note 5).
- 18 Building Societies Act 1986 s 98(3) (as amended: see note 5) (which is expressed to be subject to s 98(4) (see the text to note 28)).
- 19 As to membership see PARA 1888 et seq.
- 20 Building Societies Act 1986 s 98(3)(a).
- 21 Building Societies Act 1986 s 98(3)(b).
- 22 Ie permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.
- 23 Ie permission under the Financial Services and Markets Act 2000 Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12) (see PARA 315).
- 24 Ie by virtue of the Financial Services and Markets Act 2000 s 20: see PARA 83.
- 25 Building Societies Act 1986 s 98(3)(c) (amended by SI 2001/3649).
- 26 For the purposes of the Building Societies Act 1986 s 98, 'relevant requirement', with reference to the Building Societies Act 1986 or the rules of a society, means a requirement of the applicable provisions of the Building Societies Act 1986 or of any rules prescribing the procedure to be followed by the society in approving the transfer and its terms: s 98(8). As to the applicable provisions see PARA 1927 note 1.
- 27 Building Societies Act 1986 s 98(3)(d).
- 28 Building Societies Act 1986 s 98(4) (as amended: see note 5).
- 29 Building Societies Act 1986 s 98(5) (as amended: see note 5).
- 30 As to the meaning of 'transfer agreement' see PARA 1927 note 6. As to the terms of the transfer agreement see PARAS 1928-1929.
- 31 Building Societies Act 1986 s 98(5)(a), (6).
- 32 Building Societies Act 1986 s 98(5)(b).
- 33 Building Societies Act 1986 s 98(5) (as amended: see note 5).
- 34 As to the meaning of 'officer' see PARA 1944.
- 35 Building Societies Act 1986 s 98(7). The fine must not exceed level 4 on the standard scale: s 98(7). As to the standard scale see PARA 27 note 21.

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### **1938. Effect of the transfer of business.**

If the Financial Services Authority<sup>1</sup> confirms the transfer of business<sup>2</sup> of a building society to a successor company<sup>3</sup> then on the vesting date<sup>4</sup> all the property, rights and liabilities of the society making the transfer (whether or not capable of being transferred or assigned), except any shares in its successor, are in accordance with the transfer regulations<sup>5</sup> transferred to and vested in the successor<sup>6</sup>. Where a society continues to hold shares in its successor after the vesting date, the consideration, if any, for the disposal of the shares together with any other property, rights or liabilities of the society acquired or incurred after that date are transferred

to and vested in its successor on the date specified for the dissolution of the society<sup>7</sup>. Unless the society gives notice<sup>8</sup> of a later date for the dissolution of the society, a society which transfers its business to its successor is dissolved on the vesting date, but the transfer of all the property, rights and liabilities of the society<sup>9</sup> is deemed to have been effected immediately before the dissolution<sup>10</sup>. For the purpose of facilitating the disposal of shares in its successor, a society may include in the notice of the vesting date, to be sent to the Authority<sup>11</sup> notice of a later date for the dissolution of the society<sup>12</sup>. If it does so, the society is dissolved on that date instead of the vesting date, but the transfer of all property, rights or liabilities of the society<sup>13</sup> is deemed to have been effected immediately before the dissolution<sup>14</sup>. A society which has obtained confirmation of the transfer of its business must send to the Authority notice of the date which is to be the vesting date not later than seven days before that date, and the Authority must record the date and, if a later date is notified for the dissolution of the society<sup>15</sup>, that date, in the public file<sup>16</sup> of the society<sup>17</sup>. As from the vesting date a society which has given notice of a later date for the dissolution of the society<sup>18</sup> must cease to transact any business except such as is necessary for the purpose of securing the disposal of the society's holding of shares in its successor<sup>19</sup>.

1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 As to the transfer of business see PARA 1927.

3 As to the meaning of 'company' see PARA 1927 note 1.

4 As to the meaning of 'vesting date' see PARA 1929 note 3.

5 As to transfer regulations see the Building Societies Act 1986 s 102; and PARA 1927 notes 7, 9. The Building Societies (Transfer of Business) Regulations 1998, SI 1998/212, have been made under the Building Societies Act 1986 s 102, and provide, inter alia, that the successor company is to be taken as substituted for the society in agreements and deeds (unless the successor company was itself a party to any such agreement or deed) (see the Building Societies (Transfer of Business) Regulations 1998, SI 1998/212, reg 6) and in other instruments and documents (see reg 7), and that the society's rights, powers and remedies, including those in respect of pending proceedings, become those of the successor company (see regs 8, 9).

6 Building Societies Act 1986 s 97(6) (s 97(6), (8) amended by SI 2001/2617). Compare *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538; [2006] 1 WLR 1704, CA, referred to in PARA 1921 note 2.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

7 Building Societies Act 1986 s 97(7). As to the dissolution of societies see PARA 2066 et seq.

8 Ie under the Building Societies Act 1986 s 97(10), as to which, see the text to note 12.

9 Ie effected by the Building Societies Act 1986 s 97(6): see the text to notes 1-6.

10 Building Societies Act 1986 s 97(9).

11 Ie under the Building Societies Act 1986 s 97(8): see the text to notes 15-17.

12 Building Societies Act 1986 s 97(10).

13 Ie effected by the Building Societies Act 1986 s 97(7): see the text to note 7.

14 Building Societies Act 1986 s 97(10).

15 Ie under the Building Societies Act 1986 s 97(10): see the text to notes 11-14.

16 As to the public file see PARA 1864.

- 17 Building Societies Act 1986 s 97(8) (as amended: see note 6).
- 18 ie under the Building Societies Act 1986 s 97(10): see the text to notes 11-14.
- 19 Building Societies Act 1986 s 97(11).

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### **1939. Rights of joint shareholders.**

Where the terms of a transfer of business<sup>1</sup> by a building society to its successor company<sup>2</sup> include provision for part of the funds of the society or its successor to be distributed among, or other rights in relation to shares in the successor to be conferred on, members of the society<sup>3</sup>, in consideration of the transfer<sup>4</sup> the following provisions apply<sup>5</sup>.

Where (1) a person ('A') held shares in the society<sup>6</sup> throughout the requisite period<sup>7</sup>; (2) any shares in the society held by A were jointly held for any period (the 'joint ownership period') constituting the whole or part of the requisite period<sup>8</sup>; (3) A was the second-named holder<sup>9</sup> of the jointly held shares for the whole or part of the joint ownership period<sup>10</sup>; and (4) no person who has priority over A for these purposes held shares in the society throughout the requisite period<sup>11</sup>, the jointly held shares must be treated<sup>12</sup> as having been held by A alone<sup>13</sup>.

For these purposes the following persons have priority over A<sup>14</sup>. Where A was not the first-named holder<sup>15</sup> of the jointly held shares for any part of the joint ownership period<sup>16</sup>, any person who was the first-named holder of those shares for the whole or part of that period has priority<sup>17</sup>. Where A was not the first-named holder of the jointly held shares for any part of the joint ownership period<sup>18</sup> but was the second-named holder of those shares for part only of that period, any person who was the second-named holder of those shares for a later part of that period has priority<sup>19</sup>. Where A was the first-named holder of the jointly held shares for part of the joint ownership period, any person who was the first-named holder of those shares for a later part of that period has priority<sup>20</sup>.

If a person dies during the requisite period at a time when he is named in the records of the society<sup>21</sup> as a joint holder of any shares jointly held, the principles described above have effect in relation to any later time as if he had never been so named<sup>22</sup>.

1 As to the terms of the transfer agreement see PARAS 1928-1929. As to the transfer of business see PARA 1927.

2 As to the meaning of 'company' see PARA 1927 note 1.

3 As to membership see PARA 1888 et seq.

4 ie such provision as is mentioned in the Building Societies Act 1986 s 100(1): see PARA 1928.

5 Building Societies Act 1986 s 102A(1) (s 102A added by the Building Societies (Joint Account Holders) Act 1995 ss 1(1), 2).

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies



(Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

6 As to shares in relation to societies see PARA 1905 et seq.

7 Building Societies Act 1986 s 102A(2)(a) (as added: see note 5). 'Requisite period' means the period beginning two years before the end of the qualifying day and ending immediately before the vesting date: s 102A(5) (as so added). As to the meaning of 'qualifying day' see PARA 1929 note 8; definition applied by s 102A(5) (as so added). As to the meaning of 'vesting date' see PARA 1929 note 3; definition applied by s 102A(5) (as so added).

8 Building Societies Act 1986 s 102A(2)(b) (as added: see note 5).

9 'Second-named holder', in relation to any shares jointly held, means that one of the joint holders who is named second in the records of the society: Building Societies Act 1986 s 102A(5) (as added: see note 5).

10 Building Societies Act 1986 s 102A(2)(c) (as added: see note 5).

11 Building Societies Act 1986 s 102A(2)(d) (as added: see note 5).

12 Ie for the purposes of the Building Societies Act 1986 s 100(8), (9): see PARA 1932.

13 Building Societies Act 1986 s 102A(2) (as added: see note 5). The effect is that A may therefore be treated as eligible under the terms of transfer for a cash distribution or for the grant of rights in relation to shares in the successor company, for which he would otherwise have been disqualified by the fact that he was not the sole or first-named holder of shares in the society throughout the requisite period.

14 Building Societies Act 1986 s 102A(3) (as added: see note 5).

15 'First-named holder', in relation to any shares jointly held, means that one of the joint holders who is named first in the records of the society, that is to say, the person by whom alone, apart from the Building Societies Act 1986 s 102A, those shares would, by virtue of Sch 2 para 7(5) (see PARA 1889), be treated as held for the purposes of s 100 (see PARAS 1928-1929, 1932): s 102A(5) (as added: see note 5).

16 Building Societies Act 1986 s 102A(3)(a) (as added: see note 5).

17 Building Societies Act 1986 s 102A(3)(a)(i) (as added: see note 5).

18 Building Societies Act 1986 s 102A(3)(a) (as added: see note 5).

19 Building Societies Act 1986 s 102A(3)(a)(ii) (as added: see note 5).

20 Building Societies Act 1986 s 102A(3)(b) (as added: see note 5).

21 As to the keeping of records by a society see PARA 1886.

22 Building Societies Act 1986 s 102A(4) (as added: see note 5).

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#### **1940. Protection of interests of beneficiaries in the case of trustee account holders.**

A trustee account holder<sup>1</sup> is to be treated by the building society and its successor as not being disentitled from sharing in a distribution<sup>2</sup> as such trustee account holder, and also in relation to another account which he may hold as a trustee account holder or in relation to another account which he may hold otherwise than as a trustee account holder, by reason only of his holding more than one account<sup>3</sup>. This principle has effect, notwithstanding anything to the

contrary in the rules of the society, where the terms of a transfer of a business<sup>4</sup> of a society to its successor include provision for a distribution to be made to its members; and where more than one distribution is provided for, it has effect in relation to each of them<sup>5</sup>.

A trustee account holder is not entitled to share in a distribution as such trustee account holder by virtue of the principle described above if<sup>6</sup>:

- 350 (1) the society has notified that account holder that he must make a statutory declaration under the Statutory Declarations Act 1835<sup>7</sup> complying with the requirements listed in heads (a) to (d) below, in relation to any account as respects which he is a trustee account holder<sup>8</sup>; but
- 351 (2) the trustee account holder does not give the society that declaration before the date specified in the society's notice to him<sup>9</sup>.

A statutory declaration complies with the requirements if the person making it declares in it<sup>10</sup>:

- 352 (a) that he is a trustee account holder in respect of an account identified in the declaration<sup>11</sup>;
- 353 (b) the name and address of each beneficiary for whom he holds the account<sup>12</sup>;
- 354 (c) the reason why it is not reasonably practicable for any beneficiary to act in relation to that account himself<sup>13</sup>; and
- 355 (d) in the case where the identity of the trustee account holder changes during any period which is relevant to the distribution in question, and the account is not closed but continues to be held for the benefit of the same beneficiaries (disregarding any who have died)<sup>14</sup>, the names and addresses of all the trustee account holders of the account during that period<sup>15</sup>.

Where a person gives a society a statutory declaration complying or purporting to comply with the requirements listed in heads (a) to (d) above in response to a notice from the society<sup>16</sup> and within the time specified in that notice, that he is a trustee account holder as respects any account he holds with that society then, subject to not having made a false declaration<sup>17</sup>, the society and its successor must treat him as a trustee account holder in respect of that account, and is not liable to any other person in respect of any distribution to him (whether or not the society makes any inquiry into his eligibility before making the distribution)<sup>18</sup>.

1 'Trustee account holder', in relation to any society, is a person who is the holder of an account as respects which all the conditions in heads (1)-(3) below are satisfied and which he holds in trust for another person, but subject to the Building Societies Act 1986 s 102D(5): s 102D(2) (ss 102B-102D added by the Building Societies (Distributions) Act 1997 s 1(1)). The conditions are that: (1) he is a member of the society by virtue of holding that account; (2) the account holder is the sole account holder or the representative joint holder (within the meaning of the Building Societies Act 1986 Sch 2 para 7 (see PARA 1889)) or, in the case of a borrowing member, is not a joint borrower or is the representative joint borrower (within the meaning of Sch 2 para 8 (see PARA 1889)); (3) it is not reasonably practicable for any one or more of the persons for whom he holds the account, by reason of ill-health or old age or any physical or mental incapacity or disability, to act in relation to the account himself: s 102D(4) (as so added). As to membership see PARA 1888 et seq. As to the meaning of 'borrowing member' see PARA 1894. Any reference in ss 102B, 102C (see PARA 1941) or s 102D to the holder of an account (however expressed) includes a reference to a person to whom the society has advanced a loan secured on land: s 102D(3) (as so added). As to loans secured on land see PARA 2006. Any reference to a person holding an account in trust for any other person includes a reference: (a) to any person holding an account for another person in pursuance of any order, direction or authority made or given under the Mental Capacity Act 2005 (see **MENTAL HEALTH**) or under the Mental Health (Northern Ireland) Order 1986, SI 1986/595 (NI 4), Pt VIII (arts 97-109); (b) to an attorney holding an account for another person under an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 648), or the Enduring Powers of Attorney (Northern Ireland) Order 1987, SI 1987/1627 (NI 16); and (c) in relation to Scotland (i) to a curator bonis and a judicial factor holding an account for another person; and (ii) to a person holding an account for another person under a factory and commission or power of attorney which continues to have effect by virtue of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s 71

(now repealed), and references to a beneficiary are to be construed accordingly: Building Societies Act 1986 s 102D(9) (as so added; amended by the Mental Capacity Act 2005 Sch 6 para 32).

Where a person holds more than one account in trust for any other person or persons and the beneficiary or any of the beneficiaries in respect of two or more of those accounts (the 'duplicate accounts') is the same then the account holder is not a trustee account holder in respect of any of those duplicate accounts except the one which was first opened, and accordingly the provisions of the Building Societies Act 1986 s 102B(3), (4) apply only in relation to that first opened duplicate account: s 102D(5) (as so added).

'Beneficiary', in relation to any account or any trustee account holder, is the person or any of the persons for whose benefit the account is held or for whose benefit the trustee account holder holds the account, as the case may be: s 102D(6) (as so added). Any beneficiary of any account who is a child is to be disregarded for the purposes of s 102D(4) unless he suffers ill-health or any physical or mental incapacity or disability which if suffered by an adult would prevent it being reasonably practicable for such an adult to act in relation to the account himself: s 102D(7) (as so added).

In any case where the identity of the trustee account holder changes during any period which is relevant to the distribution (see note 2) in question, and the account is not closed but continues to be held for the benefit of the same beneficiaries (disregarding any who have died), the trustee account holders during that period are to be treated for the purpose of s 102B and the distribution as one person: s 102D(8) (as so added).

2 'Distribution' in relation to a society means: (1) a distribution among members of the society of part of the funds of the society or its successor, other than a distribution within the Building Societies Act 1986 s 100(2)(b) (see PARA 1929); or (2) the conferring of rights in relation to shares in the successor on members of the society, in consideration of the transfer: s 102B(2) (as added: see note 1).

Where rights to acquire shares are to be conferred on one or more members of the society by reference to more than one account in accordance with the provisions of s 102B, those rights are not, without more, to be taken, for the purposes of s 100(8) (see PARA 1932), to confer rights to acquire the shares in priority to other subscribers: s 102D(10) (as added: see note 1).

3 Building Societies Act 1986 s 102B(3) (as added: see note 1) (which is expressed to be subject to s 102B(4)-(6) (see the text and notes 6-18) and s 102C (see PARA 1941)). The terms of the transfer of business in question must comply with s 102B(3): s 102B(3) (as so added). The effect of the provisions relating to trustee account holders can be illustrated by a case in which the manager of an old people's home holds separate share accounts in a building society on trust for 20 elderly residents. If the society transfers its business to a successor company, the manager (despite being the only member of the society in respect of the 20 share accounts) will not be disentitled from receiving a separate cash distribution, or a separate grant of rights in relation to shares in the successor company, in respect of each of the accounts.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

4 As to the terms of the transfer agreement see PARAS 1928-1929. As to the transfer of business see PARA 1927.

5 Building Societies Act 1986 s 102B(1) (as added: see note 1).

6 Building Societies Act 1986 s 102B(4) (as added: see note 1).

7 As to statutory declarations see **CIVIL PROCEDURE** vol 11 (2009) PARA 1024.

8 Building Societies Act 1986 s 102B(4)(a) (as added: see note 1). The Treasury may make regulations prescribing: (1) the time within which the notice required by s 102B(4)(a) must be given; and (2) the minimum time which may be specified in the notice for the purposes of s 102B(4)(b) (see the text to note 9), but, if such regulations are not made, any such notice must be given in such time, and must specify such time, as will give the trustee account holder a reasonable opportunity to make the declaration and give it to the society in compliance with the notice: s 102D(11) (s 102D as added (see note 1); and s 102D(11) amended by SI 2001/2617). Such regulations must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 102D(12) (as so added). At the date at which this volume states the law no such regulations had been made. As to the meaning of 'notice' see PARA 1866 note 8. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

9 Building Societies Act 1986 s 102B(4)(b) (as added: see note 1). See note 8.

- 10 Building Societies Act 1986 s 102B(5) (as added: see note 1).
- 11 Building Societies Act 1986 s 102B(5)(a) (as added: see note 1).
- 12 Building Societies Act 1986 s 102B(5)(b) (as added: see note 1).
- 13 Building Societies Act 1986 s 102B(5)(c) (as added: see note 1).
- 14 See the Building Societies Act 1986 s 102D(8); and note 1.
- 15 Building Societies Act 1986 s 102B(5)(d) (as added: see note 1).
- 16 Ie under the Building Societies Act 1986 s 102B(4): see the text to notes 6-9.
- 17 Ie subject to the Building Societies Act 1986 s 102C: see PARA 1941.
- 18 Building Societies Act 1986 s 102B(6) (as added: see note 1).

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#### **1941. Consequences of false declaration.**

Where, in relation to a person who has made a statutory declaration to a building society purporting to comply with the relevant statutory requirements<sup>1</sup>, it is shown that at the time the declaration is made he is not a trustee account holder<sup>2</sup> in relation to the account in question, then<sup>3</sup>:

- 356 (1) a distribution must not be made to him<sup>4</sup> if it is so shown before the distribution is made<sup>5</sup>;
- 357 (2) if a distribution is made to him, he is liable<sup>6</sup> (a) to repay to the society's successor any funds, and surrender to it any shares or rights to any shares, which he may have received as the holder of that account<sup>7</sup>; (b) if any shares or rights to any shares are not surrendered, to pay the successor an amount equal to the relevant value<sup>8</sup> of those shares or rights<sup>9</sup>.

Where head (2) above applies, the person is also liable to pay to the successor interest (at the rate applicable to judgment debts<sup>10</sup> or, as respects Scotland, to decrees of the Court of Session) on<sup>11</sup>:

- 358 (i) any funds which he is liable to repay to the successor under head (a) above<sup>12</sup>;
- 359 (ii) the relevant value of any shares or rights which are surrendered under head (a) above<sup>13</sup>; and
- 360 (iii) any amount payable under head (b) above<sup>14</sup>,

as from the day on which he received the funds, shares or rights until repayment or payment has been made<sup>15</sup>.

Where the successor receives any payment in circumstances where head (2) above applies, the amount of the payment is treated as settlement of a debt due to the successor and not as an amount due to members of the society<sup>16</sup>.

- 1 See the Building Societies Act 1986 s 102B(5); and PARA 1940.
- 2 As to the meaning of 'trustee account holder' see PARA 1940 note 1.
- 3 Building Societies Act 1986 s 102C(1) (s 102C added by the Building Societies (Distributions) Act 1997 s 1(1)).  
As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Building Societies Act 1986 ss 97-102D, Sch 2 para 30 and Sch 17 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a building society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5; and PARA 1942. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.
- 4 In pursuance of the Building Societies Act 1986 s 102B: see PARA 1940.
- 5 Building Societies Act 1986 s 102C(1)(a) (as added: see note 3).
- 6 Building Societies Act 1986 s 102C(1)(b) (as added: see note 3).
- 7 Building Societies Act 1986 s 102C(1)(b)(i) (as added: see note 3). As to shares in relation to societies see PARA 1905 et seq. As to references to the holder of an account see PARA 1940 note 1.
- 8 'Relevant value', in relation to any shares or rights to any shares, means the market value of those shares on the first day on which they are quoted on the Stock Exchange Daily Official List, and the Taxation of Chargeable Gains Act 1992 s 272 (see **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 44) applies for these purposes: Building Societies Act 1986 s 102C(3) (as added: see note 3).
- 9 Building Societies Act 1986 s 102C(1)(b)(ii) (as added: see note 3).
- 10 As to the rate applicable to judgment debts see the Judgments Act 1838 s 17; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.
- 11 Building Societies Act 1986 s 102C(2) (as added: see note 3). Generally Scottish matters are beyond the scope of this work.
- 12 Building Societies Act 1986 s 102C(2)(a) (as added: see note 3).
- 13 Building Societies Act 1986 s 102C(2)(b) (as added: see note 3).
- 14 Building Societies Act 1986 s 102C(2)(c) (as added: see note 3).
- 15 Building Societies Act 1986 s 102C(2) (as added: see note 3).
- 16 Building Societies Act 1986 s 102C(4) (as added: see note 3).

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#### **1942. Transfer of business under the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. The Treasury has power to make by statutory instrument such modifications<sup>2</sup> to the transfer provisions (including certain provisions of the Building Societies Act 1986)<sup>3</sup> as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a mutual society<sup>4</sup> (the 'transferor') to a subsidiary of a mutual society<sup>5</sup> (whether or not of the same type) (the 'transferee')<sup>6</sup>.

1 The Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 ss 3-5 come into force on such day as the Treasury may by order made by statutory instrument appoint, and different days may be appointed for different purposes: see s 6. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. At the date at which this volume states the law no such day had been appointed, and no orders had been made under ss 3, 4.

2 'Modifications' include omissions, additions and alterations: Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 s 3(9). See note 1.

3 'Transfer provisions' means, in relation to building societies, the Building Societies Act 1986 ss 97-102D, Sch 2 para 30, Sch 17 (see PARAS 1927-1941) and provision contained in subordinate legislation made under those provisions: see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(11)(a), (d). See note 1.

4 A 'mutual society' is a building society incorporated or deemed to be incorporated under the Building Societies Act 1986 (see PARA 1856 et seq); a friendly society within the meaning of the Friendly Societies Act 1992 (see PARA 2082); an industrial and provident society registered or deemed to be registered under the Industrial and Provident Societies Act 1965 (see PARA 2394 et seq); or an EEA mutual society: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(10). See note 1. An 'EEA mutual society' is a body which is a European Cooperative Society for the purposes of EC Council Regulation 1435/2003 (OJ L207, 18.8.2003, p 1) on the Statute for a European Cooperative Society; a body which is established as a cooperative under the law of an EEA state as mentioned in that Regulation; or a body which is a cooperative or mutual undertaking of such description as the Treasury may specify by order and which is established or operates in accordance with the laws of an EEA state or any of the Channel Islands or the Isle of Man: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(12).

5 A 'subsidiary of a mutual society' is a relevant company (1) in which the society holds a majority of the voting rights or of which the society is a member and alone controls, pursuant to an agreement with other shareholders or members, a majority of the voting rights; and (2) in relation to which the society has the right to appoint or remove a majority of the company's board of directors, but the Treasury may, by order, amend heads (1) and (2) above to make the degree of control required more or less onerous: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(13). See note 1. A 'relevant company' is a company within the meaning of the Companies Act 2006 (or, before the commencement of Pt 1 (ss 1-6), the Companies Act 1985) (see **COMPANIES**); a company within the meaning of the Companies (Northern Ireland) Order 1986 (SI 1986/1032 (NI 6)); a body corporate which is incorporated in an EEA state other than the United Kingdom: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(14). As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 See the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(1). See note 1.

An order under s 3 may make provision as to the rights (including rights of and pertaining to membership) in relation to the mutual society of which the transferee is a subsidiary of the members of the transferor and of persons who, after the transfer, become customers of the transferee: s 3(2). Such an order may confer such functions on the Authority as the Treasury thinks appropriate: s 3(3).

An order under s 3 may make such consequential, saving, supplementary or transitional provision as the Treasury thinks appropriate; and may make different provision for different purposes: s 3(4). The power to make such an order is exercisable by statutory instrument: s 3(5). An order which makes modifications of a provision mentioned in s 3(11)(a)-(d) (which include the provisions relating to friendly societies mentioned in s 3(11)(b) (see note 3), or amends s 3(13)(a) or (b) (see note 5 heads (1), (2)), (whether or not it contains any other provision) must not be made unless a draft of it has been laid before and approved by resolution of each House of Parliament: s 3(6). Otherwise, an order is subject to annulment in pursuance of a resolution of either House of Parliament: s 3(7). If a draft of an order mentioned in s 3(6) would, apart from this provision, be treated for the purposes of the Standing Orders of either House of Parliament as a hybrid instrument it must proceed in that House as if it were not such an instrument: s 3(8).

For the purposes of the Financial Services and Markets Act 2000 Sch 1 para 17 (power to charge fees) (see PARA 16) a function conferred on the Financial Services Authority by an order under the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3 is to be treated as a function conferred under or as a result of the Financial Services and Markets Act 2000: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(15). As to the Financial Services Authority see PARA 1863, and also PARAS 4, 6 et seq.

An order under s 3 may provide for s 4 to have effect: s 4(1). Section 4(3) applies if the terms of a transfer to which the order applies include provision for part of the funds of the transferor or the mutual society of which the transferee is a subsidiary (the 'holding mutual') to be distributed in consideration of the transfer among the members of the transferor, the holding mutual, or both the transferor and the holding mutual: s 4(2). In such a case, the provision for the distribution must be authorised as follows: (1) it must not exceed the limits prescribed by order under s 4(4) (see below), and the distribution must be approved (in the case of the

transferor) by the transfer resolution or (in the case of the holding mutual) by a resolution of such description as the Treasury specifies by order; (2) if the provision for a distribution exceeds the prescribed limits, it must be approved by each of the resolutions mentioned in head (1) above: s 4(3). 'Transfer resolution' means, in relation to a friendly society, the resolution required by the Friendly Societies Act 1992 s 86(2)(b) (see PARA 253 head (b)): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 4(5)(b). The Treasury must by order authorise distributions of funds to members by mutual societies participating (directly or through a subsidiary) in transfers to which an order mentioned in s 4(1) applies, subject to limits specified by or determined in accordance with the order: s 4(4). Expressions used in ss 3, 4 have the same meaning as in s 3: s 4(6). Section 3(4)-(7) apply to an order under s 4 as they apply to an order under s 3: s 4(7).

Her Majesty may by Order in Council provide for any of the provisions of the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 to extend with or without modifications, to any of the Channel Islands or to the Isle of Man: s 5.

## **UPDATE**

### **1942 Transfer of business under the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007**

TEXT AND NOTE 1--Day appointed is 16 January 2009: SI 2009/36. In exercise of the power conferred on it, the Treasury has made the Mutual Societies (Transfers) Order 2009, SI 2009/509.

NOTE 5--Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(14) amended: SI 2009/1941.

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## **(ii) Management, Meetings and Accounts**

### **A. DIRECTORS AND OFFICERS**

#### **(A) IN GENERAL**

#### **1943. Approval by the Financial Services Authority.**

A building society must be authorised by obtaining permission under Part IV of the Financial Services and Markets Act 2000<sup>1</sup> to carry on its core regulated activities of accepting deposits and entering into regulated mortgage contracts as lender<sup>2</sup>. As an authorised person, a building society is placed under a statutory duty to take reasonable care to ensure that no person performs a controlled function<sup>3</sup> under an arrangement<sup>4</sup> entered into by the society or a contractor of the society in relation to the carrying on of a regulated activity by the society unless the Financial Services Authority approves the performance by that person of the controlled function to which the arrangement relates<sup>5</sup>. A building society will therefore need to take reasonable care to ensure that each of its directors<sup>6</sup> and each of its other officers<sup>7</sup> and employees who is responsible for the discharge of a controlled function is approved by the Financial Services Authority as a fit and proper person to perform that function<sup>8</sup>.

<sup>1</sup> ie the Financial Services and Markets Act 2000 Pt IV (ss 40-55).

2 See PARA 2046.

3 le a function of a description specified in rules made by the Financial Services Authority under the Financial Services and Markets Act 2000. The Authority may only specify a description of function for these purposes if it is satisfied that the function: (1) is likely to enable the person responsible for its performance to exercise a significant influence on the conduct of the authorised person's affairs, so far as relating to the regulated activity; (2) will involve the person performing it in dealing with customers of the authorised person in a manner substantially connected with the carrying out of the regulated activity; or (3) will involve the person performing it in dealing with property of customers of the authorised person in a manner substantially connected with the carrying on of the regulated activity: see s 59(10); and PARA 367. As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

4 'Arrangement' means any kind of arrangement for the performance of a function of the authorised person ('A') which is entered into by A or any contractor of his with another person, and includes in particular that other person's appointment to an office, his becoming a partner or his employment: see the Financial Services and Markets Act 2000 s 59(10); and PARA 367.

5 See the Financial Services and Markets Act 2000 s 59(1), (2); and PARA 367.

6 As to the office of director see PARA 1944 et seq.

7 As to the meaning of 'officer' see PARA 1944.

8 As to the procedure for applying for approval see the Financial Services and Markets Act 2000 ss 60-62; and PARAS 368-370. Reference should be made to the Financial Services Authority's Handbook of Rules and Guidance for the detailed specification of controlled functions and for the criteria which determine whether a person is fit and proper to perform those functions. As to the Handbook generally see PARA 22.

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#### **1944. Directors and officers generally.**

Every building society must have at least two directors<sup>1</sup>; allowing the number of directors to fall below two is one of the grounds upon which a society may be wound up by the court<sup>2</sup>. One of the directors must be appointed the chairman of the board of directors<sup>3</sup>. A person under the age of 18<sup>4</sup> may not hold any office in a society<sup>5</sup>.

'Officer', in relation to a building society, means any director, chief executive<sup>6</sup>, secretary<sup>7</sup> or manager<sup>8</sup> of the society<sup>9</sup>. A corporation<sup>10</sup> is not expressly prohibited by statute from being appointed an officer of a society and it would seem that a corporation can be appointed to any office which does not involve the exercise of functions which can only be performed by a natural person<sup>11</sup>.

Any natural person is eligible to be elected a director of a society except where<sup>12</sup>: (1) there is in force a prohibition order<sup>13</sup> in relation to a person<sup>14</sup>; (2) the rules of a society preclude the election of persons who have reached a specified age<sup>15</sup>; (3) the rules of a society preclude the election of persons who do not have the requisite holding in the society<sup>16</sup>; and (4) the person is a minor<sup>17</sup>.

All officers are bound by the rules, and are taken to have full notice of them<sup>18</sup>.

The rules of a society may impose, as a condition of a person's eligibility to be or to remain a director of the society, a requirement that he must hold beneficially shares in the society not less in value than the amount prescribed by the rules, but the minimum holding required must not exceed £1,000 or such other amount as may be substituted by order of the Treasury<sup>19</sup>.



- 1 Building Societies Act 1986 s 58(1). As to the appointment and election of directors see PARAS 1945-1949; and as to the retirement of directors see PARA 1950. See also generally the Financial Services Authority's Handbook of Rules and Guidance, High Level Standards: Senior Management, Arrangements, Systems and Controls (SYSC), the Fit and Proper Test for Approved Persons (FIT). As to the Handbook generally see PARA 22.
- 2 Building Societies Act 1986 s 89(1)(c). As to the grounds for winding up by the court see PARA 2072.
- 3 Building Societies Act 1986 s 58(2).
- 4 Family Law Reform Act 1969 s 1(1), (2).
- 5 See the Building Societies Act 1986 s 5(8), Sch 2 para 5(3)(b). As to minors as members see PARA 1891.
- 6 As to the office of chief executive see PARAS 1964-1965.
- 7 As to the office of secretary see PARAS 1966-1967.
- 8 'Manager', in relation to a building society, means a person (other than the chief executive) employed by the society who, under the immediate authority of a director or the chief executive of the society exercises managerial functions or is responsible for maintaining accounts or other records of the society: Building Societies Act 1986 s 119(1).
- 9 Building Societies Act 1986 s 119(1). In relation to any offence, 'officer' also includes any person who purports to act as an officer of the society, and in relation to any other body corporate means the corresponding officers of that body: s 119(1). As to bodies corporate see generally **COMPANIES; CORPORATIONS**.
- 10 As to corporations generally see **CORPORATIONS**.
- 11 See *Re West of England and South Wales District Bank, ex p Swansea Friendly Society* (1879) 11 ChD 768 (decided in relation to the provisions of the Friendly Societies Act 1875 s 15(7) (repealed)). However, only a natural person may be elected as a director of a building society: see the Building Societies Act 1986 s 60(4) (amended by the Building Societies Act 1997 s 27(4)).
- 12 Building Societies Act 1986 s 60(4) (as amended: see note 11).
- 13 Ie made under the Financial Services and Markets Act 2000 s 56(2): see PARA 364.
- 14 See the Building Societies Act 1986 s 60(4), (4A) (s 60(4) amended, and s 60(4A) added, by SI 2001/2617).
- 15 See the Building Societies Act 1986 s 60(4), (6), (7), (7A)-(7C); and PARA 1950.
- 16 See the Building Societies Act 1986 s 60(4), (9); and PARA 1946.
- 17 See the Building Societies Act 1986 s 60(4), Sch 2 para 5(3); and PARA 1891.
- 18 See the Building Societies Act 1986 Sch 2 para 3(2); and PARA 1878. As to the effect, alteration and content of rules see PARAS 1878-1884.
- 19 Building Societies Act 1986 s 60(9) (s 60(9), (16) amended by SI 2001/2617). The power of the Treasury to make such an order includes power to make such transitional provision as it considers necessary or expedient, and is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 60(16) (as so amended). At the date at which this volume states the law no such order had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) para 512 et seq.

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## 1945. Election and voting.

The directors of a building society, except in so far as they may be co-opted under the rules of the society<sup>1</sup>, must be elected to office, either on a poll<sup>2</sup> taken at the annual general meeting<sup>3</sup> of the society, or by postal or electronic ballot<sup>4</sup> of the members<sup>5</sup> conducted during that part of the financial year<sup>6</sup> of the society which precedes the date on which the annual general meeting is held, as the rules provide<sup>7</sup>. Where directors of a society are to be elected to office on a poll taken at the annual general meeting of the society, a form for the appointment of a proxy<sup>8</sup> must be sent to each person entitled to notice of the meeting<sup>9</sup>. The persons entitled to vote in an election of directors are those members who, on the voting date<sup>10</sup>, are entitled to vote on an ordinary resolution<sup>11</sup> of the society<sup>12</sup>.

Where there are more candidates than vacancies to be filled, a person entitled to vote in the election has one vote in respect of every vacancy, but cannot be required to cast all or any of his votes<sup>13</sup>. Where there are not more candidates than vacancies to be filled by the election a person entitled to vote in the election has one vote in respect of every candidate, but cannot be required to cast all or any of his votes; each vote is capable of being cast either for or against the candidate concerned; and a candidate is elected if more votes are cast for him than against him<sup>14</sup>.

1 le by virtue of the Building Societies Act 1986 s 60(13); see PARA 1949. As to directors generally see PARA 1944.

2 As to the right to demand a poll see PARA 1987.

3 As to annual general meetings see PARA 1977.

4 As to postal and electronic ballots see PARA 1988.

5 As to membership see PARA 1888 et seq.

6 As to the meaning of 'financial year' see PARA 1992 note 2.

7 Building Societies Act 1986 s 60(1) (amended by the Building Societies Act 1997 s 27(1); and SI 2003/404). As to the matters which must be specified in the rules as respects directors see PARA 1883.

8 As to the appointment of proxies see PARA 1986.

9 Building Societies Act 1986 s 60(1A) (added by the Building Societies Act 1997 s 27(2)). As to the meaning of 'notice' see PARA 1866 note 8. As to persons entitled to receive notice of meetings see PARA 1985.

10 'Voting date' means: (1) in the case of an election at a meeting, the date of the meeting, except where head (4) below applies; (2) in the case of an election conducted by postal ballot or by electronic ballot in the case of which not all the voting is electronic (within the meaning of the Building Societies Act 1986 Sch 2 para 33A (see PARA 1988)), the date which the society specifies as the final date for the receipt of completed ballot papers; (3) in the case of an election conducted by electronic ballot in which all the voting is electronic voting (within the meaning of the Sch 2 para 33A (see PARA 1988)), the date which the society specifies as the final date for registering votes; (4) in a case where a member appoints a proxy to vote at the meeting for him, the date which the society specifies as the final date for receipt of appointments of proxies to vote at the election: s 60(17) (definition amended by SI 2003/404).

11 As to the meaning of 'ordinary resolution' see PARA 1983.

12 Building Societies Act 1986 s 60(2). As to the right to vote see PARA 1984.

13 Building Societies Act 1986 s 60(3) (substituted by the Building Societies Act 1997 s 27(3)).

14 Building Societies Act 1986 s 60(3A) (added by the Building Societies Act 1997 s 27(3)).

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#### **1946. Nomination for election.**

The rules<sup>1</sup> of a society may impose, as conditions of the validity of a person's nomination for election as a director<sup>2</sup>, requirements as to<sup>3</sup>:

- 361 (1) the minimum number of members<sup>4</sup> who must join in nominating him<sup>5</sup>;
- 362 (2) their qualifications as respects length of membership and the value of their shares or the amount of their mortgage debt<sup>6</sup>;
- 363 (3) the depositing of money with the society in connection with his candidature<sup>7</sup>,

but no other requirements<sup>8</sup>.

A nomination of a candidate for election as a director of a society may be made at any time, but if made after the closing date for the nomination of candidates<sup>9</sup> for the next election of directors, the nomination must be carried forward (unless the candidate otherwise requires) as a nomination for the next election of directors after that<sup>10</sup>.

The rules made under head (1) above must not require the following numbers of members to join in nominating a person for election as a director<sup>11</sup>: (a) in the case of a society whose total commercial assets<sup>12</sup> do not exceed £100 million, more than 50 members<sup>13</sup>; (b) in the case of a society whose total commercial assets exceed £100 million but do not exceed £250 million, more than 100 members<sup>14</sup>; (c) in the case of a society whose total commercial assets exceed £250 million but do not exceed £1,000 million, more than 150 members<sup>15</sup>; (d) in the case of a society whose total commercial assets exceed £1,000 million but do not exceed £5,000 million, more than 200 members<sup>16</sup>; and (e) in the case of a society whose total commercial assets exceed £5,000 million, more than 250 members<sup>17</sup>.

The rules under head (2) above must not require a nominating member to have been a member for more than two years before the date of the nomination, or if he claims eligibility as a shareholding member<sup>18</sup>, to hold, or to have held at any time during that period, shares in the society to a value greater than £200 or, if he claims eligibility as a borrowing member<sup>19</sup>, to owe to the society, or to have owed to the society at any time during that period, a mortgage debt of an amount greater than £200<sup>20</sup>.

The rules made under head (3) above must not require more than £500 to be deposited with the society, nor require the money to be deposited before the date which, under the rules, is the closing date for the nomination of candidates for the election, and must provide for the return of the deposit to the candidate in the event of his securing either not less than five per cent of the total number of votes cast for all the candidates in the election, or not less than 20 per cent of the number of votes cast for the candidate who is elected with the smallest number of votes<sup>21</sup>.

1 As to the matters which must be specified in the rules as respects directors see PARA 1883.

2 As to directors generally see PARA 1944.

3 Building Societies Act 1986 s 60(10).

4 As to membership see PARA 1888 et seq.

5 Building Societies Act 1986 s 60(10)(a).

6 Building Societies Act 1986 s 60(10)(b) (substituted by the Building Societies Act 1997 s 27(5)). As to shares in relation to societies see PARA 1905 et seq. 'Mortgage debt', in relation to a loan secured on land and any time, means the total amount outstanding at that time in respect of: (1) the principal of the loan; (2) interest on the loan; and (3) any other sum which the borrower is obliged to pay the society under the terms of the loan: Building Societies Act 1986 s 119(1) (definition substituted by the Building Societies Act 1997 Sch 7 para 53(1)(k)).

7 Building Societies Act 1986 s 60(10)(c).

8 Building Societies Act 1986 s 60(10). Any rules made by virtue of s 60(10) must comply with s 61 (see the text and notes 9-22; and PARAS 1947-1951): s 60(10).

9 'Closing date for the nomination of candidates', in relation to an election of directors, means the last day of the last financial year to end before the voting date: Building Societies Act 1986 s 60(10A) (added by the Building Societies Act 1997 s 27(6)). As to the meaning of 'voting date' see PARA 1945 note 10.

10 Building Societies Act 1986 s 60(10A) (as added: see note 9).

11 Building Societies Act 1986 s 61(1) (s 61(1), (2) substituted by the Building Societies Act 1997 s 28(1)).

12 'Total commercial assets' means the difference between the total assets of the society as shown in the relevant accounts and the aggregate of: (1) the liquid assets of the society as shown in those accounts in pursuance of regulations under the Building Societies Act 1986 s 72C or s 72G (see PARA 1993), or in accordance with international accounting standards, as appropriate; and (2) the fixed assets of the society as so shown: s 61(3A) (added by the Building Societies Act 1997 s 28(2); and amended by SI 2004/3380). As to the meaning of 'international accounting standards' see PARA 1992 note 4. As to the meanings of 'liquid assets' and 'fixed assets' in the case of societies which produce IAS individual accounts or IAS group accounts (see PARA 1992) see PARA 2008 notes 8, 9; definitions applied by virtue of the Building Societies Act 1986 s 61(3A) (as so added and amended). 'Relevant accounts' means the accounts which, immediately before the closing date for nomination of candidates, were the accounts last prepared by the society under s 72A or s 72E (see PARA 1992): s 61(3A) (as so added and amended). The Treasury may by order vary s 61(3A) by adding to or deleting from it any provision or by varying any provision contained in it: s 61(4) (substituted by the Building Societies Act 1997 s 28(2); and amended by SI 2001/2617). At the date at which this volume states the law no such order had been made, but see note 13. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

13 Building Societies Act 1986 s 61(1)(a) (s 61(1) as substituted (see note 11); and amended by SI 1999/3032). The Treasury may, by order, substitute for any amount or number specified in the Building Societies Act 1986 s 61(1), for any amount specified in s 61(2) (see the text to notes 18-20), or for any amount or percentage specified in s 61(3) (see the text to note 21), such other amount, number or percentage as it thinks appropriate: s 61(4) (as substituted and amended: see note 12). The power to make such an order includes power to make such transitional provision as the Treasury considers necessary or expedient, and is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 61(5) (amended by SI 2001/2617). In exercise of the power under the Building Societies Act 1986 s 61(4) the Building Societies (Nominations for Directors' Election) Order 1999, SI 1999/3032, and the Building Societies Act 1986 (Substitution of Specified Amounts and Modification of the Funding Limit Calculation) Order 2007, SI 2007/860, have been made.

14 Building Societies Act 1986 s 61(1)(b) (as substituted and amended: see notes 11, 13).

15 Building Societies Act 1986 s 61(1)(c) (as substituted and amended: see notes 11, 13).

16 Building Societies Act 1986 s 61(1)(d) (as substituted and amended: see notes 11, 13).

17 Building Societies Act 1986 s 61(1)(e) (as substituted and amended: see notes 11, 13).

18 As to the meaning of 'shareholding member' see PARA 1894.

19 As to the meaning of 'borrowing member' see PARA 1894.

20 Building Societies Act 1986 s 61(2) (as substituted (see note 11); and amended by SI 2007/860). See note 13.

21 Building Societies Act 1986 s 61(3) (amended by SI 2007/860). See note 13.

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### **1947. Election addresses.**

If, before the closing date for the nomination of candidates<sup>1</sup>, a duly nominated<sup>2</sup> candidate for election as a director<sup>3</sup> furnishes the society with an election address, or a revised election address, of not more than 500 words, then<sup>4</sup>: (1) it is the duty of the society to send a copy of the address or, as the case may require, the revised address to each member<sup>5</sup> of the society who is entitled to vote in the election<sup>6</sup>; and (2) each member's copy must be sent in the same manner and, so far as practicable, at the same time as the notice of the meeting<sup>7</sup> at which the election is to be conducted or the notice of the postal or electronic ballot<sup>8</sup> is sent out, as the case may be, or as soon as is practicable thereafter<sup>9</sup>. Provision is made for a society to comply with the requirements to send an election address by using electronic communications<sup>10</sup>. It is an offence if a society fails to comply with the requirements, and the society, and any officer<sup>11</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>12</sup>, but the failure does not invalidate the election<sup>13</sup>.

However, a society is not required to send copies of an address or a revised address to members where<sup>14</sup>: (a) publicity for the address or revised address would be likely to diminish substantially the confidence in the society of investing members of the public<sup>15</sup>; or (b) the rights as to the circulation of addresses are being abused to seek needless publicity for defamatory matter or for frivolous or vexatious purposes<sup>16</sup>. The requirement does not arise in respect of an address or revised address which does not relate directly to the affairs of the society<sup>17</sup>. The Financial Services Authority<sup>18</sup> hears and determines any disputes as to whether publicity for the address or revised address would be likely to diminish substantially the confidence in the society of investing members of the public, whether on the application of the society or of any other person who claims to be aggrieved<sup>19</sup>.

1 As to the meaning of 'closing date for the nomination of candidates' see PARA 1946 note 9.

2 As to nomination see PARA 1946.

3 As to directors generally see PARA 1944.

4 Building Societies Act 1986 s 61(7) (amended by the Building Societies Act 1997 s 28(3)).

5 As to membership see PARA 1888 et seq.

6 Building Societies Act 1986 s 61(7)(a) (as amended: see note 4). Any dispute in respect of a refusal by the society to send copies of an election address, or a revised election address, under s 61(7) may be referred to arbitration, subject to the rules of the society: see PARA 2063.

7 As to the meaning of 'notice' see PARA 1866 note 8. As to persons entitled to receive notice of meetings see PARA 1985.

8 As to postal and electronic ballots see para 1988.

9 Building Societies Act 1986 s 61(7)(b) (amended by SI 2003/404).

10 See the Building Societies Act 1986 s 61(7A)-(7E) (added by SI 2003/404). The Building Societies Act 1986 s 61(7B) applies where, in a case in which: (1) a society gives notice in accordance with Sch 2 para 22A or Sch 2 para 22B (see PARA 1985) of the meeting at which the election is to be conducted; (2) a society gives notice of a postal ballot by which the election is to be conducted by sending it electronically to an electronic address; or (3) a society gives notice of an electronic ballot by which the election is to be conducted, the copy

of the election address or revised election address that is required to be sent to a member under s 61(7)(b) (see the text to note 9) is not transmitted or published at the same time as the notice: s 61(7A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

Where s 61(7B) applies, the requirement of s 61(7)(b) to send a member his copy of the election address or revised election address in the same manner as the notice is satisfied if: (a) a copy of the address or revised address is made available to the member in the same way as the notice; or (b) such a copy (without being made available to the member in that way) is sent to the member in a manner set out by the society for the purpose in the notice: s 61(7A), (7B) (as so added). Where a copy of an election address or revised election address is sent to a member electronically under s 61(7B), it must be sent to an electronic address notified by the member for the purpose: s 61(7C) (as so added).

The requirements of s 61(7)(b) or head (a) above are satisfied by the publication of a copy of the election address or revised election address on a website only if: (i) the notice of the election meeting or of the electronic ballot is a notice given to that member by being published on a website; (ii) an agreement between the society and the member to his accessing information on a website applies to copies of election addresses or revised election addresses for the meeting or ballot in question; (iii) the member is notified, in a manner agreed between him and the society, of the publication of a copy of the address or revised address on a website, the address of that website, and the place on that website where the copy may be accessed, and how it may be accessed; (iv) the notification for the purposes of head (iii) above is given no later than the day after the date on which the copy of the election address or revised election address is first capable of being accessed on the notified website; and (v) that date was the same as the date on which the notice of the election meeting or of the electronic ballot was first capable of being accessed on a website or (in a case to which s 61(7B) applies) was as soon as practicable after that date; (vi) a copy of the election address or revised election address is continuously published on the notified website throughout the period beginning with the day on which it was first accessible on that site and ending with the voting date (see PARA 1945 note 10): s 61(7D) (as so added).

Where, in a case in which s 61(7D) is relied on for compliance with a requirement under s 61(7)(b) or head (a) above, nothing in s 61(7A) (see heads (1)-(3) above) invalidates the election of a director where a copy is published for a part, but not all, of the period mentioned in head (vi) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, the failure does not invalidate the election of a director: s 61(7E) (as so added).

11 As to the meaning of 'officer' see PARA 1944.

12 Building Societies Act 1986 s 61(7)(c). The fine must not exceed level 4 on the standard scale: s 61(7)(c). As to the standard scale see PARA 27 note 21.

13 Building Societies Act 1986 s 61(7).

14 Building Societies Act 1986 s 61(8) (amended by the Building Societies Act 1997 s 28(4)).

15 Building Societies Act 1986 s 61(8)(a) (as amended: see note 14). Any dispute arising out of s 61(8)(a) is outside the jurisdiction of the court: see PARA 2061.

16 Building Societies Act 1986 s 61(8)(b).

17 See the Building Societies Act 1986 s 61(8) (as amended: see note 14).

18 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

19 Building Societies Act 1986 s 61(9) (amended by SI 2001/2617). As to persons aggrieved see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

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## **1948. Appointment.**

If the rules<sup>1</sup> of a society so provide, the directors may appoint as additional directors or to fill any vacancy on the board of directors any person who has not attained the earlier of the normal and compulsory retirement ages<sup>2</sup>, and appears to them to be fit and proper to be a director, not being a person who, having been nominated<sup>3</sup> for election as a director at any election held within the preceding 12 months, was not elected as a director<sup>4</sup>.

1 As to the matters which must be specified in the rules as respects directors see PARA 1883. As to directors generally see PARA 1944.

2 See PARA 1950.

3 As to nomination see PARA 1946.

4 Building Societies Act 1986 s 60(13).

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#### **1949. Co-option of directors.**

A person who is co-opted<sup>1</sup> ceases to hold office at the end of the permitted period unless he is elected as a director<sup>2</sup> of the society within that period<sup>3</sup>. The permitted period is the period beginning with the date of the co-opted director's appointment and ending with whichever of the following first occurs<sup>4</sup>: (1) in the case of a society which elects its directors at its annual general meeting<sup>5</sup>, the conclusion of the next such meeting following his appointment<sup>6</sup>; (2) in the case of a society which elects its directors by postal or electronic ballot<sup>7</sup>, the declaration at its annual general meeting of the result of the next such ballot conducted after his appointment<sup>8</sup>; (3) the expiration of the period of 16 months beginning with the date of his appointment<sup>9</sup>. However, a general meeting or postal or electronic ballot is to be disregarded for these purposes if the closing date for the nomination<sup>10</sup> of candidates falls before the date of the co-opted director's appointment<sup>11</sup>.

1 le co-opted by appointment under Building Societies Act 1986 s 60(13), as to which, see PARA 1948.

2 As to directors generally see PARA 1944.

3 Building Societies Act 1986 s 60(14).

4 Building Societies Act 1986 ss 60(17), 61(12).

5 As to annual general meetings see PARA 1977.

6 Building Societies Act 1986 ss 60(17), 61(12)(i). As to appointment generally see PARA 1948.

7 As to postal and electronic ballots see PARA 1988.

8 Building Societies Act 1986 ss 60(17), 61(12)(ii) (s 61(12) amended by SI 2003/404).

9 Building Societies Act 1986 ss 60(17), 61(12)(iii).

10 As to nomination see PARA 1946.

11 Building Societies Act 1986 ss 60(17), 61(12) (as amended: see note 7).

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### **1950. Retirement of directors.**

The rules of a building society may require its directors to retire at a prescribed age without eligibility for re-election or re-appointment<sup>1</sup>, and if the rules make such provision a person who has attained<sup>2</sup> the prescribed age is not eligible to be elected as a director of the society<sup>3</sup>. If a person has attained the normal retirement age, which is 70 years or such lesser age as the rules of the society prescribe as the normal retirement age for its directors<sup>4</sup>, he is not eligible to be elected a director unless he has been approved as eligible for election by resolution of the board of directors<sup>5</sup>, and his age and the reasons for the board's approval of his eligibility have been notified<sup>6</sup> to every person entitled to vote<sup>7</sup> at the election<sup>8</sup>. Provision is made for a society to comply with the notification requirement by using electronic communications<sup>9</sup>. The above requirements do not apply where the compulsory retirement age is no greater than the normal retirement age<sup>10</sup>. If a society, in a case where the board of directors has approved as eligible for election a person who has attained the normal retirement age, fails to notify every person entitled to vote at the election of the candidate's age and the reasons for the board's approval of his eligibility, the society, and any officer<sup>11</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>12</sup>. However, any such failure does not invalidate the election<sup>13</sup>.

A director of a society attaining the normal retirement age, or, as the case may be, the compulsory retirement age must, subject to any provision of the rules for earlier retirement, retire from office at the next annual general meeting of the society<sup>14</sup>.

A director of a society must retire from office:

- 364 (1) at the third annual general meeting of the society following the date of his election, unless<sup>15</sup> (a) head (2) below applies<sup>16</sup>; or (b) he is required to retire at the next annual general meeting owing to his age<sup>17</sup>; or (c) his retirement is provided for under rules relating to retirement by rotation<sup>18</sup>; and
- 365 (2) in any case where he had attained the normal retirement age at his election, at the next annual general meeting following that date<sup>19</sup>.

This is subject to any provision for his earlier retirement on the grounds of ceasing to hold the requisite shares in the society contained in the rules of the society<sup>20</sup>.

A person who holds office as, or is to his knowledge nominated for election or proposed to be co-opted as, a director of a society must not later than 28 days before he attains the normal or, as the case may be, compulsory retirement age for directors give the society notice<sup>21</sup> of the date on which he will attain that age<sup>22</sup>. A director failing to do so is liable on summary conviction to a fine<sup>23</sup> and in the case of a continuing offence to an additional fine<sup>24</sup> for every week during which the offence continues<sup>25</sup>.

The rules of a society, if they provide for the retirement by rotation of its directors, may provide that a person elected to fill a vacant seat on the board must retire at the next annual general meeting at which, in accordance with the rules for retirement by rotation, the seat falls vacant<sup>26</sup>. This applies to any vacancy arising when an elected director ceases to hold office for any reason before the annual general meeting at which (disregarding his age) the seat is due to fall vacant<sup>27</sup>.



- 1 Building Societies Act 1986 s 60(5). This is known as the 'compulsory retirement age': s 60(8).
- 2 A person attains a given age expressed in years at the commencement of the relevant anniversary of the date of his birth: see the Family Law Reform Act 1969 s 9.
- 3 Building Societies Act 1986 s 60(6). As to the appointment and election of directors see PARAS 1945-1949. As to age discrimination and the general exception in regard to retirement see the Employment Equality (Age) Regulations 2006, SI 2006/1031; and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 785 et seq.
- 4 Building Societies Act 1986 s 60(8).
- 5 Building Societies Act 1986 s 60(7)(a).
- 6 As to the meaning of 'notify' see PARA 1866 note 8.
- 7 As to the right to vote see PARA 1984.
- 8 Building Societies Act 1986 s 60(7)(b).
- 9 See the Building Societies Act 1986 s 60(7A)-(7C) (added by SI 2003/404). Where the information required to be notified by the Building Societies Act 1986 s 60(7)(b) (see the text to note 8) is sent electronically, it must be sent to an electronic address notified by the person for the purpose: s 60(7A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.  
  
The requirement of s 60(7)(b) to notify information to a person is satisfied by the publication of that information on a website only if: (1) the society and that person have agreed to his accessing information on a website; (2) the published information is information to which the agreement applies; (3) that person is notified before the voting date, in a manner agreed between him and the society, of the publication of the information on a website, the address of that website, and the place on that website where the information may be accessed, and how it may be accessed; and (4) the information is published continuously on that website throughout the period beginning with the giving of that notification and ending with the voting date: s 60(7B) (as so added). As to the meaning of 'voting date' see PARA 1945 note 10.  
  
Where, in a case in which s 60(7B) is relied on for compliance with a requirement of s 60(7)(b) information is published for a part, but not all, of the period mentioned in head (4) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, the failure does not invalidate the election of a director: s 60(7C) (as so added).
- 10 Building Societies Act 1986 s 60(5). See the text and notes 1, 4.
- 11 As to the meaning of 'officer' see PARA 1944.
- 12 Building Societies Act 1986 s 61(6). The fine must not exceed level 4 on the standard scale: s 61(6). As to the standard scale see PARA 27 note 21. As to the defence of due diligence see PARA 1969.
- 13 Building Societies Act 1986 s 61(6).
- 14 Building Societies Act 1986 s 60(12). As to annual general meetings see PARA 1977.
- 15 Building Societies Act 1986 s 60(11)(a).
- 16 See the Building Societies Act 1986 s 60(11)(a).
- 17 See the Building Societies Act 1986 s 60(11)(a), (12); and the text to notes 14-16.
- 18 See the Building Societies Act 1986 ss 60(11)(a), 61(10); and the text and note 26.
- 19 Building Societies Act 1986 s 60(11)(b).
- 20 Building Societies Act 1986 s 60(11). See PARAS 1945-1949.
- 21 As to the meaning of 'notice' see PARA 1866 note 8.
- 22 Building Societies Act 1986 s 60(15).
- 23 Is not exceeding level 3 on the standard scale: Building Societies Act 1986 s 60(15)(a).

- 24    le not exceeding £40: Building Societies Act 1986 s 60(15)(b).
- 25    Building Societies Act 1986 s 60(15).
- 26    Building Societies Act 1986 s 61(10).
- 27    Building Societies Act 1986 s 61(11).

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### **1951. Notification of changes.**

Where a person becomes or ceases to be a director of a building society<sup>1</sup>, the society must give notice<sup>2</sup> of that fact to the Financial Services Authority<sup>3</sup> within one month, stating the person's full name and address and the date on which he became, or ceased to be, a director<sup>4</sup>. The Authority must record the person's name and the date on which he began to hold or, as the case may be, ceased to hold office, in the public file<sup>5</sup> of the society<sup>6</sup>. It is an offence if a society fails to do this, and the society, and any officer<sup>7</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>8</sup>.

In a case where the rules provide for election by postal or electronic ballot<sup>9</sup> the date of a person's election to office as a director is the date of the meeting at which the declaration of the result of the ballot is made<sup>10</sup>.

- 1    As to the appointment and election of directors see PARAS 1945-1949; and as to the retirement of directors see PARA 1950.
- 2    As to the meaning of 'notice' see PARA 1866 note 8.
- 3    As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 4    Building Societies Act 1986 s 61(13) (amended by SI 2001/2617).
- 5    As to the public file see PARA 1864.
- 6    Building Societies Act 1986 s 61(13) (as amended: see note 4).
- 7    As to the meaning of 'officer' see PARA 1944.
- 8    Building Societies Act 1986 s 61(14). The fine must not exceed level 4 on the standard scale: s 61(14). As to the standard scale see PARA 27 note 21.
- 9    As to postal and electronic ballots see PARA 1988.
- 10    Building Societies Act 1986 s 60(17) (amended by SI 2003/404). See also PARAS 1945-1949.

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Management, Meetings and Accounts/A. DIRECTORS AND OFFICERS/(A) In general/1952.  
Prohibition of tax-free payments to directors.

### **1952. Prohibition of tax-free payments to directors.**

A building society must not pay a director remuneration (whether as director or otherwise) free of income tax, or otherwise calculated by reference to or varying with the amount of his income tax, or to or with any rate of income tax<sup>1</sup>. Any rule of a society and any provision of any contract, or in any resolution of a society, for payment to a director in breach of this provision has effect as if it provided for payment, as a gross sum subject to income tax, of the net sum for which the rule, contract or resolution actually provides<sup>2</sup>.

1 Building Societies Act 1986 s 62(1). As to income tax generally see **INCOME TAXATION**.

2 Building Societies Act 1986 s 62(2).

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Disclosure of interest in contracts and other transactions.

### **1953. Disclosure of interest in contracts and other transactions.**

It is the duty of a director of a building society who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the society to declare the nature of his interest to the board of directors of the society<sup>1</sup>. In the case of a proposed contract, the declaration must be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration, or, if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he became so interested<sup>2</sup>. In a case where the director becomes interested in a contract after it is made, the declaration must be made at the first meeting of the directors held after the director becomes so interested<sup>3</sup>.

A general notice<sup>4</sup> given to the directors of a society by a director to the effect that<sup>5</sup>: (1) he is a member of a specified company or firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm<sup>6</sup>; or (2) he is to be regarded as interested in any contract which may after the date of the notice be made with a specified person who is connected with him<sup>7</sup>, is deemed a sufficient declaration of interest in relation to any contract made after that date with that company, firm or person<sup>8</sup>. A director need not make a declaration or give a notice by attending in person at a meeting of the directors if he takes reasonable steps to secure that the declaration or notice is brought up and read at the meeting<sup>9</sup>.

These requirements<sup>10</sup> apply in relation to any transaction or arrangement as they apply in relation to a contract, and for these purposes, a transaction or arrangement of a kind capable of falling within the relevant provisions<sup>11</sup> and made by a society for a director, or a person connected with a director, is to be treated (if it would not otherwise be so treated, and whether or not prohibited by those provisions) as a transaction or arrangement in which that director is interested<sup>12</sup>.

A director who fails to comply with these requirements<sup>13</sup> is guilty of an offence and is liable on conviction to a fine<sup>14</sup>.

- 1 Building Societies Act 1986 s 63(1). There is no provision governing the effect of non-disclosure on the validity of a contract; but see *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549, [1967] 3 All ER 98, CA, concerning a similar statutory provision governing companies (non-disclosure was held to make the contract voidable). Note that under general law a director is not entitled to make personal profits at the expense of the society: see **COMPANIES** vol 14 (2009) PARAS 547, 550 et seq. As to the law of contract generally see **CONTRACT**.
- 2 Building Societies Act 1986 s 63(2).
- 3 Building Societies Act 1986 s 63(3).
- 4 As to the meaning of 'notice' see PARA 1866 note 8.
- 5 Building Societies Act 1986 s 63(4).
- 6 Building Societies Act 1986 s 63(4)(a).
- 7 Building Societies Act 1986 s 63(4)(b). As to the meaning of 'connected with' see PARA 1961.
- 8 Building Societies Act 1986 s 63(4).
- 9 Building Societies Act 1986 s 63(5).
- 10 I.e. the Building Societies Act 1986 s 63(1)-(5): see the text to notes 1-9.
- 11 I.e. the provisions relating to loans and other financial benefits to directors and connected persons in the Building Societies Act 1986 s 65: see PARA 1955.
- 12 Building Societies Act 1986 s 63(6).
- 13 I.e. the Building Societies Act 1986 s 63(1)-(6): see the text to notes 1-12.
- 14 Building Societies Act 1986 s 63(7). Such a person is liable on conviction on indictment to a fine, or on summary conviction to a fine not exceeding the statutory maximum: see s 63(7). As to the statutory maximum see PARA 56 note 24.

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#### **1954. Substantial property transactions with directors.**

Subject to the exceptions mentioned below, a building society must not enter into an arrangement whereby<sup>1</sup>: (1) a director of the society, or a person connected with<sup>2</sup> a director of the society, acquires or is to acquire one or more non-cash assets<sup>3</sup> of the requisite value from the society<sup>4</sup>; or (2) the society acquires or is to acquire one or more non-cash assets of the requisite value from a director of the society or a person so connected<sup>5</sup>, unless the arrangement is first approved by a resolution of the society passed at a general meeting<sup>6</sup>. For this purpose a non-cash asset is of the requisite value if at the time the arrangement in question is entered into its value is<sup>7</sup>: (a) where the last balance sheet of the society showed reserves amounting to less than £1,000,000, not less than the higher of £2,000 or the amount which represents ten per cent of the reserves so shown<sup>8</sup>; or (b) in any other case not less than £200,000<sup>9</sup>.

An arrangement entered into by a society in contravention of this provision, and any transaction entered into in pursuance of the arrangement, whether by the society or by any other person, is voidable at the instance of the society unless<sup>10</sup>: (i) restitution of any money or

other asset which is the subject matter of the arrangement or transaction is no longer possible or the society has been indemnified<sup>11</sup> by any other person for the loss or damage suffered by it<sup>12</sup>; or (ii) any rights acquired in good faith for value and without actual notice of the contravention by any person who is not a party to the arrangement or transaction would be affected by its avoidance<sup>13</sup>; or (iii) the arrangement is affirmed by the society at a general meeting held not later than the next annual general meeting<sup>14</sup> after the entry into the arrangement<sup>15</sup>.

If an arrangement or transaction is entered into with a society by a director of the society or a person connected with him in contravention of this provision, that director and the person so connected, and any other director of the society who authorised the arrangement or any transaction entered into in pursuance of such an arrangement, is liable<sup>16</sup>: (A) to account to the society for any gain which he has made directly or indirectly by the arrangement or transaction<sup>17</sup>; and (B) jointly and severally with any other person so liable, to indemnify the society for any loss or damage resulting from the arrangement or transaction<sup>18</sup>. This is without prejudice to any liability otherwise imposed, and is subject to the following two exceptions<sup>19</sup>. If an arrangement or transaction is entered into by a society and a person connected with a director of the society in contravention of this provision, that director is not liable if he shows that he took all reasonable steps to secure the society's compliance with this provision<sup>20</sup>. In any case, a person so connected and any other director who authorised the arrangement is not so liable if he shows that, at the time the arrangement was entered into, he did not know the relevant circumstances constituting the contravention<sup>21</sup>.

1 Building Societies Act 1986 s 64(1).

2 As to the meaning of 'connected with' see PARA 1961.

3 'Non-cash asset' means any property or interest in property other than cash and a reference to the acquisition of a non-cash asset includes the creation or extinction of an estate or interest in, or a right over, any property and also the discharge of any person's liability, other than a liability for a liquidated sum: Building Societies Act 1986 s 64(5).

4 Building Societies Act 1986 s 64(1)(a).

5 Building Societies Act 1986 s 64(1)(b).

6 Building Societies Act 1986 s 64(1). As to meetings and resolutions generally see PARA 1974 et seq.

7 Building Societies Act 1986 s 64(2). The Treasury may by order substitute for the amounts specified in s 64(2) such other amounts as it thinks appropriate: s 64(3) (amended by SI 2001/2617). The power to make such an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 64(4). In exercise of the power under s 64(3) the Building Societies Act 1986 (Substitution of Specified Amounts and Modification of the Funding Limit Calculation) Order 2007, SI 2007/860, has been made.

8 Building Societies Act 1986 s 64(2)(b) (s 64(2)(a), (b) amended by SI 2007/860). See note 7.

9 Building Societies Act 1986 s 64(2)(a) (as amended: see note 8). See note 7.

10 Building Societies Act 1986 s 64(6).

11 ie in pursuance of the Building Societies Act 1986 s 64(7)(b): see the text to note 18.

12 Building Societies Act 1986 s 64(6)(a). As to restitution generally see **RESTITUTION**.

13 Building Societies Act 1986 s 64(6)(b).

14 As to annual general meetings see PARA 1977.

15 Building Societies Act 1986 s 64(6)(c).

16 Building Societies Act 1986 s 64(7).

- 17 Building Societies Act 1986 s 64(7)(a).
- 18 Building Societies Act 1986 s 64(7)(b).
- 19 Building Societies Act 1986 s 64(7).
- 20 Building Societies Act 1986 s 64(8).
- 21 Building Societies Act 1986 s 64(9).

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### **1955. Restrictions on loans and other transactions.**

A building society must not<sup>1</sup>:

- 366 (1) make a loan to a director or a person connected with<sup>2</sup> a director of the society<sup>3</sup>;
- 367 (2) dispose<sup>4</sup> of property by way of lease or hire to a director or a person connected with a director of the society<sup>5</sup>;
- 368 (3) make a payment on behalf of a director or a person connected with a director of the society in connection with the provision of any service of a kind which is provided by societies for individuals in the ordinary course of business<sup>6</sup>;
- 369 (4) enter into a guarantee or provide any security which is incidental to or connected with any such loan, disposal of property or payment<sup>7</sup>; or
- 370 (5) take part in any arrangement whereby another person enters into a transaction which, if it had been entered into by the society, would have contravened any of heads (1) to (4) above, and that other person, in pursuance of the arrangement, has obtained or is to obtain any benefit from the society or a subsidiary of the society<sup>8</sup>.

The prohibition in head (1) above does not apply to:

- 371 (a) any loan of an amount which, when aggregated with any other relevant<sup>9</sup> loans, does not exceed £10,000<sup>10</sup>;
- 372 (b) any loan made in the ordinary course of the society's business and of an amount not greater and made on other terms not more favourable than it is reasonable to expect the society to have offered to a person of the same financial standing but unconnected with the society<sup>11</sup>; or
- 373 (c) any loan, the amount of which, when aggregated with any other relevant loans, does not exceed £200,000, made for or towards the purchase or improvement of a dwelling house used or to be used as the director's only or main residence if he is an executive director<sup>12</sup> and loans of that description and on similar terms are ordinarily made by the society to its employees<sup>13</sup>.

The prohibition in head (2) above does not apply to:

- 374 (i) any lease or hiring of property the value of which, when aggregated with the value of any other relevant leases or hirings, does not exceed £20,000<sup>14</sup>; or
- 375 (ii) any lease or hiring made in the ordinary course of the society's business and on terms not more favourable than it is reasonable to expect the society to have offered to a person unconnected with the society<sup>15</sup>.

The prohibition in head (3) above does not apply to:

- 376 (A) any payment amounting, when aggregated with any other relevant payment, to no more than £10,000 in respect of which the person on whose behalf it is made is under an obligation to reimburse the society within a period not exceeding two months beginning with the date of payment<sup>16</sup>; or
- 377 (B) any payment of an amount not greater and on other terms not more favourable than it is reasonable to expect the society to have offered to a person of the same financial standing but unconnected with the society<sup>17</sup>.

A society is not precluded<sup>18</sup> from doing anything to provide a director with funds to meet expenditure incurred or to be incurred by him for the purposes of the society or for the purpose of enabling him properly to perform his duties as a director of the society, nor is the society precluded from doing anything to enable a director to avoid incurring such expenditure<sup>19</sup>. However, this applies only if one of the following conditions is satisfied: (aa) the things must either be done with the prior approval of the society given at a general meeting at which the requisite matters are disclosed, or be done on condition that, if the approval of the society is not given at the next annual general meeting<sup>20</sup>, the loan is to be repaid, or any other liability arising under the transaction is to be discharged, within six months from the conclusion of that meeting<sup>21</sup>; and (bb) the amount provided, when aggregated with any other relevant provision of funds, does not exceed £40,000<sup>22</sup>. The requisite matters which must be disclosed for the purposes of head (aa) above are the purpose of the expenditure incurred or to be incurred, or which would otherwise be incurred, by the director, the amount of the funds to be provided by the society, and the extent of the society's liability under any transaction which is or is connected with the thing in question<sup>23</sup>.

The Treasury<sup>24</sup> may by order made by statutory instrument substitute for any of the sums specified above a larger sum specified in the order<sup>25</sup>.

1 Transactions or arrangements which contravene the provisions of the Building Societies Act 1986 s 65 are voidable and the society and its directors may be guilty of an offence: see PARA 1956.

2 As to the meaning of 'connected with' see PARA 1961.

3 Building Societies Act 1986 s 65(1)(a) (s 65(1)(a), (c) amended by the Building Societies Act 1997 Sch 7 para 24(1)).

4 'Dispose', in relation to any property, includes the granting of any interest in or right over it: Building Societies Act 1986 s 119(1).

5 Building Societies Act 1986 s 65(1)(b).

6 Building Societies Act 1986 s 65(1)(c) (as amended: see note 3).

7 Building Societies Act 1986 s 65(1)(d).

8 Building Societies Act 1986 s 65(1)(e). For these purposes, 'subsidiary' has the same meaning as in the Companies Act 1985 s 736 (prospectively repealed) (see **COMPANIES** vol 14 (2009) PARA 25) (as to replacement provision see the Companies Act 2006 s 1159): Building Societies Act 1986 s 65(10) (definition added by the Building Societies Act 1997 Sch 7 para 24(2)(b)).

9 'Relevant', in relation to a transaction of a description falling within head (1), head (2) or head (3) in the text, means an outstanding or, in the case of a lease or hiring, current transaction of that description (whether entered into by, or by arrangement with, the society) not being one authorised by any other authorising provision: Building Societies Act 1986 s 65(10). 'Outstanding', in relation to loans, means outstanding in respect of principal and interest and, in relation to the provision of funds subject to a condition for repayment or discharge of any other liability, means unpaid or undischarged to any extent: s 65(10). 'Authorising provision' and 'authorised', in relation to a transaction of a description falling within head (1), head (2) or head (3) in the text, mean respectively any provision of ss 65(2), 65(3) (see the text to notes 10-15) or s 65(4) (see the text to notes 16-17) or constituted by s 65(5) (see the text and notes 18-19) and any transaction or thing done to which the relevant provision does not apply or which is not precluded from being done by virtue of that provision: s 65(10). 'Provision of funds' includes anything else which, by virtue of s 65(5), a society is not precluded from doing by s 65(1): s 65(10) (definition amended by the Building Societies Act 1997 Sch 7 para 24(2)(a), Sch 9).

10 Building Societies Act 1986 s 65(2)(a) (s 65(2)(a), (c), (3)(a), (4)(a), (6)(b) amended by SI 2007/860). See note 25.

11 Building Societies Act 1986 s 65(2)(b).

12 'Executive', in relation to a director, means a person who holds office as a director and also as chief executive, secretary or manager: Building Societies Act 1986 s 119(1). As to the office of chief executive see PARAS 1964-1965; and as to the office of secretary see PARAS 1966-1967. As to the meaning of 'manager' see PARA 1944 note 8.

13 Building Societies Act 1986 s 65(2)(c) (as amended: see note 10).

14 Building Societies Act 1986 s 65(3)(a) (as amended: see note 10).

15 Building Societies Act 1986 s 65(3)(b).

16 Building Societies Act 1986 s 65(4)(a) (as amended: see note 10).

17 Building Societies Act 1986 s 65(4)(b).

18 Ie by the Building Societies Act 1986 s 65(1): see the text to notes 1-8.

19 Building Societies Act 1986 s 65(5).

20 As to annual general meetings see PARA 1977.

21 Building Societies Act 1986 s 65(6)(a).

22 Building Societies Act 1986 s 65(6)(b) (as amended: see note 10).

23 Building Societies Act 1986 s 65(7).

24 As to the Treasury see para 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

25 Building Societies Act 1986 s 65(8) (amended by SI 2001/2617). Such an order is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 65(9). In exercise of the power under s 65(8) the Building Societies Act 1986 (Substitution of Specified Amounts and Modification of the Funding Limit Calculation) Order 2007, SI 2007/860, has been made.

## UPDATE

### 1955 Restrictions on loans and other transactions

NOTE 8--In definition of 'subsidiary' reference to Companies Act 1985 s 736 now to Companies Act 2006 s 1159 (see **COMPANIES** vol 14 (2009) PARA 25): Building Societies Act 1986 s 65(10) (definition amended by SI 2009/1941).



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### **1956. Sanctions for breach of prohibition on loans and other transactions.**

If a building society enters into a transaction or arrangement in contravention of the prohibition on loans and other financial benefits to directors or any person connected with a director<sup>1</sup>, the transaction or arrangement is voidable at the instance of the society unless<sup>2</sup>: (1) restitution of any money or any other asset which is the subject matter of the arrangement or transaction is no longer possible, or the society has been indemnified<sup>3</sup> for the loss or damage suffered by it<sup>4</sup>; or (2) any rights acquired in good faith for value and without actual notice of the contravention by a person other than the person for<sup>5</sup> whom the transaction or arrangement was made would be affected by its avoidance<sup>6</sup>.

Where a transaction or arrangement is made by a society for a director of the society or a person connected with such a director in contravention of such prohibition, that director and the person so connected and any other director of the society who authorised the transaction or arrangement (whether or not it has been avoided in pursuance of head (1) or head (2) above) is liable<sup>7</sup>: (a) to account to the society for any gain which he has made directly or indirectly by the transaction or arrangement<sup>8</sup>; and (b) jointly and severally with any other person similarly liable, to indemnify the society for any loss or damage resulting from the transaction or arrangement<sup>9</sup>. This is without prejudice to any liability otherwise imposed, but is subject to the two exceptions set out below<sup>10</sup>. Where a transaction or arrangement is entered into by a society and a person connected with a director of the society in contravention of the prohibition, that director is not liable under head (a) or head (b) above if he shows that he took all reasonable steps to secure the society's compliance with that provision<sup>11</sup>. In any case, a person so connected and any such other director is not so liable if he shows that, at the time the transaction or arrangement was entered into, he did not know the circumstances constituting the contravention<sup>12</sup>.

A director of a society who authorises or permits the society to enter into a transaction or arrangement knowing or having reasonable cause to believe that the society was thereby contravening the prohibition on loans and similar benefits to directors or any person connected with a director is guilty of an offence<sup>13</sup>.

A society which enters into a transaction or arrangement for one of its directors in contravention of such prohibition is guilty of an offence unless it shows that, at the time the transaction or arrangement was entered into, it did not know the circumstances constituting the contravention<sup>14</sup>.

A person who procures a society to enter into a transaction or arrangement knowing or having reasonable cause to believe that the society was thereby contravening such prohibition is guilty of an offence<sup>15</sup>.

A person, other than a society, guilty of an offence under these provisions is liable on conviction to imprisonment or a fine or both<sup>16</sup>. A society guilty of an offence under these provisions is liable on conviction to a fine<sup>17</sup>.

1    Ie the prohibition made by the Building Societies Act 1986 s 65(1): see PARA 1955. As to the meaning of 'connected with' see PARA 1961.

2    Building Societies Act 1986 s 66(1).

3    Ie indemnified in pursuance of the Building Societies Act 1986 s 66(2)(b): see the text and note 9.

4 Building Societies Act 1986 s 66(1)(a). As to restitution generally see **RESTITUTION**.

5 A prohibited transaction is made 'for' a person if: (1) in the case of a loan, disposal or payment within the Building Societies Act 1986 s 65(1)(a), s 65(1)(b) or s 65(1)(c) (see PARA 1955), it is made, in the case of s 65(1)(a) or s 65(1)(b), to him or, in the case of s 65(1)(c), on his behalf; (2) in the case of a guarantee or security within s 65(1)(d) (see PARA 1955), it is made as an incident of or in connection with a loan or disposal to him or a payment on his behalf; and (3) in the case of an arrangement within s 65(1)(e) (see PARA 1955), the transaction to which the arrangement relates was made for him: ss 65(11), 70(5).

6 Building Societies Act 1986 s 66(1)(b).

7 Building Societies Act 1986 s 66(2).

8 Building Societies Act 1986 s 66(2)(a).

9 Building Societies Act 1986 s 66(2)(b).

10 Building Societies Act 1986 s 66(2).

11 Building Societies Act 1986 s 66(3).

12 Building Societies Act 1986 s 66(4).

13 Building Societies Act 1986 s 66(5). See the text and note 16. As to the defence of due diligence see PARA 1969.

14 Building Societies Act 1986 s 66(6). See the text to note 17. As to the liability of officers of the society for offences committed by the society see PARA 1969.

15 Building Societies Act 1986 s 66(7). See the text and note 16.

16 Building Societies Act 1986 s 66(8). Such a person is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both: see s 66(8). As to the statutory maximum see PARA 56 note 24. As to the liability of officers of bodies corporate other than building societies for offences committed under the Building Societies Act 1986 see PARA 1969.

17 Building Societies Act 1986 s 66(9). Such a society is liable on conviction on indictment or on summary conviction to a fine which, on summary conviction, must not exceed the statutory maximum: see s 66(9).

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### **1957. Transactions with directors and persons connected with them.**

Where a building society enters into a transaction<sup>1</sup> the parties to which include: (1) a director of the society<sup>2</sup>; or (2) a person connected with<sup>3</sup> such a director<sup>4</sup>, and the board of directors, in connection with the transaction, exceed any limitation<sup>5</sup> on their powers by reason of anything included in the society's constitution, that is to say, its memorandum and rules<sup>6</sup>, the transaction is voidable at the instance of the society<sup>7</sup>. Whether or not the transaction is avoided, any such party to the transaction as is mentioned in head (1) or head (2) above, and any director of the society who authorised the transaction, is liable to account to the society for any gain which he has made directly or indirectly by it, and to indemnify the society for any loss or damage resulting from it<sup>8</sup>. These provisions do not exclude the operation of any other enactment or rule of law by virtue of which the transaction may be called in question or any liability to the society may arise<sup>9</sup>.

The transaction ceases to be voidable if: (a) restitution of any money or other asset which was the subject-matter of the transaction is no longer possible<sup>10</sup>; or (b) the society is indemnified for any loss or damage resulting from the transaction<sup>11</sup>; or (c) rights acquired bona fide for value and without actual notice of the directors' exceeding their powers by a person who is not a party to the transaction would be affected by the avoidance<sup>12</sup>; or (d) the transaction is ratified by the society in general meeting, by ordinary or special resolution or otherwise as the case may require<sup>13</sup>.

1 'Transaction' includes any act: Building Societies Act 1986 s 66A(8) (s 66A added by the Building Societies Act 1997 s 38).

2 Building Societies Act 1986 s 66A(1)(a) (as added: see note 1).

3 As to the meaning of 'connected with' see PARA 1961.

4 Building Societies Act 1986 s 66A(1)(b) (as added: see note 1).

5 The reference to limitations under the society's constitution includes limitations deriving from: (1) a resolution of the society passed at a general or special meeting or on a postal or electronic ballot; or (2) any agreement between the members of the society: Building Societies Act 1986 s 66A(8) (as added (see note 1); and amended by SI 2003/404). As to the constitution of societies see PARA 1856 et seq. As to membership see PARA 1888 et seq. As to meetings and resolutions generally see PARA 1974 et seq. As to postal and electronic ballots see PARA 1988.

6 Building Societies Act 1986 s 66A(1) (as added: see note 1). As to the meaning of 'memorandum' see PARA 1873 note 2.

Section 66A does not affect the operation of s 5(8), Sch 2 para 17(1) (see PARA 2038) in relation to any party to the transaction not within s 66A(1)(a) (see the text to notes 1-2) or s 66A(1)(b) (see the text to notes 3-4): s 66A(7) (as so added). But where a transaction is voidable by virtue of s 66A and valid by virtue of Sch 2 para 17(1) in favour of such a person, the court may, on the application of that person or of the society, make an order affirming, severing or setting aside the transaction on such terms as appear to the court to be just: see s 66A(7) (as so added). As to the meaning of 'court' see PARA 1871 note 6.

7 Building Societies Act 1986 s 66A(2) (as added: see note 1).

8 Building Societies Act 1986 s 66A(3) (as added: see note 1). A person other than a director of the society is not liable under s 66A(3) if he shows that at the time the transaction was entered into he did not know that the directors were exceeding their powers: s 66A(6) (as so added).

9 Building Societies Act 1986 s 66A(4) (as added: see note 1).

10 Building Societies Act 1986 s 66A(5)(a) (as added: see note 1). As to restitution generally see **RESTITUTION**.

11 Building Societies Act 1986 s 66A(5)(b) (as added: see note 1).

12 Building Societies Act 1986 s 66A(5)(c) (as added: see note 1).

13 Building Societies Act 1986 s 66A(5)(d) (as added: see note 1). As to the meaning of 'ordinary resolution' see PARA 1983; and as to the meaning of 'special resolution' see PARA 1980.

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## **1958. Records of loans, etc for directors.**

A building society must maintain a register<sup>1</sup> containing a copy of every subsisting transaction or arrangement (other than an excepted transaction or arrangement) which falls within the provisions<sup>2</sup> relating to loans and other financial benefits to directors or any person connected with<sup>3</sup> a director, and is a transaction or arrangement for<sup>4</sup> a director or a person connected with a director of the society during the current financial year<sup>5</sup> or any of the preceding ten financial years<sup>6</sup>. If a transaction or arrangement is not in writing a written<sup>7</sup> memorandum setting out the terms must be kept in the register<sup>8</sup>. A society must make available for inspection by members<sup>9</sup>: (1) at its principal office<sup>10</sup> during the period of 15 days expiring with the date of its annual general meeting<sup>11</sup>; and (2) at the annual general meeting<sup>12</sup>, a statement containing the requisite particulars of the transactions and arrangements within the prohibition which were included in the register at any time during the last complete financial year preceding the meeting<sup>13</sup>.

The requisite particulars are particulars of the principal terms of the transaction or arrangement including (but not limited to)<sup>14</sup>:

- 378 (a) a statement of the fact either that the transaction or arrangement was made or that it subsisted during the financial year<sup>15</sup>;
- 379 (b) the name of the person for whom it was made and, where that person is or was connected with a director of the society, the name of that director<sup>16</sup>;
- 380 (c) in the case of a loan or any related guarantee (i) the amount of the mortgage debt<sup>17</sup> or corresponding liability both at the beginning and at the end of the financial year; (ii) the maximum amount of that debt or liability during that year; (iii) the amount of any interest which, having fallen due, has not been paid; and (iv) the amount of any provision made in the accounts in respect of any failure or anticipated failure by the borrower to repay the whole or part of the loan or to pay the whole or part of any interest on it<sup>18</sup>;
- 381 (d) in the case of a disposal of property by way of lease or hire (i) the value of the property; (ii) the amount of any rental which, having fallen due, has not been paid; and (iii) the amount of any provision made in the accounts in respect of any failure or anticipated failure by the lessee or hirer to pay the whole or part of the rent<sup>19</sup>;
- 382 (e) in the case of any payment made on behalf of the director or person connected with him, the amount of the payment<sup>20</sup>; and
- 383 (f) in the case of a guarantee or security (i) the amount for which the society was liable under the guarantee or security both at the beginning and at the end of the financial year; (ii) the maximum amount for which the society may become liable; and (iii) any amount paid and any liability incurred by the society for the purpose of fulfilling the guarantee or security (including any loss incurred by reason of its enforcement)<sup>21</sup>.

Two copies of the statement must be sent by the society to the Financial Services Authority<sup>22</sup> on the date on which the statement is required to be first made available to members, and the Authority must keep one of them in the public file of the society<sup>23</sup>. A copy of the statement must also be sent, on demand and on payment of such fee<sup>24</sup> as the society may from time to time determine, to any member of the society<sup>25</sup>. Provision is made for a society to comply with the requirement to send a copy of the statement by using electronic communications<sup>26</sup>.

There are excepted from the obligations imposed by the above requirements on a society with respect to a financial year all transactions or arrangements made or subsisting during that year for a person who was at any time during that year a director of the society or was connected with a director of the society if the aggregate of the values of each transaction or arrangement made for that person, less the amount, if any, by which the value of those transactions or arrangements has been reduced, did not exceed £2,000 at any time during that year<sup>27</sup>. There are also excepted from the obligations with respect to a financial year all transactions or arrangements of a specified kind<sup>28</sup> made during that year for a person who was at any time

during that year a director of the society or was connected with a director of the society if the aggregate of the values of each such transaction or arrangement so made for that director or any person connected with him, less the amount, if any, by which the value of those transactions or arrangements has been reduced, did not exceed £10, 000 at any time during that year<sup>29</sup>.

It is an offence if a society fails to comply with these provisions<sup>30</sup>, and the society, and any officer<sup>31</sup> who is also guilty of the offence, is liable on conviction to a fine<sup>32</sup>.

- 1 As to the keeping of records by a building society see PARA 1886.
- 2 I.e. the provision of the Building Societies Act 1986 s 65(1): see PARA 1955.
- 3 As to the meaning of 'connected with' see PARA 1961.
- 4 As to transactions or arrangements made 'for' a person see PARA 1956 note 5.
- 5 As to the meaning of 'financial year' see PARA 1992 note 2.
- 6 Building Societies Act 1986 s 68(1). As to the transactions and arrangements excepted from s 68(1) see the text and notes 27-29.
- 7 As to the meaning of 'written' see PARA 1064 note 2.
- 8 Building Societies Act 1986 s 68(2).
- 9 As to membership see PARA 1888 et seq.
- 10 As to the requirements for principal offices see PARA 1872.
- 11 Building Societies Act 1986 s 68(3)(a). As to annual general meetings see PARA 1977.
- 12 Building Societies Act 1986 s 68(3)(b).
- 13 Building Societies Act 1986 s 68(3). The auditors of the society must examine the statement and make a report on it to members of the society: see PARA 2003. As to the office of auditor see PARA 1998 et seq.
- 14 Building Societies Act 1986 s 68(4), Sch 9 para 2(1), (2).
- 15 Building Societies Act 1986 Sch 9 para 2(2)(a). For the purposes of Sch 9, 'financial year' means the financial year to which the statement under s 68(3) (see the text to notes 9-13) relates: Sch 9 para 1.
- 16 Building Societies Act 1986 Sch 9 para 2(2)(b).
- 17 As to the meaning of 'mortgage debt' see PARA 1946 note 6.
- 18 Building Societies Act 1986 Sch 9 para 2(2)(c) (amended by the Building Societies Act 1997 Sch 7 para 59).
- 19 Building Societies Act 1986 Sch 9 para 2(2)(d).
- 20 Building Societies Act 1986 Sch 9 para 2(2)(e).
- 21 Building Societies Act 1986 Sch 9 para 2(2)(f).
- 22 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 23 Building Societies Act 1986 s 68(5) (amended by SI 2001/2617). As to the public file see PARA 1864.
- 24 I.e. not exceeding £5: see the Building Societies Act 1986 s 68(6) (amended by the Building Societies Act 1997 Sch 7 para 26).
- 25 Building Societies Act 1986 s 68(6) (as amended: see note 24).

26 See the Building Societies Act 1986 s 68(6A), (6B), (11A) (added by SI 2003/404). Where a copy of a statement is required to be sent to a member under the Building Societies Act 1986 s 68(6) (see the text to note 25): (1) it may be sent to him electronically only if it is sent to an electronic address notified by the member for the purpose; but (2) the requirement to send it is also treated as satisfied if the conditions set out in s 68(6B) are satisfied: s 68(6A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

The conditions mentioned in head (2) above are satisfied in the case of a copy of a statement if: (a) the society and the member have agreed that information that is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the statement in question; (c) the member is notified, in a manner agreed between him and the society, of the publication of the statement on a website, the address of that website, and the place on that website where the statement may be accessed, and how it may be accessed; and (d) a copy of the statement continues to be published on that website throughout the period of 21 days beginning with the day on which the society notifies the member in accordance with head (c) above: s 68(6B) (as so added).

Where, in a case in which head (2) above is relied on for compliance with a requirement of s 68(6), a statement is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, no offence is committed under s 68(11) (see the text to note 32) by reason of that failure: s 68(11A) (as so added).

27 Building Societies Act 1986 s 68(7) (s 68(7), (8) amended by SI 2007/860). The Treasury may by order substitute for the amounts specified in the Building Societies Act 1986 s 68(7), (8) (see the text to notes 28-29) such other amounts as it thinks appropriate: s 68(9) (amended by SI 2001/2617). The power to make such an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 68(10). As to an order made see the Building Societies Act 1986 (Substitution of Specified Amounts and Modification of the Funding Limit Calculation) Order 2007, SI 2007/860. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

28 Ie those falling within the Building Societies Act 1986 s 65(1)(b), s 65(1)(d) or s 65(1)(e): see PARA 1955.

29 Building Societies Act 1986 s 68(8) (as amended: see note 27).

30 Ie the provisions of the Building Societies Act 1986 s 68, Sch 9: see the text and notes 1-29.

31 As to the meaning of 'officer' see PARA 1944.

32 Building Societies Act 1986 s 68(11). Such a society, and any officer who is also guilty of the offence, is liable on conviction on indictment or on summary conviction to a fine which, on summary conviction, must not exceed the statutory maximum: see s 68(11). As to the statutory maximum see PARA 56 note 24. See note 26.

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### **1959. Ban on receipt of commissions in connection with loans.**

No person who holds office in or is employed by a building society as director, secretary<sup>1</sup>, chief executive<sup>2</sup>, manager<sup>3</sup>, solicitor<sup>4</sup>, surveyor or valuer or in connection with the assessment of the adequacy of securities for loans secured on land<sup>5</sup>, may, in addition to the remuneration prescribed or authorised by the rules or any resolution of the society, accept from any other person any commission<sup>6</sup> for or in connection with any loan made by the society<sup>7</sup>. If such a person accepts a commission in contravention of this provision: (1) he and<sup>8</sup> the person who paid it are liable on summary conviction to a fine<sup>9</sup>; and (2) if, having been convicted of an offence under head (1) above, the person accepting the commission fails to pay over to the society the amount or value of the commission, as and when directed to do so by the court which convicted him, he commits an offence and is liable on summary conviction to

imprisonment<sup>10</sup>. The person who paid the commission does not commit the offence unless he paid the commission knowing the circumstances that constituted the offence on the part of the person who accepted it from him<sup>11</sup>.

Where: (a) a charge upon a policy of life assurance<sup>12</sup> is given as additional security for a loan made by a society<sup>13</sup>; or (b) a society makes an additional loan to enable payment to be made of a premium on a policy of insurance<sup>14</sup>; or (c) any policy of insurance is taken out so as to comply with the terms on which a loan is made by a society, whether by way of insuring the property given as security for the loan or otherwise<sup>15</sup>, and the policy is effected through the society, or the society nominates or selects a person by whom the policy is to be issued, it is unlawful for any person who holds office in or is employed by a building society as director, secretary, chief executive, manager, solicitor, surveyor or valuer<sup>16</sup>, in connection with the effecting of the policy, to receive any commission from a person by or through whom the policy is issued<sup>17</sup>. A person who pays, and a person who accepts, any commission which this prohibition makes it unlawful to receive is liable on summary conviction to a fine<sup>18</sup>.

1 As to the office of secretary see PARAS 1966-1967.

2 As to the office of chief executive see PARAS 1964-1965.

3 As to the meaning of 'manager' see PARA 1944 note 8.

4 'Solicitor', in relation to England and Wales, includes licensed conveyancer: Building Societies Act 1986 s 67(7). As to solicitors and licensed conveyancers generally see **LEGAL PROFESSIONS**.

5 Building Societies Act 1986 s 67(1) (amended by the Building Societies Act 1997 Sch 7 para 25(1)). As to loans secured on land see PARA 2006.

6 'Commission' includes any gift, bonus or benefit: Building Societies Act 1986 s 67(7).

7 Building Societies Act 1986 s 67(2).

8 Is subject to the Building Societies Act 1986 s 67(4): see the text to note 11.

9 Building Societies Act 1986 s 67(3)(a). The fine must not exceed level 4 on the standard scale: s 67(3)(a). As to the standard scale see PARA 27 note 21.

10 Building Societies Act 1986 s 67(3)(b). Such a person is liable to imprisonment for a term not exceeding six months: see s 67(3)(b).

11 Building Societies Act 1986 s 67(4).

12 'Charge upon a policy of life assurance', in relation to a loan secured on land in Scotland, means an assignation in security in respect of such a policy: Building Societies Act 1986 s 67(7) (amended by the Building Societies Act 1997 Sch 7 para 25(3)). Generally Scottish matters are beyond the scope of this work.

13 Building Societies Act 1986 s 67(5)(a) (s 67(5) amended by the Building Societies Act 1997 Sch 7 para 25(2)).

14 Building Societies Act 1986 s 67(5)(b) (as amended: see note 13).

15 Building Societies Act 1986 s 67(5)(c) (as amended: see note 13).

16 See the text to notes 1-5.

17 Building Societies Act 1986 s 67(5).

18 Building Societies Act 1986 s 67(6). The fine must not exceed level 4 on the standard scale: s 67(6).

## **UPDATE**

### **1959 Ban on receipt of commissions in connection with loans**

NOTE 4--'Solicitor' now includes any person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes a reserved instrument activity (within the meaning of that Act) (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 512): Building Societies Act 1986 s 67(7) (definition amended by Legal Services Act 2007 Sch 21 para 71).

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### **1960. Disclosure of related business.**

Where, at any time during a financial year<sup>1</sup> of a building society, a person is both a director or other officer<sup>2</sup> of a building society and is (or is a director of or partner in) a business associate of the society, the following provisions apply, as respects that year, to that person in relation to the business of the business associate<sup>3</sup>. A person is a 'business associate' of a society in any financial year of the society if that person carries on a business which consists of or includes the provision of relevant services, provides relevant services during that year to, or to other persons in connection with loans secured on land<sup>4</sup> made by, the society, and is not a connected undertaking of the society<sup>5</sup>. For these purposes the 'relevant services' provided by a business associate are: (1) conveyancing services<sup>6</sup> provided by a solicitor<sup>7</sup>; (2) surveying and valuing land or other property<sup>8</sup>; (3) accountancy services<sup>9</sup>; (4) arranging for the provision of insurance against loss of or damage to property or on human life<sup>10</sup>; or (5) any other services designated<sup>11</sup> as relevant services<sup>12</sup>.

Where a business associate of a society provides the society with services which are relevant services, any administrative services<sup>13</sup> provided to the society by the business associate are also relevant services<sup>14</sup>. A person who is a director or other officer of the society in relation to the business of the business associate must as respects a financial year of the society furnish the society with the requisite particulars<sup>15</sup> of that business<sup>16</sup>. In order to enable him to furnish the requisite particulars of the business of a business associate of a society the person who is under an obligation to furnish them to the society may require any person who is a member of or partner in, or holds any office or employment with, the business associate to furnish him with such information relating to its business as he may reasonably require for that purpose<sup>17</sup>. Any person who, without reasonable excuse: (a) fails to furnish the requisite particulars or furnishes particulars which are false or misleading in a material particular or, in the case of certain particulars<sup>18</sup>, are not a justified estimate; or (b) fails to furnish any information lawfully required of him to enable the person who is under an obligation to furnish the particulars to do so or furnishes information which is false or misleading in a material particular, is liable on conviction to a fine<sup>19</sup>.

A society must maintain at its principal office<sup>20</sup> a register containing the particulars furnished to it as respects the last financial year and each of the ten financial years preceding that year<sup>21</sup>. However, no particulars of the business of a business associate of a society need be kept in this register as respects any financial year of the society in which the volume of the business<sup>22</sup> of which the requisite particulars are required did not exceed £10,000<sup>23</sup>. A society must make available for inspection by members at its principal office during the period of 15 days expiring with the date of its annual general meeting<sup>24</sup>, and at the annual general meeting, a statement containing the particulars required to be kept in the register as respects the last financial year<sup>25</sup>. Two copies of the statement must be sent by the society to the Financial Services Authority on the date on which the statement is required to be first made available to



members, and the Authority must keep one of them in the public file<sup>26</sup> of the society<sup>27</sup>. A copy of the statement must also be sent, on demand and on payment of such fee<sup>28</sup> as the society may from time to time determine, to any member of the society<sup>29</sup>. Provision is made for a society to comply with the requirement to send a copy of the statement by using electronic communications<sup>30</sup>.

1 As to the meaning of 'financial year' see PARA 1992 note 2.

2 As to the meaning of 'officer' see PARA 1944.

3 Building Societies Act 1986 s 69(1).

4 As to loans secured on land see PARA 2006.

5 Building Societies Act 1986 s 69(2) (amended by the Building Societies Act 1997 Sch 7 para 27(1)), Building Societies Act 1986 s 69(7), Sch 10 para 10(1). 'Associated' has a corresponding meaning: s 69(2), Sch 10 para 10(1) (s 69(2) as so amended).

6 'Conveyancing services' in relation to:

11 (1) land in England and Wales, means the preparation of transfers, conveyances, contracts and other documents in connection with, and other services ancillary to, the disposition or acquisition of estates or interests in land, and for these purposes (a) 'disposition' does not include a testamentary disposition or any disposition in the case of such a lease as is referred to in the Law of Property Act 1925 s 54(2) (short leases) (see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 101), but subject to that, includes in the case of leases both their grant and their assignment; and (b) 'acquisition' has a corresponding meaning (Building Societies Act 1986 s 69(17)(a) (s 16(17)(a) substituted, and s 16(17)(aa) added, by the Statute Law (Repeals) Act 2004 s 1(2), Sch 12 para 18));

12 (2) land in Northern Ireland has the same meaning as in head (1) above with the modification that 'disposition' does not include any disposition in the case of such a lease as is excepted, by the Landlord and Tenant Law Amendment Act (Ireland) 1860 s 4, from the requirements of that provision (Building Societies Act 1986 s 69(17)(aa) (as so added)); and

13 (3) heritable property in Scotland, includes drafting all writs relating to such property and negotiating and concluding missives for its purchase, sale, transfer, lease and sublease (s 69(17)(b)). Generally Scottish matters are beyond the scope of this work.

7 Building Societies Act 1986 s 69(3)(a). 'Solicitor', in relation to England and Wales, includes licensed conveyancer, that is to say, a person who holds a licence under the Administration of Justice Act 1985 Pt II (ss 11-39) (see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1319 et seq): Building Societies Act 1986 s 69(17). As to solicitors and licensed conveyancers generally see **LEGAL PROFESSIONS**.

8 Building Societies Act 1986 s 69(3)(b).

9 Building Societies Act 1986 s 69(3)(c).

10 Building Societies Act 1986 s 69(3)(d).

11 The Treasury may by order in a statutory instrument designate as relevant services services of any description specified in the order which are normally provided to building societies, and make such incidental, supplementary or transitional provision as it considers necessary or expedient: Building Societies Act 1986 s 69(5) (amended by SI 2001/2617). Any statutory instrument containing an order made under the Building Societies Act 1986 s 69(5) or s 69(12) (see the text and notes 22-23) is subject to annulment in pursuance of a resolution of either House of Parliament: s 69(16) (amended by SI 2001/2617). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. At the date at which this volume states the law no order has been made under the Building Societies Act 1986 s 69(5).

12 Building Societies Act 1986 s 69(3)(e).

13 'Administrative services' means services necessary or incidental to the conduct of the society's business: Building Societies Act 1986 s 69(17).

14 Building Societies Act 1986 s 69(4), Sch 10 para 10(1).

15 The requisite particulars of the business of a business associate of a society are: (1) except where an election under head (2) below is in force, those specified in the Building Societies Act 1986 Sch 10 Pt I (paras 1-4) (see heads (a)-(d) below); (2) if a society elects to adopt Sch 10 Pt II (paras 5-8) (see heads (A)-(D) below) for its directors and other officers as respects a financial year, those specified in Sch 10 Pt II; and (3) as regards relevant services designated by an order under s 69(5) (see note 11), such particulars as are specified in the order: s 69(7) (amended by the Building Societies Act 1997 Sch 7 para 27(2)).

The requisite particulars required by the Building Societies Act 1986 Sch 10 Pt I are as follows:

- 14 (a) where the business associate provides conveyancing services the requisite particulars required by Sch 10 para 1 are: (i) the number of cases in which it has provided conveyancing services in respect of a loan secured on land and the purchase of the land both to the society and to the borrower; (ii) the number of cases in which it has provided the society (but not the borrower) with conveyancing services in respect of a loan secured on land; (iii) the aggregate amount of the fees paid to it by the society or by or on behalf of the borrower for the provision of conveyancing services falling within heads (i) and (ii) above; (iv) the aggregate of the amounts paid to it by the society by way of commission for its having introduced investment business to the society; (v) the aggregate amount of any fees paid to it by the society in consideration of the provision of conveyancing services in respect of any land held by the society; and (vi) the aggregate amount of any fees paid to it by the society in consideration of the provision of administrative services to the society (Sch 10 para 1 (amended by the Building Societies Act 1997 Sch 7 para 60(1), (2), Sch 9));
- 15 (b) where the business associate provides the services of surveying and valuing property the requisite particulars required by the Building Societies Act 1986 Sch 10 para 2 are: (i) the number of cases in which, in respect of any land which is to secure a loan, it has surveyed the land or provided a valuation of it on behalf of the society or the borrower or both; (ii) the number of cases in which, on behalf of the society (but not the borrower), it has surveyed any land which is to secure a loan or provided the society with a valuation of it; (iii) the aggregate amount of the fees paid to it by the society or by or on behalf of the borrower for the provision of the services falling within heads (i) and (ii) above; (iv) the aggregate of the amounts paid to it by the society by way of commission for its having introduced investment business to the society; (v) the aggregate amount of any fees paid to it by the society in consideration of the provision of surveying or valuing services in respect of any property held by the society; and (vi) the aggregate amount of any fees paid to it by the society in consideration of the provision of administrative services to the society (Sch 10 para 2 (amended by the Building Societies Act 1997 Sch 7 para 60(1), (2), Sch 9));
- 16 (c) where the business associate provides accountancy services the requisite particulars required by the Building Societies Act 1986 Sch 10 para 3 are: (i) the aggregate amount of the fees paid to it by the society for the provision of accountancy services; and (ii) the aggregate amount of any fees paid to it by the society in consideration of the provision of administrative services to the society (Sch 10 para 3 (amended by the Building Societies Act 1997 Sch 7 para 60(1)));
- 17 (d) where the business associate arranges for the provision of relevant insurance the requisite particulars required by the Building Societies Act 1986 Sch 10 para 4 are: (i) the aggregate of the amounts paid to it by the society or by way of commission by insurers in respect of relevant insurance effected by the society or by borrowers in compliance with the terms on which loans secured on land are made by the society; and (ii) the aggregate amount of any fees paid to it by the society in consideration of the provision of administrative services to the society (Sch 10 para 4 (amended by the Building Societies Act 1997 Sch 7 para 60(1), (3))).

The requisite particulars required by the Building Societies Act 1986 Sch 10 Pt II are as follows:

- 18 (A) where the business associate provides conveyancing services the requisite particulars required by Sch 10 para 5 are: (aa) the prescribed band within which falls the estimated number of cases in which it has provided conveyancing services in respect of a loan secured on land and the purchase of the land both to the society and to the borrower; (bb) the prescribed band within which falls the estimated number of cases in which it has provided the society (but not the borrower) with conveyancing services in respect of a loan secured on land; (cc) the prescribed band within which falls the estimated aggregate amount of the fees paid to it by the society or by or on behalf of the borrower for the provision of conveyancing services falling within heads (aa) and (bb) above; (dd) the prescribed band within which falls the estimated aggregate of the amounts paid to it by the society by way of commission for its having introduced investment business to the society; (ee) the prescribed band within which falls the estimated aggregate amount of any fees paid to it by the society in consideration of the provision of conveyancing

services in respect of any land held by the society; and (ff) the prescribed band within which falls the estimated aggregate of any fees paid to it by the society in consideration of the provision of administrative services to the society (Sch 10 para 5 (amended by the Building Societies Act 1997 Sch 7 para 60(1), (2), Sch 9));

- 19 (b) where the business associate provides the services of surveying and valuing property the requisite particulars required by the Building Societies Act 1986 Sch 10 para 6 are: (aa) the prescribed band within which falls the estimated number of cases in which, in respect of any land which is to secure a loan, it has surveyed the land or provided a valuation of it on behalf of the society or the borrower or both; (bb) the prescribed band within which falls the estimated number of cases in which, on behalf of the society (but not the borrower), it has surveyed any land which is to secure a loan or provide the society with a valuation of it; (cc) the prescribed band within which falls the estimated aggregate amount of the fees paid to it by the society or by or on behalf of the borrower for the provision of the services falling within heads (aa) and (bb) above; (dd) the prescribed band within which falls the estimated aggregate of the amounts paid to it by the society by way of commission for its having introduced investment business to the society; (ee) the prescribed band within which falls the estimated aggregate of any fees paid to it by the society in consideration of the provision of surveying or valuing services in respect of any property held by the society; and (ff) the prescribed band within which falls the estimated aggregate amount of any fees paid to it by the society in consideration of the provision of administrative services to the society (Sch 10 para 6 (amended by the Building Societies Act 1997 Sch 7 para 60(1), (2), Sch 9));
- 20 (c) where the business associate provides accountancy services the requisite particulars required by the Building Societies Act 1986 Sch 10 para 7 are: (aa) the prescribed band within which falls the estimated aggregate amount of the fees paid to it by the society for the provision of accountancy services; and (bb) the prescribed band within which falls the estimated aggregate amount of any fees paid to it by the society in consideration of the provision of administrative services to the society (Sch 10 para 7 (amended by the Building Societies Act 1997 Sch 7 para 60(1)));
- 21 (d) where the business associate arranges for the provision of relevant insurance the requisite particulars required by the Building Societies Act 1986 Sch 10 para 8 are: (aa) the prescribed band within which falls the estimated aggregate of the amounts paid to it by the society or by way of commission by insurers in respect of relevant insurance effected by the society or by borrowers in compliance with the terms on which loans secured on land are made by the society; and (bb) the prescribed band within which falls the estimated aggregate amount of any fees paid to it by the society in consideration of the provision of administrative services to the society (Sch 10 para 8 (amended by the Building Societies Act 1997 Sch 7 para 60(1), (3))).

The Treasury may by order prescribe, for the purposes of the Building Societies Act 1986 Pt II series of numbers by reference to limits specified in the order, or series of monetary amounts by reference to limits so specified, and, in any provision of Pt II, 'prescribed band' means, in relation to cases, any series of numbers so prescribed for the purposes of that provision and, in relation to monetary amounts, any series of monetary amounts so prescribed for the purposes of that provision: Sch 10 paras 9(1), 10(1) (Sch 10 para 9(1) amended by SI 2001/2617). This power includes power to prescribe different series of numbers or of monetary amounts for the purposes of different provisions: Building Societies Act 1986 Sch 10 para 9(2). The power to make such an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Sch 10 para 9(3). As to the prescribed bands see the Building Societies (Prescribed Bands for Disclosure) Order 1987, SI 1987/723.

'Financial year' means a financial year of the society with which the business associate is associated: Building Societies Act 1986 Sch 10 para 10(1). 'Relevant insurance' means insurance falling within s 69(3)(d) (see the text to note 10): Sch 10 para 10(1).

An election by a society to adopt Sch 10 Pt II as regards the requisite particulars to be furnished by its directors and other officers must be made in writing to the Financial Services Authority before the beginning of the financial year as respects which it is made and the requisite particulars must be furnished in writing within the period of six weeks beginning with the end of the financial year for which they are required: s 69(8) (amended by the Building Societies Act 1997 Sch 7 para 27(2); and SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

16 Building Societies Act 1986 s 69(6). See the text to notes 17-19.

17 Building Societies Act 1986 s 69(9).

18 The particulars under the Building Societies Act 1986 Sch 10 Pt II: see note 15.

19 Building Societies Act 1986 s 69(10). Such a person is liable on conviction on indictment or on summary conviction to a fine which, on summary conviction, must not exceed the statutory maximum: see s 69(1). As to the statutory maximum see PARA 56 note 24.

20 As to the requirements for principal offices see PARA 1872.

21 Building Societies Act 1986 s 69(11). As to the keeping of records by a society see PARA 1886.

22 'Volume of the business', in relation to any business constituted by the provision of any services referred to in any provision of the Building Societies Act 1986 Sch 10 Pt I or Sch 10 Pt II (see note 15) means: (1) in the case of a paragraph of Sch 10 Pt I, the aggregate of all the fees and commissions which are the subject of the requisite particulars under that paragraph; and (2) in the case of a paragraph of Sch 10 Pt II, the aggregate of the amounts which are specified in orders under Sch 10 para 9 (see note 15) as the upper limits of the prescribed bands within which fall the estimated aggregates of the fees or commissions or other amounts received which are the subject of the requisite particulars under the provisions of that paragraph: Sch 10 para 10(2).

23 Building Societies Act 1986 s 69(12) (amended by SI 2007/860). As regards the £10,000 sum another sum may be substituted for it by order of the Treasury in a statutory instrument: Building Societies Act 1986 s 69(12) (as so amended). See note 11. As to the order made under the Building Societies Act 1986 s 69(12) see the Building Societies Act 1986 (Substitution of Specified Amounts and Modification of the Funding Limit Calculation) Order 2007, SI 2007/860.

24 As to annual general meetings see PARA 1977.

25 Building Societies Act 1986 s 69(13).

26 As to the public file see PARA 1864.

27 Building Societies Act 1986 s 69(14) (amended by SI 2001/2617).

28 le not exceeding £5: see the Building Societies Act 1986 s 69(15) (amended by the Building Societies Act 1997 Sch 7 para 27(3)).

29 Building Societies Act 1986 s 69(15) (as amended: see note 28).

30 See the Building Societies Act 1986 s 16(15A), (15B) (added by SI 2003/404). Where a copy of a statement is required to be sent to a member under the Building Societies Act 1986 s 69(15) (see the text to note 29): (1) it may be sent to him electronically only if it is sent to an electronic address notified by the member for the purpose; but (2) the requirement to send it is also treated as satisfied if the conditions set out in s 16(15B) are satisfied: s 16(15A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

The conditions are satisfied in the case of a statement if: (a) the society and the member have agreed that information that is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the statement in question; (c) the member is notified, in a manner agreed between him and the society, of the publication of the statement on a website, the address of that website, and the place on that website where the statement may be accessed, and how it may be accessed; and (d) a copy of the statement continues to be published on that website throughout the period of 21 days beginning with the day on which the society notifies the member in accordance with head (c) above: s 69(15B) (as so added).

## UPDATE

### 1960 Disclosure of related business

NOTE 7--Definition of 'solicitor' amended to correspond with that in the Legal Services Act s 69(17) (see PARA 1959 NOTE 4): Building Societies Act 1986 s 69(17) (amended by Legal Services Act 2007 Sch 21 para 72).

Management, Meetings and Accounts/A. DIRECTORS AND OFFICERS/(A) In general/1961.  
Connected persons.

### 1961. Connected persons.

For the purposes of Part VII of the Building Societies Act 1986<sup>1</sup> a person is connected with a director of a building society if, but only if, not being himself a director of it, he is<sup>2</sup>:

- 384 (1) that director's spouse or civil partner, child or stepchild<sup>3</sup>; or
- 385 (2) a body corporate with which the director is associated<sup>4</sup>; or
- 386 (3) a person acting in his capacity as trustee of any trust the beneficiaries of which include (a) the director, his spouse or civil partner or any children or stepchildren of his<sup>5</sup>; or (b) a body corporate with which he is associated, or of a trust whose terms confer a power on the trustees that may be exercised for the benefit of the director, his spouse or civil partner, or any children or stepchildren of his, or any such body corporate<sup>6</sup>; or
- 387 (4) a person acting in his capacity as partner of that director or of any person who, by virtue of head (1), head (2) or head (3) above is connected with that director<sup>7</sup>; or
- 388 (5) a Scottish firm in which (a) that director is a partner<sup>8</sup>; (b) a partner is a person who, by virtue of head (1), head (2) or head (3) above, is connected with that director<sup>9</sup>; or (c) a partner is a Scottish firm in which that director is a partner or in which there is a partner who by virtue of head (1), head (2) or head (3) above is connected with that director<sup>10</sup>.

A director is associated with a body corporate if he, his spouse or civil partner, his child or stepchild or a person acting in his capacity as trustee of any trust the beneficiaries of which include the director, his spouse or civil partner, child or stepchild between them either<sup>11</sup>: (i) own at least one-fifth of that body's equity share capital<sup>12</sup>; or (ii) are entitled to exercise or control the exercise of more than one-fifth of the voting power at any general meeting of that body<sup>13</sup>.

1    Ie the Building Societies Act 1986 Pt VII (ss 58-70): see PARA 1944 et seq.

2    Building Societies Act 1986 s 70(1), (2).

3    Building Societies Act 1986 s 70(2)(a) (s 70(2)(a), (c), (4) amended by the Civil Partnership Act 2004 Sch 27 para 123(a), (b)). A reference to the child or stepchild of any person includes an illegitimate child of his but does not include any person who has attained the age of 18: Building Societies Act 1986 s 70(3)(a) (amended by the Building Societies Act 1997 Sch 7 para 28). As to civil partnerships generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

4    Building Societies Act 1986 s 70(2)(b). See the text and notes 11-13. As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

5    Building Societies Act 1986 s 70(2)(c)(i) (as amended: see note 3).

6    Building Societies Act 1986 s 70(2)(c)(ii) (as amended: see note 3). Head (3) in the text does not apply to a person acting in his capacity as trustee under an employees' share scheme, or a pension scheme: s 70(3)(b). As to employees' share schemes see **COMPANIES** vol 14 (2009) PARA 169.

7    Building Societies Act 1986 s 70(2)(d).

8    Building Societies Act 1986 s 70(2)(e)(i).

9    Building Societies Act 1986 s 70(2)(e)(ii).

10   Building Societies Act 1986 s 70(2)(e)(iii).

11 Building Societies Act 1986 s 70(4) (as amended: see note 3).

12 Building Societies Act 1986 s 70(4)(a). 'Equity share capital' means the company's issued share capital excluding any part of that capital which, neither as respects dividends nor as respects capital, carries any right to participate beyond a specific amount in a distribution: Companies Act 1985 s 744 (prospectively repealed) (as to replacement provisions see the Companies Act 2006 s 548); definition applied by the Building Societies Act 1986 s 70(4)(a). See also **COMPANIES** vol 15 (2009) PARA 1148.

13 Building Societies Act 1986 s 70(4)(b).

## **UPDATE**

### **1961 Connected persons**

NOTE 12--Building Societies Act 1986 s 70(4)(a) amended: SI 2009/1941.

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### **1962. Powers and liabilities in general.**

The general powers and duties<sup>1</sup> of the board of directors of building societies are regulated by the same principles as those of the directors of limited companies<sup>2</sup>. Accordingly, they owe a fiduciary duty to the society to act bona fide in what they genuinely believe to be the best interests of the society as a whole<sup>3</sup>. Their duties also include a duty to act for proper purposes<sup>4</sup> and to act with care and skill<sup>5</sup>. As fiduciaries, they are debarred from making any profit from their position or from having a personal interest in any contract or other dealing with the society, except to the extent that they are permitted to do so by the rules<sup>6</sup>.

They are not trustees<sup>7</sup>, but paid confidential agents invested with wide powers to manage the business and affairs of the society<sup>8</sup>. It is not within the competence of a general meeting of the society to interfere with the directors in the exercise of managerial powers entrusted to them by the rules<sup>9</sup>.

If the rules declare that when the directors or managers exercise certain powers the minutes signed by the directors or managers concurring are sufficient authority for such exercise, omission to sign will not invalidate an exercise of the powers otherwise duly authorised<sup>10</sup>. If, however, the directors or managers exceed their powers by doing acts which are neither authorised by the rules<sup>11</sup>, nor for which there is such a potential necessity as to confer an implied power<sup>12</sup>, such acts will not be binding on the society, though the directors or managers may incur personal liability.

They will be personally liable to the society for any loss caused to it by their ultra vires acts<sup>13</sup>, and may be liable to third parties in damages for breach of a warranty of authority<sup>14</sup>.

An indemnity given to the directors or managers by the rules does not extend to acts which are ultra vires and beyond the powers which the society itself could confer upon them<sup>15</sup>.

1 For the special statutory powers and duties see PARAS 1952-1961. For the powers of directors to bind the society see PARAS 2038-2039. The powers and duties of the board of directors are one of the matters that must be covered by the society's rules: see the Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4), Table item 10 and PARA 1883.

2 *Sheffield and South Yorkshire Permanent Building Society v Aizlewood* (1889) 44 ChD 412 at 453 per Stirling J. As to the powers and duties of directors of limited companies, including the general law relating to the fiduciary position and duties of company directors see **COMPANIES**. See in particular the general principle that where the power is entrusted to the board the general meeting cannot interfere: see *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113; and **COMPANIES** vol 14 (2009) PARA 541.

3 For an example in the context of companies see *Re Smith & Fawcett Ltd* [1942] Ch 304, [1942] 1 All ER 542, CA.

4 See (in the context of companies) *Howard Smith Limited v Ampol Petroleum Limited* [1974] AC 821, [1974] 1 All ER 1126, PC; *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11, 21.

5 See (in the context of companies) *Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407, CA. It should be noted that the relatively ill-defined duty of care and skill which the directors owe to the society under the general law is supplemented by the specific requirements which apply to the discharge of their controlled functions under the Financial Services Authority Handbook of Rules and Guidance: see PARA 1943.

6 For examples in the context of companies see *Re George Newman & Company Ltd* [1895] 1 Ch 674, CA; *Aberdeen Railway Co v Blaikie* (1854) 1 Macq 461, 471-72. In practice, the position under the general law will invariably be relaxed by provisions in the rules of a building society authorising the payment of remuneration and, where appropriate, pension benefits to directors (the manner of remunerating directors and the circumstances in which pensions may be awarded to them both being matters that are required to be covered by the society's rules: see the Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4), Table item 9(c) and (d) and PARA 1883). In addition, the rules will normally permit a director to have a personal interest in contracts or other dealings with the society, though it will be necessary to have regard in this connection to the extensive statutory requirements which apply to transactions in which a director has an interest: see PARAS 1953-1960.

7 *Sheffield and South Yorkshire Permanent Building Society v Aizlewood* (1889) 44 ChD 412 at 454, 459 per Stirling J.

8 For examples in the context of companies see *Forest of Dean Coal Mining Co* (1878) 10 ChD 451 at 453; *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 1 All ER 625, [1974] 1 WLR 1133.

9 *Hickmott v Woolwich Equitable Building Society* Reg Rep 1974, 41 at 45. See, too, in the context of companies, *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134, CA; *Scott v Scott* [1943] 1 All ER 582; *Rose v McGivern* [1998] 2 BCLC 593. It may be that the members are debarred from passing a resolution which merely expresses an opinion (rather than embodying a direction) on how the directors should exercise their powers: *NRMA v Parker* (1986) 11 ACLR 1.

10 *Priestley v Hopwood* (1864) 4 New Rep 239.

11 *Chapleo v Brunswick Permanent Building Society* (1881) 6 QBD 696, CA; *Portsea Island Building Society v Barclay* [1895] 2 Ch 298, CA.

12 *Small v Smith* (1884) 10 App Cas 119, HL (where a guarantee of a prior mortgage debt in consideration of the prior mortgagee forbearing to exercise his power of sale was held ultra vires, though the society was not forbidden by its rules to lend on equity of redemption). See also *Cyclists' Touring Club v Hopkinson* [1910] 1 Ch 179 at 188 per Swinfen Eady J (where it was held that the club, a non-trading concern licensed by the Board of Trade, had an implied power to grant a pension to a retiring secretary in respect of long and faithful service, following the principle laid down by Lord Watson in *Small v Smith* above at 138).

13 Eg if they make loans to members on the security of their shares, though not if they merely authorise such loans (*Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485, CA), or if they remit fines imposed on members by the rules (*Re Ilfracombe Permanent Mutual Benefit Building Society* [1901] 1 Ch 102 at 110 per Wright J). See also PARA 1901.

14 *Richardson v Williamson* (1871) LR 6 QB 276; *Chapleo v Brunswick Permanent Building Society* (1881) 6 QBD 696, CA (where a secretary embezzled money which he was authorised by the directors to receive on loan in excess of the borrowing powers of the society). As to circumstances in which directors may be held to be pledging their personal credit see *Re National Permanent Benefit Building Society, ex p Williamson* (1869) 5 Ch App 309 at 312 per Giffard LJ.

15 *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485 at 488, CA, per Lindley LJ. As to the avoidance of exemptions or indemnities from liability and as to the power of the court to relieve officers from liability see PARAS 1970-1971.

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### **1963. Statutory powers and duties.**

The directors of a building society have certain special statutory powers, duties, and liabilities<sup>1</sup>. There are detailed statutory provisions relating to dealings between directors of a society and the society<sup>2</sup>. Where under the Building Societies Act 1986 a contravention by a society of a statutory requirement is made an offence, liability is also frequently attached by the Act to any officer who is in default<sup>3</sup>.

1 These are referred to at the relevant places in this title.

2 See PARAS 1924, 1930, 1952-1961.

3 See PARA 1969.

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## **(B) CHIEF EXECUTIVE**

### **1964. Appointment.**

Every building society must have a chief executive<sup>1</sup>, appointed by the directors of the society<sup>2</sup>, being a person who is employed by the society and who either alone or jointly with one or more other persons is or will be responsible under the immediate authority of the directors for the conduct of the business of the society<sup>3</sup>. The office of chief executive and secretary<sup>4</sup> may be held by the same person<sup>5</sup>. The directors must take all reasonable steps to secure that the person appointed as chief executive is a person who has the requisite knowledge and experience to discharge the functions of his office<sup>6</sup>. The chief executive may be a director of the society<sup>7</sup>. Where a person becomes or ceases to be the chief executive of a society, the society must give notice<sup>8</sup> of this to the Financial Services Authority<sup>9</sup> within one month, stating the person's full name and address and the date on which he became, or ceased to be, chief executive, and the Authority must record the person's name and the date on which he began to hold, or, as the case may be, ceased to hold office, in the public file<sup>10</sup> of the society<sup>11</sup>. If the office of chief executive is vacant or if for any other reason there is no chief executive capable of acting then anything required or authorised to be done by or to the chief executive may be done by or to any assistant or deputy chief executive, or if there is no assistant or deputy capable of acting, by or to any officer<sup>12</sup> of the society authorised generally or specially for that purpose by the directors<sup>13</sup>.

1 Building Societies Act 1986 s 59(1).

2 Building Societies Act 1986 s 59(4). As to the office of director see PARAS 1944-1963.



- 3 Building Societies Act 1986 s 59(1). See the text to note 5.
- 4 As to the office of secretary see PARAS 1966-1967.
- 5 Building Societies Act 1986 s 59(3).
- 6 Building Societies Act 1986 s 59(5).
- 7 As to the meaning of 'executive' see PARA 1955 note 12.
- 8 As to the meaning of 'notice' see PARA 1866 note 8.
- 9 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 10 As to the public file see PARA 1864.
- 11 Building Societies Act 1986 s 59(6) (amended by SI 2001/2617).
- 12 As to the meaning of 'officer' see PARA 1944.
- 13 Building Societies Act 1986 s 59(7).

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## **1965. Duties.**

The chief executive is responsible under the immediate authority of the directors for the conduct of the business of the building society<sup>1</sup>. The following are some of the special powers and duties of, and provisions relating to, the chief executive:

- 389 (1) a copy of any prohibition order made by the Financial Services Authority<sup>2</sup> must be served on the chief executive<sup>3</sup>;
- 390 (2) the summary financial statement must be signed by two directors on behalf of the board of directors and by the chief executive of the society<sup>4</sup>; and
- 391 (3) the balance sheet of a society must be signed by two directors on behalf of the board of directors and by the chief executive of the society<sup>5</sup>.

<sup>1</sup> See the Building Societies Act 1986 s 59(1); and PARA 1964. As to the office of director see PARAS 1944-1963.

<sup>2</sup> As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

<sup>3</sup> See the Building Societies Act 1986 s 36A(8); and PARA 2048.

<sup>4</sup> See the Building Societies Act 1986 s 76(7); and PARA 1996.

<sup>5</sup> See the Building Societies Act 1986 s 80(1); and PARA 1997.

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## (C) SECRETARY

### **1966. Appointment.**

Every building society must have a secretary<sup>1</sup>, appointed by the directors<sup>2</sup>, and the office of secretary and chief executive<sup>3</sup> may be held by the same person<sup>4</sup>. The directors must take all reasonable steps to secure that the person appointed as secretary is a person who has the requisite knowledge and experience to discharge the functions of this office<sup>5</sup>. The secretary may be a director of the society<sup>6</sup>. If the office of secretary is vacant or if for any other reason there is no secretary capable of acting then anything required or authorised to be done by or to the secretary may be done by or to any assistant or deputy secretary, or if there is no assistant or deputy capable of acting, by or to any officer<sup>7</sup> of the society authorised generally or specially for that purpose by the directors<sup>8</sup>.

- 1 Building Societies Act 1986 s 59(2).
- 2 Building Societies Act 1986 s 59(4). As to the office of director see PARAS 1944-1963.
- 3 As to the office of chief executive see PARAS 1964-1965.
- 4 Building Societies Act 1986 s 59(3).
- 5 Building Societies Act 1986 s 59(5).
- 6 See PARA 1955 note 12.
- 7 As to the meaning of 'officer' see PARA 1944.
- 8 Building Societies Act 1986 s 59(7).

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### **1967. Duties and agency of secretary.**

The secretary of a building society has special powers and duties. For example, he must receive from the Financial Services Authority<sup>1</sup> a copy of the memorandum<sup>2</sup> and rules of the successor society on the amalgamation of two or more societies<sup>3</sup>. He may certify a printed document as a true copy of the rules or memorandum of the society as registered, in which case it must be received in evidence and, in the absence of any evidence to the contrary, must be deemed a true copy<sup>4</sup>. Any notice, direction or document required or authorised by or under any provision of the Building Societies Act 1986 or by the rules of a society to be served on a society may be served on him<sup>5</sup>. In the case of a society which alters its purpose or powers or its rules, he must sign the copies of a record of the alteration and make the appropriate statutory declaration, and he must receive from the Authority a copy of the record of such alteration where the alteration has been registered<sup>6</sup>.

Even without having been formally appointed agent of the society, the secretary may become its general agent, so as to bind it, with regard to certain matters arising in the ordinary course of its business<sup>7</sup>. If he employs a private clerk to assist him, he will be responsible to the society for the acts of the clerk, notwithstanding that the society knew and approved of such employment<sup>8</sup>. The secretary may also be held to be the general agent of the directors in doing acts ultra vires the society<sup>9</sup>.

1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 As to the meaning of 'memorandum' see PARA 1873 note 2.

3 See the Building Societies Act 1986 s 93(3)(d); and PARA 1918. As to the amalgamation of societies see PARAS 1918-1919.

4 See the Building Societies Act 1986 s 113(2); and PARA 1887.

5 See the Building Societies Act 1986 s 115(1), (3)(a); and PARA 1885.

6 See the Building Societies Act 1986 s 5, Sch 2 para 4(2), (4); and PARAS 1876, 1881.

7 *Allard v Bourne* (1863) 15 CBNS 468 (repairs to property mortgaged to the society); *Cross v Fisher* [1892] 1 QB 467 at 475, CA, per Lord Halsbury LC (receipt of money on deposit which the secretary embezzled).

8 *Re Mutual Aid Permanent Benefit Building Society, ex p James* (1883) 48 JP 54.

9 *Cross v Fisher* [1892] 1 QB 467, CA. As to the office of director see PARAS 1944-1963.

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## (D) LIABILITIES OF OFFICERS

### 1968. Liability on bills of exchange, etc.

When a bill or note is drawn or accepted by an officer on behalf of a building society, he will be personally responsible unless he uses clear and explicit words to show that this is not the intention<sup>1</sup>; but the giving of a promissory note on which the directors and not the society are liable does not affect the liability of the society for money which has, in fact, been lent to, or deposited with, it<sup>2</sup>.

1 *Price v Taylor* (1860) 5 H & N 540 at 545 per Martin B and Bramwell B; *Allan v Miller* (1870) 22 LT 825 at 827 per Channell B. The mere circumstance of his adding to his name 'secretary', 'director', or other description of his official position, will not relieve him of personal liability (*Bottomley v Fisher* (1862) 1 H & C 211 at 217 per Bramwell B; *Allan v Miller* above), nor will the circumstance that the promise is to pay money as 'value received for the society' (*Allan v Miller*). All these cases were decisions relating to unincorporated societies, but it is conceived that they apply equally to incorporated societies. For the general rule with regard to agents see **AGENCY** vol 1 (2008) PARAS 3, 38, 47, 128. As to bills of exchange generally see PARA 1400 et seq.

2 *Heath v Kidsgrove Permanent Building Society* (1887) 82 LT Jo 449, Stoke County Court. See also *Chapleo v Brunswick Permanent Building Society* (1881) 6 QBD 696, CA, where the society appears to have escaped liability only because its borrowing powers had been exhausted when the loan was made. Both these cases were decisions relating to unincorporated societies, but it is conceived that they apply equally to incorporated societies.

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### **1969. Liability for defaults.**

Where under the Building Societies Act 1986 a contravention by a building society of a statutory requirement is made an offence, liability is also frequently attached by the Act to any officer who is in default. Where an offence under any provision of the Act committed by a society is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any officer<sup>1</sup> of the society, he, as well as the society, is guilty of that offence and liable to be proceeded against and punished in accordance with that provision<sup>2</sup>. In any proceedings for an offence under the Act it is a defence for a person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or any person under his control<sup>3</sup>.

1 As to the meaning of 'officer' see PARA 1944. As to the exemption of officers from liability for default etc see PARA 1970.

2 Building Societies Act 1986 s 112(1). In addition, where an offence under any provision of the Act committed by a body corporate other than a society is proved to have been committed with the consent or connivance, or to be attributable to any neglect on the part of, any officer of the body corporate, he, as well as the body corporate, is guilty of that offence and liable to be proceeded against and punished accordingly: s 112(3). As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

3 Building Societies Act 1986 s 112(4).

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### **1970. Avoidance of exemptions from liability.**

Subject to the exception set out below, any provision contained in the rules of a building society or in any contract with a society or otherwise, for exempting any director<sup>1</sup> or other officer<sup>2</sup> or person employed by the society as auditor<sup>3</sup>, from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the society, is void<sup>4</sup>. A society may, however, purchase and maintain insurance for a person against any such liability, or indemnify a person against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted<sup>5</sup>.

1 As to the office of director see PARAS 1944-1963.

2 As to the meaning of 'officer' see PARA 1944.

3 As to the office of auditor see PARA 1998 et seq.

4 Building Societies Act 1986 s 110(1), (2).

5 Building Societies Act 1986 s 110(3) (amended by the Building Societies Act 1986 (Modifications) (No 2) Order 1991, SI 1991/2738, art 2). Cf the similar provisions of the Companies Act 2006 ss 532, 533 (formerly the Companies Act 1985 s 310): see **COMPANIES** vol 15 (2009) paras 951, 952.

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### **1971. Power of court to give relief from liability.**

If in any proceeding for negligence, default, breach of duty or breach of trust against a director<sup>1</sup> or other officer<sup>2</sup> of a building society or person employed by a society as auditor<sup>3</sup> it appears to the court hearing the case that that officer or person is or may be liable in respect of that negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused from the negligence, default, breach of duty, or breach of trust, the court may relieve him, either wholly or partly, from his liability on such terms as the court may think fit<sup>4</sup>. Where any such officer or person has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply<sup>5</sup> to the court for relief, and the court on any such application has the same power to relieve him as it would have had if it had been a court before which proceedings against that officer or person for negligence, default, breach of duty or breach of trust had been brought<sup>6</sup>.

1 As to the office of director see PARAS 1944-1963.

2 As to the meaning of 'officer' see PARA 1944.

3 As to the office of auditor see PARA 1998 et seq.

4 Companies Act 1985 s 727(1); Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 675(1) (both applied by the Building Societies Act 1986 s 110(4)). Where a case under the Companies Act 1985 s 727(1) is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant ought in pursuance of that provision to be relieved either in whole or in part from the liabilities sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge may think proper: Companies Act 1985 s 727(3); applied by the Building Societies Act 1986 s 110(4). See **COMPANIES** vol 14 (2009) PARA 600. In relation to companies, the court concerned in these proceedings would be the court with jurisdiction to wind up the company: see the Companies Act 1985 s 744(1). No express provision as to the court is made in relation to building societies. The Companies Act 1985 s 727 is repealed by the Companies Act 2006 s 1295, Sch 16 as from 1 October 2008 and replaced by provisions in almost identical terms in s 1157.

5 In relation to companies such application would be made by petition under CPR Pt 49; *Practice Direction--Applications under the Companies Act 1985, Part VII of the Financial Services and Markets Act 2000 and the Insurance Companies Act 1982* PD 49B para 4(1)(i). No express provision is made in this regard by the Building Societies Act 1986 s 110(4). See note 4.

6 Companies Act 1985 s 727(2); applied by the Building Societies Act 1986 s 110(4). See note 4.

### **UPDATE**

## **1971 Power of court to give relief from liability**

NOTES 4-6--Building Societies Act 1986 s 110(4) amended: SI 2009/1941.

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## ***B. THE REGISTER OF MEMBERS***

### **1972. Register of members.**

Every building society must maintain a register of members showing the names and postal addresses of each member and whether each member is a shareholding member<sup>1</sup> or a borrowing member<sup>2</sup> or both<sup>3</sup>. The register must be kept at its principal office<sup>4</sup> or such other place or places as the directors<sup>5</sup> of the society think fit<sup>6</sup>. It is an offence if a society fails to maintain a register, and the society, and any officer<sup>7</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>8</sup>. In the case of joint shareholders and joint borrowers all the names are to be entered in the register but the representative joint holder or representative joint borrower must be indicated as such<sup>9</sup>.

1 As to the meaning of 'shareholding member' see PARA 1894.

2 As to the meaning of 'borrowing member' see PARA 1894.

3 Building Societies Act 1986 s 5(8), Sch 2 para 13(1) (substituted by the Building Societies Act 1997 Sch 7 para 56(10); and amended by SI 2003/404). As to membership see PARA 1888 et seq.

Where a member has notified to the building society an electronic address for the purpose of receiving notices or documents required to be sent by the society under the Building Societies Act 1986, the register must show: (1) the electronic address in addition to the postal address of the member; and (2) the purposes for which the electronic address has been notified: Sch 2 para 13(1A) (added by SI 2003/404). As to the meaning of 'electronic address' see PARA 1883 note 24.

The 'registered address' of a member means the postal address shown in the register of members or, where the member has requested that communications from the society be sent to some other postal address, that other postal address: Building Societies Act 1986 s 119(1), Sch 2 para 13(4) (amended by SI 2003/404).

4 As to the requirements for principal offices see PARA 1872.

5 As to the office of director see PARAS 1944-1963.

6 Building Societies Act 1986 Sch 2 para 13(2).

7 As to the meaning of 'officer' see PARA 1944.

8 Building Societies Act 1986 Sch 2 para 13(3). The fine must not exceed level 4 on the standard scale: Sch 2 para 13(3). As to the standard scale see PARA 27 note 21.

9 Building Societies Act 1986 Sch 2 paras 7(7), 8(7). As to joint shareholders and joint borrowers see PARA 1889.

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### **1973. Right to obtain particulars from register.**

At any time when a building society: (1) has had its permission under Part IV of the Financial Services and Markets Act 2000<sup>1</sup> to accept deposits cancelled<sup>2</sup>; and (2) has not subsequently been granted such permission<sup>3</sup>, a member of the society<sup>4</sup> has the right to obtain from the register of members<sup>5</sup> the names and addresses of members of the society, for the purpose of communicating with them on a subject relating to the affairs of the society<sup>6</sup>. This does not apply unless the member in question: (a) is qualified under the rules of the society to join in a members' requisition for a special meeting<sup>7</sup>, or to join in nominating a person for election as a director<sup>8</sup>; or (b) would be so qualified if any requirements as to length of time a person must have been a shareholding or borrowing member<sup>9</sup> were omitted<sup>10</sup>.

If, at any time not falling within heads (1) and (2) above, a member of a society who is qualified under the rules of the society to join in a members' requisition for a special meeting, or to join in nominating a person for election as a director, makes a written<sup>11</sup> application to the Financial Services Authority<sup>12</sup> for the right to obtain names and addresses from the register, the Authority<sup>13</sup>: (i) if satisfied that the applicant requires that right for the purpose of communicating with members of the society on a subject relating to its affairs, and has not, since making the application, voluntarily ceased to be a member of the society<sup>14</sup>; and (ii) having regard to the interests of the members as a whole and to all the other circumstances<sup>15</sup>, may direct that the applicant has the right to obtain from the register the names and addresses of the members for the purpose of communicating with them on that subject<sup>16</sup>. The Authority may charge a reasonable fee for considering such an application<sup>17</sup>. Any such direction may be given subject to such limitations or conditions as the Authority may think fit<sup>18</sup>. Before giving such a direction, the Authority must give particulars of the application to the society and must afford the society an opportunity of making representations with respect to the application, and if either the society or the applicant so requests, the Authority must give them an opportunity of being heard by it<sup>19</sup>.

A member entitled to obtain the names of members of a society may apply in writing to the society, describing in the application the subject on which he proposes to communicate with other members of the society, and the society must give him all necessary information as to the place or places where the register, or part of it, is kept, and provide reasonable facilities for inspecting it and taking a copy of any names and addresses in the register<sup>20</sup>. A society is not obliged to disclose to a member making an application any particulars contained in the register other than the names and addresses of the members, and the society may construct the register in such a way that it is possible to disclose the names and addresses to inspection without disclosing any other particulars<sup>21</sup>.

In general, information obtained may not be disclosed<sup>22</sup>. Any person who discloses information in contravention of this provision is liable on conviction to a fine<sup>23</sup>.

1    I.e. permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.

2    Building Societies Act 1986 s 5(8), Sch 2 para 15(1)(a) (Sch 2 para 15(1), (2) substituted, and Sch 2 para 15(1A) added, by the Building Societies Act 1997 s 37(1); and the Building Societies Act 1986 Sch 2 para 15(1), (2), (3), (4) amended, and Sch 2 para 15(2A) added, by SI 2001/2617). See also the Financial Services Authority's Handbook of Rules and Guidance, Building Societies Regulatory Guide (BSOG) Ch 1A. As to the Handbook generally see PARA 22.

- 3 Building Societies Act 1986 Sch 2 para 15(1)(b) (as substituted and amended: see note 2).
- 4 As to membership see PARA 1888 et seq.
- 5 It kept under the Building Societies Act 1986 Sch 2 para 13: see PARA 1972.
- 6 Building Societies Act 1986 Sch 2 para 15(1) (as substituted and amended: see note 2).
- 7 As to members' requisitions see PARA 1978.
- 8 Building Societies Act 1986 Sch 2 para 15(1A)(a) (as added: see note 2). For the right of members with regard to the nomination of a candidate for election as a director see PARA 1946.
- 9 As to the meanings of 'shareholding member' and 'borrowing member' see PARA 1894.
- 10 Building Societies Act 1986 Sch 2 para 15(1A)(b) (as added: see note 2).
- 11 As to the meaning of 'written' see PARA 1064 note 2.
- 12 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 13 Building Societies Act 1986 Sch 2 para 15(2) (as substituted and amended: see note 2).
- 14 Building Societies Act 1986 Sch 2 para 15(2)(a) (as substituted and amended: see note 2).
- 15 Building Societies Act 1986 Sch 2 para 15(2)(b) (as substituted and amended: see note 2).
- 16 Building Societies Act 1986 Sch 2 para 15(2) (as substituted and amended: see note 2).
- 17 Building Societies Act 1986 Sch 2 para 15(2A) (as added: see note 2).
- 18 Building Societies Act 1986 Sch 2 para 15(3) (as amended: see note 2).
- 19 Building Societies Act 1986 Sch 2 para 15(4) (as amended: see note 2).
- 20 Building Societies Act 1986 Sch 2 para 15(5).
- 21 Building Societies Act 1986 Sch 2 para 15(6).
- 22 See the Building Societies Act 1986 Sch 2 para 15(7) (Sch 2 para 15(7), (8) added by the Building Societies Act 1997 s 37(2)). No information obtained under the Building Societies Act 1986 Sch 2 para 15(1) (see the text and notes 1-6) or Sch 2 para 15(2) (see the text and notes 11-16) or Sch 2 para 15(7) and relating to a member of the society may be disclosed except: (1) with the consent of that member; or (2) in the case of information obtained under Sch 2 para 15(1) or Sch 2 para 15(2), for purposes connected with the purpose mentioned in that provision: Sch 2 para 15(7) (as so added).
- 23 Building Societies Act 1986 Sch 2 para 15(8) (as added: see note 22). Such a person is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, and on summary conviction to a fine not exceeding the statutory maximum: see Sch 2 para 15(8)(a), (b) (as so added). As to the statutory maximum see PARA 56 note 24.

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## ***C. MEETINGS***

### **(A) POWERS AND RULES OF MEETINGS**

#### **1974. Powers of meetings.**



Certain statutory powers are exercisable by members of building societies<sup>1</sup> in general meeting<sup>2</sup>. At a meeting of the society members may pass a special resolution<sup>3</sup> for a change of name of the society<sup>4</sup>, for alteration of its purpose or powers or its rules<sup>5</sup>, for compensation to be paid to or in respect of any director<sup>6</sup> or other officer<sup>7</sup> for loss of office or diminution of emoluments attributable to an amalgamation or transfer of engagements<sup>8</sup> or transfer of business<sup>9</sup>, to authorise the voluntary winding up of the society<sup>10</sup> or to approve the winding up of the society by the court<sup>11</sup>. In certain circumstances shareholding members may pass a shareholding members' resolution<sup>12</sup>, and borrowing members may pass a borrowing members' resolution<sup>13</sup>.

- 1 As to membership see PARA 1888 et seq. As to the general powers of management see PARA 1962.
- 2 As to the business that may be transacted at the annual general meeting of a society see PARA 1977.
- 3 As to the meaning of 'special resolution' see PARA 1980.
- 4 See the Building Societies Act 1986 Sch 2 para 9(3); and PARA 1869. As to the naming of societies see PARA 1867 et seq.
- 5 See the Building Societies Act 1986 Sch 2 para 4(1); and PARA 1875.
- 6 As to the office of director see PARAS 1944-1963.
- 7 As to the meaning of 'officer' see PARA 1944.
- 8 See the Building Societies Act 1986 s 96(1)(a); and PARA 1924.
- 9 See the Building Societies Act 1986 s 99(2)(a); and PARA 1930.
- 10 See the Building Societies Act 1986 s 88(1); and PARA 2071.
- 11 See the Building Societies Act 1986 s 89(1)(a); and PARA 2072.
- 12 See PARA 1981.
- 13 See PARA 1982.

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### **1975. Provisions as to meetings to be included in rules.**

The rules of a building society must provide for the calling and holding of meetings<sup>1</sup>. In particular they must provide for:

- 392 (1) the right of members to requisition meetings<sup>2</sup>;
- 393 (2) the right of members to move resolutions at meetings<sup>3</sup>;
- 394 (3) the manner in which notice of any resolutions to be moved at meetings is to be given to members<sup>4</sup>;
- 395 (4) the procedure to be observed at meetings<sup>5</sup>;
- 396 (5) the form of notice for the convening of a meeting and the manner of its service<sup>6</sup>; and

397 (6) the voting rights of members, the right to demand a poll and the manner in which a poll is to be taken<sup>7</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4), Table item 13. As to the required content of rules generally see PARA 1883.

2 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(a). As to membership see PARA 1888 et seq.

3 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(b). As to the right to propose and circulate resolutions see PARA 1990.

4 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(c).

5 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(d).

6 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(e).

7 Building Societies Act 1986 Sch 2 para 3(4), Table item 13(f). As to the right to vote see PARA 1984; and as to the right to demand a poll see PARA 1987.

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## (B) GENERAL MEETINGS

### **1976. Types of general meetings.**

Building societies must hold an annual general meeting<sup>1</sup> and may hold other general meetings of members called in the manner provided in their rules<sup>2</sup>, including special meetings called on the requisition of members<sup>3</sup> and special meetings called by the Financial Services Authority<sup>4</sup>.

1 As to annual general meetings see PARA 1977. As to notices of meetings see PARA 1985. As to transmission of notices of meetings to an electronic address and publication of notices on websites see the Building Societies Act 1986 Sch 2 paras 22A, 22B; and PARA 1985.

2 See the Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4), Table item 13; and PARAS 1883, 1975. As to membership see PARA 1888 et seq.

3 See the Building Societies Act 1986 Sch 2 para 3(4), Table item 13(a) (see PARAS 1883, 1975), Sch 2 para 20A (see PARA 1978), Sch 2 para 20B (see PARA 1979); and PARA 1978.

4 See the Building Societies Act 1986 s 56; and PARA 2058. As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

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### **1977. Annual general meeting.**

In the first four months of each financial year<sup>1</sup> every building society must hold a meeting as its annual general meeting in addition to any other meetings held in that year and must specify it as such in the notices calling it<sup>2</sup>. A society need not hold an annual general meeting in the calendar year in which it is incorporated<sup>3</sup>. If default is made in holding an annual general meeting the Financial Services Authority<sup>4</sup> may call it, or direct the calling of it, in that financial year, and may give such ancillary or consequential directions as it thinks expedient<sup>5</sup>. The business which may be dealt with at the annual general meeting includes any resolution whether special or not, notwithstanding anything in the rules of the society<sup>6</sup>. The business of the annual general meeting will also include the taking of a poll to elect the directors of the society<sup>7</sup> or (where they are elected by a postal or electronic ballot) the declaration of the result of the ballot for their election<sup>8</sup>, the appointment of the society's auditors for the period ending with the conclusion of the next annual general meeting<sup>9</sup> and the consideration of the annual accounts for the last financial year<sup>10</sup>.

It is an offence if default is made in holding an annual general meeting in accordance with the statutory requirements or in complying with directions made by the Authority, and the society, and any officer<sup>11</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>12</sup>.

1 As to the meaning of 'financial year' see PARA 1992 note 2.

2 Building Societies Act 1986 s 5(8), Sch 2 para 20(1). As to the meaning of 'notice' see PARA 1866 note 8. As to notice of meetings see PARA 1985. As to transmission of notices of meetings to an electronic address and publication of notices on websites see Sch 2 paras 22A, 22B; and PARA 1985.

3 Building Societies Act 1986 Sch 2 para 20(2). As to the incorporation of societies see PARAS 1865-1866.

4 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

5 Building Societies Act 1986 Sch 2 para 20(3) (Sch 2 para 20(3), (5) amended by SI 2001/2617). The directions may modify or supplement the operation of the rules of the society in relation to the calling, holding and conducting of the meeting; Building Societies Act 1986 Sch 2 para 20(3).

6 Building Societies Act 1986 Sch 2 para 20(4).

7 See the Building Societies Act 1986 s 60(1)(a); and PARA 1945 et seq.

8 See the Building Societies Act 1986 s 60(1)(b), (17); and PARA 1945 et seq.

9 See the Building Societies Act 1986 s 77(1); and PARA 1998.

10 See the Building Societies Act 1986 ss 76(8), s 81(1); and PARAS 1996, 1997. As to the laying of the annual accounts before the annual general meeting see PARA 1998.

11 As to the meaning of 'officer' see PARA 1944.

12 Building Societies Act 1986 Sch 2 para 20(5) (as amended: see note 5). The fine must not exceed level 4 on the standard scale: Sch 2 para 20(5). As to the standard scale see PARA 27 note 21.

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## **1978. Special meeting on members' requisition.**

A members' requisition is a requisition of not less than the requisite number of members of the building society (and that number is 500 or such lesser number as may be specified in the rules of the society)<sup>1</sup>. On a members' requisition, a society must: (1) duly call a special meeting, and specify the meeting as such in the notice calling it<sup>2</sup>; and (2) if so required by the requisition, send to each member entitled to receive notice of the meeting a copy of the statement of not more than 500 words with respect to the matters to be dealt with at the meeting<sup>3</sup>. Provision is made for a society to comply with the requirement to send such a copy by using electronic communications<sup>4</sup>. Where a meeting is so called no business is to be conducted at the meeting other than that stated in the notice calling it or, where applicable, a decision on an ordinary resolution as to whether the money deposited by the requisitionists should be applied to defray the whole or any part of the expenses of holding the meeting<sup>5</sup>.

The requisition must state the objects of the meeting, be signed by the requisitionists and be deposited at the society's principal office<sup>6</sup>, and may consist of several documents in like form each signed by one or more requisitionists and each after the first deposited within three months of the date on which the first was deposited<sup>7</sup>. Where the requisition consists of several documents, the date of its deposit is taken to be the date on which the document signed by the requisitionist making up the requisite number is deposited at the society's principal office<sup>8</sup>.

The rules of a society may require a requisitionist:

- 398 (a) to state his full name and address<sup>9</sup>;
- 399 (b) to fulfil one or other of the following conditions, namely: (i) to have been a shareholding member<sup>10</sup> for a specified period<sup>11</sup> and to hold, or to have held at any time during that period, shares in the society<sup>12</sup> to such value (not greater than the prescribed amount<sup>13</sup>) as is specified in the rules<sup>14</sup>; and (ii) to have been a borrowing member<sup>15</sup> for a specified period and to owe to the society, or to have owed to the society at any time during that period, a mortgage debt<sup>16</sup> of such amount (not greater than the prescribed amount) as is specified in the rules<sup>17</sup>; and
- 400 (c) to identify a share or mortgage account with the society which will evidence the fact that he fulfils one or other of those conditions<sup>18</sup>.

No objection may be made by virtue of such rules to the requisition or, where the requisition consists of several documents, to any of those documents unless it is made within 14 days of the requisition or document being deposited at the society's principal office<sup>19</sup>.

The rules of the society may also require a sum of money, not exceeding £50 per requisitionist, to be deposited with the requisition and, where any money is so deposited, it is to be forfeited to the society or returned to the persons who deposited it, as provided by the rules<sup>20</sup>. The rules must not provide for any deposited money to be forfeited to the society except where a quorum is not present within half an hour after the time appointed for the meeting<sup>21</sup>, or where and to the extent that those eligible to vote at the meeting decide by ordinary resolution that the money should be applied to defray the whole or any part of the expenses of holding the meeting<sup>22</sup>.

If the rules of a society so provide, the requirement to call a special meeting<sup>23</sup> does not require the society: (A) to call a special meeting if the only or main object of the meeting is to move a resolution in substantially the same terms as any resolution which has been defeated at a meeting or on a postal or electronic ballot<sup>24</sup> during the period beginning with the third annual general meeting<sup>25</sup> before the date on which the requisition is deposited at the society's principal office<sup>26</sup>; or (B) to call a special meeting to be held during the period of four months beginning one month after the end of its financial year<sup>27</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 20A(2) (Sch 2 para 20A added by the Building Societies Act 1997 s 25; and the Building Societies Act 1986 Sch 2 para 20A(2) amended by SI 1999/3031). As to membership see PARA 1888 et seq.

The Treasury may by order substitute for the number specified in the Building Societies Act 1986 Sch 2 para 20A(2) or for the sum specified in Sch 2 para 20A(7) (see the text to note 19) such other number or sum as appears to it to be appropriate, and such an order may make such supplementary, transitional and saving provision as appears to the Treasury to be necessary or expedient: Sch 2 para 20A(13) (as so added; and amended by SI 2001/2617). The power to make such an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 Sch 2 para 20A(14) (as so added). In exercise of the power under Sch 2 para 20A(13) the Building Societies (Members' Requisitions) Order 1999, SI 1999/3031, and the Building Societies Act 1986 (Substitution of Specified Amounts and Modification of the Funding Limit Calculation) Order 2007, SI 2007/860, have been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 Building Societies Act 1986 Sch 2 para 20A(1)(a) (as added: see note 1). As to the meaning of 'notice' see PARA 1866 note 8. As to notice of meetings see PARA 1985. As to transmission of notices of meetings to an electronic address and publication of notices on websites see Sch 2 paras 22A, 22B; and PARA 1985.

3 Building Societies Act 1986 Sch 2 para 20A(1)(b) (as added: see note 1). As to members entitled to receive notice of meetings see PARA 1985.

Schedule 2 para 20A(1)(b) does not require the society to send copies of a statement to members entitled to receive notice of a meeting in any case where:

- 22 (1) publicity for the statement would be likely to diminish substantially the confidence in the society of investing members of the public (Sch 2 para 20A(10)(a) (as so added)); or
- 23 (2) the rights conferred by Sch 2 para 20A(1)(b) are being abused to seek needless publicity for defamatory matter or for frivolous or vexatious purposes (Sch 2 para 20A(10)(b) (as so added)),

and Sch 2 para 20A(1)(b) does not confer any rights on members, or impose any duties on a society, in respect of a statement which does not relate directly to the affairs of the society (Sch 2 para 20A(10) (as so added)).

The Financial Services Authority must hear and determine any dispute arising under Sch 2 para 20A(10)(a), whether on the application of the society or of any other person who claims to be aggrieved: Sch 2 para 20A(12) (as so added; and amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq. As to persons aggrieved see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

Where the Building Societies Act 1986 Sch 2 para 20A(1)(b) requires copies of a statement to be sent to members entitled to receive notice of a meeting, the proceedings at the meeting are not invalidated by the accidental omission to send a copy of the statement to a member entitled to receive one, or the non-receipt of such a copy by such a member: Sch 2 para 20A(11) (as so added). See note 4.

4 See the Building Societies Act 1986 Sch 2 para 20A(1A), (1B), (11A) (Sch 2 para 20A as added (see note 1); and Sch 2 para 20A(1A), (1B), (11A) added by SI 2003/404). Where a copy of a statement is required to be sent to a member under the Building Societies Act 1986 Sch 2 para 20A(1)(b) (see the text to note 3): (1) it may be sent to him electronically only if it is sent to an electronic address notified by the member for the purpose; but (2) the requirement to send it is also treated as satisfied if the conditions set out in Sch 2 para 20A(1B) are satisfied: Sch 2 para 20A(1A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

The conditions mentioned in head (2) above are satisfied in the case of a statement if: (a) the society and that member have agreed that information which is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the statement in question; (c) no later than one working day after the statement is first capable of being accessed on a website that person is notified, in a manner agreed between him and the society, of the publication of the statement on a website, the address of that website, the place on that website where the statement may be accessed, and how it may be accessed; and (d) a copy of the statement is published continuously on that website throughout the period beginning (so far as practicable) at the same time as copies of the statement are sent to members in accordance with head (2) in the text, and ending with the conclusion of the meeting: Sch 2 para 20A(1B) (as so added).

Where, in a case in which head (2) above is relied on for compliance with a requirement of Sch 2 para 20A(1)(b) (see head (2) in the text), a statement is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, the failure does not invalidate the proceedings at the meeting: Sch 2 para 20A(11A) (as so added). See note 3.

5 Building Societies Act 1986 Sch 2 para 20A(1) (as added: see note 1). The text refers to a decision under Sch 2 para 20A(8)(b): see the text to note 22. As to the meaning of 'ordinary resolution' see PARA 1983.

6 As to the requirements for principal offices see PARA 1872.

- 7 Building Societies Act 1986 Sch 2 para 20A(3) (as added: see note 1).
- 8 Building Societies Act 1986 Sch 2 para 20A(4) (as added: see note 1).
- 9 Building Societies Act 1986 Sch 2 para 20A(5)(a) (as added: see note 1).
- 10 As to the meaning of 'shareholding member' see PARA 1894.
- 11 'Specified period' means such period (not more than two years) before the date of the requisition as is specified in the rules: Building Societies Act 1986 Sch 2 para 20A(5) (as added: see note 1).
- 12 As to shares in relation to societies see PARA 1905 et seq.
- 13 For the purposes of the Building Societies Act 1986 Sch 2 Pt III (paras 20-36), the 'prescribed amount' is £100 or such other amount as the Treasury by order specifies for the time being: Sch 2 para 36(1) (amended by SI 2001/2617). The power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 Sch 2 para 36(2). Such an order may contain transitional, consequential or supplementary provision: Sch 2 para 36(3). At the date at which this volume states the law no such order had been made.
- 14 Building Societies Act 1986 Sch 2 para 20A(5)(b)(i) (as added: see note 1).
- 15 As to the meaning of 'borrowing member' see PARA 1894.
- 16 As to the meaning of 'mortgage debt' see PARA 1946 note 6.
- 17 Building Societies Act 1986 Sch 2 para 20A(5)(b)(ii) (as added: see note 1).
- 18 Building Societies Act 1986 Sch 2 para 20A(5)(c) (as added: see note 1).
- 19 Building Societies Act 1986 Sch 2 para 20A(6) (as added: see note 1).
- 20 Building Societies Act 1986 Sch 2 para 20A(7) (as added (see note 1); and amended by SI 2007/860). See note 1.
- 21 Building Societies Act 1986 Sch 2 para 20A(8)(a) (as added: see note 1).
- 22 See the Building Societies Act 1986 Sch 2 para 20A(8)(b) (as added: see note 1).
- 23 Ie under the Building Societies Act 1986 Sch 2 para 20A(1): see the text to notes 2-4.
- 24 As to postal and electronic ballots see PARA 1988.
- 25 As to annual general meetings see PARA 1977.
- 26 Building Societies Act 1986 Sch 2 para 20A(9)(a) (as added (see note 1); and amended by SI 2003/404).
- 27 Building Societies Act 1986 Sch 2 para 20A(9)(b) (as added: see note 1). As to the meaning of 'financial year' see PARA 1992 note 2.

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### **1979. Failure to comply with members' requisition.**

Where a members' requisition<sup>1</sup> is deposited at a building society's principal office<sup>2</sup> and the society is not relieved<sup>3</sup> of the obligation to call a special meeting<sup>4</sup>, subject to the proviso below, if the society does not within 28 days from the date of the deposit of the requisition duly call a

meeting to be held within 63 days from that date<sup>5</sup>: (1) the requisitionists, or any proportion of them exceeding one-half, may themselves call a meeting to be held within five months from that date<sup>6</sup>; and (2) no business is to be conducted at a meeting so called other than that stated in the notice<sup>7</sup> calling it or, where applicable, a decision on an ordinary resolution<sup>8</sup> as to whether the money deposited by the requisitionists should be applied to defray the whole or any part of the expenses of holding the meeting<sup>9</sup>. A meeting so called by requisitionists is to be called in the same manner, as nearly as may be, as that in which meetings are to be called by the society<sup>10</sup>. If (a) the society is required<sup>11</sup> to send to each member entitled to receive notice of the meeting a copy of a statement of not more than 500 words with respect to the matters to be dealt with at the meeting<sup>12</sup>; and (b) subject to the proviso below, that requirement is not complied with within 28 days from the date of the deposit of the requisition<sup>13</sup>, the requisitionists, or any proportion of them exceeding one-half, may themselves send a copy of the statement to each such member<sup>14</sup>.

The proviso is that, if the rules of the society do not require the society to call a special meeting to be held during the period of four months beginning one month after the end of its financial year<sup>15</sup>, then any days falling within that period must be disregarded<sup>16</sup>.

Any reasonable expenses incurred by the requisitionists by reason of the failure of the society to call a meeting, or to send a copy of a statement of not more than 500 words with respect to the matters to be dealt with at the meeting<sup>17</sup>, are to be repaid to the requisitionists by the society<sup>18</sup>. Any sum so repaid is recoverable by the society from such of the directors<sup>19</sup> of the society as were responsible for the failure, whether by the retention of fees or other remuneration in respect of services or otherwise<sup>20</sup>.

1 As to the meaning of 'members' requisition' see PARA 1978.

2 As to the requirements for principal offices see PARA 1872.

3 Is relieved by the Building Societies Act 1986 s 5(8), Sch 2 para 20A(9)(a): see PARA 1978.

4 Building Societies Act 1986 Sch 2 para 20B(1) (Sch 2 para 20B added by the Building Societies Act 1997 s 26).

5 Building Societies Act 1986 Sch 2 para 20B(2) (as added: see note 4).

6 Building Societies Act 1986 Sch 2 para 20B(2)(a) (as added: see note 4).

7 As to the meaning of 'notice' see PARA 1866 note 8. As to notice of meetings see PARA 1985. As to transmission of notices of meetings to an electronic address and publication of notices on websites see the Building Societies Act 1986 Sch 2 paras 22A, 22B; and PARA 1985.

8 As to the meaning of 'ordinary resolution' see PARA 1983.

9 See the Building Societies Act 1986 Sch 2 para 20B(2)(b) (as added: see note 4). The text refers to a decision under Sch 2 para 20A(8)(b): see PARA 1978.

10 Building Societies Act 1986 Sch 2 para 20B(3) (as added: see note 4).

11 Is by the Building Societies Act 1986 Sch 2 para 20A(1)(b): see PARA 1978.

12 Building Societies Act 1986 Sch 2 para 20B(4)(a) (as added: see note 4). As to members entitled to receive notice of meetings see PARA 1985.

13 Building Societies Act 1986 Sch 2 para 20B(4)(b) (as added: see note 4).

14 Building Societies Act 1986 Sch 2 para 20B(4) (as added: see note 4). As to membership see PARA 1888 et seq.

15 Is such provision as is mentioned in the Building Societies Act 1986 Sch 2 para 20A(9)(b): see PARA 1978. As to the meaning of 'financial year' see PARA 1992 note 2.

- 16 See the Building Societies Act 1986 Sch 2 para 20B(5) (as added: see note 4).
- 17 See the requirement in the Building Societies Act 1986 Sch 2 para 20B(4): see the text and notes 11-14.
- 18 Building Societies Act 1986 Sch 2 para 20B(6) (as added: see note 4).
- 19 As to the office of director see PARAS 1944-1963.
- 20 Building Societies Act 1986 Sch 2 para 20B(7) (as added: see note 4).

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## (C) TYPES OF RESOLUTIONS

### 1980. Special resolutions.

A resolution of a building society is a special resolution when it has been passed by not less than three-quarters of the number of the members of the society<sup>1</sup> qualified to vote<sup>2</sup> on a special resolution and voting either<sup>3</sup>: (1) in person or by proxy on a poll<sup>4</sup> on the resolution at a meeting of the society of which notice<sup>5</sup> specifying the intention to move the resolution as a special resolution has been duly given<sup>6</sup>; or (2) in a postal or electronic ballot<sup>7</sup> on the resolution of which notice specifying that the resolution will not be effective unless it is passed as a special resolution has been duly given<sup>8</sup>. No resolution of a society may be passed as a special resolution unless it is required to be so passed by or under any provision of the Building Societies Act 1986 or by the rules of the society<sup>9</sup>. In any rules made by a society on or after 1 October 1960 the expression 'special resolution' means, unless the context otherwise requires, a special resolution as defined above<sup>10</sup>.

1 As to membership see PARA 1888 et seq. As to the difficulty in amending a special resolution at a meeting (in a companies context) see *Re Moorgate Mercantile Holdings Ltd* [1980] 1 All ER 40, [1980] 1 WLR 227; and **COMPANIES** vol 14 (2009) PARAS 614, 622.

2 As to the right to vote see PARA 1984.

3 Building Societies Act 1986 s 5(8), s 119(1), Sch 2 para 27(1).

4 As to the appointment of proxies see PARA 1986; and as to the right to demand a poll see PARA 1987.

5 As to the meaning of 'notice' see PARA 1866 note 8. As to notice of meetings see PARA 1985.

6 Building Societies Act 1986 s 119(1), Sch 2 para 27(1)(a).

7 As to postal and electronic ballots see PARA 1988.

8 Building Societies Act 1986 s 119(1), Sch 2 para 27(1)(b) (amended by SI 2003/404).

9 Building Societies Act 1986 Sch 2 para 26. See also PARA 1981.

10 Building Societies Act 1986 s 119(1), Sch 2 para 27(2).



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### **1981. Shareholding members' resolutions.**

In certain circumstances a shareholding members' resolution is required to be passed<sup>1</sup>.

A resolution of a building society is a shareholding members' resolution when it has been passed by not less than three-quarters of the number of the shareholding members of the society<sup>2</sup>: (1) qualified to vote<sup>3</sup> on a shareholding members' resolution<sup>4</sup>; and (2) voting in person or by proxy on a poll<sup>5</sup> on the resolution at a meeting of the society of which notice<sup>6</sup> specifying the intention to move the resolution as a shareholding members' resolution has been duly given<sup>7</sup>. No resolution of a society may be passed as a shareholding members' resolution unless it is required to be so passed by or under any provision of the Building Societies Act 1986 or by the rules of the society<sup>8</sup>.

1 A shareholding members' resolution is required in the case of an amalgamation (see the Building Societies Act 1986 s 93(2)(c); and PARA 1918), a transfer of engagements (see ss 94(2), (5)(a), 96(4); and PARAS 1920, 1925), and a transfer of business to a commercial company (see s 97(4)(c), Sch 2 para 30; and PARAS 1927, 1936).

2 Building Societies Act 1986 s 5(8), s 119(1) (definition added by the Building Societies Act 1997 Sch 7 para 53(1)(o)), Building Societies Act 1986 Sch 2 para 27A (added by the Building Societies Act 1997 Sch 7 para 57(8)). As to the meaning of 'shareholding member' see PARA 1894.

3 As to the members qualified to vote see PARA 1984.

4 Building Societies Act 1986 s 119(1), Sch 2 para 27A(a) (as added: see note 2).

5 As to the appointment of proxies see PARA 1986; and as to the right to demand a poll see PARA 1987.

6 As to the meaning of 'notice' see PARA 1866 note 8. As to notice of meetings see PARA 1985.

7 Building Societies Act 1986 s 119(1), Sch 2 para 27A(b) (as added: see note 2).

8 Building Societies Act 1986 Sch 2 para 26 (amended by the Building Societies Act 1997 Sch 7 para 57(7)). See also PARA 1980.

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### **1982. Borrowing members' resolutions.**

In certain circumstances a borrowing members' resolution is required to be passed<sup>1</sup>.

A resolution of a building society is a borrowing members' resolution when it has been passed by a majority of the borrowing members of the society<sup>2</sup> voting in person or by proxy on a poll<sup>3</sup> on the resolution at a meeting of the society of which notice<sup>4</sup> specifying the intention to move the resolution as a borrowing members' resolution has been duly given<sup>5</sup>. For these purposes<sup>6</sup> an individual who is indebted to a society in respect of a loan fully secured on land<sup>7</sup> is not a

borrowing member of the society at any time if at that time the amount of his mortgage debt<sup>8</sup> is less than the prescribed amount<sup>9</sup>. In the case of a borrowing members' resolution approving a transfer of engagements by a society<sup>10</sup>, only those borrowing members whose mortgages are to be transferred are entitled to vote on the resolution<sup>11</sup>.

No resolution of a society may be passed as a borrowing members' resolution unless it is required to be so passed by or under any provision of the Building Societies Act 1986 or by the rules of the society<sup>12</sup>.

In any rules made by a society after 1 January 1987 the expression 'borrowing members' resolution' means, unless the context otherwise requires, a borrowing members' resolution as defined above<sup>13</sup>.

1 A borrowing members' resolution is required in the case of an amalgamation (see the Building Societies Act 1986 s 93(2)(c); and PARA 1918), a transfer of engagements (see ss 94(2), (5)(a), 96(4); and PARAS 1920, 1925), and a transfer of business to a commercial company (see s 97(4)(c), Sch 2 para 30; and PARAS 1927, 1936).

2 As to the meaning of 'borrowing member' see PARA 1894.

3 As to the appointment of proxies see PARA 1986; and as to the right to demand a poll see PARA 1987.

4 As to the meaning of 'notice' see PARA 1866 note 8. As to notice of meetings see PARA 1985.

5 Building Societies Act 1986 s 5(8), s 119(1), Sch 2 para 29(1) (added by the Building Societies Act 1997 Sch 7 para 57(9)).

6 See for the purposes of the Building Societies Act 1986 Sch 2 Pt III (paras 20-36), relating to meetings, resolutions and postal ballots.

7 As to loans fully secured on land see PARA 2007.

8 As to the meaning of 'mortgage debt' see PARA 1946 note 6.

9 Building Societies Act 1986 Sch 2 para 29(2) (added by the Building Societies Act 1997 s 2(4)). As to the prescribed amount see PARA 1978 note 12.

10 As to the transfer of engagements see the Building Societies Act 1986 s 94; and PARA 1920.

11 Building Societies Act 1986 Sch 2 para 29(3).

12 Building Societies Act 1986 Sch 2 para 28.

13 Building Societies Act 1986 Sch 2 para 29(4); Building Societies Act 1986 (Commencement No 1) Order 1986, SI 1986/1560, art 3, Sch 2.

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### **1983. Ordinary resolutions.**

'Ordinary resolution' means a resolution which will be effective without being passed as a special resolution<sup>1</sup>, shareholding members' resolution<sup>2</sup> or borrowing members' resolution<sup>3</sup>.

1 As to the meaning of 'special resolution' see PARA 1980.

2 As to the meaning of 'shareholding members' resolution' see PARA 1981.

3 Building Societies Act 1986 s 119(1) (definition added by the Building Societies Act 1997 Sch 7 para 53(1)(l)). As to the meaning of 'borrowing members' resolution' see PARA 1982.

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## (D) RIGHT TO VOTE, NOTICES, PROXIES, POLLS, ETC

### 1984. Right to vote.

A member of a building society<sup>1</sup> is entitled to vote on<sup>2</sup>:

- 401 (1) an ordinary resolution<sup>3</sup> or a special resolution<sup>4</sup> if he was, at the end of the last financial year<sup>5</sup> before the voting date<sup>6</sup>, and is, on the voting date, a shareholding or borrowing member<sup>7</sup> of the society<sup>8</sup>;
- 402 (2) a shareholding members' resolution<sup>9</sup> if he was, at the end of that year, and is, on the voting date, a shareholding member of the society<sup>10</sup>; and
- 403 (3) a borrowing members' resolution<sup>11</sup> if he was, at the end of that year, and is, on the voting date, a borrowing member of the society<sup>12</sup>.

Any provision in the rules of a society is void to the extent that it would have the effect of restricting these rights conferred on members to vote, subject to the exceptions below<sup>13</sup>.

If the rules of the society so provide, a shareholding member is not entitled to vote on an ordinary resolution or a special resolution as such a member, or to vote on a shareholding members' resolution if<sup>14</sup>: (a) he did not have a qualifying shareholding at the qualifying shareholding date<sup>15</sup>; or (b) he ceased to hold shares<sup>16</sup> at some time between that date and the voting date<sup>17</sup>. A member has a 'qualifying shareholding' at any time if at that time he holds shares in the society to a value not less than the prescribed amount<sup>18</sup> or such lesser amount as may be specified in the rules<sup>19</sup>. Where a society's rules make such provision as is mentioned in head (a) above, a shareholding member is taken to have had a qualifying shareholding at the qualifying shareholding date if he had such a holding<sup>20</sup>: (i) at the end of the last financial year before the voting date, except where head (ii) below applies<sup>21</sup>; or (ii) in a case where the voting date falls during that part of a financial year which follows the conclusion of the annual general meeting<sup>22</sup> commenced in that year, at the beginning of the period of 56 days immediately preceding the voting date for members voting in person at a meeting or, as the case may be, on a postal or electronic ballot<sup>23</sup>.

1 As to membership see PARA 1888 et seq.

2 Building Societies Act 1986 s 5(8), Sch 2 para 23(1) (substituted by the Building Societies Act 1997 Sch 7 para 57(3)). This is subject to the following exceptions: (1) minors may not vote (see the Building Societies Act 1986 Sch 2 para 5(3)(b); and PARA 1891); (2) only the representative joint holder or representative joint borrower may vote (see Sch 2 paras 7(4), 8(4); and PARA 1889); and (3) in the case of heads (1) and (2) in the text, a shareholding member may not vote to the extent to which the rules of a society restrict the right to vote in accordance with Sch 2 para 23(3) (see notes 14-17).

3 As to the meaning of 'ordinary resolution' see PARA 1983.

- 4 As to the meaning of 'special resolution' see PARA 1980.
- 5 As to the meaning of 'financial year' see PARA 1992 note 2.
- 6 As to the meaning of 'voting date' see PARA 1936 note 16.
- 7 As to the meanings of 'shareholding member' and 'borrowing member' see PARA 1894.
- 8 Building Societies Act 1986 Sch 2 para 23(1)(a) (as substituted: see note 2).
- 9 As to the meaning of 'shareholding members' resolution' see PARA 1981.
- 10 Building Societies Act 1986 Sch 2 para 23(1)(b) (as substituted: see note 2).
- 11 As to the meaning of 'borrowing members' resolution' see PARA 1982.
- 12 Building Societies Act 1986 Sch 2 para 23(1)(c) (as substituted: see note 2).
- 13 Building Societies Act 1986 Sch 2 para 23(2).
- 14 Building Societies Act 1986 Sch 2 para 23(3) (Sch 2 para 23(3), (4) substituted by the Building Societies Act 1997 Sch 7 para 57(4)).
- 15 Building Societies Act 1986 Sch 2 para 23(3)(a) (as substituted: see note 14).
- 16 As to shares in relation to societies see PARA 1905 et seq.
- 17 Building Societies Act 1986 Sch 2 para 23(3)(b) (as substituted: see note 14).
- 18 As to the prescribed amount see PARA 1978 note 13.
- 19 Building Societies Act 1986 Sch 2 para 23(5).
- 20 Building Societies Act 1986 Sch 2 para 23(4) (as substituted: see note 14).
- 21 Building Societies Act 1986 Sch 2 para 23(4)(a) (as substituted: see note 14).
- 22 As to annual general meetings see PARA 1977.
- 23 Building Societies Act 1986 Sch 2 para 23(4)(b) (as substituted (see note 14); and amended by SI 2003/404). As to postal and electronic ballots see PARA 1988.

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### **1985. Notice of meetings.**

Any provision in the rules of a building society is void to the extent that it provides for the calling of a meeting of the society<sup>1</sup> (other than an adjourned meeting) by less than 21 days' notice<sup>2</sup> expiring with the date of the meeting or, if earlier, the date specified by the society, under its rules, as the final date for the receipt of appointments of proxies to vote at the meeting<sup>3</sup>. A meeting of a society may be called by 21 days' notice, unless the rules provide for longer notice to be given<sup>4</sup>, and where notice is given in accordance with this provision, the notice is taken for the purposes of the Building Societies Act 1986 or any other enactment to have been duly given according to the rules of the society<sup>5</sup>.

Notice of a meeting must be given to every member of the society<sup>6</sup> who would be eligible to vote at the meeting if the meeting were held on the date of the notice<sup>7</sup>. Notice of the meeting must also be given to every person<sup>8</sup>: (1) who becomes a shareholding or borrowing member<sup>9</sup> of the society after the date of the notice and before the specified date<sup>10</sup>; or (2) who, being such a member at the date of the notice, attains the age of 18 after that date and on or before the date of the meeting<sup>11</sup>, and who, in either case, would be eligible to vote at the meeting if he remained such a member until the date of the meeting<sup>12</sup>. Provision is made for the transmission of notices of meetings to an electronic address<sup>13</sup> and for the publication of notices on websites<sup>14</sup>.

In relation to any notice, directions or other document required or authorised by or under any provision of the Building Societies Act 1986 or by the rules of a society to be served on any person other than the Financial Services Authority<sup>15</sup> but subject, in the case of notices or other documents to be given or sent to members of a society, to any provision of its rules<sup>16</sup>, any such documents may be served on the person by delivering it to him<sup>17</sup>, by leaving it at his proper address or by sending it by post to him at that address<sup>18</sup>.

A society is not obliged by anything in the Building Societies Act 1986 or its rules to send a notice or other document to a member in whose case the society has reason to believe that communications sent to him at his registered address<sup>19</sup> are unlikely to be received by him<sup>20</sup>. Where the requirement to serve a notice or other document relates to notice of a meeting or postal or electronic ballot<sup>21</sup>, the society must instead advertise the meeting or ballot by displaying a notice in a prominent position in every branch office, or by advertisement in one or more newspapers circulating in the areas in which the members of the society reside, as the rules of the society provide<sup>22</sup>. The notice must be given not later than 21 days before the date of the proposed meeting or, as the case may be, the final date for the receipt of completed ballot papers or for the registration of votes in an electronic ballot<sup>23</sup>, and must state where members may obtain copies of the resolutions and any statements with respect to the matter referred to in a resolution, forms relating to voting by proxy and, in the case of a postal ballot, the ballot papers, or, in the case of an electronic ballot, how members may access electronic voting facilities<sup>24</sup>.

Accidental omission to give notice of a meeting to, or non-receipt of notice of a meeting by, any person entitled to receive notice of the meeting does not invalidate the proceedings at that meeting<sup>25</sup>.

1 As to meetings generally see PARA 1974 et seq.

2 As to the meaning of 'notice' see PARA 1866 note 8.

3 Building Societies Act 1986 s 5(8), Sch 2 para 21(1) (amended by SI 2003/404). As to the appointment of proxies see PARA 1986. As to the right to vote see PARA 1984.

4 Building Societies Act 1986 Sch 2 para 21(2).

5 Building Societies Act 1986 Sch 2 para 21(3).

6 As to membership see PARA 1888 et seq.

7 Building Societies Act 1986 Sch 2 para 22(1) (which is expressed to be subject to Sch 2 Pt III (paras 20-36)).

8 Ie subject to the Building Societies Act 1986 Sch 2 Pt III.

9 As to the meanings of 'shareholding member' and 'borrowing member' see para 1894.

10 Building Societies Act 1986 Sch 2 para 22(2)(a) (Sch 2 para 22(2) substituted, and Sch 2 para 22(2A) added, by the Building Societies Act 1997 Sch 7 para 57(2)). 'Specified date' means the date specified by the society as the final date for the receipt of appointments of proxies to vote at the meeting; Building Societies Act 1986 Sch 2 para 22(2A) (as so added; and amended by SI 2003/404).

11 Building Societies Act 1986 Sch 2 para 22(2)(b) (as substituted: see note 10).

12 Building Societies Act 1986 Sch 2 para 22(2) (as substituted: see note 10).

13 See the Building Societies Act 1986 Sch 2 para 22A (Sch 2 paras 22A, 22B added by SI 2003/404). Where a notice of a meeting of a society is required to be sent to a person under any provision of the Building Societies Act 1986, the notice may be sent to him electronically only if it is sent to an electronic address notified by him to the society for the purpose: Sch 2 para 22A(1) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24. In a case in which Sch 2 para 22A is relied on for compliance with a requirement to send a notice, a notice given in accordance with the provision is to be treated as given to a person on the day that the notice is transmitted: Sch 2 para 22A(2) (as so added).

14 See the Building Societies Act 1986 Sch 2 para 22B (as added: see note 13). A requirement under any provision of the Building Societies Act 1986 to send a notice of a meeting of the society to a person is also treated as satisfied if the conditions set out in Sch 2 para 22B(2) are satisfied: Sch 2 para 22B(1) (as so added).

Those conditions are satisfied in the case of a notice of a meeting of a society if: (1) the society and the person have agreed that notices which are required to be sent to him may instead be accessed by him on a website; (2) the agreement applies to the notice in question; (3) that person is notified, in a manner agreed between him and the society for that purpose, of the publication of the notice on a website, the address of that website, and the place on that website where the notice may be accessed, and how it may be accessed; and (4) the notice is published continuously on that website throughout the period beginning with the giving of that notification and ending with the conclusion of the meeting: Sch 2 para 22B(2) (as so added). A notification given for the purposes of head (3) above must: (a) state that it concerns a notice of a meeting of the society served in accordance with the Building Societies Act 1986; (b) specify the place, date and time of the meeting; and (c) state whether the meeting is to be an annual or special general meeting: Sch 2 para 22B(3) (as so added). In a case in which Sch 2 para 22B is relied on for compliance with a requirement to send a notice, a notice given in accordance with Sch 2 para 22B is to be treated as given to a person on the day that person is notified in compliance with head (3) above and heads (a)-(c) above: Sch 2 para 22B(4) (as so added).

Where, in a case in which Sch 2 para 22B is relied on for compliance with a requirement to send a notice of a meeting, a notice is published for a part, but not all, of the period mentioned in head (4) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, the failure does not invalidate the proceedings of the meeting: Sch 2 para 22B(5) (as so added).

15 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

16 Building Societies Act 1986 s 115(1) (amended by SI 2001/2617).

17 The reference to delivering a document to a person includes a reference to sending it electronically to an electronic address which that person has notified for the purpose in accordance with express provision made by the Building Societies Act 1986: see s 115(2A); and PARA 1885. See notes 13-14.

18 Building Societies Act 1986 s 115(2). As to the meaning of 'proper address' see s 115(4); and PARA 1885. As to the persons on whom any such documents may be served see s 115(3); and PARA 1885.

19 As to the meaning of 'registered address' see PARA 1972 note 3.

20 Building Societies Act 1986 s 5(9), Sch 2 para 14(1).

21 As to postal and electronic ballots see PARA 1988.

22 Building Societies Act 1986 Sch 2 paras 14(2), 35(1), (2) (Sch 2 para 35(1) amended by SI 2003/404).

23 Building Societies Act 1986 Sch 2 para 35(3) (amended by SI 2003/404).

24 Building Societies Act 1986 Sch 2 para 35(4) (amended by SI 2003/404).

25 Building Societies Act 1986 Sch 2 para 22(3). See *Royal Mutual Benefit Building Society v Sharman* [1963] 2 All ER 242, [1963] 1 WLR 581. As to resolutions generally see PARA 1980 et seq.

Management, Meetings and Accounts/C. MEETINGS/(D) Right to Vote, Notices, Proxies, Polls, etc/1986. Proxies.

### **1986. Proxies.**

A member of a building society<sup>1</sup> who is entitled to attend and vote at a meeting of the society<sup>2</sup> may appoint another person, whether a member of the society or not, as his proxy, to attend and to vote at the meeting instead of him, and may direct the proxy how to vote at the meeting<sup>3</sup>. A form for the appointment of a proxy may only be sent electronically to a person if it is sent to an electronic address<sup>4</sup> notified by that person to the society for the purpose<sup>5</sup>. The appointment of a proxy may be contained in an electronic communication<sup>6</sup> sent by a member to an electronic address notified by or on behalf of the society for the purpose<sup>7</sup>.

A proxy is only entitled to vote on a poll<sup>8</sup> (unless the rules of the society otherwise provide)<sup>9</sup>. Where the society, under its rules, specifies a final date for the receipt of appointments of proxies to vote at a meeting, a person appointed a proxy by a member who at that date is entitled to attend and vote at the meeting may act as his proxy at the meeting whether or not the member ceases to be so entitled after that date<sup>10</sup>.

Every notice calling a meeting<sup>11</sup> of a society must include, with reasonable prominence, a statement<sup>12</sup>:

- 404 (1) that a member entitled to attend and vote may appoint a proxy (or, where it is allowed, one or more proxies) to attend and vote at the meeting instead of him<sup>13</sup>;
- 405 (2) that the proxy need not be a member of the society<sup>14</sup>; and
- 406 (3) that the member may direct the proxy how to vote at the meeting<sup>15</sup>.

It is an offence if default is made in complying with this provision, and the society, and any officer<sup>16</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>17</sup>.

Every form for the appointment of a proxy sent by a society to persons entitled to notice of a meeting of the society<sup>18</sup> must contain provision enabling that person to direct the proxy how to vote at the meeting<sup>19</sup>. It is an offence if default is made in complying with this provision, and the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine<sup>20</sup>.

Any provision in the rules of a society is void in so far as it would have the effect of requiring the appointment of a proxy, or any document necessary to show the validity of, or otherwise relating to, the appointment of a proxy, to be received by the society or any other person more than seven days before a meeting or adjourned meeting in order that the appointment may be effective at the meeting or adjourned meeting<sup>21</sup>.

The instrument appointing a proxy must contain certain declarations by the member<sup>22</sup>.

1 As to membership see PARA 1888 et seq.

2 As to the right to vote see PARA 1984. As to meetings generally see PARA 1974 et seq.

3 Building Societies Act 1986 s 5(8), Sch 2 para 24(1).

4 As to the meaning of 'electronic address' see PARA 1883 note 24.

5 Building Societies Act 1986 Sch 2 para 24(1A) (Sch 2 para 24(1A), (1B) added by SI 2003/404).

6 As to the meaning of 'electronic communication' see PARA 1868 note 4.

7 Building Societies Act 1986 Sch 2 para 24(1B) (as added: see note 5).

- 8 See PARA 1987.
- 9 Building Societies Act 1986 Sch 2 para 24(3).
- 10 Building Societies Act 1986 Sch 2 para 24(2) (amended by SI 2003/404).
- 11 As to the meaning of 'notice' see PARA 1866 note 8. As to notice of meetings see PARA 1985.
- 12 Building Societies Act 1986 Sch 2 para 24(4).
- 13 Building Societies Act 1986 Sch 2 para 24(4)(a).
- 14 Building Societies Act 1986 Sch 2 para 24(4)(b).
- 15 Building Societies Act 1986 Sch 2 para 24(4)(c).
- 16 As to the meaning of 'officer' see PARA 1944.
- 17 Building Societies Act 1986 Sch 2 para 24(5). The fine must not exceed level 4 on the standard scale: Sch 2 para 24(5). As to the standard scale see PARA 27 note 21.
- 18 As to persons entitled to receive notice of meetings see PARA 1985.
- 19 Building Societies Act 1986 Sch 2 para 24(4A) (added by the Building Societies Act 1997 Sch 7 para 57(5)).
- 20 Building Societies Act 1986 Sch 2 para 24(5) (amended by the Building Societies Act 1997 Sch 7 para 57(6)). The fine must not exceed level 4 on the standard scale: Building Societies Act 1986 Sch 2 para 24(5).
- 21 Building Societies Act 1986 Sch 2 para 24(6) (amended by SI 2003/404).
- 22 See the Building Societies Act 1986 Sch 2 para 34; and PARA 1989.

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### **1987. Right to demand a poll.**

The rules of a building society must provide for the right to demand a poll and the manner in which a poll is to be taken<sup>1</sup>. The rules of a society are void in so far as they would have the effect of either<sup>2</sup>: (1) excluding the right to demand a poll at a meeting of the society on any question other than the election of a chairman of the meeting or the adjournment of the meeting<sup>3</sup>; or (2) making ineffective a demand for a poll on any such question which is made by not less than ten members having the right to vote at the meeting<sup>4</sup>. Voting must be on a poll in the case of a special resolution<sup>5</sup>, a shareholding members' resolution<sup>6</sup>, a borrowing members' resolution<sup>7</sup> or an election of directors<sup>8</sup>. Any appointment of a proxy<sup>9</sup> to vote at a meeting of a society is to be taken to confer authority to demand or join in demanding a poll and for the purposes of counting the members joining in the demand for a poll a demand by a person as a proxy of a member is to be treated as the same as a demand by the member<sup>10</sup>.

A member of a society purporting to exercise his right to vote on a poll at a meeting of the society must, in the voting paper, make certain declarations as to his qualification to vote<sup>11</sup>.

- 1 See the Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4), Table item 13(f); and PARAS 1883, 1975.
- 2 Building Societies Act 1986 Sch 2 para 25(1).



- 3 Building Societies Act 1986 Sch 2 para 25(1)(a). As to meetings generally see PARA 1974 et seq.
- 4 Building Societies Act 1986 Sch 2 para 25(1)(b). As to membership see PARA 1888 et seq. As to the right to vote see PARA 1984.
- 5 See the Building Societies Act 1986 Sch 2 para 27(1)(a); and PARA 1980. This is unless a postal or electronic ballot is taking place: see Sch 2 para 27(1)(b); and PARA 1980. As to postal and electronic ballots see PARA 1988.
- 6 See the Building Societies Act 1986 Sch 2 para 27A; and PARA 1981.
- 7 See the Building Societies Act 1986 Sch 2 para 29(1); and PARA 1982.
- 8 See the Building Societies Act 1986 s 60(1)(a); and PARA 1945.
- 9 As to the appointment of proxies see PARA 1986.
- 10 Building Societies Act 1986 Sch 2 para 25(2) (amended by SI 2003/404).
- 11 See the Building Societies Act 1986 Sch 2 para 34; and PARA 1989.

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### **1988. Postal and electronic ballots.**

The rules of a building society may provide for the voting<sup>1</sup> in an election of directors<sup>2</sup> or on any resolution of the society (other than a shareholding members' resolution<sup>3</sup> or a borrowing members' resolution<sup>4</sup>) to be conducted in all or any particular circumstances by postal ballot<sup>5</sup>. Such rules may also make provision in relation to the use of electronic communications<sup>6</sup> in the conduct of a postal ballot<sup>7</sup>.

Where, under a society's rules, a postal ballot is to take place, the following provisions must be complied with<sup>8</sup>. Notice<sup>9</sup> of the postal ballot must be given not less than 21 nor more than 56 days before the date which the society specifies as the final date for the receipt of completed ballot papers (the 'voting day')<sup>10</sup>. Notice of a postal ballot must be given to every member of the society<sup>11</sup> who would be entitled to vote in the election or on the resolution if the voting date for the election or the resolution fell on the date of the notice<sup>12</sup>. Notice of the postal ballot must also be given to every person<sup>13</sup>: (1) who becomes a shareholding or borrowing member<sup>14</sup> of the society after the date of the notice<sup>15</sup> and before the voting day<sup>16</sup>; or (2) who, being such a member at the date of that notice, attains the age of 18 after that date and on or before the voting day<sup>17</sup>, and who, in either case, would be eligible to vote in the election or on the resolution if he remained such a member until that day<sup>18</sup>. Provision is made for such notice of a postal ballot to be sent electronically<sup>19</sup>.

Notice of a postal ballot must contain such other notices relating to the election or resolution ('related notices'), and be accompanied by such other documents ('accompanying documents'), as would be required to be given or sent to a member in connection with notice of a meeting<sup>20</sup>, had it been intended to hold the election or vote on the resolution at a meeting instead of by postal ballot, with the exception, however, of any notice relating to voting by proxy at a meeting<sup>21</sup>. Provision is made for the related notices or accompanying documents to be sent electronically<sup>22</sup>.

The accidental omission to give notice of a postal ballot or to send any documents required to accompany the notice to any person entitled to receive it, or non-receipt of the notice or document, does not invalidate the postal ballot<sup>23</sup>.

The postal ballot voting paper must contain certain declarations by the member<sup>24</sup>.

A postal ballot in which electronic communications are used<sup>25</sup> is to be distinguished from an electronic ballot, where the ballot, if and to the extent that the voting is not electronic, is conducted in the same way as a postal ballot<sup>26</sup>.

Where the rules of a building society provide for a postal ballot to be conducted in any circumstances in the case of an election or resolution and those rules do not expressly prohibit the conduct of an electronic ballot in those circumstances, the ballot in the case of that election or resolution may, in those circumstances, be an electronic ballot instead of a postal ballot<sup>27</sup>. A ballot in the case of an election or resolution is an electronic ballot if it is conducted: (a) in accordance with provisions relating to such ballots<sup>28</sup>; and (b) in so far as it is not conducted with those provisions, as if it were a postal ballot<sup>29</sup>. However, voting in the case of an election or resolution may not be conducted by an electronic ballot in which all the voting is electronic voting in accordance with the provisions defining electronic voting<sup>30</sup> unless the rules of the society expressly permit it<sup>31</sup>.

The rules of a building society may provide for voting in the case of an election of directors or a resolution of the society, other than a shareholding members' resolution or a borrowing members' resolution, to be conducted by an electronic ballot in which all the voting is electronic voting in accordance with the provisions defining electronic voting<sup>32</sup>.

Where voting may be conducted by electronic ballot<sup>33</sup> the rules of the society may contain provision supplementing rules relating to postal ballots in so far as it is necessary to provide for the conduct of electronic voting in accordance with the provisions defining electronic voting<sup>34</sup>. Where voting may be conducted by electronic ballot<sup>35</sup> the rules of the society may make provision as to the consequences of any irregularities occurring in the course of a ballot, including (but not restricted to) provision as to the validity of multiple votes cast by a member in the same election or on the same resolution<sup>36</sup>.

In the case of an electronic ballot, the society is not required to send notice of the ballot to any person if: (i) that person has agreed<sup>37</sup> that notices of electronic ballots and a voting facility may be accessed by him on a website<sup>38</sup>; and (ii) the society notifies that person in the appropriate way<sup>39</sup>.

The provisions on notices of a postal ballot<sup>40</sup> apply with appropriate modifications in relation to notices of an electronic ballot<sup>41</sup>.

1 As to the right to vote see PARA 1984.

2 As to the election of directors see PARAS 1945-1949.

3 As to the meaning of 'shareholding members' resolution' see PARA 1981.

4 As to the meaning of 'borrowing members' resolution' see PARA 1982.

5 Building Societies Act 1986 s 5(8), Sch 2 para 33(1) (amended by the Building Societies Act 1997 Sch 7 para 57(14); and SI 2003/404). 'Ballot' means an electronic ballot or a postal ballot, as the case may be; 'electronic ballot', in relation to an election or resolution of a building society, means the electronic ballot taking place, in accordance with the Building Societies Act 1986 Sch 2 para 33A (see the text to notes 27-41), in the case of the election or resolution; and 'postal ballot', in relation to an election or resolution of a building society, means any postal ballot taking place by virtue of any rules of the society made in accordance with Sch 2 para 33 (see the text to notes 6-23), in the case of the election or resolution: s 119(1) (definitions added by SI 2003/404). As to resolutions generally see PARA 1980 et seq.

6 As to the meaning of 'electronic communication' see PARA 1868 note 4.

- 7 Building Societies Act 1986 Sch 2 para 33(1A) (added by SI 2003/404).
- 8 Building Societies Act 1986 Sch 2 para 33(2). As to the relevant provisions see the text to notes 9-24.
- 9 As to the meaning of 'notice' see PARA 1866 note 8.
- 10 Building Societies Act 1986 Sch 2 para 33(3).
- 11 As to membership see PARA 1888 et seq.
- 12 Building Societies Act 1986 Sch 2 para 33(4) (which is expressed to be subject to Sch 2 Pt III (paras 20-36)). For an exemption from this requirement see PARA 1985.
- 13 Building Societies Act 1986 Sch 2 para 33(5) (substituted by the Building Societies Act 1997 Sch 7 para 57(15)). The Building Societies Act 1986 Sch 2 para 33(5) is expressed to be subject to Sch 2 Pt III.
- 14 As to the meanings of 'shareholding member' and 'borrowing member' see PARA 1894.
- 15 Ie under the Building Societies Act 1986 Sch 2 para 33(4): see the text to notes 11-12.
- 16 Building Societies Act 1986 Sch 2 para 33(5)(a) (as substituted: see note 13).
- 17 Building Societies Act 1986 Sch 2 para 33(5)(b) (as substituted: see note 13).
- 18 Building Societies Act 1986 Sch 2 para 33(5) (as substituted: see note 13).
- 19 See the Building Societies Act 1986 Sch 2 para 33(5A)-(5E) (added by SI 2003/404). Where a notice of a postal ballot is required to be given to a person by the Building Societies Act 1986 Sch 2 para 33(4) or Sch 2 para 33(5) (see the text to notes 11-18), the notice may be sent to him electronically only if it is sent to an electronic address notified by the person to the society for the purpose: Sch 2 para 33(5A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24. In a case in which notice of a postal ballot is sent electronically to an electronic address in accordance with Sch 2 para 33(5A), the notice is to be treated as given to a person on the day on which it is transmitted: Sch 2 para 33(5B) (as so added).
- A requirement of Sch 2 para 33(4) or Sch 2 para 33(5) to send a notice of a postal ballot is also treated as satisfied if: (1) the society and the person have agreed that notices which are required to be sent to him may instead be accessed by him on a website; (2) the agreement applies to the notice in question; (3) that person is notified, in a manner agreed between him and the society for that purpose, of the publication of the notice on a website, the address of that website, and the place on that website where the notice may be accessed, and how it may be accessed; and (4) the notice is published continuously on that website throughout the period beginning with the giving of that notification and ending with the voting date (see PARA 1945 note 10): Sch 2 para 33(5C) (as so added).
- In a case in which Sch 2 para 33(5B) is relied on for compliance with a requirement of Sch 2 para 33(4) or Sch 2 para 33(5), a notice of a postal ballot is to be treated as sent to a person on the day when notification is given in accordance with head (4) above: Sch 2 para 33(5D) (as so added). Where, in a case in which heads (1)-(4) above are relied on for compliance with a requirement of Sch 2 para 33(4) or Sch 2 para 33(5), a notice of a postal ballot is published for a part, but not all, of the period mentioned in head (4) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, the failure does not invalidate the postal ballot: Sch 2 para 33(5E) (as so added).
- 20 As to notice of meetings see PARA 1985.
- 21 Building Societies Act 1986 Sch 2 para 33(6) (amended by SI 2003/404). As to the appointment of proxies see PARA 1986.
- 22 See the Building Societies Act 1986 Sch 2 para 33(6A)-(6C), (7A) (added by SI 2003/404). Where the notice of a postal ballot is required by the Building Societies Act 1986 Sch 2 para 33(6) (see the text to note 21) to contain a related notice or to be accompanied by an accompanying document: (1) in a case where the notice of that ballot is given to a person electronically in accordance with Sch 2 par 33(5A) (see note 19), the related notice or accompanying document may be sent to him electronically only if it is sent to the same electronic address, and at the same time as the notice of the postal ballot; (2) in a case where notice of that ballot is given on a website in accordance with Sch 2 para 33(5C) (see note 19), the requirement to send the related notice or accompanying document to that person is also treated as satisfied if the conditions set out in Sch 2 para 33(6B) are satisfied: Sch 2 para 33(6A) (as so added).
- Those conditions are satisfied in the case of a related notice or accompanying document if: (a) the society and that member have agreed that information which is required to be sent to him may instead be accessed by him

on a website; (b) the agreement applies to the related notice or accompanying document in question; (c) at the same time and in the same manner as the society notifies that person of the publication of the notice of the postal ballot, it notifies him of the publication of the related notice or accompanying document on a website, the address of that website, the place on that website where that statement or notification may be accessed, and how it may be accessed; and (d) the related notice or accompanying document is published continuously on that website throughout the period beginning with the giving of that notification in accordance with head (c) above and ending with the voting date (see PARA 1945 note 10): Sch 2 para 33(6B) (as so added).

Where notice of a postal ballot and any related notice or accompanying document is sent to a person electronically, that person may return the completed voting paper to the society either by post or electronically by sending it to an electronic address notified by the society to that person for the purpose, unless the rules of the society make provision to the contrary: Sch 2 para 33(6C) (as so added).

Where, in a case in which head (2) above is relied on for compliance with a requirement of Sch 2 para 33(6), a related notice or accompanying document is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, the failure does not invalidate the postal ballot: Sch 2 para 33(7A) (as so added).

23 Building Societies Act 1986 Sch 2 para 33(7).

24 See the Building Societies Act 1986 Sch 2 para 34; and PARA 1989.

25 See the text to notes 1-24.

26 See the text to notes 27-41.

27 Building Societies Act 1986 Sch 2 para 33A(1) (Sch 2 para 33A added by SI 2003/404).

28 Building Societies Act 1986 Sch 2 para 33A(2)(a) (as added: see note 27). The reference in the text is to the provisions of Sch 2 para 33A(3)-(14): see the text and notes 30-41.

29 Building Societies Act 1986 Sch 2 para 33A(2)(b) (as added: see note 27).

30 See the Building Societies Act 1986 Sch 2 para 33A(8)-(11) (as added: see note 27). The voting of a person in an electronic ballot is electronic if: (1) a person has access on a website to the notice of the electronic ballot, any document which is required to accompany the notice and a facility for registering his vote; (2) that person registers his vote by means of that facility; and (3) the conditions set out in Sch 2 para 33A(9) are satisfied: Sch 2 para 33A(8) (as so added).

Those conditions are satisfied if: (a) the society and the person have agreed that notices of electronic ballots, any document which is required to accompany the notice, and a voting facility may be accessed by him on a website; (b) that agreement applies to the electronic ballot and accompanying documents in question; (c) that person is notified, in a manner agreed for the purpose between him and the society of the publication of the notice and documents and the availability of the voting facility on a website, the address of that website, and the place on that website where the notice, any such documents, and the facility may be accessed, and how they may be accessed; and (d) the notice and each such document continues to be published and the facility continues to be available on that website throughout the period beginning with the giving of that notification and ending with the date which the society specifies as the final date for the registration of votes: Sch 2 para 33A(9) (as so added).

A notice given for the purposes of head (c) above must: (i) state that it concerns a notice of an electronic ballot given in accordance with the Building Societies Act 1986; and (ii) state whether the voting to be conducted by the electronic ballot is in an election or on a resolution or both: Sch 2 para 33A(10) (as so added).

Nothing in Sch 2 para 33A(9) (see heads (a)-(d) above) invalidates an electronic ballot where: (A) any notice or document that is required to be published, and any facility which is required to be made available, for the period mentioned in head (d) above is published or made available for a part, but not all, of that period; but (B) the failure to publish that notice or document, or make that facility available, throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid: Sch 2 para 33A(11) (as so added).

31 Building Societies Act 1986 Sch 2 para 33A(3) (as added: see note 27).

32 Building Societies Act 1986 Sch 2 para 33A(4) (as added: see note 27). The reference to the provisions defining electronic voting is a reference to Sch 2 para 33A(8)-(10): see note 30.

33 Ie by virtue of the Building Societies Act 1986 s 33A(1): see the text to note 27.

34 Building Societies Act 1986 Sch 2 para 33A(5) (as added: see note 27). See notes 30, 32.

- 35 le by virtue of the Building Societies Act 1986 s 33A(1), (3): see the text to notes 27, 30-31.
- 36 Building Societies Act 1986 Sch 2 para 33A(6) (as added: see note 27).
- 37 le in accordance with the Building Societies Act 1986 Sch 2 para 33A(9)(a): see note 30 head (a).
- 38 Building Societies Act 1986 Sch 2 para 33A(7)(a) (as added: see note 27).
- 39 Building Societies Act 1986 Sch 2 para 33A(7)(b) (as added: see note 27). The method of notification is in accordance with Sch 2 para 33A(9)(c): see note 30 head (c).
- 40 le the Building Societies Act 1986 Sch 2 para 33(3)-(7): see the text and notes 9-23.
- 41 See the Building Societies Act 1986 Sch 2 para 33A(12)-(14) (as added: see note 27). The provisions of Sch 2 para 33(3)-(7) (see the text and notes 9-23) apply, with the modification specified in Sch 2 para 33A(13), in relation to notices of an electronic ballot as they apply in relation to notices of a postal ballot: Sch 2 para 33A(12) (as so added). That modification is that Sch 2 para 33(3) (see the text to notes 9-10) has effect as if the reference to the receipt of completed ballot papers included a reference to the registration of votes by means of a voting facility on a website: Sch 2 para 33A(13) (as so added). For the purposes of Sch 2 para 33(3) (as applied to electronic ballots by Sch 2 para 33A(13)), in a case in which a person is notified for the purposes of Sch 2 para 33A(9)(c) (see note 30 head (c)), a notice of an electronic ballot is treated as given to a person on the day when notification is given in accordance with that provision: Sch 2 para 33A(14) (as so added).

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### **1989. Declarations to be made in proxy and ballot forms.**

A building society must secure that every document issued by it for use as a voting paper<sup>1</sup> and every appointment of a proxy<sup>2</sup> incorporates a form of declaration for completion by the member using it<sup>3</sup>. It is an offence if a society fails to comply with this requirement, and the society, and any officer<sup>4</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>5</sup>.

A person making a declaration must:

- 407 (1) declare that he has attained the age of 18 years or will have attained that age on or before the voting date<sup>6</sup> or, where he is voting by proxy, on or before the date of the meeting<sup>7</sup>;
- 408 (2) where the vote is to be cast on a shareholding members' resolution<sup>8</sup>, declare:  
(a) that on the voting date he is or, so far as he can reasonably foresee, will be a shareholder of the society<sup>9</sup>; and (b) where the person is not entitled to vote unless he had a qualifying shareholding<sup>10</sup> on the qualifying shareholding date<sup>11</sup>, that he had, or so far as he can reasonably foresee, will have such a shareholding on that date<sup>12</sup>;
- 409 (3) where the vote is to be cast on a borrowing members' resolution<sup>13</sup>, declare that on the voting date he is or, so far as he can reasonably foresee, will be a borrowing member<sup>14</sup> of the society<sup>15</sup>; and
- 410 (4) where the vote is to be cast on an ordinary or special resolution<sup>16</sup>, declare either as mentioned in head (2) above, or as mentioned in head (3) above, or both<sup>17</sup>.

Provision is made for the use of electronic communications in the appointment of proxies and in the conduct of ballots<sup>18</sup>.

If a member of a society who purports to exercise his right:

- 411 (i) to appoint a proxy to vote instead of him at a meeting of the society<sup>19</sup>; or
- 412 (ii) to vote in a postal or electronic ballot<sup>20</sup>; or
- 413 (iii) to vote on a poll at a meeting of the society<sup>21</sup>,

fails to make a declaration in accordance with heads (1) to (4) above in the appointment or, as the case may be, on the voting paper, the appointment made or the vote cast by him is invalid<sup>22</sup>.

1 As to voting in a postal or electronic ballot see PARA 1988; and as to voting on a poll at a meeting of the building society see PARA 1987.

2 As to the appointment of proxies see PARA 1986.

3 Building Societies Act 1986 s 5(8), Sch 2 para 34(3) (amended by SI 2003/404). See also the Building Societies Act 1986 Sch 2 para 34(3A); and note 18.

4 As to the meaning of 'officer' see PARA 1944.

5 Building Societies Act 1986 Sch 2 para 34(4). The fine must not exceed level 4 on the standard scale: Sch 2 para 34(4). As to the standard scale see PARA 27 note 21.

6 As to the meaning of 'voting date' see PARA 1936 note 16; definition applied by the Building Societies Act 1986 Sch 2 para 34(5).

7 Building Societies Act 1986 Sch 2 para 34(2)(a) (Sch 2 para 34(2) substituted by the Building Societies Act 1997 Sch 7 para 57(16)). As to meetings generally see PARA 1974 et seq.

8 As to the meaning of 'shareholding members' resolution' see PARA 1981.

9 Building Societies Act 1986 Sch 2 para 34(2)(b)(i) (as substituted: see note 7).

10 As to the meaning of 'qualifying shareholding' see PARA 1984; definition applied by virtue of the Building Societies Act 1986 Sch 2 para 34(5).

11 As to the meaning of 'qualifying shareholding date' see PARA 1984; definition applied by the Building Societies Act 1986 Sch 2 para 34(5).

12 Building Societies Act 1986 Sch 2 para 34(2)(b)(ii) (as substituted: see note 7).

13 As to the meaning of 'borrowing members' resolution' see PARA 1982.

14 As to the meaning of 'borrowing member' see PARA 1894.

15 Building Societies Act 1986 Sch 2 para 34(2)(c) (as substituted: see note 7).

16 As to the meaning of 'ordinary resolution' see PARA 1983. As to the meaning of 'special resolution' see PARA 1980.

17 Building Societies Act 1986 Sch 2 para 34(2)(d) (as substituted: see note 7).

18 See the Building Societies Act 1986 Sch 2 para 34(2A)-(2C), (3A) (added by SI 2003/404). Where an appointment of a proxy is contained in an electronic communication sent in accordance with the Building Societies Act 1986 Sch 2 para 24(1B) (see PARA 1986), the requirements of Sch 2 para 34(2) (see heads (1)-(4) in the text) are satisfied only if: (1) the appointment incorporates the terms of the declaration required by Sch 2 para 34(2) (see the text to notes 6-17); and (2) the authenticity and integrity of the appointment is established (whether by an electronic signature or otherwise) in such manner as may have been agreed between the member and the society: Sch 2 para 34(2A) (as so added). This provision refers to Sch 2 para 24(1A)(b), but it is submitted that the reference should be to Sch 2 para 24(1B). As to the meaning of 'electronic communication' see PARA 1868 note 4. 'Authenticity' and 'integrity', with reference to an electronic communication, must be

construed in accordance with the Electronic Communications Act 2000 s 15(2) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 947; **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 616); Building Societies Act 1986 Sch 2 para 34(5) (definitions added by SI 2003/404). As to the meaning of 'electronic signature' see **CIVIL PROCEDURE** vol 11 (2009) PARA 948; definition applied by virtue of the Building Societies Act 1986 Sch 2 para 34(5) (amended by SI 2003/404).

Where a member voting in a postal ballot returns a completed voting paper electronically as mentioned in the Building Societies Act 1986 Sch 2 para 33(6C) (see PARA 1988 note 22), the requirements of Sch 2 para 34(2) are satisfied only if: (a) the voting paper incorporates the terms of the declaration required by Sch 2 para 34(2); and (b) the authenticity and integrity of the completed paper is established (whether by electronic signature or otherwise) in such manner as may have been agreed between the member and the society: Sch 2 para 34(2B) (as so added). This provision refers to Sch 2 para 33(6E)(b), but it is submitted that the reference should be to Sch 2 para 33(6C).

Where a member registers a vote on a website in accordance Sch 2 para 33A(8)(b) (see PARA 1988 note 30 head (2)), the requirements of Sch 2 para 34(2) are satisfied only if: (i) at the place on the website where the voting facility is accessed, the member has confirmed the terms of the declaration specified by Sch 2 para 34(2); and (ii) the authenticity and integrity of the member's vote is established (whether by electronic signature or otherwise) in such a manner as may have been agreed between the member and the society: Sch 2 para 34(2C) (as so added).

A building society must ensure that: (A) every voting paper sent by it to a member by means of an electronic communication incorporates a declaration in accordance with Sch 2 para 34(2); and (B) every voting facility provided by it on a website is accompanied by such a declaration, for completion or confirmation by the member purporting to exercise his right to vote: Sch 2 para 34(3A) (as so added). See also the text to notes 1-3.

19 Building Societies Act 1986 Sch 2 para 34(1)(a).

20 Building Societies Act 1986 Sch 2 para 34(1)(b) (amended by SI 2003/404).

21 Building Societies Act 1986 Sch 2 para 34(1)(c).

22 Building Societies Act 1986 Sch 2 para 34(1) (amended by SI 2003/404).

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## **1990. Right to propose and circulate resolutions.**

The rules of a building society must provide for the right of members<sup>1</sup> to move resolutions at a meeting<sup>2</sup>. If at least the requisite number<sup>3</sup> of qualified members<sup>4</sup> of a society give notice to the society of their intention to have moved on their behalf a resolution, other than a shareholding members' resolution<sup>5</sup> or a borrowing members' resolution<sup>6</sup>, specified in the notice at an annual general meeting<sup>7</sup> of the society, the society must<sup>8</sup>:

414 (1) include in the notice of the annual general meeting a notice specifying the intention to have the resolution moved on their behalf at the meeting and, where applicable, the intention to move it as a special resolution<sup>9</sup>; and

415 (2) at the request of the members intending to have the resolution moved on their behalf, send to each member entitled to receive notice of the meeting a copy of any statement of not more than 500 words with respect to the matter referred to in the resolution<sup>10</sup>.

It is an offence if a society fails to comply with this requirement where notice is duly given, and the society, and any officer<sup>11</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>12</sup>.

This obligation is subject to the following exceptions. The society is not required to send notices of a resolution or copies of a statement to members in any case where<sup>13</sup>: (a) publicity for the resolution or, as the case may be, the statement would be likely to diminish substantially the confidence in the society of investing members of the public<sup>14</sup>; or (b) the rights conferred are being abused to seek needless publicity for defamatory matter or for frivolous or vexatious purposes<sup>15</sup>, and the obligation does not confer any rights on members or impose any duties on a society in respect of a resolution or statement which does not relate directly to the affairs of the society<sup>16</sup>. The Financial Services Authority<sup>17</sup> must hear and determine any dispute arising under head (a) above, whether on the application of the society or of any other person who claims to be aggrieved<sup>18</sup>. If the rules of a society so provide, the obligation does not require notice of a resolution to be given to members of the society if the resolution is in substantially the same terms as any resolution which has been defeated at a meeting or on a postal or electronic ballot<sup>19</sup> during the period beginning with the third annual general meeting before the date on which notice of the resolution is given to the society<sup>20</sup>. A society is not obliged to send copies of a statement with respect to a resolution if, as a result of the exceptions, it is not obliged to give notice of the resolution<sup>21</sup>.

Notice of a members' resolution<sup>22</sup> must be given to the society not later than the last day of the financial year<sup>23</sup> preceding the financial year in which is held the annual general meeting at which it is intended to move the resolution, and any statement to be sent to members under head (2) above must also be notified to the society not later than that day<sup>24</sup>. The society must send to members the notices of a resolution and the copies of the statement in the same manner and (so far as practicable) at the same time as the notice of the annual general meeting at which the resolution is intended to be moved and, where it is not practicable for them to be sent at the same time as the notice, they must be sent as soon as practicable thereafter<sup>25</sup>. Provision is made for the electronic transmission of notices and statements in connection with a member's resolution<sup>26</sup>. The accidental omission to send a notice or copy of a statement to a person entitled to receive one, or the non-receipt of a notice or copy by such a person, does not invalidate the proceedings at a meeting<sup>27</sup>.

1 As to membership see PARA 1888 et seq.

2 See the Building Societies Act 1986 s 5(8), Sch 2 para 3(1), (4), Table item 13(b); and PARAS 1883, 1975. As to resolutions generally see PARA 1980 et seq.

3 The 'requisite number' (1) in the case of a society in relation to which the difference between its total assets as shown in the accounts last prepared by it under the Building Societies Act 1986 s 72A or s 72E (see PARA 1992) immediately before the date on which the members gave notice to the society under Sch 2 para 31(1) and the aggregate of (a) the liquid assets of the society as shown in those accounts in pursuance of regulations under s 72C or s 72G (see PARA 1993) or in accordance with international accounting standards, as appropriate; and (b) the fixed assets of the society as so shown, exceeds £100 million, is 500 or such lesser number as is specified for the purpose in the rules of the society; and (2) in the case of any other society, is 100 or such lesser number as is specified for the purpose in the rules of the society: Sch 2 para 31(2)(a) (amended by SI 1997/2840; SI 1999/3033; and SI 2004/3380). As to the meaning of 'notice' see PARA 1866 note 8. As to the accounts see PARA 1991 et seq. As to the meaning of 'international accounting standards' see PARA 1992 note 4. As to the meanings of 'liquid assets' and 'fixed assets' in the case of societies which produce IAS individual accounts or IAS group accounts see PARA 2008 notes 8, 9; definition applied by virtue of the Building Societies Act 1986 Sch 2 para 31(9) (added by SI 2004/3380). As to IAS individual accounts and IAS group accounts see PARA 1992.

The Treasury may by order vary the definition of 'requisite number' in the Building Societies Act 1986 Sch 2 para 31(2) whether by the addition of any description or other provision or by the substitution or deletion of any definition, description or other provision for the time being specified or contained in Sch 2 para 31: Sch 2 para 32(4) (amended by SI 2001/2617). Such an order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament (Building Societies Act 1986 Sch 2 para 32(5)), and may contain transitional, consequential or supplementary provision (Sch 2 para 32(6)). For the orders which have been made under Sch 2 para 32(4) see the Building Societies (Members' Resolutions) Order 1997, SI 1997/2840; and the Building Societies (Members' Resolutions) Order 1999, SI 1999/3033. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.



4 Every member of a society is a 'qualified member' unless the rules make other provision for the purpose which is not rendered void under the Building Societies Act 1986 Sch 2 para 31(3): Sch 2 para 31(2)(b). Any provision contained in the rules of a society is void to the extent that it would have the effect, for the purposes of Sch 2 para 31(1), of requiring a qualified member: (1) to have been a member for more than two years ending with the qualifying date; or (2) if he claims eligibility as a shareholding member, to hold, or to have held at any time, shares in the society to a value greater than the prescribed amount in force on the qualifying date; or (3) if he claims eligibility as a borrowing member, to owe to the society, or to have owed to the society at any time, a mortgage debt of an amount greater than the prescribed amount in force on the qualifying date: Sch 2 para 31(3) (amended by 1997/2840). See note 3. For this purpose the qualifying date is the date on which the notice is given to the society under the Building Societies Act 1986 Sch 2 para 31(1): Sch 2 para 31(3). As to the meanings of 'shareholding member' and 'borrowing member' see PARA 1894. As to the meaning of 'mortgage debt' see PARA 1946 note 6. As to shares in relation to societies see PARA 1905 et seq. As to the prescribed amount see PARA 1978 note 13.

The Treasury may by order vary: (a) the definition of 'qualified member' in Sch 2 para 31(2); or (b) the descriptions of provisions which are rendered void by Sch 2 para 31(3), whether by the addition of any description or other provision or by the substitution or deletion of any definition, description or other provision for the time being specified or contained in Sch 2 para 31: Sch 2 para 32(4) (as amended: see note 3). For an order which has been made under Sch 2 para 32(4) see the Building Societies (Members' Resolutions) Order 1997, SI 1997/2840.

5 As to the meaning of 'shareholding members' resolution' see PARA 1981.

6 As to the meaning of 'borrowing members' resolution' see PARA 1982.

7 As to annual general meetings see PARA 1977.

8 Building Societies Act 1986 Sch 2 para 31(1) (amended by the Building Societies Act 1997 Sch 7 para 57(13)) (which is expressed to be subject to the Building Societies Act 1986 Sch 2 para 31(4)-(6) (see the text to notes 13-16, 19-21)).

9 Building Societies Act 1986 Sch 2 para 31(1)(a). As to the meaning of 'special resolution' see PARA 1980.

10 Building Societies Act 1986 Sch 2 para 31(1)(b) (as amended: see note 8). As to members entitled to receive notice of meetings see PARA 1985.

11 As to the meaning of 'officer' see PARA 1944.

12 Building Societies Act 1986 Sch 2 para 31(8). The fine must not exceed level 4 on the standard scale: Sch 2 para 31(8). As to the standard scale see PARA 27 note 21.

13 Building Societies Act 1986 Sch 2 para 31(4).

14 Building Societies Act 1986 Sch 2 para 31(4)(a).

15 Building Societies Act 1986 Sch 2 para 31(4)(b).

16 Building Societies Act 1986 Sch 2 para 31(4).

17 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

18 Building Societies Act 1986 Sch 2 para 31(7) (amended by SI 2001/2617). As to persons aggrieved see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

19 As to postal and electronic ballots see PARA 1988.

20 Building Societies Act 1986 Sch 2 para 31(5) (amended by SI 2003/404).

21 See the Building Societies Act 1986 Sch 2 para 31(6).

22 Is a resolution given under the Building Societies Act 1986 Sch 2 para 31(1): see the text and notes 3-10.

23 As to the meaning of 'financial year' see PARA 1992 note 2.

24 Building Societies Act 1986 Sch 2 para 32(1).

25 Building Societies Act 1986 Sch 2 para 32(2).

26 See the Building Societies Act 1986 Sch 2 para 32(2A)-(2D), (3A) (added by SI 2003/404).

The Building Societies Act 1986 Sch 2 para 32(2B) applies where, in a case in which a society gives notice in accordance with Sch 2 para 22A or Sch 2 para 22B (see PARA 1985) of the annual general meeting at which a resolution is intended to be moved, the notice of the resolution and the copy of a statement in respect of the resolution that are required to be sent to a member under Sch 2 para 31(1)(a) or Sch 2 para 31(1)(b) (see heads (1)-(2) in the text) are not transmitted or published at the same time as the notice: Sch 2 para 32(2A) (as so added).

The requirement of Sch 2 para 32(2) (see the text to note 25) to send a member his notice of the resolution and his copy of a statement in the same manner as the notice of the annual general meeting is satisfied if: (1) a notice of the resolution and a copy of the statement are made available to the member in the same way as the notice; or (2) such a notice and such a copy (without being made available to the member in that way) are sent to the member in a manner set out by the society for the purpose in the notice: Sch 2 para 32(2B) (as so added). Where a notice of a resolution and copy of a statement are sent to a member electronically under Sch 2 para 32(2B), they must be sent to an electronic address notified by the member for the purpose: Sch 2 para 32(2C) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

The requirements of Sch 2 para 32(2) or of head (1) above are satisfied by the publication of a notice of the resolution and a copy of the statement on a website only if: (a) the notice of the annual general meeting at which the resolution is intended to be moved is a notice given to that member by being published on a website; (b) an agreement between the society and the member to his accessing information on a website applies to the notice of a resolution and copy of a statement for the meeting in question; (c) the member is notified, in a manner agreed between the society and the member, of the publication of the notice of a resolution and copy of a statement on a website, the address of that website, the place on that website where the notice and copy may be accessed, and how they may be accessed; (d) the notification for the purposes of head (c) above is given no later than the day after the date on which the notice of a resolution and the copy of a statement are first capable of being accessed on the notified website; (e) that date was the same as the date on which the notice of the annual general meeting was first capable of being accessed on a website or (in a case to which head (1) above applies) was as soon as practicable after that date; (f) the notice of a resolution and copy of a statement are continuously published on the notified website for a period beginning (so far as practicable) at the same time as the notices and statements are sent to members in accordance with Sch 2 para 32(2), and ending with the conclusion of the annual general meeting at which the resolution is moved: Sch 2 para 32(2D) (as so added).

Where, in a case in which Sch 2 para 32(2D) is relied on for compliance with a requirement of Sch 2 para 32(2) or of head (1) above, a notice or copy published for a part, but not all, of the period mentioned in head (f) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, the failure does not invalidate the proceedings at the meeting: Sch 2 para 32(3A) (as so added).

27 Building Societies Act 1986 Sch 2 para 32(3). See note 26.

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## ***D. ACCOUNTS***

### **1991. Accounting records.**

Accounting records must be kept for every building society<sup>1</sup>. The accounting records of a society must be kept in an orderly manner and must be such as to<sup>2</sup>:

- 416 (1) explain its transactions<sup>3</sup>;
- 417 (2) disclose, with reasonable accuracy and promptness, the state of the business of the society at any time<sup>4</sup>;
- 418 (3) enable the directors properly to discharge the duties imposed on them by or under the Building Societies Act 1986 (and, where applicable, European legislation on international accounting standards<sup>5</sup>) and their functions of direction of the affairs of the society<sup>6</sup>; and

- 419 (4) enable the society properly to discharge the duties imposed on it by or under the Building Societies Act 1986 (and, where applicable, European legislation on international accounting standards)<sup>7</sup>.

In particular the accounting records must contain<sup>8</sup>:

- 420 (a) entries from day to day of all sums received and paid by the society and the matters in respect of which they are received or paid<sup>9</sup>;
- 421 (b) entries from day to day of every transaction entered into by the society which will, or there is a reasonable ground for expecting may, give rise to liabilities or assets of the society other than insignificant assets or liabilities in respect of the management of the society<sup>10</sup>; and
- 422 (c) a record of the assets and liabilities of the society and in particular of assets and liabilities of any class specifically regulated by or under the lending and funding limit provisions of the Building Societies Act 1986<sup>11</sup>.

The accounting records must be kept at the society's principal office<sup>12</sup> or at such other place or places as the directors think fit and must be open to inspection by the directors at all times<sup>13</sup>. Accounting records must be preserved for six years from the date on which they were made<sup>14</sup>. Where the records to be kept by a society are not kept by making entries in a bound book, but by some other means, adequate precautions must be taken for guarding against falsification and facilitating their discovery<sup>15</sup>.

Where a society has connected undertakings<sup>16</sup>, the society must also secure that such accounting records are kept by the society and the connected undertakings as will enable the society to comply with these requirements in relation to the business of the society and the connected undertakings<sup>17</sup>.

1 Building Societies Act 1986 s 71(1) (amended by SI 2001/2617). As to the keeping of records by a building society see PARA 1886.

2 Building Societies Act 1986 s 71(2).

3 Building Societies Act 1986 s 71(2)(a).

4 Building Societies Act 1986 s 71(2)(b).

5 The European Parliament and Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) on the application of international accounting standards, art 4.

6 Building Societies Act 1986 s 71(2)(c) (s 71(2)(c), (d) amended by SI 2004/3380). As to the office of director see PARAS 1944-1963.

7 Building Societies Act 1986 s 71(2)(d) (as amended: see note 6). See note 5.

8 Building Societies Act 1986 s 71(3).

9 Building Societies Act 1986 s 71(3)(a).

10 Building Societies Act 1986 s 71(3)(b).

11 Building Societies Act 1986 s 71(3)(c) (amended by the Building Societies Act 1997 Sch 7 para 29(1)). As to the lending and funding limits see the Building Societies Act 1986 ss 6, 7; and PARAS 1916, 2008.

12 As to the requirements for principal offices see PARA 1872.

13 Building Societies Act 1986 s 71(8).

14 Building Societies Act 1986 s 71(9).

15 Building Societies Act 1986 s 114(2).

16 'Connected undertaking' means a subsidiary undertaking or an associated undertaking: Building Societies Act 1986 s 119(1) (definition added by the Building Societies Act 1997 Sch 7 para 53(1)(d)). As to the meaning of 'subsidiary undertaking' see PARA 1916 note 9; and as to the meaning of 'associated undertaking' see PARA 1916 note 8.

17 Building Societies Act 1986 s 71(10) (amended by the Building Societies Act 1997 Sch 7 para 29(3); and SI 2001/2617).

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## **1992. Duty to prepare annual accounts.**

The directors of every building society<sup>1</sup> must prepare accounts for the society for each of its financial years ('individual accounts')<sup>2</sup>. A society's individual accounts may be prepared either in accordance with the relevant domestic statutory provisions<sup>3</sup> ('Building Societies Act individual accounts') or in accordance with international accounting standards ('IAS individual accounts')<sup>4</sup>. After the first financial year in which the directors of a building society prepare IAS individual accounts (the 'first IAS year'), all subsequent individual accounts of the society must be prepared in accordance with international accounting standards unless there is a relevant change of circumstance<sup>5</sup>. There is a relevant change of circumstance if, at any time during or after the first IAS year, the society ceases to have any securities admitted to trading on a regulated market<sup>6</sup>. Where the directors of a building society prepare IAS individual accounts, they must state in the notes to those accounts that the accounts have been prepared in accordance with international accounting standards<sup>7</sup>.

If at the end of a financial year a building society has subsidiary undertakings, the directors, as well as preparing individual accounts for the year, must prepare group accounts for the year for the society and those undertakings taken as a whole ('group accounts')<sup>8</sup>. The group accounts of certain societies are required<sup>9</sup> to be prepared in accordance with international accounting standards ('IAS group accounts')<sup>10</sup>. Subject to the following provisions, the group accounts of other societies may be prepared in accordance with the relevant domestic statutory provisions<sup>11</sup> ('Building Societies Act group accounts') or in accordance with international accounting standards ('IAS group accounts')<sup>12</sup>. After the first financial year in which the directors of a building society prepare IAS group accounts (the 'first IAS year'), all subsequent group accounts of the society must be prepared in accordance with international accounting standards unless there is a relevant change of circumstance<sup>13</sup>. There is a relevant change of circumstance if, at any time during or after the first IAS year, the society ceases to have any securities admitted to trading on a regulated market<sup>14</sup>. Where the directors of a building society prepare IAS group accounts, they must state in the notes to those accounts that the accounts have been prepared in accordance with international accounting standards<sup>15</sup>.

The directors of a building society that prepares group accounts must secure that the individual accounts of (1) the building society; and (2) each of its subsidiary undertakings, are all prepared using the same financial reporting framework, except to the extent that in their opinion there are good reasons for not doing so<sup>16</sup>. This provision applies only to accounts of subsidiary undertakings which are required to be prepared<sup>17</sup>. The provision does not require accounts of undertakings that are charities to be prepared using the same financial reporting framework as accounts of undertakings which are not charities<sup>18</sup>. Head (1) above does not apply where the directors of a building society prepare IAS group accounts and IAS individual accounts<sup>19</sup>. The directors of a society which has subsidiary undertakings must secure that,

except where in their opinion there are good reasons against it, the financial year of each of its subsidiary undertakings coincides with the society's own financial year<sup>20</sup>.

1 As to the office of director see PARAS 1944-1963.

2 Building Societies Act 1986 s 72A(1) (ss 72A, 72D, 72E, 72H, 72I added by SI 2004/3380). See also PARA 1993.

The financial year of building societies established after 25 August 1894 is the period of 12 months ending with 31 December: Building Societies Act 1986 ss 117(1), 119(1). The initial financial year of a society is such period as expires with the end of the calendar year in which it is established and the final financial year of a society is such shorter period than 12 months as expires with the date as at which the society makes up its final accounts: ss 117(2), 119(1).

In the case of a society established before 25 August 1894:

24 (1) if (a) before 1 October 1962 the society had altered its financial year in exercise of the power conferred by the Building Societies Act 1960 s 70(2) (now repealed); or (b) after that date and before 1 January 1987 (ie the commencement date for the Building Societies Act 1986 s 117), the society has exercised the corresponding power conferred by the Building Societies Act 1962 s 128(2) (now repealed), 'financial year', after the date on which the society exercised the power, has the meaning given in the Building Societies Act 1986 s 117 and (so far as may be relevant for the purposes of the Building Societies Act 1986) includes the period for which the society made up its accounts in the exercise of the power (s 120(4), Sch 20 paras 1, 16(a); Building Societies Act 1986 (Commencement No 1) Order 1986, SI 1986/1560, art 3, Sch 2); and

25 (2) subject to head (1) above, 'financial year' means a period of 12 months ending with the time up to which, at 1 January 1987, the accounts of the society were annually made up (Building Societies Act 1986 Sch 20 paras 1, 16(b); Building Societies Act 1986 (Commencement No 1) Order 1986, SI 1986/1560, Sch 2).

A society whose financial year does not, by virtue of the saving provisions of the Building Societies Act 1986 Sch 20, end with 31 December may alter its financial year by making up its accounts for one period of more than 6 months, and not more than 18 months, ending with 31 December; and in relation to a society exercising the power conferred by s 117(3), references in the Building Societies Act 1986 to a financial year of the society include references to that period: ss 117(3), 119(1).

3 The provisions referred to are those in the Building Societies Act 1986 s 72B: see PARA 1993.

4 Building Societies Act 1986 s 72A(2) (as added: see note 2). This is subject to s 72A(3)-(5) (see the text to notes 5-6) and s 72I (see the text to notes 16-20): see s 72A(2) (as so added). 'International accounting standards' means the international accounting standards, within the meaning of European Parliament and Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) on the application of international accounting standards, adopted from time to time by the European Commission in accordance with the Regulation: Building Societies Act 1986 s 81B(1) (s 81B added by SI 2004/3380).

5 Building Societies Act 1986 s 72A(3) (as added: see note 2).

6 Building Societies Act 1986 s 72A(4) (as added: see note 2). 'Regulated market' has the meaning given in the Markets in Financial Instruments Directive (ie European Parliament and Council Directive 2004/39 (OJ L145, 30.4.2004, p 1) on markets in financial instruments) art 4.1.14: Building Societies Act 1986 s 81B(1) (definition substituted by SI 2007/126). If, having changed to preparing Building Societies Act individual accounts following a relevant change of circumstance, the directors again prepare IAS individual accounts for the society, the provisions of the Building Societies Act 1986 s 72A(3), (4) apply again as if the first financial year for which such accounts are again prepared were the first IAS year: s 72A(5) (as so added).

7 Building Societies Act 1986 s 72D (as added: see note 2).

8 Building Societies Act 1986 s 72E(1) (as added: see note 2).

9 Ie under European Parliament and Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) on the application of international accounting standards, art 4.

10 Building Societies Act 1986 s 72E(2) (as added: see note 2).

11 The provisions referred to are those in the Building Societies Act 1986 s 72F: see PARA 1993.

- 12 Building Societies Act 1986 s 72E(3) (as added: see note 2).
- 13 Building Societies Act 1986 s 72E(4) (as added: see note 2).
- 14 Building Societies Act 1986 s 72E(5) (as added: see note 2). If, having changed to preparing Building Societies Act group accounts following a relevant change of circumstance, the directors again prepare IAS group accounts for the society, the provisions of s 72E(4), (5) apply again as if the first financial year for which such accounts are again prepared were the first IAS year: s 72E(6).
- 15 Building Societies Act 1986 s 72H (as added: see note 2).
- 16 Building Societies Act 1986 s 72I(1) (as added: see note 2).
- 17 Ie under the Companies Act 2006 Pt 15 (ss 380-474) (see **COMPANIES** vol 15 (2009) PARA 693 et seq): Building Societies Act 1986 s 72I(2) (as added (see note 2); amended by SI 2008/948).
- 18 Building Societies Act 1986 s 72I(3) (as added: see note 2). As to the accounts of charities generally see **CHARITIES** vol 8 (2010) PARA 335 et seq.
- 19 Building Societies Act 1986 s 72I(4) (as added: see note 2).
- 20 Building Societies Act 1986 s 72I(5) (as added: see note 2).

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### **1993. Content and form of annual accounts.**

Building Societies Act individual accounts<sup>1</sup> must comprise a balance sheet as at the last day of the financial year, and an income and expenditure account<sup>2</sup>. The balance sheet must give a true and fair view<sup>3</sup> of the state of affairs of the society as at the end of the financial year; and the income and expenditure account must give a true and fair view of the income and expenditure of the society for the financial year<sup>4</sup>. Building Societies Act individual accounts must comply with the requirements of regulations<sup>5</sup> as to the form and content of the balance sheet and income and expenditure account and additional information to be provided by way of notes to the accounts or otherwise<sup>6</sup>. Where compliance with the provisions of those regulations, and the other requirements<sup>7</sup> as to the matters to be included in a society's individual accounts or in notes to those accounts, would not be sufficient to give a true and fair view, the necessary additional information must be given in the accounts or in a note to them<sup>8</sup>. If in special circumstances compliance with any of those provisions is inconsistent with the requirement to give a true and fair view, the directors must depart from that provision to the extent necessary to give a true and fair view<sup>9</sup>. Particulars of any such departure, the reasons for it and its effect must be given in a note to the accounts<sup>10</sup>.

The Treasury<sup>11</sup> may by regulations<sup>12</sup>: (1) add to the classes of documents to be comprised in a society's Building Societies Act individual accounts<sup>13</sup>; (2) make provision as to the matters to be included in any document so added<sup>14</sup>; (3) modify the requirements<sup>15</sup> as to the matters to be stated in any document comprised in the society's Building Societies Act individual accounts<sup>16</sup>; and (4) reduce the classes of documents to be comprised in a society's Building Societies Act individual accounts<sup>17</sup>. The Treasury must by regulations make provision with respect to the form and contents of Building Societies Act individual accounts<sup>18</sup>. The Treasury may by regulations make provision with respect to additional information to be contained in Building Societies Act individual accounts, whether in the form of notes or otherwise<sup>19</sup>.

Building Societies Act group accounts<sup>20</sup> must comprise a balance sheet dealing with the state of affairs of the building society and its subsidiary undertakings and an income and expenditure account showing the income and expenditure for the society and its subsidiary undertakings<sup>21</sup>. Building Societies Act group accounts must give a true and fair view of the state of affairs as at the end of the financial year, and the income and expenditure for the financial year of the society and the subsidiary undertakings included in the group accounts as a whole, so far as concerns members of the society<sup>22</sup>. Building Societies Act group accounts must comply with the requirements of regulations<sup>23</sup> as to the form and content of the group accounts and additional information to be provided by way of notes to the accounts or otherwise<sup>24</sup>. Where compliance with the provisions of those regulations, and the other provisions<sup>25</sup> as to the matters to be included in a society's group accounts or in notes to those accounts, would not be sufficient to give a true and fair view, the necessary additional information must be given in the accounts or in a note to them<sup>26</sup>. If in special circumstances compliance with any of those provisions is inconsistent with the requirement to give a true and fair view, the directors must depart from that provision to the extent necessary to give a true and fair view<sup>27</sup>. Particulars of any such departure, the reasons for it and its effect must be given in a note to the accounts<sup>28</sup>.

The Treasury may by regulations<sup>29</sup>: (a) add to the classes of documents to be comprised in a society's Building Societies Act group accounts<sup>30</sup>; (b) make provision as to the matters to be included in any document so added<sup>31</sup>; (c) modify the requirements<sup>32</sup> as to the matters to be stated in any document comprised in the society's Building Societies Act group accounts<sup>33</sup>; and (d) reduce the classes of documents to be comprised in a society's Building Societies Act group accounts<sup>34</sup>. The Treasury must by regulations make provision with respect to the form and contents of Building Societies Act group accounts<sup>35</sup>. The Treasury may by regulations make provision with respect to additional information to be contained in Building Societies Act group accounts, whether in the form of notes or otherwise<sup>36</sup>.

Certain information relating to emoluments and other benefits of directors and others, to loans and other dealings in favour of directors and connected persons<sup>37</sup>, and to information about the employees of a society<sup>38</sup> must be given in notes to a building society's annual accounts<sup>39</sup>. It is the duty of any director<sup>40</sup> of a society, and any person who is or has at any time in the preceding five years been an officer of the society, to give notice to the society of such matters relating to himself as may be necessary for the purposes of the disclosures relating to emoluments of and dealings with directors and other officers<sup>41</sup>. A person who makes default in complying with that duty commits an offence and is liable on summary conviction to a fine<sup>42</sup>. Certain information concerning related undertakings<sup>43</sup> must be given in notes to a building society's annual accounts<sup>44</sup>.

1 As to Building Societies Act individual accounts see PARA 1992.

2 Building Societies Act 1986 s 72B(1) (ss 72B, 72C, 72F, 72G added by SI 2004/3380). See also PARA 1992. As to the meaning of 'financial year' see PARA 1992 note 2. 'Income and expenditure account', in relation to a society which prepares IAS accounts, includes an income statement or other equivalent financial statement required to be prepared by international accounting standards: Building Societies Act 1986 s 81B(1) (s 81B added by SI 2004/3380). As to IAS accounts see PARA 1992. As to the meaning of 'international accounting standards' see PARA 1992 note 4.

As to the format of the balance sheet see the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, reg 3 (amended by SI 1999/248) and the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, Sch 2 (amended by SI 2004/3199). As to the format of the income and expenditure account see the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, reg 3 (as so amended), Sch 1.

3 References in the Building Societies Act 1986 Pt VIII (ss 72A-81B) to accounts giving a 'true and fair view' are references: (1) in the case of Building Societies Act individual accounts (see PARA 1992), to the requirement under s 72B that such accounts give a true and fair view; (2) in the case of Building Societies Act group accounts (see PARA 1992), to the requirement under s 72F that such accounts give a true and fair view; and (3) in the case of IAS accounts (see PARA 1992), to the requirement under international accounting standards that such accounts achieve a fair presentation: s 81B(2) (as added: see note 2).

- 4 Building Societies Act 1986 s 72B(2) (as added: see note 2).
- 5 le made under the Building Societies Act 1986 s 72C: see the text to notes 18-19.
- 6 Building Societies Act 1986 s 72B(3) (as added: see note 2). For a further matter to be stated in notes to accounts for IAS individual accounts see s 72D; and PARA 1992.
- 7 le requirements of the Building Societies Act 1986.
- 8 Building Societies Act 1986 s 72B(4) (as added: see note 2).
- 9 Building Societies Act 1986 s 72B(5) (as added: see note 2).
- 10 Building Societies Act 1986 s 72B(6) (as added: see note 2).
- 11 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 12 Building Societies Act 1986 s 72B(7) (as added: see note 2). Regulations under s 72B(7) may make different provision for different descriptions of society and may include incidental and supplementary provisions: s 72B(8) (as so added). The power to make regulations under s 72B(7) is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 72B(9) (as so added). At the date at which this volume states the law no such regulations had been made.
- 13 Building Societies Act 1986 s 72B(7)(a) (as added: see note 2). The reference to the documents comprised in a society's Building Societies Act individual accounts is a reference to those documents as required under s 72B(1) (see the text and notes 1-2).
- 14 Building Societies Act 1986 s 72B(7)(b) (as added: see note 2). See note 12.
- 15 le under the Building Societies Act 1986 Pt VIII.
- 16 Building Societies Act 1986 s 72B(7)(c) (as added: see note 2). See note 12.
- 17 Building Societies Act 1986 s 72B(7)(d) (as added: see note 2). See note 12.
- 18 Building Societies Act 1986 s 72C(1) (as added: see note 2). See note 19.
- 19 Building Societies Act 1986 s 72C(2) (as added: see note 2). Without prejudice to the generality of s 72C(1), (2), the regulations may: (1) prescribe accounting principles and rules; (2) require corresponding information for a preceding financial year; and (3) make different provision for different descriptions of society: s 72C(3) (as so added). The power to make regulations under s 72C is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 72C(4) (as so added). As to regulations made under s 72C see the Building Societies (Accounts and Related Provisions) (Amendment) Regulations 2007, SI 2007/859, which amend regulations made originally under earlier provisions, the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504 (amended by SI 1999/248; SI 2001/3649; SI 2004/3199; SI 2005/2114; SI 2007/859).
- 20 As to Building Societies Act group accounts see PARA 1992.
- 21 Building Societies Act 1986 s 72F(1) (as added: see note 2). For supplementary provisions relating to group accounts see the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, reg 4, Sch 4 (amended by SI 1999/248; SI 2001/3649; SI 2004/3199).
- 22 Building Societies Act 1986 s 72F(2) (as added: see note 2).
- 23 le made under the Building Societies Act 1986 s 72G: see the text to notes 35-36.
- 24 Building Societies Act 1986 s 72F(3) (as added: see note 2). For a further matter to be stated in notes to accounts for IAS group accounts see s 72H; and PARA 1992.
- 25 le provisions of the Building Societies Act 1986.
- 26 Building Societies Act 1986 s 72F(4) (as added: see note 2).
- 27 Building Societies Act 1986 s 72F(5) (as added: see note 2).



28 Building Societies Act 1986 s 72F(6) (as added: see note 2).

29 Building Societies Act 1986 s 72F(7) (as added: see note 2). Regulations under s 72F(7) may make different provision for different descriptions of society and may include incidental and supplementary provisions: s 72F(8) (as so added). The power to make regulations under s 72F(7) is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 72F(9) (as so added). At the date at which this volume states the law no such regulations had been made.

30 Building Societies Act 1986 s 72F(7)(a) (as added: see note 2). The reference to the documents comprised in a society's Building Societies Act individual accounts is a reference to those documents as required under s 72F(1) (see the text and notes 20-21). See note 29.

31 Building Societies Act 1986 s 72F(7)(b) (as added: see note 2). See note 29.

32 *Ie* under the Building Societies Act 1986 Pt VIII.

33 Building Societies Act 1986 s 72F(7)(c) (as added: see note 2). See note 29.

34 Building Societies Act 1986 s 72F(7)(d) (as added: see note 2). See note 29.

35 Building Societies Act 1986 s 72G(1) (as added: see note 2). See note 36.

36 Building Societies Act 1986 s 72G(2) (as added: see note 2). Without prejudice to the generality of s 72G(1), (2), the regulations may: (1) prescribe accounting principles and rules; (2) require corresponding information for a preceding financial year; (3) make different provision for different descriptions of society; and (4) permit group accounts to be prepared in other than consolidated form: s 72G(3) (as so added). The power to make regulations under s 72G is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 72G(4) (as so added). As to regulations made under s 72G see the Building Societies (Accounts and Related Provisions) (Amendment) Regulations 2007, SI 2007/859, which amend regulations made originally under earlier provisions, the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504 (see note 19). See also note 19.

37 *Ie* information specified in the Building Societies Act 1986 Sch 10A Pt I (paras 1-12) (Schs 10A, 10B added by SI 2004/3380; and amended by SI 2008/948). The Treasury may, by order, modify the provisions of the Building Societies Act 1986 Sch 10A: s 72J(5) (ss 72J, 72K added by SI 2004/3380). In the Building Societies Act 1986 s 72J 'modify' includes amend, add to or repeal: s 72J(8) (as so added). An order under s 72J may make consequential amendments of or repeals in other provisions of the Building Societies Act 1986, make such transitional or saving provisions as appear to the Treasury to be necessary or expedient, and make different provision for different cases: s 72J(6) (as so added). The power to make an order under s 72J is exercisable by statutory instrument but no such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 72J(7) (as so added). At the date at which this volume states the law no such order had been made.

38 *Ie* information specified in the Building Societies Act 1986 Sch 10A Pt II (para 13) (as added: see note 37).

39 Building Societies Act 1986 s 72J(1), (2) (as added: see note 37). 'Annual accounts', in relation to a building society, means the individual accounts required by s 72A (see PARA 1992) and any group accounts required by s 72E (see PARA 1992), together with the notes to those accounts: s 81B(1) (as added: see note 2), s 119(1) (definition substituted by SI 2004/3380).

For the information prescribed in the form of notes to annual accounts see the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, reg 5 (amended by SI 2004/3199) and the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, Sch 5 (amended by SI 1999/248; SI 2004/3199).

40 As to the office of director see PARAS 1944-1963.

41 *Ie* for the purposes of the Building Societies Act 1986 Sch 10A Pt I: see s 72J(3) (as added: see note 37).

42 Building Societies Act 1986 s 72J(4) (as added: see note 37). The fine must not exceed level 3 on the standard scale: s 72J(4) (as so added). As to the standard scale see PARA 27 note 21.

43 *Ie* information specified in the Building Societies Act 1986 Sch 10B (as added and amended: see note 37): see notes 37, 44. The Treasury may, by order, modify the provisions of the Building Societies Act 1986 Sch 10B: s 72K(4) (as added: see note 37). In s 72K 'modify' includes amend, add to or repeal: s 72K(7) (as so added). An order under s 72K may make consequential amendments of or repeals in other provisions of the Building Societies Act 1986, make such transitional or saving provisions as appear to the Treasury to be necessary or expedient, and make different provision for different cases: s 72K(5) (as so added). The power to make an order under s 72K is exercisable by statutory instrument but no such order may be made unless a draft of it has been

laid before and approved by a resolution of each House of Parliament: s 72K(6) (as so added). At the date at which this volume states the law no such order had been made.

44 Building Societies Act 1986 s 72K(1) (as added: see note 37). In the case of a building society whose directors are not required to prepare consolidated group accounts, the information specified in Sch 10B Pt I (paras 1-8) (as added and amended: see note 37) must be given: Building Societies Act 1986 s 72K(2) (as so added). In the case of a building society whose directors are required to prepare consolidated group accounts, the information specified in Sch 10B Pt II (paras 9-20) (as so added and amended) must be given: Building Societies Act 1986 s 72K(3) (as so added). See note 43.

## **UPDATE**

### **1993 Content and form of annual accounts**

TEXT AND NOTES--Building Societies Act 1986 ss 72L (disclosures relating to off-balance sheet arrangements required in notes to accounts), 72M, Sch 10C (disclosure of auditor remuneration required in notes to accounts) added: SI 2008/1519.

NOTE 19--SI 1998/504 further amended: SI 2008/1143, SI 2009/1391.

NOTE 39--SI 1998/504 Sch 5 further amended: SI 2008/1143.

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### **1994. Duty to prepare annual business statement.**

The directors of a building society<sup>1</sup> must, by reference to the annual accounts<sup>2</sup> and other records and information at their disposal, prepare with respect to each financial year of the society<sup>3</sup> a statement, referred to as the annual business statement, relating to the prescribed aspects<sup>4</sup> of the business of the society during the year<sup>5</sup>. Any director who fails to comply with this requirement is liable on conviction on indictment or on summary conviction to a fine<sup>6</sup>. If the society has connected undertakings<sup>7</sup> the annual business statement must also deal with prescribed aspects of their business during the year to which it relates<sup>8</sup>. The annual business statement must contain such information relating to such aspects of the business of the society and must be in such form as the Treasury<sup>9</sup> prescribes by regulations<sup>10</sup>. The regulations may require the annual business statement to include prescribed information about directors and past directors and persons connected with them and other officers<sup>11</sup> and past officers and persons connected with them and their financial interests<sup>12</sup>. The information comprising the annual business statement must give a true representation of the matters in respect of which it is given<sup>13</sup>. The regulations may prescribe that certain matters contained in the annual business statement need not be the subject of report by the society's auditors<sup>14</sup>.

Every director or other officer of a society is under a duty to give notice<sup>15</sup> to the society of such matters relating to himself or his financial interests as may be necessary for the purposes of compliance with these provisions<sup>16</sup>. Any person who fails to comply with this requirement is liable on summary conviction to a fine<sup>17</sup>.

1 As to the office of director see PARAS 1944-1963.

2 As to the annual accounts see PARAS 1992-1993.

- 3 As to the meaning of 'financial year' see PARA 1992 note 2.
- 4 'Prescribed' means prescribed by regulations made under the Building Societies Act 1986 s 74(3): s 74(3). The power to make such regulations is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 74(7). For the prescribed aspects of a society's business which must be included in the annual business statement see the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, reg 9, Sch 9 (amended by SI 2005/2114; SI 2007/859).
- 5 Building Societies Act 1986 ss 74(1), 119(1).
- 6 Building Societies Act 1986 s 74(10). The fine must not exceed, on summary conviction, the statutory maximum: s 74(10). As to the statutory maximum see PARA 56 note 24.
- 7 As to meaning of 'connected undertaking' see PARA 1991 note 16.
- 8 Building Societies Act 1986 s 74(2) (amended by the Building Societies Act 1997 Sch 7 para 31).
- 9 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 10 Building Societies Act 1986 s 74(3) (amended by SI 2001/2617). See note 4.
- 11 As to the meaning of 'officer' see PARA 1944.
- 12 See the Building Societies Act 1986 s 74(4).
- 13 Building Societies Act 1986 s 74(5).
- 14 Building Societies Act 1986 s 74(6). For the material that need not be the subject of an auditors' report see the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, reg 9(4), Sch 9 para 3. As to the office of auditor see PARA 1998 et seq; and as to the auditors' report see PARA 2003.
- 15 As to the meaning of 'notice' see PARA 1866 note 8.
- 16 Building Societies Act 1986 s 74(8).
- 17 Building Societies Act 1986 s 74(9). The fine must not exceed level 5 on the standard scale: s 74(9). As to the standard scale see PARA 27 note 21.

## UPDATE

### 1994 Duty to prepare annual business statement

TEXT AND NOTE 14--Building Societies Act 1986 s 74(6) amended: SI 2008/1519.

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### 1995. Duty to prepare a directors' report.

The directors of a building society<sup>1</sup> must prepare for submission to the annual general meeting<sup>2</sup> a report on the business of the society containing<sup>3</sup>:

- 423 (1) a fair review of the business of the society and its connected undertakings<sup>4</sup> (if any), complying with the relevant provisions<sup>5</sup>;
- 424 (2) a description of the principal risks and uncertainties facing the society and its connected undertakings (if any)<sup>6</sup>;

- 425 (3) such information relating to such aspects of the business of the society or of the society and any connected undertakings as may be prescribed by regulations made by the Treasury<sup>7</sup>; and
- 426 (4) a statement containing details of various matters<sup>8</sup>.

If the society has subsidiary undertakings, the report may, where appropriate, give greater emphasis to those matters which are significant to the society and its subsidiary undertakings taken as a whole<sup>9</sup>. If a directors' report does not contain the review, information and statement required under heads (1) to (4) above<sup>10</sup>, each director is liable on conviction on indictment or on summary conviction to a fine<sup>11</sup>.

1 As to the office of director see PARAS 1944-1963.

2 As to annual general meetings see PARA 1977.

3 Building Societies Act 1986 s 75(1).

4 As to the meaning of 'connected undertaking' see PARA 1991 note 16.

5 Building Societies Act 1986 s 75(1)(a) (s 75(1)(a) substituted, and s 75(1)(aa) added, by SI 2004/3380).

The provisions referred to in the text are those of the Building Societies Act 1986 s 75A. The review required for the purposes of s 75(1) is a balanced and comprehensive analysis of: (1) the development and performance of the business of the building society and its connected undertakings (if any) during the financial year; and (2) the position of the building society and its connected undertakings (if any) at the end of that year, consistent with the size and complexity of the business: s 75A(1) (s 75A added by SI 2004/3380). As to the meaning of 'financial year' see PARA 1992 note 2. The review must, to the extent necessary for an understanding of the development, performance or position of the business of the society and its connected undertakings (if any), include: (a) analysis using financial key performance indicators; and (b) where appropriate, analysis using other key performance indicators, including information relating to environmental matters and employee matters: Building Societies Act 1986 s 75A(2) (as so added). 'Key performance indicators' means factors by reference to which the development, performance or position of the business of the society and any connected undertakings it has can be measured most effectively: s 75A(4) (as so added). The review must, where appropriate, include references to and additional explanations of amounts included in the annual accounts of the society: s 75A(3) (as so added). As to the annual accounts of the society see PARAS 1992-1993.

6 Building Societies Act 1986 s 75(1)(aa) (as added: see note 5).

7 Building Societies Act 1986 s 75(1)(b) (amended by the Building Societies Act 1997 Sch 7 para 32(1)(a); and SI 2001/2617). The power to make such regulations is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 75(3). For the prescribed information see the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, reg 8, Sch 8 (amended by SI 2004/3199; SI 2005/2114; SI 2007/859). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Building Societies Act 1986 s 75(1)(c) (substituted by the Building Societies Act 1997 Sch 7 para 32(1)(b)). The matters are: (1) whether the society has acquired or established, or allowed a subsidiary undertaking to acquire or establish, a business to which the Building Societies Act 1986 s 92A(3), (4) (see PARA 2041) or, as the case may be, s 92A(5) (see PARA 2041) applied; (2) if the society has acquired or established, or allowed such an undertaking to acquire or establish, such a business, what the business is and whether the society complied with the requirements of s 92A(1) (see PARA 2041); and (3) if the society did not comply with those requirements, why the society nevertheless proceeded, or allowed the undertaking to proceed, with the acquisition or establishment: s 75(1A) (added by the Building Societies Act 1997 Sch 7 para 32(2)). As to the meaning of 'subsidiary undertaking' see PARA 1916 note 9.

9 Building Societies Act 1986 s 75(1B) (added by SI 2004/3380).

10 The Building Societies Act 1986 s 75(4) also refers to the review required for connected undertakings under s 75(2), where applicable, but this provision has been repealed.

11 Building Societies Act 1986 s 75(4) (amended by the Building Societies Act 1997 Sch 7 para 32(4)). The fine must not exceed, on summary conviction, the statutory maximum: Building Societies Act 1986 s 75(4). As to the statutory maximum see PARA 56 note 24.

**UPDATE****1995 Duty to prepare a directors' report**

NOTE 7--SI 1998/504 Sch 8 amended: SI 2009/1391.

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**1996. Duty to prepare a summary financial statement for members and depositors.**

With respect to each financial year<sup>1</sup>, the directors of a building society<sup>2</sup> must prepare for members<sup>3</sup> and depositors a summary financial statement for that year, which is a statement derived from the annual accounts<sup>4</sup>, annual business statement<sup>5</sup> and directors' report<sup>6</sup>, giving a summary account of the society's financial development during and financial position at the end of the year<sup>7</sup>. If the society has connected undertakings<sup>8</sup> the statement must (so far as they are dealt with in the group accounts<sup>9</sup>) give an account of the financial development and position of the society and its connected undertakings<sup>10</sup>. The Treasury<sup>11</sup> may by regulations make provision with respect to the form of the summary financial statement and the information which must be included in it<sup>12</sup>. The summary financial statement must also include in the prescribed form statements to the effect that<sup>13</sup>:

- 427 (1) it is only a summary of information in the accounts, business statement and directors' report<sup>14</sup>;
- 428 (2) in so far as it summarises the information in the accounts, those accounts have been audited<sup>15</sup>;
- 429 (3) the accounts, business statement and directors' report will be available to members and depositors free of charge on demand at every office of the society after a specified date<sup>16</sup>.

The summary financial statement must include a statement of the auditors'<sup>17</sup> opinion as to its consistency with the accounts, business statement and directors' report and its conformity with the statutory requirements and regulations<sup>18</sup>. The summary financial statement must be signed by two directors on behalf of the board of directors and by the chief executive of the society<sup>19</sup>.

A copy of the summary financial statement (and if the auditors' report includes a qualification of their opinion that the annual accounts give a true and fair view<sup>20</sup>, a copy also of the auditors' report) must be sent by the society, not later than 21 days before the date of the annual general meeting<sup>21</sup> at which the accounts and reports are to be considered, to every member of the society who is entitled to receive notice<sup>22</sup> of the meeting and two copies must be sent to the Financial Services Authority<sup>23</sup>. Provision is made for a copy to be sent to a member electronically<sup>24</sup>. It is an offence if a society fails to comply with the above requirements, and the society, and any officer<sup>25</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>26</sup>, and, in the case of a continuing offence, to an additional fine<sup>27</sup> for every day during which the offence continues<sup>28</sup>.

The Authority must keep one of the copies of the summary financial statement in the public file of the society<sup>29</sup>.

A copy of the summary financial statement (and if the auditors' report includes a qualification of their opinion that the annual accounts give a true and fair view<sup>30</sup>, a copy also of the auditors' report) must be given or sent by the society free of charge at any time before the publication of the next summary financial statement to<sup>31</sup>: (a) any individual who for the first time subscribes for shares<sup>32</sup> in the society, on his first subscribing for the shares<sup>33</sup>; and (b) any member of the society who was not sent a copy<sup>34</sup>, within seven days of his making a demand for a copy<sup>35</sup>. Provision is made for a copy to be sent to an individual or a member electronically<sup>36</sup>. It is an offence if a society fails to comply with the above requirements, and the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine<sup>37</sup>, and, in the case of a continuing offence, to an additional fine<sup>38</sup> for every day during which the offence continues<sup>39</sup>.

1 As to the meaning of 'financial year' see PARA 1992 note 2.

2 As to the office of director see PARAS 1944-1963.

3 As to membership see PARA 1888 et seq.

4 As to the annual accounts see PARAS 1992-1993.

5 As to the annual business statement see PARA 1994.

6 As to the directors' report see PARA 1995.

7 Building Societies Act 1986 ss 76(1), 119(1).

8 As to the meaning of 'connected undertaking' see PARA 1991 note 16.

9 As to the duty of directors to prepare group accounts see PARA 1992.

10 Building Societies Act 1986 s 76(2) (amended by the Building Societies Act 1997 Sch 7 para 33(1)).

11 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

12 Building Societies Act 1986 s 76(3) (amended by SI 2001/2617). The power to make such regulations is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 76(6). For the form of the summary financial statement and the information which must be included in it see the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, reg 10, Sch 10 (both amended by SI 2007/859).

13 Building Societies Act 1986 s 76(4).

14 Building Societies Act 1986 s 76(4)(a).

15 Building Societies Act 1986 s 76(4)(b). As to the auditing of accounts see PARA 1998 et seq.

16 Building Societies Act 1986 s 76(4)(c).

17 As to the office of auditor see PARA 1998 et seq.

18 See the Building Societies Act 1986 s 76(5). The regulations referred to are those made under s 76: see note 12.

19 Building Societies Act 1986 s 76(7). As to the office of chief executive see PARAS 1964-1965.

20 See the Building Societies Act 1986 s 78(6); and PARA 2003.

21 As to annual general meetings see PARA 1977.

22 As to the meaning of 'notice' see PARA 1866 note 8. As to members entitled to receive notice of meetings see PARA 1985.

23 See the Building Societies Act 1986 s 76(8), (8A) (s 76(8) substituted, and s 76(8A) added, by 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

24 See the Building Societies Act 1986 s 76(8B)-(8D) (added by SI 2003/404). Where a copy of the summary financial statement or of the auditors' report is required to be sent to a member under the Building Societies Act 1986 s 76(8) (see the text to notes 20-23): (1) it may be sent to him electronically only if it is sent to an electronic address notified to the society by the member for the purpose; but (2) the requirement to send it is also treated as satisfied if the conditions set out in s 76(8C) are satisfied: s 76(8B) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

The conditions mentioned in head (2) above are satisfied in the case of a copy of a summary financial statement or auditors' report if: (a) the society and the member have agreed that information that is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the summary financial statement or auditors' report in question; (c) the member is notified, in a manner agreed between him and the society, of the publication of the summary financial statement and (where applicable) the auditors' report on a website, the address of that website, and the place on that website where the statement and (where applicable) the report may be accessed, and how it may be accessed; (d) the notification given for the purposes of head (c) above is given not less than 21 days before the date of the annual general meeting at which the accounts and reports are to be considered; and (e) a copy of the statement and (where applicable) the report is published on the website throughout a period beginning at least 21 days before the date of meeting: s 76(8C) (as so added).

Where, in a case in which s 76(8C) is relied on for compliance with a requirement of s 76(8), a copy of a summary financial statement or auditors' report is published for a part, but not all, of the period mentioned in head (e) above, and the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society or the officer to prevent or avoid, the failure does not invalidate the proceedings of the meeting at which the accounts and reports are considered, and no offence is committed under s 76(10) (see the text to notes 25-28) by reason of that failure: s 76(8D) (as so added).

25 As to the meaning of 'officer' see PARA 1944.

26 Is not exceeding level 5 on the standard scale: Building Societies Act 1986 s 76(10)(a). As to the standard scale see PARA 27 note 21. See note 24.

27 Is not exceeding £200: Building Societies Act 1986 s 76(10)(b). See note 24.

28 Building Societies Act 1986 s 76(10). See note 24.

29 Building Societies Act 1986 s 76(12) (amended by SI 2001/2617). As to the public file see PARA 1864.

30 See note 20.

31 Building Societies Act 1986 s 76(9).

32 As to shares in relation to societies see PARA 1905 et seq.

33 Building Societies Act 1986 s 76(9)(a) (substituted by the Building Societies Act 1997 Sch 7 para 33(2)).

34 Is under the Building Societies Act 1986 s 76(8): see the text to notes 20-23.

35 Building Societies Act 1986 s 76(9)(b) (amended by SI 2003/404).

36 See the Building Societies Act 1986 s 76(9A)-(9E) (added by SI 2003/404). Where a copy of the summary financial statement or of the auditors' report is required under the Building Societies Act 1986 s 76(9)(a) (see the text to notes 30-33) to be sent to an individual who for the first time subscribes for shares in the society (a 'new subscriber'): (1) it may be sent to him electronically only if it is sent to an electronic address notified to the society by that new subscriber for the purpose before or at the time when he subscribes for the shares; but (2) the requirement to send it is also treated as satisfied if the conditions set out in s 76(9B) are satisfied: s 76(9A) (as so added).

The conditions mentioned in head (2) above are satisfied in the case of a copy of a summary financial statement or of an auditors' report if: (a) before or at the time when he subscribes for the shares, the society and the new subscriber have agreed that information that is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the summary financial statement or to the auditors' report in question; (c) before or at the time when he subscribes for the shares, the new subscriber is notified, in a manner agreed between him and the society, of the publication of the summary financial statement or auditors' report on a website, the address of that website, and the place on that website where that statement or that report may be accessed, and how it may be accessed; and (d) a copy of the summary financial

statement or of the auditors' report is published on that website throughout a period beginning on the date on which the new subscriber is notified in accordance with head (c) above and ending no later than the date of the publication of the next summary financial statement: s 76(9B) (as so added).

Where a copy of the summary financial statement or of the auditors' report is required to be sent to a member under s 76(9)(b) (see the text to notes 34-35): (i) it may be sent to him electronically only if it is sent to an electronic address notified to the society by that member for the purpose; but (ii) the requirement to send it is also treated as satisfied if the conditions set out in s 76(9D) are satisfied: s 76(9C) (as so added).

The conditions mentioned in head (ii) above are satisfied in the case of a copy of a summary financial statement or of an auditors' report if: (A) the society and that member have agreed that information that is required to be sent to him may instead be accessed by him on a website; (B) the agreement applies to the summary financial statement or auditors' report in question; (C) within the seven days specified in s 76(9)(b), the member is notified, in a manner agreed between him and the society, of the publication of the summary financial statement or auditors' report on a website, the address of that website, and the place on that website where the statement or report may be accessed, and how it may be accessed; and (D) a copy of the summary financial statement or of the auditors' report is published on that website throughout a period beginning on the date on which the member is notified in accordance with head (c) above and ending no earlier than the date of the publication of the next summary financial statement: s 76(9D) (as so added).

Where, in a case in which head (2) above or head (ii) above is relied on for compliance with a requirement under s 76(9), a copy of a summary financial statement or auditors' report is published for a part, but not all, of the period mentioned in head (d) or head (D) above (as the case may be), but the failure to publish that copy of a statement or report throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society or the officer to prevent or avoid, the failure does not prevent the requirements of s 76(9) from being treated as fulfilled in relation to that copy of a statement or report, and no offence is committed under s 76(11) (see the text to notes 37-39) by reason of that failure: s 76(9E) (as so added).

37    le not exceeding level 3 on the standard scale: Building Societies Act 1986 s 76(11)(a). See note 36.

38    le not exceeding £40: Building Societies Act 1986 s 76(11)(b). See note 36.

39    Building Societies Act 1986 s 76(11). See note 36.

## **UPDATE**

### **1996 Duty to prepare a summary financial statement for members and depositors**

NOTE 12--SI 1998/504 reg 10 further amended: SI 2008/1143.

TEXT AND NOTES 17, 18--Building Societies Act 1986 s 76(5) amended: SI 2008/1519.

NOTE 23--Building Societies Act 1986 s 76(8A) amended: SI 2008/1519.

TEXT AND NOTES 30, 31--Building Societies Act 1986 s 76(9) further amended: SI 2008/1519.

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### **1997. Procedure on completion of accounts.**

The balance sheet of a building society must be signed by two directors<sup>1</sup> on behalf of the board of directors and by the chief executive of the society<sup>2</sup>. The income and expenditure account<sup>3</sup> and the annual business statement<sup>4</sup> must be annexed to the balance sheet, as must any group accounts<sup>5</sup>. These documents must be approved by the board of directors before the balance



sheet is signed on their behalf and the date of their approval must be indorsed on the balance sheet<sup>6</sup>. The auditors' report<sup>7</sup> and the directors' report<sup>8</sup> must be attached to the balance sheet<sup>9</sup>. It is an offence if: (1) a balance sheet has not been signed as required, and a copy of it is issued, circulated or published<sup>10</sup>; or (2) any copy of a balance sheet is issued, circulated or published without having annexed to it a copy of the income and expenditure account or a copy of the annual business statement, or without having attached to it a copy of the auditors' report or a copy of the directors' report<sup>11</sup>. On default the society, and any officer<sup>12</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>13</sup>.

The directors of a society must lay before the society at the annual general meeting<sup>14</sup> the annual accounts<sup>15</sup> for the last financial year<sup>16</sup>. On default every person who was a director at any time during the relevant period<sup>17</sup> is liable on summary conviction to a fine<sup>18</sup> and, in the case of a continuing offence, to an additional fine<sup>19</sup> for every day during which the offence continues<sup>20</sup>. The directors must send two copies of the annual accounts for the last financial year to the Financial Services Authority<sup>21</sup> not later than 14 days before the annual general meeting at which the accounts are to be considered<sup>22</sup>. On default every person who was a director at any time during the relevant period is liable on summary conviction to a fine<sup>23</sup> and, in the case of a continuing offence, to an additional fine<sup>24</sup> for every day during which the offence continues<sup>25</sup>. The Authority must keep one of the copies of the annual accounts of a society received by it in the public file of the society<sup>26</sup>. A society must make copies of the annual accounts available, as from the date by which at the latest its directors are required to send them to the Authority, free of charge to members<sup>27</sup> of and depositors with the society at every office of the society and, free of charge, must send copies of those documents to any member or depositor who demands it<sup>28</sup>. Provision is made for such copies to be sent electronically<sup>29</sup>. If a society fails to comply with the demand to make available or, as the case may be, within seven days of the demand to send to a person a copy of the annual accounts, the society, and any officer who is also guilty of the offence, is liable on summary conviction to a fine<sup>30</sup> and, in the case of a continuing offence, to an additional fine<sup>31</sup> for every day during which the offence continues<sup>32</sup>.

If a building society publishes<sup>33</sup> any of its statutory accounts<sup>34</sup>, they must be accompanied by the relevant auditors' report<sup>35</sup>. A building society that is required to prepare group accounts for a financial year must not publish its statutory individual accounts for that year without also publishing with them its statutory group accounts<sup>36</sup>.

If a building society publishes non-statutory accounts<sup>37</sup>, it must publish with them a statement indicating: (a) that they are not the society's statutory accounts<sup>38</sup>; (b) whether statutory accounts dealing with any financial year with which the non-statutory accounts purport to deal have been prepared<sup>39</sup>; (c) whether the society's auditors have made an auditors' report<sup>40</sup> on the statutory accounts for any financial year<sup>41</sup>; and (d) whether any such auditors' report: (i) was qualified or unqualified, or included a reference to any matters to which the auditors drew attention by way of emphasis without qualifying the report<sup>42</sup>; or (ii) contained a statement<sup>43</sup> as to the failure to obtain necessary information and explanations<sup>44</sup>. The society must not publish with any such non-statutory accounts any auditors' report required by the Building Societies Act 1986<sup>45</sup>.

A building society which contravenes the above provisions<sup>46</sup>, and any officer of it who is in default, is guilty of an offence and liable on summary conviction to a fine<sup>47</sup>.

1 As to the office of director see PARAS 1944-1963.

2 Building Societies Act 1986 s 80(1). As to the office of chief executive see PARAS 1964-1965. As to the duty of directors to prepare a balance sheet see PARAS 1992-1993.

3 As to the duty of directors to prepare an income and expenditure account see PARAS 1992-1993.

4 As to the annual business statement see PARA 1994.

- 5 Building Societies Act 1986 s 80(2) (s 80(2), (3), (6) amended by SI 1999/248). As to the duty of directors to prepare group accounts see PARA 1992.
  - 6 Building Societies Act 1986 s 80(3) (as amended: see note 5).
  - 7 As to the office of auditor see PARA 1998 et seq; and as to the auditors' report see PARA 2003.
  - 8 As to the directors' report see PARA 1995.
  - 9 See the Building Societies Act 1986 s 80(2), (4).
  - 10 Building Societies Act 1986 s 80(5). As to the defence of due diligence see PARA 1969.
  - 11 Building Societies Act 1986 s 80(6) (as amended: see note 5).
  - 12 As to the meaning of 'officer' see PARA 1944.
  - 13 Building Societies Act 1986 s 80(5), (6). The fine must not exceed level 3 on the standard scale: s 80(5), (6). As to the standard scale see PARA 27 note 21.
  - 14 As to annual general meetings see PARA 1977.
  - 15 Reference to the annual accounts includes a reference to the documents required to be annexed or attached to them under the Building Societies Act 1986 s 80 (see the text and notes 1-13): s 81(8). As to the annual accounts see PARAS 1992-1993.
  - 16 Building Societies Act 1986 s 81(1). As to the meaning of 'financial year' see PARA 1992 note 2.
  - 17 'Relevant period' means the period beginning at the end of the last financial year and ending with the date which falls 14 days before the annual general meeting following the end of that year: Building Societies Act 1986 s 81(6).
  - 18 Ie not exceeding level 5 on the standard scale: Building Societies Act 1986 s 81(4)(a).
  - 19 Ie not exceeding £200: Building Societies Act 1986 s 81(4)(b).
  - 20 Building Societies Act 1986 s 81(4).
  - 21 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
  - 22 Building Societies Act 1986 s 81(2) (s 81(2), (3), (7) amended by SI 2001/2617).
  - 23 Ie not exceeding level 5 on the standard scale: Building Societies Act 1986 s 81(4)(a).
  - 24 Ie not exceeding £200: Building Societies Act 1986 s 81(4)(b).
  - 25 Building Societies Act 1986 s 81(4).
  - 26 Building Societies Act 1986 s 81(7) (as amended: see note 22). As to the public file see PARA 1864.
  - 27 As to membership see PARA 1888 et seq.
  - 28 Building Societies Act 1986 s 81(3) (as amended: see note 22).
  - 29 See the Building Societies Act 1986 s 81(3A)-(3B), (5A) (added by SI 2003/404). Where a copy of the annual accounts is required to be sent to a member or depositor under the Building Societies Act 1986 s 81(3) (see the text to notes 27-28): (1) they may be sent to him electronically only if they are sent to an electronic address notified to the society by that member or depositor for the purpose; but (2) the requirement to send them is also treated as satisfied if the conditions set out in s 81(3B) are satisfied: s 81(3A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.
- The conditions mentioned in head (2) above are satisfied in the case of a copy of the annual accounts if: (a) the society and the member or depositor have agreed that information that is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the annual accounts in question; (c) within seven days of his demand, the member or depositor is notified, in a manner agreed for the purpose between him and the society, of the publication of the accounts on a website, the address of that website, and the place on that website where the accounts may be accessed, and how they may be accessed; and (d) the

accounts are published on that website throughout the period beginning on the date on which the member or depositor is notified in accordance with head (c) above and ending with the conclusion of the annual general meeting at which the accounts are to be considered: s 81(3B) (as so added).

Where, in a case in which head (2) above is relied on for compliance with a requirement under s 81(3), a copy of the annual accounts is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society or the officer to prevent or avoid, no offence is committed under s 81(5) (see the text to notes 30-32) by reason of that failure: s 81(5A) (as so added).

30    le not exceeding level 3 on the standard scale: Building Societies Act 1986 s 81(5)(a). See note 29.

31    le not exceeding £40: Building Societies Act 1986 s 81(5)(b). See note 29.

32    Building Societies Act 1986 s 81(5). See note 29.

33    For these purposes, a building society is regarded as publishing a document if it publishes, issues or circulates it or otherwise makes it available for public inspection in a manner calculated to invite members of the public generally, or any class of members of the public, to read it: Building Societies Act 1986 s 81A(4) (s 81A added by SI 2003/404).

34    References in the Building Societies Act 1986 s 81A to a building society's 'statutory accounts' are to its annual accounts as required to be laid before the society under s 81 (see the text to notes 14-33): s 81A(5) (as added: see note 33).

35    Building Societies Act 1986 s 81A(1) (as added: see note 33). The auditors' report is required under s 78: see PARA 2003.

36    Building Societies Act 1986 s 81A(2) (as added: see note 33).

37    References in the Building Societies Act 1986 s 81A to the publication by a society of 'non-statutory accounts' are to the publication of: (1) any balance sheet or income and expenditure account relating to, or purporting to deal with, a financial year or part of a financial year of the society; or (2) an account in any form purporting to be a balance sheet or income and expenditure account for the group consisting of the society and its subsidiary undertakings relating to, or purporting to deal with, a financial year or part of a financial year of the society, otherwise than as part of the society's statutory accounts or summary financial statement prepared under s 76 (see PARA 1996): s 81A(5) (as added: see note 33). As to the meaning of 'subsidiary undertaking' see PARA 1916 note 9.

38    Building Societies Act 1986 s 81A(3)(a) (as added: see note 33).

39    Building Societies Act 1986 s 81A(3)(b) (as added: see note 33).

40    le a report under the Building Societies Act 1986 s 78: see PARA 2003.

41    Building Societies Act 1986 s 81A(3)(c) (as added: see note 33).

42    Building Societies Act 1986 s 81A(3)(d)(i) (as added: see note 33).

43    le a statement under the Building Societies Act 1986 s 76(6): see PARA 2004.

44    Building Societies Act 1986 s 81A(3)(d)(ii) (as added: see note 33).

45    Building Societies Act 1986 s 81A(3) (as added: see note 33). The reference in the text is to an auditors' report made under s 78: see PARA 2003.

46    le any provision of the Building Societies Act 1986 s 81A: see the text to notes 33-45.

47    Building Societies Act 1986 s 81A(6) (as added: see note 33). The fine must not exceed level 3 on the standard scale: s 81A(6) (as so added).

## **UPDATE**

### **1997 Procedure on completion of accounts**

TEXT AND NOTES 10-13--Building Societies Act 1986 s 80(6) amended: SI 2008/1519.

TEXT AND NOTES 33-35--Building Societies Act 1986 s 81A(1) amended: SI 2008/1519.

TEXT AND NOTES 40-44--Building Societies Act 1986 s 81A(3)(c), (d) amended: SI 2008/1519.

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## ***E. AUDITORS AND AUDIT OF ACCOUNTS***

### **1998. Appointment of auditors.**

Every building society must appoint an auditor or auditors at each annual general meeting<sup>1</sup> to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting<sup>2</sup>. The first auditors of a society may be appointed by the directors<sup>3</sup> at any time before the first general meeting of the society following the end of the society's first financial year<sup>4</sup> and auditors so appointed hold office until the conclusion of that meeting<sup>5</sup>. If the directors fail to exercise such powers, they may be exercised by the society in general meeting<sup>6</sup>. The directors, or the society in general meeting, may fill any casual vacancy in the office of auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors, if any, may act<sup>7</sup>. If at any annual general meeting of a society no auditors are appointed or re-appointed, the Financial Services Authority<sup>8</sup> may appoint a person to fill the vacancy, and, within one week of that power of the Authority becoming exercisable, the society must give it notice<sup>9</sup> of that fact<sup>10</sup>. It is an offence if a society fails to give that notice, and the society, and any officer<sup>11</sup> who is also guilty of the offence, is liable on summary conviction to a fine<sup>12</sup> and, in the case of a continuing offence, to an additional fine<sup>13</sup> for every day during which the offence continues<sup>14</sup>.

Not less than 28 days' notice must be given to the society of the intention to move a resolution at a general meeting of a society<sup>15</sup>:

- 430 (1) appointing as auditor a person other than a retiring auditor<sup>16</sup>; or
- 431 (2) filling a casual vacancy in the office of auditor<sup>17</sup>; or
- 432 (3) re-appointing as auditor a retiring auditor who was appointed by the directors to fill a casual vacancy<sup>18</sup>; or
- 433 (4) removing an auditor before the expiration of his term of office<sup>19</sup>.

A society must give notice of any such resolution to its members<sup>20</sup> at the same time and in the same manner as it gives notice of the meeting, or, if that is not practicable, must give them notice of the resolution, not less than 21 days before the meeting, either by advertisement in a newspaper having an appropriate circulation or in any other way allowed by the rules of the society<sup>21</sup>. On receipt of notice of such an intended resolution the society must forthwith send a copy of it<sup>22</sup>:

- 434 (a) to the person proposed to be appointed or removed, as the case may be<sup>23</sup>;
- 435 (b) in a case within head (1) above, to the retiring auditor<sup>24</sup>; and
- 436 (c) where, in a case within head (2) or head (3) above, the casual vacancy was caused by the resignation of an auditor, to the auditor who resigned<sup>25</sup>.

Where notice is given of such a resolution as is mentioned in head (1) or head (4) above, and the retiring auditor, or, as the case may be, the auditor proposed to be removed, makes with respect to the intended resolution representations in writing to the society, not exceeding a reasonable length, and requests their notification to the members, the society must, unless the representations are received by it too late to do so<sup>26</sup>: (i) in any notice of the resolution given to members, state the fact of the representations having been made<sup>27</sup>; and (ii) send a copy of the representations to every member to whom notice of the meeting is or has been sent<sup>28</sup>. Provision is made for the electronic transmission of such written representations of auditors<sup>29</sup>. It is an offence if a society fails to comply with the above requirements, and the society, and any officer who is also guilty of the offence, is liable on conviction to a fine<sup>30</sup>. If a copy of such representations is not sent out as required because it was received too late or because of the society's default, the auditor may, without prejudice to his right to be heard orally, require that the representations be read out at the meeting<sup>31</sup>.

Within 14 days of the receipt by the society of any such representations, either the society or any person claiming to be aggrieved<sup>32</sup> may apply to the High Court<sup>33</sup> or the Authority for an order that copies of the representations need not or, as the case may be, must not be sent out nor the representations be read out at the meeting<sup>34</sup>. An application to the High Court is made on the ground that the auditor is abusing the rights conferred to secure needless publicity for defamatory matter, and if the court is satisfied that the auditor is so abusing those rights it may by order direct that copies of the representations need not be sent out nor the representations read out at the meeting; and the court may further order the society's costs on the application to be paid in whole or in part by the auditor notwithstanding that he is not a party to the application<sup>35</sup>. An application to the Authority is made on the ground that the sending out of copies of, or the reading out at the meeting of, the representations would be likely to diminish substantially the confidence in the society of investing members of the public, and if the Authority is satisfied that the sending out of copies of the representations or the reading of them would have that effect it must by order direct that copies of the representations must not be sent out nor the representations read at the meeting<sup>36</sup>.

If the High Court or the Authority makes such an order the society must send, within 14 days of the decision, a statement setting out the effect of the order to every member to whom notice of the meeting is or has been sent<sup>37</sup>; and, if not, the society must send a copy of the written representations made or cause the representations to be read out at the meeting<sup>38</sup>. Provision is made for the electronic transmission of such statement or written representations<sup>39</sup>. It is an offence if a society fails to comply with the above requirements, and the society, and any officer who is also guilty of the offence, is liable on conviction to a fine<sup>40</sup>.

1 As to annual general meetings see PARA 1977.

2 Building Societies Act 1986 s 77(1).

3 As to the office of director see PARAS 1944-1963.

4 As to the initial financial year see PARA 1992 note 2.

5 Building Societies Act 1986 s 77(2) (s 77(2) substituted and s 77(3) added by SI 2008/948), Building Societies Act 1986 Sch 11 para 1(1). Sch 11 has effect as regards the appointment, resignation and removal of auditors: s 77(2) (as so substituted). Appointment as auditor of a building society is an appointment as a statutory auditor to which the provisions of the Companies Act 2006 Pt 42 (ss 1209-1264) (see **COMPANIES** vol 15 (2009) PARA 975 et seq) apply: Building Societies Act s 77(3) (as so added). As to former provisions on the qualification and disqualification of auditors see PARA 1999.

6 Building Societies Act 1986 Sch 11 para 1(2).

7 Building Societies Act 1986 Sch 11 para 2.

8 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

- 9 As to the meaning of 'notice' see PARA 1866 note 8.
- 10 Building Societies Act 1986 Sch 11 para 3(1) (Sch 11 paras 3, 4 amended by SI 2001/2617).
- 11 As to the meaning of 'officer' see PARA 1944.
- 12 Ie not exceeding level 3 on the standard scale: Building Societies Act 1986 Sch 11 para 3(2)(a). As to the standard scale see PARA 27 note 21.
- 13 Ie not exceeding £40: Building Societies Act 1986 Sch 11 para 3(2)(b).
- 14 Building Societies Act 1986 Sch 11 para 3(2).
- 15 Building Societies Act 1986 Sch 11 para 4(1). As to meetings and resolutions generally see PARA 1974 et seq.
- 16 Building Societies Act 1986 Sch 11 para 4(1)(a).
- 17 Building Societies Act 1986 Sch 11 para 4(1)(b).
- 18 Building Societies Act 1986 Sch 11 para 4(1)(c).
- 19 Building Societies Act 1986 Sch 11 para 4(1)(d). As to the removal of auditors see PARA 2000.
- 20 As to membership see PARA 1888 et seq.
- 21 Building Societies Act 1986 Sch 11 para 4(2).
- 22 Building Societies Act 1986 Sch 11 para 4(3).
- 23 Building Societies Act 1986 Sch 11 para 4(3)(a).
- 24 Building Societies Act 1986 Sch 11 para 4(3)(b).
- 25 Building Societies Act 1986 Sch 11 para 4(3)(c). As to the resignation of auditors see PARA 2001.
- 26 Building Societies Act 1986 Sch 11 para 4(4).
- 27 Building Societies Act 1986 Sch 11 para 4(4)(a).
- 28 Building Societies Act 1986 Sch 11 para 4(4)(b). See note 29.
- 29 See the Building Societies Act 1986 Sch 11 para 4(9A)-(9C), (10A) (added by SI 2003/404). The provisions of the Building Societies Act 1986 Sch 11 para 4(9B)-(9C) apply where: (1) a copy of representations is required to be sent under Sch 11 para 4(4)(b) (see the text to note 28) or under Sch 11 para 4(9)(b) (see the text to note 38); or (2) a statement is required to be sent under Sch 11 para 4(9)(a) (see the text to note 37): Sch 11 para 4(9A) (as so added).

Where a copy of representations or a statement is required to be sent to a member: (a) it may be sent to him electronically only if it is sent to an electronic address notified by the member for the purpose; but (b) the requirement to send it is also treated as satisfied if the conditions set out in Sch 11 para 4(9C) are satisfied: Sch 11 para 4(9B) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

The conditions mentioned in head (b) above are satisfied in the case of a copy of representations or a statement if: (i) the society and the member have agreed that information that is required to be sent to him may instead be accessed by him on a website; (ii) the agreement applies to the representations or statement in question; (iii) the member is notified, in a manner agreed between him and the society, of the publication of the copy of the representations or the statement on a website, the address of that website, the place on that website where the representations or statement may be accessed, and how it may be accessed, and where the notification concerns the publication of a statement required to be sent by Sch 11 para 4(9)(a), the member is notified within the period specified in that provision; and (iv) the copy of the representations or the statement is published continuously on that website throughout the period beginning with the date on which notification is given in accordance with head (iii) above and ending with the conclusion of the meeting: Sch 11 para 4(9C) (as so added).

Where, in a case in which head (b) above is relied on for compliance with a requirement of Sch 11 para 4(4) or of Sch 11 para 4(9), a copy of representations or a statement is published on a website for a part, but not all, of the period mentioned in head (iv) above, but the failure to publish it throughout that period is wholly

attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, no offence is committed under Sch 11 para 4(10) (see the text and notes 30, 40) by reason of that failure: Sch 11 para 4(10A) (as so added) (where it is thought that the reference to Sch 11 para 4(9A)(b) is erroneous and that the reference should be to para 4(9B)(b)).

30 Building Societies Act 1986 Sch 11 para 4(10). See note 29. The society and any such officer is liable on conviction on indictment to a fine (Sch 11 para 4(10)(a)), or on summary conviction to a fine not exceeding the statutory maximum and, in the case of a continuing offence, to a fine not exceeding one-tenth of the statutory maximum for every day during which the offence continues (Sch 11 para 4(10)(b)). As to the statutory maximum see PARA 56 note 24.

31 Building Societies Act 1986 Sch 11 para 4(5).

32 As to persons aggrieved see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

33 In the application of the Building Societies Act 1986 Sch 11 to Scotland, references to the High Court are to be read as references to the Court of Session: Sch 11 para 9. However generally Scottish matters are beyond the scope of this work.

34 Building Societies Act 1986 Sch 11 para 4(6) (as amended: see note 10). As to the commencement of proceedings see **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq.

35 Building Societies Act 1986 Sch 11 para 4(7).

36 Building Societies Act 1986 Sch 11 para 4(8) (as amended: see note 10).

37 Building Societies Act 1986 Sch 11 para 4(9)(a) (as amended: see note 10).

38 Building Societies Act 1986 Sch 11 para 4(9)(b) (as amended: see note 10). See note 29.

39 See note 29.

40 Building Societies Act 1986 Sch 11 para 4(10). See also note 29. The society and any such officer is liable on conviction on indictment to a fine (Sch 11 para 4(10)(a)), or on summary conviction to a fine not exceeding the statutory maximum and, in the case of a continuing offence, to a fine not exceeding one-tenth of the statutory maximum for every day during which the offence continues (Sch 11 para 4(10)(b)).

## **UPDATE**

### **1998 Appointment of auditors**

TEXT AND NOTES 3-5--Building Societies Act 1986 Sch 11 para 1(1) amended: SI 2008/1519.

TEXT AND NOTES 8-105--Building Societies Act 1986 Sch 11 para 3(1) amended: SI 2008/1519.

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### **1999. Qualification and disqualification of auditors.**

Until 6 April 2008 the following provisions apply<sup>1</sup>. A person is not qualified for appointment as auditor of a building society unless<sup>2</sup> he is eligible for appointment as a company auditor<sup>3</sup>, or he is a member of a body of accountants, established in the United Kingdom<sup>4</sup> or another member state, which is for the time being designated by order of the Treasury<sup>5</sup>.

The following persons are not qualified for appointment as an auditor of a society<sup>6</sup>:

- 437 (1) a director or employee of the society<sup>7</sup>;
- 438 (2) a person who is a partner of, or in the employment of, or who employs, a director or employee of the society<sup>8</sup>;
- 439 (3) a person who is ineligible<sup>9</sup> for appointment as auditor of a company which is a subsidiary undertaking of the society<sup>10</sup>.

These provisions do not prevent the appointment as auditor of a Scottish firm if none of the partners of the firm is disqualified for appointment as auditor of the society<sup>11</sup>.

No person may act as auditor of a society at a time when he knows that he is disqualified from appointment to that office, and if an auditor of a society to his knowledge becomes so disqualified during his term of office he must vacate his office and give notice<sup>12</sup> to the society that he has vacated it by reason of that disqualification<sup>13</sup>. A person who acts as auditor in contravention of this requirement, or fails without reasonable excuse to give notice of vacating his office as required, is guilty of an offence and liable on conviction to a fine<sup>14</sup>.

1 The Building Societies Act 1986 Sch 11 para 5 is omitted and repealed from 6 April 2008 by SI 2008/948. From that date appointment as an auditor of a building society is an appointment as a statutory auditor to which the provisions of the Companies Act 2006 Pt 42 (ss 1209-1264) (see **COMPANIES** vol 15 (2009) PARA 957 et seq) apply: see the Building Societies Act 1986 s 77(3) (added by SI 2008/948). See also para 1998. As to the limit of any exemption from liability for auditors see the Building Societies Act 1986 s 110; and PARAS 1970-1971.

2 Building Societies Act 1986 Sch 11 para 5(1) (Sch 11 para 5(1) amended, and Sch 11 para 5(1)(a), (b) substituted, by SI 1991/1997). See note 1.

3 Building Societies Act 1986 Sch 11 para 5(1)(a) (as substituted: see note 2). See note 1.

4 As to the meaning of 'United Kingdom' see PARA 2 note 3.

5 Building Societies Act 1986 Sch 11 para 5(1)(b) (as substituted (see note 1); and amended by SI 2001/2617). The power to make an order designating a body of accountants is exercisable by statutory instrument subject to annulment by a resolution of either House of Parliament: Building Societies Act 1986 Sch 11 para 5(4) (amended by the Building Societies Act 1997 Sch 7 para 61(b)). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. See note 1.

6 Building Societies Act 1986 Sch 11 para 5(2). See note 1.

7 Building Societies Act 1986 Sch 11 para 5(2)(a). As to the office of director see PARAS 1944-1963. See note 1.

8 Building Societies Act 1986 Sch 11 para 5(2)(b). See note 1.

9 Ie by virtue of the Companies Act 1989 s 27 (repealed). See note 1.

10 Building Societies Act 1986 Sch 11 para 5(2)(c) (amended by the Building Societies Act 1997 Sch 7 para 61(a); and SI 1991/1997). As to the meaning of 'subsidiary undertaking' see para 1916 note 9. See note 1.

11 See the Building Societies Act 1986 Sch 11 para 5(3). See note 1.

12 As to the meaning of 'notice' see PARA 1866 note 8.

13 Building Societies Act 1986 Sch 11 para 5(5). See note 1.

14 Building Societies Act 1986 Sch 11 para 5(6). Such a person is liable on conviction on indictment to a fine (Sch 11 para 5(6)(a)), or on summary conviction to a fine not exceeding the statutory maximum and, in the case of a continuing offence, to an additional fine not exceeding one-tenth of the statutory maximum for every day during which the offence continues (Sch 11 para 5(6)(b)). As to the statutory maximum see PARA 56 note 24. See note 1.



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## **2000. Removal of auditors.**

A building society may by resolution in general meeting<sup>1</sup> remove an auditor<sup>2</sup> before the expiration of his term of office, notwithstanding anything in any agreement between it and him<sup>3</sup>. Where a resolution removing an auditor is passed at a general meeting of a society, the society must within 14 days give notice<sup>4</sup> of that fact to the Financial Services Authority<sup>5</sup>. It is an offence if a society fails to give the notice so required, and the society, and every officer<sup>6</sup> who is also guilty of the offence, is liable on conviction to a fine<sup>7</sup>.

The power to remove an auditor does not deprive a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as auditor<sup>8</sup>.

1 As to meetings and resolutions generally see PARA 1974 et seq.

2 As to the appointment of auditors see PARA 1998.

3 Building Societies Act 1986 s 77(2), Sch 11 para 6(1).

4 As to the meaning of 'notice' see PARA 1866 note 8.

5 Building Societies Act 1986 Sch 11 para 6(2) (amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

6 As to the meaning of 'officer' see PARA 1944.

7 Building Societies Act 1986 Sch 11 para 6(3). The society and any such officer is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, in the case of a continuing offence, to an additional fine not exceeding £40 for every day during which the offence continues: see Sch 11 para 6(3). As to the standard scale see PARA 27 note 21.

8 Building Societies Act 1986 Sch 11 para 6(4).

## **UPDATE**

### **2000 Removal of auditors**

TEXT AND NOTES--As to provision for the removal of auditors on improper grounds see the Building Societies Act 1986 Sch 11 para 6A (added by SI 2008/1519).

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## **2001. Resignation of auditors.**

An auditor of a building society<sup>1</sup> may resign his office by depositing a notice<sup>2</sup> to that effect at the society's principal office<sup>3</sup>, and any such notice operates to bring his term of office to an end on the date on which the notice is deposited, or on such later date as may be specified in it<sup>4</sup>. An auditor's notice of resignation is not effective unless it contains either<sup>5</sup>: (1) a statement to the effect that there are no circumstances connected with his resignation which he considers should be brought to the notice of the members<sup>6</sup> of, or depositors with, the society<sup>7</sup>; or (2) a statement of any such circumstances as are mentioned above<sup>8</sup>. Where a notice is deposited at a society's principal office, the society must within 14 days send a copy of the notice to the Financial Services Authority<sup>9</sup>; and, if the notice contains a statement under head (2) above, to every person who is statutorily entitled<sup>10</sup> to receive a copy of the summary financial statement<sup>11</sup>. Provision is made for the electronic transmission of such statement or notice<sup>12</sup>. If default is made in complying with the above requirements the society, and any officer<sup>13</sup> who is guilty of the offence, is liable on conviction to a fine<sup>14</sup>.

Within 14 days of the receipt by the society of a notice containing a statement under head (2) above, the society or any person claiming to be aggrieved may apply<sup>15</sup> to the High Court<sup>16</sup> or to the Authority for an order that copies of the notice need not or, as the case may be, must not be sent out<sup>17</sup>. An application to the High Court is made on the ground that the auditor is using the notice to secure needless publicity for defamatory matter, and if the court is satisfied that the auditor is using the notice for that purpose it may by order direct that copies of it need not be sent out, and the court may further order the society's costs on the application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application<sup>18</sup>. An application to the Authority is made on the ground that the sending out of the notice would be likely to diminish substantially the confidence in the society of investing members of the public, and if the Authority is satisfied that the sending out of the notice would be likely to have that effect it must by order direct that copies of it must not be sent out<sup>19</sup>.

Within 14 days of the decision of the High Court or of the Authority, the society must send to the persons statutorily entitled to receive copies of the summary financial statement<sup>20</sup>: (a) if the court or the Authority makes such an order, a statement setting out the effect of the order<sup>21</sup>; and (b) if not, a copy of the notice containing the statement under head (2) above<sup>22</sup>. Provision is made for the electronic transmission of such statement or notice<sup>23</sup>. If default is made in complying with the above requirements the society, and any officer who is guilty of the offence, is liable on conviction to a fine<sup>24</sup>.

1 As to the appointment of auditors see PARA 1998.

2 As to the meaning of 'notice' see PARA 1866 note 8.

3 As to the requirements for principal offices see PARA 1872.

4 Building Societies Act 1986 s 77(2), Sch 11 para 7(1).

5 Building Societies Act 1986 Sch 11 para 7(2).

6 As to membership see PARA 1888 et seq.

7 Building Societies Act 1986 Sch 11 para 7(2)(a).

8 Building Societies Act 1986 Sch 11 para 7(2)(b).

9 Building Societies Act 1986 Sch 11 para 7(3)(a) (Sch 11 para 7(3), (4), (6), (7) amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

10 Ie under the Building Societies Act 1986 s 76(8): see PARA 1996.

11 Building Societies Act 1986 Sch 11 para 7(3)(b). As to the duty of directors to prepare a summary financial statement see PARA 1996.

12 See the Building Societies Act 1986 Sch 11 para 7(7A)-(7C), (8A) (added by SI 2003/404). The provisions of the Building Societies Act 1986 Sch 11 para 7(7B)-(7C) apply where: (1) the reference to a notice containing a statement under Sch 11 para 7(2)(b) (see the text to note 8) is required to be sent to a person under Sch 11 para 7(3)(b) (see the text to note 11) or under Sch 11 para 7(7)(b) (see the text to note 22); or (2) a statement is required to be sent under Sch 11 para 7(7)(a) (see the text to note 21): Sch 11 para 7(7A) (as so added).

Where a notice or a statement is required to be sent to a person, the notice or statement may be sent to him electronically only if: (a) in a case where a person mentioned in Sch 11 para 7(3)(b) has notified the society of an electronic address for the purpose of this provision, it is sent to that address; or (b) in a case where no electronic address has been notified for the purpose of this provision, it is sent to an electronic address notified by him for the purpose of s 76(8B) (electronic address for the reception of summary financial statement for members and depositors) (see PARA 1996): Sch 11 para 7(7B) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.

The requirement to send a notice or a statement is also treated as satisfied if: (i) the society and a person mentioned in Sch 11 para 7(3)(b) have agreed that information that is required to be sent to him may instead be accessed by him on a website; (ii) the agreement applies to the notice or statement in question; (iii) in a manner agreed between the society and that person, he is notified of the publication of the notice or statement on a website, the address of that website, and the place on that website where the notice or statement may be accessed, and how it may be accessed; and (iv) the notice or statement is published on the website throughout a period of at least 14 days, beginning with the day on which the person is notified in accordance with head (iii) above: Sch 11 para 7(7C) (as so added).

Where, in a case in which Sch 11 para 7(7C) is relied on for compliance with a requirement under Sch 11 para 7(3) or under Sch 11 para 7(7), a notice or a statement is published for a part, but not all, of the period mentioned in head (iv) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, no offence is committed under Sch 11 para 7(8) (see the text and notes 14, 24) by reason of that failure: Sch 11 para 7(8A) (as so added).

13 As to the meaning of 'officer' see PARA 1944.

14 Building Societies Act 1986 Sch 11 para 7(8). See note 12. The society and any such officer is liable on conviction on indictment to a fine (Sch 11 para 7(8)(a)), or on summary conviction to a fine not exceeding the statutory maximum and, in the case of a continuing offence, to a fine not exceeding one-tenth of the statutory maximum for every day during which the offence continues (Sch 11 para 7(8)(b)). As to the statutory maximum see PARA 56 note 24.

15 As to the commencement of proceedings see **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq. As to persons aggrieved see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

16 As to references to the High Court see PARA 1998 note 33.

17 Building Societies Act 1986 Sch 11 para 7(4) (as amended: see note 9).

18 Building Societies Act 1986 Sch 11 para 7(5).

19 Building Societies Act 1986 Sch 11 para 7(6) (as amended: see note 9).

20 Building Societies Act 1986 Sch 11 para 7(7) (as amended: see note 9).

21 Building Societies Act 1986 Sch 11 para 7(7)(a) (as amended: see note 9).

22 Building Societies Act 1986 Sch 11 para 7(7)(b).

23 See note 12.

24 Building Societies Act 1986 Sch 11 para 7(8). See note 12. The society and any such officer is liable on conviction on indictment to a fine (Sch 11 para 7(8)(a)), or on summary conviction to a fine not exceeding the statutory maximum and, in the case of a continuing offence, to a fine not exceeding one-tenth of the statutory maximum for every day during which the offence continues (Sch 11 para 7(8)(b)).

## UPDATE

### 2001 Resignation of auditors

TEXT AND NOTES--As to the notifications that must be made where an auditor of a building society ceases to hold office for any reason see the Building Societies Act 1986 Sch 11 paras 8A-8C.

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## **2002. Right of resigning auditor to requisition general meeting.**

Where an auditor's<sup>1</sup> notice of resignation contains a statement that there are circumstances connected with his resignation which he considers should be brought to the notice of the members<sup>2</sup> of, or the depositors with, the building society<sup>3</sup>, he may also deposit at the society's principal office<sup>4</sup> a requisition signed by him calling on the directors of the society<sup>5</sup> forthwith duly to convene a special general meeting of the society for the purpose of receiving and considering such explanation of the circumstances connected with his resignation as he may wish to place before the meeting<sup>6</sup>. Where an auditor's notice of resignation contains such a statement, the auditor may request the society to send to its members<sup>7</sup>: (1) before the general meeting at which his term of office would otherwise expire or have expired, as the case may be<sup>8</sup>; or (2) before any general meeting at which it is proposed to fill the vacancy caused by his resignation<sup>9</sup>, a statement in writing, not exceeding a reasonable length, of the circumstances connected with his resignation<sup>10</sup>. In that case, unless the statement is received by the society too late for it to comply, the society must<sup>11</sup>: (a) in any notice of the meeting<sup>12</sup> given to members, state the fact of the statement having been made<sup>13</sup>; and (b) send a copy of the statement to every member to whom notice of the meeting is or has been sent<sup>14</sup>. Provision is made for the electronic transmission of the statement<sup>15</sup>. If the directors of the society do not within 21 days from the date of the deposit of such a requisition proceed duly to convene the meeting for a day not more than 28 days after the date on which the notice convening the meeting is given, every director who failed to take all reasonable steps to secure that a meeting was so convened is guilty of an offence and liable on conviction on indictment or on summary conviction to a fine<sup>16</sup>.

If a copy of the auditor's statement is not sent out as required because it was received too late or because of the society's default, the auditor may, without prejudice to his right to be heard orally, require that the statement be read out at the meeting<sup>17</sup>.

Copies of a statement need not be sent out and the statement need not be read out at the meeting if<sup>18</sup>: (i) on an application made to the High Court<sup>19</sup> by the society or a person aggrieved<sup>20</sup>, the court is satisfied that the rights so conferred are being abused to secure needless publicity for defamatory matter<sup>21</sup>; or (ii) on an application to the Financial Services Authority<sup>22</sup> by the society or a person aggrieved, the Authority is satisfied that the circulating or reading out of the statement would be likely to diminish substantially the confidence in the society of investing members of the public<sup>23</sup>.

An auditor who has resigned his office is entitled to attend any such meeting as is mentioned in head (1) or head (2) above and to receive all notices of, and other communications relating to, any such meeting which any member of the society is entitled to receive, and to be heard at any such meeting which he attends on any part of the business of the meeting which concerns him as former auditor of the society<sup>24</sup>.

1 As to the appointment of auditors see PARA 1998.

- 2 As to membership see PARA 1888 et seq.
- 3 le made under the Building Societies Act 1986 s 77(2), Sch 11 para 7(2)(b): see PARA 2001.
- 4 As to the requirements for principal offices see PARA 1872.
- 5 As to the office of director see PARAS 1944-1963.
- 6 Building Societies Act 1986 Sch 11 para 8(1).
- 7 Building Societies Act 1986 Sch 11 para 8(2).
- 8 Building Societies Act 1986 Sch 11 para 8(2)(a).
- 9 Building Societies Act 1986 Sch 11 para 8(2)(b). As to meetings generally see PARA 1974 et seq.
- 10 Building Societies Act 1986 Sch 11 para 8(2).
- 11 Building Societies Act 1986 Sch 11 para 8(3).
- 12 As to the meaning of 'notice' see PARA 1866 note 8. As to notice of meetings see PARA 1985.
- 13 Building Societies Act 1986 Sch 11 para 8(3)(a).
- 14 Building Societies Act 1986 Sch 11 para 8(3)(b).
- 15 See the Building Societies Act 1986 Sch 11 para 8(3A)-(3C) (added by SI 2003/404). Where a copy of a statement is required to be sent to a member under the Building Societies Act 1986 Sch 11 para 8(3)(b) (see the text to note 14): (1) it may be sent to him electronically only if it is sent to an electronic address notified by the member for the purpose; but (2) the requirement to send it is also treated as satisfied if the conditions set out in Sch 11 para 8(3B) are satisfied: Sch 11 para 8(3A) (as so added). As to the meaning of 'electronic address' see PARA 1883 note 24.  
 The conditions mentioned in head (2) above are satisfied in the case of a copy of a statement if: (a) the society and the member have agreed that information which is required to be sent to him may instead be accessed by him on a website; (b) the agreement applies to the statement in question; (c) that member is notified, in a manner agreed between him and the society for the purpose, of the publication of the statement on a website, the address of that website, and the place on that website where the notice may be accessed, and how it may be accessed; and (d) the statement is published continuously on that website throughout the period beginning with the giving of that notification and ending with the conclusion of the meeting: Sch 11 para 8(3B) (as so added).  
 Where, in a case in which head (2) above is relied on for compliance with a requirement under Sch 11 para 8(3)(b), a statement is published for a part, but not all, of the period mentioned in head (d) above, but the failure to publish it throughout that period is wholly attributable to circumstances which it would not be reasonable to have expected the society to prevent or avoid, that failure does not invalidate the proceedings of the meeting: Sch 11 para 8(3C) (as so added).
- 16 Building Societies Act 1986 Sch 11 para 8(4). On summary conviction the fine must not exceed the statutory maximum: Sch 11 para 8(4). As to the statutory maximum see PARA 56 note 24.
- 17 Building Societies Act 1986 Sch 11 para 8(5).
- 18 Building Societies Act 1986 Sch 11 para 8(6).
- 19 As to the commencement of proceedings see **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq. As to references to the High Court see PARA 1998 note 33.
- 20 As to persons aggrieved see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.
- 21 Building Societies Act 1986 Sch 11 para 8(6)(a). If the High Court makes such an order, it may also order the society's costs of the application to be paid by the auditor, notwithstanding that he is not a party to the application: Sch 11 para 8(7).
- 22 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 23 Building Societies Act 1986 Sch 11 para 8(6)(b) (amended by SI 2001/2617).

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### **2003. Auditors' report.**

The auditors of a building society<sup>1</sup> must make a report to the members<sup>2</sup> on the annual accounts<sup>3</sup> which are to be laid before the society at the annual general meeting<sup>4</sup> during their tenure of office<sup>5</sup>. The report must be open to inspection by any member at the annual general meeting of the society<sup>6</sup>.

The auditors' report must include an introduction identifying the annual accounts that are the subject of the audit and the financial reporting framework that has been applied in their preparation, and a description of the scope of the audit identifying the auditing standards in accordance with which the audit was conducted<sup>7</sup>. The report must state clearly whether, in the auditors' opinion, the annual accounts have been properly prepared in accordance with the requirements of the Building Societies Act 1986 (and, where applicable, European legislation on international accounting standards)<sup>8</sup>. The report must state in particular whether the annual accounts give a true and fair view<sup>9</sup> in accordance with the relevant financial reporting framework: (1) in the case of an individual balance sheet<sup>10</sup>, of the state of affairs of the society as at the end of the financial year<sup>11</sup>; (2) in the case of an individual income and expenditure account<sup>12</sup>, of the income and expenditure of the society for the financial year<sup>13</sup>; and (3) in the case of group accounts<sup>14</sup>, of the state of affairs as at the end of the financial year and the income and expenditure for the financial year of the society and the subsidiary undertakings<sup>15</sup> dealt with in the group accounts, so far as concerns members of the society<sup>16</sup>.

The auditors' report must be either unqualified or qualified and must include a reference to any matters to which the statutory auditors wish to draw attention by way of emphasis without qualifying the report<sup>17</sup>. If the auditors' report includes a qualification of their opinion that the annual accounts give a true and fair view of the matters specified in heads (1) to (3) above, the statutory provisions requiring a copy of the summary financial statement to be circulated<sup>18</sup> extend to a copy of the auditors' report<sup>19</sup>.

The auditors' report on the annual accounts must include a report to the members on the annual business statement<sup>20</sup> and the directors' report<sup>21</sup>, stating whether they have been prepared so as to conform to the statutory requirements and regulations<sup>22</sup> and whether, in the opinion of the auditors<sup>23</sup>: (a) the information given in the annual business statement gives a true representation of the matters in respect of which it is given<sup>24</sup>; and (b) the information given in the directors' report is consistent with the accounting records and the annual accounts for the year<sup>25</sup>. The auditors' report on the annual business statement need not deal with any matters to the extent that the regulations provide that such matters are not to be the subject of report by the auditors<sup>26</sup>.

The auditors must examine the statement of particulars of restricted transactions with directors<sup>27</sup> before it is made available to members and make a report to the members on it, and the report must be annexed to the statement before it is made available to members<sup>28</sup>. The auditors' report on the statement must state whether in their opinion the statement contains the required particulars<sup>29</sup>, and where their opinion is that it does not, they must include in their report, so far as they are reasonably able to do so, a statement giving the requisite particulars<sup>30</sup>.

The auditors' report must state the names of the auditors and be signed and dated by them<sup>31</sup>. Every copy of the auditors' report which is laid before the building society at the annual general meeting or which is otherwise circulated, published or issued, must state the names of the auditors<sup>32</sup>. If a copy of the auditors' report is laid before the society or otherwise circulated, published or issued without the required statement of the auditors' names, the society and every officer of it who is in default is guilty of an offence and liable on summary conviction to a fine<sup>33</sup>.

- 1 As to the appointment of auditors see PARA 1998.
- 2 As to membership see PARA 1888 et seq.
- 3 As to the meaning of 'annual accounts' see PARA 1993 note 39. As to the annual accounts generally see PARAS 1992-1993.
- 4 As to annual general meetings see PARA 1977.
- 5 Building Societies Act 1986 s 78(1).
- 6 Building Societies Act 1986 s 78(2) (amended by SI 1995/3233).
- 7 Building Societies Act 1986 s 78(3A) (s 78(3A), (3B), (4A) added, and s 78(4) substituted, by SI 2004/3380).
- 8 Building Societies Act 1986 s 78(3B) (as added: see note 7). The European legislation referred to in the text is European Parliament and Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) on the application of international accounting standards, art 4.
- 9 As to the meaning of 'true and fair view' see PARA 1993 note 3.
- 10 As to the duty of directors to prepare a balance sheet see PARAS 1992-1993.
- 11 Building Societies Act 1986 s 78(4)(a) (as substituted: see note 7). As to the meaning of 'financial year' see PARA 1992 note 2.
- 12 As to the duty of directors to prepare an income and expenditure account see PARAS 1992-1993.
- 13 Building Societies Act 1986 s 78(4)(b) (as substituted: see note 7).
- 14 As to the duty of directors to prepare group accounts see PARA 1992.
- 15 As to the meaning of 'subsidiary undertaking' see PARA 1916 note 9.
- 16 Building Societies Act 1986 s 78(4)(c) (as substituted: see note 7).
- 17 Building Societies Act 1986 s 78(4A) (as added: see note 7).
- 18 In the Building Societies Act 1986 s 76(8), s 76(9): see PARA 1996.
- 19 Building Societies Act 1986 s 78(6).
- 20 As to the annual business statement see PARA 1994.
- 21 Building Societies Act 1986 s 78(3). As to the directors' report see PARA 1995.
- 22 In the requirements of the Building Societies Act 1986 s 74 (annual business statement) (see PARA 1994), s 75 (directors' report) (see PARA 1995), and the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504 (see PARAS 1993-1996).
- 23 Building Societies Act 1986 s 78(7).
- 24 Building Societies Act 1986 s 78(7)(a).
- 25 Building Societies Act 1986 s 78(7)(b).

26 See the Building Societies Act 1986 ss 74(6), 78(8); and PARA 1994. As to the matters that are not to be the subject of report by the auditors see the Building Societies (Accounts and Related Provisions) Regulations 1998, SI 1998/504, reg 9(4), Sch 9 (amended by SI 2005/2114; SI 2007/859).

27 The transactions falling within the Building Societies Act 1986 s 65. The society must make the statement of particulars of these transactions available for inspection by members under s 68(3): see PARAS 1955, 1958.

28 Building Societies Act 1986 s 78(9).

29 The particulars required by the Building Societies Act 1986 s 68: see PARA 1958.

30 Building Societies Act 1986 s 78(10).

31 Building Societies Act 1986 s 78A(1) (s 78A added by SI 2004/3380). References in the Building Societies Act 1986 s 78A to signature by the auditors are, where the office of auditor is held by a body corporate or partnership, to signature in the name of the body corporate or partnership by a person authorised to sign on its behalf: s 78A(4) (as so added).

32 Building Societies Act 1986 s 78A(2) (as added: see note 31).

33 Building Societies Act 1986 s 78A(3) (as added: see note 31). The fine must not exceed level 3 on the standard scale: s 78A(3) (as so added). As to the standard scale see PARA 27 note 21.

## **UPDATE**

### **2003 Auditors' report**

TEXT AND NOTES 1-30--Building Societies Act 1986 s 78 further amended: SI 2008/1519.

TEXT AND NOTES 31-33--Building Societies Act 1986 ss 78A-78D substituted for s 78A: SI 2008/1519.

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### **2004. Auditors' duties and powers.**

It is the duty of the auditors of a building society<sup>1</sup> in preparing their report to the members<sup>2</sup> to carry out such investigations as will enable them to form an opinion as to<sup>3</sup>: (1) whether proper accounting records have been kept<sup>4</sup>; and (2) whether the annual accounts<sup>5</sup> are in agreement with the accounting records<sup>6</sup>. If the auditors are of the opinion that the annual accounts are not in agreement with the accounting records they must state that fact in their report<sup>7</sup>. Every auditor of a society has a right of access at all times to the accounting and other records of the society and all other documents relating to its business, and a right to require from the officers<sup>8</sup> of the society such information and explanations as he thinks necessary for the performance of the duties of the auditors<sup>9</sup>.

Where a society has a connected undertaking then<sup>10</sup>: (a) if the connected undertaking is a body corporate<sup>11</sup> incorporated in any part of the United Kingdom<sup>12</sup>, it is the duty of the connected undertaking and its auditors to give to the society's auditors such information and explanation, and such access to documents, as those auditors may reasonably require for the purposes of their duties as auditors of the society<sup>13</sup>; (b) in any other case, it is the duty of the society, if required by its auditors to do so, to take all such steps as are reasonably open to it to obtain from the connected undertaking such information and explanation and such access as are



mentioned above<sup>14</sup>. It is an offence if a society or any other body corporate fails to comply with head (a) or head (b) above, and the society or other body is liable on summary conviction to a fine<sup>15</sup>, and so is any officer of the society or, as the case may be, of the other body who is also guilty of the offence<sup>16</sup>. If an auditor of the other body fails without reasonable excuse to comply with head (a) above he is liable, on summary conviction, to a fine<sup>17</sup>.

If the auditors fail to obtain all the information and explanations and the access to documents which, to the best of their knowledge and belief, are necessary for the purposes of their audit, they must state that fact in their report<sup>18</sup>.

The auditors have the right to attend any general meeting of the society, and to receive all notices of and other communications relating to any general meeting which any member of the society is entitled to receive, and to be heard at any meeting which they attend on any part of the business of the meeting which concerns them as auditors<sup>19</sup>.

An officer of a society or of a body which is a connected undertaking of the society commits an offence if he knowingly or recklessly makes to the auditors of that or another society or body a statement which<sup>20</sup>: (i) conveys or purports to convey any information or explanation which the auditors require, or are entitled to require, as auditors of the society or other body, as the case may be<sup>21</sup>; and (ii) is false or misleading in a material particular<sup>22</sup>. A person guilty of such an offence is liable on conviction to imprisonment or to a fine or to both<sup>23</sup>.

1 As to the appointment of auditors see PARA 1998.

2 As to the auditors' report see PARA 2003. As to membership see PARA 1888 et seq.

3 Building Societies Act 1986 s 79(1).

4 Building Societies Act 1986 s 79(1)(a). As to the keeping of accounting records see PARA 1991.

5 As to the annual accounts see PARAS 1992-1993.

6 Building Societies Act 1986 s 79(1)(c).

7 Building Societies Act 1986 s 79(2).

8 As to the meaning of 'officer' see PARA 1944.

9 Building Societies Act 1986 s 79(3).

10 Building Societies Act 1986 s 79(4) (amended by the Building Societies Act 1997 Sch 7 para 34(1)). As to the meaning of 'connected undertaking' see PARA 1991 note 16.

11 As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

12 As to the meaning of 'United Kingdom' see PARA 2 note 3.

13 Building Societies Act 1986 s 79(4)(a) (as amended: see note 10).

14 Building Societies Act 1986 s 79(4)(b) (as amended: see note 10).

15 ie not exceeding level 3 on the standard scale: Building Societies Act 1986 s 79(8). As to the standard scale see PARA 27 note 21.

16 Building Societies Act 1986 s 79(8).

17 Building Societies Act 1986 s 79(8).

18 Building Societies Act 1986 s 79(6).

19 Building Societies Act 1986 s 79(7). As to meetings generally see PARA 1974 et seq.

20 Building Societies Act 1986 s 79(9) (amended by the Building Societies Act 1997 Sch 7 para 34(3)).

21 Building Societies Act 1986 s 79(9)(a).

22 Building Societies Act 1986 s 79(9)(b).

23 Building Societies Act 1986 s 79(9). Such a person is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both (s 79(9)(i)), or on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both (s 79(9)(ii)). As to the statutory maximum see PARA 56 note 24.

## UPDATE

### 2004 Auditors' duties and powers

TEXT AND NOTES--Building Societies Act 1986 s 79 further amended: SI 2008/1519.

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### (iii) Loans Secured on Land

#### A. INTRODUCTION

##### 2005. In general.

The general law of mortgages applies to mortgages taken by building societies as security for loans made to borrowers<sup>1</sup>. The source of the society's power to make secured loans is its memorandum<sup>2</sup>. The same law also applies to questions which arise incidentally to such mortgages, such as the presumption that a tenant for life who pays off the amount secured by a mortgage intends to keep the charge alive for his own benefit<sup>3</sup>, and the postponement<sup>4</sup> of a legal mortgage to a subsequent security on the ground of negligence in the custody of the title deeds<sup>5</sup>.

In entering into a contract for the provision of a loan to an individual secured by a first mortgage of residential land in the United Kingdom<sup>6</sup>, a building society will frequently be carrying on a regulated activity under the Financial Services and Markets Act 2000<sup>7</sup>. Where that Act does not apply, the agreement under which the loan is made may nonetheless constitute a regulated agreement under the Consumer Credit Act 1974<sup>8</sup>.

1 *Bell v London and South Western Bank* [1874] WN 10; *Provident Permanent Building Society v Greenhill* (1878) 9 ChD 122; *Nationwide Building Society v Registry of Friendly Societies* [1983] 3 All ER 296, [1983] 1 WLR 1226. As to the law of mortgages generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

2 See the Building Societies Act 1986 s 5(8), Sch 2 para 2; and PARA 1874.

3 *Re Harvey, Harvey v Hobday* [1896] 1 Ch 137, CA. As to this presumption against merger see **MORTGAGE** vol 77 (2010) PARA 673 et seq.

4 *Northern Counties of England Fire Insurance Co v Whipp* (1884) 26 ChD 482, CA.

5 *Garside v Liverpool Railway Permanent Benefit Building Society* (1897) 13 TLR 189, CA (where the solicitor of the society obtained possession of and dealt with the title deeds of the property he had mortgaged to the society); and see the Law of Property Act 1925 s 13; and **MORTGAGE** vol 77 (2010) PARA 262.

6 As to the meaning of 'United Kingdom' see PARA 2 note 3.

7 See the Financial Services and Markets Act 2000 s 22 and the definition of 'regulated mortgage contract' in the Financial Services and Markets Act (Regulated Activities) Order 2001, SI 2001/544, art 61(3)(a); and PARA 203 note 1. Where the society carries on a regulated activity relating to regulated mortgage contract, the society will need to comply with the detailed requirements set out in the Financial Services Authority's Handbook of Rules and Guidance, Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB). As to the Handbook generally see PARA 22.

8 See **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 78 et seq. The Consumer Credit Act 1974 does not regulate a consumer credit agreement if it is secured by a land mortgage and entering into that agreement as lender is a regulated activity for the purposes of the Financial Services and Markets Act 2000: see the Consumer Credit Act 1974 s 16(6C) (added by SI 2001/544): see **CONSUMER CREDIT**.

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## **2006. Loans secured on land.**

For the purposes of the Building Societies Act 1986 a loan<sup>1</sup> is secured on land<sup>2</sup> if it is secured by<sup>3</sup>:

- 440 (1) a mortgage<sup>4</sup> of a legal estate in land in England and Wales or Northern Ireland<sup>5</sup>;
- 441 (2) a heritable security over land in Scotland<sup>6</sup>; or
- 442 (3) a qualifying security<sup>7</sup> over land in an EEA country or territory other than the United Kingdom<sup>8</sup>.

A loan is also secured on land if<sup>9</sup>:

- 443 (a) it is secured by a mortgage of an equitable interest in land in England and Wales or Northern Ireland<sup>10</sup>;
- 444 (b) the equitable interest is an equitable interest in land of a description, and is created in circumstances, prescribed in an order made by the Treasury<sup>11</sup>; and
- 445 (c) any conditions prescribed in the order are complied with<sup>12</sup>.

Such an order may apply in relation to securities held by or on behalf of building societies or connected undertakings<sup>13</sup> of a description specified in the order, or securities held by or on behalf of all such societies or undertakings other than those of a description specified in the order<sup>14</sup>.

The Treasury may by order provide for any provision of the Building Societies Act 1986 to have effect in relation to loans secured on land outside the EEA with such modifications as appear to it to be appropriate<sup>15</sup>.

1 As to the lending limit see PARA 2008.

2 'Land', in the expression 'loan secured on land' means: (1) land in an EEA country or territory; and (2) in so far as land in any other country or territory is, under any provision of the Building Societies Act 1986, land on which loans may be secured, land in that other country or territory: s 6A(8) (s 6A added by the Building Societies Act 1997 s 5), Building Societies Act 1986 s 119(1) (definition added by the Building Societies Act 1997 Sch 7 para 53(1)(i)). For the purposes of the Building Societies Act 1986 s 6A and s 6B (see PARA 2007), 'EEA country or territory' means a country or territory in the European Economic Area: s 6A(7) (as so added). For these purposes, the Channel Islands, the Isle of Man and Gibraltar are treated as included in the European

Economic Area: s 6A(7) (as so added). The European Economic Area (the 'EEA') is the area established under the Agreement signed at Oporto on 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3), as adjusted by the Protocol signed at Brussels on 17 March 1993 (Cm 2183; OJ L1, 3.1.94, p 572).

3 Building Societies Act 1986 s 6A(1) (as added: see note 2).

4 As to the meaning of 'mortgage' see PARA 1868 note 9. In relation to loans secured on land in Scotland, 'mortgage' means a heritable security, 'mortgagor' and 'mortgagee' mean respectively the debtor and creditor in a heritable security, and connected expressions are to be construed accordingly: Building Societies Act 1986 s 119(2) (amended by the Building Societies Act 1997 Sch 7 para 53(2)). As to the law of mortgages generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

5 Building Societies Act 1986 s 6A(1)(a) (as added: see note 2). A loan is treated as secured by a mortgage of a legal estate in registered land in England and Wales or Northern Ireland notwithstanding that the loan is made before the mortgagor is registered as proprietor of the estate, and a loan is treated as secured by a heritable security over land in Scotland notwithstanding that the loan is made before title to that land has been transferred to the debtor in the heritable security: s 6A(3) (as so added). 'Heritable security' means a security capable of being constituted over any land by disposition or assignation of that interest in security of any debt and of being recorded in the Register of Sasines or, as the case may be, in the Land Register of Scotland and includes a security constituted by a standard security and any other charge enforceable in the same manner as a standard security: s 119(1). Generally Scottish matters are beyond the scope of this work.

6 Building Societies Act 1986 s 6A(1)(b) (as added: see note 2). See note 5.

7 For the purposes of the Building Societies Act 1986 s 6A and s 6B (see PARA 2007), 'qualifying security', in relation to land in an EEA country or territory other than the United Kingdom and a loan, means a security over the land which: (1) acknowledges, and requires repayment of, the loan; and (2) secures repayment of the loan on the land: s 6A(7) (as added: see note 2). As to the meaning of 'United Kingdom' see PARA 2 note 3.

8 Building Societies Act 1986 s 6A(1)(c) (as added: see note 2).

9 Building Societies Act 1986 s 6A(2) (as added: see note 2).

10 Building Societies Act 1986 s 6A(2)(a) (as added: see note 2).

11 Building Societies Act 1986 s 6A(2)(b) (as added (see note 2); and amended by SI 2001/2617). An order under the Building Societies Act 1986 s 6A(2) or s 6A(4) (see the text to note 15) may make such incidental, supplementary and transitional provision as appears to the Treasury to be necessary or expedient: s 6A(5) (as so added; and amended by SI 2001/2617). The power to make such an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Building Societies Act 1986 s 6A(6) (as so added). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

As to the prescribed types of equitable interest in land which can constitute security for a loan secured on land see the Building Societies (Prescribed Equitable Interests) Order 1997, SI 1997/2693.

12 Building Societies Act 1986 s 6A(2)(c) (as added: see note 2). See note 11.

13 As to the meaning of 'connected undertaking' see PARA 1991 note 16.

14 Building Societies Act 1986 s 6A(2) (as added: see note 2).

15 Building Societies Act 1986 s 6A(4) (as added (see note 2); and amended by SI 2001/2617). At the date at which this volume states the law no such order had been made. See note 11.

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## 2007. Loans fully secured on land.

For the purposes of the Building Societies Act 1986 a loan<sup>1</sup> which is owed to a building society or a subsidiary undertaking<sup>2</sup> of a society and is secured on residential property<sup>3</sup> or other land is fully secured on the land if<sup>4</sup>: (1) the principal of, and interest accrued on, the loan does not exceed the value of the requisite security<sup>5</sup>; and (2) no, or no more than one, mortgage of the land which has priority over the society's or undertaking's mortgage is outstanding in favour of an outside person<sup>6</sup>. Where a mortgage of the residential property or other land which has priority over the society's or undertaking's mortgage is outstanding, the principal of the loan secured or, in the case of a loan by instalments, intended to be secured by that mortgage is deducted from the value of the requisite security for the purposes of head (1) above<sup>7</sup>. Where the loan is secured on residential property or other land in the United Kingdom, any outstanding charge over the land which<sup>8</sup>: (a) in the case of land in England and Wales, is registered in the appropriate local land charges register<sup>9</sup>; (b) in the case of land in Scotland, is recorded in the Register of Sasines, or registered in the Land Register<sup>10</sup>; (c) in the case of land in Northern Ireland, is registered in the statutory charges register<sup>11</sup>, will be disregarded for these purposes<sup>12</sup>.

Where, on the occasion on which a society or a subsidiary undertaking of a society makes or acquires a loan which is secured on land<sup>13</sup>, the society or undertaking is satisfied that the loan is<sup>14</sup>: (i) a loan which is fully secured on residential property<sup>15</sup>; (ii) a loan which is not so secured but is fully secured on land<sup>16</sup>; or (iii) a loan which is not fully secured on land<sup>17</sup>, the loan must be treated as such a loan for the purposes of the Building Societies Act 1986<sup>18</sup>.

Where at any time, in the case of a loan treated as falling within head (i), head (ii) or head (iii) above, the society or undertaking<sup>19</sup>:

- 446 (A) is satisfied (aa) on a revaluation that the value of the requisite security has changed<sup>20</sup>; (bb) on notice<sup>21</sup> given to it by the borrower that there has been a change in the use of the land<sup>22</sup>; (cc) that so much of the mortgage debt<sup>23</sup> as represents the principal of the loan has changed<sup>24</sup>; (dd) that the principal of the loan secured by a prior mortgage has changed or has been repaid<sup>25</sup>; or (ee) that the relative priority of the mortgage of the land on which the loan is secured has changed<sup>26</sup>; and
- 447 (B) is also satisfied that the change or repayment is such that, if it were to make a loan equal to the mortgage debt at that time, the loan would instead be a loan falling within another of head (i), head (ii) or head (iii) above<sup>27</sup>; and
- 448 (C) in a case falling within head (A)(aa) above, is satisfied on a revaluation that the value of the requisite security has changed, and elects that this provision<sup>28</sup> will apply<sup>29</sup>,

the loan is treated as such a loan for the purposes of the Building Societies Act 1986 until such time, if any, as this provision<sup>30</sup> again applies<sup>31</sup>.

1 The question whether a loan is fully secured on land is relevant both in determining whether a person is eligible to be a borrowing member of a building society and in applying the lending limit. As to borrowing membership see PARA 1894. As to the lending limit see PARA 2008.

2 Any reference in the Building Societies Act 1986, however expressed, to loans being owed to a building society or a subsidiary undertaking of a society is a reference to their being so owed either at law or in equity: s 119(3A) (added by the Building Societies Act 1997 Sch 7 para 53(4)). As to the meaning of 'subsidiary undertaking' see PARA 1916 note 9. As to loans owed to a syndicate of which a building society or a connected undertaking of a society is a member see the Building Societies Act 1986 s 6(13); and PARA 2008.

3 As to the meaning of 'residential property' see PARA 1856 note 2.

4 Building Societies Act 1986 s 6B(1) (s 6B added by the Building Societies Act 1997 s 6), Building Societies Act 1986 s 119(1) (definition added by the Building Societies Act 1997 Sch 7 para 53(1)(i)). In the application of the Building Societies Act 1986 s 6B(1), (2), (7) (see the text to notes 7, 19-31) to residential property or other land in Scotland or an EEA country or territory other than the United Kingdom, references to a mortgage of the land must be construed as references to a heritable or, as the case may require, qualifying security over the

land: s 6B(9) (as so added). As to the meaning of 'EEA country or territory' see PARA 2006 note 2. As to the meaning of 'United Kingdom' see PARA 2 note 3. As to the meaning of 'mortgage' see PARA 1868 note 9. As to the meaning of 'heritable security' see PARA 2006 note 5. As to the meaning of 'qualifying security' see PARA 2006 note 7.

5 Building Societies Act 1986 s 6B(1)(a) (as added: see note 4). 'Requisite security', in relation to a loan secured on residential property or other land, means: (1) the security constituted by the legal estate in, or the heritable or qualifying security over, the land; or (2) in a case where an equitable interest in land in England and Wales or Northern Ireland is or is also taken as security, that constituted by that security or, as the case may be, the combined securities: s 6B(8) (as so added). See note 4.

6 Building Societies Act 1986 s 6B(1)(b) (as added: see note 4). 'Outside person', in relation to a society or a subsidiary undertaking of a society, means any person other than the following, namely: (1) the society; (2) a subsidiary undertaking of the society; (3) a lending syndicate of which the society or such an undertaking is a member; and (4) trustees of a trust under which the society or such an undertaking is a beneficiary: s 6B(8) (as so added). 'Trust' includes arrangements: (a) which have effect under the law of a country or territory outside the United Kingdom; and (b) under which persons acting in a fiduciary capacity hold and administer property on behalf of other persons, and 'beneficiary' and 'trustees', in relation to such arrangements, are to be construed accordingly: s 6B(8) (as so added).

7 Building Societies Act 1986 s 6B(2) (as added: see note 4). See note 4.

8 Building Societies Act 1986 s 6B(3) (as added: see note 4).

9 Building Societies Act 1986 s 6B(3)(a) (as added: see note 4). As to the appropriate local land charges register see **LAND CHARGES** vol 26 (2004 Reissue) PARA 607 et seq.

10 Building Societies Act 1986 s 6B(3)(b) (as added: see note 4). The text refers to charges recorded in the Register of Sasines, or registered in the Land Register under the Civic Government (Scotland) Act 1982 s 108 or the Housing (Scotland) Act 1987 Sch 9: Building Societies Act 1986 s 6B(3)(b) (as so added). Generally Scottish matters are beyond the scope of this work.

11 Building Societies Act 1986 s 6B(3)(c) (as added: see note 4). The text refers to charges registered in the statutory charges register under the Land Registration Act (Northern Ireland) 1970 s 87, Sch 11: Building Societies Act 1986 s 6B(3)(c) (as so added).

12 Building Societies Act 1986 s 6B(3) (as added: see note 4). The text refers to the purposes of s 6B(1)(b) (see the text to note 6) and s 6B(2) (see the text to note 7): s 6B(3) (as so added).

13 As to the meaning of 'loan secured on land' see PARA 2006.

14 Building Societies Act 1986 s 6B(4) (as added: see note 4).

15 Building Societies Act 1986 s 6B(4)(a) (as added: see note 4).

16 Building Societies Act 1986 s 6B(4)(b) (as added: see note 4).

17 Building Societies Act 1986 s 6B(4)(c) (as added: see note 4).

18 Building Societies Act 1986 s 6B(4) (as added: see note 4). The loan must be so treated until such time, if any, as s 6B(7) (see the text to notes 19-31) applies: s 6B(4) (as so added). Section 6B(4) has effect in relation to a loan which the society or undertaking makes by two or more payments on different dates as if: (1) the reference to the occasion on which the society or undertaking makes the loan were a reference to the occasion on which it makes the first of the payments; (2) other references to the loan were references to it in its intended maximum amount; and (3) the value of any security for the loan were its expected maximum value: s 6B(5) (as so added). Where a society or a subsidiary undertaking of a society makes or acquires a loan which is secured on land, the society or undertaking is deemed to be satisfied as mentioned in s 6B(4)(c) (see the text to note 17) until such time, if any, as it is satisfied as mentioned in s 6B(4)(a) (see the text to note 15) or s 6B(4)(b) (see the text to note 16): s 6B(6) (as so added).

19 Building Societies Act 1986 s 6B(7) (as added: see note 4). See note 4.

20 Building Societies Act 1986 s 6B(7)(a)(i) (as added: see note 4).

21 As to the meaning of 'notice' see PARA 1866 note 8.

22 Building Societies Act 1986 s 6B(7)(a)(ii) (as added: see note 4).

- 23 As to the meaning of 'mortgage debt' see PARA 1946 note 6.
- 24 Building Societies Act 1986 s 6B(7)(a)(iii) (as added: see note 4).
- 25 Building Societies Act 1986 s 6B(7)(a)(iv) (as added: see note 4).
- 26 Building Societies Act 1986 s 6B(7)(a)(v) (as added: see note 4).
- 27 Building Societies Act 1986 s 6B(7)(b) (as added: see note 4).
- 28 Ie the Building Societies Act 1986 s 6B(7).
- 29 Building Societies Act 1986 s 6B(7)(c) (as added: see note 4).
- 30 Ie the Building Societies Act 1986 s 6B(7).
- 31 Building Societies Act 1986 s 6B(7) (as added: see note 4).

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## **2008. The lending limit.**

Broadly speaking, the purpose of the lending limit is to ensure that the amount owing to a building society and its subsidiary undertakings in respect of loans fully secured on land accounts for not less than 75 per cent of the trading assets of the society and its subsidiary undertakings. This objective is secured by placing the society under a duty to secure that the difference between the value of X on any quarter day<sup>1</sup>, and the value of Y on that day or the value of Y on the immediately preceding quarter day, whichever is the greater, does not exceed 25 per cent of that value of X<sup>2</sup>. If a society fails to comply with this requirement the powers conferred on the Financial Services Authority to direct the restructuring of the business<sup>3</sup> will become exercisable in relation to the society, but the failure will not affect the validity of any transaction or other act<sup>4</sup>.

For these purposes X equals the difference between the total assets of the society and any subsidiary undertakings<sup>5</sup> of the society as shown in the society's accounts<sup>6</sup> and the aggregate of: (1) the liquid assets of the society and any such undertakings as shown in those accounts<sup>8</sup>; (2) the fixed assets of the society and any such undertakings as so shown<sup>9</sup>; and (3) where any such undertakings are effecting or carrying out contracts of insurance, such of their assets as shown in those accounts as represent long term insurance funds<sup>10</sup>. For these purposes Y equals the principal of, and interest accrued on, loans which are owed to the society or any subsidiary undertaking of the society<sup>11</sup> and are fully secured on residential property<sup>12</sup>. For this purpose the total assets of the society and any subsidiary undertakings of the society will be taken to be increased by the amount of any provision made for bad or doubtful debts of the society or any such undertaking<sup>13</sup>. Any loans owed to the society or any subsidiary undertaking of the society must be disregarded for the purposes of the definition of Y to the extent that they are not included in the total assets of the society and any such undertakings as shown in the society's accounts<sup>14</sup>. The reference to anything being shown in a society's accounts is to be construed<sup>15</sup>: (a) in relation to a quarter day on which a financial year<sup>16</sup> of the society ends, as a reference to its being shown in the accounts prepared by the society for that year<sup>17</sup>; (b) in relation to any other quarter day, as a reference to its being shown in the accounts which would have been prepared by the society for the year ending on that day if that year were a financial year of the society<sup>18</sup>.

Where a loan is owed to a lending syndicate of which a society or connected undertaking<sup>19</sup> of a society is a member, so much of the loan as is referable to the society's or undertaking's participation in the syndicate will be treated<sup>20</sup> as a loan owed to the society or undertaking<sup>21</sup>.

1 As to the meaning of 'quarter day' see PARA 1916 note 1.

2 Building Societies Act 1986 s 6(1) (s 6 substituted by the Building Societies Act 1997 s 4). The Treasury may by order substitute for the 25% specified, such greater percentage (not greater than 40%) as it appears to it to be appropriate, and such an order may make such supplementary, transitional and saving provision as it appears to the Treasury to be necessary or expedient: Building Societies Act 1986 s 6(6) (as so substituted). The power to make such an order is exercisable by statutory instrument (s 6(9) (as so substituted)), and no such order may be made unless a draft of the order has been laid before and approved by a resolution of each House of Parliament (s 6(10) (as so substituted)). At the date at which this volume states the law no such order had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

3 le the powers conferred by the Building Societies Act 1986 s 36; see PARA 2047. As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

4 Building Societies Act 1986 s 6(5) (as substituted (see note 2); and amended by SI 2001/2617).

5 As to the meaning of 'subsidiary undertaking' see PARA 1916 note 9.

6 As to the meaning of 'accounts' see PARA 1916 note 16.

7 Building Societies Act 1986 s 6(2) (as substituted: see note 2). The definition of X in s 6(2) and s 6(12) (see note 10) must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under s 22, and Sch 2 (see PARAS 84-85): Building Societies Act 1986 s 6(12A) (added by SI 2001/3649).

8 Building Societies Act 1986 s 6(2)(a) (as substituted (see note 2); and amended by SI 2004/3380). In the case of societies which produce IAS individual accounts or IAS group accounts, 'liquid assets' means: (1) cash and cash equivalents; (2) treasury bills and similar securities; (3) loans and advances to credit institutions; and (4) debt securities and other fixed income securities: Building Societies Act 1986 s 6(16) (added by SI 2004/3380). As to IAS individual accounts and IAS group accounts see PARA 1992.

9 Building Societies Act 1986 s 6(2)(b) (as substituted: see note 2). In the case of societies which produce IAS individual accounts or IAS group accounts, 'fixed assets' means: (1) land and buildings; (2) plant and machinery; (3) equipment, fixtures, fittings and vehicles; (4) payments on account and assets in the course of construction; and (5) intangible fixed assets: s 6(16) (as added: see note 8).

10 Building Societies Act 1986 s 6(2)(c) (as substituted (see note 2); and amended by SI 2001/3649). 'Long term insurance funds', in relation to an undertaking effecting or carrying out contracts of insurance, means funds maintained by it: (1) in accordance with asset identification rules (within the meaning of the Financial Services and Markets Act 2000 s 142(2) (see PARA 27)) in respect of its business in effecting or carrying out contracts of long term insurance; or (2) where it is incorporated in a country or territory outside the United Kingdom, under the corresponding provisions of the law of that country or territory: Building Societies Act 1986 s 6(12) (substituted by SI 2001/3649). As to the meaning of 'United Kingdom' see PARA 2 note 3. As to insurance generally see **INSURANCE**.

11 As to references to loans being owed to a society or a subsidiary undertaking of a society see PARA 2007 note 2.

12 Building Societies Act 1986 s 6(2) (as substituted: see note 2). As to the meaning of 'residential property' see PARA 1856 note 2. As to loans fully secured on land see PARAS 2006-2007.

13 Building Societies Act 1986 s 6(2) (as substituted: see note 2). The Treasury may by order: (1) modify s 6(2) and s 6(3) (see the text to note 14) in their application to assets of subsidiary undertakings; (2) apply s 6(2) and s 6(3) to corresponding assets of associated undertakings; or (3) modify s 6(2) and s 6(3) in their application to such assets: s 6(7) (as so substituted; and amended by SI 2001/2617). Such an order may make different provision for different circumstances, provision for particular assets of undertakings to be disregarded, and such supplementary, transitional and saving provision as appears to the Treasury to be necessary or expedient: Building Societies Act 1986 s 6(8) (as so substituted; and amended by SI 2001/2617). The power to make such an order is exercisable by statutory instrument (Building Societies Act 1986 s 6(9) (as so



substituted)), which is subject to annulment in pursuance of a resolution of either House of Parliament (s 6(11) (as so substituted)). As to an order made under s 6(7) see the Building Societies Act 1986 (Modification of the Lending Limit and Funding Limit Calculations) Order 2004, SI 2004/3200 (amended by SI 2006/3221). As to the meaning of 'associated undertaking' see PARA 1916 note 8.

- 14 Building Societies Act 1986 s 6(3) (as substituted: see note 2). See note 13.
- 15 Building Societies Act 1986 s 6(4) (as substituted: see note 2).
- 16 As to the meaning of 'financial year' see PARA 1992 note 2.
- 17 Building Societies Act 1986 s 6(4)(a) (as substituted: see note 2).
- 18 Building Societies Act 1986 s 6(4)(b) (as substituted: see note 2).
- 19 As to the meaning of 'connected undertaking' see PARA 1991 note 16.
- 20 le for the purposes of the Building Societies Act 1986 s 6, s 6A (see PARA 2006), s 6B (see PARA 2007).
- 21 Building Societies Act 1986 s 6(13) (as substituted: see note 2).

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## 2009. Legal mortgages.

A legal mortgage of land or of an interest in land must be made by deed<sup>1</sup>. Where the mortgage is of a freehold estate in unregistered land, such deed must be either a demise for a term of years absolute, with a proviso for cesser on redemption, or a charge by way of legal mortgage<sup>2</sup>. If the mortgage is of a leasehold estate in unregistered land, the deed must be either a sub-demise for a specified term of years being less than the term vested in the mortgage or a charge by way of legal mortgage<sup>3</sup>.

It is no longer possible to create a legal mortgage of registered land by demise or subdemise<sup>4</sup>. Where the land is registered, a legal mortgage must, therefore, be created by charge by way of legal mortgage.

The legal charge is the more modern form of deed and, in the majority of cases, a building society mortgage will be a legal charge<sup>5</sup>.

1 See the Law of Property Act 1925 ss 52(1), 205(1)(ii), (ix); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 14 et seq; **MORTGAGE** vol 77 (2010) PARA 104. See also **MORTGAGE** vol 77 (2010) PARA 118. As to legal mortgages of land see **MORTGAGE** vol 77 (2010) PARA 187 et seq.

2 See the Law of Property Act 1925 s 85(1); and **MORTGAGE** vol 77 (2010) PARAS 190, 191.

3 See the Law of Property Act 1925 s 86(1); and **MORTGAGE** vol 77 (2010) PARAS 191, 250.

4 See the Land Registration Act 2002 s 23(1)(a); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 906.

5 In the Building Societies Act 1986 the term 'mortgage' is expressed to include 'charge': s 119(1). As to the law of mortgages generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

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## **2010. Equitable mortgages.**

An equitable mortgage will not vest any legal estate or interest in the mortgagee<sup>1</sup>. As a general rule, any property which can be the subject of a legal mortgage<sup>2</sup> can also be the subject of an equitable mortgage<sup>3</sup>. The Building Societies Act 1986 does not make specific reference to equitable mortgages.

1 See **MORTGAGE** vol 77 (2010) PARAS 105, 118 et seq.

2 As to legal mortgages see PARA 2009.

3 An equitable mortgage is a contract which creates a charge on the property but does not convey any legal estate or interest to the creditor; it amounts to an 'equitable interest' as defined in the Law of Property Act 1925 s 205(1)(x): see **MORTGAGE** vol 77 (2010) PARA 105.

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## ***B. TYPES OF BORROWER***

### **2011. In general.**

The typical building society borrower will be an adult beneficial owner of residential property with legal capacity to borrow money and to give security for the money borrowed.

A minor is capable of being a member of a building society provided that the society's rules do not stipulate otherwise<sup>1</sup>. However, a minor cannot hold a legal estate in land<sup>2</sup> and cannot, therefore, execute a valid legal mortgage<sup>3</sup>. If a society which has no notice of a borrower's minority advances funds for the purchase of land, the society will be entitled, by subrogation to the vendor's lien for unpaid purchase money, to an equitable charge on the property for the purchase money advanced, with interest<sup>4</sup>. This right will not extend to further advances secured on the land<sup>5</sup>.

A personal representative may raise money for the purposes of the administration of the deceased's personal estate by borrowing from a building society<sup>6</sup>. However, any such mortgage would only secure against the estate the principal sum borrowed, plus fines, interest and other such items and would not secure any liabilities of the personal representative incurred in any other capacity<sup>7</sup>.

Trustees of a charity have a general power to mortgage the land of the charity<sup>8</sup>. The mortgage can be to secure the repayment of a proposed loan or grant<sup>9</sup>; or to secure the discharge of any other proposed obligation<sup>10</sup>. Before the mortgage is executed the trustees must have obtained and considered proper advice in writing on certain relevant matters<sup>11</sup>.

Trustees under the Settled Land Act 1925 who are not also statutory owners are not competent to be mortgagors<sup>12</sup>. Where a society lends money to a tenant for life under the Settled Land Act 1925, or a statutory owner by the direction of the trustees under that Act on the security of a charge by way of legal mortgage, or a legal mortgage by demise, it will enjoy statutory

protection<sup>13</sup>. The tenant for life or statutory owner cannot charge the settled estate as security for any of his individual liabilities.

In other cases where land is mortgaged by trustees<sup>14</sup>, the loan should be paid to two or more trustees or to a trust corporation to ensure that the interests of the beneficiaries are overreached and that the society gets a good receipt for the loan<sup>15</sup>.

1 See PARA 1891.

2 Law of Property Act 1925 s 1(6).

3 *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL (where the court held that such a mortgage was void against the minor by virtue of the Infants Relief Act 1874 s 1). The Infants Relief Act 1874 provided that any contract or loan with a minor was absolutely void. The Infants Relief Act 1874 was repealed and replaced by the Minors Contracts Act 1987. Under the common law, loans to minors are still not enforceable, but under the Minors' Contracts Act 1987 s 3 the court has discretion to order a minor to make restitution of property which passed to him under an unenforceable contract: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 24.

4 *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL. See also *Butler v Rice* [1910] 2 Ch 277; *Burston Finance Ltd v Speirway Ltd* [1974] 3 All ER 735, [1974] 1 WLR 1648; *Paul v Speirway Ltd* [1976] Ch 220, [1976] 2 All ER 587; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, [1998] 1 All ER 737, HL. The rate of interest is fixed by the court: see *Thurstan v Nottingham Permanent Benefit Building Society* [1902] 1 Ch 1 at 14, CA, per Romer LJ and Cozen-Hardy LJ.

5 *Thurstan v Nottingham Permanent Benefit Building Society* [1902] 1 Ch 1 at 13, CA, per Romer LJ; affd sub nom *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, HL.

6 See the Administration of Estates Act 1925 s 39(1); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 438, 440.

7 *Cruikshank v Duffin* (1872) LR 13 Eq 555; *Thorne v Thorne* [1893] 3 Ch 196.

8 See the Charities Act 1993 s 38(1), (2) (s 38(1), (4) amended by the Charities Act 2006 Sch 8 paras 96, 130; and the Charities Act 1993 s 38(2), (3) substituted, and s 38(3A)-(3D) added, by the Charities Act 2006 s 27(1), (2)). As to the restrictions on mortgaging charity land generally see the Charities Act 1993 s 38; and **CHARITIES** vol 8 (2010) PARA 398.

9 See the Charities Act 1993 s 38(2) (as substituted: see note 8).

10 See the Charities Act 1993 s 38(3A) (as added: see note 8).

11 See the Charities Act 1993 s 38(2), (3) (as substituted: see note 8), s 38(3A)-(3D) (as added: see note 8), s 38(4) (as amended: see note 8). See further **CHARITIES**.

12 See the Trustee Act 1925 s 16(1), (2); and **TRUSTS** vol 48 (2007 Reissue) PARA 1055.

13 See the Settled Land Act 1925 ss 71, 72, 95; and **SETTLEMENTS** vol 42 (Reissue) PARAS 785, 849-850, 874.

14 As to the powers of trustees in relation to land subject to the trust see the Trusts of Land and Appointment of Trustees Act 1996 ss 6, 8, 10, 16, 23; and **TRUSTS**. See also the Trustee Act 1925 ss 16, 17; and note 12.

15 See the Law of Property Act 1925 ss 2(1)(ii), (2), 27; and **REAL PROPERTY**; the Trustee Act 1925 s 14; and **TRUSTS** vol 48 (2007 Reissue) PARA 1051. See *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435, HL; *State Bank of India v Sood* [1997] Ch 276, [1997] 1 All ER 169, HL.

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## 2012. Companies.

The powers of a company to borrow funds and to give security for loans will be contained in its memorandum of association<sup>1</sup>. However, a trading company, whether or not it has an express power to borrow contained in its memorandum, will have an implied power to do so, and to give security for that borrowing<sup>2</sup>. In addition, in favour of someone who deals with the company in good faith, the power of the board of directors to bind the company, or to authorise others to do so, is deemed to be free of any limitation under the company's constitution<sup>3</sup>. A party to a transaction with a company is not bound to inquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so<sup>4</sup>.

From the date the powers under the Building Societies Act 1997 were adopted by a particular building society<sup>5</sup> no body corporate taking a loan from a society could become a borrowing member<sup>6</sup>. A body corporate which was a borrowing member immediately before such date remains a borrowing member if it continues to meet the requirements<sup>7</sup>.

1 See further **COMPANIES** vol 15 (2009) PARA 1256.

2 *General Auction Estate and Monetary Co v Smith* [1891] 3 Ch 432.

3 See the Companies Act 1985 s 35A(1) (prospectively repealed); and **COMPANIES** vol 14 (2009) PARA 263 (as to replacement provisions for ss 35A, 35B see the Companies Act 2006 s 40).

4 See the Companies Act 1985 s 35B (prospectively repealed); and **COMPANIES** vol 14 (2009) PARA 263. See also note 3.

5 From the date the Building Societies Act 1997 s 2 applies to each relevant building society (ie 1 December 1997, or in the case of an existing building society whose record of alterations takes effect or is registered after 1 December 1997, on the date specified in that record: see the Building Societies Act 1997 (Commencement No 3) Order 1997, SI 1997/2668, art 2, Schedule Pt II item (b)).

6 See the Building Societies Act 1986 s 5(8), Sch 2 para 5(2); and PARAS 1892, 1894. One of the requirements for a borrowing member is that the borrower is an individual: see Sch 2 para 5(2); and PARA 1894. As to the meaning of 'borrowing member' see PARA 1894. As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

7 See the Building Societies Act 1997 s 46(1), Sch 8 para 5; and PARA 1892.

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## C. THE MORTGAGE OR CHARGE

### 2013. Mortgage or charge by way of legal mortgage.

With the exception of the rule that a legal mortgage of land or of an interest in land must be made by way of deed<sup>1</sup>, and the rule that it is no longer possible to create a legal mortgage of registered land by demise or subdemise<sup>2</sup>, there is no statutory prescribed form of mortgage or charge by way of legal mortgage to a building society, and the rules of a society will rarely do more than stipulate that the deed contain certain provisions<sup>3</sup>.

Building societies generally have printed forms of mortgages drafted to cater for the different types of facility which they provide, detailed terms often being incorporated by reference to an

offer letter or separate booklet of mortgage conditions. In the absence of express provisions, the common law will imply certain limited terms into the mortgage relationship. If there is no clear and express provision in the security which entitles a society to charge compound interest, it is not entitled to do so<sup>4</sup>; and a mortgage term stipulating that, on default being made in the payment of an instalment, the whole sum will immediately become due, implies a covenant to pay upon which proceedings may be brought<sup>5</sup>, although if there is ambiguity the mortgage deed is construed contra proferentem<sup>6</sup>.

1 See the Law of Property Act 1925 s 52(1); and PARA 2009. As to legal mortgages of land see **MORTGAGE** vol 77 (2010) PARA 187 et seq.

2 See the Land Registration Act 2002 s 23(1)(a); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 906.

3 A mortgage created by a company in favour of a building society must be registered at the Companies Registry: see the Companies Act 1985 ss 395, 396 (prospectively repealed); and **COMPANIES** vol 15 (2009) PARA 1279 (as to replacement provisions see the Companies Act 2006 ss 860, 861, 870, 874).

4 *Eastern Counties Building Society v Russell* [1947] 1 All ER 500; affd on another point [1947] 2 All ER 734, CA. This applies as against the borrower or as against a surety.

5 *Sherriff v Glenton* (1873) 28 LT 65. As to such a provision see further *Keene v Biscoe* (1878) 8 ChD 201; *Wallingford v Mutual Society* (1880) 5 App Cas 685, HL; *Cordingley v Alliance Society* [1887] WN 220, CA; and **MORTGAGE** vol 77 (2010) PARA 207 et seq.

6 *Eastern Counties Building Society v Russell* [1947] 2 All ER 734, CA. As to the contra proferentem rule see **CONTRACT** vol 9(1) (Reissue) PARAS 776, 800, 803 et seq. See to similar effect the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 7(2).

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## 2014. Incorporation of the rules.

A building society mortgage may be worded in such a way as to incorporate the society's rules into its terms, and, in such cases, it is usual for the borrower to covenant to observe, perform and be bound by the society's rules for the time being in force<sup>1</sup>. Where that is the case, the borrower will be bound both by the rules in force at the date of the mortgage itself and by any subsequent valid<sup>2</sup> amendments to those rules, even though such alterations may increase his obligations under the terms of the mortgage<sup>3</sup>. If the property is again mortgaged, then the society's rules will bind a subsequent mortgagee who has notice of them<sup>4</sup>; if a mortgagor transfers the equity of redemption and his shares in the society, he may still remain liable to the society in accordance with the rules unless he has obtained a release from the society<sup>5</sup>.

1 Eg the borrower may covenant to make payments in accordance with the rules. However incorporation of rules in a mortgage is now generally avoided, particularly due to the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (see **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq).

2 A society may only alter its rules by special resolution: see the Building Societies Act 1986 s 5(8), Sch 2 para 4(1); and PARA 1875.

3 See *Davies v Second Chatham Permanent Benefit Building Society* (1889) 61 LT 680, DC; *Pepe v City and Suburban Permanent Building Society* [1893] 2 Ch 311. Semble this would not apply to a person who had already ceased to be a member on giving notice of withdrawal under the rules: see *Christie v Northern Counties Permanent Benefit Building Society* (1889) 43 ChD 62 at 67-68 per North J.

4 *Andrews v City Permanent Benefit Building Society* (1881) 44 LT 641 (where the rules gave the society a right to consolidate).

5 *West Bromwich Building Society v Bullock* [1936] 1 All ER 887.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(1) BUILDING SOCIETIES/ (iii) Loans Secured on Land/D. REDEMPTION, TRANSFER AND DISCHARGE/(A) Redemption of Mortgage/2015. Conditions for redemption in rules.

## ***D. REDEMPTION, TRANSFER AND DISCHARGE***

### **(A) REDEMPTION OF MORTGAGE**

#### **2015. Conditions for redemption in rules.**

The rules of a building society must include provisions dealing with the manner in which loans are to be made and repaid, and the conditions on which a borrower may redeem the amount due from him before the end of the period for which the loan was made<sup>1</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 3(4), Table item 5 (amended by the Building Societies Act 1997 Sch 7 para 56(5)(b)). As to all the matters required to be included in the rules see PARA 1883.

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#### **2016. Control of right to redeem by rules.**

In general, redemption will only be permitted in accordance with the terms of the contract of membership and security as contained in the rules of the society and the mortgage deed. However, the right to redeem cannot be excluded or rendered illusory<sup>1</sup>, and the mortgagee society cannot reserve any rights in the rules or the mortgage deed which would be inconsistent with the borrower's right to redeem<sup>2</sup>. Any collateral advantages forming part of the mortgage transaction will not be valid following redemption<sup>3</sup>.

1 *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, [1938] 4 All ER 618, CA; affd [1940] AC 613, [1940] 2 All ER 401, HL.

2 *Samuel v Jarrah Timber and Wood Paving Corp Ltd* [1904] AC 323, HL.

3 A 'collateral advantage' is a provision giving the mortgagee a benefit over and above the repayment of the advance, with interest. To be invalid, such a benefit must form part of the mortgage transaction: if the advantage arises out of a separate arrangement then it may be enforced even after redemption. Whether a provision giving rise to the collateral advantage is part of the mortgage transaction, or is separate from it, is a question of substance rather than form: see *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, HL. Such collateral advantages will only be valid prior to redemption if they are not unfair or unconscionable, are not in the nature of a penalty clogging the equity of redemption, and are not inconsistent with the right to redeem: *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*; *Multiservice Bookbinding*

*Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489. As to the mortgagor's equity of redemption see **MORTGAGE** vol 77 (2010) PARA 107; and as to the equity of redemption see **MORTGAGE** vol 77 (2010) PARA 302 et seq.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(1) BUILDING SOCIETIES/ (iii) Loans Secured on Land/D. REDEMPTION, TRANSFER AND DISCHARGE/(A) Redemption of Mortgage/2017. Contribution by redeeming member to losses.

## **2017. Contribution by redeeming member to losses.**

The liability at any time of a borrowing member<sup>1</sup> of a building society is limited to the amount which, at that time, is payable under any mortgage<sup>2</sup> or other security by which his indebtedness to the society in respect of the loan is secured<sup>3</sup>.

1 As to the meaning of 'borrowing member' see PARA 1894.

2 As to the meaning of 'mortgage' see PARA 1868 note 9.

3 Building Societies Act 1986 s 5(8), Sch 2 para 6(2) (Sch 2 para 6 substituted by the Building Societies Act 1997 s 2(3)); and see PARA 1898. See also *Brownlie v Russell* (1883) 8 App Cas 235, HL (where it was held on the winding up of a society that an advanced member was liable for the full amount remaining payable on his advanced shares, that being the balance of the sum he had borrowed from the society). Note that the practice of allotting advanced shares in a society has now been discontinued. As to the winding up of societies see PARA 2071 et seq.

It may be that, if the mortgage included a term which made a borrowing member liable for a share of any losses incurred by the society, or which incorporated a provision in the rules which made him so liable, any resultant liability for losses (having been made part of the sum payable under the mortgage) could be enforced without contravention of the Building Societies Act 1986 Sch 2 para 6(2): compare *Re Albion Mutual Permanent Benefit Building Society* (1888) 43 ChD 410n; *Re West Riding of Yorkshire Permanent Benefit Building Society* (1890) 43 ChD 407. It is, however, extremely unlikely in modern conditions that a building society mortgage would contain a term to that effect. It is also thought that any such term would be vulnerable to challenge as an unfair term under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as to which see **CONTRACT**).

It is clear that, following redemption, when a borrowing member has paid all that is due under the terms of the mortgage and the rules and the mortgage has been discharged, he will cease to be a member of the society and cannot be liable for any losses: *Re West Riding of Yorkshire Permanent Benefit Building Society, ex p Pullman* (1890) 45 ChD 463.

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## **2018. Effect of winding up upon right to redeem.**

The right of a borrower to redeem on the payment of the sums for which he is liable under the mortgage and rules continues notwithstanding that the building society is being wound up<sup>1</sup>.

1 *Re Doncaster Permanent Building Society* (1866) LR 3 Eq 158; *Brownlie v Russell* (1883) 8 App Cas 235, HL; *Tosh v North British Building Society* (1886) 11 App Cas 489, HL; *Re Middlesbrough, Redcar, and Saltburn etc Building Society* (1889) 58 LJCh 771. As to the winding up of societies see PARA 2071 et seq.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(1) BUILDING SOCIETIES/ (iii) Loans Secured on Land/D. REDEMPTION, TRANSFER AND DISCHARGE/(B) Transfer and Discharge of Mortgage/2019. Transfer of mortgage.

## (B) TRANSFER AND DISCHARGE OF MORTGAGE

### 2019. Transfer of mortgage.

A mortgage in favour of a building society may be transferred to another where the borrower consents<sup>1</sup> and, in certain circumstances, where he directs<sup>2</sup>. If the mortgage deed contains the power to do so<sup>3</sup>, the mortgage debt, and any security for it, can be transferred without the consent of the mortgagor, but not so as to place the transferee in the same position under the mortgage contract as the transferor<sup>4</sup>.

Under statutory provisions<sup>5</sup> a society is, in principle, able to transfer a mortgage without the consent of the borrower and without the relevant power being included in the mortgage document, and such transfer, provided it is in the correct form<sup>6</sup>, would be effective to transfer the mortgage debt, the right to sue on the mortgage covenants and the right to enforce the security, and subject to the right of redemption or cesser all the mortgagee's estate and interest in the mortgaged property<sup>7</sup>.

A society can also acquire mortgages originally made in favour of another society on a merger<sup>8</sup>.

1 *Re Rumney and Smith* [1897] 2 Ch 351 at 359, CA, per Lindley LJ.

2 See the Law of Property Act 1925 s 95(1); and **MORTGAGE** vol 77 (2010) PARA 364. The effect of s 95(1) is that, where a mortgagor is entitled to redeem, then, subject to compliance with the terms entitling him to require a reconveyance or surrender, he will be entitled to require the mortgagee to assign the mortgage debt and convey the mortgaged property to any third person.

3 In the case of a mortgage to a consumer, such a provision is subject to the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see regs 3(1), 4, 5(5), Sch 2 para 1(p); and **CONTRACT**.

4 *Sun Permanent Building Society v Western Suburban and Harrow Road Permanent Building Society* [1921] 2 Ch 438 at 458-459, CA, where Warrington LJ stated that although the mortgage debt and security could be transferred without the consent of the mortgagor, other rights and advantages such as those derived from statute and the society's rules could not be transferred.

5 See the Law of Property Act 1925 s 114(1). See also the Land Registration Act 2002 s 27(3) (in the case of registered land); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 911, 913. Where it is unregistered land, no contrary intention must have been expressed in the mortgage deed: see the Law of Property Act 1925 s 114(1). Where the land is unregistered s 115(2) means that, if it appears from the receipt that the mortgage money is being paid by a person other than the person entitled to the immediate equity of redemption, the receipt will operate as a transfer of mortgage to that person except in the cases provided in s 115(2): see **MORTGAGE** vol 77 (2010) PARA 649.

6 Under the Law of Property Act 1925 s 114, the transfer must be by way of deed executed by the lender: see **MORTGAGE** vol 77 (2010) PARA 365. Under the Land Registration Act 2002 s 27(3), the transfer must be in the appropriate form for registration. See also the Land Registration Rules 2003, SI 2003/1417, r 72; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 915. A disposition of a registered charge must, in the case of a transfer, be in Sch 1 Form TR3, TR4 or AS2 as appropriate: see r 116; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 927. An application to register a transfer, assent or charge of registered land or a transfer, assent or sub-charge of a registered charge must be made on Sch 1 Form AP1 (substituted by SI 2005/1982): see the Land Registration Rules 2003, SI 2003/1417, r 13; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1076.



7 Under the Law of Property Act 1925 s 114 only the rights and powers specified in that provision can be transferred: see **MORTGAGE** vol 77 (2010) PARA 365. As to the effects of registration under the Land Registration Act 2002 see ss 28, 30; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 934, 936.

8 See PARAS 1918-1926.

## **UPDATE**

### **2019 Transfer of mortgage**

NOTE 6--SI 2003/417 r 72 substituted, r 116 amended: SI 2008/1919.

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### **2020. Receipts and surrenders or reconveyances.**

There are three statutory powers under which a receipt may be given which will operate as a release of property mortgaged to a building society. These are the general statutory powers conferred by the Law of Property Act 1925<sup>1</sup> (in the case of unregistered land) and the Land Registration Act 2002<sup>2</sup> (in the case of registered land), and the special power conferred by the Building Societies Act 1986<sup>3</sup>.

Under the Law of Property Act 1925, the receipt must state the name of the person paying the money, be executed by the mortgagee or the person in whom the mortgaged property is vested and who is legally entitled to give a receipt for the mortgage money, and should be indorsed on, or written at the foot of, or annexed to, the mortgage document<sup>4</sup>. Provided that the receipt is for all the money secured, the receipt operates as a reconveyance<sup>5</sup> or surrender<sup>6</sup> or release, and discharges the mortgaged property from both the principal debt and the interest secured by the mortgage and from all claims under the mortgage<sup>7</sup>. A receipt under the Law of Property Act 1925 may operate as a transfer of the mortgage where the person stated to have paid the money appears from the receipt not to have been the person entitled to the immediate equity of redemption and the receipt does not state that such transfer will not occur<sup>8</sup>.

Under the Land Registration Act 2002, the alternative procedure to a receipt under the Building Societies Act 1986 is the registration of an instrument of discharge in the required form executed as a deed or authenticated in such other manner as the registrar may approve<sup>9</sup>.

In addition, a society may discharge a mortgage by executing a reconveyance<sup>10</sup> or surrender<sup>11</sup> in favour of the owner of the equity of redemption or the reversion expectant on the determination of the mortgage term<sup>12</sup>.

1 See the Law of Property Act 1925 s 115(1); and the text and notes 4-7.

2 As to charges generally see the Land Registration Act 2002 Pt 5 (ss 48-57); the Land Registration Rules 2003, SI 2003/1417, Pt 9 (rr 101-116); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 943 et seq.

A discharge of a registered charge must be in the prescribed form, as must a release of part of the registered estate in a registered title from a registered charge; any discharge or release in the appropriate prescribed form must be executed as a deed or authenticated in such other manner as the Chief Land Registrar may approve; and an application to register such a discharge or release must be made in the prescribed form: see r 114(1), (2), (5); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 959. An application to register a discharge in Sch 1

Form DS1 must be made in Sch 1 Form AP1 (substituted by SI 2005/1982) or the Land Registration Rules 2003, SI 2003/1417, Sch 1 Form DS2 and an application to register a release in Sch 1 Form DS3 must be made in Sch 1 Form AP1 (as so substituted): see r 114(5).

During the currency of any notice under Sch 2 (see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1077), however, and subject to and in accordance with the limitations contained in that notice, notification of the discharge of a registered charge, or of the release of part of a registered title in a registered title from a registered charge, may be delivered to the registrar in electronic form; and such notification so given is to be regarded as having the same effect as a discharge or a release of part in the appropriate prescribed form executed in accordance with the above requirements by or on behalf of the person who has delivered it to the registrar: see r 115(2). Notwithstanding these provisions, the registrar is entitled to accept and act upon any other proof of satisfaction of a charge that he may regard as sufficient: see r 114(4).

3 See the Building Societies Act 1986 s 6C, Sch 2A; and PARA 2021.

4 Law of Property Act 1925 s 115(1).

5 A reconveyance is to the extent of the interest which is the subject matter of the mortgage and is to the person who, immediately before the execution of the receipt, was entitled to the equity of redemption: Law of Property Act 1925 s 115(1)(b). This applies where the mortgage does not take effect by demise or sub-demise: s 115(1)(b).

6 Where a mortgage takes effect by demise or sub-demise such a receipt takes effect as a surrender of the term which either determines the term or merges it in the reversion immediately expectant upon it: Law of Property Act 1925 s 115(1)(a) (but see the text and note 10).

7 Law of Property Act 1925 s 115(1).

8 Law of Property Act 1925 s 115(2). This will not apply if the mortgage is paid off out of capital money, or other money in the hands of a personal representative or trustee properly applicable for the discharge of the mortgage, and it is not expressly provided that the receipt is to operate as a transfer: s 115(2).

9 See the Land Registration Rules 2003, SI 2003/1417, rr 114-115; and note 2.

10 See the Building Societies Act 1986 Sch 2A para 1(1)(b), (c); and PARA 2021.

11 This term is used in recognition of the method of mortgaging by demise; but, as the term of years thereby created is subject to a provision for cesser on redemption (see the Law of Property Act 1925 ss 85(1), 86(1); and **MORTGAGE** vol 77 (2010) PARA 190), a surrender is not strictly necessary on the mortgage being redeemed (see s 116; and **MORTGAGE** vol 77 (2010) PARA 642).

12 See generally **MORTGAGE** vol 77 (2010) PARA 101 et seq.

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## **2021. Receipt under the Building Societies Act 1986.**

When all money intended to be secured by a mortgage<sup>1</sup> given to a building society has been fully paid or discharged, the society may indorse on or annex to the mortgage one or other of<sup>2</sup>:

449 (1) a receipt in the prescribed form<sup>3</sup> signed by any person acting under the authority of the board of directors<sup>4</sup>;

450 (2) a reconveyance of the mortgaged property to the mortgagor<sup>5</sup>;

451 (3) a reconveyance of the mortgaged property to such person of full age, and on such trusts, if any, as the mortgagor may direct<sup>6</sup>.

Except where a charge is a registered charge within the meaning of the Land Registration Act 2002<sup>7</sup>, such receipt will operate as a surrender of the term created by the mortgage, or a reconveyance to the person who immediately before the execution of the receipt was entitled to the equity of redemption<sup>8</sup>.

A statutory receipt is a final discharge and after it has been given no claim can be made by the society in respect of any sum secured by the mortgage, even if receipt was given under a mistake<sup>9</sup>. A statutory receipt may be delivered as an escrow<sup>10</sup>.

1 For these purposes, 'mortgage' includes a further charge: Building Societies Act 1986 s 6C (added by the Building Societies Act 1997 s 7(1)), Building Societies Act 1986 Sch 2A para 1(5) (Sch 2A added by the Building Societies Act 1997 Sch 2).

2 Building Societies Act 1986 Sch 2A para 1(1) (as added: see note 1). Schedule 2A para 1 does not apply to Scotland: Sch 2A para 1(6) (as so added). Generally Scottish matters are beyond the scope of this work. Special provision is made in the application of Sch 2A para 1 to Northern Ireland: see Sch 2A para 2 (as so added).

3 The Treasury may make rules for prescribing anything authorised or required by the Building Societies Act 1986 Sch 2A para 1 to be prescribed: Sch 2A para 3(1) (Sch 2A as added (see note 1); and Sch 2A para 3(1) amended by SI 2001/2617). For these purposes, 'prescribed' means prescribed by rules made under the Building Societies Act 1986 Sch 2A para 3: Sch 2A para 3(1) (as so added). The power to make such rules is exercisable by statutory instrument: Sch 2A para 3(2) (as so added). As to the prescribed forms of receipt see the Building Societies (Prescribed Form of Receipt) Rules 1997, SI 1997/2869. The forms must be strictly followed although a mere clerical error may not be fatal: *Spice v Bacon* (1877) 2 ExD 463, 466. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

The Law of Property Act 1925 s 115(9) (see **MORTGAGE** vol 77 (2010) PARA 645) does not apply to a receipt in the prescribed form indorsed or annexed by a building society in pursuance of the Building Societies Act 1986 Sch 2A para 1(1) (see the text and notes 1-2), and in the application of the Law of Property Act 1925 s 115(9) to a receipt so indorsed or annexed which is not in that form, the receipt will be taken to be executed in the manner required by the statute relating to the society if it is signed as mentioned in the Building Societies Act 1986 Sch 2A para 1(1): Sch 2A para 1(3) (as so added).

4 Building Societies Act 1986 Sch 2A para 1(1)(a) (as added: see note 1). As to the office of director see PARAS 1944-1963.

5 Building Societies Act 1986 Sch 2A para 1(1)(b) (as added: see note 1). For these purposes, 'mortgagor', in relation to a mortgage, means the person for the time being entitled to the equity of redemption: Sch 2A para 1(5) (as so added).

6 Building Societies Act 1986 Sch 2A para 1(1)(c) (as added: see note 1).

7 See **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 861.

8 See the Building Societies Act 1986 Sch 2A para 1(2) (as added (see note 1); and amended by the Land Registration Act 2002 Sch 11 para 19(1), (2)). The provision under which the receipt operates is the Law of Property Act 1925 s 115(1), (3), (6), (8): see PARA 2020; and **MORTGAGE** vol 77 (2010) PARAS 645, 649.

9 *Harvey v Municipal Permanent Investment Building Society* (1884) 26 ChD 273, CA; *London and County United Building Society v Angell* (1896) 65 LJQB 194. These cases were, however, decided under the Building Societies Act 1874 s 42, which provided that a receipt would vacate 'the mortgage and further charge or debt'. The position may be different under the Building Societies Act 1986, Sch 2A para 1(1)(a) which operates in accordance with the differently worded Law of Property Act 1925 s 115(1) (see note 8) as a 'discharge of the mortgaged property from all principal money and interest'.

10 *Lloyds Bank Ltd v Bullock* [1896] 2 Ch 192 (where the mortgage with indorsed receipt was handed to the solicitor of the society to be delivered on payment off, and he, without receiving payment, dealt fraudulently with the property, the legal estate remained with the society).

Secured on Land/E. ENFORCEMENT OF MORTGAGE/(A) Remedies in General/2022. Mortgagee's remedies in general.

## ***E. ENFORCEMENT OF MORTGAGE***

### **(A) REMEDIES IN GENERAL**

#### **2022. Mortgagee's remedies in general.**

Where a building society borrower is in default in payment of the mortgage debt, all or any of the normal remedies of a mortgagee in those circumstances are available to the society; that is to say, the society can sue for payment on the covenant to pay principal and interest, for possession of the mortgaged estate, and for foreclosure, and can combine the claims in the same action<sup>1</sup>. The usual course is for the society, subject to the restrictions imposed by the mortgage or by statute, either to seek possession of the mortgaged property with a view to exercising a power of sale conferred by the mortgage or by statute, or else to appoint a receiver<sup>2</sup>.

1 See **MORTGAGE** vol 77 (2010) PARA 514 et seq.

2 See the Law of Property Act 1925 s 101; and **MORTGAGE** vol 77 (2010) PARAS 227, 437, 443, 444, 464, 465, 476. As to sale out of court see PARAS 2025-2027; and as to the power to appoint a receiver out of court see PARA 2028.

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#### **2023. Bankruptcy of borrower.**

If a borrower becomes bankrupt, the building society must submit a proof of debt to the trustee in bankruptcy<sup>1</sup>. The proof of debt should disclose the society's security<sup>2</sup>.

If a society is a secured creditor<sup>3</sup> and realises its security, it may prove for the balance of its debt, after deducting the amount realised<sup>4</sup>.

1 The proof of debt should be submitted in accordance with the Insolvency Rules 1986, SI 1986/1925: see the Insolvency Act 1986 s 322(1); the Insolvency Rules 1986, SI 1986/1925, rr 6.96-6.114; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 528-539, 542-546, 561, 571.

2 If a secured creditor omits to disclose its security in its proof of debt the security must be surrendered for the general benefit of creditors, unless the court, on application, orders otherwise on the ground that the omission was inadvertent or the result of honest mistake: see the Insolvency Rules 1986, SI 1986/1925, r 6.116(1).

3 As to the meaning of 'secured creditor' see the Insolvency Act 1986 s 383 (prospectively amended); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 560.

4 Insolvency Rules 1986, SI 1986/1925, r 6.109(1).

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## **2024. Insolvency of borrower.**

Where a loan secured on land has been made by a building society to a company registered in England and Wales and the company becomes insolvent, the rights of the society will depend upon the nature of its security<sup>1</sup> and the procedure being applied to govern the affairs of the insolvent company<sup>2</sup>. Subject to the statutory restrictions when an application for an administration order is pending or such an order is enforced, a specific legal mortgage or equitable charge given by a company may be enforced in the same manner as similar securities given by an individual<sup>3</sup>.

1    le whether there is a specific legal mortgage or an equitable charge, or whether there is merely a debenture giving no charge on the company's assets. See generally **COMPANIES**.

2    Under the Insolvency Act 1986 there are four types of procedure which govern the administration of the affairs of insolvent companies: (1) voluntary arrangements under Pt I (ss 1-7B); (2) administrations under Pt II (s 8); (3) receivership under Pt III (ss 28-72H); and (4) winding up under Pt IV (ss 73-219), Pt V (ss 220-229) and Pt VI (ss 230-246): see **COMPANY AND PARTNERSHIP INSOLVENCY**.

3    See generally **MORTGAGE** vol 77 (2010) PARA 101 et seq.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(1) BUILDING SOCIETIES/ (iii) Loans Secured on Land/E. ENFORCEMENT OF MORTGAGE/(B) Sale out of Court/2025. Duty to obtain best price.

## **(B) SALE OUT OF COURT**

### **2025. Duty to obtain best price.**

Where a building society as lender sells land in exercise of a power of sale under a mortgage it owes the borrower a duty to take reasonable care to obtain a proper price<sup>1</sup>.

A society exercising a power of sale as mortgagee is, therefore, in the position of a fiduciary vendor subject to the qualifications that: (1) it is at liberty to sell at such time as it thinks proper; (2) it has the wide discretion given by statute<sup>2</sup> as to the mode of sale; and (3) it has the benefit of the statutory protection<sup>3</sup> given to mortgagees in that it will not be answerable for any involuntary loss happening in the execution of the power of sale<sup>4</sup>.

The property cannot be sold by the society as mortgagee to the secretary, solicitor or other agent of the society acting in the matter of the sale; any attempt at such a sale will be set aside as invalid<sup>5</sup>.

1    *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 All ER 633, CA. A similar duty is owed to any subsequent mortgagee (*Downsview Nominees Ltd v First City Corporation Ltd* [1993] 3 All ER 626, [1993] AC 295, PC) and to any guarantor of the borrower's payment obligations (*Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410, CA).

Prior to the Building Societies Act 1997, building societies were unique in being placed under a statutory duty to take reasonable care to ensure that the price at which the land was sold was the best price that could reasonably be obtained: see the Building Societies Act 1986 s 13(7), Sch 4 para 1(1)(a) (now repealed by virtue of the Building Societies Act 1997 ss 12(1), 46(2), Sch 9). A building society's duty now follows the general law under *Cuckmere Brick Co Ltd v Mutual Finance Ltd* above. To avoid the suggestion that the repeal of the Building Societies Act 1986 Sch 4 para 1(1)(a) might place societies in a better position than other lenders, the Building Societies Act 1997 provides that, in relation to any time after the Building Societies Act 1986 Sch 4 ceases to have effect by virtue of the Building Societies Act 1997 s 12(1), any rule of law requiring a lender to take reasonable care to obtain a proper price or true market value will have effect as if the Building Societies Act 1986 Sch 4 para 1(1)(a) (duty to take reasonable care to ensure best price that can reasonably be obtained), and corresponding earlier enactments, had not been enacted: see the Building Societies Act 1997 s 12(2).

2 See the Law of Property Act 1925 s 101(1); and **MORTGAGE** vol 77 (2010) PARAS 227, 437, 443, 444, 461, 476.

3 See the Law of Property Act 1925 s 106(3); and **MORTGAGE** vol 77 (2010) PARA 461.

4 *Reliance Permanent Building Society v Harwood-Stamper* [1944] Ch 362, [1944] 2 All ER 75 (where the question of reasonable care is considered).

5 *Martinson v Clowes* (1882) 21 ChD 857. As to the office of secretary see PARAS 1966-1967. As to solicitors generally see **LEGAL PROFESSIONS**; and as to agents generally see **AGENCY**.

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## **2026. Transfer of equity of redemption or mortgage.**

Provided that he complies with any procedure stipulated in the mortgage contract, a mortgagor can sell his interest in the mortgaged property. The building society may release the vendor member and substitute the purchaser as a borrowing member of the society taking the necessary steps to ensure that the purchaser is made liable for the covenants contained in the mortgage<sup>1</sup>, although the vendor member may not always be released from personal liability on his covenants<sup>2</sup>. If the society wishes to release him, a formal release should be effected<sup>3</sup>.

1 *Ingledeu v Temple* (1881) 7 LT Jo 263.

2 See eg *Chelsea and Walham Green Building Society v Armstrong* [1951] Ch 853, [1951] 2 All ER 250.

3 *West Bromwich Building Society v Bullock* [1936] 1 All ER 887, 80 Sol Jo 654.

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## **2027. Application of proceeds of sale.**

Following the exercise of a power of sale, a building society is entitled to retain from the proceeds of such sale all instalments payable up to the time of completion of the sale, together

with the outstanding balance of the principal sum remaining at that time unpaid and any costs reasonably incurred by the society in enforcing its security<sup>1</sup>. Whether the society will be entitled to retain any other amounts will depend on the terms of the contract contained in the mortgage and the rules<sup>2</sup>. Any surplus sale money must be paid to the mortgagor<sup>3</sup>.

If a society has notice of a subsequent mortgage and sells the mortgaged property, or joins with the mortgagor in a sale, it will be responsible to the subsequent mortgagee for the surplus proceeds of sale<sup>4</sup>.

1 *Cotterell v Stratton* (1872) LR 8 Ch App 295; *Parker-Tweedale v Dunbar Bank plc (No 2)* [1991] Ch 26, [1990] 2 All ER 588, CA. As to a mortgagee's entitlement to costs generally see *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA.

2 *Matterson v Elderfield* (1869) 4 Ch App 207 (where on the express terms of the rules the portions of future instalments attributable to interest were retained); *Re Goldsmith, ex p Osborne* (1874) 10 Ch App 41 (where, in the absence of express provision, the interest portion of future instalments was not allowed to be retained); *Re O'Donohue's Estate* (1876) IR 10 Eq 221, CA (where on the express terms discount was allowed on future instalments). In considering the validity of a term which entitled the society to retain future interest, it would now be necessary to have regard to the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as to which see **CONTRACT**). Where the power of sale is exercised following a default by the borrower, it would also be necessary to consider the impact of the law relating to penalties: compare *Lordsvale Finance plc v Bank of Zambia* [1996] QB 752, [1996] 3 All ER 156, [1996] 3 WLR 688.

3 See the Law of Property Act 1925 s 105; and **MORTGAGE** vol 77 (2010) PARA 472. This applies after discharge of any prior incumbrances to which the sale is not made subject; and s 105 stipulates the order in which the proceeds of sale should be applied.

4 *West London Commercial Bank v Reliance Permanent Building Society* (1885) 29 ChD 954, CA.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(1) BUILDING SOCIETIES/ (iii) Loans Secured on Land/E. ENFORCEMENT OF MORTGAGE/(C) Appointment of Receiver/2028. Appointment of a receiver by a society.

## (C) APPOINTMENT OF RECEIVER

### 2028. Appointment of a receiver by a society.

Like other mortgagees, a building society is entitled to appoint a receiver of the income of the mortgaged property or any part of it<sup>1</sup>. This power is only exercisable when the mortgagee has become entitled to exercise his statutory power of sale, and then the appointment may be made by writing under hand<sup>2</sup>. Although the receiver appointed under the statutory power is deemed to be the agent of the mortgagor, who is solely responsible for the receiver's acts or defaults unless the mortgage deed provides otherwise<sup>3</sup>, he must nevertheless account to the mortgagee for all money received by him<sup>4</sup>.

1 See the Law of Property Act 1925 s 101(1)(iii); and **MORTGAGE** vol 77 (2010) PARA 476. The power applies only if and so far as a contrary intention is not expressed in the mortgage deed, and has effect subject to the terms of that deed: s 101(4). As to the power to appoint a receiver see further **MORTGAGE** vol 77 (2010) PARA 469 et seq.

2 See the Law of Property Act 1925 s 109(1); and **MORTGAGE** vol 77 (2010) PARA 476.

3 See the Law of Property Act 1925 s 109(2); and **MORTGAGE** vol 77 (2010) PARA 479.

4 *Leicester Permanent Building Society v Butt* [1943] Ch 308, [1943] 2 All ER 523.

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### **2029. Appointment of a receiver by the court.**

Where there has been a breach by a borrower of his obligations under the mortgage, or where the security is otherwise in jeopardy, the building society can obtain an order for the appointment of a receiver by the court, if the circumstances render it just and convenient<sup>1</sup>. However, because the society has the statutory power to appoint a receiver<sup>2</sup> it is not usually necessary for a society to apply to the court for such an order<sup>3</sup>.

1 See *Prytherch, Prytherch v Williams* (1889) 42 ChD 590; and **MORTGAGE** vol 77 (2010) PARA 560. As to the appointment of a receiver by the court see **MORTGAGE** vol 77 (2010) PARA 560 et seq.

2 Under the Law of Property Act 1925 ss 101(1)(iii), 109: see **MORTGAGE** vol 77 (2010) PARA 476.

3 See eg *Bank of Credit and Commerce International SA v BRS Kumar Bros Ltd* [1994] 1 BCLC 211.

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## **(D) ACTION, FORECLOSURE AND POSSESSION**

### **2030. Action by building society.**

Where a borrower is in default in making repayment of principal, payments of interest, or of instalments due under the mortgage deed, the building society may take action against him under the covenant contained in the mortgage deed<sup>1</sup>. An action to recover any principal sum is barred 12 years after the right to receive the money accrued<sup>2</sup>, and an action to recover arrears of interest is normally barred after six years from the date on which the interest became due<sup>3</sup>.

An action to enforce the security (typically by claiming possession of the mortgaged property) will usually be taken against the borrower, who will generally be the person who has legal title to the property. Consequently, problems will arise if there are persons who are not named in the legal title but who are entitled to a beneficial interest in the property<sup>4</sup>.

1 See **MORTGAGE** vol 77 (2010) PARA 514 et seq. Action is now generally to be commenced in the county court: see the County Courts Act 1984 s 15; CPR 55.2, 55.3(1); and **CIVIL PROCEDURE** vol 11 (2009) PARA 116; **COURTS** vol 10 (Reissue) PARAS 712, 722. In appropriate cases it may be justified to start a claim in the High Court: see CPR 55.2, 55.3(2), (3); *Practice Direction--Possession Claims* PD 55 para 1; and **CIVIL PROCEDURE** vol 11 (2009) PARA 116. As to the allocation of business between the High Court and county courts see the Courts and Legal Services Act 1990 s 1; the High Court and County Courts Jurisdiction Order 1991, SI 1991/724; and **COURTS** vol 10 (Reissue) PARA 579.



2 See the Limitation Act 1980 s 20(1); and **LIMITATION PERIODS** vol 68 (2008) PARA 1105. Where the property subject to the mortgage or charge comprises any future interest or life assurance policy and it is a term of the mortgage or charge that arrears of interest are to be treated as part of the principal sum of money secured by the mortgage or charge, interest will not be treated as becoming due before the right to recover the principal sum of money has accrued or is treated as having accrued: see s 20(7); and **LIMITATION PERIODS** vol 68 (2008) PARA 1117.

3 See the Limitation Act 1980 s 20(5); and **LIMITATION PERIODS** vol 68 (2008) PARA 1111.

4 Eg a tenant: see PARA 2032. This situation will also arise where the property is in the sole name of a husband, and the wife is entitled to a beneficial interest through her contribution to the purchase price. If the wife's beneficial interest arises after the creation of the mortgage or at about the same time (such as where the advance is used for completion of the purchase of the property) the wife's beneficial interest will be subject to the society's mortgage. If the interest predates the society's mortgage the wife will be bound by the mortgage only if the society had no notice (actual or constructive) of her interest at the date of the mortgage, in the case of unregistered land; and in the case of registered land the wife will have an overriding interest unless the society made prior inquiries of her and that interest was not disclosed: *Caunce v Caunce* [1969] 1 All ER 722, [1969] 1 WLR 286; *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL; *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085, HL; *Lloyds Bank plc v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111, HL. These cases refer to an overriding interest under the Land Registration Act 1925 s 70(1)(g), but this provision has been repealed: see now the Land Registration Act 2002 ss 11, 12, Sch 1 para 2, Sch 3 para 2; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 866. See further **LAND REGISTRATION** vol 26 (2004 Reissue) PARAS 866, 962; **MORTGAGE** vol 77 (2010) PARA 280.

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### 2031. Foreclosure and sale.

Like any other mortgagee, a building society is entitled to a decree for foreclosure<sup>1</sup>. Where the sum actually owing is less than the county court limit, although the mortgage is expressed to secure a loan of a larger amount, the proceedings may be taken in the county court<sup>2</sup>.

A society is entitled to add the costs of foreclosure proceedings to its security<sup>3</sup>, unless its conduct has been unreasonable or improper, in which case it may be deprived of its costs and may also be charged with interest on the balance, if any, in its hands<sup>4</sup>.

In foreclosure proceedings the court may direct a sale of the mortgaged property<sup>5</sup>.

1 *Provident Permanent Building Society v Greenhill* (1878) 9 ChD 122. The form of decree will usually be the same as in the case of an ordinary mortgage: *Bell v London and South Western Bank* [1874] WN 10. As to foreclosure generally see **MORTGAGE** vol 77 (2010) PARA 566 et seq.

2 See the County Courts Act 1984 s 23(c); and **COURTS** vol 10 (Reissue) PARA 719. As to the county court limit for equity jurisdiction see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724; and **COURTS** vol 10 (Reissue) PARAS 579, 710, 712-713, 715, 721. As to the commencement of a claim in the county court see CPR Pt 8; *Practice Direction--Alternative Procedure for Claims* PD 8; and **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq; **MORTGAGE** vol 77 (2010) PARA 534.

3 *Cotterell v Stratton* (1872) 8 Ch App 295.

4 Cf *Durham and Northumberland Working Men's Permanent Building Society v Davidson* (1892) 61 LJQB 473, CA. See also *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171, [1992] 4 All ER 588, CA.

5 See the Law of Property Act 1925 s 91; and **MORTGAGE** vol 77 (2010) PARAS 616, 671.

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### 2032. Tenancies binding on building society as mortgagee.

Tenancies created before the mortgage, or created by the mortgagor after the mortgage under an express or statutory power, are binding on the building society as mortgagee<sup>1</sup>, and the tenant under such a tenancy is entitled as against the society to such statutory protection by way of security of tenure as may be available to him<sup>2</sup>. In building society mortgages, the mortgagor's statutory powers of leasing<sup>3</sup> are usually excluded or exercisable only with the written consent of the mortgagee.

If the mortgagor has no statutory or express power of leasing which can be so exercised as to bind the society, a lease by the mortgagor (during the term of the mortgage) which the society has not recognised will confer only a precarious tenancy, good against the mortgagor but ineffective against the society if it asserts its paramount title<sup>4</sup>. What amounts to recognition of the tenancy by the society depends upon the circumstances of each particular case<sup>5</sup>. Failure by the society to evict the tenant of the mortgagor as a trespasser within a short period after it had obtained knowledge of the letting does not itself amount to such recognition<sup>6</sup>, even though the rent from the tenant is collected by a person who is acting both as the agent of the mortgagor and as the agent, but not as an officer, of the society and who deducts the mortgage repayments from the money received as rent<sup>7</sup>.

1 On going into possession the society is entitled to receive the rents and profits of the tenancies: see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

2 See **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 34. In proceedings taken by a society for possession it may be advisable to sue all occupiers of the premises who are known to claim to have the right to remain in possession as against the society. Other occupiers may be given notice of the proceedings so that they may, if they think fit, apply to be joined as defendants: see *Leicester Permanent Building Society v Shearley* [1951] Ch 90, [1950] 2 All ER 738. A wife with no immediate prospect of paying off a mortgage on the matrimonial home has no right to be joined in the mortgagee's possession claim against the husband: see *Hastings and Thanet Building Society v Goddard* [1970] 3 All ER 954, [1970] 1 WLR 1544, CA.

3 See the Law of Property Act 1925 s 99(1), (13); and **MORTGAGE** vol 77 (2010) PARAS 346, 347.

4 *Dudley and District Benefit Building Society v Emerson* [1949] Ch 707, [1949] 2 All ER 252, CA (mortgage by way of legal charge; the mortgagor's tenant was held not to be protected by the Rent Restrictions Acts against eviction by the mortgagees); *Britannia Building Society v Earl* [1990] 2 All ER 469, [1990] 1 WLR 422, CA (mortgage by way of legal charge prior to grant of tenancy; held that the statutory protection conferred on the tenants (see the Rent Act 1977 s 98; and **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 942 et seq) did not defeat the society's claim for possession); cf *Quennell v Maltby* [1979] 1 All ER 568, [1979] 1 WLR 318, CA, distinguishing *Dudley and District Benefit Building Society v Emerson* above (the court will look behind the formal legal relationship of the parties and will not grant possession to a mortgagee unless it is thought bona fide and reasonable for the purposes of enforcing the security). See further **MORTGAGE** vol 77 (2010) PARA 101 et seq. As to particulars of claim in the county court see CPR 16.4; *Practice Direction--Statements of Case* PD 16; and **CIVIL PROCEDURE** vol 11 (2009) PARA 587 et seq.

5 *Parker v Braithwaite* [1952] 2 All ER 837 at 841 per Danckwerts J; *Stroud Building Society v Delamont* [1960] 1 All ER 749, [1960] 1 WLR 431.

6 *Re O'Rourke's Estate* (1889) 23 LR Ir 497; applied in *Parker v Braithwaite* [1952] 2 All ER 837.

7 *Parker v Braithwaite* [1952] 2 All ER 837 (failure by society to take steps to evict tenant for eight months after knowing of letting), citing *Bradford Permanent Building Society v Cholmondeley* (26 May 1952, unreported) (failure by society to take steps for between a year and 18 months after knowledge was obtained through its local agent, who was acting in more than one capacity). See also *Stroud Building Society v Delamont*

[1960] 1 All ER 749, [1960] 1 WLR 431 (society had so acted as to accept mortgagor's tenant as its own); and **MORTGAGE** vol 77 (2010) PARA 299.

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### **2033. Right to possession of mortgaged property.**

A building society, as mortgagee under a legal mortgage, has the right to immediate possession of the mortgaged property, or to receipt of the rent and profits, where no provision is made for retention of possession by the mortgagor<sup>1</sup>, subject to certain statutory restrictions<sup>2</sup>. Under the most common form of building society mortgage, however, the principal, as well as interest, is paid by the mortgagor by periodical instalments, and the society precludes itself from going into possession so long as the periodical payments are punctually made<sup>3</sup>. Where under the terms of such a mortgage the whole of the loan becomes due on default in payment of an instalment, the society, where such default has been made, is entitled<sup>4</sup> to an order for possession of the mortgaged property<sup>5</sup>.

1 *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, [1957] 2 All ER 35. See also the Law of Property Act 1925 ss 87(1), 95(4); and **MORTGAGE** vol 77 (2010) PARA 402.

2 Ie subject to what is stated in PARA 2034.

3 See *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 at 321, [1957] 2 All ER 35 at 37 per Harman J.

4 Ie subject to what is stated in PARA 2034.

5 *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883, [1962] 1 All ER 163 (applied in *London Permanent Benefit Building Society v De Baer* [1969] 1 Ch 321, [1968] 1 All ER 372; distinguished in *Alnwick RDC v Taylor* [1966] Ch 355, [1966] 1 All ER 899). Quaere whether under an instalment mortgage where there is no provision for the whole loan becoming payable in one sum a mortgagee may be kept out of possession on redemption spread over the period of the mortgage instalment: see *Birmingham Citizens Permanent Building Society v Caunt* above at 897 and 172 per Russell J.

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### **2034. Court's power to adjourn, or stay execution in, proceedings for possession of dwelling house.**

In proceedings for possession of mortgaged property which consists of or includes a dwelling house<sup>1</sup> the court has power to adjourn the proceedings, stay or suspend execution of any judgment or order for possession or postpone the date for delivery of possession for such period as it thinks reasonable where it appears to the court that, if the power is exercised, the

borrower is likely within a reasonable period to pay any sum due under the mortgage or to remedy the breach of any other of his obligations under the mortgage<sup>2</sup>.

1 For this purpose 'dwelling house' includes any building or part thereof which is used as a dwelling: Administration of Justice Act 1970 s 39(1). The fact that part of the premises comprised in a dwelling house is used as a shop or office or for business, trade or professional purposes, does not prevent the dwelling house from being a dwelling house: s 39(2).

2 See the Administration of Justice Act 1970 s 36(1), (2). Any adjournment, stay, suspension or postponement may be made subject to such conditions as to payment by the mortgagor of any sum secured by the mortgage or the remedying of any default as the court thinks fit: s 36(3). Such conditions may be varied or revoked by the court: s 36(4). Where a mortgagor is permitted to pay the principal sum by instalments but provision is made for earlier payment in the event of any default by the mortgagor a court may treat as due under the mortgage only such amounts of principal and interest as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment: see the Administration of Justice Act 1973 s 8(1). See *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 All ER 449, [1996] 1 WLR 343, CA; and **MORTGAGE** vol 77 (2010) PARA 556. As to the exercise of the court's powers in a case where a claim for possession is combined with a claim for payment of the mortgage debt, see *Cheltenham & Gloucester Building Society v Grattidge* (1998) 30 HLR 250.

As to the jurisdiction of the county court to hear claims for recovery of land where the mortgaged land consists of or includes a dwelling house and no part of the land is situated in Greater London see the County Courts Act 1984 s 21(1), (3), (4); and **COURTS** vol 10 (Reissue) PARA 715. As to claims for the recovery of possession of land see CPR Pt 55; *Practice Direction--Possession Claims* PD 55; and **CIVIL PROCEDURE** vol 11 (2009) PARA 116. See also CPR Sch 1 RSC Ord 113; *Ropaigealach v Barclays Bank plc* [2000] QB 263, [1999] 4 All ER 235, CA; and **MORTGAGE** vol 77 (2010) PARAS 408, 530, 546, 554.

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#### **(iv) Powers of Building Societies**

##### **2035. Powers of building societies.**

Although a building society incorporated under the Building Societies Act 1986<sup>1</sup> is a body corporate<sup>2</sup>, it does not have all the powers of a corporation at common law<sup>3</sup>. The powers of a society are limited to: (1) those expressly given by the Building Societies Act 1986; (2) those which are incidental to it being a statutory corporation; (3) those expressly given by its memorandum; and (4) those incidental to the powers so given<sup>4</sup>.

Moreover, a society is subject to the common law and to statutory provisions which affect the conduct of its affairs or business, like any other person<sup>5</sup>.

1 As to the incorporation of societies see PARAS 1865-1866.

2 See PARA 1856. As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

3 As to the powers of corporations see PARA 2036; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1223 et seq.

4 See *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653; *A-G v Great Eastern Ry Co* (1880) 5 App Cas 473, HL; *Small v Smith* (1884) 10 App Cas 119, HL. Subject to the provisions of the Building Societies Act 1986, a society has the powers conferred on it by its memorandum: see s 5(5); and PARA 1865. As to the express powers of a society set out in its memorandum see PARAS 1873-1874. A society's capacity is not limited by its memorandum: see PARA 2037. In so far as a society is carrying on any activity comprised in the provision of a banking service, it must be treated for all purposes (1) as a bank and a banker; and (2) as carrying on the

business of banking or a banking undertaking, whether or not it would be otherwise so treated: Building Societies Act 1997 s 12(3).

5 'Person' includes a body of persons corporate or unincorporate: Interpretation Act 1978 ss 5, 22(1), 23(1), Sch 1; and see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1225; **STATUTES** vol 44(1) (Reissue) PARA 1382.

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### **2036. Meaning of 'ultra vires'.**

The term 'ultra vires' in its proper sense denotes some act or transaction on the part of a corporation which, although not unlawful or contrary to public policy if done by an individual, is yet beyond the corporation's legitimate powers as defined by the statute under which it is formed, or the statutes which are applicable to it, or by constitution. The doctrine in this sense is no longer applicable to building societies<sup>1</sup>. The term 'ultra vires' is, however, still sometimes used to refer to acts which, while within the corporate capacity of the society, are ultra vires the directors in the sense of being beyond the powers conferred on them by the society or its constitution<sup>2</sup>. The directors are also sometimes described as acting ultra vires where they exercise their powers for an improper purpose<sup>3</sup>.

1 See PARA 2037.

2 The term was also used in two different ways in relation exclusively to the powers of a company in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1982] Ch 478, [1982] 3 All ER 1057 at 1076-1077 per Vinelott J. On appeal, however, the Court of Appeal considered that such use of the term could lead to confusion and that the term should be confined rigidly to 'describing acts which are beyond the corporate capacity of a company': see [1986] Ch 246 at 297, [1985] 3 All ER 52 at 87, CA, per Slade LJ, and at 303 and 91 per Browne-Wilkinson LJ. As to the position in cases where the directors of a building society act beyond their powers see PARA 2038.

3 See **COMPANIES** vol 14 (2009) PARA 259.

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### **2037. Society's capacity not limited by its memorandum.**

The validity of an act done by a building society may not be called into question on the ground of lack of capacity by reason of anything included in the society's memorandum<sup>1</sup>. A member of a society<sup>2</sup> may bring proceedings to restrain the doing of an act which would otherwise be beyond the society's capacity; but no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the society<sup>3</sup>. It remains the duty of the directors<sup>4</sup> to observe any limitations on their powers flowing from the society's memorandum; and action by the directors which would otherwise be beyond the society's capacity may only be ratified by the society by special resolution<sup>5</sup>. A resolution ratifying such action does not affect any liability incurred by the directors or any other person; and relief from any such liability must be agreed to separately by special resolution<sup>6</sup>.

1 Building Societies Act 1986 s 5(8), Sch 2 para 16(1) (Sch 2 para 16 substituted by the Building Societies Act 1997 Sch 1). As to the meaning of 'memorandum' see PARA 1873 note 2.

2 As to membership see PARA 1888 et seq.

3 Building Societies Act 1986 Sch 2 para 16(2) (as substituted: see note 1).

4 As to the office of director see PARAS 1944-1963.

5 Building Societies Act 1986 Sch 2 para 16(3) (as substituted: see note 1). As to the meaning of 'special resolution' see PARA 1980.

6 Building Societies Act 1986 Sch 2 para 16(4) (as substituted: see note 1).

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### **2038. Powers of directors to bind the society.**

In favour of a person dealing with a building society in good faith, the power of the board of directors<sup>1</sup> to bind the society, or authorise others to do so, is not limited by reason of anything included in the society's constitution<sup>2</sup>, that is to say, its memorandum<sup>3</sup> and rules<sup>4</sup>. For this purpose: (1) a person deals with a society if he is a party to any transaction or other act to which the society is a party<sup>5</sup>; (2) a person is not regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the society's constitution<sup>6</sup>; and (3) a person is presumed to have acted in good faith unless the contrary is proved<sup>7</sup>. The references to limitations on the directors' powers under a society's constitution include limitations deriving from a resolution of the society passed at a general meeting or special meeting<sup>8</sup> or on a postal or electronic ballot<sup>9</sup>, or from any agreement between the members of the society<sup>10</sup>.

This provision<sup>11</sup> does not affect: (a) any right of a member of the society to bring proceedings to restrain the doing of an act which is beyond the powers of the directors, but no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the society<sup>12</sup>; and (b) any liability incurred by the directors, or any other person, by reason of the directors' exceeding their powers<sup>13</sup>.

1 As to the office of director see PARAS 1944-1963.

2 As to the constitution see PARA 1856 et seq.

3 As to the meaning of 'memorandum' see PARA 1873 note 2.

4 Building Societies Act 1986 s 5(8), Sch 2 para 17(1) (Sch 2 para 17 substituted by the Building Societies Act 1997 Sch 1). Notwithstanding anything in the Building Societies Act 1986 Sch 2 para 3(2) (see PARA 1878), Sch 2 para 17(1) applies in relation to members of the society, and to persons claiming on account of members or under the rules of the society, as it applies in relation to other persons: Sch 2 para 17(4) (as so substituted).

5 Building Societies Act 1986 Sch 2 para 17(2)(a) (as substituted: see note 4).

6 Building Societies Act 1986 Sch 2 para 17(2)(b) (as substituted: see note 4).

7 Building Societies Act 1986 Sch 2 para 17(2)(c) (as substituted: see note 4).

- 8 As to meetings and resolutions generally see PARA 1974 et seq.
- 9 As to postal and electronic ballots see PARA 1988.
- 10 Building Societies Act 1986 Sch 2 para 17(3) (as substituted (see note 4); and amended by SI 2003/404). As to membership see PARA 1888 et seq.
- 11 I.e. the Building Societies Act 1986 Sch 2 para 17(1): see the text to notes 1-4.
- 12 Building Societies Act 1986 Sch 2 para 17(5) (as substituted: see note 4).
- 13 Building Societies Act 1986 Sch 2 para 17(6) (as substituted: see note 4).

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### **2039. No duty to inquire as to capacity of society or authority of directors.**

A party to a transaction with a building society is not bound to inquire as to whether it is permitted by the society's constitution<sup>1</sup> or as to any limitation on the powers of the board of directors to bind the society<sup>2</sup> or authorise others to do so<sup>3</sup>.

- 1 As to the constitution see PARA 1856 et seq.
- 2 As to the office of director see PARAS 1944-1963. As to the power of directors to bind the society see PARA 2038.
- 3 Building Societies Act 1986 s 5(8), Sch 2 para 18(1) (Sch 2 para 18 substituted by the Building Societies Act 1997 Sch 1). Notwithstanding anything in the Building Societies Act 1986 Sch 2 para 3(2) (see PARA 1878), Sch 2 para 18(1) applies in relation to members of the society as it applies in relation to other persons: Sch 2 para 18(2) (as so substituted). As to membership see PARA 1888 et seq.

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### **2040. Restrictions on certain transactions.**

Subject to the exceptions mentioned below, a building society must not (and must secure that each of its subsidiary undertakings<sup>1</sup> does not)<sup>2</sup>:

- 452 (1) act as a market maker<sup>3</sup> in securities<sup>4</sup>, commodities<sup>5</sup> or currencies<sup>6</sup>;
- 453 (2) trade in commodities or currencies<sup>7</sup>; and
- 454 (3) enter into any transaction involving derivative investments<sup>8</sup>.

However, a contravention of this rule does not invalidate any transaction or other act<sup>9</sup>.

No transaction entered into by a society, or a subsidiary undertaking of a society, will be taken into account for the purposes of head (1) above if it relates only to securities or currencies or both and the amount or value of the consideration given by the society or undertaking does not

exceed £100,000, or it is entered into in the society's or undertaking's capacity as the manager of a collective investment scheme<sup>10</sup>.

No transaction so entered into will be taken into account for the purposes of head (2) above if it relates only to currencies and the amount or value of the consideration given by the society or undertaking does not exceed £100,000, or it is ancillary or incidental to another transaction entered into by the society or undertaking<sup>11</sup>.

The above monetary limits<sup>12</sup> refer to the time when the transaction is entered into, and where the amount or value of the consideration there referred to is not in sterling, it will be converted at the rate of exchange prevailing at that time<sup>13</sup>. For these purposes<sup>14</sup>, two or more transactions which form part of a larger transaction or series of transactions will be treated as a single transaction<sup>15</sup>.

Nothing in head (3) above applies in relation to any transaction entered into by a society, or a subsidiary undertaking of a society, if<sup>16</sup>: (a) it is entered into in the society's or undertaking's capacity as the manager of the collective investment scheme<sup>17</sup>; (b) it is entered into for the purpose of limiting the extent to which the society, or a connected undertaking<sup>18</sup> of the society, will be affected by changes in any of the following factors, namely, interest rates, exchange rates, any index of retail prices, any index of residential property prices, any index of the prices of securities, and the ability or willingness of one or more persons to pay or repay a sum or sums owing at law or in equity to the society or a connected undertaking of the society<sup>19</sup>; or (c) it involves a contract for difference<sup>20</sup> and it is entered into for the purpose of limiting the extent to which any person will be affected by changes in any interest or exchange rate applicable to a loan owed by him to, shares held by him in, or a deposit<sup>21</sup> of his with, the society, or a connected undertaking of the society<sup>22</sup>.

Nothing in head (3) above applies in relation to any transaction entered into by a subsidiary undertaking of a society, if it is entered into in the undertaking's capacity<sup>23</sup>: (i) as a person who has permission under Part IV of the Financial Services and Markets Act 2000<sup>24</sup> to effect or carry out contracts of long-term insurance<sup>25</sup>; or (ii) as an EEA firm<sup>26</sup>, which has permission<sup>27</sup> (as a result of qualifying for authorisation<sup>28</sup>) to effect or carry out contracts of long-term insurance<sup>29</sup>.

A society must also do all that is reasonably practicable to secure that neither it nor any of its subsidiary undertakings, either alone or with any or any others of those undertakings<sup>30</sup>: (A) holds at any time more than five per cent of the issued share capital<sup>31</sup>; or (B) is at any time entitled to exercise, or to control the exercise of, more than five per cent of the voting power at any general meeting<sup>32</sup>, of an undertaking which is, at that time, doing any of the things which the society is prohibited from doing<sup>33</sup>, or an undertaking whose subsidiary undertaking is, at that time, doing any of those things<sup>34</sup>.

The Treasury<sup>35</sup> may by order vary the provisions described above<sup>36</sup> by adding to or deleting from them any provision or by varying any provision contained in them<sup>37</sup>.

1 As to the meaning of 'subsidiary undertaking' see PARA 1916 note 9.

2 Building Societies Act 1986 s 9A(1) (s 9A added by the Building Societies Act 1997 s 10) (which is expressed to be subject to the Building Societies Act 1986 s 9A(2)-(4): see the text and notes 10-11, 16-22).

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

3 'Market maker' means, subject to the Building Societies Act 1986 s 9A(10), a person who holds himself out as willing at all normal times to buy or sell at a price specified by him securities, commodities or currencies of a particular description: s 9A(9) (as added: see note 2). A society, or subsidiary undertaking of a society, is not by reason of holding itself out as willing to issue its own securities to be regarded as acting as a market maker in such securities for the purposes of s 9A: s 9A(10) (as so added). See notes 4-5.

4 'Securities' means shares, stock, debentures, debenture stock, loan stock, bonds, units of a collective investment scheme and other securities of any description: Building Societies Act 1986 s 9A(9) (as added: see



note 2). As to collective investment schemes see the Financial Services and Markets Act 2000 Pt XVII (ss 235-284); and PARAS 601 et seq, 672 et seq.

5 'Commodity' means any produce of agriculture, forestry or fisheries, or any mineral, either in its natural state or having undergone only such processes as are necessary or customary to prepare the produce or mineral for the market: Building Societies Act 1986 s 9A(9) (as added: see note 2).

6 Building Societies Act 1986 s 9A(1)(a) (as added: see note 2).

7 Building Societies Act 1986 s 9A(1)(b) (as added: see note 2).

8 Building Societies Act 1986 s 9A(1)(c) (as added: see note 2). 'Derivative investment' means an investment of the following kinds: (1) instruments giving entitlements to investments; (2) options; (3) futures; (4) contracts for differences: s 9A(9) (s 9A as so added; and definition substituted by SI 2001/3649). The definition of 'derivative investment' must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under s 22, and Sch 2 (see PARAS 84-85): Building Societies Act 1986 s 9A(9A) (s 9A as so added; and s 9A(9A) added by SI 2001/3649).

9 Building Societies Act 1986 s 9A(1) (as added: see note 2).

10 Building Societies Act 1986 s 9A(2) (as added: see note 2).

11 Building Societies Act 1986 s 9A(3) (as added: see note 2).

12 Ie referred to in the Building Societies Act 1986 s 9A(2) or s 9A(3): see the text to notes 10-11.

13 Building Societies Act 1986 s 9A(7) (as added: see note 2). Subject to s 9A(7), the value in sterling of: (1) any transaction effected by or with a society or connected undertaking in another currency; or (2) any assets or liabilities of a society or connected undertaking denominated in another currency, must be determined for any purpose of the Building Societies Act 1986 in accordance with directions given by the Financial Services Authority under s 119(4): s 119(4) (substituted by the Building Societies Act 1997 Sch 7 para 53(5); and amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

14 Ie for the purposes of the Building Societies Act 1986 s 9A(2) or s 9A(3): see the text to notes 10-11.

15 Building Societies Act 1986 s 9A(8) (as added: see note 2).

16 Building Societies Act 1986 s 9A(4) (as added: see note 2).

17 Building Societies Act 1986 s 9A(4)(a) (as added: see note 2).

18 As to the meaning of 'connected undertaking' see PARA 1991 note 16.

19 Building Societies Act 1986 s 9A(4)(b) (as added (see note 2); and amended by SI 2001/1826).

20 Ie a derivative instrument falling within note 8 head (4).

21 As to the meaning of 'deposit' see PARA 1866 note 7.

22 Building Societies Act 1986 s 9A(4)(c) (as added: see note 2).

23 Building Societies Act 1986 s 9A(5) (as added: see note 2).

24 Ie permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.

25 Building Societies Act 1986 s 9A(5)(a) (as added (see note 2); and s 9A(5)(a), (b) substituted by SI 2001/3649).

26 Ie of the kind mentioned in the Financial Services and Markets Act 2000 Sch 3 para 5(d): see PARA 315 note 1.

27 Ie under the Financial Services and Markets Act 2000 Sch 3 para 15: see PARA 315.

28 Ie under the Financial Services and Markets Act 2000 Sch 3 para 12: see PARA 315.

29 Building Societies Act 1986 s 9A(5)(b) (as added (see note 2); and substituted (see note 25)).

- 30 Building Societies Act 1986 s 9A(6) (as added: see note 2).
- 31 Building Societies Act 1986 s 9A(6)(a) (as added: see note 2).
- 32 Building Societies Act 1986 s 9A(6)(b) (as added: see note 2). As to general meetings see PARA 1976 et seq.
- 33 Ie by the Building Societies Act 1986 s 9A(1): see the text to notes 1-9.
- 34 Building Societies Act 1986 s 9A(6) (as added: see note 2).
- 35 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 36 Ie the Building Societies Act 1986 s 9A(1)-(10): see the text and notes 1-34.
- 37 Building Societies Act 1986 s 9A(11) (as added: see note 2). The Treasury may by order: (1) substitute for the amount specified in s 9A(2) (see the text to note 10) or s 9A(3) (see the text to note 11), or for the percentage specified in s 9A(6) (see the text and notes 30-34), such other amount or percentage as it thinks appropriate; or (2) vary s 9A(4)(b) (see the text to notes 18-19) by adding to or deleting from it any reference to a factor or by varying any reference to a factor contained in it: s 9A(12) (as so added; and amended by SI 2001/2617). An order under the Building Societies Act 1986 s 9A(11) or s 9A(12) may make different provision for different cases or purposes, and such supplementary, transitional and saving provision as appears to the Treasury to be necessary or expedient, and the power to make such an order is exercisable by statutory instrument: s 9A(13) (as so added; and amended by SI 2001/2617). No order may be made under the Building Societies Act 1986 s 9A(11) unless a draft of the order has been laid before and approved by a resolution of each House of Parliament: s 9A(14) (as so added). A statutory instrument containing an order under s 9A(12) is subject to annulment in pursuance of a resolution of either House of Parliament: s 9A(15) (as so added). As to an order made under the Building Societies Act 1986 s 9A(12) see the Building Societies (Restricted Transactions) Order 2001, SI 2001/1826.

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## **2041. Acquisition or establishment of a business.**

A building society must pass an ordinary resolution<sup>1</sup> in order to<sup>2</sup> acquire or allow a subsidiary undertaking<sup>3</sup> to acquire a business if<sup>4</sup>: (1) in the opinion of the board of directors of the society<sup>5</sup> the greater part of the income of the business is or will be derived from activities having no connection with loans secured on residential property<sup>6</sup>, or the greater part of the resources of the business are or will be devoted to such activities, or the greater part of the business consists or will consist of such activities<sup>7</sup>; (2) X is not less than 15 per cent of Y, where X is the amount or value of the consideration to be given for the shares, voting rights or assets proposed to be acquired, and Y is the amount of the society's own funds<sup>8</sup> as at the relevant date<sup>9</sup>.

A building society must also pass an ordinary resolution in order to establish or allow such an undertaking to establish a business if<sup>10</sup>: (a) in the opinion of the board of directors of the society the greater part of the income of the business is or will be derived from activities having no connection with loans secured on residential property, or the greater part of the resources of the business are or will be devoted to such activities, or the greater part of the business consists or will consist of such activities<sup>11</sup>; (b) X is not less than 15 per cent of Y, where X is the aggregate of the following as estimated by the society<sup>12</sup>: (i) the cost of acquiring, developing, adapting or repairing any premises required for the purposes of the business<sup>13</sup>; (ii) the initial<sup>14</sup> cost of acquiring any plant or equipment, or any intellectual property<sup>15</sup>, so required<sup>16</sup>; (iii) the initial cost of employing or training staff so required<sup>17</sup>; (iv) the cost of obtaining any professional advice required in connection with the establishment of the business<sup>18</sup>; (v) any other non-

recurring items of expenditure to be incurred in that connection<sup>19</sup>; and (vi) in the case of a business proposed to be established by a subsidiary undertaking, the amount of any capital to be provided by the society which will not be used for defraying items of expenditure falling within heads (i) to (v) above<sup>20</sup>, and Y is the amount of the society's own funds as at the relevant date<sup>21</sup>.

A failure to comply with the requirements described above does not invalidate any transaction or other act<sup>22</sup>.

In order to be effective for the purposes described above, an ordinary resolution of a society must be passed by a majority of the members of the society entitled to vote<sup>23</sup> on such a resolution and voting either<sup>24</sup> in person or by proxy on a poll<sup>25</sup> on the resolution at a meeting of the society<sup>26</sup>, or in a postal or electronic ballot on the resolution<sup>27</sup>.

The provisions described above do not apply in relation to a society in so far as it undertakes<sup>28</sup> to fulfil engagements transferred to it of another society<sup>29</sup>.

1 As to the meaning of 'ordinary resolution' see PARA 1983.

2 Building Societies Act 1986 s 92A(1) (s 92A added by the Building Societies Act 1997 s 29).

3 As to the meaning of 'subsidiary undertaking' see PARA 1916 note 9.

4 Building Societies Act 1986 s 92A(1)(a) (as added: see note 2). For the purposes of s 92A(1)(a) and s 92A(4) (see the text to notes 8-9), two or more proposed acquisitions by a society or subsidiary undertaking which will form part of a larger acquisition or series of acquisitions are treated as a single acquisition: s 92A(7) (as so added).

5 As to the office of director see PARAS 1944-1963.

6 As to the meaning of 'residential property' see PARA 1856 note 2.

7 Building Societies Act 1986 s 92A(3) (as added: see note 2).

8 As to the meaning of 'own funds' see PARA 1916 note 15.

9 Building Societies Act 1986 s 92A(4) (as added: see note 2). 'Relevant date' in relation to a building society means: (1) the date of the end of its last financial year or, failing that, the date of its establishment; or (2) where it has been involved in a transfer of engagements, the date of that transfer, whichever is the later: s 92A(9) (as so added). The Treasury may by order vary s 92A(9): see note 12. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the meaning of 'financial year' see PARA 1992 note 2. As to the transfer of engagements see PARA 1918 et seq.

10 Building Societies Act 1986 s 92A(1)(b) (as added: see note 2).

11 Building Societies Act 1986 s 92A(3) (as added: see note 2).

12 Building Societies Act 1986 s 92A(5) (as added: see note 2). The Treasury may by order substitute for the percentage specified in s 92A(4) (see the text to notes 8-9) or s 92A(5) such other percentage as appears to it to be appropriate, and such order may make such supplementary, transitional and saving provision as appears to the Treasury to be necessary or expedient: s 92A(10) (as so added; and amended by SI 2001/2617). The Treasury may by order vary the Building Societies Act 1986 s 92A(5) and s 92A(9) (see notes 9, 14-15) by adding to or deleting from them any provision or by varying any provision contained in them, and such order may make different provisions for different cases or purposes, and such supplementary, transitional and saving provision as appears to the Treasury to be necessary or expedient: s 92A(11) (as so added; and amended by SI 2001/2617). The power to make an order under the Building Societies Act 1986 s 92A(10) or s 92A(11) is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 92A(12) (as so added). At the date at which this volume states the law no such order had been made.

13 Building Societies Act 1986 s 92A(5)(a) (as added: see note 2).

14 'Initial', in relation to any cost, means incurred, or likely in the directors' opinion to be incurred, not later than 12 months after the establishment of the business: Building Societies Act 1986 s 92A(9) (as added: see note 2). The Treasury may by order vary s 92A(9): see note 12.

15 'Intellectual property' includes: (1) any patent, know-how, trade mark, service mark, registered design, copyright or design right; and (2) any licence under or in respect of any such right: Building Societies Act 1986 s 92A(9) (as added: see note 2). The Treasury may by order vary s 92A(9): see note 12. As to intellectual property see generally **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS; PATENTS AND REGISTERED DESIGNS; TRADE MARKS AND TRADE NAMES**.

16 Building Societies Act 1986 s 92A(5)(b) (as added: see note 2).

17 Building Societies Act 1986 s 92A(5)(c) (as added: see note 2).

18 Building Societies Act 1986 s 92A(5)(d) (as added: see note 2).

19 Building Societies Act 1986 s 92A(5)(e) (as added: see note 2).

20 Building Societies Act 1986 s 92A(5)(f) (as added: see note 2).

21 Building Societies Act 1986 s 92A(5) (as added: see note 2).

22 Building Societies Act 1986 s 92A(1) (as added: see note 2). Where a business is proposed to be acquired or established by a syndicate whose members include a society or subsidiary undertaking: (1) s 92A(1) has effect as if the business were proposed to be acquired or, as the case may be, established by the society; and (2) whichever of s 92A(4) (see the text to notes 8-9) and s 92A(5) (see the text to notes 12-21) is applicable has effect as if X were only so much of X as is referable to participation in the syndicate by the society or undertaking: s 92A(6) (as so added).

23 As to membership see PARA 1888 et seq. As to the right to vote see PARA 1984.

24 Building Societies Act 1986 s 92A(2) (as added: see note 2).

25 As to the appointment of proxies see PARA 1986; and as to the right to demand a poll see PARA 1987.

26 Building Societies Act 1986 s 92A(2)(a) (as added: see note 2). In a case falling within s 92A(2)(a), a form for the appointment of a proxy must be sent to each person entitled to notice of the meeting: s 92A(2) (as so added). As to the meaning of 'notice' see PARA 1866 note 8. As to persons entitled to receive notice of meetings see PARA 1985. As to meetings and resolutions generally see PARA 1974 et seq.

27 Building Societies Act 1986 s 92A(2)(b) (as added (see note 2); and amended by SI 2003/404). As to postal and electronic ballots see PARA 1988.

28 In accordance with the Building Societies Act 1986 s 94 and Sch 16: see PARAS 1920-1923, 1926.

29 See the Building Societies Act 1986 s 92A(8) (as added: see note 2).

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## **2042. Restriction on the creation of floating charges.**

A building society must not create a floating charge<sup>1</sup> on the whole or part of its undertaking or property<sup>2</sup>. A floating charge created in contravention of this prohibition is void<sup>3</sup>.

1 As to floating charges see **COMPANIES** vol 15 (2009) PARA 1269 et seq.

2 Building Societies Act 1986 s 9B(1) (s 9B added by the Building Societies Act 1997 s 11).

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

3 Building Societies Act 1986 s 9B(2) (as added: see note 2).

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### **2043. Liabilities of associated bodies.**

If a body corporate is linked by resolution<sup>1</sup> with a building society or is a subsidiary of the society, then the society is under an obligation to discharge certain liabilities<sup>2</sup> of that associated body<sup>3</sup> in so far as that body is unable to discharge them out of its own assets<sup>4</sup>. This obligation does not extend to liabilities of the body to its members other than the building society with which it is associated<sup>5</sup>.

1 For these purposes, a body corporate is 'linked by resolution' to a building society if the board of directors of the society has passed a resolution making the power to support the body exercisable in relation to that body and the resolution is in force: Building Societies Act 1986 s 18(9); definition applied by s 22(3) (repealed subject to savings: see note 2).

2 Although the Building Societies Act 1986 s 22 has been repealed by the Deregulation (Building Societies) Order 1995, SI 1995/3233, art 5(1), it continues to have effect in relation to any liability which: (1) is incurred before 11 June 1996 (ie the day the Deregulation (Building Societies) Order 1995 SI 1995/3233, art 5 came into force: see art 1); or (2) arises out of an obligation entered into before that date; or (3) in the case of a liability in tort or delict, is referable to an act or omission occurring before that date: art 5(2). See also the Building Societies Act 1997 ss 12(1), 46(2), Sch 9.

3 For these purposes, 'associated body', in relation to a building society, means a body as respects which any of the following conditions is satisfied: (1) the body is one in which the society holds shares or corresponding membership rights; or (2) the body is one to which the society is linked by resolution; or (3) the body is one in which shares or corresponding membership rights are held by a body within head (1) or head (2) above (the body not being one whose objects enable it to carry on activities outside the powers of the society and the investment or support being made or given with the consent of the Financial Services Authority and subject to any conditions specified in the consent): Building Societies Act 1986 s 18(8)(b), (17); definition applied by s 22(3) (repealed subject to savings: see note 2). However note that s 22(1) (repealed subject to savings) only applies to a body corporate linked by resolution or a subsidiary, not to all associated bodies. As to the Financial Services Authority see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

4 Building Societies Act 1986 s 22(1) (repealed subject to savings: see note 2).

5 Building Societies Act 1986 s 22(2) (repealed subject to savings: see note 2). See further the Building Societies (Transfer of Business) Regulations 1998, SI 1998/212, reg 8; and PARA 1938 note 5.

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### **2044. Tying-in arrangements.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. A person (the 'lender') may not provide a residential property loan<sup>2</sup> together with one or more controlled services<sup>3</sup> to another person (the 'borrower') unless certain conditions are complied with before a relevant step<sup>4</sup> is taken with respect to any of those services or the loan<sup>5</sup>. The conditions are that the lender:

- 455 (1) informs the borrower by notice<sup>6</sup> that the residential property loan and each of the controlled services in question are separate services<sup>7</sup>;
- 456 (2) informs the borrower by notice whether the terms and conditions of the residential property loan will be capable of being varied by the lender after it is made<sup>8</sup>;
- 457 (3) provides the borrower with a statement of<sup>9</sup>: (a) the price<sup>10</sup> which will be payable by the borrower for each of the controlled services if they are all provided in accordance with the terms proposed by the lender<sup>11</sup>; and (b) the extent to which, if at all, the terms and conditions of the residential property loan would differ if it were to be provided by the lender without the controlled services in question being provided by the lender<sup>12</sup>; and
- 458 (4) informs the borrower by notice that, if the borrower declines to take from the lender any of the controlled services in question, the lender will not on that account refuse to provide the residential property loan<sup>13</sup>.

These conditions do not apply to the provision of a controlled service if the lender proves that the provision of that service was not connected with the transaction in respect of which the borrower required the residential property loan in question, or, where it was so connected, that he did not know, and had no reasonable cause to know, that it was<sup>14</sup>.

A person who (i) in the course of his business provides, or makes arrangements for the provision of, controlled services together with residential property loans<sup>15</sup>; and (ii) advertises or in any other manner promotes the provision of any controlled service or any residential property loan, or the making by him of any such arrangements<sup>16</sup>, must comply with such requirements as to the information to be given, or which may not be given, in any such advertisement or promotion, as regulations made by the Secretary of State may impose<sup>17</sup>.

For these purposes: (A) where a lender is a member of a group of companies<sup>18</sup>, the lender and all the other members of the group are treated as one<sup>19</sup>; and (B) where the lender derives any financial benefit from the provision of a controlled service by any other person, the lender is treated as providing that service<sup>20</sup>.

1 The Courts and Legal Services Act 1990 ss 104-107 (see also para 2045) are to be brought into force by order made by the Lord Chancellor or by the Secretary of State or by both acting jointly under s 124(3) as from a day to be appointed under s 124(3). At the date at which this volume states the law no such day had been appointed. As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq. As to the Secretary of State see PARA 3.

2 'Residential property loan' means any loan which is secured on land in the United Kingdom and is made to an individual in respect of the acquisition of land which is for his residential use or the residential use of a dependant of his: Courts and Legal Services Act 1990 s 104(1). As to the meaning of 'United Kingdom' see PARA 2 note 3. The Secretary of State may by order specify the circumstances in which land is to be treated as being for a person's residential use and who are to be treated as a person's dependants: s 105(3). At the date at which this volume states the law no such order had been made.

Before making any order or regulations under s 104 or under s 105 the Secretary of State must consult the Office of Fair Trading and such other persons as he considers appropriate: s 105(10) (amended by the Enterprise Act 2002 Sch 25 para 23(1), (7)). As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq. See note 1.

3 'Controlled services' means any services of a description prescribed by order made by the Secretary of State: Courts and Legal Services Act 1990 s 105(1). The order may prescribe any description of: (1) banking, insurance, investment, trusteeship, executorship or other financial services; (2) services relating to the acquisition, valuation, surveying or disposal of property; (3) conveyancing services; or (4) removal services: s 105(2). See notes 1, 2. At the date at which this volume states the law no such order had been made. 'Conveyancing services' means the preparation of transfers, conveyances, contracts and other documents in connection with, and other services ancillary to, the disposition or acquisition of estates or interests in land: s 119(1).

4 'Relevant step', in relation to any controlled service or residential property loan, means such step as may be prescribed by order made by the Secretary of State in relation to that service or loan (taken by such person as may be so prescribed): Courts and Legal Services Act 1990 s 105(8). See notes 1, 2. At the date at which this volume states the law no such order had been made.

5 Courts and Legal Services Act 1990 s 104(2). Section 104(2) does not apply in relation to the provision of a controlled service if the lender proves: (1) that the provision of that service was not connected with the transaction in respect of which the borrower required the residential property loan in question; or (2) where it was so connected, that the lender did not know, and had no reasonable cause to know, that it was: s 105(4). See note 1.

6 'Notice' means a notice in writing given in the form prescribed by regulations made by the Secretary of State: Courts and Legal Services Act 1990 s 105(8). See notes 1, 2. At the date at which this volume states the law no such regulations had been made.

7 Courts and Legal Services Act 1990 s 104(3)(a). See note 1.

8 Courts and Legal Services Act 1990 s 104(3)(b). See note 1.

9 Courts and Legal Services Act 1990 s 104(3)(c). 'Statement' means a statement in writing given in the form prescribed by regulations made by the Secretary of State: s 105(8). See notes 1, 2. At the date at which this volume states the law no such regulations had been made.

10 'Price' has the meaning given by order made by the Secretary of State: Courts and Legal Services Act 1990 s 105(8). See notes 1, 2. At the date at which this volume states the law no such order had been made.

11 Courts and Legal Services Act 1990 s 104(3)(c)(i). See note 1.

12 Courts and Legal Services Act 1990 s 104(3)(c)(ii). See note 1.

13 Courts and Legal Services Act 1990 s 104(3)(d). See note 1.

14 Courts and Legal Services Act 1990 s 105(4). See note 1.

15 Courts and Legal Services Act 1990 s 104(4)(a). See note 1.

16 Courts and Legal Services Act 1990 s 104(4)(b). See note 1.

17 Courts and Legal Services Act 1990 s 104(4). See notes 1, 2. At the date at which this volume states the law no such regulations had been made.

18 'Group of companies' means a holding company and its subsidiaries within the meaning of the Companies Act 1985 s 736 (prospectively repealed) (see **COMPANIES** vol 14 (2009) PARA 25) (as to the replacement provision see the Companies Act 2006 s 1159): Courts and Legal Services Act 1990 s 105(6). See note 1.

19 Courts and Legal Services Act 1990 s 105(5)(a). The Secretary of State may by order provide that, in such cases or for such purposes as may be prescribed by the order, s 105(5)(a) or s 105(5)(b) (see the text to note 20) is not to have effect: s 105(7). See notes 1, 2. At the date at which this volume states the law no such order had been made.

20 Courts and Legal Services Act 1990 s 105(5)(b). See notes 1, 19.

## **UPDATE**

### **2044 Tying-in arrangements**

NOTE 18--In definition of 'group of companies' reference to Companies Act 1985 s 736 now to Companies Act 2006 s 1159: Courts and Legal Services Act 1990 s 105(6) (amended by SI 2009/1941).

5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(1) BUILDING SOCIETIES/(iv) Powers of Building Societies/2045. Offences and enforcement.

## **2045. Offences and enforcement.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. Contravention of the tying-in provisions<sup>2</sup> is an offence<sup>3</sup>. The lender also commits an offence if he refuses to provide the borrower with the residential property loan<sup>4</sup> or refuses to provide it to him on the terms applicable if it were provided together with the controlled services<sup>5</sup>, or where they differ, on terms which are compatible with the statement required by the tying-in provisions<sup>6</sup>, unless he proves that his reason for so refusing was unconnected with the borrower's having declined to take from the lender one or more of the controlled services<sup>7</sup>. This applies where the lender has, in relation to the proposed residential property loan together with one or more controlled services, complied with the statutory conditions<sup>8</sup>, and the borrower has declined to take from the lender one or more of the controlled services<sup>9</sup>. Any person guilty of such an offence is liable on summary conviction or on conviction on indictment to a fine<sup>10</sup>. If the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, secretary or other similar officer of a body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly<sup>11</sup>. The fact that a person has committed an offence under this provision in connection with any agreement does not make the agreement void or unenforceable, in whole or in part, or otherwise affect its validity or give rise to any cause of action for breach of statutory duty<sup>12</sup>.

Every local weights and measures authority (an 'authority'), and the Office of Fair Trading, has the duty of enforcing the tying-in provisions<sup>13</sup> and any regulations made under them<sup>14</sup>. Where an authority proposes to institute proceedings it must give the Office of Fair Trading notice of the intended proceedings and a summary of the relevant facts<sup>15</sup>. The authority must not institute proceedings until the end of the period of 28 days beginning with the date on which it gave the required notice and summary, or, if earlier, the date on which the Office of Fair Trading notifies it of receipt of the notice and summary<sup>16</sup>. Every authority must, whenever the Office of Fair Trading requires, report to it in such form and with such particulars as it requires on the exercise of its functions under this provision<sup>17</sup>. A duly authorised officer of the Office of Fair Trading or of an authority (an 'authorised officer') who has reasonable cause to suspect that an offence may have been committed<sup>18</sup> may, at any reasonable time<sup>19</sup>:

- 459 (1) enter any premises which are not used solely as a dwelling<sup>20</sup>;
- 460 (2) require any officer, agent or other competent person on the premises who is, or may be, in possession of information relevant to an investigation in connection with the provision made<sup>21</sup> to provide such information<sup>22</sup>;
- 461 (3) require the production<sup>23</sup> of any document<sup>24</sup> which may be relevant to such an investigation<sup>25</sup>;
- 462 (4) take copies, or extracts, of any such documents<sup>26</sup>;
- 463 (5) seize and retain any document which he has reason to believe may be required as evidence in proceedings for an offence<sup>27</sup>.

Any authorised officer exercising any such power must, if asked to do so, produce evidence that he is such an officer<sup>28</sup>. A justice of the peace may issue a warrant if satisfied, on information on oath given by an authorised officer, that there is reasonable cause to believe that an offence may have been committed and that<sup>29</sup>: (a) entry to the premises concerned, or production of any documents which may be relevant to an investigation in connection with the tying-in provisions<sup>30</sup>, has been or is likely to be refused to the authorised officer<sup>31</sup>; or (b) there is reasonable cause to believe that, if production of any such document were to be required by



the authorised officer without such a warrant having been issued, the document would not be produced but would be removed from the premises or hidden, tampered with or destroyed<sup>32</sup>.

A person commits an offence if he:

- 464 (i) intentionally obstructs an authorised officer in the exercise of any power under this provision<sup>33</sup>;
- 465 (ii) intentionally fails to comply with any requirement properly imposed on him by an authorised officer in the exercise of any such power<sup>34</sup>;
- 466 (iii) fails, without reasonable excuse, to give to an authorised officer any assistance or information which he may reasonably require of him for the purpose of exercising any such power<sup>35</sup>; or
- 467 (iv) in giving to an authorised officer any information which he has been required to give to an authorised officer exercising any such power, makes any statement which he knows to be false or misleading in a material particular<sup>36</sup>.

A person guilty of such an offence is liable on summary conviction to a fine<sup>37</sup>. However, a person is not required to answer any question put to him by an authorised officer, or to give any information to an authorised officer, if to do so might incriminate him<sup>38</sup>.

1 The Courts and Legal Services Act 1990 ss 104-107 (see also para 2044) are to be brought into force by order made by the Lord Chancellor or by the Secretary of State or by both acting jointly under s 124(3) as from a day to be appointed under s 124(3). At the date at which this volume states the law no such day had been appointed. As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq. As to the Secretary of State see PARA 3.

2 The relevant provisions are contained in the Courts and Legal Services Act 1990 s 104(2), (4): see PARA 2044.

3 Courts and Legal Services Act 1990 s 106(1). See note 1.

4 As to the meaning of 'residential property loan' see PARA 2044 note 2.

5 As to the meaning of 'controlled services' see PARA 2044 note 3.

6 Ie under the Courts and Legal Services Act 1990 s 104(3)(c)(ii): see PARA 2044.

7 Courts and Legal Services Act 1990 s 106(3). See note 1.

8 Ie the conditions mentioned in the Courts and Legal Services Act 1990 s 104(3): see PARA 2044.

9 Courts and Legal Services Act 1990 s 106(2). See note 1.

10 Courts and Legal Services Act 1990 s 106(4). On summary conviction, the fine must not exceed the statutory maximum: see s 106(4). As to the statutory maximum see PARA 56 note 24. See note 1.

11 Courts and Legal Services Act 1990 s 106(5), (6). See note 1.

12 Courts and Legal Services Act 1990 s 106(7). See note 1.

13 Ie the Courts and Legal Services Act 1990 ss 104-106: see PARA 2044.

14 Courts and Legal Services Act 1990 s 107(1) (s 107(1), (3)-(6) amended by the Enterprise Act 2002 Sch 25 para 23(1), (8)). At the date at which this volume states the law no such regulations had been made. The Courts and Legal Services Act 1990 s 107(1) does not authorise a local weights and measures authority in Scotland to institute such proceedings: s 107(2). Generally Scottish matters are beyond the scope of this work. As to the Office of Fair Trading see **COMPETITION** vol 18 (2009) PARA 6 et seq. As to local weights and measures authorities see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 20 et seq. See note 1.

15 Courts and Legal Services Act 1990 s 107(3) (as amended: see note 14). See note 1.

16 Courts and Legal Services Act 1990 s 107(4) (as amended: see note 14). See note 1.

- 17 Courts and Legal Services Act 1990 s 107(5) (as amended: see note 14). See note 1.
- 18 Ie under the Courts and Legal Services Act 1990 s 106: see the text to notes 1-12.
- 19 Courts and Legal Services Act 1990 s 107(6) (as amended: see note 14). See note 1.
- 20 Courts and Legal Services Act 1990 s 107(6)(a). See note 1.
- 21 Ie by the Courts and Legal Services Act 1990 s 104 or s 105: see PARA 2044.
- 22 Courts and Legal Services Act 1990 s 107(6)(b). See note 1.
- 23 In relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form: Courts and Legal Services Act 1990 s 107(16). See note 1.
- 24 'Document' includes information recorded in any form: Courts and Legal Services Act 1990 s 107(15). See note 1.
- 25 Courts and Legal Services Act 1990 s 107(6)(c). See note 1.
- 26 Courts and Legal Services Act 1990 s 107(6)(d). See note 1.
- 27 Courts and Legal Services Act 1990 s 107(6)(e). See note 1.
- 28 Courts and Legal Services Act 1990 s 107(7). See note 1.
- 29 Courts and Legal Services Act 1990 s 107(8). In relation to Scotland, 'justice of the peace' includes a sheriff, and 'information on oath' is to be read as 'evidence on oath': s 107(9). Generally Scottish matters are beyond the scope of this work.  
Such a warrant must authorise the authorised officer (accompanied, where he considers it appropriate, by a constable or any other person) to enter the premises specified in the information, using such force as is reasonably necessary, and to exercise any of the authorised officer's powers (see the text to notes 18-27): s 107(10). See notes 1, 14.
- 30 Ie the provision made by the Courts and Legal Services Act 1990 s 104 or s 105: see PARA 2044.
- 31 Courts and Legal Services Act 1990 s 107(8)(a). See note 1.
- 32 Courts and Legal Services Act 1990 s 107(8)(b). See note 1.
- 33 Courts and Legal Services Act 1990 s 107(11)(a). See note 1.
- 34 Courts and Legal Services Act 1990 s 107(11)(b). See note 1.
- 35 Courts and Legal Services Act 1990 s 107(11)(c). See note 1.
- 36 Courts and Legal Services Act 1990 s 107(11)(d). See note 1.
- 37 Courts and Legal Services Act 1990 s 107(12), (13). In the case of an offence under head (i), head (ii) or head (iii) in the text the fine must not exceed level 3 on the standard scale (s 107(12)), and in the case of an offence under head (iv) in the text the fine must not exceed level 4 on the standard scale (s 107(13)). As to the standard scale see PARA 27 note 21. See note 1.
- 38 Courts and Legal Services Act 1990 s 107(14). See note 1.

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## **(v) The Financial Services Authority's Powers of Control**

### **A. AUTHORISATION**

#### **2046. Initial authorisation by the Financial Services Authority.**

No person<sup>1</sup> may carry on a regulated activity in the United Kingdom<sup>2</sup>, or purport to do so, unless he is an authorised person<sup>3</sup>, or an exempt person<sup>4</sup>. This prohibition is referred to as the 'general prohibition'<sup>5</sup>. An activity is a regulated activity for these purposes if it is an activity of a specified kind<sup>6</sup> which is carried on by way of business and relates to an investment<sup>7</sup> of a specified kind or, in the case of an activity of a kind which is also specified for this purpose, is carried on in relation to property of any kind<sup>8</sup>. As accepting deposits and entering into regulated mortgage contracts as lender constitute regulated activities, building societies are required to be authorised by obtaining a Part IV permission under the Financial Services and Markets Act 2000 to carry on these activities<sup>9</sup>.

A building society which, immediately before 1 December 2001<sup>10</sup>, was authorised or treated as authorised for the purposes of the Building Societies Act 1986 is treated as having been given, on 1 December 2001, a Part IV permission to carry on any regulated activities which, immediately before 1 December 2001, it was by reason of that authorisation able to carry on in the United Kingdom without contravening the Building Societies Act 1986<sup>11</sup>.

1 As to the meaning of 'person' see PARA 2035 note 5.

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 As to the meaning of 'authorised person' see PARA 314 note 8. The following persons are authorised for these purposes: (1) a person who has a Part IV permission to carry on one or more regulated activities; (2) an EEA firm qualifying for authorisation under the Financial Services and Markets Act 2000 Sch 3; (3) a Treaty firm qualifying for authorisation under Sch 4; (4) a person who is otherwise authorised by a provision of, or made under, the Financial Services and Markets Act 2000: see s 31(1); and PARA 226. A Part IV permission under the Financial Services and Markets Act 2000 is a permission given by the Financial Services Authority under Pt IV (ss 40-55) (see PARA 348 et seq) or having effect as if so given: see s 40(4); and PARA 348. As to the meaning of 'EEA firm' see PARA 315 note 1. As to the meaning of 'Treaty firm' see PARA 319 note 1. As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

4 See the Financial Services and Markets Act 2000 s 19(1); and PARA 80. As to the meaning of 'exempt person' see PARA 80 note 4.

5 See the Financial Services and Markets Act 2000 s 19(2); and PARA 80.

6 As to the meaning of 'specified' see PARA 84 note 1. As to the specified activities and investments for the purposes of the Financial Services and Markets Act 2000 see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544; and PARA 88 et seq.

7 As to the meaning of 'investment' see PARA 84 note 2. See also note 6.

8 See the Financial Services and Markets Act 2000 s 22(1); and PARA 84. As to the regulated activities see s 22(2), (3), Sch 2; and PARAS 84-85.

9 See the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Pt II Ch II (arts 5-9AA) (see PARA 89 et seq), Pt II Ch XV (arts 61-63A) (see PARA 203 et seq). As defined in art 61(3)(a), a 'regulated mortgage contract' includes most contracts for the provision of credit to an individual on the security of a first mortgage of residential property in the United Kingdom: see PARA 203 note 1. See also Pt II Ch XVA (arts 63B-63E) (regulated home reversion plans) (see PARA 209 et seq) and Pt II Ch XVB (arts 63F-63I) (regulated home purchase plans) (see PARA 215 et seq). Accepting deposits is a regulated activity from 1 December 2001, and entering into a regulated mortgage contract as lender or administering a regulated mortgage contract are both regulated activities from 31 October 2004 (ie a day specified by the Treasury): see art 2(1), (2)(b) (amended by SI 2002/1777); and the Financial Services and Markets Act 2000 (Commencement No 7) Order 2001, SI 2001/3538, art 2(1). Any day so specified must be notified at least one week in advance by publication

in the London, Edinburgh and Belfast Gazettes: see the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 2(3) (added by SI 2002/1777): see the London Gazette, 14 July 2003.

10 In the commencement of the Financial Services and Markets Act 2000 s 19: see the Financial Services and Markets Act 2000 (Transitional Provisions) (Authorised Persons etc) Order 2001, SI 2001/2636, art 2(1)(b); and the Financial Services and Markets Act 2000 (Commencement No 7) Order 2001, SI 2001/3538, art 2(1).

11 See the Financial Services and Markets Act 2000 (Transitional Provisions) (Authorised Persons etc) Order 2001, SI 2001/2636, art 22 (amended by SI 2001/3650). The text refers to contravention of the Building Societies Act 1986 s 9(1) (now repealed), which provided for the initial authorisation of societies by the Building Societies Commission under the Building Societies Act 1986. Transitional provisions provide that where immediately before 1 December 2001 a society was subject to a condition on its authorisation or subject to a direction then the condition or direction has effect after 1 December 2001 as if it were a requirement imposed on the society under the Financial Services and Markets Act 2000 s 43: see the Financial Services and Markets Act 2000 (Transitional Provisions) (Authorised Persons etc) Order 2001, SI 2001/2636, art 50.

## UPDATE

### 2046 Initial authorisation by the Financial Services Authority

NOTE 9--See also SI 2001/544 Pt II Ch XVC (arts 63J-63M) (regulated sale and rent back agreements) (PARA 220A).

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### 2047. Power to direct restructuring of business.

Where a building society has failed to comply with the relevant statutory requirements<sup>1</sup>, certain powers become exercisable by the Financial Services Authority<sup>2</sup> in relation to the society<sup>3</sup>. The Authority may give the society a direction<sup>4</sup>:

- 468 (1) requiring the society, within a specified period, to submit for its approval a restructuring plan designed to secure that<sup>5</sup>: (a) the society will, by the end of a specified period, comply with the relevant statutory requirements as applied at the last day of that period<sup>6</sup>; and (b) it will not thereafter fail to comply with those requirements<sup>7</sup>;
- 469 (2) requiring the society, within a specified period, to submit to its members<sup>8</sup> for their approval at a meeting the requisite transfer resolutions<sup>9</sup> for a transfer of the business of the society to a company<sup>10</sup>, and to notify<sup>11</sup> the Authority of the result of the meeting<sup>12</sup>; or
- 470 (3) requiring the society, at its option, within a specified period to submit for approval a restructuring plan or to submit to its members for their approval at a meeting the requisite transfer resolutions for a transfer of the business of the society to a company<sup>13</sup>, and to notify the Authority, within a specified period, of the option it has decided to pursue<sup>14</sup>.

Where the Authority gives a direction under head (1), head (2) or head (3) above, it may also give a direction<sup>15</sup>:

- 471 (i) imposing limitations on the issue of shares<sup>16</sup>, the acceptance of deposits<sup>17</sup> or the making of loans<sup>18</sup>;
- 472 (ii) requiring the society within a specified period to take certain steps, or to refrain from adopting or pursuing a particular course of action, or to restrict the scope of its business in a particular way<sup>19</sup>;
- 473 (iii) requiring the society within a specified period to take steps with regard to the conduct of the business of any connected undertaking<sup>20</sup> of the society<sup>21</sup>;
- 474 (iv) requiring within a specified period the removal of any director or other officer<sup>22</sup>.

Where a restructuring plan is submitted by a society to the Authority under head (1) or head (3) above then if it appears to the Authority that the plan is reasonably likely to secure its purposes, the Authority must approve it and direct the society to carry it out, or if it appears to the Authority that the plan is, with modifications, likely to secure its purposes and the Authority and the society agree on appropriate modifications within the period of 21 days from the date on which the Authority notifies the society of the modifications it proposes for the society's agreement, the Authority must approve the plan as modified and direct the society to carry it out, but otherwise the Authority must reject the plan<sup>23</sup>.

Where a meeting is held in pursuance of a direction under head (2) or head (3) above for the purpose of voting on the requisite transfer resolutions, then if the resolutions are agreed to and the confirmation<sup>24</sup> of the transfer by the Authority is obtained, the society must proceed<sup>25</sup> to transfer its business to a successor company, or if either resolution is disagreed to, the society must notify the Authority of that fact as soon as it is practicable to do so<sup>26</sup>.

The Authority may, if it thinks fit, extend or further extend any period during which a society is to take any steps required of it<sup>27</sup> and may do so whether or not application is made to it before the expiry of the period in question<sup>28</sup>.

If a society which has been directed<sup>29</sup> to carry out a restructuring plan fails, within the period allowed to it, to secure the purpose of the plan specified in head (a) above, the powers conferred on the Authority to make prohibition orders<sup>30</sup> become exercisable in relation to the society<sup>31</sup>.

If a society fails, within the period allowed to it:

- 475 (A) where it has been so directed, to submit a restructuring plan<sup>32</sup>;
- 476 (B) where it has been so directed, to submit to members the requisite transfer resolutions<sup>33</sup>;
- 477 (C) where it has been so directed, to either submit a restructuring plan or submit to members the requisite transfer resolutions<sup>34</sup>;
- 478 (D) where it has been given a direction under heads (i) to (iv) above, to comply with any requirement imposed by the direction<sup>35</sup>;
- 479 (E) where it has been directed to carry out a restructuring plan, to secure the purpose of the plan specified in head (a) above<sup>36</sup>;
- 480 (F) to agree to the requisite transfer resolutions submitted to the members<sup>37</sup>; or
- 481 (G) where it has agreed to the requisite transfer resolutions, to proceed<sup>38</sup> to transfer its business to the successor company<sup>39</sup>,

or if the Authority rejects a restructuring plan, the powers conferred on the Authority to petition to the High Court for the winding up of the society<sup>40</sup> become exercisable in relation to the society<sup>41</sup>.

The provisions described above do not imply that it is improper for the Authority to give to a society or societies generally an indication of the action it might or might not take in relation to any proposed activity<sup>42</sup>.

1 The 'relevant statutory requirements' are: (1) the requirement imposed by the Building Societies Act 1986 s 5(1)(a) or s 5(1)(b) (purpose or principal purpose and principal office) (see PARA 1856); (2) the requirement imposed by s 6(1) (the lending limit) (see PARA 2008); or (3) the requirement imposed by s 7(1) (the funding limit) (see PARA 1916): s 36(1) (s 36 substituted by the Building Societies Act 1997 s 13(1)).

2 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

3 Building Societies Act 1986 s 36(1) (as substituted (see note 1); and s 36(1)-(13), (16) amended by SI 2001/2617).

4 Building Societies Act 1986 s 36(2) (as substituted (see note 1); and amended (see note 3)). See also the Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001, SI 2001/3592, art 36. As to the requirement for the Authority to give the society a warning notice if it proposes to give the society a direction under head (1), (2) or (3) in the text, and the further requirement to give the society a decision notice if it decides to give such a direction, see the Building Societies Act 1986 s 46A; and PARA 2052.

5 Building Societies Act 1986 s 36(3) (as substituted (see note 1); and amended (see note 3)).

6 Building Societies Act 1986 s 36(3)(a) (as substituted: see note 1). For the purpose of applying the relevant statutory requirements as directed by s 36(3)(a): (1) in the case of a requirement which operates by reference to a quarter day, the day as at which the requirements are to be applied must be treated as such a day; and (2) the assets and liabilities of the society must be determined by reference to a balance sheet prepared by the directors by reference to that day and sent to the Authority within the period of three months beginning with that day: s 36(4) (as so substituted; and amended (see note 3)). Section 81(4) (penalties) applies in the event of a default in complying with this provision as it applies in the event of a default in complying with s 81(2) (see PARA 1997): s 36(4) (as so substituted). As to the meaning of 'quarter day' see PARA 1916 note 1; definition applied by s 36(15) (as so substituted). As to the office of director see PARAS 1944-1963.

7 Building Societies Act 1986 s 36(3)(b) (as substituted: see note 1).

8 As to membership see PARA 1888 et seq.

9 As to the meaning of 'requisite transfer resolutions' see PARA 1927 note 6; definition applied by the Building Societies Act 1986 s 36(15) (as substituted: see note 1).

10 Ie under the Building Societies Act 1986 s 97: see PARA 1927 et seq.

11 As to the meaning of 'notify' see PARA 1866 note 8.

12 Building Societies Act 1986 s 36(5) (as substituted (see note 1); and amended (see note 3)).

13 See note 10.

14 Building Societies Act 1986 s 36(6) (as substituted (see note 1); and amended (see note 3)).

15 Building Societies Act 1986 s 36(7) (as substituted (see note 1); and amended (see note 3)).

16 As to shares in relation to societies see PARA 1905 et seq.

17 As to the meaning of 'deposit' see PARA 1866 note 7.

18 Building Societies Act 1986 s 36(7)(a) (as substituted: see note 1).

19 Building Societies Act 1986 s 36(7)(b) (as substituted: see note 1).

20 As to the meaning of 'connected undertaking' see PARA 1991 note 16.

21 Building Societies Act 1986 s 36(7)(c) (as substituted: see note 1).

22 Building Societies Act 1986 s 36(7)(d) (as substituted: see note 1). As to the meaning of 'officer' see PARA 1944.

23 Building Societies Act 1986 s 36(8) (as substituted (see note 1); and amended (see note 3)).

24 As to the meaning of 'confirmation' see PARA 1927 note 11.

25 See note 10.

26 Building Societies Act 1986 s 36(9) (as substituted (see note 1); and amended (see note 3)). As to the transfer of business see PARA 1927 et seq. If the Authority receives a notice from a society that either resolution is disagreed to, it may, if it thinks fit, serve on the society a direction requiring it, within a specified period, to submit to the Authority for its approval a restructuring plan; and if the Authority does so the provisions of s 36(8) apply as if the plan had been submitted under s 36(3) (see the text to notes 5-7): s 36(10) (as so substituted and amended). The Authority must give the society a warning notice and a decision notice before giving a direction under s 36(10): see s 46A and PARA 2052.

27 Ie under any of the provisions of the Building Societies Act 1986 s 36(1)-(10): see the text and notes 1-26.

28 Building Societies Act 1986 s 36(11) (as substituted (see note 1); and amended (see note 3)).

29 Ie under the Building Societies Act 1986 s 36(8): see the text to note 23.

30 Ie under the Building Societies Act 1986 s 36A: see PARA 2048.

31 Building Societies Act 1986 s 36(12) (as substituted (see note 1); and amended (see note 3)).

32 Building Societies Act 1986 s 36(13)(a) (as substituted: see note 1).

33 Building Societies Act 1986 s 36(13)(b) (as substituted: see note 1).

34 Building Societies Act 1986 s 36(13)(c) (as substituted: see note 1).

35 Building Societies Act 1986 s 36(13)(d) (as substituted: see note 1).

36 Building Societies Act 1986 s 36(13)(e) (as substituted: see note 1).

37 Building Societies Act 1986 s 36(13)(f) (as substituted: see note 1).

38 Ie under the Building Societies Act 1986 s 97: see PARAS 1927-1928, 1938.

39 Building Societies Act 1986 s 36(13)(g) (as substituted: see note 1).

40 Ie under the Building Societies Act 1986 s 37: see PARA 2049. As to the meaning of 'High Court' see PARA 1866 note 10.

41 Building Societies Act 1986 s 36(13) (as substituted (see note 1); and amended (see note 3)).

42 Building Societies Act 1986 s 36(16) (as substituted (see note 1); and amended (see note 3)).

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## **2048. Power to make prohibition orders.**

If a building society which has been directed to carry out a restructuring plan<sup>1</sup> fails within the period allowed to it<sup>2</sup> to secure the purpose of the plan<sup>3</sup> the Financial Services Authority<sup>4</sup> may issue a prohibition order directed to the society<sup>5</sup>. A prohibition order is an order: (1) prohibiting, subject to the saving or transitional provisions of the order<sup>6</sup>, the continuance or, as the case may be, the carrying on of the activity specified in the order after a date so specified, either absolutely or unless conditions so specified are complied with<sup>7</sup>; and (2) requiring, subject to the saving or transitional provisions of the order, the disposal within a period specified in the order of all assets acquired or otherwise in its possession by virtue of the activity<sup>8</sup>. A disposal of

assets in pursuance of a prohibition order vests the assets in the transferee but without prejudice to any claim against the society by a person who had an interest in the assets<sup>9</sup>.

If the Authority proposes to issue a prohibition order it must give the society a warning notice<sup>10</sup>. If the Authority then decides to issue a prohibition order it must give the society a decision notice, and may issue the order at the same time as or after giving the decision notice<sup>11</sup>. A warning notice or decision notice about a prohibition order must set out the terms of the order which the Authority proposes, or has decided, to make, including any saving or transitional provisions to be included in it<sup>12</sup>.

If the Authority issues a prohibition order it must serve the order on the society and must keep a copy of the order in the public file of the society<sup>13</sup>. A copy of the order must also be served on each director and on the chief executive of the society<sup>14</sup>. A prohibition order takes effect on the date specified in the order<sup>15</sup> and remains in force until revoked by the Authority<sup>16</sup>. The Authority may suspend or revoke a prohibition order so far as it relates to an asset the disposal of which appears to it, on the application of the society, to be impracticable<sup>17</sup>.

If a society contravenes a prohibition order issued against it the power conferred on the Authority to present a petition to the High Court<sup>18</sup> for the winding up of the society<sup>19</sup> becomes exercisable in relation to the society, and the Authority may exercise that power or certify the contravention in writing<sup>20</sup> to the High Court, or do both of those things, but the contravention does not invalidate any transaction or other act<sup>21</sup>. On receiving such a certification, the High Court may inquire into the case and after hearing any witnesses who may be produced against or on behalf of the society and after hearing any statement which may be offered in defence, may punish the society in like manner as if it had been guilty of contempt of the court<sup>22</sup>. Where a contravention of a prohibition order which is so certified is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any officer<sup>23</sup> of the society he, as well as the society, may be punished in like manner as if he had been guilty of contempt of the court<sup>24</sup>.

1    le under the Building Societies Act 1986 s 36(8): see PARA 2047.

2    le under the Building Societies Act 1986 s 36(1)-(11): see PARA 2047.

3    See the Building Societies Act 1986 s 36(12); and PARA 2047.

4    As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

5    Building Societies Act 1986 s 36A(1) (s 36A added by the Building Societies Act 1997 s 14; and the Building Societies Act 1986 s 36A(1) amended by SI 2001/2617). See also the Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001, SI 2001/3592, art 37.

6    The saving or transitional provisions which may be included in a prohibition order are such as appear to the Authority to be just having regard to the interests of shareholders of and depositors with the society and the interests of other persons who will be affected by the order: Building Societies Act 1986 s 36A(4) (as added (see note 5); and amended by SI 2001/2617). 'Shareholder and depositor' includes a potential shareholder or depositor: Building Societies Act 1986 s 119(1).

7    Building Societies Act 1986 s 36A(2)(a) (as added: see note 5).

8    Building Societies Act 1986 s 36A(2)(b) (as added: see note 5).

9    Building Societies Act 1986 s 36A(3) (as added: see note 5).

10   Building Societies Act 1986 s 36A(5) (s 36A as added (see note 5); and s 36A(5) substituted, and s 36A(5A)-(5D) added, by SI 2001/2617).

The Financial Services and Markets Act 2000 Pt XXVI (ss 387-396) (notices) (see PARA 769 et seq) is to be treated as applying in respect of warning notices and decision notices given under the Building Societies Act 1986 s 36A as it applies in respect of warning notices and decision notices given under the Financial Services and Markets Act 2000, save that s 388(1)(e) is to be omitted (see PARA 770); s 388(2) (which makes provision



for the type of action to which a decision notice may relate if it was preceded by a warning notice) (see PARA 770) is to be read as if, for the word 'Part', there were substituted the word 'section'; s 390 (final notices) (see PARA 772) is to be omitted; and for the purposes of s 391 (publication) (see PARA 774) a decision notice given under the Building Societies Act 1986 s 36A is to be treated as if it were a final notice rather than a decision notice: s 36A(5C), (5D) (as so added).

11 Building Societies Act 1986 s 36A(5A) (as added: see note 10).

12 Building Societies Act 1986 s 36A(5B) (as added: see note 10).

13 Building Societies Act 1986 s 36A(6) (s 36A as added (see note 5); and s 36A(6) substituted by SI 2001/2617). As to the public file see PARA 1864.

14 Building Societies Act 1986 s 36A(8) (as added: see note 5). This requirement, so far as it relates to directors, is satisfied by serving a copy on each director whose appointment has been officially notified and the non-receipt of a copy by a director or the chief executive does not affect the validity of the order: s 36A(9) (as so added). As to the office of director see PARAS 1944-1963; and as to the office of chief executive see PARAS 1964-1965.

15 Building Societies Act 1986 s 36A(7) (as added (see note 5); and amended by SI 2001/2617).

16 Building Societies Act 1986 s 36A(10) (as added (see note 5); and s 36A(10)-(12) amended by SI 2001/2617).

17 Building Societies Act 1986 s 36A(11) (as added (see note 5); and amended (see note 16)).

18 As to the meaning of 'High Court' see PARA 1866 note 10. In the application of the Building Societies Act 1986 s 36A to a society whose principal office is in Scotland, references to the High Court are to be read as references to the Court of Session: s 36A(15) (as added: see note 5). Generally Scottish matters are beyond the scope of this work. As to the requirements for principal offices see PARA 1872.

19 le conferred by the Building Societies Act 1986 s 37(1): see PARA 2049.

20 As to the meaning of 'writing' see PARA 1064 note 2.

21 Building Societies Act 1986 s 36A(12) (as added (see note 5); and amended (see note 16)).

22 Building Societies Act 1986 s 36A(13) (as added: see note 5). As to the power of courts to punish contempt see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 502 et seq.

23 As to the meaning of 'officer' see PARA 1944.

24 Building Societies Act 1986 s 36A(14) (as added: see note 5).

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## **2049. Power to petition for winding up etc.**

Where (1) a building society is in breach of certain statutory provisions<sup>1</sup>; (2) it contravenes a prohibition order<sup>2</sup>; or (3) the Financial Services Authority<sup>3</sup> has reason to believe that the purpose or principal purpose of the society has ceased to be that required for the establishment of a society under the Building Societies Act 1986<sup>4</sup>, the Authority may present a petition to the High Court<sup>5</sup> for the winding up of the society under the applicable winding up legislation<sup>6</sup>. In a case falling within head (1) above, the Authority may instead make an application to the High Court for an order giving directions to the society<sup>7</sup>. The power to present a petition or to make an application for such an order is available to the Authority whether or

not it has previously presented a petition or made an application for such an order, as the case may be<sup>8</sup>.

The order in response to an application for an order giving directions to the society is an order directing the society to comply with the relevant direction<sup>9</sup> as directed in the order, or to carry out a restructuring plan as directed in the order<sup>10</sup>. Where the High Court makes such an order, the Authority must keep a copy of the order in the public file of the society<sup>11</sup>. The High Court must not make an order winding up the society on an application under head (3) above unless it is satisfied that the purpose or principal purpose of the society has ceased to be that required for the establishment of a society under the Building Societies Act 1986<sup>12</sup>.

1 Building Societies Act 1986 s 37(1)(a) (s 37 substituted by the Building Societies Act 1997 s 15). The text refers to the provisions of the Building Societies Act 1986 s 36(13): see PARA 2047.

2 Building Societies Act 1986 s 37(1)(b) (as substituted: see note 1). The text refers to the power conferred by virtue of s 36A(12): see PARA 2048.

3 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

4 Building Societies Act 1986 s 37(1)(c) (as substituted (see note 1); and s 37(1), (2), (4) amended by SI 2001/2617). The text refers to the requirement imposed by the Building Societies Act 1986 s 5(1): see PARA 1856.

5 As to the meaning of 'High Court' see PARA 1866 note 10. In the application of the Building Societies Act 1986 s 37 to a society whose principal office is in Scotland, references to the High Court must be read as references to the Court of Session: s 37(6) (as substituted: see note 1). Generally Scottish matters are beyond the scope of this work. As to the requirements for principal offices see PARA 1872.

6 Building Societies Act 1986 s 37(1) (as substituted and amended: see note 4. As to the meaning of 'applicable winding up legislation' see PARA 2071 note 2. As to the winding up of societies see PARA 2071 et seq.

7 See the Building Societies Act 1986 s 37(2) (as substituted (see note 1); and amended (see note 4)).

8 Building Societies Act 1986 s 37(1), (2) (as substituted (see note 1); and amended (see note 4)).

9 le to comply with a direction under the Building Societies Act 1986 s 36(3), (5), (6), (7), (10): see PARA 2047.

10 Building Societies Act 1986 s 37(3) (as substituted: see note 1).

11 Building Societies Act 1986 s 37(4) (as substituted (see note 1); and amended (see note 4)). As to the public file see PARA 1864.

12 Building Societies Act 1986 s 37(5) (as substituted: see note 1).

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## **2050. Power to direct transfers of engagements or business.**

If, with respect to a building society which has a permission under Part IV of the Financial Services and Markets Act 2000 to accept deposits<sup>1</sup>, the Financial Services Authority<sup>2</sup> considers it expedient to do so in order to protect the investments of shareholders or depositors<sup>3</sup>, it may either direct the society, within a specified period<sup>4</sup>: (1) to transfer all its engagements to one or more other societies<sup>5</sup>; or (2) to transfer its business to an existing company<sup>6</sup>. If it appears to the

Authority that a society has failed to comply with such a direction, the Authority may exercise its power to vary or cancel a Part IV permission on its own initiative under the Financial Services and Markets Act 2000<sup>7</sup> in relation to the society<sup>8</sup>.

Where the Authority gives a society a direction under head (1) above, or does not give a society such a direction solely because the society is already seeking to transfer all its engagements to one or more other societies, the Authority may, if it considers it expedient to do so in order to protect the investments of shareholders or depositors, direct that, instead of resolving to transfer its engagements by the two resolutions required by statute<sup>9</sup>, the society may resolve to do so by a resolution of the board of directors<sup>10</sup>. Where the Authority gives a society a direction under head (2) above, or does not give a society such a direction solely because the society is already seeking to transfer its business to an existing company, the Authority may, if it considers it expedient to do so in order to protect the investments of shareholders or depositors, direct that, instead of approving the transfer and the terms of the transfer by the two resolutions required by statute<sup>11</sup>, the society may approve the transfer and those terms by a resolution of the board of directors<sup>12</sup>. Such a direction must be in writing<sup>13</sup>, may be given subject to such limitations or conditions as the Authority may think fit and, unless renewed by a further direction, ceases to have effect at the end of the period of 90 days beginning with the day on which it is given<sup>14</sup>.

1    Ie permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.

2    As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

3    As to the meaning of 'shareholder and depositor' see PARA 2048 note 6.

4    Building Societies Act 1986 s 42B(1) (s 42B added by the Building Societies Act 1997 s 17(1); and the Building Societies Act 1986 s 42B(1), (3)-(5), (8) amended, s 42B(2) substituted, and s 42B(2A) added, by SI 2001/2617). See also the Financial Services and Markets Act 2000 (Transitional Provisions) (Partly Completed Procedures) Order 2001, SI 2001/3592, art 38. As to the requirement for the Authority to give the society a warning notice if it proposes to give the society a direction under the Building Societies Act 1986 s 42B(1), except one varying a previous direction with the agreement of the society concerned, and the further requirement to give the society a decision notice if it decides to give such a direction, see s 46A; and PARA 2052.

5    Building Societies Act 1986 s 42B(1)(a) (as added: see note 4). The text refers to a transfer under s 94: see PARAS 1920-1921.

6    Building Societies Act 1986 s 42B(1)(b) (as added: see note 4). The text refers to a transfer to an existing (as opposed to a specially formed) company under s 97: see PARAS 1927-1928, 1938.

7    Ie under the Financial Services and Markets Act 2000 s 45: see PARA 355.

8    Building Societies Act 1986 s 42B(2) (as added and substituted: see note 4). This does not affect the Authority's ability to exercise that power, in relation to the society, on any other ground: s 42B(2A) (as added: see note 4).

9    Ie the two resolutions required by the Building Societies Act 1986 s 94(2) (with or without the additional resolution required by s 94(3)): see PARA 1920.

10   Building Societies Act 1986 s 42B(3) (as added and amended: see note 4). As to the office of director see PARAS 1944-1963. As to the modifications of the provisions relating to dissolution, winding up, mergers, and transfer of business (ie ss 94-96, Sch 16: see PARAS 1920-1926) where a direction is given under s 42B(3) see s 42B(7)(a), (8) (as so added and amended), s 42B(9) (as so added), Sch 8A Pt I (paras 1-5) (Sch 8A added by the Building Societies Act 1997 s 17(2), Sch 4; and amended by SI 2001/2617; and SI 2003/404).

11   Ie the two resolutions required by the Building Societies Act 1986 s 97(4)(c): see PARA 1927.

12   Building Societies Act 1986 s 42B(4) (as added and amended: see note 4). As to the modifications of the provisions relating to dissolution, winding up, mergers, and transfer of business (ie ss 97-100, Sch 17: see PARA 1927 et seq) where a direction is given under s 42B(4) see s 42B(7)(b), (8) (as so added and amended), s 42B(9) (as so added), Sch 8A Pt II (paras 6-11) (as added and amended: see note 10); and the Building Societies (Transfer of Business) Regulations 1998, SI 1998/212, reg 5, Sch 3 (amended by SI 2001/3649).

13 As to the meaning of 'writing' see PARA 1064 note 2.

14 Building Societies Act 1986 s 42B(5) (as added and amended: see note 4).

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## **2051. Variation and revocation of transfer directions.**

A direction<sup>1</sup> by the Financial Services Authority<sup>2</sup> that a building society should transfer all its engagements to one or more other societies or should transfer its business to an existing company may be varied by a further direction<sup>3</sup>. A direction may be revoked by the Authority by a notice<sup>4</sup> in writing<sup>5</sup> to the society concerned<sup>6</sup>.

1 le under the Building Societies Act 1986 s 42B(1): see PARA 2050.

2 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

3 Building Societies Act 1986 s 42C(1) (s 42C added by the Building Societies Act 1997 s 18; and the Building Societies Act 1986 s 42C(1) amended by SI 2001/2617).

4 As to the meaning of 'notice' see PARA 1866 note 8.

5 As to the meaning of 'writing' see PARA 1064 note 2.

6 Building Societies Act 1986 s 42C(1) (as added and amended: see note 3).

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## **2052. Notices, hearings and appeals.**

The Financial Services Authority<sup>1</sup> must give a building society a warning notice<sup>2</sup> if it proposes<sup>3</sup>: (1) to give certain directions to a society relating to the restructuring of the business<sup>4</sup>; or (2) to give a direction to a society to transfer all its engagements to one or more other societies or to transfer its business to an existing company, other than a direction varying a previous direction with the agreement of the society concerned<sup>5</sup>. The warning notice must set out the terms of the direction which the Authority proposes to give<sup>6</sup>.

If the Authority decides to give a direction to a society of the kind mentioned in head (1) above or give a direction to a society of the kind mentioned in head (2) above, other than a direction varying a previous direction with the agreement of the society concerned, it must give the society a decision notice<sup>7</sup>, and such notice must set out the terms of the direction which the Authority has decided to give<sup>8</sup>. A society to whom a decision notice is given may refer the matter to the Financial Services and Markets Tribunal<sup>9</sup>.

Part XXVI of the Financial Services and Markets Act 2000<sup>10</sup> is to be treated as applying in respect of warning notices and decision notices given under the provisions described above as it applies in respect of warning notices and decision notices given under that Act<sup>11</sup>.

- 1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 2 See note 9.
- 3 Building Societies Act 1986 s 46A(1) (s 46A added by SI 2001/2617).
- 4 Building Societies Act 1986 s 46A(1)(a) (as added: see note 3). The text refers to directions under s 36(3), (5), (6), (7), (10): see PARA 2047.
- 5 Building Societies Act 1986 s 46A(1)(b) (as added: see note 3). The text refers to directions under s 42B(1): see PARA 2050.
- 6 Building Societies Act 1986 s 46A(2) (as added: see note 3).
- 7 Building Societies Act 1986 s 46A(3) (as added: see note 3).
- 8 Building Societies Act 1986 s 46A(4) (as added: see note 3).
- 9 Building Societies Act 1986 s 46A(5) (as added: see note 3). The provisions of the Financial Services and Markets Act 2000 Pt IX (ss 132-137) (hearings and appeals) (see PARAS 43-46, 65-69) are to be treated as applying in respect of references to the Financial Services and Markets Tribunal made under the Building Societies Act 1986 s 46A as they apply in respect of references made to that Tribunal under the Financial Services and Markets Act 2000: Building Societies Act 1986 s 46A(7) (as so added).
- 10 In the Financial Services and Markets Act 2000 Pt XXVI (ss 387-396): see PARA 769 et seq.
- 11 Building Societies Act 1986 s 46A(6) (as added: see note 3). However, the application of the Financial Services and Markets Act 2000 Pt XXVI is subject to modifications: see the Building Societies Act 1986 s 46A(8) (as so added).

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## ***B. INFORMATION, INSPECTIONS AND INVESTIGATIONS***

### **2053. Power to obtain information and documents.**

The power to obtain information and documents applies to information, documents or other material, or explanations of matters, which relate to the business of a building society or its plans for future development, and where a society has connected undertakings<sup>1</sup> the power also applies to information, documents or other material, or explanations of matters, which relate to, or also relate to, the business, or the plans for future development, of every such connected undertaking<sup>2</sup>. However, no requirement in relation to information, documents or other material may be imposed on a connected undertaking of a society unless that undertaking carries on business in the United Kingdom<sup>3</sup>, but a requirement may be imposed on a society in relation to information, documents or other material in the possession or control of a connected undertaking outside the United Kingdom<sup>4</sup>.

In connection with the exercise of its supervisory functions<sup>5</sup>, the Financial Services Authority<sup>6</sup> may, by notice<sup>7</sup> to a society or a connected undertaking of a society, require the society or undertaking to which it is addressed to<sup>8</sup>:

- 482 (1) furnish to it, within a specified<sup>9</sup> period or at a specified time or times, such specified information as the Authority considers it needs for the purposes of its supervisory functions<sup>10</sup>;
- 483 (2) produce to it, at a specified time and place, such specified documents or other material as the Authority considers it needs for the purposes of its supervisory functions<sup>11</sup>;
- 484 (3) provide to it, within a specified period, such explanations of specified matters as the Authority considers it needs for the purposes of its supervisory functions<sup>12</sup>;
- 485 (4) furnish to it a report by an approved<sup>13</sup> accountant or other person with relevant professional skill on, or on specified aspects of, information or documents or other material furnished or produced to the Authority<sup>14</sup>.

Any person authorised for the purpose by the Authority (an 'authorised officer') may, on producing evidence of his authority, require a society or connected undertaking to<sup>15</sup>:

- 486 (a) furnish to him forthwith such specified information as the Authority considers it needs for the purposes of its supervisory functions<sup>16</sup>;
- 487 (b) produce to him forthwith such documents or other material as the Authority considers it needs for those purposes<sup>17</sup>;
- 488 (c) provide to him forthwith such explanations of specified matters as the Authority considers it needs for those purposes<sup>18</sup>.

Where by virtue of heads (1) to (3) or heads (a) to (c) above the Authority or an authorised officer has power to require the furnishing of any information, the production of any document or material or the provision of any explanation, by a society or connected undertaking, the Authority or authorised officer has the like power as regards any person who<sup>19</sup>: (i) is or has been an officer<sup>20</sup> or employee or agent<sup>21</sup> of the society or undertaking<sup>22</sup>; or (ii) in the case of documents or material, appears to the Authority or authorised officer to have the document or material in his possession or under his control<sup>23</sup>. Where any person from whom production of a document or material is so required claims a lien on the document or material, the production of it is without prejudice to the lien<sup>24</sup>.

The provisions described above do not compel the production by a barrister, solicitor or advocate of a document or material containing a privileged communication made by him or to him in that capacity or the furnishing of information contained in a privileged communication so made<sup>25</sup>.

The Authority or authorised officer may, if the documents or material are produced, take copies of or extracts from them and require the person who produced them, or any other person who is a present or past director<sup>26</sup> or officer of, or is or was at any time employed by, the society or connected undertaking concerned, to provide an explanation of the documents or material, and if the documents or material are not produced, require the person who was required to produce the documents or material to state, to the best of his knowledge and belief, where the documents or material are<sup>27</sup>.

Any person who fails without reasonable excuse to furnish any information or accountant's report, to produce any documents or material, or to provide any explanation or make any statement is liable on summary conviction to a fine<sup>28</sup> and, in the case of a continuing offence, to an additional fine<sup>29</sup> for every day during which the offence continues<sup>30</sup>. Any society which furnishes any information, provides any explanation or makes any statement which is false or misleading in a material particular is liable, on conviction on indictment or on summary

conviction to a fine<sup>31</sup>. Any person who knowingly or recklessly furnishes any information, provides any explanation or makes any statement which is false or misleading in a material particular is liable on conviction on indictment to imprisonment or to a fine or to both, and on summary conviction to a fine<sup>32</sup>.

- 1 As to the meaning of 'connected undertaking' see PARA 1991 note 16.
- 2 Building Societies Act 1986 s 52(1), (2) (amended by the Building Societies Act 1997 Sch 7 para 17(2)).
- 3 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 4 Building Societies Act 1986 s 52(4) (amended by the Building Societies Act 1997 Sch 7 para 17(4)).
- 5 'The purposes of its supervisory functions' means the purposes of the discharge by the Financial Services Authority of any of its functions under the Building Societies Act 1986 Pt I (s 1) (see PARA 1863), s 36 (see PARA 2047), s 36A (see PARA 2048), s 37 (see PARA 2049), s 42B (see PARA 2050), s 42C (see PARA 2051), s 46A (see PARA 2052), Pt X (ss 86-103) (see PARAS 1918 et seq, 2041, 2066 et seq), and s 107 (see PARA 2059): s 52(1) (amended by SI 2001/2617).
- 6 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 7 As to the meaning of 'notice' see PARA 1866 note 8.
- 8 Building Societies Act 1986 s 52(5) (amended by the Building Societies Act 1997 Sch 7 para 17(5); and SI 2001/2617). The Building Societies Act 1986 s 52(5) is expressed to be subject to s 52(4) (see the text to notes 3-4).
- 9 'Specified' means specified in a notice or requirement under the Building Societies Act 1986 s 52: s 52(13) (substituted by the Building Societies Act 1997 Sch 7 para 17(8)).
- 10 Building Societies Act 1986 s 52(5)(a) (as amended: see note 8).
- 11 Building Societies Act 1986 s 52(5)(b) (as amended: see note 8).
- 12 Building Societies Act 1986 s 52(5)(c) (as amended: see note 8).
- 13 'Approved', in relation to an accountant or other person with relevant professional skill, means approved by the Authority: Building Societies Act 1986 s 52(13) (as substituted (see note 9); and amended by SI 2001/2617).
- 14 Building Societies Act 1986 s 52(5)(d) (as amended: see note 8).
- 15 Building Societies Act 1986 s 52(5A) (added by the Building Societies Act 1997 Sch 7 para 17(6); and amended by SI 2001/2617). The Building Societies Act 1986 s 52(5A) is expressed to be subject to s 52(4) (see the text to notes 3-4).
- 16 Building Societies Act 1986 s 52(5A)(a) (as added and amended: see note 15).
- 17 Building Societies Act 1986 s 52(5A)(b) (as added and amended: see note 15).
- 18 Building Societies Act 1986 s 52(5A)(c) (as added and amended: see note 15).
- 19 Building Societies Act 1986 s 52(6) (substituted by the Building Societies Act 1997 Sch 7 para 17(6); and amended by SI 2001/2617).
- 20 As to the meaning of 'officer' see PARA 1944.
- 21 'Agent' in relation to a society, or connected undertaking, includes its bankers, accountants, solicitors and auditors: Building Societies Act 1986 s 52(13) (as substituted: see note 9).
- 22 Building Societies Act 1986 s 52(6)(a) (as substituted: see note 19).
- 23 Building Societies Act 1986 s 52(6)(b) (as substituted and amended: see note 19).
- 24 Building Societies Act 1986 s 52(7). See further **LIEN**.

25 Building Societies Act 1986 s 52(8).

26 As to the office of director see PARAS 1944-1963.

27 Building Societies Act 1986 s 52(9) (substituted by the Building Societies Act 1997 Sch 7 para 17(7); and amended by SI 2001/2617).

28 Is not exceeding level 5 on the standard scale: Building Societies Act 1986 s 52(10)(a). As to the standard scale see PARA 27 note 21.

29 Is not exceeding £200: Building Societies Act 1986 s 52(10)(b).

30 Building Societies Act 1986 s 52(10). As to what generally amounts to a 'reasonable excuse' see *Leck v Epsom RDC* [1922] 1 KB 383, 20 LGR 173 (decided in the context of public health); *Aldridge v Warwickshire Coal Co Ltd* (1925) 133 LT 439, 18 BWCC 131, CA (decided in the context of road traffic); *Saddleworth UDC v Aggregate and Sand Ltd* (1970) 69 LGR 103, 114 Sol Jo 931 (decided in the context of a nuisance order made under the Public Health Act 1936).

31 Building Societies Act 1986 s 52(11). On summary conviction the fine must not exceed the statutory maximum: s 52(11). As to the statutory maximum see PARA 56 note 24. As to the liability of officers and the defence of due diligence see PARA 1969.

32 Building Societies Act 1986 s 52(12). Such a person is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, and on summary conviction to a fine not exceeding the statutory maximum: s 52(12).

## UPDATE

### 2053 Power to obtain information and documents

TEXT AND NOTE 25--Reference to barrister, solicitor or advocate now to relevant lawyer, which means means a barrister, advocate, solicitor or other legal representative communications with whom may be the subject of a claim to professional privilege: Building Societies Act 1986 s 52(8), (13) (s 52(8) amended, definition in s 52(13) added, by Legal Services Act 2007 Sch 21 para 70).

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### 2054. Entry of premises under warrant.

A justice of the peace may issue a warrant<sup>1</sup> if satisfied on information on oath, given by or on behalf of the Financial Services Authority<sup>2</sup>, an authorised officer<sup>3</sup>, or a person appointed as an investigator<sup>4</sup> or as an inspector<sup>5</sup>, that there are reasonable grounds for believing that the first or second set of conditions below is satisfied<sup>6</sup>.

The first set of conditions is that: (1) there are on the premises specified in the warrant information, documents or other material in relation to which a requirement has been imposed on any person<sup>7</sup>, or which it is the duty of any person to produce<sup>8</sup>; and (2) that person has failed, wholly or in part, to comply with the requirement, or, having been requested to do so, has failed, wholly or in part, to comply with that duty<sup>9</sup>.

The second set of conditions is that: (a) there are on the premises specified in the warrant information, documents or other material in relation to which a requirement could be imposed



on any person<sup>10</sup>, or which any person could be requested to produce in compliance with the duty imposed on him<sup>11</sup>; and (b) if such a requirement were imposed, or such a request made, it would not be complied with, or any information, documents or other material to which it related would be removed, tampered with or destroyed<sup>12</sup>.

- 1    le under the Financial Services and Markets Act 2000 s 176: see PARA 454.
- 2    As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 3    As to the meaning of 'authorised officer' see PARA 2053; definition applied by the Building Societies Act 1986 s 52B(1) (s 52B added by SI 2001/2617).
- 4    le under the Building Societies Act 1986 s 55(1): see PARA 2057.
- 5    le under the Building Societies Act 1986 s 56(1): see PARA 2058.
- 6    Building Societies Act 1986 s 52B(1) (as added: see note 3).
- 7    le under the Building Societies Act 1986 s 52(5), s 52(5A), s 52(6) or s 57(3): see PARAS 2053, 2058.
- 8    Building Societies Act 1986 s 52B(2)(a) (as added: see note 3). The text refers to the duty to produce under s 55(3) or s 57(2): see PARAS 2057-2058.
- 9    Building Societies Act 1986 s 52B(2)(b) (as added: see note 3).
- 10   See note 7.
- 11   Building Societies Act 1986 s 52B(3)(a) (as added: see note 3). See note 8.
- 12   Building Societies Act 1986 s 52(B)(3)(b) (as added: see note 3).

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## **2055. Restrictions on the disclosure of confidential information.**

The Financial Services and Markets Act 2000 contains restrictions on the disclosure of confidential information<sup>1</sup>. For the purposes of these provisions<sup>2</sup>:

- 489 (1) information which (a) relates to the business or other affairs of a building society or other body, or its or their plans for future development, or to any person who is or has been, or has been appointed (or, in the case of a director<sup>3</sup>, nominated or proposed as), an officer<sup>4</sup> of a society or other body<sup>5</sup>; (b) was received by a primary recipient<sup>6</sup> for the purposes of, or in the discharge of, any functions of the Financial Services Authority<sup>7</sup> under any provision made by or under the Building Societies Act 1986<sup>8</sup>; and (c) is not excluded information<sup>9</sup>, is to be treated as confidential information<sup>10</sup>; and
- 490 (2) in relation to such information, each of the Authority, any person who is or has been employed by the Authority, and any person appointed by the Authority to carry out functions under the Building Societies Act 1986, is a primary recipient<sup>11</sup>.

- 1 See the Financial Services and Markets Act 2000 ss 348-353; and PARAS 479, 487-488. As to restrictions on the disclosure of confidential information generally see **CONFIDENCE AND DATA PROTECTION**.
- 2 Building Societies Act 1986 s 53A(1) (s 53A added by SI 2001/2617).
- 3 As to the office of director see PARAS 1944-1963.
- 4 As to the meaning of 'officer' see PARA 1944.
- 5 Building Societies Act 1986 s 53A(1)(a), (2)(a) (as added: see note 2).
- 6 le within the meaning of the Building Societies Act 1986 s 53A(1)(b): see the text to note 11.
- 7 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 8 Building Societies Act 1986 s 53A(1)(a), (2)(b) (as added: see note 2).
- 9 Building Societies Act 1986 s 53A(1)(a), (2)(c) (as added: see note 2). Information is excluded information if: (1) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by the Financial Services and Markets Act 2000 s 348 (see PARA 479); or (2) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person: Building Societies Act 1986 s 53A(4) (as so added).
- 10 Building Societies Act 1986 s 53A(1)(a) (as added: see note 2). It is immaterial for the purposes of s 53A(2) whether or not the information was received by virtue of a requirement to provide it imposed by or under the Building Societies Act 1986, or for other purposes as well as purposes mentioned in s 53A(2): s 53A(3) (as so added).
- 11 Building Societies Act 1986 s 53A(1)(b) (as added: see note 2).

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## **2056. Disclosure of information to the Financial Services Authority from other sources.**

If and in so far as it appears to the Secretary of State<sup>1</sup> that the disclosure of any information will enable the Financial Services Authority<sup>2</sup> better to discharge its functions under the Building Societies Act 1986, but not otherwise, then<sup>3</sup>: (1) information obtained by the Secretary of State in connection with an inspection of companies' books and papers<sup>4</sup> may be disclosed to the Authority or further disclosed, notwithstanding the provision as to security of information<sup>5</sup>; and (2) where the information is contained in a report made by inspectors<sup>6</sup> relating to an investigation of affairs or ownership of companies and certain other bodies corporate, the Secretary of State may furnish a copy of the report to the Authority<sup>7</sup>.

1 As to the Secretary of State see PARA 3. In regard to Northern Ireland the Building Societies Act 1986 refers to the Department of Economic Development, which was renamed the Department of Enterprise, Trade and Investment: see the Departments (Northern Ireland) Order 1999, SI 1999/283 (NI 1), art 3(5).

2 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

3 Building Societies Act 1986 s 54(1), (2) (s 54(1), (2) amended by SI 2001/2617).

4 lie under the Companies Act 1985 ss 447, 448 or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 440 or art 441: see **COMPANIES** vol 15 (2009) PARAS 1558, 1559.

5 Building Societies Act 1986 s 54(1)(a), (2)(a) (as amended: see note 3). The provision as to security of information is contained in the Companies Act 1985 s 449 or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 442: see **COMPANIES** vol 15 (2009) PARA 1561.

6 lie inspectors appointed under the Companies Act 1985 s 431, s 432, s 442 or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6), art 424, art 425, art 435 or art 439: see **COMPANIES** vol 15 (2009) PARAS 1541, 1542, 1545.

7 Building Societies Act 1986 s 54(1)(b), (2)(b) (as amended (see note 3); s 54(1)(b) amended by SI 2007/2194). As to bodies corporate see generally **COMPANIES**; **CORPORATIONS**.

## UPDATE

### **2056 Disclosure of information to the Financial Services Authority from other sources**

TEXT AND NOTES--Building Societies Act 1986 s 54(2) omitted: SI 2009/1941.

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### **2057. Investigations on behalf of the Financial Services Authority.**

If it appears to the Financial Services Authority<sup>1</sup> desirable to do so for the purposes of its supervisory functions in relation to a building society<sup>2</sup> it may appoint one or more competent persons to investigate and report to it on the state and conduct of the business of the society concerned, or any particular aspect of that business<sup>3</sup>. If an appointed person considers it necessary for the purposes of his investigation, he may also investigate the business of any body corporate<sup>4</sup> which is, or has at any relevant time been, a connected undertaking<sup>5</sup> of the society under investigation<sup>6</sup>. During an investigation, it is the duty of every officer<sup>7</sup>, employee and agent of a society<sup>8</sup> or other body which is under investigation<sup>9</sup>:

- 491 (1) to produce to the appointed person all records, books and papers relating to the body concerned which are in his custody or power<sup>10</sup>;
- 492 (2) to attend before such appointed persons when required to do so<sup>11</sup>; and
- 493 (3) otherwise to give to such appointed persons all assistance in connection with the investigation which he is reasonably able to give<sup>12</sup>.

Any officer, employee or agent of a society or other body who fails without reasonable excuse to<sup>13</sup>:

- 494 (a) produce any records, books or papers which it is his duty to produce<sup>14</sup>; or
- 495 (b) attend before the appointed person when required to do so<sup>15</sup>; or
- 496 (c) answer any question which is put to him by appointed persons with respect to any society or other body corporate which is under investigation<sup>16</sup>,

is liable on summary conviction to a fine<sup>17</sup>.

Any officer, employee or agent of a society or other body who knowingly or recklessly furnishes to any appointed person any information which is false or misleading in a material particular is liable on conviction on indictment to imprisonment or to a fine or to both, and on summary conviction to a fine<sup>18</sup>.

1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 As to the meaning of 'the purposes of its supervisory functions', in relation to the Authority, see PARA 2053 note 5; definition applied by the Building Societies Act 1986 s 55(6)(b) (s 55(1), (6)(b) amended by SI 2001/2617).

3 Building Societies Act 1986 s 55(1) (as amended: see note 2). Section s 55 also applies where the Authority appoints one or more competent persons to investigate and report on any matter reported to the Authority under the Insolvency Act 1986 s 7A(2) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 144): see the Insolvency Act 2000 s 2, Sch 2 para 13(1) (amended by SI 2002/1555).

4 As to bodies corporate see generally **COMPANIES; CORPORATIONS**.

5 As to the meaning of 'connected undertaking' see PARA 1991 note 16.

6 Building Societies Act 1986 s 55(2) (amended by the Building Societies Act 1997 Sch 7 para 21).

7 As to the meaning of 'officer' see PARA 1944.

8 'Agent', in relation to a society or other body whose business is under investigation, includes its bankers, its accountants and solicitors and any persons, where they are not officers of the other body concerned, who are employed as its auditors: Building Societies Act 1986 s 55(6)(a). Any reference to an officer, employee or agent of a society or other body includes a reference to a person who has been but no longer is an officer, employee or agent of that society or other body: s 55(6)(c).

9 Building Societies Act 1986 s 55(3). In relation to the use in evidence of answers given to questions under s 55(3), the provisions of s 57(5)-(5B) (see PARA 2058) apply to answers given under s 55(3) as extended by the Insolvency Act 2000 Sch 2 para 13(1) (see note 3) as they apply to answers given under the Building Societies Act 1986 s 57 (see PARA 2058): see the Insolvency Act 2000 Sch 2 para 13(2).

10 Building Societies Act 1986 s 55(3)(a).

11 Building Societies Act 1986 s 55(3)(b).

12 Building Societies Act 1986 s 55(3)(c).

13 Building Societies Act 1986 s 55(4).

14 Building Societies Act 1986 s 55(4)(a).

15 Building Societies Act 1986 s 55(4)(b).

16 Building Societies Act 1986 s 55(4)(c).

17 Building Societies Act 1986 s 55(4). The fine must not exceed level 5 on the standard scale: s 55(4). As to the standard scale see PARA 27 note 21. As to what is a reasonable excuse see the cases cited in PARA 2053 note 30.

18 Building Societies Act 1986 s 55(6). Such an officer, employee or agent is liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both, and on summary conviction to a fine not exceeding the statutory maximum: s 55(6). As to the statutory maximum see PARA 56 note 24.

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## **2058. Inspections and special meetings.**

On the application of the requisite number of members of a building society<sup>1</sup>, or where no such application is made but the Financial Services Authority<sup>2</sup> is of the opinion that an investigation should be held into the affairs of the society, or that the affairs of the society call for consideration by a meeting of its members<sup>3</sup>, the Authority may<sup>4</sup>:

- 497 (1) appoint one or more competent inspectors to investigate and report on the affairs of the society<sup>5</sup>; or
- 498 (2) call a special meeting of a society to consider its affairs<sup>6</sup>; or
- 499 (3) either on the same or on different occasions, both appoint an inspector or inspectors and call a special meeting for those purposes<sup>7</sup>.

The investigation or consideration may extend to any body corporate which is or at any relevant time has been a connected undertaking of the society<sup>8</sup>.

Where an application has been made by the requisite number of members of a society:

- 500 (a) it must be supported by such evidence as the Authority may require in order to show that the applicants have good reason for requiring an investigation by inspectors or consideration by a special meeting, as the case may be, and that the applicants are not actuated by malicious, frivolous, vexatious or scandalous motives in making the application<sup>9</sup>;
- 501 (b) the Authority must require the applicants to give security for payment of the costs of the investigation or meeting before the inspector is appointed or the meeting is called subject, in the case of the costs of an investigation, to an amount not exceeding the corresponding Companies Act limit<sup>10</sup>;
- 502 (c) such notice<sup>11</sup> of the application must be given to the society and, in a case where the investigation is to extend to its affairs also, to the society's connected undertaking, as the Authority may direct<sup>12</sup>; and
- 503 (d) as regards the expenses of or incidental to the investigation or meeting (i) in the case of an investigation, in whichever way instituted, the expenses must be defrayed in the first instance by the Authority but without prejudice to its rights to contribution<sup>13</sup>; (ii) in the case of a meeting, the expenses must be defrayed by the applicants, or out of the funds of the society, or by the members or officers or former members or officers of the society, in such proportions as the Authority may direct<sup>14</sup>.

Where the Authority acts of its own volition, it must in advance of taking action inform the society of the action which it proposes to take and the grounds for that action, and the society may, within 14 days of receiving the information, give the Authority an explanatory statement in writing<sup>15</sup> by way of a reply<sup>16</sup>.

If a special meeting is called, the Authority may direct<sup>17</sup> at what time and place it is to be held, and what matters are to be discussed and determined, and may give such other directions as it thinks fit with respect to the calling, holding and conduct of the meeting<sup>18</sup>, and may appoint a person to be chairman at the meeting<sup>19</sup>. Such a meeting has all the powers of a meeting called according to the rules of the society<sup>20</sup>.

When inspectors have been appointed it is the duty of all officers and agents<sup>21</sup> of the body under investigation<sup>22</sup> to produce to the inspectors all documents and material of or relating to the body under investigation which are in their custody or power, to attend before the inspectors when required to do so, and otherwise to give the inspectors all assistance in connection with the investigation which they are reasonably able to give<sup>23</sup>. If the inspectors consider that a person other than an officer or agent of the body under investigation is or may be in possession of information concerning its affairs, they may require that person to produce to them any documents or material in his custody or power relating to the body under investigation, to attend before them and otherwise to give them all assistance in connection with the investigation which he is reasonably able to give; and it is that person's duty to comply with the requirement<sup>24</sup>.

The inspectors may examine on oath the officers and agents of the body under investigation, and such other person as may be in possession of relevant information, in relation to the affairs of the body under investigation, and may administer an oath accordingly<sup>25</sup>.

The inspectors may, and if so directed by the Authority must, make interim reports to the Authority, but they may at any time in the course of the investigation, without making an interim report, inform the Authority of matters coming to their knowledge as a result of the investigation tending to show that an offence has been committed<sup>26</sup>. The Authority may, if it thinks fit<sup>27</sup>:

- 504 (A) send a copy of any report made by the inspectors to the body whose affairs are or were the subject of the investigation<sup>28</sup>;
- 505 (B) furnish a copy of any such report on request to any member of the body whose affairs are or were the subject of the investigation, the auditors of that body, any person whose conduct is referred to in the report, and any other person whose financial interests appear to the Authority to be affected by matters dealt with in the report, whether as creditor or otherwise<sup>29</sup>; and
- 506 (C) cause the report to be printed and published<sup>30</sup>.

A copy of the inspectors' report, certified by the Authority to be a true copy, is admissible in any legal proceedings as evidence of the opinion of the inspectors in relation to any matter contained in the report; and a document purporting to be such a certificate must be received in evidence and is deemed to be such a certificate, unless the contrary is proved<sup>31</sup>.

1 Building Societies Act 1986 s 56(2)(a). The requisite number of members in the case of a society having more than 1,000 members is 100, and in the case of any other society is one-tenth of the whole number of members of the society: s 56(5). As to membership see PARA 1888 et seq.

2 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

3 Building Societies Act 1986 s 56(2)(b) (ss 56(1), (2)(b), (6)(a), (c), (d), (7), (10), 57(7), (8), (9), (10) amended by SI 2001/2617).

4 Building Societies Act 1986 s 56(1) (as amended: see note 3).

5 Building Societies Act 1986 ss 56(1)(a), 57(1). Inspectors appointed under s 56, in addition to having the powers which are necessary for or incidental to the discharge of their functions under s 56, have the powers specified in s 57 (see the text and notes 21-31): s 56(9).

6 Building Societies Act 1986 s 56(1)(b).

7 Building Societies Act 1986 s 56(1)(c).

8 Building Societies Act 1986 s 56(1) (amended by the Building Societies Act 1997 Sch 7 para 22(1)). The powers conferred by the Building Societies Act 1986 s 56(1) may be exercised in relation also to a connected undertaking of a society either: (1) where the application referred to in s 56(2)(a) (see the text to note 1) so

requests; or (2) where the application contains no such request but the Authority is of the opinion that it is necessary for the purposes of the investigation into or consideration of the affairs of the society that the affairs of the connected undertaking should also be investigated or considered: s 56(3) (s 56(3), (4) amended by the Building Societies Act 1997 Sch 7 para 22(2); and SI 2001/2617). As to the meaning of 'connected undertaking' see PARA 1991 note 16. Where the inspectors are of the opinion mentioned in head (2) above in relation to a connected undertaking of a society they may, with the consent of the Authority, extend their investigation to the affairs of the connected undertaking and make their report accordingly: Building Societies Act 1986 s 56(4) (as so amended).

9 Building Societies Act 1986 s 56(6)(a) (as amended: see note 3).

10 Building Societies Act 1986 s 56(6)(c) (as amended: see note 3). 'The corresponding Companies Act limit', in relation to security for the payment of the costs of an investigation, is £5,000 or such other sum as is specified for the time being in an order under the Companies Act 1985 s 431(4) for the purposes of s 431 (see **COMPANIES** vol 15 (2009) PARA 1541): Building Societies Act 1986 s 56(11).

11 As to the meaning of 'notice' see PARA 1866 note 8.

12 Building Societies Act 1986 s 56(6)(b) (s 56(6)(b), (8) amended by the Building Societies Act 1997 Sch 7 para 22(3); and SI 2001/2617).

13 Building Societies Act 1986 s 56(6)(d)(i) (as amended: see note 3). The Authority is entitled to be repaid the expenses of the investigation defrayed by it as follows: (1) by the applicants for the investigation, to such extent, if any, as the Authority may direct; (2) by any body whose affairs were the subject of the investigation, to such extent, if any, as the Authority may direct; (3) by any person convicted of an offence in proceedings instituted as a result of the investigation, to such extent, if any, as the court by or before which he was convicted may order: s 57(10) (as amended: see note 3). A person liable under any one of heads (1)-(3) above is entitled to contribution from any other person liable under the same head, according to the amount of their respective liabilities under it: s 57(10) (as so amended).

14 Building Societies Act 1986 s 56(6)(d)(ii) (as amended: see note 3). As to the meaning of 'officer' see PARA 1944.

15 As to the meaning of 'writing' see PARA 1064 note 2.

16 Building Societies Act 1986 s 56(7) (as amended: see note 3). Where the Authority considers that it is necessary to investigate or consider the affairs of a connected undertaking under s 56(3)(b) (see note 8 head (2)), the notice procedure in s 56(7) applies in relation to the connected undertaking in the same way as it applies in relation to the society: s 56(8) (as amended: see note 12).

17 The provisions of the Building Societies Act 1986 s 56(10) and any direction given under them have effect notwithstanding anything in the rules of the society: s 56(10).

18 Building Societies Act 1986 s 56(10)(a) (as amended: see note 3). See note 17.

19 Building Societies Act 1986 s 56(10)(b) (as amended: see note 3). In default of such an appointment, the meeting may appoint its own chairman: s 56(10)(b). See note 17.

20 Building Societies Act 1986 s 56(10)(c). See note 17.

21 References to officers or to agents include past, as well as present, officers or agents, as the case may be; and 'agents' in relation to a society or any connected undertaking of a society includes its bankers, its accountants and solicitors and its auditors: Building Societies Act 1986 s 57(1) (amended by the Building Societies Act 1997 Sch 7 para 23).

22 'Body under investigation' means the society whose affairs or, as the case may be, the society whose affairs, and each connected undertaking of the society whose affairs, are the subject of the investigation: Building Societies Act 1986 s 57(1) (as amended: see note 21).

23 Building Societies Act 1986 s 57(2). If an officer or agent of the body under investigation or such other person as may be in possession of relevant information: (1) refuses to produce any document or material which it is his duty to produce; or (2) refuses to attend before the inspectors when required to do so; or (3) refuses to answer any question put to him by the inspectors with respect to the affairs of the body under investigation, the inspectors may certify the refusal in writing to the High Court: s 57(6). The court may then inquire into the case and, after hearing any witnesses who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence, may punish the offender as if he had been guilty of contempt of the court: s 57(6). As to the meaning of 'High Court' see PARA 1866 note 10. If the principal office of the society is in Scotland any reference to the High Court is to be read as a reference to the Court of Session: s

57(11). Generally Scottish matters are beyond the scope of this work. As to the requirements for principal offices see PARA 1872. As to the power of courts to punish contempt see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 502 et seq.

24 Building Societies Act 1986 s 57(3). See note 23.

25 Building Societies Act 1986 s 57(4). An answer given by a person to a question put to him under s 57(1)-(4) (see the text and notes 21-24) may be used in evidence against him: see s 57(5). However, in criminal proceedings in which that person is charged with an offence to which s 57(5A) applies (1) no evidence relating to the answer may be adduced; and (2) no question relating to it may be asked, by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person: s 57(5A) (s 57(5A), (5B) added by the Youth Justice and Criminal Evidence Act 1999 Sch 3 para 9). The Building Societies Act 1986 s 57(5A) applies to any offence other than: (a) an offence under the Perjury Act 1911 s 2 or s 5 (false statements made on oath otherwise than in judicial proceedings or made otherwise than on oath) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 716-717); (b) an offence under the Criminal Law (Consolidation) (Scotland) Act 1995 s 44(1) or s 44(2) (false statements made on oath or otherwise than on oath); or (c) an offence under the Perjury (Northern Ireland) Order 1979, SI 1979/1714 (NI 19), art 7 or art 10 (false statements made on oath otherwise than in judicial proceedings or made otherwise than on oath): Building Societies Act 1986 s 57(5B) (as so added).

26 Building Societies Act 1986 s 57(7) (as amended: see note 3).

27 Building Societies Act 1986 s 57(8) (as amended: see note 3).

28 Building Societies Act 1986 s 57(8)(a).

29 Building Societies Act 1986 s 57(8)(b) (amended by SI 2001/2617). The Authority may charge a reasonable fee for furnishing to any person a copy of a report under the Building Societies Act 1986 s 57(8)(b): s 57(8A) (added by SI 2001/2617).

30 Building Societies Act 1986 s 57(8)(c).

31 Building Societies Act 1986 s 57(9) (as amended: see note 3).

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## ***C. RESTRICTION ON USE OF NAMES AND DESCRIPTIONS***

### **2059. Control of names and descriptions.**

No person carrying on in the United Kingdom<sup>1</sup> a business of any description may, unless that person is a building society, use any name or in any other way so describe himself or hold himself out so as to indicate, or reasonably be understood to indicate that<sup>2</sup>: (1) he is a building society<sup>3</sup>; (2) he, or his business, is connected with one or more building societies<sup>4</sup>; or (3) he, or his business, is connected with building societies generally<sup>5</sup>. This does not prohibit an institution<sup>6</sup> carrying on the business of taking deposits<sup>7</sup> and making loans secured on land which has its principal place of business in a country or territory outside the United Kingdom from using the name under which it carries on business in that country or territory if<sup>8</sup>: (a) the name is used in immediate conjunction with a description distinguishing the institution from a society and the description has been and remains approved for these purposes by the Financial Services Authority<sup>9</sup>; and (b) where the name appears in writing<sup>10</sup>, the description is sufficiently prominent to secure that a person who reads the name will also read the description<sup>11</sup>. For a description to distinguish an institution from a society it must distinguish it by reference to all or any of the following matters as the Authority determines in its case, but need not indicate any other distinction<sup>12</sup>: (i) the situation of its principal place of business<sup>13</sup>; (ii) its legal status or



constitution<sup>14</sup>; and (iii) the law, if any, which authorises it to take deposits in the United Kingdom<sup>15</sup>.

The prohibition does not prevent a person from carrying on a business under a name which indicates a connection between him or his business and one or more societies, or between him or his business and societies generally, if the name has been and remains approved by the Authority<sup>16</sup>. In considering whether to approve a name, the Authority must have regard to the true connection (if any) in fact existing between the persons using, or proposing to use the name, and the particular society or societies in question or with societies generally, as the case may be, and where the connection is with a particular society or societies, the respective natures of the business of that person and the society or societies in question, and must be satisfied that the connection indicated by the name is not misleading<sup>17</sup>. The Authority must not approve the use of the name where the name indicates investment or other financial support by the society unless it is satisfied that the name indicates no more investment or support than is the case and than is, in the Authority's opinion, within the financial capacity of the society to provide<sup>18</sup>.

The Authority may direct the form in which an application for approval must be made and the information or evidence it requires generally or in the particular case<sup>19</sup>. The Authority has the power to revoke any approval of a distinguishing description or a name<sup>20</sup>. The grounds for revocation of approval are: (A) in the case of a distinguishing description, that, by reason of any change in the matters by reference to which a distinction is made, the description does not or does not any longer distinguish the institution as required<sup>21</sup>; or (B) in the case of a name, that the name has proved to be misleading to the public, that the approval has been obtained by fraud or mistake, or that there has been a change in the facts to which the Authority had regard in giving its approval<sup>22</sup>. Before any approval is revoked, the person to whom it was first given must be given an opportunity to make representations as to the proposed revocation<sup>23</sup>.

The prohibition does not prevent a person from using a description (other than his name) which, or from holding himself out in a way that, indicates a connection between himself or his business and one or more societies if and to the extent that he has been authorised to do so in writing by the society or societies in question<sup>24</sup>. Neither is a person prohibited from using a description (other than his name) which, or holding himself out in a way that, indicates a connection between himself or his business and societies generally where the connection indicated is not misleading<sup>25</sup>.

Where on an application for the first registration of a company, or the registration of a company by a new name, by the Registrar of Companies<sup>26</sup>, or approval by the Secretary of State<sup>27</sup> of words or expressions for inclusion in a business name<sup>28</sup>, or in relation to Northern Ireland approval by the Department of Enterprise, Trade and Investment<sup>29</sup> of words or descriptions for inclusion in a business name<sup>30</sup>, it appears to the Registrar, the Secretary of State or the Department, as the case may be, that the use of the name or the words or description by the person seeking to register with it would contravene the prohibition, the registration must not be made nor the approval given<sup>31</sup>.

Any person who contravenes the prohibition is liable on summary conviction to a fine<sup>32</sup>, and if the contravention involves a public display or exhibition of the offending name, description or other matter, there is a fresh contravention of the prohibition on each day during which that person causes or permits the display or exhibition to continue for which that person is liable on summary conviction to a fine<sup>33</sup>.

1 As to the meaning of 'United Kingdom' see PARA 2 note 3.

2 Building Societies Act 1986 s 107(1).

3 Building Societies Act 1986 s 107(1)(a).

4 Building Societies Act 1986 s 107(1)(b).

5 Building Societies Act 1986 s 107(1)(c).

6 'Institution' means a body corporate wherever incorporated, a partnership formed under the law of any part of the United Kingdom, a partnership or other unincorporated association of two or more persons formed under the law of a member state other than the United Kingdom: Building Societies Act 1986 s 107(12) (substituted by SI 2001/3649).

7 'Deposit' must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under s 22, and Sch 2 (see PARAS 84-85): Building Societies Act 1986 s 107(12) (as substituted: see note 6).

8 Building Societies Act 1986 s 107(2).

9 Building Societies Act 1986 s 107(2)(a) (s 107(2)(a), (3)-(7) amended by SI 2001/2617). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

10 As to the meaning of 'writing' see PARA 1064 note 2.

11 Building Societies Act 1986 s 107(2)(b).

12 Building Societies Act 1986 s 107(3) (as amended: see note 9).

13 Building Societies Act 1986 s 107(3)(a).

14 Building Societies Act 1986 s 107(3)(b).

15 Building Societies Act 1986 s 107(3)(c).

16 Building Societies Act 1986 s 107(4) (as amended: see note 9).

17 Building Societies Act 1986 s 107(5) (as amended: see note 9).

18 Building Societies Act 1986 s 107(5) (as amended: see note 9).

19 Building Societies Act 1986 s 107(6) (as amended: see note 9).

20 Building Societies Act 1986 s 107(7) (as amended: see note 9).

21 Building Societies Act 1986 s 107(7)(a).

22 Building Societies Act 1986 s 107(7)(b) (as amended: see note 9).

23 Building Societies Act 1986 s 107(7).

24 Building Societies Act 1986 s 107(8).

25 Building Societies Act 1986 s 107(9).

26 Ie under the Companies Act 1985 or the Companies (Northern Ireland) Order 1986, SI 1986/1032 (NI 6): see **COMPANIES**.

27 As to the Secretary of State see PARA 3.

28 Ie under the Business Names Act 1985 s 2 (prospectively repealed): see **COMPANIES** vol 14 (2009) PARA 223 et seq.

29 The Building Societies Act 1986 refers to the Department of Economic Development, which was renamed the Department of Enterprise, Trade and Investment: see the Departments (Northern Ireland) Order 1999, SI 1999/283 (NI 1), art 3(5).

30 Ie under the Business Names (Northern Ireland) Order 1986, SI 1986/1033 (NI 7), art 4.

31 Building Societies Act 1986 s 107(10). See generally **COMPANIES**.

32 Ie not exceeding level 5 on the standard scale: Building Societies Act 1986 s 107(11). As to the standard scale see PARA 27 note 21.

33 Building Societies Act 1986 s 107(11). The fine must not exceed £200: s 107(11).

## **UPDATE**

### **2059 Control of names and descriptions**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

TEXT AND NOTES 26-31--Building Societies Act 1986 s 107(10) amended: SI 2009/1941.

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## ***D. COMMENCEMENT OF PROCEEDINGS***

### **2060. Time limit for commencement of proceedings.**

Notwithstanding any limitation on the time for taking proceedings contained in any Act, summary proceedings for any offence under the Building Societies Act 1986 may be commenced by the Financial Services Authority<sup>1</sup> at any time within the period of one year beginning with the date on which sufficient evidence to justify prosecution, in the Authority's opinion, came to its knowledge<sup>2</sup>. However, this does not authorise the commencement of proceedings for any offence at a time more than three years after the date on which the offence was committed<sup>3</sup>.

1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 Building Societies Act 1986 s 111(1) (s 111(1), (3), (4) amended by SI 2001/2617). A certificate, purporting to be signed by or on behalf of the Authority, as to the date on which such evidence came to its knowledge, is conclusive evidence of that date: Building Societies Act 1986 s 111(3) (as so amended). In the application of s 111 to Scotland, in s 111(1) the words 'by the Authority' are omitted, and all references to the Authority are to be read as references to the Lord Advocate (s 111(4) (as so amended)), and the Criminal Procedure (Scotland) Act 1995 applies (Building Societies Act 1986 s 111(5) (amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 Sch 4 para 65)). Generally Scottish matters are beyond the scope of this work.

3 Building Societies Act 1986 s 111(2).

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## **(vi) Disputes**

### **2061. Settling disputes.**

Disputes between a building society and a member of the society<sup>1</sup> in his capacity as a member, or between a society and a representative of such a member in that capacity, in respect of any rights or obligations arising from the rules of the society or any provision of the Building Societies Act 1986 or any statutory instrument under it<sup>2</sup> may be determined only by the High Court<sup>3</sup>. Except in certain cases, no such disputes may be referred to arbitration<sup>4</sup>. The court must not hear and determine any dispute which is required to be referred to arbitration<sup>5</sup> or which is referred to the Financial Services Authority<sup>6</sup>, except that the court may hear and determine such a dispute in any case where, on the application of any person concerned, it appears to the court that application has been made by either party to the dispute to the other party for the purpose of having the dispute settled by arbitration, and that either arbitrators have not been appointed within 40 days of that application or the arbitrators have refused, or have neglected for a period of 21 days, to proceed with the reference or make an award<sup>7</sup>. The court may not hear and determine a dispute regarding a claim that publicity for a director's election address or revised director's election address<sup>8</sup>, or a statement to members with respect to matters to be dealt with at a special meeting called on a requisition of members<sup>9</sup>, or a resolution proposed to be moved by members or a statement relating to such a resolution<sup>10</sup>, would be likely to diminish substantially the confidence in the society of investing members of the public<sup>11</sup>.

Nothing in the provisions regarding arbitration<sup>12</sup> affects the jurisdiction of any court to hear and determine disputes which arise out of a mortgage or any contract other than the rules of the society<sup>13</sup>.

1 As to membership see PARA 1888 et seq.

2 Building Societies Act 1986 s 85(1) (amended by the Building Societies Act 1997 Sch 7 para 37), Building Societies Act 1986 Sch 14 para 1(2).

3 Building Societies Act 1986 Sch 14 para 1(1). As to the meaning of 'High Court' see PARA 1866 note 10. In the case of a society whose principal office is in Scotland the Court of Session has jurisdiction to hear and determine disputes: Sch 14 para 1(1). Generally Scottish matters are beyond the scope of this work.

4 Building Societies Act 1986 Sch 14 para 1(3) (which is expressed to be subject to the cases referred to in Sch 14 para 1(5) (see the text to notes 5-6)).

5 Ie under the Building Societies Act 1986 Sch 14 para 4: see PARA 2063.

6 Building Societies Act 1986 Sch 14 para 1(5) (amended by SI 2001/2617). The text refers to a dispute which is referred to the Authority under the Building Societies Act 1986 Sch 14 para 6: see PARA 2062. As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

7 Building Societies Act 1986 Sch 14 para 2.

8 See the Building Societies Act 1986 s 61(8)(a); and PARA 1946.

9 See the Building Societies Act 1986 Sch 2 para 20A(10)(a); and PARA 1978.

10 See the Building Societies Act 1986 Sch 2 para 31(4)(a); and PARA 1990.

11 Building Societies Act 1986 Sch 14 para 1(4) (amended by the Building Societies Act 1997 Sch 7 para 64(1)). The Authority is to hear and determine such disputes: see the Building Societies Act 1986 s 61(9), Sch 2 para 20A(12), Sch 2 para 31(7); and PARAS 1947, 1990.

12 Ie under the Building Societies Act 1986 Sch 14.

13 See the Building Societies Act 1986 s 85(2).

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## **2062. Role of the Financial Services Authority.**

Any dispute as to the rights of a member of a building society<sup>1</sup> to obtain particulars from the register of members<sup>2</sup> must be referred to the Financial Services Authority<sup>3</sup>.

1 le under the Building Societies Act 1986 s 5(8), Sch 2 para 15: see PARA 1973. As to membership see PARA 1888 et seq.

2 As to the register of members see PARAS 1972-1973.

3 Building Societies Act 1986 s 85(1), Sch 14 para 6(1) (Sch 14 para 6 amended by SI 2001/2617). Such a dispute is heard by the Authority as on a reference to arbitration, and its award has the same effect as that of an arbitrator acting in a reference under the Building Societies Act 1986 Sch 14 para 4(1) (see PARA 2063): Sch 14 para 6(2) (as so amended). As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

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## **2063. Arbitration.**

If the rules of a building society so provide, a dispute between a member<sup>1</sup> and the society in relation to a refusal by the society to send to its members copies of an election address or a revised election address of a director of the society<sup>2</sup>, or a statement with respect to the matters to be dealt with at a special meeting called on a requisition of members<sup>3</sup>, or a notice or a statement relating to a resolution intended to be moved by members<sup>4</sup>, is to be referred to arbitration<sup>5</sup>. This does not apply if the refusal by the society was on the grounds either that publicity for the document would be likely to diminish substantially the confidence in the society of investing members of the public, or that the rights conferred were being abused to seek needless publicity for defamatory matter<sup>6</sup>. If the rules of a society so provide, any dispute in respect of a refusal by the society to call a special meeting<sup>7</sup> is to be referred to arbitration<sup>8</sup>.

One or more arbitrators must be appointed in the manner provided for by the rules of the society, and so must another arbitrator if an appointed arbitrator dies or refuses to act<sup>9</sup>. No arbitrator acting on a reference may be beneficially interested, whether directly or indirectly, in the funds of the society<sup>10</sup>.

If the rules of the society do provide for disputes to be referred to arbitration then the rules will be treated as an arbitration agreement<sup>11</sup>. The rules may provide for the procedure to be followed on a reference to arbitration<sup>12</sup>. The award of the arbitrator, or of the majority of them if there is more than one, is final and binding<sup>13</sup>.

Nothing in the provisions regarding arbitration<sup>14</sup> affects the jurisdiction of any court to hear and determine disputes which arise out of a mortgage or any contract other than the rules of the society<sup>15</sup>.

1 As to membership see PARA 1888 et seq.

2 le in accordance with the Building Societies Act 1986 s 61(7): see PARA 1946. As to the office of director see PARAS 1944-1963.

3 le under the Building Societies Act 1986 s 5(8), Sch 2 para 20A(1)(b): see PARA 1978.

4 le under the Building Societies Act 1986 Sch 2 para 31(1): see PARA 1990.

5 Building Societies Act 1986 s 85(1), Sch 14 para 4(1) (amended by the Building Societies Act 1997 Sch 7 para 64(2)).

6 Building Societies Act 1986 Sch 14 para 4(2) (amended by the Building Societies Act 1997 Sch 7 para 64(3)). Disputes relating to a refusal on the ground that publicity for the document would be likely to diminish substantially the confidence in the society of investing members of the public are reserved for the Financial Services Authority: see PARA 2061 note 11. Disputes relating to a refusal on the ground that the rights conferred were being abused to seek needless publicity for defamatory material are for the court: see the Building Societies Act 1986 Sch 14 para 1(5); and PARA 2061.

7 le required to be called under the Building Societies Act 1986 Sch 2 para 20A(1)(a): see PARA 1978.

8 Building Societies Act 1986 Sch 14 para 4A (added by the Building Societies Act 1997 Sch 7 para 64(4)).

9 Building Societies Act 1986 Sch 14 para 5(1), (2). In relation to an arbitration in Scotland, references to an arbitrator must be read as references to an arbiter: Sch 14 para 8. Generally Scottish matters are beyond the scope of this work.

10 Building Societies Act 1986 Sch 14 para 5(3).

11 See the Building Societies Act 1986 Sch 14 para 5(6) (amended by the Arbitration Act 1996 Sch 3 para 47). As to arbitration pursuant to an arbitration agreement see the Arbitration Act 1996 Pt I (ss 1-84); and **ARBITRATION** vol 2 (2008) PARA 1209 et seq. The Building Societies Act 1986 Sch 14 para 5(6) does not apply to Scotland: Sch 14 para 5(7). See note 9.

12 Building Societies Act 1986 Sch 14 para 5(4).

13 Building Societies Act 1986 Sch 14 para 5(5).

14 le under the Building Societies Act 1986 Sch 14.

15 See the Building Societies Act 1986 s 85(2).

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## **2064. Court proceedings.**

Disputes which have not been reserved for reference to the Financial Services Authority<sup>1</sup> or to arbitration<sup>2</sup> will result in court proceedings<sup>3</sup>. Any person who institutes court proceedings in relation to a dispute<sup>4</sup> must give notice<sup>5</sup> of that fact and of the matter in dispute to the Authority<sup>6</sup>. The High Court will not proceed to hear a dispute until it is satisfied that this notice has been given<sup>7</sup>. The Authority is entitled, with the permission of the court, to attend and to be heard at such a court hearing<sup>8</sup>.

1 See PARA 2062. As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 See PARA 2063.

3 See the Building Societies Act 1986 s 85(1), Sch 14 para 1; and PARA 2061. The court may, on the application of any person concerned, also hear and determine a dispute which is so reserved if the arbitration does not proceed: see Sch 14 para 2; and PARA 2061.

4 Is a dispute to which the Building Societies Act 1986 Sch 14 para 1 applies: see PARA 2061.

5 As to the meaning of 'notice' see PARA 1866 note 8.

6 Building Societies Act 1986 Sch 14 para 3(1) (Sch 14 para 3 amended by SI 2001/2617).

7 Building Societies Act 1986 Sch 14 para 3(2).

8 Building Societies Act 1986 Sch 14 para 3(3) (as amended: see note 6).

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## **2065. Complaints.**

A complaint by a member or other customer relating to an act or omission which occurs during the performance by a building society of an activity which is regulated under the Financial Services and Markets Act 2000 will normally fall within the jurisdiction of the Financial Ombudsman Service, which operates the ombudsman scheme established under Part XVI of that Act<sup>1</sup>.

1 The reference is to the Financial Services and Markets Act 2000 Pt XVI (ss 225-234A). As to the ombudsman scheme see PARA 575 et seq. Under the rules for the operation of the scheme, the jurisdiction of the Financial Ombudsman Service also includes the consideration of complaints relating to acts or omissions in carrying on specified types of activity which are not regulated under the Financial Services and Markets Act 2000.

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## **(vii) Dissolution and Winding Up**

### **A. DISSOLUTION BY CONSENT**

#### **2066. Instrument of dissolution.**

A building society may be dissolved by an instrument of dissolution with the consent of three-quarters of the members of the society<sup>1</sup>, holding not less than two-thirds of the number of shares in the society<sup>2</sup>; their consent is testified by their signatures to an instrument of dissolution<sup>3</sup>. The instrument of dissolution is binding on all members of the society as from the date on which a copy of it is placed in the public file of the society<sup>4</sup>, and must set out:

507 (1) the liabilities and assets of the society in detail<sup>5</sup>;

- 508 (2) the number of members, and the amount standing to their credit in the accounting records of the society<sup>6</sup>;
- 509 (3) the claims of depositors and other creditors, and the provision to be made for their payment<sup>7</sup>;
- 510 (4) the intended appropriation or division of the funds and property of the society<sup>8</sup>; and
- 511 (5) the names of one or more persons to be appointed trustees for the purposes of the dissolution, and their remuneration<sup>9</sup>.

Where shares are held jointly only the representative joint holder is treated for these purposes as the holder of the shares<sup>10</sup>. Members who are minors<sup>11</sup> and members who have given notice of withdrawal and have not been paid<sup>12</sup> may consent to a dissolution and must be taken into account in calculating the number of members of the society. The duly authorised agent of a member may sign the instrument on behalf of his principal<sup>13</sup>.

1 As to membership see PARA 1888 et seq.

2 As to shares in relation to societies see PARA 1905 et seq.

3 Building Societies Act 1986 ss 86(1)(a), 87(1). An instrument of dissolution may be altered with the like consent, testified in the like manner: s 87(3).

4 Building Societies Act 1986 s 87(6). The same applies in the case of an alteration to an instrument of dissolution: s 87(6). As to the public file see PARA 1864. As to the placing of a copy of the instrument, or altered instrument, on the public file, see s 87(10) and PARA 2069.

5 Building Societies Act 1986 s 87(2)(a).

6 Building Societies Act 1986 s 87(2)(b). As to the accounting records see PARA 1991.

7 Building Societies Act 1986 s 87(2)(c). As to the Treasury's power by order under s 90B to alter priorities on a dissolution or winding up to ensure parity between ordinary creditors and non-deferred shareholders see PARA 2080.

8 Building Societies Act 1986 s 87(2)(d).

9 Building Societies Act 1986 s 87(2)(e).

10 See the Building Societies Act 1986 s 5(8), Sch 2 para 7(5); and PARA 1889. As to the meaning of 'representative joint holder' see PARA 1889. Where a representative joint holder also holds shares both jointly and severally he need only sign the statement once: *Dennison v Jeffs* [1896] 1 Ch 611.

11 *Dennison v Jeffs* [1896] 1 Ch 611; and see PARA 1891. As to minors as members see PARA 1891.

12 *Sibun v Pearce* (1890) 44 ChD 354, CA; and see PARA 1911.

13 *Dennison v Jeffs* [1896] 1 Ch 611. But see *Second Edinburgh and Leith 493rd Starr-Bowkett Building Society v Aitken* (1892) 29 SLR 456, where the Court of Session held that a signature by an agent was not sufficient.

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## **2067. Restrictions on dissolution to effect transfer.**



Except with the consent of the Financial Services Authority<sup>1</sup>, no instrument of dissolution<sup>2</sup>, or alteration of such an instrument, has any effect if the purpose of the proposed dissolution or alteration is to effect or facilitate the transfer of a building society's engagements to any other society<sup>3</sup> or the transfer of its business to a company<sup>4</sup>. Any provision in a resolution or document that members of the society<sup>5</sup> proposed to be dissolved must accept, in or towards satisfaction of their rights in the dissolution, investments (whether in shares, deposits or any other form) in a company or another society is conclusive evidence of such a purpose<sup>6</sup>.

1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 As to instruments of dissolution see PARA 2066.

3 As to the transfer of engagements see PARA 1920 et seq.

4 Building Societies Act 1986 s 87(8) (amended by the Building Societies Act 1997 Sch 7 para 38; and SI 2001/2617). As to the transfer of business to a commercial company see PARA 1927 et seq.

5 As to membership see PARA 1888 et seq.

6 Building Societies Act 1986 s 87(9).

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## **2068. Position during progress of dissolution.**

During the progress of dissolution of a building society in pursuance of an instrument of dissolution<sup>1</sup>, the Building Societies Act 1986 continues to apply as if the trustees under the instrument of dissolution were the board of directors of the society<sup>2</sup>.

Withdrawing members entitled to priority under the rules whose notices have matured before the date of the dissolution retain their priority in a winding up under an instrument of dissolution<sup>3</sup>. The representatives of deceased members have priority over withdrawing members<sup>4</sup>.

The rights of members under the rules cannot be altered by the instrument of dissolution, unless the alteration has been previously sanctioned so as to be effective as an alteration of rules<sup>5</sup>.

Where at any time a society is being wound up or dissolved by consent, a borrowing member<sup>6</sup> is not liable to pay any amount other than one which, at that time, is payable under the mortgage<sup>7</sup> or other security by which his indebtedness to the society in respect of the loan is secured<sup>8</sup>.

1 As to instruments of dissolution see PARA 2066.

2 See the Building Societies Act 1986 s 87(4). It would seem that as there is now a statutory obligation to call annual general meetings, the decision in *Payne v Coe* [1950] Ch 619, [1950] 2 All ER 111 (that there was no obligation to call annual general meetings after the beginning of the dissolution) is superseded. As to annual general meetings see PARA 1977. As to the office of director see PARAS 1944-1963.

3 *Barnard v Tomson* [1894] 1 Ch 374; *Re Counties Conservative Permanent Benefit Building Society, Davis v Norton* [1900] 2 Ch 819; and see PARA 1914.

4 *Re West London and General Permanent Benefit Building Society* (1898) 78 LT 393, CA; *Re Counties Conservative Permanent Benefit Building Society, Davis v Norton* [1900] 2 Ch 819; and see PARA 1914.

5 Eg taking away the priority of members who had given notice of withdrawal: *Botten v City and Suburban Permanent Building Society* [1895] 2 Ch 441.

6 As to the meaning of 'borrowing member' see PARA 1894.

7 As to the meaning of 'mortgage' see PARA 1868 note 9.

8 Building Societies Act 1986 s 92 (substituted by the Building Societies Act 1997 Sch 7 para 40). See also PARA 1898.

## UPDATE

### 2068 Position during progress of dissolution

TEXT AND NOTE 6--After 'dissolved by consent' read 'or is in building society insolvency or building society special administration': Building Societies Act 1986 s 92 (amended by SI 2009/805). As to building society insolvency or building society special administration, see PARA 2079.

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### 2069. Returns to the Financial Services Authority.

Within 15 days of the necessary consent being given and testified<sup>1</sup> to an instrument of dissolution of a building society<sup>2</sup> or any alteration to such an instrument, the trustees<sup>3</sup> must give notice<sup>4</sup> to the Financial Services Authority<sup>5</sup> of the fact and, except in the case of an alteration, of the date of commencement of the dissolution, enclosing a copy of the instrument or altered instrument<sup>6</sup>. Failure to comply with this requirement renders each trustee liable on summary conviction to a fine<sup>7</sup>.

Within 28 days from the termination of the dissolution the trustees must give notice to the Authority of the fact and the date of the termination, enclosing an account and balance sheet signed and certified by them as correct, showing the assets and liabilities of the society at the commencement of the dissolution, and the way in which those assets and liabilities have been applied and discharged<sup>8</sup>. Failure to comply with this requirement renders them liable on summary conviction to a fine<sup>9</sup> and, in the case of a continuing offence to an additional fine<sup>10</sup> for every day during which the offence continues<sup>11</sup>.

The Authority must keep any notice or other document received by it under the provisions described above in the public file of the society<sup>12</sup> and must record in that file the date on which the notice or document is placed in it<sup>13</sup>.

1 le in accordance with the Building Societies Act 1986 s 87(1): see PARA 2066.

2 As to instruments of dissolution see PARA 2066.

- 3 As to the trustees see PARAS 2066 text to note 9, 2070.
- 4 As to the meaning of 'notice' see PARA 1866 note 8.
- 5 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 6 Building Societies Act 1986 s 87(5) (s 87(5), (7), (10) amended by SI 2001/2617).
- 7 Building Societies Act 1986 s 87(5). The fine must not exceed level 3 on the standard scale: s 87(5). As to the standard scale see PARA 27 note 21.
- 8 Building Societies Act 1986 s 87(7) (as amended: see note 6).
- 9 le not exceeding level 2 on the standard scale: Building Societies Act 1986 s 87(7)(a).
- 10 le not exceeding £10: Building Societies Act 1986 s 87(7)(b).
- 11 Building Societies Act 1986 s 87(7).
- 12 As to the public file see PARA 1864.
- 13 Building Societies Act 1986 s 87(10) (as amended: see note 6).

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## **2070. Responsibilities of trustees.**

A trustee of an instrument of dissolution of a building society<sup>1</sup> who relies entirely on his co-trustee and takes no active part in the execution of the trust does not act 'honestly and reasonably'<sup>2</sup> so as to be entitled to claim relief from liability<sup>3</sup>.

- 1 As to instruments of dissolution see PARA 2066.
- 2 See the Trustee Act 1925 s 61; and cf *Re Pawson's Settlement* [1917] 1 Ch 541 (as to liability of trustees who have acted 'reasonably'). See further **TRUSTS** vol 48 (2007 Reissue) PARA 1123.
- 3 *Re Second East Dulwich 745th Starr-Bowkett Building Society* (1899) 68 LJCh 196.

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## **B. WINDING UP**

### **2071. Voluntary winding up.**

If a building society resolves by special resolution<sup>1</sup> that it be wound up voluntarily, then it may be wound up voluntarily under the applicable winding up legislation<sup>2</sup>. The society must send a copy of any such special resolution to the Financial Services Authority<sup>3</sup> within 15 days after it is passed<sup>4</sup> and the Authority must keep a copy in the public file of the society<sup>5</sup>. A copy of the

special resolution must also be annexed to every copy of the society's memorandum or rules issued after the resolution has been passed<sup>6</sup>, and failure to comply with either of these requirements renders the society, and any officer<sup>7</sup>, including a liquidator<sup>8</sup>, of the society who is also guilty of the offence, liable on summary conviction to a fine<sup>9</sup>.

Subject to the provisions of Part IV of the Insolvency Act 1986 relating to preferential payments<sup>10</sup>, a society's property in a voluntary winding up must be applied in satisfaction of the society's liabilities to creditors *pari passu* and, subject to that application, in accordance with the rules of the society<sup>11</sup>.

1 As to the meaning of 'special resolution' see PARA 1980.

2 Building Societies Act 1986 ss 86(1)(b), 88(1). For the purposes of s 37 (see PARA 2049), s 88, s 89 (see PARA 2072) and s 103 (see PARA 2076), the 'applicable winding up legislation' means the companies winding up legislation (ie the Insolvency Act 1986 Pt IV (ss 73-219), Pt VI (ss 230-246), Pt VII (ss 247-251), Pt XII (ss 386-387), Pt XIII (ss 388-398) and, in so far as they relate to offences under any such enactment, ss 430, 432, Sch 10 (see **COMPANY AND PARTNERSHIP INSOLVENCY**), and equivalent Northern Ireland provisions), as modified by the provisions of the Building Societies Act 1986 s 90(2), Sch 15: ss 90(1), (2), (3), 119(1), Sch 15 para 1 (amended by the Companies Act 1989 s 211(2); and SI 1989/2405). See generally **COMPANY AND PARTNERSHIP INSOLVENCY; COMPANIES**.

As to the application of other companies insolvency legislation to building societies see the Building Societies Act 1986 s 90A, Sch 15A; and PARA 2079. As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

3 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

4 Where an act is to be done within a specified time, the general rule in cases is that the day from which it runs is not to be counted: *Goldsmiths' Co v West Metropolitan Rly Co* [1904] 1 KB 1, CA; and see **TIME** vol 97 (2010) PARA 336.

5 Building Societies Act 1986 s 88(2) (amended by SI 2001/2617). As to the public file see PARA 1864.

6 Building Societies Act 1986 s 88(3).

7 As to the meaning of 'officer' see PARA 1944.

8 Building Societies Act 1986 s 88(5).

9 Building Societies Act 1986 s 88(4). The fine must not exceed level 3 on the standard scale: s 88(4). As to the standard scale see PARA 27 note 21.

10 Ie the Insolvency Act 1986 Pt IV.

11 Building Societies Act 1986 Sch 15 para 12(2) (amended by SI 2001/2617). As to the Treasury's power by order under the Building Societies Act 1986 s 90B to alter priorities on a dissolution or winding up to ensure parity between ordinary creditors and non-deferred shareholders see PARA 2080.

## UPDATE

### 2071 Voluntary winding up

TEXT AND NOTES 1, 2--However, a resolution may not be passed if the conditions in the Building Societies Act 1986 s 90D are not satisfied, or the society is in building society insolvency or building society special administration (see PARA 2079): s 88(1) (amended by the Building Societies (Insolvency and Special Administration) Order 2009, SI 2009/805).

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## **2072. Grounds for winding up by the court.**

A building society may be wound up by the court<sup>1</sup> under the applicable winding up legislation<sup>2</sup> if<sup>3</sup>:

- 512 (1) it has passed a special resolution<sup>4</sup> that it be wound up by the court<sup>5</sup>;
- 513 (2) the number of members is reduced below ten<sup>6</sup>;
- 514 (3) the number of directors is reduced below two<sup>7</sup>;
- 515 (4) being registered as a society<sup>8</sup>, the society has not been given permission under Part IV of the Financial Services and Markets Act 2000 to accept deposits<sup>9</sup>, and more than three years has expired since it was so registered<sup>10</sup>;
- 516 (5) its permission under Part IV of the Financial Services and Markets Act 2000 to accept deposits has been cancelled, and no such permission has subsequently been granted to it<sup>11</sup>;
- 517 (6) it exists for an illegal purpose<sup>12</sup>;
- 518 (7) it is unable to pay its debts<sup>13</sup>; or
- 519 (8) in the opinion of the court it is just and equitable that it should be wound up<sup>14</sup>.

In addition, the society may be wound up by the court when certain powers of the Financial Services Authority<sup>15</sup> become exercisable in relation to the society<sup>16</sup>.

The jurisdiction is vested in the High Court and the county courts. If the capital of the society paid up or credited as paid up exceeds £120,000, the proceedings must be in the High Court<sup>17</sup>; and if the paid up, or credited as paid up, capital does not exceed that sum, the county court of the district in which the society's principal office is situated has concurrent jurisdiction with the High Court to wind up the society<sup>18</sup>.

A society which is in the course of dissolution by consent, or is being wound up voluntarily, may be wound up by the court<sup>19</sup>.

On hearing a petition to wind up a society the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit<sup>20</sup>. The conditions the court may impose include conditions for securing that the society be dissolved by consent of its members<sup>21</sup>, or the society amalgamates with, or transfers its engagements to, another society<sup>22</sup>, or the society transfers its business to a company<sup>23</sup>, or any default which occasioned the petition is made good, and that the costs of the proceedings on the petition are met by those responsible for the default<sup>24</sup>.

At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the society or any creditor or contributory may, where any action or proceeding against the society is pending in the High Court or Court of Appeal, apply to the court for a stay of those proceedings, and where any other action or proceeding is pending against the society, apply to the court having jurisdiction to wind up the society to restrain any further such proceedings. The court may stay or restrain the proceedings on such terms as it thinks fit<sup>25</sup>. It has similar powers to impose conditions upon staying winding-up proceedings as it has when adjourning the petition<sup>26</sup>. If, before the presentation of a petition for the winding up by the court of the society, an instrument of dissolution<sup>27</sup> is placed in the society's public file, the winding up of the society is deemed to have commenced on the date on which the instrument is so placed, and unless the court, on proof of fraud or mistake, directs otherwise, all proceedings in the course of the dissolution are deemed to have been validly taken<sup>28</sup>.

If a winding-up order is made in respect of a society, the society must give notice of the order within 15 days to the Authority, which must keep the notice on the public file of the society<sup>29</sup>. It is an offence if a society fails to give such notice, and the society, and any officer<sup>30</sup> also guilty of the offence, is liable on summary conviction to a fine<sup>31</sup>.

The court must adjust the rights of the contributories amongst themselves and distribute any surplus in accordance with the society's rules<sup>32</sup>.

- 1 As to the meaning of 'court' see PARA 1871 note 6.
- 2 As to the meaning of 'applicable winding up legislation' see PARA 2071 note 2.
- 3 Building Societies Act 1986 ss 86(1)(b), 89(1).
- 4 As to the meaning of 'special resolution' see PARA 1980.
- 5 Building Societies Act 1986 s 89(1)(a).
- 6 Building Societies Act 1986 s 89(1)(b). As to membership see PARA 1888 et seq.
- 7 Building Societies Act 1986 s 89(1)(c).
- 8 Ie under the Building Societies Act 1986 s 5(8), Sch 2, or the Building Societies Act 1962 or the Building Societies Act 1874. See PARA 1858.
- 9 Ie permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.
- 10 Building Societies Act 1986 s 89(1)(d) (s 89(1)(d) amended, and s 89(1)(e) substituted, by SI 2001/2617).
- 11 Building Societies Act 1986 s 89(1)(e) (as substituted: see note 10).
- 12 Building Societies Act 1986 s 89(1)(f). This includes a reference to its existing after its purpose or principal purpose has ceased to be that required for the establishment of a society by s 5(1)(a) (see PARA 1856): s 89(4)(b) (substituted by the Building Societies Act 1997 Sch 7 para 39).
- 13 Building Societies Act 1986 s 89(1)(g).
- 14 Building Societies Act 1986 s 89(1)(h).
- 15 Ie referred to in the Building Societies Act 1986 s 37(1): see PARA 2049. As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.
- 16 Building Societies Act 1986 s 89(1).
- 17 Insolvency Act 1986 s 117(1), (2). See PARA 2071 note 2.
- 18 Building Societies Act 1986 s 117(2). See PARA 2071 note 2. The reference to the society's capital paid up or credited as paid up has effect as a reference to the amount standing to the credit of shares in a society as shown by the latest balance sheet: Building Societies Act 1986 Sch 15 para 15.
- 19 Building Societies Act 1986 s 86(2). As to dissolution by consent see PARA 2066; and as to voluntary winding up see PARA 2071.
- 20 See the Insolvency Act 1986 s 125; the Building Societies Act 1986 Sch 15 para 18(1); and PARA 2071 note 2. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 477.
- 21 Ie under the Building Societies Act 1986 s 87: see PARA 2066.
- 22 Ie under the Building Societies Act 1986 s 93 or s 94: see PARA 1918 et seq.
- 23 Ie under the Building Societies Act 1986 s 97: see PARA 1927 et seq.
- 24 Building Societies Act 1986 Sch 15 para 18(2). As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

25 See the Insolvency Act 1986 s 126; the Building Societies Act 1986 Sch 15 para 19; and PARA 2071 note 2. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 887.

26 See the Insolvency Act 1986 s 147; the Building Societies Act 1986 Sch 15 para 24; and PARA 2071 note 2. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 902.

27 lie under the Building Societies Act 1986 s 87: see PARA 2066.

28 See the Insolvency Act 1986 s 129(1), (1A); the Building Societies Act 1986 Sch 15 para 20; PARA 2071 note 2; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 489. As to the public file see PARA 1864.

29 Building Societies Act 1986 Sch 15 para 21(3) (amended by SI 2001/2617).

30 As to the meaning of 'officer' see PARA 1944.

31 Building Societies Act 1986 Sch 15 para 21(4). The fine must not exceed level 3 on the standard scale: Sch 15 para 21(4). As to the standard scale see PARA 27 note 21.

32 See the Insolvency Act 1986 s 154; the Building Societies Act 1986 Sch 15 para 25; and PARA 2071 note 2. See also **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 831. As to the Treasury's power by order under s 90B to alter priorities on a dissolution or winding up to ensure parity between ordinary creditors and non-deferred shareholders see PARA 2080.

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## 2073. Petitioners.

A petition for the winding up of a building society may be presented by the Financial Services Authority<sup>1</sup>, the society or its directors<sup>2</sup>, any creditor or creditors (including any contingent or prospective creditor), or any contributory<sup>3</sup> or contributories, either together or separately<sup>4</sup>. A petition may only be presented by any contributory if the number of members<sup>5</sup> is reduced below ten, or the share in respect of which he is a contributory has been held, either by him or, if it has devolved to him on the death of a former holder, between them, for at least six months before the commencement of the winding up<sup>6</sup>.

1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 As to the office of director see PARAS 1944-1963.

3 'Contributory' means every person liable to contribute to the assets of the society in the event of its being wound up, and includes any person alleged to be a contributory for the purposes of all proceedings for determining, and all proceedings prior to the determination of, the persons who are deemed to be contributories, and also includes persons who are liable to pay or contribute to the payment of: (1) any debt or liability of the society being wound up; or (2) any sum for the adjustment of rights of members among themselves; or (3) the expenses of winding up, but does not include persons liable to contribute by virtue of the declaration by the court under the Insolvency Act 1986 s 213 (or, in the case of Northern Ireland, under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 177) (imputed responsibility for fraudulent trading) or under the Insolvency Act 1986 s 214 (or, in the case of Northern Ireland, under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405 (NI 19), art 178) (wrongful trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 911, 914); Building Societies Act 1986 s 89(5), Sch 15 paras 9(2), 37; and see PARA 2071 note 2. The extent of the liability of a member of a building society in a winding up does not exceed the extent of his liability under Sch 2 para 6(2): see Sch 15 paras 7(4), 35(4); and PARA 2078.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

4 Building Societies Act 1986 s 89(2) (amended by SI 2001/2617). The Authority also has the power to present a winding-up petition in the event of certain of its powers becoming exercisable in relation to a society: see the Building Societies Act 1986 s 37, s 89(1), (2); and PARAS 2049, 2072. Section 89(2) is also subject to the 'applicable winding up legislation' (see PARA 2071 note 2): see s 89(2).

5 As to membership see PARA 1888 et seq.

6 Building Societies Act 1986 s 89(3).

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## **2074. Dissolution of a society which has been wound up.**

Where a building society has been wound up voluntarily, it is dissolved three months after the return of the final meetings of the society and its creditors made by the liquidator is placed in the public file<sup>1</sup> of the society<sup>2</sup>, or at any later date that the court thinks fit. Where a society has been wound up by the court, it is dissolved three months after the liquidator's notice of the final meeting, or the notice of the completion of the winding up from the official receiver is placed in the public file of the society, or on such later date as the Financial Services Authority<sup>3</sup> may, subject to appeal, direct<sup>4</sup>.

When a society is dissolved by consent or following a winding up, all property and rights vested in it or held on trust for it, excluding property held by it on trust for another person, are deemed to be bona vacantia, subject to the power of the court to declare the dissolution void<sup>5</sup>.

1 As to the public file see PARA 1864.

2 Building Societies Act 1986 s 90, Sch 15 para 56(1); and see PARA 2071 note 2. As to which court has jurisdiction see PARA 2072 text and notes 17-18.

3 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

4 See the Building Societies Act 1986 Sch 15 para 29 (amended by SI 2001/2617), and the Building Societies Act 1986 Sch 15 para 56(2) (amended by SI 1989/2405).

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

5 See the Companies Act 1985 ss 654-658 (prospectively repealed) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 933 et seq) (as to replacement provisions see the Companies Act 2006 ss 1012-1023, 1034), and the equivalent Northern Ireland provisions; applied to building societies by the Building Societies Act 1986 Sch 15 para 57(1)-(3). As to the power of the court to declare a dissolution void see PARA 2075.

## **UPDATE**

### **2074 Dissolution of a society which has been wound up**

NOTE 5--Building Societies Act 1986 Sch 15 paras 57(1), (3) substituted: SI 2009/1941.



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## **2075. Power of court to declare dissolution of building society void.**

Where a building society has been dissolved by consent<sup>1</sup> or following a winding up<sup>2</sup>, the High Court<sup>3</sup> may, on an application by the trustees appointed for the purposes of the dissolution by consent<sup>4</sup> or by the liquidator or by any other person appearing to the court to be interested<sup>5</sup>, within 12 years after the date on which the society was dissolved, make an order on such terms as the court thinks fit declaring the dissolution to have been void<sup>6</sup>. When an order is made, such proceedings may be taken as might have been taken if the society had not been dissolved<sup>7</sup>. Within seven days of the order being made, or such further time as the court allows, the applicant must provide the Financial Services Authority<sup>8</sup> with a copy of the order, which the Authority must keep in the public file<sup>9</sup> of the society<sup>10</sup>. Failure to do so renders the applicant liable on summary conviction to a fine<sup>11</sup> and, in the case of a continuing offence, to an additional fine<sup>12</sup> for every day during which the offence continues<sup>13</sup>.

1    Ie under the Building Societies Act 1986 s 87: see PARA 2066 et seq.

2    Ie under the Building Societies Act 1986 s 88 or s 89: see PARAS 2071-2073.

3    As to the meaning of 'High Court' see PARA 1866 note 10. In relation to a society whose principal office was in Scotland the power vests in the Court of Session: Building Societies Act 1986 s 91(1). Generally Scottish matters are beyond the scope of this work. As to the requirements for principal offices see PARA 1872.

4    See note 1.

5    Building Societies Act 1986 s 91(2).

6    Building Societies Act 1986 s 91(1), (2).

7    Building Societies Act 1986 s 91(3).

8    As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

9    As to the public file see PARA 1864.

10   Building Societies Act 1986 s 91(4) (amended by SI 2001/2617).

11   Ie not exceeding level 3 on the standard scale: Building Societies Act 1986 s 91(5)(a). As to the standard scale see PARA 27 note 21.

12   Ie not exceeding £40: Building Societies Act 1986 s 91(5)(b).

13   Building Societies Act 1986 s 91(5).

## **UPDATE**

### **2075 Power of court to declare dissolution of building society void**

TEXT AND NOTE 2--After 'Following winding up' read ', building society insolvency or building society special administration': Building Societies Act 1986 s 91(1), (2) (amended by the Building Societies (Insolvency and Special Administration) Order 2009, SI 2009/805). As to building society insolvency or building society special administration, see PARA 2079.

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## **2076. Cancellation of registration.**

The Financial Services Authority<sup>1</sup> may cancel the registration of a building society if it is satisfied that<sup>2</sup>: (1) the certificate of incorporation has been obtained for the society by fraud or mistake and that the society does not have permission under Part IV of the Financial Services and Markets Act 2000<sup>3</sup> to accept deposits<sup>4</sup>; or (2) the society has ceased to exist<sup>5</sup>. Before cancelling the registration of a society under these provisions, the Authority must give the society not less than two months' notice<sup>6</sup>, specifying briefly the grounds of the proposed cancellation<sup>7</sup>. The society may appeal against cancellation in these circumstances to the High Court<sup>8</sup>, where its principal office<sup>9</sup> is situated in England and Wales or in Northern Ireland, or to the Court of Session where that office is situated in Scotland, and the court, if it thinks it just to do so, may set aside the cancellation<sup>10</sup>. The Authority may in any event, if it thinks fit, cancel the registration of a society at the request of the society, evidenced in such manner as the Authority may direct<sup>11</sup>.

The Authority must cancel the registration of a society where it is satisfied that a society has been dissolved following an amalgamation<sup>12</sup>, a transfer of its engagements<sup>13</sup> or a transfer of its business<sup>14</sup>, or wound up under the applicable winding up legislation<sup>15</sup> and dissolved<sup>16</sup>.

Any cancellation must be in writing<sup>17</sup> signed by the Authority<sup>18</sup>.

1 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

2 Building Societies Act 1986 s 103(2) (s 103(1)-(4), (8) amended by SI 2001/2617).

3 I.e. permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.

4 Building Societies Act 1986 s 103(2)(a) (as amended: see note 2). As to the incorporation of societies see PARAS 1865-1866.

5 Building Societies Act 1986d s 103(2)(b).

6 As to the meaning of 'notice' see PARA 1866 note 8.

7 Building Societies Act 1986 s 103(4) (as amended: see note 2).

8 As to the meaning of 'High Court' see PARA 1866 note 10.

9 As to the requirements for principal offices see PARA 1872.

10 Building Societies Act 1986 s 103(5). Generally Scottish matters are beyond the scope of this work.

11 Building Societies Act 1986 s 103(3) (as amended: see note 2).

12 I.e. by virtue of the Building Societies Act 1986 s 93(5): see PARA 1919.

13 I.e. by virtue of the Building Societies Act 1986 s 94(10): see PARA 1921.

14 I.e. by virtue of the Building Societies Act 1986 s 97(9) or s 97(10): see PARA 1938.

15 As to the meaning of 'applicable winding up legislation' see PARA 2071 note 2.

16 Building Societies Act 1986 s 103(1) (as amended: see note 2).

17 As to the meaning of 'writing' see PARA 1064 note 2.

18 Building Societies Act 1986 s 103(8) (as amended: see note 2).

## UPDATE

### 2076 Cancellation of registration

TEXT AND NOTE 16--After 'and dissolved' read ', or that the society has been dissolved following building society insolvency or building society special administration': Building Societies Act 1986 s 103(1) (amended by SI 2009/805). As to building society insolvency or building society special administration, see PARA 2079.

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### 2077. Notice and effect of cancellation.

As soon as practicable after the cancellation of registration of a building society<sup>1</sup> the Financial Services Authority<sup>2</sup> must cause a notice of the cancellation to be published in the London Gazette, the Edinburgh Gazette or the Belfast Gazette according to the situation of the society's principal office<sup>3</sup> and, if it thinks fit, in one or more newspapers<sup>4</sup>.

If registration is cancelled<sup>5</sup> otherwise than following a dissolution, then the society may continue to exist, but, subject to the right to appeal<sup>6</sup>, it ceases to be an incorporated society under the Building Societies Act 1986 and accordingly ceases to be a building society within the meaning of the Act<sup>7</sup>. This is without prejudice to any liability actually incurred by the society, and any such liability may be enforced against the society as if the cancellation had not taken place<sup>8</sup>. The society may still be ordered to be wound up<sup>9</sup>.

1 See PARA 2076.

2 As to the functions of the Financial Services Authority in relation to building societies see PARA 1863. As to the Authority generally see PARAS 4, 6 et seq.

3 As to the requirements for principal offices see PARA 1872.

4 Building Societies Act 1986 s 103(9) (amended by SI 2001/2617).

5 Ie under the Building Societies Act 1986 s 103(2) or s 103(3): see PARA 2076.

6 Ie conferred by the Building Societies Act 1986 s 103(5): see PARA 2076.

7 Building Societies Act 1986 s 103(6). As to the incorporation of societies see PARAS 1865-1866.

8 Building Societies Act 1986 s 103(7).

9 *Re Grosvenor House Property Acquisition and Investment Building Society* (1902) 71 LJCh 748.

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## **2078. Liabilities of members.**

Where at any time a building society is being wound up or dissolved by consent, a borrowing member<sup>1</sup> is not liable to pay any amount other than one which, at that time, is payable under the mortgage<sup>2</sup> or other security by which his indebtedness to the society in respect of the loan is secured<sup>3</sup>. He can redeem on payment of the full amount owing under the mortgage<sup>4</sup> but he cannot be put on the list of contributories<sup>5</sup>. The liability at any time of a shareholding member<sup>6</sup> of a society is limited to the amount which, at that time, has been actually paid, or is in arrear, on his shares in the society<sup>7</sup>. The liability at any time of a borrowing member of a society is limited to the amount which, at that time, is payable under the mortgage or other security by which his indebtedness to the society in respect of the loan is secured<sup>8</sup>. An investing member who has withdrawn and been paid the amount of his shares, although within a year of the commencement of the winding up of a society, is under no liability, being a past member<sup>9</sup>.

In the case of a transfer of shares in a society after a compulsory winding-up order, the transferee is not entitled to be registered as owner of the shares without the sanction of the court. The court has power to order the rectification of the register of members by the insertion of the transferee's name, but the exercise of the power is discretionary and an order will not be made except on strong grounds<sup>10</sup>.

1 As to the meaning of 'borrowing member' see PARA 1894.

2 As to the meaning of 'mortgage' see PARA 1868 note 9.

3 Building Societies Act 1986 s 92 (substituted by the Building Societies Act 1997 Sch 7 para 40). See also PARAS 1898, 2068.

4 *Brownlie v Russell* (1883) 8 App Cas 235, HL.

5 *Re Middlesbrough, Redcar, and Saltburn etc Building Society* (1889) 58 LJCh 771.

6 As to the meaning of 'shareholding member' see PARA 1894.

7 Building Societies Act 1986 s 5(8), Sch 2 para 6(1) (Sch 2 para 6 substituted by the Building Societies Act 1997 s 2(3)). See PARA 1898. As to shares in relation to societies see PARA 1905 et seq.

8 Building Societies Act 1986 Sch 2 para 6(2) (as substituted: see note 7). See PARA 1898.

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

9 *Re Sheffield and South Yorkshire Permanent Building Society (in liquidation)* (1889) 22 QBD 470, DC. See also the Building Societies Act 1986 s 90, Sch 15 para 7(2) (see PARA 2071 note 2), where the reference to past members in the Insolvency Act 1986 s 74(1) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 704) is excluded in relation to building societies.

10 *Re Onward Building Society* [1891] 2 QB 463, CA. As to the register of members see PARAS 1972-1973.

## **UPDATE**

## **2078 Liabilities of members**

TEXT AND NOTE 1--After 'dissolved by consent' read 'or is in building society insolvency or building society special administration': Building Societies Act 1986 s 92 (amended by SI 2009/805).

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## **2079. Application of other companies insolvency legislation.**

For the purpose of: (1) enabling voluntary arrangements to be approved in relation to building societies<sup>1</sup>; (2) enabling administration orders to be made in relation to societies<sup>2</sup>; and (3) making provision with respect to persons appointed as receivers and managers of societies' property<sup>3</sup>, certain provisions of the Insolvency Act 1986<sup>4</sup> are applied in relation to building societies with modifications<sup>5</sup>.

1 Building Societies Act 1986 s 90A(a) (s 90A added by the Building Societies Act 1997 s 39(1)).

As to the power to modify certain legislation applying in relation to building societies see the Banking (Special Provisions) Act 2008 s 11; and PARA 1856 note 1.

2 Building Societies Act 1986 s 90A(b) (as added: see note 1).

3 Building Societies Act 1986 s 90A(c) (as added: see note 1).

4 The provisions in question are the Insolvency Act 1986 Pt I (ss 1-7B) (voluntary arrangements) (except s 1A), Pt II (s 8) (administrations), Pt III Ch I (ss 28-49) (receivers and managers), Pt VI (ss 230-246) (provisions applying to companies which are insolvent or in liquidation), Pt VII (ss 247-251) (interpretation), Pt XII (ss 386-387) (preferential debts), Pt XIII (ss 388-398) (insolvency practitioners), s 434 (Crown application), Pt XVIII (ss 435-436A) (interpretation) and, in so far as they relate to offences under any such enactment, ss 430, 432, Sch 10 (see **COMPANY AND PARTNERSHIP INSOLVENCY**), and equivalent Northern Ireland provisions: see the Building Societies Act 1986 s 90A (as added: see note 1), Sch 15A para 1(2) (Sch 15A added by the Building Societies Act 1997 Sch 6; and the Building Societies Act 1986 Sch 15A para 1(2) amended by the Insolvency Act 2000 Sch 2 para 14(1), (2); and SI 2002/3152).

5 The modifications are set out in the Building Societies Act 1986 Sch 15A (as added (see note 4); and amended by the Insolvency Act 2000 Sch 2 para 14; SI 2001/2617; SI 2001/3649; SI 2002/3152; SI 2007/2194).

## **UPDATE**

## **2079 Application of other companies insolvency legislation**

TEXT AND NOTES--The Banking Act 2009 Pts 2, 3 (ss 90-168) (bank insolvency and bank administration: see PARAS 791C.1-791C.3) also apply in relation to building societies, subject to certain modifications, so as to provide for a building society insolvency and building society special administration regime: see the Building Societies Act 1986 s 90C (ss 89A, 90C-90E added by SI 2009/805); and SI 2009/805 Sch 1. On a petition for a winding up order or an application for an administration order in respect of a building society the court may, instead, make a building society insolvency order: see the Building Societies Act 1986 s 89A. Specified conditions must be satisfied before, in respect of a building society, an application for an administration order is determined, a petition for a winding up order is determined, a resolution for a voluntary winding up order is passed or an administrator is appointed: see s 90D. The Company Directors

Disqualification Act 1986 is modified in relation to building society special administration: see s 21E (added by SI 2009/805); and the Building Societies Act 1986 s 90E.

NOTES 4, 5--Building Societies Act 1986 Sch 15A further amended: SI 2009/1941.

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### ***C. POWER TO ALTER PRIORITIES ON DISSOLUTION OR WINDING UP***

#### **2080. Power of the Treasury.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. The Treasury may by order<sup>2</sup> make provision for the purpose of ensuring that, on the winding up<sup>3</sup>, or dissolution by consent<sup>4</sup>, of a building society, any assets available for satisfying the society's liabilities to creditors or to shareholders are applied in satisfying those liabilities *pari passu*<sup>5</sup>.

Liabilities to creditors do not include: (1) liabilities in respect of subordinated deposits<sup>6</sup>; (2) liabilities in respect of preferential debts<sup>7</sup>; (3) any other category of liability which the Treasury specifies in the order for these purposes<sup>8</sup>. Liabilities to shareholders do not include liabilities in respect of deferred shares<sup>9</sup>.

The net effect of any such order would be that ordinary and non-deferred shareholders rank equally in a winding up or dissolution.

1 The Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 s 2 comes into force on such day as the Treasury may by order made by statutory instrument appoint, and different days may be appointed for different purposes: see s 6. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. At the date at which this volume states the law no such day had been appointed.

2 An order under the Building Societies Act 1986 s 90B may (1) make amendments of the Building Societies Act 1986; (2) make different provision for different purposes; (3) make such consequential, supplementary, transitional and saving provision as appears to the Treasury to be necessary or expedient: s 90B(5) (s 90B prospectively added by the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 s 2). See note 1. The power to make an order under the Building Societies Act 1986 s 90B is exercisable by statutory instrument but no such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 90B(6) (as so prospectively added).

3 As to winding up see PARA 2071 et seq.

4 As to dissolution by consent see PARA 2066 et seq.

5 Building Societies Act 1986 s 90B(1) (as prospectively added: see note 2). See note 1.

6 Building Societies Act 1986 s 90B(2)(a) (as prospectively added: see note 2). See note 1.

7 Building Societies Act 1986 s 90B(2)(b) (as prospectively added: see note 2). See note 1. A preferential debt is a debt which constitutes a preferential debt for the purposes of any of the enactments specified in Sch 15 para 1 (see PARA 2071) (or which would constitute such a debt if the society were being wound up): s 90B(4) (as so prospectively added).

8 Building Societies Act 1986 s 90B(2)(c) (as prospectively added: see note 2). See note 1.

<sup>9</sup> Building Societies Act 1986 s 90B(3) (as prospectively added: see note 2). See note 1. As to the meaning of 'deferred shares' see PARA 1906.

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## **(2) FRIENDLY SOCIETIES**

### **(i) Introduction**

#### **A. IN GENERAL**

##### **(A) SCOPE**

##### **2081. Scope.**

This section of the title gives an account of the law governing societies of two principal types:

- 520 (1) societies registered under the Friendly Societies Act 1974<sup>1</sup>; and
- 521 (2) friendly societies registered and incorporated under the Friendly Societies Act 1992<sup>2</sup>.

In addition, coverage is given of such law as there is relating to unregistered friendly societies<sup>3</sup>.

Of the societies falling within head (1) above, by far the most important are registered friendly societies, but there are a number of other types of society which fall within this head<sup>4</sup>. New societies may no longer be registered under the Friendly Societies Act 1974<sup>5</sup>, and certain provisions of that Act are consequently no longer in force, but many remain for the purpose of regulating the conduct of existing registered societies<sup>6</sup>.

Registered friendly societies (as distinct from other registered societies) are subject to regulation under both the Friendly Societies Act 1974 and the Friendly Societies Act 1992. Some provisions of the Friendly Societies Act 1974<sup>7</sup> no longer apply to registered friendly societies, but are replaced, only in relation to registered friendly societies<sup>8</sup>, by equivalent provisions in the Friendly Societies Act 1992<sup>9</sup>, much of which applies to friendly societies whether they are registered under the Friendly Societies Act 1974 or registered and incorporated under the Friendly Societies Act 1992<sup>10</sup>.

In summary:

- 522 (a) registered societies which are friendly societies are regulated partly by the Friendly Societies Act 1974 and partly by the Friendly Societies Act 1992; accordingly, in this section of the title, the relevant law may be found with the law relating to registered societies<sup>11</sup>, or that relating to friendly societies generally<sup>12</sup>, as the case may be;
- 523 (b) existing registered friendly societies may, and each new friendly society must, be registered and incorporated under the Friendly Societies Act 1992, and upon that event are governed solely by that Act<sup>13</sup>;
- 524 (c) registered societies other than friendly societies are regulated, for registration and allied purposes, solely by the Friendly Societies Act 1974<sup>14</sup>.

In addition to the legislation relating solely to friendly societies mentioned above, friendly societies carrying out activities that are regulated under the Financial Services and Markets Act 2000 require permission from the Financial Services Authority to carry out those activities<sup>15</sup>.

1 See PARAS 2149-2292.

2 See PARAS 2110-2148.

3 See PARAS 2098-2104.

4 See PARA 2089.

5 See PARA 2149.

6 See generally PARAS 2149-2292.

7 Eg the Friendly Societies Act 1974 ss 29-45 (accounts, valuations, inspections etc) (see PARAS 2202-2228), ss 76-80 (disputes) (see PARAS 2245-2256).

8 Thus they remain in force in relation to other types of registered society.

9 See the Friendly Societies Act 1992 ss 65-83; and PARA 2319 et seq.

10 See further PARA 2082.

11 See PARAS 2149-2292.

12 See PARAS 2293-2393.

13 See PARAS 2085, 2110 et seq, 2293 et seq.

14 See PARAS 2149-2292.

15 See PARA 2109. As to activities regulated under the Financial Services and Markets Act 2000 see PARA 84 et seq. As to the Financial Services Authority see PARA 2105 and also PARAS 4, 6 et seq.

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## **2082. Terminology.**

It is important to distinguish between the following terms in their use throughout the coverage of friendly societies:

525 (1) 'registered society', that is to say any society, including a friendly society<sup>1</sup>, registered<sup>2</sup> under the Friendly Societies Act 1974<sup>3</sup>;

526 (2) 'registered friendly society', that is to say a friendly society registered under that Act<sup>4</sup>;

527 (3) 'incorporated friendly society', or 'incorporated society', that is to say a friendly society registered<sup>5</sup> and incorporated under the Friendly Societies Act 1992<sup>6</sup>.

In the provisions of the Friendly Societies Act 1974 describing the kinds of society which may be or remain registered under that Act<sup>7</sup>, 'friendly society' means a society providing by voluntary subscriptions of its members, with or without the aid of donations, for any of the purposes specified by statute<sup>8</sup>.



In the Friendly Societies Act 1992, 'friendly society', without further qualification, means an incorporated friendly society or a registered friendly society<sup>9</sup>.

1 As to the meaning of 'friendly society' see further the text and notes 7-9.

2 'Registered' in the Friendly Societies Act 1974 means registered under that Act or any other Act (whether similar in extent or not) which at any time before 1 April 1975 made similar provision for registration: s 111(1).

3 See the Friendly Societies Act 1974 s 111(1). As to the prohibition on registration of new societies under the Friendly Societies Act 1974 see PARA 2149. As to the registration of branches of societies under that Act see PARAS 2151-2153. See also note 5. Societies and branches formerly registered under equivalent Northern Ireland provisions are treated as registered under the Friendly Societies Act 1974: see PARA 2095 note 2.

4 See the Friendly Societies Act 1974 s 7(2)(a); the Friendly Societies Act 1992 s 116; and PARAS 2084, 2087, 2149.

5 Registration under the Friendly Societies Act 1992, which is a part of the process of, and a necessary prerequisite to, incorporation, is to be distinguished from registration under the Friendly Societies Act 1974, which is the event and condition on which a society became and remains entitled to the privileges conferred and subject to the liabilities imposed by that Act. Accordingly, since no society can be incorporated under the Friendly Societies Act 1992 without first being registered under it, the definition here given includes the words 'registered and' before 'incorporated' even though they are not in s 116.

6 See the Friendly Societies Act 1974 s 116; and PARA 2085.

7 See the Friendly Societies Act 1974 s 7(1): see PARA 2089.

8 Friendly Societies Act 1974 s 7(1)(a) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 4). As to the statutory purposes see PARA 2096.

9 Friendly Societies Act 1992 s 116.

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## (B) FRIENDLY SOCIETIES

### **2083. Societies which are friendly societies.**

A friendly society is a voluntary association of individuals, unincorporated or incorporated, subscribing for provident benefits. Friendly societies form part of a main group of voluntary benefit thrift and provident societies<sup>1</sup>. In recent years the benefits of friendly societies have been provided primarily in the form of long term life insurance, but also include provision for sickness and unemployment benefits, and funeral expenses. In addition, friendly societies may carry on social or benevolent activities, particularly for members in financial difficulties, on either a contractual or a discretionary basis. There is a close affinity in the early history and legislation of friendly societies, co-operative societies, building societies and trade unions<sup>2</sup>.

A friendly society may: (1) be registered under the Friendly Societies Act 1974<sup>3</sup> as an unincorporated association of individuals (a 'registered friendly society')<sup>4</sup>; (2) be registered and incorporated under the Friendly Societies Act 1992 (an 'incorporated friendly society')<sup>5</sup>; or (3) be unregistered<sup>6</sup>.

1 The others are building societies (see PARA 1856 et seq), co-operative societies (see PARA 2394 et seq) and trade unions (see PARA 2100 note 1; and **EMPLOYMENT** vol 40 (2009) PARA 846 et seq). As to societies of the same general nature, and subject to much of the same legislation, see PARA 2089.

2 For an account of the origin, early history, governing legislation and characteristics of friendly societies and other benefit or thrift associations see Beveridge *Voluntary Action* (1948) and Gosden *Self-Help: Voluntary Associations in nineteenth-century Britain* (1973).

3 Since 1 February 1993 (ie the commencement date of the Friendly Societies Act 1992 s 93), no new society can be registered under the Friendly Societies Act 1974 (see the Friendly Societies Act 1992 s 93(1)); any new society seeking registration must now be registered and incorporated under the Friendly Societies Act 1992. As to the meaning of 'incorporated friendly society' see PARA 2082.

4 See PARA 2149 et seq.

5 See PARA 2085.

6 See PARAS 2098-2104.

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## **2084. Registered and unregistered friendly societies.**

Friendly societies<sup>1</sup> may be incorporated<sup>2</sup>, registered<sup>3</sup> or unregistered<sup>4</sup>. While the permitted purposes of an incorporated or registered friendly society are defined by statute<sup>5</sup>, there is no equivalent legal definition of unregistered friendly society. Unlike registered or incorporated friendly societies, unregistered friendly societies are not capable of meeting the conditions for the grant of permission by the Financial Services Authority under Part IV of the Financial Services and Markets Act 2000<sup>6</sup> to carry on the regulated activities of effecting or carrying out contracts of insurance<sup>7</sup>.

Where legislation refers expressly to unregistered friendly societies or where mention is made of friendly societies without reference to registration, an unregistered friendly society is a society the purposes of which are substantially the same as those necessary for registration under the Friendly Societies Act 1974 or incorporation under the Friendly Societies Act 1992<sup>8</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 See PARA 2110 et seq.

3 See PARA 2149 et seq.

4 See PARA 2098 et seq.

5 See PARA 2109.

6 Ie the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 84 et seq. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

7 See the Financial Services and Markets Act 2000 s 41, Sch 6 para 1(1); and PARA 351. As to activities regulated under the Financial Services and Markets Act 2000 see PARA 84 et seq. Unregistered societies commonly give death benefits, but there has been no direct decision on what constitutes carrying on life assurance business by such societies. A co-operative society which provided in its rules for payment of a sum on the death of a member or his wife proportionate to the amount of his purchases was held not to carry on such business, as no policy was issued or premiums paid, there was no obligation to appropriate any sum to an insurance fund, and the society might in general meeting at any time terminate the arrangement: *Hampton v*

*Toxteth Co-operative Provident Society Ltd* [1915] 1 Ch 721, CA; and see also *Nelson & Co v Board of Trade* (1901) 84 LT 565.

8 See PARAS 260, 274.

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## **2085. Incorporated friendly societies.**

Institutions which provide long term life insurance are prohibited by European Union insurance legislation from engaging directly in other activities, although they may offer other services through separately controlled and financed subsidiaries<sup>1</sup>. Under the Friendly Societies Act 1974, friendly societies<sup>2</sup> were prohibited from owning subsidiaries. However, under the Friendly Societies Act 1992, registered friendly societies<sup>3</sup> are now capable of being incorporated and acquiring legal personality<sup>4</sup>. The consequences of such incorporation are that friendly societies may own their assets and establish subsidiaries or, together with other societies, jointly control other bodies in order to offer a wider range of financial services<sup>5</sup>. Further, an incorporated society<sup>6</sup> has the power to invest funds and provide financial assistance to subsidiaries and jointly controlled bodies, as well as offer the traditional providential benefits of friendly societies<sup>7</sup>.

1 See the Life Assurance Consolidation Directive (ie European Parliament and Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) concerning life assurance); and **INSURANCE** vol 25 (2003 Reissue) PARA 21.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to the meaning of 'registered friendly society' see PARA 2082.

4 See the Friendly Societies Act 1992 Pt II (ss 5-26); and PARA 2110 et seq.

5 See the Friendly Societies Act 1992 s 13, Sch 8; and PARAS 2110-2148.

6 As to the meaning of 'incorporated society' see PARA 2082.

7 See the Friendly Societies Act 1992 s 14; and PARA 2136.

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## **2086. When a friendly society is a charity.**

If, under the rules of a friendly society, poverty is a necessary qualification for participation in the benefits of the society, the society may be a charity in the legal sense and may enjoy some of the privileges of charitable institutions<sup>1</sup>, but not otherwise<sup>2</sup>. A friendly society does not become charitable because it receives donations and subscriptions<sup>3</sup>. The word 'benevolent' includes purposes that do not come within the technical meaning of charitable purposes<sup>4</sup>. Registered friendly societies and branches<sup>5</sup> which are charities are not required to be registered

under the Charities Act 1993 as they are exempt charities<sup>6</sup>, although they will no longer be exempt under the Charities Act 2006<sup>7</sup>.

1 *Spiller v Maude* (1881) 32 ChD 158n; *Pease v Pattinson* (1886) 32 ChD 154; *Re Buck, Bruty v Mackey* [1896] 2 Ch 727; *Re Lacy, Royal General Theatrical Fund Association v Kydd* [1899] 2 Ch 149; cf *Anon* (1745) 3 Atk 277. The law as stated in these cases will be affected by the Charities Act 2006 Pt 1 (ss 1-5) (meanings of 'charity' and 'charitable purpose'): see **CHARITIES** vol 8 (2010) PARA 1 et seq. As to charitable institutions see **CHARITIES** vol 8 (2010) PARA 1 et seq.

2 *Re Clark's Trust* (1875) 1 ChD 497; *Cunnack v Edwards* [1896] 2 Ch 679, CA; *Braithwaite v A-G* [1909] 1 Ch 510.

3 *Re Clark's Trust* (1875) 1 ChD 497 at 500; *Re Buck, Bruty v Mackey* [1896] 2 Ch 727 at 733.

4 *James v Allen* (1817) 3 Mer 17; *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] AC 341, [1944] 2 All ER 60, HL; and see **CHARITIES** vol 8 (2010) PARAS 65, 89.

5 As to branches of societies see PARA 2091.

6 See the Charities Act 1993 ss 3(5)(a), 96(1), Sch 2 para (y); and the Interpretation Act 1978 s 17(2). See also **CHARITIES** vol 8 (2010) PARA 315.

7 As from a day to be appointed, registered friendly societies and branches will no longer be exempt charities: see the Charities Act 1993 Sch 2 para (y) (prospectively amended by the Charities Act 2006 s 11(1), (8)). At the date at which this volume states the law, no such day had been appointed.

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## **2087. Types of registered friendly societies.**

There are several distinct types of registered friendly societies<sup>1</sup>. Some friendly societies may accumulate their funds by the contributions or levies paid by members and interest on investments, and use them only for the payment of benefits. Others, which are known as dividing societies and include slate clubs and tontine<sup>2</sup> societies, periodically, and generally annually, divide in cash among their members the balance of the funds remaining after all claims have been paid and provided for<sup>3</sup>. In another form of dividing society there is no actual division, but at the end of the year shares in the balance remaining in the benefit fund are appropriated to members' accounts. The accumulations of these shares and interest are paid on death or on the attainment of a certain age or, subject generally to forfeiture of one or more of the yearly accumulations, on previous withdrawal. There is also the deposit society, in which the member's contribution goes in part to a common fund and in part to a personal account from which he may withdraw<sup>4</sup>. The sick benefit is paid partly from the common fund and partly from the members' deposits, and its extent is dependent on the amount a member has in his deposit account when he becomes ill. The money in the personal account is payable on death or in other events, as in the last-mentioned example. A society may have funds of one or more of these types<sup>5</sup>.

1 As to the meaning of 'registered friendly society' see PARA 2082.

2 'Tontine' means an annuity with benefit of survivorship among several persons.

3 See the Friendly Societies Act 1974 s 9(1), which allows a society (other than a benevolent society or working men's club) to register provided the rules of the society make provision for meeting all existing claims before the division of funds. As to the meanings of 'benevolent society' and 'working men's club' see PARA 2089.

4 See the Friendly Societies Act 1974 s 63, which allows rules to provide for accumulating at interest any surplus of a member's contributions above what is required for providing assurance and for withdrawal of the accumulations; and see PARA 2156.

5 Some of the larger registered friendly societies and branches now use more than one of these systems.

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## **2088. Collecting societies.**

Friendly societies may employ collectors to collect contributions at the homes of members. Where these collected contributions have been paid for death benefit or other assurances on life the societies, in common with industrial assurance companies, have been subject to special legislation since 1875<sup>1</sup>. The main Acts governing the carrying on of industrial assurance business were the Industrial Assurance Act 1923 and the Industrial Assurance and Friendly Societies Act 1948<sup>2</sup>. Both those Acts have been repealed<sup>3</sup> but continue to have modified effect in relation to policies effected before 1 December 2001<sup>4</sup>. Under those Acts, with certain exceptions<sup>5</sup>, business qualifies as industrial assurance business<sup>6</sup> if, when carried on before 1 December 2001, it consisted of effecting assurances on human life, the premiums in respect of which were received by means of collectors and if, when carried on after that day, it consists of the carrying out of such assurances the premiums in respect of which either continue to be received by means of collectors or are received by other means pursuant to an agreement agreed in writing with the owner of the policy<sup>7</sup>. Friendly societies which carry on such business are known as collecting societies<sup>8</sup>.

1 The legislation was separated with the enactment of the Friendly Societies Act 1896 and the Collecting Societies and Industrial Assurance Companies Act 1896 (both now repealed).

2 See also the Friendly Societies Act 1974 s 116(2), Sch 10 para 6(2); and the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt VI (ss 54-59) (see PARAS 2375-2379), which refers to the Industrial Assurance Act 1923 s 23 notwithstanding its repeal. See also the Industrial Assurance and Friendly Societies Act 1948 (repealed with savings).

3 See the Financial Services and Markets Act 2000 ss 416(1)(a), (b), 432(3), Sch 22.

4 Ie by virtue of the Financial Services and Markets Act 2000 (Consequential Amendments and Savings) (Industrial Assurance) Order 2001, SI 2001/3647.

5 Ie where such business does not include: (1) assurances the premiums in respect of which were payable before 1 December 2001 at intervals of two months or more; (2) assurances effected by a society or company established before 1 January 1924 which at that date had no assurances outstanding, the premiums on which were payable at intervals of less than one month, so long as the society or company did not effect any such assurances between 1 January 1924 and 1 December 2001; (3) assurances effected before 1 January 1924, premiums in respect of which are payable at intervals of one month or upwards, and which had up to such date been treated as part of the business transacted by a branch other than the industrial branch of the society or company; (4) assurances for £25 or upwards effected after 1 January 1924, premiums in respect of which are payable at intervals of one month or upwards, and which were treated before 1 December 2001 as part of the business transacted by a branch other than the industrial branch of the society or company, in cases where the relevant authority had certified before that day that the terms and conditions of such assurances were on the whole not less favourable to the assured than those imposed by the Industrial Assurances Act 1923: s 1(2) provisos (a)-(d) (amended by SI 2001/3647). 'Relevant authority' means, in relation to a time before the commencement of the Friendly Societies Act 1992 s 100, Sch 19 (now repealed), the Chief Registrar, and in

relation to a period after that time, the Friendly Societies Commission: Industrial Assurance Act 1923 s 45(1) (definition added by the Friendly Societies Act 1992 Sch 19 para 12). The Friendly Societies Act 1992 Sch 19 has been repealed; and the office of Chief Registrar and the Friendly Societies Commission have ceased to exist and all assets, rights and liabilities attached to that office or the Commission have been transferred to the Treasury: see the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 12; and PARA 2105. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

6 Industrial Assurance Act 1923 s 1(2)(i), (ii) (substituted by SI 2001/3647).

7 le in accordance with the Industrial Assurance Act 1923 s 1A (added by SI 2001/3647).

8 For these purposes, 'collecting society' means an incorporated friendly society or registered friendly society which carried on industrial assurance business immediately before 1 December 2001 and is subject to an existing liability or a liability which may accrue under any policy effected in the course of that business: Industrial Assurance Act 1923 s 1(1A) (added by the Companies Act 1967 Sch 6 Pt II; substituted by the Friendly Societies Act 1992 Sch 19 para 2(1); and amended by SI 2001/3647). 'Friendly society' and 'registered friendly society' have the same meanings as in the Friendly Societies Act 1992 (see PARA 2082): Industrial Assurance Act 1923 s 45(1) (definition added by the Friendly Societies Act 1992 Sch 19 para 12).

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## (C) OTHER REGISTERED SOCIETIES

### **2089. Other societies which may remain registered.**

Five classes of societies, other than friendly societies<sup>1</sup>, may also remain registered societies<sup>2</sup> under the Friendly Societies Act 1974<sup>3</sup>. Those classes are:

- 528 (1) cattle insurance societies, for the purpose of insurance to any amount against loss of cattle, sheep, lambs, swine, horses and other animals by death from disease or otherwise<sup>4</sup>;
- 529 (2) benevolent societies, for any benevolent or charitable purpose<sup>5</sup>;
- 530 (3) working men's clubs, for purposes of social intercourse, mutual helpfulness, mental and moral improvement and rational recreation<sup>6</sup>;
- 531 (4) old people's home societies, for the purpose of providing homes for the members and others at any age after 50<sup>7</sup>; and
- 532 (5) specially authorised societies, which are societies registered for any purpose which the Treasury may authorise as a purpose to which some or all of the provisions of the Friendly Societies Act 1974 ought to be extended<sup>8</sup>.

Registration under the companies legislation<sup>9</sup> is not necessary in the case of a specially authorised society<sup>10</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to the meaning of 'registered society' see PARA 2082.

3 See the Friendly Societies Act 1974 s 7(1) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 4). Note that no new society may be registered under the Friendly Societies Act 1974: see PARA 2149.

4 Friendly Societies Act 1974 s 7(1)(b). It seems that 'other animals' includes only animals ejusdem generis.

5 Friendly Societies Act 1974 s 7(1)(c). The point whether benevolent societies might be established for purposes of general benevolence, as distinguished from specified purposes, has not been decided by the courts. As 'benevolent' includes purposes which are not exclusively charitable (see **PARA 2086**), benevolent societies and branches will not normally be charities within the meaning of the Charities Act 1993: see ss 96, 97; and **CHARITIES** vol 8 (2010) **PARA 1**. Any such society or branch which is a charity within the meaning of that Act is exempt from registration under it if registered under the Friendly Societies Act 1974: see the Charities Act 1993 s 3(5)(a), Sch 2 (see **PARA 2086** notes 6, 7); and see **CHARITIES** vol 8 (2010) **PARA 315**.

6 Friendly Societies Act 1974 s 7(1)(d). See **CLUBS** vol 13 (2009) **PARA 211**.

7 Friendly Societies Act 1974 s 7(1)(e).

8 Friendly Societies Act 1974 s 7(1)(f). As to the Treasury see **PARA 3**; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) **PARA 512** et seq. Treasury authorisations are of executive character and not statutory instruments and therefore are not covered in this work. See also **PARA 2090**.

9 See **COMPANIES** vol 14 (2009) **PARA 131** et seq.

10 *Peat v Fowler* (1886) 55 LJQB 271, DC, where the registration of the society was authorised by the Treasury under the corresponding provision (see the Friendly Societies Act 1875 s 8(5) (repealed)).

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## **2090. Specially authorised societies.**

In the case of specially authorised societies<sup>1</sup> the Treasury may limit the application of the Friendly Societies Act 1974 to such of its provisions as are specified in the special authority<sup>2</sup>. Apart from such limitations, specially authorised societies are subject to all the provisions relating to registered societies<sup>3</sup>. A specially authorised loan society<sup>4</sup> registered under the Friendly Societies Act 1974<sup>5</sup> has power, if its rules contain certain provisions, to receive deposits and borrow from non-members as well as from members<sup>6</sup>.

1 As to specially authorised societies see **PARA 2089** text and notes 8-10.

2 Friendly Societies Act 1974 s 7(1)(f). As to the Treasury see **PARA 3**; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) **PARA 512** et seq. Where provisions of the Friendly Societies Act 1974 are specified, only those provisions extend to a specially authorised society which has been registered by virtue of the authority: s 7(4). As to the special authorities see **PARA 2089** text and note 8. The limitations usually exclude such privileges as exemption from stamp duty. The acknowledgment of registration usually specifies the provisions of the Friendly Societies Act 1974 which are extended to the society, and those which are not. See **PARA 2149** text and note 3.

3 As to the meaning of 'registered society' see **PARA 2082**.

4 By Special Authority No 2 of 10 June 1976, the Treasury authorised as a purpose, inter alia, the creation of funds by monthly or other subscription to be lent to or invested for members or for their benefit, known as 'specially authorised loan societies', and restricted to societies registered before 15 August 1917. See **PARA 2089** text and note 8. As to the requirement of a separate loan fund see **PARA 2194**.

5 Note that no new society may be registered under the Friendly Societies Act 1974: see **PARA 2149**.

6 See **PARAS 2156** text and notes 22-23, 2193. Permission from the Financial Services Authority under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see **PARA 84** et seq) is required to enable the society to carry on the regulated activity of accepting deposits without infringing the general prohibition in s 19 (see **PARA 80**). As to the Financial Services Authority see **PARA 270**, and see also **PARAS 4, 6** et seq.

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## (D) BRANCHES OF SOCIETIES

### **2091. Branches and registered branches.**

The Friendly Societies Act 1974 and the Friendly Societies Act 1992 both contemplate the existence of branches of societies, but to different effect. In each case, however, the term has an artificial and specific meaning. The Friendly Societies Act 1974 defines 'branch', in relation to a registered society<sup>1</sup>, as any number of the members of the society, under the control of a central body, having a separate fund administered by themselves or by a committee or officers appointed by themselves, and bound to contribute to a fund under the control of the central body<sup>2</sup>. The Friendly Societies Act 1992 defines 'registered branch' as a branch of a registered friendly society which is separately registered<sup>3</sup> within the meaning of the Friendly Societies Act 1974<sup>4</sup>.

For purposes relating to the effect of incorporation on registered societies with branches<sup>5</sup>, 'branch' is defined by the Friendly Societies Act 1992 as follows. In relation to a registered friendly society<sup>6</sup> it means any registered or unregistered branch of the society, and in relation to an incorporated friendly society<sup>7</sup> it means a group of members, provided for by the rules of the society, which:

- 533 (1) is under the control, and bound to contribute to the funds, of the society; and
- 534 (2) has its own funds and other property vested in trustees and administered, in accordance with its rules, by the members of the group themselves, or through its own committee or other officers<sup>8</sup>.

The affairs of registered branches are administered by their own appointed committee and officers<sup>9</sup> and their investments are controlled by their committee or members<sup>10</sup>. The contributions and benefits provided by registered branches in the same society may and often do vary. Subject to the conditions contained in the society's rules, branches of a registered society have the right to secede from the society<sup>11</sup>, but may only be dissolved with the consent of the central body of the society or in accordance with the society's general rules<sup>12</sup>. The composition and powers of the central body of a society with branches are determined by the society's rules<sup>13</sup>.

Societies with branches are commonly called orders, and branches of friendly societies are commonly called lodges, courts or tents.

The rules of registered societies may provide for their branches to be grouped as branches of district branches. A district branch may itself be registrable as a branch if it falls within the definition of branch given above<sup>14</sup>.

An incorporated friendly society is a single corporate entity and cannot, therefore, have separately registered branches. On the incorporation of a registered society with registered or unregistered branches, all the property held immediately before incorporation by any person in trust for any branch of the society, and all rights and liabilities to which any such branch was then entitled or subject, become<sup>15</sup> the property, rights and liabilities of the society<sup>16</sup>. A



registered society may<sup>17</sup> make a scheme identifying any property, rights or liabilities of any branch of the society which are not to be transferred to the society on its incorporation<sup>18</sup>. On the incorporation of a registered friendly society, its registration under the Friendly Societies Act 1974 and that of any branch of the society is cancelled by the Financial Services Authority<sup>19</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 Friendly Societies Act 1974 s 111(1).

3 As to the meaning of 'registered' see PARA 2082 note 2.

4 Friendly Societies Act 1992 s 116. No separate definition of 'branch' is given (except for the limited purposes mentioned in the text and notes 5-8) and, given the terms of the definition of 'registered branch', it appears that the definition set out in the text and notes 1-2 applies.

5 I.e. the Friendly Societies Act 1992 s 6, Sch 4: see PARA 2114.

6 As to the meaning of 'registered friendly society' see PARA 2082.

7 As to the meaning of 'incorporated friendly society' see PARA 2082.

8 Friendly Societies Act 1992 Sch 4 para 1(2). As to the appointment of trustees see PARA 2179. As to the vesting of property in trustees see PARA 2185.

9 See PARAS 2172-2174.

10 See PARAS 2187-2192.

11 See PARAS 2092-2093.

12 See the Friendly Societies Act 1974 s 93(1), (2); and PARA 2261 et seq.

13 See PARA 2156.

14 See the text and notes 1-4.

15 I.e. subject to the Friendly Societies Act 1992 s 6(5) (see the text and notes 17-18), and by virtue of s 6(4) (see the text and note 16).

16 Friendly Societies Act 1992 s 6(4). See further PARA 2116.

17 I.e. in accordance with the Friendly Societies Act 1992 Sch 4 para 2: see PARA 2114.

18 Friendly Societies Act 1992 s 6(5). Any such property, rights or liabilities are excluded from transfer under s 6(4) (see the text and note 16): s 6(5). See further PARA 2116.

19 Friendly Societies Act 1992 s 6(6) (amended by SI 2001/2617). See further PARA 2116. As to the Financial Services Authority see PARA 2105, and see also PARAS 4, 6 et seq.

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## **2092. Secession and expulsion.**

The rules of a registered friendly society<sup>1</sup> with branches<sup>2</sup> must make provision for the conditions under which branches may secede<sup>3</sup>, and rules also generally provide for the circumstances under which a branch may be expelled and the manner of expulsion. A secession is invalid where the rules of the society have not been complied with<sup>4</sup>.

A body which, having been a branch of a society, has wholly seceded or been expelled from that society, may not thereafter use the name of that society or any name implying that it is a branch of that society, nor the number by which it was designated as such a branch<sup>5</sup>. An officer or member of the branch who uses any such name or number is guilty of an offence<sup>6</sup>.

1 As to the meaning of 'registered friendly society' see PARA 2082.

2 As to branches and registered branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 5. See also PARA 2156.

4 *Schofield v Vause* (1886) 36 WR 170n, CA.

5 Friendly Societies Act 1974 s 14.

6 Friendly Societies Act 1974 s 98(1)(d). As to the penalty for this offence see PARA 2278 text and note 10.

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### **2093. Effect of expulsion or secession.**

When a branch<sup>1</sup> is expelled from a registered friendly society<sup>2</sup> all the members of the branch are similarly expelled, and if one of the rules is that only members of the society are entitled to death benefit, they all lose the right to such benefit<sup>3</sup>.

Notice of a proposed secession need not be given to members joining a branch after a resolution to secede<sup>4</sup>. In settling accounts on the secession of a branch, the funds are not to be divided as in a winding up<sup>5</sup>.

A seceded or expelled branch of a registered friendly society becomes an unregistered friendly society without any of the advantages of a registered friendly society<sup>6</sup>. A seceded or expelled branch of any other society registered under the Friendly Societies Act 1974<sup>7</sup> becomes an unregistered association, and its legality as such depends on whether its objects and purposes are those in respect of which an association is required by law to be so registered<sup>8</sup>.

1 As to branches and registered branches of societies see PARA 2091.

2 As to the meaning of 'registered friendly society' see PARA 2082.

3 *Fisher v Brailsford* (1895) Diprose & Gammon 256, DC. As to the funds of an expelled branch see further *Strickland v Starkie* (1900) CR Rep, Pt A, 89 (Parliamentary Papers for 1901 vol 72), and other cases in that report. As to liability of a seceding branch to pay to the parent society part of its funds in respect of members remaining in the society see *McCowatt v Allerston* (1921) CR Rep, Pt A, 67 (Parliamentary Papers for 1922 vol 17).

4 *Re Sheffield Order of Druids Society* (1892) 56 JP 613.

5 *Re Sheffield Order of Druids Society* (1892) 56 JP 613 at 614, where there was a provision in the society's rules that on the secession of a branch liabilities should be ascertained and the funds should be equally divided among the members. Wright J stated that, if the provision meant that the branch funds were to be divided among the members as if the branch were being wound up, it was clearly ultra vires, but he preferred to construe the provision as meaning that the liabilities of the branch were to be ascertained and the fair proportion of its funds in the hands of the parent society allotted to it.

6 As to unregistered friendly societies see PARA 2098 et seq.

7 lie under the Friendly Societies Act 1974 s 7: see PARA 2089.

8 As to associations which are required to be registered as companies, and as to illegal associations, see PARA 2101; and **COMPANIES** vol 14 (2009) PARA 24 et seq.

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## (E) THE LEGISLATION

### **2094. Purpose and history of legislation.**

The purpose of friendly society legislation, which began at the end of the eighteenth century, was to encourage the promotion of thrift, the better management of friendly societies and the protection of their funds. Under the earliest Acts the rules of friendly societies were allowed by justices of the peace and enrolled at quarter sessions. Later a barrister was appointed to examine and certify rules before enrolment; he was afterwards constituted the Registrar of Friendly Societies<sup>1</sup>, and took charge of rules which had been enrolled with the clerk of the peace in each county. In 1875 the Registry of Friendly Societies was established<sup>2</sup> and since then all previously existing enrolled and certified friendly societies have been deemed to be registered<sup>3</sup>.

The Friendly Societies Act 1974 consolidated the Friendly Societies Acts 1896 to 1971 and certain other enactments relating to the societies to which these Acts applied.

The Friendly Societies Act 1992 introduced a substantially new legislative framework for friendly societies<sup>4</sup>, setting them apart from the other kinds of registered societies with which they had been grouped up to that time<sup>5</sup>. It established a Friendly Societies Commission<sup>6</sup> whose functions have since been transferred to the Financial Services Authority<sup>7</sup>. For the first time, the legislation enabled the incorporation of friendly societies, permitting existing friendly societies to incorporate and providing for all newly registered friendly societies to become incorporated on registration<sup>8</sup>. The limits placed on friendly societies business under the Friendly Societies Act 1974 were expanded; incorporated friendly societies were given power under the Friendly Societies Act 1992 to have subsidiaries and jointly to control other bodies corporate for certain purposes<sup>9</sup>. The Friendly Societies Act 1992 also introduced a system of authorisation in relation to all societies' insurance or other business<sup>10</sup>.

The regulatory controls imposed on friendly societies have been brought into line with other financial institutions and are now carried out by the Authority<sup>11</sup>.

1 See the Friendly Societies Act 1846 s 10 (repealed).

2 See the Friendly Societies Act 1875 s 10 (repealed).

3 Between 1896 and 1974 the principal Act governing friendly societies was the Friendly Societies Act 1896, which consolidated previous legislation. That Act applied to societies and branches subsisting at its commencement on 1 January 1897 (see s 108 (repealed)) which, or the rules of which, had been registered, enrolled or certified under any Act relating to friendly societies or to cattle insurance societies as if they had been registered under the Friendly Societies Act 1896 (s 101(1) (repealed)). The Friendly Societies Act 1974 applies to any society or branch to which, immediately before the passing of that Act on 31 July 1974, the Friendly Societies Act 1896 applied by virtue only of s 101(1) (repealed): Friendly Societies Act 1974 s 116(2), Sch 10 para 7(a). As to the meaning of 'registered' in the Friendly Societies Act 1974, and of 'registered friendly society' in the Friendly Societies Act 1992, see PARA 2082. As to branches of societies see PARA 2091.

4 The Friendly Societies Act 1992 was preceded by a Green Paper (Cm 919) in January 1990 entitled 'Friendly Societies: A New Framework' on which there was extensive consultation. The Act received the Royal Assent on 16 March 1992.

5 See further PARAS 2081-2082, 2089.

6 See the Friendly Societies Act 1992 Pt I (ss 1-4), Sch 1 (as originally enacted).

7 As to the transfer of functions to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

8 See the Friendly Societies Act 1992 ss 5, 6; and PARA 2111 et seq.

9 See the Friendly Societies Act 1992 s 13, Sch 8; and PARA 2134.

10 See the Friendly Societies Act 1992 ss 31-43 (as originally enacted). Authorisation is now carried out by the Financial Services Authority: see PARA 2105.

11 See the Financial Services and Markets Act 2000 ss 334, 335; the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617; and PARAS 758-759. See also PARA 2309.

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## **2095. Territorial scope of the legislation.**

The previous legislation relating to friendly and other registered societies generally applied to England and Wales, the Isle of Man and the Channel Islands, but not to Northern Ireland<sup>1</sup>. The Friendly Societies Act 1974, as originally enacted, expressly excluded Northern Ireland from its application but has since been extended to include Northern Ireland<sup>2</sup>. Similarly the Friendly Societies Act 1992 extends to Northern Ireland<sup>3</sup>. In their application to the Isle of Man and to the Channel Islands, the Friendly Societies Act 1974 and the Friendly Societies Act 1992 have effect subject to such adaptations and modifications as may be specified<sup>4</sup>. Both Acts apply to Scotland.

1 See the Friendly Societies Act 1896 s 103 (repealed); the Industrial Assurance and Friendly Societies Act 1948 s 24(1), (2) (repealed); and the Friendly Societies Act 1955 s 1(4) (repealed).

2 Friendly Societies Act 1974 s 117(3) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 50, Sch 22); Friendly Societies Act 1992 s 96(1). In consequence, the previous Northern Ireland legislation, namely the Friendly Societies Act (Northern Ireland) 1970, is repealed; and societies and branches registered thereunder are treated as registered under the Friendly Societies Act 1974: Friendly Societies Act 1992 ss 96(2)-(4), 120(2), Sch 22 Pt II. See also the Friendly Societies Act 1992 (Commencement No 7 and Transitional Provisions and Savings) Order 1993, SI 1993/3226, arts 3, 4, 8.

3 Friendly Societies Act 1992 s 124(1).

4 The Friendly Societies Act 1974 has been extended to the Channel Islands and the Isle of Man: see ss 112(1), 113(1); the Friendly Societies (Channel Islands) Order 1975, SI 1975/419; and the Friendly Societies (Isle of Man) Order 1975, SI 1975/420. Certain provisions of the Friendly Societies Act 1992 have been extended to the Channel Islands: see s 125(1); and the Friendly Societies Act 1992 (Industrial Assurance) (Channel Islands) Order 2001, SI 2001/3677. In relation to the Friendly Societies Act 1974, any Order in Council specifying adaptations and modifications may be varied or revoked by a subsequent Order in Council: ss 112(2), 113(2).

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## ***B. PURPOSES OF REGISTERED AND INCORPORATED FRIENDLY SOCIETIES***

### **2096. Purposes of a registered or incorporated friendly society.**

Friendly societies<sup>1</sup> may remain registered<sup>2</sup> under the Friendly Societies Act 1974 for the purposes of providing, by voluntary<sup>3</sup> subscriptions of the members, with or without the aid of donations, for any purposes within the provisions of the Friendly Societies Act 1992<sup>4</sup>.

The purposes of an incorporated friendly society are those provided for by the society's memorandum<sup>5</sup>. The purposes for which an incorporated friendly society may exist are:

535 (1) the carrying on<sup>6</sup> of:

25

1. (a) any business of any description falling within a class specified in head A or head B of Schedule 2 to the Friendly Societies Act 1992 or within head C of that Schedule<sup>7</sup>; or
2. (b) any activity falling within head D of Schedule 2 to the Friendly Societies Act 1992<sup>8</sup>; and

26

536 (2) the carrying on, in addition to any business or activity falling within head (1) above, any of the following, namely:

27

3. (a) social or benevolent activities<sup>9</sup>;
4. (b) group insurance business<sup>10</sup>;
5. (c) reinsurance<sup>11</sup> of risks insured by other friendly societies;
6. (d) control or joint control of bodies corporate<sup>12</sup>.

28

The memorandum may confer power to carry out additional activities permitted by the Friendly Societies Act 1992<sup>13</sup>.

The classes of long term business under head A of Schedule 2 to the Friendly Societies Act 1992 are: life and annuity<sup>14</sup>; marriage, civil partnership and birth<sup>15</sup>; linked long term<sup>16</sup>; permanent health<sup>17</sup>; tontines<sup>18</sup>; capital redemption<sup>19</sup>; and pension fund management<sup>20</sup>.

The classes of general business under head B of Schedule 2 to the Friendly Societies Act 1992 are: accident<sup>21</sup>; sickness<sup>22</sup>; and miscellaneous financial loss<sup>23</sup>.

Business under head C of Schedule 2 to the Friendly Societies Act 1992 is business, not falling within the descriptions of insurance business in head A or head B of that Schedule, consisting of the effecting and carrying out of contracts in accordance with which benefits are provided for the relief or maintenance of any persons during sickness or when in distressed circumstances, or to meet the funeral expenses of any persons<sup>24</sup>.

Activities under head D of Schedule 2 to the Friendly Societies Act 1992 are activities, carried out in accordance with the society's rules, or with arrangements made under the rules, whereby discretionary benefits are provided: (i) for the education of any persons; (ii) for the

relief or maintenance of any persons during sickness, when out of employment or when in distressed circumstances; or (iii) for the funeral expenses of any persons<sup>25</sup>.

The Treasury may by order vary the list of purposes by adding or deleting, or by varying the description of, any activity for the time being specified<sup>26</sup>.

For the purposes of the Friendly Societies Act 1992, the effecting and carrying out of a contract whose principal object is within one class of insurance business<sup>27</sup>, but which contains related and subsidiary provisions in another class, is taken to be business of the former, and no other<sup>28</sup>, if:

- 537 (A) the principal object falls within any class in head A of Schedule 2 to the Friendly Societies Act 1992 and the subsidiary provisions fall within class 1 or 2 of head B of that Schedule<sup>29</sup>, and the society is authorised to carry on long term business of class I in head A of that Schedule<sup>30</sup>; or
- 538 (B) the principal object is within one of the classes of head B of Schedule 2 to the Friendly Societies Act 1992 and the subsidiary provisions fall within another of those classes<sup>31</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 No new society may be registered under the Friendly Societies Act 1974 after 1 February 1993: see PARAS 2083, 2149. Subject to s 7, a society registered under the Friendly Societies Act 1974 immediately before 1 February 1993 continues as a registered society in accordance with that Act: Friendly Societies Act 1992 s 93(2).

3 It is not compulsory. It is conceived that the word 'voluntary' used in connection with subscriptions to friendly societies cannot be used in the legal sense as meaning 'without consideration', as members of such societies gain the benefit of insurance. It was held in *Battersea Metropolitan Borough Council v British Iron and Steel Research Association* [1949] 1 KB 434, [1949] 1 All ER 21, CA, that contributions which carried with them advantages incidental to membership might be 'voluntary contributions' within the meaning of that expression in the Scientific Societies Act 1843 s 1 (repealed).

4 Friendly Societies Act 1974 s 7(1)(a) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 4), which provides that the specified purposes are those listed in the Friendly Societies Act 1992 Sch 2 (see the text and notes 14-25).

5 Friendly Societies Act 1992 s 7(1). As to the memorandum see PARA 2119. As to the meaning of 'incorporated friendly society' see PARA 2082.

6 This is subject to the Friendly Societies Act 1992 s 5(2)(b): see PARA 2111.

7 See the text and notes 14-24.

8 Friendly Societies Act 1992 s 7(2)(a). See the text and note 25.

9 It is in accordance with the Friendly Societies Act 1992 s 10: see PARA 2097 text and notes 18-19.

10 It is in accordance with the Friendly Societies Act 1992 s 11: see PARA 2138.

11 It is in accordance with the Friendly Societies Act 1992 s 12: see PARA 2139.

12 Friendly Societies Act 1992 s 7(2)(b). As to control or joint control see s 13; and PARA 2133.

13 Friendly Societies Act 1992 s 7(2). The additional activities are those set out in Sch 5: see PARA 2097.

14 It is effecting and carrying out contracts of insurance on human life or contracts to pay annuities on human life, but excluding, in each case, contracts within the Friendly Societies Act 1992 Sch 2 head A class III (see the text and note 16): Sch 2 head A class I.

15 It is effecting and carrying out contracts of insurance to provide a sum on marriage or on the formation of a civil partnership or on the birth of a child, being contracts expressed to be in effect for a period of more than one year: Friendly Societies Act 1992 Sch 2 head A class II (amended by the Civil Partnership Act 2004 Sch 27 para 143).

16    le effecting and carrying out contracts of insurance on human life or contracts to pay annuities on human life where the benefits are wholly or partly to be determined by reference to the value of, or the income from, property of any description (whether or not specified in the contracts) or by reference to fluctuation in, or in an index of, the value of the property of any description (whether or not so specified): Friendly Societies Act 1992 Sch 2 head A class III.

17    le effecting and carrying out contracts of insurance providing specified benefits against risks of persons becoming incapacitated in consequence of sustaining injury as a result of an accident or of an accident of a specified class or of sickness or infirmity, being contracts that: (1) are expressed to be in effect for a period of not less than five years, or until the normal retirement age for the persons concerned, or without limit of time; and (2) either are not expressed to be terminable by the insurer, or are expressed to be so terminable only in special circumstances mentioned in the contract: Friendly Societies Act 1992 Sch 2 head A class IV.

18    le effecting and carrying out tontines: Friendly Societies Act 1992 Sch 2 head A class V. As to the meaning of 'tontine' see PARA 2087 note 2.

19    le effecting and carrying out capital redemption contracts: Friendly Societies Act 1992 Sch 2 head A class VI.

20    le effecting and carrying out: (1) contracts to manage the investments of pension funds; or (2) contracts of the kind mentioned in head (1) above that are combined with contracts of insurance covering either conservation of capital or payment of a minimum interest: Friendly Societies Act 1992 Sch 2 head A class VII.

21    le effecting and carrying out contracts of insurance providing fixed pecuniary benefits or benefits in the nature of indemnity (or a combination of both) against risks of the person insured:

2       (1)   sustaining injury as the result of an accident or of an accident of a specified class;

3       (2)   dying as a result of an accident or of an accident of a specified class; or

4       (3)   becoming incapacitated in consequence of disease or of a disease of a specified class,

inclusive of contracts relating to industrial injury and occupational disease but exclusive of contracts falling within the Friendly Societies Act 1992 Sch 2 head B class 2 (see the text and note 22) or within Sch 2 head A class IV (see the text and note 17): Sch 2 head B class 1.

22    le effecting and carrying out contracts of insurance providing fixed pecuniary benefits or benefits in the nature of indemnity (or a combination of the two) against risks of loss to the persons insured attributable to sickness or infirmity, but exclusive of contracts falling within the Friendly Societies Act 1992 Sch 2 head A class IV (see the text and note 17): Sch 2 head B class 2.

23    le effecting and carrying out contracts of insurance against any of the following risks, namely: (1) risks of loss to the persons insured attributable to their being unemployed; (2) risks of loss to the persons insured attributable to their being in distressed circumstances; or (3) risks of loss to the persons insured attributable to sickness or infirmity, but in each case exclusive of contracts falling within the Friendly Societies Act 1992 Sch 2 head B class 2 (see the text and note 22) or Sch 2 head A class IV (see the text and note 17): Sch 2 head B class 3.

24    Friendly Societies Act 1992 Sch 2 head C.

25    Friendly Societies Act 1992 Sch 2 head D.

26    Friendly Societies Act 1992 s 5(4) (amended by SI 2001/2617). No such order may be made unless a draft of it has been placed before and approved by a resolution of each House of Parliament: Friendly Societies Act 1992 s 5(5). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

27    le a class within the Friendly Societies Act 1992 Sch 2 head A or head B: see the text and notes 14-23. See also PARA 2138 note 5.

28    Friendly Societies Act 1992 s 117(3).

29    See the text and notes 21-22.

30    Friendly Societies Act 1992 s 117(4). As to Sch 2 head A class I see the text and note 14.

31    Friendly Societies Act 1992 s 117(5).

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### **2097. Additional purposes of an incorporated friendly society.**

The memorandum of an incorporated friendly society<sup>1</sup> may empower it to do anything falling within Schedule 5 to the Friendly Societies Act 1992 in the manner directed by the society's rules<sup>2</sup>. The memorandum of an incorporated friendly society may confer on it any other power<sup>3</sup>, but no such power may be exercised except for carrying out the society's purposes<sup>4</sup>. An incorporated friendly society will, subject to the provisions of the Friendly Societies Act 1992, its memorandum and its rules, have any other power which is incidental or conducive to the carrying out of its purposes<sup>5</sup>.

An incorporated friendly society may<sup>6</sup>, out of any separate loan fund to be formed by contributions or deposits from its members, make loans to members on their personal security, with or without sureties<sup>7</sup>. A loan may not at any time be made out of money contributed otherwise than for the purpose of the loan fund<sup>8</sup>. The society may not:

- 539 (1) make any loan to a member on personal security beyond the amount fixed by the rules, or make any loan which, together with any money owing by a member to the society, exceeds £200<sup>9</sup>; or
- 540 (2) hold at any one time on deposit from its members any money beyond the amount fixed by the rules, and the amount so fixed may not exceed two-thirds of the total sums owing to the society by the members who have borrowed from the loan fund<sup>10</sup>.

A society may set up and administer a fund for the purchase, on behalf of members contributing thereto, of Defence Bonds, National Savings Certificates, Ulster Savings Certificates or such other securities of Her Majesty's government as the Financial Services Authority may prescribe<sup>11</sup>. A society may allow persons to become members of the society for the purpose only of contributing to a fund set up by virtue of these provisions<sup>12</sup>.

A society may invest funds of the society in subscribing for any of the share or loan capital of a housing association<sup>13</sup> other than shares or debentures not fully paid up at the time of issue<sup>14</sup>. A society may accumulate at interest, for the use of any member, any surplus of his contributions to the funds of the society which may remain after providing for any assurance in respect of which they are paid and for the withdrawal of the accumulations<sup>15</sup>. A society may subscribe out of its funds to any hospital, infirmary, charitable or provident institution, any annual or other sum which may be necessary to secure to members of the society, and their families, the benefits of that institution<sup>16</sup>. A society may contribute to the funds and take part in the government of any other friendly society<sup>17</sup>.

A society may include among its purposes the carrying on of any social or benevolent activity<sup>18</sup> which is not inconsistent with its other purposes<sup>19</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082. As to the memorandum see PARA 2119.

2 See the Friendly Societies Act 1992 s 7(2), Sch 5 para 1. As to the rules see PARA 2121.



- 3 le as specified in the Friendly Societies Act 1992 Pt II (ss 5-26).
- 4 Friendly Societies Act 1992 s 7(3).
- 5 Friendly Societies Act 1992 s 7(4). As to the purposes of an incorporated friendly society see PARA 2096.
- 6 This is subject to the Friendly Societies Act 1992 Sch 5 para 2(2)-(4) (see the text and notes 7-10).
- 7 Friendly Societies Act 1992 Sch 5 para 2(1). A member is not capable of holding any interest in the loan fund exceeding £800: Sch 5 para 2(3). The Treasury may by order amend Sch 5 para 2(3) or (4) (see the text and notes 9-10) so as to substitute, for the sum for the time being so specified, such greater sum as is specified in the order: Sch 5 para 2(5) (amended by SI 2001/2617). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to sureties generally see PARA 1017.
- 8 Friendly Societies Act 1992 Sch 5 para 2(2).
- 9 Friendly Societies Act 1992 Sch 5 para 2(4)(a); and see note 7.
- 10 Friendly Societies Act 1992 Sch 5 para 2(4)(b); and see note 7.
- 11 Friendly Societies Act 1992 Sch 5 para 3(1) (amended by SI 2001/2617). Any securities prescribed before 1 February 1993, for the purposes of the Friendly Societies Act 1974 s 47 (see PARA 2192), are to be treated as having been prescribed under the Friendly Societies Act 1992 Sch 5 para 3(1): Sch 5 para 3(3); Friendly Societies Act 1992 (Commencement No 3 and Transitional Provisions) Order 1993, SI 1993/16. As to the Financial Services Authority see PARA 2105, and see also PARAS 4, 6 et seq.
- 12 Friendly Societies Act 1992 Sch 5 para 3(2).
- 13 le within the meaning of the Housing Associations Act 1985: see **HOUSING** vol 22 (2006 Reissue) PARA 11.
- 14 Friendly Societies Act 1992 Sch 5 para 4(1). Schedule 5 para 4 has effect without prejudice to any power the society may have by virtue of s 14 (see PARA 2136): Sch 5 para 4(2).
- 15 Friendly Societies Act 1992 Sch 5 para 5.
- 16 Friendly Societies Act 1992 Sch 5 para 6.
- 17 Friendly Societies Act 1992 Sch 5 para 7. As to the meaning of 'friendly society' see PARA 2082.
- 18 For these purposes, 'benevolent activity' means the making of donations, the raising of funds or any other activity carried on for a charitable purpose or for any other benevolent purpose: Friendly Societies Act 1992 s 10(2). Cf PARA 2086.
- 19 Friendly Societies Act 1992 s 10(1).

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## ***C. UNREGISTERED FRIENDLY SOCIETIES***

### **2098. In general.**

Although the enactments relating to friendly societies have no direct application to unregistered friendly societies<sup>1</sup>, their existence is recognised by some of those enactments and in other legislation, and they are not without some statutory privileges<sup>2</sup>. An unregistered friendly society is an unincorporated association of individuals. The members for the time being are jointly entitled beneficially to its property and funds. The property of such a society is commonly vested in trustees<sup>3</sup>.

1 As to the interpretation of references in enactments to unregistered friendly societies see PARA 2084.

2 See PARA 2099. As to interests of members of societies serving in the reserve or auxiliary forces of the Crown see also PARAS 2375-2379.

3 Cf the Friendly Societies Act 1974 s 54 (see PARA 2185), which provides for the vesting of a registered society's property in its trustees; and cf **CLUBS** vol 13 (2009) PARAS 204, 211. As to the number of trustees in whom land of an unregistered society may be vested cf PARA 2185 (which is concerned with the position where the society is a registered society; the enactments cited there do not directly govern the position where the society is unregistered, as to which there is no decided authority). As to joint tenants of land generally see **REAL PROPERTY** vol 39(2) (Reissue) PARA 190 et seq. As to proceedings by or against unregistered societies see PARA 2104.

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### **2099. Privileges of and restrictions upon unregistered societies.**

An unregistered friendly society is exempt from income tax and corporation tax, whether on income or on chargeable gains, if its income does not exceed a specified sum<sup>1</sup>.

An unregistered friendly society may not carry on insurance business in the United Kingdom<sup>2</sup>.

No person can be appointed a physician, surgeon or other medical officer of an unregistered friendly society unless he is a fully registered medical practitioner<sup>3</sup>.

1 See the Income and Corporation Taxes Act 1988 s 459; and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1221. The specified sum is £160 a year: see s 459; and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1221.

2 See the Financial Services and Markets Act 2000 s 41, Sch 6 Pt I para 1; and PARA 351. As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 See the Medical Act 1983 s 47; and **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 210. As to the registration of medical practitioners generally see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 34 et seq.

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### **2100. Effect of society's purposes being in restraint of trade.**

Trade friendly societies which restrict membership to persons engaged in a particular trade or industry<sup>1</sup> may become illegal associations if their rules contain provisions in restraint of trade. If their purposes are mainly legal, they are not necessarily illegal associations if their rules contain some provisions in restraint of trade made for the purpose of protecting funds against certain claims, provided such provisions go no further than is reasonable or necessary for the purpose<sup>2</sup>. If the main purposes are in restraint of trade, an unregistered friendly society is an illegal association<sup>3</sup>.

1 Since the introduction of trade union legislation these societies have almost ceased to exist. The first Act passed was the Trade Union Act 1871. As to the effect where the purposes of a trade union or employers' association are in restraint of trade see the Trade Union and Labour Relations (Consolidation) Act 1992 s 128(1), (2); and **EMPLOYMENT** vol 40 (2009) PARA 1030. As to the prohibition against a trade union being registered under the Friendly Societies Act 1974 see the Trade Union and Labour Relations (Consolidation) Act 1992 s 10(3); and **EMPLOYMENT** vol 40 (2009) PARA 852.

2 *Swaine v Wilson* (1889) 24 QBD 252, CA. As to restraint of trade generally see **COMPETITION** vol 18 (2009) PARA 377 et seq.

3 *Duke v Littleboy* (1880) 49 LJCh 802. See also *Hornby v Close* (1867) LR 2 QB 153; *Farrer v Close* (1869) LR 4 QB 602.

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## **2101. Illegality for want of incorporation.**

An association of people contributing to a fund to provide themselves with benefits of a friendly society<sup>1</sup> nature, such as sickness benefits, and dividing the balance of the funds periodically<sup>2</sup>, is not an illegal association for want of registration under the legislation governing companies<sup>3</sup>.

An unregistered association, the purposes of which may be construed as being for the acquisition of gain by the association or individual members<sup>4</sup>, would be illegal for want of such registration, and it is conceived that a society having this purpose, even though it may provide benefits of a friendly society nature, could not be regarded as an unregistered friendly society within the meaning of the Friendly Societies Act 1974<sup>5</sup>. Questions on this point arise in connection with the enforcement of contracts entered into with societies and rights of members, and also with regard to the winding up of their affairs<sup>6</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to dividing societies see PARA 2087.

3 See *Re One and All Sickness and Accident Assurance Association* (1909) 25 TLR 674; and see also *Oldham Our Lady's Sick and Burial Society v Taylor* (1887) 3 TLR 472, CA; *Re Lead Co's Workmen's Fund Society, Lowes v Governor & Co for Smelting Down Lead with Pit and Sea Coal* [1904] 2 Ch 196. In *Marrs v Thompson* (1902) 86 LT 759, DC, Channell J excluded an unregistered friendly society from the necessity of registration under the Companies Acts on the ground that the society came within the exception of a company formed under another Act, as unregistered societies were mentioned in certain provisions of the Friendly Societies Act 1896 (now repealed).

4 Eg a loan society: see *Shaw v Benson* (1883) 11 QBD 563, CA; *Jennings v Hammond* (1882) 9 QBD 225, DC; *Greenberg v Cooperstein* [1926] Ch 657. An association of more than 20 persons is not necessarily an illegal association if not for carrying on a business: *Dominion Iron and Steel Co Ltd v Baron Invernairn* [1927] WN 277.

5 *Marrs v Thompson* (1902) 86 LT 759, DC.

6 As to winding up of unregistered friendly societies see PARA 2103.

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5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(2) FRIENDLY SOCIETIES/(i) Introduction/C. UNREGISTERED FRIENDLY SOCIETIES/2102. Rights of members of unregistered societies.

### **2102. Rights of members of unregistered societies.**

If the rules of an unregistered friendly society contain no provision for their amendment, it would seem that any amendments cannot affect existing rights of a member without his consent<sup>1</sup>. In the absence of any provision in the rules, a member can resign his membership at any time. The resignation is effective without the need for acceptance by the society, and therefore cannot be withdrawn after it has been received<sup>2</sup>. The provisions relating to nominations in the Friendly Societies Act 1974<sup>3</sup> do not apply to unregistered friendly societies. If a member makes a nomination under provisions contained in rules, in the absence of a provision on that happening, the nomination is not revoked by his subsequent marriage<sup>4</sup>. A provision in the rules of an unregistered society for payment of death benefit to certain named relatives at the committee's discretion, unless otherwise bequeathed by will, does not make the benefit the property of a member during his life, and in the absence of a will the benefit forms no part of his estate, and payment by the committee in terms of the rules discharges the society from further claim<sup>5</sup>. The payment of that benefit to the nominee of a deceased member, made in accordance with provisions in the rules, would also be a sufficient discharge to the society against a claim by the administrator of the deceased member's estate; but it is probable that, in the absence of any evidence of a contrary intention, the nomination gives only a title to collect the benefit for which the nominee must account to the administrator<sup>6</sup>. This would also be the case if the rules provided for a nomination and the member made a nomination which was invalid under the rules, and the rules gave a discretion to the committee as to who should be paid the money in the absence of a nomination<sup>7</sup>.

The decision of a majority of the members to register an unregistered friendly society has been held binding on the minority<sup>8</sup>.

1 *Souter v Davies* (1895) 39 Sol Jo 264, DC.

2 *Finch v Oake* [1896] 1 Ch 409, CA.

3 See PARAS 2230-2240.

4 *Haffenden v Stamford Sick and Benefit Club* (1913) CR Rep, Pt A, 223 (Parliamentary Papers for 1914 vol 76) (county court).

5 *Ashby v Costin* (1888) 21 QBD 401.

6 *Harris v United Kingdom Postal and Telegraph Service Benevolent Society* (1889) 87 LT Jo 272; *Young v Waterson* 1918 SC 9, Ct of Sess.

7 *Hannay v Horner* (1916) 32 TLR 240.

8 *Oldham Our Lady's Sick and Burial Society v Taylor* (1887) 3 TLR 472, CA; *M'Kenny v Barnsley Corp'n* (1894) 10 TLR 533, CA; *Yeates v Roberts* (1855) 7 De GM & G 227.

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### **2103. Dissolution of unregistered societies.**

An association which is a non-trading concern, and which exists only for the purpose of providing benefits of a friendly society<sup>1</sup> nature for its members, may be wound up as an unregistered company<sup>2</sup> under the Insolvency Act 1986<sup>3</sup>. The High Court has inherent jurisdiction to wind up an unregistered association<sup>4</sup>. Further, an unregistered friendly society will be regarded as terminated, so that its assets become distributable: (1) on the happening of an event for which the rules prescribe dissolution or termination; (2) where all interested parties agree; and (3) where the substratum on which the society was founded has ceased to exist<sup>5</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to the winding up of unregistered companies see the Insolvency Act 1986 Pt V (ss 220-229); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1147 et seq.

3 See the Insolvency Act 1986 s 221(1); and see *Re Victoria Society, Knottingley* [1913] 1 Ch 167. An association which is illegal for want of registration under the legislation governing companies (see PARA 2101) cannot be wound up under the provisions of the Insolvency Act 1986: see **COMPANIES** vol 14 (2009) PARA 108; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1150. As to the remedies, if any, available to subscribers to, or any persons contracting with, an illegal association see **COMPANIES** vol 14 (2009) PARA 107 et seq.

4 See *Re One and All Sickness and Accident Assurance Association* (1909) 25 TLR 674; *Re Lead Co's Workmen's Fund Society*, *Lowes v Governor & Co for Smelting Down Lead with Pit and Sea Coal* [1904] 2 Ch 196; *Blake v Smither* (1906) 22 TLR 698; *Re William Denby & Sons Ltd, Sick and Benevolent Fund, Rowling v Wilks* [1971] 2 All ER 1196, [1971] 1 WLR 973. The court has jurisdiction to order the winding up and dissolution, not only of an unregistered friendly society, but also of any body of any kind for which no appropriate statutory machinery exists for securing its proper winding up: *Keys v Boulter (No 2)*, *Williamson v Bennett* [1972] 2 All ER 303, [1972] 1 WLR 642.

5 *Re William Denby & Sons Ltd, Sick and Benevolent Fund, Rowling v Wilks* [1971] 2 All ER 1196 at 1201-1202, [1971] 1 WLR 973 at 978-979. As to distribution of assets on winding up by the court see *Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51, [1972] 2 All ER 439; *Elvidge v Coulson* [2003] EWHC 2089 (Ch), [2003] All ER (D) 247 (Jul).

## UPDATE

### 2103 Dissolution of unregistered societies

NOTE 3--Insolvency Act 1986 s 221(1) amended: SI 2009/1941.

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### 2104. Proceedings by or against unregistered societies.

An unregistered society cannot sue or be sued in its own name nor can the secretary or any other officer of the society sue or be sued on behalf of the society, even if the rules purport to give him power to sue and provide for his being sued<sup>1</sup>.

A claim may be brought by or against trustees of an unregistered society in their capacity as such without adding as parties any persons who have a beneficial interest in the trust; and any judgment or order given or made in the claim is binding on those persons unless the court in the same or other proceedings otherwise orders<sup>2</sup>.

Where several members of an unregistered society have the same interest in a claim, the claim may be begun, or the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest<sup>3</sup>.

1 *Gray v Pearson* (1870) LR 5 CP 568; *Evans v Hooper* (1875) 1 QBD 45, CA.

2 CPR 19.7A.

3 See CPR 19.6.

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#### ***D. REGULATION OF FRIENDLY SOCIETIES***

##### **2105. Transfer of functions to the Financial Services Authority and the Treasury.**

For the purposes of the Friendly Societies Acts 1974 and 1992 a body corporate of Commissioners was established by the Friendly Societies Act 1992 called the Friendly Societies Commission with the general functions of promoting the financial stability of friendly societies, securing their conformity with the Friendly Societies Act 1992 and administering the system of regulation of their activities<sup>1</sup>. The registration and incorporation of friendly societies remained the duty of the Registry of Friendly Societies under the Chief Registrar<sup>2</sup>. On 1 December 2001, the Commission and the Registry ceased to exist and the majority of their functions were transferred to the Financial Services Authority<sup>3</sup> with certain powers to make legislative provision being transferred to the Treasury<sup>4</sup>. All assets, rights and liabilities which at that time attached to the Registry or the Commission (including records maintained or held by, and any other assets, rights and liabilities of, the central office) were transferred to the Treasury<sup>5</sup>.

1 See the Friendly Societies Act 1992 s 1 (as originally enacted).

2 See the Friendly Societies Act 1992 s 5, Sch 3 (as originally enacted).

3 As to the Financial Services Authority generally see PARAS 4, 6 et seq.

4 See the Financial Services and Markets Act 2000 s 334; the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 4; and the Financial Services and Markets Act 2000 (Commencement No 7) Order 2001, SI 2001/3538. See also PARAS 758-759. The functions transferred to the Treasury are set out in the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 4, Sch 1 Pts I, II. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 See the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, arts 10, 12.

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Introduction/D. REGULATION OF FRIENDLY SOCIETIES/2106. Functions of the Financial Services Authority in relation to friendly societies.

## **2106. Functions of the Financial Services Authority in relation to friendly societies.**

The Financial Services Authority<sup>1</sup> has the following functions in relation to friendly societies<sup>2</sup>:

- 541 (1) to secure that the purposes of each friendly society are in conformity with the Friendly Societies Act 1992 and with any other enactment regulating the purposes of friendly societies<sup>3</sup>;
- 542 (2) to administer the system of regulation of the activities of friendly societies<sup>4</sup>; and
- 543 (3) to advise and make recommendations to the Treasury and other government departments on any matter relating to friendly societies<sup>5</sup>.

The Authority also has, in relation to such societies, the other functions conferred on it by or under the Friendly Societies Act 1992 or any other enactment<sup>6</sup>.

1 As to the transfer of functions to the Financial Services Authority see PARA 2105.

2 As to the meaning of 'friendly society' see PARA 2082.

3 Friendly Societies Act 1992 s 1(1)(a) (s 1 substituted by SI 2001/2617).

4 Friendly Societies Act 1992 s 1(1)(b) (as substituted: see note 3).

5 Friendly Societies Act 1992 s 1(1)(c) (as substituted: see note 3). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

6 Friendly Societies Act 1992 s 1(2) (as substituted: see note 3).

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## **2107. Power to make regulations, orders and directions, and to charge fees.**

Under the Friendly Societies Act 1974 the Treasury has the power to make regulations<sup>1</sup> with respect to:

- 544 (1) the seal to be used by the Financial Services Authority for the registration of any society or document (including any amendment to any document) under the Friendly Societies Act 1974, the Industrial and Provident Societies Act 1965, the Building Societies Act 1986 or the Friendly Societies Act 1992, or otherwise for sealing any document for the purposes of any of those Acts<sup>2</sup>;
- 545 (2) the duties and functions of the Financial Services Authority under the Friendly Societies Act 1974<sup>3</sup>;
- 546 (3) the inspection of documents kept by the Financial Services Authority under the Friendly Societies Act 1974<sup>4</sup>,

and generally for carrying the Friendly Societies Act 1974 into effect<sup>5</sup>.

Before the Authority allows any person to inspect any document held by it in connection with the Friendly Societies Act 1974, or provides any person with a copy of any such document (or part of such document), it may charge that person a reasonable fee<sup>6</sup>.

Under the Friendly Societies Act 1992, the Authority may, by directions<sup>7</sup>, make provision with respect to the form of any document to be sent to it under the Friendly Societies Act 1992 or the Friendly Societies Act 1974, the particulars to be included in any such document and the procedure to be followed in sending any such document<sup>8</sup>.

The Treasury has power to make orders modifying provisions of the Friendly Societies Act 1992 for the purpose of assimilating the law relating to friendly societies to that relating to companies or insurance business<sup>9</sup>.

Further regulations and orders may be made by the Treasury in relation to auditors and valuations under certain provisions of the Friendly Societies Act 1974<sup>10</sup>, and by the Treasury and the Authority in relation to a range of matters under provisions of the Friendly Societies Act 1992<sup>11</sup>.

1 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

Any power of the Treasury or the Secretary of State to make regulations under the Friendly Societies Act 1974 is exercisable by statutory instrument and a statutory instrument made in exercise of any such power is subject to annulment in pursuance of a resolution of either House of Parliament: s 109(2) (amended by SI 2001/2617). As to the Secretary of State see PARA 3.

2 Friendly Societies Act 1974 s 109(1)(b) (s 109(1)(b)-(d) amended by SI 2001/2617). See the Friendly Societies Act 1974 (Seal of the Financial Services Authority) Regulations 2001, SI 2001/3729. As to the Financial Services Authority see PARA 2105, and see also PARAS 4, 6 et seq. Any reference in the Friendly Societies Act 1974 to the seal of the Financial Services Authority is a reference to the seal provided for in regulations made under s 109(1)(b) (and not to its common seal): s 111(3) (substituted by SI 2001/2617).

3 Friendly Societies Act 1974 s 109(1)(c) (as amended: see note 2). As to the functions of the Authority in relation to friendly societies see PARAS 2105-2106.

4 Friendly Societies Act 1974 s 109(1)(d) (as amended: see note 2). See the text and note 6.

5 Friendly Societies Act 1974 s 109(1) (amended by SI 2001/3649).

6 Friendly Societies Act 1974 s 104A (added by SI 2001/2617).

7 le by directions made under the Friendly Societies Act 1992 s 114. The directions have effect subject to any other provision of or made under the Friendly Societies Act 1992: s 114(2) (s 114 substituted by SI 2001/3649).

8 Friendly Societies Act 1992 s 114(1) (as substituted: see note 7).

9 See the Friendly Societies Act 1992 s 102; and PARA 2381.

Any power of the Treasury to make regulations or orders under the Friendly Societies Act 1992 is exercisable by statutory instrument: s 121(1) (amended by SI 2001/2617). Any statutory instrument containing such regulations or such orders other than an order under the Friendly Societies Act 1992 s 5 (see PARA 2110 et seq), s 69J (see PARA 2328), s 69K (see PARA 2329) or s 126 (commencement) is subject to annulment in pursuance of a resolution of either House of Parliament: s 121(2) (amended by SI 2005/2211). Any power to make regulations or orders conferred by the Friendly Societies Act 1992 includes power to make different provision for different cases, and to make transitional, consequential or supplementary provision: s 121(3).

10 See the Friendly Societies Act 1974 s 31(5) (obligation to appoint auditors) (see PARA 2206); s 40(1) (remuneration of qualified auditors) (see PARA 2208); s 42 (regulation and directions relating to valuations) (see PARA 2203). See note 1.

11 See the Friendly Societies Act 1992 s 5(4) (purposes of incorporated friendly societies) (see PARA 2096 text and note 26); s 69B (duty to prepare accounts) (see PARA 2325); ss 69C, 69G (contents and form of annual



accounts) (see PARAS 2325, 2327); s 71(1)(b) (report on a friendly society's affairs by committee of management) (see PARA 2330); s 91(8) (conversion of friendly society into company) (see PARA 2359); s 93(14) (registration of societies under the Friendly Societies Act 1974) (see PARA 2150); the Friendly Societies Act 1992 s 99(3) (insurance of lives of children under 10) (see PARA 2380); s 103(1) (power to modify Pt VI (ss 68-79)) (see PARA 2381); s 112(4) (records of friendly societies) (see PARA 2389). See note 9.

## **UPDATE**

### **2107 Power to make regulations, orders and directions, and to charge fees**

NOTE 9--Friendly Societies Act 1992 s 121(2) further amended: SI 2008/1140.

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### **2108. Authentication of documents.**

Any document<sup>1</sup> bearing the seal or stamp of the Financial Services Authority<sup>2</sup> must be received in evidence without further proof<sup>3</sup>. Any document purporting to have been signed by a person authorised to do so on behalf of the Authority, and every document purporting to be signed by any inspector<sup>4</sup> or public valuer under the Friendly Societies Act 1974, in the absence of any evidence to the contrary, must be received in evidence without proof of the signature<sup>5</sup>. All documents required by the Friendly Societies Act 1974 to be sent to the Authority must be deposited with the rules of the societies to which the documents respectively relate and must be registered or recorded by the Authority, with such observations, if any, on them as it considers appropriate<sup>6</sup>.

1 For these purposes, 'document' means any document issued, received or created by the Financial Services Authority (or, as the case may be, by any inspector or public valuer under the Friendly Societies Act 1974) for the purposes of or in connection with the Friendly Societies Act 1974: s 110(2A) (added by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the seal of the Financial Services Authority see PARA 2107 note 2.

3 Friendly Societies Act 1974 s 110(1) (s 110(1), (2) substituted by SI 2001/2617).

4 As to inspectors see PARAS 2215, 2319.

5 Friendly Societies Act 1974 s 110(2) (as substituted: see note 3).

6 Friendly Societies Act 1974 s 110(3) (amended by SI 2001/2617).

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### **2109. Regulation of investment business.**

Friendly societies, like all providers of financial services, are subject to the regulatory system established by the Financial Services and Markets Act 2000<sup>1</sup>. That Act contains a general prohibition, which prohibits a person from carrying on a regulated activity<sup>2</sup> in the United Kingdom<sup>3</sup> unless he is either an authorised person<sup>4</sup> or an exempt person<sup>5</sup>. Friendly societies must apply to the Financial Services Authority<sup>6</sup> for permission to carry out activities regulated by the Financial Services and Markets Act 2000<sup>7</sup>. Friendly societies must also comply with the numerous rules and other guidance issued by the Financial Services Authority, most of which are contained in the Financial Services Authority's Handbook of Rules and Guidance<sup>8</sup>.

1 See PARA 2 et seq.

2 As to regulated activities see the Financial Services and Markets Act 2000 s 22; and PARA 84 et seq.

3 As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 As to authorised persons see the Financial Services and Markets Act 2000 s 31; and PARA 314.

5 See the Financial Services and Markets Act 2000 s 19; and PARA 80.

6 The Financial Services and Markets Act 2000 provides for the Financial Services Authority to be the sole regulatory authority for the financial services industry, with powers of authorisation, supervision and enforcement: see PARAS 4, 6 et seq. As to the Financial Services Authority see also PARA 2105.

7 The most usual way is to apply for permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq.

8 As to the Handbook generally see PARA 22. See in particular Prudential Standards, Interim Prudential Sourcebook for Friendly Societies (IPRU-FSOC) which is of relevance to friendly societies carrying out activities which are regulated under the Financial Services and Markets Act 2000.

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## **(ii) Incorporated Friendly Societies**

### ***A. CONSTITUTION, ESTABLISHMENT, REGISTRATION AND INCORPORATION***

#### **(A) CONSTITUTION**

##### **2110. Constitution.**

A friendly society (whether newly established or already in existence as a registered friendly society<sup>1</sup>) is incorporated by virtue of registration under the Friendly Societies Act 1992 and is incorporated from the date of its registration by the Financial Services Authority<sup>2</sup>. Incorporated friendly societies are corporate bodies but not companies registered under the Companies Acts. The liability of a member is limited to the amount of any subscription<sup>3</sup> to the society which is outstanding<sup>4</sup> and no subscription is recoverable at law except on the winding up of the society<sup>5</sup>.

1 For the establishment of a new society see PARA 2111. As to the meaning of 'registered friendly society' see PARA 2082.

2 Friendly Societies Act 1992 ss 5(3), 6(1) (both amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and see also PARAS 4, 6 et seq.

3 'Subscription' includes any premium or other sum, however described, payable in respect of the provision of benefits by, or on behalf of, a member of a friendly society under the rules of the society: Friendly Societies Act 1992 s 119(1).

4 Friendly Societies Act 1992 s 5(6), Sch 3 para 8(1).

5 Friendly Societies Act 1992 Sch 3 para 8(2).

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## (B) ESTABLISHMENT OF NEW SOCIETIES

### **2111. Establishment.**

No friendly society<sup>1</sup> may now be registered under the Friendly Societies Act 1974<sup>2</sup> and any new friendly societies must now be registered and incorporated under the Friendly Societies Act 1992<sup>3</sup>. A society may be established under the Friendly Societies Act 1992 if, under its proposed memorandum<sup>4</sup>: (1) its purposes are to include the carrying on of one or more of the activities falling within head A, B, C or D<sup>5</sup> of the list of permitted activities<sup>6</sup>; (2) any such activity is to be carried on by the society with a view to providing insurance and other benefits for its members and such connected persons as are prescribed in the rules of the society<sup>7</sup>; and (3) any other purposes which the society is to have are within the permitted capacity of incorporated friendly societies<sup>8</sup> under the Act<sup>9</sup>.

A society established under the Friendly Societies Act 1992 is incorporated as from the date of its registration by the Financial Services Authority<sup>10</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 93(1). See PARA 2149.

3 Friendly Societies Act 1992 s 5(1)(a). Friendly societies registered under the Friendly Societies Act 1974 may also be registered and incorporated under the Friendly Societies Act 1992: s 5(1)(b). See further PARA 2113.

4 As to the meaning of 'memorandum' see PARA 2119 note 1.

5 Ie within the Friendly Societies Act 1992 s 5, Sch 2 head A, head B, head C or head D: see PARA 2096.

6 Friendly Societies Act 1992 s 5(2)(a).

7 Friendly Societies Act 1992 s 5(2)(b)(i). Such activity is to be funded by voluntary subscriptions from members of the society, with or without donations: s 5(2)(b)(ii).

8 Any reference within the Friendly Societies Act 1992 Pt II (ss 5-26) to the permitted capacity of incorporated friendly societies is a reference to the capacity to carry on all the activities mentioned in s 7(2) (see PARA 2096): s 5(7). As to the meaning of 'incorporated friendly society' see PARA 2082.

9 Friendly Societies Act 1992 s 5(2)(c).

10 Friendly Societies Act 1992 s 5(3) (amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

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## (C) REGISTRATION AND INCORPORATION

### *(a) New Societies*

#### **2112. Requirements for establishment and incorporation.**

Any seven or more persons may establish a society under the Friendly Societies Act 1992 by:

- 547 (1) agreeing upon the purposes of the society and upon the extent of its powers in a memorandum<sup>1</sup>;
- 548 (2) agreeing upon rules for the regulation of the society<sup>2</sup>; and
- 549 (3) sending to the Financial Services Authority<sup>3</sup> three copies of the memorandum and rules, each copy signed by at least seven of those persons<sup>4</sup> and, unless the secretary is to be elected, by the intended secretary<sup>5</sup>.

Where two or more friendly societies<sup>6</sup> propose to amalgamate<sup>7</sup> they must establish their successor society by:

- 550 (a) agreeing upon the purposes of their successor and upon the extent of its powers in a memorandum<sup>8</sup>;
- 551 (b) agreeing upon rules for the regulation of their successor<sup>9</sup>;
- 552 (c) each approving the memorandum and rules by special resolution<sup>10</sup>; and
- 553 (d) sending to the Authority three copies of the rules and memorandum, each copy signed by the secretary of each of the societies participating in the amalgamation<sup>11</sup>.

Where copies of the memorandum and rules are sent to the Authority as required, the Authority must, if satisfied that the memorandum and rules are in conformity with the Friendly Societies Act 1992, and the intended name of the society is not, in its opinion, undesirable, register the society and issue it with a certificate of incorporation<sup>12</sup>.

The Authority may not register a society as the successor society to any friendly society proposing an amalgamation unless it has confirmed<sup>13</sup> the proposed amalgamation<sup>14</sup>; nor may it register a society which, if it were registered, would be a society carrying out certain types of insurance business<sup>15</sup> if the Authority is satisfied that the principal place of business of the society is to be situated outside the United Kingdom<sup>16</sup>.

1 Friendly Societies Act 1992 s 5(6), Sch 3 para 1(1)(a). The provisions of the memorandum must comply with the requirements of Sch 3: Sch 3 para 1(1)(a). As to the memorandum see PARA 2119.

2 Friendly Societies Act 1992 Sch 3 para 1(1)(b). The rules must comply with the requirements of Sch 3: Sch 3 para 1(1)(b).

3 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

4 If there are only seven persons, each copy must be signed by all of them: Friendly Societies Act 1992 Sch 3 para 1(1)(c) (amended by SI 2001/2617).

5 Friendly Societies Act 1992 Sch 3 para 1(1)(c) (as amended: see note 4). As to the secretary see PARA 2301.

6 As to the meaning of 'friendly society' see PARA 2082.

7 le under the Friendly Societies Act 1992 s 85: see PARA 2352.

8 Friendly Societies Act 1992 Sch 3 para 1(2)(a). The provisions of the memorandum must comply with the requirements of Sch 3: Sch 3 para 1(2)(a).

9 Friendly Societies Act 1992 Sch 3 para 1(2)(b). The rules must comply with Sch 3: Sch 3 para 1(2)(b).

10 Friendly Societies Act 1992 Sch 3 para 1(2)(c). As to special resolutions see PARA 2306.

11 Friendly Societies Act 1992 Sch 3 para 1(2)(d) (amended by SI 2001/2617).

12 Friendly Societies Act 1992 Sch 3 para 1(3) (amended by SI 2001/2617).

13 le under the Friendly Societies Act 1992 s 85: see PARA 2352.

14 Friendly Societies Act 1992 Sch 3 para 1(4) (amended by SI 2001/2617).

15 le a society to which the Friendly Societies Act 1992 s 37(2) or (3) applies.

Section 37(2) applies to a friendly society which carries on long term business (see PARA 2138):

5 (1) if its rules do not contain provision for calling up additional contributions, for reducing benefits or for claiming assistance from other persons who have undertaken to provide it; or

6 (2) if its annual contribution income from long term business exceeded 500,000 ECU for three consecutive years and it is not the subject of a direction under s 37(5),

and, for the purposes of head (2) above, years ending before 1 January 1985 are to be disregarded: s 37(2).

Section 37(3) applies to a friendly society which carries on general business (see PARA 2138):

7 (a) if its rules do not contain provision for calling up additional contributions or for reducing benefits; or

8 (b) if its annual contribution income from general business in any previous year exceeded 1,000,000 ECU and it is not the subject of a direction under s 37(5),

and, for the purposes of head (b) above, years ending before 1 January 1993 are to be disregarded: s 37(3).

'Annual contribution income' means, in relation to a friendly society's long term business, the income of the society in a financial year without any deduction for reinsurance cessions: s 117(1). In s 37(2), (3) a reference to a year, in relation to annual contribution income, is a reference to any financial year of a society for which, at the relevant time, accounts have been or ought to have been prepared: s 37(4).

The Authority may, if it is satisfied that it is consistent with the international obligations of the United Kingdom to do so, direct that a friendly society: (i) which is, by virtue only of head (2) above, a society to which s 37(2) applies; or (ii) which is, by virtue only of head (b) above, a society to which s 37(3) applies must, unless the direction is revoked, be treated as not being a society to which s 37(2) or, as the case may be, s 37(3) applies: s 37(5) (s 37(5)-(7) amended by SI 2001/2617). If the Authority has given a direction under the Friendly Societies Act 1992 s 37(5) in relation to a society such as is mentioned in head (i) above and the society's annual contribution income from long term business exceeds 500,000 ECU for three consecutive years ending after a date specified in the direction, the Authority must revoke the direction: s 37(6) (as so amended). If the Authority has given a direction in relation to a society such as is mentioned in head (ii) above and the society's annual contribution income from general business in a year ending after a date specified in the direction exceeded 1,000,000 ECU, the Authority must revoke the direction: s 37(7) (as so amended).

16 Friendly Societies Act 1992 Sch 3 para 1(5) (added by SI 1996/1669; and amended by SI 2001/2617). As to the meaning of 'United Kingdom' see PARA 2 note 3.

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*(b) Registered Friendly Societies*

**2113. Incorporation of registered friendly societies.**

A registered friendly society<sup>1</sup> may be registered and incorporated under the Friendly Societies Act 1992 if it satisfies specified conditions in relation to its purposes<sup>2</sup>, and complies with specified applicable provisions as to its registration under the Act<sup>3</sup>. In order for a registered friendly society to become registered and incorporated under the Friendly Societies Act 1992, the following steps must be taken:

- 554 (1) the proposal to apply for incorporation must be submitted to the members of the society for their consent by the procedure required for a proposal to amend the rules<sup>4</sup> or, in the case of a society with branches, the general rules, of the society<sup>5</sup>;
- 555 (2) consent to the application must be given in accordance with that procedure<sup>6</sup>;
- 556 (3) the society must agree, in accordance with that procedure, upon the purposes<sup>7</sup> of the society after incorporation and upon the extent of its powers in a memorandum<sup>8</sup>, and upon the rules for the regulation of the society after incorporation<sup>9</sup>;
- 557 (4) there must be sent to the Financial Services Authority<sup>10</sup> three copies of the memorandum and rules, each signed by at least seven members and the secretary of the society, and a statutory declaration by the secretary of the society that the steps mentioned in heads (1) and (2) above were taken<sup>11</sup>.

Where copies of the memorandum, the rules and the statutory declaration have been duly sent to the Authority as required, and it is satisfied:

- 558 (a) that the steps mentioned in heads (1) and (2) above were taken;
- 559 (b) that the provisions of the memorandum and rules are in conformity with the Friendly Societies Act 1992;
- 560 (c) that the name proposed for the society after incorporation is not, in its opinion, undesirable; and
- 561 (d) in the case of certain societies carrying out insurance business<sup>12</sup>, that the principal place of business of the society is situated in the United Kingdom<sup>13</sup>,

the Authority must register the society and issue it with a certificate of incorporation<sup>14</sup>.

On registering a society the Authority must: (i) retain and register one copy of the memorandum and of the rules; (ii) return another copy to the secretary of the society, together with a certificate of registration; and (iii) keep another copy, a copy of the certificate of incorporation, and a copy of the certificate of registration of the memorandum and the rules, in the public file of the society<sup>15</sup>.

<sup>1</sup> As to the meaning of 'registered friendly society' see PARA 2082.

- 2 Friendly Societies Act 1992 s 6(1)(a). The conditions specified in s 5(2) (see PARA 2111) must be satisfied by reference to the society's proposed memorandum: s 6(1)(a). As to the memorandum see PARA 2119.
- 3 Friendly Societies Act 1992 s 6(1)(b). The requirements are those in s 5(6), Sch 3: see the text and notes 4-15; and PARAS 2110-2112, 2114.
- 4 As to the amendment of rules see PARA 2123.
- 5 Friendly Societies Act 1992 Sch 3 para 2(1)(a).
- 6 Friendly Societies Act 1992 Sch 3 para 2(1)(b).
- 7 As to the purposes of a society see PARA 2096.
- 8 Friendly Societies Act 1992 Sch 3 para 2(1)(c)(i). The provisions of the memorandum must comply with the requirements of Sch 3: Sch 3 para 2(1)(c)(i).
- 9 Friendly Societies Act 1992 Sch 3 para 2(1)(c)(ii). The rules must comply with the requirements of Sch 3: Sch 3 para 2(1)(c)(ii).
- 10 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 11 Friendly Societies Act 1992 Sch 3 para 2(1)(d) (amended by SI 2001/2617). As to statutory declarations see **CIVIL PROCEDURE** vol 11 (2009) PARA 1024.
- 12 Is a society to which the Friendly Societies Act 1992 s 37(2) or (3) applies: see PARA 2112 note 15.
- 13 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 14 Friendly Societies Act 1992 Sch 3 para 2(2) (amended by SI 1996/1669; and SI 2001/2617).
- 15 Friendly Societies Act 1992 Sch 3 para 3 (amended by SI 2001/2617). As to the public file see PARA 2382.

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### *(c) Registered Friendly Societies with Branches*

#### **2114. Incorporation of registered friendly societies with branches.**

Under the Friendly Societies Act 1974 branches may be separately registered and have separately owned funds<sup>1</sup>. On the incorporation of a registered friendly society<sup>2</sup>, its registration under the Friendly Societies Act 1974, and that of any registered branch<sup>3</sup>, is cancelled by the Financial Services Authority<sup>4</sup>. On the incorporation of a registered friendly society with registered or unregistered branches, all the property held immediately before incorporation, by any person, in trust for any branch of the society, and all rights and liabilities to which any branch was then entitled or subject, become<sup>5</sup> the property, rights or liabilities of the society<sup>6</sup>.

A registered friendly society may<sup>7</sup> make a scheme identifying any property, rights or liabilities of any branch of the society which are not to be transferred to the society on its incorporation, and any such property, rights or liabilities are excluded from transfer<sup>8</sup>. A scheme may deal with property, rights and liabilities of one or more branches of the registered society and may, instead of specifying any property, rights and liabilities of the branch of the registered society, refer to all the property, rights and liabilities which are referable to such parts of its activities as

are specified in the scheme<sup>9</sup>. On making a scheme the registered society must send to the Authority<sup>10</sup>:

- 562 (1) four copies of the scheme, each signed by the secretary<sup>11</sup>;
- 563 (2) a statutory declaration by the secretary that the scheme was duly approved by the society<sup>12</sup>;
- 564 (3) in the case of a scheme identifying any property, rights or liabilities of a branch which was, immediately prior to incorporation, carrying on any insurance or non-insurance business, a certificate from the appropriate actuary that the incorporated society will, on incorporation, possess sufficient assets to meet such of the liabilities to be transferred to the society from that branch as are referable to that business<sup>13</sup>.

On receiving copies of a scheme, the Authority must, if satisfied that the society has duly approved the scheme:

- 565 (a) retain and register one copy of the scheme;
- 566 (b) return another copy to the secretary of the registered society, together with a certificate of registration;
- 567 (c) keep another copy in the public file<sup>14</sup> of the registered society and, after incorporation, in the public file of the incorporated society<sup>15</sup>,

and the Authority may not register the incorporated society under the Friendly Societies Act 1992 until after it has registered the scheme<sup>16</sup>.

1 See the Friendly Societies Act 1974 ss 12-15A (see PARA 2151 et seq). As to branches of societies see PARA 2091.

2 As to the meaning of 'registered friendly society' see PARA 2082.

3 As to the meaning of 'registered branch' see PARA 2091.

4 Friendly Societies Act 1992 s 6(6) (amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 See subject to the Friendly Societies Act 1992 s 6(5): see the text and notes 7-8.

6 Friendly Societies Act 1992 s 6(4). The rights and liabilities referred to in s 6 include any rights and liabilities subsisting immediately before incorporation under any agreement or arrangement for the payment of pensions, allowances or gratuities or under the law of any country or territory outside the United Kingdom: s 6(7), Sch 4 para 6(c). As to the meaning of 'United Kingdom' see PARA 2 note 3.

7 See in accordance with the Friendly Societies Act 1992 Sch 4 para 2: see note 8.

8 Friendly Societies Act 1992 s 6(5). Schedule 4 para 2 applies to a registered friendly society with branches which proposes: (1) that the incorporated society will have branches; and (2) that any of those branches is to be treated as a continuation of a branch of the registered society: Sch 4 para 2(1). The registered society may, by the procedure required to amend the rules of the society, approve a scheme under s 6(5) identifying property, rights and liabilities of a branch which are to continue to be property, rights and liabilities of the branch (as a branch of the incorporated society) and so are to be excluded from transfer under s 6(4): Sch 4 para 2(2). A scheme may not identify for exclusion from transfer under s 6(4) any property, rights or liabilities of a branch of the registered friendly society which are referable only to an activity of the branch which a branch of the incorporated society would, by virtue of s 7(5) (see PARA 2121), be unable to carry out on its own behalf: Sch 4 para 2(4).

9 Friendly Societies Act 1992 Sch 4 para 2(3).

10 Friendly Societies Act 1992 Sch 4 para 2(5) (amended by SI 2001/2617).

11 Friendly Societies Act 1992 Sch 4 para 2(5)(a). As to the secretary see PARA 2301.



12 Friendly Societies Act 1992 Sch 4 para 2(5)(b). As to statutory declarations see **CIVIL PROCEDURE** vol 11 (2009) PARA 1024.

13 Friendly Societies Act 1992 Sch 4 para 2(5)(c).

14 As to the public file see PARA 2382.

15 As to the meaning of 'incorporated society' see PARA 2082.

16 Friendly Societies Act 1992 Sch 4 para 2(6) (amended SI 2001/2617).

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## (D) EFFECT OF INCORPORATION

### **2115. Effect of incorporation on a registered friendly society.**

Subject to the provisions of the Friendly Societies Act 1992, on the incorporation of a registered friendly society<sup>1</sup> the incorporated friendly society<sup>2</sup> is treated as the same person as the registered friendly society<sup>3</sup>. After its incorporation the society continues to be entitled to all rights and subject to all rights and liabilities to which it was entitled or subject immediately before incorporation<sup>4</sup>. Any property held immediately before incorporation by any person in trust for the society becomes the property of the society on incorporation<sup>5</sup>. Any agreement made, transaction effected or other thing done by, to or in relation to the registered society<sup>6</sup> which is in force or effective immediately before incorporation has effect as if made, effected or done by, to or in relation to the incorporated society<sup>7</sup>. Thus any reference to the society:

- 568 (1) in any agreement;
- 569 (2) in any process or other document issued, prepared or employed for the purposes of any proceedings before any court or other tribunal or authority; and
- 570 (3) in any other document whatsoever, other than an enactment, relating to or affecting any property, right or liability of the society,

is to be taken as a reference to the incorporated society<sup>8</sup>.

On incorporation of a registered friendly society:

- 571 (a) a person who was a member of the society immediately before incorporation becomes a member of the incorporated society<sup>9</sup>;
- 572 (b) any appointment as a trustee or treasurer of the registered friendly society determines<sup>10</sup>;
- 573 (c) all other persons who were officers<sup>11</sup> of the registered friendly society become officers, holding corresponding offices, of the incorporated society<sup>12</sup>.

Any agreement made by a registered friendly society which is in force immediately before the society's incorporation under the Friendly Societies Act 1992 has effect as if:

- 574 (i) for references to members of the registered society there were substituted references to members of the incorporated society<sup>13</sup>;
- 575 (ii) for references to officers of the registered society, other than its trustees or treasurer, there were substituted references to the corresponding officers of the incorporated society<sup>14</sup>;
- 576 (iii) for references to the trustees of the registered friendly society there were substituted references to the incorporated society<sup>15</sup>; and
- 577 (iv) for references to the treasurer of the registered friendly society there were substituted references to such person as the incorporated society may appoint or, in default of appointment, to the officer of that society who corresponds as nearly as may be to the treasurer<sup>16</sup>.

Any contract of employment with the registered society in force immediately before incorporation is merely modified by the substitution of the name of the incorporated society as the employer and is not terminated or varied in any other way<sup>17</sup>. Any period of employment with the registered society counts for all purposes as a period of employment with the incorporated society<sup>18</sup>.

The final financial year of the registered friendly society is the period not exceeding 12 months expiring immediately before its incorporation<sup>19</sup>. Anything which, if the society had not been incorporated, would be required to be done by the registered society at a time after its incorporation is to be done by the incorporated society<sup>20</sup>.

1 As to the meaning of 'registered friendly society' see PARA 2082.

2 As to the meaning of 'incorporated friendly society' see PARA 2082.

3 Friendly Societies Act 1992 s 6(7), Sch 4 para 3(1).

4 Friendly Societies Act 1992 s 6(3). As to the rights and liabilities referred to in the text see Sch 4 para 6(c); and PARA 2114 note 6.

5 Friendly Societies Act 1992 s 6(2).

6 Ie without prejudice to the generality of the Friendly Societies Act 1992 Sch 4 para 3(1): see the text and notes 1-3.

7 Friendly Societies Act 1992 Sch 4 para 3(2).

8 Friendly Societies Act 1992 Sch 4 para 3(2)(a)-(c).

9 Friendly Societies Act 1992 Sch 4 para 4(a).

10 Friendly Societies Act 1992 Sch 4 para 4(b).

11 Unless the context otherwise requires, 'officer' means: (1) in relation to a registered friendly society or registered branch, a trustee, the treasurer, secretary, chief executive (however described), a member of the committee of management and a person appointed by the society or branch to sue or be sued on its behalf; or (2) in relation to an incorporated friendly society, a member of the committee of management, the chief executive (however described) and the secretary: Friendly Societies Act 1992 s 119(1). As to the chief executive and secretary see PARA 2301. As to the committee of management see PARA 2184. As to the officers of registered societies generally see PARA 2172 et seq. As to trustees of registered societies see PARA 2179 et seq.

12 Friendly Societies Act 1992 Sch 4 para 4(c). However, this is without prejudice to anything done by the society after incorporation as respects the election or appointment of members of its committee of management and its other officers: Sch 4 para 4.

13 Friendly Societies Act 1992 Sch 4 para 5(a).

14 Friendly Societies Act 1992 Sch 4 para 5(b).

15 Friendly Societies Act 1992 Sch 4 para 5(c).

16 Friendly Societies Act 1992 Sch 4 para 5(d).

17 Friendly Societies Act 1992 Sch 4 para 6(a).

18 Friendly Societies Act 1992 Sch 4 para 6(b).

19 Friendly Societies Act 1992 Sch 4 para 7(1).

20 Friendly Societies Act 1992 Sch 4 para 7(2). If the incorporated friendly society fails to do anything which it is required to do by virtue of Sch 4 para 7(2), the society and its officers will be subject to the sanctions to which the registered society and its officers would have been subject if the society had failed to do it: Sch 4 para 7(3).

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## **2116. Effect of incorporation on the branches of a registered friendly society.**

Where, on the incorporation of a registered society, the property, rights and liabilities of a branch of the registered society<sup>1</sup> are all transferred to the incorporated society<sup>2</sup>, the provisions relating to the effect of incorporation of a registered friendly society<sup>3</sup> apply in relation to branches of the society as they apply in relation to the registered society with modifications<sup>4</sup>. Where the property, rights and liabilities of a branch of a registered society are all excluded by virtue of a scheme from the transfer to the incorporated society<sup>5</sup>, the property, rights and liabilities of the branch continue as the property, rights and liabilities of the branch, as a branch of the incorporated society<sup>6</sup>. The branch of the incorporated society must be treated as a continuation of the branch of the registered society and on incorporation:

578 (1) any member of the branch continues as a member<sup>7</sup>; and

579 (2) any trustee, treasurer or other officer of the branch immediately before incorporation continues in office<sup>8</sup>,

but heads (1) and (2) above are without prejudice to anything done after incorporation as respects the membership and officers of the branch<sup>9</sup>.

Where on the incorporation of a registered society some of the property, rights and liabilities of a branch of the registered society are transferred<sup>10</sup> to the incorporated society and some are excluded from the transfer by virtue of a scheme<sup>11</sup>, the provisions relating to the effect of incorporation of a registered friendly society<sup>12</sup> as respects property, rights and liabilities transferred from the branch to the incorporated society apply in relation to the branch as they apply in relation to the registered society, with modifications<sup>13</sup>. On incorporation of the registered society, the property, rights and liabilities of the branch which are excluded from transfer continue as property, rights and liabilities of the branch, as a branch of the incorporated society<sup>14</sup>. As respects the property, rights and liabilities so excluded, the branch must, after incorporation of the registered society, be treated as a continuation of the branch of the registered society and on incorporation:

580 (a) any member of the branch continues as a member<sup>15</sup>;

581 (b) any trustee, treasurer or other officer of the branch continues in office<sup>16</sup>,

but heads (a) and (b) above are without prejudice to anything done after incorporation as respects membership and officers of the branch<sup>17</sup>.

1 le under the Friendly Societies Act 1992 s 6(4): see PARA 2114 note 6. As to branches of societies see PARA 2091.

2 Friendly Societies Act 1992 s 6(7), Sch 4 para 8(1).

3 le the Friendly Societies Act 1992 Sch 4 paras 3-7: see PARA 2115. As to the meaning of 'registered friendly society' see PARA 2082.

4 Friendly Societies Act 1992 Sch 4 para 8(2), which provides that the modifications are as follows:

9 (1) Sch 4 para 4 applies with the omission of Sch 4 para 4(c) and the following wording (see PARA 2115 head (c) and note 12);

10 (2) in Sch 4 para 5 for references to the members, officers, trustees or treasurer of the society (see PARA 2115 heads (i)-(iv)) there are substituted references to the corresponding officers of the branch,

and the branch is deemed to be dissolved immediately after the transfer of its property, rights and liabilities to the incorporated society.

5 Friendly Societies Act 1992 Sch 4 para 9(1).

6 Friendly Societies Act 1992 Sch 4 para 9(2).

7 Friendly Societies Act 1992 Sch 4 para 9(3)(a).

8 Friendly Societies Act 1992 Sch 4 para 9(3)(b).

9 Friendly Societies Act 1992 Sch 4 para 9(3).

10 le under the Friendly Societies Act 1992 s 6(4): see PARA 2114 text and note 6.

11 Friendly Societies Act 1992 Sch 4 para 10(1).

12 le the Friendly Societies Act 1992 Sch 4 paras 3, 5, 6 and 7: see PARA 2115.

13 Friendly Societies Act 1992 Sch 4 para 10(2), which provides that the modifications are:

11 (1) in Sch 4 para 5 (see PARA 2115 heads (i)-(iv)) for references to the members, officers, trustees or treasurer of the society there are substituted references to the corresponding officers of the branch; and

12 (2) Sch 4 para 7(1) (see PARA 2115 text to note 19) does not apply.

14 Friendly Societies Act 1992 Sch 4 para 10(3).

15 Friendly Societies Act 1992 Sch 4 para 10(4)(a).

16 Friendly Societies Act 1992 Sch 4 para 10(4)(b).

17 Friendly Societies Act 1992 Sch 4 para 10(4).

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## **2117. Consequences of transfer.**

A transfer<sup>1</sup> does not give rise to any liability to stamp duty<sup>2</sup>. The persons who were the trustees and treasurer of the registered friendly society<sup>3</sup> immediately before its incorporation must deliver to the incorporated society any property of the society held by them and any documents relating to the property, rights and liabilities of the registered friendly society or its financial affairs<sup>4</sup>. The persons who were the trustees and treasurer of any branch of a registered friendly society immediately before its incorporation must deliver to the incorporated society any property, formerly property of the branch, which is transferred to the society<sup>5</sup>, and any documents relating to such of the property, rights and liabilities of the branch as are transferred<sup>6</sup>.

If the Public Trustee<sup>7</sup> held property on trust for the registered society immediately before its incorporation, he must deliver to the incorporated society any property so held by him and any documents relating to it<sup>8</sup>.

The action mentioned in these provisions must be taken not later than the end of 90 days beginning with the day on which the registered society is incorporated<sup>9</sup>. Nothing in the Friendly Societies Act 1992 has effect to relieve the former trustees or treasurer of a registered society or branch or the Public Trustee from any liability arising from acts or omissions before the incorporation of the society<sup>10</sup>.

1    le a transfer effected by the Friendly Societies Act 1992 s 6: see PARA 2115.

2    Friendly Societies Act 1992 s 6(7), Sch 4 para 11. See also **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1001 et seq.

3    As to the meaning of 'registered friendly society' see PARA 2082. As to trustees of registered societies see PARA 2179 et seq; and as to the treasurer see PARA 2183.

4    Friendly Societies Act 1992 Sch 4 para 12(2).

5    le by virtue of the Friendly Societies Act 1992 s 6(4): see PARA 2114 text and note 6.

6    Friendly Societies Act 1992 Sch 4 para 12(3).

7    As to the Public Trustee see also PARA 2182; and **TRUSTS** vol 48 (2007 Reissue) PARA 766 et seq.

8    Friendly Societies Act 1992 Sch 4 para 12(4).

9    Friendly Societies Act 1992 Sch 4 para 12(1). As to the date of a society's incorporation see s 6(1); and PARA 2110 text and notes 1-2.

10   Friendly Societies Act 1992 Sch 4 para 12(5).

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## **2118. Making of contracts and execution of documents.**

A contract may be made:

582 (1)    by an incorporated friendly society<sup>1</sup>, by writing under its common seal<sup>2</sup>; or

583 (2) on behalf of an incorporated friendly society, by any person acting under its authority, express or implied,

and any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of an incorporated friendly society<sup>3</sup>.

The following provisions have effect with respect to the execution of documents by an incorporated friendly society<sup>4</sup>. A document is sealed by an incorporated friendly society by affixing its common seal, if it has one<sup>5</sup>. A document signed by a member of the committee of management<sup>6</sup> and the secretary<sup>7</sup> of an incorporated friendly society, or by two members of the committee of management, and expressed, in whatever form of words, to be executed by the society has the same effect as if executed under the common seal of the society<sup>8</sup>. A document executed by a society which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it is presumed, unless a contrary intention is proved, to be delivered upon its being so executed<sup>9</sup>. In favour of a purchaser<sup>10</sup> a document is deemed to have been duly executed by a society if it purports to be signed by a member of the committee of management and the secretary of the society, or by two members of the committee of management; and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, it is deemed to have been delivered upon its being executed<sup>11</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 The provisions of the Friendly Societies Act 1992 s 7(6), Sch 6 apply whether or not the society has a common seal: Sch 6 para 2(3).

3 Friendly Societies Act 1992 Sch 6 para 1.

4 Friendly Societies Act 1992 Sch 6 para 2(1).

5 Friendly Societies Act 1992 Sch 6 para 2(2). See note 2.

6 As to the committee of management see PARA 2294 et seq.

7 As to the secretary of an incorporated friendly society see PARA 2301.

8 Friendly Societies Act 1992 Sch 6 para 2(4).

9 Friendly Societies Act 1992 Sch 6 para 2(5).

10 For these purposes, 'purchaser' means a purchaser in good faith for valuable consideration; and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property: Friendly Societies Act 1992 Sch 6 para 2(7).

11 Friendly Societies Act 1992 Sch 6 para 2(6).

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## **B. STATUTORY DOCUMENTS**

### **(A) THE MEMORANDUM**

## 2119. The memorandum.

The memorandum<sup>1</sup> of an incorporated friendly society must: (1) specify the name of the society<sup>2</sup>; (2) state whether the registered office of the society is to be situated in England and Wales, or in Scotland, or in Northern Ireland<sup>3</sup>; (3) specify the address of its registered office<sup>4</sup>; (4) state the purposes of the society and the extent of its powers<sup>5</sup>; and (5) if any of those purposes are to include the carrying on of any business outside the United Kingdom<sup>6</sup>, state with respect to those purposes that such is the case<sup>7</sup>.

1 In relation to an incorporated friendly society, 'memorandum' means the memorandum registered under the Friendly Societies Act 1992 s 5(6), Sch 3 para 3 (see PARA 2113), including the record of any alteration under Sch 3 para 6 (see PARA 2123): Sch 3 para 4(3). As to the meaning of 'incorporated friendly society' see PARA 2082.

2 Friendly Societies Act 1992 Sch 3 para 4(1)(a).

3 Friendly Societies Act 1992 Sch 3 para 4(1)(b). The choice stated in a society's memorandum in pursuance of this provision may not be altered by the society: Sch 3 para 4(2).

4 Friendly Societies Act 1992 Sch 3 para 4(1)(c).

5 Friendly Societies Act 1992 Sch 3 para 4(1)(d). As to the purposes of incorporated societies see PARAS 2096-2097.

6 As to the meaning of 'United Kingdom' see PARA 2 note 3.

7 Friendly Societies Act 1992 Sch 3 para 4(1)(e).

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## 2120. Effect of the memorandum.

The provisions of the memorandum<sup>1</sup> of an incorporated friendly society<sup>2</sup> are binding upon each of the members and officers<sup>3</sup> of the society, and all persons claiming on account of a member or under its rules<sup>4</sup>. Any other person who is a party to a transaction<sup>5</sup> with an incorporated friendly society which is within the permitted capacity of an incorporated friendly society<sup>6</sup> is not bound to inquire as to whether the transaction is within the capacity of the society in question<sup>7</sup>.

If such other person gives valuable consideration for an act<sup>8</sup> and does not know that the act is beyond the capacity of the society, the act is deemed to be one which is within the capacity of the society to enter into, notwithstanding the provisions of its memorandum<sup>9</sup>. This provision does not affect:

584 (1) the right of a member of an incorporated friendly society to bring proceedings to restrain the doing of an act (other than an act done in fulfilment of a legal obligation arising from a previous act of the society) which is beyond the capacity of the society<sup>10</sup>;

585 (2) the duty of the committee of management<sup>11</sup> to observe any limitation on its powers flowing from the society's memorandum<sup>12</sup>; or

586 (3) any liability incurred by any person by reason of the society acting beyond its capacity<sup>13</sup>.

Where an incorporated friendly society purports to transfer or grant an interest in property, the fact that the act was beyond the capacity of the society does not affect the title of a person who in good faith subsequently acquired the property or an interest in it for valuable consideration and without actual notice of the circumstances affecting the validity of the society's act<sup>14</sup>.

In any proceedings arising out of these provisions<sup>15</sup>, the burden of proving that a person knew that an act was beyond the capacity of the society in question lies on the person making the allegation<sup>16</sup>.

1 As to the meaning of 'memorandum' see PARA 2119 note 1.

2 As to the meaning of 'incorporated friendly society' see PARA 2082.

3 As to the meaning of 'officer' see PARA 2115 note 11.

4 Friendly Societies Act 1992 s 8(1). All such members, officers and persons, but no others, are taken to have notice of the provisions of the memorandum: s 8(1).

5 For these purposes 'transaction' includes any act: Friendly Societies Act 1992 s 8(9).

6 As to the meaning of 'permitted capacity of an incorporated friendly society' see PARA 2111 note 8.

7 Friendly Societies Act 1992 s 8(2).

8 I.e. any act of an incorporated society which is within the permitted capacity of such societies under the Friendly Societies Act 1992 but is beyond the capacity of the society in question: s 8(3).

9 Friendly Societies Act 1992 s 8(4).

10 Friendly Societies Act 1992 s 8(6)(a).

11 As to the committee of management see PARA 2294 et seq.

12 Friendly Societies Act 1992 s 8(6)(b).

13 Friendly Societies Act 1992 s 8(6)(c). Relief from any liability mentioned in s 8(6)(c) must be agreed to by special resolution: s 8(7). As to special resolutions see PARA 2306.

14 Friendly Societies Act 1992 s 8(5).

15 I.e. arising out of the Friendly Societies Act 1992 s 8(4): see the text to note 9.

16 Friendly Societies Act 1992 s 8(8).

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## (B) THE RULES

### **2121. The rules.**

The rules of an incorporated friendly society<sup>1</sup> must provide for the following matters<sup>2</sup>:



- 587 (1) the terms of admission of members and the manner in which membership is to cease<sup>3</sup>;  
 588 (2) if the terms on which a benefit is provided are not in the rules, the manner in which they are to be determined<sup>4</sup>;  
 589 (3) any forfeitures which may be imposed on any member<sup>5</sup>;  
 590 (4) the consequences of non-payment of any subscription<sup>6</sup>;  
 591 (5) the manner of remunerating the auditors<sup>7</sup>;  
 592 (6) as respects officers<sup>8</sup>:

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7. (a) the manner of their election or appointment and their removal;  
 8. (b) the manner of remunerating them; and  
 9. (c) the circumstances in which pensions may be awarded to persons by virtue of their office and the method of determining the terms of such pensions<sup>9</sup>;

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- 593 (7) the powers and duties of the committee of management<sup>10</sup>;  
 594 (8) the investment of the funds of the society<sup>11</sup>;  
 595 (9) the manner in which disputes are to be settled<sup>12</sup>;  
 596 (10) if the society has a common seal, the form, custody and use of the seal<sup>13</sup>;  
 597 (11) the calling and holding of meetings, and in particular:

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10. (a) the right to requisition meetings;  
 11. (b) the right to move resolutions at meetings;  
 12. (c) the manner in which notice<sup>14</sup> of meetings, and of any resolutions to be moved at meetings, is to be given;  
 13. (d) the procedure to be observed at meetings;  
 14. (e) the form of notice for the convening of a meeting;  
 15. (f) the voting rights of members, the right to demand a poll and the manner in which a poll is to be taken<sup>15</sup>;

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- 598 (12) the entitlement of members to participate in the distribution of any surplus assets after payments to creditors, on the winding up, or dissolution by consent, of the society<sup>16</sup>;  
 599 (13) the procedure for altering the society's memorandum<sup>17</sup> and rules<sup>18</sup>.

Nothing in the Friendly Societies Act 1992 prevents the society from providing in its rules:

- 600 (i) for such system of representation of members in the making of decisions by the society as the society thinks fit<sup>19</sup>;  
 601 (ii) for the division of members into groups under the control of the society and bound to contribute to the funds of the society but, subject to that, having funds and property of their own vested in trustees and administered by themselves or through their own trustees, officers or committees and in accordance with their own rules<sup>20</sup>;  
 602 (iii) for the delegation of authority to any such group (or its committee or officers) to act, within such limits as the society may set, on the society's behalf<sup>21</sup>,

but no such group may do anything on its own account which is not a social or benevolent activity<sup>22</sup> or which does not fall within head D of the permitted purposes<sup>23</sup>, or the additional purposes of incorporated friendly societies<sup>24</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

- 2 Friendly Societies Act 1992 s 5(6)(b), Sch 3 para 5(1), (3). Nothing in Sch 3 para 5 is to be taken to authorise any provision in the rules of a society which is inconsistent with, or rendered void by, the Friendly Societies Act 1992 or any instrument made under it: Sch 3 para 5(2).
- 3 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 1.
- 4 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 2.
- 5 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 3.
- 6 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 4.
- 7 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 5.
- 8 As to the meaning of 'officer' see PARA 2115 note 11.
- 9 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 6.
- 10 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 7. As to the committee of management see PARA 2294 et seq.
- 11 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 8.
- 12 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 9.
- 13 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 10.
- 14 'Notice' means written notice and 'notice to' a person means notice given to that person; and 'notify' is to be construed accordingly: Friendly Societies Act 1992 s 119(1).
- 15 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 11.
- 16 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 12.
- 17 As to the meaning of 'memorandum' see PARA 2119 note 1.
- 18 Friendly Societies Act 1992 Sch 3 para 5(3) Table item 13. As to alteration of the memorandum and rules see PARA 2123.
- 19 Friendly Societies Act 1992 s 7(5)(a).
- 20 Friendly Societies Act 1992 s 7(5)(b).
- 21 Friendly Societies Act 1992 s 7(5)(c).
- 22 Ie which does not fall within the Friendly Societies Act 1992 s 10: see PARA 2097.
- 23 Ie the Friendly Societies Act 1992 Sch 2 head D: see PARA 2096.
- 24 Friendly Societies Act 1992 s 7(5). As to the additional purposes see Sch 5; and PARA 2097.

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## **2122. The effect of the rules.**

The provisions of the rules<sup>1</sup> of an incorporated friendly society<sup>2</sup> are binding upon each of the members and officers<sup>3</sup> of the society and all persons claiming on account of a member or under

its rules<sup>4</sup>. Any other person who is a party to a transaction<sup>5</sup> with an incorporated friendly society is not bound to inquire as to any limitation on the powers of the committee of management<sup>6</sup> to bind the society<sup>7</sup>.

In favour of any other person who gives valuable consideration for an act<sup>8</sup> and does not know that the act is beyond the powers of the committee of management, the power of the committee of management to bind the society will be deemed free of any limitation in the society's constitution<sup>9</sup>.

This provision does not affect:

- 603 (1) the right of a member of an incorporated friendly society to bring proceedings to restrain the doing of any act, other than an act done in fulfilment of a legal obligation arising from a previous act of the society, which is beyond the powers of the committee of management<sup>10</sup>;
- 604 (2) the duty of the committee of management to act within its powers under the constitution of the society<sup>11</sup>;
- 605 (3) any liability incurred by any person by reason of the committee of management exceeding its powers<sup>12</sup>.

Where an incorporated friendly society purports to transfer or grant an interest in property, the fact that the committee of management acted beyond its powers under the society's constitution does not affect the title of a person who in good faith subsequently acquires the property or interest in it for valuable consideration and without actual notice of the circumstances, if any, affecting the validity of the society's act<sup>13</sup>.

In any proceedings arising out of these provisions the burden of proving that a person knew that any act was beyond the powers of the committee of management lies on the person making the allegation<sup>14</sup>. These provisions do not affect the application, in relation to an incorporated friendly society, of any rule of law relating to the validity of acts which are within the capacity of a body corporate but may have been affected by defects arising from its internal management under its constitution<sup>15</sup>.

1 As to the rules see PARA 2121.

2 As to the meaning of 'incorporated friendly society' see PARA 2082.

3 As to the meaning of 'officer' see PARA 2115 note 11.

4 Friendly Societies Act 1992 s 9(1). All such members, officers and persons, but no others, are taken to have notice of the provisions of the rules: s 9(1).

5 For these purposes, 'transaction' includes any act: Friendly Societies Act 1992 s 9(8)(b).

6 As to the committee of management see PARA 2294 et seq.

7 Friendly Societies Act 1992 s 9(2).

8 Ie any act of an incorporated friendly society which is, or is deemed by the Friendly Societies Act 1992 s 8(4) (see PARA 2120) to be, within the capacity of the society and is decided upon by the committee of management acting beyond its powers under the constitution of the society: s 9(3).

9 Friendly Societies Act 1992 s 9(4). For these purposes, references to limitations on the committee's powers under the constitution of the society include limitations deriving from a resolution of the society in general meeting or any agreement between the members of the society: s 9(8)(a).

10 Friendly Societies Act 1992 s 9(6)(a).

11 Friendly Societies Act 1992 s 9(6)(b).

12 Friendly Societies Act 1992 s 9(6)(c). Action by the committee of management of an incorporated friendly society which is beyond its powers under the society's constitution but is within its capacity may be ratified by the society in general meeting in such manner as its rules provide; however, relief from any liability mentioned in s 9(6)(c) must be agreed to by special resolution separate from any resolution ratifying the committee's powers: s 9(7). As to special resolutions see PARA 2306.

13 Friendly Societies Act 1992 s 9(5).

14 Friendly Societies Act 1992 s 9(9).

15 Friendly Societies Act 1992 s 9(10).

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## (C) ALTERATION OF THE MEMORANDUM OR RULES

### **2123. Alteration of the memorandum or rules.**

An incorporated friendly society<sup>1</sup> may, in the manner prescribed by its rules, alter its memorandum<sup>2</sup> and rules<sup>3</sup> by the addition, rescission or variation of any provision<sup>4</sup>. It is not necessary to alter the memorandum or rules of an incorporated friendly society by reason only that its name or registered office is changed<sup>5</sup>. Where a society makes an alteration of its memorandum or rules under these provisions, it must send to the Financial Services Authority<sup>6</sup>: (1) three copies of a record of the alteration signed by the secretary<sup>7</sup>; and (2) a statutory declaration by the secretary that the alteration was made in accordance with the procedure prescribed by the society's rules<sup>8</sup>. Where copies of a record of an alteration of a society's memorandum or rules are sent to the Authority, and the Authority is satisfied that the alteration is in conformity with the Friendly Societies Act 1992, it must: (a) retain and register one of the copies; (b) return another to the secretary of the society together with a certificate of registration of the alteration; and (c) keep another copy, together with a copy of the certificate of registration of the alteration, in the public file of the society<sup>9</sup>. On making an alteration of its memorandum or rules under these provisions the society must determine the date on which it intends the alteration to take effect, and the record of the alteration must specify that date<sup>10</sup>. An alteration of the memorandum or rules of a society under these provisions does not take effect until the specified date or, if the alteration is registered on a later date, the date on which the certificate of registration is issued<sup>11</sup>.

If an incorporated friendly society arranges for the publication in consolidated form of its memorandum or rules as altered for the time being: (i) it must send a copy to the Authority; and (ii) the Authority must keep the copy in the public file of the society, but may not register the copy<sup>12</sup>. If an incorporated friendly society fails to send the documents mentioned in heads (1) and (2) above to the Authority, within the period of three months beginning with the date on which an alteration to its memorandum or rules is made, the society is guilty of an offence<sup>13</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 As to the memorandum see PARA 2119.

3 As to the rules see PARA 2121.

4 Friendly Societies Act 1992 s 5(6), Sch 3 para 6(1). However, this does not apply to any alteration to which s 13(6) (see PARA 2133) applies, or which is prohibited by Sch 3 para 4(2) (see PARA 2119 note 3): Sch 3 para 6(2). The rules of every society are required to provide for their alteration: see PARA 2121 head (13).

5 Friendly Societies Act 1992 Sch 3 para 6(3). An alteration to the name or registered office of an incorporated friendly society will, instead of being effected under Sch 3 para 6, be effected under Sch 3 para 9 (see PARA 2125) or Sch 3 para 12 (see PARA 2127).

6 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

7 As to the secretary of a friendly society see PARA 2301.

8 Friendly Societies Act 1992 Sch 3 para 6(4) (Sch 3 para 6(4), (6), (8) amended by SI 2001/2617). As to statutory declarations see **CIVIL PROCEDURE** vol 11 (2009) PARA 1024.

9 Friendly Societies Act 1992 Sch 3 para 6(6) (as amended: see note 8). As to the public file of a society see PARA 2382.

10 Friendly Societies Act 1992 Sch 3 para 6(5).

11 Friendly Societies Act 1992 Sch 3 para 6(7).

12 Friendly Societies Act 1992 Sch 3 para 6(8) (as amended: see note 8).

13 Friendly Societies Act 1992 Sch 3 para 6(9). The society is liable on summary conviction to a fine not exceeding level 4 on the standard scale: Sch 3 para 6(9). As to the standard scale see PARA 27 note 21.

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## (D) SUPPLY OF COPIES

### **2124. Supply of copies of statutory documents.**

An incorporated friendly society<sup>1</sup> must, on demand, give a copy of its statutory documents<sup>2</sup> free of charge to any member of the society to whom a copy of those documents has not previously been given<sup>3</sup>. It must give such a copy on demand to any other person on payment of such fee as the society may require, not exceeding the prescribed amount<sup>4</sup>. If the society fails to comply with this requirement it is guilty of an offence<sup>5</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 I.e: (1) a printed copy of the society's rules for the time being, with a copy of the certificate of incorporation of the society annexed to it; and (2) a printed copy of the memorandum of the society for the time being: Friendly Societies Act 1992 s 5(6), Sch 3 para 13(2). As to the rules see PARA 2121; and as to the memorandum see PARA 2119.

3 Friendly Societies Act 1992 Sch 3 para 13(1)(a).

4 Friendly Societies Act 1992 Sch 3 para 13(1)(b). 'Prescribed amount' means £1 or such other amount as the Treasury prescribes by order: Sch 3 para 13(4) (amended by SI 2001/2617). At the date at which this volume states the law, no such order had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 Friendly Societies Act 1992 Sch 3 para 13(3). The offence is punishable on summary conviction with a fine not exceeding level 4 on the standard scale: Sch 3 para 13(3). As to the standard scale see PARA 27 note 21.

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### **C. REGISTERED NAME AND OFFICE**

#### **2125. Registered name.**

The name of an incorporated friendly society<sup>1</sup> must have 'Limited' as its last word, except that, if the society is to be registered with a memorandum<sup>2</sup> stating that its registered office is to be situated in Wales, the name may have 'cyfyngedig', the Welsh equivalent of 'Limited', as its last word<sup>3</sup>.

Every incorporated friendly society must have its name mentioned in legible characters in: (1) all its business letters, notices and other official publications; (2) all its bills of parcels, invoices, receipts and letters of credit; and (3) all bills of exchange, promissory notes, indorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the society<sup>4</sup>. Where the name of an incorporated friendly society does not include the words 'friendly society', the fact that it is an incorporated friendly society must be shown in legible characters in all such documents as are mentioned in heads (1) to (3) above<sup>5</sup>. If an incorporated friendly society fails to comply with these provisions it is guilty of an offence<sup>6</sup>.

If the society has a common seal, it must bear the registered name of the society<sup>7</sup>.

An incorporated friendly society may change its name by a resolution of the society in general meeting after giving such notice<sup>8</sup> as is required for a special resolution<sup>9</sup>. Where a society changes its name under these provisions, notice of the change must be sent to the Financial Services Authority<sup>10</sup> and, unless it is of the opinion that the changed name is undesirable, the Authority must: (a) register the notice of the change of name; (b) issue the society with a certificate of registration; and (c) keep a copy of the certificate of registration in the public file<sup>11</sup> of the society<sup>12</sup>. If an incorporated friendly society fails, within three months beginning with the date on which a resolution changing its name is passed, to send to the Authority such notice, the society will be guilty of an offence<sup>13</sup>.

A change of name does not take effect until the date on which the certificate of registration is issued or such later date as may be specified in the certificate<sup>14</sup>. A change of name does not affect the rights and obligations of the society, of any of its members or of any other person concerned<sup>15</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 As to the memorandum see PARA 2119.

3 Friendly Societies Act 1992 s 5(6), Sch 3 para 9(1).

4 Friendly Societies Act 1992 Sch 3 para 10(1). As to the instruments mentioned in head (3) in the text see generally PARA 1400 et seq.

5 Friendly Societies Act 1992 Sch 3 para 10(2).

6 Friendly Societies Act 1992 Sch 3 para 11(1)(b). The offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale: Sch 3 para 11(1). As to the standard scale see PARA 27 note 21. As to the liability of individual officers etc see PARA 2126.

7 Friendly Societies Act 1992 Sch 3 para 9(3).

- 8 As to the meaning of 'notice' see PARA 2121 note 14.
- 9 Friendly Societies Act 1992 Sch 3 para 9(4). As to special resolutions see PARA 2306.
- 10 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 11 As to the public file see PARA 2382.
- 12 Friendly Societies Act 1992 Sch 3 para 9(5) (amended by SI 2001/2617).
- 13 Friendly Societies Act 1992 Sch 3 para 11(1)(a) (amended by SI 2001/2617). The offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale: Friendly Societies Act 1992 Sch 3 para 11(1).
- 14 Friendly Societies Act 1992 Sch 3 para 9(6).
- 15 Friendly Societies Act 1992 Sch 3 para 9(7).

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## **2126. Liability of individual officers etc for offences relating to a society's name.**

If an officer<sup>1</sup> of an incorporated friendly society<sup>2</sup> or a person on its behalf:

- 606 (1) issues or authorises the issue of any business letter, notice or other official publication of the society or any bill of parcels, invoice, receipt or letter of credit of the society in which the society's name is not mentioned<sup>3</sup>; or
- 607 (2) signs or authorises to be signed on behalf of the society any bill of exchange, promissory note, indorsement, cheque or order for money or goods in which the society's name is not so mentioned<sup>4</sup>,

he is guilty of an offence<sup>5</sup>, and in the case of the conduct mentioned in head (2) above, he is further personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount of it, unless it is duly paid by the society<sup>6</sup>.

If an officer of an incorporated friendly society whose name does not include the words 'friendly society' or a person on its behalf:

- 608 (a) issues or authorises the issue of any such document as is mentioned in head (1) above, and the fact that it is an incorporated friendly society is not shown in legible characters in the document<sup>7</sup>; or
- 609 (b) signs or authorises to be signed on behalf of the society any such document as is mentioned in head (2) above, and the fact that it is an incorporated friendly society is not shown in legible characters in the document<sup>8</sup>,

he is guilty of an offence<sup>9</sup>, and in the case of the conduct mentioned in head (b) above, he is further personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount of it, unless it is duly paid by the society<sup>10</sup>.

1 As to the meaning of 'officer' see PARA 2115 note 11.

- 2 As to the meaning of 'incorporated friendly society' see PARA 2082.
- 3 Friendly Societies Act 1992 s 5(6), Sch 3 para 11(2)(a). As to the requirement to mention the society's name see Sch 3 para 10(1); and PARA 2125.
- 4 Friendly Societies Act 1992 Sch 3 para 11(2)(b).
- 5 A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: Friendly Societies Act 1992 Sch 3 para 11(2). As to the standard scale see PARA 27 note 21. As to the liability of an incorporated friendly society for offences relating to its name see PARA 2125.
- 6 Friendly Societies Act 1992 Sch 3 para 11(2).
- 7 Friendly Societies Act 1992 Sch 3 para 11(3)(a). As to the requirement to show that it is an incorporated friendly society see Sch 3 para 10(2); and PARA 2125.
- 8 Friendly Societies Act 1992 Sch 3 para 11(3)(b).
- 9 A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: Friendly Societies Act 1992 Sch 3 para 11(3).
- 10 Friendly Societies Act 1992 Sch 3 para 11(3).

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## **2127. Registered office.**

The memorandum<sup>1</sup> of an incorporated friendly society<sup>2</sup> must specify the address of its registered office<sup>3</sup>. An incorporated friendly society may change its registered office in such manner as its rules<sup>4</sup> prescribe or, if the rules do not provide for that matter, by a resolution of the society in general meeting after the giving of such notice<sup>5</sup> as is required for a special resolution<sup>6</sup>. Notice of any such change must be sent to the Financial Services Authority<sup>7</sup>, which must: (1) register the notice of the change of registered office; (2) issue the society with a certificate of registration; and (3) keep a copy of the certificate of registration in the public file<sup>8</sup> of the society<sup>9</sup>.

A change of registered office will not take effect until the date on which the certificate of registration is issued or such later date as may be specified in the certificate<sup>10</sup>.

If an incorporated friendly society fails, within the period of three months beginning with the date on which a resolution changing its registered office is passed, to send to the Authority the required notice, the society is guilty of an offence<sup>11</sup>.

- 1 As to the memorandum see PARA 2119.
- 2 As to the meaning of 'incorporated friendly society' see PARA 2082.
- 3 See the Friendly Societies Act 1992 s 5(6), Sch 3 para 4(1)(c); and PARA 2119.
- 4 As to the rules see PARA 2121.
- 5 As to the meaning of 'notice' see PARA 2121 note 14.
- 6 Friendly Societies Act 1992 Sch 3 para 12(1). As to special resolutions see PARA 2306.
- 7 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.



8 As to the public file see PARA 2382.

9 Friendly Societies Act 1992 Sch 3 para 12(2) (Sch 3 para 12(2), (4) amended by SI 2001/2617).

10 Friendly Societies Act 1992 Sch 3 para 12(3).

11 Friendly Societies Act 1992 Sch 3 para 12(4) (as amended: see note 9). Such an offence is punishable on summary conviction with a fine not exceeding level 4 on the standard scale: Sch 3 para 12(4) (as so amended). As to the standard scale see PARA 27 note 21.

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## **D. MEMBERS AND MEMBERSHIP**

### **2128. Admission of members.**

The terms of admission of members of incorporated friendly societies<sup>1</sup>, and the manner in which membership is to cease, are matters which are required to be covered in the rules<sup>2</sup>. There is no limitation on the maximum number of members unless it is fixed by rule. A new friendly society must have at least seven members<sup>3</sup>. There is no statutory provision that a friendly society loses its right to remain registered<sup>4</sup> if its membership is reduced below seven members, but a society may in that event be wound up by the court<sup>5</sup>. If the Financial Services Authority<sup>6</sup> is satisfied that a society has ceased to exist it may cancel the society's registration<sup>7</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 5(6), Sch 3 para 5(3) Table item 1. As to the rules see PARA 2121.

3 See the Friendly Societies Act 1992 Sch 3 para 1(1); and PARA 2112.

4 As to the distinction between registration under the Friendly Societies Act 1974 and registration under the Friendly Societies Act 1992 see PARA 2082 note 5.

5 See the Friendly Societies Act 1992 s 22(1)(b); and PARA 2146.

6 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

7 See the Friendly Societies Act 1992 s 26(2); and PARA 2148.

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### **2129. Minors.**

A person under 18 may, if the rules do not provide otherwise, be admitted as a member of an incorporated friendly society<sup>1</sup> and, if he is over 16 by himself, and if he is under 16 by his parent or guardian, execute all instruments and give all receipts necessary to be executed or given under the rules<sup>2</sup>. A person under 18 may not vote or hold any office<sup>3</sup> in the society<sup>4</sup>, and

may not nominate, or join in nominating, a person for election as a member of the management committee<sup>5</sup> or (if the secretary is elected) as secretary of the society<sup>6</sup>.

- 1 As to the meaning of 'incorporated friendly society' see PARA 2082.
- 2 Friendly Societies Act 1992 s 5(6), Sch 3 para 7(a).
- 3 As to officers of an incorporated friendly society see PARAS 2172, 2301.
- 4 Friendly Societies Act 1992 Sch 3 para 7(b).
- 5 As to the committee of management see PARA 2294 et seq.
- 6 Friendly Societies Act 1992 Sch 3 para 7(c). As to the secretary see PARA 2301.

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### **2130. Liability of members.**

The liability of a member of an incorporated friendly society<sup>1</sup> is limited to the amount of any subscription to the society which is outstanding<sup>2</sup>. No subscription of a member of an incorporated friendly society is recoverable at law, except on the winding up of the society<sup>3</sup>.

The rules must provide for the consequences of non-payment of any subscription<sup>4</sup>.

- 1 As to the meaning of 'incorporated friendly society' see PARA 2082.
- 2 Friendly Societies Act 1992 s 5(6), Sch 3 para 8(1).
- 3 Friendly Societies Act 1992 Sch 3 para 8(2). As to the winding up of a society see PARA 2143 et seq.
- 4 See the Friendly Societies Act 1992 Sch 3 para 5(3) Table item 4; and PARA 2121 head (4).

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### **2131. Register of members.**

Every incorporated friendly society<sup>1</sup> must maintain a register of the names and addresses of the members of the society<sup>2</sup>, to be kept at the registered office of the society or at such other place or places as the committee of management<sup>3</sup> thinks fit<sup>4</sup>. Failure to maintain the register is an offence<sup>5</sup>.

An incorporated friendly society which was previously a registered friendly society<sup>6</sup> need not enter in the register the address of a member who became a member before its incorporation while the society has no address for him and while his whereabouts are unknown<sup>7</sup>. If it appears that a member's registered address<sup>8</sup> is no longer current, the society may remove it and need

not enter an address for that member in the register while it has no address for him and his whereabouts remain unknown<sup>9</sup>.

A member, or a person having an interest in the funds of an incorporated friendly society, may inspect the records at all reasonable hours at the registered office of the society, or at any other place where they are kept<sup>10</sup>. However, a member or such a person, unless he is an officer of the society or is specially authorised by resolution of the society to do so, does not have the right to inspect the loan account of any other member without his written consent<sup>11</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 5(6), Sch 3 para 14(1).

3 As to the committee of management see PARA 2294 et seq.

4 Friendly Societies Act 1992 Sch 3 para 14(2).

5 Friendly Societies Act 1992 Sch 3 para 14(5). A society which commits such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: Sch 3 para 14(5). As to the standard scale see PARA 27 note 21.

6 As to the meaning of 'registered friendly society' see PARA 2082.

7 Friendly Societies Act 1992 Sch 3 para 14(3).

8 'Registered address', in relation to a member of an incorporated society, means: (1) the address shown in the register of members; or (2) where the member has requested that communications from the society be sent to some other address, that other address: Friendly Societies Act 1992 s 119(1), Sch 3 para 14(6).

9 Friendly Societies Act 1974 s 63A(4) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 22); Friendly Societies Act 1992 Sch 3 para 14(4).

10 Friendly Societies Act 1992 Sch 3 para 15(1).

11 Friendly Societies Act 1992 Sch 3 para 15(2). As to loans to members see PARA 2140.

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## **2132. Withdrawal from membership and expulsion.**

The right of a member of an incorporated friendly society<sup>1</sup> to withdraw from membership, and the power of a society to expel a member, are not matters for which statutory provision is made, but are generally matters for the rules of individual societies. There are a number of cases in this regard decided in relation to registered societies<sup>2</sup>, but it is conceived that they are applicable also in relation to incorporated societies<sup>3</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 As to the meaning of 'registered society' see PARA 2082.

3 See PARAS 2169-2170.

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## ***E. SUBSIDIARIES AND JOINTLY CONTROLLED BODIES***

### **2133. Control of subsidiaries and other bodies corporate.**

An incorporated friendly society<sup>1</sup> may, subject to certain provisions<sup>2</sup>, include among its purposes<sup>3</sup> any of the following activities<sup>4</sup>:

- 610 (1) forming subsidiaries<sup>5</sup>;
- 611 (2) taking part with others in forming bodies corporate to be jointly controlled by it<sup>6</sup>; and
- 612 (3) otherwise acquiring, or keeping, control or joint control of bodies corporate<sup>7</sup>.

Any alteration of the memorandum<sup>8</sup> of an incorporated friendly society to include among its purposes and powers the carrying on of any activity such as is mentioned in heads (1) to (3) above, or any amendment of a provision in its memorandum which permits it to do so, must be adopted by a special resolution<sup>9</sup> of the society in general meeting<sup>10</sup>.

A registered friendly society<sup>11</sup> may not include in a memorandum adopted under the Friendly Societies Act 1992<sup>12</sup> any provision enabling it on incorporation to carry on any of the activities mentioned in heads (1) to (3) above, unless its inclusion has been authorised by a special resolution of the society in general meeting<sup>13</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 Ie the provisions described in the text and notes 2-13; and PARA 2134.

3 As to the purposes of an incorporated friendly society see PARAS 2096-2097.

4 Friendly Societies Act 1992 s 13(1).

5 Friendly Societies Act 1992 s 13(1)(a). As to the meaning of 'subsidiary' see PARA 2134.

6 Friendly Societies Act 1992 s 13(1)(b). As to the meanings of 'joint control' and 'jointly controlled' see PARA 2134.

7 Friendly Societies Act 1992 s 13(1)(c).

8 As to the memorandum see PARA 2119.

9 As to special resolutions see PARA 2306.

10 Friendly Societies Act 1992 s 13(6). As to general meetings see PARA 2302.

11 As to the meaning of 'registered friendly society' see PARA 2082.

12 Ie under the Friendly Societies Act 1992 s 5(6), Sch 3 para 2(1)(c): see PARA 2113 text and notes 7-9.

13 Friendly Societies Act 1992 s 13(7).

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### **2134. Meanings of 'control', 'subsidiary' and 'joint control'.**

For the purposes of the Friendly Societies Act 1992, an incorporated friendly society<sup>1</sup> has control of a body corporate if the society:

- 613 (1) holds a majority of the voting rights in it<sup>2</sup>;
- 614 (2) is a member of it and has the right to appoint or remove a majority of its board of directors<sup>3</sup>; or
- 615 (3) is a member of it and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in it<sup>4</sup>.

An incorporated friendly society also has control of a body corporate if the body corporate is itself a body controlled in one of the ways mentioned in head (1), (2) or (3) above by a body corporate of which the society has control<sup>5</sup>.

A body corporate is a subsidiary of an incorporated friendly society if the society has control of it<sup>6</sup>.

An incorporated friendly society has joint control of a body corporate<sup>7</sup> if, in pursuance of an agreement or other arrangement between them, the society and another person:

- 616 (a) hold a majority of the voting rights in that body<sup>8</sup>;
- 617 (b) are members of it and together have the right to appoint or remove a majority of its board of directors<sup>9</sup>; or
- 618 (c) are members of it and alone control, pursuant to an agreement with other shareholders or members, a majority of the voting rights in it<sup>10</sup>.

An incorporated friendly society also has joint control of a body corporate if:

- 619 (i) a subsidiary of the society has joint control of the body corporate in a way mentioned in head (a), (b) or (c) above<sup>11</sup>;
- 620 (ii) a body corporate of which the society has joint control has joint control of the body corporate in such a way<sup>12</sup>; or
- 621 (iii) the body corporate is controlled in a way mentioned in head (1), (2) or (3) above by a body corporate of which the society has joint control<sup>13</sup>.

A society acquires joint control whenever any of the conditions mentioned in heads (a) to (c) above or in heads (i) to (iii) above are satisfied with respect to a body corporate, notwithstanding that it may already be a subsidiary of the society<sup>14</sup>.

Rights which are exercisable only in certain circumstances will be taken into account only when the circumstances have arisen, and for so long as they continue to obtain, or when the circumstances are within the control of the person having the rights; and rights which are normally exercisable but are temporarily incapable of exercise will continue to be taken into account<sup>15</sup>.

The voting rights in a body corporate are reduced by any rights held by the body itself<sup>16</sup>. Rights held by a person as nominee for another are treated as held by the other and rights are

regarded as held as nominee for another if they are exercisable only on his instructions or with his consent or concurrence<sup>17</sup>. Rights attached to shares held by way of security are treated as held by the person providing the security: (A) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with his instructions; (B) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in his interests<sup>18</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 13(9)(a)(i). References in s 13(9)(a) and (c) to the voting rights in a body corporate are to the rights conferred on shareholders in respect of their shares or, in the case of a body corporate not having a share capital, on members, to vote at general meetings of the body corporate on all, or substantially all, matters: s 13(10), Sch 8 para 2.

3 Friendly Societies Act 1992 s 13(9)(a)(ii). The reference to the right to appoint or remove a majority of the board is a reference to the right to appoint or remove directors holding a majority of the voting rights at board meetings on all, or substantially all, matters: Sch 8 para 3(1). A body is to be treated for the purposes of s 13(9) as having the right to appoint to a directorship if: (1) a person's appointment to the directorship follows necessarily from his appointment as an officer of that body; or (2) the directorship is held by the body itself: Sch 8 para 3A(1) (Sch 8 para 3A added by the Financial Services and Markets Act 2000 Sch 18 para 14(1), (3)). A body ('B') and some other person ('P') together are to be treated, for the purposes of the Friendly Societies Act 1992 s 13(9), as having the right to appoint to a directorship if: (a) P is a body corporate which has directors and a person's appointment to the directorship follows necessarily from his appointment both as an officer of B and a director of P; (b) P is a body corporate which does not have directors and a person's appointment to the directorship follows necessarily from his appointment both as an officer of B and as a member of P's managing body; or (c) the directorship is held jointly by B and P: Sch 8 para 3A(2) (as so added). For the purposes of s 13(9), a right to appoint (or remove) which is exercisable only with the consent or agreement of another person must be left out of account unless no other person has a right to appoint (or remove) in relation to that directorship: Sch 8 para 3A(3) (as so added). Nothing in Sch 8 para 3A is to be read as restricting the effect of s 13(9): Sch 8 para 3A(4) (as so added).

4 Friendly Societies Act 1992 s 13(9)(a)(iii). See note 2.

5 Friendly Societies Act 1992 s 13(9)(aa) (added by the Financial Services and Markets Act 2000 Sch 18 para 11).

6 Friendly Societies Act 1992 s 13(9)(b).

7 A body corporate is a body jointly controlled by an incorporated friendly society if the society has joint control of it: Friendly Societies Act 1992 s 13(9)(d).

8 Friendly Societies Act 1992 s 13(9)(c)(i). See note 2.

9 Friendly Societies Act 1992 s 13(9)(c)(ii). See notes 2-3.

10 Friendly Societies Act 1992 s 13(9)(c)(iii). See note 2.

11 Friendly Societies Act 1992 s 13(9)(cc)(i) (s 13(9)(cc) added by the Financial Services and Markets Act 2000 Sch 18 para 12).

12 Friendly Societies Act 1992 s 13(9)(cc)(ii) (as added: see note 11).

13 Friendly Societies Act 1992 s 13(9)(cc)(iii) (as added: see note 11).

14 Friendly Societies Act 1992 s 13(9) (amended by the Financial Services and Markets Act 2000 Sch 18 para 13).

15 Friendly Societies Act 1992 Sch 8 para 4.

16 Friendly Societies Act 1992 Sch 8 para 10. References in any provisions of Sch 8 paras 5-10 (see the text and notes 17-18) to rights held by a person include rights falling to be treated as held by him by virtue of any other provision of those paragraphs but not rights which by virtue of any such provision are to be treated as not held by him: Sch 8 para 11.

17 Friendly Societies Act 1992 Sch 8 para 6. Rights held by a person in a fiduciary capacity will be treated as not held by him: Sch 8 para 5. See also notes 16, 18.

18 Friendly Societies Act 1992 Sch 8 para 7. Rights are treated as held by an incorporated friendly society if they are held by any of its subsidiaries, and nothing in Sch 8 para 6 (see the text to note 17) or Sch 8 para 7 is to be construed as requiring rights held by an incorporated friendly society to be treated as held by any of its subsidiaries: Sch 8 para 8. For the purposes of Sch 8 para 7 the rights are treated as being exercisable in accordance with the instructions or in the interests of an incorporated society if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of any subsidiary of that society or in the interests of any body over which the society has joint control: Sch 8 para 9 (amended by the Financial Services and Markets Act 2000 Sch 18 para 14(1), (4)). See also note 16.

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### **2135. Assistance to subsidiaries and jointly controlled bodies.**

An incorporated friendly society<sup>1</sup> may provide its subsidiaries or bodies jointly controlled<sup>2</sup> by it with any of the following services<sup>3</sup>:

- 622 (1) loans of money, with or without security and whether or not at interest<sup>4</sup>;
- 623 (2) the use of services or property, whether or not for payment<sup>5</sup>;
- 624 (3) grants of money, whether or not repayable<sup>6</sup>; and
- 625 (4) guarantees of the discharge of their liabilities<sup>7</sup>.

An incorporated friendly society may make payments towards the discharge of the liabilities of any of its subsidiaries<sup>8</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 As to the meanings of 'subsidiary' and 'jointly controlled body' see PARA 2134.

3 Friendly Societies Act 1992 s 16(1).

4 Friendly Societies Act 1992 s 16(1)(a).

5 Friendly Societies Act 1992 s 16(1)(b).

6 Friendly Societies Act 1992 s 16(1)(c).

7 Friendly Societies Act 1992 s 16(1)(d). As to guarantees generally see PARA 1013 et seq.

8 Friendly Societies Act 1992 s 16(2).

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## ***F. INVESTMENT OF FUNDS AND HOLDING OF LAND***

### **2136. Investment of funds.**

An incorporated friendly society<sup>1</sup> may invest its funds:

- 626 (1) in the purchase of land, or in the erection of offices or other buildings on it<sup>2</sup>;
- 627 (2) upon any other security expressly directed by the rules<sup>3</sup> of the society, other than personal security, but without prejudice to any provision of the Friendly Societies Act 1992 relating to loans<sup>4</sup>; or
- 628 (3) in any other investment of a kind which trustees are for the time being authorised by law to make<sup>5</sup>.

An incorporated friendly society may also invest its funds in any other manner authorised by its constitution<sup>6</sup> if:

- 629 (a) it is a society to which rules in respect of margins of solvency apply<sup>7</sup>; and
- 630 (b) it maintains the margin of solvency which it is required to maintain by virtue of such rules<sup>8</sup>.

Once a society falls within heads (a) and (b) above, it is to be treated as continuing to do so for purposes of its investment powers unless the Financial Services Authority<sup>9</sup> serves a notice on the society stating that it appears to the Financial Services Authority that the society has ceased to fall within those heads<sup>10</sup>. If such a notice is served, the powers of investment of the society are accordingly limited, until the notice is revoked, to investments falling under heads (1) to (3) above<sup>11</sup>. The Financial Services Authority may, by a subsequent notice to the society, revoke such notice at any time when it appears to it that the society again falls within heads (a) and (b) above<sup>12</sup>. The Financial Services Authority must keep a copy of any notice served on a society<sup>13</sup> in the public file of the society<sup>14</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 14(1)(a).

3 As to the rules see PARA 2121.

4 Friendly Societies Act 1992 s 14(1)(b). As to provisions relating to loans see s 16 (see PARA 2135), s 17 (see PARA 2140), s 82 (see PARA 2351).

5 Friendly Societies Act 1992 s 14(1)(c). By virtue of the Trustee Act 2000, the powers of investment available to trustees are now very extensive: see **TRUSTS** vol 48 (2007 Reissue) PARA 1007 et seq.

6 Friendly Societies Act 1992 s 14(2) (amended by SI 2001/2617). As to the constitution of an incorporated friendly society see PARA 2110.

7 Friendly Societies Act 1992 s 14(3)(a) (s 14(3)(a), (b) amended by SI 2001/2617). Rules in respect of margins of solvency are made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 138: see PARA 21.

8 Friendly Societies Act 1992 s 14(3)(b) (as amended: see note 7).

9 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

10 Friendly Societies Act 1992 s 14(5), (6) (s 14(5), (6) amended by SI 2001/2617). A notice under the Friendly Societies Act 1992 s 14(6) may direct a society to dispose of an investment which it could not acquire except under s 14(2) (see the text and note 6): s 14(8). Subject to s 14(8), a society may retain any investment which it could only have acquired under s 14(2): s 14(9).



11 Friendly Societies Act 1992 s 14(7).

12 Friendly Societies Act 1992 s 14(10) (amended by SI 2001/2617).

13 le any notice served under the Friendly Societies Act 1992 s 14(6) (see the text and notes 9-10) or s 14(10) (see the text to note 12).

14 Friendly Societies Act 1992 s 14(12) (amended by SI 2001/2617). As to the public file see PARA 2382.

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### **2137. Holding of land for purposes other than investment.**

An incorporated friendly society<sup>1</sup> may acquire and hold land for the purpose of carrying on any of its activities<sup>2</sup>, or for the purpose of enabling a subsidiary of the society, or a body jointly controlled by it, to conduct its business<sup>3</sup>. An incorporated society may dispose of or otherwise deal with any such land which is held by it<sup>4</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 15(a). As to the purposes and activities of an incorporated friendly society see PARAS 2096-2097.

3 Friendly Societies Act 1992 s 15(b). As to the meanings of 'subsidiary' and 'jointly controlled body' see PARA 2134.

4 Friendly Societies Act 1992 s 15.

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## ***G. GROUP INSURANCE AND REINSURANCE BUSINESS***

### **2138. Group insurance business.**

An incorporated friendly society<sup>1</sup> may include among its purposes<sup>2</sup> the carrying on of any group insurance business<sup>3</sup>. 'Group insurance business' means business carried on in accordance with the society's rules<sup>4</sup> which: (1) is of a description falling within either long term business<sup>5</sup> or general business<sup>6</sup>; and (2) is carried on as the business of providing benefits, in pursuance of a contract with a qualifying person<sup>7</sup>, for or in respect of the members of a group scheme<sup>8</sup>. Group insurance business may be carried on by an incorporated friendly society whether or not members of the group scheme are, or are required by the society to be, members of the society<sup>9</sup>. Where an incorporated friendly society carries on any group insurance business and the rules of the society so provide, any qualifying person with whom the society contracts, or his nominee, may be accorded the rights of a member of the society, including any right to

vote, for the purpose of participating in the affairs of the society in the interests of the members of the group scheme with which he is concerned<sup>10</sup>. A person who is accorded the rights of a member of a society by virtue of the above provision is, for the purposes of any power conferred by the Friendly Societies Act 1992 on the Financial Services Authority<sup>11</sup> which is exercisable in the interests of members of the society, to be treated as if he were a member of the society<sup>12</sup>.

The rules of an incorporated friendly society may not prevent a person from being a member of the society in his private capacity by reason only of the fact that he has been accorded the rights of a member by the above provisions<sup>13</sup>.

The Treasury may make regulations specifying the manner in which group insurance business may be carried on by incorporated friendly societies<sup>14</sup>. Such regulations may in particular include limitations or requirements relating to the contracts in pursuance of which group insurance business may be carried on<sup>15</sup>, or the persons with whom, or the groups of persons for whose benefit, such contracts may be made<sup>16</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 As to the purposes of an incorporated friendly society see PARAS 2096-2097.

3 Friendly Societies Act 1992 ss 7(2)(b)(ii), 11(1).

4 As to the rules see PARA 2121.

5 'Long term business' means insurance business of any of the classes specified in the Friendly Societies Act 1992 s 7, Sch 2 head A (see PARA 2096): s 117(1). 'Insurance business' means long term business and general business (see note 6) but, except for the purposes of ss 87, 88 (see PARAS 2354-2355), does not include the operations of a society whose benefits vary according to the resources available and which require each of its members to contribute on a flat-rate basis: s 117(1) (definition amended by SI 2001/2617).

6 'General business' means insurance business of any of the classes specified in the Friendly Societies Act 1992 Sch 2 head B (see PARA 2096): s 117(1).

7 For these purposes, 'qualifying person' means a person who has established or is otherwise responsible for the operation of a group scheme or a trustee of such a scheme; 'group scheme' means a scheme or other arrangement under which benefits are to be provided for or in respect of persons who are members of the scheme and who qualify for membership by virtue of being employees of a particular employer, or being members of some other group of persons of a prescribed description (see the text and notes 14-16); and 'member', in relation to a group scheme, includes any person for or in respect of whom benefits are to be provided under the scheme, whatever the terms in which such persons are described in the scheme: Friendly Societies Act 1992 s 11(3).

By a drafting error there are two provisions numbered s 11(3); that containing the definitions set out above is the first of them, the second is set out in the text and note 9.

8 Friendly Societies Act 1992 s 11(2).

9 Friendly Societies Act 1992 s 11(3). As to numbering of this provision see note 7.

10 Friendly Societies Act 1992 s 11(4).

11 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

12 Friendly Societies Act 1992 s 11(5) (amended by SI 2001/2617).

13 Friendly Societies Act 1992 s 11(6).

14 Friendly Societies Act 1992 s 11(7) (amended by SI 2001/2617). The Friendly Societies (Group Schemes) Regulations 1993, SI 1993/59, have been made under this provision. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

15 Friendly Societies Act 1992 s 11(7)(a).

16 Friendly Societies Act 1992 s 11(7)(b).

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### **2139. Reinsurance.**

An incorporated friendly society<sup>1</sup> may include among its purposes<sup>2</sup> the carrying on of the kinds of reinsurance business<sup>3</sup> described below, to such extent or in such circumstances as may from time to time be approved by the appropriate actuary<sup>4</sup>. These provisions apply to business consisting of the effecting and carrying out of contracts of reinsurance of risks which: (1) are insured, or to be insured, by any other friendly society, whether incorporated or not<sup>5</sup>; and (2) are of a class, or part of a class, of insurance business which the society carrying on the reinsurance business itself carries on<sup>6</sup>.

An incorporated friendly society which carries on any insurance business may provide in its rules<sup>7</sup> for the reinsurance to such extent as may from time to time be approved by the appropriate actuary of any risks against which persons are, or are to be, insured by the society<sup>8</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 As to the purposes of an incorporated friendly society see PARAS 2096-2097.

3 'Reinsurance business' means the effecting and carrying out of contracts of reinsurance: Friendly Societies Act 1992 s 117(2).

4 Friendly Societies Act 1992 s 12(1). 'Actuary' means an actuary possessing such qualifications, if any, as may be specified in rules made by the Financial Services Authority under the Financial Services and Markets Act 2000 s 340 (and the provisions of s 340(3)-(6) apply in relation to an actuary appointed by virtue of any provision of the Friendly Societies Act 1992 as they apply in relation to an actuary appointed in compliance with such rules); 'appropriate actuary' means: (1) if the society is under a duty imposed by rules made by the Authority under the Financial Services and Markets Act 2000 s 340, the society's appointed actuary; and (2) if it is not under such a duty, an actuary appointed to perform the function in question; and 'appointed actuary' means the actuary appointed in accordance with rules made under s 340: Friendly Societies Act 1992 s 119(1) (definitions amended by SI 2001/2617). As to rules in relation to actuaries made by the Authority under the Financial Services and Markets Act 2000 s 340 see PARA 764. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 Friendly Societies Act 1992 s 12(2)(a). As to the meaning of 'friendly society' see PARA 2082.

6 Friendly Societies Act 1992 s 12(2)(b).

7 As to the rules see PARA 2121.

8 Friendly Societies Act 1992 s 12(3).

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## ***H. LOANS, BENEFIT TERMS AND NOMINATIONS***

### **2140. Loans to assured members.**

An incorporated friendly society<sup>1</sup> may advance to a member of at least one full year's standing any sum not exceeding one-half of the amount of an assurance of his life, on the written security of himself and two satisfactory sureties for repayment<sup>2</sup>. The amount advanced, with all interest on it, may be deducted from the sum assured, without prejudice in the meantime to the operation of the security<sup>3</sup>. A person's membership of a registered friendly society<sup>4</sup> before the society's incorporation is to be taken into account in calculating his standing for these purposes<sup>5</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 17(1). As to sureties generally see PARA 1013 et seq.

3 Friendly Societies Act 1992 s 17(2).

4 As to the meaning of 'registered friendly society' see PARA 2082.

5 Friendly Societies Act 1992 s 17(3).

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### **2141. Benefit terms.**

The terms on which an incorporated friendly society<sup>1</sup> provides any benefit must be specified in its rules<sup>2</sup> or be determined in a manner specified in its rules<sup>3</sup>. If the terms on which a benefit is provided are not specified in the society's rules, the society must make copies of them available free of charge to members of the society at every office of the society, and must send copies of them free of charge to any member of the society who demands them<sup>4</sup>. If, on such demand made of it, a society fails to make available or, as the case may be, to send a copy of those terms within seven days of the demand, the society is guilty of an offence<sup>5</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 As to the rules see PARA 2121.

3 Friendly Societies Act 1992 s 18(1).

4 Friendly Societies Act 1992 s 18(2).

5 Friendly Societies Act 1992 s 18(3). The offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale: s 18(3). As to the standard scale see PARA 27 note 21.

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Incorporated Friendly Societies/H. LOANS, BENEFIT TERMS AND NOMINATIONS/2142.  
Nominations by members.

## **2142. Nominations by members.**

A member of an incorporated friendly society<sup>1</sup> who is not under the age of 16 years may<sup>2</sup> nominate<sup>3</sup> a person or persons to whom any sum of money payable by the society on the death of that member, or any specified amount of money so payable, is to be paid at his death<sup>4</sup>. The total amount which may be nominated must not exceed the relevant maximum<sup>5</sup>, or such higher amount as may for the time being apply<sup>6</sup>. The sum payable on the death of a member by an incorporated friendly society must include sums of money contributed to or deposited in the separate loan fund, together with interest on them, and any sum of money accumulated for the use of the member, together with interest<sup>7</sup>. The person nominated under these provisions must not, at the date of nomination, be an officer<sup>8</sup> or employee of the society unless he is the husband, wife, father, mother, child, brother, sister, nephew or niece of the nominator<sup>9</sup>.

Nominations so made may be revoked or varied by any similar document<sup>10</sup>. The marriage of a member of the society operates as a revocation of any nomination previously made by that member<sup>11</sup>. Where a society has paid money to a nominee in ignorance of a marriage subsequent to the nomination, the receipt of the nominee is a valid discharge to the society<sup>12</sup>.

On receiving satisfactory proof of the death of a nominator, an incorporated friendly society must<sup>13</sup> pay to his nominee or nominees the amount due to the deceased or, as the case may be, the amount specified in the nomination<sup>14</sup>. The total amount paid by an incorporated friendly society by virtue of a nomination, whether in favour of one nominee or more, may not exceed the relevant maximum<sup>15</sup>. The receipt of a nominee over 16 years of age for any amount paid in accordance with these provisions will be valid<sup>16</sup>.

If any member of an incorporated friendly society entitled from its funds to a sum not exceeding the relevant maximum dies without having made any nomination of that sum then subsisting, the society may, without letters of administration or probate of any will, distribute the sum among such persons as appear to the society, upon such evidence as the society may deem satisfactory, to be entitled by law to receive that sum<sup>17</sup>. A payment by an incorporated friendly society under these provisions is valid and effectual against any demand made upon the society by any other person, but the next of kin or personal representatives of the deceased member have a remedy for recovery of the money paid against the person who has received the money<sup>18</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 This is subject to the provisions set out in the text and notes 3-12: Friendly Societies Act 1992 s 18(4), Sch 9 para 1(1).

3 The nomination must either be by writing under the nominator's hand delivered at, or sent to, the registered office of the society, or be made in a book kept at that office: Friendly Societies Act 1992 Sch 9 para 1(1).

4 Friendly Societies Act 1992 Sch 9 para 1(1).

5 The relevant maximum amount is, for the time being, £5,000: Friendly Societies Act 1992 Sch 9 para 1(2).

6 Friendly Societies Act 1992 Sch 9 para 1(2). As to the amount which may for the time being apply see the Administration of Estates (Small Payments) Act 1965 s 6(1) (see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 187): Friendly Societies Act 1992 Sch 9 para 1(2).

7 Friendly Societies Act 1992 Sch 9 para 1(3). As to the separate loan fund see Sch 5 para 2 (amended by SI 2001/2617).

8 As to the meaning of 'officer' see PARA 2115 note 11.

9 Friendly Societies Act 1992 Sch 9 para 1(4). It is thought that there should also be a reference here to 'civil partner' and that when the Civil Partnerships Act 2004 was passed, the need to amend this provision to refer to the spouse or civil partner of the nominator, rather than his or her husband or wife, seems to have been overlooked: cf the Friendly Societies Act 1974 s 66(5), an exactly comparable provision to which such an amendment has been made, discussed at PARA 2234. See also the Industrial and Provident Societies Act 1965, s 23(2), a similar provision similarly amended, and PARA 2504.

10 Friendly Societies Act 1992 Sch 9 para 1(5). The document must be under the hand of the nominator and sent, delivered or made as described in note 3: Sch 9 para 1(5).

11 Friendly Societies Act 1992 Sch 9 para 1(6).

12 Friendly Societies Act 1992 Sch 9 para 1(7).

13 This is subject to the provision described in the text and note 15: Friendly Societies Act 1992 Sch 9 para 2(1).

14 Friendly Societies Act 1992 Sch 9 para 2(1).

15 Friendly Societies Act 1992 Sch 9 para 2(2). The relevant maximum is that referred to in the text and notes 5-6.

16 Friendly Societies Act 1992 Sch 9 para 2(3).

17 Friendly Societies Act 1992 Sch 9 para 3(1). Contrast the position in relation to registered societies: see PARAS 2237-2238.

18 Friendly Societies Act 1992 Sch 9 para 3(2).

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## ***I. DISSOLUTION, WINDING UP AND CANCELLATION OF REGISTRATION***

### **(A) MODES OF DISSOLUTION AND WINDING UP**

#### **2143. Modes of dissolution and winding up.**

An incorporated friendly society<sup>1</sup> may be dissolved by consent of the members or may be wound up voluntarily or by the court<sup>2</sup> in accordance with the Friendly Societies Act 1992<sup>3</sup>. With three exceptions, an incorporated friendly society may not be dissolved or wound up in any other manner<sup>4</sup>.

The three exceptions are as follows<sup>5</sup>: (1) following an amalgamation of two or more societies, each of the amalgamating societies is dissolved by operation of law on the transfer date<sup>6</sup>; (2) where a society has transferred all its engagements to another friendly society, it is dissolved by operation of law on the transfer date<sup>7</sup>; and (3) where the Financial Services Authority<sup>8</sup> has directed the transfer of all the engagements of a society, it is dissolved by operation of law on the transfer date<sup>9</sup>.

An incorporated friendly society which is in the course of dissolution by consent, or is being wound up voluntarily, may be wound up by the court<sup>10</sup>.

- 1 As to the meaning of 'incorporated friendly society' see PARA 2082.
- 2 'Court', in relation to the winding up of an incorporated friendly society, means the court which has jurisdiction under the applicable winding up legislation to wind up the society; in any other case it means the county court for the district in which the registered office of the incorporated friendly society is situated: Friendly Societies Act 1992 s 119(1). 'Applicable winding up legislation' is not defined for the purposes of the Act generally, but see s 23; and PARA 2145 note 3.
- 3 See the Friendly Societies Act 1992 Pt II (ss 5-26).
- 4 Friendly Societies Act 1992 s 19(1). Notwithstanding s 19(1), an incorporated friendly society may (like a registered friendly society) be wound up on the application of the Financial Services Authority under s 52: see PARA 2310. See note 8.
- 5 Friendly Societies Act 1992 s 19(1).
- 6 See the Friendly Societies Act 1992 s 85(4); and PARA 2352.
- 7 See the Friendly Societies Act 1992 s 86(5); and PARA 2353.
- 8 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 9 See the Friendly Societies Act 1992 s 90(9); and PARA 2357.
- 10 Friendly Societies Act 1992 s 19(2).

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## (B) DISSOLUTION BY CONSENT

### **2144. Dissolution by consent.**

An incorporated friendly society<sup>1</sup> may be dissolved by an instrument of dissolution<sup>2</sup>. An instrument of dissolution has effect only if it is approved by special resolution<sup>3</sup>.

An instrument of dissolution must set out:

- 631 (1) the liabilities and assets of the society in detail<sup>4</sup>;
- 632 (2) the number of members and the nature of their interests in the society<sup>5</sup>;
- 633 (3) the claims of creditors, and the provision to be made for their payment<sup>6</sup>;
- 634 (4) the intended appropriation or division of the funds and property of the society<sup>7</sup>;
- 635 (5) the names of one or more persons to be appointed as trustees for the purposes of the dissolution, and their remuneration<sup>8</sup>.

An instrument of dissolution may be altered, but the alteration has effect only if it is approved by special resolution<sup>9</sup>.

The Friendly Societies Act 1992 continues to apply to an incorporated friendly society as if the trustees appointed under the instrument of dissolution were the committee of management of the society<sup>10</sup>. Within 15 days of the passing of a special resolution approving an instrument of dissolution, the trustees must give notice of the fact to the Financial Services Authority<sup>11</sup> and of the date of commencement of the dissolution, enclosing a copy of the instrument<sup>12</sup>. Within 15

days of the passing of the special resolution approving an alteration of such an instrument, the trustees must give notice of the fact to the Authority, enclosing a copy of the altered instrument<sup>13</sup>. If the trustees fail to comply with these provisions, they are each guilty of an offence<sup>14</sup>. An instrument of dissolution, or an alteration to it, is binding on all members of the society as from the date the copy of the instrument or altered instrument, as the case may be, is placed on the public file of the society<sup>15</sup>.

The trustees must, within 28 days from the termination of the dissolution, give notice to the Financial Services Authority of the fact and the date of the termination, enclosing an account and balance sheet signed and certified by them as correct, showing the assets and liabilities of the society at the commencement of the dissolution, and the way in which those assets and liabilities have been applied and discharged<sup>16</sup>. If the trustees fail to comply with this provision they are each guilty of an offence<sup>17</sup>.

Except with the consent of the Authority, no instrument of dissolution or alteration to such instrument is of any effect if the purpose of the proposed dissolution or alteration is to effect or facilitate the transfer of the society's engagements to any other friendly society or to a company<sup>18</sup>. Any provision in a resolution or document that members of an incorporated friendly society proposed to be dissolved are to accept membership of some other body in or towards satisfaction of their rights in the dissolution will be conclusive evidence of such a purpose<sup>19</sup>.

Where an incorporated friendly society has been dissolved, the court<sup>20</sup> may, at any time within 12 years after the date on which the society was dissolved, make an order<sup>21</sup> declaring the dissolution to be void<sup>22</sup>. When such an order is made, such proceedings may be taken as might have been taken if the society had not been dissolved<sup>23</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 20(1).

3 Friendly Societies Act 1992 s 20(2). As to special resolutions see PARA 2306.

4 Friendly Societies Act 1992 s 20(3)(a).

5 Friendly Societies Act 1992 s 20(3)(b).

6 Friendly Societies Act 1992 s 20(3)(c).

7 Friendly Societies Act 1992 s 20(3)(d).

8 Friendly Societies Act 1992 s 20(3)(e).

9 Friendly Societies Act 1992 s 20(4).

10 Friendly Societies Act 1992 s 20(5). As to the committee of management see PARA 2294 et seq.

11 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

12 Friendly Societies Act 1992 s 20(6)(a) (amended by SI 2001/2617). The Authority must keep in the public file of the society a copy of any notice or other document received by it under the Friendly Societies Act 1992 s 20(6) or s 20(8) (see the text to note 16), and must record in that file the date on which the notice or other document is placed in it: s 20(12) (amended by SI 2001/2617).

13 Friendly Societies Act 1992 s 20(6)(b) (amended by SI 2001/2617). See also note 12.

14 Friendly Societies Act 1992 s 20(6). The offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale: s 20(6). As to the standard scale see PARA 27 note 21.

15 Friendly Societies Act 1992 s 20(7).

16 Friendly Societies Act 1992 s 20(8) (amended by SI 2001/2617). See also note 12.



17 Friendly Societies Act 1992 s 20(9). The offence is punishable on summary conviction with a fine not exceeding level 2 on the standard scale and, in the case of a continuing offence, an additional fine not exceeding one-tenth of that level for every day during which the offence continues: s 20(9)(a), (b).

18 Friendly Societies Act 1992 s 20(10) (amended by SI 2001/2617).

19 Friendly Societies Act 1992 s 20(11).

20 For this purpose, 'court' means, in relation to a society whose registered office is in England and Wales, the High Court: Friendly Societies Act 1992 s 25(6).

21 Such an order may be made on such terms as the court thinks fit; an order may be made on an application by the trustees appointed for the dissolution, the liquidator or any other person appearing to the court to be interested: Friendly Societies Act 1992 s 25(2). The applicant must, within seven days of the making of the order or such further time as the court may allow, furnish the Authority with a copy of the order, and the Financial Services Authority must keep a copy in the public file of the society: s 25(4) (amended by SI 2001/2617). Failure to comply with the Friendly Societies Act 1992 s 25(4) is an offence punishable on summary conviction with a fine not exceeding level 3 on the standard scale and, in the case of a continuing offence, an additional fine not exceeding one-tenth of that level for every day during which the offence continues: s 25(5).

22 Friendly Societies Act 1992 s 25(1).

23 Friendly Societies Act 1992 s 25(3).

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## (C) VOLUNTARY WINDING UP

### **2145. Voluntary winding up.**

An incorporated friendly society<sup>1</sup> may, if it resolves by special resolution<sup>2</sup> that it be wound up voluntarily, be so wound up voluntarily under the applicable winding up legislation<sup>3</sup>. A copy of any special resolution passed for the voluntary winding up of an incorporated friendly society must be sent by the society to the Financial Services Authority<sup>4</sup> within 15 days after it is passed, and the Authority must keep the copy in the public file<sup>5</sup> of the society<sup>6</sup>. A copy of any such resolution must be annexed to every copy of the society's memorandum<sup>7</sup> or rules<sup>8</sup> issued after the passing of the resolution<sup>9</sup>. If an incorporated friendly society fails to comply with these provisions the society is guilty of an offence<sup>10</sup>. For these purposes, a liquidator of the society is to be treated as an officer of it<sup>11</sup>.

Where an incorporated friendly society has been wound up voluntarily, it is dissolved as from three months from the date of the placing in the public file of the society of the return of the final meetings of the society and its creditors made by the liquidator<sup>12</sup>.

Where an incorporated society has been dissolved following a winding up, the court may within 12 years make an order declaring the dissolution void<sup>13</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 As to special resolutions see PARA 2306.

3 Friendly Societies Act 1992 s 21(1). In its application to the winding up of an incorporated friendly society, by virtue of s 21(1) or s 22(1) (see PARA 2146), the companies winding up legislation has effect with the modifications effected by s 23, Sch 10 Pts I-III: s 23(2). The supplementary provisions of Sch 10 Pt IV also have

effect in relation to such a winding up and in relation to dissolution by consent: s 23(2). For the purposes of ss 21, 22 (both as amended), 'the applicable winding up legislation' means the companies winding up legislation as so modified: s 23(3). Under the above provisions 'the companies winding up legislation' means the enactments applicable in relation to England and Wales, Scotland and Northern Ireland which are specified in Sch 10 para 1, including any enactment which creates an offence by any person arising out of acts or omissions occurring before the commencement of the winding up: s 23(1). The enactments which comprise the companies winding up legislation are the provisions of the Insolvency Act 1986 Pt IV (ss 73-219), Pt VI (ss 230-246), Pt VII (ss 247-251), Pt XII (ss 386, 387) and Pt XIII (ss 388-398), and ss 430, 432 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq), and equivalent Northern Ireland legislation: Friendly Societies Act 1992 Sch 10 para 1. Those provisions are applied generally to the winding up of an incorporated friendly society as they apply to the winding up of a company, subject to modifications: Sch 10 para 2. The following general modifications are made:

- 13 (1) references to 'company', 'directors', 'the registrar of companies' (or 'registrar'), and 'the articles' are replaced, respectively, by references to 'incorporated friendly society', 'committee of management', 'the Financial Services Authority', and 'the rules' (Sch 10 para 3(1) (amended by SI 2001/2617));
- 14 (2) references to officers or an officer of a company take effect as references to the corresponding officers or officer of the incorporated friendly society (Friendly Societies Act 1992 Sch 10 para 3(2)(a));
- 15 (3) references to a director of a company have effect as references to a member of the committee of management (Sch 10 para 3(2)(b));
- 16 (4) references to an administrator, administration order, administrative receiver, shadow director or voluntary arrangement are omitted (Sch 10 para 3(2)(c));
- 17 (5) provisions as modified which have the effect of requiring notice to be sent to the Financial Services Authority take effect as including a requirement that the Authority keep a copy on the public file of the society and record the date on which it was placed there, and references to the date of registration of notice or documents have effect as references to the date of placing it on the public file (Sch 10 para 4 (amended by SI 2001/2617));
- 18 (6) provisions specifying sums which are subject to alteration by order take effect with any alteration so made (Friendly Societies Act 1992 Sch 10 para 5).

The modifications made by Sch 10 Pt II (paras 6-36) (amended by SI 2001/2617; and SI 2007/2194) affect the following provisions of the Insolvency Act 1986: ss 74, 75-78, 79, 83, 84, 88, 89, 90, 95, 96, 101, 107, 110, 111, 117, 122, 124, 125, 126, 129, 130, 140, 141, 142, 147, 154, 165, 187, 201, 202-204, 205, 216, 217, 218, 219, 387: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 432 et seq.

4 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 As to the public file see PARA 2382.

6 Friendly Societies Act 1992 s 21(2) (amended by SI 2001/2617).

7 As to the memorandum see PARA 2119.

8 As to the rules see PARA 2121.

9 Friendly Societies Act 1992 s 21(3).

10 Friendly Societies Act 1992 s 21(4). The offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale: s 21(4). As to the standard scale see PARA 27 note 21.

11 Friendly Societies Act 1992 s 21(5).

12 See the Friendly Societies Act 1992 Sch 10 para 67(1), which applies the Insolvency Act 1986 ss 94, 106, 201, as modified (see note 3). The Companies Act 1985 ss 654-658 (prospectively repealed) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 933-935) (as to replacement provisions see the Companies Act 2006 ss 1012-1023, 1034), relating to the treatment of the property of dissolved companies as bona vacantia, apply to the property of dissolved incorporated friendly societies, with specified modifications: see the Friendly Societies Act 1992 Sch 10 para 68. As to bona vacantia see also **CROWN PROPERTY** vol 12(1) (Reissue) PARA 235 et seq.

13 See the Friendly Societies Act 1992 s 25(1); and PARA 2144.

## UPDATE

### 2145 Voluntary winding up

NOTE 3--Friendly Societies Act 1992 Sch 10 para 2 amended: SI 2009/1941.

NOTE 12--Friendly Societies Act 1992 Sch 10 para 68 amended: SI 2009/1941.

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## (D) WINDING UP BY THE COURT

### 2146. Winding up by the court: grounds and petitioners.

An incorporated friendly society<sup>1</sup> may be wound up by the court<sup>2</sup> under the applicable winding up legislation<sup>3</sup> on any of the following grounds, that is, if<sup>4</sup>:

- 636 (1) the society has by special resolution<sup>5</sup> resolved that it be wound up by the court<sup>6</sup>;
- 637 (2) the number of members is reduced below seven<sup>7</sup>;
- 638 (3) the number of members of the committee of management is reduced below two<sup>8</sup>;
- 639 (4) the society has not commenced business within a year from its incorporation or has suspended its business for a whole year<sup>9</sup>;
- 640 (5) the society exists for an illegal purpose<sup>10</sup>;
- 641 (6) the society is unable to pay its debts<sup>11</sup>; or
- 642 (7) the court is of the opinion that it is just and equitable that the society should be wound up<sup>12</sup>.

A contributory<sup>13</sup> may not present a petition unless the number of members is reduced below seven, or he has been a contributory for at least six months before the winding up<sup>14</sup>. Otherwise, except as the applicable winding up legislation provides, a petition for the winding up of an incorporated friendly society may be presented by: (a) the Financial Services Authority<sup>15</sup>; (b) the society or its committee of management; (c) any creditor or creditors, including any contingent or prospective creditor; or (d) any contributory or contributories; or by all or any of those parties, together or separately<sup>16</sup>.

Where an incorporated friendly society has been wound up by the court, it is dissolved as from three months from the date of the placing in the public file of the society of the liquidator's notice<sup>17</sup>.

Where an incorporated society has been dissolved following a winding up, the court may within 12 years make an order declaring the dissolution void<sup>18</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

- 2 As to the meaning of 'court' see PARA 2143 note 2.
- 3 As to the applicable winding up legislation see PARA 2145 note 3.
- 4 Friendly Societies Act 1992 s 22(1).
- 5 As to special resolutions see PARA 2306.
- 6 Friendly Societies Act 1992 s 22(1)(a).
- 7 Friendly Societies Act 1992 s 22(1)(b). See PARA 2128.
- 8 Friendly Societies Act 1992 s 22(1)(c). As to the committee of management see PARA 2294 et seq.
- 9 Friendly Societies Act 1992 s 22(1)(d).
- 10 Friendly Societies Act 1992 s 22(1)(e). As to the purposes of a society see PARAS 2096-2097.
- 11 Friendly Societies Act 1992 s 22(1)(f).
- 12 Friendly Societies Act 1992 s 22(1)(g).
- 13 'Contributory' means every person liable to contribute to the assets of the society in the event of its being wound up: Friendly Societies Act 1992 s 22(4), Sch 10 para 9(2)(a). For the purposes of proceedings for the determination of the persons who are contributories, 'contributory' includes persons alleged to be so: Sch 10 para 9(2)(b). The term also includes persons liable to pay or contribute to: (1) the payment of any debt or liability of the society; (2) any sum for the adjustment of rights of members between themselves; or (3) the expenses of the winding up: Sch 10 para 9(2)(c). The term does not include persons declared by the court liable to contribute by virtue of the Insolvency Act 1986 s 213 (imputed responsibility for fraudulent trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 911) or s 214 (wrongful trading) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 914), as modified (see PARA 2145 note 3): Friendly Societies Act 1992 Sch 10 para 9(2).
- 14 Friendly Societies Act 1992 s 22(3).
- 15 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 16 Friendly Societies Act 1992 s 22(2).
- 17 See the Friendly Societies Act 1992 Sch 10 para 67(2), which applies the Insolvency Act 1986 ss 172(8), 205 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 618), as modified (see PARA 2145 note 3). The Companies Act 1985 ss 654-658 (prospectively repealed) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 933-935) (as to replacement provisions see the Companies Act 2006 ss 1012-1023, 1034), relating to the treatment of the property of dissolved companies as bona vacantia, apply to the property of dissolved incorporated friendly societies, with specified modifications: see the Friendly Societies Act 1992 Sch 10 para 68. As to bona vacantia see also **CROWN PROPERTY** vol 12(1) (Reissue) PARA 235 et seq.
- 18 See the Friendly Societies Act 1992 s 25(1); and PARA 2144.

## UPDATE

### 2146 Winding up by the court: grounds and petitioners

NOTE 17--Friendly Societies Act 1992 Sch 10 para 68 amended: SI 2009/1941.

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## 2147. Continuation of long term business.

In relation to the winding up of an incorporated friendly society<sup>1</sup> which carries on long term business<sup>2</sup>, including any reinsurance business<sup>3</sup>, the liquidator must, unless the court<sup>4</sup> otherwise orders, carry on the long term business of the society with a view to its being transferred as a going concern under the Friendly Societies Act 1992<sup>5</sup>. In carrying on that business, the liquidator may agree to the variation of any contracts of insurance<sup>6</sup> in existence when the winding up order is made but may not effect any new contracts of insurance<sup>7</sup>.

If the liquidator is satisfied that the interests of creditors, in respect of liabilities of the society attributable to its long term business, require the appointment of a special manager of that business, he may apply to the court; the court may on such application appoint a special manager of that business to act during such time as it may direct, with such powers, including any of the powers of a receiver or manager, as may be entrusted to him by the court<sup>8</sup>. The court may, if it thinks fit and subject to such conditions, if any, as it may determine, reduce the amount of the contracts made by the society in the course of carrying on its long term business<sup>9</sup>.

The court may, on the application of the liquidator, a special manager or the Financial Services Authority<sup>10</sup>, appoint an independent actuary<sup>11</sup> to investigate the long term business of the society and to report to the liquidator, the special manager or the Authority, as the case may be, on the desirability or otherwise of that business being continued and on any reduction in the contracts made in the course of that business that may be necessary for its successful continuation<sup>12</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 As to the meaning of 'long term business' see PARA 2138 note 5.

3 Friendly Societies Act 1992 s 24(1). As to the meaning of 'reinsurance business' see PARA 2139 note 3.

4 As to the meaning of 'court' see PARA 2143 note 2.

5 Friendly Societies Act 1992 s 24(2).

6 'Contract of insurance' includes any contract the effecting of which constitutes the carrying on of insurance business by virtue of the Friendly Societies Act 1992 s 117 (see PARA 2096): s 119(1).

7 Friendly Societies Act 1992 s 24(2).

8 Friendly Societies Act 1992 s 24(3). The Insolvency Act 1986 s 177(5) applies to a special manager appointed under the Friendly Societies Act 1992 s 24(3) as it applies to a special manager appointed under the Insolvency Act 1986 s 177: Friendly Societies Act 1992 s 24(4). See **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 500-501.

9 Friendly Societies Act 1992 s 24(5).

10 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

11 As to the meaning of 'actuary' see PARA 2139 note 4.

12 Friendly Societies Act 1992 s 24(6) (amended by SI 2001/2617).

Incorporated Friendly Societies/I. DISSOLUTION, WINDING UP AND CANCELLATION OF REGISTRATION/(E) Cancellation of Registration/2148. Cancellation of registration.

## (E) CANCELLATION OF REGISTRATION

### **2148. Cancellation of registration.**

Where the Financial Services Authority<sup>1</sup> is satisfied that an incorporated friendly society<sup>2</sup> has been dissolved under an instrument of dissolution<sup>3</sup> or following a winding up<sup>4</sup>, it must cancel the society's registration under the Friendly Societies Act 1992<sup>5</sup>.

Where the Authority is satisfied, with respect to an incorporated friendly society, that a certificate of incorporation<sup>6</sup> has been obtained by fraud or mistake, that the society has ceased to exist or, in the case of certain societies carrying out insurance business<sup>7</sup>, that the principal place of business of the society is outside the United Kingdom<sup>8</sup>, it may cancel the society's registration<sup>9</sup>. The Authority may, if it thinks fit, cancel the registration of an incorporated friendly society at the request of the society evidenced in such manner as the Authority may direct<sup>10</sup>. Before cancelling the society's registration, the Authority must give the society not less than two months' previous notice<sup>11</sup>, specifying briefly the grounds of the proposed cancellation<sup>12</sup>.

Where the registration of an incorporated friendly society is cancelled, the society may appeal to the High Court and, on any such appeal, the court may, if it thinks it just to do so, set aside the cancellation<sup>13</sup>.

Where the registration of a society is cancelled under these provisions then, subject to the right of appeal, the society, so far as it continues to exist, ceases to be a society incorporated under the Friendly Societies Act 1992<sup>14</sup>; but this does not affect any liability actually incurred by an incorporated friendly society, and any such liability may be enforced against the society as if the cancellation had not taken place<sup>15</sup>.

Any cancellation of the registration of an incorporated friendly society under these provisions must be effected by written notice given by the Authority to the society<sup>16</sup>. As soon as practicable after the cancellation of the registration of an incorporated friendly society the Authority must cause notice of it to be published in the London, Edinburgh or Belfast Gazette, according to the situation of the society's registered office, and, if it thinks fit, in one or more newspapers<sup>17</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the meaning of 'incorporated friendly society' see PARA 2082.

3 See PARA 2144.

4 See PARAS 2145-2146.

5 Friendly Societies Act 1992 s 26(1) (amended by SI 2001/2617). As to the registration and incorporation of societies see PARA 2112.

6 As to the certificate of incorporation see PARA 2112 text and note 12.

7 I.e. societies to which the Friendly Societies Act 1992 s 37(2) or (3) applies: see PARA 2112 note 15.

8 As to the meaning of 'United Kingdom' see PARA 2 note 3.

9 Friendly Societies Act 1992 s 26(2) (amended by SI 1996/1669; and SI 2001/2617).

10 Friendly Societies Act 1992 s 26(3) (amended by SI 2001/2617).

- 11 As to the meaning of 'notice' see PARA 2121 note 14.
- 12 Friendly Societies Act 1992 s 26(4) (amended by SI 2001/2617).
- 13 Friendly Societies Act 1992 s 26(5).
- 14 Friendly Societies Act 1992 s 26(6).
- 15 Friendly Societies Act 1992 s 26(7).
- 16 Friendly Societies Act 1992 s 26(8) (amended by SI 2001/2617).
- 17 Friendly Societies Act 1992 s 26(9) (amended by SI 2001/2617).

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### **(iii) Registered Societies**

#### **A. REGISTRATION**

#### **2149. Prohibition on registration of new societies under the Friendly Societies Act 1974.**

Since 1 February 1993 it is no longer possible to register a society under the Friendly Societies Act 1974<sup>1</sup>. An existing society<sup>2</sup> continues as a registered society in accordance with the provisions of that Act<sup>3</sup>. An existing friendly society is not prevented by anything in the Friendly Societies Act 1992 from performing any contract which was in force immediately before that date, or from carrying on any social or benevolent activity which is not inconsistent with its other activities<sup>4</sup>.

1 Friendly Societies Act 1992 s 93(1), which was brought into force on 1 February 1993: Friendly Societies Act 1992 (Commencement No 3 and Transitional Provisions) Order 1993, SI 1993/16, art 2, Sch 3. This does not apply to branches of societies: see PARA 2151.

2 An 'existing society' is one registered under the Friendly Societies Act 1974 immediately before 1 February 1993 (see note 1): Friendly Societies Act 1992 s 93(2).

3 Friendly Societies Act 1992 s 93(2). It follows that there is no longer any provision for the acknowledgment of registration of a society. The Friendly Societies Act 1974 s 15(1), which provided, in relation to both societies and branches, for the registrar to issue such acknowledgment, and s 15(2), which provided that acknowledgment constitutes conclusive evidence of registration (unless it is proved that the society's registration has been suspended or cancelled), are replaced by s 15A (see PARA 2152), which makes similar provision applicable only to branches of existing societies. This replacement does not, however, affect the operation of s 15(2) in relation to acknowledgments issued under s 15(1): Friendly Societies Act 1992 s 95, Sch 16 paras 1, 6(3).

4 Friendly Societies Act 1992 s 93(4).

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Registered Societies/A. REGISTRATION/2150. Obligation of registered friendly society to amend rules: the transitional period.

**2150. Obligation of registered friendly society to amend rules: the transitional period.**

Before the end of a transitional period<sup>1</sup> each existing friendly society<sup>2</sup>, and each registered branch<sup>3</sup> of an existing friendly society, must by special resolution<sup>4</sup> agree upon the alterations which are to be made to its rules<sup>5</sup> so that they conform to the provisions of both the Friendly Societies Act 1974 and the Friendly Societies Act 1992<sup>6</sup>. The society or branch must send to the Financial Services Authority three copies of the rules as altered, each signed by the secretary and accompanied by a statutory declaration by him that the agreement was effected by a resolution passed as a special resolution<sup>7</sup>. If the Authority is satisfied that the rules as altered are in conformity with the Friendly Societies Act 1974 and the Friendly Societies Act 1992, it must retain and register a copy of the altered rules<sup>8</sup>. On registering a copy of the altered rules, the Authority must: (1) return another copy to the secretary of the society or branch with a certificate of registration; and (2) keep another copy with a record of the date on which the alterations are to take effect<sup>9</sup>, and a copy of the certificate of registration, in the public file of the society<sup>10</sup>.

If the Authority has not, before the end of the transitional period, received copies of altered rules from a society or branch, the society or branch is treated as having agreed on such alteration of its rules as the Authority directs<sup>11</sup>. Where the Authority proposes to give such a direction it must serve on the society or branch a notice of that proposal and consider any representations made by the society or branch within such period (not less than 14 days) from the date on which the notice is served as the Authority may allow, and the Authority must give the society or branch an opportunity of being heard within that period if the society so requests<sup>12</sup>.

Where a society or branch is treated as having agreed upon altered rules, the Authority must prepare three copies of the rules for the society or branch, and must:

- 643 (a) retain and register one copy;
- 644 (b) send another to the secretary of the society, together with a certificate of registration; and
- 645 (c) keep another copy, together with a copy of that certificate, in the public file of the society or branch,

and the rules so registered are for all purposes the rules of the society or branch until amended under the Friendly Societies Act 1974<sup>13</sup>.

1 'Transitional period' means the period beginning with the commencement date for the Friendly Societies Act 1992 s 93 and ending with such day as the Treasury prescribes by order: s 93(14) (amended by SI 2001/2617). The commencement dates for the Friendly Societies Act 1992 s 93 were 1 February 1993 and 1 January 1994: see the Friendly Societies Act 1992 (Commencement No 3 and Transitional Provisions) Order 1993, SI 1993/16; and the Friendly Societies Act 1992 (Commencement No 6 and Transitional Provisions) Order 1993, SI 1993/2213. At the date at which this volume states the law, no order had been made prescribing a date for the end of the transitional period. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

2 As to the meaning of 'existing society' see PARA 2149 note 2. As to the meaning of 'friendly society' see PARA 2082.

3 As to the meaning of 'registered branch' see PARA 2091.

4 As to special resolutions see PARA 2218.



5 On agreeing upon any such alterations to its rules the society or branch must determine the date on which the alteration is to take effect, and any alteration sent to the Financial Services Authority must be accompanied by a record of that date: Friendly Societies Act 1992 s 93(6), (15) (s 93(6) amended by SI 2001/2617). However, no date may be specified which falls more than six months after the date of the meeting at which the alteration was agreed: Friendly Societies Act 1992 s 93(7). As to alteration of the rules of registered societies and branches generally see PARA 2160 et seq. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

6 Friendly Societies Act 1992 s 93(5)(a), (15).

7 Friendly Societies Act 1992 s 93(5)(b), (15) (s 93(5)(b) amended by SI 1996/1188; and SI 2001/2617). As to statutory declarations see **CIVIL PROCEDURE** vol 11 (2009) PARA 1024.

8 Friendly Societies Act 1992 s 93(8), (15) (s 93(8) amended by SI 2001/2617). Rules so registered take effect on the specified date or, if later, the date of registration: Friendly Societies Act 1992 s 93(10). As to registration of amendments of rules see PARAS 2163-2164.

9 See note 5.

10 Friendly Societies Act 1992 s 93(9), (15) (s 93(9) amended by SI 2001/2617). As to the public file of the society see PARA 2382.

11 Friendly Societies Act 1992 s 93(11), (15) (s 93(11) amended by SI 2001/2617).

12 Friendly Societies Act 1992 s 93(12), (15) (s 93(12) amended by SI 2001/2617).

13 Friendly Societies Act 1992 s 93(13), (15) (s 93(13) amended by SI 2001/2617). As to the amendment of rules see PARA 2123 et seq.

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## **2151. Registration of branches of existing societies.**

The prohibition on registering a new society under the Friendly Societies Act 1974<sup>1</sup> does not extend to the registration of a branch<sup>2</sup> of an existing society<sup>3</sup>, which continues to be registrable<sup>4</sup>. However, a body which has been registered as a branch of a registered society<sup>5</sup> may no longer be registered as a society under the Friendly Societies Act 1974<sup>6</sup>: any new society is registrable only under the Friendly Societies Act 1992<sup>7</sup>.

When a registered society establishes a new branch, the secretary of the registered friendly society must send to the Financial Services Authority<sup>8</sup>:

- 646 (1) notice of the establishment of the branch<sup>9</sup>;
- 647 (2) notice of the place where its registered office, to which all communications and notices may be addressed, is to be situated<sup>10</sup>;
- 648 (3) if the branch is to have trustees<sup>11</sup> or other officers<sup>12</sup> authorised to sue and be sued on its behalf, other than the trustees or officers authorised to sue or be sued on behalf of the society, a list of the names of those trustees or officers<sup>13</sup>; and
- 649 (4) two copies of the rules of the branch<sup>14</sup>.

The society is not entitled to any of the privileges of the Friendly Societies Act 1974 with respect to a branch until the branch has been registered<sup>15</sup>.

1 See PARA 2149.

- 2 As to branches of societies see PARA 2091.
- 3 As to the meaning of 'existing society' see PARA 2149 note 2.
- 4 See the Friendly Societies Act 1992 s 93(3); the Friendly Societies Act 1974 s 12(1), s 15A; the text and notes 7-14; and PARA 2152.
- 5 As to the meaning of 'registered society' see PARA 2082.
- 6 Friendly Societies Act 1974 s 13(1) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 5).
- 7 See PARA 2149.
- 8 Friendly Societies Act 1974 s 12(1) (amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 9 Friendly Societies Act 1974 s 12(1)(a).
- 10 Friendly Societies Act 1974 s 12(1)(b).
- 11 As to trustees generally see PARA 2179 et seq.
- 12 As to the officers of a society or branch see PARA 2172 et seq.
- 13 Friendly Societies Act 1974 s 12(1)(c).
- 14 Friendly Societies Act 1974 s 12(1)(d). As to the rules see PARA 2156 et seq.
- 15 Friendly Societies Act 1974 s 12(2).

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## **2152. Acknowledgment of registration of branches of existing societies.**

On being satisfied that a branch of an existing society<sup>1</sup> has complied with the provisions of the Friendly Societies Act 1974 as to registration<sup>2</sup>, the Financial Services Authority<sup>3</sup> must issue to that branch an acknowledgment of registration<sup>4</sup>. Such acknowledgment is conclusive evidence that the branch is duly registered, unless it is proved that the registration of the society of which it is a branch has been suspended or cancelled<sup>5</sup>. Acknowledgment is also conclusive evidence of the rules<sup>6</sup>.

1 As to branches generally see PARA 2091. As to the meaning of 'existing society' see PARA 2149 note 2. As to the power to register a branch of an existing society see PARA 2151.

2 See, in particular, the matters required to be contained in the rules: see PARA 2156 et seq.

3 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

4 Friendly Societies Act 1974 s 15A(1) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 6(1); and amended by SI 2001/2617). The Friendly Societies Act 1974 s 15A replaces s 15, which applied to both branches and societies; but this does not affect the operation of s 15(2) in relation to an acknowledgment issued under s 15(1) (see PARA 2149 note 3); Friendly Societies Act 1992 Sch 16 para 6(3).

5 Friendly Societies Act 1974 s 15A(2) (as added: see note 4). As to suspension and cancellation of registration see PARAS 2257-2260.

- 6 See the Friendly Societies Act 1974 s 15A(3) (as added: see note 4); and PARA 2158.

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### **2153. Appeal from refusal to register branch.**

If the Financial Services Authority<sup>1</sup> refuses to register a branch<sup>2</sup>, the branch may appeal to the High Court<sup>3</sup>. If that refusal is overruled on appeal, the Financial Services Authority must give an acknowledgment of registration<sup>4</sup> to the branch<sup>5</sup>.

- 1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 2 As to registration of branches see PARA 2151.
- 3 Friendly Societies Act 1974 s 16(1) (substituted by SI 2001/2617). As to the procedure see CPR Pt 52; *Practice Direction--Appeals* PD 52 para 23.7; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1686.
- 4 Ie an acknowledgment of registration under the Friendly Societies Act 1974 s 15A: see PARA 2152.
- 5 Friendly Societies Act 1974 s 16(2) (amended by the Friendly Societies Act 1992 Sch 22 Pt I; and SI 2001/2617).

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### **2154. Provisions as to dividing societies.**

A society (other than a benevolent society or working men's club<sup>1</sup>) is not disentitled to registration<sup>2</sup> under the Friendly Societies Act 1974 by reason of any rule for, or practice of, dividing any part of its funds, if the rules of the society contain distinct provision for meeting all claims on the society existing at the time of the division, before any division takes place<sup>3</sup>.

- 1 As to benevolent societies, working men's clubs and other registered societies (including, but not confined to, friendly societies) see PARAS 2081, 2089.
- 2 Since no new society may be registered under the Friendly Societies Act 1974 (see PARA 2149), this provision must be read as referring to branches of existing societies, which are still registrable: see PARA 2151.
- 3 Friendly Societies Act 1974 ss 7(2)(a), 9(1), Sch 2 para 10. Members may be restrained by injunction from an illegal division of the funds of a society: *Scott v Peel* (1895) Diprose & Gammon 277. As to trustees' liability for such illegal division see *Cox v James* (1882) Diprose & Gammon 282.

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Registered Societies/A. REGISTRATION/2155. Carrying on business in another registration area.

### **2155. Carrying on business in another registration area.**

A society may not be registered<sup>1</sup> under the Friendly Societies Act 1974 unless its registered office is to be situated in the United Kingdom<sup>2</sup>, the Channel Islands or the Isle of Man<sup>3</sup>. However, a society having a fund under the control of a central body to which every branch is bound to contribute may be registered as a single society<sup>4</sup>.

1 No new society may be registered under the Friendly Societies Act 1974: see PARA 2149. The precise effect of this provision is consequently unclear. It may simply be that the registered office of a new branch must be situated in the United Kingdom, the Channel Islands or the Isle of Man for the branch to be registrable (see PARA 2151); or it may be that the registered office of an existing registered society must remain in those areas for the society to be entitled to remain registered; finally it may be that the provision has effect to determine whether an existing registered society, at the time of its registration, was entitled to be registered. As to changes in the situation of the registered office see PARA 2160 text and note 4. The registration of a society may be cancelled for contravention of the Friendly Societies Act 1974, or where it is found that acknowledgment of registration was obtained by fraud or mistake: see PARA 2258.

2 As to the meaning of 'United Kingdom' see PARA 2 note 3.

3 Friendly Societies Act 1974 s 7(2)(b) (amended by the Financial Services and Markets Act 2000 Sch 18 para 2). See note 1.

4 Friendly Societies Act 1974 s 11(2) (amended by the Financial Services and Markets Act 2000 Sch 18 para 3, Sch 22). See note 1.

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## **B. RULES**

### **(A) CONTENT OF RULES**

#### **2156. Contents.**

The rules of a registered society<sup>1</sup> must contain provisions in respect of the following matters<sup>2</sup>:

- 650 (1) the name of the society<sup>3</sup>;
- 651 (2) the place which is to be its registered office, to which all communications and notices may be addressed<sup>4</sup>;
- 652 (3) the whole of the objects for which the society is to be established, the purposes for which the funds are to be applicable, the terms of admission of members, the conditions under which a member is entitled to a benefit, any forfeitures to be imposed on any member and the consequences of non-payment of any subscription<sup>5</sup>;
- 653 (4) the mode of holding meetings, the right of voting and the manner of making, altering or rescinding rules<sup>6</sup>;
- 654 (5) the manner of appointing and removing a committee of management (by whatever name), a treasurer and other officers and trustees, and, in the case of a

- society with branches, the composition and powers of the central body and the conditions under which a branch may secede from the society<sup>7</sup>;
- 655 (6) the investment of the funds, keeping of the accounts and annual audit of the accounts<sup>8</sup>;
- 656 (7) except in relation to registered friendly societies, the sending to the Financial Services Authority of an annual return relating to the society's affairs and the number of its members<sup>9</sup>;
- 657 (8) the inspection of the society's books by every person having an interest in its funds<sup>10</sup>;
- 658 (9) the manner in which disputes are to be settled<sup>11</sup>;
- 659 (10) where the society is to divide its funds, provision for meeting all claims upon the society existing at the time of division before any such division takes place<sup>12</sup>;
- 660 (11) in the case of a registered friendly society or cattle insurance society, the voluntary dissolution of the society<sup>13</sup>;
- 661 (12) in the case only of a registered friendly society, such periodic valuations as the law requires from time to time, in respect of the whole of its business or any particular business or businesses<sup>14</sup>;
- 662 (13) in the case only of a cattle insurance society, the keeping of proper accounts and the keeping of a separate account of management expenses and all contributions and other money which may be applied to those expenses<sup>15</sup>;
- 663 (14) in the case only of a cattle insurance society, the right of the specified number of members to apply to the Authority for an investigation of the affairs of the society or for winding it up<sup>16</sup>.

The rules of a registered society or branch may provide for: (a) the reinsurance of risks of any class against which persons are, or are to be, insured by that society or branch, to such an extent as is approved from time to time by a qualified actuary<sup>17</sup>; (b) accumulating at interest, for a member's use, any surplus of his contributions to the funds of the society or branch which may remain after providing for the assurance for which they are paid, and for the withdrawal of the accumulations<sup>18</sup>; (c) the admission of minors as members<sup>19</sup>.

The rules of a registered friendly society may provide for the carrying on of reinsurance business<sup>20</sup>, to such an extent or in such circumstances as are approved from time to time by the appropriate actuary<sup>21</sup>.

The rules of a specially authorised society which satisfies certain conditions<sup>22</sup> may provide that the society may receive deposits and borrow money at interest from its members or other persons, and on registration of the rule it is valid<sup>23</sup>.

The rules of a registered cattle insurance society or branch, and of such specially authorised societies or branches as the Treasury may determine, bind the society or branch and members, and all persons claiming through them<sup>24</sup>, to the same extent as if each member had executed them as a deed and covenanted to conform to them, subject to the provisions of the Friendly Societies Act 1974<sup>25</sup>.

A copy of the rules of a registered society or branch must be delivered to any person, on demand, on payment of a reasonable fee<sup>26</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 Friendly Societies Act 1974 s 7(2)(a). These matters are relevant to the continued registration of societies and to the new registration of branches of existing societies: see PARAS 2149-2151. It is important to avoid inconsistency between provisions in the rules of a registered society and its branches, and also to make clear whether or not the rules of a branch are to be affected on any matters by alterations in the rules of the registered society or any branch: *Dixon v Thompson* (1891) Diprose & Gammon 46, DC.

3 Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 1.

4 Friendly Societies Act 1974 Sch 2 para 2.

5 Friendly Societies Act 1974 Sch 2 para 3(1) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 51, Sch 22 Pt I). Nothing in head (3) in the text:

19 (1) requires tables to be included in the rules relating to the benefits payable to or in respect of any members of the society in pursuance of group insurance business (Friendly Societies Act 1974 Sch 2 para 3(2) (amended by SI 2001/2617));

20 (2) prevents a registered friendly society from specifying in its rules the manner in which the conditions are to be determined, under which any member may become entitled to any benefit assured by the society, instead of specifying the conditions themselves (Friendly Societies Act 1974 Sch 2 para 3(3) (added by the Friendly Societies Act 1992 Sch 16 para 51));

21 (3) requires the rules of a society to contain tables if the rules of the society provide that no further obligations may be undertaken or (as the case may be) no further policies may be issued in accordance with any such tables (Friendly Societies Act 1974 Sch 2 para 11(1)).

Subject to head (3) above, the tables which the rules of a society are required to contain under head (3) in the text, and any tables contained in the rules of a branch must, in the case of a society or branch which proposes to carry on long term business, have been certified by a qualified actuary, in so far as they relate to that business: Sch 2 para 11(2) (amended by SI 2001/3649). This does not apply to a society first registered before 26 July 1968 or to a branch of such a society or to a society formed by the amalgamation of two or more such societies: Friendly Societies Act 1974 Sch 2 para 11(3). As to the meaning of 'long term business' see PARA 2138 note 5; definition applied by Sch 2 para 11(2A) (added by SI 2001/3649).

6 Friendly Societies Act 1974 Sch 2 para 4. As to meetings see PARAS 2216, 2302 et seq. As to amendment of rules see PARA 2160 et seq.

7 Friendly Societies Act 1974 Sch 2 para 5. As to the committee of management see PARAS 2184, 2294 et seq; as to auditors and treasurers see PARA 2183; and as to trustees see PARA 2179 et seq.

8 Friendly Societies Act 1974 Sch 2 para 6. As to investments see PARA 2187 et seq. As to accounts and audits etc see PARAS 2202 et seq, 2323 et seq.

9 Friendly Societies Act 1974 Sch 2 para 7. This provision is repealed in relation to registered friendly societies: see the Friendly Societies Act 1992 Sch 16 paras 1, 51(2). As to annual returns see PARA 2211. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

10 Friendly Societies Act 1974 Sch 2 para 8. As to inspection of books see PARA 2214.

11 Friendly Societies Act 1974 Sch 2 para 9. As to the determination of disputes see PARAS 2245 et seq, 2349-2351.

12 Friendly Societies Act 1974 Sch 2 para 10; and see PARA 2154.

13 Friendly Societies Act 1974 Sch 2 para 14 (amended by the Friendly Societies Act 1992 Sch 22 Pt I). As to voluntary dissolution see PARA 2263.

14 Friendly Societies Act 1974 Sch 2 para 13.

15 Friendly Societies Act 1974 Sch 2 para 12. This provision is repealed in relation to registered friendly societies: see the Friendly Societies Act 1992 Sch 16 paras 1, 51(1). As to the keeping of proper accounts see PARA 2205.

16 Friendly Societies Act 1974 Sch 2 para 15. This provision is repealed in relation to registered friendly societies: see the Friendly Societies Act 1992 Sch 16 paras 1, 51(1). As to the specified number of members see PARA 2271.

17 Friendly Societies Act 1974 s 23(1).

18 Friendly Societies Act 1974 s 63.

19 Friendly Societies Act 1974 s 60(1). As to the attainment of full age see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

20 This provision applies to business consisting of the effecting and carrying out of reinsurance contracts which are insured or to be insured by any other registered society or any incorporated friendly society and are of a class or part of a class of insurance business which the society proposing to carry on the reinsurance business itself carries on: Friendly Societies Act 1974 s 23A(2) (s 23A added by the Friendly Societies Act 1992 Sch 16 paras 1, 8).

21 Friendly Societies Act 1974 s 23A(1) (as added: see note 20). As to the meaning of 'appropriate actuary' see PARA 2139 note 4; definition applied by s 23A(3) (as so added).

22 The conditions are: (1) that the society has for its object the creation of funds to be lent out to members or for their benefit; and (2) it has in its rules provision that: (a) no part of its funds is to be divided by way of profit, bonus, dividend or otherwise among its members; and (b) that all money lent to members is to be applied to such purpose as the society or its committee may approve: Friendly Societies Act 1974 s 23(3).

23 Friendly Societies Act 1974 s 23(2). The society will, however, require the permission of the Financial Services Authority under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 84 et seq) in order to carry on the regulated activity of accepting deposits without placing itself in breach of the general prohibition in s 19 (see PARA 80).

24 As to the meaning of 'person claiming through a member' see PARA 2185 note 4.

25 Friendly Societies Act 1974 s 22(1). As to the execution of deeds see the Law of Property (Miscellaneous Provisions) Act 1989 s 1; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 7, 8. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

26 Friendly Societies Act 1974 s 21 (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 7).

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### **2157. Powers exercisable only if the rules so provide.**

The following powers are exercisable by a registered society<sup>1</sup> only if its rules so provide:

- 664 (1) power to hold land<sup>2</sup>;
- 665 (2) power to make loans to members<sup>3</sup>;
- 666 (3) power to accumulate the surplus of contributions for members' use<sup>4</sup>;
- 667 (4) power to reinsure risks and to carry on the business of reinsurance of certain risks<sup>5</sup>;
- 668 (5) power to contribute to the funds or to take part in the government of another registered friendly society or branch<sup>6</sup>;
- 669 (6) power to set up and administer funds for the purchase of government securities on behalf of members<sup>7</sup>; and
- 670 (7) in the case of a specially authorised society, power to receive deposits and to borrow money at interest from members or other persons<sup>8</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 See the Friendly Societies Act 1974 s 53(1); and PARA 2189.

3 See the Friendly Societies Act 1974 s 49; and PARA 2194.

4 See the Friendly Societies Act 1974 s 63; and PARA 2156 text and note 18.

5 See the Friendly Societies Act 1974 ss 23(1), 23A; and PARA 2156 text and notes 20-21.

- 6 See the Friendly Societies Act 1974 ss 50(1), 52(2); and PARAS 2198-2199, 2201.
- 7 See the Friendly Societies Act 1974 s 47; and PARA 2192.
- 8 See the Friendly Societies Act 1974 s 23(2), (3); and PARA 2156 text and notes 22-23.

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### **2158. Validation and ratification by members of registered friendly societies and branches.**

If action not permitted by the rules<sup>1</sup> of a registered friendly society<sup>2</sup> or registered branch<sup>3</sup> is taken by or on behalf of the society or branch, the action is valid<sup>4</sup> if all the members<sup>5</sup> of the society or branch either signified their agreement to it in writing before it was taken, or signified their approval of it in writing before the end of the period of 28 days commencing with the day on which it was taken<sup>6</sup>.

If a contract between a registered friendly society or branch and its members purports to create rights and obligations, as to which the rules of the society or branch do not permit rights and obligations to be created, the contract is valid and binds all members of the society or branch if all the members of the society or branch are parties to it<sup>7</sup>.

However, the taking of any action, or any term in a contract, is not validated unless the matter falls within the capacity<sup>8</sup> of a registered friendly society or branch<sup>9</sup>.

- 1 As to the contents of the rules see PARA 2156.
- 2 As to the meaning of 'registered friendly society' see PARA 2082.
- 3 As to branches and registered branches of societies see PARA 2091.
- 4 This is so whether or not it would be so apart from the Friendly Societies Act 1992 s 94(1): s 94(1).
- 5 In the Friendly Societies Act 1992 s 94, references to the members of a society or branch are to the members entitled to vote at a meeting of the society or branch: s 94(4).
- 6 Friendly Societies Act 1992 s 94(1).
- 7 Friendly Societies Act 1992 s 94(2).
- 8 Ie under the Friendly Societies Act 1974 or the Friendly Societies Act 1992.
- 9 Friendly Societies Act 1992 s 94(3).

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### **(B) REGISTRATION OF RULES**



## **2159. Acknowledgment of registration of rules of societies and branches.**

An acknowledgment of registration of a society<sup>1</sup> also constitutes acknowledgment of registration of the rules of the society, and is conclusive evidence of the rules in force at the date of registration<sup>2</sup>.

An acknowledgment of registration of a branch of a society<sup>3</sup> also constitutes an acknowledgment, and is conclusive evidence, of the rules of the branch in force at the date of registration<sup>4</sup>.

1 See PARA 2149 note 3.

2 Friendly Societies Act 1974 s 17. This provision was repealed by the Friendly Societies Act 1992 ss 95, 120(2), Sch 16 paras 1, 6(2), Sch 22 Pt I, but not so as to affect its operation in relation to an acknowledgment of registration under the Friendly Societies Act 1974 s 15(1) (repealed) (see PARA 2149 note 3): Friendly Societies Act 1992 Sch 16 para 6(3).

3 See PARA 2152.

4 See the Friendly Societies Act 1974 s 15A (added by the Friendly Societies Act 1992 Sch 16 para 6(1)); and PARA 2152.

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## **(C) AMENDMENT OF RULES**

### **2160. Method of amendment.**

There is no statutory provision regulating generally the manner in which the rules of registered societies<sup>1</sup> and their branches<sup>2</sup> are amended, but the rules of all registered societies must contain a provision for the manner in which the rules of a society or branch can be amended or rescinded<sup>3</sup>.

Notice of any change in the situation of the registered office of a registered society or branch must be sent to the Financial Services Authority<sup>4</sup>. In the case of a branch, the notice must be sent through an officer of the society of which it is a branch, appointed for that purpose<sup>5</sup>. Such a notice is registered as if it were an amendment of rules<sup>6</sup>.

A registered society may change its name by an amendment of its rules and in no other way, but no such amendment may be registered unless the change has the written approval of the Authority<sup>7</sup>. The change of name does not affect any right or obligation of the society or of any member and any pending legal proceedings may be continued by or against the trustees of the society or any other officer who may sue or be sued on behalf of the society, notwithstanding its new name<sup>8</sup>.

The extent to which the acknowledgment of registration of an amendment is conclusive as to its validity is considered elsewhere in this title<sup>9</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091; and as to the contents of rules see PARA 2156.

3 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 4; and PARA 2156. Before 1876, certified societies, as they were then called, could amend their rules in the manner in which their own rules provided or they could amend them in the manner provided by statute (see the Friendly Societies Act 1896 s 101(1) (repealed); and the Friendly Societies Act 1974 s 116(2), Sch 10 para 7(a)). The statutory method of amending rules (see the Friendly Societies Act 1855 s 27 (repealed), which provided that rules could be altered at a special meeting called for that purpose) was repealed as from 1 January 1876 (see the Friendly Societies Act 1875 s 5, Sch 1 (repealed)). If rules certified before that date contained no provision for their amendment, the society cannot rely on the statutory provision which has been repealed, and the rules can be amended only with the assent of all the members whose interests are affected: *Souter v Davies* (1895) 39 Sol Jo 264.

4 Friendly Societies Act 1974 s 18(2)(a) (s 18(2)(a), (b) amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 Friendly Societies Act 1974 s 18(2)(a) (as amended: see note 4).

6 Friendly Societies Act 1974 s 18(2)(b) (as amended: see note 4). As to registration of amendments see PARA 2163.

7 Friendly Societies Act 1974 s 81(1) (amended by SI 2001/2617).

8 Friendly Societies Act 1974 s 81(2).

9 See PARA 2164.

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## **2161. Consequences of amendment.**

The contract between the members and a registered society<sup>1</sup> or branch<sup>2</sup> is contained in its rules<sup>3</sup>. If the rules are the only form of contract between a member and a registered society or branch, and there is power to amend them, a member is bound by any such amendment within that power, whatever the extent of the amendment may be and without any express assent or concurrence on the part of a particular member<sup>4</sup>. A member cannot be deprived of payment of a benefit due and payable to him under the rules as they existed before the amendment becomes effective, but the amendment can affect any benefit which may become due or payable afterwards<sup>5</sup>. If there is a secondary contract, such as a policy or certificate of membership, it may be that the member's assent would be necessary to an amendment of rules affecting that contract unless it is expressly stated to be made subject to an amendment of rules<sup>6</sup>. The society's power to amend its rules does not prevent a contract to pay death benefits which is contained in those rules from being a contract of assurance<sup>7</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091; and as to the contents of rules see PARA 2156.

3 See eg *Smith v Galloway* [1898] 1 QB 71, DC. It seems that the rules are a contract between the member and the society or branch in its registered capacity and not merely a contract between the members among themselves: cf *Bonsor v Musicians' Union* [1956] AC 104, [1955] 3 All ER 518, HL (where the majority of the House of Lords was of the opinion that rules of a registered trade union constituted a contract between a member and the union).

4 *Smith v Galloway* [1898] 1 QB 71, DC; *Dixon v Thompson* (1891) Diprose & Gammon 46, DC. An alteration is also binding on the guarantors of a member: *Birmingham and Midland Money Society Ltd v King* (1907) 124 LT Jo 181. An amendment may not be binding, however, if it goes beyond what was within the reasonable

contemplation of the parties when the original rules took effect: *Hole v Garnsey* [1930] AC 472 at 493, HL, per Viscount Sumner, and at 500 per Lord Tomlin.

5 *Smith v Galloway* [1898] 1 QB 71, DC. An alteration of a rule as to the manner of determining disputes made after an application to determine a dispute would not affect the applicant's rights under existing rules: *Ritson v Dobson* (1911) 104 LT 808. Rules which can be altered may be altered to the prejudice of officers appointed under those rules: *Page v Liverpool Victoria Friendly Society* (1927) 43 TLR 712, CA; applied in *Yeo v Stewart* [1947] 2 All ER 28.

6 See *Stooke v Mutual Provident Alliance* (1891) Diprose & Gammon 195, DC; *Powell v Tokeley* (1906) CR Rep, Pt A, 134, DC (Parliamentary Papers for 1907 vol 78); cf *Rosenberg v Northumberland Building Society* (1889) 22 QBD 373, CA.

7 *Chessler v Hebrew United Lodge No 22 of Grand Order of Israel and Shield of David Registered Friendly Society* [1942] 2 All ER 333, DC.

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## **2162. When amendment becomes effective.**

No amendment of the rules of a registered society<sup>1</sup> or branch<sup>2</sup> is valid until it has been registered<sup>3</sup>.

An appointment of trustees<sup>4</sup> in accordance with unregistered rules is inoperative<sup>5</sup>.

Where invalid or unregistered amendments in rules have been made, the old rules remain in force, even though in practice abandoned<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091; and as to the contents of rules see PARA 2156.

3 Friendly Societies Act 1974 s 18(1). For this purpose copies of the amendment, signed by three members and the secretary of the society or of the branch, as the case may be, must be sent to the Financial Services Authority: s 18(1) (amended by SI 2001/2617). See further PARA 2163. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

4 As to trustees of registered societies see PARA 2179 et seq.

5 *Batley v Townrow* (1814) 4 Camp 5. Rules were not valid under previous Acts until confirmed by justices (33 Geo 3 c 54 (Friendly Societies) (1793) s 3 (repealed); Friendly Societies Act 1829 s 4 (repealed)) or certified by the registrar (Friendly Societies Act 1855 s 27 (repealed)). See *Dewhurst v Clarkson* (1854) 23 LQB 247.

6 *R v Cotton* (1850) 15 QB 569 (alterations by consent, without statutory formalities, and not enrolled); *Re Meredith and Whittingham* (1856) 1 CBNS 216; but see *R v Lord Godolphin* (1838) 8 Ad & El 338 (where it was considered doubtful whether old rules abandoned for 30 years were still enforceable); *Ex p Norrish* (1821) Jac 162 (where a society which no longer acted upon its registered rules was held to be dissolved).

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### 2163. Registration of amendment.

On being satisfied that any amendment of the registered rules<sup>1</sup> of a registered society<sup>2</sup> or branch<sup>3</sup> is not contrary to the provisions of the Friendly Societies Act 1974, the Financial Services Authority<sup>4</sup> must issue to the society or branch an acknowledgment of registration of the amendment, which is conclusive evidence that the amendment is duly registered<sup>5</sup>. The Authority's function is to consider whether or not the amendments are bad for non-conformity with the statutory provisions. It cannot refuse to register because it disapproves of them or regards them as bad in substance<sup>6</sup>. It can refuse to register if it is satisfied that an amendment has not been duly made<sup>7</sup>.

If the Authority refuses to register an amendment of a rule of a registered society or branch, the society or branch may appeal to the High Court<sup>8</sup>. If a refusal to register an amendment of a rule is overruled on appeal, the Authority must give an acknowledgment of registration<sup>9</sup> to the society or branch<sup>10</sup>.

1 As to the contents of rules see PARA 2156.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 Friendly Societies Act 1974 s 19 (amended by SI 2001/2617). As to the effect of the acknowledgment see PARA 2164.

6 See *R v Brabrook* (1893) 69 LT 718, DC.

7 See *R v Tidd Pratt* (1865) 6 B & S 672. See also *Orton v Bristow* (1916) 32 TLR 352, CA (where a rule requiring a calendar month's notice was held not to be satisfied by giving a lunar month's notice).

8 Friendly Societies Act 1974 s 20(1)(a) (substituted by SI 2001/2617). As to the procedure see CPR Pt 52; *Practice Direction--Appeals* PD 52 para 23.7; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1686.

9 Ie under the Friendly Societies Act 1974 s 19: see the text and notes 1-5.

10 Friendly Societies Act 1974 s 20(2) (amended by SI 2001/2617).

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### 2164. Effect of acknowledgment of registration of amendment.

The acknowledgment of registration of an amendment of rules of a registered society<sup>1</sup> or branch<sup>2</sup>, given by the Financial Services Authority<sup>3</sup>, is conclusive that everything antecedent to the registration has been duly carried out, and when the certificate has been issued it is incompetent for anybody to raise any objection of procedure or details with reference to matters antecedent to the registration<sup>4</sup>. The acknowledgment is not, however, conclusive as to the legality of rules or amendments or of the power to make amendments<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091; and as to the contents of rules see PARA 2156.

3 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

4 *Re Quinn and National Catholic Benefit and Thrift Society's Arbitration* [1921] 2 Ch 318 at 324 per Eve J (applying the reasoning in *Dewhurst v Clarkson* (1854) 23 LJQB 247 and *Rosenberg v Northumberland Building Society* (1889) 22 QBD 373, CA; and following *Butler v Springmount Dairy Society* [1906] 2 IR 193).

5 *Laing v Reed* (1869) 5 Ch App 4; *Rosenberg v Northumberland Building Society* (1889) 22 QB 373, CA; *Souter v Davies* (1895) 39 Sol Jo 264, DC; *Davie v Colinton Friendly Society* (1870) 43 Sc Jur 54; *Osborne v Amalgamated Society of Railway Servants* [1909] 1 Ch 163, CA (affd sub nom *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87, HL); *R v Davis* (1866) 13 LT 629; *Swaine v Wilson* (1889) 24 QBD 252, CA; *Birch v National Union of Railwaymen* [1950] Ch 602, [1950] 2 All ER 253.

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### **C. MEMBERS AND MEMBERSHIP**

#### **2165. Admission of members.**

The terms of admission of members to registered societies<sup>1</sup> and branches<sup>2</sup> are matters which are required to be covered in the rules of the society or branch<sup>3</sup>. There is no limitation on the maximum number of members unless it is fixed by rule. A society was required to have at least seven members before it could be registered<sup>4</sup>. There is no statutory provision that a society loses its right to remain registered if its membership is reduced below seven members, but if the Financial Services Authority<sup>5</sup> is satisfied that a society has ceased to exist it may cancel the society's registration<sup>6</sup>. The rules of a registered society may limit the age at which a person can be admitted<sup>7</sup>.

Similar but separate provision is made in relation to the incorporation of friendly societies under the Friendly Societies Act 1992, and is considered elsewhere in this title<sup>8</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 3(1); and PARA 2156. As to the contents of rules see PARA 2156.

4 See the Friendly Societies Act 1974 s 7(2)(c). See also the text and notes 5-6.

5 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

6 See the Friendly Societies Act 1974 s 91; and PARA 2258.

7 If the rules of a registered society in force at 1 April 1975 (ie the date of commencement of the Friendly Societies Act 1974) were in force on 1 January 1909 and provide for the admission as members of persons from the minimum age authorised by the Friendly Societies Act 1896, the rules are construed as providing for the admission as members of persons from birth: Friendly Societies Act 1974 s 116(2), Sch 10 para 5.

8 See PARAS 2128-2132.

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## **2166. Minors.**

The rules of a registered society<sup>1</sup> or branch<sup>2</sup> may provide for the admission of minors as members<sup>3</sup>. Such a member may, by himself if he is over 16, and by his parent or guardian if he is under 16, execute all instruments and give all receipts necessary to be executed or given under the rules<sup>4</sup>, but he cannot be a member of the committee of management or a trustee, manager or treasurer<sup>5</sup>.

Similar but separate provision is made in relation to the incorporation of friendly societies under the Friendly Societies Act 1972, and is considered elsewhere in this title<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091; and as to the contents of rules see PARA 2156.

3 Friendly Societies Act 1974 s 60(1). As to the attainment of full age see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

4 Friendly Societies Act 1974 s 60(2).

5 Friendly Societies Act 1974 s 25. As to those officers see PARA 2172 et seq.

6 See PARA 2129.

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## **2167. Liability of members.**

Registered societies<sup>1</sup> or branches<sup>2</sup>, other than cattle insurance societies and certain specially authorised societies<sup>3</sup>, cannot sue a member for arrears or current subscriptions<sup>4</sup>. Sums of money payable by a member to a registered cattle insurance society or branch, or to such specially authorised societies or branches as the Treasury may allow to take the benefit of this provision, are deemed to be debts due from the member to the society or branch and are recoverable as such in the county court for the district in which the member resides<sup>5</sup>.

The rules must provide for the consequences of non-payment of any subscription<sup>6</sup>, but such a rule cannot give the society power to sue<sup>7</sup>. Fines may not be enforced unless they are reasonable<sup>8</sup>.

Where the funds of a society have been improperly divided among members, the members may be ordered to refund the amount received by them<sup>9</sup>.

A registered society or branch is not a corporate body<sup>10</sup>, and the Friendly Societies Act 1974 makes no provision limiting the liability of members in respect of its debts. It is conceived that members who are not committee members are not liable to contribute to the funds more than the subscriptions prescribed by the rules<sup>11</sup> and that in respect of contracts entered into on behalf of societies or branches the general law of agency applies<sup>12</sup>.

- 1 As to the meaning of 'registered society' see PARA 2082.
- 2 As to branches of societies see PARA 2091.
- 3 As to cattle insurance societies and specially authorised societies see PARAS 2089-2090.
- 4 See the Friendly Societies Act 1974 s 61. See also *Cockerell v Aucompte* (1857) 2 CBNS 440; *Re Great Britain Mutual Life Assurance Society* (1880) 16 ChD 246, CA.
- 5 Friendly Societies Act 1974 s 22(2). See **COURTS** vol 10 (Reissue) PARA 713. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 6 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 3(1); and PARA 2156. As to the contents of rules see PARA 2156.
- 7 Friendly Societies Act 1974 s 61.
- 8 *Lovejoy v Mulkern* (1877) 46 LJCh 630, CA. This needs to be read having regard to the provisions of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (see **CONTRACT**). It is thought that unless the rule provided for a fine to be reasonable in the sense of being proportionate to the loss suffered by the society from the member's default, it would be vulnerable to challenge as being an unfair term within the meaning of the Regulations.
- 9 *James v Barrett* (1882) Diprose & Gammon 292 (county court).
- 10 As to the incorporation of friendly societies see PARA 2111 et seq.
- 11 See *Wise v Perpetual Trustee Co* [1903] AC 139, PC.
- 12 Cf **CLUBS** vol 13 (2009) PARA 266 et seq.

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## 2168. Register of members.

Every registered friendly society<sup>1</sup> must maintain a register of the names and addresses of the members of the society<sup>2</sup>, to be kept at the registered office of the society or at such other place or places as the committee of management<sup>3</sup> thinks fit<sup>4</sup>. Failure to maintain a register is an offence<sup>5</sup>.

A society need not enter in the register the address of a member who became a member before 1 January 1994<sup>6</sup> while it has no address for him and his whereabouts are unknown<sup>7</sup>. Where it appears to a society that the address for a member shown in the register is no longer current, it may remove that address from the register, and need not enter an address for that member while it has no address for him and his whereabouts are unknown<sup>8</sup>.

- 1 As to the meaning of 'registered friendly society' see PARA 2082. There is no equivalent provision relating to registered societies other than friendly societies.
- 2 Friendly Societies Act 1974 s 63A(1) (s 63A added by the Friendly Societies Act 1992 Sch 16 paras 1, 22).
- 3 As to the committee of management see PARA 2184.
- 4 Friendly Societies Act 1974 s 63A(2) (as added: see note 2).

5 Friendly Societies Act 1974 s 63A(5) (as added: see note 2). A society committing such an offence is liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 63A(5) (as so added). As to the standard scale see PARA 27 note 21.

6 As to the date of commencement of the Friendly Societies Act 1974 s 63A: Friendly Societies Act 1992 (Commencement No 6 and Transitional Provisions) Order 1993, SI 1993/2213, art 2(1), Sch 6.

7 Friendly Societies Act 1974 s 63A(3) (as added: see note 2).

8 Friendly Societies Act 1974 s 63A(4) (as added: see note 2).

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### **2169. Withdrawal from membership.**

The right of a member<sup>1</sup> to terminate his membership of a registered society<sup>2</sup> or branch<sup>3</sup> must be ascertained according to the provisions in the rules<sup>4</sup>. If there is no provision on this matter, it would seem that a member can resign his membership at any time. The resignation is effective without the need for acceptance by the society, and therefore cannot be withdrawn after it has been received<sup>5</sup>. It would also seem that if by the rules notice of withdrawal is required, but no particular form is prescribed, and it is not stated to whom notice is to be given, parol notice given by a member to the secretary, or to an officer or other person through whom the original contract with the society was made, is sufficient<sup>6</sup>.

1 As to membership of a registered society or branch see PARA 2165.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 As to the rules see PARA 2156 et seq.

5 *Finch v Oake* [1896] 1 Ch 409, CA.

6 *Re Solvency Mutual Guarantee Society, Hawthorne's Case* (1862) 31 LJCh 625.

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### **2170. Expulsion.**

As a society is founded on a written contract expressing the terms on which the members associate together, there is no inherent power to expel a member, and a member may not therefore be expelled unless the rules provide that power<sup>1</sup>. Any power of expulsion must be exercised in good faith, for the benefit of the society<sup>2</sup> and strictly in accordance with the rules<sup>3</sup>. If rules give the committee or some other authority power to expel a member for some act of disobedience or misconduct on his part, its decision cannot be questioned, provided the decision is arrived at after the member's defence has been heard or he has been given an



opportunity of being heard<sup>4</sup>. If a member is not given the opportunity the decision will be null and void<sup>5</sup>. If the rules have been strictly observed, and the member has had due notice and full opportunity of answering the charges made against him and the power of expulsion has been exercised in good faith and for a reason which is not manifestly absurd, no tribunal can interfere to prevent the expulsion<sup>6</sup>.

Where under the rules of a friendly society it is a condition that a member should be, and continue to be, a member of another institution, by ceasing to belong to the latter institution the member automatically ceases to belong to the society<sup>7</sup>.

On the expulsion of a branch from a society, the members of the branch cease to be members of the society<sup>8</sup>.

1 *Dawkins v Antrobus* (1881) 17 ChD 615 at 620, CA, per Jessel MR. As to the principle that an expulsion can be effected only in accordance with the contract contained in the rules cf *Bonsor v Musicians' Union* [1956] AC 104, [1955] 3 All ER 518, HL. As to the principle that the rules of a registered friendly society constitute a contract cf PARA 2161.

2 *Tantussi v Molli* (1886) 2 TLR 731.

3 See *Hiles v Amalgamated Society of Woodworkers* [1968] Ch 440, [1967] 3 All ER 70; and see **CLUBS** vol 13 (2009) PARA 237. As to the rules see PARA 2156 et seq.

4 *Wood v Woad* (1874) LR 9 Exch 190.

5 *Fisher v Keane* (1878) 11 ChD 353; *Burn v National Amalgamated Labourers' Union* [1920] 2 Ch 364. As to the need to observe the principles of natural justice see *Hiles v Amalgamated Society of Woodworkers* [1968] Ch 440, [1967] 3 All ER 70; but cf *Gaiman v National Association for Mental Health* [1971] Ch 317, [1970] 2 All ER 362 (indicating that the position is different where the body concerned is a legal entity distinct from its members (in this case, a company limited by guarantee)). As to the rules of natural justice see generally **JUDICIAL REVIEW** vol 61 (2010) PARA 629 et seq.

6 Cf **CLUBS** vol 13 (2009) PARA 240.

7 *Sargeant v Butterworth* (1907) 23 TLR 450.

8 See PARA 2093.

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## **2171. Protection of members joining the forces from deprivation of membership.**

Any provision in the rules of a registered society<sup>1</sup> or branch<sup>2</sup> which purports to deprive persons of membership of the society or branch or of any interest in it by reason of their service in any of the naval, military or air forces of the Crown is of no effect, and no person may be fined for failure to attend any meeting of the society or branch or otherwise to comply with its rules if the failure was due to his service<sup>3</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 108 (amended by the Armed Forces Act 1981 Sch 5 Pt I). As to the protection of members of reserve and auxiliary forces from forfeiture of policies effected with friendly societies for non-payment of subscriptions see PARAS 2375-2379.

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## **D. OFFICERS**

### **(A) IN GENERAL**

#### **2172. Necessary and usual officers.**

The affairs of a registered society<sup>1</sup> or branch<sup>2</sup> are managed through its officers<sup>3</sup>, and the rules must provide for trustees, a treasurer and other officers, and a committee of management<sup>4</sup>. There must also be a qualified auditor<sup>5</sup>. Every friendly society must have a chief executive and a secretary<sup>6</sup>. Other officers sometimes appointed include managers, persons to sue and be sued on behalf of a society or branch<sup>7</sup>, a chairman, sick visitors and so forth. Officers are sometimes described by titles borrowed from freemasonry and other crafts.

A minor<sup>8</sup> cannot be a member of the committee, a trustee, manager or treasurer<sup>9</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 'Officer', for the purposes of the Friendly Societies Act 1974, includes a trustee, treasurer, secretary, or member of the committee of management of a society or branch, or a person appointed by the society or branch to sue or be sued on its behalf: s 111(1). Registered friendly societies, in common with incorporated friendly societies, are under an obligation to appoint a chief executive and a secretary (see the Friendly Societies Act 1992 s 28(1); and PARA 2301), and accordingly a different definition of 'officer' is given for the purposes of the Friendly Societies Act 1992 (see PARA 2115 note 11).

4 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 5.

5 As to auditors in relation to registered societies see PARAS 2183, 2206; and as to auditors in relation to friendly societies see PARA 2332.

6 Friendly Societies Act 1992 s 28(1). See note 3.

7 See the Friendly Societies Act 1974 ss 12(1)(c), 103(1), 111(1).

8 As to the attainment of full age see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 1.

9 See the Friendly Societies Act 1974 s 25; and PARA 2166.

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#### **2173. Appointment of officers.**

The rules of a registered society<sup>1</sup> or branch<sup>2</sup> must provide for the appointment of the officers<sup>3</sup>. A list<sup>4</sup> signed by the secretary and by every trustee<sup>5</sup> and other officer named in it is evidence, on registration of the society or branch, that the named persons have been duly appointed<sup>6</sup>.

Specific provision as to the appointment of the chief executive and secretary of a friendly society is considered elsewhere in this title<sup>7</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See PARA 2172. As to the rules see PARA 2156 et seq.

4 As to this list see PARA 2151 text and note 13.

5 For specific provisions as to the appointment of trustees see PARA 2179.

6 Friendly Societies Act 1974 s 26 (substituted by the Friendly Societies Act 1992 Sch 16 paras 1, 10). Such evidence is thought to be rebuttable: see **CIVIL PROCEDURE** vol 11 (2009) PARA 1097. As to registration see PARA 2149 et seq.

7 See PARA 2301.

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## **2174. Removal, dismissal and resignation of officers.**

The rules of a registered society<sup>1</sup> or branch<sup>2</sup> must provide for the removal of officers<sup>3</sup>. An officer dismissed by resolution of a general meeting of a society cannot be reinstated by a mandatory order<sup>4</sup>. On receiving notice from a competent court of his removal from office, a secretary of a society may not part with the books in his custody as office holder except to the official to whom he is directed to deliver them<sup>5</sup>. An officer of a collecting society after dismissal has no right to give a list of the members to a rival society<sup>6</sup>.

In the absence of any provisions in the rules or any contract, it seems that an officer can resign by giving notice to the secretary, and that he cannot withdraw his notice of resignation<sup>7</sup>.

1 As to the meaning of 'registered society' see PARA 2082. As to the rules see PARA 2156 et seq.

2 As to branches of societies see PARA 2091.

3 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 5; and PARA 2156. See *Tillotson v Liverpool Victoria Legal Friendly Society* (1907) 124 LT Jo 241. Rules can be altered to the prejudice of the tenure of an officer appointed under those rules: see PARA 2161 note 5.

4 *Evans v Heart of Oak Benefit Society* (1866) 12 Jur NS 163. As to mandatory orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

5 *Glasgow District of Ancient Order of Foresters v Stevenson* (1899) 2 F 14, Ct of Sess.

6 *Liverpool Victoria Legal Friendly Society v Houston* (1900) 3 F 42, Ct of Sess.

7 *Re Gloucester, Aberystwith and South Wales Rly Co, Maitland's Case* (1853) 4 De GM & G 769; *Glossop v Glossop* [1907] 2 Ch 370; *Transport Ltd v Schonberg* (1905) 21 TLR 305.

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### **2175. Priority over officer's creditors on his death.**

On the death of an officer<sup>1</sup> of a registered society<sup>2</sup> or branch<sup>3</sup> who has in his possession, by virtue of his office, money or property belonging to the society or branch, the executors or administrators must, on the demand in writing<sup>4</sup> of the trustees<sup>5</sup> of the society or branch, or of any two of them, or of any person authorised by the society or branch or its committee of management to make the demand, pay the money and deliver over the property to the trustees in preference to any other debt or claim against the officer's estate<sup>6</sup>.

1 As to the meaning of 'officer' see PARA 2172 note 3.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 'Demand in writing' covers a writ or summons: see *Absolom v Gething* (1863) 32 Beav 322 (service of bill in Chancery).

5 As to the trustees see PARA 2179 et seq.

6 Friendly Societies Act 1974 s 59(1)(a), (2). See also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 391.

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### **2176. Priority on bankruptcy or in execution.**

A registered society<sup>1</sup> or branch<sup>2</sup> has a priority against creditors, in the event of the bankruptcy<sup>3</sup> of an officer<sup>4</sup> who has in his possession, by virtue of his office, money or property belonging to the society or branch<sup>5</sup>; or in the event of any execution, attachment or other process being issued, or action or diligence being raised against the officer or his property<sup>6</sup>. The trustee in bankruptcy or the sheriff or other person executing the process must, on demand in writing<sup>7</sup>, pay the money and deliver over the property to the trustees of the society or branch in preference to any other debt or claim<sup>8</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 'Bankruptcy' includes liquidation of the officer's affairs by arrangement: Friendly Societies Act 1974 s 59(3). See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 588, 859 et seq.

4 As to the meaning of 'officer' see PARA 2172 note 3.

5 Friendly Societies Act 1974 s 59(1)(a).

6 Friendly Societies Act 1974 s 59(1)(b).

7 le on demand made in the same way as demand is made on the personal representatives in case of death: see the Friendly Societies Act 1974 s 59(2); and PARA 2175.

8 Friendly Societies Act 1974 s 59(2).

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### **2177. Preference construed strictly.**

The provisions relating to preference<sup>1</sup> are construed strictly, as they are against common right. Preference is given in respect of property in the possession of the officer<sup>2</sup> by virtue of his office. There would be no preference if the officer in possession of the property were not the officer having the duty under the rules to hold it<sup>3</sup>.

It appears that in bankruptcy or the winding up of an insolvent estate the preferential right of a registered friendly society or branch will prevail against the Crown claiming in respect of a Crown debt<sup>4</sup>.

It would seem that if the treasurer of a registered society to which he owes money becomes bankrupt, and his landlord distrains for rent, the landlord, as between himself and the society, may retain the proceeds of the distress<sup>5</sup>.

Neglect to obtain from the treasurer the protection of a bond or other security required by the rules of the society may deprive the society of its claim to priority<sup>6</sup>; but a society does not lose its priority by reason of the bankrupt officer being beneficially interested in the property of the society<sup>7</sup>, nor by the society being negligent in examining its accounts<sup>8</sup>.

1 See PARAS 2175-2176.

2 As to the meaning of 'officer' see PARA 2172 note 3.

3 *Re Jardine, ex p Fleet* (1850) 4 De G & Sm 52; *Re Aberdeen* (1896) 13 TLR 7; and see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 588.

4 See the Insolvency Act 1986 s 434; the Administration of Estates Act 1925 s 57(1); *Food Controller v Cork* [1923] AC 647, HL; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 588.

5 *Re Thomas* (1876) Diprose & Gammon 64 (county court).

6 See *Ex p Ross* (1802) 6 Ves 802; *Re Clarke, ex p Haynes* (1844) 3 Mont D & De G 663; *John O'Gaunt Lodge of Oddfellows v Bell* (1883) Diprose & Gammon 67 (county court).

7 *Re Clarbon, ex p Crowley* (1837) 2 Deac 555.

8 *Absolom v Gething* (1863) 32 Beav 322; *Moors v Marriott* (1878) 7 ChD 543 (building society); and see also *Re Baker, ex p Burge* (1841) 1 Mont D & De G 540; *Re Welch, ex p Trustees of Oddfellows' Society* (1894) 63 LJQB 524 at 526 per Wright J.

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### **2178. When preference applies.**

The preferential right<sup>1</sup> applies only in the case of properly constituted officers<sup>2</sup>. It does not apply in the case of a society's bankers<sup>3</sup>, even though appointed under the rules<sup>4</sup>, nor to money lent, by the consent of a society upon a promissory note carrying interest, to a person who acts as treasurer, even though not appointed<sup>5</sup>. The right applies where the officer has been removed from office before the date of his bankruptcy<sup>6</sup>.

When the defaulting officer is in partnership with another person, and both become bankrupt, the society is entitled to preference only out of the separate estate of the officer<sup>7</sup>.

1 See PARAS 2175-2176.

2 *Re Thick, ex p Buckland* (1818) Buck 214; *Re Aberdein* (1896) 13 TLR 7. As to the meaning of 'officer' see PARA 2172 note 3. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 588.

3 *Re Rufford and Wragge, ex p Orford* (1852) 1 De GM & G 483; and see also *Re Wise, ex p Whiphaim* (1844) 3 Mont D & De G 564; *Re West of England and South Wales District Bank, ex p Swansea Friendly Society* (1879) 11 ChD 768; but cf *Re Batson, ex p Riddell* (1842) 3 Mont D & De G 80.

4 *Re Clarke, ex p Harris* (1845) De G 162.

5 *Ex p Ashley, ex p Corser* (1801) 6 Ves 441; *Ex p Ross* (1802) 6 Ves 802; *Ex p Stamford Friendly Society* (1808) 15 Ves 280; *Re Shattock, ex p Long Ashton Junior Friendly Society* (1861) 5 LT 370.

6 *Re Eilbeck, ex p Trustees of Good Intent Lodge No 987 of the Grand United Order of Odd Fellows* [1910] 1 KB 136 (following *Re Miller, ex p Official Receiver* [1893] 1 QB 327, CA). In *Re Eilbeck, ex p Trustees of Good Intent Lodge No 987 of the Grand United Order of Odd Fellows* above, the bankruptcy supervened after the debtor had ceased to be, and in *Re Miller, ex p Official Receiver* above, while the debtor was still, an officer of the society. See also *Re Batson, ex p Riddell* (1842) 3 Mont D & De G 80. A society is entitled to preferential payment out of the estate of a bankrupt treasurer whose assets consist only of stock in trade and furniture, not specifically identifiable as belonging to the society: *Re Atkins, ex p Edmonds* (1882) 51 LJCh 406; *Re Miller, ex p Official Receiver* above.

7 *Re Ashley, ex p Appach* (1840) 1 Mont D & De G 83.

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## **(B) TRUSTEES**

### **2179. Appointment and removal of trustees.**

Every registered society<sup>1</sup> and branch<sup>2</sup> must have one or more trustees<sup>3</sup>, whose appointment and removal must be provided for in the rules<sup>4</sup>. They must be appointed by a resolution of the society or branch in general meeting or in such other manner as the rules may provide<sup>5</sup>. A corporation may be a trustee<sup>6</sup>.

If the appointment is by resolution, a copy of the resolution, signed by the trustee appointed and by the secretary of the society or branch, must be sent to the Financial Services Authority<sup>7</sup>. In the case of appointment in another manner provided by the rules, the society or branch must send to the Authority notice of the trustee's appointment signed by the secretary of the society or branch, and an acceptance of office signed by the trustee<sup>8</sup>.

In the case of the appointment of a trustee of a branch, any of the documents referred to above must be sent through an officer appointed in that behalf by the society of which the branch forms part<sup>9</sup>.

Failure to send a copy is an offence<sup>10</sup>, but does not seem to invalidate the appointment<sup>11</sup>.

A secretary or treasurer of a registered society or branch may not also be a trustee of that society or branch<sup>12</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 24(1) (s 24 substituted by the Friendly Societies Act 1992 Sch 16 paras 1, 9).

4 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 5; and PARA 2156.

5 Friendly Societies Act 1974 s 24(2) (as substituted: see note 3). As to general meetings of the society or branch see PARA 2216.

6 *Re Pilkington Bros Ltd Workmen's Pension Fund* [1953] 2 All ER 816, [1953] 1 WLR 1084.

7 Friendly Societies Act 1974 s 24(3) (as substituted (see note 3); and amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

8 Friendly Societies Act 1974 s 24(4) (as substituted (see note 3); and amended by SI 2001/2617).

9 Friendly Societies Act 1974 s 24(5) (as substituted (see note 3); and amended by SI 2001/2617). As to the necessity for a society with branches to provide by its rules for the composition and powers of its central body see PARA 2156.

10 See the Friendly Societies Act 1974 s 98(1)(a); and PARA 2278.

11 See *Beckett v Willetts* (1857) 29 LTOS 144.

12 Friendly Societies Act 1974 s 24(6) (as substituted: see note 3).

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## **2180. Trustees' functions.**

Unless the rules otherwise provide, the trustees of a registered society<sup>1</sup> or branch<sup>2</sup> are the proper persons to sue or be sued<sup>3</sup> and may be sued for debts incurred by the society before their appointment<sup>4</sup>. Although they are nominal claimants or defendants, the society is the real litigant, and therefore the board of management of the society is entitled to direct any change of solicitors<sup>5</sup>.

The trustees are also the officers in whom by law the property of a registered society or branch is vested<sup>6</sup>. They may, with the consent of the committee or of a general meeting, invest the funds in certain authorised investments<sup>7</sup>.

The trustees sign certain statutory documents and notices required to be sent to the registrar, including the notice of their own appointment<sup>8</sup>, indorsed receipts on discharge of mortgages<sup>9</sup> and declarations in support of instruments of dissolution<sup>10</sup>. They make the formal demand for payment in priority to other creditors for sums due to a society or branch from the estates of deceased or bankrupt officers<sup>11</sup>. They can require an officer to render an account and pay and deliver up all property in his hands and can prosecute persons who obtain possession of the property of the society or branch by false representation or imposition, or who fraudulently withhold or apply such property<sup>12</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See the Friendly Societies Act 1974 s 103(1); and PARA 2290. As to the appointment of trustees see PARA 2179.

4 *Beckett v Willetts* (1857) 29 LTOS 144.

5 *Laskey v Runtz* (1908) 24 TLR 496.

6 See PARAS 2182, 2185.

7 See PARA 2187.

8 See PARA 2179.

9 See PARA 2197.

10 See PARA 2264. A declaration made in support of an instrument of dissolution may alternatively be made by three members and the secretary: see PARA 2264.

11 See PARAS 2175-2176.

12 See PARAS 2285, 2290.

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## **2181. Responsibility of trustees.**

The trustees of a registered society<sup>1</sup> or branch<sup>2</sup> are not liable<sup>3</sup> to make good any deficiency in the funds of the society or branch, and each trustee is liable only for sums of money actually received by him on account of the society or branch<sup>4</sup>. The indemnity does not extend to illegal acts<sup>5</sup>, but it would extend to ministerial acts by trustees under the direction of the committee of management<sup>6</sup>. It is conceived that trustees in the performance of their functions under the Friendly Societies Act 1974 and under rules are not altogether subject to the same rules of conduct as ordinary trustees of a trust fund under the general law relating to trustees<sup>7</sup>. Their position is different from, on the one hand, the directors of a company, who have not vested in them the property which they manage, and who are answerable for that management as agents for the members and not as trustees<sup>8</sup>, and, on the other hand, the trustees of a will or settlement, who have the property vested in them and are responsible for its management<sup>9</sup>. The members who are the beneficiaries, for whose use and benefit the property is held by the trustees, control and manage the property either in general meeting or through their appointed officers<sup>10</sup>.



The statutory functions of trustees are mainly ministerial<sup>11</sup>. They are usually the officers who sue or who are sued on behalf of a society or branch, and in this matter their responsibilities and powers are nominal<sup>12</sup>. They are removable by the members at any time<sup>13</sup>. In investing funds, with which trustees in practice are most often concerned, they may make authorised investments only with the consent of the committee or of a general meeting<sup>14</sup>. They do not have the powers of investment exercisable by trustees under the general law<sup>15</sup>.

With regard to the authority enabling investment with certain consents in, for example, trustee securities<sup>16</sup>, industrial and provident societies (which are incorporated bodies) have a similar enabling provision in their principal governing statute<sup>17</sup> and it seems that the members of their committees are responsible for their decisions as agents and not as trustees<sup>18</sup>. In this respect the only distinction between those societies and societies registered under the Friendly Societies Act 1974 would seem to be that the former are incorporated and hold property in the corporate name and the latter are unincorporated and hold property in the names of trustees. The statutory protection given to the trustees of a registered society or branch, that they are not liable to make good any deficiency in the funds and are liable only for sums of money actually received by them<sup>19</sup>, is unqualified.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 This is the case notwithstanding anything in the Friendly Societies Act 1974 s 54(1) or (2) (see PARA 2185): s 54(3).

4 Friendly Societies Act 1974 s 54(3).

5 *Cox v James* (1882) Diprose & Gammon 282 (High Court case; trustees held to be personally liable on illegal division of funds made by them); *Holmes v Taylor* (1889) Diprose & Gammon 285 (High Court case; illegal division of funds); *Scott v Evans* (1895) Diprose & Gammon 560 (High Court case; liability of trustees to account on illegal dissolution); *Kelly v Peacock* (1917) 55 SLR 65 (illegal dissolution case). As to the liability of new trustees if they disobey an injunction granted against their predecessors see *Avery v Andrews* (1882) 51 LJCh 414.

6 *Grimes v Harrison* (1859) 26 Beav 435 (trustees signed cheques at the request of the committee; they were held not to be personally liable for loss incurred through the misapplication by the committee of money so obtained). As to the committee of management see PARA 2184.

7 As to the law relating to trustees generally see **TRUSTS** vol 48 (2007 Reissue) PARA 601 et seq.

8 Cf *Re Faure Electric Accumulator Co* (1888) 40 ChD 141 at 151 per Kay J; *Smith v Anderson* (1880) 15 ChD 247 at 275, CA, per James LJ. See **COMPANIES** vol 14 (2009) PARA 544 et seq.

9 Cf *Re National Permanent Mutual Benefit Building Society* (1889) 43 ChD 431 at 434 per North J. See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 335 et seq.

10 Cf the meaning of 'branch' set out in PARA 2091. See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 5 (see PARA 2156), requiring the rules to provide for a committee of management. As to the responsibility of members of the committee for statutory offences in connection with management see s 98(5); and PARA 2280.

11 See PARA 2180.

12 *Laskey v Runtz* (1908) 24 TLR 496. See PARA 2180.

13 Their removal must be provided for in the rules: see the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 5; and PARA 2156.

14 See PARA 2187.

15 Cf *Re National Permanent Mutual Benefit Building Society* (1889) 43 ChD 431 at 434 per North J. However, see now the Friendly Societies Act 1974 s 46(1)(e); and PARAS 2187, 2191.

16 See PARAS 2187, 2190.

- 17 See the Industrial and Provident Societies Act 1965 s 31(c); and PARA 2498.
- 18 See *Smith v Anderson* (1880) 15 ChD 247 at 275, CA, per James LJ; and PARA 2463.
- 19 See the text to notes 1-3.

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## **2182. Public Trustee as custodian trustee.**

The rules of a registered friendly society<sup>1</sup> or branch<sup>2</sup> may provide for the appointment of the Public Trustee<sup>3</sup> as custodian trustee<sup>4</sup>. If he agrees to accept the office, the securities for any investments can be transferred to him<sup>5</sup>, and he invests the funds according to the rules<sup>6</sup>. He pays the interest to the trustees, and, if and when required, transfers securities to them or pays to them the proceeds on realisation of investments<sup>7</sup>.

- 1 As to the meaning of 'registered friendly society' see PARA 2082.
- 2 As to branches of societies see PARA 2091.
- 3 As to the Public Trustee generally see **TRUSTS** vol 48 (2007 Reissue) PARA 766 et seq.
- 4 Friendly Societies Act 1974 s 55(1)(b). It should be noted that this applies only to registered friendly societies, not to other registered societies.
- 5 This is the case notwithstanding anything in the Friendly Societies Act 1974 s 54: see PARAS 2181, 2185.
- 6 See the Friendly Societies Act 1974 s 55(1), (2) (s 55(1) amended by SI 2001/2617). The Public Trustee is exonerated from any liability in relation to any securities held by him in pursuance of this provision: Friendly Societies Act 1974 s 55(3).  
See also the Public Trustee Act 1906 s 4, under which the Public Trustee or a duly authorised trust corporation may be appointed custodian trustee, leaving the management of the property with the other trustees as managing trustees. On such appointment, the whole of the trust property is transferred to the custodian trustee as if he were sole trustee: s 4(2)(a). This provision is available to registered societies and branches and there is therefore an exception to the principle that the property of a society or branch must be held in the names of all the trustees: cf PARAS 2180, 2185. See further **TRUSTS** vol 48 (2007 Reissue) PARA 792 et seq.
- 7 Friendly Societies Act 1974 s 55(2).

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## **(C) OTHER OFFICERS**

### **2183. Auditors and treasurer.**

Auditors of societies are prima facie not officers<sup>1</sup>, but may be officers under the terms of the rules<sup>2</sup>. Other officers of registered societies and branches are ineligible for appointment as auditors<sup>3</sup>.

The rules of a registered society and branch must provide for the appointment and removal of a treasurer<sup>4</sup>. Trustees are ineligible for this office<sup>5</sup>. A banking company cannot be appointed treasurer<sup>6</sup>, and neither can a minor<sup>7</sup>.

The responsibility of a treasurer for money belonging to a society which he has received is that of a bailee so that if, before paying it into the bank, he is robbed by vis major, it seems his guarantor would not be liable<sup>8</sup>.

1 As to the meaning of 'officer' see PARA 2172 note 3.

2 *Re London and General Bank* [1895] 2 Ch 166, CA; *Re Kingston Cotton Mill Co* [1896] 1 Ch 6, CA; *Re Western Counties Steam Bakeries and Milling Co* [1897] 1 Ch 617, CA; *R v Shacter* [1960] 2 QB 252, [1960] 1 All ER 61, CCA. As to auditors of friendly societies generally see PARA 2332 et seq. As to the rules see PARA 2156 et seq.

3 See PARA 2333.

4 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 5; and PARA 2117. See also *Roberts v Price* (1847) 4 CB 231 (void election).

5 See the Friendly Societies Act 1974 s 24(6); and PARA 2179 text and note 12.

6 *Re West of England and South Wales District Bank, ex p Swansea Friendly Society* (1879) 11 ChD 768; distinguished in *Re Pilkington Bros Ltd Workmen's Pension Fund* [1953] 2 All ER 816, [1953] 1 WLR 1084.

7 See the Friendly Societies Act 1974 s 25; and PARA 2172 text and notes 8-9.

8 *Walker v British Guarantee Association* (1852) 18 QB 277; and see **BAILMENT** vol 3(1) (2005 Reissue) PARAS 3, 15-19.

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## **2184. Committee of management.**

The Friendly Societies Act 1992 introduced new provisions as to the committee of management which apply in relation to all friendly societies, and which are dealt with elsewhere in this title<sup>1</sup>. The following additional matters are specific to registered societies and branches<sup>2</sup>.

The rules of a registered friendly society or branch must provide for the appointment and removal of a committee of management<sup>3</sup>, the members of which are officers<sup>4</sup>. A minor may not be a member of the committee<sup>5</sup>.

The duties of a committee of management are, among other things, to manage the society and to institute proceedings against persons in relation to fraud in the obtaining or withholding of, or the misapplication of, property<sup>6</sup>; and its consent to investments may be necessary<sup>7</sup>. The committee also has certain powers of determining who is entitled to money due from a society to a member who has died without having made a nomination subsisting at the time of his death<sup>8</sup>.

1 See the Friendly Societies Act 1992 ss 27-29; and PARAS 2294-2301.

2 The societies and branches registered under the Friendly Societies Act 1974: see PARA 2082. As to branches of societies see PARA 2091.

3 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 5; and PARA 2156.

4 See PARA 2172 note 3.

5 See the Friendly Societies Act 1974 s 25; and PARAS 2166, 2172.

6 See the Friendly Societies Act 1974 s 99(2), (6); and PARA 2285. As to offences by the committee of management see s 98(1), (5); and PARA 2278 et seq.

7 See the Friendly Societies Act 1974 s 46(1); and PARA 2187. Cf the responsibilities of trustees: see PARA 2181.

8 See PARA 2229 et seq.

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## ***E. INVESTMENT, FUNDS AND PROPERTY***

### **(A) VESTING AND DEVOLUTION**

#### **2185. Vesting of property.**

All property<sup>1</sup> belonging to a registered society<sup>2</sup>, whether acquired before or after registration, is vested in the society's trustees<sup>3</sup> for the time being, for the use and benefit of the society and its members and of all persons claiming through the members<sup>4</sup> according to the rules<sup>5</sup>.

The property of a registered branch<sup>6</sup> vests wholly or partly in the trustees for the time being of that branch, or of any other branch of which that branch forms part or, if the society's rules so provide, in the trustees for the time being of the society<sup>7</sup>. The property vests for the use and benefit either of the members of the branch in question and persons claiming through them or of the members of the society generally and persons claiming through them, according to the rules of the society<sup>8</sup>.

1 'Property' extends to all property, whether real or personal, including books and papers: see the Friendly Societies Act 1974 s 111(1).

2 As to the meaning of 'registered society' see PARA 2082.

3 As to the trustees see PARAS 2179-2182.

4 'Persons claiming through a member' includes the nominees of the member where nomination is allowed: Friendly Societies Act 1974 s 111(1).

5 Friendly Societies Act 1974 s 54(1). As to the rules of a society see PARA 2156 et seq; and as to registration see PARA 2149 et seq. Even if a registered society or branch has more than four trustees, its land is vested in them all: see the Law of Property Act 1925 s 7(3), which effectively disapplies the limitation as to numbers of grantees imposed by s 34(2) (see **REAL PROPERTY** vol 39(2) (Reissue) PARA 211); and PARA 2189. In proceedings, property may be stated to be the property of the trustees of a society or branch in their own names as trustees for the society or branch: see PARA 2290. As to the penalty for withholding or misapplying the property of a registered society or branch see PARA 2282. As to the Public Trustee acting as custodian trustee, and as to a possible exception to the principle that the property is vested in all the trustees, see PARA 2182. The property of

an unregistered society vests in the trustees on registration, and must be delivered to them by those in whose hands it may be: *Yeates v Roberts* (1855) 7 De GM & G 227; *Sharp v Warren* (1818) 6 Price 131; *Oldham Our Lady's Sick and Burial Society v Taylor* (1887) 3 TLR 472, CA; cf *Davies v Griffiths* (1853) 1 WR 402.

6 As to branches of societies see PARA 2091.

7 Friendly Societies Act 1974 s 54(2). See also note 5.

8 Friendly Societies Act 1974 s 54(2). Notices of changes of trustees must be sent to the Financial Services Authority: see PARA 2179. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

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### **2186. Devolution on trustee's death, resignation or removal.**

Upon the death, resignation or removal of a trustee<sup>1</sup> of a registered society<sup>2</sup> or branch<sup>3</sup>, the property vested in him as such a trustee vests in the succeeding trustees, either solely or with any surviving or continuing trustees; and, until the appointment of succeeding trustees, it vests in the surviving or continuing trustees only, or in the executors or administrators of the last surviving or continuing trustee. The property vests subject to the same trusts, without conveyance, assignment or assignation<sup>4</sup>.

1 As to the trustees of a society see PARAS 2179-2182.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 Friendly Societies Act 1974 s 58. As to funds in the hands of a treasurer of a friendly society held by virtue of his office see *Re Woodliffe, ex p Ray* (1839) 3 Deac 537.

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## **(B) INVESTMENT**

### **2187. Powers of investment.**

The rules of a registered society<sup>1</sup> or branch<sup>2</sup> must provide for the investment of its funds<sup>3</sup>. The trustees<sup>4</sup> may, with the consent of the committee<sup>5</sup> or of a majority of the members present and entitled to vote in general meeting, invest<sup>6</sup> the whole or a part of the funds to any amount<sup>7</sup>:

671 (1) in the purchase of land or the erection or alteration of offices or other buildings on it<sup>8</sup>;

- 672 (2) upon any other security<sup>9</sup> expressly directed by the rules, not being personal security, except as authorised in the Friendly Societies Act 1974 with respect to loans<sup>10</sup>;
- 673 (3) in any investment in which trustees are for the time being by law authorised to invest trust funds<sup>11</sup>; and
- 674 (4) in the case of a registered friendly society or branch of which the rules expressly so direct, in subscribing up to any amount permitted for any of the share or loan capital of a housing association<sup>12</sup>, other than shares or debentures not fully paid up at the time of issue<sup>13</sup>.

The trustees of a registered society have power<sup>14</sup>, subject to the same consents as are referred to above, to invest the society's funds in any other manner authorised by the society's rules<sup>15</sup>, if it is a society which is required to maintain, and does maintain, a prescribed minimum margin of solvency in respect of its long term or general insurance business<sup>16</sup>. A society which satisfies this requirement will continue to do so until the Financial Services Authority<sup>17</sup> serves a notice on it stating that the society no longer appears to do so<sup>18</sup>; the society thereupon reverts to the limited investment powers mentioned in heads (1) to (3) above<sup>19</sup>, save that it can retain any investment made under the wider powers unless the Authority directs the society to dispose of any such investment<sup>20</sup>.

- 1 As to the meaning of 'registered society' see PARA 2082. As to the rules see PARA 2156 et seq.
- 2 As to branches of societies see PARA 2091.
- 3 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 6; and PARA 2156.
- 4 As to the trustees of a society see PARAS 2179-2182.
- 5 As to the committee of management see PARAS 2184, 2294 et seq.
- 6 As to the power to make loans see PARA 2194 et seq.
- 7 Friendly Societies Act 1974 s 46(1).
- 8 Friendly Societies Act 1974 s 46(1)(c). See further PARA 2189.
- 9 It was held in *Re United Law Clerks' Society* [1947] Ch 150, [1946] 2 All ER 674, that 'any other security', in what is now the Friendly Societies Act 1974 s 46(1)(d), does not include ordinary or preference shares.
- 10 Friendly Societies Act 1974 s 46(1)(d). See further PARA 2190. As to the power to make certain loans on members' personal security see PARA 2194.
- 11 Friendly Societies Act 1974 s 46(1)(e). The powers of investment conferred on trustees by the Trustee Act 2000 are now very extensive: see PARAS 2191, 2196.
- 12 'Housing association' has the same meaning as in the Housing Associations Act 1985 or the Housing (Northern Ireland) Order 1981, SI 1981/156, Pt II: Friendly Societies Act 1974 s 51(4) (amended by the Housing (Consequential Provisions) Act 1985 Sch 2 para 26; and the Friendly Societies Act 1992 Sch 16 paras 1, 18(b)). See **HOUSING** vol 22 (2006 Reissue) PARA 11.
- 13 Friendly Societies Act 1974 s 51(1). This power was formerly subject to the same restrictions as those made on the power of registered societies to make loans (see s 50(1), (2); and PARA 2198), by virtue of s 51(2). However, s 51(2) has been amended by the Friendly Societies Act 1992 Sch 16 para 18(a), and now states additionally that those restrictions do not apply to investments made by the trustees of a registered friendly society or a branch of such a society. Given that the power conferred by the Friendly Societies Act 1974 s 51(1) is available only to societies of that description, the effect of the amendment would appear to be to remove the restrictions from the exercise of the power. This view is reinforced by the enactment of s 50(2A): see PARA 2198 note 7.
- 14 See the Friendly Societies Act 1974 s 46(2A) (added by the Friendly Societies Act 1992 Sch 16 para 15(3)). This provision applies the Friendly Societies Act 1992 s 14(2)-(12) in respect of the investment powers of the trustees of a registered friendly societies as those provisions apply to the powers of investment of an

incorporated friendly society (see PARA 2136), subject to obtaining the necessary consents (see the text to notes 4-6).

15 See the Friendly Societies Act 1974 s 14(2). See note 14.

16 If it is a society to which rules in respect of margins of solvency, made under the Financial Services and Markets Act 2000 s 138 (see PARA 21) apply and it maintains the required margin of solvency: Friendly Societies Act 1992 s 14(3) (amended by SI 2001/2617). See note 14.

17 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

18 Friendly Societies Act 1992 s 14(5), (6) (s 14(5), (6), (10), (12) amended by SI 2001/2617). Such a notice may be revoked by a subsequent notice: Friendly Societies Act 1992 s 14(10) (as so amended). The Authority must keep a copy of any notice served on a society in the public file of the society: s 14(12) (as so amended). See note 14.

19 See the Friendly Societies Act 1992 s 14(7). See note 14. Section 14(7) refers to s 14(1), which is not applied by the Friendly Societies Act 1974 s 46(2A) (see note 14); however, the Friendly Societies Act 1992 s 14(1) is expressed in equivalent terms to the Friendly Societies Act 1974 s 46(1), the provisions of which are described in heads (1)-(3).

20 Friendly Societies Act 1992 s 14(8), (9). See note 14.

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## **2188. Investment by and for branches.**

The rules of a registered society<sup>1</sup> with branches<sup>2</sup> and the rules of any branch may provide for investment of funds of the society or of that branch by the trustees<sup>3</sup> of any branch or by the trustees of the society; and the consent required for that investment is the consent of the committee<sup>4</sup>, or of a majority of members present and entitled to vote in general meeting, of the society or branch by which the funds are invested<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2082. As to the rules see PARA 2156 et seq.

2 As to branches of societies see PARA 2091.

3 As to the trustees of a society see PARAS 2179-2182.

4 As to the committee of management see PARAS 2184, 2294 et seq.

5 Friendly Societies Act 1974 s 46(2).

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## **2189. Investment in land and buildings.**

If the rules of a registered society<sup>1</sup> or branch<sup>2</sup> so provide, the society or branch may acquire and hold land for the purpose of carrying on any of its activities in the names of the trustees<sup>3</sup>. A registered society or branch may also, if its rules so provide, dispose of or otherwise deal with any land so held<sup>4</sup>. No person is bound to inquire as to the authority of the trustees to dispose of or to deal with the land, and the trustees' receipt is a discharge for all sums of money arising from or in connection with the disposal or other dealing with the land<sup>5</sup>.

The power of a registered society or branch to hold land devised to it by will seems to depend on whether the terms of the gift tend to a perpetuity. If there is nothing to prevent existing members from dealing with the property, the gift is valid<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 For the purposes of the Friendly Societies Act 1974 s 53, a branch of a registered society need not be separately registered: s 53(2). As to branches of friendly societies see PARA 2091.

3 Friendly Societies Act 1974 s 53(1) (substituted by the Friendly Societies Act 1992 Sch 16 paras 1, 19). As to the trustees of a society see PARAS 2179-2182. Whereas the Friendly Societies Act 1974 s 46(1)(c) gives statutory authority for the purchase of land as an investment without any provision for such investment being made in the rules, but with a requirement as to the consent required for such investment (see PARA 2187), s 53(1) gives power to acquire and hold land etc only if the rules so provide. The Law of Property Act 1925 s 7(3) (b) preserved the provisions of the Friendly Societies Act 1896 with regard to land to which that Act applied (see s 47(1) (repealed), replaced by the Friendly Societies Act 1974 s 53(1)). As to the application of the Law of Property Act 1925 s 7(3)(b) to the Friendly Societies Act 1974 see s 116(2), (3), Sch 10 para 2; and as to the effect of the provision see PARA 2185 note 5.

4 Friendly Societies Act 1974 s 53(1) (as substituted: see note 3).

5 Friendly Societies Act 1974 s 53(1)(a),(b) (as substituted: see note 3).

6 *Re Clarke, Clarke v Clarke* [1901] 2 Ch 110; *Re Drummond, Ashworth v Drummond* [1914] 2 Ch 90. A gift tending to perpetuity to a society which is not a charity would be invalid: see *Re Clark's Trust* (1875) 1 ChD 497; and **CHARITIES** vol 8 (2010) PARAS 140-144. As to perpetuities generally see **PERPETUITIES AND ACCUMULATIONS** vol 35 (Reissue) PARA 1001 et seq.

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## **2190. Investment in securities authorised by rules.**

In addition to investments directly authorised by statute<sup>1</sup>, the trustees<sup>2</sup> of a registered society<sup>3</sup> or branch<sup>4</sup>, with the consent of a majority of its members present and entitled to vote in general meeting or of the committee<sup>5</sup>, may invest upon any security expressly directed by the rules, but the security must not be a personal security, that is, a mere personal promise to repay<sup>6</sup>. 'Security' is used here to imply that a debtor-creditor relationship is created and that the repayment of the debt is secured or guaranteed by a charge on some property or by some document recording the obligation of a person or corporation to pay. Thus preference stock or shares in chartered or incorporated companies, which are in the nature of participation in an enterprise and do not involve a debtor-creditor relationship, are not securities in which investment may be directed by the rules<sup>7</sup>. This power does not extend to advancing money on note of hand, taking interest from a treasurer for money in his hands<sup>8</sup>, or leaving money which ought to be invested on mere deposit with a bank or a society<sup>9</sup>. The usual securities expressly directed by rules are loans on mortgages to local authorities charged on the rates, and mortgages on freehold and leasehold property<sup>10</sup>.



- 1 See PARA 2187.
- 2 As to the trustees of a society see PARAS 2179-2182.
- 3 As to the meaning of 'registered society' see PARA 2082.
- 4 As to branches of societies see PARA 2091.
- 5 As to the committee of management see PARAS 2184, 2294 et seq.
- 6 See the Friendly Societies Act 1974 s 46(1)(d); and PARA 2187. An exception is made in regard to loans on personal security to members made from a separate loan fund: see ss 46(1)(d), 49; and PARAS 2187 head (2), 2195.
- 7 *Re United Law Clerks' Society* [1947] Ch 150, [1946] 2 All ER 674.
- 8 Cf *Ex p Stamford Friendly Society* (1808) 15 Ves 280; *Re Shattock, ex p Long Ashton Junior Friendly Society* (1861) 5 LT 370.
- 9 The former power to invest in savings banks contained in the Friendly Societies Act 1974 s 46(1)(a) is repealed by the Friendly Societies Act 1992 Sch 16 paras 1, 15, Sch 22 Pt I, and there is now no express power to invest in any other bank; it appears that merely leaving money on deposit does not amount to an investment.
- 10 As to investments in mortgages of freehold and leasehold properties see PARA 2196.

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## **2191. Investment in trust securities.**

Investments may be made by trustees<sup>1</sup> of a registered society<sup>2</sup> or branch<sup>3</sup>, with the consent of a majority of its members present and entitled to vote in general meeting or of the committee<sup>4</sup>, in any investment in which trustees are for the time being by law authorised to invest trust funds<sup>5</sup>. Trustees' powers of investments are set out in the Trustee Act 2000<sup>6</sup>. It seems clear that, in exercising those powers, the trustees of a registered society or branch must comply with the specific duties (including in particular the duty to obtain and consider proper advice) imposed by the Act<sup>7</sup>. It has not, however, been decided whether they must also observe the same rules provided for ordinary trustees as to the degree of care and prudence which ordinary trustees are required by law to exercise in making investments<sup>8</sup>.

- 1 As to the trustees of a society see PARAS 2179-2182.
- 2 As to the meaning of 'registered society' see PARA 2082.
- 3 As to branches of societies see PARA 2091.
- 4 As to the committee of management see PARAS 2095, 2207 et seq.
- 5 See the Friendly Societies Act 1974 s 46(1)(e); and PARA 2187 head (3).
- 6 See the Trustee Act 2000 Pt II (ss 3-7); and **TRUSTS** vol 48 (2007 Reissue) PARA 1007 et seq.
- 7 See the Trustee Act 2000 s 5; and **TRUSTS** vol 48 (2007 Reissue) PARA 1014.

8 As to the responsibility of the trustees of a registered society see further PARA 2181.

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### **2192. Societies' power to purchase certain government securities.**

A registered society<sup>1</sup> or branch<sup>2</sup> may, in accordance with its rules, set up and administer a fund for the purchase, on behalf of members contributing to it, of defence bonds or national savings certificates or such other government securities as the Treasury may prescribe<sup>3</sup>. In amending its rules for this purpose, any such society or branch may make provision for enabling persons to become members of the society for the purpose only of contributing to that fund and without being entitled to any rights as members other than rights as contributors to the fund<sup>4</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 47(1) (amended by SI 2001/2617). As to the general power of friendly societies to invest in public funds see PARA 2187 et seq. Securities prescribed under the Friendly Societies Act 1974 s 47 before 1 February 1993 are deemed to be prescribed also under the Friendly Societies Act 1992 s 7, Sch 5 para 3(1), in relation to incorporated friendly societies: see Sch 5 para 3(3); and PARA 2097 text and note 11. As to the meaning of 'incorporated friendly society' see PARA 2082. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 Friendly Societies Act 1974 s 47(2). As regards societies or branches which were in existence on 25 April 1940, the Chief Registrar could prescribe forms of rules which could be adopted for that purpose, and, if requested by the committee of a society or branch existing at that date to register a rule in any form thus prescribed, could register it; and any rule so registered had effect as if it had been duly passed by the society or branch: s 47(3). This provision is repealed by SI 2001/2617, but with the saving that it is to be treated as if it continued to have effect in relation to any rule registered before 1 December 2001.

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## **(C) BORROWING**

### **2193. Power to borrow.**

The only powers of borrowing by registered societies<sup>1</sup> and branches<sup>2</sup> conferred by the Friendly Societies Act 1974 are: (1) the power to borrow on the mortgage of land and buildings if the rules provide that the society or branch may hold land<sup>3</sup>; (2) in the case of registered societies, not branches, the power to accept deposits made by members to a separate loan fund only if the rules make provision for such a fund<sup>4</sup>; and (3) certain powers which a specially authorised society may have under its rules<sup>5</sup>. It seems that a registered society or branch can take power in its rules to borrow for the purpose of the conduct of its business to the extent to which it is

necessary for carrying out its objects<sup>6</sup>. Under such a power a registered society or branch may accept loans from the surplus funds of a society or branch of a different description where the rules of the lending society or branch authorise such loans<sup>7</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See the Friendly Societies Act 1974 s 53; and PARA 2189. As to mortgages generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

4 See the Friendly Societies Act 1974 s 49; and PARA 2194.

5 See the Friendly Societies Act 1974 s 23(2), (3); and PARA 2156.

6 Cf *Laing v Reed* (1869) 5 Ch App 4; *Murray v Scott* (1884) 9 App Cas 519, HL (which concerned the rules of benefit building societies where the statutes contained no express borrowing powers); and see *Re City of Glasgow Friendly Society* (1918) CR Rep, Pt A, 13-17 (Parliamentary Papers for 1919 vol 39). In *Pare v Clegg* (1861) 30 LJCh 742, money borrowed by a certified friendly society under a rule giving power to borrow by mortgage or otherwise was held to be a valid debt against the society. See also *Re United Deposit Friendly Relief Society* (1903) 11 SLT 85.

7 See the Friendly Societies Act 1974 s 50; and PARA 2198.

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## (D) LENDING

### **2194. Power to lend; separate loan fund.**

Apart from statutory authority, the trustees<sup>1</sup> of a registered society<sup>2</sup> have no authority to lend the society's money<sup>3</sup>.

A registered society<sup>4</sup>, when so authorised by its rules, may create a separate loan fund by receiving contributions or deposits from its members for the purpose of making loans to members<sup>5</sup>. Lending money to members is not a purpose in respect of which a society can be registered<sup>6</sup>, but registered societies may undertake it within limits<sup>7</sup>.

No member may have an interest in the loan fund exceeding £800<sup>8</sup>; and at any one time a society may not hold on deposit from its members any money beyond the amount fixed by the rules, which must not exceed two-thirds of the total sums owing to the society by members who have borrowed from the loan fund<sup>9</sup>.

A society may make loans to members only out of the loan fund, not out of money contributed for other purposes<sup>10</sup>. Such loans may be made on the personal security of members, with or without sureties<sup>11</sup>, and to the amount fixed by the rules<sup>12</sup>; but no loan may be made which, together with any money owing by a member to the society, exceeds £200<sup>13</sup>. No person other than an officer or person authorised by resolution of a society can inspect a member's loan account without the member's written consent<sup>14</sup>. A loan on personal security to a person who is not a member is not illegal in the sense that money lent on personal security is irrecoverable, but it is a breach of trust<sup>15</sup>.

- 1 As to the trustees of a society see PARAS 2179-2182.
- 2 As to the meaning of 'registered society' see PARA 2082.
- 3 *Re Coltman, Coltman v Coltman* (1881) 19 ChD 64 at 70, CA, per Brett LJ.
- 4 The power described in this paragraph is not conferred on a branch of a society. As to branches of societies see PARA 2091.
- 5 See the Friendly Societies Act 1974 s 49. As to the rules see PARA 2156 et seq.
- 6 It is not a purpose referred to in the Friendly Societies Act 1974 Sch 1 (repealed subject to certain transitional provisions) or the Friendly Societies Act 1992 s 5, Sch 2: see PARA 2096. In the case of registered specially authorised societies, a special authority is in force allowing societies registered before 15 August 1917 to exist for the purpose of making loans to members. These societies are subject to the limits and restrictions imposed by the Friendly Societies Act 1974 s 49: see Special Authority No 2 of 10 June 1976. As to specially authorised societies see PARAS 2089-2090.
- 7 See the Friendly Societies Act 1974 s 49(a)-(d); and the text and notes 8-13.
- 8 Friendly Societies Act 1974 s 49(b) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 16).
- 9 Friendly Societies Act 1974 s 49(d).
- 10 Friendly Societies Act 1974 s 49(a).
- 11 Friendly Societies Act 1974 s 49; and cf PARA 2190. As to sureties generally see PARA 1013 et seq.
- 12 Friendly Societies Act 1974 s 49(c).
- 13 Friendly Societies Act 1974 s 49(c) (amended by the Friendly Societies Act 1992 Sch 16 para 16(b)). As a loan above £200 is illegal, the money cannot be recovered from a surety for a member to whom the money is lent: *Lougher v Molyneux* [1916] 1 KB 718.
- 14 Friendly Societies Act 1974 s 62(2).
- 15 *Re Coltman, Coltman v Coltman* (1881) 19 ChD 64, CA.

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## **2195. Loans to assured members.**

A registered society<sup>1</sup> and, subject to the society's rules, a registered branch<sup>2</sup> may make a loan to an assured member of at least one full year's standing on his own written security and that of two satisfactory sureties<sup>3</sup>. The amount lent must not exceed one-half of the amount for which the member's life is assured<sup>4</sup>. The amount advanced, with interest, may be deducted from the sum assured, without prejudice in the meantime to the operation of the security<sup>5</sup>.

- 1 As to the meaning of 'registered society' see PARA 2082.
- 2 As to branches of societies see PARA 2091.
- 3 Friendly Societies Act 1974 s 48(1). As to sureties generally see PARA 1013 et seq.
- 4 Friendly Societies Act 1974 s 48(1).
- 5 Friendly Societies Act 1974 s 48(2).

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### **2196. Power to lend on mortgage.**

The authority of trustees<sup>1</sup> of a registered society<sup>2</sup> or branch<sup>3</sup> to invest funds by way of mortgage on freehold and leasehold property may be conferred either by the rules<sup>4</sup> or by statute<sup>5</sup>. In each case the consent of the committee<sup>6</sup> or of a majority of the members present and entitled to vote in general meeting is required<sup>7</sup>.

1 As to the trustees of a society see PARAS 2179-2182.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 See the Friendly Societies Act 1974 s 46(1)(d); and PARAS 2187 head (2), 2190. As to the rules see PARA 2156 et seq.

5 See as an investment in which trustees are for the time being by law authorised to invest trust funds: see the Friendly Societies Act 1974 s 46(1)(e); and PARAS 2187 head (3), 2191. As to the power to make loans to first-time buyers of property see the Housing Act 1985 ss 445-448; and **HOUSING** vol 22 (2006 Reissue) PARAS 697-698.

6 As to the committee of management see PARAS 2184, 2294 et seq.

7 Friendly Societies Act 1974 s 46(1).

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### **2197. Discharge of mortgages.**

Where a mortgage or other assurance of any property<sup>1</sup> has been made to a registered society<sup>2</sup> or branch<sup>3</sup>, a receipt indorsed on or annexed to the mortgage or other assurance is deemed, on certain conditions, to fulfil the requirements of the Law of Property Act 1925 as to a receipt which will operate, without other reconveyance, surrender or release, as a surrender of the mortgage term or as a reconveyance, and as a discharge of the mortgaged property from all principal money and interest secured by the mortgage and all claims under it<sup>4</sup>. The conditions are that the receipt must be: (1) a receipt in full for all the money secured by the mortgage or other assurance on the property<sup>5</sup>; (2) signed by the trustees of the society or branch and countersigned by the secretary<sup>6</sup>; and (3) in the form prescribed by the Friendly Societies Act 1974, or any other form specified in the rules of the society or branch or any schedule to them<sup>7</sup>.

1 As to the meaning of 'property' see PARA 2185 note 1.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 Friendly Societies Act 1974 s 57(1), (2)(a). This provision applies only to England and Wales: s 57(3). As to the requirements of the Law of Property Act 1925 for receipts operating as discharges in the manner set out in the text see s 115(1); and **MORTGAGE** vol 77 (2010) PARA 645. Where the receipt of a registered society or branch is deemed to fulfil these requirements, other provisions of s 115 apply (see s 115(2), (3), (6)-(8), (10), (11); and **MORTGAGE** vol 77 (2010) PARA 645): Friendly Societies Act 1974 s 57(2)(b)-(d).

5 Friendly Societies Act 1974 s 57(1).

6 Friendly Societies Act 1974 s 57(1)(a). As to the secretary see PARA 2172.

7 Friendly Societies Act 1974 s 57(1)(b). For the form prescribed by the Friendly Societies Act 1974 see s 57, Sch 4. As to the importance of adhering literally to the prescribed form see *Thomas v Kelly* (1888) 13 App Cas 506 at 519, HL, per Lord Macnaghten; cf *Re Ethel and Mitchells and Butlers' Contract* [1901] 1 Ch 945. As to clerical error see *Spice v Bacon* (1877) 2 ExD 463 at 466, CA; and as to execution see *Carlisle Banking Co v Thompson* (1884) 28 ChD 398. As to the receipt being an estoppel see *Harvey v Municipal Permanent Investment Building Society* (1884) 26 ChD 273, CA; *London and County United Building Society v Angell* (1896) 65 LQB 194. As to delivery as an escrow see *Lloyds Bank Ltd v Bullock* [1896] 2 Ch 192. As to the rules of a society see PARA 2156 et seq. As to mortgages generally see **MORTGAGE** vol 77 (2010) PARA 101 et seq.

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## **2198. Loans to society or branch of different description.**

A registered society<sup>1</sup> or branch<sup>2</sup> (other than a benevolent society<sup>3</sup> or its branch) may, if its rules so provide, make loans to another registered society or registered branch of a society which is not of the same description<sup>4</sup> as the lending society or branch<sup>5</sup>. Such loans may be made interest free<sup>6</sup>.

In relation to registered societies which are not friendly societies<sup>7</sup>, such an advance may not be made by a society or branch unless the value of its assets showed a surplus over the amount of its liabilities<sup>8</sup>, and no advance may be so made to an amount greater (with any amounts outstanding in respect of previous such advances) than the amount for the time being unapplied of that surplus<sup>9</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 As to the meaning of 'benevolent society' see PARA 2089.

4 A society or branch is for this purpose deemed to be of the same description as another society or branch only if both are registered as the same type of society (or branch) as is mentioned in the Friendly Societies Act 1974 s 7(1)(a) (see PARA 2096), s 7(1)(b), (d) or (e) (see PARA 2089), or, if a specially authorised society (see s 7(1)(f)) or branch, if they are both established for the same purpose or purposes: s 50(5). This does not, however, prejudice the power of a society or branch under s 52(2) (see PARA 2201) to contribute to the funds and take part in the management of another society or branch of the same description: s 50(4).

5 Friendly Societies Act 1974 s 50(1). As to the rules see PARA 2156 et seq.

6 Friendly Societies Act 1974 s 50(3).

7 The provisions of the Friendly Societies Act 1974 s 50(2) (described in the text and notes 8-9) do not apply to registered friendly societies: s 50(2A) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 17). However, they continue to apply to registered societies which are not registered friendly societies: see the Friendly Societies Act 1974 s 7(1)(b)-(f); and PARA 2089. The enactment of s 50(2A) also has the effect of rendering redundant s 51(3) by which amounts invested by registered friendly societies in housing associations (see PARA 2187 notes 12-13) were to be taken into account for the purposes of s 50(2).

8 Ie according to the last valuation under the Friendly Societies Act 1974 s 41 (see PARA 2203) or, where the society or branch is not so valued, according to its last annual return under s 43 (see PARA 2211). As to the repeal of those provisions in relation to registered friendly societies see note 7.

9 Friendly Societies Act 1974 s 50(2)(a). For any purpose other than the purposes of s 50(2)(a), in determining the amount unapplied, there must be deducted any amounts outstanding in respect of advances so made after the date to which the valuation or return referred to in note 8 relates: s 50(2)(b). See note 7.

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### **2199. Rights of lending society.**

A lending society or branch<sup>1</sup> may take such part in the government and control of the society or branch to which any loan is made or agreed to be made<sup>2</sup> as is provided by the rules of that society or branch<sup>3</sup>.

Disputes between the borrowing and lending societies or branches relating to the loan must be determined according to the provisions of the Friendly Societies Act 1974 in the case of registered societies which are not friendly societies<sup>4</sup>, and of the Friendly Societies Act 1992 in the case of friendly societies<sup>5</sup>.

1 Ie a registered society or branch which makes a loan as described in PARA 2198. As to the meaning of 'registered society' see PARA 2082. As to branches of societies see PARA 2091.

2 See PARA 2198.

3 Friendly Societies Act 1974 s 50(1). As to the rules see PARA 2156 et seq.

4 See PARA 2250.

5 See PARA 2351.

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## **(E) SUBSCRIPTIONS AND CONTRIBUTIONS**

### **2200. Subscriptions to hospitals etc.**

A registered society<sup>1</sup> or branch<sup>2</sup> may subscribe out of its funds to any hospital, infirmary or charitable or provident institution any annual or other sum which may be necessary to secure the benefits of that institution to members of the society or branch and their families<sup>3</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 52(1). The absence of the term 'in accordance with its rules' or similar indicates that this provision is not required to be included in the rules. As to the extension of this provision to a trade union or branch thereof as regards contributing to the funds and taking part in the management of a medical society see the Trade Union and Labour Relations (Consolidation) Act 1992 s 19(3); and **EMPLOYMENT** vol 40 (2009) PARA 881.

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## **2201. Contributions to other societies.**

In accordance with its rules, a registered society<sup>1</sup> or branch<sup>2</sup> may contribute to the funds and take part, by delegates or otherwise, in the government of any other registered society or registered branch<sup>3</sup>, without thereby becoming a branch of the other society or branch<sup>4</sup>; and such a contributing society does not become a member of the other society<sup>5</sup>. If the registered society contributed to is a medical society, that is to say a society carried on for the purpose of relief in sickness by providing medical attendance and medicine, a contributing society or branch may withdraw its contributions only on three months' notice to the medical society and on payment of all contributions to the date when the notice expires<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082. As to the rules see PARA 2156 et seq.

2 As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 52(2). The provisions of s 50 allowing loans to be made to registered societies or branches only if the borrowing society or branch is of a different description from the lending society or branch (see PARA 2198) do not prejudice the power of a registered society or branch under s 52(2) to contribute to the funds etc of another registered society or branch of the same description: s 50(4). As to societies being of the same description see PARA 2198 note 4.

4 Friendly Societies Act 1974 s 52(2). As to the extension of this provision to a trade union or branch thereof as regards contributing to the funds and taking part in the management of a medical society see the Trade Union and Labour Relations (Consolidation) Act 1992 s 19(3); and **EMPLOYMENT** vol 40 (2009) PARA 881.

5 *Snell v Vine* (1890) Diprose & Gammon 313.

6 Friendly Societies Act 1974 s 52(3). See note 4. Registered friendly societies providing medical benefits may thereby be constituted on a federal basis.

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Registered Societies/F. VALUATIONS AND ACCOUNTS/(A) Registered Friendly Societies/2202. Valuation and accounts in relation to registered friendly societies.

## ***F. VALUATIONS AND ACCOUNTS***

### **(A) REGISTERED FRIENDLY SOCIETIES**

#### **2202. Valuation and accounts in relation to registered friendly societies.**

The provisions of the Friendly Societies Act 1974 relating to the valuation of assets and the preparation and auditing of accounts<sup>1</sup> are repealed in relation to registered friendly societies and branches thereof<sup>2</sup>, but remain in effect in respect of registered societies which are not friendly societies<sup>3</sup>.

Registered friendly societies and branches, in common with incorporated friendly societies, are governed in these respects by the Friendly Societies Act 1992<sup>4</sup>.

1    le the Friendly Societies Act 1974 ss 29-45.

2    See the Friendly Societies Act 1992 s 95, Sch 16 paras 1, 12.

3    See PARAS 2203-2213.

4    See PARA 2323 et seq.

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### **(B) REGISTERED SOCIETIES OTHER THAN FRIENDLY SOCIETIES**

#### ***(a) Valuations***

#### **2203. Valuations of specially authorised societies.**

Certain specially authorised societies<sup>1</sup> and branches<sup>2</sup> must have their assets and liabilities valued at least once every five years<sup>3</sup>. However, the Financial Services Authority<sup>4</sup> may dispense with this requirement where it deems it inapplicable to the purposes or the nature of the operations of the society or branch<sup>5</sup>; or in respect of any particular business conducted by a society or branch if, in its opinion, the requirement is inapplicable to that business because of its nature or the manner in which it is conducted<sup>6</sup>. These provisions may be modified by regulations<sup>7</sup>.

The Authority may direct<sup>8</sup> that any particular specially authorised society or branch is to have its assets and liabilities, or those in respect of any particular business, valued at intervals of three years if, in its opinion, it is expedient to do so in the members' interests<sup>9</sup>.

1    As to specially authorised societies see PARAS 2089-2090.

2    As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 41(1)(a) (s 41(1), (5), (6) amended by SI 2001/2617). The Friendly Societies Act 1974 s 41 is repealed in relation to registered friendly societies: see PARA 2202. Section 41(1) applies only to specially authorised societies where it is so directed in the authority for registering that society or branch: s 41(4).

4 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 Friendly Societies Act 1974 s 41(5) (as amended: see note 3). See note 3.

6 Friendly Societies Act 1974 s 41(6) (as amended: see note 3). In relation to any such society or branch on which a partial exemption is conferred the requirement for a valuation has effect, subject to any regulations made or direction given under s 42 (see the text and notes 7-9), as if: (1) it required that society or branch at least once in every five years to cause its assets and liabilities in respect of any business other than the business to which the partial exemption relates to be valued under s 41; and (2) the report required to be sent to the Authority under s 41(1) (see PARA 2204) were a report on the assets and liabilities so valued: s 41(6) (as so amended). See note 3.

7 The Treasury may make regulations providing that, in the case of societies or branches of a specified class, the Friendly Societies Act 1974 s 41 is to apply as if for five years there were substituted three years: s 42(1) (s 42(1)-(5) amended by SI 2001/2617). The Friendly Societies Act 1974 s 42 is repealed in relation to registered friendly societies: see PARA 2202.

The Treasury may also provide that in specified cases s 41 is to apply as if it required business of a specified class to be valued every three years, and other business (except where an exemption under s 41(6) (see the text and note 6) has been granted) to be valued every five years: s 42(2) (as so amended). It may exercise this power so as to make different provision in relation to different cases or circumstances: s 42(6). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.

8 le without the need to make regulations. Such a direction may be revoked at any time: Friendly Societies Act 1974 s 42(5) (as amended: see note 7). See note 7.

9 See the Friendly Societies Act 1974 s 42(4) (as amended: see note 7). See note 7.

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## **2204. Actuary's report in relation to specially authorised societies.**

Certain specially authorised societies and branches<sup>1</sup> must have their valuations<sup>2</sup> carried out by qualified actuaries<sup>3</sup> appointed by them<sup>4</sup>, and must send the actuary's report to the Financial Services Authority<sup>5</sup>. The report must be signed by the actuary and state his address<sup>6</sup>. It must be made in such form and contain such particulars as the Authority may direct<sup>7</sup>, and must contain an abstract made by the actuary of the results of his valuation, together with a statement containing such information concerning the benefits assured and the contributions receivable by the society or branch, and of its funds and effects, debts and credits, as the Authority may require<sup>8</sup>.

For the purpose of valuations the Treasury may appoint public valuers who are qualified actuaries<sup>9</sup>, and the Treasury may determine the rates of remuneration to be paid by societies and branches for their services<sup>10</sup>.

Every registered society and branch must keep a copy of the last valuation report or reports<sup>11</sup> always hung up in a conspicuous place at the registered office of the society or branch<sup>12</sup>.

- 1 See PARA 2203 note 3. As to specially authorised societies see PARAS 2089-2090.
- 2 As to the requirement of valuations see PARA 2203.
- 3 The definition of 'qualified actuary' contained in the Friendly Societies Act 1974 s 9(3) has been repealed by the Friendly Societies Act 1992 Sch 22 Pt I. As to the qualifications for appointment as an actuary under the Friendly Societies Act 1992 see PARA 2333.
- 4 Friendly Societies Act 1974 s 41(1)(a) (s 41(1) amended by SI 2001/2617). The Friendly Societies Act 1974 s 41 is repealed in relation to registered friendly societies: see PARA 2203 note 3.
- 5 See the Friendly Societies Act 1974 s 41(1)(b) (as amended: see note 4). See note 4. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 6 Friendly Societies Act 1974 s 41(3)(a). See note 4.
- 7 Friendly Societies Act 1974 s 41(1) (as amended: see note 4). See note 4.
- 8 Friendly Societies Act 1974 s 41(3)(b) (amended by SI 2001/2617). See note 4.
- 9 Friendly Societies Act 1974 s 41(2)(a). See note 4. Every document purporting to be signed by a public valuer must, in the absence of any evidence to the contrary, be received in evidence without proof of the signature: s 110(2).
- 10 Friendly Societies Act 1974 s 41(2)(b). See note 4. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 11 There would be more than one report if a society or branch were required to have part of its business valued at five-yearly intervals and another part at three-yearly intervals: see PARA 2203.
- 12 Friendly Societies Act 1974 s 45(b). See note 4. Failure to comply with this provision is an offence: see PARA 2278. As to the same requirement in the case of the last annual balance sheet see PARA 2212 text and note 17.

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### *(b) Accounts*

#### **2205. Obligation to keep accounts.**

Registered societies<sup>1</sup> and branches<sup>2</sup> (other than registered friendly societies or branches thereof<sup>3</sup>) must keep such books of account relating to their transactions, assets and liabilities<sup>4</sup> as are necessary to give a true and fair view of the state of the affairs of the societies or branches and to explain their transactions<sup>5</sup>. They must establish and maintain a satisfactory system of control of their books of account, cash holdings and all receipts and remittances<sup>6</sup>. Books of account may be kept by making entries in bound books or by some other method of recording<sup>7</sup>.

In respect of each year of account<sup>8</sup>, every registered society or branch must prepare either a revenue account which deals with its affairs as a whole for that year<sup>9</sup>, or two or more revenue accounts for that year which deal separately with the particular businesses conducted by the society or branch<sup>10</sup>. Every such revenue account must give a true and fair view of the income and expenditure, for the period to which it relates, either of the branch as a whole or, as the case may be, in respect of the particular business in question<sup>11</sup>.

The balance sheet of a registered society or branch must give a true and fair view of the state of its affairs as at the date of the balance sheet<sup>12</sup>. The balance sheet of a specially authorised society or branch, which by virtue of a direction in its authority for registration is required to carry out a valuation<sup>13</sup>, must give a true and fair view of its assets and current liabilities and of the resulting balances of its funds as at the date of the balance sheet<sup>14</sup>.

Failure by a member of the committee of a registered society or branch to take reasonable steps to secure compliance with the above provisions is an offence<sup>15</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 The Friendly Societies Act 1974 ss 29-45 are repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 12, but remain in force in relation to registered societies which are not friendly societies: see PARA 2202.

4 Friendly Societies Act 1974 s 29(1)(a).

5 Friendly Societies Act 1974 s 29(2).

6 Friendly Societies Act 1974 s 29(1)(b).

7 Friendly Societies Act 1974 s 29(3). Where a book of account is kept by some means other than making entries in a bound book, the society or branch must take adequate precautions for guarding against falsification, and for facilitating its discovery: s 29(4). In the case of cattle insurance societies, registration is subject to the rules providing for the keeping of proper accounts: see s 7(2)(a), Sch 2 para 12; and PARA 2156.

8 'Year of account', in relation to a registered society or branch, means a period of 12 months ending with 31 December: Friendly Societies Act 1974 s 111(4).

9 Friendly Societies Act 1974 s 30(2)(a).

10 Friendly Societies Act 1974 s 30(2)(b).

11 See the Friendly Societies Act 1974 s 30(1). Where there are two or more revenue accounts dealing separately with particular businesses, each must give a true and fair view of the income and expenditure in respect of the business to which it relates and, when considered together, they must give a true and fair view of the income and expenditure of the society or branch as a whole: s 30(1)(b), (3).

12 Friendly Societies Act 1974 s 30(4). This is subject to s 30(5): see the text and notes 13-14.

13 I.e. a valuation under the Friendly Societies Act 1974 s 41: see PARA 2203 text and notes 2-3.

14 Friendly Societies Act 1974 s 30(5) (amended by the Friendly Societies Act 1992 Sch 22 Pt I).

15 See PARA 2278. As to the publication of accounts see PARA 2212. As to the corresponding requirements for the accounts of societies registered under the Industrial and Provident Societies Act 1965 see PARA 2513 et seq.

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## **2206. Appointment of auditors.**

Subject to specified exceptions, every registered society<sup>1</sup> or branch<sup>2</sup> (other than a registered friendly society or branch thereof<sup>3</sup>) must in each year of account<sup>4</sup> appoint one or more qualified

auditors to audit its accounts and balance sheet for that year<sup>5</sup>. Any society or branch may be exempt from these requirements<sup>6</sup> in any year of account if:

- 675 (1) its receipts and payments<sup>7</sup> in respect of the preceding year of account<sup>8</sup> did not, in the aggregate, exceed £5,000<sup>9</sup>;
- 676 (2) the number of members at the end of that year did not exceed 500<sup>10</sup>; and
- 677 (3) the value of its assets at the end of that year did not, in the aggregate, exceed £5,000<sup>11</sup>.

A branch may be exempt<sup>12</sup> on the alternative grounds that:

- 678 (a) it satisfies the conditions set out in heads (1) and (2) above<sup>13</sup>;
- 679 (b) at the end of the preceding year of account at least 75 per cent<sup>14</sup> of its assets had been transferred to the society of which it is a branch or to another registered branch of that society for the purpose of being invested in that society or branch<sup>15</sup>, and the value of the assets not so transferred did not, in the aggregate, exceed £5,000<sup>16</sup>; and
- 680 (c) the society or branch to which the assets were transferred is not exempt in the year of account in question<sup>17</sup>.

Subject to any direction to the contrary given by the Financial Services Authority<sup>18</sup>, registered societies and branches which are exempt in respect of the current year of account may appoint either one or more qualified auditors, or two or more persons who are not qualified auditors, to audit their accounts and balance sheets for that year<sup>19</sup>.

No person is a qualified auditor for these purposes unless he is eligible<sup>20</sup> for appointment as a statutory auditor<sup>21</sup>. A person who is an officer<sup>22</sup> or employee of a registered society or branch, or a person who is a partner of, or in the employment of, or who employs, an officer or employee of the society or branch, may not be appointed auditor of that society or branch<sup>23</sup>.

A registered society or branch may, by resolution<sup>24</sup>, disapply the requirement to appoint auditors<sup>25</sup> in relation to a year of account if: (i) the value of its assets at the end of the preceding year of account did not in the aggregate exceed £1,400,000; and (ii) its turnover<sup>26</sup> for that year did not exceed £350,000 or, if a charity, £250,000<sup>27</sup>. This does not apply to a society or branch which holds or has at any time since the end of the preceding year of account, held, a deposit<sup>28</sup>. The Authority may by notice to a society or branch disapply the power to disapply the requirement to appoint auditors in relation to the year of account of the society or branch in which the notice is given<sup>29</sup>. Where a society or branch exercises the power, the disapplication ceases to have effect if at any time before the end of the year of account to which it relates the society or branch holds a deposit, or the Authority gives to the society or branch notice as mentioned above<sup>30</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 The Friendly Societies Act 1974 ss 29-45 are repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 12, but remain in force in relation to registered societies which are not friendly societies: see PARA 2202.

4 As to the meaning of 'year of account' see PARA 2205 note 8.

5 Friendly Societies Act 1974 s 31(1) (amended by SI 1996/1738). As to who is a qualified auditor see the text and notes 20-23.

6 See the Friendly Societies Act 1974 s 31(4).

7 Regulations made by the Treasury may prescribe what receipts and payments of a society are to be taken into account for this purpose and such regulations may make different provision in relation to different cases or circumstances: Friendly Societies Act 1974 s 31(5) (amended by SI 2001/2617). At the date at which this volume states the law, no such regulations had been made. As to the Treasury see **PARA 3**; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) **PARA 512** et seq; and as to the transfer of functions to the Treasury see **PARA 2105**.

8 'Preceding year of account' means the year of account immediately preceding the current year of account; and 'current year of account' in relation to the appointment of auditors means the year of account in which the question of appointment arises: Friendly Societies Act 1974 s 111(4)(a), (b).

9 Friendly Societies Act 1974 s 31(2)(a). Regulations made by the Treasury may substitute a different sum or number for any of those specified in s 31(2), or a different sum or percentage for any sum or percentage specified in s 31(3), and different provision may be made in relation to different cases or circumstances: s 31(5) (as amended: see note 7). At the date at which this volume states the law, no such regulations had been made.

10 Friendly Societies Act 1974 s 31(2)(b). See note 9.

11 Friendly Societies Act 1974 s 31(2)(c). See note 9.

12 See the Friendly Societies Act 1974 s 31(3). This is expressed to be without prejudice to s 31(2) (see the text and notes 9-11).

13 Friendly Societies Act 1974 s 31(3)(a).

14 See note 9.

15 In accordance with the Friendly Societies Act 1974 s 46(2): see **PARA 2188**.

16 Friendly Societies Act 1974 s 31(3)(b). See note 9.

17 See the Friendly Societies Act 1974 s 31(1), (3)(c).

18 In the case of any society or branch which is exempt in respect of the current year of account, the Financial Services Authority may direct it to appoint a qualified auditor to audit its accounts and balance sheet for that year: Friendly Societies Act 1974 s 32(2) (s 32(1)-(4) amended by SI 2001/2617). In the case of any society or branch which was exempt in respect of any earlier year of account, and which did not appoint any qualified auditors for that year, the Authority may direct it to appoint a qualified auditor to audit the accounts and balance sheet for that year: Friendly Societies Act s 32(3)(a) (as so amended). Where that society or branch has already sent an annual return to the Authority (see **PARA 2211**) for the year in question, it may direct that, after the accounts and balance sheet have been audited by a qualified auditor, a further annual return must be sent within three months from the date of the receipt of the direction: s 32(3)(b) (as so amended). Failure to comply with a direction is an offence: s 32(4) (as so amended). As to the penalty for commission of such an offence see **PARA 2278**. As to the Financial Services Authority see **PARA 2105**, and also **PARAS 4, 6** et seq.

19 Friendly Societies Act 1974 s 32(1) (as amended: see note 18).

20 Ineligible under the Companies Act 2006 Pt 42 (ss 1209-1264): see **COMPANIES** vol 15 (2009) **PARA 957** et seq.

21 Friendly Societies Act 1974 s 36(1) (amended by SI 1991/1997; and SI 2008/948). See **COMPANIES** vol 15 (2009) **PARA 957** et seq. As to the remuneration of qualified auditors see **PARA 2208** note 9.

22 As to the meaning of 'officer' see **PARA 2172** note 3.

23 Friendly Societies Act 1974 s 37(1) (amended by SI 1991/1997). An appointment made in contravention of the Friendly Societies Act 1974 s 37 is not an effective appointment for the purposes of the Act: s 37(3). References in s 37(1) to an officer or employee are to be construed as not including an auditor: s 37(4). See also **PARAS 2172, 2183**.

24 The power is exercisable by resolution passed at a general meeting of the society or branch at which: (1) less than 20% of the total votes cast are cast against the resolution; and (2) less than 10% of the members of the society or branch for the time being entitled under the body's rules to vote cast their votes against the resolution: Friendly Societies Act 1974 s 32A(2) (s 32A added by SI 1996/1738).

25 In the requirement under the Friendly Societies Act 1974 s 31: see the text and notes 1-17.

26 For this purpose, 'turnover', in relation to a society or branch, means the amounts derived from the provision of goods and services falling within the society's or branch's activities, after deduction of: (1) trade discounts; (2) value added tax; and (3) any other taxes based on the amounts so derived: Friendly Societies Act 1974 s 32A(8) (as added: see note 24).

27 Friendly Societies Act 1974 s 32A(1), (6) (as added: see note 24). For a period which is a society's or branch's year of account, but not in fact a year, the maximum figure must be proportionately adjusted: s 32A(7) (as so added).

28 Friendly Societies Act 1974 s 32A(3) (as added: see note 24). The reference to a deposit must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision and Sch 2 (see PARA 84 et seq): Friendly Societies Act 1974 s 32A(3A) (s 32A as so added; and s 32A(3A) added by SI 2001/3649).

29 Friendly Societies Act 1974 s 32A(4) (as added (see note 24); and amended by SI 2001/2617).

30 Friendly Societies Act 1974 s 32A(5) (as added (see note 24); and amended by SI 2001/2617).

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## **2207. Reappointment and removal of auditors.**

A qualified auditor appointed<sup>1</sup> to audit the accounts and balance sheet of a registered society<sup>2</sup> or branch<sup>3</sup> (other than a registered friendly society or branch thereof<sup>4</sup>) for the preceding year of account<sup>5</sup> is automatically reappointed for the current year of account<sup>6</sup> unless:

- 681 (1) a resolution is passed at a general meeting<sup>7</sup> of the society or branch appointing someone else or expressly providing that he is not to be reappointed or disapplying the requirement to appoint auditors in relation to the current year of account<sup>8</sup>;
- 682 (2) he has given written notice to the society or branch of his unwillingness to be reappointed<sup>9</sup>;
- 683 (3) he is ineligible for appointment as auditor of the society or branch for the current year of account<sup>10</sup>; or
- 684 (4) he has ceased to act as auditor of the society or branch by reason of death or incapacity<sup>11</sup>.

A resolution of the kind referred to in head (1) above is not effective unless notice of the intention to move the resolution has been given to the society or branch at least 28 days before the meeting at which it is moved<sup>12</sup>. Where notice of the intention to move any such resolution has been given to a society or branch which is required by its rules to give notice to members<sup>13</sup> of the meeting at which the resolution is to be moved, the society or branch must, if it is practical to do so, give them notice of the resolution at the same time and in the same manner as it gives notice of the meeting<sup>14</sup>. Where notice of the resolution is not so given, the society or branch must give notice of it to members at least 14 days before the meeting at which the resolution is to be moved, either by advertisement in a newspaper having an appropriate circulation, or in any other way allowed by the rules<sup>15</sup>.

On receiving notice of intention to move a resolution of a kind referred to in head (1) above, a registered society or branch must forthwith send a copy of the notice to the retiring auditor<sup>16</sup>. On receiving such a notice, the retiring auditor may, at any time before the date of the general meeting, make representations in writing (not exceeding a reasonable length) to the society or

branch with respect to the intended resolution<sup>17</sup>, and may notify the society or branch that he intends to make such representations<sup>18</sup> and request that notice be given to the members of his intention, or any such representations made by him as are received by the society or branch before notice of the intended resolution is given to members<sup>19</sup>. A society or branch which receives such representations or notification of intended representations before the date when notice of the intended resolution is required to be given to members<sup>20</sup> must, in any notice of the resolution given to members, state that it has received the representations or notification<sup>21</sup> and that any member may receive, on demand made before the date of the general meeting, a copy of any representations which have been or may be received by the society or branch before that date<sup>22</sup>. Unless the High Court is satisfied that the rights of a retiring auditor are being abused to secure needless publicity for defamatory matter<sup>23</sup>, the society or branch must, on such demand by a member made before the date of the meeting, send him a copy of any representations received before that date<sup>24</sup>. The retiring auditor may, in addition, and without prejudice to his right to be heard orally, require that the representations be read out at the meeting<sup>25</sup>.

1 As to the appointment of auditors see PARA 2206.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 The Friendly Societies Act 1974 ss 29-45 are repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 12, but remain in force in relation to registered societies which are not friendly societies: see PARA 2202.

5 As to the meaning of 'preceding year of account' see PARA 2206 note 8. As to the meaning of 'year of account' see PARA 2205 note 8.

6 Friendly Societies Act 1974 s 33(1). As to the meaning of 'current year of account' see PARA 2206 note 8.

7 As to general meetings of registered societies see PARA 2216.

8 Friendly Societies Act 1974 s 33(1)(a) (amended by SI 1996/1738). Where notice is given of an intended resolution to appoint at a general meeting some person or persons in place of a retiring auditor, and the resolution cannot be proceeded with at the meeting because of the death or incapacity of that person or those persons, or because he or they are ineligible for appointment (see note 10) for the current year of account, the retiring auditor is not automatically reappointed: Friendly Societies Act 1974 s 33(2).

9 Friendly Societies Act 1974 s 33(1)(b).

10 Friendly Societies Act 1974 s 33(1)(c). For this purpose, a person is ineligible for appointment as auditor for the current year of account if, but only if: (1) his appointment is prohibited by s 37 (see PARA 2206 text and note 23); or (2) in the case of a society or branch which is not an exempt society or branch in respect of that year of account, he is not a qualified auditor at the time when the question of his appointment falls to be considered: s 33(3). As to exempt societies and branches see PARA 2206 text and notes 6-17.

11 Friendly Societies Act 1974 s 33(1)(d).

12 Friendly Societies Act 1974 s 34(1). Where, however, for any of the reasons referred to in note 8, an intended resolution to appoint some person or persons in place of a retiring qualified auditor cannot be proceeded with at the meeting, and the rules of the registered society or branch provide that an auditor can be appointed only by a resolution passed at a general meeting after notice of the intended resolution has been given to the society or branch before the meeting, a resolution passed at that meeting reappointing the retiring auditor, or appointing another auditor in his place, is effective notwithstanding that no notice of the resolution has been given to the society or branch under its rules: s 34(4). As to the rules see PARA 2156 et seq.

13 Any provision in the Friendly Societies Act 1974 s 34 or s 35 requiring notice to be given to the members of a society or branch, or (in the case of s 35) conferring any right upon a member, is to be construed, in the case of a meeting of delegates appointed by members, as requiring a notice to be given to the delegates so appointed, or as conferring the right upon a delegate: ss 34(5), 35(6). As to the requirement for provisions as to meetings to be included in the rules see PARA 2156 head (4).



- 14 Friendly Societies Act 1974 s 34(2).
- 15 Friendly Societies Act 1974 s 34(3).
- 16 Friendly Societies Act 1974 s 35(1).
- 17 Friendly Societies Act 1974 s 35(2).
- 18 Friendly Societies Act 1974 s 35(2)(a).
- 19 Friendly Societies Act 1974 s 35(2)(b).
- 20 As to the requirement to give notice of the resolution to members or delegates see the text and notes 13-15.
- 21 Friendly Societies Act 1974 s 35(3)(a).
- 22 Friendly Societies Act 1974 s 35(3)(b).
- 23 See the Friendly Societies Act 1974 s 35(4). In such a case application to the High Court may be made by the society or branch or by any other person, and the court may order the costs of the society or branch on such application to be paid, in whole or in part, by the auditor, notwithstanding that he is not a party to the application: s 35(4).
- 24 Friendly Societies Act 1974 s 35(3)(c).
- 25 Friendly Societies Act 1974 s 35(3).

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## **2208. Conduct of audit.**

The auditors<sup>1</sup> of a registered society<sup>2</sup> or branch<sup>3</sup> (other than a registered friendly society or branch thereof<sup>4</sup>) must make a report to the society or branch on the accounts examined by them, and on the revenue account or accounts and the balance sheet for the year of account<sup>5</sup> in respect of which they are appointed<sup>6</sup>. The report must state whether the revenue account or accounts and the balance sheet for that year comply with the requirements of the Friendly Societies Act 1974<sup>7</sup> and whether, in the auditors' opinion:

- 685 (1) the revenue account or accounts give a true and fair view, in accordance with those requirements, of the income and expenditure of the society or branch as a whole for that year of account, and, in the case of accounts which deal with a particular business conducted by the society or branch, a true and fair view, in accordance with those requirements, of the income and expenditure of the society or branch in respect of that business for that year<sup>8</sup>; and
- 686 (2) the balance sheet gives a true and fair view, in accordance with those requirements, either of the state of the affairs of the society or branch, or, as the case may require, of its assets and current liabilities and the resulting balances of its funds, as at the end of that year of account<sup>9</sup>.

In preparing their report, the auditors have a duty to carry out such investigations as will enable them to form an opinion on whether the society or branch has kept proper books of account<sup>10</sup> and maintained a satisfactory system of control over its transactions<sup>11</sup>, and whether

the revenue account or accounts, the other accounts (if any) to which the report relates, and the balance sheet are in agreement with the books of account<sup>12</sup>. If the auditors are not satisfied on any of these matters, they must state that fact in their report<sup>13</sup>; and if they fail to obtain all the information and explanations which, to the best of their knowledge and belief, are necessary for the purposes of their audit, that fact also must be stated in their report<sup>14</sup>. Accounts duly audited and signed may be impeached on grounds of fraud, but not of honest error<sup>15</sup>.

Every auditor of a registered society or branch has a right of access at all times to the books, deeds and accounts of the society or branch, and to all other documents relating to its affairs<sup>16</sup>, and is entitled to require from the officers<sup>17</sup> such information and explanations as he thinks necessary for the performance of his duties<sup>18</sup>. The auditors are also entitled to attend any general meeting, and to receive all notices of, and other communications relating to, general meetings which any member is entitled to receive<sup>19</sup>, and they are entitled to be heard at any meeting which they attend on any part of the business of the meeting which concerns them as auditors<sup>20</sup>.

1 As to the auditors see PARAS 2206-2207.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 The Friendly Societies Act 1974 ss 29-45 are repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 12, but remain in force in relation to registered societies which are not friendly societies: see PARA 2202.

5 As to the meaning of 'year of account' see PARA 2205 note 8.

6 Friendly Societies Act 1974 s 38(1).

7 Friendly Societies Act 1974 s 38(2). As to the requirements of the Act in relation to the keeping of accounts see s 30; and PARA 2205.

8 Friendly Societies Act 1974 s 38(2)(a). Where the auditors' report relates to any accounts other than the revenue account or accounts for the year of account in respect of which they are appointed, that report must state whether those accounts give a true and fair view of any matter to which they relate: s 38(3).

9 Friendly Societies Act 1974 s 38(2)(b). Regulations made by the Treasury under the Friendly and Industrial and Provident Societies Act 1968 s 10 may prescribe the maximum rates of remuneration to be paid by registered societies and branches for the audit of their accounts and balance sheets by qualified auditors: Friendly Societies Act 1974 s 40(1) (amended by SI 2001/2617). No such auditor may ask for, receive or be entitled to receive remuneration in excess of the rate so prescribed: Friendly Societies Act 1974 s 40(2). See PARA 2515. At the date at which this volume states the law, no such regulations had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.

10 Ie in accordance with the Friendly Societies Act 1974 s 29(1)(a): see PARA 2205.

11 Ie in accordance with the Friendly Societies Act 1974 s 29(1)(b): see PARA 2205.

12 Friendly Societies Act 1974 s 38(4).

13 Friendly Societies Act 1974 s 38(4).

14 Friendly Societies Act 1974 s 38(5).

15 *Holgate v Shutt* (1884) 28 ChD 111, CA.

16 Friendly Societies Act 1974 s 39(1)(a).

17 As to the meaning of 'officer' see PARA 2172 note 3.

18 Friendly Societies Act 1974 s 39(1)(b).

19 Friendly Societies Act 1974 s 39(2)(a).

20 Friendly Societies Act 1974 s 39(2)(b).

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## **2209. Duty to obtain accountant's report where no obligation to appoint auditors.**

Where, at the end of a year of account<sup>1</sup> of a registered society or branch<sup>2</sup> (other than a registered friendly society or branch thereof<sup>3</sup>), a disapplication of the obligation to appoint auditors<sup>4</sup> is in force in relation to the year<sup>5</sup>, and the society's or branch's turnover<sup>6</sup> in the preceding year of account exceeded £90,000<sup>7</sup>, the society or branch must, before the end of the period of 28 days beginning immediately after the end of the year of account, appoint an appropriate person<sup>8</sup> to make: (1) a report on its accounts and balance sheet for the year<sup>9</sup>; and (2) a report relating to the preceding year of account stating whether in the opinion of the person making the report the financial criteria for the exercise of the power to disapply the requirement to appoint auditors<sup>10</sup> were met in relation to the year<sup>11</sup>.

A person appointed for this purpose, for the purposes of his appointment: (a) has a right of access at all times to the books, deeds and accounts of the relevant society or branch<sup>12</sup>, and to all other documents relating to its affairs; and (b) is entitled to require from the officers<sup>13</sup> of the relevant society or branch such information and explanations as that person thinks necessary<sup>14</sup>. If the person appointed fails to obtain all the information and explanations which, to the best of that person's knowledge and belief, are necessary for purposes of doing what he has been appointed to do, that fact must be stated in his report<sup>15</sup>. A person appointed is entitled: (i) to receive notice of, and attend, any general meeting of the relevant society or branch at which any relevant matter<sup>16</sup> is discussed; and (ii) to be heard at any such general meeting which he attends on any part of the business of the meeting which relates to any relevant matter<sup>17</sup>.

1 As to the meaning of 'year of account' see PARA 2205 note 8.

2 As to the meaning of 'registered society' see PARA 2082. As to branches of societies see PARA 2091.

3 The Friendly Societies Act 1974 ss 29-45 are repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 12, but remain in force in relation to registered societies which are not friendly societies: see PARA 2202.

4 Ie under the Friendly Societies Act 1974 s 32A(1): see PARA 2206. As to the obligation to appoint auditors see s 31; and PARA 2206.

5 Friendly Societies Act 1974 s 39A(1)(a) (s 39A added by SI 1996/1738).

6 For this purpose, 'turnover', in relation to a society or branch, means the amounts derived from the provision of goods and services falling within the society's or branch's activities, after deduction of: (1) trade discounts; (2) value added tax; and (3) any other taxes based on the amounts so derived: Friendly Societies Act 1974 s 32A(8) (added by SI 1996/1738); definition applied by the Friendly Societies Act 1974 s 39A(6) (as added: see note 5).

7 Friendly Societies Act 1974 s 39A(1)(b) (as added: see note 5).

8 An appropriate person is to a person who is: (1) a qualified auditor for the purposes of the Friendly Societies Act 1974 (see PARA 2206); and (2) not ineligible by virtue of s 37(1) (see PARA 2206) to be appointed as auditor of the society or branch: s 39A(5) (as added: see note 5).

9 A report for the purposes of head (1) in the text must: (1) state whether, in the opinion of the person making the report, the revenue account or accounts, the other accounts (if any) to which the report relates, and the balance sheet are in agreement with the books of account kept by the society or branch under the Friendly Societies Act 1974 s 29 (see PARA 2205); and (2) state whether, in that person's opinion, on the basis of the information contained in those books of account, the revenue account or accounts and the balance sheet comply with the requirements of the Friendly Societies Act 1974: s 39A(3) (as added: see note 5).

10 See note 4.

11 Friendly Societies Act 1974 s 39A(2), (4) (as added: see note 5). Regulations made by the Treasury under the Friendly and Industrial and Provident Societies Act 1968 s 10 may prescribe the maximum rates of remuneration to be paid by registered societies and branches for the making of a report for the purposes of the Friendly Societies Act 1974 s 39A(2): s 40(1) (amended by SI 1996/1738; and SI 2001/2617). No reporting accountant may ask for, receive or be entitled to receive remuneration in excess of the rate so prescribed: Friendly Societies Act 1974 s 40(2). See PARA 2515. At the date at which this volume states the law, no such regulations had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.

12 References to the relevant society or branch, in relation to a person appointed under the Friendly Societies Act 1974 s 39A(2) (see the text and notes 10-11), are to the society or branch responsible for his appointment under that provision: s 39B(5) (s 39B added by SI 1996/1738).

13 As to the meaning of 'officer' see PARA 2172 note 3.

14 Friendly Societies Act 1974 s 39B(1) (as added: see note 12).

15 Friendly Societies Act 1974 s 39B(2) (as added: see note 12).

16 For these purposes, the following are relevant matters, namely: (1) any report of the person appointed under the Friendly Societies Act 1974 s 39A(2) (see the text and notes 10-11); and (2) any matter which is relevant to what that person has been appointed under that provision to do: s 39B(4) (as added: see note 12).

17 Friendly Societies Act 1974 s 39B(3) (as added: see note 12). See note 16.

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## **2210. Financial Services Authority's power to require accounts to be audited.**

The Financial Services Authority<sup>1</sup> may give a direction to a registered society or branch<sup>2</sup> (other than a registered friendly society or branch thereof<sup>3</sup>) in respect of any relevant year of account<sup>4</sup> of the society or branch before the year of account in which the direction is given: (1) requiring it to appoint one or more qualified auditors<sup>5</sup> to audit its accounts and balance sheet for that year; and (2) where it has sent to the Authority its annual return<sup>6</sup> for that year before the date of the direction, requiring it, after its accounts and balance sheet have been audited by a qualified auditor, to send the Financial Services Authority within three months from receipt of the direction a further annual return complying with the requirements of the Friendly Societies Act 1974 (other than that as to time of sending)<sup>7</sup>. A failure by a registered society or branch to comply with any such direction given by the Authority is an offence<sup>8</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the meaning of 'registered society' see PARA 2082. As to branches of societies see PARA 2091.

3 The Friendly Societies Act 1974 ss 29-45 are repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 12, but remain in force in relation to registered societies which are not friendly societies: see PARA 2202.

4 For these purposes, a year of account of a registered society or branch is a relevant year of account if it is one at the end of which there is in force in relation to it a disapplication under the Friendly Societies Act 1974 s 32A(1) (see PARA 2206): s 39C(3) (s 39C added by SI 1996/1738). As to the meaning of 'year of account' see PARA 2205 note 8.

5 See PARA 2206.

6 As to annual returns see PARA 2211.

7 Friendly Societies Act 1974 s 39C(1) (as added (see note 4); and amended by SI 2001/2617). As to the accounting requirements of the Friendly Societies Act 1974 see PARA 2205 et seq.

8 Friendly Societies Act 1974 s 39C(2) (as added (see note 4); and amended by SI 2001/2617). See PARA 2278.

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## **2211. Annual returns.**

Every registered society<sup>1</sup> or branch<sup>2</sup> (other than a registered friendly society or branch thereof<sup>3</sup>) must send to the Financial Services Authority<sup>4</sup> once a year, not later than 31 July, a return relating to its affairs<sup>5</sup>. The annual return must be made up for the year of account<sup>6</sup> preceding that in which it is required to be sent<sup>7</sup>. It must contain the revenue account or accounts for that year, prepared in accordance with the requirements of the Friendly Societies Act 1974<sup>8</sup>, and a balance sheet as at the end of that year<sup>9</sup>.

The return of every specially authorised society and branch which is required to make a valuation of its assets and liabilities<sup>10</sup> must also include:

- 687 (1) in the case of a society or branch to which the Authority has given neither a complete nor a partial exemption from the requirement to make a valuation<sup>11</sup>, a statement specifying the date of the last actuary's report<sup>12</sup> on the condition of the society or branch, or the dates of the last reports on the assets and liabilities of the society or branch in respect of particular businesses conducted by it<sup>13</sup> and a place where a copy of that report or those reports may be inspected<sup>14</sup>;
- 688 (2) in the case of a society or branch to which the Authority has given a complete exemption from the requirement to make a valuation, a statement specifying the reason for that exemption<sup>15</sup>; and
- 689 (3) in the case of a society or branch to which the Authority has given a partial exemption, a statement specifying the reason for that partial exemption, and the date or dates of the last report or reports on the assets and liabilities of the society or branch in respect of any business or businesses conducted by it, and a place where a copy of that report or those reports may be inspected<sup>16</sup>.

Every return must contain such other particulars, and be in such form, as the Authority may direct<sup>17</sup>. It must be accompanied by a copy of the auditors' report on the accounts and balance sheet contained in the return<sup>18</sup>, or by the accountant's report where no audit is required<sup>19</sup>.

The return of a registered branch must be sent to the Authority through an officer appointed in that behalf by the society of which the branch forms part<sup>20</sup>.

- 1 As to the meaning of 'registered society' see PARA 2082.
- 2 As to branches of societies see PARA 2091.
- 3 The Friendly Societies Act 1974 ss 29-45 are repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 12, but remain in force in relation to registered societies which are not friendly societies: see PARA 2202.
- 4 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 5 Friendly Societies Act 1974 s 43(1) (amended by SI 1996/1738; and SI 2001/2617).
- 6 As to the meaning of 'year of account' see PARA 2205 note 8.
- 7 Friendly Societies Act 1974 s 43(1), (3)(a).
- 8 As to the requirements of the Friendly Societies Act 1974 s 30(2): see PARA 2205 text and notes 8-10.
- 9 Friendly Societies Act 1974 s 43(3)(b). The return must not contain any accounts other than the revenue account or accounts for the year of account to which the return relates, unless they have been examined by the auditors under s 38 (see PARA 2208) or have been the subject of a report under s 39A(2)(a) (see PARA 2209): s 43(3)(c) (amended by SI 1996/1738).
- 10 See PARA 2203.
- 11 See PARA 2203 text and notes 4-6.
- 12 See PARA 2204.
- 13 As to separate reports on the assets and liabilities of particular businesses of a society or branch see PARAS 2203, 2204 note 11.
- 14 Friendly Societies Act 1974 s 43(5)(a).
- 15 Friendly Societies Act 1974 s 43(5)(b).
- 16 Friendly Societies Act 1974 s 43(5)(c).
- 17 Friendly Societies Act 1974 s 43(6) (amended by SI 2001/2617).
- 18 Friendly Societies Act 1974 s 43(4)(b) (renumbered by SI 1996/1738). See PARA 2208.
- 19 Friendly Societies Act 1974 s 43(4)(a) (added by SI 1996/1738). The accountant's report is required by the Friendly Societies Act 1974 s 39A: see PARA 2209.
- 20 Friendly Societies Act 1974 s 43(2).

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## **2212. Publication of accounts and balance sheet.**

A registered society or branch<sup>1</sup> (other than a registered friendly society or branch thereof<sup>2</sup>) may not publish any revenue account or balance sheet unless it has been signed by the secretary of the society or branch and by two members of its committee acting on the committee's behalf<sup>3</sup>.

Where at the end of a registered society's or branch's year of account<sup>4</sup> no disapplication of the provision requiring the appointment of auditors<sup>5</sup> is in force in relation to the year, the society or branch may not publish a year end revenue account or balance sheet<sup>6</sup> unless: (1) it has been previously audited by the auditor or auditors last appointed to audit the accounts and balance sheet of the society or branch; and (2) it incorporates a report by the auditor or auditors stating whether in his or their opinion it complies with the accounting requirements of the Friendly Societies Act 1974<sup>7</sup>.

Where at the end of a registered society's or branch's year of account a disapplication of the provision requiring the appointment of auditors<sup>8</sup> is in force in relation to the year and the society's or branch's turnover<sup>9</sup> in the preceding year of account exceeded £90,000, the society or branch may not publish a year end revenue account or balance sheet unless: (a) it is one on which the society or branch has obtained an accountant's report<sup>10</sup>; and (b) it incorporates so much of the report as relates to it<sup>11</sup>.

Where a registered society's or branch's year of account is one in relation to which the Financial Services Authority has directed an audit<sup>12</sup>, the society or branch may not publish any year end or interim revenue account or balance sheet, unless it incorporates a report by the auditor or auditors appointed in pursuance of the direction stating whether in his or their opinion it complies with the accounting requirements of the Friendly Societies Act 1974<sup>13</sup>.

A specially authorised society or branch which is not statutorily exempted from making a valuation of its assets and liabilities<sup>14</sup> may not publish any balance sheet unless it includes a statement containing the same particulars as the statement required to be included in the annual return<sup>15</sup>.

Every registered society and branch must keep a copy of the last annual balance sheet, together with its auditors' report<sup>16</sup>, always hung up in a conspicuous place at its registered office<sup>17</sup>.

1 As to the meaning of 'registered society' see PARA 2082. As to branches of societies see PARA 2091.

2 The Friendly Societies Act 1974 ss 29-45 are repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 12, but remain in force in relation to registered societies which are not friendly societies: see PARA 2202.

3 Friendly Societies Act 1974 s 30A(1) (s 30A added by SI 1996/1738). As to the committee of management see PARAS 2184, 2294 et seq.

4 As to the meaning of 'year of account' see PARA 2205 note 8.

5 Ie under the Friendly Societies Act 1974 s 32A(1): see PARA 2206. As to the obligation to appoint auditors see s 31; and PARA 2206.

6 'Year end balance sheet', in relation to a year of account, means a balance sheet relating to the position at the end of the year; and 'year end revenue account', in relation to a year of account, means a revenue account for the year or for any period falling within the year of account and ending at the end of the year: Friendly Societies Act 1974 s 30A(12) (as added: see note 3).

7 Friendly Societies Act 1974 s 30A(2) (as added: see note 3). The requirements are those of s 30(1), (4) or, as the case may be, s 30(5) (see PARA 2205): s 30A(12) (as so added). Where at the beginning of a year of account (the 'current year of account') a registered society or branch is subject to s 30A(2) in relation to the publication of a year end revenue account or balance sheet for the preceding year of account, it may not publish any interim revenue account or balance sheet for the current year of account: (1) if a disapplication under s 32A(1) (see note 5) is in force in relation to that year, unless it incorporates a report by an appropriate person stating whether in his opinion it complies with s 30(1), (4) or, as the case may be, s 30(5); and (2) if no disapplication under s 32A(1) is in force in relation to that year, unless heads (1) and (2) in the text are met in relation to it: s 30A(4) (as so added). 'Interim balance sheet', in relation to a year of account, means a balance

sheet relating to the position at a time in the year other than the end; and 'interim revenue account', in relation to a year of account, means a revenue account for any period falling within the year of account, other than one ending at the end of the year: s 30A(12) (as so added).

Section 39B (see PARA 2209) applies in relation to a person appointed for the purposes of s 30A(4), (5) as it applies in relation to a person appointed under s 39A(2) (see PARA 2209): s 30A(8) (as so added). References to a disapplication under s 32A(1) being in force in relation to a year of account, where the year of account has ended, must be construed as references to a disapplication under that provision being in force at the end of the year: s 30A(9) (as so added). Subject to s 30A(11), in s 30A(4), (5) references to an appropriate person are to a person who is: (a) a qualified auditor for the purposes of the Friendly Societies Act 1974 (see PARA 2206); and (b) not ineligible by virtue of s 37(1) (see PARA 2206) to be appointed as auditor of the society or branch: s 30A(10) (as so added). In relation to the application of s 30A(4) to a registered society or branch which: (i) was an exempt society or an exempt branch in respect of the preceding year of account; and (ii) appointed persons who were not qualified auditors to audit its accounts and balance sheet for that year, s 30A(10), if the year is not one in relation to which the Financial Services Authority has given a direction under s 32(2) (see PARA 2206), has effect with the omission of s 30A(10)(a) (see head (a) above): s 30A(11) (as so added). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

8 See note 5.

9 For this purpose, 'turnover', in relation to a society or branch, means the amounts derived from the provision of goods and services falling within the society's or branch's activities, after deduction of: (1) trade discounts; (2) value added tax; and (3) any other taxes based on the amounts so derived: Friendly Societies Act 1974 s 32A(7) (added by SI 1996/1738); definition applied by the Friendly Societies Act 1974 s 30A(12) (as added: see note 3).

10 Ie a report from a person appointed under the Friendly Societies Act 1974 s 39A(2) which meets the requirements of s 39A(3) (see PARA 2209): s 30A(3) (as added: see note 3).

11 Friendly Societies Act 1974 s 30A(3) (as added: see note 3). Where at the beginning of a year of account (the 'current year of account') a registered society or branch is subject to s 30A(3) in relation to the publication of a year end revenue account or balance sheet for the preceding year of account, it may not publish any interim revenue account or balance sheet for the current year of account unless it incorporates a report by an appropriate person stating: (1) whether, in his opinion, the revenue account, or, as the case may be, the balance sheet, is in agreement with the books of account kept by the society or branch under s 29 (see PARA 2205); and (2) whether, in his opinion, on the basis of the information contained in those books of account, the revenue account or, as the case may be, the balance sheet complies with the requirements of the Friendly Societies Act 1974 (see PARA 2205 et seq): s 30A(5) (as so added). Section 30A(3) ceases to apply in relation to a year of account if a direction under s 39C (see PARA 2210) is made in relation to it: s 30A(7) (as so added).

12 Ie a direction under the Friendly Societies Act 1974 s 39C has effect: see PARA 2210.

13 Friendly Societies Act 1974 s 30A(6) (as added: see note 3). The requirements are those of s 30(1), (3) or, as the case may be, s 30(5): see PARA 2205.

14 See PARA 2203 text and notes 1-3.

15 Friendly Societies Act 1974 s 30(7). As to the statement required to be included in the annual return see PARA 2211 text and notes 10-16.

16 See PARA 2208.

17 Friendly Societies Act 1974 s 45(a). Failure to comply with this provision is an offence: see PARA 2278. As to the same requirement in the case of the actuary's report or reports see PARA 2204 text and notes 11-12.

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## **2213. Supply of copies of annual return and balance sheet.**



On the application of a member or a person interested in its funds, a registered society<sup>1</sup> or branch<sup>2</sup> (other than a registered friendly society or branch thereof<sup>3</sup>) must supply to him gratuitously either: (1) a copy of the last annual return of the society or branch; or (2) a balance sheet or other document duly audited containing the same particulars relating to the affairs of the society or branch as are contained in the annual return<sup>4</sup>. Together with every copy of the annual return or with every balance sheet or other document so supplied, the registered society or branch must provide a copy of the auditors' report on the accounts and balance sheet<sup>5</sup> contained in the return or on the balance sheet or document supplied, as the case may require<sup>6</sup>.

Where the last annual return of a registered society or branch relates to a year of account at the end of which there is in force in relation to the year a disapplication of the requirement to appoint auditors<sup>7</sup>, the balance sheet or other document need not be audited and a copy of the accountant's report must instead be supplied<sup>8</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 The Friendly Societies Act 1974 ss 29-45 are repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 12, but remain in force in relation to registered societies which are not friendly societies: see PARA 2202.

4 Friendly Societies Act 1974 s 44(1). As to annual returns and balance sheets see PARA 2211.

5 As to the auditors' report see PARA 2208.

6 Friendly Societies Act 1974 s 44(2).

7 I.e. a disapplication under the Friendly Societies Act 1974 s 32A(1): see PARA 2206.

8 Friendly Societies Act 1974 s 44(3) (added by SI 1996/1738). As to the accountant's report see the Friendly Societies Act 1974 s 39A; and PARA 2209.

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## ***G. INSPECTIONS AND MEETINGS***

### **(A) INSPECTIONS**

#### **2214. Right to inspect books.**

A member or any person having an interest in the funds of a registered society<sup>1</sup> or branch<sup>2</sup> may inspect the books at all reasonable hours at the registered office of the society or branch or at any place where the books are kept<sup>3</sup>, and may take copies of them<sup>4</sup>. However, only officers<sup>5</sup>, or members or persons interested who are specially authorised by a resolution of the society or branch, are entitled to inspect the loan account of any other member without his written consent<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 62(1). A member may be entitled to inspect by means of an agent if the member is not competent to examine the books himself: *R v Bedwellty UDC, ex p Price* [1934] 1 KB 333. The right extends to collecting books: *Moffatt v Taunton* (1891) Diprose & Gammon 307. Refusal to allow inspection is an offence: see PARA 2278.

4 *Nelson v Anglo-American Land Mortgage Agency Co* [1897] 1 Ch 130.

5 As to the meaning of 'officer' see PARA 2172 note 3.

6 Friendly Societies Act 1974 s 62(2). As to loans to members see PARAS 2194-2195.

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## **2215. Inspection of affairs.**

On the application of one-fifth of the members of a registered society<sup>1</sup> (other than a registered friendly society<sup>2</sup>), or of 100 members if the society has not fewer than 1,000 and not more than 10,000 members, or of 500 members if the society has more than 10,000 members<sup>3</sup>, the Financial Services Authority<sup>4</sup> may appoint an inspector or inspectors to examine and report on the society's affairs<sup>5</sup>. This provision does not apply to a society with branches, except with the consent of the central body of that society<sup>6</sup>.

A member may issue a circular among his fellow members for the purpose of getting sufficient signatures to such an application, but inaccurate statements as to the society's financial condition may be restrained by injunction<sup>7</sup>.

The application must be supported by such evidence that there is good reason for an inspection and that the applicants are not actuated by malicious motives, and such notice of the application must be given to the society, as the Authority directs<sup>8</sup>.

The inspector may require the production of all or any of the books and documents of a registered society, and may examine on oath<sup>9</sup> its officers<sup>10</sup>, members, agents, and servants in relation to its business<sup>11</sup>. However, the inspector is not entitled to conduct the inspection or examination in public, nor may he make public the information gained by him, or otherwise make use of the information, except for the purposes of carrying out the examination and of preparing his report, and for ancillary purposes<sup>12</sup>. The inspector makes his report to the Authority<sup>13</sup>. In the absence of any evidence to the contrary, a document purporting to be signed by an inspector may be received in evidence without proof of the signature<sup>14</sup>.

Before appointing an inspector, the Authority may require the applicants to give security for the costs of the proposed inspection<sup>15</sup>. All expenses of and incidental or preliminary to an inspection must be defrayed by the members applying for it, or out of the society's funds, or by present or former members or officers, in such proportions as the Authority may direct<sup>16</sup>. They may be recovered in a magistrates' court as a civil debt<sup>17</sup>.

Inspections of the affairs of a registered friendly society are considered elsewhere in this title<sup>18</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 The Friendly Societies Act 1974 s 90 is repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 36. As to registered societies other than friendly societies see generally PARA 2089.

3 Friendly Societies Act 1974 s 90(1), (2)(a), (b) (s 90(1) amended by SI 2001/2617).

4 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 Friendly Societies Act 1974 s 90(1)(a). As to the calling of a special meeting on such an application see PARA 2217. As to application for investigation with a view to dissolution see PARA 2271.

6 Friendly Societies Act 1974 s 90(2).

7 *Hill v Hart-Davies* (1882) 21 ChD 798. As to the procedure on application for an injunction see **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq.

8 Friendly Societies Act 1974 s 90(3) (amended by SI 2001/2617).

9 The inspector may administer the oath for this purpose: Friendly Societies Act 1974 s 90(6).

10 As to the meaning of 'officer' see PARA 2172 note 3.

11 Friendly Societies Act 1974 s 90(6). It is an offence for a society to refuse to produce books or furnish information required by an inspector: see PARA 2278.

12 *Hearts of Oak Assurance Co Ltd v A-G* [1932] AC 392, HL.

13 A copy of the report is usually sent to both the society and the applicants, but the Authority appears to be under no statutory obligation to send it.

14 Friendly Societies Act 1974 s 110(2).

15 Friendly Societies Act 1974 s 90(4) (amended by SI 2001/2617).

16 Friendly Societies Act 1974 s 90(5) (amended by SI 2001/2617).

17 Friendly Societies Act 1974 s 101(2) (amended by SI 2001/2617). As to the summary recovery of civil debts see the Magistrates' Courts Act 1980 s 58(1); and **MAGISTRATES** vol 29(2) (Reissue) PARA 826.

18 See the Friendly Societies Act 1992 ss 65-67; and PARA 2319 et seq.

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## (B) MEETINGS

### 2216. General meetings.

The rules of registered societies<sup>1</sup> and branches<sup>2</sup> must provide for the mode of holding general meetings<sup>3</sup>. Rules may provide for general meetings being constituted by delegates appointed by members<sup>4</sup>.

Where the place of meetings is fixed by the rules which provide for their alteration only at a meeting of the society legally convened, new rules made at a meeting held elsewhere and purporting to replace former rules are void<sup>5</sup>.

Further provision as to meetings of registered and incorporated friendly societies is made by the Friendly Societies Act 1992 and is considered elsewhere in this title<sup>6</sup>.

- 1 As to the meaning of 'registered society' see PARA 2082.
- 2 As to branches of societies see PARA 2091.
- 3 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 4; and PARA 2156. As to the adjournment of meetings and notice of business see *Orton v Bristow* (1915) 32 TLR 129; affd (1916) 32 TLR 352, CA. Rules usually provide for holding ordinary meetings for receiving contributions (weekly or fortnightly etc), business meetings (quarterly or half-yearly or annually etc), and special meetings to be called at any time by the direction of the committee or by a requisition from a certain number of members; for notice of special meetings to be given and for forming a quorum; for use or non-use of proxies, and appointment; and, in case of equality, for the casting vote of the chairman. As to further statutory provisions relating to special meetings see PARA 2217. Where the secretary of a society was served with a requisition, duly signed in accordance with the rules, to call a meeting for the purpose of altering or rescinding the rules, he was obliged to convene the meeting: *R v Bannatyne* (1851) 17 QB 524; and see *R v Aldham and United Parishes Insurance Society* [1854] 2 WR 456 (mandamus to officer to convene meeting not granted in special circumstances).
- 4 See the Friendly Societies Act 1974 s 111(1). Cf *Wilkinson v City of Glasgow Friendly Society* 1911 SC 476 (which decided that a delegate meeting could not pass a special resolution for the purpose of converting a registered society into a company); but see now the Friendly Societies Act 1974 s 86(1)(b); and PARA 2218. As to conversion see PARA 2223. As to special resolutions see PARA 2218.
- 5 *R v Tidd Pratt* (1865) 6 B & S 672.
- 6 See PARA 2302 et seq.

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## **2217. Financial Services Authority's power to call special meetings.**

The Financial Services Authority<sup>1</sup> may call a special meeting of a registered society<sup>2</sup> (other than a registered friendly society<sup>3</sup>) on the application of the same number of people as may apply for the appointment of an inspector<sup>4</sup>. The same consent (in the case of a society with branches) and the same evidence and security are required as for the appointment of an inspector, and the same provisions apply regarding the defrayal of expenses<sup>5</sup>.

The Authority may direct the time and place of the meeting and the matters to be discussed and determined at the meeting; the meeting has all the powers of a meeting called according to the rules of the society<sup>6</sup>, and may appoint its own chairman notwithstanding any rule of the society to the contrary<sup>7</sup>.

Special meetings of registered friendly societies are considered elsewhere in this title<sup>8</sup>.

- 1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 2 As to the meaning of 'registered society' see PARA 2082.
- 3 The Friendly Societies Act 1974 s 90 is repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 36. As to registered societies other than friendly societies see PARA 2089.
- 4 See the Friendly Societies Act 1974 s 90(1), (2); and PARA 2215.
- 5 See the Friendly Societies Act 1974 s 90(2)-(5); and PARA 2215.
- 6 As to the requirement that the rules of a society provide for the holding of meetings see PARA 2156 head (4).

7 Friendly Societies Act 1974 s 90(7). As to the rules see PARA 2156 et seq.

8 See the Friendly Societies Act 1992 ss 65-67; and PARA 2319 et seq.

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## **2218. Special resolutions.**

Certain transactions of registered societies<sup>1</sup> (other than registered friendly societies<sup>2</sup>) may be carried out only by passing a special resolution. These are: (1) amalgamation with another registered society<sup>3</sup>; (2) transfer of engagements to another registered society or to a company<sup>4</sup>; and (3) conversion of a registered society into a company<sup>5</sup>.

For the purposes of the Friendly Societies Act 1974, a special resolution in relation to a registered society or branch<sup>6</sup> other than a registered friendly society is<sup>7</sup> a resolution which is passed: (a) at a general meeting of which notice, specifying the intention to propose that resolution, has been duly given in accordance with the society's rules<sup>8</sup>; and (b) by not less than three-quarters of those members of the society for the time being entitled under the society's rules to vote who vote either in person or by proxy<sup>9</sup> at the meeting or, in the case of a meeting of delegates appointed by members<sup>10</sup>, by not less than three-quarters of the delegates who vote at the meeting<sup>11</sup>.

Notwithstanding anything to the contrary in the rules<sup>12</sup> of a registered society, at any such general meeting, other than a meeting of delegates, proxy voting is permitted on a special resolution if the procedure adopted complies with the requirements imposed by the Treasury by regulations<sup>13</sup>. The proxy need not be a member of the society and in the case of a collecting society must not be a collector or superintendent of the society<sup>14</sup>. The proxy must be appointed in writing by the person appointing him or by his duly authorised agent<sup>15</sup>, and in order to be valid the instrument of appointment<sup>16</sup> must be deposited at the society's registered office, or such other place in the United Kingdom<sup>17</sup> as is specified in the notice convening the meeting, not less than 48 hours before the time for holding the meeting or adjourned meeting at which the vote is to take place<sup>18</sup>. The instrument may indicate whether the proxy is to vote for or against the resolution or as he thinks fit<sup>19</sup>, and a vote given in accordance with the instrument is valid notwithstanding the previous death or mental disorder<sup>20</sup> of the appointer or the revocation of the proxy, provided the society has not received any written intimation of the event at its registered office before the commencement of the meeting or adjourned meeting at which the proxy is used<sup>21</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 For the purposes of the Friendly Societies Act 1974, 'special resolution' in relation to a registered friendly society must be construed in accordance with the Friendly Societies Act 1992 s 30, Sch 12 para 7 (see PARA 2306); Friendly Societies Act 1974 s 86(2A) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 33).

3 See the Friendly Societies Act 1974 s 82; and PARAS 2220-2221. A special resolution is not necessary on an amalgamation of a juvenile with an adult friendly society: see PARA 2222.

4 See the Friendly Societies Act 1974 s 82; and PARA 2220.

5 See the Friendly Societies Act 1974 s 84; and PARAS 2223-2225.

6 As to branches see PARA 2091.

- 7     be subject to the Friendly Societies Act 1974 s 86(2A) (see note 2): s 86(1) (amended by the Friendly Societies Act 1992 Sch 16 para 33).
- 8     Friendly Societies Act 1974 s 86(1)(a). As to general meetings see PARA 2216.
- 9     See the text and notes 12-21.
- 10    See PARA 2216 text and note 4.
- 11    Friendly Societies Act 1974 s 86(1)(b).
- 12    As to the rules see PARA 2156 et seq.
- 13    Friendly Societies Act 1974 s 86(2) (amended by SI 2001/2617). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105. At the date at which this volume states the law, no such regulations had been made; but the Friendly Societies (Proxy Voting) Regulations 1971, SI 1971/1946, have effect as if made under the Friendly Societies Act 1974 s 86(2) (see s 116(2), Sch 10 para 1).
- 14    Friendly Societies (Proxy Voting) Regulations 1971, SI 1971/1946, reg 2(a). As to collecting societies see PARA 2088.
- 15    Friendly Societies (Proxy Voting) Regulations 1971, SI 1971/1946, reg 2(a). It seems that the name of the proxy and the date of the meeting may be filled in by an authorised person after execution: *Ernest v Loma Gold Mines Ltd* [1897] 1 Ch 1, CA; *Sadgrove v Bryden* [1907] 1 Ch 318.
- 16    This also applies to a power of attorney, if any, or a notarially certified copy of the power or authority: Friendly Societies (Proxy Voting) Regulations 1971, SI 1971/1946, reg 2(b).
- 17    As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 18    Friendly Societies (Proxy Voting) Regulations 1971, SI 1971/1946, reg 2(b). As to adjourned meetings cf the position before the regulations came into force as illustrated by *McLaren v Thomson* [1917] 2 Ch 261, CA, where it was held that, if the rules required a proxy to be lodged before the date of a meeting, a proxy lodged after that meeting, but before the date of its adjournment, could not be used at the adjourned meeting.
- 19    See the Friendly Societies (Proxy Voting) Regulations 1971, SI 1971/1946, reg 2(c), which sets out a form of instrument and provides that that form, or one as near to it as circumstances admit, must be used for the instrument of appointment.
- 20    The regulation actually uses the term 'insanity', but it is submitted that 'mental disorder' is more appropriate in the light of modern mental health legislation: see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 401 et seq.
- 21    Friendly Societies (Proxy Voting) Regulations 1971, SI 1971/1946, reg 2(d).

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## **2219. Registration of special resolutions.**

A copy of every special resolution<sup>1</sup>, signed by the chairman of the meeting and countersigned by the secretary, must be sent to the Financial Services Authority<sup>2</sup> and registered by it, and until the copy is registered the special resolution is ineffective<sup>3</sup>.

1     As to special resolutions in relation to registered societies see PARA 2218.

2 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

3 Friendly Societies Act 1974 s 86(3) (amended by SI 2001/2617).

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## **H. MERGERS AND CONVERSIONS INVOLVING REGISTERED SOCIETIES OTHER THAN FRIENDLY SOCIETIES**

### **(A) AMALGAMATION AND TRANSFER OF ENGAGEMENTS**

#### **2220. Powers to amalgamate and to transfer engagements.**

Two or more registered societies<sup>1</sup> (neither being a registered friendly society<sup>2</sup>) may, by special resolution<sup>3</sup> of each of them, become amalgamated together as one society<sup>4</sup>, with or without dissolution or division of the funds of the societies or any of them<sup>5</sup>.

A registered society may, by special resolution, transfer to any extent its engagements to any other registered society which, by special resolution or in such other manner as may be authorised by its rules, undertakes to fulfil those engagements<sup>6</sup>.

A registered society may by special resolution determine to transfer to any extent its engagements to a company regulated by the Companies Acts<sup>7</sup> or to an industrial and provident society<sup>8</sup>.

In order to transfer some but not all of its engagements, a registered society must, in addition to passing the special resolution required as described above, pass an affected members' resolution<sup>9</sup>.

If a registered society transfers all its engagements, the registration of the society becomes void and must be cancelled by the Financial Services Authority<sup>10</sup>.

Separate provision as to transfers of engagements by, and amalgamations of, friendly societies is made by the Friendly Societies Act 1992, and is considered elsewhere in this title<sup>11</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 These provisions do not apply to registered friendly societies: Friendly Societies Act 1974 s 82(8) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 29). The Friendly Societies Act 1974 s 86(4) made further provision as to special resolutions for the transfer of engagements or amalgamations of registered friendly societies, but since s 82(8) apparently ends the power of friendly societies to make a resolution under the Friendly Societies Act 1974, and there is separate provision under the Friendly Societies Act 1992 for friendly societies to amalgamate or transfer engagements (see PARA 2352 et seq), it is thought that the Friendly Societies Act 1974 s 86(4) is no longer operative.

3 As to special resolutions see PARA 2218.

4 For judicial authority on the effect of an amalgamation see *Northern Rock Building Society v Davies (Inspector of Taxes)* [1969] 3 All ER 1310, [1969] 1 WLR 1742 (concerning the union of building societies).

5 Friendly Societies Act 1974 s 82(1). As to the registration of special resolutions see PARA 2218. Except in relation to juvenile societies (see PARA 2222), there is no statutory provision for the amalgamation of branches,

which therefore may be effected only if there is an appropriate provision in the rules. As to the rules see PARA 2156 et seq.

6 Friendly Societies Act 1974 s 82(2) (amended by the Friendly Societies Act 1992 Sch 16 para 29). It has been held in the comparable context of the Industrial and Provident Societies Act 1965 that 'engagements' means the business undertaking of the society in question (*Stansell Ltd v Co-operative Group (CWS) Ltd* [2005] EWHC 1601 (Ch), [2006] 1 BCLC 401); this point was common ground on the appeal (see sub nom *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538, [2006] 1 WLR 1704, [2006] 2 BCLC 599). There is no statutory provision for the transfer of engagements between branches, which therefore may be effected only if there is an appropriate provision in the rules.

7 'Companies Acts' means the Companies Act 2006, the Companies Act 1985 and any earlier enactment for the like purposes which has been repealed: Friendly Societies Act 1974 s 111(1) (amended by the Companies Consolidation (Consequential Provisions) Act 1985 Sch 2; and the Friendly Societies Act 1992 Sch 16 para 48); Companies Act 2006 s 1297(5).

8 Friendly Societies Act 1974 s 82(3) (amended by the Friendly Societies Act 1992 Sch 16 para 29). 'Industrial and provident society' means a society registered or deemed to be registered under the Industrial and Provident Societies Act 1965 (see PARA 2410 et seq); Friendly Societies Act 1974 s 82(9) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 29).

9 Friendly Societies Act 1974 s 82(3A) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 29). An 'affected members' resolution' is a resolution passed by the appropriate majority of the members whose engagements with the society are included in the transfer and who, under the rules, would be entitled to vote on a special resolution: Friendly Societies Act 1974 s 82(3A) (as so added). 'Appropriate majority' means a majority consisting of not less than three-quarters of those members who vote: s 82(3B) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 29).

10 Friendly Societies Act 1974 s 82(5) (amended by the Friendly Societies Act 1992 Sch 22 Pt I; and SI 2001/3649). As to cancellation of registration see PARAS 2257-2260. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

11 See the Friendly Societies Act 1992 ss 85, 86; note 2; and PARA 2352 et seq.

## UPDATE

### 2220 Powers to amalgamate and to transfer engagements

NOTE 7--Definition of 'Companies Acts' omitted: SI 2009/1941.

NOTE 8--Friendly Societies Act 1974 s 82(3) amended: SI 2009/1941.

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### 2221. Vesting of property.

It seems that on amalgamation of registered societies<sup>1</sup> other than registered friendly societies<sup>2</sup> the property of the amalgamating societies vests in the trustees of the amalgamated society without conveyance or transfer<sup>3</sup>.

1 See PARA 2220. As to the meaning of 'registered society' see PARA 2082.



2 This cannot apply to registered friendly societies, since the effect of the amalgamation of societies is to create a new society which, if it is a friendly society, must be incorporated under the Friendly Societies Act 1992: see PARA 2112.

3 See the Friendly Societies Act 1974 ss 54(1), 58; and PARAS 2185-2186. An amalgamation or transfer of engagements does not prejudice any right of a creditor of a registered society which is a party to it: s 82(7). As to the application of s 82 see PARA 2220 note 2.

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## **2222. Amalgamation of juvenile and adult societies.**

A registered society<sup>1</sup> consisting wholly of members under 21 years of age may amalgamate<sup>2</sup> with a registered society having members above that age (neither being a registered friendly society<sup>3</sup>), or with a branch or branches of such society, by resolutions registered in the manner required for the registration of an amendment of rules<sup>4</sup>. Alternatively, provision may be made by such resolutions for distributing among several branches the members of a society consisting wholly of members under 21 years of age<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to amalgamations generally see PARA 2220.

3 These provisions do not apply to registered friendly societies: Friendly Societies Act 1974 s 82(8) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 29). See further PARA 2220 note 2.

4 Friendly Societies Act 1974 s 82(6). In the case of such amalgamation the usual procedure of special resolution etc (see PARA 2220) need not be followed: see s 82(6). As to the registration of an amendment of rules see PARAS 2162-2164. As to the admission of persons under 18 years of age see PARA 2166.

5 Friendly Societies Act 1974 s 82(6).

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## **(B) CONVERSION**

### *(a) Conversion into Company*

## **2223. Power to convert into company.**

A registered society<sup>1</sup> (other than a registered friendly society<sup>2</sup>) may by special resolution<sup>3</sup> convert itself into a company under the Companies Acts<sup>4</sup>.

The objects of the company into which the society is converted should be substantially the objects set out in the society's rules, but afterwards the company can enlarge its objects under its powers as a registered company<sup>5</sup>. When a registered society has been converted into a limited company the objects of which, as declared by the memorandum of association, are to continue the society's business, and also to carry on an extended range of business, whatever relief a member might be entitled to in properly constituted proceedings, he cannot, while suing as a member of the company, claim to restrain it from carrying out those of the objects of its memorandum which are in excess of the objects of the original society; and this is so even assuming that the special resolution for conversion was ultra vires the society<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 The Friendly Societies Act 1974 s 84 is repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 31. As to the conversion of friendly societies into companies see s 91; and PARA 2359.

3 As to special resolutions see PARA 2218.

4 Friendly Societies Act 1974 s 84(1). As to the meaning of 'Companies Acts' see PARA 2220 note 7. On the conversion of a registered society into a company, the members of the society are not simultaneously converted into members of the company: *Re Blackburn Philanthropic Assurance Co Ltd* [1914] 2 Ch 430.

5 See *Blythe v Birtley* [1910] 1 Ch 228 at 235, CA, per Cozens-Hardy MR: 'When it is a limited company, it may then exercise such powers of enlarging and altering its objects, with the sanction of the court, as are given by the Companies Acts'. But, for example, a friendly society could not be converted into a brewery company: see *Blythe v Birtley*. See also *McGlade v Royal London Mutual Insurance Society Ltd* [1910] 2 Ch 169, CA. As to the objects of registered societies which are not friendly societies see the Friendly Societies Act 1974 s 7(1)(b)-(f); and PARA 2089. As to the power of a registered company to alter its objects see **COMPANIES** vol 14 (2009) PARAS 240 et seq.

6 *McGlade v Royal London Mutual Insurance Society Ltd* [1910] 2 Ch 169, CA, where Cozens-Hardy MR said at 177: 'I think it might have been competent for a member to commence an action, suing on behalf of himself and all other . . . members . . . , asking for a declaration that the special resolution was ultra vires, and that all proceedings under it were therefore void'. These views gave rise to doubts as to whether certain societies already converted into companies had been validly so converted, and for the purpose of putting an end to those doubts the Companies (Converted Societies) Act 1910 (now repealed by the Statute Law (Repeals) Act 1989) was enacted. See also *Re Royal London Mutual Assurance Society Ltd* (1910) 55 Sol Jo 46.

## UPDATE

### 2223 Power to convert into company

TEXT AND NOTES 1-4--Friendly Societies Act 1974 s 84(1) amended: SI 2009/1941.

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### 2224. Special resolution as memorandum of association.

If a special resolution for converting a registered society<sup>1</sup> (other than a registered friendly society<sup>2</sup>) into a company<sup>3</sup> contains the particulars required by the Companies Acts<sup>4</sup> to be contained in the memorandum of association of a company and a copy of it has been

registered by the Financial Services Authority, a copy of the resolution under the seal and stamp of the Authority has the same effect as a memorandum of association duly signed and attested under the Companies Acts<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 See PARA 2223 note 2.

3 See PARA 2223.

4 As to the meaning of 'Companies Acts' see PARA 2220 note 7. As to the particulars required to be contained in a company's memorandum of association see **COMPANIES** vol 14 (2009) PARA 243 et seq. Upon registration of the sealed copy of the resolution with the Financial Services Authority, the society is converted into a company and ceases to be subject to the provisions of the Friendly Societies Act 1974: see PARA 2225. As to the name of the company see **COMPANIES** vol 14 (2009) PARA 200 et seq. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 Friendly Societies Act 1974 s 84(2) (amended by SI 2001/2617).

## **UPDATE**

### **2224 Special resolution as memorandum of association**

TEXT AND NOTES--Friendly Societies Act 1974 s 84(2) amended: SI 2009/1941.

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### **2225. Effect of conversion into company.**

When a registered society<sup>1</sup> (other than a registered friendly society<sup>2</sup>) is converted into a company and becomes registered under the Companies Acts<sup>3</sup>, its registration under the Friendly Societies Act 1974 becomes void and must be cancelled by the Financial Services Authority<sup>4</sup>. The registration of a registered society as a company does not affect any right or claim subsisting against, nor any penalty incurred by, the society<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 See PARA 2223 note 2.

3 See PARAS 2223-2224. As to the meaning of 'Companies Acts' see PARA 2220 note 7.

4 Friendly Societies Act 1974 s 84(3) (amended by SI 2001/3649). As to the equivalent provision where a registered society transfers all its engagements see PARA 2220 text and note 10. As to cancellation of registration see PARAS 2257-2260. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 Friendly Societies Act 1974 s 84(4). Cf s 82(7); and PARA 2221. For the purpose of enforcing any such right, claim or penalty the society may be sued and proceeded against in the same manner as if it had not become registered as a company: s 84(4)(a). Every such right or claim, or the liability to any such penalty, has priority as against the company's property over all other rights or claims against, or liabilities of, the company: s 84(4)(b).

**UPDATE****2225 Effect of conversion into company**

TEXT AND NOTES 1-4--Friendly Societies Act 1974 s 84(3) amended: SI 2009/1941.

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*(b) Conversion into Industrial and Provident Society***2226. Conversion of registered society into industrial and provident society.**

A registered society other than a registered friendly society<sup>1</sup> may apply for registration under the Industrial and Provident Societies Act 1965<sup>2</sup> if the proposal to apply for registration has been submitted to the members of the registered society for their consent<sup>3</sup>, and consent has been obtained accordingly<sup>4</sup>. On registration under that Act, all property<sup>5</sup> held by the registered society immediately before that registration by any person in trust for the registered society or any branch<sup>6</sup> (whether or not a registered branch) becomes property of the industrial and provident society<sup>7</sup>. The society continues to be entitled to all rights, and subject to all liabilities<sup>8</sup>, as before registration<sup>9</sup>.

No later than 90 days beginning with the day on which a society is registered under the Industrial and Provident Societies Act 1965:

- 690 (1) the registered society's trustees<sup>10</sup> must deliver to the registered office of the industrial and provident society any property of the registered society or a branch of it held by them, and any documents relating to the property, rights and liabilities of the registered society or to its financial affairs<sup>11</sup>;
- 691 (2) the trustees of any branch of the registered society must deliver to that office any property of the branch or any other branch of the society held by them and any documents relating to the property, rights and liabilities of the branch or to its financial affairs<sup>12</sup>;
- 692 (3) if he holds property on trust for the registered society or any branch of the society the Public Trustee<sup>13</sup> must deliver to that office the property held by him and any documents relating to it<sup>14</sup>.

This does not, however, have the effect of relieving the trustees or the Public Trustee from any liability arising from acts or omissions before the registration of the society under the Industrial and Provident Societies Act 1965<sup>15</sup>.

On registration as an industrial and provident society, the previous registration of the society becomes void and must be cancelled by the Financial Services Authority<sup>16</sup>.

Any appointment as a trustee of the registered society or any branch of it determines on registration of the society as an industrial and provident society<sup>17</sup>, but all other officers become equivalent officers in the industrial and provident society<sup>18</sup>. Any current contract of employment

with the registered society or any branch takes effect with the substitution of the industrial and provident society as the employer, but with no termination or any other variation<sup>19</sup>, and accordingly any period of employment with the registered society counts as employment with the industrial and provident society<sup>20</sup>. The rights and liabilities of the registered society or branch under any agreement or arrangement for the payment of pensions, allowances or gratuities vests in the industrial and provident society along with all the other rights and liabilities<sup>21</sup>.

Any agreement made, transaction effected or other thing done by, to or in relation to the registered society or branch (whether registered or not) which is effective immediately before registration as an industrial and provident society has effect as if made, effected or done by, to or in relation to the industrial and provident society<sup>22</sup>.

1 As to the meanings of 'registered society' and 'registered friendly society' see PARA 2082. In this paragraph 'registered society' denotes the society registered under the Friendly Societies Act 1974, as distinct from the society after it is registered under the Industrial and Provident Societies Act 1965, when it is referred to as the 'industrial and provident society'.

2 See PARA 2410 et seq.

3 Such consent must be by the procedure required for a proposal to amend the rules of the society (see PARA 2160 et seq): Friendly Societies Act 1974 s 84A(1) (s 84A added by the Friendly Societies Act 1992 Sch 16 paras 1, 32).

4 Friendly Societies Act 1974 s 84A(1) (as added: see note 3).

5 This includes property situated outside the United Kingdom: Friendly Societies Act 1974 s 84A(4)(a) (as added: see note 3). As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 As to branches of societies see PARA 2091.

7 Friendly Societies Act 1974 s 84A(2) (as added: see note 3).

8 The reference to rights and liabilities includes rights and liabilities under the law of any country or territory outside the United Kingdom: Friendly Societies Act 1974 s 84A(4)(b) (as added: see note 3).

9 Friendly Societies Act 1974 s 84A(3) (as added: see note 3).

10 As to the trustees of a society see PARA 2179 et seq. As to the determination of appointment of the trustees upon registration as an industrial and provident society see the text and note 17.

11 Friendly Societies Act 1974 s 84A(5)(a) (as added: see note 3).

12 Friendly Societies Act 1974 s 84A(5)(b) (as added: see note 3).

13 As to the Public Trustee see PARA 2182; and **TRUSTS** vol 48 (2007 Reissue) PARA 766 et seq.

14 Friendly Societies Act 1974 s 84A(5)(c) (as added: see note 3).

15 Friendly Societies Act 1974 s 84A(5) (as added: see note 3).

16 Friendly Societies Act 1974 s 84A(6) (as added (see note 3); and amended by SI 2001/3649). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

17 Friendly Societies Act 1974 s 84A(7), Sch 6A paras 1, 2(1) (s 84A(7) as added (see note 3); Sch 6A added by the Friendly Societies Act 1992 Sch 16 paras 1, 52).

18 Friendly Societies Act 1974 Sch 6A para 2(2) (as added: see note 17).

19 Friendly Societies Act 1974 Sch 6A para 4(3)(a) (as added: see note 17).

20 Friendly Societies Act 1974 Sch 6A para 4(3) (as added: see note 17).

21 Friendly Societies Act 1974 Sch 6A para 4(3)(b) (as added: see note 17).

22 Friendly Societies Act 1974 Sch 6A para 3 (as added: see note 17). Accordingly references to the registered society or branch in: (1) any agreement (whether or not in writing) and in any deed, bond or instrument; (2) any process or other document issued, prepared or employed for the purposes of any proceeding before any court or other tribunal or authority; and (3) any other document whatsoever (other than an enactment) relating to or affecting any property, right or liability of the registered society or branch, must be taken as referring to the industrial and provident society: Sch 6A para 3(a)-(c) (as so added). Any agreement (including a deed, bond or other instrument) made by the registered society or branch in force immediately before the registration as an industrial and provident society has effect as if for references to members or officers (other than trustees) of the registered society or branch there were substituted references to members or corresponding officers of the industrial and provident society, and for references to trustees of the registered society or branch there were substituted references to the industrial and provident society: Sch 6A para 4(1), (2) (as so added).

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## ***I. CONVERSION OF REGISTERED SOCIETY INTO BRANCH***

### **2227. Conversion of society into branch.**

A registered society<sup>1</sup> may, by a resolution passed by a majority of the members or delegates present and entitled to vote at any general meeting of which notice, specifying the intention to propose the resolution, has been duly given according to the rules, determine to become a branch<sup>2</sup> of any other registered society, and also, if thought fit, of any registered branch of such a society<sup>3</sup>.

If the society's rules do not comply with all the provisions of the Friendly Societies Act 1974 and of the Treasury regulations<sup>4</sup> in respect of the registration of branches, the general meeting at which the resolution is passed may also make the necessary amendments in the rules<sup>5</sup>. A copy of the society's rules, marked to show the amendments, if any, made at the meeting, and two copies of the resolution and of any such amendment of rules, each signed by the chairman of the meeting and by the secretary of the society, and countersigned by the secretary of the society of which it is to become a branch, must be sent to the Financial Services Authority<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to registered branches see PARA 2091.

3 Friendly Societies Act 1974 s 85(1). As to the rules see PARA 2156 et seq.

4 'Treasury regulations' means any regulations made by the Treasury and in force under the Friendly Societies Act 1974: s 111(1) (definition amended by SI 2001/2617). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 Friendly Societies Act 1974 s 85(2).

6 Friendly Societies Act 1974 s 85(3) (amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

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Registered Societies/I. CONVERSION OF REGISTERED SOCIETY INTO BRANCH/2228.  
Registration as branch.

## **2228. Registration as branch.**

Where the necessary documents for converting a registered society<sup>1</sup> into a branch have been submitted to the Financial Services Authority<sup>2</sup>, and it finds that the society's rules (amended or not, as the case may be) comply with the provisions of the Friendly Societies Act 1974 and the Treasury regulations<sup>3</sup>, it must, without further request or notice, cancel the registration<sup>4</sup> of the society and register it as a branch of the other society referred to in the resolution in question, and also, if it is so specified in the resolution, of any branch of that other society; and, without further application or evidence, it must register any such amendment of rules<sup>5</sup>. Until such registration, the resolution does not take effect<sup>6</sup>. The rules of a society which becomes a branch, so far as they are not contrary to any express provision of the Friendly Societies Act 1974 or the Treasury regulations, and subject to any amendment<sup>7</sup>, continue in force as the rules of the branch until amended<sup>8</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 See PARA 2227. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

3 As to the meaning of 'Treasury regulations' see PARA 2227 note 4. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 The cancellation need not be advertised: see the Friendly Societies Act 1974 s 85(5), which excludes the application of s 91(6) (see PARAS 2257 text and notes 5-6, 2258 text and notes 19-20).

5 Friendly Societies Act 1974 s 85(4) (amended by SI 2001/2617).

6 Friendly Societies Act 1974 s 85(4).

7 See PARA 2227.

8 Friendly Societies Act 1974 s 85(6).

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## ***J. NOMINATIONS AND PAYMENTS ON DEATH***

### **2229. Sum payable on death.**

The money payable by a registered society<sup>1</sup> or branch<sup>2</sup> on the death of a member (in addition to any sums insured on his life under rules or policies<sup>3</sup>) includes money contributed to or deposited in the separate loan fund<sup>4</sup> and sums accumulated for the member's use, together with interest<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091. These provisions do not apply to a benevolent society, a working men's club or an old people's home society: Friendly Societies Act 1974 s 66(4). As to those types of society see PARA 2089.

3 As to the validity of policies see *Robinson v Trustees of Loyal Philanthropic Friendly Society* (1905) 119 LT Jo 414; and **INSURANCE** vol 25 (2003 Reissue) PARA 95 et seq. 'Sums payable on the death of a member' probably means sums which he can dispose of as he wills and not sums which rules direct are to be paid to certain relatives only, such as sums for the relief and maintenance of widows and orphans: see the Report of the Chief Registrar of Friendly Societies 1914, Pt A, 26 (Parliamentary Papers for 1914-1916 vol 49); and the Report of the Chief Registrar of Friendly Societies 1918, Pt A, 7 (Parliamentary Papers for 1919 vol 39). As to insurances for funeral expenses etc where the assured is resident abroad and the contract of assurance was effected before 1 December 2001 see the Friendly Societies Act 1974 s 74, Sch 6 (repealed with savings by SI 2001/3647).

4 See PARA 2194.

5 Friendly Societies Act 1974 s 66(3).

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## **2230. Power of nomination.**

A member aged 16 years or over of a registered society<sup>1</sup> or branch<sup>2</sup>, other than a benevolent society, working men's club or old people's home society or branch<sup>3</sup>, may nominate a person or persons to receive any sum of money payable on his death<sup>4</sup> by the society or branch, or any specified sum so payable<sup>5</sup>. This power of nomination is subject to an overall limit as to amount<sup>6</sup>.

The nomination must be in writing<sup>7</sup> or in print<sup>8</sup>, be signed by the nominator<sup>9</sup> and delivered at or sent<sup>10</sup> to the registered office<sup>11</sup> of the society or branch, or made in a book kept at the office<sup>12</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See the Friendly Societies Act 1974 s 66(1), (4).

4 As to sums payable on the death of a member see PARA 2229.

5 Friendly Societies Act 1974 s 66(1).

6 See PARA 2231.

7 Friendly Societies Act 1974 s 66(1).

8 See the Interpretation Act 1978 s 5, Sch 1; and **STATUTES** vol 44(1) (Reissue) PARA 1388.

9 Signature by mark would appear to be insufficient, even if attested by two witnesses: *Morton v French* 1908 SC 171.

10 It has been held that the nomination must be so delivered or sent within the nominator's lifetime: *Thorogate and Royal Co-operative Collecting Society* (1947) Reports of Selected Disputes referred to the Industrial Assurance Commissioner 1938-1949, 67.

11 As to the registered office of the society see PARA 2156 text and note 4.

12 Friendly Societies Act 1974 s 66(1).



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### **2231. Amount disposable by nomination.**

Where a nomination<sup>1</sup> was delivered at or sent to the registered office<sup>2</sup> of the society, or made in the appropriate book<sup>3</sup>, before 21 December 1955, the maximum amount which may be disposed of by the nomination is £100<sup>4</sup>. In the case of a nomination delivered, sent or made on or after 21 December 1955 but before 5 September 1965, the maximum amount is £200<sup>5</sup>. In the case of a nomination delivered, sent or made on or after 5 September 1965 but before 10 August 1975, the maximum amount is £500<sup>6</sup>. In the case of a nomination delivered, sent or made on or after 10 August 1975 but before 12 May 1984, the maximum amount is £1,500<sup>7</sup>. In the case of nominations after 11 May 1984 the limit is increased to £5,000<sup>8</sup>. A nominator need not nominate the whole of the money payable on his death, and a nomination of a sum not exceeding the maximum permitted amount is valid even though the total amount payable on the death exceeds that amount<sup>9</sup>. Where a nomination does not specify the maximum sum which is to be payable and the sum to which the nomination relates exceeds £5,000 only because of an increase in benefit resulting from the adoption of a prescribed or approved scheme under the Decimal Currency Act 1969<sup>10</sup>, the nomination is not invalidated by reason of the excess<sup>11</sup>.

1    le a nomination of recipients of amounts due on the death of a member of a registered society or branch: see PARA 2230.

2    As to the registered office of the society or branch see PARA 2156 text and note 4.

3    As to the procedure on nomination see PARA 2230.

4    See the Friendly Societies Act 1896 ss 56(1), 57(1) (both as originally enacted; now repealed).

5    See the Friendly Societies Act 1896 ss 56(1), 57(1) (both as amended by the Friendly Societies Act 1955 s 5(1)(a), s 5(3); now repealed).

6    See the Friendly Societies Act 1896 ss 56(1), 57(1) (both as amended by the Administration of Estates (Small Payments) Act 1965 Sch 2; now repealed); and the Friendly Societies Act 1974 ss 66(2), 67(2) (both as originally enacted), s 116(2), Sch 10 para 12.

7    Friendly Societies Act 1974 ss 66(2), 67(2) (both as amended by SI 1975/1137). This provision applies in relation to any nomination delivered at or sent to the appropriate office or made in the appropriate book after the expiration of a period of one month beginning with the date on which the amending order came into force (ie 10 July 1975): Administration of Estates (Small Payments) Act 1965 s 6(1)(e), (2) (s 6(1)(e) added, and s 6(2) amended, by the Friendly Societies Act 1974 Sch 9 para 20).

8    Friendly Societies Act 1974 ss 66(2), 67(2) (both as amended by SI 1984/539).

9    *Bennett v Slater* [1899] 1 QB 45, CA.

10   The Friendly Societies Act 1974 s 66(2) actually refers to 'any such increase as is mentioned in section 64(2)(c)'. Section 64(2) provided for the disregard of certain amounts in applying pecuniary limits, and s 64(2)(c) listed any increase in a benefit under a friendly society contract resulting from the adoption of a scheme prescribed or approved under the Decimal Currency Act 1969 s 6 as one such amount. The Friendly Societies Act 1974 s 64 has been repealed by the Income and Corporation Taxes Act 1988 Sch 31, but no consequential amendment was made of the Friendly Societies Act 1974 s 66(2). It is suggested that, as indicated in the text, s 66(2) can be read as including a reference to such schemes rather than to s 64(2)(c). The Decimal Currency Act 1969 s 6 was enacted to permit the making of regulations to determine conversion amounts from the old monetary system to the decimal system, and to approve schemes for the purpose of determining amounts payable under the decimal currency system. The Friendly Societies (Decimal Currency) Regulations 1970, SI 1970/932 (amended by SI 2001/3647), were made under that provision.

11 Friendly Societies Act 1974 s 66(2) (as amended: see note 8). This provision will also apply where the maximum amount disposable is £500 or £1,500 as appropriate in relation to the respective limits (see the text to note 5) and these limits are so exceeded: see s 66(2) (as originally enacted).

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### **2232. Will operating as nomination.**

A will may operate as a nomination<sup>1</sup> when the original will is left in the custody of the society at the registered office<sup>2</sup>, but mere production of the will, or probate of the will, is not sufficient<sup>3</sup>. However, an invalid nomination, if executed in accordance with the Wills Act 1837, may operate as a will<sup>4</sup>. A valid nomination is of a testamentary character<sup>5</sup>.

1 Is a nomination of recipients of amounts due on the death of a member of a registered society or branch: see PARA 2230.

2 As to the registered office of the society or branch see PARA 2156 text and note 4.

3 *Fielding and Lord v Rochdale Equitable Pioneers Society* (1892) 92 LT Jo 431 (county court). As to probate of wills see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 81 et seq. As to the construction of wills see **WILLS** vol 50 (2005 Reissue) PARA 476 et seq.

4 See *Re Baxter's Goods* [1903] P 12; and **WILLS** vol 50 (2005 Reissue) PARA 350.

5 *Gill v Gill* 1938 SC 65, Ct of Sess; and see PARA 2235 text and note 8. Cf the remarks of Megarry J concerning a nomination under the trust deed and rules of a company pension scheme in *Re Danish Bacon Co Ltd Staff Pension Fund, Christensen v Arnett* [1971] 1 All ER 486 at 493-494, [1971] 1 WLR 248 at 256-257.

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### **2233. Nomination by member of branch.**

A nomination<sup>1</sup> by a member of a registered branch<sup>2</sup> delivered at or sent to the registered office<sup>3</sup> of that branch, or made in a book kept at that office, is effectual notwithstanding that the money to which the nomination relates, or some part of it, is not payable by that branch, but is payable by the society or by some other branch<sup>4</sup>.

1 Is a nomination of recipients of amounts due on the death of a member: see PARA 2230.

2 As to branches and registered branches of societies see PARA 2091.

3 As to the registered office of the society or branch see PARA 2156 text and note 4.

4 Friendly Societies Act 1974 s 66(8).

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### **2234. Who may be nominated.**

A nomination<sup>1</sup> cannot be made in favour of a person who at the date of the nomination is an officer<sup>2</sup> or servant of the society or branch, unless that officer or servant is the nominator's spouse, civil partner, father, mother, child, brother, sister, nephew or niece<sup>3</sup>. Where the rules of a society specify relations who may be nominated, but do not expressly exclude all others, the nominees need not be relations<sup>4</sup>. A nomination may be made of more than one person<sup>5</sup>.

1    Ie a nomination of recipients of amounts due on the death of a member of a registered society or branch: see PARA 2230.

2    As to the meaning of 'officer' see PARA 2172 note 3.

3    Friendly Societies Act 1974 s 66(5) (amended by the Civil Partnership Act 2004 Sch 27 para 52(1), (2)).

4    *Lavin v Howley* (1897) 102 LT Jo 560.

5    See the Friendly Societies Act 1974 s 66(1); and PARA 2230. There was no express provision in the legislation that a nomination might be made in favour of more than one person until the Friendly Societies Act 1971 (see s 14(1)(a), Sch 2 para 14 (repealed)); but see *Fielding and Lord v Rochdale Equitable Pioneers Society* (1892) 92 LT Jo 431 (county court), where the nomination was in favour of seven persons.

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### **2235. Revocation, variation or termination of nomination.**

A nomination<sup>1</sup> may be revoked or varied by a document under the hand of the nominator<sup>2</sup>, delivered, sent or made in the same way as a nomination<sup>3</sup>. A nomination is not revocable by will unless the original will is left in the custody of the society at the registered office<sup>4</sup>; mere production of the will or of the probate is not sufficient<sup>5</sup>. The marriage of, or formation of a civil partnership by, a member of a society or branch operates as a revocation of any nomination previously made by that member<sup>6</sup>; but the receipt of a nominee is a valid discharge to the society or branch where, in ignorance of a marriage subsequent to the nomination, it has paid money to the nominee<sup>7</sup>. A nomination, being revocable, does not operate as a gift<sup>8</sup> and the nominee's death in the nominator's lifetime has the effect of defeating the nomination so that on the nominator's death his legal personal representative is entitled to the property<sup>9</sup>.

1    Ie a nomination of recipients of amounts due on the death of a member of a registered society or branch: see PARA 2230.

2    See also PARA 2230 text and notes 7-9.

3 Friendly Societies Act 1974 s 66(6). As to the manner of making nominations see PARA 2230. Cf the variation of a nomination under the rules of a company pension scheme: see *Re Danish Bacon Co Ltd Staff Pension Fund*, *Christensen v Arnett* [1971] 1 All ER 486, [1971] 1 WLR 248. A variation or revocation by a member of a registered branch, delivered at or sent to the registered office of that branch or made in a book kept at that office, is effectual notwithstanding that the money to which the nomination relates, or some part of it, is not payable by that branch, but is payable by the society or some other branch: Friendly Societies Act 1974 s 66(8); and see PARA 2233.

4 As to the registered office of the society or branch see PARA 2156 text and note 4.

5 *M'Kee v Meikle* (1893) 27 ILT 100; *Fielding and Lord v Rochdale Equitable Pioneers Society* (1892) 92 LT Jo 431; *Lavin v Howley* (1897) 102 LT Jo 560; *Bennett v Slater* [1899] 1 QB 45, CA.

6 Friendly Societies Act 1974 s 66(7), (7A) (s 66(7A) added by the Civil Partnership Act 2004 Sch 27 para 52(1), (3)). As to wills made in contemplation of marriage see the Law of Property Act 1925 s 177 (repealed) in relation to wills made before 1 January 1983, and the Wills Act 1837 s 18(4) in relation to wills made on or after that date; and see further **WILLS** vol 50 (2005 Reissue) PARAS 380-381.

7 Friendly Societies Act 1974 s 69(2); *Nelson v Royal London Friendly Society* (1896) Diprose & Gammon 544, DC.

8 *Biggs v Lewis* (1890) 89 LT Jo 47 (county court).

9 *Re Barnes*, *Ashenden v Heath* [1940] Ch 267, where Farwell J refused to follow the decision of Phillimore J on this point in *Caddick v Highton* (1899) as reported in 68 LJQB 281. See also *Demee v National Independent Mechanics' Friendly Society* (1919) CR Rep, Pt A, 8-10 (Parliamentary Papers for 1920 vol 37).

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## **2236. Payment on death of nominator.**

On receiving satisfactory proof of the death of a nominator, the registered society<sup>1</sup> or branch<sup>2</sup> must pay the nominee or nominees the amount due to the deceased member or, as the case may be, the amount specified in the nomination<sup>3</sup>, not being an amount exceeding the prescribed limit<sup>4</sup>. The receipt of a nominee over 16 years of age is valid<sup>5</sup>. There is a prima facie presumption that the nominee is intended to take beneficially, but it is a question depending on evidence, and the member's personal representative may in a proper case demand repayment from the nominee<sup>6</sup>, subject to sums expended by the nominee for medical fees and funeral expenses in respect of the nominator<sup>7</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See PARA 2230 text and notes 1-6.

4 Friendly Societies Act 1974 ss 67(1), (2), 116(2), Sch 10 para 12 (s 67(2) amended by SI 1975/1137; and SI 1984/539). As to the maximum amount disposable by nomination see PARA 2231. Any sum exceeding the maximum may be payable if it arises from an increase in benefit resulting from the adoption of a scheme under the Decimal Currency Act 1969: see the Friendly Societies Act 1974 s 67(2); and PARA 2231 text and notes 10-11.

5 Friendly Societies Act 1974 s 67(3).

6 See *Lavin v Howley* (1897) 102 LT Jo 560 (county court); *Biggs v Lewis* (1890) 89 LT Jo 47 (county court). For a case where it was held that an executor nominee was not entitled to take beneficially see *Re Read, Turner*

*v Read* (1896) 75 LT 295. As to the rights of an executor as to estate undisposed of by will cf **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 615-618.

7 *Hughes v Parry* (1892) 93 LT Jo 131 (county court).

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### **2237. Payment on member's death where there is no nomination.**

If a member of a registered society<sup>1</sup> or branch<sup>2</sup> who is entitled to a sum from its funds not exceeding a specified amount<sup>3</sup> dies without having made a nomination<sup>4</sup> of that sum which subsists at the time of his death, the society or branch may, without letters of administration or probate of any will, distribute the sum among such persons as appear to the committee, upon such evidence as it may deem satisfactory, to be entitled by law to receive it<sup>5</sup>, having regard to all the circumstances of the case, the amount and nature of the claim and the probabilities of the claimants being the persons who are entitled<sup>6</sup>. In ascertaining the persons entitled by law, the society may dispense with strict evidence of title and relationship, but may not alter the title or select one out of a number of next of kin as sole payee, even with the consent of the majority<sup>7</sup>.

This power applies only where the sum to which the member is entitled from the funds of the society or branch does not exceed £5,000<sup>8</sup> or exceeds that sum only because of an increase in benefit resulting from the adoption of a prescribed or approved scheme under the Decimal Currency Act 1969<sup>9</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See the text and notes 8-9.

4 Ie a nomination of recipients of amounts due on the death of that member: see PARA 2230.

5 Friendly Societies Act 1974 s 68(1). The committee's power to make such distribution is discretionary: see *Escritt v Todmorden Co-operative Society* [1896] 1 QB 461. As to distribution of an estate under a will or on intestacy see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 531-558. No provision is made as to the position where there is no will which can be deemed a nomination and there are no persons who, under the general law of intestacy, would be entitled to receive the sum in question: see further PARA 2238 text and notes 6-7.

6 *Nelson v Royal London Friendly Society* (1896) Diprose & Gammon 544 at 550, DC.

7 *Symington's Executor v Galashiels Co-operative Store Co Ltd* (1894) 21 R 371, Ct of Sess.

8 Friendly Societies Act 1974 s 68(1) (amended by SI 1975/1137; and 1984/539). The amending orders (made under the Administration of Estates (Small Payments) Act 1965 s 6(1)(b)) apply respectively in relation to deaths occurring on or after 10 August 1975 (ie after the expiration of a period of one month beginning with the date on which the order came into force), and after 11 May 1984.

9 Friendly Societies Act 1974 s 68(3). See also PARA 2231 text and notes 10-11.

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### **2238. Payment on death of illegitimate member where there is no nomination.**

If an illegitimate<sup>1</sup> member of a registered society<sup>2</sup> or branch<sup>3</sup> dies without having made a nomination<sup>4</sup> subsisting at the time of his death, the society or branch may pay the sum of money which the member might have nominated to or among the persons who, in the committee's opinion, would have been entitled to it if the member had been legitimate<sup>5</sup>; and if there are no such persons<sup>6</sup>, the society or branch must deal with the money as the Treasury directs<sup>7</sup>.

1 See notes 5-6.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 Is a nomination of recipients of amounts due on the death of that member: see PARA 2230.

5 Friendly Societies Act 1974 s 68(2); and see note 6. As to the distribution of assets of an intestate see the Administration of Estates Act 1925 Pt IV (ss 45-52); and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 583 et seq. Since the enactment of the Family Law Reform Act 1987 ss 1, 18 (which provide that for the purposes of the Administration of Estates Act 1925 Pt IV a relationship between two persons must be construed without regard to whether the parents of either person were married, or to whether the parents of any person through whom the relationship is deduced were married: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 588), the question whether a deceased member of a society was illegitimate would not appear to affect the ascertainment of the people who would be entitled to receive the sum to which the deceased was entitled.

6 As a matter of construction, the provision of the Friendly Societies Act 1974 s 68(2) described in the text to note 7 refers only to the position where the deceased member was illegitimate; there is no comparable provision in s 68(1) as to the position where the deceased member was legitimate and there are no persons entitled to the sum in question. Under the general law of intestacy, if there is no relative in the prescribed degrees of kinship to whom property may pass, the property passes to the Crown as bona vacantia: see the Administration of Estates Act 1925 s 46; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 613. As to bona vacantia see also **CROWN PROPERTY** vol 12(1) (Reissue) PARA 235 et seq. Contrast the equivalent provisions relating to nominations made by members of an incorporated friendly society, in which no reference is made to the legitimacy of the member: see the Friendly Societies Act 1992 s 18(4), Sch 9 para 3; and PARA 2142 text and notes 17-18.

7 Friendly Societies Act 1974 s 68(2); and see note 6. This power applies only where the member's entitlement from the funds does not exceed the amount stated in PARA 2237 text to notes 8-9: see s 68(2), (3) (s 68(3) amended by SI 1975/1137; and SI 1984/539). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

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### **2239. Validity of payment.**

Payment on the death of a member, where there is no subsisting nomination<sup>1</sup>, by a registered society<sup>2</sup> or branch<sup>3</sup> under its statutory powers<sup>4</sup> to a person who appears to the committee of the

society or branch to be entitled is valid and effectual against any demand made upon the trustees, or the society or branch, by any other person<sup>5</sup>. The committee should consider all the circumstances of the case, including the amount and nature of the claim and the probability of the person claiming being the person lawfully entitled<sup>6</sup>. Payment to the widow of a member who left a will of which the society had received no notice would be valid<sup>7</sup>. The next of kin or personal representative has in a proper case the right to recover from the person who received the money<sup>8</sup>.

1    le a nomination of recipients of amounts due on the death of that member: see PARA 2230.

2    As to the meaning of 'registered society' see PARA 2082.

3    As to branches of societies see PARA 2091.

4    le under the Friendly Societies Act 1974 s 68: see PARAS 2237-2238.

5    Friendly Societies Act 1974 s 69(1). See *Nelson v Royal London Friendly Society* (1896) Diprose & Gammon 544, DC; and see also *Symington's Executor v Galashiels Co-operative Store Co Ltd* (1894) 21 R 371, Ct of Sess. As to the validity of a receipt given under the terms of a policy by a blood relation of the deceased see *Da Costa v Prudential Assurance Co* (1918) 88 LJB 884, CA; *O'Reilly v Prudential Assurance Co Ltd* [1934] Ch 519, CA.

6    *Nelson v Royal London Friendly Society* (1896) Diprose & Gammon 544 at 550, DC.

7    *Nelson v Royal London Friendly Society* (1896) Diprose & Gammon 544, DC.

8    Friendly Societies Act 1974 s 69(1).

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## **2240. Member domiciled in the Channel Islands or Isle of Man.**

Where a deceased who was domiciled in the Channel Islands or Isle of Man has failed to make a nomination when entitled so to do<sup>1</sup>, the sum payable must be paid to his legal representative according to the law of the island of domicile<sup>2</sup>.

1    As to the entitlement to make a nomination see PARA 2230.

2    Friendly Societies Act 1974 s 114. As to the application of the Act to the Channel Islands and the Isle of Man see PARA 2095. As to domicile see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 35 et seq.

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## **2241. Sums payable according to rules.**

Where, according to the rules, sums are payable to certain relatives of a deceased member, unless otherwise bequeathed by his will, the personal representative of a member who dies without disposing of such sums is not entitled to the money as assets for the payment of the deceased's debts<sup>1</sup>.

1 *Ashby v Costin* (1888) 21 QBD 401; *Re Davies, Davies v Davies* [1892] 3 Ch 63; and see also *Harris v United Kingdom Postal and Telegraph Service Benevolent Society* (1889) 87 LT Jo 272, where the claim of a nominee to money resulting from a death levy prevailed over that of the administrator of the deceased member. These cases concerned unregistered societies, but the decisions also appear to apply to registered societies.

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## **K. GROUP INSURANCE BUSINESS**

### **2242. Group insurance business.**

If the rules of a registered friendly society<sup>1</sup> expressly so direct, the society may carry on any group insurance business<sup>2</sup>. Group insurance business may be carried on in such a case whether or not members of the group scheme are, or are required by the society to be, members of the society<sup>3</sup>.

Where the rules of a society carrying on group insurance business expressly provide for it, any qualifying person<sup>4</sup> with whom the society contracts, or his nominee, may be given the rights of a member of the society, including the right to vote, in order to participate in the affairs of the society in the interests of the members of the group scheme with which he is concerned<sup>5</sup>. A person accorded these rights is not to be precluded by the rules from being a member of the society in his private capacity<sup>6</sup>.

1 As to the meaning of 'registered friendly society' see PARA 2082. As to the rules see PARA 2156 et seq.

2 Friendly Societies Act 1974 s 65A(1) (s 65A added by the Friendly Societies Act 1992 Sch 16 paras 1, 23). 'Group insurance business' means business (carried on in accordance with the society's rules and subject to any regulations made under the Friendly Societies Act 1992 s 11 (see PARA 2138)), which is of a description falling within Sch 2 head A or Sch 2 head B class 2 (see PARA 2096) and is carried on as the business of providing benefits, in pursuance of a contract with a qualifying person, for or in respect of the members of a group scheme: Friendly Societies Act 1974 s 65A(2) (as so added). 'Group scheme' means a scheme or other arrangement under which benefits are to be provided for or in respect of persons who are members of the scheme and who qualify for membership by virtue of being employees of a particular employer or being members of some other group of persons of a description specified in regulations made under the Friendly Societies Act 1992 s 11 (see PARA 2138): Friendly Societies Act 1974 s 65A(3) (as so added). 'Qualifying person' means a person who has established or is otherwise responsible for the operation of a group scheme or a trustee of such a scheme: s 65A(3) (as so added). 'Member' in relation to a group scheme includes any person for or in respect of whom benefits are to be provided under the scheme, whatever the terms in which such persons are described in the scheme: s 65A(3) (as so added).

The Treasury is empowered to make regulations under the Friendly Societies Act 1992 s 11(7) (see PARA 2138) which apply to registered friendly societies: Friendly Societies Act 1974 s 65A(8) (as so added; and amended by SI 2001/2617). The Friendly Societies (Group Schemes) Regulations 1993, SI 1993/59, made under the Friendly Societies Act 1992 s 11(7), prescribe for the purposes of the definition of 'group scheme' a club formed for the purposes of: (1) the promotion of lawful sports or games; and (2) the provision of facilities for recreation, including physical exercise, or other leisure-time occupation. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.



3 Friendly Societies Act 1974 s 65A(4) (as added: see note 2).

4 As to the meaning of 'qualifying person' see note 2.

5 Friendly Societies Act 1974 s 65A(5) (as added: see note 2). A person accorded the rights of a member under this provision is to be treated as a member for the purposes of any power conferred on the Financial Services Authority by the Friendly Societies Act 1974 or the Friendly Societies Act 1992 which is exercisable in the interests of the members: Friendly Societies Act 1974 s 65A(7) (as so added; and amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

6 Friendly Societies Act 1974 s 65A(6) (as added: see note 2).

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## ***L. VALIDATION OF EXISTING CONTRACTS***

### **2243. Validation of certain existing contracts entered into by friendly societies.**

Where a contract was entered into by a relevant friendly society<sup>1</sup> after 3 May 1966 and before 1 June 1984 in the course of life or endowment business<sup>2</sup>, then for the purpose of determining any question as to the compliance of the society with the relevant enactments<sup>3</sup> or as to the validity of the contract, there must be disregarded any term which is set out otherwise than in the registered rules<sup>4</sup> of the society or a policy document issued by the society to the member concerned<sup>5</sup>.

1 The Friendly Societies Act 1984 s 1 refers to 'an exempt new friendly society', which means a society: (1) which was registered after 3 May 1966 or was registered in the period of three months ending on that date but which at no time before that date carried on any life or endowment business; and (2) the rules of which, on 1 June 1984, provided that the only life or endowment business which the society might carry on was business of a description falling within the Income and Corporation Taxes Act 1970 s 333(2)(a)-(c) (repealed): Friendly Societies Act 1984 s 1(2). Section 1(5) provides that 'life or endowment business' has the meaning assigned to it by the Income and Corporation Taxes Act 1970 s 337(2) (repealed), which has been replaced by the Income and Corporation Taxes Act 1988 s 466(1) (see PARA 2366 note 2).

2 Friendly Societies Act 1984 s 1(1).

3 The 'relevant enactments' are: (1) the Friendly Societies Act 1974 s 7(3), (3A) (repealed with savings); (2) s 64 (repealed: see now the Income and Corporation Taxes Act 1988 s 464, Sch 15; and PARA 2371); and (3) any other enactment which was repealed by the Friendly Societies Act 1974 containing provisions similar to those listed in heads (1)-(2) above: Friendly Societies Act 1984 s 1(4). See **INCOME TAXATION** vol 23(2) (Reissue) PARA 1004.

4 As to the rules of a registered society see PARA 2156 et seq.

5 Friendly Societies Act 1984 s 1(3).

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## ***M. BENEFIT TERMS***

### **2244. Benefit terms.**

The terms on which a registered friendly society<sup>1</sup> provides any benefit must either be specified in its rules, or be determined in a manner specified in its rules<sup>2</sup>. If benefit terms are not specified in a society's rules, the society is required to make copies of them available free of charge to members of the society at each of its offices and must send copies of them, free of charge, to any member of the society who demands them<sup>3</sup>. Failure by the society to make such benefit terms available or, as the case may be, to send them to a member who demands them within seven days of the demand, is an offence<sup>4</sup>.

1 As to the meaning of 'registered friendly society' see PARA 2082.

2 Friendly Societies Act 1974 s 65B(1) (s 65B added by the Friendly Societies Act 1992 Sch 16 paras 1, 23). As to the rules see PARA 2156 et seq.

3 Friendly Societies Act 1974 s 65B(2) (as added: see note 2).

4 Friendly Societies Act 1974 s 65B(3) (as added: see note 2). Such an offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale: s 65B(3) (as so added). As to the standard scale see PARA 27 note 21.

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## ***N. DISPUTES***

### **(A) REGISTERED FRIENDLY SOCIETIES**

#### **2245. Determination of disputes in relation to registered friendly societies.**

The provisions of the Friendly Societies Act 1974 relating to the determination of disputes<sup>1</sup>, are substantially amended so as no longer to apply to registered friendly societies and branches thereof, but only to registered societies which are not friendly societies<sup>2</sup>.

Registered friendly societies and branches, in common with incorporated friendly societies, are governed in these respects by provisions of the Friendly Societies Act 1992, which are dealt with elsewhere in this title<sup>3</sup>.

1 Ie the Friendly Societies Act 1974 ss 76-80.

2 The provisions of the Friendly Societies Act 1974 s 76, s 80, and consequently those of ss 78, 79, no longer apply to registered societies which are friendly societies or branches thereof: s 76(3A) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 25(3)); Friendly Societies Act 1974 s 80(1A) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 28). Those provisions of the Friendly Societies Act 1974 accordingly remain of relevance only to registered societies which are not friendly societies: see PARAS 2246-2256.

3 See PARAS 2349-2351.

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## (B) REGISTERED SOCIETIES OTHER THAN FRIENDLY SOCIETIES

### *(a) Determining Disputes*

#### **2246. Provisions in rules for settling disputes.**

Every registered society<sup>1</sup> or branch<sup>2</sup> must provide by its rules for the manner in which disputes are to be settled<sup>3</sup>.

Every dispute involving a registered society or branch (other than a registered friendly society or branch<sup>4</sup>) falling within certain categories<sup>5</sup> must be decided in the manner directed by the rules of the society or branch<sup>6</sup>. This provision is imperative and ousts any other jurisdiction<sup>7</sup> unless the parties consent to that jurisdiction or unless no decision is made in a dispute, referred under the rules, within the time limited by the statute<sup>8</sup>.

If the parties so agree, a county court may hear and determine a dispute falling within one of the specified classes of dispute instead of its being determined under the rules<sup>9</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 9; and PARA 2156.

4 See PARA 2245.

5 See PARA 2248.

6 Friendly Societies Act 1974 s 76(1) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 25(2)).

7 See PARA 2249.

8 See PARA 2247. As to the effect of decisions see PARA 2251.

9 Friendly Societies Act 1974 s 76(3B) (added by the Friendly Societies Act 1992 Sch 16 para 25(3)). See PARA 2255.

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#### **2247. Time limit for decision.**

Where the rules of a registered society<sup>1</sup> or branch<sup>2</sup> (other than a registered friendly society or branch<sup>3</sup>) contain no directions as to disputes<sup>4</sup>, or where no decision is made within 40 days after application for a reference of a dispute under the rules of the society or branch<sup>5</sup>,

application may be made<sup>6</sup> to the county court, which may hear and determine the matter in dispute<sup>7</sup>. In the case of a society with branches, the 40 days do not begin to run until application has been made in succession to all the bodies entitled to determine disputes under the rules of the society or branch, but no rules may require a greater delay than three months between each successive determination<sup>8</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See PARA 2245.

4 Friendly Societies Act 1974 s 79(3). 'Dispute' means a dispute falling within s 76: s 79(4). See PARA 2248.

5 As to the requirement that the rules must provide for the manner in which disputes are to be dealt with see PARA 2246.

6 The application may be made by any person, society or branch such as is mentioned in the Friendly Societies Act 1974 s 76(1)(a)-(e) (see PARA 2248) who is a party to the dispute: s 79(1).

7 Friendly Societies Act 1974 s 79(1) (amended by the Friendly Societies Act 1992 Sch 22 Pt I). As to the determination of disputes by the county court see PARA 2255.

8 Friendly Societies Act 1974 s 79(2). See PARA 2255.

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## **2248. Classes of disputes.**

The classes of dispute<sup>1</sup> in relation to a registered society<sup>2</sup> or branch<sup>3</sup> (other than a registered friendly society or branch<sup>4</sup>) which must be decided in the manner directed by the rules are as follows:

- 693 (1) disputes between a member or person claiming through a member<sup>5</sup> or under the rules of a registered society or branch, and the society or branch or any of its officers<sup>6</sup>;
- 694 (2) disputes between any person aggrieved who has ceased to be a member of a registered society or branch, or any person claiming through such an aggrieved person, and the society or branch or any of its officers, where the dispute arose while he was a member or arises out of his previous relationship to the society or branch as a member<sup>7</sup>;
- 695 (3) disputes between any registered branch of a society and the society of which it is a registered branch<sup>8</sup>;
- 696 (4) disputes between an officer of any registered branch, and the society of which that registered branch is a branch<sup>9</sup>;
- 697 (5) disputes between two or more registered branches of any society, or any officers of them<sup>10</sup>.

The term 'dispute' includes any dispute arising on the question whether a member or person aggrieved is entitled to be, or to continue to be, a member or to be reinstated as a member<sup>11</sup>. It does not, however, include a dispute between the parties mentioned in heads (1) and (2) above

which has arisen as a result of and incidentally to a dispute between a member, or a person aggrieved who has ceased to be a member, of a registered society or branch and a person claiming through him or under the rules of the registered society or branch<sup>12</sup>.

1 See PARA 2246.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 See PARA 2245.

5 As to the meaning of 'person claiming through a member' see PARA 2185 note 4.

6 Friendly Societies Act 1974 s 76(1)(a). As to the meaning of 'officer' see PARA 2172 note 3. Such disputes must have relation to the membership of the member: *Morrison v Glover* (1849) 4 Exch 430.

Examples of disputes within this class are disputes relating to: the distribution of a fund in the hands of trustees of a friendly society (*Grinham v Card* (1852) 7 Exch 833; *Winter v Wilkinson* [1915] 1 Ch 317, CA); a claim for sick pay (*Re Hogg, ex p Parkin* (1898) 14 TLR 210; *Catt v Wood* [1910] AC 404, HL); a claim for death benefit (*R v Dublin Justices* (1891) 28 LR Ir 516; *Bushell v Smith* (1891) Times, 12 June, DC); the construction of rules (*Ex p Payne* (1849) 5 Dow & L 679; *Trott v Hughes* (1850) 16 LTOS 260; *Stone v Liverpool Marine Society* (1894) 63 LJQB 471, DC (affd 10 TLR 370, CA); *Cox v Hutchinson* [1910] 1 Ch 513); the propriety of convening a special meeting for the purpose of amending rules (*Hoey v M'Farlane* (1858) 4 CBNS 718); the conduct of an officer involving expulsion (*Glasgow District of Ancient Order of Foresters v Stevenson* (1899) 2 F 14, Ct of Sess); or the repayment of money deposited by a member (*Melrose v Adams* (1897) 24 R 483).

Examples of disputes not within this class are: disputes between a society and a member not in his capacity as member, such as a claim by a society against one of its officers for misappropriation of funds (*Sinden v Banks* (1861) 3 E & E 623); a dispute as to the title of the administrator of a deceased member to represent the member (*Symington's Executor v Galashiels Co-operative Store Co Ltd* (1894) 21 R 371, Ct of Sess; cf *Kelsall v Tyler* (1856) 11 Exch 513); and a dispute with a member as mortgagor or mortgagee (*Morrison v Glover* above; *R v Trafford* (1854) 24 LJMC 20; and see also *Carroll v Pilling* [1939] LJNCCR 148 (cited in note 11)).

7 Friendly Societies Act 1974 s 76(1)(b), (4)(b). As to the meaning of 'person aggrieved' see *Robinson v Currey* (1881) 7 QBD 465 at 475, CA; and see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

8 Friendly Societies Act 1974 s 76(1)(c) (s 76(1)(c)-(e) amended by the Friendly Societies Act 1992 Sch 16 paras 1, 25(2), Sch 22 Pt I). As to an extension of this provision see PARA 2250 text and note 6.

9 Friendly Societies Act 1974 s 76(1)(d) (as amended: see note 8).

10 Friendly Societies Act 1974 s 76(1)(e) (as amended: see note 8).

11 Friendly Societies Act 1974 s 76(4)(a). See also s 76(4)(b), (c) (see the text and notes 7, 12); and *Carroll v Pilling* [1939] LJNCCR 148 (honorary member of society engaged by officers to give entertainment; engagement cancelled and member expelled; claim by member for damages for breach of contract and wrongful expulsion; county court precluded from entertaining claim for wrongful expulsion, but not claim for breach of contract).

12 Friendly Societies Act 1974 s 76(4)(c) (added by the Friendly Societies Act 1992 Sch 16 para 25(4)).

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## 2249. Exclusion of courts' jurisdiction.

If a dispute involving a registered society<sup>1</sup> or branch<sup>2</sup> (other than a registered friendly society or branch<sup>3</sup>) comes within any of the classes which are required to be decided according to the

rules<sup>4</sup>, no tribunal other than that provided in the rules has jurisdiction to hear it in the first instance without the consent of all parties concerned<sup>5</sup>. The courts' jurisdiction is not ousted if the dispute has not been decided according to the rules<sup>6</sup>, or if the dispute concerns a matter which is alleged to be ultra vires the constitution of the society or branch<sup>7</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See PARA 2245.

4 See PARA 2248.

5 *Reeves v White* (1852) 17 QB 995; and see PARA 2248 note 6. See also *Dugan v Lodge of Ancient Shepherds Trustees* (1898) 33 ILT 14; *M'Caffrey v M'Mahon* (1901) 35 ILT 97; *Mulkern v Lord* (1879) 4 App Cas 182, HL (a building society case), where it was laid down that the burden of showing that the ordinary right of maintaining an action has been lost is on the party denying that right. As to reference of disputes by consent to the county court see PARA 2246.

6 Eg if a member is expelled on a charge different from the charge before the arbitrators, and of which he had not been given any notice as required by rules (*Andrews v Mitchell* [1905] AC 78 at 82, HL; cf *M'Kernan v Greenock Lodge of United Operative Masons' Association* (1873) 11 M 548, Ct of Sess), or if a member is expelled by resolution of committee passed without formulating any charge against him or hearing him (*Wayman v Perseverance Lodge of Cambridgeshire Order of United Brethren Friendly Society* [1917] 1 KB 677).

7 Eg a dispute as to whether certain rules are ultra vires (*McEllistram v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548, HL, decided under the Industrial and Provident Societies Act 1893 s 49 (repealed)); whether a resolution is ultra vires the rules (*Heard v Pickthorne* [1913] 3 KB 299, CA, decided under the National Insurance Act 1911 s 67 (repealed)); whether rules are illegal and ultra vires (*Re Quinn and National Catholic Benefit and Thrift Society's Arbitration* [1921] 2 Ch 318, decided under the National Insurance Act 1911 s 67 (repealed); and cf *Bundey v Seabrook* (1932) 48 TLR 361); and whether the rules have been violated on the election of an officer (*M'Gowan v City of Glasgow Friendly Society* 1913 SC 991, Ct of Sess).

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## **2250. Disputes between societies.**

Where a registered society<sup>1</sup> or branch<sup>2</sup> (other than a registered friendly society or branch<sup>3</sup>) has made or agreed to make advances out of its surplus funds<sup>4</sup> to another registered society or branch, and the lender is thereby empowered by the borrower's rules to take part in the government or control of the borrower<sup>5</sup>, any dispute between the lender and the borrower relating to the advance or agreement or to the rights of the lender or one of its officers under the borrower's rules must be decided in the manner directed by the borrower's rules, as if the borrower were a branch of the lender<sup>6</sup>. The bringing of legal proceedings for the determination of the dispute is not, however, prohibited, unless before the commencement of the proceedings application has been made for a reference under the borrower's rules; and any such proceedings may be brought in the county court, whether or not that court apart from this special authorisation has jurisdiction to entertain them<sup>7</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 These provisions do not apply where the lender is a registered friendly society or a branch of such a society: Friendly Societies Act 1974 s 80(1A) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 28). See also PARA 2245.

4 As to loans of surplus funds see PARA 2198.

5 As to the lender's rights see PARA 2199. As to the rules see PARA 2156 et seq.

6 Friendly Societies Act 1974 s 80(1) (amended by the Friendly Societies Act 1992 Sch 16 para 28), applying the Friendly Societies Act 1974 ss 76, 78, 79 (see PARAS 2246-2248). As to the meaning of 'dispute' see PARA 2248. As to disputes between a society and its branch see PARA 2248 text and note 8. In the case of disputes between a borrowing society or branch and a lending society or branch 'rules of the society or branch' means the rules of the borrowing society or branch: see s 80(2)(a).

7 Friendly Societies Act 1974 s 80(2)(b).

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## 2251. Effect of decisions.

A decision given in accordance with the provisions in the rules of a registered society<sup>1</sup> or branch<sup>2</sup> (other than a registered friendly society or branch<sup>3</sup>) as to disputes is binding and conclusive on all parties, and cannot be appealed from, restrained by injunction or removed into any court of law<sup>4</sup>. The decision is binding where there is a want of jurisdiction or other irregularity in its making, if the parties have acquiesced in the want of jurisdiction or irregularity<sup>5</sup>. An application for the enforcement of such a decision may be made to the county court<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 See PARA 2245.

4 Friendly Societies Act 1974 s 76(1). However, for the purposes of the Tribunals and Inquiries Act 1992 s 12, this provision is deemed to have been enacted before 1 August 1958, and consequently does not prevent the removal of the proceedings into the High Court by quashing order or prejudice the High Court's power to make a mandatory order: see the Friendly Societies Act 1974 s 76(1) (amended by the Tribunals and Inquiries Act 1992 Sch 3 para 10); the Tribunals and Inquiries Act 1992 s 12(1); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 21; and **JUDICIAL REVIEW** vol 61 (2010) PARA 688. As to cases decided before 1958 see eg *Re Gollings and Tradesmen's Friendly Society, Peterborough* (1891) 64 LT 775 (appeal to High Court to set aside arbitrators' decision dismissed); *Crichton v Dalry Myrtle Lodge of Free Gardeners' Friendly Society* (1904) 6 F 398, Ct of Sess; *Catt v Wood* [1910] AC 404, HL.

5 *R v Evans* (1854) 3 E & B 363 (acquiescence in irregular appointment of arbitrators); *Pike v Carter* (1825) 10 Moore CP 376; *Re West London Philanthropic Burial Society* (1869) 33 JP 614 (acquiescence in jurisdiction of justices).

6 Friendly Societies Act 1974 s 76(2).

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*(b) Reference to Arbitration*

**2252. Arbitration.**

Where the rules of a registered society<sup>1</sup> or branch<sup>2</sup> direct disputes to be referred to arbitration<sup>3</sup>, the arbitration must be conducted according to the provisions of the rules in all matters of substance<sup>4</sup>. Where the rules require arbitrators to be appointed by the society and the society neglects to appoint them, recourse may be made to the county court after 40 days from the application for a reference<sup>5</sup>, or the society may be compelled to appoint arbitrators by a mandatory order<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 As to references to arbitration see further PARAS 2246, 2248. See also *Willis v Wells* [1892] 2 QB 225; *Dugan v Lodge of Ancient Shepherds Trustees* (1898) 33 ILT 14.

4 *Andrews v Mitchell* [1905] AC 78, HL. As to the principles applicable to arbitration generally see **ARBITRATION** vol 2 (2008) PARA 1201 et seq.

5 See PARAS 2247 text and note 7, 2255 text and note 8.

6 See *Norton v Counties Conservative Permanent Benefit Building Society* [1895] 1 QB 246, CA; *Ex p Young* (1896) 40 Sol Jo 338. As to appointing an arbitrator in a dispute in regard to a deposit in a savings bank see *R v Witham Savings Bank* (1834) 1 Ad & El 321. As to the appointment of arbitrators under the Arbitration Act 1996 see PARA 2253; and **ARBITRATION** vol 2 (2008) PARA 1226 et seq. See also *Jessop v Huddersfield Industrial Society* (1899) 80 LT 598. As to mandatory orders see **JUDICIAL REVIEW** vol 61 (2010) PARA 703 et seq.

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**2253. Application of the Arbitration Act 1996.**

The provisions of the Arbitration Act 1996<sup>1</sup> apply generally to arbitrations where the reference is made under the rules of a registered society<sup>2</sup> or branch<sup>3</sup> (other than a registered friendly society or branch<sup>4</sup>), and the arbitrator, arbiter or umpire to whom a dispute is so referred may, at the request of either party, state a case on any question of law arising in the dispute for the opinion of the High Court<sup>5</sup>.

1 See **ARBITRATION** vol 2 (2008) PARA 1209 et seq.

2 As to the meaning of 'registered society' see PARA 2082. As to the rules see PARA 2156 et seq.

3 As to branches of societies see PARA 2091.

4 See PARA 2245.



5 Friendly Societies Act 1974 s 78(1) (substituted by the Arbitration Act 1996 Sch 3 para 29).

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## **2254. Hearing and enforcement of award.**

Arbitrators may decline to hear counsel<sup>1</sup>. The rules of evidence must be observed<sup>2</sup>.

Application for the enforcement of an award made in accordance with the rules of a registered society<sup>3</sup> or branch<sup>4</sup> (other than a registered friendly society or branch<sup>5</sup>) may be made to the county court<sup>6</sup>, but a member may, if the rules so provide, be suspended by the society for non-compliance with an award without any application to the county court<sup>7</sup>.

1 *Re MacQueen and Nottingham Caledonian Society* (1861) 9 CBNS 793; and see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1116.

2 *Re Enoch and Zaretzky, Bock & Co* [1910] 1 KB 327, CA; and see **ARBITRATION** vol 2 (2008) PARAS 1243, 1245; **CIVIL PROCEDURE** vol 11 (2009) PARA 753. As to the conduct of the arbitration see generally **ARBITRATION** vol 2 (2008) PARA 1243 et seq.

3 As to the meaning of 'registered society' see PARA 2082.

4 As to branches of societies see PARA 2091.

5 See PARA 2245.

6 Friendly Societies Act 1974 s 76(2).

7 *Catt v Wood* [1910] AC 404, HL.

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### *(c) Determination by County Court*

## **2255. Jurisdiction of the county court.**

The county court has jurisdiction<sup>1</sup>, in relation to a dispute involving a registered society<sup>2</sup> or branch<sup>3</sup> (other than a registered friendly society or branch<sup>4</sup>), to hear and decide a dispute:

- 698 (1) where it is expressly directed in the rules<sup>5</sup>;
- 699 (2) where, in relation to a dispute which would otherwise fall to be determined under the rules, the parties agree that it is instead to be determined by the county court<sup>6</sup>;
- 700 (3) where the rules contain no direction as to disputes<sup>7</sup>;

- 701 (4) where no decision is made on a dispute within 40 days after application to the society or branch for a reference under its rules<sup>8</sup>;
- 702 (5) in certain circumstances where the dispute is between a lending society or branch and a borrowing society or branch<sup>9</sup>; and
- 703 (6) if the rules contain directions by virtue of which a dispute would fall to be determined by the Financial Services Authority<sup>10</sup>.

The county court has no jurisdiction in the first instance to hear and determine a dispute unless the application falls within one of the above cases<sup>11</sup>.

A county court to which a dispute has been referred under the rules may, but cannot be compelled to, state a case for the opinion of the High Court on a point of law<sup>12</sup>.

Proceedings commenced in the county court against a registered society or branch, where the rules contain no direction as to disputes<sup>13</sup> or where no decision is made on a dispute within the prescribed time<sup>14</sup>, may, in a proper case, be removed on application for judicial review by way of quashing order to the High Court<sup>15</sup>, as may a reference of a dispute to the county court under the rules of a society<sup>16</sup>.

1 The society or branch or the trustees or other officers appointed to be sued on its behalf may be made respondents: see PARA 2290.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 See PARA 2245.

5 See the Friendly Societies Act 1974 s 76(1) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 25, Sch 22 Pt I); and PARA 2246.

6 See the Friendly Societies Act 1974 s 76(3B) (added by the Friendly Societies Act 1992 Sch 16 para 25); and PARA 2246 text and note 9.

7 See the Friendly Societies Act 1974 s 79(1), (3) (s 79(1) amended by the Friendly Societies Act 1992 Sch 22 Pt I); and PARA 2247.

8 See the Friendly Societies Act 1974 s 79(1) (as amended: see note 7); and PARA 2247. If the judge of a county court decides as arbitrator, under s 76(1) or s 76(3B) (see the text and note 6), his decision is conclusive and there is no appeal (but see PARA 2251 text and note 4); but on an application to the county court under s 79, an appeal lies in the ordinary way to the Court of Appeal (see the County Courts Act 1984 s 77; and *Wilkinson v Jagger* (1887) 20 QBD 423; cf *R (M'Aneny) v Tyrone County Court Judge* (1910) 44 ILT 147). As to when the period of 40 days commences to run in the case of a branch see PARA 2247; and see *R v Catley* (1887) 19 QBD 491. For further cases on the jurisdiction of the county court (decided under the Friendly Societies Act 1896 s 68(6) (repealed), which has been replaced by the Friendly Societies Act 1974 s 79)) see eg *R v Shropshire County Court Judge, Re Thomas* (1887) 3 TLR 526; *Ex p Wooldridge* (1862) 1 B & S 844. The jurisdiction is not taken away by an alteration of rules made after the right to apply to the county court has arisen: *Ritson v Dobson* (1911) 104 LT 808. As to the right of a dissatisfied member to apply to the county court on an amalgamation or dissolution see PARA 2267.

9 See the Friendly Societies Act 1974 s 80(2)(b); and PARA 2250.

10 Friendly Societies Act 1974 s 76(3C) (added by SI 2001/2617). In such circumstances the dispute must be referred to the county court: Friendly Societies Act 1974 s 76(3C) (as so added). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

11 *Re Hogg, ex p Parkin* (1898) 14 TLR 210. As to the granting of a prohibiting order where a county court acts in excess of its jurisdiction see **COURTS** vol 10 (Reissue) PARA 621. For a collection of cases in which judges of county courts have been prohibited from proceeding in cases not included in their jurisdiction to determine, and of county court cases in which claimants have been nonsuited through want of jurisdiction, see Diprose & Gammon. As to prohibiting orders generally see **JUDICIAL REVIEW** vol 61 (2010) PARA 693 et seq.

12 See the Friendly Societies Act 1974 s 78(1) (substituted by the Arbitration Act 1996 Sch 3 para 29); and PARA 2253.

13 See the text and note 7.

14 See the text and note 8.

15 See *Re Royal Liver Friendly Society* (1887) 35 ChD 332; *Tiplady v Royal Liver Friendly Society* (1887) 3 TLR 697; and **COURTS** vol 10 (Reissue) PARA 621. The High Court would decline to entertain the application for a quashing order if it were made for improper reasons, eg for purposes of procrastination: *Tiplady v Royal Liver Friendly Society*. Presumably disputes between lending and borrowing societies (see the text and note 9) could similarly be removed to the High Court, but it is conceived that in view of the unlimited jurisdiction conferred on the county court in these disputes an application for a quashing order would rarely be granted. As to quashing orders generally see **JUDICIAL REVIEW** vol 61 (2010) PARA 693 et seq.

16 See PARA 2251 text and note 4.

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## **2256. Jurisdiction on enforcement of award.**

In proceedings for enforcing an award<sup>1</sup> on a dispute involving a registered society<sup>2</sup> or branch<sup>3</sup> (other than a registered friendly society or branch<sup>4</sup>), the county court is the proper tribunal to determine, in the first instance, whether the dispute should have been decided in accordance with the rules of the society<sup>5</sup>. The High Court may overrule a decision of the county court if it is shown that there is an error on the face of the award or that it has been corruptly obtained<sup>6</sup>. It will not grant a prohibiting order before the matter has come before the county court<sup>7</sup>.

1 See PARA 2254.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 See PARA 2245.

5 *Skipton Industrial Co-operative Society Ltd v Prince* (1864) 33 LJQB 323.

6 *Armitage v Walker* (1855) 2 K & J 211; *Re Gollings and Tradesmen's Friendly Society, Peterborough* (1891) 64 LT 775; *Gall v Loyal Glenbogie Lodge of Oddfellows' Friendly Society* (1900) 2 F 1187, Ct of Sess; *Collins v Barrowfield United Oddfellows* 1915 SC 190, Ct of Sess. Note, however, that the High Court does not have power to set aside or remit an award on an arbitration on the ground of errors of fact or law on the face of the award: see the Arbitration Act 1996 s 81(2); and **ARBITRATION** vol 2 (2008) PARA 1210.

7 *Skipton Industrial Co-operative Society Ltd v Prince* (1864) 33 LJQB 323.

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## ***O. CANCELLATION OF REGISTRATION***

### **2257. Voluntary cancellation of registration.**

At the request of a society, the Financial Services Authority<sup>1</sup> may, if it thinks fit<sup>2</sup>, by notice in writing<sup>3</sup> cancel its registration<sup>4</sup>. Notice of the cancellation must forthwith be published in the London Gazette<sup>5</sup> and in a newspaper in general circulation in the neighbourhood of the society's registered office<sup>6</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 The granting or refusal of the request is discretionary. There should be some valid reason for the request, eg withdrawal of all members and no funds.

3 As to references in statutes to writing see the Interpretation Act 1978 s 5, Sch 1; and **STATUTES** vol 44(1) (Reissue) PARA 1388.

4 Friendly Societies Act 1974 s 91(1)(a) (s 91(1) substituted, and s 91(1A) added, by SI 2001/2617). The request must be evidenced in such way as the Authority may direct: Friendly Societies Act 1974 s 91(1A) (as so added).

5 If the registered office of the society or branch is situated in Scotland, publication must be in the Edinburgh Gazette; or, if it is in Northern Ireland, in the Belfast Gazette: see the Friendly Societies Act 1974 ss 91(6), 111(1).

6 Friendly Societies Act 1974 s 91(6).

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### **2258. Compulsory cancellation or suspension of registration.**

If the Financial Services Authority<sup>1</sup> is satisfied that: (1) an acknowledgment of registration<sup>2</sup> has been obtained by fraud or mistake<sup>3</sup>; (2) a society exists for an unlawful purpose<sup>4</sup>; (3) a society has wilfully and after notice from the Authority violated any of the provisions of the Friendly Societies Act 1974<sup>5</sup>; (4) a society has ceased to exist<sup>6</sup>; or (5) in the case of a society carrying out certain types of insurance business<sup>7</sup>, the principal place of business of the society is outside the British Islands<sup>8</sup>, it may by notice in writing cancel the society's registration<sup>9</sup>. In any case falling within heads (1) to (4) above the Authority may by notice in writing suspend the registration of the society for up to three months, with power from time to time to renew such suspension for a similar period<sup>10</sup>. The Authority must give the society not less than two months' previous written notice briefly specifying the ground of the proposed cancellation or suspension<sup>11</sup>. If, before the expiry of that period, a society duly lodges an appeal<sup>12</sup>, its registration may not be cancelled before the date of determination or abandonment of the appeal<sup>13</sup>, but the Authority may by notice in writing suspend the society's registration from the expiry of that period until the date of determination or abandonment of the appeal<sup>14</sup>.

The registration of a society must be cancelled if it transfers all its engagements to another registered society or to a company or industrial and provident society<sup>15</sup>, or becomes converted into a company<sup>16</sup> or into a branch of another registered society or branch<sup>17</sup>, or becomes registered as an industrial and provident society<sup>18</sup>.

Where the registration of a society has been cancelled or suspended, notice must forthwith be published in the London Gazette<sup>19</sup> and in a newspaper in general circulation in the neighbourhood of the society's registered office<sup>20</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 Under the Friendly Societies Act 1992 s 93(1), no society may be registered under the Friendly Societies Act 1974: see PARA 2083 note 3. The Friendly Societies Act 1974 s 15, which provided for acknowledgments of registration, is replaced by s 15A, which provides for acknowledgments of registration of branches of existing societies, which may still be registered (see PARA 2159): Friendly Societies Act 1992 s 93(3). This does not affect the operation of the Friendly Societies Act 1974 s 15 in relation to acknowledgments previously issued: Friendly Societies Act 1992 s 95, Sch 16 para 6(3). See further PARAS 2149, 2152.

3 Friendly Societies Act 1974 s 91(1)(b)(i) (s 91(1) substituted by SI 2001/2617).

4 Friendly Societies Act 1974 s 91(1)(b)(ii) (as substituted: see note 3). The Friendly Societies Act 1896 s 77(1) (repealed), from which this provision is derived, originally referred to an 'illegal purpose'. It was held that 'illegal' meant unlawful, and not illegal as being ultra vires the society: *Re Middle Age Pension Friendly Society* [1915] 1 KB 432, DC.

5 Friendly Societies Act 1974 s 91(1)(b)(iii) (as substituted: see note 3).

6 Friendly Societies Act 1974 s 91(1)(b)(iv) (as substituted: see note 3).

7 Is a society to which the Friendly Societies Act 1992 s 37(2) or (3) applies: see PARA 2112 note 15.

8 Friendly Societies Act 1974 s 91(1)(b)(v) (as substituted: see note 3). 'British Islands' means the United Kingdom, the Channel Islands and the Isle of Man: Interpretation Act 1978 s 5, Sch 1. As to the meaning of 'United Kingdom' see PARA 2 note 3.

9 Friendly Societies Act 1974 s 91(1) (as substituted: see note 3).

10 Friendly Societies Act 1974 s 91(2) (amended by SI 2001/2617).

11 Friendly Societies Act 1974 s 91(3) (amended by SI 2001/2617). This requirement does not apply where a society has itself requested cancellation (see PARA 2257), or the cancellation is under the Friendly Societies Act 1974 s 82(5), s 84(3) or s 85(4) (see PARAS 2220, 2225, 2228) or under any provision of the Friendly Societies Act 1992: Friendly Societies Act 1974 s 91(4) (amended by the Friendly Societies Act 1992 Sch 16 para 37).

12 Is an appeal under the Friendly Societies Act 1974 s 92: see PARA 2259.

13 Friendly Societies Act 1974 s 91(4) (as amended: see note 11).

14 Friendly Societies Act 1974 s 91(5) (amended by SI 2001/2617).

15 See the Friendly Societies Act 1974 s 82(5), as read with s 82(2), (3) (see PARA 2220). By virtue of s 82(8), these provisions do not apply to registered friendly societies: see PARA 2220.

16 See the Friendly Societies Act 1974 s 84(3); and PARA 2223 et seq. This provision is repealed in relation to registered friendly societies.

17 See the Friendly Societies Act 1974 s 85(4); and PARAS 2227-2228.

18 See the Friendly Societies Act 1974 s 84A(6); and PARA 2226. As to registration as an industrial and provident society see PARA 2410 et seq.

19 If the registered office of the society or branch is situated in Scotland, publication must be in the Edinburgh Gazette; or, if it is in Northern Ireland, in the Belfast Gazette: see the Friendly Societies Act 1974 ss 91(6), 111(1).

20 Friendly Societies Act 1974 s 91(6).

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### **2259. Appeals against cancellation and suspension of registration.**

A society may appeal to the High Court<sup>1</sup> against the cancellation of its registration<sup>2</sup>, provided the appeal is lodged before the expiry of the period of notice required to be given by the Financial Services Authority<sup>3</sup>. A society may similarly appeal to the High Court against a renewal of the suspension of its registration<sup>4</sup>, so far as the renewal provides for the suspension to continue more than six months from the original date of suspension<sup>5</sup>.

1 Friendly Societies Act 1974 s 92(2) (amended by SI 2001/2617).

2 Friendly Societies Act 1974 s 92(1)(a). As to compulsory cancellation of registration see PARA 2258. No appeal lies where registration is cancelled on the grounds mentioned in s 91(4) (circumstances where prior notice of cancellation is not required: see PARA 2258 note 11): s 92(1)(a).

3 Friendly Societies Act 1974 s 92(1)(a). As to the period of notice see s 91(3); and PARA 2258 text and note 11. As to the effect of lodging an appeal within that period see PARA 2258 text and notes 12-14. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

4 See the Friendly Societies Act 1974 s 91(2); and PARA 2258 text and note 10.

5 Friendly Societies Act 1974 s 92(1)(b).

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### **2260. Effect of cancellation and suspension.**

Where a society's registration has been cancelled<sup>1</sup> or suspended<sup>2</sup> it is not entitled to any privileges of a registered society under the Friendly Societies Act 1974, either as from the date of cancellation or between the date of suspension and the end of the suspension period or its renewal<sup>3</sup>. This provision is without prejudice to any liability actually incurred by the society, which may be enforced against it as if the cancellation or suspension had not taken place<sup>4</sup>. As a result of the cancellation or suspension the society is treated as unregistered<sup>5</sup>.

1 ie under the Friendly Societies Act 1974 s 91(1): see PARAS 2257-2258.

2 ie under the Friendly Societies Act 1974 s 91(2) or (5): see PARA 2258 text and notes 10, 14.

3 Friendly Societies Act 1974 s 91(7). As to renewal of suspension see PARA 2258 text and note 10. As to appeal against renewal see s 92; and PARA 2259.

4 Friendly Societies Act 1974 s 91(7).

5 As to unregistered societies see PARAS 2098-2104.

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## **P. DISSOLUTION OF SOCIETIES AND BRANCHES**

### **(A) IN GENERAL**

#### **2261. Methods of dissolution.**

Registered societies<sup>1</sup> and branches<sup>2</sup> may be terminated or dissolved: (1) upon the happening of any event declared by the rules to be the termination of the society or branch<sup>3</sup>; (2) by instrument of dissolution<sup>4</sup>; or (3) by award of the Financial Services Authority<sup>5</sup>.

A society which has branches may not be dissolved except with the consent of the central body<sup>6</sup>. A registered society which has more than seven members may also be wound up by the court as an unregistered company<sup>7</sup>.

Where the Authority has appointed one or more persons to investigate and report to it on the state and conduct of the affairs of a friendly society or branch<sup>8</sup>, and it appears to the Authority on receiving the report that it is in the interests of the members or of the public that the society or branch<sup>9</sup> should be wound up, the Authority may, unless the society or branch is already being wound up by the court, present a petition to the High Court that, if the court thinks it just and equitable, the society or branch should be wound up<sup>10</sup> by the court<sup>11</sup>.

1 As to the meaning of 'registered society' see PARA 2082. As to the dissolution of unregistered societies see PARA 2103.

2 As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 93(1)(a). As to the rules see PARA 2156 et seq. A registered society is not necessarily permanent; if it is meant to be terminable the rules should provide for the event on which it is to terminate.

4 Friendly Societies Act 1974 s 93(1)(b) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 38). See PARAS 2263-2270. In the case of a registered friendly society or branch, or registered cattle insurance society or branch, the rules are required to make provision as to voluntary dissolution: see s 7(2), Sch 2 para 14; and PARA 2156. As to the consents required for an instrument of dissolution see PARA 2263. Any method of dissolution other than by instrument would probably not be practicable as the instrument provides for the way in which the funds are to be divided or appropriated: see PARA 2264. A society cannot by its rules contract itself out of the powers of dissolution given by statute: *Walker v London Tramways Co* (1879) 12 ChD 705; and see also *Ellis v Dadson* (1891) 60 LJCh 353.

5 Friendly Societies Act 1974 ss 93(1)(c) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 38; and SI 2001/2617). Such award is made under the Friendly Societies Act 1974 s 95(3) or s 95A(1): see PARAS 2272, 2275. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

6 Friendly Societies Act 1974 s 93(2).

7 See the Insolvency Act 1986 ss 220, 221; *Re Victoria Society, Knottingley* [1913] 1 Ch 167; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1147 et seq.

8 Ie where it has appointed an inspector under the Friendly Societies Act 1992 s 65: see PARA 2319.

9 Friendly Societies Act 1974 s 87(2) (s 87 substituted by the Friendly Societies Act 1992 Sch 16 para 34).

10 le in accordance with the Insolvency Act 1986: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 438 et seq.

11 Friendly Societies Act 1974 s 87(1) (as substituted (see note 9); and amended by SI 2001/2617).

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## **2262. Defunct society's funds.**

The remaining fund of a registered society which is not a charity, and which becomes defunct through having no members, belongs to the Crown as bona vacantia<sup>1</sup>. If it is a charity, the remaining fund will be applied on the principle of cy-pres<sup>2</sup>.

1 *Cunnack v Edwards* [1896] 2 Ch 679, CA; *Braithwaite v A-G* [1909] 1 Ch 510; *Sharp v Dunbar Sailors' Society* (1903) 10 SLT 572; and see *Re Ruddington Land* [1909] 1 Ch 701. As to bona vacantia see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 235 et seq.

2 *Spiller v Maude* (1881) 32 ChD 158n; *Re Buck, Bruty v Mackey* [1896] 2 Ch 727; and see **CHARITIES** vol 8 (2010) PARA 208 et seq.

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## **(B) DISSOLUTION BY INSTRUMENT**

### **2263. Consent to instrument of dissolution.**

A registered society<sup>1</sup> or branch<sup>2</sup> may be dissolved by an instrument of dissolution<sup>3</sup> approved by a special resolution of the society or branch<sup>4</sup>. In the case of a branch of a friendly society the dissolution must be with the consent of the central body and in accordance with the general rules of the society<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 As to the instrument of dissolution see the Friendly Societies Act 1974 s 94(1); and PARA 2264.

4 Friendly Societies Act 1974 s 93(1)(b) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 38(a)). As to special resolutions see PARAS 2218, 2306.

5 Friendly Societies Act 1974 s 93(1)(b); *Kelly v Peacock* (1917) 55 SLR 65. As to the rules see PARA 2156 et seq.



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## **2264. Instrument of dissolution.**

The instrument of dissolution of a registered society<sup>1</sup> or branch<sup>2</sup> must<sup>3</sup> specify:

- 704 (1) the liabilities and assets in detail<sup>4</sup>;
- 705 (2) the number of members and the nature of their interests<sup>5</sup>;
- 706 (3) the claims of creditors, if any, and the provision to be made for their payment<sup>6</sup>; and
- 707 (4) the intended appropriation or division of the funds and property, unless the appropriation or division is stated in the instrument to be left to the award of the Financial Services Authority<sup>7</sup>.

In the case of a registered friendly society or branch the instrument must not direct or contain any provision for a division or appropriation of the funds, or any part of them, otherwise than for the purpose of carrying into effect the objects of the society or branch as declared in its rules, unless the claim of every member or person claiming any relief, annuity or other benefit from the funds is first duly satisfied or adequate provisions are made for satisfying those claims<sup>8</sup>.

The instrument must be registered with all alterations in the same manner as an amendment of the rules, and is binding on all the members<sup>9</sup>. The instrument must be sent to the Authority accompanied by a statutory declaration by one of the trustees<sup>10</sup> or by three members and the secretary of the society or branch that the statutory provisions have been complied with<sup>11</sup>. The instrument is exempt from charge for the purposes of stamp duty land tax<sup>12</sup>.

The instrument of dissolution may be altered, subject to the same consents<sup>13</sup> as are required for the dissolution<sup>14</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 The provisions of the Friendly Societies Act 1974 s 94 (see the text and notes 4-14) apply where a registered society or branch is dissolved under s 93(1)(b) (see PARA 2261): s 94(1).

4 Friendly Societies Act 1974 s 94(2)(a).

5 Friendly Societies Act 1974 s 94(2)(b).

6 Friendly Societies Act 1974 s 94(2)(c).

7 Friendly Societies Act 1974 s 94(2)(d) (amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

8 Friendly Societies Act 1974 s 94(5). As to the rules see PARA 2156 et seq. As to the rights of persons entitled to certain retirement annuities see PARA 2266. As to the right of a dissatisfied member or other person to apply to the county court see PARA 2267.

9 Friendly Societies Act 1974 s 94(6). As to the registration of an amendment of the rules see PARAS 2162-2164.

10 As to the trustees see PARAS 2179-2182.

11 Friendly Societies Act 1974 s 94(4) (amended by SI 2001/2617). As to the requirement to advertise the dissolution see PARA 2265.

12 See the Friendly Societies Act 1974 s 105A; and PARA 2383.

13 The Friendly Societies Act 1974 s 94(3) refers to 'the like consents as are required by section 93(1)(b) . . . testified in the same manner'. Save in the case of a branch of a registered friendly society, the only consent now required by s 93(1)(b) (see PARA 2263 note 4) is that referred to in PARA 2263 text and note 5; it is not clear whether s 94(3) can be construed as generally requiring an amendment to an instrument of dissolution to be subject to approval by special resolution, which s 93(1)(b) now provides (see PARA 2263 text and note 4).

14 Friendly Societies Act 1974 s 94(3). See note 13. As to the registration of alterations see s 94(6); and the text to note 9.

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## **2265. Advertisement of dissolution.**

Notice of dissolution of a registered society<sup>1</sup> or branch<sup>2</sup> is advertised by the Financial Services Authority<sup>3</sup> in the London Gazette<sup>4</sup> and in some newspaper in general circulation in the neighbourhood of the registered office of the society or branch<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

4 If the registered office of the society or branch is situated in Scotland, publication must be in the Edinburgh Gazette; or, if it is in Northern Ireland, in the Belfast Gazette: see the Friendly Societies Act 1974 ss 94(7), 111(1).

5 Friendly Societies Act 1974 s 94(7) (amended by SI 2001/2617; and SI 2001/3649).

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## **2266. Rights of persons entitled to benefit of retirement annuities.**

If on the dissolution of a registered friendly society<sup>1</sup> or branch<sup>2</sup>, any approved annuity<sup>3</sup> ceases to be paid or any contract for the payment of such an annuity fails in whole or in part, no payment may be made in respect of the annuity out of the funds of the society or branch to the annuitant or other person entitled to the benefit of the contract, but any sum which would otherwise have been paid to him must be applied in purchasing for the benefit of the annuitant an annuity, for the same term and subject to the same conditions against surrender, commutation or assignment, from a person lawfully carrying on in the United Kingdom a business of granting annuities on human life<sup>4</sup>.

- 1 As to the meaning of 'registered friendly society' see PARA 2082.
- 2 As to branches of societies see PARA 2091.
- 3 Is an 'approved annuity' as defined in the Income and Corporation Taxes Act 1988 s 620(9) (repealed), under which the definition is extended to include any annuity or lump sum under personal pension arrangements (see Pt XIV Ch IV (ss 630-655) (repealed)): see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 692.
- 4 Friendly Societies Act 1974 s 93(4) (amended by the Income and Corporation Taxes Act 1988 Sch 29 para 32).

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## **2267. Application to the county court.**

Where an instrument of dissolution of a registered friendly society<sup>1</sup> or branch<sup>2</sup> has been registered<sup>3</sup>, any member or any person claiming any relief, annuity or other benefit from the funds who is dissatisfied with the provision made for satisfying his claim, may apply to the county court for the district within which the chief or any other place of business of the society or branch is situated<sup>4</sup>. The application must be made within three months from the date of the London Gazette in which notice of the dissolution is advertised<sup>5</sup>. The county court has the same powers in the matter as it has in the settlement of disputes<sup>6</sup>.

- 1 As to the meaning of 'registered friendly society' see PARA 2082.
- 2 As to branches of societies see PARA 2091.
- 3 As to the instrument of dissolution see PARA 2264.
- 4 Friendly Societies Act 1974 s 93(3) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 38(c)). As to applications to the county court see **COURTS** vol 10 (Reissue) PARA 701 et seq.
- 5 Friendly Societies Act 1974 ss 93(3), 94(7). As to the advertisement of dissolution see PARA 2265. As to the right to commence proceedings to set aside the dissolution within the same time limit see PARA 2268.
- 6 Friendly Societies Act 1974 s 93(3). As to the settlement of disputes see PARA 2349 et seq.

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## **2268. Proceedings to set aside dissolution.**

Within three months from the date of the London Gazette in which the notice of the dissolution of a registered society<sup>1</sup> or branch<sup>2</sup> is advertised<sup>3</sup>, a member or other person interested in or

having a claim on the funds, or a trustee<sup>4</sup>, may commence proceedings to set aside the dissolution<sup>5</sup>. The dissolution may accordingly be set aside<sup>6</sup>. Notice of the proceedings must be given to the Financial Services Authority<sup>7</sup> not later than the expiry of: (1) the period of seven days after the commencement of the proceedings; or (2) the period of three months referred to above, whichever period first expires<sup>8</sup>. Where an order is made setting aside the dissolution of a society or branch, the society or branch must give notice of the order to the Authority within seven days after the order is made<sup>9</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 As to the advertisement of dissolution see PARA 2265.

4 As to the power of trustees to commence proceedings see *Rudd v James* [1896] 2 Ch 554 at 561, CA. As to trustees of registered societies see PARAS 2179-2182.

5 Friendly Societies Act 1974 s 94(7)(a).

6 See the Friendly Societies Act 1974 s 94(7)(b).

7 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

8 Friendly Societies Act 1974 s 97(1) (s 97(1), (2) amended by SI 2001/2617). See also *Wilmot v Grace* [1892] 1 QB 812.

9 Friendly Societies Act 1974 s 97(2) (as amended: see note 8).

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## **2269. Date of dissolution.**

Unless proceedings to set aside a dissolution of a registered society<sup>1</sup> or branch<sup>2</sup> are commenced within the required time and the dissolution is set aside accordingly<sup>3</sup>, the legal dissolution of the society or branch takes effect from the date of the advertisement<sup>4</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 As to the required time and the result of proceedings see PARA 2268.

4 Friendly Societies Act 1974 s 94(7). Section 94(7) further provides that in such event 'the requisite consents to the instrument of dissolution shall be deemed to have been duly obtained without proof of the signatures thereto'; but the instrument of dissolution is no longer generally subject to consent testified by signatures (see s 93(1)(b); and PARA 2264 note 13), and it would thus appear that this part of s 94(7) is otiose. As to the advertisement of dissolution see PARA 2265.

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Registered Societies/P. DISSOLUTION OF SOCIETIES AND BRANCHES/(B) Dissolution by Instrument/2270. Effect of dissolution.

### **2270. Effect of dissolution.**

The instrument of dissolution of a registered society<sup>1</sup> or branch<sup>2</sup> and any alterations are binding upon all members of a society or branch<sup>3</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 94(6).

This appears to include signatories who die between the date of registration and advertisement; if a member dies after the date of the instrument his nominee or personal representative seems to be entitled to receive the amount the member would have received on the distribution of the fund, and not the death benefit provided by the rules: see *Fortune v Orr* (1894) Diprose & Gammon 539; *Russell v Hereford Friendly Society* (1899) CR Rep, Pt A, 21 (Parliamentary Papers for 1900 vol 91).

As to the removal of the requirement for signatures of members to consent to the instrument of dissolution see PARAS 2264 note 13, 2269 note 4.

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## **(C) DISSOLUTION BY AWARD OF THE FINANCIAL SERVICES AUTHORITY**

### ***(a) Societies other than Registered Friendly Societies***

#### **2271. Application for investigation.**

When a dissolution of a registered society<sup>1</sup> or branch<sup>2</sup> (other than a registered friendly society or branch<sup>3</sup>) is desired by award of the Financial Services Authority<sup>4</sup>, an application<sup>5</sup> in writing is made to it stating that the society or branch funds are insufficient to meet the existing claims on them, or that the rates of contribution fixed in the rules are insufficient to cover the benefits assured, and setting forth grounds for the allegation of insufficiency and requesting an investigation into the affairs of the society or branch with a view to dissolution<sup>6</sup>. The Authority may then, at the expense of the society or branch concerned<sup>7</sup>, appoint one or more competent persons to conduct an investigation on its behalf into the affairs of the society or branch<sup>8</sup>. The Authority must give at least one month's written notice to the society or branch concerned<sup>9</sup>.

The application must be made under the hands of one-fifth of the members, or by 100 members if there are not fewer than 1,000 and not more than 10,000 members, or by 500 members if the membership exceeds 10,000<sup>10</sup>.

The consent of the central body of a society is necessary before the Authority can investigate the affairs of a society with branches with a view to its dissolution<sup>11</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 The Friendly Societies Act 1974 ss 90, 95 are repealed in relation to registered friendly societies by the Friendly Societies Act 1992 Sch 16 paras 1, 36, 39. Such societies are now governed, in relation to dissolution by award, by the Friendly Societies Act 1974 s 95A: see PARA 2275. As to registered societies or branches other than registered friendly societies or branches, ie benevolent societies, cattle insurance societies, working men's clubs, old people's home societies and specially authorised societies see s 7(1)(b)-(f); and PARA 2089.

4 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 The rules of a registered cattle insurance society must set out the right of the number of members set out in the text to note 10 to make an application for an investigation: see the Friendly Societies Act 1974 s 7(2)(a), Sch 2 para 15; and PARA 2156.

6 Friendly Societies Act 1974 s 95(2).

7 The expenses of the investigation and award and of advertising the notice of dissolution must be paid out of the society's or branch's funds before any other appropriation is made: Friendly Societies Act 1974 s 95(7).

8 Friendly Societies Act 1974 s 95(1) (amended by SI 2001/2617). The granting of an application is discretionary: *Professional and Civil Service Supply Association v Dougal* (1898) 5 SLT 359.

9 Friendly Societies Act 1974 s 95(1) (as amended: see note 8).

10 Friendly Societies Act 1974 ss 90(1), (2), 95(2). The requisite consents to the application are deemed to have been duly obtained without proof of the signatures: s 95(6). As to the appointment of inspectors, and the calling of special meetings on the application of the like proportions and numbers of members, see PARAS 2215, 2217.

11 Friendly Societies Act 1974 ss 90(2), 95(2).

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## **2272. Award of dissolution.**

If on investigation<sup>1</sup> of the affairs of a registered society<sup>2</sup> or branch<sup>3</sup> (other than a registered friendly society or branch<sup>4</sup>) it appears that the funds are insufficient to meet the existing claims on them, or that the rates of contribution fixed in the rules are insufficient to cover the benefits assured, the Financial Services Authority may, if it considers it expedient to do so, award that the society or branch be dissolved and its affairs wound up; and, if so, the Authority must direct in what manner the assets are to be divided or appropriated<sup>5</sup>.

The operation of the award may be suspended for such period as the Authority may deem necessary to enable the society or branch to make such alterations and adjustments of contributions and benefits as will, in its judgment, prevent the necessity of the award of dissolution coming into operation; and where within that period the society makes such alterations and adjustments, the Authority may cancel the award<sup>6</sup>.

1 As to applications for such investigations see PARA 2271.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 The Friendly Societies Act 1974 s 95 is repealed in relation to registered friendly societies: see PARA 2271 note 3.

5 Friendly Societies Act 1974 s 95(3) (amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

6 Friendly Societies Act 1974 s 95(4) (amended by SI 2001/2617).

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### **2273. Effect of award of dissolution.**

An award of dissolution<sup>1</sup> is final and conclusive on the registered society<sup>2</sup> or branch<sup>3</sup> in respect of which the award is made, and on all members, and on all other persons<sup>4</sup> having any claim on the funds of the society or branch; and is enforceable in the same manner as a decision on a dispute<sup>5</sup>. There is no appeal from the award<sup>6</sup>, but the dissolution consequent upon the award may be set aside on application<sup>7</sup> made by a member or other person interested in or having any claim on the funds of the society or branch within three months from the date when notice of the award of dissolution is advertised<sup>8</sup>.

Where a person takes proceedings to set aside an award, he must give notice of the proceedings to the Financial Services Authority not later than seven days after the commencement of the proceedings or the period of three months mentioned above, whichever first expires<sup>9</sup>. Where an order is made setting aside the dissolution of an order or a branch, the society or branch must give the Authority notice of it within seven days after the order is made<sup>10</sup>.

1 As to the making of an award of dissolution see PARA 2272.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 In *R v Chief Registrar of Friendly Societies, ex p Evans* (1900) CR Rep, Pt A, 89 (Parliamentary Papers for 1901 vol 72) at 91, CA, Vaughan Williams LJ was doubtful whether the words 'and on all other persons' in the Friendly Societies Act 1896 s 80(5) (repealed), from which the present provision is derived, were meant to include strangers who were creditors; and see also the judgment of AL Smith LJ.

5 Friendly Societies Act 1974 s 96. This provision, as amended, applies to registered friendly societies: see PARA 2276. As to the settlement of disputes see PARA 2246 et seq.

6 Friendly Societies Act 1974 s 96. See note 5. See also *Wilmot v Grace* [1892] 1 QB 812.

7 The application may be made to the High Court, as it is doubtful whether the county court has jurisdiction: *Wilmot v Grace* [1892] 1 QB 812.

8 Friendly Societies Act 1974 s 95(6)(a), (b). This provision is repealed in relation to registered friendly societies: see PARA 2271 note 3. It seems that application may be made, not on the ground that the award is unjust between the parties, but upon other grounds, eg that the Financial Services Authority has exceeded its authority, or that it has not heard all the parties interested: see *Wilmot v Grace* [1892] 1 QB 812 at 815. As to the advertisement of the award see PARA 2274. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

9 Friendly Societies Act 1974 s 97(1) (s 97(1), (2) amended by SI 2001/2617). The same provisions as to notice of the proceedings and notice of an order setting aside the dissolution apply as in the case of dissolution by instrument: see PARA 2268 text and notes 7-9.

10 Friendly Societies Act 1974 s 97(2).

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## **2274. Publication of award and date of dissolution.**

Within 21 days of making an award of dissolution<sup>1</sup> of a registered society<sup>2</sup> or branch<sup>3</sup>, the Financial Services Authority<sup>4</sup> must have the award advertised by notice in the London Gazette<sup>5</sup> and in a newspaper in general circulation in the neighbourhood of the registered office of the society or branch concerned<sup>6</sup> at the expense of the society or branch<sup>7</sup>. Unless within three months of the advertisement a member or other person interested in or having a claim on the funds of the society or branch commences proceedings to set aside the dissolution consequent upon the award<sup>8</sup> and it is set aside accordingly<sup>9</sup>, the society or branch is legally dissolved as from the date of the advertisement<sup>10</sup>.

1 As to the making of an award of dissolution see PARA 2272.

2 As to the meaning of 'registered society' see PARA 2082. See note 6.

3 As to branches of societies see PARA 2091. See note 6.

4 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 If the registered office of the society or branch is situated in Scotland, publication must be in the Edinburgh Gazette; or, if it is in Northern Ireland, in the Belfast Gazette: see the Friendly Societies Act 1974 ss 95(6), 111(1).

6 Friendly Societies Act 1974 s 95(6) (amended by SI 2001/2617). The Friendly Societies Act 1974 s 95(6) is repealed in relation to registered friendly societies and branches: see PARA 2271 note 3.

7 Friendly Societies Act 1974 s 95(7). See note 6.

8 Friendly Societies Act 1974 s 95(6)(a). See note 6. See also PARA 2273.

9 Friendly Societies Act 1974 s 95(6)(b). See note 6. See also PARA 2273.

10 Friendly Societies Act 1974 s 95(6). See note 6. See also PARA 2273.

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### ***(b) Registered Friendly Societies and Branches***



## **2275. Dissolution by award of the Financial Services Authority.**

If it appears to the Financial Services Authority<sup>1</sup>, as a result of an investigation undertaken on its behalf under its statutory powers<sup>2</sup>, that:

- 708 (1) the funds of a registered friendly society<sup>3</sup> or branch<sup>4</sup> are insufficient to meet the existing claims on them; or
- 709 (2) the rates of contribution fixed in the rules of the society or branch are insufficient to cover the benefits assured to be given by the society or branch,

the Authority may, if it considers it expedient to do so, order that the society or branch be dissolved and its affairs wound up; and where the Authority makes such an award, it must also direct how the assets of the society or branch are to be divided or appropriated<sup>5</sup>.

Where the Authority makes such an award, it may suspend its operation for as long as it deems necessary to enable the society or branch to make such alterations and adjustments of contributions and benefits as will in its judgment prevent the necessity for the award of dissolution coming into operation; and where, during the period of suspension, the alterations and adjustments are made, the Authority may cancel the award<sup>6</sup>.

The expenses of every award and of advertising every notice must be paid out of the funds of the society or branch before any other appropriation of them is made<sup>7</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 Ie an investigation into the state and conduct of the activities of a friendly society undertaken in accordance with the Friendly Societies Act 1992 s 65: see PARA 2319.

3 As to the meaning of 'registered friendly society' see PARA 2082.

4 As to branches of societies see PARA 2091.

5 Friendly Societies Act 1974 s 95A(1) (s 95A added by the Friendly Societies Act 1992 Sch 16 para 39; and the Friendly Societies Act 1974 s 95A(1), (2) amended by SI 2001/2617). As to the rules see PARA 2156 et seq.

6 Friendly Societies Act 1974 s 95A(2) (as added and amended: see note 5).

7 Friendly Societies Act 1974 s 95A(5) (as added: see note 5).

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## **2276. Effect of award of dissolution.**

Every award of dissolution<sup>1</sup> of a registered friendly society<sup>2</sup> or branch<sup>3</sup> is final and conclusive on the society or branch in respect of which it is made, and on all the members and other persons having any claim on its funds; an award is enforceable in the same way as a decision on a dispute<sup>4</sup>. There is no appeal from the award<sup>5</sup>, but the dissolution consequent upon the award may be set aside on application<sup>6</sup> made by a member or other person interested in or having

any claim on the funds of the society or branch within three months from the date when notice of the award of dissolution is advertised<sup>7</sup>.

Where a person takes proceedings to set aside an award, he must give notice of the proceedings to the Financial Services Authority not later than seven days after the commencement of the proceedings or three months after the date of the advertisement referred to above, whichever first expires<sup>8</sup>. Where an order is made setting aside the dissolution of an order or a branch, the society or branch must give the Financial Services Authority notice of it, within seven days after the order is made<sup>9</sup>.

1 As to the making of an award of dissolution see PARA 2275.

2 As to the meaning of 'registered friendly society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 Friendly Societies Act 1974 s 96 (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 40). As to the settlement of disputes see PARA 2246 et seq.

5 Friendly Societies Act 1974 s 96 (as amended: see note 4). See also *Wilmot v Grace* [1892] 1 QB 812.

6 The application may be made to the High Court, as it is doubtful whether the county court has jurisdiction: *Wilmot v Grace* [1892] 1 QB 812.

7 Friendly Societies Act 1974 s 95A(4)(a), (b) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 39). It seems that application may be made, not on the ground that the award is unjust between the parties, but upon other grounds, eg that the Financial Services Authority has exceeded its authority, or that it has not heard all the parties interested: see *Wilmot v Grace* [1892] 1 QB 812 at 815. As to advertisement of the award see PARA 2277. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

8 Friendly Societies Act 1974 s 97(1) (amended by the Friendly Societies Act 1992 Sch 16 para 41; and SI 2001/2617). The same provisions as to notice of the proceedings and notice of an order setting aside the dissolution apply as in the case of dissolution by instrument: see PARA 2268 text and notes 7-9.

9 Friendly Societies Act 1974 s 97(2) (amended by SI 2001/2617).

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## **2277. Publication of award and date of dissolution.**

Within 21 days after making any award of dissolution<sup>1</sup> of a registered friendly society<sup>2</sup> or branch<sup>3</sup>, the Financial Services Authority<sup>4</sup> must cause notice of the award to be advertised<sup>5</sup> in the London Gazette<sup>6</sup> and in a newspaper in general circulation in the neighbourhood of the registered office of the society or branch<sup>7</sup>. Unless within three months a member or person interested in, or having any claim on, the funds of the society or branch commences proceedings to set aside the dissolution consequent on the award<sup>8</sup>, and it is set aside accordingly<sup>9</sup>, the society or branch is legally dissolved from the date of the advertisement<sup>10</sup>.

The expenses of the award and the advertising required are to be paid out of the funds of the society or branch before any other appropriation of them is made<sup>11</sup>.

1 As to the making of an award of dissolution see PARA 2275.

- 2 As to the meaning of 'registered friendly society' see PARA 2082.
- 3 As to branches of societies see PARA 2091.
- 4 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 5 As to the expenses of the advertisement see PARA 2275 text and note 7.
- 6 If the registered office of the society or branch is situated in Scotland, publication must be in the Edinburgh Gazette; or, if it is in Northern Ireland, in the Belfast Gazette: see the Friendly Societies Act 1974 s 111(1).
- 7 Friendly Societies Act 1974 s 95A(4) (s 95A added by the Friendly Societies Act 1992 Sch 16 paras 1, 39; and the Friendly Societies Act 1974 s 95A(4) amended by SI 2001/2617).
- 8 Friendly Societies Act 1974 s 95A(4)(a) (as added: see note 7). See PARA 2276.
- 9 Friendly Societies Act 1974 s 95A(4)(b) (as added: see note 7). See PARA 2276.
- 10 Friendly Societies Act 1974 s 95A(4) (as added: see note 7).
- 11 Friendly Societies Act 1974 s 95A(5) (as added: see note 7).

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## ***Q. OFFENCES***

### **(A) STATUTORY OFFENCES**

#### **2278. Failure to observe statutory requirements.**

It is an offence under the Friendly Societies Act 1974 for a registered society<sup>1</sup> or branch<sup>2</sup>, or any officer or member<sup>3</sup>:

- 710 (1) to fail to give any notice, send any return or document, or do or allow to be done anything required by the Act to be given, sent, done or allowed to be done<sup>4</sup>;
- 711 (2) wilfully<sup>5</sup> to neglect or refuse to do any act or to furnish any information required for the purposes of the Act by the Financial Services Authority<sup>6</sup> or by any other authorised person or to do anything forbidden by the Act<sup>7</sup>; or
- 712 (3) to make a return or wilfully to furnish information required for the purposes of the Act in any respect false or insufficient<sup>8</sup>.

It is also an offence for an officer or member of a body which, having been a branch of a society, has wholly seceded or been expelled from that society, to use the society's name, or any name implying that the body is a branch of the society or to use the number by which that body was designated as a branch<sup>9</sup>.

All the above offences are punishable on summary conviction by a fine<sup>10</sup>.

If an officer of a registered friendly society or any other person aids or abets in the dissolution of a friendly society, otherwise than as provided in the Friendly Societies Act 1974, he is liable on summary conviction to a fine<sup>11</sup>.

If a member of the committee of a registered society or branch (other than a registered friendly society or branch<sup>12</sup>) fails to take all reasonable steps to secure the compliance of any revenue account or balance sheet with the requirements of the Friendly Societies Act 1974<sup>13</sup>, he is liable on summary conviction to a fine<sup>14</sup> unless he proves that he had reasonable grounds to believe, and did believe, that a competent and reliable person was charged with the duty of seeing that the relevant provision was complied with and was in a position to discharge that duty<sup>15</sup>.

It is an offence, punishable on summary conviction with a fine, if a registered society or branch (other than a registered friendly society or branch) fails to comply with any direction given by the Authority requiring it to appoint a qualified auditor or to submit a further annual return<sup>16</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091. Societies and branches are prosecuted in their registered names.

3 As to the meaning of 'officer' see PARA 2172 note 3; and as to officers see PARAS 2172-2184. As to members and membership see PARAS 2165-2171.

4 Friendly Societies Act 1974 s 98(1)(a). Nothing in s 98(1) applies to any act, omission or contravention which is an offence under any other provision of the Friendly Societies Act 1974: s 98(2) (amended by SI 2001/2617).

5 'Wilfully' means deliberately and intentionally, not accidentally or inadvertently: see *R v Senior* [1899] 1 QB 283, CCR.

6 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

7 Friendly Societies Act 1974 s 98(1)(b) (amended by SI 2001/2617). See note 4.

8 Friendly Societies Act 1974 s 98(1)(c). See note 4. The offence of making a false return is not complete when the document is made out, but only when the return is sent: *Windridge v Ancient Order of Foresters' Friendly Society* [1933] 1 KB 42, DC.

9 Friendly Societies Act 1974 s 98(1)(d). See note 4. As to the secession and expulsion of branches see PARAS 2092-2093.

10 Friendly Societies Act 1974 s 98(3). The fine must not exceed level 3 on the standard scale: s 98(3) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 27 note 21.

11 Friendly Societies Act 1974 s 98(4) (amended by the Friendly Societies Act 1992 Sch 22 Pt I). The fine must not exceed level 4 on the standard scale: Friendly Societies Act 1974 s 98(4) (as so amended; and amended by virtue of the Criminal Justice Act 1982 ss 38, 46).

12 The Friendly Societies Act 1974 ss 29-45 (see PARA 2205 et seq) no longer have effect in relation to registered friendly societies and branches: see the Friendly Societies Act 1992 s 95, Sch 16 paras 1, 12.

13 If it fails to secure that the revenue accounts and the balance sheet give a true and fair view of the matters of which the Friendly Societies Act 1974 requires that they should give a true and fair view: see s 30(1)-(5); and PARA 2205.

14 The fine must not exceed level 5 on the standard scale: Friendly Societies Act 1974 s 30(8) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46).

15 Friendly Societies Act 1974 s 30(8) (as amended: see note 14). See note 12.

16 See the Friendly Societies Act 1974 s 32(4); and PARA 2206 note 18. See note 12. Such an offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale: s 98(3) (as amended: see note 10).

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### **2279. Insuring money to be paid on child's death.**

A society, whether registered or not, or any branch, which pays money on the death of a child under ten years of age otherwise than in accordance with the Friendly Societies Act 1974 commits an offence<sup>1</sup>.

A parent or parent's personal representative claiming money on the death of a child commits an offence if he produces to the society or branch from which the money is claimed a false death certificate or one fraudulently obtained, or in any way attempts to defeat the provisions of the Friendly Societies Act 1974 with respect to payments on the death of children<sup>2</sup>.

Both the offences described above are punishable on summary conviction with a fine<sup>3</sup>.

1 Friendly Societies Act 1974 s 98(1)(f). Nothing in s 98(1) applies to any act, omission or contravention which is an offence under any other provision of the Friendly Societies Act 1974: s 98(2) (amended by SI 2001/2617). Insurance on the lives of children was dealt with by the Friendly Societies Act 1974 ss 71, 74, Sch 6 (all repealed); replacement provisions are contained in the Friendly Societies Act 1992 s 99: see PARA 2380. As to societies and branches see PARAS 2082, 2091.

2 Friendly Societies Act 1974 s 98(1)(g) (amended by the Friendly Societies Act 1992 Sch 16 para 42(a)). See note 1.

3 Friendly Societies Act 1974 s 98(3). The fine must not exceed level 3 on the standard scale: s 98(3) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 27 note 21.

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### **2280. Liability of officers and members of the committee of management.**

If any registered society<sup>1</sup> or branch<sup>2</sup> is guilty of an offence under the Friendly Societies Act 1974, every officer<sup>3</sup> of the society or branch bound by its rules<sup>4</sup> to fulfil any duty of which the offence is a breach, or, if there is no such officer, then every member of the committee of management<sup>5</sup>, other than a member who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is liable to the same penalty as if he had committed the offence<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091. Societies and branches are prosecuted in their registered names.

3 As to the meaning of 'officer' see PARA 2172 note 3. For the case of an officer who resigns office before the expiration of a period for doing an act (eg sending an annual return by 31 July: see the Friendly Societies Act 1974 s 43; and PARA 2211) see *Booth v Weightman* (1904) 91 LT 532, DC. As to an officer in fact if not of right see *Gibson v Barton* (1875) LR 10 QB 329. For other cases under company law see **COMPANIES** vol 14 (2009) PARA 619 et seq.

4 As to matters provided for in the rules see PARA 2156 et seq.

5 As to the committee of management see PARAS 2184, 2294 et seq.

6 Friendly Societies Act 1974 s 98(5).

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### **2281. Supply of incorrect rules.**

It is an offence for any person, with intent to mislead or defraud, to give to any other person: (1) a copy of any rules, laws, regulations or other documents, other than the rules of a registered society<sup>1</sup> or branch<sup>2</sup>, on the pretence that they are its existing rules, or that there are no other rules of that society or branch<sup>3</sup>; or (2) a copy of any rules on the pretence that they are the rules of a registered society or branch when the society or branch is not registered<sup>4</sup>. The penalty on summary conviction is a fine, and on conviction on indictment is a fine or imprisonment or both<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2082. As to the rules see PARA 2156 et seq.

2 As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 99(1)(a).

4 Friendly Societies Act 1974 s 99(1)(b).

5 Friendly Societies Act 1974 s 99(1) (amended by virtue of the Magistrates' Courts Act 1980 s 32(2)). The penalty on summary conviction is a fine not exceeding the prescribed sum; and on conviction on indictment the penalty is a fine, or imprisonment for a term not exceeding two years, or both: Friendly Societies Act 1974 s 99(1) (as so amended). As to the prescribed sum see PARA 56 note 24.

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### **2282. Fraudulent withholding and application of property.**

If any person<sup>1</sup> obtains possession by false representation or imposition of any property of a registered society<sup>2</sup> or branch<sup>3</sup>, or fraudulently withholds any such property in his possession, or fraudulently applies any such property for purposes which are not authorised by the rules of the society or branch or which are not in accordance with the Friendly Societies Act 1974, he is liable on summary conviction to a fine<sup>4</sup>, and may be ordered to deliver up the property or to repay all money improperly applied<sup>5</sup>. If in proceedings for any such offence which do not result in a conviction, or in civil proceedings instituted for the purpose, a magistrates' court is satisfied that any person having possession of any property of a registered society or branch has failed to deliver it up when requested to do so by the society or branch, the court may make an order requiring him to deliver up that property<sup>6</sup>. If in any such proceedings a magistrates' court is satisfied that any person has applied money belonging to a registered

society or branch for purposes which are not authorised by its rules, or which are not in accordance with the Friendly Societies Act 1974, the court may order him to repay to the society or branch the money which he has so applied; and, whatever the nature of the proceedings, the order is enforceable as an order for the payment of money recoverable summarily as a civil debt<sup>7</sup>.

A prima facie case against a defendant is made out if it is proved that he has received the property of the society and has failed to give it up on demand or to account for it<sup>8</sup>. A creditor of an officer, who, being possessed of money of a society, makes an assignment of his property for the benefit of his creditors, cannot be convicted of withholding unless it is shown that specific money belonging to the society is in his possession<sup>9</sup>, nor can a treasurer of an unregistered association, which subsequently becomes registered, who is not party to the registration and declines to deliver up papers and money in his hands belonging to the unregistered association<sup>10</sup>.

1 An officer is liable to make good money misappropriated by his private clerk: *Re Mutual Aid Permanent Benefit Building Society, ex p James* (1883) 49 LT 530; *Re Briton Friendly Society* (1852) 1 WR 50.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 The fine must not exceed level 5 on the standard scale: Friendly Societies Act 1974 s 99(2) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 27 note 21.

5 Friendly Societies Act 1974 s 99(2) (as amended: see note 4). Information for offences under this provision can be laid only by certain persons: see PARA 2285. As to the indictment of an offender see PARA 2289. Withholding is a continuing offence: *Mayer v Harding* (1867) 17 LT 140; *Best v Butler and FitzGibbon* [1932] 2 KB 108; cf *Pullen v Carlton* [1918] 2 KB 207, DC. Dismissal of a complaint that property has been withheld or misapplied does not create an estoppel against a claim based on contract for payment of any deficiency in cash or stock: *Beeches Workingmen's Club and Institute Trustees v Scott* [1969] 2 All ER 420, [1969] 1 WLR 550, CA. Cf the Civil Evidence Act 1968 s 11; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1208.

6 Friendly Societies Act 1974 s 99(3). As to appeals against the order see PARA 2287.

7 Friendly Societies Act 1974 s 99(4) (amended by the Financial Services and Markets Act 2000 Sch 18 para 4, Sch 22). As to the enforcement of an order of a magistrates' court for the payment of a civil debt see the Magistrates' Courts Act 1980 s 96; and **MAGISTRATES** vol 29(2) (Reissue) PARA 828. As to appeals against the order see PARA 2287.

8 *R v Bennett and Ward* (1894) 63 LJMC 181. As to the construction of a bond conditioned for the handing over when required of a box belonging to a society see *Wybergh v Ainley* (1824) M'Cle 669.

9 *Ex p O' Donnell* (1865) LR 1 QB 274.

10 *Patrick v Gilbert* (1870) 18 WR 315. But cf *Ex p Gordon* (1851) 15 JP Jo 767, where a treasurer of a society which divided, and of which one division was registered, was convicted of withholding from the registered portion money originally belonging to the entire society.

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### **2283. Fraudulent entries and omissions in documents.**

Any person who wilfully makes, orders or allows to be made any entry or erasure in, or omission from, a balance sheet of a registered society<sup>1</sup> or branch<sup>2</sup> other than a registered

friendly society or branch, or a return or document required to be sent, produced or delivered for the purposes of the Friendly Societies Act 1974, with intent to falsify it or to evade any of the provisions of the Act, is liable on summary conviction to a fine<sup>3</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 Friendly Societies Act 1974 s 100 (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 43). The fine must not exceed level 5 on the standard scale: Friendly Societies Act 1974 s 100 (as so amended; and amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 27 note 21.

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## (B) PROCEDURE FOR STATUTORY OFFENCES

### **2284. Time limit for summary proceedings.**

Summary proceedings instituted by the Financial Services Authority<sup>1</sup> for offences under the Friendly Societies Act 1974<sup>2</sup> may be commenced at any time within one year of the first discovery of the offence by the Authority<sup>3</sup>, but not in any case after more than three years from the commission of the offence<sup>4</sup>. Every default constituting an offence is a new offence in every week during which it continues<sup>5</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 See PARA 2285.

3 This is notwithstanding any limitation on the time for the taking of proceedings contained in any enactment: Friendly Societies Act 1974 s 98(7) (amended by SI 2001/2617).

4 Friendly Societies Act 1974 s 98(7) (as amended: see note 3).

5 Friendly Societies Act 1974 s 98(6). For corresponding provisions for instituting proceedings for offences under the Friendly Societies Act 1992 see PARA 2385.

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### **2285. Instituting proceedings.**

Summary proceedings for an offence under the Friendly Societies Act 1974 may be instituted by the Financial Services Authority<sup>1</sup> or by any person aggrieved<sup>2</sup>.



In cases of obtaining possession by false representation or imposition, or fraudulently withholding or applying the property of any registered society or branch<sup>3</sup>, proceedings may be instituted only by the following persons<sup>4</sup>:

- 713 (1) in the case of a registered society, the society or any member authorised by it, or the trustees or committee<sup>5</sup>;
- 714 (2) in the case of a registered branch, the branch or any member authorised by it or the trustees or committee, or the society's central body, or any member of the society or branch authorised by the central body<sup>6</sup>;
- 715 (3) in any case, any member of the society or branch authorised by the Financial Services Authority<sup>7</sup>; and
- 716 (4) the Financial Services Authority<sup>8</sup>.

A conviction will be set aside as ultra vires if the information was laid by officers of a society who were not officers appointed for the purpose<sup>9</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 Friendly Societies Act 1974 s 101(1) (amended by SI 2001/2617). As to the meaning of 'person aggrieved' see *Robinson v Currey* (1881) 7 QBD 465 at 475, CA; and see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

3 Is an offence under the Friendly Societies Act 1974 s 99(2); see PARA 2282. As to the meaning of 'registered society' see PARA 2082. As to branches and registered branches of societies see PARA 2091.

4 Friendly Societies Act 1974 s 99(6) (amended by SI 2001/2617).

5 Friendly Societies Act 1974 s 99(6)(a). As to the trustees of the society see PARAS 2179-2182. As to the committee of management see PARAS 2184, 2294 et seq.

6 Friendly Societies Act 1974 s 99(6)(b).

7 Friendly Societies Act 1974 s 99(6)(c) (substituted by SI 2001/2617).

8 Friendly Societies Act 1974 s 99(6)(d) (added by SI 2001/2617).

9 *Ex p Gordon* (1851) 15 JP Jo 767.

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## **2286. Costs and expenses.**

Costs and expenses ordered or directed by the Financial Services Authority<sup>1</sup> to be paid by any person under the Friendly Societies Act 1974 are recoverable summarily as civil debts<sup>2</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 Friendly Societies Act 1974 s 101(2) (amended by SI 2001/2617). As to the enforcement of an order of a magistrates' court for the payment of a civil debt see the Magistrates' Courts Act 1980 s 96; and **MAGISTRATES** vol 29(2) (Reissue) PARA 828. As to appeals against the order see PARA 2287.

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## **2287. Appeals.**

The right of appeal from a conviction by a magistrates' court for an offence under the Friendly Societies Act 1974 is governed by the general law<sup>1</sup>. Where in civil proceedings, or in proceedings which do not result in a conviction, a magistrates' court orders a person to deliver up property or to repay money<sup>2</sup>, the order may be appealed against as if it were an order of the court made on the conviction of the person to whom the order is directed<sup>3</sup>.

1 See the Magistrates' Courts Act 1980 Pt V (ss 108-114); and **MAGISTRATES** vol 29(2) (Reissue) PARA 882 et seq.

2 See under the Friendly Societies Act 1974 s 99(3) or (4): see PARA 2282.

3 Friendly Societies Act 1974 s 99(5).

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## **2288. Remedy by civil action.**

A conviction for an offence under the Friendly Societies Act 1974 does not take away the common law remedy by a claim against an officer for money had and received<sup>1</sup>; but an order for repayment followed by imprisonment in default is a bar to a claim brought by a society for recovery of the same money<sup>2</sup>.

An officer of an unregistered society can be sued for conversion of money to his own use, and the members can obtain an injunction to restrain any dealing with the fund<sup>3</sup>.

1 *Sinden v Banks* (1861) 3 E & E 623; *Sharp v Warren* (1818) 6 Price 131. See **RESTITUTION** vol 40(1) (2007 Reissue) PARA 5.

2 *Vernon v Watson* [1891] 2 QB 288 at 290, CA, per Lord Halsbury LC; *Knight v Whitmore* (1885) 53 LT 233, DC.

3 *Marrs v Thompson* (1902) 86 LT 759, DC; *Wolfe v Matthews* (1882) 21 ChD 194. As to conversion see **TORT** vol 45(2) (Reissue) PARA 548 et seq.

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## **2289. Indictment.**

Where a person has supplied incorrect rules with intent to mislead or defraud<sup>1</sup>, or has obtained possession of the property of a registered society or branch by false representation or imposition or has fraudulently withheld or applied such property<sup>2</sup>, the provisions of the Friendly Societies Act 1974 do not prevent him from being proceeded against on indictment if he has not previously been convicted of the same offence under that Act<sup>3</sup>. Proceedings on indictment against an officer for misappropriation are not superseded by the statutory remedy provided to enforce a civil debt<sup>4</sup>. In the case of an unregistered society proceedings against persons for misappropriation can be taken only under the ordinary criminal law<sup>5</sup>.

1    le where he is guilty of an offence under the Friendly Societies Act 1974 s 99(1): see PARA 2281.

2    le where he is guilty of an offence under the Friendly Societies Act 1974 s 99(2): see PARA 2282.

3    See the Friendly Societies Act 1974 s 99(7).

4    *R v Stafford Justices, ex p Foster* (1894) 97 LT Jo 123.

5    As to the unlawful taking of property see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 282 et seq.

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## ***R. LEGAL PROCEEDINGS BY OR AGAINST REGISTERED SOCIETIES AND BRANCHES***

### **2290. Proceedings by or against registered societies.**

The trustees<sup>1</sup> of a registered society<sup>2</sup> or branch<sup>3</sup>, or any officers<sup>4</sup> authorised by its rules, may bring or defend, or cause to be brought or defended, actions or other legal proceedings in any court whatsoever, touching or concerning any property, right or claim of the society or branch, and may sue and be sued in their proper names without any description other than the title of their office<sup>5</sup>. The liability of trustees to be sued in proceedings with respect to a right or claim of the society or branch is restricted to cases in which the right or claim concerns its property and therefore does not extend to all cases where the society or branch funds are threatened by a claim for damages<sup>6</sup>. In all legal proceedings whatsoever concerning property vested in the trustees of a registered society or branch the property may be stated to be the property of the trustees in their own names as trustees for the society or branch without further description<sup>7</sup>.

A trustee or other officer appointed to sue or be sued on behalf of a registered society may sign the acknowledgement of service but must state the position he holds<sup>8</sup>.

Proceedings may be brought against a trustee of a society or branch by the other trustee or trustees<sup>9</sup>.

1    As to the trustees of a registered society see PARAS 2179-2182.

2    As to the meaning of 'registered society' see PARA 2082.

3    As to branches of societies see PARA 2091.

4 As to the meaning of 'officer' see PARA 2172 note 3.

5 Friendly Societies Act 1974 s 103(1). The trustees of a society, having under its rules a vested interest in the funds of its branches, are therefore entitled to sue the trustees of its branches for improper investment of branch funds: see *Tomley v Shreeve* [1937] 3 All ER 75. Notices of appointment of trustees and officers authorised to sue or be sued (where rules make provision for such officers) must be sent to the Financial Services Authority, where they are recorded and may be inspected: Friendly Societies Act 1974 ss 12(1)(c), 24(3), 110(3) (s 24(3) substituted by the Friendly Societies Act 1992 Sch 16 paras 1, 9; and the Friendly Societies Act 1974 ss 24(3), 110(3) amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq. As to parties to proceedings generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 207 et seq.

6 *Longdon-Griffiths v Smith* [1951] 1 KB 295, [1950] 2 All ER 662 (action for libel against registered friendly society cannot be brought against trustees but must be brought against society in its registered name).

7 Friendly Societies Act 1974 s 56. See *R v Marks* (1866) 10 Cox CC 367.

8 See CPR Pt 10; *Practice Direction--Acknowledgement of Service* PD 10 para 4; and **CIVIL PROCEDURE** vol 11 (2009) PARA 184. See also eg *Taff Vale Rly Co v Amalgamated Society of Railway Servants* [1901] AC 426 at 434, HL.

9 Friendly Societies Act 1974 s 103(7).

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## **2291. Officer as defendant.**

In legal proceedings brought under the Friendly Societies Act 1974 by a member or a person claiming through a member, a registered society<sup>1</sup> or branch<sup>2</sup> may also be sued in the name, as defendant, of any officer<sup>3</sup> or person who receives contributions or issues policies on behalf of the society or branch within the jurisdiction of the court in which the legal proceedings are brought, with the addition of the words 'on behalf of the society or branch' (naming the same)<sup>4</sup>. An officer sued on behalf of the society is not personally liable<sup>5</sup>.

The death, resignation or removal from office of an officer of a registered society or branch, or any act of the officer after the commencement of proceedings, does not cause the abatement or discontinuance of legal proceedings<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 As to the meaning of 'officer' see PARA 2172 note 3.

4 Friendly Societies Act 1974 s 103(2). See also *Roberts v Page* (1876) 1 QBD 476.

5 *Wormwell v Hailstone* (1830) 6 Bing 668; *Harrison v Timmins* (1838) 4 M & W 510; *Alexander v Worman* (1860) 6 H & N 100.

6 Friendly Societies Act 1974 s 103(3).

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## **2292. Service of process against officers.**

Where proceedings are taken against an officer<sup>1</sup> or other person sued on behalf of a registered society<sup>2</sup> or branch<sup>3</sup>, the officer or other person is sufficiently served: (1) if he is served personally; or (2) if a true copy of the summons, writ or other process: (a) is left at the registered office of the society or branch, or at any place of business of the society or branch within the jurisdiction of the court in which the proceeding is brought; or (b) where that office or place of business is closed, is posted on its outer door<sup>4</sup>. Where the service is not effected in any such way, a copy must be forwarded in a letter sent by registered post or by the recorded delivery service addressed to the committee<sup>5</sup> at the registered office of the society or branch and posted at least six days before any further step is taken in the proceedings<sup>6</sup>.

Where proceedings are taken against a society or branch for the recovery of any fine under the Friendly Societies Act 1974, the summons or other process is sufficiently served by leaving a true copy at its registered office or at any place of business of the society or branch within the jurisdiction of the court in which the proceedings are brought or, if that office or place of business is closed, by posting the copy on its outer door<sup>7</sup>.

1 As to the meaning of 'officer' see PARA 2172 note 3.

2 As to the meaning of 'registered society' see PARA 2082.

3 As to branches of societies see PARA 2091.

4 See the Friendly Societies Act 1974 s 103(4).

5 As to the committee of management see PARAS 2184, 2294 et seq.

6 Friendly Societies Act 1974 s 103(5). Under the provisions of the Friendly Societies Act 1896 s 94 (repealed) (which were replaced by the provisions set out in this paragraph), it was held that the provisions applied only to proceedings brought under what is now the Friendly Societies Act 1974 s 103(2) (see PARA 2291); and that in proceedings brought under what is now s 103(1) (see PARA 2290) service could be effected according to whatever was the normal practice of that court: *Gatehouse v Shaw* (1919) CR Rep, Pt A, 58 (Parliamentary Papers for 1920 vol 37), CA.

7 Friendly Societies Act 1974 s 103(6).

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## **(iv) Matters Common to All Friendly Societies**

### **A. MANAGEMENT AND ADMINISTRATION**

#### **(A) COMMITTEE OF MANAGEMENT AND OTHER OFFICERS**

### **2293. Approval by the Financial Services Authority.**

A friendly society<sup>1</sup> which is an authorised person under the Financial Services and Markets Act 2000<sup>2</sup> must take reasonable care to ensure that no person performs a controlled function<sup>3</sup> under an arrangement<sup>4</sup> entered into by the society or a contractor of the society in relation to the carrying on of a regulated activity by the society, unless the Financial Services Authority approves the performance by that person of the controlled function to which the arrangement relates<sup>5</sup>. A friendly society which carries on regulated activities will therefore need to take reasonable care to ensure that each member of its committee of management<sup>6</sup> and each of its other officers and employees who is responsible for the discharge of a controlled function is approved by the Authority as a fit and proper person to perform that function<sup>7</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 I.e. a person who (so far as is relevant) has permission from the Financial Services Authority under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 84 et seq) to carry on one or more regulated activities under that Act: see s 31(1)(a), (2); and PARA 314. As to regulated activities see PARA 84 et seq. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

3 I.e. a function of a description specified in rules made by the Financial Services Authority under the Financial Services and Markets Act 2000. The Financial Services Authority may only specify a description of function for these purposes if it is satisfied that the function: (1) is likely to enable the person responsible for its performance to exercise a significant influence on the conduct of the authorised person's affairs, so far as relating to the regulated activity; (2) will involve the person performing it in dealing with customers of the authorised person in a manner substantially connected with the carrying on of the regulated activity; or (3) will involve the person performing it in dealing with property of customers of the authorised person in a manner substantially connected with the carrying on of the regulated activity: see s 59(3)-(7); and PARA 367.

4 An 'arrangement' means any kind of arrangement for the performance of a function of the authorised person ('A') which is entered into by A or any contractor of his with another person, and includes in particular that other person's appointment to an office, his becoming a partner or his employment: Financial Services and Markets Act 2000 s 59(10). See PARA 367.

5 Financial Services and Markets Act 2000 s 59(1), (2). See PARA 367.

6 As to the committee of management see PARA 2294.

7 As to the procedure for applying for approval see the Financial Services and Markets Act 2000 ss 60-62; and PARAS 368-370. Reference should be made to the Financial Services Authority's Handbook of Rules and Guidance for the detailed specification of controlled functions and for the criteria which determine whether a person is fit and proper to perform those functions. As to the Handbook generally see PARA 22. As to friendly societies, regulation of investment business and the Handbook see also PARA 2109.

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### **2294. Committee of management.**

Every friendly society<sup>1</sup> must have a committee of management with at least two members<sup>2</sup>. The committee must appoint one of its members to be chairman of the committee<sup>3</sup>. A member of the committee must normally be elected to office in accordance with the rules of the society<sup>4</sup>, unless the member concerned has been co-opted on to the committee<sup>5</sup>. The committee may co-opt any person as a member of the committee, whether or not he is a member of the society, and whether he is co-opted as an additional member or to fill a vacancy, if: (1) he

appears to the committee to be fit and proper to be a member; and (2) he has not failed to be elected as a member of the committee, having been nominated at an election held within the preceding 12 months<sup>6</sup>.

A friendly society must notify the Financial Services Authority<sup>7</sup> within one month of the date on which a person becomes or ceases to be a member of the committee of management of the society, stating the person's name, address and the date on which he became or ceased to be a member of the committee; and in the case of a person becoming a member of the committee, his date of birth must also be notified<sup>8</sup>. Failure so to notify is an offence punishable on summary conviction with a fine<sup>9</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 27(1).

3 Friendly Societies Act 1992 s 27(2).

4 The rules of a friendly society must make provision for the manner in which the officers of the society are elected or appointed and for their removal: see the Friendly Societies Act 1974 s 7(2), Sch 2 para 5 (see PARA 2156); and the Friendly Societies Act 1992 s 5, Sch 3 para 5(3) item 6(a) (see PARA 2121).

5 Friendly Societies Act 1992 s 27(3).

6 Friendly Societies Act 1992 s 27(4).

7 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

8 Friendly Societies Act 1992 s 29(1), (2) (s 29(1), (5) amended by SI 2001/2617). On receipt of such a notice the Financial Services Authority must record the name of the person to whom it relates, and the date on which he began to hold or ceased to hold office, in the public file of the society: Friendly Societies Act 1992 s 29(5) (as so amended). As to the public file see PARA 2382.

9 Friendly Societies Act 1992 s 29(4). The fine must not exceed level 4 on the standard scale: s 29(4). As to the standard scale see PARA 27 note 21.

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## **2295. Eligibility to be elected a committee member.**

Subject to the rules of the friendly society<sup>1</sup> and to the provisions relating to normal retirement age<sup>2</sup>, any person who is not under 18 years of age<sup>3</sup> is eligible to be elected as a member of its committee<sup>4</sup>.

The rules of a society may require the members of the committee to retire at a prescribed age without eligibility for re-election or reappointment<sup>5</sup>. This is known as the 'compulsory retirement age'<sup>6</sup>. If the rules of a society make such a provision, a person who has attained the prescribed age is ineligible to be elected as a member of the committee<sup>7</sup>.

Once a person has attained the normal retirement age<sup>8</sup> for the society he ceases to be eligible for election to the committee unless: (1) he has been approved as eligible to be so elected by a resolution of the committee; and (2) his age and the reasons for the committee's approval of his eligibility have been notified to every person entitled to vote at the election<sup>9</sup>. This does not

apply, however, where the compulsory retirement age<sup>10</sup> is no greater than the normal retirement age for members of the committee<sup>11</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 'Normal retirement age' means 70 years of age, or such lesser age as the rules of the society may prescribe as the normal retirement age for members of its committee: Friendly Societies Act 1992 s 27(5), Sch 11 para 1(1). 'Committee' means the committee of management of the society: Sch 11 para 1(1). As to the committee of management generally see PARA 2294.

3 A person under 18 may not hold any office in the society: Friendly Societies Act 1992 s 5, Sch 3 para 7(b).

4 Friendly Societies Act 1992 Sch 11 para 2.

5 Friendly Societies Act 1992 Sch 11 para 3(1).

6 Friendly Societies Act 1992 Sch 11 para 1(1).

7 Friendly Societies Act 1992 Sch 11 para 3(2).

8 See note 2.

9 Friendly Societies Act 1992 Sch 11 para 3(3). Failure to give such notification is an offence punishable on summary conviction with a fine not exceeding level 4 on the standard scale; but that failure does not invalidate the election: Sch 11 para 3(4). As to the standard scale see PARA 27 note 21.

10 See the text and notes 5-6.

11 Friendly Societies Act 1992 Sch 11 para 3(1).

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## **2296. Eligibility to be a co-opted committee member.**

A person who has attained the normal retirement age<sup>1</sup> of a friendly society<sup>2</sup> or the compulsory retirement age<sup>3</sup> (where that age is less than the normal retirement age) may not be co-opted<sup>4</sup> as a member of the committee<sup>5</sup> of a friendly society<sup>6</sup>.

1 As to the meaning of 'normal retirement age' see PARA 2295 note 2.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to the meaning of 'compulsory retirement age' see PARA 2295 text and notes 5-6.

4 As to the persons who may be co-opted see PARA 2294 text and note 6.

5 As to the meaning of 'committee' see PARA 2295 note 2.

6 Friendly Societies Act 1992 s 27(5), Sch 11 para 4.

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### **2297. Notice to society of age of committee member.**

A person who holds office as, or is to his knowledge nominated for election or proposed for co-option<sup>1</sup> to the committee<sup>2</sup> as, a member of the committee of a friendly society<sup>3</sup>, must give the society notice, not later than 28 days before he attains the normal retirement age<sup>4</sup> or, as the case may be, the compulsory retirement age<sup>5</sup> for members of the committee, of the date on which he will attain that age<sup>6</sup>. Failure to give the required notice is an offence<sup>7</sup>.

1 As to the persons who may be co-opted see PARA 2294 text and note 6.

2 As to the meaning of 'committee' see PARA 2295 note 2.

3 As to the meaning of 'friendly society' see PARA 2082.

4 As to the meaning of 'normal retirement age' see PARA 2295 note 2.

5 As to the meaning of 'compulsory retirement age' see PARA 2295 text and notes 5-6.

6 Friendly Societies Act 1992 s 27(5), Sch 11 para 5(1).

7 Friendly Societies Act 1992 Sch 11 para 5(2). The offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale and, in the case of a continuing offence, with an additional fine not exceeding one-tenth of that level for every week during which the offence continues: Sch 11 para 5(2). As to the standard scale see PARA 27 note 21.

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### **2298. Retirement of elected committee members.**

In general, a member of the committee<sup>1</sup> of a friendly society<sup>2</sup> must retire from office at the fifth annual general meeting of the society following the date of his election<sup>3</sup>.

The general rule is subject, however, to the following exceptions<sup>4</sup>:

717 (1) where the committee member had attained the normal retiring age<sup>5</sup> at his election, he must retire at the next annual general meeting following that date<sup>6</sup>;

718 (2) a committee member who attains the normal retirement age or, as the case may be, the compulsory retirement age<sup>7</sup>, must retire from office at the next annual general meeting of the society, subject to any provision of the society's rules for earlier retirement<sup>8</sup>;

719 (3) if the rules provide for the retirement of members of its committee by rotation, they may also provide that a person elected to fill a vacant seat on the committee must retire at the annual general meeting at which, in accordance with the rules for retirement in rotation, the seat is to fall vacant<sup>9</sup>.

1 As to the meaning of 'committee' see PARA 2295 note 2.

- 2 As to the meaning of 'friendly society' see PARA 2082.
- 3 Friendly Societies Act 1992 s 27(5), Sch 11 para 6(1)(a). The date of a person's election to office as a member of the committee, where the rules provide for a postal ballot, is the date of the meeting at which the result of the ballot is declared: Sch 11 para 1(2). As to postal ballots see PARA 2307.
- 4 Friendly Societies Act 1992 Sch 11 para 6(1)(a).
- 5 As to the meaning of 'normal retirement age' see PARA 2295 note 2.
- 6 Friendly Societies Act 1992 Sch 11 para 6(1)(b).
- 7 As to the meaning of 'compulsory retirement age' see PARA 2295 text and notes 5-6.
- 8 Friendly Societies Act 1992 Sch 11 para 6(2).
- 9 Friendly Societies Act 1992 Sch 11 para 6(3). This applies to any vacancy arising when an elected member ceases to hold office, for any reason, before the annual general meeting at which (disregarding his age) the seat is due to fall vacant: Sch 11 para 6(4).

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## **2299. Retirement of co-opted members.**

A person who is co-opted<sup>1</sup> as a member of the committee<sup>2</sup> of a friendly society<sup>3</sup> ceases to hold office at the end of the permitted period<sup>4</sup> unless he is elected to office as a member within that period<sup>5</sup>.

- 1 As to the persons who may be co-opted see PARA 2294 text and note 6.
- 2 As to the meaning of 'committee' see PARA 2295 note 2.
- 3 As to the meaning of 'friendly society' see PARA 2082.
- 4 'Permitted period', with reference to the tenure of office of a co-opted member of the committee, means the period beginning with the date of his appointment and ending with the declaration of the next election of members of the committee conducted after his appointment, or the expiration of the period of 16 months beginning with the date of his appointment, whichever first occurs: Friendly Societies Act 1992 s 27(5), Sch 11 para 7(2).
- 5 Friendly Societies Act 1992 Sch 11 para 7(1).

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## **2300. Dealings with members of the committee of management.**

Dealings with members of the committee<sup>1</sup> of a friendly society<sup>2</sup> are governed by specific provisions and also by other provisions applied and modified in their application to friendly societies<sup>3</sup>.

A friendly society or registered branch must not make any payment to a member of the committee of management of the society or branch (1) by way of compensation for loss of office; or (2) as consideration for or in connection with the member's retirement from office, unless particulars of the proposed payment (including its amount) have been disclosed to members of the society or branch and the proposal has been approved by the society or branch<sup>4</sup>.

Certain provisions of the Building Societies Act 1986 concerning directors<sup>5</sup> have effect as if any reference to a director of a building society included a reference to a member of the committee of management of a friendly society or registered branch<sup>6</sup>.

1 As to the meaning of 'committee' see PARA 2295 note 2.

2 As to the meaning of 'friendly society' see PARA 2082.

3 See the Friendly Societies Act 1992 s 27(5), Sch 11 paras 8-16; and the text and notes 4-6. This also applies to registered branches: s 27(5). As to registered branches see PARA 2091.

4 Friendly Societies Act 1992 Sch 11 para 8(1) (Sch 11 para 8 substituted by SI 2008/948). The Friendly Societies Act 1992 Sch 11 para 8(1) does not apply to a bona fide payment by way of damages for breach of contract or by way of pension in respect of past services; and for these purposes, 'pension' includes any superannuation allowance, superannuation gratuity or similar payment: Sch 11 para 8(2) (as so substituted).

5 In the Building Societies Act 1986 s 62 (prohibition of tax-free payments to directors); s 63 (disclosure of interests in contracts and other transactions); s 64 (substantial property transactions); s 65 (restriction on loans, etc); s 66 (sanctions); s 68 and Sch 9 (records of loans, etc); s 69 (disclosure and record of related businesses); and s 70 (interpretation). See PARA 1952 et seq.

6 Friendly Societies Act 1992 Sch 11 para 9(1). Accordingly, references to a friendly society (or registered branch) are substituted for references to a building society, and references to the committee of management are substituted for references to the board of directors: Sch 11 para 9(2). Additional specific modifications are made in relation to the Building Societies Act 1986 ss 65, 69 (Friendly Societies Act 1992 Sch 11 para 9(3), (4)); in the latter case one such modification involves the replacement of a list contained in the Building Societies Act 1986 s 69, Sch 10 of particulars required to be notified by a director or officer of a building society, the replacement list being set out in the Friendly Societies Act 1992 Sch 11 paras 10-16 (Sch 11 para 16 amended by SI 2001/2617): see the Friendly Societies Act 1992 Sch 11 para 9(6). By a drafting error there is no provision numbered Sch 11 para 9(5). See also note 5.

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### **2301. Chief executive and secretary.**

Every friendly society<sup>1</sup> must have a chief executive and a secretary<sup>2</sup>. This is in addition to any officers in relation to which the rules of a registered friendly society<sup>3</sup> must or may make provision<sup>4</sup>.

The chief executive of a friendly society is appointed by the committee of management<sup>5</sup> and is responsible, either alone or jointly with one or more other persons, under the immediate authority of the committee, for the conduct of the business of the society<sup>6</sup>. The committee of

management must take all reasonable steps to secure that the person appointed as chief executive has the requisite knowledge and experience to discharge the functions of his office<sup>7</sup>.

The secretary must either be appointed by the committee of management or, if the rules of the society so provide, be elected to office in accordance with the rules<sup>8</sup>.

It is permissible for the offices of chief executive and secretary to be held by the same person<sup>9</sup>.

Anything required or authorised to be done by or to the chief executive or secretary may be done by an assistant or deputy secretary or chief executive, if the office in question is vacant, or if there is no chief executive or secretary capable of acting for any other reason. If there is no assistant or deputy capable of acting, any member of the society's staff who is authorised generally or specially for the purpose by the committee of management may act in his place<sup>10</sup>.

A friendly society must notify the Financial Services Authority<sup>11</sup> within one month of a person becoming or ceasing to be the society's chief executive or secretary, stating his full name and address and the date on which he became, or ceased to be, chief executive or secretary<sup>12</sup>. Failure so to notify is an offence punishable on summary conviction with a fine<sup>13</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 28(1).

3 As to the meaning of 'registered friendly society' see PARA 2082.

4 As to the officers required to be appointed under the rules of a registered society see PARA 2172 et seq. The requirement to appoint a chief executive and secretary applies to friendly societies but to no other registered societies: see the Friendly Societies Act 1992 s 28(1). Accordingly, the Friendly Societies Act 1992 provides a definition of 'officer' (see PARA 2115 note 11) different from that in the Friendly Societies Act 1974 s 111 (see PARA 2172 note 3).

5 As to the committee of management see PARA 2294 et seq.

6 Friendly Societies Act 1992 s 28(2).

7 Friendly Societies Act 1992 s 28(4).

8 Friendly Societies Act 1992 s 28(3).

9 Friendly Societies Act 1992 s 28(5).

10 Friendly Societies Act 1992 s 28(6).

11 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

12 Friendly Societies Act 1992 s 29(3) (s 29(3), (5) amended by SI 2001/2617). On receipt of such a notice the Financial Services Authority must record the name of the person to whom it relates and the date on which he began to hold or ceased to hold office, in the public file of the society: Friendly Societies Act 1992 s 29(5) (as so amended). As to the public file see PARA 2382.

13 Friendly Societies Act 1992 s 29(4). The fine must not exceed level 4 on the standard scale: s 29(4). As to the standard scale see PARA 27 note 21.

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## (B) MEETINGS AND RESOLUTIONS

## 2302. Annual general meeting.

A friendly society<sup>1</sup> or registered branch<sup>2</sup> must hold a general meeting every year as its annual general meeting, in addition to any other meetings in that year<sup>3</sup>. No more than 15 months may elapse between the date of one annual general meeting and that of the next<sup>4</sup>. If an incorporated friendly society<sup>5</sup> holds its first annual general meeting within 18 months of its incorporation, it need not hold it in the first year of its incorporation or in the following year<sup>6</sup>. Similarly, if a registered friendly society<sup>7</sup> or registered branch holds its first annual general meeting within 18 months of its registration under the Friendly Societies Act 1974, it need not hold it in the year of its registration or in the following year<sup>8</sup>.

A meeting which is to be held as the annual general meeting of a friendly society or registered branch must be specified as such in any notice calling it<sup>9</sup>. The business which may be dealt with at an annual general meeting includes any resolution, including a special resolution, notwithstanding anything in the rules of the society or branch<sup>10</sup>.

A friendly society or branch commits an offence if it fails to hold an annual general meeting as described above<sup>11</sup>. If no annual general meeting is held as required by the Friendly Societies Act 1992, the Financial Services Authority<sup>12</sup> may call or direct the calling of an annual general meeting and give any ancillary or consequential directions which it considers expedient, including modifying or supplementing the operation of the society's rules in relation to the calling, holding and conducting of the meeting<sup>13</sup>. Default in complying with any such directions of the Authority is an offence<sup>14</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to the meaning of 'registered branch' see PARA 2091.

3 Friendly Societies Act 1992 s 30, Sch 12 para 1(1). As to general meetings of registered societies see PARA 2216. As to the provisions which the rules of an incorporated friendly society must include relating to meetings see PARA 2121.

4 Friendly Societies Act 1992 Sch 12 para 1(2).

5 As to the meaning of 'incorporated friendly society' see PARA 2082.

6 Friendly Societies Act 1992 Sch 12 para 1(3).

7 As to the meaning of 'registered friendly society' see PARA 2082.

8 Friendly Societies Act 1992 Sch 12 para 1(4). Note, however, that only branches, not societies, may now be newly registered under the Friendly Societies Act 1974: see the Friendly Societies Act 1992 s 93(1); and PARA 2149.

9 Friendly Societies Act 1992 Sch 12 para 2(1).

10 Friendly Societies Act 1992 Sch 12 para 2(2).

11 Friendly Societies Act 1992 Sch 12 para 3(1). The offence is punishable on summary conviction with a fine not exceeding level 4 on the standard scale: Sch 12 para 3(1). As to the standard scale see PARA 27 note 21.

12 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

13 Friendly Societies Act 1992 Sch 12 para 3(2) (Sch 12 para 3(2), (3) amended by SI 2001/2617).

14 Friendly Societies Act 1992 Sch 12 para 3(3) (as amended: see note 13). The offence is punishable on summary conviction with a fine not exceeding level 5 on the standard scale: Sch 12 para 3(3).

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### **2303. Notice for calling meetings.**

A meeting of a friendly society<sup>1</sup> or registered branch<sup>2</sup> must be called by not less than 14 days' notice<sup>3</sup> to members, or a longer period if the rules so require, expiring with the date of the meeting or, where proxy voting is allowed, with whatever earlier date is specified by the society or branch, under its rules, as the final date for the receipt of instruments appointing proxies to vote at the meeting<sup>4</sup>.

Where the rules do not provide for the giving of individual notices to those entitled<sup>5</sup> to vote at meetings of any description, the rules may provide for the giving of notice by advertisement<sup>6</sup>. If the rules provide for notice to be given by advertisement, the rules must include provision requiring the advertisements to be inserted in at least one newspaper circulating in the areas in which the members of the society reside, or where the membership is drawn from a professional body or wholly or mainly from persons engaged in a particular trade, profession or vocation, in an appropriate professional journal, as the rules provide<sup>7</sup>.

If the rules of a society or branch provide: (1) for adjourned meetings to be called without notice or with such notice as the rules require; or (2) for meetings to be held at a specified time and place, on such dates as are prescribed by the rules, either without further notice or with such notice as the rules may require, the above requirements as to notice of meetings do not apply to meetings which are held by virtue of such provisions<sup>8</sup>.

The above provisions are without prejudice to any requirement of the rules of a friendly society or branch to give notice of special resolutions<sup>9</sup> to be moved, or any other business to be transacted, at a meeting of the society or branch<sup>10</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to the meaning of 'registered branch' see PARA 2091.

3 The notice to members must be in the manner prescribed by the rules of the society or branch: Friendly Societies Act 1992 s 30, Sch 12 para 4(1).

4 Friendly Societies Act 1992 Sch 12 para 4(1).

5 I.e. at the time the notice is given: Friendly Societies Act 1992 Sch 12 para 4(2).

6 Friendly Societies Act 1992 Sch 12 para 4(2).

7 Friendly Societies Act 1992 Sch 12 para 4(3).

8 Friendly Societies Act 1992 Sch 12 para 4(4).

9 As to special resolutions see PARA 2306.

10 Friendly Societies Act 1992 Sch 12 para 4(5).

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Common to All Friendly Societies/A. MANAGEMENT AND ADMINISTRATION/(B) Meetings and Resolutions/2304. Members' entitlement to vote on resolutions.

### **2304. Members' entitlement to vote on resolutions.**

Any provision in the rules of a friendly society<sup>1</sup> or registered branch<sup>2</sup> is void, to the extent that it would have the effect of making the voting rights conferred on members by the rules conditional on the amount of their subscriptions<sup>3</sup>, except in relation to any provision in the rules excluding or limiting the voting rights of members in such cases or circumstances as the Treasury<sup>4</sup> may prescribe by regulations<sup>5</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to the meaning of 'registered branch' see PARA 2091.

3 Friendly Societies Act 1992 s 30, Sch 12 para 5(1). 'Subscription' includes a contribution payment falling to be made by a member: Sch 12 para 5(3).

4 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.

5 Friendly Societies Act 1992 Sch 12 para 5(2) (amended by SI 2001/2617). At the date at which this volume states the law, no such regulations had been made.

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### **2305. Right to demand a poll.**

Any provision in the rules of a friendly society<sup>1</sup> or registered branch<sup>2</sup> is void, if and so far as its effect would be: (1) to exclude the right to demand a poll at a meeting of the society on any question other than the election of a chairman of the meeting or the adjournment of the meeting; or (2) to make a demand for a poll ineffective on any such question, which is made by not fewer than ten members<sup>3</sup> who are entitled to vote at the meeting or, in the case of a society whose rules provide for delegate voting, five delegates who are so entitled<sup>4</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to the meaning of 'registered branch' see PARA 2091.

3 The reference to 'members' includes, where the rules allow the appointment of proxies, reference to persons duly appointed on behalf of members entitled to attend and vote at the meeting: Friendly Societies Act 1992 s 30, Sch 12 para 6(2).

4 Friendly Societies Act 1992 Sch 12 para 6(1).

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Common to All Friendly Societies/A. MANAGEMENT AND ADMINISTRATION/(B) Meetings and Resolutions/2306. Special resolutions.

### **2306. Special resolutions.**

A resolution of a friendly society<sup>1</sup> may only be passed as a special resolution<sup>2</sup> if:

- 720 (1) it is required by or under any provision of the Friendly Societies Act 1974<sup>3</sup> or the Friendly Societies Act 1992, or by the rules of the society, to be passed as one<sup>4</sup>;
- 721 (2) at least 14 days' notice, or longer if the rules of the society so require, expiring:
- 33
- 16. (a) with the date of the meeting at which the resolution is to be moved; or
  - 17. (b) where proxy voting is permitted, with such earlier date as the society may specify under its rules as the final date for the receipt of instruments appointing proxies to vote at the meeting,
  - 18. is given to members in the manner prescribed by its rules<sup>5</sup>; and
- 34
- 722 (3) any such notice (or, in the case of a postal ballot, the ballot papers) includes a statement that the resolution will not be effective unless it is passed as a special resolution<sup>6</sup>.

With one exception, a resolution of a friendly society is not effective as a special resolution unless it is passed by not less than three-quarters of the number of the members of the society entitled to vote on it, who in fact do vote, in person or by proxy, on a poll at a meeting of the society or in a postal ballot<sup>7</sup>. The exception is where the rules of a friendly society provide for delegate voting, in which case a resolution is not effective as a special resolution unless it is passed by not less than three-quarters of the number of delegates entitled to vote on the resolution, who vote on a poll at a meeting or in a postal ballot<sup>8</sup>.

Where the rules of a friendly society do not require individual notice to be given to those entitled to vote on a special resolution, the rules may provide for notice to be given by advertisement<sup>9</sup>. If the rules so provide, they must require the advertisements to be inserted either: (i) in at least one newspaper circulating in the areas in which the members of the society reside; or (ii) where the membership of the society is drawn from a professional body, or wholly or mainly from persons who are or have been engaged in a particular trade, profession or vocation, in an appropriate professional journal<sup>10</sup>.

Notwithstanding anything to the contrary in the rules of a friendly society, proxy voting must be allowed on any resolution to be moved as a special resolution at any meeting of the society other than a delegate meeting; the procedure adopted by the society for proxy voting must comply with any requirements prescribed in regulations made by the Treasury<sup>11</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 In the Friendly Societies Act 1992, 'special resolution' means a resolution passed in accordance with the provisions described in the text and notes 3-6: ss 30, 119(1), Sch 12 para 7(1).

3 For the purposes of the Friendly Societies Act 1974, 'special resolution', in relation to a registered friendly society, is to be construed in accordance with the Friendly Societies Act 1992 Sch 12 para 7: see the Friendly Societies Act 1974 s 86(2A) (added by the Friendly Societies Act 1992 Sch 16 paras 1, 33(b)). See also PARA 2218.

4 Friendly Societies Act 1992 Sch 12 para 7(1)(a).

5 Friendly Societies Act 1992 Sch 12 para 7(1)(b).



6 Friendly Societies Act 1992 Sch 12 para 7(1)(c). As to postal ballots see PARA 2307.

7 Friendly Societies Act 1992 Sch 12 para 7(2).

8 Friendly Societies Act 1992 Sch 12 para 7(3).

9 Friendly Societies Act 1992 Sch 12 para 7(4).

10 Friendly Societies Act 1992 Sch 12 para 7(5).

11 Friendly Societies Act 1992 Sch 12 para 7(6) (amended by SI 2001/2617). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.

The Friendly Societies (Proxy Voting) Regulations 1993, SI 1993/2294, reg 2 provides that the procedure must comply with the following requirements:

- 22 (1) in every notice calling a meeting of the society at which a special resolution is to be moved there must be a statement that a member entitled to attend and vote may appoint a proxy to attend and vote instead of him, and that the member may direct the proxy how to vote at the meeting;
- 23 (2) the instrument appointing the proxy must be signed by the appointer or his agent authorised in writing;
- 24 (3) that instrument or any other document necessary to show the validity of, or otherwise relating to, the appointment must be received at the registered office of the society or such other place within the United Kingdom as is specified in the notice convening the meeting, not less than 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote;
- 25 (4) there must be no requirement that the instrument or other document must be received more than seven days before a meeting or adjourned meeting at which that person proposes to vote, in order for the appointment to be effective;
- 26 (5) an instrument must be in the form prescribed by the regulations (ie in the Schedule);
- 27 (6) the society may add to such prescribed form any explanatory notes it may think fit to assist an appointer;
- 28 (7) where the rules of a society permit a proxy to speak at a meeting the instrument of appointment may confer authority to do so;
- 29 (8) a vote given in accordance with the terms of an instrument of appointment is valid notwithstanding;
79. (a) the previous death or mental disorder (see PARA 2218 note 20) of the appointer or revocation of the proxy or of the authority under which it was executed, provided that no intimation in writing of that event has been received by the society at its registered office before the commencement of the meeting or adjourned meeting; or  
79
80. (b) that since the last day specified for the receipt of instruments appointing a proxy the appointer has ceased to be entitled to attend and vote at the meeting.  
80

The proxy need not be a member of the society, and in the case of a collecting society (see PARA 2088), must not be a collector or superintendent of the society: reg 2(b). As to the meaning of 'United Kingdom' see PARA 2 note 3.

Common to All Friendly Societies/A. MANAGEMENT AND ADMINISTRATION/(B) Meetings and Resolutions/2307. Postal ballots.

### **2307. Postal ballots.**

The rules of a friendly society<sup>1</sup> or registered branch<sup>2</sup> may provide for the voting in an election of the committee of management<sup>3</sup> or, where applicable, of the secretary<sup>4</sup>, or on any resolution (whether special<sup>5</sup> or not), to be conducted in all or in any particular circumstances by postal ballot<sup>6</sup>.

Any postal ballot must comply with the following requirements<sup>7</sup>. Notice of a postal ballot must be given not less than 14 nor more than 56 days before the date which the society or branch specifies as the final date for the receipt of completed ballot papers (known as the 'voting date')<sup>8</sup>. Notice must be given to every member of the society or branch who would be entitled to vote in the election or on the resolution if the voting date for the election or resolution fell on the date of the notice<sup>9</sup>.

Notice of a postal ballot must contain such other notices relating to the election or resolution, and be accompanied by such other documents, as would be required to be given or sent to a member in connection with the election or resolution concerned had it been intended to hold the election or vote on the resolution at a meeting instead of by a postal ballot, with the exception of any notice relating to voting by proxy at a meeting<sup>10</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to the meaning of 'registered branch' see PARA 2091.

3 As to the committee of management see PARA 2294 et seq.

4 As to the secretary see PARA 2301.

5 As to special resolutions see PARA 2306.

6 Friendly Societies Act 1992 s 30, Sch 12 para 8(1). In the Friendly Societies Act 1992, 'ballot' or 'postal ballot' in relation to an election or resolution of the society or branch means a postal ballot taking place by virtue of those rules: Sch 12 para 8(1).

7 Friendly Societies Act 1992 Sch 12 para 8(2).

8 Friendly Societies Act 1992 Sch 12 para 8(3).

9 Friendly Societies Act 1992 Sch 12 para 8(4).

10 Friendly Societies Act 1992 Sch 12 para 8(5).

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### **2308. Resolutions requiring special notice.**

Where special notice of a resolution is required under any provision of the Friendly Societies Act 1992<sup>1</sup>, the resolution is not effective unless notice of the intention to move it has been given to the friendly society<sup>2</sup> concerned at least 28 days before the meeting at which it is to be

moved<sup>3</sup>. The society concerned must give its members notice of such a resolution at the same time and in the same manner as its rules require for notice of the meeting or, if that is not practicable, by advertisement in a newspaper having an appropriate circulation<sup>4</sup>, or in any other mode allowed by the society's rules, at least 14 days before the meeting<sup>5</sup>. If, after notice has been given to the society of the intention to move such a resolution, a meeting is called for a date 28 days or less after the notice has been given, the notice is deemed properly given, even though not within the time required<sup>6</sup>.

1 Eg a resolution at a general meeting to remove an auditor before the expiry of his term of office: see the Friendly Societies Act 1992 s 72, Sch 14 para 11; and PARA 2338.

2 As to the meaning of 'friendly society' see PARA 2082.

3 Friendly Societies Act 1992 s 30, Sch 12 para 9(1).

4 'Appropriate circulation' is not defined, but it is conceived that the circulation of newspapers required for notice of calling meetings or the advertisement of special resolutions pertains: see PARAS 2303 text and note 7, 2306 text and note 10.

5 Friendly Societies Act 1992 Sch 12 para 9(2).

6 Friendly Societies Act 1992 Sch 12 para 9(3).

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## ***B. AUTHORISATION***

### **2309. Authorisation by the Financial Services Authority.**

Friendly societies must apply to the Financial Services Authority<sup>1</sup> for permission to carry out activities regulated by the Financial Services and Markets Act 2000<sup>2</sup>. The regulation of such activities is dealt with elsewhere in this title<sup>3</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 Ie under the Financial Services and Markets Act 2000 Pt IV (ss 40-55): see PARA 348 et seq. See also PARA 2109. A society becomes an 'authorised person' for the purposes of the Financial Services and Markets Act 2000 when the necessary permission is given: see s 31(1)(a), (2); and PARA 2293. See also PARA 314.

3 See generally PARA 5 et seq.

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## ***C. POWERS OF THE FINANCIAL SERVICES AUTHORITY***

### 2310. Power to petition the court or apply for an order.

Where the Financial Services Authority<sup>1</sup> has reason to believe that any of the following conditions is satisfied, it may present a petition<sup>2</sup> to the High Court<sup>3</sup> for the winding up of a friendly society<sup>4</sup> under the applicable winding up legislation<sup>5</sup>. The conditions are:

- 723 (1) that the society is carrying on activities that are not activities which such a society is permitted to carry on by the Friendly Societies Act 1974 or the Friendly Societies Act 1992<sup>6</sup>;
- 724 (2) that the society is not carrying on any specified activity<sup>7</sup>;
- 725 (3) that the society is failing to satisfy any obligation to which it is subject by virtue of any provision of the law of any EEA state<sup>8</sup> other than the United Kingdom<sup>9</sup> which gives effect to the General Insurance Directives<sup>10</sup> or the Life Assurance Consolidation Directive<sup>11</sup> or is otherwise applicable to the insurance activities of the society in that state<sup>12</sup>.

A court may not make an order for the winding up of a society under these provisions unless it is satisfied that at least one of these conditions is satisfied<sup>13</sup>.

Where the Authority has reason to believe that any of the above conditions is satisfied, it may make application to the High Court for an order<sup>14</sup> directing the society to modify its business as directed in the order, or to take such other steps as may be directed<sup>15</sup>. The court may not make such an order unless it is satisfied that one or more of the above conditions are satisfied<sup>16</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 The power to present a petition is available to the Financial Services Authority whether or not it has previously presented a petition: Friendly Societies Act 1992 s 52(7) (amended by SI 2001/2617).

3 Or, where applicable, to the Court of Session or the High Court in Northern Ireland: see the Friendly Societies Act 1992 s 52(8).

4 As to the meaning of 'friendly society' see PARA 2082.

5 Friendly Societies Act 1992 s 52(1) (amended by SI 2001/2617). As to the meaning of 'the applicable winding up legislation' in relation to an incorporated friendly society see the Friendly Societies Act 1992 s 23; and PARA 2145 note 3. In relation to a registered friendly society 'the applicable winding up legislation' means the Insolvency Act 1986 Pt V (ss 220-229) (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 1147 et seq), or, where the society's registered office is in Northern Ireland, the Insolvency (Northern Ireland) Order 1989, SI 1989/2405, Pt VI: Friendly Societies Act 1992 s 52(9).

6 Friendly Societies Act 1992 s 52(2)(a).

7 Friendly Societies Act 1992 s 52(2)(b). The activities referred to are any activities falling within Sch 2: see PARA 2096.

8 'EEA state' means a state which is a contracting party to the EEA Agreement; and 'EEA Agreement' means the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the Protocol signed at Brussels on 17 March 1993: Friendly Societies Act 1992 s 119(1) (definitions added by SI 1994/1984).

9 As to the meaning of 'United Kingdom' see PARA 2 note 3.

10 'General Insurance Directives' means the First General Insurance Directive (ie EC Council Directive 73/239 of 24 July 1973 (OJ L228, 16.8.73, p 3) on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance), the Second General Insurance Directive (ie EC Council Directive 88/357 of 22 June 1988 (OJ L172, 4.7.88, p 1) on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Council Directive 73/239), the Third General Insurance Directive (ie EC Council Directive 92/49 of 18 June 1992 (OJ L228, 11.8.92, p 1) on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Council Directives 73/239 and 88/357), and such

other directives as make provision with respect to the business of direct insurance other than life assurance: see the Friendly Societies Act 1992 s 119(1) (definition substituted by SI 1994/1984). References in the Friendly Societies Act 1992 to the First or Third General Insurance Directive are references to that directive as amended by European Parliament and Council Directive 95/26 of 29 June 1995 (OJ L168, 18.7.95, p 7) amending EEC Directive 77/780 (OJ L322, 17.12.77, p 30) and EEC Directive 89/646 (OJ L386, 30.12.89, p 1) in the field of credit institutions, EEC Directive 73/239 (OJ L228, 16.8.73, p 3) and EEC Directive 92/49 (OJ L228, 11.8.92, p 1) in the field of non-life insurance, EEC Directive 93/22 (OJ L141, 11.6.93, p 27) in the field of investment firms and EEC Directive 85/611 (OJ L375, 31.12.85, p 3) in the field of undertakings for collective investment in transferable securities ('UCITS') with a view to reinforcing prudential supervision and as amended by the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1) on reinsurance and amending EEC Council Directives 73/239, 92/49 as well as EC Directives 98/78 and 2002/83): see the Friendly Societies Act 1992 s 119(1A) (added by SI 1996/1669; and amended by SI 2001/3649; SI 2004/3379; SI 2007/3253); the Friendly Societies Act 1992 s 119(3) (added by SI 2007/3253).

11 The reference to the 'Life Assurance Consolidation Directive' is a reference to European Parliament and Council Directive 2002/83 of 5 November 2002 (OJ L345, 19.12.2002, p 1) concerning life assurance: see the Friendly Societies Act 1992 s 119(1) (definition added by SI 2004/3379). References in the Friendly Societies Act 1992 to the Life Assurance Consolidation Directive are references to that directive as amended by the Reinsurance Directive (ie European Parliament and EC Council Directive 2005/68 (OJ L323, 9.12.2005, p 1)): see the Friendly Societies Act 1992 s 119(1D) (added by SI 2007/3253).

12 Friendly Societies Act 1992 s 52(2)(c) (substituted by SI 1994/1984; and amended by SI 2004/3379).

13 Friendly Societies Act 1992 s 52(2).

14 The power to apply for an order is available to the Financial Services Authority whether or not it has previously applied for an order: Friendly Societies Act 1992 s 52(7) (as amended: see note 2).

15 Friendly Societies Act 1992 s 52(3), (5) (s 52(3), (5) amended by the Financial Services and Markets Act 2000 Sch 18 para 15, Sch 22; and the Friendly Societies Act 1992 s 52(3) further amended by SI 2001/2617).

16 Friendly Societies Act 1992 s 52(4) (substituted by the Financial Services and Markets Act 2000 Sch 18 para 15). Where the court makes such an order the Financial Services Authority must keep a copy of the order in the public file of the society: Friendly Societies Act 1992 s 52(6) (amended by SI 2001/2617). As to the public file of the society see PARA 2382.

## UPDATE

### 2310 Power to petition the court or apply for an order

NOTE 8--Definition of 'EEA Agreement' omitted; definition of 'EEA state' substituted: SI 2008/1140.

NOTE 10--Directive 85/611 replaced: see PARA 6.

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### 2311. Supervision of activities of subsidiaries etc.

If it appears to the Financial Services Authority<sup>1</sup> that the activities of subsidiaries<sup>2</sup> of an incorporated friendly society<sup>3</sup> or bodies jointly controlled by it<sup>4</sup> are, or may become, disproportionate to those of the friendly society group<sup>5</sup> as a whole, it may direct the society: (1) to take or refrain from taking steps specified in the direction with a view to securing that the activities in question cease to be, or do not become, disproportionate; or (2) to take specified steps with a view to securing that it ceases to have control or joint control of any subsidiary or

jointly controlled body in question, or that any such subsidiary or jointly controlled body is wound up<sup>6</sup>.

If it appears to the Authority that any activity of a subsidiary of, or body jointly controlled by, an incorporated friendly society, is unsuitable for a member of a friendly society group, it may direct<sup>7</sup> the society: (a) to take steps specified in the direction with a view to securing that that activity ceases; or (b) to take steps so specified with a view to securing that the society ceases to have control or joint control of the subsidiary or jointly controlled body, or that the subsidiary or jointly controlled body is wound up<sup>8</sup>.

A direction under these provisions may specify that the society is to comply with it: (i) immediately on receipt of a final notice in relation to the direction; (ii) before the end of such period as may be specified in the direction, beginning with the giving of a final notice in relation to the direction; or (iii) on the happening of an event subsequent to the giving of such a notice<sup>9</sup>. A society given such a direction must either comply with it or convert itself into a company<sup>10</sup>. The Authority may by written notice to the society vary a direction at the request of the society or revoke such a direction<sup>11</sup>. If a society requests the Authority to notify it as to whether, in the Authority's opinion, it has complied with such a direction, the Authority is obliged to comply with the request<sup>12</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the meaning of 'subsidiary' see PARA 2134.

3 As to the meaning of 'incorporated friendly society' see PARA 2082.

4 As to the meaning of 'jointly controlled body' see PARA 2134.

5 'Friendly society group' means an incorporated friendly society, subsidiaries of that society and bodies jointly controlled by it: Friendly Societies Act 1992 s 54(1).

6 Friendly Societies Act 1992 s 54(2) (amended by SI 2001/2617).

7 The Financial Services Authority must keep a copy of such a direction (or of any notice under the Friendly Societies Act 1992 s 54(6) (see the text and note 11) or a final notice varying a direction (see PARAS 2313-2315) or notification under s 54(7) (see the text and note 12)) in the public file of the society: s 54(9) (amended by SI 2001/2617). As to the public file of the society see PARA 2382. 'Final notice' means a final notice given under the Financial Services and Markets Act 2000 s 390 (see PARA 772), as applied by the Friendly Societies Act 1992 s 58A(6) (see PARA 2314): s 54(10) (added by SI 2001/2617).

8 Friendly Societies Act 1992 s 54(3) (amended by SI 2001/2617).

9 Friendly Societies Act 1992 s 54(4) (amended by SI 2001/2617).

10 Friendly Societies Act 1992 s 54(5). As to conversion to a company see Pt VIII (ss 85-92); and PARA 2359.

11 Friendly Societies Act 1992 s 54(6) (substituted by SI 2001/2617). See note 7.

12 Friendly Societies Act 1992 s 54(7) (amended by SI 2001/2617). See note 7.

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## **2312. Supervision of group insurance business.**

Where a friendly society<sup>1</sup> carries on any group insurance business<sup>2</sup>, providing benefits for or in respect of a group of persons who are not members of the society<sup>3</sup>, and it appears to the Financial Services Authority<sup>4</sup> that the business is, or may become, disproportionate to the other activities of the society (including any group insurance business carried on for the provision of benefits for or in respect of persons who are members of the society), it may direct the society to take or refrain from taking steps specified in the direction, with a view to securing that the group business in question ceases to be, or does not become, disproportionate<sup>5</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to the meaning of 'group insurance business' see PARA 2138.

3 Friendly Societies Act 1992 s 55(1).

4 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 Friendly Societies Act 1992 s 55(2) (amended by SI 2001/2617). The procedural provisions in the Friendly Societies Act 1992 s 54(4)-(9) (see PARA 2311) apply to such a direction: s 55(3).

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## ***D. NOTICES, HEARINGS AND APPEALS***

### **2313. Warning notices.**

If the Financial Services Authority<sup>1</sup> proposes: (1) to give a direction<sup>2</sup> to a society, or to vary such a direction other than at the request of the society; or (2) to give a direction in relation to a society<sup>3</sup>, it must give the society a warning notice<sup>4</sup>. The warning notice must set out the terms of the direction which the Authority proposes to give and, in the case of a proposal to give a direction under head (1) above, any provisions which the Authority proposes to include<sup>5</sup> in the direction<sup>6</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 I.e. under the Friendly Societies Act 1992 s 54 (supervision of activities of subsidiaries etc) (see PARA 2311) or s 55 (supervision of group insurance business) (see PARA 2312).

3 I.e. under the Friendly Societies Act 1992 s 90 (power of Financial Services Authority to effect transfer of engagements) (see PARA 2357).

4 Friendly Societies Act 1992 s 58A(1) (s 58A added by SI 2001/2617). The Financial Services and Markets Act 2000 Pt XXVI (ss 387-396) (notices) (see PARA 769) is to be treated as applying in respect of warning notices given under the Friendly Societies Act 1992 s 58A as it applies in respect of warning notices given under the Financial Services and Markets Act 2000, subject to certain modifications: Friendly Societies Act 1992 s 58A(6), (8) (as so added).

5 I.e. by virtue of the Friendly Societies Act 1992 s 54(4) (see PARA 2311) (including that provision as applied by s 55(3) (see PARA 2312)).

6 Friendly Societies Act 1992 s 58A(2) (as added: see note 4).

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### **2314. Decision notices.**

If the Financial Services Authority<sup>1</sup> decides: (1) to give a direction<sup>2</sup> to a society, or to vary such a direction other than at the request of the society; or (2) to give a direction in relation to a society<sup>3</sup>, it must give the society a decision notice<sup>4</sup>.

The decision notice must set out the terms of the direction which the Authority has decided to give and, in the case of a decision to give a direction under head (1) above, any provisions to be included<sup>5</sup> in the direction<sup>6</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 Ie under the Friendly Societies Act 1992 s 54 (supervision of activities of subsidiaries etc) (see PARA 2311) or s 55 (supervision of group insurance business) (see PARA 2312).

3 Ie under the Friendly Societies Act 1992 s 90 (power of Financial Services Authority to effect transfer of engagements) (see PARA 2357).

4 Friendly Societies Act 1992 s 58A(3) (s 58A added by SI 2001/2617). The Financial Services and Markets Act 2000 Pt XXVI (ss 387-396) (notices) (see PARA 769 et seq) is to be treated as applying in respect of decision notices given under the Friendly Societies Act 1992 s 58A as it applies in respect of decision notices given under the Financial Services and Markets Act 2000, subject to certain modifications: Friendly Societies Act 1992 s 58A(6), (8) (as so added). As to references to the Financial Services and Markets Tribunal see PARA 2315.

5 Ie by virtue of the Friendly Societies Act 1992 s 54(4) (see PARA 2311) (including that provision as applied by s 55(3) (see PARA 2312)).

6 Friendly Societies Act 1992 s 58A(4) (as added: see note 4).

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### **2315. References to the Financial Services and Markets Tribunal.**

A society to whom a decision notice is given<sup>1</sup> may refer the matter to the Financial Services and Markets Tribunal<sup>2</sup>.

1 Ie under the Friendly Societies Act 1992 s 58A: see PARA 2314.

2 Friendly Societies Act 1992 s 58A(5) (s 58A added by SI 2001/2617). The provisions of the Financial Services and Markets Act 2000 Pt IX (ss 132-137) (hearings and appeals) (see PARA 43 et seq) are to be treated as applying in respect of references to the Financial Services and Markets Tribunal made under the Friendly Societies Act 1992 s 58A as they apply in respect of references made to that Tribunal under the Financial Services and Markets Act 2000: Friendly Societies Act 1992 s 58A(7) (as so added).



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## **E. INFORMATION**

### **2316. Powers to obtain information, documents etc.**

The Financial Services Authority<sup>1</sup> may, by notice to a friendly society<sup>2</sup> or to a subsidiary or jointly controlled body of a friendly society<sup>3</sup>, require it to take any of the following actions<sup>4</sup>:

- 726 (1) to furnish to it, within a specified<sup>5</sup> period, or at a specified time or times, such specified information<sup>6</sup> as the Authority considers it needs for the purposes of its supervisory functions<sup>7</sup>;
- 727 (2) to produce to it, at a specified time and place, such specified documents or other material<sup>8</sup> as the Authority considers it needs for the purposes of its supervisory functions<sup>9</sup>;
- 728 (3) to provide to it, within a specified period, such explanations of specified matters<sup>10</sup> as the Authority considers it needs for the purposes of its supervisory functions<sup>11</sup>;
- 729 (4) to furnish to it, within a specified period, a report by an accountant or actuary approved by the Authority on, or on specified aspects of, information or documents or other material furnished or produced to the Authority<sup>12</sup>.

Any person authorised for the purpose by the Authority (an 'authorised officer') may, on producing evidence of his authority, require a friendly society or a subsidiary of, or body jointly controlled by, an incorporated friendly society<sup>13</sup>:

- 730 (a) to furnish to him forthwith such specified information as the Authority considers it needs for the purposes of its supervisory functions<sup>14</sup>;
- 731 (b) to produce to him forthwith such documents or other material as the Authority considers it needs for those purposes<sup>15</sup>;
- 732 (c) to provide to him forthwith such explanations of specified matters as the Authority considers it needs for those purposes<sup>16</sup>.

Where the Authority has power under head (1), (2) or (3) above, or by virtue of heads (a) to (c) above an authorised officer has power, to require any information, documents, material or explanation by a friendly society, the Authority or authorised officer has the like powers as regards any person who: (i) is or has been an officer<sup>17</sup>, employee or agent<sup>18</sup> of the society, or in relation to a directive society<sup>19</sup>, a controller<sup>20</sup> or manager of the society; or (ii) in the case of documents or material, appears to the Authority or authorised officer to have the document or material in his possession or under his control<sup>21</sup>. Both the Authority and an authorised officer have similar powers, as regards a subsidiary of, or body jointly controlled by, an incorporated friendly society, in relation to any person who is or has been an officer, employee or agent of the subsidiary or jointly controlled body or, in the case of documents or material, who appears to the Authority or authorised officer to have the document or material in his possession or under his control<sup>22</sup>.

Where such a person from whom production of a document or material is required claims a lien on the document or material, the production of it is without prejudice to the lien<sup>23</sup>.

Where the Authority or an authorised officer requires production of documents or material under the provisions described above and they are not produced by the person concerned, the Authority or authorised officer may require that person to state, to the best of his knowledge and belief, where they are; if they are produced, the Authority or authorised officer may take copies of or extracts from them and require the person who produces them or any other person who is or has been an officer, employee or agent of the friendly society or other body, as the case may be, to provide an explanation of the documents or material<sup>24</sup>.

A barrister, solicitor, advocate and certain other persons are exempt from the above requirements if the document or material concerned is contained in a privileged communication or is protected from disclosure on the ground of confidentiality<sup>25</sup>.

Any person who fails without reasonable excuse to furnish any information or report, to produce any documents or material, or to provide any explanation or make any statement, when required to do so under the provisions described above, is guilty of an offence<sup>26</sup>.

Any friendly society which furnishes any information, provides any explanation or makes any statement, which is false or misleading in a material particular, is guilty of an offence<sup>27</sup>. Any person who knowingly or recklessly does so is guilty of an offence<sup>28</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the meaning of 'friendly society' see PARA 2082.

3 The Friendly Societies Act 1992 s 62 does not authorise any requirement in relation to information, documents or other material (see note 6) to be imposed on a subsidiary of or body jointly controlled by an incorporated friendly society unless that subsidiary or body carries on business in the United Kingdom; but a requirement may be imposed under s 62 on a friendly society in relation to information, documents or other material in the possession or control of a subsidiary of or body jointly controlled by the society which does not carry on business in the United Kingdom: s 62(2). As to the meanings of 'subsidiary' and 'jointly controlled body' see PARA 2134. As to the meaning of 'incorporated friendly society' see PARA 2082. As to the meaning of 'United Kingdom' see PARA 2 note 3.

4 Friendly Societies Act 1992 s 62(3) (amended by SI 2001/2617).

5 'Specified' in the Friendly Societies Act 1992 s 62 means specified in a notice under that provision: s 62(12).

6 These provisions apply to information, documents or other material, or explanations of matters which relate to the activities or plans for the future development of a friendly society or of a subsidiary or jointly controlled body of an incorporated friendly society: Friendly Societies Act 1992 s 62(1).

7 Friendly Societies Act 1992 s 62(3)(a) (as amended: see note 4). In relation to requirements imposed by s 62, 'the purposes of its supervisory functions' means the purposes of the discharge by the Authority of any of its functions under the Friendly Societies Act 1992: s 62(1) (amended by SI 2001/2617).

8 As to the documents and materials to which these provisions apply see note 6.

9 Friendly Societies Act 1992 s 62(3)(b) (as amended: see note 4).

10 As to such explanations to which these provisions apply see note 6.

11 Friendly Societies Act 1992 s 62(3)(c) (as amended: see note 4).

12 Friendly Societies Act 1992 s 62(3)(d) (as amended: see note 4).

13 Friendly Societies Act 1992 s 62(3A) (added by SI 2001/2617).

14 Friendly Societies Act 1992 s 62(3A)(a) (as added: see note 13).

15 Friendly Societies Act 1992 s 62(3A)(b) (as added: see note 13).

16 Friendly Societies Act 1992 s 62(3A)(c) (as added: see note 13).

17 As to the meaning of 'officer' see PARA 2115 note 11.

18 'Agent', in relation to a friendly society or a subsidiary of, or body jointly controlled by, an incorporated friendly society, includes its bankers, accountants, solicitors and auditors and the appropriate actuary: Friendly Societies Act 1992 s 62(12). As to the meaning of 'appropriate actuary' see PARA 2139 note 4.

19 In relation to a society to which the Friendly Societies Act 1992 s 37(2) or (3) applies: see PARA 2112 note 15.

20 'Controller', in relation to a friendly society to which the Friendly Societies Act 1992 s 37(2) or (3) applies (see PARA 2112 note 15), means a person who, either alone or with any associate or associates: (1) is entitled to exercise or control the exercise of 10% or more of the voting power at any general meeting of the society; or (2) is able to exercise a significant influence over the management of the society by virtue of an entitlement to exercise, or to control the exercise of, the voting power at any general meeting of the society: ss 55A(2), 119(1) (s 55A added by SI 1994/1984; and amended by SI 2001/2617). As to general meetings see PARA 2302.

21 Friendly Societies Act 1992 s 62(4) (amended by SI 1994/1984; and SI 2001/2617).

22 Friendly Societies Act 1992 s 62(5) (amended by SI 2001/2617).

23 Friendly Societies Act 1992 s 62(6). See further **LIEN** vol 68 (2008) PARA 801 et seq.

24 Friendly Societies Act 1992 s 62(8) (amended by SI 2001/2617).

25 See the Friendly Societies Act 1992 s 62(7).

26 Friendly Societies Act 1992 s 62(9). The offence is punishable on summary conviction with a fine not exceeding level 5 on the standard scale, and in the case of a continuing offence with an additional fine not exceeding one-tenth of that level for every day during which the offence continues: s 62(9)(a), (b). As to the standard scale see PARA 27 note 21.

27 Friendly Societies Act 1992 s 62(10). The offence is punishable on conviction on indictment with a fine, and on summary conviction with a fine not exceeding the statutory maximum: s 62(10)(a), (b). As to the statutory maximum see PARA 56 note 24.

28 Friendly Societies Act 1992 s 62(11). The offence is punishable on conviction on indictment with imprisonment for up to two years or a fine or both, and on summary conviction with a fine not exceeding the statutory maximum: s 62(11)(a), (b).

## UPDATE

### 2316 Powers to obtain information, documents etc

TEXT AND NOTE 25--Reference to a barrister, solicitor, advocate now to a relevant lawyer (defined in Friendly Societies Act 1992 s 62(12)): s 62(7) (s 62(7) amended, definition added, by Legal Services Act 2007 Sch 21 para 103).

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### 2317. Entry of premises under warrant.

A justice of the peace may issue a warrant<sup>1</sup> if satisfied on information on oath given by or on behalf of the Financial Services Authority<sup>2</sup>, an authorised officer<sup>3</sup>, or a person appointed as an investigator<sup>4</sup> or as an inspector<sup>5</sup>, that there are reasonable grounds for believing that the first or second set of conditions below is satisfied<sup>6</sup>.

The first set of conditions is that:

- 733 (1) there are on the premises specified in the warrant information, documents or other material in relation to which a requirement has been imposed on any person<sup>7</sup>, or which it is the duty of any person to produce<sup>8</sup>; and
- 734 (2) that person has failed (wholly or in part) to comply with that requirement or, having been requested to do so, has failed (wholly or in part) to comply with that duty<sup>9</sup>.

The second set of conditions is that:

- 735 (a) there are on the premises specified in the warrant information, documents or other material in relation to which a requirement could be imposed on any person<sup>10</sup>, or which any person could be requested to produce in compliance with the duty imposed on him<sup>11</sup>; and
- 736 (b) if such a requirement were imposed, or such a request made it would not be complied with or any information, documents or other material to which it related would be removed, tampered with or destroyed<sup>12</sup>.

1 le under the Financial Services and Markets Act 2000 s 176: see PARA 454.

2 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

3 le within the meaning of the Friendly Societies Act 1992 s 62(3A): see PARA 2316 text to note 13.

4 le under the Friendly Societies Act 1992 s 65(1): see PARA 2319.

5 le under the Friendly Societies Act 1992 s 66(1): see PARA 2320.

6 Friendly Societies Act 1992 s 62A(1) (s 62A added by SI 2001/2617).

7 le under the Friendly Societies Act 1992 s 62(3), (3A), (4) or (5) (see PARA 2316) or s 67(3) (see PARA 2322).

8 le under the Friendly Societies Act 1992 s 65(3) (see PARA 2319) or s 67(2) (see PARA 2322).

9 Friendly Societies Act 1992 s 62A(2) (as added: see note 6).

10 le under the Friendly Societies Act 1992 s 62(3), (3A), (4) or (5) (see PARA 2316) or s 67(3) (see PARA 2322).

11 le under the Friendly Societies Act 1992 s 65(3) (see PARA 2319) or s 67(2) (see PARA 2322).

12 Friendly Societies Act 1992 s 62A(3) (as added: see note 6).

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### **2318. Disclosure of information.**

Confidential information<sup>1</sup> relating to the business or other affairs of a friendly society<sup>2</sup>, a registered branch<sup>3</sup> of a friendly society or any other person must not be disclosed by: (1) the Financial Services Authority; (2) any person who is or has been employed by the Authority; and (3) any person appointed by the Authority to carry out functions under the Friendly Societies Act 1992 or the Friendly Societies Act 1974<sup>4</sup>, or by any person obtaining the information

directly or indirectly from one of those persons, without the consent of the person from whom the information was obtained and, if different, the person to whom it relates<sup>5</sup>.

Information is not confidential<sup>6</sup> if it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded<sup>7</sup>, or it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person<sup>8</sup>.

1 The Friendly Societies Act 1992 s 63A applies to information which was received by a person in heads (1)-(3) in the text for the purposes of, or in the discharge of, any functions of the Financial Services Authority under any provision made by or under the Friendly Societies Act 1992 or the Friendly Societies Act 1974 and which is not excluded information by virtue of the Friendly Societies Act 1992 s 63A(4) (see the text and notes 6-8): s 63A(2)(b), (c) (s 63A added by SI 2001/2617). It is immaterial whether or not the information was received by virtue of a requirement to provide it imposed by or under the Friendly Societies Act 1992 or for other purposes as well as purposes mentioned in s 63A(2): s 63A(3) (as so added). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to the meaning of 'registered branch' see PARA 2091.

4 Financial Services and Markets Act 2000 s 348(1); Friendly Societies Act 1992 s 63A(1), (2)(a) (as added: see note 1). The persons mentioned in heads (1)-(3) in the text are the 'primary recipient' for the purposes of the Financial Services and Markets Act 2000 ss 348-353 (see PARA 479 et seq), the provisions of which are applied by the Friendly Societies Act 1992 s 63A(1).

5 Financial Services and Markets Act 2000 s 348(1).

6 Ie it is not excluded information for the purposes of the Friendly Societies Act 1992 s 63A(2): see note 1.

7 Ie by the Financial Services and Markets Act 2000 s 348 (restrictions on disclosure of confidential information): see PARA 479.

8 Friendly Societies Act 1992 s 63A(4) (as added: see note 1).

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## ***F. INVESTIGATIONS, INSPECTIONS AND THE CALLING OF MEETINGS***

### **2319. Investigations on behalf of the Financial Services Authority.**

If it appears to the Financial Services Authority<sup>1</sup> desirable, for the purpose of its supervisory functions<sup>2</sup>, it may appoint one or more competent persons to investigate and report to it on the state and conduct of the activities of a friendly society<sup>3</sup>, or on any particular aspect of those activities<sup>4</sup>.

If a person so appointed thinks it necessary for the purposes of his investigation, he may also investigate the activities of any body corporate which is, or has at any relevant time been, a subsidiary of, or jointly controlled by, the society under investigation<sup>5</sup>.

Anyone who is or has been an officer<sup>6</sup>, employee or agent<sup>7</sup> of a friendly society or other body which is under investigation is under a duty:

- 737 (1) to produce to the investigator all records, books and papers relating to the body concerned which are in his custody or power;
- 738 (2) to attend before the investigator when required to do so;
- 739 (3) to answer any question which is put to him by the investigator with respect to any friendly society or other body which is under investigation,

and otherwise to give him all assistance in connection with the investigation which he is reasonably able to give<sup>8</sup>.

Anyone who fails, without reasonable excuse, to produce any records, books or papers which it is his duty to produce, or to comply with his duty to attend or answer any question, commits an offence<sup>9</sup>. Anyone who is or has been an officer, employee or agent of a friendly society or other body and who knowingly or recklessly furnishes to an investigator any information which is false or misleading in a material particular commits an offence<sup>10</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 The purposes of the discharge by the Financial Services Authority of any of its functions under the Friendly Societies Act 1992: s 62(1) (amended by SI 2001/2617); applied by the Friendly Societies Act 1992 s 65(6) (amended by SI 2001/2617). See also PARA 2316 note 7.

3 As to the meaning of 'friendly society' see PARA 2082.

4 Friendly Societies Act 1992 s 65(1) (amended by SI 2001/2617)).

5 Friendly Societies Act 1992 s 65(2) (amended by SI 1994/1984; and SI 2001/2617). As to the meanings of 'subsidiary' and 'jointly controlled body' see PARA 2134.

6 As to the meaning of 'officer' see PARA 2115 note 11.

7 'Agent', in relation to a friendly society or other body whose activities are under investigation, includes its bankers, accountants, solicitors and auditors and the appropriate actuary: Friendly Societies Act 1992 s 65(6). As to the meaning of 'appropriate actuary' see PARA 2139 note 4.

8 Friendly Societies Act 1992 s 65(3) (amended by SI 1994/1984; and SI 2001/2617). In relation to a friendly society to which the Friendly Societies Act 1992 s 37(2) or (3) applies (see PARA 2112 note 15), the reference in s 65(3) to an officer includes a reference to a controller or manager: s 65(5A) (added by SI 1994/1984). As to the meaning of 'controller' see PARA 2316 note 20.

9 Friendly Societies Act 1992 s 65(4). The offence is punishable on summary conviction with a fine not exceeding level 5 on the standard scale: s 65(4). As to the standard scale see PARA 27 note 21.

10 Friendly Societies Act 1992 s 65(5) (amended by SI 1994/1984; and SI 2001/2617). The offence is punishable on conviction on indictment with imprisonment for up to two years or a fine or both, and on summary conviction with a fine not exceeding the statutory maximum: Friendly Societies Act 1992 s 65(5) (as so amended). As to the statutory maximum see PARA 56 note 24.

In relation to a friendly society to which s 37(2) or (3) applies (see PARA 2112 note 15), the reference in s 65(5) to an officer includes a reference to a controller or manager: s 65(5A) (as added: see note 8).

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## **2320. Inspections and special meetings: in general.**

The requisite number of members of a friendly society<sup>1</sup> (that is, one-tenth of the total number of members or, in the case of a society having more than 1,000 members, 100 of them<sup>2</sup>), may apply to the Financial Services Authority<sup>3</sup> for the appointment of one or more competent inspectors to investigate and report on the affairs of the society, or for a special meeting of the society to be called to consider its affairs, or for both of these things<sup>4</sup>. In the case of a registered society with branches, regardless of the number of members, the central body of the society must first consent to the application being made<sup>5</sup>.

The Authority is also empowered to appoint an inspector, call a special meeting, or do both, if it is of the opinion that an investigation should be held into a society's affairs, or that the affairs of the society call for consideration by a meeting of its members<sup>6</sup>.

The Authority may extend an investigation or consideration at a members' meeting to include the affairs of a subsidiary or jointly controlled body of the society<sup>7</sup> concerned, either where the members' application requests it, or if the Authority is of the opinion that it is necessary to the investigation of the friendly society<sup>8</sup>. The inspectors may similarly extend the scope of an investigation, with the consent of the Authority, if they are of that opinion<sup>9</sup>.

Where an application is made by the requisite number of members the Authority may require evidence from the applicants, showing that they have good reasons for making the application and are not actuated by malicious, frivolous, vexatious or scandalous motives<sup>10</sup>. The Authority may direct what notice of the application is to be given to the society concerned or, if the application extends to the affairs of a subsidiary or jointly controlled body, what notice is to be given to that body also<sup>11</sup>.

The Authority may require security to be given for the costs of the investigation or meeting, before appointing the inspectors or calling the meeting<sup>12</sup>. The expenses of or incidental to an investigation are to be met by the Authority, in the first place, subject to certain rights of contribution<sup>13</sup>. The costs of an investigation must not exceed the corresponding Companies Act limit<sup>14</sup>. The expenses of or incidental to a meeting are to be defrayed by the applicants, or out of the funds of the society, or by past or present members or officers of the society, in such proportions as the Authority directs<sup>15</sup>.

Where, at the instance of the Authority:

- 740 (1) an inspection or meeting is proposed; or
- 741 (2) the scope of an investigation or the consideration of the meeting is extended to any subsidiary or jointly controlled body,

the Authority must inform the society of its proposed action and the grounds for it, and the society or, as the case may be, the subsidiary or jointly controlled body is entitled to give the Authority an explanatory statement, within 14 days, by way of reply<sup>16</sup>.

Inspectors appointed for these purposes have the powers necessary for or incidental to the discharge of their functions under these provisions, as well as further specific powers<sup>17</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 66(5).

3 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

4 Friendly Societies Act 1992 s 66(1), (2)(a) (s 66(1)-(4), (6)-(8) amended by SI 2001/2617). As to special meetings see also PARA 2321.

5 Friendly Societies Act 1992 s 66(2).

6 Friendly Societies Act 1992 s 66(2)(b) (as amended: see note 4).

- 7 As to the meanings of 'subsidiary' and 'jointly controlled body' see PARA 2134.
- 8 Friendly Societies Act 1992 s 66(1), (3) (as amended: see note 4).
- 9 Friendly Societies Act 1992 s 66(4) (as amended: see note 4).
- 10 Friendly Societies Act 1992 s 66(6)(a) (as amended: see note 4).
- 11 Friendly Societies Act 1992 s 66(6)(b) (as amended: see note 4).
- 12 Friendly Societies Act 1992 s 66(6)(c) (as amended: see note 4).
- 13 Friendly Societies Act 1992 s 66(6)(d)(i) (as amended: see note 4). As to the rights of contribution see PARA 2322.
- 14 Friendly Societies Act 1992 s 66(6)(c). 'The corresponding Companies Act limit', in relation to security for the payment of the costs of an investigation, is £5,000 or such other sum as is specified for the time being in an order under the Companies Act 1985 s 431(4) (see **COMPANIES** vol 15 (2009) PARA 1541): Friendly Societies Act 1992 s 66(11). At the date at which this volume states the law, no such order had been made.
- 15 Friendly Societies Act 1992 s 66(6)(d)(ii) (as amended: see note 4).
- 16 Friendly Societies Act 1992 s 66(7), (8) (as amended: see note 4).
- 17 Friendly Societies Act 1992 s 66(9). As to the inspectors' further powers see PARA 2322.

## UPDATE

### 2320 Inspections and special meetings: in general

NOTE 14--Friendly Societies Act 1992 s 66(11) amended: SI 2009/1941.

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#### 2321. Additional provisions regarding special meetings.

Where a special meeting of a friendly society<sup>1</sup> is called<sup>2</sup>, the Financial Services Authority<sup>3</sup> may direct where and when the meeting is to be held, what is to be discussed and determined at the meeting, and which members may attend and vote at it, and may give such other directions about the calling, holding and conduct of the meeting it thinks fit<sup>4</sup>. The Authority may appoint a person to be chairman of the meeting, or in default of such appointment the meeting may appoint its own chairman<sup>5</sup>. The meeting has all the powers of a meeting called according to the rules of the society<sup>6</sup>. These provisions and any direction given by the Authority have effect notwithstanding anything in the rules of the society concerned<sup>7</sup>.

- 1 As to the meaning of 'friendly society' see PARA 2082.
- 2 As to the power to call special meetings see PARA 2320.
- 3 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 4 Friendly Societies Act 1992 s 66(10)(a) (s 66(10)(a), (b) amended by SI 2001/2617).
- 5 Friendly Societies Act 1992 s 66(10)(b) (as amended: see note 4).



6 Friendly Societies Act 1992 s 66(10)(c). As to the rules see PARA 2156 et seq.

7 Friendly Societies Act 1992 s 66(10).

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### **2322. Additional provisions regarding inspections.**

Where an inspector is appointed<sup>1</sup> to investigate the affairs of a friendly society and, if the investigation has been so extended, the affairs of any body which is or has been a subsidiary of, or jointly controlled by, the friendly society and is also the subject of the investigation<sup>2</sup>, it is the duty of all past and present officers<sup>3</sup>, employees and agents<sup>4</sup> of the body under investigation: (1) to produce to the inspectors all documents and material of or relating to the body which are in their custody or power; (2) to attend before the inspectors when required to do so; (3) otherwise to give the inspectors all assistance in connection with the investigation which they are reasonably able to give<sup>5</sup>. Any other person who the inspectors consider is, or may be, in possession of information concerning the affairs of the body under investigation may be required to produce documents or material in his custody or power relating to the body under investigation, to attend before the inspectors, and to render them all assistance in connection with the investigation which he is reasonably able to give, and that person is under a duty to comply with the requirement<sup>6</sup>.

The inspectors may examine any such person on oath, and may administer an oath accordingly<sup>7</sup>. An answer given by such a person to a question put to him may be used in evidence against him<sup>8</sup>. If any such person refuses to produce any document or material which he is under a duty to produce, refuses to attend before the inspectors when required to do so, or refuses to answer any question put to him by the inspectors with respect to the affairs of the body in question, the inspectors may certify the refusal in writing to the High Court; the court may inquire into the case, hear witnesses and any statement offered in defence, and may punish the offender as if he had been guilty of contempt of court<sup>9</sup>.

The inspectors may, and if the Financial Services Authority<sup>10</sup> so directs must, make interim reports to the Authority, but if matters come to the knowledge of inspectors tending to show that an offence has been committed, they may inform the Authority of those matters at any time<sup>11</sup>.

The Authority may, if it thinks fit<sup>12</sup>:

742 (a) send a copy of the inspectors' report to the body whose affairs were the subject of the investigation<sup>13</sup>;

743 (b) furnish a copy of any such report, on request, to<sup>14</sup>:

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19. (i) any member of the body whose affairs were the subject of the investigation<sup>15</sup>;

20. (ii) the auditors of that body<sup>16</sup>;

21. (iii) any person whose conduct is referred to in the report<sup>17</sup>;

22. (iv) any other person whose financial interests appear to the Authority to be affected by matters dealt with in the report, whether as creditor or otherwise<sup>18</sup>;

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744 (c) have the report printed and published<sup>19</sup>.

A copy of a report of inspectors appointed to hold an investigation, certified by the Authority to be a true copy, is admissible in any legal proceedings as evidence of the inspectors' opinion on anything in the report; and a document purporting to be such a certificate must be received in evidence and deemed to be such a certificate, unless the contrary is proved<sup>20</sup>.

The Authority is entitled to be repaid the costs of an investigation:

- 745 (A) by the applicants for the investigation, to such extent as the Authority directs;
- 746 (B) by any body whose affairs were the subject of the investigation, to such extent as the Authority directs;
- 747 (C) by any person convicted of an offence in proceedings instituted as a result of the investigation, to such extent as the court before which he was convicted may order,

and a person liable under any one of heads (A) to (C) above is entitled to contribution from any other person liable under the same head, according to the amount of their respective liabilities under it<sup>21</sup>.

1 As to the appointment of inspectors see PARA 2320.

2 Ie under the Friendly Societies Act 1992 s 66: see PARA 2320. As to the meaning of 'friendly society' see PARA 2082.

3 As to the meaning of 'officer' see PARA 2115 note 11.

4 'Agents', in relation to a friendly society or subsidiary of or body jointly controlled by an incorporated friendly society, includes its bankers, accountants, solicitors and auditors and the appropriate actuary: Friendly Societies Act 1992 s 67(1). As to the meaning of 'appropriate actuary' see PARA 2139 note 4. As to the meanings of 'subsidiary' and 'jointly controlled body' see PARA 2134.

5 Friendly Societies Act 1992 s 67(1), (2) (s 67(1) amended by SI 2001/2617). Any reference to 'officers' in the Friendly Societies Act 1992 s 67(1)-(4), (6) includes, in relation to a society to which s 37(2) or (3) applies (see PARA 2112 note 15), a reference to controllers or managers: see s 67(10A) (added by SI 1994/1984). As to the meaning of 'controller' see PARA 2316 note 20.

6 Friendly Societies Act 1992 s 67(3). See note 5.

7 Friendly Societies Act 1992 s 67(4). See note 5.

8 Friendly Societies Act 1992 s 67(5). However, in criminal proceedings in which that person is charged with any offence other than an offence under the Perjury Act 1911 s 2 or s 5 (false statements made on oath otherwise than in judicial proceedings or made otherwise than on oath) (or the equivalent Scottish or Northern Irish legislation) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 716-717), no evidence relating to the statement may be adduced and no question relating to it may be asked, by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person: Friendly Societies Act 1992 s 67(5A), (5B) (added by the Youth Justice and Criminal Evidence Act 1999 Sch 3 para 24).

9 Friendly Societies Act 1992 s 67(6). See note 5. As to contempt of court see **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 401 et seq.

10 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

11 Friendly Societies Act 1992 s 67(7) (amended by SI 2001/2617).

12 Friendly Societies Act 1992 s 67(8) (amended by SI 2001/2617).

13 Friendly Societies Act 1992 s 67(8)(a).

14 Friendly Societies Act 1992 s 67(8)(b) (as amended: see note 12). The Financial Services Authority may charge a reasonable fee for furnishing to any person a copy of a report under s 67(8)(b): s 67(8A) (added by SI 2001/2617).

15 Friendly Societies Act 1992 s 67(8)(b)(i).

16 Friendly Societies Act 1992 s 67(8)(b)(ii).

17 Friendly Societies Act 1992 s 67(8)(b)(iii).

18 Friendly Societies Act 1992 s 67(8)(b)(iv) (as amended: see note 12).

19 Friendly Societies Act 1992 s 67(8)(c).

20 Friendly Societies Act 1992 s 67(9) (amended by SI 2001/2617).

21 Friendly Societies Act 1992 s 67(10) (amended by SI 2001/2617).

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## ***G. ACCOUNTS AND AUDIT***

### **(A) ACCOUNTING RECORDS**

#### **2323. Accounting records.**

Every friendly society<sup>1</sup> and every registered branch<sup>2</sup> must cause accounting records<sup>3</sup> to be kept<sup>4</sup>. Where an incorporated friendly society<sup>5</sup> has subsidiaries<sup>6</sup> or jointly controls other bodies<sup>7</sup>, the society must also secure that such accounting records are kept by them as to enable the society to comply with the statutory requirements<sup>8</sup> in relation to the business of the society, those subsidiaries and jointly controlled bodies<sup>9</sup>.

The accounting records must be kept in an orderly manner and must be sufficient to show and explain the transactions of the society or branch<sup>10</sup>. In particular they must:

- 748 (1) disclose the financial position of the society or branch at any time with reasonable accuracy and promptness<sup>11</sup>;
- 749 (2) enable the committee of management properly to discharge its duties<sup>12</sup> and its function of direction of the affairs of the society or branch<sup>13</sup>; and
- 750 (3) enable the society or branch to discharge the duties<sup>14</sup> imposed on it<sup>15</sup>.

The accounting records must contain entries from day to day of all sums received and paid by the society or branch and the matters in respect of which they are received or paid<sup>16</sup>. They must also contain entries from day to day of every transaction entered into by the society or branch which will, or there is reasonable ground for expecting may, give rise to assets or liabilities, other than insignificant ones, in respect of the management of the society or branch<sup>17</sup>. They must contain a record of the assets and liabilities of the society and branch<sup>18</sup>.

Accounting records must be kept at the registered office of the society or branch, or at such other place or places as the committee of management thinks fit, and must be open to

inspection by the committee of management at all times<sup>19</sup>. Accounting records must be preserved for six years from the date on which they were made<sup>20</sup>.

- 1 As to the meaning of 'friendly society' see PARA 2082.
- 2 As to branches and registered branches of societies see PARA 2091.
- 3 As to annual accounts and reports see PARAS 2324-2331.
- 4 Friendly Societies Act 1992 s 68(1) (amended by SI 2001/2617).
- 5 As to the meaning of 'incorporated friendly society' see PARA 2082.
- 6 As to the meaning of 'subsidiary' see PARA 2134.
- 7 As to the meaning of 'jointly controlled body' see PARA 2134.
- 8 Ie the requirements of the Friendly Societies Act 1992 s 68: see the text and notes 9-20.
- 9 Friendly Societies Act 1992 s 68(10) (amended by SI 2001/2617).
- 10 Friendly Societies Act 1992 s 68(2).
- 11 Friendly Societies Act 1992 s 68(2)(a).
- 12 Ie under the Friendly Societies Act 1974, the Friendly Societies Act 1992 and, where applicable, the IAS Regulation (ie European Parliament and Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) on the application of international accounting standards) art 4: see the Friendly Societies Act 1992 s 68(2)(b) (s 68(2)(b), (c) amended by SI 2005/2211); and the Friendly Societies Act 1992 s 78A(1) (s 78A added by SI 2005/2211). As to the committee of management and its duties see PARAS 2184, 2294 et seq.
- 13 Friendly Societies Act 1992 s 68(2)(b) (as amended: see note 12).
- 14 Ie under the Friendly Societies Act 1974, the Friendly Societies Act 1992 and, where applicable, the IAS Regulation (ie European Parliament and Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1)) art 4: Friendly Societies Act 1992 s 68(2)(c) (as amended: see note 12).
- 15 Friendly Societies Act 1992 s 68(2)(c) (as amended: see note 12).
- 16 Friendly Societies Act 1992 s 68(3)(a).
- 17 Friendly Societies Act 1992 s 68(3)(b).
- 18 Friendly Societies Act 1992 s 68(3)(c).
- 19 Friendly Societies Act 1992 s 68(8).
- 20 Friendly Societies Act 1992 s 68(9).

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## (B) ANNUAL ACCOUNTS AND REPORT

### *(a) Societies' and Branches' Individual Accounts*

#### **2324. Duty to prepare individual accounts.**

The committee of management<sup>1</sup> of a friendly society<sup>2</sup> or registered branch<sup>3</sup> is required to prepare accounts for the society or branch for each of its financial years<sup>4</sup>. These accounts are the 'individual accounts' of the society or branch<sup>5</sup>. The individual accounts of a friendly society or registered branch of a society may be prepared in accordance with the Friendly Societies Act 1992<sup>6</sup> ('Friendly Societies Act individual accounts'), or in accordance with international accounting standards<sup>7</sup> ('IAS individual accounts')<sup>8</sup>.

After the first financial year in which the committee of management of a friendly society or registered branch prepares IAS individual accounts (the 'first IAS year'), all subsequent individual accounts of the society or branch must be prepared in accordance with international accounting standards unless there is a relevant change of circumstance<sup>9</sup>. There is a relevant change of circumstance if, at any time during or after the first IAS year:

- 751 (1) the society or branch becomes a subsidiary undertaking<sup>10</sup> of another undertaking and individual accounts for that undertaking are not prepared in accordance with international accounting standards<sup>11</sup>;
- 752 (2) the society or branch ceases to be a society or part of a society with securities admitted to trading on a regulated market<sup>12</sup>; or
- 753 (3) a parent undertaking<sup>13</sup> of the society or branch ceases to be an undertaking with securities admitted to trading on a regulated market<sup>14</sup>.

If, having changed to preparing Friendly Societies Act individual accounts following a relevant change of circumstance, the committee of management again prepares IAS individual accounts for the society or branch, the provisions set out above<sup>15</sup> apply again as if the first financial year for which such accounts are again prepared were the first IAS year<sup>16</sup>.

1 As to the committee of management see PARA 2294 et seq.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to branches and registered branches of societies see PARA 2091.

4 Friendly Societies Act 1992 s 69A(1) (s 69A added by SI 2005/2211). As to the meaning of 'financial year' see PARA 2392.

5 Friendly Societies Act 1992 s 69A(1) (as added: see note 4).

6 Ie in accordance with the Friendly Societies Act 1992 s 69B: see PARA 2325.

7 'International accounting standards' means the international accounting standards, within the meaning of the IAS Regulation (ie European Parliament and Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) on the application of international accounting standards), adopted from time to time by the European Commission in accordance with the IAS Regulation: Friendly Societies Act 1992 s 78A(1) (added by SI 2005/2211).

8 Friendly Societies Act 1992 s 69A(2) (as added: see note 4). This is expressed to be subject to s 69I (see PARA 2327) and to s 69A(3) (see the text to note 9).

9 Friendly Societies Act 1992 s 69A(3) (as added: see note 4).

10 'Parent undertaking' and 'subsidiary undertaking' are to be construed in accordance with the Companies Act 2006 s 1162, read in conjunction with s 1161(1), Sch 7 (see **COMPANIES** vol 15 (2009) PARAS 26, 27): Friendly Societies Act 1992 s 78A(1) (as added (see note 7); definitions amended by SI 2008/948).

11 Friendly Societies Act 1992 s 69A(4)(a) (as added: see note 4).

12 Friendly Societies Act 1992 s 69A(4)(b) (as added: see note 4). For this purpose, 'regulated market' has the same meaning as it has in the Markets in Financial Instruments Directive (ie European Parliament and Council Directive 2004/39 of 21 April 2004 (OJ L145, 30.4.2004, p 1) on markets in financial instruments): Friendly Societies Act 1992 s 69A(4) (as added (see note 4); and amended by SI 2007/126).

- 13 See note 10.
- 14 Friendly Societies Act 1992 s 69A(4)(c) (as added: see note 4).
- 15 In the Friendly Societies Act 1992 s 69A(3), (4): see the text and notes 9-14.
- 16 Friendly Societies Act 1992 s 69A(5) (as added: see note 4).

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### **2325. Form and content of individual accounts.**

Friendly Societies Act individual accounts<sup>1</sup> must comprise a balance sheet as at the last day of the financial year<sup>2</sup> and an income and expenditure account<sup>3</sup>. The balance sheet must give a true and fair view<sup>4</sup> of the state of affairs of the society or branch as at the end of the financial year; and the income and expenditure account must give a true and fair view of the income and expenditure of the society or branch for the financial year<sup>5</sup>.

Friendly Societies Act individual accounts must comply with the requirements of regulations<sup>6</sup> as to the form and content of the balance sheet and income and expenditure account and additional information to be provided by way of notes to the accounts or otherwise<sup>7</sup>. Where compliance with the provisions of those regulations, and the other provisions of the Friendly Societies Act 1992 as to the matters to be included in the individual accounts of a society or branch or in notes to those accounts, would not be sufficient to give a true and fair view, the necessary additional information must be given in the accounts or in a note to them<sup>8</sup>. If in special circumstances compliance with any of those provisions is inconsistent with the requirement to give a true and fair view, the committee of management must depart from that provision to the extent necessary to give a true and fair view<sup>9</sup>. Particulars of any such departure, the reasons for it, and its effect, must be given in a note to the accounts<sup>10</sup>.

The Treasury may by regulations:

- 754 (1) add to the classes of documents to be comprised in the Friendly Societies Act individual accounts of a society or branch<sup>11</sup>;
- 755 (2) make provision as to the matters to be included in any document so added<sup>12</sup>;
- 756 (3) modify the requirements<sup>13</sup> as to the matters to be stated in any document comprised in the Friendly Societies Act individual accounts of a society or branch<sup>14</sup>;
- 757 (4) reduce the classes of documents to be comprised in the Friendly Societies Act individual accounts of a society or branch<sup>15</sup>.

Such regulations may make different provision for different cases and may include incidental and supplementary provisions<sup>16</sup>.

Where the committee of management of a friendly society prepare IAS individual accounts for a society or branch, it must state in the notes to those accounts that the accounts have been prepared in accordance with international accounting standards<sup>17</sup>.

1 See PARA 2324.

2 As to the meaning of 'financial year' see PARA 2392.

3 Friendly Societies Act 1992 s 69B (s 69B added by SI 2005/2211).

'Income and expenditure account', in relation to a friendly society or registered branch which prepares IAS accounts, includes an income statement or other equivalent financial statement required to be prepared by international accounting standards: Friendly Societies Act 1992 s 78A(1) (s 78A added by SI 2005/2211). 'IAS accounts' means IAS individual accounts (see PARA 2324) or IAS group accounts (see PARAS 2326-2327); Friendly Societies Act 1992 s 78A(1) (as so added). As to the meaning of 'international accounting standards' see PARA 2324 note 7.

4 References in the Friendly Societies Act 1992 Pt VI (ss 68-78A) to accounts giving a 'true and fair view' are references: (1) in the case of Friendly Societies Act individual accounts (see PARA 2324), to the requirement under s 69B that such accounts give a true and fair view; (2) in the case of Friendly Societies Act group accounts (see PARAS 2326-2327), to the requirement under s 69F that such accounts give a true and fair view; and (3) in the case of IAS accounts (see note 3), to the requirement under international accounting standards that such accounts achieve a fair presentation: s 78A(2) (as added: see note 3).

5 Friendly Societies Act 1992 s 69B(2) (as added: see note 3).

6 The regulations made under the Friendly Societies Act 1992 s 69C. The Treasury must by regulations make provision with respect to the form and content of Friendly Societies Act individual accounts: s 69C(1) (s 69C added by SI 2005/2211). The Treasury may by regulations make provision with respect to additional information to be contained in Friendly Societies Act individual accounts, whether in the form of notes or otherwise: Friendly Societies Act 1992 s 69C(2) (as so added). The regulations may, in particular: (1) prescribe accounting principles and rules; (2) require corresponding information for a preceding financial year; (3) make different provision for different descriptions of society or branch: s 69C(3) (as so added). See the Friendly Societies (Accounts and Related Provisions) Regulations 1994, SI 1994/1983, regs 4, 6, 8, 10, Sch 1 Pt I, Sch 2 Pt I, Schs 5, 6 (amended by SI 2005/2210). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

7 Friendly Societies Act 1992 s 69B(3) (as added: see note 3).

8 Friendly Societies Act 1992 s 69B(4) (as added: see note 3).

9 Friendly Societies Act 1992 s 69B(5) (as added: see note 3). As to the committee of management see PARA 2294 et seq.

10 Friendly Societies Act 1992 s 69B(6) (as added: see note 3).

11 Friendly Societies Act 1992 s 69B(7)(a) (as added: see note 3).

12 Friendly Societies Act 1992 s 69B(7)(b) (as added: see note 3).

13 The requirements of the Friendly Societies Act 1992 Pt VI.

14 Friendly Societies Act 1992 s 69B(7)(c) (as added: see note 3).

15 Friendly Societies Act 1992 s 69B(7)(d) (as added: see note 3).

16 Friendly Societies Act 1992 s 69B(8) (as added: see note 3).

17 Friendly Societies Act 1992 s 69D (added by SI 2005/2211).

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## *(b) Group Accounts*

### **UPDATE**

## 2325 Form and content of individual accounts

NOTE 6--SI 1994/1983 reg 8 amended: SI 2008/1144.

## 2326. Duty to prepare group accounts.

If at the end of a financial year<sup>1</sup> an incorporated friendly society<sup>2</sup> has subsidiary undertakings<sup>3</sup>, the committee of management<sup>4</sup>, in addition to preparing individual accounts<sup>5</sup> for the year, must prepare consolidated accounts for the year for the society and those undertakings taken as a whole, unless exempted<sup>6</sup>. Those accounts are the society's group accounts<sup>7</sup>.

Certain friendly societies are obliged<sup>8</sup> to prepare their group accounts in accordance with international accounting standards<sup>9</sup> ('IAS group accounts')<sup>10</sup>. The group accounts of other friendly societies may be prepared in accordance with the Friendly Societies Act 1992<sup>11</sup> ('Friendly Societies Act group accounts'), or may be IAS group accounts prepared in accordance with international accounting standards<sup>12</sup>.

After the first financial year in which the committee of management of a friendly society prepares IAS group accounts (the 'first IAS year'), all subsequent group accounts of the society must be prepared in accordance with international accounting standards unless there is a relevant change of circumstance<sup>13</sup>. There is a relevant change of circumstance if, at any time during or after the first IAS year:

- 758 (1) the society becomes a subsidiary undertaking of another undertaking and accounts for that undertaking and its subsidiary undertakings (taken as a whole) are not prepared in accordance with international accounting standards<sup>14</sup>;
- 759 (2) the society ceases to be a society with securities admitted to trading on a regulated market<sup>15</sup>; or
- 760 (3) a parent undertaking<sup>16</sup> of the society ceases to be an undertaking with securities admitted to trading on a regulated market<sup>17</sup>.

If, having changed to preparing Friendly Societies Act group accounts following a relevant change of circumstance, the committee of management again prepares IAS group accounts for the society, the above provisions<sup>18</sup> apply again as if the first financial year for which such accounts are again prepared were the first IAS year<sup>19</sup>.

1 As to the meaning of 'financial year' see PARA 2392.

2 As to the meaning of 'incorporated friendly society' see PARA 2082.

3 As to the meaning of 'subsidiary undertaking' see PARA 2324 note 10.

4 As to the committee of management see PARA 2294 et seq.

5 As to individual accounts see PARAS 2324-2325.

6 Friendly Societies Act 1992 s 69E(1) (s 69E added by SI 2005/2211). The Treasury may by regulations exempt specified descriptions of incorporated friendly societies with subsidiaries from any duty to prepare group accounts: Friendly Societies Act 1992 s 69E(7) (as so added). Such regulations may exempt societies by reference to any criterion and may make different provision for different descriptions of societies: s 69E(8) (as so added). See the Friendly Societies (Accounts and Related Provisions) Regulations 1994, SI 1994/1983, reg 7 (amended by SI 2005/2210). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

7 Friendly Societies Act 1992 s 69E(1) (as added: see note 6).



- 8 le by the IAS Regulation (ie European Parliament and Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) on the application of international accounting standards) art 4.
- 9 As to the meaning of 'international accounting standards' see PARA 2324 note 7.
- 10 Friendly Societies Act 1992 s 69E(2) (as added: see note 6).
- 11 le in accordance with the Friendly Societies Act 1992 s 69F: see PARA 2327.
- 12 Friendly Societies Act 1992 s 69E(3) (as added: see note 6). This is expressed to be subject to s 69E(4)-(8) (see note 6; and the text and notes 13-19) and s 69I (see PARA 2327).
- 13 Friendly Societies Act 1992 s 69E(4) (as added: see note 6).
- 14 Friendly Societies Act 1992 s 69E(5)(a) (as added: see note 6).
- 15 Friendly Societies Act 1992 s 69E(5)(b) (as added: see note 6). For this purpose, 'regulated market' has the same meaning as it has in the Markets in Financial Instruments Directive (ie European Parliament and Council Directive 2004/39 of 21 April 2004 (OJ L145, 30.4.2004, p 1) on markets in financial instruments): Friendly Societies Act 1992 s 69E(5) (as so added; and amended by SI 2007/126).
- 16 As to the meaning of 'parent undertaking' see PARA 2324 note 10.
- 17 Friendly Societies Act 1992 s 69E(5)(c) (as added: see note 6).
- 18 le the Friendly Societies Act 1992 s 69E(4), (5): see the text and notes 13-15.
- 19 Friendly Societies Act 1992 s 69E(6) (as added: see note 6).

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### **2327. Form and content of group accounts.**

Friendly Societies Act group accounts<sup>1</sup> must comprise a balance sheet dealing with the state of affairs of the society and its subsidiary undertakings<sup>2</sup> and an income and expenditure account<sup>3</sup> showing the income and expenditure of the society and its subsidiary undertakings<sup>4</sup>.

Friendly Societies Act group accounts must give a true and fair view<sup>5</sup> of the state of affairs as at the end of the financial year<sup>6</sup>, and the income and expenditure for the financial year, of the society and the subsidiary undertakings included in the group accounts as a whole, so far as concerns the members of the society<sup>7</sup>.

Friendly Societies Act group accounts must comply with the requirements of regulations<sup>8</sup> as to the form and content of the group accounts and additional information to be provided by way of notes to the accounts or otherwise<sup>9</sup>. Where compliance with the provisions of those regulations, and the other provisions of the Friendly Societies Act 1992 as to the matters to be included in a society's group accounts or in notes to those accounts, would not be sufficient to give a true and fair view, the necessary additional information must be given in the accounts or in a note to them<sup>10</sup>. If in special circumstances compliance with any of those provisions is inconsistent with the requirement to give a true and fair view, the committee of management must depart from that provision to the extent necessary to give a true and fair view<sup>11</sup>. Particulars of any such departure, the reasons for it, and its effect, must be given in a note to the accounts<sup>12</sup>.

The Treasury may by regulations:

- 761 (1) add to the classes of documents to be comprised in a society's Friendly Societies Act group accounts<sup>13</sup>;
- 762 (2) make provision as to the matters to be included in any document so added<sup>14</sup>;
- 763 (3) modify the statutory requirements<sup>15</sup> as to the matters to be stated in any document comprised in the society's Friendly Societies Act group accounts<sup>16</sup>; and
- 764 (4) reduce the classes of documents to be comprised in a society's Friendly Societies Act group accounts<sup>17</sup>.

Such regulations may make different provision for different descriptions of society and may include incidental and supplementary provisions<sup>18</sup>.

Where the committee of management of a friendly society prepares IAS group accounts<sup>19</sup>, it must state in the notes to those accounts that the accounts have been prepared in accordance with international accounting standards<sup>20</sup>.

The committee of management of a friendly society that prepares group accounts must secure that the individual accounts of the friendly society, each of its subsidiary undertakings, and each of its registered branches<sup>21</sup>, are all prepared using the same financial reporting framework, except to the extent that in its opinion there are good reasons for not doing so<sup>22</sup>. The committee of management of a society which has subsidiary undertakings must ensure that, except where in its opinion there are good reasons against it, the financial year of each of its subsidiary undertakings coincides with the society's own financial year<sup>23</sup>.

1 See PARA 2326.

2 As to the meaning of 'subsidiary undertaking' see PARA 2324 note 10.

3 As to the meaning of 'income and expenditure account' see PARA 2325 note 3.

4 Friendly Societies Act 1992 s 69F(1) (s 69F added by SI 2005/2211).

5 As to the meaning of 'true and fair view' see PARA 2325 note 4.

6 As to the meaning of 'financial year' see PARA 2392.

7 Friendly Societies Act 1992 s 69F(2) (as added: see note 4).

8 The Treasury must by regulations make provision with respect to the form and content of Friendly Societies Act group accounts: Friendly Societies Act 1992 s 69G(1) (s 69G added by SI 2005/2211). The Treasury may by regulations make provision with respect to additional information to be contained in Friendly Societies Act group accounts, whether in the form of notes or otherwise: Friendly Societies Act 1992 s 69G(2) (as so added). The regulations may, in particular: (1) prescribe accounting principles and rules; (2) require corresponding information for a preceding financial year; and (3) make different provision for different descriptions of society: s 69G(3) (as so added). See the Friendly Societies (Accounts and Related Provisions) Regulations 1994, SI 1994/1983, regs 5, 6, 7, 8, Sch 1 Pt II, Sch 2 Pt II, Schs 5, 6 (reg 7, Sch 6 amended by SI 2005/2210). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

9 Friendly Societies Act 1992 s 69F(3) (as added: see note 4).

10 Friendly Societies Act 1992 s 69F(4) (as added: see note 4).

11 Friendly Societies Act 1992 s 69F(5) (as added: see note 4). As to the committee of management see PARA 2294 et seq.

12 Friendly Societies Act 1992 s 69F(6) (as added: see note 4).

13 Friendly Societies Act 1992 s 69F(7)(a) (as added: see note 4).

14 Friendly Societies Act 1992 s 69F(7)(b) (as added: see note 4).

- 15 le the requirements of the Friendly Societies Act 1992 Pt VI (ss 68-78A).
- 16 Friendly Societies Act 1992 s 69F(7)(c) (as added: see note 4).
- 17 Friendly Societies Act 1992 s 69F(7)(d) (as added: see note 4).
- 18 Friendly Societies Act 1992 s 69F(8) (as added: see note 4).
- 19 See PARA 2326.
- 20 Friendly Societies Act 1992 s 69H (added by SI 2005/2211).
- 21 As to registered branches see PARA 2091.
- 22 Friendly Societies Act 1992 s 69I(1) (s 69I added by SI 2005/2211). The Friendly Societies Act 1992 s 69I(1) only applies to accounts of subsidiary undertakings which are: (1) required to be prepared under the Companies Act 2006 Pt 15 (ss 386-474) (see **COMPANIES** vol 15 (2009) PARA 708 et seq); or (2) required to be prepared under the Friendly Societies Act 1992 Pt VI: s 69I(2) (as so added; amended by SI 2008/948). The Friendly Societies Act 1992 s 69I(1) does not require accounts of undertakings that are charities to be prepared using the same financial reporting framework as accounts of undertakings which are not charities: s 69I(3) (as so added). The individual accounts of a friendly society do not need to be prepared using the same financial reporting framework as the individual accounts of its subsidiary undertakings and registered branches where the committee of management of a friendly society prepares IAS group accounts and IAS individual accounts: s 69I(4) (as so added).
- 23 Friendly Societies Act 1992 s 69I(5) (as added: see note 22).

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### *(c) Disclosure Requirements*

#### **UPDATE**

#### **2327 Form and content of group accounts**

NOTE 8--SI 1994/1983 reg 8 amended: SI 2008/1144.

#### **2328. Disclosure requirements relating to members of the committee of management and employees.**

The following information must be given in notes to the annual accounts<sup>1</sup> of a friendly society<sup>2</sup> or a registered branch<sup>3</sup>:

- 765 (1) the aggregate amount of committee members' emoluments<sup>4</sup>;
- 766 (2) where the amount shown in compliance with head (1) above is £60,000 or more, the emoluments of the chairman must be shown<sup>5</sup> and further details of the committee members' emoluments<sup>6</sup>;
- 767 (3) the number of members of the committee who have waived rights to receive emoluments in the present financial year or in the future which, but for the waiver, would have fallen to be included in the amount shown under head (1) above in the present annual accounts or in future annual accounts and the aggregate amount of those emoluments<sup>7</sup>;

- 768 (4) the aggregate amount of pensions<sup>8</sup> of past and present members of the committee<sup>9</sup>;
- 769 (5) the aggregate amount of any compensation to members of the committee and past members of the committee in respect of loss of office<sup>10</sup>;
- 770 (6) the aggregate amount of any consideration<sup>11</sup> paid to or receivable by third parties<sup>12</sup> for making available the services of any person: (a) as a member of the committee; or (b) while a member of the committee as director of any of its associated bodies or otherwise in connection with the management of the affairs of the society or any of its associated bodies<sup>13</sup>;
- 771 (7) where the chief executive<sup>14</sup> of the society is not also a member of the committee of the society, he must be treated for these purposes as a member of that committee and in such circumstances there must be a note in the accounts specifying that the chief executive has been so treated<sup>15</sup>;
- 772 (8) a statement showing, in relation to loans from and other transactions and arrangements with the society<sup>16</sup>, the aggregate amounts outstanding under them at the end of the financial year and the numbers of persons for whom such loans, transactions and arrangements were made<sup>17</sup>;
- 773 (9) in respect of the statutory auditors<sup>18</sup> of the society or branch, the amount of their remuneration and of their associates<sup>19</sup> (and where remuneration is paid to auditors or their associates for non-audit services, that remuneration must be shown separately) and, in respect of the actuaries of the society or branch, the amount of their remuneration, including any sums paid by the society or branch in respect of the auditors' or actuaries' expenses<sup>20</sup>; and
- 774 (10) the average number<sup>21</sup> of persons employed by the society in the financial year<sup>22</sup> and the average number of persons so employed within each category<sup>23</sup> of persons employed by the society<sup>24</sup>.

It is the duty of any member of the committee of management, and any person who has been at any time in the preceding five years a member of the committee, to give notice to the society of such matters relating to himself as may be necessary for the purposes of heads (1) to (9) above<sup>25</sup>. A person who does not comply with this requirement is guilty of an offence<sup>26</sup>.

The annual accounts of a friendly society which is required to produce group accounts<sup>27</sup> must include the material specified by heads (8) to (10) above not only in respect of the society but also in respect of the society and its subsidiaries in combination<sup>28</sup>.

The Treasury may, by order, modify the provisions set out above<sup>29</sup>; and such an order may make consequential amendments or repeals of other provisions of the Friendly Societies Act 1992, make such transitional or saving provisions as appear to the Treasury to be necessary or expedient, and make different provision for different cases<sup>30</sup>.

1 As to annual accounts see PARAS 2324-2327.

2 As to the meaning of 'friendly society' see PARA 2082.

3 Friendly Societies Act 1992 s 69J(1) (s 69J, Sch 13D added by SI 2005/2211). As to registered branches see PARA 2091.

4 Friendly Societies Act 1992 s 69J(2), Sch 13D para 1(1) (as added: see note 3). As to the committee of management see PARA 2294 et seq. 'Committee members' emoluments' means the emoluments paid to or receivable by any person in respect of: (1) his services as a member of the committee; or (2) his services while a member of the committee: (a) as director of any of the society's associated bodies; or (b) otherwise in connection with the management of the affairs of the society or any of its associated bodies: Sch 13D para 1(2) (as so added). As to associated bodies see note 12. There must also be shown, separately, the aggregate amounts within head (1) above, head (2)(a) above and head (2)(b) above: Sch 13D para 1(3) (as so added). The 'emoluments' of a person include:

- 30 (i) fees and percentages;
- 31 (ii) sums paid by way of expenses allowance (so far as those sums are chargeable to United Kingdom income tax) (see **INCOME TAXATION** vol 23(1) (Reissue) PARA 699 et seq);
- 32 (iii) contributions paid in respect of him under any pension scheme; and
- 33 (iv) the estimated money value of any other benefits received by him otherwise than in cash,

and emoluments in respect of a person's accepting office as a member of the committee must be treated as emoluments in respect of his services as a member of the committee: Sch 13D para 1(4) (as so added). As to the meaning of 'United Kingdom' see PARA 2 note 3. 'Pension' includes any superannuation allowance, superannuation gratuity or similar payment; 'pension scheme' means a scheme for the provision of pensions in respect of services as a member of the committee or otherwise which is maintained in whole or in part by means of contributions; and 'contribution', in relation to a pension scheme, means any payment (including an insurance premium) paid for the purposes of the scheme by or in respect of persons rendering services in respect of which pensions will or may become payable under the scheme except that it does not include any payment in respect of two or more persons if the amount paid in respect of each of them is not ascertainable: Sch 13D para 10(1)(b)-(d) (as so added).

With respect to the amounts to be shown under Sch 13D paras 1, 4, 5 and 6 (see heads (4)-(6) in the text), the amount in each case includes all relevant sums paid by or receivable from the society, the society's associated bodies and any other person, except sums to be accounted for to the society or any of its associated bodies: Sch 13D para 7(1), (2) (as so added). The amount to be shown under Sch 13D para 5 (see head (5) in the text) must distinguish between the sums respectively paid by or receivable from the society, its associated bodies and persons other than the society and its associated bodies: Sch 13D para 7(3) (as so added). References to amounts paid to or receivable by a person include amounts paid to or receivable by a person connected with him or a body corporate associated with him (but not so as to require an amount to be counted twice): Sch 13D para 7(4) (as so added). See note 12.

The amounts to be shown for any financial year under Sch 13D paras 1, 2, 5 and 6 (see heads (1), (2), (5), (6) in the text) are the sums receivable in respect of that year (whenever paid) or, in the case of sums not receivable in respect of a period, the sums paid during that year: Sch 13D para 8(1) (as so added). But where: (A) any sums are not shown in a note to the accounts for the relevant financial year on the ground that the person receiving them is liable to account for them as mentioned in Sch 13D para 7(2), but the liability is thereafter wholly or partly released or is not enforced within a period of two years; or (B) any sums paid by way of expenses allowance are charged to United Kingdom income tax after the end of the relevant financial year, those sums, to the extent to which the liability is released or not enforced or they are charged as mentioned (as the case may be), must be shown in a note to the first accounts in which it is practicable to show them and must be distinguished from the amounts to be shown apart from this provision: Sch 13D para 8(2) (as so added).

5 Friendly Societies Act 1992 Sch 13D para 2(1) (as added: see note 3). Where there has been more than one chairman during the year, the emoluments of each must be stated so far as attributable to the period during which he was chairman: Sch 13 para 2(2) (as so added). In Sch 13D para 2, 'emoluments' has the same meaning as in Sch 13D para 1 (see note 4), except that it does not include contributions paid in respect of a person under a pension scheme: Sch 13D para 2(6) (as so added). See note 4.

6 Where the amount shown is £60,000 or more, the following information must be given with respect to the committee members' emoluments: (1) the number of members of the committee whose emoluments fell within each of the following bands: not more than £5,000, more than £5,000 but not more than £10,000, more than £10,000 but not more than £15,000, and in successive bands of £5,000; (2) if the emoluments of any of the members of the committee exceeded that of the chairman, the greatest amount of emoluments of any member of the committee: Friendly Societies Act 1992 Sch 13D para 2(3) (as added: see note 3). Where more than one person has been chairman during the year, the reference in head (2) above to the emoluments of the chairman is to the aggregate of the emoluments of each person who has been chairman, so far as attributable to the period during which he was chairman: Sch 13D para 2(4) (as so added). The information required by head (1) above need not be given in respect of a member of the committee who discharged his duties as such wholly or mainly outside the United Kingdom; and any such member of the committee must be left out of account for the purposes of head (2) above: Sch 13D para 2(5) (as so added). See note 4.

7 Friendly Societies Act 1992 Sch 13D para 3(1) (as added: see note 3). As to the meaning of 'emoluments' see note 4; definition applied by Sch 13D para 3(3) (as so added). For these purposes, it must be assumed that a sum not receivable in respect of a period would have been paid at the time at which it was due, and if such sum was payable only on demand, it must be deemed to have been due at the time of the waiver: Sch 13D para 3(2) (as so added).

8 References to pensions include benefits otherwise than in cash and in relation to so much of a pension as consists of such a benefit references to its amount are to the estimated money value of the benefit: Friendly Societies Act 1992 Sch 13D para 4(4) (as added: see note 3). The nature of any such benefit must be disclosed: Sch 13D para 4(5) (as so added). See note 4.

9 Friendly Societies Act 1992 Sch 13D para 4(1) (as added: see note 3). This amount does not include any pension paid or receivable under a pension scheme if the scheme is such that the contributions under it are substantially adequate for the maintenance of the scheme, but, subject to this, it includes any pension paid or receivable in respect of any such services of a member of the committee or past member of the committee whether to or by him or on his nomination or by virtue of dependence on or other connection with him, to or by any other person: Sch 13D para 4(2) (as so added). The amount shown must distinguish between pensions in respect of services as a member of the committee or a director of any of its associated bodies, and other pensions: Sch 13D para 4(3) (as so added). See note 4.

10 Friendly Societies Act 1992 Sch 13D para 5(1) (as added: see note 3). This amount includes compensation received or receivable by past or present members of the committee for: (1) loss of office as a member of the committee; or (2) loss, while a member of the committee or in connection with his ceasing to be a member of the committee, of any other office in connection with the management of the society's affairs, or any office as director or otherwise in connection with the management of the affairs of any associated body of the society, and must distinguish between compensation in respect of the office of member of the committee or a director of any of its associated bodies, and compensation in respect of other offices: Sch 13D para 5(2) (as so added). References to compensation include benefits otherwise than in cash; and in relation to such compensation references to its amount are to the estimated money value of the benefit, and the nature of the compensation must be disclosed: Sch 13D para 5(3) (as so added). References to compensation for loss of office include compensation in consideration for, or in connection with, a person's retirement from office: Sch 13D para 5(4) (as so added). See note 4.

11 The reference to consideration includes benefits paid or receivable otherwise than in cash; and in relation to such consideration references to its amount are to the estimated money value of the benefit, and the nature of the consideration must be disclosed: Friendly Societies Act 1992 Sch 13D para 6(2) (as added: see note 3). See note 4.

12 The reference to third parties is to a person other than: (1) the member of the committee himself or a person connected with him or a body corporate associated with him; and (2) the society or any of its associated bodies: Friendly Societies Act 1992 Sch 13D para 6(3) (as added: see note 3). 'Associated body', in relation to a society, means a body in which the society holds shares or corresponding membership rights: Sch 13D para 14 (as so added). In Sch 13D paras 6, 7, references to a person being 'connected' with a member of the committee, and to a member of the committee being 'associated with' a body corporate, must be construed in accordance with the Building Societies Act 1986 s 70 (see PARA 1961) (as applied to friendly societies by the Friendly Societies Act 1992 Sch 11 para 9 (see PARA 2300)): Sch 13D para 10(2) (as so added).

13 Friendly Societies Act 1992 Sch 13D para 6(1) (as added: see note 3). See note 4. References to services to an associated body of a society must be taken to refer to services to a body which was an associated body of the society at the time at which the services were rendered, or, in the case only of Sch 13D para 5 (see head (5) in the text), immediately before the member of the committee lost his office as member of the committee: Sch 13D para 10(1)(a) (as so added).

14 As to the chief executive see PARA 2301.

15 Friendly Societies Act 1992 Sch 13D para 9 (as added: see note 3).

16 In (1) loans from and other transactions and arrangements with the society described in the Building Societies Act 1986 s 65 (see PARA 1955) (as applied to friendly societies by the Friendly Societies Act 1992 Sch 11 para 9 (see PARA 2300)) (which restricts loans to and other transactions and arrangements with directors and persons connected with them), other than those to which the provisions of the Building Societies Act 1986 s 65(5), (6) apply; and (2) in the case of a society the committee of management of which is obliged to prepare group accounts, loans from and other transactions and arrangements with a subsidiary undertaking of the society to which head (1) above would apply were the society rather than the subsidiary undertaking a party to them: Friendly Societies Act 1992 Sch 13D para 11(1) (as added: see note 3). Schedule 13D para 11 applies in relation to loans to, and other transactions and arrangements with, a person connected with a member of the committee where the society (or, in the case of a subsidiary undertaking incorporated in the United Kingdom, the subsidiary undertaking) has notice of the connection between that member of the committee and that person: Sch 13D para 11(4) (as so added). See note 17.

17 Friendly Societies Act 1992 Sch 13D para 11(2) (as added: see note 3). The notes to the annual accounts must, in relation to any loan or other transaction or arrangement subsisting during or at the end of the financial year, make the following disclosures: (1) where a copy of it or a memorandum of its terms is included in the register maintained under the Building Societies Act 1986 s 68 (see PARA 1958) (as applied to friendly societies

by the Friendly Societies Act 1992 Sch 11 para 9 (see PARA 2300)) (which requires the maintenance of such a register), the existence of the register and the availability of requisite particulars from it for inspection must be disclosed; (2) where the committee of management is obliged to prepare group accounts, its particulars must be disclosed unless it was one which would, had the subsidiaries of the society formed part of the society, have been exempted from the obligations imposed by the Building Societies Act 1986 s 68 (see PARA 1958) (as applied to friendly societies by the Friendly Societies Act 1992 Sch 11 para 9 (see PARA 2300)): Sch 13D para 11(3) (as so added). Schedule 13D para 11 does not apply to non-directive friendly societies or their registered branches: s 69J(5) (as added: see note 3). 'Non-directive friendly society' means a registered friendly society: (a) to which s 37(2) and s 37(3) (restriction of combinations of business: see PARA 2112 note 15) do not apply; and (b) which does not carry on reinsurance business: s 78A(1) (added by SI 2005/2211).

18 As to auditors see PARA 2332 et seq.

19 For the purposes of determining whether a person is to be regarded as an associate of a society's auditor and for determining the remuneration paid to auditors or their associates for non-audit services, the Companies Act 1985 (Disclosure of Remuneration for Non-audit Work) Regulations 1991, SI 1991/2128 have effect as if any reference to a company included a reference to a society or branch: Friendly Societies Act 1992 Sch 13D para 12(2) (as added: see note 3). See **COMPANIES** vol 15 (2009) PARA 922.

20 Friendly Societies Act 1992 Sch 13D para 12(1) (as added: see note 3).

21 The average number is determined by dividing the relevant annual number by the number of complete calendar months in the financial year: Friendly Societies Act 1992 Sch 13D para 13(2) (as added: see note 3). The relevant annual number is determined by ascertaining for each complete calendar month in the financial year the number of persons employed under contracts of service by the society in that month (whether throughout the month or not), or the number of persons in the category in question of persons so employed, and, in either case, adding together all the monthly numbers: Sch 13D para 13(3) (as so added). Schedule 13D para 13 does not apply to non-directive friendly societies or their registered branches: s 69J(5) (as added: see note 3).

22 There must also be stated the aggregate amounts respectively of: (1) wages and salaries paid or payable in respect of that year to those persons; (2) social security costs incurred by the society on their behalf; and (3) other pension costs so incurred, in so far as those amounts, or any of them, are not stated elsewhere in the society's accounts: Friendly Societies Act 1992 Sch 13D para 13(4) (as added: see note 3). See note 21.

23 The categories of person employed by the society are such as the directors may select, having regard to the manner in which the society's activities are organised: Friendly Societies Act 1992 Sch 13D para 13(5) (as added: see note 3). See note 21.

24 Friendly Societies Act 1992 Sch 13D para 13(1) (as added: see note 3). See note 21.

25 Friendly Societies Act 1992 s 69J(3) (as added: see note 3).

26 Friendly Societies Act 1992 s 69J(4) (as added: see note 3). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 69J(4) (as so added). As to the standard scale see PARA 27 note 21.

27 Ie under the Friendly Societies Act 1992 s 69E: see PARA 2326.

28 Friendly Societies Act 1992 s 69J(6) (as added: see note 3).

29 Friendly Societies Act 1992d s 69J(7) (as added: see note 3). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

30 Friendly Societies Act 1992 s 69J(8) (as added: see note 3).

## UPDATE

### 2328-2329 Disclosure Requirements

As to disclosures relating to off-balance-sheet arrangements see PARA 2329A and as to disclosure of auditor remuneration see PARA 2329B.

### 2328 Disclosure requirements relating to members of the committee of management and employees

TEXT AND NOTES 18-20--Friendly Societies Act 1992 Sch 13D para 12(1) repealed: SI 2008/1140.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(2) FRIENDLY SOCIETIES/(iv) Matters Common to All Friendly Societies/G. ACCOUNTS AND AUDIT/(B) Annual Accounts and Report/(c) Disclosure Requirements/2329. Disclosures about related undertakings.

### **2329. Disclosures about related undertakings.**

Where a friendly society is not required to prepare consolidated accounts<sup>1</sup>, the following information must be given in notes to the annual accounts<sup>2</sup> of the friendly society<sup>3</sup> or registered branch<sup>4</sup>:

- 775 (1) the name of each subsidiary undertaking<sup>5</sup> and body corporate in which the society has a significant holding<sup>6</sup> and where it is registered and, if it is incorporated outside the United Kingdom<sup>7</sup>, the country in which it is incorporated<sup>8</sup>;
- 776 (2) the identity of each class of shares held by the society in the subsidiary undertaking or body corporate and the proportion of the nominal value of the shares of that class represented by those shares<sup>9</sup>;
- 777 (3) the aggregate amount of the capital and reserves of each subsidiary undertaking or body corporate as at the end of its relevant financial year<sup>10</sup> and its profit or loss for that year<sup>11</sup>.

Where a friendly society is required to prepare consolidated accounts, the following information must be given<sup>12</sup>:

- 778 (a) the name of each body corporate that is a subsidiary undertaking of the society at the end of the financial year and where it is registered and, if it is incorporated outside the United Kingdom, the country in which it is incorporated<sup>13</sup>;
- 779 (b) the identity of each class of shares held by the society and by the group<sup>14</sup> in the subsidiary undertaking and the proportion of the nominal value of the shares of that class represented by those shares<sup>15</sup>;
- 780 (c) with respect to each subsidiary undertaking not included in the consolidation, the aggregate amount of its capital and reserves as at the end of its relevant financial year<sup>16</sup> and its profit or loss for that year<sup>17</sup>;
- 781 (d) the name of any jointly controlled body in which a body corporate included in the consolidation has an interest, where it is registered and, if it is incorporated outside the United Kingdom, the country in which it is incorporated<sup>18</sup>;
- 782 (e) the identity of each class of shares held by the society and by the group in the jointly controlled body and the proportion of the nominal value of the shares of that class represented by those shares<sup>19</sup>;
- 783 (f) the name of any other body corporate in which the society or the group has a significant holding<sup>20</sup>, where it is registered and, if it is incorporated outside the United Kingdom, the country in which it is incorporated<sup>21</sup>;
- 784 (g) the identity of each class of shares held by the society or the group in the body corporate and the proportion of the nominal value of the shares of that class represented by those shares<sup>22</sup>;



785 (h) the aggregate amount of the capital and reserves of the body corporate as at the end of its relevant financial year<sup>23</sup> and its profits or loss for that year<sup>24</sup>.

The Treasury may, by order, modify the provisions set out above<sup>25</sup>; and such an order may make consequential amendments or repeals of other provisions of the Friendly Societies Act 1992, make such transitional or saving provisions as appear to the Treasury to be necessary or expedient, and make different provision for different cases<sup>26</sup>.

1 le under the Friendly Societies Act 1992 s 69E: see PARA 2326.

2 As to annual accounts see PARAS 2324-2327.

3 As to the meaning of 'friendly society' see PARA 2082.

4 Friendly Societies Act 1992 s 69K(1), (2) (s 69K, Sch 13E added by SI 2005/2211). As to registered branches see PARA 2091.

5 This requirement relates to undertakings that are subsidiary undertakings of the society at the end of the financial year: Friendly Societies Act 1992 Sch 13E para 1(1) (as added: see note 4). As to the meaning of 'subsidiary undertaking' see PARA 2324 note 10. As to the meaning of 'financial year' see PARA 2392.

6 A holding is significant for this purpose if: (1) it amounts to 20% or more of the nominal value of the shares in the body corporate; or (2) the amount of the holding (as stated or included in the society's accounts) exceeds one-tenth of the amount (as so stated) of the society's assets: Friendly Societies Act 1992 Sch 13E para 5(2) (as added: see note 4).

7 As to the meaning of 'United Kingdom' see PARA 2 note 3.

8 Friendly Societies Act 1992 Sch 13E paras 1(2), (3), 5(1), 6(1), (2) (as added: see note 4). The specific reason why each subsidiary undertaking is not required to be included in consolidated accounts must be stated: Sch 13E para 1(4) (as so added). Information otherwise required by Sch 13E para 6 need not be given if it is not required in order for the society's individual accounts and group accounts to give a true and fair view: Sch 13E para 6(4) (as so added).

9 Friendly Societies Act 1992 Sch 13E paras 2(1), 6(3) (as added: see note 4). The shares held by or on behalf of the society itself must be distinguished from those attributed to the society which are held by or on behalf of a subsidiary undertaking: Sch 13E para 2(2) (as so added).

References to shares held by a society are to be construed as follows: Sch 13E para 8(1) (as so added). For the purposes of Sch 13E paras 2, 3, shares held by a subsidiary undertaking, or by a person acting on behalf of the society or a subsidiary undertaking, are treated as if they were held by the society but shares held on behalf of a person other than the society or a subsidiary undertaking are not treated as if they were held by the society: Sch 13E para 8(2) (as so added). For the purposes of Sch 13E paras 5-7, shares held on behalf of a society by any person are treated as if they were held by the society but shares held on behalf of a person other than the society are not treated as if they were held by the society: Sch 13E para 8(3) (as so added). For the purposes of Sch 13E paras 2-7, shares held by way of security are to be treated as if they were held by the person providing the security where: (1) apart from the right to exercise them for the purposes of preserving the value of the security, or of realising it, the rights attached to the shares are exercisable only in accordance with his instructions; and (2) the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights attached to the shares are exercisable only in his interests: Sch 13E para 8(4) (as so added).

10 The 'relevant financial year' of a subsidiary undertaking or body corporate is: (1) if its financial year ends with that of the society, that year; and (2) if not, its financial year ending last before the end of the society's financial year: Friendly Societies Act 1992 Sch 13E paras 3(4), 7(5) (as added: see note 4). Where disclosure is made with respect to a subsidiary undertaking and that undertaking's financial year does not end with that of the society, there must be stated in relation to that undertaking the date on which its last financial year before the end of the society's financial year ended: Sch 13E para 4 (as so added).

11 Friendly Societies Act 1992 Sch 13E paras 3(1), 7(5) (as added: see note 4). The information referred to in head (3) in the text need not be given if the society's investment in the subsidiary undertaking or in all bodies corporate in which it has a significant holding is included in the society's accounts, or is shown in aggregate in the notes to the accounts, by way of the equity method of valuation or if: (1) the subsidiary undertaking or body corporate is not required by any provision of the Companies Act 2006 to deliver a copy of its balance sheet for

its relevant financial year and does not otherwise publish that balance sheet in the United Kingdom or elsewhere; and (2) the society's holding is less than 50% of the nominal value of the shares in the undertaking or body corporate: Friendly Societies Act 1992 Sch 13E paras 3(2), 7(2), (3) (as so added; Sch 13E paras 3(2), 7(3) amended by SI 2008/948). Information otherwise required by head (3) in the text need not be given if it is not material: (a) in the case of Friendly Societies Act accounts, for the purpose of giving a true and fair view for the society of the matters set out in the Friendly Societies Act 1992 s 69B(2) (see PARA 2325) or, where appropriate, s 69F(2) (see PARA 2327); or (b) in the case of IAS accounts, to the requirement under international accounting standards that such accounts achieve a fair presentation: Sch 13E paras 3(3), 7(4) (as so added). As to the meaning of 'true and fair view' see PARA 2325 note 4. As to the meaning of 'IAS accounts' see PARA 2325 note 3. As to the meaning of 'international accounting standards' see PARA 2324 note 7. As to the equity method of valuation see **COMPANIES** vol 15 (2009) PARA 757.

12 Friendly Societies Act 1992 s 69K(3) (as added: see note 4).

13 Friendly Societies Act 1992 Sch 13E para 9(1)-(3) (as added: see note 4). It must be stated whether the subsidiary undertaking is included in the consolidation and, if it is not, the reason for excluding it from the consolidation must be given: Sch 13E para 9(4) (as so added). It must also be stated with respect to each subsidiary undertaking of the society by virtue of which of the conditions specified in the Companies Act 2006 s 1162 (see **COMPANIES** vol 14 (2009) PARA 26) (as applied by the Friendly Societies Act 1992 s 78A (see PARA 2324 note 10)) it is a subsidiary undertaking of the society: Sch 13E para 9(5) (as so added). Schedule 13E para 9(5) does not apply in relation to a subsidiary undertaking if: (1) the relevant condition is that specified in the Companies Act 2006 s 1162 (see **COMPANIES** vol 14 (2009) PARA 26); and (2) the society that is its immediate parent undertaking (within the meaning of s 1162) holds the same proportion of the shares in the undertaking as it holds voting rights: Friendly Societies Act 1992 Sch 13E para 9(6) (as so added; amended by SI 2008/948).

14 'Group' means a friendly society and its subsidiary undertakings: Friendly Societies Act 1992 Sch 13E para 20 (as added: see note 4).

15 Friendly Societies Act 1992 Sch 13E para 10(1), (2) (as added: see note 4). The information must be shown separately in respect of the society and the group: see Sch 13E para 10(1) (as so added). References to shares held by the society or the group are to be construed as follows: Sch 13E para 19(1) (as so added). For the purposes of Sch 13E paras 10, 12(4), (5), 13-15, shares held on behalf of a society by any person are treated as if they were held by the society but shares held on behalf of a person other than the society are not treated as if they were held by the society: Sch 13E para 19(2) (as so added). References to shares held by the group are to any shares held by or on behalf of the society or any of its subsidiary undertakings; but shares held on behalf of a person other than the society or any of its subsidiary undertakings are not treated as if they were held by the group: Sch 13E para 19(3) (as so added). Shares held by way of security are treated as if they were held by the person providing the security: (1) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights attached to the shares are exercisable only in accordance with his instructions; or (2) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of security, or of realising it, the rights attached to the shares are exercisable only in his interests: Sch 13E para 19(4) (as so added).

16 The 'relevant financial year' of a subsidiary undertaking is: (1) if its financial year ends with that of the society, that year; and (2) if not, its financial year ending last before the end of the society's financial year: Friendly Societies Act 1992 Sch 13E para 11(4) (as added: see note 4).

17 Friendly Societies Act 1992 Sch 13E para 11(1) (as added: see note 4). The information referred to in head (c) in the text need not be given if the group's investment in the subsidiary undertaking is included in the accounts by way of the equity method of valuation or if: (1) the subsidiary undertaking is not required by any provision of the Companies Act 2006 to deliver a copy of its balance sheet for its relevant financial year and does not otherwise publish that balance sheet in the United Kingdom or elsewhere; and (2) the holding of the group is less than 50% of the nominal value of the shares in the subsidiary undertaking: Friendly Societies Act 1992 Sch 13E para 11(2) (as so added; amended by SI 2008/948). Information otherwise required by the Friendly Societies Act 1992 Sch 13E para 11 need not be given if it is not required in order for the society's group accounts to give a true and fair view: Sch 13E para 11(3) (as so added). See note 15.

18 Friendly Societies Act 1992 Sch 13E para 12(1)-(3) (as added: see note 4). See note 15.

19 Friendly Societies Act 1992 Sch 13E para 12(4), (5) (as added: see note 4). See note 15.

20 A holding is significant for this purpose if: (1) it amounts to 20% or more of the nominal value of the shares in the undertaking; or (2) the amount of the holding (as stated or included in the society's individual accounts) exceeds one-tenth of the amount of the society's assets (as so stated): Friendly Societies Act 1992 Sch 13E paras 13(2), 16(2) (as added: see note 4). See note 15.

21 Friendly Societies Act 1992 Sch 13E paras 13(1), 14(1), (2), 16(1), 17(1), (2) (as added: see note 4). Where it is the society that has the significant holding, the information otherwise required by heads (f) and (g) in the text need not be given if: (1) it is not material for the purposes of giving a true and fair view, for the society and its subsidiary undertakings as a whole, of the matters set out in s 69F(2) (see PARA 2327); (2) in the case of IAS accounts, it is not material to the requirement under international accounting standards that such accounts achieve a fair presentation: Sch 13E para 14(4) (as so added). Where it is the group that has the significant holding, the information otherwise required by heads (f) and (g) in the text need not be given if it is not required in order for the society's group accounts to give a true and fair view: Sch 13E para 17(4) (as so added). See note 15.

22 Friendly Societies Act 1992 Sch 13E paras 14(3), 17(3) (as added: see note 4). See notes 15, 21.

23 The 'relevant financial year' of an undertaking is: (1) if its financial year ends with that of the society, that year; and (2) if not, its financial year ending last before the end of the society's financial year: Friendly Societies Act 1992 Sch 13E paras 15(4), 18(4) (as added: see note 4).

24 Friendly Societies Act 1992 Sch 13E paras 15(1), 18(1) (as added: see note 4). The information required by head (h) in the text need not be given in respect of a body corporate if: (1) the body corporate is not required by any provision of the Companies Act 2006 to deliver a copy of its balance sheet for its relevant financial year and does not otherwise publish that balance sheet in the United Kingdom or elsewhere; and (2) the holding of the society or group is less than 50% of the nominal value of the shares in the undertaking: Friendly Societies Act 1992 Sch 13E paras 15(2), 18(2) (as so added; amended by SI 2008/948). Information otherwise required by head (h) in the text need not be given if it is not material: (a) for the purposes of giving a true and fair view, for the society and its subsidiary undertakings as a whole, of the matters set out in s 69F(2) (see PARA 2327); (b) in the case of IAS accounts, to the requirement under international accounting standards that such accounts achieve a fair presentation: Sch 13E paras 15(3), 18(3) (as so added). See note 15.

25 Friendly Societies Act 1992 s 69K(4) (as added: see note 4). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

26 Friendly Societies Act 1992 s 69K(5) (as added: see note 4).

## **UPDATE**

### **2328-2329 Disclosure Requirements**

As to disclosures relating to off-balance-sheet arrangements see PARA 2329A and as to disclosure of auditor remuneration see PARA 2329B.

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#### **2329A. Disclosures relating to off-balance-sheet arrangements.**

If in any financial year, a friendly society or registered branch has been party to arrangements that are not reflected in its balance sheet, and at the balance sheet date the risks or benefits arising from those arrangements are material, the information required by s 69L must be given in notes to the society's or branch's annual accounts: Friendly Societies Act 1992 s 69L(1) (s 69L added by SI 2008/1140). The information required is the nature and business purpose of the arrangements and the financial impact of the arrangements on the society or branch: Friendly Societies Act 1992 s 69L(2). The information need only be given to the extent necessary for enabling the financial position of the society or branch to be assessed: s 69L(3). Where a friendly society is required to prepare consolidated group accounts, s 69L applies in relation to those accounts as if the undertakings included in the consolidation were a single

friendly society: s 69L(4). As to the meaning of 'friendly society' see PARA 2082; and as to branches and registered branches of societies see PARA 2091.

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### **2329B. Disclosure of auditor remuneration.**

The information specified in the Friendly Societies Act 1992 Sch 13F must be given in notes to a friendly society's or a registered branch's annual accounts: s 69M(1) (s 69M, Sch 13F added by SI 2008/1140). The following must be shown: (1) the amount of any remuneration receivable by the society's auditor for the auditing of the annual accounts and (2) the amount of any remuneration receivable in respect of the financial year by the society's auditor, or any person who was, at any time during that financial year, an associate of the society's auditor, for the supply of other services to the society or branch or any associate of the society or branch: Friendly Societies Act 1992 Sch 13F para 1(1). Where the remuneration includes benefits in kind, the nature and estimated money-value of those benefits must also be shown: Sch 13F para 1(2). Separate disclosure is required in respect of the auditing of the accounts in question and of each type of service specified above, but not in respect of each service falling within a type of service: Sch 13F para 1(3). Separate disclosure is required in respect of services supplied to the society and its subsidiaries on the one hand and to associated pension schemes on the other: Sch 13F para 1(4). Where more than one person has been appointed as a society's auditor in respect of the financial year, separate disclosure is required in respect of the remuneration of each such person and his associates: Sch 13F para 1(5). Where a friendly society is required to prepare consolidated group accounts (a) those accounts must comply with head (2) above, as if the undertakings included in the consolidation were a single friendly society, and (b) notes to the society's individual accounts do not have to disclose the information required by that provision if the notes state that the group accounts are so required: Sch 13F para 1(6). The types of service in respect of which disclosure is required are (i) the auditing of accounts of associates of the society pursuant to legislation, including that of countries and territories outside the United Kingdom; (ii) other services supplied pursuant to such legislation; (iii) other services relating to taxation; (iv) services relating to information technology; (v) internal audit services; (vi) valuation and actuarial services; (vii) services relating to litigation; (viii) services relating to recruitment and remuneration; (ix) services relating to corporate finance transactions entered into or proposed to be entered into on behalf of the society or any of its associates; (x) all other services: Sch 13F para 2. Disclosure is not required of remuneration for certain services provided by a distant associate: see Sch 13F para 3. As to the duty of the auditor to supply information to the directors to enable the required disclosure to be made, see Sch 13F para 4. As to the meaning of 'associate' and 'distant associate' of a friendly society's auditor, see Sch 13F para 5. Schedule 13F applies to a registered branch as it applies to a friendly society: Sch 13F para 7. The Treasury may, by order, modify the provisions of Sch 13F: s 69M(2). An order under s 69M may make consequential amendments or repeals of other provisions of the Friendly Societies Act 1992, make such transitional or saving provisions as appear to the Treasury to be necessary or expedient, or make different provision for different cases: s 69M(3). As to the meaning of 'friendly society' see PARA 2082; and as to branches and registered branches of societies see PARA 2091.

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*(d) Annual Report and Business Review*

**2330. Report on friendly society's affairs by the committee of management.**

The committee of management<sup>1</sup> of a friendly society<sup>2</sup> must prepare for submission to the annual general meeting<sup>3</sup> of the society a report on the activities of the society<sup>4</sup> containing:

- 786 (1) a fair review of the business of the society, its subsidiary undertakings<sup>5</sup> and any bodies that it jointly controls<sup>6</sup>;
- 787 (2) a description of the principal risks and uncertainties facing the society, its subsidiary undertakings and any bodies that it jointly controls<sup>7</sup>;
- 788 (3) such information relating to such aspects of the activities of the society as may be prescribed by regulations made by the Treasury<sup>8</sup>; and
- 789 (4) a statement whether any and, if so, what activities carried on during the year by the society are believed to have been carried on outside its powers<sup>9</sup>.

If the friendly society has subsidiary undertakings, the report may, where appropriate, give greater emphasis to those matters which are significant to the society and its subsidiary undertakings taken as a whole<sup>10</sup>.

Where an incorporated friendly society<sup>11</sup> has subsidiaries or jointly controls other bodies the report must<sup>12</sup>:

- 790 (a) contain such information relating to such aspects of the activities of any subsidiaries or bodies which it jointly controls as may be prescribed by regulations made by the Treasury<sup>13</sup>;
- 791 (b) contain a statement whether any, and if so what, activities carried on during the year by any of its subsidiaries or by any body which it jointly controls are believed to have been carried on outside the powers of the subsidiary or jointly controlled body<sup>14</sup>.

If the report does not contain the prescribed information, or the information in the report is not given in accordance with the regulations, each member of the committee of management commits an offence<sup>15</sup>.

1 As to the committee of management see PARA 2294 et seq.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to annual general meetings see PARA 2302.

4 Friendly Societies Act 1992 s 71(1).

5 As to the meaning of 'subsidiary undertaking' see PARA 2324 note 10.

6 Friendly Societies Act 1992 s 71(1)(a) (substituted by SI 2005/2211). As to the meaning of 'jointly controlled body' see PARA 2134. As to the business review see PARA 2331.

- 7 Friendly Societies Act 1992 s 71(1)(aa) (added by SI 2005/2211).
- 8 Friendly Societies Act 1992 s 71(1)(b) (amended by SI 2001/2617). See the Friendly Societies (Accounts and Related Provisions) Regulations 1994, SI 1994/1983, reg 12, Sch 8. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.
- 9 Friendly Societies Act 1992 s 71(1)(c).
- 10 Friendly Societies Act 1992 s 71(1A) (added by SI 2005/2211).
- 11 As to the meaning of 'incorporated friendly society' see PARA 2082.
- 12 Friendly Societies Act 1992 s 71(2).
- 13 Friendly Societies Act 1992 s 71(2)(a) (amended by SI 2001/2617). See the regulations cited in note 8.
- 14 Friendly Societies Act 1992 s 71(2)(c).
- 15 Friendly Societies Act 1992 s 71(3). A person guilty of such an offence is liable: (1) on conviction on indictment to a fine; and (2) on summary conviction to a fine not exceeding the statutory maximum: s 71(3). As to the statutory maximum see PARA 56 note 24.

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### **2331. Business review.**

The business review<sup>1</sup> is a balanced and comprehensive analysis, consistent with the size and complexity of the business<sup>2</sup>, of:

- 792 (1) the development and performance of the business of the friendly society<sup>3</sup>, its subsidiary undertakings<sup>4</sup> and any bodies that it jointly controls<sup>5</sup> during the financial year<sup>6</sup>; and
- 793 (2) the position of the friendly society, its subsidiary undertakings and any bodies that it jointly controls at the end of that year<sup>7</sup>.

The review must, to the extent necessary for an understanding of the development, performance or position of the business of the society, its subsidiary undertakings and any bodies that it jointly controls, include analysis using financial key performance indicators<sup>8</sup> and, where appropriate, analysis using other key performance indicators, including information relating to environmental matters and employee matters<sup>9</sup>.

The review must, where appropriate, include references to additional explanations of amounts included in the annual accounts<sup>10</sup> of the society<sup>11</sup>.

- 1 le the review required for the purposes of the Friendly Societies Act 1992 s 71(1)(a): see PARA 2330.
- 2 Friendly Societies Act 1992 s 71A(1) (s 71A added by SI 2005/2211).
- 3 As to the meaning of 'friendly society' see PARA 2082.
- 4 As to the meaning of 'subsidiary undertaking' see PARA 2324 note 10.

- 5 As to the meaning of 'jointly controlled body' see PARA 2134.
- 6 Friendly Societies Act 1992 s 71A(1)(a) (as added: see note 2). As to the meaning of 'financial year' see PARA 2392.
- 7 Friendly Societies Act 1992 s 71A(1)(b) (as added: see note 2).
- 8 'Key performance indicators' means factors by reference to which the development, performance or position of the business of the society, any subsidiary undertakings it has and any bodies that it jointly controls, can be measured effectively: Friendly Societies Act 1992 s 71A(4) (as added: see note 2).
- 9 Friendly Societies Act 1992 s 71A(2) (as added: see note 2).
- 10 As to the annual accounts see PARA 2324 et seq.
- 11 Friendly Societies Act 1992 s 71A(3) (as added: see note 2).

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## (C) AUDITORS

### **2332. Appointment of auditors.**

Every friendly society<sup>1</sup> and every registered branch<sup>2</sup> is required to appoint an auditor or auditors at each annual general meeting<sup>3</sup>, to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting<sup>4</sup>.

The first auditors of a friendly society or registered branch may be appointed by its committee of management<sup>5</sup> at any time before the first general meeting of the society or branch following the end of its initial financial year<sup>6</sup> and auditors appointed in this way hold office until the conclusion of that meeting<sup>7</sup>.

The committee of management, or the society or branch in general meeting, may fill any casual vacancy in the office of auditor; but while any such vacancy continues, the surviving or continuing auditor or auditors (if any) may act<sup>8</sup>.

If at any annual general meeting of a friendly society or registered branch no auditor is appointed or reappointed, the Financial Services Authority<sup>9</sup> may appoint a person to fill the vacancy; and the society or branch must, within one week of this power of the Authority becoming exercisable, give it notice of that fact<sup>10</sup>. Failure by the society or branch to do so is an offence<sup>11</sup>.

Appointment as auditor of a friendly society to which the Audit Directive<sup>12</sup> applies is an appointment as a statutory auditor to which the relevant provisions of the Companies Act 2006<sup>13</sup> apply<sup>14</sup>.

- 1 As to the meaning of 'friendly society' see PARA 2082.
- 2 As to branches and registered branches of societies see PARA 2091.
- 3 As to annual general meetings see PARA 2302.
- 4 Friendly Societies Act 1992 s 72(1).

- 5 As to the committee of management see PARA 2294 et seq.
- 6 As to the meaning of 'initial financial year' see PARA 2392.
- 7 Friendly Societies Act 1992 s 72(2), Sch 14 para 1(1). If the committee of management fails to exercise these powers, the powers may be exercised by the society or branch in general meeting: Sch 14 para 1(2).
- 8 Friendly Societies Act 1992 Sch 14 para 2.
- 9 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 10 Friendly Societies Act 1992 Sch 14 para 3(1) (amended by SI 2001/2617).
- 11 Friendly Societies Act 1992 Sch 14 para 3(2). Such an offence is punishable on summary conviction: (1) with a fine not exceeding level 3 on the standard scale; and (2) in the case of a continuing offence with an additional fine not exceeding one-tenth of that level for every day during which the offence continues: Sch 14 para 3(2). As to the standard scale see PARA 27 note 21.
- 12 The European Parliament and EC Council Directive 2006/43 (OJ L157, 9.6.2006, p 87) on statutory audits of annual accounts and consolidated accounts, amending Directives 78/660 and 83/349 and repealing Directive 84/253. References in the Building Societies Act 1992 Pt VI (ss 68-78A) to a friendly society to which the Audit Directive applies are to a friendly society that is an insurance undertaking within the meaning given by EEC Council Directive 1991/674 art 2.1 on the annual accounts and consolidated accounts of insurance undertakings: Friendly Societies Act 1992 s 78A(3) (added by SI 2008/948).
- 13 The Companies Act 2006 Pt 42 (ss 1209-1264): see **COMPANIES** vol 15 (2009) PARA 957 et seq.
- 14 Friendly Societies Act 1992 Sch 14 para 3A(1) (Sch 14 para 3A added by SI 2008/948). The following provisions do not apply in that case: (1) the Building Societies Act 1992 Sch 14 paras 4, 5 (eligibility for appointment) (see PARA 2333); (2) Sch 14 para 6 (appointment of partnership) (see PARA 2333); (3) Sch 14 para 7 (cases in which auditor need not be a member of a recognised supervisory body) (see PARA 2334); and (4) Sch 14 para 8 (effect of ineligibility) (see PARA 2335): Sch 14 para 3A(2) (as so added).

## UPDATE

### 2332 Appointment of auditors

NOTE 10--Friendly Societies Act 1992 Sch 14 para 3(1) amended: SI 2008/1140.

NOTE 12--Directive 2006/43 implemented, in part, by the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565.

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### 2333. Eligibility for appointment as auditor.

In general<sup>1</sup>, a person is only eligible for appointment as the auditor of a friendly society<sup>2</sup> or a registered branch<sup>3</sup> if he is a member of a recognised supervisory body<sup>4</sup> and is not ineligible for the appointment under the rules of that body<sup>5</sup>. An individual or a firm<sup>6</sup> may be appointed as auditor<sup>7</sup>.

A person is ineligible for appointment as an auditor of a friendly society or registered branch if he is: (1) an officer or employee of the friendly society or any registered branch of the society; or (2) a partner or employee of such a person or a partnership of which such a person is a partner<sup>8</sup>. A person is ineligible for appointment as an auditor of an incorporated friendly society<sup>9</sup>



if he is prohibited<sup>10</sup> from acting as statutory auditor of a subsidiary<sup>11</sup> of the society, or of a body jointly controlled<sup>12</sup> by the society and some other person<sup>13</sup>. For this purpose, an auditor of a friendly society or branch is not to be regarded as an officer or employee of the society or branch<sup>14</sup>. A person is also ineligible for appointment as auditor of a friendly society or branch if there exists between him and any associate<sup>15</sup> of his and the society or branch or, if it is an incorporated friendly society, any of its subsidiaries, a connection of such a description as may be specified in regulations made by the Treasury<sup>16</sup>.

1 This provision is subject to the exception provided by the Friendly Societies Act 1992 s 72(2), Sch 14 para 7: see PARA 2334.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to branches and registered branches of societies see PARA 2091.

4 'Recognised supervisory body' means a body which is a recognised supervisory body for the purposes of the Companies Act 2006 Pt 42 (ss 1209-1264) (see **COMPANIES** vol 15 (2009) PARA 957 et seq): Friendly Societies Act 1992 Sch 14 para 4(3) (definition amended by SI 2008/948).

5 Friendly Societies Act 1992 Sch 14 para 4(1).

6 'Firm' means a corporate body or partnership: Friendly Societies Act 1992 Sch 14 para 4(3).

Where a partnership constituted under the law of England, Wales or Northern Ireland, or under the law of any other country or territory in which a partnership is not a legal person, is appointed auditor (Sch 14 para 6(1)):

(1) the appointment is (unless the contrary intention appears) an appointment of the partnership as such and not of the partners (Sch 14 para 6(2)); and

(2) where the partnership ceases, the appointment is treated as extending to: (a) any partnership which succeeds the practice of that partnership and is eligible for the appointment; and (b) any person who succeeds to that practice having previously carried it on in partnership and who is eligible for appointment (Sch 14 para 6(3)).

For this purpose, a partnership is regarded as succeeding to the practice of another partnership only if the members of the successor partnership are substantially the same as those of the former partnership; and a partnership or other person is to be regarded as succeeding to the practice of a partnership only if it or he succeeds to the whole or substantially the whole of the business of the former partnership: Sch 14 para 6(4). Where the partnership ceases and no person succeeds to the appointment under head (2) above, the appointment may with the consent of the recognised supervisory body be treated as extending to a partnership or other person eligible for appointment who succeeds to the business of the former partnership or to such part of it as is agreed by the body is to be treated as comprising the appointment: Sch 14 para 6(5).

7 Friendly Societies Act 1992 Sch 14 para 4(2).

8 Friendly Societies Act 1992 Sch 14 para 5(1)(a), (b).

9 As to the meaning of 'incorporated friendly society' see PARA 2082.

10 Ie by the Companies Act 2006 s 1214(2) (independence requirement): see **COMPANIES** vol 15 (2009) PARA 971. See note 4.

11 As to the meaning of 'subsidiary' see PARA 2134.

12 As to the meaning of 'jointly controlled body' see PARA 2134.

13 Friendly Societies Act 1992 Sch 14 para 5(1) (amended by SI 2008/948).

14 Friendly Societies Act 1992 Sch 14 para 5(2).

15 'Associate' has the meaning given by the Companies Act 2006 s 1260 (see **COMPANIES** vol 15 (2009) PARA 971): Friendly Societies Act 1992 Sch 14 para 5(4) (amended by SI 2008/948).

16 Friendly Societies Act 1992 Sch 14 para 5(3) (amended by SI 2001/2617). At the date at which this volume states the law, no such regulations had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.

**UPDATE****2333 Eligibility for appointment as auditor**

NOTE 6--As to the meaning of 'firm' see now the Friendly Societies Act 1992 s 78A(1) (definition added by SI 2008/1140).

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**2334. Cases in which auditor need not belong to recognised supervisory body.**

A person who is not a member of a recognised supervisory body<sup>1</sup> may be an auditor of a registered friendly society<sup>2</sup> or a registered branch<sup>3</sup> if:

- 794 (1) its receipts and payments in respect of the preceding financial year<sup>4</sup> did not, in the aggregate, exceed £5,000<sup>5</sup>;
- 795 (2) the number of its members at the end of that year did not exceed 500<sup>6</sup>; and
- 796 (3) the value of its assets at the end of that year did not, in the aggregate, exceed £5,000<sup>7</sup>.

A person who is not a member of a recognised supervisory body may also be an auditor of a registered branch if<sup>8</sup>:

- 797 (a) the conditions mentioned in heads (1) and (2) above are satisfied<sup>9</sup>;
- 798 (b) at the end of the preceding financial year at least 75 per cent of its assets had been transferred to the society of which it is a branch or to another registered branch of that society, for the purpose of being invested, in accordance with the Friendly Societies Act 1974, by that society or other branch, and the value of the assets not so transferred did not, in the aggregate, exceed £5,000<sup>10</sup>; and
- 799 (c) an auditor of the society or branch to which the assets were transferred is a member of a recognised supervisory body<sup>11</sup>.

The Financial Services Authority<sup>12</sup> may direct that a society or branch which is an exempt society or branch<sup>13</sup> in respect of any financial year is to be treated in that year as if it were not an exempt society or branch<sup>14</sup>. Subject thereto, a society or branch which is an exempt society or branch in respect of any financial year must appoint either: (i) one or more qualified auditors; or (ii) two or more persons who are not qualified auditors, to audit its annual accounts for that year<sup>15</sup>.

Regulations made by the Treasury<sup>16</sup> may substitute for any sum, number or percentage for the time being specified above<sup>17</sup>, such sum, number or percentage as may be specified in the regulations and prescribe what receipts and payments are to be taken into account for those purposes<sup>18</sup>.

1 As to the meaning of 'recognised supervisory body' see PARA 2333 note 4.

- 2 As to the meaning of 'registered friendly society' see PARA 2082.
- 3 Friendly Societies Act 1992 s 72(2), Sch 14 para 7(1) (Sch 14 para 7(1), (4), (6), (7) amended, and Sch 14 para 7(2) repealed, by SI 2001/2617). As to branches and registered branches of societies see PARA 2091.
- 4 As to the meaning of 'financial year' see PARA 2392.
- 5 Friendly Societies Act 1992 Sch 14 para 7(1)(a).
- 6 Friendly Societies Act 1992 Sch 14 para 7(1)(b).
- 7 Friendly Societies Act 1992 Sch 14 para 7(1)(c).
- 8 Friendly Societies Act 1992 Sch 14 para 7(3).
- 9 Friendly Societies Act 1992 Sch 14 para 7(3)(a).
- 10 Friendly Societies Act 1992 Sch 14 para 7(3)(b).
- 11 Friendly Societies Act 1992 Sch 14 para 7(3)(c).
- 12 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 13 'Exempt society or branch' means in respect of any financial year a registered friendly society or registered branch which is entitled to appoint a person who is not a member of a recognised supervisory body as an auditor in respect of that financial year: Friendly Societies Act 1992 Sch 14 para 7(5).
- 14 Friendly Societies Act 1992 Sch 14 para 7(7) (as amended: see note 3). This provision refers to 'sub-paragraph (4)', but it is submitted that the reference should be to Sch 14 para 7(6).
- 15 Friendly Societies Act 1992 Sch 14 para 7(6) (as amended: see note 3).
- 16 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.
- 17 Ie in the Friendly Societies Act 1992 Sch 14 para 7(1) or Sch 14 para 7(3): see the text and notes 1-11.
- 18 Friendly Societies Act 1992 Sch 14 para 7(4) (as amended: see note 3).

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### **2335. Effect of ineligibility to act as an auditor.**

No person may act under the Friendly Societies Act 1992<sup>1</sup> as an auditor of a friendly society<sup>2</sup> or registered branch<sup>3</sup> if he is ineligible for appointment to the office<sup>4</sup>. If an auditor becomes ineligible for appointment during the term of his office, he must vacate the office and forthwith give notice in writing<sup>5</sup> to the society concerned that he has vacated it by reason of ineligibility<sup>6</sup>. It is an offence for a person to act as auditor when ineligible or to fail to give notice of vacating his office in these circumstances<sup>7</sup>. In proceedings for such an offence, it is a defence to show that the person did not know and had no reason to believe that he was or had become ineligible for appointment<sup>8</sup>.

1 As to the appointment of auditors under the Friendly Societies Act 1992 see PARA 2332.

2 As to the meaning of 'friendly society' see PARA 2082.

- 3 As to branches and registered branches of societies see PARA 2091.
- 4 Friendly Societies Act 1992 s 72(2), Sch 14 para 8(1). As to eligibility to be appointed auditor of a registered friendly society or registered branch see PARAS 2333-2334.
- 5 As to the giving of notice see PARA 2390.
- 6 Friendly Societies Act 1992 Sch 14 para 8(2).
- 7 Friendly Societies Act 1992 Sch 14 para 8(3). The offence is punishable on conviction on indictment with a fine and on summary conviction with a fine not exceeding the statutory maximum, and in the case of a continuing offence with an additional fine not exceeding one-tenth of the statutory maximum for each day during which the offence continues: Sch 14 para 8(3)(a), (b). As to the statutory maximum see PARA 56 note 24.
- 8 Friendly Societies Act 1992 Sch 14 para 8(4).

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### **2336. Power of Financial Services Authority to require second audit.**

If a person appointed as auditor<sup>1</sup> of a friendly society<sup>2</sup> or registered branch<sup>3</sup> was, for any part of the period during which the audit was conducted, ineligible for appointment to that office, the Financial Services Authority<sup>4</sup> may direct the friendly society or registered branch concerned to retain an eligible person<sup>5</sup>: (1) to audit the relevant accounts again; or (2) to review the first audit and to report, giving his reasons, whether a second audit is needed<sup>6</sup>. The society or branch must comply with the Authority's direction within 21 days<sup>7</sup>. Failure to comply with these provisions is an offence<sup>8</sup>. A direction under these provisions is, on the application of the Authority, enforceable by injunction<sup>9</sup>. If a second audit is recommended, the society or branch must forthwith take such steps as are necessary to comply with the recommendation<sup>10</sup>. If a person accepts an appointment, or continues to act, as an auditor when he knows he is ineligible, the society concerned may recover from him any costs incurred by it in complying with these requirements<sup>11</sup>.

- 1 As to the appointment of auditors see PARA 2332.
- 2 As to the meaning of 'friendly society' see PARA 2082.
- 3 As to branches and registered branches of societies see PARA 2091.
- 4 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 5 As to eligibility to act as an auditor see PARAS 2333-2334.
- 6 Friendly Societies Act 1992 s 72(2), Sch 14 para 9(1)(a), (b). Any statutory or other provisions applying in relation to the first audit apply, so far as practicable, in relation to the second audit: Sch 14 para 9(4). Where a direction is given under Sch 14 para 9 the Authority must place a copy of the direction in the public file of the society: Sch 14 para 9(3) (substituted by SI 2001/2617). Where a society or branch receives a report under the Friendly Societies Act 1992 Sch 14 para 9(1)(b) (see head (2) in the text), it must within 21 days send a copy of it to the Authority to be placed in the public file: Sch 14 para 9(3A) (added by SI 2001/2617). As to the public file see PARA 2382.
- 7 Friendly Societies Act 1992 Sch 14 para 9(1).
- 8 Friendly Societies Act 1992 Sch 14 para 9(5). Such an offence is punishable on summary conviction: (1) with a fine not exceeding level 5 on the standard scale; and (2) in the case of a continuing offence with an

additional fine not exceeding one-tenth of that level for every day during which the offence continues: Sch 14 para 9(5). As to the standard scale see PARA 27 note 21.

9 Friendly Societies Act 1992 Sch 14 para 9(6) (amended by SI 2001/2617).

10 Friendly Societies Act 1992 Sch 14 para 9(2).

11 Friendly Societies Act 1992 Sch 14 para 9(7).

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### **2337. Removal of auditors.**

A friendly society<sup>1</sup> or registered branch<sup>2</sup> may, by ordinary resolution in general meeting<sup>3</sup>, remove an auditor<sup>4</sup> before the expiration of his term of office, notwithstanding any agreement between it and him<sup>5</sup>. In such an event, the society or branch must within 14 days give notice of that fact to the Financial Services Authority<sup>6</sup>. Failure to give that notice is an offence<sup>7</sup>. These provisions do not operate to deprive anyone removed from office in this way of compensation or damages that may be payable to him in consequence of terminating his appointment as auditor or any appointment terminating with that as auditor<sup>8</sup>. An auditor's removal does not affect his rights in relation to any general meeting of the society or branch at which: (1) his term of office would otherwise have expired; or (2) it is proposed to fill the vacancy caused by his removal<sup>9</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to branches and registered branches of societies see PARA 2091.

3 As to resolutions in general meeting see PARA 2302 et seq.

4 As to the appointment of auditors see PARA 2332. As to eligibility to act as an auditor see PARAS 2333-2334.

5 Friendly Societies Act 1992 s 72(2), Sch 14 para 10(1).

6 Friendly Societies Act 1992 Sch 14 para 10(2) (amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

7 Friendly Societies Act 1992 Sch 14 para 10(3). Such an offence is punishable on summary conviction: (1) with a fine not exceeding level 3 on the standard scale; and (2) in the case of a continuing offence, with an additional fine not exceeding one-tenth of that level for every day during which the offence continues: Sch 14 para 10(3). As to the standard scale see PARA 27 note 21.

8 Friendly Societies Act 1992 Sch 14 para 10(4).

9 Friendly Societies Act 1992 Sch 14 para 10(5). As to an auditor's rights in relation to any general meeting see s 75; and PARA 2345.

## **UPDATE**

### **2337 Removal of auditors**

TEXT AND NOTES--Where an auditor of a friendly society to which the European Parliament and EC Council Directive 2006/43 ('the Audit Directive') applies is removed

from office an application may be made to the High Court under the Friendly Societies Act 1992 Sch 14 para 10A: Sch 14 para 10A(1) (Sch 14 para 10A added by SI 2008/1140). The persons who may make such an application are any member of the society who was also a member at the time of the removal or the Authority: Friendly Societies Act 1992 Sch 14 para 10A(2). If the court is satisfied that the removal was on grounds of divergence of opinion on accounting treatments or audit procedures or any other improper grounds, it may make such order as it thinks fit for giving relief in respect of the removal: Sch 14 para 10A(3). The court may, in particular, declare that any resolution of the society removing an auditor, or appointing a new auditor in his place, is void, require the directors of the society to re-appoint the auditor until the next general meeting of the society, or give directions as to the conduct of the society's affairs in the future: Sch 14 para 10A(4).

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### **2338. Rights of auditors who are removed or not reappointed.**

Special notice is required for a resolution at a general meeting<sup>1</sup> of a friendly society<sup>2</sup> or registered branch<sup>3</sup>, removing an auditor<sup>4</sup> before the expiration of his term of office or appointing as auditor a person other than a retiring auditor<sup>5</sup>. On receipt of notice of such an intended resolution, the friendly society or branch must send a copy of it forthwith to the person proposed to be removed or, as the case may be, to the person proposed to be appointed and to the retiring auditor<sup>6</sup>. The auditor proposed to be removed or, as the case may be, the retiring auditor, may make representations in writing to the society or branch with respect to the intended resolution and request their notification to members of the society<sup>7</sup>.

Unless the auditor's representations are received too late for it to do so, the society or branch must<sup>8</sup>:

- 800 (1) in any notice of the resolution given to its members state the fact that the representations have been made<sup>9</sup>;
- 801 (2) include in or with the notice a copy of the representations<sup>10</sup>; and
- 802 (3) make copies of them available to members at the meeting at which the resolution is to be moved<sup>11</sup>.

If notice of the representations is not given because they are received too late or because of the default of the society or branch, the auditor may, without prejudice to his right to be heard orally<sup>12</sup>, require that the representations be read out at the meeting<sup>13</sup>. These steps need not be taken if, on the application of the society or branch or any other person aggrieved, the court<sup>14</sup> is satisfied that the auditor's rights are being abused to secure needless publicity for defamatory matter; and the court may order the costs of the society or branch on the application to be paid in whole or in part by the auditor in this event, notwithstanding that he is not a party to the application<sup>15</sup>.

1 As to general meetings see PARA 2302. As to resolutions requiring special notice see PARA 2308.

2 As to the meaning of 'friendly society' see PARA 2082.

- 3 As to branches and registered branches of societies see PARA 2091.
- 4 As to the appointment of auditors see PARA 2332. As to eligibility to act as an auditor see PARAS 2333-2334.
- 5 Friendly Societies Act 1992 s 72(2), Sch 14 para 11(1).
- 6 Friendly Societies Act 1992 Sch 14 para 11(2).
- 7 Friendly Societies Act 1992 Sch 14 para 11(3). The representations must not exceed a reasonable length: see Sch 14 para 11(3).
- 8 Friendly Societies Act 1992 Sch 14 para 11(4).
- 9 Friendly Societies Act 1992 Sch 14 para 11(4)(a).
- 10 Friendly Societies Act 1992 Sch 14 para 11(4)(b).
- 11 Friendly Societies Act 1992 Sch 14 para 11(4)(c).
- 12 As to the auditor's right to be heard orally at general meetings see PARA 2345 text and note 8.
- 13 Friendly Societies Act 1992 Sch 14 para 11(5).
- 14 As to the meaning of 'court' see PARA 2143 note 2. As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.
- 15 Friendly Societies Act 1992 Sch 14 para 11(6).

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### **2339. Resignation of auditors.**

An auditor<sup>1</sup> of a friendly society<sup>2</sup> or registered branch<sup>3</sup> may resign his office by depositing a notice in writing to that effect at the society's registered office<sup>4</sup>. An effective notice of resignation operates to bring the auditor's term of office to an end as of the date on which the notice is deposited or on such later date as may be specified in it<sup>5</sup>. A copy of the notice must be sent to the Financial Services Authority<sup>6</sup> by the society or branch concerned within 14 days of when the notice was deposited<sup>7</sup>. Failure to do so is an offence<sup>8</sup>.

- 1 As to the appointment of auditors see PARA 2332. As to eligibility to act as an auditor see PARAS 2333-2334.
- 2 As to the meaning of 'friendly society' see PARA 2082.
- 3 As to branches and registered branches of societies see PARA 2091.
- 4 Friendly Societies Act 1992 s 72(2), Sch 14 para 12(1). The notice is not effective unless it is accompanied by the statement required by Sch 14 para 14 (see PARA 2341): Sch 14 para 12(2). As to a society's registered office see PARA 2127.
- 5 Friendly Societies Act 1992 Sch 14 para 12(3).
- 6 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 7 Friendly Societies Act 1992 Sch 14 para 12(4).

8 Friendly Societies Act 1992 Sch 14 para 12(5). Such an offence is punishable: (1) on conviction on indictment with a fine; and (2) on summary conviction with a fine not exceeding the statutory maximum and, in the case of a continuing offence, with an additional fine not exceeding one-tenth of the statutory maximum for every day during which the offence continues: Sch 14 para 12(5). As to the statutory maximum see PARA 56 note 24.

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### **2340. Rights of resigning auditors.**

Where the auditor<sup>1</sup> of a friendly society<sup>2</sup> or registered branch<sup>3</sup> accompanies his notice of resignation with a statement of circumstances which he considers should be brought to the attention of members or creditors of the society or branch, he may deposit with the notice a signed requisition calling on the committee of management<sup>4</sup> forthwith duly to convene an extraordinary general meeting of the society or branch, for the purpose of receiving and considering such explanation of the circumstances connected with his resignation as he may wish to place before the meeting<sup>5</sup>.

Unless the statement is received too late for the following provisions to be complied with, at the request of the auditor the society must<sup>6</sup>:

- 803 (1) in any notice of the meeting convened on his requisition, or of any general meeting<sup>7</sup> at which his term of office would otherwise have expired, or at which it is proposed to fill the vacancy caused by his resignation, state the fact that the statement has been made<sup>8</sup>;
- 804 (2) include in or with that notice a copy of a statement in writing by the auditor (not exceeding a reasonable length) of the circumstances connected with his resignation<sup>9</sup>; and
- 805 (3) make copies of the statement available to members at any such meeting<sup>10</sup>.

If the committee of management does not, within 21 days from the date of deposit of such a requisition, convene a meeting for a day not more than 28 days after the date on which the notice convening the meeting is given, every member of the committee who failed to take all reasonable steps to secure that a meeting was duly convened is guilty of an offence<sup>11</sup>. If notice of the auditor's statement is not given as required because it is received too late, or because of the default of the society or branch, the auditor may, without prejudice to his right to be heard orally<sup>12</sup>, require that the statement be read out at the meeting<sup>13</sup>.

These steps need not be taken if, on the application of the society or branch, or of any other person who claims to be aggrieved, the court<sup>14</sup> is satisfied that the rights of the auditor are being abused to secure needless publicity for defamatory matter; and the court may, in such a case, order the costs of the society or branch on the application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application<sup>15</sup>.

1 As to the appointment of auditors see PARA 2332. As to eligibility to act as an auditor see PARAS 2333-2334.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to branches and registered branches of societies see PARA 2091.



- 4 As to the committee of management see PARA 2294 et seq.
  - 5 Friendly Societies Act 1992 s 72(2), Sch 14 para 13(1), (2).
  - 6 Friendly Societies Act 1992 Sch 14 para 13(3).
  - 7 As to general meetings see PARA 2302 et seq.
  - 8 Friendly Societies Act 1992 Sch 14 para 13(3)(a).
  - 9 Friendly Societies Act 1992 Sch 14 para 13(3)(b).
  - 10 Friendly Societies Act 1992 Sch 14 para 13(3)(c).
  - 11 Friendly Societies Act 1992 Sch 14 para 13(4). A person guilty of such an offence is liable on conviction on indictment to a fine and on summary conviction to a fine not exceeding the statutory maximum: Sch 14 para 13(4). As to the statutory maximum see PARA 56 note 24.
  - 12 As to the auditor's right to be heard orally at general meetings see PARA 2345 text and note 8.
  - 13 Friendly Societies Act 1992 Sch 14 para 13(5).
  - 14 As to the meaning of 'court' see PARA 2143 note 2. As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.
  - 15 Friendly Societies Act 1992 Sch 14 para 13(6).
- An auditor who has resigned has, notwithstanding his resignation, the rights conferred by s 75 (see PARA 2345) in relation to any such general meeting of the society or branch as is mentioned in Sch 14 para 13(3) (see the text and notes 6-10); and, in such a case, the references in that provision are to be construed as references to matters concerning him as a former auditor: Sch 14 para 13(7).

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### **2341. Statement by person ceasing to hold office.**

When an auditor<sup>1</sup> of a friendly society<sup>2</sup> or registered branch<sup>3</sup> ceases to hold office for any reason, he must deposit at the registered office<sup>4</sup> of the society or branch concerned<sup>5</sup>:

- 806 (1) a statement of any circumstances connected with his ceasing to hold office, which he considers should be brought to the attention of the members or creditors of the society or branch<sup>6</sup>; or
- 807 (2) if he considers that there are no such circumstances, a statement that there are none<sup>7</sup>.

In a case falling within head (1) above, it is also the duty of the auditor, unless he receives notice of an application to the court<sup>8</sup> before the end of a period of 21 days beginning with the day on which he deposited the statement, to send the Financial Services Authority<sup>9</sup> a copy within a further seven days<sup>10</sup>.

In the case of resignation, the statement must be deposited along with the notice of resignation; in the case of failure to seek reappointment, the statement must be deposited not less than 14 days before the end of the time allowed for next appointing an auditor; in any other case, the statement must be deposited not later than the end of 14 days beginning with the date on which he ceases to hold office<sup>11</sup>.

If the statement is of circumstances which the auditor considers ought to be brought to the attention of members and creditors, the society must, within 14 days of the deposit of the statement, either send a copy of it to every member who is, when the statement is deposited, entitled to vote at a meeting of the society or branch<sup>12</sup>, or apply to the court<sup>13</sup>. If it applies to the court, the society or branch must notify the auditor of the application<sup>14</sup>.

If the court is satisfied that the auditor is using the statement to secure needless publicity for defamatory matter it must direct that copies of the statement need not be sent out and it may further order that the costs of the society or branch on the application be paid, in whole or in part, by the auditor, notwithstanding that he is not a party to the application; within 14 days of the court's decision, the society or branch must send a statement setting out the effect of the order to every member who was, when the statement by the auditor was deposited, entitled to vote at a meeting of the society or branch<sup>15</sup>. If the court is not so satisfied, the society or branch must:

808 (a) send copies of the statement to every member who was, when the statement by the auditor was deposited, entitled to vote at a meeting of the society or branch; and

809 (b) notify the auditor of the court's decision, within 14 days of it being given,

and the auditor must, within seven days of receiving such notice, send a copy of the statement to the Authority<sup>16</sup>.

If a person ceasing to hold office as an auditor fails to comply with these provisions he is guilty of an offence<sup>17</sup>. If a society or branch makes a default in complying with these provisions it is guilty of an offence<sup>18</sup>.

1 As to the appointment of auditors see PARA 2332. As to eligibility to act as an auditor see PARAS 2333-2334.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to branches and registered branches of societies see PARA 2091.

4 As to the registered office see PARAS 2127, 2156.

5 Friendly Societies Act 1992 s 72(2), Sch 14 para 14(1).

6 Friendly Societies Act 1992 Sch 14 para 14(1)(a).

7 Friendly Societies Act 1992 Sch 14 para 14(1)(b).

8 I.e. an application under the Friendly Societies Act 1992 Sch 14 para 14(4)(b): see the text to note 13. As to the meaning of 'court' see PARA 2143 note 2.

9 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

10 Friendly Societies Act 1992 Sch 14 para 14(2) (amended by SI 2001/2617).

11 Friendly Societies Act 1992 Sch 14 para 14(3).

12 As to the entitlement of members of a society or branch to vote at meetings see PARA 2304.

13 Friendly Societies Act 1992 Sch 14 para 14(4).

14 Friendly Societies Act 1992 Sch 14 para 14(5).

15 Friendly Societies Act 1992 Sch 14 para 14(6).

16 Friendly Societies Act 1992 Sch 14 para 14(7) (amended by SI 2001/2617).

17 Friendly Societies Act 1992 Sch 14 para 15(1). A person guilty of such an offence is liable: (1) on conviction on indictment to a fine; and (2) on summary conviction to a fine not exceeding the statutory maximum: Sch 14 para 15(1). As to the statutory maximum see PARA 56 note 24.

18 Friendly Societies Act 1992 Sch 14 para 15(2). A society or branch guilty of such an offence is liable: (1) on conviction on indictment to a fine; and (2) on summary conviction to a fine not exceeding the statutory maximum and, in the case of a continuing offence, to an additional fine not exceeding one-tenth of the statutory maximum for every day during which the offence continues: Sch 14 para 15(2).

## UPDATE

### 2341 Statement by person ceasing to hold office

TEXT AND NOTES--Where an auditor of a friendly society or registered branch ceases for any reason to hold office, he must notify the appropriate audit authority: see the Friendly Societies Act 1992 Sch 14 para 15A (Sch 14 paras 15A-15C added by SI 2008/1140). It is an offence to fail to comply with this requirement: Friendly Societies Act 1992 Sch 14 para 15A(5). The friendly society or registered branch must also notify the appropriate audit authority where an auditor ceases to hold office before the end of his term of office: see Sch 14 para 15B. 'Appropriate audit authority' means the Secretary of State or, if the Secretary of State has delegated functions under the Companies Act 2006 s 1252 (see **COMPANIES** vol 15 (2009) PARA 960) to a body whose functions include receiving the equivalent notice under s 522 or s 523 (see **COMPANIES** vol 15 (2009) PARAS 945, 946), that body: Friendly Societies Act 1992 Sch 14 para 15C.

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### 2342. Remuneration of auditors.

The remuneration<sup>1</sup> of auditors appointed by a friendly society<sup>2</sup> or registered branch<sup>3</sup> in general meeting<sup>4</sup> must be fixed by the society or branch in general meeting, or in such manner as the society or branch may determine in general meeting<sup>5</sup>. The remuneration of auditors appointed by a committee of management<sup>6</sup> or the Financial Services Authority<sup>7</sup> must be fixed by the committee of management or the Authority, as the case may be<sup>8</sup>. The amount of the remuneration of auditors, in their capacity as such, must be stated in a note to the annual accounts of the society or branch<sup>9</sup>.

The Treasury<sup>10</sup> may make regulations for securing the disclosure of any remuneration received or receivable by auditors or their associates in respect of services other than those of auditors in their capacity as such<sup>11</sup>.

1 'Remuneration' includes sums paid in respect of expenses: Friendly Societies Act 1992 s 72(2), Sch 14 para 16(4). Schedule 14 para 16 applies in relation to benefits in kind as to payments in cash; and, in relation to any such benefit, references to its amount are to its estimated money value: Sch 14 para 16(5). The nature of any such benefit must also be disclosed: Sch 14 para 16(6).

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to branches and registered branches of societies see PARA 2091.

4 As to general meetings see PARA 2302 et seq.

5 Friendly Societies Act 1992 Sch 14 para 16(1). As to the appointment of auditors see PARA 2332.

6 As to the committee of management see PARA 2294 et seq.

7 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

8 Friendly Societies Act 1992 Sch 14 para 16(2) (amended by SI 2001/2617).

9 Friendly Societies Act 1992 Sch 14 para 16(3).

10 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.

11 Friendly Societies Act 1992 Sch 14 para 17(1) (amended by SI 2001/2617). Such regulations may: (1) provide that 'remuneration' includes sums paid in respect of expenses; (2) apply in relation to benefits in kind as to payments in cash, and in relation to any such benefit require disclosure of its nature and its estimated money value; (3) define 'associate' in relation to an auditor; and (4) require the disclosure of remuneration in respect of services rendered to subsidiaries: Friendly Societies Act 1992 Sch 14 para 17(2). As to the meaning of 'subsidiary' see PARA 2134. Such regulations may also require the auditor to disclose the relevant information in his report or require the relevant information to be disclosed in a note to the accounts of the society or branch and require the auditor to supply the committee of management of the society or branch with such information as will enable that disclosure to be made: Sch 14 para 17(3). As to the auditor's report to the committee of management see PARA 2343 et seq. See the Friendly Societies (Accounts and Related Provisions) Regulations 1994, SI 1994/1983 (amended by SI 2001/3649).

## UPDATE

### 2342 Remuneration of auditors

NOTE 1--Friendly Societies Act 1992 Sch 14 para 16(5) amended, Sch 14 para 16(6) repealed: SI 2008/1140.

NOTES 5, 8--Friendly Societies Act 1992 Sch 14 para 16(1), (2) amended: SI 2008/1140.

TEXT AND NOTE 9--Friendly Societies Act 1992 Sch 14 para 16(3) repealed: SI 2008/1140.

TEXT AND NOTES 10, 11--Friendly Societies Act 1992 Sch 14 para 17 repealed: SI 2008/1140. As to the disclosure of auditor remuneration see now the Friendly Societies Act 1992 s 69M, Sch 13F; and PARA 2329B.

NOTE 11--SI 1994/1983 further amended: SI 2005/2210, SI 2008/1144.

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## (D) AUDITORS' REPORT

### 2343. Auditors' report on annual accounts.

The auditors<sup>1</sup> of a friendly society<sup>2</sup> or registered branch<sup>3</sup> must make a report to the members on the annual accounts<sup>4</sup> which are to be laid before the society or branch at the annual general meeting<sup>5</sup> during their tenure of office<sup>6</sup>. In preparing their report the auditors must carry out such investigations as will enable them to form an opinion as to whether:

- 810 (1) proper accounting records<sup>7</sup> have been kept;
- 811 (2) the annual accounts are in agreement with the accounting records;

and if the auditors are of the opinion that proper accounting records have not been kept, they must state that fact in their report<sup>8</sup>.

If the auditors fail to obtain all the information and explanations and access to documents which they believe necessary for the purposes of their audit, they must also state that fact in their report<sup>9</sup>. They must also in their report state whether in their opinion the information given in the report of the committee of management<sup>10</sup> for the financial year<sup>11</sup> for which the annual accounts are prepared is consistent with those accounts and state whether in their opinion that report has been prepared in accordance with the Friendly Societies Act 1992 and regulations made under it<sup>12</sup>.

The auditors must include in their report: (a) an introduction identifying the annual accounts that are the subject of the audit and the financial reporting framework that has been applied in their preparation; (b) a description of the scope of the audit identifying the auditing standards in accordance with which the audit was conducted<sup>13</sup>.

The auditors must also, in their report, state clearly whether in their opinion the annual accounts have been properly prepared<sup>14</sup>.

The auditors must also, in their report, state in particular whether the annual accounts give a true and fair view<sup>15</sup> in accordance with the relevant financial reporting framework:

- 812 (i) in the case of an individual balance sheet<sup>16</sup>, of the state of affairs of the society or branch as at the end of the financial year;
- 813 (ii) in the case of an individual income and expenditure account, of the income and expenditure of the society or branch for the financial year;
- 814 (iii) in the case of the group accounts<sup>17</sup> of an incorporated friendly society, of the state of affairs as at the end of the financial year and of the income and expenditure for the financial year of the society and the subsidiary undertakings<sup>18</sup> dealt with in the group accounts, so far as concerns members of the society<sup>19</sup>.

The auditors' report may be either unqualified or qualified, and must include a reference to any matters to which the auditors wish to draw attention by way of emphasis without qualifying the report<sup>20</sup>.

1 As to the appointment of auditors see PARA 2332. As to eligibility to be appointed see PARAS 2333-2334. As to the disclosure of information to the Financial Services Authority see PARA 766. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to branches and registered branches of societies see PARA 2091.

4 As to the annual accounts of a friendly society or registered branch see PARA 2323 et seq.

5 As to annual general meetings see PARA 2302.

6 Friendly Societies Act 1992 s 73(1).

7 See PARA 2323.

8 Friendly Societies Act 1992 s 73(2) (amended by SI 2001/2617).

9 Friendly Societies Act 1992 s 73(3). As to the auditor's rights to information and access to documents see PARA 2345.

- 10 As to the committee of management see PARA 2294 et seq. As to the committee of management's report see PARA 2330.
- 11 As to the meaning of 'financial year' see PARA 2392.
- 12 Friendly Societies Act 1992 s 73(4A) (s 73(4A), (5A)-(5D) added by SI 2005/2211).
- 13 Friendly Societies Act 1992 s 73(5A) (as added: see note 12).
- 14 Friendly Societies Act 1992 s 73(5B) (as added: see note 12). Accounts must be prepared in accordance with the requirements of the Friendly Societies Act 1992 (and, where applicable, the IAS Regulation (ie European Parliament and Council Regulation 1606/2002 (OJ L243, 11.9.2002, p 1) on the application of international accounting standards) art 4): Friendly Societies Act 1992 s 73(5B) (as so added).
- 15 As to the meaning of 'true and fair view' see PARA 2325 note 4.
- 16 As to individual accounts see PARAS 2324-2325.
- 17 As to group accounts see PARAS 2326-2327.
- 18 As to the meaning of 'subsidiary undertaking' see PARA 2324 note 10.
- 19 Friendly Societies Act 1992 s 73(5C) (as added: see note 12).
- 20 Friendly Societies Act 1992 s 73(5D) (as added: see note 12).

## UPDATE

### 2343 Auditors' report on annual accounts

TEXT AND NOTES--Friendly Societies Act 1992 s 73 amended so as to change references to 'auditors' plural to 'auditor' singular: SI 2008/1140.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(2) FRIENDLY SOCIETIES/(iv) Matters Common to All Friendly Societies/G. ACCOUNTS AND AUDIT/(D) Auditors' Report/2344. Signature of auditors' report.

### 2344. Signature of auditors' report.

The auditors' report<sup>1</sup> to members of a friendly society<sup>2</sup> or registered branch<sup>3</sup> must state the names of the auditors and be signed and dated by them<sup>4</sup>. The copies of the report sent<sup>5</sup> to the Financial Services Authority<sup>6</sup> must also be signed by the auditors<sup>7</sup>. Every copy of the auditors' report which is laid before the society or branch in general meeting<sup>8</sup>, sent to the Authority or otherwise circulated, published or issued must state the names of the auditors<sup>9</sup>. If a copy of the auditors' report:

- 815 (1) is laid before the society or branch, sent to the Authority or otherwise circulated, published or issued, without the required statement of the auditors' names; or
- 816 (2) is sent to the Authority without being signed as required,

the society or branch and every officer of it who is in default is guilty of an offence and liable on conviction on indictment to a fine<sup>10</sup>.

- 1 As to the auditor's report see PARA 2343. As to the appointment of auditors see PARA 2332. As to eligibility to be appointed see PARAS 2333-2334.
- 2 As to the meaning of 'friendly society' see PARA 2082.
- 3 As to branches and registered branches of societies see PARA 2091.
- 4 Friendly Societies Act 1992 s 74(1) (amended by SI 2005/2211). References in the Friendly Societies Act 1992 s 74 to signature by the auditors are, when the office of auditor is held by a body corporate or partnership, to signature in the name of the body corporate or partnership by a person authorised to sign on its behalf: s 74(5). As to the appointment of a partnership as auditor see PARA 2333 note 6.
- 5 le under the Friendly Societies Act 1992 s 78(1) or (2): see PARA 2348.
- 6 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 7 Friendly Societies Act 1992 s 74(2) (amended by SI 2001/2617).
- 8 As to general meetings see PARA 2302 et seq.
- 9 Friendly Societies Act 1992 s 74(3) (amended by SI 2001/2617).
- 10 Friendly Societies Act 1992 s 74(4) (amended by SI 2001/2617).

## UPDATE

### 2344 Signature of auditors' report

TEXT AND NOTES--Friendly Societies Act 1992 ss 74-74C substituted for s 74 by SI 2008/1140. Provision is made as to the signature of the auditor's report (s 74); signature by the senior statutory auditor (s 74A); the publication of auditors' names in the copies of the auditor's report which are filed or published (s 74B); and the circumstances in which names may be omitted (s 74C).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(2) FRIENDLY SOCIETIES/(iv) Matters Common to All Friendly Societies/G. ACCOUNTS AND AUDIT/(D) Auditors' Report/2345. Auditors' rights to information and to attend meetings.

### 2345. Auditors' rights to information and to attend meetings.

The auditors<sup>1</sup> of a friendly society<sup>2</sup> or registered branch<sup>3</sup> are entitled to access at all times to the books, accounts and vouchers of the society or branch and to require from the officers<sup>4</sup> of the society or branch whatever information and explanations they think necessary for the performance of their duties as auditors<sup>5</sup>. They are entitled to receive from the society or branch: (1) notice of any general meeting<sup>6</sup> of the society or branch and of any matter relating to the business of such a meeting of which notice is given (by whatever means) to the members of the society or branch; and (2) copies of any communications sent to the members of the society or branch with respect to any such meeting<sup>7</sup>. The auditors are also entitled to attend any general meeting of the society or branch and to be heard on any part of the business of the meeting which concerns them as auditors<sup>8</sup>.

If an officer of a friendly society or registered branch knowingly or recklessly<sup>9</sup> makes to its auditors a statement which conveys or purports to convey any information or explanations

which the auditors require or are entitled to require and the statement is misleading, false or deceptive in a material particular, he commits an offence<sup>10</sup>.

It is the duty of a subsidiary<sup>11</sup> of an incorporated friendly society<sup>12</sup>, and the subsidiary's auditors, to give to the society's auditors such information and explanations as they may reasonably require for the purposes of their duties as auditors of the society<sup>13</sup>. If the subsidiary or its auditors fail to do so they are guilty of an offence<sup>14</sup>.

If an incorporated friendly society has a subsidiary which is not a company<sup>15</sup> it must, if required by its auditors, take all such steps as are reasonably open to it to obtain from the subsidiary such information and explanations as they may reasonably require for the purposes of their duties as auditors of that society and failure to do so is an offence<sup>16</sup>.

1 As to the appointment of auditors see PARA 2332. As to eligibility to be appointed see PARAS 2333-2334.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to branches and registered branches of societies see PARA 2091.

4 As to the meaning of 'officer' see PARA 2115 note 1.

5 Friendly Societies Act 1992 s 75(1)(a), (b).

6 As to general meetings see PARA 2302 et seq.

7 Friendly Societies Act 1992 s 75(1)(c).

8 Friendly Societies Act 1992s 75(1)(d). The right to attend and be heard at a meeting is exercisable, in the case of a body corporate or partnership, by an individual authorised by it in writing to act as its representative at the meeting: s 75(2).

9 As to recklessness see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 11-12.

10 Friendly Societies Act 1992 s 75(3), (4). A person guilty of such an offence is liable: (1) on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both; or (2) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both: s 75(5). As to the statutory maximum see PARA 56 note 24.

11 In this case the subsidiary must be a company within the meaning of the Companies Act 1985 (see s 735 (prospectively repealed); and **COMPANIES** vol 14 (2009) PARA 32 (as to replacement provision see the Companies Act 2006 s 1)) incorporated in Great Britain, or a company within the meaning of the Companies (Northern Ireland) Order 1986, SI 1986/1032 incorporated in Northern Ireland: Friendly Societies Act 1992 s 75(6). As to the meaning of 'subsidiary' generally see PARA 2134.

12 As to the meaning of 'incorporated friendly society' see PARA 2082. The Friendly Societies Act 1992 s 75(6) refers to the subsidiary of a friendly society without further qualification, but only incorporated friendly societies may have subsidiaries (see PARAS 2085, 2133 et seq).

13 Friendly Societies Act 1992 s 75(6).

14 Friendly Societies Act 1992 s 75(7). Such an offence is punishable on summary conviction with a fine not exceeding level 5 on the standard scale: s 75(7). As to the standard scale see PARA 27 note 21.

15 See note 11.

16 Friendly Societies Act 1992 s 75(8), (9). Such an offence is punishable on summary conviction by a fine not exceeding level 5 on the standard scale: s 75(9).

## UPDATE

### 2345 Auditors' rights to information and to attend meetings



TEXT AND NOTES--Friendly Societies Act 1992 s 75 amended, so as to change references to 'auditors' plural to 'auditor' singular: SI 2008/1140.

TEXT AND NOTES 11-13--Where a subsidiary of a friendly society is a company, as defined in the Companies Act 2006 s 1(1) (see **COMPANIES** vol 14 (2009) PARA 24), the subsidiary and its auditors must give to the auditors of the friendly society such information and explanations as they may reasonably require for the purposes of their duties as auditors of the society: Friendly Societies Act 1992 s 75(6) (substituted by SI 2009/1941).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(2) FRIENDLY SOCIETIES/(iv) Matters Common to All Friendly Societies/G. ACCOUNTS AND AUDIT/(D) Auditors' Report/2346. Approval and signing of accounts.

### **2346. Approval and signing of accounts.**

The annual accounts<sup>1</sup> of a friendly society<sup>2</sup> or a registered branch<sup>3</sup> must be approved by the committee of management<sup>4</sup>. Having been approved, they must be signed by the secretary<sup>5</sup> of the society or branch on the balance sheet<sup>6</sup>. Every copy of the balance sheet laid before the society or branch in general meeting<sup>7</sup>, or otherwise circulated, published or issued, must state the name of the secretary of the society or branch<sup>8</sup>. The copy of the balance sheet of a society or branch which is sent<sup>9</sup> to the Financial Services Authority<sup>10</sup> must also be signed by the secretary of the society or branch<sup>11</sup>.

If annual accounts are approved which do not comply with the requirements of the Friendly Societies Act 1992, every member of the committee of management who is party to their approval and who knows that they do not comply or is reckless<sup>12</sup> as to whether they comply commits an offence<sup>13</sup>.

If a copy of the balance sheet of a society or branch is sent to the Authority without being signed as required, or is laid before the society or branch, or otherwise circulated, published or issued, without the balance sheet having been signed or without the statement of the signatory's name being included, as required, the society or branch and every officer who is in default commits an offence<sup>14</sup>.

1 As to the duty to prepare annual accounts see PARA 2324 et seq.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to branches and registered branches of societies see PARA 2091.

4 Friendly Societies Act 1992 s 76(1). As to the committee of management see PARA 2294 et seq.

5 As to the secretary see PARA 2301.

6 Friendly Societies Act 1992 s 76(2).

7 As to general meetings see PARA 2302 et seq.

8 Friendly Societies Act 1992 s 76(3).

9 Ie under the Friendly Societies Act 1992 s 78: see PARA 2348.

10 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

11 Friendly Societies Act 1992 s 76(4) (amended by SI 2001/2617).

12 As to recklessness see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 11-12.

13 Friendly Societies Act 1992 s 76(5). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 76(5). Every member of the committee at the time the accounts are approved is taken to be a party to their approval unless he shows that he took all reasonable steps to prevent their being approved: s 76(5). As to the standard scale see PARA 27 note 21.

14 Friendly Societies Act 1992 s 76(6) (amended by SI 2001/2617). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale: Friendly Societies Act 1992 s 76(6).

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(2) FRIENDLY SOCIETIES/(iv) Matters Common to All Friendly Societies/G. ACCOUNTS AND AUDIT/(D) Auditors' Report/2347. Information on appointed actuary to be annexed to balance sheet.

### **2347. Information on appointed actuary to be annexed to balance sheet.**

Certain copies<sup>1</sup> of a friendly society's<sup>2</sup> balance sheet<sup>3</sup> must have annexed to them, as respects every person who was that friendly society's appointed actuary<sup>4</sup> at any time during the financial year<sup>5</sup> to which the balance sheet relates, a statement of the following information<sup>6</sup>:

- 817 (1) whether the actuary was a member of the society or any subsidiary<sup>7</sup> of the society at any time during the year<sup>8</sup>;
- 818 (2) particulars of any pecuniary interest of the actuary in any transaction between the actuary and the society or any subsidiary of it subsisting at any time during that year or, in the case of transactions of a minor character, a general description of such interests<sup>9</sup>;
- 819 (3) the aggregate amount of any remuneration and the value of any other benefits (other than a pension or other future or contingent benefit) under any contract of service of the actuary with, or contract for services by the actuary to, the society or any subsidiary of the society, receivable by the actuary in respect of any period in that year<sup>10</sup>; and
- 820 (4) a general description of any other pecuniary benefit (including any pension or other future contingent benefit) received by the actuary from the society or any subsidiary of the society in that year, or receivable by him from the society or any other such subsidiary<sup>11</sup>.

There must also be a statement that the society has made a request to the actuary to furnish to it the particulars specified above, and identifying any particulars furnished pursuant to the request<sup>12</sup>.

If a friendly society fails to annex the required statement to a copy of its balance sheet<sup>13</sup>, the society concerned commits an offence<sup>14</sup>.

1    le a copy which is: (1) furnished to the Financial Services Authority under the Friendly Societies Act 1992 s 78 (see PARA 2348); (2) laid before the society at its annual general meeting; or (3) furnished to a member at his request: s 77(1) (amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq. As to the annual general meeting see PARA 2302.

2    As to the meaning of 'friendly society' see PARA 2082.

- 3 As to the requirement to produce, and the format of, balance sheets see PARAS 2324-2327.
- 4 As to the meaning of 'appointed actuary' see PARA 2139 note 4.
- 5 As to the meaning of 'financial year' see PARA 2392.
- 6 Friendly Societies Act 1992 s 77(2). Section 77(2) applies in relation to the following as it applies in relation to the actuary: (1) the actuary's spouse or civil partner; (2) a partner of the actuary; (3) any child or step-child of the actuary who is under 18; (4) any person (other than the society concerned or its subsidiary) of whom the actuary is an employee; and (5) any body corporate (other than the society concerned or any subsidiary of that society) of which the actuary is a director or which is controlled by him: s 77(3) (amended by the Civil Partnership Act 2004 Sch 27 para 141). An actuary is taken to control a body corporate if he is a person: (a) in accordance with whose directions or instructions the directors of that body corporate are accustomed to act; or (b) who, either alone or with any other person to whom heads (1)-(5) above apply, is entitled to exercise or controls the exercise of one-third or more of the voting power at any general meeting of the body corporate of which it is a subsidiary: Friendly Societies Act 1992 s 77(4).
- 7 As to the meaning of 'subsidiary' see PARA 2134.
- 8 Friendly Societies Act 1992 s 77(2)(a).
- 9 Friendly Societies Act 1992 s 77(2)(b).
- 10 Friendly Societies Act 1992 s 77(2)(c).
- 11 Friendly Societies Act 1992 s 77(2)(d).
- 12 Friendly Societies Act 1992 s 77(2).
- 13 In accordance with the requirements of the Friendly Societies Act 1992 s 77.
- 14 Friendly Societies Act 1992 s 77(5). Such an offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale: s 77(5). As to the standard scale see PARA 27 note 21.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(2) FRIENDLY SOCIETIES/(iv) Matters Common to All Friendly Societies/G. ACCOUNTS AND AUDIT/(E) Laying and Furnishing of Accounts and Reports/2348. Laying and furnishing of accounts and reports.

## (E) LAYING AND FURNISHING OF ACCOUNTS AND REPORTS

### **2348. Laying and furnishing of accounts and reports.**

In each year, the committee of management<sup>1</sup> of a friendly society<sup>2</sup> or registered branch<sup>3</sup> must lay before the society or branch at the annual general meeting<sup>4</sup>, and send to the Financial Services Authority<sup>5</sup>, not later than 30 June or 14 days before that meeting, whichever is the earlier, copies of the annual accounts for the last financial year<sup>6</sup>, the auditors' report<sup>7</sup> on those accounts and, in the case of a society, the report of the committee of management<sup>8</sup> for that year<sup>9</sup>. Failure to do so is an offence by every person who was a member of the committee of management of the society or branch at any time during the relevant period<sup>10</sup>.

Every friendly society and registered branch must make available copies of the annual accounts, the auditors' report and, in the case of a society, the report of the committee of management, free of charge, to members of the society or branch, at every office of the society or branch; and it must also send, free of charge, copies of those documents to any member of the society or branch who demands them<sup>11</sup>. Failure to make the accounts available, or to supply them within seven days of the demand, is an offence<sup>12</sup>.

The Authority must keep one of the copies of documents received by it from a friendly society<sup>13</sup> in the public file of the society<sup>14</sup>.

- 1 As to the committee of management see PARA 2294 et seq.
- 2 As to the meaning of 'friendly society' see PARA 2082.
- 3 As to branches and registered branches of societies see PARA 2091.
- 4 As to the annual general meeting see PARA 2302.
- 5 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 6 As to the meaning of 'financial year' see PARA 2392. As to the annual accounts see PARAS 2324-2327.
- 7 As to the auditors' report see PARA 2343 et seq.
- 8 As to the report of the committee of management see PARA 2330.
- 9 Friendly Societies Act 1992 s 78(1), (2) (substituted by SI 2001/2617).
- 10 Friendly Societies Act 1992 s 78(5). 'Relevant period' means the period beginning at the end of the last financial year and ending with the date which falls 14 days before the annual general meeting following the end of that year: s 78(7). Such an offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale and, in the case of a continuing offence, with an additional fine not exceeding one-tenth of that level for every day during which the offence continues: s 78(5). As to the standard scale see PARA 27 note 21.
- 11 Friendly Societies Act 1992 s 78(3)(a), (b), (4)(a), (b). The duty to do so starts as from the date by which, at the latest, the committee of management is due to send the copies to the Financial Services Authority and ends, as respects the accounts, when the society comes to be under the same duty in respect of the accounts for the next financial year: s 78(3), (4) (amended by SI 2001/2617).
- 12 Friendly Societies Act 1992 s 78(6). Such an offence is punishable on summary conviction with a fine not exceeding level 3 on the standard scale and, in the case of a continuing offence, with an additional fine not exceeding one-tenth of that level for every day during which the offence continues: s 78(6).
- 13 Ie under the Friendly Societies Act 1992 s 78(1): see the text and notes 1-9.
- 14 Friendly Societies Act 1992 s 78(8) (amended by SI 2001/2617). As to the public file of the society see PARA 2382.

## **UPDATE**

### **2348 Laying and furnishing of accounts and reports**

TEXT AND NOTES 1-11--Friendly Societies Act 1992 s 78(1)-(4) amended so as to change references to 'auditors' plural to 'auditor' singular: SI 2008/1140.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/8. MUTUAL SOCIETIES/(2) FRIENDLY SOCIETIES/(iv) Matters Common to All Friendly Societies/H. DISPUTES AND COMPLAINTS/2349. Determination of certain disputes by arbitration.

## **H. DISPUTES AND COMPLAINTS**

### **2349. Determination of certain disputes by arbitration.**

The Friendly Societies Act 1992 removed the jurisdiction of the Chief Registrar of Friendly Societies<sup>1</sup> to determine disputes in relation to friendly societies<sup>2</sup> and registered branches<sup>3</sup>, which previously existed under the Friendly Societies Act 1974<sup>4</sup>, and substituted new provisions<sup>5</sup>.

Any dispute<sup>6</sup> between:

- 821 (1) a member or person claiming through a member, or under the rules, of a friendly society or registered branch and the society or branch;
- 822 (2) a person aggrieved, who has ceased to be a member of a friendly society or registered branch, or a person claiming through such a person, and the society or branch or an officer of the society or branch;
- 823 (3) a registered branch and the society of which it is a registered branch;
- 824 (4) an officer<sup>7</sup> of a registered branch and the society of which it is a registered branch; or
- 825 (5) two or more registered branches, or any of their officers,

must be determined by arbitration in the manner directed by the rules<sup>8</sup> of the society or branch<sup>9</sup>. This does not prevent any person from having a complaint dealt with under an ombudsman scheme<sup>10</sup> before, or instead of, arbitration<sup>11</sup>. An application for enforcement of an award on arbitration may be made to the county court<sup>12</sup>.

If the parties to a dispute agree that it is to be determined by the county court, it may be so determined, instead of being determined by arbitration<sup>13</sup>. If a party to a dispute applies to the society or branch in accordance with its rules for the determination of the dispute by arbitration, and no determination of it has been made within the period of 40 days beginning with the day on which the application was made<sup>14</sup>, and either party applies for determination of the dispute by the county court, the dispute may be so determined<sup>15</sup>.

1 As to the Chief Registrar see PARA 2105.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to branches and registered branches of societies see PARA 2091.

4 I.e. the Friendly Societies Act 1974 s 77 (repealed by the Friendly Societies Act 1992 Sch 16 paras 1, 26, Sch 22 Pt I).

5 The new provisions are the Friendly Societies Act 1992 ss 80-82: see the text and notes 6-15; and PARAS 2350-2351. Residual provisions as to the settlement of disputes remain in the Friendly Societies Act 1974, relative to societies other than friendly societies and branches which remain registered under that Act: see PARA 2245 et seq.

6 In the Friendly Societies Act 1992 s 80, 'dispute': (1) includes any dispute arising on the question whether a member or person aggrieved is entitled to be, or to continue to be, a member or to be reinstated as a member; but (2) in the case of a person who has ceased to be a member, does not (except as mentioned in head (1) above) include any dispute other than one on a question which arose while he was a member, or arises out of his membership; and (3) does not include a dispute between parties mentioned in heads (1) and (2) in the text, which has arisen as a result of, and incidentally to, a dispute between a member, or person aggrieved who has ceased to be a member, and a person claiming through him or under the rules of a society or branch: s 80(8). As to the meaning of 'person aggrieved' see **JUDICIAL REVIEW** vol 61 (2010) PARA 664.

7 As to the meaning of 'officer' see PARA 2115 note 11.

8 A society registered under the Friendly Societies Act 1974 is required by s 7(2), Sch 2 para 9 to provide in its rules the manner in which disputes are to be settled: see PARA 2156. An incorporated friendly society is similarly required, under the Friendly Societies Act 1992 s 5, Sch 3 para 5(3) Table item 9, to provide for the manner in which disputes are to be settled: see PARA 2121.

9 Friendly Societies Act 1992 s 80(1). Where, however, the rules of a registered friendly society or branch provide for such disputes to be determined by arbitration by the Chief Registrar or an assistant registrar, any

such disputes must be determined instead by a reference to the county court: s 123(1); Friendly Societies Act 1992 (Transitional and Consequential Provisions and Savings) Regulations 1993, SI 1993/932, reg 8(a). As to the meaning of 'registered friendly society' see PARA 2082. Until a day to be appointed (ie the day prescribed to be the end of the 'transitional period' under the Friendly Societies Act 1992 s 93(14): see PARA 2150), where the rules of a registered friendly society or branch do not provide for determination of such disputes by arbitration, they are to be determined instead by a reference to the county court: s 126(2); Friendly Societies Act 1992 (Commencement No 3 and Transitional Provisions) Order 1993, SI 1993/16, art 6.

10     le in accordance with the scheme for which the Financial Services and Markets Act 2000 Pt XVI (ss 225-234A) provides (the ombudsman scheme): see PARA 575 et seq. See also PARA 2350.

11     Friendly Societies Act 1992 s 80(1A) (added by SI 2001/2617).

12     Friendly Societies Act 1992 s 80(2).

13     Friendly Societies Act 1992 s 80(5).

14     If the society has registered branches, the period of 40 days does not begin to run until application has been made in succession to all the bodies entitled to determine the dispute by arbitration in accordance with the rules; but the rules may not require a greater delay than three months between each successive determination by such a body: Friendly Societies Act 1992 s 80(7).

15     Friendly Societies Act 1992 s 80(6).

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### **2350. Complaints by members of friendly societies.**

A friendly society<sup>1</sup> or registered branch<sup>2</sup> has power<sup>3</sup> to establish internal procedures for the resolution of complaints<sup>4</sup>, or to make, to join with others in making, or to accede<sup>5</sup> to, schemes for the investigation of complaints and their settlement by an adjudicator<sup>6</sup>. The Financial Services Authority<sup>7</sup> has the function of promoting the establishment by societies and branches of internal complaints procedures and schemes for the investigation and settlement of complaints and in particular the Authority may issue such guidance on those matters to societies and branches as it thinks fit<sup>8</sup>. A society or branch may not, however, prevent a member from referring any dispute to arbitration<sup>9</sup> by purporting to require instead the making of a complaint or the acceptance of any determination of a complaint<sup>10</sup>.

In cases where a friendly society or registered branch is an authorised person under the Financial Services and Markets Act 2000<sup>11</sup>, complaints by members and other customers relating to an act or omission which occurred in carrying on an activity which is regulated by that Act will normally fall within the jurisdiction of the Financial Ombudsman Service, which operates the ombudsman scheme established under Part XVI of that Act<sup>12</sup>. The scheme is intended to provide for disputes to be resolved quickly and with the minimum of formality by an independent person<sup>13</sup>, and complaints are to be determined by what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case<sup>14</sup>. Detailed rules for the operation of the scheme have been made by the Authority<sup>15</sup>.

1     As to the meaning of 'friendly society' see PARA 2082.

2     As to branches and registered branches of societies see PARA 2091.

3     le notwithstanding anything in the Friendly Societies Act 1992 s 80: see PARA 2349.

4 Friendly Societies Act 1992 s 81(1)(a). 'Complaint' includes any complaint made by a member about action of a friendly society or branch which constitutes (in relation to that member) unfair treatment, maladministration or breach of any contractual or other duty and causes him pecuniary loss or inconvenience; and 'action' includes omissions: s 81(3). 'Member' includes any person who is or was a member of the society or branch or is claiming through a member or under the rules: s 81(3).

5 'Accede', in relation to a scheme, means assume the obligations and rights of membership of the scheme: Friendly Societies Act 1992 s 81(3).

6 Friendly Societies Act 1992 s 81(1)(b).

7 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

8 Friendly Societies Act 1992 s 81(2) (amended by SI 2001/2617).

9 Ie under the Friendly Societies Act 1992 s 80: see PARA 2349.

10 Friendly Societies Act 1992 s 81(1).

11 Ie a person who (so far as relevant) has permission from the Authority under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 84 et seq) to carry on one or more regulated activities under that Act: see s 31(1)(a), (2); and PARA 314. See also PARA 2293. As to regulated activities see PARA 84 et seq.

12 Ie the Financial Services and Markets Act 2000 Pt XVI (ss 225-234A): see PARA 575 et seq.

13 See the Financial Services and Markets Act 2000 s 225(1); and PARA 575.

14 See the Financial Services and Markets Act 2000 s 228(2); and PARA 579.

15 The ombudsman scheme is discussed more fully elsewhere in this title: see PARA 575 et seq.

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### **2351. Disputes arising out of loans of surplus funds to societies of a different description.**

Where:

826 (1) a registered friendly society<sup>1</sup> or registered branch<sup>2</sup> (the 'lender') has made or agreed to make advances to another society or branch<sup>3</sup> (the 'borrower'); and

827 (2) the lender is in consequence empowered by the rules<sup>4</sup> of the borrower to take part in the government or control of the borrower,

the provisions as to disputes in the Friendly Societies Act 1992<sup>5</sup> apply in relation to the determination of a dispute between the lender and the borrower relating: (a) to such an advance or agreement; or (b) to the rights of the lender or an officer<sup>6</sup> of the lender under the rules of the borrower, as if the borrower were a branch of the lender<sup>7</sup>.

1 As to the meaning of 'registered friendly society' see PARA 2082.

2 As to branches and registered branches of societies see PARA 2091.

3 Ie under the powers conferred by the Friendly Societies Act 1974 s 50: see PARA 2198.

4 As to the rules of a registered society or branch see PARA 2156.

5 In the Friendly Societies Act 1992 s 80: see PARA 2349. In the application of s 80 to any such dispute, references in that provision to the rules of the society are references to the rules of the borrower: s 82(2). Section 80 does not prevent the bringing of legal proceedings for the determination of any such dispute unless, before the commencement of the proceedings, application has been made for a reference under the rules of the borrower: s 82(3). Proceedings for the determination of any such dispute may be brought in the county court, whether or not the court would otherwise have jurisdiction to entertain them: s 82(4).

6 As to the meaning of 'officer' see PARA 2115 note 11.

7 Friendly Societies Act 1992 s 82(1).

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## ***I. AMALGAMATION, TRANSFERS OF ENGAGEMENTS AND CONVERSION***

### **(A) AMALGAMATION**

#### **2352. Amalgamation of friendly societies.**

Any two or more friendly societies<sup>1</sup> may amalgamate by establishing an incorporated friendly society<sup>2</sup> as their successor<sup>3</sup>. In order to establish a society as their successor, friendly societies proposing to amalgamate must:

- 828 (1) provide certain information about the proposed amalgamation to their members<sup>4</sup>;
- 829 (2) decide on the constitution of the successor society<sup>5</sup>;
- 830 (3) each approve the proposed amalgamation and the terms on which it is to take place by special resolution<sup>6</sup>; and
- 831 (4) obtain the confirmation of the Financial Services Authority<sup>7</sup> of the amalgamation,

and on obtaining the confirmation of the Authority, the successor society may be registered and incorporated under the Friendly Societies Act 1992<sup>8</sup>.

If the Authority confirms the amalgamation and the successor society is registered under the Act, the certificate of incorporation issued by the Authority must specify a date as the transfer date for the amalgamation<sup>9</sup>. On the transfer date all the property, rights and liabilities of each society participating in the amalgamation become the property, rights and liabilities of the successor society and each society so participating is dissolved, but the transfer from each such society to the successor society is deemed to have been effected immediately before the dissolution of that society<sup>10</sup>.

Where a society is dissolved in this way its registration, whether under the Friendly Societies Act 1974 or the Friendly Societies Act 1992, must be cancelled by the Authority<sup>11</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to the meaning of 'incorporated friendly society' see PARA 2082.



3 Friendly Societies Act 1992 s 85(1). The provisions of the Friendly Societies Act 1974 relating to amalgamations, transfers of engagements and conversion of registered societies now apply only to registered societies which are not registered friendly societies: see s 82(8); and PARAS 2220-2228.

4 It must comply with the applicable requirements of the Friendly Societies Act 1992 s 85(2)(a), (6), Sch 15 paras 1-4. That is, each participating society must send a statement to every member entitled (when the statement is sent) to vote on any resolution required by s 85: Sch 15 para 1(1). The statement must arrive no later than 14 days (or such longer period as the rules may require for notice of any resolution required by s 85) before the meeting at which any such resolution is to be moved or, where proxy voting is permitted, such earlier date as may be specified by the society, under its rules, as the final date for the receipt of instruments appointing proxies to vote at the meeting: Sch 15 para 1(3). The matters of which the required statement is to give particulars are as follows: (1) the financial position of the society and of every other society or person participating in the amalgamation; (2) any interest of the members of the committee of management of the society in the amalgamation; (3) the compensation or other consideration (if any) proposed to be paid to or in respect of: (a) the members of the committee of management or other officers of the society; and (b) the officers of every other society or person participating in the amalgamation; (4) any other matter which the Financial Services Authority requires in the case of the particular amalgamation: Sch 15 para 2(1)(a)-(c), (e) (amended by SI 2001/2617). No such statement is to be sent unless its contents, so far as they concern the above matters, have been approved by the Financial Services Authority: Friendly Societies Act 1992 Sch 15 para 2(2). As to the committee of management see PARA 2294 et seq. As to the meaning of 'officer' see PARA 2115 note 11. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

5 It must take the steps required by the Friendly Societies Act 1992 s 5, Sch 3 para 1(2): see PARA 2112.

6 As to special resolutions see PARA 2306.

7 As to confirmation by the Authority see PARA 2360 et seq.

8 Friendly Societies Act 1992 s 85(2) (amended by SI 2001/2617). As to the processes of registration and incorporation see PARA 2112 et seq.

9 Friendly Societies Act 1992 s 85(3) (amended by SI 2001/2617; and SI 2001/3649).

10 Friendly Societies Act 1992 s 85(4). As to the effect of the statutory transfer of property, rights and liabilities cf *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538, [2006] 1 WLR 1704, [2006] 2 BCLC 599; and see PARA 2353 note 17. If, on the transfer date, each of the societies whose amalgamation was confirmed by the Authority has a permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 348 et seq), the Authority must, with effect from that date, give their successor such permission under Pt IV as it considers appropriate, and must notify the successor of the permission by giving the successor a decision notice: Friendly Societies Act 1992 s 85(4A) (s 85(4A)-(4D) added by SI 2001/2617). The Financial Services and Markets Act 2000 Pt XXVI (ss 387-396) (see PARA 769 et seq) applies to a decision notice given under the Friendly Societies Act 1992 s 85 as it applies to a decision notice given under the Financial Services and Markets Act 2000 s 52(9) by virtue of s 52(9)(a) (see PARA 350), except that s 390 (final notices) (see PARA 772) does not apply, and for the purposes of s 391 (publication) (see PARA 774) the decision notice is to be treated as if it were a final notice rather than a decision notice: Friendly Societies Act 1992 s 85(4B) (as so added). The giving of permission pursuant to s 85(4A) is to be treated for the purposes of the Financial Services and Markets Act 2000 s 55 (right to refer matters to the Financial Services and Markets Tribunal) (see PARA 361) as if it were the determination of an application made by the successor under Pt IV, and Pt IX (ss 132-137) (hearings and appeals) applies accordingly; however, in the application of Pt IX, s 133(9) (which prevents the Authority from taking action specified in a decision notice until after any reference and appeal) is omitted: Friendly Societies Act 1992 s 85(4C), (4D) (as so added). See PARA 348 et seq.

11 Friendly Societies Act 1992 s 85(5).

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## (B) TRANSFER OF ENGAGEMENTS, ETC

### 2353. Transfer of engagements by or to a friendly society.

A friendly society<sup>1</sup> may transfer its engagements<sup>2</sup>, to any extent, to any of the following<sup>3</sup>:

- 832 (1) an industrial and provident society<sup>4</sup>;
- 833 (2) a company<sup>5</sup>;
- 834 (3) in relation to engagements the fulfilment of which will constitute the carrying on of insurance business<sup>6</sup>, any other person who is an insurer<sup>7</sup>;
- 835 (4) in relation to engagements the fulfilment of which will not constitute the carrying on of insurance business, a person, or body of persons, who is not of a description specified in head (1), (2) or (3) above<sup>8</sup>.

In order to transfer any of its engagements, a friendly society must: (a) provide certain information about the transfer to its members<sup>9</sup>; (b) resolve to transfer the engagements by special resolution<sup>10</sup>; (c) if the transfer is of some, but not all, of its engagements, resolve to do so by an affected members' resolution<sup>11</sup>; (d) record the extent of the transfer as so resolved in an instrument of transfer of engagements<sup>12</sup>; and (e) obtain the confirmation of the Financial Services Authority to the transfer<sup>13</sup>.

When the confirmation of the Authority is obtained, the instrument of transfer of engagements may be registered<sup>14</sup>.

Where the Authority confirms a transfer of engagements, on the application of the society proposing to transfer them and the proposed transferee, the Authority must register a copy of the instrument of transfer of engagements and issue a registration certificate to the transferee<sup>15</sup>. The registration certificate will specify a date as the transfer date for that transfer<sup>16</sup>. On the transfer date, the property, rights and liabilities of the society transferring its engagements become the property, rights and liabilities of the transferee, to the extent provided in the instrument of transfer; and if the transfer is of all the society's engagements, the society is dissolved and its registration, whether under the Friendly Societies Act 1974 or the Friendly Societies Act 1992, must be cancelled by the Authority<sup>17</sup>. The transfer is deemed to have been effected immediately before the dissolution<sup>18</sup>.

Where it is proposed that any engagements of a person other than a friendly society should be transferred to a friendly society, the proposed transferee, in order to undertake to fulfil them, must resolve to do so by special resolution<sup>19</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 In accordance with the Friendly Societies Act 1992 Pt VIII (ss 85-92): see PARAS 2352, 2354-2365. It has been held in the comparable context of the Industrial and Provident Societies Act 1965 that 'engagements' means the business undertaking of the society in question (*Stansell Ltd v Co-operative Group (CWS) Ltd* [2005] EWHC 1601 (Ch), [2006] 1 BCLC 401); this point was common ground on the appeal (see sub nom *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538, [2006] 1 WLR 1704, [2006] 2 BCLC 599).

3 Friendly Societies Act 1992 s 86(1). Section 86(1)(a) which made specific provision for a transfer of engagements by one friendly society to another friendly society was repealed by SI 2001/3649. Accordingly, a transfer of engagements by one friendly society to another friendly society will now proceed under the Friendly Societies Act 1992 s 86(1)(d) (see head (3) in the text) if the fulfilment of the transferred engagements will constitute the carrying on of insurance business and the transferee society is an 'insurer' (see note 7) or under s 86(1)(e) (see head (4) in the text) in other cases. Where it is proposed to transfer the engagements of one friendly society to another friendly society, the proposed transferee, in order to undertake to fulfil them must comply with the applicable requirements of Sch 15 Pt I (see note 9) and, if required, with ss 87, 88 (see PARAS 2354-2355); and it must also resolve to undertake to fulfil the engagements by special resolution or, if the Financial Services Authority consents to that mode of proceeding, by resolution of the committee of management: s 86(3) (amended by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Friendly Societies Act 1992 ss 86, 88, Sch 15 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a friendly society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5 (not yet in force); and PARA 2358. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

4 Friendly Societies Act 1992 s 86(1)(b). As to industrial and provident societies generally see PARA 2394 et seq.

5 Friendly Societies Act 1992 s 86(1)(c). Section 86(1)(c) refers to a company within the meaning of the Companies Act 1985 (see s 735 (prospectively repealed); and as to replacement provisions see the Companies Act 2006 s 1) or the Companies (Northern Ireland) Order 1986, SI 1986/1032, incorporated in Great Britain or Northern Ireland: see **COMPANIES** vol 14 (2009) PARA 24 et seq.

6 As to the meaning of 'insurance business' see PARA 2138 note 5.

7 Friendly Societies Act 1992 s 86(1)(d) (amended by SI 2001/3649). For this purpose, 'insurer' means: (1) a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 348 et seq) to effect or carry out contracts of insurance; or (2) an EEA firm of the kind mentioned in Sch 3 para 5(d), which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12) to effect or carry out contracts of insurance (see PARA 315): Friendly Societies Act 1992 s 86(12) (s 86(12), (13) added by SI 2001/3649). The Friendly Societies Act 1992 s 86(12) must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision and Sch 2 (see PARA 84): Friendly Societies Act 1992 s 86(13) (as so added).

8 Friendly Societies Act 1992 s 86(1)(e) (amended by SI 2001/3649).

9 Friendly Societies Act 1992 s 86(2)(a). The society must comply with the applicable requirements of Sch 15 paras 1-4. These requirements are the same as those in relation to s 85: see PARA 2352 note 4. In addition to the requirements in relation to s 85, however, in the case of a transfer under s 86 the statement the society must send to its members must include a summary of any actuary's report which the society is directed to furnish to the Financial Services Authority under s 88 (see PARA 2355): Sch 15 para 2(2)(d) (amended by SI 2001/2617). If it appears to the Authority that it is impractical to send such a summary of the actuary's report in the statement it may direct that the summary be sent separately within such period as the Authority may specify in the direction: Friendly Societies Act 1992 Sch 15 para 1(4) (amended by SI 2001/2617). As to the meaning of 'actuary' see PARA 2139 note 4.

10 Friendly Societies Act 1992 s 86(2)(b). As to special resolutions see PARA 2306.

11 Friendly Societies Act 1992 s 86(2)(c). An 'affected members' resolution' is a resolution approving a transfer of engagements which is passed by the appropriate majority of those members whose contracts with the society are included in the transfer and who are entitled to vote on the resolution: s 86(9)(a). 'Appropriate majority' means a majority consisting of not less than three-quarters of those who vote on the resolution (in person or by proxy) at a meeting of the society or in a postal ballot: s 86(9)(b). The provisions of Sch 12 para 7(1)(b), (c), (4), (5) and (6) (see PARA 2306) apply to an affected members' resolution as they apply to a special resolution: s 86(9). Delegate voting may not take place on an affected members' resolution; and where the rules of a friendly society provide for delegate voting on any matter, they must provide for voting by individual members on such resolutions: s 86(10).

12 Friendly Societies Act 1992 s 86(2)(d). Such an instrument is not subject to stamp duty: see PARA 2383.

13 Friendly Societies Act 1992 s 86(2)(e) (amended by SI 2001/2617).

14 Friendly Societies Act 1992 s 86(2).

15 Friendly Societies Act 1992 s 86(4)(a), (b). The Authority must keep a copy of the instrument of transfer and the registration certificate: (1) where the transferee is a friendly society, in the public file of that society; and (2) in any other case, in the public file of the society transferring the engagements: s 86(6) (amended by SI 2001/2617). As to the public file of a friendly society see PARA 2382.

16 Friendly Societies Act 1992 s 86(4).

17 Friendly Societies Act 1992 s 86(5)(a), (b), (7) (s 86(7) amended by SI 2001/2617). As to the effect of the statutory transfer of property, rights and liabilities cf *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538, [2006] 1 WLR 1704, [2006] 2 BCLC 599, in which it was held by the Court of Appeal that a transfer of engagements by an industrial and provident society was effective under the Industrial and Provident Societies Act 1965 s 51(1) (see PARA 2562) to pass a contractual right which could only have been assigned at common

law with the consent of the other party to the contract (which had not been obtained). As to registration of friendly societies see PARA 2149 et seq.

18 Friendly Societies Act 1992 s 86(5).

19 Friendly Societies Act 1992 s 86(8).

## UPDATE

### 2353 Transfer of engagements by or to a friendly society

TEXT AND NOTE 5--Friendly Societies Act 1992 s 86(1)(c) amended: SI 2009/1941.

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### 2354. Actuary's report as to margin of solvency.

Where a friendly society<sup>1</sup> proposes to transfer any of its engagements to another friendly society and the fulfilment of any of those engagements will constitute:

- 836 (1) in the case of a transferor which is a directive society<sup>2</sup>, the carrying on of insurance business in one or more EEA states<sup>3</sup>; and
- 837 (2) in any other case, the carrying on of insurance business in the United Kingdom<sup>4</sup>,

and the transferee will, after taking the proposed transfer into account, be under a duty to maintain a margin of solvency<sup>5</sup>, the transferee must furnish the Financial Services Authority<sup>6</sup> with a report by the appropriate actuary<sup>7</sup> as to whether, immediately after the proposed transfer, it will possess that margin of solvency<sup>8</sup>.

Where the fulfilment of any of the engagements will constitute the carrying on of long term business<sup>9</sup>, but a report is not required as mentioned above, the Authority may direct the transferee to furnish the Authority with a report by the appropriate actuary as to whether it will, immediately after the proposed transfer, possess an excess of assets over liabilities<sup>10</sup>.

The appropriate actuary has a right of access at all times to the books, accounts and vouchers of the transferor and the transferee, and is entitled to require from the officers<sup>11</sup> of either society such information and explanations as he thinks necessary to enable him to prepare such a report<sup>12</sup>. If the appropriate actuary fails to obtain all the information and explanations and the access to documents which, to the best of his knowledge and belief, are necessary for the purposes of the report, he must state that fact in his report<sup>13</sup>.

An officer of a transferor or of the transferee commits an offence if he knowingly or recklessly makes a statement (written or oral) to the appropriate actuary which conveys, or purports to convey, information or explanations which he is entitled to require for the purposes of his report, and which is misleading, false or deceptive in a material particular<sup>14</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

- 2   le a friendly society to which the Friendly Societies Act 1992 s 37(2) or (3) applies: see PARA 2112 note 15.
- 3   Friendly Societies Act 1992 s 87(2)(a)(i) (s 87(2)(a) substituted by SI 1994/1984; and SI 1997/2849). As to the meaning of 'insurance business' see PARA 2138 note 5. As to the meaning of 'EEA state' see PARA 2310 note 8.
- 4   Friendly Societies Act 1992 s 87(2)(a)(ii) (as substituted: see note 3). As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 5   le the margin of solvency required by rules made under the Financial Services and Markets Act 2000 s 138: see PARA 21.
- 6   As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 7   As to the meaning of 'appropriate actuary' see PARA 2139 note 4.
- 8   Friendly Societies Act 1992 s 87(1), (2) (amended by SI 2001/2617).
- 9   As to the meaning of 'long term business' see PARA 2138 note 5.
- 10   Friendly Societies Act 1992 s 87(3) (amended by SI 2001/2617).
- 11   As to the meaning of 'officer' see PARA 2115 note 11.
- 12   Friendly Societies Act 1992 s 87(4).
- 13   Friendly Societies Act 1992 s 87(5).
- 14   Friendly Societies Act 1992 s 87(6). The offence is punishable: (1) on conviction on indictment, with imprisonment for up to two years or a fine or both; and (2) on summary conviction, with imprisonment for up to six months or a fine not exceeding the statutory maximum or both: s 87(7). However, if a person is guilty of an offence, but would not have been so but for the substitutions in s 87(2) (see the text and notes 3-4), he is not liable on summary conviction to more than three months' imprisonment: Friendly Societies Act 1992 (Amendment) Regulations 1994, SI 1994/1984, reg 26(2). As to the statutory maximum see PARA 56 note 24.

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### **2355. Actuary's report on long term business.**

Where:

838 (1) a friendly society<sup>1</sup> (a 'transferor society') proposes to transfer to any person engagements, the fulfilment of which will constitute:

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23. (a) in the case of a directive society<sup>2</sup>, the carrying on of long term business<sup>3</sup> in one or more EEA states<sup>4</sup>; and
24. (b) in any other case, the carrying on of long term business in the United Kingdom<sup>5</sup>; or

38

839 (2) a friendly society (a 'transferee society') proposes to undertake to fulfil any such engagements to be transferred to it from another friendly society<sup>6</sup>,

the Financial Services Authority<sup>7</sup> may direct the transferor society or the transferee society to furnish the Authority with a report by an independent actuary<sup>8</sup> on the terms of the proposed

transfer and as to his opinion on the likely effects of the transfer on the members of the society who are long term policyholders<sup>9</sup>.

A friendly society which is directed to furnish such a report must, on payment of a reasonable fee, furnish a copy of the report to any person who asks for one at any time before the transfer in question is confirmed by the Authority<sup>10</sup>.

The provisions relating to the preparation of a report by the actuary as to the margin of solvency, including rights of access and information, and the provisions as to offences, apply to the preparation of a report under the provisions described above<sup>11</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 Is a friendly society to which the Friendly Societies Act 1992 s 37(2) or (3) applies: see PARA 2112 note 15.

3 As to the meaning of 'long term business' see PARA 2138 note 5.

4 Friendly Societies Act 1992 s 88(1)(a)(i) (s 88(1)(a) substituted by SI 1994/1984; and SI 1997/2849). As to the meaning of 'EEA state' see PARA 2310 note 8.

5 Friendly Societies Act 1992 s 88(1)(a)(ii) (as substituted: see note 4). As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Friendly Societies Act 1992 s 88(1)(b).

7 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

8 'Independent actuary', in relation to a transfer of engagements, means an actuary who is not the appropriate actuary of a friendly society participating in the transfer: Friendly Societies Act 1992 s 88(5). As to the meaning of 'appropriate actuary' see PARA 2139 note 4.

9 Friendly Societies Act 1992 s 88(2) (amended by SI 2001/2617). 'Long term policyholder' means a member whose contract with a friendly society is a contract the effecting of which by the society constituted the carrying on of long term business: Friendly Societies Act 1992 s 88(5).

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the transfer provisions contained in the Friendly Societies Act 1992 ss 86, 88, Sch 15 as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a friendly society to a subsidiary of a mutual society (whether or not of the same type): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 ss 3-5 (not yet in force); and PARA 2358. At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

10 Friendly Societies Act 1992 s 88(3) (amended by SI 2001/2617). As to confirmation by the Financial Services Authority see PARA 2361.

11 Friendly Societies Act 1992 s 88(4), applying s 87(4)-(7) (see PARA 2354 text and notes 11-14).

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### **2356. Power of Financial Services Authority to alter requirements for transfer by a friendly society.**

If the Financial Services Authority<sup>1</sup> is satisfied that it is expedient to do so in the interests of the members or potential members of a friendly society<sup>2</sup>, it may give a direction modifying or

disapplying certain requirements of the Friendly Societies Act 1992 in relation to a particular proposed transfer or to all transfers made by the society after the making of the direction<sup>3</sup>.

The Authority may not give such a direction unless<sup>4</sup>:

- 840 (1) an application has been made to it by not less than 10 per cent of the members of the society concerned or, in the case of a society with more than 1,000 members, by not fewer than 100 members of the society<sup>5</sup>;
- 841 (2) not less than one month before giving the direction the Authority has served on the society concerned a notice stating that it proposes to make a direction and specifying the considerations which have led it to conclude that it would be expedient to give it<sup>6</sup>;
- 842 (3) the Authority has considered any representations made by the society with respect to the notice mentioned in head (2) above, within such period (being not less than one month) from the date on which the society was served with the notice, as the Authority may allow<sup>7</sup>; and
- 843 (4) if the society so requests, the Authority has afforded to it an opportunity to be heard by it within that period<sup>8</sup>.

On giving a direction, the Authority is required to serve on the society concerned a copy of the direction, which specifies the considerations which have led the Authority to conclude that it is expedient to give the direction, but the Authority may not give a direction unless all the considerations so specified were those, or among those, which were specified in the notice served on the society under heads (1) to (4) above<sup>9</sup>. The Authority must keep a copy of any direction given in the public file of the society concerned<sup>10</sup>. Notice of a direction must be published by the Authority in one or more of the London, Belfast or Edinburgh Gazettes, as it thinks appropriate, and in such other ways as appear to the Authority expedient for informing the public<sup>11</sup>.

If the Authority considers it expedient to do so in the interests of the members or potential members of the society concerned, it may vary or revoke a direction by a further direction<sup>12</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the meaning of 'friendly society' see PARA 2082.

3 Friendly Societies Act 1992 s 89(1) (s 89(1), (3)-(6) amended by SI 2001/2617). The requirements of the Friendly Societies Act 1992 s 86(2)(b) and (c) may be modified and the requirements of Sch 15 Pt I may be modified or disapplied: s 89(1)(a), (b). As to those requirements see PARA 2353 text and notes 10-11. However, a direction may not modify the requirements of s 86(2) so as to permit a society to resolve to make a transfer by a resolution passed by less than a majority, or so as to require more than a three-quarters majority, of those voting on the resolution: s 89(2).

4 Friendly Societies Act 1992 s 89(3) (as amended: see note 3).

5 Friendly Societies Act 1992 s 89(3)(a).

6 Friendly Societies Act 1992 s 89(3)(b) (as amended: see note 3).

7 Friendly Societies Act 1992 s 89(3)(c) (as amended: see note 3).

8 Friendly Societies Act 1992 s 89(3)(d) (as amended: see note 3).

9 Friendly Societies Act 1992 s 89(5) (as amended: see note 3).

10 Friendly Societies Act 1992 s 89(7) (substituted by SI 2001/3649). As to the public file of a society see PARA 2382.

11 Friendly Societies Act 1992 s 89(6) (as amended: see note 3).

12 Friendly Societies Act 1992 s 89(4) (as amended: see note 3).

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### **2357. Power of Financial Services Authority to effect transfer of engagements.**

The Financial Services Authority<sup>1</sup> may give a direction providing for the transfer of such of the engagements of a friendly society<sup>2</sup> as are specified in the direction to a specified person (the 'transferee')<sup>3</sup>. The Authority may give such a direction if: (1) it considers that the society is unable to manage its affairs satisfactorily in relation to the engagements specified and that a transfer of those engagements would be expedient to protect the interests of the members of the society<sup>4</sup>; and (2) the proposed transferee has complied with the applicable statutory requirements<sup>5</sup> and has resolved to undertake to fulfil the engagements by special resolution<sup>6</sup> or, if the Authority so allows, by resolution of the committee of management<sup>7</sup>. The Authority may direct that head (2) above be modified in relation to a particular proposed transfer, but not so as to permit a society to resolve to undertake to fulfil the engagements by less than a simple majority, or more than a three-quarters majority, of those voting<sup>8</sup>.

The Authority may not give a direction if, were the transfer to be proposed by the society itself<sup>9</sup>, it would be precluded by certain provisions from confirming it<sup>10</sup>.

Before giving a direction, the Authority is required to serve on the society concerned a warning notice stating that it intends to give the direction<sup>11</sup>; and it must publish notice of the proposed direction in one or more of the London, Belfast or Edinburgh Gazettes, as it thinks appropriate and, if it thinks appropriate, in one or more newspapers<sup>12</sup>.

If the Authority gives such a direction it must keep a copy of that direction and must register it and issue a registration certificate to the transferee, specifying a date as the transfer date for the transfer<sup>13</sup>. On the transfer date, the property, rights and liabilities of the society become, to the extent provided in the direction, the property, rights and liabilities of the transferee and, if the transfer is of all the society's engagements, the society is dissolved, the transfer being deemed to have been effected before the dissolution<sup>14</sup>.

Following its dissolution, the society's registration, whether under the Friendly Societies Act 1974 or the Friendly Societies Act 1992, must be cancelled by the Authority<sup>15</sup>.

The Authority must keep a copy of a direction and of the registration certificate, if the transferee is a friendly society, in the public file of that society and, in any other case, in the public file of the society transferring the engagements<sup>16</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the meaning of 'friendly society' see PARA 2082.

3 Friendly Societies Act 1992 s 90(1) (s 90(1)-(7), (10), (11) amended by SI 2001/2617).

4 Friendly Societies Act 1992 s 90(2)(a) (as amended: see note 3).

5 I.e. the Friendly Societies Act 1992 Sch 15 para 1: see PARAS 2352 note 4, 2353 note 9.

6 As to special resolutions see PARA 2306.



7 Friendly Societies Act 1992 s 90(2)(b) (as amended: see note 3). As to the committee of management see PARA 2294 et seq.

8 Friendly Societies Act 1992 s 90(2) (as amended: see note 3).

9 le under the Friendly Societies Act 1992 s 86: see PARA 2353.

10 Friendly Societies Act 1992 s 90(3) (as amended: see note 3). The provisions referred to are Sch 15 paras 11, 13-17: see PARAS 2362-2364.

11 le a notice in accordance with the Friendly Societies Act 1992 s 58A: see PARA 2313. Such a notice must: (1) state that any interested party has the right to make representations to the Authority; (2) specify a date before which written representations, or notice of that party's intention to make oral representations, must be received; and (3) specify a date on which it intends to hear oral representations: s 90(5) (as amended: see note 3). After the date specified in head (2) above, the Authority must determine the time and place at which oral representations may be made, give notice of that determination to the society and the proposed transferee and any persons who have notified their intention to make oral representations, and send copies of the written representations to the society and the proposed transferee: s 90(6) (as so amended). Before the Authority decides whether to give the society a decision notice in accordance with s 58A(3) (see PARA 2313), the Authority must allow the society and the proposed transferee an opportunity to comment on the written representations, whether at a hearing or in writing before the expiry of such period as the Authority specifies: s 90(7) (as so amended).

12 Friendly Societies Act 1992 s 90(4) (as amended: see note 3).

13 Friendly Societies Act 1992 s 90(8) (amended by SI 2001/3649).

14 Friendly Societies Act 1992 s 90(9). As to the effect of the statutory transfer of property, rights and liabilities see PARA 2353 note 17.

15 Friendly Societies Act 1992 s 90(11) (as amended: see note 3).

16 Friendly Societies Act 1992 s 90(10) (as amended: see note 3). As to the public file of a society see PARA 2382.

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### **2358. Transfer of a friendly society's business under the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007.**

As from a day to be appointed the following provisions have effect<sup>1</sup>. The Treasury has power to make by statutory instrument such modifications<sup>2</sup> to the transfer provisions (including the provisions of the Friendly Societies Act 1992 relating to the transfer of engagements by or to a friendly society, and those relating to the actuary's report on a transfer of business)<sup>3</sup> as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a mutual society<sup>4</sup> (the 'transferor') to a subsidiary of a mutual society<sup>5</sup> (whether or not of the same type) (the 'transferee')<sup>6</sup>.

1 The Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 ss 3-5 come into force on such day as the Treasury may by order made by statutory instrument appoint, and different days may be appointed for different purposes: see s 6. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. At the date at which this volume states the law no such day had been appointed, and no orders had been made under ss 3, 4.

2 'Modifications' include omissions, additions and alterations: Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 s 3(9). See note 1.

3 'Transfer provisions' means, in relation to friendly societies, the Friendly Societies Act 1992 ss 86, 88, Sch 15 (see PARAS 2353, 2355) and provision contained in subordinate legislation made under ss 86, 88, Sch 15: see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(11)(b), (d). See note 1.

4 A 'mutual society' is a building society incorporated or deemed to be incorporated under the Building Societies Act 1986 (see PARA 1856 et seq); a friendly society within the meaning of the Friendly Societies Act 1992 (see PARA 2082); an industrial and provident society registered or deemed to be registered under the Industrial and Provident Societies Act 1965 (see PARA 2394 et seq); or an EEA mutual society: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(10). See note 1. An 'EEA mutual society' is a body which is a European Cooperative Society for the purposes of EC Council Regulation 1435/2003 (OJ L207, 18.8.2003, p 1) on the Statute for a European Cooperative Society; a body which is established as a cooperative under the law of an EEA state as mentioned in that Regulation; or a body which is a cooperative or mutual undertaking of such description as the Treasury may specify by order and which is established or operates in accordance with the laws of an EEA state or any of the Channel Islands or the Isle of Man: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(12).

5 A 'subsidiary of a mutual society' is a relevant company (1) in which the society holds a majority of the voting rights or of which the society is a member and alone controls, pursuant to an agreement with other shareholders or members, a majority of the voting rights; and (2) in relation to which the society has the right to appoint or remove a majority of the company's board of directors, but the Treasury may, by order, amend heads (1) and (2) above to make the degree of control required more or less onerous: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(13). See note 1. A 'relevant company' is a company within the meaning of the Companies Act 2006 (or, before the commencement of Pt 1 (ss 1-6), the Companies Act 1985); a company within the meaning of the Companies (Northern Ireland) Order 1986 (SI 1986/1032 (NI 6)); a body corporate which is incorporated in an EEA state other than the United Kingdom: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(14). As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 See the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(1). See note 1.

An order under s 3 may make provision as to the rights (including rights of and pertaining to membership) in relation to the mutual society of which the transferee is a subsidiary of the members of the transferor and of persons who, after the transfer, become customers of the transferee: s 3(2). Such an order may confer such functions on the Authority as the Treasury thinks appropriate: s 3(3).

An order under s 3 may make such consequential, saving, supplementary or transitional provision as the Treasury thinks appropriate; and may make different provision for different purposes: s 3(4). The power to make such an order is exercisable by statutory instrument: s 3(5). An order which makes modifications of a provision mentioned in s 3(11)(a)-(d) (which include the provisions relating to friendly societies mentioned in s 3(11)(b) (see note 3), or amends s 3(13)(a) or (b) (see note 5 heads (1), (2)), (whether or not it contains any other provision) must not be made unless a draft of it has been laid before and approved by resolution of each House of Parliament: s 3(6). Otherwise, an order is subject to annulment in pursuance of a resolution of either House of Parliament: s 3(7). If a draft of an order mentioned in s 3(6) would, apart from this provision, be treated for the purposes of the Standing Orders of either House of Parliament as a hybrid instrument it must proceed in that House as if it were not such an instrument: s 3(8).

For the purposes of the Financial Services and Markets Act 2000 Sch 1 para 17 (power to charge fees) (see PARA 16) a function conferred on the Financial Services Authority by an order under the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3 is to be treated as a function conferred under or as a result of the Financial Services and Markets Act 2000: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(15). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

An order under s 3 may provide for s 4 to have effect: s 4(1). Section 4(3) applies if the terms of a transfer to which the order applies include provision for part of the funds of the transferor or the mutual society of which the transferee is a subsidiary (the 'holding mutual') to be distributed in consideration of the transfer among the members of the transferor, the holding mutual, or both the transferor and the holding mutual: s 4(2). In such a case, the provision for the distribution must be authorised as follows: (1) it must not exceed the limits prescribed by order under s 4(4) (see below), and the distribution must be approved (in the case of the transferor) by the transfer resolution or (in the case of the holding mutual) by a resolution of such description as the Treasury specifies by order; (2) if the provision for a distribution exceeds the prescribed limits, it must be approved by each of the resolutions mentioned in head (1) above: s 4(3). 'Transfer resolution' means, in relation to a friendly society, the resolution required by the Friendly Societies Act 1992 s 86(2)(b) (see PARA 2353 head (b)); see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 4(5)(b). The Treasury must by order authorise distributions of funds to members by mutual societies participating (directly or through a subsidiary) in transfers to which an order mentioned in s 4(1) applies, subject to limits specified by or determined in accordance with the order: s 4(4). Expressions used in ss 3, 4 have the same meaning as in s 3: s 4(6). Section 3(4)-(7) apply to an order under s 4 as they apply to an order under s 3: s 4(7).

Her Majesty may by Order in Council provide for any of the provisions of the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 to extend with or without modifications, to any of the Channel Islands or to the Isle of Man: s 5.

## UPDATE

### **2358 Transfer of a friendly society's business under the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007**

NOTE 5--Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(14) amended: SI 2009/1941.

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## (C) CONVERSION

### **2359. Conversion of a friendly society into a company.**

A friendly society<sup>1</sup> may convert itself into a company<sup>2</sup>. In order to do so, it must:

- 844 (1) supply certain information about the proposed conversion to its members<sup>3</sup>;
- 845 (2) approve the proposed conversion, the terms on which it is to take place and the proposed memorandum and articles of association for the company, by special resolution<sup>4</sup>; and
- 846 (3) obtain the confirmation of the Financial Services Authority of the conversion<sup>5</sup>.

On obtaining that confirmation, the society may apply for registration as a company<sup>6</sup>.

The terms on which the conversion of a friendly society into a company is to take place may include provision for part of the funds of the society or the company to be distributed among, or for other rights in relation to shares in the company to be conferred on, members of the society<sup>7</sup>.

Where a special resolution of a society contains the particulars required<sup>8</sup> to be contained in the memorandum of association, or the articles of association, of a company and a copy of the resolution has been registered by the Authority, a copy of that resolution under the seal and stamp of the Authority<sup>9</sup> has the same effect as a memorandum of association or, as the case may be, articles of association which have been duly signed<sup>10</sup>.

On the registration of a friendly society as a company, the registration of the society under the Friendly Societies Act 1974 or the Friendly Societies Act 1992 must be cancelled by the Authority<sup>11</sup>.

Where a friendly society converts into a company, the terms approved by the society and confirmed by the Authority, in so far as they provide for the conferral of rights on members or officers of the society, are enforceable as if they had been the subject of an agreement between the society and those members and officers<sup>12</sup>.

Registration of a friendly society as a company does not affect any right or claim subsisting against the society or any penalty incurred by the society, and for the purpose of enforcing

such a right, claim or penalty, the society may be sued and proceeded against in the same manner as if it had not become registered as a company<sup>13</sup>.

The Authority may, with the consent of the Treasury, make regulations governing the conversion of friendly societies into companies, and in particular for: (a) the transition from regulation under the Friendly Societies Act 1974 or the Friendly Societies Act 1992 to regulation by or under any other enactment; and (b) the treatment, in the hands of the company into which the society has converted, of the property, rights and liabilities of the society immediately before conversion and the modification of any enactment in its application to any such property, rights and liabilities<sup>14</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 91(1), which refers to a company registered under the Companies Act 1985 (as to company formation see the Companies Act 1985 Pt I Ch I (ss 1-24) (prospectively repealed); and as to replacement provisions see the Companies Act 2006 Pt 2 (ss 7-16)) or the Companies (Northern Ireland) Order 1986, SI 1986/1032. See generally **COMPANIES** vol 14 (2009) PARA 24 et seq.

3 See the Friendly Societies Act 1992 s 91(2)(a), (9), Sch 15 paras 1-4. The society must comply with the following requirements. It must send a statement concerning such matters as may be prescribed by regulations made by the Treasury, and such other matters as may be required by the Financial Services Authority for the particular conversion, to every member entitled at the time of sending to vote on any resolution required by s 91(2): Sch 15 para 3(1) (amended by SI 2001/2617). The statement must be sent to arrive no later than 14 days (or such longer period as the rules may require for notice of any resolution under the Friendly Societies Act 1992 s 91) before the meeting at which any such resolution is to be moved or, where proxy voting is permitted, such earlier date as may be specified by the society, under its rules, as the final date for receipt of instruments appointing proxies for the meeting, but no statement may be sent unless its contents, so far as they concern the required matters, have been approved by the Authority: Sch 15 para 4 (amended by SI 2001/2617). Regulations may include among the prescribed matters any alternatives to a proposed conversion which may be available: Friendly Societies Act 1992 Sch 15 para 3(2). At the date at which this volume states the law, no regulations had been made under these provisions. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2104. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

4 Friendly Societies Act 1992 s 91(2)(b). As to special resolutions see PARA 2306.

5 Friendly Societies Act 1992 s 91(2)(c) (s 91(2)(c), (4)-(6), (8) amended by SI 2001/2617). As to confirmation by the Authority see PARA 2361.

6 Friendly Societies Act 1992 s 91(2).

7 Friendly Societies Act 1992 s 91(3).

8 As required by the Companies Act 1985 (or the Companies Act 2006) or the Companies (Northern Ireland) Order 1986, SI 1986/1032: see **COMPANIES** vol 14 (2009) PARA 243 et seq.

9 Any reference in the Friendly Societies Act 1992 to the seal of the Authority is a reference to the seal provided for in regulations made under the Friendly Societies Act 1974 s 109(1)(b) (see PARA 2107) (and not to the Financial Services Authority's common seal): Friendly Societies Act 1992 s 119(1AA) (added by SI 2001/2617).

10 Friendly Societies Act 1992 s 91(4) (as amended: see note 5).

11 Friendly Societies Act 1992 s 91(5) (as amended: see note 5).

12 Friendly Societies Act 1992 s 91(6) (as amended: see note 5).

13 Friendly Societies Act 1992 s 91(7).

14 Friendly Societies Act 1992 s 91(8) (as amended: see note 5). At the date at which this volume states the law, no such regulations had been made.

## UPDATE

## **2359 Conversion of a friendly society into a company**

NOTE 2--Friendly Societies Act 1992 s 91(1) amended: SI 2009/1941.

TEXT AND NOTES 8-10--Friendly Societies Act 1992 s 91(4) substituted: SI 2009/1941.

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### **(D) CONFIRMATION BY THE FINANCIAL SERVICES AUTHORITY**

#### **2360. Applications for confirmation.**

An application by a friendly society<sup>1</sup> for confirmation by the Financial Services Authority<sup>2</sup> of: (1) an amalgamation<sup>3</sup>; (2) a transfer of engagements<sup>4</sup>; or (3) the conversion of a friendly society into a company<sup>5</sup>, must be made in such manner as the Authority may direct<sup>6</sup>. An application for confirmation of an amalgamation must be made jointly by the friendly societies concerned<sup>7</sup>.

Notice of an application for confirmation of an amalgamation, transfer or conversion must be published by the society concerned in one or more of the London Gazette, the Edinburgh Gazette or the Belfast Gazette, as the Authority directs, and in one or more newspapers, if it so directs<sup>8</sup>. The notice must:

- 847 (a) state that any interested party has the right to make representations to the Authority with respect to the application<sup>9</sup>;
- 848 (b) specify a date, determined by the Authority, before which any written representations or notice of a person's intention to make oral representations must be received by the Authority<sup>10</sup>; and
- 849 (c) specify a date, determined by the Authority, as the day on which it intends to hear any oral representations<sup>11</sup>.

Where a friendly society participating in a transfer of engagements is required to furnish an actuary's report<sup>12</sup>, the society must publish a notice in like manner:

- 850 (i) stating that such a report has been obtained<sup>13</sup>;
- 851 (ii) stating the addresses of the offices of the society<sup>14</sup> at which copies of the report will be available for inspection, for a period of not less than 21 days beginning with the date of first publication of the notice<sup>15</sup>; and
- 852 (iii) containing such particulars of any other matter relating to the report which the Authority requires<sup>16</sup>.

This notice may be included in the notice of application for confirmation referred to above<sup>17</sup>.

After the date specified in the notice of application for confirmation as the date before which any written representations, or notice of a person's intention to make oral representations, must be received, the Authority is required to: (A) determine the time and place at which oral representations may be made; (B) give notice of the time and place to the society applying for confirmation and to any persons who have given notice of their intention to make oral

representations; and (c) send copies of any written representations received by the Authority to the applicant society<sup>18</sup>. The Authority must then allow the society an opportunity to comment on the written representations, whether at the hearing or in writing, before the end of the period specified for this purpose in a notice to the applicant society<sup>19</sup>.

- 1 As to the meaning of 'friendly society' see PARA 2082.
- 2 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 3 Ie under the Friendly Societies Act 1992 s 85: see PARA 2352.
- 4 Ie under the Friendly Societies Act 1992 s 86: see PARA 2353 et seq.
- 5 Ie under the Friendly Societies Act 1992 s 91: see PARA 2359.
- 6 Friendly Societies Act 1992 ss 85(6), 86(11), 91(9), Sch 15 para 5(1) (amended by SI 2001/2617).
- 7 Friendly Societies Act 1992 Sch 15 para 5(2).
- 8 Friendly Societies Act 1992 Sch 15 para 6(1) (amended by SI 2001/2617). Where application for a transfer is made by a directive society and, as regards any policy included in the proposed transfer, an EEA state other than the United Kingdom is the state in which the risk or commitment is situated, the society must also, if the Authority so directs, publish the notice in two national newspapers in that state: Friendly Societies Act 1992 Sch 15 para 6(1A) (added by SI 1994/1984; and amended by SI 1997/2849; and SI 2001/2617). For these purposes, 'policy' means a contract (other than a contract of reinsurance) the effecting of which by a directive society constituted the carrying on of insurance business of any class: Friendly Societies Act 1992 Sch 15 para 18(2) (substituted by SI 1994/1984). As to the meaning of 'EEA state' see PARA 2310 note 8. As to the meaning of 'insurance business' see PARA 2138 note 5. As to the meaning of 'United Kingdom' see PARA 2 note 3. A directive society is one to which the Friendly Societies Act 1992 s 37(2) or (3) applies: see PARA 2112 note 15.
- 9 Friendly Societies Act 1992 Sch 15 para 6(2)(a) (Sch 15 para 6(2)(a)-(c) amended by SI 2001/2617).
- 10 Friendly Societies Act 1992 Sch 15 para 6(2)(b) (as amended: see note 9).
- 11 Friendly Societies Act 1992 Sch 15 para 6(2)(c) (as amended: see note 9).
- 12 Ie under the Friendly Societies Act 1992 s 88: see PARA 2355.
- 13 Friendly Societies Act 1992 Sch 15 para 6(3)(a).
- 14 Where the society is directed under the Friendly Societies Act 1992 Sch 15 para 6(1A) to publish a notice in newspapers in another member state (see note 8), the notice under Sch 15 para 6(3) must also state the address of such place in that state as the Financial Services Authority directs: Sch 15 para 6(3)(b)(ii) (Sch 15 para 6(3)(b) substituted by SI 1994/1984; and amended by SI 2001/2617).
- 15 Friendly Societies Act 1992 Sch 15 para 6(3)(b) (as substituted and amended: see note 14).
- 16 Friendly Societies Act 1992 Sch 15 para 6(3)(c) (amended by SI 2001/2617).
- 17 Friendly Societies Act 1992 Sch 15 para 6(3).
- 18 Friendly Societies Act 1992 Sch 15 para 7(a)-(c) (Sch 15 para 7 amended by SI 2001/2617).
- 19 Friendly Societies Act 1992 Sch 15 para 7 (as amended: see note 18).

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### **2361. Confirmation by the Financial Services Authority.**

Where an application is properly made for confirmation by the Financial Services Authority<sup>1</sup> of an amalgamation<sup>2</sup>, transfer of engagements<sup>3</sup> or conversion<sup>4</sup>, the Authority must confirm it, unless it is prohibited<sup>5</sup> from doing so<sup>6</sup>.

In relation to any amalgamation or transfer of engagements, if it seems to the Authority that there is a substantial risk that the successor society or the transferee society will not be able lawfully to carry out the engagements to be transferred to it, it may not give confirmation, and where it has already done so, it must withdraw its confirmation, but it may not withdraw it on or after the transfer date for the amalgamation or transfer<sup>7</sup>.

The Authority is not precluded from confirming an amalgamation, transfer or conversion solely because some requirement of the Friendly Societies Act 1992, or in the rules of a society, is not fulfilled, if it appears to the Authority that it could not have been material to the members' decision and the Authority gives a direction that the failure is to be disregarded<sup>8</sup>. Subject to this, the Authority may not confirm:

- 853 (1) an amalgamation or transfer, if it considers that: (a) some information material to the members' decision was not made available to all the members eligible to vote; (b) the vote on any resolution approving the amalgamation or transfer does not represent the views of the members eligible to vote; or (c) some relevant requirement of the Friendly Societies Act 1992 or the rules of any friendly society participating in the amalgamation or transfer was not fulfilled<sup>9</sup>;
- 854 (2) a conversion, if it considers that: (a) some information material to the members' decision about the conversion was not made available to all the members eligible to vote; (b) the vote on any resolution approving the conversion does not represent the views of the members eligible to vote; or (c) some relevant requirement of the Friendly Societies Act 1992 or the rules of the society was not fulfilled<sup>10</sup>;
- 855 (3) an amalgamation, transfer of engagements or conversion unless it is satisfied that there is no substantial risk that the successor society, the proposed transferee, or the company into which the society is converted, will not have such permission under the Financial Services and Markets Act 2000<sup>11</sup> as will enable it to carry on the business which it will have as a result of the amalgamation, transfer or conversion without contravening the general prohibition under that Act<sup>12</sup>.

Where the Authority would be precluded from confirming an amalgamation, transfer of engagements or a conversion, because of any of the defects or reasons mentioned in heads (1) to (3) above, it may give the friendly society concerned a direction requiring it to take specified steps to remedy the defect, including calling a further meeting, or remove the risk referred to in head (3) above, and to furnish the Authority with evidence that those steps have been taken<sup>13</sup>. If the Authority is satisfied that the steps have been taken and the defect has been substantially remedied or, as the case may be, the risk has been removed, the Authority must confirm the amalgamation, transfer or conversion<sup>14</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 See PARA 2352.

3 See PARA 2353.

4 See PARA 2359.

5 ie by any provision of the Friendly Societies Act 1992 Sch 15.

6 Friendly Societies Act 1992 ss 85(6), 86(11), 91(9), Sch 15 para 8(1) (Sch 15 paras 8-10 amended by SI 2001/2617).

7 Friendly Societies Act 1992 Sch 15 para 8(2) (as amended: see note 6). For these purposes, the Authority may have regard to any requirement of the law of a country or territory outside the United Kingdom which appears to the Authority to be relevant: Sch 15 para 8(3) (as so amended). As to the meaning of 'United Kingdom' see PARA 2 note 3.

8 Friendly Societies Act 1992 Sch 15 para 9(3) (as amended: see note 6). A 'relevant requirement', with reference to the Friendly Societies Act 1992 or the rules of a friendly society, means a requirement of Part VIII (ss 85-92), Sch 15 or of any rules prescribing the procedure to be followed by the society in approving or effecting an amalgamation or transfer of engagements or its conversion into a company: Sch 15 para 18(2) (substituted by SI 1994/1984).

9 Friendly Societies Act 1992 Sch 15 para 9(1) (as amended: see note 6).

10 Friendly Societies Act 1992 Sch 15 para 9(2) (as amended: see note 6).

11 le: (1) permission (if any) under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 348 et seq); or (2) permission (if any) under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12) (see PARA 315).

12 Friendly Societies Act 1992 Sch 15 para 11 (substituted by SI 2001/2617). As to the general prohibition see the Financial Services and Markets Act 2000 s 19; and PARA 80.

13 Friendly Societies Act 1992 Sch 15 para 10(1), (2)(a), (b) (as amended: see note 6).

14 Friendly Societies Act 1992 Sch 15 para 10(2) (as amended: see note 6).

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## **2362. Confirmation of transfers of engagements.**

The Financial Services Authority<sup>1</sup> may not confirm a transfer of engagements<sup>2</sup> unless it is satisfied: (1) that all the engagements included in the transfer may properly be transferred to the transferee<sup>3</sup>; (2) that the transfer is in the interests of the members of each friendly society<sup>4</sup> participating in the transfer<sup>5</sup>; and (3) in the case of a partial transfer of engagements, that the purposes of each friendly society participating in the transfer will, after the transfer, continue to include the carrying on of one or more of the permitted activities<sup>6</sup>.

Where the transferee society is required to furnish an actuary's report as to the margin of solvency after the transfer<sup>7</sup>, the Authority must not confirm the transfer unless it is satisfied that, after taking the transfer into account, the transferee society will possess the requisite margin of solvency<sup>8</sup>, or, where no margin of solvency is required, will possess an excess of assets over liabilities<sup>9</sup>. The Authority is also prohibited from confirming a transfer of engagements the fulfilment of which will constitute the effecting or carrying out of contracts of insurance<sup>10</sup> in the United Kingdom<sup>11</sup>, unless it is so satisfied<sup>12</sup>.

In the case of certain transfers of engagements by directive societies<sup>13</sup>, the Authority must not confirm such a transfer unless:

- 856 (a) it is satisfied that every policy included in the transfer evidences a contract entered into before the date of the application<sup>14</sup>;



- 857 (b) the relevant authority<sup>15</sup> certifies that the transferee possesses the necessary margin of solvency after taking the proposed transfer into account<sup>16</sup>; and
- 858 (c) where the establishment from which the policies are to be transferred is situated in an EEA state other than the United Kingdom, the Authority is satisfied that the supervisory authority in that EEA state has been consulted and has responded or three months have elapsed since the consultation<sup>17</sup>.

Where, as regards any policy which is included in the proposed transfer, the risk is situated in an EEA state other than the United Kingdom, the Authority may not confirm the transfer unless it is satisfied that the supervisory authority in that EEA state has been notified and has consented, or it has not refused its consent and three months have elapsed since notification<sup>18</sup>.

Provision which is in all significant respects identical to that described above in relation to transfers of general business by directive societies<sup>19</sup>, is made in relation to the transfer by such societies of engagements other than contracts of reinsurance<sup>20</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 See PARA 2353 et seq.

3 Friendly Societies Act 1992 s 86(11), Sch 15 para 12(a) (Sch 15 para 12 amended by SI 2001/2617).

4 As to the meaning of 'friendly society' see PARA 2082.

5 Friendly Societies Act 1992 Sch 15 para 12(b).

6 Friendly Societies Act 1992 Sch 15 para 12(c). As to the permitted purposes of a friendly society see s 5, Sch 2; and PARA 2096.

7 Ie under the Friendly Societies Act 1992 s 87: see PARA 2354.

8 Ie the margin of solvency required by rules made under the Financial Services and Markets Act 2000 s 138: see PARA 21.

9 Friendly Societies Act 1992 Sch 15 para 13(1) (Sch 15 para 13 substituted by SI 2001/3649). This applies where the report is furnished under the Friendly Societies Act 1992 s 87(2): see PARA 2354. However, Sch 15 para 13 does not apply to any transfer of engagements to which Sch 15 para 15 or Sch 15 para 15A (see the text and notes 13-20) applies: Sch 15 para 13(3) (as so substituted).

10 As to the meaning of 'contract of insurance' see PARA 2147 note 6.

11 As to the meaning of 'United Kingdom' see PARA 2 note 3.

12 Friendly Societies Act 1992 Sch 15 para 13(2) (as substituted: see note 9). See also note 9.

13 This applies to a transfer of engagements (other than contracts of reinsurance) where:

34 (1) the effecting of the engagements constituted the carrying on of general business (Friendly Societies Act 1992 Sch 15 para 15(1)(a) (Sch 15 para 15 substituted by SI 1994/1984));

35 (2) the transferor is a directive society to which the Friendly Societies Act 1992 s 37(3) applies (see PARA 2112 note 15) (Sch 15 para 15(1)(b) (as so substituted)); and

36 (3) the transferee is: (a) a directive society; (b) a UK firm which has an EEA right deriving from any of the Insurance Directives; (c) an EEA firm of the kind mentioned in the Financial Services and Markets Act 2000 s 31, Sch 3 para 5(d) (see PARA 315); (d) an insurance company whose head office is in Switzerland, which has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 348 et seq) to effect or carry out contracts of insurance, which permission is not limited to reinsurance business; or (e) an insurance company whose margin of solvency is required to be supervised under the First General Insurance Directive (ie EC Council Directive 73/239 of 24 July 1973 (OJ L228, 16.8.73, p 3) on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct

insurance other than life assurance) art 25 or art 26 (Friendly Societies Act 1992 Sch 15 para 15(1)(c) (as so substituted; and amended by SI 2001/3649)).

As to the meaning of 'general business' see PARA 2138 note 6. As to the Insurance Directives generally see PARA 86 note 6. As to the meaning of 'reinsurance business' see PARA 2139 note 3. As to the meaning of 'UK firm' see the Financial Services and Markets Act 2000 Sch 3 para 10; and PARA 323 note 4 (definition applied by the Friendly Societies Act 1992 Sch 15 para 18(1) (Sch 15 para 18 substituted by SI 1994/1984; and amended by SI 2001/3649)).

14 Friendly Societies Act 1992 Sch 15 para 15(2)(b) (as substituted (see note 13); and amended by SI 2001/2617).

15 'Relevant authority' means, in relation to the each type of body specified in note 13 head (3)(a)-(e) respectively, the following: (1) the Financial Services Authority; (2) the Authority; (3) the home state regulator; (4) the supervisory authority in Switzerland; or (5) the Authority or other supervisory authority responsible for supervision: Friendly Societies Act 1992 Sch 15 para 15(6) (substituted by SI 2001/3649). 'Supervisory authority' in relation to an EEA state other than the United Kingdom, means the authority responsible in that state for supervising persons whose business consists of effecting or carrying out contracts of insurance: Friendly Societies Act 1992 s 119(1) (definition added by SI 1994/1984; and amended by SI 2001/3649). In the definition of 'supervisory authority', the reference to contracts of insurance and to effecting or carrying out such contracts must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision and Sch 2 (see PARA 84): Friendly Societies Act 1992 s 119(1C) (added by SI 2001/3649). As to the meaning of 'EEA state' see PARA 2310 note 8.

16 Friendly Societies Act 1992 Sch 15 para 15(2)(c) (as substituted: see note 13).

17 Friendly Societies Act 1992 Sch 15 para 15(2)(d) (as substituted (see note 13); and amended by SI 1997/2849; and SI 2001/2617).

18 Friendly Societies Act 1992 Sch 15 para 15(3) (as substituted (see note 13); and amended by SI 1997/2849; and SI 2001/2617).

19 In the Friendly Societies Act 1992 Sch 15 para 15: see the text and notes 13-18.

20 See the Friendly Societies Act 1992 Sch 15 para 15A (added by SI 1993/2519; substituted by SI 1994/1984; and amended by SI 1997/2849; SI 2001/2617; SI 2001/3649; and SI 2004/3379).

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### **2363. Rights of policyholders on transfer of engagements.**

Where the Financial Services Authority<sup>1</sup> confirms a transfer of engagements<sup>2</sup> and, as regards any policy<sup>3</sup> included in the transfer, an EEA state<sup>4</sup> other than the United Kingdom<sup>5</sup> is the EEA state in which the risk or commitment is situated<sup>6</sup>, the Authority must direct that notice of its decision or any order, and of the execution of any instrument giving effect to the transfer, is to be published in the EEA state in which the risk or commitment is situated, and that notice is to specify the period during which the policyholder<sup>7</sup> may exercise any right to cancel the policy<sup>8</sup>. The instrument does not bind the policyholder if such a notice is not published or he exercises his right to cancel during the specified period<sup>9</sup>.

The law of the EEA state in which the risk or commitment is situated determines whether the policyholder has a right to cancel the policy, and the conditions applicable to any such right<sup>10</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq. The Friendly Societies Act 1992 s 86(11), Sch 15 paras 16A, 16B refers to the 'Commission', but it is submitted that this should have been replaced by a reference to the Financial Services Authority.

2 The confirmation of transfer under the Friendly Societies Act 1992 Sch 15 para 15 or Sch 15 para 15A: see PARA 2362. As to the transfer of engagements generally see PARA 2353.

3 As to the meaning of 'policy' see PARA 2360 note 8.

4 As to the meaning of 'EEA state' see PARA 2310 note 8.

5 As to the meaning of 'United Kingdom' see PARA 2 note 3.

6 Friendly Societies Act 1992 Sch 15 paras 16A(1), 16B(1) (Sch 15 paras 16A, 16B added by SI 1994/1984; and amended by SI 1997/2849).

7 'Policyholder' means a member whose contract with a directive society is a contract the effecting of which by the society constituted the carrying on of insurance business (other than reinsurance business) of any class: Friendly Societies Act 1992 Sch 15 para 18(2) (substituted by SI 1994/1984). A directive society is one to which the Friendly Societies Act 1992 s 37(2) or (3) applies: see PARA 2112 note 15. As to the meaning of 'insurance business' see PARA 2138 note 5; and as to the meaning of 'reinsurance business' see PARA 2139 note 3.

8 Friendly Societies Act 1992 Sch 15 paras 16A(2)(a), (b), 16B(2)(a), (b) (both as added and amended: see note 6).

9 Friendly Societies Act 1992 Sch 15 paras 16A(2), 16B(2) (both as added and amended: see note 6).

10 Friendly Societies Act 1992 Sch 15 paras 16A(3), 16B(3) (both as added and amended: see note 6).

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### **2364. Effect of failure to comply with relevant requirements.**

Failure to comply with the relevant requirements<sup>1</sup> of the Friendly Societies Act 1992, or any rules of a friendly society<sup>2</sup>, does not invalidate an amalgamation<sup>3</sup>, transfer of engagements<sup>4</sup> or conversion<sup>5</sup>; but a society which participates in an amalgamation or transfer, or converts into a company, and fails without reasonable excuse to comply with such a requirement, commits an offence<sup>6</sup>.

1 'Relevant requirement', with reference to the Friendly Societies Act 1992 or the rules of a friendly society, means a requirement of Pt VIII (ss 85-92), Sch 15, or of any rules prescribing the procedure to be followed by the society in approving or effecting an amalgamation, a transfer of engagements or its conversion into a company: ss 85(6), 86(11), 91(9), Sch 15 para 18(2) (substituted by SI 1994/1984).

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to amalgamations see PARA 2352.

4 As to transfers of engagements see PARA 2353.

5 As to the conversion of societies into companies see PARA 2359.

6 Friendly Societies Act 1992 Sch 15 para 17. The offence is punishable on summary conviction with a fine not exceeding level 4 on the standard scale: Sch 15 para 17. As to the standard scale see PARA 27 note 21.

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## (E) COMPENSATION FOR LOSS OF OFFICE

### **2365. Compensation for loss of office.**

The terms of an amalgamation<sup>1</sup>, transfer of engagements<sup>2</sup> of a friendly society<sup>3</sup>, or a conversion<sup>4</sup>, may include provision for compensation<sup>5</sup> for loss of office<sup>6</sup> or diminution of emoluments attributable to the amalgamation, transfer or conversion, to be paid by a participating society<sup>7</sup> to or in respect of the following persons<sup>8</sup>:

- 859 (1) the officers of the society which is to pay the compensation<sup>9</sup>;
- 860 (2) in the case of an amalgamation or transfer, the officers of any other participating society<sup>10</sup>;
- 861 (3) in the case of a transfer, the officers of any other person participating in the transfer<sup>11</sup>; and
- 862 (4) the appointed actuary<sup>12</sup> (if any) of any society participating in an amalgamation or transfer<sup>13</sup>.

Any such provision for compensation for loss of office must be approved by the society which is to pay the compensation by a special resolution<sup>14</sup> separate from any resolution approving the other terms of the amalgamation, transfer or conversion<sup>15</sup>. If compensation which has not been so authorised is received by an officer, it must be repaid<sup>16</sup>.

1 As to amalgamations see PARA 2352.

2 As to transfers of engagements see PARA 2353.

3 As to the meaning of 'friendly society' see PARA 2082.

4 As to the conversion of societies into companies see PARA 2359.

5 'Compensation' includes the provision of benefits in kind: Friendly Societies Act 1992 s 92(5).

6 'Loss of office' includes, in relation to an officer of an incorporated friendly society holding office, by virtue of his position in the society, in a subsidiary of the society or body jointly controlled by the society, the loss of that office: Friendly Societies Act 1992 s 92(5). As to the meaning of 'officer' see PARA 2115 note 11. As to the meaning of 'incorporated friendly society' see PARA 2082. As to the meanings of 'subsidiary' and 'jointly controlled body' see PARA 2134.

7 'Participating society' means, in relation to an amalgamation or transfer, a friendly society participating in the amalgamation or transfer; and, in relation to the conversion of a friendly society, that society: Friendly Societies Act 1992 s 92(5).

8 Friendly Societies Act 1992 s 92(1).

9 Friendly Societies Act 1992 s 92(2)(a).

10 Friendly Societies Act 1992 s 92(2)(b).

11 Friendly Societies Act 1992 s 92(2)(c).

- 12 As to the meaning of 'actuary' see PARA 2139 note 4.
- 13 Friendly Societies Act 1992 s 92(2)(d).
- 14 As to special resolutions see PARA 2306.
- 15 Friendly Societies Act 1992 s 92(3).
- 16 Friendly Societies Act 1992 s 92(4).

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## ***J. EXEMPTION FROM TAX***

### **2366. Exemption in respect of life or endowment business.**

A friendly society<sup>1</sup> may claim exemption from income tax and corporation tax (whether on income or chargeable gains) on profits arising from life or endowment business<sup>2</sup>. However, this provision:

- 863 (1) does not exempt a registered friendly society registered after 31 December 1957 which at any time during the three months ending with 3 May 1966 entered into any transaction in return for a single premium, being a transaction forming part of its life or endowment business<sup>3</sup>;
- 864 (2) does not exempt an incorporated friendly society which before incorporation was a registered friendly society as mentioned in head (1) above<sup>4</sup>;
- 865 (3) does not apply to profits arising from gross roll-up business<sup>5</sup>;
- 866 (4) does not apply to profits arising from specified life or endowment business consisting of: (a) the assurance of gross sums under contracts under which the total premiums payable for 12 months (or, in certain cases, the gross sum assured) exceed a specified amount<sup>6</sup>; or (b) the granting of annuities of annual amounts exceeding a specified amount<sup>7</sup>;
- 867 (5) does not apply to so much of the profits arising from life or endowment business as is attributable to contracts for the assurance of gross sums made on or after 20 March 1991 and expressed at the outset not to be made in the course of tax exempt life or endowment business<sup>8</sup>;
- 868 (6) as respects other life or endowment business ('tax exempt life or endowment business'), has effect subject to the provisions of the Income and Corporation Taxes Act 1988<sup>9</sup>.

The following particular provisions apply to a friendly society if its rules make no provision for it to carry on life or endowment business consisting of the assurance of gross sums exceeding £2,000 or the granting of annuities of annual amounts exceeding £416<sup>10</sup>:

- 869 (i) where at any time such a society amends its rules so as to cease to be such a society, any part of its life or endowment business relating to contracts made before that time and which immediately before that time was exempt from tax, continues to be so exempt<sup>11</sup>; conversely, where a society amends its rules so that it

becomes such a society, its previously effected non-exempt business remains non-exempt<sup>12</sup>;

- 870 (ii) similarly, where a society of such a kind acquires by way of transfer of engagements life or endowment business relating to contracts made before that time and which immediately before that time was exempt from tax or non-exempt, it remains exempt or non-exempt, as the case may be<sup>13</sup>.

Where at any time an insurance business transfer scheme has effect to transfer long term business to a friendly society, any life or endowment business which relates to contracts included in the transfer is not thereafter tax exempt life or endowment business<sup>14</sup>.

The tax exempt business of a friendly society which is converted into a company<sup>15</sup> continues to be exempt from corporation tax (whether on income or chargeable gains) on profits arising from it<sup>16</sup>.

1 In the Income and Corporation Taxes Act 1988, 'friendly society' without further qualification means an incorporated friendly society or a registered friendly society; 'incorporated friendly society' means a society incorporated under the Friendly Societies Act 1992; and 'registered friendly society' has the same meaning as in that Act: Income and Corporation Taxes Act 1988 s 466(2) (definitions added by the Finance (No 2) Act 1992 Sch 9 paras 1, 14). As to the meanings of 'incorporated friendly society' and 'registered friendly society' under the Friendly Societies Act 1992 see PARA 2082.

2 Income and Corporation Taxes Act 1988 s 460(1) (amended by the Finance (No 2) Act 1992 Sch 9 para 5). Provision was made for a registered friendly society to elect, up until 31 July 1992, that the Income and Corporation Taxes Act 1988 s 460(1) should not apply in certain circumstances: see s 462A (added by the Finance Act 1991 Sch 9 para 2; and amended by the Finance (No 2) Act 1992 Sch 9 para 9).

'Life or endowment business' means any business of effecting or carrying out contracts of insurance which fall within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3(1), Sch 1 Pt II para I, II or III (see PARA 90), any pension business, any other life assurance business and any business within Sch 1 Pt II para IV if the contract is made before 1 September 1996 or is made on or after that date and the effecting and carrying out of the contract also constitutes business within Sch 1 Pt II para I, II or III, but does not include: (1) the issue, in respect of a contract made before 1 September 1996, of a policy affording provision for sickness or other infirmity (bodily or mental) unless: (a) it also affords assurance for a gross sum independent of the sickness or infirmity; (b) not less than 60% of the premiums is attributable to the provision afforded during sickness or other infirmity; and (c) there is no bonus or addition which may be declared or accrue on the assurance of the gross sum; or (2) the assurance of any annuity the consideration for which consists of sums obtainable on the maturity or surrender of any other policy of assurance issued by the society which forms part of the tax exempt life or endowment business of the society: Income and Corporation Taxes Act 1988 s 466(1), (1A), (1B) (s 466(1) substituted, and s 466(1A), (1B) added, by the Finance Act 1996 s 171(1); and the Income and Corporation Taxes Act 1988 s 466(1) amended by SI 2001/3629). 'Pension business' means so much of a friendly society's life assurance business as is referable to contracts entered into for the purposes of a registered pension scheme, but where a pension scheme ceases to be a registered pension scheme by virtue of the withdrawal of registration of the pension scheme under the Finance Act 2004 s 157 (see **SOCIAL SECURITY AND PENSIONS**), any of the friendly society's life assurance business that was pension business when the pension scheme was a registered pension scheme is to be treated as ceasing to be pension business at the beginning of the period of account of the friendly society in which the pension scheme so ceases to be a registered pension scheme: Income and Corporation Taxes Act 1988 s 466(2A), (2B) (added by the Finance Act 2004 Sch 35 paras 2, 22). 'Life assurance business' means the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life, not being industrial assurance business: Income and Corporation Taxes Act 1988 s 466(2).

3 Income and Corporation Taxes Act 1988 s 460(2)(a) (amended by the Finance (No 2) Act 1992 Sch 9 para 5).

4 Income and Corporation Taxes Act 1988 s 460(2)(aa) (added by the Finance (No 2) Act 1992 Sch 9 para 5).

5 Income and Corporation Taxes Act 1988 s 460(2)(b) (amended by the Finance Act 2007 Sch 7 paras 2, 40(a)). 'Gross roll-up business' means business of any of the following kinds: (1) pension business; (2) child trust fund business; (3) individual savings account business; (4) life reinsurance business; and (5) overseas life assurance business: Income and Corporation Taxes Act 1988 ss 431(2), 431EA, 466(2) (definitions added by the Finance Act 2007 Sch 7 paras 2, 6, 10, 43). As to individual savings account business see **INCOME TAXATION** vol 23(1) (Reissue) PARA 1353.

6 The specified amounts are:

- 37 (1) for contracts made after the passing of the Finance Act 1995 (ie 1 May 1995), total annual premiums of £270 (Income and Corporation Taxes Act 1988 s 460(2)(c)(zai) (added by the Finance Act 1995 Sch 10 para 1(2)));
- 38 (2) for contracts made after the passing of the Finance Act 1991 (ie 25 July 1991) but before 1 May 1995, total annual premiums of £200 (Income and Corporation Taxes Act 1988 s 460(2)(c)(ai) (added by the Finance Act 1991 Sch 9 para 1; and amended by the Finance Act 1995 Sch 10 para 1(3)));
- 39 (3) for contracts made after 31 August 1990 but before 25 July 1991, total annual premiums of £150 (Income and Corporation Taxes Act 1988 s 460(2)(c)(i) (amended by the Finance Act 1991 Sch 9 para 1));
- 40 (4) for contracts made after 31 August 1987 but before 1 September 1990, total annual premiums of £100 (Income and Corporation Taxes Act 1988 s 460(2)(c)(ia) (added by the Finance Act 1990 Sch 9 para 6; and amended by the Finance Act 1991 Sch 9 para 1));
- 41 (5) for contracts made after 13 March 1984 but before 1 September 1987, a gross sum of £750 (Income and Corporation Taxes Act 1988 s 460(2)(c)(ii));
- 42 (6) for contracts made before 14 March 1984, a gross sum of £500 (s 460(2)(c)(iii)).

In determining the total premiums payable in any period of 12 months under heads (1)-(4) above, where the premiums are payable more frequently than annually, 10% must be disregarded, and so much of any premium as is charged for exceptional risk of death or disability is disregarded: s 460(3) (amended by the Finance Act 1990 Sch 9 para 6; the Finance Act 1991 Sch 9 para 1; the Finance Act 1995 Sch 10 para 1(4); and the Finance Act 2003 s 172(5)).

In applying the limits in heads (5) and (6) above, any bonus or addition declared upon a gross sum or annuity or accruing upon an assurance by reference to an increase in the value of any investments must be disregarded: Income and Corporation Taxes Act 1988 s 460(4).

Where the amount of premium payable, under a contract for the assurance of gross sums under tax exempt life or endowment business made after 31 August 1987 and before 1 May 1995, is increased by virtue of a variation made between 25 July 1991 and 31 July 1992, or between 1 May 1995 and 31 March 1996, the contract is treated as made at the time of the variation: s 460(4A), (4B) (added by the Finance Act 1991 Sch 9 para 1; and amended by the Finance Act 1995 Sch 10 para 1(5), (6)).

7 Income and Corporation Taxes Act 1988 s 460(2)(c). The maximum annual annuities are, in relation to heads (1)-(5) in note 6, £156, and in relation to head (6), £104: see s 460(2)(c)(zai)-(iii) (as added and amended: see note 6). In applying that amount, any bonus or addition declared on an annuity must be disregarded: see s 460(3) (as amended: see note 6).

8 Income and Corporation Taxes Act 1988 s 460(2)(ca) (added by the Finance Act 1991 Sch 9 para 1).

9 Income and Corporation Taxes Act 1988 s 460(2)(d).

10 See the Income and Corporation Taxes Act 1988 s 460(5) (s 460(5)-(10) amended by the Finance (No 2) Act 1992 Sch 9 para 5(4)). In addition to the provisions described in the text and notes 13-15, the provisions cited in note 6 head (6) and in note 7 have effect in relation to such a society as if for £500 and £104 there were substituted £2,000 and £416; and references to tax exempt life or endowment business must be construed accordingly: Income and Corporation Taxes Act 1988 s 460(6) (as so amended).

11 Income and Corporation Taxes Act 1988 s 460(7) (as amended: see note 10).

12 Income and Corporation Taxes Act 1988 s 460(8) (as amended: see note 10).

13 Income and Corporation Taxes Act 1988 s 460(9), (10) (as amended: see note 10).

14 Income and Corporation Taxes Act 1988 s 460(10A) (added by the Finance Act 1990 Sch 9 paras 6, 7; and amended by the Finance Act 2007 Sch 12 para 1(1), (2); and SI 2001/3629). This does not apply where the provisions of the Income and Corporation Taxes Act 1988 s 460(11), (12) apply (see the text and notes 15-16): s 460(10A) (as so added and amended).

15 Ie under the Friendly Societies Act 1992 s 91: see PARA 2359.

16 Income and Corporation Taxes Act 1988 s 460(11) (amended by the Finance (No 2) Act 1992 Sch 9 para 5(5); the Finance Act 2007 Sch 12 para 1(1), (3); and SI 2001/3629). Where at any time an insurance company acquires by way of transfer of engagements from a friendly society any life or endowment business consisting of business which: (1) relates to contracts made before that time; and (2) immediately before that time was tax exempt life or endowment business, that business continues to be exempt from corporation tax (whether on income or chargeable gains) on profits arising from it: Income and Corporation Taxes Act 1988 s 460(12) (substituted by the Finance Act 2007 Sch 12 para 1(1), (4)). However, if any contracts constituting or forming part of the business of a company covered by the Income and Corporation Taxes Act 1988 s 460(11) or s 460(12) are varied during an accounting period of the company so as to increase the premiums payable under them, the business relating to those contracts is not exempt from corporation tax for that or any subsequent accounting period: s 460(13) (added by the Finance Act 2007 Sch 12 para 1(1), (4)). As to the meaning of 'insurance company' see the Income and Corporation Taxes Act 1988 s 431(2); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1352 (definition applied by s 466(2) (amended by the Finance Act 1996 s 171(2)(a))). For the purposes of the Corporation Tax Acts, any part of a company's business which is exempt from corporation tax by virtue of the Income and Corporation Taxes Act 1988 s 460(11) or s 460(12) is to be treated as a separate business from any other business carried on by the company: s 460(14) (added by the Finance Act 2007 Sch 12 para 1(1), (4)). The Treasury may by regulations provide that, where any part of the business of a company is exempt from corporation tax by virtue of the Income and Corporation Taxes Act 1988 s 460(11) or s 460(12), the Corporation Tax Acts have effect subject to such modifications (or exceptions) as the Treasury considers appropriate and such regulations may make different provision for different cases, may include any incidental, supplementary, consequential or transitional provisions which the Treasury considers appropriate, and may include retrospective provision: Income and Corporation Taxes Act 1988 s 460(15), (16) (added by the Finance Act 2007 Sch 12 para 1(1), (5)). As to the meaning of the 'Corporation Tax Acts' see PARA 2367 note 2. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. See the Insurance Companies (Tax Exempt Business) Regulations 2007, SI 2007/2145.

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### **2367. Application of Corporation Tax Acts.**

Generally<sup>1</sup>, the Corporation Tax Acts<sup>2</sup> apply to life or endowment business<sup>3</sup> carried on by friendly societies<sup>4</sup> as they apply to mutual life assurance business or other long term business<sup>5</sup> carried on by insurance companies<sup>6</sup>, except that the Treasury may by regulations<sup>7</sup> modify the Acts, in particular to provide that any part of a business is to be treated as a separate business<sup>8</sup>.

The provisions of those Acts which apply on the transfer of long term business by insurance companies<sup>9</sup> apply in the same way to the transfer of the whole or part of the business of a friendly society to another friendly society, or on the transfer of business from a friendly society to a company which is not a friendly society, and on the conversion of a friendly society into such a company, subject to a like power of the Treasury to make modifications<sup>10</sup>.

The Treasury may by regulations provide for modifications where the transferee is a friendly society<sup>11</sup>.

1 le subject to the Income and Corporation Taxes Act 1988 s 460(1): see PARA 2366.

2 'Corporation Tax Acts' means the enactments relating to the taxation of the income and chargeable gains of companies and of company distributions (including provisions relating also to income tax): Income and Corporation Taxes Act 1988 s 831(1)(a). See **INCOME TAXATION** vol 23(1) (Reissue) PARA 21.

3 As to the meaning of 'life or endowment business' see PARA 2366 note 2.

4 As to the meaning of 'friendly society' for these purposes see PARA 2366 note 1.



5 'Long term business' means business which consists of the effecting or carrying out of contracts of long term insurance: Income and Corporation Taxes Act 1988 ss 431(1), 466(2) (amended by the Finance Act 1990 Sch 6 para 1; the Finance Act 1996 s 171(2)(b); and SI 2001/3629).

6 See **INCOME TAXATION** vol 23(2) (Reissue) PARA 1352 et seq.

7 Regulations may make different provision for different cases and may include provision having retrospective effect: Income and Corporation Taxes Act 1988 s 463(4) (added by the Finance Act 1990 s 50). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 Income and Corporation Taxes Act 1988 s 463(1) (renumbered by the Finance Act 1990 s 50; and amended by the Finance (No 2) Act 1992 Sch 9 paras 1, 10; the Finance Act 1996 s 171(5), (6); and SI 2001/3629). See the Friendly Societies (Modification of the Corporation Tax Acts) Regulations 2005, SI 2005/2014 (amended by SI 2007/2134).

9 As to the applicable provisions see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1352 et seq. As to the meaning of 'insurance company' see the Income and Corporation Taxes Act 1988 s 431(2); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1352 (definition applied by s 466(2) (amended by the Finance Act 1996 s 171(2)(a))).

10 Income and Corporation Taxes Act 1988 s 463(2) (added by the Finance Act 1990 s 50; and amended by SI 2001/3629).

11 Income and Corporation Taxes Act 1988 s 463(3) (added by the Finance Act 1990 s 50; and amended by SI 2001/3629).

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### **2368. Exemption in relation to other business: registered friendly societies.**

A registered friendly society<sup>1</sup> may claim exemption from corporation tax (whether on income or chargeable gains) on profits other than those arising from life or endowment business<sup>2</sup>.

Where a society of a specified description<sup>3</sup> makes a payment after 26 March 1974 (or such later date as may be directed) to a member in respect of his interest in the society, otherwise than in the course of his life or endowment business, which exceeds the aggregate of sums paid to him by way of contribution or deposits (after deduction of payments and repayments made to him by the society), the excess is a qualifying distribution<sup>4</sup> for the purpose of corporation tax and income tax<sup>5</sup>.

Where a friendly society is converted into a company<sup>6</sup>, and immediately before the conversion was exempt from tax in respect of profits on business other than life or endowment business, the company is similarly exempt as long as there is no increase in the scale of benefits provided by the company on that business<sup>7</sup>.

Where: (1) at any time an insurance company<sup>8</sup> acquires by way of transfer of engagements from a registered friendly society any business other than life or endowment business; and (2) immediately before that time the society was exempt from corporation tax on profits arising from that business, the insurance company is exempt from corporation tax on its profits arising from any part of that business which relates to contracts made before that time<sup>9</sup>.

1 As to the meaning of 'registered friendly society' for these purposes see PARA 2366 note 1.

2 Income and Corporation Taxes Act 1988 s 461(1) (amended by the Income Tax Act 2007 Sch 1 paras 1, 81, Sch 3 Pt 1). The amendment made by the Income Tax Act 2007 removes the exemption from income tax as from the year 2007-2008. As to the meaning of 'life or endowment business' see PARA 2366 note 2.

3 Ie a society to which the Income and Corporation Taxes Act 1988 s 461(2) applies, namely any society registered after 31 May 1973, unless:

43 (1) its business is limited to the provision under its rules of benefits for or in respect of employees of a particular employer or such other group for the time being approved by Her Majesty's Revenue and Customs; or

44 (2) it was registered before 27 March 1974 and its rules limit the aggregate which may be paid by a member as contributions and deposits to £1 per month or such greater amount as Her Majesty's Revenue and Customs may authorise,

or which was registered before 1 June 1973 and is subject to a direction that s 461(2) is to apply: s 461(2), (7) (s 461(2), (4), (6) amended, s 461(7)-(9) substituted, and s 461(11) added, by SI 2001/3629). For further provision relating to directions see the Income and Corporation Taxes Act 1988 s 461(6), (8), (9) (s 461(6) as so amended; s 461(8), (9) as so substituted). As to Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq; **INCOME TAXATION** vol 23(1) (Reissue) PARA 31.

For the purposes of s 461, s 461C (see PARA 2369): (a) any group of persons which was approved for the purposes of head (1) above immediately before 1 December 2001 is to be treated as having been approved on that date; (b) any greater amount which was authorised for the purposes of head (2) above immediately before 1 December 2001 is to be treated as having been authorised on that date; and (c) where a direction that s 461(2) is to apply to a society was in force immediately before 1 December 2001, a direction in relation to that society is to be treated as having been made on that date: s 461(11) (as so added).

A registered friendly society formed on the amalgamation of two or more societies is treated as registered before 1 June 1973 if at the time of the amalgamation s 461(2) did not apply to any of the societies amalgamated, but otherwise is treated as registered at that time: s 461(10).

4 See **INCOME TAXATION** vol 23(1) (Reissue) PARA 912.

5 Income and Corporation Taxes Act 1988 s 461(3).

6 Ie under the Friendly Societies Act 1992 s 91: see PARA 2359.

7 Income and Corporation Taxes Act 1988 s 461(4) (as amended (see note 3); and further amended by the Finance Act 2007 Sch 1 paras 1, 81, Sch 3 Pt 1). A part of a company's business which is exempt by virtue of the Income and Corporation Taxes Act 1988 s 461(4) or s 461(4A) (see the text and note 9) is treated as a separate business for the purposes of the Corporation Tax Acts: Income and Corporation Taxes Act 1988 s 461(5) (amended by the Finance Act 2007 Sch 12 para 4(1), (3)). As to the meaning of 'Corporation Tax Acts' see PARA 2367 note 2. The Treasury may by regulations provide that, where any part of the business of a company is exempt from corporation tax by virtue of the Income and Corporation Taxes Act 1988 s 461(4) or s 461(4A), the Corporation Tax Acts have effect subject to such modifications (or exceptions) as the Treasury considers appropriate; and such regulations may make different provision for different cases, may include any incidental, supplementary, consequential or transitional provisions which the Treasury considers appropriate and may include retrospective provision: Income and Corporation Taxes Act 1988 s 461(12), (13) (added by the Finance Act 2007 Sch 12 para 4(1), (4)). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. See the Insurance Companies (Tax Exempt Business) Regulations 2007, SI 2007/2145.

8 As to the meaning of 'insurance company' see the Income and Corporation Taxes Act 1988 s 431(2); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1352 (definition applied by s 466(2) (amended by the Finance Act 1996 s 171(2)(a))).

9 Income and Corporation Taxes Act 1988 s 461(4A) (s 461(4A), (4B) added by the Finance Act 2007 Sch 12 para 6(3)). However, if during an accounting period of the insurance company there is an increase in the scale of benefits which it undertakes to provide in the course of carrying on any such part of that business, the company is not exempt from corporation tax by virtue of the Income and Corporation Taxes Act 1988 s 461(4A) for that or any subsequent accounting period: s 461(4B) (as so added).

Common to All Friendly Societies/J. EXEMPTION FROM TAX/2369. Exemption in relation to other business: incorporated friendly societies.

### **2369. Exemption in relation to other business: incorporated friendly societies.**

A qualifying society<sup>1</sup> is entitled to claim exemption from corporation tax (whether on income or chargeable gains) on profits arising from business other than life or endowment business<sup>2</sup>.

Where an incorporated friendly society which is not a qualifying society makes a payment to a member in respect of his interest in the society, otherwise than in the course of life or endowment business, which exceeds the aggregate of sums paid to him in contribution or deposits (after deduction of payments and repayments made to him by the society), the excess is a qualifying distribution<sup>3</sup> for the purpose of corporation tax and income tax<sup>4</sup>.

Where at any time a qualifying society is converted into a company, the company is exempt from tax on its profits arising from any part of its business other than life or endowment business, which relates to contracts made before that time<sup>5</sup>, as long as there is no increase in the scale of benefits provided by the company on that business<sup>6</sup>.

Where: (1) at any time an insurance company<sup>7</sup> acquires by way of transfer of engagements from a qualifying society any business other than life or endowment business; and (2) immediately before that time the society was exempt from corporation tax on profits arising from that business, the insurance company is exempt from corporation tax on its profits arising from any part of that business which relates to contracts made before that time<sup>8</sup>.

1 'Qualifying society' means an incorporated friendly society:

- 45 (1) which immediately before incorporation was a registered friendly society to which the Income and Corporation Taxes Act 1988 s 461(2) did not apply (see PARA 2366) (s 461A(1)(a) (ss 461A-461C added by the Finance (No 2) Act 1992 Sch 9 paras 1, 7));
- 46 (2) which was formed otherwise than by the incorporation of a registered friendly society or the amalgamation of two or more friendly societies, and whose business is limited to the provision under its rules of benefits for or in respect of employees of a particular employer or such other group as is for the time being approved by Her Majesty's Revenue and Customs (Income and Corporation Taxes Act 1988 s 461A(1)(b), (2) (as so added; and amended by SI 2001/3629)); or
- 47 (3) which was formed by the amalgamation of two or more friendly societies provided that at the time of the amalgamation the Income and Corporation Taxes Act 1988 s 461(2) applied to none of the registered friendly societies, and all of the incorporated friendly societies being amalgamated (if any) were qualifying societies (s 461A(1)(c), (3) (as so added)),

and no direction is in force to the effect that the society is to cease to be a qualifying society, made by Her Majesty's Revenue and Customs under s 461C (withdrawal of qualifying status) is in force (s 461A(1) (as so added)). Any group of persons which was approved for these purposes by the Friendly Societies Commission immediately before 1 December 2001 is to be treated as having been approved by Her Majesty's Revenue and Customs on that date: s 461A(4) (added by SI 2001/3629). As to the Friendly Societies Commission, which has ceased to exist, see PARA 2105. As to Her Majesty's Revenue and Customs see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 900 et seq; **INCOME TAXATION** vol 23(1) (Reissue) PARA 31.

As to the withdrawal of qualifying status see the Income and Corporation Taxes Act 1988 s 461C (as so added; and amended by SI 2001/3629).

As to the meanings of 'incorporated friendly society' and 'registered friendly society' for these purposes see PARA 2366 note 1.

2 Income and Corporation Taxes Act 1988 s 461B(1) (as added (see note 1); and amended by the Income Tax Act 2007 Sch 1 paras 1, 82(1), (2), Sch 3 Pt 1). The amendment made by the Income Tax Act 2007 removes the exemption from income tax as from the year 2007-2008. As to the meaning of 'life or endowment business' see PARA 2366 note 2.

This does not apply to profits arising by reason of the society's interest in a subsidiary or a body over which it exercises joint control: Income and Corporation Taxes Act 1988 s 461B(2) (as so added). As to the meanings of 'subsidiary' and 'jointly controlled body' see PARA 2134.

3 See **INCOME TAXATION** vol 23(1) (Reissue) PARA 912.

4 Income and Corporation Taxes Act 1988 s 461B(3) (as added: see note 1). Where an incorporated friendly society was a registered friendly society immediately before incorporation, this provision applies with appropriate modifications: see s 461B(4) (as so added; and amended by SI 2001/3629).

5 Income and Corporation Taxes Act 1988 s 461B(5) (as added (see note 1); and amended by the Income Tax Act 2007 Sch 1 paras 1, 82(1), (3), Sch 3 Pt 1). Any part of a company's business to which an exemption under the Income and Corporation Taxes Act 1988 s 461B(5) or s 461B(6A) (see the text and note 8) relates is treated as a separate business for the purposes of the Corporation Tax Acts: Income and Corporation Taxes Act 1988 s 461B(7) (as so added; and amended by the Finance Act 2007 Sch 12 para 5(1), (3)). As to the meaning of 'Corporation Tax Acts' see PARA 2367 note 2. The Treasury may by regulations provide that, where any part of the business of a company is exempt from corporation tax by virtue of the Income and Corporation Taxes Act 1988 s 461B(5) or s 461B(6A), the Corporation Tax Acts have effect subject to such modifications (or exceptions) as the Treasury considers appropriate; and such regulations may make different provision for different cases, may include any incidental, supplementary, consequential or transitional provisions which the Treasury considers appropriate and may include retrospective provision: Income and Corporation Taxes Act 1988 s 461B(8), (9) (s 461B as so added; and s 461B(8), (9) added by the Finance Act 2007 Sch 12 para 5(1), (4)). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. See the Insurance Companies (Tax Exempt Business) Regulations 2007, SI 2007/2145.

6 Income and Corporation Taxes Act 1988 s 461B(6) (as added (see note 1); and substituted by the Finance Act 2007 Sch 12 para 5(1), (2)).

7 As to the meaning of 'insurance company' see the Income and Corporation Taxes Act 1988 s 431(2); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1352 (definition applied by s 466(2) (amended by the Finance Act 1996 s 171(2)(a))).

8 Income and Corporation Taxes Act 1988 s 461B(6A) (s 461B as added (see note 1); and s 461B(6A), (6B) added by the Finance Act 2007 Sch 12 para 5(1), (2)). However, if during an accounting period of the insurance company there is an increase in the scale of benefits which it undertakes to provide in the course of carrying on any such part of that business, the company is not exempt from corporation tax by virtue of the Income and Corporation Taxes Act 1988 s 461B(6A) for that or any subsequent accounting period: s 461B(6B) (as so added).

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### **2370. Conditions for tax exempt business.**

The provision conferring entitlement to claim exemption from tax on life or endowment business<sup>1</sup> does not apply:

871 (1) to so much of the profits arising from any business as is attributable to a policy which is not a qualifying policy<sup>2</sup> and is not an excluded policy<sup>3</sup>, and would not be a qualifying policy if all excluded policies with other friendly societies were left out of account<sup>4</sup>;

872 (2) in relation to a policy issued in respect of certain contracts<sup>5</sup> for the assurance of a gross sum, where there has been an infringement of relevant statutory provisions<sup>6</sup>, to so much as is attributable to that policy of the profits of the friendly society or insurance company concerned<sup>7</sup>.

1     le the Income and Corporation Taxes Act 1988 s 460(1): see PARA 2366. As to the meaning of 'life or endowment business' see PARA 2366 note 2.

2     See the Income and Corporation Taxes Act 1988 s 267, Sch 15 para 6(2); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1004.

3     A policy is an excluded policy if: (1) it is a policy held otherwise than with the friendly society or insurance company; or (2) the person who has the contract effecting the policy acquired the rights under it on an assignment otherwise than for money or money's worth: Income and Corporation Taxes Act 1988 s 462(1A) (added by the Finance Act 2007 s 45(1), (2)). As to the meaning of 'friendly society' for these purposes see PARA 2366 note 1. As to the meaning of 'insurance company' see the Income and Corporation Taxes Act 1988 s 431(2); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1352 (definition applied by s 466(2) (amended by the Finance Act 1996 s 171(2)(a))).

4     Income and Corporation Taxes Act 1988 s 462(1) (substituted by the Finance Act 2007 s 45(1), (2)). This does not withdraw exemption in relation to profits arising from any part of a business relating to contracts made not later than 3 May 1966: see the Income and Corporation Taxes Act 1988 s 462(2) (amended by the Finance (No 2) Act 1992 Sch 9 paras 1, 8; and the Finance Act 2007 s 45(1), (3)).

5     le contracts made on or after 1 June 1984 and before 19 March 1985: Income and Corporation Taxes Act 1988 s 462(3).

6     le the Income and Corporation Taxes Act 1988 Sch 15 para 3(2)-(11): see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1004.

7     Income and Corporation Taxes Act 1988 s 462(3) (amended by the Finance Act 2007 s 45(1), (4)). This does not affect the status of a qualifying policy: Income and Corporation Taxes Act 1988 s 462(4).

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### **2371. Maximum benefits.**

A person is not entitled to have at any time outstanding contracts with any one or more friendly societies<sup>1</sup>, registered branches<sup>2</sup> or insurance companies<sup>3</sup> which (taking them all together) are for the assurance of more than £750 by way of gross sum under business which is afforded exemption from corporation tax<sup>4</sup>, or more than £156 by way of annuity under such business<sup>5</sup>, but where all the contracts were made before 14 March 1984, the figures are £2,000 and £416 respectively<sup>6</sup>.

With respect to contracts for the assurance of gross sums, a member may not have outstanding contracts under which the total annual premiums exceed a specified amount<sup>7</sup> (unless all were made before 1 September 1987)<sup>8</sup>.

A friendly society, registered branch or insurance company may require a person to make a statutory declaration that the total amount assured under outstanding contracts entered into by that person, or the total premiums payable, do not exceed the applicable limits<sup>9</sup>.

1     As to the meaning of 'friendly society' for these purposes see PARA 2366 note 1.

2     As to the meaning of 'registered branch' see PARA 2091; definition applied by the Income and Corporation Taxes Act 1988 s 466(2) (amended by the Finance (No 2) Act 1992 Sch 9 para 14).

3     As to the meaning of 'insurance company' see the Income and Corporation Taxes Act 1988 s 431(2); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1352 (definition applied by s 466(2) (amended by the Finance Act 1996 s 171(2)(a))).

4     le under the Income and Corporation Taxes Act 1988 s 460: see PARA 2366.

5 Income and Corporation Taxes Act 1988 s 464(2) (amended by the Finance Act 2007 Sch 12 para 2(1), (2)).

6 Income and Corporation Taxes Act 1988 s 464(1). In applying the limits, any bonus or addition declared upon a gross sum or annuity or accruing upon an assurance by reference to an increase in the value of any investments must be disregarded: s 464(5)(a).

Where the amount of premium payable, under a contract for the assurance of gross sums under business which is afforded exemption from corporation tax by s 460 (see PARA 2366) if the contract is made after 31 August 1987 and before 1 May 1995, is increased by virtue of a variation made between 25 July 1991 and 31 July 1992 or made between 1 May 1995 and 31 March 1996, the contract is treated as made at the time of the variation: s 464(4A), (4B) (added by the Finance Act 1991 Sch 9 para 3; and amended by the Finance Act 1995 Sch 10 para 2; and the Income and Corporation Taxes Act 1988 s 464(4A) further amended by the Finance Act 2007 Sch 12 para 2(1), (4)).

For further matters to be taken into account or disregarded in applying the limits described in these provisions see the Income and Corporation Taxes Act 1988 s 464(4) (amended by the Finance Act 1990 s 49(4)); the Income and Corporation Taxes Act 1988 s 464(5) (amended by the Finance (No 2) Act 1992 Sch 9 para 11); and the Income and Corporation Taxes Act 1988 s 464(6) (amended by the Finance Act 2007 Sch 12 para 2(1), (5)).

7 In the case of contracts under which the total premiums payable in any period of 12 months exceed £270; or in the case of contracts made before 1 May 1995, £200; or in the case of contracts made before 25 July 1991 (ie the passing of the Finance Act 1991), £150; or in the case of contracts made before 1 September 1990, £100: Income and Corporation Taxes Act 1988 s 464(3) (amended by the Finance Act 1990 s 49(3); the Finance Act 1991 Sch 9 para 3; the Finance (No 2) Act 1992 Sch 9 para 11; and the Finance Act 1995 s 54, Sch 10 para 2).

In determining the total premiums payable in any period of 12 months, there must be disregarded: (1) where the premiums are payable more frequently than annually, 10%; (2) so much of any premium as is charged for exceptional risk of death; and (3) £10 of the premiums payable under a contract made before 1 September 1987 by a society other than a new society: Income and Corporation Taxes Act 1988 s 464(5)(d) (amended by the Finance (No 2) Act 1992 Sch 9 para 11).

8 Income and Corporation Taxes Act 1988 s 464(3) (as amended: see note 7).

9 Income and Corporation Taxes Act 1988 s 464(7) (amended by the Finance (No 2) Act 1992 Sch 9 para 11; and the Finance Act 2007 Sch 12 para 2(1), (6)). As to statutory declarations see **CIVIL PROCEDURE** vol 11 (2009) PARA 1024.

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### **2372. Further provisions as to old societies.**

If an old society<sup>1</sup> begins to carry out tax exempt life or endowment business or to carry it out on an enlarged scale or of a new character, and it appears to Her Majesty's Revenue and Customs<sup>2</sup> expedient for the protection of the revenue, Her Majesty's Revenue and Customs may direct that the society is to be treated as a new society<sup>3</sup>. An old society may appeal to the Special Commissioners against the direction within 30 days on the ground that it has not begun to carry out business as mentioned or that the direction is not necessary for the protection of the revenue<sup>4</sup>.

A direction continues to have effect where the old society is a registered society which becomes an incorporated society, so that the incorporated society is treated as a new society<sup>5</sup>.

1 An 'old society' is a friendly society which is not a new society: Income and Corporation Taxes Act 1988 s 465(1). A 'new society' is: (1) a registered friendly society registered after 3 May 1966 or during the period of three months ending with that date but which did not before that date carry on any life or endowment business;

or (2) an incorporated friendly society other than one which, before its incorporation, was a registered friendly society not within head (1) above: s 466(2) (definition added by the Finance (No 2) Act 1992 Sch 9 paras 1, 14). As to the meanings of 'friendly society', 'registered friendly society' and 'incorporated friendly society' for these purposes see PARA 2366 note 1. As to the meaning of 'life or endowment business' see PARA 2366 note 2.

2     le having regard to the restrictions on qualifying policies: see the Income and Corporation Taxes Act 1988 s 267, Sch 15 paras 3(1)(b), 4(3)(b); and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1004.

3     See the Income and Corporation Taxes Act 1988 s 465(2)-(4) (s 465(3) amended by the Finance Act 1991 Sch 19 Pt V).

4     Income and Corporation Taxes Act 1988 s 465(5).

5     Income and Corporation Taxes Act 1988 s 465(6) (added by the Finance (No 2) Act 1992 Sch 9 para 12).

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### **2373. Assets of branches after incorporation of registered friendly society.**

Where any assets of a branch<sup>1</sup> of a registered friendly society<sup>2</sup> have been identified in a scheme regarding the exclusion from the transfer of property and rights of a society on its incorporation<sup>3</sup>, the assets are treated, in relation to any time after the incorporation, as assets of the society, and tax liabilities arising from them are liabilities of the society rather than of the branch<sup>4</sup>. The society may, however, recover the amount of any tax paid from the trustees in whom the assets are vested<sup>5</sup>.

1     As to branches of societies see PARA 2091.

2     As to the meaning of 'registered friendly society' for this purpose see PARA 2366 note 1.

3     le under the Friendly Societies Act 1992 s 6(5): see PARA 2091.

4     Income and Corporation Taxes Act 1988 s 465A(1), (2) (s 465A added by the Finance (No 2) Act 1992 Sch 9 paras 1, 13).

5     Income and Corporation Taxes Act 1988 s 465A(3) (as added: see note 4).

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## **K. PROTECTION FOR POLICY HOLDERS**

### **2374. Financial Services Compensation Scheme.**

The Financial Services Authority has established the Financial Services Compensation Scheme<sup>1</sup> to compensate persons in cases where relevant persons<sup>2</sup> are unable, or are likely to be unable, to satisfy claims against them<sup>3</sup>.

1     le under the Financial Services and Markets Act 2000 Pt XV (ss 212-224): see PARA 584. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2     A 'relevant person' is a person who is an authorised person at the time the act or omission giving rise to the claim against him took place, or an appointed representative at that time: Financial Services and Markets Act 2000 s 213(9), (10). Claims against a friendly society or registered branch will accordingly fall within the scope of the scheme where the society or branch was a relevant person at that time.

3     For detailed discussion of the Financial Services Compensation Scheme see PARA 583 et seq.

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## ***L. PERSONS SERVING IN RESERVE AND AUXILIARY FORCES***

### **2375. Protection of persons serving in reserve and auxiliary forces.**

In the case of persons performing relevant service, relief is afforded against the forfeiture of life assurance policies effected with friendly societies<sup>1</sup> for the non-payment of premiums and against the consequences of non-payment of contributions to friendly societies<sup>2</sup>. Relevant service for this purpose is, generally, service in the naval, military or air forces of the Crown otherwise than on a normal regular engagement, and is considered elsewhere in this work<sup>3</sup>.

1     As to the meaning of 'friendly society' for this purpose see PARA 2376 note 2.

2     See the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt VI (ss 54-59). As to the protection of life assurance policies against forfeiture see PARAS 2376-2378; and as to relief in respect of the consequences of non-payment of contributions see PARA 2379. As to power to extend Pt VI to the Isle of Man and the Channel Islands by Order in Council, subject to any exceptions, adaptations and modifications see s 59(3); and as to the exercise of this power see the Reserve and Auxiliary Forces (Industrial Assurance and Friendly Societies) (Channel Islands) Order 1952, SI 1952/165; and the Reserve and Auxiliary Forces (Industrial Assurance and Friendly Societies) (Isle of Man) Order 1952, SI 1952/166.

3     See the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 64(1), Sch 1; the Reserve Forces Act 1980 s 146; and **ARMED FORCES** vol 2(2) (Reissue) PARA 79.

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### **2376. Protection of life policy.**

Where a policy<sup>1</sup> of assurance upon human life in respect of which there are separate premiums, effected before 1 December 2001 with a friendly society<sup>2</sup> (whether registered or not<sup>3</sup>) other than a collecting society<sup>4</sup>, or after that date with a friendly society, has been forfeited<sup>5</sup> for non-payment of a premium or premiums, the owner<sup>6</sup> of the policy, whether or not he is himself a



serviceman, may obtain relief provided that certain conditions are fulfilled<sup>7</sup>. These are that: (1) the forfeiture must have been for non-payment of a relevant premium or premiums (namely a premium or premiums which fell due during a serviceman's period of relevant service<sup>8</sup> or within a specified period from its ending<sup>9</sup> or before the beginning of the period of service on a policy which was in force immediately before the beginning of the service<sup>10</sup>); (2) at the beginning of the period of service one year's premiums or more must have been paid on the policy<sup>11</sup>; and (3) it must appear on the application for reinstatement of the policy that at the time of the forfeiture the owner was unable to pay by reason of circumstances directly or indirectly attributable to the serviceman's<sup>12</sup> performing the period of relevant service or, if it had ended, to his having performed it<sup>13</sup>.

If these conditions are fulfilled and the owner of the policy or any other person on his behalf at any time before the expiration of six months from the date of the ending of the period of relevant service in question<sup>14</sup> duly makes an application to the society for reinstatement of the policy<sup>15</sup>, the society must grant the application<sup>16</sup> and indorse the policy or serve upon the applicant a notice to that effect<sup>17</sup>. If, however, at the time when the forfeiture took place, the society was entitled to forfeit the policy by reason of non-payment of any premium not being a relevant premium as well as by reason of non-payment of the relevant premium or premiums, then it is not under any obligation to reinstate the policy unless the premium or premiums other than relevant premiums are paid within 28 days from the time when the granting of the application is notified<sup>18</sup>. If the society refuses to reinstate the policy it must serve upon the applicant a notice in a prescribed form, which includes a statement of the applicant's right of appeal<sup>19</sup>.

A complaint may be made to the ombudsman scheme<sup>20</sup> in relation to any refusal by a company or society to grant an application for reinstatement, and from any termination or shortening by it of a period of protection and from any decision of it as to the length of time for which a period of protection is to be fixed or extended; and, where an ombudsman determines a complaint in favour of the complainant in circumstances in which a period of protection is required to be fixed or extended, the length of it is to be determined by him instead of by the company or society<sup>21</sup>.

1 'Policy' includes a contract of assurance in respect of which no specific document constituting the contract is issued: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 59(2). A policy of assurance upon human life for this purpose includes an endowment policy: cf s 56(3), (6); and see PARA 2377.

2 As to the meaning of 'friendly society' see PARA 2082; definition applied by the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 59(2) (definition added by SI 2001/3647).

3 It is submitted that the phrase 'whether registered or not' operates to apply the provisions described in this paragraph and PARAS 2377-2379 not only to unregistered societies, but also to incorporated societies, particularly since the permitted purposes of a registered friendly society and those of an incorporated friendly society are the same: see the Friendly Societies Act 1974 s 7(1)(a); the Friendly Societies Act 1992 Sch 2; and PARA 2096. References to a 'registered friendly society' include references to a branch of such a society: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 59(2).

4 For this purpose, 'collecting society' means a friendly society which, at the time when the policy in question was effected, carried on industrial assurance business within the meaning of the Industrial Assurance Act 1923 s 1 (now repealed): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 55(1A) (added by SI 2001/3647). As to collecting societies see PARA 2088.

5 References to 'forfeiture of a policy' are to be construed, in a case where the policy provides that on a default in the payment of premiums the policy is to be converted into a free policy for a reduced amount, as including references to such a conversion: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 59(2).

6 'Owner' means, in relation to a policy effected with a friendly society other than a collecting society, the person who is for the time being the person entitled to receive the sums payable under the policy on maturity, and means, in relation to a policy which has been forfeited, the person who would be so entitled if the policy were still in force: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 59(2).

- 7 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 55(1), (2), applying s 54(2), (4) (s 55(1) substituted by SI 2001/3647).
- 8 As to the meaning of 'relevant service' see PARA 2375; and **ARMED FORCES** vol 2(2) (Reissue) PARA 79.
- 9 The three months or twice the duration of the period of service, whichever is the shorter: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 54(2)(a); applied by s 55(2).
- 10 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 54(2)(b); applied by s 55(2).
- 11 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 54(2); applied by s 55(2).
- 12 'Serviceman' means a man who performs a period of relevant service: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 64(1).
- 13 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 55(2), applying s 54(4). As to evidence regarding the performance of relevant service see s 60; and **ARMED FORCES** vol 2(2) (Reissue) PARA 80.
- 14 As to the circumstances in which an application or an appeal may be granted out of time see the Reserve and Auxiliary Forces (Protection of Friendly Society Life Policies) Regulations 1951, SI 1951/1408, reg 7 (amended by SI 2001/3647). As to the power under which these regulations were made see PARA 2378. See also note 20.
- 15 As to the application see further the Reserve and Auxiliary Forces (Protection of Friendly Society Life Policies) Regulations 1951, SI 1951/1408, reg 2. See also note 20.
- 16 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 55(2). As to the adjustment of rights under policies reinstated see PARA 2329.
- 17 Reserve and Auxiliary Forces (Protection of Friendly Society Life Policies) Regulations 1951, SI 1951/1408, reg 3. As to the service of notices see reg 8. Failure by a registered friendly society to comply with the regulations is an offence: see PARA 2378.
- 18 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 55(2) proviso.
- 19 Reserve and Auxiliary Forces (Protection of Friendly Society Life Policies) Regulations 1951, SI 1951/1408, reg 4, Schedule (amended by SI 2001/3647). See note 17.
- 20 The under the Financial Services and Markets Act 2000: see PARA 2350.
- 21 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 54(9) (s 54(9) amended, and s 54(9A) added, by SI 2001/3647); applied by the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 55(3). A complaint to the ombudsman scheme made under s 54(9) is to be treated as if it were a complaint to which the voluntary jurisdiction of the scheme applies; and the scheme operator may make such adaptations of the voluntary jurisdiction rules as appear to it to be necessary in the circumstances for the determination of such a complaint: s 54(9) (as so amended). As to the meanings of 'voluntary jurisdiction of the scheme' and 'voluntary jurisdiction rules' see the Financial Services and Markets Act 2000 s 227(3), (12); and PARA 578 (definition applied by the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 54(9A) (as so added)).

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### **2377. Adjustment of rights under policies protected.**

Where a policy is reinstated<sup>1</sup>, the amount or aggregate amount of any relevant premium or premiums<sup>2</sup> remaining unpaid is, where no claim on the policy has arisen, written off by varying the terms of the policy and, where a claim has arisen, set off against the claim<sup>3</sup>. The time for writing off is at the expiration of 28 days from the date of the ending of a specified period<sup>4</sup> from

the termination of the relevant service or, if the policy was reinstated after the ending of that period, from the date on which the decision for reinstatement was notified<sup>5</sup>. Where at the time for writing off there are relevant arrears on the policy and the policy is then in force and no claim has arisen under it, the terms of the policy are varied as follows<sup>6</sup>. If the policy is a whole life policy, the relevant arrears are extinguished by a reduction of the sum assured under the policy, the amount of the reduction being the amount of the arrears multiplied by a factor based on the age next birthday of the person whose life is assured<sup>7</sup>. If the policy is an endowment policy<sup>8</sup>, the date of maturity of the policy is postponed by a period equal to that in respect of which the premium or premiums comprised in the relevant arrears were payable, and the period during which premiums under the policy remain payable after that time is correspondingly extended<sup>9</sup>.

Where a claim arises or is deemed to have arisen<sup>10</sup> under a policy before the time for writing off, the amount payable in respect of the claim is reduced by the amount of the relevant arrears at the time when the claim arises or is deemed to have arisen together with compound interest at the rate of three per cent per annum with half-yearly rests, any sums paid or tendered in respect of any premiums being treated as satisfying them in the order in which they fall due<sup>11</sup>.

Where the amount of a free policy or of a surrender value is required to be ascertained and at the date when the ascertainment is made there is or are remaining unpaid any premium or premiums on the policy which, if the time for writing off has come, have been dealt with or are to be dealt with as relevant arrears under the above provisions<sup>12</sup>, or, if that time has not come, will fall to be so dealt with if not paid before that time, the provisions of the policy, of any guarantee given in relation to it, and of the Industrial Assurance Acts 1923 to 1968<sup>13</sup> relating to free policies and surrender values have effect subject to such modifications as appear to the actuary<sup>14</sup> necessary having regard to the non-payment of the premium or premiums and the actual or prospective variation of the terms of the policy<sup>15</sup>.

Subject to the above provisions, a reinstated policy has effect, and is deemed always to have had effect, as if the forfeiture had not taken place<sup>16</sup>.

1 As to reinstatement see PARA 2376.

2 See PARA 2376 text and notes 8-10.

3 See the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 56(1)-(4).

4 I.e. the period referred to in PARA 2376 note 9.

5 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 56(2)(b).

6 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 56(3).

7 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 56(3). The factors are tabulated in relation to the age next birthday as follows (the factors being indicated in parentheses): age next birthday 1-5 (6), age next birthday 6-10 ( $5\frac{1}{2}$ ), age next birthday 11-15 (5), age next birthday 16-20 ( $4\frac{1}{2}$ ), age next birthday 21-25 (4), age next birthday 26-30 ( $3\frac{1}{2}$ ), age next birthday 31-35 (3), age next birthday 36-40 ( $2\frac{1}{2}$ ), age next birthday 41-45 ( $2\frac{1}{4}$ ), age next birthday 46-50 (2), age next birthday 51-55 ( $1\frac{3}{4}$ ), age next birthday 56-65 ( $1\frac{1}{2}$ ), age next birthday 66-75 ( $1\frac{1}{4}$ ), age next birthday 76 and over (1): see s 56(3).

8 'Endowment policy' means a policy insuring money to be paid on the duration for a specified period of the life of the person assured, either with or without provision for the payment of money in the event of that person's death before the expiration of that period and either with or without provision for the payment of money before the expiration of that period and during that person's life in the event of his marriage or otherwise: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 56(6) (amended by the Friendly Societies Act 1955 s 3(3)).

9 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 56(3). See also, in relation to certain contracts, the Friendly Societies (Life Assurance Premium Relief) Regulations 1977, SI 1977/1143.

10 le by virtue of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 57(3): see the text and note 16.

11 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 56(4).

12 See the text and notes 6-9.

13 The Industrial Assurance Acts 1923 to 1968 are all now repealed: see PARA 2088.

14 'Actuary' means an independent actuary whose appointment has been agreed by the parties to the policy: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 56(5A) (added by SI 2001/3647).

15 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 56(5) (amended by SI 2001/3647).

16 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 57(3). The society may not, however, again forfeit the policy by reason of any non-payment of a relevant premium that occurred before the forfeiture: s 57(3) proviso.

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### **2378. Power to make regulations and disciplinary measures.**

Regulations may be made by statutory instrument for giving effect to the statutory provisions<sup>1</sup> relating to the protection of life assurance policies<sup>2</sup>. Any contravention by an industrial assurance company, a collecting society, or a friendly society<sup>3</sup> of those provisions or of regulations made under those provisions is to be treated as if it were a contravention of a requirement imposed under the Financial Services and Markets Act 2000 (with the effect that the disciplinary measures in Part XIV of that Act apply)<sup>4</sup>.

1 See PARAS 2375-2377.

2 See the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 57(4), which still refers to regulations made by the Commissioner with the consent of the Treasury. The definition of 'Commissioner' in s 59(2) has been repealed but s 57(4) has not been amended accordingly. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

The Statutory Instruments Act 1946 (see **STATUTES**) applies to a statutory instrument containing regulations under this power as if it had been made by a Minister of the Crown: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 57(6); and see PARA 2107. No regulations may be made unless a draft has been approved by resolution of each House of Parliament, although this did not apply to regulations made within three months from 1 August 1951: s 57(7). The Reserve and Auxiliary Forces (Protection of Friendly Society Life Policies) Regulations 1951, SI 1951/1408 were made under this power: see PARA 2376.

3 As to the meanings of 'collecting society', 'industrial assurance company' and 'friendly society' for these purposes see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 59(2) (definitions added by SI 2001/3647).

4 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 57(5) (substituted by SI 2001/3647; and amended by SI 2002/1555). As to the disciplinary measures in the Financial Services and Markets Act 2000 Pt XIV (ss 205-211) see PARA 465 et seq.

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Common to All Friendly Societies/L. PERSONS SERVING IN RESERVE AND AUXILIARY FORCES/2379. Relief against non-payment of contributions other than life policy premiums.

### **2379. Relief against non-payment of contributions other than life policy premiums.**

Where any person performing a period of relevant service<sup>1</sup> was at the beginning of that period a member of a friendly society<sup>2</sup> and has paid contributions<sup>3</sup> to the society for a period up to that time of one year or longer, and he then ceases to pay them, he does not for that reason cease to be a member of the society<sup>4</sup>. No further contributions may be paid by him until the ending of his period of service, and his rights to any benefits (other than benefits under life assurance policies)<sup>5</sup> are suspended until he subsequently resumes payment of contributions; but, on resuming payment, he is, as respects any benefits accruing in the future, in the same position as he would have been if he had not ceased to pay contributions<sup>6</sup>. If, however, he fails to resume payment before the expiration of three months from the ending of his period of service, he ceases to be a member of the society and ceases to be protected<sup>7</sup>. A friendly society may by its rules provide for the continuance of membership of persons performing relevant service upon terms more favourable than the above terms<sup>8</sup>.

1 As to the meaning of 'relevant service' see PARA 2375; and **ARMED FORCES** vol 2(2) (Reissue) PARA 79.

2 As to the meaning of 'friendly society' see PARA 2082; definition applied by the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 59(2) (definition added by SI 2001/3647). See also PARA 2376 notes 2-3.

3 I.e. other than or in addition to life assurance premiums: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 58(1). Section 58(1) does not affect any policy to which s 55 (see PARAS 2375-2378) applies: s 58(2).

4 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 58(1). See note 3. Section 58 is deemed to have had effect from 15 July 1950: s 58(4).

5 See note 3.

6 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 58(1). See note 3.

7 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 58(1) proviso. See note 3.

8 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 58(3).

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## ***M. MISCELLANEOUS MATTERS***

### **2380. Insurance of lives of children under ten years of age.**

As from 1 February 1993<sup>1</sup>, if a friendly society<sup>2</sup> or registered branch<sup>3</sup>, or an industrial assurance company<sup>4</sup>, enters into a contract of insurance<sup>5</sup> under which benefit in excess of £800 is payable on the death of any person and that person dies under the age of ten, the obligation of the society, branch or company as to payment of benefit is only to pay £800, but without prejudice to any person's right to recover part of the premiums paid<sup>6</sup>. The limit of £800 does not,

however, apply where the benefit is payable to a person who has an interest in the life of the person on whose death it is payable<sup>7</sup>.

1 The provisions, formerly in the Friendly Societies Act 1974 s 71, prohibiting the payment of money, other than repayment of premiums, on the death of a child under ten years of age, were repealed by the Friendly Societies Act 1992 Sch 16 paras 1, 24, Sch 22 Pt I with effect from 1 February 1993 and replaced by s 99: Friendly Societies Act 1992 (Commencement No 3 and Transitional Provisions) Order 1993, SI 1993/16.

2 As to the meaning of 'friendly society' see PARA 2082.

3 As to branches and registered branches of societies see PARA 2091.

4 'Industrial assurance company' means a person, other than a friendly society, who immediately before the repeal of the Industrial Assurance Act 1923, carried on industrial assurance business, and after that repeal is subject to an existing liability or a liability which may accrue under any policy effected in the course of that business; and 'industrial assurance business' means business which, immediately before the repeal of the Industrial Assurance Act 1923, fell within s 1(2) (see PARA 2088 note 8): Friendly Societies Act 1992 s 99(5) (added by SI 2001/3647).

5 As to the meaning of 'contract of insurance' see PARA 2147 note 6.

6 Friendly Societies Act 1992 s 99(1). This does not appear to prohibit the payment of more than £800, but any payment in excess of that amount would presumably be discretionary only. The Treasury may by order substitute some other sum for the sum for the time being specified in s 99(1): s 99(3) (amended by SI 2001/2617). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105. At the date at which this volume states the law, no such order had been made.

7 Friendly Societies Act 1992 s 99(2).

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### **2381. Powers of Treasury and Financial Services Authority to modify provisions of the Friendly Societies Act 1992.**

If on any modification<sup>1</sup> of the statutory provisions relating to companies or to persons or bodies (other than friendly societies<sup>2</sup>) carrying on insurance business<sup>3</sup>, including reinsurance business<sup>4</sup>, it appears to the Treasury expedient to modify the relevant provisions of the Friendly Societies Act 1992<sup>5</sup> for the purpose of assimilating the law relating to friendly societies to the law as so modified, the Treasury may, by order, make such modifications of the relevant provisions of the Act as it thinks appropriate for the purpose<sup>6</sup>. These modifications may include the conferring of power to make subordinate legislation, the creation of criminal offences, and provision for the charging of fees (but not any charge in the nature of taxation)<sup>7</sup>.

The Financial Services Authority<sup>8</sup>, on the application or with the consent of a friendly society, may direct that all or any of the provisions relating to accounts and audit in the Friendly Societies Act 1992<sup>9</sup> are not to apply to the society, or are to apply with such modifications as may be specified in the direction<sup>10</sup>. A direction may be subject to conditions, may be revoked by the Authority at any time, and may on the application or with the consent of the society concerned be varied at any time by the Authority<sup>11</sup>.

Where the Authority makes such a direction, or revokes or varies such a direction, it must cause the direction, variation or revocation to be entered on a register kept by it for these purposes<sup>12</sup>. The register must be available for inspection on reasonable notice by members of

the public<sup>13</sup>. The Authority must keep a copy of any direction made by it, and any revocation or variation of any such direction, in the public file of the society to which it relates<sup>14</sup>.

- 1 'Modification' includes any additions, and as regards the statutory provisions relating to companies, any modification effected by a future Act or instrument; and 'statutory provisions' includes the provisions of any instrument made under an Act: Friendly Societies Act 1992 s 102(5).
- 2 As to the meaning of 'friendly society' see PARA 2082.
- 3 As to the meaning of 'insurance business' see PARA 2138 note 5.
- 4 As to the meaning of 'reinsurance business' see PARA 2139 note 3.
- 5 The relevant provisions of the Friendly Societies Act 1992 are: (1) so much of Pt II as relates to winding up (ss 19-26) (see PARA 2143 et seq); (2) Pt IV (s 37) (see PARA 2112 note 15); (3) Pt V (ss 52-67) (regulation of business) (see PARAS 2310-2322); (4) Pt VI (ss 68-78) (accounts and audit) (see PARAS 2323-2348); and (5) Pt VIII (ss 85-92) (amalgamations, transfers of engagements and conversions) (see PARAS 2352-2365): s 102(2)(a)-(e).
- 6 Friendly Societies Act 1992 s 102(1). Such an order may make consequential amendments or repeals of other provisions of the Friendly Societies Act 1992, and may make such transitional or saving provision as appears necessary or expedient: s 102(4). The Friendly Societies Act 1992 (International Accounting Standards and other Accounting Amendments) Order 2005, SI 2005/2211, was made under the Friendly Societies Act 1992 s 102. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.
- 7 Friendly Societies Act 1992 s 102(3).
- 8 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 9 All or any of the provisions of the Friendly Societies Act 1992 Pt VI (see note 5) or any regulations made for the purposes of that Part.
- 10 Friendly Societies Act 1992 s 103(1) (s 103(1)-(3) amended by SI 2001/2617).
- 11 Friendly Societies Act 1992 s 103(2), (3) (as amended: see note 10).
- 12 Friendly Societies Act 1992 s 103(7) (s 103(7)-(9) added by SI 1996/1188; and the Friendly Societies Act 1992 s 103(7) amended by SI 2001/2617).
- 13 Friendly Societies Act 1992 s 103(8) (as added: see note 12).
- 14 Friendly Societies Act 1992 s 103(9) (as added (see note 12); and amended by SI 2001/2617). As to the public file see PARA 2382.

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### **2382. Public file of a friendly society.**

The Financial Services Authority<sup>1</sup> is under a duty to prepare and maintain a file relating to each friendly society<sup>2</sup>, known as the public file<sup>3</sup>. The file is required to contain the documents or copy documents and the records of the matters directed to be kept in the public file, by or under provisions of the Friendly Societies Act 1992<sup>4</sup>. The file must be available for inspection on reasonable notice by members of the public on payment of a reasonable fee<sup>5</sup>. Any member of the public is entitled, on payment of a reasonable fee, to be furnished with a copy of all or any of the documents or records kept in the public file of a friendly society<sup>6</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the meaning of 'friendly society' see PARA 2082.

3 Friendly Societies Act 1992 s 104(1) (s 104(1), (3) amended by SI 2001/2617). The Authority may keep in the public file of a registered friendly society any documents relating to a registered branch of the society which correspond to documents relating to the society which it is required to keep on that file: Friendly Societies Act 1992 s 104(3) (as so amended). As to the meaning of 'registered friendly society' see PARA 2082. As to branches and registered branches of societies see PARA 2091.

4 Friendly Societies Act 1992 s 104(1)(a).

5 Friendly Societies Act 1992 s 104(1)(b) (amended by SI 2001/3649); Friendly Societies Act 1992 s 104(2A) (added by SI 2001/2617).

6 Friendly Societies Act 1992 s 104(2) (amended by SI 2001/3649); Friendly Societies Act 1992 s 104(2A) (as added: see note 5).

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### **2383. Exemptions from stamp duty and stamp duty land tax.**

Stamp duty is not chargeable upon any document required or authorised by the Friendly Societies Act 1974 and the Friendly Societies Act 1992, or by the constitution of an incorporated friendly society<sup>1</sup>, a registered friendly society<sup>2</sup> or a registered branch<sup>3</sup>; nor is stamp duty chargeable on a policy of insurance or appointment or revocation of appointment of an agent, or other document required or authorised by the Friendly Societies Act 1974 or by the rules of a registered friendly society or branch<sup>4</sup>.

A land transaction<sup>5</sup> effected by or in consequence of an amalgamation of two or more friendly societies<sup>6</sup> or registered societies<sup>7</sup>, a transfer of the engagements of a friendly society<sup>8</sup> or a transfer of the engagements of a friendly society pursuant to a direction given by the Financial Services Authority<sup>9</sup>, is exempt from charge for the purposes of stamp duty land tax<sup>10</sup>. Relief must be claimed in a land transaction return<sup>11</sup> or an amendment of such a return<sup>12</sup>.

1 As to the meaning of 'incorporated friendly society' see PARA 2082.

2 As to the meaning of 'registered friendly society' see PARA 2082.

3 Friendly Societies Act 1992 s 105. As to branches and registered branches of societies see PARA 2091. As to stamp duty generally see **STAMP DUTIES AND STAMP DUTY RESERVE TAX** vol 44(1) (Reissue) PARA 1001 et seq.

4 Friendly Societies Act 1974 s 105 (amended by the Finance Act 1985 Sch 27 Pt IX).

5 'Land transaction' means any acquisition of a chargeable interest: Finance Act 2003 s 43(1); definition applied by the Friendly Societies Act 1974 s 105A(3) (added by SI 2003/2867); Friendly Societies Act 1992 s 105A(3) (added by SI 2003/2867).

6 I.e. under the Friendly Societies Act 1992 s 85: see PARA 2352. As to the meaning of 'friendly society' see PARA 2082.

7 I.e. under the Friendly Societies Act 1974 s 82: see PARA 2220. As to the meaning of 'registered society' see PARA 2082.



8 le under the Friendly Societies Act 1992 s 86 (see PARA 2353) or the Friendly Societies Act 1974 s 82 (see PARA 2220).

9 le under the Friendly Societies Act 1992 s 90: see PARA 2357. As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

10 Friendly Societies Act 1974 s 105A(1) (as added: see note 5); Friendly Societies Act 1992 s 105A(1) (as added: see note 5). As to stamp duty land tax see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

11 'Land transaction return' has the meaning given by the Finance Act 2003 s 76(1) (see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**): Friendly Societies Act 1974 s 105A(3) (as added: see note 5); Friendly Societies Act 1992 s 105A(3) (as added: see note 5).

12 Friendly Societies Act 1974 s 105A(2) (as added: see note 5); Friendly Societies Act 1992 s 105A(2) (as added: see note 5).

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### **2384. Officers and auditors not to be exempted from liability.**

Any of the following provisions, whether contained in the constitution of a friendly society<sup>1</sup> or in any contract with a friendly society or otherwise, is void<sup>2</sup>: (1) any provision for exempting any member of the committee of management<sup>3</sup>, other officer<sup>4</sup>, or person employed as auditor<sup>5</sup> of a friendly society, from any liability which, by virtue of any rule of law, would otherwise attach to him in respect of the negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the society; or (2) any provision for indemnifying any such person against any such liability<sup>6</sup>.

This does not prevent a friendly society: (a) from purchasing and maintaining insurance against any such liability for such a person; or (b) from indemnifying him against any liability incurred by him in defending any proceedings, whether criminal or civil, in which judgment is given in his favour or in which he is acquitted<sup>7</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 Friendly Societies Act 1992 s 106(1).

3 As to the committee of management see PARA 2294 et seq.

4 As to the meaning of 'officer' see PARA 2115 note 11. For the purposes of the Friendly Societies Act 1992 s 106, a reference to an officer of a friendly society includes a reference to the appropriate actuary: s 106(5). As to the meaning of 'appropriate actuary' see PARA 2139 note 4.

5 As to the auditor of a friendly society see PARA 2332 et seq.

6 Friendly Societies Act 1992 s 106(2).

7 Friendly Societies Act 1992 s 106(3). The Companies Act 1985 s 727 (prospectively repealed) (see **COMPANIES** vol 14 (2009) PARA 600) (as to replacement provisions from 1 October 2008 see the Companies Act 2006 s 1157) or the Companies (Northern Ireland) Order 1986, SI 1986/1032, art 675, each of which empowers the court to grant relief in certain cases of negligence, default, breach of duty or breach of trust, applies in relation to officers and auditors of a friendly society as it applies in relation to officers and auditors of a company: Friendly Societies Act 1992 s 106(4).

**UPDATE****2384 Officers and auditors not to be exempted from liability**

NOTE 7--Friendly Societies Act 1992 s 106(4) amended: SI 2009/1941.

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**2385. Time limit for commencing proceedings.**

Summary proceedings for any offence under the Friendly Societies Act 1992 may be commenced by the Financial Services Authority<sup>1</sup> at any time within the period of one year<sup>2</sup> beginning with the date on which evidence comes to its knowledge<sup>3</sup> which is sufficient, in the opinion of the Authority, to justify a prosecution for the offence<sup>4</sup>. This does not, however, authorise the commencement of proceedings at a time more than three years after the date on which the offence was committed<sup>5</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 This is so notwithstanding any limitation on the time for the taking of proceedings contained in any enactment: Friendly Societies Act 1992 s 107(1) (s 107(1), (3) amended by SI 2001/2617).

3 For this purpose a certificate, purporting to be signed on behalf of the Financial Services Authority, as to the date on which such evidence came to its knowledge, is conclusive evidence of that date: Friendly Societies Act 1992 s 107(3) (as amended: see note 2).

4 Friendly Societies Act 1992 s 107(1) (as amended: see note 2). As to commencing proceedings for an offence under the Friendly Societies Act 1974 see PARA 2284.

5 Friendly Societies Act 1992 s 107(2).

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**2386. Offences by bodies corporate, partnerships and unincorporated associations.**

Where an offence under the Friendly Societies Act 1992 committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of any member of the committee of management<sup>1</sup>, director, manager, secretary<sup>2</sup> or other similar officer<sup>3</sup> of the body corporate, or any person who was purporting to act in that capacity, he, as well as the body corporate, is guilty of that offence and is liable to be proceeded against and punished accordingly<sup>4</sup>. Where the affairs of a body corporate are managed by the members, this applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate<sup>5</sup>.

Where a partnership is guilty of an offence under the Friendly Societies Act 1992, every partner, other than a partner who is proved to have been ignorant of, or to have attempted to prevent, the commission of the offence is also guilty of that offence and is liable to be proceeded against and punished accordingly<sup>6</sup>.

Where an unincorporated association, other than a partnership, is guilty of an offence under the Friendly Societies Act 1992: (1) every officer of the association who is bound to fulfil any duty of which the breach is the offence; or (2) if there is no such officer, every member of the governing body other than a member who is proved to have been ignorant of, or to have attempted to prevent, the commission of the offence, is also guilty of the offence and liable to be proceeded against and punished accordingly<sup>7</sup>.

1 As to the committee of management see PARA 2294 et seq.

2 As to the secretary see PARA 2301.

3 As to the meaning of 'officer' see PARA 2115 note 11.

4 Friendly Societies Act 1992 s 108(1).

5 Friendly Societies Act 1992 s 108(2).

6 Friendly Societies Act 1992 s 108(3).

7 Friendly Societies Act 1992 s 108(4).

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### **2387. Defence of due diligence.**

In any proceedings for an offence under the Friendly Societies Act 1992 it is a defence for a person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid commission of such an offence, by himself or any person under his control<sup>1</sup>.

1 Friendly Societies Act 1992 s 109.

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### **2388. Evidence.**

Any document<sup>1</sup> bearing the seal or stamp<sup>2</sup> of the Financial Services Authority is to be received in evidence without further proof<sup>3</sup>. Any document purporting to have been signed by a person authorised to do so on behalf of the Financial Services Authority, and every document purporting to be signed by any inspector or public valuer under the Friendly Societies Act 1992,

must, in the absence of any evidence to the contrary, be received in evidence without proof of the signature<sup>4</sup>.

Any printed document purporting to be a copy of the rules or memorandum of an incorporated friendly society<sup>5</sup>, or the rules of a registered friendly society<sup>6</sup> or a registered branch<sup>7</sup>, and certified by the secretary or other officer<sup>8</sup> of the society or branch to be a true copy of its rules or memorandum as registered, is receivable in evidence and, in the absence of any evidence to the contrary, is deemed to be a true copy of its rules or memorandum<sup>9</sup>.

1 'Document' means any document issued, received or created by the Financial Services Authority (or, as the case may be, by any inspector or public valuer under the Friendly Societies Act 1992: see PARA 2320) for the purposes of or in connection with the Friendly Societies Act 1992: s 111(1B) (s 111(1) substituted, and s 111(1A), (1B) added, by SI 2001/2617). As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 As to the seal of the Financial Services Authority see PARA 2359 note 9.

3 Friendly Societies Act 1992 s 111(1) (as substituted: see note 1).

4 Friendly Societies Act 1992 s 111(1A) (as added: see note 1).

5 As to the rules and memorandum of an incorporated friendly society see PARA 2119 et seq. As to the meaning of 'incorporated friendly society' see PARA 2082.

6 As to the rules of a registered friendly society see PARA 2156 et seq. As to the meaning of 'registered friendly society' see PARA 2082.

7 As to branches and registered branches of societies see PARA 2091.

8 As to the secretary see PARA 2301. As to the meaning of 'officer' see PARA 2115 note 11.

9 Friendly Societies Act 1992 s 111(2).

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### **2389. Records of friendly societies.**

Unless the Friendly Societies Act 1992 or regulations made under it<sup>1</sup> provide otherwise, any record to be kept by a friendly society<sup>2</sup> may be kept in any manner<sup>3</sup>. Where any such record is not kept in a bound book, but by some other means, adequate precautions must be taken for guarding against falsification and facilitating its discovery<sup>4</sup>.

Any record kept by a friendly society may be kept by recording matters otherwise than in legible form, so long as the recording is capable of being reproduced in a legible form<sup>5</sup>. In such a case, any duty imposed by or under the Friendly Societies Act 1992 to allow inspection, or to furnish a copy, of the record or any part of it, is to be treated as a duty to allow inspection of, or to furnish, a reproduction of the recording or of the relevant part of it in legible form<sup>6</sup>.

Default in complying with these requirements is an offence<sup>7</sup>.

1 As to regulations under the Friendly Societies Act 1992 see generally PARA 2107.

2 As to the meaning of 'friendly society' see PARA 2082.

3 Friendly Societies Act 1992 s 112(1).

4 Friendly Societies Act 1992 s 112(2).

5 Friendly Societies Act 1992 s 112(3).

6 Friendly Societies Act 1992 s 112(3). The Treasury may by regulations make such additional provision as it considers appropriate in connection with such records as are kept otherwise than in legible form, and the regulations may make modifications of the Friendly Societies Act 1992 in so far as it relates to the records of friendly societies: s 112(4) (amended by SI 2001/2617). At the date at which this volume states the law, no such regulations had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq; and as to the transfer of functions to the Treasury see PARA 2105.

7 Friendly Societies Act 1992 s 112(5). The society is liable on summary conviction of the offence to a fine not exceeding level 4 on the standard scale; and, in the case of a continuing offence, to an additional fine not exceeding one-tenth of that level for every day during which the offence continues: s 112(5)(a), (b). As to the standard scale see PARA 27 note 21.

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## **2390. Service of notices.**

The provisions referred to below relate to any notice, directions, or other document, required or authorised to be served on any person, other than the Financial Services Authority<sup>1</sup>, by or under any provision of the Friendly Societies Act 1992, or by the rules of a friendly society<sup>2</sup>. These provisions are, however, subject to any provision of a friendly society's rules, in the case of notices or other documents to be given or sent to the members of the society<sup>3</sup>.

Any such document may be served on the person concerned by delivering it to him, by leaving it at his proper address, or by sending it by post to him at his proper address<sup>4</sup>. In the case of a friendly society, any such document may be served on its secretary<sup>5</sup>. In the case of a body corporate, other than an incorporated friendly society<sup>6</sup>, it may be served on the secretary or clerk of that body<sup>7</sup>. In the case of a partnership, it may be served on any partner<sup>8</sup>. In the case of an unincorporated association, other than a partnership or a registered friendly society<sup>9</sup> or registered branch<sup>10</sup>, the document may be served on any member of its governing body<sup>11</sup>.

The proper address of any person for these purposes<sup>12</sup> is, in the case of a friendly society or its secretary, the address of its registered office<sup>13</sup>; in the case of a member of an incorporated friendly society, his registered address<sup>14</sup>; in the case of a member of the committee of management<sup>15</sup> or the chief executive<sup>16</sup> of a friendly society, his officially notified address; in the case of a body corporate (other than an incorporated friendly society), its secretary or clerk, the address of its registered or principal office in the United Kingdom<sup>17</sup>; in the case of an unincorporated association (other than a partnership, registered friendly society or registered branch) or a member of its governing body, its principal office in the United Kingdom; and, in any other case, his last known address (whether his residence or a place where he carries on business or is employed)<sup>18</sup>.

1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.

2 Friendly Societies Act 1992 s 113(1) (amended by SI 2001/2617). As to the meaning of 'friendly society' see PARA 2082. As to the rules of a friendly society see PARAS 2121, 2156 et seq.

3 Friendly Societies Act 1992 s 113(1) (as amended: see note 2).

- 4 Friendly Societies Act 1992 s 113(2).
- 5 Friendly Societies Act 1992 s 113(3)(a). As to the secretary see PARA 2301.
- 6 As to the meaning of 'incorporated friendly society' see PARA 2082.
- 7 Friendly Societies Act 1992 s 113(3)(b).
- 8 Friendly Societies Act 1992s 113(3)(c).
- 9 As to the meaning of 'registered friendly society' see PARA 2082.
- 10 As to branches and registered branches of societies see PARA 2091.
- 11 Friendly Societies Act 1992 s 113(3)(d).
- 12 le for the purposes of the Friendly Societies Act 1992 s 113 and the Interpretation Act 1978 s 7 (service of documents).
- 13 As to the registered office see PARA 2127.
- 14 See PARA 2131.
- 15 As to the committee of management see PARA 2294 et seq.
- 16 As to the chief executive see PARA 2301.
- 17 As to the meaning of 'United Kingdom' see PARA 2 note 3.
- 18 Friendly Societies Act 1992 s 113(4).

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### **2391. Form of documents.**

The Financial Services Authority<sup>1</sup> may, by directions, make provision with respect to the form of any document to be sent to it under the Friendly Societies Act 1992 or the Friendly Societies Act 1974, the particulars to be included in any such document and the procedure to be followed in sending any such document<sup>2</sup>. The directions have effect subject to any other provision of or made under the Friendly Societies Act 1992<sup>3</sup>.

- 1 As to the Financial Services Authority see PARA 2105, and also PARAS 4, 6 et seq.
- 2 Friendly Societies Act 1992 s 114(1) (s 114 substituted by SI 2001/3649).
- 3 Friendly Societies Act 1992 s 114(2) (as substituted: see note 2).

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### **2392. Financial year of friendly societies.**

The initial financial year of a friendly society<sup>1</sup> is the period expiring with the end of the calendar year in which it is registered<sup>2</sup> under the Friendly Societies Act 1974 or incorporated<sup>3</sup> under the Friendly Societies Act 1992<sup>4</sup>. The final financial year of the society is the period of less than 12 months which expires with the date as at which the society makes up its final accounts<sup>5</sup>. Otherwise, the financial year of the society is the period of 12 months ending with 31 December<sup>6</sup>.

1 As to the meaning of 'friendly society' see PARA 2082.

2 As to registration of a friendly society see PARA 2149 et seq.

3 As to incorporation see PARA 2110 et seq.

4 Friendly Societies Act 1992 s 118(2).

5 Friendly Societies Act 1992 s 118(2).

6 Friendly Societies Act 1992 s 118(1).

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### **2393. Information supplied for the purposes of social security.**

At the request of any person claiming benefit from a registered friendly society<sup>1</sup> or branch<sup>2</sup>, or from an incorporated friendly society<sup>3</sup>, the Secretary of State<sup>4</sup> must provide the society or branch for the purposes of the claim with a copy or abstract of any medical certificate relating to that person and supplied by him to the Secretary of State for the purposes of the enactments relating to social security<sup>5</sup>.

Where the Secretary of State furnishes a registered society or branch or an incorporated friendly society, in connection with a claim for benefit from the society, with information relating to a claim or award under the enactments relating to social security, the expenses incurred by the Secretary of State or any other government department in connection with his doing so are treated as expenses in carrying those enactments into effect<sup>6</sup>.

1 As to the meaning of 'registered friendly society' see PARA 2082.

2 As to branches of societies see PARA 2091.

3 As to the meaning of 'incorporated friendly society' see PARA 2082.

4 As to the Secretary of State see PARA 3.

5 Friendly Societies Act 1974 s 107(1) (amended by the Friendly Societies Act 1992 Sch 16 paras 1, 46, Sch 22 Pt I); Friendly Societies Act 1992 s 115(1). This is subject to any exceptions or conditions prescribed by regulations of the Secretary of State: Friendly Societies Act 1974 s 107(1); Friendly Societies Act 1992 s 115(1). At the date at which this volume states the law, no regulations had been made under these provisions. As to the enactments relating to social security see **SOCIAL SECURITY AND PENSIONS**.

6 Friendly Societies Act 1974 s 107(2); Friendly Societies Act 1992 s 115(2).

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## **9. INDUSTRIAL AND PROVIDENT SOCIETIES**

### **(1) CONSTITUTION**

#### **(i) Introduction**

##### ***A. BACKGROUND TO THE PRESENT LAW***

##### **2394. Nature and early legislation.**

Societies registered under the Industrial and Provident Societies Act 1965<sup>1</sup> are bodies corporate with limited liability<sup>2</sup>, and are known as industrial and provident societies<sup>3</sup>. That name does not necessarily describe their functions, as their rules may authorise them to carry on any industry, business or trade<sup>4</sup>. The name was originally applied to societies the purposes of which were to make profits by the personal exertions of their members and to distribute the profits by way of provident provision for their members' future. These trading societies were first established under an Act of 1834<sup>5</sup> which enabled friendly societies to be established for any purpose which was not illegal<sup>6</sup>. An Act of 1846<sup>7</sup> expressly permitted friendly societies to be established for the frugal investment of the savings of members<sup>8</sup>.

Until 1852, industrial and provident societies continued to be established under the Acts relating to friendly societies and were of the nature of partnerships, the liability of their members being unlimited. In that year the first Industrial and Provident Societies Act<sup>9</sup> was passed, which defined the purpose of those societies as the carrying on or exercising in common of any labour, trade or handicraft, with certain exceptions<sup>10</sup>. Members and others were paid for work and services performed<sup>11</sup>, and members were permitted to receive interest on their subscriptions up to a limit of five per cent per annum<sup>12</sup>. Up to one-third of the profits made by the society could be divided among the members by way of a return to them of the profits arising from purchases of goods by them from the society and by way of payment to them for work and services performed by them for the society<sup>13</sup>. The remaining profits had to be retained in the society or applied for the provident purposes authorised in respect of friendly societies<sup>14</sup>. The co-operative principle was thus first given statutory recognition, and the benefit of the Act was restricted to co-operative societies. Although it is now possible for certain societies which are not co-operative to be registered<sup>15</sup>, the most usual qualification for registration continues to be the co-operative nature of the society. An Act of 1862<sup>16</sup> conferred incorporation on societies registered under it and limited the liability of their members<sup>17</sup>.

In 1893 the law relating to industrial and provident societies was consolidated in the Industrial and Provident Societies Act 1893, which was amended by a number of Acts passed between 1894 and 1961<sup>18</sup>. The law was again consolidated in the Industrial and Provident Societies Act 1965, which has been further amended since but remains the principal statute governing industrial and provident societies<sup>19</sup>. Credit unions are a particular kind of industrial and provident society and have their own statute, the Credit Unions Act 1979<sup>20</sup>.



- 1 As to the Industrial and Provident Societies Act 1965 and subsequent Acts governing industrial and provident societies see generally PARA 2397.
- 2 See the Industrial and Provident Societies Act 1965 s 3; and PARA 2416.
- 3 See PARA 2395 note 1.
- 4 See the Industrial and Provident Societies Act 1965 s 1; and PARA 2402.
- 5 4 & 5 Will 4 c 40 (repealed).
- 6 4 & 5 Will 4 c 40 s 2 (repealed).
- 7 9 & 10 Vict c 27 (repealed).
- 8 9 & 10 Vict c 27 s 1(4) (repealed).
- 9 le the Industrial and Provident Societies Act 1852 (repealed).
- 10 Industrial and Provident Societies Act 1852 s 1 (repealed).
- 11 Industrial and Provident Societies Act 1852 s 2(1) (repealed).
- 12 Industrial and Provident Societies Act 1852 s 2(4) (repealed).
- 13 Industrial and Provident Societies Act 1852 s 2(5) (repealed).
- 14 Industrial and Provident Societies Act 1852 s 2(5)(repealed)
- 15 See PARA 2402.
- 16 le the Industrial and Provident Societies Act 1862 (repealed).
- 17 Industrial and Provident Societies Act 1862 s 5 (repealed).
- 18 le the Industrial and Provident Societies Act 1894; Industrial and Provident Societies (Amendment) Acts of 1895, 1913 and 1928; Industrial and Provident Societies Act 1952; Industrial and Provident Societies (Amendment) Act 1954; Industrial and Provident Societies Act 1961 (all repealed).
- 19 See generally PARA 2397.
- 20 As to the Credit Unions Act 1979 see generally PARA 2402.

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### **2395. Registered societies.**

'Registered society' means a society registered or deemed to be registered under the Industrial and Provident Societies Act 1965<sup>1</sup>.

1 Industrial and Provident Societies Act 1965 s 74(1) (renumbered by SI 2001/2617). As to societies which are deemed to be registered under the Industrial and Provident Societies Act 1965 see PARA 2396. 'Registered society' may also include a society which is registered under the corresponding law in force in Northern Ireland: see ss 74(1), 76; and PARA 2397 note 2. Unlike the Industrial and Provident Societies Act 1893 (see s 4 (repealed)), the Industrial and Provident Societies Act 1965 does not define 'industrial and provident society', but it is clear from the long title of the Act that the term means a society registered under the Act, and this meaning is given statutory force by the Friendly and Industrial and Provident Societies Act 1968 s 21(1), which

Act is to be read as one with the Industrial and Provident Societies Act 1965: see PARA 2397. As to the societies which may be registered under the Industrial and Provident Societies Act 1965 see PARA 2402. As to credit unions see PARA 2402.

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### **2396. Continuity of registration under previous Acts.**

Every incorporated society in existence on 1 January 1894 which had been registered or certified under any Act relating to industrial and provident societies<sup>1</sup> was deemed to be a society registered under the Industrial and Provident Societies Act 1893, and, so far as its rules were not contrary to any express provision of that Act, they were to continue in force until altered or rescinded<sup>2</sup>.

Any society which immediately before 1 January 1966 was registered or deemed to be registered under the Industrial and Provident Societies Act 1893<sup>3</sup>, being a society having at that date its registered office<sup>4</sup> in Great Britain<sup>5</sup> or the Channel Islands, is deemed to be registered under the Industrial and Provident Societies Act 1965<sup>6</sup>.

1 As to the legislation prior to 1893 see PARA 2394.

2 Industrial and Provident Societies Act 1893 s 3 (repealed).

3 As to societies which were deemed to be registered under the Industrial and Provident Societies Act 1893 see the text to notes 1, 2.

4 As to a society's registered office see generally PARAS 2443-2444.

5 As to the meaning of 'Great Britain' see PARA 2 note 3.

6 Industrial and Provident Societies Act 1965 s 4. Any acknowledgment of registry of such a society issued by virtue of the Industrial and Provident Societies Act 1893 s 5(4), s 6 or s 7(2) (all repealed) is deemed to be an acknowledgment of the registration under the Industrial and Provident Societies Act 1965 of that society (see PARA 2415) and, by virtue of s 9 (see PARA 2415), of its rules in force at the date of the acknowledgment: s 4(a). Any acknowledgment of registry of an amendment of the society's rules issued by virtue of the Industrial and Provident Societies Act 1893 s 7(2) (repealed) or s 10(3) (repealed) is deemed to be an acknowledgment of the registration of that amendment under the Industrial and Provident Societies Act 1965 (see PARA 2437): s 4(b). Any change of the society's name (see PARA 2440) duly made before 1 January 1966 in accordance with the Industrial and Provident Societies Act 1893 s 52 (repealed) as in force at the time of the change, and any change in the situation of the society's registered office (see PARA 2443) of which notice was duly given before that date under s 11 (repealed), is deemed for the purposes of the Industrial and Provident Societies Act 1965 to be a duly registered amendment of the society's rules: s 4(c). Any rules of that society which, having been made before 1 January 1894, continued in force immediately before 1 January 1966 by virtue of the Industrial and Provident Societies Act 1893 s 3 (repealed) (see the text to note 2) are deemed to be registered under the Industrial and Provident Societies Act 1965: s 4(d). For a limitation on the effect of rules registered before 12 September 1893 see PARA 2429.

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## **B. MODERN LEGISLATION**

### **2397. The Industrial and Provident Societies Acts 1965 to 2003.**

The main statutes which at present govern registered societies<sup>1</sup> are the Industrial and Provident Societies Act 1965<sup>2</sup>, the Industrial and Provident Societies Act 1967<sup>3</sup>, the Friendly and Industrial and Provident Societies Act 1968<sup>4</sup>, the Industrial and Provident Societies Act 1975<sup>5</sup> and the Industrial and Provident Societies Act 1978<sup>6</sup>. These statutes may be cited together as the Industrial and Provident Societies Acts 1965 to 1978<sup>7</sup>, and in their application to registered societies the Acts of 1965, 1968, 1975 and 1978 are to be construed as one<sup>8</sup>. Two more recent Acts provide, inter alia, for bringing the law relating to registered societies into conformity with certain aspects of the law relating to companies: these are the Industrial and Provident Societies Act 2002<sup>9</sup> (which may be cited together with the Industrial and Provident Societies Acts 1965 to 1978 as the Industrial and Provident Societies Act 1965 to 2002<sup>10</sup>) and the Co-operatives and Community Benefit Societies Act 2003<sup>11</sup> (which may be cited together with the Industrial and Provident Societies Acts 1965 to 2002 as the Industrial and Provident Societies Acts 1965 to 2003<sup>12</sup>).

The Credit Unions Act 1979 provides for registration of societies under the Industrial and Provident Societies Act 1965 as credit unions<sup>13</sup>.

1 As to the meaning of 'registered society' see PARA 2395.

2 The Industrial and Provident Societies Act 1965, which consolidates the previous legislation (see PARA 2394) with certain corrections and improvements, is the Act under which societies are registered and is their principal governing statute. The Act extends to Great Britain and to the Channel Islands (s 78(2)), but has effect in the Channel Islands subject to such adaptations and modifications as may be specified by Order in Council (s 75(1)), any such order being variable or revocable by a subsequent order (s 75(2)). As to such adaptations and modifications see the Industrial and Provident Societies (Channel Islands) Order 1965, SI 1965/2165.

The Industrial and Provident Societies Act 1965 does not extend to Northern Ireland (s 78(2)), but provision is made for societies registered under the corresponding law for the time being in force for Northern Ireland to have their rules recorded by the Financial Services Authority, in which event the society, its rules and any amendment of the rules are deemed to be duly registered under the Industrial and Provident Societies Act 1965 for the purpose of specified sections of that Act, and references to a registered society in those sections are to be construed accordingly: see s 76(1), (2) (s 76(1) amended by SI 2001/2617; and the Industrial and Provident Societies Act 1965 s 76(2) amended by the Co-operatives and Community Benefit Societies Act 2003 s 5(6)). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. A similar procedure applies in relation to credit unions which are excluded from the general provisions of the Industrial and Provident Societies Act 1965 s 76: see the Credit Unions Act 1979 s 32 (amended by SI 2001/2617; and SI 2002/1555). These provisions do not confer any power or impose any obligation or liability with respect to the taking or refraining from taking of, or failure to take, any action outside Great Britain and the Channel Islands: Industrial and Provident Societies Act 1965 s 76(3) (as extended, in relation to credit unions, by the Credit Unions Act 1979 s 32 (as so amended)). In relation to societies which have recorded their rules as above, appropriate modification is made to the Government of Ireland (Companies, Societies, & c) Order 1922, SR & O 1922/184, art 22, by the Industrial and Provident Societies Act 1965 s 76(4). In the application to such societies of s 45(1) (see PARA 2526), the reference to the Industrial and Provident Societies Act 1965 is to be construed as a reference to the law for the time being in force in Northern Ireland for purposes corresponding to those of that Act: s 76(3).

The validity of things done under earlier Industrial and Provident Societies Acts is preserved by the Industrial and Provident Societies Act 1965 s 77(2) and documentary references to those earlier Acts are, if and so far as the context permits, to be construed as referring to the Industrial and Provident Societies Act 1965: see s 77(3). Nothing in s 4 (see PARA 2396) affects the general application of the Interpretation Act 1889 s 38 (repealed, and replaced by the Interpretation Act 1978 ss 16(1), 17(2)(a), Sch 2 para 3), with regard to the effect of repeals: Industrial and Provident Societies Act 1965 s 77(4); and see **STATUTES**.

3 The Industrial and Provident Societies Act 1967 contains provisions for facilitating the borrowing of money by registered societies: see PARA 2454. It does not extend to Northern Ireland: s 8(3).

4 The Friendly and Industrial and Provident Societies Act 1968 contains provisions governing the accounts and audit of registered societies: see PARAS 2512-2524. The Act may be extended to the Channel Islands by Order in Council with such exceptions, adaptations and modifications, if any, as may be specified in the order (s 22(1)); the order may be varied or revoked by a subsequent order (s 22(2)), and a revoking order may contain such transitional, incidental or supplemental provisions as appear necessary or expedient in consequence of the revocation (s 22(3)). See the Friendly and Industrial and Provident Societies (Channel Islands) Order 1968, SI 1968/2031. The Friendly and Industrial and Provident Societies Act 1968 may be similarly extended to the Isle of Man, in so far as its provisions relate to societies registered under the Friendly Societies Act 1992. The Friendly and Industrial and Provident Societies Act 1968 does not extend to Northern Ireland: s 23(5).

5 The Industrial and Provident Societies Act 1975 raises the maximum limit of shareholding in registered societies and makes certain supplemental provisions: see PARAS 2417, 2447. The Act extends to the Channel Islands but not to Northern Ireland: s 3(5).

6 The Industrial and Provident Societies Act 1978 raises the amount of deposits which an industrial and provident society may take without thereby carrying on the business of banking and authorises the further alteration of those amounts from time to time: see eg PARA 2406. It extends to the Channel Islands but does not extend to Northern Ireland: s 3(4).

7 Industrial and Provident Societies Act 1967 s 8(1); Friendly and Industrial and Provident Societies Act 1968 s 23(2) (amended by the Friendly Societies Act 1974 Sch 11; and SI 2001/3647); Industrial and Provident Societies Act 1975 s 3(2); Industrial and Provident Societies Act 1978 s 3(2).

8 Friendly and Industrial and Provident Societies Act 1968 s 23(4)(c); Industrial and Provident Societies Act 1975 s 3(1); Industrial and Provident Societies Act 1978 s 3(1). As to the effect of enacting that statutes are to be construed as one see *Phillips v Parnaby* [1934] 2 KB 299, DC; and **STATUTES**. Although there is no provision that the Industrial and Provident Societies Act 1967 is to be construed as one with the Industrial and Provident Societies Act 1965, certain relevant provisions and the meaning of relevant terms in the Industrial and Provident Societies Act 1965 are applied for the purposes of the Industrial and Provident Societies Act 1967: see the Industrial and Provident Societies Act 1967 s 7(1), (2) (amended by SI 2001/2617; and SI 2001/3649).

9 The Industrial and Provident Societies Act 2002 amends the provisions in the Industrial and Provident Societies Act 1965 setting out the procedure by which a society registered under that Act may convert itself into, or amalgamate with or transfer its engagements to, a company (see PARA 2563) and enables the law relating to registered societies to be amended so as to bring it into conformity with certain aspects of the law relating to companies (see PARA 2398). Any provisions of the Act or any instrument made under it may be extended by Order in Council, with modifications (if any) and with such transitional, incidental or supplementary provision as appear to Her Majesty to be necessary or expedient, to any of the Channel Islands: see the Industrial and Provident Societies Act 2002 s 3. At the date at which this volume states the law no such order had been made.

10 Industrial and Provident Societies Act 2002 s 4(1).

11 The Co-operatives and Community Benefit Societies Act 2003 permits a registered society whose business is conducted for the benefit of the community to provide that its assets are dedicated permanently for that purpose: see PARA 2402. It also amends provisions of the Industrial and Provident Societies Act 1965 for the purpose of bringing the law relating to industrial and provident societies into conformity with certain aspects of the law relating to companies. Any provisions of the Co-operatives and Community Benefit Societies Act 2003, or any instrument made under it, may be extended by Order in Council, with modifications (if any), and with such transitional, incidental or supplementary provisions as appear to Her Majesty to be necessary or expedient, to any of the Channel Islands: s 8. At the date at which this volume states the law no such order had been made.

12 Co-operatives and Community Benefit Societies Act 2003 s 9(1).

13 See the Credit Unions Act 1979 ss 1, 2; and PARA 2402.

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**2398. Power to modify legislation to assimilate to company law.**

If, on any modification<sup>1</sup> of the statutory provisions<sup>2</sup> in force in Great Britain<sup>3</sup> relating to companies, it appears to the Treasury<sup>4</sup> to be expedient to modify the relevant statutory provisions<sup>5</sup> for the purpose of assimilating the law relating to companies and the law relating to industrial and provident societies, the Treasury may, by order, make such modifications<sup>6</sup> of the relevant statutory provisions as it thinks appropriate for that purpose<sup>7</sup>.

1 'Modification' includes any additions and, as regards modifications of the statutory provisions relating to companies, any modification whether effected by any future Act or by an instrument made after the passing of the Industrial and Provident Societies Act 2002 under an Act whenever passed: s 2(6). As to company law see generally **COMPANIES; COMPANY AND PARTNERSHIP INSOLVENCY**.

2 'Statutory provisions', except in the expression 'relevant statutory provision' (see note 5), includes the provisions of any instrument made under an Act: Industrial and Provident Societies Act 1965 s 2(6).

3 As to the meaning of 'Great Britain' see PARA 2 note 3.

4 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

5 'Relevant statutory provisions' are the provisions of the Industrial and Provident Societies Acts 1965 to 1978 (see PARA 2397) as for the time being in force except the Industrial and Provident Societies Act 1965 s 1 (societies which may be registered) (see PARA 2402), s 10(1) (amendments of registered rules) (see PARAS 2436-2437), ss 16-18 (cancellation, suspension or refusal of registration of society or rules) (see PARA 2579 et seq), ss 23-27 (nominations, provision for intestacy, payment in respect of mentally incapable persons and validity of payments) (see PARA 2503 et seq), ss 50-54 (amalgamations, transfers of engagements and conversions) (see PARA 2559 et seq), s 55(b) (dissolution of registered society by instrument) (see PARA 2566), s 56 (power of Financial Services Authority to petition for winding up) (see PARA 2574), s 58 (instrument of dissolution) (see PARA 2568 et seq), s 59 (restriction on dissolution or cancellation of registration of society) (see PARA 2562 et seq): Industrial and Provident Societies Act 2002 s 2(2).

6 The power to modify the relevant statutory provisions includes the power to modify so as to confer power to make orders, regulations, rules or other subordinate legislation, create criminal offences or provide for the charging of fees but not any charge in the nature of taxation: Industrial and Provident Societies Act 2002 s 2(3). Any such order may make consequential amendments of or repeals in the provisions in s 2(2) (see note 5) or make such transitional or saving provisions as appear to the Treasury to be necessary or expedient: s 2(4). The power to make an order is exercisable by statutory instrument and no such order may be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 2(5). See the Friendly and Industrial and Provident Societies Act 1968 (Audit Exemption) (Amendment) Order 2006, SI 2006/265; and PARA 2514.

7 Industrial and Provident Societies Act 2002 s 2(1).

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### **2399. Fees, regulations and orders.**

Before the Financial Services Authority<sup>1</sup> allows any person to inspect any document<sup>2</sup> held by it in connection with the Industrial and Provident Societies Act 1965<sup>3</sup>, or provides any person with a copy of any such document (or part of such document), it may charge that person a reasonable fee<sup>4</sup>. These provisions also apply for the purposes of the Industrial and Provident Societies Act 1967<sup>5</sup> and the Credit Unions Act 1979<sup>6</sup>.

The Treasury<sup>7</sup> has power to make regulations prescribing certain matters under the Friendly and Industrial and Provident Societies Act 1968<sup>8</sup> and to make orders under the Industrial and

Provident Societies Act 1978<sup>9</sup>. The Treasury also has power to make orders and regulations under the Credit Unions Act 1979<sup>10</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the Authority's rule-making powers see PARA 21 et seq.

2 As to the registration of documents generally see PARA 2411.

3 As to the Industrial and Provident Societies Act 1965 see PARA 2397.

4 Industrial and Provident Societies Act 1965 s 70A (added by SI 2001/2617).

5 Industrial and Provident Societies Act 1965 s 70A (as added: see note 4); applied for the purposes of the Industrial and Provident Societies Act 1967 by s 7(2) (amended by SI 2001/2617; and SI 2001/3649). As to the Industrial and Provident Societies Act 1967 generally see PARA 2397.

6 Industrial and Provident Societies Act 1965 s 70A (as added: see note 4); applied by the Credit Unions Act 1979 s 31(2) (amended by SI 2001/2617; and SI 2002/1555). As to the Credit Unions Act 1979 generally see PARA 2397.

7 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

8 See the Friendly and Industrial and Provident Societies Act 1968 s 4(8) (see PARA 2514), s 10(1) (see PARA 2515) and s 13(3) (see PARA 2520). The power to make regulations under this Act may be exercised so as to make different provision in relation to different cases or different circumstances to which the power is applicable: s 19(1). The power is exercisable by statutory instrument, and any statutory instrument containing regulations made under s 4 or s 10 is subject to annulment in pursuance of a resolution of either House of Parliament: s 19(2). See further **STATUTES**. See also PARAS 2514-2515, 2520.

9 See the Industrial and Provident Societies Act 1978 s 2 (s 2(1), (2), (4) amended by SI 2001/2617). An order made under the power conferred by this section altering deposit-taking limits may make such provisions in connection therewith and may contain such other transitional, consequential, incidental or supplemental provisions as appear to the Treasury to be necessary or appropriate in that connection: Industrial and Provident Societies Act 1978 s 2(1), (2) (as so amended). An order may vary or revoke any previous order: s 2(3). The power is exercisable by statutory instrument, which is subject to annulment in pursuance of a resolution of either House of Parliament s 2(4) (as so amended). See the Industrial and Provident Societies (Increase in Deposit-taking Limits) Order 1981, SI 1981/394; and PARA 2406.

10 See the Credit Unions Act 1979 s 29 (substituted by SI 2001/2617). Any power to make an order or regulations conferred on the Treasury by any provision of the Credit Unions Act 1979 is exercisable by statutory instrument: s 29(1) (as so substituted). A statutory instrument made under the Credit Unions Act 1979 is subject to annulment in pursuance of a resolution of either House of Parliament: s 29(2) (as so substituted). At the date at which this volume states the law no such orders or regulations had been made.

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## 2400. Taxation.

A registered society<sup>1</sup> is taxed on all sources of income, including any profit or surplus arising from transactions with its members which would be included in chargeable profits or gains if those transactions were with non-members<sup>2</sup>. If, however, a registered society<sup>3</sup> does not sell to non-members, or if the number of its shares is not limited by its rules or practice, it may deduct as expenses any discounts, rebates, dividends or bonuses granted to members or other persons in respect of amounts paid or payable by or to them on account of their transactions with the society, being discounts, rebates, dividends or bonuses calculated by reference to such amounts or to the magnitude of such transactions<sup>4</sup>.

Share or loan interest<sup>5</sup> paid by a registered society<sup>6</sup> is not treated as a distribution for the purposes of corporation tax but interest payable by such a society (whether as share interest or loan interest) is treated for those purposes as interest under a loan relationship of the society<sup>7</sup>.

If in the course of, or as part of, a union or amalgamation of two or more registered societies<sup>8</sup>, or a transfer of engagements from one registered society to another<sup>9</sup>, there is a disposal of an asset by one society to another, both are treated for the purposes of corporation tax in respect of chargeable gains as if the asset were acquired from the society making the disposal for a consideration of such amount as would secure that neither a gain nor a loss would accrue to that society on the disposal<sup>10</sup>. The same rules apply where the relevant authority<sup>11</sup> acquires under an approved scheme<sup>12</sup> from a registered society which is a housing association<sup>13</sup> its interest in all the land held by it for carrying out its objects, or where, after the authority has made such an acquisition, the authority disposes to a single housing association the whole of that land (except any part previously disposed of or agreed to be disposed of otherwise than to a housing association) together with all related assets<sup>14</sup>.

A registered society which is a housing association, and which satisfies certain conditions<sup>15</sup>, may, if duly approved for this purpose<sup>16</sup>, qualify for exemption from tax in respect of rent due from members and profits from the sale of property occupied by tenants of the association<sup>17</sup>.

1 As to the meaning of 'registered society' see PARA 2395.

2 See the Income and Corporation Taxes Act 1988 s 486; and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1410. In that Act 'company' generally means any body corporate or unincorporated association: see s 832(1). See further **INCOME TAXATION** vol 23(1) (Reissue) PARA 1.

As to the liability of registered societies to capital gains tax see generally the Taxation of Chargeable Gains Act 1992; and **CAPITAL GAINS TAXATION**. As to the liability of societies to value added tax in respect of goods and services supplied by them see generally **VALUE ADDED TAX**.

3 The Income and Corporation Taxes Act 1988 s 486 refers to a 'registered industrial and provident society'; which means a society registered (see PARA 2395) or deemed to be registered (see PARA 2396) under the Industrial and Provident Societies Act 1965 or under the Industrial and Provident Societies Act (Northern Ireland) 1969: see the Income and Corporation Taxes Act 1988 s 486(12). As to computation for corporation tax purposes of the income of a credit union see s 487; and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1411.

4 See the Income and Corporation Taxes Act 1988 s 486(10); and **INCOME TAXATION** vol 23(1) (Reissue) PARA 122.

5 'Share interest' means any interest, dividend, bonus or other sum payable to a shareholder of the society by reference to the amount of his holding in the share capital of the society; 'loan interest' means any interest payable by the society in respect of any mortgage, loan, loan stock or deposit: Income and Corporation Taxes Act 1988 s 486(12). References to the payment of interest include references to the crediting of interest: s 486(12).

6 See note 3.

7 See the Income and Corporation Taxes Act 1988 s 486(1); and **INCOME TAXATION** vol 23(1) (Reissue) PARA 232; **INCOME TAXATION** vol 23(2) (Reissue) PARA 1410. As to charges on income see s 338; and **INCOME TAXATION** vol 23(1) (Reissue) PARA 863.

Previously, except where the recipient's usual place of abode was not within the United Kingdom, share or loan interest had to be paid without deduction of income tax (see s 486(2), (3); and **INCOME TAXATION** vol 23(1) (Reissue) PARA 232; **INCOME TAXATION** vol 23(2) (Reissue) PARA 1410), the recipient being chargeable to tax in accordance with his individual liability (ie under Schedule D, Case III: see s 486(4); and **INCOME TAXATION** vol 23(1) (Reissue) PARA 232; **INCOME TAXATION** vol 23(2) (Reissue) PARA 1410). Every registered society, within three months after the end of any accounting period of the society, had to deliver to the inspector of taxes a return showing (1) the name and place of residence of every person to whom the society paid without deduction of income tax sums amounting to more than £15 in that period (see s 486(6)(a)); and (2) the amount so paid in that period to each of those persons (see s 486(6)(b)). If the return under s 486(6) was not duly made, share and loan interest paid by the society in the period was not brought into account for the purposes of provisions on loan relationships: see s 486(7) (amended by the Finance Act 1996 Sch 14 para 30(b)). For the purposes of income tax for the year 2007-2008 and subsequent tax years, and for the purposes of corporation tax for accounting periods after 5 April 2007, the provisions of the Income and Corporation Taxes Act 1988 s 486(2),

(3), (6) are repealed and s 486(7) is further amended so as to refer to the Income Tax Act 2007 s 887(2) (see **INCOME TAXATION**) instead of the Income and Corporation Taxes Act 1988 s 486(6): see the Income Tax Act 2007 ss 1027, 1031, 1034(1), Sch 1 Pt 1 paras 1, 90, Sch 3 Pt 1. For transitional provisions and savings see s 1030(1), Sch 2.

8 See note 3.

9 As to amalgamation and transfer of engagements see **PARAS** 2560-2563.

10 See the Income and Corporation Taxes Act 1988 s 486(8); and **INCOME TAXATION** vol 23(2) (Reissue) **PARA** 1410.

11 Ie either the Housing Corporation or the Welsh Ministers: see **HOUSING** vol 22 (2006 Reissue) **PARAS** 5, 18 et seq.

12 Ie approved under the Housing Associations Act 1985 s 82, Sch 7 para 5: see **HOUSING** vol 22 (2006 Reissue) **PARA** 28.

13 As to registered societies which are registered housing associations known as 'registered social landlords' see **PARA** 2408.

14 See the Taxation of Chargeable Gains Act 1992 s 218; and **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) **PARA** 284.

15 No claim for exemption has effect unless it is proved that during the year or accounting period, or part of it, to which the claim relates: (1) no property belonging to the association was let otherwise than to a member of the association (Income and Corporation Taxes Act 1988 s 488(10)(a)); (2) no property let by the association, and no part of such property, was occupied, whether solely or as joint occupier, by a person not being a member of the association (subject, however, to an exception allowing occupation under the will or intestacy of a deceased member for a period of six months after the death) (s 488(10)(b)); (3) the association is, or is deemed to be, a registered society (see **PARAS** 2395-2396), and is a housing association within the meaning of the Housing Associations Act 1985 (see **PARA** 2408) (Income and Corporation Taxes Act 1988 s 488(10)(c)); (4) the rules of the association restrict membership to persons who are tenants or prospective tenants of the association, and preclude the granting or assignment of tenancies to persons other than members (s 488(6), (10)(c)); (5) the association has complied with such other conditions as may be prescribed (s 488(6), (10)(c)); and (6) any covenants required by those conditions to be included in grants of tenancies have been observed (s 488(10)(d)). Substantial compliance with these requirements may be sufficient: see s 488(11); and **INCOME TAXATION** vol 23(2) (Reissue) **PARA** 1412.

16 As to approval see the Income and Corporation Taxes Act 1988 s 488(6), (7); and **INCOME TAXATION** vol 23(2) (Reissue) **PARA** 1412.

17 See the Income and Corporation Taxes Act 1988 s 488(1)(a), (5); and **INCOME TAXATION** vol 23(2) (Reissue) **PARA** 1412. As to the making of claims under s 488, and as to the position of the member-tenants of the association, see further **INCOME TAXATION** vol 23(2) (Reissue) **PARA** 1412.

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## **2401. Other legislation relating to registered societies.**

In so far as a registered society is a charity<sup>1</sup>, it is not required to be registered under the Charities Act 1993<sup>2</sup>.

In so far as any registered society provides credit to members or others, it will be subject to the provisions of the Consumer Credit Act 1974<sup>3</sup>.

If a registered society carrying on the business of a social club wishes to supply alcohol<sup>4</sup> on club premises to members or guests, then it must abide by the rules contained in the Licensing Act



2003<sup>5</sup>. The main authorisation relating to a club in these circumstances is the club premises certificate<sup>6</sup> allowing a club to supply alcohol to members and sell it to guests without the need for any member or employee to hold a personal licence or for a designated supervisor to be appointed. More limited rights of entry are also given to the police and other authorised persons over club premises, and the premises are not subject to police powers of instant closure on grounds of disorder and noise nuisance<sup>7</sup>. However, a club may also choose to obtain a full premises licence or temporary event notice depending on the relevant activities<sup>8</sup>. A qualifying club activity may be carried on under and in accordance with a club premises certificate under Part 4 of the Licensing Act 2003<sup>9</sup>. A club is a qualifying club in relation to the supply of alcohol to members or guests if it satisfies both the general conditions<sup>10</sup> and the additional conditions<sup>11</sup>. A club is a qualifying club in relation to the provision of regulated entertainment if it satisfies the general conditions<sup>12</sup>.

Other legislation affecting the conduct of the affairs of registered societies is mentioned where relevant in this title<sup>13</sup>.

1 As to the type of society which may qualify as a charity see PARA 2402; and see generally **CHARITIES**. As to permission to omit the word 'limited' from the name of a society having objects which are wholly charitable or benevolent see PARA 2439. As to the requirement that a registered society which is a charity must state that fact on its correspondence see PARA 2442. As to the meaning of 'registered society' see PARA 2395.

2 It is an 'exempt charity' within the meaning of the Charities Act 1993: see s 3(5), s 96, Sch 2 para (y); and **CHARITIES** vol 8 (2010) PARA 315.

3 See generally **CONSUMER CREDIT**.

4 As to the meaning of 'alcohol' see **LICENSING AND GAMBLING** vol 67 (2008) PARA 30.

5 See generally **LICENSING AND GAMBLING**. These rules are generally less stringent than the rules covering a commercial enterprise selling direct to the public. As to the licensing system under the Licensing Act 2003 generally see **LICENSING AND GAMBLING** vol 67 (2008) PARA 26 et seq.

6 See **LICENSING AND GAMBLING** vol 67 (2008) PARA 85 et seq.

7 See the Licensing Act 2003 Pt 8 (ss 160-171).

8 Eg a qualifying club wishing to provide entertainment to members of the public on certain days must hold a club premises certificate to cover its normal activities and a premises licence to authorise the provision of entertainment to the public. In these circumstances the club would need to ensure that a personal licence is held by a member or employee under the Licensing Act 2003 Pt 6 (ss 111-135). On special occasions of exceptional international, national or local significance, the opening hours of a club may be relaxed by the making of a licensing hours order.

9 It is under the Licensing Act 2003 Pt 4 (ss 60-97). See **LICENSING AND GAMBLING** vol 67 (2008) PARA 85 et seq.

The following are licensable activities (see s 1(1); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 28) that are also qualifying club activities: (1) the supply of alcohol by or on behalf of a club to, or to the order of, a member of the club; (2) the sale by retail of alcohol by or on behalf of a club to a guest of a member of the club for consumption on the premises where the sale takes place; and (3) the provision of regulated entertainment (see **LICENSING AND GAMBLING**) where that provision is by or on behalf of a club for members of the club or members of the club and their guests: see s 1(2); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 29.

10 The following are the general conditions which a club must satisfy if it is to be a qualifying club in relation to a qualifying club activity: (1) under the rules of the club, persons may not be admitted to membership or be admitted, as candidates for membership, to any of the privileges of membership, without an interval of at least two days between their nomination or application for membership and their admission; (2) under the rules of the club, persons becoming members without prior nomination or application may not be admitted to the privileges of membership without an interval of at least two days between their becoming members and their admission; (3) the club is established and conducted in good faith as a club; (4) the club has at least 25 members; (5) alcohol is not supplied, or intended to be supplied, to members on the premises otherwise than by or on behalf of the club: see the Licensing Act 2003 s 62; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 86.

11 See the Licensing Act 2003 s 61(1), (2); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 86. The following are the additional conditions which a club must satisfy if it is to be a qualifying club in relation to the supply of

alcohol to members or guests: (1) so far as not managed by the club in general meeting or otherwise by the general body of members, the purchase of alcohol for the club, and the supply of alcohol by the club, are managed by a committee whose members: (a) are members of the club; (b) have attained the age of 18 years; and (c) are elected by the members of the club; (2) no arrangements are, or are intended to be, made for any person to receive at the expense of the club any commission, percentage or similar payment on, or with reference to, purchases of alcohol by the club; (3) no arrangements are, or are intended to be, made for any person directly or indirectly to derive any pecuniary benefit from the supply of alcohol by or on behalf of the club to members or guests, apart from: (a) any benefit accruing to the club as a whole; or (b) any benefit which a person derives indirectly by reason of the supply giving rise or contributing to a general gain from the carrying on of the club: see s 64; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 86. A club which is an industrial and provident society is taken to satisfy the additional condition in head (1) above if, and to the extent that, the purchase of alcohol for the club, and the supply of alcohol by the club, are under the control of the members or of a committee appointed by the members: see s 65(1)-(3); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 87.

12 See the Licensing Act 2003 s 61(3); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 86.

13 In particular, as to housing legislation see PARA 2408; and as to credit unions see PARA 2402.

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### ***C. OBJECTS OF SOCIETIES; SPECIAL ACTIVITIES***

#### **2402. Purposes for which a society may be registered.**

A society may be registered<sup>1</sup> under the Industrial and Provident Societies Act 1965 for the purpose of carrying on any industry, business<sup>2</sup> or trade (including dealings of any description with land<sup>3</sup>), whether wholesale or retail<sup>4</sup>, if either (1) the society is a bona fide co-operative society<sup>5</sup>; or (2) in view of the fact that the business of the society is being, or is intended to be, conducted for the benefit of the community, there are special reasons why the society should be registered under the Industrial and Provident Societies Act 1965 rather than as a company under the Companies Act 1985<sup>6</sup>. 'Co-operative society' does not include a society which carries on, or intends to carry on, business with the object of making profits mainly for the payment of interest, dividends or bonuses on money invested or deposited with, or lent to, the society or any other person<sup>7</sup>.

Special provisions apply if a society is to carry on certain classes of business<sup>8</sup>.

A society may also be registered under the Industrial and Provident Societies Act 1965 as a credit union<sup>9</sup> if the following conditions are met: (a) its objects are those, and only those, of a credit union<sup>10</sup>; and (b) as a result of any provision of the rules, admission to membership of the society meets certain specific requirements<sup>11</sup> (whether or not any other qualifications for admission to membership are also required by the rules) and in consequence a common bond exists between members of the society<sup>12</sup>. A society whose objects are wholly or substantially those of a credit union may not be registered otherwise than as a credit union<sup>13</sup>.

A society which at the commencement of the Credit Unions Act 1979 was registered under the Industrial and Provident Societies Act 1965, but whose objects were wholly or substantially those of a credit union, had to take all reasonable steps to have its existing registration cancelled and become registered as a credit union<sup>14</sup>. Such a society remains for all purposes the same body corporate before and after the change of registration<sup>15</sup>.

1 As to the procedure on registration see PARA 2413 et seq. As to the meaning of 'registered society' see PARA 2395.

2 'Business' is not defined in the Industrial and Provident Societies Act 1965. As to use of the word in the Companies Acts see *Smith v Anderson* (1880) 15 ChD 247 at 258, CA, per Jessel MR; *Re Bristol Athenaeum* (1889) 43 ChD 236; and **COMPANIES** vol 14 (2009) PARA 1. Although they are bodies corporate (see PARA 2416), registered societies may carry on the business of dentistry, and may carry on business as opticians: see the Dentists Act 1984 s 43; the Opticians Act 1989 s 9; and **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARAS 385 et seq, 803 et seq.

3 'Land' includes hereditaments and chattels real: Industrial and Provident Societies Act 1965 s 74(1) (renumbered by SI 2001/2617). See also note 4.

4 The words 'including dealings of any description with land' and 'whether wholesale or retail' do not appear to have any enlarging or limiting effect on the expression 'any industry, business or trade'. A society has power to do all acts directly incidental to the business which it is incorporated to carry on, eg the taking on of apprentices: *Burnley Equitable Co-operative and Industrial Society v Casson* [1891] 1 QB 75, DC. As to the limitation on a member's shareholding see PARA 2447.

5 Industrial and Provident Societies Act 1965 s 1(1)(a), (2)(a). See further the text to note 7.

In the annual report of the Chief Registrar for 1989-90 (see paras 4.4, 4.5), 'bona fide co-operative society', not defined in the Industrial and Provident Societies Act 1965, was described in terms which are essentially the same as the criteria set out in note 7. The report also notes that a bona fide co-operative society registered under these provisions should cease to be registered if subsequently it fails to meet the criteria (see para 4.9). Note that the functions of the Chief Registrar are now carried out by the Financial Services Authority: see PARA 2410.

6 Industrial and Provident Societies Act 1965 s 1(1)(a), (2)(b) (s 1(2)(b) amended by the Companies Consolidation (Consequential Provisions) Act 1985 Sch 2). As to registration under the Companies Act 1985 see generally **COMPANIES**. The notes of guidance for the registration of societies (Form F617) issued by the Registry of Friendly Societies (now the Financial Services Authority: see PARA 2410) indicate that a society claiming that it will be conducted for the benefit of the community must be able to show, among other matters, that it will benefit persons other than its own members and that its business will be in the interests of the community; and that factors relevant to suitability for registration are whether the society is non-profit making and is prohibited by its rules from distributing its assets among members, and the factors referred to in note 7 heads (2), (3), (5). Typical societies which qualify for registration under head (2) in the text are those which provide housing for various groups within the community (see PARA 2408). Some of these are charitable or philanthropic in character. As to the application of the Charities Act 1993 see PARA 2401. As to the name of a society the objects of which are wholly charitable or benevolent see PARA 2439. As to model rules see PARA 2428.

The Treasury may by regulations make provision for enabling any community benefit society, or any community benefit society of a prescribed kind, to ensure that: (1) assets of the society of a prescribed kind; (2) assets of the society specified by it in accordance with the regulations; or (3) all of the society's assets, cannot be used or dealt with except in a case mentioned under the Co-operatives and Community Benefit Societies Act 2003 s 1(2): s 1(1). In s 1 'community benefit society' means a society registered, or deemed to be registered, under the Industrial and Provident Societies Act 1965 which fulfils the condition specified in s 1(2)(b) (see head (2) in the text); and 'prescribed' means prescribed by regulations under the Co-operatives and Community Benefit Societies Act 2003 s 1: s 1(9). The exceptional cases referred to in head (3) above are: (a) where the use or dealing is, directly or indirectly, for a purpose that is for the benefit of the community and is of a prescribed kind or, if no kinds of purpose are prescribed, for any purpose that is for the benefit of the community; or (b) where the circumstances are such as may be prescribed: s 1(2). Where under the regulations a society has ensured that relevant assets cannot be used or dealt with except in a specified case, any such assets are 'dedicated assets' for the purposes of s 1: s 1(3). Regulations under s 1 may, in particular: (i) provide for the procedure by which a society may ensure that relevant assets cannot be used or dealt with except in a case falling within s 1(2); (ii) provide for such of a society's rules as are of a prescribed kind to be unalterable, or for them to be alterable only in prescribed circumstances or in circumstances specified in rules of a prescribed kind; (iii) provide that, in any circumstances prescribed under head (b) above, dedicated assets must be dealt with in a prescribed way; (iv) make provision for ensuring that any society, company or other person to whom any dedicated assets are transferred in prescribed circumstances cannot use or deal with those assets except in a case mentioned in s 1(2); (v) provide for members of a society who lose property rights as a result of the society's ensuring that relevant assets cannot be used or dealt with except in such a case to be compensated for that loss, whether by payment of a prescribed amount or of an amount determined in a prescribed way or otherwise, subject to such exceptions as may be prescribed; (vi) provide for the enforcement of provisions designed to ensure that relevant assets cannot be used or dealt with except in a case falling within s 1(2); (vii) make provision for the carrying out of investigations by persons appointed by a prescribed person; (viii) confer power on a prescribed person to require persons of a prescribed description to provide him with information in order to enable or assist him to perform any of his functions under the regulations; (ix) provide for restrictions on the use and disclosure of information obtained by any person in the performance of any function under the

regulations: s 1(4). Regulations under s 1 may also: (A) impose criminal liability; (B) confer functions on a prescribed person; (C) confer jurisdiction on any court; (D) authorise a prescribed person to make rules, binding on persons of a prescribed description, for the purpose of enabling or assisting him to perform any of his functions under the regulations; (E) make provision as to the making, publication and enforcement of such rules; (F) provide for a prescribed person to charge fees sufficient to meet the costs of performing any of his functions under the regulations; (G) modify, exclude or apply, with or without modifications, any enactment or rule of law; (H) contain such incidental, consequential and supplemental provision as the Treasury considers appropriate; (I) make different provision for different cases: s 1(5). Regulations under s 1 may not create any new criminal offence punishable with imprisonment for more than seven years: s 1(6). The power to make regulations under s 1 is exercisable by statutory instrument: s 1(7). No regulations may be made under s 1 unless a draft of the regulations has been laid before Parliament and approved by a resolution of each House: s 1(8). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. As to the regulations made under s 1, see the Community Benefit Societies (Restriction on Use of Assets) Regulations 2006, SI 2006/264. Provision is made by those regulations in relation to restriction on the use of assets (regs 2-4, Sch 1); prescribed societies, circumstances and rules (regs 5-7); enforcement measures (regs 8-15); miscellaneous and supplemental matters (reg 16); and modification of the Industrial and Provident Societies Act 1965 (reg 17, Sch 2).

7 Industrial and Provident Societies Act 1965 s 1(3). The notes of guidance for the registration of societies issued by the Registry of Friendly Societies (now the Financial Services Authority: see PARA 2410) indicate that to qualify as a bona fide co-operative society a society will normally be expected to satisfy the following conditions: (1) the business of the society will be conducted for the mutual benefit of its members in such a way that the benefit which they obtain will in the main stem from their participation in its business; (2) control of the society will under its rules be vested in the members equally and not in accordance with their financial interests in the society; (3) interest payable on share and loan capital (see PARA 2446 et seq) will under the rules not exceed a rate necessary to obtain and retain the capital required to carry out the objects of the society; (4) the profits of the society's business after payment of interest on share capital, if distributable among the members, will under its rules be distributable among them in relation to the extent to which they have traded with or taken part in the business of the society; (5) there should be no artificial restriction of membership with the object of increasing the value of proprietary rights and interests. As to model rules see PARA 2428.

8 See PARA 2403 et seq.

9 The Industrial and Provident Societies Acts 1965 to 1978 (see PARA 2397) apply to credit unions, unless the Credit Unions Act 1979 provides otherwise: s 31(3). The following provisions of the Industrial and Provident Societies Act 1965 do not apply to credit unions: s 1, Sch 1 (see the Credit Unions Act 1979 s 2(1), Sch 1; see also PARA 2425); the Industrial and Provident Societies Act 1965 s 6 (see the Credit Unions Act 1979 s 31(3); and PARA 2447); the Industrial and Provident Societies Act 1965 s 11 (see the Credit Unions Act 1979 s 4(5); and PARA 2403); the Industrial and Provident Societies Act 1965 s 12 (see the Credit Unions Act 1979 s 31(3); and PARA 2409); the Industrial and Provident Societies Act 1965 s 19 (see the Credit Unions Act 1979 ss 5(1), 31(3); and PARA 2468); the Industrial and Provident Societies Act 1965 s 7(3) (see the Credit Unions Act 1979 s 2(1); the Industrial and Provident Societies Act 1965 s 21 (see the Credit Unions Act 1979 s 11, s 31(3); and PARA 2404); the Industrial and Provident Societies Act 1965 s 30 (see the Credit Unions Act 1979 s 12, s 31(3); and PARA 2494); the Industrial and Provident Societies Act 1965 s 31 (see the Credit Unions Act 1979 s 31(3); and PARA 2498); the Industrial and Provident Societies Act 1965 s 52 (see the Credit Unions Act 1979 s 22; and PARAS 2564-2565); the Industrial and Provident Societies Act 1965 s 76 (see the Credit Unions Act 1979 s 32(1); and PARA 2397). The following provisions of the Industrial and Provident Societies Act 1965 are modified in their application to credit unions: s 2(1) (see the Credit Unions Act 1979 s 6(1)(a); and PARA 2413); the Industrial and Provident Societies Act 1965 s 2(3) (see the Credit Unions Act 1979 s 2(2); and PARA 2415); the Industrial and Provident Societies Act 1965 s 10(3) (see the Credit Unions Act 1979 s 4(3); and PARA 2437); the Industrial and Provident Societies Act 1965 s 16(1)(a)(i) (see the Credit Unions Act 1979 s 6(1)(b); and PARA 2579); the Industrial and Provident Societies Act 1965 s 16(1)(c)(i), (ii) (see the Credit Unions Act 1979 s 20(1)(a), (b); and PARA 2579); the Industrial and Provident Societies Act 1965 s 48(1) (see the Credit Unions Act 1979 s 17(1); and PARA 2583); the Industrial and Provident Societies Act 1965 s 53(1) (see the Credit Unions Act 1979 s 23(2); and PARA 2417); the Industrial and Provident Societies Act 1965 s 53(2) (see the Credit Unions Act 1979 s 6(1)(c); and PARA 2417); the Industrial and Provident Societies Act 1965 ss 61-66, 68 (see the Credit Unions Act 1979 s 28(1)-(4); and PARAS 2547-2548).

10 See the Credit Unions Act 1979 s 1(2)(a). The objects of a credit union are: (1) the promotion of thrift among the members of the society by the accumulation of their savings; (2) the creation of sources of credit for the benefit of the members of the society at a fair and reasonable rate of interest; (3) the use and control of the members' savings for their mutual benefit; and (4) the training and education of the members in the wise use of money and in the management of their financial affairs: s 1(3).

11 See the requirements specified in the Credit Unions Act 1979 s 1(3A) or (3B) (s 1(3A), (3B) added by SI 2003/256). The requirement specified in the Credit Unions Act 1979 s 1(3A) is that admission to membership of the society is restricted to persons all of whom fulfil the same specific qualification for admission to membership, being a qualification specified in, or approved under, s 1(4) (see heads (a)-(f) below) as being

appropriate to a credit union: s 1(3A) (as so added). The requirement specified in s 1(3B) is that admission to membership of the society is restricted to persons each of whom fulfils either: (1) the qualification for admission to membership specified by head (e) below as being appropriate to a credit union; or (2) the same specific qualification for admission to membership, being a qualification which is so specified in head (a), (b), (c), (d) or (f) below: s 1(3B) (as so added).

The qualifications for admission to membership which are appropriate to a credit union are: (a) following a particular occupation; (b) residing in a particular locality; (c) being employed in a particular locality; (d) being employed by a particular employer; (e) being a member of a bona fide organisation or being otherwise associated with other members of the society for a purpose other than that of forming a society to be registered as a credit union; (f) residing in or being employed in a particular locality; and such other qualifications as are for the time being approved by the Financial Services Authority: s 1(4) (amended by SI 1996/1189; and SI 2001/2617). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

12 See the Credit Unions Act 1979 s 1(2)(b) (substituted by SI 2003/256).

13 Credit Unions Act 1979 s 2(3).

14 Credit Unions Act 1979 s 2(4).

15 Credit Unions Act 1979 s 2(5).

## UPDATE

### 2402 Purposes for which a society may be registered

TEXT AND NOTES 1-6--Industrial and Provident Societies Act 1965 s 1(2)(b) amended: SI 2009/1941.

NOTE 6--For modification of SI 2006/264 see Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

NOTE 9--Industrial and Provident Societies Act 1965 s 53(2) amended: SI 2009/1941.

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### 2403. Purchase of government securities.

The rules of a society, other than a credit union, registered or to be registered under the Industrial and Provident Societies Act 1965<sup>1</sup> may provide for the setting up and administration by the society of a fund for the purchase, on behalf of the members contributing to the fund, of defence bonds or national savings certificates or such other government securities as may for the time being be prescribed by the Treasury<sup>2</sup>. Any such rules may make provision for enabling persons to become members of the society for the purpose only of contributing to that fund and without being entitled to any rights as members other than rights as contributors to the fund<sup>3</sup>.

<sup>1</sup> As to the meaning of 'registered society' see PARA 2395. As to the rules generally see PARA 2423 et seq. These provisions do not apply to credit unions: Credit Union Act 1979 s 4(5). As to credit unions see PARA 2402.

<sup>2</sup> Industrial and Provident Societies Act 1965 s 11(1) (amended by SI 2001/2617). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

The power of registered societies to make such provision in their rules was originally conferred by the Societies (Miscellaneous Provisions) Act 1940, which gave the Chief Registrar power to prescribe forms of rules for this purpose, and, if requested to do so by the committee of management or other directing body of a registered society in existence on 25 April 1940 (ie the date of the passing of the Act), to register a rule of the society in such of the prescribed forms as was indicated in the request: ss 8(3), 10(1) (repealed). Any rule which by virtue of this provision was immediately before 1 January 1966 (ie the date of commencement of the Industrial and Provident Societies Act 1965) included among the registered rules of a registered society has effect as if it had been duly passed by the society: s 11(2) (amended by the Friendly Societies Act 1974 Sch 9 para 18(b)). The Treasury's power to prescribe further classes of government security for societies registered under the Industrial and Provident Societies Act 1965 is exercised under the Friendly Societies Act 1974 s 47(1) (see PARA 2103): see the Industrial and Provident Societies Act 1965 s 11(1) (amended by the Friendly Societies Act 1974 Sch 9 para 18(a)).

3 Industrial and Provident Societies Act 1965 s 11(1) (as amended: see note 2).

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#### **2404. Advances to members.**

The rules of a registered society<sup>1</sup>, other than a credit union, may provide for advances of money to members<sup>2</sup>. Except in the case of societies registered to carry on banking business<sup>3</sup> and agricultural, horticultural or forestry societies<sup>4</sup>, the rules may provide for such advances only on the security of real or personal property<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2395. As to the rules generally see PARA 2423 et seq.

2 Industrial and Provident Societies Act 1965 s 21. This is a power which a registered society may include in its rules, whatever may be its purposes. As to the power of local authorities to guarantee the repayment of advances made to members for housing purposes see PARA 2408; and **HOUSING**. This provision, being inconsistent with the provisions of the Credit Unions Act 1979, is omitted in the application of the Industrial and Provident Societies Act 1965 to credit unions: Credit Unions Act 1979 s 31(3).

3 As to advances of money by societies carrying on banking business see PARA 2405.

4 As to advances of money by agricultural, horticultural and forestry societies see PARA 2409.

5 Industrial and Provident Societies Act 1965 s 21.

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#### **2405. Societies carrying on the business of banking.**

A society, other than a credit union, which has any withdrawable share capital (1) may not be registered with the object of carrying on the business of banking; and (2) if already registered, may not carry on such business<sup>1</sup>. On the first Monday in February and August in each year, every registered society which carries on the business of banking must make out a statement of its capital, and of its liabilities and assets as at the first day<sup>2</sup> of the preceding month<sup>3</sup>. This

statement must be kept hung up in a conspicuous position in the society's registered office, and in every other office or place of business belonging to the society where the business of banking is carried on, until the next such Monday<sup>4</sup>. Failure to observe any of the above provisions is an offence<sup>5</sup>. The rules of a society registered to carry on banking business may provide for advances of money to members in any manner customary in the conduct of such business<sup>6</sup>.

1 Industrial and Provident Societies Act 1965 s 7(1). Head (2) in the text, being a provision replaced by or inconsistent with provisions of the Financial Services and Markets Act 2000, does not apply to credit unions: see the Credit Unions Act 1979 s 31(4) (added by SI 2002/1501). Societies not carrying on the business of banking may have withdrawable share capital (see PARAS 2448-2449) if this is provided for in the rules: see PARA 2425. As to share capital generally see PARA 2446 et seq. As to the business of banking see PARA 791 et seq. A registered society would carry on the business of banking within the meaning of the prohibition if it carried on the principal business of a banker by receiving deposits repayable on demand or on notice and paying interest on them, even though it did not also carry on other parts of a banker's business: *Re Bottomgate Industrial Co-operative Society* (1891) 65 LT 712 at 714, DC. See also *Re Birkbeck Permanent Benefit Building Society* [1912] 2 Ch 183, CA; affd on this point sub nom *Sinclair v Brougham* [1914] AC 398, HL.

2 ie 1 January or 1 July.

3 Industrial and Provident Societies Act 1965 s 7(2), Sch 2. The statement must be in the form set out in Sch 2, or in a form as near to that form as the circumstances admit: s 7(2).

4 Industrial and Provident Societies Act 1965 s 7(2). This provision places registered societies carrying on banking business under an obligation similar to that imposed on registered companies carrying on banking business: see generally PARA 791 et seq.

5 See the Industrial and Provident Societies Act 1965 s 7(6)(a), (b); and PARA 2549. It would seem that an offence is not committed if a society authorised under its rules to carry on banking business does not in fact do so by opening accounts, receiving deposits etc: *Re Builders Bank Ltd* (1906) (an unreported Divisional Court case referred to in CR Rep Pt A, pp 10, 35 (Parliamentary Papers (1907) vol 78)).

6 Industrial and Provident Societies Act 1965 s 21. This provision, being inconsistent with the provisions of the Credit Unions Act 1979, is omitted in the application of the Industrial and Provident Societies Act 1965 to credit unions: Credit Unions Act 1979 s 31(3). As to the rules generally see PARA 2423 et seq.

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## **2406. Business not deemed to be banking.**

The taking of deposits of not more than £400 in any one payment and not more than £400 for any one depositor, payable on not less than two clear days' notice, is not treated as carrying on the business of banking for the purposes of the Industrial and Provident Societies Act 1965<sup>1</sup>, but no society which takes such deposits may make any payment of withdrawable capital while any payment due on account of any such deposit is unsatisfied<sup>2</sup>. This is a limited form of savings bank business which any registered society, whatever its business, may transact if it takes power in its rules to do so. The rules may provide for deposits being made by other persons as well as members<sup>3</sup>.

1 ie for the purposes of the Industrial and Provident Societies Act 1965 s 7(1), (2); see PARA 2405.

2 Industrial and Provident Societies Act 1965 s 7(3) (amended by the Industrial and Provident Societies Act 1978 s 1(1)). The Industrial and Provident Societies Act 1978 s 2(2) (amended by SI 2001/2617) authorises the

further alteration of the amounts in the Industrial and Provident Societies Act 1965 s 7(3) from time to time by order made by statutory instruments; the limits set by the Industrial and Provident Societies Act 1978 were each further raised to £400 by the Industrial and Provident Societies (Increase in Deposit-taking Limits) Order 1981, SI 1981/394.

A registered society which makes any payment of withdrawable capital in contravention of this provision commits an offence: see the Industrial and Provident Societies Act 1965 s 7(6)(c); and PARA 2549. Special provisions apply to a society where: (1) the society is one which was registered under the Industrial and Provident Societies Act 1893 before 27 April 1952, and to which the Industrial and Provident Societies Act 1965 s 4 (see PARA 2396) applies (s 7(4)); (2) no amendment of the society's registered rules has been registered since 27 April 1952 (s 7(4)(a)); (3) those rules permit the taking of deposits up to, but not in excess of, 50p in any one payment and £20 for any one depositor (s 7(4)(b)); Decimal Currency Act 1969 s 10(1)); and (4) the society's committee has, since 27 April 1952, passed a written resolution to replace those limits by the higher limits of £400 (Industrial and Provident Societies Act 1965 s 7(4)(c) (amended by the Industrial and Provident Societies Act 1978 s 1(1); and SI 1981/394)). In such a case the society's registered rules have effect subject to that resolution: Industrial and Provident Societies (Increase in Deposit-taking Limits) Order 1981, SI 1981/394, art 4(1), (2). When such a resolution has been passed, the committee has no power to vary or revoke it: art 4(4). On the registration after 22 September 1982 of an amendment of the society's rules, if the committee has not already passed any such resolution, its power to do so determines; or, if the committee has passed such a resolution, the registered rules have effect as if the resolution had not been passed, but without prejudice to any sums standing deposited with the society immediately before the date of registration of the amendment: art 4(3), (5). Similar provisions are contained in the Industrial and Provident Societies Act 1965 s 7(4), (5) and in the Industrial and Provident Societies Act 1974 s 1(2)-(6) in relation to a society the committee of which resolved, when the permitted limits were lower, to substitute those lower limits for the limits contained in the society's rules. As to amendment of the rules see PARA 2434 et seq.

3 See PARA 2453. As to offences in connection with inviting deposits see PARA 2552. As to the rules generally see PARA 2423 et seq.

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## **2407. Insurance business.**

Registered societies may carry on insurance business<sup>1</sup>, in which case they are now subject to the provisions of the Financial Services and Markets Act 2000<sup>2</sup>.

A credit union<sup>3</sup>, or any two or more credit unions, may enter into arrangements with a person carrying on the business of insurance for the purpose of making funds available to meet losses incurred by members of a credit union which is a party to the arrangements; and any two or more credit unions may enter into any other kind of arrangements for that purpose<sup>4</sup>.

1 As to the classification of insurers as legal entities (including industrial and provident societies and friendly societies) see **INSURANCE** vol 25 (2003 Reissue) PARA 11. As to the fact that registered societies are bodies corporate see PARA 2416. As to the meaning of 'registered society' generally see PARA 2395. Registered societies used to be covered by the regulating provisions of the Insurance Companies Act 1982, in which 'registered society' was defined as a society registered or deemed to be registered under the Industrial and Provident Societies Act 1965 or any corresponding enactment or Measure in force in Northern Ireland: Insurance Companies Act 1982 s 96(1) (repealed). Since the legislation's repeal the appropriate statute is the Financial Services and Markets Act 2000.

2 As to the Financial Services and Markets Act 2000 and the regulation of insurance by the Financial Services Authority see generally **INSURANCE**. As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

3 As to credit unions see PARA 2402.



4 Credit Unions Act 1979 s 16(1). A credit union has power to make contributions under arrangements made in accordance with s 16(1), and such arrangements may in particular provide for the vesting of a fund in trustees appointed under the arrangements: s 16(2). Arrangements under s 16(1) will not come into force and no contribution may be made thereunder by a credit union, until they have been approved by the Authority; and the Authority must not approve any such arrangements unless they provide that any variation of their terms also require its approval: s 16(3) (amended by SI 2001/2617).

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### **2408. Societies providing housing.**

A registered society established for the purpose of, or having among its objects or powers those of, providing, constructing, improving or managing, or facilitating or encouraging the construction or improvement of, housing accommodation<sup>1</sup> may be a housing association within the meaning of the Housing Act 1985 and the Housing Associations Act 1985 if it does not trade for profit, or if its constitution or rules prohibit the issue of any capital with interest or dividend exceeding the rate for the time being prescribed by the Treasury<sup>2</sup>, whether with or without differentiation as between share and loan capital<sup>3</sup>. Housing associations which are registered with the relevant authority<sup>4</sup> are known as 'registered social landlords'<sup>5</sup>.

A registered society is eligible to be registered and so become a registered social landlord if: (1) it is non-profit-making; (2) it is established for the purpose of, or has among its objects or powers those of, providing, constructing, improving or managing houses to be kept available for letting, or (where the rules of the body restrict membership to persons entitled or prospectively entitled, as tenants or otherwise, to occupy a house provided or managed by the body) houses for occupation by members, or hostels; and (3) any additional purposes or objects of the association are limited to those specified<sup>6</sup>. As soon as may be after placing a registered society on the register as a social landlord or removing it from the register<sup>7</sup>, the relevant authority must give notice of the registration or removal to the Financial Services Authority<sup>8</sup>, and must also give the Authority notice of any appeal by the society against removal<sup>9</sup>.

A registered society which is also a registered housing association is, in the conduct of its affairs, subject to a number of statutory provisions in addition to those of the Industrial and Provident Societies Act 1965 to 1978<sup>10</sup>.

1 I.e. including flats, lodging houses and hostels: see the Housing Act 1985 s 56; and **HOUSING** vol 22 (2006 Reissue) PARA 11. As to the meaning of 'registered society' see PARA 2395.

2 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 See the Housing 1985 s 5(1); the Housing Associations Act 1985 s 1(1); and **HOUSING** vol 22 (2006 Reissue) PARA 11. For details of the financial assistance provided under the Housing Acts generally see **HOUSING**.

4 I.e. the Housing Corporation or the Welsh Ministers. The Housing Corporation is the registering authority for England: see **HOUSING** vol 22 (2006 Reissue) PARA 18 et seq. The Welsh Ministers are the registering authority for Wales: see **HOUSING** vol 22 (2006 Reissue) PARA 19.

5 Registration of housing associations as social landlords with the Housing Corporation or the Welsh Ministers is governed by the Housing Act 1996 Pt I (ss 1-64): see **HOUSING** vol 22 (2006 Reissue) PARA 66 et seq.

- 6 See the Housing Act 1996 s 2(2); and **HOUSING** vol 22 (2006 Reissue) PARA 68. The additional purposes or objects are those specified in s 2(4): see **HOUSING** vol 22 (2006 Reissue) PARA 68.
- 7 As to removal from the register see the Housing Act 1996 s 4; and **HOUSING** vol 22 (2006 Reissue) PARA 70.
- 8 See the Housing Act 1996 s 3(3), s 4(6); and **HOUSING** vol 22 (2006 Reissue) PARAS 69-70. The registration or removal must be recorded. As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.
- 9 See the Housing Act 1996 s 6(3); and **HOUSING** vol 22 (2006 Reissue) PARA 72.
- 10 See PARAS 2460, 2495, 2533, 2559, 2566.

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### **2409. Agricultural, horticultural or forestry societies.**

Where a society, other than a credit union, registered or to be registered under the Industrial and Provident Societies Act 1965, consists mainly of members who are producers of agricultural or horticultural produce or persons engaged in forestry, or organisations of such producers or persons so engaged, and the object or principal object of the society is the making to its members of advances of money for agricultural, horticultural or forestry purposes, registration of the rules of the society or of any amendment of them may not be refused on the ground that the rules provide, or would as amended provide, for the making of such advances without security<sup>1</sup>.

A registered society carrying on the business of agriculture or horticulture<sup>2</sup> may qualify for grants made under the Agriculture Act 1967 in respect of expenditure incurred by the society in fulfilling a guarantee given by it as security for a bank loan required by a person for the purpose of his agricultural or horticultural business<sup>3</sup>.

A registered society may be an allotment society for the purposes of the statutory provisions governing the promotion and extension of such societies<sup>4</sup>.

Special provisions apply where registered societies create certain charges on property which is farming stock<sup>5</sup>.

1 Industrial and Provident Societies Act 1965 s 12. Cf the general requirement that the rules must provide for security to be given for advances: see PARA 2404. As to registration of rules and amendments see PARAS 2415, 2437; and as to cancellation of registration see PARA 2579. This provision, being inconsistent with the provisions of the Credit Unions Act 1979, is omitted in the application of the Industrial and Provident Societies Act 1965 to credit unions: Credit Unions Act 1979 s 31(3). As to the meaning of 'registered society' see PARA 2395.

2 As to the meaning of 'agriculture or horticulture business' see **AGRICULTURAL LAND; AGRICULTURAL PRODUCTION AND MARKETING**.

3 See the Agriculture Act 1967 s 64(2); and **AGRICULTURAL LAND; AGRICULTURAL PRODUCTION AND MARKETING**.

4 See generally **AGRICULTURAL LAND**.

5 See PARA 2454.

### **UPDATE**

## **2409 Agricultural, horticultural or forestry societies**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

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### **(ii) Registration and Incorporation**

#### ***A. THE FINANCIAL SERVICES AUTHORITY AS REGISTRATION BODY***

##### **2410. The registration authority.**

For the purposes of the Industrial and Provident Societies Acts 1965 to 1978<sup>1</sup> and the Credit Unions Act 1979<sup>2</sup> the registration authority is the Financial Services Authority, any functions formerly exercised by the Chief Registrar, the assistant registrars and the Central Office of Friendly Societies under those statutes having been transferred by the Treasury<sup>3</sup> under the Financial Services and Markets Act 2000<sup>4</sup>.

1 As to those statutes generally see PARA 2397.

2 As to the Credit Unions Act 1979 generally see PARA 2397.

3 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 See the Financial Services and Markets Act 2000 s 338; the Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617, art 4; and PARA 762. As to the Financial Services Authority generally see PARAS 4, 6 et seq. See also generally the Authority's Handbook of Rules and Guidance, Specialist Sourcebooks, Credit Unions Sourcebook (CRED). As to the Handbook generally see PARA 22.

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##### **2411. Deposit, registering and recording of documents.**

Under the Industrial and Provident Societies Act 1965<sup>1</sup>, registered societies, including credit unions<sup>2</sup>, are required to deposit or register with, or have recorded by, the Financial Services Authority<sup>3</sup> the following documents: (1) applications to register a society or an amendment of rules<sup>4</sup>; (2) annual returns<sup>5</sup>; (3) applications for approval of a change of name<sup>6</sup>; (4) notices of change of registered office<sup>7</sup>; (5) special resolutions for amalgamations, transfers of

engagements or conversions<sup>8</sup>; (6) notices of appointment of receivers, and receivers' returns<sup>9</sup>; (7) instruments of dissolution<sup>10</sup>; (8) winding-up resolutions and other documents required to be registered under the winding-up provisions of the Insolvency Act 1986<sup>11</sup>. Provision is made for the recording of the rules of Northern Irish societies wishing to carry on business in Great Britain<sup>12</sup>.

Every return and other document required for the purposes of the Industrial and Provident Societies Act 1965 must be made in such form and contain such particulars, and must be deposited in such manner, as the Authority may direct; and the Authority must register and record those documents with such observations thereon (if any) as it considers appropriate<sup>13</sup>. These provisions apply also for the purposes of the Credit Unions Act 1979<sup>14</sup>.

1 As to the deposit of documents under the Agricultural Credits Act 1928, the Industrial and Provident Societies Act 1967, the Friendly and Industrial and Provident Societies Act 1968 and the Insurance Companies Act 1982 see PARAS 2407, 2454, 2522.

2 See the Credit Unions Act 1979 s 31(2) (amended by SI 2001/2617; and SI 2002/1555). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

4 See PARAS 2413, 2436. As to the rules generally see PARA 2423 et seq.

5 See PARA 2523.

6 See PARA 2440.

7 See PARA 2443.

8 See PARA 2487.

9 See PARAS 2456-2457.

10 See PARA 2570.

11 See PARA 2566; and **COMPANY AND PARTNERSHIP INSOLVENCY**.

12 See PARA 2397 note 2.

13 Industrial and Provident Societies Act 1965 s 72(1) (substituted by SI 2001/3649). Previous provisions were held not to give the Chief Registrar (now the Financial Services Authority: see PARA 2410) power to dispense with the form altogether: see *Robertson v Russell* (1930) CR Rep Pt 3, s 1, p 32, DC. The Authority's power under this provision to determine the form of an annual return and the particulars to be contained in it is without prejudice to the requirements of the Friendly and Industrial and Provident Societies Act 1968 s 11(2) (see PARA 2523): see s 11(3); and PARA 2523.

14 Credit Unions Act 1979 s 31(2) (as amended: see note 2).

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## **2412. Evidence of documents.**

Any document<sup>1</sup> bearing the seal or stamp of the Financial Services Authority must be received in evidence without further proof<sup>2</sup>. Any document purporting to have been signed by a person

authorised to do so on behalf of the Authority, and every document purporting to be signed by any inspector under the Industrial and Provident Societies Act 1965, in the absence of any evidence to the contrary, is to be received in evidence without proof of the signature<sup>3</sup>. These provisions apply also for the purposes of the Credit Unions Act 1979<sup>4</sup>.

1 For these purposes, 'document' means any document issued, received or created by the Financial Services Authority (or, as the case may be, by any inspector under the Industrial and Provident Societies Act 1965) for the purposes of or in connection with that Act, the Industrial and Provident Societies Act 1967 or the Friendly and Industrial and Provident Societies Act 1968: Industrial and Provident Societies Act 1965 s 72(4) (s 72(2) substituted, and s 72(3)-(4) added, by SI 2001/2617). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the appointment and powers of inspectors see PARAS 2530-2531. As to documentary evidence generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 864 et seq.

Any reference in the Industrial and Provident Societies Act 1965 to the seal of the Authority is a reference to the seal provided for in regulations made under the Friendly Societies Act 1974 s 109(1)(b) (see PARA 2107) (and not to the Authority's common seal), and any reference to a document sealed by the Authority is a reference to a document sealed with that seal: s 74(2) (added by SI 2001/2617).

2 Industrial and Provident Societies Act 1965 s 72(2) (as substituted: see note 1).

3 Industrial and Provident Societies Act 1965 s 72(3) (as added: see note 1).

4 See the Credit Unions Act 1979 s 31(2) (amended by SI 2001/2617; and SI 2002/1555). As to credit unions see PARA 2402.

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## ***B. REGISTRATION PROCEDURE***

### **2413. Application to register.**

An application to register a society, other than a credit union<sup>1</sup>, must be signed by three members and the secretary, and must be sent with two printed copies of the society's rules to the Financial Services Authority<sup>2</sup>. An application to register a society consisting solely of two or more registered societies must be signed by the secretary of each (or, if more than two, of each of any two) of the constituent societies, and be accompanied by two printed copies of the rules of the society sought to be registered<sup>3</sup>. In the case of credit unions, an application to register a society must be signed by 21 members and the secretary and must be sent with two printed copies of the credit union's rules to the Authority<sup>4</sup>.

1 See the Credit Unions Act 1979 s 6(1); and the text and note 4. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 2(1)(b) (amended by SI 1996/1738; and SI 2001/2617). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the matters which have to be provided for in the rules see PARA 2425. As to the rules generally see PARA 2423 et seq.

3 Industrial and Provident Societies Act 1965 s 2(2) (amended by SI 1996/1738).

4 The minimum number of members of a credit union is 21; and the Industrial and Provident Societies Act 1965 s 2(1) (see the text and notes 1-2), as it applies to registration as a credit union or an application for

registration, is amended so as to refer to 21 members instead of three: Credit Unions Act 1979 s 6(1) (amended by SI 1996/1738).

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#### **2414. Restrictions on registration.**

A society, other than a credit union, may not be registered unless (1) it is shown to the satisfaction of the Financial Services Authority<sup>1</sup> to be within either of the two classes of society<sup>2</sup> permitted to be registered<sup>3</sup>; (2) its rules contain provision in respect of certain matters<sup>4</sup>; (3) the place which under those rules is to be the society's registered office<sup>5</sup> is situated in Great Britain or the Channel Islands<sup>6</sup>; and (4) the number of members is not less than three<sup>7</sup>.

Different restrictions apply to the registration of a credit union<sup>8</sup>. A credit union may not be registered under the Industrial and Provident Societies Act 1965 unless: (a) it is shown to the satisfaction of the Authority that specified conditions are fulfilled; (b) the rules of the credit union comply with certain provisions; (c) the society's registered office is situated in Great Britain; (d) the society has made an application to the Authority for permission under the Financial Services and Markets Act 2000<sup>9</sup> to accept deposits<sup>10</sup>; and (e) the Authority is satisfied that, once registered under the Industrial and Provident Societies Act 1965, the society will satisfy and continue to satisfy the threshold conditions set out in the Financial Services and Markets Act 2000<sup>11</sup> in relation to the regulated activity of accepting deposits<sup>12</sup>. The conditions which must be fulfilled are: (i) that the objects of the society are those, and only those, of a credit union<sup>13</sup>; and (ii) that as a result of any provision of the rules admission to membership of the credit union meets certain specific requirements<sup>14</sup> (whether or not any other qualifications for admission to membership are also required by the rules) and that, in consequence, a common bond exists between the members of the credit union<sup>15</sup>. The minimum number of members of a credit union is 21<sup>16</sup>.

There are restrictions on the use of names and the use of the word 'limited' in the names of societies, including credit unions, registered under the Industrial and Provident Societies Act 1965<sup>17</sup>.

A society to be registered for the purpose of carrying on the business of banking may not have any withdrawable share capital<sup>18</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Ie either a bona fide co-operative society or a society the business of which is conducted for the benefit of the community: see further PARA 2402.

3 Industrial and Provident Societies Act 1965 s 1(1)(a) (amended by SI 2001/2617), Industrial and Provident Societies Act 1965 s 1(2) (amended by the Companies Consolidation (Consequential Provisions) Act 1985 Sch 2).

4 Industrial and Provident Societies Act 1965 s 1(1)(b). As to the matters to be provided for see Sch 1; and PARA 2425. As to the rules generally see PARA 2423 et seq.

5 As to the registered office see PARAS 2443-2444.

6 Industrial and Provident Societies Act 1965 s 1(1)(c). As to the meaning of 'Great Britain' see PARA 2 note 3.

7 Industrial and Provident Societies Act 1965 s 2(1)(a) (amended by SI 1996/1738). This does not apply in the case of a society the members of which consist solely of two or more registered societies: see the Industrial and Provident Societies Act 1965 s 2(2); and PARA 2413.

8 See the Credit Unions Act 1979 s 1; and the text and notes 9-15.

9 See for Part IV permission under the Financial Services and Markets Act 2000 s 40: see PARA 348.

10 References to a deposit or accepting deposits must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision and Sch 2 (see PARAS 84-85); Credit Unions Act 1979 s 31(1A) (added by SI 2001/3649; and substituted by SI 2002/1501).

11 See set out in the Financial Services and Markets Act 2000 Sch 6: see PARA 351.

12 Credit Unions Act 1979 s 1(1) (amended by SI 2001/2617; and SI 2002/1501).

The Authority must not issue an acknowledgement of registration under the Industrial and Provident Societies Act 1965 s 2(3) (see PARA 2415) to a credit union unless it also proposes to give that society permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 348 et seq) to accept deposits: Credit Unions Act 1979 s 1(1A), (1B) added by SI 2002/1501). If the Authority issues an acknowledgement of registration to a credit union under the Industrial and Provident Societies Act s 2(3), it must determine any outstanding application of that credit union for permission under the Financial Services and Markets Act 2000 Pt IV (see PARA 348) to accept deposits as soon as reasonably possible thereafter: Credit Unions Act 1979 s 1(1B) (as so added).

13 As to the objects of a credit union see PARA 2402 note 10.

14 As to those requirements see PARA 2402 note 11.

15 Credit Unions Act 1979 s 1(2) (amended by SI 2003/256). See also PARA 2402. In ascertaining whether a common bond exists between the members of a society, the Authority may, if it considers it proper in the circumstances of the case, treat as sufficient evidence of the existence of a common bond a statutory declaration which is given by three members and the secretary of the society, and is to the effect that a common bond exists; and may, if it considers it proper in the circumstances of the case, treat the fact that admission to membership is restricted as mentioned in head (ii) in the text, as sufficient evidence of the existence of a common bond: Credit Unions Act 1979 s 1(5) (amended by SI 1996/1189; and SI 2001/2617).

16 Credit Unions Act 1979 s 6(1).

17 As to the names of societies see PARA 2439 et seq.

18 See PARA 2405.

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## **2415. Acknowledgment of registration.**

On being satisfied that a society, including a credit union, has complied with the statutory provisions as to registration<sup>1</sup>, the Financial Services Authority<sup>2</sup> must issue to the society an acknowledgment of registration bearing the Authority's seal<sup>3</sup>. The acknowledgment of registration also constitutes an acknowledgment, and is conclusive evidence, of the registration of the rules of the society in force at the date of the society's registration<sup>4</sup>.

<sup>1</sup> As to those provisions see PARAS 2402, 2413-2414.

2 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 Industrial and Provident Societies Act 1965 s 2(3) (amended by SI 2001/2617; and SI 2001/3649). The reference in the Industrial and Provident Societies Act 1965 s 2(3) as it applies to registration as a credit union, to compliance with the statutory provision as to the registration must be construed as a reference to compliance with the provisions of both the Industrial and Provident Societies Act 1965 and the Credit Unions Act 1979: see s 2(2). As to bodies sponsoring model rules see PARA 2428. As to the Authority's seal see PARA 2412.

4 Industrial and Provident Societies Act 1965 s 9. This is without prejudice to s 53(3): see PARA 2418. As to rules and amendments see further PARA 2423 et seq.

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### **2416. Effects of registration.**

By virtue of its registration<sup>1</sup>, a society becomes a body corporate by its registered name<sup>2</sup>, by which it may sue and be sued, with perpetual succession and with limited liability<sup>3</sup>. Registration vests in the society all property for the time being vested in any person in trust for it, and all legal proceedings pending by or against the trustees of the society may be brought or continued by or against the society in its registered name<sup>4</sup>. The further privileges conferred on registered societies and their members include (1) the society's power to hold land and to invest funds<sup>5</sup>; (2) the rights of members to dispose on death of their property in the society by means of nomination, and provisions for the distribution of a member's property in the society on his death where there has been no nomination<sup>6</sup>; (3) a simple method for the decision of disputes<sup>7</sup>.

1 As to the evidential effects of the issue of the acknowledgment of registration see PARA 2415.

2 As to the registered name see PARAS 2439-2441.

3 Industrial and Provident Societies Act 1965 s 3 (amended by the Co-operatives and Community Benefit Societies Act 2003 Schedule).

4 Industrial and Provident Societies Act 1965 s 3. A bond given to trustees of a society before its registration becomes vested in the society after registration: *Queensbury Industrial Society v Pickles* (1865) LR 1 Exch 1. An offer to take shares in a society about to be registered is a continuing offer, and, if not revoked, may be accepted by the society after registration: *Bridgetown Co-operative Society v Whelan* [1917] 2 IR 39.

5 See PARA 2494 et seq.

6 See PARA 2503 et seq.

7 See PARA 2534 et seq.

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## **C. CONVERSION OF COMPANY INTO REGISTERED SOCIETY**

### **2417. Resolution for conversion of company into society.**

A company registered under the Companies Acts<sup>1</sup> may by special resolution determine to convert itself into a registered society including a credit union<sup>2</sup>. Except in the case of a credit union<sup>3</sup>, where the nominal value of the company's shares held by any member other than a registered society exceeds the maximum shareholding for the time being permitted in a registered society<sup>4</sup>, the resolution may provide for the conversion of the shares representing that excess into a transferable loan stock bearing such rate of interest as may be fixed, and repayable on such conditions only as are determined by the resolution<sup>5</sup>.

The resolution must be accompanied by a copy of the society's rules and must appoint three persons, or, in the case of a conversion into a credit union, 21 persons<sup>6</sup>, being members of the company, who, together with the secretary, must sign the rules<sup>7</sup>. Those persons may either be authorised to accept any alterations to the rules made by the Financial Services Authority<sup>8</sup> without further consulting the company<sup>9</sup>, or be required to lay any such alterations before the company in general meeting for acceptance as the resolution may direct<sup>10</sup>.

Unless regulations make provision to the contrary, a community interest company<sup>11</sup> may not convert itself<sup>12</sup> into a registered society under the above provisions<sup>13</sup>.

1 For this purpose 'Companies Acts' includes the Companies Act 1985, any earlier enactment for the like purposes which has been repealed, and any law for the like purposes which is or has been in force in Northern Ireland or any of the Channel Islands: Industrial and Provident Societies Act 1965 s 74(1) (renumbered by SI 2001/2617; and definition amended by the Companies Consolidation (Consequential Provisions) Act 1985 Sch 2). See generally **COMPANIES**.

2 Industrial and Provident Societies Act 1965 s 53(1) (amended by the Industrial and Provident Societies Act 1975 s 3(3); the Companies Consolidation (Consequential Provisions) Act 1985 Sch 2; and SI 2007/2194). As to the conversion of a registered society into a company see **PARAS** 2564-2565. As to the meaning of 'registered society' see **PARA** 2395. As to credit unions see **PARA** 2402.

3 In its application to the conversion of a company into a credit union, the reference to the limitations on shareholding in the Industrial and Provident Societies Act 1965 s 53 is omitted: Credit Unions Act 1979 s 23(1), (2). That is because in the application of the Industrial and Provident Societies Act 1965 to credit unions, s 6, which contains the limitations, is omitted: see the Credit Unions Act 1979 s 31(3).

4 The maximum shareholding in registered societies permitted to members (other than registered societies or certain other bodies or persons) is £20,000: see the Industrial and Provident Societies Act 1965 s 6(1); and **PARA** 2447.

5 Industrial and Provident Societies Act 1965 s 53(1) (as amended: see note 2).

6 Credit Unions Act 1979 s 6(1)(c) (amended by SI 1996/1738). As to the rules generally see **PARA** 2423 et seq.

7 Industrial and Provident Societies Act 1965 s 53(2) (amended by SI 1996/1738).

8 As to the Financial Services Authority in regard to registered societies see **PARA** 2410. As to the Authority generally see **PARAS** 4, 6 et seq.

9 Industrial and Provident Societies Act 1965 s 53(2)(a) (amended by SI 2001/2617).

10 Industrial and Provident Societies Act 1965 s 53(2)(b).

11 As to community interest companies see **COMPANIES** vol 14 (2009) **PARA** 82 et seq.

12 Ie under the Industrial and Provident Societies Act 1965 s 53 or the Industrial and Provident Societies Act (Northern Ireland) 1969 s 62.

13 Companies (Audit, Investigations and Community Enterprise) Act 2004 s 56(1) (amended by SI 2007/1093). If regulations make provision allowing the conversion of community interest companies under the Industrial and Provident Societies Act 1965 s 53 (or its Northern Ireland equivalent) they may include provision modifying s 53 (or its Northern Ireland equivalent) in its application by virtue of the regulations: Companies (Audit, Investigations and Community Enterprise) Act 2004 s 56(2). At the date at which this volume states the law no such regulations had been made.

## UPDATE

### **2417 Resolution for conversion of company into society**

NOTE 1--Definition of 'Companies Acts' substituted: SI 2009/1941.

TEXT AND NOTES 6-10--Industrial and Provident Societies Act 1965 s 53(2) amended: SI 2009/1941.

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### **2418. Registration of society on conversion.**

A copy of the resolution for conversion of a company into a registered society must be sent with a copy of the proposed rules<sup>1</sup> to the Financial Services Authority<sup>2</sup> which, upon the registration of the society, must give to it, in addition to an acknowledgment of registration<sup>3</sup>, a certificate similarly sealed or signed that the rules of the society referred to in the resolution have been registered<sup>4</sup>. The name under which the converted company is registered as a society must not include the word 'company'<sup>5</sup>.

A company is not to be registered as a credit union<sup>6</sup> unless the Authority is satisfied that: (1) either there are no outstanding deposits by members with the company or that, in the case of every such outstanding deposit, the member concerned has consented in writing to the deposit being converted into an equivalent amount of shares in the credit union immediately upon the company being registered as a credit union; and (2) in no case does the nominal value of the company's shares held by any member, together with the amount of any deposit of his which is to be converted as mentioned in head (1) above, exceed the maximum shareholding for the time being permitted by any applicable rules made by the Authority<sup>7</sup> in the case of a member of a credit union<sup>8</sup>.

1 See PARA 2417. As to the rules generally see PARA 2423 et seq.

2 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395.

3 As to the acknowledgment of registration see PARA 2415. The provision that an acknowledgment of registration is an acknowledgment, and conclusive evidence, of the registration of rules in force at the date of the society's registration (see PARA 2415) is without prejudice to the requirement (see the text to note 4) as to the issue of a certificate that the rules have been registered: Industrial and Provident Societies Act 1965 s 9.

4 Industrial and Provident Societies Act 1965 s 53(3) (amended by SI 2001/2617). As to the Authority's seal see PARA 2412.

5 Industrial and Provident Societies Act 1965 s 53(5).

6 le in accordance with the Industrial and Provident Societies Act 1965 s 53. As to credit unions see PARA 2402.

7 le made by the Authority under the Financial Services and Markets Act 2000. As to rules made by the Authority generally see PARA 21 et seq.

8 Credit Unions Act 1979 s 23(1), (3) (s 23(3) amended by SI 2001/2617; and SI 2002/1501).

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## **2419. Cancellation of registration of the company.**

A copy of the resolution for the conversion of a company into a registered society<sup>1</sup>, together with the certificate issued by the Financial Services Authority<sup>2</sup>, must be sent for registration to the office of the registrar of companies<sup>3</sup> and, on his registering that resolution and certificate, the conversion takes effect<sup>4</sup>. On the conversion of a company into a registered society, the company's registration under the Companies Acts becomes void and must be cancelled by the registrar of companies<sup>5</sup>.

1 As to this resolution see PARA 2417. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to the issue of the certificate see PARA 2418. As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

3 le the registrar of companies within the meaning of the Companies Act 1985 (see s 744 (prospectively repealed); and **COMPANIES** vol 14 (2009) PARA 131) (as to the replacement provision see the Companies Act 2006 s 1060(3)); Industrial and Provident Societies Act 1965 s 53(4) (amended by the Companies Consolidation (Consequential Provisions) Act 1985 Sch 2).

4 Industrial and Provident Societies Act 1965 s 53(4) (as amended: see note 3).

5 Industrial and Provident Societies Act 1965 s 53(6). This does not, however, affect rights or claims subsisting against the company: see PARA 2420.

## **UPDATE**

### **2419 Cancellation of registration of the company**

TEXT AND NOTES 1-4--Industrial and Provident Societies Act 1965 s 53(4) amended: SI 2009/1941.

NOTE 5--Industrial and Provident Societies Act 1965 s 53(6) amended: SI 2009/1941.

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## **2420. Priority of company's creditors on conversion.**

The registration of a company as a registered society, including a credit union, does not affect any right or claim for the time being subsisting against the company or any penalty for the time being incurred by it<sup>1</sup>. For the purpose of enforcing any such right, penalty or claim the company may be sued and proceeded against in the same manner as if it had not been registered as a society<sup>2</sup>. Every such right or claim, and the liability to any such penalty, has priority as against the property of the society over all other rights or claims against or liabilities of the society<sup>3</sup>.

1 Industrial and Provident Societies Act 1965 s 53(7); Credit Unions Act 1979 s 31(3). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 53(7)(a).

3 Industrial and Provident Societies Act 1965 s 53(7)(b).

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## ***D. APPEALS FROM REFUSAL TO REGISTER***

### **2421. Right of appeal.**

A society, including a credit union, may appeal from any decision of the Financial Services Authority<sup>1</sup> to refuse registration of the society (including a refusal by reason only of anything contained in or omitted from the society's rules<sup>2</sup>) on any ground other than that the Authority is not satisfied that the society falls within either of the two classes of society permitted to be registered<sup>3</sup>. An appeal lies to the High Court<sup>4</sup>. If the decision is overruled on appeal, the Authority must thereupon issue to the society an acknowledgment of its registration<sup>5</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

2 As to the provisions to be contained in the rules of the society see PARA 2425. As to the rules generally see PARA 2423 et seq.

3 Industrial and Provident Societies Act 1965 s 18(1)(a) (s 18(1)(a), (2), (3) amended by SI 2001/2617); Credit Unions Act 1979 s 31(3). As to the classes of society permitted to be registered see PARA 2402. As to the requirements which must be satisfied before a society may be registered see PARA 2414. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

4 Industrial and Provident Societies Act 1965 s 18(2) (as amended: see note 3). As to the procedure on appeal see PARA 2422. In the case of a society whose registered office is situated in Scotland, the appeal is to the Court of Session (see s 18(2) (as so amended)), but generally Scottish matters are beyond the scope of this work.

5 Industrial and Provident Societies Act 1965 s 18(3) (as amended: see note 3). As to acknowledgment of registration see PARA 2415.

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## **2422. Procedure on appeal.**

Where any decision made by the Financial Services Authority<sup>1</sup> is one against which appeal lies to the High Court<sup>2</sup>, any such appeal must be heard in the Chancery Division<sup>3</sup>. The appellant must file notice<sup>4</sup> at the court within 28 days after the date of the decision against which he wishes to appeal<sup>5</sup>. Where a statement of the reasons for a decision is given later than the notice of that decision, the period for filing the appellant's notice is calculated from the date on which the statement is received by the appellant<sup>6</sup>. In addition to any respondents to the appeal, the appellant must serve notice on the Authority<sup>7</sup>. The Authority is entitled to attend the hearing and make representations to the court<sup>8</sup>.

At any stage of the appeal, the court may direct that the appellant's notice be served on any person<sup>9</sup>. It may direct that notice be given by advertisement or otherwise of the bringing of the appeal, the nature of the appeal and the time when the appeal will or is likely to be heard<sup>10</sup>. The court may also give such other directions as it thinks proper to enable any person interested in the society or the subject matter of the appeal to appear and be heard at the appeal hearing<sup>11</sup>.

Generally appeals are limited to a review of the earlier decision; the court (unless it orders otherwise) will not receive oral evidence or evidence which was not before the Authority earlier, it may draw any inference of fact it considers justified on the evidence, no party can rely on a matter not contained in its appeal notice (unless the court gives permission), and the court will allow an appeal where the Authority's decision was wrong or unjust due to a serious procedural or other irregularity<sup>12</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 See the Industrial and Provident Societies Act 1965 s 18; and PARAS 2421, 2438, 2582.

3 See *Practice Direction--Appeals* PD 52 paras 23.2(6), 23.7. The provisions of CPR Pt 52 apply to such appeals with certain amendments (see the text to notes 4-8): see **CIVIL PROCEDURE** vol 12 (2009) PARAS 1684, 1686. As to CPR Pt 52 generally see **CIVIL PROCEDURE** vol 12 (2009) PARA 1657 et seq.

4 As to the appellant's notice see **CIVIL PROCEDURE** vol 12 (2009) PARA 1663.

5 See *Practice Direction--Appeals* PD 52 para 17.3.

6 See *Practice Direction--Appeals* PD 52 para 17.4.

7 See *Practice Direction--Appeals* PD 52 para 17.5.

8 See *Practice Direction--Appeals* PD 52 para 17.6.

9 See *Practice Direction--Appeals* PD 52 para 23.7(2)(a).

10 See *Practice Direction--Appeals* PD 52 para 23.7(2)(b).

11 See *Practice Direction--Appeals* PD 52 para 23.7(2)(c).

12 See CPR 52.11; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1662, 1672. See also the Industrial and Provident Societies Act 1965 s 18(3); and PARAS 2421, 2438.

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### **(iii) The Rules**

#### **A. STATUTORY REQUIREMENTS AND VALIDITY**

##### **2423. Provisions in rules.**

Every registered society, including a credit union, is required to have registered rules<sup>1</sup> which provide for certain matters<sup>2</sup>. Other matters must be set out in the rules if the society wishes to adopt, or to exclude the application of, certain statutory provisions<sup>3</sup>. Special provisions apply to the rules of societies carrying on the business of banking<sup>4</sup> and of agricultural and related societies<sup>5</sup>. Societies carrying on business affected by legislation other than the Industrial and Provident Societies Acts 1965 to 2003 may be required by that legislation to make some special provisions in their rules<sup>6</sup>.

1 As to the obligation to send copies of the rules with the application to register a society see PARA 2413. The acknowledgment of registration of a society is also an acknowledgment of the registration of the rules in force on that date: see PARA 2415. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 See PARA 2425. As to the binding effect of rules on the members of a society see PARA 2429. As to the limitation of the capacity of a registered society by its rules and the power of a committee to bind a society see PARAS 2431-2433.

3 See PARA 2427.

4 See PARAS 2405-2406.

5 See PARA 2409.

6 See eg PARA 2426.

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##### **2424. Validity of rules in restraint of trade.**

Rules may be made for the protection of the society and will not be illegal as being in restraint of trade unless they impose a greater restraint than is reasonably necessary for that purpose<sup>1</sup>. An acknowledgment of registration of a society or of an amendment of its rules does not make lawful any of the provisions in the rules which are unlawful<sup>2</sup>, but the fact that some rules are illegal does not make the society an illegal society<sup>3</sup>.

1 *Swaine v Wilson* (1889) 24 QBD 252, CA; *McEllistram v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548, HL; *Tipperary Co-operative Creamery Society v Hanley* [1912] 2 IR 586; *Coolmoyne and Fethard Co-operative Creamery Ltd v Bulfin* [1917] 2 IR 107. As to covenants in restraint of trade see generally **COMPETITION** vol 18 (2009) PARA 377 et seq.

2 See PARA 2437.

3 *Swaine v Wilson* (1889) 24 QBD 252, CA.

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## **2425. Necessary provisions.**

The rules of a registered society, other than a credit union, must make provision for the following matters<sup>1</sup>:

- 873 (1) the name of the society<sup>2</sup>;
- 874 (2) the objects of the society<sup>3</sup>;
- 875 (3) the place which is to be the society's registered office to which all communications and notices to the society may be addressed<sup>4</sup>;
- 876 (4) the terms of admission of the members, including any society or company investing<sup>5</sup> funds in the society<sup>6</sup>;
- 877 (5) the mode of holding meetings, the scale and right of voting, and the mode of making, altering or rescinding rules<sup>7</sup>;
- 878 (6) the appointment and removal of a committee (by whatever name), and of managers or other officers and their respective powers and remuneration<sup>8</sup>;
- 879 (7) determination of the maximum amount of the interest in the shares of the society which may be held by any member (other than members exempted from the statutory limit on shareholding)<sup>9</sup>;
- 880 (8) determination whether the society may contract loans or receive money on deposit from members or others<sup>10</sup>, and, if so, under what conditions, under what security and to what limits of amount<sup>11</sup>;
- 881 (9) determination whether the shares or any of them are to be transferable, and provision for the form of transfer and registration of the shares and for the consent of the committee thereto; determination whether the shares or any of them are to be withdrawable, and provision for the mode of withdrawal and for payment of the balance due on them on their withdrawal from the society<sup>12</sup>;
- 882 (10) provision for the audit of accounts by one or more auditors appointed<sup>13</sup> by the society<sup>14</sup>;
- 883 (11) determination whether and, if so, how members may withdraw from the society, and provision for the claims of the representatives of deceased members, or the trustees of the property of bankrupt members, and for the payment of nominees<sup>15</sup>;
- 884 (12) the mode of application of the profits of the society<sup>16</sup>;
- 885 (13) if the society is to have a common seal, provision for its custody and use<sup>17</sup>;
- 886 (14) determination whether and, if so, by what authority, and in what manner, any part of the society's funds may be invested<sup>18</sup>.

The rules of a credit union must make provision for the following matters<sup>19</sup>:

- 887 (a) the name of the society<sup>20</sup>;
- 888 (b) the objects of the society<sup>21</sup>;
- 889 (c) the place which is to be the registered office to which all communications and notices to the society may be addressed<sup>22</sup>;
- 890 (d) the qualifications for and the terms of admission to membership of the society, including any special provision for the insurance of members in relation to their shares<sup>23</sup>;
- 891 (e) the mode of holding meetings, including provisions as to the quorum necessary for the transaction of any description of business and the mode of making, altering or rescinding rules<sup>24</sup>;
- 892 (f) the appointment and removal of a committee, by whatever name, and of managers or other officers and their respective powers and remuneration<sup>25</sup>;
- 893 (g) determination (subject to any applicable rules made by the Financial Services Authority<sup>26</sup> under the Financial Services and Markets Act 2000<sup>27</sup>) of the maximum amount of the interest in the shares of the society which may be held by any member<sup>28</sup>;
- 894 (h) provision for the mode of withdrawal of shares and for payment of the balance due thereon on withdrawing from the society<sup>29</sup>;
- 895 (i) the mode and circumstances in which loans to members are to be made and repaid, including any special provision for the insurance of members in relation to loans made to them<sup>30</sup>;
- 896 (j) provision for the custody and use of the society's seal<sup>31</sup>;
- 897 (k) provision for the audit of accounts by one or more auditors appointed by the society in accordance with the requirements of the Friendly and Industrial and Provident Societies Act 1968 and any applicable rules made by the Authority under the Financial Services and Markets Act 2000<sup>32</sup>;
- 898 (l) provision for the withdrawal of members from the society and for the claims of representatives of deceased members or the trustees of the property of bankrupt members and for the payment of nominees<sup>33</sup>;
- 899 (m) provision for terminating the membership of members<sup>34</sup> and for the repayment of shares held by and loans made to a member whose membership is terminated<sup>35</sup>;
- 900 (n) provision for dissolution of the society, including provision requiring any assets remaining after payment of debts, repayment of share capital and discharge of other liabilities to be transferred to another credit union or, if not so transferred, to be applied for charitable purposes<sup>36</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1; and the text and notes 2-18. As to the meaning of 'registered society' see PARA 2395. These provisions do not apply to a credit union: Credit Unions Act 1979 s 2(1). As to credit unions see the text and notes 19-36; and PARA 2402. As to the binding effect of rules on the members of a society see PARA 2429. As to the limitation of the capacity of a registered society by its rules and the power of a committee to bind a society see PARAS 2431-2433.

2 Industrial and Provident Societies Act 1965 Sch 1 para 1. The name must comply with the requirements of s 5 (see PARAS 2439-2441): Sch 1 para 1.

3 Industrial and Provident Societies Act 1965 Sch 1 para 2. As to the objects for which a society may be registered see PARA 2402.

4 Industrial and Provident Societies Act 1965 Sch 1 para 3. As to the registered office see PARAS 2443-2444.

5 As to investing under the provisions of the Industrial and Provident Societies Act 1965: see PARAS 2447, 2468. As to admission of members generally see PARA 2467 et seq.

6 Industrial and Provident Societies Act 1965 Sch 1 para 4.



- 7 Industrial and Provident Societies Act 1965 Sch 1 para 5. As to meetings and voting see PARA 2478 et seq. As to the amendment of rules see PARAS 2434-2438.
- 8 Industrial and Provident Societies Act 1965 Sch 1 para 6. As to the appointment and removal of officers and committees see PARA 2458 et seq.
- 9 Industrial and Provident Societies Act 1965 Sch 1 para 7. The determination is made in accordance with s 6 (see PARA 2447); Sch 1 para 7. As to the statutory limit on shareholding and the members exempted from it see s 6(1); and PARA 2447.
- 10 This power is subject to the provisions of the Industrial and Provident Societies Act 1965: see PARAS 2405-2406; and PARA 2453.
- 11 Industrial and Provident Societies Act 1965 Sch 1 para 8.
- 12 Industrial and Provident Societies Act 1965 Sch 1 para 9. See PARAS 2448-2449.
- 13 He appointed in accordance with the requirements of the Companies Act 2006 Pt 42 (ss 1209-1264) (see **COMPANIES** vol 15 (2009) PARA 957 et seq) or the Friendly and Industrial and Provident Societies Act 1968 (see PARAS 2514-2515, 2521).
- 14 Industrial and Provident Societies Act 1965 Sch 1 para 10 (amended by the Friendly and Industrial and Provident Societies Act 1968 Sch 1 para 12; and SI 2008/948).
- 15 Industrial and Provident Societies Act 1965 Sch 1 para 11. See PARAS 2476, 2503 et seq.
- 16 Industrial and Provident Societies Act 1965 Sch 1 para 12. See PARAS 2501-2502.
- 17 Industrial and Provident Societies Act 1965 Sch 1 para 13 (substituted by the Co-operatives and Community Benefit Societies Act 2003 s 5(7)). As to the use and custody of the seal see PARA 2445. As to further provisions in regard to seals see PARA 2490 et seq.
- 18 Industrial and Provident Societies Act 1965 Sch 1 para 14. As to authorised investments see PARA 2498.
- 19 See the Credit Unions Act 1979 s 4(1), Sch 1; and the text and notes 20-36.
- 20 Industrial and Provident Societies Act 1965 Sch 1 para 1. The name must comply with s 3(1) (name to include the words 'credit union') and the Industrial and Provident Societies Act 1965 s 5(1), (2) (name not to be undesirable and to end with the word 'limited'): see PARA 2439.
- 21 Industrial and Provident Societies Act 1965 Sch 1 para 2.
- 22 Industrial and Provident Societies Act 1965 Sch 1 para 3.
- 23 Industrial and Provident Societies Act 1965 Sch 1 para 4.
- 24 Industrial and Provident Societies Act 1965 Sch 1 para 5.
- 25 Industrial and Provident Societies Act 1965 Sch 1 para 6.
- 26 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.
- 27 As to rules by the Authority under the Financial Services and Markets Act 2000 generally see PARA 21 et seq.
- 28 Credit Unions Act 1979 Sch 1 para 7 (amended by SI 2002/1501).
- 29 Credit Unions Act 1979 Sch 1 para 8.
- 30 Credit Unions Act 1979 Sch 1 para 9.
- 31 Credit Unions Act 1979 Sch 1 para 10.
- 32 Credit Unions Act 1979 Sch 1 para 11 (amended by SI 2002/1501). The text refers to rules made under the Financial Services and Markets Act 2000 s 340: see PARA 764.
- 33 Credit Unions Act 1979 Sch 1 para 12.

34 le to comply with the limit provided for in the Credit Unions Act 1979 s 5(6) on the number of non-qualifying members of a credit union: see PARA 2470.

35 Credit Unions Act 1979 Sch 1 para 13 (amended by SI 2002/1501).

36 Credit Unions Act 1979 Sch 1 para 14.

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## **2426. Social clubs.**

The rules of a registered society<sup>1</sup> carrying on the business of a social club and supplying alcohol on its premises to members or guests must, for this purpose, contain provisions which satisfy both general conditions and additional conditions as to membership and the supply of such alcohol<sup>2</sup>.

1 As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 See the Licensing Act 2003 ss 61, 62, 64; and PARA 2401. See also **LICENSING AND GAMBLING** vol 67 (2008) PARA 86 et seq.

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## **2427. Optional provisions.**

Registered societies, including credit unions, are authorised<sup>1</sup> to set out in their rules provisions as to: (1) the form of any instrument necessary for carrying the purposes of the society into effect<sup>2</sup>; (2) the imposition of reasonable fines on persons who contravene or fail to comply with any of the rules<sup>3</sup>; (3) rights of inspection of the society's books in addition to the statutory rights<sup>4</sup>; (4) the advancing of money to members<sup>5</sup>; (5) the indorsing of a special form of receipt on discharge of mortgages<sup>6</sup>; (6) the giving of security by officers<sup>7</sup>; (7) the manner of deciding disputes<sup>8</sup>; (8) the exclusion from membership of persons under 18 years of age<sup>9</sup>; (9) the exclusion of power to hold and deal with land<sup>10</sup>.

In addition, registered societies have power to make rules with respect to any other matter, provided that those rules are not inconsistent with any statutory provision<sup>11</sup> and not otherwise unlawful<sup>12</sup>.

Credit unions are able to make the following additional provisions in their rules if they so choose: provision to extend membership to relatives in the same household as a member<sup>13</sup>; provision to disentitle a member who ceases to fulfil the qualifications for admission to membership from retaining his membership<sup>14</sup>; provision to disentitle a non-qualifying member

from purchasing shares and receiving loans<sup>15</sup>; provision in relation to voting by a chairman who has a casting vote<sup>16</sup>; and provision in relation to subscriptions for shares<sup>17</sup>.

1 As to the matters which must be provided for in a society's rules see PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 13(1). The form of any such instrument may be specified either in the rules or in any schedule to them: s 13(1). This provision needs to be read having regard to the provisions of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083. It is thought that unless the rule provided for a fine to be reasonable in the sense of being proportionate to the loss suffered by the society from the member's default, it would be vulnerable to challenge as being an unfair term within the meaning of the Regulations.

3 Industrial and Provident Societies Act 1965 s 13(2). As to recovery of fines see PARA 2557.

4 See the Industrial and Provident Societies Act 1965 s 46(2); and PARA 2527. These additional provisions may be made only in rules made on or after 12 September 1983: s 46(2).

5 See the Industrial and Provident Societies Act 1965 ss 12, 21; and PARAS 2404-2405, 2409. A credit union may make a loan to a member, upon such security (or without security) and terms as the rules of the credit union may provide: see the Credit Unions Act 1979 s 11(1); and PARA 2499.

6 See the Industrial and Provident Societies Act 1965 s 33(1)(b); and PARA 2496.

7 See the Industrial and Provident Societies Act 1965 s 41; and PARA 2464.

8 See the Industrial and Provident Societies Act 1965 s 60(1); and PARA 2534.

9 See the Credit Unions Act 1979 s 20; and PARAS 2458-2459, 2469. A credit union may take deposits from a person who is under the age at which, by virtue of s 20 he may become a member of the credit union: see the Credit Unions Act 1979 s 9(1).

10 See the Industrial and Provident Societies Act 1965 s 30(1); and PARA 2494.

11 It is not inconsistent with any provision of, or any instrument made under, the Industrial and Provident Societies Act 1965 or any other Act requiring or authorising the rules to deal with particular matters, and not inconsistent with any other provision of the Industrial and Provident Societies Act 1965 or of any other Act: s 13(4).

12 Industrial and Provident Societies Act 1965 s 13(4).

13 See the Credit Unions Act 1979 s 1(6); and PARA 2470.

14 See the Credit Unions Act 1979 s 5(5); and PARA 2470.

15 See the Credit Unions Act 1979 s 5(8); and PARA 2470. As to the meaning of 'non-qualifying member' see PARA 2470.

16 See the Credit Unions Act 1979 s 5(9); and PARA 2485.

17 See the Credit Unions Act 1979 s 7(1); and PARA 2446.

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## **2428. Model rules.**

Forms of model rules are obtainable from certain sponsoring organisations<sup>1</sup>. The fees payable to the Financial Services Authority on an application to register a new society vary very considerably depending upon whether or not a form of model rules is adopted and, if so, with what number of changes, if any. The cheapest option is, of course, to make no changes to the model rules at all. Thereafter bands covering one to six amendments, seven to ten amendments and 11 or more amendments apply (the fee in the latter case being the same as the fee for rules not based on a model set at all). The cost of an application to register a change to a society's rules is covered by the annual fee payable to the Authority.

1 No set of model rules has been drawn up by the Financial Services Authority or its predecessor for the use of all societies, as their constitutions and purposes differ too widely, and because the models provided by the sponsoring organisations satisfy the needs of most applicants for registration. As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the matters for which the rules must provide see PARA 2425. A full list of sponsoring bodies and their addresses is supplied by the Financial Services Authority on application.

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## ***B. RELATIONSHIP BETWEEN MEMBERS AND THE SOCIETY***

### **(A) GENERAL EFFECT OF RULES AND SUPPLY OF COPIES**

#### **2429. Binding effect of rules generally.**

In general, the registered rules<sup>1</sup> of a registered society, including a credit union, bind the society and all its members and all persons claiming through them<sup>2</sup> respectively to the same extent as if each member had subscribed his name and affixed his seal to them, and there were contained in those rules a covenant on the part of each member and any person claiming through him to conform to them subject to the provisions of the Industrial and Provident Societies Act 1965<sup>3</sup>. However, without his consent in writing having been first obtained, a member is not bound by any amendment of rules registered after he became a member and after 27 March 1928 if and so far as that amendment requires him to take or subscribe for more shares than the number held by him at the date of registration of the amendment, or to pay upon the shares so held any sum exceeding the amount unpaid upon them at that date, or in any other way increases his liability to contribute to the share or loan capital of the society<sup>4</sup>.

In the case of a society which was registered under the Industrial and Provident Societies Act 1893 on 1 January 1894, and which is now deemed to be registered under the Industrial and Provident Societies Act 1965<sup>5</sup>, no provision in any rule registered before 12 September 1893 prevents the society or its members from exercising any power given by the Industrial and Provident Societies Act 1965 which is not made to depend on the provisions of the society's rules<sup>6</sup>.

1 'Registered rules' means the rules of a society (including a credit union) registered or deemed to be registered under the Industrial and Provident Societies Act 1965 as for the time being in force after any amendment of them so registered: s 74(1) (renumbered by 2001/2617). 'Amendment' includes a new rule, and a resolution rescinding a rule: Industrial and Provident Societies Act 1965 s 74(1) (as so renumbered). As to pre-existing societies which, and the rules of which, are deemed to be registered under the Industrial and Provident Societies Act 1965 see PARA 2396. As to the amendment of rules see PARA 2434 et seq. As to the limitation of the

capacity of a registered society by its rules and the power of a committee to bind a society see PARAS 2431-2433. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 'Persons claiming through a member' includes the heirs, executors or administrators and assignees of a member and, where nomination is allowed, his nominee: Industrial and Provident Societies Act 1965 s 74(1) (as renumbered: see note 1). As to nomination see PARA 2503 et seq.

3 Industrial and Provident Societies Act 1965 s 14(1). See also the Credit Unions Act 1979 s 31(3). Cf the effect of the memorandum and articles of a company: see **COMPANIES** vol 14 (2009) PARA 243 et seq. A mortgage given to a society by a member to secure all money due from him under the rules and other money becoming due from him was held not to entitle the society against an assignee seeking to redeem to tack on money embezzled by the member, as it was not money due under the rules: *Bailes v Sunderland Equitable Industrial Society Ltd* (1886) 55 LT 808. As to the abolition of tacking see **MORTGAGE** vol 77 (2010) PARA 264.

4 Industrial and Provident Societies Act 1965 s 14(2). This provision is derived from the Industrial and Provident Societies (Amendment) Act 1928 s 1 (repealed), which applied only to amendments made on or after 28 March 1928, the date when it came into operation. As to the position before that Act see *Biddulph and District Agricultural Society Ltd v Agricultural Wholesale Society Ltd* [1927] AC 76, HL (member assented to altered rule by taking up additional shares on basis of rule; member bound to take up further shares when required by rule); *Hole v Garnsey* [1930] AC 472, HL (member not having assented to amendment not bound by it; in this case the decision in *Dibble v Wilts and Somerset Farmers Ltd* [1923] 1 Ch 342, though not the grounds on which that decision was based, was in effect upheld by the House of Lords); and see further PARA 2434 note 3. In *Re Foreglen Co-operative Agricultural Society Ltd* [1930] NI 114, CA, the liability of members to subscribe to loan capital was an original liability from the time of joining the society. These cases are still law, but only in respect of amendments registered before 28 March 1928.

5 Is a society to which the Industrial and Provident Societies Act 1965 s 4 applies: see PARA 2396.

6 Industrial and Provident Societies Act 1965 s 14(3). This provision re-enacts that of the Industrial and Provident Societies Act 1893 s 22 (repealed). See further PARAS 2526 note 1, 2527.

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## 2430. Supply of copies of rules.

A copy of its registered rules<sup>1</sup> must be delivered by a registered society to any person who demands it, subject to payment by that person of such sum not exceeding ten pence as the society may see fit to charge<sup>2</sup>. Refusal or neglect to supply a copy, or the supply, with intent to mislead or defraud, of a copy of incorrect rules, is an offence<sup>3</sup>.

1 As to the meaning of 'registered rules' see PARA 2429 note 1.

2 Industrial and Provident Societies Act 1965 s 15(1) (amended by the Decimal Currency Act 1969 s 10(1)). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 See PARAS 2547, 2555.

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## (B) CAPACITY OF SOCIETY AND POWER OF COMMITTEE TO BIND IT

### **2431. Limitation of capacity of society by its rules.**

The validity of an act done by a registered society must not be called into question on the ground of lack of capacity by reason of anything in the society's registered rules<sup>1</sup>. A member<sup>2</sup> of a registered society may bring proceedings to restrain the doing of an act which would otherwise<sup>3</sup> be beyond the society's capacity, but no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the society<sup>4</sup>. It remains the duty of the members of the committee<sup>5</sup> of a registered society to observe any limitations on their powers flowing from the society's registered rules, and action by the members of the committee which would otherwise<sup>6</sup> be beyond the society's capacity may only be ratified by the society by special resolution<sup>7</sup>. A resolution ratifying such action does not affect any liability incurred by a member of the committee or any other person; relief from any such liability must be agreed to separately by special resolution<sup>8</sup>. A party to a transaction with a registered society is not bound to inquire as to whether it is permitted by the society's registered rules<sup>9</sup>.

The above provisions<sup>10</sup> do not apply to acts of a registered society which is a charity<sup>11</sup> except in favour of a person who (1) gives full consideration in money or money's worth in relation to the act in question; and (2) does not know that the act is not permitted by the society's registered rules, or who does not know at the time the act is done that the society is a charity<sup>12</sup>. Where such a society purports to transfer or grant an interest in property, the fact that the act was not permitted by the society's registered rules does not affect the title of a person who subsequently acquires the property or any interest in it for full consideration without actual notice of any such circumstances affecting the validity of the society's act<sup>13</sup>. In any proceedings arising out of this provision<sup>14</sup>, the burden of proving (a) that a person knew that an act was not permitted by the society's registered rules; or (b) that a person knew that the society was a charity, lies on the person making the allegation<sup>15</sup>.

1 Industrial and Provident Societies Act 1965 s 7A(1) (ss 7A-7D added by the Co-operatives and Community Benefit Societies Act 2003 s 3). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the meaning of 'registered rules' see PARA 2429 note 1. The operation of the Industrial and Provident Societies Act 1965 s 7A is restricted by s 7D (see the text to notes 10-15); and s 7E (see PARA 2433) has effect notwithstanding s 7A: s 7A(5) (as so added). See also the Credit Unions Act 1979 s 31(3). The provisions of the Industrial and Provident Societies Act 1965 ss 7A-7E are very similar in concept to the provisions which apply in respect of the capacity of companies and building societies, the powers of their respective boards and dealings with persons associated with the company or the society, although each set of provisions is tailored to the particular type of body corporate. Decisions on the construction of the provisions applicable to such bodies may therefore be of assistance in the construction of these provisions. See further PARA 2035 et seq.

2 As to members see PARA 2467 et seq.

3 Ie but for the Industrial and Provident Societies Act 1965 s 7A(1): see the text to note 1.

4 Industrial and Provident Societies Act 1965 s 7A(2) (as added: see note 1).

5 As to the meaning of 'committee' see PARA 2458 note 1.

6 Ie but for Industrial and Provident Societies Act 1965 s 7A(1): see the text to note 1.

7 Industrial and Provident Societies Act 1965 s 7A(3) (as added: see note 1). 'Special resolution' means a resolution passed by not less than 75% of such members of the society as (being entitled to do so) vote in person, or, where the society's rules allow proxies, by proxy, at a general meeting of which not less than 21 days' notice, specifying the intention to propose the resolution, has been duly given according to those rules: s 7A(6) (as so added). A copy of every such special resolution, signed by the chairman of the meeting at which the resolution was passed and countersigned by the secretary of the society, is to be sent to the Financial Services Authority and registered by it; and until that copy is so registered the special resolution does not take

effect: s 7A(7) (as so added). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

8 Industrial and Provident Societies Act 1965 s 7A(4) (as added: see note 1).

9 Industrial and Provident Societies Act 1965 s 7C (as added: see note 1).

10 Ie the Industrial and Provident Societies Act 1965 s 7A: see the text to notes 1-8.

11 'Charity', in relation to a society whose registered office is situated (1) in England or Wales, has the same meaning as in the Charities Act 1993 (see **CHARITIES** vol 8 (2010) PARA 1); (2) in Scotland, means a body established for charitable purposes only, where 'charitable purposes' has the same meaning as in the Income Tax Acts (see **CHARITIES** vol 8 (2010) PARA 2); and (3) in one of the Channel Islands, means a society established for charitable purposes only, where 'charitable purposes' has the meaning given by the law of the Island in question: Industrial and Provident Societies Act 1965 s 7D(5) (as added: see note 1).

12 Industrial and Provident Societies Act 1965 s 7D(1) (as added: see note 1).

13 Industrial and Provident Societies Act 1965 s 7D(2) (as added: see note 1).

14 Ie the Industrial and Provident Societies Act 1965 s 7D(1): see the text to notes 10-12.

15 Industrial and Provident Societies Act 1965 s 7D(3) (as added: see note 1). Where a registered society is a charity with its registered office situated in England or Wales, the ratification of an act under s 7A(3), or the ratification of a transaction to which s 7E (see PARA 2433) applies, is ineffective without the prior written consent of the Charity Commission for England and Wales: s 7D(4) (as so added; and amended by the Charities Act 2006 Sch 8 para 47). As to the Charity Commission see **CHARITIES** vol 8 (2010) PARA 538 et seq.

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## **2432. Absence of duty to inquire as to capacity of society or authority of committee.**

In favour of a person dealing with<sup>1</sup> a registered society in good faith<sup>2</sup>, the power of the committee<sup>3</sup> to bind the society, or authorise others to do so, is deemed to be free of any limitation<sup>4</sup> under the society's registered rules<sup>5</sup>. This does not affect any right of a member of the society to bring proceedings to restrain the doing of an act which is beyond the powers of the committee, but no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the society<sup>6</sup>. Nor does it affect any liability incurred by a member of the committee, or any other person, by reason of the committee's exceeding its powers<sup>7</sup>. A party to a transaction with a registered society is not bound to inquire as to any limitation on the powers of the committee to bind the society or authorise others to do so<sup>8</sup>.

The above provisions<sup>9</sup> do not apply to the acts of a registered society which is a charity<sup>10</sup> except in favour of a person who (1) gives full consideration in money or money's worth in relation to the act in question; and (2) does not know that the act is beyond the powers of the committee, or who does not know at the time the act is done that the society is a charity<sup>11</sup>. Where such a society purports to transfer or grant an interest in property, the fact that the committee in connection with the act exceeded any limitation on its powers under its rules does not affect the title of a person who subsequently acquires the property or any interest in it for full consideration without actual notice of any such circumstances affecting the validity of the society's act<sup>12</sup>. In any proceedings arising out of this provision<sup>13</sup>, the burden of proving (a) that a

person knew that an act was beyond the powers of the committee; or (b) that a person knew that the society was a charity, lies on the person making the allegation<sup>14</sup>.

- 1 A person deals with a society if he is a party to any transaction or other act to which the society is a party: Industrial and Provident Societies Act 1965 s 7B(2)(a) (ss 7B-7D added by the Co-operatives and Community Benefit Societies Act 2003 s 3). See also the Credit Unions Act 1979 s 31(3); and PARA 2431 note 1.
- 2 A person is not regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the committee under the society's registered rules, and a person is presumed to have acted in good faith unless the contrary is proved: Industrial and Provident Societies Act 1965 s 7B(2)(b), (c) (as added: see note 1). As to the meaning of 'registered rules' see PARA 2429 note 1. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.
- 3 As to the meaning of 'committee' see PARA 2458 note 1.
- 4 References to limitations under the society's registered rules include limitations deriving (1) from a resolution of the society in general meeting or a meeting of any class of its members; or (2) from any agreement between the members of the society or of any class of members: Industrial and Provident Societies Act 1965 s 7B(3) (as added: see note 1).
- 5 Industrial and Provident Societies Act 1965 s 7B(1) (as added: see note 1).
- 6 Industrial and Provident Societies Act 1965 s 7B(4) (as added: see note 1).
- 7 Industrial and Provident Societies Act 1965 s 7B(5) (as added: see note 1).
- 8 Industrial and Provident Societies Act 1965 s 7C (as added: see note 1).
- 9 In the Industrial and Provident Societies Act 1965 s 7B (see the text to notes 1-7).
- 10 As to the meaning of 'charity' see PARA 2431 note 11.
- 11 Industrial and Provident Societies Act 1965 s 7D(1) (as added: see note 1).
- 12 Industrial and Provident Societies Act 1965 s 7D(2) (as added: see note 1).
- 13 In the Industrial and Provident Societies Act 1965 s 7D(1): see the text to notes 9-11.
- 14 Industrial and Provident Societies Act 1965 s 7D(3) (as added: see note 1).

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### **2433. Transactions with committee members and other persons in excess of powers.**

Where a registered society enters into a transaction<sup>1</sup> to which the parties include (1) a member of the committee<sup>2</sup> of the society; or (2) a person connected with such a member or a company<sup>3</sup> with whom such a member is associated<sup>4</sup>, and the committee of the society, in connection with the transaction, exceeds any limitation<sup>5</sup> on its powers under the society's registered rules<sup>6</sup>, the transaction is voidable at the instance of the society<sup>7</sup>. Whether or not it is avoided, any such party to the transaction, and any member of the committee who authorised the transaction, is liable (a) to account to the society for any gain which he has made directly or indirectly by the transaction; and (b) to indemnify the society for any loss or damage resulting from the transaction<sup>8</sup>. The transaction ceases to be voidable if (i) restitution of any money or other asset



which was the subject-matter of the transaction is no longer possible; (ii) the society is indemnified for any loss or damage resulting from the transaction; (iii) rights acquired bona fide for value and without actual notice of the committee's exceeding its powers by a person who is not party to the transaction would be affected by the avoidance; or (iv) the transaction is ratified by the society in general meeting in such a way as the case may require<sup>9</sup>. A person other than a member of the committee is not liable<sup>10</sup> if he shows that at the time the transaction was entered into he did not know that the committee was exceeding its powers<sup>11</sup>. Where a transaction is so voidable<sup>12</sup>, but is valid<sup>13</sup> in favour of such a person, the court<sup>14</sup> may, on the application of that person or of the society, make such order confirming, severing or setting aside the transaction, on such terms as appear to the court to be just<sup>15</sup>.

1 'Transaction' includes any act deriving (1) from a resolution of the society in general meeting or a meeting of any class of its members; or (2) from any agreement between the members of the society or of any class of its members: Industrial and Provident Societies Act ss 7E(1), 7F(1) (ss 7E, 7F added by the Co-operatives and Community Benefit Societies Act 2003 s 3). See also the Credit Unions Act 1979 s 31(3). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to the meaning of 'committee' see PARA 2458 note 1.

3 'Company' has the same meaning as in the Companies Act 1985 (see **COMPANIES** vol 14 (2009) PARA 1): Industrial and Provident Societies Act 1965 s 7F(2) (as added: see note 1).

4 The Companies Act 2006 ss 252-255 (formerly the Companies Act 1985 s 346(2)-(8)) (see **COMPANIES** vol 14 (2009) PARAS 481, 482) applies for the purposes of references in the Industrial and Provident Societies Act 1965 s 7E(1) (see the text to note 7) to a person's being connected with a committee member, or to a committee member's being associated with a company, but those provisions apply (1) as if any reference to a director of a company were a reference to a member of a committee of a registered society; and (2) subject to such other adaptations and modifications as may be specified by regulations made by the Treasury under s 7F: see s 7F(3) (as added: see note 1). Any such regulations are to be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 7F(4) (as so added). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. At the date at which this volume states the law no such regulations had been made.

5 Reference to 'limitations' includes limitations deriving (1) from a resolution of the society in general meeting or a meeting of any class of its members; or (2) from any agreement between the members of the society or of any class of its members: Industrial and Provident Societies Act 1965 s 7F(1) (as added: see note 1).

6 As to the meaning of 'registered rules' see PARA 2429 note 1.

7 Industrial and Provident Societies Act 1965 s 7E(1), (2) (as added: see note 1). See PARA 2431 note 1.

8 Industrial and Provident Societies Act 1965 s 7E(3) (as added: see note 1). Nothing in s 7E(1)-(3) is to be construed as excluding the operation of any other enactment or rule of law by virtue of which the transaction may be called in question or any liability to the society may arise: s 7E(4) (as so added). 'Enactment' includes an enactment contained in an Act of the Scottish Parliament and subordinate legislation whether made under an Act or an Act of the Scottish Parliament: s 7F(5) (as so added).

9 Industrial and Provident Societies Act 1965 s 7E(5) (as added: see note 1).

10 Ie under the Industrial and Provident Societies Act 1965 s 7E(3): see the text to note 8.

11 Industrial and Provident Societies Act 1965 s 7E(6) (as added: see note 1). Section 7E does not affect the operation of s 7B (see PARA 2432) in relation to any party to the transaction not within head (i) or head (ii) in the text: s 7E(7) (as so added).

12 Ie under the Industrial and Provident Societies Act 1965 s 7E.

13 Ie by virtue of the Industrial and Provident Societies Act 1965 s 7B: see PARA 2432.

14 'Court', in relation to a registered society, means the court having jurisdiction to wind up the society under the Insolvency Act 1986, as applied by the Industrial and Provident Societies Act 1965 s 55 (see PARA 2566 et seq): s 7F(6) (as added: see note 1).

15 Industrial and Provident Societies Act 1965 s 7E(8) (as added: see note 1).

**UPDATE****2433 Transactions with committee members and other persons in excess of powers**

TEXT AND NOTES 1-7--Industrial and Provident Societies Act 1965 s 7E(1) amended: SI 2009/1941.

NOTE 3--Industrial and Provident Societies Act 1965 s 7F(2) omitted: SI 2009/1941.

NOTE 4--Industrial and Provident Societies Act 1965 s 7F(3) amended: SI 2009/1941.

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**C. AMENDMENT OF RULES****2434. Power to amend rules.**

There is no statutory mode of amending the rules of a registered society<sup>1</sup> other than a credit union. The rules of a credit union may not be amended except by a resolution passed by not less than two-thirds of the members present at a general meeting called for the purpose, after the giving of such notice as is required by the rules for such a resolution<sup>2</sup>. The rules themselves must provide for the mode of their alteration or rescission and of making new rules<sup>3</sup>. Registered societies are not under the same statutory regulations as registered companies with regard to amendments of rules, but on general principles it seems that the power should be restricted to such amendments as could reasonably be considered to have been within the contemplation of the members when the society was established, and that, for example, an amendment to change the purposes of a society so as to make it a new enterprise with an increased financial obligation on the members would not be within the power<sup>4</sup>.

It appears that a registered society cannot alter rights of membership merely by passing a resolution at a general meeting<sup>5</sup>.

It would seem that an amendment of rules may concern only the internal rights of members, must be made in good faith and not aimed at an individual member or members, and must not be inconsistent with the nature of the society<sup>6</sup>.

1 For specified purposes and subject to certain limitations, the committee of a society has power to effect amendments: see the Industrial and Provident Societies Act 1965 s 6(2)-(4) (see PARA 2447), s 7(4), (5) (see PARA 2406 note 2), s 11(2) (see PARA 2403 note 2); the Friendly and Industrial and Provident Societies Act 1968 s 12 (see PARA 2512); and the Industrial and Provident Societies Act 1975 s 1(2)-(5) (see PARA 2447). As to the limitation of the capacity of a registered society by its rules and the power of a committee to bind a society see PARAS 2431-2433. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Credit Unions Act 1979 s 4(2).

3 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 5; the Credit Unions Act 1979 s 4(1), Sch 1 para 5; and PARA 2425. The rule should provide for any conditions as to the nature of the meeting at which amendments may be passed, the notice to be given of such meeting, or of the amendments or the majority by which amendments may be passed.

4 *Hole v Garnsey* [1930] AC 472 at 500, HL, per Lord Tomlin. In that case it was held that an amendment increasing a member's liability to subscribe to share capital was not binding on him; for the statutory provision now in force as to this point see PARA 2429. Another amendment to reduce share capital was not questioned as being within the power to amend. As to that point, Romer J, in the same case at first instance, sub nom *Re Wilts and Somerset Farmers Ltd* [1928] Ch 809 at 815 said: 'There is nothing in the Industrial and Provident Societies Act [1893] which expressly prohibits such a reduction, and I know of nothing in that Act or elsewhere that can be considered as prohibiting it by implication. No one has suggested before me that the reduction was made in bad faith or for any improper purpose and I must treat it as being valid'.

5 *Auld v Glasgow Working Men's Building Society* (1887) 12 App Cas 197, HL.

6 *Strohmenger v Finsbury Permanent Investment Building Society* [1897] 2 Ch 469, CA.

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### **2435. Complete or partial amendment.**

An amendment of a society's rules may be complete or partial. A complete amendment consists of the substitution of an entire set of rules for the existing set of rules, and any other amendment is a partial amendment<sup>1</sup>.

1 As to what is included in 'amendment' see PARA 2429 note 1. A partial amendment was formerly defined as the addition of a new rule or rules, or part of a rule or rules, to the existing rules; or the substitution of a new rule or rules or part of a rule or rules for any of the existing rules, or any part thereof; or a rescission of any of the existing rules, or any part thereof, without any substitution; or more than one or all of these modes: Industrial and Provident Society Regulations dated 1 January 1894, SR & O 1894/731, reg 2(a). The Financial Services Authority in its information notes on registering partial and complete amendments defines a partial amendment as what occurs when some rules are altered, added or deleted and a complete amendment as the replacement of the existing book of rules by a new book of rules. For practical purposes, the significance is that different forms are required for the registration of partial and complete amendments. In the case of a partial amendment the existing rule book will remain registered and the amendments will appear at the end, whereas in the case of a complete amendment, the new book will be registered. As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

As to the limitation of the capacity of a registered society by its rules and the power of a committee to bind a society see PARAS 2431-2433. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

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### **2436. Application to register an amendment.**

An application to register an amendment of rules must be sent to the Financial Services Authority<sup>1</sup> with two printed copies of the amendment signed by three members and the secretary of the society, or in the case of a society for the time being consisting solely of registered societies, by the secretary of the society and by the secretary of each (or, if more than two, by each of any two) of the constituent societies<sup>2</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 10(1) (amended by the Deregulation (Industrial and Provident Societies) Order 1996, SI 1996/1738, art 4(2); and SI 2001/2617). As to changes of name of a registered society and changes in the situation of its registered office see PARAS 2440, 2443. As to the limitation of the capacity of a registered society by its rules and the power of a committee to bind a society see PARAS 2431-2433.

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### **2437. Acknowledgment of registration.**

No amendment of rules is valid until it has been registered<sup>1</sup>. On being satisfied that any amendment is not contrary to the provisions of the Industrial and Provident Societies Act 1965, the Financial Services Authority<sup>2</sup> must issue to the society in respect of that amendment an acknowledgment of registration bearing the Authority's seal<sup>3</sup>. The acknowledgment is not conclusive as to the legality of alterations made by an amendment<sup>4</sup>.

1 Industrial and Provident Societies Act 1965 s 10(1). See *Re Londonderry Equitable Co-operative Society* [1910] 1 IR 69, where a society carrying on the businesses of general dealers, manufacturers and agents formed a building department, with rules which were not registered; on the liquidation of the society it was held that the society and the building department were separate societies, and that the winding up of the building department was a matter for administration by the Chancery Division, and the liquidator of the society had no power to deal with its assets. As to the special provisions governing change of name and change in the situation of the registered office see PARAS 2440, 2443. As to the limitation of the capacity of a registered society by its rules and the power of a committee to bind a society see PARAS 2431-2433.

2 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 Industrial and Provident Societies Act 1965 s 10(3) (amended by SI 2001/2617; and SI 2001/3649). In the Industrial and Provident Societies Act 1965 s 10(3), as it applies to credit unions, the reference to the statutory provisions is to be construed as including a reference to the Credit Unions Act 1979: s 4(3). As to model rules see PARA 2428. As to the Authority's seal see PARA 2412.

The Industrial and Provident Societies Act 1965 s 10(3) used further to provide that the acknowledgment was conclusive evidence that the amendment had been duly registered. In relation to such a provision it was held that the effect was that, after the acknowledgment had been given, it was not competent for any person to raise objections of procedure or details with reference to matters antecedent to the registration: *Re Quinn and National Catholic Benefit and Thrift Society's Arbitration* [1921] 2 Ch 318 ad 324 per Eve J (following *Butler v Springmount Dairy Society* [1906] 2 IR 193; *Dewhurst v Clarkson* (1854) 23 LJQB 247; *Rosenberg v Northumberland Building Society* (1889) 22 QBD 373, CA). The decision in *Re Quinn and National Catholic Benefit and Thrift Society's Arbitration* itself can no longer apply. The decision in *Rosenberg v Northumberland Building Society* was based on the provisions of the Building Societies Act 1874, which was much closer in wording to the relevant provisions of the Industrial and Provident Societies Act 1965, but was subject to criticism by the Court of Appeal in *Osborne v Amalgamated Society of Railway Servants* [1909] 1 Ch 163, 179, per Fletcher Moulton LJ. The effect of an acknowledgment is therefore now uncertain. The duty of the Authority (formerly the Registrar) is confined to considering whether an amendment complies with the provisions of the Industrial and Provident Societies Act 1965 (see *R v Brabrook* (1893) 69 LT 718, DC).

4 *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485 at 488, CA, per Lindley LJ; and see the cases cited in PARA 2164.

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#### **2438. Appeal from refusal to register an amendment.**

A registered society, including a credit union, may appeal from a decision of the Financial Services Authority<sup>1</sup> to refuse registration of any amendment of the society's rules<sup>2</sup>. The procedure is the same as in the case of a refusal to register a society<sup>3</sup>. If the decision of the Authority is overruled on appeal, it must thereupon issue to the society an acknowledgment of registration of the amendment<sup>4</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 18(1)(b) (s 18(1)(b), (3) amended by SI 2001/2617).

3 See the Industrial and Provident Societies Act 1965 s 18(2); and PARA 2421. As to procedure in the High Court see PARA 2422.

4 Industrial and Provident Societies Act 1965 s 18(3) (as amended: see note 2).

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#### **(iv) Name; Office; Seal**

##### **2439. Use of word 'limited' and approval of name.**

The last word in the name of a registered society must be the word 'limited' or (in some cases) its Welsh equivalent<sup>1</sup>, except that if the Financial Services Authority<sup>2</sup> is satisfied that the objects of the society are wholly charitable or benevolent the Authority may register the society by, or permit a change of name to, a name which does not contain that word or its Welsh equivalent<sup>3</sup>. If it subsequently appears to the Authority that a society which does not have the word 'limited' or its Welsh equivalent in its name is not being conducted wholly for charitable or benevolent objects, whether in consequence of a change in its rules or otherwise, it may direct that that word be added as the last word in its name, and must notify the society accordingly<sup>4</sup>.

A society must not be registered under a name which in the Authority's opinion is undesirable<sup>5</sup>. On conversion to a registered society, a company may not use the word 'company' in its name<sup>6</sup>, nor, in practice, will any registered society be permitted to use that word in its name.

The name of every society registered as a credit union must contain the words 'credit union' or its Welsh equivalent<sup>7</sup>.

1 Industrial and Provident Societies Act 1965 s 5(2) (amended by the Welsh Language Act 1993 s 28(2)). If the rules of the society state that its registered office is to be in Wales, the last word must be 'limited' or the word 'cyfyngedig': see the Industrial and Provident Societies Act s 5(2) (as so amended). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

As to the requirement that any registered society which is a charity must state that fact on its correspondence see PARA 2442.

2 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

3 Industrial and Provident Societies Act 1965 s 5(5) (amended by the Welsh Language Act 1993 s 28(1), (3); and SI 2001/2617). For the purposes of the Industrial and Provident Societies Act s 5(5), the objects of a credit union are not to be regarded as wholly charitable or benevolent: Credit Unions Act 1979 s 3(4).

4 Industrial and Provident Societies Act 1965 s 5(5) (as amended: see note 3).

5 Industrial and Provident Societies Act 1965 s 5(1) (amended by SI 2001/2617). Proposed names should be sent to the Authority for approval before the application for registration is made. Names including such words as 'Royal' or 'Imperial', or calculated to suggest the patronage of Her Majesty the Queen or any member of the royal family, or any connection with Her Majesty's government or any government department, are not accepted without the consent of the proper authority.

6 See the Industrial and Provident Societies Act 1965 s 53(5); and PARA 2418.

7 Credit Unions Act 1979 s 3(1) (amended by the Welsh Language Act 1993 s 29(2)). If the rules of the society state that its registered office is to be in Wales, the name must contain the words 'credit union' or 'undeb credyd': see the Credit Unions Act 1979 s 3(1) (as so amended). In other respects, the name of such a society must comply with the Industrial and Provident Societies Act 1965 s 5(1) (see the text to note 5) and s 5(2) (see the text to note 1): Credit Unions Act 1979 s 4(1), Sch 1 para 1 (s 4(1) amended by SI 2001/2617).

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## **2440. Change of name.**

The name of a registered society, including a credit union, must be set out in its rules<sup>1</sup>. That name may be changed only by a resolution for the purpose passed at a general meeting of the society after the giving of such notice of the resolution as is required by the society's rules, or, if the rules do not make special provision as to notice of such a resolution, after the giving of such notice as is required by the rules of a resolution to amend the rules<sup>2</sup>. The name may not be changed without the approval in writing of the Financial Services Authority<sup>3</sup>. If the change is approved, it must be registered by the Authority as an amendment of the society's rules<sup>4</sup>. The change does not affect any right or obligation of the society, or of any member of it, and any pending legal proceedings may be continued by or against the society notwithstanding its new name<sup>5</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 1; the Credit Unions Act 1979 s 4(1), Sch 1 para 1; and PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

As to the requirement that any registered society which is a charity must state that fact on its correspondence see PARA 2442.

2 Industrial and Provident Societies Act 1965 s 5(3)(a).

3 Industrial and Provident Societies Act 1965 s 5(3)(b) (amended by SI 2001/2617). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et

seq. Approval is discretionary, and the Authority will wish to be satisfied that, amongst other things, the change is necessary and will not confuse those dealing with the society, or be prejudicial to persons having claims on the society. The application form in use as at the date this volume states the law, which is signed on behalf of the society by the secretary, states that the change of name has been resolved upon by a resolution passed at a general meeting held on a specified date, of which notice of the intention to propose the resolution was duly given in accordance with the Industrial and Provident Societies Act 1965 s 5 and provides for the reasons for the change of name to be stated.

4 Industrial and Provident Societies Act 1965 s 10(2)(b) (amended by SI 2001/2617). The prescribed procedure for application for registration of an amendment of rules (see PARAS 2436-2437) does not apply to a change of name: see the Industrial and Provident Societies Act 1965 s 10(2).

5 Industrial and Provident Societies Act 1965 s 5(4).

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### **2441. Use of name.**

Every registered society, including a credit union, must cause its registered name to be painted or affixed, and to be kept painted or affixed, in a conspicuous position and in letters easily legible, on the outside of its registered office and every other office or place in which its business is carried on; and must also have the name mentioned in legible characters<sup>1</sup> in all its notices, advertisements and other official publications<sup>2</sup>; in all its business letters<sup>3</sup>; in all bills of exchange<sup>4</sup>, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the society<sup>5</sup>; and in all bills, invoices, receipts and letters of credit of the society<sup>6</sup>.

A registered society which fails to comply with these requirements is guilty of an offence<sup>7</sup>. Moreover, any officer<sup>8</sup> of a society, or any other person acting on its behalf, is liable on summary conviction to a fine<sup>9</sup> if he (1) issues or authorises the issue of any notice, advertisement or other official publication, or any bill, invoice, receipt or letter of credit of the society in which the society's registered name is not mentioned in legible characters<sup>10</sup>; or (2) signs or authorises to be signed on its behalf any bill of exchange, promissory note, indorsement, cheque or order for money or goods, in which the registered name is not so mentioned<sup>11</sup>. In the case of a conviction in respect of a bill of exchange, promissory note, indorsement, cheque or order for money or goods, the officer or other person concerned is personally liable to the holder of the document for the amount specified in it unless that amount is duly paid by the society<sup>12</sup>.

A person must not, unless registered as a credit union, use in reference to himself a name, title or description containing the words 'credit union' (or its Welsh equivalent, 'undeb credyd') or any cognate term or derivative of those words, or represent himself as being a credit union<sup>13</sup>. The penalty on summary conviction is a fine<sup>14</sup>. This provision does not apply to (a) the use of a name, title or descriptive expression by certain bodies corporate<sup>15</sup>; (b) the use by any person or unincorporated association of a name which has been approved in writing by the Financial Services Authority<sup>16</sup>; or (c) the use by an officer or employee of a credit union, certain bodies corporate<sup>17</sup>, or a person or association which has obtained approval under head (b) above, of a title or descriptive expression indicating his office or post with the credit union, body, person or association<sup>18</sup>.

1 Industrial and Provident Societies Act 1965 s 5(6) (amended by the Co-operatives and Community Benefit Societies Act 2003 Schedule). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

As to the requirement that any registered society which is a charity must state that fact on its correspondence see PARA 2442.

2 Industrial and Provident Societies Act 1965 s 5(6)(a).

3 Industrial and Provident Societies Act 1965 s 5(6)(b).

4 As to the power to issue negotiable instruments cf *Peruvian Rylys Co v Thames and Mersey Marine Insurance Co, Re Peruvian Rylys Co* (1867) 2 Ch App 617 at 623; and **COMPANIES** vol 14 (2009) PARA 292. See also PARA 2488.

5 Industrial and Provident Societies Act 1965 s 5(6)(c).

6 Industrial and Provident Societies Act 1965 s 5(6)(d).

7 See PARA 2547.

8 As to the meaning of 'officer' see PARA 2458 note 1.

9 le a fine not exceeding level 3 on the standard scale: see the Industrial and Provident Societies Act 1965 s 5(7) (amended by virtue of the Criminal Justice Act 1982 ss 37, 38, 46). As to the standard scale see PARA 27 note 21. As to recovery of fines see PARA 2557.

10 Industrial and Provident Societies Act 1965 s 5(6)(a), (d), (7)(b) (s 5(7)(b) amended by the Co-operatives and Community Benefit Societies Act 2003 s 5(4)(b)).

11 Industrial and Provident Societies Act 1965 s 5(6)(c), (7)(c).

12 Industrial and Provident Societies Act 1965 s 5(7). For cases where officers have been held personally liable see *Atkins & Co v Wardle* (1889) 58 LJQB 377; *Nassau Steam Press v Tyler* (1894) 70 LT 376; cf *Gray v Raper* (1866) LR 1 CP 694; *Chapman v Smethurst* [1909] 1 KB 927, CA; and see **COMPANIES** vol 14 (2009) PARA 295.

13 Credit Unions Act 1979 s 3(2) (amended by the Welsh Language Act 1993 s 29(3)).

14 Credit Unions Act 1979 s 3(2) (amended by virtue of the Criminal Justice Act 1982 s 46). The fine must not exceed level 4 on the standard scale: see the Credit Unions Act 1979 s 3(2) (as so amended).

15 Credit Unions Act 1979 s 3(3)(a) (s 3(3) substituted, and s 3(3A)-(3D) added, by SI 2003/256). The text refers to any body corporate which falls within the Credit Unions Act 1979 s 3(3A).

A body corporate falls within s 3(3A) if its head office is not in England, Wales or Scotland and it (1) has Part IV permission under the Financial Services and Markets Act 2000 (see PARA 348) to accept deposits; (2) is exempt from the prohibition imposed by s 19 (see PARA 80) in respect of accepting deposits; (3) has permission under the Financial Services and Markets Act 2000 to accept deposits by virtue of qualifying for authorisation under Sch 3 (see PARA 315 et seq) or Sch 4 (see PARA 319); or (4) is subject to legal provisions that are similar to the relevant provisions: Credit Unions Act 1979 s 3(3A) (as so added). For these purposes, 'legal provisions' includes laws, regulations and administrative provisions; and 'relevant provisions' means the provisions of the Credit Unions Act 1979; and any provision of or made under the Industrial and Provident Societies Act 1965 or the Financial Services and Markets Act 2000 so far as it relates to credit unions: Credit Unions Act 1979 s 3(3D) (as so added). References to a deposit or accepting deposits must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision and Sch 2 (see PARAS 84-85): Credit Unions Act 1979 s 31(1A) (substituted by SI 2002/1501).

For the purposes of head (4) above, a body corporate is to be treated as being subject to legal provisions that are similar to the relevant provisions if it is subject to legal provisions which (a) provide that the main activities carried on by the body are accepting deposits from, and lending money to, persons who are members or shareholders of the body; (b) require the body to obtain authorisation or approval before it commences business; (c) require the members and shareholders of the body to be linked by reference to some common characteristic or circumstance; and (d) provide that those from whom the body accepts deposits must be shareholders or members of the body (although the legal provisions may allow for some exceptions to this proposition): Credit Unions Act 1979 s 3(3B) (as so added).

In determining, for the purposes of head (4) above, whether a body corporate is subject to legal provisions that are similar to the relevant provisions, regard must be had as to whether the legal provisions to which it is subject require the body to obtain authorisation or approval before it commences business and whether those provisions (i) impose limits on the objects which the body may or must have; (ii) impose limits on the membership of the body; (iii) impose restrictions on the kind of activities which the body may carry on; (iv) impose limits or conditions on the body's ability to accept deposits; (v) impose limits on the value of the shares



which any one shareholder may have in the body; (vi) impose limits on the body's ability to lend money, which (in each case) are similar to those imposed by the relevant provisions: s 3(3C) (as so added).

16 Credit Unions Act 1979 s 3(3)(b) (as substituted: see note 15). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

17 As to such bodies corporate see the Credit Unions Act 1979 s 3(3A); and note 15.

18 Credit Unions Act 1979 s 3(3)(c) (as substituted: see note 15).

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## **2442. Statement of status as charity on correspondence etc.**

Where a registered society is a charity<sup>1</sup> and its registered name<sup>2</sup> does not include the word 'charity' or the word 'charitable', the society must state the fact that it is a charity in legible characters (1) in all notices, advertisements and other official publications of the society; (2) in all business letters of the society; (3) in all bills of exchange, promissory notes, indorsements, cheques and orders for money or goods, purporting to be signed by or on behalf of the society; (4) in all bills, invoices, receipts and letters of credit of the society; and (5) in all conveyances<sup>3</sup> purporting to be executed<sup>4</sup> by or on behalf of the society<sup>5</sup>.

Any officer<sup>6</sup> of a registered society, or any other person acting on such a society's behalf, who (a) issues or authorises the issue of a document in head (1), (2) or (4) above; (b) signs or authorises to be signed any document in head (3) above; or (c) executes or authorises to be executed on behalf of the society any document in head (5) above, in which such a statement is required but is not made in the required manner<sup>7</sup>, is liable on summary conviction to a fine<sup>8</sup>.

1 'Charity' (1) in relation to a society whose registered office is situated in England or Wales, has the same meaning as in the Charities Act 1993 (see **CHARITIES** vol 8 (2010) PARA 1); (2) in relation to a society whose registered office is situated in Scotland, means a body established for charitable purposes only, where 'charitable purposes' has the same meaning as in the Income Tax Acts (see **CHARITIES** vol 8 (2010) PARA 2); and (3) in relation to a society whose registered office is situated on one of the Channel Islands, means a society established for charitable purposes only ('charitable purposes' having the meaning given by the law of the Island in question): Industrial and Provident Societies Act 1965 s 5A(7) (s 5A added by the Co-operatives and Community Benefit Societies Act 2003 s 2). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to the registered name of a registered society see PARAS 2439-2441.

3 'Conveyance' means any document for the creation, transfer, variation or extinction of an interest in land: Industrial and Provident Societies Act 1965 s 5A(8) (as added: see note 1).

4 For these purposes, execution includes purported execution and the doing of any act which, though not by itself execution, when combined with other acts constitutes execution or purported execution: Industrial and Provident Societies Act 1965 s 5A(9) (as added: see note 1).

5 Industrial and Provident Societies Act 1965 s 5A(1) (as added: see note 1). Where a society's registered name includes the word 'elusen' or 'elusennol', s 5A(1) does not apply in relation to any document which is wholly in Welsh: s 5A(2) (as so added). The statement must be in English, except that, in the case of a document which is otherwise wholly in Welsh, the statement may be in Welsh if it consists of or includes the word 'elusen' or 'elusennol': s 5A(3) (as so added).

6 As to the meaning of 'officer' see PARA 2458 note 1.

7 le under the Industrial and Provident Societies Act 1965 s 5A(1): see the text to notes 1-5.

8 Industrial and Provident Societies Act 1965 s 5A(5) (as added: see note 1). The fine must not exceed level 3 on the standard scale: see s 5A(5) (as so added). As to the standard scale see PARA 27 note 21. In the case of a conviction by virtue of head (b) in the text, the officer or other person is also personally liable to the holder of any such document for the amount specified in the document unless that amount is duly paid by the society: s 5A(6) (as so added). Section 62 (see PARA 2548) does not apply in respect of an offence committed by a registered society under s 61 (see PARA 2547) where the offence consists of a failure to comply with s 5A: s 5A(4) (as so added).

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#### **2443. Situation of registered office; change of registered office.**

Every registered society, including a credit union, must have a registered office and must set out the address of that office in its rules<sup>1</sup>. Notice of any change in the situation of the registered office must be sent to the Financial Services Authority<sup>2</sup>, who thereupon must register the change as an amendment of the society's rules<sup>3</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 3; the Credit Unions Act 1979 s 4(1), Sch 1 para 3; and PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 10(2)(a) (s 10(2)(a), (b) amended by SI 2001/2617). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

3 Industrial and Provident Societies Act 1965 s 10(2)(b) (as amended: see note 2). The procedure for application for registration of amendment of rules on such registration (see PARAS 2436-2437) does not apply to a change in the situation of the registered office: s 10(2). As to fees see PARA 2399.

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#### **2444. Purposes of registered office.**

The registered office of a registered society, including a credit union, is the place to which all communications and notices to the society may be addressed<sup>1</sup>. A copy of the last balance sheet with the auditors' report must be kept hung up there<sup>2</sup>, as well as the half-yearly statements of societies carrying on the business of banking<sup>3</sup>. A register of members and officers must also be kept there<sup>4</sup>. The situation of the registered office determines, in the case of cancellation or suspension of registration, or of dissolution by instrument, the locality of the newspaper in which notice of that event is published<sup>5</sup>. Summonses against a registered society for offences against the Industrial and Provident Societies Acts are also served at the registered office<sup>6</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 3; the Credit Unions Act 1979 s 4(1), Sch 1 para 3; and PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 See PARA 2525.

3 See PARA 2405.

4 See PARA 2471.

5 See PARAS 2570, 2585.

6 See PARA 2546.

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## **2445. Use and custody of seal.**

The rules of a registered society, if the society is to have a common seal, must make provision for its custody and use<sup>1</sup>. There is no statutory provision for the affixing of a seal to be attested by the signatures of witnesses; this is a matter which should therefore be provided for in the rules<sup>2</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 13; the Credit Unions Act 1979 s 4(1), Sch 1 para 10; and PARA 2425. Note that it appears that a credit union must have a common seal whereas a registered society generally need not have a common seal: see also PARA 2490 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to the affixing of a seal where no particular formality is prescribed by statute or by the constitution of a body corporate see **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1261-1262. As to the necessity for compliance with any such formalities see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 41. As to presumptions of due execution and estoppel against a body corporate see **CORPORATIONS; DEEDS AND OTHER INSTRUMENTS; ESTOPPEL**. As to the form of contracts of registered societies see PARA 2488.

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## **(v) Capital**

### **A. SHARE CAPITAL**

#### **2446. Nature of shares.**

A registered society, including a credit union, is not required to provide in its rules for the number or value of the shares<sup>1</sup> which it may issue, and such limitations are not generally made. However, all shares in a credit union must be of £1 denomination and may, subject to the rules of the credit union, be subscribed for either in full or by periodical or other subscriptions, but no share is to be allotted to a member until it has been fully paid in cash<sup>2</sup>. The rules must

determine whether the shares or any of them are to be withdrawable or transferable<sup>3</sup>. Unless under its rules or in practice a society restricts the number of its members or limits the issue of shares, the share capital will vary from time to time according to the shares issued, and, in the case of a society with withdrawable share capital, it may decrease if the value of shares withdrawn exceeds that of shares issued<sup>4</sup>.

The rules of a registered society may provide for shares to be paid for in full when they are issued, or by instalments, or at call; and where they are to be paid for at call a member is liable to pay up any balance remaining unpaid on his shares when required under the rules or on the liquidation of the society<sup>5</sup>. However, a member cannot be required by an amendment of rules registered after 27 March 1928 to pay upon shares held by him a sum exceeding the amount unpaid upon them at the date of registration of the amendment or to subscribe for further shares unless his written consent is first obtained<sup>6</sup>.

1 As to the register of members and shareholdings and registration of shares of a society under its rules see PARAS 2449, 2471-2472. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 Credit Unions Act 1979 s 7(1).

3 See PARAS 2448-2449.

4 Cf the reduction of capital of a company: see **COMPANIES** vol 15 (2009) PARA 1173. See also PARA 2434 note 4.

5 As to the liability of members in a winding up see PARA 2576. Sums unpaid on shares may be recovered from the member as a debt: see PARA 2543. As to a society's lien on shares see PARA 2544. As to an application for shares made before registration of a society see PARA 2416 note 4. It would seem that shares may be issued for a consideration other than cash: see PARA 2471. Shares may not be issued at a discount: *Ooregum Gold Mining Co of India v Roper* [1892] AC 125, HL. There is no statutory provision with regard to the issue of shares at a premium or the underwriting of shares and commissions. If it is within the powers of a registered society to do this, it would seem that the rules must contain the necessary authority. Registered companies are under statutory regulation in respect of these matters: see generally **COMPANIES**.

6 See PARA 2429.

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## **2447. Limit of shareholding.**

No member of a registered society, other than another registered society, or an authority which acquired the holding by virtue of certain provisions of the Housing Acts<sup>1</sup>, or a member who acquired the holding by virtue of certain provisions of the Agricultural Credits Act 1923<sup>2</sup>, may have or claim any interest in the shares of the society exceeding £20,000<sup>3</sup>. The rules of a registered society must provide for determination<sup>4</sup> of the maximum amount of the interest in the shares of the society which may be held by any member other than those exempted from the limit<sup>5</sup>. The Treasury<sup>6</sup> may make orders from time to time varying the limit<sup>7</sup>.

1 Ie by virtue of the Housing Associations Act 1985 s 58 or s 59(2) (repealed) or the Housing Act 1996 s 22 (see **HOUSING** vol 22 (2006 Reissue) PARAS 43, 66): Industrial and Provident Societies Act 1965 s 6(1)(b) (amended by the Housing (Consequential Provisions) Act 1985 Sch 2 para 8; and SI 1997/627). As to the meaning of 'registered society' see PARA 2395.

2 le by virtue of the Agricultural Credits Act 1923 s 2, Schedule Pt 1 para 2 (repealed), at a time when s 2 applied to the society: Industrial and Provident Societies Act 1965 s 6(1)(c). The Agricultural Credits Act 1923 s 2 provided for the formation and extension of approved registered societies as agricultural credit societies, and Schedule Pt 1 para 2 provided that shareholdings in such societies should be exempt from the then limit of shareholding in registered societies.

3 Industrial and Provident Societies Act 1965 s 6(1) (amended by SI 1994/341). The prohibition in the Industrial and Provident Societies Act 1965 s 6(1) is in terms addressed to the member rather than to the society or to any officer of the society. It seems clear that the member would be committing an offence under s 61(b) and it is thought likely that the society or any officer involved in the issue of shares in excess of the shareholding limit would also commit an offence: see PARA 2547. If the society were to persist in so acting after having been given a warning, its registration might be liable to be cancelled: see PARA 2579.

The corresponding provisions on limits for having or claiming interest in the shares of a credit union were repealed in 2002: Credit Unions Act 1979 s 5(3), (4), (4A), (10) (repealed SI 2002/1501). As to credit unions see PARA 2402.

4 le the determination in accordance with the Industrial and Provident Societies Act 1965 s 6: see the text to notes 1-3; and see note 5. As to the rules generally see PARA 2423 et seq.

5 Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 7. The limit of shareholding for members (other than those exempt from the limits provided by the Industrial and Provident Societies Act 1893) was £200; this figure was increased to £500 by the Industrial and Provident Societies Act 1952, and to £1,000 by the Industrial and Provident Societies Act 1961; and that amount was originally specified in the Industrial and Provident Societies Act 1965. The amount was increased to £5,000 by the Industrial and Provident Societies Act 1975 s 1(1), and to £10,000 by the Industrial and Provident Societies (Increase in Shareholding Limit) Order 1981, SI 1981/395, and at the date at which this volume states the law is £20,000, having been increased by the Industrial and Provident Societies (Increase in Shareholding Limit) Order 1994, SI 1994/341. Where, immediately before 27 April 1952, or 22 July 1961, or 3 August 1975, or 13 April 1981, the rules of a registered society permitted members (other than those exempt from the limit) to hold shares up to the then statutory maximum (ie £200, £500, £1,000 or £5,000, as the case might be), and, within a specified period after each of those dates, no amendment of the rules was registered, but the society's committee, by resolution recorded in writing, resolved that those members should be permitted to hold an amount greater than the old limit but not exceeding the new limit, then the registered rules took effect accordingly: Industrial and Provident Societies Act 1965 s 6(2), (3); Industrial and Provident Societies Act 1975 s 1(2); Industrial and Provident Societies (Increase in Shareholding Limit) Order 1981, SI 1981/395. The periods referred to for the exercise of these powers by the committee were respectively: (1) in respect of the increase from £200 up to an amount not exceeding £500, the period up to 22 July 1961 (Industrial and Provident Societies Act 1965 s 6(2)(c)); (2) in respect of the increase from £500 to an amount not exceeding £1,000, the period up to 22 January 1963 (s 6(3)(c)); (3) in respect of the increase from £1,000 to an amount not exceeding £5,000, the period up to 3 February 1977 (Industrial and Provident Societies Act 1975 s 1(3)); and (4) in respect of the increase from £5,000 to £10,000, the period up to 13 October 1982 (Industrial and Provident Societies (Increase in Shareholding Limit) Order 1981, SI 1981/395). Once any such resolution had been passed, the committee had no power to vary or revoke it (except, in the case of a resolution increasing the limit from £1,000 to an amount not exceeding £5,000, so far as may be authorised by an order making a further alteration of the limit: see the text to note 7): Industrial and Provident Societies Act 1965 s 6(4); Industrial and Provident Societies Act 1975 s 1(4); Industrial and Provident Societies (Increase in Shareholding Limit) Order 1981, SI 1981/395, art 4(3). Where any such resolution has been passed by the committee, and subsequently, at any time on or after 1 January 1966, an amendment of the society's rules is or has been registered, the registered rules then have effect as if such resolution had not been passed; this does not, however, affect any interest in the shares of the society held by any member immediately before the date of registration of the amendment: Industrial and Provident Societies Act 1965 s 6(4); Industrial and Provident Societies Act 1975 s 1(5); Industrial and Provident Societies (Increase in Shareholding Limit) Order 1981, SI 1981/395, art 4(4).

Where registered rules of a society provide for a fixed maximum shareholding limit in accordance with the Industrial and Provident Societies Act 1965 s 6(1) (see the text and notes 1-3), the committee may, by a resolution recorded in writing, resolve that the maximum shareholding limit may be increased to such amount up to £20,000 as may be specified in the resolution, and subject to notice having been given the registered rules have effect thereafter accordingly until such time as any subsequent amendment to the rules is registered whereupon the rules so registered have effect as if the earlier resolution had not been passed; this does not affect any interest in the shares of the society held by any member immediately before the date of registration of the amendment: Industrial and Provident Societies (Increase in Shareholding Limit) Order 1994, SI 1994/341, art 4(1). This power to increase the maximum shareholding limit up to an amount not exceeding £20,000 could have been exercised up to 15 September 1995: see art 4(2). The committee of a society cannot vary or revoke such a resolution: art 4(3). Notice in writing of any change in the rules of a society made by the committee of a society in exercise of the power to increase the maximum shareholding limit must be given within 60 days of the making of the necessary resolution: see art 4(4), Schedule.

6 As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

7 Industrial and Provident Societies Act 1975 s 2(1) (s 2(1), (2), (4) amended by SI 2001/2617). The limit specified in any such order may not be less than £5,000: see the Industrial and Provident Societies Act 1975 s 2(1) (as so amended). Any such order may make provision in connection with altering the limit for the time being applicable under the Industrial and Provident Societies Act 1965 s 6(1) (see the text and notes 1-3) as is made by the Industrial and Provident Societies Act 1975 s 1 (see note 5) and may contain such other transitional, consequential, incidental or supplementary provisions as appear to the Treasury to be necessary or appropriate: s 2(2) (as so amended). An order may vary or revoke any previous order: s 2(3). The power to make an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 2(4) (as so amended). The most recent order made was the Industrial and Provident Societies (Increase in Shareholding Limit) Order 1994, SI 1994/341, increasing the limit to £20,000: see notes 3, 5.

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#### **2448. Withdrawable shares.**

A withdrawable share is a share which, by the rules of the society, a member has the right to withdraw, and for the value of which he has the right under those rules to receive payment from the society<sup>1</sup>. A society having any withdrawable share capital must not be registered with the object of carrying on, and if already a registered society must not carry on, the business of banking<sup>2</sup>.

Shares in a credit union must be withdrawable but a credit union must not issue shares except on terms enabling it to require not less than 60 days' notice of withdrawal<sup>3</sup>. However, if a withdrawal of shares would reduce a member's paid-up shareholding in the credit union to less than his total liability (including any contingent liability) to the credit union, whether as borrower, guarantor or otherwise, then, in the case of a member to whom there is a loan by the credit union which is treated a secured loan<sup>4</sup>, the withdrawal is not to be permitted and, in any other case, the withdrawal is to be permitted only at the discretion of the committee of the credit union<sup>5</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 9; the Credit Unions Act 1979 s 4(1), Sch 1 para 8; and PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq. See also PARA 2578.

2 See the Industrial and Provident Societies Act 1965 s 7(1); and PARA 2405. As to a limitation on the power to make payments of withdrawable capital see s 7(3); and PARA 2406.

3 Credit Unions Act 1979 s 7(4).

4 Ie treated as a secured loan by virtue of the Credit Unions Act 1979 s 11A: see PARA 2499.

5 Credit Unions Act 1979 s 7(5) (amended by SI 1996/1189).

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## 2449. Provisions in rules.

The rules of a registered society, other than a credit union, must determine whether the shares or any of them are to be withdrawable and, if so, must provide for the mode of withdrawal and for payment of the balance due on withdrawal from the society<sup>1</sup>. The rules should provide whether withdrawable shares may be withdrawn by a member on demand or on notice, and, if on notice, the manner in which the notice must be given to the society and the length of the notice. If there is to be power to suspend the right of withdrawing shares, the rules should provide on whose authority the right may be suspended and under what circumstances, and also whether a suspension may be continued<sup>2</sup>. The rules must also determine whether the shares or any of them are to be transferable, and, if so, provide for the form of transfer and registration of the shares, and for the consent of the committee thereto<sup>3</sup>.

The rules of a credit union must make provision for the mode of withdrawal of shares and for payment of the balance due thereon when a member leaves the society<sup>4</sup>. Shares in a credit union may not be transferable, save in the case of transfers pursuant to a nomination on the death of a nominator<sup>5</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 9; and PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 It would seem that if a rule gives the committee power to suspend the right of withdrawal for a stated period it can renew the suspension from time to time for such periods: *Jedburgh Co-operative Store Co v Fox* reported in (1916) Scotsman, 1 December; and see the Report of the Chief Registrar of Friendly Societies, Pt A Appendix F, p 136 (Parliamentary Papers (1917-18) vol 27). See further PARA 2578.

3 Industrial and Provident Societies Act 1965 Sch 1 para 9. The Forged Transfers Act 1891 (see **COMPANIES** vol 14 (2009) PARAS 430, 433) applies to registered societies as though they were companies: s 3 (amended by the Statute Law (Repeals) Act 2004).

4 See the Credit Unions Act 1979 s 4(1), Sch 1 para 8; and PARA 2425. As to notice of withdrawal and restrictions on the right of withdrawal of shares in a credit union see s 7(4), (5); and PARA 2448.

5 Credit Unions Act 1979 s 7(2), (3). See also the Industrial and Provident Societies Act 1965 s 24(1); and PARA 2506.

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## 2450. Classes of shares.

There is no statutory mention of any classes of shares other than withdrawable and transferable shares<sup>1</sup>. In the absence of statutory provision to the contrary, it would seem that rules may make provision for classes of shares, such as preference and deferred shares; if such provision is made, the rights of those shares in respect of capital, profits and other matters must be determined by the rules.

1 Shares in a credit union must be withdrawable but must not be transferable save in pursuance of nomination, on the death of a nominator: see the Credit Unions Act 1979 s 7(2)-(5); and PARAS 2448-2449.

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### **2451. Share certificates.**

There is no statutory requirement that a registered society must issue share certificates, and rules do not generally so provide. It would seem that, if share certificates are issued, the rules should provide for their authentication on behalf of the society, and for lost certificates<sup>1</sup>. A credit union must not issue to a member a certificate denoting ownership of a share<sup>2</sup>.

1 As to entry on the society's register of the particulars of shares held by each member see PARA 2471. As to the meaning of 'registered society' see PARA 2395.

2 Credit Unions Act 1979 s 7(2). As to credit unions see PARA 2402.

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### **2452. Losses.**

A registered society, including a credit union, is not required to make any provision in its rules for any loss which it may have suffered to be borne by shares which are withdrawn. If a member gives notice to withdraw withdrawable shares, and before the expiration of the notice the society ceases to function as a going concern, either by the actual cessation of normal business or the recognition by those responsible for its management that it must stop, the unexpired notice becomes cancelled and the member gains no priority over other members who have not given notice to withdraw<sup>1</sup>.

1 *Re United Citizens Investment Trust Ltd* [1932] 1 Ch 395, CA (following *Re Ambition Investment Building Society* [1896] 1 Ch 89; *Re Carrick (North British Building Society in Liquidation)* (1885) 22 SLR 833; *Re Counties Conservative Permanent Benefit Building Society, Davis v Norton* [1900] 2 Ch 819). As to the rules generally see PARA 2423 et seq. See also PARA 2578.

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## **B. LOAN CAPITAL**

### **2453. Authority for borrowing.**

The borrowing power of a registered society, other than a credit union, depends upon the provisions in its rules, which must provide whether the society may contract loans or receive



money on deposit from members or others, and, if so, under what conditions, under what security, and to what limits of amount<sup>1</sup>.

Separate provisions apply to credit unions. A credit union has a general power to borrow<sup>2</sup>. It may not accept a deposit<sup>3</sup> from any person except by way of subscription for its shares<sup>4</sup>, save in the case of deposits by persons who are too young to be members<sup>5</sup> and in relation to its borrowing powers<sup>6</sup>. A credit union which provides certain ancillary services<sup>7</sup> to a member or any other person from whom the credit union has accepted a deposit may charge a fee to cover the cost of providing the service<sup>8</sup>.

1 Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 8; and see PARA 2425. As to loans to societies for housing purposes see generally PARA 2408; and **HOUSING**. As to the control of borrowing see generally PARA 1276 et seq. A member of a registered society may be liable to subscribe for loan capital under a provision in the rules: see *Re Foreglen Co-operative Agricultural Society Ltd* [1930] NI 114, NI CA; and PARA 2429. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq. As to banking business and the taking of deposits see PARAS 2405-2406. As to offences in connection with inviting deposits see PARA 2552.

2 Credit Unions Act 1979 s 10(1) (amended by SI 2002/1501).

3 References to a deposit or accepting deposits must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision and Sch 2 (see PARAS 84-85): Credit Unions Act 1979 s 31(1A) (substituted by SI 2002/1501).

4 Credit Unions Act 1979 s 8(1).

5 See the Credit Unions Act 1979 s 9; and PARA 2469.

6 Credit Unions Act 1979 s 8(1). The reference is to its borrowing powers under s 10: see the text to note 2.

7 'Ancillary service' means any service which is ancillary to the activity of accepting a deposit or making a loan, and includes: (1) the making or receiving of payments, made by way of standing order, direct debit or any other means, as agent for a member or any other person from whom the credit union has accepted a deposit; (2) issuing and administering means of payment (eg chequebooks and debit cards); (3) money transmission services; (4) giving advice on the services specified by heads (1)-(3) above: Credit Unions Act 1979 s 9A(2) (s 9A added by SI 2003/256).

8 Credit Unions Act 1979 s 9A(1) (as added: see note 7).

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#### **2454. Charges on property of registered societies.**

There is no general provision for mortgages or other charges on the property of a registered society, including a credit union, to be registered with the Financial Services Authority<sup>1</sup>. However, where a debenture issued by a registered society and creating in favour of a bank a floating charge on property of the society which is farming stock<sup>2</sup> has been registered under the Agricultural Credits Act 1928<sup>3</sup>, notice of the charge, signed by the secretary of the society, must be sent to the Authority<sup>4</sup> and registered<sup>5</sup>. In addition, provision is made for application to the Authority for the recording of a fixed or floating charge on the assets of a registered society having its registered office in England or Wales, in which case an instrument which creates or is evidence of that charge is not a bill of sale for the purposes of the Bills of Sale Acts 1878 and 1882 and is not invalidated by those Acts<sup>6</sup>.

Such an application must normally be delivered by post or otherwise to the Authority within 21 days from the date of execution of the instrument which creates or is evidence of the charge<sup>7</sup>. If, however, on the application of the society or of any other person claiming the benefit of the instrument, it appears to the Authority that by reason of inadvertence or other sufficient cause the application was not made within the prescribed period of 21 days, or any matters were omitted from or misstated in the application, the Authority may direct that the period for making the application be extended on such terms as it thinks fit, or, as the case may be, direct that the omission or misstatement be rectified<sup>8</sup>. The Authority must secure<sup>9</sup> that an acknowledgment (bearing the Authority's seal) of the application is issued to the person by whom it was made<sup>10</sup>; a copy of the instrument included in the application<sup>11</sup>, a note of any particulars so included and a copy of the acknowledgment of the application are placed on a file maintained by the Authority in respect of the society by whom the instrument was executed<sup>12</sup>; and that the file is available for inspection during office hours by members of the public on payment of such fee as may be required<sup>13</sup>. Provision is made for notice to be given to the Authority of any release, discharge or other transaction relating to any charge in respect of which an application has been made and for the inclusion in the file of any such notice appearing to the Authority to relate to the charge<sup>14</sup>.

1 Subject to the exceptions referred to in the text and in notes 2-6, a security given by a registered society charging its personal chattels will be invalid unless registered as a bill of sale. As to bills of sale generally see PARA 1620 et seq. If, however, a floating charge not so registered is given on all the society's property, and the property, although described in general terms, is severable, the charge will be valid as to the assets of the society which do not consist of personal chattels: *Re North Wales Produce and Supply Society* [1922] 2 Ch 340. As to the validity and priority of charges on real property see generally **MORTGAGE** vol 77 (2010) PARA 101 et seq. As to the provisions (which have no counterpart in the law relating to registered societies) for registration of charges on the property of companies see **COMPANIES** vol 15 (2009) PARA 1295 et seq. As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to the meaning of 'farming stock' see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1328.

3 Such a charge may be registered in like manner as an agricultural charge and, if so registered, is valid as respects the property in question notwithstanding anything in the Bills of Sale Acts 1878 and 1882, and is not deemed to be a bill of sale within the meaning of those Acts: Agricultural Credits Act 1928 s 14(1). As to the registration of agricultural charges see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1331.

4 Previously the central office established under the Friendly Societies Act 1896: see PARA 2410.

5 Agricultural Credits Act 1928 s 14(1).

6 Industrial and Provident Societies Act 1967 s 1(1). This provision does, of course, apply only to charges on personal chattels: see note 1. It does not apply to a debenture registered under the Agricultural Credits Act 1928 s 14 (see the text to notes 2-5): Industrial and Provident Societies Act 1967 s 2(2).

7 Industrial and Provident Societies Act 1967 s 1(2) (amended by SI 1996/1738; and SI 2001/2617). As to the extended period allowed under the Industrial and Provident Societies Act 1967 s 1(5) see the text to note 8. With the application there must be a copy of the instrument which creates or is evidence of the charge, authenticated in the manner directed by the Authority and such additional particulars relating to the charge and so authenticated as may be required by the Authority: s 1(2)(a) (amended by SI 2001/3649). The application must be accompanied by such fee as may be required by rules made in accordance with the Financial Services and Markets Act 2000 Sch 1 para 17 (see PARA 16): Industrial and Provident Societies Act 1967 s 1(2)(b) (substituted by SI 2001/2617).

8 Industrial and Provident Societies Act 1967 s 1(5) (amended by SI 1996/1738; and SI 2001/2617).

9 Industrial and Provident Societies Act 1967 s 1(3) (amended by SI 2001/2617).

10 Industrial and Provident Societies Act 1967 s 1(3)(a) (amended by SI 2001/2617; and SI 2001/3649). As to the Authority's seal see PARA 2412.

11 See note 7.

12 Industrial and Provident Societies Act 1967 s 1(3)(b) (amended by SI 2001/3649).

13 Industrial and Provident Societies Act 1967 s 1(3)(c) (amended by SI 2001/2617). As to the fee see the Industrial and Provident Societies Act 1967 s 1(2)(b); and note 7. See also PARA 2399.

14 See the Industrial and Provident Societies Act 1967 s 1(4) (amended by SI 2001/2617; and SI 2001/3649). This is without prejudice to the generality of the power to give directions conferred by the Industrial and Provident Societies Act 1965 s 72 (see PARAS 2411-2412): Industrial and Provident Societies Act 1967 s 1(4) (as so amended).

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## 2455. Ultra vires borrowing.

In the case of an ultra vires borrowing by a society, other than a credit union<sup>1</sup>, the lender cannot recover the amount advanced as money had and received<sup>2</sup>, and cannot set it off against any amount due from him to the society<sup>3</sup>. To the extent, however, to which the money advanced can be proved to have been applied to the discharge of the society's just debts (whether accruing before or after the date of the loan<sup>4</sup>), he is entitled to rank as creditor of the society in respect of the amount so applied<sup>5</sup>, and has a lien on any security given to him<sup>6</sup> although he is not subrogated to any securities of any creditor paid off with his money<sup>7</sup>. In addition, in the case of an ultra vires borrowing, the lender is entitled to a tracing order or a declaration of charge if the money lent can be traced into any investments or other property held by the society or by a volunteer having no better equity than the lender, in the same way as if the money lent were trust money<sup>8</sup>.

1 As to borrowing by a credit union see the Credit Unions Act 1979 s 10; and PARA 2453. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 *Sinclair v Brougham* [1914] AC 398, HL. The reasoning of the House of Lords was based upon the principle that the remedy for money had and received rested upon a notional or imputed promise of repayment and that it would be contrary to public policy to grant such a remedy to enable a party to escape the consequences of having lent money on an actual promise of repayment. The remedy has been recognised to be available in cases of ultra vires contracts which are not borrowing contracts: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL (a case concerning interest rate swap contracts), in which the majority of their Lordships also rejected the implied contract theory as the foundation for liability to such a claim, preferring the view that it was a personal action based on total failure of consideration. Following the later decision of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL, that a restitutionary claim will lie for recovery of money paid under a mistake of law (contrary to the prevailing understanding at the time of the *Westdeutsche* decision), such a claim appears to be an alternative to a claim for money had and received where a contract is void because of a mistake as to capacity. The proposition in the text thus rests now on very uncertain foundations. As to the effect of a provision in the rules that the signature of a contract by certain officers is to be conclusive that it is an authorised contract see PARA 2488 note 3.

3 *Birkbeck Building Society v Birkbeck* (1913) 29 TLR 218, DC.

4 *Baroness Wenlock v River Dee Co* (1887) 19 QBD 155, CA; *Sinclair v Brougham* [1914] AC 398 at 440-441, HL, per Lord Parker of Waddington.

5 *Owen v Roberts* (1887) 57 LT 81; and see **COMPANIES** vol 15 (2009) PARA 1256 et seq; **CORPORATIONS**.

6 *Blackburn Building Society v Cunliffe, Brooks & Co* (1882) 22 ChD 61, CA; affd on other points sub nom *Cunliffe Brooks & Co v Blackburn and District Benefit Society* (1884) 9 App Cas 857, HL. As to lien generally see **LIEN**.

7 See **COMPANIES**; **CORPORATIONS**.

8 See **COMPANIES; EQUITY**.

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### **2456. Notice of appointment of receiver or manager.**

Every receiver or manager of the property of a registered society, including a credit union, who has been appointed under the powers contained in any instrument must within one month from the date of his appointment notify the Financial Services Authority<sup>1</sup> of his appointment<sup>2</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 43(a) (amended by SI 2001/2617).

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### **2457. Returns to be made.**

Every receiver or manager of the property of a registered society, including a credit union, who has been appointed under the powers contained in any instrument must deliver to the Financial Services Authority<sup>1</sup> a return showing his receipts and payments for the period of six months from the date of his appointment, a similar return for each subsequent period of six months, and a return for the final period before he ceases to act<sup>2</sup>. The last return must also show the aggregate amount of his receipts and payments during all preceding periods since his appointment<sup>3</sup>. Each return must be sent to the Authority within one month after the expiration of the period for which it is made up or, except in the case of the final return, within such longer period as the Authority may allow<sup>4</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 43(b), (c) (amended by SI 2001/2617).

3 Industrial and Provident Societies Act 1965 s 43(c) (as amended: see note 2).

4 Industrial and Provident Societies Act 1965 s 43(b), (c) (as amended: see note 2).

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## **(vi) Management and Officers**

### **A. IN GENERAL**

#### **2458. Appointment and removal of officers.**

The rules of a registered society, including a credit union, must make provision for the appointment and removal of a committee, by whatever name, and of managers or other officers<sup>1</sup>, and their respective powers and remuneration<sup>2</sup>. Every society must have a committee and a secretary, but provision may be made in the rules for other officers if desired<sup>3</sup>. A member under the age of 18 may not be a member of the committee, trustee, manager or treasurer of the society<sup>4</sup>. No notice of appointment or change of officers need be given to the Financial Services Authority<sup>5</sup>, but particulars relating to officers must be entered in the register kept at the registered office<sup>6</sup>, and the annual return requires the names and addresses of committee members and of officers in receipt or charge of money to be given in the return<sup>7</sup>.

1 'Officer' includes any treasurer, secretary, committee member, manager or servant of the society other than a servant appointed by the committee, but does not include an auditor appointed by the society in accordance with the requirements of the Friendly and Industrial and Provident Societies Act 1968 (see PARA 2514); Industrial and Provident Societies Act 1965 s 74(1) (definition amended by the Friendly and Industrial and Provident Societies Act 1968 Sch 1 para 11; and the Industrial and Provident Societies Act 1965 s 74(1) renumbered by SI 2001/2617). 'Committee' means the committee of management or other directing body of the society: Industrial and Provident Societies Act 1965 s 74(1) (as so renumbered). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 6; the Credit Unions Act 1979 s 4(1), Sch 1 para 6; and PARA 2425. Where, following an election to an office for which two candidates had stood, the candidate with the greater number of votes was found to have been ineligible for election, the other candidate, in the absence of a rule to the contrary, was not deemed to have been elected, and the election was void: *Sedgley and Leeds Industrial Co-operative Society Ltd* (1953) CR Rep Pt 3, p 3. An agreement between the promoter of a society and a person whom he induced the society to appoint as officer, providing for payment of money as a consideration for the appointment is corrupt and will not be enforced: *Starr v Wall* (1889) 6 TLR 108, DC.

3 This requirement is implicit in statutory provisions giving functions to the secretary: see eg the Industrial and Provident Societies Act 1965 s 2(1)(b) (registration application to be signed by the secretary); and PARA 2413.

4 Industrial and Provident Societies Act 1965 s 20 (amended by the Family Law Reform Act 1969 Sch 1).

5 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

6 See the Industrial and Provident Societies Act 1965 s 44(1)(e); and PARA 2471.

7 As to annual returns see generally PARA 2523.

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## 2459. Trustees.

As a registered society, including a credit union, is a corporate body<sup>1</sup>, its property is vested in the corporation, and trustees are not generally necessary. If they are required for any special purposes, it is desirable that the rules should determine by whom their appointment may be made<sup>2</sup>. A minor may not be a trustee<sup>3</sup>.

<sup>1</sup> See PARAS 2394, 2416. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

<sup>2</sup> The Industrial and Provident Societies Act 1965 and the Credit Unions Act 1979 make no provision for the appointment or functions of trustees. It would seem that the general law relating to trustees applies: see **TRUSTS**. As to the rules generally see PARA 2423 et seq.

<sup>3</sup> Industrial and Provident Societies Act 1965 s 20 (amended by the Family Law Reform Act 1969 Sch 1).

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## 2460. Registered housing associations.

Registered societies which are registered housing associations<sup>1</sup> are subject to a number of additional provisions as to the making of payments or granting of benefits to officers or employees of the society<sup>2</sup>, and as to the powers of the relevant authority<sup>3</sup> to remove and appoint members of the committee<sup>4</sup>.

<sup>1</sup> I.e. registered housing associations known as 'registered social landlords': see PARA 2408. As to the meaning of 'registered society' see PARA 2395.

<sup>2</sup> See the Housing Act 1996 Sch 1 para 2; and **HOUSING** vol 22 (2006 Reissue) PARA 74. For these purposes, references to an officer of a registered social landlord include, in the case of a registered society, a co-opted member of the committee of the society: see s 59; and **HOUSING** vol 22 (2006 Reissue) PARA 74.

<sup>3</sup> I.e. the Housing Corporation or the Welsh Ministers: see PARA 2408; and **HOUSING** vol 22 (2006 Reissue) PARA 18 et seq.

<sup>4</sup> As to the relevant authority's power to remove committee members or other officers following an inquiry or audit see PARA 2533. The relevant authority may also remove a committee member who is bankrupt, who has made an arrangement with his creditors who is disqualified from being a company director, or who is subject to a disqualification undertaking, under the Company Directors Disqualification Act 1986 or the equivalent legislation in Northern Ireland, who is subject to an order for failure to pay under a county court administration order, who is disqualified under the Charities Act 1993 from being a charity trustee, who is incapable of acting by reason of mental disorder, who has not acted, or who cannot be found or who does not act and whose absence or failure to act impedes the committee's proper management of the society's affairs: see the Housing Act 1996 Sch 1 para 4; and **HOUSING** vol 22 (2006 Reissue) PARA 75. The relevant authority may by order appoint a person to be a committee member (whether or not he is a member of the society, and, if he is not, notwithstanding that the rules restrict membership of the committee to members of the society) (1) in place of a committee member removed by the relevant authority; (2) where there are no members of the committee; or (3) where the relevant authority is of the opinion that it is necessary for the proper management of the society's affairs to have an additional member of its committee (notwithstanding that it will cause the maximum number of committee members permissible under the society's constitution to be exceeded): see Sch 1 para 8; and **HOUSING** vol 22 (2006 Reissue) PARA 78. As to the duration of such an appointment, appeals and notice of removal see **HOUSING** vol 22 (2006 Reissue) PARAS 75, 78.

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## ***B. COMMITTEE OF MANAGEMENT***

### **2461. Committee's statutory functions and powers.**

The committee of management of a registered society has certain statutory functions and powers in connection with: the transfer of property of a member under a nomination<sup>1</sup>; the determination of persons entitled by law to receive a member's interest if he dies without a nomination subsisting; the payment of a member's interest in certain cases as the Treasury may direct if a deceased member was illegitimate<sup>2</sup>; the making of payments to persons on behalf of those who are mentally incapable<sup>3</sup>; the authorisation of a member to prosecute in cases of fraud and misapplication<sup>4</sup>; ensuring that a rule requiring an officer to give security is properly observed<sup>5</sup>; making a demand on an officer to give in his account or pay over money or deliver up property<sup>6</sup>; and signing receipts indorsed on discharges of mortgages<sup>7</sup>.

1 See PARA 2506.

2 See PARA 2508.

3 See PARA 2510.

4 See PARA 2551.

5 See PARA 2464.

6 See PARA 2465.

7 See PARA 2496. As to further powers of the committee see PARAS 2434 note 1, 2494 note 2, 2519-2520.

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### **2462. Committee's responsibility for statutory offences.**

An offence by a registered society against any of the provisions of the Industrial and Provident Societies Acts<sup>1</sup> may, under certain circumstances, be deemed to have been committed by every member of its committee<sup>2</sup>.

1 In the general provisions in the Industrial and Provident Societies Act 1965 ss 61-66 and s 68 (see PARA 2547 et seq) as to offences by registered societies, their officers and others, as they apply to credit unions, references to the Industrial and Provident Societies Act 1965 include references to the Credit Unions Act 1979: s 28(1). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 See PARA 2548.

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### **2463. Committee's responsibility for management.**

Where, under the rules of a registered society, including a credit union, the control of its business is vested in the committee of management, the members of the society in general meeting cannot exercise that control<sup>1</sup>. There are no judicial decisions with regard to the responsibility of members of the committee of a registered society in connection with their management of its affairs, or their liability for acts done by them ultra vires their powers under the rules of the society, or for their negligence in carrying out their duties. Although they are not affected by any statutory provisions which may apply to directors of registered companies on these matters, it would seem that, being persons appointed to manage the business and affairs of the society, they are accountable in the same manner as such directors under the general law of agency<sup>2</sup>.

The provisions of the Supply of Goods and Services Act 1982 that in certain contracts for the supply of a service there is an implied term that the service will be carried out with reasonable care and skill<sup>3</sup>, do not apply to the services rendered to an industrial and provident society by any member of the committee of management or other directing body of such a society in his capacity as such<sup>4</sup>.

1 *Alexander v Duddy* 1956 SC 24, Ct of Sess; *Roper v Long Eaton Co-operative Society Ltd* (1952) CR Rep Pt 3, p 3; *Ruddock v Watford Co-operative Society Ltd* (1955) CR Rep Pt 3, p 3. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq. Cf management of building societies: see PARA 1944 et seq.

2 Cf *Re Faure Electric Accumulator Co* (1888) 40 ChD 141 at 151 per Kay J; *Smith v Anderson* (1880) 15 ChD 247 at 275, CA, per James LJ; and see **AGENCY; COMPANIES**. As to personal liability on cheques etc see PARA 2441.

3 See the Supply of Goods and Services Act 1982 s 13; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 97 et seq.

4 Supply of Services (Exclusion of Implied Terms) Order 1983, SI 1983/902.

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## **C. OFFICERS**

### **2464. Security by officers.**

If the rules of a registered society, including a credit union, so require, every officer<sup>1</sup> of the society having receipt or charge of money must before entering upon the execution of his office give security in such sum as the society's committee may direct, conditioned for his rendering a just and true account of all money received and paid by him on account of the



society at such times as its rules appoint or as the society or its committee require him so to do, and for the payment by him of all sums due from him to the society<sup>2</sup>. The officer is to give this security either (1) by becoming bound, either with or without a surety as the society's committee may require, in a bond in one of the prescribed forms<sup>3</sup> or such other form as the committee may approve<sup>4</sup>; or (2) by giving the security of a guarantee society<sup>5</sup>.

1 As to the meaning of 'officer' see PARA 2458 note 1. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 Industrial and Provident Societies Act 1965 s 41(1).

3 For the prescribed forms see the Industrial and Provident Societies Act 1965 Sch 4.

4 Industrial and Provident Societies Act 1965 s 41(2)(a).

5 Industrial and Provident Societies Act 1965 s 41(2)(b).

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## **2465. Officers' accounts.**

Every officer<sup>1</sup> of a registered society, including a credit union, having receipt or charge of money, and every servant of the society in receipt or charge of money who is not engaged under a special agreement to account, must, at such times as he is required so to do by the rules, or on demand, or on notice in writing given or left at his last or usual place of residence, render an account as may be required by the society or its committee to be examined and allowed or disallowed by it; and must, on demand or on such notice, pay over all money and deliver all property for the time being in his hands or custody to such person as the society or committee may appoint<sup>2</sup>. After the death of the officer or servant, this duty is taken to be imposed on his personal representatives<sup>3</sup>. In the case of any neglect or refusal to comply with these requirements, the society may sue on any bond or security given<sup>4</sup>, or apply to the county court or to a magistrates' court<sup>5</sup>.

1 As to the meaning of 'officer' see PARA 2458 note 1.

2 Industrial and Provident Societies Act 1965 s 42(1). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

3 Industrial and Provident Societies Act 1965 s 42(2).

4 As given under the Industrial and Provident Societies Act 1965 s 41: see PARA 2464.

5 Industrial and Provident Societies Act 1965 s 42(3). Where application is made to a county court, the court may proceed in a summary way, and its order is final and conclusive notwithstanding anything in the County Courts Act 1984 s 77 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1679): Industrial and Provident Societies Act 1965 s 42(3) (amended by the County Courts Act 1984 Sch 2 Pt V para 29). The jurisdiction of the High Court is not excluded: *Re Royal Liver Friendly Society* (1887) 35 ChD 332. As to costs on the county court scale in a High Court claim see *Duxbury v Barlow* [1901] 2 KB 23, CA. An application to a magistrates' court must be made within six months of the demand: Magistrates' Courts Act 1980 s 127(1); *Harpin v Sykes* (1885) 1 TLR 307, DC. An order for payment is enforceable as a civil debt: Magistrates' Courts Act 1980 s 58. As to enforcement by indictment see *R v Stafford Justices, ex p Foster* (1894) 97 LT Jo 123, DC. As to the procedure in magistrates' courts generally see **MAGISTRATES**. For a case in the High Court for an account and damages see *Municipal Permanent Investment Building Society v Richards* (1888) 39 ChD 372, CA.

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## **2466. Removal or resignation of officer.**

The manner of removing officers<sup>1</sup> of a registered society is not prescribed by statute but must be provided for in the society's rules<sup>2</sup>. In the absence of any other provision in the rules or any contract, it would seem that an officer may resign by giving notice to the secretary, and that he cannot withdraw his notice of resignation<sup>3</sup>.

1 As to the meaning of 'officer' see PARA 2458 note 1.

2 See PARA 2458. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to removal of committee members and other officers of societies which are registered housing associations see PARA 2460. As to the rules generally see PARA 2423 et seq.

3 *Maitland's Case* (1853) 4 De GM & G 769; *Glossop v Glossop* [1907] 2 Ch 370; *Transport Ltd v Schonberg* (1905) 21 TLR 305; and see **COMPANIES**.

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## **(2) MEMBERSHIP AND MEETINGS**

### **(i) Membership**

#### **2467. Who may be members.**

Members of registered societies, other than credit unions, may be individuals, or other registered societies or bodies corporate<sup>1</sup>. Only individuals may be members of a credit union<sup>2</sup>.

1 See the Industrial and Provident Societies Act 1965 ss 19, 20. As to the special provisions relating to membership of a registered society by bodies corporate see PARA 2468. As to membership by minors see PARA 2469. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Credit Unions Act 1979 s 5(1).

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#### **2468. Registered societies and other bodies corporate as members.**

Registered societies the rules of which do not provide otherwise, and other bodies corporate the regulations of which so permit, may be members of a registered society other than a credit union<sup>1</sup>. Where one registered society is a member of another, then, for the purposes of any enactment with respect to the making or signing of any application, instrument or document by members of a registered society, any reference to such a member is to be construed, in relation to the first-mentioned society as a member of the second-mentioned, as a reference to two committee members and the society's secretary<sup>2</sup>.

1 See the Industrial and Provident Societies Act 1965 s 19(1), which provides that shares in a registered society may be held by any other body corporate, if its regulations so permit, by its corporate name. As to one registered society being a member of another see PARAS 2413, 2447, 2498, 2579. Members which are registered societies are exempt from the normal limit of shareholding: see PARA 2447. As to voting by society members see PARA 2500. Only individuals may be members of a credit union (see the Credit Unions Act 1979 s 5(1); and PARA 2467); hence the Industrial and Provident Societies Act 1965 s 19 is omitted in the application of the Industrial and Provident Societies Act 1965 to credit unions (Credit Unions Act 1979 s 31(3)). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 Industrial and Provident Societies Act 1965 s 19(2). As to the committee see PARA 2458 et seq.

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## **2469. Minors.**

A person under the age of 18 but above the age of 16 may be a member of a registered society unless provision to the contrary is made by the society's registered rules and, subject to those rules and to the provisions of the Industrial and Provident Societies Acts 1965 to 1978<sup>1</sup>, may enjoy all the rights of a member and execute all instruments and give all receipts necessary to be executed or given under the rules, but may not be a committee member, trustee, manager or treasurer of the society<sup>2</sup>.

A credit union may take deposits from a person who is under the age at which he may become<sup>3</sup> a member of the credit union<sup>4</sup>.

1 As to the Acts which may be so cited see PARA 2397. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 Industrial and Provident Societies Act 1965 s 20 (amended by the Family Law Reform Act 1969 Sch 1). As to the liability of members under the age of 18 see PARA 2475.

3 I.e. by virtue of the Industrial and Provident Societies Act 1965 s 20: see the text and notes 1-2.

4 See the Credit Unions Act 1979 s 9(1) (amended by SI 2002/1501).

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## 2470. Terms of admission.

The rules of a registered society must set out the terms of admission of members, including any society or company investing funds in the society. In the case of a credit union, its rules must set out the qualifications for, and the terms of, admission to membership of the society, including any special provision for the insurance of members in relation to their shares<sup>1</sup>. A member becomes a shareholder of the society, and therefore provision should be made for the number of shares he may be required to hold; in the case of societies other than credit unions, provision must be made for the determination of the maximum holding within the limit of £20,000 permitted by statute which a member other than one exempted from this limit may hold<sup>2</sup>; and it may be desired to provide for other matters, such as entrance fees, age limits<sup>3</sup> and any qualifications or disqualifications by trade, employment or otherwise<sup>4</sup>. A person may not be a member of a credit union unless he holds at least one fully paid-up share in that credit union but the rules of the credit union must not require a person to hold more than £5 in fully paid-up shares as a condition of membership<sup>5</sup>. The qualifications for admission to membership of a credit union must be set out in its rules and must be appropriate to a credit union<sup>6</sup>. If the rules of a credit union so provide, a person is to be treated as fulfilling a qualification for admission to membership if he is a member of the same household as, and is a relative of, another person who is a member of the credit union and fulfils that qualification directly<sup>7</sup>.

A member of a credit union who ceases to fulfil the qualification for admission to membership is entitled to retain his membership unless the rules of the credit union provide otherwise. Such a person is known as a 'non-qualifying member'<sup>8</sup>. The number of non-qualifying members must not at any time exceed ten per cent of the total membership<sup>9</sup>. Non-qualifying members are to be left out of account in determining whether a common bond exists between the members of the credit union<sup>10</sup>. A non-qualifying member is entitled, except in so far as the rules of the credit union provide otherwise, to purchase shares and receive loans<sup>11</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 4; the Credit Unions Act 1979 s 4(1), Sch 1 para 4; and PARA 2425. As to investments in registered societies by companies and other registered societies see PARA 2468. A provision in the rules restricting the number of members with a view to preserving or increasing the value of proprietary rights and interests may prevent a society from being a bona fide co-operative: see PARA 2402 note 7. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 Industrial and Provident Societies Act 1965 s 6(1) (amended by SI 1994/341). As to the limit of shareholding, and members exempt from that limit, see PARA 2447.

3 See PARA 2469.

4 As to discrimination on racial grounds in respect of admission to membership of any association of persons see the Race Relations Act 1976 ss 25, 26; and **DISCRIMINATION** vol 13 (2007 Reissue) PARAS 466-467. As to the corresponding provisions under the Disability Discrimination Act 1995 see s 21F; and **DISCRIMINATION** vol 13 (2007 Reissue) PARA 596.

5 Credit Unions Act 1979 s 5(2).

6 See the Credit Unions Act 1979 s 1(4); and PARA 2402 note 11. Other qualifications for admission to membership may also be required by the rules: see s 1(2)(b); and PARA 2402.

7 Credit Unions Act 1979 s 1(6).

8 Credit Unions Act 1979 s 5(5). The expression 'non-qualifying member', in relation to an amalgamated credit union or a credit union which has accepted a transfer of engagements (see PARAS 2560-2561), includes a person who does not fulfil the qualifications for admission to membership of that credit union but became a member of it by virtue of the amalgamation or transfer of engagements, having been immediately before the amalgamation or transfer a non-qualifying member of one of the amalgamating credit unions or, as the case may be, the credit union from which the transfer of engagements was made: s 21(4).

9 Credit Unions Act 1979 s 5(6).

10 Credit Unions Act 1979 s 5(7); and see PARA 2414.

11 Credit Unions Act 1979 s 5(8) (amended by SI 1996/1189).

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## **2471. Register of members and officers.**

Every registered society, including a credit union, must keep at its registered office<sup>1</sup> a register in which it must enter the following particulars: (1) the names and addresses of the members<sup>2</sup>; (2) a statement of the number of shares held by each member and of the amount paid or agreed to be considered as paid on the shares of each member<sup>3</sup>; (3) a statement of other property<sup>4</sup> in the society, whether in loans, deposits or otherwise, held by each member<sup>5</sup>; (4) the date at which each person was entered in the register as a member, and the date at which any person ceased to be a member<sup>6</sup>; (5) the names and addresses of the society's officers with the offices held by them respectively, and the dates on which they assumed office<sup>7</sup>.

The register may be kept either by making entries in bound books or by recording the matters in question in any other manner<sup>8</sup>, but in the latter case adequate precautions must be taken for guarding against falsification and for facilitating its discovery<sup>9</sup>. Every registered society must either keep at its registered office a duplicate register containing the particulars relating to names, addresses and dates of membership of members and the similar particulars relating to officers<sup>10</sup>, but not the particulars relating to shares and property<sup>11</sup>, or so construct the register that it is possible to open to inspection<sup>12</sup> the particulars in it other than those relating to shares and property without exposing those last-mentioned particulars<sup>13</sup>. Any person authorised for the purpose by the Financial Services Authority<sup>14</sup> may, on producing evidence of his authority, at all reasonable hours inspect any particulars in the register or duplicate register<sup>15</sup>.

1 As to the registered office see PARAS 2443-2444. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 44(1)(a).

3 Industrial and Provident Societies Act 1965 s 44(1)(b).

4 'Property' includes all real, personal or heritable and moveable estate, including books and papers: Industrial and Provident Societies Act 1965 s 74(1) (renumbered by SI 2001/2617).

5 Industrial and Provident Societies Act 1965 s 44(1)(c).

6 Industrial and Provident Societies Act 1965 s 44(1)(d).

7 Industrial and Provident Societies Act 1965 s 44(1)(e).

8 Cf the provisions as to maintenance of a company register: see **COMPANIES** vol 14 (2009) PARA 130 et seq.

9 Industrial and Provident Societies Act 1965 s 44(2).

10 Ie those particulars contained in the Industrial and Provident Societies Act 1965 s 44(1)(a), (d), (e): see the text to notes 2, 6-7.

11 Ie those particulars contained in the Industrial and Provident Societies Act 1965 s 44(1)(b), (c): see the text to notes 3-5.

- 12 As to rights of inspection see PARAS 2526-2528.
- 13 Industrial and Provident Societies Act 1965 s 44(3).
- 14 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.
- 15 Industrial and Provident Societies Act 1965 s 44(4) (amended by SI 2001/2617).

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### **2472. The register as evidence.**

A registered society's register or duplicate register of members and officers<sup>1</sup>, or any other register or list of members or shares kept by the society, is prima facie evidence<sup>2</sup> of any of the following particulars entered in it: (1) the names, addresses and occupations of the members<sup>3</sup>; (2) the number of shares respectively held by the members, the distinguishing numbers of those shares if they are distinguished by numbers, and the amount paid or agreed to be considered as paid on any of those shares<sup>4</sup>; (3) the date at which the name of any person, company or society was entered in that register or list as a member<sup>5</sup>; (4) the date at which any such person, company or society ceased to be a member<sup>6</sup>.

1 As to the register and duplicate register see PARA 2471. As to the meaning of 'registered society' see PARA 2395 As to credit unions see PARA 2402.

2 It is not conclusive evidence: cf **COMPANIES** vol 14 (2009) PARA 345.

3 Industrial and Provident Societies Act 1965 s 44(5)(a).

4 Industrial and Provident Societies Act 1965 s 44(5)(b).

5 Industrial and Provident Societies Act 1965 s 44(5)(c).

6 Industrial and Provident Societies Act 1965 s 44(5)(d).

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### **2473. Statutory rights of members individually.**

A member of a registered society, including a credit union, has the following statutory rights, which cannot be taken away by provisions in the rules: (1) to be supplied with a copy of the rules on demand on payment of a sum not exceeding ten pence<sup>1</sup>; (2) to inspect his own account and the duplicate register of members, or the original register where it is constructed so that only the particulars which he is entitled to inspect are exposed<sup>2</sup>; (3) to be supplied gratuitously on application with a copy of the last annual return<sup>3</sup>; (4) to have certain disputes between him and the society determined in the manner provided in the rules, or, if they contain no such provision, or if the society does not comply with that provision, to have the

dispute determined by the courts<sup>4</sup>; (5) to nominate persons to whom his property in the society may be paid or transferred at death, and to revoke or vary those nominations<sup>5</sup>; (6) to institute proceedings for setting aside a dissolution of the society by instrument<sup>6</sup>; and (7) if duly authorised for this purpose, to institute proceedings for misapplication of the society's property<sup>7</sup>.

In addition, every member of a credit union has a right to vote on every matter determined by a vote of members<sup>8</sup>.

1 See PARA 2430. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 See PARAS 2471, 2526. A member may have the right to inspect other books if the rules so provide: see PARA 2527.

3 See PARA 2524.

4 See PARAS 2534-2536, 2540.

5 The power to nominate is subject to certain limitations as to amount: see PARA 2503 et seq.

6 See PARA 2571.

7 See PARA 2551.

8 See PARA 2485.

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#### **2474. Statutory rights of members collectively.**

Certain proportions or numbers of members of a registered society, including a credit union, have the following statutory rights, which are exercisable irrespective of provisions in the rules: (1) to apply to the Financial Services Authority<sup>1</sup> to appoint an accountant or actuary to examine the society's books<sup>2</sup>; (2) to apply to the Authority to appoint an inspector to inquire into the affairs of the society<sup>3</sup>; (3) to apply to the Authority to call a special meeting of the society<sup>4</sup>; and (4) to execute an instrument of dissolution of the society and divide or appropriate the funds as they determine<sup>5</sup>.

In addition to these statutory rights, members, at duly convened meetings, can transact other statutory business<sup>6</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 See PARA 2529.

3 See PARAS 2530-2532.

4 See PARAS 2482-2484.

5 See PARA 2566 et seq.

6 See PARA 2481.

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### **2475. Liability of members.**

A member is personally liable for the liabilities and debts of a registered society, including a credit union, only to the extent of any sum unpaid on any shares in respect of which he is liable as a present member, or as a past member if his membership ceased less than one year before the commencement of a winding up of the society's affairs<sup>1</sup>; and his liability to subscribe to share or loan capital cannot be increased by an amendment of the rules unless his written consent has been first obtained<sup>2</sup>.

Subject as above, a member and all persons claiming through him are bound by the rules of the society, including any amendments, as if he had executed the rules under his seal and they contained a covenant by him, and by all persons claiming through him, to conform to them<sup>3</sup>. He can be sued by the society for any money payable to it by him, and the society has a lien on any shares for any debt due to it by him and may set off any sum credited on those shares in or towards payment of that debt<sup>4</sup>.

There are no special statutory provisions governing the liability of a member who is a minor<sup>5</sup>.

1 See PARA 2576.

2 See PARA 2429. As to the rules generally see PARA 2423 et seq.

3 See PARA 2429.

4 See PARAS 2543-2544.

5 It would seem that the position of a minor member of a registered society is similar to that of a shareholder in a company who is a minor, and that he may repudiate his contract either during his minority or when he comes of age: cf **COMPANIES** vol 14 (2009) PARA 330.

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### **2476. Withdrawal of membership.**

The rules of a registered society, other than a credit union, must provide whether and, if so, how members may withdraw from it<sup>1</sup>. It would seem that the right of withdrawal may by rule be denied to members, but if it is not so denied the mode of withdrawal should be stated<sup>2</sup>. In the case of a credit union, the rules must provide for the withdrawal of members from the society and for the claims of representatives of deceased members or the trustees of the property of bankrupt members, and for the payment of nominees<sup>3</sup>. Membership must be taken to have ceased from the date of the notice or application for withdrawal of any withdrawable shares held by a member<sup>4</sup>. The death of a member operates as a withdrawal if there is no contrary provision in the rules, and the rules should determine whether his personal representatives can



claim to be admitted themselves as members, and, if so, on what evidence and on what conditions, and, if they are not to be entitled to claim admission, how they can realise the value of the testator's or intestate's interest in the shares<sup>5</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 11; and PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 See the Industrial and Provident Societies Act 1965 Sch 1 para 11. See also PARA 2425.

3 See the Credit Unions Act 1979 s 4(1), Sch 1 para 12; and PARA 2425.

4 See the Industrial and Provident Societies Act 1965 s 57(e); and PARAS 2448-2449, 2576-2577.

5 See the Industrial and Provident Societies Act 1965 Sch 1 para 11, under which the rules must make provision for the claims of the representatives of deceased members, and for payments of nominees. As to nomination and payments on death see PARA 2503 et seq.

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#### **2477. Cessation of membership on other happenings.**

If it is intended that membership of a registered society may cease for some reason other than the voluntary withdrawal of a member, the rules should provide for cessation upon, for example, failure to hold any minimum share qualification required by the rules, failure to pay an annual subscription, expulsion for misconduct and the like. In these cases provision should also be made for dealing with the shares of the member, providing whether they are to be forfeited or how otherwise dealt with. A member cannot be expelled on any charge brought against him unless he is first given an opportunity of appearing and giving his answer to the charge<sup>1</sup>. It is desirable, therefore, that the rules should set out this right, and also whether the expulsion may be directed by the committee or a general meeting. There must be provision in the rules for the claims of a bankrupt member's trustee<sup>2</sup>.

The rules of a credit union must make provision for terminating the membership of members, so as to comply with the limit on the number of non-qualifying members<sup>3</sup>. The rules must also make provision for the repayment of shares held by, and of any loans to, a member whose membership is terminated for such a purpose<sup>4</sup>.

1 *Wood v Woad* (1874) LR 9 Exch 190; *Fisher v Keane* (1878) 11 ChD 353; *Labouchere v Earl of Wharnccliffe* (1879) 13 ChD 346 at 350; *Burn v National Amalgamated Labourers' Union of Great Britain and Ireland* [1920] 2 Ch 364. A power of expulsion must be exercised in strict accordance with the rules: see *Young v Ladies' Imperial Club* [1920] 2 KB 523, CA. As to the application of the principles of natural justice see *Lawlor v Union of Post Office Workers* [1965] Ch 712, [1965] 1 All ER 353; *Hiles v Amalgamated Society of Woodworkers* [1968] Ch 440, [1967] 3 All ER 70; *University of Ceylon v Fernando* [1960] 1 All ER 631, [1960] 1 WLR 223, PC; and JUDICIAL REVIEW vol 61 (2010) PARA 630.

2 See PARA 2511.

3 See the Credit Unions Act 1979 s 4(1), Sch 1 para 13; and PARA 2425. See also PARA 2470.

4 See the Credit Unions Act 1979 Sch 1 para 13; and PARA 2425.

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## **(ii) Meetings**

### **A. DESCRIPTION AND CONVENING OF MEETINGS**

#### **2478. Provisions in rules for meetings.**

The rules of a registered society, other than a credit union, must provide for the mode of holding general meetings<sup>1</sup>. The rules of a credit union must also provide for the mode of holding general meetings, but they must include provision as to the quorum necessary for the transaction of any description of business<sup>2</sup>. There is no statutory provision for the intervals at which general meetings should be held, nor are such meetings required to be held once a year, but any provision in the rules for holding meetings should be made in good faith, and a rule would not be registered which provided for holding them at such long intervals as to render their action practically nugatory. The accounts of a registered society, including a credit union, must be audited annually by one or more auditors appointed in accordance with the statutory requirements<sup>3</sup>, and there should therefore be at least provision for holding an ordinary annual meeting for the presentation of accounts and transacting other business under the rules, such as the appointment of officers<sup>4</sup>. The rules of a society may provide for general meetings to be constituted by delegates appointed by members<sup>5</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 5; and PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 See the Credit Unions Act 1979 s 4(1), Sch 1 para 5; and PARA 2425.

3 In accordance with the requirements of the Friendly and Industrial and Provident Societies Act 1968 and in the case of credit unions of any applicable rules under the Financial Services and Markets Act 2000 s 340 (see PARA 764): Industrial and Provident Societies Act 1965 Sch 1 para 10 (amended by the Friendly and Industrial and Provident Societies Act 1968 Sch 1 para 12); Credit Unions Act 1979 Sch 1 para 11 (amended by SI 2002/1501). As to the Industrial and Provident Societies Act 1968 s 4A see PARA 2514. See further generally PARAS 2514-2515.

4 As to the appointment and removal of officers see PARA 2458.

5 The Industrial and Provident Societies Act 1965 provides that, where the rules of a registered society so allow, 'meeting' includes a meeting of delegates appointed by members: s 74(1) (renumbered by SI 2001/2617). Branches of registered societies are not legally recognised under the Industrial and Provident Societies Acts as they are under friendly society legislation: cf the Friendly Societies Act 1974 s 111(1); and PARAS 2091, 2216. If the rules of a registered society provide for members being grouped into branches, provision may be made for those members to be represented by delegates at general meetings of the society: cf *Wilkinson v City of Glasgow Friendly Society* 1911 SC 476, where it was held that a delegate meeting of a registered friendly society could not pass a special resolution for the conversion of the society into a company. As to the conversion of a registered society into a company see PARAS 2564-2565. As to special resolutions see PARAS 2486-2487.

## **UPDATE**

### **2478 Provisions in rules for meetings**

NOTE 3--Industrial and Provident Societies Act 1965 Sch 1 para 10 further amended: SI 2008/948.

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### **2479. General meetings for special purposes.**

There should be provision in the rules of a registered society for the calling of general meetings, other than annual general meetings, as general meetings are necessary for the passing of certain statutory special resolutions<sup>1</sup>. Moreover, the rules of a credit union may not be amended except by a resolution passed by not less than two-thirds of the members present at a general meeting called for the purpose after giving of such notice as is by the rules required for such a resolution<sup>2</sup>. Generally there is a provision giving a specified number or proportion of members the right to requisition a general meeting on giving written notice to the secretary. A special general meeting may under certain circumstances be directed to be held by the Financial Services Authority<sup>3</sup>, and a meeting so held has all the powers of a meeting called according to the rules of the society<sup>4</sup>.

<sup>1</sup> See for amalgamations, transfers of engagements and conversions into a company: see PARA 2559. As to the rules generally see PARA 2423 et seq.

<sup>2</sup> See the Credit Unions Act 1979 s 4(2); and PARA 2434.

<sup>3</sup> As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

<sup>4</sup> See PARAS 2482-2484.

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### **2480. Notice of meetings; quorum.**

The rules of a registered society should make provision for giving members due notice of meetings, as failure to give due notice may invalidate the proceedings<sup>1</sup>. Except in the case of a credit union, the rules are not required to provide for a quorum. In the absence of such a provision, it would seem that two members form a quorum<sup>2</sup>. In the case of a credit union, the rules must make provision as to the quorum necessary for the transaction of any description of business<sup>3</sup>.

<sup>1</sup> See *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503, CA; *Young v Ladies' Imperial Club* [1920] 2 KB 523, CA. For other cases under company law see **COMPANIES**. It would seem that if all members are present at a meeting they can waive any insufficiency of notice: *Re Express Engineering Works Ltd* [1920] 1 Ch 466, CA; *Re Oxted Motor Co* [1921] 3 KB 32. As to the rules generally see PARA 2423 et seq.

2 *Sharp v Dawes* (1876) 2 QBD 26, CA; *Re Sanitary Carbon Co* [1877] WN 223. Cf **COMPANIES** vol 14 (2009) PARAS 529, 646; and **COMPANIES** vol 15 (2009) PARAS 1768, 1796.

3 See the Credit Unions Act 1979 s 4(1), Sch 1 para 5; and PARA 2425. See also s 4(2); and PARAS 2434, 2479.

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### **2481. Statutory powers of general meetings.**

Apart from its powers under the rules, a general meeting of a registered society may (1) make regulations as to the time and manner of inspecting the society's books<sup>1</sup>; (2) authorise a member or person interested to inspect a loan or deposit account of another member without that member's written consent<sup>2</sup>; (3) authorise any member to prosecute for fraud or misapplication<sup>3</sup>; (4) require any officer upon demand made or notice in writing to give in his accounts or to pay or deliver all money and property in his hands or custody to such person as the meeting directs<sup>4</sup>; and (5) pass resolutions for a change of name, and special resolutions for amalgamations, transfers of engagements and, except in the case of a credit union<sup>5</sup>, conversion into a company<sup>6</sup>.

1 See PARA 2526. As to the rules generally see PARA 2423 et seq.

2 See PARA 2527.

3 See PARA 2551.

4 See PARA 2465.

5 The Industrial and Provident Societies Act 1965 s 52 (conversion of registered society into company or amalgamation with, or transfer of engagements from a registered society to, company) (see PARA 2563 et seq) does not apply to credit unions: Credit Unions Act 1979 s 22.

6 As to change of name see PARA 2440. As to special resolutions, amalgamations, transfers of engagements and conversions see PARAS 2486-2487, 2559 et seq.

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### **2482. Special meetings.**

The Financial Services Authority<sup>1</sup> may call a special meeting of a registered society, including a credit union, on the application of one-tenth of the whole number of its members or, if the membership exceeds 1,000 members, of 100 members<sup>2</sup>. The application must be supported by such evidence as the Authority directs for the purpose of showing that the applicants have good reason for requiring the meeting and that they are not actuated by malicious motives; and such notice of the application must be given to the society as the Authority directs<sup>3</sup>. If it

thinks fit, the Authority may also require the applicants to give security for the costs of the proposed meeting before calling it<sup>4</sup>.

- 1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.
- 2 Industrial and Provident Societies Act 1965 s 49(1)(b) (s 49 amended by SI 2001/2617).
- 3 Industrial and Provident Societies Act 1965 s 49(2) (as amended: see note 2).
- 4 Industrial and Provident Societies Act 1965 s 49(3) (as amended: see note 2).

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### **2483. Expenses of special meeting.**

The expenses of and incidental or preliminary to a special meeting of a registered society<sup>1</sup> must be defrayed by the members applying for it, or out of the society's funds, or by the society's members or officers, or former members or officers, in such proportions as the Financial Services Authority<sup>2</sup> may direct<sup>3</sup>. The expenses may be recovered as a civil debt<sup>4</sup>.

- 1 As to special meetings see PARA 2482. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.
- 2 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.
- 3 Industrial and Provident Societies Act 1965 s 49(4) (amended by SI 2001/2617). For example, the order may direct that the expenses are to be borne jointly and severally by the persons ordered to pay them. As to the apportionment of costs see *Robertson v Russell* (1930) CR Rep Pt 3, s 1, p 32, DC.
- 4 See the Industrial and Provident Societies Act 1965 s 67(1); and PARA 2558.

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### **2484. Time and place of special meeting and its powers.**

The Financial Services Authority<sup>1</sup> may direct at what time and place a special meeting of a registered society<sup>2</sup> is to be held and what matters are to be discussed and determined, and the meeting has all the powers of a meeting called according to the rules and power to appoint its own chairman notwithstanding any rule of the society to the contrary<sup>3</sup>. These provisions apply also to a special meeting of a credit union called at the instance of the Authority<sup>4</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to the calling of special meetings see PARA 2482.

3 Industrial and Provident Societies Act 1965 s 49(6) (amended by SI 2001/2617). As to the rules generally see PARA 2423 et seq.

4 See the Credit Unions Act 1979 s 18(1); and PARA 2530.

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## **B. VOTING AND RESOLUTIONS**

### **2485. Right of voting.**

The rules of a registered society, other than a credit union, must provide for the scale and right of voting<sup>1</sup>, and it seems that on both these matters the rules may make such provision as is desired<sup>2</sup>. In the case of credit unions, subject to any provision in the rules of a credit union as to voting by a chairman who has a casting vote, on every matter which is determined by a vote of members of a credit union, every member is entitled to vote and has only one vote<sup>3</sup>. There may be provision for voting by proxy, and, if such provision is made, it is desirable that a form of proxy should be given, and that provision should be made for the conditions under which and by whom it may be used<sup>4</sup>. It is also desirable to provide for the case of a tie in voting.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 5; and PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 The freedom to make such provision in the rules as is desired is, of course, subject to the limitations arising from the conditions which a society must fulfil in order to be, or continue to be, registered: see PARAS 2402, 2579.

3 Credit Unions Act 1979 s 5(9).

4 That rules may provide for voting by proxies is recognised by the Industrial and Provident Societies Act 1965 s 50: see PARA 2486. As to voting by society members see PARA 2500. The name of the proxy and date of meeting may be filled in after execution by an authorised person: *Ernest v Loma Gold Mines Ltd* [1897] 1 Ch 1, CA; *Sadgrove v Bryden* [1907] 1 Ch 318. If a proxy is required to be lodged before the date of the meeting, a proxy lodged after that date but before the date of an adjourned meeting cannot be used at that meeting: *McLaren v Thomson* [1917] 2 Ch 261, CA. There is no common law right to vote by proxy: *Harben v Phillips* (1883) 23 ChD 14 at 35, CA, per Bowen LJ.

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### **2486. Special resolutions.**

A special resolution of a registered society, including a credit union, is required for it to amalgamate with, or to transfer engagements to, another registered society<sup>1</sup>; or, except in the case of credit unions, which may not do so<sup>2</sup>, to convert the society into a company<sup>3</sup>; or to amalgamate with, or transfer engagements to, a company<sup>4</sup>.

For the purposes of the amalgamation of societies and the transfer of engagements between societies<sup>5</sup> a special resolution is one (1) which is passed by not less than two-thirds of such members of the society for the time being entitled under the society's rules to vote as may have voted in person, or by proxy where the rules allow proxies, at any general meeting of which notice, specifying the intention to propose the resolution, has been duly given according to those rules; and (2) which is confirmed by a majority of such members for the time being entitled to vote as above as may have voted in person or by proxy as above at a subsequent general meeting of which notice has been duly given and held not less than 14 days<sup>6</sup> nor more than one month<sup>7</sup> from the day of the meeting at which the resolution was passed<sup>8</sup>.

For the purposes of conversion into a company or amalgamation with or transfer of engagements to a company<sup>9</sup> a special resolution is one (a) which is passed at a general meeting of which notice, specifying the intention to propose the resolution, has been duly given according to the rules of the society; (b) which is passed by not less than three-fourths of such of the qualifying members<sup>10</sup> of the society as may have voted in person or, where permitted, by proxy; (c) on which not less than half of the qualifying members of the society voted either in person or, where permitted, by proxy; and (d) which is confirmed by a majority of such of the qualifying members of the society as may have voted in person or, where permitted, by proxy at a subsequent general meeting of which notice has been duly given held not less than 14 days<sup>11</sup> nor more than one month<sup>12</sup> from the day of the meeting at which the resolution was passed in accordance with heads (a) to (c) above<sup>13</sup>.

1 See PARAS 2559-2562. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 See the Credit Unions Act 1979 s 22; and see PARAS 2559, 2563, 2565.

3 See PARAS 2559, 2564-2565.

4 See PARAS 2558, 2563.

5 Ie for the purposes of the Industrial and Provident Societies Act s 50 (see also PARA 2561) and s 51 (see also PARA 2562).

6 It should be noted that the requirement is not that there should be an interval of 14 clear days between the two meetings, but that the second meeting should be held not less than 14 days from the day of the first meeting. Contrast the Companies (Consolidation) Act 1908 s 69(2) (repealed); and *Re Railway Sleepers Supply Co* (1885) 29 ChD 204; and see **COMPANIES** vol 14 (2009) PARA 632.

7 Ie one calendar month: see the Interpretation Act 1978 s 5, Sch 1 (having regard to s 22, Sch 2 Pt 1 para 4).

8 Industrial and Provident Societies Act 1965 ss 50(2), 51(2).

A special resolution for the purposes of the Industrial and Provident Societies Act 1965 should not be confused with a special resolution as it may be defined in the rules of a society for other particular purposes, nor with an ordinary resolution passed at a special meeting, nor with a special resolution for the purposes of the Companies Acts (see **COMPANIES** vol 14 (2009) PARA 614) or of the Friendly Societies Act 1974 (see PARA 2219). As to the difficulty in amending a special resolution at a meeting (in a companies context) see *Re Moorgate Mercantile Holdings Ltd* [1980] 1 All ER 40, [1980] 1 WLR 227; and **COMPANIES** vol 14 (2009) PARAS 614, 622.

A special resolution may be compared with the resolution requiring a two-thirds majority of those present at a general meeting to pass a valid amendment to the rules of a credit union: see the Credit Unions Act 1979 s 4(2); and PARA 2434.

9 Ie for the purposes of the Industrial and Provident Societies Act 1965 s 52: see also PARAS 2563-2565.

10 References in the Industrial and Provident Societies Act 1965 s 52(3) to the qualifying members are to the members of the society who are for the time being entitled to vote under the society's rules: s 52(3) (substituted by the Industrial and Provident Societies Act 2002 s 1).

11 See note 6.

12 See note 7.

13 Industrial and Provident Societies Act 1965 s 52(3) (as substituted: see note 10). See note 8.

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### **2487. Evidence of passing of special resolution; registration.**

A declaration by the chairman at a general meeting held for the purpose of passing or confirming a special resolution<sup>1</sup> that the resolution has been carried is deemed conclusive evidence of that fact<sup>2</sup>. A copy of every special resolution, signed by the chairman of the meeting at which it was confirmed<sup>3</sup> and countersigned by the secretary of the society, must be sent to the Financial Services Authority<sup>4</sup> and registered by it<sup>5</sup>. Until that copy is registered, the resolution does not take effect<sup>6</sup>. It is the duty of a registered society which has passed a special resolution to send it for registration within 14 days from the day on which it is confirmed<sup>7</sup>, but this does not invalidate registration of the resolution after that time<sup>8</sup>.

1 See PARA 2486.

2 Industrial and Provident Societies Act 1965 ss 50(3), 51(2), 52(3A) (s 52(3A), (3B) added by the Industrial and Provident Societies Act 2002 s 1). In the case of the Industrial and Provident Societies Act 1965 s 52 (conversion into, amalgamation with, or transfer of engagements to company) (see also PARAS 2563-2565) a declaration by the chairman that all reasonably practical steps have been taken to ascertain the number of qualifying members of the society is also deemed conclusive evidence: s 52(3A) (as so added); and see PARA 2486 note 10.

3 Is confirmed under the Industrial and Provident Societies Act 1965 s 50(2)(b) (see PARA 2486 head (2)) or s 52(3)(d) (see PARA 2486 head (d)). See note 5.

4 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

5 Industrial and Provident Societies Act 1965 s 50(4) (amended by SI 2001/2617), Industrial and Provident Societies Act 1965 ss 51(2), 52(3B) (s 52(3B) as added: see note 2). Section 50(4) and s 50(5) (see the text and note 6) have effect for the purposes of s 52 as they have effect for the purposes of s 50 except that the reference to the resolution being confirmed under s 50(2)(b) (see PARA 2486 head (2)) is instead a reference to s 52(3)(d) (see PARA 2486 head (d)): see s 52(3B) (as so added).

6 Industrial and Provident Societies Act 1965 s 50(4) (as amended: see note 5).

7 See note 3. See also note 5.

8 Industrial and Provident Societies Act 1965 ss 50(5), 51(2), 52(3B) (s 52(3B) as added: see note 1). See note 5.



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### **(3) ADMINISTRATION, POWERS AND PROPERTY**

#### **(i) Contracts**

##### **A. IN GENERAL**

##### **2488. Form of contracts; bills and notes.**

Any contract which, if made between private persons, would by law be required to be in writing and, if made according to English law, to be under seal, may be made, varied or discharged on behalf of a registered society, including a credit union<sup>1</sup>, in writing under the society's common seal and, so far as concerns its form, is then effectual in law and binding on all parties to it, their heirs, executors or administrators, as the case may be<sup>2</sup>. In addition, a contract which, if made between private persons, would by law be required to be in writing, signed by the parties to be charged with it, may be made, varied or discharged on behalf of a registered society in writing signed by any person acting under its authority, express or implied, and is effectual in law, and binds the society, its successors and all other parties to the contract<sup>3</sup>. A signature purporting to be made by a person holding any office in the society attached to a writing whereby any contract purports to be made, varied or discharged by or on behalf of the society is, until the contrary is proved, taken to be the signature of a person holding that office at the time when the signature was made<sup>4</sup>. In the case of a contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing, its making, variation or discharge by parol on behalf of the society by any person acting under its authority, express or implied, is effectual in law and binding on the society, its successors and all other parties to the contract<sup>5</sup>.

Promissory notes or bills of exchange are deemed to have been made, accepted or indorsed on behalf of any registered society, including a credit union, if made, accepted or indorsed in the society's name, or by or on behalf or account of the society, by any person acting under the society's authority<sup>6</sup>.

1 As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 29(1). This provision does not prejudice the operation of the Corporate Bodies' Contracts Act 1960 (see the text to notes 3-5): Industrial and Provident Societies Act 1965 s 29(3). As to the use of a registered society's seal (if it has one) see PARA 2445. As to the execution of deeds by registered societies, and generally, see **CORPORATIONS; DEEDS AND OTHER INSTRUMENTS**. A deed executed by an individual no longer requires a seal: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1).

As to provisions relating to purported contracts, deeds and obligations see PARA 2489. As to provisions relating to the execution of deeds and other documents see PARA 2490 et seq.

3 Corporate Bodies' Contracts Act 1960 s 1(1)(a), (2), (3). If it is not clear on the face of a document that it is signed by an officer on behalf of the society, the person signing may be held personally liable: *Dutton v Marsh* (1871) LR 6 QB 361; *Lindus v Melrose* (1858) 3 H & N 177; *Chapman v Smethurst* [1909] 1 KB 927, CA. See further PARA 2441; and generally **AGENCY**. It has been held in Ireland that a provision in a rule that the signature of a contract by certain officers is conclusive that it is a contract authorised by the rules gives a bona fide lender a valid claim against the society, even if the borrowing was not authorised by a general meeting as required by the rules: *Re Londonderry Equitable Co-operative Society* [1910] 1 IR 69.

4 Industrial and Provident Societies Act 1965 s 29(2).

5 Corporate Bodies' Contracts Act 1960 s 1(1)(b), (2), (3). See further **CORPORATIONS**.

6 Industrial and Provident Societies Act 1965 s 28. As to the use of the registered name see further PARA 2441.

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## **2489. Purported contracts, deeds and obligations.**

The following provisions apply to the making of a deed as they apply to the making of a contract<sup>1</sup>.

A contract which purports to be made by or on behalf of a registered society<sup>2</sup> at a time when the society has not been registered<sup>3</sup> has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the society or as agent for it<sup>4</sup>. Accordingly, the contract is to be treated (1) as imposing on that person all the obligations it purports to impose on the society; and (2) as conferring on him all the rights it purports to confer on the society<sup>5</sup>.

1 Industrial and Provident Societies Act 1965 s 29A(3) (s 29A added by the Co-operatives and Community Benefit Societies Act 2003 s 4(1)). See also PARA 2488.

2 In the Industrial and Provident Societies Act 1965 s 29A(1) the reference to a 'registered society' includes a reference to a society registered under the law for the time being in force in Northern Ireland for purposes corresponding to those of the Industrial and Provident Societies Act 1965, and the reference to the Industrial and Provident Societies Act 1965 includes a reference to that law: s 76(2A) (added by the Co-operatives and Community Benefit Societies Act 2003 s 4(2)). As to the meaning of 'registered society' generally see PARA 2395. As to credit unions see PARA 2402.

3 Ie under the Industrial and Provident Societies Act 1965: see PARA 2410 et seq.

4 Industrial and Provident Societies Act 1965 s 29A(1) (as added: see note 1).

5 Industrial and Provident Societies Act 1965 s 29A(2) (as added: see note 1).

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## **B. EXECUTION OF DEEDS AND OTHER DOCUMENTS**

### **2490. Common seal.**

Notwithstanding any enactment or rule of law, a registered society need not have a common seal<sup>1</sup>. If a registered society does have a common seal, the society must have its registered name<sup>2</sup> engraved on the seal in legible characters<sup>3</sup>. If a registered society decides to have a common seal, it must not cause such a seal to be made unless the registered rules<sup>4</sup> of the society contain provision for the custody and use of that seal<sup>5</sup>. An officer<sup>6</sup> of a registered

society, or any other person acting on such a society's behalf, who uses or authorises the use of any seal purporting to be the common seal of the society which does not have the society's registered name engraved on it in legible characters is liable on summary conviction to a fine<sup>7</sup>.

1 Industrial and Provident Societies Act 1965 s 29B(1) (s 29B added by the Co-operatives and Community Benefit Societies Act 2003 s 5(1)). As to the use and custody of a seal see PARAS 2425, 2445. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to the registered name of a registered society see PARAS 2439-2441.

3 Industrial and Provident Societies Act 1965 s 29B(2) (as added: see note 1). Section 62 (see PARA 2548) does not apply in respect of an offence committed by a registered society under s 61 (see PARA 2547) where the offence consists of a failure to comply with s 29B(2) or s 29B(3) (see the text and notes 4-5); s 29B(4) (as so added).

4 As to a society's registered rules see PARA 2423 et seq.

5 Industrial and Provident Societies Act 1965 s 29B(3) (as added: see note 1). See also note 3.

6 As to the meaning of 'officer' see PARA 2458 note 1.

7 Industrial and Provident Societies Act 1965 s 29B(5) (as added: see note 1). The fine must not exceed level 3 on the standard scale: see s 29B(5) (as so added). As to the standard scale see PARA 27 note 21.

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## **2491. Methods of execution of documents.**

The following provisions have effect with respect to the execution of documents by a registered society in England and Wales<sup>1</sup>.

A registered society may, if it has a common seal<sup>2</sup>, execute a document by affixing that seal to it<sup>3</sup>. A document (1) signed by a member of the committee<sup>4</sup> of a registered society and the secretary of the society, or by two members of the committee; and (2) expressed, in whatever form of words, to be executed by the society, has the same effect as if it were executed under the common seal of the society<sup>5</sup>. A document executed by a registered society which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, on delivery, as a deed, and it is presumed, unless a contrary intention is proved, to be delivered on its being so executed<sup>6</sup>. In favour of a purchaser<sup>7</sup> a document is deemed to have been duly executed by a registered society if it purports to be signed by a member of the committee of the society and the secretary of the society, or by two members of the committee, and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, to have been delivered on its being executed<sup>8</sup>.

1 Industrial and Provident Societies Act 1965 s 29C(1) (s 29C added by the Co-operatives and Community Benefit Societies Act 2003 s 5(1)). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 See PARA 2490.

3 Industrial and Provident Societies Act 1965 s 29C(2) (as added: see note 1).

4 As to the meaning of 'committee' see PARA 2458 note 1.

5 Industrial and Provident Societies Act 1965 s 29C(3) (as added: see note 1). The provisions of s 29C(3)-(5) apply whether or not the society has a common seal: s 29C(6) (as so added).

6 Industrial and Provident Societies Act 1965 s 29C(4) (as added: see note 1). See also note 5.

7 'Purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property: Industrial and Provident Societies Act 1965 s 29C(6) (as added: see note 1).

8 Industrial and Provident Societies Act 1965 s 29C(5) (as added: see note 1). See also note 5.

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## **2492. Power of society to have official seal for use abroad.**

The following provisions apply to a registered society if (1) it has a common seal<sup>1</sup>; and (2) its objects<sup>2</sup> require or comprise the transaction of business in foreign countries<sup>3</sup>.

The society may, if authorised by its registered rules<sup>4</sup>, have an official seal<sup>5</sup> for use in any territory, district or place elsewhere than in the United Kingdom<sup>6</sup>.

1 As to the common seal see PARA 2490. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to a society's objects see PARA 2402.

3 Industrial and Provident Societies Act 1965 s 29E(1) (s 29E added by the Co-operatives and Community Benefit Societies Act 2003 s 5(1)).

4 As to a society's registered rules see PARA 2423 et seq.

5 An 'official seal' is a facsimile of the society's common seal with the addition on its face of the name of every territory, district or place where it is to be used: Industrial and Provident Societies Act 1965 s 29E(3) (as added: see note 3).

6 Industrial and Provident Societies Act 1965 s 29E(2) (as added: see note 3). As to the meaning of 'United Kingdom' see PARA 2 note 3.

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## **2493. Effect and authorisation of use of official seal.**

The official seal<sup>1</sup> of a registered society, when duly affixed to a document, has the same effect as the society's common seal<sup>2</sup>. If a registered society has an official seal, it may authorise any person appointed for the purpose as respects any territory, district or place appearing on the face of the seal to affix it to any deed or other document to which the society is party there<sup>3</sup>. An

authorisation must be given by writing under the society's common seal<sup>4</sup>. As between the society and a person dealing with such an agent, the agent's authority continues (1) if a period is mentioned in the authorisation, during that period; or (2) if no period is mentioned, until notice of the revocation or determination of the agent's authority has been given to the person dealing with him<sup>5</sup>. The person affixing the official seal must certify in writing on the deed or other instrument to which the seal is affixed the date on which and the place at which it is affixed<sup>6</sup>.

1 As to the meaning of 'official seal' see PARA 2492 note 5.

2 Industrial and Provident Societies Act 1965 s 29F (ss 29F, 29G added by the Co-operatives and Community Benefit Societies Act 2003 s 5(1)). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the execution of documents by means of a common seal see PARAS 2490-2491.

3 Industrial and Provident Societies Act 1965 s 29G(1) (as added: see note 2).

4 Industrial and Provident Societies Act 1965 s 29G(2) (as added: see note 2).

5 Industrial and Provident Societies Act 1965 s 29G(3) (as added: see note 2).

6 Industrial and Provident Societies Act 1965 s 29G(4) (as added: see note 2).

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## **(ii) Land and Investments**

### ***A. HOLDING OF LAND; DISCHARGE OF MORTGAGES***

#### **2494. Dealing with land.**

Among the purposes for which a society, other than a credit union, may be registered are included dealings of any description with land<sup>1</sup>. Unless its registered rules direct otherwise, every registered society, other than a credit union, whatever its purposes are, may hold, purchase or take on lease in its own name any land, and may sell, exchange, mortgage or lease<sup>2</sup> any such land and erect, alter or pull down buildings on it<sup>3</sup>. A purchaser, assignee, mortgagee or tenant is not bound to inquire as to the authority for any such dealing with the land by the society<sup>4</sup>, and the society's receipt is a discharge for all money arising from or in connection with any such dealing<sup>5</sup>.

A credit union may hold, purchase or take on lease in its own name any land for the purpose of conducting its business thereon but for no other purpose (except so far as is necessary for the purpose of making loans to its members on the security of an interest in land and of enforcing any such security<sup>6</sup>), and may sell, exchange, mortgage or lease any such land and erect, alter or pull down buildings on it<sup>7</sup>. No person is bound to inquire as to the authority for any dealing with land by a credit union and the receipt of a credit union is a discharge for all moneys arising from or in connection with any dealing with land by it<sup>8</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1); and PARA 2402. As to the meaning of 'registered society' see PARA 2395. As to the meaning of 'land' see PARA 2402 note 3. This provision does not apply to

registration as a credit union: Credit Unions Act 1979 s 2(1) (amended by SI 2002/1501). As to credit unions see PARA 2402.

2 Where the rules provide that a tenant member is to pay a fair and usual rent, in the absence of any provision to the contrary the committee may vary the existing rent: *Tenant Co-operators Ltd v James* (1902) 18 TLR 237. As to lettings by registered societies see further PARA 2408. As to the rules generally see PARA 2423 et seq.

3 Industrial and Provident Societies Act 1965 s 30(1). This does not apply to credit unions: Credit Unions Act 1979 s 31(3). Certain limitations apply in the case of societies which are housing associations: see PARA 2495. A fee simple vested in a corporation which is liable to determine by reason of the dissolution of the corporation is a fee simple absolute: Law of Property Act 1925 s 7(2). Any special facilities or modes conferred by other statutes for disposing of or acquiring land are preserved: see s 7(3)(c); and **REAL PROPERTY** vol 39(2) (Reissue) PARA 246. As to a devise of land to a society see *Re Clarke, Clarke v Clarke* [1901] 2 Ch 110; *Re Drummond, Ashworth v Drummond* [1914] 2 Ch 90. A gift tending to perpetuity to a society which is not a charity would be invalid: *Re Clark's Trust* (1875) 1 ChD 497; see **CHARITIES** vol 8 (2010) PARA 62.

4 Industrial and Provident Societies Act 1965 s 30(1)(a). This does not apply to credit unions: see note 3.

5 Industrial and Provident Societies Act 1965 s 30(1)(b). This does not apply to credit unions: see note 3.

6 See the Credit Unions Act 1979 s 12(3); and PARA 2499.

7 Credit Unions Act 1979 s 12(1), (2).

8 Credit Unions Act 1979 s 12(6).

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## **2495. Land of housing associations.**

A registered society which is a registered housing association<sup>1</sup> may not sell, lease, mortgage, charge or otherwise dispose of any land except with the consent of the relevant authority<sup>2</sup>, and such consent may be subject to conditions<sup>3</sup>. A similar prohibition applies to registered societies which are unregistered housing associations<sup>4</sup> in respect of grant-aided land<sup>5</sup>.

Where, in the case of a registered society which is a registered housing association, the relevant authority is satisfied, as the result of an inquiry or audit<sup>6</sup>, that there has been any misconduct or mismanagement in the society's administration, or that the management of the land belonging to the society would be improved if the land were transferred to another body, the relevant authority may<sup>7</sup> direct that transfer to be made<sup>8</sup>.

1 As to registered housing associations known as 'registered social landlords' see PARA 2408.

2 I.e the Housing Corporation or the Welsh Ministers: see PARA 2408; and **HOUSING** vol 22 (2006 Reissue) PARA 18 et seq.

3 See the Housing Act 1996 s 9; and **HOUSING** vol 22 (2006 Reissue) PARA 106.

4 As to unregistered housing associations see **HOUSING** vol 22 (2006 Reissue) PARA 11.

5 See the Housing Associations Act 1985 s 9(1A); and **HOUSING** vol 22 (2006 Reissue) PARA 43.

6 I.e an inquiry under the Housing Act 1996 s 7, Sch 1 para 20 or an audit under Sch 1 para 22: see **HOUSING** vol 22 (2006 Reissue) PARA 90.

7 With the Secretary of State's consent in the case of the Housing Corporation: see notes 2, 8.

8 See the Housing Act 1996 Sch 1 para 27; and **HOUSING** vol 22 (2006 Reissue) PARA 94. As to powers for the relevant authority to make orders in the case of misconduct or mismanagement in the affairs of a registered social landlord see PARA 2533; and **HOUSING** vol 22 (2006 Reissue) PARA 92.

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## **2496. Discharge of mortgages in the case of unregistered land.**

Where a mortgage or other assurance of any property<sup>1</sup> in England or Wales has been made to a registered society, including a credit union, a receipt indorsed on or annexed to the mortgage or other assurance is deemed, on certain conditions, to be a receipt which fulfils the requirements of the Law of Property Act 1925<sup>2</sup> as to a receipt which will operate as a surrender or reconveyance and as a discharge of the mortgaged property<sup>3</sup>. The conditions are that the receipt must be (1) a receipt in full for all money secured on the property by the mortgage or other assurance<sup>4</sup>; (2) signed by two committee members and countersigned by the society's secretary, or, if the society is in liquidation, signed by the liquidator or liquidators for the time being, described as such<sup>5</sup>; and (3) in one of the statutory forms<sup>6</sup>, or in any other form specified in the society's rules or any schedule to the rules<sup>7</sup>.

On payment of all money intended to be secured to a registered society on the security of any property, the debtor or his successor or representatives is entitled to a receipt in the appropriate statutory form<sup>8</sup>.

1 As to the meaning of 'property' see PARA 2471 note 4.

2 I.e. the Law of Property Act 1925 s 115(1): see **MORTGAGE** vol 77 (2010) PARA 645. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 Industrial and Provident Societies Act 1965 s 33(1), (2)(a). The Law of Property Act 1925 s 115(2) (see **MORTGAGE** vol 77 (2010) PARA 649) applies if, but only if, the receipt states the name of the person who pays the money: Industrial and Provident Societies Act 1965 s 33(2)(b). The provisions of the Law of Property Act 1925 s 115(3), (6), (8), (10), (11) also apply and s 115(7) applies where consistent with the terms of the form used for the receipt: Industrial and Provident Societies Act 1965 s 33(2)(c), (d). See generally **MORTGAGE** vol 77 (2010) PARA 101 et seq.

4 Industrial and Provident Societies Act 1965 s 33(1).

5 Industrial and Provident Societies Act 1965 s 33(1)(a).

6 I.e. in one of the forms set out in the Industrial and Provident Societies Act 1965 Sch 3 Pt 1.

7 Industrial and Provident Societies Act 1965 s 33(1)(b). As to the importance of adhering to the prescribed form, and as to execution generally, see the cases cited in PARA 2197 note 7.

8 Industrial and Provident Societies Act 1965 s 35. As to the statutory forms see note 6.

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### **2497. Discharge in the case of registered land.**

An instrument of discharge of a charge made under the Land Registration Act 2002<sup>1</sup> in the required form<sup>2</sup> under the seal of a registered society and countersigned by the secretary has the same effect in vacating the mortgage and otherwise as a statutory receipt<sup>3</sup>.

1 As to charges generally see the Land Registration Act 2002 Pt 5 (ss 48-57); the Land Registration Rules 2003, SI 2003/1417, Pt 9 (rr 101-116); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 943 et seq.

2 A discharge of a registered charge must be in the prescribed form, as must a release of part of the registered estate in a registered title from a registered charge; any discharge or release in the appropriate prescribed form must be executed as a deed or authenticated in such other manner as the Chief Land Registrar may approve; and an application to register such a discharge or release must be made in the prescribed form: see the Land Registration Rules 2003, SI 2003/1417, r 114(1), (2), (3), (5); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 959. An application to register a discharge in Sch 1 Form DS1 must be made in Sch 1 Form AP1 or Sch 1 Form DS2 and an application to register a release in Sch 1 Form DS3 must be made in Sch 1 Form AP1: see r 114(5). However, during the currency of any notice under Sch 2 (see **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 1077), and subject to and in accordance with the limitations contained in that notice, notification of the discharge of a registered charge, or of the release of part of a registered title in a registered title from a registered charge, may be delivered to the registrar in electronic form; and such notification so given is to be regarded as having the same effect as a discharge or a release of part in the appropriate prescribed form executed in accordance with the above requirements by or on behalf of the person who has delivered it to the registrar: see r 115(2). Notwithstanding these provisions, the registrar is entitled to accept and act upon any other proof of satisfaction of a charge that he may regard as sufficient: see r 114(4).

3 See the Land Registration Rules 2003, SI 2003/1417, rr 114-115; and note 2.

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## ***B. INVESTMENT OF FUNDS***

### **2498. Authorised investments.**

A registered society, other than a credit union, must provide in its rules whether, and, if so, by what authority, and in what manner, any part of its funds may be invested<sup>1</sup>. Investments may be made in or upon any security<sup>2</sup> authorised by the registered rules<sup>3</sup>, and also (unless those rules direct otherwise): (1) in or upon any mortgage, bond, debenture, debenture stock, corporation stock, annuity, rentcharge, rent or other security (not being securities payable to bearer) authorised by or under any Act of (a) a billing authority or a precepting authority<sup>4</sup>; (b) a fire and rescue authority in Wales<sup>5</sup>; (c) a levying body<sup>6</sup>; or (d) a body<sup>7</sup> empowered to issue special levies<sup>8</sup>; (2) in the shares or on the security of any other registered society, of any society registered under the Building Societies Act 1986<sup>9</sup>, or of any company registered under the Companies Acts<sup>10</sup> or incorporated by Act of Parliament or by charter, being a society or company with limited liability<sup>11</sup>; (3) in or upon any other security, being a security in which trustees are for the time being authorised by law to invest<sup>12</sup>.



1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 14; and PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to the rules generally see PARA 2423 et seq. Section 1 and Sch 1 do not apply to credit unions: see the Credit Unions Act 1979 s 2(1) (amended by SI 2002/1501). As to credit unions generally see PARA 2402.

2 As to the meaning of 'security' see *Re United Law Clerks Society* [1947] Ch 150, [1946] 2 All ER 674; and PARAS 2098, 2101.

3 Industrial and Provident Societies Act 1965 s 31. As to the conditions on which, if the rules so provide, investments may be made in the form of advances to members see PARA 2404. Section 31, being inconsistent with the provisions of the Credit Unions Act 1979, does not apply to credit unions: s 31(3).

4 Ie as defined in the Local Government Finance Act 1992 s 69: see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 524 et seq.

5 Ie such an authority constituted by a scheme under the Fire and Rescue Services Act 2004 s 2 or a scheme to which s 4 applies: see **FIRE SERVICES**.

6 Ie within the meaning of the Local Government Finance Act 1988 s 74: see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 530.

7 Ie a body as regards which the Local Government Finance Act 1988 s 75 applies: see **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 530.

8 Industrial and Provident Societies Act 1965 s 31(a) (amended by the Local Government Finance Act 1992 Sch 13 para 13; the Fire and Rescue Services Act 2004 Sch 1 para 19; and SI 1990/776). See generally **LOCAL GOVERNMENT** vol 29(1) (Reissue) PARA 530. As to credit unions see note 3.

9 As to the Building Societies Act 1986, and as to registration of building societies thereunder, see PARA 1856 et seq.

10 As to the meaning of 'Companies Acts' see PARA 2417 note 1.

11 Industrial and Provident Societies Act 1965 s 31(b) (amended by the Building Societies Act 1986 Sch 18 Pt 1 para 6). As to credit unions see note 3.

12 Industrial and Provident Societies Act 1965 s 31(c). Trustees' powers of investment are now governed primarily by the Trustee Act 2000: see **TRUSTS**. Although that Act did not expressly amend the reference in the Industrial and Provident Societies Act 1965 s 31(c) to the provisions of the Trustee Investments Act 1961 which formerly applied to trustees, it is thought that the words at the beginning of s 31(c) are wide enough to confer on a registered society the powers now enjoyed by trustees under the 2000 Act. As to credit unions see note 3.

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## **2499. Loans by credit unions.**

A credit union may make a loan to a member<sup>1</sup>, upon such security (or without security) and on such terms as its rules may provide<sup>2</sup>. On the application of a member to a credit union, the loan is to be treated<sup>3</sup> as a secured loan where, at the time the loan is made, the member's paid-up shareholding in the credit union is equal to or greater than his total liability (including contingent liability) to the credit union, whether as borrower, guarantor or otherwise<sup>4</sup>.

The rules of a credit union must provide for the mode and circumstances in which loans to members are to be made and repaid, including any special provision for the insurance of members in relation to loans made to them<sup>5</sup>.

A credit union may charge interest on loans made by it but such interest must be at a rate not exceeding one per cent per month, or such other rate as may from time to time be specified<sup>6</sup>, on the amount of the loan outstanding; and such interest must be inclusive of all administrative and other expenses incurred in connection with the making of the loan<sup>7</sup>.

1     le who is of full age, namely over 18: see the Family Law Reform Act 1969 s 1(1), (2). Although there is no statutory restriction in the Credit Unions Act 1979 on loans to minors, such a contract appears to be void as a matter of general law. As to minors as members of a credit union see the Industrial and Provident Societies Act 1965 s 20; and PARA 2469. As to credit unions see PARA 2402.

2     Credit Unions Act 1979 s 11(1) (substituted by SI 2002/1501). As to the rules generally see PARA 2423 et seq.

3     le for the purposes of the Credit Unions Act 1979.

4     Credit Unions Act 1979 s 11A (added by SI 1996/1189).

5     See the Credit Unions Act 1979 s 4(1), Sch 1 para 9; and PARA 2425.

6     'Specified' means specified by order made by the Treasury: Credit Unions Act 1979 s 11(7) (amended by SI 2001/2617). See the Credit Unions (Maximum Interest Rate on Loans) Order 2006, SI 2006/1276, which specifies a maximum interest rate of 2% per month. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

7     Credit Unions Act 1979 s 11(5).

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## **2500. Society's power to appoint proxy.**

A registered society, including a credit union, which has invested any part of its funds in the shares or on the security of any other body corporate may appoint as proxy any one of its members notwithstanding that he is not personally a shareholder of that other body corporate<sup>1</sup>. During the continuance of his appointment, the member is taken by virtue thereof as holding the number of shares held by the society for all purposes other than the transfer of any such share or the giving of a receipt for any dividend<sup>2</sup>.

1     Industrial and Provident Societies Act 1965 s 32(1). As to voting by proxy see PARA 2485. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2     Industrial and Provident Societies Act 1965 s 32(2).

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## **C. APPROPRIATION OF PROFITS**

## 2501. Provision for appropriation of profits.

The rules of a registered society, other than a credit union, must provide for the mode of application of its profits<sup>1</sup>. Where a society seeks to be registered on the grounds that its business is being, or is intended to be, conducted for the benefit of the community<sup>2</sup>, the provisions in its rules as to profits must be consistent with this purpose<sup>3</sup>. The Financial Services Authority<sup>4</sup> requires that the rate of interest on share and loan capital be limited by the rules to a rate which approximates to the minimum necessary to obtain and retain the capital required to carry out the society's objects<sup>5</sup>. Where a society is registered on the grounds that it is a bona fide co-operative society<sup>6</sup>, the rules must similarly limit the amount of interest payable on share or loan capital, but in this case provision may be made for further distribution of profits among the members, provided that the further amount which each member is permitted to receive is related to the amount of profit made by the society in respect of his participation in its business<sup>7</sup>.

The dividends payable on any shares of a credit union must not exceed a rate of eight per cent per annum or such other rate as may from time to time be specified by order by the Treasury<sup>8</sup>.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 12; and PARA 2425. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 As to the purposes for which a society may be registered see PARA 2402.

3 See PARA 2402 note 6.

4 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

5 See PARA 2402 notes 6, 7.

6 See PARA 2402.

7 See PARA 2402 note 7.

8 Credit Unions Act 1979 s 14(4) (amended by SI 2001/2617). At the date at which this volume states the law no such order had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

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## 2502. Construction of provisions.

A registered society may appropriate profits to the furtherance of political ends, provided that those purposes are authorised by the rules<sup>1</sup>. A rule providing that profits may be applied to social or provident purposes, or any other purposes, whether within the objects for which the society is formed or not, limits the appropriation to purposes of a social and provident nature, and does not authorise expenditure for political purposes<sup>2</sup>. Where the object of a society is to carry on the trade of general dealers, manufacturers, farmers and workers of mines and minerals, a provision in the rules that profits may be applied either to increase the society's

capital, reserve fund or business, or to any lawful purposes, does not authorise a payment out of profits to a workmen's strike fund, for such a payment is not an application of profits to a lawful purpose of the society consistent with its rules<sup>3</sup>.

The payment of an extra dividend to the surviving spouse of a member after the member's death as a matter of general practice and in accordance with rules passed for the purpose of authorising such payments does not constitute life assurance business so as to contravene the statutory restrictions upon the bodies which may carry on such a business<sup>4</sup>.

1 *Cahill v London Co-operative Society Ltd* [1937] Ch 265, [1937] 1 All ER 631. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 *Lafferty v Barrhead Co-operative Society* 1919 1 SLT 257.

3 *Warburton v Huddersfield Industrial Society* [1892] 1 QB 817, CA.

4 *Hampton v Toxteth Co-operative Provident Society Ltd* [1915] 1 Ch 721, CA. As to the general statutory restrictions on the carrying on of insurance business see **INSURANCE**. As to registered societies carrying on insurance business see PARA 2407.

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### **(iii) Nominations and Payments on Death**

#### **2503. Right of nomination.**

Subject to certain restrictions<sup>1</sup>, a member of a registered society, including a credit union<sup>2</sup>, has the right to nominate a person or persons to become entitled at his death to his property in the society<sup>3</sup>. A registered society's rules must make provision for the payment of nominees<sup>4</sup>, and it is usual and desirable to set out in the rules the full statutory provisions relating to nomination. The nomination must be made by a written statement signed by the nominator<sup>5</sup> and delivered at or sent to the society's registered office during his lifetime or made in any book kept at that office<sup>6</sup>. The society must keep a book in which the names of all persons so nominated, and any revocation or variation of any nomination<sup>7</sup>, must be recorded<sup>8</sup>.

The nomination of a person who is at the date of the nomination an officer or servant of the society is not valid unless that person is the spouse, civil partner, father, mother, child, brother, sister, nephew or niece of the nominator<sup>9</sup>.

1 See the text to note 9; and PARA 2504.

2 As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 Industrial and Provident Societies Act 1965 s 23(1). As to the testamentary character of nominations generally, and the fact that an invalid nomination executed as a will may take effect as a will, see PARA 2141.

4 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 11; the Credit Unions Act 1979 s 4(1), Sch 1 para 12; and PARA 2425. As to the rules generally see PARA 2423 et seq.

5 In *Morton v French* 1908 SC 171, decided under the Industrial and Provident Societies Act 1893 s 25(1) (repealed), which required 'a writing under his hand', it was held in Scotland that a nomination authenticated by a member's mark only and by the signatures of two witnesses was not a writing under his hand.

6 Industrial and Provident Societies Act 1965 s 23(1).

7 As to revocation or variation of nominations see PARA 2505.

8 Industrial and Provident Societies Act 1965 s 23(5).

9 Industrial and Provident Societies Act 1965 s 23(2) (amended by the Civil Partnership Act 2004 Sch 27 para 24(1), (2)). As to civil partnerships generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

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#### **2504. Property to which nomination may be made; limits of amount.**

Subject to limits as to the amount<sup>1</sup>, property the subject of a nomination may comprise the whole, or such part or respective parts as may be specified in the nomination, of any property in the society (whether in shares, loans or deposits or otherwise) which the nominator may have at the date of the nomination, in the case of a nomination made before 1 January 1914, or at the time of his death, in any other case<sup>2</sup>.

If the nomination was made before 1 January 1914 and at the date of the nomination the amount credited to the nominator in the society's books exceeded £100, the nomination is not valid<sup>3</sup>. If the nomination is made after 31 December 1913<sup>4</sup>, and at the date of the nominator's death occurring at any time thereafter the amount of his property in the society comprised in the nomination exceeds the relevant statutory limit<sup>5</sup> the nomination is valid to the extent of that limit, but not further or otherwise<sup>6</sup>.

1 See text to notes 3-5.

2 Industrial and Provident Societies Act 1965 s 23(1). The Industrial and Provident Societies Act 1893 s 25(1) (repealed), as originally enacted, did not refer to property which the nominator might have at the time of his death; it was held that the property referred to in that Act was the property of the nominator at the date of the nomination and not at the date of death, and therefore a nomination was valid if at the date of the nomination the property did not exceed the current statutory limit, although it exceeded that limit at the date of death: *Eccles Provident Industrial Co-operative Society Ltd v Griffiths* [1912] AC 483, HL. The Industrial and Provident Societies Act 1893 s 25(1) (repealed) was replaced, in respect of all nominations made on or after 1 January 1914, by the Industrial and Provident Societies (Amendment) Act 1913 s 5(1) (repealed). The present statutory provisions re-enact the repealed provisions applying to nominations made before, and nominations made on or after, that date.

3 Industrial and Provident Societies Act 1965 s 23(3)(a).

4 In the case of nominations made after 31 December 1913 and before 5 August 1954 it will be noted that, although the limit of the amount which may effectively be nominated depends upon the date of the nomination, this limit is applied to the value of the property comprised in the nomination at the date of death, and not at the date of nomination. In other cases the limit depends on the date of death. See the text to notes 5, 6.

5 The statutory limits are as follows: (1) where the nomination was made after 31 December 1913 and before 5 August 1954, £100 (Industrial and Provident Societies Act 1965 s 23(3)(b)); (2) where the death occurred after 4 August 1954 and before 5 September 1965, £200 (s 23(3)(c) (as originally enacted)); (3) where the death occurred after 4 September 1965 and before 10 August 1975, £500 (s 23(3)(c) (formerly amended to this effect by the Administration of Estates (Small Payments) Act 1965 Sch 2)); (4) where the death occurred after 9 August 1975 and before 11 April 1984, £1,500 (Industrial and Provident Societies Act 1965 s 23(3)(c)

(formerly amended to this effect by the Administration of Estates (Small Payments) Act 1965 Sch 2; and SI 1975/1137); (5) where the death occurred after 10 April 1984, £5,000 (Industrial and Provident Societies Act 1965 s 23(3)(c) (amended by virtue of SI 1984/539)). The Treasury may by order further increase the limit: see the Administration of Estates (Small Payments) Act 1965 s 6. As to the application of these limits see note 4. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

6 Industrial and Provident Societies Act 1965 s 23(3)(b), (c) (as amended: see note 5).

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### **2505. Revocation or variation of nomination.**

A nomination by a member of a registered society, including a credit union, may be varied or revoked by a subsequent nomination made by him<sup>1</sup>, or by any similar document in the nature of a revocation or variation signed by him and delivered at or sent to the society's registered office during his lifetime, but a nomination is not revocable or variable by the will of the nominator or by any codicil to that will<sup>2</sup>.

The marriage of a member operates as a revocation of any nomination made by him before the marriage and after 31 December 1913<sup>3</sup>; but if any property of that member has been transferred by an officer of the society in pursuance of the nomination in ignorance of a marriage contracted by the nominator subsequent to the date of the nomination, the receipt of the nominee is a valid discharge to the society, and the society is under no liability to any other person claiming the property<sup>4</sup>.

The formation of a civil partnership by a member of a society revokes any nomination made by him before the formation of the civil partnership; but if any property of that member has been transferred by an officer of the society in pursuance of the nomination in ignorance of a civil partnership formed by the nominator after the date of the nomination, the receipt of the nominee is a valid discharge to the society, and the society is under no liability to any other person claiming the property<sup>5</sup>.

The death of the nominee in the nominator's lifetime has the effect of defeating the nomination, so that on the nominator's death his personal representative is entitled to the property<sup>6</sup>.

1 As to the method by which a nomination must be made see PARA 2503. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 23(4).

3 As to the significance of this date see PARA 2504 note 2.

4 Industrial and Provident Societies Act 1965 s 23(6). As to the meaning of 'officer' see PARA 2458 note 1.

5 Industrial and Provident Societies Act 1965 s 23(7) (added by the Civil Partnership Act 2004 Sch 27 para 24(1), (3)). As to civil partnerships generally see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

6 *Re Barnes, Ashenden v Heath* [1940] Ch 267 (not following *Caddick v Highton* [1901] 2 Ch 476n; and adopting the observations of Lord Mersey in *Eccles Provident Industrial Cooperative Society Ltd v Griffiths* [1912] AC 483 at 490, HL); *Demee v National Independent Mechanics' Friendly Society* (1919) CR Rep Pt A, p 8 (Parliamentary Papers (1920) vol 37).

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## **2506. Proceedings on death of nominator.**

On receiving satisfactory proof<sup>1</sup> of the death of a member who has made a nomination, and if and to the extent that the nomination is valid<sup>2</sup>, the society's committee<sup>3</sup> must in the case of each person entitled under the nomination either transfer to him, or pay him the full value of, any property to which he is so entitled<sup>4</sup>. Where any of the property comprised in the nomination consists of shares in the society, this provision has effect notwithstanding that the society's rules declare that its shares are not to be transferable<sup>5</sup>; but if the transfer of any shares comprised in the nomination in the manner directed by the nominator would raise the share capital of any nominee beyond the maximum for the time being permitted in the case of that society<sup>6</sup>, the committee may not transfer to the nominee more of those shares than will raise his share capital to that maximum, and must pay him the value of any of those shares not transferred<sup>7</sup>. There is a presumption that the nominee is intended to take beneficially, but it is a question depending on evidence, and the nominator's personal representatives may in a proper case demand repayment from the nominee<sup>8</sup>, subject, it may be, to sums expended by the nominee for doctors' fees and funeral expenses in respect of the nominator<sup>9</sup>.

1    Ie such evidence as may reasonably, but not unreasonably or capriciously, be required: see *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782.

2    Ie valid under the Industrial and Provident Societies Act 1965 s 23(2), (3): see PARAS 2503-2504.

3    As to the meaning of 'committee' see PARA 2458 note 1. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

4    Industrial and Provident Societies Act 1965 s 24(1). The fact that shares in a credit union are not otherwise transferable (see PARA 2449) does not affect their transfer in pursuance of a nomination on the death of the nominator, under s 24(1): Credit Unions Act 1979 s 7(3).

5    Industrial and Provident Societies Act 1965 s 24(2). As to the rules generally see PARA 2423 et seq.

6    As to the statutory limit of shareholding see PARA 2447.

7    Industrial and Provident Societies Act 1965 s 24(2).

8    *Biggs v Lewis* (1890) 89 LT Jo 47; but cf *Lavin v Howley* (1897) 102 LT Jo 560. For a case where it was held that an executor nominee was not entitled to take beneficially see *Re Read, Turner v Read* (1896) 75 LT 295. As to the rights of an executor as to estate undisposed of by will cf **EXECUTORS AND ADMINISTRATORS**.

9    *Hughes v Parry* (1892) 93 LT Jo 131 (county court).

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## **2507. Payment when nominee is a minor.**

Where any sum falls to be paid under a valid nomination to a nominee who is under 16 years of age, the society may pay that sum to either parent, or to a guardian, of the nominee or to any other person of full age who will undertake to hold it in trust for the nominee or to apply it for his benefit and whom the society may think a fit and proper person for the purpose, and the receipt of that parent, guardian or other person is a sufficient discharge to the society for all money so paid<sup>1</sup>.

There is no statutory provision for dealing in a similar way with money the subject of a nomination where the nominee is a minor of 16 years or over, and no provision enabling such a minor to give the society a valid receipt<sup>2</sup>. It may be that a registered society in this case would be unable to pay the sum in question while the nominee remained a minor.

1 Industrial and Provident Societies Act 1965 s 24(3).

2 Cf the Friendly Societies Act 1974 s 67(3); and PARA 2236.

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## **2508. Payment where there is no nomination.**

If a deceased member of a registered society does not leave a nomination subsisting at his death, his property in the society will pass, in accordance with the general law, to his personal representatives<sup>1</sup>.

If any member of a registered society dies and at his death his property in the society in respect of shares, loans or deposits does not exceed in the whole £5,000 and is not the subject of any nomination, the society's committee<sup>2</sup> may, without letters of administration or probate of any will, distribute that property among such persons as appear to the committee, on such evidence as it deems satisfactory, to be entitled by law to receive it<sup>3</sup>.

If, however, such a deceased member was illegitimate and leaves no widow, widower, surviving civil partner or issue (including any illegitimate child of the member) and neither of his parents survives him, the committee must deal with his property in the society as the Treasury directs<sup>4</sup>.

1 See generally **EXECUTORS AND ADMINISTRATORS**. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the right of nomination see PARA 2503. As to revocation and variation of nomination see PARA 2505.

2 As to the meaning of 'committee' see PARA 2458 note 1.

3 Industrial and Provident Societies Act 1965 s 25(1) (amended by the Administration of Estates (Small Payments) Act 1965 Sch 1 Pt I, Sch 3; and SI 1984/539).

This power of the committee is discretionary and it may eg refuse to pay on intestacy without production of letters of administration: *Escritt v Todmorden Co-operative Society* [1896] 1 QB 461, DC. As to persons entitled on intestacy see **EXECUTORS AND ADMINISTRATORS**. In determining the persons entitled by law to receive the property of a deceased member, the committee may dispense with strict evidence of title and relationship, but may not alter the title or select one out of a number of next of kin as single payee even with the consent of the majority: *Symington's Executor v Galashiels Co-operative Store Co Ltd* (1894) 21 R 371. As to the validity of payment to persons apparently entitled see PARA 2509.

4 Industrial and Provident Societies Act 1965 s 25(2) (amended by the Family Law Reform Act 1969 s 19 (2), (3); and the Civil Partnership Act 2004 Sch 27 para 25). As to civil partnerships generally see **MATRIMONIAL AND**



**CIVIL PARTNERSHIP LAW.** As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

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### **2509. Validity of payment to persons apparently entitled.**

All payments or transfers made by the committee of a registered society under the statutory provisions as to distribution of the property of a deceased member which is not subject to a nomination<sup>1</sup>, or as to payment of the property of a mentally incapable member<sup>2</sup>, to any person appearing to the committee at the time of the payment or transfer to be entitled under those provisions are valid and effectual against any demand made upon the committee or society by any other person<sup>3</sup>.

1    Ie the Industrial and Provident Societies Act 1965 s 25 (see PARA 2508), or any corresponding provision of any Act repealed by that Act: s 27. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2    Ie the Industrial and Provident Societies Act 1965 s 26(1) (see PARA 2510), or any corresponding provision of any Act repealed by that Act: s 27.

3    Industrial and Provident Societies Act 1965 s 27.

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### **(iv) Payment on Member's Mental Disorder or Bankruptcy**

#### **2510. Mentally disordered persons.**

Where, after considering medical evidence, the committee<sup>1</sup> of a registered society, including a credit union<sup>2</sup>, is satisfied that a member of the society or person claiming through him<sup>3</sup> is incapable through disorder or disability of mind of managing his own affairs, and is also satisfied that no person has been duly appointed to administer his property<sup>4</sup> on his behalf, and it is proved to the committee's satisfaction that it is just and expedient so to do, the society may pay the amount of any shares, loans and deposits belonging to that member or person to any other person whom the committee judges proper to receive it on his behalf, and the receipt of that person is a good discharge to the society for any sum so paid<sup>5</sup>.

1    As to the meaning of 'committee' see PARA 2458 note 1.

2    As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3    As to persons claiming through a member see PARA 2429 note 2.

4 As to the meaning of 'property' see PARA 2471 note 4.

5 Industrial and Provident Societies Act 1965 s 26(1). This provision does not apply where the member or person concerned lacks capacity within the meaning of the Mental Capacity Act 2005 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 641) and there is a donee of an enduring power of attorney or lasting power of attorney within the meaning of the Mental Capacity Act 2005 (see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 648) or a deputy appointed for the member or person by the Court of Protection, and the donee or deputy has power in relation to the member or person for the purposes of the Industrial and Provident Societies Act 1965: s 26(2) (substituted by the Mental Capacity Act 2005 Sch 6 para 11). As to the Court of Protection see **MENTAL HEALTH** vol 30(2) (Reissue) PARAS 676, 681 et seq. As to the validity of payments made under the Industrial and Provident Societies Act 1965 s 26 see PARA 2509. An entry in the books of a registered society transferring money belonging to a mentally disordered member to an account in his wife's name was held (under the corresponding provisions of the Industrial and Provident Societies Act 1893) not to be a payment which relieved the society from a statutory claim, of which it had received notice, by a poor law authority against the member's property in respect of his maintenance; and it would seem that actual payment in such circumstances would not have protected the society: *Gloucester Union Guardians v Gloucester Industrial and Co-operative Society Ltd* (1907) 96 LT 168, CA; cf *Cardiff Union v Banks and Neels* (1908) 72 JP 319.

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## **2511. Bankruptcy.**

There must be provision in the rules of a registered society, including a credit union, for the claims of the trustees of bankrupt members' property<sup>1</sup>. A sufficient provision would seem to be that the member's property is to be paid or transferred to the trustee.

1 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 11; the Credit Unions Act 1979 s 4(1), Sch 1 para 12; and PARA 2425. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

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## **(v) Accounts and Annual Returns**

### **A. THE LEGISLATION**

#### **2512. Statutory requirements.**

The obligations of registered societies<sup>1</sup> as to accounts, audit and annual returns are governed, for the most part, by the Friendly and Industrial and Provident Societies Act 1968<sup>2</sup>. Notwithstanding anything in the rules of any registered society, the society's committee<sup>3</sup> may, up to the date on which an amendment of the society's rules is first registered<sup>4</sup> after 26 July 1968, pass a resolution making such amendments of the rules as may be consequential on the

provisions of that Act<sup>5</sup>. The Financial Services Authority<sup>6</sup> is not required to register any amendment of a society's rules unless the amendments consequential on the Act either have been made before the application for registration of that amendment or are to be effected by that amendment<sup>7</sup>.

1 As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 The Friendly and Industrial and Provident Societies Act 1968 either replaces or amends the requirements as to accounts, audit and returns contained in the Industrial and Provident Societies Act 1965. The Friendly and Industrial and Provident Societies Act 1968 formerly applied also to the accounts, audit, returns and valuations of registered friendly societies, but in that respect it is now repealed and the relevant provisions are contained in the Friendly Societies Act 1974: see PARA 2113 et seq. The definition of 'society' in the Friendly and Industrial and Provident Societies Act 1968 is now confined to societies registered, or deemed to be registered (see PARA 2396), under the Industrial and Provident Societies Act 1965: see the Friendly and Industrial and Provident Societies Act 1968 s 21(1), (4)(b) (definition amended by the Friendly Societies Act 1974 Sch 11). The Friendly and Industrial and Provident Societies Act 1968 applies to credit unions except in so far as the Credit Unions Act 1979 provides otherwise: see the Friendly and Industrial and Provident Societies Act 1968 s 23(2) (amended by SI 2001/3647); and see generally PARA 2402 note 9. As to the geographical extent of the Friendly and Industrial and Provident Societies Act 1968 and the fact that it is to be construed as one with the Industrial and Provident Societies Act 1965 see PARA 2397. As to offences under the Friendly and Industrial and Provident Societies Act 1968 see PARA 2556.

3 As to the meaning of 'committee' see PARA 2458 note 1. As to the rules generally see PARA 2423 et seq.

4 Is registered under the Industrial and Provident Societies Act 1965 s 10: see PARAS 2436-2437.

5 Friendly and Industrial and Provident Societies Act 1968 s 12(1), (2)(b) (amended by the Friendly Societies Act 1974 Sch 11).

6 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

7 Friendly and Industrial and Provident Societies Act 1968 s 12(3) (amended by the Friendly Societies Act 1974 Sch 11; and SI 2001/2617).

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## ***B. ACCOUNTS AND AUDIT***

### **2513. Obligation to keep accounts.**

Every registered society, including a credit union, must cause to be kept such proper books of account with respect to its transactions, assets and liabilities as are necessary to give a true and fair view of the state of the affairs of the society and to explain its transactions<sup>1</sup>. It must also establish and maintain a satisfactory system of control of its books of account, cash holdings and all receipts and remittances<sup>2</sup>. Books of account may be kept either by making entries in bound books or by recording the matters in question in any other manner<sup>3</sup>.

In respect of each year of account<sup>4</sup>, every registered society must cause to be prepared either a revenue account dealing with the affairs of the society as a whole for that year<sup>5</sup>, or two or more revenue accounts for that year dealing separately with particular businesses conducted by the society<sup>6</sup>. Every balance sheet of a society must give a true and fair view as at the date of the balance sheet of the state of affairs of the society<sup>7</sup>.

Failure by a committee member of a registered society to take reasonable steps to secure compliance with any of these provisions may be an offence<sup>8</sup>.

1 Friendly and Industrial and Provident Societies Act 1968 s 1(1)(a), (2). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Friendly and Industrial and Provident Societies Act 1968 s 1(1)(b).

3 Friendly and Industrial and Provident Societies Act 1968 s 2(1). Where a book of account is not kept by making entries in a bound book but by some other means, the society must take adequate precautions for guarding against falsification and facilitating its discovery: s 2(2).

4 'Year of account' means any period required by statute to be included in an annual return of the society (see PARA 2523); Friendly and Industrial and Provident Societies Act 1968 s 21(1). In relation to the appointment of an auditor or auditors (see PARA 2514), the 'current year of account' means the year of account in which the question of that appointment arises; and the 'preceding year of account' means the year of account immediately preceding the current year of account: s 21(3).

5 Friendly and Industrial and Provident Societies Act 1968 s 3(2)(a). Every revenue account dealing with the affairs of the society as a whole must give a true and fair view of the income and expenditure of the society as a whole for the period to which the account relates: s 3(1)(a).

6 Friendly and Industrial and Provident Societies Act 1968 s 3(2)(b). A revenue account dealing with a particular business conducted by the society must give a true and fair view of the society's income and expenditure in respect of that business for the period to which the account relates: s 3(1)(b). In a case concerning two or more revenue accounts, those accounts, when considered together, must give a true and fair view of the income and expenditure of the society as a whole for the year of account to which they relate: s 3(3).

7 Friendly and Industrial and Provident Societies Act 1968 s 3(4) (amended by the Friendly Societies Act 1974 Sch 11).

8 See the Friendly and Industrial and Provident Societies Act 1968 s 3(7); and PARA 2556. As to publication of accounts see PARA 2516.

## UPDATE

### 2513 Obligation to keep accounts

TEXT AND NOTES 4-8--The Friendly and Industrial and Provident Societies Act 1968 s 3 does not apply to industrial and provident societies that are insurance undertakings: see the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565, Sch 1 paras 1, 2. As to the definition of 'insurance undertaking' see **COMPANIES** vol 15 (2009) PARA 701.

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### 2514. Appointment and removal of auditors.

In each year of account<sup>1</sup> every registered society, other than a society which is exempt from or has disapplied this requirement<sup>2</sup>, must appoint one or more qualified auditors<sup>3</sup> to audit its accounts and balance sheet for that year<sup>4</sup>.

Subject to any direction given by the Financial Services Authority<sup>5</sup>, every registered society which is exempt in respect of the current year of account<sup>6</sup> may appoint either one or more qualified auditors or two or more persons who are not qualified auditors to audit its accounts and balance sheet for that year<sup>7</sup>.

No person is a qualified auditor for these purposes unless he is eligible for appointment as a statutory auditor<sup>8</sup>. A person who is an officer or servant<sup>9</sup> of a society, or a person who is a partner of, or in the employment of, or who employs, an officer or servant of a society, may not be appointed auditor of that society<sup>10</sup>.

A qualified auditor appointed for the preceding year of account<sup>11</sup> is automatically re-appointed for the current year of account<sup>12</sup> unless (1) a resolution is passed at a general meeting of the society appointing someone else or providing expressly that he is not to be re-appointed<sup>13</sup>; (2) he has given written notice to the society of his unwillingness to be re-appointed<sup>14</sup>; (3) he is ineligible for appointment as auditor of the society for the current year of account<sup>15</sup>; or (4) he has ceased to act as auditor of the society by reason of incapacity<sup>16</sup>. A resolution at a general meeting of a registered society appointing another person as auditor in place of a retiring qualified auditor, or providing expressly that a retiring qualified auditor is not to be re-appointed, is not effective unless notice of the intention to move the resolution has been given to the society at least 28 days before the meeting at which it is moved<sup>17</sup>. Where notice of the intention to move any such resolution has been given to a society which is required by its rules to give notice to members<sup>18</sup> of the meeting at which the resolution is to be moved, the society must, if it is practicable to do so, give them notice of the resolution at the same time and in the same manner as it gives notice of the meeting<sup>19</sup>. Where notice of the resolution is not so given, the society must give notice of it to members at least 14 days before the meeting at which the resolution is to be moved, either by advertisement in a newspaper having an appropriate circulation, or in any other way allowed by the rules<sup>20</sup>.

On receiving notice of intention to move a resolution at a general meeting appointing another person as auditor in place of a retiring qualified auditor, or providing expressly that a retiring qualified auditor is not to be re-appointed, a society must forthwith send a copy of the notice to the retiring auditor<sup>21</sup>. On receiving a copy of the notice, the retiring auditor may, at any time before the date of the general meeting, make written representations, not exceeding a reasonable length, to the society with respect to the intended resolution<sup>22</sup>, and may notify it that he intends to make such representations<sup>23</sup> and request that notice of his intention, or of any such representations made by him and received by it before notice of the intended resolution is given to members, be given to the members<sup>24</sup>. A society which receives such representations or notification of intended representations before the date when notice of the intended resolution is required to be given to members<sup>25</sup> must, in any notice of the resolution given to members, state that it has received the representations or notification<sup>26</sup> and that any member may receive, on demand made before the date of the general meeting, a copy of any representations which have been or may be received by the society before that date<sup>27</sup>. Unless the High Court is satisfied that the retiring auditor's rights are being abused to secure needless publicity for defamatory matter<sup>28</sup>, the society must, on demand by a member made before the date of the meeting, send him a copy of any representations received before that date<sup>29</sup>, and the retiring auditor may, in addition, require that they are to be read out at the meeting<sup>30</sup>. He also has a right to be heard orally<sup>31</sup>.

1 As to the meaning of 'year of account' see PARA 2513 note 4.

2 As to the exempt societies see note 4. As to societies which have disappplied the requirement under the Friendly and Industrial and Provident Societies Act 1968 s 4A see note 4. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 As to the meaning of 'qualified auditor' see the text to notes 8-10.

4 Friendly and Industrial and Provident Societies Act 1968 s 4(1) (amended by SI 1996/1738).

The Friendly and Industrial and Provident Societies Act 1968 s 4(1) does not apply to any society if (1) its receipts and payments in respect of the preceding year of account did not in the aggregate exceed £5,000; (2) the number of members at the end of that year did not exceed 500; and (3) the value of its assets at the end of that year did not in the aggregate exceed £5,000: s 4(2) (amended by the Friendly Societies Act 1974 Sch 11). Regulations made by the Treasury may prescribe what receipts and payments of a society are to be taken into account for this purpose and may substitute a different sum or number for any of those mentioned: Friendly and Industrial and Provident Societies Act 1968 s 4(8) (amended by the Friendly Societies Act 1974 Sch 11; and SI 2001/2617). As to the making of regulations under the Friendly and Industrial and Provident Societies Act 1968 see PARA 2399. At the date at which this volume states the law, no regulations had been made under s 4. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

A registered society may disapply s 4 in relation to any year of account beginning on or after 1 September 1996 if (a) the value of its assets at the end of the preceding year of account did not in the aggregate exceed £2,800,000; and (b) its turnover for that year did not exceed £5,600,000 (or in the case of a charity, its gross income did not exceed £250,000) (such sums proportionately adjusted in the case of a year of account which is not in fact a year): s 4A(1), (6), (7) (s 4A added by SI 1996/1738; Friendly and Industrial and Provident Societies Act 1968 s 4A(1) amended by SI 2001/2617; and SI 2006/265). 'Turnover', in relation to a society, means the amounts derived from the provision of goods and services falling within the society's activities, after deduction of trade discounts, value added tax, and any other taxes based on the amounts so derived: Friendly and Industrial and Provident Societies Act 1968 s 4A(8) (as so added). The power in s 4A(1) is exercisable by resolution passed at a general meeting at which less than 20% of the total votes cast are cast against the resolution, and less than 10% of the members of the society entitled under the society's rules to vote cast their votes against the resolution: s 4A(2) (as so added). The power does not apply to credit unions; societies which are, or have, subsidiaries; societies which prepare accounts under the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 1993, SI 1993/3245; or societies which hold, or at any time since the end of the preceding year of account, have held, a deposit, other than a deposit in the form of withdrawable share capital: Friendly and Industrial and Provident Societies Act 1968 s 4A(3) (as so added; and amended by the Housing Act 2004 Sch 16; and SI 2001/3649). In the Friendly and Industrial and Provident Societies Act 1968 s 4A(3), the reference to a deposit must be read with the Financial Services and Markets Act 2000 s 22, any relevant order under that provision and Sch 2 (see PARAS 84-85): Friendly and Industrial and Provident Societies Act 1968 s 4A(9) (added by SI 2001/3649). See also PARA 2515.

The Financial Services Authority may by notice to a society disapply the Friendly and Industrial and Provident Societies Act 1968 s 4A(1) in relation to the year of account of the society in which the notice is given: s 4A(4) (as so added; s 4A(4), (5) amended by SI 2001/2617). Where a society exercises the power conferred by the Friendly and Industrial and Provident Societies Act 1968 s 4A(1), the disapplication ceases to have effect if, at any time before the end of the year of account to which it relates, the society becomes one to which s 4A(3) applies, or the Authority gives the society notice under s 4A(4): s 4A(5) (as so added and amended). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

5 In the case of any particular society which is exempt in respect of the current year of account, the Authority may direct it to appoint a qualified auditor to audit its accounts and balance sheet for that year: Friendly and Industrial and Provident Societies Act 1968 s 4(6) (s 4(6), (7) amended by SI 2001/2617). As to the meaning of 'current year of account' see PARA 2513 note 4. In the case of any particular society which was exempt in respect of any earlier year of account, and which did not appoint any qualified auditors to audit its accounts and balance sheet for that year, the Authority may direct it to appoint a qualified auditor to audit those accounts and that balance sheet: s 4(7)(a) (as so amended). Where that society has already sent an annual return to the Authority (see PARA 2523) for the year in question, it may direct that, after the accounts and balance sheet have been audited by a qualified auditor, a further annual return is to be sent within three months from the date of the receipt of the direction: s 4(7)(b) (as so amended; and further amended by the Friendly Societies Act 1974 Sch 11). As to the penalty for failure to comply see PARAS 2547, 2556.

6 A society to which, by virtue of the Friendly and Industrial and Provident Societies Act 1968 s 4(2) (see note 4), s 4(1) (see the text and notes 1-4) does not apply in respect of any year of account is referred to as an exempt society in respect of that year of account: s 4(4) (amended by the Friendly Societies Act 1974 Sch 11). As to the exempt societies see note 4. See also the Friendly and Industrial and Provident Societies Act 1968 s 4A; and note 4.

7 Friendly and Industrial and Provident Societies Act 1968 s 4(5) (amended by SI 2001/2617).

8 Friendly and Industrial and Provident Societies Act 1968 s 7(1) (amended by SI 1991/1997; SI 2001/2617; and SI 2008/948). As to eligibility for appointment as a statutory auditor see the Companies Act 2006 Pt 42 (ss 1209-1264); and **COMPANIES** vol 15 (2009) para 957 et seq.

9 For this purpose 'officer or servant' does not include an auditor: Friendly and Industrial and Provident Societies Act 1968 s 8(5).

10 Friendly and Industrial and Provident Societies Act 1968 s 8(1)(a), (b). A person may also not be appointed as auditor of a society if (1) by virtue of s 8(1) he is prohibited from being appointed as auditor of a society which is a subsidiary of that society, or of which that society is a subsidiary, or which is a subsidiary of the society of which that society is a subsidiary (s 8(2)(a)); or (2) he is prohibited by the Companies Act 2006 s 1214 (independence requirement) (see **COMPANIES** vol 15 (2009) para 971) from acting as a statutory auditor of a company which is a subsidiary of that society (Friendly and Industrial and Provident Societies Act 1968 s 8(2)(b) (substituted by SI 1991/1997; and amended by SI 2008/948)). As to the meaning of 'subsidiary' see **PARAS** 2517-2518. 'Company' includes any body corporate other than a registered society: Friendly and Industrial and Provident Societies Act 1968 ss 8(5), 15(9). Any appointment made in contravention of any of the provisions of s 8 is not an effective appointment for the purposes of the Friendly and Industrial and Provident Societies Act 1968: s 8(4).

11 As to the meaning of 'preceding year of account' see **PARA** 2513 note 4.

12 As to the meaning of 'current year of account' see **PARA** 2513 note 4.

13 Friendly and Industrial and Provident Societies Act 1968 s 5(1)(a). Where notice is given of an intended resolution to appoint some person or persons in place of a retiring auditor, and the resolution cannot be proceeded with at the meeting because of the death or incapacity of that person or those persons, or because he or they are ineligible for appointment (see note 15) for the current year of account, the retiring auditor is not automatically re-appointed: s 5(1) proviso.

14 Friendly and Industrial and Provident Societies Act 1968 s 5(1)(b).

15 Friendly and Industrial and Provident Societies Act 1968 s 5(1)(c). For this purpose a person is ineligible for appointment as auditor for the current year of account if, but only if, his appointment is prohibited by s 8 (see the text to notes 9-10) (s 5(2)(a)), or, in the case of a society which is not an exempt society in respect of that year of account, he is not a qualified auditor at the time when the question of his appointment falls to be considered (s 5(2)(b)). As to exempt societies see note 4.

16 Friendly and Industrial and Provident Societies Act 1968 s 5(1)(d).

17 Friendly and Industrial and Provident Societies Act 1968 s 6(1) (amended by the Friendly Societies Act 1971 Schs 2, 3). Where, however, for any of the reasons referred to in note 13 an intended resolution to appoint some person or persons in place of a retiring qualified auditor cannot be proceeded with at the meeting, and the society's rules provide that an auditor can be appointed only by a resolution passed at a general meeting after notice of the intended resolution has been given to the society before the meeting, a resolution passed at that meeting re-appointing the retiring auditor or appointing another auditor in his place is effective notwithstanding that no notice of the resolution has been given to the society under its rules: Friendly and Industrial and Provident Societies Act 1968 s 6(4).

18 Any reference in these provisions to requiring notice to be given to the members of a society, or conferring any right upon a member, is to be construed, in the case of a meeting of delegates appointed by members, as requiring the notice to be given to the delegates so appointed, or as conferring the right upon a delegate: see Friendly and Industrial and Provident Societies Act 1968 s 6(10). As to meetings of delegates see **PARA** 2478. As to the rules generally see **PARA** 2423 et seq.

19 Friendly and Industrial and Provident Societies Act 1968 s 6(2).

20 Friendly and Industrial and Provident Societies Act 1968 s 6(3).

21 Friendly and Industrial and Provident Societies Act 1968 s 6(5).

22 Friendly and Industrial and Provident Societies Act 1968 s 6(6).

23 Friendly and Industrial and Provident Societies Act 1968 s 6(6)(a).

24 Friendly and Industrial and Provident Societies Act 1968 s 6(6)(b).

25 As to the requirement to give notice of the resolution to members or delegates see the text to notes 18-20.

26 Friendly and Industrial and Provident Societies Act 1968 s 6(7)(a).

27 Friendly and Industrial and Provident Societies Act 1968 s 6(7)(b).

28 See the Friendly and Industrial and Provident Societies Act 1968 s 6(8). Application to the High Court may be made by the society or by any other person, and the court may order the society's costs on such application to be paid, in whole or in part, by the auditor, notwithstanding that he is not a party to the application: s 6(8).

29 Friendly and Industrial and Provident Societies Act 1968 s 6(7)(c).

30 Friendly and Industrial and Provident Societies Act 1968 s 6(7).

31 Friendly and Industrial and Provident Societies Act 1968 s 6(7).

## UPDATE

### 2514 Appointment and removal of auditors

TEXT AND NOTES 1-7--The Friendly and Industrial and Provident Societies Act 1968 ss 4, 4A do not apply to industrial and provident societies that are insurance undertakings: Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565, Sch 1 paras 1, 4. As to the meaning of insurance undertakings see **COMPANIES** vol 15 (2009) PARA 701.

TEXT AND NOTE 8--As to the application of the Friendly and Industrial and Provident Societies Act 1968 s 7 to industrial and provident societies that are insurance undertakings see SI 2008/565 Sch 1 paras 1, 7.

TEXT AND NOTES 9, 10--The Friendly and Industrial and Provident Societies Act 1968 s 8 does not apply to industrial and provident societies that are insurance undertakings: see SI 2008/565 Sch 1 paras 1, 8.

TEXT AND NOTES 11-16--As application of the Friendly and Industrial and Provident Societies Act 1968 s 5 to industrial and provident societies that are insurance undertakings see SI 2008/565 Sch 1 paras 1, 5. As to the prevention by members of the automatic re-appointment of the auditor in the case of industrial and provident societies that are insurance undertakings see the Friendly and Industrial and Provident Societies Act 1968 s 5A (added by SI 2008/565).

NOTE 4--Friendly and Industrial and Provident Societies Act 1968 s 4A(3) amended: SI 2008/565.

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### 2515. Conduct of audit; auditors' remuneration.

The auditors of a registered society must make a report to the society on the accounts examined by them, and on the revenue account or accounts and the balance sheet for the year of account<sup>1</sup> in respect of which they are appointed<sup>2</sup>. The report must state whether the revenue account or accounts and the balance sheet for that year comply with the statutory requirements<sup>3</sup> as to keeping accounts<sup>4</sup>; and whether in the auditors' opinion: (1) the revenue account or accounts give a true and fair view, in accordance with those requirements, of the income and expenditure of the society as a whole for that year of account and, in the case of each such account which deals with a particular business conducted by the society, a true and fair view, in accordance with those requirements, of the society's income and expenditure in



respect of that business for that year<sup>5</sup>; and (2) the balance sheet gives a true and fair view, in accordance with those requirements, of the state of the affairs of the society as at the end of that year of account<sup>6</sup>.

In preparing their report, the auditors have a duty to carry out such investigations as will enable them to form an opinion on whether the society has kept proper books of account<sup>7</sup> and maintained a satisfactory system of control over its transactions<sup>8</sup>, and whether the revenue account or accounts, the other accounts (if any) to which the report relates, and the balance sheet are in agreement with the books of account<sup>9</sup>. If the auditors are not satisfied on any of these matters, they must state that fact in their report<sup>10</sup>; and if they fail to obtain all the information and explanations which, to the best of their knowledge and belief, are necessary for the purposes of their audit, that fact also must be stated in their report<sup>11</sup>.

Every auditor of a registered society has a right of access at all times to the society's books, deeds and accounts and to all other documents relating to its affairs<sup>12</sup>, and is entitled to require from the officers such information and explanations as he thinks necessary for the performance of his duties<sup>13</sup>. The auditors are also entitled to attend any general meetings and to receive all notices of, and other communications relating to, general meetings which any member of the society is entitled to receive<sup>14</sup>; and at any meeting which they attend they are entitled to be heard on any part of the business of the meeting which concerns them as auditors<sup>15</sup>.

Where a society has disapplied the requirement to appoint an auditor<sup>16</sup> and its turnover<sup>17</sup> in the preceding year of account<sup>18</sup> exceeded a certain amount<sup>19</sup>, it must appoint an appropriate person<sup>20</sup> within 28 days from the end of the year of account to make: (a) a report<sup>21</sup> on the society's accounts and balance sheet for the year; and (b) a report<sup>22</sup> relating to the preceding year of account<sup>23</sup>. The Financial Services Authority<sup>24</sup> may give a direction to a society, in respect of any relevant year of account<sup>25</sup> of the society preceding that in which the direction is given, requiring it to appoint a qualified auditor or qualified auditors to audit its accounts and balance sheet for that year and, where an annual return was submitted before the direction was given, to send the Authority a further annual return within three months from receipt of the direction complying with statutory requirements<sup>26</sup>.

Maximum rates of remuneration to be paid by registered societies for the audit of their accounts and balance sheets by qualified auditors or for the making of certain reports<sup>27</sup> may be prescribed by regulations made by the Treasury<sup>28</sup>. No auditor or reporting accountant may ask for or receive or is entitled to receive remuneration in excess of the rate so prescribed in respect of his services<sup>29</sup>.

Provision must be made in the rules of every registered society for the audit of accounts by one or more auditors appointed in accordance with the statutory requirements<sup>30</sup>.

1 As to the meaning of 'year of account' see PARA 2513 note 4. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Friendly and Industrial and Provident Societies Act 1968 s 9(1).

3 I.e the Friendly and Industrial and Provident Societies Act 1968 ss 1-3: see PARA 2513.

4 Friendly and Industrial and Provident Societies Act 1968 s 9(2).

5 Friendly and Industrial and Provident Societies Act 1968 s 9(2)(a). Where the auditors' report relates to any accounts other than the revenue account or accounts for the year of account in respect of which they are appointed, that report must state whether those accounts give a true and fair view of any matter to which they relate: s 9(3).

6 Friendly and Industrial and Provident Societies Act 1968 s 9(2)(b).

7 I.e in accordance with the Friendly and Industrial and Provident Societies Act 1968 s 1(1)(a) (see PARA 2512): s 9(4)(a).

8 le in accordance with the Friendly and Industrial and Provident Societies Act 1968 s 1(1)(b) (see PARA 2512): s 9(4)(b).

9 Friendly and Industrial and Provident Societies Act 1968 s 9(4)(c).

10 Friendly and Industrial and Provident Societies Act 1968 s 9(4).

11 Friendly and Industrial and Provident Societies Act 1968 s 9(6).

12 Friendly and Industrial and Provident Societies Act 1968 s 9(5)(a).

13 Friendly and Industrial and Provident Societies Act 1968 s 9(5)(b).

14 Friendly and Industrial and Provident Societies Act 1968 s 9(7)(a).

15 Friendly and Industrial and Provident Societies Act 1968 s 9(7)(b).

16 le under the Friendly and Industrial and Provident Societies Act 1968 s 4A: see PARA 2514 note 4.

17 As to the meaning of 'turnover' see PARA 2514 note 4; definition applied by the Friendly and Industrial and Provident Societies Act 1968 s 9A(6) (ss 9A-9C added by SI 1996/1738).

18 As to the meaning of 'preceding year of account' see PARA 2513 note 4.

19 Friendly and Industrial and Provident Societies Act 1968 s 9A(1) (as added: see note 17). The amount referred to in the text is £90,000: see s 9A(1) (as so added).

As to the application of s 9A to registered social landlords which are industrial and provident societies (ie registered societies) see the Housing Act 1996 s 7, Sch 1 Pt III para 17, removing the turnover requirements; and **HOUSING** vol 22 (2006 Reissue) PARA 88.

20 The reference to an appropriate person is to a person who is a qualified auditor for the purposes of the Friendly and Industrial and Provident Societies Act 1968, and is not ineligible by virtue of s 8(1) (see PARA 2514): s 9A(5) (as added: see note 17). As to the rights of the person appointed see note 23.

21 This report must (1) state whether, in the opinion of the person making the report, the revenue account or accounts, the other accounts (if any) to which the report relates, and the balance sheet, are in agreement with the books of account kept by the society under the Friendly and Industrial and Provident Societies Act 1968 s 1 (see PARA 2513); and (2) state whether, in that person's opinion, on the basis of the information contained in those books of account, the revenue account or accounts and the balance sheet comply with the requirements of the Friendly and Industrial and Provident Societies Act 1968 and the appropriate registration Act: s 9A(3) (as added: see note 17).

22 This report must state whether in the opinion of the person making the report the financial criteria for the exercise of the power conferred by the Friendly and Industrial and Provident Societies Act 1968 s 4A(1) (see PARA 2514 note 4) were met in relation to the year: s 9A(4) (as added: see note 17).

23 Friendly and Industrial and Provident Societies Act 1968 s 9A(2) (as added: see note 17). For the purposes of his appointment, a person appointed under s 9A(2): (1) must have a right of access at all times to the books, deeds and accounts of the relevant society, and to all other documents relating to its affairs; and (2) is entitled to require from the officers of the relevant society such information and explanations as he thinks necessary: s 9B(1) (as so added). References to the relevant society, in relation to a person appointed under s 9A(2), are to the society responsible for his appointment under that provision: s 9B(5) (as so added).

If a person appointed under s 9A(2) fails to obtain all the information and explanations which, to the best of that person's knowledge and belief, are necessary for the purposes of doing what he has been appointed to do, that fact must be stated in his report: s 9B(2) (as so added).

A person appointed under s 9A(2) is entitled (a) to receive notice of, and attend, any general meeting of the relevant society at which any relevant matter is discussed; and (b) to be heard at any such general meeting which he attends on any part of the business of the meeting which relates to any relevant matter: s 9B(3) (as so added). For the above purposes, the following are relevant matters: (i) any report of the person appointed under s 9A(2); and (ii) any matter which is relevant to what that person has been appointed under that provision to do: s 9B(4) (as so added).

24 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

25 For these purposes, a year of account of a society is a relevant year of account if it is one at the end of which there is in force in relation to it a disapplication under the Friendly and Industrial and Provident Societies Act 1968 s 4A(1) (see PARA 2514 note 4): s 9C(2) (as added: see note 17).

26 Friendly and Industrial and Provident Societies Act 1968 s 9C(1) (as added (see note 17); and amended by SI 2001/2617). The statutory requirements referred to in the text are those of the Friendly and Industrial and Provident Societies Act 1968 and those of the Industrial and Provident Societies Act 1965 s 39: see PARA 2523-2524.

27 le for the making of a report for the purposes of the Friendly and Industrial and Provident Societies Act 1968 s 3A(4)(a) (see PARA 2516 head (a)) or s 3A(5) (see PARA 2516) or s 9A(2)(a) or (b) (see heads (a) and (b) in the text).

28 Friendly and Industrial and Provident Societies Act 1968 s 10(1) (amended by SI 1996/1738; and SI 2001/2617). At the date at which this volume states the law, no such regulations had been made. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

29 Friendly and Industrial and Provident Societies Act 1968 s 10(2) (amended by SI 1996/1738). 'Reporting accountant' means a person appointed to make a report for the purposes of the Friendly and Industrial and Provident Societies Act 1968 s 3A(4)(a) (see PARA 2516 heads (a), (b)) or s 3A(5) (see PARA 2516 heads (A), (B)) or s 9A(2)(a) or (b) (see heads (a), (b)): s 10(3) (added by SI 1996/1738).

30 See the Industrial and Provident Societies Act 1965 s 1(1)(b), Sch 1 para 10; the Credit Unions Act 1979 s 4(1), Sch 1 para 11; and PARA 2425. As to the statutory requirements governing the appointment of auditors see PARA 2514. As to the rules generally see PARA 2423 et seq.

## UPDATE

### 2515 Conduct of audit; auditors' remuneration

TEXT AND NOTES 1-15--As to the application of the Friendly and Industrial and Provident Societies Act 1968 s 9 to industrial and provident societies which are insurance undertakings see the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565, Sch 1 paras 1, 9. As to the meaning of insurance undertaking see **COMPANIES** vol 15 (2009) PARA 701.

TEXT AND NOTES 16-26--The Friendly and Industrial Provident Societies Act 1968 ss 9A-9C do not apply to industrial and provident societies that are insurance undertakings: see SI 2008/565 Sch 1 paras 1, 10.

TEXT AND NOTES 27-29--As to the application of the Friendly and Industrial and Provident Societies Act 1968 s 10 to industrial and provident societies which are insurance undertakings see SI 2008/565 Sch 1 paras 1, 11.

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### 2516. Exhibiting and publication of accounts and balance sheet.

A registered society must not publish any revenue account or balance sheet unless it has been signed by the secretary of the society and by two members of the committee of the society acting on behalf of that committee<sup>1</sup>.

Where at the end of a society's year of account<sup>2</sup> no disapplication under the Friendly and Industrial and Provident Societies Act 1968<sup>3</sup> is in force in relation to the year, the society must

not publish a year end revenue account or balance sheet<sup>4</sup> unless (1) it has been previously audited by the auditor or auditors last appointed to audit the accounts and balance sheet of the society; and (2) it incorporates a report by the auditor or auditors stating whether in his or their opinion it complies with the relevant statutory provision in regard to giving a true and fair view<sup>5</sup>. Where at the beginning of a year of account (the 'current year of account') a society is subject to the provision set out above<sup>6</sup> in relation to the publication of a year end revenue account or balance sheet for the preceding year of account, it must not publish any interim revenue account or balance sheet<sup>7</sup> for the current year of account (a) if a disapplication<sup>8</sup> is in force in relation to that year, unless it incorporates a report by an appropriate person<sup>9</sup> stating whether in his opinion it complies with the relevant statutory provision in regard to giving a true and fair view<sup>10</sup>; and (b) if no such disapplication is in force in relation to that year, unless heads (1) and (2) above are met in relation to it<sup>11</sup>.

Where at the end of a society's year of account a disapplication<sup>12</sup> is in force in relation to the year and the society's turnover<sup>13</sup> in the preceding year of account exceeded the relevant amount<sup>14</sup>, the society must not publish a year end revenue account or balance sheet unless (i) it is one on which the society has obtained from the appropriate person<sup>15</sup> a report which meets the relevant requirements<sup>16</sup>; and (ii) it incorporates so much of the report as relates to it<sup>17</sup>. Where at the beginning of a year of account (the 'current year of account') a society is subject to the provision set out above<sup>18</sup> in relation to the publication of a year end revenue account or balance sheet for the preceding year of account, it must not publish any interim revenue account or balance sheet for the current year of account unless it incorporates a report by an appropriate person<sup>19</sup> stating (A) whether, in his opinion, the revenue account or, as the case may be, the balance sheet, is in agreement with the books of account kept by the society<sup>20</sup>; and (B) whether, in his opinion, on the basis of the information contained in those books of account, the revenue account or, as the case may be, the balance sheet complies with the requirements of the Friendly and Industrial and Provident Societies Act 1968 and the appropriate registration Act<sup>21</sup>.

Where a society's year of account is one in relation to which a direction by the Financial Services Authority<sup>22</sup> has effect, the society must not publish any year end or interim revenue account or balance sheet, unless it incorporates a report by the auditor or auditors appointed in pursuance of the direction stating whether in his or their opinion it complies with the relevant statutory provision in regard to giving a true and fair view<sup>23</sup>.

A credit union may display at its registered office, but only at that office, an unaudited interim revenue account or balance sheet, subject to compliance with certain conditions<sup>24</sup>.

Every registered society must keep a copy of the latest balance sheet of the society hung up at all times in a conspicuous position at its registered office<sup>25</sup>.

Failure to comply with these requirements is an offence<sup>26</sup>.

1 Friendly and Industrial and Provident Societies Act 1968 s 3A(1) (s 3A added by SI 1996/1738). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the revenue account and the balance sheet see PARA 2513. As to the secretary and the committee see PARA 2458.

2 As to the meaning of 'year of account' see PARA 2513 note 4.

3 Ie under the Friendly and Industrial and Provident Societies Act 1968 s 4A(1): see PARA 2514 note 4.

4 'Year end revenue account', in relation to a year of account, means a revenue account for the year or for any period falling within the year of account and ending at the end of the year; and 'year end balance sheet', in relation to a year of account, means a balance sheet relating to the position at the end of the year: Friendly and Industrial and Provident Societies Act 1968 s 3A(12) (as added: see note 1).

5 Friendly and Industrial and Provident Societies Act 1968 s 3A(2) (as added: see note 1). The reference is to whether it complies with either s 3(1) or, as the case may be, s 3(4): see PARA 2513.

6 Ie the Friendly and Industrial and Provident Societies Act 1968 s 3A(2): see the text and notes 2-5.

7 'Interim revenue account', in relation to a year of account, means a revenue account for any period falling within the year of account, other than one ending at the end of the year; and 'interim balance sheet', in relation to a year of account, means a balance sheet relating to the position at a time in the year other than the end: Friendly and Industrial and Provident Societies Act 1968 s 3A(12) (as added: see note 1).

8 Ie under the Friendly and Industrial and Provident Societies Act 1968 s 4A(1): see PARA 2514 note 4. In s 3A(4), references to a disapplication under s 4A(1) being in force in relation to a year of account, where the year of account has ended, are to be construed as references to a disapplication under that provision being in force at the end of the year: s 3A(9) (as added: see note 1).

9 Subject to the Friendly and Industrial and Provident Societies Act 1968 s 3A(11), in s 3A(4), (5) references to an appropriate person are to a person who is (1) a qualified auditor for the purposes of the Friendly and Industrial and Provident Societies Act 1968; and (2) not ineligible by virtue of s 8(1) (see PARA 2514) to be appointed as auditor of the society: s 3A(10) (as added: see note 1). In relation to the application of s 3A(4) to a society which was an exempt society (ie under s 4(4): see PARA 2514) in respect of the preceding year of account, and appointed persons who were not qualified auditors to audit its accounts and balance sheet for that year, s 3A(10), if the year is not one in relation to which the Financial Services Authority has given a direction under s 4(7)(a) (see PARA 2514 note 5), has effect with the omission of head (1) above: s 3A(11) (as so added; and amended by SI 2001/2617). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

10 Ie whether it complies with either the Friendly and Industrial and Provident Societies Act 1968 s 3(1) or, as the case may be, s 3(4): see PARA 2513.

11 Friendly and Industrial and Provident Societies Act 1968 s 3A(4) (as added: see note 1). Section 9B (see PARA 2515 note 23) applies in relation to a person appointed for the purposes of s 3A(4) or s 3A(5) (see the text and notes 18-21) as it applies in relation to a person appointed under s 9A(2) (see PARA 2515): s 3A(8) (as so added). As to the non-application of s 3A(4) to interim revenue accounts or balance sheets referred to in the Credit Unions Act 1979 s 24(1) see note 24.

12 Ie under the Friendly and Industrial and Provident Societies Act 1968 s 4A(1): see PARA 2514 note 4.

13 As to the meaning of 'turnover' see PARA 2514 note 4; definition applied by the Friendly and Industrial and Provident Societies Act 1968 s 3A(12) (as added: see note 1).

14 The amount is £90,000: see the Friendly and Industrial and Provident Societies Act 1968 s 3A(3) (as added: see note 1).

15 Ie a person appointed under the Friendly and Industrial and Provident Societies Act 1968 s 9A(2): see PARA 2515.

16 Ie the requirements of the Friendly and Industrial and Provident Societies Act 1968 s 9A(3): see PARA 2515 note 21.

17 Friendly and Industrial and Provident Societies Act 1968 s 3A(3) (as added: see note 1). This provision ceases to apply in relation to a year of account if a direction under s 9C (see PARA 2515) is made in relation to it: s 3A(7) (as so added).

18 Ie the Friendly and Industrial and Provident Societies Act 1968 s 3A(3): see the text and notes 12-17.

19 See note 9.

20 Ie kept under the Friendly and Industrial and Provident Societies Act 1968 s 1: see PARA 2513.

21 Friendly and Industrial and Provident Societies Act 1968 s 3A(5) (as added: see note 1).

22 Ie a direction by the Authority under the Friendly and Industrial and Provident Societies Act 1968 s 9C: see PARA 2515.

23 Friendly and Industrial and Provident Societies Act 1968 s 3A(6) (as added: see note 1). The relevant statutory provision is s 3(1) or, as the case may be, s 3(4): see PARA 2513.

24 Credit Unions Act 1979 s 24(1). The conditions are that (1) the latest audited revenue account and balance sheet are displayed side by side with the interim revenue account or balance sheet; and (2) the interim revenue account or balance sheet so displayed is marked in clearly legible characters and in a prominent position with the words 'UNAUDITED REVENUE ACCOUNT' or, as the case may be, 'UNAUDITED BALANCE SHEET': see s 24(1). The Friendly and Industrial and Provident Societies Act 1968 s 3A(4) (restriction on

publication of interim revenue accounts and balance sheets) (see the text to note 11) does not apply in relation to any such interim revenue account or balance sheet as is referred to in the Credit Unions Act 1979 s 24(1): s 24(2) (amended by SI 1996/1738; and SI 2002/1501).

25 Industrial and Provident Societies Act 1965 s 40 (amended by SI 1996/1738). As to the additional statement which banking societies are required to exhibit see PARA 2405.

The Industrial and Provident Societies Act 1965 s 40, being a provision replaced by or inconsistent with provisions of the Financial Services and Markets Act 2000, does not apply to credit unions: see the Credit Unions Act 1979 s 31(4) (added by SI 2002/1501).

26 See PARAS 2547, 2556.

## UPDATE

### 2516 Exhibiting and publication of accounts and balance sheet

TEXT AND NOTES--As to the application of the Friendly and Industrial and Provident Societies Act 1968 s 3A to industrial and provident societies that are insurance undertakings see the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565, Sch 1 paras 1, 3. As to the meaning of insurance undertaking see **COMPANIES** vol 15 (2009) PARA 701.

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## C. GROUP ACCOUNTS

### 2517. Subsidiary companies.

For the purposes of the statutory provisions as to a registered society's accounts<sup>1</sup>, a company<sup>2</sup> is deemed to be a subsidiary of a society if, but only if, the society either is a member of the company and controls the composition of its board of directors<sup>3</sup>, or holds more than half in nominal value of the company's equity share capital<sup>4</sup>.

A credit union is not permitted to have any subsidiary<sup>5</sup>.

1 In the Friendly and Industrial and Provident Societies Act 1968. As to the meaning of 'registered society' see PARA 2395.

2 For this purpose 'company' includes any body corporate other than a registered society: Friendly and Industrial and Provident Societies Act 1968 s 15(9).

3 Friendly and Industrial and Provident Societies Act 1968 s 15(1)(a). The composition of a company's board of directors is deemed to be controlled by a society if, but only if, by the exercise of some power exercisable by it without the consent or concurrence of any other person, the society can appoint or remove the holders of all or of a majority of the directorships: s 15(2). For this purpose a society is deemed to have power to appoint to a directorship if: (1) a person cannot be appointed to the directorship without the exercise in his favour by the society of a power exercisable by it without the consent or concurrence of any other person; or (2) a person's appointment to the directorship follows necessarily from his appointment as a committee member of the society; or (3) the directorship is held by the society itself: s 15(3).

4 Friendly and Industrial and Provident Societies Act 1968 s 15(1)(b). In relation to a company, 'equity share capital' means its issued share capital excluding any part which, neither as respects dividends nor as respects

capital, carries any right to participate beyond a specified amount in a distribution: s 15(9). In determining whether a company is a subsidiary of a society: (1) any shares held or power exercisable by the society in a fiduciary capacity are treated as not held or exercisable by it (s 15(4)(a)); (2) (subject to heads (3) and (4) below) any shares held or power exercisable by any person as a nominee for the society, except where the society is concerned only in a fiduciary capacity, are treated as held or exercisable by the society (s 15(4)(b)); (3) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the company or of a trust deed for securing any issue of such debentures are disregarded (s 15(4)(c)); (4) any shares held or power exercisable by, or by a nominee for, the society (not being held or exercisable as mentioned in head (3) above) are treated as not held or exercisable by the society if its ordinary business includes the lending of money and the shares are held or power is exercisable as mentioned above by way of security only for the purposes of a transaction entered into in the ordinary course of that business (s 15(4)(d)).

5     Ie within the meaning of Friendly and Industrial and Provident Societies Act 1968 s 15 (see the text and notes 1-4): Credit Unions Act 1979 s 26. As to credit unions see PARA 2402.

## UPDATE

### 2517 Subsidiary companies

TEXT AND NOTES--The Friendly and Industrial and Provident Societies Act 1968 s 15 does not apply to industrial and provident societies that are insurance undertakings: see the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565, Sch 1 paras 1, 15. As to the meaning of insurance undertaking see **COMPANIES** vol 15 (2009) PARA 701.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/9. INDUSTRIAL AND PROVIDENT SOCIETIES/(3) ADMINISTRATION, POWERS AND PROPERTY/(v) Accounts and Annual Returns/C. GROUP ACCOUNTS/2518. Subsidiary societies.

### 2518. Subsidiary societies.

For the purposes of the statutory provisions as to a registered society's accounts<sup>1</sup>, a registered society is deemed to be a subsidiary of another such society if, but only if, that other society either is a member of the first-mentioned society and controls the composition of its committee<sup>2</sup>, or can exercise a majority of the votes to which members of the first-mentioned society are entitled under its rules<sup>3</sup>.

1     Ie the Friendly and Industrial and Provident Societies Act 1968. As to the meaning of 'registered society' see PARA 2395.

2     Friendly and Industrial and Provident Societies Act 1968 s 15(5)(a). The composition of a society's committee is deemed to be controlled by another society if, but only if: (1) by the exercise of some power exercisable by it without the consent or concurrence of any other person, that other society can appoint and remove the members or a majority of the members of that committee; or (2) that other society is itself a member of that committee and by the exercise of a power exercisable by it without the consent or concurrence of any other person can either appoint and remove the remaining committee members or appoint and remove such number of committee members as, together with itself, would constitute a majority of the committee members: s 15(6). For these purposes, a society is deemed to have power to appoint a person to membership of the committee of another society if (a) he cannot be appointed without the exercise in his favour by the first-mentioned society of a power exercisable by it without the consent or concurrence of any other person; or (b) his appointment follows necessarily from his appointment as a committee member of the first-mentioned society: s 15(7).

3     Friendly and Industrial and Provident Societies Act 1968 s 15(5)(b). The provisions of s 15(4) (see PARA 2517 note 4) apply, with the necessary modifications, in determining whether one registered society is a subsidiary of another: s 15(8). A credit union may not have any subsidiary within the meaning of s 15: see the

Credit Unions Act 1979 s 26; and PARA 2517. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

## UPDATE

### 2518 Subsidiary societies

TEXT AND NOTES--The Friendly and Industrial and Provident Societies Act 1968 s 15 does not apply to industrial and provident societies that are insurance undertakings: see the Insurance Accounts Directive (Miscellaneous Insurance undertakings) Regulations 2008, SI 2008/565, Sch 1 paras 1, 15. As to the meaning of insurance undertaking see **COMPANIES** vol 15 (2009) PARA 958.

Halsbury's Laws of England/FINANCIAL SERVICES AND INSTITUTIONS (VOLUME 48 (2008) 5TH EDITION, PARAS 1-589; VOLUME 49 (2008) 5TH EDITION, PARAS 590-1619; VOLUME 50 (2008) 5TH EDITION, PARAS 1620-2586)/9. INDUSTRIAL AND PROVIDENT SOCIETIES/(3) ADMINISTRATION, POWERS AND PROPERTY/(v) Accounts and Annual Returns/C. GROUP ACCOUNTS/2519. Obligation to prepare group accounts.

### 2519. Obligation to prepare group accounts.

Where at the end of a year of account<sup>1</sup> a registered society has subsidiaries<sup>2</sup>, then, unless exempt from this requirement<sup>3</sup>, it must cause group accounts to be prepared for that year dealing with the state of affairs and income and expenditure of the society and its subsidiaries<sup>4</sup>.

This requirement does not apply to a registered society which, at the end of its year of account, is the wholly owned subsidiary of another body corporate incorporated in Great Britain<sup>5</sup>. The group accounts of any registered society need not deal with a subsidiary if in the opinion of the society's committee, approved by the Financial Services Authority<sup>6</sup>: (1) it is impracticable, or would be of no real value to members of the society, in view of the insignificant amounts involved, or would involve expense or delay out of proportion to the value to members<sup>7</sup>; or (2) the result would be misleading, or harmful to the business of the society or any of its subsidiaries<sup>8</sup>; or (3) the business of the society and that of the subsidiary are so different that they cannot reasonably be treated as a single undertaking<sup>9</sup>. If the society's committee is of any such opinion in respect of each of its subsidiaries, and that opinion is approved by the Authority, the society is not required to cause group accounts to be prepared<sup>10</sup>.

1 As to the meaning of 'year of account' see PARA 2513 note 4.

2 As to the meaning of 'subsidiary' see PARAS 2517-2518. As to the meaning of 'registered society' see PARA 2395.

3 See the text to notes 5-10.

4 Friendly and Industrial and Provident Societies Act 1968 s 13(1). Where the year of account of a subsidiary does not coincide with that of the society of which it is a subsidiary, then, unless the Financial Services Authority on the application or with the consent of the society's committee otherwise directs, the group accounts must deal with the subsidiary's state of affairs as at the end of its year of account ending with or last before that of the society, and with the subsidiary's income and expenditure for that year of account: s 13(4) (amended by SI 2001/2617). A credit union may not have any subsidiary within the meaning of the Friendly and Industrial and Provident Societies Act 1968 s 15: see the Credit Unions Act 1979 s 26; and PARA 2517. As to credit unions generally see PARA 2402. As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. See also note 10.

5 Friendly and Industrial and Provident Societies Act 1968 s 14(1). For this purpose a registered society is deemed to be the wholly owned subsidiary of another body corporate if it has no members except that other



body corporate and the wholly owned subsidiaries of that body and its or their nominees; s 14(4). As to the meaning of 'Great Britain' see PARA 2 note 3.

6 Friendly and Industrial and Provident Societies Act 1968 s 14(2) (s 14(2), (3) amended by SI 2001/2617). See note 4.

7 Friendly and Industrial and Provident Societies Act 1968 s 14(2)(a). See note 10.

8 Friendly and Industrial and Provident Societies Act 1968 s 14(2)(b). See note 10.

9 Friendly and Industrial and Provident Societies Act 1968 s 14(2)(c). See note 10.

10 Friendly and Industrial and Provident Societies Act 1968 s 14(3) (as amended: see note 6). In relation to any year of account of an industrial and provident society, a subsidiary of the society is disregarded for the purposes of s 13 (see the text and notes 1-4) if (1) the society's previous year of account was one in relation to which the subsidiary was not required to be dealt with in group accounts of the society for that year; (2) the reason for that was s 14(2) (see the text to notes 6-9) or s 14(3) or s 14(3A); and (3) the auditors of the society include in the appropriate report a certificate to the effect that they agree with the committee of the society that the reason given by the committee in its last opinion in respect of the subsidiary to have been approved by the Authority under s 14(2) or s 14(3), and the grounds so given by it for that reason, continued to apply throughout the year of account: s 14(3A) (s 14(3A)-(3C) added by SI 1996/1738, Friendly and Industrial and Provident Societies Act 1968 s 14(3A) amended by SI 2001/2617). For the purposes of head (3) above, the appropriate report is (a) where the year of account is one in relation to which the society is subject to the obligation under the Friendly and Industrial and Provident Societies Act 1968 s 13(1) (see the text to notes 1-4), the report required to be made under s 13(5) by the society's auditors (see PARA 2521); and (b) where it is not, the report required to be made by them under s 9(1) (see PARA 2515): s 14(3B) (as so added). A certificate is disregarded for the purposes of head (3) above if contained in a report made after the date which, in relation to the year to which the certificate relates, is the last date for making the return required by the Industrial and Provident Societies Act 1965 s 39(1) (see PARA 2523): Friendly and Industrial and Provident Societies Act 1968 s 14(3C) (as so added).

## UPDATE

### 2519 Obligation to prepare group accounts

TEXT AND NOTES 1-4--The Friendly and Industrial and Provident Societies Act 1968 s 13(1), (4) does not apply to industrial and provident societies that are insurance undertakings see the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565, Sch 1 paras 1, 13. As to the meaning of insurance undertaking see **COMPANIES** vol 15 (2009) PARA 701.

TEXT AND NOTES 5-10--The Friendly and Industrial and Provident Societies Act 1968 s 14 does not apply to industrial and provident societies that are insurance undertakings see the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565, Sch 1 paras 1, 14. As to the meaning of insurance undertaking see **COMPANIES** vol 15 (2009) PARA 701.

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### 2520. Form and contents of group accounts.

Where a registered society is required to cause group accounts to be prepared<sup>1</sup>, those accounts must give a true and fair view of the state of affairs and income and expenditure of the society and the subsidiaries<sup>2</sup> dealt with as a whole, so far as concerns members of the society<sup>3</sup>. The

group accounts must normally comprise a consolidated balance sheet which deals with the state of affairs of the society and the subsidiaries to be dealt with in those accounts, and a consolidated revenue account which deals with the income and expenditure of the society and those subsidiaries<sup>4</sup>. If, however, the society's committee is of the opinion that some other form is better for the purpose of presenting the same or equivalent information, and of so presenting the information that it may be readily appreciated by the society's members, the group accounts may be prepared in that other form<sup>5</sup>. In particular, they may consist of (1) more than one set of consolidated accounts dealing respectively with the society and one group of subsidiaries, and with other groups of subsidiaries; or (2) separate accounts dealing with each of the subsidiaries to be dealt with in the group accounts; or (3) statements expanding the information about those subsidiaries in the society's own accounts; or (4) any combination of those forms<sup>6</sup>. The consolidated balance sheet and income and expenditure account must combine the information contained in the separate balance sheets and income and expenditure accounts of the society and of the subsidiaries dealt with by the consolidated accounts, but with such adjustments, if any, as the society's committee thinks necessary<sup>7</sup>. Where full consolidated accounts are prepared<sup>8</sup>, they are subject to detailed requirements as to the items to be dealt with and the form in which they are to be set out<sup>9</sup>; where consolidated accounts are prepared in some other form<sup>10</sup>, they must give the same or equivalent information<sup>11</sup>.

1 As to the circumstances in which group accounts must be prepared, and the exemptions, see PARA 2519. As to the meaning of 'registered society' see PARA 2395.

2 As to the meaning of 'subsidiary' see PARAS 2517-2518.

3 Friendly and Industrial and Provident Societies Act 1968 s 13(2).

4 Friendly and Industrial and Provident Societies Act 1968 s 13(3) (amended by SI 2001/2617); Industrial and Provident Societies (Group Accounts) Regulations 1969, SI 1969/1037, reg 2(1). As to those regulations see generally PARA 2399. For this purpose 'income and expenditure', in relation to a subsidiary which is a company, includes profit and loss: reg 6.

5 Industrial and Provident Societies (Group Accounts) Regulations 1969, SI 1969/1037, reg 2(2).

6 Industrial and Provident Societies (Group Accounts) Regulations 1969, SI 1969/1037, reg 2(2). Where a balance sheet is accordingly prepared dealing with the society and one or more subsidiaries, but not with all the subsidiaries required to be dealt with in the group accounts, there must be set out in the balance sheet, separately from all other assets and liabilities, the aggregate amount of assets consisting of shares in or amounts owing from the subsidiaries required to be dealt with in the group accounts but not dealt with by the balance sheet, and the aggregate amount of indebtedness to those subsidiaries: reg 5.

7 Industrial and Provident Societies (Group Accounts) Regulations 1969, SI 1969/1037, reg 3.

8 Ie in accordance with the Industrial and Provident Societies (Group Accounts) Regulations 1969, SI 1969/1037, reg 2(1): see the text to note 4.

9 Industrial and Provident Societies (Group Accounts) Regulations 1969, SI 1969/1037, reg 4. As to the detailed requirements see Schedule Pt I (provisions as to balance sheet), Pt II (provisions as to revenue account). These requirements are relaxed in the case of a registered society which is an insurance company to which the Financial Services and Markets Act 2000 now applies (see PARA 2407) and which conducts as its main business the business of insurance: see the Industrial and Provident Societies (Group Accounts) Regulations 1969, SI 1969/1037, Schedule Pt III. The Friendly and Industrial and Provident Societies Act 1968 s 13(1)-(5) and the Industrial and Provident Societies (Group Accounts) Regulations 1969, SI 1969/1037, do not apply to certain industrial and provident societies which carry on insurance business and are required to prepare accounts under the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 1993, SI 1993/3245, which implement EC Council Directive 91/674 (OJ L374, 31.12.91, p 7) on the annual accounts and consolidated accounts of insurance undertakings. As to the statutory requirements as to insurance company accounts see generally **INSURANCE**.

10 See the text to notes 5, 6.

11 Industrial and Provident Societies (Group Accounts) Regulations 1969, SI 1969/1037, reg 4.

**UPDATE****2520 Form and contents of group accounts**

TEXT AND NOTES 1-4--The Friendly and Industrial and Provident Societies Act 1968 s 13(2), (3) does not apply to industrial and provident societies that are insurance undertakings see the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565, Sch 1 paras 1, 13. As to the meaning of insurance undertaking see **COMPANIES** vol 15 (2009) PARA 701.

NOTE 9--SI 1993/3245 replaced: SI 2008/565.

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**2521. Audit of group accounts.**

Where a registered society has caused group accounts to be prepared<sup>1</sup> for a year of account<sup>2</sup> it must submit those accounts for audit to the auditors appointed to audit the accounts and balance sheet of the society for that year<sup>3</sup>. Those auditors must make a report to the society on the group accounts, stating whether the accounts have been properly prepared in accordance with the statutory requirements<sup>4</sup> and whether in their opinion those accounts give a true and fair view of the state of affairs and income and expenditure of the society and its subsidiaries<sup>5</sup>.

1 As to the obligation to prepare group accounts see PARA 2519. As to the meaning of 'registered society' see PARA 2395.

2 As to the meaning of 'year of account' see PARA 2513 note 4.

3 Friendly and Industrial and Provident Societies Act 1968 s 13(5). As to the appointment and removal of auditors see PARA 2514.

4 I.e. the requirements of the Friendly and Industrial and Provident Societies Act 1968 and of the Industrial and Provident Societies (Group Accounts) Regulations 1969, SI 1969/1037: see PARA 2520.

5 I.e. a true and fair view in accordance with the Friendly and Industrial and Provident Societies Act 1968 s 13(2) (see PARA 2520): s 13(5).

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**2522. Return and inspection of group accounts.**

A registered society must send its group accounts and a copy of the auditors' report on those accounts<sup>1</sup> to the Financial Services Authority<sup>2</sup> together with its annual return<sup>3</sup> for the year of account to which those group accounts relate<sup>4</sup>. The latest group accounts of the society must be supplied free of charge, together with the latest annual return, to every member or person interested in the society's funds who applies<sup>5</sup> for a copy of the latest annual return<sup>6</sup>.

1 As to the auditors' report see PARA 2521. As to the meaning of 'registered society' see PARA 2395.

2 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

3 As to submission of the annual return see PARA 2523.

4 Friendly and Industrial and Provident Societies Act 1968 s 13(6) (s 13(6), (7) amended by SI 2001/2617). As to the year of account to which the group accounts relate see PARA 2519.

5 Ie under the Industrial and Provident Societies Act 1965 s 39(5): see PARA 2524.

6 See the Friendly and Industrial and Provident Societies Act 1968 s 13(7) (as amended: see note 4).

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## ***D. ANNUAL RETURN***

### **2523. Obligation to send return.**

Not later than a specified date in each year, every registered society must send to the Financial Services Authority<sup>1</sup> a return relating to its affairs for that period<sup>2</sup>. In general, the return must be sent within the period of seven months beginning immediately after the end of the period required to be included in the return<sup>3</sup>, and must be made up for the period beginning with the date of the society's registration, or with the date to which the society's last annual return was made up, whichever is the later, and ending either with the date of the last balance sheet published by the society before the appropriate date<sup>4</sup>, or, if the date of that balance sheet is earlier than 31 August immediately preceding the appropriate date or later than 31 January of the year in which the appropriate date falls, with 31 December immediately preceding the appropriate date<sup>5</sup>. If, however, the Authority is of opinion that special circumstances exist, it may allow a society to make a return up to a date other than those specified above<sup>6</sup>. The last return by a registered society which is being terminated by an instrument of dissolution<sup>7</sup> must be made up to the date of that instrument<sup>8</sup>.

The annual return is in a form prescribed by the Authority<sup>9</sup>, but must in any event<sup>10</sup> contain the society's revenue account or accounts<sup>11</sup> prepared<sup>12</sup> in respect of the year of account<sup>13</sup> to which the return relates, and a balance sheet as at the end of that year<sup>14</sup>; and it must not contain any accounts other than the revenue account or accounts for that year unless those other accounts have been examined<sup>15</sup> by the auditors or been subject<sup>16</sup> to an accountant's report<sup>17</sup>. The return must be accompanied by certain documents depending on the circumstances<sup>18</sup>. Where the period required to be included in the return is one at the end of which there is in force in relation to the period a disapplication<sup>19</sup> of the obligation to have accounts audited, the documents are (1) copies of the accountant's reports, if any, which the society is required<sup>20</sup>, because of the disapplication, to obtain; and (2) a copy of each balance sheet made during the

period included in the return<sup>21</sup>. Where it is not such a period, the documents are (a) a copy of the report of the auditor or auditors on the society's accounts for the period included in the return; and (b) a copy of each balance sheet made during that period and of any report of the auditor or auditors on that balance sheet<sup>22</sup>.

In the case of a society required to prepare group accounts, the return must also be accompanied by those accounts and a copy of the auditors' report on them<sup>23</sup>.

Failure to comply with these requirements is an offence<sup>24</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395.

2 See the Industrial and Provident Societies Act 1965 s 39(1) (amended by SI 1996/1738; and SI 2001/2617), and the Friendly and Industrial and Provident Societies Act 1968 s 11(1) (amended by the Friendly Societies Act 1974 Sch 11; and SI 2001/2617). As to registered societies carrying on insurance business and duties to send to the Authority copies of accounts and statements see PARA 2407; and **INSURANCE**. As to the duty of receivers of managers to make returns to the Authority see PARA 2457.

The Industrial and Provident Societies Act 1965 s 39, being a provision replaced by or inconsistent with provisions of the Financial Services and Markets Act 2000, does not apply to credit unions: see the Credit Unions Act 1979 s 31(4) (added by SI 2002/1501). As to credit unions see PARA 2402.

3 Industrial and Provident Societies Act 1965 s 39(1) (as amended: see note 2). The period is required to be included by s 39(2): see the text and notes 4, 5.

4 The 'appropriate date' is 31 March of the year in which an annual return of a society is required to be sent to the Authority, or the date on which that return is so sent, whichever is the earlier: Industrial and Provident Societies Act 1965 s 39(2A) (added by the Friendly and Industrial and Provident Societies Act 1968 Sch 1 para 10; and amended by SI 2001/2617).

5 Industrial and Provident Societies Act 1965 s 39(2) (amended by the Friendly and Industrial and Provident Societies Act 1968 Sch 1 para 10).

6 Industrial and Provident Societies Act 1965 s 39(3) (amended by SI 1996/1738; and SI 2001/2617).

7 Ie under the Industrial and Provident Societies Act 1965 s 55(b): see PARA 2566 et seq.

8 Industrial and Provident Societies Act 1965 s 39(4). The instrument of dissolution may not be registered until the Authority has received this final return: see s 58(5); and PARA 2570.

9 As to the form of documents see PARA 2411.

10 Friendly and Industrial and Provident Societies Act 1968 s 11(2) (amended by the Friendly Societies Act 1974 Sch 11). The Authority's power under the Industrial and Provident Societies Act 1965 s 72(1) (see PARA 2411) to determine the form of an annual return and the particulars to be contained in it is without prejudice to the statutory provisions as to its contents: Friendly and Industrial and Provident Societies Act 1968 s 11(3) (amended by the Friendly Societies Act 1974 Sch 11; and SI 2001/2617). See also PARA 2411 note 13.

11 As to the power of the society to prepare a single revenue account or two or more revenue accounts see PARA 2513.

12 Ie in accordance with the Friendly and Industrial and Provident Societies Act 1968 s 3(2): see PARA 2513.

13 As to the meaning of 'year of account' see PARA 2513 note 4.

14 Friendly and Industrial and Provident Societies Act 1968 s 11(2)(a).

15 Ie under the Friendly and Industrial and Provident Societies Act 1968 s 9: see PARA 2515.

16 Ie for the purposes of the Friendly and Industrial and Provident Societies Act 1968 s 9A: see PARA 2515.

17 Friendly and Industrial and Provident Societies Act 1968 s 11(2)(b) (amended by SI 1996/1738).

18 See the Industrial and Provident Societies Act 1965 s 39(1), (1A), (1B); and the text to notes 19-22.

19   le a disapplication under the Friendly and Industrial and Provident Societies Act 1968 s 4A of the obligation under s 4: see PARA 2514.

20   le under the Friendly and Industrial and Provident Societies Act 1968 s 9A: see PARA 2515.

21   Industrial and Provident Societies Act 1965 s 39(1)(a), (1A) (added by SI 1996/1738).

22   Industrial and Provident Societies Act 1965 s 39(1)(b), (1B) (added by SI 1996/1738).

23   See PARA 2522.

24   See PARAS 2547, 2556.

## UPDATE

### 2523 Obligation to send return

TEXT AND NOTES 2, 9-17--As to the application of the Friendly and Industrial and Provident Societies Act 1968 s 11 to industrial and provident societies that are insurance undertakings see the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565, Sch 1 paras 1, 12. As to the meaning of insurance undertaking see **COMPANIES** vol 15 (2009) PARA 701.

NOTE 8--Industrial and Provident Societies Act 1965 s 39(4) amended: SI 2009/1941.

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### 2524. Supply of copy of return.

Every registered society must supply, free of charge to every member or person interested<sup>1</sup> in the society's funds who applies for it, a copy of the latest return of the society<sup>2</sup>. The return so supplied must be accompanied by a copy of the auditors' report (or other report) on the accounts and balance sheet contained in the return<sup>3</sup>, and, in the case of a society required to prepare group accounts, by a copy (also free of charge) of the latest such accounts<sup>4</sup>.

Failure to comply with these requirements is an offence<sup>5</sup>.

1   There is no statutory definition of 'person interested': cf *Mason v Schuppisser* (1899) 81 LT 147, which is a decision on a corresponding expression. It is uncertain whether the expression covers creditors of the society: cf the Industrial and Provident Societies Act 1965 s 58(6)(a) (see PARA 2571), where the expression used is 'person interested in or having any claim on the funds of the society'. As to the meaning of 'registered society' see PARA 2395.

2   Industrial and Provident Societies Act 1965 s 39(5). As to the non-application of s 39 to credit unions see PARA 2523 note 2. As to credit unions see PARA 2402.

3   See the Friendly and Industrial and Provident Societies Act 1968 s 11(5) (amended by the Friendly Societies Act 1974 Sch 11). As to the 'other report' referred to in the text see the Friendly and Industrial and Provident Societies Act 1968 s 11(5A) (added by SI 1996/1738), which provides that, where the year of account to which an annual return relates is one at the end of which there is in force in relation to the year a disapplication under the Friendly and Industrial and Provident Societies Act 1968 s 4A(1) (see PARA 2514), s 11(5) is have effect as if for the reference to the report of the auditors on the accounts and balance sheet contained in the return there were substituted a reference to any report which the society is required, because of the disapplication, to obtain under s 9A(2)(a) (see PARA 2515 head (a)).

4 See PARA 2522.

5 See PARAS 2547, 2556.

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## **(vi) Inspection and Investigation**

### **A. INSPECTION**

#### **2525. Availability for inspection of accounts and other documents.**

Every registered society<sup>1</sup> must keep a copy of its latest balance sheet and auditors' report hung up in a conspicuous position at its registered office<sup>2</sup>, and on application must supply free of charge to members or persons interested in the funds a copy of the latest annual return and other documents<sup>3</sup>. The Financial Services Authority<sup>4</sup> keeps a file of documents received by it in respect of each society<sup>5</sup>.

1 As to the meaning of 'registered society' see PARA 2395.

2 See PARA 2516.

3 See PARA 2524.

4 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

5 See PARA 2411.

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#### **2526. Inspection of books.**

Except as provided by the Industrial and Provident Societies Act 1965, no member or other person has any right to inspect the books of a registered society, including a credit union<sup>1</sup>. Subject to any regulations as to the time and manner of inspection which may be made from time to time by the general meetings of a registered society, any member, and any person having an interest<sup>2</sup> in the society's funds, must be allowed to inspect, at all reasonable hours, his own account and either all the particulars contained in the duplicate register of members and officers<sup>3</sup> or, if no duplicate register is kept, the particulars, other than those exempted from inspection<sup>4</sup>, in the original register of members and officers<sup>5</sup>. Failure to allow such inspection is an offence<sup>6</sup>. It would seem that a member or other person entitled to inspect the books may do so by an agent<sup>7</sup>, and may make copies of the books<sup>8</sup>.

1 Industrial and Provident Societies Act 1965 s 45(1). In the case of a society to which s 4 applies (see PARA 2396), this provision has effect notwithstanding anything relating to such inspection in any rules of the society made before 12 September 1893: s 45(2). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 As to 'person interested' see PARA 2524 note 1.

3 As to the duty of a registered society either to keep a duplicate register or to construct its register so that certain particulars only may be inspected see PARA 2471.

4 As to the particulars entered under the Industrial and Provident Societies Act 1965 s 44(1)(b) or (c): see PARA 2471.

5 Industrial and Provident Societies Act 1965 s 46(1). The register and duplicate register are kept at the registered office: see PARA 2471.

6 See PARA 2547.

7 *R v Bedwellty UDC, ex p Price* [1934] 1 KB 333, DC.

8 *Nelson v Anglo-American Land Mortgage Agency Co* [1897] 1 Ch 130.

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## **2527. Further right of inspection of books.**

By its rules, other than rules made earlier than 12 September 1893, a registered society, including a credit union, may authorise the inspection of such of the society's books upon such conditions as may be specified in the rules<sup>1</sup>, but no person who is not an officer<sup>2</sup> of the society or specially authorised by a resolution of the society may be authorised by the rules to inspect the loan or deposit account of any other person without that other person's written consent<sup>3</sup>.

1 Industrial and Provident Societies Act 1965 s 46(2). This is in addition to any inspection authorised under s 46(1) (see PARA 2526): s 46(2). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 As to the meaning of 'officer' see PARA 2458 note 1.

3 Industrial and Provident Societies Act 1965 s 46(2).

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## **2528. Inspection by the Financial Services Authority.**



Any person authorised by the Financial Services Authority<sup>1</sup> may, on producing evidence of his authority, at all reasonable hours inspect any particulars in any register or duplicate register of members and officers<sup>2</sup> of a registered society, including a credit union<sup>3</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to a society's obligation to keep such a register see PARA 2471.

3 Industrial and Provident Societies Act 1965 s 44(4) (amended by SI 2001/2617). As to the Authority's power to require production of books and other documents for certain purposes see PARA 2583.

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## **2529. Inspection by order of the Financial Services Authority.**

On the application of ten members of a registered society, including a credit union, each of whom has been a member for not less than 12 months immediately preceding the date of the application, the Financial Services Authority<sup>1</sup>, if it thinks fit, may appoint an accountant or actuary to inspect the society's books and report on them<sup>2</sup>. The applicants must deposit with the Authority such sum as security for the costs of the proposed inspection as it may require, and all the expenses of, and incidental to, any such inspection must be defrayed by the applicants, or out of the society's funds, or by the members or officers, or former members or officers, in such proportions as the Authority may direct<sup>3</sup>. The person appointed to inspect the books has power to make copies of any books, and to take extracts from them, at all reasonable hours at the society's registered office or at any other place where the books are kept<sup>4</sup>. The Authority must communicate the result of the inspection to the applicants and to the society<sup>5</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 47(1) (s 47(1), (2), (4) amended by SI 2001/2617).

3 Industrial and Provident Societies Act 1965 s 47(2) (as amended: see note 2). As to the apportionment of expenses see PARA 2483. Expenses are recoverable summarily as a civil debt: see PARA 2558.

4 Industrial and Provident Societies Act 1965 s 47(3).

5 Industrial and Provident Societies Act 1965 s 47(4) (as amended: see note 2).

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## **B. INVESTIGATION OF AFFAIRS**

### **2530. Appointment of inspectors.**

Upon the application of one-tenth of the whole number of members of a registered society, including a credit union, or of 100 members if the membership exceeds 1,000, the Financial Services Authority<sup>1</sup> may appoint an inspector or inspectors to examine into and report on the society's affairs<sup>2</sup>. The application must be supported by such evidence as the Authority directs showing that the applicants have good reason for requiring the examination and that they are not actuated by malicious motives; and such notice of the application must be given to the society as the Authority directs<sup>3</sup>. The Authority may also, if it thinks fit, require the applicants to give security for the costs of the proposed examination before appointing an inspector<sup>4</sup>.

A member may circularise his fellow members for the purpose of getting sufficient signatures to such an application, but inaccurate statements as to the financial position of the society may be restrained by injunction<sup>5</sup>.

Without prejudice to the above provisions<sup>6</sup>, where the Authority is of the opinion that, for reasons connected with the exercise of its functions<sup>7</sup>, an investigation should be held into the affairs of a credit union or that the affairs of the credit union call for consideration by a meeting of the members, it may appoint an inspector to investigate and report on the affairs of the credit union or may call a special meeting of members of the credit union, or may (either on the same or on different occasions) both appoint such an inspector and call such a meeting<sup>8</sup>. The costs of any such investigation or meeting may be recovered from the credit union or from its present or former members or officers, in such proportions as the Authority directs<sup>9</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 49(1)(a) (s 49(1), (2), (3) amended by SI 2001/2617). See also PARA 2482. The court will not interfere with the discretion of the Authority (formerly the Chief Registrar of Friendly Societies) in the appointment of an inspector: see *Professional and Civil Service Supply Association Ltd v Dougal* (1896) CR Rep (1897) Pt A, p 89. It is suggested, however, that, consistently with the court's general approach to the exercise of discretions, the court would intervene in the unlikely event that it was satisfied that no reasonable body exercising the functions of the Authority would have acted as the Authority had done.

3 Industrial and Provident Societies Act 1965 s 49(2) (as amended: see note 2).

4 Industrial and Provident Societies Act 1965 s 49(3) (as amended: see note 2).

5 *Hill v Hart-Davies* (1882) 21 ChD 798. As to the procedure on application for an injunction see **CIVIL PROCEDURE**.

6 I.e the Industrial and Provident Societies Act 1965 s 49: see the text and notes 1-4.

7 I.e its functions under the Industrial and Provident Societies Act 1965 or the Credit Unions Act 1979.

8 Industrial and Provident Societies Act 1965 s 18(1) (amended by SI 2001/2617; and SI 2002/1501).

9 Credit Unions Act 1979 s 18(2) (amended by SI 2001/2617).

### 2531. Inspector's powers.

An inspector appointed to investigate a registered society's affairs<sup>1</sup> may require the production of all or any of the society's books, accounts, securities and documents, and may examine on oath its officers<sup>2</sup>, members, agents and servants in relation to its business, and for that purpose may administer oaths<sup>3</sup>. The inspector makes his report to the Financial Services Authority<sup>4</sup>. Any document bearing the Authority's seal and stamp must be received in evidence without further proof, and any document purporting to have been signed by a person authorised to do so on behalf of the Authority and every document purporting to be signed by any inspector, in the absence of any evidence to the contrary, is to be received in evidence without proof of the signature<sup>5</sup>.

1 As to the appointment of inspectors see PARA 2530. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to the meaning of 'officer' see PARA 2458 note 1. An auditor is not an 'officer' but he may be the society's agent; it seems, however, that an auditor performing his statutory functions, while so acting, would not be an agent of the society, and, therefore, would not be liable to be examined under this power.

3 Industrial and Provident Societies Act 1965 s 49(5). This provision applies also in relation to an inspector appointed in accordance with the Credit Unions Act 1979 s 18(1) (see PARA 2530): s 18(3).

4 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. There appears to be no particular form for this report. A copy of the report will as a rule be sent to both the society and the applicants, but the Authority appears to be under no obligation to send it. The proceedings should not be more public than is necessary for securing that their efficiency is not impaired: cf *Hearts of Oak Assurance Co Ltd v A-G* [1932] AC 392 at 402-403, HL, per Lord Macmillan.

5 See the Industrial and Provident Societies Act 1965 ss 72(2), 72(3), the Credit Unions Act 1979 s 31(2); and PARA 2412. As to the Authority's seal see PARA 2412.

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### 2532. Direction for payment of expenses.

The expenses of and incidental or preliminary to an examination of a registered society's affairs<sup>1</sup> must be defrayed by the members applying for it, or out of the society's funds, or by the members or officers, or former members or officers, of the society in such proportions as the Financial Services Authority<sup>2</sup> may direct<sup>3</sup>. The expenses may be recovered in a magistrates' court as a civil debt<sup>4</sup>.

1 As to application for an examination see PARA 2530. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

3 Industrial and Provident Societies Act 1965 s 49(4) (amended by SI 2001/2617). As to the apportionment of costs and expenses see PARA 2483 note 3.

4 See the Industrial and Provident Societies Act 1965 s 67(1); and PARA 2558.

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### **2533. Registered housing associations.**

In the case of a registered society which is a registered housing association<sup>1</sup>, the relevant authority<sup>2</sup> may appoint a person to conduct an inquiry into its affairs, and may require its accounts and balance sheet, or such of them as are specified, to be audited by an auditor appointed by the relevant authority<sup>3</sup>. Where it is satisfied, as the result of such an inquiry or audit, that there has been any misconduct or mismanagement in the administration of the society, the relevant authority may by order (1) remove any officer, employee or agent of the society who appears to have been responsible for or privy to the misconduct or mismanagement, or has by his conduct contributed to it or facilitated it<sup>4</sup>; (2) suspend any such person for up to six months, pending determination whether he should be removed; (3) direct any bank or other person who holds money or securities on behalf of the society not to part with the money or securities without the authority's approval; (4) by order restrict the transactions which may be entered into, or the nature or amount of the payments which may be made, without the relevant authority's approval<sup>5</sup>.

1 As to registered housing associations known as 'registered social landlords' see PARA 2408. As to the meaning of 'registered society' see PARA 2395.

2 I.e. the Housing Association or the Welsh Ministers: see PARA 2408; and **HOUSING** vol 22 (2006 Reissue) PARA 18 et seq. See also PARA 2495.

3 See the Housing Act 1996 s 7, Sch 1 paras 20-21 (inquiry) and Sch 1 para 22 (audit); and **HOUSING** vol 22 (2006 Reissue) PARA 90.

4 As to the relevant authority's power to remove committee members on other grounds and to make appointments to the committee see PARA 2460.

5 See the Housing Act 1996 Sch 1 para 24; and **HOUSING** vol 22 (2006 Reissue) PARA 92. As to the relevant authority's power, following an inquiry or audit, to require transfer of land of the society see PARA 2495.

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## **(4) DISPUTES AND LEGAL PROCEEDINGS**

### **(i) Disputes**

#### **2534. Determination under rules.**

A registered society, including a credit union, need not make provision in its rules for the settlement of disputes<sup>1</sup> but, if the rules give directions as to the manner in which certain classes of dispute are to be decided, they must normally<sup>2</sup> be decided in that manner<sup>3</sup>. The classes of dispute referred to above are disputes between the society or one of its officers<sup>4</sup> and

(1) a member of the society<sup>5</sup>; (2) any person aggrieved<sup>6</sup> who has ceased to be a member not more than six months previously<sup>7</sup>; (3) any person claiming through a member<sup>8</sup> or any such person aggrieved<sup>9</sup>; or (4) any person claiming under the society's rules<sup>10</sup>.

1 See the Industrial and Provident Societies Act 1965 s 60(6); and PARA 2540. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq. As to the determination of disputes where no provision is made in the rules see PARA 2540.

2 In certain circumstances, a dispute may be referred to the county court despite directions in the rules for reference to the Financial Services Authority (see PARA 2536) or to a court not specified in the rules (see PARA 2535).

3 Industrial and Provident Societies Act 1965 s 60(1) (amended by SI 2001/2617). This is subject to the Industrial and Provident Societies Act 1965 s 60(2) (see PARA 2536), s 60(2A) (see PARA 2536), s 60(4), (5) (see PARA 2535): see note 2. As to the effect and enforcement of the decision see PARAS 2538-2539.

Nothing in s 60(1) or in rules of a kind there mentioned prevents any person, in accordance with the scheme for which the Financial Services and Markets Act 2000 Pt XVI (ss 225-234A) (the ombudsman scheme) (see PARA 575 et seq) provides, from having a complaint dealt with under such a scheme before, or instead of, determination in the manner directed in the rules: Industrial and Provident Societies Act 1965 s 60(1A) (added by SI 2001/2617).

4 As to the meaning of 'officer' see PARA 2458 note 1.

5 Industrial and Provident Societies Act 1965 s 60(1)(a). See note 3. A dispute between a society and an officer in respect of his accounts is not a dispute between a society and a member in his capacity as member: *Municipal Permanent Investment Building Society v Richards* (1888) 39 ChD 372, CA. For further cases on this point see PARA 2081 et seq. As to disputes on the question of whether or not a person is a member see PARA 2538 note 7.

6 'Person aggrieved' is not defined by the Industrial and Provident Societies Act 1965. For the purposes of other legislation, one who has suffered legal loss by an act complained of is a person aggrieved (*Robinson v Currey* (1881) 7 QBD 465 at 475, CA) if the act tends to his legal injury (*Re Rivière's Trade Mark*) (1884) 26 ChD 48 at 54, CA). See also *Re Reed, Bowen & Co, ex p Official Receiver* (1887) 19 QBD 174 at 177, CA; and cf *Graves' Case* (1869) LR 4 QB 715 at 724; and see generally **ADMINISTRATIVE LAW**.

7 Industrial and Provident Societies Act 1965 s 60(1)(b). See note 3.

8 As to the meaning of 'persons claiming through a member' see PARA 2429 note 2.

9 Industrial and Provident Societies Act 1965 s 60(1)(c). See note 3.

10 Industrial and Provident Societies Act 1965 s 60(1)(d). See note 3.

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### **2535. Reference under rules to arbitrators or to the court.**

The rules of a registered society may provide that disputes are to be referred to an arbitrator or arbitrators, appointed or selected as mentioned in the rules, or to justices, or to a magistrates' court or to the county court<sup>1</sup>. If the rules direct any dispute to be referred to justices, it is to be determined by a magistrates' court<sup>2</sup>. Where, by virtue of that provision or otherwise, a dispute is cognisable under the rules by a magistrates' court, the parties to the dispute may refer it by agreement to the county court, which may hear and determine it<sup>3</sup>.

1 As to the effect of the court's decision in such cases see PARA 2538. As to other circumstances in which a dispute may be determined by the court see PARA 2540. As to the powers of a magistrates' court in respect of disclosure and inspection of documents see PARA 2541. As to arbitrators see generally **ARBITRATION** vol 2 (2008) PARA 1201 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 Industrial and Provident Societies Act 1965 s 60(4).

3 Industrial and Provident Societies Act 1965 s 60(5).

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### **2536. Reference to county court.**

The county court<sup>1</sup> may determine a dispute in a registered society<sup>2</sup> if (1) both parties to the dispute consent; or (2) the rules of the society concerned contain no directions as to disputes<sup>3</sup>. If the rules contain directions by virtue of which a dispute would fall to be determined by the Financial Services Authority<sup>4</sup>, the dispute must instead be referred to the county court for determination<sup>5</sup>.

1 As to the county court see **COURTS** vol 10 (Reissue) PARA 701 et seq. Disputes in Scotland are determined by the sheriff; however, Scottish matters are generally beyond the scope of this work.

2 As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 Industrial and Provident Societies Act 1965 s 60(2) (substituted by the Friendly Societies Act 1992 s 83). As to the rules generally see PARA 2423 et seq.

4 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

5 Industrial and Provident Societies Act s 60(2A) (added by SI 2001/2617).

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### **2537. County court's powers.**

For the purposes of the hearing or determination of a dispute<sup>1</sup>, a county court<sup>2</sup> has power to order the expenses of determining the dispute to be paid either out of the funds of the registered society or by such parties to the dispute as it thinks fit<sup>3</sup>.

1 Ie under the Industrial and Provident Societies Act 1965 s 60: see PARA 2536.

2 As to the county court see **COURTS** vol 10 (Reissue) PARA 701 et seq. Disputes in Scotland are determined by the sheriff; however, Scottish matters are generally beyond the scope of this work.

3 Industrial and Provident Societies Act 1965 s 60(8)(a) (substituted by SI 2001/2617). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

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### **2538. Effect of decision; jurisdiction of courts.**

Where a dispute is determined in the manner directed by the registered society's rules<sup>1</sup>, or determined by the county court<sup>2</sup>, the decision is binding and conclusive on all parties without appeal, and is not removable into any court of law or restrainable by injunction<sup>3</sup>. The ordinary jurisdiction of the court is not affected if the dispute has not been decided according to the rules<sup>4</sup>, or if the dispute concerns a matter which is ultra vires the society's constitution<sup>5</sup>, as for example where the question is whether certain rules are valid or ultra vires<sup>6</sup> or whether a person's membership has been duly terminated<sup>7</sup>.

1    le under the Industrial and Provident Societies Act 1965 s 60(1): see PARA 2534. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2    le under the Industrial and Provident Societies Act 1965 s 60(2): see PARA 2536. See note 3.

3    Industrial and Provident Societies Act 1965 s 60(3)(a). As from a day to be appointed, s 60(3) is amended so as to remove the reference to s 60(2): s 60(3) (prospectively amended by the Friendly Societies Act 1992 Sch 22 Pt I). At the date at which this volume states the law no such day had been appointed.

This provision applies even if the decision is erroneous on a point of law: *Catt v Wood* [1910] AC 404, HL. It will apply not only to ordinary arbitrators, but also to a magistrates' court or county court sitting as arbitrator under the rules: see the Industrial and Provident Societies Act 1965 ss 60(1), 60(3)(a); and cf PARA 2165. As to the position where a magistrates' court or county court determines the dispute otherwise than under the rules see PARA 2540. A decision made in accordance with the rules may, however, be binding on a member only so long as he remains a member: see *Bellshill and Mossend Co-operative Society Ltd v Dalziel Co-operative Society Ltd* [1960] AC 832, [1960] 1 All ER 673, HL (overruling *Birtley District Co-operative Society Ltd v Windy Nook and District Industrial Co-operative Society Ltd (No 2)* [1960] 2 QB 1, [1959] 1 All ER 623). In the light of the fact that the Industrial and Provident Societies Act 1965 s 60(3) re-enacts the Industrial and Provident Societies Act 1893 s 49(1) (repealed), it is uncertain whether the present provision will have effect so as to prevent the removal of the proceedings into the High Court by a quashing order or to prejudice the power of the High Court to make a mandatory order: see the Tribunals and Inquiries Act 1992; and **JUDICIAL REVIEW** vol 61 (2010) 703.

4    *Andrews v Mitchell* [1905] AC 78 at 82-83, HL, per Lord Davey; and see the other cases cited in PARA 2149.

5    See the cases cited in PARA 2149. The decision in *Cox v Hutchinson* [1910] 1 Ch 513, where the fact that the question at issue was whether an act was ultra vires was said to be no answer to an application to stay proceedings, appears to be inconsistent with *Heard v Pickthorne* [1913] 3 KB 299, CA, and, in view of the approval of the latter decision in *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548, HL, it seems that *Cox v Hutchinson* above must be considered to be overruled.

6    *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548, HL; *Todd v Kelso Co-operative Society Ltd* 1953 SLT (Sh Ct) 2.

7    *Judson v Ellesmere Port Ex-servicemen's Club* [1948] 2 KB 52, [1948] 1 All ER 844, CA. In relation to registered friendly societies (unlike industrial and provident societies) it is now provided by statute that a dispute whether a member is entitled to continue as a member is a dispute to be decided in the manner directed by the rules: see PARA 2081 et seq. For cases decided before the provision in question was enacted see PARA 2158.

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### **2539. Enforcement of decision.**

Where a dispute is determined in the manner directed by the registered society's rules<sup>1</sup>, or determined by the county court<sup>2</sup>, an application for the enforcement of the decision may be made to the county court<sup>3</sup>. In proceedings for enforcing an award, the county court is the proper tribunal to determine, in the first instance, whether the dispute was one proper to be decided in accordance with the society's rules<sup>4</sup>. The High Court may overrule a decision of the county court if it is shown that there is an error on the face of the award or that it has been corruptly obtained<sup>5</sup>. The High Court will not grant a prohibiting order before the matter has come before the county court<sup>6</sup>.

1    le under the Industrial and Provident Societies Act 1965 s 60(1): see PARA 2534. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2    le under the Industrial and Provident Societies Act 1965 s 60(2): see PARA 2536. See note 3.

3    Industrial and Provident Societies Act 1965 s 60(3)(b). As from a day to be appointed, s 60(3) is amended so as to remove the reference to s 60(2): s 60(3) (prospectively amended by the Friendly Societies Act 1992 s 120(2), Sch 22 Pt I). At the date at which this volume states the law no such day had been appointed. As to the county court see **COURTS** vol 10 (Reissue) PARA 701 et seq.

4    *Skipton Industrial Co-operative Society Ltd v Prince* (1864) 33 LJQB 323.

5    *Armitage v Walker* (1855) 2 K & J 211; *Re Gollings and Tradesmen's Friendly Society, Peterborough* (1891) 64 LT 775, DC; *Gall v Loyal Glenbogie Lodge of Oddfellows' Friendly Society* (1900) 2 F (Ct of Sess) 1187; *Collins v Barrowfield United Oddfellows* 1915 SC 190.

6    *Skipton Industrial Co-operative Society Ltd v Prince* (1864) 33 LJQB 323.

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### **2540. Jurisdiction of courts in default of other determination.**

Where a registered society's rules contain no direction as to disputes, or where no decision is made on a dispute within 40 days after application to the society for a reference under its rules, application may be made by a party to the dispute (other than the society or an officer of the society)<sup>1</sup> either to the county court or to a magistrates' court, which may hear and determine the matter in dispute<sup>2</sup>. In either case, the procedure, the decision and its enforcement, and the right of appeal are according to the ordinary procedure of the court hearing the dispute<sup>3</sup>.

1    le any person who is mentioned in the Industrial and Provident Societies Act 1965 s 60(1)(a)-(d) (see PARA 2534): see s 60(6). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2    Industrial and Provident Societies Act 1965 s 60(6). As to a dispute not decided within 40 days see *Ritson v Dobson* (1911) 104 LT 808 (a friendly society case).



3 *Wilkinson v Jagger* (1887) 20 QBD 423; *R (M'Aneny) v Tyrone County Court Judge* (1910) 44 ILT 147. Cf PARA 2538. As to the procedure in the county court see **COURTS** vol 10 (Reissue) PARA 701 et seq. As to removal of proceedings from the county court to the High Court by a quashing order see **JUDICIAL REVIEW** vol 61 (2010) PARA 693. District judges are remunerated for any duties to be performed by them under the Industrial and Provident Societies Act 1965 in such manner as the Treasury with the Lord Chancellor's consent may from time to time direct: s 69; Courts and Legal Services Act 1990 s 74. As to the civil jurisdiction of, and the procedure in, magistrates' courts see **MAGISTRATES**. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq. The Lord Chancellor's function under the Industrial and Provident Societies Act 1965 s 69 is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

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### **2541. Disclosure and inspection of documents in magistrates' court.**

For the purposes of the hearing or determination of a dispute, a magistrates' court may grant to either party such disclosure as to documents and otherwise, or such inspection of documents, as the court considers necessary for the just and expeditious disposal of the dispute<sup>1</sup>.

1 Industrial and Provident Societies Act 1965 s 60(8)(b) (amended by SI 2001/2617). In the case of disclosure to be made on behalf of the society, disclosure is made by such officer of the society as the court may determine: Industrial and Provident Societies Act 1965 s 60(8)(b). As to disclosure and inspection of documents in the county court see generally **CIVIL PROCEDURE**.

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### **2542. Application of the Arbitration Act 1996.**

The provisions of the Arbitration Act 1996 apply generally to arbitrations for the determining of disputes arising in registered societies<sup>1</sup>. The court to which any dispute is referred<sup>2</sup> may, at the request of either party, state a case on any question of law arising in the dispute for the opinion of the High Court<sup>3</sup>.

1 See generally **ARBITRATION** vol 2 (2008) PARA 1201 et seq. As to what is sufficient notice of intention to proceed see *Hilton v Hill* (1863) 9 LT 383. As to the meaning of 'registered society' see PARA 2395.

2 Ie under the Industrial and Provident Societies Act 1965 s 60(2)-(7): see PARAS 2535-2540.

3 Industrial and Provident Societies Act 1965 s 60(9) (substituted by the Arbitration Act 1996 Sch 3 para 20(3); and amended by SI 2001/2617). In Scotland, an opinion is given by the Court of Session; however, Scottish matters are generally beyond the scope of this work. The Industrial and Provident Societies Act 1893 s 49(6) (repealed), from which the earlier version of the present provision is derived, on this point nullified the decision in *Tabernacle Permanent Building Society v Knight* [1892] AC 298, HL. Cf the Friendly Societies Act 1974 s 78(1); and PARAS 2253, 2255. As to challenging the arbitration award and appeals on a point of law see the Arbitration Act 1996 ss 66-71; and **ARBITRATION** vol 2 (2008) PARA 1276 et seq.

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## **(ii) Remedies for Debts from Members**

### **2543. Recovery of debts and fines.**

All money payable by a member to a registered society, including a credit union, is a debt due from him to the society and is recoverable as such in the county court within the jurisdiction of which the society's registered office is situate, or within the jurisdiction of which the member resides, at the society's option<sup>1</sup>. A debt due from a member may be recovered in the county court even where the amount of the debt is in excess of the court's ordinary jurisdiction, and also where, at the time of bringing the claim, the member has ceased to be a member of the society<sup>2</sup>. It seems that the High Court has concurrent jurisdiction<sup>3</sup>.

A fine imposed by a registered society's rules may be recovered by the society in a magistrates' court<sup>4</sup>.

<sup>1</sup> Industrial and Provident Societies Act 1965 s 22(1). For the procedure see generally **CIVIL PROCEDURE**. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

<sup>2</sup> *Gwendolen Freehold Land Society v Wicks* [1904] 2 KB 622.

<sup>3</sup> Cf the cases cited in PARA 2255.

<sup>4</sup> See PARA 2557.

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### **2544. Lien on shares.**

A registered society, including a credit union, has a lien<sup>1</sup> on the shares of any member for any debt due to it from him and may set off any sum credited to the member on those shares in or towards the payment of the debt<sup>2</sup>. The reduction of a member's share capital by virtue of such a set-off does not, however, relieve him of his liability in respect of his shares<sup>3</sup>. A registered society still carrying on its business and acting in good faith may exercise its lien even though the society is in difficulties which result shortly afterwards in a winding-up resolution<sup>4</sup>.

<sup>1</sup> As to the enforcement and extinguishing of a lien see generally **LIEN**. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

<sup>2</sup> Industrial and Provident Societies Act 1965 s 22(2).

3 The effect of the Industrial and Provident Societies Act 1965 s 22(2) is not to relieve a member of his obligations of membership in respect of his shares: *Lloyd v Francis* [1937] 4 All ER 489 at 491, CA, per Sir Wilfrid Greene MR.

4 *Re Gwawr-y-Gweithyr Industrial and Provident Society Ltd, Dovey v Morgan* [1901] 2 KB 477. 'Set off' does not appear to be used in the strict legal sense, but more in the business or accountant's sense as indicating that the society may deduct or write off from the sum credited the amount of the member's debt: *Re Gwawr-y-Gweithyr Industrial and Provident Society Ltd, Dovey v Morgan* above at 482 per Lord Alverstone CJ. See also **COMPANIES**.

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### **(iii) Proceedings by and against Registered Societies**

#### **2545. Procedure in civil claims.**

In civil claims, a registered society, including a credit union, may sue and be sued under its registered name<sup>1</sup>. There are no special provisions in the Industrial and Provident Societies Acts with regard to procedure and practice in claims by or against registered societies. High Court claims are governed by the ordinary rules of that court<sup>2</sup>, except for matters arising out of an appeal against a decision of the Financial Services Authority<sup>3</sup>, or an application for recording of a charge, which are governed by special rules of court<sup>4</sup>. County court claims by or against registered societies follow, as to procedure, the general practice of that court<sup>5</sup>.

1 See the Industrial and Provident Societies Act 1965 s 3; and PARA 2416. As to the meaning of 'registered society' see PARA 2395.

2 See CPR Pt 7; CPR Pt 8; CPR Pt 10; and **CIVIL PROCEDURE**.

3 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

4 See PARAS 2422, 2454.

5 See **COURTS** vol 10 (Reissue) PARA 701 et seq. As to the remuneration of county court district judges see PARA 2540 note 3.

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#### **2546. Service of summons.**

Where proceedings are taken against a registered society, including a credit union, for the recovery of any fine under the Industrial and Provident Societies Acts<sup>1</sup> or the Credit Unions Act 1979, the summons or other process is sufficiently served by leaving a true copy of it at the registered office, or if that office is closed, by posting the copy on the outer door of that office<sup>2</sup>.

1 In the Industrial and Provident Societies Acts 1965 to 1978: see generally PARAS 2397, 2402. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 68. In s 68, as it applies to credit unions, the reference to the Industrial and Provident Societies Acts includes a reference to the Credit Unions Act 1979: s 28(1).

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## (iv) Statutory Offences

### 2547. Breaches of statutory provisions in general.

A registered society, including a credit union, or an officer<sup>1</sup> or member of the society, or any other person, commits an offence if the society or he (1) fails to give any notice, send any return or other document, or do anything or allow anything to be done which the society, officer, member or other person is, by the Industrial and Provident Societies Acts, required to give, send, do or allow to be done<sup>2</sup>; or (2) wilfully neglects<sup>3</sup> or refuses to do any act, or to furnish any information, required for the purposes of the Acts by the Financial Services Authority<sup>4</sup>, or by any other person duly authorised under the Acts, or does anything forbidden by the Acts<sup>5</sup>; or (3) makes a return required by the Acts, or wilfully furnishes information so required, which is in any respect false or insufficient<sup>6</sup>.

In any proceedings for an offence under the Credit Unions Act 1979, it is a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control<sup>7</sup>.

On summary conviction for any of these offences, the society, officer, member or other person, as the case may be, is liable to a fine<sup>8</sup>. The procedure on appeal is governed by the general law<sup>9</sup>. Every act or default under the Industrial and Provident Societies Act 1965 constituting an offence constitutes a new offence in every week during which it continues<sup>10</sup>.

1 As to the meaning of 'officer' see PARA 2458 note 1. An officer who resigns his office before the period for doing an act expires (eg sending an annual return) is not liable if the act is not done: see *Booth v Weightman* (1904) 91 LT 532, DC. A de facto officer may be liable: see *Gibson v Barton* (1875) LR 10 QB 329, and see **COMPANIES** vol 14 (2009) PARA 607. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 61(a) (amended by SI 2001/2617). Although the statutory reference is to 'this Act', it is to be taken as a reference to the Industrial and Provident Societies Acts 1965 to 1978 (so far as each Act contains relevant material), since the later Acts are to be construed as one with the 1965 Act: see generally PARA 2397. In the Industrial and Provident Societies Act 1965 ss 61-66, 68, as they apply to credit unions, references to the Industrial and Provident Societies Act 1965 include references to the Credit Unions Act 1979: s 28(1).

3 'Wilfully' means deliberately and intentionally, not accidentally or inadvertently: *R v Senior* [1899] 1 QB 283. As to the meaning of 'neglects' cf *Re London and Paris Banking Corp* (1875) LR 19 Eq 444.

4 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

5 Industrial and Provident Societies Act 1965 s 61(b). See note 2.

6 Industrial and Provident Societies Act 1965 s 61(c). The offence of making a false return is not complete when the document is made out, but only when the return is sent to the Authority (formerly the Registrar): see *Windridge v Ancient Order of Foresters' Friendly Society* [1933] 1 KB 42. See also note 2.

7 Credit Unions Act 1979 s 28(6).

8 Industrial and Provident Societies Act 1965 s 61 (amended by virtue of the Criminal Justice Act 1982 Sch 3). The fine must not exceed level 3 on the standard scale: see the Industrial and Provident Societies Act 1965 s 61. As to the standard scale see PARA 27 note 21.

9 See the Magistrates' Courts Act 1980 s 108; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 1980.

10 Industrial and Provident Societies Act 1965 s 63.

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## **2548. Offences by societies also offences by officers.**

Every offence committed by a registered society, including a credit union, under the Industrial and Provident Societies Acts<sup>1</sup> is deemed to have been also committed by every officer of that society bound by its rules to fulfil the duty of which that offence is a breach or, if there is no such officer, by every committee member who is not proved to have been ignorant of, or to have attempted to prevent, the commission of that offence<sup>2</sup>.

1 In the Industrial and Provident Societies Acts 1965 to 1978 and, in relation to credit unions, the Credit Unions Act 1979: see generally PARA 2397. See also PARA 2547. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 62. As to the meanings of 'officer' and 'committee', see PARA 2458 note 1. As to the rules generally see PARA 2423 et seq. Where an offence under the Credit Unions Act 1979 which has been committed by a body corporate other than a registered society is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly: s 28(5). Where an individual is convicted on indictment under the Industrial and Provident Societies Act 1965 s 62 of an offence under the Credit Unions Act 1979, he is liable not only to a fine but, in the alternative or in addition, to imprisonment for a term not exceeding two years: s 28(4).

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## **2549. Banking societies.**

A registered society is guilty of an offence if it carries on the business of banking when it has any withdrawable share capital<sup>1</sup>, or, in carrying on that business, fails to make out the required statement or to keep it hung up in a conspicuous position in its offices<sup>2</sup>. A registered society which takes deposits within certain limits<sup>3</sup>, and is therefore not treated as carrying on the business of banking, is guilty of an offence if it makes any payment of withdrawable capital

while any payment due on account of any such deposit remains unsatisfied<sup>4</sup>. The penalty on summary conviction for any such offence is a fine<sup>5</sup>.

1 Industrial and Provident Societies Act 1965 s 7(6)(a). As to the prohibition on carrying on banking in those circumstances see PARA 2405. As to the meaning of 'registered society' see PARA 2395.

2 Industrial and Provident Societies Act 1965 s 7(6)(b). As to these requirements see PARA 2405.

3 As to the amounts which may be taken for this purpose see PARA 2406.

4 Industrial and Provident Societies Act 1965 s 7(6)(c). As to societies not deemed to be carrying on banking see PARA 2406.

5 Industrial and Provident Societies Act 1965 s 7(6) (amended by virtue of the Criminal Justice Act 1982 s 46). The fine must not exceed level 1 on the standard scale: see the Industrial and Provident Societies Act 1965 s 7(6) (as so amended). As to the standard scale see PARA 27 note 21. As to offences by officers see PARA 2548.

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## **2550. Offences in connection with dissolutions and cancellations.**

Any person who knowingly makes a false or fraudulent declaration in the statutory declaration required to accompany an instrument of dissolution<sup>1</sup> is guilty of an offence<sup>2</sup>.

Where, pursuant to a proposed cancellation of a society's registration on the ground that it does not fulfil the proper purposes of a registered society<sup>3</sup>, any person contravenes or fails to comply with directions given by the Financial Services Authority<sup>4</sup>, he is liable on summary conviction to a penalty<sup>5</sup>. Where, pursuant to such a proposed cancellation, or pursuant to a petition by the Authority for the winding up of a society<sup>6</sup>, a society or person fails to comply with a notice of the Authority requiring information, it or he is liable to the same penalty<sup>7</sup>.

1 See PARA 2570.

2 See the Industrial and Provident Societies Act 1965 s 58(4); and PARA 2570.

3 See PARA 2583. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

4 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the directions which the Authority may give see PARA 2583.

5 Industrial and Provident Societies Act 1965 s 16(5) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46; and by SI 2001/2617). The penalty is a fine not exceeding level 3 on the standard scale, or imprisonment for a term not exceeding three months, or both: see the Industrial and Provident Societies Act 1965 s 16(5) (as so amended). As to the standard scale see PARA 27 note 21. As from a day to be appointed, the reference to a term of imprisonment is removed: see s 16(5) (as so amended; prospectively amended by the Criminal Justice Act 2003 Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed. See also PARA 2583.

6 As to winding up on the Authority's petition see PARA 2574.

7 Industrial and Provident Societies Act 1965 s 48(2) (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). As from a day to be appointed, the reference to a term of imprisonment is removed: Industrial and Provident Societies Act 1965 s 48(2) (as so amended; prospectively amended by the Criminal Justice Act 2003 Sch 37 Pt 9). At the date at which this volume states the law no such day had been appointed. See also PARA 2583.

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## **2551. Unlawful possession and misapplication of funds.**

If any person, by false representation or imposition, obtains possession of any property<sup>1</sup> of a registered society (including a credit union) or, having any such property in his possession, withholds or misapplies it, or wilfully applies any part of it to purposes which are not authorised by the society's rules or which are not in accordance with the Industrial and Provident Societies Acts<sup>2</sup> and, in relation to credit unions, the Credit Unions Act 1979<sup>3</sup>, he is liable on summary conviction to a fine with costs or expenses and to be ordered to deliver up the property or to repay all money improperly applied; in default of such delivery or repayment, or of the payment of any such fine, he is liable to be imprisoned<sup>4</sup>. This provision does not, however, prevent any such person from being proceeded against by way of indictment for any offence if he has not previously been convicted in respect of the same matters under this summary procedure<sup>5</sup>. If in the summary proceedings it is not proved that the person charged acted with a fraudulent intent, he may be ordered to deliver up any property belonging to the society or to repay any money improperly applied, with costs or expenses, but he is not liable to conviction<sup>6</sup>.

Summary proceedings for these offences may be instituted (1) by the society concerned; or (2) by any member authorised by the society itself or its committee or by the Financial Services Authority<sup>7</sup>; or (3) by the Authority<sup>8</sup>.

1 As to the meaning of 'property' see PARA 2471 note 4.

2 I.e. the Industrial and Provident Societies Acts 1965 to 1978: see generally PARA 2397. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

3 Credit Unions Act 1979 s 28(1).

4 Industrial and Provident Societies Act 1965 s 64(1) (amended by virtue of the Criminal Justice Act 1982 s 46). The penalty is a fine not exceeding level 2 on the standard scale or imprisonment for a term not exceeding three months: see the Industrial and Provident Societies Act 1965 s 64(1) (as so amended). As to the standard scale see PARA 27 note 21.

5 Industrial and Provident Societies Act 1965 s 64(1). For an instance of a summary prosecution under the corresponding provision of the Industrial and Provident Societies Act 1893 see *Sargeant v Large* (1954) Times, 3 February (alleged misapplication of beer, wines and spirits by steward). As to summary procedure see **MAGISTRATES** vol 29(2) (Reissue) PARA 681 et seq. As to procedure on indictment see generally **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1202 et seq. An order for repayment, followed by imprisonment for default, is a bar to an action to recover the same money: *Vernon v Watson* [1891] 2 QB 288 at 290, CA, per Lord Halsbury LC.

6 Industrial and Provident Societies Act 1965 s 64(2).

7 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

8 Industrial and Provident Societies Act 1965 s 66(1)(a) (amended by SI 2001/2617). As to the time within which proceedings may be instituted see PARA 2557.

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### **2552. Misleading statements and practices.**

Any person who (1) makes a statement, promise or forecast which he knows to be misleading, false or deceptive in a material particular; (2) dishonestly conceals any material facts whether in connection with a statement, promise or forecast made by him or otherwise; or (3) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive in a material particular, is guilty of an offence if his intention is to induce (or is reckless as to whether it may induce) another person (whether or not the person to whom the statement, promise or forecast is made) to enter or offer to enter into, or to refrain from entering or offering to enter into, a relevant agreement<sup>1</sup> or to exercise or refrain from exercising, any rights conferred by a relevant investment<sup>2</sup>.

<sup>1</sup> As to the meaning of 'relevant agreement' see PARA 568 note 4.

<sup>2</sup> See the Financial Services and Markets Act 2000 s 397; and PARA 568. As to the meaning of 'relevant investment' see PARA 568 note 4. As to related offences see PARA 568. As to misleading the Financial Services Authority or the Office of Fair Trading and other matters relating to offences under the Financial Services and Markets Act 2000 see PARA 569 et seq.

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### **2553. Falsification of documents.**

If any person wilfully makes, orders or allows to be made any entry or erasure in, or omission from, any balance sheet of a registered society or any contribution or collecting book, or any return or document required to be sent, produced or delivered for the purposes of the Industrial and Provident Societies Acts or the Credit Unions Act 1979<sup>1</sup> with intent to falsify it or to evade any of the provisions of those Acts, he is liable on summary conviction to a fine<sup>2</sup>.

<sup>1</sup> Ie the Industrial and Provident Societies Acts 1965 to 1978 and the Credit Unions Act 1979 (see s 28(1)): see generally PARAS 2397, 2402. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

<sup>2</sup> Industrial and Provident Societies Act 1965 s 65 (amended by virtue of the Criminal Justice Act 1982 ss 38, 46). The fine must not exceed level 3 on the standard scale: see the Industrial and Provident Societies Act 1965 s 65 (as so amended). As to the standard scale see PARA 27 note 21.

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### **2554. Failure to use registered name.**



Any officer<sup>1</sup> of a registered society or other person acting on its behalf who contravenes certain requirements as to the use of the society's registered name<sup>2</sup> is liable on summary conviction to a fine<sup>3</sup> and may also incur certain personal liability<sup>4</sup>.

1 As to the meaning of 'officer' see PARA 2458 note 1.

2 As to these requirements see PARA 2441. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 See the Industrial and Provident Societies Act 1965 s 5(7); and PARA 2441. The fine must not exceed level 3 on the standard scale: see s 5(7); and PARA 2441 note 9. As to the standard scale see PARA 27 note 21.

4 See PARA 2441.

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### **2555. Unlawfully delivering untrue rules.**

If any person, with intent to mislead or defraud, gives to any other person a copy of any rules other than rules for the time being registered under the Industrial and Provident Societies Act 1965, on the pretence that they are the existing rules of a registered society<sup>1</sup>, or that there are no other rules of the society, or gives to any other person a copy of the rules of a society which is not registered under the Act on the pretence that they are the rules of a registered society, he is liable on summary conviction to a fine<sup>2</sup>.

1 As to the duty to supply copies of the rules see PARA 2430. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the rules generally see PARA 2423 et seq.

2 Industrial and Provident Societies Act 1965 s 15(2) (amended by virtue of the Criminal Justice Act 1982 s 46). The fine must not exceed level 1 on the standard scale: see the Industrial and Provident Societies Act 1965 s 15(2) (as so amended). As to the standard scale see PARA 27 note 21.

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### **2556. Contravention of provisions relating to accounts and audit.**

Any contravention by a registered society of any provision of the Friendly and Industrial and Provident Societies Act 1968<sup>1</sup>, or any failure by a society to comply with any provision of that Act, or with any direction by the Financial Services Authority<sup>2</sup> as to audit by a qualified auditor of the accounts and balance sheet of an exempt society or a society to which the audit provisions have been disapplied<sup>3</sup>, is an offence under the Industrial and Provident Societies Act 1965<sup>4</sup>. If in relation to any revenue account or balance sheet of a registered society a member of its committee fails to take all reasonable steps to secure compliance with the provisions

requiring that those documents give a true and fair view<sup>5</sup>, he is guilty of an offence unless he proves that he had reasonable grounds to believe, and did believe, that a competent and reliable person was charged with the duty of seeing that the relevant provision was complied with and was in a position to discharge that duty<sup>6</sup>; and a person guilty of an offence under this provision is liable on summary conviction to a fine<sup>7</sup>.

1 As to those provisions see PARAS 2512-2524. As to the meaning of 'registered society' see PARA 2395.

2 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

3 In a direction given under the Friendly and Industrial and Provident Societies Act 1968 s 4 (see PARA 2514) or under s 9C (see PARA 2515).

4 Friendly and Industrial and Provident Societies Act 1968 ss 18, 21(2)(b) (s 18 amended by SI 2001/2617). For this purpose, 'offence under the Industrial and Provident Societies Act 1965' means an offence under s 61 (see PARA 2547): Friendly and Industrial and Provident Societies Act 1968 s 21(2) (amended by the Friendly Societies Act 1974 Sch 11).

5 In the Friendly and Industrial and Provident Societies Act 1968 s 3(1), (3) or (4): see PARA 2513.

6 Friendly and Industrial and Provident Societies Act 1968 s 3(7).

7 Friendly and Industrial and Provident Societies Act 1968 s 3(7) (amended by the Friendly Societies Act 1971 s 11(5); and by virtue of the Criminal Justice Act 1982 ss 38, 46). The fine must not exceed level 5 on the standard scale: see the Friendly and Industrial and Provident Societies Act 1968 s 3(7) (as so amended). As to the standard scale see PARA 27 note 21.

## UPDATE

### 2556 Contravention of provisions relating to accounts and audit

TEXT AND NOTES 1-4--As to the application of the Friendly and Industrial and Provident Societies Act 1968 s 18 to industrial and provident societies that are insurance undertakings see the Insurance Accounts Directive (Miscellaneous Insurance Undertakings) Regulations 2008, SI 2008/565. Sch 1 paras 1, 16.

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## (v) Recovery of Fines and Costs

### 2557. Summary recovery of fines.

Any fine imposed by the Industrial and Provident Societies Acts<sup>1</sup>, or by regulations made under those Acts, or by the rules of a registered society, is recoverable summarily<sup>2</sup>. Proceedings to recover fines under the rules may be instituted only by the registered society concerned<sup>3</sup>. Except in the case of proceedings in respect of unlawful possession or misapplication of funds<sup>4</sup>, proceedings for recovery of fines imposed by the Acts or by regulations may be instituted only by the Financial Services Authority<sup>5</sup> or by any person aggrieved<sup>6</sup>. Notwithstanding any limitation on the time for the taking of proceedings contained in any Act<sup>7</sup>, proceedings instituted by the Authority may be brought at any time within one year of the first discovery of the offence by the Authority, but not in any case more than three years after the commission of the offence<sup>8</sup>.

1    Ie the Industrial and Provident Societies Acts 1965 to 1978: see generally PARA 2397.

2    As to fines imposed by the Industrial and Provident Societies Acts and their summary recovery see PARAS 2547-2556. As to the power to make regulations and orders see PARA 2399. As to the power to impose fines under a society's rules and their summary recovery see the Industrial and Provident Societies Act 1965 s 13(2), (3); and PARA 2427. As to the rules generally see PARA 2423 et seq. As to summary jurisdiction and procedure see generally **MAGISTRATES**.

3    Industrial and Provident Societies Act 1965 ss 13(3), 66(1)(b). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

4    As to the persons who may bring such proceedings see PARA 2551.

5    As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

6    See the Industrial and Provident Societies Act 1965 s 66(1)(c) (substituted by SI 2001/2617). As to the meaning of 'person aggrieved' see PARA 2534 note 6.

7    This provision ousts the general limitation period of six months imposed by the Magistrates' Courts Act 1980 s 127(1): see **MAGISTRATES** vol 29(2) (Reissue) PARA 589.

8    See the Industrial and Provident Societies Act 1965 s 66(2) (amended by SI 2001/2617). As to the continuing nature of offences see PARA 2547. As to appeals see PARA 2547. The extension of the time limit for summary prosecutions given by the Industrial and Provident Societies Act 1965 s 66(2) does not apply to proceedings for an offence under the Credit Unions Act 1979: s 28(3).

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## **2558. Recovery of costs or expenses.**

Any costs or expenses ordered or directed by the Financial Services Authority<sup>1</sup> to be paid by any person under the Industrial and Provident Societies Acts<sup>2</sup> are recoverable summarily as a civil debt<sup>3</sup>. This provision applies also for the purposes of the Credit Unions Act 1979<sup>4</sup>.

1    As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2    Ie the Industrial and Provident Societies Acts 1965 to 1978: see generally PARA 2397.

3    Industrial and Provident Societies Act 1965 s 67(1) (amended by SI 2001/2617). As to costs or expenses so directed or ordered see PARAS 2483, 2529-2530, 2532, 2583. As to recovery of civil debts summarily see the Magistrates' Courts Act 1980 s 58; and **MAGISTRATES** vol 29(2) (Reissue) PARA 826. It would seem that the court may refuse to make an order for payment if there has been any non-observance of statutory provisions relating to the matter in respect of which the direction was made, but that it is not competent for the court to inquire into the merits of the direction itself: *Roberston v Russell* (1930) CR Rep Pt 3, s 1, pp 32-33, DC.

4    See the Credit Unions Act 1979 s 31(2) (amended by SI 2001/2617; and SI 2002/1555).

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## **(5) TERMINATION**

### **(i) Amalgamation, Transfer of Engagements and Conversion**

#### **A. SPECIAL RESOLUTIONS**

##### **2559. Special resolutions.**

A registered society, including a credit union, may pass a statutory special resolution<sup>1</sup> for the following purposes: (1) amalgamation with one or more other registered societies<sup>2</sup>; (2) transfer of engagements to another registered society<sup>3</sup>; (3) amalgamation with a company<sup>4</sup>; (4) transfer of engagements to a company<sup>5</sup>; or (5) conversion into a company<sup>6</sup>. Special restrictions in these matters apply to registered societies which are registered housing associations<sup>7</sup>.

1    le a special resolution for the purposes of the Industrial and Provident Societies Act 1965: see PARA 2486. As to evidence of passing of special resolutions, and registration, see PARA 2487. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2    See PARA 2561.

3    See PARA 2562.

4    See PARA 2563.

5    See PARA 2563.

6    See PARA 2564.

7    As to registered societies which are registered housing associations (or 'registered social landlords'), and the recording of their registration as such, see PARA 2408. Where the Financial Services Authority has recorded such registration of a society, it may not register a special resolution passed by that society for certain purposes relating to amalgamation, transfer or conversion of a society or amalgamation with or transfer of its engagements to a company registered under the Companies Acts unless, together with the copy of the special resolution sent to the Authority, there is also sent a copy of the consent of the Housing Corporation or the Welsh Ministers (as appropriate) (the 'relevant authority') (see PARA 2408) to the amalgamation, transfer or conversion: see the Housing Act 1996 s 7, Sch 1 para 12; and **HOUSING** vol 22 (2006 Reissue) PARA 80. As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

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#### **B. AMALGAMATION AND TRANSFER OF ENGAGEMENTS**

##### **2560. Meaning of 'amalgamation' and 'transfer of engagements'.**

There is no statutory definition of an amalgamation or a transfer of engagements. An amalgamation of two or more registered societies would seem to mean a union forming a new society, and a transfer of engagements to mean the transfer of a society's rights and liabilities in respect of its creditors, shareholders or others to another society or registered company, the engagements being transferred without the necessity of any other act where the transferor society is discharged from the liabilities, which are assumed instead by the transferee society or company<sup>1</sup>.

There is, however, statutory provision that, on an amalgamation or transfer of engagements, the rights of a creditor of any registered society which is a party to the amalgamation or transfer are not to be prejudiced<sup>2</sup>. There has been no judicial decision on this provision. Its effect would seem to be that the creditor retains his rights against the amalgamating or transferor society, and it may be that he can exercise those rights against its assets, after the transaction, in priority to creditors of the amalgamated or transferee society, as the case may be<sup>3</sup>.

1 The effect of a transfer of engagements was considered in *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538; [2006] 1 WLR 1704, in which the Court of Appeal accepted the appellant's society's contention that a transfer of engagements transferred not only obligations or liabilities to third parties as well as to members, without the necessity for novation (which would require the consent of any such third party), but also contractual rights and property, again without any requirement for third party consent. (Members might be taken to have consented through their agreement to become members of a society governed by the Industrial and Provident Societies Act 1965.) The court appears to have accepted the parties' agreed explanation of 'engagements' as 'business undertaking'. As to the novation of contracts see **CONTRACT** vol 9(1) (Reissue) PARA 1036 et seq. As to transfer of membership on a transfer of engagements see *Sun Permanent Benefit Building Society v Western Suburban and Harrow Road Permanent Society* [1921] 2 Ch 438 at 456, CA. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 See the Industrial and Provident Societies Act 1965 s 54.

3 This sentence as it appeared in a previous edition of this paragraph was quoted in the judgment of Mummery LJ in *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538; [2006] 1 WLR 1704 (see note 1), but no view was expressed on its subject matter, except that it would not prevent creditors of the transferring society from looking to the transferee society to satisfy their claims, even if they were still entitled to look to the transferor society. Questions of this nature have arisen in cases where the life assurance business of a company has been transferred to another: see **CONTRACT** vol 9(1) (Reissue) PARA 1042. Special provisions apply where the whole or part of the long term business carried on by an insurance company to which the Financial Services and Markets Act 2000 applies is to be transferred to another body: see **INSURANCE** vol 25 (2003 Reissue) PARA 824.

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## **2561. Amalgamation of registered societies.**

By special resolution<sup>1</sup> of each of the societies, any two or more registered societies, including credit unions<sup>2</sup>, may become amalgamated together as one society, with or without any dissolution or division of the funds of the societies or any of them, and the property<sup>3</sup> of each society becomes vested in the amalgamated society without the necessity of any form of conveyance other than that contained in the special resolution<sup>4</sup>. A credit union may not, however, amalgamate with any other registered society which is not a credit union<sup>5</sup>. The Financial Services Authority<sup>6</sup> must not register a special resolution for an amalgamation<sup>7</sup>, if, in its opinion, the proposed amalgamation would result in a contravention of any of the provisions of the Industrial and Provident Societies Acts 1965 to 1978 or the Credit Unions Act 1979 or any

requirement imposed under the Financial Services and Markets Act 2000, or there would be no common bond between the members of the proposed amalgamated credit union<sup>8</sup>.

1 As to the meaning of 'special resolution' see PARA 2486.

2 Credit Unions Act 1979 s 21(1). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 As to the meaning of 'property' see PARA 2471 note 4.

4 Industrial and Provident Societies Act 1965 s 50(1). As to the restrictions on registered societies which are registered housing associations see PARA 2559 note 7. As to the passing of, and the need to register, the special resolution see PARAS 2486-2487.

In relation to the application of s 50, with modifications, for the purposes of the Community Benefit Societies (Restriction on Use of Assets) Regulations 2006, SI 2006/264, see reg 17, Sch 2 para 4. See also PARA 2402 note 6.

5 Credit Unions Act 1979 s 21(2).

6 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

7 Ie under the Industrial and Provident Societies Act 1965 s 50: see the text and notes 1-4.

8 Credit Unions Act 1979 s 21(3) (amended by SI 2001/2617; and SI 2002/1501). As to the common bond see PARA 2402.

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## **2562. Transfer of engagements to a registered society.**

By special resolution<sup>1</sup>, a registered society, including (subject to certain conditions<sup>2</sup>) a credit union, may transfer its engagements to any other registered society which may undertake to fulfil those engagements<sup>3</sup>. If that resolution approves the transfer of the whole or any part of the society's property to the transferee society, that whole or part vests in the transferee society without any conveyance or assignment<sup>4</sup>. The method by which a society may undertake to fulfil another society's engagements is not prescribed by statute, and would seem to be determined by the rules of the transferee society which might provide, expressly or otherwise, for acceptance to be made by resolution of a general meeting or by the committee or in some other way<sup>5</sup>.

Where a registered society has transferred its engagements, its registration must not be cancelled until a certificate, signed by the secretary or some other officer<sup>6</sup> of the society approved by the Financial Services Authority<sup>7</sup>, that all property vested in the society has been duly conveyed or transferred by the society to the persons entitled, has been lodged with the Authority<sup>8</sup>.

1 As to the meaning of 'special resolution' see PARA 2486.

2 A credit union may not transfer its engagements to, or accept a transfer of engagements from, any registered society which is not a credit union: Credit Unions Act 1979 s 21(1), (2). There are restrictions on the registration of a special resolution by a credit union under the Industrial and Provident Societies Act 1965 s 51,

similar to those on a registration under s 50 (see PARA 2561): Credit Unions Act 1979 s 21(3) (amended by SI 2001/2617; and SI 2002/1501).

3 Industrial and Provident Societies Act 1965 s 51(1). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the restrictions on registered societies which are registered housing associations see PARA 2559 note 7. As to the passing of, and the need to register, the special resolution see PARAS 2486-2487. The effect of a transfer of engagements was considered in *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538; [2006] 1 WLR 1704, [2006] 2 BCLC 599, in which the Court of Appeal accepted the appellant's society's contention that a transfer of engagements transferred not only obligations or liabilities to third parties as well as members, without the necessity for novation (which would require the consent of any such third party), but also contractual rights and property, again without any requirement for third party consent. (Members might be taken to have consented through their agreement to become members of a society governed by the Industrial and Provident Societies Act 1965.) The court appears to have accepted the parties' agreed explanation of 'engagements' as 'business undertaking'. The case concerned a building contract made between the transferor society and Stansell Ltd, on which the transferee society sought to sue. The contract contained an express provision prohibiting assignment, which was found to be overridden by the wide words of s 51. The court's attention was drawn to the fact that the comparable provision in the Building Societies Act 1986 s 94(8) (see PARAS 1920, 1921), contains the words 'whether or not capable of being transferred or assigned' in respect of right to which that provision applies, but the court found no assistance in that provision or in the absence of any such words from the Industrial and Provident Societies Act 1965 s 51.

In relation to the application of s 51, with modifications, for the purposes of the Community Benefit Societies (Restriction on Use of Assets) Regulations 2006, SI 2006/264, see reg 17, Sch 2 para 5. See also PARA 2402 note 6.

4 Industrial and Provident Societies Act 1965 s 51(1).

5 Presumably the transferee society must have power under its rules to acquire the property and liabilities of the transferor society. Thus the transferred engagements must fall within the objects of the transferee society.

6 As to the meaning of 'officer' see PARA 2458 note 1.

7 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

8 Industrial and Provident Societies Act 1965 s 59 (amended by SI 2001/2617).

## UPDATE

### 2562 Transfer of engagements to a registered society

NOTE 3--See *Midlands Co-operative Society Ltd v Revenue and Customs Comrs* [2008] EWCA Civ 305, [2008] STC 1803.

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### 2563. Amalgamation and transfer of engagements between society and company.

By special resolution<sup>1</sup>, a registered society<sup>2</sup>, other than a credit union, may determine to amalgamate with a company under the Companies Acts<sup>3</sup>, or transfer its engagements to such a company<sup>4</sup>. If a registered society amalgamates with or transfers all its engagements to a company, the society's registration under the Industrial and Provident Societies Act 1965 becomes void, and must be cancelled by the Financial Services Authority<sup>5</sup>. There is no statutory provision for the vesting of property on an amalgamation with a company, or on the transfer of

engagements to a company<sup>6</sup>. It would seem that a company may enter into an amalgamation or accept a transfer of engagements from a registered society only if it has power to do so under its memorandum of association. There is no statutory provision for the transfer of a registered company's engagements to a registered society<sup>7</sup>.

1 As to the meaning of 'special resolution' see PARA 2486.

2 This does not include a registered society which is also a registered housing association, where there are further requirements: see PARA 2559 note 7. As to the meaning of 'registered society' generally see PARA 2395.

3 As to the meaning of 'Companies Acts' see PARA 2417 note 1.

4 Industrial and Provident Societies Act 1965 s 52(1). This provision does not apply to credit unions: Credit Unions Act 1979 s 22. As to credit unions see PARA 2402.

In relation to the application of the Industrial and Provident Societies Act 1965 s 52, with modifications, for the purposes of the Community Benefit Societies (Restriction on Use of Assets) Regulations 2006, SI 2006/264, see reg 17, Sch 2 para 6. See also PARA 2402 note 6.

As from a day to be appointed, the Treasury has power to make by statutory instrument such modifications to the 'transfer provisions' (which in relation to industrial and provident societies, means the Industrial and Provident Societies Act 1965 s 52 and any provision contained in subordinate legislation made under that provision: see below) as it thinks appropriate to facilitate, or in consequence of, the transfer of the whole of the business of a mutual society (including an industrial and provident society: see below) (the 'transferor') to a subsidiary of a mutual society (whether or not of the same type) (the 'transferee'): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(1) (ss 3-5 not yet in force). At the date at which this volume states the law, no such day had been appointed, and no orders had been made under ss 3, 4.

An order under s 3 may make provision as to the rights (including rights of and pertaining to membership) in relation to the mutual society of which the transferee is a subsidiary of the members of the transferor and of persons who, after the transfer, become customers of the transferee: s 3(2). Such an order may confer such functions on the Authority as the Treasury think appropriate: s 3(3). As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

An order under s 3 may make such consequential, saving, supplementary or transitional provision as the Treasury thinks appropriate; and may make different provision for different purposes: s 3(4). The power to make such an order is exercisable by statutory instrument: s 3(5). An order which makes modifications of a provision mentioned in s 3(11)(a)-(c) (which includes the provisions relating to industrial and provident societies mentioned in s 3(11)(c) (see below)), or amends s 3(13)(a) or (b) (see heads (1), (2) below), (whether or not it contains any other provision) must not be made unless a draft of it has been laid before and approved by resolution of each House of Parliament: s 3(6). Otherwise, an order is subject to annulment in pursuance of a resolution of either House of Parliament: s 3(7). If a draft of an order mentioned in s 3(6) would, apart from this provision, be treated for the purposes of the Standing Orders of either House of Parliament as a hybrid instrument it must proceed in that House as if it were not such an instrument: s 3(8).

'Modifications' include omissions, additions and alterations: s 3(9). A 'mutual society' is a building society incorporated or deemed to be incorporated under the Building Societies Act 1986 (see PARA 1856 et seq); a friendly society within the meaning of the Friendly Societies Act 1992 (see PARA 2082); an industrial and provident society registered or deemed to be registered under the Industrial and Provident Societies Act 1965 (see PARA 2394 et seq); or an EEA mutual society: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(10). An 'EEA mutual society' is a body which is a European Cooperative Society for the purposes of EC Council Regulation 1435/2003 (OJ L207, 18.8.2003, p 1) on the Statute for a European Cooperative Society; a body which is established as a cooperative under the law of an EEA state as mentioned in that Regulation; or a body which is a cooperative or mutual undertaking of such description as the Treasury may specify by order and which is established or operates in accordance with the laws of an EEA state or any of the Channel Islands or the Isle of Man: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(12). 'Transfer provisions' means, in relation to industrial and provident societies, the Industrial and Provident Societies Act 1965 s 52, and any provision contained in subordinate legislation under such provision: see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(11)(b), (d). A 'subsidiary of a mutual society' is a relevant company (1) in which the society holds a majority of the voting rights or of which the society is a member and alone controls, pursuant to an agreement with other shareholders or members, a majority of the voting rights; and (2) in relation to which the society has the right to appoint or remove a majority of the company's board of directors, but the Treasury may, by order, amend heads (1) and (2) above to make the degree of control required more or less onerous: s 3(13). A 'relevant company' is a company within the meaning of the Companies Act 2006 (or, before the commencement of Pt 1 (ss 1-6), the Companies Act 1985) (see **COMPANIES**); a company within the meaning of the Companies (Northern Ireland) Order 1986 (SI 1986/1032 (NI 6)); a body corporate which is incorporated in an EEA state other than the United Kingdom: Building Societies



(Funding) and Mutual Societies (Transfer) Act 2007 s 3(14). As to the meaning of 'United Kingdom' see PARA 2 note 3.

For the purposes of the Financial Services and Markets Act 2000 Sch 1 para 17 (power to charge fees) (see PARA 16) a function conferred on the Financial Services Authority by an order under the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3 is to be treated as a function conferred under or as a result of the Financial Services and Markets Act 2000: Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(15).

An order under s 3 may provide for s 4 to have effect: s 4(1). Section 4(3) applies if the terms of a transfer to which the order applies include provision for part of the funds of the transferor or the mutual society of which the transferee is a subsidiary (the 'holding mutual') to be distributed in consideration of the transfer among the members of the transferor, the holding mutual, or both the transferor and the holding mutual: s 4(2). In such a case, the provision for the distribution must be authorised as follows: (a) it must not exceed the limits prescribed by order under s 4(4) (see below), and the distribution must be approved (in the case of the transferor) by the transfer resolution or (in the case of the holding mutual) by a resolution of such description as the Treasury specifies by order; (b) if the provision for a distribution exceeds the prescribed limits, it must be approved by each of the resolutions mentioned in head (a) above: s 4(3). 'Transfer resolution' means, in relation to an industrial and provident society, the resolution required by the Friendly Societies Act 1992 s 52 (see the text): see the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 4(5)(c). The Treasury must by order authorise distributions of funds to members by mutual societies participating (directly or through a subsidiary) in transfers to which an order mentioned in s 4(1) applies, subject to limits specified by or determined in accordance with the order: s 4(4). Expressions used in ss 3, 4 have the same meaning as in s 3: s 4(6). The provisions of s 3(4)-(7) apply to an order under s 4 as they apply to an order under s 3: s 4(7).

Her Majesty may by Order in Council provide for any of the provisions of the Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 to extend with or without modifications, to any of the Channel Islands or to the Isle of Man: s 5.

5 Industrial and Provident Societies Act 1965 s 52(4) (amended by SI 2001/2617). Cancellation of registration is subject to the Industrial and Provident Societies Act 1965 s 59 (see PARA 2562): s 52(4) (as so amended). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

6 Cf PARAS 2561-2562. In relation to a transfer of long term business see **INSURANCE** vol 25 (2003 Reissue) PARA 824.

7 As to the conversion of a company into a registered society see, however, PARAS 2417-2420.

## **UPDATE**

### **2563 Amalgamation and transfer of engagements between society and company**

NOTE 4--Building Societies (Funding) and Mutual Societies (Transfer) Act 2007 s 3(14) amended: SI 2009/1941.

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## ***C. CONVERSION OF REGISTERED SOCIETY INTO COMPANY***

### **2564. Resolution for conversion of society into company.**

By special resolution<sup>1</sup>, a registered society<sup>2</sup> other than a credit union, may determine to convert itself into a company under the Companies Acts<sup>3</sup>. If the resolution contains the particulars which are required by the Companies Acts to be contained in the memorandum of association

of a company<sup>4</sup> and a copy of the resolution has been registered by the Financial Services Authority<sup>5</sup>, a copy of that resolution under the seal or stamp of the Authority has the same effect as a memorandum of association duly signed and attested under the Companies Acts<sup>6</sup>. On the registration of the society as a company, its registration under the Industrial and Provident Societies Act 1965 becomes void and must be cancelled by the Authority<sup>7</sup>.

1 As to the meaning of 'special resolution' see PARA 2486.

2 This does not include a registered society which is also a registered housing association, where there are further requirements: see PARA 2559 note 7. As to the meaning of 'registered society' generally see PARA 2395.

3 Industrial and Provident Societies Act 1965 s 52(1). As to the meaning of 'Companies Acts' see PARA 2417 note 1. As to the reverse conversion (ie of a company into a registered society) see PARAS 2417-2420. These provisions do not apply to credit unions: Credit Unions Act 1979 s 22. As to credit unions see PARA 2402.

In relation to the application of the Industrial and Provident Societies Act 1965 s 52, with modifications, for the purposes of the Community Benefit Societies (Restriction on Use of Assets) Regulations 2006, SI 2006/264, see reg 17, Sch 2 para 6. See also PARA 2402 note 6.

As to the power of the Treasury on any modification of the statutory provisions in force in Great Britain relating to companies, to modify the relevant statutory provisions for the purpose of assimilating the law relating to companies and the law relating to industrial and provident societies, see the Industrial and Provident Societies Act 2002 s 2; and PARA 2398. As to the Treasury see PARA 3; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 As to these particulars see **COMPANIES** vol 14 (2009) PARA 104 et seq.

5 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

6 Industrial and Provident Societies Act 1965 s 52(2) (amended by the Companies Consolidation (Consequential Provisions) Act 1985 Sch 2; and SI 2001/2617). As to the Authority's seal see PARA 2412.

7 Industrial and Provident Societies Act 1965 s 52(4) (amended by SI 2001/2617). Registration of the society as a company does not affect rights or claims subsisting against the society: see PARA 2565.

## UPDATE

### 2564 Resolution for conversion of society into company

TEXT AND NOTES 4-6--Industrial and Provident Societies Act 1965 s 52(2) amended: SI 2009/1941.

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### 2565. Priority of society's creditors on conversion.

The registration of a registered society as a company is in a true sense a conversion and not a dissolution<sup>1</sup>. The registration does not affect any right or claim for the time being subsisting against the society or any penalty for the time being incurred by it; and for the purpose of enforcing any such right, claim or penalty the society may be sued and proceeded against in the same manner as if it had not become registered as a company<sup>2</sup>. Every such right or claim,

or the liability to any such penalty, has priority as against the company's property over all other rights or claims against or liabilities of the company<sup>3</sup>.

1 *Re London Housing Society Ltd's Trust Deeds, Moreland v Woodward* [1940] Ch 777 at 783, [1940] 3 All ER 665 at 668. See also *Blythe v Birtley* [1910] 1 Ch 228, CA (friendly society case). As to the meaning of 'registered society' see PARA 2395.

2 Industrial and Provident Societies Act 1965 s 52(5)(a). The society and the company into which it has been converted are in substance the same thing with different machinery; thus trusts of a pension fund created for the benefit of employees of a registered society continue, after the society's conversion into a company, for the benefit of the same class of employees of the company: *Re London Housing Society Ltd's Trust Deeds, Moreland v Woodward* [1940] Ch 777, [1940] 3 All ER 665.

3 Industrial and Provident Societies Act 1965 s 52(5)(b).

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## **(ii) Dissolution and Winding Up**

### **2566. Modes of terminating registered societies.**

A registered society may be dissolved (1) by an order to wind up the society, or a resolution for its winding up, made as directed in regard to companies by the Insolvency Act 1986<sup>1</sup>; or (2) by the consent of three-fourths of its members testified by their signatures to an instrument of dissolution<sup>2</sup>. The method to follow in winding up a society is dependent on its financial position. If it is solvent, the usual procedure is by way of an instrument of dissolution or a members' voluntary winding up. If it is insolvent and possesses assets which can be realised for distribution to creditors, there can be a winding up by order of the court or a creditors' voluntary liquidation.

In the case of dissolution either under the Insolvency Act 1986 or by instrument, the society is not dissolved until there has been lodged with the Financial Services Authority<sup>3</sup> a certificate signed by the liquidator, or by the secretary or some other officer<sup>4</sup> approved by the Authority, that all property vested in the society has been duly conveyed or transferred by the society to the persons entitled<sup>5</sup>.

Where there are no existing assets, an application may be made to the Authority to cancel the society's registration and, if it thinks fit, the Authority may grant the application even though there has been no formal procedure for dissolution<sup>6</sup>.

Special provisions apply to the dissolution of a registered society which is a registered housing association<sup>7</sup>.

1 Industrial and Provident Societies Act 1965 s 55(a) (amended by the Insolvency Act 1986 Sch 14). The provisions of the Insolvency Act 1986 apply to the order or resolution as if the society were a company, subject to the modification that any reference in those provisions to the registrar within the meaning of that Act is to be construed as a reference to the Financial Services Authority: Industrial and Provident Societies Act 1965 s 55(a) (i) (amended by SI 2001/2617). This is modified in relation to credit unions: Credit Unions Act 1979 s 6(1)(d) (amended by the Insolvency Act 1986 Sch 14). See also **COMPANY AND PARTNERSHIP INSOLVENCY**. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to winding up see further PARA 2573 et seq; and see generally **COMPANY AND PARTNERSHIP INSOLVENCY**.

2 Industrial and Provident Societies Act 1965 s 55(b). As to instruments of dissolution see PARAS 2568-2572. In addition to the two methods of dissolution referred to in the text, specific provision is made in two cases for winding up on petition to the court (see note 7; and PARA 2574) and a society may also terminate by amalgamation or transfer of engagements (see PARAS 2561-2563), by conversion into a company (see PARA 2563), or by the cancellation of its registration (see PARA 2579 et seq).

3 See note 1.

4 As to the meaning of 'officer' see PARA 2458 note 1.

5 Industrial and Provident Societies Act 1965 s 59 (amended by SI 2001/2617). See also PARA 2572.

6 As to cancellation see PARA 2579 et seq.

7 As to registered societies which are registered housing associations (known as 'registered social landlords'), and the recording of their registration as such by the Authority, see PARA 2408. Where such registration has been so recorded, the society may not be wound up voluntarily under the Insolvency Act 1986, or dissolved by instrument, without the consent of the relevant authority (ie either the Housing Corporation or the Welsh Ministers: see PARA 2408); see the Housing Act 1996 s 7, Sch 1 para 12; and **HOUSING** vol 22 (2006 Reissue) PARA 80. If the society is dissolved by any method under the Insolvency Act 1986, or by instrument of dissolution, there must be transferred to the relevant authority or, if so directed, to another specified registered social landlord, so much of the society's property as remains after meeting the claims of creditors and other liabilities, subject to the relevant authority's power to discharge any such claims or liabilities itself: see the Housing Act 1996 Sch 1 para 15; and **HOUSING** vol 22 (2006 Reissue) PARA 83. See also PARA 2567 note 1. Further, the relevant authority has power to present a petition for the winding up of the society under the Insolvency Act 1986 on the ground that it is failing properly to carry out its purposes or objects (in such case, the modification referred to in note 1 applies) or on the ground that it is unable to pay its debts, within the meaning of the Insolvency Act 1986: see the Housing Act 1996 Sch 1 para 14; and **HOUSING** vol 22 (2006 Reissue) PARA 82.

## UPDATE

### 2566 Modes of terminating registered societies

NOTE 1--Credit Unions Act 1979 s 6(1)(d) amended: SI 2009/1941.

TEXT AND NOTES 1, 2--Industrial and Provident Societies Act 1965 s 55 substituted: SI 2009/1941.

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### 2567. Instrument of dissolution and members' voluntary winding up.

An instrument of dissolution may have the advantage that, after discharge of liabilities and expenses, the remaining funds may be divided or appropriated in any manner decided upon by the signatories<sup>1</sup>; in a statutory winding up they would have to be distributed in accordance with the provisions of the Insolvency Act 1986<sup>2</sup>. A statutory winding up may have an advantage where, owing to the size of the membership and distribution of members, there may be difficulty in obtaining the signatures of three-fourths of the members, and also where there is a proposed scheme of reconstruction and it is desired to make it binding on creditors and members<sup>3</sup>.

1 The division or appropriation of the funds must be among persons who are entitled under the general law to those funds: *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society* (1976) CR Rep Pt 1, p 36,

per Megarry V-C. As to the restrictions in the case of registered societies which are registered housing associations see PARA 2566 note 7. Where a registered society is a charity, its assets may not be applied on dissolution to other than charitable purposes: see **CHARITIES**. As to the dealing by the Housing Corporation or the Welsh Ministers (the 'relevant authority') (see PARA 2408) with the property of a dissolved society which was both a charity and a registered housing association (or 'registered social landlord') see the Housing Act 1996 s 7, Sch 1 para 15, Sch 1 para 15A (Sch 1 para 15A prospectively added); and **HOUSING** vol 22 (2006 Reissue) PARA 83. As to the application of the Charities Act 1993 to registered societies see PARA 2401.

2 See generally **COMPANY AND PARTNERSHIP INSOLVENCY**.

3 As to schemes for reconstruction see **COMPANY AND PARTNERSHIP INSOLVENCY**.

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## **2568. Contents of instrument of dissolution.**

An instrument of dissolution of a registered society, including a credit union, must be signed<sup>1</sup> by not less than three-fourths of its members<sup>2</sup>. The instrument must set out (1) the liabilities and assets of the society in detail<sup>3</sup>; (2) the number of the members and the nature of their respective interests in the society<sup>4</sup>; (3) the claims of creditors, if any, and the provision to be made for their payment<sup>5</sup>; and (4) the intended appropriation or division of the society's funds and property, unless stated in the instrument to be left to the Financial Services Authority's award<sup>6</sup>. The instrument must also contain the name of some newspaper circulating in or about the locality of the society's registered office in which it is desired that notice of the dissolution be advertised<sup>7</sup>. Alterations in the instrument may be made by the consent of not less than three-fourths of the members testified by their signatures to the alteration<sup>8</sup>.

1 As to signatures see PARA 2569. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 s 55(b). As to registration of the instrument see PARA 2570.

3 Industrial and Provident Societies Act 1965 s 58(1), (2)(a).

4 Industrial and Provident Societies Act 1965 s 58(2)(b).

5 Industrial and Provident Societies Act 1965 s 58(2)(c).

6 Industrial and Provident Societies Act 1965 s 58(2)(d) (amended by SI 2001/2617). As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

7 As to the requirement about the newspaper see further PARA 2570.

8 Industrial and Provident Societies Act 1965 s 58(3). As to the registration of alterations see PARA 2570.

## **UPDATE**

### **2568 Contents of instrument of dissolution**

NOTE 2--Industrial and Provident Societies Act 1965 s 55 substituted: SI 2009/1941.

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### **2569. Signatures to the instrument.**

The consent of a member to an instrument of dissolution must be testified by his signature<sup>1</sup>. It would seem that the instrument may be signed by an agent on his behalf<sup>2</sup>, and that members who are minors of at least 16 years of age may sign<sup>3</sup>, but there has been no judicial decision whether members who are such minors may appoint agents to execute the instrument on their behalf<sup>4</sup>.

1 Industrial and Provident Societies Act 1965 s 55(b).

2 *Dennison v Jeffs* [1896] 1 Ch 611 (not following *Second Edinburgh and Leith 493rd Starr-Bowkett Building Society v Aitken* (1892) 29 SLR 456).

3 See PARA 2469.

4 See *Rudd v James* [1896] 2 Ch 554, CA, which left this point undecided.

### **UPDATE**

### **2569 Signatures to the instrument**

NOTE 1--Industrial and Provident Societies Act 1965 s 55 substituted: SI 2009/1941.

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### **2570. Registration and advertisement of dissolution.**

The instrument of dissolution of a registered society, including a credit union, must be sent to the Financial Services Authority<sup>1</sup> accompanied by a statutory declaration made by three members<sup>2</sup> and the society's secretary that all relevant statutory provisions have been complied with<sup>3</sup>, and possibly also by any sum of money requested by the Authority sufficient to defray any expenses of publishing notice of the dissolution in a newspaper and in the Gazette<sup>4</sup>. The Authority may not register the instrument until it has received the society's final return<sup>5</sup>. The instrument and any alterations to it<sup>6</sup> are then registered in the same way as an amendment of the society's rules<sup>7</sup>, and are binding upon all the members<sup>8</sup>.

The Authority must cause notice of the dissolution to be advertised at the society's expense in the Gazette and in some newspaper circulating in or about the locality in which the society's registered office is situated<sup>9</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 In the case of a society which for the time being consists solely of two registered societies, the statutory declaration is made by both such members: Industrial and Provident Societies Act 1965 s 58(9).

3 Industrial and Provident Societies Act 1965 s 58(4) (s 58(4), (5), (6) amended by SI 2001/2617). Any person who knowingly makes a false or fraudulent declaration in the matter is guilty of an offence: Industrial and Provident Societies Act 1965 s 58(4) (as so amended). See also PARA 2550.

4 As to the requirements as to publication of notice of dissolution see the text to note 9. In relation to a registered society where the society's registered office is situated, or the society carries on business, in England, Wales or the Channel Islands, 'Gazette' means the London Gazette; but if the society's registered office is situated, or the society carries on business, in Scotland, it means the Edinburgh Gazette; and if the society's rules are recorded in Northern Ireland (see PARA 2397), it means the Belfast Gazette: Industrial and Provident Societies Act 1965 s 74(1) (renumbered and definition amended by SI 2001/2617). There seems to be some uncertainty as to whether the charge referred to still applies.

5 Industrial and Provident Societies Act 1965 s 58(5) (as amended: see note 3). As to the final return see PARA 2523.

6 As to the making of alterations see PARA 2568.

7 As to registration of amendments of rules see PARA 2437. As to the rules generally see PARA 2423 et seq.

8 Industrial and Provident Societies Act 1965 s 58(5) (as amended: see note 3).

9 Industrial and Provident Societies Act 1965 s 58(6) (as amended (see note 3); and further amended by SI 2001/3649). See also PARA 2571.

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## **2571. Proceedings to have instrument set aside.**

Within three months from the date of the Gazette<sup>1</sup> in which the advertisement of dissolution<sup>2</sup> appears, a member or other person interested in or having any claim on the society's funds may commence proceedings in the county court<sup>3</sup> to set aside the dissolution<sup>4</sup>. A person taking such proceedings must send notice of them to the Financial Services Authority<sup>5</sup> not later than seven days after they are commenced, or not later than the expiration of the period of three months from the date of the advertisement of dissolution, whichever is the earlier<sup>6</sup>. Notice of any order setting the dissolution aside must be sent by the society to the Authority within seven days after the making of the order<sup>7</sup>.

1 As to the meaning of 'Gazette' see PARA 2570 note 4.

2 As to publication of notice of dissolution in the Gazette see PARA 2570.

3 I.e. the county court having jurisdiction in the locality in which the society's registered office is situated: Industrial and Provident Societies Act 1965 s 58(6)(a). Proceedings in Scotland are brought before the sheriff; although Scottish matters are generally beyond the scope of this work.

4 Industrial and Provident Societies Act 1965 s 58(6)(a). The court may set aside the dissolution accordingly: s 58(6)(b).

5 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

6 Industrial and Provident Societies Act 1965 s 58(8) (amended by SI 2001/2617).

7 Industrial and Provident Societies Act 1965 s 58(8) (as amended: see note 6). As to proceedings in the county court see PARA 2545.

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## **2572. Date of dissolution.**

Unless on proceedings brought within the statutory time limit<sup>1</sup> the dissolution of a registered society is set aside, the society is legally dissolved from the date of the advertisement of dissolution<sup>2</sup>, and the requisite consents<sup>3</sup> to the instrument of dissolution are deemed to have been duly obtained without proof of the signatures to it<sup>4</sup>. If, however, the required certificate as to conveyance or transfer of all the society's property<sup>5</sup> has not been lodged with the Financial Services Authority<sup>6</sup> by the date of the advertisement, the society is legally dissolved only from the date when that certificate is so lodged<sup>7</sup>. If it should happen that any property is not conveyed or transferred, and is not claimed by the Crown as bona vacantia, it may be that the court would make an order vesting the property in some person on trust to administer it under the terms of the instrument of dissolution<sup>8</sup>.

1 As to this limit see PARA 2571.

2 As to publication of notice of dissolution in the Gazette see PARA 2570. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 As to these consents see PARA 2568.

4 Industrial and Provident Societies Act 1965 s 58(6).

5 I.e. the certificate referred to in the Industrial and Provident Societies Act 1965 s 59: see PARA 2566.

6 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

7 Industrial and Provident Societies Act 1965 s 58(7) (amended by SI 2001/2617).

8 See *Re Ruddington Land* [1909] 1 Ch 701.

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## **2573. Compulsory or voluntary winding up.**

The procedure and practice relating to the winding up of the affairs of registered societies by order of the court or voluntarily by resolution under the Insolvency Act 1986<sup>1</sup> are dealt with elsewhere in this work<sup>2</sup>.

1 As to the general application of the Insolvency Act 1986 to an order or resolution for the winding up of a registered society see PARA 2566.



2 See generally **COMPANY AND PARTNERSHIP INSOLVENCY**.

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### **2574. Winding up on the Financial Services Authority's petition.**

In the case of a society which was registered before 26 July 1938<sup>1</sup>, the Financial Services Authority<sup>2</sup> may present a petition for its winding up to the court if it appears to it that the society does not fulfil either of the purposes for which a society may be registered<sup>3</sup>, and that it would be in the interests of persons who have invested or deposited money with the society, or of any other person, that the society should be wound up<sup>4</sup>.

The Authority may present a petition to the court for the winding up of a credit union (1) if it appears to it that (a) the credit union is unable to pay sums due and payable to its members, or is able to pay such sums only by obtaining further subscriptions of shares, or by defaulting in its obligations to creditors; or (b) there has been, in relation to that credit union, a failure to comply with any provision of, or of any direction given under, the Credit Unions Act 1979 or the Industrial and Provident Societies Acts 1965 to 1978; or (c) there is no longer a common bond between the members of the credit union<sup>5</sup>; or (2) in any other case where it appears to the Authority that the winding up of the credit union is in the public interest or is just and equitable having regard to the interests of all the members of the credit union<sup>6</sup>.

1 In a society which was registered or deemed to be registered under the Industrial and Provident Societies Act 1893 before 26 July 1938 and which is now deemed to be registered under the Industrial and Provident Societies Act 1965: see PARA 2396. As to the meaning of 'registered society' see PARA 2395.

2 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq.

3 As to these purposes see PARA 2402.

4 Industrial and Provident Societies Act 1965 s 56 (amended by SI 2001/2617). As to the Authority's power to require information for the purpose of this provision see PARA 2583. In *Re First Mortgage Co-operative Investment Trust Ltd* [1941] 2 All ER 529, the court declined to make an order on a petition for winding up in a case in which the society had undertaken to register under the Companies Act 1929, and a majority of shareholders wished the society to continue. See further PARA 2579 note 11.

5 See PARA 2414.

6 Credit Unions Act 1979 s 20(2) (amended by SI 2001/2617). As to credit unions see PARA 2402.

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### **2575. Winding up resolutions.**

An extraordinary or special resolution to bring about a voluntary liquidation under the Insolvency Act 1986 must be passed by a registered society in the manner provided in that Act<sup>1</sup>.

1 See the Industrial and Provident Societies Act 1965 s 55(a); and PARA 2566. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402. As to extraordinary or special resolutions for winding up, and as to extraordinary and special resolutions generally, see **COMPANIES** vol 14 (2009) PARAS 614, 615; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 939, 943-944.

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### **2576. Limits of members' liability to contribute.**

Where a registered society is wound up in pursuance of an order or resolution under the Insolvency Act 1986<sup>1</sup>, the provisions of that Act with regard to the liability of a present or past member to contribute for payment of the society's debts and liabilities, the expenses of winding up and the adjustment of the rights of contributories amongst themselves, are qualified as follows:

- 1 (1) no person<sup>2</sup> who ceased to be a member not less than one year before the beginning of the winding up is liable to contribute<sup>3</sup>;
- 2 (2) no person is liable to contribute in respect of any debt or liability contracted after he ceased to be a member<sup>4</sup>;
- 3 (3) no person who is not a member is liable to contribute unless it appears to the court that the contributions of the existing members are insufficient to satisfy the just demands on the society<sup>5</sup>;
- 4 (4) no contribution is to be required from any person exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a past or present member<sup>6</sup>;
- 5 (5) where withdrawable shares have been withdrawn a person is taken to have ceased to be a member in respect of those shares as from the date of the notice or application for withdrawal<sup>7</sup>.

An assignment of book debts by a liquidator is an assignment subject to equities and thus to the rights of debtors under the society's rules<sup>8</sup>.

1 See the Industrial and Provident Societies Act 1965 s 55(a); and PARA 2566. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 ie no individual, society or company: see PARA 2467.

3 Industrial and Provident Societies Act 1965 s 57(a).

4 Industrial and Provident Societies Act 1965 s 57(b).

5 Industrial and Provident Societies Act 1965 s 57(c).

6 Industrial and Provident Societies Act 1965 s 57(d).

7 Industrial and Provident Societies Act 1965 s 57(e). This is intended as a guide to the liquidator in settling the list of contributories; the use of the word 'withdrawn' indicates that the operation of this provision is to be

confined to cases where the shares have in fact been withdrawn: see *Re United Citizens' Investment Trust Ltd* [1932] 1 Ch 395, CA; and PARA 2578.

8 See *Lloyd v Francis* [1937] 4 All ER 489 at 492-493, CA, per Sir Wilfrid Greene MR.

## UPDATE

### 2576 Limits of members' liability to contribute

TEXT AND NOTES 1-7--Industrial and Provident Societies Act 1965 s 57 amended: SI 2009/1941.

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### 2577. Increase of member's liability.

A member's liability to subscribe to share or loan capital may not be increased by an amendment of rules without his consent<sup>1</sup>, and therefore without that consent his name may not be placed on a list of contributories in a winding up for a larger sum than the original liability which he undertook when he became a member<sup>2</sup>.

1 See the Industrial and Provident Societies Act 1965 s 14(2); and PARA 2429. As to the rules generally see PARA 2423 et seq.

2 *Hole v Garnsey* [1930] AC 472, HL. A member may be liable, under provisions in rules, to subscribe to loan capital: see *Re Foreglen Co-operative Agricultural Society Ltd* [1930] NI 114, CA.

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### 2578. Withdrawal of shares on a winding up.

Where a member of a registered society gives notice to withdraw shares, and during the currency of the notice the stoppage of the society's business becomes recognised as inevitable, the notice becomes void and repayment of the shares cannot be claimed<sup>1</sup>.

A withdrawal of subscriptions towards a share under a power given in the rules is not the same as a withdrawal of shares, and therefore in a winding up a member is liable as a contributory for the difference between the nominal capital of his shares and the net amount standing to his credit; the withdrawal of part of his subscription by a member merely increases his contingent liability in respect of his shares. In such case also the estate of a deceased member remains liable to contribute notwithstanding that he may have died more than a year prior to the commencement of the winding up, for he had not ceased to be a member for a year or upwards so as to escape liability to contribute. A member who pays a subscription towards a share in order to obtain an advance is liable as a contributory for the unpaid part of the share even if he has repaid the whole of the advance; in the case of a deceased member, his estate

is liable<sup>2</sup>. Where no rule of a society requires payment out to the executors of a deceased shareholder, the personal representatives of a holder of withdrawable shares who died before the commencement of the liquidation are not entitled to any priority over other shareholders<sup>3</sup>. Where a society is solvent but is carrying on business at a loss, and has consequently suspended withdrawal of shares and is likely to continue to do so, this does not justify a petition for winding up by a minority of shareholders against the wishes of the majority of shareholders and creditors<sup>4</sup>.

1 See PARAS 2452, 2576. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 *Re United Service Share Purchase Society Ltd* [1909] 2 Ch 526.

3 *Re United Citizens' Investment Trust Ltd* [1932] 1 Ch 395 at 414, CA, per Maugham J.

4 *Re Horsham Industrial and Provident Society Ltd* (1894) 70 LT 801, DC.

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### **(iii) Cancellation and Suspension of Registration**

#### **2579. Grounds for cancellation.**

A society's registration is cancelled on a transfer of its engagements to another society or company, or on amalgamation with a company, or on conversion into a company<sup>1</sup>. Registration may also be cancelled by the Financial Services Authority<sup>2</sup>, by writing, on any of the following grounds<sup>3</sup>:

- 6 (1) if at any time it is proved to the Authority's satisfaction that the number of the society's members has been reduced to less than three (or 21 in the case of a credit union) or, in the case of a society for the time being consisting solely of other registered societies, to less than two<sup>4</sup>, or that an acknowledgment of registration has been obtained by fraud or mistake<sup>5</sup>, or that the society has ceased to exist<sup>6</sup>;
- 7 (2) at the society's request, if the Authority thinks fit<sup>7</sup>;
- 8 (3) on proof to the Authority's satisfaction that the society exists for an illegal purpose<sup>8</sup>, or has wilfully and after notice from the Authority violated any of the provisions of the Industrial and Provident Societies Acts<sup>9</sup> or any enactment repealed by them<sup>10</sup>;
- 9 (4) if at any time it appears to the Authority that the society does not fulfil either of the purposes for which a society may be registered<sup>11</sup>;
- 10 (5) if it appears to the Authority that an agricultural, horticultural or forestry society, the rules of which contain a provision for the making of advances to members without security, is not qualified to make such advances<sup>12</sup>.

There are certain provisions applying specifically to credit unions<sup>13</sup>.

1 See the Industrial and Provident Societies Act 1965 ss 52(4), 59; and PARAS 2562-2564. Although there is no provision in the Act that a society's registration is to be cancelled on amalgamation with another society, it would seem that in practice amalgamation will usually involve the cessation of the existence of the

amalgamating societies (see PARAS 2560-2561), thus giving rise to the possibility of cancellation on that ground (see the text to note 6). On dissolution of a society by an order or resolution for winding up or an instrument of dissolution (see PARA 2566), although there may be no formal steps for cancellation of registration under s 16, registration will inevitably terminate. Section 52 (conversion of registered society into a company or amalgamation with, or transfer of engagements to, a company: see PARAS 2563-2564) does not apply to credit unions: see the Credit Unions Act 1979 s 22. See also note 3.

2 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

3 Industrial and Provident Societies Act 1965 s 16(1) (amended by SI 2001/2617). The Authority's power to cancel registration is subject to the provisions of the Industrial and Provident Societies Act 1965 s 16 (see also PARA 2581 et seq), s 18(1)(c) (right of appeal) (see PARA 2582) and s 59 (lodging of certificate as to transfer of society's property) (see PARAS 2562, 2566): see s 16(1) (as so amended).

The Authority may also exercise the power to cancel the registration of a credit union in accordance with s 16 where the credit union's permission given by the Authority under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) (see PARA 348 et seq) has been cancelled or where the Authority has given the credit union a warning notice under s 54(1) (see PARA 357): Credit Unions Act 1979 s 20(1A) (s 20(1A)-(1D) added by SI 2002/1501). Cancellation of registration under the Industrial and Provident Societies Act s 16 by virtue of the Credit Unions Act 1979 s 20(1A) may not take effect until the Authority has cancelled the credit union's permission under the Financial Services and Markets Act 2000 Pt IV and there is no possibility (or no further possibility) of that determination of the Authority being reversed or varied: Credit Unions Act 1979 s 20(1B) (as so added). In the Industrial and Provident Societies Act 1965 s 16(4) (see PARA 2583), in its application to credit unions, the reference to the ground referred to in s 16(1)(c)(ii) (see the text to note 11) includes a reference to the ground mentioned in the Credit Unions Act 1979 s 20(1A): s 20(1C) (as so added). The Industrial and Provident Societies Act 1965 s 18 (see also PARA 2582) does not apply in relation to a decision of the Authority to cancel the registration of a credit union by virtue of the Credit Unions Act 1979 s 20(1A) (and so a society may not appeal from a decision of the Authority to cancel its registration by virtue of s 20(1A)): s 20(1D) (as so added).

4 Industrial and Provident Societies Act 1965 s 16(1)(a)(i) (s 16(1)(a)(i) amended by SI 1996/1738; and the Industrial and Provident Societies Act 1965 s 16(1)(a), (b), (c) amended by SI 2001/2617); Credit Unions Act 1979 s 6(1)(b). See also note 3.

5 Industrial and Provident Societies Act 1965 s 16(1)(a)(ii) (as amended: see note 4). As to acknowledgment of registration see PARA 2415. See note 3.

6 Industrial and Provident Societies Act 1965 s 16(1)(a)(iii) (as amended: see note 4). The Authority retains a power to cancel the registration of a reconstituted society, which had ceased to exist, as it is a new and different society: *Re Wimbledon and Merton Democratic Club Society Ltd* (1999) Times, 7 January. From the date of cancellation of a society's registration it becomes an unincorporated association to which the principle of spontaneous dissolution can apply: *Boyle v Collins* [2004] EWHC 271 (Ch), [2004] 2 BCLC 471. These two decisions are not entirely easy to reconcile, since it appears to have been assumed in *Re Wimbledon and Merton Democratic Club Society Ltd* that a society might cease to exist if the circumstances were such that the principle of spontaneous dissolution would apply if it were an unincorporated association, whereas the reasoning in *Boyle v Collins* above is that the principle cannot apply while a society remains registered and is thus a body corporate. If that is correct, it appears that the words 'the society has ceased to exist' in the Industrial and Provident Societies Act 1965 s 16(1)(a)(iii) must authorise the cancellation of a society's registration where, for example, it has ceased to exist by transferring its engagements or by dissolution: see further s 59 (and PARA 2562), prohibiting cancellation of a society's registration in such circumstances until the certificate of conveyance or transfer under that section has been lodged. Such an approach would be consistent with the description in the former case of the Authority's power as administrative, to keep the register in order. See note 3.

7 Industrial and Provident Societies Act 1965 s 16(1)(b) (as amended: see note 4). This is to be evidenced in such manner as the Authority from time to time directs: see s 16(1)(b) (as so amended). See further PARA 2583. See note 3.

8 'Illegal' means unlawful, and not illegal as being ultra vires the society: *Re Middle Age Pension Friendly Society* [1915] 1 KB 432, DC. See also *Wallingford v Mutual Society* (1880) 5 App Cas 685, HL; and the cases cited in PARAS 2424 note 1, 2502 note 3, 2538 note 5.

9 I.e. the Industrial and Provident Societies Acts 1965 to 1978: see generally PARA 2397.

10 Industrial and Provident Societies Act 1965 s 16(1)(c)(i) (as amended: see note 4). In this provision as it applies to credit unions, the reference to violation of any of the provisions of the Industrial and Provident

Societies Acts 1965 to 1978 is to be construed as including a reference to violation of any of the provisions of the Credit Unions Act 1979: s 20(1)(a). As to the repealed enactments see PARA 2394. See also note 3.

11 Industrial and Provident Societies Act 1965 s 16(1)(c)(ii) (as amended: see note 4). In this provision as it applies to credit unions, the reference to the fact that the society does not fulfil either of the purposes for which a society (other than a credit union) may be registered, is to be construed as a reference to the fact that there is no longer a common bond between the members of a credit union (see PARA 2414): Credit Unions Act 1979 s 20(1)(b). See also note 3. As to the two purposes for which a society may be registered see PARA 2402. As to the relevance of this provision in a petition for the winding up of a registered society under the Insolvency Act 1986 see *Re Surrey Garden Village Trust Ltd, Re Addington Smallholders Ltd* [1964] 3 All ER 962, [1965] 1 WLR 974 (decided under the Companies Act 1948). There is no power on this ground to cancel the registration of a society which before 26 July 1938 was registered or deemed to be registered under the Industrial and Provident Societies Act 1893, and which is now deemed to be registered under the Industrial and Provident Societies Act 1965 (see PARA 2396), if no invitation to subscribe for or to acquire or offer to acquire securities, or to lend or deposit money, has been made on or after that date by or on behalf of the society: s 16(2). See, however, PARA 2574.

12 Industrial and Provident Societies Act 1965 s 16(1)(c)(iii) (as amended: see note 4). As to the general provision that the rules may provide for advances to members only on security see PARA 2404. As to the grounds on which an agricultural, horticultural or forestry society may qualify to make advances without security see PARA 2409. Cancellation may be effected if it appears to the Authority that the society no longer consists mainly of such members as are referred to in s 12 (see PARA 2409) or that the activities carried on by the society do not mainly consist of making advances for the purposes there mentioned: s 16(1)(c)(iii) (as so amended). See note 3.

13 See the Credit Unions Act 1979 s 6(1)(b), s 20(1)(a), (b), (1A)-(1D), s 22; and notes 1, 3, 4.

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## **2580. Suspension of registration.**

Where the Financial Services Authority<sup>1</sup> might cancel a society's registration, including the registration of a credit union<sup>2</sup>, it may by notice in writing suspend the society's registration for any term not exceeding three months<sup>3</sup> and from time to time renew the suspension for the like period<sup>4</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 I.e. under the Industrial and Provident Societies Act 1965 s 16(1)(c): see PARA 2579. These provisions apply to the suspension of registration of a credit union: Credit Unions Act 1979 s 20(1). See also s 20(1A)-(1D); and PARA 2579 note 3.

3 Industrial and Provident Societies Act 1965 s 17(1)(a) (s 17(1) amended by SI 2001/2617). This provision is subject to the Industrial and Provident Societies Act s 17(3) in regard to notice: see PARA 2581.

4 Industrial and Provident Societies Act 1965 s 17(1)(b) (as amended: see note 3). This provision is subject to s 18(1)(d) in regard to appeals: see PARA 2582.

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TERMINATION/(iii) Cancellation and Suspension of Registration/2581. Notice of proposed cancellation or suspension.

### **2581. Notice of proposed cancellation or suspension.**

In general, before cancelling or suspending a society's registration, the Financial Services Authority<sup>1</sup> must give the society not less than two months' notice in writing specifying briefly the ground of the proposed cancellation or suspension<sup>2</sup>. This notice need not be given, however, where a society's registration is to be cancelled at its own request, or by virtue of an amalgamation with, transfer of engagements to or conversion into, a company, or after the lodging with the Authority of a certificate<sup>3</sup> that its property has been duly conveyed or transferred<sup>4</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 Industrial and Provident Societies Act 1965 ss 16(3), 17(3) (amended by SI 2001/2617).

3 I.e. a certificate under the Industrial and Provident Societies Act 1965 s 59: see PARA 2562.

4 Industrial and Provident Societies Act 1965 s 16(3) (as amended: see note 2).

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### **2582. Appeal against cancellation or suspension.**

Where the Financial Services Authority<sup>1</sup> proposes to cancel a society's registration, being a cancellation of which two months' notice is required<sup>2</sup> and not being a cancellation on the ground that the society does not fulfil one of the purposes for which a society, including a credit union, may be registered<sup>3</sup>, the society may appeal against the Authority's decision if the appeal is lodged before the expiration of the period of notice of the proposed cancellation<sup>4</sup>. If the appeal is duly lodged, the society's registration may not be cancelled before the date of the determination or abandonment of the appeal<sup>5</sup>, but the Authority by notice in writing may suspend the society's registration from the expiration of the period of notice until the date of the determination or abandonment of the appeal<sup>6</sup>.

A society may also appeal against a renewal of suspension of its registration<sup>7</sup>, so far as that renewal provides for the suspension to continue more than three months from the original date of suspension<sup>8</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to this requirement see PARA 2581.

3 As to cancellation on this ground see PARA 2579.

4 Industrial and Provident Societies Act 1965 s 18(1)(c) (s 18(1), (2) amended by SI 2001/2617). The provisions of the Industrial and Provident Societies Act s 18, concerning appeals, apply in relation to credit unions: Credit Unions Act 1979 s 20(1). As to provisions in regard to credit unions see also s 20(1A)-(1D); and PARA 2579 note 3. An appeal from a decision of the Authority lies to the High Court: Industrial and Provident Societies Act 1965 s 18(2) (as so amended). Appeals in Scotland are made to the Court of Session; although Scottish matters are generally beyond the scope of this work. As to the procedure on appeal to the High Court see PARA 2422.

5 Industrial and Provident Societies Act 1965 s 16(3) (amended by SI 2001/2617).

6 Industrial and Provident Societies Act 1965 s 17(2) (amended by SI 2001/2617).

7 I.e. a renewal of suspension under the Industrial and Provident Societies Act 1965 s 17(1)(b): see PARA 2580.

8 Industrial and Provident Societies Act 1965 s 18(1)(d) (as amended: see note 4).

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### **2583. Cancellation on the ground that the statutory purposes are not fulfilled.**

Where the Financial Services Authority<sup>1</sup> proposes to cancel the registration of a society on the ground that it does not fulfil one of the purposes for which a society, including a credit union, may be registered<sup>2</sup>, it must consider any representations with respect to the proposed cancellation made to it by the society within the period of duration of the notice of proposed cancellation<sup>3</sup> and, if the society so requests, afford it an opportunity of being heard by it before its registration is cancelled<sup>4</sup>. If it appears to the Authority at any time after the expiration of one month from the date of the giving of the notice that the steps have not been taken which by that time could reasonably have been taken for the purpose either of converting the society into, or amalgamating it with, or transferring its engagements to, a company<sup>5</sup>, or of dissolving the society<sup>6</sup>, it may give such directions as it thinks fit for securing that the society's affairs are wound up before cancellation of the registration takes effect<sup>7</sup>. Any person who contravenes or fails to comply with these directions is guilty of an offence<sup>8</sup>.

If the Authority considers it necessary for the exercise of its power to cancel a society's registration on the ground that it does not fulfil one of the purposes for which a society may be registered<sup>9</sup>, or of its power to give directions<sup>10</sup>, or of its power to petition for winding up<sup>11</sup>, then, by notice in writing served on the society or on any person who is or has been an officer<sup>12</sup> of the society, the Authority may at any time require that society or person to produce to it such books, accounts and other documents relating to the society's business, and to furnish to it such other information relating to that business, as it considers necessary for the exercise of those powers; and the notice may require the information to be verified by a statutory declaration<sup>13</sup>. A society or other person failing to comply with the requirements of such a notice is guilty of an offence<sup>14</sup>. If it considers it just, the Authority may direct that all or any of the expenses incurred by it in exercising these powers of requiring information are to be defrayed, either wholly or to such extent as it may determine, out of the society's funds or by its officers or former officers or any of them<sup>15</sup>. Any sum which the society or other person is so required to pay is a debt due to the Authority from that society or person<sup>16</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.



2 As to cancellation on this ground see PARA 2579. As to the purposes for which a society may be registered see PARA 2402. There is no appeal to the court in the case of cancellation on this ground: see PARA 2582.

3 As to the notice of proposed cancellation see PARA 2581.

4 Industrial and Provident Societies Act 1965 s 16(4)(a) (s 16(4) amended by SI 2001/2617). As to provisions in regard to credit unions see also the Credit Unions Act 1979 s 20(1A)-(1D); and PARA 2579 note 3.

5 Ie in accordance with the Industrial and Provident Societies Act 1965 s 52: see PARAS 2563-2564.

6 Ie under the Industrial and Provident Societies Act 1965 s 55: see PARA 2566.

7 Industrial and Provident Societies Act 1965 s 16(4)(b) (as amended: see note 4). See note 4.

8 See the Industrial and Provident Societies Act 1965 s 16(5); and PARA 2550.

9 See note 2.

10 Ie by virtue of the Industrial and Provident Societies Act 1965 s 16(4): see the text to notes 5-7.

11 Ie by virtue of the Industrial and Provident Societies Act 1965 s 56: see PARA 2574.

12 As to the meaning of 'officer' see PARA 2458 note 1.

13 Industrial and Provident Societies Act 1965 s 48(1) (s 48(1), (3) amended by SI 2001/2617). In relation to a credit union, the powers of the Authority under the Industrial and Provident Societies Act 1965 s 48(1) apply also in connection with the exercise of its functions under the Credit Unions Act 1979 and extend to the Authority in connection with the exercise of its functions under that Act; and the provisions of the Industrial and Provident Societies Act 1965 s 48(2) (see the text and note 14; and PARA 2550) and s 48(3) (see the text and notes 15-16), concerning penalties and defraying expenses, apply accordingly: Credit Unions Act 1979 s 17(1) (amended by SI 2001/2617).

14 See the Industrial and Provident Societies Act 1965 s 48(2); and PARA 2550. See also note 13.

15 Industrial and Provident Societies Act 1965 s 48(3) (as amended: see note 13). As to apportionment of expenses see PARA 2483. See also note 13.

16 Industrial and Provident Societies Act 1965 s 48(3) (as amended: see note 13). See also note 13. As to recovery of expenses see PARA 2558.

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## **2584. Cancellation at the society's request.**

A request to the Financial Services Authority<sup>1</sup> to cancel a society's registration<sup>2</sup> must be evidenced in such manner as it may from time to time direct<sup>3</sup>.

1 As to the Financial Services Authority in regard to registered societies see PARA 2410. As to the Authority generally see PARAS 4, 6 et seq. As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

2 As to cancellation at the society's request see PARA 2579 head (2).

3 See the Industrial and Provident Societies Act 1965 s 16(1)(b); and PARA 2579.

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### **2585. Advertisement of cancellation or suspension.**

As soon as practicable after it takes place, notice of every cancellation or suspension of a society's registration<sup>1</sup> and of any renewal of suspension must be published in the Gazette<sup>2</sup> and in some local newspaper circulating in or about the locality in which the society's registered office is situated<sup>3</sup>.

1 This includes suspension pending determination or abandonment of an appeal against cancellation: see PARA 2582.

2 As to the meaning of 'Gazette' see PARA 2570 note 4.

3 Industrial and Provident Societies Act 1965 ss 16(6), 17(4).

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### **2586. Effect of cancellation or suspension.**

From the date of publication in the Gazette of notice of cancellation of a society's registration<sup>1</sup>, the society absolutely ceases to be entitled to any of the privileges of the Industrial and Provident Societies Acts<sup>2</sup> as a registered society<sup>3</sup>. Similarly, from the date of publication in the Gazette of notice of suspension of registration<sup>4</sup> until the period of suspension and of any renewal of suspension ends (whether ending on the expiration of that period or on a successful appeal), the society is not entitled to any of the privileges of those Acts as a registered society<sup>5</sup>. Both as regards cancellation and suspension, these provisions are without prejudice to any liability actually incurred by the society, which may be enforced against it as if the cancellation or suspension had not taken place<sup>6</sup>. There is no statutory provision that cancellation of registration effects a dissolution of the society<sup>7</sup>. It would seem that it becomes an unregistered and unincorporated voluntary association, and whether it could be continued and could legally carry out its objects would depend on its rules and whether or not its circumstances were such that it would be required by law to be registered<sup>8</sup>.

1 As to publication of this notice see PARA 2585.

2 Ie the Industrial and Provident Societies Acts 1965 to 1978: see generally PARA 2397.

3 Industrial and Provident Societies Act 1965 s 16(7). As to the meaning of 'registered society' see PARA 2395. As to credit unions see PARA 2402.

4 As to publication of this notice see PARA 2585.

5 Industrial and Provident Societies Act 1965 s 17(5). This applies also in cases of suspension pending determination or abandonment of appeal against cancellation (see PARA 2582): s 17(5).

6 Industrial and Provident Societies Act 1965 ss 16(7), 17(5). The effects of these provisions would usually be set out in the published notice of cancellation or suspension (as to which see PARA 2585).

7 The Industrial and Provident Societies Act 1965 s 3 (see PARA 2416) provides that a society is a body corporate by virtue of its registration, so once the registration has been cancelled it seems that the society will again become an unincorporated association of members bound together by their mutual contractual obligations. This was the position contemplated by Lewison J in *Boyle v Collins* [2004] EWHC 271 (Ch), [2004] 2 BCLC 471. See also note 8.

8 Cf the Companies Act 1985 s 716(1) (repealed); and the observations in *Hole v Garnsey* [1930] AC 472 at 499, HL, per Lord Tomlin. In the circumstances postulated, it also seems likely that the substratum of the contract on which the association is based will have disappeared, leading to its termination. See further *Re William Denby & Sons Ltd Sick and Benevolent Fund* [1971] 2 All ER 1196, [1971] 1 WLR 973; *Re GKN Bolts and Nuts Ltd Sports and Social Club* [1982] 2 All ER 855, [1982] 1 WLR 774; *Boyle v Collins* [2004] EWHC 271 (Ch), [2004] 2 BCLC 471; and note 7.